Foreign Affairs, Trade and Development Canada

Department of Justice

CANADA

Affaires étrangères, Commerce et Développement Canada

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VIA EMAIL

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Re: ***Detroit International Bridge Company v. Government of Canada (NAFTA), PCA Case No. 2012-25: Application to Amend Confidentiality Order & Procedural Order No. 3***

Dear Mr. Chairman and members of the Tribunal,

Pursuant to paragraph 19 of the Confidentiality Order dated March 27, 2013, Canada requests that the Tribunal amend the Confidentiality Order to make clear that the non-disputing NAFTA Parties – the United States and Mexico – have the right to attend hearings and access

transcripts of hearings. Specifically, Canada requests that the Tribunal amend paragraphs 14 and 16 of the Confidentiality Order to allow the non-disputing NAFTA Parties:

1. unrestricted access to the transcripts for the jurisdictional hearing of March 20 and 21, 2014 and any future hearings, on request; and

2. the right to attend any future hearings and, upon request, to make oral submissions on matters of interpretation of NAFTA.

Canada also requests that the Tribunal amend Procedural Order No. 3, paragraph 31 to reflect the above.

While Canada understands that the United States and Mexico will be requesting copies of the transcript from the March 20-21, 2014 hearing pursuant to Procedural Order No. 7,[1] this request to amend the Confidentiality Order will ensure that, if there are any future hearings in this arbitration, the rights of the non-disputing NAFTA Parties are not further prejudiced by a blanket exclusion from hearings.

Canada also objects to DIBC's notifications of March 31, 2014 and April 8, 2014 that it intends to "designate as confidential information" the transcript from the hearing on jurisdiction and admissibility which took place on March 20-21, 2014. In Canada's view, the transcript contains no confidential information as that term is defined in the Confidentiality Order.

1. There was Inadequate Opportunity to Address the Rights of Non-Disputing NAFTA Parties Prior to Procedural Orders Nos. 6 and 7

The question of whether the non-disputing NAFTA Parties are entitled to attend hearings in this dispute arose only three days before the hearing on jurisdiction and admissibility on March 20-21, 2014. In response to the request of the United States to attend the hearing, DIBC sent an email to the Tribunal on March 17, 2014 at 4:04pm (EDT) objecting to the presence of the United States and Mexico at the hearing because the Confidentiality Order states that hearings are *in camera*. Canada sent a brief response by email on the same day at 9:05pm (EDT) setting out in summary its position that the NAFTA gives non-disputing NAFTA Parties the right to attend hearings even if they are designated *in camera* pursuant to UNCITRAL Rule 28(3). Canada offered to make further submissions to the Tribunal on this issue.

On March 18, 2014, the Tribunal did not invite further submissions but issued Procedural Order No. 6 deciding that "the Confidentiality Order shall be respected and the attendance at the Hearing on Jurisdiction by non-disputing NAFTA Parties is not permitted." Procedural Order No. 6 prompted the United States and Mexico to write to the Tribunal on March 19, 2014

[1] Canada reserves the right to makes submissions in response to any request by the United States and/or Mexico in this regard should DIBC oppose those requests.

urgently requesting reconsideration of this decision given that the hearing was scheduled to start the next morning.[2]

The matter was briefly discussed at the hearing on the morning of March 20, 2014 and the Tribunal upheld its decision to exclude the non-disputing NAFTA Parties from the hearing based on the Confidentiality Order as it is currently drafted. This decision was elaborated upon in Procedural Order No. 7 dated March 25, 2014.

Given that this dispute arose at the eleventh-hour and in the midst of hearing preparation and travel to Washington D.C. (as the Tribunal recognizes in paragraph 6 of Procedural Order No. 7), Canada does not feel that there was adequate time or opportunity for a thorough consideration of this issue. In light of its importance for this arbitration, and the precedent it could set for future NAFTA arbitrations, Canada requests that the Tribunal provide the disputing parties and the non-disputing NAFTA Parties adequate opportunity to present their views in writing and that the Confidentiality Order be amended to conform to the rights of the non-disputing NAFTA Parties enshrined in NAFTA Chapter Eleven.

2. The Confidentiality Order Permits Amendments or Derogations for Good Cause

Paragraph 14 of the Confidentiality Order states "at the request of the Claimant and in accordance with Article 28(3) of the UNCITRAL Arbitration Rules all hearings shall be held *in camera*." Paragraph 16 states in relevant part "[A]t the request of Claimant and, as a consequence of Article 28(3) of the UNCITRAL Arbitration Rules, transcripts of the hearing shall be kept confidential."

Paragraph 19 of the Confidentiality Order permits either disputing party to request an amendment to or derogation from the Confidentiality Order with good cause. As described below, there is good cause to amend paragraphs 14 and 16 of the Confidentiality Order to clarify that non-disputing NAFTA Parties have the right to attend future *in camera* hearings and have unrestricted access to the transcripts.

Had Canada been aware of DIBC's position that non-disputing NAFTA Parties were to be excluded from hearings at the time the Confidentiality Order was being negotiated, Canada would have raised this issue directly with the Tribunal at that time. At the first procedural hearing between the disputing parties and the Tribunal on March 20, 2013, there was no discussion as to whether the United States and Mexico would be excluded from hearings and DIBC had never raised the issue with Canada previously. In light of the text of NAFTA Article 1128, and in light of the consistent practice of the NAFTA Parties and NAFTA tribunals to allow non-disputing NAFTA Parties to attend *in camera* hearings, Canada had no reason to assume DIBC held this position while drafting the Confidentiality Order.

Indeed, the Confidentiality Order in this case is substantially similar to those used in other NAFTA disputes where the hearings were *in camera* but the non-disputing NAFTA Parties

[2] Letter from United States to Tribunal dated March 19, 2014; Letter from Mexico to Tribunal dated March 19, 2014.

were nevertheless in attendance.[3] As the United States noted in its March 19, 2014 letter, the non-disputing NAFTA Parties have ordinarily not even been required to seek permission to attend NAFTA Chapter Eleven hearings. Instead, it is common practice for the tribunal's Secretary to apprise the non-disputing NAFTA Parties of the date and location of the hearing and make arrangements for their attendance.

Accordingly, while Canada's position remains that the existing Confidentiality Order should not have been interpreted as barring the non-disputing NAFTA Parties from hearings and from access to transcripts, the lack of clarity on the issue is good cause for an amendment pursuant to paragraph 19.

3. Claimant's Election for an *In Camera* Hearing Cannot Prejudice the Rights of the Non-Disputing NAFTA Parties

The letter of the United States to the Tribunal dated March 19, 2014, endorsed by Mexico in its letter on the same date, also reflects Canada's views as to the interpretation of the NAFTA. Canada will not repeat all of the arguments presented by the United States but would like to provide the Tribunal with further elaboration as to why there is good cause to grant Canada's request to amend the Confidentiality Order.

a. NAFTA Chapter Eleven Provides Special Rights of Participation to Non-Disputing NAFTA Parties With Respect to the Interpretation of NAFTA

DIBC elected to submit its claim to arbitration under the UNCITRAL Arbitration Rules pursuant to NAFTA Article 1120(1)(c). Article 1120(2) of the NAFTA states that "the applicable arbitration rules shall govern the arbitration except to the extent modified by this Section [B]." Thus, any modification to the UNCITRAL Rules, including Article 28(3), by NAFTA Chapter Eleven must take precedence and govern the arbitration.[4]

Interpreting NAFTA Article 1128 ("Participation by a Party") in accordance with Article 31 of the *Vienna Convention of the Law of Treaties* means that the *in camera* hearing rule in UNCITRAL Rule Article 28(3) has been modified with respect to the non-disputing NAFTA Parties.

Article 1128 states: "On written notice to the disputing parties, a Party may make *submissions* to a Tribunal on a question of interpretation of this Agreement" (emphasis added). The text suggests that the non-disputing NAFTA Parties have been conferred a right to make "submissions," rather than provided with an opportunity to be exercised at the discretion of a tribunal. Article 1128 does not distinguish oral from written submissions. Rather, as the *ADF v. United States* tribunal observed, "[t]he parties recognize that the Governments of Canada and

[3] *Chemtura Corporation v. Government of Canada* (UNCITRAL) Confidentiality Order, January 21, 2008, ¶¶ 5, 10, **Exhibit R-163**; *S.D. Myers Inc. v. Canada* (UNCITRAL) Procedural Order No. 11, November 11, 1999 at 2, ¶ 1, **Exhibit R-164**; *Pope & Talbot Inc. v. Canada* (UNCITRAL) Procedural Order on Confidentiality No. 5, December 17, 1999, ¶ 1, **Exhibit-R-165**.

[4] For example, NAFTA Articles 1127 and 1129 and Annex 1137.4 modify the applicable arbitration rules with respect to documents and awards which might otherwise be confidential.

Mexico have the right to make *written and oral submissions* pursuant to NAFTA Article 1128."[5] Because Article 1128 gives non-disputing NAFTA Parties the right to make either or both written and oral submissions before and after hearings, it follows that they may also make oral submissions at a hearing and make further written submissions based on issues that were raised during that hearing. Thus, the right to make submissions necessarily implies a right of attendance.

As the United States pointed out in its March 19, 2014 letter, a non-disputing NAFTA Party cannot know if it wishes to make oral submissions at a hearing if it is not able to attend the hearing. A non-disputing NAFTA Party cannot know if it wishes to make post-hearing written submissions on issues raised during a hearing if it was not permitted to attend the hearing and is prevented from accessing to the transcript. A non-disputing NAFTA Party also cannot know what the disputing Parties or the Tribunal had to say about its pre-hearing written submissions if it is barred from the hearing and prevented from reading the transcript. In other words, the Article 1128 rights of a non-disputing NAFTA Party cannot be effectively exercised without knowing what is said at a hearing. It therefore follows that the most reasonable interpretation of Article 1128 is that it modifies UNCITRAL Rule Article 28(3) so as to permit the non-disputing NAFTA Parties to be present at *in camera* hearings and have access to the transcripts. To do otherwise would prejudice the rights of the non-disputing NAFTA Parties.

The fact that there was extensive argument by Canada and DIBC and questioning from the Tribunal on the interpretation of Articles 1116, 1117, 1121 and the NAFTA negotiating texts at the March 20-21, 2014 hearing illustrate the importance of providing the non-disputing NAFTA Parties access to hearings and transcripts should they so request. Both the United States and Mexico have already made pre-hearing written submissions on the interpretation of the NAFTA in this dispute. Article 1128 gives them the right to decide if they wish to make post-hearing submissions on matters of interpretation on the basis of their review of what was said during the hearing.

b. The Practice of the NAFTA Parties and Tribunals is to Allow Non-Disputing NAFTA Parties to Attend Hearings

The above interpretation is consistent with the practice of the NAFTA Parties themselves and with the observations and practice of previous NAFTA tribunals.

In *S.D. Myers v. Canada*, despite the hearings having been declared *in camera* and the procedural order having made no mention of the attendance of the non-disputing NAFTA Parties,[6] and despite the position of the claimant that Article 1128 provided them no right to attend hearings and make oral submissions,[7] the Tribunal not only allowed the United States and

[5] *ADF Group Inc. v. United States* (ICSID Case No. ARB(AF)/00/1) Minutes of the First Session of the Tribunal, February 3, 2001, ¶ 15 (emphasis added), **Exhibit R-166**.

[6] *S.D. Myers Inc. v. Canada* (UNCITRAL) Procedural Order No. 11, November 11, 1999 at 2, ¶ 1, **Exhibit R-164**.

[7] *S.D. Myers Inc. v. Canada* (UNCITRAL) Investor's Reply to the Submissions of the United Mexican States, January 28, 2000, ¶ 1, **Exhibit R-167** (stating claimant's position that Article 1128 does not give non-disputing NAFTA Parties the right to attend hearings).

Mexico to attend the hearing but Mexico also made an oral submission in addition to post-hearing written submissions based on arguments made at the hearing.[8]

In *Pope & Talbot*, despite the hearings having been declared *in camera* pursuant to the UNCITRAL Rules and the relevant procedural order having made no mention of the attendance of the non-disputing NAFTA Parties,[9] and notwithstanding the objections of the claimant and its position that Article 1128 does not provide a non-disputing NAFTA Party the right to attend hearings,[10] both the United States and Mexico were in attendance at *in camera* hearings and both Parties made post-hearing submissions based on arguments that arose during those hearings.[11]

In *GAMI v. Mexico*, the hearings were *in camera* but both Canada and the United States were in attendance at the jurisdictional hearing and reserved their right to make further submissions under NAFTA Article 1128 based on what was said during the hearing.[12]

In *Chemtura v. Canada*, notwithstanding the fact that the hearings were *in camera* and there was no mention of the non-disputing NAFTA Parties in the confidentiality order,[13] the United States and Mexico were both in attendance at the hearings.[14]

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[8] *S.D. Myers Inc. v. Canada* (UNCITRAL) Partial Award, November 13, 2000, ¶¶ 77-79, **RLA-69**; *S.D. Myers Inc. v. Canada* (UNCITRAL) Supplemental Submission of the United Mexican States, September 25, 2001, ¶ 1, **Exhibit R-168** (referring to arguments adduced at the damages hearing); *S.D. Myers Inc. v. Canada* (UNCITRAL) Second Partial Award, October 21, 2002, ¶¶ 71, 76, **RLA-70**.

[9] *Pope & Talbot Inc. v. Canada* (UNCITRAL) Procedural Order on Confidentiality No. 5, December 17, 1999, ¶ 1, **Exhibit R-165**.

[10] *Pope & Talbot Inc. v. Canada* (UNCITRAL) Investor's Reply to the post-hearing submission of Mexico and the United States, June 1, 2000, ¶ 32, **Exhibit R-169** (stating claimant's position that Article 1128 does not give non-disputing NAFTA Parties the right to attend hearings).

[11] See *Pope & Talbot Inc. v. Canada* (UNCITRAL) Supplemental Submission of the United Mexican States, May 25, 2000, **Exhibit R-170** (referring to arguments and questions arising during the May 1, 2000 hearing); *Pope & Talbot Inc. v. Canada* (UNCITRAL) Eighth Article 1128 Submission of the United States of America, December 3, 2001, **Exhibit R-171** (referring and responding to arguments by the claimant and question from the Tribunal during the November 15, 2001 hearing); *Pope & Talbot Inc. v. Canada* (UNCITRAL) Post-Hearing Article 1128 Submission of United Mexican States (Damages Phase), December 3, 2001, **Exhibit R-172** (referring and responding to arguments by the claimant and directions by the Tribunal during the November 15, 2001 hearing).

[12] *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Procedural Order No. 1, January 31, 2003, ¶ 12.1, **Exhibit R-173**; *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Submission of the United States of America, June 30, 2003, **Exhibit R-174**; *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Transcript of Jurisdictional hearing, September 17, 2003 at 44, **Exhibit R-175**; *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Procedural Order No. 5, April 7, 2004, **Exhibit R-176**; *GAMI Investments, Inc. v. United Mexican States* (UNCITRAL) Final Award, November 15, 2004, ¶¶ 7, 11, **RLA-71** ("Mexico raised jurisdictional objections, They were to the subject of a special hearing on 17 September 2003…in the course of which counsel addressed the Tribunal and answered questions put to them by the arbitrators….Representatives of the Governments of Canada and the United States of America were present….Both sent representatives to the Hearing on Jurisdiction and the Final Hearings in Washington.").

[13] *Chemtura Corporation v. Government of Canada* (UNCITRAL) Confidentiality Order, January 21, 2008, ¶¶ 5, 10, **Exhibit R-163**; *Chemtura Corporation v. Government of Canada* (UNCITRAL) Procedural Order No. 5, July 30, 2009, ¶ 19, **Exhibit R-177** (directing the hearing to be held in camera and attended only by those referred to in paragraph 5 of the Confidentiality Order, which included no reference to the United States and Mexico).

c. DIBC's Objections Are Unsupported and Cannot Override Article 1128

Other than a literal reading of the existing Confidentiality Order, DIBC has raised only two arguments as to why the non-disputing NAFTA Parties are not permitted to attend the hearings.[15] Neither have any merit.

First, DIBC relies on the October 17, 2001 decision of the *UPS v. Canada* tribunal as support for its argument that the non-disputing NAFTA Parties cannot attend *in camera* hearings.[16] But that decision was made only with respect to the hearing attendance of the public and *amicus curiae*, *not* the non-disputing NAFTA Parties. In fact, not only did both the United States and Mexico attend the July 2002 *in camera* hearing following the *UPS* tribunal's October 17, 2001 order notwithstanding the claimant's position that they had no right to be there, but both requested the opportunity to make post-hearing submissions based on arguments that arose during the hearing.[17] Both the United States and Mexico did so on August 23, 2002.[18] As such, *UPS* serves to undermine DIBC's own argument.

DIBC also relies on the *Mr. A.J.O. v. The Slovak Republic* award to say that non-disputing parties were not permitted to attend the hearing.[19] This award has no relevance to the NAFTA for the obvious reason that the treaty in that case (The Netherlands-Czech/Slovak bilateral investment treaty) has no provisions equivalent to NAFTA Articles 1120(2), 1127, 1128 or 1129. The two treaties are completely different in this respect and the *Mr. A.J.O.* award is therefore of no assistance to this Tribunal.

Second, DIBC argues that the United States should be excluded from hearings in this dispute because DIBC is also suing the United States in the Washington Litigation. But this argument is inconsistent with DIBC's own claim that the Washington Litigation is separate and distinct from the NAFTA arbitration. To suggest that anything said in the NAFTA arbitration would somehow prejudice DIBC in the Washington Litigation vis-à-vis the United States is untenable. Indeed, the Counter-Memorial, Reply and Rejoinder in the jurisdictional phases of this arbitration all of which refer to the Washington Litigation have already been published in

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[14] *Chemtura Corporation v. Government of Canada* (UNCITRAL) Excerpt of Transcript, Hearing on the Merits, Vol. 1, September 2, 2009 at 7- 9, **Exhibit R-178** (Tribunal noting that the hearing is in camera but noting the attendance of the United States and Mexico).

[15] Letter of DIBC to the Tribunal dated March 19, 2014.

[16] *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae, October 17, 2001, ¶ 67, **RLA-72**.

[17] *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Award on Jurisdiction, November 22, 2002, ¶ 5, **RLA-73**.

[18] *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Third Article 1128 Submission by the United States, August 23, 2002, ¶ 1, **Exhibit R-179** (referring to questions that arose during the hearing); *United Parcel Service of America Inc. v. Government of Canada* (UNCITRAL) Third Article 1128 Submission by Mexico, August 23, 2002, ¶¶ 1, 5, 7, **Exhibit R-180**.

[19] *Mr. A.J.O. v. The Slovak Republic* (UNCITRAL) Final Award, April 23, 2012, ¶ 57, **RLA-74**.

full on Canada's website without redactions for confidentiality.[20] No exhibit or authority submitted in this arbitration thus far has been designated as confidential.

But even if there is confidential information as defined by the Confidentiality Order submitted during the course of the arbitration, the non-disputing NAFTA Parties are bound to "treat the information as if it were a disputing Party."[21] DIBC cannot claim prejudice by virtue of the attendance of the non-disputing NAFTA Parties when they already have rights of access to the evidence and documentation. The fact that DIBC is also suing the United States in a separate domestic proceeding cannot abrogate the existing treaty rights of non-disputing NAFTA Parties in this NAFTA arbitration.

4. The March 20-21, 2014 Transcript Does Not Contain Confidential Information

In its March 31 and April 8, 2014 emails to the Tribunal, DIBC suggests that the transcripts contain "confidential information" as that term is defined in the Confidentiality Order. To date, the claimant has not designated *any* information in *any* document or exhibit as confidential information. Given that the March 20-21, 2014 hearing was based on submissions and documents already in the public domain and not containing confidential information, Canada is unaware of any other confidential information that could have arisen during the hearing.[22] Should the claimant seek to redact portions of the transcript which do not conform to the definition of confidential information as set out in the Confidentiality Order, Canada will submit the issue for resolution to the Tribunal pursuant to Article 5 of the Confidentiality Order.

5. Conclusion

DIBC has, despite Canada's urging to do otherwise, requested *in camera* hearings pursuant to UNCITRAL Rule Article 28(3). Nevertheless, this must be interpreted in light of the special rights granted to the non-disputing NAFTA Parties in NAFTA Chapter Eleven, including Articles 1127-1129. The Tribunal should also consider this issue in light of the binding interpretation by the NAFTA Free Trade Commission that there is no general duty of confidentiality in NAFTA Chapter Eleven arbitrations and that all documents and submissions in this arbitration can be publically released (subject to redactions for appropriate confidential information).[23] The scope of NAFTA Article 1128 should not be read as to encumber the rights of non-disputing NAFTA Parties to make submissions to the Tribunal on questions of interpretation of the NAFTA.

For the aforementioned reasons, Canada respectfully requests that the Tribunal amend paragraphs 14 and 16 the Confidentiality Order and paragraph 31 of Procedural Order No. 3 so

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[20] The only redactions in any submission thus far were to Canada's Memorial on Jurisdiction at ¶¶ 307 and 309, which redacted two quotations from the transcript of the March 20, 2013 First Procedural Hearing.

[21] NAFTA Article 1129(2).

[22] Given that the Confidentiality Order already provides that the transcript cannot be made public, designation of confidential information for the purposes of preventing it from entering the public domain is redundant.

[23] NAFTA Free Trade Commission Note of Interpretation (July 31, 2001), **RLA-2**; Confidentiality Order, March 27, 2013, ¶ 16.

as to allow the attendance of the non-disputing NAFTA Parties to any future hearing and to allow them unrestricted access to the transcripts of the jurisdictional hearing of March 20 & 21, 2014 and any future transcripts generated in these proceedings.

Yours very truly,

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