UNDER THE UNCITRAL ARBITRATION RULES AND
SECTION B OF CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT

CANFOR CORPORATION and
TERMINAL FOREST PRODUCTS LTD.

Investors
(Claimants)

v.

UNITED STATES OF AMERICA

Party
(Respondent)

CLAIMANTS' REPLY TO UNITED STATES' ANSWERS TO THE TRIBUNAL'S ADDITIONAL QUESTIONS IN RELATION TO THE BYRD AMENDMENT

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Preliminary Comments

1. The United States' submissions are based, in essence, on the following two arguments.

    1. The United States' failure to comply with Article 1902(2)(b) can be excused because the purposes of the notification provision in Article 1902(2)(b) were "fully satisfied" in this case because Canada was otherwise aware of the enactment of the Byrd Amendment.

    2. In any event, the required written notice under Article 1902(2)(b) was not given because of an oversight,[1] because written notification was pointless,[2] or because the United States officials were ignorant of their international obligations under NAFTA to provide written notification[3] and these *ex post facto* rationalizations excuse its non-compliance with Article 1902(2)(b).

Both of these propositions are astounding given the United States' overarching duty to interpret and apply its treaty obligations in good faith.

No Evidence to Support the United States' Position

2. To suggest that an "oversight" or ignorance played a role in why written notification was not provided by the United States is patently disingenuous and completely unsupported by

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[1] See eg. page 6 of the Response of the Respondent United States of America to the Tribunal's Additional Questions Regarding the Continued Dumping and Subsidy Offset Act of 2000 [hereinafter "US Submission"] where the United States says the "[t]he lack of written notification may have been the result of a simple oversight due to the scope of the Appropriations Bill and the necessity of its swift passage".

[2] See eg. page 6 of the US Submission where the United States says that "it was considered pointless to provide written notification to Canada regarding the CDSOA when there was clear evidence that Canada was already aware".

[3] See eg. page 7 of the US Submission where the United States says that "[t]here is no evidence to suggest that the President was aware of Article 1902(2)(b), as requirement . . .".

evidence. It is clear from the material before this Tribunal that the United States had no intention to notify the other NAFTA parties under Chapter 19 of NAFTA because it did not consider the Byrd Amendment to have anything *"to do with the administration of the antidumping and countervailing duty laws"*.[4] In the United States' view, the Byrd Amendment was simply a "*government payment program*".[5]

3. The reason the United States has not presented any evidence to this Tribunal to support its bald assertion that the reason Canada was not notified in writing under Article 1902(2)(b) was because of an oversight or because of ignorance is obvious. There is no such evidence. In the Claimants' submission, if the United States was compelled to produce documents in its possession dealing with its correspondence with the other NAFTA parties in relation to the enactment of the Byrd Amendment, that correspondence would certainly be entirely consistent with the approach taken by the United States before the WTO.

The United States' Arguments Attempt to Rewrite History

4. The United States' attempt to resile from the position taken before the WTO is simply an attempt to rewrite history in a way which supports the United States' latest attempt to defend its governmental actions in relation to the softwood lumber dispute. Such revisionism cannot be permitted.

The United States Ignored, and Violated, Its Treaty Obligations

5. In any event, whether Canada was aware or not of the Byrd Amendment is irrelevant to the issue before the Tribunal. The obligations undertaken by the United States in relation to the Byrd Amendment are mandatory and were not followed, and therefore the Byrd Amendment cannot be granted the protection provided for in Chapter 19. Downplaying its flagrant disregard of its international obligations under Article 1902(2) in such a manner is unjustifiable.

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[4] See *United States - Continued Dumping and Subsidy Offset Act of 2000* (Complaints by Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand) (2002) WTO docs. WT/DS217/R and WT/DS234/R, para. 4.502.

[5] *Ibid* at para. 4.231 and 4.501.

6. The Claimants' position that the conditions of Article 1902 must be complied with before the United States can take advantage of its right to amend its antidumping and countervailing duty laws in relation to Canadian goods is supported by the United States' own domestic law and the analysis of its domestic courts. The *NAFTA Implementation Act*, brought into force to implement the United States' obligations under NAFTA, including specifically the obligations undertaken by the United States under Article 1902, provides that:

> Any amendment enacted after the Agreement [NAFTA] enters into force with respect to the United States that is made to -- (1) section 303 or title VII of the Tariff Act of 1930 [19 U.S.C. ss 1671 et seq.], or any successor statute ... shall apply to goods from a NAFTA country only to the extent specified in the amendment.[6]

7. The Court of International Trade recently ruled that the United States may not, as a matter of domestic law, apply the Byrd Amendment to imports from Canada that are subject to antidumping and countervailing duty orders because the Byrd Amendment did not specify that it applies to goods from Canada or Mexico. In commenting on the importance of the s. 408 specification requirement, the Judge Pogue stated:

> Section 408 insulates NAFTA parties, including their exporters, from some changes to the antidumping and countervailing duty laws unless Congress has explicitly stated otherwise. Such an exercise of self-restraint was intended to ensure that future Congresses, agencies, and courts did not inadvertently abrogate the rights NAFTA parties negotiated, or, alternatively, to require the future Congresses to give due consideration to the United States' NAFTA obligation before they amend antidumping and countervailing duty laws.[7]

The United States' Analysis is Superficial and Misleading

8. Finally, the United States' continued practice of purporting to summarize and then dismiss the Claimants' claims in relation to the Byrd Amendment is both superficial and misleading. The Claimants' claims with respect to the Byrd Amendment are set out in detail in Canfor's Notice of Arbitration and Statement of Claim at paragraphs 141 to 147 and have been dealt with at length in the Claimants' oral and written submissions to this Tribunal. The United States' attempt to reduce those claims to two lines, as it does on page 2 of its reply to the

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[6] 19 U.S.C. §§3438 (NAFTA *Implementation Act*, s. 408).

[7] *Canadian Lumber Trade Alliance et al v. The United States of America et al*, CIT, Pogue Judge, April 7, 2006, p. 22), [hereinafter: "*Lumber Trade Alliance v. United States*"].

Tribunal's supplemental questions, does not fairly address the Claimants' arguments or claims in relation to the Byrd Amendment, which allegations clearly raise issues squarely within the jurisdiction of this Tribunal.

Specific Reply to the United States' Answers to the Tribunal's Additional Questions

A. The United States explains the lack of notification by reference to the "short timeframe and the unusual circumstances of this substantive amendment of the *Tariff Act* being adopted as part of an appropriations bill." *See* R-PHM at n. 167.

(a) Assuming that that explanation may suffice as far as a notification of the Byrd Amendment in advance of the Congressional vote on the Conference Report, should the United States, in order to fulfill its obligation under Article 1902(2)(b), have taken steps thereafter to notify the proposed "amending statute" to the other NAFTA Parties in writing prior to its enactment (i.e., in the case of the United States, prior to the signature of the Byrd Amendment into law by the President)?

9. Whether or not Canada was aware of the existence of the Byrd Amendment is irrelevant given that compliance with Article 1902(2) is mandatory under the provisions of NAFTA. An amendment which is enacted by a NAFTA Party which does not satisfy those conditions is outside the arrangement agreed to by the NAFTA Parties and therefore the protection of Article 1901(3). Further, the United States' hypothesized explanations of the reasons for the United States' failure to comply with its Treaty obligations to notify under Article 1902 are mere conjectures. The United States offers theories and speculations to justify its non-compliance, but it offers no proof, despite that the evidence to support such assertions, if it existed, lies entirely in the control of the United States itself. Given the failure of the United States to provide any credible support of its assertions, the Tribunal should draw the negative inference that the United States did not notify under Article 1902 because it did not regard, and did not want to have the Byrd Amendment regarded as, "antidumping or countervailing duty law". This is the only explanation that is consistent with its actual objectively verifiable conduct, such as its characterization of the Byrd Amendment in WTO proceedings.

(b) Is it correct that, in failing to do so, the United States breached this obligation to the other NAFTA Parties under Article 1902(2)(b)?

10. The Claimants note that the United States has declined to answer what seems to be a straightforward question from the Tribunal. The Tribunal's question was whether, by failing to notify, the United States breached its obligation under Article 1902(2)(b). That question calls for an answer either yes or no. The Claimants say the only possible answer is "yes, the United States breached this obligation."

11. Instead of addressing the Tribunal's question, however, the United States challenges the Tribunal's jurisdiction to determine it. The Tribunal is charged under the *Vienna Convention of the Law of Treaties*[8] with interpreting Article 1901(3) in light of its context, object and purpose. So doing necessarily involves reading the words of Article 1901(3), including the expression "antidumping and countervailing duty law," in light of Chapter 19 as a whole and the balance of rights and obligations contained therein. Having pleaded Article 1901(3) as a jurisdictional bar, the United States cannot at this stage credibly purport to deny the Tribunal the jurisdiction to consider whether other provisions of Chapter 19 may constitute conditions as to the invocation of Article 1901(3), given the balance of rights and obligations in Article 1901(3) and purpose and object of Article 1901(3) to preserve that balance.

C. Do a good faith interpretation and application of the notification requirement of Article 1902(2)(b) within the context of NAFTA Chapter Nineteen require that if a State Party is prevented for some reason from making the notification "as far in advance as possible of the date of enactment of such statute," it must then postpone the final step in enactment (i.e., signature into law by the President in the case of the United States) until such time as the notification expressly required under Article 1902(2)(b) and the opportunity for consultation expressly required under Article 1902(2)(c) have been satisfied?

12. The United States again does not answer the question posed, but instead asserts there to be an absence of evidence as to the President of the United States' awareness of the United States' international obligations under NAFTA. The balance of the United States' response is to the effect that notification is irrelevant, as notification would have been futile ("served no useful

[8] *Vienna Convention on the Law of Treaties*, (1969) 1155 U.N.T.S. 331, in force 1980, Art. 31.

purpose"). The United States cannot treat its obligation to notify and consult in such a cavalier manner. At one level the United States' answer to the Tribunal's question could be seen as a stunning indictment of the competence and/or diligence of the advisors to the President. At another level, it simply cannot be credible that the Executive Branch of the United States would have acted in ignorance of the obligations under NAFTA, which as the Court of International Trade has noted, are also part of United States domestic law.[9]

D. Is one of the purposes of the required notification and opportunity for consultation under Article 1902(2)(b)-(c) to prevent harm to the interests of another State Party before that harm, in its view, is inflicted under Article 1902(2)(d)?

E. Is another purpose of the required notification and opportunity for consultation to support another State Party in seeking review of the statutory amendment before a binational panel under Article 1903 in the event that the "amending Party" nonetheless enacts the amendment in question?

F. The United States argues that the notification requirement of Article 1902(2)(b) was effectively met because of the widespread press reports that, according to the United States, provided the other State Parties with "actual notice" of the Byrd Amendment. *See* Canfor Hearing Tr. 654-656.

a. Pursuant to the NAFTA, can an amending Party dispense with Article 1902(20(b)'s mandatory notification on the basis of an assumption that the other State Parties would be aware of the "amending statute" anyway?

13. The United States focuses its arguments in answer to these three questions on the fact that Canada had "actual notice" that the United States was enacting the Byrd Amendment. This misses the point. The purpose of notice under Article 1902 does not merely serve the function of putting a party on notice that there is *some* law being proposed that may affect its interests, but provides notice that the law in question is *characterized* or viewed by that Party as an amendment to its antidumping and countervailing duty law. Characterization is important because it provides an indication that the party in question is seeking to rely on the limited immunity from NAFTA challenge under Chapter 19 for antidumping and countervailing duty law, and implicates the United States' obligation to ensure that such amendment is consistent with the WTO agreements. This advance knowledge that the Party in question considers the

[9] *Lumber Trade Alliance v. United States,* supra note 7, at 21-22, 106-107 and 114.

proposed law to be an amendment to antidumping or countervailing duty law *within the meaning of NAFTA Chapter 19* allows the other parties to challenge the amendment in a timely manner if it does not conform to the conditions for immunity under Chapter 19, i.e. before significant harm has already been done to its interests.

14. In any event, in the absence of written notification under Article 1902, Canada had every right to assume, based on the United States' representations before the WTO proceedings, that the United States was *NOT* characterizing the Byrd Amendment as an amendment to its antidumping and countervailing duty law that would enjoy the limited immunity from NAFTA challenge conferred by 1901(3).

G. Does the lack of timely notification and of opportunity for prior consultation have the consequence that an "amending statute", which is "an amendment to a Party's antidumping or countervailing duty statute," cannot be regarded as having become "antidumping law and countervailing duty statute" under the definition of Article 1902(1), including for purposes of Article 1901(3)? Specifically,

(b) If a State Party fails to notify under Article 1902(2)(b) and to offer the opportunity for prior consultations under Article 1902(2)(c) with respect to a particular statutory amendment, does it thereby fail to bring that amendment within the definition of antidumping or countervailing duty statute as set forth in Article 1911 and Annex 1911?

15. The interpretation of the United States is at odds with the plain language of Article 1902, which establishes conformity with Article 1902(2) as a condition for a party exercising its right to amend its antidumping and countervailing duty law. If amendments that did not meet these conditions fell within the definition of antidumping and countervailing duty statutes in Article 1911, as the United States suggests, they would be protected from NAFTA challenge, when the drafters intended just the contrary.

16. The United States once again attempts to excuse its non-compliance with Article 1902, (or suggests that compliance with Article 1902 is irrelevant), by arguing that just because an amendment to its antidumping and countervailing duty statutes does not meet the necessary preconditions under Article 1902 it does not follow that those amendments are outside the

definitions of antidumping and countervailing duty statutes as those terms are defined under NAFTA.

17. The terms antidumping law and countervailing duty law must be interpreted in the context of this specific agreement, where the Parties had agreed on certain rights and obligations in relation to unfair trade practices. Just because a statute is an antidumping and countervailing duty statute under United States' domestic law does not make it an antidumping and countervailing duty statute under the Treaty.

18. The NAFTA Parties' agreement in relation to unfair trade practices is clear -- the Parties agreed to retain antidumping and countervailing duty law in place at the time of NAFTA -- they also agreed that amendments to antidumping and countervailing duty statutes as defined in NAFTA must meet the specific conditions set out in Article 1902(a) - (d) in order for this law to apply to the goods of the other NAFTA parties.

19. Use of the phrase "antidumping and countervailing duty statutes" as it relates to the obligations and the rights of the NAFTA parties under NAFTA surely is only intended to encompass those statutes that were either in existence at the time the NAFTA came into force or met the specific conditions of Article 1902(2) -- otherwise carefully crafted provisions of the agreement (such as the protections provided to the antidumping and countervailing duty law envisaged by Chapter 19 (eg. Article 1901(3))) would apply to antidumping and countervailing duty statutes that the Parties agreed would not apply to them.

20. Accordingly, "antidumping statutes" and "countervailing duty statutes" as those terms are used in NAFTA only encompass statutes in existence at the time of NAFTA and amendments which comply with the conditions outlined in Article 1902(2).

21. In the last paragraph of the United States' answer to this question,[10] the United States argues that a Party could shield amendments to its antidumping and countervailing duty law from obligations under Chapter 19 by simply failing to notify the other NAFTA parties of the

[10] US Submission, supra note 1 at p. 14.

amendment or by intentionally enacting the legislation that subverts the object and purpose of NAFTA -- thereby removing the amendment from the definition of an antidumping and countervailing duty statute and depriving the NAFTA party of the opportunity to challenge the amendment under Article 1903.

22. The problem with this argument is that it presupposes what it attempts to prove: that the United States could apply an antidumping and countervailing duty statute to a NAFTA Party even though it had not complied with the conditions outlined in Article 1902(a) through (d) -- when in actual fact, if those conditions are not met, those statutes cannot be legally applied to Canadian or Mexican goods, *even under the US domestic law implementing the NAFTA*.[11]

J. Before the WTO Panel, the United States asserted that "The CDSOA [i.e., the Byrd Amendment] is a government payment programme," and that "The CDSOA has nothing to do with the administration of the anti-dumping and countervailing duty *laws*" (emphasis added). *See United States – Continued Dumping and Subsidy Offset Act of 2000*, Report of the Panel, WT/DS217/R and WT/DS234/R, 16 September 2002, at ¶¶ 4.501 and 4.502.

(b) The United States argues that the WTO Panel and Appellate Body disagreed and that 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. *See* R-PHM at ¶ 65D(b). Must the present Tribunal determine whether the Byrd Amendment is AD or CVD law under Article 1901(3), and not under the WTO agreements in respect of which the WTO Panel and Appellate Body made their findings?

23. The United States distorts the finding of the WTO Appellate Body and its implications for this claim. The Appellate Body found that the Byrd Amendment was a specific action against dumping or subsidization outside the normal permissible parameters of antidumping and countervailing duty law. In other words, it was a kind of action that goes beyond the proper content of antidumping and countervailing duty laws that remedy those unfair practices exclusively through a duty that does not exceed the amount of dumping or subsidization.

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[11] See *Lumber Trade Alliance v. United States*, supra note 7 at 114.

L. Is it relevant for the Preliminary Question that the Byrd Amendment is in the process of being repealed? Specifically,

(a) Do Claimants' claims concern the period that the Byrd Amendment has been in effect?

24. The expectation of funds being received by virtue of the Byrd Amendment itself affects the value of the companies in question and their cost of capital, and thus their competitive position. Thus, the effects in question do not begin only with the actual receipt of the cash. As the WTO panel noted in its ruling on section 301 of the United States' *Trade Act*, anticipated or expected actions may have real effects on competitive opportunities, i.e. may cause harm to economic operators even before those actions actually occur, thus engaging state responsibility where treaty norms are intended to avoid the harms in question.[12] Further, the definition of "subsidy" in the WTO SCM Agreement, Art. 1 includes measures such as "loan guarantees",[13] thus recognizing that harm can be done to competitors in their relative position in the marketplace even by a conditional or contingent promise to provide assistance to a firm, i.e. without any disbursement having actually occurred.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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May 26, 2006

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[12] United States - Sections 301 - 310 of the *Trade Act 1974* (Complainant: European Communities) (1999) WTO doc. WT/DS152/R, paras. 7.81-7.91.

[13] Agreement on Subsidies and Countervailing Measures, set out in Annex 1A of the WTO Agreement, 15 April 1994 33 Int. Leg. Met. 1144, Art. 1.