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.

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

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CONTENTS

ARGUMENT 1

I. THE UNCITRAL NOTES FACTORS ARE RELEVANT AND WEIGH IN FAVOR OF WASHINGTON AS THE PLACE OF ARBITRATION 1

A. The Subject-Matter In Dispute Is Located In Washington, Not British Columbia 2

B. Cost And Convenience Favor Washington Over Vancouver Or Toronto 5

C. The Venues Proposed By The Disputing Parties Are Equally Neutral 6

II. THE TRIBUNAL SHOULD DECIDE ITS JURISDICTION AS A PRELIMINARY QUESTION 8

III. THE TRIBUNAL SHOULD DECIDE THE ISSUE OF BIFURCATION WITHOUT REQUIRING THE UNITED STATES TO ADDRESS THE MERITS IN A STATEMENT OF DEFENSE 9

CONCLUSION 11

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In accordance with Procedural Order No. 2, dated November 3, 2003, respondent United States of America respectfully submits this rejoinder 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.

ARGUMENT

I. THE UNCITRAL NOTES FACTORS ARE RELEVANT AND WEIGH IN FAVOR OF WASHINGTON AS THE PLACE OF ARBITRATION

Canfor errs in contending that the factors in Paragraph 22 of the UNCITRAL Notes are not relevant to determining the place of arbitration in cases governed by the UNCITRAL Arbitration Rules. As the United States demonstrated in its opening submission, the factors listed in Paragraph 22, by their plain language, address the legal seat of the arbitration, not the physical location of hearings. The United States' opening submission also established that

every NAFTA tribunal under the UNCITRAL Rules to address the question applied the UNCITRAL Notes factors to determine the place of arbitration. Each such tribunal weighed *all* of the Notes factors, not just the few that Canfor acknowledges pertain to the legal seat rather than the location of hearings. It is noteworthy that the members of the tribunals subscribing to this view include recognized arbitration experts such as Professor Dr. Karl-Heinz Bockstiegel, Judge Charles Brower, L. Yves Fortier QC, Justice Kenneth Keith, Marc Lalonde, William Rowley QC, and V.V. Veeder QC, among many others.

Canfor fails to address these authorities or provide any authority to the contrary. Instead, it conclusorily asserts that the Tribunal should ignore the UNCITRAL Notes factors that so plainly weigh in favor of Washington. Its novel and unsupported approach is without merit. And, as shown below, the other arguments raised in Canfor's recent submission are equally unfounded.

A. The Subject-Matter In Dispute Is Located In Washington, Not British Columbia

Canfor errs in asserting that the subject-matter of this dispute concerns the "conduct of Canadian softwood lumber producers in British Columbia," and that the dispute has a stronger connection with Vancouver than with Washington because the measures at issue injured Canfor's operations there.[1] *First*, the subject-matter of the dispute is clearly centered in Washington, not British Columbia. The tribunal in *ADF Group Inc. v. United States* defined the "subject-matter of the dispute" as "the issue presented for consideration; the thing in which [or in respect of which] a right or duty has been asserted."[2] In this case, Canfor alleges

[1] *See* Investor's Reply Submission on Place of Arbitration and Request that the United States Provide a Statement of Defence ("Canfor Reply") ¶¶ 17-25 (Dec. 3, 2003) (emphasis removed). Canfor does not suggest that the subject-matter of the dispute has any connection with its other proposed venue, Toronto. *See id.*

[2] *ADF Group Inc. v. United States*, ICSID Case No. ARB(AF)/00/1, Procedural Order No. 2 Concerning Place of Arbitration ("*ADF Decision on Place of Arbitration*") ¶ 20 (July 11, 2002) (quoting Black's Law Dictionary at

that the antidumping and countervailing duty investigations conducted by the Department of Commerce and the International Trade Commission violated Section A of NAFTA Chapter Eleven.[3] The "issue presented for consideration" here is therefore the conduct of those agencies in undertaking those investigations and adopting the relevant measures, not the conduct of softwood lumber companies in British Columbia.

Second, Canfor's contention that its British Columbia operations are relevant to the determination of the place of arbitration because they are "highly integrated" with its U.S. investments is refuted by the plain text of the NAFTA.[4] A claimant may submit a claim to investor-State arbitration under NAFTA Chapter Eleven only for breaches of obligations contained in Section A of that chapter.[5] The provisions of Section A are all obligations pertaining to investments, as Chapter Eleven itself is concerned solely with investments. Canfor alleges breaches of four provisions of Chapter Eleven: Articles 1102, 1103, 1105(1) and 1110.[6] The obligations contained in Articles 1105 and 1110 solely address treatment of an investor's *investment*. Articles 1102 and 1103 apply to the treatment of both investors and their investments. While Canfor may claim that it has been denied national treatment or most-favored nation treatment under those provisions, it may do so only if it can demonstrate

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1439 (7th ed., 1999)) (Investor's Authorities on Place of Arbitration and Request that the United States Provide a Statement of Defence ("Canfor Exhibits") tab B4).

[3] Canfor Notice of Arbitration and Statement of Claim ("Statement of Claim" or "Statement") ¶ 19 (July 9, 2002) ("Canfor brings this claim in connection with the Government of the United States' violations of NAFTA Articles 1102, 1103, 1105 and 1110 arising out of and in connection with the conduct of the Government of the United States, including the DOC and ITC, in relation to the investigations [which resulted in the antidumping and countervailing duty determinations at issue]"); *see also* Objection to Jurisdiction of Respondent United States, dated Oct. 16, 2003 at 13-14.

[4] *See* Canfor Reply ¶ 23.

[5] *See* NAFTA art. 1116(1) (limiting claims to those that the respondent has breached Section A "and that the investor has incurred loss or damage by reason of, or arising out of, *that breach*") (emphasis added). Claims may also be submitted for breaches of certain provisions of Chapter Fifteen of the NAFTA (which themselves require a breach of Section A of Chapter Eleven), but those provisions are not at issue here.

[6] *See* Statement ¶ 19.

that it has been accorded less favorable treatment *with respect to its U.S. investments*.[7] Any consideration of the effects of the measures, therefore, necessarily points to a U.S. venue.

Finally, Canfor can point to no Chapter Eleven tribunal that has ever considered the extraterritorial effects of measures to be relevant to determining the place of arbitration. In the three cases discussed by Canfor, *Methanex Corp. v. United States*, *Ethyl Corp. v. Canada* and *ADF Group Inc. v. United States*, the claimants all alleged, as Canfor does here, that certain measures enacted by a NAFTA Party deprived them of a valuable export market.[8] In all three cases, the tribunal determined that the subject-matter of the dispute was centered in the jurisdiction where the measures were adopted.[9] In fact, in *Ethyl*, this was the decisive factor favoring an arbitration site in Canada.[10] And in *Methanex*, the tribunal expressly rejected the claimant's argument that the subject-matter of the dispute was in Vancouver where its losses allegedly occurred, stating that "[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*."[11] Canfor's argument that these cases support the opposite conclusion is unsustainable.

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[7] *See* NAFTA art. 1102(1) ("Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors *with respect to* the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.") (emphasis added).

[8] In *Methanex*, the claimant alleged claims in respect of California's ban of the gasoline additive MTBE. In *Ethyl*, the claimant challenged a Canadian federal statute banning imports of the gasoline additive MMT. And in *ADF*, the claimant alleged injuries arising from the federal Surface Transportation Assistance Act of 1982 and the Department of Transportation's implementing regulations, which require that federally-funded state highway projects use only steel that is produced and fabricated in the United States.

[9] *See Methanex Corp. v. United States, The Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of Arbitration* ("*Methanex Decision on Place of Arbitration*") ¶ 42 (Dec. 31, 2000) (Canfor Exhibits tab B3); *Ethyl Corp. v. Canada, Decision Regarding the Place of Arbitration* ("*Ethyl Decision on Place of Arbitration*") at 10 (Nov. 28, 1997) (Canfor Exhibits tab B2); *United Parcel Service of America, Inc. v. Canada, Decision of the Tribunal on the Place of Arbitration* ("*UPS Decision on Place of Arbitration*") ¶ 19 (Oct. 17, 2001) (Canfor Exhibits tab B1).

[10] *See Ethyl Decision on Place of Arbitration* at 8 (Canfor Exhibits tab B2).

[11] *Methanex Decision on Place of Arbitration* ¶ 33 (emphasis added) (Canfor Exhibits tab B3); *see also id.* ¶¶ 11, 33 ("[The claimant alleges that the subject-matter of the dispute is in Canada because its] real loss is being

B. Cost And Convenience Favor Washington Over Vancouver Or Toronto

Canfor's arguments in its reply submission concerning the relative cost and convenience of the proposed venues are without merit. *First*, Canfor's contention that the Tribunal should disregard the United States' cost and inconvenience of traveling to Vancouver or Toronto because the United States has no problem participating in WTO proceedings in Switzerland is baseless.[12] There is no provision in the WTO agreements permitting the Dispute Settlement Body to choose a place of arbitration other than Geneva. Moreover, the United States maintains a permanent office in Geneva that is specifically staffed and equipped to support proceedings before the WTO. The United States has no similar facilities in Vancouver or Toronto, only consulates. As the *Ethyl* tribunal found, "the availability for temporary use by government lawyers of facilities at a consular post or diplomatic mission is not comparable to a dedicated office of counsel."[13]

Second, Canfor's claim that the British Columbia International Commercial Arbitration Centre in Vancouver offers facilities comparable to those at ICSID for as competitive a rate is unsupported. Canfor merely provides general cost-of-living statistics showing that Vancouver is a less expensive city to live in than Washington.[14] In any event, even if there were some marginal cost advantage in using the facilities suggested by Canfor, it would be far outweighed by the cost and inconvenience of transporting the three tribunal members, the administrative secretary and the U.S. government attorneys and officers to Vancouver.

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suffered at the headquarters . . . in Vancouver. . . . In the Tribunal's view, the subject-matter of the dispute is not located in Canada.").

[12] *See* Canfor Reply ¶ 11.

[13] *Ethyl Decision* at 7 (Canfor Exhibits at B2). By contrast, Canfor's counsel in the Chapter Nineteen proceedings has an office in Washington that is presumably available for use in this case.

[14] Canfor Reply ¶ 15, n.8.

Finally, Canfor's contention that the proximity of evidence points to Canada because the relevant documentary evidence is "substantially taken from the Canadian operations of companies such as Canfor" is unavailing.[15] The principal documentary evidence in this matter consists of the administrative records of the antidumping and countervailing duty proceedings in Washington. It would be senseless – if not impossible – to reassemble that same information from the hundreds of softwood lumber producers subject to the investigations.[16] Moreover, Canfor does not dispute that witnesses who may be required to testify in person likely reside in Washington. Thus, as a practical matter, the documentary and other evidence in this case is located almost entirely in Washington.

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

Canfor's reassertion in its reply submission that neutrality should be the "critical factor" in the Tribunal's determination of the place of arbitration is unpersuasive.[17] *First*, the intentional exclusion of neutrality as a factor in Paragraph 22 of the UNCITRAL Notes, Chapter Eleven's limitation of the place of arbitration to one of the three NAFTA Parties and the fact that the disputing parties further limited the place of arbitration to the United States or Canada all suggest that neutrality is not an important factor either in Chapter Eleven arbitrations generally or in this arbitration specifically.[18] Canfor fails to address this point, apart from acknowledging that "complete neutrality cannot be achieved" in this case.[19]

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[15] *See id.* ¶ 19.

[16] With respect to the countervailing duty determinations at issue, a "country-wide" subsidy rate was calculated based on aggregate information provided by Canadian federal and provincial governments that was derived from hundreds of producers. *See* Statement ¶¶ 92, 137-39.

[17] Canfor Reply ¶ 8.

[18] *See Methanex Decision on Place of Arbitration* ¶ 36 ("[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

Second, the tribunal in *ADF* found that Washington *was* a neutral forum despite the fact that the claimant in that case was challenging federal laws and regulations enacted in Washington (the Surface Transportation Assistance Act of 1982 and the Department of Transportation's implementing regulations).[20] Thus, Canfor's suggestion that there is an established practice in Chapter Eleven arbitrations against siting arbitrations in the jurisdiction that enacted the measures at issue is without support.

Third, Canfor misconstrues the *Methanex* case.[21] That case does not stand for the proposition, as Canfor contends, that neutrality "can be satisfied by avoiding the jurisdiction responsible for the measures in question."[22] Rather, the *Methanex* tribunal sited the arbitration in the United States in part *because* it was the jurisdiction where the measures at issue were enacted.[23]

Finally, *Methanex* involved a Canadian company challenging the State of California's adoption of measures banning the use in California of MTBE, a gasoline additive that was found to be contaminating California's drinking water. The claim drew considerable attention from environmentalists and others in California. In contrast, the antidumping and countervailing duty determinations at issue, which impose duties on Canadian softwood

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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 it was not so desired by the parties to this arbitration*.") (emphasis added) (Canfor Exhibits tab B3).

[19] Canfor Reply ¶ 27.

[20] *ADF Decision on Place of Arbitration* ¶ 20 (Canfor Exhibits tab B4).

[21] *See* Canfor Reply ¶ 28.

[22] *Id.* ¶ 27.

[23] *See Methanex Decision on Place of Arbitration* ¶ 33 (Canfor Exhibits tab B3). Although the tribunal, in *dicta*, indicated that the place of arbitration should not be in California, neither disputing party had actually requested California as the place of arbitration. *See id.* ¶ 25.

lumber imports at the U.S.-Canadian border, do not have the same direct impact on the Washington area populace and have not generated the same local attention.

In British Columbia and Ontario, on the other hand, the softwood lumber issue is an important local issue. The softwood lumber industry is a major source of income and jobs in these areas. British Columbia attributes its recent economic troubles primarily to the very measures at issue in this case. As Canfor itself has acknowledged, "[g]iven the importance of the [softwood lumber] issue within Canada . . . *one would be hard pressed to find a qualified Canadian who had not made some comment"* about the softwood lumber dispute.[24] Thus, to the extent that neutrality should be weighed at all, it should hardly be considered a factor weighing in favor of Vancouver or Toronto.

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

The United States demonstrated in its November 25 submission (and its October 16 Objection to Jurisdiction) that bifurcation of these proceedings is not only consistent with the governing arbitration rules, it is the most efficient and economical way to proceed. The jurisdictional question, we noted, presents a straightforward legal issue that can be addressed without delving into the complex factual issues in this arbitration. Canfor does not take issue with this argument. To the contrary, Canfor concurs that "the analysis that will be required to adjudicate Canfor's claim for damages is anything but straightforward and discrete. Instead, in order to resolve Canfor's claim it will indeed be necessary to delve into complex facts."[25]

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[24] *See* Letter from Counsel to Canfor to the Secretary General of ICSID at 3 (Mar. 24, 2003), appended hereto at tab 1.

[25] Canfor Reply ¶ 44 (internal quotations removed).

Canfor's refusal to address the issue of bifurcation, even after the Tribunal's November 26 communication requesting it to do so, confirms that there is no meritorious argument against bifurcation here.

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

Canfor fails to support its argument that there is a "consistent practice" in Chapter Eleven arbitrations to provide a statement of defense before the tribunal addresses bifurcation. *First*, such an argument is not supported by the arbitration rules selected by Canfor to govern this case.[26] Article 21 of the UNCITRAL Rules specifically contemplates that such an objection be made "*no later* than in the statement of defence," and that it should be addressed "as a preliminary question."[27]

Second, Canfor has not established that the timing of the submission of a statement of defense was *contested* in any of the cases it cites.[28] For example, in *Methanex*, the United States consented to submit a statement of defense before the tribunal addressed the jurisdictional objections. In *International Thunderbird Gaming Corp. v. Mexico* as well, the parties consented to the timing of the submission of a statement of defense. In that case, the claimant did not consider the statement of defense useful to the issues of bifurcation or the tribunal's jurisdiction; rather, it considered the statement of defense a "perfunctory document" that "says no more than 'no, no, no, and we don't think so.'"[29] In the only NAFTA Chapter

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[26] Canfor Reply ¶ 36.

[27] UNCITRAL Arbitration Rules art. 21(3), (4) (emphasis added).

[28] Counsel for the United States is not aware of any case in which the timing of the submission of a statement of defense was contested, but has not conducted a comprehensive review of all cases.

[29] *International Thunderbird Gaming Corp. v. Mexico*, Transcript of April 29, 2003 Hearing, at 93-94 ("[I]n my experience, which involves some dozen NAFTA disputes at this point, I have yet to see a case where the

Eleven decision of record in which the timing of the submission of a statement of defense *was* clearly put in issue, the tribunal denied the claimant's request for a statement of defense and proceeded directly to decide the jurisdictional objection as a preliminary issue.[30]

To be clear, the United States believes that a statement of defense would be of no use to either the Tribunal's determination of its objection to jurisdiction or its decision whether to bifurcate in the first place. As the Tribunal is aware, in its objection, the United States argues that it did not consent to arbitrate under Chapter Eleven the *type* of claim asserted by Canfor in this case. All that is needed to decide this issue is Canfor's Statement of Claim, a copy of the NAFTA and the United States' objection. Nothing the United States might include in a statement of defense would change in any way the *type* of claim asserted by Canfor, or help the Tribunal determine the nature of that claim.

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statement of claim or the statement of defense were more than perfunctory documents.") (statement of claimant's counsel) (internal punctuation added), appended hereto at tab 2.

[30] *See United Parcel Service of America, Inc. v. Government of Canada, Decision of the Tribunal on the Filing of a Statement of Defense* ¶ 20 (Oct. 17, 2001) (Canfor Exhibits 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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