

**ARBITRATION UNDER
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE 2010 UNCITRAL ARBITRATION RULES**

Between

DETROIT INTERNATIONAL BRIDGE COMPANY

(on its own behalf and on behalf of its enterprise The Canadian Transit Company)

Claimant

and

THE GOVERNMENT OF CANADA

Respondent

(and together with the Claimant, the “*disputing parties*”)

PROCEDURAL ORDER No. 8

May 12, 2014

Arbitral Tribunal

Mr. Yves Derains (Chairman)

The Hon. Michael Chertoff

Mr. Vaughan Lowe, Q.C

I. BACKGROUND OF THE PROCEEDINGS

1. By letter dated April 17, 2014, Canada requested the Arbitral Tribunal to amend paragraphs 14 and 16 of the Confidentiality Order and paragraph 31 of Procedural Order No. 3 so as to allow the attendance of the non-disputing NAFTA Parties to any future hearings and allow them unrestricted access to the transcripts of the Hearing on Jurisdiction of March 20-21, 2014 and any future transcripts generated in these proceedings.
2. By e-mail of April 18, 2014, the Tribunal invited DIBC to submit its comments on Canada's request above by May 2, 2014.
3. By e-mail of May 2, 2014, DIBC submitted its objections to Canada's request to amend the Confidentiality Order and Procedural Order No. 3.
4. By e-mail of May 5, 2014, the Arbitral Tribunal acknowledged receipt of DIBC's e-mail of May 2, 2014 and informed the disputing parties¹ that it would render its decision on this issue shortly.

II. SUMMARY OF THE PARTIES' POSITIONS

A. Summary of Canada's Position

5. Pursuant to paragraph 19 of the Confidentiality Order dated March 27, 2013, Canada requested that the Tribunal amend the Confidentiality Order to make clear that the non-disputing NAFTA Parties, *i.e.* the United States and Mexico, have the right to attend hearings and access to transcripts of hearings. Canada also requested that the Tribunal amend paragraph 31 of Procedural Order No. 3 to reflect the above.
6. According to Canada, paragraph 19 of the Confidentiality Order permits either disputing party to request an amendment to or derogation from the Confidentiality Order with good cause. It argues that, as explained 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.
7. 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 the time. At the first

¹ In accordance with the practice in NAFTA Article 1139, the (capitalized) terms 'Party' and 'Parties' refer to the States Parties to NAFTA. The term 'disputing parties' refers to the disputing investor (*i.e.*, the claimant) and the disputing Party (*i.e.*, the respondent) in this case.

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.

8. According to Canada, the Confidentiality Order in this case is substantially similar to those used in other NAFTA disputes where the hearings were held *in camera* but the non-disputing NAFTA Parties were nevertheless in attendance. 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.
9. Canada argues that Claimant's election for an *in camera* hearing cannot prejudice the right of the non-disputing NAFTA Parties. Interpreting NAFTA Article 1128 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.
10. 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 necessary implies a right of attendance. 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.
11. According to Canada, the practice of the NAFTA Parties and Tribunals is to allow non-disputing NAFTA Parties to attend hearings despite the hearings having been declared *in camera*. In support of such allegation, Canada cites the following cases: *S.D. Myers v. Canada*², *Pope & Talbot*³, *GAMI v. Mexico*⁴ and *Chemtura v. Canada*⁵.
12. Canada makes reference to DIBC's argument that the United States should be excluded from hearings in this case because DIBC is also suing the United States in the Washington Litigation. According to Canada, 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

² Exhibits R-164, R-167 and R-168.

³ Exhibits R-165; R-169 to R-172.

⁴ Exhibits R-173 to R-176.

⁵ Exhibits R-163; R-177 and R-178.

somehow prejudice DIBC in the Washington Litigation vis-à-vis the United States in untenable. 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 full on Canada's website without redactions for confidentiality. No exhibit or authority submitted in this arbitration thus far has been designated as confidential.

13. 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 arbitration.

B. Summary of DIBC's Position

14. DIBC opposes to Canada's request to amend the Confidentiality Order and Procedural Order No. 3 for lack of good cause.
15. According to DIBC, Article 28(3) of the UNCITRAL Arbitration Rules states that "*Hearings shall be held in camera unless the parties agree otherwise*". Canada acknowledged at the procedural hearing on March 20, 2013 that under this rule, Canada could not prevent *in camera* hearings absent Claimant's consent, which Claimant did not provide. Canada did not at the time argue its current view that the term "*in camera*" excludes other NAFTA Parties from its scope. Claimant relied on the plain language of Article 28(3) and Canada's concessions as a guarantee that no third party would attend the hearings in this arbitration. The Tribunal confirmed Claimant's understanding of the plain meaning of the term "*in camera*" in the Confidentiality Order and Procedural Orders No. 3, 6 and 7.
16. To the extent that Canada had a different interpretation of that term, it was Canada's burden to assert that interpretation at the procedural hearing of March 20, 2013. It is particularly appropriate to place this burden on Canada given (a) the unusual interpretation Canada gives to the term "*in camera*"; (b) Canada's extensive experience with NAFTA proceedings; (c) the fact that Canada was aware that Claimant was (and remains) in active litigation against the United States, and therefore – perhaps more so than in typical NAFTA proceedings – would not consent to the United States' attendance at hearings in this proceeding.
17. Canada's failure to disclose its interpretation of "*in camera*" during the negotiation of the Confidentiality Order and Procedural Order No. 3 does not create good cause to amend such documents.
18. According to DIBC, no provision of the NAFTA gives non-disputing Parties a specific right to attend or access confidential hearings. Nor does the NAFTA in any way depart from the UNCITRAL Rules regarding *in camera* hearings to allow an exception for non-disputing Parties. No Tribunal has ever held that such an exception exists. Canada

provides no authority in which a claimant specifically objected to non-disputing Party access and the tribunal allowed such attendance.

19. Even if Canada was correct that NAFTA Article 1128 provides non-disputing Parties a right to make oral submissions (which it does not), nothing in Article 1128 gives non-disputing Parties the right to attend the entirety of hearings.
20. DIBC alleges that the prior arbitral practice cited by Canada is irrelevant in this case for two reasons: (i) Canada cites no instance in which the claimant contested non-disputing Party access pursuant to UNCITRAL Article 28(3) and such objection was overruled; and (ii) Canada cites no instance in which (as is the case here) a non-disputing Party was in active litigation against the claimant.
21. According to DIBC, altering the Confidentiality Order and Procedural Order No. 3 is particularly inappropriate here because Claimant is in active litigation with a non-disputing Party, a fact acknowledged by the Tribunal in Procedural Order No. 7. Even though the Washington Litigation and this NAFTA arbitration challenge different measures, the substance of the Washington Litigation was heavily debated at the Hearing on Jurisdiction. Nothing in NAFTA Article 1128 gives the United States the right to listen to or participate in such debate. The fact that the briefs in this proceeding have been made available to the United States and Mexico does not alter this analysis. New issues arise at hearings, particularly in response to questions from the Tribunal, and Claimant should be able to freely answer these questions without fear of disclosure to a litigation opponent in another proceeding.

III. GROUNDS FOR THE TRIBUNAL'S DECISION

22. As stated above, based on Article 19 of the Confidentiality Order, Canada requested the Arbitral Tribunal to amend paragraphs 14 and 16 of the Confidentiality Order and paragraph 31 of Procedural Order No. 3 so as (i) to allow the attendance of the non-disputing NAFTA Parties to any future hearings and (ii) allow them unrestricted access to the transcripts of the Hearing on Jurisdiction of March 20-21, 2014 and any future transcripts generated in these proceedings.
23. By way of background, the Confidentiality Order of March 27, 2013, signed by both disputing parties, states in its Article 14 that “[...] *all hearings shall be held in camera*” and in its Article 16 that “[...] *transcripts of the hearings shall be kept confidential*”. Moreover, Article 19 of the same document provides that “*each disputing party may apply to the Tribunal for an amendment to, or a derogation from, this Confidentiality Order with good cause*”.
24. On March 27, 2013 the Tribunal issued Procedural Order No. 3 after discussions between the disputing parties and the Tribunal (i) during a conference call held on

December 13, 2012, (ii) which was followed by an exchange of written correspondence and, finally, (iii) at a hearing held in New York on March 20, 2013. This Procedural Order deals with the participation of non-disputing NAFTA Parties under its Articles 30 and 31 where their rights are described as follows:

30. NAFTA Article 1128 submissions by the other NAFTA Parties must be presented within the time frame fixed by the Tribunal in the schedule of proceedings. Each disputing party shall be entitled to comment on any such Article 1128 submission within a time frame to be fixed by the Tribunal.

31. Non-disputing NAFTA Parties shall be entitled to receive a copy of the evidence and submissions referred to in Articles 1127 and 1129 of the NAFTA.

25. The Tribunal first notes that this text, which does not refer to oral submissions, was jointly proposed by the disputing parties.
26. Contrary to Canada's allegation, the Tribunal finds that holding hearings *in camera*, as agreed by the disputing parties, in no way jeopardizes the non-disputing NAFTA Parties' right to make submissions on the interpretation of NAFTA pursuant to NAFTA Article 1128⁶. This is because, as determined in Procedural Order No. 7, "*the non-disputing NAFTA Parties may request to have access to the transcripts of hearings or part of it in order to be able to make written or oral submissions on issues of interpretation of the NAFTA.*" The Tribunal also notes that NAFTA Article 1129 provides that non-disputing Parties may obtain from the disputing Party a copy of the evidence tendered to the Tribunal and of the written argument of the disputing parties.
27. As already stated at paragraph 1 of Procedural Order No. 6, NAFTA Article 1128 does not mention anything about the physical participation of non-disputing NAFTA Parties at hearings. In any case, should the non-disputing NAFTA Parties wish to make oral submissions before this Tribunal regarding issues of interpretation of the NAFTA, they can request the Tribunal to do so pursuant to Procedural Order No. 7.
28. The arbitral practice raised by Canada to allow non-disputing NAFTA Parties to attend hearings despite the hearings having been declared *in camera*, does not apply to this case. This is because, as acknowledged by the disputing parties, Claimant is engaged in domestic litigation against one of the non-disputing Parties (i.e. the United States of America) which is closely related to the issues discussed in this arbitration. In order to allow Claimant to freely debate its case during the hearings, the Tribunal finds that the Confidentiality Order and Procedural Order No. 3 shall be maintained in their entirety.

⁶ NAFTA Article 1128 reads as follows: "*On written notice to the disputing parties, a Party [in this case the United States and Mexico] may make submissions to a Tribunal on a question of interpretation of this [NAFTA] Agreement.*"

29. Accordingly, the Tribunal finds that Canada has not provided a good cause for the amendment of the Confidentiality Order or Procedural Order No. 3, which coupled with Procedural Order No.7, protect both the interests of Claimant and those of the non-disputing NAFTA Parties.

IV. THE TRIBUNAL'S DECISION

30. In light of the above, the Tribunal finds that Canada's request to amend paragraphs 14 and 16 of the Confidentiality Order and paragraph 31 of Procedural Order No. 3 lacks good cause under Article 19 of the Confidentiality Order and is dismissed.

Place of arbitration: Washington DC, USA



Yves DERAÏNS

Chairman of the Arbitral Tribunal