

**NAFTA Chapter 11/UNCITRAL Cattle Cases
Consolidated Canadian Claims v United States of America**

October 20, 2006

Procedural Order (PO) No.1

This PO puts on record the results of the discussion and agreement between the Parties and the Tribunal at the 1st Procedural Meeting in Washington DC on October 3, 2006 taking into account as well the Parties' Joint Letter of September 28, 2006 and the further comments received from the Parties on the draft of this Order.

1. Attendance

- 1.1. Names of all attending the meeting were notified in advance and are highlighted in the following sections 1.2 and 1.3.
- 1.2. The representation of the Parties in this procedure is as follows (UNCITRAL Rule 4):

Counsel for Claimants:

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Counsel for Respondent:

Mr. Mark Clodfelter

Assistant Legal Adviser
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1.3. The Arbitral Tribunal appointed by the Parties consists of:

Co-Arbitrators:

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Chairman of Tribunal:

Prof. Dr. Karl-Heinz Böckstiegel

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2. Communications (UNCITRAL Rule 13.3)

- 2.1. The Tribunal shall address communications to Lead-Counsel of the Parties. E-mail communications will be addressed to all Counsel of the Parties. Courier mail will be addressed to the Lead-Counsel indicated by each Party.
- 2.2. Counsel of the Parties shall address communications directly to each member of the Tribunal with a copy to Counsel for the other Party

by e- mail, to allow direct access during travels,

and confirmed either by courier or by fax (but fax communications shall not exceed 15 pages).

- 2.3. To facilitate word-processing and citations in the deliberations and later decisions of the Tribunal, the e-mail transmission of briefs and substantial or longer submissions shall be in Windows Word, or in a PDF document that can be word-searched and from which text can be copied and pasted into Windows Word.
- 2.4. In view of the different law offices used by counsel of Claimant, the Parties have agreed that Respondent shall send its courier communications only to Mr. Woods.
- 2.5. Deadlines for submissions shall be considered as complied with if the submission is received by the Tribunal and the other Party in electronic form or by courier on the respective date.
- 2.6. Longer submissions shall be preceded by a Table of Contents.
- 2.7. To facilitate that parts can be taken out and copies can be made, submissions of all documents including statements of witnesses and experts shall be submitted separated from Memorials, unbound in binders and preceded by a list of such documents consecutively numbered with consecutive numbering in later submissions (C-1, C-2 etc. for Claimants; R-1, R-2 etc. for Respondents) and with dividers between the documents. As far as possible, in addition, documents shall also be submitted in electronic form (preferably in Windows Word to facilitate word processing and citations).

3. Particulars Regarding the Procedure

- 3.1. The **Procedure** shall be in accordance with the Rules of NAFTA Chapter 11 and the UNCITRAL Arbitration Rules currently in force.

- 3.2. The **applicable substantive law** shall be as determined by NAFTA Rule 1131 and UNCITRAL Rule 33.
- 3.3. The **language** of the arbitral procedure shall be English.
- 3.4. The Parties have agreed that the **place of arbitration** is Washington, D.C.
- 3.5. The **city where the Hearing** on the Preliminary Issue will be held will be decided by the Tribunal after the Parties have filed submissions in this regard **by October 31, 2006**.
- 3.6. The Parties have agreed on a bifurcated procedure to the effect that, in a first stage of the procedure, the Tribunal shall only deal with a **"Preliminary Issue"** which the Parties have defined as follows:

"Does this Tribunal have jurisdiction to consider claims under NAFTA Article 1116 for an alleged breach of NAFTA Article 1102(1) where all of the Claimants' investments at issue are located in the Canadian portion of the North America Free Trade Area and the Claimants do not seek to make, are not making and have not made investments in the territory of the United States of America?"

The parties agree that a negative determination of this question will dispose of all of claimants' claims in their entirety.

The parties also agree that any other objections of a potentially jurisdictional nature shall be reserved for a single merits phase should the claims not be dismissed at the preliminary phase."

- 3.7. The Parties have further agreed as follows regarding **Confidentiality**:

"Either party may make public the written submissions, hearing transcripts, and orders and awards generated during the course of this arbitration, except to the extent that they refer to confidential information – in which case any such text shall be redacted prior to being made public.

If either party submits any **document containing confidential information**, it shall designate it as such and, where practicable, provide a redacted version of the document that may be released to the public. Where a party refers to a document that has been designated confidential in its written submission, it shall provide a redacted version of the submission that may be released to the public.

The parties agree to endeavor to make arrangements for a **one-way video-conference transmission** of all substantive hearings including the hearing on the Preliminary Issue so that those hearings may be viewed by the public in a room separate from the hearing room. "

4. Consolidation

- 4.1. The Parties have agreed that all claims of Canadian citizens and corporations referred to in the "Notices of Arbitration and Statement of Claim" submitted between March 16 and June 2, 2005 and listed by name and address in Claimants' "Litigants List", and listed as well by Respondent on its website as "Cases Regarding the Border Closure due to BSE Concerns", shall be consolidated before and decided by this Tribunal.
- 4.2. All Claimants are represented by the same Counsel as mentioned above.

5. Timetable

For the first stage of this bifurcated procedure, the following timetable has been set:

- 5.1. For the purposes of the procedure on the Preliminary Issue, the Parties agree that the Statements of Claim submitted by the Claimants between March 16 and June 2, 2005, are a sufficient basis for Respondent to present its objections in detail.

By October 31, 2006, the Claimants shall submit

a CD containing all Statements of Claim

and a binder, with a table of contents, containing one full Statement of Claim together with copies of those parts of the other Statements of Claim which differ from the first one.

- 5.2. By December 1, 2006, the Respondent shall file its Memorial with all its objections regarding the Preliminary Issue together with all evidence (documents, witness statements, expert statements) it wishes to rely on.
- 5.3. By January 30, 2007, the Claimants file their Reply Memorial on the Preliminary Issue with any evidence (documents, witness statements, expert statements) they wish to rely on.
- 5.4. By March 1, 2007, Art. 1128 submissions and/or Amicus submissions, if any, may be filed.

- 5.5. By May 1, 2007, the Respondent files its Rebuttal Memorial on the Preliminary Issue with any further evidence (documents, witness statements, expert statements), but only in rebuttal to Claimant's Reply memorial or regarding new evidence.
- 5.6. By July 5, 2007, the Claimants file their Rebuttal Memorial on Jurisdiction with any further evidence (documents, witness statements, expert statements), but only in rebuttal to Respondent's Reply memorial or regarding new evidence.
- 5.7. Thereafter, no new evidence may be submitted, unless agreed between the Parties or expressly authorized by the Tribunal.
- 5.8. By July 12, 2007,
 - * the Parties submit notifications of the witnesses and experts presented by themselves or by the other Party they wish to examine at the Hearing,
 - * the Parties inform the Tribunal of the arrangements made for the transcript of the Hearing.
- 5.9. On July 17, 2007, a Pre-Hearing Conference between the Parties and the Tribunal shall be held, if considered necessary by the Tribunal, either in person or by telephone.
- 5.10. As soon as possible thereafter, Tribunal issues a Procedural Order regarding details of the Hearing.
- 5.11. From October 9 to 11, 2007, Hearing on the Preliminary Issue of up to 3 days.
- 5.12. By dates set at the end of the Hearing, if considered appropriate by the Tribunal after consultation with the Parties, Parties shall submit Post-Hearing Briefs of up to 30 pages (no new documents allowed unless agreed by the Parties or admitted by the Tribunal).

6. Evidence Rules

The Parties and the Tribunal may use, as an additional guideline, the "IBA Rules on the Taking of Evidence in International Commercial Arbitration", always subject to changes considered appropriate in this case by the Tribunal.

7. Documentary Evidence

- 7.1. All documents (including texts and translations into English of all substantive law provisions, cases and authorities) considered relevant by the Parties shall be submitted with their Memorials, as established in the Timetable.

- 7.2. All documents shall be submitted in the form established above in the section on communications.
- 7.3. New factual allegations or evidence shall not be any more permitted after the respective dates for the Rebuttal Memorials indicated in the above Timetable unless agreed between the Parties or expressly authorized by the Tribunal.
- 7.4. Documents in a language other than English shall be accompanied by a translation into English.

8. Witness Evidence

- 8.1. Written Witness Statements of all witnesses shall be submitted together with the Memorials mentioned above by the time limits established in the timetable.
- 8.2. In order to make most efficient use of time at the Hearing, written Witness Statements shall generally be used in lieu of direct oral examination though exceptions may be admitted by the Tribunal. Therefore, insofar as, at the Hearing, such witnesses are invited by the presenting Party or asked to attend at the request of the other Party, the available hearing time should mostly be reserved for cross-examination and re-direct examination, as well as for questions by the Arbitrators.

9. Expert Evidence

Should the Parties wish to present expert testimony, the same procedure would apply as for witnesses.

10. Hearing on the Preliminary Issue

Subject to changes in view of the further procedure up to the Hearing:

- 10.1. The dates of the hearing shall be those given in the above timetable.
- 10.2. The city where the Hearing is to be held shall be decided by the Tribunal according to section 3.5.above.
- 10.3. As soon as possible after the Tribunal's decision on the city, the Parties shall submit a joint proposal regarding the location of the Hearing which, failing such agreement, shall be decided by the Tribunal.
- 10.4. The Parties may present opening statements of not more than three hours.
- 10.5. No new documents may be presented at the Hearing. But demonstrative exhibits may be shown using documents submitted earlier in accordance with the timetable.

- 10.6. Taking into account the time available during the period provided for the Hearing in the timetable, the Tribunal intends to establish equal maximum time periods both for the Claimants and for the Respondent which the Parties shall have available. Changes to that principle may be applied for at the latest at the time of the Pre-Hearing Conference.
- 10.7. All substantive hearings including the Hearing on the Preliminary Issue shall be simultaneously transcribed using a live transcription software system, with the delivery to the parties and members of the Tribunal of daily transcripts each evening after the close of the hearing.

Procedural hearings shall be recorded, but not transcribed, unless otherwise agreed.

The Parties, who shall share the respective costs, shall try to agree on and make the necessary arrangements in this regard. With regard to the Hearing on the Preliminary Issue, the Parties shall inform the Tribunal accordingly before the time of the Pre-Hearing Conference as provided in the timetable.

- 10.8. Should the Parties be presenting a witness or expert not testifying in English and thus requiring interpretation, they are expected to provide the interpreter unless agreed otherwise. Should more than one witness or expert need interpretation, to avoid the need of double time for successive interpretation, simultaneous interpretation shall be provided.

11. Extensions of Deadlines and Other Procedural Decisions

- 11.1. Short extensions may be agreed between the Parties as long as they do not affect later dates in the Timetable and the Tribunal is informed before the original date due.
- 11.2. Extensions of deadlines shall only be granted by the Tribunal on exceptional grounds and provided that a request is submitted immediately after an event has occurred which prevents a Party from complying with the deadline.
- 11.3. The Tribunal indicated to the Parties, and the Parties took note thereof, that in view of travels and other commitments of the Arbitrators, it might sometimes take a certain period for the Tribunal to respond to submissions of the Parties and decide on them.
- 11.4. Procedural decisions will be issued by the chairman of the Tribunal after consultation with his co-arbitrators or, in cases of urgency or if a co-arbitrator cannot be reached, by him alone.

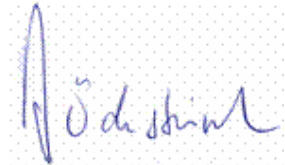
12. Arbitration Costs (UNCITRAL Rules 38 – 41)

- 12.1. In accordance with UNCITRAL Rule 38, the Tribunal shall fix the costs of arbitration (fees and expenses).
- 12.2. In accordance with UNCITRAL Rule 39, after the consultation with the Parties during the Washington meeting, the Tribunal fixes the fees of the members of the Tribunal to be US-Dollars 500.00 per hour.
- 12.3. The Tribunal may appoint an Administrative Secretary. The respective fees and expenses of the Administrative Secretary shall be costs of arbitration.
- 12.4. In accordance with UNCITRAL Rule 41, the Tribunal has requested and received from each Party an equal amount as an advance for the costs of arbitration to the trust account of the Chairman of the Tribunal.

14. Results of the Procedural Meeting

The Parties, within one week after receiving the draft for this Procedural Order, were given an opportunity to submit comments. Taking into account the comments received, the Tribunal has issued this Order.

On behalf of the Tribunal

A handwritten signature in blue ink, appearing to read 'K. Böckstiegel', is written over a light blue dotted grid background.

Karl-Heinz Böckstiegel
Chairman of the Tribunal