ADF Group Inc.
v.
United States of America
(ICSID Case No. ARB(AF)/00/1)

Procedural Order No. 2
Concerning the Place of Arbitration

1. At our first session held by video–conference with the parties and their respective counsel, it was noted that the parties had not been able to agree on the location of the place of arbitration of the instant case, having agreed only that the place of arbitration, for reasons of cost and convenience, should be located either in Canada or in the United States. Nevertheless, the parties agreed that the question of the proper place of arbitration should be determined by the Tribunal, after the parties have each had an opportunity to submit a written memorial to the Tribunal.

2. The Claimant submitted its written Memorial together with its Annexes on the place of arbitration question ("Claimant's Memorial") to the Secretary of the Tribunal on 26 February 2001, having sent copies thereof directly to counsel for the Respondent. The Respondent filed its written Submission on the same question ("Respondent's Submission") with the Secretary of the Tribunal on 19 March 2001. On 2 April 2001, the Claimant filed a written Reply to the Submission of the Respondent ("Investor's Reply"). In turn, the Respondent submitted its Final Observations on the place of arbitration to the Tribunal's Secretary on 16 April 2001 ("Respondent's Final Observations").

3. The Claimant requests us to designate Montreal, in the Province of Quebec, Canada, as the place of arbitration in the instant case (Claimant's Memorial, para. 16). The Respondent submits that we should instead select Washington D.C. as the place of arbitration (Respondent's Submission, p.1).

4. Article 1130 of the North American Free Trade Agreement ("NAFTA") provides that

> "[u]nless 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." (Emphasis supplied.)

Both the United States of America and Canada are parties to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958 ("New York Convention"). Indeed, so is the United Mexican States.

5. Article 21 of the ICSID Arbitration (Additional Facility) Rules reads in full as follows:

> "Determination of Place of Arbitration
>
> (1) Subject to Article 20 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 it deems appropriate for the inspection of goods, other property or documents. It may also

> visit any place connected with the dispute or conduct inquiries there. The parties shall be given sufficient notice to enable them to be present at such inspection or visit.
>
> (3) The award shall be made at the place of arbitration."

6. Article 20 of the ICSID Arbitration (Additional Facility) Rules, entitled "Limitation on Choice of Forum," requires no more than that arbitration proceedings be held "only in States that are parties to the [New York Convention]." Clearly, Article 20 does not bring us very far in approaching the issue of an appropriate place of arbitration.

7. The UNCITRAL Rules, the other set of arbitration rules referred to in Article 1130 of the NAFTA, provide only the most general guidance on this matter:

> "Place of Arbitration
>
> Article 16.
>
> (1) 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.
>
> * * * *" (Emphasis added.)

Fortunately, the UNCITRAL Notes on Organizing Arbitral Proceedings ("UNCITRAL Notes") are substantially more helpful, even though they do not bind either the disputing parties or the Arbitral Tribunal:

> "3. Place of Arbitration

> (a) Determination of the place of arbitration, if not already agreed upon by the parties
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> * * *
>
> 22. Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (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 where the arbitration takes place and 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.
>
> * * *"

Both the Claimant and the Respondent agree that we may and should take into consideration the kinds of factors identified as pertinent in Paragraph 22 of the UNCITRAL Notes. We will do so seriatim.

8. The first factor that bears consideration is the "suitability of the law on arbitral procedure of (a proposed) place of arbitration." The Claimant begins its case for Montreal as an appropriate place of arbitration with the general proposition that a "suitable" domestic legal system is one which is "supportive" of arbitration and that a jurisdiction which creates "uncertainty in arbitration by permitting a myriad of legal challenges to an award" is not supportive. In the view of the Claimant, a "supportive" jurisdiction provides a legal environment that sets out "clear, predictable and limited procedures for challenging an award along with an effective mechanism for recognition and enforcement of an award." (Claimant's Memorial, paras. 49-50.)

9. For its part, the United States stresses its broad commitment to "facilitating international arbitration" (Respondent's Submission, p.7) and the recognition by the United States Supreme Court of an "emphatic federal policy in favor of arbitral dispute resolution" (Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc. 473 US 614, 631(1985); US Appendix, Exh. 5). That Court held that

> "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 require that we enforce the parties' agreement, even assuming that a contrary result would be forth coming in a domestic context." (473 US at 629; emphasis added.)

10. It appears to us that the "suitability" in international arbitration of the law on arbitral procedure of a suggested place of arbitration, has multiple dimensions. These dimensions include the extent to which that law, e.g., protects the integrity of and gives effect to the parties' arbitration agreement; accords broad discretion to the parties and to the arbitrators they choose to determine and control the conduct of arbitration proceedings; provides for the availability of interim measures of protection and of means of compelling the production of documents and other evidence and the attendance of reluctant witnesses; consistently recognizes and enforces, in accordance with the terms of widely accepted international conventions, international arbitral awards when rendered; insists on principled restraint in establishing grounds for reviewing and setting aside international arbitral awards; and so on. The Claimant has tended to focus and distinguish between two aspects of the lex arbitri: (a) recognition and enforcement of arbitral

awards; and (b) review by the courts of the locus arbitri of such awards in actions to modify or set aside and vacate those awards. The Respondent has, for its part, sought to confront the distinction on which Claimant focuses.

11. In respect of the recognition and enforcement of international awards, including awards issued under the NAFTA and ICSID (Additional Facility) Rules, the parties agree that the laws of the United States and the laws of Canada and the Province of Quebec render applicable the pertinent provisions of the New York Convention. Both Canada and the United States, in their respective reservations to the New York Convention, had determined that they would apply the Convention only to arbitral proceedings arising out of disputes which are considered as "commercial" under their respective national laws. Article 1136(7) of the NAFTA, however, provides that "[a] claim that is submitted to arbitration under this Section [B] shall be considered to arise out of a commercial relationship or transaction for purposes of Article 1 of the New York Convention and Article 1 of the Inter-American Convention." Accordingly, the parties are agreed that the laws of both the United States and of Canada (and of Quebec Province) concerning international arbitrations are equally "suitable" so far as concerns the recognition and enforcement of the ensuing awards.

12. In respect of review by a national court in the place of arbitration of an international arbitral award, it is suggested by the Claimant that the "deeming provision" of Article 1136(7) of the NAFTA "might not reach actions to review and set aside

Chapter Eleven awards in situations where domestic review remedies were limited to awards in commercial arbitration." (Investor's Reply, para. 17.) The Claimant points out that Canada amended its Federal Commercial Arbitration Act to "deem" Chapter Eleven awards "to be commercial for the purposes of actions to review (such) award(s)", while the United States made no similar amendment to its own Federal Arbitration Act. The Claimant states further that "(all) three NAFTA Parties (have claimed at differing times and in different fora) that NAFTA Article 1136(7) deems Chapter Eleven arbitrations to be commercial strictly for the purposes of recognition and enforcement of awards and not for any other purpose and specifically not for the purposes of review of awards." (Investor's Reply, para. 18; emphasis added.) The Claimant goes on to elaborate that actions in a U.S. federal court to review and set aside arbitral awards are governed by Chapter 1 ("General Provisions") of the Federal Arbitration Act, U. S. C. Title 9, Arbitration, the grounds for vacating such awards being set out in Chapter 1, Sec. 10, U. S. C. Title 9, while actions for recognition and enforcement are governed by Chapter 2 (referring to the New York Convention) and Chapter 3 (referring to the Inter-American Convention) of U. S. C. Title 9. Neither Chapter 2 of 9 U. S. C. nor the New York Convention, the Claimant contends, provides for actions to review and set aside arbitral awards (Investor's Reply, para. 30). Although Sec. 208, Chapter 1 of 9 U. S. C. does provide for application of Chapter 1 to actions brought under Chapter 2 "to the extent that Chapter [1] is not in conflict with this Chapter [2] or the [New York] Convention," Claimant argues that whether an action initiated in the United States to set aside a Chapter Eleven award can be considered "an application or proceeding brought under

[Chapter 2]" is a "serious question." (Investor's Reply, id.) Accordingly, the Claimant characterizes United States law on this matter as "unclear" and affected with "uncertainty," a condition tending to "undermine the authority of the Tribunal and its eventual award" by possible "post award litigation" which "will severely test judicial deference to international arbitration awards" (Investor's Reply, paras. 13, 36 and 44) and which renders United States arbitration law as "unsuitable."

13. Upon the other hand, the Claimant submits that Quebec law clearly provides for, and identifies the grounds of, judicial review of Chapter Eleven awards. (Id., para. 46.) Quebec's arbitration law is said to be based on the UNCITRAL Model Law and does not distinguish between "commercial" and "non-commercial" arbitration (Id., para. 47) and hence is "unclouded by the uncertainty resulting from the debate whether Chapter Eleven arbitrations are international commercial arbitrations." (Id., para. 9(a).)

14. The United States, for its part, rejects the Claimant's contentions summed up above. The United States stresses, firstly, that it is "impossible" at this stage of "Chapter Eleven's evolution" for any party to have "absolute certainty as to the legal regime governing review of a Chapter Eleven award" (Respondent's Final Observations, p.3), whether such review takes place in Canada or in the United States. At the time of its Final Observations, no decision in a proceeding to review a Chapter Eleven award had, according to the United States, been rendered, even in a first instance court, in any of the NAFTA Parties. (Id., p.3.) The United States goes on to note that the Attorney-General of

Canada has gone on record in United Mexican States v. Metalclad Corporation, recently before the British Columbia Supreme Court, as contending that "in interpreting NAFTA, Chapter Eleven tribunals should not attract extensive judicial deference and should not be protected by a higher standard of judicial review." (Outline of Argument of Intervenor Attorney-General of Canada in United Mexican States v. Metalclad Corporation, para. 30; Tab 17 of Claimant's Memorial, p.12.) The Claimant has not, in the view of the United States, adduced any basis for believing that an action in Quebec to review a Chapter Eleven award would not be subject to similar questions as to the applicable standard of judicial review. (Respondent's Final Observations, p. 14.) We note, incidentally, that the case of United Mexican States v. Metalclad Corporation was decided in first instance by the Supreme Court of British Columbia on May 2, 2001, which held, among other things, that the applicable standard of review was that of the British Columbia International Commercial Arbitration Act, which closely follows the UNCITRAL Model Law. In considering the standard of review to be applied in reviewing the Metalclad Corp. v. United Mexican States Award, the Supreme Court of British Columbia referred to the leading British Columbia authority on enforcement under the International Commercial Arbitration Act, Section 34, Quintette Coal, Ltd. v. Nippon Steel Corporation [1991] 1 W.W.R. 219 (B.C.C.A.). The British Columbia Court noted that case has been followed by several other courts in Canada. (United Mexican States v. Metalclad Corporation and the Attorney General of Canada, May 2, 2001; Case No. 2001BCSC664, at page 19.) In the Quintette Coal, Ltd. case, the majority of the Court commented on the standard of review stating:

> "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 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985)] are as compelling in this jurisdiction as they are in the United States 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)"

15. The United States also, perhaps more importantly, directly controverts the correctness of the Claimant's description of the condition of United States law in this respect and states outright that "suitable procedures for review of a Chapter Eleven award are available in the United States under both federal and D.C. law, regardless of whether the award is deemed commercial for purposes of review." The clear statement is made, albeit in a footnote, that "under Sec. 208 of the U.S. 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." (Respondent's Final Observations, p. 4 and footnote 2; emphasis added.) We would also observe that in the United States, with respect to the enforcement of an arbitral award against a foreign state (e.g., if Mexico or Canada were involved) under the Foreign Sovereign Immunities Act 28 U. S. C. 1605(a)(6), the foreign state would not have immunity from suit in the courts of the United States. The FSIA favors enforcement of awards. The standard applicable to the enforcement of a NAFTA arbitral award against the United States is similar as the

United States has waived its sovereign immunity with respect to the enforcement of NAFTA Arbitral Awards under the Tucker Act 18 U. S. C. 1491(a) in conjunction with NAFTA 19 U. S. C. 3311(a).

16. After extensive consideration of the submissions of both parties, we are unpersuaded that we must characterize the U.S. Federal Arbitration Act as an "unsuitable" lex arbitri or as a less "suitable" lex arbitri than the Canadian or Quebec law on international arbitration. In the absence of United States case law directly addressing the specific issue raised here by the Claimant, we do not consider that the Claimant has adequately documented its description of the relevant United States law as infected, as it were, by a "lack of clarity" which "undermines the authority of the Tribunal and its eventual award and promises to multiply post award litigation." (Claimant's Response, para. 13.) We would also note that the distinction heavily stressed by the Claimant between an action to review and set aside a Chapter Eleven award and an action for recognition and enforcement of such an award may not, in certain situations, be as important as might be supposed. The grounds for vacating an arbitral award under 9 U. S. C. Chapter 1, Section 10 and those for setting aside an award under Article 34 of the UNCITRAL Model Law on the one hand, and the grounds specified in the New York Convention for resisting an action for recognition and enforcement of an award on the other hand, exhibit overlapping in significant degree. An action for recognition and enforcement may frequently be expected to be resisted by pleading the existence of grounds for vacating the award. We do not believe that the Claimant has provided us with

sufficient basis for refusing to join the tribunals in the Methanex and Ethyl cases in holding that Canadian law and United States law relating to international arbitration, are equally "suitable" for purposes of determining an appropriate place of arbitration. (Ethyl Corporation v. Government of Canada, Decision Regarding the Place of Arbitration of November 28, 1997, 38 International Legal Materials 700 (1999, May No. 3); Tab 23 of Claimant's Memorial; and Methanex Corporation v. United States of America, Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of Arbitration, December 21, 2000, U.S. Appendix, Exh. 1.)

17. We turn now to the second factor listed in Paragraph 22 of the UNCITRAL Notes: the existence of a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced. Since both the United States and Canada are parties to the New York Convention, this factor is moot in the present case.

18. The third UNCITRAL Notes factor is the convenience of the parties and the arbitrators. The convenience, or relative inconvenience, of the arbitrators offers no real guidance in this case. Two of the three arbitrators reside or hold office outside the United States. Similarly, two of the three arbitrators reside or hold office outside Canada. Thus, whether the place of arbitration be in Canada or in the United States, two of the arbitrators would have to travel to one or the other State. It is no more inconvenient for Mr. Feliciano to travel to Washington D.C. than to Montreal. Similarly, it seems no more

inconvenient for Ms. Lamm to travel to Montreal than it is for Professor de Mestral to come to Washington D.C. In respect of the parties, however, the relative inconvenience of travelling to Montreal or to Washington D.C. may not be as finely balanced. At this stage, we are not informed as to how many officials, counsel, representatives and witnesses of one or the other party would have to travel to Montreal or Washington D.C., as the case may be. The United States submits that the convenience of the parties favors Washington D.C. over Montreal because the United States, qua party, is comprised of numerous agencies of which at least seven are concerned with or involved in the instant dispute. (Respondent's Final Observations, pp. 8-9.) Presumably, all seven agencies are based in Washington D.C. So far as Claimant is concerned, it may well be that some of its officials or representatives involved in this dispute are based in Virginia, though others would presumably be located in Quebec or elsewhere in Canada. We should, at the same time, note that the Tribunal may, when necessary or appropriate, meet in Montreal or any other place to hear particular witnesses and facilitate the presentation of evidence, upon request of either party and with prior notice to and agreement of both parties. On balance, in the circumstances of this case, we believe that the submission of the United States on this point, is not unreasonable, even though the relative inconvenience of a State, as a party, is not necessarily compelling.

19. The next UNCITRAL factor relates to the availability and cost of support services needed. In principle, there may well be no significant difference between Montreal and Washington D.C. in respect of the availability of arbitration support services in one or the

other city. It appears to us, however, that because the ICSID is administering this case and providing the services of the Secretary of the Tribunal, the over-all costs of the arbitration support involved are likely to be substantially less in Washington D.C. than in Montreal. The opinion of the ICSID, solicited by us and conveyed to us by our Secretary, is to that effect.

20. The UNCITRAL Notes refer, lastly, to the location of the subject-matter of the dispute and proximity of evidence. The question of "proximity" of testimonial and documentary "evidence" has been substantially dealt with above under the rubric of the convenience of the parties. The "subject matter of the dispute," when examined in terms of ordinary meaning, refers to "the issue presented for consideration; the thing in which [or in respect of which] a right or duty has been asserted; the thing in dispute." (Black's Law Dictionary, 7th ed., 1999, p. 1439; brackets added.) Article 1119(c) of the NAFTA requires the written notice of intent of an investor to submit a claim to arbitration to specify, *inter alia*, "the issues and the factual basis for the claim." Similarly, Article 3(d) of the ICSID Arbitration (Additional Facility) Rules provide that the notice of intent to institute arbitration proceedings shall include information concerning "the issues in dispute." From the notice of intent to submit a claim to arbitration filed by the Claimant under Article 1119 of the NAFTA and the notice of intent to institute arbitration proceedings submitted by the Claimant under Article 3 of the ICSID Arbitration (Additional Facility) Rules, the "subject-matter" of the present dispute may be seen to refer to, essentially, the claims made by the Claimant about the consistency or lack of

consistency of certain measures (or applications thereof) taken by the Respondent United States with certain provisions of Chapter Eleven of the NAFTA. To the extent that such claims can be regarded as having a "location" or situs anywhere, we consider that those claims may, for purposes of determining an appropriate place of arbitration, be deemed to be located in the place where the United States authorities, to whom they are addressed, are based. We do not imply that that is the only place in which those claims can be deemed to be located for present or related purposes. But the location of the official addressees of the claims appear to us as a sufficiently real and substantial basis. The physical facilities or construction project in respect of which the claims are made are also in relative geographic proximity to Washington D.C. That the place of fabrication of certain parts or materials to be installed in the project may be in Canada, seems to relate only peripherally, at most, to the matter of location of the claims asserted in this case. We should add that we have yet to receive the parties' main pleadings in this case. We do not believe, however, that the content of those pleadings will affect our consideration above of the factor of location of the subject-matter of the dispute.

21. We come finally to the element of "neutrality" of the place of arbitration. It is our belief that Washington D.C. is properly regarded as a "neutral" place of arbitration, notwithstanding that it is the capital of the Respondent Party. Our perspective on this last point is rooted in the belief that the ICSID is, and is widely perceived to be, a "neutral" forum and institution. The policy imperatives which drive parties proceeding to international arbitration to seek a "neutral" forum are, in our opinion, satisfied by

choosing the city in which the ICSID is located which also happens to be the capital of the United States.

22. For all the foregoing considerations, the Tribunal determines to designate Washington D.C. as the place of arbitration in the instant case. The Tribunal may also meet in Montreal or any other place, when necessary or appropriate, to hear particular witnesses and facilitate the presentation of evidence, upon request of either party and with notice to and the agreement of both parties.

Signed by the Members of the Tribunal:

Carolyn B. Lamm /s/

Armand de Mestral /s/

Florentino P. Feliciano /s/

Date of last signature : [July 11, 2001]