

**Arbitration under Chapter Eleven of the North American Free Trade Agreement (NAFTA)
and the UNCITRAL Arbitration Rules**

CANFOR CORPORATION

Claimant

v.

UNITED STATES OF AMERICA

Respondent

PROCEDURAL ORDER No. 5

Before the Arbitral Tribunal constituted
under Chapter Eleven of the North
American Free Trade Agreement and
comprised of:

Joseph H. H. Weiler
Conrad K. Harper
Emmanuel Gaillard (President)

May 28, 2004

PROCEDURAL ORDER No. 5

WHEREAS:

1. In the Decision of January 23, 2004 on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, the Arbitral Tribunal invited the parties, to the extent they may find it constructive with respect to the question of the Respondent's objection to the Tribunal's jurisdiction on the basis of Chapter Nineteen of the NAFTA, to discuss "*the texts at issue as well as any evidence of fact or law, including, insofar as the parties may find it relevant, preparatory materials to the negotiation of the NAFTA and the opinions of the most highly qualified publicists.*" (Decision of January 23, 2004, paragraph 47).
2. On March 8, 2004, the Claimant informed the Arbitral Tribunal that it had requested the Respondent to "*produce documents relating to the negotiating history of the relevant portions of the NAFTA.*" In a separate letter to the Respondent, subsequently submitted to the Tribunal on March 24, 2004, the Claimant requested that the Respondent make available to it "*any documents relating to the negotiating history of the provisions of the NAFTA implicated in [its] claim*" and, more specifically, "*any documents relating to the negotiating history of Articles 1101 and 1108 insofar as they relate to scope and coverage (including reservations and exceptions), Articles 1901 through 1904 and 1911, and Article 2004*". The Claimant further observed in its letter to the Respondent that its "*request should not be considered as limited to the various iterations of the negotiating text, but rather as also encompassing any documents, including position papers, memoranda, communications between the NAFTA Parties whether by letter or otherwise, that relate to the drafting or negotiation of those provisions.*"
3. On March 19, 2004, the Respondent provided its views to the Tribunal with respect to the Claimant's request for documents. In particular, the Respondent indicated that it understood paragraph 47 as regarding the possibility for the disputing parties to refer "*to descriptions of the negotiating history or circumstances of conclusion of the treaty that are generally available*", while the Claimant's request addressed documents that are not publicly available.
4. The Respondent informed the Tribunal that it was aware of two categories of NAFTA negotiating records in its custody: (i) "*memoranda, notes and communications reflecting the internal deliberations of United States agencies with respect to the negotiations*" which were "*never communicated to Canada and Mexico*" and which did not qualify as "preparatory work" within the meaning of Article 32 of the Vienna Convention on the Law of Treaties; and (ii) "*draft texts that Canada compiled and distributed during the course of the negotiations. They reflect the state of the negotiations at the end of each negotiation session, as well as on various dates during later stages of the negotiations.*" With respect to the second category of documents, the Respondent emphasized the limited value of incomplete preparatory work and indicated that it had not relied upon them in the present proceedings. It noted however that none of the NAFTA Parties would object to their disclosure in the circumstances of this case.
5. In a letter of March 24, 2004, the Claimant addressed the issues raised by the Respondent. In particular, the Claimant argued that the generally available documents did not support the Respondent's position regarding the NAFTA Parties' intention to exclude the application of Chapter Eleven to conduct of the kind which is the subject of the present dispute and that such an intention would be expected to be revealed in the negotiating history of the Agreement, be it in generally available documents or other preparatory work.

6. With respect to the categories of documents in the Respondent's custody, the Claimant did not accept the Respondent's description of those categories or its characterization of what constitutes "preparatory work". In particular, the Claimant pointed to "*documents 'in explication of the various drafts'*" and to "*memoranda prepared by the various negotiating teams relied upon by the legal drafters in preparing the various drafts*" which it maintained should be produced. With respect to documents reflecting the internal deliberations of United States agencies, the Claimant disputed the Respondent's determination that those documents did not reflect information communicated among the negotiating parties and that they would be irrelevant to the issue of the interpretation of the NAFTA by the Tribunal. The Claimant further observed that the phrase "preparatory works" as used in the Vienna Convention is, in any event, of a wide ambit and that even unilateral communications could be of relevance to the Tribunal. Finally, the Claimant noted that the Tribunal should have available to it the most comprehensive record of the relevant negotiations and be in a position to assess the probative value of any particular document.

7. On March 26, 2004, the Arbitral Tribunal issued Procedural Order No. 4 whereby it invited the Respondent to file the draft texts of the NAFTA as compiled by Canada during the course of the negotiation. The Tribunal indicated to the parties that it would consider in due course the question of documents not covered by that Order.

8. In accordance with Procedural Order No. 4, the Respondent produced on April 9, 2004 the negotiating texts of Chapters Eleven, Nineteen and Twenty of the NAFTA that were maintained by Canada and distributed to Mexico and the United States. The Respondent noted that those texts represent what the Office of the United States Trade Representative records show to be the complete set of the negotiating history of the relevant chapters that Canada maintained as the informal "secretariat" for the negotiations. The Respondent further informed the Tribunal that the three NAFTA Parties were in the process of comparing their sets of the negotiating texts and that it would advise the Tribunal in the event that that process resulted in a different understanding as to what constitutes the complete set of those texts. Subsequently, on May 10, 2004, the Respondent filed two additional negotiating texts of Chapter Eleven of the NAFTA provided by Canada.

9. In a second letter of April 9, 2004, the Respondent addressed the issue of the other documents at issue. It submitted that the Claimant was seeking a broad-based "fishing expedition" type of discovery that cannot be satisfied in the context of an international arbitral proceeding. The Respondent also argued that the documents exposing the unilateral intent of one party to negotiations do not reflect the common intention of the parties and are of little value to treaty interpretation. The Respondent further pointed to the fact that the bulk of the documents sought by the Claimant are privileged from disclosure under United States law. Finally, the Respondent stated that it would be unduly burdensome for it to identify and locate the requested documents.

10. In its reply of April 15, 2004, the Claimant disputed the Respondent's position. In particular, the Claimant noted that its request was not broad-based but narrowed down as reasonably as possible given that it did not have knowledge of the specific documents under the United States control. With respect to the relevance of the requested documents, the Claimant noted that the negotiating history of the NAFTA and the circumstances of its conclusion had been put in issue by the Respondent in its Objection to Jurisdiction and that those texts and circumstances may be relevant to establishing the intent alleged by the Respondent as regards the exclusion of the application of Chapter Eleven in the circumstances of the present dispute.

11. With respect to the documents categorized by the Respondent as reflecting its internal deliberations, the Claimant noted first that the Respondent had not denied the existence of memoranda prepared by the negotiating teams that were relied upon by the legal drafters and that those documents probably fall within the category of documents communicated among the Parties. In addition, the Claimant disputed the Respondent's position that only documents shared among the three NAFTA Parties could be relevant to treaty interpretation. According to the Claimant, internal communications

and unilateral acts, while not proving the other NAFTA Parties' intent, may provide an indication of the Respondent's own intention.

12. The Claimant also disputed the Respondent's argument that the record before the Tribunal does not support recourse to the negotiating texts as a supplementary means of interpretation. The Claimant emphasized the disputing parties' disagreement on the ordinary meaning of Article 1901(3) of the NAFTA, on which the Respondent is relying. The Claimant also argued that the Respondent's limitation of the materials would be unfair and prejudicial to its ability to answer the Respondent's Objection to Jurisdiction.

13. On May 19, 2004, the Respondent addressed an additional letter to the Tribunal, whereby it noted that the Claimant's Reply to the United States Objection to Jurisdiction submitted on May 14, 2004 made no reference to the negotiating texts of the NAFTA produced by the Respondent. Accordingly, the Respondent observed that there was no justification for the Claimant's pending request for documents and requested that the Tribunal deny it.

14. The Claimant disputed the Respondent's position in a letter of May 25, 2004, whereby it argued that, while it had not referred to the documents produced by the Respondent, which it contends do not support the Respondent's argument, the materials it has requested are relevant to the interpretation issue before the Tribunal and would assist the Tribunal in its task.

15. The Tribunal has carefully examined each of these arguments and finds as follows.

16. In their submissions relating to the Tribunal's jurisdiction, the parties have requested in particular that the Tribunal interpret Article 1901(3) of the NAFTA and establish whether the Respondent has agreed to investor-State arbitration of disputes with respect to its antidumping and countervailing duty laws under that Agreement. To the extent that there is a dispute among the parties to this arbitration on the meaning of certain provisions of the NAFTA, including Article 1901(3), the parties may find it constructive to discuss, and the Tribunal may find it useful to consider, the negotiating history of the NAFTA.

17. In this respect, the Tribunal has carefully considered the distinction made by the Respondent between "*draft texts that Canada compiled and distributed during the course of the negotiations*" and "*memoranda, notes and communications reflecting the internal deliberations of United States agencies with respect to the negotiations*" which were "*never communicated to Canada and Mexico*" (Respondent's letter of March 19, 2004).

18. As regards the first category of materials, the Tribunal notes that the various drafts of the negotiating texts maintained by Canada and distributed to Mexico and the United States, which have been produced in accordance with Procedural Order No. 4, unquestionably form part of the negotiating history of the NAFTA which may be considered for the purposes of treaty interpretation.

19. The Tribunal notes that the Respondent's arguments concern primarily the second category of materials, *i.e.* internal documents not shared with the other NAFTA Parties. The Respondent has in particular argued that these documents reflect the unilateral intent of one party to the negotiations rather than the common intent of all NAFTA Parties and that they are privileged from disclosure (Respondent's second letter of April 9, 2004). The Tribunal accepts the Respondent's position and considers that the internal materials of an individual NAFTA Party established solely for that Party and not communicated to the other Parties during the negotiations of the Agreement do not reflect the common intention of the NAFTA Parties in drafting, adopting, or rejecting a particular provision.

20. The Tribunal does not consider, however, that these two categories of documents constitute the only and complete materials relating to the negotiation of the NAFTA and the circumstances of its conclusion. To the extent they exist, negotiating records such as communications, explication notes,

position papers or memoranda established during the negotiation of the Agreement and which were circulated among, discussed by or relied upon by the negotiating teams or by the drafting teams of the NAFTA Parties may well be pertinent to the issue of the common intention of the NAFTA Parties in suggesting a particular draft and in adopting, or rejecting, a particular provision. The Tribunal notes in this respect that the Respondent has neither confirmed nor denied the existence of such documents.

21. The Tribunal therefore accepts the Claimant's request regarding any materials such as communications, explication notes, position papers or memoranda which, to the extent they exist, were shared among the three NAFTA Parties with respect to the relevant portions of the NAFTA.

22. In so deciding, the Tribunal has borne in mind its duty to conduct the arbitral proceeding in a way consistent with the principles of fairness and equality among the disputing parties. Without prejudice to the issue of whether the present dispute is an investment dispute and whether the Claimant's claim falls under Chapter Eleven of the NAFTA, the Tribunal notes that, in the context of investment disputes, each of the NAFTA Parties has accorded to the nationals of the other two Parties the right to submit to arbitration a claim on its own behalf regarding a dispute with that NAFTA Party. It is the Tribunal's view that, had the dispute arisen between any of the NAFTA Parties rather than between one of the NAFTA Parties and a private party, the parties to the arbitration would have had equal access to the negotiating history of the Agreement as well as equal opportunity to resort to those documents. In this context, the Tribunal finds it consistent with the principle of equality that the parties to this arbitration are given the same opportunity to present their case, including the opportunity for the private party to access existing documents of the types specified above which are freely available to the government party, irrespective of whether such documents are ultimately conclusive as to any issue in dispute.

THE ARBITRAL TRIBUNAL DECIDES AS FOLLOWS:

23. The Tribunal invites the Respondent to file, no later than August 6, 2004, any materials such as communications, explication notes, position papers or memoranda which were shared among the three NAFTA Parties with respect to the relevant portions of the NAFTA as identified in the Claimant's request for documents of March 8, 2004 (Articles 1101 and 1108 insofar as they relate to scope and coverage (including reservations and exceptions), Articles 1901 through 1904 and 1911, and Article 2004).

May 28, 2004

On behalf of the Arbitral Tribunal:



Professor Emmanuel Gaillard
President