

IN THE CONSOLIDATED ARBITRATION PURSUANT TO ARTICLE 1126  
OF THE NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES  
BETWEEN

CANFOR CORPORATION, TERMINAL FOREST  
PRODUCTS LTD.,

*Claimants/Investors,*

*-and-*

UNITED STATES OF AMERICA,

*Respondent/Party.*

**REPLY POST-HEARING SUBMISSION OF RESPONDENT  
UNITED STATES OF AMERICA**

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In accordance with the Tribunal's instructions, the United States responds to claimants' post-hearing submission of February 17, 2006. The United States first offers some general observations on claimants' submission, and then addresses certain of claimants' responses to the Tribunal's list of questions.

**A. General Observations**

NAFTA Article 1901(3) excludes claimants' claims in their entirety. Claimants' arguments in their post-hearing submission as to why that exclusion does not apply to their claims are critically flawed. *First*, the premise underlying many of claimants' responses, that there is only one way to draft an exclusionary clause, is unsound.<sup>1</sup> The NAFTA's text reveals a variety of means used by the Parties to exclude certain subject matters from obligations under all or part of the Agreement. The relevant issue for

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<sup>1</sup> Claimants' Post-Hearing Submission at 23-24 & 25-26 (Feb. 17, 2006) ("Cls.' PH Sub.").

purposes of the Preliminary Question is the effect of Article 1901(3), as drafted, on claimants' claims.

Claimants' allegations concern Commerce's and the ITC's interpretation and application of U.S. trade law during the course of the antidumping and countervailing duty investigations. Claims challenging the administration of a Party's laws would impose obligations "with respect to" those laws, within the ordinary meaning of that phrase.<sup>2</sup> It thus matters not how broadly or narrowly one interprets the term "antidumping law or countervailing duty law" in Article 1901(3). Even accepting claimants' narrow interpretation of that term, Article 1901(3) bars claimants' claims because those claims impose obligations on the United States "with respect to" its AD/CVD law.

*Second*, claimants cannot avoid Article 1901(3) simply by identifying their claims by reference to the rules they allege to have been breached.<sup>3</sup> Such reasoning would

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<sup>2</sup> As the United States has demonstrated, the phrase "with respect to" is used synonymously in the NAFTA, and in general usage, with other phrases such as "in relation to," "with reference to," "relating to," "as regards," "concerning," "regarding," "respecting," and "touching on." *Canfor Corp. v. United States of America*, Reply on Jurisdiction of Respondent United States of America, at 10-12 (Aug. 6, 2004); *see also Canfor Corp. v. United States of America*, Transcript of Hearing on Jurisdiction (Dec. 7-9, 2004) ("Canfor Hrg. Tr.") Vol. 1 at 67:18-75:12; *Canfor Corp. v. United States of America, Terminal Forest Prods. Ltd. v. United States of America*, Transcript of Hearing on Jurisdiction (Jan. 11-12, 2006) ("Consolidation Hrg. Tr.") Vol. 1 at 102:10-106:17; *see also id.* Vol. 2 at 64:8-13; 169:16-170:13 (noting that the use of the term "*relativement à*" (relating to) in the French text of Article 1901(3) demonstrates that the Parties did not intend "with respect to" in Article 1901(3) to have a specific, narrow meaning); *Canfor Corp. v. United States of America*, Notice of Arbitration and Statement of Claim (July 9, 2002) ("Canfor SOC") ¶ 19 (conceding that its claims are "arising out of and in connection with" United States AD/CVD investigations and determinations); *Tembec, Inc. et al v. United States of America*, Tembec Counter-Memorial on Jurisdiction at 2 (Feb. 17, 2005) (describing its claims as "arising in connection with the trade laws"); *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/02, Award on Jurisdiction §§ 27-28, 31 (June 2, 2000) (interpreting the phrase "proceedings *with respect to* a measure" in the context of Article 1121 as proceedings that "have a legal basis derived from," "refer to" or "hav[e] their origin in" the measure). Claimants' claims challenging the interpretation and application of U.S. trade law would impose obligations on the United States "arising out of or in connection with," "relating to," "referring to," "concerning," "having a legal basis derived from" or "touching on" U.S. AD/CVD law, and are therefore barred by Article 1901(3).

<sup>3</sup> *See* Cls.' PH Sub. at 34, 36.

vitiating every treaty exclusion. A Chapter Eleven claimant could, for example, challenge a Party's immigration measures, or its national security measures, despite clear exclusions for those matters, simply by labeling their claims "investment claims." For purposes of interpreting the effect of an exclusionary provision such as Article 1901(3), claims must be identified by the nature of the measures challenged, not by the "rules purported to have been violated."<sup>4</sup> Claimants' claims – which are nearly identical to many of the claims Canfor made to the Chapter Nineteen panels<sup>5</sup> – are AD/CVD claims that are subject to the exclusive jurisdiction of the Chapter Nineteen binational panels.

*Third*, claimants concede that a "mere error of law" is not reviewable under Chapter Eleven<sup>6</sup> – a concession that requires dismissal of their claims. As their Notices of Arbitration make clear, claimants' claims are premised on the alleged misapplications of U.S. AD/CVD law (*e.g.*, "zeroing," production cost allocations, price comparisons, specificity determinations, cross-border comparisons, company-specific duty rates, etc.).<sup>7</sup> Claimants' theory of jurisdiction, however, is dependent on the supposed procedural "abuses" committed by Commerce and the ITC during the course of the AD/CVD investigations.<sup>8</sup> In other words, claimants' view is that, if an error by Commerce or the ITC in the administration of U.S. AD/CVD law is serious enough, it can support an investment claim, even if a less serious error could not support such a claim. But claimants cannot explain how AD/CVD claims supposedly become investment claims by

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<sup>4</sup> *Fisheries Jurisdiction (Sp. v. Can.)*, 1998 I.C.J. 432, 487 (Dec. 4) (Sep. Op. of J. Koroma).

<sup>5</sup> See *Canfor Corp. v. United States of America*, Objection to Jurisdiction of Respondent United States of America, at 16-18 (Oct. 16, 2003) (chart comparing claims made by Canfor in the two proceedings).

<sup>6</sup> Cls.' PH Sub. at 4; see also *id.* at 3-4.

<sup>7</sup> *Id.* at 4; see also *Canfor SOC* ¶¶ 107-148; *Terminal Forest Prods. Ltd. v. United States of America*, Notice of Arbitration (Mar. 30, 2004) ("Terminal NOA") ¶¶ 19-49.

<sup>8</sup> Cls.' PH Sub. at 31.

virtue of the severity of the procedural foul alleged.<sup>9</sup> The ordinary meaning of Article 1901(3), in its context and in light of the object and purpose of the Treaty, demonstrates that Chapter Nineteen was intended as the exclusive forum for *all* claims with respect to a Party's AD/CVD law.

Moreover, when asked by the Tribunal to produce specific examples of so-called "abuses," claimants utterly fail to substantiate their charges. They can cite to only a single U.S. government action that is actually mentioned in their Notices of Arbitration: a preliminary critical circumstances determination that was rescinded by the Department of Commerce months after it was made. That preliminary determination was part of a normal administrative process and did not constitute a procedural "abuse." In any event, claimants fail to demonstrate how their claims with respect to any of the actions they cite would not impose obligations on the United States with respect to its AD/CVD law, contrary to Article 1901(3).

*Fourth*, none of claimants' explanations for Article 1901(3)'s inclusion in the NAFTA stand up to scrutiny. Claimants contend that Article 1901(3) was merely intended to shield a Party from being compelled, by virtue of a provision in another chapter, from amending its antidumping and countervailing duty law.<sup>10</sup> In addition to finding no support in the ordinary meaning of Article 1901(3), claimants' argument ignores the fact that there is no mechanism *anywhere* in the NAFTA that could compel a

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<sup>9</sup> Claimants' theory appears to be based on the misconception that Chapter Nineteen is simply the "domestic law" chapter, and Chapter Eleven is the "international law" chapter. This mischaracterization ignores those chapters' respective subject matters: "Antidumping and Countervailing Duty Matters" and "Investment."

<sup>10</sup> Cls.' PH Sub. at 6.

Party to change its laws.<sup>11</sup> Because Claimants accord no viable meaning to Article 1901(3), their reading of this Article renders it ineffective, contrary to generally accepted principles of treaty interpretation.

*Finally*, the Tribunal should disregard claimants' arguments that it should exercise jurisdiction because claimants would otherwise have no place to lodge their claims against particular government actions. Claimants suggest, for example, that because Commerce's preliminary determinations cannot be challenged in U.S. court or before Chapter Nineteen panels, they must have a remedy in Chapter Eleven.<sup>12</sup> Likewise, they assert entitlement to a Chapter Eleven forum because the Article 1904 process, in their view, has been ineffective, and because Article "1905(1) is a remedy only available to the Parties, not to investors."<sup>13</sup> That claimants find the available AD/CVD remedies ineffective, however, is not a justification for finding jurisdiction where none would otherwise exist. Any lack of a given remedy in the NAFTA – for challenges to preliminary determinations, for instance – reflects a deliberate choice by the NAFTA Parties that the Tribunal is bound to respect.

As the Chapter Eleven tribunal in *Fireman's Fund Ins. Co. v. United Mexican States* held, "a foreign investor is [not] entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement."<sup>14</sup> Rather, claimants have the burden of demonstrating an "unequivocal indication" that the Parties consented to

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<sup>11</sup> See Consolidated Hrg. Tr. Vol. 2 at 136:1-11. Claimants concede, for example, that "a Chapter 11 Tribunal has only limited remedial authority that does not include obligating a party to change its law." Cls.' PH Sub. at 22.

<sup>12</sup> *Id.* at 20.

<sup>13</sup> *Id.* at 31.

<sup>14</sup> ICSID Case No. ARB(AF)/02/01, Decision on the Preliminary Question ¶ 64 (July 17, 2003).

arbitrate under Chapter Eleven the category of claims they seek to submit.<sup>15</sup> Claimants are far from meeting that burden in these proceedings. Rather, Chapter Nineteen contains a clear exclusion in the form of Article 1901(3),<sup>16</sup> pursuant to which claimants' claims should be dismissed.

**B. Specific Responses to Claimants' Post-Hearing Submission**

Below, the United States responds only to those arguments in claimants' post-hearing submission that warrant further comment. The lack of further comment on any particular assertion by claimants should not be construed as agreement with that assertion. For ease of reference, we note in each heading the question number(s) at issue.

**Does Art. 1904 review comprise "treatment" or "conduct"? [Q. 3b]**

Claimants responded to Question 3b in the affirmative, asserting that the binational panel decisions were "an element of the entire process which has resulted in the violations of the obligations under NAFTA Chapter 11."<sup>17</sup> They also suggested that the United States would bear international responsibility for any wrongful acts committed by a panel that contained a majority of U.S. nationals.<sup>18</sup> While the issue is moot given claimants' representation that they do not challenge any panel decisions,<sup>19</sup> the United

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<sup>15</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo.)*, 1993 I.C.J. 325, 342 (Sept. 13). Claimants' unsupported assertion to the contrary – that jurisdictional exclusions should be read narrowly and that the party challenging jurisdiction bears the burden of proof – should be rejected. Cls.' PH Sub. at 12.

<sup>16</sup> Claimants' assertion that the United States suggested that an insufficiency in legal scrubbing explained the alleged deficiency in the manner in which Article 1901(3) was drafted is based on a distortion of the record. *See* Cls.' PH Sub. at 13. The United States maintains that Article 1901(3) clearly excludes claimants' claims. The fact that no legal scrubbing occurred and that different teams of negotiators negotiated different chapters of the NAFTA may explain why different wording was used in different provisions. That is not to suggest, however, that any single provision is inadequately drafted.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 2 (citing Canfor Hrg. Tr. Vol. 3 at 716:1-7).



States notes for the record that binational panels are not organs of any Party – regardless of the nationality of the panel members – and their actions are therefore not attributable to the State and cannot constitute “measures adopted or maintained by a Party” that could be subject to Chapter Eleven arbitration.

**Would procedural “abuses” in an AD/CVD investigation confer jurisdiction on a Chapter Eleven tribunal? [Qs. 4, 58]**

Claimants’ asserted entitlement to a Chapter Eleven remedy based on the United States’ supposed “abuse” of procedures under its AD/CVD law in the investigations, and its supposed failure to “follow the spirit and intent of [sic] behind Chapter Nineteen,” is baseless.<sup>20</sup> Claimants recognize that Chapter Nineteen contains “the process established for anti-dumping and countervailing duty matters.”<sup>21</sup> And they concede that U.S. AD/CVD determinations “are not reviewable under Chapter 11 for mere error of law.”<sup>22</sup> But they cannot explain how an AD/CVD claim reviewable under Chapter Nineteen becomes reviewable under Chapter Eleven as well simply by virtue of allegations that Commerce and the ITC did not merely err, but engaged in abuse.

In response to Question 4, in which they are asked to list five examples of such “abuses,” claimants identify only a single action that is arguably within the four corners of their pleadings – the Department of Commerce’s preliminary critical circumstances determination.<sup>23</sup> That preliminary determination was made on August 17, 2001, and duties were collected on an emergency basis for a three-month period.<sup>24</sup> On April 2,

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<sup>20</sup> *Id.* at 31.

<sup>21</sup> *Id.* at 29.

<sup>22</sup> *Id.* at 4; *see also id.* at 3-4.

<sup>23</sup> *Id.* at 6.

<sup>24</sup> Certain Softwood Lumber Products From Canada, 66 Fed. Reg. 43,186, 43,190 (Aug. 17, 2001), appended hereto at Tab A.

2002, Commerce issued its final determination finding that the requirements for critical circumstances were not present, which resulted in a refund of those duties, with interest.<sup>25</sup> This sequence of events reflects a normal administrative process, not a supposed “abuse” of procedure. Moreover, claimants shed no light on how they were supposedly harmed by the preliminary determination. And they all but concede in their post-hearing submission that they are not entitled to a Chapter Eleven remedy for a preliminary determination such as this one that is not connected to any final determination.<sup>26</sup>

Claimants’ remaining examples of alleged abuse by the United States all fall outside of their Notices of Arbitration, and cannot form the basis for jurisdiction. The claims concerning the United States’ responses to the Chapter Nineteen panel decisions concern events that post-date the Notices of Arbitration, and are substantively different from the claims in the pleadings.<sup>27</sup> Claimants cannot retroactively amend their claims by alleging that these acts form part of some nebulous “pattern of conduct.”

In any event, the examples given by claimants do not evidence “abuse of process” by the United States. As claimants concede, the ITC issued a fully “compliant decision” in response to the Chapter Nineteen panel’s August 2004 remand decision.<sup>28</sup> That the ITC had “no choice” but to comply, or supposedly did so “grudgingly,” does not evidence an “abuse of process.”<sup>29</sup> Moreover, as claimants also acknowledge, a WTO panel has found that the ITC’s Section 129 determination fully “complied with WTO

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<sup>25</sup> Certain Softwood Lumber Products From Canada, 67 Fed. Reg. 15,545, 15,547 (Apr. 2, 2002), appended hereto at Tab A.

<sup>26</sup> Cls.’ PH Sub. at 20 (“If an investor were to seek relief based upon a claim concerning a preliminary determination alone, it is possible that this might raise issues of finality and exhaustion of local remedies.”).

<sup>27</sup> *See, e.g., id.* at 27.

<sup>28</sup> *Id.*, App. A at 3.

<sup>29</sup> *Id.* at 7 & App. A at 3.

obligations.”<sup>30</sup> Certainly, the WTO panel did not agree with claimants’ assessment that the ITC’s Section 129 determination constituted an abuse of process.

Likewise, the appointment of a Commerce official in the fall of 2005 who was allegedly biased against Canada does not constitute a “measure adopted or maintained by a Party,” let alone an abuse of process that may form the basis for jurisdiction over claimants’ claims. Claimants also fail to explain how they were allegedly harmed by the appointment. In fact, the only relevant, significant act taken by Commerce since that appointment was the November 22, 2005 remand determination recalculating the CVD rate at a *de minimis* level, in accordance with the Chapter Nineteen panel’s remand decision.

Claimants also err in alleging that Commerce failed to include a draft U.S. Forestry Service report on the administrative record.<sup>31</sup> Commerce added the draft report, which addressed the conversion of board foot scaled logs in the State of Washington, to the administrative record on April 11, 2003 in response to a panel request.<sup>32</sup>

Four of the five examples of conduct that claimants purport give rise to this Tribunal’s jurisdiction do not even appear in, and post-date, claimants’ Notices of Arbitration. Claimants raise two of the examples (the Commerce appointment and the draft Forestry report) for the very first time in their post-hearing submission. And, all of

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<sup>30</sup> *Id.* at 3.; see also WTO Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, WT/DS277/RW (circulated Nov. 15, 2005) (appeal pending) at 92 (“[T]he United States has implemented the decision of the Panel, and the DSB, to bring its measure into conformity with its obligations under the AD and SCM Agreements.”).

<sup>31</sup> Cls.’ PH Sub. at 7.

<sup>32</sup> See Letter from Michele D. Lynch, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, to Caratina Alston, Secretary, United States Section, NAFTA Secretariat (April 11, 2003) (noting inclusion of Draft Spelter report); Declaration of Eric B. Greynolds (April 10, 2003) (noting that draft report is “being added to the administrative record in accordance with a March 14, 2003 Order”). Both documents are appended hereto at Tab B.

the examples contain factual errors which, when exposed, belie claimants' contention that the United States "abused" procedures under its AD/CVD laws. In any event, finding any of the five examples on which claimants rely to support a claim under Chapter Eleven would impose obligations on the United States with respect to its AD/CVD law, in contravention of Article 1901(3).

### **Approach to jurisdiction [Qs. 6, 7]**

Claimants err in suggesting that the United States' objection is not jurisdictional because it is based on only a single NAFTA provision.<sup>33</sup> There is no rule that a jurisdictional objection must be based on multiple provisions. The Chapter Eleven tribunal in *Methanex Corp. v. United States of America*, for example, dismissed all of Methanex's claims based on a single provision, Article 1101(1).<sup>34</sup>

Claimants likewise strain credulity by arguing that, should the Tribunal adopt the jurisdictional test in the *UPS* case, it should conclude that there is not sufficient evidence on the record to rule on the Preliminary Question.<sup>35</sup> Further development of the factual record would not shed any additional light on the nature of claimants' claims and whether they impose obligations on the United States with respect to its AD/CVD law and are therefore precluded by Article 1901(3).

In addition, in arguing that the approach to jurisdiction adopted by the *UPS* tribunal should not be followed, claimants provide a partial and distorted picture of Canada's jurisdictional arguments made in that case. They contend that Canada's

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<sup>33</sup> Cls.' PH Sub. at 8.

<sup>34</sup> Final Award of the Tribunal on Jurisdiction and Merits (Aug. 3, 2005), Part IV, Chapter E, ¶ 22. Claimants also contradict themselves by suggesting that Articles 1101(3) and 1301(2) each constitute "a complete exception to a certain category of government conduct." Cls.' PH Sub. at 23. Those provisions would not be "complete exception[s]" if they could only function in conjunction with other provisions.

<sup>35</sup> Cls.' PH Sub. at 9.

objection was based on substantive obligations in Chapter Eleven (Articles 1102 and 1105) and suggest that the jurisdictional test set forth in the *UPS* case therefore does not apply to the instant case, where the objection is based on a single provision located outside of the investment chapter.<sup>36</sup>

Canada, however, objected to the Tribunal's jurisdiction over claims concerning taxation matters on the basis of Article 2103.<sup>37</sup> Although the *UPS* tribunal did not rule on that objection because the claimant abandoned the claim, the tribunal concluded that the "position taken by the two parties appears to conform exactly to the Agreement."<sup>38</sup> In other words, the *UPS* tribunal confirmed that claimants had no right to submit a claim under Chapter Eleven with respect to a taxation matter by virtue of the jurisdictional exclusion in Article 2103.

**Significance of the term "obligations" in Art. 1901(3) [Qs. 18, 20, 36a, 36b, 37]**

Claimants' contention that Section B of Chapter Eleven does not impose "obligations" on a Party is unavailing.<sup>39</sup> Claimants concede in response to Question 36b that "the term 'obligation' is used elsewhere [in the NAFTA] as a descriptive term to reference substantive or *procedural requirements* of the Agreement itself."<sup>40</sup> There is no reason to assume that the term "obligations" in Article 1901(3) does not likewise refer to the procedural requirements set forth in Section B of Chapter Eleven.

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<sup>36</sup> *Id.*

<sup>37</sup> *United Parcel Service of America Inc. v. Government of Canada*, Award on Jurisdiction ¶¶ 14(iii), 116 (Nov. 22, 2002).

<sup>38</sup> *Id.* ¶ 117.

<sup>39</sup> Cls.' PH Sub. at 14.

<sup>40</sup> *Id.* at 24 (emphasis added).

Claimants also err in asserting that, because Article 1901(3) contains the term “obligation,” it does not have the same “broad exclusionary effect of a provision that include[s] the words ‘This Chapter does not apply to.’”<sup>41</sup> In so arguing, claimants incorrectly assume that there is only one means of drafting an exclusionary provision. As the United States demonstrated in its post-hearing submission, however, the NAFTA Parties have used the exclusionary phrase “does not apply” in a manner similar to their use of the phrase “does not impose obligations.”<sup>42</sup> For example, Article 1607 provides, in pertinent part, that “Except for [certain provisions], no provision of this agreement *shall impose any obligations* on a Party regarding its immigration measures.”<sup>43</sup> In explaining that article, the SAA notes that it is intended to “make[ ] clear that no provision of any other chapter . . . *applies* to immigration measures.”<sup>44</sup>

Claimants acknowledge that provisions using the phrase “does not apply” constitute a “complete exception to a certain category of government conduct.”<sup>45</sup> Yet they have also conceded that Article 1607 which, like Article 1901(3), uses the formulation “no provision of this Agreement shall impose any obligation,” is a “clear exclusionary provision.”<sup>46</sup> Article 1901(3) likewise constitutes a clear exclusionary provision. It excludes a specific subject matter – *i.e.*, matters with respect to a Party’s

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<sup>41</sup> *Id.* at 8.

<sup>42</sup> Post-Hearing Submission of Respondent United States of America (Feb. 17, 2006) (“U.S. PH Sub.”) at 36-38.

<sup>43</sup> NAFTA art. 1607 (emphasis added).

<sup>44</sup> NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H. Doc. No. 103-159, Vol. I, 103d Cong., 1st Sess., at 176 (1993) (“SAA”) (emphasis added).

<sup>45</sup> Cls.’ PH Sub. at 23.

<sup>46</sup> *Id.* at 25.

AD/CVD law – from obligations emanating from provisions of the NAFTA outside of Chapter Nineteen.

**If Art. 1901(3) is merely “interpretive,” what is the object of interpretation? [Q. 21]**

Claimants’ response to this question reveals a critical gap in their theory. Claimants vaguely assert that Article 1901(3) prevents the interpretation of the NAFTA “in any particular context” in a manner that imposes an obligation on the Parties to amend their AD/CVD laws.<sup>47</sup> There is, however, no provision in the NAFTA that could compel a Party to amend its AD/CVD laws. Under claimants’ theory, Article 1901(3) precludes a contingency that could not exist in the first place, even without Article 1901(3).

In its early submissions, Canfor speculated that precluding State-to-State dispute resolution in Chapter Twenty was the true aim of Article 1901(3).<sup>48</sup> Canfor abandoned that theory after the United States pointed out that no similar provision was considered necessary in the Canada-U.S. Free Trade Agreement, even though that Agreement contained a similar State-to-State mechanism.

More recently, claimants have speculated that Article 1901(3) was included to prevent a Mexican court from interpreting the NAFTA to impose an obligation on the Mexican legislature to amend its municipal AD/CVD law.<sup>49</sup> Claimants cannot explain, however, why *the United States* would have sought the inclusion of an article governing

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<sup>47</sup> *Id.* at 14.

<sup>48</sup> *See, e.g., Canfor Corp. v. United States of America*, Reply to the United States’ Objection to Jurisdiction ¶ 126 (May 14, 2004) (“As the Parties had agreed upon a special 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.”); *see also id.* ¶ 111.

<sup>49</sup> Cls.’ PH Sub. at 32-33.

the respective powers of Mexico's branches of government. Moreover, Article 1901(3) does not mention Mexico, Mexican courts, the Mexican legislature or Mexican AD/CVD law. Nor does the purpose alleged by claimants comport with the United States' Statement of Administrative Action, which notes that the changes made to Article 1901 to accommodate a third Party were merely "technical."<sup>50</sup>

Claimants' theories regarding Article 1901(3)'s inclusion in the NAFTA suggest that they agree with the United States that Article 1901(3) primarily addresses the Parties' concern that an obligation could be imposed on them by some dispute resolution body.<sup>51</sup> The logical inference, however, is that the investor-State mechanism in *Chapter Eleven* was the Parties' main concern. Investor-State arbitration was the only dispute resolution mechanism that was new to the NAFTA. And a Chapter Eleven tribunal that overreached its jurisdiction by requiring a Party to pay damages in connection with the application of its AD/CVD laws would be imposing an obligation on a Party with respect to those laws. Unlike claimants' various theories regarding the inclusion of Article 1901(3), the United States' interpretation gives Article 1901(3) actual meaning, and it comports with the plain terms of that Article, in its context and in light of the Treaty's object and purpose, and with the circumstances surrounding the drafting of Chapter Nineteen.

### **Meaning of the term "AD law or CVD law" in Art. 1901(3) [Q. 35E]**

The dictionary cited by claimants and other French dictionaries support the notion that the French term "*legislation*" used in Article 1901(3) embraces not only law, but

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<sup>50</sup> SAA at 194.

<sup>51</sup> The United States notes that the provision in the Canada-Chile FTA that is nearly identical to Article 1901(3) appears under the heading "Dispute Resolution." See Canada-Chile Free Trade Agreement, Dec. 5, 1996, art. M-07.



authority to enact law and actions taken with respect to the law.<sup>52</sup> Had the Parties intended Article 1901(3) to address only AD/CVD “statutes,” they would have used that term in the English text, and would have used the corresponding terms in the Spanish and French texts, as was done in Article 1911. In any event, the phrase “with respect to” the law in Article 1901(3) is sufficiently broad to embrace actions taken pursuant to the law, regardless of the scope of the term “antidumping law or countervailing duty law.”

**Meaning of “administrative practice” in Arts. 1902(1) and 1904(2) [Q. 24]**

Claimants’ attempt to import a supposed definition of the term “administrative practice” from subsection 123(g) of the Uruguay Round Agreements Act into NAFTA Articles 1902(1) and 1904(2) is unavailing. The meaning of that term in the URAA has no bearing on the NAFTA. In any event, the URAA SAA does not actually define the term “administrative practice,” as claimants contend.<sup>53</sup> An actual definition of the term “administrative practice” in a directly related agreement is found in Article 1706 of the CFTA. That article defines administrative practice to include “all actions, practices and procedures by any federal agency having regulatory responsibility over the activities of

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<sup>52</sup> See, e.g., LE NOUVEAU PETIT ROBERT: DICTIONNAIRE ALPHABÉTIQUE ET ANALOGIQUE DE LA LANGUE FRANÇAISE 1473 (2004) (defining *legislation* as “Droit, pouvoir de faire les lois”); LABORATOIRE D’ANALYSE ET DE TRAITEMENT INFORMATIQUE DE LA LANGUE FRANÇAISE, *available at* <http://atilf.atilf.fr/dendien/scripts/fast.exe?mot=legislation> (defining *legislation* to include “action, droit, pouvoir de fair les lois.”).

<sup>53</sup> Claimants assert that the term “administrative practice” “is defined as an ‘administrative practice consisting of written policy guidance of general application.’” Cls.’ PH Sub. at 16. Read in context, however, the SAA provides:

Subsection 123(g) ensures that the Administration will consult with relevant Congressional committees, and consider public and private sector views, concerning any change in regulation, *or in administrative practice consisting of written policy guidance of general application*, that the Administration may propose in response to a WTO panel or Appellate Body report that finds the regulation or practice to be inconsistent with a Uruguay Round agreement.<sup>53</sup>

URUGUAY ROUND TRADE AGREEMENTS, STATEMENT OF ADMINISTRATIVE ACTION, H. Doc. No. 103-316, Vol. 1, 103d Cong., 2d Sess. (1994) at 352 (emphasis added). The URAA SAA thus merely describes the *type* of administrative practice that must be subject to certain consultations before it can be changed pursuant to subsection 123(g).

financial institutions, including but not limited to rules, orders, directives and approvals.” That definition incorporates the concept of “application” of a Party’s laws. Claimants’ suggestion that the Tribunal should instead refer to a non-definition in an unrelated agreement is unpersuasive.

**Relevance of the term “application” in Arts. 1902(2) and 1905(1) [Q. 27]**

Claimants’ contention that Articles 1902(2) and 1905(1) “distinguish between ‘law’ and its application” is incorrect. Those provisions do not draw any such distinction; they merely concern the application of specific categories of laws in particular circumstances (as distinct from a Party’s law, writ large). The absence of the word “application” in Article 1901(3) is irrelevant. As noted, the phrase “obligations with respect to” the law is sufficiently broad and general to encompass obligations concerning the application of the law.

**Relevance of use of “law” in Art. 1901(3) instead of “measures” or “matters” [Q. 29]**

Without any analysis, claimants assert that the term “measure” is broader than “law” and broader than “application of the law.”<sup>54</sup> As noted in our post-hearing submission, Article 1901(3)’s effect on claimants’ claims would be no different if that provision excluded the application of provisions in other chapters with respect to AD/CVD “matters.”<sup>55</sup> All AD/CVD matters are, by definition, “with respect to” AD/CVD law.

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<sup>54</sup> Cls.’ PH Sub. at 18. The United States notes that in the *UPS* case, UPS –which was represented by counsel for claimants in this arbitration – argued that Article 2103 (which provides that, with certain exceptions, nothing in the NAFTA shall apply to taxation *measures*) did not bar their claims because they challenged the “application” of the tax measure, whereas Article 2103 merely excluded challenges to the substance of a Party’s tax measures. *UPS v. Canada, Counter-Memorial of the Investor (Jurisdiction Phase)* ¶ 123 (Mar. 26, 2002), available at [http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel\\_archive-en.asp](http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel_archive-en.asp).

<sup>55</sup> U.S. PH Sub. at 28.

**Remedies available in U.S. court with respect to AD/CVD law [Qs. 35, 53, 56]**

Claimants make several acknowledgements concerning the treatment of AD/CVD determinations that further confirm that the NAFTA Parties did not consent to arbitrate such matters under Chapter Eleven. Claimants recognize, for example, that “conduct of the United States in relation to the preliminary determinations [is] not reviewable under United States’ municipal law,” or before the binational panels, because those determinations do not reflect final agency decisions.<sup>56</sup> It is inconceivable that the United States would have consented to subject preliminary determinations that do not reflect final agency decisions to Chapter Eleven review when it expressly excluded those determinations from review by its own courts, and from the specialized mechanism in the NAFTA designed for AD/CVD disputes.

Claimants likewise concede that “an investor cannot submit a claim for damages against the United States ‘relating to AD/CVD law’ in a United States court.”<sup>57</sup> Again, it strains credulity to believe that the United States consented to subject its determinations – preliminary or final – to claims for damages under Chapter Eleven of the NAFTA, when it declined to make that remedy available in its own courts.

Finally, claimants acknowledge that once a binational panel is requested, that review is “exclusive”: “In other words, the same matter may not proceed simultaneously before both the USCIT and a Binational Panel.”<sup>58</sup> The United States thus removed the possibility of duplication between its courts and the binational panels. Claimants’ theory

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<sup>56</sup> Cls.’ PH Sub. at 20.

<sup>57</sup> *Id.* at 30.

<sup>58</sup> *Id.*

that the United States nevertheless consented to simultaneous proceedings before a binational panel and a Chapter Eleven tribunal is without merit.<sup>59</sup>

### **Relevance of Art. 1905 [Q. 42]**

Claimants' speculation as to why Canada has not availed itself of Article 1905 is baseless. They suggest that the United States is immune from an Article 1905 proceeding because its acts stem not from the "application" of its laws, but from the "violation" of those laws.<sup>60</sup> Claimants' inference is unfounded. Many possible reasons may exist why Canada has not invoked Article 1905, including that the Chapter Nineteen panel decisions have been implemented and that the United States has not frustrated the binational panel process.

### **Claimants' Byrd Amendment claims [Qs. 65-77]**

Claimants concede that "[t]he 'law' itself is not conduct of the kind complained of here," confirming that they do not challenge the Byrd Amendment *per se*.<sup>61</sup> Rather, they challenge that law's alleged "effects on the application of AD or CVD law," specifically,

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<sup>59</sup> Claimants' theory is contrary to the NAFTA and the *Tariff Act*, which both provide – without qualification – that binational panel review of antidumping and countervailing duty determinations is "exclusive." See NAFTA ann. 1904.15, Sch. of U.S. ¶ 10 ("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."); 19 U.S.C. § 1516a(g) (providing for "[e]xclusive review of determination[s] by binational panels."). Additionally, there is no provision in the NAFTA or U.S. law for introducing proprietary information on the administrative record into a Chapter Eleven proceeding. See Consolidated Hrg. Tr. Vol. 1 at 168:5-14. Nor is there any ability to recreate that information in the context of these proceedings, as Commerce obtained that data from dozens of softwood lumber companies apart from claimants. Accordingly, this Tribunal could not sit in judgment of many of the claims set forth in claimants' Notices of Arbitration. Claimants have no explanation as to why, if the NAFTA Parties consented to this arbitration as they contend, the Parties did not provide Chapter Eleven tribunals and disputing parties under Chapter Eleven with access to the proprietary information on the administrative record that is essential to decide their claims.

<sup>60</sup> Cls.' PH Sub. at 27.

<sup>61</sup> *Id.* at 18. This statement, combined with claimants' refusal to give a clear, affirmative answer in response to the Tribunal's Questions 65A and 73, confirm that claimants challenge only the Amendment's alleged effect on the initiation of the investigations.

its alleged “effect on decisions to initiate investigations.”<sup>62</sup> Claimants also confirm that they have not been directly affected by the Byrd Amendment, acknowledging that “duties paid by Canfor and Terminal have not to date been distributed to the United States industry.”<sup>63</sup> The decisions to initiate the investigations were taken in the administration of U.S. AD/CVD law. Claimants’ challenge to the Amendment’s effects on the decisions to initiate AD/CVD investigations thus imposes an obligation on the United States with respect to its AD/CVD law, and is therefore barred by Article 1901(3). Claimants’ various arguments why the Byrd Amendment is not “AD/CVD law” are wrong, but irrelevant in light of their claims.<sup>64</sup>

#### **Relevance of WTO DSU reports [Qs. 81-83, Appendix A]**

Claimants have ignored the Tribunal’s request that they provide it with a “very specific discussion” of the purported twenty-five softwood lumber cases, including the cases claimants’ concede favor the United States.<sup>65</sup> Instead, they simply list the cases in an appendix, and declare a blanket victory with respect to twenty-three of them.

Claimants avoid discussing the specifics of those cases because such discussion would

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<sup>62</sup> *Id.* at 34; *see also id.* at 36.

<sup>63</sup> *Id.* at 38.

<sup>64</sup> Claimants contend that the Byrd Amendment is not AD/CVD law because: (i) it is supposedly so antithetical to U.S. AD/CVD law that it cannot fall within the scope of the term “antidumping law or countervailing duty law” in Article 1901(3); (ii) the United States did not provide notice under Article 1902(2); and (iii) the United States took the position before the WTO that the Amendment was not a specific action against dumping or subsidy. These arguments are only relevant if claimants challenge the Byrd Amendment *per se*, which they do not. Moreover, for the reasons set forth in the United States’ post-hearing submission, these arguments lack merit. The United States further notes the contradiction in claimants’ response to Question 65E, in which they assert that the WTO’s conclusions are “not relevant” to the Preliminary Question because “[t]hose Tribunals were not determining whether the Byrd Amendment is ‘antidumping law and countervailing duty law’ under NAFTA Article 1901(3), but rather were determining whether the Amendment was a ‘specific action against’ dumping or subsidy under the AD and SCM Agreements.” Claimants cannot have it both ways: they cannot ignore the WTO’s findings by distinguishing the context in which the claims occurred, yet ascribe relevance to comments made by the United States before the WTO without acknowledging the different context in which those comments were made.

<sup>65</sup> *See Consolidated Hrg. Tr. Vol. 1 at 299:18-300:14.*

highlight the fact that the United States has prevailed on numerous issues in those proceedings – many of the same issues that claimants seek to persuade this Tribunal constitute a violation of the provisions of Chapter Eleven. Notably, a WTO panel recently issued a report in which it upheld the United States’ use of “zeroing” in the context of the antidumping investigations.<sup>66</sup>

**Description of origins of softwood lumber dispute [Q. 84]**

Claimants’ argument that the softwood lumber dispute has no basis in fact, and that the United States would have imposed trade remedies against Canadian-produced softwood lumber regardless of Canadian stumpage rates, should be disregarded. The AD/CVD panel decisions and WTO panel reports uniformly describe the softwood lumber dispute as rooted primarily in the provincial stumpage programs. None of those findings support the theory advanced by claimants in response to Question 84.

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<sup>66</sup> See Sophie Walker, *WTO lumber-duty ruling favors U.S. over Canada*, HOUSTON CHRONICLE, Feb. 16, 2006 (“Canada had challenged the United States’ use of a methodology known as ‘zeroing’ to calculate the duties, but the WTO found that U.S. methods were consistent with WTO rules.”).

**CONCLUSION**

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

*Respectfully submitted,*

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