

UNDER THE UNCITRAL ARBITRATION RULES AND
SECTION B OF CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT

CANFOR CORPORATION
("Canfor")

Investor
(Claimant)

v.

THE GOVERNMENT OF
THE UNITED STATES OF AMERICA

Party
("Respondent")

REJOINDER ON JURISDICTION OF THE CLAIMANT,
CANFOR CORPORATION

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I. INTRODUCTION

1. Pursuant to the Tribunal's Procedural Order No. 4, Canfor Corporation ("Canfor") respectfully submits this Rejoinder on Jurisdiction in response to the Reply on Jurisdiction of the Respondent United States of America ("United States' Reply") dated August 6, 2004.

2. Canfor will confine its response to new points raised by the United States, and to clarifications and corrections of misstatements made by the United States about Canfor's position in these proceedings. Where the United States simply repeats arguments that have already been addressed in its original Objection to Jurisdiction, Canfor relies upon the arguments outlined in its Reply to the United States' Objection to Jurisdiction ("Canfor's Reply") dated May 14, 2004.

3. Before addressing the substantive issues raised in the United States' Reply, two preliminary issues must be addressed. First, at page 1 of its Reply, the United States asserts that there is no dispute between the disputing parties as to the central issue before this Tribunal. That is simply not correct.

4. The United States characterizes the issue as "whether the United States consented to arbitrate antidumping and countervailing duty claims...under the investment chapter of the NAFTA."¹ With respect, that is not the issue before this Tribunal. The issue, properly stated, is: does Article 1901(3) prevent Canfor from prosecuting this claim under NAFTA Chapter 11, simply because the factual matrix out of which the arbitrary, discriminatory and abusive conduct of United States' officials arose has some connection to the antidumping or countervailing duty laws of the United States or their application to Canfor?

¹ United States' Reply at p. 1.

5. Second, care must be taken in reviewing the United States' Reply, as it consistently misstates or fundamentally mischaracterizes many of the submissions advanced by Canfor. Accordingly, although Canfor will identify the misstatements or mischaracterizations when responding to specific points, it is essential that the Tribunal examine the submissions actually made by Canfor, rather than the purported paraphrasing contained within the United States' Reply.

6. For example, pervasive throughout the United States' Reply is the characterization of Canfor's claims as "antidumping and countervailing duty claims." They are not. This characterization of Canfor's claims lacks the precision necessary to undertake the proper analysis required to address the question actually in issue on this jurisdictional motion.

7. Canfor's claims have as their genesis the unfair, inequitable and discriminatory treatment of Canfor by United States' officials, designed to ensure a predetermined, politically motivated and results driven outcome, which conduct was carried out for the purpose of causing harm to Canfor and those in similar positions.² The conduct of which Canfor complains is the arbitrary, unreasonable and discriminatory conduct of United States' officials, not mandated by law, which, should the Tribunal wish to deal with the issues raised by the United States' Objection to Jurisdiction as a preliminary matter before adjudicating the merits, must be presumed to have not met the standards to which the United States agreed to abide under Articles 1102, 1103, 1105 and 1110 of the NAFTA³ and the customary international law standards implicit in those

² *Canfor Corporation v. The Government of the United States of America*, Notice of Arbitration and Statement of Claim, July 9, 2002 at para. 20.

³ See eg. *Methanex Corporation v. Government of the United States*, Preliminary Award on Jurisdiction and Admissibility (Chapter 11 Tribunal), 7 August 2002, at paras. 112-126; *Pope & Talbot Inc. v. The Government of Canada*, Award on the "Relating to Investment Motion", (Chapter 11 Tribunal) 26 January 2000 (online: <http://www.dfait-maeci.gc.ca/tna-nac/pope-en.asp> – accessed May 13, 2004) at para. 25 [*"Pope and Talbot"*].

provisions.⁴ A recent example of this abusive conduct is the International Trade Commission's ("ITC's") blatant disregard of the rule of law⁵, which engages the rights that Canfor is entitled to assert under Chapter 11. Canfor is entitled to relief from such egregious conduct of the United States' authorities.

II. OVERVIEW OF CANFOR'S RESPONSE

8. Below, in summary form, we set out the propositions advanced by the United States in its Reply, and Canfor's brief response to them.

⁴ See e.g. *NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001), online: DFAIT <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp> accessed 28 January 2003) [*"Chapter 11 Interpretative Note"*].

⁵ The Chapter 19 Panel decision released August 31, 2004 aptly describes how the United States' officials have approached the softwood lumber dispute. It states:

The Commission [the ITC] has made it abundantly clear to this Panel that it is simply unwilling to accept this Panel's review authority under Chapter 19 of the NAFTA and has consistently ignored the authority of this Panel in an effort to preserve its finding of threat of material injury. This conduct obviates the impartiality of the agency decision-making process, and severely undermines the entire Chapter 19 panel review process. (at p. 3)

The Panel went on to conclude that another remand on substantive issues would have been an "idle and useless formality", given the ITC's unwillingness to respect the authority of the Panel, or to comply with its obligations under the NAFTA. The minority opinion, authored by Mark Joelson, an American panellist, was even stronger. In endorsing the majority opinion, he wrote:

In my view, the question of what form the Panel's remand to the Commission should take here poses an important test not only for this particular binational panel but also, more broadly, for the efficacy and integrity of the NAFTA binational panel process....

The Commission has made it plain by its actions and words that it is disinclined to accept the Panel's review authority under Chapter 19 in this case. Given this situation...issuing yet another open ended remand instruction to the Commission would be to allow the Chapter 19 process to become a mockery and an exercise in futility...(at p. 11-12)

In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination (Canada v. United States), (2004, USA-CDA-2002-1904-07 (Ch. 19 Panel), online: NAFTA Secretariat <<http://www.nafta-sec-alena.otg/english/index.htm>> (accessed: 23 September 2004) [*"ITC Second Remand Decision"*].

A. United States' Argument on the function of Article 1901(3) (United States' Reply, pp. 4 to 7):

Article 1901(3) of NAFTA performs a function similar to Article 1607 and 2103(1) in that it exempts a particular subject matter – a parties' antidumping and countervailing duty law – from other parts of the NAFTA.

Canfor's Response:

Article 1901(3) performs a much more limited function than Articles 1607 and 2103(1). Articles 1607 and 2103(1) use fundamentally different terminology than Article 1901(3). The NAFTA recognizes a difference between a "law" and a "measure". A "law" is the set of legal rules or norms to be applied, whereas a "measure" is much broader, and encompasses not only a Party's laws but also the conduct of the state in the application or purported application of such laws. Article 1901(3) is an interpretive provision which uses a specifically defined term - "antidumping law and countervailing duty law" whereas Articles 1607 and 2103(1) both use "measures". Article 1901(3) simply ensures that no other chapter of NAFTA outside of Chapter 19 can impose an obligation on the Party to do something (or refrain from doing something) to that Party's antidumping and countervailing duty "laws" (such as the obligations imposed in Chapter 19 under Articles 1902(d) and 1904(15)).

B. United States' Argument that Canfor seeks to impose obligations on the United States (United States' Reply, pp. 7 to 17):

Canfor seeks to impose obligations on the United States with respect to its antidumping and countervailing duty laws.

Canfor's Response:

The United States is bound to articulate, in respect of each claim advanced by Canfor:

1. the specific provisions of the NAFTA relied upon by Canfor which allegedly is being construed so as to impose obligations;
2. the exact nature of those obligations; and
3. how such obligations are being imposed upon the United States "with respect to" its antidumping and countervailing duty law.

Neither in its original Objection, nor in its Reply, does the United States demonstrate how Canfor has in any way sought to construe a provision in another chapter of NAFTA as imposing an obligation on the United States with respect to its antidumping or countervailing duty laws, nor does it ever specifically identify

the nature of the obligation that Canfor's claims would supposedly impose upon the United States.

C. United States' Argument on "with respect to" (United States' Reply, pp. 10 to 12):

Canfor's submission asserts the words "with respect to" have a special, narrow meaning.

Canfor's Response:

On the contrary, Canfor's interpretation of the phrase "with respect to" is based upon the ordinary meaning of these words in light of their context, object and purpose. Interpreted in accordance with Article 31 of the *Vienna Convention on the Law of Treaties*⁶, "with respect to" means that the "obligations" referred to in Article 1901(3) address themselves to a Party's *laws*, requiring some action directly affecting those *laws*. In other words, Article 1901(3) ensures the provisions in other chapters of NAFTA cannot be construed so as to require a Party do something (or refrain from doing something) to its *laws*.

D. United States' Argument that "law" includes "application of the law" (United States' Reply, pp. 12 to 15):

Canfor's claim is premised upon a "baseless" distinction between the substance of a law and the application of the law.

Canfor's Response:

The United States' submission improperly characterizes Canfor's claims. Canfor's claim is based on the plain language of the NAFTA interpreted in light of the context, purpose and object of the treaty. Article 1901(3) specifically uses defined terms – "antidumping law" and "countervailing duty law". The definition of antidumping law and countervailing duty law is precise. The definition does not include the application of the law described in that Article.

E. United States' Argument that Canfor would accord private parties greater rights than the NAFTA Parties (United States' Reply, pp. 17 to 21):

Canfor's interpretation of Article 1901(3) results in private parties having broader dispute resolution rights than NAFTA Parties (with reference to Canfor's argument about Article 2004).

⁶ (1969) 1155 U.N.T.S. 331, in force 1980 ["*Vienna Convention*"].

Canfor's Response:

The United States is simply incorrect in asserting that somehow states have lesser rights than private claimants under Canfor's interpretation. First, the NAFTA provides NAFTA Parties with a certain bundle of dispute resolution rights and it provides investors with different dispute resolution rights under Chapter 11. It is not a case of NAFTA Parties having or not having "broader" dispute resolution rights than investors. Second, nothing under NAFTA Article 2004 precludes Canada from advancing the same legal claims brought by Canfor in the independent exercise of Canada's rights, for an alleged violation of NAFTA Chapter 11 since the exception in Article 2004 only applies to the matters covered in Chapter 19 itself, which do not include investor rights.

F. United States' Argument on the objectives of the NAFTA (United States' Reply, pp. 22 to 23):

Canfor attempts to override the specific terms of Article 1901(3) with general, preambular language concerning NAFTA's object and purpose, which is contrary to accepted canons of treaty interpretation.

Canfor's Response:

Contrary to the United States' submission, Canfor relies upon the plain language of the treaty. The United States' insistence that only one of the objectives of NAFTA, namely, "effective procedures . . . for the resolution of disputes", is relevant, is a narrow interpretation that cannot be countenanced. NAFTA as a whole must be read having regard to all of its objectives. In any event, recent events have once again demonstrated the United States' unwillingness to allow Chapter 19 to be an effective dispute resolution mechanism.

G. United States' Argument on parallel proceedings (United States' Reply, pp. 24 to 27):

Canfor misstates the Tribunal's reasoning in the *Bluefin Tuna*⁷ case which the United States says rejects the "presumption or parallel proceedings".

Canfor's Response:

The conclusion the United States draws from the *Bluefin Tuna* case is incorrect. The Tribunal in that case did indeed take as its point of departure a *presumption* of parallel obligations, including obligations with respect to settlement of disputes, even though it ultimately concluded in that case that one treaty excluded dispute resolution under another treaty.

⁷ *Southern Bluefin Tuna Case (Australia and New Zealand v. Japan)*, Award on Jurisdiction and Admissibility, Arbitral Tribunal constituted under Annex VII of the *United Nations Convention on the Law of the Sea*, 39 I.L.M. 1359 (UNCLOS Arb. Trib. 2000) [*"Bluefin Tuna"*].

9. Finally, in its Rejoinder Canfor will comment on the documents which were produced pursuant to the Tribunal's Procedural Order #5 after Canfor had filed its Reply. These documents once again confirm what Canfor has previously stated: the interpretation of Article 1901(3) the United States now asserts was not in the contemplation of the Parties at the time the NAFTA was negotiated.

10. Accordingly, for the reasons outlined in this Rejoinder, the United States' Objection to Jurisdiction must be dismissed.

III. REJOINDER ARGUMENT

A. The United States misinterprets Articles 1607 and 2103 and misstates the function of Article 1901(3)

11. At pages 4 through 7 of its submission, the United States asserts that "Canfor [has] ignore[d] the fact that the NAFTA Parties used more than one method to define the scope of the NAFTA's dispute resolution mechanisms."⁸ It then argues that Article 1901(3) "performs a function similar to Articles 1607 and 2103(1): it exempts a particular subject matter – a party's antidumping and countervailing duty law – from other parts of the NAFTA."⁹ Contrary to the United States' submission, however, a cursory review of Canfor's submission demonstrates that Canfor was alive to the sensitive balance between rights and dispute settlement obligations throughout the NAFTA¹⁰, and further, that reviewed carefully, the "mechanisms" referred to by the United States, rather than supporting the United States' position, clearly support Canfor.

⁸ United States' Reply, at p. 4.

⁹ *ibid* at 5.

¹⁰ See, for instance, Canfor's Reply at paras 136-144.

12. In specific response to the United States' submissions on Articles 1607 and 2103, Canfor will demonstrate that the United States has failed to have regard for the essential differences between those provisions and Article 1901(3).

(i) **Articles 1607 and 2103 use the term "measures" not "law"**

13. The first difference between Articles 1607 and 2103, on the one hand, and Article 1901(3) on the other, is that the former two provisions make clear that they relate to "measures," whereas Article 1901(3) relates only to "antidumping law or countervailing duty law," which are specifically defined in Chapter 19. Had the drafters of the NAFTA intended Article 1901(3) to apply to anything touching upon countervailing duty or antidumping matters, it is apparent from the wording used in Articles 1607 and 2103 that the Parties would not have used the phrase "antidumping law or countervailing duty law", but would instead have used the more encompassing phrase "antidumping measures or countervailing duty measures".

14. The notion of a measure is a common one at international law and is consistently used to encompass a variety of state actions.¹¹ A measure is any act normally attributable to a state according to the applicable international law of state responsibility.

15. The breadth of the term "measures," as it is defined under NAFTA, has received consideration by other NAFTA Chapter 11 Tribunals. In *Ethyl Corporation*, at para. 66, for instance, the Tribunal endorsed a broad interpretation of the word "measure" in the context of an express discussion of the difference between a law and a measure:

¹¹ *United States – Sunset Review of Antidumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*; report of the Appellate Body, WT/DS244/AB/R, 15 December, 2003 at para. 81

"In principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch." (footnotes omitted)

In addressing what constitutes a measure, the Tribunal notes that Canada's Statement on Implementation of the North American Free Trade Agreement, Can. Gaz. Part 1C (1 Jan. 1994) (hereinafter Canadian Statement on Implementation of NAFTA) (at 80) states that:

The term measure is a non-exhaustive definition of the ways in which governments impose discipline in their respective jurisdictions.

This is born out by Article 201(1), which provides that:

Measure includes any law, regulation, procedure, requirement or practice.

Clearly, something other than a law, even something in the nature of a "practice", which may not even amount to a legal stricture, may qualify.¹²

16. The term "measures" was again interpreted broadly in the *Loewen* case. It was described as "embrac[ing] any action which affects the rights of persons coming within the application of the relevant treaty provision".¹³ Therefore, it is clear that the term "measures" encompasses not only the Party's laws, but also the manner and conduct of the Party in the application or purported application of such laws.¹⁴

17. By contrast, Article 1901(3) uses a specific and precise phrase, "antidumping law or countervailing duty law" which laws are then defined in Article 1902(1) as follows:

Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents.

¹² *Ethyl Corporation v The Government of Canada*, Award on Jurisdiction (NAFTA Chapter 11 Tribunal) 24 June 1998.

¹³ *Loewen Group Inc. and Raymond R. Loewen v. United States of America*, (ICSID Case. No. ARB(AF)/98/3), Award on Jurisdiction, (NAFTA Chapter 11 Tribunal), 5 January 2001 (online: <http://www.naftalaw.org> – accessed-24 September 2004), at 11, citing *Regina v. Pierre Bouchereau*, 30 77 [1977] ECR 1999, at para. 44, holding that judicial acts constituted measures.

¹⁴ For the United States to now assert that the phrase "antidumping law or countervailing duty law" has the same meaning as "antidumping measure or countervailing duty measure" is inconsistent with the United States' own position during the negotiation of the NAFTA. The material produced by the United States in response to the Tribunal's direction to produce documents relating to the negotiation of the NAFTA text make this clear. The United States was clearly alive to the distinction between the broad term "measure" and more narrow terms such as law, and indeed only agreed to the use of the word measure in Article 1101 "on the condition the definition of "measure includes single actions". Accordingly, they cannot argue now that it has the same breadth as law in good faith, and the Tribunal cannot adopt such an interpretation. See: Washington Composite "Investment", May 22, 1992, Doc. No. 4540, footnote 1; Virginia Composite "Investment", June 4, 1992, Doc. No. 4571, footnote 1; and Crystal Composite "Investment", June 4, 1992, Doc. No. 04606, footnote 1.

18. That definition is then repeated in Article 1904(2), as follows:

the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority.

19. Obviously, therefore, by the use of the more precise, defined phrase "antidumping law or countervailing duty law", as opposed to the broader phrase "antidumping measure or countervailing duty measure", the Parties intended to signal a distinction in the scope or ambit of Article 1901(3) as compared to Articles 1607 and 2103.¹⁵

(ii) **The structure of Articles 1607 and 1901(3) is different**

20. The second notable difference between Article 1607 and Article 1901(3) is that the structure of the former provision uses the phrase "no provision of this Agreement shall impose any obligation", whereas the latter uses the phrase "no provision of *any other Chapter* of this Agreement shall be *construed* as imposing any obligation on a Party" (emphasis added). The implications of this difference are twofold.

21. First, contrary to the submission of the United States at page 5 of its Reply, the use of the words "*shall be construed*" in Article 1901(3) but not in Article 1607 bolsters the submission advanced by Canfor that Article 1901(3) is simply intended to provide guidance as to how to interpret other provisions of the NAFTA. It is not jurisdictional in nature. Had the meaning of Article 1607 and Article 1901(3) been intended to be synonymous, then the same phrase would have been used.

¹⁵ The choice of the expression "laws", as defined in Chapter 19 to mean the applicable *general legal rules or norms*, rather than "measures," is consistent with the context, object and purpose of Chapter 19: the parties were seeking to ensure that the antidumping and countervailing duty laws of the Parties were to be reserved and any obligations on the Parties to do anything in relation to those laws were to be confined to obligations imposed under Chapter 19.

22. Second, and more significantly, given the fact that Article 1901(3) states that “no provision of any other Chapter” can be construed in a certain way, the inescapable inference is that provisions within Chapter 19 can (and do) impose obligations on a Party with respect to their antidumping and countervailing duty law.

23. An examination of the provisions of Chapter 19 explains what the parties meant by the use of the phrase “imposing obligations on a Party with respect to their antidumping law or countervailing duty law”. Article 1902(2) provides one such example. It provides that a Party may change or modify its antidumping or countervailing duty law, but it imposes a restriction upon the manner in which that change can occur – i.e., it must be consistent with, *inter alia*, the “Antidumping Code” and the “Subsidies Code”.

24. An even more specific example of what the Parties meant by “imposing obligations on a Party with respect to its antidumping law or countervailing duty law” can be seen in Article 1904(15). This provision imposes a very specific obligation on the Parties to do something in respect of, or “with respect to,” their antidumping and countervailing duty laws: namely, to amend them in particular ways. It provides:

15. In order to achieve the objectives of this Article, the Parties shall amend their antidumping and countervailing duty statutes and regulations with respect to antidumping or countervailing duty proceedings involving goods of the other Parties, and other statutes and regulations to the extent that they apply to the operation of the antidumping and countervailing duty laws. In particular, without limiting the generality of the foregoing, each Party shall:

(a) amend its statutes or regulations to ensure that existing procedures concerning the refund, with interest, of antidumping or countervailing duties operate to give effect to a final panel decision that a refund is due;

(b) amend its statutes or regulations to ensure that its courts shall give full force and effect, with respect to any person within its jurisdiction, to all sanctions imposed pursuant to the laws of the other Parties to enforce provisions of any protective order or undertaking that such other Party has promulgated or accepted in order to permit access for purposes of panel

review or of the extraordinary challenge procedure to confidential, personal, business proprietary or other privileged information;

(c) amend its statutes or regulations to ensure that

(i) domestic procedures for judicial review of a final determination may not be commenced until the time for requesting a panel under paragraph 4 has expired, and

(ii) as a prerequisite to commencing domestic judicial review procedures to review a final determination, a Party or other person intending to commence such procedures shall provide notice of such intent to the Parties concerned and to other persons entitled to commence such review procedures of the same final determination no later than 10 days prior to the latest date on which a panel may be requested; and

(d) make the further amendments set out in its Schedule to Annex 1904.15.

25. Annex 1904.15 then sets out an even more specific set of obligations to amend or enact laws in a particular way.

26. Thus, in the context of Chapter 19, what the Parties meant by "imposing an obligation ... with respect to" the Parties' "antidumping law or countervailing duty law" was imposing an obligation to do something to the law such as to change, amend or modify it, in the manner described in Article 1902(3) and 1904(15).¹⁶ Therefore, unlike Articles 1607 and 2103, the restriction contained in Article 1901(3) was simply intended to confine any obligations being

¹⁶ Further confirmation of this point is found in the material produced by the United States in response to the Tribunal's procedural order concerning document production. A lawyers group review of Chapter 19 states in part:

"NAFTA establishes a mechanism for independent binational panels to review final antidumping and countervailing duty determinations by administrative authorities in each country . . . these panels will substitute for domestic judicial review in cases in which either the importing or exporting country has requested panel review of a determination, when requested to do so by a person entitled to seek judicial review of that determination under the domestic law of the importing country . . . a panel must apply the domestic law of the importing country in reviewing a determination. . . . the NAFTA explicitly preserves the right of each country to retain its antidumping and countervailing duty laws . . . **Each country will amend its laws to implement the obligations of this section.**" (emphasis added)

imposed on the Parties with respect to each Party's antidumping and countervailing duty law to those imposed under Chapter 19, thereby clearly defining the ambit of the antidumping or countervailing duty law that could be applied by the Parties.¹⁷

(iii) **Difference in terminology used between Articles 1607 and 2103 and Article 1901(3)**

27. The third difference of relevance between Article 1901(3) and Articles 1607 and 2103, the significance of which is ignored by the United States, is that the former uses the phrase "with respect to", while the latter, respectively, use "regarding" and "apply." It is Canfor's submission that the normal usage of the latter terms is broader than the phrase "with respect to." The simple fact is that in these provisions of NAFTA, the Parties chose to use different expressions, suggesting differences in intended meaning. That is consistent as well with the other differences noted above, all of which make clear that Articles 1607 and 2103 are of broader ambit than Article 1901(3).

B. The United States never defines the obligations its says Canfor seeks to impose

28. The United States, at pages 7 through 17, repeatedly submits that Canfor seeks to "impose obligations on the United States . . . with respect to [the United States'] antidumping

States and the United States of America, (Doc. No. 2868); Doc. No. 2859 (untitled); and Lawyers Group Review (Doc. No. 2853 and 2849).

¹⁷ The United States' confusion over the function and meaning of Article 1901(3) can be seen in its comment upon the *Byrd Amendment*, in footnote 22 on page 9. Article 1902(2) demonstrates that the *Byrd Amendment* cannot be construed as part of the "antidumping law or countervailing duty law" safeguarded under Article 1901(3) because that amendment violated the obligation of the United States not to amend its antidumping or countervailing duty law in a manner inconsistent with the United States WTO obligations. This is yet another example of the United States' approach to interpreting NAFTA to further its own interest – it seeks refuge under Article 1901(3) because it says it is an antidumping and countervailing duty law – yet not only did the United States not follow Article 1902(3) in enacting that law, the Amendment itself has already been found by the WTO Appellate Body to be inconsistent with the United States WTO obligations (see *United States – Continued Dumping and Subsidy Offset Act of 2000* (Complaints by Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand) (2003) WTO Doc. WT/DS217/AB/r and WT/DS234/AB/R at paras 318-319) [*Byrd Amendment – Appellate Body Decision*]. The United States has to date taken no action to remedy this delict (see e.g. *Status Report of the United States* (2004) WTO Doc. WT/DS217/16/Add. 1-8 and WT/DS234/16/Add. 1-8).

law or countervailing duty law",¹⁸ yet not once does it define the obligation it says is being imposed, nor how it is an obligation in respect of its "antidumping law or countervailing duty law". Instead, both the original Objection and the United States' Reply are filled with vague and repetitive generalized assertions of the imposition of some "obligation". In respect of each claim advanced by Canfor, the United States is bound to articulate which provisions of NAFTA relied upon by Canfor impose obligations, what those obligations are, and how those obligations are being imposed on the United States "with respect to" its "antidumping law or countervailing duty law." It has simply failed to do so.¹⁹

29. As Canfor demonstrated in its Reply, and as articulated above, Article 1901(3) prohibits the imposition of an obligation on a Party to do something with respect to its municipal antidumping and countervailing duty laws, as those terms are defined in Chapter 19. It is a provision directed at the interface between the parallel municipal law regime and the international regime, and ensures that no obligation can be imposed under NAFTA upon a Party to do anything in relation to its municipal antidumping or countervailing duty law outside of the obligations imposed under Chapter 19. Nowhere does Canfor's claim impose such an obligation.

C. The United States misstates Canfor's submission concerning "with respect to"

30. At pages 10 through 12 of United States' Reply, it claims that Canfor has asserted a "special, narrow meaning" to the words "with respect to" in Article 1901(3). On the contrary, Canfor's reading of "with respect to" is based on the ordinary meaning of these words in light of

¹⁸ For example, see United States' Reply at pp. 7 and 16.

¹⁹ The conduct of the United States violates rules of customary international law which have been incorporated into Chapter 11, (most explicitly in 1105 (*Chapter 11 Interpretative Note, supra* note 4) but also, to the extent that the conduct at issue entails invidious *discrimination* against aliens, in 1102.) The conduct of the United States would thus breach international law obligations (custom) even in the absence of the NAFTA: the effect of NAFTA Chapter 11 in this case is largely to provide to the investor a right of action to seek compensation for conduct that the United States is obliged not to engage in, even aside from any additional *substantive* legal standards in Chapter

their context, object and purpose, in accordance with Article 31 of the *Vienna Convention*. Canfor does not assert that "with respect to" is being used as a term of art or in some out of the ordinary sense in Article 1901(3), but rather that the particular context, the surrounding language in Article 1901(3), as well as the context and purpose of Chapter 19 as a whole, make it clear that "with respect to" means that the obligations referred to in Chapter 1901(3) would purport to address themselves to a Party's *laws*, requiring some action on those *laws*.

31. The word "obligation" implies a requirement to do something (or refraining from doing something).²⁰ "With respect to," in its ordinary meaning and grammatical placement in context, thus defines the *subject matter* or *object* of the requirement to act or refrain from acting. Thus, Article 1901(3) means that provisions in other chapters of NAFTA cannot be construed so as to require that a Party do something (or refrain from doing something) to its *laws*.²¹

32. Canfor does not deny that, in a different context, "with respect to" could, hypothetically, have a different sense, defining some other kind of relationship or connection. Canfor's interpretation proceeds from the immediate and broader contexts of these words as they appear in NAFTA Article 1901(3). While it might be probative under some circumstances to examine the words "with respect to" as they appear in chapters of NAFTA other than Chapter 19, any such consideration must, to be in accordance with the *Vienna Convention* principles of treaty

11. This makes all the more implausible the United States' reliance on 1901(3), which refers to the possibility of obligations being "imposed" by other chapters of *NAFTA*.

²⁰ See e.g. *Webster's Third New International Dictionary of the English Language Unabridged*, s.v. "obligation": 1 an act of obligating oneself to a course of action...something...that binds or constrains to a course of action; 3a something that one is bound to do or forebear . . . 6 *Roman and Civil Law*: a legal relationship or tie in accordance with which one party is able to compel another in a personal action and under the existing circumstances to do or not do a specified act ... or to refrain from specified conduct and which arises out of a contract, quasi-contract, delict or quasi-delict.

²¹ In this regard, the United States submits, at page 8 of its Reply, that there is some significance to the fact that the factual matrix underlying various Chapter 19 proceedings (and WTO proceedings, for that matter) "closely mirrors" claims submitted to this Tribunal, and that the Chapter 19 claims are obviously with respect to United States antidumping or countervailing duty law, is once again not on point. Canfor again relies upon its earlier submissions

interpretation, relate the provision in the other chapter to the context of the words that are the actual subject of judicial interpretation, i.e. to the phrase "with respect to" as it appears within Chapter 19.²²

33. At page 10 of its Reply, the United States erroneously maintains that the majority opinion in the *Waste Management*²³ case endorses the proposition that the phrase "with respect to" has an intrinsically broad meaning. The United States urges that such an interpretation should be applied regardless of the context in which the words appear in the NAFTA. The United States' interpretation of *Waste Management* is not correct. The majority in *Waste Management* at no time dealt with, or ruled upon, what the specific expression "with respect to"

respecting the availability of parallel proceedings in different *fora* applying different legal standards. (See Canfor's Reply at paras. 80-109).

²² Moreover, it would be anomalous if the United States could assert that arbitrary conduct that is not in accordance with the law could be considered "with respect to" the "law" and therefore accorded the protection given to "law" in Article 1901(3). The position that arbitrary conduct cannot be construed as "with respect to" law is supported by ICJ case law, as such conduct is opposed to the very rule of law. In the *Elettronica Sicula SPA (United States v. Italy)*, [1989] I.C.J. Rep. 15 ["*ELSI*"], the ICJ stated:

"Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the Court in the *Asylum* case, when it spoke of "arbitrary action" being "substituted for the rule of law" (*Asylum Judgment* I.C.J. Reports 1950, p. 284). It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety. (at para 128)"

On the *ELSI* interpretation of 'arbitrary', it would appear that, if the facts alleged by Canfor support a finding that Canfor has been subjected to arbitrary treatment, that conduct cannot also be 'with respect to law'. To interpret the word "law" in Article 1901(3) in such a manner as to protect conduct fundamentally inconsistent with the rule of law itself would be to countenance the invocation of Article 1901(3) in a manner that amounts to an *abus de droit*.

Canfor notes that the *ELSI* formula for "arbitrariness" has been expanded upon by more recent tribunals. See: *Mondev International Limited v. USA*, (ICSID Case, No. ARB(AF)/99/2), Final Award, NAFTA Chapter 11 Tribunal, 11 October 2002 (online: <http://www.naftalaw.org> – accessed – 24 September 2004) at para.'s 126-127 (concerning denials of justice); *Loewen Group Inc. and Raymond R. Loewen v. United States of America*, (ICSID Case No. ARB(AF)/98/3), Final Award, (NAFTA Chapter 11 Tribunal), 26 June 2003 (online: <http://www.naftalaw.org> – accessed – 24 September 2004) at para.'s 131-135 (concerning denials of justice); and *Waste Management, Inc. v. Mexico(II)*, Final Award, (ICSID Case No. ARB(AF)/00/3), Final Award, NAFTA Chapter 11 Tribunal, 30 April 2004 (online: <http://www.naftalaw.org> – accessed – 24 September 2004) at para.'s 89-99 (concerning regulatory arbitrariness).

²³ *Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, (Chapter 11 Tribunal), 2 June 2000 (online: http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos-Mexico/Waste_1_manage ment/Waste_1_ management.htm – accessed May 13, 2004) at para. 16 ["*Waste Management*"]; .

meant in the context of Article 1121(2)(b). They chose to interpret all of the words in NAFTA Article 1121(2)(b) which were at issue, those being "any proceedings with respect to the *measure* of the disputing party that is alleged to be a breach referred to in Article 1116." (emphasis added) The focus, if any, was on the word "measure" not on the words "with respect to".

34. The investor in that case had argued that the waiver did not bar the domestic proceedings in question, because in the domestic proceedings the investor was relying for its claim not on a breach of NAFTA but of domestic laws. The majority in *Waste Management* held that, even though the investor was relying on domestic laws, the measure it was attacking was the same measure as it was claiming under Chapter 11 proceedings to violate NAFTA.²⁴ Therefore, in the end, the majority in *Waste Management* interpreted the word "measure" broadly, not the words "with respect to."²⁵

D. The NAFTA distinguishes between law and the application of the law

35. The United States, at pages 12 through 15, asserts that Canfor's claim is premised upon a "baseless" distinction between the "substance" of a law and the "application" of the law. The United States submits that there is "no meaningful distinction" between a challenge to a Party's law and a challenge to the application of that law. With due respect, the United States' submission improperly characterizes Canfor's claims and, in any event, cannot be sustained.

²⁴ *ibid*, at para. 27.

²⁵ In this respect, the Investor notes again that it is significant that the drafters did not use the expression "with respect to a Party's antidumping and countervailing duty measures" in Article 1901(3) but rather used the expression "with respect to a Party's antidumping and countervailing duty laws." A provision that prevented provisions of other Chapters of NAFTA from imposing obligations "with respect to" antidumping and countervailing duty measures could indeed, based on the majority ruling in *Waste Management*, be susceptible to being read broadly. The difficulty for the United States is that, although the notion of a measure is a very common one in international trade law, the drafters of Article 1901(3) chose the expression "antidumping law and countervailing duty law" not "antidumping and countervailing duty measures" to be the object of the expression "with respect to", defining those laws in a manner which clearly does not encompass all acts or matters which are consistently considered to be measures in international law and which would be included within the definition of "measure" under NAFTA.

36. First, Canfor's submissions in relation to Article 1901(3) are based on the plain language of the NAFTA. The United States' submission, by contrast, ignores that plain language. As noted, Article 1901(3) specifically uses words defined in Article 1902(2). The words "antidumping law" and "countervailing duty law" refer to the set of rules to be applied. Those rules include "relevant statutes, legislative history, regulations, administrative practice and judicial precedents". The definition does not include the application of that set of rules.

37. That the Parties intended the phrase "antidumping law" and "countervailing duty law" to refer to the set of rules (as opposed to the application of those rules) is apparent on the face of not only Chapter 19, but also from the use of the word "law" in other chapters, such as Chapter 18, where the use of the word makes clear that "laws" cannot refer to the application of the rules embodied in the laws. For instance, Article 1802 imposes upon a Party an obligation to:

ensure that its laws, regulations, procedures and administrative rulings of general application respecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons and Parties to become acquainted with them.

38. Second, Chapter 19, and more particularly Article 1902(1) itself, includes the deliberate distinction between law and the application of law that the United States denies exists – i.e., it provides that a Party may "apply" its antidumping or countervailing duty law. Yet, if the phrase "antidumping law and countervailing duty law" included the application of that law, this provision would be rendered meaningless. Further, Article 1904 distinguishes between the law (i.e., the statutes and regulations), and the application of that law – namely, the "determinations" – once again clearly evidencing the drafters' intent to differentiate between antidumping and countervailing duty law, on the one hand, and the outcome of a particular case, on the other. Moreover, the United States has advanced no supportable reason why the phrase "antidumping law or countervailing duty law" ought to be construed, in the face of a clear and precise

definition, as encompassing arbitrary, abusive and discriminatory conduct that violate basic standards of fairness and impartiality, which conduct wholly undermines the obligations assumed by the United States under the NAFTA.

39. Third, implicit in the United States' argument is the proposition that since a claimant can challenge the application of antidumping and countervailing duty law under the Chapter 19 process, this somehow evidences an intention that arbitrary, abusive and discriminatory conduct that is in any way connected to an antidumping or countervailing duty investigation is immune from Chapter 11 dispute resolution. Not only does the plain language of NAFTA refute such a claim, there is absolutely nothing in the documentation produced by the United States relating to the negotiation of the NAFTA that would support such an interpretation. Further, the United States' submission once again ignores the well established proposition that dispute resolution arising from the same factual matrix may occur simultaneously under both international and municipal regimes.²⁶

40. Fourth, the United States has, in effect, suggested that Canfor's approach to Article 1901(3) would open up the door to routine use of Chapter 11 as means of challenging antidumping and countervailing duty determinations. On the contrary, where Chapter 19 panel review of such determinations functions properly, or a NAFTA country has applied its law in a fair, impartial and non-arbitrary manner, it is inconceivable that a complaint under Chapter 11 would be found meritorious. By contrast, the present matter is anything but routine; this is a unique situation where the conduct of United States' officials has repeatedly been found to be

²⁶ See e.g. *Occidental Exploration and Production Company v. the Republic of Ecuador*, LCIAA Case No. UN 3467, Final Award, July 1, 2004, at paras 38-63; *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/01/13; *CMS Gas Transmission Company v. The Republic of Argentina*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/01/8 July 17, 2003, 42 ILM 788 (2003) at para. 80.

not in accordance with legal standards over a period of some 20 years, and where United States' authorities have repeatedly refused to be disciplined by the rule of international law and the judgments of tribunals.

41. Finally, to support its argument that there is no distinction between a "law" and its "application", the United States relies upon certain *obiter* comments of the NAFTA Chapter 11 tribunal in the jurisdictional award in the *United Parcel Service of North America, Inc.* case.²⁷ First, the United States completely misstates the effect of the *UPS* decision. It is wholly inaccurate to say that the *UPS* Tribunal "reject[ed] the same application/substance distinction Canfor seeks to make here" when the point was never argued. Indeed, the Tribunal itself noted that "no Canadian challenge remains under this heading" and gave it no further consideration, except to note that the position ultimately advanced by *UPS* and not opposed by Canada "appeared to conform exactly to the Agreement." The United States, in footnote 45, seems to imply that the Tribunal endorsed the position articulated by the United States in its Article 1128 submission. That is simply wrong. The reference to the "two parties" quoted by the United States refers to *UPS* and to Canada, not to Canada and the United States. The "position" referred to by the Tribunal refers to the position of Canada and *UPS* the effect of which was that the claims in issue would more properly proceed under Article 1102.²⁸

²⁷ *United Parcel Service of North America, Inc. v. Canada*, Award on Jurisdiction, 22 November 2002, online: <<http://www.dfait-maeci.gc.ca/tna-nac/parcel-en.asp>> (accessed: 23 September 2004) ["*UPS*"].

²⁸ The entire treatment of this issue is dealt with in two paragraphs:

42. Second, the *UPS* decision is of no application in any event. The debate in that case related to the term "measures" and more particularly "taxation measures". In relying on the *UPS* case, the United States once again ignores the distinction between a "law" and a "measure."²⁹ As noted above, as a measure includes the application of a rule, the situation in the *UPS* case is entirely different than this claim, where Article 1901(3) refers only to "antidumping law or countervailing duty law", not "antidumping measure or countervailing duty measure."

E. The Context of Article 1901(3) does not support the United States' submission

43. At pages 17 through 21, the United States asserts that the context of Article 1901(3) confirms its interpretation, and in particular, submits that Canfor "errs in its interpretation of Article 2004" of NAFTA. It argues that Article 2004 supports the United States', rather than Canfor's, interpretation of Article 1901(3) because it alleges that Canfor's interpretation would lead to the conclusion that private parties have broader dispute resolution rights than NAFTA Parties. The United States says:

Taxation measures

116. The ASC contains allegations relating to goods and services tax. They appear in parts of the Claim relating both to national treatment (article 1102) and minimum standard (article 1105). The allegation relating to article 1105 was challenged by Canada, in its Memorial, as being outside the Tribunal's jurisdiction. Counsel for the Investor stated at the hearing that it abandoned that particular claim and as a consequence para. 33(1) of the ASC. It did however maintain the Claim relating to the tax so far as article 1102 was concerned. As a result of that statement, counsel for Canada did not at the hearing pursue its challenge in relation to taxation.

117. The Tribunal records those clarifications which have the consequence that no Canadian challenge remains under this heading. We simply note that while article 2103 provides that nothing in the Agreement applies to taxation measures, one of the limits to that exception is that article 1102 (but not article 1105) does apply to taxation measures (with exceptions that are not relevant). Accordingly the position taken by the two parties appears to conform exactly with the Agreement.

²⁹ In its Article 1128 submission in *UPS*, the United States said this: "NAFTA Article 201 defines a 'measure' as 'any law, regulation, procedure, requirement or practice.' As a 'measure,' a 'practice' includes a pattern of applying or failing to apply (or enforcing or failing to enforce) another measure, such as a law or regulation. For example, the repeated non-enforcement of a particular law could constitute a 'practice' and therefore a 'measure'". *United Parcel Service of North America, Inc. v. Canada*, Second Submission of the United States, 13 May 2002, online: <www.naftaclaims.com/disputes-canada/disputes_canada_ups.htm> (accessed 24 September 2004) at para. 14.

Moreover, under Canfor's theory, a private claimant could avail itself of the legal standards, procedures and remedies of both Chapters Eleven and Nineteen, whereas the NAFTA Parties are limited by Article 2004 to challenging antidumping and countervailing duty matters before binational panels. According to Canfor, private claimants also have the right to challenge both preliminary and final determinations, whereas the NAFTA Parties can seek review of only the latter. Canfor offers no explanation, however, as to why the NAFTA Parties would have accorded to private parties broader rights to challenge antidumping and countervailing duty determinations than they accorded themselves, contrary to the general presumption under the NAFTA of broader dispute resolution rights for NAFTA Parties.³⁰

44. Once again, the United States either misstates, or fundamentally misunderstands, Canfor's claim.³¹ The United States is simply incorrect in asserting that somehow NAFTA Parties have lesser rights than private claimants under Canfor's interpretation of Article 1901(3). Moreover, the question is not whether the NAFTA Parties have or have not broader dispute resolution rights than investors. The NAFTA Parties have been given certain dispute resolution rights and investors have been provided with other rights.

45. Canfor does not deny that Chapter 19 sets out multiple mechanisms for dispute resolution in cases involving either antidumping or countervailing duty determinations, or in cases involving amendments to a Party's antidumping or countervailing duty law. For example, Article 1904 provides for review of specific determinations, under municipal standards, and Article 1903 establishes a review mechanism when a Party amends or modifies its antidumping or countervailing duty statute based on principles set out in Article 1902(2)(d).

46. However, contrary to the United States' submission, nothing under NAFTA Article 2004 precludes a state from advancing the same legal claims brought by Canfor in the independent exercise of the state's rights, for an alleged violation of NAFTA Chapter 11. As is made abundantly clear by Article 1115, Canada would be able to institute Chapter 20 proceedings for

³⁰ United States' Reply, at p. 19.

³¹ See Canfor's Reply at paras. 111-119.

the same violations of Chapter 11 alleged in this claim by Canfor because they are not matters that are otherwise covered in Chapter 19.

47. At page 20, the United States advances the submission that Article 2004 "evidences the drafter's caution by specifying an exclusion that is set forth in general terms in Article 1901(3)", citing the *UPS* case as authority for this proposition.

48. With respect, the United States' argument in support of its conclusion that Article 2004 is simply a cautious repetition of Article 1901(3) is fundamentally flawed. Article 1901(3) refers to obligations in other chapters of NAFTA, whereas Article 2004 addresses itself to just the opposite: those matters that arise out of the provisions or coverage of Chapter 19 itself and which are dealt with by the special procedures contained in Chapter 19.

49. Furthermore, there is a major difference between the legal provisions at issue in the *UPS* case (Article 1501 and note 43) and those in issue here, namely, Articles 1901(3) and 2004. In *UPS*, the Tribunal was dealing with the relationship between a note to a treaty provision and a provision of the treaty itself. It will often be the case that a note is intended merely for greater clarity or specificity or as an aid to interpreting rather than adding an additional right or obligation to that stated in the actual treaty provision it references. By contrast, here we are dealing with two independent treaty provisions. Interpreting them in such a way that reduces one or the other provision to inutility would violate a fundamental principle of treaty interpretation, namely the principle of effectiveness.

F. All NAFTA objectives are relevant

50. Contrary to the United States' submission at page 22 and 23, Canfor does not seek to give primacy to general objectives of the NAFTA over its plain language. Rather, as demonstrated above, Canfor relies upon that plain language and the principles which inform doing so,³² as dictated under Article 102 of NAFTA and the *Vienna Convention*.³³

51. Further, at pages 23 and 24, the United States once again focuses on the only objective of the NAFTA it says is relevant to these proceedings, namely "effective procedures...for the resolution of disputes". The United States asserts that the objectives of the treaty can be divided into those that relate to trade, and those that relate to investment, and that only the latter are relevant when dealing with an investment dispute under Chapter 11.

52. With respect, such a narrow reading of the treaty cannot be countenanced. The objectives of the NAFTA cannot be individually examined and then assigned to a particular chapter of the treaty. Rather, the treaty as a whole must be read having regard to all of the objectives. That self evident proposition was explicitly articulated by the Parties in Article 102(2)

The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

53. Finally, the United States' submission that denying Canfor access to the dispute resolution mechanism of Chapter 11 is necessary to facilitate the creation of "effective procedures...for the resolution of disputes" cannot be sustained.

³² These principles include national treatment and transparency, noted specifically in Article 102, as well as the general international law principle of good faith, as manifested in the theory of *abus du droit* – which requires States to exercise treaty powers and prerogative authority in a manner that is neither arbitrary, discriminatory nor capricious.

³³ *Vienna Convention, supra* note 6, Art. 31(1).

54. Clearly, in the context of the softwood lumber dispute, it cannot be contended that the Chapter 19 process has been an "effective" process for dispute resolution. Effective dispute resolution is effective for both investors and the State Parties. However, despite binational and international tribunals continually ruling the United States' conduct has been inconsistent both with its municipal and its international obligations, the United States has consistently either intentionally delayed implementation of necessary corrective action,³⁴ flaunted, ignored or chastised the properly constituted panels rulings³⁵, or taken untenable positions on important issues³⁶, all of which clearly demonstrate the United States has little intention of complying with its international obligations in good faith.

55. More specifically, the dispute resolution process under Chapter 19 in connection with the latest iteration of the dispute has been underway for in excess of two years, during which time over two billion dollars of duties have been levied against the Canadian industry, and several hundred million dollars against Canfor.³⁷ In that regard, the recent pattern of conduct of the United States' authorities in relation to Chapter 19 is consistent with the approach taken by the United States throughout this dispute. In fact, the attitude of the United States to the supposedly "effective" dispute resolution process embodied under Chapter 19 has been nothing short of a wanton denial of the Chapter 19 Tribunal's authority, such as to "obviate the impartiality of the agency decision-making process, and severely undermine[] the entire Chapter

³⁴ For example see e.g. *Byrd Amendment - Appellate Body Decision*, *supra*, note 17.

³⁵ For example see e.g. *ITC Second Remand Decision*, *supra* note 5

³⁶ For example see a letter from The Honourable James Scott Peterson, P.C., M.P., Minister of International Trade, Canada to The Honourable Donald L. Evans, Secretary of Commerce, United States of America dated 22 June 2004, in which The Honourable Minister. Peterson objects to the United States Department of Commerce's refusal to refund duty deposits of West Fraser Mills Limited despite its finding that West Fraser's dumping margin was in the *de minimus* range and therefore not susceptible to duties in the Remand Redetermination of 21 April 2004.

³⁷ See e.g. *NAFTA Panel Orders ITC to Find no Injury Threat in 10 Days*, Inside U.S. Trade, 3 September 2004, online: <<http://www.insidetrade.com>> (accessed: 23 September 2004) in which approximated US\$2,600,000,000 in duties deposited by Canadian softwood producers; and Canfor Investor Presentation, August 2004, in which Canfor alleges it paid \$409,000,000 to June 2004.

19 panel review process."³⁸ Nothing short of permitting Canfor to advance its claims respecting the egregious governmental misconduct of the United States can allow it to vindicate its rights, or to achieve the objective of effective dispute resolution.

G. The *Bluefin Tuna* case

56. At pages 24 through 27 of its submission the United States incorrectly argues that there is no presumption of parallel proceedings, either in international law, or under the NAFTA. In particular, the United States relies upon an erroneous reading of *Bluefin Tuna*³⁹ to attempt to establish a presumption against parallel proceedings. It asserts that in the *Bluefin Tuna* case, the tribunal rejected parallel proceedings, and argues from that fact that there is no "presumption of parallel proceedings under international law."

57. While the United States correctly observes that in putting forward the tribunal's position that there is a presumption in favor of parallel proceedings, Canfor inadvertently cited a passage from the recitations of the parties' submissions, for which Canfor apologizes, the actual holding of the tribunal amply supports the propositions Canfor relies upon.

58. An examination of the entire ruling in *Bluefin Tuna* confirms the reading that the tribunal did indeed take as its point of departure a *presumption* of parallel obligations, including obligations with respect to settlement of disputes.

59. Thus, in paragraph 52 the Tribunal held:

. . . it is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in *their provisions for settlement of*

³⁸ *ITC Second Remand Decision*, *supra* note 5 at p. 3.

³⁹ *Bluefin Tuna*, *supra* note 7.

disputes arising thereunder. The current range of international legal obligations benefits from a process of accretion and cumulation; . . ."(emphasis added)⁴⁰

60. Notwithstanding that starting point, the tribunal went on to consider provisions of UNCLOS⁴¹ that explicitly addressed the limits of compulsory jurisdiction in dispute settlement. One of those provisions created an exception to compulsory jurisdiction where parties had made an agreement to settle a particular dispute by "peaceful means of their own choice." The tribunal considered the 1993 Convention,⁴² or provisions thereof, as precisely such an agreement to settle the kind of dispute at issue by other means.

61. It is to be noted that in holding that the general position of international law in favour of multiple or parallel proceedings had been overcome in that case, the tribunal relied exclusively on treaty provisions of UNCLOS that addressed explicitly, by their words, the settlement of disputes. By contrast, Article 1903(1) of NAFTA says *nothing* by its very words about the applicability or limits of any dispute settlement mechanism under NAFTA. As Canfor has explained at length, instead Article 1901(3) ensures that provisions in chapters of NAFTA other than Chapter 19 are *interpreted* ("construed") in such a way that those provisions of themselves do not impose on NAFTA Parties any obligations to do something in relation to their antidumping law or countervailing duty law as these laws are defined in Article 1902.

H. The circumstances of the conclusion of the NAFTA do not support the United States' submission

62. The United States raised the issue of circumstances of the conclusion of the NAFTA in its original Objection. Canfor's response to this submission is at pages 41 – 43 of its Reply. Since

⁴⁰ *ibid* at para. 52

⁴¹ *United Nations Convention on the Law of the Sea*, U.N. Doc. A/CONF.62/122 (1982).

⁴² *Convention for the Conservation of Southern Bluefin Tuna Between Australia, Japan and New Zealand*, (20 May 1993) online: <<http://www.ccsbt.org/docs/about.html>> (accessed: 23 September 2004).

filing that Reply, and in compliance with the Tribunal's procedural direction, the United States has produced more documents relating to the negotiating history and circumstances of the conclusion of the NAFTA. While many of the documents are of limited utility because large portions of them do not indicate either date or source, and the United States has provided no index or listing of the documents, the documents once again confirm what Canfor has previously stated: the interpretation of Article 1901(3) the United States now asserts was not in the contemplation of the Parties at the time the NAFTA was negotiated. Three points are of note in this regard.

63. First, nothing in any of the materials produced by the United States gives any indication whatsoever that the purpose or the Parties' intent in adding Article 1901(3) to NAFTA was to exclude an investor's ability to bring a claim pursuant to NAFTA Chapter 11. If that was the purpose or the Parties' intention, surely the documents would have explained it or at the very least mentioned it. They do not.

64. Second, the United States Statement of Administrative Action ("SAA"), on which the United States relies as showing its contemporaneous understanding of the NAFTA, makes clear that Article 1901(3) was not intended to have the effect the United States now contends. Article 1901(3) did not appear in the Canada United States Free Trade Agreement, which agreement was the predecessor of NAFTA. It was added as one of very few changes made to Articles 1901 and 1902 during the negotiation of the NAFTA. The United States explained the differences between Articles 1901 and 1902 in the Canada United States Free Trade Agreement, and Articles 1901 and 1902 of the NAFTA, and the limited purpose of those changes. It said:

Articles 1901 and 1902 make clear that each country retains its domestic antidumping and countervailing duty laws and can amend them...[t]hese provisions are identical to

Articles 1901 through 1903 of the CFTA, *except for technical changes necessary to accommodate the addition of a third country.*⁴³ (emphasis added)

65. Thus, it appears from the SAA that the purpose of Article 1901(3) was simply to facilitate the addition of Mexico to the Agreement.

66. Third, the conclusion that Article 1901(3) was not intended to have the effect contended by the United States is also demonstrated by a review of the various drafts of the Investment Chapter which the United States has produced. Those documents show that the Investment Chapter contained an extensive section titled "*Provisions to be Placed Outside the Investment Chapter*". While reference was made in that regard to exceptions for national security, competition, monopolies and state enterprises, and taxation, no mention was ever made about antidumping or countervailing duty matters.⁴⁴ Had the parties intended such matters to be excluded from Chapter 11, one would expect some clear reference in that regard.

67. Accordingly, Canfor's assertion in its Reply has been confirmed by the recently produced documents. The circumstances of the conclusion of the NAFTA and its negotiating history support Canfor's and not the United States' interpretation of Article 1901(3).

⁴³ *North American Free Trade Agreement, Implementation Act*, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1st Sess., at 194 (1993).

⁴⁴ Lawyer's Revisions "Investment", August 27, 1992 (Doc. No. 04851-04875); and see also the following which have been provided to the Tribunal by the United States and not reproduced in the Investor's Book of Authorities Watergate Daily Update "Investment", 4 August 1992, (Doc. No. 00437-00455); Watergate Daily Update "Investment" 4 August 1992, (Doc. No. 00456-00485); Watergate Daily Update "Investment", 4 August 1992 (Doc. No. 00486-00516); Lawyer's Revisions "Investment", 22 August 1992, (doc. No. 00517-00546); Lawyer's Revisions "Investment", August 24, 1992 (Doc. No. 04815-04841); Lawyer's Revisions "Investment", 26 August 1992, (Doc. No. 00547-00577); Lawyer's Revisions "Investment", August 27, 1992 (Doc. No. 00578-00611); Lawyer's Revisions "Investment", August 28, 1992 (Doc. No. 04876-04902); Lawyer's Revisions "Investment", August 28, 1992 (Doc. No. 00612-00645); Lawyer's Revisions "Investment", August 29, 1992 (Doc. No. 04903-04927); Lawyer's Revisions "Investment", August 30, 1992 (Doc. No. 04928-04950); Lawyer's Revisions "Investment", August 30, 1992 (Doc. No. 04975-04996 and Doc. No. 00646-00674); and Lawyer's Revisions "Investment", August 31, 1992 (Doc. No. 04951-04974).

IV. CONCLUSION

68. For all the reasons set out in Canfor's Reply and above, Canfor respectfully submits that the United States' Objection to Jurisdiction must be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

P. John Landry

Keith E.W. Mitchell