

**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. 17

January 23, 2013

ARBITRAL TRIBUNAL:

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

WHEREAS Section 6.1 of the Tribunal's Procedural Order No. 3 dated June 3, 2009 provides that, at any stage of the proceedings, a Disputing Party may request leave from the Tribunal to deliver written interrogatories to the other Disputing Party along with a reasoned explanation as to why it considers such evidence necessary, including in light of the other evidence that is available;

WHEREAS the Investors applied for leave to file interrogatories on May 9, 2012 in accordance with Section 6.1 of Procedural Order No. 3, and whereas the Respondent objected to the Investors' application on May 11, 2012;

WHEREAS in its letter dated May 23, 2012, the Tribunal advised the Disputing Parties of its view that the Investors' interrogatories fell within the categories of (i) questions seeking further document production or clarification regarding the existence of documents, (ii) questions seeking clarification of facts articulated in the Respondent's Counter-Memorial and (iii) questions related to information contained in witness affidavits, and determined how each of these categories should be addressed;

WHEREAS at a procedural hearing on June 8, 2012, the Tribunal, in consultation with the Disputing Parties, determined the procedure for responding to the Investors' interrogatories;

WHEREAS on July 9, 2012, the Respondent responded to all the interrogatories submitted by the Investors, in accordance with the Tribunal's direction at the June 8, 2012 procedural hearing, and whereas these responses included elements of factual clarification as well as information concerning the availability of any additional documentary evidence;

WHEREAS on January 11, 2013, the Respondent submitted its application for leave to file interrogatories to the Investors in accordance with Section 6.1 of Procedural Order No. 3 (the "Application");

WHEREAS on January 15, 2013, the Investors requested the Tribunal to deny the Respondent's Application on the basis that the Respondent's questions do not serve the purpose of interrogatories as stated by the Tribunal in Procedural Order No. 3 and its letter of May 23, 2012; and whereas in the alternative, the Investors requested the Tribunal to refuse any questions that depart from that purpose;

WHEREAS the Investors generally object to the Respondent's proposed interrogatories on the basis that they are in reality either document production requests or attempts at probing the Investors' submissions or evidence prior to the hearing; and whereas the Investors specifically argue that the proposed interrogatories are more appropriate for cross-examination, inappropriately seek to understand the Investors' reading of the evidence or inappropriately seek evidence that is already available;


THE TRIBUNAL NOW DECIDES AND ORDERS:

1. The Tribunal must decide the Respondent's Application for leave to file interrogatories. The Investors do not dispute the utility of interrogatories as such but object to the Respondent's Application for reasons related to the content of the proposed interrogatories. Accordingly, the Tribunal addresses the Respondent's request for leave in light of the substance of the proposed interrogatories.
2. In considering the Respondent's Application, the Tribunal keeps in mind the need to accord both sides a fair opportunity to prepare and present their cases as well as the need to conduct the proceedings in a reasonably expeditious manner. As the Tribunal noted in its letter of May 23,

2012, interrogatories constitute only one out of several means for engaging with the other Disputing Party's submissions and evidence. Issues are appropriately dealt with in interrogatories if there is reason to believe that the "exchange of information prior to the Reply and Rejoinder may allow the Disputing Parties to narrow their disagreement and clarify points of fact before the merits hearing".

3. Having reviewed the Respondent's proposed interrogatories, the Tribunal is satisfied that a number of the Respondent's questions seek clarification of factual or legal aspects of the Investors' case. These comprise factual or legal questions arising from the Investors' Memorial or Reply and factual questions arising from witness statements. In the Tribunal's view, answers from the Investors to this category of interrogatories are likely to aid the Respondent in preparing its Rejoinder in a more focused manner, and will thus assist the efficient conduct of the proceedings.
4. The Tribunal however distinguishes a second category of interrogatories that materially relate to the amount, weight or reliability of evidence tendered by the Investors. These include questions that ask the Investors to provide additional or new evidence in relation to statements of fact contained in their Memorial or Reply or in witness statements. In the Tribunal's view, interrogatories are not the most appropriate tool for probing, challenging or contradicting evidence. These questions are better addressed in the Disputing Parties' final round of written submissions and/or at the hearing.
5. As regards documentary evidence in particular, the Tribunal also takes note of the Investors' assertion that, "[t]o the extent that the interrogatories purport to pose questions about documents, those questions are readily answered by Canada's own documents, the documents already produced by the Investors, and by reference to the Investors' submissions".
6. Accordingly, the Respondent's Application for leave to file interrogatories is granted with respect to questions 1a, 3a, 4, 5, 8, 10a, 11, 12, 13a, 14a, 16a, 17a, 18a, 22, 23a, and 29a and 29b. The Tribunal directs the Investors to respond to these interrogatories within the time period set in Procedural Order No. 15.
7. Given the extensive document production that has taken place in these proceedings, the Tribunal makes no formal order for the production of further documents by the Investors (save in respect of questions 18 and 23, to which the Investors have not raised any specific objections). However, in the interest of answering the Respondent's questions comprehensively, the Investors are encouraged to accompany their responses in accordance with Paragraph 6 of this Order with such relevant documentation as is within their possession, custody, or control.
8. With respect to all other questions, the Respondent's Application is denied.

Dated: January 23, 2013



Judge Bruno Simma
President of the Tribunal

On behalf of the Tribunal