

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT
DISPUTES**

ICSID CASE No. ARB(AF)/00/1

BETWEEN:

ADF GROUP INC.

INVESTOR

AND

**THE GOVERNMENT OF THE UNITED STATES
OF AMERICA**

PARTY

WRITTEN SUBMISSIONS OF THE INVESTOR

on the issue of the

PLACE OF ARBITRATION

**(Chapter 11 - Section B - Article 1130 of the NAFTA; Schedule C - Chapter IV - Article 20
and Article 21 of the ICSID Arbitration (Additional Facility) Rules)**

I. FACTS

1. On or about July 21st, 2000, ADF Group Inc. (the “Investor”) filed with the International Centre for the Settlement of Investment Disputes (“ICSID”) a Notice of Arbitration (“Notice”) pursuant to Articles 2 and 3 of the *Arbitration (Additional Facility) Rules* (“ICSID-AFR”) of the International Centre for Settlement of Investment Disputes and Articles 1116, 1117, 1120(1)(b) and 1137(1)(b) of Chapter Eleven of *The North American Free Trade Agreement* (“NAFTA”)¹;
2. The parties (“Parties”) to the arbitration (the “Case”) are the Investor and the Government of the United States of America (“United States”);
3. The Investor’s claim against the United States under Chapter Eleven of NAFTA, on its own behalf and on behalf of ADF International Inc. (“Investment”), is more fully related and explained in the Notice, incorporated herein as if fully recited at length;
4. The Investor is a steel fabricator with its head office and principal place of business in Terrebonne, Quebec. The Investment is located in Coral Springs, Florida;
5. On or about August 25th, 2000, the Acting Secretary-General of ICSID, Antonio R. Parra, notified the Parties that he had approved access to the Additional Facility of ICSID and that he had registered the Notice pursuant to the ICSID-AFR. A Certificate of Registration was issued the same day to the Parties by the Acting Secretary-General;
6. On or about September 12th, 2000, ICSID informed the Parties that the Investor’s appointed arbitrator, Professor Armand De Mestral, had accepted his appointment as an arbitrator in the Case;
7. On or about November 6th, 2000, ICSID informed the Parties that the United States’ appointed arbitrator, Ms. Carolyn B. Lamm, had accepted her appointment as an arbitrator in the Case;
8. On or about January 11th, 2001, ICSID informed the Parties that Judge Florentino P. Feliciano had accepted his appointment as President of the Arbitral Tribunal (“Tribunal”) in the Case;
9. On or about February 3rd, 2001, the Tribunal held its First Session;
10. On the agenda of the First Session was the issue of where the arbitration in the Case should take place, as per the requirements of Chapter Eleven - Section B - Article 1130 of NAFTA and Schedule C - Chapter IV - Article 20 and Article 21 of the ICSID-AFR;
11. Despite discussions between the Parties, the Parties have been unable to agree on the location of the place of arbitration;

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North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States of America, December 17, 1992, Can.T.S., 1994, No. 2 (entered into force January 1, 1994). NAFTA may be obtained on-line at the following web site: <http://www.nafta-sec-alena.org>.

12. Nevertheless, the Parties have agreed that, in light of the impasse, it would be appropriate to have the issue of the proper place of arbitration determined by the Tribunal, after the Parties each had an opportunity to submit a written memorial to the Tribunal, and without oral argument before the Tribunal;

13. These are the written submissions of the Investor on the appropriate place of arbitration;

II. ISSUE BEFORE THE TRIBUNAL AND POSITION OF THE PARTIES

14. While the Parties cannot agree on the place of arbitration, they are in agreement that the place of arbitration should not be located in Mexico;

15. Based on previous negotiations, the Investor understands that the United States intends to request that the place of arbitration be Washington D.C., U.S.A.;

16. The Investor requests that the place of arbitration be Montreal, in the Province of Quebec, Canada;

III. SUBMISSION OF THE INVESTOR

A) Introduction

17. In these submissions, the Investor will first examine the provisions of NAFTA and the ICSID-AFR, as they relate to the determination of the place of arbitration;

18. The Investor will then discuss a set of criteria that may be applied by the Tribunal in the exercise of its discretionary authority to choose the place of arbitration;

19. The Investor will also review how other NAFTA Chapter Eleven tribunals have decided the issue;

20. Finally, the Investor will conclude with an analysis of the relative importance which should be attributed to each relevant criterion in the determination of the place of arbitration in the instant case;

B) Requirements of NAFTA

21. Article 1130 of NAFTA, being the only relevant provision dealing with the “place of arbitration” with respect to proceedings under Chapter Eleven of NAFTA, basically provides that unless the Parties agree otherwise, the place of arbitration must be in the territory of a NAFTA party. Article 1130 states more particularly as follows:

“Article 1130: Place of Arbitration

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.”

[Emphasis is ours]

22. For the purposes of the instant Case, Article 1130 of NAFTA articulates four (4) requirements that will be examined in turn:

- (i) “Unless the disputing parties otherwise agree”;
- (ii) “a Tribunal shall hold an arbitration in the territory of a Party”;
- (iii) “that is a party to the New York Convention”; and
- (iv) “selected in accordance with (...) (a) the ICSID Additional Facility Rules if the arbitration is under those Rules”.

First requirement: (i) “Unless the disputing parties otherwise agree”:

23. The Parties may agree between themselves on a place of arbitration. As this has not occurred, one must therefore proceed to the next requirement;

Second requirement: (ii) “a Tribunal shall hold an arbitration in the territory of a Party”:

24. Since there is no agreement between the Parties, the Tribunal “shall” («effectuera») hold an arbitration “in the territory of a Party”;

25. The parties to NAFTA are Canada, the United States and Mexico;

26. Absent agreement of the Parties, the Tribunal is constrained to choose a place of arbitration that is situated in the territory of one of the parties to NAFTA. That is, the Tribunal must choose a place of arbitration that is situated in Canada, the United States or Mexico;

27. As previously noted, both the Investor and the United States have agreed to request that the place of arbitration not be located in Mexico, if only for reasons dictated by the desire for both Parties to the Case to limit costs;

28. The Investor requests that the place of arbitration be located in Montreal, Province of Quebec, Canada;

29. The Investor understands that the United States intends to request that the place of arbitration be Washington D.C., U.S.A.;

Third requirement: (iii) “that is a party to the New York Convention”:

30. Under Article 1139 of NAFTA (Section C-Definitions of Chapter Eleven), it is provided that for the purposes of Chapter Eleven of NAFTA, “**New York Convention** means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958” (the “1958 New York Convention”);

31. Canada, the United States and Mexico are parties to the 1958 New York Convention (<http://www.uncitral.org/en-index.htm>);

32. Since the Parties have agreed that the place of arbitration should not be located in Mexico, the Investor submits that the place of arbitration may thus either be Canada or the United States;

Fourth requirement: (iv) “selected in accordance with (...) (a) the ICSID Additional Facility Rules if the arbitration is under those Rules”;

33. As the arbitration in the instant Case is governed by the ICSID-AFR (“ICSID” being specifically defined in turn in Article 1139 of NAFTA as the “International Centre for the Settlement of Investment Disputes”), it is to these rules to which one must now turn;

C) Requirements of the ICSID-AFR

34. Articles 20 and 21 of the ICSID-AFR provide as follows:

| CHAPTER IV <u>PLACE OF ARBITRATION</u> | CHAPITRE IV <u>LIEU DE L'ARBITRAGE</u> |
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| <p>Article 20</p> <p><i>Limitation on <u>Choice of Forum</u></i></p> <p>Arbitration proceedings shall be held only in States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards.</p> | <p>Article 20</p> <p><i>Restriction quant au <u>siège du Tribunal</u></i></p> <p>Les instances d'arbitrage ne peuvent se dérouler que dans les États qui sont parties à la Convention des Nations Unies pour la reconnaissance et l'exécution des sentences arbitrales étrangères (1958).</p> |
| <p>Article 21</p> <p><i>Determination of <u>Place of Arbitration</u></i></p> <p>(1) Subject to Article 20 of these Rules the <u>place</u> of arbitration shall be determined by the Arbitral Tribunal after consultation with the parties and the Secretariat.</p> | <p>Article 21</p> <p><i>Détermination du <u>lieu de l'arbitrage</u></i></p> <p>(1) Sous réserve des dispositions de l'article 20 du présent Règlement, le <u>lieu</u> de l'arbitrage est déterminé par le Tribunal arbitral après consultation avec les parties et le Secrétariat.</p> |

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| <p>(2) The Arbitral Tribunal may <u>meet</u> at any place it deems appropriate for the inspection of goods, other property or documents. It may also visit any place connected with the dispute or conduct inquiries there. The parties shall be given sufficient notice to enable them to be present at such inspection or visit.</p> <p>(3) The award shall be made at the <u>place of arbitration</u>.</p> <p>[Emphasis is ours]</p> | <p>(2) Le Tribunal arbitral peut se <u>réunir</u> en tout lieu qu'il juge approprié aux fins d'inspection de marchandises ou autres biens et d'examen de pièces. Il peut également visiter tous lieux associés au différend ou y mener une enquête. Les parties en sont informées suffisamment à l'avance pour avoir la possibilité d'assister à cette inspection ou visite.</p> <p>(3) La sentence est rendue au <u>lieu de l'arbitrage</u>.</p> |
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35. The Investor has referred to the ICSID-AFR in both its English and French official versions so as to draw the attention of the Tribunal to the notional distinction between the seat of the Tribunal («siège» du Tribunal) and the place of arbitration («lieu» de l'arbitrage)², being the physical location where arbitration hearings are actually held³;

36. The Investor will proceed on the assumption that the issue of the “seat” of arbitration is distinct from the issue of the actual physical location of the hearings and will further proceed on the assumption that the award is to be made at the seat («siège») of arbitration. The Investor will henceforth use the civil law terminology of the seat («siège») of arbitration, if only to avoid any confusion on this issue, and will otherwise refer to the distinct issue of the actual location of the Tribunal hearings when required;

37. With respect to the seat of arbitration, Article 20 of the ICSID-AFR essentially repeats the requirement set out in Article 1130 of NAFTA;

² The Spanish version, the other official language of the ICSID-AFR (see Article 60), refers to «lugar».

³ W.L. Craig, W.W. Park & J. Paulson, *International Commercial Arbitration-ICC Arbitration Practice*, Oceana Publication: Dobbs Ferry, NY, Loose Leaf, Release 2000-1, Chapter 7, p. 60, ¶7.02 (“C.P.&P.”), explain that: “The fact that the ICC’S Court of Arbitration, whose permanent seat is Paris, approves awards does not mean that the award is rendered in Paris. Nor does the fact that hearings are held elsewhere alter the principle that the award is deemed to originate in the city formally designated as the place of arbitration”. [Emphasis is ours, footnotes omitted]. The distinction between the English and French versions (“place”/«siège») of the ICSID-AFR may be explained by examining the same distinction found in the English and French versions of the ICC Rules. In Release 2000-2, Chapter 12, page 51, ¶12.01, C.P.& P. explain that at the time the 1998 ICC Rules were revised, “[c]onsideration was given (...) to substituting the word “seat” of the arbitration for “place” to avoid confusion concerning the official domiciliation of the arbitral tribunal with locations at which certain portions of the arbitral proceedings might take place. Much recent legal writings uses “seat” for just this reason. The revisers decided to retain the phrase “place of arbitration”, considering that this had not caused any significant problems in the past and that modern arbitration rules in their majority, as is also the case with the New York Convention, have continued to use “place”. An opportunity may nevertheless have been missed to harmonize common law and civil law vocabulary, particularly since the French version of the prior [ICC] Rules had always used the term *siège*.” [Emphasis is ours, footnote omitted]. Compare Article 14 (“place”/«lieu») and Article 25(3) (“place”/«siège») of the 1998 version of the ICC Rules.

38. Under Article 21 of the ICSID-AFR, subject to the requirement of Article 20 of the ICSID-AFR and Article 1130 of NAFTA, the Tribunal is granted the widest possible discretion to decide the seat of arbitration;

39. With respect to the physical location («lieu», as opposed to «siège») of the Tribunal hearings, Article 21 also grants, after consultation with the parties to the dispute and the ICSID Secretariat, the widest possible discretion as to the actual physical location of the arbitration hearings (including Article 21(2));

40. The Investor will first examine 1) the issue of the seat of arbitration and then proceed to 2) the issue of the actual location of the hearings, though issues raised in the latter may dovetail into the former;

1. *Seat of Arbitration*

41. The Investor submits that, in determining the seat of arbitration, the Tribunal may consider (i) criteria established under other arbitration rules which may provide additional guidance and (ii) previous decisions on the issue rendered by NAFTA Chapter Eleven tribunals;

(i) **Criteria established under the ICSID-AFR and other arbitration rules**

42. Issues as to the seat of arbitration under the ICSID-AFR do not appear to have been fully tested⁴;

43. Article 1120 of NAFTA enables a disputing investor to submit a Chapter Eleven claim to arbitration under the ICSID Convention, the ICSID-AFR or the UNCITRAL Arbitration Rules (the “UNCITRAL Rules”). While the UNCITRAL Rules are not directly applicable given that the Investor chose to submit its claim to arbitration under the ICSID-AFR, the UNCITRAL Rules can provide some guidance to the Tribunal, in the absence of clear directions and established precedents under the ICSID-AFR;

44. Article 16 of the UNCITRAL Rules, which makes the same distinctions as Articles 20 and 21 of the ICSID-AFR, provides as follows:

| <i>PLACE OF ARBITRATION</i> | <i>LIEU DE L'ARBITRAGE</i> |
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| Article 16 | Article 16 |
| 1. <u>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</u> | 1. <u>À défaut d'accord entre les parties sur le lieu de l'arbitrage, ce lieu est déterminé par le tribunal arbitral compte tenu des circonstances de</u> |

⁴ I.F.I. Shihata and A. R. Parra, “The Experience of the International Centre for Settlement of Investment Disputes”, (1999) 14(2) *ICSID Review – Foreign Investment Law Journal* 299, at p. 348: “Arbitration under the Additional Facility Rules is (...) still far from being fully tested”.

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| <p><u>regard to the circumstances of the arbitration.</u></p> <p>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.</p> <p>3. <u>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.</u></p> <p>4. <u>The award shall be made at the place of arbitration.</u></p> <p>[Emphasis is ours]</p> | <p><u>l'arbitrage.</u></p> <p>2. Le tribunal arbitral peut fixer l'emplacement de l'arbitrage à l'intérieur du pays choisi par les parties. Il peut entendre des témoins et tenir des réunions pour se consulter, en tout lieu qui lui conviendra, compte tenu des circonstances de l'arbitrage.</p> <p>3. <u>Le tribunal arbitral peut se réunir en tout lieu qu'il jugera approprié aux fins d'inspection de marchandises ou d'autres biens et d'examen de pièces. Les parties en seront informées suffisamment longtemps à l'avance pour avoir la possibilité d'assister à la descente sur les lieux.</u></p> <p>4. <u>La sentence est rendue au lieu de l'arbitrage.</u></p> |
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45. The “circumstances of the arbitration” referred to in paragraph 16(1) of the UNCITRAL Rules are not further elaborated upon in those Rules, but are discussed at some length in the *UNCITRAL Notes on Organizing Arbitral Proceedings*⁵ (the “UNCITRAL Notes”). As stated in Paragraph 2 of the UNCITRAL Notes, its provisions are not binding on arbitrators or the parties;

46. Section 3 of the UNCITRAL Notes provides some insight into factors that can be considered in selecting the seat of arbitration:

“3. Place of arbitration

(a) Determination of the place of arbitration, if not already agreed upon by the parties

21. Arbitration rules usually allow the parties to agree on the place of arbitration, subject to the requirement of some arbitral institutions that arbitrations under their rules be conducted at a particular place, usually the location of the institution. If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make that determination, it may wish to hear the views of the parties before doing so.

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

⁵ *Report of the United Nations Commission on International Trade Law on the work of its twenty-ninth session, Official Records of the General Assembly, Fifty-first Session, Supplement No 17 (A/51/17)*, New York, May 28 – June 14, 1996. (<http://www.uncitral.org/en-index.htm>).

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

(b) Possibility of meetings outside the place of arbitration

23. Many sets of arbitration rules and laws on arbitral procedure expressly allow the arbitral tribunal to hold meetings elsewhere than at the place of arbitration. For example, under the UNCITRAL Model Law on International Commercial Arbitration "the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents" (article 20(2)). The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical." [Emphasis is ours].

47. We shall now examine each criterion suggested by paragraph 22 of Section 3 of the UNCITRAL Notes;

(a) Suitability of the law on arbitral procedure

48. The suitability of the law on arbitral procedure of the place of arbitration is important for several reasons:

- (i) the award is deemed to be made at the seat of arbitration⁶ and any judicial review of the award will be conducted in accordance with the domestic law of the seat of arbitration; and
- (ii) the proceedings of the arbitration are governed by the laws of the seat of arbitration and they are subject to the mandatory provisions of such local law.

49. In general, a domestic legal system which provides an environment that is supportive of arbitration is to be preferred over one which is not supportive. A jurisdiction which creates uncertainty in arbitration, by permitting a myriad of legal challenges to an award, is a jurisdiction that is not supportive of arbitration;

50. A "suitable" domestic legal system is one which 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;

51. The Investor recognizes that there may be little distinction between the United States and Quebec in terms of recognition and enforcement of an award. However, in the instant Case, and in all Chapter Eleven arbitrations, as will be explained below, the United States does not provide a suitable legal environment for the challenge of an award, whereas Quebec does;

⁶ Article 21(3) of the ICSID-AFR and discussion above *re*: "place"/ «siège» vs. «lieu» of arbitration.

52. Recent domestic litigation arising out of Chapter Eleven awards⁷ coupled with the position taken by the United States in other Chapter Eleven litigation⁸ leads to the conclusion that the applicability of the 1958 New York Convention to the review or annulment of Chapter Eleven awards will be challenged by the United States in any Chapter Eleven arbitration wherein the United States is the seat of arbitration;

53. At best, the United States legal environment for challenging NAFTA Chapter Eleven awards can be described as uncertain and as one that all but guarantees protracted litigation on issues that are not normally subject to domestic review in international arbitration. In contrast Quebec has a clear and predictable legal framework that ensures that arbitral awards, including Chapter Eleven awards, are upheld, except under limited grounds for review of international arbitration decisions;

54. The Investor's conclusions in this respect are drawn from the reservations made by Canada and the United States to the 1958 New York Convention and the impact of those reservations on NAFTA Chapter Eleven awards. Before reviewing the domestic law in Quebec and the United States, it is worth reviewing how Canada and the United States have adopted the 1958 New York Convention;

55. Canada has made the following reservation to the 1958 New York Convention (<http://www.uncitral.org/en-index.htm>):

"Canada declared that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Canada, except in the case of the Province of Quebec where the law does not provide for such limitation." [Emphasis is ours];

56. The United States has made the following reservation to the 1958 New York Convention (<http://www.uncitral.org/en-index.htm>):

"State will apply the Convention only to recognition and enforcement of awards made in the territory of another Contracting State.

State will apply the Convention only to differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law."

57. For the purposes of the eventual enforcement of an award issued as a result of the arbitration in the instant Case ("Award"), Article 1136(7) of NAFTA ("Finality and Enforcement of an Award") provides that:

⁷ *The United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, File No. L.002904.

⁸ *Methanex Corporation v. United States of America*, Submission of the United States of America, September 1, 2000.

“A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the InterAmerican Convention.” [Emphasis is ours];

58. As a result, for the purposes of enforcement of an eventual Award, both Canada and the United States are, at least facially, proper forums for enforcement of an Award, as the limitation of “commercial relationship or transaction” found in both Canada (except Quebec where no such limitation exists in any event) and the United States reservations with respect to the 1958 New York Convention are otherwise waived by Article 1136(7) of NAFTA;

59. However, for the purposes of review and annulment of Chapter Eleven awards, the situation is far less clear with respect to the United States. The Investor submits that the United States has failed to take the necessary steps to ensure that its domestic legal environment provide a predictable and clear process for the review and annulment of NAFTA Chapter Eleven awards;

60. The Investor will first review the legal environment in Quebec before turning to the situation in the United States;

Review of Chapter Eleven Awards Under Quebec Law

61. The law on arbitral proceedings in Quebec is governed by Articles 940 to 951.2 of the *Code of Civil Procedure*⁹, being Book VII of the CCP. International arbitrations held in Quebec are governed by Title I of Book VII. Article 940.6 of the CCP states as follows:

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| <p>940.6. Dans le cas d'un arbitrage mettant en cause des intérêts du commerce extraprovincial ou international, le présent Titre s'interprète, s'il y a lieu, en tenant compte:</p> <p>1° de la Loi type sur l'arbitrage commercial international adoptée le 21 juin 1985 par la Commission des Nations-Unies pour le droit commercial international;</p> <p>2° du Rapport de la Commission des Nations-Unies pour le droit commercial international sur les travaux de sa dix-huitième session tenue à Vienne du 3 au 21 juin 1985;</p> <p>3° du Commentaire analytique du projet de texte d'une loi type sur l'arbitrage commercial international figurant au rapport du Secrétaire général présenté à la dix-huitième session de la Commission des Nations-Unies pour le droit commercial international.</p> | <p>940.6. Where matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of this Title, where applicable, shall take into consideration</p> <p>(1) the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985 [the “UN Model Law”];</p> <p>(2) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session held in Vienna from 3 to 21 June 1985;</p> <p>(3) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the United Nations Commission on International Trade Law.</p> |
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⁹ *Code of Civil Procedure*, L.R.Q., C-25 (the “Code of Civil Procedure” or the “CCP”).

62. As indicated above, in its implementation of the 1958 New York Convention, Canada has made the following reservation to the 1958 New York Convention (<http://www.uncitral.org/en-index.htm>):

“Canada declared that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Canada, except in the case of the Province of Quebec where the law does not provide for such limitation.” [Emphasis is ours]

63. As a result, Quebec’s legal provisions respecting review or annulment of arbitral awards contained in Title I of Book VII of the CCP apply to all arbitration proceedings, including international arbitration, and not just to “commercial” arbitration;

64. The applicable provisions of the *Code of Civil Procedure* are “arbitration friendly” and apply to a wide variety of disputes, including NAFTA Chapter Eleven arbitrations. This is confirmed by the text of Canada’s reservation to the 1958 New York Convention as regards Quebec (“commercial” reservation requirement inapplicable in Quebec) and Quebec’s adoption of the UN Model Law (as referred to in Article 940.6(1) of the CPP reproduced above) within the provisions of Book VII of the CCP¹⁰;

65. In this respect, the *Code of Civil Procedure* includes provisions on the appointment of arbitrators, the order of arbitration proceeding, arbitration awards, their annulment and their enforcement. Some of the provisions of the *Code of Civil Procedure* apply only where the parties have not made stipulations to the contrary in their arbitration agreement, while other provisions, however, are mandatory¹¹;

66. More particularly in this respect, the *Code of Civil Procedure* provides for a limited challenge to arbitral awards by way of an application for annulment only.¹² Quebec law does not allow for an appeal of an arbitral award. When faced with an application for annulment, a Quebec court cannot inquire into the merits of the dispute¹³ and may annul the award only on a narrow and limited number of grounds. These grounds for annulment are closely modelled on and track the UN Model Law;

67. By its domestic implementation of the UN Model Law, through the provisions of the CCP, Quebec has opted into the emerging world order which favours the full faith and credit of arbitration awards («libre circulation de la sentence arbitrale»), subject to limited exceptions contained in the UN Model Law. Even with respect to these limited exceptions, domestic courts

¹⁰ Commentaires du ministre de la Justice, *Le Code Civil du Québec*, Les Publications Québec: Québec, 1993, Tome II, p. 1648: “[Translation] [Amongst the implementing Act’s other purposes], it was designed to introduce in our [Quebec] law the principles of the United Nation’s Commission on International Trade Law *Model Law on International Commercial Arbitration* of June 21st, 1985”.

¹¹ *Code of Civil Procedure*, Article 940.

¹² *Code of Civil Procedure*, Article 947.

¹³ *Code of Civil Procedure*, Article 946.2.

are increasingly deferring to arbitration panel decisions in such matters in order to respect the finality of the award¹⁴;

Review of Chapter Eleven Awards Under US Federal Law

68. In stark contrast to the situation in Quebec, the legal grounds for setting aside a NAFTA Chapter Eleven award in the United States and even the applicable statutes, are far from clear, creating an environment that encourages post-award litigation rather than providing a predictable and limited framework for challenge. At the Federal level, the United States has not implemented the UN Model Law¹⁵;

69. In its *Statement of Administrative Action* respecting the *North American Free Trade Agreement Implementation Act*, the United States is silent on the question of how NAFTA Chapter Eleven awards may be reviewed or annulled, but does set out how those awards may be enforced. In reviewing NAFTA Article 1136, it states that:

“Paragraph four [of Article 1136 of NAFTA] requires each Party to provide for enforcement of an award in its territory. The *Federal Arbitration Act* (9 U.S.C. 1 et seq.) satisfies the requirement for the enforcement of non-ICSID awards in the United States. The convention on the Settlement of Investment Disputes Act of 1966 (U.S.C. 1650, 1650a) provides for the enforcement of ICSID awards”.¹⁶

70. The only reference in the *Statement of Administrative Action* to the revision or annulment of a Chapter Eleven award is a reference to the fact that Article 1136(3) of NAFTA “provides a disputant the opportunity to seek revision or annulment of an award before enforcement may be sought”.¹⁷

¹⁴ As stated in the latest edition of A. Redfren & M. Hunter, *Law and Practice of International Commercial Arbitration*, London: Sweet & Maxwell, 1999, at p. 432, ¶9-32: “(...) [b]asic though it is, [the Model Law] reflects the modern movement towards finality of arbitration awards.”

¹⁵ “9. *UNCITRAL Model Law on International Commercial Arbitration (1985)*
Legislation based on the *UNCITRAL Model Law on International Commercial Arbitration* has been enacted in Australia, Bahrain, Belarus, Bermuda, Bulgaria, Canada, Cyprus, Egypt, Germany, Greece, Guatemala, Hong Kong Special Administrative Region of China, Hungary, India, Iran (Islamic Republic of), Ireland, Kenya, Lithuania, Macau Special Administrative Region of China, Madagascar, Malta, Mexico, New Zealand, Nigeria, Oman, Peru, Russian Federation, Singapore, Sri Lanka, Tunisia, Ukraine, within the United Kingdom of Great Britain and Northern Ireland: Scotland; within the United States of America: California, Connecticut, Oregon and Texas; and Zimbabwe.” (“<http://www.uncitral.org/en-index.htm>”).

¹⁶ *The North American Free Trade Implementation Act*, Statement of Administrative Action by the United States, at pp. 148-149.

¹⁷ *Supra*, at page 148.

71. The reference in the *Statement of Administrative Action* to the fact that the *Federal Arbitration Act* (9 U.S.C. 1 et seq.) [the “FAA”] “satisfies the requirement for the enforcement of non-ICSID awards”¹⁸ and the *Statement’s* silence on a domestic United States procedure for revision or annulment of an award creates a significant area of uncertainty in the event that the United States is chosen as the seat of arbitration;

72. That uncertainty arises out of the fact that the FAA applies only to “commercial” arbitration “contracts”¹⁹ and the United States, as is immediately discussed below, has already gone on record as claiming unequivocally that, for purposes of revision and annulment, NAFTA Chapter Eleven awards are not “commercial” awards;

73. In a recent NAFTA Chapter Eleven arbitration, the United States expressed strong doubt as to whether a claim for compensation for expropriation could be said to amount to a commercial arbitration dispute within the meaning of the UN Model Law, as implemented in Ontario by the *International Commercial Arbitration Act*, R.S.O. 1990, c. I-9. In its submission on the second procedural hearing in *Methanex Corporation v. United States of America*, the United States made the following comments with respect to the application of the Model Law to Chapter Eleven arbitrations:

“Section 2(2) of the Ontario International Commercial Arbitration Act applies the Model Law only “to international *commercial* arbitration agreements and awards.” (Emphasis supplied) Chapter 11 of the NAFTA, however, is not a commercial arbitration agreement, and given the nature of this dispute – a challenge under

¹⁸ An award under the ICSAID-AFR is a non-ICSID award as it is not handed down under the ICSID Convention proper.

¹⁹ “**Chapter 1. GENERAL PROVISIONS**

Section 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transaction", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” [Emphasis is ours].

international law to measures to protect public health an the environment – an award would not easily lend itself to being characterized as commercial.”

Methanex Corporation v. United States of America, Submission of the United States of America, September 1, 2000, at pp. 9-10, as cited in Petitioner’s Outline of Argument in *The United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, File No. L.002904, Part V (Whether this Court’s Jurisdiction is Governed by the *Commercial Arbitration Act* or the *International Commercial Arbitration Act*), at p. 41, ¶147.

74. The United States made a further submission regarding NAFTA Article 1136(7) stating:

“It is unclear that this provision can be construed to deem Chapter 11 claims as commercial in contexts other than the two conventions specifically identified, and it is far from clear that the claims here could be considered “commercial” for other purposes.”

United States’ Submission, *supra*, at p. 10.

75. Canada has also expressed strong doubts as to whether NAFTA Chapter Eleven awards can be said to be “commercial”. In an application for judicial review brought by Mexico to review a NAFTA Chapter Eleven award, Canada stated:

“The Attorney General of Canada agrees [with Mexico] that Chapter Eleven disputes are not private commercial arbitrations. An examination of the NAFTA architecture and of the arbitral proceedings under Chapter Eleven demonstrates that Chapter Eleven arbitration contrasts with private commercial arbitrator in at least the five following ways”²⁰.

76. In the same proceedings, Mexico argued that:

“146. (...), the relationship between Metalclad and Mexico arising from the provisions of NAFTA Chapter Eleven is not a commercial arbitration agreement. The NAFTA is a treaty. The arbitration relationship arises in this case out of allegations of violation of Section A of Chapter Eleven which are restricted to legislative or administrative acts, the acts of the Municipality and the Federal government’s “tolerance” of those acts, taken in relation to issues of public health and environmental concerns, not in a commercial capacity”²¹;

77. Given that all three NAFTA parties consider that a Chapter Eleven arbitration is not a commercial arbitration, then the question that arises is how Chapter Eleven awards may be reviewed or annulled under local law;

²⁰ Outline of Argument of Intervenor Attorney General of Canada in *The United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, File No. L.002904, at p. 4, ¶ 7.

²¹ Petitioner’s Outline of Argument in *The United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, File No. L.002904, Part V (Whether this Court’s Jurisdiction is Governed by the *Commercial Arbitration Act* or the *International Commercial Arbitration Act*: ¶¶119-154).

78. Faced with that anticipated issue, Canada amended the Federal *Commercial Arbitration Act*²² at the time NAFTA was implemented domestically to specifically ensure, at the Federal level, that NAFTA Chapter Eleven arbitrations would be considered “commercial” arbitrations under that Act. Subsection 5(4) of Canada’s Federal *Commercial Arbitration Act* now reads, in part, as follows:

“5. (1) (...);

(4) For greater certainty, the expression “commercial arbitration” in Article 1(1) of the Code includes:

(a) a claim under Article 1116 or 1117 of the Agreement, as defined in subsection 2(1) of the *North American Free Trade Agreement Implementation Act*”.

79. By amending its *Commercial Arbitration Act* to make specific reference to NAFTA Chapter Eleven arbitrations, Canada ensured that any arbitration involving Canada as a party would be subject to review (and not simply enforcement) under that Act. Under section 34 of the Commercial Arbitration Code, which is based on the UN Model Law (section 2 of the FCAA; definition of “Code”) that is implemented by the Federal *Commercial Arbitration Act* (subsection 5(1) of the FCAA), there is a recourse for setting aside arbitration awards;

80. The United States did not make any similar amendment and in fact, in its *Statement of Administrative Action* specifically stated that “[n]o change in statute will be required to implement the provisions of Chapter Eleven”²³;

81. Consequently, it is not at all clear that the FAA would apply to a NAFTA Chapter Eleven arbitration as its scope of application is restricted to “commercial” arbitration “contracts”, as indicated above;

82. Indeed in this respect, the FAA is divided into three chapters. The third chapter concerns the *Inter-American Convention on International Arbitration* and is not applicable here;

83. The second chapter concerns the agreements and awards falling under the 1958 New York Convention. Section 202 of the FAA states as follows:

“Section 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens

²² R.S.C. 1985, c. 17 (2nd Supp.) (the Federal “*Commercial Arbitration Act*” or the “FCAA”), as amended by section 50 of the *North American Free Trade Implementation Act*, S.C. 1993, c. 44. Under paragraph 5(1) of the FCAA, the FCAA “applies only in relation to matters where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters”.

²³ *Statement of Administrative Action* of the United States, at p. 149.

of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.”

84. Clearly, if the U.S. considers that a NAFTA Chapter Eleven arbitration is not “commercial”, then by the terms of section 202, it would not fall within Chapter 2 of the FAA;

85. Article 1136(7) of NAFTA states that a Chapter Eleven claim shall be considered to “arise out of a commercial relationship” for the purposes of Article I of the 1958 New York Convention. However, Mexico, in its application for judicial review of the Chapter Eleven award in *Metalclad*²⁴, has already argued that Article 1136(7) “does not state therefore that an arbitration conducted pursuant to Chapter Eleven shall be deemed to be a “commercial arbitration” for purposes of an application to set aside an award (as opposed to enforcement which is quite different)”²⁵;

86. Given the statement of the United States referred to earlier in *Methanex*, that NAFTA Chapter Eleven arbitrations are not private commercial arbitrations for the purposes of review of awards under the Model Law and that the United States has not implemented federally the UN Model Law, it can reasonably be anticipated that in any post litigation arising out of a NAFTA Chapter Eleven award, the United States would raise the issue of the applicability of Chapter 2 of the FAA to the review of such an award;

87. If Chapters 2 and 3 of the FAA are not applicable to a review of a NAFTA Chapter Eleven arbitration, that would leave only Chapter 1 of the FAA as potentially governing a review of NAFTA Chapter Eleven awards. That Chapter, by its very terms (see sections 1 and 2), is restricted to “commercial” arbitration “contracts”, as indicated above;

88. The NAFTA parties clearly intended that NAFTA Chapter Eleven awards be subject to procedures for review or annulment. NAFTA Article 1136(3)(b) of NAFTA provides as a condition of enforcement of an award, that a specific period of time has elapsed and that “no disputing party has commenced a proceeding to revise, set aside or annul the award”. Given the NAFTA parties intent that NAFTA Chapter Eleven awards be subject to procedures to review or annul those awards, such intent should be given effect by choosing a seat of arbitration where review proceedings may take place in a predictable, arbitration friendly environment as opposed to choosing a seat of arbitration where the review proceedings are ill-defined and uncertain;

89. On the basis of the above, Quebec is clearly the better seat of arbitration since, in Quebec, the emerging issue of whether or not NAFTA Chapter Eleven awards are indeed “commercial” awards (an issue that is being vigorously argued at every turn by Mexico, Canada *and* the United States) is irrelevant and since Quebec has implemented the UN Model Law

²⁴ Petitioner’s Outline of Argument in *The United Mexican States v. Metalclad Corporation*, Supreme Court of British Columbia, File No. L.002904, Part V (Whether this Court’s Jurisdiction is Governed by the *Commercial Arbitration Act* or the *International Commercial Arbitration Act*: ¶¶119-154)

²⁵ *Supra*, pleading at p. 38, ¶135.

which, in turn, affords certainty to the Parties in the Case about the availability, scope and clarity of avenues of relief;

90. In reaching its decision on the place of arbitration, the Tribunal should also recall that Canada (for disputes involving Canada) amended the Federal *Commercial Arbitration Act* in its NAFTA implementation legislation to ensure that NAFTA Chapter Eleven awards were subject to review and annulment under that Act. The United States did not enact similar legislation, with the result that it is unclear what United States law, if any, governs the review or annulment of Chapter Eleven awards. If there is applicable law, it is not at all clear what standard would be applied in reviewing such awards. In contrast to the uncertain situation in the United States, Quebec offers a stable predictable legal environment which is arbitration friendly;

- (b) Presence of 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

91. This issue was discussed in the previous section. The reservations of the United States and Canada (except as regards Quebec) with respect to the implementation of the 1958 New York Convention clearly favours the selection of the Province of Quebec as the seat of arbitration;

- (c) Convenience of the parties and the arbitrators, including the travel distances

92. The issue of the convenience of the Parties relates more to the issue of where Tribunal proceedings are held rather than the location of the seat of arbitration. In negotiations, while the Parties have been unable to agree on a seat of arbitration, the Investor understands that each Party has expressed a degree of flexibility as to where the hearings actually take place;

93. The convenience criterion may also be considered with regards to the members of the Tribunal and the Parties. The objective of the criterion is to ensure a cost effective selection of a location which is equally accessible for all the Parties to the Case and the Tribunal members involved in the arbitration;

94. The members of the Tribunal are located in three different cities (Montreal, Washington D.C. and Geneva). Whether the location of arbitration hearings is in Montreal or in Washington D.C., at least two arbitrators will need to travel. Montreal is an international city with easy and convenient air links with both Europe and major American cities;

(d) Availability and cost of support services needed

95. In choosing a place of arbitration, consideration should be given to the availability and the cost of support services required for the proper conduct of the arbitration. These include transportation costs, accommodations, as well as interpreters or transcription services;

96. The Investor recognizes that such services will probably be equally available in Montreal and in Washington D.C.;

97. The costs of procuring such services will inevitably be higher in most American cities (such as New York or Washington D.C.) than in Montreal, which is a city with a relatively low cost of living and a favourable rate of exchange to the United States dollar;

98. Consequently, costs to both Parties will be reduced by the choice of Montreal as the seat and the location of arbitration;

99. Finally, for the purposes of review of an arbitration award before a domestic tribunal, the Investor also indicates that Quebec has a judiciary that is bound by requirements of institutional bilingualism²⁶. That means that any issue may be litigated in any Quebec court in English or in French, at the choice of the litigants. Thus, language should not be seen as a constraint on the seat of the arbitration – any litigation arising out of the instant case would be heard and decided in English if either of the parties so requested. In addition, given the nature of the Quebec legal system in the Canadian constitutional order, the Quebec judiciary is familiar with both systems of private law civil law and public law common law;

(e) Location of the subject matter of the dispute and proximity of evidence

100. The Investor's claim is based upon a contract entered into by Shirley Contracting Corporation and the Virginia Department of Transport for the construction of certain highways at the Springfield Interchange as well as a subcontract between the Investment and Shirley Contracting Corporation. The documentation which is relevant with regards to the execution of these contracts is located both at the Investor's head office in Terrebonne (Quebec) and at the office of the Investment in Coral Springs, Florida;

101. The measures which give rise to the present Case are contained in the laws adopted by the Congress of the United States and the regulations made by governmental authorities acting pursuant to such laws, all of which are readily available on documentary support;

102. The Investor recognizes that some of the evidence is undoubtedly located in Washington D.C. and the State of Virginia, as some of the evidence is undoubtedly located in Terrebonne and Coral Springs;

²⁶ Section 133 of the *Constitution Act 1867*, 30 & 31 Vic., c. 3 (U.K.).

103. The Investor believes that the hearings will be based on documentary records which may be made available at any location. If circumstances require, the location of the hearings may be shifted depending on the requirements dictated by the availability of evidence;

104. On this issue, since the sources of evidence do not point to a single spot, the Investor submits that a final decision as to the seat of arbitration should not be made conditional on this criterion, but rather should be taken into account in determining the place *or* places of arbitration hearings;

(ii) Previous decisions rendered by NAFTA Chapter Eleven Tribunals

105. In several proceedings conducted pursuant to Chapter Eleven of NAFTA, the seat of arbitration was selected by agreement between the Parties. Where parties have been unable to agree, only two procedural orders have been rendered so far on the determination of the seat of arbitration;

106. In *Ethyl Corporation v Canada*, conducted under the UNCITRAL Rules, Ethyl Corporation requested New York as a place of arbitration while the Government of Canada requested Ottawa, or alternatively, Toronto. The arbitral panel chose the city of Toronto, even though located within the same province (Ontario) as is located the city of Ottawa, both of which are located in the country of the respondent NAFTA party;

107. In the case of *Marvin Roy Feldman Karpa v United Mexican States*²⁷, the arbitration panel also had to decide on the place of arbitration in accordance with the ICSID-AFR. Since neither of the parties had objected to the selection of a place of arbitration in Canada and neither specified that such selection would give rise to any legal obstacles that would affect the proceedings, the arbitral panel decided to fix the place of arbitration in Ottawa;

108. In light of the legal obstacles that would affect the proceedings as discussed above, and the fact that Terrebonne is located in the same province as Montreal (as was Toronto with respect to Ottawa), jurisprudence under NAFTA Chapter Eleven does not create an obstacle to selecting Montreal as the seat of arbitration;

109. Finally, both of these cases addressed the issue of the neutrality of the forum. The Investor is not a party to NAFTA. It had to accept the NAFTA rules as they are, whereas the NAFTA parties were in a position to negotiate the NAFTA treaty. Nowhere is it stated that the seat of arbitration cannot be set in the Investor's home State. Absent evidence to the contrary, it can be safely assumed that a private litigant does not exercise any power or authority over the court system in the Investor's home country. On the other hand, there should be a presumption that the seat of arbitration should not be located in the host State whose measures are being challenged by arbitration, since the very purpose of such arbitration is to take the dispute outside of the host's State domestic legal system in order to protect the investor. By placing the seat of arbitration in the host State, and thus anchoring arbitration to the domestic host State's legal

²⁷ *Marven Roy Feldman Karpa v United Mexican States*, Procedural order No 1 concerning the place of arbitration, April 3, 2000.

system for review or annulment of an eventual award, one is defeating the purpose of having denationalised arbitration of the host State's measures in the first place;

110. In light of all of the above, it is submitted that Quebec is the better forum;

2. *Location of the Hearings*

111. The issue of actual location of the hearing was addressed in the previous section dealing with the seat of arbitration;

112. As this issue is dependent to some extent on the location of witnesses, the Investor suggests that this issue be kept in abeyance for the time being, but does not object, subject to circumstances as they evolve, that a first hearing could be held in Washington D.C.;

D) *Relevant Importance that should be Attributed to the Criteria*

113. As stated above, the choice of a seat of arbitration is of significant relevance because of its impact on the review and enforceability of the final arbitral award;

114. In addition, it is worth underlining that an arbitral panel is not bound to hold all of its meetings and hearings at the seat of arbitration. Hearings can be held in any city that is agreed upon by the Parties or determined by the Tribunal without prejudice to the chosen seat of arbitration;

115. As a result, some of the criteria suggested by the UNCITRAL Notes bear a lower level of significance in view of the ability of the Tribunal to select a place of hearing which is different from the seat of arbitration. The UNCITRAL Notes themselves recognized that the listed factors may bear different relative weight;

116. The Investor respectfully submits that the following is an accurate weighing of the various criteria that should be used in the selection of a seat of arbitration for the present Case;

117. Suitability of the local law on arbitral procedure is of paramount importance and, in the present Case, favours the clear choice of the Province of Quebec;

118. Since meetings of the Tribunal can be held in any city agreed upon by the Parties, the consideration of convenience is of lesser importance in the choice of the seat of arbitration. In any event, Montreal still benefits from an advantage in this respect;

119. For the same reason as stated above with regards to convenience, the availability and cost of support services is also of lesser importance in choosing the appropriate place of arbitration. In any event, this criterion also favours the selection of Montreal;

120. The location of the subject matter and the proximity of evidence are also considerations which are important when determining where the arbitral panel will hold its meetings but of

lesser relevance when considering the seat of arbitration. In any event, this issue has yet to be determined;

IV. CONCLUSION

121. The Investor respectfully submits that, based on the suitability of local law and the review and enforcement provisions alone, and also taking into consideration the many other factors addressed above, the appropriate seat of arbitration in the present Case is Montreal, in the Province of Quebec, Canada.

Signed at Montreal, this 26 day of February, 2001

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