

**UNDER THE UNCITRAL ARBITRATION RULES AND
THE NORTH AMERICAN FREE TRADE AGREEMENT**

UNITED PARCEL SERVICE OF AMERICA, INC. ("UPS")

Claimant / Investor

-AND-

GOVERNMENT OF CANADA ("Canada")

Respondent / Party

**INVESTOR'S SUBMISSION
ON
PLACE OF ARBITRATION**

PART ONE: INTRODUCTION AND STATEMENT OF ISSUE

1. The Investor makes this submission pursuant to *Procedural Decision No. 1*.

2. NAFTA Article 1130 provides:

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:

- (a) the ICSID Additional Facility Rules if the arbitration is under those Rules or the ICSID Convention; or
- (b) the UNCITRAL Arbitration Rules if the arbitration is under those rules.

3. This arbitration is being conducted under the UNCITRAL Arbitration Rules. Article 16 of those Rules provides:

- 1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.
- 2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.
- 3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.
- 4. The award shall be made at the place of arbitration.

4. The disputing parties do not agree on the place of arbitration. In its letter of March 16, 2001, Canada submitted that the place of arbitration should be in Canada. The Investor submitted in its letter of March 22, 2001 that the place of arbitration should be the United States and not Canada, and suggested Washington D.C., Boston, MA or San Francisco, CA. It appears that the disputing parties do agree that the place of arbitration should not be Mexico, given that the language of this arbitration is English and the necessary translation into Spanish in the event of judicial review under Mexican arbitration law would be unduly inconvenient and costly to the disputing parties.

5. The Investor would also agree to hold this arbitration in a non-NAFTA state that is a party to the *New York Convention* where the English language is an official language,

such as the United Kingdom.

PART TWO: ARGUMENT

6. The Investor submits that the arbitration should not be held in Canada, nor should the *lex arbitri* be the arbitral law of Canada. The relevant circumstances of this arbitration support the conclusion that the place of arbitration be a location in the United States of America. The Investor makes this submission for the following reasons:
- A. the place of arbitration determines the *lex arbitri*;
 - B. adopting Canadian arbitral law as the *lex arbitri* would place the Investor in a position of inequality;
 - C. Canada's law of arbitral procedure is not suitable for this arbitration;
 - D. the circumstances of the arbitration and the balance of convenience favour the United States as the place of arbitration; and
 - E. it would be inappropriate for the Tribunal to hold hearings in Canada.
- A. *The Place of Arbitration Determines the Lex Arbitri*
7. Under the UNCITRAL Arbitration Rules, arbitral awards are made at the place of arbitration as determined by the disputing parties or the Tribunal.¹ The place of arbitration thus determines what arbitral law the arbitration will be subject to and can govern the nature and scope of judicial review of any award.
8. The traditional view is that the arbitral law of the place of arbitration, the *lex loci arbitri*, is the *lex arbitri*. This is also referred to as the "seat" theory, which asserts that arbitral proceedings are governed by the law of the place in which the arbitration is held.² If the disputing parties cannot agree on the *lex arbitri* or the place of arbitration, then the key question for this Tribunal is - what should the *lex arbitri* be? Questions of convenience and cost are also relevant, but relate more directly to the physical location of the Tribunal hearings, rather than the question of the most appropriate domestic arbitral law to be used as the *lex arbitri*.

¹ UNCITRAL Arbitration Rules Article 16(4) provides: "The Award shall be made at the place of arbitration." It is also relevant that under Canada's arbitration law, which is based almost entirely on the UNCITRAL Model law, states that "The provisions of this Code, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in Canada."; see Article 1(2), *Commercial Arbitration Code*, Schedule 1 of the *Canada Commercial Arbitration Act*, R.S., 1985, c.17 (2nd Supp.).

² Collier, Lowe, *The Settlement of Disputes in International Law* (1999) at 231. The less orthodox view of the question of the *lex arbitri* is found in what has been termed as the "delocalisation" approach. In this approach, the *lex arbitri* would be that of some place other than the place of arbitration.

9. The NAFTA constitutes the arbitration agreement in this arbitration. NAFTA Article 1131 establishes that the applicable law for Chapter 11 arbitrations is the NAFTA agreement and international law. The NAFTA does not provide direct guidance as to the *lex arbitri*.
10. Indeed, the only guidance given is contained in NAFTA Article 1130 and UNCITRAL Arbitration Rules Article 16 which provide that Tribunals should make any decision on place of arbitration "having regard to the circumstances of the arbitration."
- B. Adopting Canadian Arbitral Law As The Lex Arbitri Would Place The Investor In A Position Of Inequality**
11. Canada has suggested that the place of arbitration should be determined in accordance with the factors outlined in the UNCITRAL Notes on Organizing Arbitral Proceedings ("UNCITRAL Notes"). The UNCITRAL Notes are referenced by the *Ethyl* Tribunal in its decision on Place of Arbitration. That Tribunal noted that the "circumstances of the arbitration" would include those elements offered for consideration in paragraph 22 of the UNCITRAL Notes, and "without any individual circumstance being accorded paramount weight irrespective of its comparative merits."³
12. The UNCITRAL Notes are helpful in setting out factors to be considered in determining the place of arbitration. These factors, however, are not exhaustive, and are mainly relevant to the convenience of the physical location of the arbitration, as opposed to the selection of the *lex arbitri*. Paragraph 22 of the UNCITRAL Notes provides as follows:
- 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.⁴
13. Of course, the circumstances that the UNCITRAL Notes address are not the only relevant circumstances that this Tribunal need address. This Tribunal must address the equality of the disputing parties as provided for under UNCITRAL Arbitration Rules Article 15 and

³ *Ethyl Corp. and Canada*, Decision on Place of Arbitration, November 28, 1997, at 3.

⁴ Paragraph 2 of the UNCITRAL Notes confirms the non-binding nature of the Notes. It states that: "No legal requirement binding on the arbitrators or the parties is imposed by the Notes. The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them."

NAFTA Article 1115. Compliance with the UNCITRAL Arbitration Rules and the NAFTA is compulsory for this Tribunal.

14. The Investor submits that the *lex arbitri* of this arbitration should not be Canadian law because the Investor can never be placed in a position of equality with the Government of Canada in an arbitration controlled by Canadian law. In an arbitration held in Canada, the Investor is in a position of disadvantage that would not reflect the principle of equality essential to a NAFTA Chapter 11 arbitration.⁵ Put a different way, Canadian law on arbitral procedure is not suitable for the present dispute.
15. The Tribunal should determine procedural matters before it in a way that enhances, rather than undermines, the principle of equality. There is an inherent imbalance when an Investor brings an international claim against a state, for instance with respect to the production and possession of relevant evidence. This imbalance has been recognized by other NAFTA Chapter 11 Tribunals.
16. For example, the NAFTA Party is usually the disputing party that possesses the knowledge and information related to the implementation of the measures in question. A NAFTA Party should not be able to rely on local laws it established for its own benefit to avoid disclosure of relevant documents related to critical elements at issue in the arbitral proceeding, to the prejudice of the Claimant. Yet this is just the position that Canada has taken in other arbitrations where the place of arbitration has been Canada, despite the very strong criticism of that position by other arbitral tribunals.
17. In both the *S.D. Myers* and *Pope & Talbot* arbitrations, document requests were made to Canada for information relating to the claim. Canada refused to produce a number of documents to the tribunals and the investors in both arbitrations, asserting that the documents contained cabinet confidences. Canada relied on section 39 of the *Canada Evidence Act* which permits the Clerk of the Privy Council, the Canadian government's most senior civil servant, to certify in writing that a document is a cabinet confidence and, accordingly, that disclosure "shall be refused without examination or hearing of the information by the court, person or body"⁶.

⁵UNCITRAL Arbitration Rules Article 15(1) states that: "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given full opportunity of presenting its case."

⁶ While the *S.D. Myers* Tribunal did not make an order for the refused documents to be produced, it did identify the problem related to the *lex arbitri* as *lex loci arbitri* in its enumeration of a number "complicating factors" in the circumstances of that case, where Canada was invoking its domestic law in the context of an international arbitration where the seat of the arbitration was Toronto, Canada.

18. Canada adopted a similar approach in *Pope & Talbot*, where the place of arbitration was Montreal, Quebec. The *Pope & Talbot* Tribunal denied that a domestic law could determine the production of evidence in an international arbitration. The *Pope & Talbot* panel did not agree with Canada's refusal to produce documents, nor that section 39 of the *Canada Evidence Act* applied to a NAFTA chapter arbitration with respect to cabinet confidentiality, and ordered Canada to provide descriptions of the documents in question. Failing the provision of descriptions of the documents or their production, the Tribunal indicated it would be prepared to draw adverse inferences in accordance with UNCITRAL Arbitration Rules Article 28(3). The Tribunal recognized in its decision the principle of equality in NAFTA arbitrations and concluded:

In the specific context of a NAFTA arbitration where the parties have agreed to operate by UNCITRAL Rules, it is an overriding principle (Article 15) that the parties be treated with equality. The other NAFTA Parties do not, so far as the Tribunal has been made aware, have domestic law that would permit or require them to withhold documents from Chapter 11 tribunals without any justification beyond a simple certification that they are some kind of state secret. In these circumstances, Canada, if it could simply rely on s. 39 might be in an unfairly advantaged position under Chapter 11 by comparison with the United States or Mexico.⁷

19. The *Pope & Talbot* Tribunal addressed this issue again in its recent *Award on the Merits of Phase 2*⁸ noting that during the document production process, Canada objected to producing cabinet confidential documents, and the Tribunal ruled that the *Canada Evidence Act* by its terms did not apply to NAFTA Chapter 11. Canada refused to comply with the Tribunal order and did not produce or even identify the documents so that the Tribunal could "make a reasoned judgment as to their relevance and materiality." The Tribunal stated in its *Award* that:

... The Tribunal deplores the decision of Canada in this matter. As the Tribunal noted in its decision on this matter dated September 6, 2000, Canada's position may well be a derogation from the "overriding principle" found in Article 15 of the UNCITRAL Arbitration Rules, under which these proceedings have been conducted, that all parties should be treated with equality. Moreover, Article 1115 of the NAFTA declares that there shall be "equal treatment among investors of the Parties." As Canada's refusal to disclose or identify documents in these circumstances is at variance with the practice of other NAFTA Parties, at least the United States, that refusal could well result in a denial of equality of treatment of investors and investments of the Parties bringing claims under Chapter 11.

20. Thus, it is the Investor's submission that it is unfair to the Investor, and treats the Investor unequally, to have any award of the Tribunal in the Investor's favour subject to review by a Canadian court applying Canadian law established (and subject to variation) under the

⁷*Pope & Talbot and Canada*, Decision By Tribunal, September 6, 2000 at para.1.5.

⁸ April 10, 2001, at para. 193.

Government of Canada, and held in a jurisdiction where Canada has demonstrated it will rely on local laws established for its own benefit that treat the Investor unequally. If the arbitration is held in the United States, the disputing parties would be treated with equality, as neither Canada nor the Investor would have any ability to control the laws under which the review would occur.

21. It is inevitable that the production of information in this arbitration will become an important issue just as it has been in previous NAFTA Chapter 11 arbitrations. Accordingly, to avoid the result in which the Investor is placed at a clear juridical disadvantage in the arbitration because it is forced to be subject to municipal evidence laws of Canada, the *lex arbitri* of the arbitration should not be the arbitral law of Canada. The preference of the Investor is that the *lex arbitri* be the arbitral law of the United States.
- C. Canada's Law of Arbitral Procedure is Not Suitable for this Arbitration**
22. The notes to the UNCITRAL Rules expressly identify the "suitability of the law on arbitral procedure" as a factor to be considered in determining the place of arbitration. It is submitted that a "suitable" law is one which supports and reinforces the parties' choice to arbitrate their dispute in a legal environment that provides clear, predictable and limited procedures for challenging an award, along with an effective mechanism for recognition and enforcement of an award. The chosen place of arbitration should provide certainty, not uncertainty, in any review of arbitral awards, and ought strictly to constrain that review.
 23. The Investor submits that Canada is not suitable as the place of arbitration in this matter and its selection should be rejected. Indeed, Canada has itself submitted in recent domestic litigation in Canada arising out of NAFTA Chapter 11 awards that there is uncertainty as to the approach to be taken to the review of Chapter 11 Arbitral Awards, and that review of those decisions is a matter of "first impression" for Canadian courts. This does not demonstrate an environment that is supportive of arbitration, rather it demonstrates an environment that creates uncertainty in arbitration with the prospect of a myriad of legal challenges to Tribunal awards.
 24. Since Canadian arbitral law is generally based on the UNCITRAL Model Law, one might have thought it could generally be said to be supportive of arbitration. Recent examples, and the position taken by Canada in Chapter 11 judicial reviews suggest this is now not the case.
 25. For instance, in Canada's intervention before the Supreme Court of British Columbia in the judicial review of the *Final Award* in the *Metalclad and Mexico* NAFTA Chapter 11

arbitration,⁹ Canada submitted that:

- a. The standard of review to be applied to a NAFTA Chapter 11 arbitration was unknown and was a matter of first impression, but that any of five different approaches might be adopted;
- b. The leading Canadian authorities supporting deference to arbitral tribunals, such as *Quintette Coal Ltd. v. Nippon Steel Corp.*,¹⁰ ought to be rejected; and
- c. Awards of Chapter Eleven tribunals "are not supposed to be worthy of judicial deference and not supposed to be protected by a high standard of review", and that Chapter Eleven tribunals are neither expert nor specialized tribunals.

26. Canada concludes its submissions this way:

Given 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.¹¹

27. Canada advocates a standard of review of NAFTA investor-state Tribunal awards that would effectively allow appeals of these decisions. That is far in excess of what was ever intended under the UNCITRAL Model Law, and would accord only minimal deference to the Tribunal, despite the consensual nature of the arbitral process and the choice of the parties to arbitrate. Members of NAFTA investor-state Tribunals are selected by the disputing parties for their expertise in interpreting and applying international law. A domestic court does not have this expertise. Accordingly, this international Tribunal should be careful to select a place of arbitration where domestic supervisory law will be appropriately deferential to the international expertise that the disputing parties have acknowledged through their consents to arbitration.
28. In its domestic court application in the recent *Canada v. S.D. Myers, Inc.* judicial review, Canada has also sought review on grounds which are well in excess of the usual jurisdictional challenge allowed under Canada's UNCITRAL Model Law based

⁹ *Mexico v. Metalclad*, Outline of Argument of Intervenor Attorney General of Canada, February 16, 2001.

¹⁰ (1990), 50 B.C.L.R. (2d) 207 (B.C.C.A.), leave to appeal refused by S.C.C. on 13 December 1990. Canada agrees in its intervention that such jurisprudence gives considerable deference to arbitral tribunals governed by UNCITRAL Model Law based provisions such as the *Canadian Commercial Code*.

¹¹ At para. 30.

arbitration law, the *Canadian Commercial Code* (the "Code").¹² This Tribunal should select as a place of arbitration a jurisdiction that is going to limit rather than promote the review of arbitral awards.

29. The United States is such a jurisdiction. Under American law, the *Federal Arbitration Act*¹³ would govern any judicial review of the Tribunal's award. A review is only available under that statute:

- (1) Where the award was procured by corruption, fraud or undue means;
- (2) Where there was evident partiality or corruption in the arbitrators, or either of them;
- (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

30. The American courts have shown clear deference to arbitral awards. In *First Options of Chicago, Inc. v. Kaplan*¹⁴, for instance, the US Supreme Court said:

...where the party has agreed to arbitrate, he or she, in effect, has relinquished much of that right's practical value. The party still can ask a court to review the arbitrator's decision, but the court will set that decision aside only in very unusual circumstances...that is to say, the court should give considerable leeway to the arbitrator, setting aside his or her decision only in certain narrow circumstances.

Accordingly, there is a clear juridical reason for preferring the United States as a place of arbitration.

D. The Balance of Convenience Favours the United States as the Place of Arbitration

31. The other circumstances set out under the UNCITRAL Notes address balance of convenience issues related mainly to the appropriate physical location at which the arbitration should be held, rather than addressing the issues as to what should be the appropriate *lex arbitri* of the arbitration. On balance these factors do not weigh heavily in favour of either party, but it is the Investor's submission that the balance of convenience supports Washington, DC as the place of arbitration.

¹² Schedule 1 of the *Canada Commercial Arbitration Act*, R.S., 1985, c.17 (2nd Supp.).

¹³ 9 U.S.C. § 1-16 (1994)

¹⁴ 514 U.S. 938 (1995); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.* 473 U.S. 614 (1985)

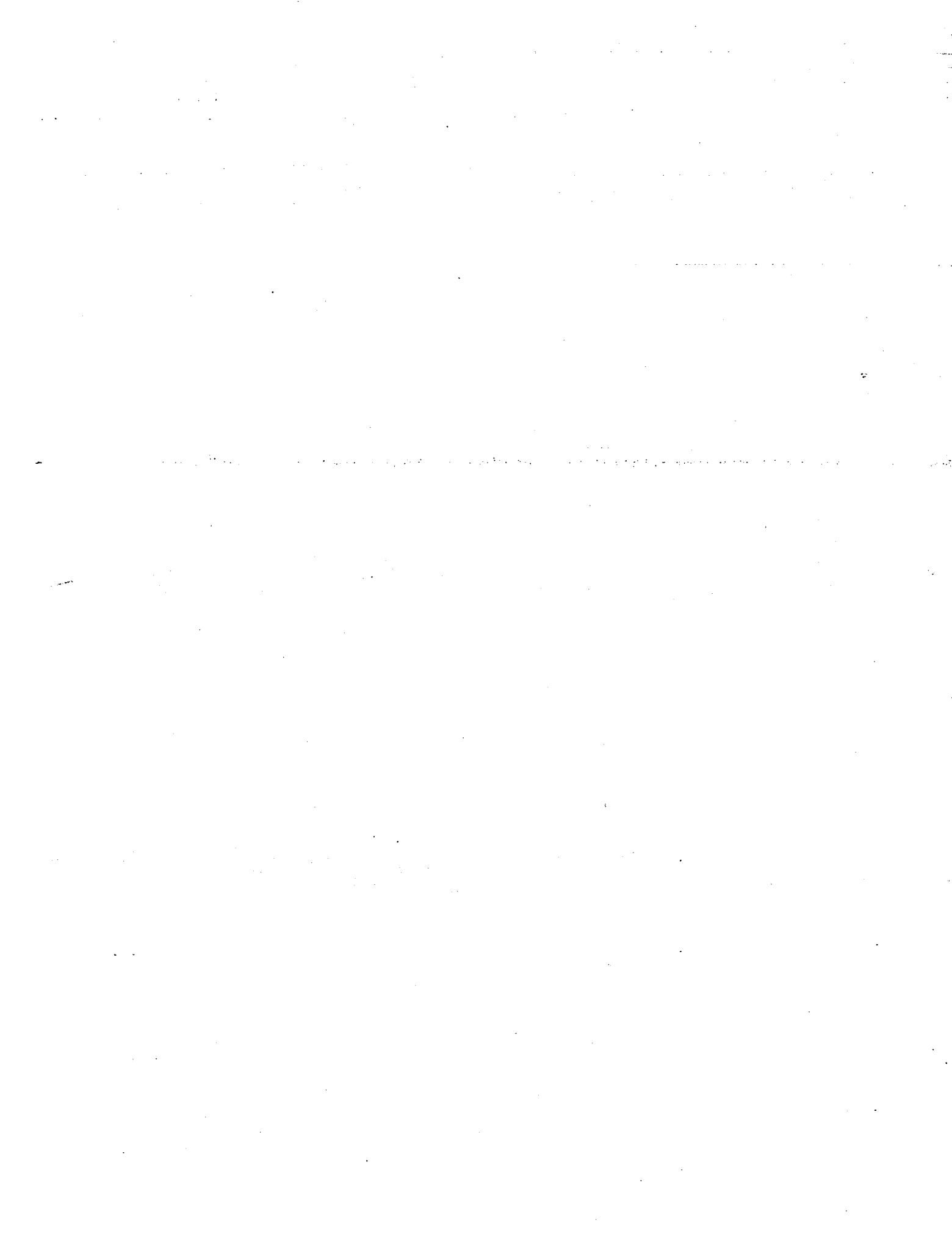
32. Criterion "c" through "e" in the UNCITRAL Notes relate to:

- (c) the location of the parties and the arbitrators, including travel distances,
- (d) availability and cost of support services needed, and
- (e) the location of the subject-matter in dispute and proximity of evidence.

The Investor addresses each of these in turn as follows:

33. With respect to criteria (c) and (d), the objective is to provide a cost effective location taking into account the locations and travel arrangements necessary for the parties and members of the Tribunal. The Investor is a US based company with its head office in Atlanta, Georgia. It is represented by counsel located in Toronto, Vancouver, Washington, DC and Atlanta, Georgia. A US location, such as Washington D.C., Boston, MA or San Francisco, CA are all acceptable to the Investor and its legal counsel.
34. Two of the Tribunal members are located on the east coast of North America while the Chair of the Tribunal is located in New Zealand. A location in Washington, DC or Boston, MA would accommodate two members of the Tribunal, requiring one or both to travel. The Investor has proposed San Francisco, CA as a reasonable compromise to accommodate the travel distance for Sir Kenneth Keith.
35. With respect to support services, any of the locations suggested by the parties could provide the necessary services, so this should not be a determining circumstance. However, the Tribunal has proposed that the administrative services of the ICSID be used. If the ICSID is appointed to provide these services, this would be a strong reason in favour of Washington as a convenient location for the arbitration.
36. In addition, NAFTA Article 1120 permits the parties to use the ICSID, reflecting the three NAFTA governments intention that they were amenable to Washington D.C. being a neutral place of arbitration as evidenced by NAFTA Article 1130. This was recognized by the *Ethyl* Tribunal in its Decision Regarding the Place of Arbitration which stated:
- ...NAFTA's Chapter 11 clearly contemplates the possibility of disputes under it against any NAFTA Party being arbitrated in Washington, DC, since Article 1120 allows a disputing investor to choose arbitration...under the ICSID convention, Article 62 of which provides that in the absence of agreement of the arbitrating parties "arbitration proceedings shall be held at the seat of the Centre" i.e., Washington DC.¹⁵
37. The last criterion of the UNCITRAL Notes - "(e) location of the subject-matter in dispute and proximity of evidence" - could by definition nearly always favour the respondent NAFTA Party because the measures at issue relate to the respondent in all cases, as would

¹⁵*Ethyl Corporation and the Government of Canada, Decision Regarding the Place of Arbitration, November 28, 1997 at 3-4.*



many factual issues relating to the NAFTA Party's breach of its NAFTA Chapter 11 obligations. Accordingly, to give this criterion undue weight would lead to the result that the place of arbitration in NAFTA Chapter 11 arbitrations will always be in the territory of the respondent NAFTA Party. This is clearly not the intention of the NAFTA Parties as the NAFTA text does not provide for this. This is in contrast to NAFTA Chapter 20 (Rule 22 of the Model Rules of Procedure for NAFTA) which explicitly provides that the place of arbitration in State-to-State NAFTA arbitrations be the capital of the respondent NAFTA Party.¹⁶

38. In this case, the state enterprise at issue is the Canada Post Corporation which is located across Canada and operates around the world, including in the US and Mexico. Both the Investor and Canada Post Corporation are active in the Canadian and international express delivery services industry. The cross-border and international nature of the breaches of Canada, and Canada Post Corporation, supports the contention that the location of the subject matter of this dispute is not restricted to Canada and is fundamentally international in nature.
39. With respect to the proximity of the evidence in this case, although it is difficult to assess this issue at this early stage of the arbitration, it can be said with some certainty that this arbitration will be largely based on documentation and expert evidence. With modern information technology, the handling of documentation should not be an issue in this arbitration, in particular in light of the fact that both disputing parties, and Canada Post Corporation, have a high degree of expertise and sophistication in the handling of information.
40. With respect to the location of witnesses and experts, there is no clear balance of convenience. Witnesses will, at minimum, be from throughout North America, and likely Europe. There is thus neither advantage nor disadvantage to either disputing party if the arbitration is located in either the US or Canada.

¹⁶ The *Ethyl* Tribunal's decision supports this position. See *Ethyl Corporation and the Government of Canada*, Decision Regarding the Place of Arbitration, November 28, 1997, at 3.

E. The Tribunal Should Not Hold Hearings In Canada

41. The Investor submits that the law of the arbitration, the *lex arbitri*, should not be the arbitration laws of Canada, nor should the Tribunal hold any hearings or make Tribunal decisions in Canada. This distinction between the physical location of the arbitration hearings, and the *lex arbitri*, is important because it is possible that merely if a hearing is located in Canada, a Canadian court may assume jurisdiction to decide certain matters related to decisions of the Tribunal. For example, under the *Canadian Commercial Code*, Article 1(2) provides that:

The provisions of this *Code*, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in *Canada*.

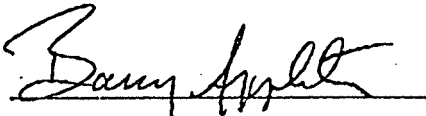
42. Article 8 of the *Code* resolves the conflict in favour of arbitration in the situation in which there is a domestic court action and a cotemporaneous arbitration. Article 9 provides that a domestic court may grant interim measures of protection if requested by a party to an arbitration. Articles 35 and 36 provides for the recognition and enforcement of arbitral awards in Canada. The Investor submits that there is a risk that this Tribunal may be subject to the jurisdiction of Canadian courts with respect to interim measures of protection by merely locating tribunal hearings in Canada. It would not be appropriate for the Tribunal to put itself in the position of being subject to such measures.

PART THREE: RELIEF SOUGHT

43. The Investor respectfully submits that this Tribunal designate the *lex arbitri* of this arbitration be the arbitral law of the United States and not Canada. The Investor proposes as possible venues for the place of arbitration: Boston, MA, Washington, D.C. or San Francisco, CA.

All of which is respectfully submitted.

Submitted this 30th day of April, 2001



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