

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

BETWEEN:

**WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS
CLAYTON, DANIEL CLAYTON AND BILCON OF DELAWARE INC.**

INVESTORS

AND

GOVERNMENT OF CANADA

RESPONDENT

PROCEDURAL ORDER NO. 8

November 25, 2009

ARBITRAL TRIBUNAL:

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

WHEREAS the present arbitration is at the stage of document production.

WHEREAS, on August 14, 2009, each of the Disputing Parties transmitted by courier some of the documents requested of it and, by e-mail of the same date, submitted refusal notices with regard to other document requests.

WHEREAS, on September 11, 2009, each of the Disputing Parties submitted to the Tribunal an application for the production of documents in the form of a Redfern schedule detailing requests for documents, the objections of the opposing Party, and the requesting Party's replies thereto.

WHEREAS, on September 24, 2009, the Disputing Parties submitted a revised Redfern schedule containing the Respondent's requests for the production of documents, the Investors' objections, and the Respondent's replies to the Investors' objections.

WHEREAS, on October 16, 2009, the Tribunal held a Case Management Meeting with the Disputing Parties in Toronto, Canada to address the appropriate further process for the production of documents and obtain clarification from the Disputing Parties with regard to the meaning of some of their requests and objections.

WHEREAS, on November 4, 2009, the Disputing Parties submitted revised requests for the production of documents and revised objections in the form of a joint Redfern schedule, which the Tribunal has considered carefully.

WHEREAS, on November 20, 2009, the Tribunal adopted Procedural Order No. 7, which defined, among other things, the process for the further production of documents and consideration of claims of cabinet privilege, political sensitivity, or legal privilege.

THE TRIBUNAL ISSUES THE FOLLOWING PROCEDURAL ORDER:

1. In reaching its conclusions with regard to the Disputing Parties' revised requests for the production of documents, the Tribunal makes the following general and more specific observations:
 - a. The Tribunal notes that the purpose of document production is to provide investors with a reasonable opportunity to obtain relevant and material documents beyond those on the public record. Conversely, respondent governments must have the opportunity to obtain relevant and material documents in the possession of investors that they require for their effective defence.
 - b. The Tribunal recalls, as already observed in Procedural Order No. 5, that the Investors have made all requests subject to the general requirement that only documents that are relevant and material to their claims be produced. In Procedural Order No. 5, the Tribunal invited the Respondent to interpret the Investors' request for documents in light of the Disputing Parties' previous submissions (in particular, the Investors' Statement of Claim). Similarly, the Tribunal understands the Respondent's requests to be subject to the implicit requirement that all requests are for documents that are relevant and material to the Respondent's defence (as set out, in particular, in the Respondent's Statement of Defence).

- c. The Tribunal does not accept, as a ground for objecting to a request, the unsubstantiated assertion by a requested Disputing Party that a particular request is not material or relevant to the requesting Disputing Party's claim or defence. However, the Tribunal accepts the possibility that a requested Disputing Party, once it has reviewed its files, might be able to legitimately report that nothing relevant and material has been found in these files.
- d. The issue of whether a request should be rejected as unduly burdensome must, in the Tribunal's view, take into account both the time and effort required to produce the requested documents and the prospect that these documents will have probative value.
- e. As regards request No. 1 by the Investors, the Tribunal notes that the provisions of NAFTA at issue in this case have been the subject of interpretation by tribunals in numerous cases, all of which are available to assist the Tribunal should any issues of interpretation arise. The Tribunal does not consider that there is any reasonable likelihood that any negotiation documents that NAFTA Parties have kept confidential for about two decades would, if now produced, alter the Tribunal's interpretation and application of those provisions. Accordingly the Tribunal considers that the burden of producing the documents requested is not outweighed by the probative value of anything likely to be produced.
- f. As regards request No. 2 by the Investors, the Tribunal finds that draft policies may be relevant and material to the Investors' claims, as the Investors seem to base their claims in part on the notion that government agencies may have changed the criteria to be used in the environmental assessment over time. In addition, draft policies may sometimes serve as provisional stand-ins for final policies that are yet to be adopted.
- g. As regards certain revisions to or expansions of existing requests by the Investors, such as in Nos. 3(b), 4, *4bis* and 10 (as modified by the Investors in a letter dated November 18, 2009), the Tribunal considers that the additional information requested may be relevant and material to the Investors' claims, and it is in the interest of avoiding delays in the proceedings to deal with these additions in the context of the current document production phase rather than at a later stage, following a separate motion by the Investors.
- h. As regards request No. 11 by the Investors concerning communications between the Members of the Joint Review Panel (JRP), the Tribunal accepts that such documents may not be in the possession, custody or control of the Respondent. However, the Tribunal wishes to clarify that, for a party to claim that documents are not in its control, it must have made "best efforts" to obtain documents that are in the possession of persons or entities with whom or which the party has a relevant relationship. This is consistent with the approach adopted by the Tribunal in *Vito G. Gallo v. Government of Canada* in its Procedural Order No. 2 dated February 10, 2009.
- i. As regards request No. 7 by the Respondent, the Tribunal finds that the requested documents may be relevant and material to the Respondent's jurisdictional arguments.

- j. As regards request No. 35 by the Respondent concerning the Investors' internal communications reflecting their knowledge and understanding of the environmental assessment of the quarry and marine terminal, the Tribunal considers that the requested documents may be relevant and material to the Respondent's defence, and that their production does not place an undue burden on the Investors, provided that it is understood that the Investors need not produce mere scientific and technical analyses in preparation for their submissions.
2. In light of the above and subject to the above clarifications, the Tribunal orders the production of all documents requested by either Disputing Party, with the exception of documents falling under the Investors' request No. 1.
3. After consulting with the Disputing Parties at the Case Management Meeting on October 16, 2009, the Tribunal determined in Procedural Order No. 7 dated November 20, 2009 that, in a separate phase, the Disputing Parties will prepare and submit logs justifying claims that documents should not be produced for reasons of privilege or sensitivity, and this Procedural Order is without prejudice to that process. An indicative timetable for the further course of document production based on Annex A to Procedural Order No. 7 is appended for the Disputing Parties' convenience.



Dated: November 25, 2009

Judge Bruno Simma
President of the Tribunal

On behalf of the Tribunal

ANNEX A: INDICATIVE TIMETABLE

Event	Party	Date
<p><i>Document production:</i></p> <ul style="list-style-type: none"> - Production of documents to the production of which the requested Party no longer objects 	Disp. Parties	November 23, 2009 and December 18, 2009
<p><i>Tribunal decision on revised requests for the production of documents</i></p>	Tribunal	November 25, 2009
<p><i>Document production:</i></p> <ul style="list-style-type: none"> - Agreement regarding whether additional time for production is required by the quantity of documents ordered, or application for additional time - Production of documents as ordered by the Tribunal in the absence of an agreement or application for additional time - Exchange of privilege logs - Notification of objections to claims of privilege/sensitivity - Production of submissions and evidence to substantiate claims of privilege/sensitivity - Reply to submissions and evidence regarding claims of privilege/sensitivity - Submission of contested claims of privilege to the Tribunal 	<p>Disp. Parties</p> <p>Disp. Parties</p> <p>Disp. Parties</p> <p>Disp. Parties</p> <p>Disp. Parties</p> <p>Disp. Parties</p>	<p>December 2, 2009</p> <p>December 28, 2009</p> <p>January 4, 2010</p> <p>January 11, 2010</p> <p>February 10, 2010</p> <p>February 25, 2010</p> <p>March 4, 2010</p>
<p><i>Tribunal decision on claims of cabinet privilege, political sensitivity, or legal privilege</i></p>	Tribunal	To be set by Tribunal (= Day X)
<p><i>Document production:</i></p> <ul style="list-style-type: none"> - Production of documents as ordered by the Tribunal 	Disp. Parties	X + 30 days