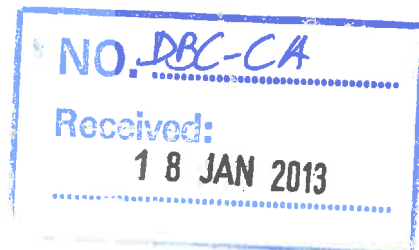


**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND UNCITRAL ARBITRATION RULES**

BETWEEN:

DETROIT INTERNATIONAL BRIDGE COMPANY



Claimant/Investor

AND:

GOVERNMENT OF CANADA

Respondent/Party

PCA Case No. 2012-25

CANADA'S SUBMISSION ON PLACE OF ARBITRATION

January 15, 2013

Departments of Justice and of
Foreign Affairs and
International Trade
Trade Law Bureau
Lester B. Pearson Building
125 Sussex Drive
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CANADA

1. Introduction

1. Pursuant to Procedural Order No. 1 dated December 20, 2012, Canada respectfully submits its views on the appropriate place of arbitration for this NAFTA Chapter 11 arbitration.

2. The facts of this case and the applicable law weigh in favour of Toronto, Ontario as the most appropriate place of arbitration. The Claimant Detroit International Bridge Company (“DIBC”) disagrees and proposed in its Notice of Arbitration that the place of arbitration should be Washington, D.C.¹

3. Pursuant to Article 18 of the *UNCITRAL Arbitration Rules, 2010* (“UNCITRAL Arbitration Rules”) where the disputing parties disagree, the Tribunal shall determine the place of arbitration.²

4. The Claimant alleges that the Governments of Canada, Ontario and Windsor have taken measures that caused damage to its investment, the Ambassador Bridge, which crosses the international border on the Detroit River between Windsor, Ontario and Detroit, Michigan. The Canadian half of the Ambassador Bridge is owned by the Claimant’s subsidiary, Canadian Transit Company (“CTC”), headquartered in Windsor, Ontario. Accordingly, virtually all of the relevant witnesses, stakeholders and evidence from both disputing parties relating to this dispute will be found within the Province of Ontario and in close proximity to Toronto. This is a decisive factor when considering the place of arbitration because, among other reasons, it will readily facilitate any judicial assistance in aid of arbitration the disputing parties and the Tribunal may require.

5. Furthermore, the law applicable to international arbitration in Canada and Ontario encapsulate the highest international standards as they are based on the UNCITRAL Model Law and the New York Convention on Enforcement of Arbitral Awards. The

¹ Notice of Arbitration (April 29, 2011), ¶ 54. In the alternative, the Claimant proposes New York. See Joint Letter of the Parties to the Tribunal dated December 10, 2012, p. 2.

² UNCITRAL Arbitration Rules, *Official Records of the General Assembly, Sixth Committee (A/65/465)* (2010). Further to the agreement of the disputing parties, the 2010 UNCITRAL Rules will apply in this arbitration. Procedural Order No. 1 (December 20, 2012).

independence and impartiality of Canadian courts are also above reproach. Toronto has been designated as the place of arbitration in thirteen NAFTA Chapter 11 disputes, including seven against the Government of Canada, demonstrating the confidence past NAFTA Chapter 11 tribunals have had in selecting Canada as the legal seat, even when Canada is the respondent Party. Taking into account all the relevant factors, Toronto is the most suitable place of arbitration for this dispute.

2. The Applicable Provisions of the NAFTA and the UNCITRAL Arbitration Rules

6. The place of arbitration is to be determined in accordance with the applicable provisions of the NAFTA and the UNCITRAL Arbitration Rules. NAFTA Article 1130 (Place of Arbitration) provides in relevant part:

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with:

...

(b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules.

7. Article 18(1) of the UNCITRAL Arbitration Rules provides:

If the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case. The award shall be deemed to have been made at the place of arbitration.

8. Since the Parties to this dispute do not agree on the place of arbitration, the Tribunal has the authority, under the UNCITRAL Arbitration Rules, to make this determination taking into account “the circumstances of the case,” subject to the condition in Article 1130 that it must be in the territory of a NAFTA party. Accordingly, the only option for the Tribunal is to designate a place of arbitration in either Canada or the United States.³

³ Neither disputing party proposes that the place of arbitration be in Mexico.

3. The UNCITRAL Notes Provide Useful Guidance

9. NAFTA Chapter 11 tribunals applying the UNCITRAL Arbitration Rules have frequently applied the criteria set out in the *UNCITRAL Notes on Organizing Arbitral Proceedings* (“UNCITRAL Notes”) as guidance to determine the place of arbitration.⁴

10. Paragraph 22 of the UNICTRAL Notes states that “(v)arious factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case.” It lists five of the “more prominent factors” relevant to determining the place of arbitration as:

- (a) suitability of the law on arbitral procedure of the place of arbitration;
- (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced;
- (c) convenience of the parties and the arbitrators, including the travel distances;
- (d) availability and cost of support services needed; and
- (e) location of the subject-matter in dispute and proximity of evidence.

11. The factors set out in paragraph 22 of the UNCITRAL Notes should be applied to determine the place of arbitration in this matter. While two of these factors – convenience of the parties and the arbitrators and the availability and cost of support services – are more relevant to a determination as to the appropriate location for the hearings, rather

⁴ UNCITRAL Notes on Organizing Arbitral Proceedings (1996) (Tab 1). The UNCITRAL Notes set forth non-binding criteria “designed to assist arbitration practitioners by providing an annotated list of matters on which an arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings.” See e.g. *ADF Group Inc. v. United States of America*, Procedural Order No. 2 Concerning the Place of Arbitration (ICSID ARB(AF)/00/1) (11 July 2001) (“*ADF*”) (Tab 2); *Canfor Corp. v. United States*, Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings (UNCITRAL) (23 January 2004) (Tab 3); *Ethyl Corporation v. Canada*, Decision Regarding the Place of Arbitration (UNCITRAL) (28 November 1997) (“*Ethyl*”) (Tab 4); *Merrill & Ring Forestry LP v. Canada*, Decision on the Place of Arbitration (UNCITRAL) December 12, 2007 (Tab 5); *Methanex Corp. v. United States of America*, The Written Reasons for the Tribunal’s Decision of 7th September 2000 on the Place of Arbitration (21 December 2000) (Tab 6); *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, Procedural Order No. 1, Decision on the Place of Arbitration, (ICSID Case No. ARB(AF)/07/4) (7 October 2009) (“*Mobil Investments*”) (Tab 7); *Pope & Talbot Incorporated. v. Canada*, Minutes of Procedural Meeting (UNCITRAL) (29 October 1999) (“*Pope & Talbot*”) (Tab 8); *United Parcel Service of America Inc. v. Canada*, Decision of the Tribunal on the Place of Arbitration (UNCITRAL) (17 October 2001) (“*UPS*”) (Tab 9).

than the place of arbitration, they nonetheless support Toronto as the most appropriate legal seat. Placing more weight on the remaining three factors – suitability of the law on arbitral procedure, presence of a treaty to enforce arbitral awards, and location of the subject-matter and proximity of evidence – favours Toronto rather than Washington, D.C. as the more appropriate place of arbitration in this dispute.

4. The UNCITRAL Notes Favour Toronto as Place of Arbitration

a) Canada and Ontario Laws on Arbitral Procedure Reflect the Highest International Standards

12. The first factor identified in the UNCITRAL Notes is suitability of the law on arbitral procedure of the place of arbitration. There is no doubt that the law applicable to international arbitration in Canada and Ontario is well developed and reflects the highest international standards. In Canada, the *Commercial Arbitration Act* implements the UNCITRAL *Model Law on International Commercial Arbitration* (“Model Law”) through the *Commercial Arbitration Code*.⁵ Ontario has adopted the *International Commercial Arbitration Act* to implement the Model Law.⁶

13. Canada and Ontario law permit the review of international arbitral awards only on the narrow grounds set out in the Model Law, which parallel those set out in the New York Convention. Thus, whether courts may set aside arbitral awards for reasons like “manifest disregard of the law” (an open question in the United States under the 1925 *Federal Arbitration Act*) does not arise with Toronto as place of arbitration because courts in Ontario are limited to the grounds of review in the Model Law.⁷

⁵ *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.), s. 5 (Tab 10). The *Commercial Code* is based on the Model Law and is set out in a schedule to the *Commercial Arbitration Act*. The federal *Commercial Arbitration Act* may apply in any case to which the Government of Canada is a party regardless of where the Tribunal is seated in Canada.

⁶ *International Commercial Arbitration Act*, R.S.O. 1990, c. I-9 (Tab 11). Other Canadian provinces have adopted similar statutes implementing the Model Law.

⁷ *Federal Arbitration Act*, 9 U.S.C. §10 (Tab 12); see e.g. *Stolt-Nielsen SA at al v. Animal Feeds International*, 559 U.S., 130 S. Ct. 1758, 176 L.Ed.2d 605 (2010) (Tab 13) at 1768 n. 3 (“We do not decide whether ‘manifest disregard’ survives our decision in [*Hall Street*] as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10”); *Goldman Sachs Execution and Clearing L.P., et al v. The Official Unsecured Creditors Committee of Bayou Group L.P. et*

14. Canadian courts also have extensive experience in applying the Model Law and have accorded deference to tribunals in the review of applications to set aside NAFTA Chapter 11 awards.⁸ When refusing to set aside the *Bayview v. Mexico* NAFTA Chapter 11 award, the Ontario Superior Court of Justice noted that “[t]he court is not permitted to engage in a hearing *de novo* on the merits of the Tribunal’s decision or to undertake a review such as that conducted by a court in relation to the decision of a domestic tribunal. A high degree of deference is accorded on review by a court.”⁹ Similarly, in *Mexico v. Feldman*, the Ontario Superior Court of Justice refused to set aside the award and stated that “a high level of deference should be accorded to the Tribunal.”¹⁰ In upholding this decision, the Ontario Court of Appeal held that “[n]otions of international comity and the reality of the global marketplace suggest that courts should use their authority to interfere with international commercial arbitration awards sparingly.”¹¹ The Court of Appeal went on to state that “our domestic law in Canada dictates a high degree of deference for decisions of specialized tribunals generally and for awards of consensual arbitration tribunals in particular.”¹²

15. Likewise, in *Canada v. S.D. Myers*, the only case in which Canada applied to set aside a NAFTA Chapter 11 award against it, the Federal Court of Canada dismissed

al, 10-5049-cv (Lead) (2nd Cr. 2012) (Tab 14) (“we have concluded that manifest disregard remains a valid ground for vacating arbitration awards.”). Canada takes no position on the suitability of the laws on arbitral procedure applicable in Washington, D.C. Canada only submits that, as a Model Law jurisdiction, there is no doubt that relevant laws applicable in Canada are suitable.

⁸ Canadian courts have rejected applications to set aside NAFTA Chapter 11 awards on several occasions. See *Mexico v. Cargill Incorporated*, 2011 ONCA 622 (O.A.C.), October 4, 2011 (“*Cargill Appeal*”) (leave to appeal to Supreme Court of Canada denied on May 10, 2012) (Tab 15); *Mexico v. Cargill Incorporated*, 2010 ONSC 4656 (26 August 2010) (“*Cargill*”) (Tab 16); *Bayview Irrigation District No. 11 et al. v. United Mexican States* (Ont. S.C.J.), May 5, 2008 (“*Bayview*”) (Tab 17); *United Mexican States v. Feldman*, Decision on Application to Set Aside Award, (Ont. S.C.J.) December 3, 2003 (“*Feldman*”) (Tab 18); *United Mexican States v. Feldman*, 193 (O.A.C.) 216, January 11, 2005 (“*Feldman Appeal*”) (Tab 19); *Canada (Attorney General) v. S. D. Myers Inc.*, 2004 FC 38 (“*S.D. Myers*”) (Tab 20) and *United Mexican States v. Metalclad Corporation*, 2001 BCSC 664 (“*Metalclad*”) (Tab 21).

⁹ *Bayview*, ¶ 11.

¹⁰ *Feldman*, ¶ 77.

¹¹ *Feldman Appeal*, ¶ 34.

¹² *Feldman Appeal*, ¶ 37; See also *Metalclad*, ¶ 54 (court affirmed that Canadian law required it to confer a high level of deference to international arbitral awards).

Canada's application and emphasized "the principle of non-judicial intervention in an arbitral award."¹³

16. Most recently, in *Mexico v. Cargill*, a case in which Canada and the United States intervened in support of Mexico's challenge of a NAFTA Chapter 11 award, the Ontario Court of Appeal, upholding the decision of the Ontario Superior Court of Justice to refuse to set aside the award against Mexico, reiterated that a high degree of deference should be accorded to NAFTA tribunals and Canadian reviewing courts should interfere only "sparingly or in extraordinary cases."¹⁴

17. Canada therefore has not only implemented the UNCITRAL Model Law, but also has an effective legal regime that would apply to any NAFTA Chapter 11 arbitration whose legal seat is Toronto, Ontario. The fact that Toronto has been designated place of arbitration in thirteen NAFTA Chapter 11 disputes, seven of which were against Canada,¹⁵ confirms that this Tribunal should have full confidence as to the suitability of the law on arbitral procedure in Canada and Ontario.

¹³ *S. D. Myers*, ¶ 42.

¹⁴ *Cargill Appeal*, ¶ 33.

¹⁵ *Clayton/Bilcon v. Canada*, Procedural Order No. 1, (UNCITRAL) (9 April 2009), ¶ 17 (Toronto) (Tab 22); *Ethyl*, Decision Regarding the Place of Arbitration (UNCITRAL) (28 November 1997), p. 10 (Toronto) (Tab 4); *Mobil Investments*, Procedural Order No. 1, Decision on the Place of Arbitration, (7 October 2009), ¶ 42 (Toronto) (Tab 7); *Melvin J. Howard, Centurion Health Corp. & Howard Family Trust v. Canada*, (UNCITRAL), Correction of the Order for the Termination of the Proceedings and Award on Costs (9 August 2010), ¶ 5 (Toronto) (Tab 23); *S.D. Myers Inc. v. Canada*, Partial Award, (UNCITRAL) (13 November 2000) (Toronto) (Tab 24); *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/05, Award (21 November 2007) (Toronto) (Tab 25); *Robert Azinian, Kenneth Davitian, & Ellen Baca v. Mexico*, ICSID Case No. ARB(AF)/97/2, Award (1 November 1999) (Toronto) (Tab 26); *Cargill, Incorporated v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award (18 September 2009) (Toronto) (Tab 27); *Corn Products International, Inc. v. Mexico*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (15 January 2008), ¶ 17 (Toronto) (Tab 28); *Fireman's Fund Insurance Company v. Mexico*, ICSID Case No. ARB(AF)/02/01, Award (17 July 2006) (Toronto) (Tab 29); *Bayview Irrigation District et al. v. Mexico*, ICSID Case No. ARB(AF)/05/1, Award (19 June 2007) (Toronto) (Tab 30); *St. Marys, VCNA, LLC v. Government of Canada*, (UNCITRAL) Procedural Order #1 (September 10, 2012) (Tab 31); *Mercer International, Inc. v. Government of Canada*, (ICSID Case No. ARB (AF) /12/3) (procedural order to be published).

b) Canada Permits the Enforcement of Foreign Arbitral Awards through the New York Convention

18. The second factor in the UNCITRAL Notes is whether a treaty exists that governs the “enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced.” As both Canada and the United States are parties to the New York Convention, this factor is neutral as between Toronto and Washington, D.C.¹⁶

c) Convenience of the Parties and the Arbitrators

19. The third factor in the UNCITRAL Notes is the convenience of the place of arbitration for both the disputing parties and the arbitrators. While more relevant in the determination of the location of the hearings, as a factor in determining the place of arbitration, Toronto is most convenient for the disputing parties and the Tribunal.

20. Officials, counsel, consultants and potential witnesses from the Governments of Canada, Ontario and Windsor (who likely constitute the bulk of individuals with knowledge of this dispute) are all based in, or are within a short distance of, Toronto. CTC is based in Windsor, Ontario, a short flight to Toronto, and DIBC is headquartered in Warren, Michigan, a suburb of Detroit and a similarly short flight away from Toronto.¹⁷ As a major international business hub and Canada’s economic centre, Toronto is very well serviced with frequent and direct flight connections to every location in which the Claimant and Respondent, counsel, members of the Tribunal and any potential witnesses are based.¹⁸

21. To the extent that convenience may be a factor for the Tribunal in selecting the place of arbitration, Toronto is more convenient than Washington, D.C.

¹⁶ *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958, 330 U.N.T.S. 38 (“New York Convention”) (Tab 32).

¹⁷ Notice of Arbitration, ¶¶ 10, 12.

¹⁸ Other NAFTA tribunals have recognized that Toronto affords full convenience to the disputing Parties, counsel and arbitral tribunal members alike. See e.g., *Ethyl*, Decision Regarding Place of Arbitration, at 7 (Tab 4).

d) Availability and Cost of Support Services Needed

22. Although the fourth factor set out in the UNCITRAL Notes is also less relevant to the determination of the place of arbitration than to the determination of the location of the hearings, previous NAFTA Chapter 11 tribunals have found this factor to be neutral in considering either Toronto or Washington, D.C. as place of arbitration.¹⁹ To the extent this factor may be relevant in selecting the place of arbitration, as an international business centre and Canada's largest city, there is no issue as to the availability and cost of support services needed in Toronto.

e) Ontario is the Location of the Subject-Matter and Evidence Relevant to this Dispute

23. The final factor is the location of the subject-matter in dispute and the proximity of the evidence. This factor decisively favours Toronto over Washington, D.C.

24. The "subject-matter in dispute" refers to the measure(s) alleged to be inconsistent with NAFTA Chapter 11.²⁰ For example, in *Ethyl v. Canada*, the Tribunal named Toronto as the place of arbitration, over New York, because the subject-matter in dispute was federal Canadian legislation.²¹ Similarly, the *ADF*, *Canfor*, and *Methanex* tribunals all found that because the subject-matter of the dispute involved alleged breaches of NAFTA Chapter 11 by the United States, Washington, D.C. was appropriate to designate as the place of arbitration.²²

25. In this dispute, the Claimant alleges that the Governments of Canada, Ontario and Windsor have breached supposed promises regarding Ontario Highway 401 direct access to the Ambassador Bridge in the City of Windsor via the Windsor-Essex Parkway in favour of the new Detroit River International Crossing ("DRIC") Bridge and took other

¹⁹ See for example *Canfor Corp. v. United States*, Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings (UNCITRAL) (23 January 2004), at 7 ¶¶ 29-30 (Tab 3) (Tribunal concluded that ultimately neither Toronto, Vancouver or Washington, D.C. had an advantage over the other when it came to availability and cost of support services needed).

²⁰ *Canfor*, ¶ 36 (Tab 3).

²¹ *Ethyl*, at 5, 8 (Tab 4).

²² *ADF*, Procedural Order No. 2 Concerning the Place of Arbitration ¶ 20 (Tab 2); *Canfor*, Decision on the Place of Arbitration, ¶¶ 34-37 (Tab 3); *Methanex*, ¶¶ 33-34, 40 (Tab 6).

traffic measures in the City of Windsor to divert traffic away from the Ambassador Bridge and towards the Detroit-Windsor Tunnel and the DRIC.²³ The impugned measures arise from the nine-point “Windsor Gateway Action Plan,” the DRIC Bi-National Planning Process and the lengthy environmental assessments carried out under Ontario and federal legislation that approved the construction of the DRIC project.²⁴ Not only is the infrastructure at issue in this dispute – the Ambassador Bridge, Highway 401, Huron Church Road, the Windsor-Essex Parkway and the Windsor-Detroit Tunnel – all physically located in Windsor, Ontario, but all of the impugned actions by Canada took place within Ontario. Conversely, there is no connection between the subject-matter and Washington, D.C.

26. The proximity of evidence is another decisive factor in favour of Toronto. All of the documentation in Canada’s possession relevant to this dispute is located in Ontario. Canada’s officials, consultants and witnesses connected with this dispute are all based in Ontario. The Claimant’s enterprise, CTC, has its office headquarters in Windsor, Ontario. Canada understands that some of CTC’s current and former officials, employees and consultants with knowledge of this dispute are also resident in Ontario.

27. As Model Law jurisdictions, Canada and Ontario maintain fulsome provisions in their laws which permit an arbitral tribunal with its legal seat in Canada to request the assistance of Canadian courts in gathering evidence.²⁵ In the event the Tribunal or the disputing parties require the assistance of the courts to compel evidence or issue subpoenas, the best jurisdiction in which to do this effectively and expeditiously is where the subject-matter of the dispute is most closely connected: Ontario.²⁶

²³ Notice of Arbitration, ¶ 48.

²⁴ Notice of Arbitration, ¶¶ 31, 34-35.

²⁵ See *Commercial Arbitration Act*, RSC 1985, c.17 (2nd Supp.), Schedule 2, Article 27 (Tab 10) (“The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of Canada assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.”); *International Commercial Arbitration Act*, R.S.O. 1990, c. 19, Schedule 1, Article 27 (Tab 11).

²⁶ See *Mobil Investments*, Decision of the Tribunal on the Place of Arbitration, ¶ 40 (Tab 7) (“[A]ll other things being equal and in light of the fact that the dispute arises in Canada, to the extent that potential evidentiary issues might arise, it is more likely than not that, to the extent such evidentiary issues arise, they

28. Conversely, it is not clear that Canadian courts would be able to provide effective assistance to an arbitral tribunal with its legal seat in the United States. For example, in *BF Jones Logistics Inc. v. Rolko*, the Ontario Superior Court of Justice refused to enforce a letter of request from an arbitral tribunal with a U.S. legal seat finding that “[t]here is no precedent in Ontario for the enforcement of Letters of Request from private arbitral tribunals.”²⁷ To avoid the *Rolko* outcome, a NAFTA Chapter 11 tribunal seated in Washington, D.C. would have to issue an order, then a disputing party would need to petition a U.S. court to issue a letter of request, which would need to be transmitted to a Canadian court by way of application, which in turn would have to consider and rule on whether to grant the letter request to obtain evidence.²⁸ Such a process would be time-consuming, inefficient and involve greater uncertainty as to enforceability given that virtually all of the relevant evidence and witnesses are in Ontario.²⁹ None of these inefficiencies or uncertainties would exist if the Tribunal were seated in Toronto.

5. Toronto is a Neutral Location

29. Neutrality is not a factor under the NAFTA, UNCITRAL Arbitration Rules or UNCITRAL Notes.³⁰ Nor did the NAFTA Parties stipulate that neutrality should be a factor in the determination of the place of arbitration. The *Methanex* Tribunal noted that

are more likely to be addressed expeditiously and efficiently by the courts of the jurisdiction that is most closely connected to the facts of the dispute.”). A tribunal seated in any other Canadian city outside Ontario would have the same ability to request judicial assistance in aid of arbitration from courts in Ontario because of Canadian intra-jurisdictional enforceability via the Ontario *Interprovincial Summonses Act*, R.S.O. 1990, c. 1.12 (Tab 33), the federal *Commercial Arbitration Act* (Tab 10), and the Ontario *International Commercial Arbitration Act* (Tab 11).

²⁷ *B.F. Jones Logistics Inc. v. Rolko*, 2004 CarswellOnt 3478, 72 O.R. (3d) 355 (Ont. S.C.J.), ¶¶ 6 and 8 (Tab 34).

²⁸ *B.F. Jones Logistics Inc. v. Rolko*, 2004 CarswellOnt 3478, 72 O.R. (3d) 355 (Ont. S.C.J.), ¶¶ 6 and 16 (Tab 34).

²⁹ For example, under the United States *Federal Arbitration Act* 9 U.S.C. § 7 (Tab 12), an arbitral tribunal seated in the United States may issue a subpoena to order a person to appear before the tribunal to produce documents material as evidence in the arbitration. Given that virtually all the persons and evidence involved in this arbitration are in Ontario, a foreign jurisdiction to U.S. courts, this power would be effectively negated.

³⁰ “Perception of a place as neutral” was expressly excluded from an earlier draft of the UNCITRAL Notes as a criterion for determining the place of arbitration: Report to UNCITRAL, 28th session, Vienna, XXVI UNCITRAL Yearbook, 1995, p. 44, ¶ 337.

while NAFTA required the legal seat to be in one of the NAFTA Parties, it does not require it to be in a State other than that of the Claimant or Respondent.³¹

30. However, to the extent that the Tribunal considers neutrality relevant, it cannot be seriously contended that Canadian courts are anything but independent and impartial.³² As the Tribunal in *Waste Management v. Mexico* noted, “Under the principles of the separation of judicial power constitutionally guaranteed in all three [NAFTA] states parties, it is for the courts to decide on issues concerning the function of arbitral tribunals and the recognition and enforcement of their awards and to do so in accordance with the law. If there was any indication that the courts of a state party were deferring to executive pronouncements on these issues, that would be highly relevant to the choice of venue. It is almost needless to say that there is no evidence or suggestion of this.”³³

31. Just as all NAFTA Chapter 11 cases against the United States have been seated in the United States,³⁴ several Canadian cities, including Toronto, have been designated as places of arbitration in NAFTA Chapter 11 disputes in which Canada was the respondent Party, indicating that tribunals consider Canadian legal seats to be neutral.³⁵ As evidenced

³¹ *Methanex v. United States*, Decision on the Place of Arbitration, ¶ 36 (Tab 6) (“the Tribunal bears in mind (i) that it was open to the NAFTA Parties to agree that in the interests of neutrality Chapter 11 disputes should be arbitrated in the territory of any third Party not directly involved in the dispute, yet they did not do so; and (ii) that in the circumstances where (as in this case) the disputing parties have further limited the choice of place of arbitration by their arbitral tribunal to one or the other’s state, a neutral national venue is simply not possible.”)

³² The suggestion made by the Claimant during the conference call with the Tribunal on December 13, 2012 that Canadian courts would not afford it an “impartial hearing” is unfounded.

³³ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision on Venue of the Arbitration, September 26, 2001 (Tab 35).

³⁴ See e.g., *ADF*, Procedural Order No. 2 Concerning the Place of Arbitration ¶ 20 (Tab 2); *Canfor*, Decision on the Place of Arbitration, ¶¶ 34-37 (Tab 3); *Methanex*, ¶¶ 33-34, 40 (Tab 6).

³⁵ *AbitibiBowater Inc. v. Canada*, Consent Award (UNCITRAL) (15 December 2010) (Montreal) (Tab 36); *Clayton/Bilcon v. Canada*, Procedural Order No. 1 (UNCITRAL) (9 April 2009), ¶ 17 (Toronto) (Tab 22); *Chemtura Corporation v. Canada*, Procedural Order No. 1 (UNCITRAL) (21 January 2008) (Tab 37), ¶20 (Ottawa); *Ethyl Corporation v. Canada*, Decision Regarding the Place of Arbitration (UNCITRAL) (28 November 1997) (Toronto) (Tab 4); *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada*, Procedural Order No. 1, Decision on the Place of Arbitration, (ICSID Case No. ARB(AF)/07/4) (7 October 2009), ¶ 42 (Toronto) (Tab 7); *Melvin J. Howard, Centurion Health Corp. & Howard Family Trust v. Canada*, Correction of the Order for the Termination of the Proceedings and Award on Costs (UNCITRAL) (9 August 2010), ¶ 5 (Toronto) (Tab 23); *Pope & Talbot Incorporated v. Canada*, Minutes of Procedural Meeting (UNCITRAL) (29 October 1999) (Tab 8) and Award on Costs (UNCITRAL) (November 26, 2002 (Montreal) (Tab 38); *S. D. Myers Inc. v. Canada*, Partial Award (UNCITRAL) (13

by the judicial review of the awards in *S.D. Myers* and *Cargill* where Canada's submissions were not accepted by the courts,³⁶ the Tribunal should have no concern whatsoever with the question of neutrality in selecting Toronto as the place of arbitration.

6. Conclusion

32. The circumstances of this case and applicable law support the selection of Toronto as the most appropriate place of arbitration in this matter. All of the relevant and material facts connect this dispute to Ontario. The vast majority of witnesses and documentary evidence are situated in Ontario. The suitability of Canadian and Ontario law on arbitral procedure, Canada's status as a party to the New York Convention, convenient location, availability of cost effective support services and the unimpeachable reputation of Canadian courts for independence and impartiality all favour Toronto as place of arbitration. None of these factors weigh in favour of Washington, D.C.

33. For the foregoing reasons, Canada submits that the Tribunal designate Toronto, Ontario as the place of arbitration pursuant to NAFTA Article 1130 and Article 18 of the UNCITRAL Arbitration Rules.

Respectfully submitted on behalf of Canada this 15th day of January, 2013,



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November 2000) (Toronto) ("*S.D. Myers Partial Award*") (Tab 24); *V.G. Gallo v. Canada*, Procedural Order No. 1 (UNCITRAL) June 4, 2008 (Vancouver) (Tab 39).

³⁶ Discussed above at ¶¶ 15-16.