

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.

**SUBMISSION ON PLACE OF ARBITRATION,
BIFURCATION AND FILING OF A STATEMENT OF
DEFENSE OF RESPONDENT UNITED STATES OF AMERICA**

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In accordance with Procedural Order No. 2, dated November 3, 2003, respondent United States of America respectfully makes this submission on the proper place of this arbitration, on whether the issue of jurisdiction should be heard and decided as a preliminary question and on the usefulness at this stage of a statement of defense addressing issues that would not be heard as a preliminary question.

For the reasons set forth below, the United States respectfully submits that the Tribunal should select Washington, D.C. as the place of arbitration. It should, as contemplated by Article 21(4) of the UNCITRAL Arbitration Rules, rule on its own jurisdiction as a preliminary question. And the Tribunal should deny Canfor's request to compel the United States to respond to the merits of Canfor's claim before any agreement to arbitrate those claims has been established.

ARGUMENT

I. THE UNCITRAL NOTES FACTORS WEIGH HEAVILY IN FAVOR OF WASHINGTON AS THE PLACE OF ARBITRATION

The NAFTA provides in pertinent part that, unless the disputing parties have agreed otherwise, the “Tribunal shall hold [the] arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with . . . the UNCITRAL Arbitration Rules if the arbitration is under those Rules.”¹ The disputing parties have agreed, pursuant to Article 1(1) of the UNCITRAL Arbitration Rules, to modify Article 16(1) of those rules to provide that the place of arbitration shall be fixed “at a city in Canada or the United States of America, having regard to the circumstances of the arbitration.”² The Tribunal therefore should select a place of arbitration in either the United States or Canada.³

Although Article 1130 of the NAFTA and Article 16 of the UNCITRAL Arbitration Rules direct the Tribunal to determine the place of arbitration “having regard to the circumstances of the arbitration,” neither provision provides much guidance on what the relevant circumstances are. The United States agrees with Canfor and every NAFTA tribunal to address the subject that paragraph 22 of the *UNCITRAL Notes on Organizing Arbitral Proceedings* (the “UNCITRAL Notes”) sets forth the primary factual and legal criteria for the Tribunal to consider in selecting the place of arbitration. Paragraph 22 of the UNCITRAL Notes sets forth the following five factors:

(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

¹ NAFTA art. 1130.

² Joint Letter to the Tribunal from the Disputing Parties, dated November 18, 2003.

³ See UNCITRAL Arbitration Rules art. 1(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.”).

awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence.⁴

Contrary to Canfor's contention, three of these five factors relevant to selecting the place of arbitration favor Washington, D.C. over Canfor's proposed venues, Vancouver, British Columbia, or Toronto, Ontario. The remaining two factors are neutral. None favors Vancouver or Toronto.

First, the subject of this dispute, which concerns antidumping and countervailing duty determinations made by two U.S. government agencies in Washington, D.C., clearly points to Washington as the place of arbitration. *Second*, Washington would be a more convenient venue than Vancouver or Toronto for the Tribunal, the disputing parties and their counsel. *Third*, the suitability of the law on arbitration is a neutral factor (although two NAFTA tribunals have expressed concern over Canada as a suitable venue). *Fourth*, considerations of cost weigh in favor of Washington. *Finally*, the remaining factor concerning enforcement is neutral, as both Canada and the United States are parties to the New York Convention.

A. The Subject-Matter In Dispute Is Located In Washington

The "location of the subject-matter in dispute and proximity of evidence" clearly point to Washington, D.C. as the place of arbitration. Canfor's claim, which is based on antidumping and countervailing duty determinations made in Washington by the U.S. Department of Commerce ("Commerce") and the International Trade Commission (the "ITC"), is far more closely connected with Washington than with Vancouver or Toronto.

⁴ UNCITRAL Notes ¶ 22.

The tribunal in *Ethyl Corp. v. Canada* was asked to decide whether Toronto or New York City should be designated as the place of arbitration. Given that the claimant alleged a Canadian federal statute violated Chapter Eleven, the *Ethyl* tribunal found that “Canada indisputably [was] the location of the subject-matter in dispute.”⁵ Moreover, having found largely inconclusive results upon examining the other UNCITRAL factors, the *Ethyl* tribunal concluded that the location of the subject-matter “turn[ed] the Tribunal definitely to selection of a place of arbitration in Canada.”⁶

The tribunal in *Methanex Corp. v. United States* similarly found the subject-matter of the dispute to be centered in the jurisdiction that adopted and maintained the measures at issue. Like that of *Canfor*, the “effective claim [in *Methanex*] is based on alleged actions in the USA affecting a US enterprise.”⁷ The *Methanex* tribunal similarly found this factor to favor Washington, D.C. over Toronto, the proposed alternate forum.⁸

Even more so than in *Ethyl* and *Methanex*, the location of the subject-matter of this dispute weighs in favor of a specific venue, in this case, Washington, D.C. Virtually all of the significant events underlying the claimant’s allegations took place in Washington. The Coalition for Fair Lumber Imports, a Washington-based industry group, submitted the petitions to Commerce and the ITC in Washington seeking the initiation of the antidumping

⁵ *Ethyl Corp. v. Canada, Decision Regarding the Place of Arbitration*, dated Nov. 28, 1997 (“*Ethyl Decision on Place of Arbitration*”), at 10 (see Investor’s Authorities on Place of Arbitration and Request that the United States Provide a Statement of Defence (“*Canfor Exs.*”), at Tab B2).

⁶ *Id.* at 8.

⁷ *Methanex Corp. v. United States, The Written Reasons for the Tribunal’s Decision of 7th September 2000 on the Place of Arbitration*, dated Dec. 31, 2000 (“*Methanex Decision on Place of Arbitration*”) at 13, ¶ 33 (see *Canfor Exs.* at Tab B3).

⁸ *See id.*

and countervailing duty investigations at issue in this case.⁹ The hearings and deliberations concerning the preliminary and final determinations at issue all took place in Washington. Canfor was represented in the investigations by its Washington, D.C. counsel, Kay Scholer, LLP. The preliminary and final antidumping and countervailing duty determinations were published in the *Federal Register* in Washington. The duties related to those determinations were imposed and cash deposits collected by U.S. Customs in the United States. Canfor's alleged investments that are the subject of its claim are located throughout the United States, including in Norfolk, Virginia, and Richmond, Virginia, near Washington.¹⁰ And Canfor's allegations primarily concern the interpretation and application in Washington of U.S. federal laws and regulations.¹¹

Finally, most or all of the relevant evidence is located in Washington. The voluminous records in the preliminary and final determinations challenged by Canfor are

⁹ The petitions were also filed by the United Brotherhood of Carpenters and Joiners, headquartered in Washington, D.C. and the Paper, Allied-Industrial, Chemical and Energy Workers International Union, headquartered in Nashville, Tennessee. *See, e.g., In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Antidumping Determination, Decision of the Panel*, dated Jul. 17, 2003 at 9 (*see* United States' Objection to Jurisdiction, dated Oct. 16, 2003, Appendix Volume I, Tab. 4).

¹⁰ *See* Canfor Notice of Arbitration and Statement of Claim, dated Jul. 9, 2002 (the "Statement of Claim" or the "Statement") ¶ 14.

¹¹ *See, e.g.,* Statement ¶¶ 76-95 (setting forth legal standards under the U.S. Tariff Act and Commerce's and the ITC's regulations and arguing that Commerce and the ITC failed properly to apply those laws and regulation); ¶ 92 ("[D]espite clear *United States law* to the contrary, there was no statutory basis for a consideration of voluntary respondents in cases conducted on an aggregate basis under section 777A(e)(2)(b) of the *Tariff Act*." (emphasis added); *id.* ¶ 108 ("Despite repeated confirmation . . . that the Respondent's actions have violated international and *United States law*, the Respondent has persevered by attempting to affect changes, modifications or otherwise improper interpretations of *its law*. . .") (emphasis added); *id.* ¶ 111b [at page 32] (Commerce "fail[ed] to provide any reasonable analysis in coming to its determination that provincial stumpage programs are a 'financial contribution', even though it knew or ought to have known that such a determination would be *inconsistent with the Respondent's domestic law*. . .") (emphasis added); *id.* ¶ 113 ("In total disregard of the requirements of *United States law* . . .); *id.* ¶ 114(7) (Commerce "*violat[ed] its own regulations* . . .") (emphasis added); *id.* ¶ 114(16) (Commerce "*den[ie]d Canfor the benefit of a predictable and transparent legal system*. . .") (emphasis added); *id.* ¶ 119(1) (Commerce "acted in blatant disregard of *United [sic] States law*. . ."); *id.* ¶ 119(2) (Commerce "acted inconsistently with [*Commerce's*] *own case law* . . .") (emphasis added); *id.* ¶ 122(1) (Commerce failed to determine that the petitioners had standing "as required by *United States law*." (emphasis added); *id.* ¶ 140(5) (Commerce "interpret[ed] *United States law, more specifically section 782(a) of the Tariff Act*, to [sic] a way which it knew or ought to have known would be in breach of the United States [sic] international obligations." (emphasis added).

located at Commerce and the ITC in Washington. In the event that witnesses will be required to testify about the investigations that led to the measures, those witnesses would likely all be based in Washington.¹² And, as noted, Canfor's investments are located throughout the United States, including near Washington. Thus, there can be no doubt that the subject-matter of this arbitration, as well as the vast majority of the evidence, is located in Washington.

By contrast, Vancouver has little connection to any of the events underlying Canfor's claims. While Vancouver is the headquarters of the investment's ultimate parent company, and Canfor owns sawmills and other facilities in British Columbia, Canfor's claim under the investment chapter must necessarily center on its investments in this country, not in Canada.¹³ As the *Methanex* tribunal stated, "[t]he fact that the investor's parent company (the Claimant) is based in Vancouver, Canada does not displace the fact that the Claimant's effective claim is based on alleged actions in the USA affecting a US enterprise."¹⁴ Toronto has no apparent connection to the events underlying Canfor's claims.

Canfor's arguments concerning the location of the subject matter of the dispute are without merit. Canfor argues that this factor and other factors in paragraph 22 of the UNCITRAL Notes pertain primarily to the physical location of hearings, but not to the *legal seat* of the arbitration.¹⁵ Because UNCITRAL Article 16(2) provides that hearings need not occur at the legal seat of the arbitration, contends Canfor, the Tribunal ought to accord little or

¹² The only individual named in the Statement of Claim is Under-Secretary Grant Aldonas, who is based in Washington, D.C. See Statement ¶ 134.

¹³ See NAFTA art. 1101(1) ("This Chapter applies to measures adopted or maintained by a Party relating to: . . . investors of another Party [and] investments of investors of another Party *in the territory of the Party.*") (emphasis added).

¹⁴ *Methanex Decision on Place of Arbitration* at 13, ¶ 33 (see Canfor Exs. at Tab B3).

¹⁵ See Canfor's Submission on Place of Arbitration and Request that the United States Provide a Statement of Defense, dated Nov. 11, 2003 ("Canfor Br.") ¶ 25.

no weight to these factors in determining the place of arbitration.¹⁶ Canfor’s attempt to embrace the factors contained in paragraph 22 of the UNCITRAL Notes while at the same time denying their relevance should be rejected for the following reasons.

First, Canfor’s argument is contradicted by the Notes themselves – which clearly distinguish the legal seat of the arbitration from the site of hearings, but direct the five factors exclusively to the determination of the legal seat. Paragraph 22 identifies “various factual and legal factors [that] influence the choice of the *place of arbitration*.”¹⁷ The heading immediately following the paragraph 22, however, is the “Possibility of *meetings outside the place of arbitration*.”¹⁸ Paragraph 23 likewise notes that “[m]any sets of arbitration rules and laws on arbitral procedure expressly allow the arbitral tribunal to hold *meetings elsewhere than at the place of arbitration*.”¹⁹ This clearly indicates the drafters’ understanding that the term “place of arbitration” and the factors listed in paragraph 22 refer to the *legal seat* of an arbitration, as distinct from the physical location of “meetings.”

Second, none of the Chapter Eleven arbitral tribunals that have considered paragraph 22 of the UNCITRAL Notes have accepted Canfor’s interpretation of that paragraph – including the tribunals in *Methanex*, *Ethyl* and *United Parcel Service of America, Inc. v. Canada* (“*UPS*”), each of which was governed by the UNCITRAL Arbitration Rules. Rather, each of these tribunals has considered the factors listed in paragraph 22 to be relevant to determining the *legal seat* of the arbitration.²⁰ Indeed, the *UPS* tribunal considered and

¹⁶ *See id.*

¹⁷ UNCITRAL Notes ¶ 22 (emphasis added).

¹⁸ *Id.* art. 3(b) (emphasis added).

¹⁹ *Id.* ¶ 23 (emphasis added).

²⁰ *See Methanex Decision on Place of Arbitration* at 10, ¶ 24 (“The place of the arbitration is the legal place, or ‘seat,’ of the arbitration; and the Tribunal here makes no decision as to the geographical place of any particular hearing.”); *Ethyl Decision on Place of Arbitration* at 3 (referring to paragraph 22 of the UNCITRAL Notes to

implicitly rejected a similar argument as to the location of hearings advanced by the claimant in that case.²¹

Lastly, Canfor’s argument that “advances in technology” have rendered the location of evidence irrelevant is without merit.²² The Notes were adopted in 1996. The world has not changed all that much since then. Witnesses must still appear to testify, usually in person. Documentary evidence – and there are tens of thousands of pages of record underlying the Commerce and ITC investigations at issue here – must be produced. And it still requires resources, in the form of time and money, to move either from one place to another. Proximity of evidence, in short, is still a relevant factor, as the tribunals in *Ethyl*, *UPS* and *ADF Group Inc. v. United States* implicitly acknowledged in their decisions.²³

B. Convenience Favors Washington Over Vancouver Or Toronto

Holding the arbitration in Washington, D.C. would be less inconvenient than Vancouver or Toronto. *First*, with respect to the arbitrators’ convenience, New York is home to two arbitrators and Paris is home to the third. Flight time from New York to Vancouver is approximately eight hours and from Paris to Vancouver is approximately 14 hours. By contrast, flight time from New York to Washington is less than one hour, and flight time from Paris to Washington is approximately eight hours. Washington is therefore clearly more

determine the legal seat of the arbitration); *United Parcel Service of America, Inc. v. Canada, Decision of the Tribunal on the Place of Arbitration*, dated Oct. 17, 2001 (“*UPS Decision on Place of Arbitration*”) at 3, ¶ 6, and at 8, ¶¶ 16-19 (same) (see Canfor Exs. at Tabs B3, B2 and B1, respectively).

²¹ See *United Parcel Service of America, Inc. v. Canada, Investor’s Submission on Place of Arbitration*, dated Apr. 20, 2001 (“*UPS’s Submission on Place of Arbitration*”) at 3, ¶ 12 (arguing, unsuccessfully, that the UNCITRAL paragraph 22 factors were “mainly relevant to the convenience of the physical location of the arbitration”) (see Appendix to Submission on Place of Arbitration, Bifurcation and Filing of a Statement of Defense of Respondent United States of America, dated Nov. 25, 2003 (“U.S. App.”) at Tab 1).

²² Canfor Br. at ¶ 25.

²³ See *Ethyl Decision on Place of Arbitration* at 8, ¶ 33; *UPS Decision on Place of Arbitration* ¶ 15; *ADF Group Inc. v. United States, Procedural Order No. 2 Concerning Place of Arbitration* at 14, ¶ 20 (see Canfor Exs. at Tabs B2, B1 and B4, respectively).

convenient to the Tribunal members than Vancouver. Washington would be slightly more convenient for the Tribunal members than Toronto given the shorter travel time, more frequent flights and lack of immigration formalities between New York and Washington.

Second, Washington, D.C. is not an inconvenient venue for Canfor. Canfor has long been represented by its firm in Washington, Kay Scholer, with respect to the antidumping and countervailing duty determinations that are the subject of this arbitration, and continues to be represented by that firm in several closely-related proceedings under Chapter Nineteen of the NAFTA.²⁴ Moreover, Canfor's President and CEO, David Emerson, as Co-Chair of the B.C. Lumber Trade Council and an active participant in the ongoing softwood negotiations between the United States and Canada, regularly travels to Washington, D.C. for trade talks and other business.

Finally, the realities of governmental decision-making strongly favor Washington over Vancouver or Toronto. Numerous federal agencies, representing various aspects of the United States Government's expertise and policymaking responsibilities, are substantively involved in this arbitration.²⁵ Because only a few of the government officers involved in this arbitration would likely be able to attend proceedings in Vancouver or Toronto given the cost and conflicting demands on their time, designating Vancouver or Toronto as the place of arbitration would significantly hinder the United States' ability to present its case in this matter.

²⁴ See *Ethyl Decision on Place of Arbitration* at 7 (stating that the location of the parties' counsel was a relevant consideration for the convenience of the parties factor) (*see* Canfor Exs. at Tab B2). It is also worth noting that, at least at the time that it served its notice of intent, Canfor was represented in this arbitration by counsel with offices in Washington, D.C. See Canfor's Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter Eleven of the North American Free Trade Agreement, dated Nov. 5, 2001, at 9.

²⁵ In addition to the Department of State, these agencies include Commerce, the ITC, the Office of the United States Trade Representative, the Department of Justice, the Department of the Treasury and the Environmental Protection Agency.

Canfor's only response on this point is that the factor pertains to the physical location of hearings.²⁶ Again, this argument is unsupported by the text of the UNCITRAL Notes and has been rejected by all NAFTA tribunals that have considered the issue. The *Methanex* tribunal, in particular, recognized the convenience of Washington, D.C. "given the manifest involvement of different US governmental departments in the conduct of this arbitration."²⁷ In the end, Washington is considerably less inconvenient to the Tribunal members, the disputing parties and their counsel than Vancouver or Toronto.

C. The Laws On Arbitral Procedure Of The United States And Canada Are Equally Suitable

The United States agrees with Canfor that the factor under paragraph 22 of the UNCITRAL Notes concerning the "suitability of the law on arbitral procedure of the place of arbitration" is a neutral factor.

Unlike investor-State cases brought under the ICSID Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ("ICSID Convention"), arbitral proceedings governed by the UNCITRAL Arbitration Rules are subject to applicable national laws on arbitral procedure. Thus, a party's attempt to seek judicial review of an award in this case would, absent agreement between the parties on a different law, be subject to the law of the place of arbitration.²⁸

The arbitration codes of British Columbia and Ontario are based on the UNCITRAL Model Law on International Commercial Arbitration. In the United States, the Federal Arbitration Act is applicable to the review of Chapter Eleven disputes sited in this country. As the tribunal in *Methanex* correctly concluded, "the two potential places of arbitration [in

²⁶ See Canfor Br. ¶ 23.

²⁷ See *Methanex Decision on Place of Arbitration* at 11, ¶ 29 (see Canfor Exs. at Tab B3).

²⁸ See NAFTA art. 1136(3)(b)(ii).

Canada and the United States] may be considered equally suitable in terms of the law on arbitral procedure and enforcement.”²⁹

The United States notes, however, that two NAFTA Chapter Eleven tribunals have recently expressed doubts as to the suitability of Canada as a place of arbitration in light of an ongoing debate there concerning the applicable standard of review for Chapter Eleven arbitrations.³⁰ In one of those cases, *UPS* (a case in which Canfor’s counsel in this arbitration, Davis & Company, served as claimant’s co-counsel), the claimant argued that the Government of Canada’s submission to the Court of British Columbia in *Metalclad Corp. v. Mexico*, in which it argued that Chapter Eleven arbitrations should not be accorded a high level of judicial deference, “demonstrates an environment that creates uncertainty in arbitration with the prospect of a myriad of legal challenges to tribunal awards.”³¹ The *UPS* tribunal decided on a place of arbitration in Washington, D.C. based on the claimant’s argument.³²

Canfor’s main argument on the “suitability of the law on arbitral procedure” is presented in the form of a chart showing the place of arbitration in fifteen NAFTA Chapter

²⁹ *Methanex Decision on Place of Arbitration* at 10, ¶ 26; accord *Ethyl Decision on Place of Arbitration* at 5 (see Canfor Exs. at Tabs B3 and B2, respectively).

³⁰ See *UPS Decision on Place of Arbitration* at 5, ¶ 11 (stating that it was “troubled” by the Canadian Government’s submission in the *Metalclad* case); *Pope & Talbot, Inc. v. Canada, Ruling Concerning the Investor’s Motion to Change the Place of Arbitration*, dated Mar. 14, 2002 (“*Pope & Talbot Ruling on Motion to Change Place of Arbitration*”) at 8-9, ¶ 20 (stating that it was “also troubled” by the government of Canada’s submissions in both *Metalclad* and *S.D. Myers, Inc. v. Canada*) (see Canfor Exs. at Tab B1 and B5, respectively).

³¹ See *UPS’s Submission on Place of Arbitration* at 6, ¶ 23 (see U.S. App. at Tab 1).

³² The only other factor weighing in favor of a Washington venue was the mere fact that the tribunal had previously suggested to the parties that they consider ICSID as its registry. See *UPS Decision on Place of Arbitration* at 8, ¶ 16 (see Canfor Exs. at Tab B1). Canfor also argues that, because there have been no challenges to NAFTA Chapter Eleven awards in the U.S. courts, it is impossible to say that a Chapter Eleven award would not face similar challenges in the U.S. courts as the awards in *Metalclad* and *S.D. Myers* faced in Canada. See Canfor Br. ¶ 19. This argument stands in sharp contrast to the claimant’s argument in *UPS* that Chapter Eleven awards would be protected by a higher standard of review in the United States than in Canada. See *UPS’s Submission on Place of Arbitration* at 7-8, ¶¶ 28-29 (“This Tribunal should select as a place of arbitration a jurisdiction that is going to limit rather than promote the review of arbitral awards. The United States is such a jurisdiction.”) (see U.S. App. at Tab 1).

Eleven cases.³³ Canfor points out, as supposed proof that Canada and the United States are equally suitable venues for Chapter Eleven arbitrations, that in eight of the fifteen cases the place of arbitration was in Canada.³⁴

Canfor's analysis of its own chart, however, is lacking. Disregarding the cases in which the place of arbitration was agreed to by the disputing parties, the chart actually shows that only four of the fifteen tribunals listed have chosen Canada as the place of arbitration. Two of those four were arbitrations by U.S. investors against Mexico, where Canada was the only neutral national venue that the tribunal could have chosen, and the other two were arbitrations by U.S. investors against Canada involving investments in Canada. Moreover, three of those four decisions were rendered before the Canadian government made its submissions to the Canadian courts concerning the appropriate standard of review for Chapter Eleven awards, and one of those tribunals indicated, based on those submissions, that it might have chosen a forum other than Canada had the case not already proceeded to the merits.³⁵ Most important, however, Canfor's chart also reveals that in *every* case in which U.S. measures were at issue, the tribunal has chosen Washington, D.C. as the place of arbitration.

D. Washington Would Be A Less Costly Venue Than Vancouver Or Toronto

Although there is no material difference between the availability of support services in Washington, D.C. and Vancouver or Toronto, siting the arbitration in Washington would be less costly than siting it in Vancouver or Toronto. Washington would require no travel for the many U.S. government agencies that have interests in this case, and is convenient for two of

³³ See Canfor Br. ¶ 20.

³⁴ See *id.* ¶ 21.

³⁵ See *Pope & Talbot Ruling on Motion to Change Place of Arbitration* at 8-9, ¶ 20 ("This Tribunal is also troubled by the Canadian submissions on reviewability and could have reached the same result [as the *UPS* tribunal] on weighing Canada's suitability were these proceedings just starting.") (see Canfor Exs. at Tab B5).

the arbitrators. It is less costly for Canfor, which has fewer attorneys involved in this case, to travel to Washington. Finally, although ICSID is not administering this arbitration, its facilities at its Centre in Washington are available for use in this arbitration at a rate that is likely more competitive than equivalent facilities in either Vancouver or Toronto.

Canfor again argues that this factor is irrelevant because it pertains solely to the physical location of hearings, and because the Tribunal has retained its own administrative secretary in this matter.³⁶ Canfor's legal argument is without merit for the reasons stated above. With respect to the retention of an administrative secretary, this is only one of many arbitral costs that should be considered in weighing the respective benefits of choosing a place of arbitration. Although by no means a dominant factor, consideration of the potential cost savings that would come from siting the arbitration in Washington weighs in favor of that venue as the place of arbitration.³⁷

E. Both Canada And The United States Are Parties To The New York Convention

It is common ground between the disputing parties that, as both the United States and Canada are parties to the New York Convention, the factor under paragraph 22 of the UNCITRAL Notes concerning whether there is an applicable multilateral or bilateral treaty on enforcement of arbitral awards is neutral.

³⁶ See Canfor Br. ¶ 24.

³⁷ The Tribunal will recall that there was extensive discussion at the October 28 hearing regarding the potential applicability of the seven-percent Canadian Goods and Service Tax ("GST") if this arbitration were sited in Canada. Canfor represented that it would research the issue and inform the Tribunal of its findings. See Transcript of October 28, 2003 Preliminary Hearing ("Hearing Tr.") at 99:21-100:3, 100:23-25, 120:4-10. No such report appears in Canfor's submission, however. If the Canadian GST were to apply to this arbitration, the cost factor would weigh further in favor of Washington, where no similar service tax applies.

F. The Venues Proposed By The Disputing Parties Are Equally Neutral

Canfor's argument that the consideration of neutrality favors Canada is without merit.³⁸ *First*, the disputing parties' agreement to exclude a venue within the territory of Mexico precludes neutrality in this case. As the *Methanex* tribunal noted, where the parties have "limited the choice of place of arbitration . . . to one or the other's state, a neutral national venue is *simply not possible*."³⁹

Second, perceived neutrality is at best a secondary factor in determining the place of arbitration. As noted in *Ethyl*, UNCITRAL eliminated "perception of a place as being neutral" from an earlier draft of the "Notes as being 'unclear, potentially confusing,'" and identified this only as an issue that a tribunal "might wish to discuss . . . with the parties."⁴⁰

To the extent that the Tribunal were to consider neutrality as a factor in this case, it should simply do so as a tie-breaking factor when the other five UNCITRAL factors do not clearly favor one proposed city versus another. For example, in *Ethyl*, where the measure at issue was a Canadian federal action, the tribunal only considered neutrality to choose between two Canadian cities it found to be "no more, and no less, appropriate" than the other "when measured by the other applicable criteria."⁴¹ Thus, as applied to the facts here, neutrality does

³⁸ See Canfor Br. ¶¶ 26-37.

³⁹ *Methanex Decision on Place of Arbitration* at 14, ¶ 36 (emphasis supplied); see also *Ethyl Decision on Place of Arbitration* at 9-10 (noting that the NAFTA Parties contemplated a sovereign party defending itself within its own jurisdiction) (see Canfor Exs. at Tabs B3 and B2, respectively). Notably, in *UPS*, where the disputing parties agreed that the place of arbitration would not be in Mexico, the claimant did not even contend that neutrality was a relevant factor in determining the place of arbitration. See *UPS's Submission on Place of Arbitration* at 3, ¶¶ 12-13 (see U.S. App. at Tab 1).

⁴⁰ *Ethyl Decision on Place of Arbitration* at 3 n.4 (quoting Report of the United Nations Commission on International Trade Law on the work at its twenty-eighth session (Vienna, 2-26 May 1995), U.N. Doc. A/50/17 ¶ 337, reprinted in XXVI UNCITRAL Y.B. (1995)) (see Canfor Exs. at Tab B2).

⁴¹ *Id.* at 10.

not counterbalance the UNCITRAL Notes criteria strongly favoring Washington, D.C. as the place of arbitration.

Third, any concern of neutrality could be addressed by holding the hearings in this case at ICSID's World Bank headquarters. ICSID's facilities are by definition neutral; the Bank is an international organization under the control of no one government. Indeed, ICSID exists specifically to facilitate the settlement of disputes between investors and governments on a non-partisan basis. As the *Methanex* tribunal stated, "the requirements of perceived neutrality in this case will be satisfied by holding such hearings in Washington DC as the seat of the World Bank, as distinct from the seat of the USA's federal government."⁴² Likewise, in *Ethyl*, the tribunal held that "NAFTA's Chapter 11 clearly contemplates the possibility of disputes under it against any NAFTA Party being arbitrated in Washington, DC, since Article 1120 allows a disputing investor to choose arbitration [at ICSID's Centre in Washington]."⁴³

II. THE TRIBUNAL SHOULD DECIDE ITS JURISDICTION AS A PRELIMINARY QUESTION

In its Procedural Order No. 2, the Tribunal ordered the disputing parties to "address in their briefs the issue of whether the arbitral procedure should be bifurcated into two phases (jurisdiction, merits)."⁴⁴ In its Objection to Jurisdiction, dated October 16, 2003, the United States demonstrated why its jurisdictional objection should be addressed as a preliminary matter separate from the merits of the dispute.⁴⁵ The Objection established, among other things, that Article 21(4) of the UNCITRAL Arbitration Rules provides that "[i]n general, the

⁴² *Methanex Decision on Place of Arbitration* at 14-15, ¶ 39 (see Canfor Exs. at Tab B3).

⁴³ *Ethyl Decision on Place of Arbitration* at 3-4 (Canfor Exs. at Tab B2). Notably, the claimant in *UPS*, arguing for Washington as the place of arbitration, noted that "NAFTA Article 1120 permits the parties to use the ICSID, reflecting the intention of the three NAFTA governments that they were amenable to Washington, DC [as] being a neutral place of arbitration." *UPS's Submission on Place of Arbitration* at 9, ¶ 36 (see U.S. App. at Tab 1).

⁴⁴ Procedural Order No. 2, ¶ 7.

⁴⁵ See Objection to Jurisdiction of Respondent United States of America ("Objection to Jurisdiction"), dated Oct. 16, 2003, at 32-34.

arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question.”⁴⁶

It further demonstrated that a separate proceeding on jurisdiction is particularly appropriate where, as here, the objection presents questions of law distinct from the merits.⁴⁷ It showed that Canfor’s claims on the merits involve a fact-intensive inquiry into the complex methodologies Commerce and the ITC used to determine whether and how much subsidization and dumping occurred; in sharp contrast, the determination by the Tribunal as to whether it has jurisdiction presents a straightforward matter of textual interpretation.⁴⁸

Bifurcation, the United States demonstrated, is therefore not only consistent with the governing arbitration rules, it is the most efficient and economical way to proceed in this matter.

In the face of the Tribunal’s order that it address the issue of bifurcation in its submission, Canfor does not dispute that it is appropriate to decide jurisdiction as a preliminary question here. Canfor does not argue, for instance, that any ground exists for joinder of the United States’ objection to the merits on these facts. Nor does it contest that the United States’ objection presents a straightforward legal question that is distinct from the merits. Canfor is silent on the issue of bifurcation for good reason: there is no argument for joinder of the objection to the merits in this case.

⁴⁶ *Id.* at 32.

⁴⁷ *See id.* at 33.

⁴⁸ *See id.*

III. THE TRIBUNAL SHOULD DECIDE THE ISSUE OF BIFURCATION WITHOUT REQUIRING THE UNITED STATES TO ADDRESS THE MERITS IN A STATEMENT OF DEFENSE

It is difficult to understand Canfor's request for a response on the merits from the United States before the Tribunal decides the issue of bifurcation as anything other than an effort to postpone the date of Canfor's counter-memorial on jurisdiction. The United States has already set forth in detail the grounds for its objection to jurisdiction, identified the legal authorities and provided copies of those authorities to Canfor and to the Tribunal. Canfor has in hand all it requires to understand and evaluate that objection. The Tribunal has before it everything it needs to decide whether to treat this objection as a preliminary question or whether to join it to the merits. A statement of defense addressing the merits would shed no light whatsoever on the issue of bifurcation.

Canfor, notably, has failed to provide a single reason why a statement of defense would help the Tribunal determine whether or not to bifurcate the proceedings or, ultimately, whether the United States has consented to arbitrate antidumping and countervailing duty claims under Chapter Eleven of the NAFTA.⁴⁹ Nor has Canfor identified any legal authority requiring – or, for that matter, recommending – the filing of a statement on the merits when no argument or evidence of record suggests even *prima facie* that the respondent agreed to arbitrate the claim.

Canfor's main argument for a statement of defense is that it would “ensure that all jurisdictional issues that the United States intends to raise are articulated now.”⁵⁰ Because the UNCITRAL Arbitration Rules require that objections to jurisdiction be raised “no later than

⁴⁹ Instead, Canfor argues that the United States has had possession of the Statement of Claim for a long time, and makes the vague and conclusory statement that requiring the United States to respond the merits “will allow the issues in the proceeding to be clearly defined.” *See id.* ¶ 52. These arguments are without substance.

⁵⁰ *See id.* ¶ 56.

in the statement of defense,” requiring the submission of that document, Canfor argues, would prevent the United States from continually raising new jurisdictional objections. Canfor contends that its fear of such an event is well founded based on a reservation of rights in the United States’ Objection to Jurisdiction. This argument is without merit.

The only jurisdictional argument the United States is making – and, to be clear, *the only one for which it seeks preliminary treatment* – is the one stated in its Objection to Jurisdiction. In that document, the United States reserved its rights “to contest the merits at a later time should it be necessary, as well as to defend the case on grounds that Canfor has not proven elements of its case that could be considered jurisdictional.”⁵¹ As the United States explained at the October 28 hearing, it made that reservation simply as a precaution against any future argument that it has waived its rights with respect to factual defenses that could be construed to have jurisdictional aspects.⁵² Given that the United States seeks preliminary treatment only for the objection stated in its Objection to Jurisdiction, the question whether any other defense is of a jurisdictional or merits nature is purely academic, as it would in no way affect the shape of these proceedings. Indeed, Canfor offers no explanation of how it would be prejudiced if the United States were to assert such other defenses at any merits phase in this case.

⁵¹ Objection to Jurisdiction at 34.

⁵² See Hearing Tr. at 146:13-147:12 (“[In the United State’s Objection to Jurisdiction,] we reserve only our right to contest the merits at a later time, as well as to defend the case on grounds that Canfor has not proven elements of its case that could be considered jurisdiction. The only objection to jurisdiction we’re making is the objection here. That language was intended to guard against someone arguing, for example, that a defense on the grounds that Canfor has not proved that it is an investor in the United States[,] which could be jurisdictional, whether there is an investment, we would not be precluded from making an argument on those grounds as one example.”) (see U.S. App. at Tab 2).

Finally, Canfor's attempt to distinguish the *UPS* case (in which, as noted, Canfor's counsel in this case served as claimant's co-counsel) is unavailing.⁵³ In that case, the claimant, a U.S. corporation, alleged that the Government of Canada had breached certain obligations under Chapters Eleven and Fifteen of the NAFTA. Canada filed an objection to jurisdiction on the ground that, among other things, portions of UPS's claims on their face fell outside the terms of Chapter Eleven. Canada argued that it should not be compelled to submit a statement of defense until its jurisdictional objection had been addressed.⁵⁴

UPS sought an order from the Tribunal compelling Canada to file a statement of defense. The claimant made many of the same arguments Canfor makes here. As in this case, UPS's main argument for a statement of defense was that, without a statement, Canada could "raise still further jurisdictional objections in its defence."⁵⁵

The *UPS* tribunal rejected the claimant's arguments and determined that Canada's jurisdictional objections should be resolved without requiring the submission of a statement of defense.⁵⁶ The tribunal reasoned that because Canada's jurisdictional objections implicated significant portions of UPS's claims – "more than 100 paragraphs of the [295-paragraph] statement of claim" – considerations of the "practical administration" of the arbitration dictated that Canada's objections should be addressed as a preliminary question.⁵⁷

⁵³ See Canfor Br. ¶ 58.

⁵⁴ *United Parcel Service of America, Inc. v. Government of Canada, Canada's Reply to Investor's Submission on the Filing of the Statement of Defence*, dated May 7, 2001 at 7, ¶ 25 (see U.S. App. at Tab 3).

⁵⁵ See *United Parcel Service of America, Inc. v. Government of Canada, Investor's Submission on the Filing of the Statement of Defence*, dated Apr. 30, 2001, at 3, ¶ 9 (see U.S. App. at Tab 4). As in this case, the claimant also argued that Canada had long been in possession of its statement of claim and suggested that the statement of defense would "assist in defining the issues and identifying the arguments that will be raised by Canada." *Id.* at 1, ¶¶ 3, 4.

⁵⁶ See *United Parcel Service of America, Inc. v. Government of Canada, Decision of the Tribunal on the Filing of a Statement of Defense*, dated Oct. 17, 2001 ("*UPS Decision on the Filing of a Statement of Defense*") at 7, ¶ 20 (see Canfor Exs. at Tab B14).

⁵⁷ *Id.* at 6-7, ¶ 17 and 7, ¶ 20.

Canfor argues that *UPS* is distinguishable from this case because in *UPS* (i) “Canada had launched a vigorous attack on the manner in which UPS had pled its claim” by alleging that some of the paragraphs in the statement of claim were too vague or frivolous to meet the pleading standards of UNCITRAL Article 18; and (ii) unlike *UPS*, the United States has reserved its ability to raise additional jurisdictional arguments.⁵⁸ These arguments are without merit.

In this arbitration, the case for treating the United States’ objection as a preliminary issue and not ordering the submission of a statement of defense at this stage is even more compelling than in *UPS*. Here, the United States contends that *all* of Canfor’s claims – implicating all 152 paragraphs of Canfor’s Statement of Claim – *prima facie* fall outside of Chapter Eleven. Canfor recites only one of Canada’s several jurisdictional arguments made in *UPS* – an objection to the form of pleading that applied only to certain paragraphs of the statement of claim – and fails to explain how it presented a more “vigorous attack” on UPS’s claims than the United States’ more comprehensive jurisdictional objections raised in this case.⁵⁹ Moreover, the United States’ objection involves a more straightforward and discrete textual analysis than in *UPS* that can be resolved quickly and efficiently without having to delve into complex facts. Addressing the United States’ objection as a preliminary issue without requiring a statement of defense would thus aid the “practical administration” of the proceeding to an even greater extent than in *UPS*. Finally, contrary to Canfor’s assertion, as in *UPS*, the United States has confirmed that it has made all the jurisdictional objections that it intends to make.

⁵⁸ Canfor Br. ¶¶ 58-59.

⁵⁹ See *UPS Decision on the Filing of a Statement of Defense* at 4, ¶ 7 (listing Canada’s various objections to jurisdiction, citing last Canada’s allegation that some paragraphs in the statement of claim failed to meet the pleading standards in UNCITRAL Article 18(2)) (see Canfor Exs. at Tab B14).

CONCLUSION

For the foregoing reasons, the United States respectfully submits that the Tribunal should: (i) designate Washington, D.C. as the place of arbitration pursuant to NAFTA Article 1130(b) and Article 16 of the UNCITRAL Arbitration Rules; and (ii) decide its own jurisdiction in this matter as a preliminary question (iii) without requiring the United States at this time to address the merits in a statement of defense.

Respectfully submitted,

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