

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

CANFOR CORPORATION,

Claimant/Investor,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**OBJECTION TO JURISDICTION OF
RESPONDENT UNITED STATES OF AMERICA**

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Pursuant to Article 21 of the UNCITRAL Arbitration Rules, respondent United States of America respectfully objects to the jurisdiction of the Tribunal on the ground that, as recognized in Article 1901(3) of the North American Free Trade Agreement (the “NAFTA”), the United States has no obligation under the NAFTA’s investment chapter to arbitrate Canfor’s claim.

PRELIMINARY STATEMENT

NAFTA Article 1901(3) provides in pertinent part as follows:

[N]o provision of any other Chapter of [the NAFTA] shall be construed as imposing obligations on a Party with respect to the Party’s antidumping law or countervailing duty law.

Article 1901 is found in Chapter Nineteen of the NAFTA, which is entitled “Review and Dispute Settlement in Antidumping and Countervailing Duty Matters.”

Canfor’s claims are based on obligations set forth in a different chapter of the NAFTA – Chapter Eleven, which is entitled “Investment.” Canfor asserts that certain actions, taken under authority of the United States’ antidumping and countervailing duty laws, violate specific obligations of the United States set forth in Section A of Chapter Eleven. Canfor further asserts that the United States has agreed, through obligations set forth in Section B of Chapter Eleven, to arbitrate Canfor’s claims.

Canfor’s contentions, however, cannot be squared with the plain terms of the NAFTA. As Article 1901(3) makes clear, the United States has not agreed to investor-State arbitration of disputes with respect to its antidumping or countervailing duty laws. It has no obligation under the NAFTA to submit such disputes to arbitration under the mechanism established in Chapter Eleven. The arbitration agreement that Canfor invokes therefore does not exist. And, as a consequence, this Tribunal lacks jurisdiction over Canfor’s claims.

Below, we first examine the facts relevant to the Tribunal’s jurisdiction and we review the principles of treaty interpretation that govern the NAFTA. We then demonstrate that the text, context, object and purpose and circumstances of conclusion of the NAFTA establish that the NAFTA Parties intended disputes concerning their antidumping and countervailing duty laws to be governed exclusively by the special dispute resolution mechanism set forth in Chapter Nineteen of the treaty – a mechanism that Canfor itself invoked (unsuccessfully) with respect to the very measures at issue in this arbitration. Because the NAFTA clearly provides for the decisions of Chapter

Nineteen panels to be final and exclusive with respect to antidumping and countervailing duty matters such as these, Canfor's claims must be dismissed in their entirety and with prejudice.

FACTS

United States Antidumping And Countervailing Duty Laws

The U.S. antidumping and countervailing duty laws are principally set forth in Title VII of the Tariff Act of 1930, as amended, 19 U.S.C. §§ 1671-1671h, 1673-1673h (the "Tariff Act"), the regulations of the Import Administration of the U.S. Department of Commerce, 19 C.F.R. § 351, and the regulations of the International Trade Commission (the "ITC"), 19 C.F.R. §§ 201, 207. Under the Tariff Act, the U.S. Department of Commerce ("Commerce") may initiate an antidumping or countervailing duty investigation if evidence suggests that dumped or subsidized imports are causing or are likely to cause material injury to a domestic industry.¹ Commerce investigates foreign producers and governments to determine the existence and extent of any dumping or unfair subsidization. The ITC conducts a parallel investigation to determine whether the domestic industry has been materially injured (or threatened with material injury) by reason of imports found by Commerce to be dumped or subsidized.²

In an antidumping investigation, Commerce determines whether imported goods are being dumped in the U.S. market. Commerce issues questionnaires to foreign producers and affiliated importers on sales made during the relevant period of

¹ See 19 U.S.C. §§ 1671a, 1673a.

² See *id.* §§ 1671b(a), 1673b(a); 19 C.F.R. § 207.

investigation. Commerce then assesses the accuracy of the responses through information gathered at the foreign producers' facilities and from U.S. importers.

Commerce uses the data it collects to calculate the "normal value," which is the price at which the subject merchandise is sold in its home market, or in some cases its cost of production and profit.³ In simple terms, the difference between U.S. price and normal value is the dumping margin, which is calculated and applied on a company-by-company basis.⁴ Commerce calculates a weighted average "all others rate" to determine the dumping margin for companies that did not participate in the investigation.⁵

In a countervailing duty investigation, Commerce determines whether a government is providing a subsidy with respect to the manufacture, export or production of the subject merchandise. A subsidy is defined under U.S. countervailing duty law as a financial contribution provided by a foreign government that confers a benefit to its recipients.⁶ To be countervailable, the subsidy must also be specific to an enterprise or industry.⁷

If Commerce determines that a countervailable subsidy is being provided, it calculates a subsidy rate for each producer benefiting from the subsidy. Where it is not practicable to determine individual rates because of the large number of exporters or

³ See 19 C.F.R. §§ 351.411.

⁴ See 19 U.S.C. § 1677(35)(A).

⁵ See *id.* § 1677(35)(B).

⁶ See *id.* §§ 1677(5)(D), (E).

⁷ See *id.* § 1677(5A)(D).

producers involved in an investigation, Commerce may determine a single country-wide subsidy rate to be applied to all exporters and producers.⁸

The ITC, by contrast, gathers evidence regarding the domestic industry. The ITC issues questionnaires to domestic producers, among others, and receives submissions by interested parties. The ITC uses the record evidence to determine whether the domestic industry is materially injured or threatened with material injury or the establishment of a domestic industry is materially retarded by reason of dumped or subsidized imports.

In virtually every antidumping and countervailing duty investigation, Commerce and the ITC rely on business proprietary information submitted by the interested parties to make their respective determinations. This information usually consists of commercially sensitive company-specific data, including data on prices for individual sales, profitability and production costs, gathered through the questionnaires. By statute, such information may be disclosed only to the Commerce or ITC employees directly involved in the investigation.⁹ To provide all parties involved in the investigation a fair opportunity to participate in the proceedings, Commerce and the ITC may issue administrative protective orders granting *counsel* for interested parties to a proceeding – but not the interested parties themselves – the right to review such information.¹⁰ Such information may not be shared with employees of another U.S. government agency or even with Commerce or ITC employees not directly involved in the investigation.¹¹

⁸ See *id.* § 1677f-1(e)(2).

⁹ See *id.* § 1677f(b)(1). The information may also be disclosed to U.S. Customs officials investigating fraud. See *id.* § 1677f(b)(1)(A)(ii).

¹⁰ See *id.* § 1677f(c); 19 C.F.R. § 207.7(b).

¹¹ See 19 U.S.C. § 1677f(b); 19 C.F.R. § 354.5(d)(1).

If a completed investigation results in final affirmative determinations by both Commerce and the ITC, Commerce issues an antidumping or countervailing duty order concerning the goods and producers in question. Judicial review of such orders is available in the U.S. Court of International Trade. That court's decisions may be appealed to the U.S. Court of Appeals for the Federal Circuit.

The NAFTA Chapter Nineteen Panel Mechanism

NAFTA Chapter Nineteen, entitled "Review and Dispute Settlement in Antidumping and Countervailing Duty Matters," establishes a unique, self-contained dispute resolution mechanism for claims based on a Party's antidumping and countervailing duty law. The binational review panels established under Chapter Nineteen have jurisdiction over claims concerning final antidumping and countervailing duty determinations of a Party.¹²

Prior to the entry into force of the U.S.-Canada Free Trade Agreement (the "CFTA"), the predecessor agreement to the NAFTA, the U.S. Court of International Trade had exclusive jurisdiction over challenges to U.S. antidumping or countervailing duty determinations.¹³ The NAFTA, like the CFTA, required the United States to amend the Tariff Act to transfer exclusive jurisdiction over final antidumping and countervailing duty claims to the binational panels when a panel is requested.¹⁴

¹² See NAFTA art. 1904.

¹³ 19 U.S.C. § 1516a; see also 28 U.S.C. § 1581(c) ("The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act.").

¹⁴ See NAFTA ann. 1904.15 ("The United States shall amend section 516A(g) of the *Tariff Act of 1930*, as amended, to provide, in accordance with the terms of this Chapter, for binational panel review of antidumping and countervailing duty cases involving Mexican or Canadian merchandise. Such amendment shall provide that if binational panel review is requested such review will be exclusive.").

When reviewing U.S. antidumping and countervailing duty measures, NAFTA Chapter Nineteen panels essentially sit in place of the U.S. Court of International Trade: like that court, the panels must apply U.S. antidumping and countervailing duty laws, including relevant legislative history, regulations, administrative practice and judicial precedents.¹⁵ Chapter Nineteen panels must also apply the same standard of review and the same “general legal principles,” including “standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies,” as would the U.S. Court of International Trade.¹⁶

Under the standard of review provided by U.S. antidumping and countervailing duty laws, Chapter Nineteen panels must “hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law.”¹⁷ Under this standard of review, the panel must defer to the reasonable statutory interpretations of the investigating authority and may not substitute its own judgment for that of the agency or engage in *de novo* review, even if the panel would have reached a different conclusion on the merits.¹⁸ This deference extends in particular to the factual findings of, and the methodologies applied by, Commerce and the ITC.¹⁹

¹⁵ See *id.* art. 1904(2).

¹⁶ *Id.* arts. 1904(3), 1911.

¹⁷ 19 U.S.C. § 1516(b)(1)(B).

¹⁸ See *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992) (it is not the duty of the panels to weigh the wisdom of Commerce’s legitimate policy choices); *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996) (the question for the court “is not whether we agree with the Commission’s decision, nor whether we would have reached the same result. . . . Ours is only to review those decisions for reasonableness.”).

¹⁹ See *Brother Indus., Ltd. v. United States*, 771 F. Supp. 374, 381 (Ct. Int’l Trade 1991) (agency’s chosen methodology for determining subsidization, dumping or injury and for calculating duty rates “is the means

A Chapter Nineteen binational panel consists of five members. Each of the involved Parties appoints two panelists.²⁰ If unable to agree on the fifth panelist, the involved Parties draw lots and the winning Party selects the panelist from a roster established by the NAFTA Parties.²¹ Reflecting the quasi-judicial function of the panel proceedings, the rosters are to include judges or former judges to the greatest extent practicable, a majority of the members on any panel must be lawyers and all panelists must be familiar with international trade law.²²

The NAFTA expressly required each of the Parties to amend its laws to permit access to business proprietary information to Chapter Nineteen panels and participants in proceedings before such panels, subject to appropriate confidentiality undertakings or orders.²³ It also required that each Party amend its laws to provide for enforcement in its

by which an agency carries out its statutory mandate and, as such, is generally regarded as within its discretion.”); *Thai Pineapple Public Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999) (Commerce “is the ‘master of antidumping law,’ and reviewing courts must accord deference to the agency in its selection and development of proper methodologies.”).

²⁰ See NAFTA ann. 1901.2(2).

²¹ See *id.* ann. 1901.2(3).

²² See *id.* ann. 1901.2(1).

²³ See *id.* ann. 1904.15, sch. of Canada, ¶ 10 (“Canada shall amend Part II of the *Special Import Measures Act*, as amended, to provide for a code of conduct, immunity for anything done or omitted to be done during the course of panel proceedings, the signing of and compliance with disclosure undertakings respecting confidential information, and remuneration for members of panels and committees established pursuant to this Chapter.”); *id.* sch. of Mexico, ¶ i (“[Mexico shall amend its laws to provide for] timely access by eligible counsel of interested parties during the course of the proceeding (including disclosure meetings) and on appeal, either before a national tribunal or a panel, to all information contained in the administrative record of the proceeding, including confidential information, excepting proprietary information of such a high degree of sensitivity that its release would lead to substantial and irreversible harm to the owner as well as government classified information, subject to an undertaking for confidentiality that strictly forbids use of the information for personal benefit and its disclosure to persons who are not authorized to receive such information; and for sanctions that are specific to violations of undertakings in proceedings before national tribunals or panels”); sch. of U.S., ¶ 12 (“The United States shall amend section 777 of the *Tariff Act of 1930*, as amended, to provide for the disclosure to authorized persons under protective order of proprietary information in the administrative record, if binational panel review of a final determination regarding Mexican or Canadian merchandise is requested.”); *id.* ¶ 13 (amendment required to provide for sanctions for violations of protective order or undertakings in Chapter Nineteen proceedings).

territory of sanctions imposed for violations of such undertakings imposed pursuant to the laws of another Party.²⁴

Chapter Nineteen panels may only “uphold a final determination, or remand it for action not inconsistent with the panel’s decision.”²⁵ The chapter does not provide for any award of money damages by the panels.²⁶ Despite the complexity and scope of antidumping and countervailing duty cases, the NAFTA subjects panel review procedures to tight time constraints, with the objective of achieving a final decision within 315 days of the initial request for panel review.²⁷ Finally, Article 1904 establishes an “extraordinary challenge” procedure whereby a Party may request review of certain alleged panel errors.²⁸

Canfor’s Allegations

In its Notice of Arbitration and Statement of Claim (the “Statement of Claim” or “Statement”), Canfor sets forth allegations of fact with respect to prior antidumping and countervailing duty investigations of softwood lumber as well as the investigations that

²⁴ *See id.* art. 1904(15) (“each Party shall . . . (b) amend its statutes or regulations to ensure that its courts shall give full force and effect, with respect to any person within its jurisdiction, to all sanctions imposed pursuant to the laws of the other Parties to enforce provisions of any protective order or undertaking that such other Party has promulgated or accepted in order to permit access for purposes of panel review or of the extraordinary challenge procedure to confidential, personal, business proprietary or other privileged information; . . .”).

²⁵ *Id.* art. 1904(8).

²⁶ *See id.*

²⁷ *See id.* art. 1904(14).

²⁸ *See id.* art. 1904(13) (Party may avail itself of the extraordinary challenge procedure where “a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct . . . the panel seriously departed from a fundamental rule of procedure, or . . . the panel manifestly exceeded its powers, authority or jurisdiction set out in this Article, for example by failing to apply the appropriate standard of review, and . . . any of the actions set out [above] has materially affected the panel’s decision and threatens the integrity of the binational panel review process.”).

resulted in the measures on which Canfor bases its claims. We briefly review below each of these sets of allegations before turning to Canfor's claims.

Prior Softwood Lumber Investigations

In 1982, Commerce commenced its first countervailing duty investigation concerning Canadian softwood lumber in response to a petition filed by the Coalition for Fair Lumber Imports (the "Coalition"), an alliance of U.S. sawmills, lumber workers and woodland owners. Canfor refers to this investigation in its Statement of Claim as "Lumber I."²⁹ The investigation primarily concerned "stumpage" programs administered by Canadian provincial governments pursuant to which softwood lumber producers harvest timber from government-owned lands for a fee. In May 1983, Commerce issued a final negative determination concluding, among other things, that, under the version of the Tariff Act in force at the time, stumpage rights were not provided to a specific enterprise or industry within the meaning of the countervailing duty statute and the stumpage was not provided at preferential rates.³⁰

Commerce subsequently commenced two additional countervailing duty investigations. "Lumber II" was terminated under a memorandum of understanding between the United States and Canada.³¹ "Lumber III" was commenced in 1991 and resulted in a final affirmative countervailing duty determination.³² Following a challenge in a CFTA Chapter Nineteen panel proceeding, Commerce revoked the determination.³³

²⁹ See Statement ¶¶ 21.

³⁰ See *id.* ¶¶ 23-24.

³¹ See *id.* ¶ 32.

³² See *id.* ¶ 42.

³³ See *id.* ¶¶ 46-59.

In April 1996, the United States and Canada entered into the Softwood Lumber Agreement, which limited the volume of softwood lumber that could enter the United States duty-free and provided for a five-year moratorium on all trade actions.

The Investigations At Issue In This Arbitration

On April 2, 2001, following the expiration of the Softwood Lumber Agreement, the Coalition and other private parties filed a petition with Commerce and the ITC alleging that the United States softwood lumber industry was materially injured by reason of allegedly dumped and subsidized softwood lumber imports from Canada.³⁴ The petitioners requested the initiation of antidumping and countervailing duty investigations to determine whether Canadian softwood lumber producers were receiving countervailable subsidies and were dumping softwood lumber imports in the U.S. market, within the meaning of U.S. countervailing duty and antidumping laws.³⁵

On April 23, 2001, Commerce initiated antidumping and countervailing duty investigations (collectively, “Lumber IV”). On May 23, 2001, the ITC published its preliminary determination in which it concluded that there was a reasonable indication that the U.S. softwood lumber industry was being threatened with material injury from Canadian softwood lumber imports that allegedly were being subsidized by the Canadian government and sold in the United States for less than fair value.³⁶

Between May and December 2001, Commerce issued countervailing duty questionnaires to the Government of Canada and the Canadian provincial governments and received responses. On August 9, 2001, Commerce preliminarily determined that

³⁴ *See id.* ¶ 66.

³⁵ *See id.*

Canadian stumpage programs conferred countervailable subsidies on Canadian softwood lumber producers and that “critical circumstances” existed for U.S. softwood lumber producers as a result of those subsidies.³⁷ On November 6, 2001, Commerce preliminarily determined that Canadian softwood lumber producers were dumping softwood lumber in the U.S. market.³⁸ Commerce calculated specific dumping margins for the six mandatory respondents and a common dumping margin for all other Canadian softwood lumber producers.³⁹

On March 21, 2002, Commerce issued final affirmative determinations in both the antidumping and countervailing duty investigations.⁴⁰ Commerce calculated an antidumping margin of 5.96% for Canfor.⁴¹ In the final countervailing duty determination, Commerce concluded that the provincial stumpage programs constituted a financial contribution that conferred a benefit on a specific Canadian industry or specific Canadian enterprises.⁴² Commerce calculated a single countrywide rate to be applied to exporters and producers subject to the investigation. Commerce subsequently made a final negative critical circumstances determination. On May 16, 2002, the ITC issued its final determination in which it found that the United States softwood lumber industry was

³⁶ *See id.* ¶ 67.

³⁷ *See id.* ¶ 68.

³⁸ *See id.* ¶ 69.

³⁹ *See id.*

⁴⁰ *See id.* ¶ 71.

⁴¹ *See id.* ¶ 72.

⁴² *See id.* ¶¶ 74-84, 93.

threatened with material injury by reason of dumped and subsidized Canadian softwood lumber imports.⁴³

Canfor's Claims Before This Tribunal

On July 9, 2002, Canfor delivered its Statement of Claim against the United States. The Statement of Claim alleges that Commerce's preliminary and final antidumping and countervailing duty determinations and critical circumstances determination and the ITC's injury determinations violated certain obligations of the United States set forth in Section A of Chapter Eleven of the NAFTA. Specifically, Canfor alleges violations of Article 1102 (national treatment), Article 1103 (most-favored-nation treatment), Article 1105(1) (minimum standard of treatment) and Article 1110 (expropriation).⁴⁴

With respect to Commerce's preliminary and final antidumping determinations – which are the primary focus of Canfor's allegations – Canfor alleges, among other things, that Commerce misinterpreted and misapplied U.S. antidumping laws by (i) excluding negative dumping margins from its margin calculation (referred to as “zeroing”),⁴⁵ (ii) allocating production costs for Canadian producers based on different grades of lumber

⁴³ See *id.* ¶ 73.

⁴⁴ See *id.* ¶ 19. Canfor had, pursuant to NAFTA Article 1119, served a notice of intent to submit a claim to arbitration on November 5, 2001. That notice was followed in mid-2002 by two similar notices of intent by three other Canadian softwood lumber companies, Tembec Inc., Tembec Industries Inc., and Doman Industries Ltd. On or about June 12, 2003, a fourth Canadian softwood lumber company, Terminal Forest Products Ltd., delivered a notice of intent to the United States, again making similar allegations. To date, none of the Tembec companies, Doman or Terminal Forest Products has submitted a claim to arbitration. Should any of those companies do so, the United States reserves the right to seek consolidation of such claims with those of Canfor, pursuant to Article 1126 of the NAFTA or by agreement of the disputing parties.

⁴⁵ See *id.* ¶¶ 122, 129.

but not different sizes of lumber;⁴⁶ and (iii) using an unfair comparison between softwood lumber prices in Canada and similar products in the United States.⁴⁷

With respect to Commerce's preliminary and final countervailing duty determinations, the Statement alleges, among other things, that Commerce misinterpreted and misapplied U.S. law by (i) failing to provide reasonable support for its conclusion that Canadian provincial stumpage programs constitute a financial contribution;⁴⁸ (ii) determining that stumpage was provided to a specific Canadian industry;⁴⁹ (iii) denying Canfor a company-specific subsidy rate;⁵⁰ and (iv) using a cross-border comparison instead of in-country benchmarks to determine whether stumpage conferred a benefit.⁵¹

Canfor's Claims Before The Chapter Nineteen Panels

On April 2, 2002, the Canadian government and other parties filed requests for panel proceedings under Chapter Nineteen of the NAFTA to review the same Commerce final antidumping and countervailing duty measures on which Canfor's claims in this arbitration are based. Canfor became a party to the Chapter Nineteen panel proceedings on April 8, 2002. Canfor joined the claimants' joint brief in the Commerce antidumping case and filed a separate brief in the Commerce countervailing duty case.⁵² On May 22,

⁴⁶ See *id.* ¶ 129.

⁴⁷ See *id.* ¶¶ 122, 129.

⁴⁸ See *id.* ¶¶ 111b, 123-126. The Statement of Claim contains two series of paragraphs numbered 109 through 111. For the sake of clarity, we attach herein the suffix "a" to the first series and the suffix "b" to the second series. Thus, the paragraph denominated as "111b" is the second paragraph 111, appearing on page 32 of the Statement of Claim.

⁴⁹ See *id.* ¶¶ 78, 115.

⁵⁰ See *id.* ¶¶ 92, 139.

⁵¹ See *id.* ¶ 113.

⁵² See *In the Matter of Softwood Lumber From Canada: Final Determination of Sales at Less Than Fair Value*, Secretariat File No. USA-CDA-2002-1904-02: *Joint Brief of Complainants*, dated Aug. 2, 2002 ("Joint AD Br."); *Certain Softwood Lumber Products From Canada*, Secretariat File No. USA-CDA-2002-

2002, requests for binational panel review were filed with respect to the ITC's final injury determinations.

The Chapter Nineteen panel reviewing the Commerce antidumping investigation issued its decision on July 17, 2003.⁵³ The panel upheld Commerce's final antidumping determination in most significant respects, finding, among other things, that Commerce did not err in using "zeroing" to determine the weighted average dumping margins.⁵⁴ The panel held that Commerce erred by not using the same value-based methodology to allocate joint costs between different sizes of lumber⁵⁵ and did not make a fair comparison between softwood lumber prices in Canada and the prices of similar products in the United States.⁵⁶

The panel reviewing the Commerce countervailing duty investigation issued its decision on August 13, 2003.⁵⁷ The panel upheld the final Commerce countervailing duty determination in most significant respects, holding, among other things, that Commerce properly found that the stumpage constituted a financial contribution⁵⁸ that was specific to an enterprise or industry,⁵⁹ and that Commerce properly denied Canfor's

1904-03: *Canadian Parties' Joint Brief*, dated August 2, 2002 ("Joint CVD Br."); *Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determination*, Secretariat File No. USA-CDA-2002-1904-03, *Brief of Canfor Corporation*, dated August 2, 2002 ("Canfor CVD Br.").

⁵³ *In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Antidumping Determination*, Secretariat File No. USA-CDA-2002-1904-02, *Decision of the Panel*, dated July 17, 2003 ("AD Panel Dec.").

⁵⁴ *See id.* at 56-57.

⁵⁵ *See id.* at 48.

⁵⁶ *See id.* at 50.

⁵⁷ *In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determination*, Secretariat File No. USA-CDA-2002-1904-03, *Decision of the Panel*, dated Aug. 13, 2003 ("CVD Panel Dec.").

⁵⁸ *See id.* at 20.

⁵⁹ *See id.* at 39.

request for a company-specific duty rate.⁶⁰ The panel held that Commerce's determination with respect to the use of cross-border benchmarks was inconsistent with U.S. countervailing duty law.⁶¹ Both the antidumping and countervailing duty panels remanded to Commerce for further proceedings, which are ongoing.

In the Chapter Nineteen proceedings, the claimants (including Canfor) made many of the same allegations that Canfor makes in this arbitration. The United States summarizes in the chart below claims common to the Chapter Nineteen proceedings and this arbitration, as well as the relevant findings by the Chapter Nineteen panels.

Canfor's Claims In This Arbitration	Canfor's Claims in the Chapter 19 Proceedings	Chapter 19 Panel Findings
<u>Commerce Antidumping Investigation</u>		
<i>"Zeroing"</i>		
Commerce "utilized a technique called zeroing, thereby skewing the average dumping margins." ⁶²	"Commerce created artificial dumping margins through the unlawful practice of zeroing." ⁶³	"Commerce did not err in employing a practice of 'zeroing' when determining weighted average margins of dumping." ⁶⁴
<i>Production Cost Allocation</i>		
Commerce "allocat[ed] costs based only on differences in grade [of lumber] and not differences in value attributable to dimension or length." ⁶⁵	Commerce allocated costs only for "different grades [of lumber] . . . but [did] not . . . carry that methodology through to . . . different sizes." ⁶⁶	"Commerce erred by failing to use the same value based methodology to allocate joint costs between different sizes of lumber." ⁶⁷

⁶⁰ See *id.* at 74.

⁶¹ See *id.* at 35. The panel reviewing the injury determination issued its decision on September 5, 2003.

⁶² Statement ¶¶ 122; see also *id.* ¶¶ 129.

⁶³ Joint AD Br., Vol. I, at 90.

⁶⁴ AD Panel Dec. at 56-57.

⁶⁵ Statement ¶¶ 129.

⁶⁶ Joint AD Br., Vol. I, at 53.

Canfor's Claims In This Arbitration	Canfor's Claims in the Chapter 19 Proceedings	Chapter 19 Panel Findings
<i>Price Comparison</i>		
Commerce “failed to utilize a fair comparison between the prices of softwood lumber production from Canada and the prices of similar products sold in the United States.” ⁶⁸	Commerce’s “price comparisons of similar products [was] distorted” because Commerce “failed to calculate cost differences between different sized products.” ⁶⁹	“Commerce erred in failing to make an adjustment to account for dimensional differences in the merchandise being compared.” ⁷⁰
<u>Commerce Countervailing Duty Investigation</u>		
<i>Financial Contribution</i>		
Commerce “failed to provide any reasonable analysis in determin[ing] that provincial stumpage programs are a ‘financial contribution.’” ⁷¹	Commerce “[did] not provide a reasoned explanation of [its] determination that provincial stumpage programs are a ‘financial contribution.’” ⁷²	Commerce’s “finding of a financial contribution in this case is affirmed.” ⁷³
<i>Specificity</i>		
Commerce erroneously “concluded that the provincial stumpage programs are specific” to an enterprise or industry. ⁷⁴	Commerce’s “determination that stumpage programs are specific is contrary to law and is not supported by substantial evidence.” ⁷⁵	“The Panel finds that [Commerce’s] specificity determination. . . . is not precluded by the statute and is supported by substantial evidence.” ⁷⁶

⁶⁷ AD Panel Dec. at 48.

⁶⁸ Statement ¶ 129; *see also id.* ¶ 122.

⁶⁹ Joint AD Br., Vol. I, at 54.

⁷⁰ AD Panel Dec. at 50.

⁷¹ Statement ¶ 111b.

⁷² Joint CVD Br., Vol. I, at B-2.

⁷³ CVD Panel Dec. at 20.

⁷⁴ Statement ¶ 78; *see also id.* ¶ 115.

⁷⁵ Joint CVD Br., Vol. I, at D-1.

Canfor's Claims In This Arbitration	Canfor's Claims in the Chapter 19 Proceedings	Chapter 19 Panel Findings
<i>Company Specific Subsidy Rate</i>		
Commerce ignored its obligation to calculate a company-specific duty rate for Canfor and "arbitrarily determined that a countrywide rate would be utilized." ⁷⁷	"Commerce unreasonably refused to calculate a company specific subsidy rate for Canfor" and instead applied a single, country-wide rate. ⁷⁸	Commerce "did not have a statutory or regulatory obligation to consider Canfor[']s . . . request for [a] company-specific duty rate[]." ⁷⁹
<i>Cross-Border Comparisons</i>		
Commerce "declined to use 'in-country' benchmarks . . . and instead used a 'cross-border' benchmark." ⁸⁰	Commerce considered benchmarks " <i>outside</i> the country under investigation, and [rejected], without reasoned consideration, evidence . . . of in-country benchmarks. . . ." ⁸¹	"Commerce's determination with respect to the use of cross-border benchmarks . . . is unsupported by substantial evidence and is contrary to law." ⁸²

The preceding chart summarizes some, but not all, of the redundant claims advanced by Canfor in its Statement of Claim.

⁷⁶ CVD Panel Dec. at 39.

⁷⁷ Statement ¶ 140; *see also id.* ¶¶ 92, 137-39.

⁷⁸ Canfor CVD Br. at 6.

⁷⁹ CVD Panel Dec. at 74.

⁸⁰ Statement ¶ 113.

⁸¹ Joint CVD Br., Vol. I, at C-1.

⁸² CVD Panel Dec. at 35.

ARGUMENT

I. THE UNITED STATES HAS NO OBLIGATION UNDER CHAPTER ELEVEN TO ARBITRATE CANFOR'S CLAIMS

The United States did not consent under Chapter Eleven of the NAFTA to arbitrate Canfor's allegations as to the antidumping and countervailing duty determinations. The jurisdiction of an arbitral tribunal is based on the common consent of the parties to the dispute.⁸³ In treaty-based investor-State arbitrations such as those under Chapter Eleven, "the arbitrators' jurisdiction results from the initial consent of the state" expressed in the agreement "and the subsequent consent of the plaintiff, who accepts the arbitrator's jurisdiction by beginning the arbitration."⁸⁴ In arbitrations governed by public international law, international tribunals have repeatedly insisted on an "unequivocal indication' of a 'voluntary and indisputable' acceptance" by a sovereign of a tribunal's jurisdiction.⁸⁵

Here, the NAFTA – the instrument delineating the scope of the United States' consent to arbitration – clearly and unequivocally excludes any consent to arbitrate this dispute under Chapter Eleven of the NAFTA. The NAFTA provides that it is to be

⁸³ See, e.g., FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 29 (Emmanuel Gaillard & John Savage eds., 1999).

⁸⁴ *Id.* at 29-30; see NAFTA art. 1122(1) ("Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."); *id.* art. 1121(1) ("A disputing investor may submit a claim . . . to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; . . .").

⁸⁵ *Application of Convention on Prevention and Punishment of Crime of Genocide* (Bosn-Herz. v. Yugo.), 1993 I.C.J. 325, 342 ¶ 34 (Sept. 13); see also *Fireman's Fund Ins. Co. v. United Mexican States*, ICSID Case No. ARB(AF)/02/01, *Decision on the Preliminary Question*, August 14, 2003 ¶ 64 ("[T]he Tribunal does not believe that under contemporary international law a foreign investor is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement.").

interpreted “in accordance with applicable rules of international law.”⁸⁶ Article 31(1) of the Vienna Convention on the Law of Treaties sets forth the cardinal rule of treaty interpretation: a treaty must be interpreted “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.”⁸⁷ The relevant context includes the treaty’s text, its preamble and annexes and any related agreements or instruments.⁸⁸

As demonstrated below, the text, context and object and purpose of the NAFTA confirm that the Parties intended specialized binational panels constituted under Chapter Nineteen to have exclusive jurisdiction under the NAFTA over claims that – like those of Canfor here – arise under a Party’s antidumping and countervailing duty laws. Far from consenting to arbitration, the United States unambiguously rejected investor-State arbitration with respect to Canfor’s claims. Because the United States has no obligation under Chapter Eleven with respect to the subject of Canfor’s claims, this Tribunal has no jurisdiction in this matter.

⁸⁶ NAFTA art. 102(2); see Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in *Canada Gazette* 68, 76 (Jan. 1, 1994) (“Paragraph 2 of article 102 affirms a basic provision of customary international law regarding the interpretation of international agreements as set out in the *Vienna Convention on the Law of Treaties*.”) (emphasis added); see also NAFTA art. 1131(1) (“A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and the applicable rules of international law.”).

⁸⁷ Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331 (the “Vienna Convention”). The International Court of Justice has determined that Article 31 is reflective of customary international law. See, e.g., *Kasikili/Sedudu Island* (Bots. v. Namib.), Judgment, 1999 I.C.J. Rep., ¶ 18 (Dec. 13).

⁸⁸ Vienna Convention, art. 31(2).

A. The Ordinary Meaning Of Article 1901(3) Establishes That The United States Did Not Consent To Arbitrate Canfor's Claims Under Chapter Eleven

The plain language of Article 1901(3) demonstrates that the United States did not consent to arbitrate Canfor's claims under Chapter Eleven of the NAFTA. Article 1901(3) states:

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.

The "ordinary meaning" and effect of this provision is clear: the United States has no obligations under the NAFTA with respect to its antidumping and countervailing duty laws except those specified in Chapter Nineteen and Article 2203. Chapter Nineteen sets forth a unique, self-contained mechanism for dealing with sensitive and complex antidumping and countervailing duty claims. The Parties intended for matters arising under a Party's antidumping and countervailing duty laws to be addressed exclusively under Chapter Nineteen. No provision of any other chapter, including Chapter Eleven, can be construed as imposing any obligation on the United States with respect to such laws.

Canfor's claims – as to both jurisdiction and liability – are based entirely on obligations found in Chapter Eleven. Its claim that the United States is obliged to arbitrate this dispute is based on the provisions of Section B of Chapter Eleven.⁸⁹ Canfor alleges that the United States is liable to it for failure to accord it and its investments "national treatment," "most-favored-nation treatment" and the "minimum standard of

treatment” in violation of NAFTA Articles 1102, 1103 and 1105 respectively, and for expropriating Canfor’s investments in the United States in breach of Article 1110.⁹⁰

Canfor’s claims, however, are clearly based on obligations “with respect to [U.S.] antidumping and countervailing duty law.” Canfor’s allegations are based on Commerce’s and the ITC’s interpretation of U.S. antidumping and countervailing duty laws and regulations, and in particular on the methodologies and procedures Commerce used in calculating the duties at issue. Canfor alleges, for example, that Commerce improperly calculated dumping margins using a “zeroing” technique, did not provide a reasoned analysis that the stumpage was “specific” to an enterprise or industry and inappropriately denied Canfor a company-specific countervailing duty rate.⁹¹ These are precisely the types of claims that are – and in fact *were* – submitted to, and decided by, binational panels constituted under Chapter Nineteen.

The result compelled by the ordinary meaning of the terms of Article 1901(3) is clear: Chapter Eleven of the NAFTA cannot be construed to impose any obligation on the United States with respect to the category of claims asserted by Canfor. The United States has no substantive obligations under the provisions alleged to have been breached upon which any claim here could be based. And, most important for purposes of this Objection, the provisions of Chapter Eleven relied upon by Canfor to invoke the jurisdiction of this Tribunal – under the plain terms of the treaty – impose no obligation

⁸⁹ See Statement ¶ 5 (“This Notice of Arbitration is submitted under Section B of Chapter 11 of NAFTA and the UNCITRAL Arbitration Rules. The contract which this dispute arises out of or in relation to is Chapter 11 of NAFTA.”).

⁹⁰ See *id.* ¶ 19.

⁹¹ See *id.* ¶¶ 122, 78, 92, 139.

on the United States. Because the United States did not consent to investor-State arbitration with respect to Canfor's claims, there is no agreement between the parties upon which the Tribunal's jurisdiction could be founded.

B. The Context Of Article 1901(3) Confirms That The United States Did Not Consent To Investor-State Arbitration Of Canfor's Claims

As noted above, a treaty is to be interpreted "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."⁹² As demonstrated below, an examination of the context of Article 1901(3) confirms that Chapter Nineteen provides the *exclusive* forum under the NAFTA for disputes arising under a Party's antidumping and countervailing duty law.⁹³

First, although the NAFTA establishes in Chapter Twenty a State-to-State dispute resolution mechanism for controversies concerning the Agreement, even that mechanism does not apply to antidumping or countervailing duty matters. The Chapter Twenty mechanism has an unusually broad reach: it applies to "all disputes concerning the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement."⁹⁴ One category of disputes, however, is expressly excluded: those "*matters covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters)*."⁹⁵ Thus, the only type of dispute that

⁹² Vienna Convention, art. 31(1) (emphasis added).

⁹³ A treaty's context for these purposes includes the text of the treaty and its annexes, among other things. *See id.* art. 31(2) ("The context for the purpose of the interpretation of a treaty shall comprise . . . the text, including its preamble and annexes . . .").

⁹⁴ NAFTA art. 2004.

⁹⁵ *Id.* (emphasis added).

a NAFTA Party may *not* bring under Chapter Twenty is that pertaining to another Party's antidumping and countervailing duty laws.

This element of the context confirms what Article 1901(3) plainly says: that Chapter Nineteen exclusively governs disputes concerning antidumping and countervailing duty laws. It would make no sense for the NAFTA to prohibit the *NAFTA Parties themselves* from pursuing State-to-State dispute resolution pertaining to a Party's antidumping and countervailing duty laws outside of Chapter Nineteen, but accord *private claimants* the privilege of doing so under Chapter Eleven.

Second, this conclusion is further reinforced by Article 1112(1), which subordinates Chapter Eleven to all other chapters of the NAFTA. Article 1112(1) provides that “[i]n the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of that inconsistency.”⁹⁶ It would be particularly odd for investor-State arbitration under Chapter Eleven to afford greater rights to private claimants than to the NAFTA Parties given the subordinate position of the investment chapter in the treaty.

Moreover, Canfor's apparent position – that private claimants may pursue remedies under both Chapters Nineteen and Eleven with respect to antidumping and countervailing duty laws – would give rise to critical inconsistencies that would, under Article 1112(1), be resolved in favor of Chapter Nineteen. 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

⁹⁶ *Id.* art. 1112(1); see also Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in *Canada Gazette* 68, 152 (Jan. 1, 1994) (Article 1112 “ensures

enforcement mechanisms – as to be irreconcilable. Contrary to Canfor’s suggestion, however, the NAFTA Parties did not craft a treaty with two irreconcilably different methods of dispute resolution for the same matter – though if they had, Article 1112(1) would compel the same result as that provided for in Article 1901(3).

Third, Chapter Eleven itself indicates that, although the drafters expressly envisioned a certain overlap in competence between the investor-State arbitration mechanism established in Section B and the State-to-State mechanism in Chapter Twenty, they envisaged no such overlap for antidumping and countervailing duty matters in Chapter Nineteen. Article 1115 provides as follows:

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.⁹⁷

The opening clause of the Article provides that the submission of a measure to investor-State arbitration does not waive a Party’s right to submit the same measure to the State-to-State arbitration mechanism set forth in Chapter Twenty. Article 1115 thus contemplates that the same measure could be the subject of dispute resolution under both Chapter Eleven and Chapter Twenty.⁹⁸ Had, as Canfor implicitly suggests, the Parties contemplated that the same measure could be the subject of proceedings under both Chapters Eleven and Nineteen, a reader would expect there to be some mention of

that the *specific* provisions of other chapters are not superseded by the *general* provisions of this chapter.”) (emphasis added).

⁹⁷ NAFTA art. 1115 (emphasis added).

⁹⁸ See also NAFTA art. 1138 (similarly contemplating that a given measure could be the subject of dispute resolution under either Chapter Eleven or Chapter Twenty).

Chapter Nineteen in Article 1115. That the Parties did not find it necessary to mention the possibility that the same measures could be subject to dispute resolution under Chapter Nineteen suggests that the Parties did not contemplate that the types of measures that are subject to the Chapter Nineteen binational panels could ever be a subject of arbitration under Chapter Eleven.

Finally, the fact that the NAFTA expressly required amendments to domestic law to permit the use of business proprietary information in Chapter Nineteen proceedings – but contemplated no such amendments for Chapter Eleven – further confirms that the Parties did not envisage that antidumping and countervailing duty matters could be submitted to Chapter Eleven arbitration. Under provisions of U.S. law of which the drafters of the treaty were well aware,⁹⁹ business proprietary information relied upon in antidumping or countervailing duty investigations could not and cannot legally be shared with either the State Department attorneys who generally act for the United States in Chapter Eleven arbitrations, counsel for claimants or the members of tribunals established under that chapter.¹⁰⁰ Despite clear knowledge of that provision of U.S. law, the NAFTA Parties required an amendment with respect to Chapter Nineteen, but did not with respect to Chapter Eleven. This element of the context provides further evidence that the NAFTA does not contemplate the submission of antidumping or countervailing duty disputes to Chapter Eleven arbitration.

⁹⁹ See NAFTA ann. 1904.15, sch. of U.S., ¶ 12 (referencing “section 777 of the *Tariff Act of 1930*, as amended,” codified at 19 U.S.C. § 1677f).

¹⁰⁰ See 19 U.S.C. § 1677f(b)-(c); *cf. id.* § 1677f(f) (conditionally permitting disclosure of such information to panel members and participants in Chapter Nineteen proceedings).

C. The NAFTA's Object And Purpose Confirm That The United States Did Not Consent To Arbitrate Canfor's Claims Under The Investment Chapter

The final element of the Vienna Convention's cardinal rule of treaty interpretation focuses on the treaty's object and purpose.¹⁰¹ NAFTA Article 102 states in pertinent part as follows:

The objectives of this Agreement, as elaborated more specifically through its principles and rules, . . . are to:

. . .

(e) create *effective* procedures . . . for the resolution of disputes.¹⁰²

As demonstrated below, a review of the NAFTA's various rules for dispute resolution reveals an overriding concern with promoting effective dispute resolution procedures – and avoiding the inefficacies that result from redundant proceedings between the same parties before different dispute resolution panels. Reading Article 1901(3) as establishing Chapter Nineteen panels as the exclusive forum under the NAFTA for antidumping and countervailing duty matters is fully consonant with this object and purpose of the treaty.

Much scholarly attention has been focused on the proliferation of international tribunals in recent decades.¹⁰³ 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. Redundant proceedings present

¹⁰¹ Vienna Convention, art. 31(1) (a treaty is to be interpreted “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.*”) (emphasis added).

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

¹⁰³ See, e.g., YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS (Oxford U. Press 2003); Shane Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 COLUM. J. TRANSNAT'L L. 143 (2001); Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendancy*, 94 AM. SOC'Y INT'L L. PROC. 160 (2000); Benedict Kingsbury, *Is the Proliferation of International Courts and Tribunals a Systemic*

the risk of conflicting judgments, undermine the principle of finality, present the possibility of double recovery for claimants, are burdensome and unfair to the respondent, represent a poor use of judicial and arbitral resources and have potentially negative systemic implications for international law and international dispute resolution generally.¹⁰⁴

Several NAFTA provisions in addition to Article 102 demonstrate the treaty's objective of creating effective dispute resolution procedures and avoiding the inefficacies of duplicative proceedings between the same parties. Article 1121, for example, provides that, as a condition precedent to submitting a claim under Chapter Eleven, an investor must waive its rights, if any, "to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to the measures of the disputing Party that is alleged to be a breach referred to in Article 1116."¹⁰⁵ Because Mexican law provides a private right to assert claims under the NAFTA in Mexican courts, Annex 1120.1 similarly prohibits duplicate

Problem?, 31 N.Y.U. J. INT'L L. & POL. 679 (1999); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999).

¹⁰⁴ See generally SHANY, *supra* note 103, at 77-81 (discussing consequences of overlapping jurisdiction); Spelliscy, *supra* note 103, at 152-156 (same); see also *MOX Plant Case* (Ir. v. U.K.), *Order No. 3*, June 24, 2003, ¶ 28 (Int'l Trib. for the Law of the Sea 2003) (suspending proceedings on the basis that "a proceeding that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the parties"); *Southern Bluefin Tuna Case - Australia and New Zealand v. Japan*, *Award on Jurisdiction and Admissibility*, Aug. 4, 2000, 39 I.L.M. 1359 (UNCLOS Arb. Trib. 2000) (declining jurisdiction on basis that claim arose primarily under another treaty).

¹⁰⁵ NAFTA art. 1121(1)(b); see also North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1st Sess., at 596 (1993) (under Article 1121, a claimant who submits a claim to arbitration under Chapter Eleven must waive its rights with respect to "any action in local courts or other fora") (emphasis added). Canfor did participate in Chapter Nineteen proceedings after it filed its Statement of Claim in this proceeding. Canfor's purported waiver under Article 1121 (see Statement ¶ 6) is therefore arguably ineffective. See *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, *Award of June 2, 2000*, ¶ 31 (waiver under Article 1121 of right to pursue parallel proceeding is ineffective where party acts inconsistently with that waiver).

assertions of NAFTA breaches in court and before investor-State arbitration tribunals.¹⁰⁶

These provisions evidence the Parties' intent to avoid providing claimants with the ability to submit under Chapter Eleven the same claims that were submitted elsewhere. As the tribunal in *Waste Management* stated: "when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages. *This is precisely what NAFTA Article 1121 seeks to avoid.*"¹⁰⁷

Likewise, Chapter Fourteen's several dispute resolution procedures apply exclusively to the "financial services" matters encompassed by the chapter, with no possibility of overlap with other NAFTA dispute resolution mechanisms.¹⁰⁸ And Article 1901(3) provides for exclusive jurisdiction over antidumping and countervailing duty matters to be vested in Chapter Nineteen panels.

Allowing this arbitration to proceed to the merits would be inconsistent not only with the express language of Article 1901(3), but with the NAFTA's objective of creating effective dispute resolution procedures. Re-litigating the binational panels' relevant factual and legal findings, such as whether stumpage constituted a "financial contribution," whether Commerce lawfully used "zeroing" to calculate the dumping margin or whether Canfor was entitled to a company-specific countervailing duty rate

¹⁰⁶ See NAFTA ann. 1120.1 ("With respect to the submission of a claim to arbitration: (a) an investor of another Party may not allege that Mexico has breached an obligation under: Section A . . . both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal.").

¹⁰⁷ *Waste Management*, Award of June 2, 2000 ¶ 27 (emphasis added).

¹⁰⁸ See *id.* art. 1101(3) (Chapter Eleven does not apply to measures covered by Chapter Fourteen); *id.* art. 1401(2) (incorporating investor-State dispute resolution solely for breaches of provisions as incorporated into Chapter Fourteen); *id.* art. 1414 (providing for a modified version of State-to-State dispute resolution for breaches of Chapter Fourteen); *id.* art. 1415 (providing for a special, exclusive dispute resolution role

would give rise to the possibility of conflicting judgments and would be burdensome, unfair to the United States (particularly since the United States prevailed on many of the significant issues before the binational panels) and wasteful of resources. The ordinary meaning of Article 1901(3) thus fully accords with the treaty's object and purpose.

D. The Circumstances Of Conclusion Of The NAFTA Also Confirm That No Jurisdiction Under Chapter Eleven Exists For Antidumping And Countervailing Duty Matters

Under Article 32 of the Vienna Convention, “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the application of article 31” The circumstances of conclusion of the NAFTA and its predecessor agreement, as reflected in the text of Chapter Nineteen, demonstrate that the Parties *could not agree* on substantive international rules to govern antidumping and countervailing duty matters. Accepting Canfor’s hypothesis – that the substantive international rules of Chapter Eleven *do* apply to such matters – would impose on the Parties an agreement that they could not, and did not, reach. The circumstances of conclusion of the treaty thus confirm the interpretation compelled by the cardinal rule of treaty interpretation: Chapter Eleven does not apply to antidumping or countervailing duty matters.

Chapter Nineteen of the NAFTA adopts, with few modifications, the procedural solution reached by the United States and Canada in Chapter Nineteen of the CFTA.

During the negotiation of the CFTA, Canada and the United States tried, but failed, to

for the Financial Services Committee where the prudential measures exception of Article 1410 is at issue in an investor-State dispute).

reach agreement on a common set of antidumping and countervailing duty rules.¹⁰⁹ In order to break the impasse, the parties agreed on a procedural, rather than a substantive, solution: a unique form of international dispute resolution that substituted binational panels for domestic courts applying domestic law.¹¹⁰ Chapter Nineteen of the NAFTA reflects precisely such a procedural solution: it sets forth no substantive international rules for antidumping and countervailing duty matters, but relies entirely on the procedural mechanism of binational panels to review the determinations of the Parties in such matters.

Chapter Eleven, by contrast, prescribes *substantive* standards incorporating rules of international law such as “national treatment” (Article 1102), “most-favored-nation treatment” (Article 1103) and “minimum standard of treatment” (Article 1105), among others. Canfor’s claim before this Tribunal is founded on the application of substantive principles in Chapter Eleven to antidumping and countervailing duty matters. In urging the application of such principles, however, Canfor reads the NAFTA to impose a solution that the Parties could not – and did not – agree upon. Thus, reading the treaty in the manner compelled by Article 1901(3) – as providing for Chapter Nineteen exclusively

¹⁰⁹ See United States-Canada Free Trade Agreement: Hearing Before the Comm. on the Judiciary, U.S. Senate, 100th Cong. 63-64 (1988) (testimony of M. Jean Anderson, Chief Counsel, International Trade Administration, U.S. Department of Commerce) (“Despite very intense negotiations, it proved impossible to agree on subsidies discipline and new approaches to unfair trade practices. . . . The two governments agreed instead to retain the existing national AD/CVD laws and procedures.”); see also JAMES R. CANNON, JR., RESOLVING DISPUTES UNDER CHAPTER 19, 151 (1994) (“In the end, Canada and the United States were unable to reach an agreement that would replace domestic AD and CVD laws with jointly agreed rules regarding dumping and subsidy disciplines.”); Homer E. Moyer, Jr., *The Outlook for Chapter 19 Panels: What the Early History Suggests*, 3 S.W. J. OF L. & TRADE AM. 423, 424 (1996) (“At least two approaches for achieving the objectives were advanced. One was to abandon the dumping laws in favor of competition or antitrust laws; the second was to negotiate a common set of substantive antidumping and subsidy rules. Neither of these approaches succeeded . . . , and the negotiations reached an impasse.”) (emphasis added).

¹¹⁰ CANNON, *supra* note 109, at 151.

to address antidumping and countervailing duty matters – is, unlike Canfor’s approach, fully consonant with the circumstances of conclusion of the treaty.

II. THE TRIBUNAL SHOULD ADDRESS THE UNITED STATES’ OBJECTION TO JURISDICTION AS A PRELIMINARY QUESTION

The United States submits that, consistent with the governing arbitration rules, this objection to jurisdiction should be addressed as a preliminary matter separate from the merits of the dispute. Article 21(4) of the UNCITRAL Arbitration Rules provides that “[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question.” Moreover, it is standard practice in international arbitrations to separate proceedings on jurisdiction from the merits of the dispute.¹¹¹ As one leading commentator explains, “[i]n general, the more prudent course is to conduct a preliminary proceeding on the question of jurisdiction. That permits the parties to fully address the issue and, if jurisdiction is lacking, avoids the expense of presenting the case on the merits.”¹¹² This practice is particularly pertinent where, as here, a State is a party to the proceedings.¹¹³

¹¹¹ See, e.g., Robert B. von Mehren, *Enforcement of Foreign Arbitral Awards in the United States*, 579 PLI/LIT. 147, 163-64 (Feb. 1998) (noting preference in international arbitration to hear and decide jurisdictional issues before the merits).

¹¹² GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* 57 (1994).

¹¹³ See, e.g., SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 99 (5th ed. 1995) (noting “basic rule of international law and a principle of international relations that a State is not obliged [to] give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not yet been established.”); *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, 3 ICSID REPORTS 131, 143 (Decision on Jurisdiction of Apr. 14, 1988) (in bifurcating, the tribunal confirmed “there is no presumption of jurisdiction – particularly where a sovereign State is involved – and the Tribunal must examine [a sovereign’s] objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties.”); *Ethyl v. Government of Canada*, 38 I.L.M. 708, 715-17 (1999) (Award on Jurisdiction of June 24, 1998) (NAFTA Chapter Eleven tribunal directing parties to brief and argue preliminary issues of place of arbitration and jurisdiction apart from proceeding on the merits).

Moreover, a separate proceeding on jurisdiction is particularly appropriate where, as here, the objections present questions of law distinct from the merits. The United States submits that under the plain meaning of the NAFTA, the United States did not consent to arbitration of Canfor's claims under Chapter Eleven. The determination by the Tribunal as to whether it has jurisdiction is a straightforward matter of textual interpretation.

In sharp contrast, Canfor's claims on the merits involve an extremely fact-intensive inquiry into Commerce's and the ITC's interpretation and application of U.S. antidumping and countervailing duty laws and the complex methodologies Commerce used to determine whether and how much subsidization and dumping occurred. The administrative records in the Chapter Nineteen proceedings upon which Canfor's case on the merits is based (consisting of all the documentary evidence collected by Commerce, hearing transcripts, briefs, published decisions, etc.; *see* NAFTA art. 1911) run to tens of thousands of pages. The records also contain proprietary information that cannot be made available in these proceedings. If decided in the United States' favor, this objection to jurisdiction would eliminate altogether the need for this Tribunal to undertake the significant task of considering the merits of the case.¹¹⁴

The United States therefore proposes the following schedule for written and oral proceedings on its objection to jurisdiction:

¹¹⁴ *See Amco Asia Corp. v. Indonesia*, 1 ICSID REPORTS 389, 390 (Decision on Jurisdiction of Sept. 25, 1983) (legal objections to jurisdiction raised by the Respondent were dealt with as a preliminary matter, as compared to fact-intensive objections which were joined to the merits (*e.g.*, whether in fact the army did or did not seize the hotel)).

December 15, 2003	Canfor's Counter-Memorial on Jurisdiction due
January 15, 2004	Any submissions by Canada or Mexico pursuant to Article 1128 due
February 16, 2004	United States' Reply due
April 19, 2004	Canfor's Rejoinder due
Early May 2004	Hearing on Jurisdiction

III. RESERVATION OF RIGHTS

The United States wishes to underscore, in objecting to the jurisdiction of the Tribunal, that it in no way concedes that Canfor's claims with respect to the measures at issue have any merit. To the contrary, Canfor's claims are defective both as a matter of law and as a matter of fact. The United States reserves its rights to contest the merits at a later time should it be necessary, as well as to defend the case on grounds that Canfor has not proven elements of its case that could be considered jurisdictional.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Tribunal render an award in favor of the United States and against Canfor, dismissing Canfor's claims in their entirety and with prejudice. The United States further requests that, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Canfor be required to bear all costs of the arbitration, including costs and expenses of counsel.

Respectfully submitted,

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