AN ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT

B E T W E E N

UNITED PARCEL SERVICE OF AMERICA INC

AND

GOVERNMENT OF CANADA

DECISION OF THE TRIBUNAL ON THE PLACE OF ARBITRATION

THE TRIBUNAL:

Dean Ronald A Cass
L Yves Fortier CC, QC
Justice Kenneth Keith (Chairman)

17 October 2001

1. The parties do not agree on the place where the arbitration is to be held. In accordance with the Tribunal's procedural decision No. 1 they have made submissions on the matter. The Investor submits that the place of the arbitration should be in the United States and proposes Washington DC, Boston MA or San Francisco CA, while Canada submits that the hearing should be in Canada and proposes Ottawa or alternatively Toronto, Montreal or Vancouver.

2. Under article 1130 of the (NAFTA), unless the disputing parties agree otherwise, the Tribunal shall hold the arbitration in the territory of a Party that is a party to the New York Convention on the execution of foreign arbitral awards (as are Canada, Mexico and the United States), selected in this case in accordance with the UNCITRAL arbitration rules. Article 16 of those rules reads:

> 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 arbitraltribunal 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.

3. That provision makes it plain that there is a difference between the "place where the arbitration is to be held" and the particular places at which different aspects of the work of the Tribunal may be carried out. The provision also does not in its terms purport to regulate the law of the arbitration. In a general way, article 1131 of NAFTA does that by directing the Tribunal to decide the issues in dispute in accordance with the Agreement and applicable rules of international law. The Agreement in its own terms and by reference to the UNCITRAL rules regulates particular aspects of matters such as evidence, an issue which the Investor raises in relation to the present matter.

4. In particular UPS contends that there would be inequality were the place of the arbitration to be in Canada because of the provisions of the Canadian Evidence Act which prevent the disclosure of confidences of the Canadian cabinet. We do not consider that this matter is significant. As Canada points out, any such claim by Canada might be made whatever the place of the arbitration. As mentioned, such a claim would have to be assessed not under the law of Canada but under the law governing the Tribunal. The issue is in any event hypothetical at present.

5. The UPS submission also calls attention to the critical principle of the equal treatment of the parties, a principle which is emphasised as well by NAFTA and by the UNCITRAL rules.

6. On more specific matters, both parties referred us to the UNCITRAL notes on organising arbitral proceedings. These notes were finalised by the United Nations Commission on International Trade Law in 1996 following extensive consultations, including discussions at several meetings of arbitration practitioners. The purpose of the notes is to assist arbitration practitioners. Although the notes are not binding and an arbitral tribunal remains free to use the notes as it sees fit and is not required to give reasons for disregarding them, other chapter 11 Tribunals have found them a helpful framework for consideration. We also find them to be of value. Paragraph 22 of the notes says this:

> 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 of and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence.

7. We consider those five matters in turn.

A. Suitability of the law on arbitral procedure of the place of arbitration

8. UPS contends that the position of the Canadian government in litigation relating to another NAFTA arbitration (the *Metalclad Corporation* v *Mexico* case) and the position of the Canadian courts provide insufficient deference to the rulings of chapter 11 Tribunals. It calls attention in particular to the fact that in argument in that case Canada submitted that the leading Canadian authorities supporting deference to arbitral tribunals ought to be rejected and that awards of chapter 11 Tribunals "are not supposed to be worthy of judicial deference and are not supposed to be protected by a high standard of review". The submission continued that chapter 11 Tribunals are neither expert nor specialised Tribunals. The Canadian submission concluded in this way:

> Given the characteristics of NAFTA chapter 11 dispute settlement, and applying the pragmatic and functional approach, it is clear that in interpreting NAFTA, chapter 11 Tribunals should not attract extensive judicial deference and should not be protected by a high standard of judicial review.

9. UPS's concern was that the standard of review proposed would effectively allow appeals against chapter 11 decisions. We would note however that the British Columbia Supreme Court does not appear to have adopted the position urged on it by the Government : *United Mexican States* v *Metalclad Corporation* 2001 BCSC 664, Tysoe J, 2 May 2001. It said that it was to take its law from the provisions of the International Commercial Arbitration Act RSBC ch 233, s34 of which essentially incorporates the limited grounds for review included in the UNCITRAL model law, a model law now adopted in many jurisdictions and commonly seen as requiring real deference by reviewing courts. The Court quoted this passage from a judgment of the British Columbia Court of Appeal :

> It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for

> predictability in the resolution of disputes" spoken of by Blackmun J. [in *Mitsubishi Motors Corp*. v. *Soler Chrysler-Plymouth Inc*., 473 U.S. 614 (1985)] are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. *Quintette Coal Ltd* v *Nippon Steel Corp* [1991] Vol 1 WWR 219, 229 (BCCA)

10. Further, as Canada submits, the Tribunals in two earlier chapter 11 cases have concluded that both countries possess equally suitable laws on arbitral procedure; *Ethyl Corporation* v *Government of Canada*, decision of 28 November 1997, pp 5-6 (38 International Legal Materials 704); and *Methanex Corporation* v *United States of America*, reasons of 31 December 2000, para 26. Moreover, the grounds for review, as available under Canadian law, are applicable not only if the place of the arbitration is in Canada but also, wherever the place of arbitration may be, if any question of recognition or enforcement arises in a Canadian court. But the place of arbitration might well be seen as the more appropriate forum for such proceedings.

11. The Tribunal is troubled by Canada's submission on this issue in the *Metalclad* case.

B. The existence of a treaty on 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.

12. Since both Canada and United States are parties to the New York Convention this factor is neutral.

C. Convenience of the Parties and the arbitrators including travel distances

13. We agree with earlier chapter 11 Tribunals (such as that in the *Methanex* case para 28) that this factor includes not just the Parties but also their counsel because their extra travelling time and expenses will ultimately be borne as costs by the disputing Parties. Canada emphasises that the head offices of the Canadian agencies whose measures are in issue are in Ottawa as are Canada's counsel. While UPS's head office is in Atlanta, Georgia, its Investment, UPS Canada, has its head office in Mississauga, Ontario, a city adjoining Toronto. Counsel for the Investor is also located in Toronto. The balance of convenience therefore strongly favours Canada over the United States. UPS points out that it is a United States based company and is represented by counsel located in Toronto, Vancouver, Washington DC and Atlanta, Georgia. A United States location such as Washington DC, Boston, MA, or San Francisco, CA are all acceptable to it and its legal counsel. The convenience of the Tribunal members, it says, does not dictate any particular choice. On that final matter Canada is essentially in agreement.

D. Availability and cost of support services

14. UPS says that any of the locations suggested could provide the support services. That should not be a determining circumstance. It calls attention to the fact that the Tribunal has however proposed that the administrative services of ICSID be used and if that decision were made this would be a strong reason in favour of Washington as a convenient location for the arbitration. Canada responds to that point by recalling that, when the Tribunal suggested to the parties that they consider ICSID as the body to provide the administrative services, the Tribunal made it clear that that suggestion was without prejudice to the determination of the place of the arbitration. UPS does however call attention to the fact that article 1120 of NAFTA permits the parties to use ICSID, reflecting the intention of the three NAFTA governments that they were amenable to Washington DC being a neutral place of arbitration. UPS says that this was recognised by the *Ethyl* Tribunal (para 10 above) in its decision.

E. Location of the subject matter in dispute and the proximity of the evidence

15. Canada argues that this factor weighs very heavily in favour of Canada and in particular Ottawa. The location of the evidence relevant to the subject matter in dispute, it says, is not subject to serious debate. All the records relating to the impugned measures and the individual decision-makers implicated by the Investor in its claim are in Canada, most being based in Ottawa. Further, the subject matter in dispute is located in Canada. UPS alleges that measures taken in Canada by the CCRA and other Federal and provincial governmental agencies and by Canada Post affecting the UPS Investment in Canada breach Canada's obligations under chapter 11. UPS expresses some concern about this criterion in the context of NAFTA proceedings since, by definition, it could nearly always favour the respondent NAFTA party. The measures at issue will relate to the respondent in all cases, as would many factual issues relating to the NAFTA party alleged to be in breach of its chapter 11 obligations. To give this criterion 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. This is in contrast, UPS points out, to state arbitrations under chapter 20 which are always to be in the capital of the respondent NAFTA party. Canada Post, the state enterprise at issue in this case, is located across Canada and operates around the world, including the United States into Mexico. Both the Investor and Canada Post are active in the Canadian and international delivery services industry. So far as the evidence is concerned, although it is difficult to assess this issue at this early stage in the arbitration, it can be said with some certainty that the 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 particularly given that the disputing parties have a high degree of expertise and sophistication in the handling of information. So far as witnesses and experts are concerned, there is no clear balance of convenience. Witnesses will be from throughout North America and likely from Europe. There is neither advantage nor disadvantage for either disputing party if the arbitration is located in either the United States or Canada.

The Tribunal's assessment

16. Of the factors mentioned so far two are neutral – B and C (although in the usual course travel from New Zealand to the United States is marginally more convenient than it is to Canada); two weigh slightly in UPS's favour (A, because of the attitude of the Canadian government in the *Metalclad* litigation and D because the Tribunal, although without prejudice, has already suggested to the Parties that they consider ICSID as its registry); and another is in Canada's favour (E, but the importance of that factor in the arbitration is not clear at present).

17. Neutrality has been identified as a factor relevant to the place of arbitration (although it is not in the UNCITRAL list), for instance in the *Methanex* decision paras 35-39. Canada addressed it in its submission. That factor is plainly relevant given the broad reference to "the circumstances of the arbitration" in Article 16(1) of the UNCITRAL rules (para 2 above).

18. In one sense a neutral place is not available given that the claimant is a United States corporation and Canada is the respondent and the place of the arbitration is to be in one or other country. It is however relevant that it is Canada's measures that are in issue, even if it has been the place of arbitration in all chapter 11 investment disputes in which it has been the respondent. It is also relevant that Washington DC can be seen as having the neutrality of being the seat of the World Bank and ICSID, rather than the seat of federal government in the United States of America. And UPS's headquarters are in Atlanta, GA.

19. While the matter is finely balanced, the Tribunal considers that the balance does favour the United States of America as the place of arbitration and in particular Washington, DC. The Tribunal so decides.

for the Tribunal
17 October 2001