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ETHYL CORPORATION *v.* GOVERNMENT OF CANADA[1]

Decision on the Place of Arbitration. 28 *November* 1997

Award on Jurisdiction. 24 *June* 1998

(*Arbitration Tribunal*: Böckstiegel, *Chairman*;
Brower and Lalonde, *Arbitrators*)[2]

SUMMARY: *The facts*: — Ethyl Corporation ("Ethyl") was a Virginia corporation which was the sole shareholder in Ethyl Canada Inc., an Ontario company. Ethyl and Ethyl Canada manufactured and distributed methylcyclopentadienyl manganese tricarbonyl ("MMT"), a fuel additive used to provide octane enhancement for unleaded petrol. Ethyl claimed that it was the sole importer into Canada of MMT and the sole distributor across Canada. Approximately 50 per cent of Ethyl Canada's sales revenue came from MMT. In 1995 the Canadian Government put forward a bill in the Canadian Parliament the effect of which would have been to ban the import of MMT into Canada and trading in MMT across provincial boundaries within Canada. The Government of Canada justified the bill on environmental grounds. The bill automatically lapsed in February 1996 when Parliament was prorogued for a general election but an identical bill was introduced following the general election. On 10 September 1996 Ethyl gave notice of its intent to submit a

[1] The names of the parties' representatives appear at p. 21 below.
[2] The arbitration was constituted under Chapter 11 of the North American Free Trade Agreement. The Investor elected to submit its claims under the UNCITRAL Rules. The seat of the arbitration was Toronto, Canada.

claim under Chapter 11 of NAFTA. On 2 December 1996 the bill was approved by the Canadian House of Commons and on 9 April 1997 by the Senate. On 14 April 1997 Ethyl filed its Notice of Arbitration. The bill received the royal assent on 25 April 1997 and entered into force on 24 June 1997. Ethyl maintained that Canada had violated Articles 1102 (national treatment), 1106 (performance requirements) and 1110 (expropriation) of NAFTA.[3]

Ethyl proposed New York as the place of arbitration; Canada suggested Toronto or Ottawa.

Decision on the Place of Arbitration: 28 November 1997

Held (unanimously): — The arbitration would be held in Toronto, Canada. Under Article 1130(b) of NAFTA,[4] the place of arbitration had to be in the territory of one of the three NAFTA Parties. Had the Parties intended that an arbitration should always be held in the territory of whichever State was not involved in a particular case, they would have said so. The Tribunal thus had a choice of venue, subject to the principle in Article 16(1) of the UNCITRAL Rules that it should have regard to the circumstances of the arbitration.[5] Having regard to considerations of expense, the convenience of counsel and the fact that the subject-matter of the dispute was located in Canada, Toronto was the most convenient place for the seat of the arbitration (pp. 5–11).

Canada maintained that the Tribunal lacked jurisdiction. Canada argued that the claim fell outside Chapter 11 of NAFTA, because at the time the Notice of Arbitration was submitted, the bill had not yet been enacted and there was, therefore, no "measure" within the meaning of NAFTA Article 1101(1). In any event the bill related to trade not investment and the claim in respect of expropriation and loss or damage outside Canada was not within Chapter 11. Canada also maintained that Ethyl had failed to comply with essential procedural steps which it alleged were preconditions to instituting arbitration proceedings under Chapter 11.

Award on Jurisdiction: 24 June 1998

Held (unanimously): — The procedural objections of Canada were rejected, except as regards Articles 1110(1) and 1101(b) and Article 1112(1) and Chapter 3, which were joined to the merits.

(1) In accordance with Article 1131 of NAFTA, the governing law of the arbitration was the provisions of NAFTA and applicable rules of international law. NAFTA[6] was to be interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties, 1969,[7] the provisions of which were declaratory of customary international law (paras. 50–3).

(2) There was no requirement to construe Chapter 11 narrowly because it limited the sovereign powers of a State. Recourse was to be had to the object and purpose of NAFTA as set out in Article 102[8] (paras. 54–7).

[3] The text of these provisions appears at p. 15, para. 7, below.
[4] See p. 6 below. [5] See pp. 6–7 below. [6] See para. 50. [7] See para. 51. [8] See para. 56.

(3) It was necessary to distinguish between the jurisdictional requirements of Chapter 11 and procedural requirements the failure to satisfy which did not result in an absence of jurisdiction (paras. 58–60).

(4) The claim was based on Chapter 11. The Tribunal could not exclude the claim *in limine* on the basis that the statute of which Ethyl complained related to trade, as that did not necessarily mean that it was not also a measure related to investment. While there was force in the argument that a bill which had not yet been enacted was not a "measure" within the meaning of NAFTA Chapter 11, in the present case, the Act, once it had received the royal assent, was clearly a measure and the claim was not invalidated because the Notice of Arbitration had been served eleven days before royal assent was given. Nor, at this stage, could the claim be excluded in so far as it related to damage suffered outside Canada. There was a distinction between the locus of the breach, which could only be Canada, and the place where the damage was sustained (paras. 61–73).

(5) While Ethyl had committed a number of breaches of the procedural requirements of Chapter 11, these were not sufficiently serious to deprive the Tribunal of jurisdiction. Ethyl would, however, be required to bear the costs of the Tribunal and the Government of Canada attributable to those aspects of the proceedings (paras. 74–95).

The texts of the decision and the award are set out as follows:

DECISION ON THE PLACE OF ARBITRATION (28 NOVEMBER 1997)

Both parties have presented extensive written submissions, as well as oral arguments during the Procedural Meeting in New York City on October 2, 1997, regarding what should be the place of arbitration in this case. In these submissions and arguments the parties have been ably represented as follows:

Ethyl Corporation ("Ethyl") by:
Mr Barry Appleton
Prof. Andreas Lowenfeld
Mr Steve Mayer
Mr Anthony Macri

The Government of Canada ("Canada") by:
Ms Valerie Hughes
Mr Brian Evernden
Mr David Haigh
Ms Ann Ewasechko

Ethyl urges that the place of arbitration be New York City,[1] whereas Canada (at page 26 of its Memorandum of October 2, 1997) requests the Tribunal "to determine that the place of arbitration should be Ottawa, or alternatively, could be Toronto . . . ".

Our decision on this point, Ethyl suggests (at page 2 of its Submission of October 16, 1997), has "importance . . . not only for this arbitration but is a persuasive precedent for future NAFTA investor-state arbitrations held under the auspices of the UNCITRAL Arbitration Rules." Doubtless this view arises from the fact, as the Tribunal is informed, that the present arbitration is the first NAFTA dispute between Canada and an alien investor.

Our decision is governed by NAFTA Article 1130(b), which provides that absent "the disputing parties agree[ing] otherwise, a Tribunal shall hold an arbitration in the territory of a Party (to NAFTA) that is a party to the New York Convention, selected in accordance with . . . the UNCITRAL Arbitration Rules if the arbitration is under those Rules." All three NAFTA parties, *i.e.*, Canada, Mexico and the United States, are parties to the New York Convention. Therefore our selection is to be made from among sites in those three countries.

The UNCITRAL Rules themselves provide only, in Article 16(1), that "the place where the arbitration is to be held . . . shall be determined by the arbitral tribunal, *having regard to the circumstances of the arbitration*." (Emphasis added.)

The Tribunal also has been referred by both parties to UNCITRAL's Notes on Organizing Arbitral Proceedings. These Notes, which are not binding,[2] state (in paragraph 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.[3, 4]

Canada makes two threshold arguments that must be addressed at the outset. It urges (at page 5 of its Memorandum of October 2, 1997), first, that Article 16(1) of

[1] Ethyl has abandoned its alternative proposal, made in its Notice of Arbitration, that the place of arbitration be Washington DC.

[2] *See* introduction to the Notes, paragraph 2:

> No legal requirement binding on the arbitrators or the parties is imposed by the Notes. The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them.

[3] Consideration (b) would appear not to be relevant here, given that all potential places of arbitration are in States Parties to the New York Convention.

[4] Canada correctly points out that a sixth consideration, namely, "perception of a place as being neutral," was eliminated from an earlier draft of the Notes as being "unclear, potentially confusing" although something that a tribunal "might wish to discuss . . . with the parties." Report of the United Nations Commission on International Trade Law on the work at its twenty-eighth session (Vienna, 2–25 May 1995). UN Doc. A/50/17, paragraph 337, reprinted in Vol. XXVI UNCITRAL Yearbook (1995).

the UNCITRAL Rules "permits the Tribunal to take into account certain general, universally applied considerations which usually are found in the doctrine of *forum conveniens*," which "provides that the forum in which to try a matter should be the jurisdiction that has the closest connection with the action and the parties." Canada then proceeds (at page 7 of its Memorandum of October 2, 1997) to list factors "which most directly connect [this arbitration] to Ottawa." Leaving aside the issue as to whether that municipal law doctrine has a place in international arbitration, the Tribunal is constrained to say that in its view its decision regarding the place of arbitration in this case must be made, as Article 16(1) prescribes, "having regard to the circumstances of the arbitration," meaning *all* such circumstances, including those elements offered for consideration in paragraph 22 of the Notes, and without any individual circumstance being accorded paramount weight irrespective of its comparative merits. In the end, Canada appears to agree, having stated (at paragraph 3 of its Reply Memorandum of October 22, 1997) that it cited the doctrine "only to demonstrate that the criteria which provide guidance in determining the appropriate forum appear to be practically the same criteria which are cited in the UNCITRAL Notes . . . ."

Canada then argues (at pages 8–9 of its Memorandum of October 2, 1997), second, that since under NAFTA Chapter 20 (Rule 22 of the Model Rules of Procedure for NAFTA) the place of arbitration of a State-to-State NAFTA arbitration is the capital of the respondent State, "[*a*] *fortiori*, where a private commercial party brings a complaint under Chapter 11, it should follow that the circumstances of the case lend themselves to the government of a sovereign country responding in its own capital." The Tribunal does not share this view. The fact that the respondent State's capital has been expressly designated by rule adopted pursuant to Chapter 20 would suggest, to the contrary, that the omission to do so in connection with Chapter 11 was, if anything, deliberate. In any event, NAFTA's Chapter 11 clearly contemplates the possibility of disputes under it against any NAFTA Party being arbitrated in Washington DC, since Article 1120 allows a disputing investor to choose arbitration (if and when it becomes available[5]) under the ICSID Convention, Article 62 of which provides that in the absence of agreement of the arbitrating parties "arbitration proceedings shall be held at the seat of the Centre" *i.e.*, Washington DC.[6]

Having disposed of these threshold issues, the Tribunal now turns its attention to the four factors relevant under the UNCITRAL Notes, considering each of them in relation to the respective proposed places of arbitration: Ottawa (or, alternatively, Toronto) and New York City.[7]

[5] To date neither Canada nor Mexico is a party to the ICSID Convention. Thus although the United States is a party to that Convention no present prospect of such an arbitration exists. Under Articles 20 and 21 of the ICSID Additional Facility Arbitration Rules, to which Article 1120 also allows resort, "the place of arbitration shall be determined by the Arbitral Tribunal after consultation with the parties and the Secretariat" and must be in a State Party to the New York Convention.

[6] ICSID Convention Article 2 fixes the seat of the Centre at "the principal office" of the World Bank, *i.e.*, Washington DC. While it is true, as Canada has noted (at paragraph 6 of its Reply Memorandum of October 22, 1997), that Washington DC is not thereby the "place of arbitration," that concept itself is not relevant to the self-contained ICSID system.

[7] The Tribunal, as previously noted, has the power, under NAFTA Article 1130(b), to select as the place of arbitration any situs in Canada, Mexico or the United States. The Tribunal notes that Ethyl (at page 5

As to criterion (a) of the Notes—"suitability of the law on arbitral procedure"—the Tribunal concludes that all proposed fora are equally suitable. It appears undisputed that Canada's Commercial Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration and by its terms would apply to this arbitration under NAFTA Chapter 11. It appears to be equally undisputed that the relevant laws of the United States, and, to the extent relevant, the State of New York, are no less suitable. The fact that the laws applicable to this arbitration, were it situated in New York City, have been in place longer than Canada's Commercial Arbitration Act, and therefore are judicially more elaborated, does not, in the view of the Tribunal, significantly affect their comparative suitability.

Criterion (c) of the Notes[8]—"the convenience of the parties and the arbitrators, including the travel distances"—likewise seems not to be significantly better served by one proposed alternative as opposed to any other. As to the Tribunal, the President, who normally is resident in Cologne, Germany, can travel with more or less equal ease to New York City, Ottawa and Toronto. Mr Lalonde, a resident of Montreal, can travel to Ottawa or Toronto just as well as Judge Brower can from his Washington DC residence to New York City. By the same token, Judge Brower would be no more and no less inconvenienced by travel to Ottawa of Toronto than would Mr Lalonde be by the need to appear in New York City.[9]

The situation of the parties is substantially similar. Canada has noted (at page 12 of its Memorandum of October 2, 1997) that:

> The investment which Ethyl Corporation alleges has been damaged is the wholly owned subsidiary, Ethyl Canada, which has its head office in Mississauga, adjoining the City of Toronto, in the Province of Ontario. Its blending facility, where it processes MMT, is in Corunna, in the Province of Ontario.

In response to this Ethyl simply contends (at page 4 of its Submission of October 16, 1997) that it has "its head office in [the Commonwealth of] Virginia" and that the "location of subsidiary offices is not a relevant factor for this arbitration." For purposes of criterion (c) alone this may well be correct. If it is, there is no significant difference in the convenience factor between Canada having to travel to New York City and Ethyl having to be present in Ottawa or Toronto. If it is not, then a degree of preference would be indicated for a Canadian venue.

of its Submission of October 16, 1997) has "submitted that if this Tribunal finds that it is inappropriate to have the place of arbitration in either Canada or the United States, the Claimant suggests that the place of arbitration be in Mexico." The Tribunal limits itself in this case, however, to the sites recommended by the parties. In doing so it emphasizes that it is in no way precluded by the parties' respective proposals from considering other locations. It proceeds as it does because it believes the parties objectively have searched out those places that are most likely in fact to be most appropriate, "having regard to the circumstances of the arbitration."

[8] The Tribunal already has determined that criterion (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"—is not "relevant here." *See* note 3, *supra*.

[9] The Tribunal does not believe, as Ethyl has suggested (at page 4 of its Submission of October 16, 1997), that in determining the "convenience of the . . . arbitrators" it is relevant that "local offices of the law firms of both Messrs Lalonde and Brower" exist in New York City.

Canada has introduced as a consideration the location of counsel to the parties, emphasizing that Ethyl's counsel has an office in Toronto as well as in New York City. Ethyl disputes the relevance of counsel's convenience, while nonetheless pointing out (at page 3 of its Submission of October 16, 1997) that "The Government of Canada also maintains a large consulate in New York City as well as Permanent Mission to the United Nations which can support the needs of the Government of Canada's legal team . . . " Canada terms this letter assertion "incorrect," as "[t]hese are diplomatic offices and are not set up to act as alternative legal offices, such as [Claimant's counsel] apparently has available to him."[10]

The Tribunal is inclined to the view that the convenience of counsel is a relevant consideration, subsumed under the "convenience of the parties." Certainly the convenience of attorneys appointed by the parties, which translates into cost factors, affects their clients. The Tribunal also believes that the availability for temporary use by government lawyers of facilities at a consular post or diplomatic mission is not comparable to a dedicated office of counsel. Accordingly, the Tribunal concludes that it is relevant to consider that fixing the place of arbitration in either Ottawa or Toronto will serve the convenience of counsel collectively better than New York City.

We now turn to criterion (d), "availability and cost of support services needed." It is clear that all necessary support services for this arbitration are available in all three of the cities that have been proposed. The Tribunal believes it appropriate to take judicial notice of the fact that such services inevitably will be more costly in New York City than in either Ottawa or Toronto. This includes transportation, hotels, meal service, hearing rooms and counsel rooms, and certified stenographic reporting services. Therefore application of criterion (d) favors Ottawa or Toronto over New York City, but does not discriminate between them.

The Tribunal does not, however, take into consideration in this regard, as Canada has proposed, the presence and availability in Ottawa of NAFTA Secretariat facilities. As Canada itself records (at page 7 of its Reply Memorandum of October 22, 1997), "The NAFTA Secretariat operates in all three NAFTA countries, *each of which funds the local office.*" (Emphasis added.) While the Tribunal accepts fully, as Canada itself has stressed (at page 7 of its Reply Memorandum of October 22, 1997), that "those offices operate independently of their host country and are viewed by the NAFTA Parties as neutral centres," the Tribunal nonetheless is concerned that to avail itself of such facilities could be viewed as inconsistent with at least the spirit of the requirement of the UNCITRAL Rules (Articles 9–10) that it act so as to leave no doubt whatsoever as to its complete independence of any party. This is all the more so where, as here, Ethyl has registered its objection (at page 5 of its Submission of October 16, 1997) that the use of such facilities "would be inappropriate."

The last criterion of the Notes—"(e) location of the subject-matter in dispute and proximity of evidence"—finally turns the Tribunal definitely to selection of a place of arbitration in Canada. Clearly the subject-matter in dispute is fixed in Canada.

[10] As regard Ethyl's counsel this point would appear to apply equally to New York City and Toronto.

Ethyl charges (*see* page 4 of its Notice of Arbitration) that certain legislative and other acts of Canada "remov[ing] MMT [methylcyclopentadienyl manganese tricarbonyl] from Canadian gasoline" have resulted in breaches by Canada of Articles 1102, 1106 and 1110 of NAFTA, thereby "harm[ing] Ethyl Corporation and the value of its Canadian investment, Ethyl Canada." The "location of the subject-matter in dispute" is not subject to serious debate.

The parties have little to say as regards "the proximity of evidence." Perhaps the nature of the case and the early stage in which it now is make it difficult to be explicit on this subject. For its part, Canada has said (at page 7 of its Memorandum of October 2, 1997) only that "virtually the whole of the cause of action in this case relates to Canadian laws, the Canadian law-making process, the actions of the Canadian Parliament and certain ministers," and that it "should be evident . . . that the witnesses to this process of law-making and policy-making are for the most part located in Ottawa."[11] In response Ethyl effectively asserts (at page 5 of its Submission of October 16, 1997) that no such witnesses will be required, as it "intends to provide proof of statements made by Canadian officials through the introduction of authoritative writings, such as Hansard," which the Tribunal understands to be the official record of debates in the Canadian Parliament. In reply, Canada argues (at page 6 of its Reply Memorandum of October 22, 1997) that "it is potentially the whole process of law making and parliamentary procedure and practice which is to be examined through the evidence of witnesses". In affirmative support of New York City as the place of arbitration Ethyl states only that, "[a]s an example, all important documents on the issue of damages are located in Richmond, Virginia," where its headquarters are situated. Thus the Tribunal is afforded little insight into just how any considerations of the proximity of evidence should affect its decision.

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

Here, however, NAFTA Article 1130(b) circumscribes our powers, limiting possible places of arbitration to either of the two States here involved or Mexico. A Mexican venue surely would represent neutrality in this case, and in all such cases. The Tribunal concludes, however, that had the NAFTA Parties felt that every arbitration under Chapter 11 of NAFTA must be sited in the NAFTA Party not involved in the dispute they would have said so and would not have remitted us to Article

[11] Canada argues (at pages 9–11 of its Memorandum of October 2, 1997) also that certain "related proceedings" are "additional factors that point to Canada as the appropriate place of arbitration . . ." Those proceedings are (1) a suit by Ethyl's Canadian subsidiary seeking "a declaration . . . that [the relevant legislation] is of no legal force and effect" as well as injunctive relief, and (2) a formal complaint by the Province of Alberta against Canada which will be subject to dispute resolution proceedings. The Tribunal does not believe that the pendency of those proceedings has any bearing on its determination of the place of arbitration.

16(1) of the UNCITRAL Rules. The Tribunal has readily concluded that a Mexican venue would not serve other important "circumstances" of this arbitration.[12]

The Tribunal concludes on the basis of all of the foregoing that, on balance, the place of arbitration should be in Canada. Although as to a number of the "circumstances of the arbitration," notably the respective suitability of the law on arbitral procedure and the convenience of the arbitrators, all three cities in contention are equally appropriate, other circumstances weigh in favor of Canada and none point toward New York City. Most significantly, Canada indisputably is the location of the subject-matter in dispute. In addition, a Canadian venue offers less costly support services and overall would better suit the convenience of counsel for the parties. It is far less certain, but likely, that Canada overall is more convenient for the parties themselves and as regards the proximity of evidence. In the end, therefore, the Tribunal finds a Canadian venue more appropriate as the place of arbitration in this case than New York City.

Once the Tribunal has determined to select a Canadian venue, none of the specific factors considered weighs strongly in favor of Toronto, Canada's alternative proposal, rather than Ottawa. The Tribunal has some reluctance, however, to choose Ottawa. This is due to the fact that it is the capital of Canada.

The Tribunal therefore has determined to designate Toronto as the place of arbitration, for the reason that while it is no more, and no less, appropriate than Ottawa when measured by the other applicable criteria, it is likely to be perceived as a more "neutral" forum.

[*Source*: http://www.dfait-maeci.gc.ca/tna-nac/documents/ethyl5.pdf]

[12] The fact that the UNCITRAL Notes omitted (*see* note 4, *supra*) "perception of a place as being neutral" from its list of criteria for selection of a place of arbitration because it was "unclear, potentially confusing" does not mean that such criterion cannot be considered. UNCITRAL in taking this step, itself indicated "that the arbitral tribunal, before deciding on the place of arbitration, might wish to discuss that with the parties."