INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

Lion Mexico Consolidated L.P.

v.

United Mexican States

(ICSID Case No. ARB(AF)/15/2)

PROCEDURAL ORDER NO. 2
(Place of Arbitration)

Members of the Tribunal
Juan Fernández-Armesto, President of the Tribunal
David J.A. Cairns, Arbitrator
Ricardo Ramírez, Arbitrator

Secretary of the Tribunal
Anneliese Fleckenstein

Assistant to the Tribunal
Luis Fernando Rodríguez

November 24, 2016

I. PROCEDURAL BACKGROUND

1. On December 15, 2015 Lion Mexico Consolidated L.P. **["Lion" or "Claimant"]** filed with the International Centre for Settlement of Investment Disputes **["ICSID"]** a Request for Arbitration against the United Mexican States **["Mexico"]** pursuant to the ICSID Additional Facility Rules **["Arbitration AF Rules"]** and Chapter 11 of the North American Free Trade Agreement **["NAFTA"]**.

2. The Arbitral Tribunal was constituted on July 27, 2016, in accordance with the Arbitration AF Rules. The Parties confirmed that the Tribunal was properly constituted and that no party had any objection to the appointment of any Member of the Tribunal. The Members of the Tribunal timely submitted their signed declarations pursuant to Article 13(1) of the Arbitration AF Rules.

3. On September 26, 2016 the Tribunal and the Parties held a first session by teleconference under Art. 21(1) Arbitration AF Rules, in order to deal with as many case management issues as possible. Before and during the session it became apparent the Parties could not reach an agreement as to the place of the arbitration.

4. On September 30, 2016 the Tribunal invited the Parties to submit within one week their arguments with regard to the selection of a seat.

5. By October 4, 2016 the Parties submitted their statements on this issue.

6. On October 14, 2016 the Tribunal issued the Procedural Order No. 1. Its Clause 11.1 provides that "[a]fter receiving the parties' positions on the matter, the Tribunal shall establish the place of arbitration in a separate order." Pursuant to such provision the present order is hereby made.

II. POSITION OF THE PARTIES

7. Mexico, the Respondent, proposes Toronto (Canada) to be the place of this arbitration, while Lion, the Claimant, proposes Washington, D.C. (United States of America).

A. Lion's position

8. Lion considers Washington, D.C. to be "the ideal place" for this arbitration[1]. In its view, "this choice respects the requirements of neutrality and experience in international arbitration matters that a seat must have, particularly in a case such as this one[2]." Lion makes the following arguments:

9. First, Washington, D.C. is in a jurisdiction that is neither that of the nationality of the investor (Canada) nor that of the host State (Mexico)[3].

10. Second, Washington, D.C. is located in the United States of America, the only NAFTA state that is not that of the Parties. This is relevant because in most arbitrations against Mexico under NAFTA the parties or the tribunal have selected a seat in a jurisdiction that was not that of either party to the arbitration. In the 12 previous NAFTA cases – brought by U.S. investors against Mexico – 10 had a seat in Canada (the third NAFTA state)[4]. In the other two, the seat was in fact Washington, D.C. despite the fact the claimant was a U.S. national[5]. In the five known non-NAFTA arbitration cases where Mexico was, or currently is, a respondent, the seat has always been Washington, D.C.[6] with Mexico having consented in two of these cases[7].

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[1] Lion's letter, para. 2.
[2] Lion's letter, para. 2.
[3] Lion's letter, para. 6.
[4] Lion's letter, para. 7, citing to *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/5); *Robert Azinian, Kenneth Davitian, & Ellen Baca v. The United Mexican States* (ICSID Case No. ARB (AF)/97/2); *Bayview Irrigation District and others v. United Mexican States* (ICSID Case No. ARB(AF)/05/1); *Cargill, Incorporated v. United Mexican States* (ICSID Case No. ARB(AF)/05/2); *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/1); *Marvin Roy Feldman Karpa v. United Mexican States* (ICSID Case No. ARB(AF)/99/1); *Fireman's Fund Insurance Company v. The United Mexican States* (ICSID Case No. ARB(AF)/02/1); *GAMI Investments, Inc. v. United Mexican States*; *KBR, Inc. v. United Mexican States* (ICSID Case. No. UNCT/14/1); and *Metalclad Corporation v. The United Mexican States* (ICSID Case No. ARB(AF)/97/1).
[5] Lion's letter, para. 12, citing to *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) and *Waste Management v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3).
[6] Lion's letter, para. 13, citing to *Telefónica S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/12/4); *Técnicas Medioambientales Tecmed v. United Mexican States* (ICSID Case No. ARB(AF)/00/2); *Gemplus, S.A., SLP, S.A., and Gemplus Industrial S.A. de C.V. v. United Mexican States* (ICSID Case No. ARB(AF)/04/3); *Talsud, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/04/4); and *Abengoa, S.A. y COFIDES, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/09/2).
[7] *Gemplus, S.A., SLP, S.A., and Gemplus Industrial S.A. de C.V. v. United Mexican States* (ICSID Case No. ARB(AF)/04/3); *Talsud, S.A. v. United Mexican States* (ICSID Case No. ARB(AF)/04/4).

11. Third, Washington, D.C. is typically regarded as a neutral forum, even in cases when one of the parties is a national of the United States[8]. Washington, D.C. was selected in eight out of 10 cases where the United States was the respondent in an arbitration under NAFTA brought by a Canadian investor[9]. In the two other cases, the seat was in New York[10].

12. Fourth, there is no doubt, and nothing to the contrary is even alleged by Mexico, that the courts in Washington, D.C. are independent and experienced in international arbitration matters, including investor-State disputes[11].

13. Finally, Lion observes that, regardless of whether the company has ties to the United States of America, this does not change the fact that its nationality is Canadian for all legal purposes[12].

B. Mexico's position

14. Mexico submits that Toronto should be the place of this arbitration in preference to Washington, D.C. The reasons advanced by Mexico are twofold:

15. First, Toronto is located in the province of Ontario (Canada). Ontario has adopted the UNCITRAL Model Law. Thus the rules of this seat regarding support, revision, and setting aside of decisions from international arbitral tribunals are equivalent to those in force in over a hundred jurisdictions across the world[13].

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[8] Lion's letter, paras. 11 and 16.
[9] Lion's letter, para. 14, citing to *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1); *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1)(III); *Apotex Inc. v. The Government of the United States of America (II)*; *The Canadian Cattlemen for Fair Trade (formerly Consolidated Canadian Claims) v. United States of America; Canfor v. USACanfor Corporation v. United States of America*; *Glamis Gold Ltd. v. United States of America; Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3); *Methanex Corporation v. United States of America*; *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2); and *Softwood Lumber Consolidated case v. United States of America*.
[10] Lion's letter, para. 14, citing to *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1) (III); and *Apotex Inc. v. The Government of the United States of America (II)*, respectively. In the latter, according to Lion, there is no evidence if it was agreed or decided by the Arbitral Tribunal.
[11] Lion's letter, para. 20.
[12] Lion's letter, para. 9.
[13] Mexico's letter, paras. 10 and 11.

16. Second, Mexico makes a case for the experience, quality, and independence of the Ontario courts in dealing with the enforcement of awards issued under NAFTA[14].

17. Mexico opposes Lion's suggestion to fix the seat in Washington, D.C. on the following grounds:

18. First, Washington, D.C. has not adopted the UNCITRAL Model Law and uses a federal statute, which demands from the Tribunal and the Parties specialized knowledge[15].

19. Second, the United States of America is not a neutral territory in this arbitration because Lion is *de facto* a U.S. investor:

- Lion admits that its main place of business and unified domicile for notifications is Dallas (Texas, U.S.A.).

- Lion is a subsidiary of Clarion Partners, a U.S. company with offices in seven locations across the United States of America, and only two overseas (in Brazil and United Kingdom).

- Lion, although incorporated in Quebec (Canada), has in fact no real presence or commercial interests in Canada: there is no publicly accessible evidence that Lion does business in Canada, deals with Canadian investors or that it is associated with any Canadian person or entity.

- Clarion Partners, Lion's parent company, has no offices in Canada[16].

20. Mexico thus concludes that Lion is a Canadian entity only *de iure*, incorporated in Quebec (Canada) merely for reasons of tax efficiency or regulatory considerations. Its genuine place of business is in the United States, which should not be the seat of this arbitration[17].

III. APPLICABLE STANDARD

21. NAFTA, the treaty under which this arbitration arises, imposes under Art. 1130 only two requirements on the Tribunal in selecting, absent the parties' agreement, the place of an arbitration:

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[14] Mexico's letter, paras. 12 through 14.
[15] Mexico's letter, paras. 10 and 11.
[16] Mexico's letter, paras. 7 and 9.
[17] Mexico's letter, para. 8.

- First, it has to choose a NAFTA country that is party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and

- Second, the choice has to be made in accordance with the Arbitration AF Rules.

22. The language of the provision is the following:

> "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."

23. As for the Arbitration AF Rules, Art. 20(1) requires only that the place of an arbitration be "determined by the Arbitral Tribunal after consultation with the parties and the Secretariat" among those States that are party to New York Convention (Art. 19). The article reads as follows:

> "Article 19. Limitation on Choice of Forum.
> 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.
>
> Article 20. Determination of Place of Arbitration.
> (1) Subject to Article 19 of these Rules the place of arbitration shall be determined by the Arbitral Tribunal after consultation with the parties and the Secretariat.
> (2) The Arbitral Tribunal may meet at any place . . . ."

IV. DISCUSSION

24. Looking at the legal standard, Article 1130 restricts the Tribunal's choice, absent the Parties' agreement, to a NAFTA country that is party to the New York Convention. The three NAFTA countries – Canada, the United States, and Mexico – are parties to the Convention, and consequently, Washington, D.C. and Toronto meet both these legal requirements. As Mexico says, "el

territorio de cualquiera de ellas puede ser seleccionado como 'lugar del arbitraje[18].'"

25. It is beyond doubt that both Toronto and Washington are, generally speaking, perfectly suitable seats for an investment arbitration. The Parties in fact concur that the courts in both locations are amenable to arbitral proceedings and show a long and well-established record in this regard.

26. In their submissions, both Parties have quoted *Gallo* as a relevant guideline, which describes the optimal seat as a neutral location with a high quality, independent and experienced judiciary[19]:

> "the perfect place of arbitration in an international investment arbitration is a jurisdiction which is neither that of the investor nor that of the host State, which has high quality, independent judiciary, with experience in providing support to, and reviewing and setting aside decisions from international arbitral tribunals, and which had the capability of handling disputes in the language of the arbitration, in this case English".

27. The first requirement established by *Gallo* is neutrality. Since Mexico is the Respondent in this arbitration, and Lion, the investor, is incorporated in Canada, the natural, neutral choice should be Washington, D.C. a location within the third NAFTA state. This is Claimant's position.

28. Mexico, however, is asking the Tribunal to disregard Washington, D.C. and select Toronto, a Canadian city, based on a double assumption: the Tribunal should presume,

    - first, that Lion's business is actually located in the United States, not in Canada; and,

    - second, that Lion is a shell company with no real ties to Canada.

    On these assumptions the United States would not be a neutral place, while Canada would be.

29. At this stage of the proceedings the Tribunal is not ready to make these assumptions, and therefore it cannot agree with Mexico's arguments. The Tribunal cannot determine at the present moment the actual ties between Lion and Canada, much less to conclude that Lion is a shell company.

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[18] Mexico's letter of October 3, 2016, para. 5.

[19] *Vito G. Gallo v. The Government of Canada*, UNCITRAL, PCA Case No. 55798, letter A-9 from the tribunal to the parties of June 4, 2008, para. 15, available at http://www.uncitral.org/res/transparency-registry/registry/data/can/v_g__gallo_html/gallopo-07.pdf. *See* Mexico's letter of October 3, 2016, para. 6, and Lion's letter of October 3, 2016, para. 3.

Furthermore, the Tribunal is not presently prepared to find that Lion has no real business in Canada.

30. The Tribunal is aware that, in its Request for Arbitration, Lion has stated that its main place of business is in the United States of America, specifically, Dallas, Texas[20]. The Tribunal, however, is not convinced that this circumstance is of so much weight as to disqualify Washington D.C. as a neutral venue. This is so because the neutrality requirement focuses on the nationality of the disputing Parties, and the Tribunal accepts for current purposes that Lion is validly incorporated under the laws of Quebec, Canada.

31. In addition, as Lion points out, Mexico's objection is somewhat at odds with Mexico's practice of having agreed to a seat in Washington, D.C. on several occasions[21].

32. The Tribunal notes that Washington, D.C. has been the seat of two NAFTA arbitrations brought by U.S. nationals against Mexico[22]. Furthermore, Washington, D.C. was selected in eight out of 10 cases where the United States was the respondent in an arbitration under NAFTA brought by a Canadian investor[23].

33. There is no question, moreover, that Washington, D.C. is widely regarded as a neutral forum, appropriate to serve as seat of international arbitrations, sometimes even in cases where one of the parties is a national of the United States.

34. Washington, D.C. does satisfy the test described in *Gallo*, i.e., the existence of

> "high quality, independent judiciary, with experience in providing support to, and reviewing and setting aside decisions from international arbitral tribunals . . . ."

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[20] Request for Arbitration, para. 2.
[21] Lion's letter, para. 25.
[22] Lion's letter, para. 12, citing to *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) and *Waste Management v. United Mexican States (II)* (ICSID Case No. ARB(AF)/00/3).
[23] Lion's letter, para. 14, citing to *ADF Group Inc. v. United States of America* (ICSID Case No. ARB(AF)/00/1); *Apotex Holdings Inc. and Apotex Inc. v. United States of America* (ICSID Case No. ARB(AF)/12/1)(III); *Apotex Inc. v. The Government of the United States of America (II)*; *The Canadian Cattlemen for Fair Trade (formerly Consolidated Canadian Claims) v. United States of America; Canfor v. USACanfor Corporation v. United States of America*; *Glamis Gold Ltd. v. United States of America; Loewen Group, Inc. and Raymond L. Loewen v. United States of America* (ICSID Case No. ARB(AF)/98/3); *Methanex Corporation v. United States of America*; *Mondev International Ltd. v. United States of America* (ICSID Case No. ARB(AF)/99/2); and *Softwood Lumber Consolidated case v. United States of America.*

35. Finally, whether a country has adopted the UNCITRAL Model Law is not decisive of this issue. As beneficial as it is, the Model Law has not been adopted by countries such as France, Switzerland, the United States, or England, which are regularly chosen as major seats of international arbitrations, as Lion points out[24]. Last but not least, all the actors involved in these proceedings are sophisticated enough to deal at ease with either a UNCITRAL-based law or U.S. law.

V. DECISION

36. For all the foregoing reasons, the Arbitral Tribunal decides that the place of this arbitration is Washington, D.C. (United States of America).

On behalf of the Tribunal,

[*Signed*]

Juan Fernández-Armesto
President of the Tribunal

[24] Lion's letter, paras. 21 through 24.