

**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 BILCON OF DELAWARE INC.**

**(the “Investors”)**

**-and-**

**GOVERNMENT OF CANADA**

**(the “Respondent” and, together with the Investors, the “Disputing Parties”)**

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**PROCEDURAL ORDER NO. 13**

**July 11, 2012**

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**ARBITRAL TRIBUNAL:**

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

Permanent Court of Arbitration (PCA) Case No. 2009-04

## I. Introduction

1. In this Order, the Tribunal addresses the Disputing Parties' outstanding arguments concerning the Respondent's objections to document production on the basis of special political or institutional sensitivity.

## II. Procedural History

2. The Tribunal refers to its Procedural Order No. 12 dated May 2, 2012, in which it recounted the procedural history relevant to the Disputing Parties' claims of privilege through March 6, 2012, and issued, *inter alia*, the following instruction to the Disputing Parties:
  52. Accordingly, the Tribunal orders the Respondent to review its claims of privilege in light of the standard elaborated by the Tribunal above and to produce to the Investors **no later than May 25, 2012** those documents, if any, that do not qualify for protection under that standard.
  53. To the extent that the Disputing Parties' privilege claims are not addressed in the present Order, the Tribunal reserves its decision for a future procedural order to be adopted after an oral hearing with the Disputing Parties.
3. By letter dated April 13, 2012, the Tribunal resolved to hold a one-day hearing on June 8, 2012, to address the document production and privilege matters not taken up in Procedural Order No. 12.
4. By letter dated May 14, 2012, the Tribunal indicated to the Disputing Parties that it would seek further briefing from them on the following issues at the June 8 hearing:
  - A. Documents over which the Disputing Parties claim privilege
    - (1) Confirmation that footnotes 23 through 26 of the Respondent's March 6, 2012 Response contain a complete listing of documents identified by the Respondent as excluded from production on deliberational or decision-making grounds pursuant to Article 9.2(f) of the IBA Rules
    - (2) Clarification regarding the nature of the privilege *en bloc* asserted by the Investors over documents made in furtherance of this arbitration in footnote 1 of the Investors' Privilege Log dated December 16, 2011
  - B. Review process carried out by the Respondent
    - (1) Description of the steps involved in the review of documents referred to in paragraph A(1) above, grouped as appropriate, including information about the respective governmental positions of the individuals who carried out the review
    - (2) Description of the elements of evaluation applied to the documents referred to in paragraph A(1) above, grouped as appropriate
  - C. Considerations regarding the scope of privilege
    - (1) Argument regarding the scope of deliberative privilege *ratione temporis*, including the legal basis for the time limits argued by the Disputing Parties

- (2) Argument regarding the application of any privilege to the documents identified in footnotes 23 through 26 of the Respondent's March 6, 2012 Response and, in particular, those related to the work of the JRP
  - (3) Argument regarding the relevance, if any, of the availability of non-privileged sources related to issues discussed in the documents for which privilege is claimed
5. The following persons made appearances at the June 8 hearing:

For the Investors

Alan Alexandroff  
Barry Appleton  
Kyle Dickson-Smith

For the Respondent

Jean-François Hébert  
Scott Little  
Ian Philp  
Shane Spelliscy

### **III. Privilege Asserted by the Respondent under Article 9.2(f) of the IBA Rules**

#### **A. Documents at Issue & Arguments of the Disputing Parties**

6. The Respondent objects to the production of certain documents pursuant to Article 9.2(f) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration of 1999 ("IBA Rules"). Article 9.2 prescribes in relevant part:

The Arbitral Tribunal shall, at the request of a Party or on its own motion, exclude from evidence or production any Document . . . for any of the following reasons:

. . .

(f) grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling . . . .

7. On the basis of Article 9.2(f), the Respondent contends that it is entitled to withhold the following documents from disclosure:
- documents evidencing federal deliberations and decision-making;
  - documents evidencing provincial deliberations and decision-making;
  - documents evidencing the deliberations of the Joint Review Panel, a non-governmental advisory body; and,
  - documents evidencing deliberations of the National Energy Board.<sup>1</sup>

#### **1. Federal Documents**

8. The Respondent submits that 112 documents related to federal deliberative and policymaking processes are protected under Article 9.2(f).<sup>2</sup> These documents are

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<sup>1</sup> Submissions to Substantiate Claims Of Privilege and Institutional Sensitivity, dated February 3, 2012, para. 10.

enumerated at lines 2669, 2670, 2672-2681, 2685-2698, 2700, 2702, 2705-2721, 2723-2735, 2738-2760, 2763-2790, and 2841-2843 of the Respondent's Privilege Log.<sup>3</sup>

9. The Respondent maintains that NAFTA tribunals have consistently upheld the protection of "Cabinet confidences" as defined in Section 39(2) of the Canada Evidence Act, referring to decisions by the tribunals in *United Parcel Service of America v. Canada*, *Merrill & Ring Forestry LP v. Canada*, *Glamis Gold Ltd. v. United States*, and *Vito Gallo v. Canada*.<sup>4</sup> According to the Respondent, the party claiming the federal deliberative privilege must determine whether its interest in withholding a document outweighs competing public interests.<sup>5</sup> It asserts, however, that, in the case of Cabinet decisions, it is "rarely essential" for a claimant to require access to the records of Cabinet deliberations to advance its case and that where the claiming party shows it has completed the weighing exercise, the tribunal should reject such objections only in exceptional circumstances.<sup>6</sup>
10. The Respondent further contends that disclosure of the federal documents "would result in the erosion of solidarity and collective responsibility for ministers."<sup>7</sup> In its view, the protection of these documents is essential for the functioning of Cabinet<sup>8</sup> and to produce them could otherwise undermine the frank and candid exchange of ideas upon which decision-making relies.<sup>9</sup> The Respondent submits that the Investors have presented no compelling need for this additional production, already having received "all internal government documents" on which the government based its decision to reject their project.<sup>10</sup>
11. The Investors refer to the decisions of the NAFTA tribunals in *Pope & Talbot v. Canada* and *United Parcel Services* to argue that because both tribunals rejected Canada's Evidence Act claims, it is clear that Section 39(1) of the Canada Evidence Act does not apply in NAFTA cases.<sup>11</sup> The Investors point to the "well established principle", as set out by the tribunal in *United Parcel Services*, that no state may have recourse to its own internal law as a means of avoiding its international responsibilities.<sup>12</sup> Rather, according to the Investors, the standard that applies to the federal documents is a balancing test as adopted by the prior NAFTA decisions.

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<sup>2</sup> Respondent's Response to Tribunal Question A(1), June 8 Hearing.

<sup>3</sup> Respondent's Response to Tribunal Question A(1), June 8 Hearing.

<sup>4</sup> Submissions to Substantiate Claims Of Privilege and Institutional Sensitivity, dated February 3, 2012, para. 17; Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, paras. 33-35.

<sup>5</sup> Additional Submissions and Observations of Canada on Objections to Document Requests, dated October 13, 2009, para. 32.

<sup>6</sup> Additional Submissions and Observations of Canada on Objections to Document Requests, dated October 13, 2009, para. 33.

<sup>7</sup> Submissions to Substantiate Claims Of Privilege and Institutional Sensitivity, dated February 3, 2012, paras. 19-20.

<sup>8</sup> Submissions to Substantiate Claims Of Privilege and Institutional Sensitivity, dated February 3, 2012, para. 16.

<sup>9</sup> Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, para. 36.

<sup>10</sup> Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, para. 37.

<sup>11</sup> Investors' Case Management Brief on Document Production Issues, dated October 13, 2009, para. 16.

<sup>12</sup> Investors' Case Management Brief on Document Production Issues, dated October 13, 2009, para. 20; Investors' Observations on Privilege, dated February 24, 2012, para.67.

## 2. Nova Scotia Documents

12. The Respondent submits that two documents related to provincial deliberative and policymaking processes are protected under Article 9.2(f), enumerated at lines 2763 and 2764 of its privilege log.<sup>13</sup> In the Respondent's view, these documents fall within the scope of protection contained in the Nova Scotia Proceedings Against the Crown Act<sup>14</sup> and are equally protected by Article 9.2(f) of the IBA Rules.
13. Though the Disputing Parties agree that a balancing test weighing the competing interests in producing the documents is necessary,<sup>15</sup> the Respondent notes that prior NAFTA tribunals have declined to order the production of documents for which such provincial government sensitivity was claimed,<sup>16</sup> while the Investors refer to Canadian cases to emphasize that the onus of establishing the claim rests with the province.<sup>17</sup>

## 3. JRP Documents

14. The Respondent submits that 524 documents, listed in its privilege log at lines 2091-2614, reflect the deliberations of the Joint Review Panel ("JRP") and are, on that basis, also immune from production.<sup>18</sup>
15. The Respondent contends that excluding the JRP documents from production is required by a compelling institutional sensitivity of the Canadian Environmental Assessment Agency ("CEAA").<sup>19</sup> Referring to the JRP as a governmental advisory body,<sup>20</sup> it argues that there is a serious risk that open and frank communications between members of JRPs would be impeded if such deliberations might subsequently be disclosed in the course of litigation<sup>21</sup> and that an absence of confidentiality would impede the CEAA's ability to identify qualified individuals who would be willing to serve.<sup>22</sup> The Respondent further emphasizes that the JRP conducted its work in an open and transparent manner and that a significant volume of documents related to the JRP's work, such as the 145-

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<sup>13</sup> Respondent's Response to Tribunal Question A(1), June 8 Hearing.

<sup>14</sup> See Nova Scotia Proceedings Against the Crown Act, R.S., c. 360, s. 11, which reads as follows: "In proceedings against the Crown, the rules of the court in which the proceedings are taken as to discovery and inspection of documents, examination for discovery and interrogatories apply in the same manner as if the Crown were a corporation, except that the Crown may refuse to produce a document or to make answer to a question on discovery or interrogatories on the ground that the production thereof or the answer would be injurious to the public interest."

<sup>15</sup> See, e.g., Investors' Observations on Privilege, dated February 24, 2012, para. 7; Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, para. 18.

<sup>16</sup> Additional Submissions and Observations of Canada on Objections to Document Requests, dated October 13, 2009, para. 38.

<sup>17</sup> Investors' Case Management Brief on Document Production Issues, dated October 13, 2009, paras. 32-35.

<sup>18</sup> Respondent's Response to Tribunal Question A(1), June 8 Hearing.

<sup>19</sup> Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, para. 23.

<sup>20</sup> Additional Submissions and Observations of Canada on Objections to Document Requests, dated October 13, 2009, para. 40.

<sup>21</sup> Additional Submissions and Observations of Canada on Objections to Document Requests, dated October 13, 2009, paras. 40-42.

<sup>22</sup> Submissions to Substantiate Claims Of Privilege and Institutional Sensitivity, dated February 3, 2012, para. 13.

page public report of the JRP's recommendations, is already in the public domain.<sup>23</sup> In its view, therefore, records of such deliberations should be exempted from production.

16. The Investors take the position that the JRP is a fact-finding panel and therefore the institutional sensitivities that might apply in the Cabinet decision-making context are less present in the case of the JRP's work.<sup>24</sup> It maintains that the Respondent has not demonstrated in its Privilege Log that any kind of deliberative privilege applies to the JRP-related documents, noting, in addition, that the IBA Rules do not make any reference to "deliberative process."<sup>25</sup>

#### **4. NEB Documents**

17. The Respondent submits that 58 documents of the National Energy Board ("NEB") are protected under Article 9.2(f).<sup>26</sup> These documents are listed in its privilege log at lines 1089, 1995, 1997, 1998, 2036, 2615-2663, and 2665-2668.<sup>27</sup>
18. According to the Respondent, the NEB documents should be privileged to protect "the future ability and inclination of Board Members and members of a Project Working Group to fully explore and discuss controversial issues."<sup>28</sup> The Respondent maintains that the Investors have "presented no reason as to why this compelling interest" should be outweighed by the Investors' request, emphasizing that the NEB has the status of a "court of record."<sup>29</sup>
19. In the Investors' view, the NEB acts like a government department, rather than a quasi-judicial body, when it carries out its environmental assessment work.<sup>30</sup> It is the Investors' position that Article 9.2(f) privilege does not apply to the NEB documents.<sup>31</sup>

### **B. The Tribunal's Decision**

#### **1. Applicable Law**

20. At the outset, the Tribunal will briefly review the law applicable to the Parties' outstanding privilege claims in the present arbitral proceedings and the elements of the approach to evaluating the claims and their objections mandated by the applicable law.
21. As noted in Procedural Order No. 12, the Tribunal must determine procedural issues relating to the Disputing Parties' privilege claims "as it considers appropriate" having regard to the circumstances of the present case. This follows from Article 15(1) of the UNCITRAL Rules, which govern the present proceedings by virtue of NAFTA Article 1120(2). In the present NAFTA Chapter Eleven arbitration, the Tribunal finds it appropriate to take account of any relevant rules of international law, as evidenced in the

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<sup>23</sup> Additional Submissions and Observations of Canada on Objections to Document Requests, dated October 13, 2009, paras. 40-42.

<sup>24</sup> Investors' Observations on Privilege, dated February 24, 2012, para. 88.

<sup>25</sup> Investors' Observations on Privilege, dated February 24, 2012, paras. 87-88, 92, 94.

<sup>26</sup> Respondent's Response to Tribunal Question A(1), June 8 Hearing.

<sup>27</sup> Respondent's Response to Tribunal Question A(1), June 8 Hearing.

<sup>28</sup> Submissions to Substantiate Claims Of Privilege and Institutional Sensitivity, dated February 3, 2012, para 5.

<sup>29</sup> Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, paras. 27-28, 30.

<sup>30</sup> Investors' Observations on Privilege, dated February 24, 2012, para. 98.

<sup>31</sup> Investors' Observations on Privilege, dated February 24, 2012, paras. 97-98.

practice of international courts and tribunals. In this regard, the Tribunal notes that both Disputing Parties have referred to the decisions of earlier NAFTA Chapter Eleven tribunals where those decisions set out standards pertinent to privilege issues.<sup>32</sup> Finally, the Tribunal has previously decided that the IBA Rules serve as guidelines in this arbitration.<sup>33</sup>

22. The Disputing Parties agree that a party in arbitration proceedings may refer to Article 9.2(f) of the IBA Rules as a basis for withholding documents where such documents are politically or institutionally sensitive.<sup>34</sup> The Disputing Parties are also in agreement, in view of an evolving *jurisprudence constante* by prior NAFTA tribunals, that any refusal to produce documents based on their political or institutional sensitivity requires a balancing process, weighing, on the one hand, the compelling nature of the requested party's asserted sensitivities and, on the other, the extent to which disclosure would advance the requesting party's case.<sup>35</sup> This balancing requirement distinguishes absolute privileges from qualified privileges, such as the one at issue here.
23. The Tribunal is under the impression that the general relevance of these considerations for determining whether a document enjoys protection in the course of NAFTA arbitral proceedings is not disputed by either Disputing Party, although each side has emphasized different elements for consideration in support of its case. What is contentious is whether the Respondent has carried out an appropriate balancing process with respect to each outstanding document to properly conclude that the Respondent's grounds of political and institutional sensitivity outweigh the extent to which disclosure would advance the Investors' case.
24. Having reviewed the jurisprudence upon which the Disputing Parties rely, the Tribunal considers that, for a party to assert privilege on grounds of political and institutional sensitivity in the context of NAFTA Chapter Eleven proceedings, it must first demonstrate that it carried out the requisite balancing exercise in the course of its review of requested documents, on a document-by-document basis, supervised by sufficiently senior legal or regulatory counsel, and that where such review is not carried out by legal counsel familiar with the arbitration, the balancing exercise must be guided by instructions from counsel familiar with the case. Along with a description of the contents of the document and an explanation of grounds for claiming the privilege, a satisfactory account of whether and how the party claiming privilege carried out the appropriate balancing process may be necessary to present the privilege claim to the tribunal.
25. To be clear, a party's own conclusion after carrying out a balancing of interests is not binding on the Tribunal. The burden of establishing the validity of a claim is on the party asserting it, and the Tribunal will make the final decision with respect to determining a party's privilege claims within the framework of the legal issues particular to the case, the evidence otherwise available, and in light of the applicable law. A demonstration of good faith and diligence in applying the appropriate legal standard, however, is a factor that may be considered by the Tribunal in arriving at its determination. A party claiming privilege is expected to make a diligent and skillful effort to describe the contents of a contested document, although the institutional sensitivity that underpins a meritorious

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<sup>32</sup> See, e.g., Investors' Observations on Privilege, dated February 24, 2012, paras. 65-69; Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, para. 18.

<sup>33</sup> Procedural Order No. 3, dated June 3, 2009, para. 2.1.

<sup>34</sup> See, e.g., Investors' Observations on Privilege, dated February 24, 2012, para. 7; Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, para. 18.

<sup>35</sup> See, e.g., Investors' Observations on Privilege, dated February 24, 2012, para. 7; Response to Claimants' Observations on Privilege of February 24, 2012, dated March 6, 2012, para. 18.

claim may limit the level of descriptive detail that the asserting party can provide (*see* Section 2 below). In a close case, the credibility of a party's consideration of the issue may be significant in concluding that the privilege claim should be sustained.

26. The specific considerations that are relevant in the balancing process will depend to some extent on the nature of the privilege claimed and the circumstances of each case. In the present proceedings, with respect to claims of sensitivity of government deliberations, the Tribunal has generally found the following considerations to be of particular importance:
- The Investors' interest in production of the requested document to advance the Investors' case as it is set, in particular, in their Memorial;
  - The Respondent's interest in non-disclosure of the requested document and the extent to which such interests are protected or recognized as legitimate in its domestic legislation;
  - Availability of alternative means of safeguarding confidentiality while allowing production, including disclosure of non-sensitive parts of documents;
  - Publicity/transparency surrounding the sensitive documents and their subject matter, including whether any related final work product (decision/report) is publicly available;
  - Insight into reasoning underlying relevant decisions contained in an available final work product;
  - Disclosure or availability of non-privileged sources with related content; and,
  - Length of time since the creation of the document or transmittal of the communication.<sup>36</sup>

## **2. The Tribunal's Review of Assertions of Privilege on Grounds of Sensitivity**

27. Before turning to the Respondent's privilege assertions, the Tribunal wishes to address a particular challenge that the Tribunal faced in its review of the Respondent's balancing process: the delicate task of probing the Respondent's claims of sensitivity without jeopardizing the confidentiality of sensitive information.
28. It is clear, and both Disputing Parties agree, that a mere assertion of sensitivity is not enough to sustain a privilege claim.<sup>37</sup> The party that claims protection must adduce additional information to demonstrate that its special political or institutional sensitivity grounds are compelling. Such information should be sufficiently detailed to allow a tribunal and the opposing party to see that relevant documents are withheld only through a controlled review process and on the basis of appropriate legal criteria, as required under NAFTA.
29. As the Tribunal explained in its Procedural Order No. 12:
- It is in the nature of legal privilege that the description of documents for which privilege is asserted must remain broad as a high degree of detail would risk

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<sup>36</sup> The Tribunal finds that, in international proceedings such as the present one, there is no particular absolute time period after which documents lose protection. The age of a document is but one consideration to be taken into account in the weighing process. In the present case, the Tribunal has not found the age of documents to be decisive in determining whether they should enjoy protection.

<sup>37</sup> *Pope & Talbot, Inc. v. Canada*, Decision on Cabinet Confidence, Sept. 6, 2000, para. 1.4.



defeating the purpose of the privilege, namely to protect the content of the communication. Accordingly, in the Tribunal's view, a privilege log is not intended to enable the opposing party to take cognizance of the content of listed documents, such as the precise subject matter on which legal advice was sought or provided. Rather, the requirement to keep a log of all documents over which privilege is asserted is to ensure that relevant documents are withheld only through a controlled and transparent process. As such, the party asserting a legal privilege is required to represent that it has reviewed all the substantive conditions for the privilege and to provide some further detail to substantiate its representation.

30. In contrast to solicitor-client privilege, the assertion of privilege on the ground of sensitivity presents an added layer of complexity, as it involves a document-by-document balancing of the parties' interests. In the course of carrying out such a weighing exercise involving sensitive information, it may not be possible to reveal the precise considerations that tilt the balance in favor of non-disclosure without divulging (some of the) sensitive information itself. Accordingly, the Tribunal relies on evidence that the process put in place by the party-in-possession was adequate to ensure that, with regard to each document, the requesting party's interests are fully taken into consideration.
31. As described below, the Tribunal concludes that the Respondent has not provided sufficient evidence to demonstrate that all documents over which it claims Article 9.2(f) privilege were reviewed in a controlled process as set out in Paragraph 24 above, guided by the considerations identified by the Tribunal in Paragraph 25. In finding that certain documents were not subject to adequate review, the Tribunal does not prejudge the outcome of such review should it have been conducted adequately. In other words, the Tribunal leaves open the question whether these documents deserve protection upon consideration of the balance of interests between the Disputing Parties. The Tribunal finds that a supplementary review is the most appropriate way of ensuring that no documents are withheld unless they were reviewed in the manner identified by the Tribunal in the present Order.

### **3. Appropriateness of Respondent's Review Processes and Evaluation Criteria**

#### **i. Federal documents**

32. The Investors admit that some federal documents fall within the scope of the Article 9.2(f) privilege. In particular, the Investors concede that the documents listed in the Respondent's Privilege Log at lines 2768, 2769, 2770, and 2771 are privileged as each contains a minute of Cabinet. The Investors maintain, however, that the Respondent has not substantiated the application of the privilege to the remaining 108 federal documents.
33. The Tribunal is satisfied that the process put in place at the Office of the Clerk to the Privy Council was adequate for carrying out the necessary document review in light of the following characteristics: the expertise in such matters of the lawyers at the Office; senior legal supervision and final determination by the Director of the Cabinet Confidences division; and instruction from the Trade Law Bureau to brief the Office with regard to the present arbitration. The Tribunal has also taken note of the Respondent's

helpful assurances, both at the June 8 hearing and in its letter of June 27, 2012, that the Privy Council conducted a balancing test on a document-by-document basis.<sup>38</sup>

34. The fact that the Respondent has, through supplementary submissions, clarified to the satisfaction of the Tribunal that it engaged in a principled and good faith balancing process is not dispositive of its privilege claims. A demonstration that such an exercise has taken place is a prerequisite to a successful assertion of privilege, but not decisive in itself. However, the Tribunal has taken note of a number of important factors that weigh in favor of accepting the Respondent's claims. These include: identification of the issues in this case by the pleadings and exchange of memorials; the fact that the Respondent has made extensive disclosures of internal government documents, even at the senior level, all the way up to the stage at which submissions to Cabinet were prepared; and, the decision by the Respondent to release, in redacted form, a briefing document to Cabinet<sup>39</sup> that presents the background for the rejection of the project by the federal government and a list of factors for and against the competing outcomes.
35. Given that the federal Cabinet is the most senior level of decision-making in Canada, NAFTA tribunals have recognized, under international law, the sensitivity of Cabinet deliberations, while not always upholding privilege claims in respect of all documents associated with those deliberations. Each claim of privilege must be assessed in its legal and factual context, and the Tribunal finds that with respect to the contested Cabinet-related documents in this case, the Respondent has satisfied the onus upon it to show that its claim of privilege should be sustained.

**ii. Nova Scotia documents**

36. The Investors again agree with the Respondent that documents related to the work of a provincial government may, in principle, fall within the scope of the privilege of Article 9.2(f). They contend, however, that the Respondent has not provided any information for the requisite weighing of interests with respect to these two documents and, therefore, cannot exclude them without providing more evidence that it met the required standards of review.<sup>40</sup>
37. The Tribunal observes that the Respondent has provided little detail regarding the review process for the documents related to Nova Scotia. It is not apparent to the Tribunal that the appropriate balancing exercise was carried out. The Respondent's explanation of the review process suggests that the two documents in question were reviewed in light of provincial law, which is distinct from the NAFTA standard applicable in this arbitration. The terms of the Nova Scotia Proceedings Against the Crown Act, which ostensibly guided the review and do not appear to make a weighing exercise a requirement, reinforces the Tribunal's impression that the process was insufficient.
38. Accordingly, the Tribunal determines that the Nova Scotia documents should be reviewed again by the Respondent. To ensure that the appropriate NAFTA standard is applied, the Tribunal requests counsel at the Trade Law Bureau familiar with the present arbitration to evaluate the two Nova Scotia documents in accordance with the balancing exercise set out in Paragraphs 24 to 26 above, with emphasis on each of the criteria the Tribunal has identified are relevant to this arbitration. Upon completion of its review, the

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<sup>38</sup> At the hearing, the Respondent represented that the Privy Council considered, *inter alia*, "the importance of the documents as evidence in the dispute, the [Investors'] need to have access to documents to adequately and fairly present [their] case." (June 8 Hearing Transcript, p. 80).

<sup>39</sup> Bates nos. 814381 to 814388.

<sup>40</sup> Investors' Observations on Privilege, dated February 24, 2012, para. 85.

Respondent shall produce, **by August 10, 2012**, any documents for which the interests in disclosure in this arbitration outweigh the Respondent's interest in non-disclosure and shall inform the Tribunal as to the results of its supplemental review.

**iii. JRP documents**

39. By far the largest category of disputed documents is that relating to documents which evidence the internal deliberations of the JRP. With regard to this category, the Tribunal finds that both sides have invoked significant interests in favor of disclosure and non-disclosure.
40. On the one hand, in view of the nature of the JRP, the Tribunal finds considerable merit in the Respondent's argument that the JRP is "at least, tribunalesque"<sup>41</sup> and that its extensive reasoned report is in principle meant to "speak for itself"<sup>42</sup> rather than be supplanted by material that originates from the JRP's internal discussions. To quote the Respondent's argument on this point:

what we don't want is for litigants then to be able to peer into the deliberative circle and use snippets or excerpts from what the deliberations were in order to challenge what were the final enumerated decisions that were reached in consensus by this Panel, by a tribunal, by a court. That is the nature of the deliberative secrecy, that is what the courts consistently emphasize ensures the independence of the judicial process, that it is free from tampering and that there can be a candid discussion among colleagues whereby they are not concerned that something that they say may later be used to impugn a decision that they eventually signed onto and that they agree with.<sup>43</sup>
41. The Tribunal also recognizes the risk that there may be a certain "chilling effect" on future JRP processes in the event that disclosure of internal documents is ordered. It is at least plausible, in the Tribunal's view, that future JRP members would be more hesitant to address controversial issues in writing if they had to reckon with the possibility of disclosure in NAFTA proceedings.
42. On the other hand, it is apparent from the Investors' Memorial that the activities of the JRP members, and possibly of government officials in relation to the JRP members, are central to the Investors' claims. Should the available evidence indicate that the JRP proceedings were tarnished by bias or misconduct, the value of preserving its deliberational secrecy diminishes, considering that the protection of its internal deliberations is intended to ensure the very soundness of its proceedings. Put differently, any argument to protect certain elements of institutional proceedings in the interest of preserving the sound administration of justice loses value where the proceedings have been shown to be tainted. This is particularly true where, as here, the deliberations in question concern the transaction of a single project as opposed to a national or regional policy with broad effect.
43. The Tribunal has also taken note of the Investors' argument that, leaving aside public sources regarding the JRP process, communications involving the JRP secretariat may be the only way of gaining information regarding the JRP members' reflections. As was

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<sup>41</sup> June 8 Hearing Transcript, p. 160.

<sup>42</sup> June 8 Hearing Transcript, p. 161.

<sup>43</sup> June 8 Hearing Transcript, p. 161-2.

clarified at an earlier stage of these proceedings, the JRP members' personal records were lost, destroyed or are for other reasons no longer available.<sup>44</sup>

44. Having reviewed the interests in disclosure and non-disclosure, the Tribunal is not persuaded that, merely by virtue of the JRP being "tribunalesque," all substantive exchanges among the JRP members can necessarily be withheld under Article 9.2(f). The Tribunal has found the process that the Respondent has put in place to review JRP-related documents to be well crafted in many respects. The Tribunal was impressed, for instance, by the Respondent's approach to use representative samples to determine where to draw the line between documents that engage the political and institutional concerns of the CEEA and those that do not. Nevertheless, as the Respondent concedes, rather than evaluate each document against the Investors' potential interest in that document's disclosure, the Respondent has withheld "all documents containing communications reflecting the thought process of the JRP."<sup>45</sup> Such a generic conclusion that institutional interests always prevail with respect to documents featuring deliberational content is not consistent with the NAFTA standard as determined by the Tribunal above.
45. In the Tribunal's view, the Respondent's stated institutional interest in favor of protecting JRP documents cannot give rise to non-disclosure insofar as these documents contain evidence of bias or improper conduct by JRP members administering the panel review process. Canadian case law dealing with the issue of disclosure of sensitive deliberations by administrative bodies other than the highest levels of federal or provincial governments equally suggests that valid reasons for believing that the deliberations did not comply with the rules of natural justice may overcome assertions of deliberational privilege.<sup>46</sup>
46. The NAFTA case law on deliberative privilege for administrative bodies is not well established. The Tribunal is persuaded that, in international proceedings such as the present arbitration, the approach taken in Canadian domestic law – that a qualified privilege exists for "tribunalesque" administrative bodies – should be adopted. For the purposes of document production in this case, the Tribunal accordingly endorses a standard for disclosure that reflects the distinctive nature of the JRP as a "tribunalesque" body that conducts open proceedings and provides extensive and detailed reasons for its decisions, while at the same time presenting the Respondent with a reasonably well-defined and practicable task. The Tribunal directs the Respondent to review the internal JRP documents again with a focus on clear indications of bias against the Investors or a failure to accord them procedural fairness. The Tribunal requests counsel at the Trade Law Bureau familiar with the present arbitration to conduct this supplemental review. The Respondent is directed to produce to the Investors, **by August 10, 2012**, any JRP document that gives a clear indication of bias or improper conduct in the deliberative process, and to inform the Tribunal of the results of its supplemental review.

#### iv. NEB documents

47. As with the JRP, the Tribunal agrees with the Respondent that some documents related to the NEB may be eligible for protection on the basis of Article 9.2(f). The Tribunal notes the NEB's qualification under Canadian law as a "court of record . . . enjoy[ing] all the

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<sup>44</sup> The Tribunal takes no view in this context as to whether it would have been prepared to order production of these records, assuming they had been available.

<sup>45</sup> June 8 Hearing Transcript, p. 64.

<sup>46</sup> *See, e.g.*, Tremblay v. Quebec (Commission des affaires sociales), [1992] 1 S.C.R. 952, 965; Carey v The Queen in Right of Ontario [1986], 2 SCR 637, 58 O.R. (2d) 352, paras. 79, 83, both referred to by the Disputing Parties.

powers, rights and privileges vested in a superior court,”<sup>47</sup> as well as the Investors’ argument that the NEB acted as an administrative body in its work relevant to these proceedings. Without further going into the intricacies of the NEB’s legal status, there is, in the Tribunal’s view, at least some institutional sensitivity connected with the NEB’s internal deliberations. Moreover, the NEB gives public reasons for its final decisions, providing insight into its thinking which may in many or most respects make further disclosure redundant.

48. Where, as here, there appears little reason for the Tribunal to order production, the opposing party must be able to show that a withheld document is central to its case. Based on its understanding of the Investors’ pleadings, the Tribunal finds that there is little likelihood that any production of the NEB’s internal deliberations would add significant information to the Investors’ case. The NEB’s actions are not directly challenged as part of this case nor have the Investors attached any of the NEB-related documents available to them to their pleadings. In consideration of the limited probativity of the outstanding documents, the Tribunal does not find it necessary to order their further review.

#### **IV. Outstanding Privilege Matters Related to Procedural Order No. 12**

##### **A. Arguments of the Parties**

49. The Investors argue that two issues regarding privilege remain unresolved following the issuance of Procedural Order No. 12.
50. The Investors assert, first, that the Respondent has inappropriately withheld production of entire documents rather than redact privileged portions. Citing Paragraph 5 of Procedural Order No. 11, the Investors submit that the Respondent is required to produce documents in their entirety except to the extent that they contain portions with privileged information.<sup>48</sup> The Investors claim that the Respondent is withholding 2,568 documents even though only a portion of each of those documents may be privileged.<sup>49</sup>
51. Secondly, the Investors contend that the Respondent is inappropriately withholding 17 documents over which it has asserted privilege under both Article 9.2(f) and Article 9.2(b) of the IBA Rules<sup>50</sup> by suggesting that it may exclude them from production because its Art. 9.2(b) objection has succeeded.<sup>51</sup> The Investors cite the *Gallo* tribunal as supporting their submission that “even if a document might ostensibly come under solicitor-client privilege, that alone does not automatically make the document privileged because of its different nature, i.e., . . . each privilege has a separate basis [which must be identified and determined].”<sup>52</sup>

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<sup>47</sup> Affidavit of Sandy Lapointe, para. 6. Accordingly, the Tribunal need not take any position on the Investors’ argument that the NEB “acts like a government department, rather than like a quasi-judicial body,” Investors’ Observations on Privilege, dated February 24, 2012, para. 98.

<sup>48</sup> June 8 Hearing Transcript, p. 56.

<sup>49</sup> June 8 Hearing Transcript, p. 56.

<sup>50</sup> Article 9.2(b) refers to a “legal impediment or privilege under the legal or ethical rules determined by the Arbitral Tribunal to be applicable.”

<sup>51</sup> The Respondent notes that the documents affected are found at lines 202, 204, 358, 359, 496, 497, 500, 511, 512, 522, 524, 526, 527, 528 and 2791.

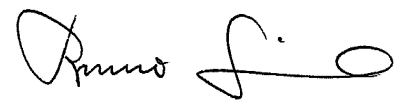
<sup>52</sup> June 8 Hearing Transcript, pp. 225-226.

52. With respect to the possibility of redaction, the Respondent stresses that it has reviewed all the outstanding requested documents for redactability and produced as many as could be produced on that basis (293 documents).
53. In response to the Investors' assertion that acceptance of an objection on the basis of a certain privilege does not negate the possibility of partial production, the Respondent contends that where documents are fully protected under an Article 9.2(b) claim, the Article 9.2(f) claim is rendered moot.

**B. Decision of the Tribunal**

54. The Tribunal is satisfied on the basis of the Respondent's representations in good faith that the Respondent has reviewed all the documents over which it asserts privilege for their redactability.
55. Regarding the Investors' argument concerning the need for further review where the Respondent has asserted more than one form of privilege, the Tribunal agrees with the *Gallo* tribunal that each claim of privilege must be addressed on its own merits where it is necessary to do so. However, the Tribunal is of the view that the clarifications made by the Respondent at the June 8 hearing dispose of the need for any further review with respect to these documents. The Respondent represented that "the information that is protected in these documents under 9.2(b) completely covers as well, the privilege based on a special political or institutional sensitivity" and that "the information protected on the basis of . . . solicitor-client privilege cannot be severed from the information . . . over which we have also claimed privilege on the basis of Article 9.2(f)."<sup>53</sup> As a result, the Tribunal is satisfied that the documents in question need not be produced as a result of its Procedural Order No. 12.
56. With respect to the outstanding documents to be re-reviewed by the Respondent related to the government of Nova Scotia and the JRP, the Respondent should, in accordance with the Tribunal's prior Orders, produce redacted copies if possible and, as noted above, where more than one privilege is asserted, evaluate each privilege separately for possible partial disclosure.

Dated: July 11, 2012



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Judge Bruno Simma  
President of the Tribunal

On behalf of the Tribunal

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<sup>53</sup> June 8 Hearing Transcript, pp. 11-12.