

**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. 9

June 5, 2014

Arbitral Tribunal

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

I. BACKGROUND OF THE PROCEEDINGS

1. By e-mails dated April 29, 2014, Mexico and the United States requested the Arbitral Tribunal to have access to the transcripts of the Hearing on Jurisdiction of March 20-21, 2014, pursuant to Procedural Order No. 7, in order to be able to make submissions on issues of interpretation of the NAFTA.
2. By e-mail of April 30, 2014, the Tribunal acknowledged receipt of Mexico's and the United States' requests above and determined the following:
 - (i) *Claimant is to submit its comments on Mexico's and US' requests by May 12, 2014. Claimant is also requested to submit its proposed redactions to the transcripts under the terms of the Confidentiality Order within the same deadline, in case the tribunal decides to give access to the transcripts to the non-disputing Parties.*
 - (ii) *Respondent is to submit its comments on Claimant's submission of May 12, 2014 by May 22, 2014.*
3. By e-mail of May 12, 2014, DIBC submitted its objections to Mexico's and the United States' requests to have access to the transcripts, and proposed redactions to the transcripts in case the Tribunal would nevertheless authorize the requested access.
4. By e-mail of May 22, 2014, Canada submitted its comments to DIBC's submission mentioned above.

II. SUMMARY OF THE PARTIES' POSITIONS

A. Summary of DIBC's Position

5. DIBC objected to the requests of Mexico and the United States to have access to the transcripts. According to DIBC, the NAFTA provides non-disputing Parties a right to make submissions on matters of interpretation, not a right to attend and access proceedings generally. It argues that the Tribunal decided over a year ago that because the hearings were to be held *in camera*, the transcripts of those hearings must be kept confidential. No reason exists to reconsider the Tribunal's decision.
6. DIBC argues that paragraph 16 of the Confidentiality Order lists the parties who may access confidential information without prior consent and the non-disputing Parties are not among those listed. As a result, paragraph 16 of the Confidentiality Order should be enforced according to its terms and the United States and Mexico should not be given access to the transcripts absent Claimant's consent.

7. Furthermore, DIBC alleges that the NAFTA specifically identifies the rights of non-disputing Parties regarding access to documents in Articles 1127 and 1129, and neither provision includes the right to access transcripts or oral arguments. NAFTA Article 1129 specifically limits the rights of non-disputing Parties to receipt of the *written* argument of the disputing parties – not the oral argument of the parties at hearings.
8. According to DIBC, allowing the United States and Mexico access to the hearing transcripts is especially inappropriate here because Claimant is in active litigation against the United States, as the Tribunal acknowledged in Procedural Orders No. 7 and 8. Granting access to hearings, through either live attendance or transcripts, should not be permitted where Claimant specifically sought to keep hearings private and particularly meant to shield the hearings from litigation opponent.
9. To the extent the Tribunal determines that the non-disputing Parties have any right to access hearing transcripts in this matter, the Tribunal should limit such access to the portions of the transcripts that directly address interpretation of the language of the NAFTA. Consistent with this approach, DIBC submitted proposed redactions to the transcripts of the Hearing on Jurisdiction redacting all portions that do not directly address matters of interpretation.
10. In view of the above, DIBC requested that the Tribunal deny the requests of the United States and Mexico for access to the transcripts of the Hearing on Jurisdiction. In the alternative, if the Tribunal decides to grant access to the transcripts, Claimant requested that access be limited to its proposed redacted copies of the transcripts.

B. Summary of Canada's Position

11. Canada objects to DIBC's request that the United States and Mexico be denied any access to the transcripts for the two reasons summarized below.
12. First, Procedural Orders No. 7 and 8 expressly contemplate releasing the transcript or part thereof to the non-disputing Parties to enable them to properly exercise their rights under NAFTA Article 1128. Canada alleges that DIBC's request would seriously damage the effectiveness of Article 1128, a provision which the NAFTA Parties specifically negotiated along with Articles 1127 and 1129, to ensure that all three signatories to the treaty would have a role in advocating how their agreement should be interpreted.
13. Second, the redactions of the transcripts proposed by DIBC do not meet the limited and specific definition of "confidential information" as set out in the Confidentiality Order. DIBC not only proposes to black-out vast portions of the transcripts dealing with information and documents which are already in the public domain and do not

otherwise constitute “confidential information”, but its proposed redactions would render the transcripts largely void of the context necessary for the non-disputing Parties to properly exercise their right of participation under NAFTA Article 1128.

14. According to Canada, up until this point of the arbitration, DIBC has not designated any document as confidential. The Hearing on Jurisdiction did not raise any new submissions, exhibits or exhibits or information which were not publicly available prior to the hearing of after, or which have not already been provided to the United States and Mexico pursuant to NAFTA Articles 1127 and 1129. On this general ground alone, Claimant’s proposed redactions should be denied.
15. With respect to the Washington litigation specifically, to the extent that the Tribunal is concerned that anything DIBC says during this NAFTA arbitration may prejudice its claim against the United States in that dispute, DIBC bears the burden of identifying what portions of the transcripts could cause such prejudice. Canada is unable to identify anything that was said during the hearing that does not reflect what is already in public domain regarding DIBC’s claims against the United States in the Washington litigation.
16. DIBC has alleged that if the Tribunal allows the United States and Mexico access to the transcripts, they may release it to the public under their domestic freedom of information laws. According to Canada this concern is unfounded, as the non-disputing Parties are bound by NAFTA Article 1129(2) to treat all documentation received as if they were a disputing Party. In other words, since the Confidentiality Order requires Canada to keep the transcripts confidential and cannot release it to the public, the United States and Mexico are bound to do the same. If the Tribunal considers it necessary, it could seek assurances from the United States and Mexico that the transcripts will be kept confidential in accordance with the Confidentiality Order.
17. If the Tribunal decides that certain types of information should be redacted from the transcripts, Canada requested the Tribunal to direct DIBC to provide justification for its designations in accordance with the Tribunal’s directive so that Canada can respond accordingly. The redactions proposed by DIBC are so over-inclusive and in several portions, arbitrary, that it is not possible for Canada to respond on a designation-by-designation basis without further guidance from the Tribunal as to what should or should not be redacted. To facilitate this process, Canada proposed a model chart (similar to a Redfern Schedule for document requests) which can be used to provide justification for and responses to confidentiality designations so, if necessary, the Tribunal can decide whether the redacted information complies with the Tribunal’s directions. Canada undertook to cooperate with the Claimant to seek agreement on appropriate redactions that comply with the Tribunal’s directions.

18. For the above reasons, Canada requested that the Tribunal “(i) reject DIBC’s request to deny the non-disputing Parties access to the transcript, and (ii) reject DIBC’s proposed redactions as non-compliant with the definition of “confidential information” in the Confidentiality Order, or, in the alternative (iii) if it deems certain types of redactions as necessary, require DIBC to justify its redactions in accordance with the Tribunal’s directions as to what information may or may not be released to the non-disputing NAFTA Parties.”

III. GROUNDS FOR THE TRIBUNAL’S DECISION

19. As stated above, on April 29, 2014, Mexico and the United States requested the Arbitral Tribunal to have access to the transcripts of the Hearing on Jurisdiction of March 20-21, 2014, pursuant to Procedural Order No. 7, in order to be able to make submissions on issues of interpretation of the NAFTA. While Canada supported Mexico and the United States’ request, Claimant objected to it.
20. By way of reminder, at paragraph 8 of Procedural Order No. 7 the Arbitral Tribunal noted that:

[...] 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 [...].

21. At page 5, item (b) of the same Order, the Tribunal decided that:

(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.

22. After analyzing DIBC’s submission, the Tribunal finds that Claimant has not submitted any new reasons for the Tribunal to reconsider its decision as set out at page 5, item (b) of Procedural Order No. 7. As a consequence, the Tribunal determines that Mexico and the United States shall have access to the transcripts of the Hearing on Jurisdiction. The Tribunal has now to decide whether the non-disputing NAFTA Parties shall have access to the transcripts in their entirety or only to parts thereof, taking into account the Confidentiality Order.

23. In its submission of May 12, 2014, Claimant proposed to redact all portions of the transcripts that do not directly address matters of interpretation of the NAFTA. Such

proposed redactions were objected by Canada as allegedly not compliant with the definition of “confidential information” in the Confidentiality Order. The Tribunal agrees with Canada on this issue and finds that the non-disputing Parties cannot be expected to make submissions on the interpretation of the NAFTA agreement without understanding the specific context and facts relating to each of those legal questions. The Tribunal notes that the non-disputing Parties already know the facts presented by the disputing parties in their memorials.

24. Accordingly, in order to be able to decide which parts of the transcripts shall be redacted, if any, the Tribunal invites Claimant to complete the enclosed table proposed by Canada (Annex I), by no later than June 12, 2014, justifying its redactions in accordance with the definition of “confidential information” in the Confidentiality Order. Canada shall submit its comments thereon by June 19, 2014. The Tribunal will render its decision shortly afterwards.

IV. THE TRIBUNAL’S DECISION

25. In light of the above, the Tribunal decides the following:
- (a) the non-disputing NAFTA Parties shall have access to the transcripts of the Hearing on Jurisdiction of March 20-21, 2014, in accordance with Procedural Order No. 7. However, before allowing access to the transcripts to Mexico and the United States, the Tribunal shall first decide whether they shall have access to the transcripts in their entirety or only to parts thereof, so as to preserve the confidentiality required by the Confidentiality Order;
 - (b) in order to be able to decide which parts of the transcripts shall be redacted, if any, Claimant is to complete the enclosed table (Annex I to this Order), by no later than June 12, 2014, justifying its proposed redactions in accordance with the definition of “confidential information” in the Confidentiality Order;
 - (c) Canada shall submit its comments to Claimant’s proposed redactions by June 19, 2014;

Place of arbitration: Washington DC, USA



Yves DERAINS

Chairman of the Arbitral Tribunal