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. 7

March 25, 2014

Arbitral Tribunal

Mr. Yves Derains (Chairman)
The Hon. Michael Chertoff
Mr. Vaughan Lowe, Q.C

WHEREAS on March 15, 2014, the Secretariat of the PCA informed the Chairman of the Arbitral Tribunal that by e-mail of March 14, 2014 the U.S. Department of State had inquired about the possibility for representatives of the U.S.to attend the Hearing on Jurisdiction on March 20-21, 2014 as a non-disputing NAFTA Party;

WHEREAS on March 16, 2014, the Tribunal forwarded the correspondence mentioned above from the U.S. Department of State to the Disputing Parties and invited them to submit their comments thereon by March 17, 2014;

WHEREAS on March 16, 2014, Canada informed the Tribunal that it had no objections to the attendance at the Hearing on Jurisdiction by representatives of the United States;

WHEREAS on March 17, 2014, DIBC informed the Tribunal that pursuant to paragraph 14 of the Confidentiality Order, all hearings should be held in camera and therefore it did not consent to attendance by non-disputing NAFTA Parties at the Hearing on Jurisdiction;

WHEREAS on March 17, 2014, Canada replied stating, in summary, that the Tribunal should authorize attendance at the Hearing on Jurisdiction by the non-disputing Parties on the grounds of NAFTA Articles 1120(2) and 1128. It argued that even if UNCITRAL Rule Article 28(3) could form the basis to exclude the non-disputing Parties from a hearing, that rule is modified by Article 1128, which gives the NAFTA Parties the right of participation on questions of interpretation of the NAFTA. Canada underlined that Claimant has no legitimate objection to the attendance of the United States and Mexico, especially in light of the fact that they both have made written submissions in this arbitration;

WHEREAS on March 18, 2014, the Arbitral Tribunal issued Procedural Order No. 6 where it decided as follows:

> *1. The Tribunal first notes that NAFTA Article 1128 mentions that "on written notice to the disputing parties, a [non-disputing] Party may make submissions to a Tribunal on a question of interpretation of this Agreement [NAFTA]". However, such provision does not mention anything about the physical participation of a non-disputing Party at hearings.*
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> *2. The Tribunal further notes that, pursuant to paragraph 14 of the Confidentiality Order dated March 27, 2013, "[a]t the request of the Claimant and in accordance with Article 28(3) of the UNCITRAL Arbitration Rules all hearings shall be held in camera". At the time this decision was taken the Tribunal and the disputing parties were aware of the NAFTA Chapter Eleven rules.*

3. As a consequence, the Confidentiality Order shall be respected and the attendance at the Hearing on Jurisdiction by non-disputing NAFTA Parties is not permitted.

WHEREAS on March 19, 2014, the U.S. Department of State requested the Tribunal to reconsider its decision in Procedural Order No. 6 and to allow the non-disputing Parties to attend oral hearings in this arbitration. In summary, they alleged that that such decision is (i) inconsistent with the NAFTA; (ii) contrary to the unanimous practice of other NAFTA tribunals; and (iii) prejudicial to the treaty rights of the non-disputing Parties. According to them, depriving non-disputing Parties of the ability to attend oral hearings is to deprive them of an important aspect of their right to make submissions under NAFTA Article 1128;

WHEREAS on March 19, 2014, Claimant objected to the U.S. Department of State's request that the Tribunal reconsiders its decision in Procedural Order No. 6;

WHEREAS on March 19, 2014, Mexico informed the Tribunal of its concerns regarding Procedural Order No. 6 and requested the Tribunal to reconsider its decision. It alleged that a refusal to allow non-disputing Parties to participate in an oral hearing is a systemic concern that transcends any effective participation of Mexico in these proceedings;

WHEREAS at the beginning of the Hearing on Jurisdiction on March 20, 2014, the Tribunal heard the Disputing Parties about the non-disputing Parties' request for reconsideration of Procedural Order No. 6. The Tribunal then informed the Disputing Parties that it had decided to maintain its decision in Procedural Order No. 6 and, therefore, not to allow participation of non-disputing Parties at the Hearing on Jurisdiction. The Tribunal summarized the reasons for such decision and informed that it would send it in writing to the Disputing Parties in the days following the Hearing on Jurisdiction.

THE TRIBUNAL DIRECTS AS FOLLOWS:

DISCUSSION

1. The Confidentiality Order of March 27, 2013, signed by both Disputing Parties in acknowledgement that they would abide by it, 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*".

2. On the same day, Procedural Order No. 3 was issued 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.*
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> *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.*

3. There is no reference in these articles to the participation of non-disputing NAFTA Parties in hearings. Since they were finalized by the Disputing Parties and the Tribunal on the same day as the Confidentiality Order, which requires that hearings be held in camera and that transcripts be kept confidential, the Tribunal is not in a position to conclude that the absence of reference to the right of non-disputing NAFTA Parties to be present at the hearings was the result of an overlooking or of a misunderstanding. In this respect, it is worth noting that the schedule for the Hearing on Jurisdiction was adopted on the basis of a proposal of the Disputing Parties which left no room for participation of the non-disputing NAFTA Parties.

4. Moreover, Claimant is engaged in litigation against the United States of America in Washington and this litigation is part of the discussion regarding the jurisdiction of the Tribunal. This, as such, is an understandable ground for Claimant's request to enforce Articles 14 and 16 of the Confidentiality Order against the non-disputing NAFTA Parties.

5. Consequently, the Tribunal confirms that the provisions of the Confidentiality Order on the participation in hearings (Articles 14 and 16) are applicable to the non-disputing NAFTA Parties.

6. The Tribunal notes that, even assuming that the presence of the non-disputing NAFTA Parties at hearings was not taken into consideration when the Confidentiality Order was adopted, the issue was raised too late to be addressed in relation to the Hearing on Jurisdiction, held on March 20 and 21, 2014. Although the Confidentiality Order and Procedural Order No. 3 are dated March 27, 2013 and the date of the Hearing on Jurisdiction was fixed on September 27, 2013, it was not before Friday March 14, 2014 at 11pm that the PCA was asked "*whether any arrangements have been made for the attendance of non-disputing Parties*", a request transmitted to the President of the Tribunal on the following Saturday.

7. The non-disputing NAFTA Parties have made submissions under NAFTA Article 1128 pursuant the time frame defined in Procedural Order No. 5 of September 27, 2013, and

those submissions have been commented by the Disputing Parties. The non-disputing NAFTA Parties have made no request for making oral submissions thereafter, even in their March 19, 2014 letter asking for the reconsideration of Procedural Order No. 6 of March 18, 2014 which confirmed that the provisions of the Confidentiality Order on the participation in hearings were applicable to the non-disputing NAFTA Parties.

8. Yet, it is possible that, after a hearing, the non-disputing NAFTA Parties have a compelling reason to wish to have access to the transcripts of the hearing or part of it relating to the interpretation of NAFTA. In such case, nothing prevents them to make a request to the Tribunal in this regard. The Tribunal would consider in consultation with the Disputing Parties how it could be achieved while preserving the confidentiality required by the Confidentiality Order and, if so requested, it might allow the non-disputing NAFTA Parties to make further written submissions or organize a special meeting to hear oral submissions.

IN LIGHT OF THE ABOVE, THE TRIBUNAL DECIDES AS FOLLOWS:

a) Articles 14 and 16 of the Confidentiality Order are enforceable with respect of the non-disputing NAFTA Parties, as already decided by the Arbitral Tribunal in Procedural Order No. 6.

b) 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.

Place of arbitration: Washington DC, USA

Chairman of the Arbitral Tribunal