

**Arbitration under Chapter Eleven of the North American Free Trade Agreement (NAFTA)  
and the UNCITRAL Arbitration Rules**

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**CANFOR CORPORATION**

**Claimant**

**v.**

**UNITED STATES OF AMERICA**

**Respondent**

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**DECISION ON THE PLACE OF ARBITRATION, FILING OF A  
STATEMENT OF DEFENCE AND BIFURCATION OF THE PROCEEDINGS**

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Before the Arbitral Tribunal constituted  
under Chapter Eleven of the North  
American Free Trade Agreement, and  
comprised of:

Joseph H. H. Weiler  
Conrad K. Harper  
Emmanuel Gaillard (President)

**January 23, 2004**

## **TABLE OF CONTENTS**

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	<u>PAGE</u>
I. THE PLACE OF ARBITRATION .....	1
A. The Arbitral Tribunal’s scope of choice .....	1
B. The circumstances of this arbitration.....	3
II. THE FILING OF A STATEMENT OF DEFENCE BY THE RESPONDENT AND THE BIFURCATION OF THE PROCEEDINGS .....	9
A. The position of the parties .....	9
B. The circumstances of this arbitration.....	10
III. THE ARBITRAL TRIBUNAL’S DECISION.....	13

## **I. THE PLACE OF ARBITRATION**

1. At the first Organizational Hearing held by the Arbitral Tribunal on October 28, 2003, the parties did not reach an agreement on the place of arbitration. It was accordingly decided that, *“failing an agreement between the Parties on the place of arbitration, such place shall be determined by the Arbitral Tribunal having regard to the circumstances of the arbitration”* (Terms of Agreement, October 28, 2003, para. 12).
2. The place of arbitration shall be determined in accordance with Article 1130 of the NAFTA, which provides that:

*“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.”*

3. Article 16(1) of the UNCITRAL Arbitration Rules provides in turn that:

*“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.”*

### **A. The Arbitral Tribunal’s scope of choice**

4. The Claimant’s position is that the place of arbitration should be a city in Canada, either Vancouver (British Columbia) or Toronto (Ontario) (Claimant’s Submission on Place of Arbitration and Request that the Respondent Provide a Statement of Defence, November 11, 2003, hereafter “Claimant’s Submission”; Claimant’s Reply Submission on Place of Arbitration and Request that the United States Provide a Statement of Defence, December 3, 2003, hereafter “Claimant’s Reply Submission”).
5. The Respondent’s position is that Washington, D.C. should be the place of arbitration (Respondent’s Submission on Place of Arbitration, Bifurcation and Filing of a Statement of Defense of Respondent United States of America, November 25, 2003, hereafter “Respondent’s Submission”; Respondent’s Rejoinder Submission on Place of Arbitration, Bifurcation and Filing of a Statement of Defense of Respondent United States of America, December 11, 2003, hereafter “Respondent’s Rejoinder Submission”).
6. The Tribunal is therefore requested to select a place of arbitration among the proposed cities in Canada (Vancouver or Toronto) and the United States (Washington, D.C.).
7. During the first Organizational Hearing of October 28, 2003, the Tribunal raised with the parties the issue of alternative seats in other countries. In this respect, the Tribunal observes that the language of Article 1130 of the NAFTA allows for some flexibility as the disputing parties may agree to a place of arbitration in the territory of

- a State that is not a NAFTA Party (*“unless the disputing parties agree otherwise”*). Therefore, Article 1130 does not restrict the disputing parties’ choice of the place of arbitration to the three NAFTA Parties. This issue was discussed during the October Hearing. Subsequently, in its first written submission, the Claimant accepted, subject to the Respondent’s agreement, the possibility of selecting either London (England) or Geneva (Switzerland) as the place of arbitration (Claimant’s Submission, paras. 6 and 44). This option, however, was not accepted by the Respondent (Respondent’s Submission, p. 2). Should the disputing parties not wish to agree to a place of arbitration in a State that is not a NAFTA Party, the arbitral tribunal has the option of choosing, under Article 1130 of the NAFTA, the place of arbitration in the territory of any of the three NAFTA Parties, the United States, Canada or Mexico.
8. By letter of November 18, 2003, the parties advised the Tribunal that they had agreed, pursuant to Article 1(1) of the UNCITRAL Arbitration Rules, to modify Article 16(1) of those Rules to provide that, “[u]nless the parties have agreed upon the place where the arbitration is to be held, the Tribunal shall fix the place of arbitration at a city in Canada or the United States of America, having regard to the circumstances of the arbitration.”
  9. The parties have taken the view that the Tribunal is constrained by their agreement—which excludes Mexico as a seat of arbitration—and shall determine the place of arbitration only amongst Canada and the United States (Claimant’s Submission, paras. 38-44; Respondent’s Submission, p. 2).
  10. The Tribunal observes that the parties’ initiative raises important questions as regards NAFTA policy considerations. Article 1130 of the NAFTA gives the arbitral tribunals, in the absence of an agreement of the parties on the place of arbitration, the possibility of choosing such place among the *three* NAFTA States. The effect of the parties’ agreement of November 2003 is to modify the scope of Article 1130 and restrain the tribunal’s options to two of the NAFTA Parties, those that are involved in this dispute (the United States as the Respondent, Canada as the State of the investor’s nationality). Under Article 1128 of the NAFTA, when a question of interpretation of the Agreement arises, a NAFTA Party may make submissions on the question of interpretation. In this arbitration, however, the two other NAFTA Parties, Canada and Mexico, have not taken any position with respect to the interpretation of Article 1130 and the possibility for disputing parties to modify the scope of that Article.
  11. The Tribunal notes that the disputing parties are involved in an international arbitration, a method of settling international disputes that is based on the principle of the agreement of the disputing parties. The only exception to this principle is the requirement that the agreement of the parties complies with any applicable rules of public policy. In the present case, the Tribunal observes that the determination of the place of arbitration in both Article 1130 of the NAFTA and Article 16(1) of the UNCITRAL Arbitration Rules is primarily based on the agreement of the disputing parties. Although the disputing parties have agreed not to agree to any particular place of arbitration, they have expressed their clear agreement to limit the scope of the Tribunal’s choice regarding the legal place of the arbitration. Such an agreement should be given effect.
  12. As a result, the Tribunal will, in the absence of an agreement between the parties (except to limit the Tribunal’s scope of choice to Canada and the United States), fix

the place of arbitration at a city in Canada or the United States of America, having regard to the circumstances of the arbitration.

**B. The circumstances of this arbitration**

13. In order to provide guidelines to the Tribunal in the determination of the place of arbitration, the parties have referred to the UNCITRAL Notes on Organizing Arbitral Proceedings (hereafter “UNCITRAL Notes”) and, in particular, Paragraph 22 of the Notes which discusses various factual and legal factors. That Paragraph provides that:

*“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.”*

14. The binding force of these Notes has been the subject of discussion among the parties. While referring to the UNCITRAL Notes as guidelines, the Claimant has emphasized that they do not bind the Tribunal and that the place of arbitration should be determined in consideration of all the “*circumstances of the arbitration*” (Claimant’s Submission, para. 7; Claimant’s Reply Submission, para. 17). According to the Respondent, the UNCITRAL Notes set forth the “*primary factual and legal criteria for the Tribunal to consider in selecting the place of arbitration*” (Respondent’s Submission, p. 2).
15. The Tribunal considers that it must determine the place of arbitration in light of any relevant circumstances in this arbitration and that the factors enumerated in the UNCITRAL Notes provide no more than non-binding guidelines, as Paragraph 2 of the Notes makes clear (“*The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them*”).
16. The Tribunal will therefore examine each of the factors offered for consideration by the parties, without according particular weight to any individual circumstance over another. These factors include neutrality, which is not referred to in the UNCITRAL Notes but which constitutes one of the key features of international arbitration.
- 1) *The neutrality factor*
17. Neutrality is a factor on which the parties are in sharp disagreement. Having argued that all five factors provided for by the UNCITRAL Notes weigh equally and do not point to either Canada or the United States, the Claimant contends that the factor of neutrality, or perceived neutrality, should direct the Tribunal to determine the place of arbitration in Canada. In support of this position, the Claimant relies on the NAFTA cases in *Ethyl v. Canada* and *UPS v. Canada*. It also makes a distinction between the

- present arbitration and the previous cases involving the United States as a respondent in *Loewen*, *Mondev*, *ADF* and *Methanex*. The Claimant argues that, unlike in those cases where Washington, D.C. was held to be the appropriate place of arbitration, in this case the Tribunal should consider Vancouver as an appropriate place of arbitration given its substantial connection to the proceedings; should Vancouver not be perceived as neutral, Toronto could in the alternative be determined as the place of arbitration where neutrality would be best ensured (Claimant's Submission, paras. 30-37).
18. The question of neutrality, or the perception of neutrality, has been emphasized by the Claimant as the critical factor in the determination of the place of arbitration (Claimant's Reply Submission, paras. 4-8 and paras. 26-30). In this respect, the Claimant maintains that Washington, D.C., which is not only the seat of the United States Government but also the place where the disputed measures were taken, is the least neutral location for the place of arbitration (Claimant's Reply Submission, paras. 27-28).
  19. The Respondent considers, for its part, that the venues proposed by each party are equally neutral (Respondent's Submission, pp. 14-15; Respondent's Rejoinder Submission, pp. 6-8). First, relying on the *Methanex v. USA* case, the Respondent argues that a neutral national venue is not possible in this case (the parties in *Methanex* had also limited the tribunal's choice to Canada or the United States, see Written reasons for Decision of September 7, 2000 on the Place of arbitration, para. 6, annexed to Claimant's Submission, Exhibit B3). Second, the Respondent submits that neutrality is not an important factor to be taken into consideration, given that it was excluded from the UNCITRAL Notes, that Chapter Eleven limits the place of arbitration to one of the three NAFTA Parties, and the fact that the parties have agreed to exclude Mexico as an alternative place of arbitration. Only if the five factors set forth in the UNCITRAL Notes do not result in the determination of a place of arbitration could neutrality be considered as a tie-breaking factor. Third, the Respondent submits that neutrality could be addressed by holding the hearings in ICSID's headquarters in Washington, D.C. In addition, the Respondent has emphasized that the softwood lumber issue is an important local issue in British Columbia and Ontario and that, should neutrality be weighed at all, it should not be considered a factor favoring a Canadian venue (Respondent's Rejoinder Submission, p. 8).
  20. The Tribunal is not convinced by the parties' arguments.
  21. The Tribunal observes that Article 1130 of the NAFTA has limited the choice of the place of arbitration, absent an agreement between the disputing parties, to one of the three NAFTA Parties. In the present arbitration, had the disputing parties intended to ensure neutrality, they were at liberty to agree to a neutral forum outside any of the three NAFTA Parties. In the alternative, the disputing parties were at liberty to leave open the option of Mexico. Rather, the parties have chosen expressly to exclude such options and to limit the scope of the Tribunal's choice to a venue in either Canada or the United States. As a result, because of the choice made by the negotiators of the NAFTA and because of the procedural choices made by the disputing parties in this arbitration, the Tribunal considers that, with regard to the place of arbitration, a neutral venue is not available.

22. Further, the Tribunal is not persuaded, in the circumstances of this arbitration, by the argument of perceived neutrality. In particular, the Tribunal finds little assistance in the Respondent's argument that any concern of neutrality in this arbitration could be addressed by holding the hearings at the ICSID facilities in Washington, D.C. First, the Respondent's implication that the mere physical location of a building may ensure the neutrality of the place of arbitration is at odds with the distinction, on which it has laid emphasis, between the legal seat of an arbitration and the physical location of hearings (*see below*, para. 28). Second, the Tribunal does not find any reason in the facts of this case to give consideration to ICSID as a weighing circumstance with respect to the determination of the place of arbitration. Absent the ratification of the Washington Convention by Canada, the guarantees offered by ICSID, including the true neutrality provided by a system which is genuinely independent from any national legal order, are not available to the disputing parties in this arbitration.
23. As a result, the Tribunal concludes that the neutrality factor does not favor either the United States or Canada. To the contrary, by the very choice of the disputing parties, any decision on the place of arbitration taken by the Tribunal will result in having one of the parties arbitrate in the other's forum. In this respect, the Tribunal endorses the analysis of the distinguished tribunal in *Methanex v. USA*:

“[...] in assessing the significance of neutrality or perceived neutrality, the Tribunal bears in mind (i) that it was open to the NAFTA parties to agree that in the interests of neutrality Chapter Eleven disputes should be arbitrated in the territory of any third Party not directly involved in the dispute, yet they did not do so; and (ii) that in circumstances where (as in this case) the disputing parties have further limited the choice of place of arbitration by their arbitration tribunal to one or the other's state, a neutral national venue is simply not possible. In this arbitration, either the Claimant or the Respondent, effectively by their own choice, will have to arbitrate in the other's home state. Strict neutrality is perhaps a circumstance much to be desired for certain arbitrations; but it was not so desired by the parties to this arbitration.” (*Methanex v. USA*, Written reasons for the Decision of September 7, 2000 on the Place of Arbitration, para. 36, annexed to Claimant's Submission, Exhibit B3).

2) *The suitability of the law on arbitral procedure*

24. The Claimant and the Respondent agree on the suitability of both U.S. and Canadian arbitral laws. The Claimant argues that this factor weighs equally between Canada and the United States and finds strong support, on this issue, in previous decisions such as *Ethyl v. Canada*, *Methanex v. USA* and *ADF v. USA* (Claimant's Submission, paras. 10-21; Claimant's Reply Submission, para. 9). The Respondent also considers that the relevant laws of the United States and Canada are equally suitable, while raising the issue of the standard of review for Chapter Eleven arbitrations in Canada as expressed in the *UPS* and *Pope & Talbot* cases because of the position taken by the Government of Canada before the British Columbia Supreme Court in *Metalclad v. Mexico* (Respondent's Submission, pp. 10-12).
25. The Tribunal agrees with the parties that this factor weighs neutrally, and that the laws applicable in British Columbia and in Ontario as well as the Federal Arbitration

Act are equally suitable, including on questions concerning the applicable standards of review for Chapter Eleven arbitral awards. The Tribunal notes that the same conclusion was reached by all previous NAFTA tribunals which had to consider the issue, notwithstanding the concern expressed by the tribunals in *UPS v. Canada* and *Pope & Talbot v. Canada* with respect to the procedural position taken by Canada in the *Metalclad* case (see *UPS v. Canada*, Decision on the Place of arbitration of October 17, 2001, paras. 9-10, annexed to Claimant's Submission, Exhibit B1; *Pope & Talbot v. Canada*, Ruling concerning the Investor's motion to change the place of arbitration, March 14, 2002, paras. 15-19, annexed to Claimant's Submission, Exhibit B5). The Tribunal does not share the concern expressed by these tribunals and regards the factor of the suitability of the law on arbitral procedure as neutral in this arbitration.

3) *The existence of a multilateral treaty on enforcement of arbitral awards*

26. The Tribunal observes that it is common ground between the parties that both the United States and Canada are parties to the New York Convention on the enforcement of arbitral awards and that therefore this factor weighs neutrally between the United States and Canada (Claimant's Submission, para. 22; Respondent's Submission, p. 13).

4) *The convenience of the parties and the arbitrators*

27. The parties are in disagreement as to the weight to be accorded to the third factor cited in the UNCITRAL Notes. The Claimant argues that it weighs neutrally and does not point to any one place over another since the parties have agreed, in accordance with Article 16(2) of the UNCITRAL Arbitration Rules, that the seat of the arbitration and the place of hearings need not coincide and that hearings or meetings may take place at any appropriate place, including Washington, D.C., Vancouver or Toronto (Claimant's Submission, para. 23; Claimant's Reply Submission, paras. 10-13). The Respondent does not agree. It contends that holding the arbitration in Washington, D.C. would be less inconvenient than Vancouver or Toronto for the members of the Tribunal as well as for the U.S. officers from the various governmental agencies involved in this arbitration, without such venue being inconvenient for Canfor (Respondent's Submission, pp. 8-10; Respondent's Rejoinder Submission, pp. 5-6).
28. The Tribunal agrees with the Claimant and considers that this factor, which should not be accorded a great weight in this arbitration, is neutral. The Tribunal is attentive to the Respondent's argument regarding the convenience of Washington, D.C. The Tribunal is also mindful that, as emphasized by the Respondent, a distinction should accurately be drawn between the legal seat of an arbitration and the geographical location of hearings (Respondent's Submission, pp. 6-8 and 10; Respondent's Rejoinder Submission, p. 1). However, in light of Paragraph 13 of the Terms of Agreement signed by the parties at the Hearing of October 28, 2003, the Tribunal considers that the parties' agreement, without prejudice to the legal seat of the arbitration, to hold the hearings and the meetings at any appropriate place—which may include, as need be, Washington, D.C.—adequately satisfies, in the circumstances of this arbitration, the convenience factor.

5) *The availability of cost and support services*

29. This factor is also the subject of disagreement between the parties. The Claimant argues that the availability and cost of support services is neutral, and that the cost of support services may become relevant at the time of the determination of the place where particular hearings will be held (Claimant's Submission, para. 24). The Claimant further argues that the facilities of ICSID in Washington, D.C. may be compared, in terms of costs, to equivalent facilities in either Vancouver or Toronto (Claimant's Reply Submission, paras. 14-16). The Respondent contends that this factor favors Washington, D.C. as a less costly venue. The relevant factors considered by the Respondent are travel costs for the members of the Tribunal, the parties and their attorneys, and the fact that ICSID facilities are available for use at rates that are likely more competitive than equivalent facilities in Vancouver or Toronto (Respondent's Submission, pp. 12-13; Respondent's Rejoinder Submission, pp. 5-6).
30. The Tribunal finds that this factor does not favor any venue over the other and considers that the parties' agreement to hold the hearings and the meetings at any appropriate place allows the Tribunal to conduct the arbitration in a cost-effective manner.

6) *The location of the subject matter in dispute and the proximity of evidence*

31. The final factor set forth in the UNCITRAL Notes, that of the location of the subject matter in dispute and the proximity of evidence, sharply divides the parties. The Claimant finds it to be neutral (Claimant's Submission, para. 25; Claimant's Reply Submission, paras. 18-25). In particular, the Claimant disputes the Respondent's submission that the subject matter of the dispute is located exclusively in Washington, D.C.: according to the Claimant, the subject matter in dispute relates to decisions made by the United States in relation to the alleged conduct of Canadian softwood lumber companies operating in British Columbia (Claimant's Reply Submission, paras. 19-20).
32. The Respondent argues to the contrary that the subject matter in dispute is located in Washington, D.C. for the following reasons: the Claimant's allegations are based on antidumping and countervailing duty determinations which were made in Washington, D.C. by the U.S. Department of Commerce and the International Trade Commission; the significant events underlying the Claimant's allegations took place in Washington, D.C.; and most or all of the relevant evidence is located in Washington, D.C. In contrast, the Respondent finds no connection between either Vancouver or Toronto and the subject matter in dispute (Respondent's Submission, pp. 3-8; Respondent's Rejoinder Submission, pp. 2-4). The Respondent further argues that the subject matter in dispute points to a U.S. venue given that the Claimant's allegations that it has been denied national treatment or most-favored nation treatment may only be made with respect to its U.S. investments (Respondent's Rejoinder Submission, pp. 3-4).
33. The Tribunal finds that, as regards the proximity of evidence, it is irrelevant in this arbitration given the parties' agreement to hold hearings and meetings at any appropriate place (*see above*, para. 28).

34. As regards the subject matter in dispute, the parties have not presented the Tribunal with a uniform definition of what constitutes the “subject matter”. The Claimant refers to the determination of the location of a particular hearing and considers that “[t]he ‘subject matter’ of the dispute is the treatment of a Canadian investor situate in Canada and the United States, by organs of the United States government situate in Washington, D.C.” (Claimant’s Submission, para. 25). The Claimant further refers to the “physical subject-matter of the dispute” which it situates in British Columbia and to “legal facts” it claims have occurred in British Columbia (Claimant’s Reply Submission, paras. 19-20). The Respondent, referring to the decision rendered in *ADF v. United States*, considers “the ‘subject-matter’ of the dispute as ‘the issue presented for consideration; the thing in which [or in respect of which] a right or duty has been asserted’ [...]” (Respondent’s Rejoinder Submission, p. 2, quoting *ADF v. USA*, Procedural Order No. 2, para. 20, annexed to Claimant’s Submission, Exhibit B4).
35. The Tribunal considers that the subject matter, independently from the proximity of evidence, does not, in this arbitration, relate to the Claimant’s conduct in British Columbia. It rather relates to the Respondent’s measures determining the Claimant’s softwood lumber importations into the United States as subsidized or dumped, which are alleged by the Claimant to have affected its investments in the United States and breached Chapter Eleven of the NAFTA. Indeed, the Tribunal is requested to decide the dispute on the basis of Chapter Eleven of the NAFTA which “applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party” (NAFTA, Article 1101(1)). The particular issue before the Tribunal is to determine whether the measures adopted or maintained by the Respondent as to the Claimant’s investments in the United States are in breach of the Respondent’s treaty obligations under Articles 1102, 1103, 1105 and 1110 of the NAFTA (*see* Notice of Arbitration and Statement of Claim, July 9, 2002, para. 18 and paras. 96 *et seq.*), should the Tribunal have jurisdiction to that effect (*see* Objection to Jurisdiction, October 16, 2003). The Tribunal notes that the three cases referred to by the Claimant have taken into account, in order to determine the place of arbitration, the acts of the Respondent State with respect to alleged breaches of the NAFTA (*see Ethyl v. Canada*, Decision regarding the Place of Arbitration of November 28, 1997, at pp. 7 and 9, annexed to Claimant’s Submission, Exhibit B2; *Methanex v. USA*, Written reasons for Decision of September 7, 2000 on the Place of arbitration, para. 33, annexed to Claimant’s Submission, Exhibit B3; *ADF v. USA*, Procedural Order No. 2, para. 20, annexed to Claimant’s Submission, Exhibit B4).
36. The Tribunal therefore finds that, with respect to the subject matter in dispute in this arbitration, substantial connections point to a venue in the United States: the United States is the territory in which the Claimant’s investments are alleged to have been made (*see* Notice of Arbitration and Statement of Claim, July 9, 2002, para. 18: “*Canfor is an investor of a Party as defined in NAFTA Article 1139, and [...] has investments in the territory of the United States as contemplated by NAFTA Article 1101 and defined in NAFTA Article 1139*”); it is the place where the alleged measures were taken; it also happens to be the country of the defendant’s domicile in this case.

7) *The Tribunal's decision*

37. The Tribunal has carefully balanced each of the factors discussed by the parties and has found most of these factors to weigh equally between a venue in Canada and a venue in the United States. The Tribunal finds however that the location of the subject matter in dispute is a factor pointing to a venue in the United States. As a result, the Tribunal considers that Washington, D.C. (United States) should be designated as the place of arbitration.

**II. THE SUBMISSION OF A STATEMENT OF DEFENCE BY THE RESPONDENT AND THE BIFURCATION OF THE PROCEEDINGS**

38. The Claimant filed its Notice of Arbitration and Statement of Claim on July 9, 2002. The Respondent has challenged the jurisdiction of the Arbitral Tribunal by submitting an Objection to Jurisdiction on October 16, 2003, whereby it requested that the Tribunal address its jurisdictional objection as a preliminary question. The issue was raised during the first Organizational Hearing of October 28, 2003. By Procedural Order No. 2 of November 3, 2003, the Tribunal ordered the parties to address in their written submissions on the place of arbitration the issue of whether the proceedings should be bifurcated into a first jurisdictional phase and a second phase on the merits.
39. The parties are also in dispute as to whether a statement of defence should be submitted by the Respondent prior to any decision by the Tribunal on the requested bifurcation of the proceedings.
40. Given that the issue of the submission of a statement of defence by the Respondent and that of the bifurcation of the proceedings are related, the Tribunal will address them together.

**A. The position of the parties**

1) *The Claimant's position*

41. The Claimant has requested the Tribunal to direct the Respondent to provide a statement of defence. Relying on the UNCITRAL Arbitration Rules (as well as the commentary of the Rules), the Claimant submits that: (1) Article 19 of the UNCITRAL Arbitration Rules makes it an obligation for a respondent to file a statement of defence in a timely manner, normally 45 days in accordance with Article 23 of the Rules; (2) such a submission will allow the issues in dispute to be clearly defined; (3) ordering the submission of a statement of defence will ensure an equal treatment of the parties and enable the Claimant to know the defences that the Respondent intends to raise; (4) ordering the filing of a statement of defence will ensure that all jurisdictional issues that the Respondent intends to raise are articulated at this stage; and (5) the submission of a statement of defence is consistent with prior NAFTA arbitration cases (Claimant's Submission, paras. 45-60; Claimant's Reply Submission, paras. 31-38). The Claimant further disputes the Respondent's argument according to which it is not under an obligation to file a statement of defence absent a demonstration by the Claimant that the Respondent has agreed *prima facie* to arbitrate the claim. According to the Claimant, such a *prima facie* agreement is to be found in

the provision of Chapter Eleven of the NAFTA and the Claimant's allegations regarding the violation of those provisions (Claimant's Reply Submission, para. 34).

42. The Claimant requests that the Respondent's statement of defence be submitted before the Tribunal makes a determination with respect to the bifurcation of the proceedings (Claimant's Submission, para. 61). The Claimant's position is that the issue of bifurcation cannot be decided in the absence of the Respondent's statement of defence, in particular in light of the complexity of the facts underlying the claim and the Claimant's allegations under Chapter Eleven of the NAFTA (Claimant's Reply Submission, paras. 39-45).

## 2) *The Respondent's position*

43. The Respondent does not consider that a statement of defence would help the Tribunal to determine whether or not to bifurcate the proceedings. In addition, the Respondent emphasizes that it has not agreed *prima facie* to arbitrate the type of claim asserted by the Claimant in this case, *i.e.* antidumping and countervailing duty claims under Chapter Eleven of the NAFTA (Respondent's Submission, pp. 18-20; Respondent's Rejoinder Submission, pp. 9-10). As regards the Claimant's concern that all jurisdictional issues should be articulated at this stage of the proceedings, the Respondent argues that the reservation of rights it has made in its Objection to Jurisdiction is a simple precaution against future waiver arguments made by the Claimant. It further emphasizes that it is making only one jurisdictional argument for which it seeks preliminary treatment (Respondent's Submission, pp. 18-20).
44. Relying on Article 21(4) of the UNCITRAL Arbitration Rules, the Respondent argues that its jurisdictional objection should be addressed as a preliminary matter. In support of a separate proceeding, the Respondent also contends that its jurisdictional objection presents a straightforward matter of textual interpretation and that the bifurcation of the proceedings would be the most efficient and economical way to proceed (Respondent's Submission, pp. 15-16; Respondent's Rejoinder Submission, p. 8).

## **B. The circumstances of this arbitration**

45. The Tribunal is not convinced by the Claimant's reading of the provisions of the UNCITRAL Arbitration Rules. Article 19(1) of the Rules provides that "[w]ithin a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators." This provision simply recognizes an arbitral tribunal's discretion to define a period of time for a respondent to submit its statement of defence, the timely submission of which is therefore subject to the deadline fixed by the tribunal. Article 23 of the Rules provides that "[t]he periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified." There is a distinction to be made between the period of time to be granted by an arbitral tribunal for the submission of written statements (which is the object of Article 23) and the date as of which that period starts (which is to be determined by the tribunal in each

- case). Neither of these provisions determines the time at which the statement of defence is to be filed.
46. Further, the Tribunal does not consider that, in this case, the submission of a statement of defence by the Respondent is a prerequisite to the issue of whether or not it can decide the bifurcation of the proceedings. Article 21(3) of the Rules makes it possible for a respondent to raise jurisdictional objections “*not later than in the statement of defence*”, which indicates that it may raise such objections in a separate document before it files its statement of defence. Article 21(4) further allows an arbitral tribunal to rule on its jurisdiction as a preliminary question. Nothing in these provisions limits the Tribunal’s power to determine whether it may decide to hold a preliminary phase without having ordered the prior submission of a statement of defence. As a legal as well as practical matter, a statement of defence that would be a formality and that would simply deny all of the Claimant’s allegations would not be of great assistance to either the Tribunal or the Claimant.
47. As a result, the Tribunal considers that the bifurcation of the proceedings between a preliminary phase on the Respondent’s jurisdictional objections and a merits phase—each phase involving issues of a different nature—may be ordered without the submission of a statement of defence. In particular, the Tribunal considers that the bifurcation of the proceedings with respect to the Respondent’s Objection to Jurisdiction on the basis of Chapter Nineteen of the NAFTA may be decided without the submission of a statement of defence. The Tribunal however observes that, straightforward as this latter issue is deemed to be by the Respondent, the parties may find it constructive to discuss the texts at issue as well as any evidence of fact or law, including, insofar as the parties may find it relevant, preparatory materials to the negotiation of the NAFTA and the opinions of the most highly qualified publicists.
48. The Tribunal’s acceptance that the proceedings may be bifurcated in no way implies that, should the Tribunal decide that it has jurisdiction to hear the merits of the Claimant’s allegations, the Respondent may seek to raise new jurisdictional objections at the merits phase. Indeed, the Tribunal shares the Claimant’s legitimate concern that “*all jurisdictional issues that the United States intends to raise [be] articulated now*” and that the Respondent in this case has “*reserved its ability to advance other arguments that may be characterized as jurisdictional, but without articulating what they might be*” (Claimant’s Submission, paras. 56 and 59).
49. Unlike the respondent in *UPS v. Canada* (Decision on the Filing of a Statement of Defence, October 17, 2001, paras. 16-17, annexed to Claimant’s Submission, Exhibit B14), the Respondent in this case has not presented the Tribunal with all of its jurisdictional arguments and has made the following reservation of rights in its Objection to Jurisdiction:
- “The United States wishes to underscore, in objecting to the jurisdiction of the Tribunal, that it in no way concedes that Canfor’s claims with respect to the measures at issue have any merit. To the contrary, Canfor’s claims are defective both as a matter of law and as a matter of fact. The United States reserves its right to contest the merits at a later time should it be necessary, as well as to defend the case on grounds that Canfor has not proven elements of its case that could be considered jurisdictional”* (Objection to Jurisdiction of Respondent United States of America, October 16, 2003, p. 34).

50. The Respondent explains this reservation of rights “*simply as a precaution against any future argument that it has waived its rights with respect to factual defenses that could be construed to have jurisdictional aspects*” (Respondent’s Submission, p. 18). Referring to the parties’ discussion with the Tribunal during the first Organizational Hearing, the Respondent further argues that such a position could cover defenses on the grounds that the Claimant has not proved that it is an investor in the United States or whether there is an investment pursuant to the relevant provisions of the NAFTA (*Id.*, at footnote 52).
51. The Tribunal is not convinced by the Respondent’s attempt to draw a distinction between legal jurisdictional defenses related to Chapter Nineteen of the NAFTA—which are presented as straightforward—and “*factual defenses that could be construed to have jurisdictional aspects*” (Respondent’s Submission, p. 18)—which it reserves for the phase on the merits, if any. The Tribunal has no reason to doubt that the Respondent is in a position, at this stage, to make every jurisdictional argument it may have, including those relating to whether or not the Claimant is an investor of a Party as defined in the NAFTA, or whether or not the Claimant has made investments in the territory of the United States as contemplated by the provisions of the NAFTA. Even though objections such as those may be fact-based, they nevertheless have the same jurisdictional nature. It is for the Tribunal, not the Respondent, to decide whether any particular jurisdictional objection should be treated as a preliminary matter or joined to the merits of the dispute.
52. The Respondent may find a strategic advantage in presenting the Tribunal, at this stage, with one jurisdictional argument, “*the only one for which its seeks preliminary treatment*” (Respondent’s Submission, p. 18). However, the Tribunal should not be constrained, when conducting the arbitration, by any of the parties’ procedural and strategic choices. The Tribunal must conduct this arbitration in a way that is compatible with the equal treatment of the parties. The Tribunal would indeed be treating the parties without equality if it were to allow the Respondent to make piecemeal objections to its jurisdiction. It is also unquestionable that the efficiency of the arbitral procedure would be seriously impaired by the duplication of the phases of the proceedings, one jurisdictional phase regarding Chapter Nineteen of the NAFTA and, if any, one phase on the merits which may include jurisdictional and other preliminary arguments to be considered before the examination of the merits.
53. The Tribunal considers that the Respondent is, at this stage, in a position to determine whether it has, or may have, any other jurisdictional or preliminary objections. Should its jurisdictional defense relating to Chapter Nineteen of the NAFTA prevail, such other objections will simply not be considered.
54. On the basis of the above, the Tribunal decides that:
- (1) The Respondent shall file a Statement of Defence limited to and setting forth all of its jurisdictional objections;
  - (2) The Respondent’s Objection to Jurisdiction of October 16, 2003 shall be treated as a preliminary question;
  - (3) Only after the Respondent has presented all of its jurisdictional objections and the Claimant has had an opportunity to comment on which, in its view, should be treated as a preliminary question, will the Tribunal (i) determine

which jurisdictional objections, if any, may, in addition to the Respondent's Objection to Jurisdiction relating to Chapter Nineteen of the NAFTA, be decided as a preliminary question, and which, if any, should be joined to the merits phase, and (ii) fix the procedural calendar for the submission of the parties' memorials on the jurisdiction of the Tribunal (together with all documents and written statements of all witnesses that the parties may deem relevant to file).

### **III. THE ARBITRAL TRIBUNAL'S DECISION**

55. For the reasons set out above, the Arbitral Tribunal decides as follows.

#### **A. On the place of the arbitration:**

- (1) The place of arbitration shall be Washington, D.C. (United States).

#### **B. On the filing of a Statement of Defence by the Respondent:**

- (2) The Respondent shall submit a Statement of Defence setting forth the entirety of the Respondent's objections to the Arbitral Tribunal's jurisdiction;
- (3) The Claimant shall have the opportunity to express its views as to whether any additional objections should be treated as a preliminary question or joined to the merits of the dispute;
- (4) The procedural calendar for the exchange of the parties' written submissions shall be as follows:
  - February 27, 2004: Respondent's Statement of Defence setting forth the entirety of the Respondent's objections to the Arbitral Tribunal's jurisdiction;
  - March 8, 2004: Claimant's comments on the Respondent's statement of February 27, 2004 on the issue of whether, in its view, any additional objections should be treated as a preliminary question or joined to the merits of the dispute.

#### **C. On the bifurcation of the proceedings:**

- (5) The Tribunal decides that the Respondent's Objection to Jurisdiction of October 16, 2003 shall be treated as a preliminary question;
- (6) After the above exchange of written submissions, the Tribunal will determine which additional jurisdictional issues, if any, shall be examined as a preliminary question, and will fix the corresponding procedural

calendar for the submission of the parties' memorials on the jurisdiction of the Tribunal (together with all documents and written statements of all witnesses that the parties may deem relevant to file).

Made by the Arbitral Tribunal on January 23, 2004

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Joseph H. H. WEILER

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Conrad K. HARPER

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Emmanuel GAILLARD (President)