IN THE ARBITRATION UNDER CHAPTER 11 
OF THE NORTH AMERICAN FREE TRADE AGREEMENT 
AND UNDER THE UNCITRAL ARBITRATION RULES 
BETWEEN

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CANFOR CORPORATION, 
Claimant/Investor, 
and 
UNITED STATES OF AMERICA, 
Respondent/Party. 

- - - - - - - - - - - - - - - - -x Volume 3 (Final)

Thursday, December 9, 2004
The World Bank 
701 18th Street, N.W. 
"J" Building 
Assembly Hall B1-080 
Washington, D.C.

The hearing in the above-entitled matter came on, pursuant to notice, at 9:08 a.m. before:
PROF. EMMANUEL GAILLARD, President 
PROF. JOSEPH WEILER, Arbitrator 
MR. CONRAD HARPER, Arbitrator

Also Present:

YAS BANIFATEMI, 
Administrative Secretary to the Arbitral Tribunal 

GONZALO FLORES,
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CONTENTS

PAGE

Continued Questions from the Tribunal 641

PROCEEDINGS

1

2  PRESIDENT GAILLARD: Good morning, ladies

Page 5
and gentlemen. I open the hearing in the third day
of the arbitration--of the hearing in the
arbitration between Canfor Corporation and the U.S.
of America under the UNCITRAL Rules and NAFTA
Chapter 11.

Before we start, I want to state for the
record unless I hear otherwise, I can take it both
parties have received this morning the CD of
yesterday's transcript, but that you are yet to
receive the hard copy. So, I take it the hard copy
will be received shortly, during the next hour, to
be on the safe side. So, that's for the hearing.

For the technicalities, that's it.

Mr. Gonzalo Flores has something to add of
an organizational nature.

MR. FLORES: Thank you, Mr. President.

It's just to set forth for the record that both
parties and the Tribunal have also received copies
of the audio recordings made during the session of
December 7 and 8. That's all.

PRESIDENT GAILLARD: Thank you very much,
Mr. Gonzalo Flores.

So, now we can resume the hearing where we
left it. We were in a Q-and-A session, and the
Tribunal was asking a number of questions. Are
there things of a preliminary nature which would be
a leftover of yesterday's questions that claimant
first would like to answer, and then I would ask
the same question to the defendant?

MR. LANDRY: Nothing from claimant's perspective.

Oh, sorry, with the exception of the question from Mr. Harper. Obviously, we are ready to answer that question, but besides that, no.

PRESIDENT GAILLARD: That's exactly where we left it, so that we will resume with that. But I'm talking about a leftover of all the questions we raised yesterday, you have no frustration, nothing you want to say in addition to what you already said; is that correct? Claimant's side?

MR. LANDRY: That's correct.

PRESIDENT GAILLARD: Thank you.

On the U.S. side?

MS. MENAKER: Other than the factual question that was left pending with us, we have nothing to supplement our answers from yesterday.

PRESIDENT GAILLARD: Of course, Ms. Menaker, thank you, we are going to get back to that. We have not forgotten that one.

All right. So, maybe we resume where we left it, and that was precisely the answer expected from Professor Howse of the question asked, I believe, by Mr. Harper.

Mr. Howse.

PROFESSOR HOWSE: Thank you,
Mr. Harper, I hope you won't mind if I just read back the question to refresh it in my own mind. You asked, suppose Chapter 11 had an Article that stated, quote, this chapter shall not be construed as imposing obligations on a party with respect to the party's antidumping law or countervailing duty law. Such law in each instance, including relevant statutes, legislative history, regulations, administrative practice, and judicial precedents. Then you ask, would it be Canfor's position, if that were the case, that its Statement of Claim can be a basis for relief from this Tribunal?

Now, just as when I draft an exam question, as I did this morning for my class with a hypothetical, usually a couple of students will come back and say, what ought we to suppose or not suppose, and they're not always the least diligent students. So, if you will--I beg your indulgence just to ask you a couple of questions about what we are to suppose.

And the first question would be, where would you imagine this appearing in Chapter 11? Would it be under scope and coverage or under dispute settlement or elsewhere? It might make a difference where it appears to how it could affect potentially the arguments that are before us now.

ARBITRATOR HARPER: I would suggest that
you tell me what the differences would be, depending upon the location of the supposition.

PROFESSOR HOWSE: That's fair enough, sir. Then that's what I will do.
And secondly, are we to suppose that the architecture of Chapter 19 remains the same? In other words, we take some of the language or most of it in 1901(3), we add on to it the definitions in 1902, but otherwise all of the architecture of Chapter 19 remains the same. Was that your intention?

ARBITRATOR HARPER: We certainly could make that assumption. My view would be that we should assume there is no change whatever in Article 19, and I guess that leaves open the proposition that the drafters were being particularly careful by, in a sense, repeating themselves in the supposed addition to Chapter 11.

PROFESSOR HOWSE: That's enormously helpful. So, now I feel comfortable responding. Well, let's begin with the possibility that this provision occurred under the heading "Scope and Coverage" in 1101. The first part of my response would be that--and just to remind you
without repeating it because I think the Tribunal is well aware of it, Canfor's argument is that obligations on a party with respect to the party's antidumping law or countervailing duty law are obligations that might be imposed to, you know, either alter or not alter in a certain way the normative material, the legal rules to be applied.

So, in the sense that this language remains the same, Canfor's claim would fully stand because our claim is not based upon problems with the law understood as the normative material to be applied. But I think the Tribunal understands well this submission of Canfor, and it's been discussed and questioned extensively.

So, in that respect our claim would remain exactly the same, but for the Tribunal, surely there would be the task still of interpreting this provision, and whether it might have significance in some way--in other words, having a full understanding.

So, maybe I should go on, if you think it's necessary, and talk a bit about, you know, what other considerations might be involved in a full understanding if this provision were in Chapter 11, or have I answered your question about how it would affect our claim?

ARBITRATOR HARPER: Only if you think you have.
PROFESSOR HOWSE: Fine. Then, if there are other questions such as—well, you did ask what significance would it make where it appears, so perhaps I should just say something about that. I mean, one of the interpretive issues with respect to 1901(3) itself is the issue of whether it is in any respect a bar to jurisdiction as opposed to an interpretive provision that might be relevant to interpreting and applying the norms in Chapter 11 on the merits. And so in sort of puzzling that out on your hypothetical, if this provision were under scope and coverage, we would have to compare it with the language of 1101(3) with respect to financial services, which is very, very different, which says this Chapter does not apply to measures adopted or maintained by a party to the extent that they are covered by Chapter 14, and I think that one would want to ask why such different language here about antidumping law or countervailing duty law than the language about financial services.

Another possibility is that the provision could occur under reservations and exceptions which, you know, are in 1108. If it occurred under reservations and exceptions, these seem to be limited exceptions. In other words, they seem to be talking about specific articles or very specific limitations on the application. And again here the
language is does not apply to any measure, for example. And then one would have to puzzle out why this provision that you've devised as a hypothetical is worded so differently from the other reservations and exceptions.

Now, there is a third possibility which is like with respect to spelling out to what extent competition matters are subject to arbitration under Chapter 11. The provision might occur in

settlement of disputes between a party and an investor of another party. You could put that there.

Now, if you put that there, I think that--that would be a fairly clear signal this goes to jurisdiction in some way. In other words, Canfor's argument that language such as construed and other structural features of 1901(3) suggest that this provision is not a jurisdictional bar or intended to be so, but is of an interpretive nature. I think we would have to answer some questions and reconsider somewhat that argument if you put this provision within, you know, the rubric settlement of disputes because that would sound much more like the parties were intending the provision to actually affect access rights for investors to dispute settlement.

So, that's to sort of explain why just this one issue of where it appears might affect the
interpretive questions, if we were dealing with this hypothetical problem, but it does not affect our claim in the sense that the language here remains such that what we are complaining of does not fall within this, whether it's an exception or a jurisdictional bar or whatever.

ARBITRATOR HARPER: Professor Howse, let me ask you to assume that the Tribunal differed from Canfor's position and determined this language was not restricted; the hypothetical language was not restricted to normative concerns, but was broader than that. What would be your answer as to the effect of this supposed language if placed in Article--in the Chapter 11?

PROFESSOR HOWSE: So, in other words, the Tribunal would be reading this as if it said with respect to the party's antidumping law or countervailing duty measures, which is language, for example, that we have said would probably indicate that not just the normative material to be applied, but every individual, discrete act of application or conduct in the course of application is covered; is that right?

ARBITRATOR HARPER: That's the thrust of the question.
PROFESSOR HOWSE: Well, in that case, I think that a different aspect of our argument would, as it were, kick in, you know, to preserve, you know, our claim, and that we would say that in that case that the issue is still a matter of interpretation, that this is not in the nature of a jurisdictional bar, and one would still need to consider, as with perhaps, to use an example, an exception under the services chapter of NAFTA some exceptions under the GATT like Article 20, we would have to go ahead and consider whether this as an exception applies so as to interpret the agreement to justify or save as it were the United States's conduct from being scrutinized under Chapter 11.

So, insofar as the four corners of this proceeding are concerned with respect just to the issue of jurisdiction, whether there is a jurisdictional bar imposed, the answer would be our claim would remain exactly the same. This does not impose a jurisdictional bar because of its structure and wording, but rather requires application within the adjudication of the merits.

And granted, that application might well be affected if the Tribunal were to come to the conclusion that not only normative material is involved, but every individual discrete act in the application or administration of the law.
ready to return to the issue of the Byrd Amendment, if that would suit the pleasure of the Tribunal.

PRESIDENT GAILLARD: Certainly.

ARBITRATOR HARPER: I believe we left pending yesterday the factual circumstances, whatever they may be, surrounding the Byrd Amendment, and I would look forward to being enlightened on that matter by the United States.

MS. MENAKER: Thank you, and good morning, Mr. President, members of the Tribunal.

The question that was left pending, I believe, is that you asked the United States whether notification of the Byrd Amendment had been given pursuant to Article 1902, and we have checked into that and can confirm that no such notification was given. That being said, I would like to make three comments on that issue.

The first is it is questionable whether such notification would have been required pursuant to the terms of Article 1902. If you read the language of 1902, it states in 1902(1) that each party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of any other party.

1902(2) then states that each party reserves the right to change or modify its antidumping law or countervailing duty law,
provided that, in the case of such an amendment, and then it goes on to have the notification requirement.

There is at least a question as to whether the notification requirement would apply with respect to the Byrd Amendment insofar as that was deemed to be a statute, not necessarily concerning or an amendment, not with respect to the goods imported from the territory, but rather with respect to the distribution of the monies collected or the duties collected on the importation of those goods. So, that is at least, I believe, an open question as to whether that notification provision would be applicable in that regard.

Now, that being said, I would also like to note that there is no question in this case that our NAFTA parties did have actual notice of the Byrd Amendment as it was widely publicized, and it was challenged, as you all know, before the WTO.

And finally, I would just note that even if the notification provision did apply and it has a specific notification requirement, it does not have a requirement of actual notice. So, the United States could very well be in technical violation of this Article, and for that, if that is the case, then we do apologize.

But that being said, again I repeat what I said yesterday, which is that the issue of whether
or not notification was given has no bearing on the
correct interpretation of Article 1901(3). Canfor
itself, on day one of this hearing, said, and I
would quote from the transcript on page 248, line
six, and Mr. Landry said, quote, Well, I think the

position of Canfor is that--it is, referring to the
Byrd Amendment--clearly a matter that relates to
the antidumping and CVD regime that they have in
place, end quote.

So, that being said, any obligation
imposed on the United States with respect to the
Byrd Amendment would fall within--would be barred
by Article 1901(3), and the fact that not--no
notification was given of this amendment cannot
change the characterization of that amendment. And
as I noted yesterday, if one were to proceed down
that line, it would lead to the really incongruous
result whereby a party simply by failing to give
notification, technical notification pursuant to
the rules in this chapter, could thereby prevent
its statute from being characterized as an
antidumping or countervailing duty statute, and
could then get around all of the obligations set
forth in Chapter 19 that the parties have agreed to
apply with respect to their antidumping and
countervailing duty statutes.

PRESIDENT GAILLARD: Ms. Menaker, what
1 would you say about the intention, the legislative
2 intention, the rationale of the Byrd Amendment with
3 respect to antidumping law and countervailing duty
4 law?
5          MS. MENAKER:  If I may have a moment?
6          PRESIDENT GAILLARD:  Of course.
7          (Pause.)
8          MS. MENAKER:  Mr. President, if it would
9 be okay with the Tribunal, I would like at a break
10 to consult with some of our colleagues from the
11 other agencies who are more familiar with the
12 legislative history on the amendment than we are
13 here.
14          PRESIDENT GAILLARD:  That's perfectly
15 acceptable.
16          MS. MENAKER:  Thank you.
17          PRESIDENT GAILLARD:  Mr. Harper, you may
18 proceed.
19          ARBITRATOR HARPER:  Thank you,
20 Mr. President.
21          In light of the comment made by
22 Ms. Menaker, let me turn to the Canfor

1 representatives and inquire whether the position
2 articulated by Mr. Landry and quoted by Ms. Menaker
3 a moment ago is still the position of Canfor.
4          (Pause.)  

PROFESSOR HOWSE: If you will excuse me, Mr. Harper, it would be easier for me if you would phrase what your understanding was of what Ms. Menaker was saying, just so we don't filter this through different understandings of her actual words. I beg your indulgence on this.

ARBITER HARPHER: Ms. Menaker, would you be good enough to give me the transcript citation, please, again.

MS. MENAKER: Certainly. It is page 248, line six. Yes, from the first day.

ARBITER HARPHER: Professor Howse, just to respond to your query, my question is this: Is it Canfor's position that the Byrd Amendment clearly is a matter that relates to the antidumping and CVD regime?

PROFESSOR HOWSE: Well, let's go back to Canfor's claim. Canfor's claim is that--and I elaborated a little bit on this yesterday in response to some questions from the President of the Tribunal. Canfor's claim is very much focused on the Byrd Amendment as the context for--as the context for abusive use of the AD/CVD process, and that relates to the petitions and the argue--in fact, Ms. Menaker herself picked up on this, the idea, and we would prove this--we would have to prove this, we realize, on the merits, that the existence of the Byrd Amendment was the context for
getting together a petition creating incentives to have a petition go forward without what would normally be required as genuine consent and support of the petition itself; in other words, the view that the practices are unfair by the industry. And my colleagues will elaborate on that more in the Statement of Claim.

I mean, certainly, we would view the Byrd Amendment as the context for this abusive behavior in the beginning of the petition and the ultimate imposition of very, very costly measures on Canfor. This being said, we have to distinguish that from the characterization of the law itself.

When you referred to the costly measures, you're talking about antidumping measures and countervailing duty measures; is that correct?

But also including the disruption to Canfor's legal security from the initiation--

As a result of those measures.

Even before the measures by the result of the process beginning because often in these situations a business starts to be--

In that case, in anticipation of those measures?

Yes, exactly. In
17 anticipation, yes.

18 ARBITRATOR HARPER: Have you finished your answer?

19 PROFESSOR HOWSE: Well, only to say that
20 the law itself, however, the United States, as far
21 as we can see, had clearly characterized before the
22 WTO as having nothing to do with the administration
23 of antidumping and countervailing duty law, the law
24 itself. That's how they characterized the law
25 itself.

26 And that may be an appropriate
27 characterization of the law itself, and then we
28 would have to look at the nature of the conduct out
29 of which--from which that law is the context and
30 the specific meaning in Canfor's claim.

31 ARBITRATOR HARPER: Do I understand
32 Canfor's position to be, Professor Howse, that the
33 Byrd Amendment is tied to the allegedly prohibitive
34 duties imposed upon Canfor? And in asking that
35 question, I specifically refer you to paragraphs
36 141 through 146 of the Statement of Claim.

37 (Pause.)

38 MR. LANDRY: Mr. Harper, as you have
39 heard, and as is indicated in our written material,
40 the Byrd Amendment is part of the factual matrix
41 within which the claim obviously is based. And one
42 of the things that you have heard both from us and
43 from Ms. Menaker is that there is an allegation
1 relating to how, given the Byrd Amendment, that
2 affected the Commerce's determination on whether or
3 not to initiate the proceeding, whether or not it
4 had sufficient support for the petition, which is
5 required under the domestic law, and the allegation
6 will be, and we will be providing evidence that, as
7 a result of that law being in place, it provided an
8 incentive to members of the domestic industry to
9 support the petition, because if they did not
10 support the petition and duties were put in place,
11 their domestic competitors would get monies back
12 and they would not. And there will be specific
13 evidence brought before the Tribunal to show that.
14  So when you say that is it--if I may
15 just--I want to go back to your question, is it
16 tied to the alleged prohibitive duties, it is part
17 of the factual matrix within which the claim is
18 made.
19  PRESIDENT GAILLARD: Mr. Landry, would
20 that be, on counsel's side, the answer to the
21 question I asked a moment ago to Ms. Menaker: What
22 is the rationale of the Byrd Amendment? You say
23

1 it's to provide an incentive to the local industry
2 to support--to support what?
MR. LANDRY: To the local industry to
support a petition going to--
PRESIDENT GAILLARD: Petition to do what?
MR. LANDRY: I'm sorry, a petition to
initiate an antidumping and countervailing duty
investigation.
PRESIDENT GAILLARD: That's your answer to
my question? It's the rationale? I mean, that's
the rationale, as I understand it, of the Byrd
Amendment?
MR. LANDRY: Rationale by the United
States?
PRESIDENT GAILLARD: Yes. Why have they
adopted the Byrd Amendment?
MR. LANDRY: Why has the United States
adopted the Byrd Amendment?
PRESIDENT GAILLARD: Right. It's a simple
question. I mean, go ahead. Maybe to put it
in--let's not use the word rationale which may seem
narrow. For which reasons the United States, in
your contention, adopted the Byrd Amendment?
MR. LANDRY: I defer to Professor Howse on
this, please.
PROFESSOR HOWSE: I think the slight
hesitation you heard, Mr. President, is that it's
possible that there might have been several
purposes that were in legislators' minds. We would
maintain that this was one of them, but it might
9 not be the only one. However, we would
10 maintain—we will maintain and prove that this
11 was—if it's the purpose that for which it was used
12 in relation to the conduct towards Canfor.
13          PRESIDENT GAILLARD: So, in your
14 contention, this rationale—there may be others,
15 but this rationale is the one which harmed you in
16 this particular case, assuming that you're right on
17 the facts and that on the merits that you're right;
18 right?
19          PROFESSOR HOWSE: It's not—the only
20 rationale on which we could be harmed—in the
21 Statement of Claim we also mention the possibility
22 that our competitors would be provided with
23 payouts. In other words, the duties would be paid
24 to our competitors, and that possibility
25 represents, in our submission, a form of
26 discrimination that's prohibited under the
27 standards of Chapter 11. So, that rationale also
28 pertains to our claim that Canfor has—suffers harm
29 in consequence of a Chapter 11 violation.
30          And, of course, the question we will have
31 to answer on the merits will be has that harm
32 crystallized in the sense of has this happened yet,
33 and does the harm only flow from when the payments
34 are made but from the influence on economic actors
35 of the expectation that such payments will be made,
36 including the pressure to settle this kind of
matter through the kind of agreement that Canada and the U.S. had at various points in time in the past.

MR. LANDRY: Mr. President, may I just--you're asking--you're using the word rationale, and we are responding to the word, if I may, to the word effect, the effect that the Byrd Amendment--the rationale of the United States as to why it implemented the Byrd Amendment. When I say that it has received a lot of press and a lot of discussion would be an understatement, but the rationale is one thing. The effect of the Byrd Amendment in the context of the softwood lumber dispute is that it provides an incentive, et cetera, et cetera.

The Byrd Amendment per se, which creates a situation, in effect, in the end where the playing field is no longer level anymore, it's in favor of the domestic industry because of the way in which it's done. You take your duties and you give the duties back to the domestic industry. It's just been described by a number of different people all use words as blatantly protectionist.

But that's getting into the rationale. The effect on Canfor in this case for the purposes of this is as we have indicated.

PRESIDENT GAILLARD: I take your point.

It's very well put. So, you're saying to me, I put
1 it in my own words, you say to me: The rationale
2 is subjective and it's always hard to reconstruct
3 the rationale, but the effect is objective, and the
4 effect which you say harms you is to provide an
5 incentive--it does incentivize the local industry
6 in the context of putting pressure on the
7 authorities to chase you for antidumping and
8 countervailing duties. Would that be a fair
9 summary of what you said?
10 MR. LANDRY: It would be, and let me
11 just--I want to make sure this point is very clear
12 on the record because it is one of the effects of
13 the Byrd Amendment which is incredibly contrary, in
14 my submission, to the whole concept of what
15 antidumping and CVD matters are about, and it's
16 this. We now have approximately, I think we heard,
17 Mr. President, $3.8 billion, $4 billion. The
18 effect of the Byrd Amendment, if it goes through to
19 fruition, is that it creates a situation where that
20 $4 billion goes out to the domestic industry to
21 effectively be used by the domestic industry in
22 competition with, for example, Canfor. You can
23 just see by using that analogy we go back to day
24 one before it starts that there is an incredible
supporting a petition because if they don't support
the petition, they don't get part of the duties.

PRESIDENT GAILLARD: From the factual
standpoint, a simple question doesn't mean
anything, it's just to get the facts right.

We heard yesterday on the respondent's
side--they say it's not been used yet. Your answer
to that is what? Yes, it's true, but the very
existence of that device already creates harm
because--the expectations of the market and all
that, I mean, the existence of that tool, even if
not used yet, in and of itself, creates harm to
Canadian exporters?

MR. LANDRY: Technically, the United
States is correct. It has not paid out any duties
under the softwood lumber dispute as of yet, but
the effect that it had at the beginning and--we
will provide evidence to that effect--of allowing
or effectively incenting people to come forward to
support the petition has been a serious effect and,
therefore, serious harm has resulted to Canfor.

PRESIDENT GAILLARD: Thank you very much.
I understand the contention.

ARBITRATOR WEILER: I would like a
clarification on one issue on this. I understand
this point made, but as Mr. Harper pointed out,
assume the panel does not take--and it's just an
assumption--the same view on the meaning of
8 antidumping law that Canfor is pressing on us, and
9 that it includes, for example, something that is
10 like measures, et cetera, and therefore it could be
11 consequential how the Byrd Act itself is
12 characterized, and from all this discussion I have
13 what your statement in page 246 which you said
14 Canfor, the position of Canfor is that it clearly
15 is a matter that relates to antidumping and CVD
16 regime, and now the responses that you have given,
17 if I hear you correctly, seem to confirm that, and
18 therefore no matter what effect it might have, the
19 question is whether your characterization--because
20 we know the United States, you argued in your
21 Statement of Claim that the United States before
22 the WTO said it has nothing to do with the WTO, but

1 we have here the respondent, the United States,
2 saying it is the CVD measure. It's an amendment to
3 the 1930 statute which might just mean that they
4 made a misstatement before the WTO. It could be
5 that they made a misstatement, but this panel has
6 to decide objectively on its own terms what is the
7 correct characterization, and here it seems to be
8 that both of you, Canfor and the United States
9 respondent, are agreeing that this is a
10 countervailing duty measure independently of what
11 the United States said before the WTO which might
12 have some probative value but is certainly not
13 conclusive. They just might have made a
MR. LANDRY: I'm going to try to answer quickly and then I'll transfer it to Professor Howse, but at a very essential level, Professor Weiler, what the position that we were taking yesterday was that the Byrd Amendment cannot have the protection provided under 1901(3) because it is obviously not the type of law that was contemplated by the parties under 1902(2)(d). It is--not only was there not any notice given--that's one thing--but the fact of the matter is it is blatantly contrary to their WTO obligations under the dumping and subsidies codes. And therefore--

PRESIDENT GAILLARD: Mr. Landry, if I can interrupt you. If that is true, and if the Byrd Amendment falls--I'm just hypothesizing, correct me where I'm wrong--if the Byrd Amendment does fall into Article 1902 and it has not been notified yet (so presumably no statute of limitation applies), and it's grossly against the WTO rules: Isn't it the case that there is a device to challenge it yet, or what would be your contention on this? Is there room for challenge of the Byrd Amendment pursuant to the very rules of Chapter 19, even today?

MR. LANDRY: May I have a moment.

PRESIDENT GAILLARD: That's a question you
MR. LANDRY: Professor Howse will respond to that.

PROFESSOR HOWSE: Well, Mr. President, it's true, and Canada could challenge it at the WTO, Canada, not the investor.

PRESIDENT GAILLARD: I understand. I'm sorry if I misspoke. I don't know how I phrased my question, but you would have to pressure Canada to protect you with that device. But assuming Canada was willing to do it, what would be your--you, as an expert--position as to the possibility or the feasibility of that kind of action initiated by Canada pursuant to Chapter 19 devices?

PROFESSOR HOWSE: Canada could, under--I suppose what you're referring to is under review of statutory amendments 1903--could challenge the Byrd Amendment as a violation of 1902(2). I think that's correct.

PRESIDENT GAILLARD: I would have assumed it's contained in your allegations because you say it's contrary to the WTO. It's something which falls under the Chapter 19 ambit because it provides, even if it's not the intention--the result is to provide the strong incentive to make
the antidumping law and countervailing duty laws or actions or enforcement of those laws much more stringent, and therefore much more difficult for, say, Canadian investors or Canadian exporters. I don't mean to qualify the situation here any further, but if that's true, it seems to me that Canada would still have an action under Chapter 19, but maybe there is a statute of limitation problem or anything.

But my initial sense, and I'm not at all an expert in these matters, would be that if notice has not been given, maybe the statute of limitation, if any, has not started to run.

So, I would like your determination on that, and in a moment I would like the determination of the respondent on this. You may want to think about it a little while before you--I don't mean a top-of-your-head answer. You may want to think a little bit.

On a related issue that I'm not clear on--I understood Canfor's claim on the Byrd Amendment to be as follows: Here is a statute which injures investors, and let's say we assume that is correct, and here is a statute that by the very statement of United States has nothing to do with CVD and antidumping. And then you could say and we think the United States is right, it has
nothing to do with CVD and antidumping, and therefore, whatever way you interpret the reach of 1901(3), the Byrd Amendment stands because the United States itself claims it has nothing to do with CVD and antidumping, so there is no issue, and it's causing injury to an investor, jurisdiction established.

But, in fact, what we find now is that the United States, the respondents are saying no, no, it has nothing absolutely to do with CVD and antidumping. It's a formal amendment to the very statute, the 1930 statute, and sorry, we should have notified it, we didn't notify it, but that doesn't change its character as a CVD antidumping.

PRESIDENT GAILLARD: It seems that at this stage both parties agree on that.

ARBITRATOR WEILER: And Canfor in the statement of Mr. Landry is saying: We think it has relatedness, everything to do with--and when Mr. Harper invites him to say he might have said I misspoke, that was a misstatement, but you're profound. You say, no, no, that has everything to do with it. That's the clarification I'm seeking.

So, both parties seem to be agreeing, and the only point is that maybe the United States made a misstatement in good faith or in bad faith--it's not for us to determine--the way they characterized it before the WTO.
But that it seems as if both parties are agreeing that this is not--this measure is not as it was characterized by the United States before the WTO. That's the clarification I seek.

PRESIDENT GAILLARD: Can I state the position of the parties as I see it now, and you tell me if you agree or not. It seems to me that in terms of ambit of what is covered by Chapter 19, there is an agreement.

Now, the dispute, therefore, breaks down to the argument on what is the true construction of Article 1901(3). So, if you prevail on your construction, everything, including the Byrd Amendment, will be under Chapter 19 and Chapter 11 because the same matrix can be characterized as different, as having different consequences under different bodies of rules, and that's your whole argument.

And if you lose on your interpretation of 1901(3), then you lose also on the Byrd Amendment. That's how I see it in terms of how the questions are presented to us, but I certainly would like both parties to confirm or infirm this understanding and if you do infirm this understanding, tell us why. Maybe claimant first and then obviously we will hear defendant on this very same issue.

PROFESSOR HOWSE: Mr. President, members
of the Tribunal, we have a situation here where the use of words is obviously extremely important, and we welcome the chance to be as clear as possible.

Canfor is maintaining that the Byrd moment has had certain effects on Canfor. Those effects have occurred in the context of an antidumping and CVD proceeding.

We are also maintaining, however, that even though the effects have occurred through those proceedings, the Byrd Amendment is not an antidumping and countervailing duty law. Its rationale, in fact, in our submission, is contrary to the purposes of antidumping and countervailing duty law which are effective and fair disciplines and unfair trade practices which was the expression in 1902(2).

So, there is a sense in which the effects felt by Canfor have come through a process, an antidumping and countervailing process, but the law itself is not consistent with the meaning of a countervailing and antidumping duty law under--consistent with the purposes of NAFTA.

Isn't it fair to say that you say that it is an illegal antidumping and countervailing duty law?

Yes.

It is an antidumping
1 and countervailing duty law which is against
2 international law, against the GATT, against the
3 applicable rules of international law or possibly
4 even domestic law which, in your view, apply. Is
5 that a fair characterization?

PROFESSOR HOWSE: There is a normative
7 dimension in the meaning of antidumping and
8 countervailing duty law in Chapter 19 in that the
9 meaning of the expression is not meant to encompass
10 anything however intrinsically unrelated to the
11 true purposes of antidumping and countervailing
12 duty law that might be labeled as such. So that
13 determining that--

PRESIDENT GAILLARD: That's what make it
15 illegal, in your view; correct?

PROFESSOR HOWSE: Right, but in describing
17 it as illegal antidumping and countervailing duty
18 law, what we are saying is then it's not genuine.
19 It's mislabeled or it's not real as countervailing
20 and antidumping duty law.

PRESIDENT GAILLARD: It remains that in
22 practice the harm which you suffer--according to

you, I'm not judging anything on the merits or
2 prejudging anything on the merits, obviously--is it
3 the harshening, to use a layman's term, harshening
4 of the countervailing duty and antidumping laws; is
that correct? By the very--it may not have been
the goal--but by the very presence of the Byrd
Amendment. Almost a mechanical result.

PROFESSOR HOWSE: In our submission, it
would be not the harshening of the law, but the
hijacking or misappropriation of the regime.

PRESIDENT GAILLARD: Should we replace
"regime" by "law," and my proposal would be
correct?

PROFESSOR HOWSE: That the harm to Canfor
has come through the tools that this nonantidumping
and countervailing duty law offers to officials to
misuse the antidumping and countervailing duty
process.

PRESIDENT GAILLARD: Thank you very much.
That's perfectly clear.

Now, I think at this juncture, we should
provide an opportunity--unless you want to

I comment--I would like the respondent to be able to
comment on this.

MR. LANDRY: I didn't think we answered
Professor Weiler's question.

PRESIDENT GAILLARD: If you have an answer
to the question, please do.

MR. LANDRY: Professor Weiler, the
reference in the transcript, I would only ask you
to look through the context of the reference
because there was discussion somewhat of some of
the issues that we are talking about, but we are 
not here to resile from my comment. You know, 
this, unfortunately, is a situation similar to 
other issues that had been raised in this lawsuit. 
This is a labeling of convenience extraordinaire. 
And at one moment when they're before the WTO when 
it's in their favor to say it is not an and CVD 
law, they say it's not an antidumping and CVD law. 
Now they say it is an antidumping and CVD law 
because it helps them. It is part.

What I say, you cannot look at the Byrd 
Amendment in my submission and in good faith say

that it does not relate in some way to the 
antidumping and CVD regime that is in place in the 
United States. You can't. But for the purposes of 
our argument, we say that given the context of 
Article 1902 and 1901(3), it is not a law that can 
receive the protection that the United States has 
suggested it should receive in this case.

PRESIDENT GAILLARD: My question to the 
U.S. has to do with the precise situation of the 
Byrd Amendment with respect to the Chapter 19 
mechanisms. One, would a challenge of the Byrd 
Amendment pursuant to the Chapter 19 devices still 
be open to Canada or would it be time-barred for 
one reason or another? And two, could it be—would 
that be an option offered to Canada--I'm talking 
from a procedural standpoint, I'm not talking from
17 a merits standpoint. You may say yes, it falls
18 under the structures or the mechanisms which are
19 designed by Chapter 19 and, of course, on the
20 merits it would be perfectly fine, and we would
21 prevail. But I'm talking in terms of jurisdiction.
22 And you don't have to answer right now, but you may

1 want to think about it.
2          MS. MENAKER: I apologize to the Tribunal
3 because we do our best to answer all of the
4 questions put before us, but I hope that you will
5 understand that I cannot be placed in a position
6 where I am inviting litigation against the United
7 states, and so I cannot be here and say yes, Canada
8 could challenge the Byrd Amendment under Chapter
9 19, whether we would have the procedural defense or
10 not or whether that is time-barred. We are here
11 defending this case, and I have not looked into
12 that possibility, and I would not want to prejudice
13 any of the United States's rights in that regard,
14 and I fear that by answering that question in any
15 respect I might be placing us in that position.
16          PRESIDENT GAILLARD: That's perfectly
17 fair. On the other hand, we are here to understand
18 whether or not we, the Chapter 11 Tribunal, have
19 jurisdiction, and you say: No, no, no, because it
20 falls under Chapter 19. So I'm pressing the point
21 and saying what about Chapter 19, and you said you
22 don't want to answer. That's fine, but it leaves
us with a less powerful argument on your side than if you were to say the very reason 1901(3) offers a shield is because precisely there are procedures which may be used, and if they have not been used, so be it. I don't mean to be unfair to your litigation strategy, and that's fine. I understand it.

MS. MENAKER: I understand.

PRESIDENT GAILLARD: You understand my question is not to put you in a bad position with Canada or anything like that. It's just to understand the rationale and the limits, if any, of your argument.

MS. MENAKER: I do understand, and I would reemphasize that in our view, any challenge to all of the claims that Canfor is bringing are barred by Article 1901(3). And Article 1901(3), you will recall, says no provision of any chapter shall be construed as imposing obligations on a party with respect to its antidumping law or countervailing duty law, and we have argued at length that all of their claims fall within that bar.

Article 1901(3) does not state that no provision of this chapter shall be construed as
imposing obligations on a party with respect to matters that are subject to dispute resolution under this chapter. It could have said that. It doesn't.

Now, the fact is that we have been discussing Canfor's claims they all turn on the antidumping and countervailing duty determinations that have been issued, and we have said repeatedly that those are issues for a Chapter 19 panel, and that is to, I'm showing you how the Treaty works, but then again for some of its claims it is challenging the preliminary determinations. We have not said that those would be proper matters to be challenged under Chapter 19.

And, in fact, we have said that under Article 1904 a Chapter 19 Tribunal would not have jurisdiction to entertain a challenge to a preliminary determination.

So, our defense does not fall on whether the matter can be litigated by a Chapter 19 panel,
to that question does not affect at all our defense under Article 1901(3).

PRESIDENT GAILLARD: I understand that, but also you will remember that we discussed extensively the argument of potential duplication or not, and that may be relevant in that discussion, that's all.

ARBITRATOR WEILER: I want to add something because my failing memory, and I apologize for it, I recall a conversation between you and I where I suggested that the construction you were putting on it, especially since one of the definitions also referred to possible future amendments to antidumping law that your construction of 1901(3) would give a shield to a member, Canada, United States, Mexico, to pass antidumping legislation which would compromise other rights and duties covered by the NAFTA, and they would be shielded because you said you could not even dispute them under Chapter 20.

And your reply to me if I remember correctly, and I apologize in advance because I'm the first to suspect my memory, was no, there is a protection there because of the duty of notification and the possibility to review it under the duty of notification. And I didn't have the Byrd Amendment in mind. Now that this hasn't taken place, and when the Chairman asks you, but would it
still be open, you're saying I'm not going to
answer on this. I think it's germane to that
conversation we had. It's germane because just as
a minute ago we said to Canfor we might not buy
into your interpretation of 1901(3) as you would
like us, we have to tell the United States we might
not buy into your interpretation of 1901. We think
it's a provision that calls for interpretation, and

this issue is germane to how we will interpret it.

So, if you don't reply in one way or
another, the Tribunal just takes note of that.

PRESIDENT GAILLARD: Just to be clear, we
have no interpretation in mind at this stage as a
tribunal. We are just hypothesizing to get your
reactions. It goes without saying.

MS. MENAKER: Well, with those comments in
mind, at our next break, I will consult and see if
we can offer any more information to the Tribunal
in this regard.

PRESIDENT GAILLARD: Thank you,
Ms. Menaker. That will be useful, and of course it
goes for both parties.

Shall we carry on on a different type of
questions?

ARBITRATOR HARPER: I think not, Mr.
President, with respect. I have enjoyed the
colloquy, but actually I was pursuing a line of
inquiry, which I should like to pursue if I may.
PRESIDENT GAILLARD: Please do.

ARBITRATOR HARPER: Let me see, directing my inquiry to Canfor, whether I can, in my approach of the world of being two plus two equals four, understand where we are. Article 1902 recognizes that a party can apply its antidumping law and countervailing law, countervailing duty law, and it can change or modify such law. That's what it says on its face.

I think it's common ground between the parties that the United States did pass an amendment called the Byrd Amendment to its antidumping and countervailing duty law. Does Canfor agree with that?

MR. LANDRY: Well, technically, Mr. Harper, and again we are straying a little bit here, so I'm going from my memory. Technically, the Byrd Amendment was not passed as amendment to what has been defined as the antidumping and countervailing duty law statute. Technically, it wasn't. It was an add-on to a--I'm using my terminology, it may be totally inappropriate in the United States context. My understanding was like an omnibus bill where an amendment was the so-called Byrd Amendment--that's what everybody
ARBITRATOR HARPER: May I inquire of the United States what its position is on that?

MS. MENAKER: That may have been the vehicle through which the amendment was brought to the floor of the Congress. However, the actual legislation is an amendment to Title VII of the Tariff Act of 1930.

ARBITRATOR HARPER: That's what I understand. I would appreciate Canfor's looking into the matter to satisfy itself because I do think this is one of those issues where it either is or is not the case that in the statute books of the United States this is or is not an amendment to antidumping or countervailing duty law. So, I would appreciate Canfor's consulting on that matter and advising the Tribunal as to whether or not it agrees with what the United States has just said.

PROFESSOR HOWSE: We may, after discussions among ourselves, say something more about this, Mr. Harper, but with respect, we view the question as a bit more complex because, again, our view is all words have to be taken in context. So, here we have the expression change or modify antidumping law or countervailing duty law, and the possibility that some such changes or modifications maybe are legal, of course, under NAFTA and some might be illegal, if they don't meet the
So, on the one hand, if we read words in context, we might say that it's possible that for purposes of applying 1902(2) and testing whether a given legislative action could result in a new amended legitimate antidumping or countervailing duty law, that we will characterize what is purporting to be done as a change or modification to antidumping or countervailing duty law while on the other hand let's say it's illegal for--an illegal change might well be characterized for purposes of 1901(3), an exceptions provision, as not antidumping or countervailing duty law because there may be a normative dimension to the meaning of that expression in the context of 1901(3), whereas in 1902(2) where you're trying to test these changes or modifications to determine whether they're genuine and legitimate as permissible antidumping or countervailing duty law, you would use those words slightly differently. And as I say that's without prejudice to some additional comments we may have, but just to suggest how we would begin, how we would analyze the issue, that context is so important here in those words, and those words may mean something slightly different when they are the object of verbs change or modify than when they appear in a provision that purports to give some kind of safe
hbor to something called antidumping or countervailing duty law.

   ARBITRATOR HARPER: Let me understand something about Canfor's litigation posture in this matter. On the one hand we have a statement in the Statement of Claim. I refer now to paragraph 144 sub five which reads, "More particularly, the Byrd Amendment falls below the standard required of the United States under NAFTA Articles 1102, 1103, and 1105 in that it ensures that any antidumping or countervailing duties imposed to remedy any proven dumping or to neutralize the impact of countervailable subsidies is overremedied in that the redistribution of such duties distorts the United States marketplace in favor of the domestic United States industry at the expense of Canfor and its investments and those in its position." That's one part of Canfor's allegation in this matter.

   Another part, if I understand it correctly, is to say that the Byrd Amendment is something other than related to antidumping and countervailing duty law.

   Under the first proposition, I take it Canfor has to deal with the language of 1901 and 1902 which states in substance that a statute has a safe harbor in respect of being litigated anywhere other than under 19, if it's antidumping or countervailing duty.
So then that leads to an exegesis on what is a statute, what is a law, what is a normative value, what is a measure. On the other hand, if the Byrd Amendment has nothing to do with countervailing duties or antidumping law, then its relationship to this case is nonexistent in terms of what is in the Statement of Claim. There is no connection. Everything that's in the Statement of Claim related to the Byrd Amendment relates to antidumping and countervailing duty.

So, I'm left perplexed, and perhaps the best way to frame a precise question to Canfor is to say, please tell the Tribunal whether you are stating that the Byrd Amendment is or is not a part of the antidumping and countervailing duty law regime of the United States.

MR. LANDRY: Could we have one moment?

(Pause.)

PROFESSOR HOWSE: With respect, we believe that we, perhaps as clearly as we can, already tried to solve this puzzle, and I just referred to what I had said earlier, that the Byrd Amendment in our submission and--and this is consistent--is not part of or is not countervailing and antidumping duty law within the meaning of 1901(3).
Nevertheless, and in the conversation that I had with the President of the Tribunal, I thought that we had to some extent clarified this, but I'm happy to go at it again, of course, because we want the Tribunal to be as clear as possible in its own mind.

Rather, we have a situation here where harm has been done to Canfor because the Byrd Amendment statute, which is not an antidumping or countervailing duty law has nevertheless given officials certain tools by which to abuse or improperly conduct themselves in the context of antidumping and CVD proceedings, and that's harmed Canfor.

So that's our view. So, if you ask us is there a relationship between those proceedings and the law, yes, but the relationship, unfortunately, is one of abuse or misuse in that the countervailing duty laws and antidumping laws and their administration are therefore purposes that are alien to, and indeed are undermined by the Byrd Amendment, which is some different kind of law.

Maybe I can give a hypothetical--is this still unclear, Mr. Harper? Do you we still need to clarify further?

ARBITRATOR HARPER: I would rather not say how clear it is to me.
PROFESSOR HOWSE: Maybe with the indulgence of the Tribunal, I could give a hypothetical outside of the context of this case that might make it clear. Would that be valuable, or maybe not?

PRESIDENT GAILLARD: Why don't you give this hypothetical and then we will have a short recess after that. That may be a good time to have a break.

PROFESSOR HOWSE: I just want to consult with my colleagues for a second as to whether we really feel this is needed.

(Pause.)

PROFESSOR HOWSE: After consultation, we really think that even if we were to give this hypothetical, we would be reduced to trying to explain in effect the same distinction that we articulated, and we think we have articulated it as persuasively as we can, if we look at the various statements about the distinction between what might be a law of a certain kind and what might affect the way in which officials improperly conducted themselves in administering a law of some kind.

PRESIDENT GAILLARD: Which you articulated well. You are referring to the briefs or to our earlier discussion on the distinction between law and its effects, its de facto consequences?

PROFESSOR HOWSE: Both, Mr. President, but
I was thinking because it was most immediately in my mind to my responses to some of your questions earlier this morning.

PRESIDENT GAILLARD: I thought you would refer to it. Thank you. I understand what you're talking about. Thank you.

Well, we will have 15-minutes recess.

Thank you.

(Brief recess.)

PRESIDENT GAILLARD: We go back to the record, thank you.

At this stage, we have a question which is addressed to respondent, and we would like to have a formal determination in writing to that question, and you will tell us how long you need to answer that question, if it takes time or not. We can discuss that as a separate issue.

In answering one of the questions, Ms. Menaker said: "And finally, I would just note that even if the notification provision did apply and it has a specific notification requirement, it does not have a requirement of actual notice. So the United States could very well be in technical violation of this Article, and for that, if that is the case, then we do apologize." It refers to the Byrd Amendment and the Article in question is 1902(2).

The question on which we would like to
have the determination of respondent in writing is twofold. One, in terms of timing or time frame or time bar or in terms of time, could respondent still notify the Byrd Amendment pursuant to Article 1902(2)? That's the first question. And the second question is: In the affirmative, does it intend to do so at any time?

Is the question clear?

MS. MENAKER: It is clear, Mr. President, and may I just ask, is there--if we were able to answer this question orally today, would that meet your needs?

PRESIDENT GAILLARD: If you were able--I was simply asking you my second question, the timing question so that we would like--we don't want to take you by surprise, or we understand the concern that the U.S. administration may want to coordinate its position talking to various people. It may have been done, but it may not. So, I would like, if you need to talk to various authorities, it's fine with us. In that case, we will give you the time you need. We were thinking of a few weeks. If you need a few weeks, it's not a problem of time.

But if you can--maybe we could revisit that after you answer orally today, if it's very clear in the record, it's all right; if there are
areas of uncertainty, we may want the determination in writing.

We are not saying it's relevant or it's not relevant. It's part of the argument as you yourself recognize, and I quote the citation, it's part of the argument on the consistency and the self-contained character of Chapter 19. And again, we don't prejudge anything as to the relevance. We want to know what the situation is.

So, maybe you can answer that now, and we will see at end of this hearing if we need a further written determination.

Ms. Menaker.

MS. MENAKER: Mr. President, members of the Tribunal, the answer that I can give you now, and you can tell me if this is sufficient for your purposes is that it is our view that there is no time bar or time frame in which the notification needs to take place. The language itself says as far as in advance as possible to the date of enactment, of course, but that does not preclude a party from later notifying.

As far as our present intent, the United States is now actively seeking the repeal of the Byrd Act in order to comply with the WTO's decision, so that is being done right now, so that
is the action that we have been taking. We will see if that answers your question of whether or not we need to simultaneously while seeking the repeal of the act to actually go through the motion of formally notifying the NAFTA parties that this was enacted.

PRESIDENT GAILLARD: What's wrong with the--how long would the repeal take? What form does it take procedurally?

MS. MENAKER: It requires legislative action.

PRESIDENT GAILLARD: And if the answer is in the negative, would it take the form of some kind of legislative act, saying, "we maintain," or it will just be nothing and the situation would remain as is?

MS. MENAKER: That's my understanding, that the Congress will either repeal the law or--
nothing because they don't want to change it, period?

MR. CLODFELTER: It depends at what stage how far the legislation progresses. If it doesn't come out of committee and never makes it to the floor of either house, for example, then that's one thing, and there would be a record of nonaction, I guess, of the committee. It makes it to the floor of one of the two the houses and it's not approved, then there would be a record of that vote. But beyond that, I mean, it would just be the history of how the proposal is treated in Congress, basically.

PRESIDENT GAILLARD: Thank you, Mr. Clodfelter.

Go ahead.

MS. MENAKER: I apologize. I did have answers to the other questions that the Tribunal posed before we took our break.

PRESIDENT GAILLARD: Why don't you do that, and on this issue regarding the Byrd Amendment, we will tell you at the end of the proceedings today if we need further elaboration on this or not.

MS. MENAKER: Thank you.

So, I had three points that I wished to make in response to your questions. The first is I would just preface my response by stating that in
the United States's view, Canfor's claim is still unclear to us. We have heard, I thought, twice in response to Professor Weiler's questions today that Canfor was relying on the Byrd Amendment as context for its claims, and yet at other times we have heard that they are still relying on the paragraphs, including paragraph 144 and 141 in their Statement of Claim, whereby they are challenging the Byrd Amendment as a measure in and of itself.

If, in fact, they are not doing that, and in accordance with their answers to Professor Weiler's questions if they are not challenging the Byrd Amendment as a measure itself, then I think my subsequent answers are irrelevant to the questions that the Tribunal asked regarding whether or not the Byrd Amendment could be challenged under Chapter 19, et cetera.

To the extent it's context, I believe I gave our answer orally and in our written submissions, that if what they are challenging is just the effect that it had on the initiation, the decision to initiate the antidumping and countervailing duty investigations, that again goes to the very heart of the administration and application of the U.S. AD/CVD laws and would be barred by Article 1901(3).

Now, let me presume, since the record I
believe on this is still a bit unclear, that Canfor is retaining its claim that the Byrd Amendment itself is a measure that violates the NAFTA. The two questions that I think you had asked was, one, what was the rationale for the Byrd Amendment's adoption and on that count there is, as far as we are aware, no legislative history for the Byrd Amendment. I don't believe the amendment went through the ordinary process of being marked up by the various committees in the House and the Senate.

So, the only indication that we have as far as Congress's intent is concerned are the findings of Congress that are in the statute itself. At the very end of the statute there is a section that says findings of Congress respecting continued dumping and subsidy offset, and I would like to just read to you three sentences from those findings. They are relatively short.

One, it says, Congress makes the following findings, quote, Injurious dumping is to be condemned, and actionable subsidies which caused injury to domestic industries must be effectively neutralized, end quote.

Then it continues, quote, The continued
dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels.

And finally, quote, United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved, end quote.

So, I did not quote the findings in their entirety, but those, I think, are the relevant portions that give an indication as to congressional intent.

PRESIDENT GAILLARD: Remind me. Is that in the record, and if yes, what is the exhibit number?

MS. MENAKER: I do not know, but we will find out if it is in the record. I don't believe that the United States submitted it, but if Canfor is challenging the Byrd Amendment as a measure, I would think that it would have submitted it.

PRESIDENT GAILLARD: Please let us know because I don't recall, but I may be wrong.

MS. MENAKER: Okay.

And finally, in response to the Tribunal's question whether Canada could have challenged the Byrd Amendment pursuant to Article 1903, I did have a chance to consult, and it is our view that yes,
9 indeed, they could have. They did not do that.
10 They did institute, initiate Chapter 19 proceedings
11 challenging the determinations, but they could have
12 challenged the amendment to the law pursuant to
13 Article 1903. With that said, again, I would like
14 to reiterate that the United States is currently
15 actively seeking the repeal of that law in order to
16 bring ourselves into compliance with the WTO's
17 decision.
18          PRESIDENT GAILLARD: Leaving that aside,
19 that last comment aside, is it your view that
20 Canada would be time-barred to do it at this stage?
21 Or would you give the same answer as for your
22 notification?

1          MS. MENAKER: We don't believe that there
2 is any such time bar to bringing the claim under
3 Article 1903.
4          PRESIDENT GAILLARD: The second question:
5 What is your contention as to the possibility by a
6 NAFTA Party, capital P, to challenge the statute
7 which falls under Chapter 19, using 1903, I
8 believe, 1903 when such statute has not been
9 notified pursuant to 1902(2)? Do you understand
10 the question? Can a State sua sponte, can a Party
11 to NAFTA sua sponte say: This falls under this, it
12 has not been notified, but I still want to
13 challenge it pursuant to that mechanism?
14          MS. MENAKER: I believe, of course, that
yes, of course, a state party would of course have that ability. Again, if the purpose of Article 1903 here is to provide a state party the opportunity to challenge an amendment made to another party's antidumping and countervailing duty law, I mean, all 1902 is there to do is for a matter of transparency, to provide notice to the other parties when you are engaging in such actions so they can determine for themselves whether they think that action is consistent with the NAFTA obligations. In my view, it would make no sense to say that a party would lose its opportunity to challenge the amendment because it chose not to notify the other parties that it was making that amendment.

MS. MENAKER: That's your legal determination?

MS. MENAKER: Yes.

PRESIDENT GAILLARD: It's not a precondition?

MS. MENAKER: That's correct.

PRESIDENT GAILLARD: So, it's conceivable--tell me whether I'm wrong--that if the authorities in the U.S. who are trying to repeal the Byrd Amendment to comply with WTO decisions are not successful, it is not out of the question that Canada could at this stage use the 1903 mechanisms.

MS. MENAKER: Yes.
1 question was intended to be answered no, it's not out of the question?

MS. MENAKER: I apologize, that's correct.

PRESIDENT GAILLARD: The "yes" means yes, it could?

MS. MENAKER: That is correct.

PRESIDENT GAILLARD: Thank you.

At this stage, turning to claimant's side: do you have any comment? These questions, as you understand, are really directed to the U.S., I mean, to the respondent, but do you want to make any comment on any of these answers, the relevance or whatever?

MR. LANDRY: Could we have one moment, please?

PRESIDENT GAILLARD: Sure. Being understood that we understand your legal arguments as expressed so far.

(Pause.)

PRESIDENT GAILLARD: Mr. Howse?

PROFESSOR HOWSE: Thank you. We have a few observations. First of all, there was one aspect of Ms. Menaker's remarks that we didn't
2 quite understand. In her final reply to your
3 question, Mr. President, she said that it was
4 possible for Canada, the party Canada, to
5 bring--still bring a review action under 1903 in
6 respect of the Byrd Amendment. Slightly earlier in
7 her remarks she had a formulation that was I think
8 along the following lines that Canada could have
9 done that, but Canada chose instead to challenge
10 the determinations in the Chapter 19 binational
11 panel process.
12          And we--so, in light of her final answer,
13 we understand that what she was not saying by that
14 was that by going the route of the binational panel
15 process, Canada had somehow lost its right to
16 challenge the Byrd Amendment as such because when
17 she was saying those words, that was how we
18 actually heard them, that at one point in time
19 Canada could have gone the 1903 route and
20 challenged the Byrd Amendment, but instead
21 challenged the determinations. And we just want to
22 make sure--well, this is really for the Tribunal.

1  we would just like to the bring to the Tribunal's
2 attention the importance on this point of making
3 sure that she didn't mean by that somehow that
4 although otherwise Canada could still go through
5 1903, that somehow Canada had made a choice of a
6 different forum in which to air its concerns about
7 the Byrd Amendment that would somehow preclude it
1209 Day 3 Final

8 for that reason now from going to 1903.
9 PRESIDENT GAILLARD: But it's hard for
10 respondent to speak for Canada. I mean, isn't it?
11 My questions were answered in that they were
12 pertaining to understanding the legal framework
13 rather than the actual determinations of each NAFTA
14 Party or each individual party with respect to all
15 this. So, my questions were asked in a
16 hypothetical form, and I think that was answered in
17 the same form.
18 Now, what about Canada as a NAFTA Party,
19 capital P, intends to do is a different issue. So,
20 that your point is well-taken, in other words.
21 Thank you.
22 PROFESSOR HOWSE: The second observation

1 is--and this is simply obvious, I will just
2 stop--which is concerning what 1903 says about the
3 kind of action that Canada could bring and its
4 consequences, and we would just underline that 1903
5 allows Canada to bring a declaratory--to ask for a
6 declaratory opinion, and 1903(1) limits the force
7 or effect of that declaratory opinion.
8 And when we look at what the force and
9 effect is limited to, at the end of the day there
10 is a possibility of corrective legislation, and if
11 that does not happen, the possibility that Canada
12 could be entitled as a kind of countermeasure to
13 enact its own equivalent of the Byrd Amendment in
14 this example.
15 And what is important about that, in our
16 submission, is that Canada cannot espouse through
17 1903 any kind of a claim for reparations on
18 Canfor's behalf. So, we just want to make that
19 submission in relation to the point about
20 duplication versus, you know, different remedies
21 and different regimes; that even if Canada went
22 through the 1903 process, the language shall have

1 force or effect only as provided in this Article
2 seems to really make very clear that Canada could
3 not use this action to in effect to espouse a claim
4 on behalf of an investor that had been injured.
5 PRESIDENT GAILLARD: Thank you, Professor
6 Howse. As I said, we have well in mind all of your
7 argument, and the questions were not intended to
8 prejudice any of those arguments.
9 Now, Mr. Harper still has a number of
10 questions, so I think we should hear them now. I
11 don't want to restrain you, but, you know, the time
12 frame depends on the length of the answers. So, if
13 you can be to the point, we don't need to restrain
14 any. You have to answer all the questions, but if
15 you can be to the point, it would help. Thank you.
16 ARBITRATOR HARPER: Thank you,
17 Mr. President.
18 Let me explore an issue that I think would
19 be helpful for the Tribunal to understand in
Let me begin by observing that under 1902(1) the United States, of course, reserves the right administratively to enforce its antidumping and countervailing duty laws. It does not grant—do you agree, members of the Canfor team?—it does not grant anywhere in Chapter 19 the authority for review of preliminary determinations. Do you agree with that?

MR. LANDRY: Mr. Harper, it is correct that you cannot review a preliminary determination under Chapter 19.

ARBITRATOR HARPER: But I take it, nonetheless, Mr. Landry, that under Canfor's approach in this case Canfor takes the position that under Chapter 11 there can be review of administrative actions, including preliminary determinations in respect of antidumping and countervailing duty laws.

MR. LANDRY: One moment, please.

(Pause.)

PROFESSOR HOWSE: Mr. Harper, thanks for this opportunity to provide further clarification.
It's our submission that Chapter 11 is not about review, quote-unquote, of determinations. It really creates the standard of treatment for all conduct attributable to a state under the appropriate rules of state responsibility unless that conduct is somehow carved out in Chapter 11 or elsewhere of the NAFTA. So, the real question before the Tribunal, in our submission, is whether 1901(3) provides some kind of carve-out, and what kind of carve-out it is.

The nature of state responsibility under Chapter 11 really just follows in general the general rules of state responsibility. So, if it's attributable to a state, and it's caused harm and it violates the standard, and there is nothing that says otherwise, some exception or limitation provision, yes, then a claim could be brought with respect to those state acts.

ARBITRATOR HARPER: The state acts in question being, Professor Howse, the preliminary determinations that are flagged in the statement of claim?

Yes, it could include that, or it could even include conduct before a preliminary determination. The investor would have to prove that it's attributable to a state under the ILC Articles. It would have to--the investor
would have to show that the conduct fell below the standard of treatment in Chapter 11, and it would have to show the investor was harmed, even though the conduct occurred before the determinations. If the investor can show all those things, we don't think that there is any bar under the state responsibility that's applicable to Chapter 11 to making the claim. We believe that everything is satisfied.

And I say, if there is no other bar, which brings us back to the issue of what 1901(3) means.

ARBITRATOR HARPER: I'm talking about Chapter 11 right now, and I'm asking you specifically where you find text in that provision in that part of the NAFTA that authorizes an inquiry, an arbitration with respect to preliminary determinations taken in antidumping and

countervailing law context.

(Pause.)

PROFESSOR HOWSE: Are you referring, Mr. Harper, to the general provision in Chapter 11 that states what measures of a party are subjected to the investor-state dispute settlement?

ARBITRATOR HARPER: I'm asking you to identify for me the text in which you anchor the proposition that an Arbitration Tribunal formed under Chapter 11 has authority to consider preliminary determinations of a antidumping and
PROFESSOR HOWSE: Well, I could refer you, first of all, to 1101. 1101 says this chapter applies to measures adopted or maintained by a party relating to investors of another party, investments of investors of another party, and so forth. And it's our submission that the word measures, both by virtue of its definition in the NAFTA itself, which I believe my colleagues have already referred to in our discussions here, as well as just the ordinary meaning of measures in international law, taken with the rules of state responsibility mean that a measure is any act attributable, properly attributable to a state that is not somehow carved out by lex specialis in the Treaty or provision in the treaty that carves it out.

ARBITRATOR HARPER: So, if one labels the preliminary determinations measures and takes the view that 1901(3) does not in haec verba deal with measures, Canfor's position is that preliminary determinations are reached under 1101; is that correct?

PROFESSOR HOWSE: Our position is that clearly 1901(3) speaks to subset of measures. Clearly law is a measure within the meaning of NAFTA, but measure includes also things that are not laws, but conduct attributable to a state,
18 according to normal rules of state responsibility.

ARBITRATOR HARPER: Was that an answer, yes or no?

PROFESSOR HOWSE: I don't think that I can myself give an answer that would be more transparent on this question. I sense, Mr. Harper, that—is there an attribution issue here? I mean, I would just need a bit more guidance as to the issue under state responsibility that's giving us trouble here.

ARBITRATOR HARPER: Perhaps the best way to approach this issue is to say that, if I understand Canfor's position correctly, Canfor believes that any action not specifically denominated in 1901(3), as excluded from review elsewhere under the NAFTA, is appropriate for review determination by an arbitration panel under Chapter 11, if an investor can claim there is harm by a state.

PROFESSOR HOWSE: I think that we have stated it as best we can our understanding of state responsibility in Chapter 11. It goes without saying that in determining whether there is a violation of the substantive standards in Chapter 11, the nature of the particular act attributable to the state will be very important to consider.
And so, a preliminary determination might raise issues under the standard in Chapter 11 and related rules of customary international law that would be different than if the measure is a final determination or judgment of a final court. I mean, those would be issues. So, we don't mean to suggest that in determining whether Chapter 11 has been violated on the merits, the Tribunal would simply have to be indifferent to the nature of a preliminary determination as a preliminary determination and not something else. We are just making a statement about the overall ambit of state responsibility, what's attributable to a state, and therefore what's actionable rather than a statement about how the Tribunal might want to view on the merits a preliminary determination in determining whether it's a wrongful act under international law within the meaning of Chapter 11 as opposed to some other kind of provision with a different degree of, I don't know, that works in a different way that might be--look more less final or whatever.

MR. MITCHELL: Mr. Harper, if I could only briefly add to Professor Howse's remarks, as your questions have been going to the question of where
within Chapter 11 is this matter rooted, and, of course, the position of Canfor is as that matter has not been briefed, it is not before this Tribunal.

And just in that regard, the Tribunal directed the United States to a file a defense on jurisdiction, and it raised the, as objection to jurisdiction number one, the issue concerning Article 1901(3) to which the parties' respective submissions have been directed.

It raised a second what it referred to as a conditional objection to jurisdiction; namely, that the complaints of Canfor were not grounded within a Chapter 11. And at paragraph nine of its Statement of Defense, it stated specifically that the United States does not propose that the Tribunal take up this question as a preliminary matter, and so the issue of to what extent and

where within Chapter 11 are the measures grounded is, in our respectful view, not a question before the Tribunal on this application.

ARBITRATOR HARPER: I thank you for that, Mr. Mitchell. I think it's fair to say that it misapprehends my line of inquiry. I have been concerned to understand how 1903 is to be understood in Canfor's litigation position, and I had understood and I think I still understand correctly, that Canfor takes the view that 1903 is
11 to be understood as a normative provision. That is
to say, normative acts can be captured by the
exclusion, but not, if you will, actual acts.

And I take it, if I understand Professor
Howse correctly, actual acts are captured in his
view by whatever the state may do that violates
rights of Canfor, and those actual acts can be
subsumed in 1101. Have I got it incorrectly?

PROFESSOR HOWSE: Well, all of the acts to
which you're referring would normally be acts
attributable to a state and measures within the
meaning of 1101.

The question that Canfor is addressing
here is what bearing 1901(3) might have on that.
And you're quite correct, Mr. Harper. In our
submission, the phrase "antidumping and
countervailing duty law" in 1901(3) refers to the
normative material or general rules, et cetera, et
cetera, of precedential weight, whether
administrative practice or otherwise to be applied
in future cases, and it does not apply to acts like
determinations in their color as decisions,
discrete decisions affecting the investor as
opposed to decisions that may affect the resolution
of matters through their precedential influence on
future decision making.

ARBITRATOR HARPER: And you reached that
view, of course, by adumbrating as well 1902(1) as
17 being confined to normative acts; am I correct?
18          PROFESSOR HOWSE:  Not normative acts, but
19 material that may have normative weight in the
20 sense that material that may be used in the future
21 in general and applied in future cases to the
22 resolution of those cases.

1          ARBITRATOR HARPER:  And having said that,
2 you are able, I take it, to have the view that
3 Chapter 11, and in particular 1101, is not captured
4 by the exclusion of 1901(3) when what's at issue
5 under 1101, as you have indicated, are acts that
6 are not normative in nature?
7          PROFESSOR HOWSE:  Yes, that is our
8 submission on the extent to which 1901(3) at the
9 extreme limit could modify 1101 as I understand it.
10 But I say at the extreme limit because we have
11 raised other interpretive issues and questions that
12 to our minds put in doubt whether 1901(3) is of
13 such a character at least to limit as a
14 jurisdictional bar the operation of Chapter 11,
15 even though it may affect the interpretation of
16 provisions in 11.
17          ARBITRATOR HARPER:  Now, having come to
18 that view, when the Tribunal is convened under
19 Chapter 11, do you understand that we have
20 authority to opine on normative acts as such?
21          PROFESSOR HOWSE:  I think that it would
22 depend on the meaning of the word opine. My
view—I mean, Canfor's view of this case is that
the answer is that a tribunal has to answer the
questions and issues put before it by the parties,
and in doing so, it may have to en passant, as it
were, make a variety of kinds of determinations
about normative matters.
Of course, in doing so, the Tribunal
would, I would assume, be very sensitive to the
fact that it is only making—would be making those
determinations solely for purposes of discharging
its mandate and solely within the confines of the
kind of relief and remedy available in an
investor-state setting.
ARBITRATOR HARPER: So, Canfor is of the
view that in this proceeding the meaning of 1901(3)
for this Tribunal is that it has nothing to do with
the allegations set forth in the Statement of Claim
because those allegations relate to acts only and
not normative provisions?
(Pause.)
PROFESSOR HOWSE: I don't believe that we
have anything in addition to say beyond what we
have already submitted on that—on that question.
So, Mr. Harper, if there was something specific
that were troubling you about the answer, we would be delighted if you could possibly just enlighten us about that specific dimension so that we could focus on that. But as a general matter, when we take your general question, we don't seem to think that we could say more to make the general position more clear.

ARBITRATOR HARPER: Let me just put it one more way and then we can move on to another subject. Tell me whether I'm right, Professor Howse. In Canfor's view, 1901(3) makes an exclusion from the reach of any other provision of NAFTA for any normative acts. That's not your position?

PROFESSOR HOWSE: For any normative acts?

ARBITRATOR HARPER: Normative acts relating to antidumping and countervailing duty laws.

PROFESSOR HOWSE: No, we do not use the terminology "normative acts." We use the terminology "material" as defined—we go back to the text of the NAFTA, and we find the definition of antidumping and countervailing duty law in 1902, and we say that 1902 provides part of the context for 1901. So that to understand the ambit of law when it's referred to in 1901(3), we have to look at the definition of in 1902 of antidumping and countervailing duty law.
And it's our submission when we look at all of the elements listed, and maybe it's not an exclusive list, but what's common to all of these elements is they are things that are normative material that is used in the decision of future cases, in the nature of general material that a decision maker will apply in a future case. So, legislative history would be an example of that. Legislative history is not a normative act but it's material that may be drawn on by tribunals and courts in applying the law in general to future situations.

Similarly, as was extensively discussed, it's significant that the use of the term judicial precedents is there, not judicial decisions. Why is it precedents? Because here we are looking at judicial acts from the perspective of their normative character as decision rules in future cases.

ARBITRATOR HARPER: So, when I look at 1901(3) and I see a declaration that says no provision of any other chapter of this agreement shall be construed as imposing obligations, et cetera, am I to understand that Canfor's position is that that direction shall not or shall be construed--shall not be construed, in effect--is a direction to the panel for future acts, we're not to do something in the future; right? We are not
to make a normative judgment in the future about antidumping and countervailing duty laws?

PROFESSOR HOWSE: I would go back to our Statement of Claim and our reliance on chapter--the rights and obligations in Chapter 11. The relief that we are claiming in seeking would not, in our submission, require or even imply the necessity for the United States to change the rules with the partial exception, and we have been through the Byrd Amendment, so let's put that because we spent a lot of time about understanding the nature of our claim and the Byrd Amendment, but generally speaking we don't think that if this Tribunal adjudicates this matter it would need in providing--in order to get to the point where it provides relief to Canfor to make any kind of--to do anything that would result in essentially placing an obligation on the United States to change the normative material that's used because our concern is the way that the material has been used by officials in this particular matter--and again, we are not challenging the whole system--we are dealing with a pattern of conduct where the way that officials have used or abused, in our submission, this material, not the material itself that ought to be applied and is applied normally by U.S. officials in normal antidumping and countervailing duty matters that don't have the
1209 Day 3 Final
21 very abnormal complexion of this case as we pleaded
22 it.

729

1 ARBITRATOR HARPER: Tell me whether I'm
2 right in trying to understand the Canfor position.
3 Canfor has said, I believe, that even where an
4 antidumping and countervailing law determination
5 passes muster under a municipal regime, such law
6 could still be overturned in a Chapter 11
7 proceeding for violating international standards?
8 PROFESSOR HOWSE: First of all,
9 Mr. Harper, thank you for the occasion to be able
10 to again refer you to our submission, that we don't
11 believe that under a Chapter 11 provision any law
12 can be overturned. It's our submission that all
13 that can be done by a Chapter 11 panel is to find
14 that there is a violation of the standards of
15 Chapter 11 and to make an award of damages or
16 relief of that monetary relief as it sees fit. We
17 don't believe that a Chapter 11 process can be used
18 to overturn laws.
19 ARBITRATOR HARPER: And similarly, Canfor
20 does not believe that a Chapter 11 process can be
21 used to overturn antidumping and countervailing
22 duty law determinations?

730

1 PROFESSOR HOWSE: No. And the simple fact
of the matter is that the investor cannot go to Chapter 11 to get the determinations overturned, and that goes to our point about on duplication that there are different remedies here, that this remedy is different. It's monetary relief for the harm suffered, not for prospective relief in removing or ceasing the improper conduct in the future.

ARBITRATOR HARPER: So, Canfor is not looking to overturn any preliminary determinations whatever; is that correct?

PROFESSOR HOWSE: We stated the nature of the relief that we are seeking in the Statement of Claim, and we would assure the Tribunal that we are not going to a Chapter 11 panel to try to get what a Chapter 11 panel cannot be properly expected to give, which is specific prospective relief of that nature.

ARBITRATOR HARPER: When Canfor looks for damages in this proceeding, is it looking for those damages on the grounds that international norms are violated in connection with the preliminary determinations?

PROFESSOR HOWSE: Our submission is that international norms, as stated in the relevant provisions of Chapter 11 have been violated by all the acts complained of in the Statement of Claim as well as the interaction and collective and overall

Page 78
ARBITRATOR HARPER: So, the answer is yes?

PROFESSOR HOWSE: I'm not sure why the answer I just gave would not be comprehensible. Maybe can you refine that for me a bit, Mr. Harper.

ARBITRATOR HARPER: I was asking for what I will consider a part, if you will, of Canfor's position.

Is it Canfor's position that it is requiring in this proceeding that--or seeking to require in this proceeding that the United States pay damages in respect of preliminary determinations?

PROFESSOR HOWSE: I'm sorry that I'm not quite sure that I understand because preliminary determinations form one kind of act--yeah, I guess yes, because in a way what we are saying is preliminary determinations are attributable and engage state responsibility under Chapter 11.

So, they could result in an award of damages either taken in themselves as violations of the standards in chapter 11 or collectively as part of the bigger picture of the conduct, the overall conduct of the United States in this matter.

ARBITRATOR HARPER: Let me put it to you differently. What Canfor is looking here is for this panel to construe Chapter 11 with its international law norms as imposing an obligation.
upon the United States to pay damages for the administration of its antidumping and countervailing duty laws?

MR. LANDRY: No.

ARBITRATOR HARPER: No? Is that the answer?

MR. LANDRY: Yes.

One moment, sir.

(Pause.)

PROFESSOR HOWSE: In our submission, the obligation to pay damages arises from the conduct complained of in the Statement of Claim, and, of course, general state responsibility.

ARBITRATOR HARPER: And that rose sua sponte in the ether, or did it arise, in Canfor's view, because it would obtain an order of this Tribunal directing the United States to pay damages? I don't understand the answer you just made.

PROFESSOR HOWSE: Well, as I think was raised in the discussion between Ms. Menaker and Professor Weiler yesterday or the day before, I think that she at one point noted that even assuming the U.S. interpretation of 1901(3), it wouldn't relieve the United States of the obligation under customary international law to pay reparations for acts that Canfor is complaining of that might violate customary international law.
I mean, the obligation to pay reparations or compensation for harm of that nature comes from the international law of state responsibility.

ARBITRATOR HARPER: Are you saying that if this Tribunal orders the United States to pay damages to Canfor, that order would not be the imposition of an obligation upon the United States to pay damages?

PROFESSOR HOWSE: Well, it's an obligation to pay damages, but where you're going is then, isn't it an obligation to pay--isn't that an obligation in respect of countervailing and antidumping duty law?

ARBITRATOR HARPER: I'm heading there.

PROFESSOR HOWSE: Yeah. We think that the words in respect of antidumping and countervailing duty law in context do not cover that kind of--that kind of obligation. The obligation stems from wrongful conduct and state responsibility for wrongful conduct in international law as embodied in Chapter 11, and it doesn't stem from, or it isn't in respect to the countervailing and antidumping duty law. It's an obligation to pay money.

ARBITRATOR HARPER: Should we then strip
out of the Statement of Claim any reference to the preliminary determinations?

PROFESSOR HOWSE: No, because the preliminary determinations are one in a series of wrongful acts, individually and collectively, that through the lenses of Chapter 11 must be viewed, in our submission, as violating the international law standards in that chapter.

So, we don't need to strip anything out. It's just that any obligation to pay damages that arises from this proceeding is, in our submission, not an obligation in relation to antidumping and countervailing duty law. It's an obligation that arises out of state responsibility under Chapter 11 and does not imply any duty on the United States to change or alter in any way the normative material on the basis of which it decides future cases, and therefore it's not an obligation within the meaning and context of 1901(3).

ARBITRATOR HARPER: The preliminary determinations flow from the enforcement of U.S. antidumping and countervailing duty law; is that correct?

PROFESSOR HOWSE: Yes, but the wrongfulness of them flows from Chapter 11 and the state responsibility to provide reparations for the wrongfulness flows from Chapter 11.
PRESIDENT GAILLARD: I hate to interrupt this fascinating discussion, but we will have to have a recess, a five minutes recess shortly, if that's a good time.

We want to hear the answer because I'm concerned--we need a pause at some point, and I think now is it a good time. Maybe after the answer?

We understand your argument as far as it says that actions to criticize are taken individually or collectively. I'm not saying it's right or wrong, but we understand this aspect of the contention.

MR. LANDRY: Mr. President, I wonder if we could take a brief lunch break because we do have some commitment that has to be dealt with.

PRESIDENT GAILLARD: I'm not sure we want to do that. I think we are almost done, and I really think in fairness to all participants, I'm sorry for those personal commitments, but we have taken these days a long time ago. We reserved three days. If members, individual members of the team have their own obligations, it's understood. They are excused, but the team itself should be here, and we want to go on. So, we will go on until one with the aim of finishing at one. If we are not finished, we will resume at two. So, make your arrangements according to that schedule,
please, and now we have five minutes recess. We will resume, according to this watch, at noon.

Thank you.

(Brief recess.)

PRESIDENT GAILLARD: We resume the hearing, and Mr. Harper still has a few questions for claimant to start with.

ARBITRATOR HARPER: With respect, and thank you, Mr. President, to one of the issues in this matter, namely the relation between 1901(3) and 1902(1) and the supremacy clause, as I shall dub it, of 1112, I would invite Canfor to reflect on the following proposition: That if this Tribunal is to be asked, as it is in the Statement of Claim, to fasten upon the United States an obligation to pay damages, doesn't the Tribunal need explicit authorization in the NAFTA for that in light of the safe harbor of 1901(3) and 1902(1) and the supremacy clause? And by that, what I mean specifically is, under the supremacy clause, of course, if there is a conflict between various provisions, it is Chapter 19 that prevails.

So, if we have any doubt about any potential conflict between what Canfor is looking for and what we have authority to do under Chapter 11, don't we need to find some explicit text for it rather than making only an inference for it?

MR. MITCHELL: If we could just have a
18 moment, Mr. Harper.
19 (Pause.)
20 MR. MITCHELL: Let me try and answer you this way, Mr. Harper: My first point is that we agree with the United States insofar as when you asked Mr. McNeill whether there was an inconsistency between Chapter 11 and in particular with reference to Article 1112 and Chapter 19, he answered you, in answer to the question whether it is the position of the United States that there is any inconsistency between Chapter 11 and Chapter 19, his answer was no. And so, I think correctly so in saying that there is no inconsistency as that term would be generally understood, meaning that the two provisions could not stand together. So, that's my first answer to your question.
21 My second answer is that the authority of the Tribunal to award damages to Canfor in respect of the violations we urge the Tribunal or will urge the Tribunal to find is found in the provisions of Section B of Chapter 11, and that if the claimant is able to establish that there have been violations of those provisions measured against the international standards that we have urged in our earlier submissions, and which I'm not going to revisit, Article 1135 gives the Tribunal the authority to make an award of monetary damages and
interest. And it's our submission that nothing
more explicit is required.

ARBITRATOR HARPER: Thank you,
Mr. Mitchell. Let me just probe that a bit.

If there is plausibility in the
proposition that international norms conflict with
municipal norms and we are asked to apply
international norms, is it Canfor's position that,
in so doing, we would be acting inconsistent with
municipal norms?

(Pause.)

MR. MITCHELL: The reason I'm hesitating
is the slippage or the movement in language from
the notion of inconsistency as that term is used in
1112, Article 1112, and your question which related
to whether you would be acting inconsistently as a
tribunal with municipal norms. And it's our
submission that you would be applying in a NAFTA
Chapter 11 arbitration the norms, the standards,
the legal rules set out in NAFTA Chapter 11 to
determine whether the conduct of which we complain
violates those standards, and the issue of whether

you would be acting inconsistently as a tribunal
with municipal norms I submit doesn't arise.

ARBITRATOR HARPER: You assert it doesn't
arise, but is that enough? I mean, let's suppose,
as we have in these proceedings, that a Chapter 19 binational panel finds that challenged antidumping and countervailing duty measures are consistent with domestic law. Nonetheless, they are challenged in a Chapter 11 proceeding before an arbitral tribunal as being inconsistent with international norms. Is it not the case under that hypothesis that the application of international norms by a tribunal like this one to the domestic regime would be inconsistent—that is to say it would be a different result, they would be deemed wrong where they had been deemed right before—with the domestic norms?

(Pause.)

MR. MITCHELL: I think you're correct when you say that there would be a different result, given what we have already talked about in terms of the authority of a Chapter 19 panel to remand to the DOC or the ITC for action in the municipal regime, and the authority or the outcome or result in a Chapter 11 proceeding, namely the payment of damages by virtue of the violation of the international wrong. To that extent, there is a different result in the two proceedings, as we have made clear throughout our written and oral submissions in these proceedings.

In our view, that is not an inconsistency, and certainly not an inconsistency as contemplated
1209 Day 3 Final

11 by Chapter 11, Article 1112. It I think is not
12 contended there can be different results in the
13 municipal regime and in the international regime.
14          ARBITRATOR HARPER: Isn't the difficulty,
15 though, Mr. Mitchell, that your position as
16 Canfor's representative here requires you to assert
17 that Chapter 11 incorporates international norms?
18 And if it does, then it necessarily makes those
19 norms under this hypothesis inconsistent with the
20 municipal norms under Chapter 19?
21          (Pause.)
22          MR. MITCHELL: With respect to the first

1 part of your question, is it Canfor's position that
2 Chapter 11 incorporates international norms, I
3 don't think that proposition is contended. With
4 respect to the latter part of your question, does
5 the existence of international norms in Chapter 11
6 necessarily make those norms inconsistent under
7 this hypothesis with the municipal norms under
8 Chapter 19, our answer is no for the reasons we've
9 articulated in our written and oral submissions
10 and--as we previously articulated.
11          ARBITRATOR HARPER: Mr. Mitchell, you have
12 just told me, and I'm reading now from page 11 or
13 at 113 and 114 of today's transcript that Canfor's
14 position is that Chapter 11 does not incorporate
15 international norms. Is that what you're telling
16 me?
MR. MITCHELL: I'm sorry, Mr. Harper, I have different page references.

ARBITRATOR HARPER: Well, I'll just ask you what your position is again. Are you saying--just categorically tell me--are you saying Chapter 11 does not incorporate international norms?

MR. MITCHELL: Let me just repeat my answer. The question was: Is it Canfor's position that Chapter 11 incorporates international norms? And my answer is that I don't think that that proposition is contested.

ARBITRATOR HARPER: "Is contested," meaning by that what? It does or it does not?

MR. MITCHELL: Chapter 11, Article 1102, Article 1105, Article 1110 obviously incorporate the international standards, like the discussions we have been having, and Mr. Landry's submissions were directed entirely in substance to that question.

ARBITRATOR HARPER: So, Chapter 11 incorporates international norms. You're asking this Tribunal to find that various actions of the United States Government pertaining to antidumping and countervailing duty matters are inconsistent with those international norms; is that correct?

MR. MITCHELL: We are asking this Tribunal to look at all of the evidence we will present and
1 determine that the conduct of the United States in connection with the matters of which we complain violates the international norms set out in Chapter 11.

ARBITRATOR HARPER: But let's be precise, Mr. Mitchell. The conduct I'm talking about is antidumping and countervailing duty law determinations. That's part of the conduct of which Canfor complains; is that correct?

MR. MITCHELL: And again, I believe our submissions orally and in writing have been clear on this. The conduct of which Canfor complains includes, in part, the conduct leading up to and resulting in the determinations, yes.

ARBITRATOR HARPER: Determinations of...

MR. MITCHELL: The determinations of, for instance, the DOC and ITC.

ARBITRATOR HARPER: All right.

Antidumping and countervailing duty law; is that correct?

MR. MITCHELL: Well, no, Mr. Harper, and I'm going to again--and the transcript and the
1209 Day 3 Final

meaning of antidumping and countervailing duty law
and whether a determination is antidumping and
countervailing duty law.

ARBITRATOR HARPER: I did not understand
what you just said. Would you say what you mean so
I can understand it, please. Answer, if you would,
this question: Is part of Canfor's claim premised
upon an attack upon determinations of
administrative agencies of the U.S. Government in
respect of antidumping and countervailing duty
laws? I think that emits of a yes or a no.

(Pause.)

MR. MITCHELL: Mr. Harper, we have, to the
best of our ability, articulated Canfor's position
with respect to the basis for its claim, and you
ask a question that, in our submission, that
assumes the result, and as we have had a
considerable debate about the meaning of the words
antidumping and countervailing duty laws, and we
stand on the submissions that we have made orally

and in writing over these three days with respect
to the nature of our claim.

ARBITRATOR HARPER: Are the preliminary
determinations cited in your Statement of Claim
preliminary determinations in the area of
countervailing duty law and antidumping law?
Again, I think that's a yes-or-no question. Either
ty they are or not.
MR. MITCHELL:  Mr. Harper, I don't think we can add anything further in our response than that which we've already said in our written and oral submissions with respect to the claim being advanced by Canfor.

ARBITRATOR HARPER:  I consider that nonresponsive.

(Pause.)

MR. MITCHELL:  The position of Canfor is that the preliminary determinations arise as a result of the conduct of United States officials which we say was exercised improperly in the antidumping and countervailing duty field.  Your question asked whether the determinations are in the area of antidumping or countervailing duty law, and we have made extensive submissions on our view of that phrase, and that determinations are not law.

ARBITRATOR HARPER:  Let me come back to the issue of international law.  Chapter 11 incorporates international law standards.  That's Canfor's position; correct?

MR. MITCHELL:  Yes.

ARBITRATOR HARPER:  And is it also Canfor's position that those international law standards may differ from municipal law standards?

MR. MITCHELL:  Again, the question is at an extremely high level of generality, but clearly
international law standards can differ from municipal law standards as is the very nature of the two different regimes.

ARBITRATOR HARPER: And what is Canfor's position in respect of a situation where the Tribunal could reach a determination that actions by the U.S. Government violated international standards, even though binational panels formed under Chapter 19 had decided that those same actions did not violate U.S. domestic law? Do you agree that in that circumstance the result of proceedings in this Tribunal would be inconsistent with a result before a binational panel under Chapter 19?

MR. MITCHELL: No.

ARBITRATOR HARPER: You agree that such a circumstance would be consistent; that is, the two results would be consistent?

MR. MITCHELL: The two results would be different. The municipal results from the binational panel would be within the scope of the remedies a binational panel is able to offer, as we've discussed, remand or affirming a determination, and the international result would be in the Chapter 11 context a determination that the United States had not lived up to either the minimum standard of treatment or its obligations under Article 1102 with the consequential award of
ARBITRATOR HARPER: Do you admit that there could be a plausible ground for differing with Canfor on that position? That is to say that one might plausibly take the view that the two results are inconsistent?

MR. MITCHELL: That is a question that the Tribunal may consider relevant for it to determine. If I can just take a step back, though, the discussion we have moved from--towards is a discussion about inconsistency of result. And again, I note the United States's position that they do not contend there is an inconsistency, but if I can just revisit the language of Article 1112, it refers to in 1112(1), in the event of any inconsistency between this chapter and another chapter, the other chapter shall prevail to the extent of the inconsistency; i.e., relating to the Treaty obligations but not to the result of the administration of a municipal law regime and the parallel results of the administration of an international law regime. That is not to what Article 1112 is directed.

ARBITRATOR HARPER: And, Mr. Mitchell, if the panel, if this Tribunal came to the view that
while there is force in the position you have just articulated, the matter is not free from doubt—that is to say, that 1112(1), by reading in futuro, namely in the event of any inconsistency, that the drafters of the Treaty had in mind the notion of inconsistent results quite apart from inconsistent texts—

MR. MITCHELL: If I could just have a moment, Mr. Harper, to respond to that.

ARBITRATOR HARPER: I haven't finished the question.

MR. MITCHELL: I'm sorry. I'm jumping the gun there.

ARBITRATOR HARPER: If, as I say, the panel, the Tribunal, were of the view that the matter was not free from doubt, in your view—that is, if you were Canfor—would that be a ground for taking the position that one should avoid a potentially inconsistent consequence by adopting Canfor's position and instead read Article 112 as essentially as a direction to the Tribunal that it should not undertake to construe Chapter 11 with its international obligations in a way that would be inconsistent with the result that would obtain under Chapter 19?

MR. MITCHELL: Just one moment, Mr. Harper.

(Move.)
MR. MITCHELL: Mr. Harper, the reason for the pause was I was just checking to see in the authorities that have been put before the panel whether we had any cases where the issue of the meaning of Article 1112 was addressed and in the moment that I had I couldn't locate it, but I can tell the Tribunal that the issue of the meaning of 1112 has been extensively briefed in other Chapter 11 cases, and my recollection of those is that the notion was clearly not of inconsistency of result, but was of whether the two Treaty provisions could stand together.

And so, I believe my answer to your question would be, no, that would not be a ground for taking the position that you described.

PRESIDENT GAILLARD: Mr. Harper, are you done with the questions?

ARBITRATOR HARPER: I am.

PRESIDENT GAILLARD: Thank you, Mr. Mitchell for the answers.

On the respondent's side, do you want to make certain comments or remarks on this line of questioning? Being understood that it was directed mainly to claimant.

MS. MENAKER: Not unless the Tribunal has questions or clarifications that it wishes to seek from us.

PRESIDENT GAILLARD: We have no questions
14 for you at this stage.
15 Now, that exhausts the questions of the
16 Tribunal. We said at one juncture you would have
17 an opportunity to answer questions which we may
18 have posed, and where no answer was provided
19 because of a break or something, that's a catch-all
20 question. Is there anything which, given the
21 questions we have asked, and your answers, you wish
22 to answer at this stage? As far as we are

1 concerned, we think that you were very helpful in
2 answering all of our questions, but my memory may
3 be bad in this respect. So, my feeling is that we
4 have an answer to everything we wanted to hear
5 about. You may want to think about it.
6 On claimant's side first? Mr. Howse?
7 PROFESSOR HOWSE: Sorry, Mr. President.
8 That's our impression, too, Mr. President,
9 so unless there--but if it happens if there are
10 questions that are live in the minds or memories of
11 any member of the Tribunal that they feel we would
12 have needed to answer but for some reason because
13 of a break we didn't, we would be happy to hear
14 them, but we don't have any in mind.
15 PRESIDENT GAILLARD: On this side of the
16 Tribunal, we have no questions left. And thank you
17 for the answers.
18 Now, on the respondent's side, is there
19 anything you wish to add or clarify or you think we

Page 97
20 have forgotten to ask you to answer in certain
21 respects?
22          MS. MENAKER: We don't have the need to

1 clarify or supplement any answers at this point, or
2 I should have ended any answers, period. I don't
3 believe there are any pending requests from the
4 Tribunal. The only thing I should add is that I
5 believe the Tribunal left open the question of
6 whether there would be a nonparty submissions made
7 pursuant.
8          PRESIDENT GAILLARD: I'm coming to that in
9 a second because that's sort of the procedural
10 aspects. I wanted to conclude the substantive
11 aspect of this three-day hearing.
12          So, I understand that if there are no
13 answers or nothing you want to raise at this stage
14 on the merits front, we can leave it there.
15          As to procedural issues, I still have a
16 number of points which I would like to address now.
17 I think we have an exhibit number missing or
18 possibly a document which is not in the file.
19 Ms. Menaker, you alluded to a document which
20 was--which had to do with the Byrd Amendment. Have
21 you found the proper quotation, or can you tell us
22 where it is?
MS. MENAKER: Yes, we certainly did not submit the Byrd Amendment, and we looked through the record, and it appears that claimant did not submit it with its materials. So, I don't believe there is a copy of the Byrd Amendment with the materials. I have my own copy that I pulled off-line, but I don't believe the Tribunal has one.

PRESIDENT GAILLARD: So, my impression on this was correct, we don't have it in the file?

MS. MENAKER: Yes.

PRESIDENT GAILLARD: Would the parties jointly--I don't think it's a point of contention, a point which is controversial in the least, but we would like to have for our convenience the document. So maybe you can exchange views among counsel and file it with the Tribunal on behalf of both parties, say, within a week. Would a week be enough? It should be a very easy thing to do.

MS. MENAKER: Yes.

PRESIDENT GAILLARD: All right. So, that would be agreeable on claimant's side?

MR. LANDRY: Yes.

PRESIDENT GAILLARD: On respondent's side?

MS. MENAKER: Yes.

PRESIDENT GAILLARD: Thank you.

As to the position of the U.S. with respect to the Byrd Amendment and the question
which we asked with respect to Chapter 19, we thank you for the answers provided orally, and given the existence of a written record, we don't feel the need to ask you to elaborate further on this. I mean, the answers were clear and not ambiguous. They are in the record, so I don't think we want anything further from you on this point.

The third procedural issue is that you will receive a transcript.

(Discussion off the record.)

PRESIDENT GAILLARD: In a few days, and I invite—in a few days you will receive the transcript as is, and I invite both parties to consult with one another and submit jointly directly to the Court Reporter any corrections which are agreed upon. If there are matters which are contentious and which are not agreed upon, which I cannot imagine in that context as to the transcript, with the tapes and all that, but we, of course, would rule on that if need be, but I really hope that can be done by consent, and it would be useful for us to have a clean transcript after you have helped with the corrections.

Any comment on that on claimant's side?

MR. LANDRY: We will work with the U.S. counsel to deal with that issue.

PRESIDENT GAILLARD: On respondent's side, it is agreed?
MS. MENAKER: Yes.

PRESIDENT GAILLARD: Thank you.

Now, with respect to the issue of posthearing briefs, there are a number of arbitrations in which after the hearing the parties are invited to file posthearing briefs. This is particularly necessary when we hear witnesses at the hearing. When it's a hearing regarding legal argument such as this one, it is not customary. I would like to see--I would like to hear the parties' determinations on this, being understood that if there is a request or if you agree, we will follow what you want. If you disagree, we will rule on it. Being specified that on our side, we do not feel that this is necessary. We thank you very much for the explanations during these three days, and for your written submissions before. We think that we are fully briefed at this stage on the relevant issues which are part of the case, and we do not wish to receive posthearing briefs on the issues which are before us at this juncture.

Now, what is your determination as far as you're concerned? Mr. Landry?

MR. LANDRY: Subject to the issue, I'm sure that you are going to be coming to in terms of 1128, but subject to that issue we don't see any need ourselves for posthearing briefs.

PRESIDENT GAILLARD: Thank you.
There is an issue as to the costs. Both parties request the costs of these proceedings.

Therefore we will need to receive evidence of what it is or at least a statement and some supporting documentation of what it is on both sides because both sides say: I am right and I need; you must say: I'm right and give me the costs. So, we don't know if we will rule on this or not, depending on where we go, and obviously I have no idea at this stage, but certainly we need to have the costs in the files so that we can make, if we so decide, a determination on this.

So, I guess it's not contentious because both parties request a cost.

How do you envisage that, and do you want to be given a time frame to submit your cost statements?

MR. MITCHELL: Mr. President, what I'm familiar with from other Chapter 11 arbitrations is that the Tribunal has rendered its determination on whether it's the final award or the preliminary matter, and has then established a schedule for briefing the issue of costs and the amount of costs, and in my submission that would be the
1 appropriate process.
2 PRESIDENT GAILLARD: I was more thinking
3 of having a time frame established at which each
4 party would make its statement of costs with a
5 short time frame to discuss it by the other side.
6 So, for instance, the dates are not
7 relevant--within two weeks both parties could give
8 us their costs, and then 10 days later they could
9 comment on the cost of the other side, as to the
10 amount, it's outrageous, how can it be so
11 expensive, or whatever, which is also fairly
12 typical. So, we would rather not, in case we
13 address this issue, have to come back to you. I
14 would rather have everything in the file, and then
15 it may or may not become relevant because, as you
16 know, if we say we have jurisdiction, we may decide
17 on the costs now. If we have jurisdiction, we may
18 put it off to the merits. There are a number of
19 option which is are open to us, but at least we
20 would be more comfortable in having something.
21 So what I have in mind is the time frame
22 to submit your costs and then a time frame to make

1 comments on this particular issue.
2 If we do that, how long would you need for
3 the first phase, which would be simultaneous? You
4 would both submit your costs and you would both
5 comment on it? Given Christmas, maybe you want a
6 little more than what you would typically have.
7           MS. MENAKER: Mr. President, we have no
8 objection to proceeding in that fashion, and in
9 fact, we have proceeded in that fashion in other
10 Chapter 11 arbitrations. We would suggest or we
11 think we would need approximately four weeks to put
12 in our cost submission, and then if we did that
13 simultaneously, perhaps two weeks to comment on one
14 another's costs submissions.
15           PRESIDENT GAILLARD: Would that be enough
16 if we go down this road, on claimant's side? Three
17 weeks?
18           MR. MITCHELL: I would suggest, in light
19 of the holiday say January 15th or whatever
20 convenient date is around there, which is about
21 four and a half weeks.
22           January 15. Four on weeks from now.

1 PRESIDENT GAILLARD: I'm sorry, Mr.
2 Mitchell, including the answer or just the
3 submission?
4           MR. MITCHELL: To put in the submission.
5           PRESIDENT GAILLARD: Right. And then how
6 long would you need to comment? Like two or three
7 weeks would be in order, but no more than that.
8           MR. MITCHELL: It would be, but if I could
9 ask a point of clarification.
10           PRESIDENT GAILLARD: Please.
MR. MITCHELL: The issue often arises where one party claims that they should be entitled to costs and it has a different view with respect to the other party. Do you envisage that these submissions that we would be providing simply reflect the amount of costs or reflect legal argument relating to the principles under the UNCITRAL Rules, et cetera?

PRESIDENT GAILLARD: Certainly the amount of costs, and in this respect we would like a breakdown. I'm not saying it's going to be relevant. To be clear, we would like a breakdown by phases, because we had several hearings in several phases, the place of arbitration is one, you know, the document production request is another, so I would like you to make our life easy in breaking down—you know what we have done so far by our rulings and not getting into the answer to any letter we have issued in this arbitration, but the phases like the place of the arbitration, the document production which can be a costly exercise, whatever. Certainly this phase, the jurisdictional arguments.

Now, we do not want, as to the elaboration on this, we do not want an argument which goes: I need the costs because I'm really right and then rehashing all the arguments on either side, because that's the back door for the posthearing brief.
which will be viewed as not accepted by the Tribunal. On the other hand, as to the appropriateness of awarding costs, the legal issue of the appropriateness of awarding costs in case we do A, B, C, or D, which is whatever we can do. We can say no, we have no jurisdiction and then what do we do. We can say, yes, we have jurisdiction partially, we could say whatever.

But you don't discuss the merits of that. You just take the opportunity and, for instance, on your side you may say: Well, even if we lose on jurisdiction, the costs should not be awarded. On the other hand, if we win on jurisdiction, the costs should be awarded and give references to the relevant arbitral case law or sources which you may want to use, but I don't want to see any arguments on the merits attached to it.

What about respondent's side?

MS. MENAKER: We agree with that approach. If it would make it easier, we could agree to limit any so-called argument, although taking into account, of course, when I say argument, I don't mean argument on the merits of the case, but argument as to the appropriateness of awarding the specific type of costs to one page in length or something of that nature.

PRESIDENT GAILLARD: Two or three pages, I hate the limitation. When we say one page, you
1 will use small print and it will be not legible. I mean, be reasonable in this respect because it's a boilerplate thing; we think what we have seen in a number of arbitrations, and, you know. So, say what you have to say in a few pages, but no arguments on the merits.

Would that be okay?

As to the time frame, we are in your hands, like January 15 is what? Whatever you want.

MR. MITCHELL: I think the United States was suggesting, say, about three weeks after? Is that what I understood?

PRESIDENT GAillard: Ms. Menaker said four weeks from now. I don't know. If that's okay, that's fine.

MR. MITCHELL: Friday, the 14th?

MR. MITCHELL: The 15th. And I think the answer is no, we are not sure, but we believe it is. And then two weeks to respond simultaneously after that.

PRESIDENT GAillard: Friday is the 14th; right?

MR. MITCHELL: Yes.

PRESIDENT GAillard: Let's say Friday the
1209 Day 3 Final

3 14th of January for the submission.
4
5 And as to the degree of detail, don't send
6 us any taxi bill. You exercise your judgment as to
7 the details, I mean, which you want to give us as
8 to the supporting documentation. I mean, we trust
9 you as professional law firms and professional
10 agencies. What you will say will be prima facie
11 taken as right, unless it's very strange, in that
12 case we will get back to you. So, you don't need
13 to get into excruciating details in proving the
14 amounts, all right?
15
16 So, we say the 14th, and then two weeks
17 later, the 28th. And then comments, as understood
18 before by the 28th of January.
19
20 So, that takes care of the cost
21 submissions.
22
23 Now, I would like to hear your views as to
24 my suggestion regarding the availability of the
25 consolidation of related proceedings pursuant to
26 Article 1126 having due consideration to, quote,

"the interest of fair and efficient resolution of
the claims," end quote.

We would insist—we want to hear you now,
but we would insist to have your determination in
writing on this, being understood that it wouldn't
be understood as binding for future conduct. So
can you give us your views not as to the merit of
this issue, if I may call it this way, but as to
the process? What I mean by the process is: Would you agree that we have in the calendar a date by which you would say, at this stage, we don't intend to consolidate within the meaning of 1126 for this and that reason. That gives us some kind of indication, being understood that no party would be bound by this, and it would not be viewed as a bar to consolidate afterwards, which I do not think would be fair to do, and certainly it would not be binding on other parties which may have an interest in doing that. So, in any event, it would create some kind of imbalance, so we are not saying that, but we would like to have an indication as to why you have a mechanism which is geared at ensuring consistency and no party seems to want to avail itself of it.

So, as to the process, maybe on claimant's side.

MR. MITCHELL: Obviously having spent three long and intense days with the Tribunal, the parties have, I think, manifested their intention that this Tribunal at this time addressed these matters, and there are--obviously 1126 has not been tested by anyone yet, and it has some interesting features to it that may cause parties to not view it as necessarily a desirable process. I think what I can say is on behalf of the claimant we are happy to provide in writing our
1 observations on the questions that you have raised by a date that would be convenient to the Tribunal, and I'm thinking at least two weeks or so.

PRESIDENT GAILLARD: Yes, of course. But by comments, I'm not thinking that you need to discuss the legislative history of all this and the pros and cons and so on. It's just a determination and with some supporting reasons, I mean,

elaboration on the reasons, and we prefer to have that in writing.

So, what would be on the U.S. side about this suggested conduct, from a procedural standpoint?

MS. MENAKER: We have no intention of invoking Article 1126 in this proceeding. That being said, we have on numerous occasions talked with claimants' counsel, who is also counsel for one of the other claimants that has filed a Notice of Arbitration and have asked them if they would agree to voluntary consolidate that claim before this Tribunal. If they change their minds on that score between now and the time that a decision is rendered, if they agreed to do that, we are still open to having them do that.

But that being said, we have no intention of invoking Article 1126 with respect to this particular proceeding.

PRESIDENT GAILLARD: But you have nothing
against elaborating a little bit in writing on this issue, or putting your position in writing in a certain time frame?

MS. MENAKER: When you say elaborating, it would be anything other than what I have just--
PRESIDENT GAILLARD: Maybe just what you said, but just something.
MS. MENAKER: Sure.
PRESIDENT GAILLARD: The purpose of the exercise is to make sure from our standpoint that you thought about it seriously. I'm sure you think about every issue very seriously, but we want that in the record.

As to the suggestion to consolidate at the 11th hour this case with other cases simply because the counsel is the same, I don't think we would expect that to be realistic, nor do we want that because it would be unfair to the parties. It's not just the lawyers, the parties are not there, they're not present in the room, they cannot follow, they cannot give instructions with respect to this particular case. So that's not what I had in mind. I didn't have in mind a consolidation of various cases before us. I had in mind a pure Article 1126, not a consolidation-by-consent idea,
1209 Day 3 Final

2 but a pure Article 1126 consolidation.
3 So, if you would--I think it's clear
4 enough--if you would just let us know by a given
5 date, and this date can be, I don't know, can be
6 the same as the one we used, January 14, we would
7 like by January 14 to receive your submissions on
8 this.
9 MS. MENAKER: Mr. President, may I
10 inquire? I think we have made, I believe, our
11 position clear, and I can assure you that we have
12 given it considerable thought, that we have no
13 intention of invoking Article 1126 in this
14 proceeding.
15 Would it suffice if I told you that? We
16 would, of course, inform the Tribunal immediately
17 if our views on that subject changed.
18 PRESIDENT GAILLARD: Claimant has comments
19 on this? Would you like to think about it?
20 Because, frankly, I would like people to pause, to
21 reflect, and to tell us without any commitment for
22 the future.

1 If I may, there is an element of oddity
2 because at some point we start deliberating, and
3 yet there is no--Article 1126 is a fairly simple
4 provision. It's not very elaborate.
5 MR. LANDRY: Mr. President, as Ms. Menaker
6 said, we have had numerous discussions with the
7 U.S. on this point. We have considered it, but we

Page 112
are more than willing to set a date to accommodate your request.

PRESIDENT GAILLARD: Given the position of both parties, and we thank you for your trust, let's put it this way. We do not request either party to express their position in writing on this issue given what you have just said now.

For the record, what we want to say is that if any party were to change their minds, it's not an issue which has anything to do with us individually or collectively as a tribunal. We are here to serve justice, if I may say, or certainly the parties, and we are happy to perform that function.

We also recognize that we are what we are, and there are other mechanisms. If any party wants to avail itself of those mechanisms, it's perfectly understood. So, we can leave it this way for the time being. Thank you.

Now, I have another two questions. One is the Article 1128 submissions. Pursuant to Article 1128, "On written notice to the disputing parties, a Party--capital P--may make submissions to a Tribunal on a question of interpretation of this Agreement." Clearly the matters we discussed today and which were briefed in the written phase of the jurisdiction aspects of this jurisdictional challenge seem to us to raise questions of
interpretation of this Agreement, in particular Article 1901(3), but, of course, many of the provisions are related or not, and we have discussed all this.

So, it would not be abnormal for the other Parties to NAFTA to have views on this, and I guess—I don't know how this is done. I think it's more for the respondent, the State, maybe to coordinate that with other Parties to NAFTA? Since they are here, I also raise the question, and if any Party to NAFTA wants to avail itself of this possibility, we would like in a relatively short time frame which can be discussed, have a declaration of intention of this—like a week, like 10 days, something which seems reasonable—and then, in another time frame which is also reasonable, to elaborate on the point they want to make—like a month, like whatever would seem reasonable—they could submit something in writing.

I know that we made that offer earlier in the proceeding, but it seems proper to us to reiterate that offer at this juncture.

So, Ms. Menaker, I think you wanted to mention how has it worked in other NAFTA cases? Or is it, Ms. Menaker, is it usually—my question I guess is: is it usually the defendant, the NAFTA Party which coordinates that with the other Parties, or is it the Tribunal directly?
MS. MENAKER: No, the respondent state doesn't coordinate directly. Just what we do is pursuant to the NAFTA, we make sure that the other parties get all procedural orders and things of that nature, so you would simply set forth a time frame by which you wanted the other nonparty participants to inform the Tribunal whether or not they wished to make such a submission, and then Canada and Mexico would directly inform the Tribunal of their intent in that regard.

PRESIDENT GAILLARD: Mr. Mitchell, do you have any view on this?

MR. MITCHELL: Yes, in our experience in the past, indeed what's often happened is the Tribunal has asked the other NAFTA parties whether they wished to avail themselves of that opportunity, and if they have not been in a position to answer that question, the dates simply set for the making of their submissions with the qualification that they be confined to the question of interpretation that Article 1128 authorizes.

PRESIDENT GAILLARD: Of course.

So, since they are present here—and this would be confirmed in writing—let's say that the Tribunal would like to know if, in principle, the...
Parties at this stage would like to avail themselves of this possibility within, say, 10 days from now, but that's a just yes-or-no answer. And then if the answer is yes, we would have a further month--would that seem reasonable?--to submit any submissions, any determinations as to the interpretation of NAFTA, of the NAFTA provisions which have been discussed in this case, and that should be fairly easy because the proceedings are on the Web site of the U.S., and it's public. And thank you for your presence here during this three-day hearing, so now you are certainly fully aware--I'm sure you were aware before, but you are fully aware of the issues. And if you have anything to say as a Party to NAFTA, we are, of course, very interested to know. If the answer is yes, the parties may want to write to us and ask us if that calls for--I don't want to receive any answer. I just want--is a Sunday. Let's call it Monday, the 20th. So, if that happens, it may be that the parties react and say, oh, it's wrong, whatever, they have things to say. I wouldn't want the parties to submit a brief answering this. They should ask the Tribunal for permission to submit some kind of comments on those determinations,
because it may be important to their case.

In particular, if that raises arguments which are new because, of course, it's the same arguments made by one party, the due process is probably satisfied. If it raises new issues which were not canvassed in this hearing or the written phase, then it's another matter. We may want to have your views on certain new arguments, if any.

MR. MITCHELL: In our experience, and I think the United States would confirm this, the claimant and respondent have typically been afforded the opportunity to react to any submission that is filed. The issue simply becomes one of the length of time that is required to do so in light of the scope of the arguments that are advanced.

PRESIDENT GAILLARD: That seems reasonable, frankly, if I may offer an answer right now.

So are you saying that you would be more comfortable if we were to say that should one party make a submission, then you would automatically have a certain time period to answer? Like three weeks, two weeks, four weeks?

MR. MITCHELL: We would be agreeable to three weeks.

PRESIDENT GAILLARD: All right. So, I think it's better to set it out now. If there is
such a submission, then the parties would automatically have the three-week period to answer, being said that here again the back door rule should apply. We don't want that to be an excuse to reopen things, I forgot to say this and that, and rehash all the arguments or things which are new because that, in itself, creates new due process problems. So, it would be limited to submissions made by the NAFTA Parties, if any, pursuant to Article 1128.

So, the dates would be December 20 for the intention to submit--to make a submission. It will be January 20 for the submission itself, if any, and February 10 for the comments of the parties in case a submission is made by any other NAFTA Party.

Now, my last point is that still for procedural nature, and I don't ask the questions because I think there is something to it, but that's good practice. I would like at this stage to ask the following questions:

Do the parties have any comments, questions, or concerns regarding the manner in which the proceedings in this arbitration have been conducted by the Arbitral Tribunal?

MR. CLODFELTER: Mr. President, it's somewhat awkward, but quite informally today we learned a fact we did not previously know. We have no idea whether it has any import whatsoever. But
we think in light of your question that we should just raise it now. We learned that one of the counsel for claimant has a familial relationship with Professor Weiler of some distance.

ARBITRATOR WEILER: He has no relationship.

MR. CLODFELTER: I'm sorry, I misunderstood, then. Okay.

ARBITRATOR WEILER: I'm sure you would know that I would raise it myself if it was.

MR. CLODFELTER: That's what we would have expected. That clarifies it. Thank you. Sorry about that.

ARBITRATOR WEILER: It's a matter sometimes of gratification and sometimes of announce that we share the same name.

MR. CLODFELTER: I can't imagine ever annoyance, but anyway we apologize for the misunderstanding.

Other than that, we have nothing.

PRESIDENT GAILLARD: On claimant's side?

MR. LANDRY: There is nothing we would like to raise at this time, no.

PRESIDENT GAILLARD: Do the parties have any objections of any kind to express in this respect? On claimant's side.

MR. LANDRY: Same answer, there is nothing
we would like to raise at this time.

PRESIDENT GAILLARD: And on the respondent's side?

MR. CLODFELTER: No, Mr. President.

PRESIDENT GAILLARD: Are there any outstanding issues, including with respect to the procedural matters that the parties wish to raise with this Arbitral Tribunal at this stage?

MR. LANDRY: Not at this time.

PRESIDENT GAILLARD: On respondent's side?

MS. MENAKER: No, thank you.

PRESIDENT GAILLARD: Thank you. In that case, that concludes this three-day hearing, and I want to thank you all for the rich discussion which we had, and it leaves us with a lot of work, but that's perfectly fine.

I wish to thank our Court Reporter as well. We were very harsh with him, but thank you, Mr. Kasdan. And thank you. So, thank you and goodbye.

(Whereupon, at 1:19 p.m., the hearing was adjourned.)

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CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court 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.

DAVID A. KASDAN, RDR-CRR