In the Arbitration under the North American Free Trade Agreement and the UNCITRAL Arbitration Rules

between

DETROIT INTERNATIONAL BRIDGE COMPANY,

Claimant,

v.

THE GOVERNMENT OF CANADA,

Respondent.

DIBC'S SUBMISSION CONCERNING THE PLACE OF ARBITRATION

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I. PRELIMINARY STATEMENT

1. Pursuant to Procedural Order No. 1, Claimant, Detroit International Bridge Company ("DIBC"), by undersigned counsel, respectfully presents this submission on the place of arbitration.

2. Under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Arbitration Rules"), the place of arbitration is the jurisdiction that will govern enforcement of the Tribunal's ultimate decision. As such, it is of importance to the fairness of this proceeding that the jurisdiction selected as the place of arbitration be neutral, both in appearance and in fact. In addition, the selected jurisdiction should have demonstrated respect for the arbitral process and enforcement of arbitral decisions. This decision does not determine where hearings or other physical proceedings will be held, a decision that may be made separately.

3. The United States is the better jurisdiction for enforcing the Tribunal's decision in this arbitration. The United States has been recognized by prior Tribunals as a neutral location, and Washington, D.C. specifically has been recognized as a neutral location because of the presence there of international bodies such as the World Bank. The United States is not a party to the proceedings, and is adverse to DIBC in pending litigation in the United States, thus eliminating any likelihood that it would favor DIBC as a United States entity in a later enforcement action. The United States also has a robust history of enforcing arbitral awards consistent with the New York Convention.

4. In contrast, Canada is a party to the proceedings and its government has shown direct animosity towards DIBC, including by recently passing legislation that prevents DIBC (or anyone) from filing legal or regulatory challenges to an unnecessary, Canadian-owned bridge named alternatively the "New International Trade Crossing" ("NITC") or the "Detroit River

International Crossing" ("DRIC") (referred to collectively herein as the "NITC/DRIC"), which is a subject of this arbitration. The Prime Minister of Canada has even publicly disparaged the owners of DIBC, an unusual occurrence that seriously calls into question Canada's neutrality in these proceedings. In addition, Canada's courts do not have a strong history of enforcing international arbitration awards against Canada, and Canada in the past has argued that NAFTA Tribunals "should not attract extensive judicial deference and should not be protected by a high standard of judicial review." Outline of Argument of Intervenor Attorney General of Canada, *United Mexican States v. Metalclad Corp.*, No. L002904 (S.C.B.C. Feb. 16, 2001) (attached as CLA-1) at p. 10 ¶ 30.

5. Under these circumstances, DIBC respectfully requests that the Tribunal select a location within the United States—preferably Washington, D.C. (or New York, N.Y.)—as the place of arbitration for this proceeding.

II. STATEMENT OF FACTS

6. Claimant DIBC and Respondent, the Government of Canada ("Canada"), are unable to agree on the place of arbitration in this matter. DIBC proposed numerous locations as the place of arbitration. It offered London and Paris as options outside of either party's home jurisdiction and further made clear that it would be open to other neutral, non-NAFTA locations suggested by Canada. DIBC also proposed Washington, D.C. and New York, N.Y. within the United States. Canada met each DIBC proposal with a response that the arbitration be held in Canada. The only issue that the parties have been able to agree upon is that neither party wishes the place of arbitration to be in Mexico.

III. THE TRIBUNAL SHOULD SELECT WASHINGTON, D.C., IN THE U.S., AS THE PLACE OF ARBITRATION

A. THE PLACE OF ARBITRATION DETERMINES THE LEGAL FRAMEWORK FOR ENFORCEMENT OF THE TRIBUNAL'S DECISION, WHILE PHYSICAL PROCEEDINGS MAY BE HELD ELSEWHERE.

7. The place of arbitration "is the legal place, or 'seat,' of the arbitration." Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of Arbitration, *Methanex Corp. v. United States of America* (Dec. 31, 2000) (attached as CLA-2) at p. 10 ¶ 24. It thus determines the legal framework that governs enforcement of the Tribunal's ultimate decision.

8. UNCITRAL Arbitration Rules distinguish between "the place of arbitration" and the physical locations of arbitration hearings and meetings. United Nations Commission on International Trade Law, *UNCITRAL Arbitration Rules*, G.A. Res. 65/22 (Dec. 6, 2010) (attached as CLA-3) (in addition to determining the official legal place of arbitration, the Tribunal may "meet at any location it considers appropriate for any purpose, including hearings"). Thus, in setting the place of arbitration, "the Tribunal [] makes no decision as to the geographical place of any hearing. Any such hearing could be held at a geographical place elsewhere than the legal place of arbitration." *Methanex* at p. 10 ¶ 24.

B. BECAUSE THE PARTIES HAVE BEEN UNABLE TO AGREE ON A LOCATION, THE TRIBUNAL MUST CHOOSE A PLACE OF ARBITRATION IN EITHER THE UNITED STATES OR CANADA.

9. The North American Free Trade Agreement ("NAFTA") provides that for arbitrations held under the UNCITRAL Arbitration 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 Arbitration Rules." NAFTA, U.S.-Can.-Mex., art. 1130-1130(b), Dec. 17, 1992, 32 I.L.M. 605, 645 (1993) (attached as CLA-4). Under the UNCITRAL

Arbitration Rules, "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*." UNCITRAL Arbitration Rules, art. 18(1) (emphasis added); *see also* Decision Regarding the Place of Arbitration, *Ethyl Corp. v. Government of Canada*, 38 I.L.M. 704 (Nov. 28, 1997) (attached as CLA-5) at pp. 2-3.

10. Here, the parties cannot agree on a place of arbitration outside of the NAFTA jurisdictions, and have agreed only that the arbitration should not take place in Mexico. Accordingly, upon consideration of the circumstances of this case, the Tribunal must choose a place of arbitration in either the United States or Canada. *See Methanex* at pp. 3-4 ¶ 6 (permitting the parties to restrict the Tribunal's choice to the United States or Canada). Mexico should also be excluded as a potential place of arbitration because the language of this arbitration is English. Decision on the Place of Arbitration, *Merrill & Ring Forestry L.P. v. Canada* (Dec. 12, 2007) (attached as CLA-6) at pp. 8-9 ¶ 35.

11. While the UNCITRAL Notes on Organizing Arbitral Proceedings list a number of factors that can potentially be considered in choosing the place of arbitration, those Notes also emphasize that "Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case." United Nations Commission on International Trade Law, *UNCITRAL Notes on Organizing Arbitral Proceedings* (March 2012) ("UNCITRAL Notes") (attached as CLA-7) at ¶ 22. Three of the factors listed in the UNCITRAL Notes ("convenience of the parties," "availability and cost of support services," and "proximity of evidence") 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, as shown below, 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.

C. THE UNITED STATES IS THE MORE NEUTRAL PLACE OF ARBITRATION FOR THIS DISPUTE.

12. The present dispute is part of a hotly contested dispute between the parties. Accordingly, it is critical that the parties be able to rely upon the enforceability of any final decision issued by the Tribunal. The Tribunal accordingly should select a location in the United States as the place of arbitration because it is a more neutral location for this dispute than Canada.

13. The neutrality of the place of arbitration is "plainly relevant given the broad reference to 'the circumstances of the arbitration' in Article 16(1) [now Article 18(1)] of the UNCITRAL rules." Decision of the Tribunal on the Place of Arbitration, *UPS of America, Inc. v. Government of Canada* (Oct. 17, 2001) (attached as CLA-8) at p. 8 ¶¶ 16-18 (considering neutrality in selecting the United States as the place of arbitration); *see also Merrill & Ring* (same); Procedural Order No. 2 Concerning the Place of Arbitration, *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1) (attached as CLA-9) at pp. 15-16 ¶¶ 21-22 (same); *Methanex* (same). As one Tribunal explained:

> "Traditionally arbitrating parties, *desiring both the reality and the appearance of a neutral forum*, incline to agree on a place of arbitration outside their respective national jurisdictions. *This is especially the case where a sovereign party is involved. Where an arbitral institution or a tribunal must make the selection, this tendency is, if anything, even greater*, and for the same reasons. Article 16(1) [now Article 18(1)] of the UNCITRAL Rules easily accommodates this consideration as one of the 'circumstances of the arbitration.'"

Ethyl Corp. at p. 9 (emphasis added).

14. As noted above, the United States is not a party to this dispute, but is instead adverse to DIBC in domestic litigation relating to the NITC/DRIC. Thus, the United States provides a forum that has "both the reality and the appearance of a neutral forum" in this dispute.

15. Other tribunals have repeatedly described Washington, D.C. as a preferred neutral place of arbitration due to it "having the neutrality of being the seat of the World Bank and ICSID." *UPS* at p. 8 ¶ 18; *see also Merrill & Ring* at p. 8 ¶ 31 (choosing Washington, D.C. and stating "Washington, DC is the seat of ICSID, the administering institution of this case, [] it has been accepted on various occasions as the place of arbitration and [] it has developed the reputation of being an independent venue for many international organizations"); *ADF Group* at pp. 15-16 ¶¶ 21 (choosing Washington, D.C. and stating "The policy imperatives which drive parties proceeding to international arbitration to seek a 'neutral' forum are, in our opinion, satisfied by choosing the city in which the ICSID is located which also happens to be the capital of the United States"); *Methanex* at p. 15 ¶ 39 (choosing Washington, D.C. and stating "The Tribunal considers that the requirements of perceived neutrality in this case will be satisfied by holding such hearings in Washington, DC as the seat of the World Bank, as distinct from the seat of the USA's federal government").

16. Further, Canada cannot have any realistic concerns that the United States will be an unfair place of arbitration. 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 DIBC than it does with Canada: DIBC has been involved in numerous litigations against U.S. government entities, including litigation currently pending in U.S. federal district court in Washington, DC. *Detroit Int'l Bridge Co. v. U.S. Coast Guard*, No. 1:10-cv-00476-RMC

(D.D.C.). DIBC, 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.

D. CANADA IS NOT A NEUTRAL LOCATION UNDER THE CIRCUMSTANCES OF THIS CASE.

17. The crux of DIBC's claim in this arbitration is that Canada has repeatedly and systematically discriminated against a U.S. company, DIBC, and failed to accord DIBC a minimum standard of fair treatment in a blatant attempt to establish Canadian ownership of bridge traffic between the U.S. and Canada to drive down the value of DIBC's Ambassador Bridge. *See* Amended Notice of Arbitration at pp. 20-35. The Amended Notice of Arbitration alleges that Canada has discriminated against DIBC and its Ambassador Bridge because DIBC is American-owned, and that Canada has therefore (among other things) attempted to prevent DIBC from building a new span to its Ambassador Bridge ("New Span"), and to favor instead the construction of the NITC/DRIC.

18. For example, on December 14, 2012, the Canadian government passed its omnibus budget bill, one part of which was the "Bridge to Strengthen Trade Act." Jobs and Growth Act, 2012, S.C. 2012, c. 31, art. 179 (Can.) (attached as C-1). This act exempts the planned Canadian-owned NITC/DRIC (but not the U.S. owned Ambassador Bridge New Span, a mere two miles away) from environmental and safety regulations such as the Canadian Environmental Assessment Act, the Canadian Port Authority Environmental Assessment Regulations, and the Statutory Instruments Act, as well as numerous other statutes and regulations. *Id.* at § 4-6. The Act further provides that after the NITC/DRIC is constructed, all relevant construction permits and authorizations shall be "deemed to have been issued." *Id.* at § 3, 6.

19. A Canadian Member of Parliament, Jeff Watson (Essex), stated that the purpose of the legislation was to "insulate" the NITC/DRIC "from any future lawsuit on the Canadian side" from DIBC, CTC, or their American owners, the Moroun family. "Canada Fires Back at Moroun," *The Windsor Star* (Oct. 18, 2012) (attached as C-2).

20. In addition to this demonstrated actual prejudice by Canada against DIBC—to the extent of manipulating DIBC's access to Canada's judicial system—the perception of unfairness should also be considered. *See Methanex* at pp. 13-15 ¶¶ 34-39 (considering both "actual neutrality" and "perceived neutrality"). DIBC 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 DIBC and the Moroun family, DIBC's primary shareholder. Prime Minister Harper himself stated, about the Moroun family:

> "This is the biggest single corridor of trade in the world and the concept that somebody should claim he privately owns it all is, to me, ludicrous, but to some degree that is the situation we are dealing with."

"Ambassador Bridge Owner Invites PM to Talk," *CBC News* (April 3, 2012) (attached as C-3).

21. Making the award in this arbitration subject to enforcement in Canadian courts will expose the award to both the reality and the appearance of being subject to courts that are not neutral, and that are subject to a sovereign that has openly announced its desire to discriminate against Claimant DIBC. This appearance of non-neutrality also creates the risk of harming the credibility of the NAFTA arbitration process. DIBC believes that even the courts of Mexico would both be more neutral and *appear* more neutral than the Canadian courts. Indeed, given the recent public statements and legislative enactments by the Canadian government referenced above, DIBC would prefer to be subject to Mexican courts over Canadian courts.

E. U.S. COURTS WILL PROVIDE GREATER REALIABILITY IN ENFORCING AN INTERNATIONAL ARBITRATION AWARD AGAINST CANADA, WHICH WEIGHS IN FAVOR OF CHOOSING A PLACE OF ARBITRATION IN THE UNITED STATES.

22. Consideration of United States and Canadian law regarding the enforceability of arbitration awards also strongly weighs in favor of selecting the United States for the place of arbitration here. Among the factors in the UNCITRAL Notes on Organizing Arbitral Proceedings (referenced above) is the "suitability of the law on arbitral procedure of the place of arbitration." *See* UNCITRAL Notes at ¶ 22(a); *UPS* at p. 3 ¶ 6; *Ethyl Corp.* at p. 3. Considerations related to this factor include:

> "the extent to which that law, e.g., *protects the integrity of and gives effect to the parties' arbitration agreement*; accords broad discretion to the parties and to the arbitrators they choose to determine and control the conduct of arbitration proceedings; provides for the availability of interim measures of protection and of means of compelling the production of documents and other evidence and the attendance of reluctant witnesses; *consistently recognizes and enforces, in accordance with the terms of widely accepted international conventions, international arbitral awards when rendered*; insists on principled restraint in establishing grounds for reviewing and setting aside international arbitration awards; and so on."

ADF Group at p. 5 ¶ 10 (emphasis added).

23. 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. In another NAFTA case, *Metalclad Corp. v. Mexico,* the Canadian government argued that "[g]iven the characteristics of NAFTA Chapter Eleven dispute settlement, and applying the pragmatic and functional approach, it is clear that in interpreting NAFTA, Chapter Eleven Tribunals *should not attract extensive judicial deference and should not be protected by a*

high standard of judicial review." Outline of Argument of Intervenor Attorney General of Canada, *Metalclad* at p. 10 ¶ 30 (emphasis added).[1]

24. In contrast, the United States enforces the terms of the New York Convention strictly and neutrally. *Belize Social Development Ltd. v. Belize*, 668 F.3d 724 (D.C. Cir. 2012) (attached as CLA-10) (finding that lower court exceeded its discretion in staying execution of arbitral award absent a finding that an enumerated exception to enforcement specified in the New York Convention applied, and remanding).

25. The later *UPS* Tribunal was "troubled by" Canada's argument in *Metalclad*, and found that such an argument weighed in favor of selecting the United States as the place of arbitration. *UPS* at pp. 4-5, 8 ¶¶ 8-11, 16 (noting that "the attitude of the Canadian government" made the factor "weigh slightly in [the claimant's] favour"). DIBC should not be placed at risk that a Canadian court may agree with the Canadian government that a decision of this Tribunal "*should not attract extensive judicial deference and should not be protected by a high standard of judicial review*." Outline of Argument of Intervenor Attorney General of Canada, *Metalclad* at p. 10 ¶ 30 (emphasis added).

26. Another Tribunal, on a motion to change the place of arbitration, similarly reasoned that, had it known of the Canadian government's argument in *Metalclad* at the time the Tribunal was originally choosing the place of arbitration, it may well have chosen another forum for the arbitration, because "Canada's arguments before its courts are aimed at winning the day,

[1] While this argument was not accepted by the Canadian court in the *Metalclad* case, it might have a higher chance of being accepted in a case in which the Canadian government is the principal defendant (in *Metalclad*, Mexico was the defendant), and in which the claimants are American businesses that have been the target of discriminatory conduct by the Canadian government and negative press by the Canadian media. In any event, as shown below, the Canadian government's position in *Metalclad* has been noted by subsequent tribunals in deciding whether Canada is an appropriate place of arbitration.

and a Chapter 11 tribunal has no way of knowing in advance whether or not that day will come." Ruling Concerning the Investor's Motion to Change the Place of Arbitration, *Pope & Talbot, Inc. v. Canada* (Mar. 14, 2002) (attached as CLA-11) at pp. 7-9 ¶¶ 17-20. Thus, there is ample basis for this Tribunal to conclude that Canadian courts are less likely than United States courts to give appropriate weight to the Tribunal's decision. That in turn makes the United States more suitable as a place of arbitration.

F. THE REMAINING UNCITRAL FACTORS ARE EITHER IRRELEVANT OR WEIGH IN FAVOR OF THE UNITED STATES.

27. UNCITRAL's Notes on Organizing Arbitral Proceedings also includes the "location of the subject-matter in dispute and proximity of evidence" as a factor for a tribunal to consider in selecting a place of arbitration. UNCITRAL Notes at p. 10 ¶ 22. This factor also weighs in favor of the United States as the place of arbitration.[2]

28. The location of the "subject matter in dispute" in this matter is in both countries, as this arbitration addresses existing and proposed bridges connecting Detroit, Michigan to Windsor, Ontario and actions taken by Canada with respect to those bridges in both countries. As a result, the "location of the subject matter" is not a serious consideration here.[3]

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[2] The remaining factors listed by the UNCITRAL Notes include: 1) "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"; 2) the "convenience of the parties and the arbitrators, including the travel distances"; and 3) "availability of and cost of support services needed." UNCITRAL Notes at 10 ¶ 22. These factors do not weigh in favor of either Canada or the United States as the place of arbitration in this matter. Both the United States and Canada are parties to NAFTA, and the ability of the Tribunal to select different locations for hearings and other physical proceedings eliminates any concern regarding the convenience of the parties and arbitrators or the availability and cost of support services.

[3] Further, past Tribunals have noted that the "location of the subject matter" does not weigh heavily in the context of NAFTA arbitration. *UPS* at p. 7 ¶ 15 ("To give this criterion undue weight would lead to the result that the place of arbitration under chapter 11 arbitrations

29. The "proximity of evidence," however, weighs in favor of the United States as the place of arbitration. With respect to 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, DIBC 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 DIBC is currently engaged in litigation against the United States government). As a result, DIBC will likely need to appeal to the courts of the place of arbitration to compel their testimony. This, and a full evidentiary record for the Tribunal, will be more easily achieved if the place of arbitration is in the United States.[4]

IV. CONCLUSION

30. For the foregoing reasons, DIBC respectfully urges the Tribunal to choose either Washington, D.C. or New York, N.Y. as the place of arbitration.

Dated: January 15, 2013

Respectfully,

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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.").

[4] The proximity of documentary evidence does not weigh in favor of either jurisdiction, as all necessary documentary evidence can be made available electronically, no matter its place of origin. *Merrill & Ring* at p. 7 ¶ 28 ("the Tribunal does not believe that this is a crucial factor in the age of electronic communications and availability of records").

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