IN THE CONSOLIDATED ARBITRATION PURSUANT TO ARTICLE 1126
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

CANFOR CORPORATION AND TERMINAL FOREST PRODUCTS LTD.,

Claimants/Investors,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

RESPONSE OF RESPONDENT UNITED STATES OF AMERICA TO THE TRIBUNAL'S ADDITIONAL QUESTIONS REGARDING THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000

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In accordance with the Tribunal's instructions, the United States responds to the Tribunal's Additional Questions Regarding the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA" or "Byrd Amendment"). Canada was aware of the CDSOA and expressed its opposition to the amendment to the United States before that bill became law. The lack of formal written notification pursuant to NAFTA Article 1902(2)(b) – whether as a result of an oversight, or perceived futility given Canada's knowledge and actions – was therefore harmless. In any event, as demonstrated below, fulfillment of the notice requirement is irrelevant to the Preliminary Question. Claimants' CDSOA claim, like its other claims, is barred in its entirety by Article 1901(3).

Below, the United States first provides some general observations on the additional questions, and then responds to the individual questions.

I. General Observations

As an initial matter, there is no occasion for the Tribunal, in deciding the Preliminary Question, to reach the Article 1902(2)(b) notification issue. Claimants complain about: (i) the CDSOA's "effect on decisions to initiate investigations," and (ii) "the financial benefits it confers on United States investors or investments in competition with the claimant Canadian investors."[1] The Tribunal lacks jurisdiction over both aspects of claimants' CDSOA claim. The fact that the United States did not provide Canada formal written notice of the CDSOA does not confer jurisdiction on this Tribunal with respect to either aspect of claimants' claim.

The Article 1902(2)(b) notice requirement is irrelevant to claimants' first CDSOA allegation. The decision to initiate antidumping and countervailing duty investigations is an essential feature of the United States' administration of its antidumping and countervailing duty laws. Compelling the United States to engage in arbitration regarding that decision, subjecting that decision to the substantive legal obligations in NAFTA Chapter Eleven, and possibly ordering the United States to pay damages for initiating the investigations would "impos[e] obligations on [the United States] with respect to [its] antidumping law or countervailing duty law," in contravention of Article 1901(3).

Moreover, the decision to initiate the investigations is not alleged to have caused claimants any loss or damage: the AD/CVD determinations that resulted from those

[1] Post-Hearing Submission of the Claimants, Canfor Corporation and Terminal Forest Products Ltd. (Feb. 17, 2006) ("C-PHS") at 33-34. Notably, Canfor has at times disavowed that it is challenging the CDSOA *per se*. *See, e.g., Canfor Corp. v. United States of America*, Transcript of Hearing on Jurisdiction (Dec. 7-9, 2004) ("Canfor Hrg. Tr.") Vol. 2 at 394:16-19 ("[T]he argument of Canfor is not that the Byrd Amendment is, per se, violative of the standards in Chapter 11 simply as a piece of legislation on its face."); *id.* at 395:3-5 ("I simply want to make clear that our claims are based upon the administration of the law, not the law itself.").

investigations were the only cause of claimants' alleged harm. Exercising jurisdiction over those determinations would "impos[e] obligations on [the United States] with respect to [its] antidumping law or countervailing duty law," in contravention of Article 1901(3). Accordingly, for purposes of this aspect of claimants' CDSOA claim, it matters not whether the CDSOA was formally notified pursuant to Article 1902(2)(b).

Likewise, the second aspect of claimants' CDSOA claim is not implicated by Article 1902(2)(b)'s notice requirement. Claimants concede that "duties paid by Canfor and Terminal have not to date been distributed to the United States industry."[2] And they acknowledge that there would be an "impact upon . . . Canfor and Terminal" only "*if* duties are distributed to their competitors," which has not occurred.[3] This aspect of claimants' CDSOA claim thus relies on *speculative future* loss or damage. NAFTA Articles 1116(1) and 1117(1), however, require that the claimant or enterprise "*has* incurred loss or damage by reason of, or arising out of, [a] breach" of the NAFTA.[4] Because, by claimants' own admission, they have incurred no loss or damage as a result of "the financial benefits [the CDSOA] confers on the United States investors or investments in competition with Canadian investors," the Tribunal lacks jurisdiction over that aspect of claimants' CDSOA claim as well. Accordingly, there is no occasion in this arbitration for the Tribunal to decide the consequences of the United States' failure to provide written notification pursuant to Article 1902(2)(b).

In any event, the remedy proposed by claimants for the United States' omission is not authorized under the terms of the NAFTA, and is beyond the Tribunal's authority to

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[2] C-PHS at 38.

[3] Reply Post-Hearing Submission of the Claimants, Canfor Corporation and Terminal Forest Products Ltd. (Mar. 10, 2006) ("C-R-PHS") at 25 (emphasis added).

[4] NAFTA arts. 1116(1) & 1117(1) (emphasis added).

grant. As set forth in further detail below, Articles 1901(3), 1902(2) and 1911 and Annex 1911 demonstrate that the NAFTA Parties did not intend to permit a private claimant to challenge their AD/CVD statutes under Chapter Eleven merely because a Party did not comply with a notice obligation it owed to that claimant's government. Imposing such a drastic remedy does not comport with the NAFTA's plain text, and would constitute an excess of authority by the Tribunal.

Such a result would also be grossly unfair in this instance. Canada had actual notice of the CDSOA, and raised concerns about the amendment to the U.S. Government before the CDSOA was enacted. The lack of written notification, therefore, did not cause Canada any harm. Nor did such lack of written notification cause *claimants* any harm. It would thus not only be contrary to the Treaty's provisions, but would also be inequitable, based on such a harmless omission, to grant claimants the right to circumvent Article 1901(3) and challenge the CDSOA under the investment chapter.

II. Specific Responses

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

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

Canada was aware of the CDSOA before it became law. The CDSOA was approved by the Senate as part of an omnibus appropriations bill on October 18, 2000. Ten days later, on October 28, 2000, the President signed the bill into law.

The proposed CDSOA was widely publicized in the domestic and international press from at least early October 2000.[5] The European Union and several U.S. trading partners voiced their disapproval of the bill to the U.S. Congress and publicly campaigned against the bill.[6] The Government of Canada complained about the bill to Congress – presumably before one or both Houses approved the bill – and to the United States Trade Representative.[7] And on October 25, Canada, Japan and the European Union sent a joint letter to President Clinton expressing their disapproval of the CDSOA

[5] *See, e.g.,* Guy Jonquieres, *US and Canada: Dumping move attracts EU ire*, FINANCIAL TIMES UK, Oct. 10, 2000, at 4 (noting that the AD/CVD legislation had been attached to the appropriations bill and that the EU ambassador to the United States had complained about it to members of Congress); *Dumping Byrd*, FINANCIAL TIMES UK, Oct. 11, 2000, at 24 (noting the proposed legislation and its potential effect on the initiation of AD/CVD investigations, and that "the European Union and other US trade partners [were] campaigning against the proposal"); R.G. Edmonson, *Senate poised to vote on "Byrd Amendment" report*, J. OF COM., Oct. 18, 2000, (noting that the "Senate [was] poised to vote on 'Byrd Amendment' report"); *Senate Approves Duty Aid for Companies*, L.A. TIMES, Oct. 19, 2000, at 2 (noting that the Senate gave its approval to the legislation); *Protectionism on the Sly*, N.Y. TIMES, Oct. 23, 2000, at A24 (noting the insertion of the "antidumping law" into the bill); *Key U.S. trading partners rail at Byrd Amendment*, NATIONAL POST, Oct. 27, 2000, at C2 (noting that "Canada, Japan and the European Commission have taken the unusual step of complaining to Bill Clinton, the U.S. President, about a looming trade bill they say would violate international trading rules"); *Worrisome bill*, THE LEADER POST (Saskatchewan), Oct. 28, 2000, at A14 (noting that "America's trade partners, including Canada, are fearful the [legislation] will launch a flood of spurious dumping complaints"); Bogdan Kipling, *Trade disputes a bonanza for lawyers*, EDMONTON J., Nov. 5, 2000, at E12 (noting that "Michael Kergin, Canada's ambassador in Washington, and the ambassadors of Japan and the European Union, have protested the Byrd Amendment to the Congress and, in a rare joint letter, dated Oct. 25, directly to President Clinton").

[6] *See, e.g., Dumping Byrd*, FINANCIAL TIMES UK, Oct. 11, 2000, at 24; *see also* Bogdan Kipling, *Trade disputes a bonanza for lawyers*, EDMONTON J., Nov. 5, 2000, at E12.

[7] Letter from Shunji Yanai, Ambassador of Japan to the United States of America, Michael Kergin, Ambassador of Canada to the United States of America, and Dr. Günter Burghardt, Ambassador of the European Commission to the United States of America, to William J. Clinton, President of the United States of America (Oct. 25, 2000) ("Letter from Ambassadors to Pres. Clinton") (stating that "[a]s we have each separately indicated to the United States Trade Representative and Congressional leadership, we view this section of the bill as a serious violation of US obligations under the anti-dumping and countervailing duty codes of the WTO"). The unsigned copy of the letter provided herewith was issued by the White House in the form of a press release.

and urging the President to veto the bill.[8] Canada was thus aware of the CDSOA prior to its enactment, had to the opportunity to request consultations, and made the United States aware of its views regarding the proposed legislation.

The lack of written notification may have been the result of a simple oversight due to the scope of the appropriations bill and the necessity of its swift passage. Or it may have been the case that it was considered pointless to provide written notification to Canada regarding the CDSOA when there was clear evidence that Canada was already aware of the legislation. Whatever the reason for the lack of written notification, Canada indisputably had actual notice of the CDSOA prior to its enactment and had the opportunity to consult with the United States before the bill became law. Accordingly, while Canada may not have received written notice of the CDSOA under Article 1902(2)(b), the purpose of the notification provision was fully satisfied.

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

Article 1902(2)(b) requires a NAFTA Party to notify another NAFTA Party in writing of amendments to its AD/CVD statute that apply to that Party in advance of the date of enactment of such statute. The CDSOA amended Title VII of the *Tariff Act*, the U.S. AD/CVD statute, as defined in NAFTA Article 1911. The United States did not notify Canada in writing of this amendment prior to its enactment. Canada, however, had actual notice of the amendment prior to enactment and, therefore, was not deprived of its right to request consultations with the United States pursuant to Article 1902(2)(c).

In any event, the Tribunal's jurisdiction is limited to determining whether the United States has breached certain obligations in Section A of Chapter Eleven or certain

[8] *Id.*

articles in Chapter Fifteen of the NAFTA. The Tribunal does not have jurisdiction to determine whether the United States has breached obligations to the other NAFTA Parties in Chapter Nineteen, or to fashion a remedy for any supposed breach.

B. The United States has taken the position that "there is no ongoing duty, pursuant to Article 1902(2)(b), to notify once that amendment becomes law." *See* R-PHM at ¶ 69. Is there a duty to notify in advance of the final step in any "enactment," failing which the terms of Article 1902(2)(b) are neither satisfied nor capable of becoming satisfied at some future date?

Article 1902(2)(b) imposes a duty on a Party to provide written notification to any affected Party of an amendment to its AD/CVD statute prior to the enactment of any such legislation. In this instance, Canada had actual notice of the CDSOA prior to its enactment into law. Article 1902(2)(b)'s purpose was therefore satisfied.

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

There is no evidence to suggest that the President was aware of Article 1902(2)(b)'s requirement, and yet decided not to postpone enacting the bill in order to comply with that requirement. In any event, in this instance, Canada was aware of the CDSOA before its enactment and expressed its views on the legislation to the United States before the President signed the bill. Even assuming awareness of Article 1902(2)(b) on the part of the relevant officials, under such circumstances, it would have served no useful purpose to have postponed the President's signature of the appropriations bill in order to provide written notification to Canada.

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

The notification requirement under Article 1902(2)(b) is intended to provide an affected Party with the opportunity to persuade the amending Party to withdraw or modify the proposed amendment. The lack of written notification in this instance, however, did not deprive Canada of any right or opportunity, as Canada had actual notice of the CDSOA and made its views about the amendment known to the United States prior to its enactment.

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

No. Article 1903 permits a NAFTA Party to challenge an amendment to another Party's AD/CVD statute only after the amendment has been enacted. Whether the challenging Party had notification of the amendment and an opportunity to consult prior to its enactment does not alter a Party's ability to invoke Article 1903. Article 1903 contains no time limitation for invoking binational panel review of a Party's AD/CVD amendments. In any event, as noted above, Canada had notice of the CDSOA and an opportunity to make its views known regarding the legislation prior to its enactment.

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

(a) Pursuant to the NAFTA, can an amending Party dispense with Article 1902(2)(b)'s mandatory notification on the basis of an assumption that the other State Parties would be aware of the "amending statute" anyway?

The presumptive purpose of Article 1902(2)(b) is to place an affected NAFTA Party on notice of any amendment to another Party's AD/CVD law so that the affected Party has the opportunity to consult with the amending party prior to enactment of the legislation. Here, there was no need for the United States to "presume" that Canada was aware of the legislation. Rather, there is indisputable evidence that Canada was aware of the CDSOA, as Canada made its views concerning the amendment known to the United States prior to the bill's enactment.

(b) Would such an interpretation frustrate the process of required prior consultation, if requested, as contemplated under Article 1902(2)(c)?

A failure to notify an affected Party under Article 1902(2)(b) could deprive an affected Party of the opportunity to consult with the amending Party prior to the amendment's enactment, unless the affected Party learns of the proposed amendment through some other means. An affected Party that learns of the proposed amendment through other means has the same ability to exercise its right under Article 1902(2)(c) to consult with the amending Party prior to enactment of the legislation in question. Such was the case here. Canada learned about the CDSOA prior to its enactment. Although Canada did not request formal consultations pursuant to Article 1902(2)(c), it expressed its views on the legislation directly to the U.S. Congressional leadership, the U.S. Trade

Representative, and President Clinton, urging that the legislation not be enacted.[9] Article 1902(2)(c)'s purpose was therefore fulfilled in this case.

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

(a) When Canada, Mexico and the United States entered into the NAFTA in 1992, were the State Parties' AD and CVD statutes specified in Article 1911 ("Definitions") and Annex 1911 ("Country Specific Definitions")?

Article 1911 and Annex 1911 define U.S. "antidumping statute" and "countervailing duty statute," for purposes of Articles 1902 and 1903, as "the relevant provisions [*i.e.*, the portions pertaining to AD or CVD, as the case may be] of Title VII of the *Tariff Act of 1930*, as amended, and any successor statutes."[10] Article 1911 and Annex 1911 thus include any amendment to a Party's AD/CVD law within the definition of "antidumping statute" and "countervailing duty statute." The Continued Dumping and Subsidy Offset Act of 2000 is an amendment to Title VII of the *Tariff Act*.

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

No. As noted, Article 1911 and Annex 1911 define U.S. "antidumping statute" and "countervailing duty statute" as "the relevant provisions of Title VII of the *Tariff Act*

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[9] *Id.*

[10] NAFTA art. 1911 & Annex 1911 (emphasis added).

of 1930, as amended, and any successor statutes."[11] That definition does not provide that "antidumping statute" and "countervailing duty statute" for the United States are "the relevant provisions of *Title VII of the Tariff Act of 1930*, as amended, and any successor statutes *that have been notified in accordance with Article 1902(2)*." Thus, Article 1911 and Annex 1911 do *not* make compliance with the notification and consultation provisions set forth in Article 1902(2) a condition precedent to the amendment forming a part of the United States' AD/CVD statute. Article 1911 and Annex 1911 must be interpreted in accordance with their ordinary meaning, and additional terms that do not appear in the text of those provisions may not be added to change the meaning of those provisions.

In addition, reading the definition of "antidumping statute" and "countervailing duty statute" to apply only to those amendments that have been notified in accordance with Article 1902(2) is illogical. Whether the United States provided written notification to its NAFTA partners prior to enacting the CDSOA does not change the nature of that legislation as an amendment to Title VII of the *Tariff Act*, or its function, which was described by Congress as "achieving . . . the remedial purpose" of the United States' AD/CVD laws.[12] The characterization of the CDSOA as a U.S. antidumping or countervailing duty statute is not affected by the United States' failure to provide written notification of that amendment in accordance with Article 1902(2).

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[11] *Id.* The CDSOA is an amendment to the "relevant" provisions of Title VII of the *Tariff Act* because it pertains to both the AD and CVD statutes.

[12] Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1002, 114 Stat. 1549, 1549A-72 (2000); *see also id.* (purpose of CDSOA is also to counteract "[t]he continued dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders").

The context of Article 1902 likewise refutes any such interpretation. Article 1902(2) sets forth four requirements that must accompany a Party's amendment to its AD/CVD law: Article 1902(2)(a) requires specification of the Party affected in the amending legislation; Article 1902(2)(b) and (c) require prior notification to an affected Party and consultation on request; and Article 1902(2)(d) requires that any amendment conform to the GATT Agreements and the NAFTA's object and purpose. The Tribunal's question appears to be premised on the fact that Article 1902(2) provides that "[e]ach Party reserves the right to change or modify its antidumping law or countervailing duty law, *provided that*" those conditions are met.[13] The text and context of Article 1902, however, demonstrate that the Parties did not intend compliance with those conditions as a prerequisite to bringing an amendment within the definition of "antidumping statute" or "countervailing duty statute" in Article 1911 and Annex 1911.

For example, failure to comply with Article 1902(2)(a) by failing to specify the affected Party in the amending legislation results in a forfeiture of the amending Party's right to "apply" that legislation to the goods of the affected Party.[14] It does not cause the amendment to fall outside the definition of "antidumping statute" or "countervailing duty statute" in Article 1911 and Annex 1911.

Likewise, a declaratory opinion by an Article 1903 binational panel that a Party's amendment violates Article 1902(2)(d) does not result in a determination that the amendment falls outside the definition of "antidumping statute" or "countervailing duty statute" in Article 1911 or Annex 1911. To the contrary, the amending Party may retain the amendment – which will continue to be treated as an "antidumping statute" or

[13] NAFTA art. 1902(2) (emphasis added).

[14] *Id.* art. 1902(2)(a).

"countervailing duty statute" for purposes of Chapter Nineteen – but may agree to modify the amendment to the "satisfact[ion]" of the complaining Party, or possibly face countermeasures by that Party.[15]

Accordingly, the NAFTA Parties did not intend the four requirements in Article 1902(2) to be preconditions to the amendment falling within the definitions of "antidumping statute" and "countervailing duty statute" in Article 1911 and Annex 1911. Article 1902(2) obliges an amending party to comply with all four requirements. But it only provides a remedy for non-compliance with the *substantive* violations of Article 1902(2)(a) and (d). It does not provide any remedy for non-compliance with the *procedural* notice and consultation provisions in subparagraphs (b) and (c). Indeed, it flies in the face of reason to remove an amendment from the definition of "antidumping statute" and "countervailing duty statute" for a procedural omission under subparagraphs (b) or (c), but not attach the same drastic consequence to noncompliance with a substantive duty under subparagraphs (a) or (d).

In any event, the procedural notice and consultation requirements provided for in subparagraphs (b) and (c) were, in fact, satisfied, albeit by different means. As noted above, Canada had notice of the CDSOA prior to its enactment into law. Canada also made its views about the amendment known to the United States prior to the amendment's enactment. Thus, even if failure to notify and consult upon request regarding a proposed amendment to a Party's AD/CVD law could have consequences regarding the characterization of that amendment – which the United States disputes – no

[15] NAFTA art. 1903(3).

such consequences could result here because Canada did receive notice of, and did have an opportunity to request consultations regarding, the CDSOA prior to its enactment.

Finally, removing an amendment from the definition of "antidumping statute" or "countervailing duty statute" due to non-compliance with Article 1902(2) would lead to absurd results. A Party could shield amendments to its AD/CVD law from obligations under Chapter Nineteen simply by failing to notify the amendment, contrary to Article 1902(2)(b), or by intentionally enacting legislation that subverts the object and purpose of the NAFTA itself, contrary to Article 1902(2)(d). If such actions had the effect of removing the amendment from the definition of an AD/CVD statute, then a complaining NAFTA Party would be deprived of the ability to challenge such an amendment under Article 1903. Such a result would frustrate the very objective of Chapter Nineteen, which imposes certain obligations on a Party with respect to its AD/CVD law, and was not intended to provide Parties with the opportunity to shield from scrutiny laws that do not conform with their international obligations.

(c) Is the consequence that the statutory amendment in question cannot be deemed part of the definition of "antidumping law and countervailing duty law" under Article 1902(1)?

No. As described above, Article 1902(2) does not contemplate that non-compliance with any of its requirements removes an amendment from the definition of "antidumping statute" or "countervailing duty statute" in Article 1911 or Annex 1911. Nor does Article 1911 or Annex 1911 specify that an amendment becomes part of a Party's AD/CVD statute only on the condition that the Article 1902(2) requirements have been met. The definition of the term "relevant statutes" in Article 1902(1) is informed by

the Article 1911 and Annex 1911 definitions, unqualified by the requirements in Article 1902(2).

(d) Does that result have, in turn, the consequence that the statutory amendment is not part of "antidumping law and countervailing duty law" within the meaning of Article 1901(3)?

No. Claimants' argument that the CDSOA is not part of AD/CVD law within the meaning of Article 1901(3) confronts four insurmountable hurdles. *First*, as noted, Article 1911 and Annex 1911 do not specify that only an Article 1902(2)-compliant amendment becomes an "antidumping statute" or countervailing duty statute." The CDSOA is a relevant amendment to Title VII of the *Tariff Act*, which was enacted in order "to see that the remedial purpose of [the United States AD/CVD] laws is achieved."[16] As such, it is an AD/CVD statute within the meaning of Article 1911 and Annex 1911 and part of the United States "antidumping and countervailing duty law" within the meaning of Article 1901(3).

Second, Article 1902(2)'s structure and context demonstrate that the Parties did not intend for non-compliance with any of its provisions to result in the removal of the amendment from the definition of "antidumping statute" and "countervailing duty statute" in Chapter Nineteen. Under the plain terms of the NAFTA, that consequence does not flow from non-compliance with paragraphs (a) or (d). As noted above, it would be inconsistent and illogical, therefore, to conclude that non-compliance with paragraph (b) or (c) had that result.

Third, interpreting Article 1901(3) to bar challenges only to a Party's AD/CVD statutes that have been notified in accordance with the procedures set forth in Article

[16] Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1002, 114 Stat. 1549, 1549A-72 (2000).

1902(2) is contrary to the ordinary meaning of that Article. Had the Parties intended such a drastic remedy – namely the wholesale removal of an AD/CVD amendment from the scope of the term "antidumping law or countervailing duty law" in Article 1901(3) – such intention would have been made clear in the Treaty's text. The Tribunal may not read into the language of Article 1911, Annex 1911, Article 1902(1) and Article 1901(3) additional terms that do not appear in those provisions.

Finally, accepting claimants' interpretation would lead to inequitable results. The duty to provide written notification of proposed AD/CVD amendments is a duty that the United States owes to Canada, and not to claimants. The United States' failure to comply with a procedural obligation it owed to Canada and Mexico – *and not to claimants* – cannot form the basis for granting claimants the right to circumvent Article 1901(3). Moreover, Canada suffered no harm from this lack of written notification since it had actual knowledge of the proposed amendment prior to enactment and clearly made its views concerning the amendment known to both the legislative and executive branches. Nor were claimants harmed by the lack of written notification given to their Government. Claimants' argument that equity requires the exercise of jurisdiction over their otherwise barred claims is therefore unfounded.

H. The United States argues that the "Byrd Amendment is an amendment of the *Tariff Act* and thus, presumptively is part of the AD/CVD law, within the meaning of the terms as used in Article 1901(3)." *See* R-PHM at ¶ 71. Does an amendment of the Tariff Act mean in and of itself that the amendment brings it within the definition of AD/CVD "law" of Article 1902(1) and, hence, in the "safe harbour" of Article 1901(3)? Or could this only be achieved by fulfilling the requirements of Article 1902(2)(b) and Article 1902(2)(c)?

Article 1911 and Annex 1911 presumptively treat any amendment to Title VII of the *Tariff Act* as an "antidumping statute" or "countervailing duty statute," as the case

may be. Moreover, the content of the CDSOA, as well as the legislative findings made by Congress when it adopted the statute, confirm that the CDSOA is a "relevant" provision of Title VII of the *Tariff Act*. The very title of the amendment – the Continued Dumping and Subsidy Offset Act – reveals the connection between the amendment and dumping and subsidization. In its findings, the U.S. Congress explained that the CDSOA's purpose was to fortify the other provisions of that Title in counteracting the detrimental effects of dumping and subsidization. As the Congress stated with respect to the enactment of the CDSOA:

> [I]njurious dumping is to be condemned and actionable subsidies which cause injury to domestic industries must be effectively neutralized. . . . United States unfair trade laws have as their purpose the restoration of conditions of fair trade so that jobs and investment that should be in the United States are not lost through the false market signals. . . . The continued dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels. . . . United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved.[17]

The Court of International Trade has likewise confirmed the original intent and purpose of the CDSOA, noting that "[t]he passage of the Byrd Amendment was intended to strengthen the remedial purposes of the antidumping and countervailing duty laws."[18] The CIT concluded that "it is clear that the Byrd Amendment is part-and-parcel of legislation intended to effectively neutralize the adverse effects of dumped and

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[17] Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1002, 114 Stat. 1549, 1549A-72 (2000).

[18] *Canadian Lumber Trade Alliance v. United States of America*, Consol. Ct. No. 05-00324, slip op. 06-48 (Apr. 7, 2006) (Pogue, J.) at 7.

subsidized goods."[19] And, Canfor itself has acknowledged that the CDSOA "clearly . . . relates to the [United States'] antidumping and CVD regime."[20]

As noted, the definitions of AD/CVD statute are not qualified by the requirements in Article 1902(2). And, for the reasons set forth above, Article 1902(2) likewise demonstrates that the Parties did not intend compliance with Article 1902(2) to be a prerequisite to an amendment falling within the Article 1911 and Annex 1911 definitions.[21]

I. Do the lack of notification by the United States of the Byrd Amendment pursuant to Article 1902(2)(b) and the failure to provide an opportunity for prior consultation pursuant to Article 1902(2)(c) indicate that, at the time of Presidential signature, the United States itself must presumptively not have considered the Byrd Amendment to pertain to AD or CVD "law" referred to in Article 1901(3) and as defined in Article 1902(1)? Is this so because of the presumption of good faith under international law as far as compliance with treaty obligations is concerned?

No. As noted above in the answer to the preceding question, Congress's intent in enacting the CDSOA, as revealed in its findings and as recognized by the CIT, was to strengthen U.S. AD/CVD law. It cannot be concluded from the United States' failure to provide written notification to Canada in accordance with Article 1902(2) that the United States did not consider the CDSOA to pertain to AD/CVD law. Rather, as noted in the United States' post-hearing submission, the CDSOA emerged from the House-Senate conference as part of the omnibus appropriations bill on October 6, 2000. The CDSOA was not debated on either the floor of the Senate or the House of Representatives. The

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[19] *Id.* at 105.

[20] Canfor Hrg. Tr. Vol. 1 at 248:6-9.

[21] It is inaccurate to characterize 1901(3) as a "safe harbour." Article 1901(3) does not immunize any matters from scrutiny under the NAFTA. Rather, it merely clarifies the NAFTA Parties' intent that Chapter Nineteen is the exclusive forum for all AD/CVD matters under the Treaty, and that any disputes concerning such matters are to be subject to the specialized mechanisms in that chapter.

House approved the bill on October 11, and the Senate gave its approval on October 18. Ten days later, the President signed the bill into law. The bill, including the CDSOA, became law in a very short timeframe because U.S. federal government agencies were operating under a continuing resolution. It was essential for the bill to be enacted so that the agencies and programs receiving appropriations under the bill could obtain necessary funding.

Given the importance of enacting the appropriations bill, the complexity of the bill, and the manner in which the CDSOA became part of that bill, it is quite possible that the relevant officials were focused on the substance of the bill and not on the notification requirement in NAFTA Article 1902(2). It is also possible that such officials concluded that it would be pointless to provide written notification of the bill's existence to Canada when the Canadian Government clearly knew about the bill and was lobbying the Congress, the USTR and the President not to adopt it. There is no evidence to suggest that the United States did not provide written notice pursuant to Article 1902(2)(b) because it did not believe that the CDSOA was part of U.S. AD/CVD law. There is thus no reasonable basis to infer that the United States failed to provide written notification to Canada because it did not consider the CDSOA to pertain to AD/CVD law.

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

(a) Is the view of the United States, referred to under Question I, confirmed by the position it took in the WTO proceedings?

No. The issue before the WTO was whether the CDSOA was a specific action against dumping and subsidization. The United States' comments were made in the context of that dispute. The CDSOA is an amendment Title VII of the *Tariff Act* that was intended to fortify the remedial purpose of the other AD/CVD laws in that Title.

(b) The United States argues that the WTO Panel and Appellate Body disagreed and that the United States accepts the findings of the WTO, and has signed into law legislation (the Deficit Reduction Act of 2005) repealing the Byrd Amendment in order to comply with those findings. *See* R-PHM at ¶ 65D(b). Must the present Tribunal determine whether the Byrd Amendment is AD or CVD law under Article 1901(3), and not under the WTO agreements in respect of which the WTO Panel and Appellate Body made their findings?

The Tribunal's task is to determine whether exercising jurisdiction over claimants' claims challenging the CDSOA would "impos[e] an obligation on the [United States] with respect to [U.S.] antidumping law or countervailing duty law," within the meaning of Article 1901(3). An affirmative answer to that question requires dismissal of claimants' CDSOA claim. The WTO's findings that the CDSOA is a specific action against dumping and subsidization, and therefore is inconsistent with the GATT Antidumping Agreement and Agreement on Subsidies and Countervailing Measures, support the conclusion that claimants' CDSOA claim imposes obligations on the United States with respect to its antidumping and countervailing duty law.

K. Does the United States' conduct referred to under Questions I and J produce the effect that the Byrd Amendment does not come within the purview of the words "with respect to a Party's antidumping law or countervailing duty law" of Article 1901(3)?

No. See responses above.

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

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

To the extent that claimants' CDSOA claim pertains to the incentive the amendment allegedly provided for industry support of the AD/CVD petitions, the repeal of the CDSOA is not relevant. Likewise, to the extent that claimants' claim is based on anticipated market effects of any future distribution of CDSOA funds, the repeal of the CDSOA is not relevant. As noted, Chapter Eleven does not recognize claims for future speculative losses.

(b) Is it relevant that the repeal of the Byrd Amendment is prospective only and provides for a transitional period, considering that the Deficit Reduction Act of 2005 provides that "all duties on entries of goods made before and filed before October 1, 2007" shall be distributed as if the Byrd Amendment had not been repealed?

No. See response above.

Respectfully submitted,

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