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

CANFOR CORPORATION
("Canfor")

Investor
(Claimant)

v.

THE GOVERNMENT
OF
THE UNITED STATES OF AMERICA
("Respondent")

Party
(Respondent)

NOTICE OF ARBITRATION AND STATEMENT OF CLAIM

Pursuant to Articles 1116 and 1120 of the North American Free Trade Agreement ("NAFTA"), Canfor, Submits the following Claim to Arbitration.

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I. DISPUTING PARTIES

1. The Claimant, CANFOR CORPORATION, ("Canfor") is a company incorporated under the laws of British Columbia, with its head office in Canada at 2900 - 1055 Dunsmuir Street, Vancouver, British Columbia, Canada, V7X 1B5, and its address for service of documents in connection with this proceeding is c/o DAVIS & COMPANY, Suite 2800-666 Burrard Street, Vancouver, British Columbia, Canada, V6C2Z7, Attention: P. John Landry (Telephone: 604-643-2935, Facsimile 604-605-3588). Canfor hereby demands that this dispute be referred to arbitration.

2. The Respondent, GOVERNMENT OF THE UNITED STATES OF AMERICA, ("Respondent"), is a Party to the North American Free Trade Agreement ("NAFTA"), entered between the Governments of Canada, the United States and the United Mexican States effective January 1, 1994. The address of the Government of the United States, for the purposes of this proceeding is c/o Office of the Legal Adviser, United States Department of State Room 5519, 2201 C Street, NW, Washington DC 20520.

II. PROCEDURAL HISTORY

3. Pursuant to NAFTA Articles 1116 and 1119, on November 5, 2001, Canfor delivered to the Respondent a Notice of Intent to Submit a Claim to Arbitration, thus putting the Respondent on notice of Canfor's allegation that the Respondent's conduct in connection with, amongst other matters, preliminary determinations issued by the United States Department of Commerce ("DOC") in respect of petitions ("Petitions") filed with the DOC and with the United States International Trade Commission ("ITC") alleging that the United States softwood lumber industry was materially injured or threatened with material injury through imports of subsidized and dumped softwood lumber from Canada, violated the Respondent's obligations under Chapter 11 of NAFTA.

4. Consultations between the disputing parties contemplated by NAFTA Article 1118 occurred in Washington, DC, on December 18, 2001 but those consultations failed to settle the claim.

5. This Notice of Arbitration is submitted under Section B of Chapter 11 of NAFTA and the UNCITRAL Arbitration Rules. The contract which this dispute arises out of or in relation to is Chapter 11 of NAFTA. As provided for in Article 1123, the disputing parties not having agreed otherwise, Canfor proposes that this proceeding be adjudged by three arbitrators.

6. Canfor has consented to the submission of this claim to arbitration. Canfor, Canfor USA Corporation ("Canfor USA"), Canadian Forest Products Ltd. ("CFP"), and Canfor Wood Products Marketing Ltd. ("Canfor Wood Products") waive their rights to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measures of the United States that are alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the United States. Copies of the consent and waivers, made in writing on May 23, 2002 are attached to this Notice of Arbitration and Statement of Claim and are delivered with it to the Respondent.

III. FACTS

A. Canfor and its Business Operations

(i) Canfor Group

7. Canfor is a British Columbia company carrying on business world-wide in the forest products industry. CFP is a British Columbia company and is a wholly owned subsidiary of Canfor. Canfor USA is a Washington corporation and is a wholly owned subsidiary of CFP.

8. Canfor, directly or through its subsidiaries, employs approximately 5,760 people in its forest products and affiliated operations. The Canfor Group's (ie., Canfor and its subsidiaries, including CFP, Canfor USA, and Canfor Wood Products) major products are softwood lumber, pulp, specialty kraft paper, newsprint, plywood, hardboard and logs. These products are exported from Canada, primarily to the United States, Europe, and the Far East. The Canfor Group is the largest producer in Canada, and the largest exporter to the United States, of softwood lumber.

(ii) Canfor Group's Canadian Operations

9. The Canfor Group operates eleven sawmills and two whole log chipping facilities in the northern interior of British Columbia, two sawmills in Alberta and a plywood mill in Prince George, British Columbia. It also manufactures bleached, semi-bleached and unbleached kraft pulp and bleached, and unbleached kraft paper at its pulp facilities located in Prince George.

10. In addition to these facilities the Canfor Group has the following secondary manufacturing operations in Canada:

(a) finger-joint mills; one attached to its Clear Lake sawmill in the interior of British Columbia, one attached to its Grand Prairie, Alberta sawmill and one, a joint venture, located at Moricetown, British Columbia;

(b) machine stress rated lumber facilities at its Grand Prairie and Prince George sawmills;

(c) a wood-treating plant in Prince George; and

(d) a panel and fibre operation in New Westminster, British Columbia.

11. Canfor has no facilities in the Province of Quebec.

(iii) Canfor Group's United States Operations

12. The Canfor Group's United States operations include a secondary manufacturing operation, approximately 9 reload centres, and 33 vendor managed inventory facilities ("VMIs").

13. The secondary manufacturing facility is located in Bellingham, Washington.

14. The nine reload centres are located in Bartow, FL, Dallas, TX, Buffalo, NY, Minneapolis, MN, Newnan, GA, Norfolk, VA, Phoenix, AZ, Richmond, VA, and Winston-Salem, NC. These centres are used to hold an inventory of the Canfor Group's softwood lumber which allows the Canfor Group to better serve its United States customers on a "just in time" basis.

15 The Canfor Group's VMIs are located throughout the United States. Canfor typically has capital of between $50 and $80 million (US) in the United States committed to these facilities.

16. All of the Canfor Group's softwood lumber destined for the United States is purchased by Canfor Wood Products, which is a British Columbia company and a wholly owned subsidiary of CFP Sales in the United States are then made by Canfor Wood Products, including through agents in the United States.

17. In 2000, approximately 68% of the Canfor Group's total softwood lumber production was imported into the United States by Canfor Wood Products, the importer of record, which has been liable for bonds and cash deposits and which will be liable for any duties ultimately assessed, as more fully set out below. The softwood lumber which is imported into the United States is re-manufactured, marketed and distributed through the Canfor Group's US-based reload centres, VMI's and re-manufacturing facility. Virtually all softwood lumber

imported by Canfor Wood Products into the United States is shipped by rail and truck. To facilitate transporting its products to and throughout the United States the Canfor Group has leased a fleet of approximately 587 railcars.

18. Accordingly, Canfor is an investor of a Party as defined in NAFTA Article 1139, and by virtue of the facts set out above, has investments to the territory of the United States as contemplated by NAFTA Article 1101 and defined in NAFTA Article 1139.

B. Historical Context

19. Canfor brings this claim in connection with the Government of the United States' violations of NAFTA Articles 1102, 1103, 1105 and 1110 arising out of and in connection with conduct of the Government of the United States, including the DOC and ITC, in relation to the investigations of the Canadian softwood lumber industry, and more particularly, including the investigations carried out in response to the Petitions which resulted in the DOC's Preliminary Countervailing Duty Determination ("PD-CVD") and Preliminary Critical Circumstances Determination ("PD-CC") both issued by the DOC on August 9, 2001, the DOC's Preliminary Anti-Dumping Determination ("PD-ADD") issued by the DOC on October 30, 2001, the DOC's Final Countervailing Duty Determination ("FD-CVD") and Final Anti-Dumping Determination ("FD-ADD") both issued by the DOC on March 26, 2002, and the ITC's May 2002 Final Determination ("ITC-FD") that the United States softwood lumber industry was threatened with material injury by reason of imports from Canada of softwood lumber.

20. The present claim arises from the unfair, inequitable and discriminatory treatment of the Canadian softwood lumber industry, including Canfor, or more particularly Canfor and its subsidiaries, by the Government of the United States. A review of the treatment received by the Canadian softwood lumber industry over the past 20 years demonstrates a pattern of conduct designed to ensure a predetermined, politically motivated and results-driven

outcome to the investigations resulting to the PD-CVD, PD-CC, PD-ADD, FD-CVD, FD-ADD and the ITC-FD. That context includes three prior softwood lumber investigations by the DOC (hereafter, *Lumber I, Lumber II and Lumber III*) as well as legislative changes to the countervailing duty law explicitly designed to ensure that softwood lumber from Canada would be found to be subsidized. An overview of that conduct is described below.

(i) Lumber I

21. On October 7, 1982 the United States Coalition for Fair Canadian Lumber Imports ("Coalition") filed a countervailing duty petition ("1982 Petition") with the International Trade Administration ("ITA"), an arm of the DOC, and the ITC, alleging that certain softwood lumber products from Canada were subsidized by the Canadian Federal and/or Provincial Governments and therefore the products at issue were countervailable under United States law. In particular, the 1982 Petition alleged that stumpage charged by the Provincial Governments constituted a subsidy on softwood lumber[1]

22. Following the filing of the 1982 Petition, the ITC and ITA commenced their investigations. In November 1982 the ITC ruled that there was a reasonable indication that United States domestic softwood lumber producers were being injured by imports of Canadian softwood lumber and that a full investigation was warranted.

23 In March 1983 the ITA issued a Preliminary Determination ("1983 PD") that Canada was not subsidizing its softwood lumber industry.

[1] "Stumpage" can be described generally as a levy or tax paid by timber harvesters for the right to cut standing timber on public lands. The payment of the levy, as well as any subsequent licence or tenure agreements, gives the timber harvesters the right to enter onto Crown (public) land to exploit an *in situ* natural resource as a *profit á prendre*. In addition, as part of any stumpage programs timber harvesters must also assume a complex bundle of forest management obligations, such as road building, fire protection, disease prevention, silviculture, and reforestation. A stumpage charge is a levy on the exercise of the right to harvest timber, and is the economic equivalent of a tax

24 In April 1983 the Coalition filed an appeal of the ITA's 1983 PD with the United States Court of International Trade ("CIT"). The CIT affirmed the ITA's 1983 PD.

25. On May 25, 1983 the ITA issued a final negative determination ("1983 FD") finding that no subsidy had been conferred by the Canadian Federal and/or Provincial Governments on softwood lumber producers in Canada. The ITA concluded that stumpage programs in the various Canadian provinces did not confer a countervailable domestic subsidy because these programs were not provided to specific enterprises or industries as required by United States countervailing duty law with respect to domestic subsidies. Further, the ITA stated that even if stumpage programs were specific, they did not provide a countervailable subsidy in that they did not provide goods at preferential rates. Finally, the ITA rejected the Petitioner's request that it determine the existence of a subsidy by comparing stumpage prices in Canada with stumpage prices in the United States ("cross-border analysis") because in the ITA's opinion any comparison of stumpage prices across borders would be "arbitrary and capricious" given the vastly different conditions in the two countries.

26. Based on the ITA's conclusions in the 1983 FD the 1982 Petition was dismissed and the investigation was terminated

(ii) Lumber II

27. Notwithstanding the ITA's ruling in *Lumber I;* on May 16, 1986 the Coalition once again filed a countervailing duty petition ("1986 Petition") with the ITA and ITC alleging that the same softwood lumber products from Canada as were in issue in *Lumber I* were subsidized by the Canadian Federal and/or Provincial governments and therefore were countervailable under United States law.

28 On June 26, 1986 the Government of Canada, stating that the 1986 Petition constituted trade harassment, requested consultations with the Government of the United

States under the *1979 GATT Subsidies Code*. Following the failure to resolve the matter through consultations, Canada requested the establishment of a review panel under the *1979 GATT Subsidies Code*.

29. On June 27, 1986, the ITC ruled that there was a reasonable indication that the United States softwood lumber industry had been injured or was being threatened with material injury by the import of Canadian softwood lumber products and therefore the 1986 Petition should be investigated further. The ITC made this ruling despite the fact that the United States Federal Trade Commission, a government agency, had itself filed a brief with the ITC confirming that Canadian stumpage programs did not confer subsidies and did not injure the Unites States softwood lumber industry.[2]

30. Following the ITC's preliminary decision in July 1986, the ITA began investigating whether alleged subsidies to Canadian softwood lumber producers were countervailable under United States law. Meanwhile, negotiations between the Governments of Canada and the United States continued as legislation trying to deal with the issue stalled in the United States House of Representatives.

31 On October 16, 1986, the ITA issued a Preliminary Determination ("1986 PD"), reversing itself from the 1983 FD, even though the facts had not materially changed. The ITC found that Canadian softwood lumber products were subsidized by the Canadian Federal and/or Provincial Governments and as a result, imposed a provisional duty of 15% on future imports of Canadian softwood lumber products. The ITA found that the Canadian stumpage programs were specific, reversing its finding in the 1983 FD. The ITA did not use a cross-border analysis, even though the petitioners had requested it to do so. A Final Determination was scheduled for December 30, 1986.

[2] The Federal Trade Commission is a government agency that oversees the United States marketplace, seeking to eliminate unfair or deceptive practice that threaten or affect consumers. They undertake economic analysis and report their results to agencies of the United State government when requested.

32. On December 30, 1986**,** the Governments of the United States and Canada signed a Memorandum of Understanding ("MOU") wherein the ITA terminated the countervailing duties investigation to exchange for the Government of Canada imposing a 15% export tax on Canadian softwood lumber products exported to the United States. The 1986 Petition and resulting investigation were effectively terminated by the signing of the MOU. As a result, the Government of Canada withdrew its *GATT* complaint.

(iii) Actions following Lumber II

33 The MOU did not declare that Canadian stumpage practices constituted a subsidy under United States or international law The MOU simply provided that in exchange for certain "replacement measures" requested by the Government of the United States being imposed in Canadian Provinces, the export tax levied on Canadian softwood lumber products would gradually be reduced to zero. The Governments also agreed that on 30 days notice either party could terminate the MOU.

34. As part of its obligations under the MOU, the DOC created a separate office within the Import Administration ("IA") branch to review the Government of Canada's performance under the MOU. A number of Canadian provinces implemented the requested replacement measures, including the two major exporting Provinces, Quebec and British Columbia, and as a result, by 1989 the export tax was eliminated entirely in British Columbia and was reduced to a negligible amount of 3.1 % in Quebec.

35. The DOC was satisfied with the MOU and the replacement measures implemented by the Canadian provinces, including British Columbia. On February 22, 1991 the acting Deputy Assistant Secretary for Import Administration, Department of Commerce, testified before a Congressional Sub Committee on Regulation, which was looking into the status of the MOU, that the replacement measures had been successful in offsetting any alleged subsidies of Canadian softwood lumber products.

(iv) Lumber III

36 On September 3, 1991, the Canadian Government, upon being satisfied that it had met all of the conditions under the MOU, including the imposition of the requested replacement measures, exercised its rights under the MOU and notified the Government of the United States that it would be terminating the MOU effective October 4, 1991.

37 On October 4, 1991, the day that the MOU terminated, the Government of the United States, through the Executive Branch, and following an investigation by the Office of the United States Trade Representative ("USTR") under Section 302 of the *United States Trade Act of 1974,* imposed "interim measures" in the form of immediate bonding requirements on the importation of softwood lumber from Canada. In conducting its investigation, the USTR concluded that the termination of the MOU was unreasonable and would have the effect of "burdening or restricting United States commerce," therefore "expeditious action" was justified. The interim duties for the affected Canadian Provinces were as follows. Quebec, 6 2%, Ontario, Alberta, Manitoba and Saskatchewan, 15%; while others, including British Columbia and the Maritimes, were exempt.

38 On October 8, 1991, the Government of Canada requested consultations with the United States under the *1979 GATT Subsidies Code,* to discuss the imposition of interim duties when no formal investigation had been initiated Following the failure to resolve the matter through consultations, the Government of Canada requested the establishment of a review panel under the *1979 GATT Subsidies* Code ("GATT Panel").

39. On October 23, 1991, citing "special circumstances" under the *1979 GATT Subsidies Code*, the DOC, the same department which on February 22, 1991 had said that the replacement measures had offset any subsidy, initiated its own countervailing duties investigation. This was the first time to DOC history that a countervailing duty investigation was initiated without the filing of a formal petition by the domestic industry. The DOC

concluded that it was necessary to take this extraordinary step because the termination of the MOU meant that the United States lumber industry would be denied any offset that had been provided by Canadian export charges against what in 1986 preliminarily had been found to be injurious Canadian subsidies.

40. On December 1, 1991, a dispute settlement panel was established under the *1979 GATT Subsidies Code* to hear the Government of Canada's allegations regarding the interim bonding measures.

41. On March 5, 1992, the DOC issued a Preliminary Determination ("1992 PD") finding that Canadian provinces conferred subsidies within the meaning of United States law, and consequently a provisional duty of 14 48% was imposed on imports of Canadian softwood lumber products including softwood lumber products from British Columbia. The subsidies found to exist consisted of (a) provincial stumpage programs, and (b) log export restrictions ("LER") imposed by British Columbia. Notwithstanding that there were no material differences from the 1983 FD, other than that the replacement measures which had been implemented by British Columbia and others at the request of the Government of the United States under the MOU, the DOC again reversed its 1983 ruling that stumpage programs were not specific and did not confer a subsidy.

42 On May 28, 1992 the DOC issued a Final Determination ("1992 FD") in which it confirmed the subsidies finding, however it lowered the countervailing duty rate to 6 51 %. Despite the affirmative subsidies finding the DOC once again rejected the Coalition’s request for a cross-border analysis, holding that the use of such an analysis to determine market prices would be inappropriate.

43. On July 15, 1992, the ITC declared that certain Canadian softwood lumber imports did cause material injury to United States domestic producers despite a lack of evidence on the record supporting a number of factors that the ITC traditionally relied upon to support an affirmative determination by the DOC ("ITC Ruling"). As a result of the ITC Ruling, the

DOC issued a countervailing duty order requiring cash deposits of 6 51 % to be provided with all future imports of softwood lumber from Canada except those from Prince Edward Island, Nova Scotia, New Brunswick and Newfoundland ("Maritimes"), which had been excluded from the investigation. [3]

44. Following the issuance of the 1992 FD, and the ITC Ruling, the Government of Canada and others requested a review of these decisions under Chapter 19 of the United States/Canada Free Trade Agreement ("FTA") On July 29, 1992 two FTA panels were established, one to deal with the Government of Canada's challenge to the 1992 FD ("First FTA Panel)"; and one to deal with the Government of Canada's challenge to the ITC's finding of injury ("Second FTA Panel").

45. On February 19, 1993 the GATT Panel issued its ruling with respect to the interim bonding requirements. The Panel found that the termination of the MOU was not a breach of an undertaking as the Government of the United States had suggested, and therefore the Panel agreed with the Government of Canada that the Government of the United States actions of imposing interim bonding requirements prior to a preliminary determination of a subsidy were contrary to the Government of the United States' obligations under the *1979 GATT Subsidies Code*. The Panel took the unusual step of recommending that the United States refund any cash deposits that had been collected.

46. On May 6, 1993, the First FTA Panel rendered its decision finding unanimously that the DOC failed to act in accordance with United States law. The First FTA Panel found:

- that there was insufficient evidence on the record to justify the DOC's findings;

[3] Although referred to as the "Maritimes" in the various PDs and FDs these four Canadian Provinces (New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland) are more commonly known as to "Atlantic Provinces". In the Canadian lexicon, the term "Maritimes" includes only New Brunswick, Nova Scotia and Prince Edward Island, and does not include Newfoundland.

- that the DOC had misunderstood the theoretical analysts being put forward by the Canadians;
- that the DOC ignored crucial empirical evidence,\;
- that the DOC failed to properly analyze all four required factors when it conducted the specificity analysis of the subsidies at issue; and
- that the DOC failed to properly conduct an analysis of whether certain of the alleged subsidies had any market distorting effect. On this issue the Panel noted that the very economic model that the DOC used in the case defined a subsidy as something that "distorted the market process" therefore the market effect "could not be legally ignored." The Panel also pointed out an inconsistency in the DOC's reasoning in that the DOC had used the market distortion test to determine that the British Columbia LERs amounted to a subsidy that was countervailable yet it refused to apply such a test to determine whether a subsidy existed in relation to other government programs.

47. As a result, the First FTA Panel remanded the decision back to the DOC, with instructions to re-examine their determination in light of the first FTA Panel's comments and findings.

48. On July 26, 1993 the Second FTA Panel issued a unanimous decision finding the ITC's determination to be flawed under both international and United States legal standards because there was insufficient evidence to support the conclusions the ITC reached. In addition, the Second FTA Panel found that the ITC's reliance on cross-sectoral comparisons was flawed because it compared an investigated industry to a non-investigated industry. The Panel remanded that determination back to the ITC for further consideration in light of the Panel's comments and findings.

49. On September 17, 1993, largely ignoring but strongly criticizing the findings of the First FTA Panel, the DOC issued a revised determination, finding once again that Canadian softwood lumber products were subsidized. Although the DOC acknowledged that a market distortion analysis was a possible tool in measuring countervailable subsidies, it said that it had used its discretion and chose not to look at the market effects of the alleged subsidies as the First FTA Panel had requested. As a result, the DOC confirmed its earlier subsidy finding and increased the CVD duties from 6.51% to 11.54%.

50. Following the DOC's determination on remand, the Government of Canada exercised its rights under the FTA to have the revised DOC determination reviewed again by the First FTA Panel.

51. On October 25, 1993, the ITC issued its revised determination without significantly adjusting its interpretation of the evidence. Again it determined that Canadian softwood lumber had caused material injury to the United States softwood lumber industry.

52. At the end of October 1993 the Canadian Government exercised its rights under the FTA to have the revised ITC determination reviewed again by the Second FTA Panel.

53. On December 17, 1993 after reviewing the DOC's revised determination, the First FTA Panel issued another remand order requiring the DOC to once again review its determination in light of the First FTA Panel's findings and comments. The First FTA Panel ordered the DOC to enter a negative determination because there was not sufficient evidence on the record to support the finding of countervailable subsidies.

54. On January 6, 1994 the DOC finally accepted the First FTA Panel's ruling that a negative finding was in order. The DOC"s acceptance was acknowledged by the First FTA Panel on February 23, 1994 and on March 7, 1994 a Notice of Final Panel Action was issued, published and made official on March 17, 1994, thereby concluding the review of the 1993 FD.

55. On January 28, 1994 the Second FTA Panel found that the ITC determination was still not substantiated by the evidence on the record and issued a second remand for the ITC to review its revised determination. The Second FTA Panel found that the ITC's revised decision was not completed in accordance with United States law and that the price comparisons that the ITC used were based on data that the ITC itself had initially rejected in its original injury determination.

56. On March 14, 1994, the ITC issued a second revised decision largely ignoring the Second FTA Panel's revised findings. This decision was subsequently reviewed once again by the Second FTA Panel. On July 6, 1994 the Second FTA Panel again found that the ITC's decision was not supported by the evidence on the record and remanded it to the ITC for the third time. The ITC did not issue another decision because the appeal was rendered moot by the subsequent revocation of the countervailing duty order described below.

57. On April 6, 1994, based on pressure from the Coalition, the Government of the United States requested that an Extraordinary Challenge Committee be appointed under the FTA to review the decision of the First FTA Panel. It alleged that (a) the Panel had exceeded its jurisdiction by failing to apply the proper standard of review, and (b) that two of the Canadian members of the Panel had failed to disclose conflicts of interest. The request for an Extraordinary Challenge Committee was done without consultations with the Government of Canada, as required under the FTA. The Coalition, and the Government of the United States, alleged that two Canadian members of the First FTA Panel had relationships with forest companies and/or the Government of Canada which affected their ability to provide a fair and objective decision. No objections had been raised by the Coalition or the Government of the United States at the start of the proceedings before the First FTA Panel even though the allegations raised before the Extraordinary Challenge Committee were based on facts that were known or ought to have been known to all parties at the start of the First FTA Panel proceedings.

58. On August 3, 1994 the Extraordinary Challenge Committee confirmed the First FTA Panel's decisions and dismissed the United States Governments allegations of conflict of interest. A majority of the Committee were of the opinion that the First FTA Panel acted within the mandate of the FTA and that the allegations of conflict of interest were without merit. Under the FTA this decision was not subject to appeal.

59. On August 16, 1994, the DOC published a formal notice revoking the countervailing duty order and terminating the collection of any additional duties on softwood lumber from Canada. Although the 1992 countervailing duty investigation ended, relying on yet another controversial legal interpretation which undermined specific FTA language to the contrary, the DOC stated that the Government of the United States did not have to return any duties paid prior to the First FTA Panel decision of March 17, 1994, which meant that the Government of the United States would keep the hundreds of mullions of dollars in cash deposits which had been collected from Canadian softwood lumber exports from October 1991.

(v) Actions following Lumber III

60. Having failed in their objective of putting in place countervailing duties, the Coalition continued pressuring United States politicians to change the trade laws to either impose a duty on Canadian softwood lumber or change the United States law to legislatively reverse Lumber II.

61. For example, on September 14, 1994 the Coalition filed proceedings in the United States Court of Appeals for the District of Columbia challenging the constitutionality of the FTA Panel decisions and the FTA chapter 19 dispute resolution process.

62. The Coalition's lobbying finally succeeded in changing United States subsidies law to increase its ability to harm the Coalition's Canadian competitors in December of 1994. As part of the passage of the *Uruguay Round Agreements Act ("URAA"),* legislation designed

to bring the United States into compliance with the *World Trade Organization Agreement on Subsidies and Countervailing Measures ("SCM Agreement"),* changes were made to the United States countervailing duty laws that would (a) allow the DOC to ignore the effects of any alleged subsidy; and (b) to find a subsidy program "specific" based on only one of the four relevant factors. As outlined in the Statement of Administrative Action that accompanied the bill that became the *URAA*, these changes were specifically intended to effectively overrule the First FTA Panel's finding in *Lumber III.*

63. On December 15, 1994, after the signing into law of the *URAA*, the United States Government announced that it would reimburse Canadian companies for all cash deposits that had been collected and improperly held as part of the 1991 through 1994 countervailing duty investigation. In addition, also on December 15, 1994, the Coalition Petition challenging the constitutionality of the FTA Panel decisions was abandoned.

64. Negotiations continued between the Governments of the United States and Canada through 1995 and into 1996 against the threat that the Coalition would file a new countervailing duty petition under the more relaxed standards created by the *URAA*. On April 2, 1996 the Governments of Canada and the United States signed the Softwood Lumber Agreement ("SLA") which provided that for a period of five (5) years, a specific volume of softwood lumber could enter the United States duty free, thereafter an export tax would be imposed on a sliding scale. In addition, the countries agreed that no trade actions would be initiated with respect to softwood lumber during the period of the agreement (which expired on April 1, 2001.)

(vi) Byrd Amendment

65. On October 28, 2000, the United States enacted the *Continued Dumping and Subsidy Offset Act of 2000* ("Byrd Amendment"), an amendment to Title VII of the *Tariff Act of 1930*. The Byrd Amendment provides that duties assessed pursuant to countervailing duty

or anti-dumping orders shall be distributed annually to affected domestic producers. An "affected domestic producer" is a producer who either filed or supported the countervail or anti-dumping petition. The Byrd Amendment was the last of a series of attempts by the United States Congress to enact essentially identical legislation, specifically directed at assisting United States industry and was passed as a part of the unrelated *Agricultural Appropriations Act, 2001*.

(vii) Immediate Context - *Lumber IV*

(a) Allegations in the Petitions

66. On April 2, 2001, one day after the SLA expired, two petitions were filed with the DOC and ITC by the Coalition and others (collectively, the "Petitioners") alleging that the United States softwood lumber industry was materially injured or threatened with material injury through imports of subsidized and dumped softwood lumber from Canada, and seeking the imposition of countervailing duties and anti-dumping duties. The Petitions also contained allegations of "critical circumstances".

(b) ITC and DOC Preliminary Determinations

67. On May 23, 2001, the ITC preliminarily determined that there was a "reasonable indication" that the United States softwood lumber industry was being threatened with material injury by reason of import of Canadian softwood lumber.

68. On August 9, 2001, the DOC "preliminarily" determined that countervailable subsidies were being provided to producers and exporters of softwood lumber products from Canada, including British Columbia, and that critical circumstances existed.

69. On November 6, 2001, the DOC published the PD-ADD, calculating a weighted-average dumping margin of 12.98 percent for Canfor.

70. No judicial review or redress is available under United States law to respect of these Preliminary Determinations.

(c) ITC and DOC Final Determinations

71. On March 26, 2002, the DOC issued the FD-CVD, which adopted an "Issues and Decision Memorandum" dated March 21, 2002, setting out the reasons for the FD-CVD.

72. On March 26,2002, the DOC issued its FD-ADD, significantly modifying its earlier determination with respect to Canfor, but nonetheless calculating a weighted average dumping margin of 5.96% for Canfor.

73. On May 16, 2002, the ITC issued its final determination that the United States softwood lumber industry was threatened with material injury by reason of imports from Canada of softwood lumber. This final determination was made official on May 22, 2002, following publication in the *Federal Register*.

(d) DOC's Analysis - PD-CVD

74. The countervailing duty petition alleged that provincial stumpage and log export restraints, as well as certain other federal and provincial programs, constituted countervailable subsidies.

75. Under United States countervailing duty law, the United States is entitled to impose countervailing duties in certain circumstances where a countervailable subsidy exists. For a countervailable subsidy to exist, there must be (1) a "financial contribution" that (2) confers a "benefit". If the program at issue is a domestic subsidy, the program must also be (3) "specific" to an enterprise or industry or group thereof. The relevant programs alleged to amount to countervailable subsidies included the various provincial stumpage programs. The DOC did not make a separate finding with respect to log export restraints but stated that any

benefit provided through log export restraints would be included in the calculation of the stumpage benefit.

76. The entire analysis of the DOC as to whether the stumpage programs constituted a "financial contribution" and were therefore countervailable subsidies, was as follows:

> In addition to being specific, a countervailable subsidy program must provide a financial contribution. Section 771(5)(D)(iii) of the Act states that the provision of a good or service (other than general infrastructure) by a government constitutes a financial contribution under the statute. We preliminarily determine that the provision of stumpage by the provincial governments constitutes the provision of a good or service under section 771(5)(D)(iii) of the Act. Thus, we preliminarily determine that the provincial governments have provided a financial contribution as defined under section 771(5)(D)(iii) of the Act to Canadian softwood lumber producers.

77. As noted above, if the program at issue is a domestic subsidy, in order for it to be considered countervailable, the program must also be specific to an enterprise, industry or group. Section 771(5A)(D)(iii) of the *Tariff Act of 1930* provides:

> Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exists:
>
> (I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.
>
> (II) An enterprise or industry is a predominant user of the subsidy.

(III) An enterprise or industry receives a disproportionately large amount of the subsidy.

(IV) The manner to which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others.

78. The DOC is required to undertake this analysis sequentially. The applicable Regulation 19 C.F.R Section 351.502(a) provides that if a single factor warrants a finding of specificity the DOC will not undertake further analysis. In the PD-CVD, the DOC determined, under (I) above, that because only two industries benefitted from stumpage programs, those programs met the requirements of specificity. Again, this finding reversed the 1983 conclusion of the DOC in *Lumber I* that stumpage programs were not provided to specific industries or enterprises.

79. Once the alleged subsidy was found to be "specific" and that it provided a "financial contribution", the DOC was required to determine whether the alleged subsidy provided a "benefit". Under section 771(5)(E)(iv) of the *Tariff Act of 1930*, a benefit is conferred when the government provides a good or service for less than adequate remuneration. Section 771(5)(E) provides, in relevant part, that the adequacy of remuneration:

> shall be determined in relation to prevailing market conditions for the good or service being provided… *the country which is subject to the investigation or review*. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of…sale. (emphasis added)

80. Similarly, Article 14(d) of the *SCM Agreement* directs that in determining whether a n alleged subsidy related to the provision of a good by a government confers a benefit:

> The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question *in the country of provision or purchase* (including price, quality, availability, marketability, transportation, and other conditions of purchase or sale. (emphases added)

81. Section 351.511(a)(2) of the DOC's Regulations sets out a hierarchical methodology of benchmarks that the DOC uses to establish whether a good or service has been provided at less than adequate remuneration. In order of preference these are:

(a) Market determined prices from actual transactions in the country in question;

(b) A world market price where it is reasonable to conclude that such price would be available to purchasers in the country in question; and

(c) Whether the government price is consistent with market principles.

82. Despite the above international standards, the DOC's statutory and regulatory mandate, and the fact that information on actual market determined stumpage transactions was available against which to assess the government stumpage prices (as they had done in *Lumber III*) which information showed no benefit was conferred, the DOC declined to apply the first benchmark. Instead, the DOC decided to apply the second benchmark and use a "cross-border analysis," notwithstanding the DOC had refused to conduct a cross-border analyses in all three previous softwood lumber investigations and had held that to engage in such a cross-border analyses would be "arbitrary and capricious", and inappropriate.

83. The DOC justified this decision by holding that "stumpage prices from the United States qualify as commercially available world market prices because it is reasonable to conclude that United States stumpage would be available to softwood lumber producers in Canada at the same prices available to U S lumber producers." It made this finding despite

the fact that by definition, United States stumpage rights are not available "in" Canada (the country which is subject to investigation) and the fact that some of the States in the United States whose stumpage prices it used as benchmarks prohibit the export of logs. Accordingly, the DOC determined that the best information upon which to determine that Canadian stumpage had been provided at less than adequate remuneration was to compare stumpage prices charged by Canadian governments to "market-determined prices for stumpage available in the United States."

84. The decision to use a cross-border comparison was made even though there was evidence that was available on the record which would have easily allowed the DOC to use the third benchmark "Measurement of Prices to General Market Principles". However, using the third benchmark, there would have been no benefit conferred on softwood lumber producers. In other words, the only way in which the DOC could determine that a benefit had been conferred was to use a "cross-border" analysis, which it had rejected on three previous occasions and had determined was "arbitrary and capricious", and inappropriate.

(e) DOC's Analysis - Canfor's request for a company specific subsidy rate

85. By letter dated May 30, 2001, Canfor made a timely request that the DOC calculate a company specific countervailable subsidy rate for Canfor. At no time prior to the issuance of the PD-CVD did the DOC respond to Canfor's request that it calculate a company specific subsidy rate for Canfor, nor did it advise Canfor that it would not do so. It simply ignored Canfor’s request, and no company specific questionnaire was provided to Canfor.

86. The DOC later justified its refusal to calculate a company specific countervailable subsidy rate for Canfor on the basis that Canfor had failed to submit a voluntary response to the questionnaire issued to the Government of Canada. However, the DOC did not advise Canfor it could or that it should respond to the Government of Canada's questionnaire.

(f) DOC's Analysis - PD-CC

87. If "critical circumstances" are preliminarily determined to be present, under United States countervailing and anti-dumping duty law, suspension of liquidation and bonds or cash deposits may be required retroactively, for imports that have occurred up to 90 days before the Preliminary Determination.

88. With respect to the "critical circumstances" allegation, the DOC was required to find that a relevant and applicable export subsidy actually existed before a critical circumstances finding could be made, and further, that there were massive imports over a relatively short period of time (Section 703(e)(1) of the *United States Tariff Act of 1930*).

89. In relation to the first part of this test, the DOC determined that a subsidy program employed by the Province of Quebec for its producers ("Export Assistance from Investissement Quebec") was an export subsidy It stated:

> ...the Department has preliminarily determined that Export Assistance from Investissement Quebec is a countervailable export subsidy. There is no question that export subsidies are inconsistent with the Agreement. Therefore, this prong of the test is satisfied.

90. The difficulties with this finding were that the program was not tied solely to exports, further, even if this program conferred a benefit at all, the alleged export subsidy at best benefitted only .0029% of all softwood lumber exports to the United States, and then only those exports from the Province of Quebec; and, the DOC's own case law does not allow application of critical circumstances findings where the subsidy is less than a *de minimus* level of one percent. However, in the DOC's view, it was somehow immaterial that the benefit

provided by the alleged export subsidy was below the *de minimus* threshold even though a finding of critical circumstances would result in the retroactive application of duties.

91. Having found an export subsidy existed in the Province of Quebec, the DOC then determined that there were "massive imports" over a "relatively short period", after applying a dubious seasonal adjustment factor and after arbitrarily excluding all exports from the provinces of New Brunswick, Nova Scotia, Newfoundland and Prince Edward Island. Once again, if it had not excluded these provinces, a finding of massive imports could not reasonably have been supported.

(g) DOC's Analysis - FD-CC and FD-CVD

92. Despite Canfor's request of May 30, 2001, the DOC did not make a company specific determination of the subsidy late for Canfor. Rather, however, than seeking solely to rely upon the clearly arbitrary basis articulated in the PD-CVD, which would have required Canfor to submit a voluntary response to a questionnaire that did not exist, the DOC now determined that additionally, despite clear United States law to the contrary, there was no statutory basis for a consideration of voluntary respondents in cases conducted on an aggregate basis under section 777A(e)(2)(b) of the *Tariff Act*.

93. The DOC also confirmed its use of a cross-border analysis in the FD-CVD

94. Unlike in the PD-CC, the DOC did not find that critical circumstances existed in the FD-CC. In particular, it found, contrary to its earlier finding, that "Export Assistance from lnvestissement Quebec" did not confer a benefit and therefore was not a countervailable subsidy. Accordingly, a final determination of critical circumstances was precluded. The DOC did not address any further its original decision making process that led to the earlier finding of benefit.

(h) DOC's Analysis - FD-ADD

95. While the FD-ADD reduced the margin of dumping from 12.98% to 5.96%, the DOC continued to use an unfair comparison as between products allegedly being dumped and the products allegedly injured or threatened with injury.

IV. VIOLATIONS OF THE NAFTA

A. Overview of Relevant Provisions of NAFTA

96. Under NAFTA Chapter 11, the Government of the United States, including its state organs the DOC and ITC, owe obligations, enforceable at the instance of an investor of another NAFTA Party. Canfor claims that the Respondent has violated NAFTA Articles 1102, 1103, 1105 and 1110, in the circumstances set out in this Statement of Claim. The relevant provisions of the NAFTA are set out in an appendix to this Statement of Claim .

(i) NAFTA Article 1102

97. Under NAFTA Article 1102, the Government of the United States is required to accord to Canadian investors and their investments treatment no less favourable than the treatment it accords to competing investors and investments based in the United States. NAFTA Article 1102 accordingly prohibits discrimination evidenced in measures that either favour a NAFTA Party's own nationals or that disadvantage the interests of their competitors from other NAFTA Parties.

98. NAFTA Article 1102 requires the Respondent to provide the best level of treatment to Canfor and its investments that it is providing to the Canfor Group's United States based competitors, operating in the same industry and under the same circumstances.

99. As described in more detail below, a better level of treatment being provided to the United States based competitors of the Canfor Group is that which does not require them to pay prohibitive duties imposed in the manner and circumstances alleged herein on their

sourcing of softwood lumber for re-manufacturing, sales and distribution to the United States. The best level of treatment being provided to the Canfor Group's United States based competitors is that which is being received by the Petitioners, who not only benefit from the unfair, arbitrary and illegal imposition of countervailing and anti-dumping duties against their Canadian based competitors, but are also entitled to receive under the Byrd Amendment a portion of the total duties collected from their Canadian based competitors, including the Canfor Group.

(ii) NAFTA Article 1103

100. Under NAFTA Article 1103, the Respondent is required to accord to Canadian investors and their investments treatment no less favourable than that which is available to any other foreign investor or its investment under a similar treaty. Accordingly, NAFTA Article 1103 entitles Canfor and its investments to receive the best level of treatment available to any foreign investors or investments in the United States under any comparable international investment agreement obligation, including those found in bilateral investment treaties.

101. On January 11, 1995, the United States entered into a bilateral investment treaty ("BIT") with Albania. Under this investment treaty, which was implemented subsequent to the coming into force of the NAFTA, the Government of the United States has agreed to provide the investments of Albanian investors with the following level of treatment:

> 3. (a) Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favourable than that required by international law.
>
> (b) Neither Party shall in any way impair by unreasonable and discriminatory measures the management, conduct,

operation, and sale or other disposition of covered investments

102. On April 19, 1994 the United States signed a bilateral investment treaty ("BIT") which entered into force on February 16, 1997, with Estonia. Under this investment treaty, which was implemented subsequent to the coming into force of the NAFTA, the Government of the United States has agreed to provide the investments of Estonian investors with the following level of treatment:

ARTICLE 11

TREATMENT OF INVESTMENT

3. (a) Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law.

(b) Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a Party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

(c) Each Party shall observe any obligation 1t may have entered into with regard to investments.

103. If it is determined that the level of treatment that the Respondent must provide to Canfor and its investments under NAFTA Article 1105 is less than that provided under the United States - Albania BIT or the United States - Estonia BIT or any other BIT entered into by the Government of the United States subsequent to the entry of the NAFTA, Canfor is nonetheless entitled to receive the better level of treatment provided under such treaties by virtue of the application of NAFTA Article 1103, and claims its entitlement to that standard of treatment to this proceeding.

(iii) NAFTA Article 1105

104. Under NAFTA Article 1105, the Respondent is required to accord to investments of Canadian investors "treatment in accordance with international law, including fair and equitable treatment and full protection and security". The investments of the investor should accordingly be treated in accordance with "international law", which includes not only the standard of "fair and equitable treatment" but also compliance with the international law principle of good faith, the customary international law prohibition against arbitrary and discriminatory treatment, and any relevant treaty standards to which the Government of the United States has agreed to be bound.

105. Under NAFTA Article 1105, the Respondent must refrain from acting in a manner that would result in a denial of substantive or procedural justice to Canfor and its investments. This standard of treatment protects the investor and its investments from wrong, unfair or unjust adjudicative or administrative decision making as well as from denials of procedural justice, including decisions reached in a procedurally unfair manner, decisions reached without sufficient opportunity to review or respond to evidence upon which they arc based, decisions made without full notice of all relevant matters, and decisions made without a full opportunity to be heard, without impartial consideration and without a reasoned judgment, all of which must be administered through a transparent system.

(iv) NAFTA Article 1110

106. Under NAFTA Article 1110, the Respondent is obligated to provide full, fair and effective compensation to investors in the event of an expropriation of their investment in the United States and to compensate an investor whenever government action substantially interferes with the use or enjoyment of its investment, whether or not the Respondent or a United States based competitor receives a direct benefit from such a taking.

B. VIOLATIONS OF NAFTA BY THE RESPONDENT

(i) Overview

107. As detailed above, the Government of the United States has, for over 20 years, engaged in an ongoing course of conduct, with the object, or alternatively, effect, of causing serious harm to the Canadian softwood lumber industry, including companies that are investors with investments in the United States under NAFTA Chapter 11, such as Canfor.

108. Despite repeated confirmation by domestic and international tribunals that the Respondent's actions have violated international and United States law, the Respondent has persevered by attempting to effect changes, modifications or otherwise improper interpretations of its law in order to cause significant economic harm to those in the competitive position of the Canfor Group and companies like it in the United States market The PD-CVD, PD-CC, PD-ADD, FD-CVD, and FD-ADD, as well as the ITC-FD are among the latest of those ongoing actions directed at and causing harm to Canfor and those in its position.

109. The actions of the Respondent, particularly as evidenced by the conduct of the DOC and ITC as described herein and as will be more fully elaborated at the hearing of this proceeding, whether considered individually or collectively, or as part of a campaign against the Canadian softwood lumber industry, all are such as to fall below the standard required

of a state under NAFTA Articles 1102, 1103 and 1105. Furthermore, the ultimate effect of the Respondents improper conduct outlined herein has been an expropriation of the United States business operations of Canfor.

(ii) Violations of NAFTA - PD-CVD

(a) Overview

110. The actions of the DOC in arriving at the PD-CVD violate each of Articles 1102, 1103 and 1105. More particularly, the manner in which DOC determined that Canadian stumpage practices are countervailable subsidies was arbitrary and unreasonable, and led to a discriminatory and therefore unfair and inequitable result.

111. In sum, the DOC's conduct fell below the standard required of the Respondent under NAFTA Articles 1102, 1103 and 1105 by:

(1) acting inconsistently with the Government of the United States' international obligations;

(2) misapplying the applicable legal standards;

(3) failing to have regard to the DOC's own past practice;

(4) making artificial and intentionally skewed comparisons which could only be designed to achieve a particular result;

(5) making its determination without any, or any sufficient, consideration of the arguments and evidence on the record before it; and

(6) making numerous errors in the calculations it did make.

The DOC, in reaching the PD-CVD, either intended to arrive at a particular discriminatory result, which could only be reached by committing the breaches of international and domestic law outlined more fully below, or was reckless, arbitrary and capricious in arriving at that result.

(1) DOC Determination that provincial stumpage programs provide a financial contribution

109. As outlined above, the DOC could only impose countervailing duties if the provincial stumpage programs constituted a subsidy. To constitute a countervailable subsidy, the DOC recognized that the government stumpage program would need to be a "good or service" which results in a "financial contribution. "Had it proceeded on the basis of a reasoned analysis, it could not have made an affirmative determination on both points, and was bound to dismiss the Petition

110 However, in dealing with this fundamental matter, the DOC simply stated that

> "The provision of stumpage by the provincial government constitutes a good or service and...thus, ... the provincial governments have provided a financial contribution..."

111 The DOC's determination and process of determination to this regard fell below the standard required of the United States under Articles 1102, 1103, and 1105 in that it was arbitrary and unreasonable, and led to a discriminatory and therefore unfair and inequitable result, by:

(1) failing to provide any reasonable analysis in coming to its determination that provincial stumpage programs are a "financial contribution", even though it knew or ought to have known that such a determination would be inconsistent with the Respondent's domestic law and its obligations under the SCM Agreement;

(2) failing to determine which of a 'good" or a "service" a provincial stumpage program is;

(3) failing to provide any reasons or other basis for its conclusions, including the determination that provincial stumpage programs are a "financial contribution"; and

(4) ignoring relevant evidence submitted by the Government of Canada and the Canadian Provinces with respect to this issue

(2) DOC Determination that provincial stumpage programs provide a benefit

112 As outlined above, the DOC was required under United States and international law to determine that the provincial stumpage programs conferred a benefit to the producers of softwood lumber. The DOC was obliged to make this determination "... in relation to prevailing market conditions for the good or service being provided....*in the country which is subject to the investigation or review."* (emphasis added)

113. In total disregard of the requirements of United States law and the Respondent's international obligations, including its obligations under the SCM Agreement, the DOC declined to use "in-country" benchmarks, despite the fact that it had done so in *Lumber III*, and instead used a "cross-border" benchmark.

114. The DOC's determination and process of determination in this regard fell below the standard required of the United States under NAFTA Articles 1102, 1103, and 1105 in that it was arbitrary and unreasonable, and led to a discriminatory and therefore unfair and inequitable result by:

(1) failing to take into account relevant evidence on the record relating to "in-country" benchmarks;

(2) acting in flagrant disregard of the Respondents international obligations, including under the SCM Agreement which required use an "in-country" benchmark;

(3) failing to undertake a proper and reasonable comparison of appropriate prices to determine if a benefit was indeed conferred;

(4) taking into account irrelevant considerations, including United States stumpage prices;

(5) failing to take into account the fact that United States stumpage rights are not available in Canada and that some of the United States whose stumpage prices it used as benchmarks for comparison with Canadian prices prohibited the export of logs;

(6) failing to take account of significant differences between conditions in Canada and the United States which had a material impact on the comparison of prices between the different jurisdictions;

(7) violating its own regulations in that the United States prices it used as a benchmark were manifestly not world market prices;

(8) using an inappropriate conversion factor in comparing United States and Canadian stumpage prices;

(9) comparing species specific prices in Canada with prices in the United States that were not species specific;

(10) using inappropriate species comparisons in its cross-border analysis;

(11) using United States bid prices instead of cut prices in its cross-border analysis, which was manifestly incorrect since those prices were being compared with stumpage charges levied in Canada at the time the logs were cut;

(12) failing to consider evidence on the record that the price or volume of lumber is not affected by the price of stumpage;

(13) failing to take into account its previous decisions on this issue to *Lumber I* and *Lumber III*, where it had concluded that to carry out a cross-border analysis to determine whether a benefit was conferred would be "arbitrary and capricious" and inappropriate, when it knew that there were no material changes to the circumstances that would justify such a reversal;

(14) including in its benefit calculation any effect of LER, despite the fact that the WTO had ruled in June, 2001 that export restrictions could not constitute a

countervailable subsidy and despite the fact that DOC had made no findings with respect to the countervailability of LER;

(15) failing to take account of the effect of the SLA on the price of logs in the United States and Canada; and

(16) denying Canfor the benefit of a predictable and transparent legal system uninfluenced by improper considerations such as harming the Canadian industry.

(3) Other DOC Determinations which result in violations of NAFTA

115 In addition to the matters described above, the DOC's PD-CVD fell below the standard required of the United States under NAFTA Articles 1102, 1103, and 1105 in that it was also arbitrary and unreasonable, and led to a discriminatory, and therefore unfair and inequitable result. More particularly, the DOC:

(1) concluded that provincial stumpage programs are specific, when the evidence patently demonstrated otherwise;

(2) came to numerous conclusions throughout its analysis which violated US international obligations under the SCM Agreement when it knew or ought to have known that such violations would materially harm the Canadian softwood lumber industry including Canfor;

(3) assumed that benefits of the alleged financial contribution were passed onto softwood lumber producers and softwood lumber manufacturers such as Canfor without conducting any or sufficient analysis to determine whether that was true;

(4) calculated duties in such a way as to impose duties that were greater than the amount of the alleged subsidy found to exist; and

(5) directed the collection of duties on an entered basis, rather than on the basis upon which the alleged subsidy had been calculated, contrary to its action in *Lumber III*.

(iii) Violations of NAFTA - PD-CC

116. The actions of the DOC in arriving at the PD-CC violated each of NAFTA Articles 1102, 1103 and 1105. Its determination that critical circumstances existed such that retroactive duties should be applied was arbitrary and unreasonable, and led to a discriminatory, and therefore unfair and inequitable result.

117. As outlined above, to make a critical circumstances determination the DOC must find that there is a subsidy which is inconsistent with the SCM Agreement, such as an export subsidy, and must find that there have been "massive imports" over a relatively short period of time.

118. In the PD-CC, the DOC found only one alleged export subsidy, which was a Quebec subsidy program to promote exports from Quebec to other parts of Canada. It also determined that there had been massive imports over the three month period prior to its decision.

119. The manner in which the DOC came to this result was arbitrary and unreasonable, and led to a discriminatory and therefore unfair and inequitable result in that:

(1) it acted in blatant disregard of Untied States and international law by deciding that it could subject all relevant Canadian softwood lumber exports to the United States for a retroactive 90 day period to suspension of liquidation, bonding and potential liabilities for duties on the basis of a single provincial program, despite the fact that the alleged export subsidy possibly benefited only three companies from the province of Quebec, related to only .0029%

(ie. 29 one-millionths) of softwood lumber exports to the United States, and created a potential retroactive liability for Canadian exporters including Canfor exceeding $300 million, i.e., a multiple of more than 1000 times the amount of the alleged subsidy in retroactive duties alone;

(2) it acted inconsistently with the DOC's own case law which does not allow application of critical circumstances findings where the subsidy is less than the *de minimus* level of one percent;

(3) it disregarded the Respondent's international and domestic obligations by finding "massive imports" when virtually all of the imports relied on to make that determination did not benefit in any way from the alleged export subsidy;

(4) it improperly and for an improper purpose excluded imports from the Maritime provinces in its calculations in determining that there had been massive imports;

(5) it used a patently unfair and discriminatory seasonality adjustment, and ignored the effects of the termination of the SLA; and

(6) it ignored relevant evidence on the record that clearly demonstrated that the subsidy was payable on sales to other Canadian provinces as well as on exports to other countries, and hence was not an export subsidy.

(iv) Violations of NAFTA-PD-ADD

120. The actions of the DOC in arriving at the PD-ADD violated each of NAFTA Articles 1102 1103 and 1105.

121. Any anti-dumping determination must, as a prerequisite, be based upon a fair comparison between the products allegedly being dumped, and the products allegedly injured or threatened with injury in the domestic market The PD-ADD was not based upon such a fair comparison. Indeed, the cumulative effect of the approach taken by the DOC was such as to fundamentally undermine any prospect of a fair comparison, and to thereby ensure

a predetermined result in the investigation The DOC's determination that Canfor sold its softwood lumber at less than fair value is unsupported by the substantial evidence on the record and is not in accordance with United States and international law.

122 Specifically, the PD-ADD by DOC, and more particularly, the calculation of a weighted average dumping margin of 12.98% for Canfor, was arbitrary and unreasonable, and led to a discriminatory and therefore unfair and inequitable result, in that:

(1) it was made in respect of a Petition filed by the Petitioners without determining that the Petitioners had standing to file the Petition or that the Petition was filed on behalf of the domestic industry as required by United States law;

(2) it was made without any, or sufficient, consideration of the arguments and evidence that demonstrated Canfor sold its softwood lumber products in the United States at prices that were above its costs and above the prices that similar products were sold in Canada;

(3) it failed to utilize a fair comparison between the prices of softwood lumber products from Canada and the prices of similar products sold in the United States;

(4) it utilized a technique called zeroing, thereby skewing the average dumping margins when it knew that the use of that technique violated the Respondent's obligations under the *WTO Anti-Dumping Agreement*;

(5) it relied upon unconsolidated rather than consolidated financial statements in determining general expense on sales data when it knew or ought to have known reliance upon unconsolidated financial statements was less accurate and would be prejudicial to Canfor's interest;

(6) it determined product cost based on volume as opposed to value such that it did not properly allocate joint costs thereby attributing the cost of products

with significantly different values in the lace of its own clear precedent and WTO decisions to the contrary; and

(7) it blatantly ignored relevant evidence and relied upon irrelevant evidence to hold that Canfor charged less than market prices for wood chips, a softwood lumber by-product, to its affiliates.

(v) Violations of NAFTA - FD-CVD

123. The actions of the DOC in arriving at the FD-CVD violate each of Articles 1102, 1103 and 1105. More particularly, the determination of the DOC that Canadian stumpage practices are countervailable subsidies was discriminatory, arbitrary and unreasonable, and therefore unfair and inequitable and further exacerbated the harm caused to the investor and its investments by the Preliminary Determination

124. To the extent that the DOC repeated, or failed to adequately remedy, the breaches of NAFTA set out above in connection with the PD-CVD, then the Investor repeats and relies upon them as further, or ongoing, breaches of NAFTA Articles 1102, 1103 and 1105 and incorporates the allegations set out above, insofar as those same matters were repeated in the FD-CVD

125 In general, the DOC, in reaching the FD-CVD was arbitrary and unreasonable, and came to a discriminatory, and therefore unfair and inequitable result, in that

(1) it made its determination without any, or any sufficient, consideration of the arguments and evidence before the DOC;

(2) it failed to have regard to the DOC's own past practice;

(3) it misapplied the applicable legal standard;

(4) it made artificial and intentionally skewed comparisons which could only be designed to achieve a particular result;

(5) it continued to utilize a cross-border analysis; and

(6) it made numerous relevant errors to the calculations it did make.

126. In sum, the entire course of conduct of the DOC to reaching the FD- CVD was either reckless, or alternatively was intended to arrive at a particular pre-determined result, which could only be reached by committing the breaches of obligation and law outlined herein. More particularly, the determination that provincial stumpage programs constituted a subsidy is unsustainable and contrary to the Respondents international law obligations.

(vi) Violations of NAFTA - FD-ADD

127. The actions of the DOC in arriving at the FD-ADD violate each of Articles 1102, 1103 and 1105. More particularly, as with the PD-ADD, the FD-ADD must, as a prerequisite, be based upon a fair comparison between the products allegedly being dumped, and the products allegedly injured or threatened with injury in the domestic market. The FD-ADD was not based upon such a fair comparison. Rather, the cumulative effect of the approach taken by the DOC was such as to fundamentally undermine any prospect of a fair comparison, and to thereby ensure a predetermined result.

128. To the extent that the DOC repeated, or failed to adequately remedy, the breaches of NAFTA set out above in connection with the PD-ADD, then the Investor repeats and relies upon them as further, or ongoing, breaches of NAFTA Articles 1102, 1103 and 1105 and incorporates the allegations set out above, insofar as those same matters were repeated in the FD-ADD.

129. In general, the DOC in reaching the FD-ADD and calculating a weighted average dumping margin of 5.96% for the investor, was arbitrary and unreasonable, and came to a discriminatory, and therefore unfair and inequitable, result in that:

(1) it made its determination in respect of a Petition filed by the Petitioners without determining that the Petitioners had standing to file the Petition, or

that the Petition was filed on behalf of the domestic industry as required by United States law;

(2) it was made without any, or insufficient, consideration of any arguments and evidence before it, including evidence that demonstrated Canfor sold its softwood lumber products in the United States at prices that were above its costs and above the prices that similar products were sold in Canada;

(3) it failed to utilize a fair comparison between the prices of softwood lumber products from Canada and the prices of similar products sold in the United States because, amongst other things, it arbitrarily excluded certain of them from the calculationsl;

(4) it continued to utilize zeroing, thereby skewing the average dumping margins when it knew that the use of that technique violated the Respondents obligations under the *WTO Anti-Dumping Agreement*;

(5) it continued to overstate Canfor's general expense rate by relying upon unconsolidated rather than consolidated financial statements in determining general expense on sales data when it know or should have known reliance upon unconsolidated financial statements was less accurate and would be prejudicial to Canfor's interest; and

(6) it continued to determine product cost partially based on volume as opposed to the value of the product produced such that it did not properly allocate joint costs, by allocating costs based only on differences in grade and not differences in value attributable to dimension or length, in the face of its own cleat-precedent and WTO decisions to the contrary.

130. Furthermore, the imposition of anti-dumping duties on Canfor, and the subjection of Canfor to an anti-dumping regime, such that Canfor can only sell its products into the United States at full cost, whereas a United States Competitor of Canfor is lawfully entitled to sell its products into the United States market at its incremental cost, accords Canfor and

its investment less than the best treatment available to the United States based competitors of Canfor and therefore violates NAFTA Article 1102.

(vii) Violations of NAFTA - Denial of due process

131. In coming to each of the PD-CVD, PD-CC and PD-ADD, and the FD-CVD and FD-ADD, the DOC breached the Respondent's obligations under NAFTA Chapter 11 to accord substantive and procedural justice to Canfor and its investments, as more particularly set out below.

(a) Burden not met to implement interim remedy before full hearing on merits

132. To accord substantive and procedural justice to Canfor and its investments as required under NAFTA Article 1105, the DOC was obligated not to impose punitive relief such as the imposition of provisional duties without having sufficiently determined that such relief was warranted. The DOC was obligated to ensure that its actions would not unnecessarily interfere with the legal rights of parties affected, such as Canfor, and would be proportional to the particular circumstances.

133. In the present case, the DOC did not accord substantive and procedural justice, in that it

(1) imposed preliminary duties prior to a full and fair hearing on the merits, and prior to any demonstration of injury to the Petitioners;

(2) took no or insufficient account of the damage and interference to the normal commercial activity of the Canadian Softwood lumber industry including Canfor, its property, or its general legal rights before coming to its determination; and

(3) did not tailor the provisional duties to the avoidance of identified harm to the Petitioners or to preventing actions by Canfor or other Canadian investors that

would frustrate or render impossible an effective remedy once a full determination on the merits had been made.

(b) Canfor denied access to independent and impartial decision maker

134. Under international law, including NAFTA Article 1 105, Canfor is entitled to have its rights determined before an independent and impartial decision maker. However, in this case, Grant Aldonas, Under-Secretary for International Trade Administration and a senior official with the Government of the United States, was involved in the DOC decision making process while also both advising the Government of the United States and taking an active role in the Government of the United States' negotiations with Canada and had prejudged the case prior to any determination. Accordingly, Canfor was denied its right to an independent and impartial decision maker.

(c) Canfor denied fundamental fairness and equity

135. Furthermore, in coming to each of the PD-CVD, PD-CC and PD-ADD, and the FD-CVD and FD-ADD, the DOC also breached fundamental principles of fairness and equity, and denied Canfor basic justice in that:

(1) it allowed its independence and impartiality to be fettered by directions to the Statement of Administrative Action in connection with the adoption of the *URAA*;

(2) it relied upon information which was prejudicial to Canfor, without providing Canfor a fair and reasonable opportunity to respond to that information;

(3) it accepted prejudicial evidence from the Petitioners and their representatives after a DOC mandated deadline without providing Canfor with a fair and reasonable opportunity to respond to that information;

(4) it held *ex parte* meetings with the Petitioner without disclosing to Canfor specific details of the meetings to order to allow Canfor a fair and reasonable opportunity to respond;

(5) it imposed unrealistic and unfair time periods for providing information, making submissions and responding to other parties' submissions;

(6) it failed to address material evidence and arguments in its determinations;

(7) it initiated the investigations in response to the Petitions without sufficient evidence of a subsidy or injury and without taking any, or sufficient, steps to ensure objectively the existence of sufficient support for the Petitions by the United States softwood lumber industry; and

(8) it denied Canfor a full and fair hearing on the merits.

(d) Canfor denied an opportunity to obtain company specific CVD rate.

136. NAFTA Article 1105 incorporates a requirement for a transparent legal system such that all relevant legal requirements for the successful operation of an investment in the United States can be readily known

137. International and United States law provides that in a CVD investigation individual subsidy rates will be established for each known exporter or producer of the relevant merchandise, subject to limited exceptions. One such exception is that an investigating authority may, in limited circumstances, establish a countrywide rate. If a countrywide rate is utilized and if a request is made by an exporter or producer, an individual subsidy rate must be promptly established by the investigating authority for that exporter or producer unless the number of such requests would place an undue burden on the DOC.

138. In the present case, DOC, contrary to established practice and without providing any reasoned analysis, determined to establish a countrywide rate.

139. As outlined above, on May 30, 2001, Canfor, as the largest exporter of softwood lumber to the United States, and a required respondent in the concurrent anti-dumping investigation, submitted a timely request for the establishment of an individual subsidy rate, and requested DOC to send it a questionnaire so that it could supply the necessary information upon which to base such a rate Canfor specifically advised DOC that it could demonstrate that it pays substantially more for stumpage than the average lumber producer in British Columbia, and therefore, if stumpage was found to be a subsidy, Canfor would be able to demonstrate that it received little, if any, benefit from it. DOC failed to respond to Canfor's letter, and failed to establish an individual subsidy rate for Canfor to either the PD-CVD or the FD-CVD. In the FD-CVD, DOC stated that under United States' CVD law, there was no right to an individual subsidy rate in a case where a countrywide rate was established, which is patently incorrect DOC also stated that Canfor should have submitted a response to the questionnaire provided to the government of Canada, despite the fact that that questionnaire was designed for the government and not a corporation, and despite the fact that the DOC failed to inform Canfor in a timely way or a reasonable manner that it could respond to this questionnaire No other exporter or producer submitted a request for an individual rate in a timely fashion, and DOC did not find that establishing an individual rate for Canfor would have placed an undue burden on it.

140. The DOC's actions and its determinations in this respect, either individually or collectively, were arbitrary and unreasonable, and therefore violated Article 1105 of NAFTA by:

(1) arbitrarily determining that a countrywide rate would be utilized;

(2) blatantly ignoring Canfor’s request for an individual rate, when it knew or ought to have known that by doing so it violated the United States international obligations, and further that its inaction would cause Canfor harm;

(3) failing to ensure that its legal regime in this regard was transparent such that all relevant legal requirements for successful operation of an investment in the United States was readily known including the requirements to be fulfilled by a company such as Canfor when requesting a company-specific rate;

(4) by imposing *post-facto* that Canfor must submit voluntarily a questionnaire specifically designed for a response by the Government of Canada, rather than by a corporation, as a precondition for a company-specific subsidy rate without bringing this requirement to Canfor's attention in a timely way or a reasonable manner; and

(5) by interpreting United States law, more specifically section 782(a) of the *Tariff Act*, to a way which it knew or ought to have known would be in breach of the United States international obligations

(viii) Violations of NAFTA - Byrd Amendment

141. The actions of the Respondent in adopting the Byrd Amendment and in its application or intended application to softwood lumber countervailing and anti-dumping duties levied on Canfor, such that those duties will be redistributed from Canfor to the Petitioners - who are already receiving the benefit of being able to subject Canfor and its investments to a costly, arbitrary and discriminatory legal process that has resulted in the imposition of prohibitive duties upon them, is blatantly discriminatory and violates NAFTA Articles 1102, 1103 and 1105.

142. The United States competitors of Canfor and its investments are being provided a level of treatment better than that of Canfor and its investments which cannot be justified in the circumstances in which these competitors operate.

143. The Byrd Amendment and its intended application in the present circumstances denies Cantor and its investments the best treatment available to investors and investments of

investors of the United States. The best treatment available to investors and investments of investors of the United States is an exemption from any obligation to pay countervailing and anti-dumping duties where those duties are imposed through a discriminatory, arbitrary and unfair process, and an entitlement to share in the proceeds of any such duties as are collected.

144. More particularly the Byrd Amendment falls below the standard required of the United States under NAFTA Articles 1102, 1103, and 1105, in that it

(1) creates a financial incentive for the domestic industry to initiate and support frivolous and vexatious anti-dumping and countervailing duty petitions, irrespective of their merit, by promising to distribute any duties ultimately collected to those members and only those members of the domestic industry that supported a petition, and not to any members of the industry that did not;

(2) creates an affirmative incentive to ensure such petitions are not resolved other than by the imposition of final duties;

(3) discourages the use of undertakings as a resolution of anti-dumping and countervailing duty complaints, as domestic industry is financially encouraged to support only the imposition of duties;

(4) artificially distorts the support for any particular petition by, in effect, paying the domestic industry to support it, (in the present case to the potential level of several hundred million dollars per year);

(5) ensures that any anti-dumping or countervailing duties imposed to remedy any proven dumping or to neutralize the impact of countervailable subsidies is over-remedied, in that the redistribution of such duties distorts the United States marketplace in favour of the domestic United States industry at the expense of Canfor and its investments and those in its position; and

(6) creates a systemic bias in favour of a petition meeting the standing requirements of United States antidumping and countervailing duty law. If a member of the domestic industry does not support a petition that is ultimately

> successful, then that member of the industry would see its competitors gain an immediate financial advantage over *it,* and accordingly is induced to support such a petition.

145. In the present case, the Petitions were initiated by the Petitioners and supported by others in the domestic industry because of the financial benefit that would be conferred on the domestic industry by the imposition and redistribution of anti-dumping and countervailing duties under the Byrd Amendment Accordingly, the decision that the Petitioners had standing to bring initiate the Petitions was made on the basis of the Byrd Amendment having artificially increased the support for these Petitions

146. The Byrd Amendment is inconsistent with Respondents obligations under *GATT 1994* and the *Anti-Dumping Agreement* and with the *SCM Agreement.* Under NAFTA Article 1105, the Respondent is obliged to honour its GATT and SCM Agreement obligations in good faith, insofar as those obligations affect its treatment of Canfor and its investments

147. As a result, individually and collectively, the actions of the DOC, together with such other conduct as is described herein and as will be adduced in evidence at the hearing of this matter, violate the Respondent's obligations under NAFTA to ensure that investors such as Canfor and its investments are accorded treatment in accordance with international law, are in all cases afforded fair and equitable treatment, and are accorded treatment no less favourable than their competitors, and particularly the Petitioners who benefit from the Respondent's conduct.

(ix) The Respondent's Actions are an Expropriation

148. The aggregate effect of the measures described herein has been to substantially deprive Canfor of the benefit of its investments in the United States, without compensation,

by imposing measures specifically designed to render Canfor's United States based business model inutile, impairing its ability to make full use of its investment within the United States. The cumulative effect of the conduct of the Respondent as outlined herein has substantially interfered with Canfor's investments in the United States and has deprived Canfor the opportunity to market and distribute softwood lumber in the United States market at a profit

IV. DAMAGE

149. The effect of the Respondent's actions, including the affirmative PD-CVD, PD-CC and PD-ADD, the FD-CVD and FD-ADD, and the ITC-FD has been to impose harm upon Canfor and its investments, and has deprived Canfor of its economic interests and property without due process of law or adequate procedural safeguards. Because of the palpable uncertainty about price and market conditions that was instantly created by the preliminary determination, sales have been lost, relations with customers have been disrupted, and long term corporate and industry planning has been impaired. More particularly, damage to Canfor includes, but is not limited to:

(1)Past income loss up to and including the date of filing of this Statement of Claim;

(2) Future income loss as a result of the wrongful conduct of the United States;

(3) Duties paid or to be paid;

(4) Reduced prices on softwood lumber sold in Canada by virtue of Canadian price discounts demanded by customers to reflect prices to shipments to United States customers;

(5) Loss caused by foregone capital investment;

(6) Bonding costs;

(7) Increased stumpage costs;

(8) Costs of incremental downtime;

(9) Loss of tax loss carryforwards; and

(10) Incremental management costs.

V. POINTS AT ISSUE

151. Has the Respondent taken measures inconsistent with its obligations under Section A of Chapter 11 of NAFTA, and if so, has Canfor incurred loss or damage by reason of, or arising out of, that breach' If so, what is the quantum of compensation payable to the investor.

VI. RELIEF OR REMEDY SOUGHT

152. Canfor claims compensation in an amount not less than 250 million United States dollars, together with the costs of this Arbitration, all professional, legal and expert fees and disbursements, and interest.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

P. John Landry

Keith E.W. Mitchell

July 9, 2002 **#172620.7**

APPENDIX

Article 1102: National Treatment

1. Each Party shall accord to investors of another Parry treatment no less favourable than that it accords, to like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments

2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part

4. For greater certainty, no Party may:

(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

(b) require an investor of another Party, by season of its nationality, to sell or otherwise dispose of an investment in the territory of the Party

Article 1103: Most-Favoured Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments

2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 1105. Minimum Standard of Treatment

1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security

2 Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(6), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife

3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1 102 but for Article 1108(7)(6).

Article 1110 Expropriation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

(a) for a public purpose;

(b) on a non-discriminatory basis;

(c) to accordance with due process of law and Article 1105(1); and

(d) on payment of compensation in accordance with paragraphs 2 through 6.

2 Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation

criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6 On payment, compensation shall be freely transferable as provided in Article 1109.

7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).

8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.