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 REPLY TO INVESTOR'S SUBMISSION ON PLACE OF ARBITRATION

May 7, 2001

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PART I. ARGUMENT IN REPLY

A. A Tribunal is Concerned with Choosing the Legal Place of Arbitration Only

1. UPS argues that, in choosing the place of arbitration, the Tribunal should also decide where the hearings physically should be held and where it should make its decisions. UPS further asserts that the factors listed in paragraph 22 of the UNCITRAL Notes on Organizing Arbitral Proceedings ("UNCITRAL Notes")[1] are mainly relevant to the physical location of the arbitration.[2]

2. UPS misstates the question to be decided by the Tribunal, which is only to decide the **legal** place of arbitration on the basis of Article 16(1) of the UNCITRAL Arbitration Rules ("UNCITRAL Rules") and the factors listed in paragraph 22 of the UNCITRAL Notes, all of which are relevant to this question alone.

3. As the Tribunal explained in the Methanex case:

> The place of arbitration is the legal place or "seat", of the arbitration; and the Tribunal here makes no decision as to the geographical place of any particular hearing. Any such hearing could be held at geographical places elsewhere than the legal place of arbitration in accordance with Article 16(2) of the UNCITRAL Rules,[3] depending on the convenience of witnesses, the parties and their legal representatives, together with other relevant circumstances. In this decision, the Tribunal is not concerned with any such matters; and both Disputing Parties remain free hereafter to make an application for a particular hearing to be held in (say) British Columbia, Texas or California, without affecting the legal place of arbitration or indeed the place where the Tribunal's award or awards are made. Accordingly, the Tribunal is here concerned solely with the question of the legal place of arbitration.[4]

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[1] UN Document A/CN.9/410. **[Tab 3]** (Note: All "Tab" references are to Canada' s Book of Authorities on Place of Arbitration unless otherwise indicated.)
[2] See paragraphs 8, 12 and 41 of the Investor's Submission on the Place of Arbitration ("Submission").
[3] Article 16(2) states: " The arbitral tribunal may determine the locale of the arbitration within the country agreed 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."
[4] The Written Reasons of the Tribunal on 7th September 2000 on the Place of Arbitration, p. 24, para. 10. **[Tab 2]** The Tribunal then proceeded to apply the factors listed in paragraph 22 of the UNCITRAL Notes, as well as neutrality, to determine the legal place of arbitration, which it concluded should be the Respondent's capital, Washington, D.C..

4. Canada agrees with this statement of law in respect of the place of arbitration. It is the question of the legal place of arbitration, and no other, that is before the Tribunal.[5]

B. Document Disclosure is not Governed by Canadian Law

5. UPS contends that Canadian law on arbitral procedure is not suitable for the present dispute. In particular, UPS states that holding the arbitration in Canada somehow "undermines" the principle of equality and creates an "imbalance" between the disputing parties.[6] UPS offers little in support of this bald assertion. It points only to the fact that Canada may refuse to disclose cabinet confidences to a NAFTA Chapter Eleven Tribunal.[7]

6. UPS' contention is based on the erroneous assumption that, if Canada is chosen as the place of arbitration, its domestic laws regarding the disclosure or production of documents - which UPS describes as part of what it refers to as *lex arbitri* - would govern the issue in this arbitration.[8]

7. NAFTA Chapter Eleven and the UNCITRAL Rule are clear as to the law that governs Investor – State arbitrations under NAFTA Chapter Eleven.

8. NAFTA Article 1131(1) states:

> A tribunal established under this Section shall decide the issues in dispute in accordance with this agreement and applicable rules of international law.

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[5] In paragraph 5 of the Investor's Submission, UPS indicates that it would agree to holding this arbitration in a non-NAFTA state that is a party to the New York Convention where English is the official language. However, NAFTA Article 1130(b) provides:

> **Unless the disputing party agrees 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: [...] the UNCITRAL Arbitration Rules if the arbitration is under those rules. (emphasis added)

Canada does not agree to hold this arbitration in a non-NAFTA state.

[6] Submissions, para. 15.

[7] *Ibid.*

[8] For example, at paragraph 21 UPS states: "It is inevitable that the production of information in this arbitration will become an important issue just as it has been in previous NAFTA Chapter 11 arbitrations. Accordingly, to avoid the result in which the Investor is placed at a clear juridical disadvantage in the arbitration because it is forced to be subject to municipal evidence laws of Canada, the *lex arbitri* of the arbitration should not be the arbitral law of Canada. The preference of the Investor is that the *lex arbitri* be the arbitral law of the United States."

9. NAFTA Article 1120(2) states:

> The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

10. As NAFTA Chapter Eleven does not specify rules of procedure for arbitrations, the relevant governing law is found in the UNCITRAL Rules, complemented by the applicable rules of international law.

11. Article 24(3) of the UNCITRAL Rules allows an arbitral tribunal to require production of documents. The provision states:

> At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

12. Article 28(3) of the UNCITRAL Rules addresses a failure to comply with a tribunal request. The provision states:

> If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

13. Hence, should either disputing party decline an arbitral tribunal's invitation to produce documentary evidence the issue will be resolved on the basis of the UNCITRAL Rules and not the domestic law of the place of arbitration.

14. As regards cabinet confidences, Canada's stance on this issue is driven by Canadian government policy and legal obligations which are unaffected by the laws of the place of arbitration.

C. Canadian Law of Arbitral Procedure is Wholly Appropriate for the Conduct of NAFTA Chapter Eleven Arbitrations

15. At paragraph 23 of its Submission UPS submits that, notwithstanding the implementation by Canada of the UNCITRAL Model law, it is not suitable as the place of arbitration because it demonstrates "an environment that creates uncertainty in arbitration with the prospect of a myriad of legal challenges to Tribunal awards". UPS'

contention is based on positions advanced by Canada in domestic courts on the issue of statutory review of NAFTA Chapter Eleven Awards.

16. The UPS argument is without merit as it in fact impugns the right of Canada, and other disputing parties holding a similar view - such as Mexico - to be heard before a court having power to hear and determine the case. It also implies that this fundamental aspect of due process is inconsistent with a suitable law of arbitral procedure because the **possibility** exists that a court might adopt a position on statutory review that UPS does not agree with. It further implies that such speculation is even relevant.

17. In any event, the recent decision of the British Columbia Supreme Court in *The United Mexican States v. Metalclad Corporation* ("Metalclad")[9] renders moot and irrelevant the basis for UPS' allegation that Canada does not possess suitable laws on arbitral procedure.

18. After quoting from the decision of the British Columbia Court of Appeal in *Quintitte Coal Ltd. v. Nippon Steel Corporation*[10] regarding the appropriate standard of review for international commercial arbitral awards, the British Columbia Supreme Court stated:

> Counsel for Mexico and Counsel for the Intervenor, Attorney General of Canada urge this Court to utilize the "pragmatic and functional approach" to determine the appropriate standard of review under the CAA and the International CAA. This approach has been developed by the Supreme Court of Canada to apply to the review of decisions of domestic administrative tribunals in place of the

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[9] 2001 BCSC 664 **[Tab 1, Canada's Supplementary Book of Authorities]**

[10] *Ibid* at pp. 18 and 19: "The leading British Columbia authority on s. 34 is *Quintette Coal Limited v, Nippon Steel Corporation,* [1991] 1W.W.R. 219 (B.C.C.A.), a decision which has been followed by several other courts in Canada. In that case, the B.C. Court of Appeal refused to interfere with an arbitration award setting prices to be paid for the supply of coal. After referring to numerous authorities, Gibbs, J.A., on behalf of the majority of the Court, commented on the standard of review in the following terms: 'It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" spoken of by Blackmun, J [in *Mitsubushi Motors Corp. v. Soler Chrysler-Plymouth Inc.,* 473 U.S. 614 (1985)] are as compelling in this jurisdiction as they are in the United sates or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. (p. 229)'" **[Tab 1, Canada's Supplementary Book of Authorities]**

previous approach, which involved a somewhat artificially applied test of jurisdictional error. The new approach began with the decision in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048 and has been developed by the Supreme Court of Canada in a number of cases over the past dozen years.

I need not decide whether it is appropriate to use the "pragmatic and functional approach" to determine the standard of review under the CAA. With respect to the International CAA, it is my view that the standard of review is set out in ss. 5 and 34 of that Act and that it would be an error for me to import into that Act an approach which has been developed as a branch of statutory interpretation in respect of domestic tribunals created by statute.[11]

19. It is trite to point out that Canada has a system of superior courts exercising inherent jurisdiction, whose independence is guaranteed under the Canadian constitution. That system is demonstrably suitable for the role it is supposed to play under NAFTA Chapter Eleven – and other international arbitral regimes – with respect to arbitral proceedings.

20. As noted in paragraphs 27, 28 and 29 of Canada's Memorandum of Argument of Place of Arbitration ("Memorandum"), the Tribunals in the *Ethyl* and *Methanex* cases have already concluded that Canada possesses wholly suitable laws on arbitral procedure.

D. The Balance of Convenience Favours Canada

21. In discussing factors (c) to (e) of paragraph 22 of the UNCITRAL Notes, UPS begins by stating at paragraph 31 of its Submission that they "relate mainly to the appropriate physical location at which the arbitration should be held, rather than addressing the issues as to what should be the *lex arbitri* of the arbitration." As already noted, these and other factors in paragraph 22 of the UNCITRAL Notes are **solely** relevant to the question of the legal place of arbitration.

22. In paragraph 33 of its Submission, UPS addresses the issue of the convenience of the disputing parties by taking into account only the circumstances of UPS and its counsel. An appropriate consideration of this factor requires taking into account the circumstances of both disputing parties. By this measure, Canada demonstrates in paragraphs 44 and 45 of its Memorandum that the balance of convenience for both

[11] *Metalclad,, supra* note 9 at pp. 19 and 20. **[Tab 1, Canada's Supplementary Book of Authorities]**

disputing parties favours Canada as the place of arbitration and points to Ottawa as the preferred Canadian venue.

23. In paragraph 34 of its Submission, UPS proposes San Francisco "as a reasonable compromise to accommodate the travel distance for Sir Kenneth Keith". Given that the balance of convenience favours Canada as the place of arbitration, a more appropriate venue to accommodate Sir Kenneth Keith would be Vancouver.

24. In paragraph 35 of its Submission, UPS states that:

> If the ICSID is appointed to provide [administrative] services, this would be a strong reason in favour of Washington as a convenient place of arbitration.

25. Reference is also made to the use of the ICSID in paragraph 36 of the UPS Submission. Given that the Tribunal's proposal to ask the ICSID to provide administrative services is without prejudice to any decision regarding the place of arbitration, UPS' discussion in this context is entirely inappropriate and wholly irrelevant.

26. In paragraph 37 of its Submission, UPS argues that " (e) location of the subject matter in dispute and proximity of evidence" should not be given undue weight as this would nearly always favour the NAFTA Party whose measures are at issue in all cases. That the NAFTA Parties agreed to allow disputes on place of arbitration to be decided in accordance with Article 16(1) of the UNCITRAL Rules, and therefore, with due regard to the factors listed in paragraph 22 of the UNCITRAL Notes, clearly indicates that location of the subject matter in dispute and proximity of evidence are factors to be considered and weighed as all the other factors.[12]

27. In paragraph 38 of its Submission, UPS argues that the subject matter of the dispute is not restricted to Canada and is fundamentally international in nature. The argument is based on an erroneous assumption of fact and a mischaracterization of what

[12] Contrary to what UPS states in paragraph 37 of its Submission, Rule 22 of the Model Rules of Procedure for NAFTA simply indicates that: "The hearing shall be held in the capital of the Party complained against." The provision speaks to the physical location of the hearing and has nothing to do with place of arbitration.

is at issue in this arbitration. At issue is UPS' investment in Canada - UPS Canada – which is based and operates in Canada.

28. As noted by Canada in paragraph 51 of its Memorandum of Argument on Place of Arbitration, the measures in issue were allegedly taken in Canada, by the CCRA and other federal and provincial agencies, and by Canada Post. The whole claim is based on allegations about Canadian laws, custom practices and tax regimes, the acts or omissions of Canada in the exercise and delegation of authority, and the actions of Canada Post. The subject matter in dispute is indisputably in Canada.

29. In paragraphs 39 and 40 of its Submission, UPS discounts the weight that should be given to proximity of evidence as a factor by stating that:

> .... With modern information technology, the handling of documentation should not be an issue in this arbitration, in particular in light of the fact that both disputing parties, and Canada Post Corporation, have a high degree of expertise and sophistication in the handling of information.
>
> With respect to the location of witnesses and experts, there is no clear balance of convenience. Witnesses will, at minimum, be from throughout North America, and likely Europe. .... .

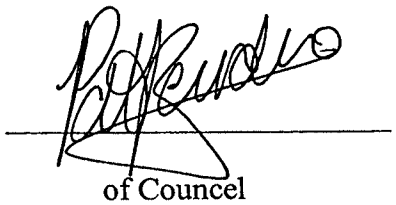
30. The fact remains that documentary evidence relevant to UPS' allegations is principally located in Ottawa, which is where it will need to be stored and initially handled. The decision-makers implicated by UPS are based in Ottawa. As well, postal and custom facilities, which implement many of the impugned measures, are in Canada. Hence, contrary to UPS' suggestion, the balance of convenience on this issue favours Canada as the place of arbitration.

PART II. RELIEF SOUGHT

31. 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 RESPECTFULY SUBMITTED

DATED in the City of Ottawa, the Province of Ontario, this 7th day of May, 2001.



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