

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

CANFOR CORPORATION, TEMBEC INC.,
TEMBEC INVESTMENTS INC., TEMBEC INDUSTRIES INC.,
TERMINAL FOREST PRODUCTS LTD.

Investors
(Claimants)

v.

UNITED STATES OF AMERICA

Party
(Respondent)

**REPLY POST-HEARING SUBMISSION OF THE CLAIMANTS,
CANFOR CORPORATION AND TERMINAL FOREST PRODUCTS LTD.**

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March 10, 2006

**REPLY POST HEARING SUBMISSION OF THE CLAIMANTS,
CANFOR CORPORATION (“CANFOR”) AND
TERMINAL FOREST PRODUCTS LTD. (“TERMINAL”)**

In accordance with the directions of the Tribunal, Canfor and Terminal (collectively, the “Claimants”) respectfully submit this Reply to the Post-Hearing Submission of Respondent United States of America. In this Reply Submission, the Claimants only respond to the answers of the United States to the questions posed by the Tribunal which call for further response. Where no further response is offered, the Claimants submit that none is necessary and rely upon their earlier oral and written submissions. Likewise, the Claimants do not respond to the answers given by the United States when the answer given by the United States was not responsive to the question posed by the Tribunal, or where the United States has again engaged in argument by adjective, without providing any reasoned support for its rhetorical responses.

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?

A. While the United States’ answer is not responsive to the Tribunal’s question, the Claimants clarify that with the exception of the Byrd Amendment, the Claimants’ claims concern the conduct of Commerce, the ITC and other governmental officials, and not the substance of antidumping or countervailing duty law itself. The Claimants’ claims in respect of the Byrd Amendment are as described in the Statement of Claim.

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

(a) Preliminary determinations?

(b) Final determinations?

(c) Interpretation and application by the investigating authorities?

(d) The process leading to the determinations?

A. Again, the Claimants observe that the United States’ introduction to its response to this question is non-responsive. The issue before the Tribunal does not concern what is or is not a measure. However, the Claimants say the broad and non-exhaustive definition of measure in NAFTA Article 201, encompasses all conduct for which the United States has state responsibility under international law, including the actions leading up to, including and following the determinations and the requirement that deposits be posted on imported softwood lumber. With respect to the United States’ response to question 2(d), the Claimants note that the United States’ response too narrowly characterizes the claims,

which concern more than simply the interpretation or application of United States' laws, but rather the treatment received by the Claimants at the hands of United States' officials. It will be for the Claimants to establish on the evidence led at the hearing on the merits, that the United States conduct meets the threshold of violating Section A of Chapter 11 of NAFTA.

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. The Claimants disagree with the United States' response. The question was not whether a Chapter 11 Tribunal has jurisdiction to review a Chapter 19 binational panel decision, but rather, whether a Chapter 11 Tribunal retains a jurisdiction over claims related to alleged violations of Chapter 11, where a binational panel has subjected a final determination to binational review under Article 1904. For the reasons already given, a Chapter 11 Tribunal has such jurisdiction.

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

A. The United States did not substantively respond to this question. Accordingly, no further response is necessary.

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

A. No further response is necessary.

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?

A. No further response is necessary.

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?

A. No further response is necessary.

B. Approach to the Preliminary Question

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

- A. The Claimants do not agree with the United States' assertion that "the Tribunal's task is to make a definitive interpretation of the relevant jurisdictional provisions and then to consider whether the claims, as credibly alleged, fall within the Tribunal's jurisdiction." The Claimants repeat their submission that Article 1901(3) is not a jurisdictional provision in the sense that such a test might be applicable.

Moreover, even if the provision is a "jurisdictional provision", the United States' suggestion that it is contrary to the approach taken by other tribunals to defer the determination of a jurisdictional objection to the merits is patently false: see, for example, *Loewen Jurisdiction Award* where four out of five jurisdiction challenges were deferred to the merits¹ and *UPS Jurisdiction Award* where two objections were deferred to the merits.² The Claimants' submission in respect of deferral to the merits is with respect to any matters upon which the Tribunal may need to make factual findings.

In further response to the United States' submission, the Claimants observe that the provision interpreted by the International Court of Justice in the *Fisheries Jurisdiction Case* is not analogous to the matter before this Tribunal.³ Indeed, the contrast between the language of the relevant provisions provides useful insight into the difference in their scope and the implausibility of the United States' position on Article 1901(3). In the *Fisheries Jurisdiction Case* a specific reservation was taken for "disputes arising out of or concerning conservation and management measures".⁴ That formulation lends itself to an analysis of whether the dispute in issue was of that nature. All that needed to be determined was whether the claim created a dispute arising out of or concerning a conservation measure. By contrast, Article 1901(3) does not, on its ordinary language, allow for such a simple analysis.

Throughout these post-hearing submissions, the United States has taken the position that this Tribunal should give Article 1901(3) the effect of a "subject matter exclusion" like the reservation in the *Fisheries Jurisdiction Case*. Indeed, it has offered no other basis upon which its Objection can succeed. However, Article 1901(3) does not contain language analogous to the Canadian reservation in the *Fisheries Jurisdiction Case* because, unlike that reservation (which applies to all "conservation and management measures"), Article 1901(3) can apply, at most, to "antidumping laws" and

¹ *Loewen Group Inc. and Raymond R. Loewen v. United States of America*, (ICSID Case No. ARB(AF)/98/3), Award on Jurisdiction, January 5, 2001, paras. 74-77 (online: <http://www.naftalaw.org>) (Authorities for Canfor Rejoinder, tab 6).

² *United Parcel Service of America Inc. v. Canada*, Award on Jurisdiction, November 22, 2002, paras. 114, 122, 137 and 138 (online: <http://www.naftalaw.org>) (Authorities for Canfor Rejoinder, tab 10).

³ *Fisheries Jurisdiction Case (Spain v. Canada)*, 1998 ICJ 96, para. 62 (online: <http://www.icj-cij.org/icjwww/idecisions.htm>) paras. 14 and 63-73 (Authorities for Canfor Reply, tab 20).

⁴ *ibid.*, para. 14.

“countervailing duty laws”, a far narrower area, and one for which, as discussed in response to Question 1, the Claimants do not allege a Chapter 11 violation.

Lastly, the Claimants observe that the United States has not raised as a preliminary jurisdictional issue whether the measures complained of relate to investment, so it is unclear why that issue is raised in response to this question. As it is not before the Tribunal, the Claimants do not respond further, nor do they respond to the inaccurate suggestion that the Claimants have attempted to “redefine their claims to avoid Article 1901(3)”.

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*?

A. No further response is required.

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?

A. No further response is required.

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

A. No further response is required.

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

A. No further response is required.

C. Treaty Interpretation

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

A. For clarity, the Claimants say that the effect of NAFTA Article 1131 is to require the Tribunal to interpret the Treaty in accordance with the objectives set out in Article 102, because Article 1131 obliges the Tribunal to interpret the NAFTA according to the rules

set out in the *Vienna Convention*⁵ and Article 31 of the *Vienna Convention* requires that a treaty be interpreted in light of its object and purpose. On its terms, Article 102 is the most definitive and comprehensive statement of the object and purpose of NAFTA.

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)

A. The Claimants agree with the United States that this ‘distinction’ is not relevant to the Preliminary Question. However, in reply to the United States’ submission that it has not focused only on one objective, or attempted to parse the objectives of the Treaty into those that relate to trade and those that relate to investment, the Claimants note that while the United States may now seek to resile from its earlier submissions, their unmistakable tenor was that the object of establishing effective conditions for the resolution of disputes was the only relevant objective.⁶

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

A. No further response is required.

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*?

A. The United States relies upon *lex specialis* as an interpretive rule that provides the Tribunal further guidance. The Claimants’ previous response to question 16 clarified their position on the use of an interpretive rule which would prefer *lex specialis* over *lex generalis*. The Claimants note again that resort to *lex specialis* does not assist the United States, as they have never suggested that the general objectives of the NAFTA override the specific language of the Treaty.

⁵ *Vienna Convention on the Law of Treaties* (1969) 1155 U.N.T.S. 331; 8 (1969) ILM 679 in force 1980 [hereinafter *Vienna Convention*] (Authorities for Canfor Reply, tab 2).

⁶ See *Canfor Corporation v. United States of America*, Arbitration Under Chapter 11, Objection to Jurisdiction of Respondent United States of America, October 16, 2003, at p. 27; *Canfor*, Reply on Jurisdiction of United States of America, August 6, 2004, pp. 23-34; *Canfor*, Transcript of Hearing on Jurisdiction, December 7, 2004, p. 129, l. 20 to p. 135, l. 7 and *Canfor Corporation, Tembec Inc., Tembec Investments Inc., Tembec Industries Inc. and Terminal Forest Products Ltd. v. United States of America*, Arbitration Under Chapter 11, Transcript of Hearing on Preliminary Question, January 12, 2006, p. 129, l. 20 to p. 135, l. 7 (*1126 Preliminary Question Hearing*).

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?**

A. No further response is required.

D. Legislative History

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

A. The United States purports to make unsupported assertions of fact as to the legislative history of Chapter 19, and in particular, that it was “not subject to a legal scrubbing”. It then purports to provide an explanation why that was so. Those statements must be given no weight whatsoever.

The United States has had ample time, if it thought relevant, to have led evidence about the negotiating history of Chapter 19 of the NAFTA, and presumably, its predecessor, the CUFTA. It did not do so. Unsupported assertions of fact cannot be relied upon by the Tribunal when no opportunity has been provided to test that evidence.⁷ Indeed, the supposed officials of the USTR who were consulted by counsel are nowhere identified, nor is there any indication what was asked of them.

In further response, the Claimants note there is a certain irony to the United States’ submission that the Claimants have not met the requirements for resort to supplemental means of interpretation when the Claimants have relied on those supplemental means to demonstrate the lack of merit to the United States’ position, while the United States does

⁷ UNCITRAL Arbitration Rules Art. 24(1) provides that : “Each Party shall have the burden of proving the facts relied on to support its claim or defence.” *The Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4, (online: <http://www.icj-cij.org/icjwww/idecisions.htm>) (United States’ Reply Authorities, tab 4) is relevant on the effect of assertions made without evidence:

“Although the suggestion that the minefield was laid by Albania was repeated in the United Kingdom statement in Court on January 18, 1949, and in the final submissions read in Court on the same day, this suggestion was in fact hardly put forward at that time except pro memoria, and no evidence in support was furnished. In these circumstances, the Court need pay no further attention to this matter.” (p. 16)

and

“The Court need not dwell on the assertion of one of the Counsel for the Albanian Government that the minefield might have been laid by the Greek Government. It is enough to say that this was a mere conjecture which, as Counsel himself admitted, was based on no proof.” (p. 17)

If the United States wished to advance this argument, it was bound to lead evidence to support it in accordance with the Procedural Order of the Tribunal.

not even purport to rely on evidence to support its interpretation but instead relies simply on its own unsworn assertions for the very same purpose.

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 Chapters 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.**
- A. The United States’ assertions of fact are unsupported by evidence, and in any event, are irrelevant to the interpretive task of this Tribunal. Moreover, the United States provides no authority whatsoever for the proposition that the fact that different Chapters of the NAFTA may have been negotiated by different drafters may be a relevant factor in interpreting a Treaty’s text.

E. Text (“ordinary meaning”)

19. **Is Chapter 19 a complete and exclusive code governing disputes concerning AD/CVD law?**
- A. It is apparent from its response that the United States views Article 1901(3) as a complete subject matter exclusion, irrespective of the manner of its drafting. For the reasons already given, the Claimants disagree.
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)?**
- A. The United States’ reliance upon Article 1607 does not assist its position. The critical distinction between Article 1607 is that it relates to the imposition of an obligation “on a Party regarding *its immigration measures*”, whereas Article 1901(3) is confined to obligations “with respect to” antidumping *law* or countervailing duty *law*.

When the terms “obligation” and “in respect of” “antidumping law” and “countervailing duty law” are correctly understood in the context of the claims, no obligation is created within the meaning of Article 1901(3). The Claimants are not challenging the validity of antidumping or countervailing duty law itself, and thus the Claimants’ claims do not imply an obligation on the part of the United States to submit its antidumping or countervailing duty *law* to Chapter 11 dispute settlement in this case. Moreover, in

context, “obligation” with respect to antidumping or countervailing duty law means an obligation to revise or amend such law, and since, as the Claimants have discussed in their pleadings, a Chapter 11 Tribunal has no authority to provide declaratory or other relief that would place a NAFTA party under an obligation to change its law, the “obligation” to submit to Chapter 11 dispute settlement in this case is not an obligation on a party “with respect to” antidumping or countervailing duty *law*.

Additionally, contrary to the conclusion drawn by the United States in the last paragraph of its response to this question, the fact that Article 1904 requires the Parties to establish a substitute for municipal appellate review of antidumping or countervailing duty determinations does not assist it. In fact, the effect of Article 1904 is to support the Claimants’ interpretation.

That is so because the “obligation” “with respect to” “antidumping law” or “countervailing duty law” created under Article 1904 is not properly characterized an obligation to submit disputes in individual cases to dispute resolution before a binational panel. The “obligation” with respect to the *laws* is to amend those laws to replace municipal review with binational review.⁸

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.

A. No further response is required.

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?

A. It is simply wrong for the United States to assert, as it baldly does, that “antidumping law or countervailing duty law” are not defined in Chapter 19. A definition is found in both Article 1902(1) and 1904(2). The relevance of those definitions to the interpretation of Article 1901(3) has previously been addressed.

⁸ See NAFTA Article 1904(15).

Once again, however, much of the United States response to the Tribunal's inquiry is non-responsive. The arguments the United States seeks to advance on the meaning of the phrase "with respect to" do not assist in understanding the meaning of the word "law".⁹

The United States' submission that the fact that the Parties specifically defined the words "antidumping law" or "countervailing duty law" in Articles 1902(1) and 1904(2) means that the words used in Article 1901(3) mean *something else* and that those definitions do not apply, can be given no weight. While the definition in Article 1904(2) may be applicable to that Article only, the definition in Article 1902(1) is of general application.

Further, the Claimants once again note the complete absence of authority to support the United States' assertions that determinations are themselves "administrative practice." There is no merit to considering a determination to be "administrative practice" without some support for that proposition from either United States law or international law. In any event, the United States' observations in that regard do not assist in answering what is meant by 'law' as requested by the Tribunal.

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)?

A. In light of the answer to question 22, this question does not arise. However, the Claimants note that the United States' response appears premised upon the notion that "administrative practice" does not appear in the definition of "domestic law" because "administrative practice" means (or includes) "determinations" which are subject to review under Article 1904. This, of course, leads to the absurd result that under Article 1904(2), the Chapter 19 panel is mandated to review a "determination" (i.e., what the United States says is "administrative practice") to determine whether that determination is in accordance with antidumping or countervailing duty law. Antidumping or countervailing duty law, however, are expressly defined to include "administrative practice". The analysis is circular.

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

A. Again, the Claimants observe that the United States provides no legal justification for its assertions.

⁹ As was already discussed at Question 6 of this Reply, the United States has, throughout its submissions, attempted to convince this Tribunal, that 1901(3) should be interpreted as a subject matter exclusion for "antidumping and countervailing duty matters" despite the fact that the provision, on its face, applies only to laws. In the United States' response here, the process by which it creates this transformation has finally been clarified. The United States says that inclusion of the words "with respect to" turns what would, at most be a narrow exclusion for laws, into a sweeping subject matter exclusion for all antidumping and countervailing duty matters. As was discussed by Canfor at paragraphs 30 and 31 of its Reply Memorial, the ordinary meaning of these words imports no such effect.

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

A. The Claimants agree that the word “law” can be used to mean a body of rules of action or conduct prescribed by controlling authority and having binding legal force. That definition is consistent with the Claimants’ view of law as the normative body of rules, rather than their application in any particular case. The United States, however, continues to fail to distinguish between the body of rules governing a case, and the application of those rules in a particular case.

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.”

A. The use of “administrative practice” in article 1706, rather than supporting the United States, supports the Claimants. The only use of the defined phrase “administrative practice” in Chapter 17 was in Article 1702(3). The relevant usage (i.e., with respect to “resulting amendments to regulations and administrative practices”)¹⁰ makes clear that it can only be referring to normative rules (note the use in conjunction with “regulations”). Moreover, the context demonstrates that “administrative practice” cannot be referring to the outcome in a particular case, as the outcome in a particular case is not something that can be subject to “amendment”

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

A. The Claimants have already made extensive submissions showing the distinction between a “law” and its application and will not repeat them here. Three points, however, are worthy of comment.

First, to the extent the United States suggests that a determination is simply the result of the application of United States antidumping or countervailing duty law, the United States predetermines the merits of the claims, in that the Claimants allege that the determinations are the result of a very different process, comprised in part of the misapplication, in a deliberate manner and for improper purposes, of United States’ laws.

¹⁰ Article 1702(3) of the Canada-United States Free Trade Agreement states, in full:

The United States of America shall accord Canadian-controlled financial institutions the same treatment as that accorded United States financial institutions with respect to amendments to the *Glass-Steagall Act* and associated legislation and resulting amendments to regulations and administrative practices.

Second, the United States again misstates what occurred during the *UPS* hearing and relies upon an argument that was not even advanced. The Tribunal did not address the argument UPS abandoned. The *UPS* decision is, on this point, of absolutely no utility, and even had the argument been addressed, the Award would be of no precedential weight. In any event, the provision at issue in *UPS* related to “measures” and not the significantly narrower term “law” which appears in 1901(3).¹¹

Lastly, at page 26, the United States reargues that the Claimants’ position with respect to the purpose of Article 1901(3) would render Article 1902(1) redundant and violate the principle of effectiveness. The fact that each Party has reserved their rights to apply, change or modify their “antidumping or countervailing duty law” is in no manner inconsistent or overlapping with Article 1901(3). As stated by Canfor in its Reply Submission, of May 14, 2004 at para. 22:

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

Quite simply, Article 1902 has one function, confirming the reservation of rights, and Article 1901(3) has another function, making the reservation of rights effective vis a vis the rest of the NAFTA outside Chapter 19. The provisions are complementary.

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”?

A. The Claimants take no issue with the first paragraph of the United States’ response. The second paragraph is, once again, unresponsive, and is used by the United States as yet another opportunity to advance its submissions on the meaning of the words “with respect to”. In doing so, the United States again demonstrates that its objection is dependent on this Tribunal interpreting Article 1901(3) to be a ‘subject matter reservation’ like that in the *Fisheries Jurisdiction Case*,¹² and shows that its support for this interpretation depends on a contorted reading of the words ‘with respect to’ that is at odds with their ordinary meaning and the context in which they appear.

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

A. No further response is required.

¹¹ *UPS Award on Jurisdiction*, *supra* note 2 at para. 117.

¹² *Fisheries Jurisdiction Case*, *supra* note 3.

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?

A. The United States answer is not responsive to the Tribunal’s question. No further response is necessary.

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?

A. It is telling that the United States’ interpretation drives it to the position that there is no remedy for conduct of United States’ officials, no matter how egregious, if the issue in any way touches upon antidumping or countervailing duty matters. The Claimants note, of course, that that is not what the ordinary language of Article 1901(3) says, and rely upon their earlier submissions. Article 1901(3) does not describe the excepted actions like the ‘subject matter’ exclusions raised by the United States.¹³ The United States’ attempt to seek immunity for conduct that denies justice to the Claimants on the basis of a provision whose ordinary meaning does not require it ought not to be countenanced.

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?

A. Once again, the United States ignores the actual wording of Article 1901(3). The United States asserts immunity for any “conduct in question [that] is with respect to a Party’s antidumping or countervailing duty law”. Yet that is not what Article 1901(3) provides: it is concerned only with avoiding the imposition of “obligations” with respect to the law itself. In effect, the United States once again rephrases Article 1901(3). These rephrasings only serve to highlight the sorts of different words the drafters *would have used*, if they had meant Article 1901(3) to cover the subject matter that the United States claims that it covers. The United States is simply unable to make its case without couching the substance of Article 1901(3) in language *other than that which the drafters actually used*.

¹³ As was already discussed in response to question 6, the *Fisheries Jurisdiction Case* reservation excepted jurisdiction for “disputes arising from or concerning *conservation or management measures*” (para. 14) [*emphasis added*]. CUFTA Article 1701(1) provides that “[n]o provision of this Agreement confers rights or imposes obligations on the Parties with respect to *Financial Services*” [*emphasis added*]. In both cases, the provisions clearly create exceptions for all government activity in an area or subject. 1901(3) is, of course, different as, on the Article’s face, it is only a portion of government activity in an area that can be affected by any exception or exclusion that the Article may create.

- 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)?**
- A. No further response is required.
- 33. Does arbitrary conduct fall under the standard of review of Article 1904(3) in conjunction with Annex 1911?**
- A. No further response is required.
- 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.**
- A. No further response is required.
- 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?**
- A. No further response is required.
- 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?**
- A. No further response is required.
- 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?**
- A. The fact is, the parties chose the word "law" rather than "measures" or "matters" to describe their intention. The United States fails to acknowledge that the words mean different things.

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

- A. The United States’ reliance upon Article 1701 of the CUFTA is misplaced (as is its reliance upon its own unilateral statements in its Statement of Administrative Action as demonstrating the intent behind Article 1901(3)). It is notable that the United States’ response ignores the distinctions between Article 1901(3) and Article 1701. In particular: Article 1701 is explicit that the referenced provisions provide the entirety of the agreement between the Parties; Article 1701 does not parallel the “shall be construed as” language of Article 1901(3); and Article 1701 covers a broad field – “financial services” (rather than on *financial services law*), whereas Article 1901(3) is confined to “law”.

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?

- A. The Claimants observe that despite the fact that Article 1901(3) is precisely drafted to make clear that no provision of any other Chapter shall be construed as imposing obligations on a party with respect to their antidumping or countervailing duty law, the United States has once again expanded the ambit of that Article to cover antidumping or countervailing duty matters, despite that this is not the language used.

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?

- A. The United States has provided no basis for suggesting that the French or Spanish texts support its strained interpretation of Article 1901(3). First, its assertion that the French and Spanish texts support the argument that the phrase “with respect to” should not be given “an unduly narrow meaning” fails for the simple reason that the Claimants have not sought to give it such a meaning. Second, the Claimants did not suggest that “antidumping law and countervailing duty law” means the same thing as “antidumping statute and countervailing duty statute”. Rather, as the Claimants have demonstrated in their initial response, the French text supports the Claimants’ submission that “law” is intended to refer to the normative body of rules by which disputes are resolved.

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?

A. No further response is required.

F. Context

36. Where in 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”?

A. It is again interesting that the United States provides no answer to the question why the word obligations was used, instead of the alternative phrase. Rather, it asserts simply that, despite the fact that different phrases were used, the meaning is the same. This begs the question why there are such differences.

Moreover, again, the United States seeks to rely upon analogies to Article 1607, 2103 and the US – Albania BIT, which analogies are inapt. Each of those other provisions uses the far broader language “measures” or “matters” in place of “law”. The analogy to the US-Albania BIT is particularly inapt as it is not even part of the “context” of the NAFTA within any of the meanings indicated in Article 31 of the *Vienna Convention*.¹⁴ The Claimants therefore question is relevance to the interpretation of the NAFTA

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

No further response is required.

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

A. The United States again resorts to its analogy with Article 1607, suggesting that comparison is “instructive”. There is no indication why or how that analogy is instructive, except that one notes, again, the difference between the use of the word “measures” in Article 1607, and the use of the word “law” in Article 1901(3).

¹⁴ *Vienna Convention, supra* note 5.

37. Please explain the difference, 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.

A. The United States' analogy between Article 1901(3) and Article 1138 does not withstand scrutiny. The United States correctly notes that Article 1138 expressly withdraws restrictions on acquisitions of investments by foreigners from State to State or investor-State dispute resolution, but it then asserts that Article 1901(3) does the same thing. It provides no explanation why the latter provision is properly so interpreted.

It is also of interest that the United States continues to contend that Article 1901(3) is of extremely broad scope, and indeed, in its view, is of broader scope than even the explicit language of Articles 804, 1138 and 1606. Were that indeed the case, one would have expected there to have been some record or commentary suggesting that was the purpose. Yet, of course, there is none.

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

A. As the United States' response does not address the Tribunal's question of why Article 1108 is silent, no further response is required.

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

A. Again, it is important to note the imprecise use of language in the United States' response. Rather than referencing antidumping or countervailing duty "law", which is the subject matter of Article 1901(3), the United States again resorts to the broader term "matters".

Regardless, the United States' response is unsupportable. Article 1401(2) does not support its interpretation of Article 1901(3). Article 1401(2) was necessary because of the specific exclusion of financial services from the ambit of Chapter 11. For the United States' premise to have any merit, Chapter 11 would have required an exclusion analogous to Article 1101(3) with respect to antidumping and countervailing duty matters.

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?

A. The United States asserts that a provision analogous to Article 1115 would be necessary for proceedings to proceed under both Article 1904 and under Chapter 11. The flaw, of course, with that reasoning, is that Article 1115 was intended to preserve a State's right to

subject the same measures to the same review under the same legal standards as a Chapter 11 Tribunal would apply, irrespective of whether an investor-State dispute was pending. There is no analogy to Chapter 19 Tribunals, as those Tribunals apply a different law than do Chapter 11 Tribunals.

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

- A. The Claimants note that the United States purports to rely upon a “principle” established by the UPS Tribunal. First, the United States has not identified any relevant principle of treaty interpretation in the *UPS Award*¹⁵ that this Tribunal should follow. Second, the Claimants observe the distinction between Articles 1901(3) and Article 1501, and in particular note that investor-State dispute resolution was not precluded under any particular principle, but rather because Article 1501 expressly excluded such resolution on a State to State basis, and Note 43 makes clear that it is also precluded on an investor-State basis.¹⁶

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

- A. No further response is required.

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

- A. The United States’ answer is completely non-responsive to the Tribunal’s inquiry. From this, one can conclude that the United States does not contend that Chapter 11 is inconsistent with Chapter 19 in any legally cognizable way.

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?

- A. No further response is required.

¹⁵ *UPS Award on Jurisdiction*, *supra* note 2.

¹⁶ *ibid*, paras. 61 and 68.

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

- A. The Claimants note that this issue is not before the Tribunal, as the United States expressly “does not raise the potential for inconsistent decisions as a basis for declining jurisdiction”.

Regardless, the response of the United States itself recognizes that inconsistent decisions are not possible when it notes that a Chapter 19 panel and a Chapter 11 panel offer fundamentally different relief and apply different laws.

The United States’ argues that Chapter 19 and Chapter 11 dispute resolution give rise to the possibility of inconsistent decisions because it is possible for a Chapter 19 tribunal to find a violation of United States’ domestic law, which the United States now says amounts to a violation of its NAFTA obligations, while a Chapter 11 Tribunal may find no violation of Chapter 11. That argument has no merit. It is in no way inconsistent for one tribunal to find (or not find) a violation of the obligations contained in Chapter 11, and another tribunal to find (or not find) a violation of United States antidumping or countervailing duty law under Chapter 19, whether the latter amounts to a violation of the Treaty or not.

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?

- A. It is surprising that the United States argues there is a possibility of double recovery by way of return of the duties and collection of damages when the United States maintains that, despite the language of the Treaty, it has no obligation to return the duties.¹⁷

In any event, the United States has not shown how a conscientious and competent Tribunal, applying the principles concerning awards of damages in investor-State arbitrations, would have any difficulty in crafting a damages award that ensures that the quantum awarded would not result in double or over-recovery for the claimant.

There is also no possibility of “double jeopardy”. The United States is obligated to comply with its obligations under its municipal regime, under the NAFTA and under the WTO Agreements. There are consequences for breaching each of those obligations, (such as WTO sanctioned retaliation, although such retaliation is prospective in nature and therefore not a matter of “double jeopardy”). Furthermore, the United States

¹⁷ See eg. Response of the United States Department of Commerce to Challenges to its Remand Redetermination, In the Matter of Softwood Lumber Products from Canada Final Determination of Sales at Less Than Fair Value, NAFTA Secretariat File No. USA-CDA-2002-1904-02, June 8, 2004, where at p. 7 the United States says:

“a NAFTA Panel’s authority is limited and it may only grant ‘remedies that are authorized by NAFTA Article 1904(8).’ This provision grants Panels the ability to rule only upon the merits of a final determination and does not grant Panels the authority to order the Department of Commerce retroactively refund duties, as argued by the respondents.”

government does not pay duties imposed as retaliatory measures for violations of the WTO Agreements. These are paid by importers of products into Canada. Presumably if the Claimants were successful here, the United States might request that the Compliance Panel reduce the retaliation levels. Additionally, the remedy in the WTO allows members to suspend benefits of the Agreement to an appropriate level. It would be incorrect to characterize such a suspension of benefits occurring simultaneously with a Chapter 11 damages award as “double jeopardy”.

Lastly, while the United States holds out the spectre of a Chapter 11 Tribunal awarding damages for conduct subsequently “revised” as the result of the Chapter 19 remand process, there is absolutely nothing wrong with a tribunal making such an award. Indeed, where the United States abuses its processes, as it did, for instance with the preliminary critical circumstances determination, the Claimants are entitled to recover damages for such conduct if they can satisfy the Chapter 11 Tribunal that it fails to meet the standard of treatment the United States was obliged to accord them. There is no double recovery if the Claimants recover for losses caused by the preliminary determinations as those losses are not erased simply because the final determination reverses the preliminary determination.

- 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 1112(1) have any effect on the question?**
- A. No further response necessary as this issue cannot arise.
- 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 relating to AD/CVD?**
- A. Contrary to the United States’ suggestion, the Claimants do not ask the Tribunal to “act as [an] appellate bod[y] to review Chapter Nineteen decisions”. Moreover, the United States now asserts that Articles 1903 through 1905 were “designed to make the Complaining party whole.” Clearly those provisions do not in any meaningful sense make a party whole.
- 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)?**
- A. As the United States concedes this matter is not before the Tribunal at this time, no further response is necessary. Nonetheless, it is the Claimants’ position that an Article 1121 waiver does not preclude a party from seeking Article 1904 appellate review of

determinations made against them. The waiver requirement was never intended to prevent a party from seeking appellate review of a determination against them, or declaratory or extraordinary relief not involving the payment of damages from an Article 1904 panel.

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

A. No further response is required.

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

A. The United States' response is in error. Article 1904(15) requires the Parties to amend their laws to give effect to a panel decision that a refund is due. The panel, however, is limited in its authority and cannot order the repayment. It can only make declaratory orders remanding the matter back to the DOC or ITC for action not inconsistent with its decision.

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

A. The Claimants agree with the United States that this question is not relevant to the Preliminary Question, so no further response should be necessary. However, as the United States then suggests that a decision of a Chapter 19 panel is not made by an "administrative tribunal or court under the law of the disputing party" because a Chapter 19 panel is not an administrative tribunal *of* the disputing party, the Claimants note that the United States' response ignores the actual words used in the Treaty. It is remarkable for the United States to suggest that decisions of Chapter 19 Tribunals are not made "under the law of" the United States, when Chapter 19 specifically required the parties to amend their laws to provide for the operation of Chapter 19 panels, and where those panels are constrained to apply only United States' law.

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?

A. No further response is required.

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.

A. No further response is required.

55. Is it correct that a binational panel under Article 1904 sits in lieu of the Court for 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?

A. No further response is required.

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?

A. No further response is required.

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?

A. The Claimants dispute the United States’ assertion that non-compliance with a Chapter 19 panel decision cannot be a measure adopted or maintained by a Party relating to investors or their investments, but notes again that this is not the issue before the Tribunal. Clearly, in any event, the United States assertion that non-compliance with a panel decision is not a measure is substantively incorrect, as the determination by the United States to maintain deposit requirements following the Chapter 19 Tribunal remand is obviously a measure adopted or maintained by the United States. Lastly, with respect to the United States’ argument that a Chapter 11 Tribunal cannot have jurisdiction over its failure to abide a Chapter 19 panel decision because the United States has not given its own courts that power, the Claimants note that the United States has not given its own Courts the power to determine whether *any* of its actions breach NAFTA Chapter 11, irrespective of the context.

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)

A. The Claimants note that the United States focuses only on remedies available to a State under Article 1905. No remedy is available to an investor under that provision.

G. Object and Purpose

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

A. No further response is required.

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

A. Again, the Claimants do not rely on Article 102(1)(c) to override the language of the Treaty. Article 102(1)(c) is one of the objectives that inform and support the Claimants’ interpretation of Article 1901(3).

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

A. No further response is required.

H. Circumstances of Conclusion

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

A. The United States’ response is speculative, non-responsive and unpersuasive. It is speculative to suggest that Article 1901(3) was included because of the inclusion of investor-State dispute resolution when that suggestion is supported by no evidence at all. It is non-responsive to again, at length, reargue its interpretive analogies to Articles 1607 of NAFTA and 1701 of CUFTA, both of which have been considered elsewhere. It is unpersuasive in its attempt to rely upon its supposed “tentative and circumspect” manner of negotiation, with respect to the continuation of the binational panel regime established under the CUFTA. That the United States initially proposed treaty language without committing to its inclusion, and then subsequently agreed to its inclusion, does not in any way assist with the interpretation of Article 1901(3).

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

A. The United States should not be permitted to resile from the position it took in its Statement of Administrative Action. The SAA clearly states that the amendments to Articles 1901 and 1902 are technical changes to facilitate the inclusion of a third country

to the Treaty. The United States seems to draw some significance from the fact that the SAA does not specifically identify Mexico as the third country, but given that the relevant provisions of the Treaty were being compared to the CUFTA, it is patently obvious that the reference is to Mexico.

The Claimants will not address yet again the United States continual misstatement that they have not provided an explanation of the possible basis for that provision. It is notable that despite having done so on a number of occasions,¹⁸ the United States has never once indicated why that explanation is not accurate.

Finally, the Claimants are not entirely sure what the United States intends by saying the SAA meant that Article 1901 and 1902 were “identical in substance” with the provisions that existed in the CUFTA. If that is so, then it is difficult to see how Article 1901(3) can be interpreted as having the exclusionary effect the United States contends.

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

- A. Nothing in the United States’ response provides any basis upon which to conclude that the absence of inclusion in the list of “Provisions to be placed outside of Investment Chapter” supports a conclusion that the matter had already been excluded. Rather, the far more logical inference is that the Parties never contemplated that responsibility for any conduct that violated Chapter 11 standards would be excluded from the investment chapter merely because of a connection to the antidumping or countervailing duty field.

I. The Byrd Amendment

65. At the Canfor hearing, the United States took the position (Canfor Tr. 91:1-2)¹⁹: “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?

- A. No further response is required.

¹⁸ See eg. *Canfor Corporation and United States of America*, Arbitration Under Chapter 11, Transcript of Hearing on Jurisdiction, December 7, 2004, p. 294, ll. 9-21 and *1126 Preliminary Question Hearing*, January 12, 2006, p. 245, l. 2 to p. 246, l 17.

¹⁹ The reference is taken from the hard copy of the transcript provided by the United States on 21 December 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 21 December 2005 in their future submissions.

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?

A. The United States asserts that the Claimants have taken inconsistent positions with respect to the Byrd Amendment. That is not so. There is nothing inconsistent in the references referred to by the United States in footnote 160.

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.

A. No further response is required.

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?

A. No further response is required.

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?

A. The Claimants dispute that the lack of notification does not affect whether the Byrd Amendment is antidumping or countervailing duty law for the purposes of Chapter 19. The United States cannot take benefit from provisions of Chapter 19 in respect of amendments to its law that do not comply with Chapter 19.

(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)?

A. No further response is required.

- 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?**
- A. Contrary to the position taken by the United States, the Claimants do not contend that any violation of municipal antidumping or countervailing duty law amounts to a violation of Chapter 11. For the Claimants to succeed they have to establish to the Tribunal's satisfaction that the conduct which they prove amounts to a violation of a Chapter 11 obligation.
- 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?**
- A. The Claimants acknowledge that their original response to this question was in error and that the first paragraph of the United States' response is correct.
- 68. Assuming that the Byrd Amendment is repealed, do Canfor and Terminal have a claim regarding the Byrd Amendment before this Tribunal?**
- A. The United States asserts that the only manner in which the Claimants are affected by the Byrd Amendment is the impact of it upon the initiation of petitions. Of course, the Byrd Amendment has a far greater effect than that when one takes into account the ability to use the Byrd Amendment as a lever during negotiations, and the impact upon integrated businesses such as Canfor and Terminal if duties are distributed to their competitors.
- 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.**
- A. No further response is required.
- 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.**
- A. No further response is required.
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?**
- A. The United States’ contention that simply because the Byrd Amendment amends the Tariff Act 1930 it is therefore “antidumping law” or “countervailing duty law” is not supportable. Labeling the Byrd Amendment as antidumping law or countervailing duty law, when the predicates of Article 1902 have not been satisfied, does not make it so. Equally, the United States’ assertion (at footnote 180) that the Claimants have conceded that the Byrd Amendment is an antidumping or countervailing duty law is not supported by the referenced transcript passages.²⁰
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?**
- A. No further response is required.
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?**
- A. No further response is required.
75. **[not used; see Question 72]**

²⁰ The Claimants note as well that in any event Terminal was not a participant in the proceedings before the Canfor Tribunal and that Terminal has yet to file a statement of claim.

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?

A. No further response is required.

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?

A. No further response is required.

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?

A. No further response is required. As the United States notes, this issue is not before the Tribunal at this time.

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.

A. No further response is required.

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?

A. The Claimants agree with the United States that this issue is not before the Tribunal at this time.

- 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 exclusion?**
- A. The Claimants observe the United States has provided no substantive response to this question and that the issue is not before the Tribunal at this time. Accordingly, no further response is required.
- 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 United States' arguments have been rejected?**
- A. The Claimants rely upon their earlier responses, except take issue with the United States' assertion that, as it has prevailed on many issues before the WTO or Chapter 19 panels, this demonstrates it has not acted in a grossly arbitrary fashion. The Claimants repeat that on 23 of the 25 reviews, the United States has been unsuccessful, irrespective of what it may claim in its press releases, and that on the other two, the United States has simply ignored the rulings.
- 82. What is the relevance, if any, that Chapter 19 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?**
- A. The Claimants agree with the United States that this issue has no relevance to the Preliminary Question.
- 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; ¶¶ 26 n. 17, ¶¶ 54.**
- A. No further response is required.

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.

A. The Claimants rely upon their earlier statement explaining the origin of the dispute.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

for

P. John Landry

for

Keith E.W. Mitchell

March 10, 2006