

**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”)

PROCEDURAL ORDER NO. 18

April 16, 2013

ARBITRAL TRIBUNAL:

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

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

WHEREAS the Investors commenced this arbitration by serving on the Respondent a Notice of Arbitration dated May 26, 2008 and a Statement of Claim dated January 30, 2009;

WHEREAS on April 9, 2009, after consultation with the Disputing Parties at a first procedural meeting, the Tribunal issued Procedural Order No 1, which sets out certain procedural rules governing this arbitration, including in respect of hearings;

WHEREAS on October 5, 2012, after consultation with the Disputing Parties, the Tribunal confirmed that the hearing on jurisdiction and merits would take place from June 17 through June 28, 2013;

WHEREAS on October 17, 2012, the Tribunal issued Procedural Order No. 15 which established a revised schedule for the final stages of the proceedings and confirmed the dates for the hearing on jurisdiction and merits;

WHEREAS on March 25, 2013, a draft of the present Order was communicated to the Disputing Parties;

WHEREAS on April 9, 2013, a pre-hearing conference was held by telephone call, in which representatives of both Disputing Parties, the Members of the Tribunal, and a representative of the International Bureau of the Permanent Court of Arbitration (the "PCA") participated;

ON THE BASIS OF THE DISCUSSION WITH THE DISPUTING PARTIES DURING THE PRE-HEARING CONFERENCE, THE TRIBUNAL NOW DECIDES AND ORDERS:

1 Duration, Date and Location of the Hearing

1.1 The Disputing Parties and the Members of the Tribunal shall reserve the period from June 17, 2013 to June 28, 2013 for the hearing. The hearing shall commence on the first day at 9:30 a.m. and thereafter at a time decided by the Tribunal in consultation with the Disputing Parties.

1.2 The hearing shall be held at:

Arbitration Place

North Arbitration Room
Bay Adelaide Centre
900-333 Bay Street
Toronto
Canada M5H 2T4

2 Preparation of the Hearing

2.1 The Disputing Parties shall endeavor to produce an agreed Timeline of Relevant Facts, to be filed with the Tribunal by May 17, 2013.

2.2 The PCA will provide each Member of the Tribunal with a tablet computer containing the Parties' written submissions in this arbitration, including all exhibits, witness statements, expert reports, and legal authorities. Accordingly there is no need for the Parties to prepare hearing bundles containing a selection of documents that they deem relevant for the hearing.

2.3 By June 10, 2013, each Disputing Party shall deliver to the hearing venue one complete hard copy version of all its written submissions, including exhibits, witness statements, expert reports, and legal authorities, for use in the hearing room.

- 2.4 The Disputing Parties may use separate document bundles for the examination of witnesses or experts, which may be handed to the witness or expert directly at the hearing (with a copy for each Member of the Tribunal, the PCA, and opposing counsel). To ensure the efficient conduct of the hearing, such bundles should however be made available at the outset of the witness's or expert's examination (rather than document by document, in the course of the examination).

3 Allocation of Time

- 3.1 The principle of equal time as between the Disputing Parties shall be observed in the conduct of the hearing.
- 3.2 The hearing shall open with the opening statements of the Investors, to be followed by those of the Respondent. The Disputing Parties and the Tribunal may then examine witnesses and experts, in an order to be agreed between the Disputing Parties and the Tribunal or decided by the Tribunal in advance of the hearing. Following the examination of witnesses and experts, there shall be a round of closing statements.
- 3.3 Each Disputing Party shall be allocated a total amount of time for the hearing, which it may choose to use for oral arguments or witness/expert examination as it deems fit. Time spent on direct or re-direct examination shall be counted toward the time account of the Disputing Party presenting the witness or expert, whereas time spent on cross-examination shall be counted toward the opposing Disputing Party's time account. Time spent on expert conferencing (*see* Section 5.3) shall be counted in half toward both Disputing Parties time accounts. Time spent on housekeeping matters or responding to Tribunal questions shall not be counted toward either Disputing Party's time account.
- 3.4 After the notification of the names of witnesses and experts that each Disputing Party wishes to cross-examine during the hearing (*see* Sections 4.1 and 5.1 below), the Disputing Parties are requested to consult with each other with a view to agreeing on the expected duration of the hearing and establishing a detailed scheduling proposal indicating the time for their opening and closing statements, the order of appearance of witnesses and experts, the date and approximate time at which each witness or expert will be presented, and the timing of breaks. The Disputing Parties are encouraged to prepare their proposal on the basis of 6-hour hearing days. Witnesses who are also representatives of a Disputing Party shall be scheduled first in the sequence of witnesses. The Disputing Parties are requested to submit such proposal to the Tribunal by May 24, 2013.

4 Examination of Witnesses

- 4.1 Witness statements shall stand in lieu of direct examination during the oral hearing. Accordingly, witnesses shall appear for testimony at the oral hearing only if they are called by the opposing Party or the Tribunal for cross-examination. By April 26, 2013, each Disputing Party shall notify in writing to the other Disputing Party, with a copy to the Tribunal, the names of the witnesses whom it wishes to cross-examine at the hearing. By May 22, 2013, each Disputing Party may amend its notification in light of the other Disputing Party's comments on any submissions from the Governments of Mexico or the United States of America.
- 4.2 In the event that a witness is called for cross-examination, the Disputing Party that has submitted a witness statement shall be responsible for summoning the witness to the hearing.
- 4.3 At the hearing, the examination of each witness shall proceed as follows: The Disputing Party summoning the witness may briefly introduce the witness and provide him or her with an opportunity to make corrections or clarifications to his or her statement; the opposing Disputing

Party may then cross-examine the witness; the Disputing Party summoning the witness may then re-examine the witness with respect to any matters or issues arising out of the cross-examination. The Tribunal may examine the witness at any time, before, during or after examination by one of the Disputing Parties.

- 4.4 Unless the Disputing Parties agree otherwise, prior to his or her examination, a fact witness shall not be present in the hearing room; discuss the oral arguments or the testimony of any other witness who has already testified prior to giving his or her testimony; read any transcript of oral arguments or oral testimony; or listen to or watch any audio or video recording of the oral arguments or oral testimony. These restrictions do not apply to witnesses who are representatives of a Disputing Party; nor do they apply to witnesses who have submitted a statement in this arbitration, but have not been called for cross-examination.
- 4.5 The Tribunal shall, at all times, have complete control over the procedure for hearing a witness. The Tribunal may in its discretion refuse to hear a witness if it considers that the facts with respect to which the witness will testify are either proven by other evidence or are irrelevant; limit or refuse the right of a Disputing Party to examine a witness when it appears that a question has been addressed by other evidence or is irrelevant; or direct that a witness be recalled for further examination at any time.

5 Examination of Experts

- 5.1 Expert reports shall stand in lieu of direct examination during the oral hearing. Accordingly, experts shall appear for testimony at the oral hearing only if they are called by the opposing Party or the Tribunal for cross-examination. By April 26, 2013, each Disputing Party shall notify in writing to the other Disputing Party, with a copy to the Tribunal, the names of the experts it wishes to cross-examine at the hearing. By May 22, 2013, each Disputing Party may amend its notification in light of the other Disputing Party's comments on any submissions from the Governments of Mexico or the United States of America.
- 5.2 The provisions of Sub-sections 4.2, 4.3, and 4.5 shall apply *mutatis mutandis* to the evidence of experts.
- 5.3 In addition to, and following, cross-examination of experts by the Disputing Parties, the Tribunal may require experts with corresponding areas of specialization to give evidence concurrently and to discuss any areas of disagreement between them in the presence of the Tribunal (expert conferencing).

6 Presentation of Documents

Documents that do not form part of the record in this arbitration may not be presented at the hearing unless agreed by the Disputing Parties or authorized by the Tribunal.

7 Transparency and Records of Hearings

- 7.1 In accordance with Procedural Order No. 2, the hearing shall be open to the public except when necessary to protect confidential information. The hearing shall be made accessible to the public in real time, through technical means to be determined in due course.
- 7.2 The hearing shall be recorded and transcribed.
- 7.3 Live Note transcription software, or comparable software, shall be used to make the hearing transcripts instantaneously available to the Disputing Parties and the Members of the Tribunal

in the hearing room. Further, rough transcripts should be provided by e-mail in the evening of each hearing day.

- 7.4 The Tribunal shall establish, as necessary, procedures and schedules for the correction of transcripts. In the event of disagreement between the Disputing Parties on corrections to transcripts, the Tribunal shall determine whether or not any such corrections are to be adopted.

8 Logistical Issues regarding the Hearing

- 8.1 The PCA shall arrange the catering of lunches and sufficient supplies of refreshments every hearing day. The Disputing Parties are invited to advise the PCA of any dietary requirements.
- 8.2 Each Disputing Party is requested to provide the PCA with a list of hearing attendees by June 10, 2013.

Date: April 16, 2013

For the Arbitral Tribunal:



Judge Bruno Simma
(Presiding Arbitrator)