

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.

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

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TABLE OF CONTENTS

A. Claims of Canfor and Terminal.....	1
1. Do the claims of Canfor and Terminal concern the substance of the AD and CVD laws themselves, or the enactment thereof, or the conduct of Commerce and ITC?.....	1
2. If it is conduct, which conduct is exactly meant:.....	2
3. Specifically, Canfor Reply ¶¶ 34-36: “arbitrary, discriminatory and abusive conduct by organs or officials of the US Government directed at the Investor or its investment.”	4
4. Canfor and Terminal: please give the Tribunal five precise examples of politically motivated abuse of process which in their opinion constitute violations of Section A of Chapter 11?.....	7
5. If the various determinations and decisions made by Commerce and ITC are to be considered to be part of AD/CVD law, do the arguments of Canfor and Terminal alleging violations of Chapter 11 due to abuse of process still stand?..	8
B. Approach to the Preliminary Question.....	8
6. What is the legal standard to be applied to determine jurisdiction in this case? ..	8
7. Do the Parties agree with the test for determining jurisdictional disputes set forth in para. 33 of the November 22, 2002 Award in UPS?.....	10
8. Do the Parties agree with the test for determining jurisdiction set forth in paras. 33 <i>et seq.</i> and para 89 of Canada’s April 12, 2002 Reply Memorial in the <i>UPS</i> case?.....	11
9. Is the test accepted in the <i>UPS</i> jurisdiction decision satisfactory? Please articulate the test that should govern in your own words.	11
10. Are the above questions relevant, considering that the United States’ objection concerning Article 1901(3) is treated as a “Preliminary Question.”?.....	11
C. Treaty Interpretation.....	12
11. Does Article 102(2) (“Parties”) also apply to an arbitral tribunal with a private claimant under Chapter 11?	12
12. What is the relevance of the distinction between “trade” and “investment” for the purposes of interpretation? (US Reply pp. 22-24; Canfor Rej. ¶ 50).	12
13. Is good faith an independent source in customary international law? (Canfor Reply ¶¶ 49-50; US Reply n. 93). See ICJ in <i>Nicaragua</i>	13
14. [not used; see Question 35B]	13
15. What are the specific customary international law rules of interpretation that apply to Article 1901(3) beyond the guidance provided in Article 102(2) of the NAFTA and Articles 31 and 32 of the Vienna Convention?.....	13

16. Para. 147 of the January 9, 2003 *ADF* Award recites governing rules of interpretation preferring *lex specialis* over *lex generalis*. What effect, if any, does such a precedent have on this Tribunal?.....14

D. Legislative History15

17. Please explain the legislative history of Article 1901(3). See *Canfor Tr.* 556-570.....15
18. When reviewing the (different) wording in the various provisions of the various Chapters of NAFTA, should one take account of the fact that the various Chapter had been drafted by various negotiating teams and that the lawyers had the (unenviable) task to make them consistent within less than two months (“legal scrubbing”)? See Consolidation Order at ¶¶ 68-71.....17

E. Text (“ordinary meaning”)17

19. Is Chapter 19 a complete and exclusive code governing disputes concerning AD/CVD law?.....17
20. Do the provisions of Section B of Chapter 11 constitute an “obligation” within the meaning of Article 1901(3)? See *Canfor Tr.* 434-436. In particular, once an investor has given consent under Article 1121 in light of the State Party’s consent under Article 1122(1), is an arbitration agreement concluded between an investor and a State (see Article 1122(2)) and if so, does that agreement give rise to an obligation within the meaning of Article 1901(3)?18
21. If Article 1901(3) is an interpretative provision, as it is contended by *Canfor* and *Terminal*, what is the object of the interpretation? See *Canfor Tr.* 284-286.....20
22. What is to be understood by “law” in Article 1901(3)? In particular, is it to be understood as defined in20
 - (a) Article 1902(1);.....20
 - (b) Article 1904(2); and/or20
 - (c) Article 1905(1) in conjunction with Article 1911?.....20
23. If (c), what is the relevance, if any, of the fact that the definition of “domestic law” in Article 1911 does not mention “administrative practice” (but does mention a Party’s Constitution)?22
24. What is to be understood by “administrative practice” in Articles 1902(1) and 1904(2)?24
25. Can the word “law” embrace administrative decisions made pursuant to a law? Does it do so in other contexts?.....24
- 25A. On the basis of analogies to other fields of regulatory law (e.g., tax, banking, securities, labor, environmental, etc.), please explain why “AD and CVD duty determinations” should or should not fall within “administrative practice.”.....24
26. Does the word “law” include its application? If so, does application include a determination by Commerce and ITC?25

27.	What is the relevance, if any, of the fact that the first sentence of Article 1902(2) refers to “to apply its ... law”? And Article 1905(1), which refers to “the application of another Party’s law”?	27
28.	Is “conduct” as alleged by Canfor the same as “law” or the application of “law”?	27
29.	What is the relevance, if any, of the fact that Article 1901(3) mentions “law” rather than “measures” or “matters”? See for “measures,” Article 201 (“includes any law, regulation, procedure, requirement or practice”). See also <i>UPS</i> at ¶¶ 116-117. Is “measure” broader than “law” or the application of the law?	27
30.	Assuming that application of the “law” falls under Article 1901(3), if the application is so egregious, does it still fall under Article 1901(3)? If not, where is the line to be drawn?	28
31.	Would the Tribunal have jurisdiction in the event of corruption and frustration of the Chapter 19 proceedings or in the case of the adoption of legislation “disguised” as AD/CVD law?	29
32.	What is the response of the United States to Canfor’s argument that “arbitrary” conduct cannot be construed as “with respect to” the law (Canfor Rej. n. 22)?	30
33.	Does arbitrary conduct fall under the standard of review of Article 1904(3) in conjunction with Annex 1911?	30
34.	What is the standard of review in US law for final AD and CVD determinations? See Annex 1911, Section 516A(b)(1)(B) [and (A)] of the Tariff Act 1930.	30
35.	Can the United States be held responsible under Chapter 11 for conduct of Commerce and/or ITC: (a) prior to a final determination, and (b) subsequent to a binational panel decision under Article 1904, relating either to AD or CVD law or AD or CVD matters?	32
35A.	Can the United States be held responsible under Chapter 11 for its failure to reimburse duties found to have been illegally imposed either because of United States law or of the WTO covered agreements or both?	32
35B.	Is the phrase “with respect to the Party’s antidumping law or countervailing duty law” in Article 1901(3) to be read as “with respect to the Party’s antidumping duty matters or countervailing duty matters”? What is the difference between the two phrases, if any?	32
35C.	What is the significance of the phrase “Except for Article 2203 (Entry into Force),” in Article 1901(3)?	33
35D.	Is Article 1901(3) a total exclusion (“all-or-nothing”) or a partial exclusion of the jurisdiction of a Chapter 11 tribunal? If it is a partial exclusion, which matters are not excluded with respect to either AD or CVD law or AD or CVD matters?	34

- 35E. Are the French and Spanish texts of the NAFTA relevant for the Preliminary Question? If so, which provisions? And if there is a difference of meaning, which rules of interpretation apply to resolve that difference? See Vienna Convention of 1969, Article 33. And what conclusions does each party draw therefrom?34
- 35F. Assuming that Article 1901(3) excludes the jurisdiction of a Chapter 11 tribunal “with respect to the Party’s antidumping law or countervailing duty law,” is the rationale of such non-arbitrability akin to the rationale why, for example, anti-trust matters were held to be non-arbitrable in the United States in the past? Or is there another rationale, and if so, which? What is the source for the rationale?.....35

F. Context.....36

36. Where in the NAFTA, other than Article 1901(3), is the word “obligations” used? Is the meaning of the word “obligations” in those other provisions the same as in Article 1901(3)? Specifically,36
- (a) Why was the word “obligations” used in Article 1901(3) rather than an exclusionary expression such as “This Chapter does not apply to”?.....36
- (b) Is the word used elsewhere in the NAFTA for the same purpose?.....38
- (c) Is the word used consistently throughout the NAFTA?.....38
37. Please explain the differences, if any, between Article 1901(3), on the one hand, and Articles 804; 1101(3), 1121(2)(b); 1138; 1501(3); 1606(1); 1607; 2103 (Annex 2106), on the other.39
38. Why is Article 1108 silent respecting Chapter 19 proceedings?44
39. Does Article 1401(2) show that disputes under other Chapters are not subject to Chapter 11 dispute review?.....45
40. What is the effect, if any, of the fact that Chapter 19 of NAFTA does not refer to Chapter 11 and Chapter 11 does not refer to Chapter 19?.....45
41. What is the relevance, if any, of the fact that Article 2004 refers to “matters covered” while Article 1901(3) refers to “law”?46
42. What is the relevance of Article 1905, if any?.....47
43. Is Article 1112(1) limited to “inconsistencies”? If so, is Chapter 11 inconsistent with Chapter 19?47
44. If and to what extent can a binational panel under Article 1904 decide on the same matters as a Chapter 11 tribunal? If so, what is the consequence thereof?49
45. How could a Chapter 11 tribunal reach a decision that is inconsistent with an Article 1904 panel?50
46. Is there a danger of double recovery, or double jeopardy, under Chapter 11 and Article 1904, for the United States in the present case? If so, in what regard?.....52

47.	In the hypothetical event of inconsistent awards in cases under Chapter 11 and Chapter 19 between the same parties relating to the same events, which award takes precedence? Do the terms of Article 1121(1) have any effect on the question?	53
48.	If conduct concerning AD/CVD is reviewed under Article 1903, 1904 and/or 1905, should a Chapter 11 tribunal await the outcome of such review, assuming that it may review matters related to AD/CVD?.....	54
49.	Does a waiver under Article 1121(1) also apply to proceedings before a binational panel under Article 1904? Is a binational panel under Article 1904 an “administrative tribunal or court” referred to in Article 1121(1)?	55
50.	With respect to Article 1121(1), is a declaratory relief possible before a Chapter 11 tribunal?.....	56
51.	Is a decision under Article 1904 in essence declaratory?	57
52.	With respect to Article 1121(1), what is meant by “extraordinary relief”?.....	57
53.	Can an investor submit a claim for damages relating to AD/CVD law in a US court, considering that a binational panel cannot award damages under Article 1904? Is such a claim dependent upon a decision by a binational panel under Article 1904?.....	58
54.	Can Canfor and Terminal claim as damages in Chapter 11 proceedings the deposits it made in the United States pursuant to AD and CVD orders? Would this fall under restitution within Article 1135(1)(b)? See Canfor Tr. 227-232.	59
55.	Is it correct that a binational panel under Article 1904 sits in lieu of the Court [of] International Trade (“USCIT”) in the United States? If so, is there any difference in what the binational panel can decide from what, otherwise, the USCIT could decide?.....	60
56.	If and to what extent can a binational panel under Article 1904 decide on the same matters as the USCIT in the United States? If so, what is the consequence thereof?.....	61
57.	Can a Chapter 11 tribunal decide on the consequences of non-compliance by a State Party with a binational panel decision under Article 1904?	61
58.	If there is a “wanton denial” by the United States, does Chapter 19 provide remedies for such a denial (e.g., Article 1905(1)(c))? (Canfor Rej. ¶ 55).....	62
G.	Object and Purpose.....	63
59.	Does the NAFTA have a presumption against concurrent proceedings?	63
60.	What is the relevance, if any, of Article 102(1)(c): “increase substantially investment opportunities . . . ?	64
61.	Is Article 1902(2)(d)(ii) limited to “trade” or does it also comprise “investment”?.....	64
H.	Circumstances of Conclusion.....	65

62.	Why was Article 1901(3) included by the State Parties? Comp. CDA-US FTA had no such provision.....	65
63.	How does the inclusion of Article 1901(3) facilitate Mexico, as it would appear from the Statement of Administrative Action at 194?	68
64.	Please explain why Article 1901(3) does not form part of the list of “Provisions to be placed outside of Investment Chapter.”	70
I.	The Byrd Amendment	72
65.	At the Canfor hearing, the United States took the position (Canfor Tr. 91:1-2): “Ms. Menaker: Exercising jurisdiction over Canfor’s claim <i>which</i> includes a challenge to the Byrd Amendment would also impose an obligation on the United States that is with respect to its antidumping and countervailing duty law” (emphasis added). What effect, if any, does that position have upon the present proceedings?	72
65A.	Are Canfor and Terminal challenging the Byrd Amendment, per se, in this arbitration? Or is their claim regarding the Byrd Amendment limited to challenging the effect that the Byrd Amendment has had on the United States’ decisions to initiate the AD/CVD investigations at issue in this case? What is the position of the United States in respect to either position of Canfor and Terminal?	72
65B.	Are Canfor and Terminal challenging the effect of the Byrd Amendment as part of AD and CVD law in this arbitration? See Canfor Tr. 694:18-21.....	73
65C.	Assuming that Article 1901(3) excludes the jurisdiction of this Tribunal over the claims of Canfor and Terminal in this arbitration regarding AD/CVD determinations, does that exclusion also concern the claims of Canfor and Terminal with respect to the Byrd Amendment? If not, what are the reasons for having jurisdiction over claims with respect to the Byrd Amendment?	74
65D.	In connection with Question 65C, what is the relevance, if any, of:	74
	(a) The lack of notification by the United States of the Byrd Amendment under Article 1902(2)(b) to date?	74
	(b) The position that the United States has taken with respect to the nature of the Byrd Amendment in the WTO DSU proceedings (<i>cf.</i> WT/DS217/R and WT/DS2343/R, 16 September 2002, at ¶¶ 4.501-5; WT/DS217/AB/R and WT/DS234/AB/R, 16 January 2003, at ¶¶ 16-17)?	76
65E.	In connection with Question 65D(b), did the panel and Appellate Body consider the Byrd Amendment as pertaining to AD and CVD law under WTO law, and if so, in reference to what law and in what manner? If and to the extent it did so, what is the relevance of such a finding by the Appellate Body in the present arbitration?.....	77
66.	[not used; see Question 65B]	79

67.	What are the latest developments with respect to the Byrd Amendment in the United States? And before the WTO DSU?	79
68.	Assuming that the Byrd Amendment is repealed, do Canfor and Terminal have a claim regarding the Byrd Amendment before this Tribunal?.....	80
69.	Has the Byrd Amendment been notified by the United States pursuant to Article 1902(2)(b)? If not, what is the relevance of such failure, if any? See Question 65C.	81
70.	[not used; see Questions 65 – 65E].....	81
71.	What is the significance of the Byrd Amendment if it is not considered to be AD/CVD law? See also Questions 65 – 65E.....	81
72.	Is it the argument of Canfor and Terminal that the Byrd Amendment is inconsistent with the GATT 1994, and the WTO Anti-Dumping Agreement and SCM Agreement, and therefore attracts the application of Article 1105 and/or other provisions of Section A of Chapter 11 of the NAFTA? (Canfor SoC ¶ 146) If so, what is the United States’ view regarding that argument?	82
73.	Is Canfor’s and Terminal’s claim against the enactment of the law (i.e., Byrd Amendment) or “actions of DOC,” or both (SoC ¶ 147; Reply ¶ 33 n. 11)? If so, what is the United States’ view regarding that argument?.....	84
74.	Is it the argument of Canfor and Terminal that assuming that the argument of the United States with respect to Article 1901(3) is correct, the Byrd Amendment falls outside Article 1901(3), and hence a Chapter 11 tribunal has jurisdiction in any event? (Canfor Reply ¶ 33, n. 11) If so, what is the United States’ view regarding that argument?.....	84
75.	[not used; see Question 72].....	84
76.	Are the only remedies against a wrongful enactment of a law relating to AD/CVD to be found under Articles 1902-1905? If so, do they preclude a Chapter 11 claim?	85
77.	Is it correct that the Byrd Amendment has not been applied to Canfor? See US Reply n. 22. Has it been applied to Terminal? If not, what are the consequences for the Byrd Amendment for the claims of Canfor and Terminal? See also Canfor Tr. 669:3-21. What is the relevance thereof for the Preliminary Question?.....	85
J.	Other Aspects	86
78.	If NAFTA had not included Chapter 19, would the Claimants’ claims have fallen within Chapter 11 and, if so, how and why?	86
79.	What is the relevance, if any of the reliance by Canfor and Terminal on the MFN clause (Article 1103) for the Preliminary Question? See Canfor’s SoC at ¶¶ 100-103; Terminal’s Notice of Arbitration at ¶¶ 35-38; Canfor Tr. 301-302.....	86

80.	Can the United States explain how AD and CVD is dealt with in its successive Model BITs? Can the United States give representative examples of actual BITs in that regard? And what about the other FTAs concluded by the United States?	86
80A.	Is it the position of the United States that if a BIT or FTA is silent regarding United States AD and CVD law, a tribunal dealing with investor-State arbitration under such BIT or FTA lacks jurisdiction with respect to either AD or CVD law or AD or CVD matters? If so, what are the reasons for such an exclusion?	87
81.	What is the relevance, if any, of the various WTO DSU decisions arising out of the softwood lumber disputes between Canada and the United States: (a) on the questions on which the United States' arguments have prevailed; and (b) on the questions on which the United States' arguments have been rejected?	88
82.	What is the relevance, if any, that Chapter Nineteen bi-national panels and a WTO panel (15 November 2005) appear to have reached different conclusions concerning the standard of review applicable to the determination of the threat of injury by the US ITC?	88
83.	In general, are decisions of the WTO DSU relevant to the present arbitration in general and for the Preliminary Question in particular? See Canfor SoC ¶ 146; Reply n. 11, ¶¶ 44, 67, 91; Rej. ¶¶ p. 15 n.21 n. 17, ¶ 54.	89
84.	By way of background, is the following description correct:	90
	The origin of the softwood lumber dispute between Canada and the United States appears to be the manner in which the price for the logging of softwood lumber is arrived at. In the United States, softwood lumber is mostly harvested from privately owned land. In Canada, most of the softwood lumber comes from land owned by the federal or provincial government. In the United States, logging rights are based on a competitive bidding (or auction). In Canada, the federal or provincial governments set so-called stumpage fees. Stumpage is a levy or tax paid by the timber harvesters for the right to cut standing timber on public lands. Stumpage takes into account a number of factors, such as labour and transportation costs and the obligation of reforestation. It is believed in the United States that the price to be paid in the United States for logging rights for a given volume of a specified limber is higher than the stumpage rate for a comparable volume of a similar lumber in Canada. The United states also believes that the lower stumpage rates in Canada unfairly subsidize Canadian softwood lumber producers. Canada is of the opposite view.	90

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**POST-HEARING SUBMISSION OF RESPONDENT
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Pursuant to the Tribunal's instructions at the Hearing on Jurisdiction of January 11-12, 2006, the United States provides the following responses to the Tribunal's Revised List of Questions of January 15, 2006.

A. Claims of Canfor and Terminal

- 1. Do the claims of Canfor and Terminal concern the substance of the AD and CVD laws themselves, or the enactment thereof, or the conduct of Commerce and ITC?**

Canfor's and Terminal's claims principally concern the "conduct" of the U.S. Department of Commerce ("Commerce") and the International Trade Commission ("ITC") in interpreting, applying and administering the United States' antidumping and countervailing duty laws. Both claimants complain about Commerce's and the ITC's

alleged misinterpretation, misapplication and maladministration of those laws.¹ In addition, Canfor and Terminal allege that the United States' adoption of the *Continued Dumping and Subsidy Offset Act of 2000* (the "Byrd Amendment") violated certain provisions of NAFTA Chapter Eleven.² At various times, however, Canfor has represented that it is *not* challenging the adoption of the Byrd Amendment, but instead is challenging the Byrd Amendment's alleged effect on Commerce's decisions to initiate the investigations.³

2. If it is conduct, which conduct is exactly meant:

As a preliminary matter, in order for "conduct" to be the subject of a Chapter Eleven claim, that conduct must amount to a measure, within the meaning of NAFTA Article 201.⁴ Claimants repeatedly refer to their claims as challenging "conduct," without specifying what particular conduct they challenge or explaining how that conduct constitutes a "measure" that may be challenged under Chapter Eleven. To the extent that

¹ See n.7, *infra*; *Canfor Corp. v. United States of America*, Transcript of Hearing on Jurisdiction (Dec. 7-9, 2004) ("Canfor Hrg. Tr.") Vol. 2 at 408:16-22 (Canfor: "[T]he conduct that we have presented in our Statement of Claim as allegedly violating the standards of treatment in Chapter 11 of NAFTA . . . [is] decisions of a discretionary nature taken by officials in the application or administration of the laws.").

² *Canfor Corp. v. United States of America*, Notice of Arbitration and Statement of Claim (July 9, 2002) ("Canfor SOC") ¶ 141; *Terminal Forest Prods. Ltd. v. United States of America*, Notice of Arbitration (Mar. 30, 2004) ("Terminal NOA") ¶ 42.

³ At the December 2004 hearing on jurisdiction, Canfor represented that it was not challenging the adoption of the Byrd Amendment when it stated that "the argument of Canfor is not that the Byrd Amendment is, per se, violative of the standards in Chapter 11 simply as a piece of legislation on its face." Canfor Hrg. Tr. Vol. 2 at 394:16-19. Canfor elaborated by stating, "I simply want to make clear that our claims are based upon the administration of the law, not the law itself." *Id.* 395:3-5. During that hearing, President Gaillard asked Canfor whether it was still maintaining its claim challenging the adoption of the Byrd Amendment, as set forth in paragraph 141 of its SOC, and indicated that his understanding was that Canfor "had implicitly dropped" its claim challenging the adoption of the Byrd Amendment, as that argument was inconsistent with the argument advanced by Canfor in its Rejoinder. *Id.* at 613:19-22; 615:19-616:4. Canfor replied that President Gaillard had interpreted Canfor's rejoinder correctly in that respect. *Id.* at 615:13-18; 616:5-8; 616:15-17. Later, contradicting itself, Canfor stated that it was not withdrawing any of the allegations made in paragraph 141. *Id.* at 617:7-10; 618:2-4. Given these contradictory representations, it remains unclear to the United States whether Canfor maintains its challenge to the adoption of the Byrd Amendment.

⁴ See NAFTA art. 1101(1).

the so-called “conduct” is not clearly identifiable and does not constitute a “measure,” that conduct cannot form the basis for a Chapter Eleven claim.

(a) Preliminary determinations?

Yes, the “conduct” challenged by Canfor and Terminal includes the preliminary determinations.⁵

(b) Final determinations?

Yes, the “conduct” challenged by Canfor and Terminal includes the final determinations.⁶

⁵ See, e.g., Canfor SOC ¶ 3 (“Canfor . . . alleg[es] that the Respondent’s conduct in connection with, amongst other matters, preliminary determinations issued by the United States Department of Commerce . . . violated the Respondents’ obligations under Chapter 11 of the NAFTA.”); *id.* ¶ 19 (“Canfor brings this claim in connection with the Government of the United States’ violations of [the] NAFTA . . . arising out of and in connection with conduct of the Government of the United States . . . including . . . the DOC’s Preliminary Countervailing Duty Determination (‘PD-CVD’) and Preliminary Critical Circumstances Determination (‘PD-CC’) [and] the DOC’s Preliminary Anti-Dumping Determination (‘PD-ADD’)”); Terminal NOA ¶ 21 (“The Department of Commerce Preliminary CVD Determination . . . failed to meet the requisite international standard owed to Terminal and to its United States investments.”); *id.* ¶ 22 (“The Preliminary CVD and Preliminary AD Determinations . . . violated the international standard of treatment, including the standard of fair and equitable treatment.”); *id.* ¶ 23 (“The United States’ breaches of Article 1105 of NAFTA aris[e] out of the Preliminary CVD Determination.”); *id.* ¶ 24 (“The United States’ breaches of NAFTA Article 1105 aris[e] out of the Preliminary AD Determination.”); Canfor Hrg. Tr. Vol. 3 at 716:19-717:3 (conduct complained of “could include [the preliminary determinations] . . .”); 721:1-6 (“a preliminary determination might raise issues under the standard in Chapter 11”); *id.* at 737:4-9 (“preliminary determinations are one in a series of wrongful acts” that “violate[ed] the international law standards in [Chapter 11]”).

⁶ See, e.g., Canfor SOC ¶ 19 (Canfor’s claim relates to “the DOC’s Final Countervailing Duty Determination (‘FD-CVD’) and Final Antidumping Determination (‘FD-AD’) both issued by the DOC on March 26, 2002, and the ITC’s May 2002 Final Determination (‘ITC-FD’)”); *Canfor Corp. v. United States of America*, Reply to the United States’ Objection to Jurisdiction (May 14, 2004) (“Canfor Reply”) ¶ 35 (“final determinations” are “one aspect” of Canfor’s claim); Terminal NOA ¶ 21 (“[The] breaches of the United States’ obligations were perpetuated through the Final CVD and AD Determinations by the Department of Commerce and the . . . Final ITC Determination.”); *id.* ¶ 22 (“[T]he Final CVD and AD Determinations and the Final ITC Determination . . . violated the international standard of treatment . . . owed to Terminal and its United States investments.”); *id.* ¶¶ 26-28 (alleging breaches of Article 1105 arising from each of the three final determinations); *Canfor Corp. v. United States of America, Terminal Forest Prods. Ltd. v. United States of America*, Transcript of Hearing on Jurisdiction (“Consolidated Hrg. Tr.”) Vol. 1 at 222:4-224:20 (“final determinations made by the DOC and ITC in 2001 and 2002” reviewed in the WTO are also part of the course of conduct complained of in this proceeding).

(c) Interpretation and application by the investigating authorities?

Yes, the “conduct” challenged by Canfor and Terminal concerns the interpretation and application by Commerce and the ITC of U.S. trade remedy laws.⁷

(d) The process leading to the determinations?

To the extent claimants challenge the “process leading to the determinations,” their allegations are based on Commerce’s and the ITC’s interpretation and application of U.S. trade remedy law, as described in subpart (c), above.

3. Specifically, Canfor Reply ¶¶ 34-36: “arbitrary, discriminatory and abusive conduct by organs or officials of the US Government directed at the Investor or its investment.”

(a) When a final determination has been reviewed by a binational panel under Article 1904, which matters are left to be reviewed by a Chapter 11 tribunal?

A Chapter Eleven tribunal has no jurisdiction to review anything under the scenario set forth in subpart (a). If an involved Party, as that term is defined, is dissatisfied with a final binational panel decision under Article 1904, its sole avenue of

⁷ See, e.g., Canfor SOC ¶ 108 (“Respondent has persevered by attempting to effect changes, modifications or otherwise improper interpretations of its law in order to cause significant economic harm to those in the competitive position of the Canfor Group.”); *id.* ¶ 111 (“[Commerce violated] NAFTA Articles 1102, 1103 and 1105 by . . . misapplying the applicable legal standards.”); *id.* ¶ 125 (“[Commerce’s final countervailing duty determination] . . . misapplied the applicable legal standard.”); *id.* ¶ 140 (“[Commerce] interpret[ed] . . . the *Tariff Act*, to [sic] a way which it knew or ought to have known would be in breach of the United States [sic] international obligations[.]”); Canfor Reply ¶ 134 (“In this case, [the] conduct of the United States . . . arises out of . . . the application of its ‘antidumping law and countervailing duty law.’”) (internal quotation marks omitted); Terminal NOA ¶¶ 21-22, 34, 38, (“The United States’ actions [including the preliminary and final determinations] and their application to Terminal . . . have interfered with . . . Terminal and its United States investments.”); *Canfor Corp. v. United States of America*, Rejoinder on Jurisdiction of the Claimant, Canfor Corporation (Sep. 9, 2004) (“Canfor Rejoinder”) ¶¶ 35-42 (“application” of United States antidumping and countervailing duty law resulted in “arbitrary, abusive and discriminatory conduct”); Canfor Hrg. Tr. Vol. 1 at 233:6-235:5 (duties were collected “on the basis of an [improper] interpretation or application of U.S. countervailing duty or antidumping law”); *id.* Vol. 2 at 408:15-22 (“the conduct” complained of consists of “decisions . . . taken by [United States] officials in the application or administration of the [antidumping and countervailing duty] laws”); Consolidated Hrg. Tr. Vol. 1 at 222:8-13 (United States failed to administer “its antidumping and CVD regime” “in an unbiased and impartial manner”); *id.* at 284:21-286:5 (conduct complained of constitutes “intentional misapplication” of United States antidumping and countervailing duty law); *id.* Vol. 2 at 73:4-10.

redress is to invoke an Extraordinary Challenge Committee. Similar to the ICSID annulment procedure, which provides limited legal grounds for reviewing ICSID awards,⁸ Article 1904(13) permits an involved Party to avail itself of the extraordinary challenge procedure only where:

(a)(i) 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,

(ii) the panel seriously departed from a fundamental rule of procedure, or

(iii) 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

(b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel process.

Article 1904(11) forecloses the appeal of panel decisions to the courts of the importing Party.⁹ And Article 1901(3) bars the imposition of any obligations in other chapters of the NAFTA with respect to a Party's antidumping and countervailing duty law – including the obligation to subject final panel decisions to review under any dispute resolution procedure provided for in those Chapters.

A Chapter Eleven tribunal thus does not have jurisdiction to review a decision rendered by a Chapter Nineteen binational panel. Nor does it have jurisdiction to review

⁸ See ICSID, Rules of Procedure for Arbitration Proceedings (2003), Rule 50(1)(c)(iii) (providing that the grounds for annulment “are limited to the following: that the Tribunal was not properly constituted; that the Tribunal has manifestly exceeded its powers; that there was corruption on the part of a member of the Tribunal; that there has been a serious departure from a fundamental rule of procedure; that the award has failed to state the reasons on which it is based . . .”).

⁹ NAFTA art. 1904(11) (“No Party may provide in its domestic legislation for an appeal from a panel decision to its domestic courts.”).

any matter relating to a Party's antidumping or countervailing duty law that is not subject to review under Chapter Nineteen – such as preliminary AD or CVD determinations. Subjecting Chapter Nineteen panel decisions and the consequences of those decisions to review under the investment chapter would not only be contrary to Article 1901(3), it would vitiate the specific and limited extraordinary challenge process agreed to by the Parties and set forth in Article 1904(13) and Annex 1904.13.

(b) Does Article 1904 review comprise also “treatment” or “conduct”?

The “conduct” and “treatment” complained of by claimants may be – and indeed was – reviewed by a Chapter Nineteen binational panel. As noted above in response to Questions 1 and 2, the “conduct” and “treatment” complained of by claimants is the alleged misinterpretation and misapplication of U.S. AD/CVD law that resulted in the making of the AD/CVD determinations. For example, Canfor and Terminal allege that Commerce treated them wrongfully by using a “zeroing” technique to calculate average dumping margins.¹⁰ The Chapter Nineteen panel, however, reviewed that same conduct and concluded that “Commerce did not err in employing a practice of ‘zeroing’ when determining weighted average margins of dumping.”¹¹

¹⁰ Canfor SOC ¶¶ 122, 129; Terminal NOA ¶ 26(c).

¹¹ *Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, Decision of the Panel, Secretariat File No. USA-CDA-2002-1904-02 (July 17, 2003) (“AD Panel Dec.”) at 56-57. Other conduct complained of by claimants, which was also addressed by the Chapter Nineteen binational panels includes: **Price Comparisons:** Canfor SOC ¶ 95 (“[T]he DOC continued to use an unfair comparison as between products allegedly being dumped and the products allegedly injured or threatened with injury.”); Terminal NOA ¶ 24(b) (Commerce “fail[ed] to conduct its analysis on the basis of a fair comparison, thereby wholly undermining the integrity of the AD investigation.”); AD Panel Dec. at 50 (“Commerce erred in failing to make an adjustment to account for dimensional differences”); **Effect of Softwood Lumber Agreement:** Canfor SOC ¶ 114(15) (Commerce “fail[ed] to take account of the effect of the SLA on the price of logs in the United States and Canada.”); Terminal NOA ¶ 23(c)(i) (Commerce erred in “its consideration of the impact of the Softwood Lumber Agreement.”); AD Panel Dec. at 21 (“Commerce did not err in its consideration of the impact of the Softwood Lumber Agreement”); **Due Process:** Canfor SOC ¶ 131 (“DOC breached the Respondent’s obligations under NAFTA Chapter 11 to accord substantive and procedural justice to Canfor and its investments”); Terminal NOA ¶ 23(d) (Commerce “fail[ed] to provide adequate substantive and procedural protections to

(c) **What does Canfor mean by “treatment” and “conduct”?**

Not answered, as this question is directed to Canfor.

4. **Canfor and Terminal: please give the Tribunal five precise examples of politically motivated abuse of process which in their opinion constitute violations of Section A of Chapter 11?**

Not answered, as this question is directed to claimants.

Terminal.”); AD Panel Dec. at 185 (“Commerce complied with all requirements of due process under United States law”); **Production Cost Allocation:** Canfor SOC ¶ 129 (Commerce “allocat[ed] costs based only on differences in grade [of lumber] and not differences in value attributable to dimension or length.”); AD Panel Dec. at 48 (“Commerce erred by failing to use the same value-based methodology to allocate joint costs between different sizes of lumber.”); **Sufficiency of Petition:** Canfor SOC ¶ 135(7) (Commerce “initiated the investigations in response to the Petitions without . . . ensur[ing] objectively the existence of sufficient support for the Petitions by the United States softwood lumber industry.”); Terminal NOA ¶ 26(a) (Commerce “fail[ed] to ensure that the Petition had sufficient support of the United States’ domestic industry.”); *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, Decision of the Panel, Secretariat File No. USA-CDA-2002-1904-03 (Aug. 13, 2003) (“CVD Panel Dec.”) at 16 (“[T]he Panel concludes that Commerce’s determination that the petition fulfilled the statutory and regulatory requirements was in the main supported by substantial evidence and was otherwise in accordance with the law.”); **Cross-Border Benchmarks:** Canfor SOC ¶ 113 (“In total disregard of the requirements of United States law . . . the DOC declined to use ‘in-country’ benchmarks . . . and instead used a ‘cross-border’ benchmark.”); Terminal NOA ¶ 23(b) (Commerce “arbitrarily and capriciously us[ed] a cross-border analysis previously rejected by it, to determine the existence of a ‘benefit.’”); CVD Panel Dec. at 35 (“Commerce’s determination with respect to the use of cross-border benchmarks . . . is unsupported by substantial evidence and is contrary to law.”); **Alleged Political Influence on Investigations:** Canfor SOC ¶ 20 (“A review of the treatment received by the Canadian softwood lumber industry over the past 20 years demonstrates a pattern of conduct designed to ensure a predetermined, politically motivated and results-driven outcome to the investigations.”); Terminal NOA ¶ 29 (“[T]he entirety of the United States’ conduct in targeting the Canadian softwood lumber industry and proceeding with the Petitions in the manner in which it did has been permeated throughout with political interference.”); CVD Panel Dec. at 16, 39, 90 (rejecting petitioners’ political bias allegations *sub silentio* by upholding Commerce’s findings in essential respects); **Company-Specific Duty Rates:** Canfor SOC ¶ 140 (Commerce erred by “arbitrarily determining that a countrywide rate would be utilized . . . ignoring Canfor’s request for an individual rate.”); CVD Panel Dec. at 74 (Commerce “did not have a[n] . . . obligation to consider Canfor and Tembec’s request for company-specific duty rates.”); **Financial Contribution:** Canfor SOC ¶ 111(1) (Commerce “fail[ed] to provide any reasonable analysis in . . . determin[ing] that provincial stumpage programs are a ‘financial contribution.’”); CVD Panel Dec. at 20 (Commerce’s “finding of a financial contribution in this case is affirmed.”); **Specificity:** Canfor SOC ¶ 115(1) (Commerce erroneously “concluded that the provincial stumpage programs are specific” to an enterprise or industry); CVD Panel Dec. at 39 (“[T]he Panel finds that [Commerce’s] specificity determination . . . is not precluded by the statute and is supported by substantial evidence.”).

5. If the various determinations and decisions made by Commerce and ITC are to be considered to be part of AD/CVD law, do the arguments of Canfor and Terminal alleging violations of Chapter 11 due to abuse of process still stand?

No. Canfor's and Terminal's so-called "abuse of process" allegations concern Commerce's and the ITC's administration and interpretation of United States AD/CVD law that resulted in the making of the determinations.¹² The determinations made by those agencies are an integral part of those agencies' administration of the U.S. antidumping and countervailing duty law. Exercising jurisdiction over claimants' claims that Commerce and the ITC "abused" their authority by making those determinations, and subjecting those determinations to the substantive obligations in Chapter Eleven, would impose an obligation on the United States with respect to its AD/CVD law, in violation of Article 1901(3).¹³

Approach to the Preliminary Question

6. What is the legal standard to be applied to determine jurisdiction in this case?

In establishing whether the necessary consensual basis for its jurisdiction is present, a tribunal may not simply accept the claimant's interpretation of the relevant jurisdictional provisions. Nor is it sufficient for a tribunal merely to satisfy itself that claimant's interpretation is "arguable." Rather, the Tribunal's task is to make a definitive interpretation of the relevant jurisdictional provisions and then to consider whether the

¹² See responses to Questions 1 & 2(c).

¹³ See generally Consolidated Hrg. Tr. Vol. 1 at 81:19-82:10; Canfor Hrg. Tr. Vol. 1 at 90:20-91:2; *Canfor Corp. v. United States of America*, Reply on Jurisdiction of Respondent United States of America (Aug. 6, 2004) ("U.S. Reply") at 7.

claims, as credibly alleged, fall within the Tribunal's jurisdiction.¹⁴ Claimants' suggestion that the Tribunal defer interpreting Article 1901(3) and, instead, compel a merits stage is contrary to the approach taken by other courts and tribunals, and is unsupported.¹⁵

The test enunciated by Judge Koroma in the *Fisheries Jurisdiction Case* is particularly relevant because it addresses a subject-matter exclusion similar to Article 1901(3) of the NAFTA. In that case, the ICJ considered whether Canada's reservation for "disputes arising out of or concerning conservation and management measures" deprived it of jurisdiction. Judge Koroma framed the Court's task thus:

[T]he question whether the Court is entitled to exercise its jurisdiction must depend on the subject-matter and not on the applicable law, or the rules purported to have been violated. In other words, once it is established that the dispute relates to the subject-matter defined or excluded in the reservation, then the dispute is precluded from the jurisdiction of the Court, whatever the scope of the rules which have purportedly been violated.¹⁶

¹⁴ Consolidated Hrg. Tr. Vol. 1 at 33:14-20. *See, e.g., Methanex Corp. v. United States of America*, First Partial Award ¶ 121 (Aug. 7, 2002); *Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803, 856 (Dec. 12) (Separate Opinion of J. Higgins); *Plama Consortium Ltd. v. Republic of Bulgaria*, Decision on Jurisdiction, ICSID Case No. ARB/03/24 ¶¶ 118-119 (Feb. 8, 2005). It is also well established that, for purposes of a jurisdictional objection, a tribunal is required to accept as true only *factual* allegations made by the claimant, and not legal arguments. *See, e.g., Methanex* First Partial Award ¶ 112. Claimants' extraordinary proposition that, for purposes of the Preliminary Question, the Tribunal "must assume that the claimants have been subjected to treatment that violates international norms set out in 1102, 1103, 1105 and 1110," must be rejected. Consolidated Hrg. Tr. Vol. 1 at 246:15-17; Canfor Hrg. Tr. Vol. 1 at 170:11-19 ("[T]he Tribunal must accept the facts as set out in Canfor's statement of claim as true. . . . [The Tribunal] must assume that Canfor has been subject to treatment that violates international norms set out in Articles 102 [sic], 1102, 1103, 1105 and 1110, simply for the purposes of this jurisdictional motion.").

¹⁵ *See* Consolidated Hrg. Tr. Vol. 2 at 78:19-79:3 (It is "conceivable that at a hearing on the merits, the Tribunal could conclude that some aspect of the claim pled fell within an exclusion under Article 1901 sub 3. That would be a question to be determined at the merits and dependent upon the interpretation given to that provision by the Tribunal."); Canfor Hrg. Tr. Vol. 1 at 319:14-320:9 ("Canfor's position is not that 1901(3) could have no effect on the ruling – on a ruling on the merits, so on the hypothetical that you give, if it turns out that the failure to meet the standards in Chapter 11 stems directly and of necessity from the law itself, it may be that 1901(3) would function in such a way that that part of the relief that flows from violating the Standards of Conduct that comes from the law itself purely and simply might not be available. But it would be our submission that that's really a matter for the merits . . .").

¹⁶ *Fisheries Jurisdiction (Sp. v. Can.)*, 1998 I.C.J. 432, 487 ¶ 4 (Dec. 4) (Separate Op. of J. Koroma).

Likewise, here the tribunal must consider the subject matter of the dispute in relation to the matters excluded by Article 1901(3). Article 1901(3) precludes the imposition of obligations arising from any chapter of the NAFTA other than Chapter Nineteen “with respect to [a] Party’s antidumping law or countervailing duty law.” If the Tribunal determines that claimants’ claims impose any obligation on the United States with respect to those laws, it must dismiss the claims for lack of jurisdiction.

Remarkably, claimants assert that the subject matter of the dispute is investment, and not antidumping and countervailing duty law, because their claims are “premised on the U.S. conduct which violates international norms” in the investment chapter.¹⁷ Judge Koroma’s test, however – which identifies a dispute by its “subject-matter,” and not by “the rules purported to have been violated” – exposes the fallacy of that argument. The subject matter of this dispute is the United States’ interpretation and application of its antidumping and countervailing duty laws. That subject matter is reserved for the exclusive jurisdiction of Chapter Nineteen panels. Claimants’ attempt to redefine their claims to avoid Article 1901(3) is unavailing.

7. Do the Parties agree with the test for determining jurisdictional disputes set forth in para. 33 of the November 22, 2002 Award in UPS?

As a general matter, the test enunciated by the tribunal in *United Parcel Service of America Inc. v. Government of Canada* is similar to that set forth by the ICJ in the *Oil Platforms* case, namely, that the tribunal or court must ascertain whether the facts as

¹⁷ Consolidated Hrg. Tr. Vol. 1 at 245:5-246:4 (Canfor: “The claimants . . . take the position that their claims are not antidumping and CVD claims. Their claims are investment claims that are premised on the U.S. conduct which violates international norms. . . . And the conduct being complained about can be subjected to review under [Chapter Eleven] regardless of whether the conduct is in any way related to antidumping and CVD matters or investigation.”); Canfor Hrg. Tr. Vol. 1 at 169:14-170:4 (“Canfor’s position [is] that its claims are not antidumping and countervailing duty claims, they are claims that are premised on U.S. conduct which violates international norms And the conduct being complained about by Canfor can be subjected to review under both [Chapter Nineteen and Chapter Eleven], regardless of whether the conduct is in any way related to antidumping and CVD matters or investigations.”).

alleged fall within the provisions of the treaty.¹⁸ While the United States agrees with the general tests enunciated in those cases, the test stated by Judge Koroma, as described above, is particularly relevant for this case.

8. Do the Parties agree with the test for determining jurisdiction set forth in paras. 33 *et seq.* and para 89 of Canada’s April 12, 2002 Reply Memorial in the *UPS* case?

The United States agrees with the general principles set forth by Canada beginning at paragraph 33 of its Reply Memorial in the *UPS* case. In particular, the United States agrees with Canada’s statement that the tribunal should “analyze the provisions invoked as a basis for jurisdiction in order to determine whether the subject matter scope of those provisions is broad enough to cover the facts as alleged by UPS.”¹⁹ As the United States’ objection is based on an exclusionary provision, this Tribunal must make a definitive conclusion as to the scope and effect of that provision, and determine whether claimants’ claims are precluded thereby.

9. Is the test accepted in the *UPS* jurisdiction decision satisfactory? Please articulate the test that should govern in your own words.

See responses to Questions 6-8.

10. Are the above questions relevant, considering that the United States’ objection concerning Article 1901(3) is treated as a “Preliminary Question”?

The legal standards set forth in response to Questions 6-8 are relevant to the Tribunal’s approach to the Preliminary Question.

¹⁸ *Compare Oil Platforms*, 1996 I.C.J. at 856 (“The only way . . . it can be determined whether the claims . . . are sufficiently plausible [under the Treaty] is to accept *pro tem* the facts as alleged . . . to be true and [in] that light to interpret [the Treaty] for jurisdictional purposes.”) *with United Parcel Service of America Inc. v. Canada*, Award on Jurisdiction ¶ 37 (Nov. 22, 2002) (“[T]he Tribunal’s task is to discover the meaning and . . . scope of the provisions which UPS invokes as conferring jurisdiction. Do the facts alleged by UPS fall within those provisions; are the facts capable, once proved, of constituting breaches of the obligations they state?”).

¹⁹ *UPS v. Canada*, Reply Memorial of the Government of Canada on Preliminary Jurisdictional Objections ¶ 45 (Apr. 12, 2002).

B. Treaty Interpretation

11. Does Article 102(2) (“Parties”) also apply to an arbitral tribunal with a private claimant under Chapter 11?

Article 102(2) applies to the manner in which the Parties shall interpret the NAFTA (*i.e.*, in the light of its objectives . . . and in accordance with applicable rules of international law). Article 102(2) does not apply to an arbitral tribunal constituted under Chapter Eleven. Nor does a Chapter Eleven tribunal have jurisdiction to determine whether a Party has acted in accordance with Article 102(2).²⁰ NAFTA Article 1131, on the other hand, applies to a NAFTA Chapter Eleven tribunal. That Article provides that a tribunal established under Section B of Chapter Eleven “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”²¹

12. What is the relevance of the distinction between “trade” and “investment” for the purposes of interpretation? (US Reply pp. 22-24; Canfor Rej. ¶ 50).

The so-called “distinction between trade and investment” is not directly relevant to the interpretation of Article 1901(3). Rather, it is primarily relevant to the question of whether claimants’ claims are precluded under the terms of Chapter Eleven, even in the absence of Article 1901(3) – a question that the Tribunal deferred to any merits phase of these proceedings.

Canfor argues, starting at paragraph 50 of its Rejoinder, that the United States focuses on only one objective of the Treaty to the exclusion of others, and proposes that Article 1901(3) be interpreted in a way that maximizes the trade liberalizing objectives of

²⁰ See NAFTA arts. 1116 & 1117.

²¹ See also Consolidated Hrg. Tr. Vol. 1 at 239:4-18 (claimants agreeing that Article 102(2) governs the Parties, whereas Article 1131(1) governs Chapter Eleven tribunals).

the NAFTA.²² Granting Canfor access to a second forum under the NAFTA to address its antidumping and countervailing duty claims, however, would not advance the trade liberalizing objectives of the NAFTA. Canfor's arguments that Article 1901(3) should be interpreted in light of this objective provides no guidance to the Tribunal's interpretive task.²³

13. Is good faith an independent source in customary international law? (Canfor Reply ¶¶ 49-50; US Reply n. 93). See ICJ in *Nicaragua*.

No.²⁴

14. [not used; see Question 35B]

15. What are the specific customary international law rules of interpretation that apply to Article 1901(3) beyond the guidance provided in Article 102(2) of the NAFTA and Articles 31 and 32 of the Vienna Convention?

Article 1131(1) of the NAFTA provides that a Chapter Eleven tribunal shall decide the issues in dispute in accordance with the NAFTA and applicable rules of international law. 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." The International Court of Justice has determined that

²² Canfor Rejoinder ¶¶ 50-53.

²³ Claimants also mistakenly contend that the United States has asserted that investment objectives relate solely to investment provisions in the treaty, and trade objectives are solely relevant to trade provisions. The United States, however, has simply observed that it is incumbent upon a party that contends that a particular provision should be read in light of a given objective to explain how that objective informs the interpretation of the provision. Claimants have failed on that score.

²⁴ See U.S. Reply at 29 n.93, citing *Border and Transborder Armed Actions (Nicar. v. Hond.)*, 1988 I.C.J. 69, 105 ¶ 94 (Dec. 20) ("The principle of good faith is, as the Court has observed, one of the basic principles governing the creation and performance of legal obligations . . . it is not in itself a source of obligation where none would otherwise exist.") (internal citation omitted); see also *Land and Maritime Boundary (Cameroon v. Nig.)*, 1998 I.C.J. 275, 297 ¶ 39 (June 11) (same).

Article 31 is reflective of customary international law.²⁵ In addition to the customary rules of interpretation reflected in the Vienna Convention, the Tribunal could be assisted by referring to the principles of effectiveness and *lex specialis*.²⁶ Finally, the distinction between a treaty's goals and treaty obligations has been recognized by the ICJ in the *Oil Platforms* case. There, the ICJ noted that the article in the treaty at issue which provided that "there shall be firm and enduring peace and sincere friendship" between the parties, "must be regarded as fixing an objective, in light of which the other Treaty provisions are to be interpreted and applied," but could not be the basis on which a breach of treaty might be found.²⁷

16. Para. 147 of the January 9, 2003 ADF Award recites governing rules of interpretation preferring *lex specialis* over *lex generalis*. What effect, if any, does such a precedent have on this Tribunal?

An award rendered by a Chapter Eleven tribunal has no binding effect except between the disputing parties and in respect of the particular case.²⁸ Awards rendered by

²⁵ See, e.g., *Kasikili/Sedudu Island (Bots. v. Namib.)*, 1999 I.C.J. Rep. ¶ 18 (Dec. 13) (cited in *Canfor Corp. v. United States of America*, Objection to Jurisdiction of Respondent United States of America (Oct. 16, 2003) ("U.S. Objection") at 19-20 n.87).

²⁶ *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 ¶ 51 (Feb. 3) ("One of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, [is] that of effectiveness."); see also *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 24 (Apr. 9) ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purpose or effect) (cited in U.S. Reply at 16 n.49); *North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.)*, 1969 I.C.J. 3, 24 ¶ 25 (Feb. 20) (holding that where States agree to a specific, comprehensive regime of treaty obligations, "the provisions of the [treaty] will prevail in the relations between the Parties, and would take precedence over any rules having a more general character, or derived from another source."); *ADF Group, Inc. v. United States of America*, Award, ICSID Case No. ARB(AF)/00/1 ¶ 147 (Jan. 9, 2003) (The "general objectives may be conceived of as partaking of the nature of *lex generalis* while a particular detailed provision set in a particular context in the rest of a Chapter or Part of NAFTA functions as *lex specialis*."); see also NAFTA art. 1112(1) ("In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency."); Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in CANADA GAZETTE ("SOI") 68, 152 (Jan. 1, 1994) (Article 1112 "ensures that the specific provisions of other chapters are not superseded by the general provisions of this chapter.").

²⁷ *Oil Platforms*, 1996 I.C.J. at 814.

²⁸ NAFTA art. 1136(1).

other Chapter Eleven tribunals, therefore, are not precedential. A Chapter Eleven tribunal should consider, and may rely on, the reasoning of another Chapter Eleven tribunal to the extent that it finds that reasoning persuasive. In the United States' view, the *ADF* tribunal correctly stated the manner in which a treaty ought to be interpreted when it stated that “the rules of interpretation found in customary international law [] enjoin us to focus first on the actual language of the provision being construed. The object and purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph [T]he general objectives of NAFTA . . . may frequently cast light on a specific interpretive issue; but [they are] not to be regarded as overriding and superseding the latter.”²⁹

D. Legislative History

17. Please explain the legislative history of Article 1901(3). See *Canfor Tr.* 556-570.

The United States reviewed the negotiating history of Article 1901(3) at both the *Canfor* and Consolidated hearings and refers the Tribunal to those discussions.³⁰ The United States supplements those oral statements with the observation, based on subsequent consultations with the USTR, that Chapter Nineteen was never subject to a “legal scrubbing” as occurred with the other chapters of the NAFTA.³¹ There was no legal review of this text because the negotiators considered Chapter Nineteen to be so

²⁹ See *ADF Award* ¶ 147; see also U.S. Reply at 23.

³⁰ See Consolidated Hrg. Tr. Vol. 2 at 103:18-112:9; *Canfor Hrg. Tr.* Vol. 2 at 556:5-570:22.

³¹ Whereas, for example, the investment chapter *travaux* contains ten draft texts entitled “lawyers’ versions” (see *Negotiating Texts of the Investment Chapter of the NAFTA*, Vol. I at 00517-00797), no such lawyers’ versions of the Chapter Nineteen texts exist.

politically sensitive – and the text reflected so many painstakingly drafted compromises – that the negotiators did not want to reopen the text in any respect.

The United States also supplements its oral statements with the observation that the provision that ultimately became Article 1901(3) was introduced by the United States at the same round of negotiations that the United States introduced its reservation – placed in a footnote attached to the caption for Chapter Nineteen – that its participation in negotiations should not be understood to mean that the United States has agreed to the “concept” of the binational panel mechanism in the NAFTA.³² This statement, which is addressed in further detail below in response to Question 62, reflects the tentative and circumspect manner in which the United States undertook the negotiations of Article 1904. That fact is consistent with the United States’ interpretation of Article 1901(3), which also reflects the Parties’ caution in making certain that their interpretation and application of their AD/CVD laws would be subject only to the obligations that they expressly assumed in Chapter Nineteen.

Finally, the United States notes that claimants have not met the requirements of the Vienna Convention on the Law of Treaties for resort to subsidiary means of interpretation.³³ Their reliance on the negotiating history (*e.g.*, the “Provisions to be Placed Outside of Investment Chapter”) does not “confirm the meaning” of Article

³² See Negotiating Texts of the Chapter on Review and Dispute Settlement in Antidumping and Countervailing Duty Matters of the NAFTA, Vol. I, Virginia Draft (June 3, 1992) at 01142 n.1 (“Chapter 19 Negotiating Texts”); *see also* response to Question 62.

³³ See *Methanex Corp. v. United States of America*, Award (Aug. 3, 2005), Part II, Chapter B, ¶ 22 (“[P]ursuant to Article 32 [of the Vienna Convention], recourse may be had to supplementary means of interpretation only in the limited circumstances there specified. Other than that, the approach of the Vienna Convention is that the text of the treaty is deemed to be the authentic expression of the intentions of the parties; and its elucidation, rather than wide-ranging searches for the supposed intentions of the parties, is the proper object of interpretation.”).

1901(3) or resolve any ambiguity or obscurity in its ordinary meaning.³⁴ Claimants' references to the negotiating history should therefore be disregarded under the accepted rules of interpretation.

18. When reviewing the (different) wording in the various provisions of the various Chapters of NAFTA, should one take account of the fact that the various Chapter had been drafted by various negotiating teams and that the lawyers had the (unenviable) task to make them consistent within less than two months (“legal scrubbing”)? See Consolidation Order at ¶¶ 68-71.

The fact that some of the NAFTA's chapters were drafted by different (often specialized) negotiating teams may be a relevant consideration in interpreting the NAFTA's text. This may be particularly the case with respect to Chapter Nineteen, which was not only negotiated by a separate team, but was not subject to a “legal scrubbing” to conform it linguistically – or in any other way – to other chapters in the Agreement.

E. Text (“ordinary meaning”)

19. Is Chapter 19 a complete and exclusive code governing disputes concerning AD/CVD law?

Yes, insofar as the NAFTA is concerned. Chapter Nineteen provides the exclusive forum under the NAFTA for resolving disputes concerning AD/CVD matters.³⁵ Chapter Nineteen is also the only chapter that contains obligations for the Parties with respect to their AD/CVD law.³⁶ To the extent that a dispute concerns AD/CVD law, but is not a proper subject for dispute resolution under Chapter Nineteen, the NAFTA does not provide any other mechanism to resolve that dispute. For example, a preliminary

³⁴ Vienna Convention art. 32; *see also* Consolidated Hrg. Tr. Vol. 2 at 149:2-150:2.

³⁵ *See* Consolidated Hrg. Tr. Vol. 1 at 178:10-21; Canfor Hrg. Tr. Vol. 1 at 28:2-8; U.S. Reply at 5.

³⁶ NAFTA art. 1901(3).

determination, whether negative or affirmative, may not be challenged pursuant to Article 1904.

That there may be disputes concerning AD/CVD law that are not subject to binational panel review under Chapter Nineteen does not change the fact that Chapter Nineteen is the exclusive forum under the NAFTA for resolving disputes concerning a Party's AD/CVD laws. In this respect, it is noteworthy that Article 1901(3) provides that "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," without limiting the obligations that may be imposed to only those disputes that may be resolved under Chapter Nineteen itself.³⁷ Regardless of the scope of the provisions addressing antidumping law and countervailing law in Chapter Nineteen, Article 1901(3)'s exclusion for such matters is comprehensive.

20. Do the provisions of Section B of Chapter 11 constitute an "obligation" within the meaning of Article 1901(3)? See Canfor Tr. 434-436. In particular, once an investor has given consent under Article 1121 in light of the State Party's consent under Article 1122(1), is an arbitration agreement concluded between an investor and a State (see Article 1122(2)) and if so, does that agreement give rise to an obligation within the meaning of Article 1901(3)?

Yes.³⁸ The NAFTA Parties have granted their consent to arbitrate disputes in accordance with the procedures set forth in Section B of Chapter Eleven. Once a claimant submits a claim to arbitration in accordance with those procedures, an arbitration agreement is created. That agreement may be enforced by the claimant. For example, if the respondent Party fails to participate in the arbitration, Article 1124

³⁷ See Canfor Hrg. Tr. Vol. 3 at 684:12-686:4.

³⁸ See Consolidated Hrg. Tr. Vol. 1 at 29:22-30:5, 85:9-86:1; *id.* Vol. 2 at 129:7-16; Canfor Hrg. Tr. Vol. 1 at 89:8-20; U.S. Reply at 2.

provides a mechanism to enable the claimant to constitute the tribunal without the assistance or participation of the respondent Party. That tribunal would then be empowered to decide the dispute in accordance with the legal standards set forth in Section A and, if warranted, award damages against the respondent Party. The arbitration agreement thus gives rise to multiple obligations on a Party within the meaning of Article 1901(3).³⁹

Article 1607 confirms that the term “obligation” as used in Article 1901(3) encompasses obligations to submit disputes to dispute resolution. Article 1607 provides:

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

Like Article 1901(3), Article 1607 excludes “obligations” arising from other Chapters of the NAFTA. Article 1607’s exception for Chapter Twenty dispute resolution confirms that dispute resolution is deemed to impose “obligations” on a Party.

In fact, claimants themselves have proposed that the term “obligation” in Article 1901(3) be interpreted by reference to the types of obligations that are imposed on the Parties in Chapter Nineteen.⁴⁰ As the United States noted at the consolidated hearing,

³⁹ See Consolidated Hrg. Tr. Vol. 1 at 85:9-86:15 (explaining that claimants’ claims impose two types of obligations on the United States, contrary to Article 1901(3): the obligation to arbitrate in accordance with the procedures set forth in Section B of Chapter Eleven, and the substantive legal obligations set forth in Section A of Chapter Eleven).

⁴⁰ See Canfor Hrg. Tr. Vol. 1 at 280:12-282:21 (“And so, the task is to look at the provisions that are contained within Chapter 19 and examine what obligations are imposed with respect to the antidumping duty laws and the countervailing duty law as those terms are defined. Article 1902 deals with one such obligation. It is the obligation to, if you amend your law, to do so in a certain process compliant with your WTO obligations following consultations.”); *see also* Canfor Hrg. Tr. Vol. 2 at 414:3-11 (“the language in 1901(3) obligation with respect to AD and CVD duty law in our submission has to be read in the context of what Chapter 19 says about a party’s rights and obligations with respect to its AD and CVD law.”)

one of the primary obligations imposed on the Parties under Chapter Nineteen is the obligation to subject antidumping and countervailing determinations to binational panel review in accordance with Article 1904.⁴¹ Thus, under claimants' own analysis, the term "obligation" embraces obligations on a Party to subject its measures to dispute resolution.

21. If Article 1901(3) is an interpretative provision, as it is contended by Canfor and Terminal, what is the object of the interpretation? See Canfor Tr. 284-286.

Not answered, as this question is directed to claimants.

22. What is to be understood by "law" in Article 1901(3)? In particular, is it to be understood as defined in

- (a) Article 1902(1);**
- (b) Article 1904(2); and/or**
- (c) Article 1905(1) in conjunction with Article 1911?**

The terms "law" and "antidumping law or countervailing duty law" in Article 1901(3) must be interpreted in the context in which they appear. Those terms are not defined in Chapter Nineteen (or elsewhere in the NAFTA) – unlike the terms "antidumping statute," "countervailing duty statute," or "domestic law" – suggesting that the Parties did not intend to accord those terms a meaning separate and independent from their context.

⁴¹ See Consolidated Hrg. Tr. Vol. 1 at 89:17-90:5 ("one of the most important obligations contained in Chapter 19 . . . is the obligation under Article 1904 to submit one's AD/CVD duty determinations to binational panels for review."); see also NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H. Doc. No. 103-159, Vol. I, 103d Cong., 1st Sess. (1993) ("SAA") at 194-195 ("*The centerpiece of Chapter Nineteen of the NAFTA, like Chapter Nineteen of the CFTA, is the procedure described in Article 1904 whereby independent binational panels, composed of judges and experts from the two NAFTA countries involved, will review final AD and CVD determinations made by the relevant administering authorities in one country with respect to the products from one of the other two countries.*") (emphasis added).

Article 1901(3) bars the imposition of obligations on a Party “*with respect to the Party’s antidumping law or countervailing duty law.*” Regardless of how broadly or narrowly the terms “law” or “antidumping law or countervailing duty law” are construed in isolation, actions taken in administering and applying a Party’s law, including making preliminary and final determinations, are “with respect to a Party’s antidumping or countervailing duty law.” Thus, even if Commerce’s and the ITC’s determinations are not considered to be encompassed within the term “law” or “antidumping law or countervailing duty law,” obligating the United States to arbitrate a challenge to those determinations under Chapter Eleven’s procedures, and subjecting those determinations to the substantive obligations in Chapter Eleven, would impose an obligation on the United States *with respect to* its AD/CVD law.⁴²

The definitions of the term “antidumping law and countervailing duty law” in Articles 1902(1) and 1904(2) are not general definitions that apply chapter-wide. Article 1904(2) expressly states that the term is defined therein solely for purposes of that Article.⁴³ And Article 1902(1)’s context likewise demonstrates that the definition therein is limited only to that Article.⁴⁴ Had the Parties intended those definitions to apply chapter-wide, they would have defined the term in Article 1911 (Definitions) or in Article 201 (Definitions of General Applications), and would not have needed to define the term

⁴² See Consolidated Hrg. Tr. Vol. 1 at 30:6-11; *id.* Vol. 2 at 178:4-10; U.S. Reply at 2.

⁴³ NAFTA art. 1904(2) (“*For this purpose, the antidumping or countervailing duty law consists of . . .*”) (emphasis added).

⁴⁴ Importing the definition from Article 1902(1) into 1902(2), for example, would not make any sense. See Consolidated Hrg. Tr. Vol. 1 at 99:19-100:3 (noting that the definition of “antidumping law and countervailing duty law” in Article 1902(1) includes “legislative history”, but it would not make sense to interpret the phrase “antidumping law or countervailing duty law” in Article 1902(2) to include that term because that Article would then provide that each Party has the right to change or modify its legislative history).

twice in the same chapter in two different articles.⁴⁵ Indeed, that the Parties clarified that the term is defined solely for purposes of two other articles confirms that they did not intend those definitions to apply to Article 1901(3).

In any event, the definitions in Articles 1904(2) and 1902(1) of the term “antidumping law or countervailing duty law” include “administrative practice.” Determinations by Commerce and the ITC are examples of administrative practice.⁴⁶ Canfor’s own arguments suggest that the definitions in Articles 1902(1) and 1904(2) may encompass antidumping and countervailing determinations.⁴⁷ Canfor argues that the term “administrative practice” is limited to past determinations on which the agency relies in making new determinations.⁴⁸ That argument, however, is contrary to the ordinary meaning of the term “administrative practice,” and seeks to import the *context* in which the term is used in Articles 1902(1) and 1904(2) into Article 1901(3). As the United States has noted, there is no justification for doing that here.⁴⁹

23. If (c), what is the relevance, if any, of the fact that the definition of “domestic law” in Article 1911 does not mention “administrative practice” (but does mention a Party’s Constitution)?

Chapter Nineteen binational panels have authority, pursuant to Article 1904, to review a Party’s AD/CVD determinations. Article 1905 establishes a mechanism to

⁴⁵ See Consolidated Hearing Tr. Vol. 1 at 97:9-17.

⁴⁶ See U.S. Reply at 15; Consolidated Hrg. Tr. Vol. 2 at 168:3-19; Canfor Hrg. Tr. Vol. 2 at 364:2-10.

⁴⁷ See Canfor Hrg. Tr. Vol. 1 at 310:6-20 (“Let’s say that at the time the NAFTA came into force it turned out that the U.S. agency in question was using a particular past determination as a rule or guideline for deciding future cases. Certainly, in that instance, it would – what these various provisions of Article 19 say is that there is no obligation imposed upon the United States and its authorities to stop using that determination as a precedent. . . . [I]t is not obliged to stop doing that. Just as it is not obliged to change its statutes, it is not obliged to change or refrain from using other normative materials even if they’re embodied in past rulings.”).

⁴⁸ See Canfor Hrg. Tr. Vol. 1 at 267:3-8; Consolidated Hrg. Tr. Vol. 2 at 27:12-28:2.

⁴⁹ See, e.g., Canfor Hrg. Tr. Vol. 2 at 363:11-364:1.

safeguard the binational panel review system that is established in Article 1904. Article 1905 may be invoked where a Party suspects that the application of another Party's domestic law has prevented the establishment of a binational panel, has prevented that panel from rendering a decision, has prevented the implementation of the panel's decision or denied it binding force, or has resulted in a failure to provide an opportunity for review of a final determination by a panel or court in accordance with certain procedures.

The term "domestic law" is defined in Article 1911 *for purposes of Article 1905(1)* to include a Party's constitution, statutes, regulations and judicial decisions to the extent that they are relevant to the AD/CVD laws. It thus refers to laws that might be used by a Party as a basis for interfering with the operation of the binational panel system. The term "constitution" is included because a Party conceivably could frustrate the panel system by virtue of a constitutional provision. For example, if a Party declined to implement a panel decision claiming that it was unconstitutional, or amended its constitution to prevent such implementation, another involved Party could avail itself of Article 1905.⁵⁰

The definition of "domestic law" in Article 1911 does not include "administrative practice." As noted above, AD/CVD determinations are examples of administrative practice. The sole remedy with respect to AD/CVD determinations is contained in Article 1904. Article 1905, on the other hand, addresses domestic laws other than AD/CVD determinations that may impact the functioning of the panel mechanism.

⁵⁰ See Consolidated Hrg. Tr. Vol. 1 at 124:9-125:6.

24. What is to be understood by “administrative practice” in Articles 1902(1) and 1904(2)?

See response to Question 22.

25. Can the word “law” embrace administrative decisions made pursuant to a law? Does it do so in other contexts?

Yes. The word “law” may be used in a general sense to mean “a body of rules of action or conduct prescribed by controlling authority, and having binding legal force.”⁵¹

An administrative decision made pursuant to a “law” (*i.e.*, a statute) is part of the body of “law” in the broader sense of the word. That decision is made pursuant to controlling authority and has binding legal force on the parties involved. Accordingly, if an obligation is imposed with respect to a Party’s administrative decision made pursuant to a law, the obligation is imposed “with respect to the Party’s antidumping law or countervailing duty law,” and thus falls within the purview of that phrase, as used in Article 1901(3).

25A. On the basis of analogies to other fields of regulatory law (e.g., tax, banking, securities, labor, environmental, etc.), please explain why “AD and CVD duty determinations” should or should not fall within “administrative practice.”

Article 1706 of the Canada-U.S. Free Trade Agreement, which is in the Financial Services chapter, contains a definition of the term “administrative practice.” That term is defined as “All actions, practices, and procedures by any federal agency having regulatory responsibility over the activities of financial institutions, including, but not limited to, rules, orders, directives, and approvals.”⁵² By analogy, this definition supports the United States’ position that AD/CVD determinations, and the methodologies

⁵¹ BLACK’S LAW DICTIONARY 884 (6th ed. 1990).

⁵² This definition is consistent with the dictionary definition of the term “practice,” which includes “The act or process of doing something; performance.” Webster’s New Rev. U. Dictionary (1984).

employed by Commerce and the ITC in making those determinations, are properly considered to be administrative practice. In the process of administering its regulatory responsibility, the Treasury Department may issue orders and grant or deny approvals, which are all part of its “administrative practice.” Similarly, Commerce and the ITC may make AD/CVD determinations in the exercise of their regulatory responsibility over administration of U.S. AD/CVD laws, which is part of their administrative practice.⁵³

26. Does the word “law” include its application? If so, does application include a determination by Commerce and ITC?

Yes. In this context, there is no distinction between a law and the law’s application. A determination is the result of the application of U.S. AD/CVD law by Commerce or the ITC, as the case may be. Those agencies apply the U.S. *Tariff Act* and their own regulations to determine whether goods are being dumped in the United States, whether there is subsidization, and whether there is injury to the U.S. industry. If, after applying U.S. law, they determine that these conditions exist, Commerce and the ITC make determinations, and Commerce issues a duty order.

As the United States has noted in its written and oral submissions, the *UPS* tribunal rejected the distinction that claimants attempt to make here when it dismissed the claimant’s Article 1105(1) claim on the basis of Article 2103(1), which provides that “[e]xcept as set out in this Article, nothing in this Agreement shall apply to taxation measures.” In that case, UPS argued that Article 2103(1) barred only challenges to a tax law, but not challenges to the application of the law.⁵⁴ Both Canada and the United

⁵³ See Canfor Hrg. Tr. Vol. 2 at 362:1-363:10; Consolidated. Hrg. Tr. Vol. 1 at 98:2-14.

⁵⁴ *UPS v. Canada*, Counter-Memorial of the Investor (Jurisdictional Phase) ¶ 123 (Mar. 26, 2002), available at http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel_archive-en.asp.

States disagreed, finding that the distinction drawn by UPS was untenable, and UPS ultimately withdrew its Article 1105(a) claim.⁵⁵

If the distinction claimants seek to draw between a law and its application in this context were accepted, a Party's right to retain its AD/CVD law would be rendered meaningless.⁵⁶ Claimants concede, as they must, that Article 1902 (which is entitled "Retention of Domestic Antidumping and Countervailing Duty Law") permits the Parties to retain their AD/CVD law.⁵⁷ Their argument that Article 1901(3) also preserves the Parties' right to retain their law – by barring any claim that would compel a Party to amend or modify its law – would render that Article redundant of Article 1902(1). Furthermore, because there is no mechanism outside of Chapter Nineteen to compel a Party to change its laws, Article 1901(3) would serve no purpose, contrary to the principle of effectiveness.⁵⁸

In any event, Article 1901(3) incorporates the concept of "application" of the law because it contains the phrase "with respect to" that law. That construction connotes a broad and general relationship between the excluded "obligations" and "antidumping law or countervailing duty law."

⁵⁵ *UPS v. Canada*, Reply Memorial of the Government of Canada on Preliminary Jurisdictional Objections ¶¶ 112-15 (Apr. 12, 2002), available at http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel_archive-en.asp; *UPS v. Canada*, Second Submission of the United States of America ¶¶ 13-15 (May 13, 2002), available at http://www.dfait-maeci.gc.ca/tna-nac/disp/parcel_archive-en.asp; Consolidated Hr. Tr. Vol. 1 at 100:10-102:3.

⁵⁶ U.S. Reply at 13-14.

⁵⁷ Canfor Reply at ¶ 75 ("Article 1902, 'Retention of Domestic Antidumping Law and Countervailing Duty Law,' reserves to the NAFTA Parties the right to retain and apply their municipal antidumping laws.") .

⁵⁸ See Consolidated Hrg. Tr. Vol. 1 at 92:13-17; *id.* at Vol. 2 136:1-11.

27. What is the relevance, if any, of the fact that the first sentence of Article 1902(2) refers to “to apply its ... law”? And Article 1905(1), which refers to “the application of another Party’s law”?

Article 1902(2) uses the verb “apply” in establishing the NAFTA Parties’ rights to retain their antidumping and countervailing laws in the context of the NAFTA and to subject imported goods from another Party to that legal regime. Article 1905(1) uses the noun “application” in a somewhat different sense to refer to a Party’s use of its constitution, statutes, regulations and judicial decisions in a manner that frustrates the operation of the binational panel mechanism.

By contrast, Article 1901(3) uses the broad, undefined phrase “with respect to antidumping law or countervailing duty law” in a general sense. That phrase is sufficiently broad to encompass the substance of AD and CVD law, as well as the application of such law. There was no need to include the term “application” in Article 1901(3) because the phrase “with respect to antidumping law or countervailing duty law” encompasses actions taken pursuant to that law.

28. Is “conduct” as alleged by Canfor the same as “law” or the application of “law”?

Yes. The “conduct” complained of by Canfor and Terminal is Commerce’s and the ITC’s actions or inaction in applying and administering the U.S. AD/CVD laws.⁵⁹

29. What is the relevance, if any, of the fact that Article 1901(3) mentions “law” rather than “measures” or “matters”? See for “measures,” Article 201 (“includes any law, regulation, procedure, requirement or practice”). See also *UPS* at ¶¶ 116-117. Is “measure” broader than “law” or the application of the law?

⁵⁹ See response to Question 2(c); see also Canfor Hrg. Tr. Vol. 2 at 408:15-22 (“[T]he conduct that we have presented in our Statement of Claim . . . [is the] decisions of a discretionary nature taken by officials in the application or administration of the laws.”).

There is more than one way to draft a broad, exclusionary clause. The phrase “with respect to antidumping law or countervailing duty law” in Article 1901(3) is sufficiently broad to encompass the obligations that claimants’ claims would impose on the United States. Moreover, only “measures” may be challenged under Chapter Eleven. Claimants have not explained how the conduct which they are challenging constitutes a measure, but would not impose an obligation on the United States “with respect to AD/CVD law.”⁶⁰ Claimants’ claims challenging the application of U.S. AD/CVD law are claims that impose obligations on the United States with respect to its AD/CVD law.

30. Assuming that application of the “law” falls under Article 1901(3), if the application is so egregious, does it still fall under Article 1901(3)? If not, where is the line to be drawn?

Yes. So long as the conduct in question is the application or misapplication of AD/CVD law, such conduct cannot be challenged under Chapter Eleven.⁶¹ If a Commerce official, for instance, egregiously misapplied the *Tariff Act*, resulting, for example, in a five-fold increase in Canfor’s duty rate over what it would be under a proper interpretation of that Act, that does not change the fact that the finding in question was made in applying U.S. AD/CVD law.

The purpose of binational review under Article 1904 is to provide a neutral forum to correct alleged misapplications of a Party’s AD/CVD law. Article 1904 makes no distinction between misapplications of the law and so-called egregious misapplications. In either event, a binational panel has authority to review the determinations and make a finding whether the determinations were made in accordance with the Party’s domestic AD/CVD law.

⁶⁰ See generally Consolidated Hrg. Tr. Vol. 2 at 155:9-157-9.

⁶¹ See Consolidated Hrg. Tr. Vol. 1 at 107:6-15; *id.* at 30:6-11; *id.* Vol. 2 at 193:10-194:8.

Claimants have argued that the application of U.S. AD/CVD law was “egregious” because the results of the investigations were politically motivated and pre-determined.⁶² Yet, whether an alleged error is simple or egregious has no relevance whatsoever to the applicability of the Chapter Nineteen binational panel review process. In fact, it was the concern (warranted or not) that AD/CVD determinations might be tainted by the influence of domestic politics that led to the establishment of the binational panel regime in the first place. Far from falling outside that regime, allegedly “egregious” errors were the reason for creating that regime.⁶³ The so-called “egregiousness” of the Parties’ interpretation and application of their AD/CVD laws does not somehow remove the determination from the purview of Article 1904. Nor does it invest Chapter Eleven tribunals with authority to review such determinations.

31. Would the Tribunal have jurisdiction in the event of corruption and frustration of the Chapter 19 proceedings or in the case of the adoption of legislation “disguised” as AD/CVD law?

If the conduct in question is not related to antidumping and countervailing duty law, although it is labeled as such, then imposing an obligation on a Party to compensate a claimant for that conduct would not be akin to imposing an obligation on a Party with respect to its antidumping or countervailing duty law. However, as long as the conduct in question is with respect to a Party’s antidumping or countervailing duty law – no matter how arbitrary, unfair, egregious or unlawful that conduct is alleged to be – it may not be

⁶² See Canfor Hrg. Tr. Vol. 2 at 423:1-2; Consolidated Hrg. Tr. Vol. 2 at 75:16-21; Canfor SOC ¶ 126; Terminal NOA ¶ 29.

⁶³ See, e.g., SOI at 198 (“[The Chapter Nineteen panel mechanism] is designed to ensure objective and impartial decision-making by administrative agencies . . .”).

subject to the substantive and dispute resolution obligations of Chapter Eleven.⁶⁴ Rather, the sole remedy under the NAFTA is contained in Article 1904.

32. What is the response of the United States to Canfor’s argument that “arbitrary” conduct cannot be construed as “with respect to” the law (Canfor Rej. n. 22)?

See response to Question 30.

33. Does arbitrary conduct fall under the standard of review of Article 1904(3) in conjunction with Annex 1911?

Yes. Article 1904(3) provides that a binational panel must apply the standard of review set forth in Annex 1911 and the general legal principles that a court of the importing Party would otherwise apply to review a determination. The term “general legal principles” is defined in Article 1911 to include principles such as due process. Thus, if an interested party claimed that a government official acted so arbitrarily in making an AD or CVD determination so as to deny it due process, a Chapter Nineteen panel would apply due process principles in assessing that claim. Indeed, such claims were raised and addressed in the Chapter Nineteen proceedings.⁶⁵

34. What is the standard of review in US law for final AD and CVD determinations? See Annex 1911, Section 516A(b)(1)(B) [and (A)] of the Tariff Act 1930.

The standard of review to be applied by a binational panel is set forth in Annex 1911. For the United States, the standard of review is that set forth in the *Tariff Act*. Section 516A of the *Tariff Act* provides that a Chapter Nineteen binational panel “shall

⁶⁴ See Canfor Hrg. Tr. Vol. 2 at 537:16-538:14; *id.* Vol. 2 at 351:16-352:2; Consolidated Hrg. Tr. Vol. 1 at 112:1-13; *id.* Vol. 2 at 189:3-12. In any event, as the United States has observed, the “labeling” issue is not relevant in this case because claimant’s claims indisputably concern U.S. administration of its AD/CVD laws. See Canfor Hrg. Tr. Vol. 2 at 520:8-13.

⁶⁵ See, e.g., AD Panel Dec. at 185 (“Commerce complied with all requirements of due process under United States law . . .”).

hold unlawful any determination, finding, or conclusion, found to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” When reviewing Commerce’s or the ITC’s findings of fact, a Chapter Nineteen binational panel may not substitute its own assessment of the facts for that of the agency. Rather, it may only determine whether the agency exercised its fact-finding authority and weighed such facts in a reasonable way.⁶⁶ When reviewing legal determinations, the binational panel’s standard of review is similarly deferential.⁶⁷ Such deference reflects the fact that Congress has delegated to executive agencies the task of making complex, specialized determinations pursuant to, in this case, AD/CVD law because such agencies are better equipped than Congress or the courts to make proper determinations with respect to that law.⁶⁸

⁶⁶ See, e.g., *Replacement Parts for Self-Propelled Bituminous Paving Equipment From Canada*, USA 89-1904-02 at 4 (Jan. 24, 1990) (“Substantial evidence . . . means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”) (internal citation omitted); *New Steel Rails From Canada*, USA 89-1904-08 at 6 (Aug. 30, 1990) (“the panel cannot reverse the ITA’s finding merely because it would have come to a contrary factual conclusion”); *Titanium Metals Corp. v. United States*, 155 F. Supp. 2d 750, 755 (C.I.T. 2001) (court should affirm an agency’s “factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency’s conclusions”) (internal citation omitted); *Nippon Steel Corp. v. Int’l Trade Comm’n*, 345 F.3d 1379, 1381 (Fed. Cir. 2003) (courts may not make any *de novo* factual findings or reweigh the evidence that was before the ITC).

⁶⁷ See, e.g., *Chevron, U.S.A. v. N.R.D.C.*, 467 U.S. 837, 843-844 (1984) (“a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency”).

⁶⁸ See, e.g., *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362 (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.”); *Brother Indus., Ltd. v. United States*, 771 F. Supp. 374, 381 (C.I.T. 1991) (the agency’s chosen methodology for determining subsidies or dumping “is the means by which an agency carries out its statutory mandate and, as such, is generally regarded as within its discretion.”).

35. Can the United States be held responsible under Chapter 11 for conduct of Commerce and/or ITC: (a) prior to a final determination, and (b) subsequent to a binational panel decision under Article 1904, relating either to AD or CVD law or AD or CVD matters?

No. Article 1901(3) bars all obligations in other chapters with respect to all actions by a Party with respect to its antidumping or countervailing duty law, without limitation. It does not distinguish between actions prior to a final determination or actions after a binational panel has rendered its decision under Article 1904.⁶⁹

35A. Can the United States be held responsible under Chapter 11 for its failure to reimburse duties found to have been illegally imposed either because of United States law or of the WTO covered agreements or both?

No. Antidumping and countervailing duties are imposed by U.S. agencies applying U.S. antidumping and countervailing duty law. Claimants argue that they are entitled to damages in the amount of those duties because, they contend, the agencies misapplied U.S. AD/CVD law and, therefore, the duties were improperly imposed. Reviewing whether the agencies properly applied U.S. AD/CVD law and, thus, properly imposed the duties, would impose an obligation on the United States with respect to its AD/CVD law.⁷⁰

35B. Is the phrase “with respect to the Party’s antidumping law or countervailing duty law” in Article 1901(3) to be read as “with respect to the Party’s antidumping duty matters or countervailing duty matters”? What is the difference between the two phrases, if any?

Had the NAFTA Parties drafted Article 1901(3) to provide that provisions in other chapters of the Agreement may not be construed to impose obligations with respect

⁶⁹ Insofar as “conduct” prior to the issuance of a determination results in a determination that is allegedly unlawful, that “conduct” is subject to binational panel review under Article 1904. Inasmuch as the “conduct” subsequent to a determination relates to AD/CVD law, it may be the subject of an Article 1905 proceeding, or a proceeding before the CIT.

⁷⁰ In addition, Article 1905 establishes a mechanism for reviewing allegations that a Party has prevented the implementation of a binational panel decision.

to a Party's AD/CVD matters, the exclusion's scope would be basically unchanged. The effect of a provision that excludes all obligations with respect to a Parties' AD/CVD laws is to exclude all AD/CVD matters from review.

35C. What is the significance of the phrase "Except for Article 2203 (Entry into Force)," in Article 1901(3)?

The phrase emphasizes the breadth of the exclusion in Article 1901(3). Article 2203 (Entry into Force) provides that the Agreement shall enter into force upon an exchange of written notifications certifying the completion of the necessary legal procedures. The United States' Statement of Administrative Action confirms that the United States understood Article 2203 to impose an obligation on the NAFTA Parties.⁷¹ By drafting Article 1901(3) in the manner in which they did, the NAFTA Parties sought to ensure that *no* other obligations from any chapter outside of Chapter Nineteen could be imposed upon them with respect to their AD/CVD laws.⁷²

A similar construction can be found in the Canada-U.S. Free Trade Agreement.

Article 1701(1) of that agreement provides:

This Part and Articles 1601, 2001, 2002, 2003, 2010, 2101, 2104, 2105 and 2106 shall apply to financial services and constitute the entirety of the agreement between the Parties with respect to financial services. No other provision of this Agreement confers rights or imposes obligations on the Parties with respect to financial services.

Among the provisions that would otherwise impose obligations on a Party with respect to financial services is Article 2105, the Entry into Force provision. NAFTA Article 1901(3)'s exclusion is broader than the exclusion in Article 1701(1) of the CFTA

⁷¹ See SAA at 6 ("Article 2203 of the Agreement *requires* the three governments to exchange notes certifying that they have each completed necessary legal procedures as a final condition of entry into force of the NAFTA.") (emphasis added).

⁷² See Consolidated Hrg. Tr. Vol. 1 at 81:7-81:18.

as the latter “carves in” obligations in addition to that arising from the Entry into Force provision.

35D. Is Article 1901(3) a total exclusion (“all-or-nothing”) or a partial exclusion of the jurisdiction of a Chapter 11 tribunal? If it is a partial exclusion, which matters are not excluded with respect to either AD or CVD law or AD or CVD matters?

Article 1901(3) operates to exclude from the jurisdiction of a Chapter Eleven tribunal all antidumping and countervailing duty matters.⁷³

35E. Are the French and Spanish texts of the NAFTA relevant for the Preliminary Question? If so, which provisions? And if there is a difference of meaning, which rules of interpretation apply to resolve that difference? See Vienna Convention of 1969, Article 33. And what conclusions does each party draw therefrom?

The “terms of the treaty are presumed to have the same meaning in each authentic text.”⁷⁴ When equally authentic texts may give rise to different possible meanings, the meaning that “best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”⁷⁵ In this case, neither the claimants nor the respondent has suggested that there is a relevant difference in meaning among the three texts.

Rather, the French and Spanish texts support the United States’ ordinary meaning arguments. First, the United States has shown that, contrary to claimants’ arguments, there is no support for giving the phrase “with respect to” an unduly narrow meaning, at odds with its ordinary meaning. This is supported by the French text, which uses a variety of different phrases – including phrases that claimants contend to have a broader

⁷³ See Consolidated Hrg. Tr. Vol. 2 at 209:1-210:3.

⁷⁴ Vienna Convention art. 33(3).

⁷⁵ *Id.* art. 33(4).

meaning than the term “with respect to” – in places where the phrase “with respect to” appears in the English text.⁷⁶

Second, the French and Spanish texts support the United States’ position that the term “antidumping law and countervailing duty law” in Article 1901(3) does not mean “antidumping statute and countervailing duty statute.” The terms AD/CVD statutes are defined terms in Article 1911 and were not used in Article 1901(3). Both the French and Spanish texts consistently use different terms for the words “law” and “statute.” Like the English text, the Spanish and French texts use the term “law” in Article 1901(3) (as well as in Articles 1902(1) and 1904(2)), and not the word “statute” which is defined in Article 1911.⁷⁷

35F. Assuming that Article 1901(3) excludes the jurisdiction of a Chapter 11 tribunal “with respect to the Party’s antidumping law or countervailing duty law,” is the rationale of such non-arbitrability akin to the rationale why, for example, anti-trust matters were held to be non-arbitrable in the United States in the past? Or is there another rationale, and if so, which? What is the source for the rationale?

In the past, U.S. courts had refused to enforce an agreement to arbitrate or a resulting award where the dispute concerned antitrust matters, even where there was an acknowledged arbitration agreement covering the subject matter of the dispute. The rationale for this position was that antitrust disputes implicated public policy concerns that were not suitable for resolution by private, arbitral bodies. The situation in this case is quite different. Here, there has been no agreement to arbitrate disputes challenging

⁷⁶ See Canfor Hrg. Tr. Vol. 1 at 71:17-73:4 (“with respect to” appears in the French text as “sa rapportant a,” “relativement a,” “au regard des,” “en ce qui concerne,” “por ce qui concerne,” and “en ce qui a trait aux”).

⁷⁷ See generally Consolidated Hrg. Tr. Vol. 2 at 170:14-178:18.

AD/CVD determinations.⁷⁸ Article 1901(3) makes clear that the Parties did not grant their consent to arbitrate this type of dispute.

The desire of the Parties to remove AD/CVD determinations from the perceived influence of domestic politics was one of the prime motivations for the adoption of the Chapter Nineteen review mechanism. In adopting Chapter Nineteen, the Parties sought to preserve the manner in which those determinations would be reviewed, as well as the remedies that would otherwise have been available domestically. They sought only to change the forum in which these disputes would be heard. Instead of domestic judges, binational panelists were granted jurisdiction over these disputes. Although the nationality of the decision-makers were different, the Parties also sought to ensure that the panelists, like specialized domestic trade law judges, would have equivalent, specialized expertise in the area.⁷⁹

F. Context

36. Where in the NAFTA, other than Article 1901(3), is the word “obligations” used? Is the meaning of the word “obligations” in those other provisions the same as in Article 1901(3)? Specifically,

(a) Why was the word “obligations” used in Article 1901(3) rather than an exclusionary expression such as “This Chapter does not apply to”?

Article 1901(3) precludes the imposition of “obligations” from other chapters of the NAFTA with respect to a Party’s antidumping and countervailing duty law. The NAFTA contains other similarly-phrased subject-matter exclusions. Article 1607, for example, provides:

⁷⁸ See Consolidation Tr. Vol. 2 at 198:10-200:7 (distinguishing this case from non-arbitrability cases on the grounds that in the latter there is an agreement to arbitrate, whereas in the former there is no such agreement).

⁷⁹ See SAA at 199-201.

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

There is little effective difference between an exclusion such as that contained in Article 1901(3) or Article 1607 that bars the imposition of “obligations,” and one such as that contained in Article 2103(1) that provides that certain provisions “shall [not] apply.”⁸⁰

The United States’ Statement of Administrative Action, for example, provides that “Article 1607 makes clear that no provision of any other chapter of the Agreement – other than certain of the NAFTA’s institutional and transparency provisions – *applies* to immigration measures.”⁸¹ Canada’s Statement on Implementation likewise provides that “Article 2103 generally limits the application of the obligations of the NAFTA with respect to taxation measures”⁸²

The analogous tax exclusion in U.S. BITs negotiated since the mid-1990s, such as the U.S.–Albania BIT, further demonstrates the interchangeability of the language used in this type of exclusion. Article XIII(1) of that Treaty provides:

No provision of this Treaty shall impose obligations with respect to tax matters, except that: (a) Articles III [Expropriation], IX [Settlement of Disputes Between One Party and a National or Company of Another Party] and X [Settlement of Disputes Between the Parties] will apply

⁸⁰ NAFTA art. 2103(1) (“Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.”). Arguably, there is a distinction between the two formulations to the extent that certain provisions of another chapter – *e.g.*, Article 2002(3)(b), making the NAFTA Secretariat available to support Chapter Nineteen proceedings – could “apply” without imposing obligations on a Party.

⁸¹ SAA at 176 (emphasis added).

⁸² SOI at 215. The United States’ SAA uses yet a different formulation to describe Article 2103, providing that “Article 2103 limits the extent to which tax measures *are subject to* the NAFTA.” SAA at 218. (emphasis added).

with respect to expropriation; and (b) Article IX will apply with respect to an investment agreement or an investment authorization.⁸³

The submittal letter from the President to the Senate confirms the exclusionary force of this language – the same type of language that is used in NAFTA Articles 1607 and 1901(3). It explains that “Article XIII *excludes tax matters generally from the coverage of the BIT . . .*”⁸⁴ Article 1901(3) likewise ensures that no provision of any other chapter of the NAFTA *applies* with respect to a Party’s antidumping and countervailing duty law, and excludes such matters from obligations imposed by provisions in other chapters in the NAFTA.

(b) Is the word used elsewhere in the NAFTA for the same purpose?

Yes, see response to subpart (a), above.

(c) Is the word used consistently throughout the NAFTA?

While the individual context must be considered in each case, the usage of the word “obligation” appears to be basically consistent throughout the NAFTA. The usage of the term in Article 1607 is perhaps the most instructive, because of the similarity of

⁸³ U.S.-Alb. Bilateral Investment Treaty, Jan. 11, 1995, art. 13(1); *see also* U.S.-Azer. Bilateral Investment Treaty, Sept. 29, 1999, art. 13(1); U.S.-Bahr. Bilateral Investment Treaty, July 13, 1996, art. 13(1); U.S.-Bol. Bilateral Investment Treaty, Apr. 17, 1998, art. 13(1); U.S.-Croat. Bilateral Investment Treaty, July 13, 1996, art. XIV(1); U.S.-Hond. Bilateral Investment Treaty, July 1, 1995, art. 13(1); U.S.-Jordan Bilateral Investment Treaty, July 2, 1997, art. 13(1); U.S.-Mozam. Bilateral Investment Treaty, Dec. 1, 1998, art. 13(1); U.S.-Trin. & Tobago Bilateral Investment Treaty, Sept. 26, 1994, art. 13(1).

⁸⁴ Submittal Letter from Peter Tarnoff, U.S. Under Secretary of State for Political Affairs, to President William J. Clinton, U.S.-Alb. Bilateral Investment Treaty (Aug. 3, 1995) at XIII (emphasis added); *see also* Submittal Letter from Strobe Talbott, U.S. Deputy Secretary of State, to President William J. Clinton, U.S.-Azer. Bilateral Investment Treaty (Sept. 8, 2000); Submittal Letter from Madeleine Albright, U.S. Secretary of State, to President William J. Clinton, U.S.-Bahr. Bilateral Investment Treaty (April 24, 2000); Submittal Letter from Madeleine Albright, U.S. Secretary of State, to President William J. Clinton, U.S.-Bol. Bilateral Investment Treaty (April 24, 2000); Submittal Letter from Madeleine Albright, U.S. Secretary of State, to President William J. Clinton, U.S.-Croat. Bilateral Investment Treaty (May 3, 2000); Submittal Letter from Madeleine Albright, U.S. Secretary of State, to President William J. Clinton, U.S.-Hond. Bilateral Investment Treaty (May 1, 2000); Submittal Letter from Madeleine Albright, U.S. Secretary of State, to President William J. Clinton, U.S.-Jordan Bilateral Investment Treaty (May 1, 2000); Submittal Letter from Madeleine Albright, U.S. Secretary of State, to President William J. Clinton, U.S.-Mozam. Bilateral Investment Treaty (May 1, 2000); Submittal Letter from Warren Christopher, U.S. Secretary of State, to President William J. Clinton, U.S.-Trin. & Tobago Bilateral Investment Treaty (June 22, 1995).

that provision to Article 1901(3). It makes clear that the term “obligation” refers to all obligations, including the obligation to submit disputes to dispute resolution under Chapter Eleven. That Article 1607, like Article 1901(3), does not specifically refer to Chapter Eleven is irrelevant.

37. Please explain the differences, if any, between Article 1901(3), on the one hand, and Articles 804; 1101(3), 1121(2)(b); 1138; 1501(3); 1606(1); 1607; 2103 (Annex 2106), on the other.

Article 804 provides that “No Party may request the establishment of an arbitral panel under Article 2008 (Request for an Arbitral Panel) regarding any proposed emergency plan.” Article 804 expressly bars the submission of disputes concerning a Party’s proposed emergency actions from State-to-State arbitration (but does not prevent a Party from subjecting such matters to consultations under Article 2006, or to good offices, mediation or conciliation under Article 2007). While Article 804 achieves a similar purpose, in part, to Article 1901(3), it is narrower in scope. Article 804 precludes only one type of action under Chapter Eight from review under one portion of the State-to-State dispute resolution chapter, instead of precluding all obligations, substantive and procedural, that emanate from other chapters.

Article 1101(3) provides that “This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).” As the United States noted at the jurisdictional hearing, Article 1101(1), and the mirror provision in Article 1401(2) incorporating provisions of Chapter Eleven, are necessitated by the overlap in subject matter coverage between Chapters Eleven and Fourteen.⁸⁵ Chapter Eleven addresses measures relating to investors and

⁸⁵ See Consolidated Hrg. Tr. Vol. 1 at 142:14-143:21; U.S. Objection at 29 & n.108.

investments generally, whereas Chapter Fourteen's coverage includes measures relating to "investors of another party, and investments of such investors, in financial institutions."⁸⁶

Because antidumping and countervailing duty matters were already withdrawn from Chapter Eleven by virtue of Article 1901(3), there was no need to include a provision similar to Article 1101(3) pertaining to antidumping and countervailing duty matters in Chapter Eleven. Moreover, even in the absence of Article 1901(3), there would not be the same need for such an exclusion, given that, in the ordinary course, antidumping and countervailing duty claims, unlike claims relating to investments in financial institutions, are not investment claims that would be subject to Chapter Eleven in the first place.⁸⁷

Article 1121(2)(b) provides that an investor may submit a claim to arbitration under Article 1117 only if the investor and its enterprise "waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party." Article 1121(2)(b) differs from Article 1901(3) in significant respects. Article 1121(2)(b) sets forth a condition precedent to the submission of a claim to arbitration. Its purpose is to prevent concurrent proceedings with respect to the same

⁸⁶ NAFTA art. 1401(1)(b).

⁸⁷ See response to Questions 78, 80 & 80A.

measure.⁸⁸ It does not, like Article 1901(3), withdraw a particular subject matter from the application of certain parts of the Treaty.

Article 1138(1) provides that:

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

Article 1138(1) expressly withdraws restrictions on acquisitions of investments by foreign persons for the purposes of national security from State-to-State dispute resolution and investor-State arbitration. It is similar in that regard to Article 1901(3), which bars the submission of claims with respect to a Party's antidumping or countervailing duty laws to either State-to-State or investor-State dispute resolution.

Article 1138(1) is more narrow than Article 1901(3), however, because the latter bars all obligations in other parts of the NAFTA, including substantive and procedural obligations.

Article 1501(3) provides that "No Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article." As noted, the *UPS* tribunal interpreted this provision to bar not only State-to-State dispute resolution, but investor-State arbitration.⁸⁹ Article 1501(3) is similar to Article 1901(3) in that it bars

⁸⁸ See response to Question 59.

⁸⁹ *UPS* Award on Jurisdiction ¶ 61. This interpretation is confirmed by NAFTA Note 43 ("Article 1501 (Competition Law): no investor may have recourse to investor-state arbitration under the Investment Chapter for any matter arising under this Article."); see also SOI at 181 ("[A]rticle [1501] is not subject to dispute settlement (either under chapter eleven investor-state arbitration or chapter twenty.)").

recourse to dispute resolution under Chapters Twenty and Eleven.⁹⁰ Article 1501(3), however, is drafted with a more narrow focus on dispute resolution, rather than excluding all obligations.

Article 1606(1) provides that:

A Party may not initiate proceedings under Article 2007 (Commission -- Good Offices, Conciliation and Mediation) regarding a refusal to grant temporary entry under this Chapter or a particular case arising under Article 1602(1) unless: (a) the matter involves a pattern or practice; and (b) the business person has exhausted the available administrative remedies regarding the particular matter.

Article 1606(1) is similar to Article 804 in that it bars recourse to only one segment of the dispute resolution mechanism in Chapter Twenty (and then only under certain conditions). It, like Article 804, is thus more narrow in scope than Article 1901(3).

Article 1607 is the provision in the NAFTA that most closely resembles Article 1901(3) in form and function. As it is discussed at length above, the United States does not elaborate on it here.

Article 2101(3) is also similar in breadth and effect to Article 1901(3) in that it bars the application of all other provisions in the Agreement with respect to tax measures, including provisions relating to both substantive obligations and dispute resolution procedures. As Article 2103(1) has been addressed at length above, the United States does not elaborate on it here.

⁹⁰ As the United States has noted, the fact that matters arising under Chapter Nineteen are explicitly excluded from State-to-State dispute resolution by virtue of Article 2004 further supports the conclusion that those matters may not be the subject of investor-State arbitration. *See UPS Award on Jurisdiction* ¶ 61 (“NAFTA authorises a broader scope for State-State arbitration than for investor-State arbitration The natural inference [from the existence of an exclusion for State-State dispute resolution] would be that there is no such jurisdiction [under Chapter Eleven]”); U.S. Reply at 19 & n.57; Consolidated Hrg. Tr. Vol. 1 at 179:8-181:15.

Article 2106, captioned “Cultural Industries,” provides that “Annex 2106 applies to the Parties specified in that Annex with respect to cultural industries.” Annex 2106 in turn provides:

Notwithstanding any other provision of this Agreement, as between Canada and the United States, any measure adopted or maintained with respect to cultural industries, except as specifically provided in Article 302 (Market Access – Tariff Elimination), and any measure of equivalent commercial effect taken in response, shall be governed under this Agreement exclusively in accordance with the provisions of the *Canada-United States Free Trade Agreement*. The rights and obligations between Canada and any other Party with respect to such measures shall be identical to those applying between Canada and the United States.

Under NAFTA Article 2106, Canada and the United States retain vis-à-vis each other the same right to take actions, and the same right to impose countermeasures, with respect to measures concerning cultural industries as they had under the CFTA. Annex 2106 clarifies that Article 2106 applies only between Canada and the other NAFTA Parties, and not between Mexico and the United States. It also clarifies that the “cultural industries” exemption does not apply to the three governments’ sector-specific tariff elimination commitments pursuant to Article 302.

Article 2106 and Annex 2106 resemble Article 1901(3) in that they “exempt [cultural industries] from all NAFTA obligations,”⁹¹ and instead subject Canada’s measures to a specialized regime. Article 2106 and Annex 2106 differ, however, from Article 1901(3) in that they withdraw a single Party’s sector from obligations under the NAFTA, instead of all of the Parties’ obligations with respect to the particular subject matter.

⁹¹ SOI at 218.

38. Why is Article 1108 silent respecting Chapter 19 proceedings?

Article 1108, entitled “Reservations and Exceptions,” “creates a system of ‘reservations’ and ‘grandfathering’ to exempt certain laws and regulations that are not in conformity with the non-discrimination, performance requirement and senior management obligations” of Chapter Eleven.⁹² Article 1108 also sets forth the relationship between Chapter Eleven and Annexes I-IV, in which the Parties have taken certain reservations with respect to existing and future measures.

Article 1108 does not reference a number of subject matters that are already withdrawn from the purview of Chapter Eleven by other provisions. It does not mention, for example, competition law matters, which are withdrawn by Article 1501(3). It does not mention immigration matters, which are precluded by Article 1607. Nor does it mention any of the other matters which are excluded under Chapter Twenty-One, including measures taken for purposes of national security (Article 2102), measures restricting transfers where a Party experiences serious balance of payment difficulties (Article 2104), or measures taken by Canada pursuant to its “cultural industries” reservation (Article 2106 and Annex 2106).

Accordingly, no inference can be drawn from the fact that Article 1108 does not refer to antidumping and countervailing duty matters, which are already withdrawn by virtue of Article 1901(3). Moreover, as noted above, even in the absence of Article 1901(3), there would not have been the same need to include a reservation with respect to antidumping and countervailing duty matters in Article 1108 given the unlikelihood that

⁹² SAA at 142.

antidumping or countervailing duty matters could give rise to an investment claim.⁹³

Claimants' arguments based on the lack of reference to AD/CVD matters in Article 1108 are without merit.

39. Does Article 1401(2) show that disputes under other Chapters are not subject to Chapter 11 dispute review?

As noted above, Article 1401(2) expressly incorporates substantive obligations and dispute resolution provisions from Chapter Eleven into Chapter Fourteen. This article further supports the conclusion that the NAFTA Parties did not intend to subject AD/CVD matters to obligations, including dispute resolution, in chapters outside of Chapter Nineteen. Had they so intended, one would expect to see references in Chapter Nineteen to those obligations that were to be applied, as was done in Article 1401(2).

40. What is the effect, if any, of the fact that Chapter 19 of NAFTA does not refer to Chapter 11 and Chapter 11 does not refer to Chapter 19?

Chapter Nineteen *does* refer to Chapter Eleven. Article 1901(3)'s exclusion of obligations in "any other Chapter of this Agreement" includes the obligations contained in Chapter Eleven.

The fact that there is no specific cross-reference to the Chapter Nineteen dispute resolution mechanism in Chapter Eleven, and visa-versa, is not evidence that the NAFTA Parties sanctioned concurrent proceedings under those two chapters. To the contrary, had the NAFTA Parties intended such parallel proceedings, one would expect a provision similar to Article 1115 to have been placed in Chapter Nineteen providing that Article 1904 sets forth a review mechanism for antidumping and countervailing determinations "without prejudice to" a claimant's right to submit the same measures to arbitration under

⁹³ See Consolidated Hrg. Tr. Vol. 1 at 136:8-12; *id.* at 137:4-13.

Chapter Eleven. One might also expect provisions giving Chapter Nineteen panels and Chapter Eleven tribunals guidance as to how they should treat findings of fact or law, final decisions, and awards of damages or restitution that are made by the other dispute resolution body. That such provisions do not exist further confirms that claimants' arguments lack merit.

41. What is the relevance, if any, of the fact that Article 2004 refers to “matters covered” while Article 1901(3) refers to “law”?

There is no practical relevance to the fact that Article 2004 precludes “matters covered in Chapter Nineteen,” whereas Article 1901(3) precludes obligations emanating from other chapters “with respect to a Party’s antidumping law or countervailing duty law.” As an initial matter, the perspectives of Articles 2004 and 1901(3) are different. Article 2004 introduces a set of rules that applies generally to the subject matter of the NAFTA except as expressly excluded. By contrast, Article 1901(3) does not introduce a set of rules. Rather, it identifies a subject matter – the Party’s antidumping law or countervailing duty law – and provides that rules set forth elsewhere in the NAFTA are not to be construed as imposing obligations on a Party with respect to that subject matter. In short, Article 2004 focuses on certain rules and carves out a specified subject matter, while Article 1901(3) focuses on a certain subject matter and carves out most rules. The difference in terminology is largely attributable to this different focus.

Moreover, under the principle enunciated by the Chapter Eleven tribunal in the *UPS* case, the exclusion of “matters covered in Chapter Nineteen” from State-to-State arbitration necessarily means that such matters are likewise withdrawn from investor-State arbitration.⁹⁴

⁹⁴ See n. 91.

42. What is the relevance of Article 1905, if any?

Article 1905 provides a mechanism for safeguarding the panel review system. A NAFTA Party may avail itself of that mechanism when it believes that another Party has frustrated the effective implementation or functioning of the binational panel process through the application of its domestic law. Article 1905, for example, provides a Party recourse where another Party refuses to implement a final panel decision on the basis that doing so would violate its laws.⁹⁵ Article 1905, in addition to the extraordinary challenge procedure under Article 1904(13) and Annex 1904.13, further demonstrates the Parties' intent that Chapter Nineteen be a self-contained mechanism within the NAFTA for all matters pertaining to the interpretation and application of a Party's antidumping and countervailing duty laws. Similarly, the inclusion of Article 1905 demonstrates that the Parties intended for claims alleging that another Party was frustrating the proper workings of the Chapter Nineteen binational panels to be resolved through the mechanism established by Article 1905 – and that they considered such conduct to be within the scope of antidumping and countervailing duty matters – and did not intend for them to be subject to other dispute resolution mechanisms in the NAFTA.

43. Is Article 1112(1) limited to “inconsistencies”? If so, is Chapter 11 inconsistent with Chapter 19?

Chapter Nineteen provides a very specific mechanism for resolving antidumping and countervailing duty disputes. It specifies that panels must consist of five persons who are nationals of the two disputing Parties, and who possess certain specified qualifications, including being expert in trade law and being current or former judges, to

⁹⁵ See SAA at 198.

the extent possible.⁹⁶ It requires that panels apply the Party's domestic law, including its legal standard of review, and allows for review of only final determinations, and not preliminary determinations.⁹⁷ It requires that panel decisions be based solely on the administrative record, and not on any extraneous evidence or testimony.⁹⁸ And, it limits the relief that a panel may provide: where a panel finds that a determination is not consistent with the applicable law, the panel's only option is to "remand it for action not inconsistent with the panel's decision."⁹⁹ The panel may not award damages. Finally, the decisions of Chapter Nineteen panels are subject to review only under the "extraordinary challenge" standard set forth in Article 1904.13 of the NAFTA.

Subjecting the same antidumping and countervailing determinations to Chapter Eleven arbitration, however, would allow for the appointment of three tribunal members, of any nationality, who are not necessarily experts in trade law. It would allow a NAFTA tribunal to sit in judgment of preliminary determinations, to subject those determinations to international legal standards, and would open the door to factual discovery beyond the administrative record. Moreover, instead of the limited remedy of remand for action not inconsistent with the panel's decision, subjecting AD and CVD determinations to Chapter Eleven review would make administrative determinations a basis for monetary damages (a form of remedy also unavailable in U.S. court). Further, the awards rendered by

⁹⁶ NAFTA Annex 1901.2(1) ("The roster shall include judges or former judges to the fullest extent practicable."); *id.* ("Candidates shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment and general familiarity with international trade law"); Annex 1901.2(3), (4) (providing mechanism for choosing five panelists).

⁹⁷ NAFTA art. 1904(2) ("An involved Party may request that a panel review . . . a final antidumping or countervailing duty determination . . . to determine whether such determination was in accordance with the antidumping and countervailing duty law of the importing Party."); *id.* art. 1904(3) ("The panel shall apply the standard of review set out in Annex 1911 . . .").

⁹⁸ NAFTA art. 1904(2) ("An involved Party may request that a panel review [a final determination], based on the administrative record . . .").

⁹⁹ NAFTA art. 1904(8).

Chapter Eleven tribunals are not subject to review under the “extraordinary challenge” standard in Article 1904.13. Instead, they may be subject to review under the set aside or annulment regimes corresponding to the applicable arbitration rules.

Subjecting antidumping and countervailing determinations to the dispute resolution provisions of Chapter Eleven would thus supersede and defeat the provisions of Chapter Nineteen, contrary to the purpose of Article 1112(1).¹⁰⁰ In addition, subjecting those determinations to both dispute resolution procedures could give rise to conflicting decisions.¹⁰¹ In accordance with Article 1112(1), however, the provisions contained in Chapter Nineteen governing a Party’s behavior with respect to AD/CVD law should prevail over the obligations governing investment contained in Chapter Eleven.

44. If and to what extent can a binational panel under Article 1904 decide on the same matters as a Chapter 11 tribunal? If so, what is the consequence thereof?

There is no overlap in jurisdiction between Article 1904 binational panels and Chapter Eleven tribunals. The former are empowered solely to “review . . . a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party.”¹⁰² Chapter Eleven tribunals may not review such determinations, by virtue of Articles 1901(3) and 1101(1).

¹⁰⁰ See also SOI at 152 (Article 1112 “ensures that the specific provisions of other chapters are not superseded by the general provisions of [the investment] chapter.”).

¹⁰¹ See response to Question 45; see also Consolidated Hrg. Tr. Vol. 1 at 209:9-18; Canfor Hrg. Tr. Vol. 1 at 130:15-132:4.

¹⁰² NAFTA art. 1904(2).

45. How could a Chapter 11 tribunal reach a decision that is inconsistent with an Article 1904 panel?

Chapter Eleven tribunals and Article 1904 binational panels sitting in judgment of the same measures could reach inconsistent decisions of fact and law. Although Chapter Nineteen binational panels apply domestic law and Chapter Eleven tribunals apply international law, claimants assert numerous violations of domestic law as bases for their claims of breach of Chapter Eleven provisions. For example, Canfor alleges in its Statement of Claim that “in total disregard of the requirements under *United States law* . . . the [Department of Commerce] declined to use ‘in-country’ benchmarks.”¹⁰³ Likewise, in the Chapter Nineteen panel proceedings, Canfor contends that “reliance on out-of-country benchmarks . . . is contrary to” United States law.¹⁰⁴ As Canfor has put the identical legal question to two dispute resolution bodies, there is a risk of conflicting findings of law. Canfor’s Statement of Claim makes numerous similar allegations of violations of U.S. law that give rise to the same risk of inconsistencies.¹⁰⁵

The submission of the same measures to two dispute resolution mechanisms under the same treaty gives rise to the possibility of inconsistencies in a more general sense as well. Article 1904(2) provides that “[s]olely for purposes of the panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made a part of this Agreement.” Thus, a finding by a Chapter Nineteen panel that a final determination is inconsistent with a Party’s antidumping and countervailing duty law is equivalent to a finding that such determination is inconsistent with the Party’s NAFTA

¹⁰³ Canfor SOC ¶ 113 (emphasis added).

¹⁰⁴ Joint CVD Br., Vol. I at C-5.

¹⁰⁵ See, e.g., Canfor SOC ¶¶ 108, 121, 122, 129.

obligations. A Chapter Eleven tribunal addressing the same claims would also be deciding whether the Party's AD/CVD determinations were made in accordance with its NAFTA obligations. It is thus possible for one tribunal to find that the determination violates the NAFTA, while the other finds the same determination to be consistent with the Agreement.

Finally, even if a Chapter Eleven tribunal found an AD or CVD determination to be contrary to a provision in Section A of Chapter Eleven, while an Article 1904 binational panel found the same determination to be contrary to the applicable domestic law, the two bodies could not possibly provide consistent relief. The Chapter Eleven tribunal would be constrained to award damages, whereas the Article 1904 panel would be constrained to remand the determination for action not inconsistent with the panel's decision. Thus, the Chapter Eleven tribunal would have awarded damages on the basis of a determination that would cease to exist as a result of the remand ordered by the Article 1904 panel.

As the United States noted at the hearing, the United States does not raise the potential for inconsistent decisions as a basis for declining jurisdiction.¹⁰⁶ Rather, the United States contends that the Parties would not have wanted to – and did not – create an Agreement in which parallel proceedings could give rise to such conflicting findings of fact and law.

¹⁰⁶ Consolidation Hrg. Tr. Vol. 2 at 220:4-223:11.

46. Is there a danger of double recovery, or double jeopardy, under Chapter 11 and Article 1904, for the United States in the present case? If so, in what regard?

The submission of antidumping and countervailing determinations to Chapter Eleven arbitration gives rise to the potential for both double recovery and double jeopardy. Chapter Nineteen requires that each Party “amend its statutes or regulations to ensure that existing procedures concerning the refund, with interest, of antidumping and countervailing duties operate to give effect to a final panel decision that a refund is due.”¹⁰⁷ Chapter Nineteen thus expressly contemplates the possibility of a refund of part or all of the duties collected as a result of an antidumping or countervailing duty order. Indeed, Canfor requests the “return/refund of all security and estimated duty deposits” in the Chapter Nineteen proceedings.¹⁰⁸

This Tribunal could likewise issue an award of damages in an amount equal to the duties paid if it found that the imposition of those duties violated Chapter Eleven. Notably, in its Statement of Claim, Canfor lists among its alleged damages “duties paid or to be paid” – the same relief it seeks in the Chapter Nineteen proceedings.¹⁰⁹ Canfor’s promise that it will withdraw its claim in the event that it recovers its deposits through the Chapter Nineteen proceedings is a clear acknowledgement of the risk of double recovery.¹¹⁰

As noted in response to Question 45 above, the submission of claimants’ claims under Chapter Eleven also gives rise to the danger of double jeopardy for the United

¹⁰⁷ NAFTA art. 1904(15)(a).

¹⁰⁸ *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, Secretariat File No. USA-CDA-2002-1904-03, Brief of Canfor Corp. (Aug. 2, 2002) at 14.

¹⁰⁹ Canfor SOC ¶ 149.

¹¹⁰ See Canfor Hrg. Tr. Vol. 1 at 229:3-20.

States. It is possible that the United States could be found to have acted in accordance with its NAFTA obligations by one panel, and be found by the other panel to have violated the NAFTA with respect to the same measures.

Indeed, as explained in response to the prior question, the likelihood of that occurrence is heightened given that a Chapter Nineteen panel is empowered only to uphold or remand a determination. After a series of remands followed by agency re-determinations, a Chapter Nineteen panel eventually will be presented with a determination that it upholds. If a Chapter Eleven tribunal were to exercise jurisdiction over challenges to AD/CVD determinations, it could award damages for an initial determination that has been revised as a result of the Chapter Nineteen remand process.

47. In the hypothetical event of inconsistent awards in cases under Chapter 11 and Chapter 19 between the same parties relating to the same events, which award takes precedence? Do the terms of Article 1121(1) have any effect on the question?

The NAFTA does not specifically provide which award would take precedence, because it expressly precludes the same AD or CVD determination from being subject to review under two different NAFTA dispute settlement regimes. The lack of any provision in the NAFTA explicitly contemplating the possibility of conflicting decisions under Chapters Eleven and Nineteen – and providing guidance in the event thereof – further demonstrates that the Parties did not intend to submit antidumping and countervailing determinations to arbitration under Chapter Eleven. Even if the NAFTA could be construed to permit review of the same determination under two different dispute settlement regimes, however, Article 1112(1) suggests that a Chapter Nineteen panel decision would take precedence since, in the event of an inconsistency, the Party's

obligations under Chapter Nineteen prevail over those obligations imposed by Chapter Eleven.

48. If conduct concerning AD/CVD is reviewed under Article 1903, 1904 and/or 1905, should a Chapter 11 tribunal await the outcome of such review, assuming that it may review matters related to AD/CVD?

This question highlights some of the troubling issues that would arise were Article 1901(3) interpreted in a manner that permitted investor-State arbitration of claims challenging AD/CVD determinations.

Just as the NAFTA Parties did not intend parallel proceedings between Chapter Eleven tribunals and Chapter Nineteen panels, neither did they intend that Chapter Eleven tribunals would act as appellate bodies to review Chapter Nineteen decisions. To the extent that review of the decisions of Chapter Nineteen panels may be available, it is pursuant to the Extraordinary Challenge Procedure established in Article 1904(3) and Annex 1904.13 or, in appropriate cases, the Special Committee procedures established in Article 1905. In any event, it would be impossible for a Chapter Eleven tribunal to review a chapter Nineteen decision because Chapter Eleven tribunals apply different rules of decision to the cases before them.

Finally, as discussed in response to Question 45, if a Chapter Eleven tribunal were to accept jurisdiction over challenges to AD/CVD determinations, it might render an award of damages for a determination that is later revised in accordance with a Chapter Nineteen remand. The remedies provided in Articles 1903, 1904 and 1905 are designed to make the complaining party whole. This reinforces the concept that Chapter Nineteen is a self-contained regime for dealing with disputes concerning AD/CVD law. Permitting a Chapter Eleven tribunal to review such actions – either while the Chapter Nineteen

process is ongoing or after it has been completed – would undermine the fundamental nature of Chapter Nineteen as a self-contained regime.

49. Does a waiver under Article 1121(1) also apply to proceedings before a binational panel under Article 1904? Is a binational panel under Article 1904 an “administrative tribunal or court” referred to in Article 1121(1)?

Under the plain terms of Article 1121(1)(b), (and, assuming for purposes of this question, that an AD/CVD determination could be subject to review by a Chapter Eleven tribunal), the waiver requirement applies to Chapter Nineteen binational panel proceedings. Article 1121(1)(b) requires that, as a condition precedent to submitting a claim to Chapter Eleven arbitration, the investor and enterprise, where applicable, waive their rights “to initiate or continue before any administrative tribunal or court under the law of any Party, *or other dispute settlement procedures*, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116.”¹¹¹ The phrase “other dispute settlement procedures,” and its placement in the sentence *after* “under the law of any Party,” indicate the Parties’ intent that the waiver requirement apply not just to domestic proceedings, but to other proceedings as well.¹¹² The focus of Article 1121 is on the measure, not the type of proceedings.

The SAA and the SOI confirm that understanding. The SAA provides that “Article 1121 requires the investor . . . to waive the right to initiate or continue any actions in local courts *or other fora* relating to the disputed measure.”¹¹³ The SOI likewise provides that “an investor may submit a claim under Article 1116 to arbitration

¹¹¹ NAFTA art. 1121(1)(b) (emphasis added).

¹¹² See also *Int’l Thunderbird Gaming Corp. v. United States of Mexico*, Award ¶ 118 (January 26, 2006) (the purpose of Article 1121 is “to prevent a party from pursuing concurrent domestic *and international remedies*”) (emphasis added).

¹¹³ SAA at 147 (emphasis added).

only if . . . the investor . . . waive[s] [its] right to initiate or continue *legal proceedings* (except specific proceedings for injunctive, declaratory or other extraordinary relief) concerning the measure in question.”¹¹⁴

The Chapter Nineteen panel proceedings constitute “proceedings” involving “other dispute resolution procedures” with respect to the same measures that claimants allege violate Chapter Eleven. The Chapter Nineteen proceedings also constitute “[an]other fora with respect to the disputed measure[s],” and “legal proceedings concerning the measures in question.” The Chapter Nineteen proceedings thus fall squarely within Article 1121’s waiver requirement.

The United States notes, however, that its jurisdictional objection based on Article 1121 is not before the Tribunal as a preliminary question. Rather, for purposes of the Preliminary Question, the United States relies on Article 1121, among other provisions, for its contextual argument that the NAFTA reflects a presumption against concurrent proceedings.¹¹⁵

50. With respect to Article 1121(1), is a declaratory relief possible before a Chapter 11 tribunal?

No. A Chapter Eleven tribunal is empowered to order or recommend interim protective measures pursuant to Article 1134, and award monetary damages or restitution pursuant to Article 1135 (an award of restitution being subject to the Party’s right to pay monetary damages instead).¹¹⁶ There is no provision in Chapter Eleven authorizing a tribunal to issue declaratory relief.

¹¹⁴ SOI at 154 (emphasis added).

¹¹⁵ See also response to Question 59.

¹¹⁶ NAFTA art. 1135(1).

51. Is a decision under Article 1904 in essence declaratory?

No. A binational panel established under Article 1903 may issue only “declaratory opinions” in which it may “recommend” modifications to a Party’s statute to remedy any non-conformity with the GATT, the NAFTA or a prior panel decision.¹¹⁷ Article 1904, however, contemplates the possibility of a “refund, with interest, of antidumping or countervailing duties.”¹¹⁸

52. With respect to Article 1121(1), what is meant by “extraordinary relief”?

Article 1121(1) makes clear that the term “extraordinary relief” *includes* injunctive and declaratory relief not involving the payment of damages. The term is not otherwise defined in the NAFTA.¹¹⁹ Its meaning, however, is not relevant to the Preliminary Question. Even if a Chapter Nineteen proceeding could be considered one for “extraordinary relief,” the waiver provision cannot re-import into Chapter Eleven an action that is barred by Article 1901(3).

Chapter Nineteen proceedings do not, in any event, fall within the exception to Article 1121’s waiver requirement. Article 1121 provides that an investor and, where appropriate, the enterprise, must waive its right to initiate or continue any proceedings with respect to the measure that is deemed to breach Chapter Eleven. As noted in response to Question 49, this includes proceedings before Chapter Nineteen panels. An exception to the waiver requirement is provided for “proceedings for injunctive,

¹¹⁷ *Id.* art. 1903(3).

¹¹⁸ NAFTA art. 1904(15)(a).

¹¹⁹ *See* Consolidated Hrg. Tr. Vol. 1 at 96:17-97:8; *id.* at 119:2-15; Canfor Hrg. Tr. Vol. 2 at 367:3-368:1 (noting differences between exhaustive definitions in the NAFTA, which use terms such as “means” and non-exhaustive definitions, which use terms such as “includes”).

declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.”¹²⁰

Unlike the waiver, this exception does not cover “any proceedings” involving “other dispute resolution procedures.” Rather, it only applies to proceedings for such relief that are before an administrative tribunal or court under the law of the disputing Party. The negotiating history for the NAFTA’s investment chapter makes clear that the Parties considered “an administrative tribunal or court under the law of the disputing Party,” as used in Article 1121, to be the equivalent of “an administrative tribunal or court *of the disputing party*.”¹²¹ Chapter Nineteen panels are not administrative tribunals or courts of the United States. They are *ad hoc* international dispute resolution bodies that are created pursuant to an international treaty. Accordingly, even assuming *arguendo* that a Chapter Nineteen panel grants declaratory or other extraordinary relief within the meaning of Article 1121, a claim before a Chapter Nineteen panel cannot fall within the waiver exception for proceedings before an administrative tribunal or court under the law of the disputing Party.

53. Can an investor submit a claim for damages relating to AD/CVD law in a US court, considering that a binational panel cannot award damages under Article 1904? Is such a claim dependent upon a decision by a binational panel under Article 1904?

If a Commerce or ITC determination is found to be inconsistent with applicable provisions of U.S. law, the remedy – whether in a U.S. court proceeding or a binational panel proceeding – is a remand to the agency for action not inconsistent with the court’s

¹²⁰ NAFTA art. 1121(1)(b) & (2)(b).

¹²¹ Negotiating Texts of the Investment Chapter of the NAFTA, Vol. I, Watergate Daily Update (Aug. 4, 1992) at 00472, art. 2126(4)(b) & n.23 (emphasis added) (leaving the final choice of terms for the legal “scrubbing” process).

or panel's decision (*i.e.*, a redetermination). Neither a binational panel nor the CIT may award damages with respect to a Party's application of its AD/CVD law.

When Article 1904 panel proceedings are requested, the CIT is automatically divested of jurisdiction over the claims.¹²² There is no provision in the NAFTA or U.S. law for remanding the proceedings to the CIT (or other U.S. court) for any purpose.¹²³ In fact, the *Tariff Act* expressly provides that determinations by Commerce or the ITC on remand from an Article 1904 panel "shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such action on any question of law or fact by an action in the nature of mandamus or otherwise."¹²⁴

54. Can Canfor and Terminal claim as damages in Chapter 11 proceedings the deposits it made in the United States pursuant to AD and CVD orders? Would this fall under restitution within Article 1135(1)(b)? See Canfor Tr. 227-232.

No. The antidumping and countervailing duty orders obligating the payments were rendered pursuant to U.S. antidumping and countervailing duty law. Claimants are barred by Article 1901(3) (and Article 1101(1)) from submitting a claim to arbitration with respect to those deposits. That Chapter Eleven tribunals may order restitution (giving the Party the option to pay monetary damages in lieu thereof) does not affect the scope of a Chapter Eleven Tribunal's jurisdiction.

¹²² See 19 U.S.C. § 1516a(g)(2).

¹²³ See 19 U.S.C. § 1516a(g)(7)(A).

¹²⁴ *Id.*

55. Is it correct that a binational panel under Article 1904 sits in lieu of the Court [of] International Trade (“USCIT”) in the United States? If so, is there any difference in what the binational panel can decide from what, otherwise, the USCIT could decide?

Chapter Nineteen panels are said to “stand in the shoes” of the CIT when reviewing final determinations.¹²⁵ When panel review is requested pursuant to Article 1904, the CIT is divested of jurisdiction to review that determination pursuant to the NAFTA and U.S. law.¹²⁶

Unlike a binational panel, the CIT has jurisdiction with respect to a number of trade-related matters outside of the antidumping and countervailing duty laws.¹²⁷ The CIT also has broader jurisdiction than Chapter Nineteen panels with respect to AD/CVD matters. For example, unlike Chapter Nineteen panels, the CIT has injunctive powers.¹²⁸ Thus, only a portion of the CIT’s jurisdiction is “transferred” to an Article 1904 panel when panel review is requested.

¹²⁵ See, e.g., Antidumping and Countervailing Duty Investigations of Certain Softwood Lumber Products From Canada: NAFTA Panel Decision, 69 Fed. Reg. 69,584, 69,585 (Dep’t Commerce Nov. 30, 2004) (“Because NAFTA panels step into the shoes of the courts they are replacing, they must apply the law of the national court that would otherwise review the administrative determination.”).

¹²⁶ See NAFTA art. 1904(11) (“A final determination shall not be reviewed under any judicial review procedures of the importing party if an involved Party requests a panel with respect to that determination within the time limits set out in this Article.”); *id.* Annex 1904.15, Schedule of the United States ¶ 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.”). That the NAFTA and U.S. law do not contain any similar provision defining the relationship between the CIT and Chapter Eleven, and expressly investing Chapter Eleven tribunals with jurisdiction over antidumping and countervailing duty matters, is further evidence that the NAFTA Parties never intended to subject their determinations to Chapter Eleven arbitration.

¹²⁷ See 28 U.S.C. § 1581.

¹²⁸ 19 U.S.C. § 1515a.

56. If and to what extent can a binational panel under Article 1904 decide on the same matters as the USCIT in the United States? If so, what is the consequence thereof?

Pursuant to the NAFTA and U.S. law, once binational panel review is requested, that review is “exclusive” of the CIT’s jurisdiction.¹²⁹ There is no possibility of a panel and the Court deciding on the same matter. Of course, if a panel is not requested, the CIT is empowered to decide on the same matter that a Chapter Nineteen panel would have considered, in addition to other matters not covered by Chapter Nineteen.¹³⁰

57. Can a Chapter 11 tribunal decide on the consequences of non-compliance by a State Party with a binational panel decision under Article 1904?

No. Chapter Nineteen is a self-contained regime for all “Review and Dispute Settlement” in “Antidumping and Countervailing Duty Matters.”¹³¹ A Chapter Eleven tribunal would be precluded, by virtue of Article 1901(3), from deciding a claim that alleged non-compliance with a binational panel decision. A Chapter Eleven tribunal, for example, that ordered a Party to pay damages because the Party failed to lower duties imposed pursuant to its domestic antidumping and countervailing duty laws, in accordance with a panel decision, would impose an obligation on that Party with respect to those antidumping and countervailing duty laws. In addition, the non-compliance with a panel decision is not a “measure adopted or maintained by a Party relating to” investors or investments, within the meaning of Article 1101(1), that would fall within the scope of

¹²⁹ NAFTA Annex 1904.15, Schedule of the United States ¶ 10 (“[I]f binational panel review is requested such review will be exclusive.”).

¹³⁰ See response to Question 55.

¹³¹ NAFTA Chapter Nineteen, Title.

Chapter Eleven in any event. As noted, however, the issue of Chapter Eleven's scope is not presently before the Tribunal.¹³²

Additionally, as noted in response to Question 53, the *Tariff Act* expressly provides that determinations by Commerce or the ITC on remand from an Article 1904 panel "shall not be subject to judicial review, and no court of the United States shall have power or jurisdiction to review such action on any question of law or fact by an action in the nature of mandamus or otherwise."¹³³ The United States would not have precluded its own courts from deciding on the consequences of alleged non-compliance with a NAFTA binational panel decision under Article 1904, yet permitted a tribunal constituted under a different section of the NAFTA to do so.

58. If there is a "wanton denial" by the United States, does Chapter 19 provide remedies for such a denial (e.g., Article 1905(1)(c))? (Canfor Rej. ¶ 55)

If a so-called "wanton denial" is based on the application of a Party's domestic law, then Article 1905 provides a remedy. Article 1905 provides the sole remedy in the NAFTA for a Party's non-compliance with panel decisions as a result of the application of the Party's domestic law. If a Party's non-compliance is, for whatever reason, not subject to Article 1905, then there is no remedy available under the NAFTA.¹³⁴

¹³² See responses to Questions 78 and 80.

¹³³ 19 U.S.C. § 1516a(g)(7)(A).

¹³⁴ The United States notes that in issuing its remand determinations in both the antidumping and countervailing duty investigations, the United States has acted consistently with its Chapter Nineteen obligations.

G. Object and Purpose

59. Does the NAFTA have a presumption against concurrent proceedings?

Yes, there is a general presumption against concurrent proceedings under different NAFTA dispute resolution procedures.¹³⁵ Article 102(1)(e) provides that one of the objectives of the NAFTA is to “create effective procedures for the . . . resolution of disputes.” Concurrent proceedings under different NAFTA dispute settlement regimes concerning the same claims are an ineffective and inefficient means for resolving those claims.

The NAFTA contains several provisions that manifest the Parties’ intent to avoid concurrent proceedings by the same claimant with respect to the same measure. Article 1121, for example, requires, as a condition precedent to the submission of a claim to Chapter Eleven arbitration, that a claimant waive its right to commence or continue any other proceedings with respect to the same measures alleged to breach Chapter Eleven. As the tribunal in *International Thunderbird Gaming Corp. v. The United States of Mexico* recently noted, the purpose of Article 1121 is “to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.”¹³⁶ Claimants’ contention that the Parties intended to subject their antidumping and countervailing determinations to parallel proceedings under the NAFTA

¹³⁵ Where the NAFTA Parties contemplated concurrent proceedings under different NAFTA dispute resolution procedures, they made this explicit. See NAFTA art. 1115. See also Consolidated Hrg. Tr. Vol. 2 at 221:19-223:11; U.S. Objection at 25-26; U.S. Reply at 24-25.

¹³⁶ *Thunderbird* Award ¶ 118. See also *Waste Management v. The United Mexican States*, Award (June 2, 2002) ¶ 27 (“[W]hen 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.”); NAFTA Annex 1120.1.

is contrary to the Agreement's object and purpose, as elaborated in Article 1121 and other provisions.

60. What is the relevance, if any, of Article 102(1)(c): “increase substantially investment opportunities . . .”?

Article 102(1)(c) does not aid the Tribunal's central task in the Preliminary Question of interpreting Article 1901(3). It does not, for example, support claimants' argument that Article 1901(3) merely allows the Parties to retain their AD/CVD laws. Article 102(1)(c) refers generally to the various NAFTA provisions that are intended to promote and protect foreign investment. It does not override the Agreement's ordinary meaning in the furtherance of those goals. To do so would be contrary to accepted canons of treaty interpretation, and would run afoul of Article 1112(1), which renders Chapter Eleven's investment protections subsidiary to the provisions of other chapters. In any event, claimants have failed to show how granting them a forum under Chapter Eleven for their antidumping and countervailing duty claims would advance the NAFTA's objective of increasing substantially investment opportunities.

61. Is Article 1902(2)(d)(ii) limited to “trade” or does it also comprise “investment”?

Article 1902(2)(d)(ii) sets forth certain objectives of the NAFTA and Chapter Nineteen against which an Article 1903 panel may assess an amendment to a Party's antidumping or countervailing duty law. Article 1902(2)(d)(ii) notes that such objectives include “establishing fair and predictable conditions for the progressive liberalization of trade,” which objectives are coupled with the Parties' need to maintain “effective and fair disciplines on unfair trade practices.” Article 1902(2)(d)(ii) does not specifically mention investment, although it mentions the objectives of the NAFTA, which include the

promotion of investment opportunities. It is doubtful that the NAFTA Parties considered that an Article 1903 panel would review an amendment to a Party's trade laws for consistency with the NAFTA's investment objectives.

H. Circumstances of Conclusion

62. Why was Article 1901(3) included by the State Parties? Comp. CDA-US FTA had no such provision.

There is no direct evidence of the Parties' reasons for including Article 1901(3) in the NAFTA. The language and context of Article 1901(3), and the circumstances of the conclusion of the NAFTA, however, suggest that Article 1901(3) was included as a safeguard to ensure that Chapter Nineteen would operate as a self-contained regime for disputes involving the Parties' respective AD and CVD laws. One of the most significant differences between the NAFTA and the CFTA was the inclusion of an investor-State mechanism in the NAFTA. Whereas under the CFTA, the risk was low that a *Party* would misinterpret the Agreement it had negotiated and entered into, and seek to submit the other Party's antidumping and countervailing determinations to obligations outside of Chapter Nineteen (and, thereby, subject *its own* determinations to those same obligations), the introduction of investor-State arbitration under the NAFTA may have, in part, prompted the inclusion of the clarification found in Article 1901(3).

In addition, the degree of political sensitivity in the United States over subjecting AD/CVD matters to international dispute resolution was even greater in 1992, when the NAFTA was being negotiated, than it was in 1986 and 1987, when the CFTA was being negotiated. This was due, in part, to the fact that Chapter Nineteen of the CFTA had become a target of significant criticism in the United States. Thus, at the time the NAFTA was being negotiated, there was an even greater sensitivity and caution in

ensuring that it was clear exactly what obligations the United States was assuming in regard to its AD/CVD laws were being assumed.

Article 1901(3) is linguistically similar to provisions found elsewhere in the NAFTA, and in the CFTA, that were employed by the Parties to shield a particular subject matter from obligations in other parts of the Agreement, including obligations pertaining to dispute resolution. NAFTA Article 1607, for example, shields immigration measures from obligations arising under the Agreement, except where specified. The specific inclusion of State-to-State dispute resolution among those “obligations” confirms the exclusion of investor-State arbitration with respect to immigration matters.

Likewise, Article 1701(1) of the CFTA employed language similar to that of Article 1901(3) to cabin financial services from obligations arising from other parts of the Agreement – including the obligation to subject matters concerning financial services to dispute resolution under the Agreement. Like Chapter Nineteen of the NAFTA, Article 1704(2) of the CFTA contains the Parties’ chosen mechanism for resolving disputes with respect to the matters covered by that chapter.¹³⁷

NAFTA Article 1607 and CFTA Article 1701(1) thus suggest that the type of exclusion used in Article 1901(3) serves to clarify that a particularly sensitive subject matter is entirely exempt from obligations in other parts of the Agreement, including dispute resolution obligations, and, instead, is subject to the exclusive and specialized regime agreed to by the Parties.

The NAFTA’s negotiating history may also shed some light on Article 1901(3)’s inclusion. Chapter Nineteen of the CFTA was the result of a political bargain struck

¹³⁷ CFTA art. 1704(1).

between two Parties that could not agree upon either a common set of antidumping and countervailing duty rules, or leaving the subject matter of antidumping and countervailing duty law out of the Agreement altogether.¹³⁸

When the United States began negotiating AD/CVD matters under the NAFTA, it did so in a tentative and circumspect manner. The United States proposed the provision that would become Article 1901(3) in the very first composite draft of June 3, 1992 (“Virginia Draft”).¹³⁹ In that same draft, the United States also included the following reservation:

The United States reserves the right freely to add, delete, modify or revise the draft U.S. text which is included in this composite solely for purposes of discussion. Inclusion of the U.S. draft text is not in any way an agreement by the United States with the concept of binational panel review in a NAFTA.¹⁴⁰

Thus, at the same time it introduced Article 1901(3), the United States indicated that it was not necessarily committed even to the “concept” of continuing the binational panel dispute resolution mechanism under the NAFTA.

In the Watergate Composite of July 22, 1992, the reservation was modified to apply to all three negotiating Parties.¹⁴¹ In the Watergate Composite of August 6, 1992, the reservation does not appear.¹⁴² In that same negotiating draft, the brackets and

¹³⁸ See United States-Canada Free Trade Agreement: Hearing Before the Senate Comm. on the Judiciary, 100th Cong., at 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.”); JAMES R. CANNON, JR., RESOLVING DISPUTES UNDER CHAPTER 19 146, 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.”).

¹³⁹ See Chapter 19 Negotiating Texts, Vol. 1, Virginia Composite (June 3, 1992) at 01143.

¹⁴⁰ *Id.* at 01142 n.1.

¹⁴¹ Chapter 19 Negotiating Texts, Vol. 1, Watergate Composite (July 22, 1992) at 01272 n.1.

¹⁴² Chapter 19 Negotiating Texts, Vol. 1, Watergate Composite (Aug. 6, 1992) at 01337.

underline were removed from the provision that ultimately became Article 1901(3). The assurance provided by Article 1901(3) that antidumping and countervailing duty matters were immune from the rest of the Agreement thus appears to bear a direct correlation to the Parties' willingness to accept in concept the binational panel review mechanism in Chapter Nineteen.

In light of this background, Article 1901(3) reflects the Parties' caution by ensuring that antidumping and countervailing duty matters could not be subject to obligations in other parts of the Agreement, and would only be subject to the specialized regime created for that purpose in Chapter Nineteen.

63. How does the inclusion of Article 1901(3) facilitate Mexico, as it would appear from the Statement of Administrative Action at 194?

As the United States noted at the hearing, the function of Article 1901(3) is not to facilitate Mexico's inclusion in the NAFTA.¹⁴³ The U.S. Statement of Administrative Action, in pertinent part, provides, "Articles 1901 and 1902 make clear that each country retains its domestic antidumping and countervailing duty laws and can amend them. . . . These provisions are identical to Articles 1901 through 1903 of the CFTA, except for technical changes necessary to accommodate the addition of a third country."

Article 1901(3), like the remainder of Article 1901, and Articles 1902 and 1903, does ensure that the Parties may retain their antidumping and countervailing duty laws. It does this by making clear that no obligations from the NAFTA, outside of Chapter Nineteen, can be imposed on the Parties with respect to such laws. Indeed, a Party's right

¹⁴³ Consolidated Hrg. Tr. Vol. 2 at 159:11-160:7.

to retain its law would be seriously compromised if that Party were ordered to pay monetary damages for having applied the law that it was permitted to retain.¹⁴⁴

The second sentence in the SAA quoted above, on which claimants rely, does not mention Article 1901(3) specifically, nor does it mention Mexico. Rather, it provides that “These provisions [Articles 1901 through 1903] are identical to Articles 1901 through 1903 of the CFTA, except for technical changes necessary to accommodate the addition of a third country.”¹⁴⁵ This Statement merely reflects the fact that the language used in the CFTA’s provisions was appropriate where there were only two State Parties to the Agreement, whereas linguistic alterations were necessary to accommodate a three-Party Agreement. For example, it was necessary to change the reference to “the other Party” in Article 1901(1) of the CFTA – a formulation suitable only for a two-Party Agreement – to “another Party” in Article 1901(1) of the NAFTA.¹⁴⁶ The inclusion of Article 1901(3) is not a technical adaptation from a two-Party Agreement to a three-Party Agreement.

When the SAA provides that Articles 1901 through 1903 are “identical” to the CFTA except for technical changes to accommodate a three-Party Agreement, it means that those Articles are identical in *substance* – a substance that was not altered by Article 1901(3)’s inclusion. The statement does not mean, as claimants argue without explanation,¹⁴⁷ that Article 1901(3) somehow accommodates the inclusion of Mexico into the Agreement.

¹⁴⁴ Consolidated Hrg. Tr. Vol. 2 at 161:4-7; U.S. Reply at 12-15.

¹⁴⁵ SAA at 194.

¹⁴⁶ See Consolidated Hrg. Tr. Vol. 1 at 42:7-16; NAFTA art. 1901(1), Redlined Text (provided at Consolidated Hrg. on Jan. 12, 2006).

¹⁴⁷ Canfor Rejoinder ¶ 65; Consolidated Hrg. Tr. Vol. 1 at 290:9-291:7; Canfor Hrg. Tr. Vol. 1 at 294:6-21.

64. Please explain why Article 1901(3) does not form part of the list of “Provisions to be placed outside of Investment Chapter.”

Claimants note that the negotiating texts of the investment chapter include a section at the end captioned “Provisions to be placed outside of investment chapter,” and contend that the fact that antidumping and countervailing duty matters are not mentioned in that section demonstrates that the Parties did not intend to exclude antidumping and countervailing duty matters from Chapter Eleven. That analysis is misguided for several reasons.

First, as the United States noted at the hearing, the list of “Provisions to be placed outside of the Investment Chapter” is not exhaustive.¹⁴⁸ That list includes only National Security, Competition, Monopolies and State Enterprises, and taxation. Those provisions were included on the list presumably because of their link to investment. In the final version of the NAFTA, for instance, Articles 1116 and 1117 expressly incorporate provisions related to monopolies and state enterprises. And the taxation provision in Article 2103 expressly subjects taxation measures to claims under Article 1110 (Expropriation and Compensation) when certain conditions have been met.

The list does not refer to immigration matters, however, which are excluded from Chapter Eleven and other parts of the NAFTA by Article 1607.¹⁴⁹ Nor does it refer to the exclusions for Balance of Payments (Article 2104¹⁵⁰), Disclosure of Information (Article

¹⁴⁸ See Consolidated Hrg. Tr. Vol. 1 at 293:11-295:13.

¹⁴⁹ See also response to Question 36.

¹⁵⁰ NAFTA art. 2104(1) (“Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures that restrict transfers where the Party experiences serious balance of payment difficulties, or the threat thereof, and such restrictions are consistent with [certain paragraphs].”).

2105¹⁵¹), Canada's Cultural Industries (Article 2106 and Annex 2106¹⁵²), Financial Services (Article 1101(3)¹⁵³), National Treatment and Market Access for Goods—Import and Export Restrictions (Article 309(3)¹⁵⁴), Energy and Basic Petrochemical—Import and Export Restrictions (Article 603(3)¹⁵⁵) or Government Procurement (Article 1108(7)&(8)¹⁵⁶). All of those matters are excluded by provisions inside or outside of Chapter Eleven, but are not included among the list of items to be placed outside of Chapter Eleven. The list was clearly non-exhaustive and claimants' attempt to draw an inference based on the lack of any reference to antidumping and countervailing duty matters on the list is without merit.

Moreover, it was unnecessary to include antidumping and countervailing duty matters on that list because the subject matter had already been excluded in Chapter Nineteen. The provision that would become Article 1901(3) was introduced in June 1992, well before the first appearance of the list of “provisions to be placed outside of investment chapter.” The NAFTA Parties had even agreed to include Article 1901(3)

¹⁵¹ *Id.* art. 2105 (“Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party’s law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions.”).

¹⁵² *See* response to Question 37.

¹⁵³ NAFTA art. 1101(3).

¹⁵⁴ NAFTA art. 309(3) (“In the event that a Party adopts or maintains a prohibition or restriction on the importation from or exportation to a non-Party of a good, nothing in this Agreement shall be construed to prevent the Party from . . . limiting or prohibiting the importation from the territory of another Party of such good of that non-Party . . .”).

¹⁵⁵ NAFTA art. 603(3) (“In circumstances where a Party adopts or maintains a restriction on importation from or exportation to a non-Party of an energy or basic petrochemical good, nothing in this Agreement shall be construed to prevent the Party from . . . limiting or prohibiting the importation from the territory of any Party of such energy or basic petrochemical good of the non-Party . . .”).

¹⁵⁶ Article 1108(7)&(8) (“Articles 1102, 1103, and 1107 do not apply to . . . procurement by a Party or a state enterprise . . .”).

before the list of provisions had been completed.¹⁵⁷ Moreover, it is not surprising to find no provision addressing antidumping and countervailing duty matters on a list in the investment chapter, given that the drafters of Chapter Nineteen viewed their work as separate from the drafting of the rest of the Agreement.¹⁵⁸

I. The Byrd Amendment

See Canfor Tr. 654-714

65. At the Canfor hearing, the United States took the position (Canfor Tr. 91:1-2)¹⁵⁹: “Ms. Menaker: Exercising jurisdiction over Canfor’s claim *which* includes a challenge to the Byrd Amendment would also impose an obligation on the United States that is with respect to its antidumping and countervailing duty law” (emphasis added). What effect, if any, does that position have upon the present proceedings?

See response to Question 65A.

65A. Are Canfor and Terminal challenging the Byrd Amendment, per se, in this arbitration? Or is their claim regarding the Byrd Amendment limited to challenging the effect that the Byrd Amendment has had on the United States’ decisions to initiate the AD/CVD investigations at issue in this case? What is the position of the United States in respect to either position of Canfor and Terminal?

Claimants’ have taken inconsistent positions with respect to this issue: at times, they have claimed that they are challenging the Byrd Amendment, per se, while at other

¹⁵⁷ Article 1901(3) was agreed to by the Parties on August 6, 1992. Although a preliminary list of “provisions to be placed outside investment chapter” appeared in the August 4, 1992 draft, the list was revised through August 11, at which time Article 1901(3) already had been accepted by the Parties. *See* Chapter 19 Negotiating Texts, Vol. 1, Watergate Composite (Aug. 6, 1992) at 01337; *id* Vol. 1, Watergate Daily Update (Aug. 4, 1992) at 00483; *id*. Vol. 1, Watergate Daily Update (Aug. 11, 1992) at 00512.

¹⁵⁸ *See* response to Question 17.

¹⁵⁹ The reference is taken from the hard copy of the transcript provided by the United States on December 21, 2005. The citation is the same as appearing at the bottom numbered page 72 of the transcript provided by the United States in electronic format on the same date, which bears a number 89 at the right hand top of the relevant portion of that page 72. At the hearing, the Tribunal noted at several occasions that the parties referred to different pages of the transcript of the Canfor hearing for the same citation; the parties are invited to use the pagination of the hard copy provided by the United States on December 21, 2005 in their future submissions.

times they have disavowed that position.¹⁶⁰ In any event, the only way in which claimants contend to have been affected by the Byrd Amendment is by virtue of the fact that the amendment allegedly provided an improper incentive to the U.S. industry to support the investigations.¹⁶¹ In that respect, claimants have made no arguments that the Byrd Amendment, per se, has harmed them. Rather, their challenge is based solely on the effect that the Amendment purportedly had on Commerce's decisions to initiate the investigations. The decision to initiate an investigation is made by Commerce in administering U.S. AD/CVD law. If that decision is challenged in a Chapter Eleven arbitration, that would be imposing obligations on the United States with respect to its AD/CVD law, in contravention of Article 1901(3).¹⁶²

65B. Are Canfor and Terminal challenging the effect of the Byrd Amendment as part of AD and CVD law in this arbitration? See Canfor Tr. 694:18-21.

Yes.¹⁶³

¹⁶⁰ See response to Question 1; *Compare, e.g.*, Canfor NOA ¶ 141 (“The actions of the Respondent in adopting the Byrd Amendment and in its application or intended application . . . violates NAFTA Articles 1102, 1103 and 1105.”) with Canfor Hrg. Tr. Vol. 2 at 394:16-19 (“[T]he argument of Canfor is not that the Byrd Amendment is, per se, violative of the standards in Chapter 11 simply as a piece of legislation on its face.”) and *id.* at 395:3-5 (“I simply want to make clear that our claims are based upon the administration of the law, not the law itself.”).

¹⁶¹ See Consolidated Hrg. Tr. Vol. 2 at 101:4-6 (Canfor: “We have pled the consequences of the Byrd Amendment in triggering the initiation of the proceedings”); Canfor Hrg. Tr. Vol. 3 at 663:7-12 (Canfor: The Byrd Amendment “provided an incentive to members of the domestic industry to support the petition, because if they did not . . . their domestic competitors would get monies back and they would not.”); *id.* Vol. 1 at 92:11-17; U.S. Reply at 9 n.22 (same); Canfor SOC ¶ 144 (The Byrd Amendment “creates a financial incentive for the domestic industry to initiate and support frivolous . . . petitions”); Terminal NOA ¶ 45 (same).

¹⁶² See U.S. Reply at 9 n.22; Consolidated Hrg. Tr. Vol. 2 at 267:1-13; *id.* Vol. 1 at 97:18-98:9; Canfor Hrg. Tr. Vol. 2 at 622:19-623:13.

¹⁶³ See response to Question 65A.

65C. Assuming that Article 1901(3) excludes the jurisdiction of this Tribunal over the claims of Canfor and Terminal in this arbitration regarding AD/CVD determinations, does that exclusion also concern the claims of Canfor and Terminal with respect to the Byrd Amendment? If not, what are the reasons for having jurisdiction over claims with respect to the Byrd Amendment?

Yes. As indicated above, the only way in which claimants contend to have been affected by the Byrd Amendment is by virtue of the fact that the amendment allegedly provided an improper incentive to the U.S. industry to support the investigations.

Claimants, in essence, thus argue that the determinations are unlawful because, among other reasons, the petitions cannot be said to have had the requisite support of the U.S. industry, as is required by the *Tariff Act*. If this Tribunal lacks jurisdiction to decide claimants' challenges to the AD/CVD determinations, as the U.S. contends, then it also lacks jurisdiction to decide the claimants' Byrd Amendment claims. All of claimants' claims challenging the determinations, regardless of the grounds upon which claimants argue that the determinations are unlawful, are barred by Article 1901(3).

65D. In connection with Question 65C, what is the relevance, if any, of:

(a) The lack of notification by the United States of the Byrd Amendment under Article 1902(2)(b) to date?

The lack of notification is of no consequence to these proceedings. As noted above, claimants' challenge to the Byrd Amendment concerns the manner in which that law allegedly provided an improper incentive for the U.S. industry to support the petitions. One ground on which claimants challenge the determinations – which are the only measures that have caused them any “loss or damage” – is that they are unlawful because the petitions lacked the requisite support of the U.S. industry, as required by the *Tariff Act*. Those determinations may not be challenged under Chapter Eleven because Article 1901(3) bars the imposition of obligations from Chapter Eleven on the United

States with respect to its AD/CVD laws. The lack of notification of the Byrd Amendment is thus immaterial.

In any event, even if claimants were challenging the adoption of the Byrd Amendment per se, the lack of notification of that Amendment would not save their claims from being barred by Article 1901(3).¹⁶⁴ The lack of notification cannot affect the characterization of the law as an AD/CVD law. Otherwise, a Party could evade Chapter Nineteen's obligations simply by failing to notify an amendment to its AD/CVD law. Such a result would make no sense.¹⁶⁵ Moreover, the text of Article 1901(3) does not support the view advanced by claimants that a Party may not invoke Article 1901(3) to bar a claim when it has not notified an amendment to its AD/CVD law in accordance with Article 1902. Article 1901(3) prohibits the imposition of any obligation from any chapter outside of Chapter Nineteen on a Party with respect to its AD/CVD law. It does not exclude obligations only to the extent they may be imposed on a Party with respect to its pre-existing AD/CVD law or with respect to amendments to its AD/CVD law that have been properly notified in accordance with Article 1902.¹⁶⁶

Finally, the obligation under Article 1902(b) is not a general obligation on the part of an "amending Party" to notify the other NAFTA Parties of an amendment to its AD or CVD law. Rather, it requires an amending Party to notify the other NAFTA Parties of an amendment "as far in advance as possible of the date of enactment of such statute." In other words, it is an obligation to alert the other Parties to the *impending* enactment of an "amending statute." It has no relevance *after* enactment of the amendment, as the

¹⁶⁴ As noted in response to Question 1, Canfor has represented that it is not challenging the Byrd Amendment per se. *See* Canfor Hrg. Tr. Vol. 2 at 394:16-395:1.

¹⁶⁵ *See* Canfor Hrg. Tr. Vol. 3 at 655:2-657:21; Consolidated Hrg. Tr. Vol. 2 at 138:15-140:1.

¹⁶⁶ *See* Consolidated Hrg. Tr. Vol. 2 at 139:7-17.

amendment will be a *fait accompli* at that point. For this additional reason, there is no relevance to the lack of notification of the Byrd Amendment “to date.”¹⁶⁷ Pursuant to Article 1902(2)(b), there was no obligation to notify post-enactment.

(b) The position that the United States has taken with respect to the nature of the Byrd Amendment in the WTO DSU proceedings (cf. WT/DS217/R and WT/DS2343/R, 16 September 2002, at ¶¶ 4.501-5; WT/DS217/AB/R and WT/DS234/AB/R, 16 January 2003, at ¶¶ 16-17)?

The position that the United States took in the WTO proceedings is not relevant to the Preliminary Question. Before the WTO, the United States argued that the Byrd Amendment was not a specific action against dumping or subsidization. The WTO panel and Appellate Body, however, disagreed.¹⁶⁸ The United States accepts the findings of the WTO and has signed into law legislation (the Deficit Reduction Act of 2005) repealing the Byrd Amendment in order to comply with those findings.

This Tribunal’s task is to determine for itself whether exercising jurisdiction over claimants’ claims to the extent those claims challenge the Byrd Amendment would impose an obligation on the United States with respect to its AD/CVD law. To the extent

¹⁶⁷ The United States also notes the rather unusual circumstances leading to enactment of the Byrd Amendment. Although the Byrd Amendment amended the *Tariff Act*, the vehicle through which it became law was a bill consisting of almost 100 pages and thirteen separate titles, whose primary focus was appropriations for agricultural programs for the upcoming fiscal year. The Byrd Amendment appeared in neither the House nor Senate version of the appropriations bill. Rather, it was inserted in a House-Senate conference to reconcile the differences between the two versions of the bill. The conference concluded its work and issued a reconciled bill (known as the “conference report”) on October 6, 2000. The House of Representatives then approved the conference report on October 11, 2000, and the Senate approved it on October 18, 2000. The President signed the bill into law on October 28, 2000. Thus, only three weeks expired from the time the Byrd Amendment was first introduced until it became law. Given this short timeframe and the unusual circumstance of this substantive amendment to the *Tariff Act* being adopted as part of an appropriations bill, it is unremarkable that the amendment was not notified in advance of enactment pursuant to Article 1902(2)(b).

¹⁶⁸ Notably, the Appellate Body rejected the argument that the Byrd Amendment was inconsistent with the “industry support” requirement because it provided producers with a financial incentive to support the petitions to initiate the investigations. WTO Appellate Body Report, *Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/R, WT/DS234R ¶ 294 (Jan. 16, 2003). See also *id.* ¶ 283; response to Question 65E.

that it finds the reasoning of another dispute settlement entity, including a WTO panel, persuasive, this Tribunal may rely on that reasoning. The United States' position in this arbitration accords with the findings of the WTO. The fact that the United States argued differently before the WTO is of no import. That position was taken in the context of a different litigation, and parties should be encouraged to accept the rulings of international tribunals.

65E. In connection with Question 65D(b), did the panel and Appellate Body consider the Byrd Amendment as pertaining to AD and CVD law under WTO law, and if so, in reference to what law and in what manner? If and to the extent it did so, what is the relevance of such a finding by the Appellate Body in the present arbitration?

The WTO Appellate Body upheld, in some respects, the panel's determination that the Byrd Amendment violated the Antidumping and SCM Agreements, but reversed the panel's determinations in other respects. The Appellate Body's findings are not directly relevant in these proceedings, but may inform the present proceedings in three respects.

First, the Appellate Body found, among other things, that because the Amendment provided for distribution of AD/CVD duties to members of the affected domestic industry, it was a non-permissible specific action against dumping or a subsidy, contrary to Article 18.1 of the Antidumping Agreement and Article 32.1 of the SCM Agreement.¹⁶⁹ That view is consistent with the proposition that imposing an obligation on the United States with respect to the Byrd Amendment would impose an obligation on the U.S. with respect to its AD/CVD law.

¹⁶⁹ WTO Appellate Body Report ¶ 263.

Second, the Appellate Body’s report illustrates the fallacy of claimants’ argument that a statute loses its status as part of a Party’s AD or CVD law simply by virtue of being found inconsistent with a particular set of rules. Claimants have argued that challenging the determinations will not impose obligations on the United States with respect to its AD/CVD law because those determinations were unlawful and not made in accordance with U.S. AD/CVD law.¹⁷⁰ Similarly, they have argued that because the Byrd Amendment is purportedly unlawful and frustrates the objectives of the trade laws, that Amendment cannot be deemed to be AD/CVD law.¹⁷¹ Under claimants’ theory, anytime a Chapter Nineteen panel finds that a Party’s determinations or amendments to its AD/CVD law are unlawful, that determination or statute could be challenged under Chapter Eleven because doing so would not be deemed to impose obligations on the Party “with respect to” its AD/CVD law.¹⁷² A finding of illegality, however, does not change the nature of the measure.¹⁷³ That certain aspects of the Byrd Amendment violated the United States’ WTO obligations did not convert that Amendment into something other than AD/CVD law.

Third, the Appellate Body’s report also undermines claimants’ assertions concerning the supposed egregious nature of the United States’ conduct. Notably, the only manner in which claimants have been harmed by the Byrd Amendment is that the

¹⁷⁰ See, e.g., Canfor Hrg. Tr. Vol. 1 at 197:8-198:13 (“unlawful exercise of a discretionary right under municipal law” such as “final determinations made under a party’s antidumping and countervailing duty law” can be reviewed under both Chapters Eleven and Nineteen).

¹⁷¹ See Consolidated Hrg. Tr. Vol. 2 at 101:7-10 (The “Byrd Amendment is . . . so far out of the realm of what is contemplated by an antidumping and CVD regime that is designed to level a playing field and definitionally the Byrd Amendment does something other than that, we also say it does not fall within any protection.”).

¹⁷² See Consolidated Hrg. Tr. Vol. 1 at 106:18-107:2.

¹⁷³ See responses to Questions 30-32.

Amendment allegedly provided an improper incentive for the domestic industry to support the petitions. The Appellate Body, however, found this aspect of the Byrd Amendment to be WTO-consistent.¹⁷⁴

66. [not used; see Question 65B]

67. What are the latest developments with respect to the Byrd Amendment in the United States? And before the WTO DSU?

On February 8, 2006, the President signed into law the Deficit Reduction Act of 2005. The Act includes a provision repealing the Byrd Amendment effective upon the date of enactment of the Act, while also providing that “all duties on entries of goods made and filed before October 1, 2007,” shall be distributed as if the Byrd Amendment had not been repealed.

In 2005, the Government of Canada and several Canadian trade associations and exporters filed complaints with the CIT. Each plaintiff claims that U.S. Customs and Border Protection acted unlawfully when it applied the Byrd Amendment to disburse to domestic producers antidumping and countervailing duties assessed on imports of goods from Canada, because pursuant to section 408 of the NAFTA Implementation Act (19 U.S.C. § 3438), the Byrd amendment does not apply to AD/CVD duties assessed on imports of goods from Canada. Those cases, which have now been consolidated, are still pending before the CIT.

¹⁷⁴ WTO Appellate Body Report ¶ 294; *see also id.* ¶ 283 (finding that an examination of the degree, and not the nature, of support is what is needed). The Appellate Body also found that the panel had erred in finding, in part, that the Byrd Amendment was a specific action against dumping or subsidization because it provided a financial incentive for domestic producers to file or support applications for the initiation of AD/CVD duty investigations. *Id.* ¶ 258. The Appellate Body held that this was an inappropriate consideration because an action could not be “against dumping or [subsidization] simply because it facilitates or induces the exercise of rights that are WTO-consistent.” *Id.*

The WTO Appellate Body issued its decision in 2003 upholding the earlier panel determination that the Byrd Amendment is inconsistent with U.S. obligations under the WTO agreements. Because the United States had not repealed the Byrd Amendment within the reasonable period of time established by a separate WTO arbitration, the WTO authorized the complaining WTO Members to suspend concessions or other obligations pursuant to the DSU. Canada, the EU, Japan and Mexico have exercised their rights to impose WTO-authorized additional tariffs on imports from the United States of goods including baby formula, oysters, wine, dairy products, candy and chewing gum. While the authorized level of suspension varies from year to year (based on changes in the amount of disbursements under the Byrd Amendment), the WTO authorized these four Members to impose additional import duties covering a total of approximately \$114 million in trade from the United States, based on fiscal year 2004 disbursements.

68. Assuming that the Byrd Amendment is repealed, do Canfor and Terminal have a claim regarding the Byrd Amendment before this Tribunal?

No. The Tribunal lacks jurisdiction over claimants' claim concerning the Byrd Amendment. The only manner in which claimants contend to have incurred a loss or damage arising from the Byrd Amendment is by virtue of the fact that the amendment allegedly provided an improper incentive to the U.S. industry to support the investigations. As noted above, the decision to initiate the investigations was made by Commerce in accordance with the *Tariff Act*. Subjecting that decision to Chapter Eleven review would be imposing an obligation on the United States with respect to its AD/CVD law. In addition, as also noted above, claimants' claims challenging those determinations are barred by Article 1901(3), irrespective of the grounds upon which claimants argue that the determinations were unlawful.

69. Has the Byrd Amendment been notified by the United States pursuant to Article 1902(2)(b)? If not, what is the relevance of such failure, if any? See Question 65C.

The Byrd Amendment has not been notified by the United States pursuant to Article 1902(2)(b).¹⁷⁵ As discussed in response to Question 65D(a), there is no ongoing duty, pursuant to Article 1902(2)(b), to notify an amendment once that amendment becomes law. The fact that the United States did not notify the Byrd Amendment in accordance with Article 1902(2)(b) is not relevant to the issue of whether claimants' claims are barred by Article 1901(3).¹⁷⁶

70. [not used; see Questions 65 – 65E].

71. What is the significance of the Byrd Amendment if it is not considered to be AD/CVD law? See also Questions 65 – 65E.

As an initial matter, the Byrd Amendment is clearly part of U.S. AD/CVD law, for purposes of Article 1901(3) of the NAFTA. The terms “antidumping statute” and “countervailing duty statute” are defined in Annex 1911 to mean, in the case of the United States, the relevant provisions of Title VII of the *Tariff Act of 1930*, as amended, and any successor statutes. The Byrd Amendment is an amendment to the *Tariff Act* and, thus, presumptively is a part of AD/CVD law, within the meaning of the term as used in Article 1901(3). Moreover, claimants have conceded that the Byrd Amendment is an AD/CVD law.¹⁷⁷

¹⁷⁵ See Canfor Hrg. Tr. Vol. 3 at 654:17-22; Consolidated Hrg. Tr. Vol. 1 at 263:22-264:21.

¹⁷⁶ See response to Question 65D(a).

¹⁷⁷ Canfor Hrg. Tr. Vol. 2 at 248:6-9 (“Well, I think the position of Canfor is that [the Byrd Amendment] is clearly a matter that relates to the antidumping and CVD regime that [the United States has] in place.”). The Byrd Amendment is an AD/CVD law, although it does not apply to goods of the importing party and does not govern AD/CVD determinations, but instead establishes a mechanism for the distribution of duties assessed pursuant to duty orders. Claimants contend that the Byrd Amendment improperly influenced the United States' decision to initiate the AD/CVD investigations because it allegedly affected the level of industry support for initiation. Because decisions about whether to conduct AD/CVD investigations are at

Even if the Byrd Amendment were considered not to be AD/CVD law, however, claimants' claims concerning that amendment would still be barred by Article 1901(3). Claimants argue that the Byrd Amendment violates provisions of NAFTA Chapter Eleven because it allegedly interfered with the proper operation of U.S. AD/CVD law by providing an improper incentive for the U.S. industry to support the petitions.¹⁷⁸ The decision to initiate an investigation is made by Commerce in administering U.S. AD/CVD law. If that decision is challenged in a Chapter Eleven arbitration, that would be imposing obligations on the United States with respect to its AD/CVD law, in contravention of Article 1901(3).¹⁷⁹

72. Is it the argument of Canfor and Terminal that the Byrd Amendment is inconsistent with the GATT 1994, and the WTO Anti-Dumping Agreement and SCM Agreement, and therefore attracts the application of Article 1105 and/or other provisions of Section A of Chapter 11 of the NAFTA? (Canfor SoC ¶ 146) If so, what is the United States' view regarding that argument?

Those claims would fail on the merits, but are barred by Article 1901(3), in any event. In Paragraph 33 and footnote 11 of its Reply, Canfor argued that because the Byrd Amendment is allegedly inconsistent with Chapter Nineteen and the WTO agreements, the United States cannot rely on Article 1901(3) to bar claimants' claims. That argument is flawed. The purpose of Article 1904 binational panel review is to decide whether AD/CVD determinations are consistent with domestic AD/CVD law, and the purpose of Article 1903 is to establish a mechanism to decide whether amendments to a Party's AD/CVD law are consistent with the Party's obligations under the Agreement. Just

the heart of a Party's AD/CVD law, claims in a Chapter Eleven proceeding that focus on such decisions fall within Article 1901(3)'s prohibition.

¹⁷⁸ See response to Question 65A.

¹⁷⁹ See response to Question 65A; U.S. Reply at 9 n.22; Consolidated Hrg. Tr. Vol. 2 at 264:22-267:13; *id.* Vol. 1 at 97:18-98:9; Canfor Hrg. Tr. Vol. 2 at 622:19-623:13.

because a determination or an amendment may be deemed unlawful or inconsistent with the Party's obligations does not remove it from a Party's AD/CVD law, as that term is used in Article 1901(3). If claimants' argument were accepted, then anytime a binational panel found that a determination was unlawful, or that an amendment to a Party's AD/CVD law was inconsistent with the Party's obligations, that determination and amendment could be challenged under Chapter Eleven because it could not be considered to be "with respect to AD/CVD law."

Claimants, in fact, have conceded that the Byrd Amendment is an AD/CVD law.¹⁸⁰ At other times, however, claimants have argued that the Byrd Amendment may be challenged under Chapter Eleven because it is "so fundamentally contrary to the concept – or the fair and effective resolution of unfair trade practices, that it is just not the type of statute that can be considered antidumping law and CVD law in the first place" ¹⁸¹ Not only does this argument contradict earlier statements made by claimants, but it is similarly flawed.

Accepting claimants' contention, *arguendo*, that the Byrd Amendment is inconsistent with trade law objectives, imposing obligations with respect to that Amendment nonetheless imposes obligations with respect to a Party's AD/CVD laws. Claimants' argument, if accepted, would effectively vitiate all exceptions under the NAFTA. A claimant that sought to bring an investment claim with respect to a Party's immigration measures, for example, could simply argue that the challenged law or its application is at odds with the proper functioning of the Party's immigration law regime, and should therefore be redefined as a non-immigration measure. Claimants' argument is

¹⁸⁰ See Canfor Hrg. Tr. Vol. 1 at 248:6-9.

¹⁸¹ Consolidated Hrg. Tr. Vol. 2 at 242:19-243:2.

not supported by the ordinary meaning of Article 1901(3) and should therefore be rejected.

73. Is Canfor’s and Terminal’s claim against the enactment of the law (i.e., Byrd Amendment) or “actions of DOC,” or both (SoC ¶ 147; Reply ¶ 33 n. 11)? If so, what is the United States’ view regarding that argument?

As noted above, claimants have made contradictory statements in this regard.¹⁸²

In any event, claimants’ claims regarding the Byrd Amendment are barred by Article 1901(3). The only manner in which claimants allege that the Byrd Amendment has affected them is that the amendment allegedly improperly provided an incentive to the U.S. industry to support the petitions to initiate AD/CVD investigations. The decision to initiate an investigation is made by Commerce in administering U.S. AD/CVD law. If that decision is challenged in a Chapter Eleven arbitration, that would be imposing obligations on the United States with respect to its AD/CVD law, in contravention of Article 1901(3).¹⁸³

74. Is it the argument of Canfor and Terminal that assuming that the argument of the United States with respect to Article 1901(3) is correct, the Byrd Amendment falls outside Article 1901(3), and hence a Chapter 11 tribunal has jurisdiction in any event? (Canfor Reply ¶ 33, n. 11) If so, what is the United States’ view regarding that argument?

See response to Question 72.

75. [not used; see Question 72]

¹⁸² See response to Questions 1 & 65A.

¹⁸³ See response to Question 65A; U.S. Reply at 9 n.22; Consolidated Hrg. Tr. Vol. 2 at 264:22-267:13; *id.* Vol. 1 at 97:18-98:9; Canfor Hrg. Tr. Vol. 2 at 622:19-623:13.

76. Are the only remedies against a wrongful enactment of a law relating to AD/CVD to be found under Articles 1902-1905? If so, do they preclude a Chapter 11 claim?

Yes. Chapter Nineteen is the exclusive forum under the NAFTA for challenges to a Party's AD/CVD law.¹⁸⁴

77. Is it correct that the Byrd Amendment has not been applied to Canfor? See US Reply n. 22. Has it been applied to Terminal? If not, what are the consequences for the Byrd Amendment for the claims of Canfor and Terminal? See also Canfor Tr. 669:3-21. What is the relevance thereof for the Preliminary Question?

Claimants contend that the existence of the Byrd Amendment provided an incentive to the U.S. lumber industry to support the petitions necessary to commence the investigations which resulted in the AD/CVD determinations.¹⁸⁵ This is the only manner in which the Byrd Amendment has been “applied” to claimants. Claimants argue that Commerce misapplied U.S. AD/CVD law when it decided that the petitions were adequately supported by the U.S. industry.¹⁸⁶ The decision to initiate an antidumping or countervailing duty investigation, along with the manner in which that investigation is conducted, however, constitutes an integral part of the Party's AD/CVD law. Claims challenging that conduct are barred by Article 1901(3).

It remains correct, as set forth in footnote 22 to the United States' Reply, that duties assessed pursuant to an antidumping order or a countervailing duty order on imports of Canfor's products into the United States have not been distributed to affected producers pursuant to the Byrd Amendment. The same is true for Terminal. The only duties collected on imports of softwood lumber that have been disbursed are those duties

¹⁸⁴ See response to Question 19.

¹⁸⁵ See Canfor SOC ¶ 144; Terminal NOA ¶ 45; Canfor Hrg. Tr. Vol. 3 at 663:6-12.

¹⁸⁶ Canfor SOC ¶ 122; Terminal NOA ¶¶ 23, 24, 25, 26.

collected from importers that have chosen not to apply for an administrative suspension of liquidation of their duties pending their legal challenge to those assessments. Canfor and Terminal are not among those importers.

J. Other Aspects

78. If NAFTA had not included Chapter 19, would the Claimants' claims have fallen within Chapter 11 and, if so, how and why?

No. Claimants' claims are not claims that may be submitted to arbitration under either Article 1116 or 1117. In particular, the claims do not relate to an investor or investment within the meaning of Article 1101(1). This issue was reserved for any merits phase and is not before the Tribunal as a preliminary question. In the absence of a full briefing and oral hearing on this issue, it would not be appropriate for the Tribunal to decide this question in its decision on the Preliminary Question.

79. What is the relevance, if any of the reliance by Canfor and Terminal on the MFN clause (Article 1103) for the Preliminary Question? See Canfor's SoC at ¶¶ 100-103; Terminal's Notice of Arbitration at ¶¶ 35-38; Canfor Tr. 301-302.

Claimants' reliance on Article 1103 is not relevant for purposes of the Preliminary Question. Claimants do not rely on the MFN clause as a basis for jurisdiction.¹⁸⁷

80. Can the United States explain how AD and CVD is dealt with in its successive Model BITs? Can the United States give representative examples of actual BITs in that regard? And what about the other FTAs concluded by the United States?

Antidumping and countervailing duty law is not addressed in the United States' 2004 Model BIT, or in any investment treaty or trade agreement to which the United States is a party, other than the NAFTA and the CFTA. It is difficult to conceive of how

¹⁸⁷ See Canfor SOC ¶¶ 100-103; Terminal NOA ¶¶ 35-38; Canfor Hrg. Tr. Vol. 1 at 300:1-303:10; *id.* at 303:11-15 (Tribunal: "So, you're using [the MFN article] in the context of the interpretation of 1901(3) and not as a stand-alone basis for jurisdiction?" Canfor: "Yes."); Consolidated Hrg. Tr. Vol. 2 at 211:15-21.

claims challenging the interpretation and application of a Party's antidumping and countervailing duty law could give rise to an investment claim under a U.S. BIT or FTA. Certainly claimants' claims do not fall within the scope of NAFTA Chapter Eleven (even absent Article 1901(3)), or the investment provisions of any other U.S. agreement. Notably, no foreign investor other than claimants (and Tembec) has submitted such a claim under the investment provisions of a U.S. BIT or FTA. Nor, despite the thousands of investment and trade agreements in existence globally, have claimants been able to cite a single example of a case in which a claimant has submitted an AD/CVD claim to investor-State arbitration.¹⁸⁸

The issue of whether such a claim could be submitted under a U.S. investment agreement raises issues that are intertwined with those raised by the United States' jurisdictional objection based on Article 1101(1). That issue was reserved for any merits phase of these proceedings, and it would not be appropriate for the Tribunal to rule on that issue in its decision on the Preliminary Question.

80A. Is it the position of the United States that if a BIT or FTA is silent regarding United States AD and CVD law, a tribunal dealing with investor-State arbitration under such BIT or FTA lacks jurisdiction with respect to either AD or CVD law or AD or CVD matters? If so, what are the reasons for such an exclusion?

Yes. See response to Question 80 above.

¹⁸⁸ See Consolidated Hrg. Tr. Vol. 2 at 74:13-21.

81. What is the relevance, if any, of the various WTO DSU decisions arising out of the softwood lumber disputes between Canada and the United States: (a) on the questions on which the United States' arguments have prevailed; and (b) on the questions on which the United States' arguments have been rejected?

The outcome of WTO dispute settlement has minimal, if any, relevance to the present dispute. Some findings by the WTO, however, could possibly be relevant. As a general matter, however, the fact that the United States has prevailed on many issues before the WTO (and before the Chapter Nineteen panels) undercuts claimants' assertions that the United States has applied its antidumping and countervailing duty laws to imports of Canadian softwood lumber in a grossly arbitrary fashion.

In addition, as noted in response to Question 65E, the WTO's findings concerning the Byrd Amendment support the United States' position that challenging that law or its effect would be imposing an obligation on the United States with respect to its antidumping and countervailing duty law, contrary to Article 1901(3).

82. What is the relevance, if any, that Chapter Nineteen bi-national panels and a WTO panel (15 November 2005) appear to have reached different conclusions concerning the standard of review applicable to the determination of the threat of injury by the US ITC?

It is not significant for purposes of this arbitration that the Chapter Nineteen binational panels and a WTO panel reached different conclusions regarding the ITC's threat of injury determination. The Chapter Nineteen panel was reviewing the ITC's original threat of injury determination, whereas the WTO panel was reviewing a substantially revised injury determination, issued pursuant to section 129 of the Uruguay Round Agreements Act. Moreover, the former was reviewing the original determination for consistency with U.S. domestic law, while the latter was reviewing the section 129 determination for consistency with certain WTO agreements. The Chapter Nineteen

panel's decision was subject to review under the NAFTA's extraordinary challenge standards, whereas the WTO panel's findings are subject to review under the DSU's appellate standard. Given all of the foregoing differences, there is no significance to the different outcomes for purposes of this arbitration.

To the extent that the WTO's standard of review differs in any way from that applied by Chapter Nineteen panels, any such difference would not be relevant to the Preliminary Question. In its report of November 15, 2005, in reviewing the ITC's November 24, 2004 threat of material injury determination, the WTO panel found that its "task [was] not to carry out a *de novo* review of the information and evidence on the record of the underlying investigation,' nor to 'substitute its own judgment for that of the investigating authorities.'"¹⁸⁹ In this respect, the WTO, like a Chapter Nineteen panel reviewing a U.S. determination, granted a high level of respect to the agency's factual findings.¹⁹⁰

83. In general, are decisions of the WTO DSU relevant to the present arbitration in general and for the Preliminary Question in particular? See Canfor SoC ¶ 146; Reply n. 11, ¶¶ 44, 67, 91; Rej. ¶¶ p. 15 n.21 n. 17, ¶ 54.

See response to Question 81.

¹⁸⁹ WTO Article 21.5 Panel Report, *Investigation of the ITC in Softwood Lumber from Canada*, WT/DS277/RW ¶4.94 (Nov. 15, 2005).

¹⁹⁰ See response to Question 34.

84. By way of background, is the following description correct:

The origin of the softwood lumber dispute between Canada and the United States appears to be the manner in which the price for the logging of softwood lumber is arrived at. In the United States, softwood lumber is mostly harvested from privately owned land. In Canada, most of the softwood lumber comes from land owned by the federal or provincial government. In the United States, logging rights are based on a competitive bidding (or auction). In Canada, the federal or provincial governments set so-called stumpage fees. Stumpage is a levy or tax paid by the timber harvesters for the right to cut standing timber on public lands. Stumpage takes into account a number of factors, such as labour and transportation costs and the obligation of reforestation. It is believed in the United States that the price to be paid in the United States for logging rights for a given volume of a specified lumber is higher than the stumpage rate for a comparable volume of a similar lumber in Canada. The United States also believes that the lower stumpage rates in Canada unfairly subsidize Canadian softwood lumber producers. Canada is of the opposite view.

The United States proposes the following edits to the text in Question 84:

The origin of the softwood lumber dispute between Canada and the United States appears to be the manner in which the price for the standing timber, i.e., “stumpage,” is set by the Canadian provincial governments, logging of softwood lumber is arrived at. In the United States, softwood lumber is mostly harvested from privately-owned land, and stumpage fees are set by the market. In Canada, however, most of the softwood lumber comes from public land, owned by the federal or provincial government. In the United States, logging rights are based on a competitive bidding (or auction). In Canada, the provincial governments administratively set the so-called stumpage fees without regard to market forces. Stumpage is a levy or tax paid by the timber harvesters for the right to cut standing timber on public lands. Canadian companies entitled to the administratively set stumpage fees may undertake additional obligations takes into account a number of factors, such as labour and transportation costs and the obligation of reforestation. It is believed in the United States that the price to be paid in the United States for logging rights for a given volume of a specified lumber-timber is higher than the stumpage rate for a comparable volume of a similar lumber-timber in Canada. The United States also believes that the lower stumpage rates in Canada unfairly subsidize Canadian softwood lumber producers. Canada is of the opposite view.

The reasons for these edits are as follows. The United States notes that the term

“stumpage” refers to standing timber, and not to an intangible right to harvest timber.

The United States also notes that only Canadian provincial governments provide stumpage. While the Canadian federal government has related programs, it is the provincial government programs that are at the heart of the subsidy dispute. Finally, the United States notes that this passage focuses on the allegations that Canadian softwood producers are unfairly subsidized, but does not address allegations concerning dumping of softwood lumber in the U.S. market.

Respectfully submitted,

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