

**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

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**PROCEDURAL ORDER NO. 3**

**June 3, 2009**

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**ARBITRAL TRIBUNAL:**

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

## **THE TRIBUNAL ISSUES THE FOLLOWING PROCEDURAL ORDER:**

### **1 Procedural Timetable**

- 1.1 **Joint consideration of jurisdiction and merits.** As agreed between the Disputing Parties, the jurisdiction of the Tribunal shall be considered jointly with the merits (liability phase).
- 1.2 **Bifurcation.** The Tribunal orders bifurcation between the merits (liability) phase and, if any liability is found to exist, a damages (quantum) phase.
- 1.3 **Timing of document production.** Each Disputing Party shall have the opportunity of requesting the production of documents by the other Disputing Party pursuant to the procedure set out in Section 3 within 21 days of the receipt of this Procedural Order.
- 1.4 **Timing of written submissions.** Following document production, the Tribunal will fix a date for the commencement of the time period for the filing of the Memorial (“Day A”). As agreed between the Disputing Parties, the Claimants’ Memorial shall be submitted within 90 days of that date (“Day B”). The Respondent’s Counter-Memorial shall be submitted within 90 days of the receipt of the Claimants’ Memorial (“Day C”). The Claimants’ Reply shall be submitted within 60 days of the receipt of the Counter-Memorial (“Day D”). The Respondent’s Rejoinder shall be submitted within 60 days of the receipt of the Claimants’ Reply (“Day E”).
- 1.5 **Indicative timetable.** An indicative timetable for the initial phase of these proceedings is appended to this Procedural Order as Annex A.

### **2 General Principles of Evidence**

- 2.1 **Applicable rules.** Matters of evidence are governed by the relevant articles of the UNCITRAL Arbitration Rules (1976) (the “UNCITRAL Rules”). In addition, the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999) (the “IBA Rules”) will be used as guidelines in these proceedings.
- 2.2 **Evidence in written submissions.** Written submissions shall be accompanied by the documentary evidence and the testimonial evidence relied upon by the submitting Disputing Party.
- 2.3 **Legal authorities.** A Disputing Party shall submit with its written submissions copies of the legal authorities that it relies upon.

### 3 Documentary Evidence

- 3.1 **Form of submissions.** Any documents submitted in these proceedings shall be presented in the following form:
- 3.1.1 Exhibits shall be contained in separate binders, each exhibit having a divider bearing on the tab the exhibit's identification number;
  - 3.1.2 The exhibits shall be numbered consecutively throughout these proceedings;
  - 3.1.3 The number of each exhibit containing a document submitted by the Claimants shall be preceded by the letter "C"; the number of each exhibit containing a document submitted by the Respondent shall be preceded by the letter "R";
  - 3.1.4 Each binder containing exhibits shall contain a list of these exhibits, setting forth for each one:
    - (a) the exhibit number;
    - (b) its date;
    - (c) and a brief description of the exhibit.
  - 3.1.5 The index of exhibits shall be updated with each new submission of documents in these proceedings.
- 3.2 **Truth and completeness.** All documentary evidence submitted to the Tribunal shall be deemed true and complete, including evidence submitted in the form of copies, unless a Disputing Party disputes its authenticity or completeness.
- 3.3 **Simultaneous document production requests.** By application in writing within 21 days of the receipt of this Procedural Order, each Disputing Party may request the production of documents from the other Disputing Party. Any such request shall:
- 3.3.1 Describe the requested documents sufficiently to identify them, or specify in sufficient detail (including subject matter) a narrow and specific category of documents;
  - 3.3.2 Indicate why such documents are relevant and material to the requesting Disputing Party's allegations;
  - 3.3.3 State that the documents are not available to the requesting Disputing Party and why the requesting Disputing Party has substantial reasons to believe that

the documents are in the possession, custody or control of the other Disputing Party.

Correspondence or documents exchanged in the course of this process shall not be copied to the Tribunal, except in the event of objections pursuant to the procedure set out in Section 3.5.

**3.4 Documents not in need of production.** Disputing Parties may not submit requests to produce:

3.4.1 Any document that provides evidence of an established or undisputed fact;

3.4.2 Any document relating to the White Point project that is publicly available on the web site of the Canadian Environmental Assessment Agency (CEAA);

3.4.3 Any other document that is publicly available from a state organ of the Respondent without unreasonable burden and within a reasonable period of time;

3.4.4 Any document that the Disputing Party may obtain as a result of being a participant in the proceedings wherein the original document was released and/or was accessible within a reasonable period of time.

**3.5 Procedure in the event of objections.** To the extent that a Disputing Party considers that a requested document is not subject to production, the following procedure shall apply:

3.5.1 The Disputing Party that has received a request for document production shall, within 30 days of receipt of the request, state which documents it refuses to produce. This refusal notice shall state the reasons for each refusal and shall indicate the documents, if any, that the Disputing Party would be prepared to produce instead of those requested. A refusal to produce shall be justified for reasons specified in Section 3.4 and Articles 3 and 9 of the IBA Rules.

3.5.2 The requesting Disputing Party shall have 14 days from the receipt to reply to the refusal notice, indicating whether it disputes the refusal.

3.5.3 A list of all documents which a Disputing Party refuses to produce and with regard to which the other Disputing Party disputes the refusal shall be submitted in an application to the Tribunal within 14 days of the reply to the refusal notice. This application shall be submitted in tabular form pursuant to the model appended to this Procedural Order as ANNEX B (commonly

referred to as a “Redfern Schedule”). The Disputing Parties may submit a joint application in the same form.

- 3.5.4 The Tribunal will take a decision on a Disputing Party’s application within 30 days of the receipt of the application. For its decision, the Tribunal will be guided – but will not be bound – by Articles 3 and 9 of the IBA Rules. If applicable, the Tribunal will take account of the need to safeguard confidentiality pursuant to the terms of Procedural Order No. 2.
- 3.5.5 A requested Disputing Party shall produce any documents within 45 days of the Tribunal’s order pursuant to Section 3.5.4.
- 3.6 **Requests for additional documents.** If, subsequent to the requests for document production referred to above, a Disputing Party requires additional documents, it shall first request leave from the Tribunal. If leave is granted, the procedure set out in the preceding paragraphs shall apply.
- 3.7 **Presentation of documents at hearings.** No new document may be presented at a hearing unless agreed by the Disputing Parties or authorised by the Tribunal.
- 3.8 **Tribunal’s competence to request document production.** Pursuant to Article 24(3) of the UNCITRAL Rules, the Tribunal remains competent, at all times, to require the Disputing Parties to produce documents, exhibits or other evidence within such a period of time as the Tribunal shall determine.

#### **4 Witness Statements**

- 4.1 **Written witness statements.** Witness statements that one of the Disputing Parties may wish to submit shall contain:
  - 4.1.1 The full name and address of the witness;
  - 4.1.2 Past and present relations of the witness with any Disputing Parties, Counsel or the Tribunal;
  - 4.1.3 A description of the witness’ position and qualifications if relevant to the dispute or to the contents of the statement;
  - 4.1.4 A detailed description of the facts for which the witness is offered and, if applicable, an indication of the source for the witness’ knowledge;

4.1.5 The signature of the witness affirming the truth of the statement.

4.2 **Notification date.** Each Disputing Party shall notify the other Disputing Party of the names of the fact witnesses by a date to be determined by the Tribunal in consultation with the Disputing Parties.

4.3 **Availability for testimony.** Each witness who has submitted a witness statement shall appear for testimony at the hearing, if requested by the other Disputing Party or called by the Tribunal.

## 5 Expert Witness Statements


5.1 **Application of Section 4 by analogy.** The provisions of Section 4 shall apply by analogy to expert statements.

5.2 **Areas of expertise.** In addition, the notification of the names of expert witnesses shall also include the areas of expertise of the expert witnesses.

## 6 Other Evidence

6.1 **Interrogatories.** At any stage of the proceedings, a Disputing Party may request leave to 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.

6.2 **Other evidentiary measures.** The Tribunal may order any other evidentiary measures. Such measures may include appointment of experts, examination of physical evidence, or visits on site. The order of one particular measure may not be construed as implying the exclusion of another.



Dated: June 3, 2009

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Judge Bruno Simma  
President of the Tribunal

on behalf of the Tribunal

## ANNEX A: INDICATIVE TIMETABLE

<b>Event</b>	<b>Party</b>	<b>Date</b>
<i>Document production:</i>		
- Requests to produce documents	Disp. Parties	June 24, 2009
- Production of documents or reasoned objections	Disp. Parties	July 24, 2009
- Replies to objections by the other Party	Disp. Parties	Aug 7, 2009
- Submission of application(s) to Tribunal in the form of a “Redfern Schedule”	Disp. Parties	Aug 21, 2009
- Decision on requests for document production	Tribunal	Sept 21, 2009*
- Production of documents as ordered by Tribunal	Disp. Parties	Nov 5, 2009
<i>Date for the commencement of the time period for the filing of the Memorial</i>	Tribunal	To be set by Tribunal (= Day A)
<i>Memorial on jurisdiction and merits</i>	Claimant	A + 90 days = B
<i>Counter-memorial on jurisdiction and merits</i>	Respondent	B + 90 days = C
<i>Reply on jurisdiction and merits</i>	Claimant	C + 60 days = D
<i>Rejoinder on jurisdiction and merits</i>	Respondent	D + 60 days = E
<i>Submissions pursuant to Article 1128 of NAFTA**</i>	Non-disputing parties	E + 15 days
<i>Observations on Article 1128 Submissions**</i>	Disp. Parties	E + max. 45 days
<i>Notification of witnesses and experts</i>	Disp. Parties	TBD
<i>Pre-hearing conference or teleconference</i>	All	TBD
<i>Hearings on jurisdiction and merits</i>	All	TBD

\* Application of Article 2(2) of the UNCITRAL Rules.

\*\* See Section X.D of Procedural Order No. 1.

**ANNEX B: MODEL SCHEDULE FOR DOCUMENT PRODUCTION REQUEST**

Requesting Party	No.	Documents or Category of Documents Requested	Relevance and Materiality According to Requesting Party		Objections to Document Production Request	Reply to Objections to Document Production Request	Tribunal's Decision
			Reference to Submissions	Comments			