

NOTICE OF INTENT TO SUBMIT
A CLAIM TO ARBITRATION
UNDER SECTION B OF CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT

DOMAN INDUSTRIES LIMITED
("Doman")

Investor

v.

THE GOVERNMENT
OF
THE UNITED STATES OF AMERICA
("United States")

Party

Pursuant to Articles 1116 and 1119 of the North American Free Trade Agreement ("NAFTA"),
Doman delivers this Notice of Intent to Submit a Claim to Arbitration.

I. Name and Address of Disputing Investor

DOMAN INDUSTRIES LIMITED
435 Trunk Road
Duncan, British Columbia
Canada V9L 2P9

II. Overview - NAFTA Chapter 11 Breaches

1. The Investor submits that the United States has breached among others the following articles under Section A of Chapter 11 of the NAFTA:

- Article 1102 - National Treatment;
- Article 1103 - Most-Favored-Nation Treatment;
- Article 1104 - Standard of Treatment;
- Article 1105 - Treatment in Accordance with International Law; and
- Article 1110 - Expropriation.

2. Doman has incurred loss and damage by reason of these breaches.

3. The relevant provisions of the NAFTA are:

Article 1102: National Treatment

1. *Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in 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 favorable 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 favorable than the most favorable 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 reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.*

Article 1103: Most-Favored-Nation Treatment

1. *Each Party shall accord to investors of another Party treatment no less favorable 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 favorable 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 1104: Standard of Treatment

Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

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)(b), 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 1102 but for Article 1108(7)(b).*

Article 1110: Expropriation and Compensation

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;*

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- (b) *on a non-discriminatory basis;*
 - (c) *in 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.*

III. Facts and Issues

A. Facts

(i) Doman and its United States Investments

1. Doman is a publicly traded corporation incorporated under the laws of British

Columbia, Canada. Doman is traded on the Toronto Stock Exchange.

2. Doman employs approximately 4,200 people for its logging and wood processing operations. Primary operations include timber harvesting, reforestation, sawmilling logs into lumber and wood chips, value-added remanufacturing, and producing dissolving sulphite pulp and NBSK pulp. Doman operates nine sawmills, two pulp mills, and one value-added plant in British Columbia.
3. Doman's single largest market is the United States. In recent years, Doman has exported as much as 62 percent of its total softwood lumber production to the United States. In 1999, the year of Doman's greatest sales to the United States, these sales were approximately C\$310 million. Doman developed its extensive customer base in the United States over many years. Its ability to service this customer base is absolutely essential for Doman's commercial viability.

Doman's exports to the United States from 1996 to early 2001 were capped at 65 percent of its normalized United States shipments as a result of the Softwood Lumber Agreement ("SLA"). Doman projected that, after the SLA expired in March 2001, its shipments to the United States would increase substantially. The initiation of the antidumping and countervailing proceedings discussed below prevented this.

4. Doman has invested substantial sums in developing and cultivating an expansive customer base in the United States through
 - Researching and analyzing the market for softwood lumber in the United States;
 - Developing and manufacturing products for sale in the United States;
 - Marketing its products in the United States; and
 - Developing and maintaining a sales and distribution infrastructure to service its customers in the United States, including the lease of warehouses and other facilities to maintain inventories in the United States.

In its 2000 annual report, Doman reported among its assets goodwill in the amount of C\$34.46 million. A substantial portion of this goodwill reflects the investments Doman has made in marketing and selling its products in the United States.

(ii) The Measures

5. On April 2, 2001 the Coalition for Fair Lumber Imports ("Coalition") and others (the "Petitioners") filed one antidumping and one countervailing duty petition with the United States Department of Commerce ("the Department") and the United States International Trade Commission ("ITC"). The petitions alleged that the United States softwood lumber industry was materially injured or threatened with material injury by reason of imports of

subsidized and dumped softwood lumber from Canada. The petitions sought the imposition of countervailing and anti-dumping duties.

6. On April 30, 2001, the Department initiated antidumping and countervailing duty investigations of softwood lumber products from Canada. In May, 2001, the ITC determined that there was a reasonable indication that the United States softwood lumber industry would be threatened with material injury from import of Canadian softwood lumber.
7. The Department conducted its countervailing duty investigation on a country-wide basis. It did not investigate the extent to which individual producers of softwood lumber products in Canada had benefited from the alleged subsidies. The Department restricted its antidumping investigation to six Canadian producers that it selected. The Department refused to accept voluntary responses to its antidumping questionnaire, including that of Doman.
8. On August 17, 2001, the Department of Commerce published a preliminary countervailing duty determination that softwood lumber imports from Canada had benefited from countervailable subsidies. The Department of Commerce found a preliminary subsidy rate of 19.3%. The Department also made an affirmative preliminary determination that critical circumstances were present. Consequently, cash deposits or bonds in that amount were required for all softwood lumber imports into the United States from Canada made on or after May 19, 2001.
9. On November 6, 2001, the Department published a preliminary anti-dumping determination. As a result of its finding the Department of Commerce established a weighted average dumping margin of 12.58% for "all other" Canadian producers, including Doman. Consequently, all softwood lumber Doman exported to the United States by Doman on or after November 6, 2001 was subject to a cash deposit or bond requirement in that amount.
10. On April 2, 2002, the Department of Commerce published its final countervailing duty determination. As a result of its findings, the Department of Commerce established a countervailing duty rate of 19.34% for imports of softwood lumber products from Canada. This duty was later corrected to 18.79%. This duty will go into effect when the final countervailing duty order is issued, at which time Doman's imports will be subject to a cash duty deposit requirement in that amount. The Department also established a weighted-average dumping margin for "all other" producers of 9.67%. This duty will go into effect when the final antidumping duty order is issued, at which time Doman's imports will be subject to a cash duty deposit requirement in that amount. In total, Doman's exports of softwood lumber to the United States will be subject to total duty deposits of 28.46% of the value of the exports.
11. Under the "Byrd Amendment," Section 1003 of Public Law No. 106-387, the United States will distribute to qualified members of the U.S. domestic industry the proceeds from antidumping and countervailing duties collected on imports of products produced by the industry. In the case of softwood lumber products from Canada, U.S. imports of the subject merchandise in 2000 were US\$6.379 billion. If imports from Canada remained at this level, and antidumping and countervailing duties were collected at the rates set forth in the

Department's antidumping and countervailing duty orders, qualified members of the U.S. softwood lumber products industry would receive approximately \$1.85 billion dollars per year. In 2000, the U.S. softwood lumber products industry suffered a loss of approximately US\$339 million. Payments the industry would receive under the Byrd Amendment would be more than double its substantial profits in 1999, when the industry recorded a profit of US\$671 million.

12. The countervailing duty and antidumping regimes of the United States permit the Department to suspend a countervailing duty or antidumping investigation upon the conclusion of a "suspension agreement" with a foreign country (in the case of a countervailing duty investigation) or foreign producers of the subject merchandise (in the case of an antidumping investigation). Conclusion of a suspension agreement is discretionary on the part of the Department. The Department is required to consult with Petitioners prior to conclusion of a suspension agreement. Less than thirty days before the Department's final determination, the Department can effectively propose and conclude a suspension agreement only with the consent of Petitioners.
13. The Byrd amendment, the countervailing duty and antidumping regimes of the United States, and the preliminary and final countervailing duty and antidumping determinations of the Department are measures that relate to Doman and its United States investments (the "Measures"). In adopting, maintaining, and applying these Measures the United States has treated Doman and its United States investments in a manner inconsistent with the provisions of Part A of NAFTA Chapter 11. The Byrd amendment provided a strong incentive for United States producers to resist any form of resolution by suspension agreement or otherwise. As a result, Doman's imports of softwood lumber into the United States are subject to substantial countervailing and antidumping duties, and Doman's customers in the United States have been unwilling to purchase Doman's products. As a result, Doman and its United States investments have incurred extensive loss and damage for which Doman should be compensated.

(iii) NAFTA Chapter 11 Breaches

(a) *Treatment in Accordance with International Law*

14. The United States has failed to provide treatment in accordance with international law, including fair and equitable treatment and full protection and security, to the United States investments of Doman. The passage of the Byrd Amendment in 2001, seven years after Canada and the United States concluded the North American Free Trade Agreement, fundamentally changed the application of antidumping and countervailing duty laws by the United States, to the detriment of Doman. The United States, through passage of the Byrd Amendment, whereby duties collected under countervailing and antidumping orders are paid to U.S. producers, gave U.S. producers enormous incentives (1) to file antidumping and countervailing duty cases, and (2) to oppose any attempts to settle those cases by means other than the imposition of duties.

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15. As a result of the Byrd amendment, the United States has failed to provide treatment in accordance with international law including fair and equitable treatment and full protection and security to the United States investments of Doman.

(b) National Treatment

16. The United States has failed to accord Doman and its United States investments the required standard of treatment under Article 1102 of NAFTA by not extending to Doman and its United States investments the best treatment available in the United States to United States investors and their investments involved in the sale, distribution, and manufacture of softwood lumber in the United States.
17. The best treatment available in the United States to United States investors and their investments involved in the sale, distribution and manufacture of softwood lumber is provided to the United States competitors of Doman operating in the United States who are not subject to the antidumping and countervailing duties. The Byrd amendment effectively precluded any opportunity to suspend these investigations.
18. Unlike their effect upon its United States competitors, the Measures and their application to Doman and its United States investments have interfered with the expansion, operation, conduct and management of Doman and its United States investments. Doman and its United States investments have suffered loss and damage as a result of the United States actions, for which Doman seeks compensation.

(c) Most-Favored-Nation Treatment

19. The United States has failed to accord Doman and its United States investments the required standard of treatment under Article 1103 of NAFTA by not extending to Doman and its United States investments the best treatment available in the United States to foreign investors and their investments involved in the sale, distribution, and manufacture of softwood lumber in the United States.
20. The best treatment available in the United States to foreign investors and their investments involved in the sale, distribution, and manufacture of softwood lumber is provided to Doman's United States competitors from countries other than Canada who are not subject to the antidumping and countervailing duties, and who are not subject to arbitrary and discriminatory targeting of their softwood lumber imports into the United States.
21. Unlike their effect upon Doman's United States competitors from countries other than Canada, the Measures, and their application to Doman and its United States investments, have interfered with the expansion, operation, conduct and management of Doman and its United States investments. Doman and its United States investments have suffered loss and damage as a result of the United States' actions, for which Doman seeks compensation.

(d) *Expropriation*

22. The effect of the Measures, and their application to Doman and its United States investments, has been to deprive Doman of the benefits of its United States investments, by among other things, substantially depriving Doman of its ability to sell products in the United States softwood lumber market, thereby amounting to an expropriation without compensation, contrary to NAFTA Article 1110.
23. Doman and its United States investments have incurred loss and damage as a result of the Measures and their application, for which Doman seeks compensation.

B. Issues

24. Has the United States breached, among others, Articles 1102, 1103, 1104, 1105 and 1110 of NAFTA Chapter 11?
25. Has Doman incurred loss or damage by reason of or arising out of that breach?
26. If so, what is the compensation to be paid to Doman by reason of or arising out of those breaches?

IV. Relief Sought and Damages Claimed

1. Doman claims damages of not less than \$513 million United States dollars and its costs associated with these proceedings, including all professional fees and disbursements.
2. Such further relief that this tribunal may deem appropriate.
3. Tax consequences of the award to maintain the integrity of the award.

DATE OF ISSUE: May 1, 2002

DELIVERED TO:

The Government of the United States of America
c/o Executive Director, Office of the Legal Advisor
United States Department of State
Room 5519, 2201 C. Street, N.W.
Washington, D.C. 20520

BERARDINO & HARRIS
Per:

Solicitor for the Investor Doman Industries Limited

The Solicitors for the Investor Doman Industries Limited is Berardino & Harris, whose office address and address for delivery is Suite 14, 1075 West Georgia Street, Vancouver, British Columbia, Canada V6E 3C9 Telephone: 604 647 4557.
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