

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES OF 1976 (“UNCITRAL Rules”)**

**-between-**

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

**(the “Investors” or “Bilcon”)**

**-and-**

**GOVERNMENT OF CANADA**

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

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**PROCEDURAL ORDER NO. 24**

**(Regarding the Production of Additional Source Documents  
Relied upon by Canada’s Experts and Witnesses)**

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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. This Procedural Order addresses issues raised in connection with the production of certain sources and documents related to expert reports submitted with Canada's Counter Memorial.

## II. PROCEDURAL HISTORY

2. By letter of July 6, 2017, the Investors requested that Canada be ordered to provide a number of sets of sources and documents, claimed to be relied upon by Canada's experts (the "**Request(s)**").
3. By letter of July 7, 2017, Canada provided comments on the Investors' letter of July 6, 2017.
4. By letter of July 13, 2017, the Investors made further requests, for the production of sources and documents and for an extension of the time period for the filing of their Reply.
5. By letter of July 18, 2017, Canada provided further comments on the Investors' letters of July 6 and 13, 2017. Canada attached an annex setting out its specific responses to the Requests as formulated in its letters of July 13, 2017 ("**Part I**") and July 6, 2017 ("**Part II**"), respectively.
6. By letter of July 24, 2017, the Investors provided comments on Canada's letter of July 18, 2017.
7. By letter of August 4, 2017, the Tribunal extended the time period for the submission of the Parties' written submissions in this phase of the arbitration by 15 days.

## III. POSITIONS OF THE PARTIES

### 1. Canada's Position

8. Canada opposes most of the Requests. Canada submits that "[i]t would be unfair for the Tribunal to order Canada to produce such sources where it determined the Claimants needed not."<sup>1</sup> Canada asks that the Requests be taken into account in the decision on costs.<sup>2</sup>
9. Canada argues that all but one of the Requests fall within three of the categories of sources and documents which are not in need of production.<sup>3</sup> Canada states that it inadvertently omitted to provide the documents in Request 17 of Part I. Pursuant to sub-sections (b) and (c) of Section IV.3 of Procedural Order No. 22, Canada argues that Requests 1 to 16 and 18 of Part I and Requests 1 to 3 and 5 to 15 of Part II relate to general propositions solely or predominantly based on the experience and expertise of Canada's experts. On the basis of Paragraph 2.2 of Procedural Order No. 3, Canada submits that Requests 4, 8 and 11 of Part II concern documents and sources not relied upon by Canada's experts. Lastly, Canada affirms that Requests 2 and 17 of Part I concern sources and documents already provided to the Investors.<sup>4</sup>

### 2. The Investors' Position

10. The Investors reiterate their Requests and submit that Canada's refusal to provide the requested sources and documents affects their ability to respond to Canada's contentions.<sup>5</sup>

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<sup>1</sup> Letter of July 18, 2017, to the Tribunal, p. 4. See also Letter of July 7, 2017, to the Tribunal, p. 1.

<sup>2</sup> Letter of July 7, 2017, to the Tribunal, p. 1; Letter of July 18, 2017, to the Tribunal, p. 1.

<sup>3</sup> Letter of July 7, 2017, to the Tribunal, p. 1; Letter of July 18, 2017, to the Tribunal, p. 1.

<sup>4</sup> Letter of July 18, 2017, to the Tribunal, pp. 2-4 and Annexes I and II.

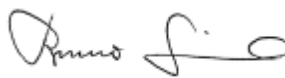
<sup>5</sup> Letter of July 24, 2017, to the Tribunal, pp. 1-2.

11. The Investors contest Canada's argument that certain source documents concern parts of one of Canada's expert reports relying solely or predominantly on the expert's experience and expertise, in light of explicit references to certain source documents in such parts of the report.<sup>6</sup> Furthermore, the Investors reiterate their request that Messrs. Power and Ward be available for cross-examination, given their alleged role in the preparation of one of Canada's expert reports.<sup>7</sup>

#### IV. THE TRIBUNAL'S DECISION

12. The Tribunal notes, at the outset, that the present disagreement between the Parties concerns the manner in which expert reports should be substantiated by sources or documentary evidence.
13. On the one hand, as explained in its Procedural Order No. 23, and in accordance with Procedural Order No. 22, there is no requirement in these proceedings that a Party's witnesses or experts comprehensively document the sources of their testimony or opinion.
14. On the other hand, the provision of supplementary sources may be helpful, not only to provide the opposing party with a meaningful opportunity to prepare its defence but also for the Tribunal's understanding of the expert reports at issue.
15. The Tribunal considers that Requests 1 to 4, 8, 10 and 12 of Part I and Request 7, 14 and 15 of Part II fall within this category. Accordingly, Canada is requested to submit such sources as fall under these Requests as soon as practicable and in any event no later than **5 days of this Order**.
16. The Tribunal, on the contrary, considers that Requests 5 to 7, 9, 11, 13 to 16 and 18 of Annex I and Requests 1 to 6 and 8 to 13 of Part II concern sources and documents which are not in need of production.
17. The Tribunal does not consider any further rulings to be necessary or appropriate at this point, including as to Request 17 of Part I, in relation to which Canada has agreed to provide sources. Similarly, the Tribunal shall reserve any decision regarding the question of the availability for cross-examination of Messrs. Power and Ward for a separate procedural order regarding the preparation for the Hearing on Quantum.

Date: August 14, 2017



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For the Tribunal

Judge Bruno Simma  
(Presiding Arbitrator)

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<sup>6</sup> Letter of July 24, 2017, to the Tribunal, p. 2, regarding the SCMA Report.

<sup>7</sup> Letter of July 24, 2017, to the Tribunal, pp. 2-3, further arguing, at p. 3, that Mr. Power knows the reason for the character of a proposition in the SCMA Report as a false assertion, according to the Investors.