

**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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**PROCEDURAL ORDER No. 4**

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**March 26, 2004**

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### WHEREAS

1. In the Decision of January 23, 2004 on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, the Arbitral Tribunal invited the Respondent to submit a Statement of Defence setting forth the entirety of the Respondent's objections to the Arbitral Tribunal's jurisdiction. The Claimant was in turn invited 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.
2. On February 27, 2004, the Respondent filed a Statement of Defence of Jurisdiction whereby it submitted that (i) the Tribunal lacks jurisdiction with respect to the Respondent's antidumping and countervailing duty law and (ii) the Tribunal lacks jurisdiction to the extent that the Claimant fails to establish the jurisdictional elements set forth in Article 1101(1) of the NAFTA.
3. In a letter of March 8, 2004, the Claimant indicated to the Tribunal that it did not propose that the Respondent's additional jurisdictional defense be dealt with as a preliminary matter.
4. In the same letter, the Claimant referred to paragraph 47 of the Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, whereby the Tribunal observed that "*the parties may find it constructive to discuss the texts at issue as well as any evidence of 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.*"
5. The Claimant informed the Tribunal that it had requested the Respondent to produce documents relating to the negotiating history of the relevant portions of the NAFTA but was unaware of the Respondent's response, the volume of material to be produced or the timeframe for such production. On this basis, the Claimant requested that the Tribunal defer establishing the procedural calendar until the Respondent advises when the negotiating history of the NAFTA will be made available.
6. The Respondent's position in this respect was expressed in a letter of March 19, 2004. The Respondent indicated that, in its submissions on jurisdiction, it had referred to publicly available information and that the existing records of the negotiations of the NAFTA consisted of (i) internal deliberations of U.S. agencies which do not qualify as "preparatory work", and (ii) drafts compiled by Canada and distributed to the U.S. and Mexico during the course of the negotiations but of limited value. According to the Respondent and based on consultations with Canada and Mexico, none of the NAFTA Parties would object to disclosure of the draft texts in the circumstances of this case. In addition, the Respondent requested the Tribunal not to sustain the Claimant's request for deferring the timetable.
7. The Claimant in turn addressed the issue in a letter of March 24, 2004, requesting the Tribunal to order the production of the draft negotiating texts as well as other preparatory materials such as memoranda prepared by the various negotiating teams and relied upon by the legal drafters, or memoranda, notes and communications reflecting the internal deliberations of U.S. agencies.
8. On March 26, 2004, the Tribunal held a conference call with the parties, addressing the above issues as well as questions of timing and procedure.

**THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:**

9. With respect to the preparatory materials to the negotiations of the NAFTA, the Respondent is invited to file with the Tribunal and provide to the Claimant no later than April 9, 2004 the draft texts of the Agreement as compiled and distributed by Canada during the course of the negotiations referred to in (ii) of paragraph 6 above.

10. The Tribunal will consider the question of the production of documents, exhibits or other evidence in addition to those addressed in paragraph 9 above in due course.

11. In accordance with the Decision of January 23, 2004 on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings and the parties' additional submissions of February 27, 2004 and March 8, 2004, the Respondent's objection to the jurisdiction of the Tribunal on the ground that the Respondent has no obligation under Chapter Eleven to arbitrate claims with respect to its antidumping and countervailing duty law shall be treated as a preliminary question.

12. Accordingly, the procedural calendar for the Preliminary Phase is as follows:

- May 14, 2004: Claimant's Counter-Memorial on Jurisdiction;
- June 25, 2004: Any submission by Canada or Mexico pursuant to Article 1128 of the NAFTA;
- August 6, 2004: Respondent's Reply on Jurisdiction;
- September 24, 2004: Claimant's Rejoinder on Jurisdiction;
- December 7-9, 2004: Hearing on Jurisdiction (Washington, D.C.).

March 26, 2004

On behalf of the Arbitral Tribunal:



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**Professor Emmanuel Gaillard**  
President