

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

CANFOR CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**STATEMENT OF DEFENSE ON JURISDICTION OF
RESPONDENT UNITED STATES OF AMERICA**

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UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

February 27, 2004

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Pursuant to the Tribunal's Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings of January 23, 2004 and Article 19 of the UNCITRAL Arbitration Rules, respondent United States of America respectfully submits this statement of defense setting forth the entirety of the United States' objections to jurisdiction.

I. FACTS AND POINTS AT ISSUE ON JURISDICTION

A. The United States Has No Obligation Under Chapter Eleven To Arbitrate Claims With Respect To Its Antidumping And Countervailing Duty Law

1. The United States hereby incorporates by reference the statements of fact, arguments, authorities and conclusions stated in its Objection to Jurisdiction of October 16, 2003. The United States objects to the jurisdiction of the Tribunal on the grounds

stated in that Objection, the terms of which shall be deemed to be restated herein in their entirety.

B. The Tribunal Also Lacks Jurisdiction To The Extent That Canfor Fails To Establish The Jurisdictional Elements Set Forth In Article 1101(1) Of The NAFTA

2. The Decision of January 23 states that “[t]he 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.”¹ For the reasons set forth below, the United States “may have” a jurisdictional objection on the ground that Canfor may not establish the elements required by Article 1101(1) when required to adduce evidence on the subject by the Tribunal. The United States therefore conditionally objects to the jurisdiction of the Tribunal on this ground.

3. Chapter Eleven of the NAFTA sets forth a number of elements that must be established for the chapter to apply. Notably, Article 1101(1) limits the scope of the chapter to “measures adopted or maintained by a Party relating to: (a) investors of another Party; [and] (b) investments of investors of another Party in the territory of the Party; . . .”

4. As the tribunal in the *Methanex* case has observed, Article 1101(1) “is the gateway leading to the dispute resolution provisions of Chapter 11. Hence the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are

¹ Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, ¶ 53 (Jan. 23, 2004) (emphasis added).

met;”² A claim before a Chapter Eleven tribunal may proceed only if, at a minimum, each of the elements set forth in Article 1101(1) are present.

5. It is the claimant that bears the burden of proving each of these elements, each of which is essential to any claim.³ Canfor, by invoking the jurisdiction of this Tribunal to adjudicate its claim, has assumed the burden of proving that it is an investor and that the measures in question relate to it and its investments in the United States within the meaning of the NAFTA’s investment chapter.

6. Canfor has alleged that it is “an investor of a Party” and that it has “investments to [sic] the territory of the United States as contemplated by Article 1101.”⁴ It also has alleged a relation in various respects between the measures complained of and it and its investments.

7. Canfor has not as yet, however, offered any evidence to prove these allegations, as would be its obligation if the Tribunal proceeded to a hearing on the merits or one preliminarily addressing these issues. Evidence addressing the truth or falsity of the allegations – which concern Canfor’s holdings and the impact of the measures on

² *Methanex Corp. v. United States*, First Partial Award, ¶ 106, 14:6 WORLD TRADE & ARB. MATERIALS 109, 156 (Dec. 2002) (First Partial Award of Aug. 7).

³ See UNCITRAL Arbitration Rules art. 24(1) (“Each party shall have the burden of proving the facts relied on to support his claim or defence.”); EMMANUEL GAILLARD & JOHN SAVAGE, EDS., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION § 590 at 360 (1999) (“It is widely accepted that the burden of proving the existence of a valid arbitration agreement lies with the party seeking to rely on it in order to . . . refer disputes to arbitration.”); see, e.g., *Feldman v. Mexico*, ICSID Case No. ARB(AF)/99/1, ¶ 177, 15:3 WORLD TRADE & ARB. MATERIALS 157, 233 (2003) (Award of Dec. 16, 2002) (“various international tribunals . . . have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.”) (quoting *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, at 14 (WTO App. Body May 23, 1997)).

⁴ Statement of Claim ¶ 18.

Canfor's investments and businesses – is principally in the control of Canfor. It is not in the control of the United States.

8. The United States has no reason at this point in time either to doubt or to credit these allegations. The United States has not attempted to conduct a factual investigation on this subject, even assuming such an investigation were possible given Canfor's control over the principal evidence. The United States is, therefore, not able at this point to take a definitive position on whether the threshold requirements of Article 1101(1) are met in this case. It will be able to take such a definitive position only after Canfor has introduced evidence on the subject. It is for this reason that the United States conditionally objects to the Tribunal's jurisdiction on this ground.

9. The United States does not propose that the Tribunal take up this question as a preliminary matter. While it would not be complicated for Canfor to adduce evidence of its ownership of investments in the territory in the United States or its status as an investor, the question of whether the measures at issue "relate to" Canfor as an investor or to its investments in the United States is, on the facts of this case, bound up with the merits of the dispute. The United States therefore does not submit that the question should be addressed as a preliminary one.

II. REMEDY SOUGHT

10. The United States respectfully requests that this Tribunal render an award in favor of the United States and against Canfor, dismissing Canfor's claims in their entirety and with prejudice. The United States further requests that, pursuant to Article

40 of the UNCITRAL Arbitration Rules, Canfor be required to bear all costs of the arbitration, including the United States' costs of legal assistance and representation.

Respectfully submitted,

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