IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES
BETWEEN

ADF GROUP INC., *Claimant/Investor,* *-and-* UNITED STATES OF AMERICA, *Respondent/Party.*	Case No. ARB(AF)/00/1

FINAL OBSERVATIONS ON PLACE OF ARBITRATION OF RESPONDENT UNITED STATES OF AMERICA

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CONTENTS

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Pursuant to Item 12 of the Minutes of the First Session of the Tribunal, Respondent United States of America respectfully submits these final observations on place of arbitration. For the reasons set forth here and in the United States' March 19 Submission, the Tribunal should select Washington, D.C. as the place of arbitration.

ARGUMENT

In its second submission on place of arbitration, claimant ADF Group Inc. ("ADF") misstates the position of the United States in several key respects and, thereby, fails to effectively refute that Washington, D.C. is the proper place of arbitration for purposes of this case. In addition, ADF's supplemental arguments ignore authorities previously relied on (including the UNCITRAL Notes and Chapter Eleven decisions) without identifying any alternative authority to guide the Tribunal.

I. THE TRIBUNAL MAY, WITH AGREEMENT OF THE PARTIES, HOLD A HEARING OUTSIDE THE PLACE OF ARBITRATION

As a threshold matter, the United States wishes to clarify its views concerning the physical location of hearings in these proceedings. It is *not* the position of the United States, as ADF submits, that the physical location of hearings may *never* deviate from the place of arbitration selected by the Tribunal. *See* ADF April 2 Submission ¶¶ 6-7. Rather, the United States' view is that the Tribunal's determination of place of arbitration determines the *presumptive* location of physical hearings *only*. When the disputing parties agree, the Tribunal may hold a hearing in another location, as it did for its first session. *See* Arbitration (Additional Facility) Rules art. 29 ("the Tribunal shall apply any agreement between the parties on procedural matters"). The first session was therefore properly held – by decision of the Tribunal *with agreement of the parties* – by videoconference in three distinct locations. In no way did such a hearing "vitiate[] these arbitral proceedings," as ADF suggests. ADF April 2 Submission ¶ 7.

Therefore, provided the disputing parties so agree, the Tribunal will again be free to designate an alternate site for a particular hearing in this case. Absent such agreement, however, Article 21 of the Arbitration (Additional Facility) Rules does not grant the Tribunal discretion to hold a hearing "any place it deems appropriate" outside the place of arbitration.[1]

II. THE UNITED STATES' LAWS ON ARBITRAL PROCEDURE ARE EMINENTLY SUITABLE FOR PURPOSES OF THIS CASE

ADF's attempt to discredit U.S. law on arbitral procedure fails for several reasons: (1) its suggestion that U.S. law is relatively uncertain is without merit; (2) amply suitable

[1] *See* US March 19 Submission at note 6 and accompanying text.

procedures for review of a Chapter Eleven award are available under U.S. law; and (3) in the most important respect – enforcement – the laws on arbitral procedure of the United States could not be more suitable.

First, contrary to ADF's suggestion, it is impossible at this stage of Chapter Eleven's evolution for ADF or any other claimant to have absolute certainty as to the legal regime governing review of a Chapter Eleven award. *See* ADF April 2 Submission ¶ 10 (claiming entitlement to grounds for review that are "clear, predictable and limited"). To date, no decision in a proceeding to review a Chapter Eleven award has issued, even in a court of first instance, in any of the NAFTA Parties. As a result, there can be no absolute certainty when it comes to judicial review of such an award – whether that review takes place in Canada or in the United States.

In fact, where a Canadian venue has been selected as the place of arbitration for a Chapter Eleven case, there has been considerable uncertainty regarding the applicable standard of review. In the case currently pending between the United Mexican States and Metalclad Corporation before the Supreme Court of British Columbia, both Mexico and Canada have submitted arguments that raise significant questions regarding the proper standard of review. Notably, their arguments apply even if British Columbia's version of the UNCITRAL Model Law governs and whether or not Chapter Eleven awards are considered "commercial."

Mexico and Canada both argue, based on decisions of the Supreme Court of Canada that would presumably apply in Quebec as well, that factors unique to investor-State arbitration ought to determine the proper standard of review of Chapter Eleven awards. For example, Canada's submission in the *Metalclad* appeal distinguishes between "public" and

"private" law issues: "The 'pragmatic and functional approach' of the Supreme Court of Canada to determine the standard of review in matters of public law is the more appropriate approach for Chapter Eleven tribunals." Outline of Argument of Intervenor Attorney General of Canada in *United Mexican States v. Metalclad* at ¶ 24 (at Tab 17 to ADF February 26 Submission). Under such a standard, Canada concludes, "it is clear that in interpreting NAFTA, Chapter Eleven tribunals should not attract extensive judicial deference and should not be protected by a high standard of judicial review." *Id.* at ¶ 30. ADF offers no reason to believe that an action to review a Chapter Eleven award in Quebec would not be subject to similar questions as to applicable standards, even under the Quebec Code of Civil Procedure.

Second, a request to the U.S. courts to review a Chapter Eleven award issued in the United States will by no means result in "legal mayhem." ADF April 2 Submission ¶ 32. Despite what ADF alleges, suitable procedures for review of a Chapter Eleven award *are available* in the United States under both federal law and D.C. law, regardless of whether the award is deemed commercial for purposes of review. A Chapter Eleven award made in Washington, D.C. would be covered by Chapters 2 and 3 of the Federal Arbitration Act (and residually by Chapter 1 in either case), as well as by Chapter 43 of the District of Columbia Uniform Arbitration Act. Moreover, a party subject to such an award could seek review in a U.S. court on grounds that differ little from the UNCITRAL Model Law.[2] *See* 9 U.S.C. §§ 10, 208; D.C. Code § 16-4311. That a U.S. court has not yet heard such a motion does not make

[2] As noted in the United States' March 19 Submission, under Section 208 of the Federal Arbitration Act (9 U.S.C. § 208), Chapter 1 of the FAA, and specifically Section 10 governing vacatur of awards, would apply to Chapter Eleven awards made in the United States. And, in any event, review of such awards for enforcement purposes unquestionably would be governed by the grounds set forth in the New York and Inter-American Conventions and implemented by Chapters 2 and 3 of the FAA. *See* note 5 *infra*.

U.S. law any less suited to Chapter Eleven awards than that of Quebec – the courts of which have not entertained such a motion either.

Third, and most important to determining place of arbitration, there can be no debate that U.S. law on arbitral procedure encourages and protects international arbitration by enforcing Convention awards, except in the specific circumstances set forth under the New York and Inter-American Conventions.[3] That ADF relies on dissenting opinions in *Mitsubishi Motors* and *Scherk* proves, rather than undermines, the United States' point.[4] In the United States, both foreign and non-domestic arbitral awards covered by the New York and Inter-American Conventions (Chapters 2 and 3 of the FAA) are enforceable according to the provisions, and subject to the exceptions, of those Conventions.[5]

Moreover, contrary to ADF's argument, the *Chromalloy* decision does not suggest that review of Chapter Eleven awards in the United States "will severely test judicial deference to international arbitration awards." ADF April 2 Submission ¶ 44. In *Chromalloy*, the U.S. court disregarded an Egyptian court's vacatur under Egyptian law of a Convention award, not because of any antipathy toward foreign interests, but because it found the Egyptian court's reasoning (*i.e.*, that the arbitrators' decision constituted a mistake of law) to reflect a "suspicious view of arbitration." 939 F. Supp. 907, 911 (D.D.C. 1996). The court elected to enforce the foreign award rather than recognize the vacatur because the latter would have

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[3] *See* US March 19 Submission at notes 8-10 and accompanying text.

[4] In any event, the dissenting Justices in both *Mitsubishi Motors* and *Scherk* were concerned with foreign corporations avoiding liability under U.S. laws by relying on agreements to arbitrate, a fact scenario irrelevant to NAFTA Chapter Eleven awards. *See Mitsubishi Motors*, 473 U.S. 614 (1985) (respondent claimed anticompetitive practices by foreign respondent under Sherman Act); *Scherk*, 417 U.S. 506 (1974) (petitioner claimed violation by foreign respondent of U.S. securities law).

[5] When the United States implemented the New York and Inter-American Conventions through Chapters 2 and 3 of the FAA, Congress included within the scope of the implementing legislation awards made in the United States

violated the United States' clear public policy favoring "judicial enforcement of binding arbitration clauses." 939 F. Supp. at 913 (citations omitted). Consistent with the findings of the *Methanex* and *Ethyl* tribunals, therefore, this Tribunal should find U.S. law on arbitral procedure eminently suitable for purposes of Chapter Eleven.[6]

III. THE LOCATION OF THE SUBJECT MATTER AND PROXIMITY OF EVIDENCE CLEARLY POINT TO WASHINGTON, D.C. AS THE PLACE OF ARBITRATION

ADF erroneously asserts that the location of the subject matter is "of virtually no relevance in the present case" (ADF April 2 Submission ¶ 49). It provides, however, no principled basis for the Tribunal to disregard either the UNCITRAL Notes or the reasoning of the *Ethyl* and *Methanex* tribunals.

To begin, ADF's assertion that the location of the subject matter is relevant only to private-law disputes is baseless. It is true that the substance of this dispute will be governed by a law (the NAFTA and international law) that will necessarily differ from the local law that will provide the *lex arbitri*. But that is a common scenario in international commercial arbitration, where the law governing the contractual relationship between the parties generally provides the rule of decision, but the *lex arbitri* governs procedural matters. Far from supporting ADF's position, the importance of this factor to international commercial arbitrations confirms its relevance for this arbitration.

Moreover, "the location of the subject-matter and proximity of evidence" is specifically relevant to *this* dispute by virtue of the UNCITRAL Notes and their acceptance by

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that involve a foreign party to the arbitration or have some other "reasonable relationship" with a foreign state. *See, e.g., Toys "R" Us*, 126 F.3d 15, 18-19 (2d Cir. 1997) (citations omitted).

[6] *See Ethyl Decision* at 6 (at Tab 23 to ADF February 26 Submission); *Methanex Decision* at ¶ 26 (at Exhibit 1 to US March 19 Submission).

ADF and other NAFTA tribunals.[7] ADF fails in particular to apprehend the relevance of the tribunal's reasoning in the *Ethyl Decision.* Contrary to ADF's inapt reference, the *Ethyl* tribunal did not recognize – "clearly" or otherwise – that the location of the subject matter "was a municipal law concept of questionable applicability in a Chapter Eleven arbitration." ADF April 2 Submission ¶ 62. To the contrary, the *Ethyl* tribunal "[left] aside" the question of whether the *forum conveniens* doctrine is relevant to international arbitration, and found instead that "Canada indisputably [was] the location of the subject-matter in dispute," which in turn "finally turn[ed] the Tribunal definitely to selection of a place of arbitration in Canada." *Ethyl Decision* at 4, 10, 8. The *Ethyl* case simply does not support ADF's position.

Nor does *Methanex*. That tribunal discounted the importance of the location of the subject matter because the UNCITRAL Arbitration Rules gave it unfettered authority to hold hearings outside the legal seat. *See Methanex Decision* at ¶ 24. But the *Methanex* tribunal nevertheless considered the factor relevant and found it to point to a place of arbitration in the United States, because that claim, like ADF's claim, was "based on alleged actions in the USA affecting a US enterprise." *Id.* at ¶ 33.

The guidance provided by *Ethyl* and *Methanex* is far more persuasive than ADF's puzzling suggestion that the location of the subject matter should "be a factor that leads to choosing a jurisdiction *other than the one* where the subject matter in dispute is found . . . ." ADF April 2 Submission ¶ 53 (emphasis supplied). ADF's theory – in addition to lacking any support – sets factor (e) of the UNCITRAL Notes on its head.

This factor plainly prefers proximity over distance and, therefore, points in this case to Washington, D.C as the place of arbitration. The vast majority of matters in dispute either

[7] *See* US March 19 Submission at note 1 and accompanying text.

took place or were located in the Washington area. Two of the three parties to the relevant construction contracts are located in Virginia, while the third is in Florida; the construction site is only thirty minutes away from Washington; and all of the United States agencies and individual decision-makers implicated by ADF's claim are based in Washington, D.C. and Virginia.[8] For these reasons, the location of the subject matter undeniably points to Washington, D.C.[9]

IV. HOLDING THE ARBITRATION IN WASHINGTON, D.C. WOULD BE SUBSTANTIALLY LESS INCONVENIENT THAN MONTREAL

Although it is common ground that the convenience of the arbitrators favors neither Washington nor Montreal, the convenience of the *parties* decidedly favors Washington. Again, ADF misconstrues the United States' position. The United States has not argued (though it may well be true) that it would bear a heavier burden bringing *witnesses* to Montreal, as ADF claims.[10] ADF April 2 Submission ¶ 65. Rather, the convenience of the parties favors Washington because the United States – as a *party* – is comprised of numerous agencies, of which no fewer than seven are concerned with this Chapter Eleven dispute. ADF fails to appreciate both the significance of this fact and that the *Methanex* tribunal acknowledged it as well. Beyond the need for counsel to consult with its client, it is the "manifest involvement of different US governmental departments in the conduct of this

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[8] Moreover, due to the large number of U.S. government officials (plus representatives of Shirley Contracting Corp.) with first-hand knowledge of the dispute, it is patently inaccurate to state, as ADF does, that the evidence in the Washington area "consists entirely of documentary evidence." ADF April 2 Submission at ¶ 60.

[9] That ADF's facilities are physically located in Terrebonne, Quebec is of little significance to choosing the place of arbitration given that the Tribunal is free in any event to visit "any place connected with the dispute" it deems appropriate, regardless of where the arbitration is sited. Arbitration (Additional Facility) Rules art. 21(2).

[10] To the extent the convenience of witnesses is relevant to the Tribunal's determination, it must fall within the analysis of Part III addressing the location of the subject matter in dispute and proximity of evidence. *See* note 8 *supra.*

arbitration" that renders Washington, D.C. a more appropriate place of arbitration.[11] *Methanex Decision* at ¶ 29.

Moreover, the inconvenience to the United States that would result if the arbitration is located in Montreal is not offset by the existence of a U.S. Consulate in that city. ADF presumes incorrectly that Montreal's consular facilities can sustain, or even aid, the litigation preparation required for a substantive hearing on the merits. U.S. Government resources – especially computing facilities – are extremely limited in Montreal, both in number and capabilities. For example, it is likely that Internet-capable computers would not be available for dedicated non-mission use. Moreover, the extensive security precautions required to access the Montreal Consulate after business hours make its use for litigation support impractical. Thus, if this arbitration takes place in Montreal, U.S. counsel would in all likelihood transport its computing equipment and work out of hotel facilities just as it would if no U.S. Consulate existed. United States counsel would thus not be any less inconvenienced than ADF's attorneys would be in Washington.

In sum, the convenience of the parties favors Washington over Montreal, while neither the convenience of the arbitrators nor that of counsel favors either venue.

V. THE TRIBUNAL SHOULD CONSULT WITH THE ICSID SECRETARIAT REGARDING THE COST OF NEEDED SUPPORT SERVICES

Contrary to ADF's assertion, the United States has not conceded that Montreal and Washington ought to be considered "more or less equal" for purposes of weighing relative expense. ADF April 12 Submission ¶ 73. Rather, this is an issue in dispute. While there may

[11] Moreover, representatives of ADF's enterprise in Florida will also have to travel to Montreal, while the same would not be true of any representatives of the United States if the arbitration is in Washington.

be no real difference between the *availability* of support services in Washington, D.C. and Quebec, the *cost* of such services would be significantly less in Washington given ICSID's role in administering this case. ADF offers no support for its claim that adequate facilities in Montreal could be virtually cost-free and, even if suitable facilities were available in Montreal at no charge, the expense to ICSID of administering the arbitration in Montreal may still exceed the cost of hosting it at its headquarters in Washington, D.C.

In order to resolve this dispute, the United States respectfully submits that, as contemplated by Article 21 of the Arbitration (Additional Facility) Rules, the Tribunal consult with the Secretariat with respect to the cost of support services needed.[12] ICSID is in the best position to provide the Tribunal with accurate information concerning these types of costs.

VI. THERE IS NO FOUNDATION TO ADF'S ALLEGATION THAT THE UNITED STATES COURTS WOULD BE UNFAIR TO ADF

Finally, ADF fails to support its argument that neutrality should outweigh the balance of UNCITRAL factors pointing to Washington, D.C. as the appropriate place of arbitration. Nor does ADF evaluate the particular circumstances in which the *Ethyl* and *Methanex* tribunals applied the concept of neutrality in the context of this Tribunal's determination on place of arbitration.[13]

Instead, ADF casts aspersions on the impartiality of the entire United States judiciary. ADF insinuates that, because U.S. federal judges are appointed by the executive branch of the

[12] Likewise, the Tribunal should consult ICSID with respect to the applicability of the Canadian Goods and Services Tax ("GST"), given that the United States is not expert in Canadian tax law and ADF's explanation does not specify how such a regime may or may not impact the parties to this dispute. ADF April 2 Submission ¶ 75.

[13] *See, e.g., Ethyl Decision* at 10 (using neutrality as a tie-breaking factor to choose between two equally appropriate Canadian cities); *Methanex Decision* at ¶ 39 (finding that "neutrality . . . will be satisfied by holding such hearings in Washington DC as the seat of the World Bank," rather than as the seat of U.S. government).

U.S. Government, the United States would "enjoy[] privileges" as a party to litigation in the Untied States. ADF April 2 Submission ¶ 80. This suggestion is outrageous. Indeed, the impartiality of judicial decision-makers is presumed within most legal dispute-resolution systems, including the instant arbitration. Just as the members of this Tribunal executed a declaration "to judge fairly as between the parties," U.S. judges take an oath of office to "faithfully and impartially discharge and perform all the duties incumbent upon" them. 28 U.S.C. § 453 (1993). A U.S. federal court judge is thus no more likely to abdicate his or her duty of impartiality in favor of the United States than is a Quebec judge in favor of ADF.[14]

In short, ADF has provided no evidence or principled reason why neutrality should dictate a result at odds with the UNCITRAL Notes criteria strongly favoring Washington, D.C. as the place of arbitration.

[14] ADF also advances the equally absurd argument that Montreal is neutral because ADF is headquartered and operates out of offices outside Montreal ("Terrebonne, a city north of Montreal" and "Lachine, a city in the Montreal suburbs"). ADF April 2 Submission at ¶ 79.

CONCLUSION

For these reasons and those set forth in its March 19 Submission, Respondent United States of America respectfully submits that the Tribunal should designate Washington, D.C. as the place of arbitration pursuant to NAFTA Article 1130(a) and Article 21(1) of the Arbitration (Additional Facility) Rules.

Respectfully submitted,

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