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)

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

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POST HEARING SUBMISSION OF THE CLAIMANTS, CANFOR CORPORATION ("CANFOR") AND TERMINAL FOREST PRODUCTS LTD. ("TERMINAL")

In accordance with the directions of the Tribunal, the Claimants, Canfor and Terminal, respectfully submit this post hearing submission in response to the list of questions provided by the Tribunal following the conclusion of the hearing. Canfor and Terminal continue to rely upon the written submissions already made, and upon the submissions made orally to the Tribunal on January 11th and 12th 2006 and will not repeat those submissions in this post hearing brief. For the convenience of the Tribunal, transcript references are included below to indicate to the Tribunal where discussion of those matters can be found. Each of the questions posed by the Tribunal are answered below in turn.

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. Apart from the Byrd Amendment, which ought not to be protected by the language "antidumping law and countervailing duty law" for reasons that the Claimants explained orally and in the pleadings, the Claimants' claims concern the conduct of Commerce, the International Trade Commission, and other governmental officials and not the substance or the enactment of antidumping or countervailing duty laws.

Transcript references: December 8, 2004 - 406:15-409:12; December 8, 2004 - 425:14-16:

> "For clarity, Canfor intends to rely upon all of the United States's conduct up to the date of the hearings on the merits as the basis for its 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. Each of these constitute conduct which is the subject of the claims. All such acts are clearly attributable to the United States under the general rules of state responsibility. Equally, the failure to implement those determinations, the flouting of them, the political interference that colours them, the bias of the decision makers making them, the results driven nature of them, and the rendering of any remedy ineffective are all aspects of state conduct that are the subject of these claims. Essentially, the United States has taken

every kind of action possible to ensure that unlawful duties remain so as to ensure that Canada is forced to accept a negotiated managed trade arrangement under duress.

Transcript references:

> December 7, 2004 - 169:14-170:4: "Canfor's position that its claims are not antidumping and countervailing duty claims, they are claims that are premised on U.S. conduct which violates international norms. Chapters 11 and 19 establish two distinct dispute resolution mechanisms based on fundamentally different legal regimes. One is based on municipal norms, and the other is based on international norms. And the conduct being complained about by Canfor can be subjected to review under both dispute resolution mechanisms, regardless of whether the conduct is in any way related to antidumping and CVD matters or investigations."
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> December 7, 2004 - 195:5-12 both "investigations" and "determinations" have been examples of the historical conduct.
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> December 8, 2004 - 408:15-22: "PROFESSOR HOWSE: Well, very simply that the conduct that we have presented in our Statement of Claim as allegedly violating the standards of treatment in Chapter 11 of NAFTA is not conduct that is mandated or is not the statute itself. It's rather decisions of a discretionary nature taken by officials in the application or administration of the laws."
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> December 8, 2004 - 449:9-450:1: "MR. MITCHELL: I wanted to try and clarify this. As has been made clear, the conduct complained of relates in many respects to the discretionary actions of the United States officials who do carry out responsibilities under the AD and CVD regimes. That is clear. That conduct that we complain of, we say, is unlawful at the international level under Chapter 11. So, it arises from or has a connection to that--the AD and CVD sphere. That is clear, and it relates to in many respects the discretionary action of the officials in that sphere. But the claim relates to the Chapter 11 standard applied to the conduct of the United States officials aimed at targeting and abusing investors such as Canfor."
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> December 8, 2004 - 451:14-16: "MR. MITCHELL: Yes. The conduct of the United States in relation to its actions in relation to the determinations is relevant."
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> December 8, 2004 - 477:10-15 "I don't think that from our point of view there is any doubt that the factual context of the treatment of the investor in this case was the context where they were being subjected to these processes, these determinations, and U.S. proceedings in relation to them."
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> December 9, 2004 - 716:1-7: "It's our submission that Chapter 11 is not about review, quote-unquote, of determinations. It really creates the standard of treatment for all conduct attributable to a state under the appropriate rules of state responsibility unless that conduct is somehow carved out in Chapter 11 or elsewhere of the NAFTA."
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> December 9, 2004 - 716:19;717:14: "ARBITRATOR HARPER: The state acts in question being, Professor Howse, the preliminary determinations that are flagged in the statement of claim? PROFESSOR HOWSE: Yes, it could include that, or it

could even include conduct before a preliminary determination. The investor would have to prove that it's attributable to a state under the ILC Articles. It would have to--the investor would have to show that the conduct fell below the standard of treatment in Chapter 11, and it would have to show the investor was harmed, even though the conduct occurred before the determinations. If the investor can show all those things, we don't think that there is any bar under the state responsibility that's applicable to Chapter 11 to making the claim. We believe that everything is satisfied."

December 8, 2004 - 747:11-748:6: "MR. MITCHELL: And again, I believe our submissions orally and in writing have been clear on this. The conduct of which Canfor complains includes, in part, the conduct leading up to and resulting in the determinations, yes. ARBITRATOR HARPER: Determinations of... MR. MITCHELL: The determinations of, for instance, the DOC and ITC. ARBITRATOR HARPER: All right. Antidumping and countervailing duty law; is that correct? MR. MITCHELL: Well, no, Mr. Harper, and I'm going to again--and the transcript and the written submissions should reflect what Canfor's position is with respect to the antidumping--the meaning of antidumping and countervailing duty law and whether a determination is antidumping and countervailing duty law."

December 8, 2004 - 749:18-750:5: "MR. MITCHELL: The position of Canfor is that the preliminary determinations arise as a result of the conduct of United States officials which we say was exercised improperly in the antidumping and countervailing duty field. Your question asked whether the determinations are in the area of antidumping or countervailing duty law, and we have made extensive submissions on our view of that phrase, and that determinations are not law."

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. Under Article 1904, Binational Panels are given the authority to review the consistency of final determinations with the municipal law governing the agency that has made the determination. Where the agency has erred in the application of municipal law, the Binational Panel may remand the matter to the agency for redetermination. Such review is a substitute for or alternative to judicial review within the legal system of the agency making the determination. By contrast, under Chapter 11 of NAFTA investor-state Tribunals have jurisdiction to apply to "measures" of NAFTA parties certain international law standards. To the extent that a final determination is a "measure," and there is little doubt that it is within the broad definition of a "measure" in NAFTA, a Binational Panel would examine whether the determination conforms to the international law standards of conduct to which the NAFTA parties have bound themselves in Chapter 11. A Binational Panel ruling that the agency has not followed its own law might be probative of whether the international law standard has been met, but something more than mere error of law

would usually be necessary to violate the international law standard. Conversely, a Binational Panel ruling that the agency acted properly within its own municipal law might be offered in support of a defense against a claim that international law standards have been violated. Thus, Binational Panel reviews of final determinations may be offered as evidence in support of or in defense against a Chapter 11 claim that the final determination violates international standards of conduct. But because the standards are different, this is merely evidence that must be weighed in terms of its relevance to the question of whether the international law standards of Chapter 11 have been violated.

Transcript references:

> December 7, 2004 - 201:2-11: "In general, the fundamental misconception which arises out of the U.S. argument is that they assume that what Canfor is attempting to do, to claim under Chapter 11 is for matters that are covered under Chapter 19. That is not so. As I've stated on a number of occasions this afternoon, Canfor's Chapter 11 claim does not subject conduct to scrutiny under municipal law. It subjects the U.S. conduct to scrutiny under international law, and an international standard of review."
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> Also see December 7, 2004 - 212:17-20: "The decisions arising from the two legal processes will not be conflicting because they will be dealing with different causes of action, different claims and different remedies."

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

A. It can, as it is an element of the entire process which has resulted in the violations of the obligations under NAFTA Chapter 11, if a claimant could establish that the United States had state responsibility for that conduct (for instance, by virtue of misconduct on such a Panel by a majority comprised of United States' appointees). Canfor and Terminal do not, however, complain about the conduct of the Article 1904 Tribunals, but rather, to the extent relevant, the conduct of the United States' officials before, or in response to, the decisions of the Article 1904 Tribunals.

It is important to bear in mind that Article 1904 review is conducted against United States' municipal law standards. Where a Binational Panel finds error on the part of United States agencies, that may be ordinary error of law, and not result from any kind of misconduct; it could be conscientious, good faith application of the United States' law. Some statements of Binational Panels suggest possible misconduct of United States' agencies, and that misconduct, rather than the fact of the Article 1904 process, gives rise to Chapter 11 violations, but decisions of the agencies are not reviewable under Chapter 11 for mere error of law. For them to be reviewable under Articles 1102, 1103, 1105 and 1110, there has to be misconduct involved in the errors in question, not just honest errors by conscientious officials doing their jobs as usual.

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

A. "Conduct" is what the officials do; "treatment" is the manner in which the officials direct conduct to a specific investor or claimant (i.e., it takes into account the impact of that conduct upon the investors). Non-exhaustively, relevant conduct includes the actions of the United States, its agents or officials, in misapplying its laws, in abusing its discretion, in using its processes to harm Canfor and Terminal, in having biased decision makers, and in not abiding the outcome of review of its processes.

Transcript references:

> December 7, 2004 at 320:15-18: Howse: "And Canfor's contention is, of course, that our view of these violations is that they stem from conduct that is not mandated, or we cannot see as mandated by U.S. law".
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> December 8, 2004- 410:9-20: "And so, the basic distinction is that 1901(3) does not prevent, jurisdictionally prevent a challenge that is based upon the discretionary conduct of officials in administration of the law. What effect it would have if we were challenging the law itself in saying that therefore implicitly Canfor is under some obligation that stems from something being wrong with its law as it's written, including the whole body of judicial precedents or administrative precedents if they have some binding precedential effect, that's the distinction we are drawing."

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. Canfor and Terminal identify the following actions of the United States which are examples of the politically motivated abuses of process for which, individually or collectively, the United States is responsible:

(i) The refusal of the ITC to follow the remand directions of the Chapter 19 Panel reviewing its actions, as described in the second remand decision dated August 31, 2004. As the Chapter 19 Panel pointed out in the *Second Remand Decision of the Panel*:

> In its Second Remand Determination, the Commission has refused to follow the instructions in the First Remand Decision. The Commission relies on the same record evidence that this Panel not once, but twice before, held insufficient as a matter of law to support the commission's affirmative threat finding.[1]

This failure was a discretionary abuse of process propagated by the ITC which ensured that the duty deposit requirements remained in place and caused losses to

[1] In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination, (31 August 2004) at p. 3, (see Canfor Rejoinder Authorities - Tab 1).

the Claimants for which they are unable to seek redress other than through NAFTA's Chapter 11 process.

Transcript References:

> December 8, 2004: 552:4-553:3: "PROFESSOR HOWSE: Well, Mr. Harper, with all due respect, and at the risk of repetition, my purpose in referring back to the second remand decision of the Panel was to give you one illustration of a moment in the ongoing conduct that Canfor considers not in relation to or respect to antidumping and countervailing duty law, and that is as the Panel held the persistent refusal of the ITC to follow--refusal, not that they didn't do it in the way the Panel liked, but refusal to follow the remand instructions of the Chapter 19 Panel. Now, as far as we know, and as far as the law says, they're obligated to do that. Their whole purpose in a determination on remand is to follow the instructions of the remanding authority. That's what-- PRESIDENT GAILLARD: Your answer in a nutshell is the conduct described in the second decision of August 31, '04? PROFESSOR HOWSE: That would be one example, sir."

(ii) The United States' conduct giving rise to the Preliminary Critical Circumstances determination, which the United States knew to be unreviewable in municipal courts, and which determination was made on the basis of wholly and patently unsustainable reasoning or factual record for the purpose of imposing pressure upon the Canadian industry to enter an improvident settlement.

To impose retroactive collection of duties at the beginning of an investigation, the DOC must make a Critical Circumstances Determination. Such a finding required a finding of an export subsidy beyond the *de minimus* range prior to this softwood case. In Softwood IV, the DOC ignored the only evidence before it and changed its method of analysis to ensure that a positive finding was made against Canadian lumber imports. The DOC justified the retroactive imposition of duties at a rate of 19.3% on a Quebec program that on the evidence was clearly not an export subsidy, and provided a benefit to only .0029% of total sales. The egregiousness of the Determination is exacerbated by the fact that the DOC ignored its own past practice of requiring a subsidy rate beyond *de minimus* prior to making a Critical Circumstances decision. This can only be seen as a blatant attempt to ensure the protection of the American industry. Finally, the United States provided no opportunity for Canadian producers to appeal the Determination and has not provided any forum in which they can seek compensation for the losses that they suffered because of this abuse other than NAFTA's Chapter 11.

(iii) The United States' failure to implement the decision of the Extraordinary Challenge Committee.

On August 31, 2004, a Chapter 19 Panel remanded the injury case to the ITC with instructions that it was to make a finding that Canadian softwood lumber imports did not threaten the American industry with material injury. While the ITC

grudgingly complied, an appeal was taken to an Extraordinary Challenge Committee. The ECC rejected the challenge and affirmed the ITC Determination that the American industry was not threatened with material injury from Canadian imports. With no injury finding, the softwood dispute should be over. The United States should have refunded the duty deposits it collected. Instead, the DOC has asserted it can ignore the outcome of the ECC because there is a 'new' injury determination in existence. This is the first and only time that the United States has failed to implement the decision of an Extraordinary Challenge Committee.

(iv) The appointment of decision makers biased against Canada.

In the fall of 2005, a new Under Secretary of Commerce for the International Trade Administration was confirmed. Prior to confirmation he made commitments to the Senate Finance Committee that demonstrated a prejudgment and pervasive bias against Canada to use the resources of the United States government to extract a negotiated settlement, irrespective of the merits of the United States' position.

(v) Failing to record the receipt of or to rely upon evidence proferred by another United States government agency that was unfavourable to the DOC's position.

Prior to issuing its Final Countervailing Duty Determination, the DOC received a thorough study from the United States Forest Service on conversion rates comparing Canadian and American standing timber. The DOC could and should have entered this report into the record. As the report did not accord with the DOC's objective in that it provided a conversion rate that would not have justified a subsidy rate at the level the DOC desired, instead of entering this report into the record, the DOC suppressed it and chose to use a 30 year old ITC study conducted on the basis of only 62 hemlock trees. Furthermore, the DOC rejected the use of a Canadian study that compared five hundred thousand logs of multiple species. This suppression and rejection of reliable evidence in favour of an obviously unreliable study commissioned by a partial body can only be explained by a predetermination of the desired results and an abuse of discretion to ensure that those predetermined results are achieved.

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. Yes. The United States cannot escape liability for internationally wrongful aberrant conduct merely by labelling the determinations that result from that conduct as "law."

B. Approach to the Preliminary Question

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

A. Unlike traditional jurisdictional objections, this motion is based on a single provision that has been argued by the United States to be a complete exclusion to the jurisdiction of this Tribunal to determine the Investor's claim. The United States' motion is not an objection to jurisdiction *ratione materiae*, *ratione temporis* or *ratione personae* in the traditional sense of objections to jurisdiction in Bilateral Investment Treaties and other international arbitrations (such as the objections of Canada in the UPS case).[2] Article 1901(3) is fundamentally not a jurisdictional provision. The question before the Tribunal is accordingly, a very narrow one.

On this view, the legal standards for determining jurisdiction that have been addressed in such arbitrations as *Methanex*,[3] *UPS*[4] and the *Oil Platforms case*[5] are not directly applicable to the task before this Tribunal.

Were this a jurisdictional objection in the traditional sense, the proper approach to jurisdiction is as set out in paragraphs 24 through 36 of Canfor's original memorial.[6] As the United States has not so much presented a jurisdictional objection as a question of law upon which its defence is based, the proper question for the Tribunal to be addressing at this stage is that set out in paragraph 11 of Canfor's original memorial, namely:

> Where a claimant alleges that the United States has violated the international law obligations assumed under NAFTA Articles 1102, 1103, 1105 and 1110, does NAFTA Article 1901(3) provide a complete defence to the claimant's otherwise properly brought claim, by virtue only of the fact that the claim has some connection to the municipal antidumping or countervailing duty laws of the United States or their application to the Claimant?[7]

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. It is the Claimants' submission that whether the facts alleged are "capable of constituting a violation" of the obligations of NAFTA Chapter 11 is not the appropriate test with respect to the Preliminary Question before the Tribunal. Accordingly, the test

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[2] *United Postal Service v. Government of Canada*, Award on Jurisdiction, (22 November 2002), (online: http://www.dfait-maeci.gc.ca/tna-nac/documents/Jurisdiction%20Award.22Nov02.pdf), ("*UPS Jurisdiction Award*"), at para. 13 (see: United States Reply Authorities - Tab 7).

[3] *Methanex Corporation v. Government of United States of America*, Preliminary Award on Jurisdiction and Admissibility (Chapter 11 Tribunal), 7 August 2002, ("*Methanex*"), at para 120 - 121.

[4] *UPS Jurisdiction Award*, supra note 2, at para. 33 (see: Canfor Reply Authorities - Tab 4).

[5] *Oil Platforms Case (Islamic Republic of Iran v. United States of America)*, Preliminary Objections Award, (12 December 1996) (online: http://www.icj-cij.org/icjwww/idocket/iop/iopframe.htm), at para. 16 (see: United States Reply Authorities - Tab 5).

[6] Reply to the United States Objection to Jurisdiction, (14 May 2004), ("Canfor Reply"), at paras. 24-36.

[7] Canfor Reply, supra note 6, at para. 11

set out in the *UPS* Jurisdiction Award[8] is not applicable to the present Tribunal's deliberations.

The United States' position at the oral hearing was that if the Tribunal interprets Article 1901(3) to be a jurisdictional provision, the test then to be applied is that articulated in the *Oil Platforms Case* and recently addressed in the *UPS* Jurisdiction Award.[9] In the words of the United States, it is argued that this Tribunal should then:

> "...consider whether the facts as credibly alleged fit within the Tribunal's jurisdiction so interpreted." (Con1-33:14-20)

That may arguably have been appropriate if the United States' motion was a traditional jurisdiction objection, for example asserting that the Claimants' claim did not meet the preliminary requirements of NAFTA Chapter 11 (such as whether there is an investor or investment, whether there is a measure that constitutes a breach, or that time limitations have been met). However, that standard does not apply in relation to the Preliminary Question.

This Tribunal should not apply the rule set out in the *UPS* Jurisdiction Award to the very different facts here. In the *UPS* Jurisdiction Award, Canada argued that anticompetitive behaviour alleged by UPS could not be addressed under Articles 1105 and 1102[10] because the facts alleged could not amount, *prima facie*, to breaches of those substantive obligations. That is quite different from the United States' argument here, where the United States asserts not that the conduct could not amount to a breach of Article 1102 or 1105, but that Article 1901(3) excludes a claim for such conduct.

If, however, the Tribunal was to look to the *UPS* Jurisdiction Award for guidance, the better example is the approach taken by that Tribunal concerning the cultural industries exemption and the subsidies exemption.[11] There, the Tribunal concluded there was insufficient evidence on the record to allow it to dismiss the Investor's allegations.[12] This is not surprising since exceptions of this nature would require, as the Tribunal noted, the benefit of a complete factual record to be fully addressed.

Accordingly, if this Tribunal holds that the test for determining jurisdictional disputes is set forth in para. 33 of the *UPS* Jurisdiction Award, it should more appropriately defer any consideration of the United States' Preliminary Objection to the merits phase of this arbitration when a more complete factual record is available.

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[8] *UPS Jurisdiction Award*, supra note 2, at para. 33.
[9] January 11, 2006 transcript-33:14-36:9; 154:14-161:18.
[10] *UPS Jurisdiction Award*, supra note 2, at paras. 29 and 70.
[11] *UPS Jurisdiction Award*, supra note 2, at paras. 104-115.
[12] *UPS Jurisdiction Award*, supra note 2, at para. 114.

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. See responses to questions 6 and 7.

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

A. The test accepted in the *UPS* Jurisdiction Award is not applicable. Whether it would be satisfactory in another case would depend upon the jurisdictional question raised. However, here, the question before this Tribunal is not whether the facts as alleged by the Investor are "capable" of constituting a violation of Articles 1102, 1105 and 1110 as alleged in the Claimants' pleadings. That must be assumed for the purposes of this motion, as the United States has not raised an objection to the Tribunal's jurisdiction on that basis. See response to questions 6, 7 and 8.

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

A. In light of the answer to question 6, these questions are not relevant.

C. Treaty Interpretation

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

A. Yes. Article 1131 of NAFTA states that the Tribunal shall "decide the issues in dispute in accordance with this Agreement and applicable rules of international law". These rules would obviously include the rules of interpretation in the *Vienna Convention*, which require that a treaty be interpreted in light of its object and purpose.

Transcript references:

> December 7, 2004, - 166:5-12: "And, of course, a similar approach is mandated under the NAFTA under Article 102(2) which states that the parties, in interpreting the NAFTA, must do so obviously in light of its objectives, the objectives being specifically articulated in that Article, and also in accordance with rules of international law which obviously incorporates the Vienna Convention."

Also see: December 7, 2004: 177:20-22, 312:20-313:5:

> January 11, 2006: 239:4-18: "MR. MITCHELL: The Tribunal's task is to apply the governing law under Article 1131, that is the agreement and applicable laws of international law, while 102(2) deals with the parties' interpretation and application of the agreement in light of its objectives and in accordance with the applicable rules of international law. There is no significant difference. The Tribunal is bound to interpret and apply the provisions of the agreement equally in accordance with the principles under the Vienna Convention including the objects. ARBITRATOR

ROBINSON: One is dealing with the parties and the other one is dealing with the Tribunal. MR. MITCHELL: Correct."

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 NAFTA is a broad free trade agreement applying many disciplines that come under the broad ambit of international trade. These disciplines are interrelated and mutually supportive. Accordingly, the "objectives of this Agreement" under Article 102 apply equally to all parts of the NAFTA despite a Chapter's specific reference to "trade" or "investment".

The cumulative effect of NAFTA provisions was discussed in *Pope and Talbot.*[13] The Tribunal said that investment is not dealt with as a side agreement --NAFTA is an integrated agreement, covering trade in goods, trade in services, investments and other matters. Measures that affect an investor's import of goods into or export of goods from the host country will often have direct and indeed decisive effects on the investor or the investment, as is the case here with integrated manufacturers and distributors of softwood lumber, whose United States' investments depend for their value upon uninterrupted supply of Canadian goods. Because the obligations of the NAFTA must be read as a cumulative whole, it is appropriate to use general objectives in Article 102(1) when interpreting any NAFTA provision.

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

A. Good faith has been recognized by Tribunals as relevant to the interpretation of treaty obligations, and the Claimants have given the example in the Claimants' pleadings of the Appellate Body of the WTO in the *Shrimp/Turtle* proceeding.[14] The question of whether good faith is an independent source of customary law obligation--that is, regardless of the existence of treaty norms and independent of other customary law obligations--is a question that in our submission this Tribunal need not answer in order to resolve the preliminary question before the Tribunal.

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[13] *Pope & Talbot Inc. v. Government of Canada*, Award on the "Relating to Investment Motion", (Chapter 11 Tribunal), 26 January 2000, (online: http://www.dfait-maeci.gc.ca/tna-nac/pope-en.asp), ("*Pope & Talbot*") at para. 26 (see: Canfor Reply Authorities - Tab 6).

[14] *U.S. Importation Prohibition of Certain Shrimp and Shrimp Products*, (WT/DS58/AB/R) adopted on 12 October 1998, ("*Shrimp/Turtle*") at para. 158 (see: Canfor Reply Authorities - Tab 12).

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. One of the most important is effectiveness in treaty interpretation; wherever possible a provision of a treaty should be construed so as not to make other provisions of the same treaty ineffective or inutile, i.e. unless the intent to do so is clear and unambiguous.[15] In interpreting exceptions, they should be read narrowly - the party invoking the exception bearing the burden of demonstrating its applicability. Such exceptions must not be abused so as to undermine or escape the fundamental balance of rights and obligations in the Treaty, although that would be the effect of adopting the United States' interpretation.

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. The Claimants do not agree that the *ADF* Award sets out "governing rules" for preferring *lex specialis* over *lex generalis*. The notion of *lex specialis* is not to be found in the *Vienna Convention on the Law of Treaties* and is used in different senses and for different purposes by different Tribunals and academic authorities. Sometimes it is invoked as a conflict rule, so that if there is a conflict between a more general and a more specific treaty norm, in the sense that it is impossible for a party bound by both to comply with both, the more specific norm should yield to the general. In WTO case law, the notion has been used to deal with the sequencing of disposition of claims, such that the treaty interpreter should dispose of claims under the *lex specialis* before considering the more general rules of the treaty. In the *ADF* Award, the Tribunal appears to have used the expression in a different sense--to communicate the idea that the provisions of individual Chapters of NAFTA are a *lex specialis* that reflect the NAFTA's general principles or objectives. The Tribunal took the view that one must place emphasis on the NAFTA's objectives as embodied in the specialized rules, such that recourse to objectives does not override the need for interpretation of the specific rules.[16] In the present case, the Claimants do not argue that the general objectives of the NAFTA override the specific language of the Treaty. Rather, the argument of the Claimants is that their interpretation of the specific language of the NAFTA is supported by, and consistent with, the objects and purposes of the Treaty and is therefore the preferred interpretation.

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[15] *Shrimp/Turtle*, supra note 14.

[16] *ADF Group Inc. v. Government of the United States of America*, Merits Award (Chapter 11 Tribunal), 9 January 2003, (online: http://www.state.gov/documents/organization/16586.pdf), ("ADF Award"), at para. 147 (see: United States Reply Authorities - Tab 2).

D. Legislative History

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

A. The legislative history, to the extent that it has been made available to the Claimants, is outlined in the Canfor transcript and in the January 12, 2006 transcript at 102:16-122:5.

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. No. There is no principle of treaty interpretation that ascribes the same meaning to different words used in a treaty, or different meanings to the same words, because of speculation that those provisions were negotiated or drafted by different negotiating teams. Were a Tribunal to embark upon such an approach, a wholly unworkable regime for treaty interpretation would develop, requiring evidence of who drafted which provisions, and would invite a subjective analysis of what each negotiating team meant. Where the same words are used, highly sophisticated negotiating teams ought not to be taken to mean different things, and vice versa.

It is noted that the United States did not agree with the suggestion that an insufficiency of legal scrubbing could explain what the United States saw as the lack of consistency between the Chapters, and perhaps an alleged deficiency in the manner Article 1901(3) was drafted. (see January 11, 2006 - 196:6-19).

No credence whatsoever should be given to the United States' speculation as to what "legal scrubbing" occurred. There is simply no evidence on the record which the Tribunal could rely upon to come to any meaningful conclusions. (See: January 12, 2006 - 107:7-111:7)

(See also: January 12, 2006 at 113:6-15).

E. Text ("ordinary meaning")

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

A. No. Chapter 19 provides an alternative means of reviewing an antidumping or countervailing duty final determination under United States' municipal law. The United States Court of International Trade may, in certain circumstances, retain a similar review jurisdiction. Equally, the WTO Agreements provide a further forum for review, on WTO standards, of United States' conduct. Chapter 11 provides another forum for review based on the standards set out in Chapter 11.

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. No. "Obligation" as used in Article 1901(3) should be interpreted as having the meaning given to it in paragraphs 125 to 128 of Canfor's original memorial,[17] and paragraphs 20 through 26 of its Rejoinder.[18] The formation of an arbitration agreement and the requirement that the United States arbitrate an allegation that it has violated its obligations under NAFTA Chapter 11 is not an "obligation with respect to" its anti-dumping or countervailing duty law.

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. If the Claimants understand the question correctly, the object of the interpretation is any other provision of the NAFTA which is required to be interpreted in any particular context. In each case, Article 1901(3) directs the interpreter that no provision of the NAFTA is to be interpreted as creating an obligation upon a NAFTA Party to amend their countervailing duty or antidumping duty laws, except as set out in Chapter 19.

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?

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[17] Canfor Reply, supra note 6, at paras. 125-128.

[18] Rejoinder on Jurisdiction of the Claimant, Canfor Corporation, (24 September 2004), ("Canfor Rejoinder") at paras. 20 - 26.

A. Canfor and Terminal submit that the Article 1902(1) definition of "law" informs the definition of "law" in Article 1901(3).

The definition in Article 1904(2) is materially similar to the definition in Article 1902(1), except that it adds the qualifier "to the extent that a court of the importing Party would rely upon such materials" which again supports the Claimants' normative interpretation. The definition does, however, seem to be intended to apply to Article 1904 only, as it is premised with the words "for this purpose".

Articles 1905(1) in conjunction with the definition of "domestic law" in Article 1911 do not assist in defining what is meant by "antidumping law" or "countervailing duty law". The words used in Article 1905(1), as defined in Article 1911, define "domestic law" as a broad range of law (constitution, statutes, regulations and judicial precedent) "to the extent they are relevant to" antidumping law or countervailing duty law. This does not assist in the definition of those terms except to demonstrate that "domestic law" is something different than antidumping and countervailing duty law.

Tellingly, the United States' interpretation of the phrase does not rely upon either of the definitions given. The Claimants submit that approach is untenable.

Transcript references: December 7, 2004 - 261:16-262:4:

> In Canfor's respectful view, Article1901(3) means nothing more and nothing less than the no provision of the chapter of the NAFTA other than Chapter 19 imposes a duty or a responsibility or an obligation on a NAFTA party to do something or not do something such as amend or not amend that party's *countervailing duty or antidumping duty law as those terms are specifically defined in Article 1901--1902(1)*. That submission is made in particular in paragraphs 126 and 127 of our memorial, and paragraph 26 of our rejoinder." (emphasis added)
>
> See also January 12, 2006 - 16:17-17:4, and at 18:20-21 as follows: "MR. MITCHELL: I would say the definition in 1902(1) applies to 1901(3). The definitions of "law" found in Articles 1904(2) and Article 1905(1) (with respect to "domestic law") in conjunction with Article 1911 are confined to the meanings set out in those articles.
>
> And, January 12, 2006: - 18:5-11: "PRESIDENT VAN DEN BERG: Mr. Mitchell, may I ask a question on this point? You rightly pointed out that 1911 and 1904(2) use the words for the purposes of, which appears to limit the definition to the use of that article. 10 MR. MITCHELL: That is an interpretation, yes.

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.

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

A. The proper understanding of administrative practice in relation to antidumping and countervailing duty law is as set out by the Chapter 19 Panel Decision following remand in the Softwood AD case as follows:

> We note, however, that zeroing is not established by regulation. Nor is zeroing a "practice" within the sense of Section 123(g). The Statement of Administrative Action gives special meaning to the term "practice" as used in Section 123(g). There, "practice" is defined as an "administrative practice consisting of written policy guidance of general application" (SAA p. 352). As Commerce conceded in oral argument, there is no "written policy guidance of general application" with respect to zeroing. At best, the Department applies zeroing on an ad hoc, informal basis (even though it may have done so consistently). Thus, even were we to notice that Commerce often - or even always - zeros, this would not constitute the existence of a "practice" that would be governed by Section 123(g).[19]

Section 123(g) set up a system by which the regulations and administrative practices of the DOC, ITC and other relevant agencies could be changed following consultations, approvals, and other requirements.[20] The issue in the Chapter 19 case was whether zeroing, which had been found illegal by the WTO in its use in the softwood case, amounted to an administrative practice so that it was protected by the Section 123(g) implementation system. The Panel used the United States' own understanding of an administrative practice - that they consist of written policy guidance of general application - to find that zeroing was not an administrative practice, and therefore not subject to the protection.

As the Claimants have maintained throughout this proceeding, an administrative practice is part of the law that the DOC or ITC applies, not its application in any particular case. Under the United States' own understanding of the term "administrative practice" it is clear that a determination, which is simply the agency decision in a particular case, can never be considered to be an administrative practice.

While administrative practice may not be law in the ordinary sense of that word as it is not binding in the sense that it must be followed, any departure from it must be fully explained so as to ensure agency predictability. The Claimants adopt the authorities at footnote 18 of the Tembec Counter Memorial and footnotes 19 through 21 of the Tembec Rejoinder.[21]

Transcript References:

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[19] *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, (Chapter 19 Bi-national Panel Review), 9 June 2005, at p. 38.

[20] This system of implementation was also what provided regulations and administrative practice protection from the *Charming Betsy* doctrine which would automatically amend them in American law following their being declared illegal under international law.

[21] *Tembec Counter-Memorial*, (17 February 2005), at pp. 11-12; *Tembec Rejoinder*, (28 April 2005), at p. 16.

> December 7, 2004 - 260:20-267:8: So, when you look at administrative practice, Ms. Menaker said, well, yes, to paraphrase, a determination is administrative practice, that's said without any authority in support, but my submission would be to the contrary: *Administrative practice would be rules or guidelines or procedures established that the parties could follow in a particular case leading up to a determination. They do not, in my submission, relate to a determination in any particular case.* (emphasis added)
>
> January 12, 2006 - 39:8-12: "MR. MITCHELL: It includes a body of rules that will be applied that have developed as a result of prior administrative practice. It excludes the application of those rules in a particular case under review.

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

A. Where a series of decisions made pursuant to a law establish a body of precedent analogous to the common law, such precedents could be considered to be a source of law.

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. "Administrative practice" is not a commonly used phrase in Canadian municipal law, except perhaps in the taxation field. However, the Claimants' submission that "administrative practice" refers to the set of rules or guidelines followed by an agency, rather than an outcome of a specific case, is supported by the United States' view as described in answer to Question 24 and by analogy to other fields.

Thus, using the Claimants' understanding of "administrative practice" as meaning a written policy guidance of general application (supra to question 24), then such "administrative practice" exists in virtually all administrative fields, even if they happen to go by names specific to the agency that creates them. Canadian examples include Aviation Standards, Consumer Packaging and Labelling Guidelines, Trade-Marks Examination Manuals, Competition Bureau Enforcement Guidelines, Securities Commission Policies and Instruments from the various Canadian provinces, and Interpretation Bulletins from the Canadian Customs and Revenue Agency. Like it is with the administrative practices of the DOC and ITC, none of these are the result of decisions in an individual case. Instead, and in accordance with the United States' understanding of the term, they are "written policy guidance of general application" that assist citizens and aliens in their dealings with regulatory agencies. Determinations of the DOC and ITC do not fit within the category.

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

A. No. A textual review of Chapter 19 demonstrates the drafters clearly distinguished between law and its application (see the first sentence of Article 1902(1)). This

distinction was recognized by the President of the Tribunal at tr. January 11, 2006 126:12-19):

> "And what the first sentence says is well look, each party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other party. And then they give the definition of antidumping law. So apparently here is the distinction to be made between application and the law itself."

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. This distinction is not relevant to the issue before the Tribunal. Article 1905(1) deals with a different topic than Article 1902(2). Article 1905(1) relates to what may result from a Party's complaint about the application of the United States' "domestic law". Article 1902(2) reserves to the Party the right to apply their antidumping and countervailing duty law. What is relevant about both these provisions is that they distinguish between "law" and its application.

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

A. The "law" itself is not conduct of the kind complained of here although the promulgation of a law could of course amount to conduct. The application of the law, particularly in its abuse of discretionary powers or the purported exercise of powers under colour of law, is encompassed within conduct.

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. Canfor and Terminal rely upon the submissions contained at paragraphs 13 – 19 of Canfor's Rejoinder.[22] Measure is clearly broader than "law" and broader than "application of the law". Measure encompasses any act for which a State is internationally responsible.

Transcript reference:

> December 7, 2004 - 313:6-18: "Now, the context of the definition of law, countervailing duty and antidumping duty law that you refer to in 1902(2), includes the nature of the matters surrounding it. They are with--and I think the area that you're struggling with or focusing upon is the phrase "administrative practice," but all of the words around that phrase demonstrate an intention that what is being contemplated here is the rules to be applied; whereas when one looks at definition of measure, it is a clearly far broader and as the context here we were able to

[22] Canfor Rejoinder, supra note 18, at paras. 13-19.

demonstrate the United States's insistence in negotiating Chapter 11 that measure can include a single act."

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. The United States cannot seek immunity for conduct which amounts to a denial of justice or other breach of the Article 1105 standard of treatment, simply on the basis that its misconduct relates to the antidumping or countervailing duty fields. The United States cannot claim on any interpretation of Article 1901(3) that that provision protects it from responsibility where the law is not a genuine antidumping or countervailing duty law, where the law is being applied disingenuously, or when the law or the process established pursuant to the law is being abused for ulterior purposes.

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. Absolutely. (See also the answer to Q. 30).

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. N/A.

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

A. This response is confined to the question whether under a municipal standard, an Article 1904 Panel can review a final determination (which is all that is subject to review under Article 1904) on the basis of a municipal law standard of arbitrariness. In that respect, the Claimants distinguish between conduct that can be considered arbitrary in the international sense, and arbitrary under the standards of the municipal regime. The Claimants accept that conduct may be arbitrary under one standard but not under another.

Certainly, under the standard of review in United States municipal law, applied pursuant to 1904 (3), there may be reviewable errors that have been caused by arbitrary conduct of agency officials. But showing arbitrariness is not necessary in order to succeed in getting a finding reversed by a Binational Panel when that Panel is applying the substantial evidence standard of review more typically applicable under US municipal law.

Certain conduct may, however, be reviewed on a municipal "arbitrary and capricious" standard. In *Pohang Iron & Steel*,[23] the CIT said that the "arbitrary and capricious"

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[23] *Pohang Iron & Steel Co., Ltd. et al. v. United States et al.*, Slip Op. 99-112., 20 October 1999, (online: http://www.cit.uscourts.gov/slip_op/Slip_op99/99-112a.pdf).

standard of review is "more deferential" than the substantial evidence standard, implying that arbitrary action by an agency would fail that standard. The Statement of Administrative Action accompanying the *Uruguay Round Agreements Act* simply says that the decisions subject to the arbitrary and capricious standard, such as a decision not to initiate, are not based on a full record, hence the substantial evidence standard is not applicable.

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. The standard of review for final antidumping and countervailing duty determinations is whether they are "unsupported by substantial evidence on the record or otherwise not in accordance with law". The standard for certain other decisions in AD and CVD cases, such as refusal to initiate an investigation, is "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law".

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. Yes. The conduct of the United States in relation to the preliminary determinations, which are not reviewable under United States' municipal law, such as the conduct leading to, and the Critical Circumstances Determination, (or the improper use of that Determination to force an improvident settlement on the Canadian softwood lumber industry) are examples of matters arising prior to a final determination that can be reviewed. The United States' conduct leading to the various preliminary determinations is part of the entire pattern of conduct that constitutes a denial of justice in this case. If an investor were to seek relief based upon a claim concerning a preliminary determination alone, it is possible that this might raise issues of finality and exhaustion of local remedies (see *Loewen*).[24] However, these doctrines, particularly finality, more clearly apply to judicial decisions, not actions such as preliminary determinations. With respect to United States' conduct subsequent to Bilateral Panel decisions, the Claimants see no reason why a Binational Panel decision would bring an end to state responsibility especially in the context of the allegation being made in this proceeding. On the contrary, since the Binational Panel itself can merely remand the matter, and the actual corrective action must be taken by the domestic authorities subsequent to the Panel decision, the NAFTA parties cannot possibly have intended for state responsibility to be exhausted once the Binational Panel has completed its review.

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?

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[24] *The Loewen Group, Inc. v. Government of the United States of America*, 26 June 2003, (online: http://www.state.gov/documents/organization/22094.pdf), at paras. 142 - 157 (see: Canfor Rejoinder Authorities - Tab 3).

A. The basis for responsibility to the Claimants is a violation of NAFTA Chapter 11. The fact that duties have been imposed illegally under United States' municipal law and in violation of the WTO agreements may be relevant evidence to assist in determining whether Chapter 11 has been violated. The legal responsibility to the Claimants does not arise simply because there has been a violation of some standard other than Chapter 11. The Claimants must establish that the United States conduct violates Chapter 11 obligations and that they have suffered damages as a result of that conduct. The issue of the failure to reimburse duties would obviously also be relevant in determining the level of damages.

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. No "law" is distinct from "matters". The use by the United States of the word "matters" as it relates to antidumping and countervailing duty "law" is an attempt to expand the scope of Article 1901(3) beyond the meaning of the term "law" that was used. The Parties deliberately selected the word "law" as opposed to "measures" or "matters". As noted by the Claimants tr. January 12, 2006 - 45:19-46:7:

> "MR. MITCHELL: Indeed, we do, and in fact, if you look through United States submissions from the beginning, there are the use of various terms, antidumping duty matters, antidumping duty claims, antidumping duty sphere, an array of claims or an array of framing that, and what we understood from that is that the United States' position has been that a Chapter 11 Tribunal has no jurisdiction by virtue of 1901(3) over any Chapter 11 claim that has any connection to the antidumping duty sphere in the United States or CVD sphere.

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

A. See tr. January 12, 2006- 86:5-13, citing Professor Howse at December 8, 2004 - 594:10-595:7:

> "PROFESSOR HOWSE: Yes. As a matter of state responsibility, the entry into force of the Treaty would require changes to antidumping and CVD laws within the meaning that Canfor attributes to that expression based on the definition in 1902, and so very simply, because what the parties - it is our surmise that because what the parties had in mind when they were thinking about what they wanted to do with the provision like 1901(3) was to protect Chapter 19 against the interpretation, an interpretation that would lead to obligations of a nature involving amendment or conditions on amendment or retention of the law. They would have had to have made this exception because again, as just a matter of basic rules of state responsibility, if they didn't make the exception, there could be just the absurd result that someone would come along and say that 19 - by virtue of 1901(3) you don't even have to amend your laws in order to make the Treaty effective."

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. Neither. The Claimants do not consider Article 1901(3) to be an exclusion of a Chapter 11 Tribunal's jurisdiction, as the provision is an interpretive direction and not a jurisdictional provision. However, the Claimants do say that a Chapter 11 Tribunal has only limited remedial authority that does not include obligating a party to change its law.

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 Claimants note that each of the texts of the NAFTA is equally authoritative. Article 33 of the *Vienna Convention* provides as follows:

> "1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail....
>
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
>
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

Applying the principles set out in Article 33, if there is any doubt as to the meaning of "law", that provision should be interpreted in the manner that best reconciles the text having regard for the object and purpose of the treaty. Here, that means that "law" should be interpreted as the set of normative rules that govern the disposition of a particular case.

The French text is relevant, and supports the Claimants. In this case, the French text of 1901(3) does not disclose a different meaning than that which the Claimants have argued attaches to the English text. If anything, the French text of Article 1901(3) is clearer than the English in suggesting that what is meant by "law" is a body of rules or norms to be applied to particular cases, and not those individual applications. Thus, the French expression used for "law" in 1901(3) is "legislation." This can mean either the general power or authority of rulemaking, not deciding individual cases, or it can mean a body of rules or laws, a corpus of law. These are the first two definitions given in the Petit Robert dictionary, and the second one is worth reading: "Ensemble des normes juridiques dans un pays ou dans un domain determine." So here the "domain determine" is anti-dumping and countervailing duty law and what the Claimants are dealing with are legal norms concerning anti-dumping and countervailing duties.

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. First, the Claimants do not accept the premise that Article 1901(3) excludes the jurisdiction of a Chapter 11 Tribunal. Moreover, the question assumes within it a premise as to the scope of what is encompassed within the phrase "with respect to the Party's antidumping law or countervailing duty law" that makes it difficult, if not impossible to respond adequately to this question. However, more generally, there is no evidence available as to why the Parties would render non-arbitrable claims that otherwise violate NAFTA Chapter 11, merely because of some connection to the AD or CVD spheres. To provide a rationale for a conclusion Claimants do not accept as correct would be speculative at best.

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. The term "obligation" appears repeatedly throughout the NAFTA although it is nowhere defined.

The phrase "This Chapter does not apply to" equally occurs in a number of instances in the NAFTA, for example in Articles 1101(3), 1201(2), and 1301(2). In the case of Articles 1101(3) and 1301(2) the phrase is used to indicate a complete exception to a certain category of government conduct. By using the term "measures" in those provisions, the drafters clearly intended to indicate that any governmental action within the scope of that defined term would be covered under the exclusion. With respect to Article 1201(2), the phrase is used to simply indicate exceptions to certain types of "services" that may have otherwise been covered by the Services Chapter, in addition to procurement and subsidies matters covered elsewhere in the NAFTA (much like Article 1108).

The NAFTA drafters could have included a clause, like Article 1101(3), in Chapter 11 that said "This Chapter does not apply to measures adopted or maintained by a Party concerning antidumping or countervailing duty matters". But they did not. To have the exclusionary effect which the United States is arguing for in its Preliminary Objection, such a clause would be required.

Quite simply, Article 1901(3) is structured in the way it is, using the word "obligation", because the NAFTA Parties did not intend it to have the same broad exclusionary effect of a provision that included the words "This Chapter does not apply to".

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

Yes, the term "obligation" is used elsewhere as a descriptive term to reference substantive or procedural requirements of the Agreement itself.[25] NAFTA Chapter 11 includes a number of instances of the use of the term to reference those substantive law requirements found in Section A of that Chapter.[26] In Chapter 19, the term is only used in two instances: Article 1901(3), and Annex 1901.2(8). The second instance references the confidentiality requirements imposed on Panellists under sub (7).

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

The term "obligation" is used in a variety of ways throughout the NAFTA. In addition to the senses described above, it is also used to express the legal requirements under international treaty law.[27] For example, the Preamble states that the NAFTA Parties are "resolved to":

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[25] For example, see:

> Article 502: Obligations Regarding Importations
>
> 1. Except as otherwise provided in this Chapter, each Party shall require an importer in its territory that claims preferential tariff treatment for a good imported into its territory from the territory of another Party to:
>
> a) make a written declaration, based on a valid Certificate of Origin, that the good qualifies as an originating good;
>
> b) have the Certificate in its possession at the time the declaration is made; ....
>
> Also see: Annex 300-A (1), Appendix 300-A.1: Canada (5), Article 504(1), Article 712(1), Article 904(1), Annex 908.2(1), Annex 913.5.a-3(4), Article 1001(4), Article 1002(4), Article 1108(5), Article 1115, Article , 1201, Article 1210(3), Annex 1210.5, Appendix 1210.5-C, Article 1309(1), Article 1402, Article 1404, Article 1410, Article 1414(5)(a), Article 1502(3), Article 1503(2), Article 1602(1), Article 1607, Annex 1604.2, Article 1701(1), Article 1703(4), 1713(2), Article 1720(1), Annex 1705.7, Article 2004, Article 2012(5), Article 2016(2)(b), Article 2019(1), 2103(5).

[26] See Articles 1116, 1117, 1136(5)(a), and Annex 1120.1.

[27] There is also one instance in the NAFTA where the term is used in reference to domestic legal requirements, see:

> **Article 305: Temporary Admission of Goods**
>
> 5. Subject to Chapters Eleven (Investment) and Twelve (Cross Border Trade in Services):

> "BUILD on their respective rights and obligations under the *General Agreement on Tariffs and Trade* and other multilateral and bilateral instruments of cooperation;"

Likewise, Article 103, titled "Relation to Other Agreements", similarly states:

> "1. *The* Parties affirm their existing rights and obligations with respect to each other under the *General Agreement on Tariffs and Trade* and other agreements to which such Parties are party."[28]

In addition, the term is used to address the relationship of the NAFTA with treaties other than the GATT, such as environmental treaties as noted under Article 104.[29]

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 Claimants have already articulated at length the distinctions between Articles 1101(3), 1501(3), 1607 and 2103, each of which are clear exclusionary provisions (see for example, Canfor Reply at paras. 135 to 144 and Canfor Rejoinder at paras.11-34). Article 1901(3), by contrast, is drafted in a different manner that does not have that effect. As the Claimants have already commented on the other provisions, this response is confined to addressing Articles 804, 1121(2)(b), 1138 and 1606(1).

Article 804 is another clear exclusion of a particular form of dispute resolution under Article 2008. It is drafted in clear and precise terms that leaves no room for ambiguity. It provides:

> No party may request the establishment of an arbitral panel under Article 2008 (Request for Arbitral Panel) regarding any proposed emergency action.

Article 1121(2)(b) is of no application. It provides the waiver requirement to initiate a proceeding. The Claimants submit this provision is not in issue, but in any event, it is in no way analogous to Article 1901(3), as all it does is establish preconditions for arbitration.

> c) no Party may condition the release of any obligation, including any bond, that it imposes in respect of the entry of a vehicle or container into its territory on its exit through any particular port of departure;

[28] Other similar examples of references to GATT "obligations" can found at: Articles 309(2), Annex 300-B Section 10: Definitions, 603(1), Annex 606(1), Annex 608.2(1), 704, 705, Annex 702.1(4), 802, 903.

[29] Other examples of references to "obligations" in other international treaties include: Article 1720(2) and Annex 1701.3 which address intellectual property conventions; Article 2106 references the obligations concerning cultural industries under the *Canada-US Free Trade Agreement*, Article 2102(1), with regard to national security, references the "obligations" under the *United Nations Charter*, and Article 2103(2) addresses tax conventions.

Article 1138 is yet another clear exclusion of resort to dispute settlement. Article 1606(1) is similar.

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

A. Article 1108 does not reference Chapter 19 proceedings because there was never any intention that merely because a claim had a connection to AD or CVD matters it would therefore be immune from the obligations set out in Chapter 11.

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

A. No. Disputes may arise under other Chapters as well as under Chapter 11. The Chapters of NAFTA are not a series of watertight compartments. A matter can arise under both Chapter 3 (trade in goods) as well as Chapter 11 (Investment) (e.g. *Pope and Talbot*),[30] or Chapter 12 (Services) and Chapter 11 (e.g. *S.D. Myers*).[31] Article 1401(2) incorporates certain obligations from Chapter 11 specifically because matters relating to financial services had otherwise already been specifically excluded from Chapter 11 by Article 1101(3).

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. This demonstrates the Claimants' point that nothing in either Chapter intended to exclude the operation of the other, and that in the absence of such language, the United States' interpretation of Article 1901(3) cannot prevail. These Chapters contain obligations that are complementary and consistent-hence there is no need to mention the one Chapter in the other, because there is no real possibility of conflict or redundancy that would need to be avoided through special rules that relate the specific provisions of the one Chapter to the other arises.

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 two provisions use different, yet precise, language. One uses "matters covered" and the other "law". The provisions perform different functions. The use of the word "law" in Article 1901(3) again reflects the fact that no provision of another Chapter is to be interpreted so as to require another Party to do something to their AD or CVD law. Article 2004 excludes the use of the dispute settlement provisions of Chapter 20 where the dispute settlement provisions of Chapter 19 apply.

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[30] *Pope & Talbot,* supra note 13.

[31] *S.D. Myers Inc. v. The Government of Canada*, Partial Award (Chapter 11 Tribunal), 13 November 2000 (online: http://www.dfait-maeci.gc.ca/tna-nac/SDM-en.asp).

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

A. The claims of Canfor and Terminal allege *inter alia* that the United States has failed to give force and effect to NAFTA Binational Panel rulings, and that this failure is egregious, intentional and a denial of justice, violating Article 1105 of NAFTA. Article 1905 provides a remedy to a NAFTA Party (not to an investor)-where, *inter alia*, "the application of another Party's domestic law: . . .(c) has prevented the implementation of the decision of a panel requested by the complaining Party or denied it binding force and effect with respect to the particular matter that was before the panel". In the instant case, the failure to give force and effect does not stem from the "application of another Party's domestic law" because in fact the failure in question is in violation of that municipal law, the application of which would require giving force and effect to a NAFTA Bilateral Panel decision.[32] Thus, the remedy contemplated by Article 1905 does not appear to be available here to Canada, and understandably, to the Claimants' knowledge, Canada has not sought relief under Article 1905.

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

A. Yes, Article 1112(1) is confined to inconsistencies. Chapter 11 is not inconsistent with Chapter 19, nor has the United States alleged that it is.

Transcript references:

> December 9, 2004 - 752:8-22: "MR. MITCHELL: If I can just take a step back, though, the discussion we have moved from--towards is a discussion about inconsistency of result. And again, I note the United States's position that they do not contend there is an inconsistency, but if I can just revisit the language of Article 1112, it refers to in 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; i.e., relating to the Treaty obligations but not to the result of the administration of a municipal law regime and the parallel results of the administration of an international law regime. That is not to what Article 1112 is directed."
>
> January 12, 2006 - 261:17-262:16): "The first observation I want to make is to comment on the premise that may be underlying the question relating to inconsistent remedies, as I think I understood the question. The language of Article 1112 relates to inconsistencies between different -- between a chapter and another chapter and sets the hierarchy. So the inconsistency of remedy in our submission isn't the inquiry that should be directed at Article 1112. But as a second point, I want to address the word "inconsistency" because while it is used in Article 1112, I am not sure it is the right way of describing an outcome under Chapter 11, say, and Chapter 19. The outcomes are different, and they are different because they apply different laws to facts which may or may not be entirely the same, but are partially

[32] *Tembec Inc. et al v. The United States of America, et al.*, 22 December 2005, Consol. Ct. No. 05-00028, at pp. 8-9, 12-39.

> the same, and the two Tribunals are constrained to only grant different remedies. So that under Chapter 11, the only remedy is a remedy of damages or restitution, and under Chapter, the only remedy is a remand. So in that sense, they are different."
>
> January 12, 2006 - 273:2-9:"Again, Mr. President, in our submission, the U.S. is misconstruing our argument. Under the interpretation advocated by the claimant, by us, given there is no attempt to afford greater rights to private claimants than NAFTA parties, there is no inconsistency between the claimant's interpretation between of Chapter 11 and Chapter 19 or Chapter 20."

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. A Binational Panel under Article 1904 does not decide the same matters as a Chapter 11 Tribunal. It cannot do so. A Binational Panel is constrained to act as an appellate Tribunal applying municipal law to a determination under review. A Chapter 11 Tribunal assesses whether the facts complained of violate Chapter 11 obligations. While there may be factual overlap, that in no way constrains both Tribunals from proceeding, just as the existence of WTO proceedings does not constrain a Chapter 19 Tribunal from proceeding.

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

A. A Chapter 11 Tribunal could not reach a decision inconsistent with an Article 1904 Panel as the two Tribunals apply different legal standards in different legal regimes. The decisions therefore are not inconsistent: it is not inconsistent for a party to be successful in an international claim, but unsuccessful in a municipal claim.

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. No. The Claimants cannot recover twice. If the Claimants receive back the duties wrongfully withheld, they will not be able to establish a loss equivalent to that amount, and their claim for damages would be confined to the other harms resulting from the United States' actions. Moreover, as repeatedly noted, the remedies available to a Chapter 19 Panel are confined to remanding it back to the DOC or ITC, and the remedies available to a Chapter 11 Tribunal are confined to restitution or damages. Accordingly, there is no possibility of double recovery. And, as noted, the United States in any event maintains that Chapter 19 Panels have no ability to compel the refund of duties, even if wrongfully withheld. There is no risk of double jeopardy in requiring the United States to comply with both its municipal and international obligations.

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. This question cannot arise. A remand direction of a Chapter 19 Tribunal cannot give rise to an inconsistent award from a Chapter 11 Tribunal. While the two Tribunals may find different facts in the respective proceedings, that does not create "inconsistent" awards.

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. No. In any event, this question is not before the Tribunal at this time. The United States has not raised any objection to the Tribunal's jurisdiction on the basis that the claim is premature or that there was a failure to exhaust remedies. Regardless, because the issues under Articles 1903, 1904 and 1905 are distinct from the issue whether the United States has violated Chapter 11 obligations, there is no reason for the Tribunal to await the outcome of such review. As a practical matter given the conduct of the United States to date, there really is no end point to such reviews. Even when an apparently final decision is reached (such as the ECC rejection of the challenge to the Chapter 19 Panel decision that the finding of threat of material injury could not be sustained),[33] the United States simply ignores that decision and continues to disingenuously abuse the process established for anti-dumping and countervailing duty matters in a manner that continues to significantly harm the Claimants.

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. Again, this question is not before the Tribunal, any consideration of Article 1121(1) having specifically been reserved to the merits, however, the answer is no. A Binational Panel review of a determination (i.e., an appeal of a decision to impose duties) does not fall within the waiver requirements of the NAFTA.

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

A. No. The only relief a Chapter 11 Tribunal can grant is set out in Article 1135(1).

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

A. Yes. Tr., December 8, 2004 - 420:19-421:6.

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[33] *Certain Softwood Lumber Products from Canada*, (ECC-2004-1904-01USA), 10 August 2005, (online: http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ue2004010e.pdf).

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

A. Claimants rely upon their response on December 8, 2004, at tr. 412:10-17 as follows:

> And the language "other extraordinary relief" suggests that the contrast is between actions for damages on the one hand, and actions for other kinds of relief which can include declarations, can include injunctions, or could include other kinds of comparable relief that is extraordinary in the sense that the relief is not in the form of damages.

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. To the Claimants' knowledge an investor cannot submit a claim for damages against the United States "relating to AD/CVD law" in a United States court.

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. Yes, Canfor and Terminal can claim damages arising out of the deposits made pursuant to the AD and CVD orders. This likely would not be considered restitution within the meaning of Article 1135, as "restitution" is "restitution of property", which is contrasted with "monetary damages" which can be paid in lieu of restitution.

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. A Binational Panel sits in lieu of the USCIT. It has exactly the same power to make decisions on the merits. However, it does not have injunctive power. When a party files an appeal with the CIT, it normally requests and is granted an injunction preventing DOC from ordering liquidation of the entries that are subject to the appeal. A Chapter 19 Panel does not have this power, though the DOC generally suspends liquidation of entries that are the subject of a Chapter 19 appeal.

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. A Binational Panel can decide the same matters as the USCIT, with the exception of granting an injunction. However, the jurisdiction of a Chapter 19 Panel, once a proceeding is initiated, is exclusive. In other words, the same matter may not proceed simultaneously before both the USCIT and a Binational Panel.

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. If a Chapter 11 Panel is satisfied that the non-compliance by a State Party with Binational Panel decisions amounts to a breach of the obligations set out under Chapter 11, then the Chapter 11 Tribunal can grant a remedy authorized by Article 1135. In doing so, it is not deciding the "consequences of non-compliance". Rather, it is granting a remedy for the breach that has been established.

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 only remedy available to Canfor for the United States' wanton denial is a Chapter 11 proceeding. Chapter 19 does not provide any such remedy. 1905(1) is a remedy only available to the Parties not to investors. Clearly, the failure to implement and follow the spirit and intent of behind Chapter 19 by the United States raises international law issues, in terms of the rights of the Parties to NAFTA, as well as issues relating to denial of justice. In some sense, this stems from the dual nature of Chapter 19 processes: they stand in for domestic processes to some extent and work within municipal law framework, and from this angle their abuse or the non-implementation of the decisions they render can be a denial of justice, just as if a Party were abusing the domestic court procedures or failing to implement a domestic court judgment; on the other hand the Chapter 19 processes are mandated by treaty; and so abuse or frustration of those processes would also be a violation of Chapter 19 obligations that are obligations of the Parties to the treaty to one another, and do not create rights of private parties to redress, but of NAFTA Parties to certain procedures and ultimately to public international law remedies such as suspension of parts of the treaty.

G. Object and Purpose

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

A. No. This has been comprehensively covered in Canfor's written submissions (see e.g., Canfor Rejoinder, para 56 ff.).[34]

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

A. The relevant provisions of the NAFTA must be interpreted in a manner which "promotes rather than inhibits the objectives of the NAFTA."[35] Accordingly, Article 102(1)(c), as an objective of the NAFTA, should properly be taken into account in the Tribunal's interpretation of Article 1901(3).

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[34] Canfor Rejoinder, supra note 18, at para. 56.

[35] *Canada - Tariffs on Certain US - Origin Agricultural Products*, (CDA-95-2008-01), 2 December 1996, (online: http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_20/Canada/cb95010e.pdf), at para 122 (see Canfor Reply Authorities - Tab 10).

The NAFTA objective to "increase substantially investment opportunities" reflects the basic objective inherent in NAFTA Chapter 11, as with other similar Bilateral Investment Treaties (BITs), of promoting and protecting investments.[36] Interpreting the Treaty in a manner that gives effect to this objective is critical in ensuring the existence of a stable and predictable environment for cross border integrated business such as the Claimants. Interpreting Article 1901(3) in a manner that stifles the investment opportunities of business such as the Claimants, as would be the effect of the broad exclusionary approach advocated by the United States, is not consistent with this Treaty objective.

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

A. Clearly, Article 1902(2)(d)(ii) encompasses both "trade" and "investment". That is demonstrably so, as the concluding words of subparagraph (ii) make clear that the determination of the object and purpose is to be "ascertained from the provisions of this agreement, its preamble and objectives..." If it were confined solely to investment, the reference to the preamble and all objectives would not have been included.

H. Circumstances of Conclusion

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

A. As set out in Canfor's memorials,[37] the purpose of Article 1901(3) was to make clear that no provision of any other Chapter imposed an obligation on a Party to amend their AD or CVD laws beyond those amendments set out in Chapter 19 itself. As the United States said in its Statement of Administrative Action, this provision was a technical change to facilitate the addition of Mexico in the CUSFTA.

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 Claimants would only be speculating what the drafters thought was necessary to facilitate the addition of Mexico to the treaty. However, the Claimants did offer a possible explanation at the Canfor hearing as follows:

> December 7, 2004 - 293:5-14: So, this morning we heard from the United States that it was for Canfor to somehow explain what these technical changes were that--that 1901(3) facilitated the addition of a third party. Well, with respect, it's my submission that it is for the United States to explain the stark discrepancy from the broad and encompassing implications of the approach they now advocate, and the approach that they advocated when they were explaining the treaty to Congress."
>
> December 7, 2004 - 294:5-21: "We can't speculate on what those technical changes were. I can hypothesize. I mean, I guess maybe I am speculating rather than

[36] In fact, BITs in Canada, which are based on the NAFTA model, are formally known as "FIPAs" - which is short for "Foreign Investment Promotion and Protection Agreement".

[37] Canfor's Reply, supra note 6 at paras. 125-127, and Canfor Rejoinder, supra note 18, at p. 4.

> hypothesizing. The--under Mexican law, as the United States has pointed out, proceedings can occur directly for a NAFTA violations under--in the domestic courts of Mexico, the notion of direct effect of the treaty exists in Mexico. It may be that it was that notion that it was felt necessary to have a provision such as this to ensure that a Mexican court did not do something so as to impose an obligation on Mexico with respect to its CVD or AD law, but we don't and we can't know. We are faced solely with the statement from the United States that this is simply a technical change designed to facilitate the addition of a third party."

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

A. The only credible explanation is that the Parties did not intend Chapter 11 claims to be excluded merely because of a connection with AD or CVD matters.

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)[38]: "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. The Byrd Amendment may be "law," but the Claimants' position is that it is not, in the sense intended in Chapter 19, "anti-dumping or countervailing duty law" as it is antithetical to what is properly understood by those terms and as the United States has not complied with the requirements of Article 1902.

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 Claimants challenge the conduct of the United States. That conduct can include certain legislative acts; however, there will only be a violation of Chapter 11 if the conduct falls below the standard of treatment to which the investor is entitled. In order to understand the fundamental unfairness or injustice to the investor that is produced by

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[38] 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.

the Byrd Amendment it is necessary to consider both its effect on decisions to initiate investigations, as well as the financial benefits it confers on United States investors or investments in competition with the claimant Canadian investors. Moreover, these effects must be viewed in light of the overall pattern of conduct described in the Claimants' pleadings.

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. Canfor and Terminal challenge the effect of the Byrd Amendment, but say that it is not part of AD or CVD law as those terms are expressed in Article 1901(3). The Byrd Amendment is not AD or CVD law within the meaning of those terms in Chapter 19, but yet it has effects on the application of AD or CVD law that contribute to the denial of justice complained of by the Claimants; indeed the offering of what amount to bounties to private actors to pursue unmeritorious claims against an investor is itself a denial of justice.

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, this Tribunal would still have jurisdiction over claims relating to the Byrd Amendment. The United States cannot rely upon Article 1901(3) as a safe harbour without satisfying the requirements of Article 1902(2), including both the notification requirements and the requirement that the amendment be WTO consistent. As the United States failed to give notice, and as the Byrd Amendment is the antithesis of an AD or CVD law, any exclusions for AD or CVD law would not capture the Byrd Amendment.

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 United States is not entitled to treat the Byrd Amendment as AD or CVD law for the purposes of Article 1901(3).

(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. When defending the Byrd Amendment before the WTO, the United States took the position that "CDSOA is a government payment programme" (Panel para 4.501)[39] and that "the CDSOA has nothing to do with the administration of the antidumping and countervailing duty laws" (para 4.502)[40] as the basis for arguing that the Byrd Amendment was not inconsistent with its WTO obligations. This position is relevant to this Tribunal as further evidence that the United States did not consider the Byrd Amendment to be part of its antidumping and countervailing law under NAFTA's Chapter 19, corroborating that offered by the lack of notification of Canada and Mexico or explicit reference of the Amendment's application them as required by Article 1902(2)(a) and (b). That the United States has still not notified the other NAFTA Parties nor included a specific reference of the Amendments application to them shows that the United States has not resiled from its position that the Byrd Amendment is not an antidumping and countervailing duty law.

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. The decisions of WTO Panel and Appellate Body are not relevant on this point because they were applying a different test to determine a different issue than this Tribunal is now. Those Tribunals were not determining whether the Byrd Amendment is "antidumping law and countervailing duty law" under NAFTA Article 1901(3), but whether it was a "specific action against" dumping or subsidy under the AD and SCM Agreements. This Tribunal must determine whether Article 1901(3) operates to nullify the United States' Chapter 11 obligations with respect to claims made concerning the Byrd Amendment. The Claimants take the position that, for their claims based on the Amendment, the issue is not whether the measure is law or even antidumping and countervailing duty law, but whether it fits within what should be understood by that phrase in Article 1901(3). The Claimants say that the Byrd Amendment does not fall within that phrase because it does not fit the requirements for amendment provided by Article 1902 and was not considered to be antidumping and countervailing duty law by the United States when it was enacted.

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 latest developments have been summarized by the WTO secretariat. This summary is current to December 1, 2005.[41]

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[39] *United States - Continued Dumping and Subsidy Offset Act of 2000*, Report of the Panel, (WT/DS217/R and WT/DS234/R), 16 September 2002, ("Continued Dumping - Report of the Panel"), at para. 4.501.

[40] *Continued Dumping - Report of the Panel*, supra note 26, at para. 4.502.

[41] *United States - Continued Dumping and Subsidy Offset Act of 2000*, Summary of the dispute to date, (online:http: //www.wto.org/english/tratop_e/dispu_e/cases_e/ds217_e.htm) (date access: 16 February 2006).

The United States has not repealed the Byrd Amendment. Last December, there were bills approved by both the House and the Senate that purported to repeal the Amendment. The bills signed by the houses were not identical which means the neither is valid and the Byrd Amendment remains United States statute. Passage of the respective bills through each House was close[42] and can by no means be assured should members try again. Furthermore, the repeal contemplated by both bills was not scheduled until October 2007, the result being that all softwood lumber imported under duty deposits until that date, including the approximately US $1,000,000,000 that has been collected from the Claimants here, would remain subjected to the Byrd Amendment.

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

A. Yes. The repeal of the Byrd Amendment, does not redress the harm already caused to the Claimants by virtue of the incentive provided by the Byrd Amendment to initiate the petitions and the consequences that have flowed from them. The repeal, in any event, will only apply to goods entering the United States after October 2007.

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. To the Claimants' knowledge it has not nor, given the material before the Tribunal, does it have intention to do so. The relevance is that the United States is not entitled to rely upon the Byrd Amendment as AD or CVD law under Article 1901(3).

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. If the Byrd Amendment is not AD or CVD law, then even under the United States' interpretation of Article 1901(3) the United States cannot object to this Tribunal's jurisdiction over claims respecting the Byrd Amendment.

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. It is the Claimants argument that the Byrd Amendment is inconsistent with GATT 1994 and the WTO Antidumping and SCM Agreements. That fact does not per se establish a breach of NAFTA Article 1105, although it is relevant to a determination whether Article 1105 and other provisions of Section A of Chapter 11 have been breached.

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[42] The Senate vote was 51-50 with Vice President Cheney casting the deciding ballot.

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. All these acts are subsumed within the conduct complained of: the denial of justice suffered by the investors must be understood in light both of the enactment of the law and the conduct of the United States' authorities in their investigations and determinations. Nevertheless, even if the conduct of the United States' authorities was beyond reproach, it would still be a denial of justice to create bounties that provide an incentive to private individuals to begin unmeritorious actions against an investor. But the fact is that in this particular case the Byrd Amendment and the actions of DOC mutually aggravate the harm to the investors.

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. Yes. See answer to question 71.

75. [not used; see Question 72]

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. The language of 1901(3) is not "law relating to AD/CVD" but "antidumping and countervailing duty law".

Articles 1902-1905 do nothing to exclude a claim pursuant to Chapter 11.

Remedies for the wrongful enactment of an AD/CVD law can include proceedings under Chapter 19, proceedings under Chapter 11 and proceedings before the WTO. Conceivably, challenges could also be brought before the United States' courts, for instance on constitutional grounds.

In any event, it is clear that when Chapter 19 refers to AD/CVD law, and creates certain obligations concerning the amendment of such law, including notice requirements, it refers to a narrower conception than the notion that it pertains to any law that could have some impact on AD/CVD proceedings. Here the Claimants revert to the fact that the United States did not so notify the Byrd Amendment. Unless such a failure of notification can be explained in some other persuasive fashion (such as proven clerical error), it shows that the Byrd Amendment was simply acknowledged by the US not to be a AD/CVD law.

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. To the Claimants' knowledge, duties paid by Canfor and Terminal have not to date been distributed to the United States industry to date. That said, the existence of the Byrd Amendment itself has caused the proceedings to be initiated. The fact that duties have not yet been paid out is irrelevant; the prospect of receiving such bounties can affect the decisions of competitors even before the funds are in their bank accounts.

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. Yes. Again, this is not a question currently before the Tribunal, but regardless, the claims would fall within Chapter 11 irrespective of the existence of Chapter 19. Chapter 19 says nothing about the conduct of the United States when measured against the obligations under Chapter 11.

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. This is not relevant to the preliminary question.

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. N/A

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. N/A

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 raise or will raise the findings in numerous WTO and NAFTA Panel reviews concerning the legal and factual errors of US officials, and in some instances, the

egregious nature of the errors and their repeated nature, as evidence of a pattern of conduct amounting to a denial of justice. The Tribunal would have to consider all this evidence and make a decision as to whether the Claimants have shown, on the balance of probabilities, a pattern of conduct amounting to a denial of justice under international law or other violation of Articles 1102, 1103, 1105 or 1110. That evidence includes the fact that on 23 of 25 reviews, the United States has not met the required standard of conduct, and on the remaining two, they have ignored the Tribunal's rulings. (See Appendix "A")

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. This 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. Yes, they are relevant to the determination of the merits of the Arbitration. They are not relevant to the Preliminary Question.

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 do not agree with the Tribunal's statement regarding the origin of the softwood lumber dispute. The dispute is far more complicated than simply a difference between stumpage regimes and therefore cannot be summarized in a paragraph. For example, the Tribunal's passage fails to account for causes such as: the vast Canadian advantage in its softwood resource endowment over the United States; the comparative advantage that results from this resource endowment; the fear that this generates in the

US softwood lumber industry which has been unable to adjust to competitive pressures; the asymmetry that results from the ability to trade lumber and inability to trade timber; cultural shifts resulting from the removal of land from the United States' forest sector that were not paralleled in Canada; and a political infrastructure in the United States which allows special interest groups such as the American lumber industry to affect government decision-making.

The Claimants agree that something akin to the Tribunal's statement is often cited as the cause of the dispute, but feel that it is more appropriate to describe such a statement as the *post hoc* rationalization of American officials supporting their country's negotiating position in the dispute. The Claimants believe that the American lumber industry would find reason to manufacture, and American officials would find cause to support, trade barriers on Canadian lumber regardless of the stumpage systems in the two countries. To support this proposition they only need to point to the fact that disputes between Canada and the United States stretch further into history than the Canadian stumpage system, and indeed, Canada itself.[43]

ALL OF WHICH IS RESPECTFULLY SUBMITTED

P. John Landry

Keith E.W. Mitchell

February 17, 2006

[43] In 1866, one year before the Dominion of Canada came into existence with the passage of the *British North America Act*, the United States abrogated the Reciprocity Treaty of 1854 by imposing a 20% duty on the importation on lumber in violation of that Treaty's provision for the free entry of natural products of each territory into the other.

Appendix "A"

At the hearing of the Preliminary Question, the Tribunal requested clarification of the 25 reviews of American actions surrounding the softwood lumber dispute, and the Claimants' observation that in 23 of those 25, the United States' actions under review have been found wanting.

The Tribunal observed that after nearly every Chapter 19 or WTO decision, both sides in the dispute proclaim victory in the press. While there may be some truth to that observation, it mischaracterizes the outcome of the various Chapter 19 or WTO challenges.

The reviews of American actions before the WTO or a Chapter 19 Panel that Canada has requested have, without exception, alleged a large number of violations in each determination subject to review. However, the ultimate issue being reviewed is "in making this decision, did the United States comply with the relevant legal rules, whether they be domestic (Chapter 19 Panels) or international (WTO)?" If Canada is successful on a ground that disposes of the appeal, the American action did not comply with the relevant legal rules.

This example can be put into the context of this case. It could be that this Tribunal finds for the Claimants in the Preliminary Question and the case can proceed to the merits. At that point, the Tribunal could find that the United States has not violated 1102, 1103, and 1110. It could also find that the United States has violated 1105, and as a result has to pay the Claimants the damages for which they claim. In the press during the softwood lumber dispute, this could be trumpeted as a victory for both sides. The United States could say that it escaped liability and won on three important issues. That might be true. Nevertheless, it still lost case, and had to pay full compensation. In the Claimants' view, when tallying cases to view compliance with the law, it is this ultimate result that matters, not an issue by issue review that may say more about the aggressiveness (or timidity) of the litigators in charge of formulating the grounds for appeal.

On this view, the Claimants say that 23 out of 25 softwood related decisions find that the United States had not acted in compliance with the relevant rules of law. These are as follows:

1. Byrd Amendment found not to comply with WTO Agreements by WTO Dispute Panel (September 16, 2002).

2. Preliminary Countervailing Duty Determination found not to comply with SCM Agreement by WTO Panel (September 27, 2002).

3. Preliminary Critical Circumstances Determination (CVD) found not to comply with the SCM Agreement (September 27, 2002).

4. Byrd Amendment found not to comply with WTO Agreements by WTO Appellate Body (January 16, 2003).

5. Final AD Determination found non-compliant with American municipal law by Chapter 19 Panel (July 17, 2003).

6. Final CVD Determination found not to comply with American municipal law by Chapter 19 Panel (August 13, 2003).

7. Final CVD Determination found not to comply with the SCM Agreement by the WTO Panel (August 29, 2003).

8. Final Threat of Injury Decision found not to comply with American municipal law (September 5, 2003).

9. Final CVD Determination found not to comply with the SCM Agreement by the WTO Appellate Body (January 19, 2004).

10. First Remand Redetermination (AD) found not to comply with American municipal law by Chapter 19 Panel (March 5, 2004).

11. Threat of Injury Determination found not to comply with WTO Agreement (March 22, 2004).

12. Final AD Determination found not to comply with the Antidumping Agreement by the WTO Dispute Panel (April 13, 2004).

13. First Remand Redetermination (Injury) is found not to comply with American municipal law (April 19, 2004).

14. First Remand Redetermination (CVD) found not to comply with American domestic law by Chapter 19 Panel (June 7, 2004).

15. Final AD Determination found not to comply with the Antidumping Agreement by the WTO Dispute Panel (August 11, 2004).

16. Second Remand Redetermination (Injury) found not to comply with American municipal law (August 31, 2004).

17. Third Remand Redetermination (Injury) found compliant with American municipal law (October 12, 2004).

18. Second Remand Redetermination (CVD) found not to comply with American domestic law by Chapter 19 Panel (December 1, 2004).

19. Third Remand Redetermination (CVD) found not to comply with American domestic law by Chapter 19 Panel (May 23, 2005).

20. Second Remand Redetermination (AD) found not to comply with American municipal law by Chapter 19 Panel (June 9, 2005).

21. Section 129 CVD Determination purporting to bring the CVD investigation into compliance with WTO rules was found to not be compliant with the SCM Agreement and Appellate Body ruling of January 19, 2004 by the Compliance Panel (August 1, 2005).

22. Second Remand Redetermination (Injury) found not to comply with American municipal law by the Extraordinary Challenge Committee (indirectly) (August 10, 2005).

23. Fourth Remand Redetermination (CVD) found not to be compliant with American municipal law by Chapter 19 Panel (October 5, 2005).

24. Section 129 Injury Determination found compliant by WTO Compliance Panel (November 15, 2005).

25. Section 129 CVD Determination purporting to bring the CVD investigation into compliance with WTO rules was found to not be compliant with the SCM Agreement and Appellate Body ruling of January 19, 2004 by the Appellate Body (December 5, 2005).

That there are two compliant decisions on this list drastically overstates American compliance with its municipal law and the WTO Agreements during the softwood lumber case. In its first instance of compliance, the United States' ITC issued its Fourth Remand Redeterminations under very specific instructions from the Chapter 19 Panel that essentially left it with no choice but to issue a compliant decision. In the second instance, the ITC s. 129 decision complied with WTO obligations after originally being found non-compliant, but then ignored previous NAFTA rulings. Furthermore, as the Tribunal is already aware, the United States has used these, its only two lawful acts, to avoid its international obligations and flout the rule of law and thereby entirely frustrated the effect of their compliance.