

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF  
THE NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES**

**BETWEEN:**

**DETROIT INTERNATIONAL BRIDGE COMPANY**

*Claimant*

**AND**

**GOVERNMENT OF CANADA**

*Respondent*

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**CONFIDENTIALITY ORDER**

**March 27, 2013**

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**ARBITRAL TRIBUNAL:**

**Mr. Yves Derains (Chairman)  
Professor Vaughan Lowe QC  
The Hon. Michael Chertoff**

For the purposes of this Confidentiality Order:

- (a) “disputing party” means either Detroit International Bridge Company (“DIBC”) or the Government of Canada (collectively the “disputing parties”);
  - (b) “confidential information” means information designated by a disputing party as confidential on the grounds that it is:
    - (i) business confidential information;
    - (ii) business confidential information relating to a third party;
    - (iii) information otherwise protected from disclosure by domestic legislation, including, but not limited to, and as amended, Canada’s *Access to Information Act*, the *Canada Evidence Act*, Canada’s *Privacy Act*, Ontario’s *Freedom of Information and Protection of Privacy Act*, and Ontario’s *Municipal Freedom of Information and Protection of Privacy Act*;
    - (iv) confidential information that is deemed to be financial, commercial, scientific or technical information supplied by third parties that has been treated as confidential information by those third parties.
  - (c) “business confidential information” includes:
    - (i) trade secrets;
    - (ii) financial, commercial, scientific or technical information that is treated consistently in a confidential manner by the disputing party, provincial, territorial or municipal governments, or third party to which it relates, including pricing and costing information, marketing and strategic planning documents, market share data, or detailed accounting or financial records not otherwise disclosed in the public domain;
    - (iii) information the disclosure of which could result in a material financial loss or gain to the disputing party, provincial, territorial or municipal governments, or third party to which it relates;
    - (v) information the disclosure of which could interfere with contractual or other negotiations of the disputing party, provincial, territorial or municipal governments, or third party to which it relates; and
    - (vi) other communications treated as confidential in furtherance of settlement between the disputing parties.
1. In order to designate information in a document as confidential information, a disputing party must, at the time it produces the document or introduces it onto the record, clearly label each page of the document that it contends contains such information, “*Confidential Information* –

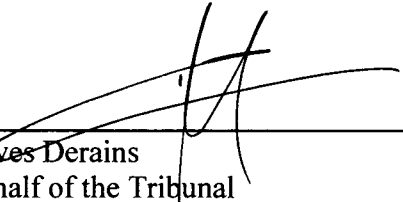
*Unauthorized Disclosure Prohibited,*” or some variation thereof. The designated confidential information label shall be enclosed in brackets (“[ ]”). Equivalent measures should be used with respect to confidential information contained in material produced in electronic and similar media. A disputing party that refers to confidential information in a written submission shall within one week of filing the unredacted version also file a version with the confidential information identified and redacted.

2. If upon receipt of a written submission, the receiving disputing party contends that it contains additional confidential information that has not been appropriately identified and redacted by the submitting disputing party, it shall so inform the submitting disputing party and the Tribunal within ten (10) days of receipt, and within twenty (20) days, the receiving disputing party shall provide an electronic copy of the written submission with the additional information which it contends is confidential appropriately identified and redacted. The twenty day period may be extended by the Tribunal if necessary.
3. In order to designate information as confidential information in a transcript, order or award, a disputing party must, within ten (10) days from its receipt of the transcript, order or award, notify the other disputing party and the Tribunal of its intent to do so, and within twenty (20) days, provide the other disputing party and the Tribunal with an electronic copy of the transcript, order or award, with the information that it contends is confidential appropriately identified and redacted. The twenty day period may be extended by the Tribunal if necessary.
4. Materials already exchanged by the disputing parties before the execution of this Confidentiality Order can be designated as confidential by notifying the other disputing party of such designation within thirty (30) days of the execution of this Confidentiality Order. A redacted version of the materials shall also be provided to the other disputing party at that time.
5. Where a disputing party does not agree that information designated as confidential information by the other disputing party is confidential under the terms of this Order, it shall submit the issue for resolution to the Tribunal. In the case of a dispute concerning the appropriateness of a designation of information as confidential, the information in question shall not be publicly disclosed until the dispute is resolved by the Tribunal.
6. Except with the prior written consent of the disputing party that claimed confidentiality with respect to the information and, in the case of materials from third parties the owner of such confidential information, and except for material governed by paragraph 8, confidential information may be used only in these proceedings and may be disclosed only for such purposes to and among:
  - (a) Members of the Tribunal (and their assistants, if any) and officials of the administrative authority and court reporters, to whom disclosure is reasonably considered by one or more Members of the Tribunal to be necessary;
  - (b) counsel and legal support staff of the disputing parties, or to counsel to provincial, territorial, or municipal governments, whose involvement in the preparation of or conduct in these proceedings is reasonably considered by the disputing party to be necessary for the preparation of the disputing party’s case;

- (c) officials or employees of the disputing parties or of provincial, territorial, or municipal governments, whose involvement in the preparation of or conduct in these proceedings is reasonably considered by the disputing party to be necessary for the preparation of the disputing party's case;
  - (d) independent experts or consultants and their support staff retained or consulted by the disputing parties or by provincial, territorial, or municipal governments, in connection with these proceedings;
  - (e) witnesses, who in good faith are reasonably expected by a disputing party to offer evidence in these proceedings, and only to the extent that the information may be relevant to their expected testimony; and
  - (f) as compelled by legal process, after providing notice to the other disputing party, consistent with the provisions of paragraph 8.
7. No disputing party shall produce or file any confidential material of the other disputing party covered by the terms of this Confidentiality Order in any Court without first bringing this Confidentiality Order to the attention of the Court and seeking directions from the Court concerning the production or filing of such material in a manner that protects its confidentiality. A disputing party shall notify the other disputing party and any affected parties prior to requesting such direction from the Court. Nothing in this provision or this Order restricts the use of a document in another court proceeding, provided the disputing party seeking to file material in another court proceeding complies with this provision.
  8. Inadvertent or improper disclosure of confidential information as set forth in this Confidentiality Order does not constitute a waiver of the designation of the information as confidential.
  9. All persons receiving confidential information shall be bound by this Confidentiality Order. Each disputing party shall have the obligation of notifying in writing all persons receiving confidential information of the obligations under this Confidentiality Order.
  10. Without restricting the obligations and liabilities set forth elsewhere in this Confidentiality Order, it shall be the responsibility of the disputing party wishing to disclose confidential information to any person described in paragraph 7 (d) or (e) to ensure that such person executes a Confidentiality Undertaking in the form attached as Appendix A before gaining access to any such information. Each disputing party shall maintain copies of such Confidentiality Undertakings and shall make such copies available to the other disputing party upon order of the Tribunal or upon termination of this arbitration.
  11. Notwithstanding any other provision in this Confidentiality Order, the disputing parties may make such disclosure of documents or information as is required by law including disclosure pursuant to Articles 1127 and 1129 of the NAFTA.
  12. Nothing in this Confidentiality Order shall be construed to abrogate or support a claim or entitlement with respect to a refusal to disclose any information on the basis of a privilege, ground for exemption or non-disclosure or public interest immunity arising at common law, or

under national or provincial/state legislation.

13. *Amicus curiae* briefs shall not be designated confidential in whole or in part.
14. 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.
15. If the Tribunal's award discloses confidential information, the Tribunal shall issue two versions of the award: (i) a private, confidential version of the award, and (ii) a public, non-confidential version of the award with confidential information redacted.
16. In the light of the Note of Interpretation of the NAFTA Free Trade Commission, issued July 31, 2001, which is binding on this Tribunal pursuant to article 1131(2) of Chapter Eleven, a disputing party shall be free to disclose to the public the redacted, public versions of all pleadings and submissions of the disputing parties or of a NAFTA Party, decisions of the Tribunal, and other relevant materials, including, but not limited to, the Request for Arbitration, Memorials, witness statements, correspondence to or from the Tribunal, procedural rulings and Orders and Awards. However, at the request of Claimant and, as a consequence of Article 28(3) of the UNCITRAL Arbitration Rules, transcripts of the hearings shall be kept confidential.
17. The obligations created by this Confidentiality Order shall survive the termination of these arbitral proceedings.
18. This Confidentiality Order shall be effective and binding upon a disputing party upon the signature of the Confidentiality Order by the Tribunal.
19. Each disputing party may apply to the Tribunal for an amendment to, or a derogation from, this Confidentiality Order with good cause.

  
\_\_\_\_\_  
Mr. Yves Derains  
On behalf of the Tribunal

March 27, 2013  
Date

Signed by both disputing parties in acknowledgement of the obligation to abide by this Confidentiality Order:

  
\_\_\_\_\_  
[X]  
On behalf of the Government of Canada

April 9, 2013  
Date

Ms. Sylvie Tabet  
Mr. Mark A. Luz  
Trade Law Bureau (JLTB)

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Date 4/2/13

Mr. William Isaacson  
Mr. Hamish Hume  
Ms. Heather King  
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BOIES, SCHILLER & FLEXNER, LLP  
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UNITED STATES OF AMERICA

**APPENDIX A**

**CONFIDENTIALITY UNDERTAKING**

**TO:** The Government of Canada (and its legal counsel) and Detroit International Bridge Company (and its legal counsel).

**FROM:** \_\_\_\_\_

1. IN CONSIDERATION of being provided with materials in connection with the arbitration between Detroit International Bridge Company and the Government of Canada, over which claims for confidentiality have been advanced (“confidential information”), I hereby agree to maintain the confidentiality of such material pursuant to the terms of the Confidentiality Order attached to this Undertaking. It shall not be copied or disclosed to any other person who has not signed a Confidentiality Undertaking nor shall the material so obtained be used by me for any purposes other than in connection with this proceeding.
2. I acknowledge that I am aware of the Confidentiality Order that has been agreed to by the disputing parties, a copy of which is attached to this Undertaking, and agree to be bound by it.
3. I will promptly return any confidential information received by me from the disputing party that provided me with such materials at the conclusion of my involvement in these proceedings.
4. I acknowledge and agree that either of the disputing parties to this arbitration is entitled to relief to restrain breaches of this Confidentiality Undertaking, to specifically enforce the provisions hereof in addition to any other remedy to which any disputing party to this arbitration may be entitled at law or in equity.
5. I agree to submit to the jurisdiction of the courts of the Province of Ontario (in the case of residents of Canada) or the District of Columbia (in the case of residents of the United States of America) to resolve any disputes under the Confidentiality Order.

SIGNED, SEALED AND DELIVERED before a witness this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
(Print Name)

\_\_\_\_\_  
(Print Witness Name)

\_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Witness Signature)