

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")

REPLY TO THE
UNITED STATES' OBJECTION
TO JURISDICTION

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I. INTRODUCTION

1. Pursuant to the Decision of the Tribunal dated January 23, 2004 and Procedural Order No. 4 Canfor (hereafter "Canfor" or the "Investor") submits this Reply Memorial in response to the Objection to Jurisdiction of the Respondent United States of America dated October 16, 2003 (the "Objection").

2. Canfor respectfully submits that this Tribunal has jurisdiction to adjudicate its claims on the merits. The source of the jurisdiction of this Tribunal is the NAFTA itself, a binding treaty to which the consent of the United States has never been in doubt.

3. In consenting to NAFTA, the United States accepted that Chapter 11 tribunals would determine questions about their jurisdiction based on a good faith interpretation of the relevant provisions of the NAFTA undertaken in accordance with the applicable rules codified in the *Vienna Convention on the Law of Treaties*.

4. Thus, the question is whether a good faith interpretation of any provision or provisions of NAFTA undertaken in accordance with *Vienna Convention* would create a bar to jurisdiction in this case.

5. The United States asserts an interpretation of Article 1901(3) of NAFTA that it says would create, if accepted, such a bar.

6. The Investor will demonstrate, however, that: (a) Article 1901(3) is not in the nature of a jurisdictional clause, but instead is an interpretive clause that directs the Parties to "construe" the "obligations" in NAFTA chapters other than Chapter 19 in a certain way; and (b) that the ordinary meaning of Article 1901(3) and the relevant

provisions of Chapter 11 that establish the jurisdiction of this Tribunal do not impose state responsibility with respect to the content of municipal countervailing duty or antidumping laws, and therefore do not create any bar to the Investor's claim.

7. The Investor's claim is not premised on state responsibility for the antidumping and countervailing duty laws themselves, but rather on the conduct of officials charged with administering those laws. This conduct was not mandated by law, but rather was discretionary, arbitrary, and cavalier, and entitles the Investor to advance this claim.

8. The United States' entire jurisdictional objection is premised on an unsupportable interpretation of Chapter 19 of the NAFTA, and of Article 1901(3) in particular. When reviewed carefully, the United States' three separate arguments, based on the "context" of NAFTA Article 1901(3), the "object and purpose" of the NAFTA, and the circumstances of the conclusion of the NAFTA, in the end, do nothing to support the United States' so-called "ordinary meaning" interpretation.

9. In its Objection, the United States fails to undertake the necessary analysis of, amongst other things, the architecture of the NAFTA and the respective roles of Chapters 11 and 19. More specifically, it fails to critically analyze the nature and purpose of, and the fundamental differences between, those chapters, the rights and duties they establish, and the different legal regimes they describe, when such an analysis is of the utmost importance to the interpretive exercise this Tribunal must undertake. That analysis is set out in detail in this Memorial and it clearly demonstrates that the United States' interpretation of Article 1901(3) is inconsistent with the "ordinary meaning" of the NAFTA and the object and purpose of the treaty as a whole.

10. Finally, even if, for the sake of argument, the United States could argue that aspects of the Investor's claim imply a challenge to the United States' antidumping and countervailing duty laws themselves, the Investor will argue in the alternative that since Article 1901(3) is by its very nature *not* a jurisdictional clause, any argument of the United States based on Article 1901(3) must be considered as a defense to specific aspects of the Investor's claims. It does not bar the jurisdiction of the Tribunal, but rather would be appropriately considered by this Tribunal when adjudicating on the merits.

II. ISSUE TRIBUNAL MUST ADDRESS

11. The question the Tribunal must address on this motion is simply this:

Where a claimant alleges that the United States has violated the international law obligations assumed under NAFTA Articles 1102, 1103, 1105 and 1110, does NAFTA Article 1901(3) provide a complete defence to the claimant's otherwise properly brought claim, by virtue only of the fact that the claim has some connection to the municipal antidumping or countervailing duty laws of the United States or their application to the claimant?

III. SUMMARY OF SUBMISSION

A. Overview Of NAFTA

12. In general, a key object and purpose of NAFTA is to promote foreign investment and provide substantial protection to foreign investors and their investments.

13. Chapter 11 creates an investor/state arbitration regime that utilizes *international* norms and standards of review to examine treatment of foreign investors and their investments by the NAFTA Parties. The only remedy available to an investor bringing a Chapter 11 claim is damages or restitution.

14. Chapter 19 creates a legal regime that allows for judicial review of final antidumping or countervailing duty determinations made by United States' agencies according to *municipal* norms and standards of review. It substitutes an impartial, international tribunal for a local court. Binational panels have no jurisdiction to award damages. The remedies under a Chapter 19 binational panel review are explicitly limited to the types of relief available in local judicial review.

B. The Investor's Claim

15. The Investor's claim is simple: it and its investments in the territory of the United States have suffered and continue to suffer serious losses arising as a result of the conduct of organs of the United States' government, including the United States' Department of Commerce and the United States' International Trade Commission. The conduct in question constitutes arbitrary and discriminatory treatment of the Investor and a prohibited abuse of rights under international law and NAFTA Chapter 11. The Investor accordingly seeks damages for losses suffered as a result of this abusive conduct.

16. The Investor's claim is not, as the United States would attempt to recast it, an appeal or re-litigation under United States' *municipal* antidumping or countervailing duty laws of the various Department of Commerce or International Trade Commission determinations that may be relevant to it. While challenges to those Determinations under United States' municipal law are on-going in other *fora*, this claim is independent of, and arises in the context of a different legal regime than, those challenges. At its core, the Investor's claim is not premised on a finding by this Tribunal that the United States has violated its own municipal laws, although such violations have already been found by the various Chapter 19 panels hearing those other complaints.

C. The United States Is Bound Under NAFTA To Act Both According To Its Own Municipal Legal Standards And In Conformity With International Standards of Treatment

17. It is irrelevant to this Tribunal's jurisdiction that the factual matrix which gives rise to Canfor's Chapter 11 claim is also relevant to the cases being prosecuted by Canada before various NAFTA Chapter 19 Panels (under United States municipal law) or before the World Trade Organization Dispute Settlement Body (under the standards established under the relevant WTO Agreements).

18. The simple fact is that, unless the international obligations the United States has undertaken under Chapter 11 (or for that matter any other international obligation it has undertaken under any other treaty) are clearly or explicitly excluded, either within the treaty or elsewhere, the United States is bound both by its municipal laws and by the international law obligations it has agreed to with its foreign trading partners. If its international obligations are not excluded, then the same factual matrix can be, and often is, used in the dispute resolution proceedings undertaken in different *fora* applying these different norms and standards of review.

D. United States' Interpretation Undermines Treaty Objects

19. The United States' analysis of NAFTA, and more specifically of Chapters 11 and 19, bolstered by categorical and unsubstantiated statements about what was intended by the Parties, fails wholly to establish that Article 1901(3) precludes an investor's claim.

20. Any interpretive exercise involving Article 1901(3) must undertake a more rigorous analysis of Chapters 11 and 19 than has been undertaken by the United States. The fundamental differences between the two chapters make them complementary rather

than inconsistent, and fully support an investor's ability to advance a claim when it suffers harm to its investment as a consequence of arbitrary or discriminatory treatment. An interpretation that these Chapters are complementary advances, rather than hinders, the NAFTA's objectives of substantially increasing investment opportunities, promoting conditions of fair competition and liberalizing trade.

21. The United States' interpretation, on the other hand, would advance none of these objectives. Rather than having due regard for the objects and purposes of the treaty and Chapters 11 and 19 in particular, the Respondent uses a superficial analysis to adopt an interpretation of Article 1901(3) that is inconsistent with its plain and ordinary meaning, that cannot be supported under the rules on treaty interpretation outlined in the *Vienna Convention*, and that is blatantly at odds with the stated objectives and purpose of the NAFTA. Its interpretation would allow it to accord substandard treatment to foreign investors and their investments (treatment which international law recognizes as being contrary to universally accepted norms) simply because that treatment bore some relation to the United States' municipal antidumping or countervailing duty regimes, however tenuous the connection. The Tribunal ought not to accede to such an interpretation.

E. Article 1901(3) Ensures Provisions Within NAFTA Outside Of Chapter 19 Do Not Require NAFTA Parties To Change Their Domestic Antidumping And Countervailing Duty Law

22. The analysis undertaken in this Memorial demonstrates that the United States remains bound to act consistently with the international standards of treatment it has committed to under the legal regime set up in NAFTA Chapter 11 to ensure non-discriminatory, fair and equitable treatment for investors of another Party. Those

obligations are unconstrained by Article 1901(3). Article 1901(3) simply ensures that no provision in any other chapter of NAFTA will oblige the NAFTA parties to change or modify their domestic antidumping and countervailing duty law, which the NAFTA parties, under Article 1902 reserved their right to maintain.

IV. ARGUMENT

A. Overview Of Argument

23. The Investor's argument in response to the Respondent's Objection proceeds in the following manner. First, the Investor sets out the proper approach for the Tribunal to take in addressing a jurisdictional objection and identifies the deficiencies in the United States' submission in that regard. Second, the Investor sets out the applicable principles of treaty interpretation and identifies how the United States' interpretation is inconsistent with them. Third, the Investor examines the interrelationship between Chapters 11 and 19, and particularly their complementary nature, and explains how proceedings under NAFTA Chapter 11 and NAFTA Chapter 19 can proceed simultaneously as they apply different laws to different facts and provide different remedies. Finally, the Investor explains the proper interpretation of NAFTA Article 1901(3).

B. Approach To Jurisdictional Questions

(i) Jurisdiction Depends On Consent

24. The jurisdiction of this Tribunal depends upon the consent of the parties.¹ The consent of Canfor is established by the very fact of commencing the proceedings.² The

¹ *Ethyl Corporation v. The Government of Canada*, Award on Jurisdiction (Chapter 11 Tribunal) 24 June 1998, at para. 59 [hereinafter *Ethyl*]

² *ibid.*

issue raised by the United States is whether it has consented. Canfor submits it has unequivocally done so in agreeing to Article 1122, which states that "each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in [the NAFTA]".

25. The approach to determining whether a Party has consented was discussed in the jurisdictional award in the NAFTA Chapter 11 arbitration in *Methanex Corporation v. Government of United States*, as follows:

In order to establish the necessary consent to arbitration, it is *sufficient* to show (1) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). *Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.*³ [Emphasis added]

26. In the present case, the United States does not challenge on this preliminary motion whether the measures complained of fall within Article 1101. Nor do they challenge whether the requirements of Article 1116 or 1117 have been met. The Investor has clearly pleaded that it is an Investor with investments in the United States, the United States has breached specific obligations in Section A of NAFTA Chapter 11, and the Investor has suffered loss or damage, by reason of, or arising out of, such breaches. Accordingly, the Investor has *prima facie* established the jurisdiction of this Tribunal.⁴

³ *Methanex Corporation v. Government of United States*, Preliminary Award on Jurisdiction and Admissibility (Chapter 11 Tribunal), 7 August 2002, at para. 120 [hereinafter *Methanex*]; see also *Ethyl*, *supra* note 1 at paras 60-61.

⁴ *Methanex*, *supra* note 3 at para. 120, see also *Ethyl*, *supra* note 1 at 59.

27. The United States argues, however, that such *prima facie* jurisdiction is rebutted by the terms of Article 1901(3), which it asserts operate to deny the consent that would otherwise exist.⁵

28. The Investor submits that Article 1901(3) does nothing of the sort. As argued more fully below, Article 1901(3) neither grants jurisdiction to, nor precludes the jurisdiction of, a Tribunal organized under NAFTA Chapter 11. It merely ensures the Parties' right to maintain antidumping and countervailing duty laws, which laws can only be changed within the context of the processes established under that chapter. Properly understood, nothing in Chapter 19 removes conduct of the United States which violates Chapter 11 obligations from international scrutiny simply because it might be in any way related to an antidumping or countervailing duty matter.

(ii) Facts Accepted As True And Considered In Their Entirety

29. For the purposes of this motion, the Tribunal must accept the facts set out in the Investor's Statement of Claim as true and assume that Canfor has been subject to arbitrary, discriminatory and otherwise abusive treatment that fails to meet the standards of treatment the United States has agreed to accord foreign investors and their investments under NAFTA Articles 1102, 1103, 1105 and 1110.⁶ When considering this jurisdictional question, the Tribunal should confine itself to the facts pleaded by the

⁵ United States Objection to Jurisdiction, 16 October 2003, [hereinafter *Objection*].

⁶ *Methanex*, *supra* note 3 at paras. 112 and 120-124; *Waste Management v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, (Chapter 11 Tribunal), 2 June, 2000 (online: [www.http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Waste_1_management/Waste_1_management.htm](http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Waste_1_management/Waste_1_management.htm) – accessed May 13, 2004) at para. 16 [hereinafter *Waste Management*]; *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, 2003) at para. 25 [hereinafter *Pope & Talbot*].

Investor.⁷ Thus, given the facts must be assumed to be true, the sole question is whether a claim in respect of otherwise objectionable treatment (i.e. conduct that, but for the United States' interpretation of Article 1901(3) would give rise to a successful Chapter 11 claim) is precluded by virtue of Article 1901(3). Canfor says it is not.

(iii) **United States Is Required To Demonstrate That Article 1901(3) Is A Jurisdictional Provision And That Each Individual Claim Is Beyond Tribunal's Jurisdiction**

30. If the United States is to succeed on its jurisdictional challenge, it must demonstrate that the ordinary meaning of the words in Article 1901(3) make it a jurisdictional clause rather than an interpretive clause or a defence to be pleaded on the merits.

31. As this Memorial will demonstrate, Article 1901(3) is drafted in a very different manner than clauses in NAFTA that bar or exclude the jurisdiction of Chapter 11 Tribunals over certain kinds of disputes.⁸ On its ordinary meaning it is not a jurisdictional clause.

32. Furthermore, to succeed, the United States must establish that Article 1901(3) precludes the Investor from advancing *each and every claim* set out in the Statement of Claim. While the United States has selectively identified allegations, or parts of allegations, in the Investor's claim⁹ that is not sufficient for it to succeed. Given the nature of this application, such selectivity cannot be countenanced. The United States has challenged the entirety of the Investor's claim and accordingly each allegation must be shown to be precluded by Article 1901(3).

⁷ *ibid.*

33. Rather than conducting such an analysis, the United States' attempts to characterize the claim in a generalized way and avoid any response to the specific allegations made. An example of the approach adopted by the United States relates to Canfor's allegations concerning the conduct of the United States in connection with legislation known as the *Byrd Amendment*.¹⁰ The United States completely avoids responding in any way to the Investor's assertion that conduct in relation to the *Byrd Amendment* (a piece of legislation which obviously violated the United States' international obligations) and the United States' threatened application of it to Canfor, violate its obligations under NAFTA Chapter 11.¹¹

34. In any event, the Investor's claim cannot be reduced, as the United States would urge, to an analysis of the actions of the United States Department of Commerce, measured against United States' municipal law, nor is it proper for the United States to define the Preliminary and Final Antidumping Determinations of the Department of Commerce as the "primary focus" of the Investor's claim.¹²

35. The primary focus of the Investor's claim is the arbitrary, discriminatory and abusive treatment by organs or officials of the United States' government, directed at the Investor and its investments, the incidents of which treatment, taken individually and collectively, fail to meet the standard of treatment the United States obliged itself to

⁸ See *infra*, paras. 135 to 141

⁹ *Objection*, pp. 13-14 and 16-18

¹⁰ *Continued Dumping and Subsidy Offset Act of 2000* (19 U.S.C. 1675c), [hereinafter *Byrd Amendment*]

¹¹ Even on its own interpretation, the United States is not entitled to rely on Article 1901(3) with respect to Canfor's claims concerning United States' conduct in relation to the application or threatened application of the *Byrd Amendment*. Given the *Byrd Amendment* changed the United States' antidumping and countervailing duty law in a manner inconsistent with both Chapter 19 and the relevant WTO agreements, it would be a violation of good faith (*abus de droit*) for the United States to rely on Article 1901(3) – see *infra* paras. 46 to 51.

¹² *Objection*, at p. 13.

accord foreign investors. While the various preliminary and final determinations and the manner in which they were arrived at will be relevant to whether the Investor was treated in a manner that violates Chapter 11, they are but one aspect of it.

36. Moreover, Canfor's claim does not primarily arise from defects in the substance of United States' municipal antidumping and countervailing duty law (although such defects may also be relevant to the claim), but from the arbitrary, discriminatory and capricious conduct of its agencies and officials which deviates from the international obligations the United States has assumed.

C. General Principles Of Treaty Interpretation

(i) *Vienna Convention Of The Law Of Treaties* Is The Starting Point

37. In order to properly interpret Article 1901(3) and thus determine whether this Tribunal has jurisdiction to adjudicate the merits of the Investor's claim, the Tribunal must have regard to the applicable rules of international law relevant to that task.

38. NAFTA Article 1131 provides that Tribunals established to hear investors' claims under Chapter 11 "shall decide the issues in dispute in accordance with [the NAFTA] and the applicable rules of international law." The applicable rules of international law are the customary international law rules of treaty interpretation codified in Article 31 of the *Vienna Convention on the Law of Treaties*:¹³

¹³ (1969) 1155 U.N.T.S. 331; 8 (1969) ILM 679 in force 1980, [hereinafter *Vienna Convention*]. See, e.g. *United States – Standards for Reformulated Gasoline*, WT/DS2/AB/R, 20 May 1996, at 17; *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, at 9-12; and *Mondev International Ltd. v. U.S.A.*, ICSID No. ARB(AF)/99/2, Final Award (Chapter 11 Tribunal), 11 October 2002, (online: <http://www.state.gov/s/l/c3758.htm> –accessed May 13, 2004), at para. 43; *S.D. Myers Inc. v. the Government of Canada*, Partial Award, (Chapter 11 Tribunal), 13 November 2000

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes:
 - a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - b) Any instrument which was made by one of more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

(ii) The Importance Of The Object And Purpose Of NAFTA

39. Although Article 31(1) of the *Vienna Convention* requires the Tribunal to focus upon the "ordinary meaning" of the text before it, the "ordinary meaning" can only be discerned from the words used, within both the context of the NAFTA and its expressed objects and purposes.

40. NAFTA Tribunals have consistently recognized the need to interpret the NAFTA against its explicitly articulated objectives. As the Tribunal said in *Canada-Tariffs on Certain US-Origin Agricultural Products*:

The Panel also attaches importance to the trade liberalization background against which the agreements under consideration must be interpreted. Moreover, as a free trade agreement, the NAFTA has the specific objective of eliminating barriers to trade among the three contracting Parties. The principles and rules through which the objectives of the NAFTA are elaborated are identified in NAFTA Article 102(1) as including national treatment, most-favoured nation treatment and transparency. **Any interpretation adopted by the Panel must,**

(online: <http://www.dfait-maeci.gc.ca/tna-nac/SDM-en.asp> – accessed May 13, 2004), at paras. 201-204 [hereinafter *S.D. Myers*].

therefore, promote rather than inhibit the NAFTA's objectives.¹⁴ [Emphasis added]

41. While the United States accepts section 31(1) of the *Vienna Convention* as the starting point of the Tribunal's interpretive task, it gives only superficial consideration to the substance of what is meant by the obligation to, in good faith, interpret the treaty provisions in their context and in light of the object and purpose of the NAFTA. Although it emphasizes the importance of analyzing the "object and purpose" of NAFTA as part of this interpretive exercise, when it finally undertakes that analysis it simply analyzes *one portion of one objective* (Article 102(i)(e)), and therefore ignores many of the key objectives forming the fundamental basis of the Treaty.¹⁵

42. Proper treaty interpretation requires a more comprehensive and rigorous analysis than has been undertaken by the United States. It is simply not sufficient to selectively identify one of the NAFTA's objectives and disregard the rest. All of the Treaty's objectives must inform the Tribunal's interpretation.

43. The objectives of the NAFTA are first set out in Article 102(1). Article 102(1) *in full* states:

Objectives

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favoured-nation treatment and transparency, are to:

¹⁴ *Canada – Tariffs on Certain US - Origin Agricultural Products*, CDA-95-2008-01, 2 December 1996, at para 122. This was an arbitration panel established pursuant to NAFTA Article 2008; See also, *Metalclad Corp. v. Mexico*, Final Award, 2 September 2000, (Chapter 11 Tribunal) (online: http://www.economia-snci.gob.mx/sphp_pages/importa/sol_control/consultoria/Casos_Mexico/Metalclad/Metalclad.htm— accessed May 13, 2004), at paras. 70-71 where the Tribunal noted the objective of substantially increasing investment opportunities in the North American Free Trade Area was an important element of its interpretative analysis.

¹⁵ *Objection*, page 27

- (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
- (b) promote conditions of fair competition in the free trade area;
- (c) increase substantially investment opportunities in the territories of the Parties;
- (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
- (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
- (f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

44. However, the articulation of the objects and purposes of the NAFTA is not confined to Article 102. Even in connection with Chapter 19, (the very chapter the United States relies on to advocate an interpretation of the NAFTA that would significantly constrain the protections to investors granted by it), the drafters of the treaty thought it appropriate to reiterate the underlying objectives of the NAFTA as a whole and Chapter 19 in particular. Thus, Article 1902(2)(d) provides that any amendment to United States' antidumping or countervailing duty law must not be inconsistent either with the WTO Agreements, or with:

the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the Parties.

45. As both the *Vienna Convention* and the NAFTA specifically reference the relevance of the preamble to the interpretive task, it too is set out here. That Preamble notes the Parties' agreement to

CREATE an expanded and secure market for the goods and service produced in their territories;

REDUCE distortions to trade;

ESTABLISH clear and mutually advantageous rules governing their trade;

ENSURE a predictable commercial framework for business planning and investment;

BUILD on their respective rights and obligations under the General Agreement on Tariffs and Trade and other multilateral and bilateral instruments of cooperation; and

*ENHANCE the competitiveness of their firms in global markets.*¹⁶

46. The Preamble, Article 102 and Article 1902(2)(d)(ii) send interpreters of Chapter 19 an unmistakable message: while the Parties may retain their municipal antidumping and countervailing duty laws, they may do so *only* in order to legitimately combat unfair trade practices. The Parties were obviously *not* granting themselves the unfettered right to impose unfair and unpredictable restrictions on economic activity that negatively affect Canadian, American or Mexican investors and their investments in other NAFTA countries under the guise of their antidumping and countervailing duty laws or their purported application.

(iii) NAFTA Directs How It Shall Be Interpreted

47. In addition to the *Vienna Convention*, the NAFTA itself directs how it shall be interpreted. Article 102(2) explicitly requires the Parties to measure any interpretation of the provisions of the treaty against the objectives set out in Article 102(1). It provides

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.

(iv) The Principle Of Good Faith Is A Relevant Rule of International Law The Tribunal Is Mandated To Take Into Account

48. As noted above, Article 31(3)(c) of the *Vienna Convention* provides that in interpreting a treaty provision "there shall be taken into account together with the

context . . . any relevant rules of international law applicable in the relations between the parties." One such rule of international law is the principle of good faith.¹⁷

49. The principle of good faith is invariably connected to how states should act in the context of obligations they have undertaken within a treaty. As a principle of international law, it has been described in various ways. For example, in the *Shrimp Turtle* case the WTO Appellate Body said:

The Chapeau of Article XX is in fact, but one expression of the principle of good faith. This principle, at once a general principal of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights and enjoins that whenever the assertion of a right "impinges on the field covered by [a] treaty obligation, it must be exercised *bona fide*, that is to say, reasonably."¹⁸

50. Professor Cheng in his treatise *General Principles of Law* discusses the principle of good faith in the following manner:

. . . discretion must be exercised in good faith, and the law will intervene in all cases where this discretion is abused . . . whenever, therefore, the owner of a right enjoys a certain discretionary power, this must be exercised in good faith, which means that it must be exercised reasonably, honestly, in conformity with the spirit of the law and with due regard to the interest of others. . . . The principle of good faith requires that every right be exercised honestly and loyally. Any fictitious exercise of a right for the purpose of evading either a rule of law or a contractual obligation will not be tolerated. Such an exercise constitutes an abuse of the right, prohibited by law.¹⁹

51. Accordingly, although these passages highlight why the principle of good faith will be directly relevant to the merits phase of this proceeding, at which the Tribunal will

¹⁶ As the Tribunal in *S.D. Myers*, *supra* note 13 stated at para. 202, the preambular language of a treaty shall be construed as part of the context in which the treaty text is situated.

¹⁷ *Vienna Convention*, *supra*, note 13, art. 26.

¹⁸ *U.S. – Importation prohibition of Certain Shrimp and Shrimp Products*, (WT/DS58/AB/R) adopted on 6 November 1988, (*US – Shrimp*) at para. 158.

¹⁹ Cheng, B. *General Principles of Law*, (Cambridge: Grotius Press, 1987) at 122-123.

have to determine the breadth of the obligations accorded under Chapter 11 (and whether the United States has engaged in a prohibited abuse of rights), they also highlight why this principle is relevant to the Tribunal's interpretive exercise, as it is clearly "a rule of international law applicable in the relations between parties"²⁰ which this Tribunal is mandated by the *Vienna Convention on the Law of Treaties* to take into account in interpreting Article 1901(3).

(v) **United States' Interpretation Is Not In Keeping With The Object and Purpose Of NAFTA**

52. Despite the clear directions contained in both the *Vienna Convention* and the NAFTA, the United States adopts a narrow and selective approach that fails to consider the objectives as a whole, which its interpretation completely undermines.

53. Given the fundamental and unassailable interpretive guidelines, the only interpretation of the ordinary meaning of the NAFTA text, including Article 1901(3), which would be in accordance with the international law principle that treaties must be interpreted in good faith²¹ is one that maximizes the liberalizing objectives contained therein.

54. Keeping the principle of good faith in mind (along with the "object and purpose" of NAFTA) it is noteworthy that the interpretation advanced by the United States ignores the progressive widening of state responsibility that the NAFTA parties have expressly agreed to throughout NAFTA, including in relation to the protections given to investors under Chapter 11. Notwithstanding this progressive widening of state responsibility, the United States now advocates an interpretation of Article 1901(3)

²⁰ *Vienna Convention, supra*, note 13 at art. 31(3)(c)

which would allow its officials to treat Canfor in a way which violates the standard of treatment it agreed it would accord foreign investors (including Canfor) under Chapter 11, so long as its conduct relates, in some way, to the exercise of any discretion, right or power it may have in relation to antidumping and countervailing duty matters, simply because the NAFTA Parties reserved their right under NAFTA to maintain their antidumping and countervailing law.

55. Surely, the NAFTA Parties could not have intended that the right to maintain antidumping and countervailing duty laws could be used so as to provide a cover for arbitrary discretionary conduct by officials under colour of law.

56. If the Respondent was correct about Article 1901(3), the specific objectives set out in Article 1902(2)(d)(ii), and the objects of the NAFTA as a whole and Chapter 11 in particular, could be easily frustrated by a Party's labelling the most patently offensive government conduct as being undertaken "with respect" to its antidumping or countervailing duty law, particularly if that law existed as of the date the NAFTA came into force. Serious harm could be visited upon an investor whose trading activity was targeted by the measure, with no right of compensation, despite the open promise of protection plainly afforded to qualified investors under Chapter 11.

57. An interpretation the effect of which would be to allow such a flagrant departure from the basic overriding and fundamental principle of international law that states must exercise discretionary power in good faith is neither justified nor necessary in this case, especially given the existence of a better available interpretation of Article 1901(3) which

²¹ A.D. McNair, *The Law of Treaties* (Oxford: Clarendon Press, 1986) at 465.

is more in keeping with that principle and which is consistent with the "object and purpose" of NAFTA.

D. Article 1901(3) Does Not Preclude A Claim In Respect Of A Violation Of Chapter 11 Obligations

58. The United States' submission is premised on a fundamental misconception of the architecture of the NAFTA and the roles of Chapter 11 and Chapter 19 within the context of the bargain struck between the NAFTA Parties. Properly understood, those two chapters deal with fundamentally different legal regimes. Any conduct being scrutinized under those regimes is reviewed using different norms, against different standards of review, and gives rise to different types of relief. Carefully reviewed in this context, there is nothing in the treaty text, including in NAFTA Chapter 19 generally or NAFTA Article 1901(3) specifically, that says that conduct which may give rise to a judicial review under domestic law under the binational panel process contemplated under Article 1904 cannot also give rise to a claim the United States has violated its *international law obligations* assumed under Chapter 11. Article 1901(3) does not, on its terms, refer to jurisdiction at all. Rather, it simply provides how specific obligations in chapters other than Chapter 19, should be construed.

(i) Overview Of Chapters 11 And 19

59. In order to appreciate the fundamental differences between Chapters 11 and 19 and how the two chapters operate together, a more detailed examination of those chapters is required.

(a) Chapter 11

(1) Section A

60. Chapter 11 comprises three sections. For relevant purposes, Section A describes the scope and coverage of the chapter and sets out the substantive obligations assumed by the Parties in connection with investors of another Party and their investments.

61. In addition to the substantive international law obligations of, among other things, national treatment, most favored nation treatment and treatment in accordance with international law, Section A of NAFTA also specifically identifies those matters which are beyond its scope and coverage.

62. For instance, NAFTA Article 1101(3) provides:

This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services)

63. Similarly, NAFTA Article 1108 provides a lengthy set of reservations and exceptions from the coverage of all or a portion of the obligations set out in Section A of Chapter 11.²² By way of example, Article 1108(3) provides:

Articles 1102, 1103, 1106 and 1107 do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors or activities, as set out in its Schedule to Annex II.

²² See also: Article 1108(5): "Articles 1102 and 1103 do not apply to any measure that is an exception to, or derogation from, the obligations under Article 1703 (Intellectual Property – National Treatment) as specifically provided for in that Article;" Article 1108(6): "Article 1103 does not apply to treatment accorded by a Party pursuant to agreements, or with respect to sectors, set out in its Schedule to Annex IV"; Article 1108(7): "Articles 1102, 1103 and 1107 do not apply to: (a) procurement by a Party or a state enterprise; or (b) subsidies or grants provided by a Party or a state enterprise, including government-supported loans, guarantees and insurance."

64. Finally, NAFTA Article 1112 provides that in the event of an "inconsistency" between NAFTA Chapter 11 and another chapter of NAFTA, the other chapter shall prevail, but in that event it shall do so "only to the extent of the inconsistency."

(2) Section B

65. Section B establishes a procedure for the investors of other NAFTA Parties to advance claims directly against a Party through an arbitration under either the auspices of the ICSID or the UNCITRAL Arbitration Rules. Articles 1116 and 1117 are jurisdictional provisions that authorize the submission of a claim to arbitration where an investor claims that another Party has breached an obligation under Section A of Chapter 11.

66. Article 1121 sets out "conditions precedent" to the submission of a claim. Those conditions specifically require a claimant to provide a limited waiver of their entitlement to advance certain proceedings in respect of the conduct of a Party that is alleged to be in breach of Chapter 11 that might otherwise be pursued before the courts or administrative tribunals of a Party. That waiver, however, does not prevent a claimant from pursuing proceedings in relation to that conduct for "injunctive, declaratory or other extraordinary relief, not involving the payment of damages" before such a court or tribunal. It provides:

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:...
 - (b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings

for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

67. Article 1122 provides the consent of the NAFTA Parties to arbitrate.

68. Finally, Article 1135 limits the Tribunal's remedial powers at the conclusion of a proceeding. It provides:

- 1135 (1) Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:
- (a) monetary damages and any applicable interest;
 - (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

69. A Chapter 11 tribunal may not direct or require a Party to change, alter, amend or repeal any measure which it found to have violated the obligations under Section A.

70. There is no suggestion for the purposes of this motion that the procedural or jurisdictional prerequisites of Section B of NAFTA Chapter 11 have not been satisfied by the Investor.

(3) Section C

71. Section C simply provides the definitions that apply in Chapter 11.

(b) Chapter 19

72. While the United States submission focuses almost exclusively on Article 1901(3), that provision can only be properly understood within the context of the structure of NAFTA Chapter 19 as a whole.

73. Chapter 19 has a very defined purpose. Its origins are in the *Canada-United States Free Trade Agreement*²³ which came into force on January 1, 1989.

74. Chapter 19 does not specifically refer to Chapter 11, nor does Chapter 11 specifically refer to Chapter 19.

75. Article 1902, "Retention of Domestic Antidumping Law and Countervailing Duty Law," reserves to the NAFTA Parties the right to retain and apply their municipal antidumping laws, but imposes a constraint upon any Party wishing to change or modify such laws in that, among other things, any such change can only occur after the amending Party notifies the other Parties of the amendment and its application to them. Any such amendment cannot be inconsistent either with the GATT²⁴, the Antidumping Code²⁵, the Subsidies Code²⁶ or the object and purpose of the NAFTA.

76. Under Article 1903, "Review of Statutory Amendments," a Party may challenge an amendment before a binational panel on the grounds of inconsistency with the GATT, the Antidumping Code or the Subsidies Code, or inconsistency with the object and purpose of NAFTA, and the Panel can issue a declaratory opinion. Should a Party not enact corrective legislation to amend its law within twelve months of the declaratory opinion, the NAFTA Party seeking the opinion may either take equivalent legislative action or terminate the agreement.

²³ 22 December, Can. T.S. 1989 no. 3, 27 I.L.M. 281 (in force 1989).

²⁴ The successor agreement : *General Agreement on Tariffs and Trade 1994*, set out in Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994 (Geneva: GATT Secretariat, 1994).

²⁵ The successor agreement: *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, set out in Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994 (Geneva: GATT Secretariat, 1994).

77. Article 1904, "Review of Final Antidumping and Countervailing Duty Determinations," which is of critical importance in understanding the essence of Chapter 19, replaces municipal judicial review of final antidumping or countervailing duty determinations with a process of binational panel review. It has no application to preliminary determinations. It applies only the municipal law of the Party as if it were a municipal court reviewing the determination. It in no way changes that municipal law, and the standard of review the binational panel must apply is that provided under municipal law.²⁷ The remedial jurisdiction of the binational panel is limited by Article 1904(8), such that the panel may only uphold a determination or remand it for action not inconsistent with its decision. There is no jurisdiction to award damages.

78. Key to the United States position is Article 1901. That Article titled "General Provisions," deals with three separate matters. Article 1901(1) provides that the binational panel review process applies only to goods the investigating authority determines are goods of another Party. Article 1901(2) relates to the process for appointing binational panels. Article 1901(3), on which the United States relies to suggest it has not consented to arbitrate an investment dispute if the conduct in question in any way relates to a countervailing duty or antidumping matter, simply provides as follows:

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.

²⁶ The successor agreement: *Agreement on Subsidies and Countervailing Measures*, set out in Annex 1A of *Marrakesh Agreement Establishing the World Trade Organization*, 15 April 1994 (Geneva: GATT Secretariat, 1994).

²⁷ *Pure Magnesium and Alloy Magnesium from Canada (CVD)*, Secretariat File No. USA-CDA-00-1904-07, Decision of the Panel (March 27, 2002) at pp. 6-7; see also *Live Swine Canada*, Secretariat File No. USA-94-1904-01, Decision of the Panel (May 30, 1995) at p. 5.

79. It is this provision to which our further submissions are directed.

(ii) The Interrelationship Between NAFTA Chapter 11 And NAFTA Chapter 19

80. The United States' submission is premised upon the view that the NAFTA establishes, in respect of conduct that has any connection to antidumping or countervailing duty matters, watertight compartments, such that the only remedy contemplated by the NAFTA in connection with any such facts is one which is based on municipal law norms and standard of review under the Chapter 19 binational panel process. According to its view, conduct, no matter how abusive, and regardless of whether the conduct blatantly violates international norms, cannot be scrutinized under the standards set out in NAFTA Chapter 11, merely because the conduct in question occurs in the context of the purported application of its antidumping and countervailing duty laws. It says this because it asserts the Parties agreed (pursuant to Article 1901(3)) such conduct could only be scrutinized using the municipal law regime set out in Chapter 19.²⁸

81. The proposition that NAFTA is made up of watertight compartments, however, finds no support in the decided cases,²⁹ is unnecessary in light of the objectives of the NAFTA, and is inconsistent with its fundamental architecture which clearly contemplates

²⁸ See, for instance, the *Objection*, at page 20 ("the Parties intended specialized binational panels constituted under Chapter Nineteen to have *exclusive jurisdiction* under the NAFTA"; page 21 "Chapter 19 sets forth a unique, self-contained mechanism for dealing with sensitive and complex antidumping and countervailing duty claims"; page 23 "Chapter Nineteen provides the *exclusive* forum under the NAFTA for disputes arising under a Party's antidumping and countervailing duty law."; page 24 "Chapter Nineteen exclusively governs disputes concerning antidumping and countervailing duty laws"; page 25 "the drafters...envisaged no such overlap for antidumping and countervailing duty matters in Chapter 19". See also pages 2 and 6.

²⁹ *Pope & Talbot*, *supra* note 6, at paras. 16-26.

that the same facts can give rise to obligations not only under multiple chapters, but also in different *fora*.

(a) A Matter Can Relate To Multiple Chapters Of NAFTA

82. In *Pope & Talbot v. Canada*, Canada advanced analogous arguments to those made by the United States here. Canada argued that the measures in question in that case were primarily aimed at trade in goods, not investment, and accordingly, because the Parties had specifically dealt with trade in goods in NAFTA Chapter 3, that chapter applied and NAFTA Chapter 11 did not. The Tribunal dismissed these arguments in their entirety. The Tribunal concluded that there was no reason that the application of one chapter of the NAFTA would necessarily result in the exclusion of another. Rather, the question was simply whether the facts in dispute fell within the provisions under which the Investor complained, regardless of whether or not those facts were somehow relevant under other provisions of NAFTA.³⁰

83. Similarly, in *S.D. Myers v. Canada*, Canada argued that the investor was not entitled to recover any damages for the breach of Articles 1102 and 1105, either because the claim arose in the context of trade in goods, (i.e., the matter was covered by Chapter 3), or because the investor suffered its losses as a cross-border provider of services (i.e., the matter was covered by Chapter 12). This argument was rejected both by the Tribunal and by the Federal Court on judicial review of the final award.³¹

84. In *S.D. Myers*, the Tribunal gave guidance on how one should examine the interrelationship between various treaty provisions. It confirmed, in reliance on *Korea-*

³⁰ *ibid.*

*Definitive Safeguard Measures on Imports of Certain Dairy Products*³², that the chapters of NAFTA are part of a 'single undertaking' and are cumulative, and that a Party must comply with all of them simultaneously unless there is formal conflict between them. Moreover, it clarified what is meant by a conflict, holding that a conflict only arises where compliance with one treaty obligation would result in violation of another.³³ Of course, no such conflict has been alleged in the present case.

85. Accordingly, the underlying approach taken by the United States that interprets the NAFTA so as to limit the regulation of the conduct of a Party to one chapter³⁴ is inconsistent with the approach consistently taken by other NAFTA Chapter 11 Tribunals.

(b) Chapter 11 And Chapter 19 Are Complementary

86. The United States makes the point that allowing parties to pursue remedies under both Chapters 11 and 19 with respect to antidumping and countervailing duty laws "would give rise to critical inconsistencies" and further that the dispute resolution mechanisms are so "dramatically different . . . as to be irreconcilable."³⁵ It says:

The dispute resolution mechanisms provided under the two chapters are so dramatically different – from constitution of the panel to governing law, from the remedies available to review and enforcement mechanisms – as to be irreconcilable.

Moreover, Canfor's apparent position – that private claimants may pursue remedies under both Chapters Nineteen and Eleven with respect to antidumping

³¹ *S.D. Myers, supra*, note 13 at paras 289-300; *Canada (Attorney General) v. S.D. Myers Inc.*, 2004 FCJ No. 29, 2004 FC 38 (FCTD).

³² WT/DS98/R, 21 June 1999 at para. 7.38.

³³ *S.D. Myers, supra*, note 13 at para. 293.

³⁴ see *Objection*, as cited in note 28.

³⁵ *ibid* at pp. 24-25.

and countervailing duty laws – would give rise to critical inconsistencies that would, under Article 1112(1) be resolved in favour of Chapter 19.³⁶

Once again, the United States fundamentally misconstrues the roles of the two chapters.

87. NAFTA Chapters 11 and 19 are complementary and completely reconcilable, with each serving its own distinct purpose.

(1) Chapter 11

88. Chapter 11 is rooted in the customary international law of state responsibility for harm caused to individuals, where those individuals have made a financial commitment to the territory of another State. It provides protection from arbitrary, unjust, inequitable or confiscatory treatment.

89. Chapter 11 is very limited in what remedies it makes available to investors. Section B of NAFTA Chapter 11 limits the relief available in such circumstances to compensation for the harm suffered, or restitution. Such proceedings do not allow an investor to seek relief that mandates a change in the municipal law of the Party allowing such conduct or a change in a measure allowing such injury. To provide a more specific example relevant to this case, Canfor cannot plead before a Chapter 19 panel that the United States' conduct in relation to the *Byrd Amendment*, including its application or intended application to Canfor, is a breach of international laws and standards whose unfair application demands compensation. And by the same token, Canfor cannot ask this Tribunal to strike down the *Byrd Amendment*.

90. Accordingly, the protections provided by Chapter 11 permit the Parties to continue to regulate activities of the investor according to municipal law as they see fit,

³⁶ *ibid.*

but constrains them to pay compensation should they violate the international obligations they have assumed.

(2) Chapter 19

91. Chapter 19 is rooted in a political bargain which substituted binational judicial review under Chapter 19 for municipal judicial review, but still based solely upon municipal legal standards. With this bargain, the Parties retain the right to maintain their municipal antidumping and countervailing duty laws, in exchange for the removal of judicial review from the hands of local authorities. In addition, that bargain also limited the right of the Parties to amend such laws, requiring such amendments to meet the international standards emerging from multilateral consensus achieved through the WTO, and the object and purpose of the NAFTA.³⁷

(3) Chapter 11 And 19 Together

92. The Respondent's attempts to discover a conflict, inconsistency or irreconcilability in the general character of the mechanisms provided under Chapters 11 and 19 only serves to prove the Investor's arguments.

93. The Respondent fails to acknowledge that it is exactly because the two mechanisms are so dramatically different that they are completely complementary. They apply different laws (municipal versus international) and they provide different remedies. As noted above, they serve two completely different – and wholly complementary – functions.

³⁷ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994), Articles 1902-1903.

94. When one analyzes the two chapters and the purpose for which they were incorporated into the NAFTA, nothing the United States has identified establishes any conflict between them, demonstrates irreconcilability between the two dispute resolution mechanisms, or would give rise to any critical inconsistencies so as to preclude a Chapter 11 claim being advanced. Further, contrary to the United States' unsubstantiated assertion, Article 1112, which relates to inconsistencies *between chapters* of the NAFTA, is not engaged by the claims made in this proceeding. There is no inconsistency, and there is therefore nothing to be resolved "in favour of Chapter 19."³⁸

95. Chapters 11 and 19 are accordingly similar in that their ultimate goal is to safeguard the interests of individual economic actors. Their difference lies in the manner in which they achieve that goal. While Chapter 11 establishes a legal regime under recognized and developing standards of international law that provides a mechanism to obtain compensation for harm caused by a breach of those international law standards, Chapter 19 provides the complementary remedy by which one can seek from a binational panel relief from final determinations made under a Party's antidumping and countervailing duty law in accordance with municipal law standards of judicial review of administrative action.

(c) Chapter 11 And 19 Proceedings Result In Effective Dispute Settlement

96. At pages 27 and 28 of its Objection, the Respondent argues, in support of its proposition that the only remedy contemplated by NAFTA in connection with the types of issues raised in Canfor's claim is a Chapter 19 remedy, that the "effective dispute

³⁸ *Objection*, at p. 24.

settlement" promised in the NAFTA would be harmed by what it refers to as "redundant" proceedings. It says:

... a review of NAFTA's various rules for dispute resolution reveals an overriding concern with effective dispute resolution procedures – and avoiding the inefficacies that result from redundant proceedings between the same parties before different dispute resolution panels.³⁹

97. It supports its position on redundancy by raising concerns over "proliferation of international tribunals in recent decades," suggesting that "one consequence of this phenomenon is that claimants have expanded opportunities to submit the same dispute simultaneously or consecutively to multiple fora, giving rise to redundant proceedings."⁴⁰

98. First, international law generally permits multiple proceedings arising out of the same or related facts. Second, as outlined in detail below, Chapter 11 and Chapter 19 proceedings are not the "same": they occur before different tribunals that apply different laws and give remedies that are completely different.

(1) International Case Law Does Not Support The United States' Argument

99. It is well established at international law that where more than one procedure or tribunal is available or has jurisdiction with respect to a claim, parallel proceedings are possible. One of the *fora* need not be used to the exclusion of the other. Dr. Gabrielle Marceau, a senior counsel in the legal affairs office of the World Trade Organization stated:

It seems accepted practice that States may adhere to different but parallel dispute settlement mechanisms for parallel or even similar obligations.⁴¹

³⁹ *ibid* at p. 27.

⁴⁰ *ibid*, at p. 28.

⁴¹ G. Marceau, "Conflicts of Norms and Conflicts of Jurisdictions", (2001) 35 *Journal of World Trade* 1081, at 1109. see also *SGS Societe Generale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case

As explained by Vaughan Lowe, Chichele Professor of Public International Law at Oxford University:

If a dispute were to arise concerning, say, the regulation by state A of ships from state B passing through state A's waters in an international strait, state B might complain that state A's conduct violated both the 1982 UN Convention on the Law of the Sea, Articles 37-44 (Transit Passage) and also GATT Article V (Freedom of Transit). Complaints might be made to the ITLOS and also to the WTO, . . . **The claims would not overlap, even though they spring from the same facts.**⁴² [Emphasis added.]

100. The Respondent cites the *Bluefin Tuna* case as part of its argument relating to redundant proceedings.⁴³ *Bluefin Tuna* does not, however, assist it. In *Bluefin Tuna*, the International Tribunal for the Law of the Sea ("ITLOS") explicitly affirmed the basic principle of international law that the existence of one forum does not give rise to a presumption that proceedings cannot also be brought in another forum. The Tribunal rejected a reading of Article 16 of UNCLOS⁴⁴ that would have excluded parallel proceedings under UNCLOS and another dispute settlement mechanism, noting that "such an interpretation would be inconsistent with the presumption of parallelism of compromissory clauses." The Tribunal went on to elaborate:

Such jurisdictional clauses do not cancel out one another; rather they are cumulative in effect. It is common for a particular dispute to be covered by several bases of jurisdiction, . . . The presumption of parallelism of jurisdictional

No. ARB/01/13, Decision on Objections to Jurisdiction, 6 August 2003 at paras. 154 and 161 where the Tribunal found that claims under the BIT could proceed through arbitration even while arbitration was ongoing under the arbitration clause of the contract out of which the dispute arose.

⁴² V. Lowe, "Overlapping Jurisdiction in International Tribunals", (1991) 20 *Australian Yearbook of International Law* 191 at 203.

⁴³ *Objection*, at p. 28 note 104.

⁴⁴ *United Nations Convention on the Law of the Sea*, U.N. Doc. A/CONF. 62/122(1982).

clauses is of long standing, it is entrenched in the case law [of the International Court of Justice], . . .⁴⁵

The ultimate decision by the UNCLOS Arbitration Panel that it did not have jurisdiction was based on the fact that although the dispute fell both within the *Convention for the Conservation of Southern Bluefin Tuna Between Australia, Japan and New Zealand* ("CCSBT") and the UNCLOS, the provisions of the CCSBT clearly excluded resorting to dispute resolution under the UNCLOS.⁴⁶

101. In addition, the United States is currently defending against multiple cases brought by the Government of Canada before the WTO.⁴⁷ In those cases, Canada is challenging the most suspect portions of the United States' antidumping and countervailing duty laws and their application to Canadian-based softwood lumber

⁴⁵ *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). at para 52.

⁴⁶ In the *MOX Plant Case (Ir. v. U.K.)*: Order No. 3 (Int'l Trib. for the Law of the Sea) (June 24, 2000), also cited by the Respondent (at footnote 104 of its submission), the Permanent Court of Arbitration ("PCA") suspended proceedings until the European Court of Justice ("ECJ") could determine a special jurisdictional issue: namely whether the dispute fell within the exclusive jurisdiction of the ECJ as a matter of the applicable internal European law, ratified and implemented in both disputing countries. It was logical to suspend proceedings in the *MOX Plant* case because the ruling of the ECJ would naturally have affected the PCA's view of its jurisdiction. No analogy exists with the present case (where the nature of the claims and applicable law are – as the Respondent itself admits – completely different). Moreover, the Respondent is not seeking a temporary suspension of these proceedings anyway.

Another recent example of the principle is the Argentina-Brazil dispute over alleged poultry dumping (*Argentina-Definitive Antidumping Duties on Poultry from Brazil*, WT/DS241/R, 22 April 2003). In August 2000, Brazil initiated proceedings under provisions of the MERCOSUR treaty against Argentina which resulted in an award in May 2001. Brazil subsequently commenced proceedings in the WTO regarding the same matter in November 2001. Argentina argued before the WTO panel that Brazil was committing an abuse of process by bringing a proceeding before the WTO proceeding after it had already obtained a ruling from a MERCOSUR Tribunal and that it had failed to act in good faith. Argentina accordingly claimed that Brazil was estopped from bringing further proceedings in the WTO because of its MERCOSUR action. The WTO panel rejected Argentina's argument, allowing the WTO proceeding to go ahead.

⁴⁷ see eg. *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, WT/DS257/R 29 August 2003 and WT/DS257AB/R 19 January 2004; and *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/R, 22, March 2004.

producers as being inconsistent with the United States' obligations under the various WTO Agreements. The Respondent has obviously not argued before these WTO panels that they should be stayed pending resolution of the NAFTA Chapter 19 binational panel proceedings, much less dismissed because of redundancy. It has not done so because they are not redundant. Like the claims being prosecuted under Chapter 11 and 19, they are simply concurrent proceedings which have been undertaken pursuant to two different legal regimes applying very different norms and standards of review.

102. Having accepted the possibility of both WTO and NAFTA dispute settlement proceedings arising out of the same basic facts, the Respondent's claim that a Chapter 11 proceeding should be dismissed because it would result in concurrent or redundant proceedings is simply not credible. Since the explicit wording of Article 1901(3) does not exclude the jurisdiction of a Chapter 11 panel where a Chapter 19 binational panel review could be brought in respect of matters arising out of the same antidumping or countervailing determination, Article 1901(3) does not reverse the presumption in international law of parallel jurisdiction.

(2) NAFTA Expressly Contemplates Simultaneous Proceedings

103. The United States further argues in support of its redundancy point that permitting simultaneous proceedings under both Chapter 11 and Chapter 19 gives rise to risk of conflicting judgments, undermines the principle of finality, presents the possibility of double recovery for claimants, is burdensome and unfair to the Respondent, represents

a poor use of resources and has potentially negative implications for international dispute resolution generally.⁴⁸

104. Once again, these bald assertions, if tested with even cursory scrutiny, cannot be sustained.

105. As described in detail above, the NAFTA explicitly contemplates simultaneous proceedings under a Party's municipal laws and under the legal regime established under Chapter 11. NAFTA Article 1121 provides that while investors making a claim under Chapter 11 must waive the right to advance proceedings before an administrative tribunal or court seeking the same relief (i.e., the payment of damages), they are expressly *not* required to do so where they seek "injunctive, declaratory or other extraordinary relief, not involving the payment of damages."

106. The proceedings before the binational panels do not involve a claim for damages. The relief provided for under Chapter 19 is in its essence, declaratory, either upholding or remanding back the determination.⁴⁹

107. Therefore, far from there being a possibility of redundancy between remedies provided in Chapters 11 and 19 as alleged by the United States, it is clear that NAFTA Chapters 11 and 19 envisage the possibility of simultaneous proceedings being prosecuted under both chapters. Even assuming the exact same conduct is being reviewed under both Chapters 11 and 19, the two proceedings apply different laws and give rise to different remedies.

⁴⁸ *Objection*, at pp. 28 and 30.

⁴⁹ *Magnesium*, *supra* note 27, and *Swine*, *supra* note 27.

108. Finally, if the United States did not want to defend itself against concurrent proceedings under the two different legal regimes arising out of Chapters 11 and 19, and more particularly, in defending itself against claims for compensation arising out of its failure to observe the Article 1105 minimum standard or the Article 1102 national treatment standard – for the manner in which it administers and applies its antidumping and countervailing duty laws – it should have demanded an explicit exemption in negotiations. There is no evidence on the record that such a demand was ever made, much less agreed upon, by the NAFTA negotiators.

109. Therefore, contrary to the United States' position, permitting simultaneous proceedings under Chapter 11 and Chapter 19 will not result in the prospect of conflicting judgments (as the two proceedings apply different laws); finality will not be undermined (as each proceeding has very different procedures for review); double recovery cannot occur (as only the Chapter 11 Panel can award damages); it is not unfair or burdensome to the Respondent (as noted Article 1121 contemplates two simultaneous proceedings and, further, it is hardly unfair and burdensome if the United States is held to account for its arbitrary and abusive conduct); and, it does not represent a poor use of resources (as any concern over the allocation of arbitral resources can be rectified by an award of costs).⁵⁰ Finally, given the objectives so clearly articulated in the NAFTA, trade liberalization and international dispute resolution are both enhanced, not undermined, by imposing obligations on a Party to treat investors fairly.

⁵⁰ *Objection*, pp. 28 and 30.

(d) Additional Arguments Of The United States Do Not Support its Interpretation

110. The United States makes three additional arguments in an attempt to support its view that Article 1901(3) precludes a Chapter 11 claim, one relating to Chapter 20,⁵¹ one relating to the wording of Article 1115,⁵² and one relating to the "Circumstances of Conclusion of the NAFTA"⁵³. However, a careful reading of Chapter 20, Article 1115 and the submission made relating to the "Circumstances of the Conclusion of the NAFTA" demonstrate that none of these arguments support the Respondent's interpretation.

(1) United States' Arguments In Relation To Chapter 20

111. The United States argues at length that "it would make no sense" for this Tribunal to permit an investor to bring a Chapter 11 claim for any State conduct related to antidumping and countervailing duty laws, given that the Parties have prohibited themselves from recourse to Chapter 20 in respect of matters covered under Chapter 19.⁵⁴ With respect, the Respondent's argument is based upon the mistaken premise that the Investor's Chapter 11 claim somehow seeks to challenge the substance of the Respondent's antidumping and countervailing duty laws (as might be Canada's goal if it could bring a Chapter 20 complaint in that regard).

112. As the Investor has noted above, Chapter 11 relates to claims based on international norms according to an international standard of review. Chapter 11 claims are not based on municipal norms or a municipal law standard of administrative justice.

⁵¹ *ibid*, pp 23-24.

⁵² *ibid*, pp. 25-26.

⁵³ *ibid*, pp. 30-32.

Chapter 11 does not permit nor does Canfor seek to challenge the Respondent's right to maintain those laws.

113. Furthermore, the fact that the dispute resolution process in Chapter 20 is inapplicable to a challenge to the substance of the United States municipal countervailing duty or antidumping laws, and that Canada would have to pursue such a challenge under the Article 1903 process, is irrelevant to whether either Canada or the Investor can prosecute a claim for the abusive treatment of Canadian investors by the United States government on the basis of the substantive obligations set out in Chapter 11.

114. The Respondent also argues that because Chapter 20 panels cannot examine Chapter 19 issues under Article 2004, Chapter 11 tribunals must be similarly excluded from having any role to play in the review of how United States officials choose to make use of antidumping and countervailing duty laws (including laws that violate the terms of Articles 1902 and 1903).⁵⁴ The existence of a specific jurisdictional clause precluding Chapter 20 dispute settlement in Chapter 19 matters actually demonstrates that the NAFTA Parties could draft such exclusions explicitly if they intended them to exist. If the Respondent's interpretation of Article 1901(3) was correct, there would have been no need for the explicit wording in Article 2004 – because Article 1901(3) applies to provisions of "any other chapter of the Agreement."

115. The only logical conclusion to draw from: (1) the lack of exclusionary language found in Article 2004 anywhere in Chapter 11; and (2) the existence of exclusionary language in Article 2004 for Chapter 20 tribunals, is that the NAFTA Parties never

⁵⁴ *ibid*, pp. 23-24.

⁵⁵ *ibid*, pp. 23-24.

intended to preclude a Chapter 11 Tribunal from examining whether there had been a breach of the obligations set out in that provision while a Chapter 19 tribunal simultaneously examined whether the United States' conduct violated its municipal antidumping and countervailing duty laws.

(2) **United States' Argument In Relation To Article
1115**

116. At pages 25 to 26 of its Objection, the Respondent suggests that if the Parties intended Chapter 11 standards to apply to matters the factual context of which might also give rise to proceedings under Chapter 19, there would have been some mention of Chapter 19 in Article 1115.⁵⁶ This once again fundamentally misunderstands the structure and architecture of the treaty. In fact, the absence of a reference to Chapter 19 in Article 1115 supports exactly the opposite conclusion.

117. Article 1115 is prefaced in the treaty text by the word "Purpose," and provides:

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

118. Article 1115 preserves the rights of *the Parties* to take Chapter 20 proceedings in relation to matters covered under Chapter 11 and therefore, both Chapter 20 and Chapter 11 proceedings are contemplated in respect of the same matter, for a breach of the exact Chapter 11 Section A obligation. In other words, Canada could, if it so wished,

⁵⁶ *ibid*, pp. 25-26.

pursue the Investor's claim for a violation of Chapter 11 under Chapter 20 and nothing in Chapter 11 prejudices Canada's right to do so.⁵⁷

119. As Chapter 19 proceedings apply a different set of legal obligations than are contained in Chapter 11, there would be no confusion over the impact of the Chapter 11 dispute resolution regime (applying international law) on the ability of a Party to prosecute a Chapter 19 proceeding. The presumption of parallelism would apply.⁵⁸ Accordingly, there would be no need for clarification that would warrant the inclusion of a reference to Chapter 19 in Article 1115.

**(3) Circumstances Of Conclusion Of The NAFTA -
The United States Has Provided No Evidence To
Support Its Interpretation Of Article 1901(3)**

120. At pages 30 to 32 of its Objection, the Respondent makes the point that

the circumstances of conclusion of the Treaty thus confirm the interpretation compelled by the cardinal rule of treaty interpretation. Chapter 11 does not apply to antidumping or countervailing matters.⁵⁹

The material presented by the Respondent in support of this proposition does not support its interpretation that Article 1901(3) precludes a Chapter 11 claim that in any way is connected to antidumping or countervailing duty matters. In fact, the evidence does nothing more than support the proposition that the Parties could not agree on an international antidumping and countervailing duty law and as a result, the Parties agreed "instead to retain the existing national AD/CVD laws and procedures." As a result, there is *no* evidence presented relating to the "Circumstances of Conclusion of the NAFTA"

⁵⁷ In doing so, however, no obligation would arise for the United States to change or modify its antidumping or countervailing laws.

⁵⁸ *Bluefin Tuna*, *supra* note 45; *Argentina Poultry*, *supra* note 46, *SGS v. Pakistan*, *supra* note 41 at para. 154.

that the Parties agreed that the only remedy contemplated by NAFTA in relation to conduct that had any connection to antidumping or countervailing duty matters was the Chapter 19 binational panel process.

121. It is important to note that the United States *Statement of Administrative Action*, a contemporaneous statement of the United States' understanding of the meaning of the NAFTA, says nothing to support the Respondent's current interpretation of Article 1901(3). It only states that "Articles 1901 and 1902 make clear that each country retains its domestic antidumping and countervailing duty laws and can amend them." By contrast, it contains an expansive view of the scope of application for Chapter 11, stating: "The chapter applies to *all* government measures relating to investments, with the exception of measures governing financial services, which are treated in Chapter Fourteen" [emphasis added]. No mention is made about the application of antidumping or countervailing duty law also being preemptively excluded from coverage under Chapter 11.

122. Surely if the parties had intended such a result it would have been the subject matter of a clear statement to that effect somewhere in the *Statement of Administrative Action*⁶⁰ or elsewhere within the United States' government records. There is no such statement, and no evidence has been introduced by the United States, because that is not what the Parties intended or agreed.

123. To put the United States' argument at pages 30 to 32 of its Objection into perspective, the effect of its assertions is that the NAFTA Parties agreed that conduct

⁵⁹ *Objection*, p. 30.

(which is discretionary and not required by or attributable to the law itself) that was in any way connected to “antidumping and countervailing duty matters” could be considered a “safe harbour” for their officials to accord arbitrary and discriminatory treatment to investors whose businesses models included trade in goods within the North American Free Trade Zone, under the guise of the Article 1902 right to maintain its antidumping and countervailing law. In light of the objectives laid out in NAFTA Articles 102, 1115 and 1902, such a proposition is entirely unpersuasive. It is simply not plausible that the NAFTA Parties could have intended to leave a gaping hole in the protection afforded by NAFTA Chapter 11 such that conduct connected in any way to municipal antidumping and countervailing duty law would become the tool of choice for mistreatment of investors and their investments.⁶¹

(e) Conclusion

124. Accordingly, for all of the above-noted reasons, the Respondent’s position that Article 1901(3) precludes a Chapter 11 claim in relation to conduct which is connected in

⁶⁰ *North American Free Trade Agreement, Implementation Act, Statement of Administrative Action*, H.R. Doc. No. 103-159, Vol. I 103d Cong. 1st Session.

⁶¹ One further point is raised by the Respondent. The Respondent claims (at page 8 of its submissions) that because legislative amendments for the protection of business confidential information were only mandated by the NAFTA text for Chapter 19 dispute settlement, Chapter 11 tribunals were apparently never expected to entertain claims having any connection to trade remedy measures. Whether such amendments were required for the implementation of Chapter 19 dispute settlement is completely irrelevant for the implementation of Chapter 11 dispute settlement. The United States cannot rely on its municipal laws on confidentiality to justify abusive treatment of foreign investors.

Chapter 19 dispute settlement involves the substitution of international tribunals for domestic courts sitting in judicial review of the application of antidumping and countervailing duty law. By its very nature, an international tribunal sitting in the place of a domestic court, but applying its local standard and rules, is bound to require more specific implementing legislation concerning procedural issues such as confidentiality. That the United States municipal law may limit access to certain evidence that might be relevant does not thereby withdraw that subject matter from NAFTA scrutiny. Rather, it raises a question which simply goes to whether the Tribunal is satisfied, on the evidence available to it, that the breach alleged has been proved.

In any event, whether it is necessary to examine allegedly confidential information to determine whether the Investor has been treated in an arbitrary, discriminatory or capricious way is a matter that can only be addressed at the hearing on the merits.

some way to the United States' antidumping and countervailing law is without merit. A Chapter 11 right to seek damages for arbitrary, discriminatory or abusive conduct is in complete symmetry with the objectives laid out in NAFTA Articles 102(1) and 1902(2)(d)(ii). Furthermore, there is no inconsistency or conflict between the dispute resolution proceedings contemplated under Chapters 11, 19 and 20. More specifically, there is no inconsistency or conflict in allowing a Chapter 11 investor–state arbitration to obtain damages for conduct not aimed at the legitimate regulation of fair trade, a Chapter 20 proceeding based on the same complaint, a Chapter 19 judicial review to obtain relief for violations of domestic law, a Chapter 19 review of any amendments to a Party's countervailing duty or antidumping law, and WTO proceedings to challenge the consistency of United States measures with its WTO obligations.⁶²

E. The Proper Interpretation Of Article 1901(3)

(i) Article 1901(3) Ensures No Other Provision Of NAFTA Will Result In A Requirement To Change Or Modify Municipal Law

125. Chapter 19 represented a crucial compromise between the NAFTA Parties concerning the right to maintain and apply municipal trade remedy laws against goods having an origin in each other's territory. Canada and Mexico hoped, through negotiations, to prohibit the use of such domestic trade remedy laws, or at least to constrain them as much as possible. Had they succeeded in achieving that goal, then Chapter 19 would have been different, perhaps instead containing a list of prohibitory provisions that would have been subject to dispute resolution proceedings under NAFTA

⁶² In contrast to the limited remedies available to an investor under Chapter 11, findings of non-compliance by a NAFTA Chapter 20 panel generate an obligation on the part of the respondent Party to *do something* to bring itself into compliance. This is why NAFTA Article 1115 states that the remedies made available to investors under Section B of the Chapter are without prejudice to the rights and obligations of *the Parties* under Chapter 20.

Chapter 20. The result of the negotiation was instead (1) the creation of a formalized, specialized, international judicial review mechanism, which would exclusively apply municipal antidumping and countervailing duty laws and standards which the Parties had agreed would continue to apply; and (2) a commitment that municipal antidumping and countervailing duty laws would only be changed or modified in a manner consistent with the provisions of Chapter 19.

126. It was as a result of the Parties agreeing to reserve the right to apply, change, and to resolve disputes in relation to municipal antidumping and countervailing duty law under the specific processes established pursuant to Chapter 19 that Article 1901(3) became necessary. As the Parties had agreed upon a specific mechanism in Chapter 19 to address changes to a Party's municipal antidumping or countervailing duty law, it was necessary to ensure that no other provision of the NAFTA, including the process contemplated in Chapter 20, would apply so as to impose such an obligation with respect to that municipal law.

127. Accordingly, Article 1901(3) is simply an interpretative provision that gives guidance to tribunals that no provision of any other chapter gives rise to an obligation to amend such laws.

128. This interpretation of Article 1901(3) is supported by looking at the specific wording used in Article 1901(3) and by analyzing the way in which the Parties dealt with the scope and application of the many provisions of NAFTA.

(ii) Wording In Article 1901(3) Supports Investor's Interpretation

129. Considering the object and purpose of NAFTA and the context in which Article 1901(3) is situated, an interpretation of Article 1901(3) that extends its application beyond the "antidumping law and countervailing duty law" itself would require that such an intent be plainly obvious in the ordinary meaning of the provision's terms. The ordinary meaning of the words actually used in Article 1901(3) not only fails to demonstrate such an intention, the wording portrays a clear manifestation of an intent to restrict its application to those measures and only those measures identified in Article 1902(1) as antidumping and countervailing duty laws.

130. The relationship between the exclusion in Article 1901(3) ("no provision of any other Chapter of [the NAFTA] shall be construed as imposing obligations on a Party") and the measures to which it applies ("the Party's antidumping laws and countervailing duty laws" as they are defined in Article 1902(1)) is governed by the phrasal preposition "with respect to." Other international tribunals have considered the meaning and effect of that and similar phrases. These tribunals have found that the words "with respect to" limit the objects to which the subject of the sentence applies, so that only those things identified in the provision are covered by it.

131. Arbitrator Highet, in the first *Waste Management* Tribunal, analyzed the meaning of 'with respect to' in Article 1121 as follows (dissenting, but with majority agreement on this point):

[t]he natural and ordinary meaning of the phrase 'with respect to' is specific, narrow and precise. It means that the proceeding in question must be a proceeding 'with respect to' a given measure of the disputing Party; as a legal matter, this means that the proceeding must primarily concern, or be addressed to, that measure. ...

This precise and ordinary meaning – that a proceeding be brought that directly concerns or attacks a specific measure – is quite different from the natural and ordinary meaning of a different phrase, such as 'relating to' or 'concerning'. Many proceedings may 'relate to' or 'concern' a measure without being proceedings 'with respect to' that measure. [Emphasis added]⁶³

132. The strict definition of 'with respect to' given in *Waste Management* can be contrasted with the definition given to the phrase "arising out of" by the International Court of Justice in the *Fisheries Jurisdiction Case*:

The Court will begin by pointing out that, in excluding from its jurisdiction "*disputes arising out of or concerning*" the conservation and management measures in question and their enforcement, the reservation does not reduce the criterion for exclusion to the "subject matter" of the dispute. The language used in the English version – "*disputes arising out of or concerning*" – brings out more clearly the broad and comprehensive character of the formula employed. The words of reservation exclude not only disputes whose immediate "subject matter" is the measures in question and their enforcement, but also those "*concerning*" such measures and, more generally, those having their "origin" in those measures ("*arising out of*") – that is to say, those disputes which, in the absence of such measures, would not have come into being. Thus the scope of the Canadian reservation appears even broader than that of the reservation which Greece attached to its accession to the General Act of 1928 ("disputes relating to the territorial status of Greece", which the Court was called upon to interpret in the case concerning the *Aegean Sea Continental Shelf (I.C.J. Reports 1978)*, p. 34 and p. 36).⁶⁴

133. The contrast between the definitions in *Fisheries Jurisdiction* and *Waste Management* shows that the meaning attributed to Article 1901(3) by the United States, i.e., that any conduct which is connected in any way to its antidumping and countervailing laws is not subject to Chapter 11 scrutiny, cannot prevail.

134. In this case, conduct of the United States which violates the obligations accorded investors under Chapter 11 at most "arises out of," in some way, the application of its "antidumping law and countervailing duty law." As the case law makes clear, this is not an

⁶³ *Waste Management*, *supra* note 6, paras. 25-26 of Arbitrator Highet's Dissent.

obligation on the United States "*with respect to*" such laws. This proposition is fully supported by the actual definition of antidumping and countervailing laws in 1902(1), which provides that a Party's domestic "antidumping and countervailing duty law" includes, "as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents." In other words, it describes the Party's antidumping and countervailing duty law that is to be *applied* by an agency disposing of a matter. However, that definition does not stipulate the agency's conduct in the course of applying the law in an individual case. The question of whether conduct, which *may include* the way in which the United States' agencies act in connection with its laws, violates the international law obligations undertaken by the party remains a separate issue.

(iii) When NAFTA Parties Intended To Limit The Scope And Application Of Certain Provisions Of NAFTA – The NAFTA Text Says So Clearly

135. The general jurisdictional provisions of Chapter 11, namely Articles 1101, 1116 and 1117⁶⁵ contain no mention of Chapter 19 or of antidumping or countervailing duty matters whatsoever. The broad definitions of "investor," "investment" and "measure" (found in Articles 201 and 1139) likewise contain no such limitations.

⁶⁴ *Fisheries Jurisdiction Case (Spain v. Canada)*, 1998 ICJ 96 at para 62.

⁶⁵ *Methanex*, *supra* note 3 at paras 120-121.

136. Had the Parties intended to exclude access to Chapter 11 dispute resolution in relation to the obligations set out under Section A of Chapter 11 merely because they had some connection to an antidumping or countervailing duty matter, they would have done so explicitly, using precise language appropriate to that task, as they did in other circumstances.

137. The NAFTA text as a whole demonstrates this point. For instance, where the Parties intended to indicate the scope of the obligations contained within a Chapter, the language used was clear. So, Article 1101 explicitly sets out what is and what is not covered.⁶⁶ To indicate what is covered, Article 1101(1) provides:

1. This Chapter applies to measures adopted or maintained by a Party relating to:
 - (a) investors of a Party;
 - (b) investments of investors of another Party in the territory of the Party; and
 - (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

As noted earlier, to indicate what is beyond its scope, Article 1101(3) provides:

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent they are covered by Chapter Fourteen (Financial Services).

138. In addition, Article 1108 provides a lengthy set of reservations and exceptions from the coverage of all or a portion of the obligations set out in Section A of that chapter.

⁶⁶ Similar provisions are found in many other chapters: see, for instance Articles 301, 701, 901, 1001, 1201, 1301 and 1401.

139. Where the Parties wanted to make clear certain measures were not affected by the treaty, a very clear and specific formulation was used. Thus, to make clear that taxation measure are beyond its scope, Article 2103 provides in part:

1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.
2. Nothing in this Agreement shall affect the rights and obligations of any Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency.

Article 2103(4) then sets out an even more specific set of instructions as to when a Chapter 11 Tribunal may consider whether breaches of Section A obligations, which have generally been excluded by Article 2103(1), have occurred.

140. Finally, to highlight the point that the Parties used explicit and precise language to exclude the application of certain NAFTA dispute resolution mechanisms, (and so there is no doubt over the proposition that the Parties knew how to exclude the application of Chapter 11 if that was their intent), three examples prove the point.

141. First, to make explicit that an investor could not have resort to investor-state dispute resolution under Chapter 11 for competition matters arising under Article 1501, the Parties agreed:

Note 43: Article 1501 (Competition Law): no investor may have recourse to investor-state arbitration under the Investment Chapter for any matter arising under this Article.

142. To make clear that national security matters were excluded from the application of Chapter 11, Article 1138 explicitly provides that the dispute settlement mechanisms in Chapter 11 (and Chapter 20) do not apply to national security matters.

1. Without prejudice to the applicability or non-applicability of the dispute settlement provisions of this Section or of Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures) to other actions taken by a Party pursuant to Article 2102 (National Security), a decision by a Party to prohibit or restrict the acquisition of an investment in its territory by an investor of another Party or its investment, pursuant to that Article shall not be subject to such provisions.
2. The dispute settlement provisions of this Section and of Chapter 20 shall not apply to the matters referred to in Annex 1138.2.

143. Finally, regard can be had for the language of Article 1501(3):

1501(3) No Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article.

144. There is no clear or explicit language anywhere in the NAFTA that conduct having a connection to antidumping or countervailing matters cannot give rise to a Chapter 11 claim. The language the United States relies on as having that effect, far from doing so clearly (as the provisions quoted above demonstrate that Parties easily could have done) uses a very different formulation of words. Instead of saying "nothing in this agreement shall apply to antidumping or countervailing duty measures," the language used is "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*." [Emphasis added]

145. As noted above, Canfor does not seek to impose any obligation with respect to United States' municipal antidumping or countervailing duty law. It complains instead

about conduct of the United States that results in arbitrary, discriminatory and abusive treatment of Canfor.⁶⁷

146. In this case, Article 1901(3) neither explicitly permits, nor explicitly denies, the opportunity to pursue dispute resolution under both Chapter 11 and 19. Accordingly, in the absence of express wording that would preclude recourse by an investor to the dispute resolution mechanism of Chapter 11, there is no reason to deny Canfor the right to seek damages from this Tribunal for the abusive conduct it suffered at the hands of the Respondent.

(iv) Conclusion

147. Accordingly, NAFTA Article 1901(3) is not designed to prevent the application of Section B of Chapter 11 and the concordant obligation to pay damages to an investor when a Party has been found to have acted in breach of the provisions contained in Section A. Rather, Article 1901(3) is designed to prevent the United States from being obliged to change the municipal antidumping and countervailing duty laws that it effectively reserved through Article 1901(3).

148. Nowhere does the Respondent identify any "obligation" that the provisions of NAFTA Chapter 11 or the Investor's Chapter 11 claim "imposes" upon it "with respect to" its municipal "antidumping and countervailing duty laws." It does not do so because in this proceeding Canfor does not seek to invoke United States' municipal law, it does not

⁶⁷ While the Investor's claim does include a challenge to conduct in relation to the *Byrd Amendment*, the Investor submits that in any event the United States cannot rely on the cover of 1901(3) to avoid state responsibility for change to its laws that is in violation of the provisions of Chapter 19 themselves. The *Byrd Amendment*, as it is illegal under WTO rules, clearly falls outside any "safe harbour" for antidumping and countervailing laws themselves that Chapter 19 may purport to create, however large or small that harbour may be claimed to be.

seek to impose an obligation on United States' municipal antidumping or countervailing duty law and it does not seek to compel the United States to change its antidumping or countervailing duty laws, in any way. Canfor only seeks to demonstrate that the United States' conduct at issue in this proceeding violates the protections accorded investors and their investments under Chapter 11 and to have this Tribunal require the United States to pay compensation for the discriminatory, unfair and inequitable treatment it and its investments have received at the hands of United States' officials.

F. The Tribunal Has Jurisdiction To Hear Canfor's Claim

149. Based upon the forgoing, the Investor submits that this Tribunal is vested with jurisdiction to hear this claim under NAFTA Article 1116. For the purposes of determining this preliminary question, it must be assumed that the United States has imposed measures that fall outside the scope of those permitted under the right to maintain antidumping and countervailing duty measures under Articles 1901 to 1903. It must further be assumed, for the sake of this preliminary motion, that United States' officials have conducted themselves in an abusive and discriminatory manner which violates Articles 1102, 1105 and 1110 of the NAFTA.

150. Assuming that such substandard treatment has been accorded to Canfor, it is simply not rational to accept the Respondent's contention that the drafters of the NAFTA intended to deny investors, such as Canfor, any right to seek damages under Chapter 11 because they established a binational panel process to review the application of municipal laws under the standards established by those municipal laws. Such a contention flies in the face of the objectives of the NAFTA, which are supposed to provide private economic operators with increased security and certainty for their business activities in

the Free Trade Zone, and access to dispute settlement when officials violate these promises.

151. Because the plain language of the NAFTA text, including Article 1901(3), does not support the Respondent's attempt to escape all liability for conduct that would constitute an abuse of right in international law, its jurisdictional objection should be dismissed in its entirety.

V. Relief Requested

152. The Investor requests that the objection to jurisdiction raised by the United States in its Objection of October 16, 2003 be dismissed in its entirety, and that the Tribunal order the United States to pay all of the Investor's costs incurred in respect of answering this preliminary question.

153. Alternatively, the Investor requests the Tribunal refuse to answer the United States' Objection on a preliminary basis and instead, order the parties to proceed to the merits phase of this arbitration. The Investor also seeks its costs in defending the United States' motion, if this alternative request is granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

P. John Landry

Keith E.W. Mitchell

May 14, 2004