THE ARBITRAL TRIBUNAL
IN THE ARBITRATION BETWEEN
VITO G. GALLO V. GOVERNMENT OF CANADA

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Dear Sirs and Mesdames,

Vito G. Gallo v. Government of Canada

1. The Arbitral Tribunal acknowledges receipt of the parties' latest communications: Claimant's communications Gal 8 and Gal 9, dated respectively, March 20 and May 12, 2008 and Respondent's communications Can 7 dated March 20, Can 7 B) dated April 29[1] and Can 8 dated May 14, 2008.

I Place of arbitration

Position of the parties

2. The parties have not been able to agree on the place of arbitration.

3. In a first attempt to find a compromise, the Tribunal had suggested London, England; this proved unacceptable to Canada. In communication A 7 the Tribunal made a second attempt to find a solution by agreement, proposing Vancouver, B.C.

4. In its communication Can 8, Respondent accepted Vancouver.

[1] Respondent erroneously numbered this communication Can 7; the Tribunal has renumbered it as Can 7 B).

5. In Gal 9 Claimant, however, refused the proposed venue. Claimant voiced its concern that every Court in Canada must take judicial notice of the Adams Mine Lake Act (the "Act") – and in British Columbia, the Court would be required to do so under section 24 (2) of the Evidence Act, RSBC 1996, Chapter 124. Having taken judicial notice, the Court *"would be encouraged to adopt the public policy reflected"*[2] in the Act. Unless the seat of the arbitration was located outside Canada, the Respondent would enjoy an unfair advantage under its own constitutional law, and consequently would threaten to prejudice any award. Investor-state arbitration - argues Claimant - was designed to prevent the host State from demanding that its own Courts be the final arbiter of the measures it takes in relation to the investor.

6. Respondent reacted to Claimant's arguments in its submission Can 8. Canada stated that under Canadian law any award to be rendered by this Tribunal can only be set aside on the basis of public policy, if the award is in conflict with the public policy of Canada, but not on the basis of a provincial statute such as the Act. Canadian Courts considering applications to set aside NAFTA Chapter 11 awards on the basis of "public policy" have confirmed this finding: an objection to an award based on the public policy ground must show that the award offends fundamental principles of justice and fairness. Claimant's contention that public policy may be found in a single provision of a provincial statute is not credible. There have been several set aside proceedings in different Canadian Courts, all of which have afforded a high level of deference to NAFTA Chapter 11 awards.[3]

Position of the Arbitral Tribunal

7. The lack of agreement among the parties requires the Tribunal to decide the place of arbitration. The Tribunal's flexibility is constrained by the NAFTA itself which restricts the scope of available jurisdictions, and the UNCITRAL Rules do not provide relevant guidance.

Legal provisions

8. The relevant NAFTA provision reads as follows:

> *"Article 1130 NAFTA: Place of Arbitration*
>
> *Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party*[4] *that is a party to the New York Convention, selected in accordance with:*
>
> ...
>
> *(b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules."*

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[2] Gal 9, p. 1.

[3] *Bayview Irrigation et al. v. United Mexican State*, March 18, 2008, Ont. Sup. Crt. Toronto 07-CV-340139-PD 2, attached to Can 8 ("*Bayview Irrigation*"); *The United Mexican States v. Marvin Roy Feldman Karpa*, No. C 41169 (Ont. C.A.) (January 11, 2005) *("Feldman Karpa"*) and decisions cited therein..

[4] i.e. Mexico, Canada and the US.

9. And Art. 16 of the UNCITRAL Rules states:

> *"Article 16: Place of arbitration*
>
> *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".*

10. Since Canada has refused to accept a venue outside of the three NAFTA countries, the choice of place of arbitration is *de facto* restricted to jurisdictions located in Canada or the United States[5]; the law authorizes the arbitrators to select any city within these jurisdictions, the only guidance being that they must *"[have] regard to the circumstances of the arbitration".*

11. In 1996 UNCITRAL published "Notes on Organizing Arbitral Proceedings" (the "Notes"), whose stated purpose is *"to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful".* The Notes have non-binding character, as they state:

> *"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".*

Paragraph 22 of the Notes provides some guidance to arbitrators who have to select a place of arbitration, when parties have not agreed on the choice:

> *"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".*

Alternatives

12. In the present case, the Tribunal is confronted with the choice of three possible places of arbitration: either Washington D.C., as advocated by Claimant, Toronto, as proposed by Respondent, or Vancouver, as proposed by the Tribunal, accepted by Respondent but opposed by Claimant.

13. How should the Tribunal proceed in choosing the place of arbitration?

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[5] The parties excluded the possibility of choosing Mexico.

14. As a first step, the Tribunal is of the opinion that the guidance offered by section 22 of the Notes is not useful in this case. Criteria (a) and (b) are met by any of the three proposed venues; and criteria (c), (d) and (e) are not really decisive, since Art. 16.2 UNCITRAL Rules authorizes the Tribunal to hear witnesses and hold meetings at any place it deems appropriate – and the Tribunal is prepared to do so in Toronto, Ontario, or at any other city, if this is the convenient solution.

15. In the Tribunal's opinion, the perfect place of arbitration in an international investment arbitration 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.

16. The criteria of quality of the judicial system and language capabilities are complied with by the three proposed places of arbitration: all have high quality courts, with independent, English-speaking judges and experience in handling international arbitration cases, including those arising from the NAFTA Chapter 11. From this point of view, the Tribunal has no reservation with regard to any venue - and none have been voiced by the parties.

17. The criterion of abstract neutrality is however not met by any of the proposed places. Mr. Gallo is a U.S. citizen, and Washington is located in the United States of America. Toronto is in Ontario, the Province where the investment was made, the legislation was enacted and the conduct which allegedly harmed the investor took place. Vancouver, although not located in Ontario, is still located in Canada, the Respondent in this arbitration. From this point of view, none of the proposed locations is ideal.

An additional issue: Section 5 of the Act

18. As Claimant has reiterated in his latest submission, the difficulties of selecting a place of arbitration are exacerbated by the wording of the Act at issue in this arbitral proceeding. Section 5 reads as follows:

> ***"Extinguishment of causes of action***
> *5. (1) Any cause of action that exists on the day this Act comes into force against the Crown in right of Ontario, a member or former member of the Executive Council, or an employee or agent or former employee or agent of the Crown in right of Ontario in respect of the Adams Mine site or the lands described in Schedule 1 is hereby extinguished. 2004, c. 6, s. 5 (1).*
> ***Same***
> *(2) No cause of action arises after this Act comes into force against a person referred to in subsection (1) in respect of the Adams Mine site or the lands described in Schedule 1 if the cause of action would arise, in whole or in part, from anything that occurred after December 31, 1988 and before this Act comes into force. 2004, c. 6, s. 5 (2).*
> ...

Enactment of this Act

(4) Subject to section 6, no cause of action arises against a person referred to in subsection (1), and no compensation is payable by a person referred to in subsection (1), as a direct or indirect result of the enactment of any provision of this Act. 2004, c. 6, s. 5 (4).

Application

(5) Without limiting the generality of subsections (1), (2) and (4), those subsections apply to a cause of action in respect of any agreement, or in respect of any representation or other conduct, that is related to the Adams Mine site or the lands described in Schedule 1. 2004, c. 6, s. 5 (5).

Same

(6) Without limiting the generality of subsections (1), (2) and (4), those subsections apply to a cause of action arising in contract, tort, restitution, trust, fiduciary obligations or otherwise. 2004, c. 6, s. 5 (6).

Legal proceedings

(7) No action or other proceeding shall be commenced or continued by any person against a person referred to in subsection (1) in respect of a cause of action that is extinguished by subsection (1) or a cause of action that, pursuant to subsection (2) or (4), does not arise. 2004, c. 6, s. 5 (7).

Same

(8) Without limiting the generality of subsection (7), that subsection applies to an action or other proceeding claiming any remedy or relief, including specific performance, injunction, declaratory relief, any form of compensation or damages, or any other remedy or relief. 2004, c. 6, s. 5 (8).

Same

(9) Subsection (7) applies to actions and other proceedings commenced before or after this Act comes into force. 2004, c. 6, s. 5 (9).

19. Claimant has submitted that Section 5 of the Act could be construed as expressing the public policy of Ontario, and that any Court in Canada would consider the public policy of Ontario as the public policy of Canada. Claimant's implicit worry is that, if the chosen place of arbitration is in Canada, any hypothetical award issued by this Tribunal in favour of Claimant could then be set aside by a Canadian Court, on the basis that such decision, by violating Section 5 of the Act, infringes the public policy of Canada.

20. Canada has strongly argued[6] that Claimant is mischaracterizing Canadian law when it asserts that Canada could rely on section 5 of the Act to set aside an award on the basis of public policy. Canada added[7]:

> *"A NAFTA Article 1136 set aside proceeding initiated on the basis of public policy under the federal Commercial Arbitration Act ("CAA") may only result in the setting aside of an arbitral award if the "...award is in conflict with the public policy of Canada." A public challenge,*

[6] Can 8, p. 2.

[7] *Ibidem*, footnotes omitted.

therefore, cannot be brought on the basis of a statute such as the [Act]; rather it must be brought against the content of the arbitral award itself".

21. Canada finally submitted that Canadian Courts considering applications to set aside NAFTA Chapter 11 awards on the basis of public policy have consistently found that the public policy, in order to result in voidance of the award, must offend fundamental principles of justice and fairness[8].

22. In order to resolve this dispute, it is necessary to remember that the stated purpose of NAFTA is to grant U.S., Canadian and Mexican investors an arbitral remedy if they claim to have suffered damages as a result of measures undertaken by the host State which are inconsistent with that State's obligations under Chapter 11[9]. If States, simply by approving national laws which declare that investors' causes of action are extinguished, could create a public policy reason which would sustain the voiding of any ensuing NAFTA arbitral award rendered against them, an avenue would be opened to circumvent the very purpose of a NAFTA. For this reason, the Arbitral Tribunal must concur with Canada that the (hypothetical) violation of section 5 of the Act can never constitute a public policy reason which permits the setting aside of a NAFTA Chapter 11 award. Public policy must be limited to violations of fundamental principles of justice and fairness.

23. These conclusions are confirmed by Canadian judicial precedents. Canadian Courts have consistently interpreted the federal and provincial *International Commercial Arbitration Acts* in the same manner advocated by Claimant and accepted by this Arbitral Tribunal. In *Bayview Irrigation* Allen, J. very recently summed up the correct interpretation:

"I find it apparent from the United Nations Commission on International Trade Law's interpretation of "public policy", and the court decisions that have considered that interpretation, that the Tribunal's conduct was not marked by corruption, bribery or fraud or contrary to the essential morality." [10]

24. The Arbitral Tribunal thus comes to the conclusion, that a Court sitting in Canada can only set aside a NAFTA Chapter 11 award for public policy reasons if the decision violates essential principles of justice and morality; and that the purported extinction of all causes of action under section 5 of the Act does not represent such principle and does not permit the voiding of any award that might find the Act to be a breach of NAFTA. Having come to this conclusion, the Arbitral Tribunal finds that there is no objection in principle for the place of arbitration to be located in Canada[11].

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[8] Quoting *Feldman Karpa*, referred to in footnote 3 and *Attorney General of Canada v. S.D. Myers Inc.*

[9] See *Bayview Irrigation*, referred to in footnote 3, at 2.

[10] *Ibidem* at 64; see also *Feldman Karpa,* referred to in footnote 3, at 66.

[11] There is an additional argument: if section 5 of the Act were to represent a valid international public policy reason, which merits the setting aside of an award (which in the Tribunal's opinion it does not), it is likely that, not only a Canadian Court but also a US Court would decide to void the award, because all legal systems – including US law – permit the setting aside of awards if they violate international public policy.

Decision

25. This brings us back to the initial point of discussion: which place of arbitration - Washington, Ontario and Vancouver - should the Tribunal choose. The Tribunal has already reached the conclusion[12] that the most relevant factor in selecting a place of arbitration is neutrality. Washington, D.C. and Toronto, Ontario each have a close connection either with one of the parties (Washington with Claimant) or with the underlying dispute (Toronto/Ontario with the Act). Vancouver offers a higher degree of neutrality. For this reason the Tribunal decides that, of the choices available, Vancouver, B.C. is the most the appropriate place of arbitration.

26. In adopting its decision, the Tribunal has relied upon Respondent's submission, emphatically stated in Can 8, that *"a public policy challenge, therefore, cannot be brought on the basis of a statute as the [Act]"* [13]. Canada is bound by its own submission, and the Tribunal expects Canada to stand by it.

II Procedural Order no. 1 and Confidentiality Order

27. The Arbitral Tribunal takes note that Respondent has suggested a minor modification in the wording of para. 40 of the draft Procedural Order no. 1, which Claimant has accepted. As regards the Confidentiality Order, the parties suggested no amendments, and it is issued in its original format.

28. Procedural Order no. 1, amended as requested by the parties, and the Confidentiality Order are unanimously approved by the Arbitral Tribunal as of June 4, 2008. An original of each document will be deposited with the PCA, acting as Secretary, and certified copies will be delivered to the parties.

On behalf of the Arbitral Tribunal,

Juan Fernández-Armesto
President

[12] See para 17 above.
[13] P. 2.