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UNDER CHAPTER ELEVEN OF THE NAFTA  
AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

MERRILL & RING FORESTRY L.P.

Claimant/Investor

AND

GOVERNMENT OF CANADA

Respondent/Party

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WRITTEN SUBMISSION OF CANADA ON THE  
PLACE OF ARBITRATION, CONFIDENTIALITY, BIFURCATION OF  
PRELIMINARY OBJECTIONS AND SCHEDULE

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November 9, 2007

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## INTRODUCTION

1. The following submissions address outstanding procedural issues to be considered by the Tribunal on November 15, 2007.
2. Canada's position on these procedural issues is that:
  - the place of arbitration should be Ottawa, Ontario or Vancouver, British Columbia;
  - the confidentiality order should not qualify Canada's domestic disclosure obligations;
  - decisions on document production should be made on a case by case basis, taking into account applicable privileges;
  - the *IBA Rules on the Taking of Evidence* (IBA Rules) should be used as guidelines for evidentiary matters except Article 3.12 of the IBA Rules; and
  - the Tribunal should consider Canada's jurisdictional objections as a preliminary question in a bifurcated hearing.

### A. PLACE OF ARBITRATION

3. The disputing parties disagree on the appropriate place of arbitration in these proceedings. The Claimant suggests that Washington, D.C. should be named the place of arbitration. Canada suggests that Vancouver, British Columbia or Ottawa, Ontario should be the place of arbitration.
4. The Tribunal has discretion to name the place of arbitration when disputing parties disagree on the place of arbitration.<sup>1</sup>
5. The facts of this case and the applicable law weigh heavily in favour of Ottawa or Vancouver as the appropriate place of arbitration. The Claimant is a State of Washington partnership that has invested in timberlands in coastal British Columbia. It challenges Canadian federal measures governing log exports from British Columbia, in particular

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<sup>1</sup> NAFTA Article 1130 and Article 16(1) of the UNCITRAL Arbitration Rules.

Notice to Exporters Serial No. 102 (Notice 102).<sup>2</sup> Evidence relating to the Claim will be found primarily in Ottawa and secondarily in Vancouver.

6. None of the facts connect the Claim to Washington, D.C. and application of the relevant legal test could not reasonably result in Washington, D.C. as the place of arbitration.

### **1. Applicable Legal Test**

7. Determination of a place of arbitration must be made in accordance with the applicable provisions of NAFTA and the UNCITRAL Arbitration Rules and should take into account NAFTA Chapter 11 arbitral practice.

8. Article 1130 of NAFTA is entitled “Place of Arbitration.” It stipulates as follows:

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, 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.

9. Article 16 of the UNCITRAL Arbitration Rules governs selection of a place of arbitration in UNCITRAL cases. Article 16 is also entitled “Place of Arbitration.” It provides:

- (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.

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<sup>2</sup> Notice 102 (Tab 1).

(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.

10. Additionally, Tribunals applying the UNCITRAL Arbitration Rules have referred to the UNCITRAL Notes on Organising Arbitral Proceedings (UNCITRAL Notes).<sup>3</sup>

While the UNCITRAL Notes are not binding,<sup>4</sup> NAFTA Chapter 11 Tribunals generally have applied the criteria in the UNCITRAL Notes to determine the place of arbitration.<sup>5</sup>

11. Articles 21 to 23 of the UNCITRAL Notes provide the following guidance on determining the place of arbitration:

(a) Determination of the place of arbitration, if not already agreed upon by the parties

21. Arbitration rules usually allow the parties to agree on the place of arbitration, subject to the requirement of some arbitral institutions that arbitrations under their rules be conducted at a particular place, usually the location of the institution. If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make that determination, it may wish to hear the views of the parties before doing so.

22. 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

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<sup>3</sup> The UNCITRAL Notes are found at <http://www.uncitral.org/pdf/english/texts/arbitration/arb-notes/arb-notes-e.pdf>

<sup>4</sup> Articles 2 & 3 of the UNCITRAL Notes express the non-binding character of the Notes.

<sup>5</sup> See, for example; *Ethyl Corp. v. Canada*, Decision Regarding the Place of Arbitration (UNCITRAL) November 28, 1997 (Tab 2) (*Ethyl*); *Pope & Talbot, Inc. v. Canada*, Minutes of Procedural Meeting (UNCITRAL) October 29, 1999 (Tab 3) (*Pope*); *ADF Group Inc. v. United States*, Procedural Order No. 2 Concerning the Place of Arbitration (ICSID ARB(AF)/00/1) July 11, 2001 (Tab 4) (*ADF*); *United Parcel Service of America Inc. v. Canada*, Decision of the Tribunal on the Place of Arbitration (UNCITRAL) October 17, 2001 (Tab 5) (*UPS*); *Canfor Corp. v. United States*, Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings (UNCITRAL) January 23, 2004 (Tab 6) (*Canfor*); *Methanex Corp. v. United States*, The Written Reasons for the Tribunal's Decision of 7<sup>th</sup> September 2000 on the Place of Arbitration (UNCITRAL) December 31, 2000 (Tab 7) (*Methanex*).

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.

(b) Possibility of meetings outside the place of arbitration

23. Many sets of arbitration rules and laws on arbitral procedure expressly allow the arbitral tribunal to hold meetings elsewhere than at the place of arbitration. For example, under the UNCITRAL Model Law on International Commercial Arbitration "the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents" (article 20(2)). The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical.

12. Canada submits that applying the factors in Article 22 of the UNCITRAL Notes to this arbitration results in Ottawa or Vancouver as the place of arbitration. Each of these factors are considered in turn.

**a) Suitability of the law on arbitral procedure of the place of arbitration**

13. The first factor is suitability of the law on arbitral procedure of the place of arbitration. Suitability in this context relates to various facets of the arbitral law. As noted in *ADF*:

...the 'suitability' in international arbitration of the law on arbitral procedure of a suggested place of arbitration has multiple dimensions. These dimensions include the extent to which the law, e.g. protects the integrity of and gives effect to the parties' arbitration agreement; accords broad discretion to the parties and to the arbitrators they choose to determine and control the conduct of the arbitration proceedings; provides for the availability of interim measures of protection and of means of compelling the production of documents and other evidence and the attendance of reluctant witnesses; consistently recognizes and enforces, in accordance with the terms of widely accepted international conventions, international arbitral awards when rendered; insists on principled restraint in establishing grounds for reviewing and setting aside international arbitral awards, and so on.<sup>6</sup>

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<sup>6</sup> *ADF* (Tab 4) at ¶ 10.

14. In Canada, the *Commercial Arbitration Act*<sup>7</sup> (*CAA*) implements at the Canadian federal level the Model Law on International Commercial Arbitration adopted by UNCITRAL on June 21, 1985. The Model Law was designed to promote the efficient functioning of international commercial arbitrations.<sup>8</sup> The *CAA* and the Commercial Arbitration Code address all the facets of arbitral law referred to by the *ADF* Tribunal. Canada therefore has an effective legal regime governing arbitral procedure in support of NAFTA Chapter 11 proceedings. This regime would apply if Ottawa or Vancouver were the place of arbitration in this case.

15. Several tribunals have examined the relative suitability of arbitral laws in Canada and the United States and have concluded that they have equally suitable laws on arbitral procedure.<sup>9</sup> As a result, this criteria is not determinative with respect to the place of arbitration in this case.

#### **b) Treaty Governing Enforcement of Arbitral Awards**

16. The second factor in selecting a place of arbitration is whether there is a treaty in effect governing “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.” Both Canada and the United States are party to the New York Convention (*Convention on the Recognition and Enforcement of Foreign Arbitral Awards*) which would apply to enforcement of an award issued in this case. Hence this factor does not favour any of the places suggested.

#### **c) Convenience of the Parties and the Arbitrators**

17. The third factor considers the convenience of the parties and the arbitrators, including travel distances. In this case, the Claimant is a limited partnership established under the laws of the State of Washington with its head office in Port Angeles,

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<sup>7</sup> R.S.C. 1985, c. 17 (2<sup>nd</sup> Supp.), s.5 (Tab 8).

<sup>8</sup> Section 5 of the *CAA* makes the Commercial Arbitration Code applicable to NAFTA Chapter 11 investor-State disputes to which Canada is a disputing party.

<sup>9</sup> Tribunals in *Ethyl* (Tab 2) at p. 5, *ADF* (Tab 4) at ¶ 16, *Canfor* (Tab 6) at ¶ 24-5 and *Methanex* (Tab 7) at ¶¶ 15-18 have concluded that Canada and the United States possess equally suitable laws on arbitral procedure.



Washington. Officers of the Claimant are located in the State of Washington, and hence Vancouver would be the closest and most convenient location for them.<sup>10</sup> The Claimant's logging operations are in coastal British Columbia,<sup>11</sup> again dictating Vancouver as the most convenient location for employees operating the investment. The service address of counsel for the Claimant is Toronto, Ontario, which has direct flights to Vancouver, Ottawa and Washington, D.C.

18. Officers of the Respondent, including potential witnesses, and counsel for the Respondent, are based in Ottawa, Ontario, hence Ottawa would be most convenient for them.<sup>12</sup> There are direct air flights to both Vancouver and Washington, D.C. from Ottawa, making either of these locations equally convenient for the Respondent if Ottawa is not the place of arbitration.

19. The Tribunal members are based in Santiago, Chile (Chair Orrego Vicuña), Chicago (Member Dam) and Toronto and London (Member Rowley). Each of these locations has convenient flights to Vancouver, Washington, D.C. and Ottawa, including direct flights to those cities from Chicago or Toronto. Given these diverse locations, the Tribunal members will have to fly to any of the possible places of arbitration, and hence this factor does not assist significantly in determination of the place of arbitration.

#### **d) Support Services**

20. The fourth factor considers the availability and cost of support services. The availability and cost of support services in Vancouver, Ottawa and Washington D.C. are roughly equivalent.

21. In any event, this factor is not determinative in this case as the arbitration is being administered by ICSID and Canada is willing to agree to the Claimant's request that hearings be held in Washington, D.C. without prejudice to the determination of the place of arbitration.

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<sup>10</sup> Statement of Claim (Claim) at ¶¶ 2-3.

<sup>11</sup> Claim at ¶ 16.

<sup>12</sup> Statement of Defence (Defence) at ¶ 29.

**e) Location of Subject-Matter in Dispute and Proximity of Evidence**

22. The final factor is the location of the subject-matter in dispute and proximity of the evidence. This factor decisively favours Ottawa, and secondarily Vancouver, as the place of arbitration.

23. The subject-matter of the dispute refers to the measure taken.<sup>13</sup> The measure at issue concerns the export of logs harvested from land in British Columbia. It is outlined in Notice 102, issued by the Canadian Department of Foreign Affairs and International Trade (DFAIT) in Ottawa. Merrill & Ring's forestry land in British Columbia is private land granted before March 1906.<sup>14</sup> As such, the timber harvested from that land is subject to the federal regime established in Notice 102.<sup>15</sup>

24. Notice 102 is issued under the *Export and Import Permits Act (EIPA)*. It establishes a surplus test intended to ensure the adequate supply and distribution of timber harvested from British Columbia's forests. Under the surplus test, those wishing to export logs harvested on federal land must submit an application to DFAIT in Ottawa and advertise on the federal bi-weekly list. All offers received in response to the advertisement are referred to the Federal Timber Export Advisory Committee (FTEAC). The FTEAC is composed of British Columbia forestry industry representatives and an Ottawa-based federal representative. FTEAC determines whether offers received reflect domestic fair market value of the logs. The responsible federal Minister in Ottawa considers the recommendation of DFAIT in determining whether to issue an export permit.<sup>16</sup>

25. Notice 102 is administered by Canadian federal government officers who live and work in Ottawa. Decisions relative to that regime are taken by Ottawa-based officials, by

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<sup>13</sup> *Ethyl* (Tab 2) at p. 8; *ADF* (Tab 4) at ¶ 20; *Canfor* (Tab 6) at ¶¶ 34-36; *Methanex* (Tab 7) at ¶ 33.

<sup>14</sup> Claim at ¶ 16.

<sup>15</sup> Defence at ¶ 14.

<sup>16</sup> Defence at ¶¶ 29-41 & Notice 102 (Tab 1).

members of the FTEAC, who are based in British Columbia and Ottawa, and by the responsible federal Minister who is also based in Ottawa.<sup>17</sup>

26. The alleged investments at issue are timber lands and timber grown in the province of British Columbia, and intangible rights to the fair market value of this timber when sold on the export market.<sup>18</sup>

27. To the extent that any provincial measures are challenged,<sup>19</sup> they involve the British Columbia *Forest Act* and the British Columbia Ministry of Forests and Range, a provincial government department. This Ministry is located in British Columbia, with regional offices throughout the province.<sup>20</sup>

28. The *Ethyl* Tribunal's analysis of the subject-matter of a dispute is instructive. In *Ethyl*, the Tribunal was asked to decide whether Ottawa, Toronto or New York City should be the place of arbitration. The Claimant alleged that Canadian federal legislation removing additives from gasoline breached NAFTA Chapter 11. The *Ethyl* Tribunal named Toronto as the place of arbitration, finding that the location of the subject-matter in dispute was "not subject to serious debate" and was "clearly" Canada.<sup>21</sup>

29. The *ADF* Tribunal analyzed subject-matter of the dispute in the same manner as *Ethyl*, stating that:

...the "subject-matter" of the present dispute may be seen to refer to, essentially, the claims made by the Claimant about the consistency or lack of consistency of certain measures (or applications thereof) taken by the Respondent United States with certain provisions of Chapter Eleven of the NAFTA. To the extent that such claims can be regarded as having a "location" or situs anywhere, we consider that those claims may, for purposes of determining an appropriate place of arbitration, be deemed to be located in the place where the United States authorities, to whom they are addressed, are based. We do not imply that that is the only

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<sup>17</sup> Claim at ¶ 24; Defence at ¶¶ 29, 38-41.

<sup>18</sup> Claim at ¶¶ 17-30.

<sup>19</sup> It is unclear whether the B.C. *Forest Act* is a measure challenged in this arbitration or simply part of the context. Canada has asked for clarification of this and, to the extent it is a measure pleaded, has objected to it as time-barred and not related *Merrill & Ring*: Defence at ¶¶ 58-61.

<sup>20</sup> Defence at Tab 7.

<sup>21</sup> *Ethyl* (Tab 2) at pp. 5, 8.

place in which those claims can be deemed to be located for present or related purposes. But the location of the official addressees of the claims appear to us as a sufficiently real and substantial basis.<sup>22</sup>

30. The Tribunal in *Canfor* also found that the “subject-matter” referred to the measures taken.<sup>23</sup> It noted:

The Tribunal considers that the subject matter, independently from the proximity of evidence, does not, in this arbitration, relate to the Claimant’s conduct in British Columbia. It rather relates to the Respondent’s measures determining the Claimant’s softwood lumber importations into the United States as subsidized or dumped, which are alleged by the Claimant to have affected its investments in the United States and breached Chapter Eleven of the NAFTA.<sup>24</sup>

31. Applying the reasoning in *Ethyl*, *ADF* and *Canfor* clearly demonstrates that the location of the subject-matter of this dispute is in Canada.

32. Similarly, the proximity of the evidence suggests Ottawa or Vancouver are the most appropriate places of arbitration.

33. The breach alleged occurred either in British Columbia or in Ottawa. Similarly, the damage allegedly sustained occurred in British Columbia, where the Claimant has its timber and from which it seeks to export harvested timber.

34. The property in question is located in British Columbia, a factor which weighs in favour of Vancouver as a more appropriate location than the United States.

35. Relevant evidence in this matter will be predominantly from individuals based in British Columbia or Ottawa who can testify about the log export scheme applied to timber grown in and exported from British Columbia. Evidence concerning the operation of the log export regime will be predominantly from federal government officers based in Ottawa and from users of the scheme in British Columbia. The British Columbia Ministry

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<sup>22</sup> *ADF* (Tab 4) at ¶ 20.

<sup>23</sup> *Canfor* (Tab 6) at ¶ 34; see also, *Methanex* (Tab 7) at ¶ 33.

<sup>24</sup> *Canfor* (Tab 6) at ¶ 35.

of Forests and Range and the BCTS may also have relevant evidence, which will be located in British Columbia. Again, no relevant evidence in this arbitration is found in Washington, D.C.

36. In short, the subject-matter of the arbitration has absolutely no connection to Washington, D.C. and no evidence is proximate to Washington, D.C. Application of the test for determining a place of arbitration mandated by NAFTA and the UNCITRAL Arbitration Rules leads primarily to naming Ottawa, and secondarily to Vancouver, as the place of arbitration.

## **2. Consideration of Neutrality**

37. Neutrality of the place of arbitration is not listed in the UNCITRAL Notes as a criteria for determining place of arbitration. However, it has been considered by two NAFTA Tribunals.<sup>25</sup>

38. If this Tribunal considers neutrality to be a relevant consideration, it will weigh in favour of selecting Vancouver as the place of arbitration. Washington, D.C. and Ottawa are capital cities of the Claimant and Respondent respectively, and are equally “non-neutral” locations.

39. The fact that Washington, D.C. is the seat of ICSID does not change the fact that Washington is the capital of the Claimants’ home State and therefore lacks neutrality in the same way as Ottawa might be perceived as lacking neutrality. Vancouver is not a capital city of either the Claimant or the Respondent, and is the only suggested location that poses no concerns about neutrality.

40. In any event, Tribunals in cases against the United States have not hesitated to name Washington, D.C. as the place of arbitration. This Tribunal should not be concerned about neutrality if it names Ottawa as the place of this arbitration.

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<sup>25</sup> *Feldman v. Mexico*, Procedural Order No. 1 Concerning the Place of Arbitration (ICSID ARB(AF) 99/1) April 3, 2000 (Tab 9) (*Feldman*); *Waste Management, Inc. v. Mexico*, Decision on Venue of the Arbitration (ICSID ARB(AF)/00/3) September 26, 2001 (Tab 10) at ¶¶ 20-23 (*Waste Management II*).

### 3. Relevance of Location of Hearings

41. Determination of the place of arbitration is separate and distinct from determination of the location(s) of hearings.
42. Canada is agreeable to hearings being held in Washington, D.C. to facilitate ICSID administration. At the same time, Canada submits that nothing on the facts of this arbitration make Washington, D.C. an appropriate place of arbitration. Holding hearings in Washington, D.C. should not affect selection of a place of arbitration.
43. Neither the UNCITRAL Arbitration Rules or ICSID Arbitration (Additional Facility) Rules require the place of arbitration to be the same as the location of hearings. To the contrary, the applicable rules clearly suggest that these are distinct decisions and different considerations apply to each of these decisions.
44. Article 16(2) and (3) of the UNCITRAL Arbitration Rules expressly allows hearings to take place at the most efficient location(s) and does not require them to be at the place of arbitration. The UNCITRAL Notes are to the same effect, urging that hearings be held in the location(s) that are most efficient and economical.<sup>26</sup>
45. Any presumption that ICSID-administered NAFTA cases should have Washington, D.C. as the place of arbitration would never favour investors or Respondents from Canada or Mexico and would always favour American investors and the United States as a Respondent. Such a presumption would be an unwarranted disincentive to agreeing to ICSID administration of NAFTA arbitrations.
46. For the foregoing reasons, Canada asks the Tribunal to designate Ottawa or alternatively, Vancouver, as the place of arbitration pursuant to NAFTA Article 1130(b) and Article 16(1) of the UNCITRAL Arbitration Rules.

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<sup>26</sup> UNCITRAL Notes, Article 23.

## **B. CONFIDENTIALITY ORDER AND APPLICATION OF THE IBA RULES**

47. The key outstanding issue relating to the Confidentiality Order is the relationship between the Confidentiality Order and domestic law requirements with respect to disclosure of information. In addition, the Claimant takes issue with the application of the IBA Rules to this arbitration.

### **1. Application of Domestic Law**

48. The disputing parties agree that a Confidentiality Order is required in these proceedings. Canada proposes that the attached Confidentiality Order govern the proceedings.<sup>27</sup> The disputing parties have not agreed on a provision addressing the relationship between the Confidentiality Order and Canada's domestic law on disclosure of information.

49. Canada has proposed paragraph 10 of the Confidentiality Order to address the treatment of information exchanged in these proceedings which may be subject to an access to information request. It reads:

Any request to the Government of Canada for documents under the Access to Information Act, including documents produced to Canada in these proceedings, will be wholly governed by that Act.

Canada's proposal avoids a conflict between its international obligations under the Confidentiality Order and domestic obligations under the *Access to Information Act* (*ATIA*).<sup>28</sup>

50. Under Canadian domestic law, the Government of Canada is bound by the *ATIA*. The *ATIA* provides every Canadian citizen and permanent resident with the right to access records under the control of a government institution, upon request and within a reasonable period of time.

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<sup>27</sup> Draft proposed Confidentiality Order (Tab 11).

<sup>28</sup> *ATIA*, R.S. 1985, c. A-1 (Tab 12).

51. However, this right of access to information is not absolute. Under the *ATIA*, the head of the responsible government institution shall refuse to disclose any record that contains:

- (a) trade secrets of a third party;
- (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
- (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of a third party;  
or
- (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.<sup>29</sup>

52. Moreover, the head of the government institution must give written notice to third parties when it intends to disclose:

- a record requested under the *ATIA* that it has reason to believe might contain trade secrets of a third party;
- financial and other information described in paragraph (b), above; or
- information that the government institution reasonably foresees will affect the competitive or contractual position of a third party, as described in paragraphs (c) and (d), above.<sup>30</sup>

53. The head of the responsible government institution must make every reasonable effort to give such notice within 30 days after the request is received.<sup>31</sup>

54. The third party can either consent to the disclosure or make representations to the government institution as to why the record should not be disclosed.<sup>32</sup> Any decision of

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<sup>29</sup> *ATIA*, s. 20(1).

<sup>30</sup> *ATIA*, s. 27(1).

<sup>31</sup> *ATIA*, s. 27(1).

<sup>32</sup> *ATIA*, s. 28(1)(a).



the government to disclose a third party's information over the objection of such third party may be reviewed by the Federal Court of Canada.<sup>33</sup>

55. The procedures and exemptions in the *ATIA* provide ample protection for any of the Claimant's business confidential information which may be provided to Canada in these proceedings.

56. The objective of public disclosure in the *ATIA* is consistent with the NAFTA objective of transparency.<sup>34</sup>

57. NAFTA does not impose a general duty of confidentiality on the disputing parties and nothing in the NAFTA precludes Canada from providing public access to documents in a NAFTA Chapter 11 arbitration.

58. The *Loewen* Tribunal confirmed that there is no general duty of confidentiality under NAFTA. The Tribunal stated:

...we do not accept the Claimants' submission that each party is under a general obligation of confidentiality in relation to the proceedings. In our view, [Article 44 of the ICSID Additional Facility Rules] does not impliedly impose such an obligation on the parties, when read in its context or against the background of international commercial law. In the case of an arbitration under NAFTA, particularly in an arbitration to which a Government is a party, it is not to be supposed that, in the absence of express provision, the Convention or the Rules and Regulations impose a general obligation on the parties the effect of which would be to preclude a Government (or the other party) from discussing the case in public, thereby depriving the public of knowledge and information concerning government an public affairs.<sup>35</sup>

59. The Tribunal in *Loewen* correctly took into account the strong public interest favouring transparency where a State is a party in international arbitrations. Investor-State dispute settlement may involve a challenge to sovereign acts under international

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<sup>33</sup> *ATIA*, s. 44(1).

<sup>34</sup> NAFTA Article 102 states that transparency is an objective of NAFTA.

<sup>35</sup> *The Loewen Group, Inc. and Raymond L. Loewen v. United States*, Decision of the Tribunal on the Respondent's Request of May 26, 1999, for a Ruling on Disclosure (ICSID Case No. ARB (AF)/98/3) 28 September 1999 at ¶ 8 (Tab 13).

law, may have far-reaching public policy ramifications or serious implications for the public treasury. As such, an arbitration that involves a government party generally implicates a public interest that must be reconciled with the investor's desire for privacy.

60. The absence of a general duty confidentiality and the presumption in favour of transparency has been confirmed by the binding Note of Interpretation issued by the NAFTA Free Trade Commission ("Commission"). It provides:

1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter 11 arbitration, and subject to the application of Article 1137(4) (Publication of an Award), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.
2. In the application of the foregoing:
  - (a) In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.
  - (b) Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
    - i) Confidential business information
    - ii) Information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
    - iii) Information which the Party must withhold pursuant to the relevant arbitral rules, as applied.
  - (c) The Parties reaffirm that disputing parties may disclose to either persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents
  - (d) The Parties further reaffirm that the governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information.

3. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold in accordance with Articles 2102 or 2105.

61. The *ATIA* disclosure obligations are consistent with the Note of Interpretation and the NAFTA objective of transparency. In fact, NAFTA Tribunals have expressly recognized that a Party's domestic legislation on disclosure is not qualified by NAFTA or applicable arbitration rules.

62. The Tribunal in *Mondev* rejected the Claimant's request for an Order directing the United States not to release its submissions and correspondence exchanged in the arbitration in response to a request made pursuant to the U.S. *Freedom of Information Act (FOIA)*. It held:

The Freedom of Information Act [FOIA] creates a statutory obligation of disclosure upon the Respondent. The ICSID (Additional Facility) Rules provide that the minutes of all hearing shall not be published without the consent of the parties (Article 44(2)) and that the consent of the parties determines who shall attend those hearings (Article 39(2)). In general terms, however, the Rules do not purport to qualify statutory obligations of disclosure which may exist for either party.<sup>36</sup>

63. More generally, as the Tribunal in *Metalclad* held, disclosure obligations imposed by domestic law cannot be ignored by either disputing party:

Indeed, as has been pointed out by the Claimant under United States security laws, the Claimant, as a public company trading on a public stock exchange in the United States, is under a positive duty to provide certain information about its activities to its shareholders, especially regarding its involvement in a process the outcome of which could perhaps significantly affect its share value.

The above having been said, it still appears to the Tribunal that it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties if during the proceedings they were both to

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<sup>36</sup> *Mondev International Ltd. v. United States*, Interim Decision regarding U.S. compliance with *FOIA* request (ICSID ARB/AF/99(2)) January 25, 2001 at p. 2 (Tab 14) ('*emphasis*' added).

limit public discussion of the case, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound.<sup>37</sup>

64. The *UPS* Tribunal reconciled the objectives of confidentiality and the public interest in transparency information by making Canada's *ATIA* applicable to information generated in that NAFTA Chapter 11 proceeding.<sup>38</sup> The Tribunal in *Pope & Talbot*<sup>39</sup> failed to do so, thereby imposing inconsistent obligations on Canada. As a result, the approach in *UPS*, *Metaclad*, *Loewen*, and *Mondev* should be preferred.

65. The objectives of transparency and the need to protect confidential information are not irreconcilable and should be construed by this Tribunal in a complementary manner. The *ATIA* itself balances disclosure of information with legitimate claims of confidentiality, including for business confidential information. As in the *UPS* case, this Tribunal can and should resolve this matter in a way that permits Canada to comply with both its domestic and international obligations. The provision of the Confidentiality Order proposed by Canada accomplishes this without prejudice to the Claimant.

## **2. The IBA Rules should apply as guidelines in these proceedings**

66. Canada requests that the IBA Rules apply as guidelines in these proceedings, except for paragraph 3.12 of these Rules (which addresses confidentiality of proceedings).

67. The IBA Rules reflect procedures used in many different legal systems, and are designed to supplement institutional or ad hoc arbitration rules.<sup>40</sup> They have been used as guidelines in past NAFTA Chapter 11 arbitrations.<sup>41</sup> The IBA Rules address such topics

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<sup>37</sup> *Metaclad Corporation v. Mexico*, Decision on a Request by the Respondent for an Order Prohibiting the Claimant from Revealing Information regarding ICSID Case (ARB/(AF)/97/1) October 27, 1997, ¶¶ 9-10 (Tab 15) ('emphasis' added).

<sup>38</sup> *United Parcel Service of America Inc. v. Canada*, Procedural and Order of Tribunal (UNCITRAL) April 4, 2003 at ¶ E11 (Tab 16).

<sup>39</sup> *Pope & Talbot, Incorporated v. Canada*, Decision and Order By the Tribunal (UNCITRAL) March 11, 2002 at ¶¶ 16-18 (Tab 17).

<sup>40</sup> IBA Rules, Preamble (Tab 18).

<sup>41</sup> See for example, *Glamis Gold v. United States*, Decision on Objections to Document Production (UNCITRAL) July 20, 2005 at ¶ 9 (Tab 19).

as document production, fact and expert evidence, evidentiary hearings and assessment of evidence. They are widely used and represent international arbitral best practice.

68. The IBA Rules are especially useful where a State is a party to the arbitration because they address evidentiary issues that arise in the particular context of disclosure of government information.

69. In particular, paragraph 9(2)(f) of the IBA Rules provides for the exclusion of evidence “on grounds of special political or institutional sensitivity (including evidence that has been classified as secret by a government or a public international institution) that the Arbitral Tribunal determines to be compelling.”

70. Paragraph 9(2)(f) has been applied to information generated in the deliberative process by the executive branch of government such as cabinet confidences. While the Tribunal need not make any ruling on this privilege now, paragraph 9(2)(f) of the IBA Rules, and those rules generally, provide the flexibility to address this on a fact specific basis if and when it arises.

71. Objections to production and the application of privilege should be addressed by the Tribunal if and when such issues arise. It is therefore premature for the Tribunal to determine this issue now, as there is yet no request for documents or refusal to produce.

### **C. PRELIMINARY MATTERS CONCERNING JURISDICTIONAL OBJECTIONS**

72. Canada raised two objections to the jurisdiction of this Tribunal in its Statement of Defence. The objections were that:

- the claims based on Notice 102 are time-barred pursuant to NAFTA Article 1116(2);<sup>42</sup> and
- the claims based on British Columbia’s measures do not relate to Merrill & Ring, and are time-barred in any event.<sup>43</sup>

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<sup>42</sup> Defence at ¶¶ 46-57.

<sup>43</sup> Defence at ¶¶ 58-61.

73. Canada asks that the Tribunal address both objections as preliminary questions, before proceeding to the merits of the arbitration. These objections raise substantive legal questions distinct from the merits of the alleged NAFTA breaches. They are not intertwined with disputed facts and can easily be addressed on a preliminary basis. If decided in Canada's favour, their disposition would resolve the Claim entirely or in substantial part, saving time and costs for the Tribunal and the disputing parties.

### 1. Applicable Legal Test

74. A Tribunal applying the UNCITRAL Arbitration Rules has authority to rule on objections to its jurisdiction.<sup>44</sup>

75. Article 21(4) of the UNCITRAL Arbitration Rules establishes a presumption that objections to jurisdiction be dealt with as a preliminary question, before consideration of the merits. Article 21(4) of the UNCITRAL Arbitration Rules provides that:

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.<sup>45</sup>

76. The majority of objections to jurisdiction in NAFTA Chapter 11 arbitrations have been heard on a preliminary basis, bifurcated from the merits and assessment of damages.<sup>46</sup>

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<sup>44</sup> UNCITRAL Arbitration Rules, Article 21(1) ("The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction...").

<sup>45</sup> See also: Caron, David D., Lee M. Caplan & Matti Pellonpää, *THE UNCITRAL ARBITRATION RULES* (2006) at pp. 449-451 (Tab 20); *Glamis Gold Ltd. v. United States*, Procedural Order No 2 (Revised), (UNCITRAL) May 31, 2005 at ¶¶ 9-10 ("Article 21(4) establishes a presumption in favour of the tribunal preliminarily considering objections to jurisdiction") (Tab 21).

<sup>46</sup> See for example: *Bayview Irrigation District v. Mexico*, Award on Jurisdiction, (ICSID ABR(AF)/05/1) June 19, 2007 (Tab 22); *Consolidated Softwood Lumber Claims v. United States*, Decision on Preliminary Question (UNCITRAL) June 6, 2006 at ¶¶ 157-176 (Tab 23); *Grand River Enterprises v. United States*, Tribunal Letter to the Parties, (UNCITRAL) October 26, 2005 at ¶ 1 (Tab 24); *Canfor* at ¶ 55(5) (Tab 6); *Methanex Corporation v. United States*, Partial Award on Jurisdiction (UNCITRAL) August 7, 2002 at ¶ 107 (Tab 25); *Feldman v. Mexico*, (ICSID ARB(AF)/99/1) Procedural Order No. 4 concerning a request for revision of Procedural Order No. 3, August 3, 2000 (Tab 26); *Pope & Talbot, Incorporated v. Canada*, Award on "Measures Relating to Investment" Motion (UNCITRAL) January 26, 2000 at ¶¶ 27-34 (Tab 27) (*Pope & Talbot*).

77. It is also standard practice to address objections to jurisdiction as a preliminary matter in international commercial arbitration generally.<sup>47</sup>

78. The objections raised by Canada are jurisdictional: questions of time bar pursuant to NAFTA Article 1116(2) relate to the jurisdiction of the Tribunal,<sup>48</sup> as do questions about whether a matter “relates to” the investor.<sup>49</sup>

79. The drafters of the UNCITRAL Arbitration Rules established the presumption in favour of preliminary consideration of jurisdictional objections to ensure efficiency in the proceedings.<sup>50</sup> Efficiency is achieved through early resolution of preliminary questions that resolve all, or substantial portions, of a case and focus the issues in dispute.<sup>51</sup>

80. The Tribunal should decide an objection to jurisdiction on a preliminary basis if doing so will likely increase the efficiency of the proceedings. Considerations relevant to this analysis include: (1) whether the objection is substantial and not frivolous; (2) whether the objection would materially reduce the time and cost of subsequent proceedings if successful; and (3) whether bifurcation is impractical because the jurisdictional issue is so intertwined with the merits that it is unlikely to result in a savings of time or cost.<sup>52</sup>

81. Application of these criteria in this arbitration demonstrates the efficiency of addressing Canada’s objections on a preliminary basis.

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<sup>47</sup> See, for example, Born, Gary B., *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* (1994) at p. 57 (“In general, the more prudent course is to conduct a preliminary proceeding on the question of jurisdiction.”) (Tab 28); Jarvin, Sigvard, “*Objections to Jurisdiction*”, in Newman, Lawrence W. & Richard D Hill (eds), *THE LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION* (2004) at p. 88 (“It is a waste of time and money for an arbitral tribunal to have conducted an arbitration from beginning to end if its award then proves to be invalid for lack of jurisdiction....”) (Tab 29).

<sup>48</sup> *Glamis* at ¶ 18 (Tab 21). see also, *Grand River* at ¶ 1 (Tab 24) & *Feldman* (Tab 26).

<sup>49</sup> *Methanex* at ¶¶ 107, 121, 128-147 (Tab 25); see also *Pope & Talbot* at ¶¶ 27-34 (Tab 27) addressing “relating to” on a preliminary motion.

<sup>50</sup> *Glamis* at ¶¶ 11-12 (Tab 21).

<sup>51</sup> Caron, David D., *et al* (Tab 20) at 449.

<sup>52</sup> *Glamis* (Tab 21) at ¶ 12; See also, *International Thunderbird Gaming Corp. v. Mexico*, Procedural Order No. 4, December 24, 2003 at ¶ (E) (Tab 30) declining to hear an objection concerning whether the investor “owns or controls” the investment on a preliminary basis as the facts were interwoven with the merits; Caron et al, at 450-451 (Tab 20).

## 2. Objection concerning Time Bar and Notice 102

82. Canada objects to the jurisdiction of this Tribunal over claims based on Notice 102 on the ground that such claims are outside the three-year time limitation in Article 1116(2) of the NAFTA.

83. This objection is clearly substantial and not frivolous. International law recognizes express time bars contained in treaties.<sup>53</sup> These time bars are *lex specialis* and must be given their plain meaning in their context and in light of the purpose of the treaty as a whole.<sup>54</sup>

84. The plain language of NAFTA Article 1116(2) clearly establishes a time bar. It provides that a claim must be made within 3 years of the date on which the investor or enterprise “first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor [or enterprise] has incurred loss or damage.”

85. Canada can establish that the Claimant had or ought to have had first knowledge of the alleged breach and damages in 1998, more than 8 years before it submitted its claim to arbitration.

86. Notice 102 has been in place since April 1, 1998 and has been applied to the Claimants logs since April 1998. It is central to the activities of land owners like Merrill & Ring who export logs on a regular basis.

87. If successful, the objection to Notice 102 based on time bar would eliminate the need for any hearing, avoiding the unnecessary expense of preparing and presenting the case on the merits.

88. The Tribunal would have to consider only limited and uncontroversial documentary evidence to establish the facts relevant to the objections. These facts clearly demonstrate the Claimant’s actual knowledge of the breach, are not intertwined with the

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<sup>53</sup> Brownlie, Ian. *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 6<sup>th</sup> ed. (Oxford, 2003) at 481 (Tab 31).

<sup>54</sup> *Vienna Convention on the Law of Treaties*, Article 31.



merits of the case and can be determined without any consideration of whether there has been a substantive breach of NAFTA.<sup>55</sup>

89. In any event, based on the allegations in the Statement of Claim and without even considering any further evidence, the Tribunal can find that Merrill & Ring had constructive knowledge of the alleged breach and resulting damages.

90. In short, this objection raises a substantive legal issue regarding the interpretation of the time bar in Article 1116 that is distinct from consideration of the facts or the merits of the case, and should be dealt with as a preliminary matter.

### **3. Time Bar and the British Columbia Forest Act**

91. It is not clear whether the Claimant challenges the British Columbia *Forest Act* as a measure in this arbitration or whether it is simply part of the factual context to the Claim. If it is the former, Canada objects to this claim as it does not relate to the Claimant and is time-barred pursuant to NAFTA Article 1116(2).

92. Any claim based on the British Columbia *Forest Act* or its administration is time-barred and should be addressed as a preliminary matter for the same reasons as those noted above in connection with the Notice 102 claim. This Claim is even more dated than Notice 102 as the relevant provision of the *Forest Act* has been in effect since 1978.<sup>56</sup>

### **4. The Forest Act does not “relate to” the investor**

93. Canada objects to the jurisdiction of this Tribunal to consider claims arising out of the British Columbia *Forest Act* because it does not “relate to” the investor.<sup>57</sup> Article 1101 of the NAFTA states that measures must “relate to” the investor or its investment to be within the jurisdiction of this Tribunal.

94. Whether a claim “relates to” an investor is a threshold jurisdictional issue that should be determined on a preliminary basis. In this case, the British Columbia *Forest*

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<sup>55</sup> See e.g. *Grand River Enterprises Six Nations Ltd. v. United States*, Decision on Objections to Jurisdiction (UNCITRAL) July 20, 2006 (Tab 32).

<sup>56</sup> Defence at ¶ 61.

<sup>57</sup> Defence at ¶¶ 58-61.

*Act* does not relate to the Claimant, as logs on private lands owned by Merrill & Ring are exempt from the local use or manufacture requirements found in that Act.

95. Determination of this objection in Canada's favour would eliminate the time and cost of addressing this allegation entirely. Even if unsuccessful, the objection based on the *Forest Act* will clarify whether that Act is a measure in dispute in this arbitration, thereby focusing pleadings and discovery, and resulting in significant savings of cost and time.

96. Further, this objection can be addressed on the basis of allegations in the Statement of Claim and presents a question of legal interpretation. The Claimant admits in the Statement of Claim that it "owns primarily private land granted to it before 1906, which means it is subject to federal government regulation."<sup>58</sup> The Claimant has not alleged it was subject to provincial jurisdiction or that the *Forest Act* applied to it. No further evidence is required to decide this issue.

97. Any claim based on the British Columbia *Forest Act* is properly dealt with in a preliminary hearing on jurisdiction as the scope and coverage of the NAFTA is a substantive question of law, distinct from consideration of the merits of the case.

## **5. Conclusion on Bifurcation Request**

98. In summary, fairness, efficiency and judicial economy make bifurcation of the preliminary objections in this case warranted. In particular: (1) the objections are substantial and not in any way frivolous; (2) if successful, the objections based on time bar will end the arbitration, while the objection based on "relating to" will end a significant portion of the arbitration. Even if unsuccessful, determination of the objection based on the *Forest Act* will clarify whether that Act is a measure in dispute in this arbitration, thereby enhancing the efficiency of the process; (3) consideration of both objections raises legal rather than factual issues, and require only a limited and uncontroversial factual record; and (4) the objections are not intertwined with the merits of the Claim.

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<sup>58</sup> Claim at ¶ 19.

99. For the foregoing reasons, Canada respectfully requests that this Tribunal bifurcate these proceedings to decide its jurisdiction as a preliminary matter by addressing the following questions:

- (1) Is the Claim in its entirety or in part time-barred by Article 1116(2) of the NAFTA?
- (2) If the Claimant affirms that the British Columbia *Forest Act* is indeed a measure at issue in this case, is that claim time-barred by Article 1116(2) and is it “related to” the investor as required by Article 1101(1)?

100. Canada further requests the opportunity to make submissions and present oral arguments on the objections to jurisdiction.

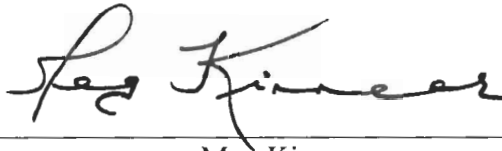
**D. FILINGS AND DATES**

101. If the Tribunal agrees to consider the objections to jurisdiction as a preliminary matter, Canada proposes the following schedule for the proceedings on jurisdiction:

Canada’s Memorial in Support of its Objections to Jurisdiction	60 days after the Tribunal’s decision on bifurcation
Claimant’s Counter-Memorial on Jurisdiction	60 days after Canada’s Memorial on Jurisdiction
Article 1128 Submissions	30 days after the Claimant’s Counter-Memorial on Jurisdiction
Canada’s Reply on Jurisdiction	30 days after Claimant’s Counter Memorial on Jurisdiction
Claimant’s Rejoinder on Jurisdiction	30 days after Canada’s Reply
Hearing on Jurisdiction	To be determined by the Tribunal in consultation with the disputing parties.

102. Canada will be prepared to address the timing of submissions on the merits and documentary requests if the Claim is not dismissed in its entirety as a result of Canada's jurisdictional objections or if the Tribunal refuses Canada's request for bifurcation.

Respectfully submitted on behalf of Canada  
this 9<sup>th</sup> day of November, 2007

A handwritten signature in black ink, appearing to read "Meg Kinnear". The signature is written in a cursive style with a large initial "M".

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for: Meg Kinnear  
Sylvie Tabet  
Lori Di Pierdomenico  
Raahool Watchmaker