

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.

**REPLY OF RESPONDENT UNITED STATES OF AMERICA TO
CLAIMANTS' RESPONSE 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 invitation in its e-mail of May 21, 2006, the United States replies to claimants' response to the Tribunal's Additional Questions Regarding the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA").

Claimants' speculation that Canada could not have had "actual notice" that the United States was changing its antidumping or countervailing duty law¹ is demonstrably false. Before the CDSOA became law, the press widely reported on the proposed "provision [that] would change the administration of [U.S.] antidumping law."² Canada not only knew of the CDSOA, it communicated its views on that legislation to the U.S. Trade Representative ("USTR") and to members of Congress prior to the CDSOA's

¹ See Response of Canfor Corp. and Terminal Forest Products Ltd. to Additional Questions by the Tribunal Regarding the Byrd Amendment (May 19, 2006) ("C-RAQ") ¶ 19.

² *Protectionism on the Sly*, N.Y. TIMES, Oct. 23, 2000, at A24; see also articles cited in Response of Respondent United States of America to the Tribunal's Additional Questions Regarding the Continued Dumping and Subsidy Offset Act of 2000 (May 19, 2006) ("R-RAQ") at n.5.

enactment.³ And, in a joint letter to President Clinton, Canada noted its concerns that the CDSOA “create[s] changes in the usage of duties collected . . . in anti-dumping and countervailing duty cases” and runs afoul of “US obligations under the anti-dumping and countervailing duty codes of the WTO.”⁴ Canada viewed the CDSOA as “an integral part of the anti-dumping and countervailing duty regime of the United States.”⁵ Canada had actual notice of the impending changes to U.S. AD/CVD law. It had the opportunity to seek consultations under NAFTA Article 1902(2)(c) concerning those changes, and it made its views on those changes known to the executive and legislative branches of the U.S. Government. The lack of written notification, therefore, caused no conceivable harm to Canada. Nor did it cause any harm to claimants.⁶

The obligation to provide written notification under Article 1902(2)(b) is an obligation owed to *Canada*, not to claimants. Claimants’ contention that the United States unfairly seeks to reap Chapter Nineteen’s supposed “benefits,” while not complying with its obligations, is without merit.⁷ Rather, it is *claimants* who seek to obtain a benefit in this case to which they are not entitled: namely, an opportunity to challenge a U.S. AD/CVD statute under the NAFTA’s investment chapter.

³ See 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) (“Joint Letter from Ambassadors to U.S. President”).

⁴ *Id.*

⁵ *United States – Continued Dumping and Subsidy Offset Act of 2000*, Interim Report of the Panel, WT/DS217/R & WT/DS234/R (July 17, 2002) (“CDSOA WTO Panel Report”) at 174 ¶ (i)1.

⁶ Claimants’ bald assertion that the United States “had no intention of [] notifying Canada” of the CDSOA is not supported by any evidence of record. C-RAQ ¶ 3(a). The United States has provided its best understanding of the likely reasons for the lack of written notification under the circumstances in which the CDSOA was enacted. See R-RAQ at 6.

⁷ C-RAQ ¶ 22.

The lack of pre-enactment written notification does not change the CDSOA's nature. Nor does it remove the CDSOA from Chapter Nineteen's definition of AD/CVD statute. According a private claimant access to Chapter Eleven arbitration simply because its State was not provided notice pursuant to Article 1902(2)(b) would be contrary to the plain terms of several provisions in Chapter Nineteen and would frustrate the NAFTA's object and purpose. Claimants' CDSOA claim must therefore be dismissed pursuant to Article 1901(3) of the NAFTA.

A. Interpreting the NAFTA's Provisions in Accordance With Their Ordinary Meaning Compels the Conclusion That the CDSOA is an AD/CVD Statute

Claimants' argument that the CDSOA does not fall within Chapter Nineteen's definition of "antidumping statute" or "countervailing duty statute" is unavailing.⁸ Claimants note 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."⁹ Yet it is claimants who seek to avoid the plain terms of those provisions.

Annex 1911 defines U.S. "antidumping statute" and "countervailing duty statute" to include "the relevant provisions of Title VII of the *Tariff Act of 1930*, as amended, and any successor statutes."¹⁰ The CDSOA is an amendment to the relevant provisions of

⁸ *Id.* ¶ 22.

⁹ *Id.* ¶ 27.

¹⁰ Claimants' assertion that sections of the *Tariff Act* other than Title VII include subjects unrelated to AD/CVD law is a red herring. *See id.* ¶ 25 & n.6. Article 1911 and Annex 1911 define "antidumping statute" and "countervailing duty statute" as relevant provisions of Title VII of the *Tariff Act*, and any amendment thereto. The CDSOA is an amendment to Title VII of the *Tariff Act*. The content of other portions of the *Tariff Act* is therefore irrelevant to any question before this Tribunal.

Title VII of the *Tariff Act*.¹¹ The CDSOA is thus indisputably an AD/CVD “statute” within the context of Chapter Nineteen.

Claimants seek to read into Annex 1911 the additional requirement that “only the laws . . . amended according to the procedures set out under Article 1902(2) are included as antidumping and countervailing duty statutes.”¹² Annex 1911 however, does not define “AD/CVD statute” as “the relevant provisions of Title VII of the *Tariff Act of 1930*, as amended, *so long as such amendment is made according to the procedures set out under Article 1902(2)*.” Claimants’ attempt to read additional terms into Article 1911 and Annex 1911 violates a fundamental principle of treaty interpretation and must be rejected.¹³

Claimants’ interpretation would also render provisions of Chapter Nineteen meaningless. Suppose, for example, that an amendment to Title VII of the *Tariff Act* mentioned goods from Mexico, but did not mention goods from Canada. In that circumstance, Article 1902(2)(a) dictates that the United States would forfeit the right to apply the amendment to Canadian goods pursuant to Article 1902(1), but retain the right to apply the amendment to Mexican goods. Under claimants’ interpretation, however, failure to specify Canadian goods would cause the wholesale removal of the amendment from the definition of “AD/CVD statute” – resulting in the forfeiture of the right to apply

¹¹ As noted in the United States’ Response, the term “relevant provisions” refers to Title VII’s antidumping provisions or its countervailing duty provisions, as the case may be. The CDSOA applies to both sets of provisions, and therefore is an amendment to the “relevant provisions” of that Title. See R-RAQ at 10, 14-18.

¹² C-RAQ ¶ 22.

¹³ See, e.g., *India – Patent Protection for Pharmaceutical & Agricultural Chemical Products*, Report of the Appellate Body, WT/DS50/AB/R (Dec. 19, 1997) ¶ 45 (noting that the interpretive principles in Article 31 of the Vienna Convention on the Law of Treaties “neither require nor condone the imputation into a treaty of words that are not there.”).

the amendment to *both* Canada and Mexico. Claimants' interpretation would thus be inconsistent with, and render meaningless, the mechanism in Article 1902(2)(a).

Likewise, the remedy for adopting a GATT-inconsistent AD/CVD statute contrary to Article 1902(2)(d) is set forth in Article 1903. Accepting claimants' interpretation that a GATT-inconsistent AD/CVD amendment is not an AD/CVD statute under Chapter Nineteen would remove an amendment to a Party's AD/CVD law from the purview of Article 1903, rendering the entirety of that Article a nullity.¹⁴

The terms "antidumping statute" and "countervailing duty statute," which are defined in Article 1911 "[f]or purposes of this Chapter," must be interpreted consistently in Article 1903 and in Article 1902(1). Interpreting those terms to incorporate the requirement of compliance with Article 1902(2) would make no sense in the context of Article 1903. The reference to AD/CVD "statute" in Article 1902(1) must be interpreted in the same manner as in Article 1903, such that it does not incorporate the requirements of compliance with Article 1902(2).¹⁵

Finally, claimants' argument concerning statements made by the United States before the WTO lacks merit.¹⁶ As claimants acknowledge, "[t]he question of whether the Byrd Amendment is or is not 'antidumping law and countervailing duty law' as that

¹⁴ That there is no specified remedy for non-compliance with Article 1902(2)(b) and (c) does not render those requirements meaningless. A Party is bound to adhere to its international obligations even in the absence of a remedy for non-compliance.

¹⁵ Likewise, the phrase "provided that" in Article 1902(2) must be interpreted consistently with respect to all four provisions in that Article. As demonstrated, that phrase does not result in the removal of an AD/CVD amendment from the definition of "AD/CVD statute" based on a Party's failure to comply with subparagraphs (a) or (d) of Article 1902(2). Those subparagraphs contain provisions that would be rendered ineffective if that interpretation were adopted. The meaning of the phrase "provided that" in Article 1902(2) must be interpreted consistently with respect to subparagraphs (b) and (c), such that non-compliance with those provisions also does not result in removal of the amendment from the definition in Article 1911 and Annex 1911.

¹⁶ C-RAQ ¶ 3(c).

expression is used in Chapter 19 was not dealt with by the WTO.”¹⁷ The WTO found that the CDSOA was a “specific action” against dumping, and the United States has accepted that finding. That debate, however, has no bearing on whether the CDSOA falls within the definition of AD/CVD statute under NAFTA Article 1911 and Annex 1911. It is the Tribunal’s task, based on its interpretation of the NAFTA’s provisions, to decide whether the CDSOA falls within those definitions. An extraneous statement made in an unrelated legal context should not inform that task.

In any event, in the context of the notification and consultation provisions in Article 1902(2), the relevant question is *Canada’s* understanding of the CDSOA. The evidence of record demonstrates that Canada understood the CDSOA to be a part of the U.S. AD/CVD regime. In its joint letter with Japan and the European Union to President Clinton of October 25, 2000, for instance, Canada noted its concern that the CDSOA “create[s] changes in the usage of duties collected . . . in anti-dumping and countervailing duty cases” and violates “US obligations under the anti-dumping and countervailing duty codes of the WTO.”¹⁸ And Canada argued before the WTO that “[t]he Byrd Amendment is part and parcel of the US anti-dumping and countervailing duty regime and is not severable from it.”¹⁹ There is thus no evidence that Canada lost its opportunity to seek

¹⁷ *Id.* ¶ 33.

¹⁸ Oct. 25, 2000 Letter from Ambassadors to U.S. President.

¹⁹ CDSOA WTO Panel Report at 111 ¶ 2(IV); *see also id.* at 174 ¶ (i)1 (noting Canada’s argument that the CDSOA is “an integral part of the anti-dumping and countervailing duty regime of the United States”); *id.* at 67 ¶ VII (“According to Canada, the Byrd Amendment . . . adds a new element to the anti-dumping and countervailing duty regime of the United States.”); *id.* at 24 ¶ IV (“Canada is of the opinion that the CDSOA similarly affects the administration of US anti-dumping and countervail laws.”); *id.* at 18 ¶ IV (noting Senator Byrd’s statement that the CDSOA was enacted because “current [AD/CVD] law has simply not been strong enough”); *id.* (noting Senator DeWine’s statement that an earlier version of the CDSOA “would take the 1930 Act one step further”); *United States – Continued Dumping and Subsidy Offset Act of 2000*, Report of the Appellate Body, WT/DS217/AB/R & WT/DS234/AB/R (Jan. 16, 2003) ¶ 71 (“Canada argues that the Panel made no findings with regard to United States anti-dumping and countervailing duty laws outside of the CDSOA; rather, the statement of the Panel is clearly with regard to the operation and

consultations pursuant to Article 1902(2)(c) because it misunderstood the nature of the CDSOA.

B. Claimants' Interpretation Would Frustrate the Intent of the NAFTA Parties

According claimants a Chapter Eleven forum would frustrate the NAFTA Parties' intent. Claimants contend in their reply, for example, that the WTO's finding that the CDSOA is WTO-inconsistent constitutes a violation of Article 1902(2)(d), and thereby removes the CDSOA from Chapter Nineteen's definition of "antidumping statute" and "countervailing duty statute."²⁰ The Parties' chosen remedy for non-compliance with Article 1902(2)(d), however, is found in Article 1903, which sets forth a specialized binational panel mechanism for reviewing amendments to a Party's AD/CVD statutes for consistency with the WTO and the NAFTA. Claimants' interpretation would have the absurd effect of removing any GATT-inconsistent AD/CVD amendment from the very provision intended for review of such amendments. And it would deprive the NAFTA Party of the right to challenge an amendment under Chapter Nineteen, in favor of granting a private claimant access to Chapter Eleven. Finally, claimants' interpretation would open the door to abuse: a Party could shield any part of its AD/CVD laws from scrutiny under Article 1903 simply by amending its laws without providing notification pursuant to Article 1902(2)(b).

effect of the CDSOA in the context of the United States trade remedies system."); Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, § 1002, 114 Stat. 1549, 1549A-72 (2000) (finding that the CDSOA was intended to "strengthen[] . . . the remedial purpose of [U.S. trade] laws"); *Canadian Lumber Trade Alliance v. United States of America*, Consol. Ct. No. 05-00324, slip op. 06-48 (Apr. 7, 2006) (Pogue, J.) at 105 (finding that the CDSOA "is part-and-parcel of legislation intended to effectively neutralize the adverse effects of dumped and subsidized goods."); *Canfor Corp. v. United States of America*, Transcript of Hearing on Jurisdiction (Dec. 7-9, 2004), Vol. 1 at 248:6-9 (Canfor: the CDSOA "clearly . . . relates to the [United States'] antidumping and CVD regime."); *Protectionism on the Sly*, N.Y. TIMES, Oct. 23, 2000, at A24 (characterizing the CDSOA as a "change [to] the administration of [U.S.] antidumping law").

²⁰ C-RAQ ¶ 33.

Claimants' theory that non-compliance with Article 1902(2) entitles them to a remedy under Chapter Eleven is no different from their argument that a finding by an Article 1904 bi-national panel that a Party misapplied its domestic law in making an AD/CVD determination confers jurisdiction on a Chapter Eleven tribunal.²¹ An adverse finding by an Article 1904 bi-national panel does not mean that making that determination was not an action taken "with respect to the Party's antidumping or countervailing duty law." Regardless of the alleged egregiousness of the inconsistency with domestic law, AD/CVD determinations are made "with respect to" a Party's AD/CVD law.

Likewise, even if a Party amends its AD/CVD statute in a manner that arguably violates Article 1902(2) – or is alleged to be "fundamentally contrary to the internationally accepted rules against dumping and subsidization"²² – the amendment is still an AD/CVD statute. To find otherwise would result in the availability of Chapter Eleven arbitration any time a bi-national panel under Article 1903 or 1904 found an amendment or determination, as the case may be, to have been adopted or made in violation of the Party's obligations. The NAFTA Parties, however, intended for Chapter Nineteen to be the exclusive forum under the NAFTA to resolve disputes concerning AD/CVD matters. If a Party makes AD/CVD determinations that are inconsistent with its law or adopts AD/CVD amendments that are inconsistent with its obligations, the remedies for those actions are found in Chapter Nineteen itself.

²¹ See, e.g., Rejoinder on Jurisdiction of the Claimant, Canfor Corp. (Sept. 24, 2004) n.22.

²² C-RAQ ¶ 3.

C. Claimants' Interpretation Is Contrary to the NAFTA's Object and Purpose

Claimants demonstrate confusion concerning Chapter Nineteen's purpose when they argue that the United States' failure to provide written notification should deprive it of the "benefits of Chapter 19 protection."²³ The right to retain and apply one's domestic AD/CVD law pursuant to Article 1902(1) is not a "benefit" conferred by the NAFTA.

The Parties established Chapter Nineteen as the exclusive forum in the NAFTA for "Review and Dispute Settlement in Antidumping and Countervailing Duty Matters." Chapter Nineteen imposes *obligations* on the Parties with respect to their AD/CVD laws. Article 1903, for example, imposes an obligation to submit AD/CVD amendments to bi-national panel review. Article 1904 imposes an obligation to submit AD/CVD determinations to bi-national panel review. And Article 1905 imposes an obligation to apply one's domestic law in a manner that does not frustrate the bi-national panel review mechanism.²⁴

The right to retain and apply domestic AD/CVD laws pursuant to Article 1902(1) was a result of the NAFTA Parties' failure to agree on a set of international substantive rules to govern AD/CVD law matters.²⁵ Subjecting an amendment to a Party's AD/CVD statute to review under the substantive international law standards in Chapter Eleven

²³ *Id.* ¶ 22.

²⁴ Likewise, Article 1901(3) bars all provisions of other chapters of the NAFTA from imposing "obligations" on a Party with respect to its AD/CVD law, clarifying that only Chapter Nineteen imposes "obligations" on the Parties with respect to that law.

²⁵ *See, e.g.*, United States-Canada Free Trade Agreement: Hearing Before the Comm. on the Judiciary, U.S. Senate, 100th Cong. 63-64 (1988) (testimony of M. Jean Anderson, Chief Counsel, International Trade Administration, U.S. Department of Commerce) ("Despite very intense negotiations, it proved impossible to agree on subsidies discipline and new approaches to unfair trade practices The two governments agreed instead to retain the existing national AD/CVD laws and procedures."); JAMES R. CANNON, JR., RESOLVING DISPUTES UNDER CHAPTER 19, 151 (1994) ("In the end, Canada and the United States were unable to reach an agreement that would replace domestic AD and CVD laws with jointly agreed rules regarding dumping and subsidy disciplines.").

would impose on the Parties an agreement that they could not – *and did not* – reach. It is inconceivable that the Parties intended such an extraordinary result to flow from a Party’s failure to provide written notice to a claimant’s State pursuant to Article 1902(2)(b). Such a result would be even more extraordinary in this particular instance, where the affected NAFTA Party had actual notice of the statutory amendment.

In sum, non-compliance with Article 1902(2) does not remove an AD/CVD amendment from the definition of “AD/CVD statute.” In this case, there is no basis for finding a violation of the notification and consultation provisions in Article 1902(2), in any event. To do so would elevate form over substance. The evidence of record demonstrates that prior to the CDSOA’s enactment, Canada (i) had actual notice that the United States was planning to amend its AD/CVD statute; (ii) understood the nature of the proposed legislation; (iii) had the opportunity to seek consultations pursuant to Article 1902(2)(c); and (iv) took advantage of its knowledge by making its views about that proposed amendment known to the legislative and executive branches of the United States. The purpose of the notification requirement in Article 1902(2)(b) was thus satisfied. The purpose of the consultation provision in Article 1902(c), which was never invoked, was likewise satisfied.

A determination that the CDSOA is not an “AD/CVD statute” would require the Tribunal to read non-existent terms into the Treaty, to read other provisions out of the Treaty, to interpret the same terms inconsistently across different provisions, and would produce absurd results that were not intended by the NAFTA Parties. Such a determination would also be inequitable because claimants did not forgo any right, or suffer any harm, as a result of their State not having received formal written notification

pursuant to Article 1902(2)(b). For all of these reasons, and the reasons set forth in the United States' prior written and oral submissions, claimants' CDSOA claim should be dismissed pursuant to Article 1901(3).

Respectfully submitted,

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