

**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. 26**

**(Regarding the Investors’ Confidentiality Designations in the Quantum Phase)**

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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 by the Parties in connection with the confidentiality designations included in the Investors' written submissions in the quantum phase of this arbitration.

## II. PROCEDURAL HISTORY

2. On May 4, 2009, the Tribunal issued the Procedural Order No. 2 concerning confidentiality arrangements for the arbitration proceedings. According to paragraph 4, "when a disputing party files with the Tribunal material containing confidential information, it shall provide a copy of that material with the confidential information redacted within twenty (20) business days of production".
3. On February 14, 2017, the Tribunal issued Procedural Order No. 22, addressing several objections raised in respect of redactions to the Investor's original Damages Memorial. The Tribunal pointed out that, "as evidenced by Paragraphs 4, 5, 29 and 32 of Procedural Order No. 2, materials designated as containing confidential information are generally assumed to contain confidential information only in part, and, thus, to be capable of redaction".
4. By letter dated April 6, 2017, the Investors re-submitted a redacted version of its Damages Memorial. By letter dated May 10, 2017, the Respondent objected to the Investors' confidentiality designations in their Memorial, witness statements, expert reports and exhibits.
5. By e-mail dated June 12, 2017, the Tribunal suspended the twenty-day period prescribed in paragraph 4 of Procedural Order No. 2 for the filing of public versions of submissions until the issue of the confidentiality designations in the Investors' Memorial had been resolved.
6. By letter dated June 27, 2017, the Tribunal issued a decision ("**Tribunal's Decision**") addressing the Parties' disagreement regarding confidentiality. The Tribunal explained the factors that it took into account in its decision and enclosed with its letter a version of the Damages Memorial redacted in accordance with the Tribunal's considerations. The Tribunal requested the Investors "to modify their redactions to witness statements and expert reports so as to align them with the Tribunal's decision".
7. By letter dated August 18, 2017, Canada contended that the Investors had not filed the Damages Memorial's witness statements and expert reports in accordance with the Tribunal's Decision. Therefore, Canada found itself unable to file its own designations in its Counter-Memorial on Damages. Canada requested that the Tribunal order the Investors to submit redacted versions of their Memorial and Reply Memorial within 20 days of filing their Reply.
8. By letter dated August 23, 2017, the Tribunal recalled the applicability of paragraph 4 of Procedural Order No. 2 to the Parties' future submissions. The Tribunal also requested the Investors to submit revised public versions of their witness statements and expert reports within 20 days of the submission of their Reply Memorial.
9. On September 20, 2017, the Investors submitted a redacted version of their Reply Memorial, as well as redacted versions of the witness statements and expert reports of their Damages Memorial.
10. By letter dated October 31, 2017, Canada contended that the Investors were not acting consistently with the Procedural Orders No. 2 and 22. According to Canada, "[m]uch of the information" that they had designated as confidential was either publicly available or did not meet the definition of "business confidentiality". To facilitate the Tribunal's consideration of the issue, Canada listed its objections to the Investors' confidentiality designations in expert reports and

witness statements accompanying the Damages Memorial in Annex I, and objections to the Investor's confidentiality designations in their Reply Memorial (with expert reports and witness statements) in Annex II.

11. By letter dated November 6, 2017, the Investors contended that all the confidentiality designations they had submitted since the Tribunal's Decision were consistent with that Decision and Procedural Orders No. 2 and 22. Therefore, the Investors requested that the Tribunal upheld these confidentiality designations.
12. On November 6, 2017, Canada submitted its Rejoinder Memorial and supporting evidence, expert reports and exhibits.
13. By letter dated November 17, 2017, the Tribunal invited the Parties to address confidentiality designations in the Claimant's Reply Memorial, the Respondent's Counter-Memorial and the Respondent's Rejoinder Memorial in accordance with a detailed schedule, which would result in the re-filing of "confidential versions" of every pleading, witness statement, expert report, and exhibit by January 30, 2018.

### **III. POSITIONS OF THE PARTIES**

#### **1. Canada's Position**

14. According to Canada, in Procedural Order No. 2 the Tribunal and the Parties "decided long ago that transparency and publication is the norm in this arbitration, not the exception".<sup>1</sup> Canada notes that there are "numerous instances where the Investors have wrongfully designated entire sections and paragraphs of their Memorial and witness statements as confidential".<sup>2</sup> As a result, Canada contends that it had to spend a significant amount of time and resources on the review of these redactions.
15. Canada observes that the Investors have claimed confidentiality designations on nine of the eleven expert reports.<sup>3</sup> This is contrary to the Tribunal's direction in Procedural Order No. 22 that "materials designated as containing confidential information are generally assumed to contain confidential information only in part, thus, to be capable of redaction".<sup>4</sup>
16. Moreover, Canada argues that several other redactions are inconsistent with Procedural Order No. 2 and 22 because statements comparable to the redacted ones can be found in previous submissions that are available online or the redactions relate to public information.

#### **2. The Investors' Position**

17. According to the Investors, publishing its proprietary confidential information—including "detailed valuation, market information, expert reports, investigations and business plans"—would "immediately provide any current or potential competitor with all of the financial, business, scientific and other metrics needed for a complete bankable business plan and a comprehensive 'how to' package for the development of a quarry at White's Point, and the shipping and marketing of the highly valuable aggregate located at that site".<sup>5</sup> The Investors argue that they have devoted "extensive effort, resources, time, planning and enormous financial expenditure to

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<sup>1</sup> Letter of May 10, 2017, p. 2.

<sup>2</sup> Letter of May 10, 2017, p. 2.

<sup>3</sup> Letter of May 10, 2017, p. 3. Letter of October 31, 2017, p. 1.

<sup>4</sup> *Procedural Order No. 22*, para. 27.

<sup>5</sup> Letter of May 25, 2017, p. 1.

the nature, scope, and value of developing a quarry at White's Point".<sup>6</sup> It would be "antithetical" to the entire purpose of this arbitration if a third party were able to obtain this information for its own interests. The harm caused by the disclosure of such information would be irreparable.<sup>7</sup>

18. The Investors do not contest the principle of transparency under NAFTA. On the contrary, they contend that their designations comply with the 2001 Free Trade Commission Notes of Interpretation, as well as Procedural Orders No. 2, 4 and 22.<sup>8</sup> Relying on the principle of "procedural integrity", the Investors however argue that, although some sources may be publicly available, when assembled and analysed together with other documents they acquire a new and different meaning.
19. The Investors submit that "only if the Tribunal is satisfied, beyond any reasonable doubt, that the Investors' designation of confidentiality cannot on any reasonable basis fall within one of the categories of 'confidential information' in Procedural Order 2, may the Tribunal countermand the confidentiality designation the Investors are entitled to make under Procedural Order No. 2".<sup>9</sup>

#### IV. THE TRIBUNAL'S DECISION

20. The Tribunal recalls the Tribunal's Decision dated June 27, 2017. In that Decision, the Tribunal had identified the following factors that the Tribunal took into account when deciding on the confidentiality designations to the Investors Damages Memorial:
  - Whether information is already in the public domain;
  - In particular, whether the Investors themselves have disclosed and discussed information in their previous written and oral pleadings in the present arbitration;
  - Whether the character of information that is public in its individual elements is altered as a result of its unique compilation by the Investors in the Damages Memorial;
  - Whether information as presented and discussed in the Damages Memorial provides insights in strategic planning by the Investors;
  - Whether disclosure of information compiled by the Investors "could result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, the disputing party to which it relates" (see Sub-paragraph 1(c)(iii) of Procedural Order No. 2).
21. Applying these factors to the redactions presently disputed between the Parties, the Tribunal has reached the decisions set out in the last column of **Annex I** and **Annex II** to the present Order. The Tribunal has conducted an analysis of each redaction in light of the specific context in which the redacted statement was made. In each instance, the Tribunal has balanced the public interest in disclosure and the Parties' interest in confidentiality. In this respect, the Tribunal has found that the mere fact that information, in isolation, may be in the public domain is not a sufficient indicator of the public (as opposed to confidential) character of a statement. Notably the expert reports presented by the Investors compile and analyse information in a manner that may provide insights into strategic planning and business decisions by the Investors or at least procure direct benefits to competitors by providing them with valuable market analysis.
22. While each redaction was considered on its own terms, the Tribunal has typically treated the following information as public information that should not be subject to redaction:

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<sup>6</sup> Letter of May 25, 2017, p. 6.

<sup>7</sup> Letter of May 25, 2017, p. 7.

<sup>8</sup> Letter of May 25, 2017, p. 2.

<sup>9</sup> Letter of May 25, 2017, p. 6.

- Projected life of the quarry, whether expressed as a global figure (50 years) or by reference to date ranges;<sup>10</sup>
- General statements about Bilcon's approach and business priorities, the investment, the general functioning of the quarry, the organization of shipments from the marine terminal, or the markets in New York and New Jersey;
- General information as to which consultants were engaged by the Investors;
- Information about tax rates and tax status (except specific tax advice to Bilcon);
- Information that is significant to follow the logic of the Investors' damages calculation.

23. On the other hand, the following information was typically treated as confidential information that may be subject to redaction:

- Specifics of the design of the quarry or the marine terminal.
- Details as to the technical advice provided by consultants at different points in time;
- Projected costs of construction, operation, and freight transport (figures);
- Quantity and geological quality of basalt to be exploited at the site;
- Specific information about envisaged processing of the basalt and end products;
- Corporate structure of, and financial information regarding, the Bilcon group;
- Specific analysis of relevant markets, including by reference to the market position of competitor companies.

24. Finally, the Tribunal notes that several expert reports submitted by the Investors were redacted in their entirety. Canada has opposed such "blanket redactions". Having reviewed the documents in question, the Tribunal can see no reason to depart from its ruling in Procedural Order No. 22 that "materials designated as containing confidential information are generally assumed to contain confidential information only in part, and, thus, to be capable of redaction." In the Tribunal's view, at the very least the cover page as well as introductory paragraphs and biographical information about the author of a report will not typically contain confidential information. Moreover, wherever possible, paragraphs describing in abstract terms the type of analysis carried out by the expert should be public, so as to enable the general public to understand the significance of the expert opinion for a Party's argument. The Investors are therefore requested to resubmit revised redacted versions of all materials that were subject to blanket redaction **by 13 December 2017**.

Date: December 8, 2017



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For the Tribunal

Judge Bruno Simma  
(Presiding Arbitrator)

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<sup>10</sup> The Tribunal considers that the anticipated duration of the project is an important element for following the damages calculations proposed by the Investors' experts. In view of the public interest in understanding how the amounts of the claims are arrived at, the Tribunal has decided to treat this information as public.