

**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. 20

**(Regarding the Respondent’s motion to consider the scope of issues
to be addressed in the damages phase as a preliminary matter)**

ARBITRAL TRIBUNAL

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

I. INTRODUCTION

1. On March 17, 2015, the Tribunal issued an Award on Jurisdiction and Liability (“**Award**”). This Procedural Order addresses Canada’s request that the Tribunal consider, in a preliminary phase, the scope and nature of damages that may have resulted from the NAFTA breach found in the Tribunal’s Award before turning to the quantification of any damages.

II. PROCEDURAL HISTORY

2. In its Award, a majority of the Tribunal found Canada liable for breaches under Articles 1102 and 1105 of NAFTA in respect of some of its conduct, while rejecting liability in other respects.
3. On May 29, 2015, the Investors requested that a hearing be scheduled to establish timelines for the quantum phase of the arbitration.
4. On June 17, 2015, Canada filed a motion for a stay of the arbitral proceedings. After having heard the views of both Parties, the Tribunal issued Procedural Order No.19 rejecting Canada’s motion for a stay. The Tribunal decided to proceed to the examination of quantum as earlier directed in its Procedural Order No. 3.
5. On August 10, 2015, the Tribunal invited the Parties to consult with each other in respect of a possible pleading schedule for the quantum phase and provide a provisional view as to the required duration of the hearing on quantum.
6. In their letter of September 4, 2015 to the Tribunal, the Parties addressed issues of a pleading schedule for the quantum phase, the need for document production, and the potential duration of the hearing.
7. In the same letter, the Parties advised the Tribunal that Canada intended to raise a preliminary question with respect of the scope of issues to be addressed in the damages phase, with which the Investors did not agree. Aside from the disagreement on the preliminary matter, the Parties proposed a ten day hearing and agreed on a provisional pleading schedule for the damages phase.
8. On June 18, 2015, Canada filed a motion requesting the Tribunal to consider the scope of the issues to be addressed in the damages phase as a preliminary matter (“**Motion**”).
9. On October 1, 2015, the Investors submitted their Response to Canada’s Motion (“**Response**”).
10. On October 16, 2015, Canada submitted its Reply to the Investors’ Response (“**Reply**”) and on October 23, 2015, the Investors submitted their Rejoinder regarding Canada’s Motion (“**Rejoinder**”).

III. POSITION OF THE PARTIES

11. The Parties disagree in respect of four main issues: First, the Parties disagree on the requested order’s potential impact on the efficiency of the proceedings. While Canada submits that the limitation of the scope of the issues to be addressed in the damages phase will reduce the cost and the complexity that will be expended by the Parties, the Investors claim that such limitation would result in a needless duplication of proceedings.
12. Second, the Parties also disagree on the impact the requested order may have on the Investors’ due process rights under Article 15 of the UNCITRAL Rules. Canada contends that both Parties will have a full opportunity to brief the Tribunal on the issue of damages. The Investors, on the other hand, contend that the Motion denies them a full opportunity to present their case.

13. Third, the Parties disagree on whether the Motion amounts to an application to interpret the Award pursuant to Article 35 of the UNCITRAL Rules which is time-barred. While Canada asserts that it has never requested the interpretation of the Award, the Investors maintain that the Motion is a disguised time-barred application to interpret the Award.
14. Finally, the Parties take different views in respect of the relevance of the decision of the tribunal in *S.D. Myers, Inc. v. Government of Canada* (“*S.D. Myers*”) to the Motion. Canada distinguishes the context of the present proceedings from that of *S.D. Myers*. On the other hand, the Investors contend that the Motion should be rejected consistently with the principles set out in *S.D. Myers*.

1. Canada’s Position

(a) The Limitation of the Scope of the Issues Will Reduce the Cost and Complexity of the Proceedings

15. Canada submits that the proposed limitation in scope as a preliminary matter will serve to reduce the time, effort and costs that will be expended by the Parties and the Tribunal.¹ It contends that the Investors have the burden of proving that the damages sought are actual losses which were “incurred by reason of or arising out of”² the NAFTA breach. It further contends that the damages the Investors could recover do not include lost profits associated with a fully operational quarry and marine terminal at Whites Point.³ Accordingly, an award of lost profits for a fully operational quarry and marine terminal is not appropriate because the NAFTA breach did not cause the Investors’ failure to develop their project.⁴ To determine whether the Joint Review Panel’s (“**JRP**”) recommendations were the cause of the Investors’ inability to operate a quarry and marine terminal, the Tribunal would have “to conduct its own environmental assessment in substitution for that of the JRP.”⁵ Canada asserts that such substitution is entirely inappropriate.
16. In the event that the Tribunal decides to conduct “its own environmental assessment,” Canada contends that the Parties would have to engage in extensive document production and retain a number of witnesses to make their case. Canada submits that the Tribunal would need more evidence in order to assess the significance of the environmental effects, the feasibility and cost of mitigation measures, the mechanics of government decision-making, the public policy issues that are relevant to government decision-making, the applicable law with respect to judicial review of the JRP recommendation or government-decisions that the project should be permitted to proceed, the economics of the aggregate industry, and, the construction and operating costs and value of the Whites Point project itself.⁶
17. Canada maintains that the purpose of its Motion is to determine, in a first stage, the principles on which damages should be awarded, leaving the pure arithmetical calculations to a second stage.⁷ In the present case, the first stage would focus solely on the causation analysis while the second stage would focus on the quantum.⁸

¹ Motion, para. 2.

² Motion, para. 4.

³ Motion, para. 4.

⁴ Motion, para. 6.

⁵ Motion, para. 7.

⁶ Motion, para. 8.

⁷ Reply, para. 7.

⁸ Reply, para. 7.

(b) The Requested Order Will not Deny the Investors the Opportunity to Present their Case

18. Canada submits that under its proposal to limit the scope of the issues addressed in the damages phase, the Parties will have the opportunity to brief the Tribunal fully on whether there is a causal link between the NAFTA breach and the injury claimed—a “prerequisite to an award of damages at international law”.⁹ According to Canada, the causation analysis will require the Tribunal to consider whether, but-for the NAFTA breach, the Investors would have realized profits from a fully operational Whites Point project over a fifty year period.¹⁰ Because the Tribunal’s determination of the issue will significantly impact the evidence relevant to the quantum, it is one that should be done *before* the Parties incur the time and expense of preparing and presenting such evidence.¹¹
19. Canada explains that in determining the issue of causation, the Tribunal would not require evidence concerning the feasibility and cost mitigation measures, the construction and operating costs of the Whites Point project, the economics of the aggregate industry, or detailed expert analysis of lost profits models. Such evidence is not interwoven with the issue of causation and is only required in the quantum stage not causation.¹²
20. Canada further maintains that its proposed approach is not at odds with the Tribunal’s Award and Procedural Order No. 19 nor will it deny the Investors’ due process rights.¹³ Indeed, the Investors fail to explain why a complete evidentiary record would be relevant to the Tribunal’s determination on the issue of whether lost profits related to the operation of the White Point project could result from the specific breach.¹⁴ Such evidence is only relevant in assessing the quantum.¹⁵ Accordingly, the Parties can fully brief the Tribunal on the issue of causation without such evidence.

(c) Canada’s Motion Is not an Application to Interpret the Award

21. Moreover, Canada refutes the Investors’ assertion that its Motion “threatens the essential legitimacy of the arbitral process”¹⁶ because it is in essence a time-barred application to interpret the Tribunal’s decision under Article 35 of the UNCITRAL Rules.¹⁷ It insists that it never requested an interpretation of the majority’s liability finding. The legitimacy of the arbitral process would be threatened if the disputing Parties were required to spend millions of dollars litigating a lost profit claims *before* the Tribunal decides on the issue of causation.¹⁸

(d) Canada’s Submissions in *S.D. Myers* Are Irrelevant to Its Motion

22. Canada asserts that the position that it had adopted in its submissions to the tribunal in *S.D. Myers* is irrelevant for the purpose of this Motion, because the facts and findings of liability are distinguishable.¹⁹ In *S.D. Myers*, Canada made its submissions in the first substantive pleading in the liability phase, at a time when claims under NAFTA Articles 1102 (National Treatment),

⁹ Reply, para. 3; Meg N et al., *Investment Disputes under NAFTA –An annotated Guide to NAFTA Chapter 11* (Kluwer Law International, 2006), p.18-1135.

¹⁰ Reply, para. 3.

¹¹ Reply, para. 3.

¹² Reply, para. 8.

¹³ Reply, para. 4.

¹⁴ Reply, para. 4.

¹⁵ Reply, para. 4.

¹⁶ Response, para. 31.

¹⁷ Reply, para. 5.

¹⁸ Reply, para. 5.

¹⁹ Reply, para. 9.

1105 (Minimum Standard of Treatment), 1106 (Performance Requirements) and 1110 (Expropriation) were “live” before the tribunal.²⁰ In making its submission in *S.D. Myers*, Canada maintains, it had no knowledge as to whether there would be a finding of breach.²¹ Accordingly, the only relevance of *S.D. Myers* for the purpose of this Motion is that the tribunal in that case also found that “damages may only be awarded to the extent that there is a sufficient causal link between ... the NAFTA breach and the loss sustained”.²²

2. The Investors’ Position

(a) Canada’s Motion Will Introduce Inefficiency into the Arbitral Proceedings

23. According to the Investors, Canada’s Motion seeks to sub-bifurcate the quantum phase, and thereby cause the hearing to be tri-furcated.²³ The sub-bifurcation of the damages phase would completely frustrate the purpose of the initial bifurcation of the proceedings: the facilitation of the efficient litigation of the claim within the arbitration process.²⁴ The scope of the damages, as understood by the Investors, can only be determined in the context of all the evidence to be adduced at the damages hearing. If the damages phase was to be sub-bifurcated, the Investors would be compelled to present a full evidentiary record at the preliminary phase, which would require the same evidence and therefore the same amount of preparation and hearing time, resulting in two duplicative full hearings instead of one.²⁵
24. Contrary to Canada’s suggestion,²⁶ the Investors assert that causation is not a separate issue from the calculation of damages:²⁷ They explain that “the evidentiary record relating to causation is not merely interwoven with the evidentiary record relating to quantum – they are effectively one and the same.”²⁸ Accordingly, both issues cannot be split into different phases of an arbitration without needless duplication of the proceedings.²⁹
25. The Investors further submit that Canada’s Motion undermines the guidance that the Tribunal has already provided in its previous decisions.³⁰ In the Investors’ view, Canada’s request amounts to a request to vary Procedural Order No. 3, with regard to which the Tribunal recently confirmed in Procedural Order No. 19 that “it should exercise its discretion taking account of the fact that it had already decided, in Procedural Order No. 3, to bifurcate the proceeding and that it is appropriate to follow its earlier Procedural Order unless good reason can be shown by Canada to the contrary.”³¹ Furthermore, the Investors insist that the Tribunal made no prejudgement about the ultimate outcome on compensation in its Award and held that the Parties will have the opportunity to submit evidence and argument concerning the quantum of the compensation award.³² According to the Investors, Canada failed to show any good reason for the Tribunal to depart from the Award and its previous procedural orders, and thereby deprive the Investors of the opportunity to prove their loss to the Tribunal.³³

²⁰ Reply, para. 10.

²¹ Reply, para. 10.

²² Reply, para. 11.

²³ Response, para. 32.

²⁴ Response, para. 33.

²⁵ Response, para. 36.

²⁶ Reply, para. 8.

²⁷ Rejoinder, para. 10.

²⁸ Rejoinder, para. 12.

²⁹ Rejoinder, para. 14.

³⁰ Response, para. 12.

³¹ Response, para. 42.

³² Response, para. 9; Rejoinder, paras. 6-7; Award, para 742.

³³ Response, para. 45.

(b) Canada's Motion Denies the Investors a Full Opportunity to Present their Case

26. The Investors contend that Canada styles its Motion as a request for “guidance”, but in effect, Canada is asking the Tribunal to prejudge the measure of damages suffered by the Investors without a full hearing and a complete evidentiary record.³⁴ If Canada's Motion is granted, it would be in violation of Article 15 of the UNCITRAL Rules 1976, which applies to the present proceedings and guarantees to each Party “a full opportunity of presenting its case”.³⁵ According to the Investors, Canada is requesting that the Tribunal limits the quantum of damages suffered by them before the Parties submit their respective evidentiary records on quantum.³⁶ In doing so, Canada is attempting to undermine the Investors' fundamental right of due process.³⁷
27. The Investors also contend that Canada disregards the Investors' right to make full submissions and to tender all relevant evidence relating to causation, foreseeability and remoteness as they pertain to the Investors' losses.³⁸ If Canada's Motion were granted, the Investors would be effectively precluded from presenting a full case on the scope of damages.³⁹ As such, the outcome sought by Canada would compromise the guarantee provided by Article 15(1) of the UNCITRAL Rules.⁴⁰

(c) Canada's Motion Is a Disguised Time-Barred Application to Interpret the Award

28. The Investors also contend that Canada's Motion amounts to an application for an interpretation of the Award which under Article 35 of the UNCITRAL Rules, should have been brought within 30 days of the Award.⁴¹ As such, it “threatens the essential legitimacy of the arbitral process.”⁴² They explain that provisions such as Article 35 for the correction and interpretation of awards provide a safeguard for procedural fairness but have narrow time limits to avoid jeopardizing the objective of finality.⁴³ Canada's Motion is thus untimely.

(d) Canada's Motion Is Ill-Founded in Light of the Principles Set Out in *S.D. Myers*

29. The Investors further assert that Canada's Motion violates the core damages principles set out in *S.D. Myers*.⁴⁴ As in the present case, *S.D. Myers* dealt with harm flowing from conduct in breach of Articles 1102 and 1105 of NAFTA, including damage resulting from lost profits. The *S.D. Myers* tribunal ordered the bifurcation of the proceedings in its initial procedural order, ordering a first phase on liability and the principles on which damages would be awarded (which phase was concluded by its Partial Award) and a second phase on the quantification of the damages (which was concluded with its Second Partial Award).⁴⁵ In *S.D. Myers*, the tribunal did not limit the scope of damages because it considered that the drafters of NAFTA intended to leave it open to tribunals to determine a measure of compensation appropriate to the specific circumstances of the case. The tribunal preferred to turn for guidance to international law principles [derived from *Chorzow factory*]⁴⁶ which essentially provide that reparation must, as far as possible, wipe-out

³⁴ Response, para. 1.

³⁵ Response, para. 3.

³⁶ Response, para. 8.

³⁷ Response, para. 8.

³⁸ Rejoinder, para. 2.

³⁹ Response, para. 8.

⁴⁰ Response, para. 8.

⁴¹ Response, para. 29.

⁴² Response, para. 31.

⁴³ Response, para. 31.

⁴⁴ Response, para. 13.

⁴⁵ Response, para. 14.

⁴⁶ Response, para. 15.

all the consequences of the NAFTA breaches that occurred and to re-establish the situation which would in all probability have existed if the breaches had not been committed.⁴⁷

30. The Investors further contend that in the first phase of *S.D. Myers*, Canada argued that it was premature to choose an approach for the measure of damages without the benefit of the full evidentiary record.⁴⁸ The tribunal in *S.D. Myers* agreed with Canada's position then, and held that the disputing parties should have the opportunity to make further factual and legal submissions on the question of the precise methodology to be used.⁴⁹
31. The Investors submit that they are entitled to advance a complete evidentiary record under any applicable head of damage.⁵⁰ According to the Investors, the *S.D. Myers* tribunal was clear in that the analysis relating to the measures of damages, including the claim for lost profits was to be based on an extensive evidentiary record.⁵¹ They assert that the *S.D. Myers* tribunal considered the scope of recovery on the bases of a complete factual record and submissions relating to causation, remoteness and quantum.⁵² The Investors also rely on the award rendered in *Kardassopoulos v. Georgia* in asserting that the tribunal's duty is to make the best estimate of the amount of the loss, on the basis of the available evidence—an exercise that should be conducted even in the absence of absolute documentary proof of the exact amount lost.⁵³

IV. THE TRIBUNAL'S DECISION:

32. The Tribunal has carefully reviewed the Parties' submissions in support of and objecting to Canada's Motion, which raise important points of procedural practicality as well as legal principle.
33. The Tribunal is not persuaded that Article 15 of the UNCITRAL Rules would prevent the Tribunal from considering principles regarding the appropriate heads of damages and causation at a preliminary stage of the quantum phase, separately from the actual quantification of such damages. Article 15 makes it clear that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate". In so doing, the arbitral tribunal must ensure that "at any stage of the proceedings each party is given a full opportunity of presenting his case". In the Tribunal's view, Article 15 emphasizes a party's right to present arguments and evidence that are relevant at a given stage of an arbitration, but it does not give a party the right to determine at which point in the arbitral process a particular set of issues is to be considered.
34. In the present case, it would be entirely conceivable to initially hear legal argument and, if necessary, allow evidence only with regard to the *types* of damages that the Investors may be entitled to seek as a consequence of the treaty breach found in the Tribunal's earlier Award. The Tribunal would expect that the salient issues at that stage would relate to the international law on State responsibility and to Canadian environmental law, although the Tribunal would not exclude the possibility that the Parties might address certain economic effects to illustrate their positions. It would always be open to the Parties to present a fuller case in respect of such economic effects, including relevant evidence, at a subsequent stage (to the extent that they have not been disposed of on legal grounds by a Tribunal decision on quantum principles).

⁴⁷ Response, para. 23.

⁴⁸ Response, para. 17.

⁴⁹ Response, para. 18.

⁵⁰ Rejoinder, para. 21.

⁵¹ Response, para. 21.

⁵² Rejoinder, para. 19.

⁵³ Response, para. 25.

35. Nor can it be said that Canada's motion to introduce a preliminary stage on quantum principles would involve a time-barred interpretation of the Tribunal's Award. In any multi-stage process, subsequent decisions may potentially cast light on the reasoning contained in previous decisions, but that possibility exists regardless of whether the quantum phase is set up in a single stage or in two stages. Either way, the Parties are free to present legal argument, if they wish, as to the possible implications of the Tribunal's pronouncements on liability for compensation. When the Tribunal noted in its Award that it "makes no prejudgment whatsoever about the ultimate outcome on compensation"⁵⁴ and added that both Parties would have the opportunity "to submit evidence and argument to this Tribunal concerning the quantum of a compensation award for loss or damage",⁵⁵ the Tribunal made it clear that it would decide any question of compensation in the context of a subsequent quantum phase in accordance with the Article 15 principle concerning the full opportunity of parties to present their case, with no prejudgment arising from the first phase. The Tribunal did not preclude the possibility of structuring the damages phase with a view to promoting efficiency as well as fairness.
36. Finally, the Tribunal has taken note of the Parties' arguments regarding the position that Canada may have taken in an earlier NAFTA case, the *S.D. Myers* arbitration. However, the Tribunal considers that the nature of the claims and the procedural situation in that case were so different from those in the present proceedings that no compelling conclusions can be drawn for such comparison. The present proceedings must be considered on their own terms.
37. In the Tribunal's view, the principal yardstick in dealing with Canada's Motion is the principle of procedural efficiency. Similar to the more common bifurcation scenarios (such as between jurisdiction and merits), the question arises whether there is a substantial likelihood that a phased consideration of issues will result in shortening or simplifying the proceedings. The Tribunal is not convinced that this would be the case in respect of Canada's proposal to consider heads of damages and causation separately from quantification.
38. The Tribunal emphasizes in this regard that its reluctance to accede to Canada's request does not imply any judgement on the Tribunal's part that the substantive arguments that Canada presents in respect of the availability of certain forms of relief would not be serious—quite to the contrary. However, the Tribunal is not persuaded that it would be put in a position to rule conclusively on questions of damages principles without hearing further evidence, as is the premise of Canada's Motion. In particular, should evidence turn out to be necessary *after* a hearing on damages principles has been held, procedural challenges would ensue leading to additional cost and further delay of the proceedings.
39. The Tribunal therefore finds that, among the scheduling options that it has considered, the Investors' request to proceed with a single, undivided quantum phase is procedurally the soundest one. The Investors have acknowledged that "[t]he burden of proving the Investors' losses rests with the Investors. It is a burden that the Investors welcome..."⁵⁶ In light of Canada's understandable expressions of concern about the extent and expense of the remaining proceedings, the Tribunal notes that at an appropriate stage it will be prepared to consider the Parties' submissions as to cost consequences that may arise in respect of the unsuccessful claims.
40. For the reasons set out above, the Tribunal denies Canada's Motion to determine the scope of issues to be addressed in the damages phase at a preliminary stage. The quantum phase shall accordingly proceed in accordance with the following procedural timetable,⁵⁷ which is based on

⁵⁴ Award, para. 732.

⁵⁵ Award, para. 732.

⁵⁶ Response, para. 2.

⁵⁷ The dates in the schedule may require adjustment in accordance with Article 2(2) of the UNCITRAL Rules which provides in relevant part: "If the last day of such period is an official holiday or a non-business day [...],

the schedule that has been agreed between the Parties.⁵⁸ The Tribunal determines that Date “A” shall be January 11, 2016.

Date “A”	January 11, 2016
Exchange of Document Requests	+ 30 days
Objections to Document Requests	+ 15 days
Responses to Objections to Document Requests	+ 15 days
Replies to Responses to Objections to Document Requests	+ 10 days
Date “B”	Date of the Tribunal’s Ruling on Document Requests
Production of Documents Pursuant to Document Requests	+ 60 days
The Investors’ Memorial and Supporting Materials	+ 90 days
Canada’s Counter-Memorial and Supporting Materials	+ 90 days
The Investors’ Reply and Supporting Materials	+ 60 days
Canada’s Rejoinder and Supporting Materials	+ 60 days
1128 Submissions	+ 45
Responses to 1128 Submissions	+ 15 days
Hearing	+ 90 days

Date: January 5, 2016

For the Arbitral Tribunal:



Judge Bruno Simma
(Presiding Arbitrator)

the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.”

⁵⁸ See Letter from the Parties to the Tribunal dated September 4, 2015.