UNDER CHAPTER ELEVEN OF THE NAFTA AND THE UNCITRAL ARBITRATION RULES

BETWEEN

UNITED PARCEL SERVICE OF AMERICA, INC.,

Claimant/Investor

AND

GOVERNMENT OF CANADA

Respondent/Party

CANADA'S MEMORANDUM OF ARGUMENT ON PLACE OF ARBITRATION

April 30, 2001

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PART I: INTRODUCTION

1. In accordance with the Tribunal's Procedural Decision No. 1 dated April 17, 2001, the Government of Canada ("Canada") submits this Memorandum of Argument on Place of Arbitration.

2. Canada requests the Tribunal to determine that, in the circumstances of this case, the place of arbitration should be Canada and that the Canadian venue should be Ottawa or, alternatively, Toronto, Montreal or Vancouver.

PART II: STATEMENT OF FACTS

3. On January 19, 2000 the Investor, United Parcel Service of America, Inc. ("UPS") delivered a Notice of Intent to Submit a Claim to Arbitration under Chapter Eleven of the North American Free Trade Agreement ("NAFTA") for alleged breaches of Canada's obligations of the NAFTA.

4. On April 19, 2000, UPS submitted its Notice of Arbitration and Statement of Claim, in which it claimed recourse to arbitration under the UNCITRAL Arbitration Rules ("UNCITRAL Rules").

5. According to the Statement of Claim, UPS is a publicly traded corporation incorporated under the laws of the State of Delaware in the United States of America.[1] The Investment, United Parcel Service Canada Ltd. ("UPS Canada") is an Ontario corporation, and is owned entirely by UPS.[2] UPS Canada provides courier delivery and associated services in Canada and, with UPS, to countries outside of Canada.[3]

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[1] Statement of Claim, paragraph 7.

[2] *Ibid.*

[3] *Ibid.*

6. UPS alleges that Canada has breached its NAFTA obligations under Section A of Chapter Eleven, Chapter Twelve and Chapter Fifteen including, but not limited, to the following provisions:

a. Articles 1102 and 1202 - National Treatment;

b. Article 1105 - Minimum Standard of Treatment;

c. Article 1502(3)(a) and 1502(3)(d) - Monopolies and State Enterprises; and

d. Article 1503(2) - State Enterprises.[4]

7. UPS alleges it suffered damages in the amount of US$160 million for various losses incurred as a result of the alleged breaches.[5]

8. The allegations in the Statement of Claim relate to Canadian federal and provincial laws, act or omissions of Canada and provincial governments, customs practices and tax regimes administered by the Canada Customs and Revenue Agency ("CCRA") and actions of Canada Post Corporation ("Canada Post"). All of the damages are alleged to have been caused to UPS Canada (though claimed by UPS on its behalf) and thus to have been suffered in Canada.

9. Canada Post is a Canadian Crown Corporation established under the Canada Post Corporation Act[6] and is responsible for operating the postal system in Canada. Its headquarters is in Ottawa.

10. The CCRA was established under the Canada Customs and Revenue Agency Act[7] and is responsible for collecting revenues, administering tax laws, providing

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[4] Statement of Claim, paragraph 11.

[5] Statement of Clam, Part G, Relief Sought and Damages Claimed.

[6] R.S. 1985, c. C-10.

customs services and delivering a number of social and economic programs to Canadians. The headquarters of the CCRA is also in Ottawa.

11. There is no agreement between the disputing parties on place of arbitration. Canada's position is that the place of arbitration should be Canada and proposes Ottawa[8] or, alternatively, Toronto, Montreal or Vancouver as venues in Canada. The Investor submits that the place of arbitration should be the United States and proposes Boston, Washington, D.C., or San Francisco as possible venues.[9]

PART III: ARGUMENT

A. Summary of Canada's Position

12. The factors listed in the UNCITRAL Notes on Organizing Proceedings ("UNCITRAL Notes")[10] for choosing the place of arbitration and the application of these factors by other NAFTA Chapter Eleven Tribunals strongly favour Canada as the place of arbitration and point to Ottawa as the appropriate Canadian venue or, alternatively, to Toronto, Montreal or Vancouver.

13. Canada possesses a wholly appropriate juridical regime for the conduct of arbitrations under NAFTA Chapter Eleven and the enforcement of arbitral awards.

14. Canada is indisputably the location of the subject matter in dispute. All the alleged breaches of NAFTA Chapter Eleven and the events giving rise to the allegations occurred in Canada. The Investment alleged to have been harmed is in Canada.

[7] S.C. 1999, c. 17.

[8] Letter to the Tribunal from Canada dated March 16, 2001, p. 3.

[9] Letter to the Tribunal from UPS dated March 22, 2001, p. 4.

[10] Adopted in 1996 and published in UN document V.96-84935. **[Tab 3]**

15. Canada overall, and Ottawa in particular, are the most convenient place of arbitration and venue in terms of traveling distance for the disputing parties and proximity of evidence, and provide conditions and services that assure the fair and equal treatment of the disputing parties.

B. Applicable Law

16. Article 1130 of the NAFTA provides that:

a. The arbitration must be held in the territory of a NAFTA party that is also party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), and

b. The selection of the place of arbitration must be in accordance with the UNCITRAL Arbitration Rules.

17. All three NAFTA Parties – Canada, Mexico and the United States – are parties to the New York Convention, satisfying the requirements of NAFTA Article 1130(a).[11] The issue therefore turns on the application of the UNCITRAL Arbitration Rules, with the Tribunal limited to selecting among venues in a NAFTA Party. However, given that Canada and UPS have proposed only Canada and the United States as places of arbitration, the Tribunal should limit itself to choosing among venues in these two countries.[12]

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[11] Canada, Mexico and the United States respectively acceded to the New York Convention on May 12, 1986, April 14, 1971, September 30, 1970. See www.uncitral.org/en-index.htm.

[12] In the *Ethyl Corporation v. The Government of Canada* ("*Ethyl*"), *Decision Regarding the Place of Arbitration*, November 28, 1997, the Tribunal limited itself to the sites recommended by the disputing parties. In so doing, it emphasized that, "it is in no way precluded by the parties' respective proposals from considering other locations. It proceeds as it does because it believes the parties objectively have searched out those places that are most likely in fact to be most appropriate, having regard to the circumstances of the arbitration." (Page 5, footnote 7). **[Tab 1]** In *Methanex Corporation v. United States of America* ("*Methanex*"), *The Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of Arbitration*, the Tribunal also limited itself to the sites recommended by the disputing parties. As the Tribunal explained: "The parties' submissions concentrated on the relative suitability of two places only: Toronto and Washington DC. There was, rightly for this case, very limited consideration given to other places within Canada and the USA, although there was some common ground that it would be appropriate

18. Article 16(1) of the UNCITRAL Rules provides:

> Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the tribunal, having regard to the circumstances of the arbitral.

19. According to paragraph 22 of the UNCITRAL Notes, prominent factors influencing the choice of the place of arbitration include:

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 or States where the award may have to be enforced;

c. convenience of the parties and the arbitrators, including the travel distances;

d. availability and cost of support services needed; and

e. location of the subject-matter in dispute and proximity of evidence.[13]

20. Although not binding, these factors have been applied by other NAFTA Chapter Eleven Tribunals in resolving disputes on place of arbitration.

21. In the Ethyl case the Tribunal stated that:

> In its view, its decision regarding the place of arbitration in this case must be made, as Article 16(1) prescribes, 'having regard to the circumstances of the arbitration, meaning all such circumstances, including those elements offered for consideration in paragraph 22 of the Notes, and without any individual

for the tribunal to choose Vancouver (where the Claimant is based) or California (whose legislature passed the measure complained of). Given that no cogent reasons were advanced for having the arbitration in any other place in Canada or the United States, the Tribunal has similarly concentrated on the respective suitability of Toronto and Washington DC for this arbitration." (Page 10, paragraph 25). **[Tab 2]**

[13] UNCITRAL Notes on Organizing Arbitral Proceedings, paragraph 22.

circumstances being accorded paramount weight irrespective of its comparative merits.[14]

22. 22. In the Methanex case the Tribunal stated:

> The UNCITRAL Notes are not legally binding, both specifically in this case and more generally as paragraph 22 of the Notes makes clear. Nonetheless, this list of factors provides a helpful starting point to the practical exercise required under Article 16(1) of the UNCITRAL Arbitration Rules.[15]

23. The Tribunals in the Ethyl and Methanex cases then turned their attention to the factors relevant under paragraph 22 of the UNCITRAL Notes, considering each of them in relation to the places of arbitration proposed by the disputing parties.[16]

C. Circumstances of the Case that the Tribunal Should Consider in Determining the Place of Arbitration

24. The factors referred to in paragraph 22 of the UNCITRAL Notes point to Canada as the place of arbitration and Ottawa as the preferred Canadian venue.

a. Suitability of the Law on Arbitral Procedure of the Place of Arbitration

25. The Commercial Arbitration Act [17]("CAA") implements at the federal level in Canada the Model Law on International Commercial Arbitrations ("Model Law") as adopted by the United Nations Commission on International Trade ("UNCITRAL") on June 21, 1985. The Model Law was developed to promote the efficient functioning of international commercial arbitrations.

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[14] *Ethyl, supra,* note 12 at p. 4. **[Tab 1]**

[15] *Methanex, supra,* note 12 at p. 4, paragraph 3. **[Tab 2]**

[16] *Ethyl, supra* note 12at pp. 5 to 9. **[Tab 1]** *Methanex, supra,* note 12 at pp. 9 to 13. **[Tab 2]**

[17] R.S.C, 1985, c. 17 (2nd Supp.). **[Tab 4]**

26. The Commercial Arbitration Code ("Code"), which is based on the Model Law, is attached as a schedule to the CAA. Section 5 of the CAA makes the Code applicable to NAFTA Chapter Eleven Investor-State disputes to which Canada is a disputing party.[18] Canada therefore has a wholly appropriate judicial environment in which to conduct arbitrations under NAFTA Chapter Eleven.

27. As between Canada and the United States, the Tribunals in the Ethyl and Methanex cases have concluded that both countries possess equally suitable laws on arbitral procedure.

28. In the Ethyl case the Tribunal stated:

> As to criterion (a) of the Notes – "suitability of the law on arbitral procedure" – the Tribunal concludes that all proposed fora are equally suitable. It appears undisputed that Canada's Commercial Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration and by its

[18] Section 5 of the CAA states:

(1) Subject to this section, the Code has the force of law in Canada.

(2) The Code 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.

(3) The Code applies to arbitral awards and arbitration agreements whether made before or after the coming into force of this Act.

(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*, and

(b) a claim under Article G-17 or G-18 of the Agreement, as defined in subsection 2(1) of the *Canada-Chile Free Trade Agreement Implementation Act*.

Section 2(1) of the *North American Free Trade Agreement Implementation Act*, R.S. 1985 c.N-23.8 states that: "'Agreement' means the North American Free Trade Agreement entered into between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America and signed on December 17, 1992, and includes any rectifications thereto made prior to its ratification by Canada; ..."

terms would apply to this arbitration under NAFTA Chapter Eleven. It appears to be equally undisputed that the relevant laws of the United States, and, to the extent relevant, the State of New York, are no less suitable. The fact that the laws applicable to this arbitration, were it situated in New York City, have been in place longer than Canada's Commercial Arbitration Act, and therefore are judicially more elaborated, does not, in the view of the Tribunal, significantly affect their comparative suitability. [19]

29. Similarly, in the Methanex case the Tribunal stated:

> The Tribunal begins, as did the Parties, with the factors listed in the UNCITRAL Notes. As regards Factors A and B, the Tribunal accepts that there is little to choose between Toronto and Washington D.C. in regards to suitability of the law on arbitral procedure and enforcement. The Tribunal concludes that, for all practical purposes in regard to this arbitration, the two potential places of arbitration may be considered equally suitable in terms of the law on arbitral procedure and enforcement.[20]

30. UPS in its letter of March 22, 2001 contends that:

> It is unfair to the Investor, and treats the Investor unfairly, to have any award of the Tribunal in the Investor's favour subject to review by a Canadian court applying Canadian law established (and subject to variation) by the Government of Canada. If the arbitration is held in the U.S., the disputing parties would be treated equally, as neither Canada nor the Investor would have any ability to control the laws under which review would occur.[21]

31. The suggestion of unfair treatment is highly objectionable as it effectively amounts to an allegation of bad faith on the part of Canada and the Canadian courts.

32. First, UPS appears to be suggesting that Canadian courts would not treat the disputing parties equally and would favour Canada in any proceeding for statutory review or enforcement of an award rendered by the Tribunal. The suggestion is without merit

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[19] *Supra*, note 12 at pp. 5 and 6. **[Tab 1]**

[20] *Supra*, note 12 at p. 10, paragraph 26. **[Tab 2]**

[21] *Supra*, note 9 at p. 4.

and is contradicted by the procedure created by the Parties for the resolution of disputes under NAFTA Chapter Eleven, which includes statutory review and enforcement of awards by their domestic courts. Therefore, in the absence of evidence to the contrary – and UPS cites none - there is a strong presumption that domestic courts of the Parties will accord disputing parties under NAFTA Chapter Eleven fair and equal treatment.

33. Second, UPS raises the hypothetical possibility that Canada might change the regime under the CAA governing statutory review and the enforcement of awards of NAFTA Chapter Eleven tribunals. Apart from the absence of any evidence that Canada is contemplating any changes to the CAA – and UPS cites none – the suggestion that Canada might amend the CAA in order to gain an advantage over UPS in the event a proceeding is commenced to revise, set aside or annul an award of the Tribunal necessarily implies that Canada would purposefully attempt to subvert or refuse to fulfill its duties as a signatory to the New York Convention. Not only is this without factual basis, it conflicts with the presumption that States behave in conformity with their international law obligations.[22]

34. In any event, as noted above, Section 5 of the CAA makes the Code applicable to NAFTA Chapter Eleven Investor-State disputes to which Canada is a disputing party. Under Article 1(2) of the Code, Canadian courts retain jurisdiction over the recognition and enforcement of arbitral awards rendered against Canada.[23]

35. Article 1(2) of the Codes stipulates that its provisions, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is Canada. Hence, whereas Article 34 of the UNCITRAL Rules – which provides for applications for setting aside as the only

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[22] *Corfu Channel Case*, (1949) I.C.J. Rep. 4 at p. 19 and 120. [Tab 5]

[23] Pursuant to section 6 of the CAA, a "court" in the Code means the Federal Court of Canada or any superior, county or district court, except where the context otherwise requires. Article 6 of the Code stipulates that these courts shall perform the functions referred to in Article 34(2) of the Code, which sets out the grounds on which an award may be set aside. [Tab 4]

recourse against an arbitral award – applies only if Canada is the place of arbitration, Article 35 of the Code – which provides for the recognition and enforcement of awards – applies regardless of the place of arbitration as long as Canada is a party to the dispute.

36. The grounds for setting aside an award in Article 34(2) of the UNCITRAL Rules are identical to the grounds on which Canadian courts may refuse to recognize or enforce an arbitral award under Article 35(2) of the UNCITRAL Rules. As a result, even if Canada were not selected as the place of arbitration, Canadian courts would still have jurisdiction under the CAA and the Code to review an award rendered by a NAFTA Chapter Eleven tribunal once its recognition and enforcement is sought.

37. UPS further contends in its letter of March 22, 2001 that:

> If the arbitration is held in Canada, the Investor could be disadvantaged by specific provisions of Canadian domestic law relating to the production of documents that could be used by a domestic court to favour the Government of Canada. If the arbitration is held in Canada, the Investor could be disadvantaged by Canada. Such provisions do not, to the Investor's knowledge, exist in the United States.[24]

In support of its contention, UPS refers to *Pope & Talbot* v. *The Government of Canada* ("Pope & Talbot").[25]

38. The Investor in the Pope & Talbot case claimed that an export control regime established under the Softwood Lumber Agreement between Canada and the United States breached certain of Canada's obligations under NAFTA Chapter Eleven. In the course of the arbitration Canada objected to producing documents that constitute Cabinet

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[24] *Supra*, note 9 at p. 4.

[25] Decision by Tribunal in NAFTA UNCITRAL Investor-State Claim, *Pope & Talbot*, Inc. v. *Government of Canada*, September 6, 2000. **[Tab 6]**

confidences.[26] Canada did so because of the fundamental importance of cabinet confidentiality to the Canadian system of parliamentary government.

39. In declining the Tribunal's invitation to disclose certain information about the documents, Canada followed its invariable practice of not disclosing cabinet confidence documents in any proceeding - whether within or outside of Canada, including claims before tribunals established under the NAFTA[27] or the WTO[28] - regardless of whether the information in the documents helps or harms Canada's case in any given litigation.

40. Therefore, contrary to the Investor's suggestion, this practice is not limited to proceedings in Canada and consequently, is of no relevance in determining the appropriate place of arbitration. Canada will be bound not to disclose documents containing Cabinet confidences regardless of the place of arbitration.[29]

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[26] *Ibid.* Note also adverse comment in Award on the Merits of Phase 2 by Arbitral Tribunal, April 10, 2001, pp. 93 and 94, paragraph 193. **[Tab 7]**

[27] *S.D. Myers v. Government of Canada* ("Myers"), Procedural Order No. 10 (Concerning Crown Privilege), November 16, 1999 and Explanatory Note to Procedural Order No. 10. **[Tab 8]**

[28] *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Panel (WTO), WT/DS70/R, April 14, 1999. **[Tab 9]**

[29] In *Mondev International Ltd. v. United States of America* ("*Mondev*"), (ICSID Case No. ARB(AF)/99/2), a NAFTA Chapter Eleven arbitration under the ICSID Additional Facility Rules, the Tribunal concluded that Investor concerns relating to confidentiality and, in particular, the requirements of the U.S. *Freedom of Information Act*, did not affect the question of place of arbitration. In that regard, the Tribunal stated: "The tribunal has concluded that the place of arbitration shall be at the International Centre for the Settlement of Disputes in Washington, D.C. All relevant factors appear to the Tribunal to point to it as the appropriate place of arbitration. Only one contention of the Claimant to the contrary calls for further mention; it relates to confidentiality. This is of particular concern to the Claimant in view of the Respondent's statement that it regards itself as bound by the requirements of the U.S. *Freedom of Information Act* with which, should it receive a request for disclosure under the terms of that legislation, it will be obliged to comply, subject only to such exceptions from disclosure as are provided for in the Act. The Claimant contends that a hearing in Canada will advantage it in successfully opposing compliance by the Respondent with any request under that legislation whereas the Respondent responds, correctly in the Tribunal's view, that it will be bound to comply with a request under the *Freedom of Information Act* (subject to statutory exceptions) wherever the arbitration be conducted, whether in the United States of America or in Canada." *Interim Decision regarding Place of Arbitration, Bifurcation of Proceedings, Production of Documents and Procedure for Submission of Evidence*, September 25, 2000, at p. 2.

b. Whether there is a Multilateral Treaty on Enforcement of Arbitral Awards between the States where the Arbitration takes Place and the State or States where the Award may have to be Enforced

41. As noted above, both Canada and the United States have enacted the New York Convention, satisfying the requirements of NAFTA Article 1130(a). The enforcement in Canada of final awards under NAFTA Chapter Eleven is found in the CAA and Model Law.[30] It follows that Canada has a wholly appropriate regime for the enforcement of awards rendered by NAFTA Chapter Eleven tribunals and that, in terms of this factor, Canada and the United States are equally suitable as places of arbitration.

c. Convenience of the Parties and the Arbitrators, including the Travel Distances

42. The Tribunal in the Ethyl case indicated that it was inclined to the view that the convenience of counsel is a relevant consideration, subsumed under the "convenience of the Parties."[31] In that regard, the tribunal noted that "the convenience of attorneys appointed by the parties, which translates into cost factors, affects their clients".[32]

43. In a similar vein, the Tribunal in the Methanex case accepted that, in balancing the relative convenience or inconvenience of the parties, the exercise must take

Extensive further argument was heard and written submissions made regarding the broader general question of confidentiality of proceedings but these do not affect the question of the place of arbitration, to which only the effect of a request made to the U.S. under the Freedom of Information Act may be argued to be relevant. Accordingly no ruling is at this time made regarding the general question of confidentiality which the Claimant is at liberty to raise should it become relevant."

Note: The Tribunal in the *Mondev* case has permitted Canada to refer to its Interim Decision in order to faciliate the conduct of the UPS arbitration by ensuring that relevant decisions touching on the place of arbitration are brought to the attention of the Tribunal. It did so on condition that the *Mondev* Interim Decision is kept confidential and not made public. **[Tab 10]**

[30] See Chapter VII of the Code. **[Tab 4]**

[31] *Ethyl, supra,* note 12 at p. 7. **[Tab 1]**

[32] *Ibid.* **[Tab 1]**

into account both the parties and counsel, because the latter's extra travelling time and expenses will be borne ultimately as costs by the disputing parties.[33]

44. The head offices of the agencies of Canada whose measures are at issue, including the Canada Post and the CCRA, are located in Ottawa, Ontario. Counsel for Canada are also located in Ottawa. While UPS' head office is in Atlanta, Georgia, its Investment, UPS Canada, has its head office in Mississauga, Ontario, which is a city adjoining Toronto. Counsel for the Investor is also located in Toronto. The balance of convenience for both parties therefore strongly favours Canada over the United States as the place of arbitration.

45. As regards the specific venue, Canada has proposed Ottawa and, in the alternative, Toronto, Montreal or Vancouver. Whereas Ottawa is more convenient for Canada, Toronto is more convenient for the Investor, with Montreal and Vancouver equally inconvenient for both parties. The balance of convenience favours Ottawa and Toronto.

46. As to the Tribunal members, there appears to be no significant difference in convenience - based on distance, availability of flights and flying time - between travelling to venues in Canada or the United States, save for Boston and Montreal where Dean Ronald Cass and L. Yves Fortier, C.C., Q.C., respectively, reside.[34]

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[33] *Methanex, supra,* note 12 at p. 11, paragraph 28. **[Tab 2]**

[34] In the *Ethyl* case the tribunal commented as follows with respect to its convenience: "As to the Tribunal, the President, who is normally resident in Cologne, Germany, can travel with more or less equal ease to New York City, Ottawa and Toronto. Mr. Lalonde, a resident of Montreal, can travel to Ottawa or Toronto just as well as Judge Brower can from his Washington, DC residence to New York City. By the same token, Judge Brower would be no more or less inconvenienced by travel to Ottawa or Toronto than would Mr. Lalonde be by the need to appear in New York City." (*Supra*, note 11 at p. 6). **[Tab 1]** In the *Methanex* case, the Tribunal stated: "As to factor C, the Tribunal considers that the convenience of the three arbitrators is irrelevant in this case when measured against other factors invoked by the Disputing Parties." (*Supra*, note 12 at p. 11, paragraph 28) **[Tab 2]**

d. Availability and Cost of Support Services

47. The Tribunal has proposed that the parties agree to ask ICSID to provide administrative services for the arbitration and has indicated that this is without prejudice to any future decision on the place of arbitration. As a result, the question of administrative services will be subservient to, and follow the Tribunal's choice of place of arbitration.

48. Canada will proceed on the assumption that administrative services can equally be provided in any of the venues proposed by the disputing parties in Canada and the United States.

e. Location of the Subject Matter in Dispute and Proximity Evidence

49. In the Ethyl case, the Tribunal was asked to decide whether Ottawa, Toronto or New York City should be designated as the place of arbitration. The Investor had requested New York City while Canada had requested Ottawa or Toronto.[35] The Investor alleged that certain federal legislation and other acts of Canada removing methlcyclopentadienyl manganese tricarbonyl (MMT) from Canadian gasoline resulted in breaches by Canada of NAFTA Articles 1102, 1106 and 1110, thereby harming the claimant and lessening the value of its Canadian investment. The Tribunal found that Canada indisputably was the location of the subject matter in dispute.[36]

50. In the Methanex case, the Tribunal was asked to decide whether Toronto or Washington, D.C. should be designated as the place of arbitration.[37] The Investor, a Canadian corporation, had requested Toronto while the United States had requested

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[35] *Ethyl, supra,* footnote 12 at p. 5. **[Tab 1]**

[36] *Ibid* at p. 8. **[Tab 1]**

[37] *Methanex, supra,* note 12 at p. 10, paragraph 25. **[Tab 2]**

Washington, D.C.. The Investor alleged that certain California legislation banning the sale of methanol in MTBE resulted in breaches by the United States of NAFTA Articles 1105 and 1110, thereby harming the Investor's U.S. investment.[38] The Tribunal concluded that the claimant's claim was based on alleged actions in the United States affecting a U.S. enterprise and therefore, the subject matter of the dispute is not located in Canada.[39]

51. The location of the subject matter in dispute in this case is not open to serious debate. 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 NAFTA Chapter Eleven. In particular, the whole claim is based on allegations about Canadian laws, Canadian customs practices and tax regimes, the acts or omissions of Canada in the exercise and delegation of authority, and the actions of Canada Post.

52. The location of the evidence relevant to the subject matter in dispute is also 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 are based in Ottawa. For example, the head offices of Canada Post and the CCRA are in Ottawa, although they also have major facilities or offices in Toronto, Montreal or Vancouver.

D. Neutrality

53. Neutrality is not a factor listed under the UNCITRAL Notes. However, the Tribunals in the Ethyl and Methanex cases have held that it is nonetheless an appropriate

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[38] *Ibid* at p. 13, paragraph 33. **[Tab 2]**

[39] *Ibid.* **[Tab 2]**

consideration that they have discretion to take into account pursuant to Article 16(1) of the UNCITRAL Rules, which provides:

> 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.

54. As the Tribunal in the Ethyl case explained:

> Traditionally arbitrating parties, desiring both the reality and the appearance of a neutral forum, incline to agree on a place of arbitration outside their respective national jurisdictions. This is especially the case where a sovereign party is involved. Where an arbitral institution or a tribunal must make the selection, this tendency is, if anything, even greater, and for the same reasons. Article 16(1) of the UNCITRAL Rules easily accommodates this consideration as one of the "circumstances of the arbitration.[40]

55. The Tribunal in the Methanex case similarly stated:

> For the purpose of the present case, the Tribunal does not place any great weight on the fact that neutrality as a factor was removed from the final version of the UNCITRAL Notes. The Tribunal's discretion turns on the broad concept of "circumstances" in Article 16(1) of the UNCITRAL Rules; and there is no linguistic or logical basis for excluding neutrality as a factor in an appropriate case. Accordingly, the Tribunal has considered neutrality as a possible circumstance in this arbitration.[41]

56. While a tribunal's discretion turns on the broad concept of the "circumstances of the arbitration",[42] this discretion is circumscribed by NAFTA Article 1130(a), which limits the possible places of arbitration to one of the NAFTA Parties. Moreover, as the Tribunals in the Ethyl and Methanex cases have noted, it was open to the NAFTA Parties to agree that, in the interests of neutrality, the place of arbitration in NAFTA Chapter

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[40] *Supra,* note 12 at p. 9. **[Tab 2]**

[41] *Supra,* note 12 at p. 13, paragraph 35. **[Tab 2]**

[42] *Ibid.* **[Tab 2]**

Eleven arbitrations should be the NAFTA Party not involved in the dispute. That they did not do so suggests that the requirements of neutrality can be met by holding the arbitration in the territory of the Party whose measures are being challenged.[43]

57. In any event, by limiting the choice of place of arbitration to Canada or the United States the disputing parties have effectively signalled that there is no need to hold the arbitration in the territory of the Party whose measures are not in issue. As the Tribunal observed in the Methanex case:

> ... [I]n the circumstances where (as in this case) the disputing parties have further limited the choice of place of arbitration by their arbitral tribunal to one or the other's state, a neutral venue is simply not possible. In this arbitration, either the Claimant or the Respondent, effectively by their own choice, will have to arbitrate in the other's home state. Strict neutrality is perhaps a circumstance much to be desired for certain arbitrations; but it was not so desired by the parties to this arbitration.[44]

58. That Canada meets the requirements of neutrality, both actual and perceived, for the purposes of this arbitration, is borne out by the fact that it has been the place of arbitration in all NAFTA Chapter Eleven Investor-State disputes to which it has been a party.[45]

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[43] In the *Ethyl* case the Tribunal stated: "A Mexican venue surely would represent neutrality in this case, and in all such cases. The Tribunal concludes, however, that had the NAFTA Parties felt that every arbitration under Chapter 11 of NAFTA must be sited in the NAFTA Party not involved in the dispute they would have said so and not have remitted us to Article 16(1) of the UNCITRAL Rules." (*Supra,* note 12 at pp. 9 and 10) **[Tab 1]** The Tribunal in the *Methanex* case echoed a similar view when it stated: " ... [I]n assessing the significance of neutrality or perceived neutrality, the Tribunal bears in mind (i) that it was open to the NAFTA Parties to agree that in the interests of neutrality Chapter Eleven disputes should be arbitrated in the territory of any third Party not directly involved in the dispute, yet they did not do so; ..." (*Supra,* note 12 at p. 14, paragraph 36). **[Tab 2]**

[44] *Methanex, supra,* note 12 at p. 14, paragraph 36. **[Tab 2]** As a possible circumstance in the arbitration, neutrality is in any event outweighed by the factors listed in paragraph 22 of the UNCITRAL Notes which, on balance, favour Canada as the place of arbitration.

[45] Canada has been a party to four NAFTA Chapter Eleven Investor-State disputes: the *Ethyl, Myers, Pope & Talbot* and the *UPS* cases.

59. In the Myers case the Investor challenged the PCB Waste Management Order issued by Canada, which prohibited the export of PCB wastes from Canada to the United States. At the time of the Order Myers operated a PCB waste disposal facility in Ohio, where it planned to process Canadian PCB waste. The Investor, which was represented by the same counsel as represents UPS in this case, and Canada agreed upon Canada as the place of arbitration selected Toronto as the most convenient Canadian venue.

60. In the Pope & Talbot case the Investor challenged Canada's implementation of the Canada-U.S. Softwood Agreement. The Investor was a U.S. forest products company with an investment in Canada consisting of three softwood lumber mills and one pulp and paper mill, all located in British Columbia. After hearing oral submissions from the disputing parties the Tribunal determined that Canada was the appropriate place of arbitration and that Montreal should be the Canadian venue.

61. In the Ethyl case, the Tribunal chose Canada as the place of arbitration and Toronto as the Canadian venue. Neutrality was the determinative factor in selecting Toronto over Ottawa as the Canadian venue. As the Tribunal explained:

> Once the Tribunal has determined to select a Canadian venue, none of the specific factors considered weighs strongly in favour of Toronto, Canada's alternative proposal, rather than Ottawa. The Tribunal has some reluctance, however, to choose Ottawa. This is due to the fact that it's the capital of Canada. The Tribunal therefore has determined to designate Toronto as the place of arbitration, for the reason that while it is no more, and no less, appropriate than Ottawa when measured by the other applicable criteria, it is likely to be perceived as a more 'neutral forum'."[46]

62. In the Methanex case, the Tribunal considered that the requirements of neutrality were sufficiently met "if the place of arbitration lies outside British Columbia (as home of the Claimant), California (responsible for the legislative measure in issue) and Texas (as the home of Methanex US)". Once these three locations were excluded, the

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[46] *Ethyl, supra*, note 12 at p. 10. **[Tab 2]**

question then arose whether Washington D.C. should also be excluded on grounds of neutrality because it is the Respondent's capital city. As to actual neutrality, the Tribunal found no evidence of any difficulties for the Claimant. The Tribunal concluded that the requirements of perceived neutrality would be satisfied by holding the hearings in Washington D.C. as the seat of the World Bank, as distinct from the seat of the United States' federal government.[47]

63. The overall objective of neutrality is to ensure that the conditions surrounding the conduct of arbitrations do not interfere with the equal treatment of the disputing parties. Therefore, neutrality is not so much concerned with subjective perceptions of impartiality than with the actual absence of bias and unequal treatment. As there is no evidence that UPS would encounter any difficulties if the arbitration were held in Ottawa, or any of the alternative Canadian venues, the requirements of equal treatment will be assured by retaining an independent organization or agency to provide the Tribunal with administrative services.

E. Conclusion

64. Although on the basis of three considerations - suitability of the law on arbitral procedure, whether Canada is a signatory to a multilateral treaty on the enforcement of arbitral awards and the convenience of the arbitrators - the venues proposed by Canada and the Investor appear to be equally appropriate, other circumstances strongly weigh in favour of Canada, and Ottawa in particular.

65. Most significantly, Canada is indisputably the location of the subject matter in dispute. In addition, Canada overall, and Ottawa in particular, are more convenient for

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[47] As the Tribunal explained: "Whilst Washington is of course the seat of federal government in the USA, it is also the seat of the World Bank and ICSID. The World Bank is an independent international organisation with juridical personality and broad jurisdictional immunities and freedoms (Article VII of it Articles of Agreement); and ICSID similarly has international legal personality and benefits from a wide jurisdictional immunity (Articles 18-20 of the Convention on the Settlement of International Disputes between States and Nationals of Other States)." *Supra,* note 12 at p. 15, paragraph 39. **[Tab 2]**

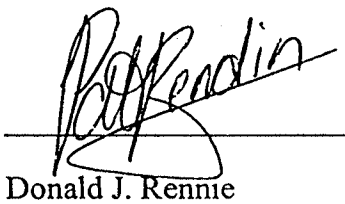
the disputing parties themselves and more convenient in terms of proximity of evidence. On balance, the factors cited from the UNCITRAL Notes strongly suggest that Canada should be the place of arbitration and favour Ottawa over other Canadian venues.

IV: RELIEF SOUGHT

66. For the foregoing reasons, Canada asks the Tribunal to determine that Canada should be the place of arbitration and that Ottawa or, in the alternative, Toronto, Montreal or Vancouver, should be the Canadian venue.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED in the City of Ottawa, the Province of Ontario, this 30th day of April, 2001.



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