ARBITRATION UNDER
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND 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

PCA Case No. 2012-25

PROCEDURAL ORDER No. 2

January 28, 2013

Arbitral Tribunal

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

I. Introduction

1. The disputing parties were unable to agree on the place of arbitration in this matter.

2. On January 15, 2013, pursuant to paragraph 14(a) of Procedural Order No.1, the disputing parties filed their respective submissions concerning the place of arbitration. Their positions in this respect are summarized below (II), which is followed by the Tribunal's decision (III).

II. Summary of the Parties' Positions

(a) Claimant's position

3. Claimant alleges to have proposed to Respondent numerous locations as the place of arbitration, including London and Paris, and made clear that it was open to other neutral, non-NAFTA locations. Within the United States Claimant proposed Washington D.C. and New York, NY. Respondent met each of these proposals with a response that the arbitration be held in Canada. The only issue that the disputing parties were able to agree on is that the place of arbitration should not be in Mexico.[1]

4. Claimant states that the North American Free Trade Agreement ("NAFTA") provides that for arbitrations held under the UNCITRAL Arbitration Rules ("UNCITRAL Rules"), unless the disputing parties agree otherwise, a tribunal shall hold an arbitration in the territory of a NAFTA jurisdiction, selected in accordance with the UNCITRAL Rules. It further states that under the UNCITRAL Rules, "[Art. 18(1)] [i]*f the parties have not 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.*"[2]

5. As the disputing parties could not agree on a place of arbitration outside the NAFTA jurisdictions and have agreed that the arbitration should not take place in Mexico, upon consideration of the circumstances of this case, the Tribunal must choose a

[1] Claimant's submission on the place of arbitration of January 15, 2013, ¶ 6.
[2] Claimant's submission on the place of arbitration of January 15, 2013, ¶ 9.

place of arbitration in either the United States or Canada.[3] It is Claimant's position that the place of arbitration should be in the United States.

6. According to Claimant, the United States is the better jurisdiction for enforcing the Tribunal's decision in this arbitration. Washington D.C. specifically has been recognized by arbitral tribunals as a neutral location because of the presence there of international bodies, such as the World Bank and ICSID.[4]

7. Claimant alleges that while the UNCITRAL Notes on Organizing Arbitral Proceedings ("UNCITRAL Notes") list a number of factors that can potentially be considered in choosing the place of arbitration, their relative importance varies from case to case. Claimant adds that three of the factors listed in the UNICTRAL Notes are irrelevant where the issue in dispute, as here, is not the location of hearings, but rather the jurisdiction where the arbitration will be enforced. In this case, the decision of which jurisdiction should enforce the arbitration should be made based upon which jurisdiction is most likely to provide judicial enforcement of the Tribunal's award that has both the reality and appearance of neutrality.[5]

8. Claimant argues that Respondent cannot have any realistic concern that the United States would be an unfair place of arbitration as the government of the United States is a close friend and partner to the Canadian government. The United States has a more antagonistic relationship with Claimant than it does with Respondent, because Claimant has been involved in numerous litigations against U.S. government entities. In addition, Claimant, which is based in Michigan, also does not have any "home court" advantage in Washington D.C., New York, N.Y., or any United States location outside the State of Michigan.[6]

9. According to Claimant, Canada is not a neutral location under the circumstances of this case. This is because, *inter alia*, Claimant initiated this arbitration to seek relief from discrimination and unfair treatment, and faces clear hostility from the Canadian government, members of which have made aggressive statements attacking Claimant and the Moroun family, Claimant's primary shareholder. Claimant states that, given

[3] Claimant's submission on the place of arbitration of January 15, 2013, ¶ 10.
[4] Claimant's submission on the place of arbitration of January 15, 2013, ¶¶ 3 and 15.
[5] Claimant's submission on the place of arbitration of January 15, 2013, ¶ 11.
[6] Claimant's submission on the place of arbitration of January 15, 2013, ¶ 16.

the recent public statements and legislative enactments by the Canadian government, Claimant would prefer to be subject to Mexican courts over Canadian courts.[7]

10. Moreover, Claimant alleges that U.S. courts would provide greater reliability in enforcing an international arbitration award against Canada, which weighs in favor of choosing a place of arbitration in the United States. This is because Canada's actions in past arbitration enforcement proceedings indicate that Canadian law does not properly recognize and enforce the decisions of arbitral tribunals in decisions against Canada.[8]

11. Claimant argues that the criterion of "proximity of evidence" also weights in favor of the United States. Regarding live witnesses, the likely potential Canadian witnesses in this matter are employees or agents of the Canadian government, whom Canada will presumably call to support its case-in-chief, and who likely would appear voluntarily at any hearings. In contrast, Claimant may need to call witnesses employed by the United States and Michigan governments – both of whom have been involved in Canada's effort to promote the NITC/DRIC at the expense of the Ambassador Bridge and its New Span. Those American witnesses likely will not appear voluntarily (especially federal witnesses, given that Claimant is currently engaged in litigation against the United States government). As a result, Claimant will likely need to appeal to the courts of the place of arbitration to compel their testimony. This will be more easily achieved if the place of arbitration is in the United States.[9]

12. For the foregoing reasons, Claimant requests the Tribunal to choose either Washington D.C. or New York, N.Y., as the place of arbitration in this case.[10]

(b) Respondent's position

13. It is Respondent's position that the facts and applicable law of this case weigh in favor of Toronto, Ontario, as the most appropriate place of arbitration.[11]

[7] Claimant's submission on the place of arbitration of January 15, 2013, ¶ 21.
[8] Claimant's submission on the place of arbitration of January 15, 2013, ¶ 23.
[9] Claimant's submission on the place of arbitration of January 15, 2013, ¶ 29.
[1010] Claimant's submission on the place of arbitration of January 15, 2013, ¶ 30.

14. Respondent alleges that 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 five factors (i.e. convenience of the parties/arbitrators and the availability/costs of support services) are more relevant to determining the appropriate location of the hearings rather than the place of arbitration, they nonetheless support Toronto as the most appropriate legal seat. Placing more weight on the remaining three factors (i.e. 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) also favors Toronto rather than Washington D.C.[12]

15. Regarding the suitability of the law on arbitral procedure of the place of arbitration, Canada and Ontario laws on arbitral procedure reflect the highest international standards, as they are based on the UNCITRAL Model Law and the New York Convention on Enforcement of Arbitral Awards.[13] The fact that Toronto has been designated place of arbitration in thirteen NAFTA Chapter 11 disputes, seven of which were against Canada, confirms that this Tribunal should have full confidence as to the suitability of the law on arbitral procedure in Canada and Ontario.[14]

16. Respondent also claims that Toronto is the most convenient seat for the disputing parties and Arbitral Tribunal. These is because officials, counsel, consultants and potential witnesses from the Government 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. The Claimant's enterprise, CTC, has its office headquarters in Windsor, Ontario. Respondent adds that there is no issue as to the availability and cost of support services needed in Toronto.

17. Respondent argues that Ontario is the location of the subject-matter and evidence relevant to this dispute. This is because not only is the infrastructure at issue in this dispute (i.e. the Ambassador Bridge, Highway 401, Huron Church Road, the Windsor-Essex Parkway and the Windsor-Detroit Tunnel) all located in Windsor, Ontario, but all the impugned actions by Canada took place within Ontario.

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[11] Respondent's submission on the place of arbitration of January 15, 2013, ¶ 2.
[12] Respondent's submission on the place of arbitration of January 15, 2013, ¶ 11.
[13] Respondent's submission on the place of arbitration of January 15, 2013, ¶ 5.
[14] Respondent's submission on the place of arbitration of January 15, 2013, ¶ 17.

Conversely, there is no connection between the subject-matter and Washington D.C.[15]

18. Also, 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. 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 instance, in *BF Jones Logistics Inc. v. Rolko*, the Ontario Superior Court of Justice refused to enforce a letter of request from an arbitral tribunal which 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.*"[16] To avoid the R*olko* 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. 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.[17]

19. Respondent argues that "neutrality" is not a factor considered under the NAFTA, UNCITRAL Rules or UNCITRAL Notes. It points out to a decision on the place of arbitration rendered in the *Methanex v. United States* case, wherein the tribunal pointed out that 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. However, to the extent that the Tribunal considers neutrality relevant, it cannot be contested that Canadian courts are independent and impartial.[18] As evidenced by the judicial review of the awards in *S.D. Myers* and *Cargill* where Canada's submissions were not accepted by the courts, the Tribunal should have no concern whatsoever with the question of neutrality in selecting Toronto as the place of arbitration.

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[15] Respondent's submission on the place of arbitration of January 15, 2013, ¶ 25.
[16] Respondent's submission on the place of arbitration of January 15, 2013, ¶ 28.
[17] Respondent's submission on the place of arbitration of January 15, 2013, ¶ 28.
[18] Respondent's submission on the place of arbitration of January 15, 2013, ¶ 29.

III. Tribunal's Decision

20. Regarding the place of arbitration, NAFTA Article 1130(b) provides as follows:

"*Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party* [i.e. Mexico, Canada and the United States] *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.*"

21. The Tribunal notes that the UNCITRAL Rules provides little guidance as to the selection of the place of arbitration. This is because Article 18(1) of the UNICTRAL Rules simply states that "[i]*f the parties have not previously agreed on the place of arbitration, the place of arbitration shall be determined by the arbitral tribunal, <u>having regard to the circumstances of the case</u>.* [...]" (emphasis added).

22. In view of Canada's refusal to have the place of arbitration located outside the NAFTA countries, and considering that the disputing parties have agreed not to have Mexico as the place of arbitration, the Tribunal's decision is restricted between the United States (particularly Washington D.C. or New York, N.Y as proposed by Claimant) and Canada (particularly Toronto, Ontario, as proposed by Respondent).

23. The UNCITRAL Notes referred to by the disputing parties provide some guidance to the Tribunal in this respect, but do not have a binding character. Paragraph 22 of these Notes reads as follows:

"*22. Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are:*
(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."

24. The Tribunal is of the view that both the United Stated and Canada meet the majority of the factors listed by the UNCITRAL Notes, i.e. factors (a), (b), (c) and (d). As for factor (e), i.e. location of the subject-matter in dispute and proximity of evidence, although they tend to favour Canada (as the impugned actions by Respondent took place in Ontario, Canada) they are not decisive. As noted by the *UPS* tribunal "*to give this criterion* [factor (e)] *undue weight would lead to the result that the place of arbitration under Chapter 11 arbitrations would nearly always be in the territory of the respondent party. This was clearly not the intention of the NAFTA parties and the text does not provide for that result.*"[19]

25. Moreover, the Tribunal shares the views expressed in *V.G. Gallo v. Canada*, that "*the perfect place of arbitration in an international investment arbitration is a jurisdiction which is neither that of the investor nor that of the host State, which has a high quality, independent judiciary, with experience in providing support to, and reviewing and setting aside decisions from international arbitral tribunals* [...]."[20]

26. In the case at hand, one of the disputing parties, by their own choice, will have to arbitrate in the other's home State. The Tribunal notes that the set of arguments brought by the disputing parties in favour of both Canada and the United Sates are reasonable and acceptable. Also, there is no doubt that the independence and impartiality of both countries' courts are above reproach. The Tribunal, however, has no option but to choose one of them.

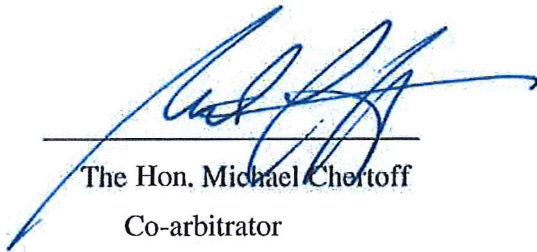
27. Having considered the submissions of the Parties, the Tribunal considers that either Canada or the United States would be suitable when viewed in the light of many of the factors that might affect the choice of seat. In these circumstances, the Tribunal has decided that the balance is tipped by the fact that Claimant has specifically alleged that Canada has adopted legislation that discriminates against Claimant and its Ambassador Bridge because it is US-owned. While that allegation is unproven, a cautious approach to the need to ensure that the seat is perceived as neutral tends to favor a US seat. Washington D.C., though the seat of the federal government of the USA, has an established and generally-recognized role as the host of international institutions, such as the World Bank, ICSID and the Inter-American Commission on

[19] See *UPS of America, Inc. v. Canada*, tribunal's decision on the place of arbitration, dated October 17, 2001, at p. 7, ¶ 15.

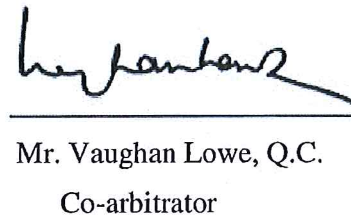
[20] *V.G. Gallo v. Canada*, letter from the arbitral tribunal to the parties of June 4, 2008, ¶ 15.

Human Rights, and consequently a particular neutrality in the context of legal disputes. The Tribunal finds no evidence of any difficulties for either Respondent or Claimant in having Washington D.C. as the seat of this arbitration; and it notes that Claimant's home state in the United States is Michigan.

28. In view of the foregoing, the Tribunal determines Washington D.C., in the United States of America, as the place of arbitration in this matter.



The Hon. Michael Chertoff
Co-arbitrator



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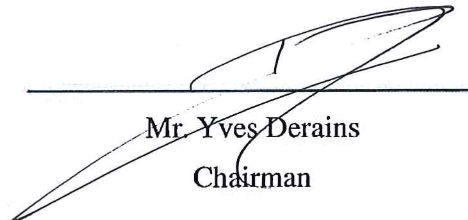

Mr. Yves Derains
Chairman