

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.**

**IN THE ARBITRATION PROCEEDING
UNDER CHAPTER ELEVEN OF THE NAFTA
AND THE ICSID ARBITRATION (ADDITIONAL FACILITY) RULES
BETWEEN:**

MOBIL INVESTMENTS CANADA INC. AND MURPHY OIL CORPORATION

and

CANADA

(ICSID CASE NO. ARB(AF)/07/4)

PROCEDURAL ORDER NO. 1

October 7, 2009

DECISION OF THE TRIBUNAL ON THE PLACE OF ARBITRATION

A. Introduction

1. In preparation for the first session of the Tribunal that was held in New York City on May 6, 2009, the Parties jointly submitted on April 29, 2009 a draft Procedural Order and draft Confidentiality Order setting forth areas of their agreement on most procedural matters.
2. The Parties were unable to reach agreement regarding the place of arbitration, although they agreed that, irrespective of the decision on the place of arbitration, the hearings in these proceedings are to be held in Washington, D.C. The arbitration proceedings being governed by the ICSID (Additional Facility) Rules, the place of arbitration falls to be determined pursuant to Article 21 of these Rules.

3. The Claimants have proposed to have the place of the arbitration as Washington, D.C, in the United States, and the Respondent has proposed St. John's (Newfoundland and Labrador) or Ottawa (Ontario), in Canada. In preparation for the first session, each Party made a Submission on the Place of Arbitration, dated May 1, 2009, along with annexes on Authorities and Supporting Documents.
4. During the first session held on May 6, 2009, both Parties presented further written submissions as well as oral arguments as to the proposed place of arbitration. At the conclusion of the oral arguments at the session, the Tribunal invited each party to provide a supplemental written submission to address the following questions regarding the party's proposed place of arbitration:
 - (1) What is the ordinary length of proceedings to set aside arbitral awards?
 - (2) What are the grounds for setting aside arbitral awards?
 - (3) Is the enforcement of an award suspended while challenged?
 - (4) What is the role of a national court in obtaining evidence?
 - (5) Is the ability to obtain evidence a factor in this case?
5. As agreed with the Tribunal, on May 12, 2009, each Party filed a Supplemental Submission on Place of Arbitration and on May 19, 2009, they each filed observations on the other's May 12, 2009 submission.
6. Thereafter, the Tribunal asked the Parties to respond to a further question:

“If this Tribunal were to conclude that the appropriate jurisdiction for the seat of arbitration was a city in Canada (for Claimant) or a city in the United States (for Respondent), which city (and court) would raise the least concerns from your perspective?”

7. On June 1, 2009, the Parties submitted their respective replies to the Tribunal's latest inquiry. The Respondent did not submit an alternative to St. John's or Ottawa; the Claimants indicated that Toronto (in the Canadian province of Ontario) was the Canadian place of arbitration that would raise the least concerns from their perspective. The Claimants also indicated that they would prefer the proceedings, if in Canada, to be subject to the jurisdiction of the Ontario Superior Court of Justice. The Tribunal appreciates that the Claimants, in a spirit of cooperation and procedural flexibility, provided their reply in response to this direct question put by the Tribunal.
8. On June 5, the Tribunal invited the Parties to comment on each other's letters of June 1, 2009, if they wished to do so, and on June 12, 2009, each party submitted a response to the Tribunal.
9. On July 7 and 10, 2009, respectively, the Claimants and the Respondent submitted additional information on recent U.S. case law.
10. The Tribunal wishes to express its appreciation to both Parties for their timely and generally helpful responses throughout the process.

B. The Scope of Choice and Basis for Selection

11. The place of arbitration is to be determined in accordance with the applicable provision of the NAFTA Agreement and the ICSID Arbitration (Additional Facility) Rules.
12. NAFTA Article 1130 provides as follows:

“Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with:

- (a) the ICSID Additional Facility Rules if the arbitration is under those Rules or the ICSID Convention; or*
- (b) the UNCITRAL Arbitration Rules if the arbitration is under those rules.”*

Further, Articles 19 and 20 of the ICSID Arbitration (Additional Facility) Rules govern the choice of the place of arbitration as follows:

“Article 19: Limitation on Choice of Forum

Arbitration proceedings shall be held only in States that are parties to the 1958 UN Convention on Recognition and Enforcement of Foreign Arbitral Awards.

Article 20: Determination of Place of Arbitration

(1) Subject to Article 19 of these Rules the place of arbitration shall be determined by the Arbitral Tribunal after consultation with the parties and the Secretariat.”

13. The NAFTA Agreement requires the place of arbitration to be in Canada, Mexico or the United States of America, so long as the State is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The ICSID Arbitration (Additional Facility) Rules likewise require that the place is in a State party to the New York Convention. All three NAFTA States are parties to that Convention and may host the place of arbitration. However, the only point of agreement between the Parties on the issue of the place of arbitration is that it should not be in Mexico. Moreover, the Parties confirmed to the Tribunal that they did not envisage a place of arbitration in any State that was not a party to the NAFTA Agreement. The Tribunal thus has to determine the place of arbitration either in the United States or in Canada.

14. In prior NAFTA investor/state disputes where the parties could not agree on the place of arbitration, the Tribunal determined the place of arbitration having regard to a range of factors, such as the reasoning of relevant national judicial authorities, the principles of fairness and equality, the suitability of

the applicable arbitration law, the convenience of the parties and of the arbitrators, the availability and costs of support services needed, the location of the subject matter in dispute and the proximity of evidence and the neutrality of the place of arbitration.¹ Above all, however, it is clear that each Tribunal took into consideration the facts particular to the dispute before it.

15. The determination of the place of arbitration in the present case, even though the Parties have agreed on the place for the actual hearings, is not an academic question. As the arbitration proceedings are not conducted under the ICSID Convention, but under the ICSID Additional Facility, the proceedings are subject to the applicable arbitration law of the relevant jurisdiction and remain under the scrutiny of the national courts of the place of arbitration. A decision on the place of arbitration thus informs the law which governs the arbitration proceedings and determines the court which may supervise the arbitration process.

C. Main Arguments of the Parties

Claimants

16. The Claimants have argued that Washington, D.C., is the most suitable place of arbitration.
17. The Tribunal understands the Claimants argument as follows: the principle of fairness among the Parties is best served by a place of arbitration which is located somewhere other than the Respondent State. Canadian courts are an institution of the Respondent. Although the Claimants' ultimate parents are from the United States, they are private companies and not the Government itself. In a similar case between a U.S. Claimant and Canada, a NAFTA

¹ See e.g., Peter Kirby, *The Choice of the Place of Arbitration Under NAFTA Chapter 11*, in NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS 341–58 (Todd Weiler ed., 2004).

Tribunal had for these reasons considered Washington, D.C., more appropriate as place of arbitration than a location in Canada.²

18. In the past other NAFTA Tribunals, applying the UNCITRAL Rules, have opted for Washington, D.C. as the place of arbitration.³ After all, Washington, D.C., is not only the seat of the Federal Government of the U.S. but also of the World Bank and ICSID and a number of other international institutions.

19. For the Claimants, deciding on Washington, D.C., as the place of arbitration would bring into play the Federal Arbitration Act and potential judicial review from the U.S. Courts for the District of Columbia, and would effectively sustain the arbitration process. Claimants argue that in these circumstances an award can only be vacated on very limited grounds, similar to those provided under the UNCITRAL Model Law on International Commercial Arbitration, and the U.S. Courts interpret these grounds narrowly. Although some U.S. Courts have stated in the past that an award may be set aside where there has been a “manifest disregard of the law,” this ground has been very narrowly construed and has rarely been applied, especially in international cases. Moreover, the Claimants note, in 2008 the U.S. Supreme Court called into question “manifest disregard of the law” as an independent ground for vacating an award.⁴ Recently, the U.S. Court of Appeals for the Fifth Circuit foreclosed *vacatur* of an award on the basis of a non-statutory ground such as “manifest disregard of the law.”⁵

20. If a person, residing outside of the U.S. who has been called upon by the Claimants as a witness, refuses to appear, the U.S. District Court could issue a

² See *United Parcel Service of America Inc. v. Government of Canada* (NAFTA/UNCITRAL), Decision of the Tribunal on the Place of Arbitration, ¶ 18 (Oct. 17, 2001).

³ See *Methanex Corp. v. United States of America* (NAFTA/UNCITRAL), The Written Reasons for the Tribunal’s Decision of 7th September 2000 on the Place of Arbitration, ¶¶ 39–40 (Dec. 31, 2000); *ADF Group Inc. v. United States of America* (ICSID Case ARB(AF)/00/1), Procedural Order No. 2 Concerning the Place of Arbitration, ¶¶ 21–22 (July 11, 2001).

⁴ *Hall Street Assocs. L.L.C. v. Mattel Inc.*, 128 S. Ct. 1396 (2008).

⁵ *Saipem America v. Wellington Underwriting Agencies Ltd.*, No. 08-20247 (5th Cir. June 9, 2009).

letter rogatory to a foreign court to compel that person within its jurisdiction to offer testimony or produce documents.⁶ The Claimants expect, however, that in the present case this possibility, which requires the involvement of a U.S. court, the U.S. State Department and the cooperation of the foreign court, will not be necessary.

21. On the other hand the specific locations that Canada has proposed, pose certain concerns for the Claimants. They note that Ottawa has been viewed by at least one Chapter 11 NAFTA Tribunal⁷ as more likely to be perceived as non-neutral than other Canadian venues, and assert that St. John's "is particularly unsound in view of the charged political atmosphere surrounding this dispute in Newfoundland and Labrador."⁸
22. The Claimants also argue that Canadian courts have not always respected the finality of Chapter 11 awards, referring to *United Mexican States v. Metalclad Corporation*.⁹ Moreover, the Attorney General of Canada appears to have urged the courts not to protect NAFTA Tribunals by higher standards of judicial review than other arbitration tribunals.¹⁰
23. The Claimants further argue that other commonly considered factors are not relevant in this instance. Specifically, the Claimants state that the convenience of the parties and the arbitrators, availability of cost and support services, location of the subject matter in dispute and proximity of the evidence, are all factors that are much reduced in relevance by virtue of the parties' agreement to hold hearings in Washington, D.C., irrespective of the legal seat.

⁶ See e.g., *Klesch & Co. v. Liberty Media Corp.*, 217 F.R.D. 517, 523 (D.Col. 2003).

⁷ *Ethyl Corp. v. Government of Canada* (NAFTA/UNCITRAL), Decision Regarding the Place of Arbitration at 10 (Nov. 28, 1997).

⁸ Claimants' Submission on Place of Arbitration, ¶ 11 (May 1, 2009). The Province's Premier allegedly made unwelcoming statements towards foreign investors.

⁹ *United Mexican States v. Metalclad Corp.* [2001] B.C.S.C. 664 (B.C. Sup. Ct.).

¹⁰ *United Mexican States v. Metalclad Corp.* (No. L002904, Vancouver Registry, B.C. Fed. Ct.), Outline of Argument of Intervenor Attorney-General of Canada, ¶ 30 (Feb. 16, 2001); *S.D. Myers, Inc. v. Government of Canada* (Court File No. T-225-01, Fed. Ct. – Trial Div.), Amended Memorandum of Fact and Law of the Applicant, ¶ 128 (2003).

Respondent

24. The Respondent, in its Submission on Place of Arbitration of May 1, 2009, asserts that the UNCITRAL Notes provide useful guidance on the place of arbitration. It specifically references Articles 21 to 23 of the UNCITRAL Notes. Article 22 thereof, lists five of the “more prominent factors” relevant to naming the place of arbitration:

- (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 distance;
- (d) availability and cost of support services needed; and
- (e) location of the subject matter in dispute and proximity of evidence.

25. The Respondent submits that factors (b), (c) and (d) as set forth in the UNICTRAL Notes are not relevant to the choice of the place of arbitration in this case, and that only (a) and (e) are relevant to this dispute. It further argues that the application of those factors favors St. John’s or Ottawa.

26. The Respondent emphasizes that the law on arbitral procedure in Canada is suitable. The Canadian Federal Government, as well as the provinces of Ontario and of Newfoundland and Labrador, have implemented the UNCITRAL Model Law on International Commercial Arbitration. In the past Canadian Courts have shown a high degree of deference for NAFTA Awards which had been submitted to their review.¹¹

¹¹ *Bayview Irrigation Dist. No. 11 et al. v. United Mexican States* (Ont. S.C.J., May 5, 2008); *United Mexican States v. Feldman*, (O.A.C. Jan. 11, 2005); *Canada (Attorney General) v. S.D. Myers, Inc.*, (F.C.) 2004 FC 38; *United Mexican States v. Metalclad Corp.*, 2001 B.C.S.C. 664. In the latter case the award was set aside to the extent that the Tribunal had gone beyond the scope of the submission to arbitration.

27. On the other hand, in spite of the U.S. Supreme Court decision in *Hall Street Associates L.L.C. v. Mattel, Inc.*,¹² the courts in the United States still continue to consider a “manifest disregard of the law” as a ground to set aside awards.¹³
28. The Respondent points out that it would be easier and less time-consuming to oblige an unwilling Canadian resident to testify or to produce documents when the place of arbitration is in Canada than if the place is a location in the United States: instead of a rogatory letter, which requires involvement of a U.S. court, of the U.S. State Department and of a Canadian court, the Canadian court could directly be requested to issue the order.
29. The Respondent further submits that the location of the subject matter in dispute and the proximity of the evidence clearly point to St. John’s, Newfoundland and Labrador as suitable locations for the place of arbitration. It is there that the Canada-Newfoundland and Labrador Offshore Petroleum Board, whose Guidelines are being challenged, and the provincial Government, which supervises the Board, are established. It is in Newfoundland and Labrador that the off-shore oil projects, which were allegedly affected by the measures, are located. On the other hand, it is in Ottawa that the Federal Government, which supervises the Board, is established. The Respondent notes that past NAFTA Tribunals have attached great importance to the location of the subject matter in dispute to locate the place of arbitration.¹⁴ Consequently, in the Respondent’s view, the subject

However the Court refused to set aside the decision of the Tribunal that there had been an expropriation in breach of Article 1110 NAFTA (*See id.* ¶¶ 54, 75 and 133–34).

¹² *Hall Street Assocs. L.L.C. v. Mattel Inc.*, 128 S. Ct. 1396 (2008).

¹³ *Stolt-Nielsen SA, et al. v. Animal Feeds Intern’l*, 06-3474-cv, at 19 (2nd Cir. Nov. 4, 2008); *Comedy Club, Inc. v. Improv West Assocs.*, 514 F.3d 833, 1010–11 (9th Cir. 2008); *Vitarroz Corp. v. G. Willi Food Intern’l Ltd. v. Steve Weinreb*, No. 05-5363, 2009 WL 1844293, at 5 (D. N.J. June 26, 2009).

¹⁴ *Methanex Corp. v. United States of America* (NAFTA/UNCITRAL), The Written Reasons for the Tribunal’s Decision of 7th September 2000 on the Place of Arbitration, ¶ 33 (Dec. 31, 2000); *ADF Group Inc. v. United States of America* (ICSID Case ARB(AF)/00/1), Procedural Order No. 2 Concerning the Place of Arbitration, ¶ 20 (July 11, 2001); *Canfor Corp. v. United States of America* (NAFTA/UNCITRAL)

matter of the dispute and the proximity of evidence “decisively favors St. John’s and then Ottawa.” Moreover, the fact that all the four companies, on whose behalf the Request for Arbitration has been submitted, have their seat in Calgary, Canada, is an additional link which points to Canada as host of the place of arbitration.

30. While the Claimants allege that it is premature to determine if the ability to obtain evidence is a factor in this case, the potential need for such evidence serves to reinforce the importance of the location of the subject matter. The Respondent notes that certain federal and provincial officials may no longer work for the Canadian Government. Consequently, the Tribunal may need the assistance of a court in St John’s or Ottawa to obtain their testimony, which can occur more readily if St John’s or Ottawa is the place of arbitration rather than if Washington, D.C. Courts and then the U.S. Department of State were required to rule on this request.¹⁵ The Respondent stresses that obtaining evidence located in Canada with court assistance is likely to be easier if St. John’s or Ottawa were to be selected.

31. The Respondent acknowledges that while neutrality is not a factor under NAFTA or the UNCITRAL Notes, it has been considered by certain NAFTA Tribunals. It argues that St. John’s and Ottawa are no less neutral places of arbitration than Washington, D.C., which is the capital city of Claimants’ home state. For instance, Ottawa’s status as capital city does not affect its neutrality. In the past, five NAFTA Tribunals have considered Canada an appropriate and neutral place of arbitration in disputes where Canada was the Respondent.¹⁶ Similarly, Washington, D.C. has been chosen as the place of

Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings (Jan. 23, 2004), ¶¶ 34-36; *Ethyl Corp. v. Government of Canada* (NAFTA/UNCITRAL), Decision Regarding the Place of Arbitration at 5, 8 (Nov. 28, 1997).

¹⁵ See Respondent’s Rebuttal to Claimants’ Supplementary Submission on Place of Arbitration at 1–3 (May 19, 2009).

¹⁶ *V.G. Gallo v. Government of Canada* (NAFTA/UNCITRAL), Procedural Order No. 1 (June 4, 2008); *Ethyl v. Canada* (Nov. 28, 1997); *Canada (Attorney General) v. S.D. Myers, Inc.*, 2004 FC 38; *Pope & Talbot, Inc. v. The Government of Canada* (NAFTA/UNCITRAL), Minutes of a Procedural Meeting (Oct.

arbitration in NAFTA Chapter 11 arbitrations where the United States was the Respondent.¹⁷ According to the Respondent, there is no evidence that Canadian courts would not be neutral. The only Canadian court to hear an application to set aside a NAFTA Chapter 11 award against Canada, refused to do so.¹⁸ Moreover a Canadian court refused to support Canada's intervention in favor of its national in a NAFTA investment arbitration against another NAFTA state.¹⁹

D. The Conclusions of the Tribunal

32. As explained below, this Tribunal believes that both Parties have put forward good arguments in favour of their submissions, and that either set of arguments could be accepted. On balance, however, against the background of the particular facts of this dispute, the Tribunal concludes that there may be marginally better reasons for selecting a location in Canada as the place of arbitration.
33. The perfect place of arbitration, as noted in a letter from the Tribunal to the parties in *V.G. Gallo v. Canada*, "is a jurisdiction which is neither that of the investor nor that of the host State, which has a high quality, independent judiciary, with experience in providing support to, and reviewing and setting aside decisions from international arbitral tribunals, and which has the capability of handling disputes in the language of the arbitration, in this case, English."²⁰

29, 1999); *Chemtura Corp. v. Government of Canada* (NAFTA/UNCITRAL), Procedural Order No. 1 (Jan. 21, 2008).

¹⁷ *Methanex Corp. v. United States of America*, ¶ 42 (Dec. 31, 2000); *ADF Group. v. United States of America*, ¶ 22 (July 11, 2001); *Canfor Corp. v. United States of America* (Jan. 23, 2004), ¶ 55(A); *Mondev Intern'l Ltd. v. United States of America* (ICSID ARB(AF)/99/2), Award, ¶ 26 (Oct. 11, 2002).

¹⁸ *Canada (Attorney General) v. S.D. Myers, Inc.*, 2004 FC 38.

¹⁹ *United Mexican States v. Feldman*, Docket C41169 (O.A.C. Jan. 11, 2005).

²⁰ *V.G. Gallo v. Canada* (NAFTA/UNCITRAL), Letter from the Tribunal to the Parties, ¶ 15 (June 4, 2008).

34. In this view, an entirely neutral place or a jurisdiction of facial neutrality is not available to this Tribunal, given that the Claimant is a U.S. corporation and Canada is the Respondent. Since Mexico has, by agreement of the Parties, been ruled out and removed from our consideration, and the Parties were unwilling to contemplate a location in a non-party to the NAFTA Agreement to serve as the place of arbitration, the place of arbitration is therefore to be in the United States or Canada.

35. Further, in this case, the Tribunal takes no position on the question of the neutrality of Canadian courts as a general proposition and sees no compelling evidence that would cause us to conclude that there is any real risk that the Canadian courts would not provide an independent forum. Nevertheless, the Tribunal recognizes that such concerns might be seen to be more pertinent in the jurisdiction where a dispute arises if it occurs in the political capital of the jurisdiction whose governmental measures are at issue. As the NAFTA Panel found in *Methanex*: “the requirements of neutrality are sufficiently met” only where the place of arbitration is outside the area where the Claimant or Respondent is responsible for the regulations at issue.²¹ Accordingly, in this case, and in recognition of the Claimants’ position that neutrality and fairness are factors that may be considered by Arbitral Tribunals, the Tribunal concludes that, to the extent possible, it would not be unreasonable to avoid selecting either St. John’s or Ottawa as the place of arbitration. Consequently Washington, D.C., or – if the Claimants’ concession is taken into account – Toronto may be chosen as the place of arbitration.

36. Tribunals in other NAFTA investment arbitrations have considered Washington, D.C., a more neutral place because it is also the seat not only of the federal Government of the U.S. but also of the World Bank and of ICSID. In the view of these tribunals, when the hearings would take place at the seat

²¹ *Methanex Corp. v. United States of America* (NAFTA/UNCITRAL), The Written Reasons for the Tribunal’s Decision of 7th September 2000 on the Place of Arbitration, ¶ 38 (Dec. 31, 2000).

of the World Bank, which is an independent international organization with its own jurisdictional personality and broad jurisdictional immunities and freedoms, a neutral place has been chosen for the arbitration.²² The Tribunal does not disagree with this assessment. Indeed, the Parties have agreed that the premises of the World Bank and ICSID, should be the place at which hearings will be held. There is no doubt that these premises are a convenient and neutral place to hold hearings. However, the place that is selected to hold any hearings and the place of arbitration raise different considerations. The latter raises considerations of a jurisdictional nature, by bringing the arbitration into the jurisdiction of a particular court in whose geographical ambit the place of arbitration is established.

37. Absent compelling evidence to the contrary, this Tribunal does not start from an *a priori* proposition that courts that are located in the jurisdiction of a Respondent are necessarily more or less neutral than courts located in the jurisdiction of a Claimant. The courts of the parties to the NAFTA Agreement which are charged with assisting NAFTA investment arbitrations have to be assumed to carry out their judicial mandate in accordance with the obligations their respective States undertook to preserve the integrity of the NAFTA Agreement.²³ The Tribunal proceeds on the basis that the principle of neutrality does not point one way or the other when choosing between the courts of the United States or Canada. Rather, it is other factors that are more relevant to its decision.

38. In this regard the Tribunal notes that both Parties have referred to the UNCITRAL Notes as a document offering relevant guidance. The Tribunal considers that the five factors identified in the UNCITRAL Notes are of some

²² See *i.d.* ¶ 39; *ADF Group Inc. v. United States of America*, ¶ 21 (July 11, 2001); *United Parcel Service of America Inc. v. Government of Canada* (NAFTA/UNCITRAL), Decision of the Tribunal on the Place of Arbitration, ¶ 14 (Oct. 17, 2001); *Mondev Intern'l Ltd. v. United States of America* (ICSID ARB(AF)/99/2), Award, ¶ 26 (Oct. 11, 2002).

²³ Ruling Concerning the Investor's Motion to Change the Place of Arbitration, *Pope & Talbot Inc. v. Government of Canada* (NAFTA/UNCITRAL), ¶ 18 (March 14, 2002).

utility in assisting the Tribunal towards a conclusion, although of the five only one appears to us to be of particular pertinence, namely that which points to relevance of the fact that it is measures adopted by Canada that are alleged to be in issue. Without prejudice to the merits, this factor tends to strengthen the connection between this dispute and Canada, consistent with factor (e) of the UNCITRAL Notes. There is no disagreement that the subject matter of this dispute is located in Canada; there is, however, disagreement as to how much weight, if any, to give to that factor. In our view, and in light of the other particular circumstances of this dispute as the Tribunal understands them at this early stage of the proceedings, this factor emerges as the only one that may indicate one particular conclusion rather than another, and in the Tribunal's view it tends to point towards a Canadian venue.

39. Specifically, the Parties have provided preliminary and limited information as to issues such as the proximity of evidence or the ability to obtain evidence, which appears to the Tribunal to be not without relevance to the decision on place of arbitration. The Respondent has also asserted that obtaining evidence located in Canada with the assistance of a court – to the extent that may be necessary – would be easier if a Canadian place of arbitration were to be selected. Against this, however, the Claimants submit that it is highly unlikely that a national court would be required to play a role to obtain any evidence in this case.

40. At this early stage, this Tribunal does not have before it a complete evidentiary record such as to allow it to fully evaluate whether and to what extent these issues of proximity to evidence, ability to obtain evidence, or even length of time in obtaining a ruling, might be relevant to this case. Practice in other cases indicates that in mature jurisdictions such as the U.S. and Canada, each with a long history of legal cooperation and exchange, evidence can be obtained and exchanged. Nevertheless, all other things being equal and in light of the fact that the dispute arises in Canada, to the extent that potential evidentiary issues might arise, it is more likely than not that, to

the extent such evidentiary issues arise, they are more likely to be addressed expeditiously and efficiently by the courts of the jurisdiction that is most closely connected to the facts of the dispute. In the present case that factor points – even if only marginally – to the selection of a Canadian jurisdiction as being preferable.

41. The Parties have discussed the respective merits and features of the U.S. Federal Arbitration Act and the Canadian implementations of the UNCITRAL Model Law as well as judicial precedents, in the event the place of arbitration would be respectively in Washington, D.C., or in St. John’s, Ottawa or Toronto. On the basis of the limited material available it is difficult for the Tribunal to express a view as to which of various competing arbitration statutes might be said to be the most “suitable” to govern this arbitration. Indeed, “suitability” has multiple dimensions: it includes – but is not limited to – factors as diverse as the autonomy of parties and arbitrators to organize the arbitration proceedings, the safeguarding of due process, the availability of interim measures of protection and of means of compelling the production of documents and the attendance of reluctant witnesses, the scope of judicial review and the possibility of annulment of the award, the ease of enforcing awards.²⁴ Consequently, judicial review is but one amongst several elements by which to assess the “suitability” of an arbitration regime established at the national level. Moreover, to consider the arbitration law and courts which might be most frequently utilized in relation to issues arising with arbitral awards as being the most suitable – so as to eliminate from consideration those courts that have in instances annulled or set aside an award – may also be too simplistic a reasoning. Taking into account all those elements, the Tribunal is not in a position to form a view as to which, if any, of the relevant U.S. or Canadian arbitration laws might be said to be more or less “suitable”

²⁴ See *ADF Group Inc. v. United States of America* (ICSID Case ARB(AF)/00/1), Procedural Order No. 2 Concerning the Place of Arbitration, ¶ 10 (July 11, 2001).

than the others to govern these arbitration proceedings. It cannot be said, therefore, that a Canadian court would be less suitable than a U.S. court.

42. For the reasons set out above, and in the context of a delicate balancing exercise in which neither option may be said to be overwhelmingly compelling in the sense of producing clear advantages or disadvantages to the effective and expeditious conduct of these proceedings, the Tribunal has therefore decided on the choice of Toronto as the appropriate place of arbitration. As discussed above, the subject matter of this dispute points towards a location in Canada as the place of arbitration, and all other factors appear to us to be either irrelevant or so finely balanced as to point to either option. The Tribunal notes that Toronto has been selected as the place of arbitration by previous NAFTA Tribunals.²⁵ It does not appear that any particular issues or problems have arisen when the courts of Ontario have been presented with challenges to NAFTA investment arbitration awards.²⁶ The Tribunal has not been provided with any information to indicate that any difficulties have previously arisen with the choice of Toronto in other NAFTA proceedings.

43. The Tribunal notes that the Claimants have requested that if Toronto were to be selected as the place of arbitration, then the Ontario Superior Court of Justice should have exclusive jurisdiction over this dispute. The Respondent has objected to this proposal. In the absence of detailed arguments on this point, the Tribunal is not in a position to take a final decision and therefore invites further submissions from the Parties on the relative merits of the specific Toronto based court to be selected. The Tribunal invites the parties to simultaneously provide those submissions within three weeks of the communication of this Order.

²⁵ See *Ethyl Corp. v. Government of Canada* (NAFTA/UNCITRAL), Decision Regarding the Place of Arbitration (Nov. 28, 1997); *Canada (Attorney General) v. S.D. Myers, Inc.* (F.C.) 2004 FC 38.

²⁶ *Bayview Irrigation District No. 11 et al. v. United Mexican States* (Ont. S.C.J., May 5, 2008); *United Mexican States v. Feldman* (O.A.C. Jan. 11, 2005).

[signed]
Professor Hans van Houtte

[signed]
Professor Merit E. Janow

[signed]
Professor Philippe Sands QC

October 7, 2009