UNDER THE UNCITRAL ARBITRATION RULES AND THE NORTH AMERICAN FREE TRADE AGREEMENT

MERRILL & RING FORESTRY L.P.

Claimant / Investor

-AND-

GOVERNMENT OF CANADA

Respondent / Party

INVESTOR'S RESPONSE TO THE PETITION OF THE COMMUNICATION, ENERGY AND PAPERWORKERS UNION OF CANADA, THE UNITED STEELWORKERS AND THE BRITISH COLUMBIA FEDERATION OF LABOUR

The Investor makes the following submission on the issues raised by the Petition of the Communication, Energy and Paperworkers Union of Canada, the United Steelworkers and the British Columbia Federation of Labour.

PART ONE: INTRODUCTION

1. The Communication, Energy and Paperworkers Union of Canada, the United Steelworkers and the British Columbia Federation of Labour (the "Petitioners") presented a petition dated June 27, 2008 for "leave to intervene". We do not know from this petition exactly what "leave to intervene" means, and what role is being sought by these Petitioners. The term "intervention" could have two possible meanings:

   a) standing as a "party" to this arbitration; or

   b) *amicus curiae* status.

2. The issues for this Tribunal to determine, and the Investor's position on each of them, are as follows:

   a) Does this Tribunal have jurisdiction to grant "party" status to strangers to the arbitration?

      The Investor submits that it does not.

   b) Does this Tribunal have jurisdiction to grant *amicus curiae* status to strangers to the arbitration?

      The Investor submits that the Tribunal may have such jurisdiction, in appropriate circumstances, on receipt of adequate material warranting the grant of such status.

   c) If the Tribunal does have jurisdiction to grant *amicus curiae* status, should such status be granted, and, if such status is to be granted, what is the proper scope of any *amicus curiae* brief to be received by the Tribunal?

      The Investor submits that, on the basis of the material filed by the Petitioners, *amicus curiae* status should not be granted at this time, but that the Tribunal might consider granting leave to reapply in the future, on proper material being submitted. If *amicus curiae* status is granted, the Petitioners cannot be entitled to attend hearings or to be provided access to any of the material filed with the Tribunal, but ought instead to be limited to providing a written submission, limited to no greater than ten (10) pages, on the specific issues which the Tribunal might determine to be appropriate.

PART TWO: ARGUMENT

This Tribunal does not have jurisdiction to grant party status to strangers to the arbitration

3. This Arbitration is governed by the NAFTA[1] and the UNCITRAL Arbitration Rules. Unless something can be found in either those Rules or Chapter 11 of the NAFTA that grants this Tribunal the power to accord status as a "party" or "disputing party" to a stranger to the arbitration, then the Tribunal has no jurisdiction to do so. The Investor submits that there is no such power given to this Tribunal by either the NAFTA or the UNCITRAL Rules. Accordingly, the petition for "party" status must be dismissed.

4. NAFTA Chapter 11 deals with the "Settlement of Disputes between a Party and an Investor of Another Party". An Investor brings its claim against a NAFTA Party pursuant to the requirements set out in NAFTA Articles 1116 or 1117, 1119, 1120, and 1121. This arbitration is conducted on the basis of the consent of the disputing parties. Under NAFTA Article 1121, the Investor confirmed its consent in writing to the arbitration, while NAFTA Article 1122 confirms that each of the NAFTA Parties have consented to claims being submitted by Investors under the procedures set out in the NAFTA Chapter 11.

5. The Investor does not consent to the participation of the Petitioners, or any one of them, or of any other third party, as a disputing party or as a party with analogous status. Nor does the Investor consent to the disclosure to the Petitioners of all submissions, evidence, pleadings or any other material provided to the Tribunal, or to their making submissions on the place of arbitration, jurisdiction, or any other matters. Thus, unless the Tribunal has a specific power to allow such participation absent the consent of the disputing parties, the Petition must be denied.

6. The Tribunal in *United Postal Service v. Canada* ("*UPS*") specifically ruled that a NAFTA Tribunal does not have authority to add such third parties as parties to the arbitration.[2] In that arbitration, the Tribunal rightly found that the consent of the disputing parties to arbitration by the NAFTA Party under Article 1122 and by the Investor under Article 1121, was only with respect to each other and did not extend to any third party.

7. The Tribunal further found that there is no provision in the NAFTA that provides a basis for the addition of persons such as the Petitioners as parties and that, on the contrary, the text of the treaty supports an inference opposing any positive general power of a tribunal

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[1] NAFTA Article 1135.

[2] *United Postal Service v Canada, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae*, October 17, 2001 at para 36. ("*UPS – Amicus Decision*")

to authorise the addition of such parties.[3] Instead, the NAFTA provides two enumerated grounds to add a third party – under Article 1126 if they are disputing parties whose dispute has something in common with the original dispute, or under Article 1128 if they are a NAFTA Party in respect of interpretation of the Agreement. It is thus apparent that the drafters contemplated third party participation in NAFTA arbitrations, and chose to limit those rights to those granted to the non-disputing NAFTA Parties. As the Petitioners clearly do not fall under either of these two grounds, there is no basis for the Tribunal to add them as parties.

8. This issue was also examined by the Tribunal in *Methanex v. the United States of America* ("*Methanex*").[4] In that case, the Tribunal was asked to consider petitions seeking leave to submit *amicus* briefs, rather than, as here, where the Petitioners may be seen to be seeking status as disputing parties. The Tribunal, however, in considering that question, made important observations relevant to the existence of jurisdiction to add "disputing parties".

9. In determining whether it had the power to allow *amicus* submissions (which the Investor discusses more fully below), the Tribunal noted that the only possible source of jurisdiction was Article 15 of the UNCITRAL Rules.[5] Implicit in that conclusion is that there was nothing in Section B of Chapter 11 of NAFTA which would grant that power, or, correspondingly, the power to add strangers to the proceeding as disputing parties. Thus, the Tribunal concluded:

> The Petitioners' requests must be considered against Article 15(1) of the UNCITRAL Arbitration Rules; *and it is not possible or appropriate to look elsewhere for any broader power or jurisdiction.*[6]

10. The tribunal in *UPS* examined Article 15(1) as a possible source of jurisdiction and found:

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[3] *UPS – Amicus Decision*, at para. 36.

[4] *Methanex Corporation and the United States of America, Decision of the Tribunal on Petitions from Third Persons To Intervene as "Amici Curiae"*, January 15, 2001,("*Methanex – Amicus Decision*").

[5] Article 15(1) of the UNCITRAL Rules states as follows:

> Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case.

There is no provision under the UNCITRAL Rules expressly permitting this Tribunal to allow persons not party to the arbitration agreement to participate in the arbitration as disputing parties.

[6] *Methanex – Amicus Decision,* at para. 25.

> While the provision is plainly important, it is about the procedure to be followed by an arbitral tribunal in exercising the jurisdiction which the parties have conferred on it. It does not itself confer power to adjust that jurisdiction to widen the matter before it by adding as parties persons additional to those which have mutally agreed to its jurisdiciton or by including subject matter in its arbitration additional to what which the parties have agreed to confer.[7]

11. In light of the above, it is therefore unsurprising that the Petitioners have been unable to point to any provision in the NAFTA which grants the Tribunal the jurisdiction to permit intervention as parties if this is what the Petitioners desire.

12. The implications of the Petitioners' submission are significant. To permit party status for what are in substance intermeddlers seeking to advance their own political agendas would be inconsistent with the rights of limited participation which the NAFTA has expressly provided in Articles 1127, 1128 and 1129 for the non-disputing NAFTA Parties – in this case the governments of Mexico and the United States of America. While these NAFTA Parties are entitled, under Article 1129, to receive the evidence and written argument of the disputing parties, their ability to make submissions is strictly confined to questions of interpretation of the NAFTA.

13. Moreover, the Petitioners might seek to have this Tribunal accord them a greater status than is given to subnational governments of the NAFTA Parties. Indeed, an issue has arisen in two previous NAFTA Investor-State claims over the rights of NAFTA Parties to share information received in the course of an Investor-State arbitration with others, including their subnational governments. The Tribunals have been clear that the NAFTA does not accord rights of access to information relating to such proceedings to the subnational governments. Not only, therefore, are the Petitioners seeking greater rights than the non-disputing NAFTA Parties possess, but they are seeking greater rights than the subnational governments of any NAFTA Party, irrespective of whether the NAFTA Party is a disputing party or not.[8]

14. Thus, the Investor adopts the analysis of the *Methanex* Tribunal (also adopted by the Tribunal in *UPS*) which found:

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[7] *UPS-Amicus Decision,* at para. 39.

[8] In *Pope & Talbot and the Government of Canada*, the Tribunal sustained the Investor's objection to Canada's practice of making protected documents available to Canada's provincial and territorial governments. The Tribunal stated that such documents could only be disclosed to"the limited class" of persons referred to in a prior procedural order (namely, the Investor and Canada), and that this class"does not include the ten provinces and three territories." See *Pope & Talbot and the Government of Canada,* Decision of February 14, 2000, at para. 6. Similarly, in *S.D. Myers and the Government of Canada* the Tribunal, considering the same issue, found that:"On the plain terms of the Treaty, CANADA is the 'Party' to the NAFTA, not any of the provinces or territories." *S.D. Myers and the Government of Canada, Procedural Order No. 16*, May 13, 2000, at para. 14.

> The Tribunal is required to decide a substantive dispute between the Claimant and Respondent. The Tribunal has no mandate to decide any other substantive dispute or any dispute determining the legal rights of third persons. The legal boundaries of the arbitration are set by this essential legal fact. It is thus self evident that if the Tribunal cannot directly, without consent, add another person as a party to this dispute or treat a third person as a party to the arbitration or NAFTA, it is equally precluded from achieving this result indirectly by exercising a power over the conduct of the arbitration.[9]

15. Accordingly, the Investor submits that the Tribunal must reject the Petitioners' leave to intervene to the extent that it means leave to be granted standing as a party to the arbitration.

This Tribunal may have jurisdiction to receive *amicus curiae* briefs, but on the material before it, it ought not to receive them from these Petitioners

16. The NAFTA Free Trade Commission ("FTC") issued a Statement on non-disputing party participation on October 7, 2003, which interpreted the NAFTA has allowing Chapter 11 tribunals to accept written submissions from non-disputing parties, and set forth certain procedural recommendations on how tribunals might deal with such applications.[10] Since the FTC's Statement is not binding on the Tribunal,[11] the decision of the Tribunal in this matter is entirely discretionary. However, while the FTC Statement is not technically binding on this Tribunal, the Investor does not oppose its contents, which are similar to the Investor's submissions made herein.

17. Consistent with the FTC's interpretation, the Tribunal in *UPS* found that Article 15(1) of the UNCITRAL rules gives a tribunal the power to allow submissions by *amici curiae*.[12] That power, however, is not unconstrained.

18. The *UPS* Tribunal determined that Article 25(4) of the UNCITRAL Rules[13] prevents third parties or their representatives from attending the hearings in the absence of both parties

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[9] *Methanex – Amicus Decision* at para. 29; *UPS-Amicus Decision* at para 39.

[10] *Statement of the Free Trade Commission on Non-Disputing Party Participation*, October 7, 2003.

[11] See *Statement of the Free Trade Commission on Non-Disputing Party Participation*, October 7, 2003, at para. 3, where the FTC merely "recommends" that Chapter 11 Tribunals adopt the procedures it put forth. Also refer to *Glamis Gold Ltd. v. the United States of America, Decision on Application and Submission by Quechan Indian Nation*, September 16, 2005, ("*Glamis – Amicus Submission*") at para. 2, where the Tribunal refers to the FTC Statement as containing mere "principles" as opposed to rules.

[12] *UPS – Amicus Decision,* at para 63.

[13] "Hearings shall be held *in camera* unless the parties agree otherwise."

agreeing.[14] The Investor does not agree to the attendance of the Petitioners or their representatives at the hearings. Accordingly, the Investor submits that this Tribunal lacks jurisdiction to permit the Petitioners to attend hearings.

19. In *UPS*, the Tribunal, while declining to make a ruling on the confidentiality or availability of documents, nevertheless highlighted that:

> Under Chapter 11 and the UNCITRAL Rules provision is made for the communication of pleadings, documents and evidence to the other disputing party, the other NAFTA Parties, the Tribunal and the Secretariat- and to no one else.[15]

On this basis, the Investor submits that the Petitioners cannot be entitled to receive copies of any documents filed in this arbitration unless the disputing parties agree that they can be made public.[16]

20. The Tribunal ought not to receive *amicus* submissions unless it is confident they will provide a particular insight into the issues before the Tribunal. An application to make an *amicus* submission raises numerous complex legal and technical issues, including whether and how a NAFTA Chapter 11 Tribunal should receive submissions from persons other than the disputing parties or the non-disputing NAFTA Parties, who should be given standing to participate as *amicus curiae*, as well as the nature of such participation.

21. The Investor adopts the reasoning of the Tribunal in *Methanex* that it must be assumed that "the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute."[17] Accordingly, *amicus* briefs should only be submitted in the event that the Tribunal determines the disputing parties are unable to provide the necessary assistance and materials needed to decide the dispute.

22. It is for this reason that the Tribunal in *UPS* stated that it would be inappropriate to allow the Petitioners in that case to make submissions on some substantive issues.[18] Indeed, it

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[14] *UPS – Amicus Decision,* at para 67.

[15] *UPS – Amicus Decision* at para 68

[16] The *Methanex – Amicus Decision* Tribunal states, at para. 47, that "...it has no power to accept the Petitioner's requests to receive materials generated within the arbitration or attend..."

[17] *Methanex – Amicus Decision,* at para. 48.

[18] *UPS – Amicus Decision*, at para 71.

specifically ruled that submissions on questions of jurisdiction and place of arbitration should not be received.[19]

23. Further, any determination to accept *amicus* briefs ought not to permit strangers to the arbitration greater rights than those accorded to the NAFTA Parties. NAFTA Article 1128 permits a non-disputing NAFTA Party to have the opportunity to provide its views on interpretations of the NAFTA. Non-disputing Parties are not permitted the right to comment on evidence, to cross-examine witnesses or to raise new legal issues. In the absence of the specific permissions included in NAFTA Article 1128, even this limited form of participation would not have been possible under the UNCITRAL Rules. If any *amicus* submission is to be received, it must be strictly limited in scope and not be permitted to raise issues outside of those articulated by the disputing parties – and even then, such submissions must be strictly limited to providing an interpretation of the particular NAFTA provisions as issue.

24. In light of the fact that non-disputing NAFTA Parties have been restricted to only making submissions on questions of interpretation of the NAFTA, if this Tribunal were to allow the Petitioners to make submissions on matters of different scope than the interpretation of the NAFTA, it could be argued that the Tribunal would also be obliged to similarly permit non-disputing NAFTA Parties to make *amicus* submissions. This appears contradictory to the express provisions of NAFTA Chapter 11.[20] Had the NAFTA Parties intended non-disputing NAFTA Parties to have the right to make submissions on matters other than the interpretation of the NAFTA, this would have been expressly provided for in NAFTA Chapter 11. Accordingly, the Investor submits that *amicus* submissions should be restricted to matters relating to the interpretation of the NAFTA.

25. Care must also be taken to ensure that *amicus* submissions are not received without sound reason to believe that they will usefully assist the Tribunal.[21] If a tribunal were to permit *amicus* briefs liberally, then the proceedings would quickly become unmanageable, as no doubt the various sub-national governments, special interest groups advocating specific views such as the Petitioners, and other non-governmental organizations, would equally seek to participate. As the *UPS* Tribunal noted, "[t]he power of the Tribunal to permit *amicus* submissions is not to be used in a way which is unduly burdensome for the parties or which unnecessarily complicates the Tribunal process." That would be unfair and costly to the disputing parties, who would be called upon to respond to potentially voluminous material, none of which would be received on the basis of their consent.

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[19] *UPS – Amicus Decision*, at para. 71.

[20] Mexico raised similar concerns with respect to non-Party submissions and *amicus* briefs in the *Methanex* arbitration. See *Methanex Corporation and United States of America, Submission of Mexico*, November 10, 2000, at para. 7.

[21] *UPS – Amicus Decision*, at para. 70.

26. In any event, the Investor submits that the Tribunal must limit the timing, form and content of any *amicus* submissions it determines to receive. The scope of the *amicus* submissions should be predicated on the objective that the Tribunal "would be assisted by these submissions on the Disputing Parties' substantive dispute."[22] In other words, a potential *amicus* must demonstrate to the Tribunal that its submission would be not only relevant, but also helpful.

27. Applying these tests, it is clear that it is premature for this Tribunal to determine whether to receive *amicus* briefs from either of these Petitioners, and if so, on what terms and conditions.

28. The Investor submits that the following factors should be considered in the exercise of the Tribunal's discretion prior to allowing *amicus curiae* briefs in this arbitration. Before any *amicus* brief is received, the Petitioners must establish in a meaningful way that they have a real interest in the outcome of the proceeding *and* that they have something important to add, of which the Tribunal would otherwise be unaware (having full regard to the principle that it ought to be for the parties to determine what evidence the Tribunal needs to receive to fully appreciate the claim and the defence). Merely finding the issues in the arbitration to be matters that prospective *amici* find to be interesting is an insufficient basis upon which a Tribunal ought to exercise its discretion to receive any material from a non-party.

29. The Tribunal should consider the demonstrated expertise as well as the objectivity, helpfulness and reliability of the material the Petitioners seek to submit. Here, with no material before the Tribunal from the Petitioners, insufficient foundation has been laid to believe that either of these Petitioners, if granted *amicus* status, would assist the Tribunal. Each Petitioner ought to be considered on their own, rather than, as here, in one joint petition where the relative interests and potentially useful contributions are not clearly articulated. Participation as *amicus* ought not to be granted merely to provide a platform to advance a particular political viewpoint.

30. Specific references were made in the submissions to the *Methanex* Tribunal, and in the *Methanex-Amicus Decision,* regarding the *amicus* procedures outlined in the WTO case *European Communites–Measures Affecting Asbestos and Asbestos Containing Products.*[23] These procedures include the conditions for those third parties who wish to apply for leave to file a written *amicus* brief. Using the example of the *Asbestos* case, an *amicus* leave application should include the following elements:

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[22] *Methanex – Amicus Decision,* at para. 48.

[23] WT/DS135/9 ("*Asbestos*"), *Additional Procedure Adopted Under Rule 16(1) of the Working Procedures for Appellate Review*, AB-2000-11, November 8, 2000.

(i) a description of the relevant expertise and experience of the applicant and the nature of the applicant's interest in the arbitration;

(ii) an outline of the specific issues in the arbitration that the applicant wishes to address;

(iii) a description of what way the applicant will make a contribution that is not likely to be repetitive of what has been already submitted (by the disputing parties or other *amici*); and

(iv) the disclosure of the nature of the third party's relationship with either of the disputing parties or the NAFTA Parties.

31. Any *amicus* brief which the Tribunal receives ought also to be strictly limited in length,[24] (such as no greater than ten pages) and confined to the specific issue or issues on which the Tribunal permits the brief to be filed. The Tribunal should not receive oral submissions from a proposed *amicus* party, nor should the *amicus* party be permitted to either attend at any hearing or to receive or review any material related to the proceeding except that which the parties consent to being made publicly available.

32. Article 15(1) of the UNCITRAL Rules provides that the parties be "treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting its case." The *Methanex* Tribunal raised this issue in response to the concerns of the Claimants that a burden would be added to the arbitration if *amicus* submissions were presented and the disputing parties were obliged to make submissions in response. As the *Methanex* Tribunal stated in its *Amicus Decision*, "[t]he burden is indeed a potential risk. It is inherent in any adversarial process which admits representations by a non-party third person."[25] And as the *Glamis* Tribunal noted, in allowing the participation of *amici curiae*, "it is important...to avoid undue burden on the Parties and delay in the proceedings."[26]

33. *Amicus* submissions should not be permitted in a way which is unduly burdensome for the parties, or which unnecessarily complicates the Tribunal process.[27] The Investor agrees with the *Methanex* Tribunal that *amici* should not adduce the evidence of any

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[24] *UPS – Amicus Decision*, at para. 70.

[25] *Methanex – Amicus Decision*, at para. 35.

[26] *Glamis – Amicus Decision*, at para. 11.

[27] *UPS – Amicus Decision*, at para. 69.

factual or expert witness, as this would be too great a burden on the disputing parties.[28] In addition, any *amicus* submission must be strictly limited in scope and not be permitted to raise issues outside of those articulated by the disputing parties. The Investor also concurs with the *Methanex* Tribunal that there is a possible risk of unequal or unfair treatment with an *amicus* process and that such matters should be addressed as and when such immediate risk arises. As the US noted in its submissions to the *Methanex* Tribunal, granting permission to submit an *amicus* brief should "not prejudice the rights of the parties or interfere with the efficient advancement of the proceedings."[29]

PART THREE: RELIEF SOUGHT

34. The Investor respectfully submits that the Petition to this Tribunal by the Petitioners be dismissed with respect to the requests that the Petitioners be given standing as a Disputing Party.

35. The Investor further submits that the application to provide an *amicus* brief should be dismissed at this time, but that the Tribunal might determine that the Petitioners could be granted leave to make an application to submit separate an *amicus curiae* submissions, in the manner and at the time determined by this Tribunal in its discretion pursuant to Article 15(1) of the UNCITRAL Arbitration Rules.

All of which is respectfully submitted this 16th day of July, 2008.

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[28] *Methanex – Amicus Decision*, at para. 36.

[29] *Methanex – Statement of Respondent,* at p. 15.