

**Under The UNCITRAL Arbitration Rules and  
Section B Of Chapter 11 Of  
The North American Free Trade Agreement**

**Canfor Corporation  
("Canfor")**

**Investor  
(Claimant)**

v.

**The Government  
Of  
The United States Of America  
("United States")**

**Party  
(Respondent)**

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**INVESTOR'S REPLY SUBMISSION ON  
PLACE OF ARBITRATION AND REQUEST THAT THE  
UNITED STATES PROVIDE A STATEMENT OF DEFENCE**

Pursuant to Article 1130(b) of the North American Free Trade Agreement ("NAFTA") and Articles 16 and 19 of the United Nations Commission on International Trade Law Arbitration Rules (the "UNCITRAL Arbitration Rules"), Canfor makes the enclosed Reply submissions in support of its contention that a city in Canada be the Place of Arbitration for this NAFTA Chapter 11 arbitration, and for an order directing the United States to provide a Statement of Defence in a timely manner.

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## **I. INTRODUCTION**

1. Pursuant to Procedural Order No. 2 issued by the Tribunal on November 3, 2003, and in response to the submissions of the United States dated November 25, 2003, the Investor makes this Reply Submission. For the reasons set forth here and in its submission of November 11, 2003, the Investor contends that:

- a. the place of arbitration should be a city in Canada, and in particular, Vancouver, British Columbia, or alternatively, Toronto, Ontario;
- b. the Tribunal should direct the United States to provide a Statement of Defence in a timely way; and
- c. despite the Tribunal's request that the disputing parties provide further submissions on the issue, it is premature to determine whether the proceedings should or should not be bifurcated into multiple phases, pending the receipt of a Statement of Defence from the United States.

## **II. PLACE OF ARBITRATION**

### **A. Overview of Each Disputing Party's Submission**

2. The Investor has argued that the five factors relevant to selecting the place of arbitration set out under paragraph 22 of the UNCITRAL Notes weigh equally between Washington, D.C. and Vancouver. However, if one takes into account the issue of neutrality or perceived neutrality as a tie-breaker, then Toronto could be favoured over both Vancouver and Washington, D.C.

3. In response, the United States has argued in favour of a strict adherence to the enumerated factors contained within the UNCITRAL Notes, with a particular, and, it would urge, a deciding focus upon circumstances related to its convenience. It does so without considering *why* each factor in the UNCITRAL Notes is relevant to the Tribunal's consideration of the question before it, and why "convenience" should be so heavily weighted.

## **B. Summary of Investor's Reply**

4. The essence of the United States' submission is that, properly interpreted, the UNCITRAL Notes demand all NAFTA arbitrations involving violations of Chapter 11 obligations by the United States' federal government be held in Washington, D.C.

5. In reply, the Investor submits that the NAFTA Parties clearly expected Tribunals to balance a broad array of factors to determine the place of arbitration whether the proceeding is conducted under the ICSID or UNCITRAL Arbitration Rules.<sup>1</sup> If the NAFTA Parties had actually intended that all investor/state arbitrations be held in the capital of the respondent Party, they would have said so in the NAFTA text, as they did, for example, in the *Model Rules of Procedure* for NAFTA Chapter 20<sup>2</sup> which explicitly provide that hearings shall be in the respondent Party's capital.<sup>3</sup> The NAFTA Parties could have included a similar rule in Chapter 11, but they did not. In the Investor's submission, that omission was intentional.<sup>4</sup>

6. Accordingly, the arguments of the United States are fundamentally deficient because they fail to acknowledge this broader perspective, advocating an interpretation which results instead in the inevitable conclusion that, because United States' federal government actions are being challenged, the arbitration can only be held in the seat of that government.

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<sup>1</sup> The *UPS* Tribunal made note of similar arguments. See: *United Parcel Service of America, Inc. v. Government of Canada* (hereafter "*UPS*"), Decision of the Tribunal on the Place of Arbitration, October 17, 2001, at para. 15. As the *Ethyl* Tribunal noted at 4, no individual circumstance should be "accorded paramount weight irrespective of its comparative merits."

<sup>2</sup> See: <[http://www.nafta-sec-alena.org/DefaultSite/legal/index\\_e.aspx?articleid=237](http://www.nafta-sec-alena.org/DefaultSite/legal/index_e.aspx?articleid=237)>

<sup>3</sup> Rule 22 provides as follows: "The hearing shall be held in the capital of the Party complained against."

<sup>4</sup> See *Ethyl Corporation v. Government of Canada* (hereafter "*Ethyl*"), Decision regarding the Place of Arbitration, November 28, 1997, at 3 where the Tribunal suggests that the omission to designate the respondent's state capital as place of arbitration in Chapter 11 was "if anything, deliberate."

7. Furthermore, in focussing so heavily on issues of convenience, the United States attempts to downplay the crucial weakness of its position – that convenience of the disputing parties can be addressed by holding hearings in a location different from the chosen *situs* of the arbitration. If there is evidence that simply must be viewed in Washington D.C., or witnesses that can only attend there, then this Tribunal can hold a hearing in Washington, D.C., just as it could in Vancouver or elsewhere.

8. The relevant issue for decision now, however, is not about where a future hearing might be held; rather it is where the *situs* of the arbitration should be, based upon all of the circumstances of the case. The nature of the measures at issue in this arbitration, coupled with the long-term character of the softwood lumber dispute between Canada and the United States, make this Tribunal’s decision on the place of arbitration different from those of previous Tribunals. In this case, the question of neutrality, or more particularly the perception of neutrality, is the critical factor in selecting the *situs* of the arbitration.

**C. Suitability of the Law on Arbitral Procedure of the Place of Arbitration**

[United States Submission, pages 10-12]

9. Even though the disputing parties appear to agree that the “suitability of the law on arbitral procedure of the place of arbitration” is a neutral factor, the United States devotes two pages of argument to implicitly suggesting that Canada is not a suitable place for arbitration. Despite the apparently inconsistent positions taken by the United States, the Investor maintains this factor is neutral as between the arbitral laws of Canada and the United States.<sup>5</sup>

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<sup>5</sup> The United States seems to draw some significance from the fact that counsel to Canfor Corporation were also co-counsel to UPS of America, Inc., in connection with the submission by UPS that Canada was not an appropriate place of arbitration for the UPS claim. That claim, of course, implicated conduct of the Canadian federal government, as well as a federal agency. The circumstances of that case, including the particular allegations against Canada and the time at which that submission was made supported the Claimant’s submission that Canada was not the appropriate place for the arbitration. The fact that counsel for Canfor also became co-counsel for UPS is simply irrelevant.

**D. Convenience of the Disputing Parties and the Arbitrators**

[United States Submission, pages 8-10]

10. The United States argues that Washington, D.C. would be less inconvenient than Vancouver or Toronto. Obviously Washington, D.C. will be the most convenient location for hearings for the officials and counsel of the United States. Similarly, Vancouver will always be the most convenient location for the Investor and its counsel.<sup>6</sup> If one applies the principle of equality of the parties in arbitration, as set out in NAFTA Article 1115 and UNCITRAL Arbitration Rules Article 15, this element of the enumerated factors should always be neutral.

11. The United States' suggestion at page 9 of its submission that "it would significantly hinder the United States' ability to present its case in this matter" if the arbitration is located outside Washington, D.C. is, with respect, both surprising and unsupportable. One can simply compare this arbitration to WTO proceedings related to the softwood lumber dispute. The situs of those proceedings is not in Washington, D.C. , nor indeed is it even in North America. The United States does not seem to have suffered "significant" prejudice in those proceedings, even though the WTO Dispute Settlement Body is located in Geneva, Switzerland, which is a much greater distance from Washington, D.C. than is Toronto.

12. Moreover, while "the cost and conflicting demands on their [ie. United States' governmental officials] time" may render it such that the United States may decide that "only a few" of the myriad governmental officers involved could take the time to attend in Vancouver or Toronto, the Claimant respectfully submits that:

- (a) again, this fact only goes to the location of a particular physical hearing and if there is an issue it can be accommodated by holding a hearing in Washington, D.C. or by use of video-conference technologies;

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<sup>6</sup>The United States argues that it is somehow relevant that Canfor has retained Washington counsel on other matters dealing with United States' municipal laws. It is again perhaps to state the obvious that if the location of counsel is relevant, it is the location of counsel *retained to prosecute the claim in issue*, rather than some other case, that must be considered.

- (b) the United States has the resources, should it consider the matter of sufficient importance, to ensure that any relevant governmental official is present at a hearing wherever it takes place; and
- (c) given the likelihood that relevant evidence will be submitted in advance of oral hearings in any event, that the proceedings will be simultaneously transcribed, and that there may be post-hearing submissions, the United States' argument lacks any substantial weight.

Accordingly, the Investor maintains that the question of convenience can be dealt with by the Tribunal on a case-by-case basis pursuant to its authority under UNCITRAL Arbitration Rules Article 16(2).

13. Similarly, if there is a question as to the convenience of the arbitrators with respect to the physical location of hearings, Toronto would be as convenient as Washington, D.C. in terms of travel, accessibility and schedule. Immigration formalities for both Canada and the United States are not a notable inconvenience. If it is necessary to make a choice between the three cities, and if neither Vancouver nor Washington, D.C. are convenient for the other party or the tribunal members, Toronto would be a reasonable compromise.

#### **E. Availability and Cost of Support Services**

[United States submission, pages 12-13]

14. The main basis upon which the United States makes its argument that Washington is a less costly venue than Toronto or Vancouver is that the ICSID has previously offered its facilities at little or no cost, even in those cases where it is not administering the arbitration, although the United States provides no support for its statement that the ICSID is available for use “at a rate that is likely more competitive than equivalent facilities in either Vancouver or Toronto.”<sup>7</sup>

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<sup>7</sup> *Canfor Corporation v. United States*, Submission on Place of Arbitration, Bifurcation And Filing of A Statement of Defense of Respondent United States of America, November 25, 2003 (hereafter “US Submission”), at 13.

15. Representatives of the Investor have spoken to officials at the ICSID and compared the costs levied by ICSID to the cost of arbitration venues in Toronto and Vancouver with which it is familiar (such as the British Columbia International Commercial Arbitration Centre (BCICAC), which was created in response to the promulgation of the UNCITRAL Model Law). It is incorrect that the ICSID rate is more competitive than other available facilities in Vancouver or Toronto; indeed, the Investor's information is to the contrary.<sup>8</sup>

16. As noted by the United States in its submission,<sup>9</sup> the Investor undertook to provide comments regarding the potential applicability of the Canadian Goods and Services Tax ("GST") to the services provided by Tribunal members if the arbitration was held in Canada. Even if the members were to hear all or part of the evidence and carry out all or part of its deliberations at a location in Canada, the services provided by them will not be subject to GST. Accordingly, the question of a goods and services tax does not factor into the costs of the arbitration.<sup>10</sup>

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<sup>8</sup> With respect to the costs of other services, because of the continuing low exchange rate in favour of the Canadian dollar, there is no doubt that there is actually a significant cost advantage in favour of Toronto or Vancouver over Washington. For example, in a recent comparison of the cost of living of world cities, prepared by the Economist newspaper, Washington was ranked as the 28<sup>th</sup> (Index 87) most expensive city, while Vancouver was ranked 66<sup>th</sup> (Index 72) and Toronto 79<sup>th</sup> (Index 69). See: Economist Intelligence Unit, "Worldwide Cost of Living - March 2001". New York is used as base index of 100 for comparison.

<sup>9</sup> US Submission at 23, footnote 37.

<sup>10</sup>The services provided by the arbitrators will **not** be subject to GST even if the actual panel were to hear all or part of the evidence and carry out all or part of their deliberations at a location in Canada. Goods and services tax or GST is imposed on Part IX of the *Excise Tax Act*. It levies a 7% tax on most goods and services supplied in Canada. A person providing arbitration services will normally be required to charge GST on his account and remit the tax to Canada Customs and Revenue Agency ("CCRA").

However, Section 165 of the *Excise Tax Act* is the charging section for GST imposed on goods and services. It provides that the 7% GST is imposed on the supply of goods and services "made in Canada". Supplies "made outside Canada" are not subject to GST. Section 142 of the *Excise Tax Act* is the section which determines whether a particular supply of goods and services is "made in Canada". Section 142(1)(g) provides that a service will be deemed to have been made in Canada if the service is to be "performed in whole or in part in Canada". However, Section 143 of the *Excise Tax Act* restricts the application of Section 142. It provides that the supply of a service

**F. Location of Subject Matter and Proximity of Evidence**

17. The United States' submission places an over-reliance on the wording of the UNCITRAL Notes, while ignoring the dispositive requirement of UNCITRAL Arbitration Rules Article 16(1) that place of arbitration must be decided "...having regard to the circumstances of the arbitration." The *UPS* Tribunal confirmed that the UNCITRAL Notes are "not binding" and that "an arbitral tribunal remains free to use the notes as it sees fit and is not required to give reasons for disregarding them."<sup>11</sup>

**(i) Subject Matter and Physical Location more Related to British Columbia than Washington, D.C.**

18. Although the Investor maintains its position that the subject matter and physical location of documentary evidence does not weigh in favour of any of the proposed cities, the argument that subject matter and evidence point solely to Washington, D.C. is clearly not sustainable.

19. The United States argues in its Submission that the subject matter of the dispute is entirely in Washington.<sup>12</sup> It completely fails to take into account that a substantial portion of the physical subject-matter of the dispute is in British Columbia. Thus, while it is the case that certain decision making occurred in Washington, and record evidence in various domestic proceedings has been assembled there, the source of that documentation is substantially taken from the Canadian

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made in Canada by a non-resident will be deemed to have been "made outside Canada" unless:

- a. the supply is made in the course of a business carried on in Canada;
- b. the supplier is a GST registrant; or
- c. the supply involves an admission to a place of amusement, seminar or similar event."

The qualifications to Section 143(a) will not apply to an arbitrator who carries on business in the United States, France or other country of residence. The qualifications in Section 143(b) will not apply because the arbitrator will not be a registrant in Canada unless he has voluntarily elected to register. He will not as a non-resident be required to register.

<sup>11</sup> *UPS* at para. 6.

<sup>12</sup> US Submission at 3-6.



operations of companies such as Canfor, which information was also subject to verification proceedings in Canada.

20. Although the Investor has argued that subject-matter does not favour one disputing party over the other, if one were to focus on the legal facts at issue, as the United States did in its arguments in the *ADF* arbitration,<sup>13</sup> the legal facts at issue in this case point to events that have occurred in the province of British Columbia. In the same way that the subject matter of the *Ethyl* case was the ban by Canada of the import of MMT *into Canada*, or in *Methanex*<sup>14</sup> the subject matter concerned the Californian measures to ban MTBE from use *in that state*, or in *ADF* the subject matter concerned a measure related to the highway exchange *in the Virginia suburbs of Washington, D.C.*, the subject matter and evidence at issue in this case relate to the alleged conduct of Canadian softwood lumber producers *in British Columbia*, as well as to the United States' measures attacking those practices, and the corresponding impact on the Investor's investments in the United States.

21. Unlike all other NAFTA cases cited by the United States, the facts of this case have a much stronger connection with Canada and the location of the operations that feed the Investor's investments in the United States than does Washington, D.C. The basic premise of the measures taken by the United States against, amongst others, Canfor is to seek a change in the conduct of importers of softwood lumber in their home jurisdiction, or otherwise force the payment of duties. In the case of Canfor the necessary extraterritorial element of those measures points squarely to

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<sup>13</sup> *ADF Group Inc. v. United States of America* (hereafter "*ADF*"), Submission on Place of Arbitration of Respondent United States of America, March 19, 2001, Section I. In its *ADF* place of arbitration submission the United States highlighted the importance of the "physical facts" of that case for the determination of the question of subject matter and evidence. The relevant physical facts in *ADF* related to a highway construction project located in a Washington, D.C. suburb. The United States' analysis in its present submission omits completely to mention that the central physical facts of this dispute are similarly located in British Columbia.

<sup>14</sup> *Methanex Corporation v. United States of America* (hereafter "*Methanex*").

British Columbia as a key location of the physical subject-matter and evidence in this dispute, not Washington, D.C.

22. Thus, while the arbitrary and unfair decision making and treatment imposed upon Canfor may have been imposed in Washington, D.C., the basis for that treatment is alleged to be business and legislative practices (ie., such as stumpage) occurring in Canada, and British Columbia in particular.

**(ii) Canfor may claim for loss as an Investor and to its Investments**

23. The United States observes that “Canfor’s claim under the investment chapter must necessarily center on its investments in this country, not in Canada.”<sup>15</sup> This observation is only partially correct as it completely ignores the complex nature of Canfor’s Canadian operations, which are by necessity highly integrated its Canadian operations with its United States’ investments. This level of cross-border integration was contemplated by the NAFTA Parties when they signed the Agreement. Indeed in NAFTA Article 102, titled “Objectives”, the state Parties explicitly confirm the NAFTA’s objectives, including to “eliminate barriers to trade in, and facilitate cross-border movement of, goods and services between the territories of the Parties” (Article 1102(1)(a)) and to “increase substantially investment opportunities in the territories of the Parties” (Article 1102(1)(c)).

24. The United States’ conduct in this case has a significant effect on the entire investment of Canfor, located both in Canada and in the United States. Although how the damages are apportioned is a matter that will be dealt with at an appropriate time in the damages phase of the arbitration, suffice it to say it will be the Investor’s position that the United States’ breaches of the NAFTA have caused damage not only to its United States based investments, but to its complete operations.

25. A similar issue was addressed by the S.D. Myers Tribunal in its Damages Award:

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<sup>15</sup> US Submission at 6.

“Where there is a breach of Chapter 11, and interference with the economic activity of an investment, the overall damage to *the economic success of the investor* arising from the measure adopted by the host state must be examined.... There is no provision that requires that all of the *investor’s losses* must be sustained within the host state in order to be recoverable. The test is that the *loss to the (foreign) investor* must be suffered as a result of the interference with its investment in the host state.... The Tribunal concludes that compensation should be awarded for the *overall economic losses* sustained by SDMI that are a proximate result of CANADA’s measure, not only those that appear on the balance sheet of its investment.<sup>16</sup> [emphasis added]

### **G. Neutrality**

26. Although not listed as one of the five factors in the UNCITRAL Notes, neutrality is obviously a relevant principle in the determination of the *situs* of an international arbitration. Each of the *UPS*, *Methanex*, *ADF*, and *Ethyl* Tribunals have said as much with their decisions on place of arbitration.<sup>17</sup> The United States clearly avoids emphasis on the question of neutrality as such an analysis would not favour Washington, D.C. as the place of arbitration.

27. Because the place of arbitration has been effectively limited to the United States or Canada, given the United States’ unwillingness to consider a neutral third state outside the NAFTA Parties, the Investor acknowledges that complete neutrality cannot be achieved, on a national basis, in this case. However, as set out in the *Methanex* Tribunal’s place of arbitration decision (upon which the United States has placed great reliance), perceived neutrality is considered a very important factor

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<sup>16</sup> *S.D. Myers, Inc. v. Government of Canada* (hereafter “*Myers*”), Damages Award, October 21, 2002, at paras. 117-122.

<sup>17</sup> *UPS* at para. 17: The Tribunal stated that neutrality “is plainly relevant given the broad reference to “the circumstances of the arbitration” in Article 16(1) of the UNCITRAL Rules.”; *Methanex* at para. 35: “The Tribunal’s discretion turns on the broad concept of “circumstances” in Article 16(2) of the of the UNCITRAL Rules; and there is no linguistic or logical basis for excluding neutrality as a factor in a appropriate case.”; *ADF* at 21; *Ethyl* at 9, the final decision of the Ethyl Tribunal in its choice of Toronto over Ottawa was based on the question of neutrality.

that can be satisfied by avoiding the jurisdiction responsible for the measure in question as well as the home locations of the investor and its investment.<sup>18</sup> Following the reasoning of the *Methanex* Tribunal, this Tribunal must conclude that the place from which the impugned measures emanate, i.e., Washington, D.C., is actually the least neutral location for the place of arbitration, just as California was ruled out as a place of arbitration in the *Methanex* case.

28. The United States claims that the *Methanex* Tribunal confirmed that the ICSID and World Bank facilities are generally perceived as being neutral.<sup>19</sup> However, the *Methanex* Tribunal arrived at this conclusion only to address the fact that Washington, D.C., is the seat of the federal government and that the ICSID could provide an alternative neutral location in the heart of the capital city – implicitly because that was a case where federal government measures were not at issue. In this case, Washington is not only the seat of government for a NAFTA Party, it is also “responsible for the legislative measure in issue.” Accordingly, in the words of the *Methanex* Tribunal, the “requirements of neutrality” would only be “sufficiently met” if the place of arbitration was to lie outside of Washington, D.C.

29. Moreover, in the context of this case, one could equally suggest that the British Columbia International Commercial Arbitration Centre, located in Vancouver, would provide a neutral setting in which the arbitration could be conducted. The Centre has been conducting independent international arbitration and mediation proceedings for over 17 years and provides all the facilities that would be required for this arbitration. In fact, as noted above, the Centre was created in response to the promulgation of the UNCITRAL Model Law. Although it is not an international institution of the same character as the ICSID, it can equally lay claim to being a completely neutral place for the arbitration.

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<sup>18</sup> *Methanex* at para. 38.

<sup>19</sup> US Submission at 15; *Methanex* at para. 39.

30. Thus, in light of the fact that the other relevant factors enumerated in the notes do not support Washington, D.C. as the place of arbitration, and that Washington, D.C. is the least neutral location in the context of this arbitration, Vancouver or Toronto would be the most appropriate places of arbitration. If neutrality is the balancing point in this analysis, then Toronto should be favoured as the place of arbitration.

### **III. STATEMENT OF DEFENCE**

[United States submission, pages 15-20]

31. The United States urges that jurisdiction be considered as a preliminary matter despite the general practice of NAFTA Chapter 11 arbitrations, conducted under the UNCITRAL Arbitration Rules, of dealing with jurisdictional matters after the filing of a Statement of Defence. The onus is on the United States to justify why this general practice should be ignored. Instead, the United States has attempted to pre-empt the Tribunal processes by filing its motion on jurisdiction before delivering a defence. The Investor's position remains that it is necessary for a Statement of Defence to be delivered in order for it, and the Tribunal, to be able to reasonably address the questions whether or not to bifurcate and, if so, what jurisdictional issues should be heard as a preliminary matter.

32. It is noteworthy that the United States provides no rationale for its refusal to submit its Statement of Defence. It baldly states that "a statement of defence addressing the merits would shed no light whatsoever on the issue of bifurcation."<sup>20</sup> In other words, the United States can be taken to be saying that understanding the details of the Respondent's defence, including any further jurisdictional positions it says it intends to make, would not provide any further information that the Tribunal might require to address the question of bifurcation, or the question of which, if any, issues should be heard in a preliminary way, or whether, indeed, any jurisdictional issue raised requires the Parties to lead evidence to establish it.

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<sup>20</sup> US Submission at 17.

33. The Statement of Defence is a relatively simple document that sets out the Respondent's position in relation to the claims made by the Claimant in its Statement of Claim, including admissions and denials, as well as its jurisdictional and other defences. The fact that the United States has been able to prepare its Motion on Jurisdiction would amply support the contention that it has sufficiently developed its positions concerning the Investor's claims to be able to submit its Statement of Defence.

34. In its Submission the United States argues that the Investor is required to provide reasons as to whether the United States has consented to arbitrate the claim, and to identify a legal authority requiring the filing of a Statement of Defence in the absence of argument or evidence that the United States "*prima facie* . . . agreed to arbitrate the claim."<sup>21</sup> By suggesting this, the United States has inappropriately attempted to shift the onus to the Investor with its preemptive filing of its Motion on Jurisdiction. It is clear that the *prima facie* agreement demanded by the United States is actually evidenced on the face of the provisions of Chapter 11 of the NAFTA and the Claimant's allegations of arbitrary, discriminatory, inequitable and unfair treatment, all as set out in its Statement of Claim.

35. Normally when a tribunal is asked to consider a jurisdictional objection, it must decide – based upon assumed facts – whether to accept, reject or join the objections to a merits hearing. For this Tribunal to be in an appropriate position to undertake such an analysis, it is necessary to understand the United States' preliminary position on the merits of Canfor's claim, which would be set out in its Statement of Defence. When a jurisdictional motion is submitted prior to the Statement of Defence, it interrupts the proper progress of the arbitration. Certainly, a motion on jurisdiction is no substitute for a Statement of Defence, and the *Objection to Jurisdiction of the Respondent* submitted on October 16<sup>th</sup> provides no substantive indication of the United States' position on the merits. Without such information, not only can the Tribunal not make an informed decision in respect of the United States' Motion, Canfor also cannot make an informed decision on whether to agree to bifurcation.

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<sup>21</sup> US Submission at 17.

36. Of the six NAFTA Chapter 11 arbitrations conducted under the UNCITRAL Arbitration Rules in which decisions have been made public, the consistent practice of these Tribunals has been for the Statement of Defence to be filed in a timely manner early in the arbitration process, usually prior to the filing of any submissions concerning jurisdiction. For example, in addition to the practice of the NAFTA Chapter 11/UNCITRAL Tribunals in *Pope & Talbot, S.D. Myers, Ethyl*, and *Methanex*,<sup>22</sup> the Tribunal in *International Thunderbird Gaming Corporation v. Mexico* (“*Thunderbird*”) explicitly required that the Statement of Defence be submitted prior to submissions from the disputing parties on the issue of bifurcation.<sup>23</sup>

37. The decision of the *UPS* Tribunal concerning the filing of the Statement of Defence in that arbitration is an exception to the practice followed in all other NAFTA Chapter 11/ UNCITRAL Arbitration Rules arbitrations. As the *UPS* Tribunal acknowledged:

We do not see this issue as a matter of clear rules or of precise right. The frequent practice, as the cases to which UPS has referred us demonstrate, is for jurisdictional issues to be raised in the Statement of Defence and not by separate proceedings.<sup>24</sup>

38. The basis for the *UPS* Tribunal’s decision to delay the submission of the Statement of Defence was that of “practical administration”, in particular in relation to the extensive nature of Canada’s jurisdictional objections, made in response to a complex and unusual form of Statement of Claim. The manner in which the UPS claim had been pled<sup>25</sup> made it impossible for Canada to substantively respond to the allegations. The pleading problem in the *UPS* case is not present here. The allegations made by Canfor against the United States are in no way vague or unclear, nor do

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<sup>22</sup> As noted in the Investor’s Submission on Place of Arbitration, November 11, 2003 at para. 57.

<sup>23</sup> *Thunderbird v. Mexico*, Procedural Order No. 1, June 27, 2003, at paras. 7.1(g), 8.3.

<sup>24</sup> *UPS v. Canada*, Decision of the Tribunal on the Filing of the Statement of Defence, October 17, 2001, at para. 20.

<sup>25</sup> Contrary to the imputation contained in the United States submission, counsel to Canfor had no involvement in drafting the pleading to which Canada made objections in the UPS case.

they present any impediment to the provision of a defence, which equality would require the United States provide now.

#### **IV. DECISION ON BIFURCATION**

39. The Tribunal has requested that the disputing parties address “the issue of whether or not the bifurcation of the proceedings is an appropriate alternative in the circumstances of the case”<sup>26</sup> on the assumption that the Tribunal deems a Statement of Defence is not required to determine the question of bifurcation. In essence, the Tribunal is asking the disputing parties for their preliminary views to the question of whether jurisdictional objections should be joined to the merits hearing.

40. As argued above, the Investor maintains that neither it nor the Tribunal can adequately address this question in the absence of the United States’ first response to the Investor’s claims, in the form of a Statement of Defence.

41. The United States contends that its jurisdictional objections involve “a more straightforward and discrete textual analysis than in *UPS* that can be resolved quickly and efficiently without having to delve into complex facts,”<sup>27</sup> and therefore that bifurcation is appropriate. It makes this submission despite the fact that in its argument on jurisdiction it relies upon facts beyond those advanced in the Statement of Claim and indeed itself “delves into complex facts” underlying the claim. Moreover, in urging a separate jurisdictional phase, the United States also mis-characterizes Canfor’s allegations by suggesting that they are “...primarily concern[ing] the interpretation and application in Washington of U.S. federal laws and regulations.”<sup>28</sup>

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<sup>26</sup> Email from Emmanuel Gaillard to Tribunal and Disputing Parties, November 26, 2003.

<sup>27</sup> US Submission at 20.

<sup>28</sup> US Submission at 5.



42. Contrary to the United States' submissions, Canfor is not seeking another forum to dispute the application of "U.S. federal laws and regulations". The NAFTA Chapter 19 process provides such extraordinary relief.

43. NAFTA Chapter 11 provides Canfor, as an Investor, with the right to seek damages for the manner in which the United States has violated obligations it owes to all foreign investors at international law. In this case, the Investor's claims primarily concern the arbitrary and discriminatory manner in which the United States has harmed the Investor and its investments, under the colour of its right to maintain anti-dumping and countervailing duty measures under the NAFTA. Accordingly, Chapter 11 does not provide a forum to challenge local laws based upon local norms, nor is that the substance of this case.

44. As a result, the analysis that will be required to adjudicate Canfor's claim for damages is anything but "straightforward and discrete." Instead, in order to resolve Canfor's claim it will indeed be necessary to "delve into complex facts". The United States merely asserts that NAFTA Article 1901(3) renders it immune to any and all claims concerning its conduct that in any way relates to countervailing and anti-dumping matters. The facts and law will demonstrate otherwise.

45. Therefore, based on the preliminary information before it, and in the absence of a Statement of Defence, the Investor would strongly urge that a determination as to whether to consider any jurisdictional issues be deferred until after a Statement of Defence is filed. Only then will the Tribunal have sufficient information to determine whether the United States' objection, or other possible jurisdictional questions, ought to be considered separately. It is important to point out that Canfor is not submitting that a jurisdictional phase will necessarily be inappropriate, but it should not be a *fait accompli* simply because the United States has refused to elaborate upon any of the substantive defences that it will ultimately advance.

## **V. RELIEF SOUGHT**

46. For the foregoing reasons, the Investor respectfully submits that the place of arbitration should be in Canada and specifically Vancouver, or alternatively Toronto, and not in the United States. The Investor also submits that the United States should be directed to provide its Statement of Defence before this Tribunal determines whether to bifurcate certain jurisdictional arguments from the merits of the proceeding.

**All of which is respectfully submitted this 3<sup>rd</sup> day of December, 2003**

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