

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

CANFOR CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**REPLY ON JURISDICTION OF
RESPONDENT UNITED STATES OF AMERICA**

Mark A. Clodfelter

*Assistant Legal Adviser for International
Claims and Investment Disputes*

Andrea J. Menaker

*Chief, NAFTA Arbitration Division, Office
of International Claims and Investment
Disputes*

Mark S. McNeill

Jennifer I. Toole

*Attorney-Advisers, Office of International
Claims and Investment Disputes*

UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

August 6, 2004

CONTENTS

PRELIMINARY STATEMENT	1
ARGUMENT	4
I. THE ORDINARY MEANING OF ARTICLE 1901(3) ESTABLISHES THAT THE UNITED STATES DID NOT CONSENT TO ARBITRATE CANFOR’S CLAIMS UNDER CHAPTER ELEVEN..	4
A. Article 1901(3) Provides An Exception To The Jurisdiction Of Chapter Eleven Tribunals.....	4
B. Canfor Seeks To Impose Obligations On The United States With Respect To Its Antidumping And Countervailing Duty Law	7
1. The Measures Canfor Challenges Are With Respect To U.S. Antidumping And Countervailing Duty Law	8
2. Canfor’s Interpretation Of “With Respect To” Is Unsupportable	10
3. Canfor’s Distinction Between A Challenge To The Substance Of A Law And To Its Application Is Baseless.....	12
4. Article 1901(3) Precludes Challenges Under Chapter Eleven To Antidumping And Countervailing Duty Determinations.....	15
II. THE CONTEXT OF ARTICLE 1901(3) CONFIRMS THAT THE UNITED STATES DID NOT CONSENT TO INVESTOR-STATE ARBITRATION OF CANFOR’S CLAIMS.....	17
A. Canfor Errs In Its Interpretation Of Article 2004	17
B. Canfor’s Argument With Respect To Business Proprietary Information Is Baseless	21
III. THE NAFTA’S OBJECT AND PURPOSE CONFIRM THAT THE UNITED STATES DID NOT CONSENT TO ARBITRATE CANFOR’S CLAIMS UNDER THE INVESTMENT CHAPTER	22
A. The NAFTA’s General Objectives Do Not Override Its Specific Provisions	22
B. There Is No Presumption Of Parallel Proceedings Under The NAFTA.....	24
C. There Is No Presumption Of Parallel Proceedings Under International Law.....	26
D. Canfor Misconstrues The NAFTA’s Objective Of Creating Effective Dispute Resolution Procedures	27
IV. THE CIRCUMSTANCES OF CONCLUSION OF THE NAFTA CONFIRM THAT THERE IS NO JURISDICTION UNDER CHAPTER ELEVEN FOR ANTIDUMPING AND COUNTERVAILING DUTY MATTERS.....	30
CONCLUSION.....	30

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

CANFOR CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**REPLY ON JURISDICTION OF
RESPONDENT UNITED STATES OF AMERICA**

Pursuant to the Tribunal’s Procedural Order No. 4 and Article 21 of the UNCITRAL Arbitration Rules, respondent United States of America respectfully submits this Reply on Jurisdiction.¹

PRELIMINARY STATEMENT

There is no dispute between the parties as to the central issue before the Tribunal: whether the United States consented to arbitrate antidumping and countervailing duty claims – like those of Canfor here – under the investment chapter of the NAFTA. As the United States demonstrated in its Objection to Jurisdiction, and as it further demonstrates herein, Article 1901(3)’s ordinary meaning, its context and the NAFTA’s object and purpose confirm that the United States did not consent to arbitrate Canfor’s claims.

¹ Procedural Order No. 4 called for Canfor to submit a “Counter-Memorial” and for the United States to submit a “Reply.” Canfor, however, designated its May 14 submission “Reply to the United States’ Objection to Jurisdiction.” [hereinafter “Canfor Reply”].

First, the ordinary meaning of Article 1901(3) compels dismissal of Canfor's claims. Although Canfor recognizes that the NAFTA's ordinary meaning is "the starting point of the Tribunal's interpretive task," it does not address the actual language of Article 1901(3) until page 44 of its 54-page Reply submission. When Canfor finally undertakes that analysis, its argument fails to explain how obligating the United States to arbitrate claims with respect to its antidumping and countervailing duty determinations, and applying Chapter Eleven's substantive obligations to those determinations, does not "impos[e] obligations on [the United States] with respect to [U.S.] antidumping law or countervailing duty law."²

Canfor's argument that Article 1901(3) is an "interpretive provision," rather than a jurisdictional one, is wholly unsupported. Similarly, Canfor's suggestion that Article 1901(3) precludes challenges to the *substance* of a Party's antidumping and countervailing duty law, but not to the *application* of that law, is contrary to Article 1901(3)'s ordinary meaning and calls for an approach that was rejected by the NAFTA tribunal in *United Postal Service of America, Inc. ("UPS") v. Canada*. Nor does Article 1901(3)'s ordinary meaning support Canfor's contention that the Article's sole purpose is to preserve the NAFTA Parties' right to retain and amend their domestic antidumping and countervailing duty laws.

Second, Canfor's arguments with respect to Article 1901(3)'s context are unavailing. Its contention that a private claimant has recourse to the legal standards, procedures and remedies of *both* Chapters Eleven and Nineteen, whereas NAFTA Parties

² Article 1901(3) provides:

Except for Article 2203 (Entry into Force), no provision of any other Chapter of this Agreement shall be construed as imposing obligations on a Party with respect to the Party's antidumping law or countervailing duty law.

have recourse only to the latter, is contrary to NAFTA's general presumption of broader dispute resolution rights for NAFTA Parties.

Third, Canfor's arguments with respect to the NAFTA's object and purpose are meritless. Canfor's attempt to override the specific terms of Article 1901(3) with preambular language concerning the Agreement's object and purpose is contrary to accepted canons of treaty interpretation.

Finally, Canfor's arguments concerning the circumstances of conclusion of the NAFTA are without merit. Contrary to Canfor's contention, subjecting the Parties' antidumping and countervailing duty determinations to the *substantive* obligations under Chapter Eleven would impose on the Parties obligations they expressly rejected in adopting the *procedural* mechanism in Chapter Nineteen.

Sections I-IV below address Canfor's arguments concerning Article 1901(3)'s ordinary meaning, its context, the NAFTA's object and purpose and the circumstances of conclusion of the NAFTA. Canfor's arguments fail to refute what is plain from the text of the Agreement: the NAFTA Parties intended disputes under the NAFTA concerning their antidumping and countervailing duty laws to be governed exclusively by the binational panel mechanism in Chapter Nineteen. For the reasons that follow, and those set forth in our Objection to Jurisdiction, the United States respectfully submits that Canfor's claims should be dismissed in their entirety.

ARGUMENT

I. THE ORDINARY MEANING OF ARTICLE 1901(3) ESTABLISHES THAT THE UNITED STATES DID NOT CONSENT TO ARBITRATE CANFOR'S CLAIMS UNDER CHAPTER ELEVEN

The ordinary meaning of Article 1901(3) compels dismissal of Canfor's claims. As the United States demonstrates below, Canfor's arguments that Article 1901(3) is not jurisdictional, and that it precludes challenges only to the *substance* of a Party's trade law, but not the *application* of that law, are wholly without merit.

A. Article 1901(3) Provides An Exception To The Jurisdiction Of Chapter Eleven Tribunals

As an initial matter, Canfor's hypothesis that an objection to the jurisdiction of a Chapter Eleven tribunal must be based on Articles 1101(3), 1108, 1116 or 1117 is without merit.³ Canfor ignores the fact that the NAFTA Parties used more than one method to define the scope of the NAFTA's dispute resolution mechanisms.⁴

In fact, the NAFTA Parties commonly placed exemptions to one chapter's obligations in other chapters – particularly exemptions like Article 1901(3) that exclude a particular subject matter from obligations in most or all of the Agreement. Article 1607, for example, excludes immigration measures from obligations contained in other parts of the NAFTA.⁵ Article 2103(1) likewise provides that, “[e]xcept as set out in this Article,

³ See Canfor Reply ¶¶ 21-26.

⁴ The NAFTA contains dispute resolution mechanisms in Chapters Eleven (Investment), Fourteen (Financial Services), Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and Twenty (Institutional Arrangements and Dispute Settlement Procedures).

⁵ Article 1607 provides:

Except for this Chapter, Chapters One (Objectives), Two (General Definitions), Twenty (Institutional Arrangements and Dispute Settlement Procedures) and Twenty-Two (Final Provisions) and Articles 1801 (Contact Points), 1802 (Publication), 1803 (Notification and Provision of Information) and 1804 (Administrative Proceedings), no provision of this Agreement shall impose any obligation on a Party regarding its immigration measures.

nothing in this agreement shall apply to taxation measures.” The effect of these exceptions is clear: a tribunal established under the NAFTA has no jurisdiction over immigration or taxation matters, except where specifically provided.⁶

Article 1901(3) performs a function similar to that of Articles 1607 and 2103(1): it exempts a particular subject matter – a Party’s antidumping and countervailing duty law – from obligations contained in other parts of the NAFTA. Unlike Articles 1607 and 2103(1), however, Article 1901(3) does not provide for dispute resolution under another chapter.⁷ Rather, disputes concerning a Party’s antidumping and countervailing duty laws are reserved for the exclusive jurisdiction of the binational panels under Chapter Nineteen. A tribunal established under Chapter Eleven thus has no jurisdiction over such matters.⁸

Canfor also misreads the term “construed” in Article 1901(3). Canfor contends that, by using that phrase, the NAFTA Parties intended Article 1901(3) to be an “interpretive provision” that cannot serve as the basis for a jurisdictional objection.⁹ The NAFTA, however, commonly uses a similar formulation – requiring that certain provisions may not be “construed” a particular way – to exempt certain subject matters from obligations in other parts of the NAFTA. Article 1410(1), for example, provides that “[n]othing in this Part shall be *construed* to prevent a Party from adopting or

⁶ See *id.* (providing that disputes concerning immigration measures may be submitted to State-to-State dispute resolution under Chapter Twenty); see also NAFTA art. 2103(4)(b) (providing that Articles 1102 and 1103 apply to certain taxation measures); NAFTA art. 2103(6) (providing that Article 1110 may be applied to certain taxation measures).

⁷ The only carve-out in Article 1901(3) is with respect to Article 2203 (Entry into Force).

⁸ See, e.g., *United Parcel Service of America, Inc. v. Canada* (Award on Jurisdiction of Nov. 22, 2002) (“UPS Award on Jurisdiction”) ¶ 61 (holding that Article 1501 precludes a Chapter Eleven tribunal from exercising jurisdiction over a claim with respect to matters arising under that article).

⁹ See Canfor Reply ¶¶ 6, 58, 127.

maintaining reasonable measures for prudential reasons.”¹⁰ The United States Statement of Administrative Action (“SAA”), which, as Canfor notes, reflects the United States’ contemporaneous understanding of the NAFTA’s meaning,¹¹ states that “Article 1410 sets out general *exceptions* that apply to the chapter and the Agreement.”¹² The SAA further describes Article 1410(1) as providing that “nothing in [Part V] *prevents*” a Party from taking certain measures.¹³ In other words, the United States considered “construed to prevent” in Article 1410(1) to be synonymous with “prevents.”

Similarly, Article 2105 provides that “[n]othing in this Agreement shall be *construed* to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement.” Canada’s Statement on Implementation (“SOI”) explains that “Article 2105 provides that nothing in the Agreement *requires* a Party to disclose or allow access to information.”¹⁴ Thus, Canada considered “construed to require” in Article 2105 to be synonymous with “requires.”

¹⁰ NAFTA art. 1410(1) (emphasis added); *see also* Article 309(3) (“[N]othing in this Agreement shall be *construed* to prevent the Party from . . . limiting or prohibiting the importation from the territory of another Party of such good of that non-Party”) (emphasis added); Article 603(3) (“[N]othing in this Agreement shall be *construed* to prevent the Party from . . . limiting or prohibiting the importation from the territory of any Party of such energy or basic petrochemical good of the non-Party”) (emphasis added); Article 1502(1) (“Nothing in this Agreement shall be *construed* to prevent a Party from designating a monopoly.”) (emphasis added); Article 1503(1) (“Nothing in this Agreement shall be *construed* to prevent a Party from maintaining or establishing a state enterprise.”) (emphasis added); Article 2101(2) (“[N]othing in [certain Parts and Chapters of the NAFTA] shall be *construed* to prevent the adoption or enforcement by any Party of measures necessary to secure compliance with laws or regulations that are not inconsistent with the provisions of this Agreement”) (emphasis added); Article 2102(1) (“[N]othing in this Agreement shall be *construed* . . . to require any Party to furnish or allow access to any information”) (emphasis added); Article 2104(1) (“Nothing in this Agreement shall be *construed* to prevent a Party from adopting or maintaining measures that restrict transfers”) (emphasis added).

¹¹ *See* Canfor Reply ¶ 121.

¹² North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1st Sess., at 166 (1993) (emphasis added).

¹³ *Id.* (emphasis added).

¹⁴ Department of External Affairs, North American Free Trade Agreement: Canadian Statement on Implementation, *in* Canada Gazette 68, 218 (Jan. 1, 1994) (emphasis added).

Like Articles 1410(1) and 2105, Article 1901(3) excludes a particular subject matter from obligations in other parts of the Agreement. That Article 1901(3) precludes provisions in other Chapters from being “construed” to impose obligations does not deprive Article 1901(3) of its jurisdictional effect.

Finally, the concern raised by Canfor that a Party could frustrate Chapter Eleven’s protections simply by objecting to jurisdiction based on Article 1901(3) – even where the dispute is wholly unrelated to a Party’s antidumping or countervailing duty law – is unfounded.¹⁵ It is the Tribunal’s role to decide whether Canfor’s claims seek to impose obligations “with respect to [U.S.] antidumping law or countervailing duty law” and are therefore outside its jurisdiction.¹⁶ The possibility that a Party might make an unmeritorious argument in that regard has no bearing on whether the NAFTA Parties consented to arbitrate a particular category of claims.

B. Canfor Seeks To Impose Obligations On The United States With Respect To Its Antidumping And Countervailing Duty Law

In this arbitration, Canfor seeks to impose obligations on the United States under NAFTA Chapter Eleven “with respect to [the United States’] antidumping law or countervailing duty law.” Exercising jurisdiction over Canfor’s claims would violate Article 1901(3)’s express prohibition on imposing such obligations. In addition, Canfor’s argument that, while its claims may “arise out of” U.S. antidumping and countervailing

¹⁵ See Canfor Reply ¶¶ 56, 123.

¹⁶ See, e.g., *UPS Award on Jurisdiction* ¶ 34 (“[A] claimant party’s mere assertion that a dispute is within the Tribunal’s jurisdiction is not conclusive. It is the Tribunal that must decide.”); *Fisheries Jurisdiction (Spain v. Can.)*, 1998 I.C.J. 432, 450 ¶ 37 (Dec. 4) (“[T]he establishment or otherwise of jurisdiction is not a matter for the parties but for the Court itself.”); *id.* at 487 ¶ 4 (separate opinion of Koroma, J.) (“[S]ince Canada excluded from the jurisdiction of the Court ‘disputes arising out of or concerning conservation and management measures’, the question whether the Court is entitled to exercise its jurisdiction must depend on the subject-matter In other words, once it is established that the dispute relates to the subject-matter defined or excluded in the reservation, then the dispute is precluded from the jurisdiction of the Court”).

duty law, they are not “with respect to” that law, is without merit.¹⁷ Finally, Canfor’s contention that its claims fall outside of Article 1901(3) because it is challenging the *application* of U.S. antidumping and countervailing duty law, and not the *substance* of that law, is unsupported by the ordinary meaning of Article 1901(3) and reflects an approach that was rejected by the Chapter Eleven tribunal in the *UPS* case.

1. The Measures Canfor Challenges Are With Respect To U.S. Antidumping And Countervailing Duty Law

As the United States demonstrated in its Objection to Jurisdiction, Canfor’s claims are based on the U.S. Department of Commerce’s (“Commerce”) and the International Trade Commission’s (the “ITC”) interpretation and application of U.S. antidumping and countervailing duty law. For example, Canfor alleges in its Statement of Claim that Commerce misinterpreted and misapplied the *Tariff Act of 1930* (the “*Tariff Act*”) and Commerce’s own regulations in concluding that the provincial stumpage programs were “specific” to an industry, and that it misinterpreted and misapplied the *Tariff Act* in failing to accord Canfor a company-specific duty rate.¹⁸ These allegations, as the United States demonstrated in its Objection to Jurisdiction, closely mirror claims submitted to (and decided by) Chapter Nineteen panels, which are undeniably “with respect to” U.S. antidumping and countervailing duty law.¹⁹

¹⁷ See Canfor Reply ¶ 134.

¹⁸ See Statement of Claim ¶¶ 77-78 (asserting that Commerce’s interpretation and application of Section 771(5A)(D)(iii) of the *Tariff Act* and 19 C.F.R. § 351.502(a) in its countervailing duty determination was inconsistent with its prior determination in *Lumber I*); see also *id.* ¶ 140 (alleging that the United States “interpret[ed] . . . section 782(a) of the *Tariff Act*, to [sic] a way which it knew or ought to have known would be in breach of the United States [sic] international obligations[.]”).

¹⁹ See U.S. Objection to Jurisdiction at 16-18 (chart comparing Canfor’s claims in this arbitration to those asserted in, and decided by, Chapter Nineteen panels).

Canfor criticizes the United States for characterizing its claims in a general way as relating to antidumping and countervailing duty law, but failing to respond to all of its specific allegations.²⁰ Canfor's sole example of an allegation that the United States supposedly did not address, however, is its allegation pertaining to the *Continued Dumping and Subsidy Offset Act of 2000* (the "Byrd Amendment").²¹ The Byrd Amendment, an amendment to Title VII of the *Tariff Act*, provides for the distribution of duties assessed pursuant to antidumping and countervailing duty orders. Canfor fails to explain how the submission to Chapter Eleven arbitration of its claim related to the Byrd Amendment, and the application of Chapter Eleven's substantive obligations to that claim, would not impose obligations on the United States with respect to its antidumping law or countervailing duty law.²²

For the avoidance of doubt, the United States objects to *all* of Canfor's claims – including its claims with respect to the Byrd Amendment – on the same basis: they all would impermissibly impose obligations on the United States with respect to U.S. antidumping law and countervailing duty law and are therefore excluded from the Tribunal's jurisdiction.

²⁰ See Canfor Reply ¶ 33.

²¹ See *id.*

²² The Byrd Amendment has not been applied to any duties collected on imports of Canfor's products into the United States. Thus, the only effect it could have on Canfor is allegedly to have improperly influenced the United States' decision to initiate, and the manner in which it conducted, its antidumping and countervailing duty investigations. The decision to initiate antidumping and countervailing duty investigations and the manner in which those investigations are conducted are at the heart of a Party's antidumping and countervailing duty law, and claims challenging such conduct in a Chapter Eleven proceeding would clearly fall within Article 1901(3)'s prohibition.

2. Canfor's Interpretation Of "With Respect To" Is Unsupportable

Notably, Canfor concedes that its claims "arise out of" the application of U.S. antidumping and countervailing duty law.²³ Canfor could not deny that fact: its Statement of Claim provides that it has brought its claim in connection with alleged breaches of the NAFTA "*arising out of and in connection with . . . the investigations . . . which resulted in*" the six antidumping and countervailing duty determinations at issue.²⁴ Based on the dissenting opinion in *Waste Management, Inc. v. United Mexican States*,²⁵ however, Canfor argues that the phrase "with respect to" in Article 1901(3) has a special, narrow meaning. According to Canfor, it excludes only claims that challenge the substance of a Party's antidumping law or countervailing duty law, and not claims that challenge the application of that law.²⁶ Canfor's attempt to avoid Article 1901(3)'s prohibition based on its strained parsing of prepositional phrases is unavailing.

First, contrary to Canfor's assertion, the *Waste Management* tribunal construed the phrase "with respect to" in Article 1121(1)(b) broadly, not narrowly.²⁷ In that case, the majority rejected the dissenting arbitrator's view that the phrase "proceedings with respect to the measure" referred to a subset of proceedings that "primarily concern[ed]" the measure. Instead, it held that the phrase encompassed proceedings that "have a legal

²³ See Canfor Reply ¶ 134 ("In this case, [the] conduct of the United States . . . at most 'arises out of,' in some way, the application of its 'antidumping law and countervailing duty law.'").

²⁴ Statement of Claim ¶ 19 (emphasis added).

²⁵ ICSID Case No. ARB (AF) 198/2 (Award of June 2, 2002) ("*Waste Management Award*").

²⁶ See Canfor Reply ¶ 131.

²⁷ See *id.* (incorrectly stating that there was "majority agreement" with respect to the allegedly narrow scope and meaning of the phrase "with respect to" in Article 1121).

basis derived from,” “refer to” or “hav[e] their origin in” the measure.²⁸ Thus, even under the reasoning of the case on which Canfor relies, Canfor’s claims would be precluded because they clearly have a legal basis derived from, refer to and have their origin in U.S. antidumping and countervailing duty law.

Second, a review of the NAFTA, and of contemporaneous statements made by the United States and Canada in connection with the implementation of the Agreement, shows that the Parties used the phrase “with respect to” interchangeably with “concerning” and other prepositions that even Canfor concedes suggest a broad and general relationship.²⁹

For example, Article 603(1) provides that “the Parties incorporate the provisions of the General Agreement on Tariffs and Trade (GATT), *with respect to* prohibitions or restrictions on trade.”³⁰ The United States SAA, however, states that “Article 603 incorporates by reference GATT rules *concerning* import and export restrictions.”³¹ Thus, the United States considered “with respect to” to be synonymous with “concerning” in Article 603(1).

Likewise, Article 1607 excludes obligations on a Party “regarding” its immigration measures. Canada’s SOI, however, states that “Article 1607 establishes that

²⁸ *Waste Management Award* ¶ 27 (“When both legal actions *have a legal basis derived from the same measures*, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages.”) (emphasis added); *id.* (“[T]he domestic proceedings initiated by ACAVERDE fall within the prohibition of NAFTA Article 1121 in that they *refer to* measures that are also invoked in the present arbitral proceedings as breaches of NAFTA provisions.”) (emphasis added); *id.* ¶ 28 (“[T]here is no doubt that [the Mexican proceedings] directly affected the international obligations assumed by the Mexican Government, given that they *had their origin in* the same measures invoked by the Claimant.”) (emphasis added).

²⁹ See Canfor Reply ¶ 132 (citing to *Fisheries Jurisdiction*, 1998 I.C.J. at 458, for the proposition that “concerning” and “arising out of” are broad in scope).

³⁰ NAFTA art. 603(1) (emphasis added).

³¹ SAA at 62.

. . . no other part of NAFTA imposes obligations on any of the countries *respecting* immigration measures.”³² Canada thus considered “respecting” – a term similar to “with respect to” – to be interchangeable with “regarding” in Article 1607.

Finally, Article 1121(1)(b) – the very article Canfor relies on for its interpretation of Article 1901(3) – requires investors to “waive their right to initiate or continue. . . any proceedings *with respect to* the measure.”³³ The SAA explains that “Article 1121 requires [investors] . . . to waive the right to initiate or continue any action in local courts or other fora *relating to* the disputed measure[s].”³⁴ Thus, in the context of Article 1121(1)(b), the United States considered “with respect to” to be synonymous with “relating to.” Accordingly, Canfor’s argument that the Parties intended the phrase “with respect to” to have some special, narrow meaning is unfounded.³⁵

3. Canfor’s Distinction Between A Challenge To The Substance Of A Law And To Its Application Is Baseless

Canfor’s argument that Article 1901(3) does not preclude its claims because it is challenging the “application” of U.S. antidumping and countervailing duty law, and not the substance of that law, is also without merit.³⁶ There is no meaningful distinction in the context of Article 1901(3) between a challenge to a Party’s law and a challenge to the *application* of that law.

³² SOI at 187.

³³ NAFTA art. 1121(1)(b) (emphasis added).

³⁴ SAA at 147.

³⁵ The same conclusion can be drawn from the fact that “with respect to” in Article 1901(3) is translated in the French version of the NAFTA posted on the NAFTA Secretariat’s website as “relativement à,” but that same phrase is translated as “se rapportant à” in Article 1121, “au regard” in Article 1901(1) and “en ce qui concerne” in Article 301(2). See http://www.nafta-sec-alena.org/DefaultSite/legal/index_f.aspx?articleid=305.

³⁶ See Canfor Reply ¶¶ 7, 111, 129, 134 & 144.

First, the ordinary meaning of Article 1901(3) admits no such distinction. The *application* of a Party’s antidumping and countervailing duty law is an integral part of that law. It requires the exercise of judgment as to the scope and effect of that law in relation to a particular set of facts. Article 1902(1) for instance, reserves not only the Parties’ right to retain their antidumping and countervailing duty law, but to “apply” that law.³⁷ The former right would be meaningless without the latter.

Furthermore, had the NAFTA Parties intended to distinguish in Article 1901(3) between the substance of a law and its application – and accord private claimants the right to challenge the latter outside of Chapter Nineteen – such a purpose would have been plain from the text of Article 1901(3). Article 1901(3), however, provides a carve-out only for Article 2203 (Entry into Force). It does not provide for challenges to the application of antidumping and countervailing duty determinations under Chapter Eleven.

Second, a claimant unquestionably can challenge the *application* of a Party’s antidumping and countervailing duty law – in the form of a final antidumping or countervailing duty determination – under Chapter Nineteen. Indeed, that is precisely what Canfor has done in the Chapter Nineteen panel proceedings. Canfor’s argument thus suggests that antidumping and countervailing duty determinations can be challenged simultaneously under *both* Chapters Nineteen and Eleven. Nothing in Article 1901(3) or Chapter Nineteen, however, suggests that the Parties ever intended such a result.

Third, Canfor’s interpretation, if accepted, would lead to absurd results. It would allow a claimant to circumvent *any* exception in the NAFTA simply by characterizing its claims as pertaining to the “application” of a law or measure. Indeed, under Canfor’s

³⁷ NAFTA art. 1902(1) (“Each Party reserves the right to *apply* its antidumping law and countervailing duty law to goods imported from the territory of any other Party.”) (emphasis added).

theory, only an exception that expressly states that it excludes the “application” of a law or measure – and Canfor cites to none – would preclude a claimant from submitting a claim involving the subject matter of that exception to Chapter Eleven arbitration. Chapter Eleven would thus become a catch-all for claims concerning subject matters that were intended to be excluded from Chapter Eleven dispute resolution. That result would be contrary to Chapter Eleven’s purpose of providing jurisdiction only over investment claims.³⁸

Finally, the Chapter Eleven tribunal in *UPS v. Canada* rejected the attempt of the claimant in that case to draw a distinction between a measure and its application. In that case, UPS (which was represented by the same counsel as Canfor in this arbitration) alleged that Canada failed to enforce its Goods and Services tax against Canada Post as it did against foreign competitors in violation of Article 1105.³⁹ UPS argued that the taxation measures exclusion in Article 2103(1) – the same Article, incidentally, that Canfor asserts in this case to set forth a clear exception to the obligations of Chapter Eleven⁴⁰ – was inapplicable because UPS did “not challenge a taxation measure itself,” but rather “the failure of Canada to *apply* its laws.”⁴¹

Both Canada and the United States rejected UPS’s distinction. Canada argued that “UPS’s attempt to draw a distinction between a challenge to the taxation measure

³⁸ See NAFTA arts. 1101(1), 1116(1) & 1117(1); see also SAA at 140.

³⁹ See *UPS v. Canada, Statement of Claim* ¶ 95 (Apr. 19, 2000), available at http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel_archive-en.asp; see also *UPS v. Canada, Amended Statement of Claim* ¶ 33 (Nov. 30, 2001), available at http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel_archive-en.asp.

⁴⁰ See Canfor Reply ¶ 139 (“When the Parties wanted to make clear certain measures were not affected by the treaty, a very clear and specific formulation was used [such as that in Article 2103]”).

⁴¹ *UPS v. Canada, Counter-Memorial of the Investor (Jurisdiction Phase)* ¶ 123 (Mar. 26, 2002) (emphasis added), available at http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel_archive-en.asp.

itself and its *application* has no merit.”⁴² The United States likewise noted in its Article 1128 submission that “no valid distinction exists between a taxation measure and a practice with respect to the *application* of a taxation measure [J]ust as Article 1105 does not apply to challenges to the adoption or imposition of a tax, it does not apply to a practice of *applying* a tax.”⁴³

Without explanation, *UPS* abandoned this claim at the hearing on jurisdiction.⁴⁴ Although the claim was moot, the tribunal confirmed in its award on jurisdiction that a claim cannot be brought under Article 1105 with respect to taxation measures, rejecting the same application/substance distinction *Canfor* seeks to make here.⁴⁵

4. Article 1901(3) Precludes Challenges Under Chapter Eleven To Antidumping And Countervailing Duty Determinations

Canfor’s contention that Article 1901(3) is intended to reserve the Parties’ rights to retain and amend their domestic antidumping and countervailing duty law, but not to exclude challenges under another chapter to the application of that law, is baseless.⁴⁶

First, *Canfor*’s argument is contrary to the ordinary meaning of Article 1901(3). *Canfor*,

⁴² *UPS v. Canada, Reply Memorial of the Government of Canada on Preliminary Jurisdictional Objections* ¶¶ 112-15 (Apr. 12, 2002), available at http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel_archive-en.asp; see also *UPS v. Canada, Reply of the Government of Canada to the United States’ and Mexico’s Submission Under Article 1128 on Canada’s Preliminary Jurisdictional Objections* ¶ 20 (May 21, 2002) (agreeing with U.S. position in ¶¶ 13-15 of its second Article 1128 submission), available at http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel_archive-en.asp.

⁴³ *UPS v. Canada, Second Submission of the United States of America* ¶¶ 13-15 (May 13, 2002) (emphasis added), available at http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel_archive-en.asp.

⁴⁴ *UPS v. Canada, Hearing on Jurisdiction*, Tr. Vol. 1 at 156:18-157:1 (July 29, 2002) (“We are abandoning our claims with respect to goods and services taxes only insofar as they relate to Article 1105 of NAFTA, and in particular, Section – or Paragraph 33(a) of the Amended Statement of Claim.”), available at <http://www.dfait-maeci.gc.ca/tna-nac/parcel-en.asp>.

⁴⁵ *UPS Award on Jurisdiction* ¶ 117 (“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 Accordingly the position taken by the two parties appears to conform exactly with the agreement.”).

⁴⁶ See *Canfor Reply* ¶ 129.

in essence, asks this Tribunal to interpret Article 1901(3) as if it provided that “no provision of any other Chapter [of the NAFTA] shall be construed as imposing obligations on a Party with respect to *the amendment of* its antidumping and countervailing duty law.”⁴⁷ Nothing in the plain terms of Article 1901(3), however, supports such an interpretation.

Second, if Article 1901(3)’s purpose were to preserve the Parties’ right to retain and amend their domestic law, that article would be redundant with Article 1902. Article 1902, which is entitled “Retention of Domestic Antidumping Law and Countervailing Duty Law,” reserves each Party’s right to retain and amend its domestic law.⁴⁸ The NAFTA Parties did not, as Canfor suggests, include two provisions in Chapter Nineteen serving the identical purpose.⁴⁹ Rather, Article 1901(3) serves a broader purpose than Article 1902: it prohibits any provision in another chapter of the NAFTA from imposing *any* obligation on a Party with respect to its antidumping or countervailing duty law.

In sum, Canfor’s central argument concerning the ordinary meaning of Article 1901(3) is inconsistent with that Article’s plain text, is based on a misreading of the *Waste Management Award* and relies on a theory that was rejected by the *UPS* tribunal. Submitting claims concerning U.S. antidumping and countervailing duty determinations to arbitration under Chapter Eleven, and applying the substantive obligations of Chapter Eleven to those determinations, as Canfor seeks to do here, would “impose[] obligations

⁴⁷ *See id.*

⁴⁸ Exceptions to those rights are found in Article 1904(15) and Annex 1904.15, which provide for amendments to the Parties’ antidumping and countervailing duty statutes and regulations to achieve the objectives of Article 1904.

⁴⁹ *See Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 ¶ 51 (Feb. 3) (“[O]ne of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, [is] that of effectiveness.”); *see also Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 24 (Apr. 9) (“It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect.”).

on [the United States] with respect to [its] antidumping [and] countervailing duty law.”

Canfor has failed to demonstrate otherwise.

II. THE CONTEXT OF ARTICLE 1901(3) CONFIRMS THAT THE UNITED STATES DID NOT CONSENT TO INVESTOR-STATE ARBITRATION OF CANFOR’S CLAIMS

Canfor’s arguments with respect to Article 1901(3)’s context are also without merit. Contrary to Canfor’s contention, Article 2004 and the statutory amendments providing for the use of business proprietary information in Chapter Nineteen proceedings support the conclusion that the Parties did not contemplate redundant proceedings under Chapters Nineteen and Eleven.

A. Canfor Errs In Its Interpretation Of Article 2004

The United States demonstrated in its Objection to Jurisdiction that exercising jurisdiction in this case would be inconsistent with the presumption of broader dispute resolution rights for NAFTA Parties than for private parties and, in particular, with NAFTA Article 2004, which excludes all “matters covered in Chapter Nineteen” from State-to-State dispute resolution.⁵⁰ Canfor contends that there is no such inconsistency because it is challenging the *application* of U.S. antidumping and countervailing duty law under the investment chapter, whereas a Party’s goal under Chapter Twenty would be to challenge the *substance* of another Party’s law.⁵¹ Canfor’s reading of Article 2004,

⁵⁰ Article 2004 provides:

Except for the matters covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply with respect to the avoidance or settlement of all disputes between the Parties regarding the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Annex 2004.

⁵¹ Canfor Reply ¶¶ 111-13.

however, is impossible to reconcile with Article 1903, which sets forth a special State-to-State dispute settlement regime for disputes involving the *substance* of a Party's trade law.

Instead of providing for State-to-State dispute resolution under Chapter Twenty, the Parties established a special mechanism for Parties to seek review of antidumping and countervailing duty matters in Chapter Nineteen itself.⁵² Article 1903, for instance, provides for State-to-State dispute settlement with respect to amendments to a Party's trade law.⁵³ Article 1904 permits a State to challenge another Party's final antidumping and countervailing duty determinations.⁵⁴ And Article 1905 contains a State-to-State dispute resolution mechanism for resolving allegations by a Party that the application of another Party's antidumping or countervailing duty law interferes with the establishment or operation of a Chapter Nineteen panel.⁵⁵

That the Parties precluded challenges to antidumping and countervailing duty determinations under Chapter Twenty, and established a special mechanism for doing so in Chapter Nineteen, demonstrates that they intended Chapter Nineteen to be self-

⁵² See SAA at 208 ("Chapter Twenty does not apply to disputes arising under Chapter Nineteen, however, which sets out specific mechanisms for dispute resolution in antidumping and countervailing duty cases.").

⁵³ Article 1903(1) provides, in pertinent part:

A Party to which an amendment of another Party's antidumping or countervailing duty statute applies may request in writing that such amendment be referred to a binational panel for a declaratory opinion.

⁵⁴ Article 1904(5) provides:

An involved Party on its own initiative may request review of a final determination by a panel and shall, on request of a person who otherwise would be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination, request such review.

⁵⁵ Article 1905(1) provides, in pertinent part:

[A] Party may request in writing consultations with the other Party regarding the allegations [that the application of another Party's domestic law has interfered with the establishment and functioning of a panel].

contained with respect to *all* antidumping and countervailing duty matters, without distinction between the substance and application of the Parties' laws. This arrangement undermines Canfor's argument that antidumping and countervailing duty determinations may be addressed under a chapter other than Chapter Nineteen.

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.⁵⁶ 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 to themselves, contrary to the general presumption under the NAFTA of broader dispute resolution rights for NAFTA Parties.⁵⁷

Canfor's argument that Article 1901(3) cannot exclude challenges to the *application* of a Party's trade law, because the Article would then be redundant with Article 2004, is also without merit.⁵⁸ The approach taken in Articles 1901(3) and 2004 is

⁵⁶ See, e.g., Statement of Claim ¶¶ 110-122 (alleging violations of Chapter Eleven with respect to preliminary antidumping, countervailing duty and critical circumstances determinations).

⁵⁷ As the *UPS* tribunal observed with respect to Article 1501(3), which excludes State-to-State dispute resolution with respect to a Party's competition law:

NAFTA authorises a broader scope for State-State arbitration than for investor-State arbitration and nowhere confers express authorisation to bring claims respecting article 1501 under investor-State proceedings. The natural inference [from Article 1501(3)'s exclusion of State-to-State proceedings] would be that there is no such jurisdiction [under Chapter Eleven].

UPS Award on Jurisdiction ¶ 61.

⁵⁸ See Canfor Reply ¶ 114.

not uncommon in the NAFTA. For example, the *UPS* tribunal found that Article 1501(3) excludes that Article's subject matter from investor-State arbitration.⁵⁹ Note 43 to the NAFTA likewise provides that "no investor may have recourse to investor-state arbitration under the Investment Chapter for any matter arising under [Article 1501]."⁶⁰ The *UPS* tribunal held that Note 43 does not give rise to any negative inference based on its overlap in coverage with Article 1501. Rather, it simply "evidence[d] the drafters' caution" by excluding in specific terms what was generally excluded by the Article itself.⁶¹

Article 2004 likewise "evidences the drafters' caution" by specifying an exclusion that is set forth in general terms in Article 1901(3). Chapter Twenty's dispute resolution procedures apply to *all* matters under the NAFTA unless specifically excluded. Article 2004 defines Chapter Twenty's broad scope, and the major exception to that coverage for antidumping and countervailing duty matters.

Chapter Eleven, on the other hand, confers limited jurisdiction over investment disputes. Articles 1116 and 1117 confer jurisdiction over claims only with respect to alleged breaches of the provisions in Section A of Chapter Eleven and two articles in Chapter Fifteen. Because of the limited scope of disputes subject to arbitration under Chapter Eleven, unlike Chapter Twenty, there would be no perceived need for Chapter Eleven to contain an express exclusion for every other type of dispute that would not be subject to investor-State arbitration.⁶²

⁵⁹ *See id.*

⁶⁰ The Notes to the NAFTA appear after Chapter Twenty-Two.

⁶¹ *UPS* Award on Jurisdiction ¶ 61.

⁶² *Cf.* Article 1401(2) (explicitly incorporating certain Chapter Eleven provisions into Chapter Fourteen). In any event, Canfor has not explained how its claims could be construed as investment claims subject to

In sum, Article 2004's exception for matters covered in Chapter Nineteen, and the absence of any similar provision in Chapter Eleven does not, as Canfor suggests, demonstrate the existence of the Tribunal's jurisdiction over antidumping and countervailing duty claims. Rather, Article 2004 confirms the Parties' intent – captured more broadly in Article 1901(3) – that Chapter Nineteen be the exclusive forum in the NAFTA for all antidumping and countervailing duty matters.

B. Canfor's Argument With Respect To Business Proprietary Information Is Baseless

The United States noted in its Objection to Jurisdiction that the fact that the NAFTA required amendments to the Parties' domestic trade law to permit the use of business proprietary information in Chapter Nineteen proceedings – but did not require similar amendments for Chapter Eleven – confirms that the Parties did not contemplate that antidumping or countervailing duty matters could be submitted to Chapter Eleven arbitration.⁶³

Canfor asserts that the United States should not be able to use its “municipal laws on confidentiality to justify abusive treatment of foreign investors,” and that the Tribunal can decide for itself whether it is satisfied with the non-proprietary evidence available to it.⁶⁴ Canfor misses the point. The United States is not seeking to use the laws providing for the use of business proprietary information in Chapter Nineteen proceedings to justify any treatment. Rather, it is the absence of any similar accommodation for Chapter

Chapter Eleven arbitration, even in the absence of Article 1901(3). Canfor's alleged investments in the United States include reload centers and inventory facilities. *See* Statement of Claim ¶¶ 12-15. Canfor, however, does not allege treatment with respect to those investments. Rather, all of its claims are with respect to softwood lumber produced in Canada and imported into the United States.

⁶³ *See* U.S. Objection to Jurisdiction at 26.

⁶⁴ Canfor Reply ¶ 123 n.61.

Eleven that provides further evidence that the Parties never contemplated that antidumping or countervailing duty claims would be submitted to arbitration under that Chapter. Whether or not the Tribunal could render a decision based solely on non-proprietary information is irrelevant to the issue of jurisdiction.

III. THE NAFTA’S OBJECT AND PURPOSE CONFIRM THAT THE UNITED STATES DID NOT CONSENT TO ARBITRATE CANFOR’S CLAIMS UNDER THE INVESTMENT CHAPTER

Canfor’s arguments with respect to the NAFTA’s object and purpose are also without merit. Canfor’s attempt to override the specific terms of Article 1901(3) with general, preambular language concerning the Agreement’s object and purpose is contrary to accepted canons of treaty interpretation. Moreover, Canfor’s argument that there is a presumption under the NAFTA in favor of redundant proceedings is contrary to the NAFTA’s objective of creating effective procedures for the resolution of disputes.

A. The NAFTA’s General Objectives Do Not Override Its Specific Provisions

As an initial matter, Canfor’s interpretive method – which gives primacy to the stated object and purpose of the NAFTA while ignoring the specific language of the provisions at issue – is unsound. Canfor contends, for example, that Article 1901(3) must be interpreted in a way that “maximizes the liberalizing objectives” of the NAFTA.⁶⁵ This approach is contrary to the terms of the NAFTA, which specifies that the general objectives in Article 102(1) are to be “elaborated more specifically through its principles

⁶⁵ Canfor Reply ¶ 53. Canfor likewise contends that Article 1901(3) must be interpreted in recognition of the supposed “progressive widening of state responsibility that the NAFTA parties have expressly agreed to throughout NAFTA.” *Id.* ¶ 54.

and rules.” And it is contrary to conventions of treaty interpretation in international law.⁶⁶ As the tribunal in *ADF Group Inc. v. United States of America* explained:

We understand the rules of interpretation found in customary international law to enjoin us to focus first on the actual language of the provision being construed. The object and purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph [T]he general objectives of NAFTA . . . may frequently cast light on a specific interpretive issue; *but [they are] not to be regarded as overriding and superseding the latter.*⁶⁷

Furthermore, the general objectives cited by Canfor relate to trade rather than investment. For example, Canfor cites Article 1902(2)(d)(ii), which calls for the establishment of “fair and predictable conditions for the progressive liberalization of *trade*.”⁶⁸ Likewise, Canfor asserts that the “unmistakable message” of these objectives is to ensure that the measures of the Parties “legitimately combat unfair *trade* practices.”⁶⁹ Canfor fails to explain, however, how these principles have any relevance to a proceeding under the *investment* chapter. An objective that *is* relevant to this arbitration is that of

⁶⁶ See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1); see also *Asian Agric. Prods. v. Sri Lanka*, 30 I.L.M. 577, 636 (June 21, 1990) (Final Award) (“Since Article 4 contains specific rules governing the particular case of investment losses sustained in civil disturbances – the situation presented by this case – this provision must, in accordance with a well-settled principle of treaty interpretation, prevail over the general property protection provision in Article 2(2). This principle . . . is captured by the maxim: ‘Generalia specialibus non derogant’”); *Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803 ¶ 28 (Dec. 12) (holding that an article in a treaty providing that “there shall be enduring peace and sincere friendship” “must be regarded as fixing an objective, in light of which the other Treaty provisions are to be interpreted and applied,” but cannot be the basis on which a breach of the treaty could be found).

⁶⁷ *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1 ¶ 147 (Award of Jan. 9, 2003) (internal citations omitted; emphasis modified).

⁶⁸ See Canfor Reply ¶ 44 (emphasis added). Canfor also cites to Article 102(1)(a) (concerning elimination of “*barriers to trade*”) (emphasis added), Article 102(1)(b) (concerning the promotion of “*conditions of fair competition*”) (emphasis added) and the Preamble (requiring the Parties to “create an expanded and secure market for . . . *goods and services*,” “reduce distortions to *trade*,” and “establish clear and mutually advantageous rules governing their *trade*”) (emphasis added).

⁶⁹ Canfor Reply ¶ 46 (emphasis added).

“creat[ing] effective procedures . . . for the resolution of disputes.”⁷⁰ Canfor’s attempt to override the specific obligations of the NAFTA by citing general objectives – that are in any event unrelated to investment – should be rejected.

B. There Is No Presumption Of Parallel Proceedings Under The NAFTA

Canfor also errs in contending that there is a presumption under the NAFTA in favor of parallel proceedings.⁷¹ To the contrary, the NAFTA manifests a presumption *against* parallel proceedings, as demonstrated by the Agreement’s objective of providing effective procedures for the resolution of disputes.⁷² That objective is elaborated through specific provisions, including the scope and coverage provisions in the chapters containing dispute resolution mechanisms⁷³ and through the various exceptions, such as Article 1901(3), that exempt particular subject matters from obligations in other parts of the NAFTA.⁷⁴

The NAFTA contains only limited exceptions to the general rule disfavoring parallel proceedings. Article 1115, for example, provides that the Chapter Eleven arbitration procedure was established without prejudice to the Parties’ rights to submit disputes to resolution under Chapter Twenty. Article 1115 reflects the international law

⁷⁰ NAFTA art. 102(1)(e). Two other objectives pertain to investment, but do not bear on any interpretive issues before the Tribunal. *See* Article 102(1)(c) (calling for the Parties to “increase substantially investment opportunities in the territories of the Parties”) and Preamble (the Parties should “ensure a predictable commercial framework for business planning and investment”).

⁷¹ *See* Canfor Reply ¶¶ 103-09.

⁷² *See* NAFTA art. 102(1)(e).

⁷³ *See, e.g.*, NAFTA art. 1101(1) (providing that Chapter Eleven “applies to measures . . . relating to . . . investors [and] investments”); Article 1401(1) (providing that Chapter Fourteen “applies to measures . . . relating to . . . financial institutions . . . investors . . . and investments . . . in financial institutions . . . and . . . cross-border trade in financial services”).

⁷⁴ *See, e.g.*, NAFTA art. 1101(3) (providing that Chapter Eleven “does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen”); Article 1607 (providing for only State-to-State dispute resolution with respect to matters concerning a Party’s immigration measures); Article 2103(1) (excluding taxation measures from other obligations under the NAFTA except as set forth in Article 2103).

principle that a private claimant may not waive the rights of its State. There is no exception in the NAFTA, however, providing for parallel proceedings with respect to antidumping and countervailing duty measures under both Chapters Eleven and Nineteen.⁷⁵

Moreover, Canfor's reliance on *Pope & Talbot, Inc. v. Canada* and *S.D. Myers, Inc. v. Canada* is misplaced. In those cases, both Chapter Eleven Tribunals rejected Canada's jurisdictional objection. In neither case, however, did Canada rely on a provision in the NAFTA expressly excluding such claims from Chapter Eleven's jurisdiction. The *Pope & Talbot* tribunal, for instance, held that "[t]here is *no provision to the express effect* that investment and trade in goods are to be treated as wholly divorced from each other."⁷⁶ Here, of course, there *is* a provision that expressly prohibits the imposition of obligations in the NAFTA outside of Chapter Nineteen with respect to a Party's antidumping and countervailing duty laws. *Pope & Talbot* and *S.D. Myers* thus provide no support for Canfor's argument.

⁷⁵ Canfor's contention that NAFTA Article 1121 expressly contemplates such parallel proceedings is without merit. See Canfor Reply ¶ 105. Article 1121's primary purpose is to *avoid* parallel proceedings, by requiring claimants, as a condition precedent to submitting a claim to arbitration under Chapter Eleven, to waive their right to pursue claims in other fora with respect to the same measures challenged under Chapter Eleven. Moreover, the exception to Article 1121's waiver requirement applies only to claims for certain types of relief "before an *administrative tribunal or court*." NAFTA art. 1121. A Chapter Nineteen panel is not an administrative tribunal or a court. Thus, contrary to Canfor's claim, NAFTA Article 1121 does not evidence the NAFTA Parties' acknowledgement that claims, such as Canfor's, could be brought under both Chapters Eleven and Nineteen.

⁷⁶ *Pope & Talbot, Inc. v. Canada: Award in Relation to Preliminary Motion by Government of Canada to Dismiss the Claim Because it Falls Outside the Scope and Coverage of NAFTA Chapter Eleven "Measures Relating to Investment" Motion* ¶ 26 (Jan. 26, 2000) (emphasis added); see also *S.D. Myers, Inc. v. Canada* ¶ 295 (Partial Award of Nov. 13, 2000) ("The thrust of a dispute under Chapter 11 is that the impugned measure relates to an investor or an investment. If it were to do so, it would be covered by Chapter 11 *unless excluded*." (emphasis added)).

C. There Is No Presumption Of Parallel Proceedings Under International Law

Canfor's contention that there is a presumption in favor of parallel proceedings under international law is based on its erroneous citation to the *Bluefin Tuna Case*.⁷⁷ Canfor asserts that the United Nations Convention on the Law of the Sea ("UNCLOS") tribunal "rejected a reading of Article 16 of UNCLOS that would have excluded parallel proceedings."⁷⁸ Canfor asserts that the tribunal held that to find otherwise "would be inconsistent with the presumption of parallelism" which is "entrenched in [international] law."⁷⁹ The UNCLOS tribunal, however, held no such thing. Canfor's mistake is plain: it cites to the tribunal's recitation of the claimant's argument in that case, rather than to the tribunal's holding.⁸⁰

In fact, the *Bluefin Tuna* tribunal *rejected* parallel proceedings by dismissing the claim. It held that the dispute arose under both the general umbrella treaty, the UNCLOS, and the specific implementing treaty, the 1993 Convention for the Conservation of Southern Bluefin Tuna (the "1993 Convention").⁸¹ It found that Article 16 of the 1993 Convention provided for binding arbitration only if all parties consented.⁸² Although Article 16 did not expressly exclude dispute resolution under the UNCLOS, the

⁷⁷ (*Austl. & N.Z. v. Japan*), 39 I.L.M. 1359, (Aug. 4, 2000) (UNCLOS Award on Jurisdiction & Admissibility) ("SBT Award").

⁷⁸ Canfor Reply ¶ 100.

⁷⁹ *Id.*

⁸⁰ *See id.* (citing SBT Award ¶ 52). The language quoted by Canfor comes from paragraphs 41(h) and 41(i), which appear under the heading "The Position of Australia and New Zealand on the Presence of Jurisdiction and the Admissibility of Their Claims.").

⁸¹ 1993 Convention for the Conservation of Southern Bluefin Tuna, May 10, 1993, Austl.-Japan-N.Z.

⁸² *See* SBT Award ¶ 57. Article 16 of the 1993 Convention provides, in pertinent part, that any dispute not resolved by negotiation or other means "shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration" *Id.* ¶ 23. Canfor apparently confuses Article 16 of the UNCLOS with Article 16 of the 1993 Convention. *See* Canfor Reply ¶ 100.

tribunal found that it sufficiently manifested the parties' intent "to remove proceedings under that Article from the reach of the compulsory procedures . . . of UNCLOS."⁸³

In contrast to *Bluefin Tuna*, which involved two treaties with overlapping jurisdiction over the same subject matter, this case involves a single treaty containing two dispute resolution mechanisms covering distinct subject matter areas. Moreover, whereas the 1993 Convention was held *implicitly* to exclude dispute resolution under UNCLOS, this case involves a provision that *expressly* makes the matter at issue here subject to dispute settlement under only one of these mechanisms.⁸⁴ Canfor's claim for parallel proceedings in this case is thus far weaker than that made by the *unsuccessful* party in the *Bluefin Tuna Case*.⁸⁵

D. Canfor Misconstrues The NAFTA's Objective Of Creating Effective Dispute Resolution Procedures

Canfor also errs in contending that parallel proceedings under Chapters Eleven and Nineteen would be an "effective" means of settling the softwood lumber dispute.⁸⁶ It argues that the two proceedings would be complementary because one provides for damages and applies international law standards, whereas the other provides relief from

⁸³ *Id.* ¶ 57. Contrary to Canfor's contention that Article 16 was found to "clearly exclude[] resorting to dispute resolution under the UNCLOS" (*see* Canfor Reply ¶ 100), the tribunal stated that "[t]he terms of Article 16 of the 1993 Convention do *not* expressly and in so many words exclude the applicability of . . . procedures . . . of UNCLOS." SBT Award ¶ 56 (emphasis added).

⁸⁴ Canfor's attempt to distinguish *MOX Plant* is unavailing. *See* Canfor Reply ¶ 100 n.46. In that case, the tribunal recognized that "a proceeding that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties." (*Ir. v. U.K.*) (June 24, 2003) (UNCLOS Order No. 3) ¶ 28. Consideration of Canfor's claims by this Tribunal would be even more problematic in that it presents the possibility of conflicting findings by two bodies established under the *same* treaty.

⁸⁵ Canfor's reliance on Dr. Gabrielle Marceau's article "Conflicts of Jurisdiction" is misplaced. *See* Canfor Reply ¶ 99. That article, far from advocating parallel proceedings, largely addresses the various means for avoiding such parallel proceedings.

⁸⁶ *See* Canfor Reply ¶¶ 96-98.

antidumping and countervailing duty determinations under municipal law standards.⁸⁷

This argument fundamentally misconstrues the NAFTA’s objective of “creat[ing] effective procedures . . . for the resolution of disputes.”⁸⁸

Parallel proceedings, among other things, waste the Parties’ and arbitral resources and risk conflicting findings or double recovery by claimants. This arbitration gives rise to all those concerns. *First*, it is wasteful of time and resources. Canfor asks this Tribunal to make precisely the same determinations – for example, whether Commerce properly interpreted and applied U.S. law in determining whether the relevant stumpage program was “specific” to an industry – that the Chapter Nineteen panels already decided. The Chapter Nineteen panel proceedings were conducted on the basis of tens of thousands of pages of record evidence and they involved substantial briefing by the participants. Re-doing that work in this arbitration would not be an “effective” means of resolving the softwood lumber dispute. Nor would it be fair to the United States, which prevailed on the specificity issue and many other key issues before the Chapter Nineteen panels.

Second, this arbitration and the Chapter Nineteen panel proceedings create the potential for conflicting findings. In fact, Canfor asks this Tribunal to contradict the findings of the Chapter Nineteen panels in many key respects. The panel in the softwood lumber countervailing duty case, for example, concluded that Commerce’s determination that the relevant stumpage program was “specific” to an industry was consistent with the

⁸⁷ *See id.*

⁸⁸ NAFTA art. 102(1)(e) (emphasis added).

Tariff Act and was “supported by substantial evidence.”⁸⁹ Canfor asks this tribunal to reopen that determination, alleging that Commerce improperly “concluded that provincial stumpage programs are specific, when the evidence patently demonstrated otherwise.”⁹⁰ Conflicting findings by two bodies under the same treaty would hardly promote effective dispute resolution.

Finally, this arbitration creates the risk of double recovery. Canfor’s contention that no such risk exists because Chapter Nineteen panels have authority to grant only declaratory relief, and not damages, is misleading. Canfor seeks much the same relief in this arbitration as it did before the Chapter Nineteen panels. For example, in the countervailing duty proceeding under Chapter Nineteen, Canfor sought not only the revocation of the final countervailing duty determination, but also the “return/refund of all security and estimated duty deposits that Commerce has required to be imposed thereon.”⁹¹ In this arbitration, Canfor seeks the same “[d]uties paid or to be paid.”⁹² Awarding Canfor the same relief in each proceeding would not be an “effective” means of resolving the dispute. Canfor’s contention that parallel proceedings would be effective is therefore without merit.⁹³

⁸⁹ *In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determination*, Secretariat File No. USA-CDA-2002-1904-03, *Decision of the Panel*, dated Aug. 13, 2003, at 39 (“The Panel finds that [Commerce’s] specificity determination . . . is not precluded by the statute and is supported by substantial evidence.”).

⁹⁰ See Statement of Claim ¶ 115.

⁹¹ See *Certain Softwood Lumber Products From Canada: Affirmative Countervailing Duty Determination*, Secretariat File No. USA-CDA-2002-1904-03, *Brief of Canfor* at 14 (Aug. 2, 2002).

⁹² Statement of Claim ¶ 149(3).

⁹³ Canfor also cites to the principle of *abus de droit*. See Canfor Reply ¶¶ 49-51. Canfor does not explain the relevance of this principle to its claims under Chapter Eleven. Rather, it appears to argue that customary international law imposes a general obligation of “good faith” independent of any specific NAFTA provision. The International Court of Justice, however, has squarely rejected that notion, holding that “[t]he principle of good faith . . . is not in itself a source of obligation where none would otherwise exist.” *Border and Transborder Armed Actions (Nicar. v. Hond.)*, 1988 I.C.J. 69, 105 ¶ 94 (Dec. 20).

IV. THE CIRCUMSTANCES OF CONCLUSION OF THE NAFTA CONFIRM THAT THERE IS NO JURISDICTION UNDER CHAPTER ELEVEN FOR ANTIDUMPING AND COUNTERVAILING DUTY MATTERS

Canfor concedes that “the Parties could not agree on an international antidumping and countervailing duty law,” and instead adopted *procedures* in the NAFTA for resolving antidumping and countervailing duty disputes.⁹⁴ The conclusion that Canfor draws from this fact, however – that Chapter Nineteen was not intended as the exclusive forum for antidumping and countervailing duty matters – is unsustainable.⁹⁵

Chapter Nineteen reflects the procedural solution of the negotiating Parties: it sets forth no substantive rules, but rather a procedural mechanism of binational panels to review the Parties’ antidumping and countervailing duty determinations for consistency with that Party’s own law. As the United States noted in its Objection to Jurisdiction, applying the substantive international law obligations under Chapter Eleven to the Parties’ determinations would impose on the Parties a solution they could not, and did not, reach. Article 1901(3)’s prohibition on imposing obligations from NAFTA chapters other than Chapter Nineteen – *i.e.*, chapters that contain substantive, international law standards – is consistent with this aspect of the circumstances of conclusion of the NAFTA.

CONCLUSION

For the foregoing reasons, and the reasons set forth in our Objection to Jurisdiction, the United States respectfully requests that this Tribunal render an award in favor of the United States and against Canfor, dismissing Canfor’s claims in their entirety

⁹⁴ Canfor Reply ¶ 120.

⁹⁵ *See id.*

and with prejudice. The United States further requests that, pursuant to Articles 38 and 40 of the UNCITRAL Arbitration Rules, Canfor be required to bear all costs of this arbitration, including costs and expenses of counsel.

Respectfully submitted,

Mark A. Clodfelter

*Assistant Legal Adviser for International
Claims and Investment Disputes*

Andrea J. Menaker

*Chief, NAFTA Arbitration Division, Office
of International Claims and Investment
Disputes*

Mark S. McNeill

Jennifer I. Toole

*Attorney-Advisers, Office of International
Claims and Investment Disputes*

UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

August 6, 2004