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)

INVESTOR'S 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 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 Canfor makes the within submissions addressing:

a. Canfor's contention that the place of arbitration should be in Canada, and in particular, in Vancouver, British Columbia, or alternatively Toronto, Ontario;

b. Canfor's application to the Tribunal for an order directing that the United States provide a Statement of Defence in a timely way; and

c. Canfor's contention that 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. Tribunal Jurisdiction

2. Canfor and the United States have been unable to agree upon the place of arbitration for this proceeding. While Canfor's submission is that the place of arbitration should be in Canada, in either Vancouver, British Columbia or Toronto, Ontario, the United States proposes that the place of arbitration should be Washington, D.C. Accordingly, pursuant to NAFTA Article 1130 and UNCITRAL Arbitration Rules Article 16, the Tribunal must determine the place of arbitration.

3. NAFTA Article 1130 provides:

Article 1130: Place of Arbitration

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[1], 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.

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[1]NAFTA Article 1139 defines "New York Convention" as follows: "the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958".

4. UNCITRAL Arbitration Rules Article 16, in turn, provides:

Article 16 - Place of Arbitration

1. 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.

2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

4. The award shall be made at the place of arbitration.

5. Each of Canada, the United States and the United Mexican States are parties to the New York Convention. Thus, unless the disputing parties agree otherwise, the Tribunal "shall hold" the arbitration in Canada, the United States or Mexico.[2]

B. Alternative Place of Arbitration

6. We understand from the position taken by the United States at the Organizational Meeting on October 28, 2003 in New York, that the United States is not prepared to agree to a juridical seat of the arbitration other than in one of the three NAFTA Parties. In the event the United States is willing to reconsider that position, Canfor is willing to agree to London, England or Geneva, Switzerland as the place of arbitration, so that neither disputing party can argue any lack of neutrality in the courts of the place of arbitration.

C. Relevant Considerations

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[2]The direction that the Tribunal "shall hold" the arbitration in one of the three NAFTA Parties relates only to the determination of the juridical seat of the arbitration, rather than to the physical location of the various proceedings - UNCITRAL Arbitration Rule, Article 16(2).

7. While the Tribunal is to determine the place of arbitration having regard to all of the "circumstances of the arbitration," other NAFTA Chapter 11 Tribunals have been guided in their analysis by the factors discussed in paragraph 22 of the UNCITRAL Notes on Organizing Arbitral Proceedings[3], though of course those notes do not bind the Tribunal[4]. That paragraph provides:

> 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 of and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence.

8. The proper analytical approach was described in one NAFTA Chapter 11/UNCITRAL arbitration this way:

> [T]he Tribunal is constrained to say that in its view its decision regarding the place of arbitration in this case must be made, as Article 16(1) prescribes, "having regard to the circumstances of the arbitration," meaning all such circumstances, including those elements offered for consideration in paragraph 22 of the Notes, and without any individual circumstance being accorded paramount weight irrespective of its comparative merits.[5]

9. Accordingly, the Claimant below analyses the "circumstances of the arbitration" with specific reference to the factors identified in the UNCITRAL Notes, as well as other factors relevant to this dispute.

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[3]UNCITRAL Yearbook, vol. XXVII: 1996, part 1, paras. 11-54

[4]*United Parcel Service of America, Inc. v. Government of Canada* (hereafter "*UPS*"), Decision of the Tribunal on the Place of Arbitration, 17 October 2001, at para. 6.

[5]*Ethyl Corporation v. Government of Canada* (hereafter "*Ethyl*"), Decision Regarding the Place of Arbitration, November 28, 1997, at page 4.

D. Suitability of the Law on Arbitral Procedure of the Place of Arbitration

10. Not surprisingly, the disputing parties in prior NAFTA Chapter 11 arbitrations have placed great significance on domestic arbitration laws in urging a particular jurisdiction as the place of arbitration. Despite the considerable efforts of able counsel, however, no Tribunal has yet been persuaded that the arbitral law of Canada is superior to the arbitral law of the United States, or vice versa.

11. Thus, in *Ethyl*, the first NAFTA Chapter 11 arbitration to address this question, the venue suggested by the Claimant, an American corporation, was New York, while Canada proposed Ottawa, or alternatively, Toronto. The claim related to measures taken by the Canadian federal government that impacted upon the business operations of Ethyl. The Tribunal concluded that:

> [A]ll proposed fora are equally suitable. It appears undisputed that Canada's Commercial Arbitration Act is based on the UNCITRAL Model Law on International Commercial Arbitration and by its terms would apply to this arbitration under NAFTA Chapter 11. It appears to be equally undisputed that the relevant laws of the United States, and, to the extent relevant, the State of New York, are no less suitable. The fact that the laws applicable to this arbitration, were it situated in New York City, have been in place longer than Canada's Commercial Arbitration Act, and therefore are judicially more elaborated, does not, in the view of the Tribunal, significantly affect their comparative suitability.[6]

12. Similarly, in *Methanex v. The United States*[7], a case concerned with measures taken by the State of California, the debate again was between a place of arbitration in Canada or one within the United States. Methanex is a Canadian corporation based in Vancouver. Its primary assertion was that the place of arbitration should be Toronto, Ontario. It argued that there was "not a great deal to choose between a place of arbitration in Canada or the United States", and that the adoption in Ontario of the UNCITRAL Model Law in Ontario left little room for intervention by the Ontario

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[6] *Ethyl, supra*, at page 5.

[7] *Methanex Corporation v. United States of America* (hereafter "*Methanex*"), Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of Arbitration, at paras. 8 and 15.

Court. The United States likewise accepted there was little difference in the arbitral laws of the two proposed jurisdictions.

13. The Tribunal did not consider there to be any meaningful distinction between the suitability of the arbitral law of Toronto or Washington DC. It said:

> [T]he Tribunal accepts that there is little to choose between Toronto and Washington DC in regard to suitability of the law on arbitral procedure and enforcement. The Tribunal concludes that, for all practical purposes in regard to this arbitration, the two potential places of arbitration may be considered equally suitable in terms of the law on arbitral procedure and enforcement.[8]

14. Likewise in *ADF v. The United States of America*[9], an ICSID Additional Facility Arbitration concerning mainly state measures, and in which the point was vigorously contested, the Tribunal, albeit with some trepidation, was unwilling to differ from the *Ethyl* and *Methanex* Tribunals' holdings that Canadian law and United States law relating to judicial review of international arbitration awards are equally suitable for determining an appropriate place of arbitration.

15. In that case, while the parties were agreed that the laws of both Quebec, which the Claimant proposed, and the United States, which the Respondent proposed, were equally suitable with respect to the recognition and enforcement of awards, the Claimant argued that the laws of the United States concerning the review and setting aside of a NAFTA Chapter 11 Tribunal award were unsuitable because they were uncertain and unclear. The United States, recognizing that at an early stage in the NAFTA's evolution, it was "impossible" for any party to have "absolute certainty as to the legal regime governing review of a Chapter Eleven award"[10] argued strenuously that a suitable procedure did exist for review of a Chapter 11 award. In the result, the Tribunal heeded the explicit assertion of the United States that the Tribunal's award would be subject to "suitable procedures for review"

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[8] *Methanex, supra*, at para. 26

[9] *ADF Group Inc. v. United States of America* (hereafter "*ADF*"), ICSID Case No. ARB(AF)/00/1, Procedural Order No. 2 Concerning the Place of Arbitration, July 11, 2002

[10] *ADF, supra,* at para. 14

and found that the Claimant had not satisfied its burden of proving that the uncertainty in American law made it unsuitable[11].

16. Two other cases warrant brief comment. In each of *Pope & Talbot v. Canada*[12] and *UPS v. Canada*, the Tribunals were called upon to assess the suitability of Canadian arbitral law because of the position that the Government of Canada was taking before the British Columbia Supreme Court in the *United Mexican States v. Metalclad*[13] judicial review (and subsequently, the *S.D. Myers* judicial review). In both cases (which are the only cases so far to proceed to any substantive level of judicial review), Canada and Mexico have argued for a liberal standard (the United States has not joined in those submissions or publicly articulated its view of the relevant standard).

17. In *Pope & Talbot*, the Claimant took the unusual step of seeking to change the place of arbitration from Canada to the United States even though the hearings on merits and damages had concluded. The Tribunal rightly rejected the notion that Canada was an unsuitable jurisdiction simply because of the position taken by the Government in the judicial review proceedings although it clearly recognized that Executive action could be relevant to the suitability of the arbitral law.[14]

18. The argument met with marginally more success in *UPS*, where the Tribunal was prepared to conclude that, in a case where Canadian measures were involved, the approach adopted by the Canadian government in that judicial review might give the United States a slight advantage in suitability.[15] There the claimant urged that as the claim was against the Canadian government, and

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[11] *ADF, supra,* at paras. 15-16

[12] *Pope & Talbot, Inc. v. Government of Canada* (hereafter, "*Pope & Talbot*"), Ruling concerning the Investor's Motion to Change the Place of Arbitration, March 14, 2002.

[13] 2001 BCSC 664

[14] The Tribunal also noted that the British Columbia Supreme Court rejected the position taken by Canada in the *Metalclad* judicial review: *Pope & Talbot, supra,* at para. 12.

[15] *UPS, supra*, at para. 16

as the Canadian government had the ability through the lawmaking process to influence the standards of review applied in Canadian courts, United States law was more suitable.

19. Unfortunately it is not yet possible to determine what approach will be taken by an American court to the judicial review of a NAFTA Chapter 11 award, whether made against the United States or another NAFTA Party. The United States has taken no position in the judicial reviews of either the *Metalclad* or *S.D. Myers*, *Inc.* awards on the applicable standard of review, nor has any judicial review of a NAFTA Chapter 11 award been taken in an American court.[16] In this regard, the comments of the Tribunal in *Waste Management Inc. v. Mexico*[17] are important:

> It is no doubt the case that more international arbitrations occur in the United States than Mexico or Canada, and that there is a body of jurisprudence on the Federal Arbitration Act and the New York Convention which indicates a generally supportive attitude on the part of the United States courts to international arbitration. On the other hand, the specific issue of the applicable law and the standard of review in NAFTA arbitration has arisen in Canada while it has not (yet) arisen in the United States. The Tribunal is inclined to agree with the Respondent that legal issues of the same general order as those which arose in Metalclad would arise in the United States courts in the event of a challenge to a Chapter 11 arbitration held in the United States. What answers would be given remain to be seen, but commentators do not regard all questions as closed in the United States. Nor, in these early days of Chapter 11 arbitration, could they be. It would be invidious, and is unnecessary, to compare the actual or hypothetical performance of United States and Canadian courts in such cases. It is sufficient on this point to say that the Tribunal cannot identify any particular issue on which there is likely to be a significant difference of approach by the courts of the two NAFTA states.

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[16]Hearings in connection with the judicial review brought by Canada of the award against it in S.D. Myers, Inc. are scheduled to commence in December, 2003, in the Federal Court of Canada: Order of Associate Chief Justice Lutfy dated July 4, 2003, available at http://www.dfait-maeci.gc.ca/tna-nac/documents/SDMyer4.pdf.

[17]*Waste Management, Inc. v. United Mexican States* (hereafter "*Waste Management*") (ICSID Case No. ARB(AF)/00/3), Decision on Venue of the Arbitration, September 26, 2001, at paragraph 19.

20. Finally, with respect to the relative suitability of the arbitral law of either Canada or the United States, their equal suitability is reflected in the overall experience in other NAFTA Chapter 11 claims, identified in the table below:

Claimant	**Respondent**	**Applicable Rules**	**By Agreement or Tribunal Order**	**Place of Arbitration**
Ethyl	Canada	UNCITRAL	Order	Toronto, Ontario
S.D. Myers, Inc.	Canada	UNCITRAL	Agreement	Toronto, Ontario
Azinian	Mexico	ICSID AF	Agreement	Toronto, Ontario
Fireman's Fund	Mexico	ICSID AF	Agreement	Toronto, Ontario
Gami	Mexico	ICSID AF	Order	Vancouver, BC
Metalclad	Mexico	ICSID AF	Agreement	Vancouver, BC
Pope & Talbot	Canada	UNCITRAL	Order	Montreal, Que.
Feldman	Mexico	ICSID AF	Order	Ottawa, Ont.
UPS	Canada	UNCITRAL	Order	Washington, DC
Thunderbird	Mexico	UNCITRAL	Consent Order	Washington, DC
Waste Management	Mexico	ICSID AF	Order	Washington, DC
ADF	United States	ICSID AF	Order	Washington, DC
Methanex	United States	UNCITRAL	Order	Washington, DC
Loewen	United States	ICSID AF	Agreement	Washington, DC
Mondev	United States	ICSID AF	Order	Washington, DC

21. Thus, of the fifteen NAFTA Chapter 11 arbitrations in which a determination as to place of arbitration has been made public, in none has the place of arbitration been Mexico, while eight were situate in Canada and seven in the United States. Accordingly, the Investor concurs with the determinations of the tribunals in *Methanex*, *Ethyl* and *ADF* that the first factor identified in the UNCITRAL notes weighs equally between Canada and the United States.

E. The Existence of a Treaty on the Enforcement of Arbitral Awards

22. As each of Canada, the United States and Mexico are signatories to the New York Convention, this factor is neutral and does not point to any place as the appropriate place of arbitration.

F. Convenience of the Parties and the Arbitrators

23. As UNCITRAL Arbitration Rule Article 16(2) provides and as the disputing parties agree that hearings need not occur at the juridical seat of the arbitration and that the actual location of those hearings can be determined from time to time based on the particular circumstances then pending, this factor too weighs neutrally with respect to a determination of the place of arbitration. Whether the hearings will actually take place in a city in Canada, a city in the United States, or some combination thereof, ought to be determined from time to time in connection with the particular matter being addressed and any other relevant considerations then prevailing. To date the disputing parties have cooperated in attending to the practical conduct of the arbitration and there is no reason to think that such cooperation will not continue in the future.

G. Availability and Cost of Support Services

24. As the Tribunal has appointed Ms. Banifatemi as administrative secretary, and as the hearings may or may not occur in the place of arbitration, again this factor weighs neutrally. While it is likely that the cost of such things as hearing rooms, court reporters, hotels and the like are less in either Toronto or Vancouver than in Washington D.C., this only becomes relevant in connection with the determination of where any particular hearing will physically occur and is irrelevant to the place of arbitration.[18]

H. Location of Subject Matter and Proximity of Evidence

25. Again, this factor is relevant mostly to the determining the location of any particular hearing, and even then ought to be given little weight. The "subject matter" of the dispute is the treatment

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[18]The only relevance might arise on an application to judicially review an award, given that the cost of legal services is likely to be less in Canada than in Washington D.C.

of a Canadian investor situate in Canada and the United States, by organs of the United States government situate in Washington, D.C. The evidence is located throughout Canada and the United States, predominantly in British Columbia and Washington, D.C. Even were weight to be accorded this factor, the practical reality is that with advances in technology, the physical location of documentary evidence does not point in one direction over another as to the seat of the arbitration[19].

I. Neutrality

26. Perhaps the most significant consideration for the Tribunal is the question of neutrality, or of perceived neutrality. This issue has played a prominent role in the other cases where the place of arbitration was disputed. The Tribunal in *Ethyl,* for instance, commented this way:

> Traditionally arbitrating parties, desiring both the reality and the appearance of a neutral forum, incline to agree on a place of arbitration outside their respective national jurisdictions. This is especially the case where a sovereign party is involved. Where an arbitral institution or a tribunal must make the selection, this tendency is, if anything, even greater, and for the same reasons. Article 16(1) of the UNCITRAL Rules easily accommodates this consideration as one of the "circumstances of the arbitration."[20]

27. Assuming that the Tribunal confines its selection of the place of arbitration to those proposed by the disputing parties, a place of arbitration that will be perceived by all as completely neutral is unlikely. As stated by the UPS Tribunal, "In one sense a neutral place is not available given the claimant is a United States corporation and Canada is the respondent and the place of the arbitration

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[19]The point was articulated this way in *UPS* (at para. 15): "So far as the evidence is concerned, although it is difficult to assess this issue at this early stage in the arbitration, it can be said with some certainty that the arbitration will be largely based on documentation and expert evidence. With modern information technology, the handling of documentation should not be an issue in this arbitration particularly given that the disputing parties have a high degree of expertise and sophistication in the handling of information. So far as witnesses and experts are concerned, there is no clear balance of convenience. Witnesses will be from throughout North America and likely from Europe. There is neither advantage nor disadvantage for either disputing party if the arbitration is located in either the United States or Canada."

[20]*Ethyl, supra,* at page 9

is to be in one or other country."[21] That said, the Tribunal is bound to examine those considerations which weigh upon the relative neutrality of the respective jurisdictions to assess whether the balance is tilted in either direction.

28. The issues involved in this case arise out of a significant trade dispute between Canada and the United States with a substantial historical dimension. Unlike the other NAFTA Chapter 11 claims in which the United States has been a Respondent, this claim directly implicates the conduct of organs of the United States government that it is alleged have systematically targeted the Claimant and others in its position. The Claimant is based in Vancouver, British Columbia, and has made investments throughout the United States. It is not surprising that the Claimant may be sceptical about any review of its claim against the United States occurring in the courts of its capital city. Correspondingly, however, and recognizing the nature of the dispute, the United States may well express reluctance at the prospect of the conduct of its government towards a Vancouver company being evaluated by a British Columbian court. That is so despite the fact that the relevant judiciaries of both Canada and the United States are equally protected by constitutional guarantees assuring their independence and procedural safeguards ensuring their impartiality.

29. The challenge, therefore, is to identify that place of arbitration where any perception that it is not "neutral" is minimized. In the Claimant's submission, that points squarely to a location within Canada as the place of arbitration.

30. It is again instructive to consider how the matter has been addressed in other Chapter 11 arbitrations. In *Ethyl*, for instance, the Tribunal confined itself to the choices offered by counsel, namely New York, Toronto, or Ottawa. After accepting that Mexico might well be a neutral place of arbitration, the Tribunal concluded (as would be appropriate here), that none of the other circumstances of the arbitration pointed to Mexico. While the Tribunal noted that for various

[21] *UPS, supra*, at para. 18

reasons, the circumstances of the arbitration pointed to a Canadian venue, the Tribunal also expressed its reluctance to select Ottawa, "due to the fact that it is the capital of Canada". [22]

31. Similarly, in *UPS*, the Tribunal determined, in a claim against Canada, that the appropriate place of arbitration was Washington D.C., "given that it is Canada's measures that are in issue".[23]

32. It is notable that in the four cases involving the United States as a Respondent, in each the place of arbitration was Washington, D.C. However, unlike in the present case, the circumstances of those arbitrations each made Washington an appropriate choice. For instance, in *Loewen*, a case implicating the operation of the Mississippi civil jury system, the parties were able to agree upon Washington D.C., as the claimant was represented by Washington counsel and the case did not challenge measures of the federal government, situate there.[24]

33. In *Mondev v. The Government of the United States*[25], the claim stemmed from judicial proceedings before the Massachusetts court, involving a dispute between a Canadian company and the City of Boston. Once more, the Claimant was represented by Washington counsel. As this was an ICSID Additional Facility arbitration, and as federal measures were not implicated, it was not inappropriate for the Tribunal to determine the place of arbitration to be the seat of the Centre, in Washington, D.C. Unfortunately the parties respective submissions are not available to the Claimant to shed further light upon the arguments advanced in that case.

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[22] *Ethyl, supra* at page 10

[23] *UPS, supra* at para. 18

[24] *The Loewen Group Inc. v. United States of America,* (hereafter "*Loewen*") (ICSID Case No. ARB(AF)/98/3), Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, at para. 19.

[25] *Mondev v. United States of America* (hereafter, "*Mondev*") (ICSID Case No. ARB(AF)/99/2*,* Award, October 11, 2002 at para. 26.

34. In *ADF*, a case involving a claim for compensation based upon the conduct of a state government, considerations of neutrality received only passing reference, with the Tribunal considering that the ICSID is, and is widely perceived to be a "neutral" forum and institution[26]. As this was an ICSID Additional Facility Rules arbitration, the "policy imperatives which drive parties proceeding to international arbitration to seek a "neutral" forum [were] in [the Tribunal's] opinion, satisfied by choosing the city in which ICSID is located."[27]

35. Finally, and most importantly, is the Tribunal's analysis in *Methanex*. Considering all the circumstances of the arbitration, save neutrality, the Tribunal had determined that the appropriate place of arbitration was Washington, D.C. The question was whether considerations of neutrality shifted the balance to favour Toronto. It is instructive to set out the Tribunal's analysis at length:

> [I]n 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 is was not so desired by the parties to this arbitration.
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> Further, the Tribunal does not consider that the interests of neutrality are best served in this arbitration by applying any general principle strictly favouring the jurisdiction of the investor over the jurisdiction of the respondent; or indeed vice versa. The previous NAFTA cases to which the Tribunal was referred were not of great assistance on this point, turning on agreement and other factors falling far short from any general principle. In the Tribunal's view, the matter must be approached on a

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[26] *ADF, supra*, at para. 21. The claim involved a Virginia state highway project procurement decision that required the Canadian investor to fabricate all structural steel used in the project exclusively in the United States. To avoid a reservation for procurement decisions contained within Article 1108, the Claimant unsuccessfully argued that the gravamen of its claim was based upon conditions attached to federal government funding of the project.

[27] *ADF, supra*, at para. 21.

> case-by-case basis, depending on the individual circumstances of the particular arbitration.
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> For this arbitration, *the Tribunal considers that the requirements of neutrality are sufficiently met if the place of arbitration lies outside British Columbia (as the home of the Claimant), California (responsible for the legislative measure in issue) and Texas (as the home of Methanex US).* Once these three locations are excluded, the question then arises whether Washington DC should also be excluded on grounds of neutrality because it is the Respondent's capital city, thereby (it might be said in sporting terms) requiring the Claimant to play away from home in its opponent's home stadium.[28]

36. The Tribunal was then able to determine that in the circumstances, Washington D.C. was not inappropriate. It was clear, however, that had federal, rather than state, measures been in issue, the same result was not assured.[29]

37. Using this analysis, while the Claimant's primary submission is that Vancouver is an appropriate place of arbitration given its substantial connection to the proceeding, any concern that Vancouver would not be perceived as neutral could be addressed by naming Toronto as the arbitral seat. Canfor does not, for instance, have mills or manufacturing facilities in Ontario, and has its executive offices in Vancouver. And, as the judicial review of arbitral awards in Canada made against either Mexico or the United States would be conducted under laws enacted by the Province of Ontario, rather than under a federal statute, any such review will be conducted under a legal regime other than that of Canfor's home province of British Columbia.

J. May the Tribunal select Mexico as the Place of Arbitration, despite it not being proposed by the Parties?

38. At the Organizational Hearing in New York, the Tribunal requested the disputing parties to address whether, given the importance of a neutral place of arbitration but the corresponding fact that neither Canfor nor the United States were proposing Mexico as the place of arbitration, the

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[28] *Methanex, supra,* at paras. 36-38.

[29] *Methanex, supra,* at 39-40.

Tribunal was constrained to select from amongst only those locations proposed by the Parties or whether it could of its own volition select Mexico.

39. Previous tribunals have confined themselves to the venues proposed by the disputing parties. Thus, in *Ethyl*, the Tribunal observed as follows:

> The Tribunal, as previously noted, has the power, under NAFTA Article 1130(b), to select as the place of arbitration any situs in Canada, Mexico or the United States. The Tribunal notes that Ethyl (at page 5 of its Submission of October 16, 1997) has "submitted that if this Tribunal finds that it is inappropriate to have the place of arbitration in either Canada or the United States, the Claimant suggests that the place of arbitration be in Mexico." The Tribunal limits itself in this case, however, to the sites recommended by the parties. In doing so it emphasizes that it is in no way precluded by the parties' respective proposals from considering other locations. It proceeds as it does because it believes the parties objectively have searched out those places that are most likely in fact to be most appropriate, "having regard to the circumstances of the arbitration."[30]

40. To similar effect, the Tribunal in *Methanex* acceded to the parties agreement that the Tribunal's choice of place of arbitration should be limited to a place within Canada or the United States, but excluding Mexico, again despite the importance of perceived neutrality. Unlike the *Ethyl* Tribunal, however, the Methanex Tribunal appeared to view itself as constrained by the agreement of the parties: "By express agreement of the Disputing Parties in this case, the Tribunal was therefore limited to selecting a place in either Canada or the USA notwithstanding the Claimant's Canadian nationality and the identity of the Respondent, the United States of America."[31] The Claimant submits that the *Methanex* Tribunal was correct in feeling so constrained.

41. In the present case the parties have agreed that the Tribunal cannot select Mexico as a place of arbitration.

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[30] *Ethyl, supra,* at footnote 7.

[31] *Methanex, supra,* at para. 6.

42. The basis for the disputing parties ability to constrain the Tribunal is as follows. Article 1(1) of the UNCITRAL Rules provides as follows:

> **Article 1 - Scope of Application**
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> 1. Where the parties to a contract have agreed in writing that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.
>
> 2. The Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

43. The authority of the Tribunal to determine place of arbitration derives from UNCITRAL Arbitration Rule Article 16 and NAFTA Article 1130. By virtue of the operation of Article 1 of the UNCITRAL Arbitration Rules, Article 16 may be modified by the agreement of the disputing parties. The only remaining question is then whether such a modification to preclude the selection of Mexico as a place of arbitration is required by virtue of NAFTA Article 1130. In other words, is NAFTA Article 1130 a provision of the "law applicable to the arbitration from which the parties cannot derogate".

44. The Claimant submits that it is not. The opening words of Article 1130 - "[u]nless the disputing parties agree otherwise" - modify the entirety of the remaining portion of Article 1130 and establish that the operation of the UNCITRAL Arbitration Rules applies to the selection of the place of arbitration, only to the extent that the disputing parties determine. In other words, the disputing parties are always free to establish a different mechanism for the selection of the place of arbitration other than that provided under the UNCITRAL Rules, or to modify those rules as they determine suits the purposes of the arbitration. Accordingly, the Tribunal may only select from amongst only Canada or the United States, unless the United States is prepared to agree to select either London, England, or Geneva, Switzerland, to both of which Canfor would also agree.

III. STATEMENT OF DEFENCE

45. The Claimant respectfully requests that the Tribunal direct the United States to promptly provide a Statement of Defence to the claims advanced by Canfor in its Statement of Claim.

46. UNCITRAL Arbitration Rules Article 19 expressly contemplates the provision of a defence in a timely way:

> **Article 19 - Statement of Defence**
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> 1. Within 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.
>
> 2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.
>
> 3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.
>
> 4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

47. Article 21 of the UNCITRAL Arbitration Rules is also relevant. It provides, in relevant part:

> **Article 21 - Pleas as to the Jurisdiction of the Arbitral Tribunal**
>
> 1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.
>
> 2. The arbitral tribunal shall have the power to determine the existence of the validity of the contract of which an arbitration clause forms part....
>
> 3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counterclaim, in the reply to the counter-claim.

> 4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

48. Finally, the UNCITRAL Arbitration Rules establish an overarching obligation on the Tribunal to conduct the proceedings with equality:

> **Article 15 - General Provisions**
>
> 1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, *provided the parties are treated with equality* and that at any stage of the proceedings each party is given a full opportunity of presenting his case....(emphasis added).

49. The Claimant submits that before the Tribunal determines whether or not the proceedings ought to be bifurcated, the United States should first provide its statement of defence. The reasons are straightforward.

50. First, ordering the production of a statement of defence is consistent with the structure of the arbitral rules under which this case is proceeding. Those rules explicitly contemplate the timely provision of a statement of defence. The language of the provision is mandatory - the respondent "must" provide its defence within the time directed by the Tribunal. And, while there is clearly a discretion vested in the Tribunal as to when such a statement of defence should be filed, Article 19 when read in conjunction with Article 23 contemplates that in a typical case a defence will be filed within 45 days.[32]

[32]Article 23 provides: "The periods of time fixed by the arbitral tribunal for the communication of written statements (*including the statement of claim and statements 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." (Emphasis added)

51. Thus, the commentary to the UNCITRAL Arbitration Rules[33] explains Article 19(1) (then proposed as Article 18) as follows:

> *Paragraph 1*
>
> 1. Under the provisions of this paragraph, the statement of defence *must* be communicated by the respondent to the claimant and to each of the arbitrators "within a period of time to be determined by the arbitrators". It should be noted that under article 21 of these rules, the time-limits established by arbitrators for the communication of written statements should normally not exceed 45 days. (Emphasis added)

52. Second, the filing of a statement of defence will allow the issues in the proceeding to be clearly defined. The statement of defence is intended to be a substantive document. The commentary continues:

> *Paragraph 2*
>
> 2. This paragraph *is designed to ensure* that the statement of defence responds to the information that is required to be included in the statement of claim under the provisions of subparagraphs (b), (c) and (d)[34] of paragraph 2 of article 17 [now 18]. In addition, the respondent has the option (similar to the option given to the claimant under article 17 [now 18] of annexing the documents or copies of the documents on which he intends to rely for his defence or of including a reference to such documents, without prejudice to his right to present additional or substitute documents at a later stage in the arbitral proceedings.[35] (Emphasis added)

53. Third, should the Tribunal ultimately determine that certain issues ought properly be considered as preliminary objections, and if the United States is unsuccessful in establishing all or some of those allegations, then ordering a statement of defence now will ensure that the orderly conclusion of the proceedings is not unduly delayed.

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[33] *UNCITRAL Yearbook,* Volume VII:1976, "Report of the Secretary-General: revised draft set of arbitration rules for optional use in ad hoc arbitration relating to international trade (A/CN.9/112)" at pages 173-4.

[34] Subparagraphs (b), (c) and (d) in turn deal with the "statement of facts supporting the claim", the "points at issue", and the "relief or remedy sought".

[35] *UNCITRAL Yearbook,* Volume VII:1976 at page 173.

54. Without the provision of a statement of defence, the Claimant's ability to substantively prepare its case is prejudiced. The Notice of Intent in this proceeding was delivered in November, 2001, and the proceeding actually commenced with the delivery of a Statement of Claim in July, 2002. The United States has, therefore, been able to prepare its substantive response to the Claimant's case for over fifteen months. Were the Tribunal to determine now that there will be a jurisdictional phase, then on the schedule currently contemplated, the earliest that a hearing will occur is summer 2004, thus providing the United States a further eight months of preparation time not equally available to the Claimant.

55. If, however, the Tribunal orders the United States to produce its Statement of Defence now, then the unequal treatment of the parties can be mitigated, as the Claimant will know the real defences the United States intends to raise in response to its claim, and will equally be able to prepare to meet them.

56. Fourth, ordering a Statement of Defence at this stage would ensure that all jurisdictional issues that the United States intends to raise are articulated now. The UNCITRAL Arbitration Rules require the United States to identify those issues "not later than" in its Statement of Defence. Thus, were the Tribunal to direct the filing of a Statement of Defence, the Claimant and the Tribunal would be able to determine whether, in either of their views, there were other issues which ought also to be considered as preliminary or jurisdictional and appropriately dealt with in a preliminary way. By ordering a Statement of Defence the spectre of multiple jurisdictional hearings is eliminated.

57. Fifth, the ordering of a Statement of Defence is consistent with the practice of previous NAFTA Chapter 11/UNCITRAL Arbitration Rules arbitrations. Thus, in *Pope & Talbot* the Tribunal ordered Canada to provide its defence at a very early stage, before subsequently determining to hold a jurisdictional phase. Similarly, in *S.D. Myers, Inc.*, the Tribunal ordered Canada to produce its statement of defence within 30 days after a preliminary meeting of the

Tribunal[36]. In *Ethyl*, Canada was directed to produce its statement of defence within 60 days of the first procedural meeting.[37] In *Methanex,* the United States was directed to produce its statement of defence within 60 days of the first procedural meeting.[38]

58. The Claimant acknowledges that the practice of requiring a statement of defence is not universal. Thus, in *UPS*, (a case to which the United States adverted during the organizational meeting in New York on October 28, 2003) the Tribunal did not order the production of a statement of defence pending a jurisdictional hearing. However, the context of Canada's jurisdictional objections in that case warranted that approach. In *UPS*, Canada had launched a vigorous attack on the manner in which UPS had pled its claim, alleging that pleading failed to satisfy the requirements of Article 18 of the UNCITRAL Arbitration Rules and in particular, the minimum requirements of pleading. The Tribunal analysed the question this way:

> We do not see this issue as a matter of clear rules or of precise right. The frequent practices, 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. They are then however frequently, as the UNCITRAL rules indicate they should be, dealt with as a preliminary matter. They are nevertheless dealt with, to respond to an issue which concerns UPS, in a binding way. It is plainly established that the ruling on jurisdiction binds the parties. Moreover, in the context of the present case, Canada has, we take it, pleaded all the possible jurisdictional arguments that it would want to raise. It says in both of its submissions that "all of its jurisdictional objections can be efficiently and effectively resolved on the statement of claim alone".[39]

59. It is notable that the United States has, in the present case and unlike in *UPS*, reserved its ability to advance other arguments that may be characterized as jurisdictional, but without articulating what they might be.

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[36] *S.D. Myers, Inc.*, Procedural Order No. 1, 28 May 1999.

[37] *Ethyl,* Procedural Order dated 13 October 1997.

[38] *Methanex*, Minutes of First Procedural Meeting Held by Conference Call on Thursday, 29 June 2000.

[39] *UPS*, Decision of the Tribunal on the Filing of a Statement of Defence, 17 October 2001, at para. 16.

60. Being mindful of the practicalities of the conduct of the arbitration and the extensive and particular nature of Canada's objections to pleading, the Tribunal in *UPS* determined to proceed with a jurisdictional phase first. That determination does not, however, provide any further guidance to this Tribunal other than that it ought to proceed practically. In the Claimant's submission, that requires that a defence be produced now so that all possible jurisdictional issues which might be resolved in a preliminary way are at least identified and Canfor can proceed with the preparation of its case.

IV. DECISION ON BIFURCATION SHOULD BE DELAYED

61. The Claimant submits that the Tribunal should not make a determination to bifurcate the proceedings until a statement of defence has been filed. Only at that point will the issues be sufficiently identified that the Claimant and the Tribunal will be able to make an informed assessment as to whether the arbitration will be more fairly and more efficiently dealt with by holding a jurisdictional phase or not. And, only once those issues are identified will it be possible to identify which issues, if any, should properly be determined in a preliminary way.

V. RELIEF SOUGHT

62. For the foregoing reasons, Canfor respectfully submits that the place of arbitration should be in Canada and specifically Vancouver, or alternatively Toronto, and not in the United States. Canfor 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 11th day of November, 2003

P. John Landry for Davis & Company Counsel for Canfor Corporation	**Keith E.W. Mitchell** for Davis & Company Counsel for Corporation