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**BY E-MAIL**

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Dear Chairman and Members of the Tribunal,

Pursuant to the Tribunal's email dated April 18, 2014, Claimant submits this letter in response to Respondent's April 17, 2014 letter requesting that the Tribunal amend the Confidentiality Order and Procedural Order No. 3 to permit non-disputing Party access to future hearings and to all hearing transcripts.

Claimant opposes Canada's request. The Tribunal decided the issue of *in camera* hearings and confidentiality of transcripts over a year ago, after briefing and hearing, and there is no good cause to reconsider the Tribunal's decision.

**1. No Good Cause Exists To Revisit the Confidentiality Order Or The Procedural Orders: Claimant Relied On The Plain Meaning Of "*In Camera*" And "Confidential" To Mean No Third-Party Access, And Canada Did Not Disclose Its Contrary Interpretation.**

The plain meaning of the term *in camera* is "in private" [1] or "In the courtroom with all spectators excluded"[2]—*i.e.*, no third party may have access.[3] No provision of the NAFTA or the UNCITRAL Arbitration Rules provides an alternate definition of this term.

[1] "In camera," THE CANADIAN LAW DICTIONARY, Exhibit CLA-81.

[2] "In camera," BLACK'S LAW DICTIONARY (9th ed. 2009), Exhibit CLA-82.

Article 28(3) of the UNCITRAL Arbitration Rules states that "Hearings shall be held *in camera* unless the parties agree otherwise."[4] Canada acknowledged at the hearing on March 20, 2013 ("Procedural Hearing") that under this rule, Canada could not prevent *in camera* hearings absent Claimant's consent, which Claimant did not provide.[5] Canada did not at that 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.

Despite Canada's silence at the Procedural Hearing, Canada now argues that it was *Claimant's* obligation to argue that UNCITRAL Article 28(3) specifically precludes non-disputing Party access, and that Claimant's purported failure to do so is "good cause" for this Tribunal to reconsider its prior decisions.[6] Canada's attempt to place the burden upon Claimant to make clear that it interprets words according to their plain meaning makes little sense. Claimant made clear pursuant to the UNCITRAL Rules that it did not consent to public hearings, but instead specifically sought *in camera* hearings.[7] *In camera* means no third parties, including no non-disputing Parties. To the extent that Canada had a different interpretation of that term, it was Canada's burden—not Claimant's—to assert that interpretation at the Procedural Hearing. 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; and (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.

If Canada interpreted the term *in camera* to denote anything other than its well-recognized, plain meaning, Canada should have disclosed this interpretation during the negotiation of the Confidentiality Order and at the Procedural Hearing. Canada's failure to do so does not create good cause to amend the Confidentiality Order or Procedural Order No. 3.

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[3] *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; *Mr. A.J.O. v. The Slovak Republic* (UNCITRAL) Final Award, April 23, 2012, ¶ 57, RLA-74. Canada argues that these decisions are inapposite because the tribunals enforced *in camera* provisions against third parties other than non-disputing Parties. (Letter from Canada to Tribunal dated April 17, 2014 at 7). Canada offers no authority, however, finding that non-disputing NAFTA Parties are excluded from the realm of third parties subject to confidentiality orders.

[4] UNCITRAL Arbitration Rules, Art. 28(3), Exhibit CLA-3.

[5] Procedural Hearing Tr. 53:2-9.

[6] Letter from Canada to Tribunal dated April 17, 2014 at 3 ("Canada had no reason to assume DIBC held this position while drafting the Confidentiality Order").

[7] Procedural Hearing Tr. 50:6-13.

**2. The NAFTA Does Not Amend The UNCITRAL Rules To Allow Non-Disputing Party Access To *In Camera* Hearings Or Confidential Transcripts.**

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.

NAFTA 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."[8] Both Mexico and the United States have done so here.[9] Canada argues that this provision gives non-disputing Parties the right to make additional submissions *orally*, and that such a right can be effected only by permitting attendance at hearings.[10] Nothing in the text of Article 1128 specifies a right to oral submissions, however, much less oral submissions provided after the submission of written briefs. Consistent with the plain language of Article 1128, then, a prior NAFTA tribunal found that the NAFTA does not provide non-disputing Parties a right to attend hearings or make oral submissions. As explained by the President of the *Azinian* tribunal, "there is nothing in Article 1128 of the NAFTA which requires a Tribunal in a proceeding to allow a third NAFTA Party to be physically present at a hearing in order to make the submissions referred to in that Article."[11]

Canada's authority to the contrary is not persuasive. Canada argues that *ADF v. United States* confirms the right of non-disputing Parties to make oral submissions. But the parties in that proceeding did not object to such oral submissions, and the *ADF* tribunal's acknowledgment that "*the parties* recognize" that Canada and Mexico could make oral submissions is no more than a reflection of the parties' agreement under the circumstances of that case.[12] In contrast, there is no such agreement here. To the contrary, as this Tribunal observed in Procedural Order No. 7, the parties here have recognized the non-disputing Parties' right to make written submissions only.

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[8] NAFTA Art. 1128, Exhibit CLA-12.

[9] *Detroit International Bridge Company v. Canada*, PCA Case No. 2012-25 (NAFTA), Submission of Mexico Pursuant Article 1128 of NAFTA (Feb. 14, 2014); *Detroit International Bridge Company v. Canada*, PCA Case No. 2012-25 (NAFTA), Submission of the United States of America (Feb. 14, 2014).

[10] Letter from Canada to Tribunal dated April 17, 2014 at 4-5.

[11] *Robert Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Procedural Order No. 4 at 4 (June 16, 1999), Exhibit CLA-83.

[12] *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.

Canada further misreads Article 1128 to permit non-disputing Party attendance at the *entirety* of hearings—rather than mere attendance sufficient to submit oral argument—and further argues that Article 1128 permits non-disputing Party attendance at hearings even where no oral submissions are planned. Canada's interpretation is unsupportable under the plain language of Article 1128, which allows non-disputing Parties to make "submissions," no more. Moreover, such "submissions" are limited to matters regarding interpretation of the NAFTA. Accordingly, even if Canada was correct that Article 1128 provides non-disputing Parties a right to make oral submissions (it does not), nothing in Article 1128 gives non-disputing Parties the right to attend the entirety of hearings. This conclusion is particularly evident here, where neither Canada nor the United States raised the issue of oral submissions at the hearing on jurisdiction and admissibility ("Jurisdictional Hearing"), and Mexico did so only after the hearing concluded.[13]

Again, Canada's authority in opposition is unpersuasive. The prior arbitral practice cited by Canada[14] is irrelevant for two reasons. First, Canada cites no instance in which the claimant contested non-disputing Party access pursuant to UNCITRAL Article 28(3) and such objection was overruled. Second, Canada cites no instance in which (as is the case here) a non-disputing Party was in active litigation against the claimant. Specifically, in both *S.D. Myers* and *Pope & Talbot*, the claimants disputed only whether written submissions by Mexico exceeded the scope of Article 1128.[15] Neither proceeding addressed whether Article 1128 gives non-disputing Parties the unfettered right to attend hearings despite the existence of confidentiality orders. Similarly, in *GAMI* and *Chemtura*, although non-disputing Parties attended hearings in proceedings subject to confidentiality orders, there is no indication that claimants objected to the attendance of the non-disputing Parties.[16] Parties to an arbitration may consent to allow non-disputing Parties to attend despite the existence of an *in camera* requirement, but that is not the case here.

Lastly, NAFTA Articles 1127-1129 and the NAFTA Free Trade Commission's interpretation that there is no general duty of confidentiality in the NAFTA are immaterial in the context of UNCITRAL Article 28(3), which unambiguously requires *in camera* hearings absent agreement by the disputing parties.[17]

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[13] Tellingly, in the planning for the Jurisdictional Hearing, Canada also did not seek to reserve time for oral submissions by the non-disputing Parties. Email from M. Luz to Tribunal dated March 6, 2014 (attaching proposed schedule).

[14] Letter from Canada to Tribunal dated April 17, 2014 at 5-6.

[15] *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; *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.

[16] Letter from Canada to Tribunal dated April 17, 2014 at 6 n.12, n.13.

[17] *Pope & Talbot Inc. v. Government of Canada* (UNCITRAL), Decision and Order by the Arbitral Tribunal ¶ 14 (Mar. 11, 2002), Exhibit CLA-84 ("Canada makes reference to the Interpretation of the NAFTA Free Trade Commission set out above, arguing that nothing in Chapter 11 imposes a general duty of confidentiality. This is true,

### 3. DIBC Is In Litigation Against A Non-Disputing Party.

Altering the Confidentiality and Procedural Orders 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.

As the Tribunal is aware, even though the Washington Litigation and this NAFTA proceeding challenge different measures, the substance of the Washington Litigation was heavily debated at the Jurisdictional Hearing. 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.

### 4. DIBC Has The Right To Redact.

On March 31 and April 8, 2014, Claimant notified the Tribunal and Canada of Claimant's reservation of its right to submit redactions to the transcripts of the Jurisdictional Hearing pursuant to paragraph three of the Confidentiality Order. Canada's objections to this notice are unfounded, as Claimant complied with the procedural requirements of the Confidentiality Order, a procedural process to which Canada agreed.

Nor is Canada correct that the transcripts contain no confidential information. Again, pursuant to paragraph 16 of the Confidentiality Order, the entirety of the hearing is confidential and private. To the extent that the Tribunal determines that the non-disputing Parties nonetheless have a limited right to make submissions solely on issues of interpretation of the NAFTA, Claimant is entitled to redact all portions of the hearing that do not address matters of interpretation. Pursuant to the Confidentiality Order, Canada may dispute any such redactions at the appropriate time.

Accordingly, Claimant has a right to redact the transcripts of the Jurisdictional Hearing and will do so no later than May 12, 2014, as directed by this Tribunal's email of April 30, 2014.

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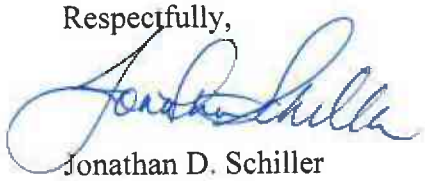
but the remainder of the Interpretation shows that the NAFTA Parties fully recognized that there may well be *specific* requirements of confidentiality that inure in the Chapter 11 process. Of course, Order No. 5 is such a specific requirement. It was not a product of a general requirement of confidentiality but of an agreement between the parties, adopted by the Tribunal, regarding appropriate treatment of submissions and other documents").

## 5. Conclusion

This Tribunal already has considered the meaning of "*in camera*" and "confidential." The Tribunal repeatedly has determined that the UNCITRAL Rules and the Confidentiality Order are clear regarding non-disputing Party access to hearings and transcripts. Claimant relied on the plain meaning of this rule and did not consent to public hearings. Canada has not provided good cause to revisit those determinations.

Claimant accordingly respectfully requests that the Tribunal deny Canada's request to amend paragraphs 14 and 16 the Confidentiality Order and paragraph 31 of Procedural Order No. 3 as set out in Canada's April 17, 2014 letter.

Respectfully,



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