RULING CONCERNING THE INVESTOR'S MOTION TO CHANGE THE PLACE OF ARBITRATION

In

NAFTA UNCITRAL INVESTOR-STATE CLAIM

Pope & Talbot, Inc. and Government of Canada

1. On October 29, 1999, the Tribunal convened a procedural meeting in Montreal. Based on the agreement of the parties to the Tribunal's earlier proposal, the Tribunal determined that the place of arbitration would be Montreal.[1]

2. On November 15, 2001, on the last day of the hearing in Washington on damages, the Investor's counsel advised the Tribunal that the Investor might be making a motion to change the place of arbitration, in view of what he contended to be changed circumstances in the case.[2] On November 22, 2001, the Investor did present a motion requesting the Tribunal to order a change in the place of arbitration to Washington. That motion is the subject of this Ruling.

Investor's Position

3. The Investor argues that, since Montreal was chosen in October, 1999, "Canada has adopted a policy of challenging NAFTA arbitrations under Canadian law."[3]

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1 Minutes of procedural meeting October 29, 1999 at 2.

2 *See* November 15, 2001 transcript at 804:12 - 811:15.

3 Investor's Motion on Determination of the Place of Arbitration ("Investor's Motion") at ¶ 5.

It further claims that, had it had foreknowledge of this change in policy, it would have objected to the choice of Canada as the place of arbitration.[4]

4. The Investor argues that Canada has changed its position on NAFTA arbitration in two important ways:

a. "[B]y asserting to Canadian Courts that NAFTA Tribunals are not worthy of a high level of judicial deference."[5] These assertions were allegedly made before the British Columbia Supreme Court in its review of a Chapter 11 tribunal award in *Metalclad and United Mexican States*.[6]

b. By employing the challenge of excess of jurisdiction to review fundamental findings of law and fact by Chapter 11 tribunals.[7] These arguments were allegedly made to the Canadian Federal Court (Trial Division) in *S.D. Myers, Inc. v. Canada*.[8]

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4 *Id.*

5 *Id.* at ¶ 6a.

6 Decision rendered Aug. 30, 2000, 40 ILM 36 (2001). The review in the British Columbia Supreme Court was styled *United Mexican States v. Metalclad Corp.*; the court's decision appears at 2001 BCSC 664 (May 2, 2001).

7 Investor's Motion at ¶ 6b.

8 The Investor included in its Motion a lengthy quotation from Canada's submission in the *Myers* proceedings before the Federal Court (*id.* at ¶ 17); it did not, however submit to the Tribunal any copy of the document. Canada has not challenged the accuracy of the passages as the Investor submitted them.

5. The Investor argues further that "Canada's approach has been to create a new process, tantamount to an appeal, through which domestic Canadian courts may rule upon the arbitral awards made by NAFTA Tribunals."[9]

6. The Investor notes that these proceedings are being conducted under the UNCITRAL Arbitration Rules.[10] It points out that other NAFTA Chapter 11 tribunals have relied on the factors set forth in the UNCITRAL Notes on Organizing Arbitral Proceedings ("UNCITRAL Notes")[11] as a helpful guide in elucidating the factors that are relevant to determine an appropriate place of arbitration.[12] One of those factors is the "suitability of the law on arbitral procedure of the place of arbitration."[13] The Investor argues that Canada is not suitable due to its recent submissions to the Canadian judiciary in NAFTA Chapter 11 cases. Specifically, the Investor alludes to arguments before the Supreme Court of British Columbia in the *Metalclad* case including the argument that Canadian authorities supporting deference to arbitral tribunals should be rejected and that awards by Chapter 11 tribunals are not worthy of

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9 *Id.* at ¶ 7.

10 Adopted by the United Nations Commission on International Trade Law, April 28, 1976 and by the United Nations General Assembly on December 15, 1976.

11 UNCITRAL Yearbook, vol. XXVII: 1996, part one), ¶¶ 11-54.

12 Investor's Motion at ¶ 11.

13 UNCITRAL Notes at ¶ 22.

judicial deference at a concomitant high standard of review because they are neither expert nor specialized bodies.[14]

7. The Investor points as well to arguments made by Canada to the Federal Court Trial Division,[15] and to Canada's statement to the Supreme Court of British Columbia that "Chapter 11 Tribunals should not attract extensive judicial deference and should not be protected by high standards of judicial review."[16]

8. The Investor draws the Tribunal's attention to comments of the Chapter 11 tribunal in *UPS and Canada* on the place of arbitration in that case. In evaluating Canada's suitability as a place of arbitration, the *UPS* tribunal stated that it was "troubled by Canada's submission on this issue in the *Metalclad* case."[17]

9. The Investor further argued that the use of Canada as the place of arbitration would place it in a position of inequality in violation of Article 15(1) of the UNCITRAL Rules.[18]

10. The Investor concludes that, for all of these reasons, the Tribunal should change the place of arbitration to Washington.

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14 Investor's Motion at ¶ 16.

15 *Id.*, at ¶ 17

16 *Id.* at ¶ 18.

17 *Id.* at ¶ 22.

18 *Id.* at ¶¶ 26 - 35.

Canada's position

11. Canada basically accepts the legal rubric urged by the Investors as a basis for analyzing the place of arbitration issue. Canada asserts that, under NAFTA and Canadian law (as well as American law), provision is made for limited judicial review. Canada asserts that "the mere fact that a party availed itself of a statutory review mechanism specifically contemplated by the arbitral scheme established by NAFTA Chapter 11 is irrelevant to a determination of the place of arbitration."[19]

12. Canada also argues that it is untenable that "the place of arbitration in this case should be changed because Canada's submissions [to Canadian courts] urged a lower standard of deference for arbitral decisions under NAFTA Chapter 11 than the Investor considers acceptable."[20] Canada notes that its courts are staffed by an independent judiciary. Those courts do not always adopt positions urged upon them by litigants; indeed, the British Columbia Supreme Court rejected the position urged by Canada in *Metalclad*.[21]

13. Canada further argued that its position in this respect had been supported by the decision of the NAFTA Chapter 11 tribunal in *Waste Management, Inc. and Mexico*, which held that Canada's exercise of its procedural rights in the

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19 Reply to Investor's Motion to Change the Place of Arbitration ("Canada's Reply") at ¶ 29.

20 *Id.* at ¶30.

21 *Id.* at ¶ 31- 32. Canada also notes that the *UPS* tribunal "did not hold that Canada was an unsuitable place of arbitration." *Id.* at ¶ 33.

Metalclad case did not make it a non-neutral place of arbitration.[22] Finally, Canada challenges the suggestion that a Canadian place of arbitration would prejudice the Investor.[23]

Ruling by the Tribunal

14. The burden the Investor has assumed in making its motion is, perforce, a severe one. This case has proceeded through preliminary motions, discovery, hearings and two awards on the merits. The present phase is the consideration of damages, upon which all briefing has been completed and a hearing concluded. It would thus be an extraordinary step to change the place of arbitration at this stage.

15. In claiming that Canada is no longer a suitable place for arbitration, the Investor does not assert that Canadian *law* is defective. As Canada points out, its Commercial Arbitration Act adopts the Model Law on International Commercial Arbitration adopted by the U.N. Commission on International Trade Law.[24] The Commercial Arbitration Code, based upon the Model Law, is expressly made applicable to Chapter 11 disputes in which Canada is a party. The Tribunal agrees with the tribunal in *Methanex Corp. and United States of*

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22 Canada's Response to Investor's Reply at ¶¶ 17-22, citing *Waste Management, Inc. and Mexico*, ICSID Case No. ARB(AF)/00/3, Sept. 26, 2001 at ¶¶ 19, 22, 23.

23 *Id.*, at ¶ 42-44.

24 Canada's Reply at ¶ 18.

America that Canada and the United States "may be considered equally suitable in terms of the law on arbitral procedure and enforcement."[25]

16. What the Investor asks is that the Tribunal disregard the text and legislative history of the Canadian arbitration laws and focus instead on arguments made in court by Canadian legal representatives that purportedly make those laws unsuitable.

17. Canada would have the Tribunal disregard its arguments to the Canadian courts on the ground that "Courts do not always adopt positions urged upon them by litigants."[26] It points out that its arguments were rejected by the British Columbia Supreme Court in *Metalclad*.[27]

18. This, however, is not a complete answer. For Canada is not simply a litigant in those review proceedings. It is also a Party to NAFTA with the obligation to preserve the integrity of that agreement. In all three NAFTA countries, the executive (or parliamentary/executive) branch is primary in negotiating and implementing international agreements. Thus, the positions taken by that branch towards implementation can be critical in assessing whether a NAFTA

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25 *Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of Arbitration*, Dec. 31, 2000 at ¶26. *Accord, Decision Regarding the Place of Arbitration* in *Ethyl Corp. and Canada*, Nov. 28, 1997 at (unnumbered) pp 5-6. The Tribunal in *UPS and Canada* reached a similar conclusion regarding British Columbia's International Commercial Arbitration Act, which it noted was also based on the UNCITRAL Model Law. *Decision on the Place of Arbitration*, Oct. 17, 2001 at ¶ 9.

26 Canada's Reply at ¶ 31.

27 *Id.* at ¶ 32.

Party is meeting its obligations under the Agreement. And those positions can be taken in a variety of ways, including appearances before the courts.[28]

19. Thus, it is certainly wrong to suggest that Canada's suitability as a place of arbitration may only be assessed by determining whether its courts have kept in check an executive otherwise free to make any legal arguments it wishes. After all, Canada's arguments before its courts are aimed at winning the day, and a Chapter 11 tribunal has no way of knowing in advance whether or when that day will come. For these reasons, the Tribunal concludes that there is a point where the behaviour of the executive in these matters must be judged on its own merits.

20. Whether we would be at that point if this case were at its beginning is unclear to the Tribunal. Another Chapter 11 tribunal acting after Canada began asserting its current legal position on reviewability was the *UPS* panel. It was "troubled by Canada's submission on this issue in the *Metalclad* case,"[29] and that concern led it to weight the suitability factor in favor of locating the arbitration in the

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[28] One other way that the executive branch can act was recently considered by this Tribunal. *See* the Tribunal's Decision and Order dated Mar. 11, 2002. Canada argued that, under its Access to Information Act (R.S.C. 1985, c. A-1, as amended), it must release to the public documents, including transcripts of hearings, that are covered by a Protective Order on Confidentiality in this arbitration and by the UNCITRAL Rules, which are expressly adopted by NAFTA Article 1120 and which govern these proceedings. Whether this conflict between domestic law, as interpreted by Canada, and its international obligations under NAFTA could be avoided by arbitration in another country is far from certain, however, the tension between the two could not reasonably be ignored in a fair evaluation of suitability.

[29] *Decision on the Place of Arbitration* at ¶ 11. The *UPS* tribunal apparently was unaware of Canada's pleadings in the *Myers* litigation.

United States.[30] This Tribunal is also troubled by the Canadian submissions on reviewability and could have reached the same result on weighing Canada's suitability were these proceedings just starting.

21. On balance, however, the Tribunal concludes that too much of this case has been completed to permit an efficient or effective[31] change of place of arbitration at this juncture. Accordingly, the Investor's Motion is denied.

March 14, 2002

Lord Dervaird, Presiding Arbitrator

The Honourable Benjamin J. Greenberg, Q.C., Arbitrator

Murray J. Belman, Arbitrator

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30 *Id.*, at ¶ 16.

31 An obvious question, if a change were ordered, would be whether Canada's courts would retain jurisdiction to review decisions and orders rendered prior to the change. That issue alone would surely guarantee very extensive litigation in both the United States and Canada.