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1	P R O C E E D I N G S
2	PRESIDENT GAILLARD: Good morning, ladies

3 and gentlemen. We resume the hearing in the second  
4 day of the hearing in the arbitration between  
5 Canfor Corporation and the United States of  
6 America. This morning we are going to hear the  
7 reply of the U.S., and then a surreply, and then we  
8 will get into the questions and answers.

9           So, if you are ready to start, I don't  
10 know who starts. I'm sorry, housekeeping matters  
11 first. You should have--on my side I have one--you  
12 should have received now, and I'm afraid that you  
13 have not received it before, the hard copy version  
14 of the transcript of yesterday.

15           Can you confirm that you all have received  
16 it, both parties; right?

17           MR. LANDRY: We have, yes.

18           PRESIDENT GAILLARD: Right.

19           MR. CLODFELTER: As has the United States,  
20 yes.

21           PRESIDENT GAILLARD: Okay. Are there  
22 other housekeeping matters or procedural issues?

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1           MR. LANDRY: One minor issue,  
2 Mr. President. We have sitting at the table with  
3 us, and I wanted to formally introduce for the  
4 record another co-counsel, and his name is Patrick  
5 Macrory from the International Law Institute.

6           PRESIDENT GAILLARD: Welcome.

7           Any other procedural issues?

8           who is going to--Mr. Clodfelter, please,

9 the floor is yours.

10 REPLY STATEMENT BY THE UNITED STATES

11 MR. CLODFELTER: Thank you, Mr. President.

12 I will begin the United States's rebuttal this  
13 morning by making a couple of general points, and  
14 then I will turn the floor over to Ms. Menaker and  
15 Mr. McNeill for additional comments.

16 The two points I would like to make are,  
17 one, what does the nature of the conduct that is  
18 the basis for these claims have to say about the  
19 meaning of Article 1901(3)? And then I would like  
20 to address the general question of the effects of  
21 the parties' respective interpretations of 1901(3).

22 So, first, what does the nature of the

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1 conduct which has been alleged as the basis for  
2 these claims say about the meaning of Article  
3 1901(3)? Yesterday, we heard a great deal of  
4 discussion about object and purpose and how that  
5 may shed light upon the meaning of Article 1901(3).

6 we heard somewhat less discussion about  
7 Article 1901(3)'s context. Mr. McNeill will  
8 address points with respect to both of those  
9 discussions later on.

10 we heard even less about the ordinary  
11 meaning of the text of Article 1901(3), and only at  
12 the end of the day continuing Canfor's practice of  
13 subordinating the actual language of Article  
14 1901(3) to object and purpose and context.

15 Ms. Menaker will address this general  
16 point as well as specific points on the ordinary  
17 meaning of the text in a few minutes.  
18 what we heard very little about, however,  
19 was the actual conduct which was the basis for the  
20 claim before you. Claimant counsel yesterday  
21 pretty much limited itself to broad  
22 characterizations of that conduct. Early on,

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1 Mr. Landry did just about everything he could to  
2 distance Canfor's claims from American antidumping  
3 and countervailing duty law. You will recall that  
4 he rejected the United States's characterization of  
5 the claims as antidumping and countervailing duty  
6 claims, and portrayed them instead as claims for  
7 violations of the substantive obligations of  
8 Chapter 11, referring the Tribunal to paragraph 20  
9 of the Notice of Arbitration and Statement of  
10 Claim, which states that "the claim arises from the  
11 unfair, inequitable, and discriminatory treatment  
12 of the Canadian softwood lumber industry, including  
13 Canfor, or more particularly, Canfor and the  
14 subsidiaries by the Government of the United  
15 States. A review of the treatment received by the  
16 Canadian softwood lumber industry over the past 20  
17 years demonstrates a pattern of conduct designed to  
18 ensure a predetermined, politically motivated, and  
19 results-driven outcome to the investigations  
20 resulting in the various determinations that are at

21 issue in this case."

22 Now, one thing that's clear from that

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1 paragraph is that what Canfor is really trying to  
2 do here is put the entire American antidumping and  
3 countervailing duty system on trial, a system which  
4 the parties, including Canfor's own government,  
5 agreed to leave in place in the middle of this  
6 20-year period of allegedly egregious conduct.

7 But neither Mr. Landry's comments nor  
8 paragraph 20 really accurately describe the conduct  
9 which has been alleged as the basis for this claim.  
10 In order to understand what this claim is about,  
11 you have to look at the detailed obligations set  
12 forth in the remainder of the Statement of Claim.  
13 And if you do and when you do, I'm going to walk  
14 you through some of this. What you will find is  
15 that all of the conduct which Canfor alleges as the  
16 basis for this claim is conduct in the  
17 administration of the U.S. antidumping and  
18 countervailing duty law.

19 We take a minute to run through the  
20 allegations you will find in the remainder of the  
21 Statement of Claim. Paragraph 98 cites the failure  
22 to impose duties on U.S. producers, and entitling

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1 those producers to receive duties collected from  
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2 Canadian products--producers. Paragraph 108, it  
3 cites the six preliminary and final determinations  
4 themselves as the actions which violate Chapter 11.  
5 In paragraphs 110, 116, 120, 123, and 127, it cites  
6 the, quote, actions of the Department of Commerce  
7 in arriving at, unquote, and then each of the  
8 various determinations. Paragraph 124, it cites,  
9 quote, The entire course of conduct of the  
10 Department of Commerce in reaching the final  
11 determination on the countervailing duty petitions,  
12 end quote. Paragraphs 130 and 133, it cites the  
13 imposition of duties. Paragraph 30 also cites,  
14 quote, subjecting Canfor to the antidumping duty  
15 regime, unquote. Paragraphs 134 and 135, various  
16 alleged due process deficiencies in the antidumping  
17 and countervailing duty investigations. Paragraph  
18 137 and 140, failure to establish company-specific  
19 rates for countervailing duties. Paragraph 141,  
20 intention to distribute collected duties to U.S.  
21 producers and so on.

22 Now, before we turn to the main point I

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1 want to make about these specific allegations of  
2 conduct, I want to make two related points. First,  
3 these are the claims for which Canfor gave notice  
4 and submitted to arbitration, and it is on the  
5 basis of these claims that the decision on  
6 jurisdiction must be made. Therefore, even though  
7 we have not heard Canfor's answer yet to the

8 questions posed yesterday and the suggestion made  
9 by you, Mr. President, about whether or not they  
10 were, in their briefs, seeking to amend or  
11 supplement their claims, let me state in advance  
12 that it would be the United States's position to  
13 strongly oppose any such amendment or supplement.

14           Unlike commercial arbitration, the  
15 requirements for noticing and submitting to  
16 arbitration claims under NAFTA are very strict. No  
17 new measures may be cited as the basis for claims  
18 in this case absent compliance with those  
19 requirements.

20           And the second subsidiary point I want to  
21 make about this is that it is very unclear how the  
22 conduct alleged in these paragraphs constitute,

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1 quote, measures, unquote, within the meaning of  
2 Article 1101. First of all, many of them are only  
3 vaguely stated. It could hardly be fairly said to  
4 describe conduct at all.

5           But more importantly, how they fall within  
6 NAFTA's definition of measures and not within  
7 NAFTA's definition of antidumping and  
8 countervailing duty law is extremely unclear, and  
9 Ms. Menaker will address that question a little  
10 later this morning. But, of course, the main point  
11 is that all of the conduct alleged by Canfor as the  
12 basis for its claim is conduct in the  
13 administration of the U.S. antidumping and

14 countervailing duty law. Therefore, the  
15 proposition that Canfor would have you accept in  
16 their interpretation is that even though they claim  
17 that the United States's administration of its  
18 countervailing and antidumping law is subject to  
19 the requirements of Chapter 11, it still cannot be  
20 said that Chapter 11 imposes obligations with  
21 respect to that law.

22           So, even though they maintain that the

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1 United States's administration of its antidumping  
2 and countervailing duty law must comport with the  
3 substantive allegations of Section A of Chapter 11,  
4 and even though the U.S., they say, is bound by  
5 Section B of Chapter 11 to arbitrate claims based  
6 upon the administration of that law, somehow  
7 Chapter 11 does not impose obligations with respect  
8 to that law.

9           Seen in these stark terms, Canfor's  
10 proposition is patently absurd. So, as tempting as  
11 it may be to dwell upon the weeds of the arguments  
12 and parse the terms of the agreement, in its  
13 clearest and starkest terms, Canfor's  
14 interpretation is simply not sustainable.

15           The second general point I would like to  
16 address are the various allegations and questions  
17 that were raised about the effects of the parties'  
18 respective proposed interpretations of Article  
19 1901(3). First of all, let me react to comments by

20 counsel yesterday in the Canfor briefs which  
21 repeatedly allege that the United States's  
22 interpretation would amount to immunizing egregious

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1 conduct that violates customary international law.  
2 And, of course, this is not the case. First of  
3 all, it ignores the fact that the parties chose to  
4 subject such conduct as it relates to antidumping  
5 and countervailing duty law to the special  
6 processes of Chapter 19. That was the parties'  
7 choice. That's how they chose to discipline that  
8 conduct. No way can it be said to immunize it.

9           And even if they cannot bring a claim  
10 under Chapter 11, their government is free to  
11 espouse a claim of violation of customary  
12 international law against the United States  
13 Government, a claim it has not espoused, I might  
14 add, and therefore, it is completely inaccurate to  
15 claim that this conduct is somehow immunized under  
16 the American proposed interpretation.

17           The second--

18           PRESIDENT GAILLARD: Do you mind if we ask  
19 a question for clarification?

20           MR. CLODFELTER: Sure.

21           ARBITRATOR WEILER: Just to understand,  
22 you said that the Government of Canada would be

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1 free to bring a claim against the United States for  
2 violation of customary international outside the  
3 NAFTA?

4 MR. CLODFELTER: Yes.

5 ARBITRATOR WEILER: Outside the NAFTA?

6 MR. CLODFELTER: Yes.

7 ARBITRATOR WEILER: So even though the  
8 NAFTA says that AD and CVD conduct has to be  
9 disputed under Chapter 19, according to your  
10 construction, they would be able to circumvent  
11 that, say we just bring it under public  
12 international law normally? Just to clarify, is  
13 that the position?

14 MR. CLODFELTER: Yes, but I want to  
15 clarify my clarification, if I might. Article  
16 1901(3) says--no other chapter of NAFTA imposes  
17 obligations with respect to antidumping and  
18 countervailing duty law. The right of Canada to  
19 invoke diplomatic protection of Canfor for  
20 violations of customary international law is, of  
21 course, not created by a chapter of NAFTA; so,  
22 there is no inconsistency between that right and

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1 Article 1901(3).

2 PRESIDENT GAILLARD: I think we understand  
3 the position, and we will refrain--I think we  
4 should keep questions until you're done, unless  
5 it's questions of clarification.

6 ARBITRATOR WEILER: I apologize.

7 PRESIDENT GAILLARD: That's fine. We will  
8 ask questions of clarification, but we will keep  
9 the rest because we have other questions, and we  
10 will ask them after you have finished.

11 MR. CLODFELTER: Let me add one other  
12 point to that. Of course, there is no existing  
13 regime for invoking third party dispute resolution  
14 of that claim. It's a matter of diplomatic  
15 protection, formal espousal, and diplomatic  
16 negotiation.

17 The second question relating to the  
18 effects of U.S. interpretation of 1901(3) relates  
19 to the question you posed, Mr. President, about the  
20 risks that by labeling otherwise violative conduct  
21 as antidumping and countervailing duty law, that  
22 somehow a state could shield itself from Chapter 11

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1 claims, and you also mentioned the possibility of  
2 with respect to the use of competition laws and the  
3 implications of Chapter 15.

4 I'll make a number of points, but the  
5 general point is that a party may not avoid Chapter  
6 11 merely by labeling its conduct as antidumping  
7 and countervailing duty law. If a matter is not  
8 genuinely subject to obligations with respect to  
9 AD/CVD law, simply calling it AD/CVD law will not  
10 shield a state from Chapter 11 implications. The  
11 Tribunal is free to look to see if, in fact, it is

12 conduct subject to obligations with respect to  
13 antidumping and countervailing duty laws.

14           So, fraudulent attempts to disguise  
15 otherwise violative behavior cannot be shielded by  
16 1901(3). At the same time, however, if, in fact,  
17 conduct is AD/CVD law or its application, then  
18 Chapter 11 is simply not available. So, even if  
19 the application of antidumping or countervailing  
20 duty law could be said to somehow violate the  
21 substantive standards of Section A, Chapter 11 is  
22 simply not available for it. I have another

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1 comment to say about that in a second. That is  
2 with respect to the third question of the effect of  
3 the U.S. interpretation that was raised by  
4 Professor Weiler, and this is a question of  
5 comparative advantage among various classes of  
6 investors.

7           You asked whether or not the  
8 interpretations would advantage, for example,  
9 non-NAFTA investors who are not party, say, to a  
10 BIT, and in that case clearly there is no advantage  
11 whatsoever. In both cases, both the NAFTA--the  
12 NAFTA party and the non-NAFTA party would have a  
13 right to seek invocation by their government of  
14 diplomatic protection of the claim.

15           In fact in that case, of course, the NAFTA  
16 investor is advantaged because it has recourse to  
17 Chapter 19 whereas the non-NAFTA investor would

18 not.

19           with regard to the non-NAFTA BIT investor,  
20 the first point that I wanted to elaborate a bit  
21 here is it is for us extremely difficult to  
22 conceive of how actions in the area of antidumping

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1 and countervailing duties could amount to a  
2 violation of any of the standards of Chapter 11,  
3 and I don't mean this merely rhetorically. You've  
4 asked for examples. We avidly await them because  
5 it's very difficult to see how this could occur.

6           And as an aside let me just mention that  
7 Canfor's reliance on the ELSI case is, of course,  
8 misplaced because the issue before the ICJ in that  
9 case was not any customary international law,  
10 minimum standard of treatment question. It was the  
11 interpretation of a specific prohibition in a  
12 treaty between the United States and Italy banning  
13 arbitrary conduct. So, its consideration of what  
14 arbitrary means has nothing to do with customary  
15 international law minimum standard of treatment.  
16 It was clearly an interpretive question of a term  
17 in a treaty.

18           And just to clarify, there is no general  
19 prohibition in customary international law for  
20 arbitrary treatment, and we think that's absolutely  
21 clear.

22           Having made those remarks, however, if it

1 were possible for conduct in the area of  
2 antidumping and countervailing duty regimes to  
3 violate the substantive obligations of Chapter 11,  
4 a BIT investor conceivably could invoke the  
5 investor-state dispute provisions of a BIT while a  
6 NAFTA investor would be barred by Article 1901(3).  
7 We do not believe that this is of any import with  
8 respect to the question before you.

9           Mr. Weiler, you indicated you're not sure  
10 it weighs either way in terms of the interpretation  
11 question. We agree because there are many  
12 variations among BITs. It could hardly be said  
13 that the level of protection afforded is equal in  
14 every single BIT. I mean, the clearest example, of  
15 course, is that some of the United States BITs  
16 include protections for and provide investor-state  
17 dispute resolution with respect to violations of  
18 investment agreements. NAFTA does not.

19           So, in that respect, investors from  
20 countries, parties to those kinds of BITs have a  
21 clear advantage over NAFTA investors. We just  
22 don't think it matters, and it has no relationship

1 to the question before you now.

2           Let me close by just making a couple of  
3 comments about the effects of Canfor's proposed  
4 interpretation of 1901(3). It also would have--it

5 would clearly have effects. One clear effect is  
6 that it will put Chapter 11 Tribunals on a  
7 collision course with Chapter 19 tribunals. The  
8 mechanism the parties chose to decide complaints  
9 about antidumping and countervailing duty law, the  
10 risk of conflicting decisions on issues is very  
11 clear. For example, the first antidumping--the  
12 first decision by the antidumping Chapter 19 Panel  
13 rejected Canfor's due process allegations that are  
14 common with the due process allegations here, and  
15 yet they continue making them here. If there is  
16 jurisdiction over this claim, they're going to ask  
17 you to rule those due process violations as  
18 violative of international law.

19           But more importantly, of course, is,  
20 Canfor's interpretation would overturn the  
21 conscious choice of the NAFTA parties to shield  
22 antidumping and countervailing duty law and its

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1 application from the disciplines of other chapters  
2 of NAFTA including Chapter 11, and for this reason  
3 you should reject it.

4           Those are the end of my general remarks.  
5 I would now like to ask you to turn the floor over  
6 to Ms. Menaker.

7           PRESIDENT GAILLARD: Ms. Menaker, you have  
8 the floor.

9           MS. MENAKER: Thank you, Mr. President,  
10 members of the Tribunal, good morning. This

11 morning, I will attempt to heed the Tribunal's  
12 advice, which it gave yesterday, which is that I  
13 will only respond to a few of the points that  
14 Canfor made yesterday that I think warrant  
15 responses. I will not, however, attempt to answer  
16 each and every question raised by the members of  
17 the Tribunal that may have touched upon something  
18 that I spoke about yesterday. That being said, I  
19 think it is a fair presumption on my part that if  
20 those questions remain important in your mind that  
21 you will raise them with us this afternoon.

22           PRESIDENT GAILLARD: That's a fair

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1 presumption. We will raise a number of questions  
2 either later this morning or this afternoon, and if  
3 we have not raised questions on which you wanted to  
4 clarify something or make a point--that goes for  
5 both sides, of course--at the end you will let us  
6 know, so there will be a sort of a general question  
7 should we have forgotten anything you want to say.  
8 So, you will certainly have ample opportunity.

9           And I think it's wise to wait for your  
10 answers when we put it in the context of what our  
11 questions are, because we will have this  
12 opportunity shortly. So, it's a good way to  
13 proceed.

14           MS. MENAKER: Okay. Thank you.

15           Now, I will just make a few brief comments  
16 regarding the ordinary meaning of Article 1901(3).

17 You will recall that yesterday we began our  
18 arguments discussing that ordinary meaning, and any  
19 interpretation of the Treaty must, of course, begin  
20 with the interpretation of the provision of the  
21 text which the Tribunal is, in fact, looking at.  
22 And with due respect, in this regard it is our

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1 submission that Canfor has gone about its task  
2 backwards. It has begun its discussion both in its  
3 written submissions and yesterday in its argument  
4 by focusing on the object and purpose of the Treaty  
5 and then its context, all the while presuming  
6 jurisdiction, and only at the very end discussing  
7 the ordinary meaning of the provision.

8           And we believe that this is of utmost  
9 importance that the Tribunal, in fact, first look  
10 at the provision in question, Article 1901(3), and  
11 determine how that provision ought to be  
12 interpreted in good faith in its context.

13           And I would just direct the Tribunal to  
14 the decision in the Chapter 11 case of ADF versus  
15 the United States, which we cited in our reply, and  
16 I quote from that decision briefly. Quote, we  
17 understand the rules of interpretation found in  
18 customary international law to enjoin us to focus  
19 first on the actual language of the provision being  
20 construed. The object and purpose of the parties  
21 to a Treaty, in agreeing upon particular paragraph  
22 of that treaty are found to be in the first

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1 instance in the words in fact used by the parties  
2 in that paragraph. The general objectives of NAFTA  
3 may frequently cast light on a specific  
4 interpretive issue, but they are not to be regarded  
5 as overriding and superseding the latter.

6           And in effect, we believe that that is  
7 what Canfor's interpretation has done.

8           Now, as Mr. Clodfelter mentioned, he  
9 quoted from paragraph 20 of Canfor's Notice of  
10 Arbitration, and that you may recall is the same  
11 paragraph which I placed on the screen yesterday to  
12 describe Canfor's claims as all directed towards  
13 the conduct of U.S. agencies that adopted the  
14 investigations at issue. And Canfor, indeed,  
15 yesterday characterized that paragraph as the best  
16 summary of its claim.

17           As Mr. Clodfelter just noted, all of the  
18 conduct that Canfor has challenged in its Notice of  
19 Arbitration all concerns the administration and the  
20 application of U.S. antidumping and countervailing  
21 duty law. It is clear in our minds that any  
22 obligation imposed on the United States with

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1 respect to that law would, therefore, violate  
2 Article 1901(3). I spent some time yesterday

3 talking about the definition of the phrase "with  
4 respect to," and I don't intend to repeat those  
5 arguments here. I would just note for the Tribunal  
6 that in response, Canfor conceded that the term  
7 "with respect to" might have a broader meaning  
8 where it is used in other Articles in the NAFTA.  
9 It nevertheless stated quite conclusively that in  
10 Article 1901(3) that same term should be  
11 interpreted more narrowly. However, it gave no  
12 reason for interpreting the term other than in  
13 accordance with its ordinary meaning, and it gave  
14 no reason why the term in Article 1901(3) should  
15 deemed to be more narrow than the term as it is  
16 otherwise used throughout various provisions of the  
17 NAFTA. It is our submission that there is no  
18 plausible reason for giving such an interpretation  
19 to that term.  
20           we would now like to turn to two arguments  
21 that Canfor made yesterday. One was with respect  
22 to the definition of antidumping law and

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1 countervailing duty law, and specifically our  
2 contention that that term that--excuse me, the  
3 antidumping and countervailing duty determinations  
4 at issue here fall within the term are, in fact, an  
5 example of an administrative practice, and  
6 therefore constitute antidumping law and  
7 countervailing duty law. And second, I will make a  
8 few comments on Canfor's remarks concerning the

9 significance of the use of the term "law" in  
10 Article 1901(3) rather than the use of the term  
11 "measure."

12           As I stated yesterday, antidumping and  
13 countervailing duty determinations are an example  
14 of an administrative practice. These  
15 determinations are issued by administrative  
16 agencies and administrative practice is built up by  
17 agency decisions, including issuance of  
18 determinations.

19           Now, there is no definition in Article 19  
20 or anywhere else in the NAFTA of the terms  
21 "administrative practice." There is, however, a  
22 definition of that term in the Canada-U.S. Free

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1 Trade Agreement, albeit in a separate chapter of  
2 that agreement. It's in the financial services  
3 chapter of that agreement, but I will quote that  
4 definition to you because I think it does shed some  
5 light on the common usage of that term.

6           In Article 1706 of that agreement, it  
7 states, and I quote, Administrative practices means  
8 all actions, practices, and procedures by any  
9 Federal agency having regulatory responsibility  
10 over the activities of financial institutions  
11 including, but not limited to, rules, orders,  
12 directives, and approvals.

13           So, in that case, when we are talking  
14 about an agency, a Federal agency that regulates

15 financial institutions, that agency may issue  
16 rules, and it may also grant or deny approvals for  
17 financial institutions to engage in certain  
18 conduct. Those approvals and those denials of  
19 approvals are all considered part of that agency's  
20 administrative practice, as that term is defined.  
21 We think that is the common usage of the term, and  
22 the same could be said here. The Federal agencies

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1 that are involved in administering the United  
2 States's trade laws, they too at times promulgate  
3 rules and regulations; that is part of their  
4 administrative practice. These agencies also issue  
5 and make determinations, and that, too, constitutes  
6 a form of their administrative practice.

7           Now, although we have been looking at the  
8 way in which we have been referring to the sentence  
9 in both Article 1902(1) and 1904(2), and have been  
10 referring to that as a definition of antidumping  
11 and countervailing duty law, I would also note that  
12 that is not a definition that is in the  
13 definitional section of Chapter 19. It is not one  
14 of the terms that is defined in the back of the  
15 chapter as a definition.

16           So, the fact that the term may be used in  
17 a manner in Article 1904(2), for instance, does not  
18 restrict in any way that term's meaning as far as  
19 the general usage is concerned.

20           Now, yesterday, Canfor argued that because

21 Article 1904 directs an agency when issuing its  
22 determinations to look at antidumping and

□

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1 countervailing duty law, and included among the  
2 things that the agencies ought to be looking at,  
3 administrative practices, that the determination  
4 itself could not be considered an administrative  
5 practice. And that is simply incorrect, in our  
6 view.

7           In the United States, the Legislative  
8 Branch adopts statutes, and statutes are clearly  
9 within the definition of law. The Judicial Branch  
10 renders decisions, and judicial precedent is also a  
11 form of law. The Executive Branch's agencies in  
12 this area make determinations. And that is an  
13 administrative practice that is also law.

14           All of these actions taken by any of these  
15 three branches of government impose rules and  
16 requirements on a party, and whether that rule or  
17 requirement is imposed by virtue of a statute, by  
18 virtue of a decision of a court, or by a  
19 determination made by an administrative agency, it  
20 is a legal rule and is encompassed within the term  
21 "law" as that term is used in Article 1901(3).  
22 Determinations in this area have the force of law.

□

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1 They are binding on the parties in that regard.

2           Yesterday, Canfor opined that a  
3 determination might be considered to be an  
4 administrative practice, but only if it were  
5 binding, and again, there is no reason for  
6 importing that requirement into the definition of  
7 an administrative practice. When--the fact is,  
8 though, that when issuing determinations, the  
9 agencies, the agencies in the United States that do  
10 this, the Department of Commerce and the  
11 International Trade Commission, do take their past  
12 administrative practice into consideration, and  
13 that practice is embodied in the determinations  
14 that they have previously issued. They are  
15 supposed to apply the same methodologies in one  
16 investigation that they have applied in another,  
17 and, in fact, not doing so may lead to a ground for  
18 a challenge of a particular determination.

19           So, although in some manner of speaking,  
20 the determinations may not have the binding effect  
21 of a judicial decision that may be binding on a  
22 particular court, they are certainly looked to as

□

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1 precedent in some regard, and they are followed,  
2 and that is, in fact, how the administrative  
3 practice is developed within those agencies.

4           I would now like to turn to the argument  
5 that Canfor made regarding the import of the fact  
6 that the word antidumping and countervailing duty  
7 law is used in Article 1901(3) rather than the term

8 antidumping or countervailing duty measure.

9           The first thing that I would direct the  
10 Tribunal's attention to is the fact that the  
11 definition of measure that is set forth in  
12 Article 201 of the NAFTA is not an exhaustive  
13 definition. It is inclusive. It states a measure  
14 includes any law, regulation, procedure,  
15 requirement, or practice.

16           The same is true for the definition of  
17 antidumping law and countervailing duty law  
18 contained in Article 1902(1). That also says  
19 antidumping law and countervailing duty law  
20 include, as appropriate for each party.

21           Neither of those definitions are  
22 exhaustive definitions. They are both open-ended.

□

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1 In fact, in other places the NAFTA did include  
2 exhaustive definitions when what they meant to say  
3 is a certain term includes these things and only  
4 these things. And as an example, I would direct  
5 the Tribunal's attention to the country-specific  
6 determinations--definitions, excuse me--in Chapter  
7 19 of the NAFTA, whereby the parties clearly say,  
8 for example, "antidumping statute means" and "a  
9 final determination means." Those are exhaustive  
10 definitions.

11           Similarly, in the definition section in  
12 Chapter 11, one can see a difference drawn between  
13 an open-ended definition and a closed set--a closed

14 definition. You have the definition of enterprise  
15 of a party as a closed definition. Enterprise of a  
16 party means an enterprise constituted or organized  
17 under the law of a party, et cetera, whereas an  
18 equity or a debt security, the definition there is  
19 an open-ended definition it. It says, includes.

20 PRESIDENT GAILLARD: Excuse me, you're  
21 quoting from which provision?

22 MS. MENAKER: Excuse me, I was quoting

□

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1 from some of the definitional section in Chapter  
2 11, 1139. There are a number of other definitions  
3 there.

4 PRESIDENT GAILLARD: Thank you.

5 MS. MENAKER: Now, Canfor has stated in a  
6 conclusory manner that if the parties wanted  
7 covered what the United States claims Article  
8 1901(3) to cover, they ought to have used the word  
9 measure, but it offers no support for that  
10 argument. As Mr. Clodfelter mentioned, in order to  
11 bring a Chapter 11 claim, a claimant must challenge  
12 a measure of another party. If you take a look at  
13 the scope and coverage of Chapter 11 in Article  
14 1101, it says that this chapter applies to measures  
15 adopted or maintained by a party.

16 So, what is the measure that Canfor is  
17 challenging here? If you turn once again to the  
18 definition of measure in Article 201, you will see  
19 that that definition is almost identical to the

20 definition given of antidumping or countervailing  
21 duty law that is set forth in Article 1902(1).

22 Now, if it is Canfor's position that they

□

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1 are challenging the United States's antidumping or  
2 countervailing duty law and measure includes any  
3 law and therefore that is the measure they are  
4 challenging, then clearly what they are saying is  
5 law, in that sense, includes the application and  
6 the administration of that law, and they,  
7 therefore, cannot contend that the definition of  
8 antidumping law or countervailing duty law does not  
9 similarly encompass the administration and  
10 application of the law.

11 Or if, on the other hand, if they are  
12 contending that the conduct that they are  
13 challenging in this Chapter 11 proceeding is a  
14 practice, and therefore that constitutes a measure,  
15 Canfor has not given any plausible reason why that  
16 practice is not an administrative practice since  
17 the conduct that has been taken has been taken by  
18 the administrative agencies in this case.

19 So, we see no distinction between a  
20 practice as defined as one of the definitions of a  
21 measure given in Article 201 and the administrative  
22 practice which is a definition of antidumping and

□

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1 countervailing duty law in Article 1902(1).

2           So, it's clear to the extent that Canfor  
3 is challenging a measure in this Chapter 11  
4 proceeding, we see no basis on which it can  
5 conclude that it has identified a measure and yet  
6 can claim that that measure does not fall within  
7 the definition of antidumping law or countervailing  
8 duty law as set forth in Article 1902(1).

9           Canfor yesterday questioned the relevance  
10 of the Chapter 11 UPS versus Canada case that the  
11 United States has relied upon. Its relevance lies  
12 in the fact that UPS made the same argument that  
13 Canfor is making here. In that case, UPS argued  
14 that Article 2103 excluded only challenges to a tax  
15 law itself. UPS claimed that because it was  
16 challenging the manner in which the tax law was  
17 applied to it, Article 2103 didn't apply.

18           Now, yesterday Canfor said that this  
19 Tribunal could not read anything into that decision  
20 because the claim was abandoned by UPS, and the  
21 issue was never argued in the case. In our view  
22 that's simply incorrect. This issue was, indeed,

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1 argued in the case. It was not argued orally, but  
2 we have submitted with our written submissions some  
3 of the pleadings that have been made in that case,  
4 and you will see that that issue was, indeed,  
5 briefed. The United States, which was not a party

6 to that proceeding, did make a submission, pursuant  
7 to Article 1128 in that case on this very issue,  
8 and UPS responded in writing to the United States's  
9 submission.

10 I would direct the Tribunal's attention to  
11 UPS's response in that regard because it is  
12 remarkably similar to Canfor's position in this  
13 case, and I will just quote from that. UPS stated,  
14 and I quote, If the NAFTA parties had intended that  
15 the failure to apply their tax laws would  
16 constitute a taxation measure, certainly the NAFTA  
17 parties would have made this explicit in the NAFTA,  
18 end quote.

19 It went on to say, quote, a review of the  
20 merits is required in the present circumstances.  
21 To permit the Tribunal to determine whether the  
22 failure in question is a taxation failure or a more

□

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1 general action that is discriminatory, unfair, or  
2 unequal. Moreover, it would be contrary to the  
3 objectives of NAFTA to permit a government to style  
4 a measure as a taxation measure in order to avoid  
5 an impartial and independent review.

6 It then stated later that dispute  
7 settlement, and I quote, dispute settlement is a  
8 basic right under the NAFTA, and so restrictions on  
9 this right should not be inferred unless they have  
10 been stated in clear and unambiguous language.

11 It continued that, quote, The term

12 taxation measures used in NAFTA Article 11--excuse  
13 me, Article 2103--does not clearly and  
14 unambiguously exclude from dispute settlement under  
15 NAFTA Chapter 11 a claim made under NAFTA Article  
16 1105 simply because the wrongful treatment of the  
17 investor takes place in a factual context that  
18 involves taxation. There is no provision of the  
19 NAFTA that clearly and unambiguously states that  
20 unfair and inequitable treatment that would  
21 otherwise be actionable under NAFTA Chapter 11 is  
22 unactionable merely because--by virtue of a

□

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1 taxation dimension to the facts of such  
2 mistreatment.

3           Now, it is true that UPS abandoned its  
4 argument at the oral argument, but the UPS case is  
5 still ongoing. It has been ongoing for a long  
6 time. It is hardly a very hard-fought case. There  
7 has been extensive discovery in that case, and we  
8 submit a claimant doesn't abandon a good argument.  
9 That argument was abandoned because it was clearly  
10 precluded. The Tribunal clearly had no  
11 jurisdiction over the 1105 claim in that case, and  
12 this is made clear by the Tribunal's remarks in its  
13 decision on jurisdiction.

14           The Tribunal noted that the parties had  
15 agreed that that claim would be withdrawn, and they  
16 said, quote, we simply note that while Article 2103  
17 provides that nothing in the agreement applies to

18 taxation measures, one of the limits to that  
19 exception is that Article 1102, but not Article  
20 1105, does apply to taxation measures, with  
21 exceptions that are not relevant.

22           Accordingly, the position taken by the two

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1 parties, the position that was taken by the two  
2 parties is the agreement to withdraw that claim  
3 from the arbitration, appears to conform exactly  
4 with the agreement. So, that Tribunal agreed that  
5 the 1105 claim was not within their jurisdiction.

6           Now, ironically Canfor points to the  
7 provision at issue in the UPS claim--the Article  
8 11--2103 as an example of a provision that clearly  
9 precludes jurisdiction over a certain subject  
10 matter. It urges this Tribunal to reject our  
11 interpretation of 1901(3) because it says we should  
12 have used the term antidumping measure or  
13 countervailing duty measure as the drafters did in  
14 Article 2103. However, in the UPS claim, the  
15 claimant argued that that was not clear, and it was  
16 not unambiguous. In fact, they said, if the  
17 drafters had wanted to exclude that type of claim,  
18 they could have done so clearly and unambiguously,  
19 and Article 2103 does not do that. And as you  
20 know, Canfor's counsel was UPS's counsel in that  
21 case.

22           So, we believe it is just simply

1 disingenuous for a claimant to simply argue that  
2 Article 1901(3) is not a clear exception, and that  
3 the exception should have been drafted in the  
4 manner of Article 2103. Of course, Canfor here  
5 does not have the flexibility that UPS had in its  
6 other claim, because UPS could abandon the claim  
7 that was clearly barred by the clear jurisdictional  
8 prohibition in Article 2103 and still have some of  
9 its claims survive. Canfor cannot do that here  
10 because Article 1901(3), unlike Article 2103, does  
11 not contain any exceptions. It bars all  
12 obligations with respect to antidumping and  
13 countervailing duty law.

14 I just want to make one final point. This  
15 is regarding Canfor's interpretation of Article  
16 1901(3). Canfor has said repeatedly that the sole  
17 function of Article 1901(3) is to prohibit the  
18 imposition of obligations on a party to change or  
19 modify or amend its antidumping or countervailing  
20 duty law, that that is its sole purpose.

21 Canfor here has brought a claim under  
22 Article 1105, and as we all know, a Chapter 11

1 Tribunal does not have the authority to order a  
2 party to change or rescind its law. It may only  
3 order monetary damages as a remedy.

4 So, under Canfor's theory, Canfor or any

5 private claimant could challenge the law itself,  
6 could make a challenge to the actual statute, and  
7 claim that the law, the statute itself, violates  
8 Article 1105. If that were before a Chapter 11  
9 Tribunal, and the Chapter 11 Tribunal agreed, it  
10 would find that the state was liable, and it would  
11 make an award of damages.

12           The result of that would not be the  
13 imposition of an obligation on a party to change  
14 its law. However, the clear result of that would  
15 be an imposition on a party with respect to that  
16 law. The obligation, obviously they are having to  
17 pay monetary damages because that law was found to  
18 have violated the NAFTA. There is no reading of  
19 Article 1901(3) where one could find that an  
20 obligation to pay monetary damages because your law  
21 violated the NAFTA does not impose a requirement on  
22 a party with respect to that law. And Canfor's

□

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1 interpretation of Article 1901(3) falls for this  
2 reason alone.

3           Now, yesterday Professor Howse seemed to  
4 understand that the position that this put Canfor's  
5 argument in, that this placed Canfor's argument at  
6 somewhat--posed a problem for Canfor's argument.  
7 Professor Howse opined that if the claim was before  
8 a Chapter 11 Tribunal, if the claim was that the  
9 law itself violated Chapter 11, Article 1901(3)  
10 might have some effect in that case because Chapter

11 11, in fact, would be imposing an obligation with  
12 respect to the law.

13           Now, in saying that, Canfor itself  
14 admitted that 1901(3) cannot simply prevent the  
15 imposition of an obligation on a party to change or  
16 modify or amend its law. Their interpretation,  
17 their own expert has, in essence, disavowed their  
18 interpretation.

19           Now, I would just like to step back from  
20 this a moment because yesterday Professor weiler  
21 asked Professor Howse a question. Professor weiler  
22 asked if a determination was found to have been

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1 issued in accordance with U.S. law, it was found to  
2 be entirely proper and, in fact, it was challenged  
3 before a Chapter 19 Panel, and that panel found  
4 that it was properly issued, and there was nothing  
5 wrong with the Chapter 19 process, you said, well,  
6 if a Chapter 11 Panel nevertheless found that that  
7 law violated international law standards, wouldn't  
8 this be imposing an obligation on a party, in  
9 essence, to change its law?

10           And the practical effect might be that  
11 even though the Chapter 11 Tribunal can't order a  
12 party to change its law, the Chapter 11 Tribunal  
13 would have issued a decision that the law violated  
14 customary international law or international legal  
15 obligations, and a state might feel that it had an  
16 obligation to bring its law into compliance with

17 customary international law. So, the practical  
18 effect might be that the state actually did change  
19 its law.

20 But even if that was not the practical  
21 effect and the effect was only that the state paid  
22 damages, that still would be no less an imposition

□

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1 on a party with respect to its antidumping law.

2 To step back even further, even if that  
3 Chapter 11 Tribunal found in the end that there was  
4 no liability, that no damage award should be made,  
5 simply obligating the party to arbitrate that  
6 dispute in an investor-state arbitration is  
7 imposing an obligation on that party with respect  
8 to that antidumping and countervailing duty law.

9 So, with that, I will end my remarks,  
10 unless the Tribunal has further questions, and if  
11 not, I would ask that it call upon my colleague,  
12 Mark McNeill, to make some additional comments  
13 regarding the NAFTA's context and object and  
14 purpose.

15 PRESIDENT GAILLARD: We do have questions.  
16 We do prefer to keep them for a later stage, maybe  
17 at least when you're done with your oral  
18 presentation. So, Mr. McNeill, you have the floor.

19 MR. MCNEILL: Good morning, Mr. President,  
20 members of the Tribunal. I will make some very  
21 brief comments this morning about Article 1901(3)'s  
22 context and the object and purpose of the NAFTA,

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1 and my comments are in response to issues raised by  
2 Canfor's counsel yesterday as well as some issues  
3 raised by the Tribunal.

4           Specifically, I will address the issue of  
5 double recovery, parallel proceedings, Article  
6 1121, object and purpose, and effective dispute  
7 resolution.

8           First, there was discussion yesterday  
9 about the issue of the risk of double recovery  
10 between this arbitration and the Chapter 19  
11 proceedings which are ongoing, and Professor Weiler  
12 raised the question of the remedies that are  
13 available under Chapter 11 and Chapter 19.

14           Now, Canfor responded to the inquiry about  
15 the potential for double recovery by giving an oral  
16 covenant that if it obtained a refund of some or  
17 all of its \$500 million or so of duties that it has  
18 paid in the Chapter 19 proceeding, that it would,  
19 quote, withdraw the claim, end quote. And the  
20 reference to the transcript is at page 225, line  
21 16.

22           with respect, Canfor misses the point.

□

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1 The point is that Canfor is seeking recovery of the  
2 same duties with interest in both proceedings. The

3 possibility that double recovery could ensue in  
4 both fora is incompatible with the NAFTA's  
5 objective of creating effective procedures for the  
6 resolution of disputes. It is additional evidence  
7 as well suggesting the parties did not intend or  
8 consent to subject themselves to the burden of  
9 defending multiple actions with respect to the same  
10 measures and face the potential of double recovery.

11 Now, Canfor appears to concede the  
12 possibility of double recovery, or it would not  
13 have asked for the same refund in their two  
14 proceedings. Similarly, Canfor would not have made  
15 a promise yesterday to withdraw this claim in the  
16 event that it obtained the relief it seeks in  
17 Chapter 19.

18 Now, in terms of the remedies available  
19 under Chapter 11 and 19, in Chapter 11 it is  
20 undisputed that a tribunal can award damages. With  
21 respect to Chapter 19, as Mr. Clodfelter explained  
22 in his presentation on the facts yesterday,

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1 binational panels are authorized to uphold  
2 determinations or remand them, quote, for actions  
3 not inconsistent with the panel's decision.

4 Now, Article 1904, paragraph 14,  
5 subparagraph (a), expressly contemplates the  
6 possibility that the effect of a binational panel's  
7 ruling is the refund of duties. It provides that,  
8 quote, Each party shall amend its statutes or

9 regulations to ensure that existing procedures  
10 concerning the refund with interest of antidumping  
11 or countervailing duties operate to give effect to  
12 a final panel decision that a refund is due.

13           Now, in the administrative review, what is  
14 called the assessment phase of a Chapter 19  
15 proceeding, the effect of a Chapter 19 Panel  
16 decision under existing municipal law, indeed, can  
17 result in the refund of part or all of duties paid,  
18 plus interest.

19           Now, ironically, yesterday, Canfor  
20 referred to the Tribunal's decision in the  
21 Occidental Exploration versus Ecuador case. The  
22 transcript reference is page 227. In that case,

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1 the Tribunal's solution to the problem of double  
2 recovery was to enjoin the other proceedings to  
3 avoid the risk of double recovery, the very  
4 solution that the United States advocates here.

5           The Tribunal stated, and this is at page  
6 73, paragraph 10, that, quote, In order to  
7 forestall any possibility of double recovery, the  
8 Tribunal directs the claimant to cease and desist  
9 from any local court action, administrative  
10 proceedings, or other actions seeking refund of  
11 that paid, and holds that any and all such actions  
12 and proceedings shall have no legal effect.

13           I will now turn to the issue of parallel  
14 proceedings. Yesterday, Canfor discussed at length

15 the SGS versus Pakistan case and other similar  
16 cases involving parallel claims under a BIT, and  
17 before domestic courts. In reliance on those  
18 cases, Canfor argues that the proceedings under  
19 Chapter 19 do not deprive this Tribunal of  
20 jurisdiction because the Chapter 19 proceedings  
21 involved different causes of action and different  
22 laws. Canfor's reliance on this line of cases is

□

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1 misplaced.

2           First, Canfor's argument is backwards. It  
3 assumes the very issue before this Tribunal, namely  
4 whether there is jurisdiction under Chapter 11 to  
5 begin with, and then it argues that jurisdiction  
6 should not be divested by the fact that there are  
7 ongoing proceedings under Chapter 19.

8           The issue here is entirely different from  
9 the SGS case. The issue here is whether the  
10 instrument under which Canfor asserts--invests the  
11 Tribunal with jurisdiction to begin with, not  
12 whether the jurisdiction is divested by an entirely  
13 different instrument.

14           The United States has never contended that  
15 this Tribunal lacks jurisdiction because of the  
16 parallel proceedings under Chapter 19. Rather, in  
17 our submissions we addressed the duplicative  
18 proceedings in Chapter 19 as an issue of context.  
19 We demonstrated the ordinary meaning of Article  
20 1901(3) was consistent with the Treaty's object and

21 purpose of promoting effective dispute resolution.  
22 And we demonstrated the parallel

□

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1 proceedings by the same parties under the same  
2 Treaty with respect to the same measures, seeking  
3 the same damages was not consistent with that  
4 objective.

5 I will now briefly address an issue raised  
6 by Canfor concerning the waiver requirement under  
7 Article 1121 of the NAFTA. Now, Canfor argued  
8 yesterday that Article 1121 actually contemplates  
9 duplicative proceedings under Chapters 11 and 19.  
10 Article 1121 exempts from the waiver requirement,  
11 quote, proceedings for injunctive, declaratory or  
12 other extraordinary relief not involving the  
13 payment of damages before an administrative  
14 tribunal or a court under the law of the disputing  
15 party.

16 Now, according to Canfor, the relief  
17 available in Chapter 19 is akin to extraordinary  
18 relief, not involving the payment of damages. In  
19 its claims and under that chapter, therefore, fit  
20 within the exception. This argument is without  
21 merit. The exception to the waiver requirement  
22 under Article 1121 does not apply to Chapter 19

□

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1 proceedings. It applies, quote, to administrative  
Page 43

2 tribunals or courts. The Chapter 19 Panels are  
3 neither administrative tribunals nor courts. Had  
4 the parties intended to include Chapter 19  
5 binational panels in that exception, Article 1121  
6 would say so.

7           Moreover, since Canfor seeks the same  
8 recovery in Chapter 19 as it seeks here, reading  
9 the binational panels to be within that exception  
10 would be directly contrary to the very purpose of  
11 Article 1121 which, according to the Waste  
12 Management Tribunal, was to avoid claims that  
13 present the risk of double recovery.

14           I will turn now to the issue of object and  
15 purpose. Yesterday, Canfor again accused the  
16 United States of focusing narrowly on only one  
17 object in the NAFTA, and the transcript reference  
18 is at page 129 beginning on line five.

19           Canfor argues that all of the objectives  
20 of the Treaty infuse all of the provisions of the  
21 NAFTA, and the particular objectives cannot be  
22 assigned to particular chapters or particular

□

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1 provisions. And Canfor read to you a long list of  
2 objectives in the preamble and in Article 102.

3           Canfor contends that these objectives  
4 somehow support its interpretation of Article  
5 1901(3), but the big question is left unanswered by  
6 Canfor: How would allowing Canfor a second forum,  
7 the wrong forum, to bring its claims promote the

8 Treaty's goal of free trade? It wouldn't.

9           Mr. Landry also made a point of reading  
10 two of the objectives set forth in Chapter 19  
11 itself. They are set forth in Article  
12 1902(2)(d)(ii). Now, I would like to revisit that  
13 provision because I think it informs the debate.

14           It provides that the object and purpose of  
15 the agreement is to establish fair and predictable  
16 conditions for the liberalization of trade, quote,  
17 while maintaining effective and fair disciplines on  
18 unfair trade practices, end quote.

19           Now, that part of the context, that part  
20 of the object and purpose in Chapter 19 contradicts  
21 Canfor's argument that the NAFTA parties consented  
22 to submit antidumping and countervailing duty

□

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1 claims to the investment chapter. It would  
2 arguably compromise the ability of the NAFTA  
3 parties to maintain effective disciplines on trade  
4 if their antidumping and countervailing duty  
5 determinations were subject to de novo review by  
6 arbitration panels under Chapter 11. That is not  
7 the standard that applies in domestic courts of the  
8 parties, and it is not the standard that the  
9 parties intended to have apply to their antidumping  
10 and countervailing determinations in subjecting  
11 those determinations to review under the NAFTA.

12           Finally, I'll briefly address one issue  
13 relating to the effective resolution of disputes.

14 We heard from Canfor's counsel more than once  
15 yesterday that Chapter 19 Panels have--that Chapter  
16 19 Panel proceedings have been ineffective and that  
17 an effective resolution of Canfor's grievances  
18 demand that it have access to Chapter 11.

19           Mr. Howse, Professor Howse, excuse me, if  
20 I understood him correctly, intimated that Canfor  
21 commenced this arbitration because it was not  
22 confident that it could compel the refund of duties

□

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1 that it seeks in Chapter 19. He stated, quote, we  
2 just don't see that we have another remedy  
3 available under the NAFTA, so we are here today  
4 making a claim that is under Chapter 11. And the  
5 transcript reference is page 230, lines six through  
6 13.

7           Now, this is a post hoc interpretation of  
8 Article 1901(3). Recounting subsequent events in  
9 the Chapter 19 proceedings does not provide  
10 evidence of what the parties intended in drafting  
11 Article 1901(3). It is irrelevant to the  
12 interpretive exercise before this Tribunal today.

13           Moreover, it is based on a faulty factual  
14 premise; namely, that the Chapter 19 proceedings  
15 have been ineffective. The Chapter 19 Panel issued  
16 a--a Chapter 19 Panel issued a third remand to the  
17 International Trade Commission in the material  
18 injury proceeding on August 31, 2004.

19           Following the third remand, the

20 International Trade Commission issued what it  
21 perceived to be the only determination consistent  
22 with the panel's decision, which was a negative

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1 threat finding. The Chapter 19 Panel's material  
2 injury decision is now the subject of an  
3 extraordinary challenge under Annex 1904(13) of the  
4 NAFTA.

5 So, the proceedings in Chapter 19 are  
6 ongoing, and they are now the subject of an  
7 extraordinary challenge, and it's impossible to say  
8 that those proceedings have been ineffective.

9 That concludes my remarks. I'm pleased to  
10 take any questions from the Tribunal.

11 PRESIDENT GAILLARD: Thank you. Does that  
12 conclude the presentation, the reply on the U.S.  
13 side?

14 MR. CLODFELTER: Yes, it does,  
15 Mr. President.

16 PRESIDENT GAILLARD: Thank you.  
17 Mr. Landry and Mr. Mitchell, do you want to pause  
18 for 10 minutes or something so that you can tell us  
19 how you want to proceed, you want to answer, and  
20 what kind of time frame have you in mind?

21 MR. LANDRY: Mr. President, I think what  
22 we would like to do is take a break to--excuse me.

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1 (Pause.)

2 MR. LANDRY: Mr. President, just, we would  
3 like to take a break at a certain point in time to  
4 basically just collect our thoughts in terms of the  
5 way we would respond. Much of the presentation  
6 made by the United States is effectively reargument  
7 of what we talked about yesterday, so we will not  
8 be taking a lengthy time, but we wanted to just  
9 take a little bit of time to deal with some of  
10 those, but we do have a bit of a timing problem  
11 with Professor Howse. There are a couple of issues  
12 that Professor Howse would like to respond to, and  
13 instead of taking a break for that, we would prefer  
14 that he now respond to those issues, if that  
15 pleases the Tribunal.

16 PRESIDENT GAILLARD: It's really up to you  
17 to organize who speaks, and you have certainly  
18 equal opportunity for the surreply, so you can  
19 certainly have Professor Howse start answering now,  
20 and then we could have a 15-minute break, if that's  
21 suitable, and then you can finish your argument.

22 For the record, we have questions, but

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1 since you may well answer some, or start the debate  
2 on some of the issues, I'd rather wait for your  
3 answer before we ask the questions we have, so that  
4 we can start the Q and A part of the hearing.

5 MR. LANDRY: If I can just have one minute

6 to speak to Professor Howse, and then we will go  
7 right into his response, and then we will take a 15  
8 or 20 minute break, if that's--

9 PRESIDENT GAILLARD: Please do.

10 (Pause.)

11 PRESIDENT GAILLARD: So, we can go back to  
12 the record.

13 Mr. Landry?

14 MR. LANDRY: Yes, Mr. President, Professor  
15 Howse will respond to I believe three points that  
16 were raised this morning in reply, and then we  
17 would request a bit of a break before the balance  
18 of the reply.

19 PRESIDENT GAILLARD: As agreed, yes.

20 SURREPLY STATEMENT BY THE CLAIMANT

21 PROFESSOR HOWSE: Mr. President, I believe  
22 that on several points which have been raised this

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1 morning by the United States, it appears that the  
2 United States has misunderstood some of the  
3 submissions or responses I made to this Tribunal  
4 yesterday, and I would very, very quickly like to  
5 return to those specific points that were made this  
6 morning in connection to what I said yesterday.

7 First of all, I want to emphasize that  
8 Canfor's claim is not that 1901(3) is meaningless  
9 or that it doesn't have some application. As  
10 Mr. Mitchell argued yesterday, it's an interpretive  
11 provision. The word "construe" is there, and it

12 does impose an obligation on a Treaty interpreter  
13 interpreting Chapter 11 just as it imposes an  
14 obligation on a Treaty interpreter interpreting any  
15 other chapter of NAFTA except 19; right--

16           So, the question is what of a situation  
17 where the violation of the standards of Chapter 11  
18 flowed inexorably or mandatorily from the law  
19 itself as opposed to its administration? In that  
20 case, I opined, since 1901(3) is an interpretive  
21 provision, and we are not suggesting it's a nullity  
22 by any means, in adjudicating the merits the

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1 Tribunal might have to refer to 1901(3) if Canfor  
2 were deemed to be making any claim that suggests  
3 that it's the law itself within the meaning of  
4 Chapter 19 that is contrary to the standards of  
5 Chapter 11.

6           Now, my colleagues will explain the way in  
7 which the Byrd Amendment is relevant here, and as  
8 they'll explain and have alluded to already, and  
9 I'm sure we will get into this in the questioning,  
10 the argument of Canfor is not that the Byrd  
11 Amendment is, per se, violative of the standards in  
12 Chapter 11 simply as a piece of legislation on its  
13 face. The Byrd Amendment is relevant because it is  
14 part of the background to conduct surrounding the  
15 initiation of this case and the nature of the  
16 petition and the degree of industry support behind  
17 it, but I think that has to be addressed when we

18 deal with the questions on the Byrd Amendment.

19           So, I simply want to make clear that our  
20 claims are based upon the administration of the  
21 law, not the law itself. On the merits, should the  
22 Tribunal have concerns about 1901(3) as an

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1 interpretive provision, then we will address those  
2 concerns at length and show how our claims flow  
3 from administration and not from the face of the  
4 law. But what we are addressing in this proceeding  
5 is the United States's motion, its submission that  
6 1901(3) is a complete jurisdictional bar to any  
7 claim under Chapter 11 of any kind, even one that  
8 is a claim that arises out of conduct in the  
9 administration of law as opposed to the law itself.

10           And a second point that I want to deal  
11 with is the issue of effective remedy. I want to  
12 make it clear that Canfor's claim is not based  
13 simply on--nor can it be satisfied--by relief in  
14 the form of refund of duties. That would be part  
15 of it, but the claim relates to damages to Canfor's  
16 investment that would not be fully made whole  
17 simply by the return of duties. And again, that's  
18 something that will be briefed and argued in detail  
19 at the proper phase of the proceeding.

20           So, even if--even if somehow Chapter 19  
21 provided an effective remedy for the return of  
22 duties, it would still not provide reparations for

1 other damage that Canfor has suffered to its  
2 business in the United States in consequence of the  
3 conduct complained of.

4           The third point concerns the question of  
5 whether a Chapter 19 binational panel is an  
6 administrative tribunal or court for purposes of  
7 the provisions in Chapter 11 that relate to  
8 waivers. Again, we have raised these provisions as  
9 part of an overall interpretation. We are not  
10 pleading them in this case with respect to the  
11 issue of the validity of the waiver because that  
12 has been explicitly removed, as we understand it,  
13 from the ambit of this proceeding. And clearly, to  
14 the extent that the United States has reserved that  
15 as an issue that it might plead on the merits, we  
16 may have to get into it in more detail.

17           Very briefly, though, it is our view that  
18 a Chapter 19 panel is an administrative tribunal or  
19 court for purposes of this provision, and again, it  
20 needs to be when the issue of the waiver is  
21 actually argued, if it's argued by the United  
22 States, we will brief it thoroughly. This relates

1 to certain considerations of municipal law,  
2 including constitutional law where, if a situation  
3 arose where a Chapter 19 Panel could not be  
4 considered, for example, a court, there might be

5 serious constitutional issues, and at least the  
6 U.S. municipal system as to the possibility of  
7 enforcing a waiver because you would be in effect  
8 waiving possibly any possibility of judicial  
9 review.

10           But again, this relates to municipal law  
11 issues, and if the substantive issue of the waiver  
12 were before this proceeding, we would explain in  
13 some detail the importance for purposes of this  
14 provision of NAFTA a Chapter 19 binational panel  
15 being deemed a court.

16           PRESIDENT GAILLARD: On this point,  
17 Mr. Howse, you--and I confirm what I said at the  
18 outset of this hearing, that we consider this issue  
19 not to be part of this stage, but since the U.S.  
20 alluded to it, you may allude to it as well, just  
21 for us to understand what's in the mind of the  
22 parties; but we are not going to decide on this at

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1 this stage--you are saying that it is possible you  
2 may have a possible argument that the waiver would  
3 be against the law in certain respects, so it would  
4 not be doable. It would not be possible to waive  
5 whatever rights you would have to waive to satisfy  
6 the NAFTA requirements as to waiver--or just in a  
7 nutshell, could you elaborate a little bit on that.

8           PROFESSOR HOWSE: Mr. President, I have to  
9 be careful here because I'm not an expert in U.S.  
10 constitutional law, but I have followed the

11 constitutional issues in both Canadian and American  
12 law that have arisen around certain provisions of  
13 NAFTA, and constitutional issues arose and were  
14 widely debated in the United States concerning the  
15 feature of NAFTA that would replace domestic  
16 judicial review with binational panel review, in  
17 effect, as we've already heard, cutting off access  
18 to the U.S. courts altogether in these matters.

19           And my understanding is that that, under  
20 U.S. constitutional law, would have raised issues  
21 about guarantees of review by a court that are  
22 understood to be in the Constitution and not

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1 subject to being taken away through this kind of  
2 agreement.

3           But, however, if one were to view a  
4 binational panel as having the character of a court  
5 for purposes--for constitutional purposes, that  
6 would be one way of dealing with the constitutional  
7 issue, to say that what's meant by court in the  
8 constitutional context goes to an independent  
9 process which could include a tribunal of this  
10 nature, but again, this will need to be considered  
11 in some depth when and if the meaning of the waiver  
12 issue is pleaded, and I really do not wish to be  
13 taken to giving an expert judgment as to the issue  
14 in U.S. constitutional law. Some of the greatest  
15 U.S. constitutional scholars have, in fact, debated  
16 this. I just want to signal that the possibility

17 of the use of the word "court" here may relate to  
18 some municipal law issues.

19           PRESIDENT GAILLARD: Thank you, Professor  
20 Howse. In fact, my question may be unfair because  
21 at the same time I say that we are not going to  
22 decide on this at this stage. It is not ripe. It

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1 has not been briefed. So, I just wanted to get a  
2 flavor of what you had in mind, but I don't think  
3 we should pursue the debate on this particular  
4 aspect. If we need to, and we will get there, we  
5 will give the parties an opportunity to fully  
6 express their views, but now that I have engaged  
7 into that debate a little too much, now maybe the  
8 other side would like to say a word, but frankly be  
9 short because I don't think it's relevant, just for  
10 the curiosity of the Tribunal. I confirm for the  
11 record that we are not going to decide that at this  
12 stage as agreed by the parties earlier. So, it's  
13 only for my curiosity, I would say, that I ask the  
14 question, and to know what's coming up.

15           Ms. Menaker, if you want to say a word on  
16 this.

17           MS. MENAKER: May I just as a point of  
18 clarification.

19           PRESIDENT GAILLARD: Clarification: I  
20 don't take that as expert testimony or anything  
21 like that. It was a personal view, and I don't  
22 think we should really make more of it.

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1           MR. LANDRY: Mr. President, hopefully that  
2 maybe that we can stop the debate by this. It is  
3 not before the Tribunal, as Mr. President has said.  
4 Take it as a given that if this matter is briefed,  
5 the interpretation of that provision within the  
6 agreement by Canfor will be that, indeed, the  
7 binational panel is an administrative Tribunal or  
8 court as 1121 envisages it. That will have to be  
9 briefed, obviously. It sounds like the U.S. is  
10 taking the position it is not, but that's not  
11 before us.

12           PRESIDENT GAILLARD: That is clear to me.  
13 I understand your position, and I also confirm that  
14 this is not ripe for determination at this stage.

15           Ms. Menaker.

16           MS. MENAKER: I would like to remark  
17 because our understanding does not comport with  
18 that. Our understanding of the agreement between  
19 the parties and with the Tribunal is that we are  
20 not asking this Tribunal to dismiss this claim on  
21 the basis of Article 1121. We have not made a  
22 jurisdictional objection on the grounds of Article

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1 1121 at this time.

2           we have, however, argued that the context

3 of the NAFTA demonstrates that the parties did not  
4 anticipate parallel proceedings going on under  
5 Chapter 11 and Chapter 19, and that issue was fully  
6 briefed. We pointed to Article 1121 in this  
7 context, and we argued that contrary to Canfor's  
8 argument, it said that in the context of Chapter  
9 11, including Article 1121, showed that the parties  
10 did envision such duplicative proceedings. In our  
11 written submissions we responded and said that is  
12 not the case, and we pointed out this precise fact  
13 and said that the proceedings that Canfor has taken  
14 part in Chapter 19 does not fall within the  
15 exception in Article 1121, and therefore, as part  
16 of the context of the Treaty, you should see that  
17 the parties did not envision these parallel  
18 proceedings.

19 So, that issue, we submit, is, indeed,  
20 before the Tribunal, so we just want the position  
21 to be clear that we are not asking for dismissal on  
22 the basis of Article 1121, but we are asking you to

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1 take into account the correct interpretation in  
2 Article 1121 insofar as it supports, we contend,  
3 our submission that the parties did not envision  
4 duplicative proceedings of this nature.

5 PRESIDENT GAILLARD: Thank you for this  
6 clarification. That is also my understanding, so I  
7 think what you just stated is perfectly correct.  
8 But that being said, I don't think we need to

9 belabor the point.

10           We have a question regarding the  
11 organization of the hearing. Is Professor Howse  
12 still available for a little while? Because if we  
13 have questions from the Tribunal which relate to  
14 points which he addressed, are you comfortable--we  
15 don't want to prejudice Canfor's position in any  
16 manner, so are you comfortable if we ask the  
17 questions now, or do you still want to break and we  
18 ask the questions afterwards, some of which may  
19 have to do with matters which were addressed by  
20 Professor Howse?

21           MR. LANDRY: Mr. Howse says approximately  
22 15 minutes, I'm informed, and for the record,

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1 Mr. President, as we indicated yesterday, Mr. Howse  
2 is available tomorrow, and I understand the  
3 proposition is that if there are questions that  
4 come that require Professor Howse's response, that  
5 you will accommodate that tomorrow. So, he has 15  
6 minutes now. If there are some specific questions,  
7 he is more than willing to answer it.

8           PRESIDENT GAILLARD: So maybe we should  
9 start now. Make use of the 15 minutes. No break  
10 for the time being. We may have a few questions,  
11 and we will start with those which have to do  
12 with--although it's hard to segregate--points which  
13 were addressed by Professor Howse, and then we will  
14 see what to do afterwards. We may have a break

15 afterwards, and then you can wrap up the rest of  
16 your rebuttal.

17 So we'll start with the questions now.

18 Mr. Harper has a question to start with.

19 ARBITRATOR HARPER: Thank you,  
20 Mr. President.

21 Professor Howse, I wanted to explore two  
22 areas with you briefly, if I may. The first, and I

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1 just to want make sure I understand what you said a  
2 few minutes ago. The first has to do with the Byrd  
3 Amendment. Is it Canfor's position that it is not  
4 challenging the Byrd Amendment in this proceeding  
5 as a statute?

6 PROFESSOR HOWSE: The pleadings on the  
7 Byrd Amendment, I believe, will be discussed and  
8 responded to by Mr. Landry; is that correct,  
9 Mr. Landry? Or would you like me to say something  
10 about those pleadings myself?

11 ARBITRATOR HARPER: I'm just talking about  
12 what you said.

13 PROFESSOR HOWSE: Right. In other words,  
14 why the Byrd Amendment is there, and what is the  
15 significance of mentioning the statute in a claim  
16 that is in essence about conduct and not  
17 challenging the statute as such? I understand the  
18 question. It's a matter of who best on the team  
19 would be--who would be best placed to take you  
20 through the exact nature of our submissions on the

21 Byrd Amendment in the frame of my remarks.

22 MR. LANDRY: Let me just go back to your

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1 question, Mr. Harper.

2 PROFESSOR HOWSE: well, perhaps since we  
3 have the 15--do you mind, Mr. Harper, if we get  
4 other questions, and then if Mr. Landry responds to  
5 your question on the Byrd Amendment?

6 ARBITRATOR HARPER: I'm comfortable with  
7 whatever the position is of Canfor. I'm just  
8 trying to find out what it is.

9 PRESIDENT GAILLARD: I guess it's for lead  
10 counsel to make a position as to what the request  
11 is, and I think it's clear in writing, and we have  
12 a few clarification questions, but we don't want to  
13 engage into this debate among counsel before this  
14 Tribunal.

15 MR. LANDRY: Mr. Harper, and I will get  
16 the specific references. We have dealt with the  
17 issue of the Byrd Amendment in our written  
18 material, but let me just say this: we do not, and  
19 I think it--I hope it was made clear yesterday, we  
20 are not challenging the Byrd Amendment from the  
21 perspective of whether or not it is--it is  
22 domestically a violation of the domestic law. The

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1 question is the Byrd Amendment and the way that  
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2 Professor Howse has talked about the effect that  
3 the Byrd Amendment had on the conduct of officials  
4 in initiating the investigation originally at this  
5 point in time is the key aspect of the claim at  
6 this point. The pleadings obviously speak for  
7 themselves, but I will get you more direct  
8 references to the written material at a later  
9 point. But I think for the purposes of your  
10 question now, I think hopefully that will answer  
11 your question.

12 ARBITRATOR HARPER: I had one other  
13 matter, if I may, Mr. President.

14 PRESIDENT GAILLARD: Yes, you may.

15 ARBITRATOR HARPER: Professor Howse, and I  
16 just want to be sure I understand your position and  
17 by inference the position of Canfor. I understood  
18 you to have said earlier this morning that Canfor's  
19 allegations are based on claims on the  
20 administration of the law and not the law itself.  
21 I'm not sure what the antecedent of the law itself  
22 was at this point, whether it was the Byrd

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1 Amendment or whether it was other law that is  
2 deemed to be antidumping and countervailing duty,  
3 but I want to find out from you, if I may, the  
4 distinction you drew. That is to say, that  
5 Canfor's claims are based upon the administration  
6 of the law and not law itself. What did you mean?

7 PROFESSOR HOWSE: well, very simply that  
Page 61

8 the conduct that we have presented in our Statement  
9 of Claim as allegedly violating the standards of  
10 treatment in Chapter 11 of NAFTA is not conduct  
11 that is mandated or is not the statute itself.  
12 It's rather decisions of a discretionary nature  
13 taken by officials in the application or  
14 administration of the laws.

15           ARBITRATOR HARPER: And in that  
16 administration of the law, do you have in mind that  
17 such administration constitutes administrative  
18 practice?

19           PROFESSOR HOWSE: Well, the individual  
20 decisions of officials taken as a whole and viewed  
21 as law to be applied in some future case could  
22 constitute administrative practice, depending upon

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1 the way in which those decisions are binding or  
2 have legal weight in a future proceeding.

3           But Canfor's claim, which is based on the  
4 words of 1901(3), in their context, in other words,  
5 in the context of Articles 1901 through 1904  
6 particularly is that what 1901 addresses is  
7 obligations that would involve doing something or  
8 not doing something with respect to the substance  
9 of the law. Our complaint is based on conduct, and  
10 if officials were to conduct themselves in  
11 other--in another proceeding entirely properly,  
12 then under Chapter 11--I mean, there would be no  
13 need to alter the law as it's written in order to

14 ensure that in the future this doesn't happen.

15           And this relates to a more general point.

16 We are not challenging the U.S. CVD/AD system. We  
17 are not saying that Chapter 19 Panels are never  
18 effective. This is a very special case. The  
19 history of what happened under Chapter 19 and this  
20 case and the history of what has happened to the  
21 investor under the decisions and actions of U.S.  
22 officials is extraordinary, and we will prove that.

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1           And so, the basic distinction is that  
2 1901(3) does not prevent, jurisdictionally prevent  
3 a challenge that is based upon the discretionary  
4 conduct of officials in administration of the law.  
5 What effect it would have if we were challenging  
6 the law itself in saying that therefore implicitly  
7 Canfor is under some obligation that stems from  
8 something being wrong with its law as it's written,  
9 including the whole body of judicial precedents or  
10 administrative precedents if they have some binding  
11 precedential effect, that's the distinction we are  
12 drawing.

13           PRESIDENT GAILLARD: Thank you.

14           Professor Weiler.

15           ARBITRATOR WEILER: Professor Howse, I  
16 thought that the argument made yesterday might have  
17 been of potential consequence; namely, that Chapter  
18 11 itself in 2021 contemplated parallel  
19 proceedings, and I thought I understood correctly

20 what Mr. McNeill was arguing this morning, that  
21 Chapter 19 proceedings were not the kind of  
22 extraordinary relief that was mentioned in the

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1 waiver provision of Chapter 11. Not that Chapter  
2 19 wasn't a court, but that the kind of relief  
3 sought in Chapter 19 proceedings were not the kind  
4 of extraordinary relief that was contemplated by  
5 this parallel thing, and I'm just not sure that you  
6 actually answered that point directly. And even if  
7 that's not what they said, then take it as a  
8 question from me.

9           PROFESSOR HOWSE: No, in fact, Professor  
10 weiler I didn't address that point, and I will  
11 address it directly now. I just need to find that  
12 provision in my NAFTA and take you through the  
13 exact wording of the provision.

14           PRESIDENT GAILLARD: 1121.

15           PROFESSOR HOWSE: Yes, I know the  
16 number--it's just that I'm--thanks--I'm trying to--

17           So, the language here is except for  
18 proceedings for injunctive, declaratory, or other  
19 extraordinary relief not involving the payment of  
20 damages, and it is our view that this expression  
21 needs to be read as a whole. In other words, the  
22 proceedings that are not exempted are proceedings

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1 for injunctive, declaratory, or other extraordinary  
2 relief not involving the payment of damages.

3           And the language "other extraordinary  
4 relief" suggests that the contrast is between  
5 actions for damages on the one hand, and actions  
6 for other kinds of relief which can include  
7 declarations, can include injunctions, or could  
8 include other kinds of comparable relief that is  
9 extraordinary in the sense that the relief is not  
10 in the form of damages.

11           ARBITRATOR WEILER: Could I ask you a  
12 second question with the President's permission?

13           PRESIDENT GAILLARD: Of course.

14           ARBITRATOR WEILER: I found also  
15 potentially of consequence the following argument I  
16 understood Ms. Menaker to make. And again if she  
17 did not make it quite in that way, then please take  
18 it as a question from me. She says, if I  
19 understood correctly, even if it's true that there  
20 might be conduct--there might be decisions or  
21 determinations or administrative actions which are  
22 not mandated by antidumping law, that the

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1 obligation of a member such as United States,  
2 Canada, or Mexico to appear before a tribunal under  
3 Chapter 11 would be an obligation in respect to  
4 that law. Even if the complaint concerned a  
5 determination, I don't think she concedes that

6 point, but I think she was telling this Tribunal,  
7 even if you accept the distinction that Canfor  
8 seems to be making that there is a difference,  
9 antidumping law means normative stuff and  
10 individual determination, et cetera, is not  
11 covered. The obligation to come and litigate that  
12 would be an obligation in respect to antidumping  
13 law. And I think that might be an argument of some  
14 consequence, and I wonder if you wanted now to say  
15 something about that.

16 PROFESSOR HOWSE: Professor Weiler, I will  
17 be very brief, and my colleagues will address this,  
18 because I have to leave, but very briefly, the  
19 language in 1901(3) obligation with respect to AD  
20 and CVD law in our submission has to be read in the  
21 context of what Chapter 19 says about a party's  
22 rights and obligations with respect to its AD and

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1 CVD law, and those obligations have been discussed,  
2 and they relate to the extent to which you can  
3 retain the law, and the extent to which and under  
4 what conditions you can amend it.

5 So, our interpretation is contextual, and  
6 so we don't think it has anything to do with  
7 whether you can oblige a NAFTA party to litigate,  
8 and that relates to a consideration we've raised  
9 several times which is that where the NAFTA parties  
10 wanted to ensure that they were not under an  
11 obligation to litigate in certain dispute

12 settlement processes, they used language that went  
13 to the exclusion of forum or the exclusion of the  
14 chapter under which that dispute settlement process  
15 would be found.

16 MS. MENAKER: Mr. President, I wanted to  
17 ask the Tribunal if I might have a chance to  
18 respond very briefly to Mr. Howse's latest remark.

19 PRESIDENT GAILLARD: Yes. Mr. Howse is  
20 excused because I see that he has to go.

21 MR. LANDRY: Mr. President, given the  
22 question was direct and directed, we do have just a

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1 minor addition to it that Mr. Mitchell would like  
2 to say before Ms. Menaker.

3 MR. MITCHELL: We will do it after the  
4 break. Okay.

5 MR. LANDRY: We will do it after the  
6 break, okay.

7 PRESIDENT GAILLARD: Ms. Menaker, you may  
8 answer now, if you prefer. Or do you want to wait  
9 for the elaboration on the argument before you  
10 answer it? Either way.

11 MS. MENAKER: I think if they have more to  
12 say in regard to an answer, I might as well wait  
13 for their full answer before responding.

14 PRESIDENT GAILLARD: That's probably best.  
15 Thank you.

16 So, now we will have a 15-minute break, so  
17 you can collect your thoughts and present an

18 answer, and then we will have the questions and  
19 answers per se. We are adjourned for 15 minutes.

20 (Brief recess.)

21 PRESIDENT GAILLARD: We resume the  
22 hearing. We will now hear from Canfor's side some

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1 rebuttal.

2 MR. LANDRY: Thank you, Mr. President. I  
3 have a couple of quick points that I would like to  
4 make in response to comments made by Mr. McNeill,  
5 and then my friend Mr. Mitchell, my colleague,  
6 Mr. Mitchell, will deal with some substantive  
7 points that were raised in the other parts of the  
8 argument, if that's okay with the Tribunal.

9 PRESIDENT GAILLARD: Certainly. Please go  
10 ahead.

11 MR. LANDRY: Again, without trying to  
12 repeat word for word what Mr. McNeill said in  
13 trying to get the context within the point, he was  
14 dealing with the issue at the end of his  
15 submissions regarding whether or not we are at a  
16 point to determine if the Chapter 19 Panel process  
17 has been effective dispute resolution.

18 I would like to make Canfor's position  
19 fairly clear on this point. Whether or not the  
20 extraordinary challenge that is happening in  
21 respect of the ITC Chapter 19 Panel decision is  
22 successful, Canfor's submission is the approach

1 taken by the U.S. in this case, specifically the  
2 ITC to respond to, has been nothing short of  
3 extraordinary. You only have to take a look at the  
4 decisions by the Chapter 19 Panel and the remand  
5 decisions by the ITC to understand why I use such a  
6 word as extraordinary because the ITC and, quite  
7 frankly, the DOC in their remand decisions have in  
8 my submission improperly and inappropriately  
9 ignored the clear directions of the chapter panel,  
10 the Chapter 19 Panel decisions.

11           Now, what happens as a result of that?  
12 The result of that is it effectively calls into  
13 question the effectiveness of the Chapter 19  
14 procedure, per se. We are dealing with at least  
15 three times that it went back to the ITC, and  
16 Mr. Mitchell said that the ITC then eventually put  
17 in a decision consistent with the ruling of the  
18 Chapter 19 Panel. To say they put it in grudgingly  
19 is an understatement. That type of an attitude,  
20 that type of an approach, if you look at it from  
21 Canfor's perspective, is just a totally ineffective  
22 remedy, and it will not at any point in time under

1 the Chapter 19 Panel process provide an effective  
2 remedy for the injuries that have been suffered by  
3 Canfor's operations in the United States up to the  
4 time when we finally get a result, even assuming

5 it's successful, assuming that the extraordinary  
6 challenge claim is unsuccessful. There will not be  
7 an effective remedy to offset the serious injury  
8 that has been suffered by Canfor.

9           So, therefore, in our submission, the  
10 approach that both the ITC and the DOC have taken  
11 in respect of the Chapter 19 Panel process shows  
12 patently that both of those agencies, in our  
13 submission, are just wantonly disregarding clear  
14 directions by the Chapter 19 Panels, thereby  
15 putting the Chapter 19 Panel process in significant  
16 doubt, if one looks at it from the point of view of  
17 an effective dispute resolution mechanism.

18           The second point, Mr. President, that I  
19 would like to deal with is the concept of double  
20 recovery, to make it very clear. Firstly, as  
21 Professor Howse said this morning, duties are one  
22 issue in the damage claim. There is a significant

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1 other damage that will be alleged--

2           PRESIDENT GAILLARD: On this one, you  
3 confirm that it's Canfor's position that the return  
4 of the duties is part of the damages you seek on  
5 the merits pursuant to Chapter 11? You said in  
6 essence it's part of it, it's not everything, there  
7 is more than that, there is additional damages and  
8 so on, but you confirm that it is part of it?

9           MR. LANDRY: Yes.

10           PRESIDENT GAILLARD: Thank you.

11 MR. LANDRY: But here is the issue, and  
12 again, it somewhat relates to the 1121 argument and  
13 somewhat relates to the debate that we had  
14 yesterday on double recovery. There is no  
15 jurisdiction in the Chapter 19 Panel to order a  
16 refund of the duties. The only jurisdiction that's  
17 in the Chapter 19 Panel is to either affirm or  
18 remand, to ask--effectively ask the decision maker  
19 to make a decision not inconsistent with its  
20 decision. It cannot order refund. It cannot order  
21 any monetary award. If any monetary award is going  
22 to come out of the Chapter 19 process, it will be

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1 as a result of, in my submission, it will be as a  
2 result of a determination that's made by a Chapter  
3 19 Panel which effectively vacates something.  
4 Let's assume for the moment the order. which means  
5 that the duties have been collected illegally, and  
6 it will be the DOC who holds these duties, who will  
7 be the one that will ultimately refund not the  
8 Chapter 19 process--sorry, the Chapter 19 Panel  
9 because it doesn't have jurisdiction to do that.  
10 And I think you will recall Professor Howse dealing  
11 with that issue.

12 Now, to add one little layer to that,  
13 having said that, and therefore in our submission  
14 that clearly makes a differentiation between the  
15 claim for damages that are being made here and the  
16 claim for extraordinary relief in effect in the way

17 of a declaratory judgment from the panel in a  
18 Chapter 19 process, if there is an additional  
19 element which may result somehow, whether it's  
20 because of the ITC, DOC determinations themselves,  
21 not the Chapter 19 Panels who can't do this. If  
22 there is such a possibility that there might be

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1 double recovery, that is where Occidental kicks in,  
2 and the position that we are taking.

3           But we are clear from our perspective that  
4 the Chapter 19 Panel process does not--that Chapter  
5 19 Panels do not have the ability to do anything  
6 but affirm the remand.

7           PRESIDENT GAILLARD: Thank you. I think  
8 we understand the argument.

9           MR. LANDRY: Mr. President, Mr. Mitchell  
10 will do the balance of the surreply.

11           PRESIDENT GAILLARD: Mr. Mitchell, please  
12 proceed.

13           MR. MITCHELL: Thank you, Mr. President.  
14 I can be very brief as it is not our intention to  
15 revisit matters previously covered.

16           I think I have five points. The first has  
17 been averted to in various different ways, and we  
18 started yesterday morning with a discussion of what  
19 the issue was before this Tribunal, and then in  
20 various contexts we have strayed into discussions  
21 about things that we submit are simply actually not  
22 before the Tribunal today. I understand the

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1 discussion we had on Article 1121 just before the  
2 break, but I think it goes beyond that.

3           And you heard this morning, and indeed, on  
4 the first day you heard from I believe it was  
5 Mr. Bettauer, there was a discussion about whether  
6 these were investment measures, and then this  
7 morning this was revisited by Mr. Clodfelter.  
8 whether what is an issue in the Statement of Claim  
9 and the memorials are measures relating to  
10 investment as that term is understood in Article  
11 1101 is simply not before the Tribunal on this  
12 motion. That's a matter that was expressly  
13 reserved to be argued later. It's not before the  
14 Tribunal.

15           The sole issue on this motion is whether  
16 what Canfor complains of, namely arbitrary,  
17 politically motivated, egregious conduct which this  
18 Tribunal must assume has occurred, is whether that  
19 conduct cannot be the subject of a Chapter 11 claim  
20 simply because it touches in some way on the AD or  
21 CVD regimes and therefore is excluded by Article  
22 1901(3). That is the simple issue for this

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1 Tribunal. And again on the point you have to  
2 assume that the facts are true, I simply refer you

3 to the Methanex decision on jurisdiction and  
4 admissibility, which is in our material, where it  
5 makes clear at, I believe, paragraph 112, paragraph  
6 50 of the decision the Tribunal is bound to accept  
7 the facts as true.

8           The second point that I want to make  
9 relates to something Mr. Clodfelter said this  
10 morning, and this was in response to the  
11 President's question with respect to labeling: And  
12 Mr. Clodfelter this morning--and I don't want to  
13 misquote him, but the tenor of his response was  
14 that the United States concedes that a party may  
15 not avoid Chapter 11 responsibility simply by  
16 labeling a matter as AD or CVD law. And the  
17 Tribunal is free to look to see if, in fact, the  
18 evidence that the parties present demonstrates that  
19 that is a proper characterization of it.

20           well, it's our submission that the  
21 Tribunal cannot answer that question in the  
22 abstract. Here, there is a plea on the face of the

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1 pleadings that the regime is being administered in  
2 a politically motivated, predetermined way,  
3 arbitrarily and abusively with the harm to intent  
4 investors such as Canfor. The Tribunal cannot  
5 simply determine on this application that the  
6 conduct of which we complain is properly labeled AD  
7 or CVD conduct. Indeed, it's our submission that  
8 at the minimum what Mr. Clodfelter has conceded is

9 that this matter has to be addressed at the merits.

10 Third, Mr. Clodfelter raised some issues  
11 concerning, and I believe that this is again back  
12 to the President's question from yesterday, whether  
13 Canfor's claim is tied solely to the Statement of  
14 Claim, and then he made some comments concerning  
15 the strictures in respect of international claims  
16 as opposed to commercial claims, and submitted that  
17 the conduct--the Tribunal would only have  
18 jurisdiction with respect to measures specifically  
19 articulated in the pleadings. I have several  
20 responses.

21 The first is that this simply is not an  
22 issue in this motion. Our plea is sufficiently

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1 made, whether it is confined to the Statement of  
2 Claim with the memorials being considered as  
3 evidence in support of the intent Canfor has  
4 pleaded, or whether the entirety of the conduct  
5 alleged in the pleadings is viewed as the substance  
6 of the claim, but again, that is not this motion.  
7 For clarity, Canfor intends to rely upon all of the  
8 United States's conduct up to the date of the  
9 hearings on the merits as the basis for its claim.

10 Second, if the allegation being made by  
11 Mr. Clodfelter this morning is intended to be some  
12 sort of allegation that there is some inadequacy in  
13 Canfor's pleading, again, that is not this motion,  
14 and it would fail in any event.

15           This arbitration is brought under the  
16 provisions of the UNCITRAL Rules. The UNCITRAL  
17 Rules set out the manner in which a case is  
18 articulated before a tribunal. It starts with a  
19 Statement of Claim which has certain minimum  
20 standards of pleading. The requirement of the  
21 UNCITRAL Rules is Article 18(2). And it is  
22 elaborated during the course of the proceeding by

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1 subsequent statements and subsequent documents and  
2 evidence provided to the Tribunal.

3           The UPS case, which we have heard in our  
4 submission far too much about given its relevance  
5 to this proceeding, did deal with the issue of  
6 adequacy of pleading, but it was in response to a  
7 specific motion alleging that there was some  
8 inadequacy of pleading. And just for your  
9 reference, the document is, in fact, in the  
10 claimant's book of authorities on the rejoinder at  
11 Tab 10, and the discussion of the UNCITRAL  
12 requirements of pleading starts at paragraph 123  
13 and following on page 38.

14           But it describes quite clearly that one  
15 does not plead every allegation of fact, one does  
16 not plead their evidence, one does not plead their  
17 law.

18           The third response in respect to this,  
19 these comments made by Mr. Clodfelter concerning  
20 the scope of Canfor's claim, is that we are dealing

21 with events subsequent to the claim, things like  
22 the treatment of the ITC and the various conduct

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1 that has occurred after the pleading. And  
2 Mr. Clodfelter made the observation that you have  
3 to have a claim in respect of the specific  
4 measures, and the NAFTA is quite clear on that.

5           In making that submission, Mr. Clodfelter  
6 is ignoring the fact that a previous NAFTA Chapter  
7 11 Tribunal has specifically dealt with that very  
8 question, and the reference--and I'm sorry I didn't  
9 anticipate this point coming up--the reference for  
10 the Tribunal is the Pope and Talbot arbitration,  
11 and there was a specific motion, and it's available  
12 on just about everybody's web site. The motion was  
13 the award concerning the motion by the Government  
14 of Canada respecting the claim based upon the  
15 imposition of the super fee. And just for  
16 reference, the date of the Tribunal's ruling was  
17 August 7th of 2000.

18           And to put this case into context, what  
19 was at issue in the Pope and Talbot case was the  
20 administration of the softwood lumber regime in  
21 Canada in respect to a claim brought by an American  
22 company, Pope and Talbot, alleging that the claim

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1 had been or that Pope and Talbot had been treated  
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2 in either a discriminatory way or in a way that  
3 violated the minimum standard, and the ultimate  
4 holding was the 1102 claim was dismissed, but on  
5 certain grounds the 1105 claim was allowed.

6           In the course of that proceeding,  
7 subsequent to the claim being brought, Canada  
8 enacted a device known as the super fee, and this  
9 was an additional export tax--export fee imposed  
10 upon lumber companies' exports from Canada to the  
11 United States beyond a certain value, and the  
12 argument was that this was discriminatorily  
13 impacted upon Pope and Talbot, the American  
14 investor. That fee was imposed two years after the  
15 arbitration was launched.

16           Canada argued that because the fee was  
17 not, and could not have been, specifically  
18 mentioned in the Statement of Claim, it couldn't be  
19 considered by the Tribunal, and the paragraphs that  
20 I would ask you to reference in the Tribunal's  
21 decisions are paragraphs 22 through 25, and I will  
22 just read for you paragraphs 24 and 25. After

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1 setting out the background, they say (reading):  
2 Based upon any fair reading of the claim, it is  
3 patent that the investor was challenging the  
4 implementation of the Softwood Lumber Agreement as  
5 it affected its rights under Chapter 11 of the  
6 NAFTA and that as the regime changed from year to  
7 year, those effects might also change. In other

8 words, the claim asks the Tribunal to consider the  
9 regime not as a static program, but as it evolved  
10 over the years.

11           And then the Tribunal goes on, "For these  
12 reasons, the Tribunal concludes that the investors'  
13 contentions regarding the super fee are not a new  
14 claim, but relate, instead, to a new element that  
15 has recently been grafted on to the overall regime.  
16 In this respect, the super fee is akin to the  
17 various changes in allocation methodology, use of  
18 discretionary quotas and the like that have marked  
19 the regime since its inception."

20           And so, if you look at the investor's  
21 Statement of Claim, and this is simply by way of  
22 example, the paragraphs 107 to 109, for instance,

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1 make the point that the Government of the United  
2 States has for over 20 years engaged in an ongoing  
3 course of conduct with the objects we allege, of  
4 causing harm to companies that are investors with  
5 investments such as Canfor, and it goes on to  
6 relate the United States continuing changes,  
7 modifications, otherwise interpretation, improper  
8 interpretations of its law causing significant  
9 economic harm to those in the position of Canfor,  
10 and describes the latest of the ongoing actions.

11           So it's clear from the Statement of Claim  
12 that what Canfor is contending relates to the  
13 ongoing pattern of conduct of the United States.

14 Ms. Menaker made some submissions  
15 regarding administrative practice. We stand on the  
16 submissions made previously, and I'm not going to  
17 elaborate upon them here.

18 With respect to the UPS case, Ms. Menaker  
19 again referred to various of the submissions. I  
20 would simply refer you to the United States's reply  
21 on jurisdiction, the authorities at Tab 10 pages  
22 156 and 157, where the counsel for Canada says to

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1 the Tribunal--this is an extract from the  
2 transcript--it says: "Before I begin, I understand  
3 that my friends have agreed to drop the allegations  
4 regarding Canada's failure to enforce its goods and  
5 services tax, so perhaps Mr. Carroll can confirm  
6 this for the record." Mr. Carroll, who was lead  
7 counsel, said: "That's almost right but not quite.  
8 We are abandoning our claims with respect to goods  
9 and services taxes only insofar as they relate to  
10 paragraph--to Article 1105 of NAFTA." And that's  
11 the extent of the argument.

12 And in my submission, whether someone  
13 abandons an argument about a different provision in  
14 a different case provides no indication of the  
15 strength of the argument, particularly when the  
16 argument is based upon a differently worded  
17 provision, one that uses the word measure.

18 And lastly, in my reply, I just want to  
19 elaborate on what Professor Howse was saying in

20 response to Professor Weiler's last inquiry about  
21 whether participation in an arbitration is an  
22 obligation with respect to the law. And I

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1 translate that to a question whether a consequence  
2 imposed upon a party, i.e., the participation in  
3 the arbitration--because they engaged in arbitrary  
4 and abusive treatment of an investor in a matter  
5 that is connected with the AD or CVD field, is what  
6 is meant by an obligation imposed upon a party with  
7 respect to their law.

8           And it's our submission that the mere fact  
9 that there is a consequence by virtue of how the  
10 party has administered their AVD (sic) laws, indeed  
11 the measures that they have carried out, and again,  
12 I note that the provision doesn't use the word  
13 measures, it uses the word law, but simply imposing  
14 a consequence upon the party by virtue of the  
15 abusive use and the abusive discretion that's  
16 granted to the United States officials under their  
17 law is not the imposition of an obligation with  
18 respect to that law. It is outside of that field.

19           So, those are the submissions of Canfor in  
20 reply, and now we look forward to the Tribunal's  
21 questions.

22           PRESIDENT GAILLARD: Thank you,

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1 Mr. Mitchell. You may want to stay where you are  
2 because we may have the questions in reverse order.  
3 Since it's fresh in our minds, we may start with  
4 you, and we have a few clarification questions, and  
5 then we will get to earlier points, if you agree to  
6 that.

7           And I see that we still have time. We  
8 plan to have a lunch break at one, if it's  
9 convenient for everybody, just for planning  
10 purposes, and we have time to start certainly the  
11 question and answer aspect.

12           If we go back, I have two questions for  
13 you. One has to do with your very last comment  
14 where you were answering an argument made in  
15 particular by Ms. Menaker, but it's in the  
16 pleadings generally as to the fact that they say in  
17 substance that the obligation to arbitrate pursuant  
18 to Chapter 11 Section B is an obligation within the  
19 meaning of 1901(3) in and of itself.

20           So, I would like to understand better your  
21 answer to that because you said it's a consequence.  
22 But I think their point is a point of mere

□

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1 interpretation of NAFTA, if I may. So they say:  
2 since the obligation to arbitrate is an obligation  
3 "with respect to" within the meaning of Article  
4 1901(3), it has been the intention of the NAFTA  
5 drafters to exclude any arbitration which has to do

6 with matters "with respect  
7 to"--quote-unquote--countervailing duty law and  
8 antidumping law.

9           what do you have to answer to that? I  
10 don't quite understand your argument as to the  
11 consequence. So maybe you want to pause on that.

12           It goes for every question we are going to  
13 ask. You may choose to pass and to come back at a  
14 later stage. Some questions will be more difficult  
15 than others. I'm not suggesting that this one is  
16 particularly difficult for you, but for any  
17 question, going forward, you may answer immediately  
18 or you may answer at a later stage during the  
19 course of the day or possibly tomorrow. We will  
20 see tonight if we need a hearing tomorrow morning  
21 as well.

22           MR. MITCHELL: Let me try and start with a

□

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1 response. I have urged upon the panel an  
2 interpretive approach that starts from the Vienna  
3 Convention, looks at what we say the plain meaning  
4 is, looks at the immediate context in 1901 and 1902  
5 and 1904, and looks at the surrounding context of  
6 the different drafting of other provisions. And we  
7 argue from that that the word--the phrase  
8 "obligations with respect to CVD law" takes its  
9 plain meaning from or its ordinary meaning from  
10 examining all of those factors.

11           The United States seems to say that any

12 time we have to do anything that touches upon in  
13 respect of anything or relating to anything that  
14 touches upon our AD or CVD regime--and I use the  
15 word "regime" as opposed to "law"--that's an  
16 obligation with respect to our law. And it's our  
17 submission that simply a consequence being imposed  
18 upon you because you've abusively used your regime  
19 is not an obligation with respect to the regime or  
20 the law which is the specifically defined term that  
21 you are allowed to maintain under Article 19,  
22 Chapter 19.

□

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1 I don't know that I can take it much  
2 further than that.

3 PRESIDENT GAILLARD: And you include in  
4 the consequences the obligation to arbitrate  
5 because it's a consequence of what you characterize  
6 as the abusive conduct; is that correct?

7 MR. MITCHELL: The obligation to arbitrate  
8 is a consequence of Canfor having brought a Chapter  
9 11 arbitration. The United States would say that  
10 is the consequence that is imposed upon them by  
11 virtue of us having done so, and that is the  
12 consequence that is with respect to their law.

13 PRESIDENT GAILLARD: Okay. Can I ask you  
14 another question. It has to do with the update of  
15 the Statement of Claims. You make two points. One  
16 is that we can view it in two different ways. We  
17 can see that if we are narrow in our interpretation

18 of what is admissible before us, we take the Notice  
19 of Arbitration and Statement of Claim, and the rest  
20 is only proof of those facts stated in  
21 there--that's a narrow interpretation. And then  
22 you say you could also have a broader

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1 interpretation which is to follow the Pope and  
2 Talbot case law. You say: when it's a continuation  
3 of the same course of conduct, you're not barred to  
4 judge more of the same thing, if I may put it in a  
5 colloquial way; right?

6 MR. MITCHELL: Yes.

7 PRESIDENT GAILLARD: I focus on the first  
8 aspect of the defense, which is--the first of your  
9 two approaches to that problem.

10 Can I conclude from this statement that  
11 your position is that in any event, the subsequent  
12 pleadings are, in essence, the evidence of the  
13 allegations which you made in broad terms anyway in  
14 the state of claim, i.e., a pattern of abusive and  
15 discriminatory conduct. Of course, I'm not  
16 prejudging the reality of this. I'm just following  
17 your argument that we have to take that as is for  
18 the purposes of the jurisdictional claims or  
19 objections; right?

20 MR. MITCHELL: Yes.

21 PRESIDENT GAILLARD: So, you say it's all  
22 contained in there, and that's more evidence of the

1 same thing.

2 MR. MITCHELL: Can be used by you to  
3 support the allegations of the pattern of conduct  
4 alleged in the Statement of Claim.

5 Again, I come back to the point that this  
6 is not the issue before the Tribunal on the  
7 jurisdictional motion. Again, because the Tribunal  
8 must assume that the pattern of conduct alleged by  
9 the investor is true.

10 PRESIDENT GAILLARD: Right, but do you  
11 accept that we have to know what is the nature of  
12 the claims you're making on the merits? Even if we  
13 have to assume that everything you said from a  
14 factual standpoint is right, do you accept, and if  
15 we accept that aspect, do you accept that we also  
16 have to consider the nature of the claims to see if  
17 we have jurisdiction on those facts, depending on  
18 how we rule on other aspects which are disputed?

19 MR. MITCHELL: I think that starts to  
20 stray into an area that the parties haven't briefed  
21 in the motion in terms of what is the task on a  
22 jurisdictional motion.

1 The Methanex panel certainly addressed  
2 that question and concluded that they were confined  
3 to issues strictly of jurisdiction as opposed to  
4 admissibility without getting into the debate as to

5 where you would draw that line, and concluded that  
6 unless the claims were, and I think the words used  
7 were incredible, unless the claims alleged were  
8 incredible--frivolous was another word used--that  
9 the allegations were assumed to be true, and then  
10 the claim would proceed.

11           But again, to go back to the issue that's  
12 being articulated is the narrow issue relating to  
13 1901(3) and whether it excludes any matter touching  
14 upon AD and CVD law, and I say that that's the  
15 issue that the Tribunal is confined to on the  
16 motion.

17           PRESIDENT GAILLARD: Thank you. That's  
18 clear.

19           I turn to my co-arbitrators. Conrad, do  
20 you want to start?

21           ARBITRATOR HARPER: Thank you,  
22 Mr. President.

□

1           PRESIDENT GAILLARD: You have a comment?

2           MR. CLODFELTER: A question of how we are  
3 going to proceed here. Will the parties have an  
4 opportunity to respond to answers given to the  
5 questions before you go on to the next question?

6           PRESIDENT GAILLARD: Yes. Maybe you  
7 should answer now. Do you want a brief answer to  
8 this?

9           Let's discuss the procedure. The idea is  
10 that on each question both sides will have an

11 opportunity to speak. You may or may not want to  
12 do it. I'm not asking the parties to be  
13 systematic, and we will not assume that you agree  
14 if you say nothing on the particular issue. That's  
15 obvious, but you may choose to answer.

16 MS. MENAKER: We have answers to both of  
17 the two questions we would like to offer.

18 PRESIDENT GAILLARD: Please do.

19 MS. MENAKER: Mr. Clodfelter will answer  
20 the second question first.

21 MR. CLODFELTER: Yesterday, it was asked  
22 whether or not Canfor intended to supplement or

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1 update or amend its claim by the allegations it has  
2 made in its briefs on this issue. We still have  
3 never heard an answer to that. Now, surely they  
4 can take a position on that. They have to know  
5 what their own intention is. So far we have not  
6 heard any representation by counsel that Canfor is  
7 changing their claim.

8 So, our assumption is that the allegations  
9 in the Statement of Claim are still the allegations  
10 of conduct on which they base their claim. Now, if  
11 that's different, it's incumbent upon them to say  
12 so. We can't proceed not knowing or guessing at  
13 these kind of fundamental questions.

14 So, we assume the claims as stated in the  
15 Statement of Claim, and whatever else they say can  
16 be taken into consideration, of course, but the

17 conduct at issue is that stated in the Statement of  
18 Claim.

19           PRESIDENT GAILLARD: It seems to me that  
20 the record is pretty clear on that; I mean on that  
21 issue. I'm not saying that what you say is right,  
22 but I think the determinations of both parties are

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1 clear, at least as far as the Tribunal is  
2 concerned.

3           MS. MENAKER: Thank you. Now I would just  
4 like to make some--address the President's--your  
5 first question, and I think you understand our  
6 position perfectly well, which is that imposing an  
7 obligation on the United States to arbitrate, that  
8 is an obligation, but I wanted to offer a response  
9 to Mr. Howse's comment on that point.

10           when looking at the terminology of Article  
11 1901, Mr. Howse had said that what you need to do  
12 is--you need to read Article 1901(3) in context to  
13 see what Article--excuse me, what Chapter 19 says  
14 about a party's rights and obligations with respect  
15 to antidumping and countervailing duty law, and  
16 only then you can ascertain what the term  
17 obligations, what obligations that encompasses.

18           And he said, for example, those  
19 obligations, by looking at Chapter 19, include the  
20 extent which you can retain your law, the extent to  
21 which can you amend your law.

22           Now, what he left out was the obligations

□

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1 that are contained in Article 1904, and those are  
2 the obligations to submit one's AD/CVD  
3 determinations to binational panels who are going  
4 to review them under the standard of review set  
5 forth in Article 1904, and that is not an empty  
6 obligation. It is an obligation of great import.

7           we have many free trade agreements with  
8 other countries, many bilateral investment  
9 treaties, many other international instruments with  
10 other countries. This system is unique. The  
11 United States has undertaken this obligation with  
12 respect to Canada and Mexico, and have undertaken  
13 the obligation to submit our determinations to  
14 binational panel reviews. That is most certainly  
15 an obligation.

16           And if you take a look at the statement of  
17 administrative action at page 194, that instrument  
18 describes, it says, and I quote, the centerpiece of  
19 Chapter 19 of the NAFTA is the procedure described  
20 in Article 1904.

21           So, I think that really answers the  
22 question that one of the obligations in Article

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443

1 19--in Chapter 19--is the obligation to submit the  
2 determinations to binational panel review and so,

3 therefore, once you accept that that is an  
4 obligation, I don't see how you can say that the  
5 obligation to arbitrate pursuant to the procedure  
6 set forth in Section B of Chapter 11 is not also an  
7 obligation that is imposed with respect to that  
8 law.

9           PRESIDENT GAILLARD: Thank you. Any  
10 comment on the other side before we have a question  
11 from Professor Weiler?

12           MR. MITCHELL: No. We will stand on the  
13 submissions made.

14           ARBITRATOR WEILER: Ms. Menaker, I also  
15 think I understand you. I hope I understand your  
16 position. To what extent is the last argument you  
17 made--to what extent would I have to find it  
18 compelling based on also accepting your other  
19 argument that the word law includes individual  
20 determinations? And I'm not saying that I will do  
21 this, but let's assume that the Tribunal buys into  
22 the Canfor argument that law in 1901(3) refers to

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1 normative, precedential, but doesn't, for example,  
2 refer to individual arbitrations, to individual  
3 determinations, and I'm not saying that we will  
4 find that, but to what extent is this last argument  
5 you make dependent on agreeing with you also on  
6 that additional point?

7           MS. MENAKER: It is not dependent on that.  
8 If Article 1901(3), and I think this also answers a

9 question that was that was raised by the President  
10 yesterday. When I put up the slide interposing the  
11 words to amend in front of instead of obligations  
12 and changed the word law to statute, even if  
13 Article 1901(3) had read no party--no provision of  
14 any other--

15 PRESIDENT GAILLARD: The short answer is  
16 that your two arguments are independent and  
17 stand-alone arguments?

18 MS. MENAKER: That is correct because even  
19 an obligation with respect to an antidumping or  
20 countervailing duty statute would still--in our  
21 view, all of our other arguments would still stand  
22 because an obligation to arbitrate a dispute

□

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1 concerning the application or interpretation of  
2 that statute would still be an obligation with  
3 respect to that statute.

4 PRESIDENT GAILLARD: Any comment on  
5 Canfor's side on this?

6 MR. MITCHELL: No further comment.

7 PRESIDENT GAILLARD: All right.

8 Conrad, do you have further questions?

9 ARBITRATOR HARPER: Mr. President, I do,  
10 thank you.

11 I just put this question generally to  
12 Canfor. I don't know which of you, Messrs. Landry  
13 or Mitchell would like to respond, and consider  
14 that as true for all the questions I wish to put.

15 I'm wrestling very hard to understand  
16 exactly what is before us, and I've heard the  
17 discussion about the Statement of Claim and the  
18 additions that are contained in the memorials  
19 submitted by Canfor, but maybe I could bring this  
20 point to a head by putting this precise question  
21 which may admit of a yes or a no answer. It may  
22 not, but I throw that out as perhaps a way of

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1 focusing the matter.

2 would Canfor allege that this Tribunal was  
3 in error if in our final decision on this pending  
4 motion we said that we assumed for purposes of the  
5 motion that the claims made by Canfor are rooted in  
6 antidumping law and countervailing duty law?

7 MR. MITCHELL: Yes.

8 ARBITRATOR HARPER: You would say that was  
9 error?

10 MR. MITCHELL: Yes, and let me elaborate  
11 on that.

12 Claims, to the extent we talk about what a  
13 claim is rooted in, have two aspects. One is the  
14 legal regime or normative standards that apply to  
15 the evaluation of the claim, and the other is the  
16 factual matrix. We think about a decision or a  
17 determination or an award as being the application  
18 of a legal standard here rooted in Chapter 11 of  
19 the NAFTA to a set of facts the evidence evaluated  
20 by the Tribunal to determine what did or did not



2 this. As has been made clear, the conduct  
3 complained of relates in many respects to the  
4 discretionary actions of the United States  
5 officials who do carry out responsibilities under  
6 the AD and CVD regimes. That is clear. That  
7 conduct that we complain of, we say, is unlawful at  
8 the international level under Chapter 11.

9           So, it arises from or has a connection to  
10 that--the AD and CVD sphere. That is clear, and it  
11 relates to in many respects the discretionary  
12 action of the officials in that sphere. But the  
13 claim relates to the Chapter 11 standard applied to  
14 the conduct of the United States officials aimed at  
15 targeting and abusing investors such as Canfor.

16           ARBITRATOR HARPER: Let me turn to another  
17 subject.

18           PRESIDENT GAILLARD: If it's another  
19 subject, Joseph has a question.

20           Professor Weiler.

21           ARBITRATOR WEILER: It's really a direct  
22 follow-up on that. Yesterday, I was under the

□

1 impression, perhaps erroneous, in reply to a  
2 question of mine that Canfor took the position that  
3 also antidumping determinations or whatever falling  
4 shorts of the word law as you understand it, which  
5 were lawful could constitute a violation of Chapter  
6 11; but now on two separate occasions and most  
7 recently in response to my brother, should I say,

8 Mr. Harper, you seem to suggest that it's only  
9 abusive illegal conduct which would qualify.

10 Did I misunderstand yesterday, or am I  
11 misunderstanding today?

12 MR. MITCHELL: The--for Canfor to succeed  
13 in our claim, we have to establish the  
14 international illegality, and that, as I think  
15 Mr. Landry was making submissions on this  
16 yesterday, is independent of the domestic legality  
17 or illegality, although the domestic legality or  
18 illegality may be relevant--I have got to be  
19 careful how I phrase that--it's independent of the  
20 domestic or municipal legality or illegality,  
21 although the Tribunal may find it relevant.

22 PRESIDENT GAILLARD: Although in your last

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1 submissions you insist on the fact that the U.S.--  
2 according to you--is breaching, is refusing to  
3 honor certain decisions which are taken pursuant to  
4 the Chapter 19 regime. So it is relevant in your  
5 opinion?

6 MR. MITCHELL: Yes. The conduct of the  
7 United States in relation to its actions in  
8 relation to the determinations is relevant.

9 See if I can--

10 PRESIDENT GAILLARD: Why is that? Because  
11 it's some kind of an indication of conduct which  
12 may be illegal under international norms? I'm  
13 trying to understand you.

14 MR. MITCHELL: Let me try this: If we  
15 took the ITC threat of injury ruling and the  
16 Chapter 19 Panel process that it went through, the  
17 United States might ultimately argue that because  
18 the DOC or the ITC, as I think we heard today,  
19 ultimately and begrudgingly adopts the or renders a  
20 determination not inconsistent with the Chapter 19  
21 Panel that they are operating in accordance with  
22 United States law.

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1 But this Tribunal might find it relevant  
2 that the Chapter 19 Panel found, for instance, that  
3 the Commission, the ITC, has made it plain by its  
4 actions and words that it is disinclined to accept  
5 the panel's review authority under Chapter 19 in  
6 this case, and that given the extended amount of  
7 time which is already being consumed by this  
8 proceeding for the panel to postpone finality by  
9 issuing yet another open-ended remand would be to  
10 allow the Chapter 19 process to become a mockery  
11 and an exercise in futility. That's taken from the  
12 concurring award, and the majority is consistent  
13 with that.

14 Those facts would be relevant to this  
15 Tribunal's determination--

16 PRESIDENT GAILLARD: But what is the  
17 argument under international law: is that, in and  
18 of itself, a breach of international law? To make  
19 the process a mockery? what's the relevance?

20 MR. MITCHELL: Again, the scope of the  
21 1105 standards isn't before the Tribunal on this  
22 motion, but if we accept that the standard

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1 is--whether the conduct shocks judicial  
2 sensibilities, or at least surprises them, which  
3 seems to be roughly where the standard is right  
4 now, that sort of conduct, we say, can amount to a  
5 violation of the 1105 standards.

6 ARBITRATOR WEILER: I really want to--this  
7 is very, very crucial, at least to my personal  
8 understanding of--this is following up both on  
9 Mr. Harper and the President. I can fully accept  
10 your claim that we should assume the facts to be  
11 correct. The jurisdictional issue actually breaks  
12 into two at least, because first of all, there is a  
13 question of principle, whether at all there can be  
14 Chapter 11 proceedings which relates to facts which  
15 in some ways, and I can't use a neutral term,  
16 rooted in or derived from or connected with  
17 antidumping and countervailing duties of a member.

18 Now, with this in mind, yesterday I  
19 flagged for you an issue that was of concern to at  
20 least this member of the panel, which was: abandon  
21 the facts of Canfor and try and give us examples of  
22 the kind of practice which would be related to

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1 antidumping, and I said maybe lawful practice under  
2 the laws of the member. It could be Mexico, it  
3 could be Canada, it could be the United States  
4 because many times there is lawful action of a  
5 state which, although it's lawful under the rules  
6 of the state and in our area of Chapter 19--this is  
7 state law that governs--might still violate an  
8 international standard. So, I said give us  
9 hypothetical examples. This is with the view to  
10 understand what is the kind of conduct which could,  
11 if we accepted, violate Chapter 11, and that would  
12 enable us, even if we accept the facts as alleged  
13 in the Statement of Claim, we would still have to  
14 decide, and even if we rejected the United States'  
15 argument that in no circumstances whatsoever--  
16 although there I will have a question later to  
17 Mr. Clodfelter--can there be a Chapter 11 claim, we  
18 still have to decide whether the facts alleged by  
19 Canfor and accepted provisionally by us as true, as  
20 you want us to do, would amount to the kind of  
21 conduct which would violate Chapter 11 and would  
22 not, even though they are related in some way to

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1 anti-dumping.

2           So, that's why independently of the facts  
3 I return. Are you now abandoning the notion that  
4 lawful action can nonetheless violate in the area  
5 of antidumping, could violate Chapter 11?

6 MR. MITCHELL: No, and I'm going to pass  
7 this on to Mr. Landry momentarily to provide an  
8 elaboration to you, but I want to go back to the  
9 latter part of your observation as to whether,  
10 given the facts that we have alleged in the  
11 Statement of Claim and the pattern of abusive  
12 conduct that we allege, assuming we get over the  
13 first hurdle you described relating to whether any  
14 claim can be brought in an AD or if it touches on  
15 an AD or CVD matter, that the Tribunal still has to  
16 decide the next question, whether the facts alleged  
17 do fall within it.

18 ARBITRATOR WEILER: And you would say that  
19 we have to decide in a second phase?

20 MR. MITCHELL: Absolutely. And that's not  
21 the issue that's being briefed before you.

22 ARBITRATOR WEILER: I understand. But in

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1 order to enable us to decide the first issue,  
2 whether there is a possibility of bringing a claim,  
3 under Chapter 11, even though this is rooted in a  
4 pattern of facts that related to Chapter 19, and  
5 that's why to the best of my abilities, which might  
6 not be so good, I suggested give us hypothetical  
7 instances where we could see that there could be a  
8 violation. Because, if I cannot envision any  
9 factual circumstance that would actually violate in  
10 relation to antidumping and countervailing duty  
11 which would actually violate Chapter 11, then I

12 would say ex hypothesii, there is no possibility to  
13 bring it. So that's why we need to hear the kind  
14 of things, the kind of conduct that would  
15 constitute a violation, and I understand better the  
16 question of some abuse of things, but the question  
17 is: is there a non-abusive context which  
18 nonetheless might constitute a violation?

19 MR. MITCHELL: I'm going to pass that to  
20 Mr. Landry to address.

21 MR. LANDRY: Just to follow up on that,  
22 Professor weiler, and I will respond to a specific

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1 example, although it's difficult to do it in the  
2 hypothetical, but I will try to give you a specific  
3 example. But just to follow up on that, we start  
4 from one proposition I think we could all accept,  
5 is that we may have something that is consistent  
6 with domestic law, but inconsistent to an  
7 international obligation, and I used the  
8 antidumping CVD regime to test that proposition.  
9 There are numerous occasions in respect of this  
10 specific dispute where things have been found  
11 consistent with U.S. domestic law but inconsistent  
12 with the WTO law.

13 I will use one example, just one example,  
14 and I'm only using this in the context of the  
15 exchange that we are trying to have here. Zeroing.  
16 Found consistent by the Chapter 19 Panel and found  
17 inconsistent in the application of it by the WTO

18 Panel. So, we had something that is different, and  
19 I think that's your point. You want to get into  
20 this difference concept.

21 Now, it's hard to go to any hypothetical  
22 example, but I will choose my own country.

□

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1 ARBITRATOR WEILER: I would like the  
2 equivalent of zeroing in relation to Chapter 11.

3 MR. LANDRY: Perhaps zeroing is a good  
4 example in and by itself. Let me try something a  
5 little different, and let's assume for the moment  
6 that this is Canada, my own country, so that I  
7 don't suggest something of another country.

8 Let's assume again under Canadian law that  
9 in the collection of duties a discretion is given  
10 to an official within their regime, and the  
11 discretion effectively is that when duties are  
12 paid, they have the discretion for no reason  
13 whatsoever. In other words, they do not have to  
14 give reason to take those duties and to pay it out  
15 to the domestic industry.

16 Now, if they don't pay it out to the  
17 domestic industry, notwithstanding they have the  
18 discretion, that would be nothing that nobody could  
19 question that; in fact if they do pay it out, it  
20 was the discretion that would be given to him under  
21 Canadian law and we'll assume no other remedies for  
22 the moment. We are just talking about Chapter 19.

1 Then under Chapter 19 it could be lawful there, but  
2 the taking of the duties, if that's what happened,  
3 and giving it to the domestic competitor of the  
4 foreign investor may be an expropriation, for  
5 example.

6           So, it is difficult to deal in the  
7 abstract, okay, but in that type of case it may be  
8 perfectly consistent with the domestic law in  
9 Canada, and therefore if the Chapter 19 Panel  
10 looked at it and said no, there was discretion in  
11 the official, it's under the domestic law,  
12 therefore we can't question it, but it may be an  
13 expropriatory act that somebody could question at  
14 customary international law, and more importantly,  
15 in our context, under Chapter 11.

16           PRESIDENT GAILLARD: On respondent's side,  
17 do you have any comment on this issue?

18           MS. MENAKER: Would you like us to limit  
19 our response to the last question, the last  
20 comment? We don't--

21           PRESIDENT GAILLARD: I was thinking of the  
22 last series of--last exchange.

1           MS. MENAKER: Certainly.  
2           We cannot envision a scenario where a  
3 circumstance arises concerning an antidumping and  
4 countervailing duty matter that is found to be

5 lawful under domestic law and yet would violate  
6 Chapter 11. We don't think there is any such  
7 scenario. We haven't heard any from Canfor. They  
8 raised the scenario of zeroing, and as you noted,  
9 that would not implicate Chapter 11.

10           This latest hypothetical, and I would note  
11 that this is not a claim that they are bringing,  
12 that they are not claiming that under an  
13 official--in an official's discretionary act that  
14 official sought to take duties that were collected  
15 from Canfor and distribute them. That is not part  
16 of the claim.

17           However, they raised the prospect that  
18 perhaps that would be an expropriation, but Chapter  
19 11 covers investments, so what is that an  
20 expropriation of? The payment of duties are not  
21 investments. That's not within the definition of  
22 an investment.

□

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1           You pay--you can impose a high tariff, and  
2 that would not give rise to--I won't go into  
3 hypotheticals, but in that situation we don't think  
4 that that would give rise to a Chapter 11 claim, so  
5 I don't think that scenario fits. And as I've  
6 said, it's certainly not pled in their Notice of  
7 Arbitration.

8           And the other thing that I would note is  
9 that the Chapter 19 Panels, when determining  
10 whether something in AD/CVD matter when that's

11 before them and they are determining whether that  
12 is--was issued in compliance with domestic law, if  
13 you had a system in place or a law in place that  
14 essentially was--if you can imagine that having  
15 violated an international standard because it was  
16 inequitable in some case, I would just like to make  
17 sure that the Tribunal is aware of the governing  
18 law that governs a Chapter 19 Panel, and that is  
19 that the is panel supposed to apply the law of  
20 the--domestic law of the party, including general  
21 principles of law, and those--that term is defined  
22 in Chapter 19 and Article 1911. It says general

□

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1 legal principle includes principles such as  
2 standing, due process, rules of statutory  
3 construction, mootness, and exhaustion of  
4 administrative remedies.

5           So, when a Chapter 19 Panel is reviewing a  
6 determination under domestic law, they are applying  
7 standards of due process. So, if you can think of  
8 a scenario where the law might have been applied in  
9 a manner that violated due process, again that is  
10 something that a Chapter 19 binational panel would  
11 be looking at in its review.

12           ARBITRATOR WEILER: Might be looking at it  
13 under domestic standard of due process which may  
14 not correspond to international standard.

15           MS. MENAKER: And again, we have not been  
16 able to envision such a hypothetical. I think it's

17 incumbent upon Canfor, if it thinks that there is  
18 such a case, to bring it to our attention.

19           PRESIDENT GAILLARD: Mr. Harper. Maybe we  
20 could take another question, another exchange and  
21 we will break for lunch.

22           ARBITRATOR HARPER: Thank you,

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1 Mr. President. Let me explore for a moment the  
2 issue of a consequence because I'm frankly baffled  
3 by the discussion that I heard earlier today.

4           The idea, as I heard it articulated by  
5 Canfor, was that the United States appearing in  
6 defense of a Notice of Arbitration because it had  
7 abusively used its antidumping law so as to give  
8 rise to a claim by Canfor that was in arbitration  
9 was not deemed by Canfor to be an action "in  
10 respect of" the antidumping law, but only a  
11 consequence of U.S. action that was abusive. I  
12 think I fairly summarized. If I have not, I'm sure  
13 that I shall be corrected.

14           And so I have been mulling what this  
15 means, how a consequence cannot be in respect of  
16 something, and I thought initially of two plus two  
17 equals four, thinking that perhaps by translating  
18 it to the simple I would grasp the concept, and  
19 there my difficulty is, and I would be grateful to  
20 you, Mr. Landry, or you, Mr. Mitchell, to help me.  
21 Because as I see it, four in that computation is a  
22 consequence of the addition of two plus two. Four

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1 is also a total "in respect of" that addition of  
2 two plus two. So, perhaps, can you explain to me  
3 how a consequence is not "in respect to" or "with  
4 respect to."

5 MR. MITCHELL: I'm not sure that the  
6 debate can be simplified down to the mathematical  
7 equation.

8 The argument is or what the United States  
9 must establish is that we are imposing an  
10 obligation, whatever that term means, and I should  
11 just pause there, that if I took the Webster's  
12 definition of obligation, it's the act of obliging  
13 one's self to a course of action or something that  
14 one is bound to do or forbear which, again, I say  
15 goes to support the argument that I made yesterday.

16 But the obligation has to be with respect  
17 to--that is, the relational connection between the  
18 obligation, has to be in a relation to the defined  
19 term countervailing duty law. The question for the  
20 Tribunal is what did the parties mean when they  
21 said that instead of saying an obligation with  
22 respect to a CVD measure, for instance.

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1 And what I urge on the Tribunal is that  
2 imposing a consequence because of behavior, the

3 measures of which Canfor complains is not an  
4 obligation with respect to. It's not a duty to do  
5 something or refrain from doing something with  
6 respect to or applied to that law.

7           And what the United States is urging is to  
8 broaden the scope of what the narrow words  
9 obligation with respect to CVD or AD law mean to  
10 anything that the United States is required to do  
11 because of something to do with their AD or CVD  
12 law. And what I say, and I tried to explain this  
13 in terms of the use of the word consequence, is  
14 that's not what the parties meant by obligation  
15 when used in relation to law.

16           PRESIDENT GAILLARD: We are going for five  
17 minutes, and then we will break for lunch.

18           ARBITRATOR HARPER: Earlier in your  
19 presentation, Mr. Mitchell, you had occasion to  
20 begin with a statement again--and if I have  
21 misquoted you, please correct me--that this  
22 Tribunal cannot determine whether what is alleged

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1 is antidumping or countervailing duty law matters.  
2 These must be litigated. Perhaps I should stop  
3 right there because that's a predicate for the  
4 question, but I don't want to have the predicate  
5 wrong.

6           Have I got it correctly that you had said  
7 something to that effect at the outset of your  
8 initial comments today?

9 MR. MITCHELL: Let me just give you the  
10 specific reference.

11 ARBITRATOR HARPER: That would be helpful.

12 PRESIDENT GAILLARD: Do you want to take a  
13 break now and we start that answer when we resume  
14 because we have four questions on the same topic?  
15 I guess it's not going to be simple.

16 MR. MITCHELL: That's fine. If that's  
17 what the Tribunal would like.

18 PRESIDENT GAILLARD: Yes, I think we would  
19 like to suggest that.

20 Could we resume at two, or is that not  
21 enough time? That gives us an hour for lunch.  
22 That's enough time for both parties?

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1 MR. MITCHELL: Based on the speed at which  
2 we are going, is the Tribunal anticipating we will  
3 likely conclude today?

4 PRESIDENT GAILLARD: It's really up to  
5 you. The questions are long and compound in many  
6 cases, but the answers are also complex, so it  
7 really depends. I think we have a chance we could  
8 finish today, but it's really up to you. We don't  
9 want to preclude any party to express itself fully.  
10 These are extremely important issues, and we want  
11 to give you ample opportunity to discuss all this.  
12 I would not give up--I would not dispose of the  
13 time tomorrow prematurely. But why not, we may be  
14 able to complete today.

15 In this respect, do you have any--I'm  
16 asking both parties--do you have any specific  
17 requests that we do continue tomorrow for some  
18 specific type of issues, or not?

19 MR. MITCHELL: The only circumstance we  
20 can envisage is if something comes up that we  
21 require Professor Howse on.

22 PRESIDENT GAILLARD: We would like to have

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1 your determination on that during the course of the  
2 day, of course. On the U.S. side, do you see any  
3 reason why we would have to come in tomorrow?

4 MS. MENAKER: No.

5 PRESIDENT GAILLARD: So, we will see how  
6 we are doing today, and we certainly--we won't have  
7 a hearing tomorrow if we are done today. I mean,  
8 it's not for the sake of having a hearing. On the  
9 other hand, we don't want you to sort of fill in  
10 your calendar prematurely. So we will resume at  
11 two.

12 (Whereupon, at 1:00 p.m., the hearing was  
13 adjourned until 2:00 p.m., the same day.)

14

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1 AFTERNOON SESSION

2 PRESIDENT GAILLARD: We are back on the  
3 record. Mr. Harper was asking certain questions.  
4 Before I give him the floor, Professor Howse was  
5 able to come back, so he's here, and I welcome him  
6 back, even if it's an unhappy circumstance which  
7 brings him back because the plane was not  
8 operating. But we are glad you are here for the  
9 purposes of this hearing.

10 Mr. Harper will resume the questions.

11 ARBITRATOR HARPER: Thank you, Mr.  
12 President.

13 Mr. Mitchell, I think you were trying to  
14 find precisely in the transcript the predicate for  
15 the question I'm about to address to you. Did you  
16 find it?

17 MR. MITCHELL: Yes, Mr. Harper, I was.  
18 And there are two passages that could be referred  
19 to. The specific point to which I was responding  
20 was the point made by Mr. Clodfelter at on my  
21 transcript page 20, starting at line one where he  
22 said: "The general point is that a party may not

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1 avoid a Chapter 11 merely by labeling its conduct  
Page 111

2 as antidumping and countervailing duty law, if a  
3 matter is not generally subject to obligations with  
4 respect to countervailing and antidumping duty law  
5 simply calling it AD/CVD law will not shield a  
6 state from Chapter 11 implications. The Tribunal  
7 is free to look to see if, in fact, it is conduct  
8 subject to obligations with respect to the--to  
9 antidumping and countervailing duty laws, so  
10 fraudulent attempts to disguise otherwise violative  
11 behavior cannot be shielded by Article 1901(3)."

12           And my analysis of that passage and  
13 interpretation of that passage is at--on my  
14 transcript again starting on page 93, and the  
15 submission that I make is that once Canfor has  
16 alleged that the conduct is not--is sufficiently  
17 violative of the obligations and sufficiently  
18 arbitrary, it's insufficient for the United States  
19 to say that that conduct is, however abusive or  
20 arbitrary, related to CVD, and therefore exempt,  
21 and I say that that's a question that the Tribunal  
22 would have to address at the merits phase of the

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1 proceeding.

2           ARBITRATOR HARPER: And that's exactly  
3 where I'm having my problem. I thank you very much  
4 for giving me the transcript references and your  
5 explication. It seems to me that the position of  
6 Canfor puts the Tribunal on the horns of a dilemma  
7 that cannot be resolved. On the one hand we have  
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8 the obligation in light of the objection to  
9 jurisdiction to determine whether we have  
10 jurisdiction, and on the other we are being told we  
11 cannot really say whether or not Canfor's claims  
12 are in their nature or by their association or by  
13 their roots antidumping or countervailing duty law  
14 claims.

15           And so, maybe you could help me figure out  
16 how the Tribunal is to act in light of the dilemma  
17 that it seems to me Canfor's position has put us  
18 in.

19           MR. MITCHELL: Yes, I'm happy to,  
20 Mr. Harper, and thank you for the opportunity.

21           It seems to have become commonplace in  
22 Chapter 11 arbitrations for the state to advance a

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1 jurisdictional objection. It's happened in Loewen,  
2 it's happened in Methanex, it's happened in Ethyl.  
3 It's happened here. It's happened in many  
4 different cases.

5           And the Tribunal has three choices. If  
6 the matter is properly something that on the  
7 assumed facts recognizing the Tribunal's limited  
8 role, and I will talk about that in a minute on a  
9 jurisdictional motion, if the Tribunal is able to  
10 resolve the jurisdictional question neatly raised,  
11 then it may do so. Or it may determine that it  
12 can't do so at that time, and may refer the matter  
13 to merits, or it may determine it in, part, and

14 refer other parts to merits.

15           And so, in, for instance, the Loewen case,  
16 the Tribunal determined that it could not resolve  
17 many of the jurisdictional objections raised by the  
18 United States, and they were joined to merits.

19           The most complete discussion of the  
20 Tribunal's role and mandate in an UNCITRAL  
21 arbitration in Chapter 11 is in the Methanex case,  
22 and I've included that in our authorities.

□

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1           And the Tribunal there, a very  
2 distinguished Tribunal, was at pains to note the  
3 distinction between challenges to jurisdiction,  
4 which it said it could address, and challenges to  
5 admissibility, which it made clear that under the  
6 UNCITRAL Rules it did not have the authority to  
7 address. And in the results in the Methanex case  
8 and the discussion--I'm not going to walk you  
9 through it, but the discussion commences on page 43  
10 and continues through to page 58, where the  
11 Tribunal approaches the difference between  
12 jurisdiction and admissibility, and determines that  
13 for many--indeed most--of the challenges raised by  
14 the United States to the Tribunal's jurisdiction in  
15 Methanex, either they were admissibility challenges  
16 or they were something that otherwise had to be  
17 joined to the merits.

18           So, while the Tribunal has the power to  
19 determine on a motion whether it has jurisdiction,

20 it is constrained in doing so to make sure that in  
21 examining that question it assumes that the facts  
22 are true, and it doesn't proceed to evaluate those

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1 facts beyond determining whether they are, to use  
2 the Methanex word, incredible.

3           ARBITRATOR HARPER: Is it the position of  
4 Canfor that the Tribunal should overrule the  
5 objection to jurisdiction on the grounds that  
6 nothing that Canfor is pleading relates to  
7 antidumping and countervailing law  
8 duty--countervailing duty law?

9           MR. MITCHELL: I don't think that that  
10 statement accurately or completely encompasses the  
11 submission being advanced on behalf of Canfor.  
12 Canfor says that the objection to jurisdiction must  
13 be dismissed because Article 1901(3) does not  
14 exclude Canfor's claims, and that the words  
15 imposing an obligation with respect to a  
16 countervailing duty law or antidumping duty law do  
17 not contemplate the nature of the proceeding that  
18 Canfor is bringing.

19           ARBITRATOR HARPER: I just want to be  
20 clear because I'm having trouble understanding the  
21 words that I'm being given. Let me try it this  
22 way, Mr. Mitchell: Is it the case that Canfor

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1 complains in this proceeding that conduct of  
2 American officials in enforcing U.S. antidumping  
3 and countervailing duty law determinations has  
4 harmed Canfor?

5 MR. MITCHELL: We are having a look to  
6 make sure we understand the question, Mr. Harper.

7 PRESIDENT GAILLARD: Please, take your  
8 time.

9 (Pause.)

10 MR. MITCHELL: Mr. Harper, I apologize.  
11 We are all having difficulty understanding the  
12 import of the question. Is it possible that you  
13 could elaborate or that you could focus me on the  
14 area that's causing you concern?

15 ARBITRATOR HARPER: Are the allegations  
16 that Canfor makes against U.S. official actions  
17 allegations that arise by virtue of actions taken  
18 by U.S. officials to enforce U.S. antidumping law  
19 and countervailing duty law?

20 PROFESSOR HOWSE: Mr. Harper, I'm going to  
21 try and help out and see whether I correctly  
22 understand the question.

□

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1 One meaning to the question would be that  
2 you would like us to confirm that Canfor  
3 acknowledges that the factual context or factual  
4 matrix of this case is the antidumping and  
5 countervailing duty--that's the factual context of

6 the case, the subjection of the investor to  
7 determinations and other acts of officials in  
8 relation to that context.

9           And I would suppose that we would simply  
10 confirm that. I don't think that from our point of  
11 view there is any doubt that the factual context of  
12 the treatment of the investor in this case was the  
13 context where they were being subjected to these  
14 processes, these determinations, and U.S.  
15 proceedings in relation to them.

16           But if I misunderstood or we have  
17 misunderstood, perhaps you were asking something  
18 more than that.

19           ARBITRATOR HARPER: Is that the entire  
20 answer Canfor wants to give me to the question?

21           PROFESSOR HOWSE: Well, sir, with respect,  
22 if we are missing something that you're concerned

□

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1 about, that's one way we can puzzle out we believe  
2 you might be driving at or wanting us to confirm,  
3 but if there is something else you would want to  
4 know our position on or to test our position on,  
5 maybe if you could spell out a bit what the  
6 something else is. If there is some other  
7 proposition you're testing in terms of whether it's  
8 a proposition that Canfor is advancing in this  
9 proceeding.

10           ARBITRATOR HARPER: Professor Howse, thank  
11 you for that. Let me see if I can approach it this

12 way and then I will move on to one other short  
13 subject.

14 Professor Howse, according to my LiveNote  
15 transcript--I'm now looking at page 150, line  
16 three, I'm doing the somewhat inelegant thing of  
17 quoting myself--but according to the transcript, it  
18 is stated that I said: Are the allegations that  
19 Canfor makes against U.S. official actions  
20 allegations that arise by virtue of actions taken  
21 by U.S. officials to enforce U.S. antidumping law  
22 and countervailing duty law?

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1 Am I to understand what you just said as  
2 being a yes to that question?

3 PROFESSOR HOWSE: Well, that's a more  
4 complicated proposition because as Canfor is  
5 pleading that a range of these actions are not  
6 proper and not properly explained by an intent and  
7 good faith to enforce those laws and have a  
8 different explanation that engages, in our  
9 submission, a breach of, among other provisions,  
10 the provision of NAFTA requiring minimum standard  
11 of treatment under customary international law.

12 So, we would want to qualify assent to  
13 that proposition with our clear pleadings that we  
14 do not believe that a number of these acts, or many  
15 of them, could be explained by good faith efforts  
16 at enforcing those laws as they stand.

17 PRESIDENT GAILLARD: If I may ask a

18 related question at this juncture, we understand  
19 that we have three choices. We can say yes, we  
20 have jurisdiction, we can say no, or we could join  
21 to the merits. That, we can understand. But what  
22 is the test, according to you, the legal test?

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1 Because you seem to imply that, if you state that  
2 in a matter which you admit is related somehow--and  
3 I'm not prejudging any of the language  
4 interpretation and all that, we understand all the  
5 arguments surrounding this--but assuming, that's  
6 why I use loose language, it's related to AD or CVD  
7 law in the broadest meaning, if we assume that, you  
8 said: well, yes, but it's bad faith, it's  
9 egregious, it's terrible, it's really bad. My  
10 question to you--we understand that allegation, and  
11 at this stage it's an allegation--my question to  
12 you is: For the purposes of our determination on  
13 jurisdiction, what is the test? Is it enough that  
14 you state that it's an outrageous conduct which  
15 goes beyond the normal application of AD law or CVD  
16 law? Is it enough for us to go to the merits to  
17 find out if that's right or wrong, or do we have a  
18 certain duty to make a determination on something  
19 at this stage, and in the affirmative, what is the  
20 test, according to you? Does that help or it  
21 doesn't help? Does it help to understand what we  
22 want to understand as to your determination?

1 MR. MITCHELL: If we could just have a  
2 moment.

3 PRESIDENT GAILLARD: Please.  
4 (Pause.)

5 PROFESSOR HOWSE: Excuse me,  
6 Mr. President, for having taken a break, but it's  
7 an important--

8 PRESIDENT GAILLARD: That's quite all  
9 right.

10 PROFESSOR HOWSE: --it's a very important  
11 question.

12 It's Canfor's view that the United States  
13 is obviously entitled to have brought this motion  
14 and restricted this motion to the single issue,  
15 whether 1901(3) is a complete jurisdictional bar to  
16 any Chapter 11 claim that arises out of a factual  
17 context related to AD and CVD laws, regardless of  
18 the nature of the conduct.

19 So, we have been put in the position where  
20 we have to address that motion at this stage,  
21 without addressing all the other complex issues  
22 that arise, obviously, on the merits of this

1 action, and issues that it may have some  
2 jurisdictional implications, albeit not the  
3 implication that 1901(3) is a jurisdictional bar.

4 It was not our choice that this issue be  
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5 severed from all the complex questions related to  
6 it and questions that need to be dealt with on the  
7 merits, but if the issue is going to be decided on  
8 its own as apparently the United States is asking  
9 the Tribunal to decide it on a preliminary basis,  
10 we think then in that case the only fair  
11 alternative is to assume the claims about the  
12 nature of the conduct.

13           If, however, the issue is reserved for the  
14 merits, then we will have the opportunity to prove  
15 the conduct, and you will assess for yourselves  
16 whether given--whether our characterization of the  
17 conduct is persuasive to you, it will be such that  
18 1901(3), which we argue is an interpretive  
19 provision in any case, which would be brought in  
20 perhaps under the merits would somehow be an  
21 obstacle to our claims.

22           PRESIDENT GAILLARD: Mr. Harper still has

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1 questions.

2           MR. MITCHELL: If I could just elaborate  
3 on that answer in specific response to the  
4 President's question.

5           PRESIDENT GAILLARD: Please, go ahead.

6           MR. MITCHELL: In addition to the comments  
7 made by Professor Howse, the question of how a  
8 Chapter 11 Tribunal is to approach the  
9 jurisdictional question has been, not surprisingly,  
10 litigated before, and in our memorial at tab or at

11 paragraph 25 on page eight, we set out just the  
12 relevant passage from Methanex, and they say this:  
13 In order to establish the necessary consent to  
14 arbitration, which is the sole objection brought  
15 here, it is sufficient to show, one, that Chapter  
16 11 applies in the first place; i.e., that the  
17 requirement was 1101 are met; and two that the  
18 claim is being brought by a claimant investor in  
19 accordance with Articles 1116 and 1117 and that all  
20 preconditions and formalities required under  
21 Articles 1118 through 21 are satisfied. where  
22 these requirements met by a claimant, 1122 is

□

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1 satisfied and the NAFTA parties' consent to  
2 arbitration is established.

3           Now, I want to come back and talk about  
4 that passage in just a second, but as well in the  
5 Ethyl case, the early jurisdictional case in that,  
6 and that's at Tab 3 of our original materials, at  
7 page 31, the Tribunal said this: On the face of  
8 the Notice of Arbitration and the Statement of  
9 Claim, Ethyl states claims for alleged breaches by  
10 Canada of its obligations under Articles 1102,  
11 1106, and 1110. The claimant indisputably is  
12 investor of a party, namely the United States, and  
13 alleges that it is incurred loss or damage by  
14 reason of or arising out of such breaches, all as  
15 required by Article 1116. It is likewise beyond  
16 doubt that the claimant has acted within three

17 years of the time when it first acquired or should  
18 have acquired knowledge of the alleged breach and  
19 knowledge that it incurred loss or damage as  
20 stipulated in Article 1116(2).

21 Claimant's Statement of Claims satisfies  
22 prima facie the requirements of Article 1116 to

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1 establish jurisdiction of this Tribunal. As was  
2 stated in the administrative decision number 11  
3 quoted in K. S. Carlston, "The Process of  
4 International Arbitration," "When the allegations  
5 in a petition bring a claim within the terms of the  
6 Treaty, the jurisdiction of the commission  
7 attaches."

8 Now, let me just address both of those  
9 passages in the context of this case. While the  
10 United States has had some discussion which we say  
11 is to this motion irrelevant of Article 1101 and  
12 whether what we complain about is an investment  
13 measure, that question has been expressly severed  
14 from this motion. Therefore, the question for the  
15 Tribunal is, is the United States correct in  
16 establish--in its proposition that whenever a  
17 Chapter 11 claim touches on matters relating to CVD  
18 or AD matters, it is excluded from--by Article  
19 1901(3)? That becomes the neat question because  
20 the other requirements as met or as set out by both  
21 the Methanex Tribunal and the Ethyl Tribunal have  
22 been indisputably been met.

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1           PRESIDENT GAILLARD: Thank you.  
2 Mr. Harper, do you want to finish your line of  
3 questions?

4           ARBITRATOR HARPER: Thank you,  
5 Mr. President. I have one more question for  
6 Mr. Mitchell.

7           If I recorded correctly your arguments in  
8 chief today, Mr. Mitchell, you stated that Canfor  
9 relies on all U.S. actions up to the day of hearing  
10 for its claim. And again if I misquoted you,  
11 please let me know. This comes back, of course, to  
12 the vexed question for the Tribunal of what it is  
13 we are to decide.

14           Is it Canfor's position that anything that  
15 has happened up until December 8, 2004, by U.S.  
16 officials that touched on anything that Canfor was  
17 doing is now before this Tribunal?

18           MR. MITCHELL: The issue before this  
19 Tribunal is the jurisdictional issue that I just  
20 articulated in my last response to President  
21 Gaillard's question. The question of what will  
22 Canfor plead and rely upon at the hearing on the

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1 merits will relate to all conduct which falls  
2 within the conduct described, the ongoing pattern

3 of abusive conduct which has caused Canfor harm?  
4 The Tribunal--and again, I make the point that's  
5 not that question, is not before the Tribunal on  
6 this application, and properly shouldn't be. If  
7 the United States at some later point wants to make  
8 the argument that, as Canada did in the Pope and  
9 Talbot case, that a particular incident of conduct  
10 does not fall within the scope of the arbitration,  
11 then the United States will be free to do so. But  
12 again, the United States has pleaded this very  
13 motion as a neat and narrow question as to whether  
14 it has any obligation to arbitrate claims that in  
15 any way touch upon CVD or antidumping duty matters,  
16 and that is the issue that the parties have briefed  
17 and upon which we have made arguments to the  
18 Tribunal.

19 ARBITRATOR HARPER: What did you mean when  
20 you told us earlier today that Canfor was relying  
21 on all U.S. actions up to the day of the hearing  
22 for its claim?

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1 MR. MITCHELL: Let me just clarify what my  
2 remarks were. They were for clarity, Canfor  
3 intends to rely upon all of the United States  
4 conduct up to the date of the hearings on the  
5 merits as the basis for its claim.

6 ARBITRATOR HARPER: Where is the citation  
7 for that?

8 MR. MITCHELL: I have a feeling you and I

9 have different page numbers because your page 150 I  
10 didn't have one at that point, but it's on mine  
11 page 93, and it's about two pages into my initial  
12 reply submission.

13 ARBITRATOR HARPER: Thank you.

14 PRESIDENT GAILLARD: Thank you. Professor  
15 Weiler has a question.

16 ARBITRATOR HARPER: Sorry, I thought  
17 Mr. Mitchell was finding his exact words so that he  
18 could answer the question I just put to him, which  
19 is what did he mean by those exact words.

20 MR. MITCHELL: Okay. I don't know how  
21 much more that I can clarify them, but let me try  
22 this: Canfor has pleaded that the United States

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1 has engaged in and continues to engage in a pattern  
2 of conduct directed at Canfor for improper purposes  
3 with all the other matters we discussed that has  
4 caused and continues to cause it harm. And Canfor  
5 says that that conduct, that full array of conduct  
6 is what it intends to put before this Tribunal on  
7 the merits and ask for the Tribunal's ruling upon  
8 them.

9 ARBITRATOR HARPER: So, you're not using  
10 everything that's happened, as alleged, against  
11 Canfor by U.S. officials for the purposes of the  
12 jurisdictional motion?

13 MR. MITCHELL: To go back to the approach  
14 to be taken to a jurisdictional motion, all of that

15 conduct has to be assumed to have occurred.

16 ARBITRATOR HARPER: What I'm searching for  
17 is: What is it? I'm sitting here on December 8,  
18 2004. I need to know what I'm being directed to  
19 consider in respect of the jurisdictional motion.

20 MR. MITCHELL: I don't mean to be obtuse.  
21 The issue on the jurisdictional motion is as  
22 narrowly defined in the memorials. Canfor has

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1 pleaded that United States officials in their  
2 various actions--and some are particularized in the  
3 Statement of Claim--have acted intentionally,  
4 arbitrarily, for politically motivated reasons to  
5 harm Canfor and its investments, that they have  
6 treated Canfor unfairly and discriminatorily in the  
7 things they have done, and that that array of  
8 conduct assumes to be true does not allow the  
9 United States to rely upon the provisions of  
10 Article 1901(3) as properly interpreted to deny  
11 Canfor the right to attempt to prove its claim  
12 under Chapter 11.

13 PRESIDENT GAILLARD: Thank you,  
14 Mr. Mitchell.

15 On the U.S. side, is there any need for an  
16 answer on this because, frankly, it was a  
17 clarification of the position of claimant, but I  
18 don't want to preclude from you making some remarks  
19 on this.

20 MS. MENAKER: We are happy to wait and

21 answer any direct questions that the Tribunal has  
22 directed to us.

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1           PRESIDENT GAILLARD: Because we also have  
2 questions for you. We operated backwards, but  
3 you're next in line, so don't worry, we will have  
4 questions for you. But before that, Professor  
5 Weiler has questions I think still for the counsel.

6           ARBITRATOR WEILER: It's actually to both,  
7 and it's directly on this issue. And I speak for  
8 myself, and it goes to the question of what was  
9 agreed that will be decided here.

10           I suppose one option for the Tribunal is  
11 to accept that the claim is totally barred because  
12 of 1901(3). At another extreme it might be a  
13 position where one would say the claim is not  
14 barred by 1903 because 1903 relates to a certain  
15 set of legal considerations, and this is a  
16 different cause of action. But it might be, and I  
17 really say it might be that the panel could decide  
18 that there would have to be very special  
19 circumstances in order for a claim that arises from  
20 adopting the formula of the President, not  
21 prejudging the issue in the field of antidumping  
22 and countervailing duties could be the subject of a

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1 Chapter 11 claim. But then the question would be  
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2 whether the statement of facts presumed by the  
3 panel satisfies those conditions because it might  
4 be that it's not a question of the merits to show  
5 at that point where they, in fact, violate Chapter  
6 11, but whether they satisfy some conditions for  
7 bringing this claim.

8           If the panel were to go down that road,  
9 when would that have to be decided? Does, for  
10 example, the United States accept that if the  
11 panel--and I'm not saying we are going to do  
12 this--we have not discussed anything--but that if  
13 the panel would simply say it is not the case that  
14 in all circumstances a Chapter 11 is barred when  
15 it's related to AD and CVD, the jurisdictional  
16 phase is finished and all other matters then are  
17 joined with the merits and would be decided later  
18 on.

19           And this is a real difficulty I'm having  
20 because the way it was presented so far seemed to  
21 be it's an either/or, and maybe there is a middle  
22 position which says there would be conditions under

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1 which, and then the question would be, even if we  
2 assume everything that Canfor alleges is true,  
3 whether it satisfies those conditions.

4           PRESIDENT GAILLARD: The question is  
5 directed to both parties. Maybe Canfor first  
6 briefly, and then we'll move on to the U.S. to  
7 answer the same question.

8           MR. MITCHELL: Clearly, the middle ground  
9 that--well, there is an array of middle ground, and  
10 the Tribunal could rule in our favor that the  
11 objection to jurisdiction must be dismissed because  
12 we are correct in the interpretation or the  
13 opposite, or join the matter to the merits.

14           The comments just made by Professor Weiler  
15 about being--that being done with--I'm not sure if  
16 the word was conditions, but I took that to be the  
17 tenor of the question. I mean, conceivably that  
18 could be done, but the position of Canfor is that  
19 this is an extraordinary case, and the  
20 circumstances are extraordinary, and Canfor is well  
21 alive to the standards under Article 1105 and 1102  
22 to which it would have to prove its case.

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1           On top of that, I would like to ask  
2 Professor Howse to comment.

3           PRESIDENT GAILLARD: Before we do that, we  
4 understand, I think--the purpose of all these  
5 questions is to understand your legal position. We  
6 understand the position as to the facts. The  
7 argument which goes that you have to assume the  
8 facts for the purpose--as stated for the purpose of  
9 the jurisdiction, we understand. It's a classic  
10 argument. We are not saying it's right or wrong,  
11 but we understand the argument.

12           In terms of the legal standard for our  
13 determination, so you're saying it's an

14 extraordinary case. So, we would have to  
15 assume--your position from a legal standpoint on  
16 the jurisdictional issue is that we have to assume  
17 that it is an extraordinary case in order to join  
18 the matter to the merits, and then sort it out at  
19 the merits phase. Is that your contention?

20 PROFESSOR HOWSE: Well, Mr. President, we,  
21 Canfor, in general, would, as I understand it, not  
22 object to this matter being dealt with at the

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1 merits. The position we are in here is that we  
2 have responded to, as you're well aware, the U.S.  
3 motion to deal with it now on a stand-alone basis,  
4 and one difficulty we have, of course, is that we  
5 responded to a motion that is based on an argument  
6 that 1901(3) is a complete jurisdictional bar  
7 rather than an argument that there might be special  
8 conditions or special concerns that would have to  
9 be met in order for an action of this type that has  
10 some relationship to some other proceeding on CVD  
11 and AD law to go forward under Chapter 11.

12 And I could imagine that the fact--I mean,  
13 while we, as Canfor has shown, there is  
14 nothing--international law and, indeed, NAFTA, is  
15 not a stranger to multiple proceedings. There  
16 clearly might be issues about multiple proceedings  
17 that would arise, should--

18 PRESIDENT GAILLARD: I hate to interrupt  
19 you, but I would like to take--we understand these

20 arguments that were made before, but would like to  
21 take them in sequence, so is the answer yes?

22 PROFESSOR HOWSE: That we would be

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1 satisfied to have these issues resolved at the  
2 merits? Yes.

3 PRESIDENT GAILLARD: Well, no, but the  
4 legal test is that we have--in the same way we have  
5 to assume that the facts as alleged by claimant are  
6 right for the purposes of jurisdiction, we, in your  
7 contention, have to assume that this is an  
8 extraordinary case, and this contention alone would  
9 induce us to sort of join any question to the  
10 merits as long as we determine that 1901(3) is not  
11 a complete bar to the issues that relate to  
12 antidumping law or countervailing duty law.

13 MR. MITCHELL: Let me try it this way, and  
14 I think the difficulty in the analysis is that the  
15 question that you're asking moves towards the  
16 question does this fall within Chapter 11? That  
17 is, is this an investment measure or what is the  
18 meaning of Article 1105 or what is the meaning of  
19 Article 1110?

20 PRESIDENT GAILLARD: That's being  
21 reserved. We assume that it's reserved. But for  
22 the purpose of that question which I just asked, I

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1 was assuming that is reserved, the investor  
2 argument and all that.

3           MR. MITCHELL: But that is the essence of  
4 the concerns that is--as I understand it, the  
5 concern that is underlying Professor Weiler's  
6 question.

7           And so, as you review the 200 pages of  
8 legal arguments, no one is sitting there saying  
9 this is the ambit of Article 1110. This is the  
10 ambit of Article 1105, or this is why these are or  
11 are not investment measures. And you will recall  
12 when we went through the previous proceedings as to  
13 what was asking the United States to file a  
14 statement of defense, and they reserved certain  
15 questions, like does this fall within investment  
16 measures.

17           PRESIDENT GAILLARD: I was referring to  
18 the test with respect to Article 1901(3), and I  
19 think Mr. Weiler was referring to that as well, not  
20 prejudging anything on Chapter 11. For the test,  
21 you're saying: it's not a jurisdictional bar;  
22 therefore, you need to go into the merits, we

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1 allege this, in and of itself, is not a bar, so you  
2 need to go to the merits because the respondent has  
3 reserved other arguments for a later stage. That's  
4 your contention, I think; is that correct?

5           MR. MITCHELL: I think perhaps--I want to

6 be careful to make sure I get my response correct  
7 here.

8 (Pause.)

9 MR. MITCHELL: Yes.

10 PRESIDENT GAILLARD: Thank you.

11 Professor Weiler.

12 ARBITRATOR WEILER: Just to restate to the  
13 United States, if, in principle, should the panel  
14 decide that in principle there might be  
15 circumstances where contrary to your argument,  
16 Article 1901(3) is not a total bar, can all other  
17 issues that pertain to jurisdiction--is it your  
18 understanding--have been reserved for the merits  
19 phase?

20 MR. CLODFELTER: One moment.

21 (Pause.)

22 PRESIDENT GAILLARD: Who is going to

□

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1 answer?

2 MR. CLODFELTER: I will answer,  
3 Mr. President. Let me begin by just referring the  
4 Tribunal to Article 21(4) which is the presumption  
5 in favor of deciding jurisdictional defenses as a  
6 preliminary question. So if the question is,  
7 should the Tribunal decide that without more it  
8 cannot decide whether 1901(3) is a complete bar,  
9 should the more be put off to the merits, we  
10 would--we think we would oppose that because it  
11 would violate the principle of preliminary

12 treatment of the jurisdictional issue. So, we  
13 should not be put to the burden or the expense of  
14 defending on the merits, especially on a  
15 jurisdictional objection of this sort.

16 But we don't think--you asked earlier is  
17 there a middle ground. We don't believe there is a  
18 middle ground. We believe that you accept the  
19 facts as alleged as true. You don't accept facts  
20 that haven't been alleged as true, which seems to  
21 be what we are hearing from the other side, that a  
22 pattern of conduct and the whole range of conduct

□

498

1 they haven't even specified yet. What you have to  
2 accept as true is the facts alleged in the  
3 Statement of Claim. All those facts show that the  
4 conduct is the basis of this claim is conduct in  
5 the administration of the U.S. antidumping and  
6 countervailing duty law. We think that is  
7 sufficient to establish that the claim would have  
8 obligations imposed by Chapter 11 on U.S.  
9 antidumping and countervailing duty law, and should  
10 therefore bar the claim in total.

11 The facts to be assumed true are the facts  
12 alleged in the Statement of Claim, and we certainly  
13 don't accept the theory of the claimant that  
14 abusive administration of the AC/CVD (sic) law is  
15 within your jurisdiction, but maybe not abusive  
16 administration of that law isn't. That is, if the  
17 officials acted wrongfully, you have jurisdiction

18 to decide if the officials have acted wrongfully.  
19 We think that's crazy. You have to assume the  
20 allegations in the Statement of Claim is true, and  
21 in doing so it is sufficient to establish their  
22 relationship to antidumping and countervailing duty

□

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1 law.

2 I hope I have answered your question.

3 PRESIDENT GAILLARD: Thank you for this  
4 clarification. We think the position of the  
5 parties is rather clear, and we think the  
6 discussion was helpful in this respect.

7 Now we would like to turn to a number of  
8 questions which are questions of clarification  
9 regarding the reply of respondent this morning.  
10 Maybe I will start, we all have a few questions.

11 Mr. Clodfelter, maybe you want to comment  
12 on the answer which was made to your position  
13 regarding the facts which would have taken place  
14 after the notice. Your position as expressed  
15 earlier was that since you have a notice  
16 requirement here, the facts which take place  
17 afterwards shouldn't be considered at all, and the  
18 argument was made that if it's the same, the  
19 continuation of the same pattern of facts, it  
20 could, and some case law was quoted. Do you want  
21 to answer this, or you want to just refer to your  
22 written pleadings on this?

1 MR. CLODFELTER: Mr. President, one  
2 person's pattern is another person's matrix. What  
3 NAFTA requires is that claimants allege measures in  
4 violation of--measures related to investments.  
5 They have to specify the conduct.

6 Now, we are not in a position to tell you  
7 how to define the limits because obviously facts  
8 develop, and even a measure alleged develops over  
9 time and changes over time, and tribunals have held  
10 that such changes do not require initiation of a  
11 separate claim or a separate notification. I'm not  
12 going to give you a definition of what those  
13 changes are.

14 And the other thing is, we have no idea of  
15 this pattern that they're talking about, of course,  
16 except what has been written in the briefs and in  
17 the Statement of Claim. The subsequent conduct  
18 they have alleged, however, is not merely the  
19 earlier measures that they alleged developed over  
20 time. We would not say, for example, that any  
21 behavior which they seem to be now criticizing  
22 before the Chapter 19 Panels, on reaction to

1 Chapter 19 Panel decisions is the same measure as  
2 the complaints they have made about the  
3 investigations, for example. That clearly is a  
4 separate measure requiring separate notification



11 dispute between the parties that the damages, as a  
12 general matter, are available under Chapter 11, and  
13 first thing there needs to be a finding of  
14 liability portion, and of course there is the  
15 assessment of damages, and damages certainly could  
16 encompass a range of things: Lost profits, you  
17 could even get attorneys' fees. There is not a  
18 perfect overlap, if this addresses the Tribunal's  
19 concern.

20           we are not saying that there is a perfect  
21 overlap between the recovery they are seeking here  
22 and the recovery they are seeking in Chapter 19.

□

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1 But you heard Canfor say this morning that there is  
2 now \$500 million worth of duties that they have  
3 paid. That is a substantial sum that they are  
4 requesting in both proceedings.

5           So, the point is that there is a  
6 substantial overlap between the two proceedings,  
7 not that there couldn't be some additional claim  
8 for damages that they could conceivably make in  
9 Chapter 11.

10           PRESIDENT GAILLARD: Joseph, do you wish  
11 to ask a question?

12           ARBITRATOR WEILER: I beg your patience  
13 and indulgence. Also my colleagues'. This might  
14 be the last time we actually get a chance to  
15 discuss this, so if I'm a bit plodding, I  
16 apologize.

17 I think my first couple of questions will  
18 be to Ms. Menaker, and they go to 1901(3) and to  
19 1902, and I think we need to deal with both.  
20 Because if I understood your position correctly, it  
21 was they are not interdependent. In other words,  
22 even the claim, the reference to antidumping law or

□

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1 countervailing duty law, one argument was that it  
2 doesn't refer to determinations or specific  
3 decisions, and you contested that and said, no, it  
4 should include all of that because that would be  
5 part of administrative practices. But then if I  
6 understood you correctly, you said: but even if I'm  
7 not right on this, they still are barred because  
8 the duty to appear to justify would be in respect  
9 of antidumping law.

10 So, since we might buy one of your  
11 arguments but not the other, I understand that they  
12 stand alone, but I want to deal with each of them.

13 So, let me deal with the question of what  
14 should be understood by antidumping law or  
15 countervailing duty law, and for that we were led I  
16 think by both sides to Article 1902 as part of  
17 their argument, and there it is said that  
18 antidumping law and countervailing duty law include  
19 as appropriate for each party relevant statutes,  
20 legislative history, regulations, administrative  
21 practice, and judicial precedents.

22 If I understood the Canfor argument

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1 correctly, they said this is all in the nature of  
2 rules, normative--and I don't want to use the word  
3 "measures"--but normative rules, and they should be  
4 differentiated by specific determinations or  
5 specific decisions which would not be covered by  
6 law.

7           And if I understood your argument  
8 correctly, Ms. Menaker, this is how you argued  
9 before us. You said, first of all, we should look  
10 at the word "include", and include means it's not  
11 an exhaustive list because if it was meant to be an  
12 exhaustive list, you referred us to other places  
13 where it says means. So, include could include  
14 other things.

15           And then you tried to persuade us that  
16 they include--could include also administrative  
17 determinations or decisions because that would be  
18 part of administrative practice.

19           And if I recall correctly, this at least  
20 is the note that I took when you were speaking, you  
21 gave us an example. You said each branch of  
22 government works in its own way. The legislature

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1 issues statutes, and the judiciary issues judicial  
2 decisions, and the Executive Branch issues

3 decisions and regulations which issues decisions or  
4 determinations which are part of its administrative  
5 practice.

6           The slight difficulty I have with this is  
7 the following: First grant me, I think you would,  
8 that the fact that it says include, and it doesn't  
9 mean that it's an exhaustive list, doesn't mean it  
10 includes everything. For example, you might say it  
11 includes also letters or correspondence that we  
12 might say we are not persuaded about that.

13           So, the question is what is to be, even if  
14 I buy--and I think I'm inclined to buy, although I  
15 would like to ponder it more that it's a  
16 nonexhaustive list--the question is what should be  
17 included in addition or what should be understood  
18 as administrative practice because one could argue  
19 one or the other.

20           So, it's a matter of interpretation. Now,  
21 what strikes me is the following, that you said the  
22 legislature issues statutes, court issues decisions

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1 but the text here refers to judicial precedents  
2 which would seem to suggest that not every judicial  
3 decision should be included, but only judicial  
4 decisions which is are of a precedent-creating  
5 nature. In other words, we might read it, and  
6 that's the direction my question is going, that, in  
7 fact, they say to us that antidumping law does not  
8 include every judicial decision, but only

9 precedent-creating decisions, and that therefore,  
10 mutatis mutandis, when we get to administrative  
11 practice, we should look to the equivalent, it's  
12 not all the output. You see the Legislative Branch  
13 also issues non-binding resolutions--you know,  
14 proclaiming the twentieth of March as the Joseph  
15 weiler day--but it's the statutes, it's the  
16 normative one you said. And for the courts it's  
17 the judicial decisions, the judicial precedents,  
18 and therefore we might want to look also for  
19 administrative practice and to say either  
20 administrative practice should include  
21 determinations, but to the extent that they are the  
22 equivalent of that normative behavior, in other

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1 words, that they are of the rule nature and not the  
2 specific application of the rule.

3 Now, my usual caveats apply. I don't know  
4 yet how this will help, if it will help them, if it  
5 will help you, et cetera, but I want to try and get  
6 everything as much as possible out of the hearing,  
7 and that's the sense of my question, the first  
8 question.

9 MS. MENAKER: Mr. Weiler, first, I would  
10 like to just clarify our position. I think that  
11 what you said was correct in some respects, but I  
12 would just like to clarify it. First, in 1901(3)  
13 it uses the term antidumping law or countervailing  
14 duty law. I would say that we could break our

15 argument down into three different levels. First,  
16 on the first level, we would say that the  
17 determinations, to the extent they're challenging  
18 the determinations, that falls within the  
19 definition of antidumping law or countervailing  
20 duty law because anything done in the  
21 administration or the application of a law, if  
22 you're challenging the administration or

□

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1 application of that law, you would be imposing an  
2 obligation on a party with respect to that law.

3           Now, that is independent of our arguments  
4 pertaining to the meaning of the term  
5 administrative practice, so even if law just  
6 referred to the statute on the books, that is still  
7 our argument that that term is broad enough there  
8 to encompass obligations that would be imposed on a  
9 party with respect to the administration and the  
10 application of that statute that would be--fall  
11 within 1901(3).

12           Now, second, what we have said is the term  
13 law, if you look at the definition in 1902(1), it  
14 includes administrative practices, and we have said  
15 that administrative practice one example of an  
16 administrative practice is a determination, and on  
17 that basis alone we would say that the term,  
18 therefore determination fits within the meaning of  
19 antidumping law or countervailing duty law.

20           And third, I would say that the list

21 there, the so-called definition is an open-ended  
22 one, so to the extent that you found for one reason

□

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1 or another that determination did not fit within  
2 the definition of administrative practice, and then  
3 we are asking you to look beyond this list and add  
4 in determination, and that's where I think your  
5 question comes in, is should we be adding a term  
6 like that into the list if we think it serves a  
7 purpose different from the other terms that are  
8 listed there.

9           ARBITRATOR WEILER: It also applies to  
10 your second argument, what should be included in  
11 administrative practice, even if we don't include  
12 anything else, because administrative practice is  
13 pretty open textured. So my question actually  
14 relates to both, the second and the third.

15           MS. MENAKER: I can certainly respect that  
16 view, but I would also urge upon the Tribunal to  
17 look at what we consider to be the ordinary meaning  
18 of administrative practice, and I pointed to the  
19 definition of that term, for instance, in the  
20 financial services chapter of the Canada-U.S. Free  
21 Trade Agreement, and I believe that that  
22 definition, a determination, if, in the context of

□

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1 a Federal agency that was administering the U.S.  
Page 145

2 trade laws, a determination would fit within that  
3 definition. So, in our view, that would fit within  
4 the ordinary meaning and would be similar to the  
5 other terms that were listed there. But  
6 nevertheless--

7           ARBITRATOR WEILER: Wouldn't you say  
8 that--I'm a great believer in looking at context  
9 always--the immediate context is 1901, 1902(1)  
10 itself, and that in that context, since it spells  
11 out that for judicial decisions, it's not just all  
12 judicial decisions which it could have been, but  
13 actually narrows it down to judicial precedent that  
14 that's the immediate context in which I should try  
15 and construe administrative practice? And that  
16 would take precedence over going to context which  
17 is a different treaty from a different time which  
18 was changed and not replicated here? I'm not  
19 trying to be vexatious, so...

20           MS. MENAKER: Let me answer that in two  
21 ways. First, I don't think that we completely  
22 agree with your interpretation of the term judicial

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1 precedent. I believe that every--in a common law  
2 system you could have decisions that they all  
3 create some sort of judicial precedent. It might  
4 not be precedent for any particular case if the  
5 decision is emanating from a court. It depends  
6 where you are when you are looking at the body of  
7 case law, but each decision, in and of itself,

8 might have some precedential value, depending on  
9 where that court sits.

10 ARBITRATOR WEILER: Wouldn't then they say  
11 judicial decisions? If they said judicial  
12 precedents, doesn't that imply that they also  
13 contemplate judicial decisions which are not  
14 precedential?

15 MS. MENAKER: I do not necessarily think  
16 so.

17 ARBITRATOR WEILER: I do not necessarily  
18 think so, either.

19 MS. MENAKER: Okay, fair enough.

20 ARBITRATOR WEILER: But I'm clarifying.

21 MS. MENAKER: Sure.

22 I would also add, you know, our second

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1 point is that administrative practice is different  
2 from judicial practice in important respects, and  
3 in the administration of the United States's  
4 antidumping and countervailing duty laws, the  
5 administrative practice is built up through the  
6 issuance of the determinations, and so the  
7 administrative practice is built upon each  
8 determination.

9 I mean, typically a single determination  
10 can represent administrative practice on a  
11 multiplicity of different issues, and so in that  
12 respect I think it is somewhat--it is akin to  
13 something like judicial precedent there, that as

14 the determinations are issued, that is, I mean, in  
15 essence the way that the administrative practice  
16 develops.

17           ARBITRATOR WEILER: There might not--I  
18 mean, Canfor didn't argue something totally  
19 different from that. They invited the panel, if I  
20 understood them correctly, to say if you look at  
21 determination as part of a normative whole, then  
22 that might be antidumping law. If you look at it

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1 as stand-alone and there might be circumstances.

2           Can I move to my second question which  
3 might also be of some consequence. It's a  
4 different form of labeling. My professional  
5 deformation, I'm a law professor, so I'm going to  
6 set a hypothetical.

7           Imagine that a Chapter 19 Panel  
8 characterized an official--an act of a national  
9 administration, Canadian, American, or Mexican,  
10 that caused injuries and damages to an investment  
11 of an investor characterized as ultra vires. They  
12 made a legal finding this is an ultra vires  
13 measure; the official has no authority to do it.  
14 It was outside his or her remit. If it were the  
15 classroom, one could sort of shade it in different  
16 way, but it's enough here.

17           would the panel not be justified in  
18 thinking that at least in relation to such a  
19 measure so characterized, it might not be

20 considered as to be in respect of the parties'  
21 antidumping law or countervailing duty law, having  
22 been qualified that it is exactly not that?

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1           And in a way, Mr. Clodfelter, that's a  
2 question that indirectly also applies to what you  
3 said today in relation to the President's different  
4 question about labeling, because you, if I  
5 understood you correctly, you said that if--it's a  
6 different type of ultra vires. If there was a  
7 measure which cloaked itself as antidumping but was  
8 egregiously not so, or at least appeared prima  
9 facie to be egregiously not so, then panels such as  
10 ours would be allowed to make a determination. In  
11 fact, if I understood you correctly, this is not an  
12 antidumping measure, this is something that  
13 pretends to be an antidumping measure, but also  
14 there there is another instance where although  
15 emanating because maybe it was issued by the  
16 antidumping authorities, et cetera, so in some ways  
17 related to antidumping law, it would still be  
18 possible for a panel of us, by a panel of this  
19 nature, at least to seize the matter in order to  
20 decide it without contravening the stricture, even  
21 as you understand it, of 1901(3). At least these  
22 are circumstances where simply seizing the matter

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1 in order to make a determination could not be  
2 construed as imposing an obligation in relation to  
3 antidumping law because that would be begging the  
4 question where there is antidumping law.

5           MR. CLODFELTER: Let me begin our answer,  
6 and Ms. Menaker may add something to it. I don't  
7 think the two situations are the same, first of  
8 all. The point I was trying to make just calling  
9 it antidumping doesn't make it antidumping, and you  
10 can look further than that, but an ultra vires act  
11 is very different because if you're looking at the  
12 context--

13           ARBITRATOR WEILER: Could we stop on the  
14 first one, on the calling it?

15           MR. CLODFELTER: Sure.

16           ARBITRATOR WEILER: That might be  
17 contested. In other words, the investor might say,  
18 let's forget about the facts of Canfor for now  
19 because I really think they might cloud the issue.  
20 The investor might come in with a claim and say  
21 with the claimant this is not antidumping or  
22 countervailing. It's just pretending to be. That

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1 was the example the President gave. And the state  
2 would in good faith even vehemently say this is the  
3 case, this is absolutely within antidumping. Who  
4 gets to decide that to say that that would be  
5 imposing--that submitting that to a panel such as

6 ours would violate, would mean that really it is  
7 shielded, and you, yourself, concede, if I  
8 understood you correctly, that there might be cases  
9 where it really should be structured.

10 MR. CLODFELTER: Well, first of all, I  
11 believe it's for the Tribunal to decide, but let me  
12 make this point first of all. It's not an issue in  
13 this case. It's been admitted that the conduct  
14 here was in the administration of antidumping and  
15 countervailing duty laws. It is not an issue  
16 before you, and it need not trouble you in deciding  
17 the effect of 1901(3) here.

18 ARBITRATOR WEILER: I think that would be  
19 a matter for the panel to decide, wouldn't it,  
20 whether everything that was alleged in the  
21 statement of fact could be characterized in that  
22 the administration of, et cetera, or not?

□

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1 MR. CLODFELTER: Well, of course, of  
2 course. What I'm saying is it's patently clear and  
3 uncontested that everything, all the conduct they  
4 allege you could maybe find a different conclusion  
5 based upon your reading of the Statement of Claim,  
6 but I think you won't.

7 And it's not being alleged that this is  
8 just labeled as antidumping. This is clearly about  
9 the U.S. administration and antidumping. They  
10 don't like the way we administered it, but it's  
11 clearly about that. So, the labeling issue really

12 isn't here in this case. The only labeling is on  
13 the other side trying to label this as something  
14 other than what it is, but it's different than the  
15 ultra vires situation.

16 PRESIDENT GAILLARD: Can you finish on the  
17 antidumping--on the labeling, I'm sorry. You say  
18 it's not--it doesn't fit the facts of the case.  
19 Now, that's one argument. What about the legal  
20 argument? What's the test? You would agree with  
21 the test, but you said it doesn't fit here, or do  
22 you want to elaborate on the test? Being

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1 understood that for the purposes of the Court  
2 Reporter, we will break in five minutes because I'm  
3 told that the nature of justice requires that.

4 MR. CLODFELTER: We will give him the  
5 break, but let me just suggest here we may be  
6 reluctant in the abstract to offer you a test since  
7 it isn't an issue here we don't believe.

8 PRESIDENT GAILLARD: That's fine. I want  
9 to hear your determination on this.

10 MR. CLODFELTER: Ultra vires, I think it's  
11 different because even in an ultra vires act, the  
12 conduct is still in the administration, perhaps, of  
13 the underlying body of law. Maybe that person  
14 didn't have authority to do it, but you could still  
15 make a determination of what that conduct relates  
16 to, and so I don't even think in an ultra vires  
17 case if you determine that the conduct is in the

18 administration, authorized or not, of antidumping  
19 or countervailing duty law, it can impose  
20 obligations on it.

21 ARBITRATOR WEILER: Mr. President, I would  
22 like to get to the bottom of this, with your

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1 permission.

2 PRESIDENT GAILLARD: Of course. It's just  
3 a question that we--can we go on. I'm asking the  
4 Court Reporter if we can go on for a few minutes.

5 ARBITRATOR WEILER: I'm really trying to  
6 think hard about this. We know, for example, from  
7 the general law of state responsibility in  
8 international law that it's a delicate issue  
9 because sometimes a government tries to escape the  
10 state responsibility by saying a police officer  
11 acted on a frolic of his own and outside his  
12 authority, and this quite delicate law was in  
13 uniform or was not in uniform, et cetera. But  
14 what's interesting in the general law of  
15 attribution in state responsibility, it's where to  
16 accept the state's position that he or she were on  
17 a frolic on their own and acting outside their  
18 authority and acting ultra vires, the state would  
19 escape its liability. So, international law  
20 doesn't want an illegal act being committed, and  
21 the state escapes state responsibility by saying:  
22 it can't be attributed to us.

1           what's interesting here and different  
2 here, and that's why maybe the general law of state  
3 responsibility couldn't just apply directly, is  
4 that here by claiming this is state  
5 responsibility--we are responsible, actually the  
6 state--the member would escape its responsibility  
7 because it becomes nonjusticiable then, because  
8 then it's Chapter 19, and there is no remedy under  
9 Chapter 19.

10           So my point on this point is that that's  
11 why I'm taking with caution just the general law of  
12 attribution under state responsibility.

13           So, now let's say that he or she are  
14 acting--really the Chapter 19 Panel say this is  
15 totally outside what the antidumping law is, they  
16 were frolicking on their own; let's say they issued  
17 a claim for money pretending that this was an  
18 official claim of antidumping and it turns out they  
19 put it in their pocket, to give an absurd example.  
20 So, at some level it's true to say that this is  
21 related to antidumping, but would a determination  
22 saying they suffered injury by doing this be

1 imposing an obligation on the antidumping law of  
2 the state? Isn't that a little bit far-fetched?  
3 It's not imposing an obligation on the antidumping  
4 law of the state because the panel or mutatis

5 mutandis, if it were a domestic issue, the Court of  
6 International Trade in New York would have said  
7 it's not antidumping law of the United States. It  
8 has nothing to do with antidumping law of the  
9 United States. It's a violation of the--it's ultra  
10 vires.

11 (Pause.)

12 MS. MENAKER: Perhaps it might make sense  
13 if the panel, the Tribunal doesn't mind we take our  
14 break now so we can collect our thoughts and then  
15 answer.

16 PRESIDENT GAILLARD: I'm sure the Court  
17 Reporter would find that to be a good idea, so  
18 let's break for 15 minutes, then you answer, and of  
19 course, claimant will be invited, if they want to,  
20 to comment on your answer. So, for the record, we  
21 pause for 15 minutes.

22 (Brief recess.)

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1 PRESIDENT GAILLARD: We resume the  
2 hearing, and Professor Weiler will continue his  
3 line of questions.

4 ARBITRATOR WEILER: I was just waiting for  
5 the reply of Ms. Menaker or Mr. Clodfelter, and  
6 then I have the finish up question to Mr. McNeill.

7 MS. MENAKER: Thank you. Just if I may,  
8 just before responding to that, I just wanted to  
9 very briefly supplement a prior answer that I gave  
10 concerning the definition of antidumping

11 countervailing duty law and its interaction with  
12 the administrative practice and whether or not that  
13 includes determinations, and I would just like to  
14 direct the Tribunal's attention to the fact that  
15 included amongst the things that are listed in  
16 1902(1) as being within the antidumping law and  
17 countervailing duty law is legislative history.  
18 And legislative history certainly is not binding,  
19 it's not precedential. It's not normative. So, in  
20 that respect, I think, Professor Weiler, you  
21 indicated some concern that a judicial precedent,  
22 perhaps, should be construed rather narrowly

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1 because not all judicial decision was included, and  
2 judicial decisions that were not binding, for  
3 instance, might not be included. And I think one  
4 has to take into account that not all of the things  
5 on that list are of a normative and certainly not  
6 of a binding character, so I just wanted to  
7 supplement my answer in that respect.

8           with regard to the question you asked us  
9 before the break, which is, if in the  
10 administration of our antidumping or countervailing  
11 duty law, if an official acted in an ultra vires  
12 manner, whether that conduct would still be not  
13 subject to investor-state dispute resolution by  
14 virtue of Article 1901(3), and first I would like  
15 to just reemphasize that there is no allegation of  
16 ultra vires conduct here. If one looks at Canfor's

17 Statement of Claim, its Notice of Arbitration  
18 there, the conduct there all relates to the  
19 administration and application of the United  
20 States's antidumping and countervailing duty law,  
21 and none of it could be characterized or fairly  
22 characterized as ultra vires conduct.

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1           Now, in the hypothetical that you gave,  
2 there I believe in your hypothetical the conduct  
3 that was at issue was, in fact, before a Chapter 19  
4 Panel, and the Chapter 19 Panel in that instance  
5 indicated that the official in question had acted  
6 outside the realm of his or her responsibilities.  
7 And I suspect, then, took some action, whether it  
8 was a determination that that person was  
9 responsible for having issued; perhaps the  
10 determination was then remanded because of that.

11           I think in that situation there clearly  
12 1901(3) would bar any other type of claim, an  
13 investor-state claim, even presuming obviously the  
14 other prerequisites for jurisdiction were met under  
15 Chapter 11 because there exercising jurisdiction  
16 over that claim would be imposing an obligation on  
17 a party with respect to the administration and  
18 application of its AD/CVD laws.

19           Now, by the same token, if there were  
20 conduct and we have not come up with any example of  
21 such conduct, but theoretically, if there were  
22 conduct that was so ultra vires so as to be outside

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1 of this sphere of antidumping or countervailing  
2 duty law, then in the same manner as what  
3 Mr. Clodfelter was saying earlier, for the same  
4 reasons that merely labeling a law as an  
5 antidumping or countervailing duty law, merely  
6 labeling conduct or merely asserting that a certain  
7 challenge would impose an obligation with respect  
8 to your antidumping or countervailing duty law is  
9 not enough, but that is precisely the question  
10 before this Tribunal, and I think that previously  
11 you asked what test do you apply, and I think I  
12 would like to direct the Tribunal's attention to  
13 footnote 16 in our reply where we quote the  
14 separate opinion of Judge Coroma on the ICJ in the  
15 Fisheries Jurisdiction cases, and I will just quote  
16 from that. It says, since Canada excluded from the  
17 jurisdiction of the court, quote, disputes arising  
18 out of or concerning conservation and management  
19 measures, end quote, the question whether the court  
20 is entitled to exercise its jurisdiction must  
21 depend on the subject matter. In other words, once  
22 it is established that the dispute relates to the

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1 subject matter defined or excluded in the  
2 reservation, then the dispute is precluded from the

3 jurisdiction of the court, end quote.

4           And so, there too the ICJ was engaged in  
5 an exercise where it had to determine the contours  
6 of the claim and whether that claim was precluded  
7 by an exclusion of jurisdiction, an exclusion from  
8 the court's jurisdiction of a particular subject  
9 matter. And that's what we are asking you to do  
10 here, is to look at Canfor's claims as pled, and  
11 reach the determination which we think is  
12 inescapable, which is exercising jurisdiction over  
13 those claims would impose obligations on us with  
14 respect to our antidumping and countervailing duty  
15 law.

16           And I think the bottom line is really, is  
17 that obligation, with respect to the AD/CVD law?  
18 It either is or is not, and regardless of how  
19 allegedly egregiously that law was administered or  
20 it was applied does not change the fact that then  
21 imposing an obligation with respect to the  
22 administration or conduct of that law would still

□

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1 be in violation of Article 1901(3). It does not  
2 make the conduct that was undertaken any less--it  
3 does not make it--excuse me, I don't want to use  
4 too many double negatives in that sentence.

5           The obligation on the United States would  
6 still be with respect to its antidumping and  
7 countervailing duty law, even if that law had been  
8 improperly applied, and I think I mentioned when I

9 did my argument yesterday--I mean, that is  
10 precisely what the Chapter 19 Panel system was  
11 devised to hear, is to hear the questions of  
12 whether the law had been properly applied.

13           Now, if your concern is that there might  
14 arise a situation where there is no remedy, I would  
15 like to at least address that, to some extent,  
16 because if the issue that you're asking us about is  
17 whether if in the administration and application of  
18 the law one of the government agencies acted  
19 improperly, they ignored the law, they manifestly  
20 disregarded the law, that, again, does not leave  
21 anybody without a remedy. That is the precise  
22 reason that the parties created the Chapter 19

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1 mechanism. The Chapter 19 binational panel in that  
2 case, would there--in that situation would remand  
3 any determination because they would find that it  
4 wasn't made in accordance with U.S. law.

5           Or if a claimant did not opt to utilize  
6 that system, they could go to the U.S. court  
7 system.

8           ARBITRATOR WEILER: Can I ask you about  
9 that.

10           MS. MENAKER: Yes.

11           ARBITRATOR WEILER: And it is really by  
12 way of clarification. But when we say no remedy,  
13 what troubles us is not that there is no remedy in  
14 the formal sense because if it goes before Chapter

15 19, they can remand it. Let's say the national  
16 administration, and again I say it's maybe best to  
17 set Canfor aside for a minute, although I really  
18 take your point that it depends what is pled here,  
19 et cetera.

20           And I think the notion of no remedies,  
21 that there is no remedy to the injuries suffered by  
22 the egregiously improper behavior is simply

□

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1 remanding it back even if they then issue a right  
2 decision or they don't.

3           what we might be concerned--since we have  
4 to construe it, I know the United States is arguing  
5 that this is crystal clear and if you only open  
6 your eyes how could you even be sitting here, but  
7 we are. So, maybe some of us take the view that  
8 it's not quite as crystal clear as you would have  
9 us believe--so, it's a question of interpretation,  
10 and we might be concerned to give an interpretation  
11 that would really open a gap in the protection  
12 which we appropriately think that NAFTA wants to  
13 afford to investors, Canadian, American, and  
14 Mexicans, so that an empty remedy like an  
15 exhaustion of local remedy rule, if it's just  
16 formal but it doesn't get a remedy, maybe it's that  
17 kind of remedy that we might be concerned with.

18           And really in situations where you could  
19 say they're acting outside the law, with blatant  
20 disregard of the law, not simply the kind of normal

21 kind of error that everybody is prone to make,  
22 including this panel.

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1 MS. MENAKER: I do understand the concern,  
2 and first there is in the hypotheticals or in a  
3 hypothetical that you posed, there might, for  
4 instance, be the remedy of a criminal sanction. If  
5 what the conduct that was undertaken was so  
6 egregious and it might have violated criminal law.  
7 So, that is another potential remedy.

8 They might also have a civil remedy in the  
9 form of what we call a Bivens action against the  
10 particular official if that official acted outside  
11 the scope of his or her authority. And they might  
12 have an action in U.S. court, and could receive a  
13 remedy in that manner.

14 But, even if one could conceive of a  
15 situation where an antidumping and countervailing  
16 duty matter that was properly before a Chapter 19  
17 Panel, so fell within the restriction of Article  
18 1901(3), even if one could conceive of a situation  
19 where conduct arising in the course of that matter  
20 could give rise to a Chapter 11 claim, if the  
21 Tribunal only had jurisdiction, that is not a  
22 reason for finding jurisdiction. The fact that you

□

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1 might have a customary international law right does  
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2 not necessarily grant you a remedy, and does not  
3 necessarily make--

4           ARBITRATOR WEILER: That's not exactly the  
5 point. Of course that alone would not give rise to  
6 jurisdiction. We are not going to rewrite the  
7 Treaty just because we think the makers of the  
8 Treaty in certain situation left an investor  
9 remedy-less, but the question we, at least I  
10 personally, find difficult is whether the bar to  
11 Chapter 11 which is not imposing an obligation on  
12 antidumping law of a member should operate there  
13 because of the way I tried to construe the problem  
14 and then exemplified it with a hypothetical. It  
15 would be difficult to say this is actually imposing  
16 an obligation on the antidumping law because it's  
17 really not on the antidumping law. That's the  
18 kernel, and maybe that's where you and I are not  
19 quite ad idem.

20           PRESIDENT GAILLARD: Is it your  
21 determination, on the U.S. side, that--what the  
22 authorities do may be right or wrong, but it has to

□

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1 be "genuinely" within the ambit of antidumping or  
2 countervailing duty law to be excluded from the  
3 jurisdiction of the Chapter 11 Tribunal? I've  
4 added the word "genuinely." And would you agree  
5 that that kind of test is what you have in mind?

6           And of course, we understand that you're  
7 saying it's not the case here, but it's a different

8 issue. We are talking about the law now.

9 MS. MENAKER: Yes, I think, Mr. President,  
10 that that would be a fair description, which is,  
11 and just to make sure that I understood your  
12 comment correctly, that is if what the official  
13 did--

14 (Pause.)

15 MS. MENAKER: If what the official did was  
16 genuinely within the ambit of antidumping and  
17 countervailing duty law, although he performed his  
18 function improperly, he did something wrong in  
19 actually administering those laws, then, yes, that  
20 would still be conduct with respect to our  
21 antidumping and countervailing duty law.

22 I think perhaps, Professor Weiler, the

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1 question you asked might also be--I mean be  
2 answered by reference to my earlier comment which  
3 is if the act itself was truly ultra vires that it  
4 took it outside of the realm of what is antidumping  
5 and countervailing duty law, then Article 1901(3)  
6 might--

7 ARBITRATOR WEILER: Can't it be a little  
8 bit more nuanced? I'm really very tentative. One  
9 approach is to say if it's so inappropriate as to  
10 take it outside the realm, and I think you're not  
11 to worry to concede to that because it really would  
12 have to be extraordinary. It's a little bit like  
13 Mr. Clodfelter, sort of if it's totally, you know,

14 really labeling, but the more difficult to touch  
15 issue is whether it is of such a nature that  
16 whatever remedy was indicated could not in a  
17 meaningful way be said to be impose an obligation  
18 in relation to antidumping law because what was  
19 done, one would really have to find that it imposed  
20 an obligation in relation to antidumping law, and  
21 what was done, that might be a more delicate issue  
22 rather than that it's totally outside the realm.

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1 But whatever remedy a Chapter 11 Tribunal would  
2 impose, could it be said in relation to certain  
3 types of conduct to actually impose an obligation  
4 on antidumping law?

5           And I suppose it could say--you could say:  
6 okay, merely appearing before Tribunal is imposing  
7 an obligation, but there we already saw that  
8 sometimes in cases like somebody has to decide  
9 whether it's here or there.

10           (Pause.)

11           MS. MENAKER: I will try to answer this  
12 question. The best that I can say is really  
13 reiterating what I had earlier answered, but  
14 perhaps doing so in a different format may make it  
15 more clear, is that certainly if the conduct at  
16 issue again did not relate to antidumping and  
17 countervailing duty law, although it was labeled as  
18 such, but that was just purely a label, the act was  
19 so ultra vires, then imposing an obligation on a

20 party to compensate for that conduct would not be  
21 akin to imposing an obligation on a party with  
22 respect to its antidumping or countervailing duty

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1 law.

2           However, if the conduct cannot be taken  
3 outside of that realm, that sphere, so if the  
4 conduct was still undertaken in the administration,  
5 the application of the antidumping and  
6 countervailing duty law, then any obligation, even  
7 if it was improperly taken, even if it was very bad  
8 conduct, any obligation imposed on a party to  
9 compensate an individual for that--any harm that it  
10 suffered as a result of that conduct still would be  
11 an imposition of an obligation on a party with  
12 respect to its antidumping and countervailing duty  
13 law.

14           PRESIDENT GAILLARD: Thank you.

15           ARBITRATOR WEILER: I want to assure you  
16 that I really think I understand your position.

17           MS. MENAKER: Thank you, and I would only  
18 just add that, of course, in the absence of even a  
19 more concrete hypothetical, of course it's  
20 difficult to answer these questions just  
21 theoretically.

22           PRESIDENT GAILLARD: Thank you for having

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1 tried to do so. We understand the position.

2           At this point, does claimant want to say  
3 something? We understand that you disagree and you  
4 have expressed views on this, but do you want to  
5 make a comment or two?

6           MR. LANDRY: We do want to make one  
7 comment, and just to follow up on that, obviously  
8 the conclusion that Ms. Menaker comes to,  
9 therefore, is that there will be instances under  
10 their interpretation where there will not be a  
11 remedy in the sense of what Professor Weiler was  
12 getting at, that is the injury to potential to  
13 foreign investors. But I want to go just beyond  
14 that a little bit, and I've spoken to Professor  
15 Howse about something that we talked about earlier  
16 that I was going to get him to respond to when he  
17 was away, and it deals with this remedy issue, so I  
18 wonder if perhaps Professor Howse could comment on  
19 that. It is in response to this.

20           PRESIDENT GAILLARD: In that case, you  
21 may.

22           Professor Howse.

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1           PROFESSOR HOWSE: We have, Mr. President,  
2 several responses on this issue of the  
3 quote-unquote realm of antidumping and  
4 countervailing duty law.

5           To be very brief, the first, and I think

6 perhaps the most important point is that in  
7 assessing whether the conduct that Canfor has  
8 complained of is within the realm of countervailing  
9 or antidumping duty law, whatever--I think that we  
10 have to understand that Canfor's claim is both with  
11 respect to individual acts of United States  
12 officials that we see, we allege are falling below  
13 the standard of treatment required by Chapter 11  
14 provisions, but also it's very much a claim about  
15 the conduct as a whole in this matter towards  
16 Canfor.

17           And we have to look at and understand  
18 whether the nature of the conduct, as a whole, and  
19 here, if I may, I would just like to cite a very  
20 recent NAFTA investor-state ruling, the GAMI and  
21 Mexico ruling. I realize it's not in the  
22 authorities, but we would be obviously prepared to

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1 provide copies to the Tribunal and to the United  
2 States. May I refer?

3           PRESIDENT GAILLARD: It's not necessary.  
4 I think it's in the public domain. You may make a  
5 comment. We don't want copies. We have access to  
6 it.

7           PROFESSOR HOWSE: Sure. Thank you.

8           And in paragraph 97, the Tribunal makes  
9 the following statement. The record as a whole,  
10 not isolated events, determines whether there has  
11 been a breach of international law, and so this may

12 also perhaps answer some of the concerns that  
13 Mr. Harper has raised, that we are looking here not  
14 just at discrete acts as violations, but a pattern  
15 of conduct over a period of time where those acts,  
16 put together, rise to the level of egregious and,  
17 in our submission, improperly motivated conduct.  
18 And so, there is part of our claim that says that  
19 the collectivity of these acts represents a  
20 violation, and I just wanted to make that clear.  
21           That being said, I would just like to make  
22 a couple of other observations on just this

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1 particular--this particular issue. I think in  
2 assessing the nature of the conduct and its  
3 relationship to good faith or proper administration  
4 of countervailing and antidumping duty laws and how  
5 far it is out of that ballpark, as it were, first  
6 of all, as we say, we have to take the conduct as a  
7 whole over all these various iterations where there  
8 have been numerous attempts both the WTO and in  
9 other NAFTA proceedings to correct these problems,  
10 and then we come to, and I would just like to  
11 briefly quote, the second remand Decision of the  
12 Panel in the injury case in August 31st, 2004,  
13 which is in the authorities. That's at Tab 1 in  
14 the authorities, and I think this is directly  
15 relevant to the question of a remedy, and the  
16 nature of the remedy that is or is not available or  
17 has been denied, even if it's theoretically

18 available to Canfor in this case.

19           On page three, the binational panel makes  
20 the following observation. In its second remand  
21 determination, the ITC has refused to follow the  
22 instructions in the first panel remand decision.

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1 And note the language refused, refused to follow  
2 the instructions.

3           And then the panel goes on to say the  
4 Commission relies on the same record evidence that  
5 the panel not once, but twice before held  
6 insufficient as a matter of law to support the  
7 Commission's affirmative threat finding. By the  
8 Commission so doing, this panel can reasonably  
9 conclude that there is no other evidence to support  
10 the Commission's affirmative threat determination.  
11 The Commission has made it abundantly clear to this  
12 panel it is simply unwilling to accept this panel's  
13 review authority under Chapter 19. Simply  
14 unwilling to accept this panel's review authority  
15 under Chapter 19. And has consistently ignored the  
16 authority of this panel.

17           And the panel I'm quoting from goes on to  
18 say, in light of this, further remands for  
19 correction are futile, that essentially that there  
20 is no point in making further remands because  
21 whenever there is a remand to correct these errors,  
22 the ITC simply refuses to accept the instructions

1 of the Chapter 19 Panel.

2           And it's our submission that this reflects  
3 the very extraordinary nature of this particular  
4 case that, essentially it would be very hard to  
5 characterize in these circumstances the Chapter 19  
6 proceeding as an effective remedy, or, indeed, the  
7 conduct of Commerce is with respect to  
8 countervailing and antidumping duty law, conduct  
9 that simply refuses to follow a ruling that the ITC  
10 is legally obliged to follow, refuses. Not  
11 reinterprets what the panel is saying, but refuses  
12 to follow, refuses the authority, is itself, in our  
13 submission, outside any authority granted in  
14 respect of antidumping and countervailing duty  
15 laws.

16           PRESIDENT GAILLARD: Professor Howse, you  
17 have used different phrases or different concepts.  
18 You have used the concept of good faith, proper  
19 administration, and extraordinary nature of the  
20 case. We understand the other side's position that  
21 they are prepared to concede that there are  
22 situations which do not--which are not barred by

1 Article 1901(3), and they have expressed their  
2 views on this. It's the "genuinely", "with respect  
3 to", I would say, that's their position as I  
4 understand it, in a nutshell. Your position would

5 be that's the wrong test. The real test is in good  
6 faith with respect to or in the ordinary conduct of  
7 things as opposed to the extraordinary nature of  
8 the case.

9           So, what is the test, as far as you are  
10 concerned? Suggest a legal position. I'm not  
11 talking about the facts of the case. I'm talking  
12 about the legal standard.

13           PROFESSOR HOWSE: The legal standard,  
14 Mr. President, that we urge on the Tribunal stems  
15 from our interpretation of 1901(3) in context. And  
16 that interpretation is that 1901(3) simply properly  
17 read in context is not of the nature of a bar to  
18 jurisdiction, and so it is our view that as far as  
19 the correct test goes, that would be really a test  
20 that would apply in a situation where there was an  
21 attempt to argue 1901(3) as an interpretive  
22 provision on the merits.

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1           At the same time, we would argue, I  
2 suppose, in the alternative or in response to what  
3 the United States has said that were there a  
4 different kind of test, were the panel to accept  
5 the submission that there is some test that says  
6 that you can go to Chapter 11 consistent with  
7 1901(3), if the conduct in question somehow is  
8 outside of the normal operation, authority, good  
9 faith administration, that, in our view, the  
10 conduct here collectively and in some cases

11 individually would meet such a test.

12           But I grant you that the test had not been  
13 sufficiently clearly articulated. We just want to  
14 make it clear that we are not in any way suggesting  
15 that we think that the conduct we are complaining  
16 of would be such that it could be characterized as  
17 properly falling within the administration or as  
18 non-ultra vires.

19           PRESIDENT GAILLARD: We understand your  
20 primary, what you just referred to as your primary  
21 case, and it has been discussed extensively. I  
22 don't think we need to dwell on that, but we do

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545

1 understand the argument.

2           what you're calling your alternative case,  
3 the test would be that it has to be properly--can  
4 you elaborate on that. Or just before elaborating,  
5 just giving us the answer, what is the test in your  
6 fallback position, if I may call it this way?

7           PROFESSOR HOWSE: If I could confer for a  
8 moment with my colleague.

9           PRESIDENT GAILLARD: Please do.

10          (Pause.)

11          PROFESSOR HOWSE: Mr. President, because  
12 we would like to look more carefully at the exact  
13 words that the U.S. has suggested in terms of a  
14 test for ultra vires or a test for something being  
15 completely or outside AD and CVD law by virtue of  
16 the extraordinary nature of the conduct in

17 question, and because in a sense, we have heard  
18 several possible tests formulated in slightly  
19 different language, in fully articulating, as you  
20 put it, alternative position, we would like the  
21 time to reflect on that, and look at the words  
22 because I don't think we yet have a completely

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1 clear test. My concern was simply to respond to  
2 the way that they chose to characterize the conduct  
3 we were--we are complaining of as it were en  
4 passant in discussing their test, but frankly their  
5 test, we would need to go back and look at the  
6 words to see exactly the nature of that test, and  
7 if there is one clear test they're proposing, and  
8 then be back to you. Would that be satisfactory?

9           PRESIDENT GAILLARD: Well, this case is  
10 not new to you. I guess you had ample time to  
11 think about the issues, and you do not necessarily  
12 have to have a fallback position. I was just  
13 suggesting that--I mean, I was not suggesting  
14 anything, I was commenting on the fact that on the  
15 U.S. side when discussing the exact scope and  
16 consequences of 1901(3), they say: look, this  
17 example of the something which is mere labeling is  
18 not leading anywhere because we would agree that  
19 mere labeling is not good enough, so it would not  
20 work as a bar in a case where it's mere labeling,  
21 and they elaborated a little bit on that. I'm not  
22 saying you--if that's all you can say at this stage

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1 on this, that's fine. And we will reflect on the  
2 suggestion that you may want to think about it  
3 further, and will take that into consideration at a  
4 later stage.

5           But Mr. Howse, we certainly understand  
6 that your primary case--and your case, period--is  
7 that it's not a bar because it's an interpretive  
8 provision, and you have made this argument very  
9 clearly.

10           MR. LANDRY: If I may, I think what we  
11 would like to do is, because you have asked for a  
12 test, and a type of test like this, I think there  
13 is a preciseness in the words. We will provide the  
14 Tribunal today with what that would be. I think  
15 that's what we are saying. We just need a bit of  
16 time. We will do it and reflect on it and we'll  
17 provide that to the Tribunal.

18           PRESIDENT GAILLARD: This is perfectly  
19 fine. You understand my concern. We are at the  
20 hearing phase, and I don't want to unnecessarily  
21 burden the case at this stage, but if that's what  
22 you mean, that you will come back to us during the

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1 course of today, that's certainly fine.

2           PROFESSOR HOWSE: If I could just,

3 Mr. President, explain why we need to do this.

4 PRESIDENT GAILLARD: It's fine.

5 On the same issue, Mr. Harper still has a  
6 question.

7 ARBITRATOR HARPER: Thank you,  
8 Mr. President. This question grows out of your  
9 words a few minutes ago, Professor Howse, and  
10 actually I think relates to the entirety of the  
11 Canfor position, so anyone is open to answer it,  
12 obviously, but I will direct it to you, if I may,  
13 sir.

14 would you specify for the Tribunal one  
15 act, and by specify I mean tell us what it actually  
16 was, one act, of which Canfor complains in which it  
17 is alleged that the U.S. officials did something  
18 that was not related to U.S. antidumping law and  
19 countervailing duty law.

20 (Pause.)

21 PROFESSOR HOWSE: Well, it is Canfor's  
22 claim that those acts that individually and

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1 collectively manifest again on the evidence that we  
2 intend to present in our view improper purpose, a  
3 purpose other than--the purpose that's stated in  
4 Chapter 19 itself of maintaining effective and fair  
5 disciplines and unfair trade practices. But  
6 rather, as we put it, purposes that are politically  
7 motivated and not related to the impartial  
8 enforcement of the law, but compromise that, that

9 those actions--it's hard to see them as relating to  
10 countervailing and antidumping law, in our  
11 submission, because they are motivated and driven  
12 by considerations and purposes that are other than  
13 as is stated in Article 1902(2), maintaining  
14 effective and fair disciplines and unfair trade  
15 practices.

16           ARBITRATOR HARPER: What I meant,  
17 Professor Howse, was not to be given conclusory  
18 statements or characterizing statements. What I  
19 meant by the word specify, what I meant by saying  
20 tell us the facts what it was. I'm asking for a  
21 description, a statement of a single act of which  
22 Canfor complains in this case in the jurisdictional

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1 phase, a single act by a U.S. official that was not  
2 related to U.S. antidumping and countervailing duty  
3 laws.

4           PROFESSOR HOWSE: Well, Mr. Harper, with  
5 all due respect, and at the risk of repetition, my  
6 purpose in referring back to the second remand  
7 decision of the Panel was to give you one  
8 illustration of a moment in the ongoing conduct  
9 that Canfor considers not in relation to or respect  
10 to antidumping and countervailing duty law, and  
11 that is as the panel held the persistent refusal of  
12 the ITC to follow--refusal, not that they didn't do  
13 it in the way the panel liked, but refusal to  
14 follow the remand instructions of the Chapter 19

15 Panel.

16 Now, as far as we know, and as far as the  
17 law says, they're obligated to do that. Their  
18 whole purpose in a determination on remand is to  
19 follow the instructions of the remanding authority.  
20 That's what--

21 PRESIDENT GAILLARD: Your answer in a  
22 nutshell is the conduct described in the second

□

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1 decision of August 31, '04?

2 PROFESSOR HOWSE: That would be one  
3 example, sir.

4 PRESIDENT GAILLARD: Thank you.

5 ARBITRATOR HARPER: And I understand that  
6 you're saying that in light of the fact that a  
7 Chapter 19 binational panel, by definition, deals  
8 with antidumping and countervailing duty law? I  
9 mean, that's what its subject matter is, is it not?

10 PROFESSOR HOWSE: Mr. Harper, what I was  
11 saying is that the very nature of a remand where  
12 the ITC is having a remand, the very--the nature of  
13 that exercise in relation to countervailing and  
14 antidumping duty laws is the redetermination of the  
15 matter in accordance with the instructions of the  
16 remanding authority.

17 So, where the ITC is refusing to follow  
18 that, it's actually doing something other than a  
19 remand in an antidumping and CVD proceeding. It's  
20 essentially rejecting authority to which it is

21 legally bound in the context of antidumping and  
22 countervailing duty law, and it's our submission

□

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1 that that just goes way outside of the ambit of  
2 action that could be reasonably and appropriately  
3 considered to be in respect of antidumping and  
4 countervailing duty law.

5           PRESIDENT GAILLARD: Thank you, Professor  
6 Howse. I think we understand the argument. Thank  
7 you for the clarification.

8           At this stage, unless respondent would  
9 like to briefly comment on this, I would like to  
10 move on to another topic, but if you do want to  
11 briefly comment on this, please do.

12           MS. MENAKER: If we may just very briefly.

13           PRESIDENT GAILLARD: Please.

14           MR. MCNEILL: Canfor's counsel says this  
15 is an extraordinary case, there is something really  
16 extraordinary about this case, but what is really  
17 truly extraordinary is the only example of  
18 something they can come up with which they say is  
19 not with respect to antidumping and countervailing  
20 duty law is something which is not even pled as a  
21 basis of their claim. It is the actions of the  
22 U.S. domestic agencies in response to the remand

□

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1 determinations by the Chapter 19 Panels.  
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2           Now, it's hard to understand how that  
3 could not be with respect to antidumping and  
4 countervailing duty laws. As a matter of fact,  
5 that is with respect to Chapter 19 as reflected the  
6 entire process in Chapter 19. So it's very hard to  
7 understand that claim.

8           Also, as a factual matter, the quotes that  
9 Professor Howse read have really been overtaken by  
10 events. He's reading from old--he's reading old  
11 events. As I mentioned this morning, there was a  
12 remand determination on August 31st, 2004, the  
13 Chapter 19 panel issued the third remand  
14 determination.

15           And the ITC made a negative threat  
16 finding. So Professor Howse is referring to events  
17 that occurred before this, so they have really been  
18 overtaken by events entirely.

19           But perhaps the largest point on this  
20 issue is that it has nothing to do with the  
21 jurisdiction of this Tribunal at this issue.  
22 Canfor is frustrated with the Chapter 19 process,

□

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1 that they're unhappy with preliminary outcomes, not  
2 even the final outcome, they're talking about  
3 preliminary outcomes, is not something that would  
4 confer jurisdiction on this Tribunal.

5           PRESIDENT GAILLARD: Thank you,  
6 Mr. McNeill. If the parties are in agreement, we  
7 would like to move to another topic at this stage

8 of an entirely different nature. We would like to  
9 discuss the legislative history, the travaux with  
10 respect to Article 1901(3), and we would have a  
11 number of questions on the documents which were  
12 produced in this respect.

13 In order to ask the questions, I would  
14 like the parties to take the two binders which were  
15 produced as the "Negotiating texts of the chapter  
16 on review and dispute settlement in antidumping and  
17 countervailing duty matters of the NAFTA",  
18 maintained by Canada and distributed to Mexico and  
19 the U.S. And there is a reference number. The  
20 first page has a page number which is 01139, and  
21 each page has a page number going forward.

22 Can you take these documents before we ask

□

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1 the questions, on each side, please. Do you have  
2 them handy? Take your time.

3 MR. MITCHELL: We do not. We are going to  
4 need to find one.

5 PRESIDENT GAILLARD: Please.

6 (Pause.)

7 PRESIDENT GAILLARD: It's an April 9  
8 submission, April 9, 2004.

9 PRESIDENT GAILLARD: We resume the  
10 hearing. And I see that both parties now have in  
11 front of them the documents which I referred to,  
12 and I would like you to take the first tab, Tab 1  
13 in this document, and go to page two, where you

14 have on top of the page a paragraph which says USA,  
15 three, "No provision of any other chapter of this  
16 Agreement shall be construed as imposing  
17 obligations on the Parties with respect to the  
18 Parties' antidumping law or countervailing duty  
19 law."

20 My first question on this is a question  
21 for clarification. The word USA means that it's a  
22 proposal by the USA. That's what the legend says.

□

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1 I guess--is it correct?

2 MR. MCNEILL: That is my understanding as  
3 well. It says USA and the United States first  
4 introduced that text, and it is in brackets and  
5 underlined because it has not been accepted as of  
6 that time.

7 PRESIDENT GAILLARD: That was my second  
8 question. When it's in brackets, it means that it  
9 hasn't been discussed yet, so it's a proposal.

10 MR. MCNEILL: It's my understanding it has  
11 been discussed. It's been put in the text, but it  
12 has not been definitively accepted at that time.  
13 It's still considered tentative or proposed text at  
14 that time.

15 PRESIDENT GAILLARD: Right. So, do we  
16 have anywhere in the record anything which tells us  
17 when this proposal was introduced by the U.S.?  
18 Earlier than this document which is Tab 1, or maybe  
19 you can identify the date of the document, and then

20 answer the question.

21 MR. MCNEILL: Not to our knowledge. The  
22 first record we have of it is dated June 30th,

□

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1 1992, which the first--I'm sorry, June 3rd, 1992.

2 It's the first draft of what's been called the  
3 rolling text, and I could give you some background  
4 on how that process worked, if you wish to hear  
5 that.

6 PRESIDENT GAILLARD: Maybe you can give us  
7 a word of background and then answer my question  
8 which is: is there any document in your files which  
9 predates that, or is it the first time this  
10 language was introduced, to your knowledge?

11 MR. MCNEILL: As far as we are aware, this  
12 was the first time the language was introduced.  
13 Generally, the--Canada acted as the informal  
14 Secretariat for this process, and there were  
15 different negotiating rounds, and the negotiating  
16 teams for each of the three NAFTA parties would get  
17 together and have a negotiating session. At the  
18 end of the session, they would have one text that  
19 was the tentative text they had produced at the end  
20 of that session, and Canada kept an ongoing record  
21 of this process, and that's what each of these  
22 drafts reflect.

□

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1           PRESIDENT GAILLARD: So, the position of  
2 respondent in this case is that this is the first  
3 time in the travaux this language appears, to your  
4 knowledge?

5           (Pause.)

6           MR. MCNEILL: This is the first piece of  
7 travaux preparatoires that we have found. We are  
8 not aware of any documents that predate the June  
9 3rd document that would indicate who originally  
10 came up with the idea for this provision.

11           PRESIDENT GAILLARD: Travaux preparatoires  
12 as opposed to what? Because you seemed to use it  
13 in a narrower sense? So, what else there is, if  
14 anything?

15           MR. MCNEILL: In response to the  
16 Tribunal's order, we conducted an extensive search  
17 for documents that were shared between the three  
18 parties, as we were requested to do. We did not  
19 find any documents that fit that description that  
20 predated this June 3rd document. Nor did we find  
21 any other documents that did not fit that  
22 description that bore any--that were related at all

□

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1 to this provision. This is the first appearance  
2 that we are aware of this provision; to the best of  
3 my knowledge.

4           PRESIDENT GAILLARD: By way of background,  
5 you wanted to elaborate on the methodology of the

6 negotiation, or have you already covered that, to  
7 the extent you wanted to cover it?

8 MR. MCNEILL: I covered it.

9 PRESIDENT GAILLARD: You have nothing to  
10 add on that?

11 MR. MCNEILL: No, I don't.

12 ARBITRATOR WEILER: Is there a record of  
13 the discussion other than the final--this made it  
14 into the text, and you indicated there must have  
15 been some discussion, et cetera. Is there any  
16 record of that discussion like we have here, this  
17 kind of thing?

18 MR. MCNEILL: No, not that I'm aware of.

19 PRESIDENT GAILLARD: So, all we can  
20 understand from this text is that that language was  
21 introduced presumably by the U.S.?

22 MR. MCNEILL: I think that's a fair

□

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1 inference from the inclusion of the USA next to the  
2 text.

3 PRESIDENT GAILLARD: Then if you go on and  
4 if you look at the various drafts, and of course  
5 the same section, tracking the language, you  
6 find--but I'm stating something, and I want you to  
7 correct me if I'm wrong because I want to test my  
8 understanding against yours. Of course you're more  
9 informed.

10 So, you see that that language--you find  
11 that language reproduced in the same form with

12 still in square brackets, so it has not been  
13 discussed, and we see it for some time. And then  
14 the language varies a little bit. For instance,  
15 you see at Tab 3 the document--I'm sorry, this is  
16 still the same language, and then you can track it.  
17 And at some point you see, for instance, at Tab 6  
18 that the square brackets have been eliminated.  
19 what does that mean?

20 MR. MCNEILL: I assume it means it was  
21 accepted by the other parties and they agreed that  
22 that would be--that they didn't need to go back and

□

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1 revisit that text, that they had agreed to that  
2 portion of the text.

3 PRESIDENT GAILLARD: So if you place  
4 yourself on August 6, 1992, which is the date of  
5 the document at Tab 6, is your answer the same as  
6 before, that there are no other documents shared  
7 among the Parties--which was our question--which  
8 discussed this; so there is no record of any  
9 discussion on why it was adopted, or was it  
10 discussed and the Parties said: no, we don't want  
11 it, or yes, whatever, or we want a different  
12 language or something like that. You found  
13 absolutely nothing; is that correct? I assume  
14 that's right because, if not, you would have  
15 produced it, I guess.

16 MR. MCNEILL: That's right. The  
17 Tribunal's order required the United States to

18 produce documents that were shared between the  
19 parties that would reflect the common intent of the  
20 three parties. We did not find any documents that  
21 bore on the--on this provision that fit that  
22 description, nor did we find other documents

□

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1 outside that description, either.

2           PRESIDENT GAILLARD: Outside that  
3 description. I'm not asking to turn those  
4 documents in, that's not my question, just to  
5 understand. Outside that description, you would  
6 say that internal memos, even that, you have not  
7 found?

8           MR. MCNEILL: No.

9           PRESIDENT GAILLARD: Not that we request  
10 it, but you have not found any such documents, like  
11 internal memos and the U.S. administration saying  
12 why is that? And so on. So you have not--

13           MR. MCNEILL: You're referring to a  
14 document that bears directly on 1901(3).

15           PRESIDENT GAILLARD: Bears directly on the  
16 predecessor--the numbers have changed, but the  
17 predecessor of Article 1901(3).

18           MR. MCNEILL: No, we have not seen such a  
19 document.

20           PRESIDENT GAILLARD: All right. And when  
21 you said "discussed with the Parties", did you  
22 include discussed among two of the parties if

1 that's the case? Have you found documents which  
2 would have been discussed among two of the parties,  
3 maybe not the third one? On the same topic, of  
4 course.

5 MR. MCNEILL: Right. My understanding is  
6 in order to reflect the intent of all the NAFTA  
7 parties, it would be a document that would be  
8 shared among the three of them.

9 PRESIDENT GAILLARD: That I understand,  
10 but that's not my question.

11 MR. MCNEILL: But no, we didn't find  
12 documents either that were shared among two of the  
13 parties. When I say among the parties, that would  
14 cover among two or among more.

15 PRESIDENT GAILLARD: So, your answer is:  
16 no, there are no documents which would have been  
17 shared among two of the parties discussing it at  
18 the third one, but for a reason--and the answer  
19 would have been the same.

20 MR. MCNEILL: That's correct.

21 PRESIDENT GAILLARD: If it is shared among  
22 two or more of the parties, the answer would have

1 been the same to the document production request?

2 MR. MCNEILL: That's right.

3 PRESIDENT GAILLARD: Okay. Then you see  
4 the text being carried in subsequent drafts, okay,  
Page 188

5 and then if you go to Tab 6--I'm sorry, 9, a  
6 document of August 25, 1992, some language has been  
7 added, with the exception of the entry into force  
8 provisions of Article blank.

9           So, can you comment on that, what does  
10 that mean? Ms. Menaker.

11           MS. MENAKER: I think that simply just  
12 indicates that at that negotiation all of the  
13 parties agreed to add those additional words in.

14           So, during--you start with the draft from  
15 the last negotiation, if any party introduces  
16 language that the other parties don't immediately  
17 accept, that's bracketed, and it remains bracketed  
18 until that issue is resolved. If a party notices  
19 something, especially in the context of kind of a  
20 legal technical change and they want to add  
21 language and it's not controversial, the other  
22 parties accept that during the course of the

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1 negotiations, that language will never appear  
2 bracketed.

3           PRESIDENT GAILLARD: So the fact that it's  
4 not bracketed means that someone came up, we don't  
5 know who, came up with the idea to be specific as  
6 to this exclusion, and the exclusion of the  
7 exclusion, if you would?

8           MS. MENAKER: That would be the inference  
9 that I would draw, based on our experience in doing  
10 this and other Treaties.

11           PRESIDENT GAILLARD: In that it was not  
12 discussed particularly. It was adopted as such by  
13 the NAFTA parties.

14           MS. MENAKER: Or it could have been  
15 discussed during the course of that particular  
16 round of negotiations. However, since no one  
17 objected, there was never any need to place the  
18 brackets on it.

19           PRESIDENT GAILLARD: Right. And then this  
20 language is carried forward, and then you see at  
21 some point the blank is filled with the proper  
22 number, and then it becomes what? It becomes

□

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1 1901(3). It's not exactly the initial language.  
2 It has been tightened a little bit, but I don't see  
3 that as relevant, but tell me if I'm wrong. It's  
4 the same idea. You end up with "except for Article  
5 2203 (entry into force)" in the final text, and for  
6 some time you have "with the exception of Article  
7 2203 (entry into force)", which to me means the  
8 same thing. So, that's all we know about this.

9           And then the language at some point is the  
10 final language which we have now in front of us,  
11 and that's what we know about this.

12           So, I ask, at a different point in time,  
13 the same question: that's all we know for the  
14 documents which have been exchanged among the NAFTA  
15 Parties, even if you consider that includes only  
16 two Parties?

17 MR. MCNEILL: That's correct.

18 PRESIDENT GAILLARD: You have not attached  
19 particular relevance to this exception, with the  
20 exception of the entry into force provision of  
21 Article X which became "except for Article 2203  
22 (entry into force)".

□

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1 Do you have anything to add on this on  
2 either side? Or is it just what you said about the  
3 negotiations: it meant that someone felt that one  
4 should be more specific and everybody agreed it's  
5 no big deal; I mean, it was not viewed as something  
6 significant.

7 MS. MENAKER: I mean, that, in our view,  
8 is the type of thing that is sometimes done at the  
9 end of a Treaty negotiation, we call a legal scrub  
10 sometimes during the midst of it, if someone  
11 realizes you need a technical change like that. Of  
12 course the provision, if you have literally nothing  
13 in the agreement, can apply to it. You need to  
14 have the entry into force provision apply, of  
15 course.

16 PRESIDENT GAILLARD: If not, the provision  
17 itself disappears when you sign the Treaty? If you  
18 are really a fine lawyer.

19 MS. MENAKER: Well, yes, it would.

20 PRESIDENT GAILLARD: All right. That's  
21 our understanding, but we wanted to see if it fits.  
22 So, basically we don't know much about the

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1 history of this language.

2 I turn to my co-arbitrators. Do you have  
3 any questions on this?

4 I turn to claimant. Do you have any  
5 comment or questions on these, queries on this, or  
6 is your analysis of the record as is, because we  
7 have read--I think all of the documents but we may  
8 have missed something, you must have done a  
9 thorough job I'm sure, and maybe we missed  
10 something. Other than the documents you discussed  
11 in your briefs which we have in mind. I'm talking  
12 about travaux preparatoires.

13 MR. MITCHELL: No, our analysis is as  
14 contained in the briefs.

15 PRESIDENT GAILLARD: So, your case is  
16 based on the fact that it has not really been  
17 discussed, but you have not, and you infer a  
18 certain interpretation. That, we understand, but  
19 you have not seen anything specific in the document  
20 production or elsewhere?

21 MR. MITCHELL: Indeed, that is our point.  
22 That if this was to have that effect, one would

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1 have expected to see something in the document  
2 production.

3 PRESIDENT GAILLARD: Right. Now, there is  
4 an argument which it's a different question. There  
5 is an argument which is that of the parallel  
6 between the state-to-state arbitration and the  
7 investor-state arbitration. I'm not saying it's  
8 particularly relevant because I ask the question.  
9 It's just one argument in the middle of a series of  
10 arguments, and it assumes that this and that is  
11 relevant, so I'm not, by asking a question,  
12 prejudging the relevance of that, and the relevance  
13 of the language or the structure of the text  
14 vis-a-vis the objectives of NAFTA and so on. So,  
15 it's just one question in the middle of the  
16 reasoning, but I would like to have some  
17 clarifications as to the structure of NAFTA with  
18 respect to the specific technical comparison  
19 between the state-to-state exclusions and the  
20 investor-state exclusions. So, I would like to  
21 tell you what I understand the exclusions to be and  
22 tell me what I miss. I'm asking both parties, of

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1 course. Tell me what I miss or what I  
2 mischaracterize, so that we understand better the  
3 relevant texts. I'm not saying that this is--which  
4 is relevant, of course, but we want to understand.  
5 So, in terms of financial services. In  
6 terms of financial services, you have an exclusion  
7 of the investor-state disputes, which is found in  
8 1101(3). Of course, you have to take into account

9 the language in Chapter 14 where there are some  
10 exceptions, and I'm aware of that, but the primary  
11 language is found in 1101(3); is that correct, on  
12 the U.S. side?

13 MR. MCNEILL: That is correct.

14 MR. MITCHELL: Yes.

15 PRESIDENT GAILLARD: Is there a parallel  
16 exception other than what there is in Chapter 14, a  
17 parallel exception for the state-to-state  
18 arbitration regarding financial services? Maybe  
19 the U.S. first.

20 So, is it your understanding? Maybe I can  
21 rephrase the question. Is it your understanding?

22 MS. MENAKER: I think I understand your

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1 question. Article 1414 in Chapter 14 provides that  
2 Section B of Chapter 20, which is the  
3 state-to-state dispute resolution mechanism applies  
4 as modified by this Article, and to the settlement  
5 of disputes arising under this chapter. And I  
6 think the--I would have to confirm this, but I  
7 think that the difference is in the selection of  
8 the panelists that are going to serve on a  
9 state-to-state dispute resolution pertaining to  
10 financial services. There are special requirements  
11 as to the--they have to be experts in financial  
12 services which does not apply to Chapter 20.

13 PRESIDENT GAILLARD: It applies as  
14 modified you would say?

15 MS. MENAKER: Yes.  
16 PRESIDENT GAILLARD: And the provisions  
17 are found in Chapter 14 itself, you would say?  
18 MS. MENAKER: Yes.  
19 PRESIDENT GAILLARD: It's 1404 and so on;  
20 right? That's your understanding, too?  
21 MR. LANDRY: Yes.  
22 MR. MITCHELL: Yes, the provisions in

□

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1 1414.  
2 PRESIDENT GAILLARD: Thank you.  
3 On national security, you have an  
4 exclusion which applies both to the investor-state  
5 arbitration and to the state-to-state arbitration,  
6 which is found in 1138(1); is that correct? So,  
7 your understanding is that there is--the exclusion  
8 is the same? And it's found in the same--at the  
9 same place; is that correct?  
10 MR. MCNEILL: Yes, I think that's correct.  
11 MR. MITCHELL: I believe the specific  
12 exclusion is found in 1138(2), which is the  
13 dispute-settlement provisions of this section in  
14 Chapter 20 shall not apply to the matters referred  
15 to in Annex 1138(2).  
16 PRESIDENT GAILLARD: For national security  
17 it's 1138(1).  
18 MR. MITCHELL: You're right. I'm sorry, I  
19 misread the provisions of (2).  
20 PRESIDENT GAILLARD: There is another

21 parallel exclusion in (2) for other matters?

22 MR. MITCHELL: Yes, that's correct.

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1 PRESIDENT GAILLARD: Now if we come to  
2 competition law, you have an exclusion of  
3 state-to-state arbitration in 1501(3), and you have  
4 an exclusion of the investor-state arbitration in  
5 note 43, but here again, and you will refer to this  
6 language in your pleadings on both sides, and here  
7 again there are certain exceptions which I'm not  
8 getting into, so my understanding is correct on  
9 this?

10 MR. MCNEILL: Yes, that's correct.

11 PRESIDENT GAILLARD: I'm glad you give  
12 consistent answers. What about Canfor?

13 MR. MITCHELL: This part is easier than  
14 the earlier part. Yes, we agree.

15 PRESIDENT GAILLARD: Thank you. And then,  
16 of course, we come to the debated language. The  
17 U.S. position is that Article 1901(3) is performing  
18 that function--excluding the investor-state  
19 arbitration with respect to AD and countervailing  
20 duty--and there is an exclusion of the  
21 state-to-state arbitration in Article 2004. One  
22 party uses this to contrast the language and the

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1 other says it's a parallel, so it should be--it  
Page 196

2 should basically have the same function. We  
3 understand the arguments. I'm just trying to  
4 locate the provisions and make sure that we  
5 understand that.

6           And we heard Canfor's position saying:  
7 it's not an imbalance, even if we are right, it's  
8 not an imbalance because the proper interpretation  
9 of Chapter 11 and state-to-state arbitration  
10 provisions means that the state can espouse--any  
11 state can espouse the position of the parties. So  
12 even a state-to-state arbitration could happen on  
13 the same type of matters in spite of the language  
14 of 2004; that's correct? You may want to elaborate  
15 a little bit on that.

16           MR. MITCHELL: That is correct. Our  
17 position is that the state may advance the same--a  
18 claim with respect to the same obligations. The  
19 difference may well be in remedy, of course,  
20 because the investor's sole remedy is compensation  
21 by way of damages, but the provisions of 2004  
22 relate only to those matters covered by Chapter 19,

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1 and I think the Tribunal has our point that that  
2 relates to the substitution of binational appellate  
3 review for domestic appellate review, and the  
4 constraints upon the amendment of the parties--

5           PRESIDENT GAILLARD: I'm sorry, sir. If a  
6 state and not a private party like yourselves would  
7 like to start state-to-state arbitration on the

8 same type of issues like this conduct which is at  
9 the heart of your claims, they would have to  
10 explain that it's not barred by 2004; right? So,  
11 they would have to fight against the language of  
12 "except for the matters covered in Chapter  
13 Nineteen...and as otherwise provided in this  
14 Agreement, the dispute settlement provisions of  
15 this Chapter shall apply", and so on and so forth.

16 So, that would be, wouldn't it, the  
17 relevant provision? The core of the matter would  
18 be the discussion on this language; is that  
19 correct, if it were a state-to-state arbitration?  
20 I'm asking counsel.

21 PROFESSOR HOWSE: If I may respond,  
22 Mr. President. That's correct, a correct

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1 interpretation of our view, a state would be  
2 required to argue that the arbitration is not with  
3 respect to a matter covered in Chapter 19, and that  
4 would go to the definition of what matters are  
5 covered in Chapter 19, what that expression means,  
6 and we have made submissions on what that  
7 expression means.

8 PRESIDENT GAILLARD: Right.

9 PROFESSOR HOWSE: But I also, even  
10 if--that suffices I think to make it clear what we  
11 are saying.

12 PRESIDENT GAILLARD: I have seen your  
13 pleadings on this. I just want to ascertain that

14 this would be the relevant language, and the  
15 argument would be a little different from what you  
16 have here under Article 1901(3), it would have to  
17 go--it's not covered by Chapter 19. It's a similar  
18 argument but on the basis of a different language.

19 PROFESSOR HOWSE: Except there may be  
20 a--we might still have to consider the effect of  
21 1901(3). Once this jurisdictional hurdle were  
22 overcome, that is to say to the extent that

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1 state-to-state dispute settlement has the  
2 possibility of a different kind of relief. Then  
3 you might have the live issue of whether you are  
4 imposing an obligation with respect to a party's  
5 antidumping and countervailing duty law by a  
6 state-to-state ruling that doesn't give damages,  
7 but that might be a ruling that goes to  
8 theoretically, could go to changing the law.

9 But the reason I didn't say that, as I  
10 realized, that if it's a matter not covered by  
11 Chapter 19, and you have got over that  
12 jurisdictional hurdle, it would be highly unlikely  
13 that the remedy would be to change your antidumping  
14 and countervailing duty law.

15 So, it's really--there is really a  
16 parallelism, not an overlap.

17 PRESIDENT GAILLARD: Right. So, you say  
18 that there is a parallel here. You say--I guess  
19 you say in your pleadings that the idea of a

20 parallel is not necessarily right in the first  
21 place--the idea which was raised by the U.S. that  
22 you need a parallel, and that's the right way to

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1 interpret a Treaty--and I guess you disagree with  
2 the idea that you cannot give to an investor more  
3 rights than to a state in terms of the right to  
4 arbitrate in the first place, and then you say in  
5 any event they could, on the basis of  
6 interpretation you just provided us with.

7           PROFESSOR HOWSE: Well, we are saying, I  
8 think, three things, but one of them is that there  
9 is no necessity of parallelism, and another is that  
10 we would disagree with the characterization of the  
11 differences in rights here as giving more. We  
12 think it's different rights related to different  
13 remedies.

14           And finally, we are not persuaded that one  
15 of the purposes of the NAFTA was to achieve some  
16 kind of equality between, whatever that may mean,  
17 between the investor-state and state-to-state  
18 proceedings. But instead it was to craft  
19 dispute-settlement mechanisms that would fulfill  
20 the whole variety of the purposes of NAFTA, some of  
21 which would need--you would need to craft remedies  
22 available to investors to do. Others states,

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1 others both, but the parties in the negotiation, as  
2 we understand it, or to put it differently, the  
3 arrangements that we have before us are driven by  
4 the purposes that are stated in the Treaty and not  
5 the attempt to seek some equality or parallelism  
6 between state-to-state and investor-state  
7 procedures.

8           PRESIDENT GAILLARD: Right, your position  
9 is very clear on this, thank you.

10           On the U.S. side, do you have any comments  
11 on this particular issue? Other than what you  
12 wrote in your briefs, which obviously we have read  
13 very carefully.

14           MR. MCNEILL: I think our position is set  
15 forth in our written and oral pleadings, and unless  
16 the Tribunal has questions, I think we have made  
17 our position clear.

18           PRESIDENT GAILLARD: No, no, just to give  
19 you an opportunity to answer what was just said,  
20 that's all, but your position is very clear, as in  
21 writing?

22           MR. MCNEILL: Yes.

□

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1           PRESIDENT GAILLARD: Then, if you take  
2 taxation, you have an exclusion in Article 2103(1)  
3 which applies to both state-to-state arbitration  
4 and investor-state arbitration with some caveats,  
5 some specific things which may not be excluded. So

6 basically you have an exclusion, but you have some  
7 rights which you can exercise. For instance,  
8 Article 2103(6) would apply in the context of an  
9 investor-state dispute. Is that a fair  
10 characterization?

11 MS. MENAKER: Yes.

12 MR. MITCHELL: Yes.

13 PRESIDENT GAILLARD: I guess a question  
14 which comes to mind is that in light of the fact  
15 that the travaux are very limited on this language  
16 of Article 1901(3), and given what we have seen a  
17 moment ago--I'm not going through it, if that's all  
18 there is--I would like some explanations on the  
19 contrast between this situation and situations like  
20 competition law or taxation where you have--tell me  
21 if I'm wrong, I'm just thinking out loud--you have  
22 a type of measures or a type of law, a subject

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1 matter which is difficult, which is sensitive; the  
2 states want to carve it out, to exclude the normal  
3 application of Chapter 11. And that's understood,  
4 I mean, the rationale for doing that is perfectly  
5 understood, but if you look at competition law, if  
6 you look at taxation--and I'm not going through the  
7 travaux for this purpose--they seem to have given  
8 rise to more discussion, and a system which frankly  
9 prima facie seems a little more elaborate with an  
10 exclusion, but there is a back door: you may lose  
11 everything but the expropriation provision;

12 something more sophisticated, if I might say.

13           And my question, I guess, is twofold. Is  
14 that characterization fair; and second, if it is  
15 fair, what is the reason for it?

16           (Pause.)

17           PRESIDENT GAILLARD: Who is answering?

18 Mr. McNeill?

19           MR. MCNEILL: Yes. Mr. President, I think  
20 you asked a very general question, why are some of  
21 these provisions more elaborate than some others  
22 and I will start with a general answer and then

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1 I'll address some of the specific provisions.

2           I think a lot of these exclusions are  
3 performing different functions, and you have to  
4 look at each chapter and each provision and see  
5 what function that is performing and why it is  
6 performing that particular function in that  
7 context.

8           I will also add as well, since we looked  
9 at the negotiating history that each chapter was  
10 drafted by a separate negotiating team, so  
11 sometimes you would find some language that may not  
12 be identical from one chapter to the other. But  
13 the primary point is that each of these exclusions  
14 is performing a different function.

15           Now, if you look at 1501(3), for instance,  
16 there you have an exclusion which is no more  
17 complex, I would say, than 1901(3). It simply says

18 no party may have recourse to dispute settlement  
19 under this agreement, but you notice a big  
20 difference here it excludes just dispute  
21 settlement. It doesn't exclude substantive  
22 obligations.

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1           If you look at 1901(3), however, it  
2 excludes everything. In fact, it is so exclusive  
3 of everything that the drafters thought it was  
4 necessary to reincorporate the entry into force  
5 provision, otherwise you might exclude the  
6 provision itself from the entry into force.

7           And I think that was driven by, as we've  
8 made in our submissions, the parties need to cabin  
9 off Chapter 19 from the rest of the agreement  
10 entirely, the antidumping and countervailing duty  
11 matters are a very politically sensitive topic and  
12 the thought was it should function as a stand-alone  
13 part of the agreement.

14           And I think that's what Article 1901(3)  
15 reflects. No provision in any other chapter shall  
16 be construed to give rise to obligations with  
17 respect to a party's antidumping and countervailing  
18 duty law.

19           If we look at the exclusion in 2103, I  
20 think there it's performing again a different  
21 function. It says except as set out in this  
22 Article, nothing in this agreement shall apply to

1 taxation measures and then you see certain  
2 carve-outs from that and certain things are added  
3 in, and I think that's driven by the particular  
4 needs of taxation measures, that it was thought  
5 that particular things that there would be an  
6 exclusion and then there'd be some things added  
7 back in, but you contrast that again with 1901(3),  
8 it was a total exclusion, it was an exclusion for  
9 dispute settlement, it was an exclusion for  
10 obligations.

11           What is most interesting, I think, when  
12 you--go ahead, I'm sorry.

13           PRESIDENT GAILLARD: Please continue.  
14 Finish what you were saying--I'm sorry, I thought  
15 you were done. Go ahead.

16           MR. MCNEILL: You also pointed to 1101(3)  
17 as an exclusion, provides this chapter does not  
18 apply to measures adopted or maintained by a party  
19 to the extent they are covered by Chapter 14.

20           Then if you look at the provisions in  
21 Article 1401, you see that the dispute settlement  
22 mechanism and certain substantive obligations from

1 Chapter 11 are incorporated directly into Chapter  
2 14.

3           And you have to look at those two  
4 provisions together. There's not--counsel for

5 Canfor said first it was taken out and then it had  
6 to be reincorporated. Really it done sequentially  
7 that way. They were put in the Treaty together,  
8 and what they mean together is that the parties  
9 assumed that investor-state did not automatically  
10 apply outside of Chapter 11, to subject matters  
11 outside of Chapter 11.

12           As I mentioned in my oral submission, I  
13 believe, Chapter 11 and Chapters 14 cover very  
14 similar topics. Chapter 11 covers investment.  
15 Chapter 14 covers a subcategory of investment,  
16 investment in financial services.

17           I think it's a very important fact that  
18 the parties thought it was necessary to clarify  
19 that these provisions had to be incorporated into  
20 this chapter. In other words, there was no 1401,  
21 there was no 1101(3), that it would not be clear  
22 that it would apply at all. They felt it necessary

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1 to clarify, even in a chapter that has such a  
2 similar topic to Chapter 11 that had to be  
3 incorporated in a very specific way. The  
4 substantive obligations and the dispute-settlement  
5 mechanism.

6           And then you go back to Chapter 19, and  
7 you don't see that incorporation of Chapter 11  
8 obligations. And there you have a chapter that  
9 covers a very different subject matter, covers  
10 antidumping and countervailing duty law, and you

11 see general provisions in the NAFTA that suggest  
12 that the parties intended to treat investment and  
13 trade differently. Trade is handled in  
14 Chapters--in Parts 22 and three. Investment is in  
15 Part Five. If you look at Article 1139, definition  
16 section of Chapter 11, it says investment does not  
17 mean claims to money that arise solely from  
18 commercial contracts for the sale of goods or  
19 services by nationals or enterprises.

20           So, there is a general intent not to  
21 include trade matters in Chapter 11. Antidumping  
22 countervailing duty disputes are arguably one

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1 subcategory of those matters.

2           So if it was necessary to incorporate  
3 these provisions directly into Chapter 14, such a  
4 similar chapter, then certainly one would expect to  
5 find similar provisions in Chapter 19, had the  
6 parties intended the antidumping matters to be  
7 subject to the substantive obligations and to the  
8 dispute-settlement mechanism in Chapter 11.

9           PRESIDENT GAILLARD: Thank you,  
10 Mr. McNeill. It was very clear. The question I  
11 wanted to ask at one point was that in certain  
12 cases you have the carve-out of the expropriation.  
13 It's not excluded specifically. Can you explain  
14 why? I'm referring to taxation. We discussed it a  
15 moment ago. You have an exclusion in 2103(1), but  
16 then you have the back door. Certain things are

17 arbitrable. Maybe I could ask the question  
18 differently or ask a second question.

19 Does that take care of the labeling  
20 argument?

21 (Pause.)

22 MS. MENAKER: I think to the best of our

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1 knowledge, the provision in Article 2103(6), we  
2 believe, is there to provide an exception so that  
3 the exclusion for tax measures will not apply where  
4 there might have been an expropriation, but it  
5 recognizes that one could--conceivably make the  
6 argument that any tax is an expropriation, someone  
7 is taking your money, and that is a fear that  
8 regulatory agencies often have is that their  
9 taxation powers will be challenged as expropriatory  
10 in the normal course of business, and I think it's  
11 well accepted that ordinary taxes are not  
12 expropriations.

13 But there is the issue that as you said,  
14 it can arise in two instances, but I don't think  
15 it's confined to the labeling instance. I think--

16 PRESIDENT GAILLARD: It goes a little  
17 further than that.

18 MS. MENAKER: Yes.

19 PRESIDENT GAILLARD: But it's one way to  
20 take care of that problem.

21 MS. MENAKER: Exactly. Because if you  
22 have something that is an expropriatory measure,

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1 you label it as a tax, you can't get away with  
2 that, but by the same token, I think there could be  
3 a case where something perhaps is legitimately  
4 characterized as a tax, but yet it is  
5 expropriatory.

6           So, what this does is it provides the  
7 state parties with a means to ensure that their  
8 ordinary taxation measures are not--that they are  
9 not subject to dispute resolution for that ordinary  
10 taxation measures and only--that's why you need to  
11 go through this mechanism if you are challenging a  
12 tax, and it is only if the tax authorities of the  
13 two state parties that are involved, including the  
14 party of which the national who was the claimant,  
15 if both parties agree that the taxation measure is  
16 not an expropriation, the claim will then not go  
17 forward.

18           So, it grants some prerogative to the  
19 states to basically stop claims that are frivolous  
20 in that regard, and if there is no consensus on  
21 that matter, then the claim can go forward.

22           PRESIDENT GAILLARD: Thank you,

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1 Ms. Menaker.

2           On Canfor's side, on the same issues, you

3 wish to make a few remarks?

4           MR. MITCHELL: Just briefly, if I could go  
5 back to your twofold question which was related to  
6 whether the characterization of the approach the  
7 parties took the carve-outs for competition,  
8 national security, and taxation was more elaborate  
9 than that taken in respect of what it is argued as  
10 a carve-out in 1901(3).

11           Absolutely. The approach taken was more  
12 elaborate, and your second question, was what was  
13 the reason for that, and it's our submission that  
14 the reason for that is simply that 1901(3) was not  
15 intended to have the effect that the United States  
16 contends. And if I can just elaborate on that from  
17 what we do know from the negotiating history, and  
18 we have just--in the course of submissions  
19 immediately heard reference to the national  
20 security carve-out, the taxation carve-out, and the  
21 competition and state enterprises carve-out. In  
22 respect of each of those, the lawyers' revision

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1 makes clear that those are provisions to be placed  
2 outside the investment chapter. The parties turned  
3 their mind to that and dealt with that extensively.  
4 In the absence of any corresponding indication with  
5 respect to Article 1901(3) and CVD and AD suggests  
6 that that intention was not the same.

7           Sorry, just one other matter that came up,  
8 and I believe this is Mr. McNeill's point. He made

9 the assertion that matters of trade--trade is dealt  
10 with in parts two and three and investment is dealt  
11 with in part five, and therefore trade and  
12 investment are dealt with separately under the  
13 Treaty. That again is a point that has already  
14 been litigated in Chapter 11 arbitrations, and the  
15 easiest example is the Pope and Talbot case, where  
16 Canada argued that the measures of which Pope and  
17 Talbot complained were measures relating to trade  
18 in goods, and therefore they didn't fall within  
19 Chapter 11. The Tribunal did not accede to that  
20 assertion, and noted that matters can relate to  
21 more than one chapter of the Treaty.

22 PRESIDENT GAILLARD: Thank you. Do you

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1 have a determination as to the impact on your case  
2 of the introduction at some point of the exclusion  
3 of the entry into force provision of the scope of  
4 Article 1901(3)?

5 MR. MITCHELL: I will turn that to  
6 Professor Howse.

7 PROFESSOR HOWSE: Yes. As a matter of  
8 state responsibility, the entry into force of the  
9 Treaty would require changes to antidumping and CVD  
10 laws within the meaning that Canfor attributes to  
11 that expression based on the definition in 1902,  
12 and so very simply, because what the parties--it is  
13 our surmise that because what the parties had in  
14 mind when they were thinking about what they wanted

15 to do with the provision like 1901(3) was to  
16 protect Chapter 19 against the interpretation, an  
17 interpretation that would lead to obligations of a  
18 nature involving amendment or conditions on  
19 amendment or retention of the law. They would have  
20 had to have made this exception because again, as  
21 just a matter of basic rules of state  
22 responsibility, if they didn't make the exception,

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1 there could be just the absurd result that someone  
2 would come along and say that 19--by virtue of  
3 1901(3) you don't even have to amend your laws in  
4 order to make the Treaty effective.

5           It's a pretty--I would say that that would  
6 be the reasons.

7           And again, just as 1901(3) could be argued  
8 to be concerned with being very cautious about the  
9 possibility of improper interpretations, this rider  
10 is also an expression of caution, the exception to  
11 the exception is an expression of caution that  
12 someone could come along and just say, well, we  
13 don't have to do any changes to our laws, even if  
14 those changes are implied by state responsibility  
15 to implement the Treaty.

16           So, in our view, it confirms our view that  
17 what 1901(3) is about is something that would make  
18 a party do something to its law or conditions  
19 related to amending or changing or retaining law.

20           PRESIDENT GAILLARD: Thank you, Professor

21 Howse. That exhausts my questions for the time  
22 being. The Tribunal still has a number of

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1 questions but if the parties are prepared to go on  
2 for as long as the Court Reporter doesn't collapse,  
3 i.e. 45 minutes to an hour max, we can go on, and  
4 maybe we can be done. I need to speak to my  
5 co-arbitrators before I confirm that.

6           So, you would be amenable, I take it, to  
7 stay for another hour, if we had to?

8           (Pause.)

9           PRESIDENT GAILLARD: We will go on for a  
10 little while, and we will ask questions, but if you  
11 feel that you want to reflect on certain issues, we  
12 are certainly available tomorrow morning as  
13 planned, and you can--we can decide by the end of  
14 the day, but we are certainly available to hear  
15 your answers tomorrow, if you prefer to answer  
16 certain questions tomorrow as opposed to rushing  
17 and answering tonight.

18           Joseph, do you want to start your  
19 questions?

20           ARBITRATOR WEILER: At least I can start.  
21 I have still maybe a couple of questions to both  
22 parties. One question to Mr. McNeill, can I go

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1 back to the waiver issue. Because again it might  
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2 be of some consequence, if 1121....

3 I just need you to clarify, if I  
4 understood you correctly, and I apologize if I  
5 didn't, you said that the kind of procedure covered  
6 by Chapter 19 proceedings was not the kind of  
7 procedure envisaged by the waiver. Maybe to  
8 sharpen the question, let's imagine that it was not  
9 Chapter 19, but that it was just the Court of  
10 International Trade, the regional thing of which  
11 Chapter 19 binational panels are meant to be a  
12 substitute.

13 would you still say that because it maybe  
14 doesn't go to the Tribunal but actually to the  
15 notion of relief being sought.

16 Canfor replied to that, but it's almost  
17 like giving you the possibility for a rejoinder.

18 MR. MCNEILL: Our main point on the  
19 exclusion from the waiver requirement was really  
20 that it provides an exception to that requirement  
21 for administrative tribunals or courts under the  
22 law of the disputing party. And I think you have

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1 to look at that language and decide whether the  
2 parties intended to include within that language  
3 the binational panels. A binational panel is not  
4 an administrative tribunal, and it's not a court.  
5 In response the Canfor said well, that raises these  
6 constitutional issues if you say binational panel  
7 is not a court.

8           And to the contrary, if the parties had  
9 intended to include the binational panels within  
10 this language, they would have said the binational  
11 panels and by saying binational panels, it doesn't  
12 raise a constitutional issue.

13           Now, in terms of the type of remedy that  
14 is available in Chapter 19, I merely pointed out  
15 that the relief they seek there, and the potential  
16 of getting back at the end of the day a check for  
17 your duties paid plus interest, at least makes  
18 Canfor's claims inconsistent with the intention of  
19 this Article, which is to prevent dual proceedings  
20 in which there could be the possibility of double  
21 recovery.

22           So, could this refer to the Court of

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1 International Trade? I would say that the Court of  
2 International Trade is, in fact, a court under the  
3 law of a disputing party. So I would say yes, the  
4 Court of International Trade would apply to this,  
5 but the binational panels would not.

6           ARBITRATOR WEILER: So, that means I at  
7 least partially misunderstood your original reply  
8 because I thought your original reply went to the  
9 nature of relief sought, not to the status of the  
10 body before whom the relief would be sought. And  
11 because I had understood your, or one of your  
12 colleague's, argument before that said the  
13 binational panels was simply substituting for the

14 Court of International Trade, and if therefore they  
15 were substituting for the Court of International  
16 Trade, maybe it wasn't thought necessary to specify  
17 also before binational panels because they were  
18 just anything that would apply before the Court of  
19 International Trade might be thought to--in fact,  
20 that would mean that the Court of International  
21 Trade--the binational panels were not a full  
22 substitute but in some respects at least an

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1 inferior substitute because this type of thing  
2 would be barred. Whereas if it remained in  
3 national hands, it would not have been barred. Is  
4 that a correct implication of what you're saying?  
5 And again I apologize if I misunderstood. It's  
6 late, and we are all tired.

7 (Pause.)

8 MR. MCNEILL: If I understand your  
9 question correctly, first of all, I guess you're  
10 asking whether the--whether 1121 could be drafted  
11 loosely to mean binational panels because the  
12 binational panels stand in the shoes of the court,  
13 and so it was just thought that this would be a  
14 general term that might capture the binational  
15 panels; is that correct?

16 ARBITRATOR WEILER: That's in response to  
17 your argument that it doesn't cover binational  
18 panels.

19 MR. MCNEILL: Right. I think our response

20 is that it would be extraordinarily sloppy drafting  
21 if the parties had intended--had actually conceived  
22 that this provision would grant jurisdiction under

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1 two separate chapters of the NAFTA with respect to  
2 antidumping and countervailing duty measures and  
3 countervailing duty determinations, and this is the  
4 way they did it. They didn't make it explicit.  
5 They didn't say this chapter--that the same claims  
6 can be submitted to Chapter 11 and to Chapter 19.  
7 Instead they referred to it in an exception to the  
8 waiver requirement as the court. So I think it  
9 would be an implausible reading of that to say that  
10 that is what they meant because it would have been  
11 very easy certainly for the parties to say before  
12 an administrative Tribunal, a court, or the  
13 binational panels under Chapter 19. I think that's  
14 what you would expect to see if there were going to  
15 be such an extraordinary result that you could  
16 bring claims--that a NAFTA party would actually  
17 agree to subject itself to claims under two  
18 chapters of the NAFTA with respect to the same  
19 measures. I think you would expect to see some  
20 clear language, that that's what the parties  
21 intended than what you see in the exception in  
22 Article 1121.

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1           ARBITRATOR WEILER: It's something that I  
2 might be interested to hear the response of Canfor.

3           MR. LANDRY: I will make one comment to  
4 that and then I'll pass it over to Professor Howse.  
5 Firstly, let's not forget that the binational  
6 panels in the system of review is now in the  
7 domestic law of the United States, so those  
8 binational panels are actually part of the domestic  
9 law in the United States. The terminology  
10 administrative tribunal or court is--is an  
11 encompassing term on a lot of different types of  
12 tribunals or courts.

13           Professor Howse, do you want to add to  
14 that?

15           PROFESSOR HOWSE: Yes, first of all, thank  
16 you for this opportunity. The question of whether  
17 proceedings are possible under more than one  
18 chapter of the NAFTA and I understood the United  
19 States to have just said that claims under two  
20 chapters of NAFTA with respect to the same measures  
21 were simply excluded. I only wished to note that  
22 there have been cases where claims under more than

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1 one chapter of NAFTA have been fully adjudicated,  
2 and one that comes to mind is--again I'm going from  
3 memory here--I believe the trucking dispute between  
4 the United States and Mexico which went to a  
5 Chapter 20 panel involved claims under both the

6 investment and services chapters of NAFTA, if I'm  
7 not mistaken, but if we have the chance to--I mean,  
8 if we don't end today and we have a chance, I would  
9 be prepared to be more precise about the cases  
10 where provisions in more than one chapter have been  
11 adjudicated.

12           And apparently in Myers, my colleague is  
13 suggesting that the Tribunal was prepared to  
14 consider that a services case could be brought in  
15 addition to investment based on the same measures  
16 and the same claims.

17           But the second observation is that the  
18 consequence of saying that for purposes of 1121(2)  
19 a binational panel is not an administrative  
20 tribunal or court under the law of the disputing  
21 party, would in our submission be contrary to the  
22 purposes of NAFTA and indeed to many statements,

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1 and again we would have to take a bit of time to  
2 find them, that not only would the replacement of  
3 Court of International Trade review by binational  
4 panels preserve fully rights and obligations of  
5 those affected, but actually would in some sense  
6 enhance them, that it was better, that it would  
7 provide it more rights. But the implication of  
8 saying that here binational panel is not such an  
9 administrative tribunal or court under the law of  
10 the disputing party would be to say now that you  
11 have Chapter 19, you have fewer rights with respect

12 to relief. And that doesn't seem to us to be  
13 consistent with the purposes.

14 And the second observation is really and  
15 again with the Tribunal's indulgence if we have the  
16 time overnight we will look into this more  
17 carefully, but under statutes, it is our  
18 understanding that you will find under domestic  
19 statutes some language that says for purposes of  
20 this statute a binational panel shall be considered  
21 to be a court, but again we would have to look into  
22 this and I'm just going from memory, and if we have

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1 a chance to do so, and the Tribunal will indulge  
2 us, we might want to make a more detailed  
3 submission about the way in which under the law of  
4 disputing parties a binational panel is deemed in  
5 that law or legislation to be an administrative  
6 Tribunal or in particular a court.

7 ARBITRATOR WEILER: Thank you. Can I ask  
8 a different question again first to the United  
9 States and maybe--I want to go back, when you  
10 explained very lucidly the different rationales for  
11 exclusions, I had two difficulties with it. One  
12 was at some level I thought that it was a non  
13 sequitur because you had assumed that the effect of  
14 1901(3) was to be a total exclusion on the--and  
15 then you explained why this made sense, and what we  
16 really were trying to understand is whether or not  
17 it was a total exclusion, so one could not put the

18 result as the explanation for what it was.

19           PRESIDENT GAILLARD: You look at the  
20 result--you look at the position and you say does  
21 it make sense. I mean, it doesn't strike me as  
22 odd, but--

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1           ARBITRATOR WEILER: But the alternative  
2 made equal sense to me, so I just didn't find it  
3 pulling one way or another.

4           But do you remember we talked about the  
5 comparative advantage of the investors, et cetera?  
6 Here, if I understood you correctly, and again  
7 apologies if I didn't, you said that antidumping  
8 and countervailing duty being so delicate and  
9 political, sensitive, et cetera, they wanted to  
10 carve it out and not allow it. When you replied to  
11 my question earlier this morning about whether or  
12 not this construction of 1901(3) put NAFTA  
13 investors into a situation inferior to BIT  
14 investors, for example, I understood your argument  
15 to be, well, in some cases there are modern BITs or  
16 that are other BITs which are better than NAFTA in  
17 some respects, that one might come back to that,  
18 but if it thought, why wouldn't it have been  
19 thought in relation to all those BITs if  
20 antidumping, et cetera, is so delicate. It's true  
21 that they don't have a Chapter 19, but Chapter 19  
22 is just meant to be a binational panel still

1 applying American law and all the rest.

2           wouldn't the same rationale, at least in  
3 some respect, have to be applied, that you don't  
4 want to allow something that was subject to the  
5 Court of International Trade and all the rest to be  
6 subject independently to a Chapter 11 type?

7           MS. MENAKER: Unless I'm misunderstanding  
8 your question, I think the clear answer is we don't  
9 have a similar type of exclusion in our BITS  
10 because BITS don't cover antidumping and  
11 countervailing duty measures. It's the same type  
12 of problem that we have been having here when we  
13 have been couching our answers in terms of we can't  
14 conceive of a claim that would fall within Chapter  
15 19 and yet give rise to an investment dispute over  
16 which a Tribunal would have jurisdiction under  
17 Chapter 11 absent 1901(3).

18           So, we do have BITS out there. They  
19 cover--they offer investor-state dispute resolution  
20 for investment disputes, but we don't think that  
21 anybody could properly bring a claim under a BIT to  
22 challenge an antidumping or countervailing duty

1 determination, even though there is no sort of  
2 1901(3) provision just because you would look at  
3 the scope and coverage of the BIT itself, and it  
4 wouldn't cover it. So, you would make a

5 jurisdictional objection based on the scope and  
6 coverage of the BIT that it covers investment  
7 disputes, and that would not qualify.

8           ARBITRATOR WEILER: But you did think,  
9 that according to your construction, you did think  
10 that it was sufficient and important to exclude it  
11 by putting in 1901(3).

12           MS. MENAKER: Yes.

13           ARBITRATOR WEILER: If it was so far out  
14 and unthinkable, why would it?

15           MS. MENAKER: Because NAFTA is--what we  
16 have here is we have a Free Trade Agreement with a  
17 BIT inside of it, so just by virtue of being in the  
18 same actual document makes it a bit of a higher  
19 risk that a claimant will take advantage of  
20 different opportunities in that respect.

21           And I would also just mention with respect  
22 to our BIT partners, we don't have Free Trade

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1 Agreements with most of those BIT partners either,  
2 so they're not in a situation where they--where  
3 there would be an international obligation that we  
4 have accepted with respect to our antidumping and  
5 countervailing duty law that they would bring in  
6 any regard.

7           ARBITRATOR WEILER: But they're subject  
8 to--since NAFTA antidumping law is American  
9 antidumping law, Canadian antidumping law, Mexican  
10 antidumping law, they are subject to antidumping

11 law, and they are subject to determinations, and  
12 you might have taken the same precaution in saying  
13 we want you to know that is we consider outside,  
14 but I understand your answer.

15 I just have one question to, unless Canfor  
16 wants to comment, I have one question to Canfor.  
17 The question to Canfor is to rephrase in my way  
18 something that Mr. Harper asked before and I still,  
19 even I'm not yet--I wasn't quite satisfied by the  
20 answer given, and I'm going to try again. 1901(3)  
21 says that no other part of the--no other chapter of  
22 the agreement shall be construed to imposing

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1 obligations on the party with respect to the  
2 parties' antidumping law, so what we really would  
3 like to know, apart from the answer that the  
4 President's question is still pending, is those  
5 aspects of the Statement of Claim specific where  
6 you would argue that relief granted by a Chapter 11  
7 proceeding should not be construed as imposing an  
8 obligation in relation to antidumping law. So, not  
9 the generic argument which I think we understood,  
10 but actually if one could walk through the  
11 Statement of Claim and say relief in relation to  
12 this, this, this, and this would not be construed  
13 as imposing an obligation in relation to  
14 anti-dumping law submission, and we can break for  
15 five minutes so both parties can get these  
16 documents before we ask the questions. Thank you.

17 (Brief recess.)

18 PROFESSOR HOWSE: We could certainly walk  
19 through the Statement of Claim. Do you have a  
20 copy? And we would be prepared to respond with  
21 respect to each of the matters that we're asking  
22 for relief on.

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1 But also bearing in mind that part of the  
2 damage to Canfor has occurred through the pattern  
3 of conduct, and that we are also submitting that,  
4 besides the individual acts, the whole pattern of  
5 conduct has--is a violation of, in particular, the  
6 minimum standard of treatment. So, in looking at  
7 individual provisions, we just would like that to  
8 be borne in mind.

9 So, I have the Statement of Claim in hand,  
10 which contains our various assertions or claims  
11 concerning the conduct with which we seek relief.  
12 And I would be--and my colleagues would be happy  
13 to, if the Tribunal wished to point to particular  
14 paragraphs there to explain why the provision of  
15 relief would not create an obligation with respect  
16 to antidumping or countervailing duty law.

17 I mean, if there are particular provisions  
18 that are giving the Tribunal concern on that front,  
19 I would be happy to look at those and talk about  
20 why they don't create such an obligation.

21 ARBITRATOR WEILER: We think that we would  
22 just be happy to listen to anything you would like

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1 to point out and that Canfor would like to point  
2 out under that direction, rather than us taking you  
3 through Canfor's Statement of Claim.

4           PROFESSOR HOWSE: First of all, I would  
5 like to emphasize that we view each of the acts as  
6 such that--of such a nature that the relief we are  
7 asking for will not impose an obligation with  
8 respect to AD and CVD laws, as we understand that  
9 expression. So, one thing I could do or we could  
10 do, which would take a long time, would be to go  
11 through every single act we describe and then talk  
12 about our view of the pattern of conduct as a  
13 whole. Or I could look--I could give you some  
14 examples and reason through an example.

15           ARBITRATOR WEILER: Why don't you reason  
16 through one or two examples.

17           PROFESSOR HOWSE: Certainly. Let's take  
18 our examples concerning the claims of the Byrd  
19 Amendment which might seem to be a very hard  
20 example because in the Byrd Amendment we are  
21 referring to a statute. I just need to find the  
22 exact paragraphs of our allegation--

□

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1           PRESIDENT GAILLARD: Can you start at  
2 paragraph 141.

3 PROFESSOR HOWSE: So, let's start with  
4 141. The actions of the respondent in adopting the  
5 Byrd Amendment and its application or intended  
6 application to softwood lumber countervailing and  
7 antidumping duties levied on Canfor such that those  
8 duties will be redistributed from Canfor to the  
9 petitioners who are already receiving the benefit  
10 of being able to subject Canfor and its investors  
11 to a costly, arbitrary and discriminatory legal  
12 process that has resulted in the imposition of  
13 prohibited duties upon them is blatantly  
14 discriminatory and violates NAFTA's Articles 1102,  
15 1103, and 1105.

16 PRESIDENT GAILLARD: Before you go on--you  
17 just read the paragraph--but before you go on, do  
18 you still maintain the words "in adopting" in the  
19 first line?

20 PROFESSOR HOWSE: Yes. And in wording the  
21 Statement of Claim in this fashion, we relied upon  
22 the characterization by the United States before a

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1 panel of the World Trade Organization of the Byrd  
2 Amendment.

3 And if I may, I would like to read that  
4 characterization. It's summarized or quoted by--

5 PRESIDENT GAILLARD: I don't understand,  
6 I'm sorry. This is a clarification point because I  
7 understand your latest submissions to say, for  
8 instance, at paragraph 26 of the rejoinder, that

9 the adoption of a law is not a problem, but what's  
10 the problem, you say, it's the application. To me,  
11 it's the thrust of your argument that the adoption  
12 itself may not be caught by this provision we are  
13 discussing, but its application is different  
14 because you read the word "law" in a particular  
15 way.

16           So, how do you reconcile these two ideas?  
17           PROFESSOR HOWSE: And this is why I wanted  
18 to look at specific examples because I think the  
19 examples play themselves out differently,  
20 Mr. President, because in this particular case this  
21 law has--the United States has characterized this  
22 law as, quote-unquote, having nothing to do with

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1 the administration of antidumping and  
2 countervailing duty laws. Those are the words that  
3 the United States used before the WTO panel,  
4 nothing to do with the administration of the  
5 antidumping and countervailing duty laws.

6           So, in this particular instance, we would  
7 argue that we could--here we relied on the United  
8 States's own characterization that this particular  
9 law had nothing to do with antidumping or  
10 countervailing duty laws. But if the United  
11 States's own characterization before the panel  
12 proceedings which is what we relied on in drafting  
13 the Statement of Claim is erroneous, then you're  
14 right, we may have a problem with adoption here.

15 That's right.

16           PRESIDENT GAILLARD: My understanding was  
17 that you had implicitly dropped these terms,  
18 because I'm surprised you insist on those terms.  
19 I'm not saying it's right or wrong. I was just  
20 questioning the consistency of that with your most  
21 recent pleadings, but that's fine. I mean,  
22 whatever is your position is your position. I

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1 don't want to put the words into your mouth.

2           PROFESSOR HOWSE: Mr. President, I believe  
3 you're correct in the way that you've read our  
4 latest submission in that we have clarified the  
5 focus of our concerns.

6           I was meaning more to just explain how we  
7 could--how we could have come to a conclusion here  
8 that the adoption itself posed a problem, given our  
9 general theory that it's really where the  
10 application of the law is concerned that 1901(3)  
11 doesn't exclude. So, that was only the point I  
12 wished to make. In fact, you have completely  
13 understood our gloss in the rejoinder on the main  
14 focus of our claim about the Byrd Amendment.

15           PRESIDENT GAILLARD: Thank you.

16           Mr. Clodfelter, you want to answer  
17 specifically on this?

18           MR. CLODFELTER: Actually, I was confused.  
19 we did hear this morning that the claim is not  
20 based upon the Byrd Amendment, not based upon the

21 statute, which is, of course, contrary to the text  
22 of the paragraph 143. So, we are a little confused

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1 still. What's the claim about here?

2 PRESIDENT GAILLARD: I guess it's not a  
3 question, it's just a remark; right?

4 MR. LANDRY: For the record,  
5 Mr. President, we do not withdraw paragraph  
6 whatever it was that Mr.--I don't have it in front  
7 of me because he's using my paragraph.

8 PRESIDENT GAILLARD: It's paragraph--it's  
9 the words "in adopting" in paragraph 141 of the  
10 Notice of Arbitration and Statement of Claim. So,  
11 it's noted. The position--there are two different  
12 things here. The position of the parties, the  
13 contention, what is it that your position is, and  
14 what the argument is. Now, one thing has to be  
15 crystal clear is what the position is and what  
16 you're requesting.

17 So, what you're saying here is: we don't  
18 drop a word of what we said in the initial  
19 pleading, the Notice of Arbitration and Statement  
20 of Claim. That's your position; correct?

21 MR. LANDRY: With respect to the Byrd  
22 Amendment as referenced by Professor Howse, you're

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1 correct.

2           PRESIDENT GAILLARD: Right. So, that's  
3 one thing.

4           Then comes the argument--and I don't want  
5 to mix the two levels--when we heard a lot of  
6 argument on this, and I don't think as far as we  
7 are concerned we have any questions. We think the  
8 positions of the parties are very clear, but I want  
9 you to have an opportunity to further elaborate on  
10 it if you so wish, but it's not a question from the  
11 Tribunal. So, on Canfor's side, Mr. Mitchell or  
12 Mr. Howse?

13           PROFESSOR HOWSE: Yes, exactly. As  
14 Mr. Landry suggested, my comments go to the  
15 argument, and I think that we have--in our most  
16 recent submission we have enriched the argument,  
17 but we--and focused the argument about the Byrd  
18 Amendment. But no, we have not actually dropped  
19 the claim.

20           But I did want to--and I also wanted to  
21 explain how not dropping it is consistent with our  
22 general theory because of the way in which the

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1 United States itself has characterized this  
2 particular statute as, quote-unquote, having  
3 nothing to do with the administration of AD and CVD  
4 law.

5           PRESIDENT GAILLARD: Thank you for  
6 clarifying the rationale, the argument.

7           We have no questions on this, but on the

8 U.S. side, do you have a comment or a point you  
9 want to make on this?

10 (Pause.)

11 MR. CLODFELTER: Mr. President, we may  
12 want to return to this later before the evening is  
13 out, but not right now.

14 PRESIDENT GAILLARD: This is fine.  
15 Professor Weiler has no further questions.  
16 Mr. Harper, do you have a few questions?

17 ARBITRATOR HARPER: Oh, yes.

18 PRESIDENT GAILLARD: Maybe more than a  
19 few.

20 (Pause.)

21 PRESIDENT GAILLARD: Let's have two  
22 minutes. The Court Reporter would like a

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1 two-minute pause, so let's have a two-minute pause.

2 (Brief recess.)

3 PRESIDENT GAILLARD: We are back on the  
4 record. Mr. Harper will have a few questions, and  
5 we will see in a moment if we need to reconvene  
6 tomorrow or not. We are completely in your hands,  
7 and we are available tomorrow to hear you, so we  
8 will decide when we hear your answer to the  
9 question, and frankly it would be your call, so we  
10 would want you to make a determination on that,  
11 after Mr. Harper has asked his questions.

12 Conrad, do you want to go ahead?

13 ARBITRATOR HARPER: Thank you, Mr.

14 President.

15           Professor Howse, is Canfor asking this  
16 Tribunal to adjudicate the issue of whether the  
17 Byrd Amendment is or is not an antidumping law or a  
18 countervailing duty law?

19           (Pause.)

20           PROFESSOR HOWSE: well, in this particular  
21 instance, Mr. Harper, I'm not sure that the  
22 Tribunal would need to adjudicate it in the sense

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1 that our position is the same, it appears, as the  
2 position that the United States has stated in this  
3 matter before the world Trade Organization. So, I  
4 think both parties are essentially of one mind  
5 that, as the United States put it, the legislation  
6 in question, the CDSOA, has nothing to do with the  
7 administration of antidumping and countervailing  
8 duty laws. It would seem very odd, and we would  
9 take the position--we have a legal position on  
10 this, too, if the United States were now to claim  
11 otherwise that it claimed at the time before the  
12 WTO panel, and--but you would have to ask them that  
13 question, if they changed their view of the Byrd  
14 Amendment since they made that submission to the  
15 WTO panel.

16           And if they have changed their view, then  
17 we would want to say something about the legal  
18 implications of their now taking a different view  
19 than the one they have taken in their oral

20 statement to another international tribunal.

21 ARBITRATOR HARPER: Let me take this

22 opportunity--it would have occurred to me

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1 anyway--to inquire of the respondent what is the

2 position of the United States on that question.

3 MS. MENAKER: Our position is that all of

4 Canfor's claims based on the Byrd Amendment are,

5 indeed, barred by Article 1901(3), as we stated in

6 our written submission since the very first

7 submission that we made, is that any obligation

8 imposed on the United States with respect to the

9 application of that law, although it has never been

10 applied or insofar as Canfor's claims are concerned

11 would be imposing an obligation on the United

12 States with respect to its antidumping and

13 countervailing duty law in contravention of Article

14 1901(3).

15 I discussed, I believe it was, yesterday

16 and in our written submissions that again the only

17 way in which the Byrd Amendment has had any effect

18 on Canfor could be their contention that the--it

19 improperly incentivized the domestic industry to

20 support the petitions before the DOC and ITC, and

21 therefore it is essentially an argument that the

22 Commerce Department and the International Trade

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1 Commission improperly instigated the investigations  
2 when, if they had applied U.S. law on the issue of  
3 standing properly, they would not have instigated  
4 those investigations.

5           And the instigation of an investigation  
6 is, of course, conduct that is inextricably  
7 intertwined with the administration and application  
8 of the antidumping and countervailing duty laws.  
9 So, in that respect, their claim with regard to the  
10 Byrd Amendment is barred by 1901(3).

11           ARBITRATOR HARPER: Because the matter  
12 seems to be one of some subtlety and perhaps  
13 complexity, I should perhaps pursue the matter,  
14 Ms. Menaker, by asking you whether the United  
15 States has a position as to whether or not the Byrd  
16 Amendment is itself a measure that is an  
17 antidumping law or a countervailing duty law.

18           MS. MENAKER: Yes, I would direct the  
19 Tribunal's attention to the definition of an  
20 antidumping and countervailing duty statute that is  
21 in Annex 1911, and that is defined as the relevant  
22 provisions of Title VII of the Tariff Act of 1930,

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1 as amended. And, in fact, the Byrd Amendment or  
2 the Subsidy Offset Act of 2000 is an amendment to  
3 Title VII of the Tariff Act. So, I believe that  
4 answers your question and responds very briefly to  
5 remarks that Canfor made.

6           The issue before the WTO was a different  
7 issue. The issue was whether the Byrd Amendment  
8 was an action against dumping or an action, a  
9 specific action against dumping or in a specific  
10 action against subsidization within the meaning as  
11 those terms are understood in WTO jurisprudence and  
12 whether they thus violated the antidumping code and  
13 the SCM agreement; and indeed, the United States  
14 argued they did not. We lost that case. We  
15 appealed it, as was our right, and the WTO  
16 appellate body upheld the panel's decision in most  
17 respects, not in all respects and not with respect  
18 to this improper standing question.

19           I think that there is certainly tension in  
20 Canfor's argument insofar as it criticizes the  
21 United States for complying with a Chapter 19  
22 Panel's decision, albeit begrudgingly. So, they

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1 criticize us because we were unhappy that we did  
2 not prevail, and yet we did comply.

3           To now suggest that the United States is  
4 somehow at fault for having made an argument before  
5 another international tribunal that it lost, and  
6 that it cannot--that it is bound by arguments or  
7 particular statements that it made to that  
8 Tribunal, insofar as they are even relevant in this  
9 context and cannot itself reform its view to some  
10 extent based on the decision rendered by that  
11 Tribunal I don't think is a fair position. Thank

12 you.

13           ARBITRATOR HARPER: In light of  
14 Ms. Menaker's statement, Professor Howse, does  
15 Canfor have a different view, or any view as to  
16 whether or not the Byrd Amendment is an antidumping  
17 law or a countervailing duty law?

18           PROFESSOR HOWSE: Very briefly, I think  
19 the United States has made some explanation of the  
20 change of what appears to be a change of position  
21 from that it took in characterizing municipal law  
22 before the WTO panel.

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1           I would only say that the panel and the  
2 appellate body were careful to rule only under  
3 the--on the question of whether the Byrd Amendment  
4 fell within the meaning of certain provisions in  
5 the WTO agreements.

6           My understanding is that the panel and the  
7 appellate body could not have, as it were,  
8 overruled the overall characterization by the  
9 United States that the Byrd Amendment,  
10 quote-unquote, had nothing to do with the  
11 administration of antidumping and countervailing  
12 duty laws. It could only find that that  
13 characterization by the United States nevertheless  
14 did not mean that for purposes of particular  
15 provisions of the WTO agreements that the U.S. had  
16 not violated those particular provisions.

17           PRESIDENT GAILLARD: with respect, it's

18 not the question. The question was: What do you  
19 think about this issue?

20 PROFESSOR HOWSE: With respect, sir, I  
21 think we need to talk among ourselves because we  
22 had understood it as something that was not in

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1 dispute. Now you're asking what we think  
2 independently of the U.S. characterization. Can we  
3 have a moment?

4 PRESIDENT GAILLARD: Of course. Please,  
5 you can speak among yourselves.

6 (Pause.)

7 PROFESSOR HOWSE: Thank you for your  
8 indulgence.

9 It's our understanding that where a party  
10 has changed or modified its antidumping law or  
11 countervailing duty law under 1902(2) of NAFTA,  
12 it's required to follow certain requirements which  
13 include a notification requirement that they're  
14 engaging in such an amendment of their antidumping  
15 and countervailing duty law.

16 And it is also our understanding that no  
17 such notification was made by the United States  
18 under the terms of 1902(2). And in our submission,  
19 having not followed 1902(2) requirements with  
20 respect to changes or modifications of antidumping  
21 or countervailing duty law, the United States  
22 cannot come now and take advantage of an exception

1 which, even on their theory, on its very words,  
2 only applies to law that is, quote-unquote,  
3 antidumping and countervailing duty law. In other  
4 words, if it is antidumping and countervailing duty  
5 law, then they would need to do what they have to  
6 do and modifying that law into 1902(2). If they  
7 haven't done it, then we don't believe it would be  
8 open even on their interpretation of 1901(3) to say  
9 it's not.

10 PRESIDENT GAILLARD: In what you say there  
11 is a point of fact and an argument, and on the fact  
12 I would like to turn to the U.S.

13 Is it a correct assertion that the Byrd  
14 Amendment has not followed Article 1902(2)  
15 requirements?

16 MS. MENAKER: I apologize, but I could not  
17 say so definitively. I would have to check with my  
18 colleagues from the USTR.

19 PRESIDENT GAILLARD: That's fine.

20 ARBITRATOR WEILER: Do you accept that  
21 it's germane to the question?

22 MS. MENAKER: Not at all. I don't think

1 it has anything to do with Article 1901(3).

2 PRESIDENT GAILLARD: We have a factual  
3 allegation, and I wanted to see that, and then we  
4 go back to the argument. We understand the

5 argument, maybe we won't elaborate on the argument  
6 now. Do you want to say a word on the argument  
7 part?

8 MS. MENAKER: First, just to respond to  
9 Canfor's argument that somehow our position has  
10 changed. Just to be clear, our position has never  
11 changed in this arbitration. From the very  
12 beginning, we said all of Canfor's claims were  
13 barred by virtue of 1901(3), and in our reply we  
14 specifically addressed their Byrd Amendment claim  
15 and said for specific clarify all of their claims,  
16 including all claims relating to the Byrd  
17 Amendment, are barred by Article 1901(3). So, our  
18 position has remained clear throughout this  
19 arbitration.

20 I don't think this Article 1902 issue--let  
21 us presume now. Like I said, I do not know  
22 factually whether or not Article 1902 had been

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1 complied with or whether it even applies, but let  
2 us just presume for the sake of argument that  
3 Canfor is correct and that there had been some  
4 violation of Article 1902. That does--that does  
5 nothing, has no bearing on the issue of whether  
6 1901(3) applies. In fact, it's somewhat circular  
7 in this regard because the obligation is to notify  
8 an amendment to your antidumping and countervailing  
9 duty law, and then Canfor is now arguing that if  
10 you don't do that notification, that somehow the

11 amendment therefore becomes not an antidumping or  
12 countervailing duty law, and any obligation you  
13 impose on it is not in violation of 1901(3).

14           So, that begs the question, then couldn't  
15 a party completely get around any notification  
16 requirements because any time it ceased to notify,  
17 then the amendment would be deemed to be not a part  
18 of its antidumping and countervailing duty law, and  
19 he would not have to comply with all of the  
20 requirements in Chapter 19 relating to amendments.

21           ARBITRATOR HARPER: I sense in this  
22 dialogue a resurgence of the issue that from time

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1 to time my colleagues have pursued, namely the  
2 issue of labeling and whether or not one could  
3 avoid an obligation by mislabeling or incur an  
4 obligation by correctly labeling. And I see, if I  
5 may, that this issue admits at least a number of  
6 arguments along that line. I think it would be  
7 helpful for us to know what the facts are--and I  
8 think I speak for my colleagues in that regard--and  
9 then we would be glad to entertain the arguments as  
10 well, but I think we need to know what the facts  
11 are.

12           PRESIDENT GAILLARD: I made a note of  
13 that. Ms. Menaker, can you make a note that we  
14 want to know what the answer is on a factual basis  
15 on the use or not of Article 1902 with respect to  
16 the Byrd Amendment.

17 MS. MENAKER: We certainly can, but  
18 again--

19 PRESIDENT GAILLARD: I understand the  
20 argument that it's not relevant, but we have a  
21 point of fact disputed, and we want clarity on  
22 that.

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1 MR. LANDRY: Mr. President, I wonder if I  
2 could just add one thing in response to a point  
3 that Ms. Menaker made.

4 PRESIDENT GAILLARD: Certainly.

5 MR. LANDRY: I will leave it very short.

6 The protections that are provided for  
7 under 1902(2)(D) regarding the amendment, it's very  
8 clear now that amendment was made--and for sake of  
9 argument let's assume there was no notice given--it  
10 was an amendment that did not comply with the WTO  
11 requirements under the--as required under that  
12 section. And that was the only point I wanted to  
13 make in response.

14 PRESIDENT GAILLARD: I understand the  
15 argument.

16 So, Mr. Harper will continue his questions  
17 for a little while, and then we will break shortly.

18 ARBITRATOR HARPER: Let me turn to a  
19 different subject.

20 (Pause.)

21 PRESIDENT GAILLARD: Mr. Harper will ask  
22 the question, and then we will see--or I'm asking

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1 the parties whether they prefer to discuss it  
2 tomorrow when they know the topic or they prefer to  
3 answer now. It would be your call, keeping in mind  
4 the fact that we cannot go on forever because of  
5 the Court Reporter, who has been on for a long  
6 time.

7           ARBITRATOR HARPER: Thank you,  
8 Mr. President.

9           Let me ask counsel for Canfor the  
10 following question: Suppose Chapter 11 of the  
11 NAFTA had an Article that stated, "This chapter  
12 shall not be construed as imposing obligations on a  
13 party with respect to the party's antidumping law  
14 or countervailing duty law. Such law in each  
15 instance includes relevant statutes, legislative  
16 history, regulations, administrative practice, and  
17 judicial precedents."

18           would it be Canfor's position, if that  
19 were the case, that its Statement of Claim can be a  
20 basis for relief from this Tribunal?

21           MR. LANDRY: I think Canfor would prefer  
22 to answer that question tomorrow when we are fresh.

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1           PRESIDENT GAILLARD: I think it's fair  
2 because that's obviously a question which may lead

3 to follow-up questions. I mean, I don't think you  
4 can just answer by yes or no that kind of question,  
5 so it's only fair. So, we would resume tomorrow,  
6 if you would agree, at nine. Is that all right for  
7 both sides? What do you have in mind in this  
8 respect?

9 MR. MITCHELL: My only constraint is I  
10 need to be at the airport by 3:30, so hopefully we  
11 won't be going that long.

12 PRESIDENT GAILLARD: On the U.S. side? Do  
13 you have any particular time requirements?

14 MS. MENAKER: 9:00 is okay with us.

15 PRESIDENT GAILLARD: So, we will resume  
16 tomorrow at nine.

17 And my guess is we should be done  
18 certainly in the morning. We had in mind an hour  
19 discussion, something like that, but forecasts are  
20 always subject to certain caveats. So, I adjourn  
21 the meeting for the day. Thank you very much, and  
22 we will meet tomorrow at nine. Thank you.

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1 (Whereupon, at 6:58 p.m., the hearing was  
2 adjourned at 9:00 a.m. the following day.)

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1 CERTIFICATE OF REPORTER

2

3 I, David A. Kasdan, RDR-CRR, Court  
4 Reporter, do hereby testify that the foregoing  
5 proceedings were stenographically recorded by me  
6 and thereafter reduced to typewritten form by  
7 computer-assisted transcription under my direction  
8 and supervision; and that the foregoing transcript  
9 is a true record and accurate record of the  
10 proceedings.

11 I further certify that I am neither  
12 counsel for, related to, nor employed by any of the  
13 parties to this action in this proceeding, nor  
14 financially or otherwise interested in the outcome

15 of this litigation.

16

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DAVID A. KASDAN, RDR-CRR

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