International Centre for Settlement of Investment Disputes
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By courier
(advance copy of cover letter by e-mail)

December 13, 2007

Meg K ST Laur
CBTB

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125 Sussex Drive
Ottawa, Ontario K1A 0G2
Canada

5575-48

Re: Merrill & Ring Forestry L.P. v. Government of Canada
NAFTA/UNCITRAL Arbitration Rules Proceeding

Dear Ms. Kinnear, Dear Mr. Appleton,

Further to our letter of December 12, 2007, please find enclosed a hard copy of the Arbitral Tribunal's Decision on the Place of Arbitration of the same date.

Sincerely yours,

Eloïse Obadia

Eloïse M. Obadia
Senior Counsel

Enclosure

cc (with enclosure):

Members of the Tribunal

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CERTIFICATE

UNDER CHAPTER ELEVEN OF THE NAFTA
AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

Merrill & Ring Forestry L.P.
Claimant

AND

GOVERNMENT OF CANADA
Respondent

I hereby certify that the attached is a true copy of the Decision on the Place of Arbitration of the Arbitral Tribunal dated December 12, 2007.

Eloïse Obadia
Senior Counsel

Washington, D.C., December 13, 2007

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

MERRILL & RING FORESTRY L. P.

Claimant/Investor

and

THE GOVERNMENT OF CANADA

Respondent/Party

(ICSID Administered Case)

DECISION ON THE PLACE OF ARBITRATION

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1. The Tribunal is called upon to determine the place of arbitration in this case, the Parties not having agreed on one. This arbitration is conducted under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules"), except to the extent that they are modified by the provisions of Section B of NAFTA Chapter 11.

2. Article 16(1) of the UNCITRAL Rules provides as follows:

> 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.

3. Article 1130 of the NAFTA Agreement provides in turn that:

> 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:
> [...]

(b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules.

4. As the NAFTA Rules have not introduced a modification to the UNCITRAL Rules in this connection and, on the contrary, have reaffirmed the application of those Rules, the determination of the Place of Arbitration is to be made in accordance with Article 16(1) of the UNCITRAL Rules.

5. In addition, the Tribunal may be guided by the UNCITRAL Notes on Organizing Arbitral Proceedings ("Notes"), as a number of other tribunals have done, although these Notes are not binding on either the parties or the Tribunal. (*See UPS v. Canada*, Decision on the Place of Arbitration, Oct. 17, 2001, *available at* http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/PA_oct.pdf; *ADF Group Inc. v. United States of America*, Procedural Order No. 2 Concerning the Place of Arbitration, July 11, 2001, *available at* http://www.state.gov/documents/organization/5965.pdf; *Methanex Corp. v. United States of America*, Written Reasons for the Tribunal's Decision of 7th September 2000 on the Place of Arbitration, *available at* http://www.state.gov/documents/organization/6038.pdf; *Ethyl Corp. v. Canada*, Decision Regarding the Place of Arbitration, Nov. 28, 1997, 38 I.L.M. 702; *Pope & Talbot, Inc. v. Canada*, Minutes of Procedural Meeting, October 29, 1999; *Canfor Corp. v. United States*, Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, January 23, 2004, *available at* http://www.state.gov/documents/organization/28637.pdf).

6. Paragraph 22 of the Notes reads as follows:

> Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence.

7. The Tribunal must also refer to the fact that the Notes do not include the "perception of a place as being neutral" as a pertinent factor. However, as noted by the *Ethyl* tribunal:

> The fact that the UNCITRAL Notes omitted . . . "perception of a place as being neutral" from its list of criteria for selection of a place of arbitration because it was "unclear, potentially confusing" does not mean that such criterion cannot be considered. UNCITRAL, taking this step, itself indicated "that the tribunal before deciding on the place of arbitration might wish to discuss that with the parties." (*Ethyl,* n. 12).

8. Two NAFTA tribunals have specifically considered the question of neutrality in determining the place of arbitration (*Feldman v. Mexico*, Procedural Order No. 1 Concerning the Place of Arbitration, ICSID ARB (AF)99/1, April 3, 2000 *available at* http://www.economia.gob.mx/work/snci/negociaciones/Controversias/Casos_Mexico/Marvin/ordenes/Order_1.pdf; *Waste Management, Inc. v. Mexico*, Decision on Venue of the Arbitration, ICSID ARB (AF)/00/3, September 26, 2001, 6 *ICSID Rep.* 541 (2004)).

9. As previously agreed with the Tribunal, both parties simultaneously presented submissions on the place of arbitration and other matters on November 9, 2007. They also addressed this question at the first meeting held on November 15, 2007, and provided the Tribunal with additional documentation in support of their respective arguments.

10. Claimant's Submission urged Washington, D.C. as the place of arbitration, because in its view it satisfies the various guidelines provided by the UNCITRAL Notes, with particular reference to the decision taken in favour of this venue in the *UPS* case (para. 18) and the tribunal's decision in the *Ethyl* NAFTA case referring to Washington, D.C. as a possible place of arbitration for NAFTA Chapter 11 arbitration (at 703). The Claimant has also argued about the need to preserve the equality of treatment of the parties in the light of Article 15 (1) of the UNCITRAL Rules and the reaffirmation of this principle in the *Pope & Talbot* case (Decision on Cabinet Confidence, September 6, 2000, para. 1.5 *available at* http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/pubdoc8.pdf).

11. The Respondent proposed that the place of arbitration should be Ottawa, Ontario or Vancouver, British Columbia, particularly in view of the fact that the Claimant is a

partnership from the State of Washington that has invested in timberlands in coastal British Columbia and challenges Canadian federal measures governing log exports from British Columbia. In the Respondent's view, most of the evidence is to be found primarily in Ottawa and secondarily in Vancouver.

12. In referring to the tests on which the UNCITRAL Notes are based, the Respondent believes that Ottawa or Vancouver meet the suitability of the law on arbitral procedure in the light of the Commercial Arbitration Act, which implements the UNCITRAL Model Law on International Commercial Arbitration of 1985, and the Commercial Arbitration Code that is specifically applicable to NAFTA Chapter 11 investor-State disputes to which Canada is a disputing party. Yet, the Respondent accepts that also the United States has equally suitable laws on arbitral procedure and as a result this particular criterion is not determinative of the place of arbitration in this case. The Respondent asserts that neither a Treaty governing enforcement of arbitral awards is determinative as both Canada and the United States are party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (*opened for signature* on June 10, 1958, 21 UST 2517, 330 UNTS 3 ("New York Convention")). The availability and costs of support services in the various cities proposed are roughly equivalent.

13. In the Respondent's argument, convenience of the place of arbitration to the parties and the arbitrators, including travel distances, is a test that speaks in favour of Ottawa or Vancouver. So does, the Respondent maintains, the location of the subject matter in dispute and the proximity of evidence, as all such elements are to be found mostly in Ottawa and Vancouver.

14. Regarding the first two factors cited in the Notes ((a) and (b)), the Tribunal agrees with the views of both parties that all of the venues proposed have "a suitable lex arbitrii," and notes that Canada and the United States are Parties to the New York Convention. Such criteria are thus not determinative of a finding about the most appropriate place of arbitration.

15. As regards the third factor cited in the Notes ((c)), it was common ground that the Presiding Arbitrator resides in Santiago, Chile and the co-arbitrators in Chicago and Washington, D.C., in one case, and Toronto and London, in the other; that the parties

have offices in Seattle (Claimant) and Ottawa (Respondent); and that counsel in this case have their offices, in the case of the Claimant, in Toronto and Washington, D.C. and, in the case of the Respondent, in Ottawa. Both Ottawa and Washington, D.C. have convenient air travel connections, a factor that will be discussed in greater detail further below; these connections are somewhat better than those offered for Vancouver. This factor suggests that Vancouver is less convenient than the other venues proposed.

16. The Notes' fourth factor ((d)) – "availability and cost of support services needed" – is not a basis in this case for choosing one proposed venue over the other. All suggested venues offer appropriate facilities to this effect, including certified stenographic reporters, videoconferencing and other requirements.

17. The Tribunal also believes that most of these services are necessary in respect of the place of a hearing, but as this place is different from the place of arbitration, as argued by the Respondent, neither does this factor offer determinative guidelines for the Tribunal to choose one over the other. The Tribunal notes that the Respondent accepts that the hearings take place in Washington, D.C.

18. The Respondent has argued that the "location of the subject-matter in dispute", the fifth and final factor listed in the Notes ((e)), favours choosing either Ottawa or Vancouver over Washington, D.C., particularly in the light of the reasons offered by the tribunals in the *Ethyl*, *ADF* and *Canfor* cases, which assigned priority to the place where the Respondent adopted the measures challenged by the Claimant. A similar argument is made by the Respondent in respect of the "proximity of evidence", a factor also included in this Note.

19. The Claimant, however, believes differently and considers that the subject-matter of the dispute does not favour either country, and that should a site visit be necessary this could be accomplished by the Tribunal independently from the place of arbitration in such a place.

20. The parties have also addressed the question of neutrality of the place of arbitration in connection with the suitability of the law on arbitral procedure. As noted above, although this factor is not included in the UNCITRAL Notes it has been considered by the tribunals in *Feldman* and *Waste Management*.

21. The Claimant has argued that this factor is closely connected to the principle of equality of the parties (David D. Caron, Lee M. Caplan and Matti Pellonpää: The Uncitral Arbitration Rules: A Commentary, 2006, at 78-79) (First Meeting transcripts, at 61-62).

22. The Claimant has also expressed its concern in respect of this particular criterion in view that in the challenge of *Metalclad* before the Supreme Court of British Columbia, Canada's Attorney General argued that in interpreting NAFTA Chapter 11 tribunals "should not attract extensive judicial deference and should not be protected by a high standard of judicial review" (Outline of Argument of Intervenor Attorney General of Canada, Vancouver Registry No. L002904, February 16, 2001, para. 30), a view likely to be followed by the courts.

23. In addition, the Claimant asserts that, contrary to the situation in the United States, the sovereign powers of the State interfere in Canada with the necessary neutrality because some key governmental information cannot be challenged or reviewed by the courts (First Meeting transcripts, at 68-69).

24. The Respondent asserts that neutrality is not an evident factor in determining the place of arbitration in the light of NAFTA Article 1130 (First Meeting transcripts, at 73), but if neutrality were to be taken into consideration for determining the place of arbitration, Vancouver should be favoured because Washington, D.C. is the capital city of the Claimant's home State as Ottawa is of the Respondent. It is also submitted by the Respondent that the fact that arguments have been made in favour of the challenge of awards before the Canadian courts responds to a normal litigation strategy and in no way affects the independence of the Canadian judiciary or the deference to arbitration. It is also explained that the safeguards surrounding government information apply to every place of arbitration independently of its location.

25. In any event, the Respondent notes, Washington, D.C. has been favoured as the place of arbitration in cases against the United States and there would be no reason not to apply the same standard to Ottawa. Moreover, as noted, the Respondent argues correctly that the place of arbitration is different from the location of hearings submitting that this particular factor should not influence the determination of the place of arbitration.

26. The Tribunal harbours no doubt about the fact that the Canadian judiciary is fully independent and realizes that it is only normal for counsel for a party to argue in litigation in favour of the challenge of an award that has been brought by that party before those courts, or for that matter any other court. The Tribunal's determination is thus not influenced by this particular event.

27. Both Ottawa and Washington, D.C. end-up, after all elements having been considered, in an almost identical situation from the point of view of their suitability as the place of arbitration. In order to arrive at a determination the Tribunal thus needs to weigh further some particular arguments made by the parties in support of their respective proposals.

28. The first such argument concerns the location of the subject matter in dispute and the proximity of evidence. While these factors are likely to be more readily available in Ottawa as the place where many or most of the challenged measures have been adopted by the Canadian government and its services, a criterion accepted by several NAFTA tribunals (*Ethyl* (at 705), *ADF* (para. 20) and *Canfor* (para. 35), the Tribunal does not believe that this is a crucial factor in the age of electronic communications and availability of records.

29. The second argument to be taken into account relates to the travel facilities servicing one or other venue. Although this particular aspect is related more to the place of hearings than to the place of arbitration, the Tribunal will consider it for the sake of completeness, particularly in view that both the UNICTRAL Rules and the parties' submissions refer to it in connection with the place of arbitration.

30. In consideration of the fact that one arbitrator has a residence in Washington, D.C. or will be traveling from Chicago, that another arbitrator shall be coming from either Toronto or London, that the Presiding arbitrator will be arriving either from New York or Miami as the most convenient ports of entry to the United States coming from Santiago, that one party will be traveling from Seattle and its counsel from Toronto, the Tribunal is persuaded that flight connections with Washington, D.C. are more readily available than with Ottawa. In this last case travel is many times routed through Toronto. In any event, connections between Ottawa and Washington, D.C. are also adequate enough so as not to inconvenience counsel for the Respondent.

31. In addition to the above considerations, the Tribunal also notes that Washington, D.C. is the seat of ICSID, the administering institution of this case, that it has been accepted on various occasions as the place of arbitration and that it has developed the reputation of being an independent venue for many international organizations (*See UPS* (para. 18), *ADF* (para. 21); *Methanex* (para. 39)). While some cases were brought under the ICSID Additional Facility Rules of Arbitration, and hence were held at and administered by ICSID itself, there are also cases brought under the UNCITRAL Rules that have been held in the ICSID facilities, just as the present case.

32. Having considered all the arguments made in favour of the different venues indicated, the Tribunal can conclude, like the *UPS* tribunal, that,

> While the matter is finely balanced, the Tribunal considers that the balance does favour the United States of America as the place of arbitration and in particular Washington, DC (*UPS*, para. 19).

33. The Tribunal appreciates, of course, that the Claimant is a national of, and distinct from, the United States, and that this factor is sufficient guarantee that the impartiality of the courts will not be in any way affected as the United States Federal judiciary is also fully independent. In this connection, Washington, D.C. is favoured, not because of being the capital of the United States but because it is the seat of ICSID and offers some advantages in terms of practical conveniences.

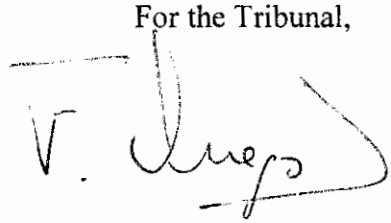
34. The Tribunal also wishes to refer to the fact that NAFTA Article 1130 provides that "a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention", as both Canada and the United States are, and thus does not exclude a venue in the territory of the Respondent party. As noted by the Claimant, however, the situation here is distinguishable from state-to-state arbitration under NAFTA Chapter 20, where Rule 22 of the Model Rules of Procedure prescribes that the place of arbitration shall be the capital of the respondent state.

35. Ideally, a Tribunal would search for a neutral place different from the territory of both Claimant and Respondent, but in this case the Tribunal is constrained by Article 1130 to choose the territory of one Contracting Party and cannot choose a place of arbitration elsewhere. As Mexico is excluded as a venue in the instant case because of the language of the arbitration being English, the choice is thus reduced to either a

venue in Canada or the United States, and here the questions of convenience discussed have a prominent role.

36. It is for the foregoing reasons that the Tribunal determines that Washington, D.C. shall be the place of arbitration of this dispute.

For the Tribunal,



Francisco Orrego Vicuña
Presiding Arbitrator

December 12, 2007.