

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

CANFOR CORPORATION and
TERMINAL FOREST PRODUCTS LTD.

Investors
(Claimants)

v.

UNITED STATES OF AMERICA

Party
(Respondent)

**RESPONSE OF CANFOR CORPORATION AND
TERMINAL FOREST PRODUCTS LTD. TO ADDITIONAL QUESTIONS
BY THE TRIBUNAL REGARDING THE BYRD AMENDMENT**

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1. In order to properly answer the Tribunal's additional questions it is necessary to provide a few preliminary comments on how the parties have approached the Byrd Amendment in the context of the United States' jurisdictional motion. This will allow the Claimants to give more direct and concise answers to the specific questions asked.

Claimants' Overall Position

2. The Claimants' overall position in relation to the Byrd Amendment is that it is not necessary for the Tribunal to deal specifically with the question of whether or not the Byrd Amendment is "antidumping law or countervailing duty law" as that phrase is utilized in Article 1901(3) because Chapter 11 obligations do not "impose obligations" on a Party such as the United States "with respect to [that] Party's antidumping law or countervailing duty law".¹ However, keeping in mind the assumption implicit in the *Introduction to the Additional Questions by the Tribunal regarding the Byrd Amendment*, the Claimants will respond to the those questions from the general perspective of whether the Byrd Amendment could be considered to be "antidumping law and countervailing duty law" as that phrase is utilized in Chapter 19 and further whether or not the United States is entitled to any protection provided by Article 1901(3) in relation to the Byrd Amendment.

Claimants' Position: Byrd Amendment is not an antidumping or countervailing duty statute

3. At a general level the Claimants' position is that the Byrd Amendment is a United States domestic law which is so fundamentally contrary to the internationally accepted rules against dumping and subsidization that it is not "antidumping law and countervailing

¹ See the Claimants' submissions by letter to this Tribunal on January 6, 2006 at pp. 6-7. See also the Canfor Reply to the United States' Objection to Jurisdiction at paras. 22 and 127; and see Canfor Rejoinder on Jurisdiction at p. 4 response answer where Canfor stated "Article 1901(3) simply ensures that no other chapter of NAFTA outside of Chapter 19 can impose an obligation on the Party to do something (or refrain from doing something) to that Party's antidumping and countervailing duty "laws" (such as the obligations imposed in Chapter 19 under Articles 1902(d) and 1904(15))" and paras. 22 to 26, and 31.

duty law” as envisaged in Chapter 19. This conclusion is fully supported by the information presently before the Tribunal including

- (a) the fact that the United States did not (and had no intention of) notifying Canada under Chapter 19 of the Byrd Amendment;
 - (b) that at no time during the legislative debates did anyone suggest that notification was required under Chapter 19;
 - (c) that in defending the Byrd Amendment before the WTO the United States had clearly concluded that the Byrd Amendment was not “antidumping law and countervailing duty law” requiring notification under Chapter 19 when it stated “the CDSOA is a government payment program”² and “the CDSOA has nothing to do with the administration of the antidumping and countervailing duty laws”,³ and
 - (d) the Appellate Body of the WTO found the Byrd Amendment to go beyond the permissible scope and structure of “antidumping and countervailing duty law” as defined in the WTO Agreements.
4. Accordingly, the United States cannot avail itself of any protection provided for by Article 1901(3).
5. However, in the context of the questions now being asked, even if a plausible argument could be made that the Byrd Amendment is an “antidumping law and countervailing duty law”, the United States is, in any event, not entitled to claim the protection of Article 1901(3) in relation to the Byrd Amendment because it has not satisfied the procedural conditions (Articles 1902(2)(a), (b) and (c)) and substantive conditions (Article 1902(2)(d)) necessary to take advantage of the right granted to the NAFTA parties under Article 1902(2) to amend their antidumping or countervailing duty statutes after the entry into force of NAFTA.

² See *United States - Continued Dumping and Subsidy Offset Act of 2000* (Complaints by Australia, Brazil, Canada, Chile, the European Communities, India, Indonesia, Japan, Korea, Mexico and Thailand) (2002) WTO docs. WT/DS217/R and WT/DS234/R, para. 4.501.

³ *Ibid* at para. 4.502.

United States' Approach is Flawed

6. The negotiation of Chapter 19 of the NAFTA was a compromise which allowed the NAFTA Parties the right to retain their existing antidumping and countervailing duty law. But that right was balanced by the notion that amendments—future antidumping and countervailing duty laws—must conform to certain conditions. These conditions are expressed as obligations on the Parties in Article 1902(2).
7. Given these basic considerations, the United States' interpretation of Articles 1901(3) and 1902 would undermine the purpose and object of Chapter 19, and particularly the delicate and sensitive balance of rights and obligations agreed to under that Chapter. Essentially, the United States argues that the Byrd Amendment is protected (as “antidumping or countervailing duty law”) by its general right to maintain antidumping or countervailing duty law, even though the Byrd Amendment, if antidumping or countervailing duty law at all, is obviously a statutory change subsequent to the coming into effect of NAFTA.
8. This argument is fundamentally flawed. Assuming the Byrd Amendment is an antidumping and countervailing duty statute, it is obviously an amendment to the antidumping and countervailing duty law that was in place at the time of NAFTA. In order for it to be NAFTA compliant, and therefore protected by the provisions of Chapter 19, the United States is obligated to meet very explicit conditions set out in Article 1902(2).
9. Without textual support or support from the negotiating history, the United States would have the Tribunal believe that Article 1901(3) includes protection not only of countervailing and antidumping laws in place at the time of NAFTA, but of amendments to them that do not conform to the conditions of 1902, i.e. amendments that the NAFTA parties do not have a right to make under *Chapter 19 itself*. The United States has given no answer as to why, without explicit language, the drafters of NAFTA would ever have sought to actually provide what the United States sees as a blanket exemption from legal responsibility under other Chapters of NAFTA for actions and omissions (amendments of the antidumping and countervailing duty law in existence at the time of NAFTA) that are

not protected under Chapter 19 itself, and in violation of the obligations undertaken by the United States under Article 1902.

10. The United States' interpretation undermines the balance of rights and obligations in Chapter 19 by conferring a right to amend antidumping or countervailing statutes to gain the protection of Article 1901(3) where the coordinate obligations have not been respected. That cannot be correct. Rather, the drafting of Article 1902 indicates that the obligations in question are *conditions* that constrain the NAFTA Parties' right to amend their antidumping or countervailing duty statutes after the entry into force of NAFTA (here the French is particularly explicit, using the expression "*a condition*"). The United States' interpretation would diminish the effectiveness of those obligations, and is thus an interpretation not to be favoured under the customary international law principles of treaty interpretation.

Answers to the Tribunal's Supplemental Questions

- A. **The United States explains the lack of notification by reference to the "short timeframe and the unusual circumstances of this substantive amendment of the Tariff Act being adopted as part of an appropriations bill." See R-PHM at n. 167.**
 - (a) **Assuming that that explanation may suffice as far as a notification of the Byrd Amendment in advance of the Congressional vote on the Conference Report, should the United States, in order to fulfill its obligation under Article 1902(2)(b), have taken steps thereafter to notify the proposed "amending statute" to the other NAFTA Parties in writing prior to its enactment (i.e., in the case of the United States, prior to the signature of the Byrd Amendment into law by the President)?**
11. Firstly, assuming that the Tribunal concludes that the Byrd Amendment is an antidumping or countervailing duty statute as envisaged by Chapter 19, it is patently disingenuous for the United States to now try to argue that it was because of "the short timeframe and the unusual circumstances of this substantive amendment ..." that notification of the Byrd Amendment was not given to the other NAFTA Parties. It is clear from the position taken by the United States before the WTO Panel and Appellate Body that the United States never intended to notify Canada or Mexico about the Byrd

Amendment under Chapter 19. Once again the United States, after the fact, adopts a convenient interpretation of what occurred to support its latest argument on the Byrd Amendment.

12. Secondly and in any event, a precondition to the United States being able to seek refuge under Article 1901(3), is that it must have complied with the notification provision under Article 1902. At the very least the other NAFTA Parties should have been notified in writing "*prior to the signature of the Byrd Amendment into law by the President*". See also the answer to Question C.

(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)?

13. Assuming that the Tribunal concludes that the Byrd Amendment is an antidumping law or countervailing duty statute as envisaged by Chapter 19, it is correct to conclude that the United States breached its obligation to the other Parties under Article 1902(2)(b) and accordingly, is not entitled to any protection it might otherwise have been entitled to under Article 1901(3).

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?

14. On the plain meaning of Article 1902 the notification precondition under Article 1902(2)(b) must be done in advance of the final step of any "enactment" and cannot be rectified at a later date.⁴

⁴ Hypothetically, a Party could avoid being in continuing violation of Article 1902(2) by withdrawing or suspending operation of its law, then giving notice of intent to reinstate the legal changes, in a timely manner allowing for consultations. This would possibly cure *on-going* breach. In other words, once the amendment has become law, the underlying obligation of state responsibility under Article 1902(2) would be for a NAFTA Party to withdraw or suspend the operation of a law in violation of Article 1902(2), including the notification requirements and then to follow the requirements of Article 1902(2) before reinstating the law. Withdrawal followed by conformity with Article 1902(2) prior to reinstatement would not, or could not, however give the NAFTA Party in question retrospective protection under Chapter 19. Thus, where, like in this case, a legal claim concerns the effects of the amendment in question while it was in force contrary to the conditions of Article 1902(2) it would not be open for a Party to maintain that the withdrawal of the law and a notification of the legal changes to be reinstated in the future.

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?

15. The notification requirement in 1902(2) does not specify any point in the internal lawmaking process of a NAFTA Party where notification is required. The crucial concern is that the notification occur sufficiently prior to the possible enactment and therefore *application of the law to other NAFTA Parties*, to allow the consultations contemplated to proceed before other Parties are subject to the law. Thus, there is no reason why the United States could not have fulfilled the requirement of 1902(2) by the executive branch simply delaying the required approval of the legislation, even after its passage by Congress, and thus preventing its application to other NAFTA Parties prior to an appropriate period of notification and consultation. How each Party assures that the needed timeframes are respected will depend obviously on its domestic public law. However, it is well-established as a principle of international law that features of a Party’s domestic political and legal system, even including constitutional rules, cannot excuse its responsibility to implement its international obligations.⁵

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)?

16. Yes.

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?

17. It may be. There is nothing in the negotiating history explicitly addressing this issue.

would bar a claim dealing exclusively with the period of time where the law did not meet the conditions for protection under Chapter 19.

⁵ *Vienna Convention on the Law of Treaties*, (1969)1155 U.N.T.S. 331, in force 1980 [hereinafter *Vienna Convention*], Article 27: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. . . .”

- 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?**
18. No. It is clear from the plain meaning of Article 1902(2)(b) that written notice in advance of the enactment of the statute is a precondition to being able to amend antidumping or countervailing duty statutes following NAFTA coming into force.
19. In any event, it is hard to imagine that Canada and Mexico had “actual notice” that the United States was changing its antidumping or countervailing duty law, when the United States was insisting in the WTO that the Byrd Amendment had nothing to do with antidumping or countervailing duty laws, or their administration.
- (b) **Would such an interpretation frustrate the process of required prior consultation, if requested, as contemplated under Article 1902(2)(c)?**
20. Yes. An interpretation of Article 1902(2)(c) that dispensed with formal written notice could easily frustrate prior consultation because:
- it creates the potential for the timing problems that the United States alleges prevented consultation for the Byrd Amendment;
 - it fails to establish any process by which consultation can take place, set any parameters regarding subject matter, and fails to provide a contact within the amending government who may receive and be responsible for comments; and
 - it would imply a manifest disregard of international rules that would taint and make meaningless any consultation process that was entered into.

- 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”)?
21. Yes.
- (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?
22. Yes. If a Party fails to follow the procedures it agreed to under Article 1902(2), the amendment should not be considered part of its antidumping or countervailing duty statutes as defined in Article 1911 and Annex 1911. Chapter 19 allowed Parties to retain their antidumping and countervailing duty statutes notwithstanding the fact that the NAFTA is a free trade agreement. Article 1911 and Annex 1911 should be interpreted so that only the laws listed, or as amended according to the procedures set out under Article 1902(2) are included as antidumping and countervailing duty statutes and receive the benefits of Chapter 19 protection. The opposite interpretation renders the Article 1902(2) procedures and rules meaningless, as the Parties would be free to ignore them. (See also the preliminary comments above and the answers to Questions A through F.)
- (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)?
23. Yes.
- (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)?
24. Yes. (See also the preliminary comments above and the answers to Questions A through F.)

- 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)?
25. In answer to the first part of the question--No. The *Tariff Act*'s breadth extends far beyond antidumping and countervailing duty matters.⁶ In fact, the definition of “antidumping statute” and “countervailing statute” in Annex 1911 only references a very specific part of the *Tariff Act*.⁷ It would, therefore, be entirely inappropriate and improper to consider any amendment to the *Tariff Act* an amendment to United States antidumping and countervailing duty law as envisaged by Chapter 19.
26. If the United States could rely on 1901(3) to protect itself against legal challenges to the *Tariff Act* under Chapters of NAFTA other than Chapter 19, clearly absurd results would follow, namely that just because the *Tariff Act* has some relation to antidumping and countervailing duty law, it would be exempt from the extensive obligations of those NAFTA Chapters that deal with tariffs. Such an interpretation would be completely contrary to the effectiveness of NAFTA obligations in those Chapters.
27. More generally, the United States' position amounts to the notion that the meaning of “antidumping and countervailing duty law” in Article 1901(3), should be interpreted without reference to the various definitions, specifications, and references to antidumping and countervailing duty law in Articles 1902 and 1911, and Annex 1911. Such a reading is contrary to the *Vienna Convention*, as it intentionally and without reason ignores the immediate context of Article 1901(3), that is Article 1902 specifically and the rest of Chapter 19 generally. Moreover, the United States begs the question of where else but

⁶ For example, the subjects regulated by the *Tariff Act* include: the reporting, entry and unloading of vehicles and vessels; the transportation in bond and warehousing of merchandise; the ascertainment, collection and recovery of (non-antidumping and countervail) tariffs and duties; and the authority of the President to enter into foreign trade agreements.

⁷ See Annex 1911 which states that: “. . . for the purposes of this Chapter: antidumping statute means (b) in the case of the United States, the relevant provisions of Title VII of the *Tariff Act of 1930*, as amended and any successor statutes; [and] countervailing duty statute means: (b) in the case of the United States, section 303 and the relevant provisions of Title VII of the *Tariff Act of 1930*, as amended, as any successor statutes.”

Chapter 19 itself this Tribunal should be seeking to find a definition of antidumping and countervailing duty law. The suggestion that any formal change in the *Tariff Act* must be considered “antidumping and countervailing duty law” is indicative of the absurdity and incoherence that could result in speculating on a meaning to antidumping and countervailing duty law other than that articulated in the provisions of Articles 1902 and 1911, and Annex 1911.

28. Finally, the United States’ position supposes that somehow Article 1901(3) was intended as a much broader “safe harbour” than that implied in the balance of rights and obligations in Chapter 19 itself. This is contrary to the object and purpose of Article 1901(3) which is to ensure that interpretations of other Chapters of NAFTA respect and preserve the compromise embodied in Chapter 19, rather than undermine it.
29. In response to the second part of the question, only those statutory amendments that have been enacted according to the procedures agreed to in Article 1902(2)(a), (b), (c) *and* (d) should benefit from whatever safe harbour Article 1901(3) provides. The Byrd Amendment met none of these.
 - 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?**
30. Yes to both parts of the question. (See also the preliminary comments above including footnote one and the answers to Question A to H.)

- 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?
31. Yes. (See also the preliminary comments above including footnote one and the answers to Question A to H.)
- (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?**
32. As a preliminary point, although the United States suggests that it accepts the finding of the WTO, the United States has not unconditionally repealed the Byrd Amendment. As noted in Question L(b) the supposed “repeal” of the Byrd Amendment is “prospective only”.
33. The question of whether the Byrd Amendment is or is not “antidumping law and countervailing duty law” as that expression is used in Chapter 19 was not dealt with by the WTO and, in any event, must be determined independently by this Tribunal. The WTO ruling is relevant, however, because the WTO Appellate Body conclusively determined that the Byrd Amendment was inconsistent with the Antidumping and Subsidy Codes and therefore the substantive condition outlined in Article 1902(2)(d)(i) of NAFTA has not been met by the United States. Accordingly, on this basis alone the United States cannot seek refuge under Article 1901(3) in relation to the Byrd Amendment.

- 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)?
34. Yes.
- 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?
35. Yes. The Claimants damages are for harm that flowed from the period of time during which the Byrd Amendment is in effect.
- (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?
36. Yes, in the sense that the prospective repeal means that the harm suffered by the Claimants will not be remedied by the repeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED


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May 19, 2006