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

- - - - - - - - - - - - - - - - -x
CANFOR CORPORATION,

Claimant/Investor,

and

UNITED STATES OF AMERICA,

Respondent/Party.

- - - - - - - - - - - - - - - - -x Volume 2 (Final)

Wednesday, December 8, 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 9:37 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,
APPEARANCES:

On behalf of the Claimant/Investor:

P. JOHN LANDRY
JEFFREY HORSWILL
TODD WEILER
PROFESSOR ROBERT L. HOWSE
DAVID M. CALABRIGO
PATRICK MACRORY
Davis & Company
2800-666 Burrard Street
Vancouver, British Columbia
V6C 2Z7
(604) 643-2935
john_landry@davis.ca
jhorswill@davis.ca

KEITH E.W. MITCHELL
APPEARANCES: (Continued)

On behalf of the Respondent/Party:

RONALD J. BETTAUER
Deputy Legal Adviser

MARK A. CLODFELTER
Assistant Legal Adviser for International
Claims and Investment Disputes

ANDREA J. MENAKER
Chief, NAFTA Arbitration Division,
Office of International Claims and
Investment Disputes

MARK S. MCNEILL

JENNIFER I. TOOLE
Attorney-Advisers, Office of
International Claims and Investment
Disputes

DAVID A. PAWLAK
CARRIElyn D. GUyMON
LAURA A. SVAT
MICHELLE G. BOYLE
CAROLINE E. GRUMMON
GWENDOLYN D. CARTER
Office of the Legal Adviser
U.S. Department of State
Suite 203, South Building
2430 E Street, N.W.
Washington, D.C. 20037-2800
(202) 776-8443
jtoole@state.gov
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On behalf of the U.S. Department of Commerce:

ELIZABETH C. SEASTRUM
Senior Counsel for Litigation
U.S. Department of Commerce
Office of Chief Counsel for Import Administration
14th and Constitution Avenue, N.W.
Room 3623
Washington, D.C. 20230
(202) 482-0834

APPEARANCES: (Continued)

On behalf of the U.S. Treasury Department:

KIMBERLY EVANS
Office of International Investment
U.S. Treasury Department
1500 Pennsylvania Avenue, N.W.
Washington, D.C. 20220
(202) 622-0416

On behalf of the International Trade Canada (Trade Law Bureau):

RODNEY NEUFELD
Direction generale du droit commercial international (JLT)
Edifice Lester B. Pearson
125, promenade Sussex
Ottawa (Ontario) K1A 0G2
(613) 944-8008
rodney.neufeld@international.gc.ca

On behalf of the United Mexican States:

STEPHAN E. BECKER
SANJAY MULLICK
Shaw Pittman, L.L.P.
2300 N Street, N.W.
Washington, D.C. 20037-1128
(202) 663-8277

SALVADOR BEHAR
Legal Counsel for International Trade
Secretaria de Economia
1911 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 728-1707
sbehar@economia.gob.mx
P R O C E E D I N G S

PRESIDENT GAILLARD: Good morning, ladies
and gentlemen. We resume the hearing in the second day of the hearing in the arbitration between Canfor Corporation and the United States of America. This morning we are going to hear the reply of the U.S., and then a surreply, and then we will get into the questions and answers.

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

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

MR. LANDRY: We have, yes.

PRESIDENT GAILLARD: Right.

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

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

MR. LANDRY: One minor issue,

Mr. President. We have sitting at the table with us, and I wanted to formally introduce for the record another co-counsel, and his name is Patrick Macrory from the International Law Institute.

PRESIDENT GAILLARD: Welcome.

Any other procedural issues?

Who is going to--Mr. Clodfelter, please,
the floor is yours.

REPLY STATEMENT BY THE UNITED STATES

MR. CLODFELTER: Thank you, Mr. President.

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

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

So, first, what does the nature of the conduct which has been alleged as the basis for these claims say about the meaning of Article 1901(3)? Yesterday, we heard a great deal of discussion about object and purpose and how that may shed light upon the meaning of Article 1901(3). We heard somewhat less discussion about Article 1901(3)'s context. Mr. McNeill will address points with respect to both of those discussions later on.

We heard even less about the ordinary meaning of the text of Article 1901(3), and only at the end of the day continuing Canfor's practice of subordinating the actual language of Article 1901(3) to object and purpose and context.
15 Ms. Menaker will address this general point as well as specific points on the ordinary meaning of the text in a few minutes.
16 What we heard very little about, however, was the actual conduct which was the basis for the claim before you. Claimant counsel yesterday pretty much limited itself to broad characterizations of that conduct. Early on,

1 Mr. Landry did just about everything he could to distance Canfor's claims from American antidumping and countervailing duty law. You will recall that he rejected the United States's characterization of the claims as antidumping and countervailing duty claims, and portrayed them instead as claims for violations of the substantive obligations of Chapter 11, referring the Tribunal to paragraph 20 of the Notice of Arbitration and Statement of Claim, which states that "the claim arises from the unfair, inequitable, and discriminatory treatment of the Canadian softwood lumber industry, including Canfor, or more particularly, Canfor and the subsidiaries by the Government of the United States. A review of the treatment received by the Canadian softwood lumber industry over the past 20 years demonstrates a pattern of conduct designed to ensure a predetermined, politically motivated, and results-driven outcome to the investigations resulting in the various determinations that are at
Now, one thing that's clear from that paragraph is that what Canfor is really trying to do here is put the entire American antidumping and countervailing duty system on trial, a system which the parties, including Canfor's own government, agreed to leave in place in the middle of this 20-year period of allegedly egregious conduct. But neither Mr. Landry's comments nor paragraph 20 really accurately describe the conduct which has been alleged as the basis for this claim.

In order to understand what this claim is about, you have to look at the detailed obligations set forth in the remainder of the Statement of Claim. And if you do and when you do, I'm going to walk you through some of this. What you will find is that all of the conduct which Canfor alleges as the basis for this claim is conduct in the administration of the U.S. antidumping and countervailing duty law.

We take a minute to run through the allegations you will find in the remainder of the Statement of Claim. Paragraph 98 cites the failure to impose duties on U.S. producers, and entitling
Now, before we turn to the main point I want to make about these specific allegations of conduct, I want to make two related points. First, these are the claims for which Canfor gave notice and submitted to arbitration, and it is on the basis of these claims that the decision on jurisdiction must be made. Therefore, even though we have not heard Canfor's answer yet to the
8 questions posed yesterday and the suggestion made by you, Mr. President, about whether or not they were, in their briefs, seeking to amend or supplement their claims, let me state in advance that it would be the United States's position to strongly oppose any such amendment or supplement. Unlike commercial arbitration, the requirements for noticing and submitting to arbitration claims under NAFTA are very strict. No new measures may be cited as the basis for claims in this case absent compliance with those requirements.

And the second subsidiary point I want to make about this is that it is very unclear how the conduct alleged in these paragraphs constitute, quote, measures, unquote, within the meaning of Article 1101. First of all, many of them are only vaguely stated. It could hardly be fairly said to describe conduct at all.

But more importantly, how they fall within NAFTA's definition of measures and not within NAFTA's definition of antidumping and countervailing duty law is extremely unclear, and Ms. Menaker will address that question a little later this morning. But, of course, the main point is that all of the conduct alleged by Canfor as the basis for its claim is conduct in the administration of the U.S. antidumping and
countervailing duty law. Therefore, the proposition that Canfor would have you accept in their interpretation is that even though they claim that the United States's administration of its countervailing and antidumping law is subject to the requirements of Chapter 11, it still cannot be said that Chapter 11 imposes obligations with respect to that law.

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

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

The second general point I would like to address are the various allegations and questions that were raised about the effects of the parties' respective proposed interpretations of Article 1901(3). First of all, let me react to comments by
counsel yesterday in the Canfor briefs which repeatedly allege that the United States's interpretation would amount to immunizing egregious conduct that violates customary international law. And, of course, this is not the case. First of all, it ignores the fact that the parties chose to subject such conduct as it relates to antidumping and countervailing duty law to the special processes of Chapter 19. That was the parties' choice. That's how they chose to discipline that conduct. No way can it be said to immunize it. And even if they cannot bring a claim under Chapter 11, their government is free to espouse a claim of violation of customary international law against the United States Government, a claim it has not espoused, I might add, and therefore, it is completely inaccurate to claim that this conduct is somehow immunized under the American proposed interpretation. The second--

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

MR. CLODFELTER: Sure.

ARBITRATOR WEILER: Just to understand, you said that the Government of Canada would be
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1 free to bring a claim against the United States for violation of customary international outside the NAFTA?

4      MR. CLODFELTER: Yes.
5      ARBITRATOR WEILER: Outside the NAFTA?
6      MR. CLODFELTER: Yes.
7      ARBITRATOR WEILER: So even though the NAFTA says that AD and CVD conduct has to be disputed under Chapter 19, according to your construction, they would be able to circumvent that, say we just bring it under public international law normally? Just to clarify, is that the position?

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

1 Article 1901(3).

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

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

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

The second question relating to the effects of U.S. interpretation of 1901(3) relates to the question you posed, Mr. President, about the risks that by labeling otherwise violative conduct as antidumping and countervailing duty law, that somehow a state could shield itself from Chapter 11 claims, and you also mentioned the possibility of with respect to the use of competition laws and the implications of Chapter 15.

I'll make a number of points, but the general point is that a party may not avoid Chapter 11 merely by labeling its conduct as antidumping and countervailing duty law. If a matter is not genuinely subject to obligations with respect to AD/CVD law, simply calling it AD/CVD law will not shield a state from Chapter 11 implications. The Tribunal is free to look to see if, in fact, it is
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12 conduct subject to obligations with respect to
13 antidumping and countervailing duty laws.
14 So, fraudulent attempts to disguise
15 otherwise violative behavior cannot be shielded by
16 1901(3). At the same time, however, if, in fact,
17 conduct is AD/CVD law or its application, then
18 Chapter 11 is simply not available. So, even if
19 the application of antidumping or countervailing
20 duty law could be said to somehow violate the
21 substantive standards of Section A, Chapter 11 is
22 simply not available for it. I have another
23 comment to say about that in a second. That is
24 with respect to the third question of the effect of
25 the U.S. interpretation that was raised by
26 Professor Weiler, and this is a question of
27 comparative advantage among various classes of
28 investors.
29 You asked whether or not the
30 interpretations would advantage, for example,
31 non-NAFTA investors who are not party, say, to a
32 BIT, and in that case clearly there is no advantage
33 whatsoever. In both cases, both the NAFTA--the
34 NAFTA party and the non-NAFTA party would have a
35 right to seek invocation by their government of
36 diplomatic protection of the claim.
37 In fact in that case, of course, the NAFTA
38 investor is advantaged because it has recourse to
39 Chapter 19 whereas the non-NAFTA investor would
With regard to the non-NAFTA BIT investor, the first point that I wanted to elaborate a bit here is it is for us extremely difficult to conceive of how actions in the area of antidumping and countervailing duties could amount to a violation of any of the standards of Chapter 11, and I don't mean this merely rhetorically. You've asked for examples. We avidly await them because it's very difficult to see how this could occur. And as an aside let me just mention that Canfor's reliance on the ELSI case is, of course, misplaced because the issue before the ICJ in that case was not any customary international law, minimum standard of treatment question. It was the interpretation of a specific prohibition in a treaty between the United States and Italy banning arbitrary conduct. So, its consideration of what arbitrary means has nothing to do with customary international law minimum standard of treatment. It was clearly an interpretive question of a term in a treaty.

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

Having made those remarks, however, if it
were possible for conduct in the area of antidumping and countervailing duty regimes to violate the substantive obligations of Chapter 11, a BIT investor conceivably could invoke the investor-state dispute provisions of a BIT while a NAFTA investor would be barred by Article 1901(3). We do not believe that this is of any import with respect to the question before you. Mr. Weiler, you indicated you're not sure it weighs either way in terms of the interpretation question. We agree because there are many variations among BITs. It could hardly be said that the level of protection afforded is equal in every single BIT. I mean, the clearest example, of course, is that some of the United States BITs include protections for and provide investor-state dispute resolution with respect to violations of investment agreements. NAFTA does not.

So, in that respect, investors from countries, parties to those kinds of BITs have a clear advantage over NAFTA investors. We just don't think it matters, and it has no relationship to the question before you now.

Let me close by just making a couple of comments about the effects of Canfor's proposed interpretation of 1901(3). It also would have--it
would clearly have effects. One clear effect is  
that it will put Chapter 11 Tribunals on a  
collision course with Chapter 19 tribunals. The  
mechanism the parties chose to decide complaints  
about antidumping and countervailing duty law, the  
risk of conflicting decisions on issues is very  
clear. For example, the first antidumping--the  
first decision by the antidumping Chapter 19 Panel  
rejected Canfor's due process allegations that are  
common with the due process allegations here, and  
yet they continue making them here. If there is  
jurisdiction over this claim, they're going to ask  
you to rule those due process violations as  
violative of international law.

But more importantly, of course, is,  
Canfor's interpretation would overturn the  
conscious choice of the NAFTA parties to shield  
antidumping and countervailing duty law and its  
application from the disciplines of other chapters  
of NAFTA including Chapter 11, and for this reason  
you should reject it.

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

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

MS. MENAKER: Thank you, Mr. President,  
members of the Tribunal, good morning. This
morning, I will attempt to heed the Tribunal's advice, which it gave yesterday, which is that I will only respond to a few of the points that Canfor made yesterday that I think warrant responses. I will not, however, attempt to answer each and every question raised by the members of the Tribunal that may have touched upon something that I spoke about yesterday. That being said, I think it is a fair presumption on my part that if those questions remain important in your mind that you will raise them with us this afternoon.

PRESIDENT GAILLARD: That's a fair presumption. We will raise a number of questions either later this morning or this afternoon, and if we have not raised questions on which you wanted to clarify something or make a point— that goes for both sides, of course—at the end you will let us know, so there will be a sort of a general question should we have forgotten anything you want to say. So, you will certainly have ample opportunity. And I think it's wise to wait for your answers when we put it in the context of what our questions are, because we will have this opportunity shortly. So, it's a good way to proceed.

MS. MENAKER: Okay. Thank you. Now, I will just make a few brief comments regarding the ordinary meaning of Article 1901(3).
You will recall that yesterday we began our arguments discussing that ordinary meaning, and any interpretation of the Treaty must, of course, begin with the interpretation of the provision of the text which the Tribunal is, in fact, looking at. And with due respect, in this regard it is our submission that Canfor has gone about its task backwards. It has begun its discussion both in its written submissions and yesterday in its argument by focusing on the object and purpose of the Treaty and then its context, all the while presuming jurisdiction, and only at the very end discussing the ordinary meaning of the provision.

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

And I would just direct the Tribunal to the decision in the Chapter 11 case of ADF versus the United States, which we cited in our reply, and I quote from that decision briefly. Quote, we understand the rules of interpretation found in customary international law to enjoin us to focus first on the actual language of the provision being construed. The object and purpose of the parties to a Treaty, in agreeing upon particular paragraph of that treaty are found to be in the first
instance in the words in fact used by the parties in that paragraph. The general objectives of NAFTA may frequently cast light on a specific interpretive issue, but they are not to be regarded as overriding and superseding the latter. And in effect, we believe that that is what Canfor's interpretation has done. Now, as Mr. Clodfelter mentioned, he quoted from paragraph 20 of Canfor's Notice of Arbitration, and that you may recall is the same paragraph which I placed on the screen yesterday to describe Canfor's claims as all directed towards the conduct of U.S. agencies that adopted the investigations at issue. And Canfor, indeed, yesterday characterized that paragraph as the best summary of its claim.

As Mr. Clodfelter just noted, all of the conduct that Canfor has challenged in its Notice of Arbitration all concerns the administration and the application of U.S. antidumping and countervailing duty law. It is clear in our minds that any obligation imposed on the United States with respect to that law would, therefore, violate Article 1901(3). I spent some time yesterday
talking about the definition of the phrase "with respect to," and I don't intend to repeat those arguments here. I would just note for the Tribunal that in response, Canfor conceded that the term "with respect to" might have a broader meaning where it is used in other Articles in the NAFTA. It nevertheless stated quite conclusively that in Article 1901(3) that same term should be interpreted more narrowly. However, it gave no reason for interpreting the term other than in accordance with its ordinary meaning, and it gave no reason why the term in Article 1901(3) should deemed to be more narrow than the term as it is otherwise used throughout various provisions of the NAFTA. It is our submission that there is no plausible reason for giving such an interpretation to that term.

We would now like to turn to two arguments that Canfor made yesterday. One was with respect to the definition of antidumping law and countervailing duty law, and specifically our contention that that term that--excuse me, the antidumping and countervailing duty determinations at issue here fall within the term are, in fact, an example of an administrative practice, and therefore constitute antidumping law and countervailing duty law. And second, I will make a few comments on Canfor's remarks concerning the
The significance of the use of the term "law" in Article 1901(3) rather than the use of the term "measure."

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

Now, there is no definition in Article 19 or anywhere else in the NAFTA of the terms "administrative practice." There is, however, a definition of that term in the Canada-U.S. Free Trade Agreement, albeit in a separate chapter of that agreement. It's in the financial services chapter of that agreement, but I will quote that definition to you because I think it does shed some light on the common usage of that term.

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

So, in that case, when we are talking about an agency, a Federal agency that regulates
financial institutions, that agency may issue rules, and it may also grant or deny approvals for financial institutions to engage in certain conduct. Those approvals and those denials of approvals are all considered part of that agency's administrative practice, as that term is defined. We think that is the common usage of the term, and the same could be said here. The Federal agencies that are involved in administering the United States's trade laws, they too at times promulgate rules and regulations; that is part of their administrative practice. These agencies also issue and make determinations, and that, too, constitutes a form of their administrative practice.

Now, although we have been looking at the way in which we have been referring to the sentence in both Article 1902(1) and 1904(2), and have been referring to that as a definition of antidumping and countervailing duty law, I would also note that that is not a definition that is in the definitional section of Chapter 19. It is not one of the terms that is defined in the back of the chapter as a definition. So, the fact that the term may be used in a manner in Article 1904(2), for instance, does not restrict in any way that term's meaning as far as the general usage is concerned.

Now, yesterday, Canfor argued that because
Article 1904 directs an agency when issuing its determinations to look at antidumping and countervailing duty law, and included among the things that the agencies ought to be looking at, administrative practices, that the determination itself could not be considered an administrative practice. And that is simply incorrect, in our view.

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

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

They are binding on the parties in that regard.
Yesterday, Canfor opined that a determination might be considered to be an administrative practice, but only if it were binding, and again, there is no reason for importing that requirement into the definition of an administrative practice. When--the fact is, though, that when issuing determinations, the agencies, the agencies in the United States that do this, the Department of Commerce and the International Trade Commission, do take their past administrative practice into consideration, and that practice is embodied in the determinations that they have previously issued. They are supposed to apply the same methodologies in one investigation that they have applied in another, and, in fact, not doing so may lead to a ground for a challenge of a particular determination. So, although in some manner of speaking, the determinations may not have the binding effect of a judicial decision that may be binding on a particular court, they are certainly looked to as precedent in some regard, and they are followed, and that is, in fact, how the administrative practice is developed within those agencies.

I would now like to turn to the argument that Canfor made regarding the import of the fact that the word antidumping and countervailing duty law is used in Article 1901(3) rather than the term
The first thing that I would direct the Tribunal's attention to is the fact that the definition of measure that is set forth in Article 201 of the NAFTA is not an exhaustive definition. It is inclusive. It states a measure includes any law, regulation, procedure, requirement, or practice.

The same is true for the definition of antidumping law and countervailing duty law contained in Article 1902(1). That also says antidumping law and countervailing duty law include, as appropriate for each party. Neither of those definitions are exhaustive definitions. They are both open-ended.

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

Similarly, in the definition section in Chapter 11, one can see a difference drawn between an open-ended definition and a closed set--a closed
definition. You have the definition of enterprise of a party as a closed definition. Enterprise of a party means an enterprise constituted or organized under the law of a party, et cetera, whereas an equity or a debt security, the definition there is an open-ended definition it. It says, includes.

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

MS. MENAKER: Excuse me, I was quoting from some of the definitional section in Chapter 11, 1139. There are a number of other definitions there.

PRESIDENT GAILLARD: Thank you.

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

So, what is the measure that Canfor is challenging here? If you turn once again to the definition of measure in Article 201, you will see that that definition is almost identical to the
20 definition given of antidumping or countervailing duty law that is set forth in Article 1902(1).
21
22 Now, if it is Canfor's position that they are challenging the United States's antidumping or countervailing duty law and measure includes any law and therefore that is the measure they are challenging, then clearly what they are saying is law, in that sense, includes the application and the administration of that law, and they, therefore, cannot contend that the definition of antidumping law or countervailing duty law does not similarly encompass the administration and application of the law.

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

So, we see no distinction between a practice as defined as one of the definitions of a measure given in Article 201 and the administrative practice which is a definition of antidumping and
countervailing duty law in Article 1902(1).
So, it's clear to the extent that Canfor is challenging a measure in this Chapter 11 proceeding, we see no basis on which it can conclude that it has identified a measure and yet can claim that that measure does not fall within the definition of antidumping law or countervailing duty law as set forth in Article 1902(1).

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

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

argued in the case. It was not argued orally, but we have submitted with our written submissions some of the pleadings that have been made in that case, and you will see that that issue was, indeed, briefed. The United States, which was not a party
to that proceeding, did make a submission, pursuant
7 to Article 1128 in that case on this very issue,
8 and UPS responded in writing to the United States's
9 submission.
10 I would direct the Tribunal's attention to
11 UPS's response in that regard because it is
12 remarkably similar to Canfor's position in this
13 case, and I will just quote from that. UPS stated,
14 and I quote, If the NAFTA parties had intended that
15 the failure to apply their tax laws would
16 constitute a taxation measure, certainly the NAFTA
17 parties would have made this explicit in the NAFTA,
18 end quote.
19 It went on to say, quote, a review of the
20 merits is required in the present circumstances.
21 To permit the Tribunal to determine whether the
22 failure in question is a taxation failure or a more

1 general action that is discriminatory, unfair, or
2 unequal. Moreover, it would be contrary to the
3 objectives of NAFTA to permit a government to style
4 a measure as a taxation measure in order to avoid
5 an impartial and independent review.
6 It then stated later that dispute
7 settlement, and I quote, dispute settlement is a
8 basic right under the NAFTA, and so restrictions on
9 this right should not be inferred unless they have
10 been stated in clear and unambiguous language.
11 It continued that, quote, The term
taxation measures used in NAFTA Article 11--excuse me, Article 2103--does not clearly and unambiguously exclude from dispute settlement under NAFTA Chapter 11 a claim made under NAFTA Article 1105 simply because the wrongful treatment of the investor takes place in a factual context that involves taxation. There is no provision of the NAFTA that clearly and unambiguously states that unfair and inequitable treatment that would otherwise be actionable under NAFTA Chapter 11 is unactionable merely because--by virtue of a taxation dimension to the facts of such mistreatment.

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

The Tribunal noted that the parties had agreed that that claim would be withdrawn, and they said, quote, we simply note that while Article 2103 provides that nothing in the agreement applies to
taxation measures, one of the limits to that exception is that Article 1102, but not Article 1105, does apply to taxation measures, with exceptions that are not relevant.

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

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

So, we believe it is just simply
1 disingenuous for a claimant to simply argue that
2 Article 1901(3) is not a clear exception, and that
3 the exception should have been drafted in the
4 manner of Article 2103. Of course, Canfor here
5 does not have the flexibility that UPS had in its
6 other claim, because UPS could abandon the claim
7 that was clearly barred by the clear jurisdictional
8 prohibition in Article 2103 and still have some of
9 its claims survive. Canfor cannot do that here
10 because Article 1901(3), unlike Article 2103, does
11 not contain any exceptions. It bars all
12 obligations with respect to antidumping and
13 countervailing duty law.
14 I just want to make one final point. This
15 is regarding Canfor's interpretation of Article
16 1901(3). Canfor has said repeatedly that the sole
17 function of Article 1901(3) is to prohibit the
18 imposition of obligations on a party to change or
19 modify or amend its antidumping or countervailing
20 duty law, that that is its sole purpose.
21 Canfor here has brought a claim under
22 Article 1105, and as we all know, a Chapter 11

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1 Tribunal does not have the authority to order a
2 party to change or rescind its law. It may only
3 order monetary damages as a remedy.
4 So, under Canfor's theory, Canfor or any
private claimant could challenge the law itself, could make a challenge to the actual statute, and claim that the law, the statute itself, violates Article 1105. If that were before a Chapter 11 Tribunal, and the Chapter 11 Tribunal agreed, it would find that the state was liable, and it would make an award of damages.

The result of that would not be the imposition of an obligation on a party to change its law. However, the clear result of that would be an imposition on a party with respect to that law. The obligation, obviously they are having to pay monetary damages because that law was found to have violated the NAFTA. There is no reading of Article 1901(3) where one could find that an obligation to pay monetary damages because your law violated the NAFTA does not impose a requirement on a party with respect to that law. And Canfor's interpretation of Article 1901(3) falls for this reason alone.

Now, yesterday Professor Howse seemed to understand that the position that this put Canfor's argument in, that this placed Canfor's argument at somewhat--posed a problem for Canfor's argument. Professor Howse opined that if the claim was before a Chapter 11 Tribunal, if the claim was that the law itself violated Chapter 11, Article 1901(3) might have some effect in that case because Chapter
11 11, in fact, would be imposing an obligation with respect to the law.
12 Now, in saying that, Canfor itself admitted that 1901(3) cannot simply prevent the imposition of an obligation on a party to change or modify or amend its law. Their interpretation, their own expert has, in essence, disavowed their interpretation.
13 Now, I would just like to step back from this a moment because yesterday Professor Weiler asked Professor Howse a question. Professor Weiler asked if a determination was found to have been issued in accordance with U.S. law, it was found to be entirely proper and, in fact, it was challenged before a Chapter 19 Panel, and that panel found that it was properly issued, and there was nothing wrong with the Chapter 19 process, you said, well, if a Chapter 11 Panel nevertheless found that that law violated international law standards, wouldn't this be imposing an obligation on a party, in essence, to change its law?
10 And the practical effect might be that even though the Chapter 11 Tribunal can't order a party to change its law, the Chapter 11 Tribunal would have issued a decision that the law violated customary international law or international legal obligations, and a state might feel that it had an obligation to bring its law into compliance with
customary international law. So, the practical effect might be that the state actually did change its law.

But even if that was not the practical effect and the effect was only that the state paid damages, that still would be no less an imposition on a party with respect to its antidumping law.

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

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

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

MR. McNEILL: Good morning, Mr. President, members of the Tribunal. I will make some very brief comments this morning about Article 1901(3)'s context and the object and purpose of the NAFTA,
and my comments are in response to issues raised by Canfor's counsel yesterday as well as some issues raised by the Tribunal.

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

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

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

With respect, Canfor misses the point.

The point is that Canfor is seeking recovery of the same duties with interest in both proceedings. The
possibility that double recovery could ensue in both fora is incompatible with the NAFTA's objective of creating effective procedures for the resolution of disputes. It is additional evidence as well suggesting the parties did not intend or consent to subject themselves to the burden of defending multiple actions with respect to the same measures and face the potential of double recovery.

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

Now, in terms of the remedies available under Chapter 11 and 19, in Chapter 11 it is undisputed that a tribunal can award damages. With respect to Chapter 19, as Mr. Clodfelter explained in his presentation on the facts yesterday, binational panels are authorized to uphold determinations or remand them, quote, for actions not inconsistent with the panel's decision.

Now, Article 1904, paragraph 14, subparagraph (a), expressly contemplates the possibility that the effect of a binational panel's ruling is the refund of duties. It provides that, quote, Each party shall amend its statutes or
9 regulations to ensure that existing procedures concerning the refund with interest of antidumping or countervailing duties operate to give effect to a final panel decision that a refund is due.

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

Now, ironically, yesterday, Canfor referred to the Tribunal's decision in the Occidental Exploration versus Ecuador case. The transcript preference is page 227. In that case, the Tribunal's solution to the problem of double recovery was to enjoin the other proceedings to avoid the risk of double recovery, the very solution that the United States advocates here.

The Tribunal stated, and this is at page 73, paragraph 10, that, quote, In order to forestall any possibility of double recovery, the Tribunal directs the claimant to cease and desist from any local court action, administrative proceedings, or other actions seeking refund of that paid, and holds that any and all such actions and proceedings shall have no legal effect. I will now turn to the issue of parallel proceedings. Yesterday, Canfor discussed at length
the SGS versus Pakistan case and other similar cases involving parallel claims under a BIT, and before domestic courts. In reliance on those cases, Canfor argues that the proceedings under Chapter 19 do not deprive this Tribunal of jurisdiction because the Chapter 19 proceedings involved different causes of action and different laws. Canfor's reliance on this line of cases is misplaced.

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

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

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

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

Now, according to Canfor, the relief available in Chapter 19 is akin to extraordinary relief, not involving the payment of damages. In its claims and under that chapter, therefore, fit within the exception. This argument is without merit. The exception to the waiver requirement under Article 1121 does not apply to Chapter 19 proceedings. It applies, quote, to administrative
The Chapter 19 Panels are neither administrative tribunals nor courts. Had the parties intended to include Chapter 19 binational panels in that exception, Article 1121 would say so.

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

I will turn now to the issue of object and purpose. Yesterday, Canfor again accused the United States of focusing narrowly on only one object in the NAFTA, and the transcript reference is at page 129 beginning on line five. Canfor argues that all of the objectives of the Treaty infuse all of the provisions of the NAFTA, and the particular objectives cannot be assigned to particular chapters or particular provisions. And Canfor read to you a long list of objectives in the preamble and in Article 102.

Canfor contends that these objectives somehow support its interpretation of Article 1901(3), but the big question is left unanswered by Canfor: How would allowing Canfor a second forum, the wrong forum, to bring its claims promote the
Treaty's goal of free trade? It wouldn't.

Mr. Landry also made a point of reading two of the objectives set forth in Chapter 19 itself. They are set forth in Article 1902(2)(d)(ii). Now, I would like to revisit that provision because I think it informs the debate. It provides that the object and purpose of the agreement is to establish fair and predictable conditions for the liberalization of trade, quote, while maintaining effective and fair disciplines on unfair trade practices, end quote.

Now, that part of the context, that part of the object and purpose in Chapter 19 contradicts Canfor's argument that the NAFTA parties consented to submit antidumping and countervailing duty claims to the investment chapter. It would arguably compromise the ability of the NAFTA parties to maintain effective disciplines on trade if their antidumping and countervailing duty determinations were subject to de novo review by arbitration panels under Chapter 11. That is not the standard that applies in domestic courts of the parties, and it is not the standard that the parties intended to have apply to their antidumping and countervailing determinations in subjecting those determinations to review under the NAFTA.

Finally, I'll briefly address one issue relating to the effective resolution of disputes.
We heard from Canfor's counsel more than once yesterday that Chapter 19 Panels have--that Chapter 19 Panel proceedings have been ineffective and that an effective resolution of Canfor's grievances demand that it have access to Chapter 11.

Mr. Howse, Professor Howse, excuse me, if I understood him correctly, intimated that Canfor commenced this arbitration because it was not confident that it could compel the refund of duties that it seeks in Chapter 19. He stated, quote, we just don't see that we have another remedy available under the NAFTA, so we are here today making a claim that is under Chapter 11. And the transcript reference is page 230, lines six through 13.

Now, this is a post hoc interpretation of Article 1901(3). Recounting subsequent events in the Chapter 19 proceedings does not provide evidence of what the parties intended in drafting Article 1901(3). It is irrelevant to the interpretive exercise before this Tribunal today. Moreover, it is based on a faulty factual premise; namely, that the Chapter 19 proceedings have been ineffective. The Chapter 19 Panel issued a--a Chapter 19 Panel issued a third remand to the International Trade Commission in the material injury proceeding on August 31, 2004.

Following the third remand, the
International Trade Commission issued what it perceived to be the only determination consistent with the panel's decision, which was a negative threat finding. The Chapter 19 Panel's material injury decision is now the subject of an extraordinary challenge under Annex 1904(13) of the NAFTA.

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

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

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

MR. CLODFELTER: Yes, it does,

Mr. President.

PRESIDENT GAILLARD: Thank you.

Mr. Landry and Mr. Mitchell, do you want to pause for 10 minutes or something so that you can tell us how you want to proceed, you want to answer, and what kind of time frame have you in mind?

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

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

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

MR. LANDRY: If I can just have one minute
to speak to Professor Howse, and then we will go
right into his response, and then we will take a 15
or 20 minute break, if that's--

PRESIDENT GAILLARD: Please do.

(Pause.)

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

Mr. Landry?

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

PRESIDENT GAILLARD: As agreed, yes.

SURREPLY STATEMENT BY THE CLAIMANT

PROFESSOR HOWSE: Mr. President, I believe
that on several points which have been raised this
morning by the United States, it appears that the
United States has misunderstood some of the
submissions or responses I made to this Tribunal
yesterday, and I would very, very quickly like to
return to those specific points that were made this
morning in connection to what I said yesterday.

First of all, I want to emphasize that
Canfor's claim is not that 1901(3) is meaningless
or that it doesn't have some application. As
Mr. Mitchell argued yesterday, it's an interpretive
provision. The word "construe" is there, and it
does impose an obligation on a Treaty interpreter interpreting Chapter 11 just as it imposes an obligation on a Treaty interpreter interpreting any other chapter of NAFTA except 19; right--

So, the question is what of a situation where the violation of the standards of Chapter 11 flowed inexorably or mandatorily from the law itself as opposed to its administration? In that case, I opined, since 1901(3) is an interpretive provision, and we are not suggesting it's a nullity by any means, in adjudicating the merits the Tribunal might have to refer to 1901(3) if Canfor were deemed to be making any claim that suggests that it's the law itself within the meaning of Chapter 19 that is contrary to the standards of Chapter 11.

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

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deal with the questions on the Byrd Amendment.

So, I simply want to make clear that our claims are based upon the administration of the law, not the law itself. On the merits, should the Tribunal have concerns about 1901(3) as an interpretive provision, then we will address those concerns at length and show how our claims flow from administration and not from the face of the law. But what we are addressing in this proceeding is the United States's motion, its submission that 1901(3) is a complete jurisdictional bar to any claim under Chapter 11 of any kind, even one that is a claim that arises out of conduct in the administration of law as opposed to the law itself.

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

So, even if—even if somehow Chapter 19 provided an effective remedy for the return of duties, it would still not provide reparations for
The third point concerns the question of whether a Chapter 19 binational panel is an administrative tribunal or court for purposes of the provisions in Chapter 11 that relate to waivers. Again, we have raised these provisions as part of an overall interpretation. We are not pleading them in this case with respect to the issue of the validity of the waiver because that has been explicitly removed, as we understand it, from the ambit of this proceeding. And clearly, to the extent that the United States has reserved that as an issue that it might plead on the merits, we may have to get into it in more detail.

Very briefly, though, it is our view that a Chapter 19 panel is an administrative tribunal or court for purposes of this provision, and again, it needs to be when the issue of the waiver is actually argued, if it's argued by the United States, we will brief it thoroughly. This relates to certain considerations of municipal law, including constitutional law where, if a situation arose where a Chapter 19 Panel could not be considered, for example, a court, there might be
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5 serious constitutional issues, and at least the
6 U.S. municipal system as to the possibility of
7 enforcing a waiver because you would be in effect
8 waiving possibly any possibility of judicial
9 review.

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

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

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

8 PROFESSOR HOWSE: Mr. President, I have to
9 be careful here because I'm not an expert in U.S.
10 constitutional law, but I have followed the
11 constitutional issues in both Canadian and American
12 law that have arisen around certain provisions of
13 NAFTA, and constitutional issues arose and were
14 widely debated in the United States concerning the
15 feature of NAFTA that would replace domestic
16 judicial review with binational panel review, in
17 effect, as we've already heard, cutting off access
18 to the U.S. courts altogether in these matters.
19 And my understanding is that that, under
20 U.S. constitutional law, would have raised issues
21 about guarantees of review by a court that are
22 understood to be in the Constitution and not

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

PRESIDENT GAILLARD: Thank you, Professor Howse. In fact, my question may be unfair because at the same time I say that we are not going to decide on this at this stage. It is not ripe. It has not been briefed. So, I just wanted to get a flavor of what you had in mind, but I don't think we should pursue the debate on this particular aspect. If we need to, and we will get there, we will give the parties an opportunity to fully express their views, but now that I have engaged into that debate a little too much, now maybe the other side would like to say a word, but frankly be short because I don't think it's relevant, just for the curiosity of the Tribunal. I confirm for the record that we are not going to decide that at this stage as agreed by the parties earlier. So, it's only for my curiosity, I would say, that I ask the question, and to know what's coming up.

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

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

PRESIDENT GAILLARD: Clarification: I don't take that as expert testimony or anything like that. It was a personal view, and I don't think we should really make more of it.
MR. LANDRY: Mr. President, hopefully that maybe that we can stop the debate by this. It is not before the Tribunal, as Mr. President has said. Take it as a given that if this matter is briefed, the interpretation of that provision within the agreement by Canfor will be that, indeed, the binational panel is an administrative Tribunal or court as 1121 envisages it. That will have to be briefed, obviously. It sounds like the U.S. is taking the position it is not, but that's not before us.

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

Ms. Menaker.

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

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

So, that issue, we submit, is, indeed, before the Tribunal, so we just want the position to be clear that we are not asking for dismissal on the basis of Article 1121, but we are asking you to take into account the correct interpretation in Article 1121 insofar as it supports, we contend, our submission that the parties did not envision duplicative proceedings of this nature.

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

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

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

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

PRESIDENT GAILLARD: So maybe we should start now. Make use of the 15 minutes. No break for the time being. We may have a few questions, and we will start with those which have to do with—although it's hard to segregate—points which were addressed by Professor Howse, and then we will see what to do afterwards. We may have a break.
afterwards, and then you can wrap up the rest of your rebuttal.

So we'll start with the questions now.

Mr. Harper has a question to start with.

ARBITRATOR HARPER: Thank you,

Mr. President.

Professor Howse, I wanted to explore two areas with you briefly, if I may. The first, and I just to want make sure I understand what you said a few minutes ago. The first has to do with the Byrd Amendment. Is it Canfor's position that it is not challenging the Byrd Amendment in this proceeding as a statute?

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

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

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

MR. LANDRY: Let me just go back to your 1 question, Mr. Harper.

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

ARBITRATOR HARPER: I'm comfortable with 5 whatever the position is of Canfor. I'm just 6 trying to find out what it is.

PRESIDENT GAILLARD: I guess it's for lead 7 counsel to make a position as to what the request 8 is, and I think it's clear in writing, and we have 9 a few clarification questions, but we don't want to 10 engage into this debate among counsel before this 11 Tribunal.

MR. LANDRY: Mr. Harper, and I will get 12 the specific references. We have dealt with the 13 issue of the Byrd Amendment in our written 14 material, but let me just say this: We do not, and 15 I think it--I hope it was made clear yesterday, we 16 are not challenging the Byrd Amendment from the 17 perspective of whether or not it is--it is 18 domestically a violation of the domestic law. The 19 question is the Byrd Amendment and the way that
Professor Howse has talked about the effect that the Byrd Amendment had on the conduct of officials in initiating the investigation originally at this point in time is the key aspect of the claim at this point. The pleadings obviously speak for themselves, but I will get you more direct references to the written material at a later point. But I think for the purposes of your question now, I think hopefully that will answer your question.

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

PRESIDENT GAILLARD: Yes, you may.

ARBITRATOR HARPER: Professor Howse, and I just want to be sure I understand your position and by inference the position of Canfor. I understood you to have said earlier this morning that Canfor's allegations are based on claims on the administration of the law and not the law itself. I'm not sure what the antecedent of the law itself was at this point, whether it was the Byrd Amendment or whether it was other law that is deemed to be antidumping and countervailing duty, but I want to find out from you, if I may, the distinction you drew. That is to say, that Canfor's claims are based upon the administration of the law and not law itself. What did you mean?

PROFESSOR HOWSE: Well, very simply that
the conduct that we have presented in our Statement
of claim as allegedly violating the standards of
treatment in Chapter 11 of NAFTA is not conduct
that is mandated or is not the statute itself.
It's rather decisions of a discretionary nature
taken by officials in the application or
administration of the laws.

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

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

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

But Canfor's claim, which is based on the
words of 1901(3), in their context, in other words,
in the context of Articles 1901 through 1904
particularly is that what 1901 addresses is
obligations that would involve doing something or
not doing something with respect to the substance
of the law. Our complaint is based on conduct, and
if officials were to conduct themselves in
other--in another proceeding entirely properly,
then under Chapter 11--I mean, there would be no
need to alter the law as it's written in order to
ensure that in the future this doesn't happen.
And this relates to a more general point.
We are not challenging the U.S. CVD/AD system. We
are not saying that Chapter 19 Panels are never
effective. This is a very special case. The
history of what happened under Chapter 19 and this
case and the history of what has happened to the
investor under the decisions and actions of U.S.
officials is extraordinary, and we will prove that.

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

PRESIDENT GAILLARD: Thank you.
Professor Weiler.
ARBITER WEILER: Professor Howse, I
thought that the argument made yesterday might have
been of potential consequence; namely, that Chapter
11 itself in 2021 contemplated parallel
proceedings, and I thought I understood correctly
what Mr. McNeill was arguing this morning, that
Chapter 19 proceedings were not the kind of
extraordinary relief that was mentioned in the
waiver provision of Chapter 11. Not that Chapter
19 wasn't a court, but that the kind of relief
sought in Chapter 19 proceedings were not the kind
of extraordinary relief that was contemplated by
this parallel thing, and I'm just not sure that you
actually answered that point directly. And even if
that's not what they said, then take it as a
question from me.

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

PRESIDENT GAILLARD: 1121.

PROFESSOR HOWSE: Yes, I know the
number—it's just that I'm—thanks—I'm trying to—
So, the language here is except for
proceedings for injunctive, declaratory, or other
extraordinary relief not involving the payment of
damages, and it is our view that this expression
needs to be read as a whole. In other words, the
proceedings that are not exempted are proceedings
for injunctive, declaratory, or other extraordinary relief not involving the payment of damages.

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

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

PRESIDENT GAILLARD: Of course.

ARBITRATOR WEILER: I found also potentially of consequence the following argument I understood Ms. Menaker to make. And again if she did not make it quite in that way, then please take it as a question from me. She says, if I understood correctly, even if it's true that there might be conduct--there might be decisions or determinations or administrative actions which are not mandated by antidumping law, that the obligation of a member such as United States, Canada, or Mexico to appear before a tribunal under Chapter 11 would be an obligation in respect to that law. Even if the complaint concerned a determination, I don't think she concedes that
point, but I think she was telling this Tribunal, even if you accept the distinction that Canfor seems to be making that there is a difference, antidumping law means normative stuff and individual determination, et cetera, is not covered. The obligation to come and litigate that would be an obligation in respect to antidumping law. And I think that might be an argument of some consequence, and I wonder if you wanted now to say something about that.

PROFESSOR HOWSE: Professor Weiler, I will be very brief, and my colleagues will address this, because I have to leave, but very briefly, the language in 1901(3) obligation with respect to AD and CVD law in our submission has to be read in the context of what Chapter 19 says about a party's rights and obligations with respect to its AD and CVD law, and those obligations have been discussed, and they relate to the extent to which you can retain the law, and the extent to which and under what conditions you can amend it.

So, our interpretation is contextual, and so we don't think it has anything to do with whether you can oblige a NAFTA party to litigate, and that relates to a consideration we've raised several times which is that where the NAFTA parties wanted to ensure that they were not under an obligation to litigate in certain dispute
settlement processes, they used language that went
to the exclusion of forum or the exclusion of the
chapter under which that dispute settlement process
would be found.

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

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

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

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

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

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

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

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

PRESIDENT GAILLARD: That's probably best.

Thank you.

So, now we will have a 15-minute break, so
you can collect your thoughts and present an
answer, and then we will have the questions and
answers per se. We are adjourned for 15 minutes.

(Brief recess.)

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

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

PRESIDENT GAILLARD: Certainly. Please go
ahead.

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

I would like to make Canfor's position
fairly clear on this point. Whether or not the
extraordinary challenge that is happening in
respect of the ITC Chapter 19 Panel decision is
successful, Canfor's submission is the approach
taken by the U.S. in this case, specifically the
ITC to respond to, has been nothing short of
extraordinary. You only have to take a look at the
decisions by the Chapter 19 Panel and the remand
decisions by the ITC to understand why I use such a
word as extraordinary because the ITC and, quite
frankly, the DOC in their remand decisions have in
my submission improperly and inappropriately
ignored the clear directions of the chapter panel,
the Chapter 19 Panel decisions.

Now, what happens as a result of that?
The result of that is it effectively calls into
question the effectiveness of the Chapter 19
procedure, per se. We are dealing with at least
three times that it went back to the ITC, and
Mr. Mitchell said that the ITC then eventually put
in a decision consistent with the ruling of the
Chapter 19 Panel. To say they put it in grudgingly
is an understatement. That type of an attitude,
that type of an approach, if you look at it from
Canfor's perspective, is just a totally ineffective
remedy, and it will not at any point in time under
the Chapter 19 Panel process provide an effective
remedy for the injuries that have been suffered by
Canfor's operations in the United States up to the
time when we finally get a result, even assuming
it's successful, assuming that the extraordinary
challenge claim is unsuccessful. There will not be
an effective remedy to offset the serious injury
that has been suffered by Canfor.

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

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

other damage that will be alleged--

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

MR. LANDRY: Yes.

PRESIDENT GAILLARD: Thank you.
MR. LANDRY: But here is the issue, and again, it somewhat relates to the 1121 argument and somewhat relates to the debate that we had yesterday on double recovery. There is no jurisdiction in the Chapter 19 Panel to order a refund of the duties. The only jurisdiction that's in the Chapter 19 Panel is to either affirm or remand, to ask--effectively ask the decision maker to make a decision not inconsistent with its decision. It cannot order refund. It cannot order any monetary award. If any monetary award is going to come out of the Chapter 19 process, it will be as a result of, in my submission, it will be as a result of a determination that's made by a Chapter 19 Panel which effectively vacates something.

Let's assume for the moment the order. Which means that the duties have been collected illegally, and it will be the DOC who holds these duties, who will be the one that will ultimately refund not the Chapter 19 process--sorry, the Chapter 19 Panel because it doesn't have jurisdiction to do that. And I think you will recall Professor Howse dealing with that issue.

Now, to add one little layer to that, having said that, and therefore in our submission that clearly makes a differentiation between the claim for damages that are being made here and the claim for extraordinary relief in effect in the way
of a declaratory judgment from the panel in a
Chapter 19 process, if there is an additional
element which may result somehow, whether it's
because of the ITC, DOC determinations themselves,
not the Chapter 19 Panels who can't do this. If
there is such a possibility that there might be
double recovery, that is where Occidental kicks in,
and the position that we are taking.

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

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

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

PRESIDENT GAILLARD: Mr. Mitchell, please
proceed.

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

I think I have five points. The first has
been averted to in various different ways, and we
started yesterday morning with a discussion of what
the issue was before this Tribunal, and then in
various contexts we have strayed into discussions
about things that we submit are simply actually not
before the Tribunal today. I understand the
1 discussion we had on Article 1121 just before the
2 break, but I think it goes beyond that.
3 And you heard this morning, and indeed, on
4 the first day you heard from I believe it was
5 Mr. Bettauer, there was a discussion about whether
6 these were investment measures, and then this
7 morning this was revisited by Mr. Clodfelter.
8 Whether what is an issue in the Statement of Claim
9 and the memorials are measures relating to
10 investment as that term is understood in Article
11 1101 is simply not before the Tribunal on this
12 motion. That's a matter that was expressly
13 reserved to be argued later. It's not before the
14 Tribunal.
15 The sole issue on this motion is whether
16 what Canfor complains of, namely arbitrary,
17 politically motivated, egregious conduct which this
18 Tribunal must assume has occurred, is whether that
19 conduct cannot be the subject of a Chapter 11 claim
20 simply because it touches in some way on the AD or
21 CVD regimes and therefore is excluded by Article
22 1901(3). That is the simple issue for this

1 Tribunal. And again on the point you have to
2 assume that the facts are true, I simply refer you
to the Methanex decision on jurisdiction and admissibility, which is in our material, where it makes clear at, I believe, paragraph 112, paragraph 50 of the decision the Tribunal is bound to accept the facts as true.

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

Well, it's our submission that the Tribunal cannot answer that question in the abstract. Here, there is a plea on the face of the pleadings that the regime is being administered in a politically motivated, predetermined way, arbitrarily and abusively with the harm to intent investors such as Canfor. The Tribunal cannot simply determine on this application that the conduct of which we complain is properly labeled AD or CVD conduct. Indeed, it's our submission that at the minimum what Mr. Clodfelter has conceded is
Third, Mr. Clodfelter raised some issues concerning, and I believe that this is again back to the President's question from yesterday, whether Canfor's claim is tied solely to the Statement of Claim, and then he made some comments concerning the strictures in respect of international claims as opposed to commercial claims, and submitted that the conduct--the Tribunal would only have jurisdiction with respect to measures specifically articulated in the pleadings. I have several responses. The first is that this simply is not an issue in this motion. Our plea is sufficiently made, whether it is confined to the Statement of Claim with the memorials being considered as evidence in support of the intent Canfor has pleaded, or whether the entirety of the conduct alleged in the pleadings is viewed as the substance of the claim, but again, that is not this motion. For clarity, Canfor intends to rely upon all of the United States's conduct up to the date of the hearings on the merits as the basis for its claim. Second, if the allegation being made by Mr. Clodfelter this morning is intended to be some sort of allegation that there is some inadequacy in Canfor's pleading, again, that is not this motion, and it would fail in any event.
This arbitration is brought under the provisions of the UNCITRAL Rules. The UNCITRAL Rules set out the manner in which a case is articulated before a tribunal. It starts with a Statement of Claim which has certain minimum standards of pleading. The requirement of the UNCITRAL Rules is Article 18(2). And it is elaborated during the course of the proceeding by subsequent statements and subsequent documents and evidence provided to the Tribunal.

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

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

The third response in respect to this, these comments made by Mr. Clodfelter concerning the scope of Canfor's claim, is that we are dealing
with events subsequent to the claim, things like the treatment of the ITC and the various conduct that has occurred after the pleading. And Mr. Clodfelter made the observation that you have to have a claim in respect of the specific measures, and the NAFTA is quite clear on that. In making that submission, Mr. Clodfelter is ignoring the fact that a previous NAFTA Chapter 11 Tribunal has specifically dealt with that very question, and the reference--and I'm sorry I didn't anticipate this point coming up--the reference for the Tribunal is the Pope and Talbot arbitration, and there was a specific motion, and it's available on just about everybody's web site. The motion was the award concerning the motion by the Government of Canada respecting the claim based upon the imposition of the super fee. And just for reference, the date of the Tribunal's ruling was August 7th of 2000.

And to put this case into context, what was at issue in the Pope and Talbot case was the administration of the softwood lumber regime in Canada in respect to a claim brought by an American company, Pope and Talbot, alleging that the claim had been or that Pope and Talbot had been treated
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2 in either a discriminatory way or in a way that
3 violated the minimum standard, and the ultimate
4 holding was the 1102 claim was dismissed, but on
5 certain grounds the 1105 claim was allowed.
6 In the course of that proceeding,
7 subsequent to the claim being brought, Canada
8 enacted a device known as the super fee, and this
9 was an additional export tax--export fee imposed
10 upon lumber companies' exports from Canada to the
11 United States beyond a certain value, and the
12 argument was that this was discriminatorily
13 impacted upon Pope and Talbot, the American
14 investor. That fee was imposed two years after the
15 arbitration was launched.
16 Canada argued that because the fee was
17 not, and could not have been, specifically
18 mentioned in the Statement of Claim, it couldn't be
19 considered by the Tribunal, and the paragraphs that
20 I would ask you to reference in the Tribunal's
21 decisions are paragraphs 22 through 25, and I will
22 just read for you paragraphs 24 and 25. After

1 setting out the background, they say (reading):
2 Based upon any fair reading of the claim, it is
3 patent that the investor was challenging the
4 implementation of the Softwood Lumber Agreement as
5 it affected its rights under Chapter 11 of the
6 NAFTA and that as the regime changed from year to
7 year, those effects might also change. In other
8 words, the claim asks the Tribunal to consider the 
9 regime not as a static program, but as it evolved 
10 over the years.
11 And then the Tribunal goes on, "For these 
12 reasons, the Tribunal concludes that the investors' 
13 contentions regarding the super fee are not a new 
14 claim, but relate, instead, to a new element that 
15 has recently been grafted on to the overall regime. 
16 In this respect, the super fee is akin to the 
17 various changes in allocation methodology, use of 
18 discretionary quotas and the like that have marked 
19 the regime since its inception."
20 And so, if you look at the investor's 
21 Statement of Claim, and this is simply by way of 
22 example, the paragraphs 107 to 109, for instance,

1 make the point that the Government of the United 
2 States has for over 20 years engaged in an ongoing 
3 course of conduct with the objects we allege, of 
4 causing harm to companies that are investors with 
5 investments such as Canfor, and it goes on to 
6 relate the United States continuing changes, 
7 modifications, otherwise interpretation, improper 
8 interpretations of its law causing significant 
9 economic harm to those in the position of Canfor, 
10 and describes the latest of the ongoing actions. 
11 So it's clear from the Statement of Claim 
12 that what Canfor is contending relates to the 
13 ongoing pattern of conduct of the United States.
Ms. Menaker made some submissions regarding administrative practice. We stand on the submissions made previously, and I'm not going to elaborate upon them here.

With respect to the UPS case, Ms. Menaker again referred to various of the submissions. I would simply refer you to the United States's reply on jurisdiction, the authorities at Tab 10 pages 156 and 157, where the counsel for Canada says to the Tribunal--this is an extract from the transcript--"Before I begin, I understand that my friends have agreed to drop the allegations regarding Canada's failure to enforce its goods and services tax, so perhaps Mr. Carroll can confirm this for the record." Mr. Carroll, who was lead counsel, said: "That's almost right but not quite. We are abandoning our claims with respect to goods and services taxes only insofar as they relate to paragraph--to Article 1105 of NAFTA." And that's the extent of the argument.

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

And lastly, in my reply, I just want to elaborate on what Professor Howse was saying in
response to Professor Weiler's last inquiry about whether participation in an arbitration is an obligation with respect to the law. And I translate that to a question whether a consequence imposed upon a party, i.e., the participation in the arbitration—because they engaged in arbitrary and abusive treatment of an investor in a matter that is connected with the AD or CVD field, is what is meant by an obligation imposed upon a party with respect to their law.

And it's our submission that the mere fact that there is a consequence by virtue of how the party has administered their AVD (sic) laws, indeed the measures that they have carried out, and again, I note that the provision doesn't use the word measures, it uses the word law, but simply imposing a consequence upon the party by virtue of the abusive use and the abusive discretion that's granted to the United States officials under their law is not the imposition of an obligation with respect to that law. It is outside of that field. So, those are the submissions of Canfor in reply, and now we look forward to the Tribunal's questions.

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

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

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

So, I would like to understand better your answer to that because you said it's a consequence. But I think their point is a point of mere interpretation of NAFTA, if I may. So they say: since the obligation to arbitrate is an obligation "with respect to" within the meaning of Article 1901(3), it has been the intention of the NAFTA drafters to exclude any arbitration which has to do
What do you have to answer to that? I don't quite understand your argument as to the consequence. So maybe you want to pause on that.

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

Let me try and start with a response. I have urged upon the panel an interpretive approach that starts from the Vienna Convention, looks at what we say the plain meaning is, looks at the immediate context in 1901 and 1902 and 1904, and looks at the surrounding context of the different drafting of other provisions. And we argue from that that the word--the phrase "obligations with respect to CVD law" takes its plain meaning from or its ordinary meaning from examining all of those factors.

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

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1 I don't know that I can take it much
2 further than that.
3 PRESIDENT GAILLARD: And you include in
4 the consequences the obligation to arbitrate
5 because it's a consequence of what you characterize
6 as the abusive conduct; is that correct?
7 MR. MITCHELL: The obligation to arbitrate
8 is a consequence of Canfor having brought a Chapter
9 11 arbitration. The United States would say that
10 is the consequence that is imposed upon them by
11 virtue of us having done so, and that is the
12 consequence that is with respect to their law.
13 PRESIDENT GAILLARD: Okay. Can I ask you
14 another question. It has to do with the update of
15 the Statement of Claims. You make two points. One
16 is that we can view it in two different ways. We
17 can see that if we are narrow in our interpretation
18 of what is admissible before us, we take the Notice
19 of Arbitration and Statement of Claim, and the rest
20 is only proof of those facts stated in
21 there--that's a narrow interpretation. And then
22 you say you could also have a broader interpretation which is to follow the Pope and
2 Talbot case law. You say: when it's a continuation
3 of the same course of conduct, you're not barred to
4 judge more of the same thing, if I may put it in a
5 colloquial way; right?
6          MR. MITCHELL: Yes.
7          PRESIDENT GAILLARD: I focus on the first
8 aspect of the defense, which is--the first of your
9 two approaches to that problem.
10          Can I conclude from this statement that
11 your position is that in any event, the subsequent
12 pleadings are, in essence, the evidence of the
13 allegations which you made in broad terms anyway in
14 the state of claim, i.e., a pattern of abusive and
15 discriminatory conduct. Of course, I'm not
16 prejudging the reality of this. I'm just following
17 your argument that we have to take that as is for
18 the purposes of the jurisdictional claims or
19 objections; right?
20          MR. MITCHELL: Yes.
21          PRESIDENT GAILLARD: So, you say it's all
22 contained in there, and that's more evidence of the
same thing.

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

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

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

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

The Methanex panel certainly addressed that question and concluded that they were confined to issues strictly of jurisdiction as opposed to admissibility without getting into the debate as to
where you would draw that line, and concluded that
unless the claims were, and I think the words used
were incredible, unless the claims alleged were
incredible--frivolous was another word used--that
the allegations were assumed to be true, and then
the claim would proceed.

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

PRESIDENT GAILLARD: Thank you. That's
clear.

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

ARBITRATOR HARPER: Thank you,
Mr. President.

PRESIDENT GAILLARD: You have a comment?

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

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

Let's discuss the procedure. The idea is
that on each question both sides will have an
opportunity to speak. You may or may not want to do it. I'm not asking the parties to be systematic, and we will not assume that you agree if you say nothing on the particular issue. That's obvious, but you may choose to answer.

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

PRESIDENT GAILLARD: Please do.

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

MR. CLODFELTER: Yesterday, it was asked whether or not Canfor intended to supplement or update or amend its claim by the allegations it has made in its briefs on this issue. We still have never heard an answer to that. Now, surely they can take a position on that. They have to know what their own intention is. So far we have not heard any representation by counsel that Canfor is changing their claim.

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

So, we assume the claims as stated in the Statement of Claim, and whatever else they say can be taken into consideration, of course, but the
conduct at issue is that stated in the Statement of
Claim.

PRESIDENT GAILLARD: It seems to me that
the record is pretty clear on that; I mean on that
issue. I'm not saying that what you say is right,
but I think the determinations of both parties are
clear, at least as far as the Tribunal is
concerned.

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

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

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

Now, what he left out was the obligations
1 that are contained in Article 1904, and those are
2 the obligations to submit one's AD/CVD
3 determinations to binational panels who are going
4 to review them under the standard of review set
5 forth in Article 1904, and that is not an empty
6 obligation. It is an obligation of great import.
7 We have many free trade agreements with
8 other countries, many bilateral investment
9 treaties, many other international instruments with
10 other countries. This system is unique. The
11 United States has undertaken this obligation with
12 respect to Canada and Mexico, and have undertaken
13 the obligation to submit our determinations to
14 binational panel reviews. That is most certainly
15 an obligation.
16 And if you take a look at the statement of
17 administrative action at page 194, that instrument
18 describes, it says, and I quote, the centerpiece of
19 Chapter 19 of the NAFTA is the procedure described
20 in Article 1904.
21 So, I think that really answers the
22 question that one of the obligations in Article

1 19--in Chapter 19--is the obligation to submit the
2 determinations to binational panel review and so,
therefore, once you accept that that is an obligation, I don't see how you can say that the obligation to arbitrate pursuant to the procedure set forth in Section B of Chapter 11 is not also an obligation that is imposed with respect to that law.

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

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

ARBITRATOR WEILER: Ms. Menaker, I also think I understand you. I hope I understand your position. To what extent is the last argument you made--to what extent would I have to find it compelling based on also accepting your other argument that the word law includes individual determinations? And I'm not saying that I will do this, but let's assume that the Tribunal buys into the Canfor argument that law in 1901(3) refers to normative, precedential, but doesn't, for example, refer to individual arbitrations, to individual determinations, and I'm not saying that we will find that, but to what extent is this last argument you make dependent on agreeing with you also on that additional point?

MS. MENAKER: It is not dependent on that. If Article 1901(3), and I think this also answers a
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9 question that was that was raised by the President yesterday. When I put up the slide interposing the words to amend in front of instead of obligations and changed the word law to statute, even if Article 1901(3) had read no party--no provision of any other--

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

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

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

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

MR. MITCHELL: No further comment.

PRESIDENT GAILLARD: All right.

Conrad, do you have further questions?

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

I just put this question generally to Canfor. I don't know which of you, Messrs. Landry or Mitchell would like to respond, and consider that as true for all the questions I wish to put.
I'm wrestling very hard to understand exactly what is before us, and I've heard the discussion about the Statement of Claim and the additions that are contained in the memorials submitted by Canfor, but maybe I could bring this point to a head by putting this precise question which may admit of a yes or a no answer. It may not, but I throw that out as perhaps a way of focusing the matter.

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

MR. MITCHELL: Yes.

ARBITRATOR HARPER: You would say that was error?

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

Claims, to the extent we talk about what a claim is rooted in, have two aspects. One is the legal regime or normative standards that apply to the evaluation of the claim, and the other is the factual matrix. We think about a decision or a determination or an award as being the application of a legal standard here rooted in Chapter 11 of NAFTA to a set of facts the evidence evaluated by the Tribunal to determine what did or did not
So, when you talk about what the claim is rooted in, the distinction is between the legal obligation here, Chapter 11 and the Chapter 11 regime, and the factual matrix which has a connection to the antidumping sphere. And I focus on sphere because it is far broader. What you look at when you look at what the claim is rooted in is the conduct of which you complain, and you apply the Chapter 11 standards to the chapter—or to the facts which the Tribunal finds after a hearing which here we define as abusive, politically motivated, predetermined conduct, just to put it into a narrow focus. And that, we say, that's not rooted in antidumping or CVD law.

ARBITRATOR HARPER: Let me press you on that, Mr. Mitchell, because I'm not sure I understood what you just said. When you say it's not rooted, the conduct of which you complain, in antidumping and countervailing duty law, are you saying that because you don't believe the conduct is legal, or because the conduct has nothing to do with antidumping and countervailing duty law?

MR. MITCHELL: I wanted to try and clarify
2 this. As has been made clear, the conduct
3 complained of relates in many respects to the
4 discretionary actions of the United States
5 officials who do carry out responsibilities under
6 the AD and CVD regimes. That is clear. That
7 conduct that we complain of, we say, is unlawful at
8 the international level under Chapter 11.
9 So, it arises from or has a connection to
10 that--the AD and CVD sphere. That is clear, and it
11 relates to in many respects the discretionary
12 action of the officials in that sphere. But the
13 claim relates to the Chapter 11 standard applied to
14 the conduct of the United States officials aimed at
15 targeting and abusing investors such as Canfor.
16 ARBITRATOR HARPER: Let me turn to another
17 subject.
18 PRESIDENT GAILLARD: If it's another
19 subject, Joseph has a question.
20 Professor Weiler.
21 ARBITRATOR WEILER: It's really a direct
22 follow-up on that. Yesterday, I was under the

1 impression, perhaps erroneous, in reply to a
2 question of mine that Canfor took the position that
3 also antidumping determinations or whatever falling
4 shorts of the word law as you understand it, which
5 were lawful could constitute a violation of Chapter
6 11; but now on two separate occasions and most
7 recently in response to my brother, should I say,
Mr. Harper, you seem to suggest that it's only abusive illegal conduct which would qualify. Did I misunderstand yesterday, or am I misunderstanding today?

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

PRESIDENT GAILLARD: Although in your last submissions you insist on the fact that the U.S.--according to you--is breaching, is refusing to honor certain decisions which are taken pursuant to the Chapter 19 regime. So it is relevant in your opinion?

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

See if I can--

PRESIDENT GAILLARD: Why is that? Because it's some kind of an indication of conduct which may be illegal under international norms? I'm trying to understand you.
MR. MITCHELL: Let me try this: If we took the ITC threat of injury ruling and the Chapter 19 Panel process that it went through, the United States might ultimately argue that because the DOC or the ITC, as I think we heard today, ultimately and begrudgingly adopts the or renders a determination not inconsistent with the Chapter 19 Panel that they are operating in accordance with United States law.

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

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

PRESIDENT GAILLARD: But what is the argument under international law: is that, in and of itself, a breach of international law? To make the process a mockery? What's the relevance?
MR. MITCHELL: Again, the scope of the 1105 standards isn't before the Tribunal on this motion, but if we accept that the standard is--whether the conduct shocks judicial sensibilities, or at least surprises them, which seems to be roughly where the standard is right now, that sort of conduct, we say, can amount to a violation of the 1105 standards.

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

Now, with this in mind, yesterday I flagged for you an issue that was of concern to at least this member of the panel, which was: abandon the facts of Canfor and try and give us examples of the kind of practice which would be related to
antidumping, and I said maybe lawful practice under the laws of the member. It could be Mexico, it could be Canada, it could be the United States because many times there is lawful action of a state which, although it's lawful under the rules of the state and in our area of Chapter 19--this is state law that governs--might still violate an international standard. So, I said give us hypothetical examples. This is with the view to understand what is the kind of conduct which could, if we accepted, violate Chapter 11, and that would enable us, even if we accept the facts as alleged in the Statement of Claim, we would still have to decide, and even if we rejected the United States' argument that in no circumstances whatsoever--although there I will have a question later to Mr. Clodfelter--can there be a Chapter 11 claim, we still have to decide whether the facts alleged by Canfor and accepted provisionally by us as true, as you want us to do, would amount to the kind of conduct which would violate Chapter 11 and would not, even though they are related in some way to anti-dumping.

So, that's why independently of the facts I return. Are you now abandoning the notion that lawful action can nonetheless violate in the area of antidumping, could violate Chapter 11?
MR. MITCHELL: No, and I'm going to pass
this on to Mr. Landry momentarily to provide an
elaboration to you, but I want to go back to the
latter part of your observation as to whether,
given the facts that we have alleged in the
Statement of Claim and the pattern of abusive
class conduct that we allege, assuming we get over the
first hurdle you described relating to whether any
claim can be brought in an AD or if it touches on
an AD or CVD matter, that the Tribunal still has to
decide the next question, whether the facts alleged
do fall within it.

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

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

ARBITRATOR WEILER: I understand. But in

1 order to enable us to decide the first issue,
2 whether there is a possibility of bringing a claim,
3 under Chapter 11, even though this is rooted in a
4 pattern of facts that related to Chapter 19, and
5 that's why to the best of my abilities, which might
6 not be so good, I suggested give us hypothetical
7 instances where we could see that there could be a
8 violation. Because, if I cannot envision any
9 factual circumstance that would actually violate in
10 relation to antidumping and countervailing duty
11 which would actually violate Chapter 11, then I
would say ex hypothesii, there is no possibility to bring it. So that's why we need to hear the kind of things, the kind of conduct that would constitute a violation, and I understand better the question of some abuse of things, but the question is: is there a non-abusive context which nonetheless might constitute a violation?

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

MR. LANDRY: Just to follow up on that, Professor Weiler, and I will respond to a specific example, although it's difficult to do it in the hypothetical, but I will try to give you a specific example. But just to follow up on that, we start from one proposition I think we could all accept, is that we may have something that is consistent with domestic law, but inconsistent to an international obligation, and I used the antidumping CVD regime to test that proposition. There are numerous occasions in respect of this specific dispute where things have been found consistent with U.S. domestic law but inconsistent with the WTO law.

I will use one example, just one example, and I'm only using this in the context of the exchange that we are trying to have here. Zeroing. Found consistent by the Chapter 19 Panel and found inconsistent in the application of it by the WTO.
18 Panel. So, we had something that is different, and
19 I think that's your point. You want to get into
20 this difference concept.
21 Now, it's hard to go to any hypothetical
22 example, but I will choose my own country.

ARBITRATOR WEILER: I would like the
1 equivalent of zeroing in relation to Chapter 11.
2 MR. LANDRY: Perhaps zeroing is a good
3 example in and by itself. Let me try something a
4 little different, and let's assume for the moment
5 that this is Canada, my own country, so that I
6 don't suggest something of another country.
7 Let's assume again under Canadian law that
8 in the collection of duties a discretion is given
9 to an official within their regime, and the
10 discretion effectively is that when duties are
11 paid, they have the discretion for no reason
12 whatsoever. In other words, they do not have to
13 give reason to take those duties and to pay it out
14 to the domestic industry.
15 Now, if they don't pay it out to the
16 domestic industry, notwithstanding they have the
17 discretion, that would be nothing that nobody could
18 question that; in fact if they do pay it out, it
19 was the discretion that would be given to him under
20 Canadian law and we'll assume no other remedies for
21 the moment. We are just talking about Chapter 19.
Then under Chapter 19 it could be lawful there, but the taking of the duties, if that's what happened, and giving it to the domestic competitor of the foreign investor may be an expropriation, for example.

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

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

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

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

MS. MENAKER: Certainly.

We cannot envision a scenario where a circumstance arises concerning an antidumping and countervailing duty matter that is found to be
lawful under domestic law and yet would violate Chapter 11. We don't think there is any such scenario. We haven't heard any from Canfor. They raised the scenario of zeroing, and as you noted, that would not implicate Chapter 11.

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

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

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

And the other thing that I would note is that the Chapter 19 Panels, when determining whether something in AD/CVD matter when that's
before them and they are determining whether that is--was issued in compliance with domestic law, if you had a system in place or a law in place that essentially was--if you can imagine that having violated an international standard because it was inequitable in some case, I would just like to make sure that the Tribunal is aware of the governing law that governs a Chapter 19 Panel, and that is that the is panel supposed to apply the law of the--domestic law of the party, including general principles of law, and those--that term is defined in Chapter 19 and Article 1911. It says general legal principle includes principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies.

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

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

MS. MENAKER: And again, we have not been able to envision such a hypothetical. I think it's
incumbent upon Canfor, if it thinks that there is such a case, to bring it to our attention.

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

ARBITRATOR HARPER: Thank you,

1 Mr. President. Let me explore for a moment the issue of a consequence because I'm frankly baffled by the discussion that I heard earlier today. The idea, as I heard it articulated by Canfor, was that the United States appearing in defense of a Notice of Arbitration because it had abusively used its antidumping law so as to give rise to a claim by Canfor that was in arbitration was not deemed by Canfor to be an action "in respect of" the antidumping law, but only a consequence of U.S. action that was abusive. I think I fairly summarized. If I have not, I'm sure that I shall be corrected.

And so I have been mulling what this means, how a consequence cannot be in respect of something, and I thought initially of two plus two equals four, thinking that perhaps by translating it to the simple I would grasp the concept, and there my difficulty is, and I would be grateful to you, Mr. Landry, or you, Mr. Mitchell, to help me. Because as I see it, four in that computation is a consequence of the addition of two plus two. Four
1 is also a total "in respect of" that addition of
two plus two. So, perhaps, can you explain to me
how a consequence is not "in respect to" or "with
respect to."

MR. MITCHELL: I'm not sure that the
debate can be simplified down to the mathematical
equation.
The argument is or what the United States
must establish is that we are imposing an
obligation, whatever that term means, and I should
just pause there, that if I took the Webster's
definition of obligation, it's the act of obliging
one's self to a course of action or something that
one is bound to do or forbear which, again, I say
goes to support the argument that I made yesterday.

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

And what I urge on the Tribunal is that
imposing a consequence because of behavior, the
measures of which Canfor complains is not an
obligation with respect to. It's not a duty to do
something or refrain from doing something with
respect to or applied to that law.

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

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

ARBITRATOR HARPER: Earlier in your
presentation, Mr. Mitchell, you had occasion to
begin with a statement again--and if I have
misquoted you, please correct me--that this
Tribunal cannot determine whether what is alleged
is antidumping or countervailing duty law matters.
These must be litigated. Perhaps I should stop
right there because that's a predicate for the
question, but I don't want to have the predicate
wrong.

Have I got it correctly that you had said
something to that effect at the outset of your
initial comments today?
MR. MITCHELL: Let me just give you the specific reference.

ARBITRATOR HARPER: That would be helpful.

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

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

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

Could we resume at two, or is that not enough time? That gives us an hour for lunch.

That's enough time for both parties?

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

PRESIDENT GAILLARD: It's really up to you. The questions are long and compound in many cases, but the answers are also complex, so it really depends. I think we have a chance we could finish today, but it's really up to you. We don't want to preclude any party to express itself fully. These are extremely important issues, and we want to give you ample opportunity to discuss all this. I would not give up—I would not dispose of the time tomorrow prematurely. But why not, we may be able to complete today.
In this respect, do you have any--I'm asking both parties--do you have any specific requests that we do continue tomorrow for some specific type of issues, or not?

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

PRESIDENT GAILLARD: We would like to have your determination on that during the course of the day, of course. On the U.S. side, do you see any reason why we would have to come in tomorrow?

MS. MENAKER: NO.

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

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

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

Mr. Harper will resume the questions.

ARBITRATOR HARPER: Thank you, Mr. President.

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

MR. MITCHELL: Yes, Mr. Harper, I was. And there are two passages that could be referred to. The specific point to which I was responding was the point made by Mr. Clodfelter at on my transcript page 20, starting at line one where he said: "The general point is that a party may not
as antidumping and countervailing duty law, if a matter is not generally subject to obligations with respect to countervailing and antidumping duty law simply calling it AD/CVD law will not shield a state from Chapter 11 implications. The Tribunal is free to look to see if, in fact, it is conduct subject to obligations with respect to the--to antidumping and countervailing duty laws, so fraudulent attempts to disguise otherwise violative behavior cannot be shielded by Article 1901(3)."

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

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

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

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

It seems to have become commonplace in Chapter 11 arbitrations for the state to advance a jurisdictional objection. It's happened in Loewen, it's happened in Methanex, it's happened in Ethyl. It's happened here. It's happened in many different cases.

And the Tribunal has three choices. If the matter is properly something that on the assumed facts recognizing the Tribunal's limited role, and I will talk about that in a minute on a jurisdictional motion, if the Tribunal is able to resolve the jurisdictional question neatly raised, then it may do so. Or it may determine that it can't do so at that time, and may refer the matter to merits, or it may determine it in, part, and
And so, in, for instance, the Loewen case, the Tribunal determined that it could not resolve many of the jurisdictional objections raised by the United States, and they were joined to merits. The most complete discussion of the Tribunal's role and mandate in an UNCITRAL arbitration in Chapter 11 is in the Methanex case, and I've included that in our authorities.

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

So, while the Tribunal has the power to determine on a motion whether it has jurisdiction,
it is constrained in doing so to make sure that in
examining that question it assumes that the facts
are true, and it doesn't proceed to evaluate those
facts beyond determining whether they are, to use
the Methanex word, incredible.

ARBITRATOR HARPER: Is it the position of
Canfor that the Tribunal should overrule the
objection to jurisdiction on the grounds that
nothing that Canfor is pleading relates to
antidumping and countervailing law
duty--countervailing duty law?
MR. MITCHELL: I don't think that that
statement accurately or completely encompasses the
submission being advanced on behalf of Canfor.
Canfor says that the objection to jurisdiction must
be dismissed because Article 1901(3) does not
exclude Canfor's claims, and that the words
imposing an obligation with respect to a
countervailing duty law or antidumping duty law do
not contemplate the nature of the proceeding that
Canfor is bringing.

ARBITRATOR HARPER: I just want to be
clear because I'm having trouble understanding the
words that I'm being given. Let me try it this
way, Mr. Mitchell: Is it the case that Canfor
MR. MITCHELL: We are having a look to make sure we understand the question, Mr. Harper.

PRESIDENT GAILLARD: Please, take your time.

(Pause.)

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

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

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

One meaning to the question would be that you would like us to confirm that Canfor acknowledges that the factual context or factual matrix of this case is the antidumping and countervailing duty— that's the factual context of
the case, the subjection of the investor to
determinations and other acts of officials in
relation to that context.

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

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

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

PROFESSOR HOWSE: Well, sir, with respect,
if we are missing something that you're concerned
about, that's one way we can puzzle out we believe
you might be driving at or wanting us to confirm,
but if there is something else you would want to
know our position on or to test our position on,
maybe if you could spell out a bit what the
something else is. If there is some other
proposition you're testing in terms of whether it's
a proposition that Canfor is advancing in this
proceeding.

ARBITRATOR HARPER: Professor Howse, thank
you for that. Let me see if I can approach it this
way and then I will move on to one other short subject.

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

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

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

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

PRESIDENT GAILLARD: If I may ask a
related question at this juncture, we understand that we have three choices. We can say yes, we have jurisdiction, we can say no, or we could join to the merits. That, we can understand. But what is the test, according to you, the legal test?

Because you seem to imply that, if you state that in a matter which you admit is related somehow--and I'm not prejudging any of the language interpretation and all that, we understand all the arguments surrounding this--but assuming, that's why I use loose language, it's related to AD or CVD law in the broadest meaning, if we assume that, you said: well, yes, but it's bad faith, it's egregious, it's terrible, it's really bad. My question to you--we understand that allegation, and at this stage it's an allegation--my question to you is: For the purposes of our determination on jurisdiction, what is the test? Is it enough that you state that it's an outrageous conduct which goes beyond the normal application of AD law or CVD law? Is it enough for us to go to the merits to find out if that's right or wrong, or do we have a certain duty to make a determination on something at this stage, and in the affirmative, what is the test, according to you? Does that help or it doesn't help? Does it help to understand what we want to understand as to your determination?
MR. MITCHELL: If we could just have a moment.

PRESIDENT GAILLARD: Please.

(Pause.)

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

PRESIDENT GAILLARD: That's quite all right.

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

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

So, we have been put in the position where we have to address that motion at this stage, without addressing all the other complex issues that arise, obviously, on the merits of this action, and issues that it may have some jurisdictional implications, albeit not the implication that 1901(3) is a jurisdictional bar. It was not our choice that this issue be
severed from all the complex questions related to it and questions that need to be dealt with on the merits, but if the issue is going to be decided on its own as apparently the United States is asking the Tribunal to decide it on a preliminary basis, we think then in that case the only fair alternative is to assume the claims about the nature of the conduct.

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

PRESIDENT GAILLARD: Mr. Harper still has questions.

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

PRESIDENT GAILLARD: Please, go ahead.

MR. MITCHELL: In addition to the comments made by Professor Howse, the question of how a Chapter 11 Tribunal is to approach the jurisdictional question has been, not surprisingly, litigated before, and in our memorial at tab or at
In order to establish the necessary consent to arbitration, which is the sole objection brought here, it is sufficient to show, one, that Chapter 11 applies in the first place; i.e., that the requirement was 1101 are met; and two that the claim is being brought by a claimant investor in accordance with Articles 1116 and 1117 and that all preconditions and formalities required under Articles 1118 through 21 are satisfied. Where these requirements met by a claimant, 1122 is satisfied and the NAFTA parties' consent to arbitration is established.

Now, I want to come back and talk about that passage in just a second, but as well in the Ethyl case, the early jurisdictional case in that, and that's at Tab 3 of our original materials, at page 31, the Tribunal said this: On the face of the Notice of Arbitration and the Statement of Claim, Ethyl states claims for alleged breaches by Canada of its obligations under Articles 1102, 1106, and 1110. The claimant indisputably is investor of a party, namely the United States, and alleges that it is incurred loss or damage by reason of or arising out of such breaches, all as required by Article 1116. It is likewise beyond doubt that the claimant has acted within three
years of the time when it first acquired or should have acquired knowledge of the alleged breach and knowledge that it incurred loss or damage as stipulated in Article 1116(2).

Claimant's Statement of Claims satisfies prima facie the requirements of Article 1116 to establish jurisdiction of this Tribunal. As was stated in the administrative decision number 11 quoted in K. S. Carlston, "The Process of International Arbitration," "When the allegations in a petition bring a claim within the terms of the Treaty, the jurisdiction of the commission attaches."

Now, let me just address both of those passages in the context of this case. While the United States has had some discussion which we say is to this motion irrelevant of Article 1101 and whether what we complain about is an investment measure, that question has been expressly severed from this motion. Therefore, the question for the Tribunal is, is the United States correct in establish--in its proposition that whenever a Chapter 11 claim touches on matters relating to CVD or AD matters, it is excluded from--by Article 1901(3)? That becomes the neat question because the other requirements as met or as set out by both the Methanex Tribunal and the Ethyl Tribunal have been indisputably been met.
PRESIDENT GAILLARD: Thank you.
Mr. Harper, do you want to finish your line of questions?

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

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

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

MR. MITCHELL: The issue before this Tribunal is the jurisdictional issue that I just articulated in my last response to President Gaillard's question. The question of what will Canfor plead and rely upon at the hearing on the merits will relate to all conduct which falls within the conduct described, the ongoing pattern...
of abusive conduct which has caused Canfor harm?
4 The Tribunal--and again, I make the point that's
5 not that question, is not before the Tribunal on
6 this application, and properly shouldn't be. If
7 the United States at some later point wants to make
8 the argument that, as Canada did in the Pope and
9 Talbot case, that a particular incident of conduct
10 does not fall within the scope of the arbitration,
11 then the United States will be free to do so. But
12 again, the United States has pleaded this very
13 motion as a neat and narrow question as to whether
14 it has any obligation to arbitrate claims that in
15 any way touch upon CVD or antidumping duty matters,
16 and that is the issue that the parties have briefed
17 and upon which we have made arguments to the
18 Tribunal.
19 ARBITRATOR HARPER: What did you mean when
20 you told us earlier today that Canfor was relying
21 on all U.S. actions up to the day of the hearing
22 for its claim?

1 MR. MITCHELL: Let me just clarify what my
2 remarks were. They were for clarity, Canfor
3 intends to rely upon all of the United States
4 conduct up to the date of the hearings on the
5 merits as the basis for its claim.
6 ARBITRATOR HARPER: Where is the citation
7 for that?
8 MR. MITCHELL: I have a feeling you and I
have different page numbers because your page 150 I didn't have one at that point, but it's on mine page 93, and it's about two pages into my initial reply submission.

ARBITRATOR HARPER: Thank you.

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

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

MR. MITCHELL: Okay. I don't know how much more that I can clarify them, but let me try this: Canfor has pleaded that the United States has engaged in and continues to engage in a pattern of conduct directed at Canfor for improper purposes with all the other matters we discussed that has caused and continues to cause it harm. And Canfor says that that conduct, that full array of conduct is what it intends to put before this Tribunal on the merits and ask for the Tribunal's ruling upon them.

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

MR. MITCHELL: To go back to the approach to be taken to a jurisdictional motion, all of that
conduct has to be assumed to have occurred.

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

MR. MITCHELL: I don't mean to be obtuse. The issue on the jurisdictional motion is as narrowly defined in the memorials. Canfor has pleaded that United States officials in their various actions—and some are particularized in the Statement of Claim—have acted intentionally, arbitrarily, for politically motivated reasons to harm Canfor and its investments, that they have treated Canfor unfairly and discriminatorily in the things they have done, and that that array of conduct assumes to be true does not allow the United States to rely upon the provisions of Article 1901(3) as properly interpreted to deny Canfor the right to attempt to prove its claim under Chapter 11.

PRESIDENT GAILLARD: Thank you, Mr. Mitchell.

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

MS. MENAKER: We are happy to wait and
answer any direct questions that the Tribunal has directed to us.

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

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

I suppose one option for the Tribunal is to accept that the claim is totally barred because of 1901(3). At another extreme it might be a position where one would say the claim is not barred by 1903 because 1903 relates to a certain set of legal considerations, and this is a different cause of action. But it might be, and I really say it might be that the panel could decide that there would have to be very special circumstances in order for a claim that arises from adopting the formula of the President, not prejudging the issue in the field of antidumping and countervailing duties could be the subject of a Chapter 11 claim. But then the question would be
whether the statement of facts presumed by the panel satisfies those conditions because it might be that it's not a question of the merits to show at that point where they, in fact, violate Chapter 11, but whether they satisfy some conditions for bringing this claim.

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

And this is a real difficulty I'm having because the way it was presented so far seemed to be it's an either/or, and maybe there is a middle position which says there would be conditions under which, and then the question would be, even if we assume everything that Canfor alleges is true, whether it satisfies those conditions.

PRESIDENT GAILLARD: The question is directed to both parties. Maybe Canfor first briefly, and then we'll move on to the U.S. to answer the same question.
MR. MITCHELL: Clearly, the middle ground that--well, there is an array of middle ground, and the Tribunal could rule in our favor that the objection to jurisdiction must be dismissed because we are correct in the interpretation or the opposite, or join the matter to the merits.

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

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

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

In terms of the legal standard for our determination, so you're saying it's an
extraordinary case. So, we would have to assume--your position from a legal standpoint on the jurisdictional issue is that we have to assume that it is an extraordinary case in order to join the matter to the merits, and then sort it out at the merits phase. Is that your contention?

PROFESSOR HOWSE: Well, Mr. President, we, Canfor, in general, would, as I understand it, not object to this matter being dealt with at the merits. The position we are in here is that we have responded to, as you're well aware, the U.S. motion to deal with it now on a stand-alone basis, and one difficulty we have, of course, is that we responded to a motion that is based on an argument that 1901(3) is a complete jurisdictional bar rather than an argument that there might be special conditions or special concerns that would have to be met in order for an action of this type that has some relationship to some other proceeding on CVD and AD law to go forward under Chapter 11.

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

PRESIDENT GAILLARD: I hate to interrupt you, but I would like to take--we understand these
arguments that were made before, but would like to
take them in sequence, so is the answer yes?

PROFESSOR HOWSE: That we would be

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

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

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

PRESIDENT GAILLARD: That's being
reserved. We assume that it's reserved. But for
the purpose of that question which I just asked, I
was assuming that is reserved, the investor
argument and all that.

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

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

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

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

MR. MITCHELL: I think perhaps--I want to
6 be careful to make sure I get my response correct here.

(Pause.)

MR. MITCHELL: Yes.

PRESIDENT GAILLARD: Thank you.

Professor Weiler.

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

MR. CLODFELTER: One moment.

(Pause.)

PRESIDENT GAILLARD: Who is going to answer?

MR. CLODFELTER: I will answer, Mr. President. Let me begin by just referring the Tribunal to Article 21(4) which is the presumption in favor of deciding jurisdictional defenses as a preliminary question. So if the question is, should the Tribunal decide that without more it cannot decide whether 1901(3) is a complete bar, should the more be put off to the merits, we would--we think we would oppose that because it would violate the principle of preliminary
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12 treatment of the jurisdictional issue. So, we
13 should not be put to the burden or the expense of
14 defending on the merits, especially on a
15 jurisdictional objection of this sort.
16
17 But we don't think—you asked earlier is
18 there a middle ground. We don't believe there is a
19 middle ground. We believe that you accept the
20 facts as alleged as true. You don't accept facts
21 that haven't been alleged as true, which seems to
22 be what we are hearing from the other side, that a
23 pattern of conduct and the whole range of conduct

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1 they haven't even specified yet. What you have to
2 accept as true is the facts alleged in the
3 Statement of Claim. All those facts show that the
4 conduct is the basis of this claim is conduct in
5 the administration of the U.S. antidumping and
6 countervailing duty law. We think that is
7 sufficient to establish that the claim would have
8 obligations imposed by Chapter 11 on U.S.
9 antidumping and countervailing duty law, and should
10 therefore bar the claim in total.
11
12 The facts to be assumed true are the facts
13 alleged in the Statement of Claim, and we certainly
14 don't accept the theory of the claimant that
15 abusive administration of the AC/CVD (sic) law is
16 within your jurisdiction, but maybe not abusive
17 administration of that law isn't. That is, if the
18 officials acted wrongfully, you have jurisdiction
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18 to decide if the officials have acted wrongfully.
19 We think that's crazy. You have to assume the
20 allegations in the Statement of Claim is true, and
21 in doing so it is sufficient to establish their
22 relationship to antidumping and countervailing duty

I hope I have answered your question.

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

Now we would like to turn to a number of
questions which are questions of clarification
regarding the reply of respondent this morning.

Maybe I will start, we all have a few questions.

Mr. Clodfelter, maybe you want to comment
on the answer which was made to your position
regarding the facts which would have taken place
after the notice. Your position as expressed
earlier was that since you have a notice
requirement here, the facts which take place
afterwards shouldn't be considered at all, and the
argument was made that if it's the same, the
continuation of the same pattern of facts, it
could, and some case law was quoted. Do you want
21 to answer this, or you want to just refer to your
written pleadings on this?
MR. CLODFELTER: Mr. President, one person's pattern is another person's matrix. What NAFTA requires is that claimants allege measures in violation of--measures related to investments. They have to specify the conduct.

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

And the other thing is, we have no idea of this pattern that they're talking about, of course, except what has been written in the briefs and in the Statement of Claim. The subsequent conduct they have alleged, however, is not merely the earlier measures that they alleged developed over time. We would not say, for example, that any behavior which they seem to be now criticizing before the Chapter 19 Panels, on reaction to Chapter 19 Panel decisions is the same measure as the complaints they have made about the investigations, for example. That clearly is a separate measure requiring separate notification.
5 and pleading.
6 But we don't know even what the additional
7 measures are in this matrix pattern of facts is, so
8 our position is that nothing we have heard fits
9 within the latitude given on pled matters to be
10 added to a case, and we would oppose any
11 supplementation of the claim without compliance
12 with NAFTA's requirements.
13             PRESIDENT GAILLARD:  Thank you.
14             Conrad, do you want to pick up?
15             ARBITRATOR HARPER:  I don't know to whom I
16 should direct this--thank you, Mr. President--so
17 let me just ask generally of the U.S. side the
18 following. Canfor has alleged, I think, in
19 statements by both Professor Howse and by
20 Mr. Landry that what it seeks in this proceeding on
21 the merits would be damages as well as the return
22 of duties and maybe other things.

1             My question for the U.S. side is: what do
2 you understand Canfor's claim to be in respect of
3 what the NAFTA provides? Is it entitled, to put
4 the question differently, to collect damages,
5 return of duties, and the like in a Chapter 11
6 proceeding?
7             PRESIDENT GAILLARD:  I think we know the
8 answer to that.
9             (Pause.)
10             MR. MCNEILL:  I think that there is no
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dispute between the parties that the damages, as a
general matter, are available under Chapter 11, and
first thing there needs to be a finding of
liability portion, and of course there is the
assessment of damages, and damages certainly could
everent 
comprise a range of things: Lost profits, you
could even get attorneys' fees. There is not a
perfect overlap, if this addresses the Tribunal's
concern.

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

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

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

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

ARBITRATOR WEILER: I beg your patience
and indulgence. Also my colleagues'. This might
be the last time we actually get a chance to
discuss this, so if I'm a bit plodding, I
apologize.
I think my first couple of questions will be to Ms. Menaker, and they go to 1901(3) and to 1902, and I think we need to deal with both. Because if I understood your position correctly, it was they are not interdependent. In other words, even the claim, the reference to antidumping law or countervailing duty law, one argument was that it doesn't refer to determinations or specific decisions, and you contested that and said, no, it should include all of that because that would be part of administrative practices. But then if I understood you correctly, you said: but even if I'm not right on this, they still are barred because the duty to appear to justify would be in respect of antidumping law.

So, since we might buy one of your arguments but not the other, I understand that they stand alone, but I want to deal with each of them. So, let me deal with the question of what should be understood by antidumping law or countervailing duty law, and for that we were led I think by both sides to Article 1902 as part of their argument, and there it is said that antidumping law and countervailing duty law include as appropriate for each party relevant statutes, legislative history, regulations, administrative practice, and judicial precedents.

If I understood the Canfor argument...
correctly, they said this is all in the nature of rules, normative—and I don't want to use the word "measures"—but normative rules, and they should be differentiated by specific determinations or specific decisions which would not be covered by law.

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

And then you tried to persuade us that they include—could include also administrative determinations or decisions because that would be part of administrative practice.

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

issues statutes, and the judiciary issues judicial decisions, and the Executive Branch issues
decisions and regulations which issues decisions or
determinations which are part of its administrative
practice.

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

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

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

but the text here refers to judicial precedents which would seem to suggest that not every judicial decision should be included, but only judicial decisions which is are of a precedent-creating nature. In other words, we might read it, and that's the direction my question is going, that, in fact, they say to us that antidumping law does not include every judicial decision, but only
precedent-creating decisions, and that therefore, mutatis mutandis, when we get to administrative practice, we should look to the equivalent, it's not all the output. You see the Legislative Branch also issues non-binding resolutions—you know, proclaiming the twentieth of March as the Joseph Weiler day—but it's the statutes, it's the normative one you said. And for the courts it's the judicial decisions, the judicial precedents, and therefore we might want to look also for administrative practice and to say either administrative practice should include determinations, but to the extent that they are the equivalent of that normative behavior, in other words, that they are of the rule nature and not the specific application of the rule.

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

MS. MENAKER: Mr. Weiler, first, I would like to just clarify our position. I think that what you said was correct in some respects, but I would just like to clarify it. First, in 1901(3) it uses the term antidumping law or countervailing duty law. I would say that we could break our
argument down into three different levels. First, on the first level, we would say that the determinations, to the extent they're challenging the determinations, that falls within the definition of antidumping law or countervailing duty law because anything done in the administration or the application of a law, if you're challenging the administration or application of that law, you would be imposing an obligation on a party with respect to that law. Now, that is independent of our arguments pertaining to the meaning of the term administrative practice, so even if law just referred to the statute on the books, that is still our argument that that term is broad enough there to encompass obligations that would be imposed on a party with respect to the administration and the application of that statute that would be--fall within 1901(3).

Now, second, what we have said is the term law, if you look at the definition in 1902(1), it includes administrative practices, and we have said that administrative practice one example of an administrative practice is a determination, and on that basis alone we would say that the term, therefore determination fits within the meaning of antidumping law or countervailing duty law. And third, I would say that the list
there, the so-called definition is an open-ended one, so to the extent that you found for one reason or another that determination did not fit within the definition of administrative practice, and then we are asking you to look beyond this list and add in determination, and that's where I think your question comes in, is should we be adding a term like that into the list if we think it serves a purpose different from the other terms that are listed there.

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

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

1 a Federal agency that was administering the U.S.
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Trade laws, a determination would fit within that definition. So, in our view, that would fit within the ordinary meaning and would be similar to the other terms that were listed there. But nevertheless--

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

MS. MENAKER: Let me answer that in two ways. First, I don't think that we completely agree with your interpretation of the term judicial precedent. I believe that every--in a common law system you could have decisions that they all create some sort of judicial precedent. It might not be precedent for any particular case if the decision is emanating from a court. It depends where you are when you are looking at the body of case law, but each decision, in and of itself,
might have some precedential value, depending on where that court sits.

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

MS. MENAKER: I do not necessarily think so.

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

MS. MENAKER: Okay, fair enough.

ARBITRATOR WEILER: But I'm clarifying.

MS. MENAKER: Sure.

I would also add, you know, our second point is that administrative practice is different from judicial practice in important respects, and in the administration of the United States' antidumping and countervailing duty laws, the administrative practice is built up through the issuance of the determinations, and so the administrative practice is built upon each determination.

I mean, typically a single determination can represent administrative practice on a multiplicity of different issues, and so in that respect I think it is somewhat--it is akin to something like judicial precedent there, that as
the determinations are issued, that is, I mean, in essence the way that the administrative practice develops.

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

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

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

Would the panel not be justified in thinking that at least in relation to such a measure so characterized, it might not be
considered as to be in respect of the parties' antidumping law or countervailing duty law, having been qualified that it is exactly not that?

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

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

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

MR. CLODFELTER: Sure.

ARBITRATOR WEILER: That might be contested. In other words, the investor might say, let's forget about the facts of Canfor for now because I really think they might cloud the issue. The investor might come in with a claim and say with the claimant this is not antidumping or countervailing. It's just pretending to be. That was the example the President gave. And the state would in good faith even vehemently say this is the case, this is absolutely within antidumping. Who gets to decide that to say that that would be imposing--that submitting that to a panel such as
ours would violate, would mean that really it is shielded, and you, yourself, concede, if I understood you correctly, that there might be cases where it really should be structured.

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

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

MR. CLODFELTER: Well, of course, of course. What I'm saying is it's patently clear and uncontested that everything, all the conduct they allege you could maybe find a different conclusion based upon your reading of the Statement of Claim, but I think you won't. And it's not being alleged that this is just labeled as antidumping. This is clearly about the U.S. administration and antidumping. They don't like the way we administered it, but it's clearly about that. So, the labeling issue really
isn't here in this case. The only labeling is on
the other side trying to label this as something
other than what it is, but it's different than the
ultra vires situation.

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

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

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

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

MR. CLODFELTER: Ultra vires, I think it's
different because even in an ultra vires act, the
conduct is still in the administration, perhaps, of
the underlying body of law. Maybe that person
didn't have authority to do it, but you could still
make a determination of what that conduct relates
to, and so I don't even think in an ultra vires
case if you determine that the conduct is in the
administration, authorized or not, of antidumping or countervailing duty law, it can impose obligations on it.

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

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

ARBITRATOR WEILER: I'm really trying to think hard about this. We know, for example, from the general law of state responsibility in international law that it's a delicate issue because sometimes a government tries to escape the state responsibility by saying a police officer acted on a frolic of his own and outside his authority, and this quite delicate law was in uniform or was not in uniform, et cetera. But what's interesting in the general law of attribution in state responsibility, it's where to accept the state's position that he or she were on a frolic on their own and acting outside their authority and acting ultra vires, the state would escape its liability. So, international law doesn't want an illegal act being committed, and the state escapes state responsibility by saying: it can't be attributed to us.
What's interesting here and different here, and that's why maybe the general law of state responsibility couldn't just apply directly, is that here by claiming this is state responsibility--we are responsible, actually the state--the member would escape its responsibility because it becomes nonjusticiable then, because then it's Chapter 19, and there is no remedy under Chapter 19.

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

So, now let's say that he or she are acting--really the Chapter 19 Panel say this is totally outside what the antidumping law is, they were frolicking on their own; let's say they issued a claim for money pretending that this was an official claim of antidumping and it turns out they put it in their pocket, to give an absurd example.

So, at some level it's true to say that this is related to antidumping, but would a determination saying they suffered injury by doing this be imposing an obligation on the antidumping law of the state? Isn't that a little bit far-fetched?

It's not imposing an obligation on the antidumping law of the state because the panel or mutatis mutandis
mutandis, if it were a domestic issue, the Court of International Trade in New York would have said it's not antidumping law of the United States. It has nothing to do with antidumping law of the United States. It's a violation of the--it's ultra vires.

(Pause.)

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

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

(Brief recess.)

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

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

MS. MENAKER: Thank you. Just if I may, just before responding to that, I just wanted to very briefly supplement a prior answer that I gave concerning the definition of antidumping...
countervailing duty law and its interaction with the administrative practice and whether or not that includes determinations, and I would just like to direct the Tribunal's attention to the fact that included amongst the things that are listed in 1902(1) as being within the antidumping law and countervailing duty law is legislative history. And legislative history certainly is not binding, it's not precedential. It's not normative. So, in that respect, I think, Professor Weiler, you indicated some concern that a judicial precedent, perhaps, should be construed rather narrowly because not all judicial decision was included, and judicial decisions that were not binding, for instance, might not be included. And I think one has to take into account that not all of the things on that list are of a normative and certainly not of a binding character, so I just wanted to supplement my answer in that respect.

With regard to the question you asked us before the break, which is, if in the administration of our antidumping or countervailing duty law, if an official acted in an ultra vires manner, whether that conduct would still be not subject to investor-state dispute resolution by virtue of Article 1901(3), and first I would like to just reemphasize that there is no allegation of ultra vires conduct here. If one looks at Canfor's...
Statement of Claim, its Notice of Arbitration
there, the conduct there all relates to the
administration and application of the United
States's antidumping and countervailing duty law,
and none of it could be characterized or fairly
characterized as ultra vires conduct.

Now, in the hypothetical that you gave,
there I believe in your hypothetical the conduct
that was at issue was, in fact, before a Chapter 19
Panel, and the Chapter 19 Panel in that instance
indicated that the official in question had acted
outside the realm of his or her responsibilities.
And I suspect, then, took some action, whether it
was a determination that that person was
responsible for having issued; perhaps the
determination was then remanded because of that.
I think in that situation there clearly
1901(3) would bar any other type of claim, an
investor-state claim, even presuming obviously the
other prerequisites for jurisdiction were met under
Chapter 11 because there exercising jurisdiction
over that claim would be imposing an obligation on
a party with respect to the administration and
application of its AD/CVD laws.
Now, by the same token, if there were
conduct and we have not come up with any example of
such conduct, but theoretically, if there were
conduct that was so ultra vires so as to be outside
of this sphere of antidumping or countervailing duty law, then in the same manner as what Mr. Clodfelter was saying earlier, for the same reasons that merely labeling a law as an antidumping or countervailing duty law, merely labeling conduct or merely asserting that a certain challenge would impose an obligation with respect to your antidumping or countervailing duty law is not enough, but that is precisely the question before this Tribunal, and I think that previously you asked what test do you apply, and I think I would like to direct the Tribunal's attention to footnote 16 in our reply where we quote the separate opinion of Judge Coroma on the ICJ in the Fisheries Jurisdiction cases, and I will just quote from that. It says, since Canada excluded from the jurisdiction of the court, quote, disputes arising out of or concerning conservation and management measures, end quote, the question whether the court is entitled to exercise its jurisdiction must depend on the subject matter. In other words, once it is established that the dispute relates to the subject matter defined or excluded in the reservation, then the dispute is precluded from the
And so, there too the ICJ was engaged in an exercise where it had to determine the contours of the claim and whether that claim was precluded by an exclusion of jurisdiction, an exclusion from the court's jurisdiction of a particular subject matter. And that's what we are asking you to do here, is to look at Canfor's claims as pled, and reach the determination which we think is inescapable, which is exercising jurisdiction over those claims would impose obligations on us with respect to our antidumping and countervailing duty law.

And I think the bottom line is really, is that obligation, with respect to the AD/CVD law? It either is or is not, and regardless of how allegedly egregiously that law was administered or it was applied does not change the fact that then imposing an obligation with respect to the administration or conduct of that law would still be in violation of Article 1901(3). It does not make the conduct that was undertaken any less--it does not make it--excuse me, I don't want to use too many double negatives in that sentence.

The obligation on the United States would still be with respect to its antidumping and countervailing duty law, even if that law had been improperly applied, and I think I mentioned when I
did my argument yesterday--I mean, that is precisely what the Chapter 19 Panel system was devised to hear, is to hear the questions of whether the law had been properly applied.

Now, if your concern is that there might arise a situation where there is no remedy, I would like to at least address that, to some extent, because if the issue that you're asking us about is whether if in the administration and application of the law one of the government agencies acted improperly, they ignored the law, they manifestly disregarded the law, that, again, does not leave anybody without a remedy. That is the precise reason that the parties created the Chapter 19 mechanism. The Chapter 19 binational panel in that case, would there--in that situation would remand any determination because they would find that it wasn't made in accordance with U.S. law.

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

ARBITRATOR WEILER: Can I ask you about that.

MS. MENAKER: Yes.

ARBITRATOR WEILER: And it is really by way of clarification. But when we say no remedy, what troubles us is not that there is no remedy in the formal sense because if it goes before Chapter
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15 19, they can remand it. Let's say the national
16 administration, and again I say it's maybe best to
17 set Canfor aside for a minute, although I really
18 take your point that it depends what is pled here,
19 et cetera.

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

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

18 And really in situations where you could
19 say they're acting outside the law, with blatant
20 disregard of the law, not simply the kind of normal
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21 kind of error that everybody is prone to make,
22 including this panel.

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1 MS. MENAKER: I do understand the concern,
2 and first there is in the hypotheticals or in a
3 hypothetical that you posed, there might, for
4 instance, be the remedy of a criminal sanction. If
5 what the conduct that was undertaken was so
6 egregious and it might have violated criminal law.
7 So, that is another potential remedy.
8 They might also have a civil remedy in the
9 form of what we call a Bivens action against the
10 particular official if that official acted outside
11 the scope of his or her authority. And they might
12 have an action in U.S. court, and could receive a
13 remedy in that manner.
14 But, even if one could conceive of a
15 situation where an antidumping and countervailing
16 duty matter that was properly before a Chapter 19
17 Panel, so fell within the restriction of Article
18 1901(3), even if one could conceive of a situation
19 where conduct arising in the course of that matter
20 could give rise to a Chapter 11 claim, if the
21 Tribunal only had jurisdiction, that is not a
22 reason for finding jurisdiction. The fact that you

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

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

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

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

And of course, we understand that you're
saying it's not the case here, but it's a different
MS. MENAKER: Yes, I think, Mr. President, that that would be a fair description, which is, and just to make sure that I understood your comment correctly, that is if what the official did--

(Pause.)

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

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

ARBITRATOR WEILER: Can't it be a little bit more nuanced? I'm really very tentative. One approach is to say if it's so inappropriate as to take it outside the realm, and I think you're not to worry to concede to that because it really would have to be extraordinary. It's a little bit like Mr. Clodfelter, sort of if it's totally, you know,
But whatever remedy a Chapter 11 Tribunal would impose, could it be said in relation to certain types of conduct to actually impose an obligation on antidumping law?

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

(Pause.)

MS. MENAKER: I will try to answer this question. The best that I can say is really reiterating what I had earlier answered, but perhaps doing so in a different format may make it more clear, is that certainly if the conduct at issue again did not relate to antidumping and countervailing duty law, although it was labeled as such, but that was just purely a label, the act was so ultra vires, then imposing an obligation on a
party to compensate for that conduct would not be akin to imposing an obligation on a party with respect to its antidumping or countervailing duty law.

However, if the conduct cannot be taken outside of that realm, that sphere, so if the conduct was still undertaken in the administration, the application of the antidumping and countervailing duty law, then any obligation, even if it was improperly taken, even if it was very bad conduct, any obligation imposed on a party to compensate an individual for that—any harm that it suffered as a result of that conduct still would be an imposition of an obligation on a party with respect to its antidumping and countervailing duty law.

PRESIDENT GAILLARD: Thank you.

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

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

PRESIDENT GAILLARD: Thank you for having
1 tried to do so. We understand the position.
2 At this point, does claimant want to say
3 something? We understand that you disagree and you
4 have expressed views on this, but do you want to
5 make a comment or two?
6 MR. LANDRY: We do want to make one
7 comment, and just to follow up on that, obviously
8 the conclusion that Ms. Menaker comes to,
9 therefore, is that there will be instances under
10 their interpretation where there will not be a
11 remedy in the sense of what Professor Weiler was
12 getting at, that is the injury to potential to
13 foreign investors. But I want to go just beyond
14 that a little bit, and I've spoken to Professor
15 Howse about something that we talked about earlier
16 that I was going to get him to respond to when he
17 was away, and it deals with this remedy issue, so I
18 wonder if perhaps Professor Howse could comment on
19 that. It is in response to this.
20 PRESIDENT GAILLARD: In that case, you
21 may.
22 Professor Howse.

1 PROFESSOR HOWSE: We have, Mr. President,
2 several responses on this issue of the
3 quote-unquote realm of antidumping and
4 countervailing duty law.
5 To be very brief, the first, and I think
perhaps the most important point is that in assessing whether the conduct that Canfor has complained of is within the realm of countervailing or antidumping duty law, whatever--I think that we have to understand that Canfor's claim is both with respect to individual acts of United States officials that we see, we allege are falling below the standard of treatment required by Chapter 11 provisions, but also it's very much a claim about the conduct as a whole in this matter towards Canfor.

And we have to look at and understand whether the nature of the conduct, as a whole, and here, if I may, I would just like to cite a very recent NAFTA investor-state ruling, the GAMI and Mexico ruling. I realize it's not in the authorities, but we would be obviously prepared to provide copies to the Tribunal and to the United States. May I refer?

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

PROFESSOR HOWSE: Sure. Thank you.

And in paragraph 97, the Tribunal makes the following statement. The record as a whole, not isolated events, determines whether there has been a breach of international law, and so this may
also perhaps answer some of the concerns that Mr. Harper has raised, that we are looking here not just at discrete acts as violations, but a pattern of conduct over a period of time where those acts, put together, rise to the level of egregious and, in our submission, improperly motivated conduct. And so, there is part of our claim that says that the collectivity of these acts represents a violation, and I just wanted to make that clear. That being said, I would just like to make a couple of other observations on just this particular--this particular issue. I think in assessing the nature of the conduct and its relationship to good faith or proper administration of countervailing and antidumping duty laws and how far it is out of that ballpark, as it were, first of all, as we say, we have to take the conduct as a whole over all these various iterations where there have been numerous attempts both the WTO and in other NAFTA proceedings to correct these problems, and then we come to, and I would just like to briefly quote, the second remand Decision of the Panel in the injury case in August 31st, 2004, which is in the authorities. That's at Tab 1 in the authorities, and I think this is directly relevant to the question of a remedy, and the nature of the remedy that is or is not available or has been denied, even if it's theoretically...
available to Canfor in this case.

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

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

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

And the panel I'm quoting from goes on to say, in light of this, further remands for correction are futile, that essentially that there is no point in making further remands because whenever there is a remand to correct these errors, the ITC simply refuses to accept the instructions.
And it's our submission that this reflects the very extraordinary nature of this particular case that, essentially it would be very hard to characterize in these circumstances the Chapter 19 proceeding as an effective remedy, or, indeed, the conduct of Commerce is with respect to countervailing and antidumping duty law, conduct that simply refuses to follow a ruling that the ITC is legally obliged to follow, refuses. Not reinterprets what the panel is saying, but refuses to follow, refuses the authority, is itself, in our submission, outside any authority granted in respect of antidumping and countervailing duty laws.

PRESIDENT GAILLARD: Professor Howse, you have used different phrases or different concepts. You have used the concept of good faith, proper administration, and extraordinary nature of the case. We understand the other side's position that they are prepared to concede that there are situations which do not--which are not barred by Article 1901(3), and they have expressed their views on this. It's the "genuinely", "with respect to", I would say, that's their position as I understand it, in a nutshell. Your position would
be that's the wrong test. The real test is in good faith with respect to or in the ordinary conduct of things as opposed to the extraordinary nature of the case.

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

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

At the same time, we would argue, I suppose, in the alternative or in response to what the United States has said that were there a different kind of test, were the panel to accept the submission that there is some test that says that you can go to Chapter 11 consistent with 1901(3), if the conduct in question somehow is outside of the normal operation, authority, good faith administration, that, in our view, the conduct here collectively and in some cases
But I grant you that the test had not been sufficiently clearly articulated. We just want to make it clear that we are not in any way suggesting that we think that the conduct we are complaining of would be such that it could be characterized as properly falling within the administration or as non-ultra vires.

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

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

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

PRESIDENT GAILLARD: Please do.

(Pause.)

PROFESSOR HOWSE: Mr. President, because we would like to look more carefully at the exact words that the U.S. has suggested in terms of a test for ultra vires or a test for something being completely or outside AD and CVD law by virtue of the extraordinary nature of the conduct in
question, and because in a sense, we have heard
several possible tests formulated in slightly
different language, in fully articulating, as you
put it, alternative position, we would like the
time to reflect on that, and look at the words
because I don't think we yet have a completely

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

PRESIDENT GAILLARD: Well, this case is
not new to you. I guess you had ample time to
think about the issues, and you do not necessarily
have to have a fallback position. I was just
suggesting that--I mean, I was not suggesting
anything, I was commenting on the fact that on the
U.S. side when discussing the exact scope and
consequences of 1901(3), they say: look, this
example of the something which is mere labeling is
not leading anywhere because we would agree that
mere labeling is not good enough, so it would not
work as a bar in a case where it's mere labeling,
and they elaborated a little bit on that. I'm not
saying you--if that's all you can say at this stage
on this, that's fine. And we will reflect on the suggestion that you may want to think about it further, and will take that into consideration at a later stage.

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

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

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

PROFESSOR HOWSE: If I could just,
Mr. President, explain why we need to do this.

PRESIDENT GAILLARD: It's fine.

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

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

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

(Pause.)

PROFESSOR HOWSE: Well, it is Canfor's claim that those acts that individually and collectively manifest again on the evidence that we intend to present in our view improper purpose, a purpose other than--the purpose that's stated in Chapter 19 itself of maintaining effective and fair disciplines and unfair trade practices. But rather, as we put it, purposes that are politically motivated and not related to the impartial enforcement of the law, but compromise that, that
those actions—it's hard to see them as relating to countervailing and antidumping law, in our submission, because they are motivated and driven by considerations and purposes that are other than as is stated in Article 1902(2), maintaining effective and fair disciplines and unfair trade practices.

ARBITRATOR HARPER: What I meant, Professor Howse, was not to be given conclusory statements or characterizing statements. What I meant by the word specify, what I meant by saying tell us the facts what it was. I'm asking for a description, a statement of a single act of which Canfor complains in this case in the jurisdictional phase, a single act by a U.S. official that was not related to U.S. antidumping and countervailing duty laws.

PROFESSOR HOWSE: Well, Mr. Harper, with all due respect, and at the risk of repetition, my purpose in referring back to the second remand decision of the Panel was to give you one illustration of a moment in the ongoing conduct that Canfor considers not in relation to or respect to antidumping and countervailing duty law, and that is as the panel held the persistent refusal of the ITC to follow—refusal, not that they didn't do it in the way the panel liked, but refusal to follow the remand instructions of the Chapter 19
Now, as far as we know, and as far as the law says, they're obligated to do that. Their whole purpose in a determination on remand is to follow the instructions of the remanding authority. That's what--

PRESIDENT GAILLARD: Your answer in a nutshell is the conduct described in the second decision of August 31, '04?

PROFESSOR HOWSE: That would be one example, sir.

PRESIDENT GAILLARD: Thank you.

ARBITRATOR HARPER: And I understand that you're saying that in light of the fact that a Chapter 19 binational panel, by definition, deals with antidumping and countervailing duty law? I mean, that's what its subject matter is, is it not?

PROFESSOR HOWSE: Mr. Harper, what I was saying is that the very nature of a remand where the ITC is having a remand, the very--the nature of that exercise in relation to countervailing and antidumping duty laws is the redetermination of the matter in accordance with the instructions of the remanding authority.

So, where the ITC is refusing to follow that, it's actually doing something other than a remand in an antidumping and CVD proceeding. It's essentially rejecting authority to which it is
legally bound in the context of antidumping and countervailing duty law, and it's our submission that that just goes way outside of the ambit of action that could be reasonably and appropriately considered to be in respect of antidumping and countervailing duty law.

PRESIDENT GAILLARD: Thank you, Professor Howse. I think we understand the argument. Thank you for the clarification.

At this stage, unless respondent would like to briefly comment on this, I would like to move on to another topic, but if you do want to briefly comment on this, please do.

MS. MENAKER: If we may just very briefly.

PRESIDENT GAILLARD: Please.

MR. MCNEILL: Canfor's counsel says this is an extraordinary case, there is something really extraordinary about this case, but what is really truly extraordinary is the only example of something they can come up with which they say is not with respect to antidumping and countervailing duty law is something which is not even pled as a basis of their claim. It is the actions of the U.S. domestic agencies in response to the remand determinations by the Chapter 19 Panels.
Now, it's hard to understand how that could not be with respect to antidumping and countervailing duty laws. As a matter of fact, that is with respect to Chapter 19 as reflected the entire process in Chapter 19. So it's very hard to understand that claim.

Also, as a factual matter, the quotes that Professor Howse read have really been overtaken by events. He's reading from old--he's reading old events. As I mentioned this morning, there was a remand determination on August 31st, 2004, the Chapter 19 panel issued the third remand determination.

And the ITC made a negative threat finding. So Professor Howse is referring to events that occurred before this, so they have really been overtaken by events entirely.

But perhaps the largest point on this issue is that it has nothing to do with the jurisdiction of this Tribunal at this issue.

Canfor is frustrated with the Chapter 19 process, that they're unhappy with preliminary outcomes, not even the final outcome, they're talking about preliminary outcomes, is not something that would confer jurisdiction on this Tribunal.

PRESIDENT GAILLARD: Thank you, Mr. McNeill. If the parties are in agreement, we would like to move to another topic at this stage
of an entirely different nature. We would like to
discuss the legislative history, the travaux with
respect to Article 1901(3), and we would have a
number of questions on the documents which were
produced in this respect.

In order to ask the questions, I would
like the parties to take the two binders which were
produced as the "Negotiating texts of the chapter
on review and dispute settlement in antidumping and
countervailing duty matters of the NAFTA",
maintained by Canada and distributed to Mexico and
the U.S. And there is a reference number. The
first page has a page number which is 01139, and
each page has a page number going forward.

Can you take these documents before we ask

the questions, on each side, please. Do you have
them handy? Take your time.

MR. MITCHELL: We do not. We are going to
need to find one.

PRESIDENT GAILLARD: Please.

(Pause.)

PRESIDENT GAILLARD: It's an April 9
submission, April 9, 2004.

PRESIDENT GAILLARD: We resume the
hearing. And I see that both parties now have in
front of them the documents which I referred to,
and I would like you to take the first tab, Tab 1
in this document, and go to page two, where you
have on top of the page a paragraph which says USA, three, "No provision of any other chapter of this Agreement shall be construed as imposing obligations on the Parties with respect to the Parties' antidumping law or countervailing duty law."

My first question on this is a question for clarification. The word USA means that it's a proposal by the USA. That's what the legend says.

I guess—is it correct?

MR. McNEILL: That is my understanding as well. It says USA and the United States first introduced that text, and it is in brackets and underlined because it has not been accepted as of that time.

PRESIDENT GAILLARD: That was my second question. When it's in brackets, it means that it hasn't been discussed yet, so it's a proposal.

MR. McNEILL: It's my understanding it has been discussed. It's been put in the text, but it has not been definitively accepted at that time. It's still considered tentative or proposed text at that time.

PRESIDENT GAILLARD: Right. So, do we have anywhere in the record anything which tells us when this proposal was introduced by the U.S.? Earlier than this document which is Tab 1, or maybe you can identify the date of the document, and then...
20 answer the question.
21          MR. MCNEILL: Not to our knowledge. The
22 first record we have of it is dated June 30th,

1 1992, which the first--I'm sorry, June 3rd, 1992.
2 It's the first draft of what's been called the
3 rolling text, and I could give you some background
4 on how that process worked, if you wish to hear
5 that.
6          PRESIDENT GAILLARD: Maybe you can give us
7 a word of background and then answer my question
8 which is: is there any document in your files which
9 predates that, or is it the first time this
10 language was introduced, to your knowledge?
11          MR. MCNEILL: As far as we are aware, this
12 was the first time the language was introduced.
13 Generally, the--Canada acted as the informal
14 Secretariat for this process, and there were
15 different negotiating rounds, and the negotiating
16 teams for each of the three NAFTA parties would get
17 together and have a negotiating session. At the
18 end of the session, they would have one text that
19 was the tentative text they had produced at the end
20 of that session, and Canada kept an ongoing record
21 of this process, and that's what each of these
22 drafts reflect.
PRESIDENT GAILLARD: So, the position of respondent in this case is that this is the first time in the travaux this language appears, to your knowledge?

(Pause.)

MR. McNEILL: This is the first piece of travaux preparatoires that we have found. We are not aware of any documents that predate the June 3rd document that would indicate who originally came up with the idea for this provision.

PRESIDENT GAILLARD: Travaux preparatoires as opposed to what? Because you seemed to use it in a narrower sense? So, what else there is, if anything?

MR. McNEILL: In response to the Tribunal's order, we conducted an extensive search for documents that were shared between the three parties, as we were requested to do. We did not find any documents that fit that description that predated this June 3rd document. Nor did we find any other documents that did not fit that description that bore any--that were related at all to this provision. This is the first appearance that we are aware of this provision; to the best of my knowledge.

PRESIDENT GAILLARD: By way of background, you wanted to elaborate on the methodology of the
6 negotiation, or have you already covered that, to
7 the extent you wanted to cover it?
8          MR. McNEILL: I covered it.
9          PRESIDENT GAILLARD: You have nothing to
10 add on that?
11          MR. McNEILL: No, I don't.
12          ARBITRATOR WEILER: Is there a record of
13 the discussion other than the final--this made it
14 into the text, and you indicated there must have
15 been some discussion, et cetera. Is there any
16 record of that discussion like we have here, this
17 kind of thing?
18          MR. McNEILL: No, not that I'm aware of.
19          PRESIDENT GAILLARD: So, all we can
20 understand from this text is that that language was
21 introduced presumably by the U.S.?
22          MR. McNEILL: I think that's a fair

1 inference from the inclusion of the USA next to the
2 text.
3          PRESIDENT GAILLARD: Then if you go on and
4 if you look at the various drafts, and of course
5 the same section, tracking the language, you
6 find--but I'm stating something, and I want you to
7 correct me if I'm wrong because I want to test my
8 understanding against yours. Of course you're more
9 informed.
10          So, you see that that language--you find
11 that language reproduced in the same form with
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still in square brackets, so it has not been
discussed, and we see it for some time. And then
the language varies a little bit. For instance,
you see at Tab 3 the document--I'm sorry, this is
still the same language, and then you can track it.
And at some point you see, for instance, at Tab 6
that the square brackets have been eliminated.
What does that mean?
MR. MCNEILL: I assume it means it was
accepted by the other parties and they agreed that
that would be—that they didn't need to go back and

1 revisit that text, that they had agreed to that
2 portion of the text.
3 PRESIDENT GAILLARD: So if you place
4 yourself on August 6, 1992, which is the date of
5 the document at Tab 6, is your answer the same as
6 before, that there are no other documents shared
7 among the Parties—which was our question—which
8 discussed this; so there is no record of any
9 discussion on why it was adopted, or was it
10 discussed and the Parties said: no, we don't want
11 it, or yes, whatever, or we want a different
12 language or something like that. You found
13 absolutely nothing; is that correct? I assume
14 that's right because, if not, you would have
15 produced it, I guess.
16 MR. MCNEILL: That's right. The
17 Tribunal's order required the United States to
produce documents that were shared between the parties that would reflect the common intent of the three parties. We did not find any documents that bore on the--on this provision that fit that description, nor did we find other documents outside that description, either.

PRESIDENT GAILLARD: Outside that description. I'm not asking to turn those documents in, that's not my question, just to understand. Outside that description, you would say that internal memos, even that, you have not found?

MR. McNEILL: No.

PRESIDENT GAILLARD: Not that we request it, but you have not found any such documents, like internal memos and the U.S. administration saying why is that? And so on. So you have not--

MR. McNEILL: You're referring to a document that bears directly on 1901(3).

PRESIDENT GAILLARD: Bears directly on the predecessor--the numbers have changed, but the predecessor of Article 1901(3).

MR. McNEILL: No, we have not seen such a document.

PRESIDENT GAILLARD: All right. And when you said "discussed with the Parties", did you include discussed among two of the parties if
that's the case?  Have you found documents which would have been discussed among two of the parties, maybe not the third one?  On the same topic, of course.

MR. MCNEILL:  Right.  My understanding is in order to reflect the intent of all the NAFTA parties, it would be a document that would be shared among the three of them.

PRESIDENT GAILLARD:  That I understand, but that's not my question.

MR. McNEILL:  But no, we didn't find documents either that were shared among two of the parties.  When I say among the parties, that would cover among two or among more.

PRESIDENT GAILLARD:  So, your answer is: no, there are no documents which would have been shared among two of the parties discussing it at the third one, but for a reason--and the answer would have been the same.

MR. McNEILL:  That's correct.

PRESIDENT GAILLARD:  If it is shared among two or more of the parties, the answer would have been the same to the document production request?

MR. McNEILL:  That's right.

PRESIDENT GAILLARD:  Okay.  Then you see the text being carried in subsequent drafts, okay,
and then if you go to Tab 6--I'm sorry, 9, a document of August 25, 1992, some language has been added, with the exception of the entry into force provisions of Article blank.

So, can you comment on that, what does that mean? Ms. Menaker.

MS. MENAKER: I think that simply just indicates that at that negotiation all of the parties agreed to add those additional words in. So, during--you start with the draft from the last negotiation, if any party introduces language that the other parties don't immediately accept, that's bracketed, and it remains bracketed until that issue is resolved. If a party notices something, especially in the context of kind of a legal technical change and they want to add language and it's not controversial, the other parties accept that during the course of the negotiations, that language will never appear bracketed.

PRESIDENT GAILLARD: So the fact that it's not bracketed means that someone came up, we don't know who, came up with the idea to be specific as to this exclusion, and the exclusion of the exclusion, if you would?

MS. MENAKER: That would be the inference that I would draw, based on our experience in doing this and other Treaties.
PRESIDENT GAILLARD: In that it was not discussed particularly. It was adopted as such by the NAFTA parties.

MS. MENAKER: Or it could have been discussed during the course of that particular round of negotiations. However, since no one objected, there was never any need to place the brackets on it.

PRESIDENT GAILLARD: Right. And then this language is carried forward, and then you see at some point the blank is filled with the proper number, and then it becomes what? It becomes

1901(3). It's not exactly the initial language. It has been tightened a little bit, but I don't see that as relevant, but tell me if I'm wrong. It's the same idea. You end up with "except for Article 2203 (entry into force)" in the final text, and for some time you have "with the exception of Article 2203 (entry into force)", which to me means the same thing. So, that's all we know about this.

And then the language at some point is the final language which we have now in front of us, and that's what we know about this.

So, I ask, at a different point in time, the same question: that's all we know for the documents which have been exchanged among the NAFTA Parties, even if you consider that includes only two Parties?
MR. MCNEILL: That's correct.

PRESIDENT GAILLARD: You have not attached particular relevance to this exception, with the exception of the entry into force provision of Article X which became "except for Article 2203 (entry into force)".

Do you have anything to add on this on either side? Or is it just what you said about the negotiations: it meant that someone felt that one should be more specific and everybody agreed it's no big deal; I mean, it was not viewed as something significant.

MS. MENAKER: I mean, that, in our view, is the type of thing that is sometimes done at the end of a Treaty negotiation, we call a legal scrub sometimes during the midst of it, if someone realizes you need a technical change like that. Of course the provision, if you have literally nothing in the agreement, can apply to it. You need to have the entry into force provision apply, of course.

PRESIDENT GAILLARD: If not, the provision itself disappears when you sign the Treaty? If you are really a fine lawyer.

MS. MENAKER: Well, yes, it would.

PRESIDENT GAILLARD: All right. That's our understanding, but we wanted to see if it fits. So, basically we don't know much about the
1 history of this language.
2 I turn to my co-arbitrators. Do you have
3 any questions on this?
4 I turn to claimant. Do you have any
5 comment or questions on these, queries on this, or
6 is your analysis of the record as is, because we
7 have read--I think all of the documents but we may
8 have missed something, you must have done a
9 thorough job I'm sure, and maybe we missed
10 something. Other than the documents you discussed
11 in your briefs which we have in mind. I'm talking
12 about travaux preparatoires.
13 MR. MITCHELL: No, our analysis is as
14 contained in the briefs.
15 PRESIDENT GAILLARD: So, your case is
16 based on the fact that it has not really been
17 discussed, but you have not, and you infer a
18 certain interpretation. That, we understand, but
19 you have not seen anything specific in the document
20 production or elsewhere?
21 MR. MITCHELL: Indeed, that is our point.
22 That if this was to have that effect, one would

1 have expected to see something in the document
2 production.
PRESIDENT GAILLARD: Right. Now, there is an argument which it's a different question. There is an argument which is that of the parallel between the state-to-state arbitration and the investor-state arbitration. I'm not saying it's particularly relevant because I ask the question.

It's just one argument in the middle of a series of arguments, and it assumes that this and that is relevant, so I'm not, by asking a question, prejudging the relevance of that, and the relevance of the language or the structure of the text vis-a-vis the objectives of NAFTA and so on. So, it's just one question in the middle of the reasoning, but I would like to have some clarifications as to the structure of NAFTA with respect to the specific technical comparison between the state-to-state exclusions and the investor-state exclusions. So, I would like to tell you what I understand the exclusions to be and tell me what I miss. I'm asking both parties, of course. Tell me what I miss or what I mischaracterize, so that we understand better the relevant texts. I'm not saying that this is—which is relevant, of course, but we want to understand.

So, in terms of financial services. In terms of financial services, you have an exclusion of the investor-state disputes, which is found in 1101(3). Of course, you have to take into account...
9 the language in Chapter 14 where there are some
10 exceptions, and I'm aware of that, but the primary
11 language is found in 1101(3); is that correct, on
12 the U.S. side?
13          MR. MCNEILL: That is correct.
14          MR. MITCHELL: Yes.
15          PRESIDENT GAILLARD: Is there a parallel
16 exception other than what there is in Chapter 14, a
17 parallel exception for the state-to-state
18 arbitration regarding financial services? Maybe
19 the U.S. first.
20          So, is it your understanding? Maybe I can
21 rephrase the question. Is it your understanding?
22          MS. MENAKER: I think I understand your

1 question. Article 1414 in Chapter 14 provides that
2 Section B of Chapter 20, which is the
3 state-to-state dispute resolution mechanism applies
4 as modified by this Article, and to the settlement
5 of disputes arising under this chapter. And I
6 think the--I would have to confirm this, but I
7 think that the difference is in the selection of
8 the panelists that are going to serve on a
9 state-to-state dispute resolution pertaining to
10 financial services. There are special requirements
11 as to the--they have to be experts in financial
12 services which does not apply to Chapter 20.
13          PRESIDENT GAILLARD: It applies as
14 modified you would say?
MS. MENAKER: Yes.

PRESIDENT GAILLARD: And the provisions are found in Chapter 14 itself, you would say?

MS. MENAKER: Yes.

PRESIDENT GAILLARD: It's 1404 and so on; right? That's your understanding, too?

MR. LANDRY: Yes.

MR. MITCHELL: Yes, the provisions in

1 1414.

PRESIDENT GAILLARD: Thank you.

On national security, you have an exclusion which applies both to the investor-state arbitration and to the state-to-state arbitration, which is found in 1138(1); is that correct? So, your understanding is that there is--the exclusion is the same? And it's found in the same--at the same place; is that correct?

MR. MCNEILL: Yes, I think that's correct.

MR. MITCHELL: I believe the specific exclusion is found in 1138(2), which is the dispute-settlement provisions of this section in Chapter 20 shall not apply to the matters referred to in Annex 1138(2).

PRESIDENT GAILLARD: For national security it's 1138(1).

MR. MITCHELL: You're right. I'm sorry, I misread the provisions of (2).

PRESIDENT GAILLARD: There is another
21 parallel exclusion in (2) for other matters?

22 MR. MITCHELL: Yes, that's correct.

1 PRESIDENT GAILLARD: Now if we come to
2 competition law, you have an exclusion of
3 state-to-state arbitration in 1501(3), and you have
4 an exclusion of the investor-state arbitration in
5 note 43, but here again, and you will refer to this
6 language in your pleadings on both sides, and here
7 again there are certain exceptions which I'm not
8 getting into, so my understanding is correct on
9 this?
10 MR. MCNEILL: Yes, that's correct.
11 PRESIDENT GAILLARD: I'm glad you give
12 consistent answers. What about Canfor?
13 MR. MITCHELL: This part is easier than
14 the earlier part. Yes, we agree.
15 PRESIDENT GAILLARD: Thank you. And then,
16 of course, we come to the debated language. The
17 U.S. position is that Article 1901(3) is performing
18 that function—excluding the investor-state
19 arbitration with respect to AD and countervailing
20 duty—and there is an exclusion of the
21 state-to-state arbitration in Article 2004. One
22 party uses this to contrast the language and the
should basically have the same function. We understand the arguments. I'm just trying to locate the provisions and make sure that we understand that.

And we heard Canfor's position saying: it's not an imbalance, even if we are right, it's not an imbalance because the proper interpretation of Chapter 11 and state-to-state arbitration provisions means that the state can espouse--any state can espouse the position of the parties. So even a state-to-state arbitration could happen on the same type of matters in spite of the language of 2004; that's correct? You may want to elaborate a little bit on that.

MR. MITCHELL: That is correct. Our position is that the state may advance the same--a claim with respect to the same obligations. The difference may well be in remedy, of course, because the investor's sole remedy is compensation by way of damages, but the provisions of 2004 relate only to those matters covered by Chapter 19, and I think the Tribunal has our point that that relates to the substitution of binational appellate review for domestic appellate review, and the constraints upon the amendment of the parties--

PRESIDENT GAILLARD: I'm sorry, sir. If a state and not a private party like yourselves would like to start state-to-state arbitration on the
8 same type of issues like this conduct which is at
9 the heart of your claims, they would have to
10 explain that it's not barred by 2004; right? So,
11 they would have to fight against the language of
12 "except for the matters covered in Chapter
13 Nineteen...and as otherwise provided in this
14 Agreement, the dispute settlement provisions of
15 this Chapter shall apply", and so on and so forth.
16 So, that would be, wouldn't it, the
17 relevant provision? The core of the matter would
18 be the discussion on this language; is that
19 correct, if it were a state-to-state arbitration?
20 I'm asking counsel.
21 PROFESSOR HOWSE: If I may respond,
22 Mr. President. That's correct, a correct
23 interpretation of our view, a state would be
24 required to argue that the arbitration is not with
25 respect to a matter covered in Chapter 19, and that
26 would go to the definition of what matters are
27 covered in Chapter 19, what that expression means,
28 and we have made submissions on what that
29 expression means.
30 PRESIDENT GAILLARD: Right.
31 PROFESSOR HOWSE: But I also, even
32 if--that suffices I think to make it clear what we
33 are saying.
34 PRESIDENT GAILLARD: I have seen your
35 pleadings on this. I just want to ascertain that
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14 this would be the relevant language, and the
15 argument would be a little different from what you
16 have here under Article 1901(3), it would have to
17 go--it's not covered by Chapter 19. It's a similar
18 argument but on the basis of a different language.

19 PROFESSOR HOWSE: Except there may be
20 a--we might still have to consider the effect of
21 1901(3). Once this jurisdictional hurdle were
22 overcome, that is to say to the extent that

1 state-to-state dispute settlement has the
2 possibility of a different kind of relief. Then
3 you might have the live issue of whether you are
4 imposing an obligation with respect to a party's
5 antidumping and countervailing duty law by a
6 state-to-state ruling that doesn't give damages,
7 but that might be a ruling that goes to
8 theoretically, could go to changing the law.
9
10 But the reason I didn't say that, as I
11 realized, that if it's a matter not covered by
12 Chapter 19, and you have got over that
13 jurisdictional hurdle, it would be highly unlikely
14 that the remedy would be to change your antidumping
15 and countervailing duty law.

15 So, it's really--there is really a
16 parallelism, not an overlap.

17 PRESIDENT GAILLARD: Right. So, you say
18 that there is a parallel here. You say--I guess
19 you say in your pleadings that the idea of a

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parallel is not necessarily right in the first place--the idea which was raised by the U.S. that you need a parallel, and that's the right way to interpret a Treaty--and I guess you disagree with the idea that you cannot give to an investor more rights than to a state in terms of the right to arbitrate in the first place, and then you say in any event they could, on the basis of interpretation you just provided us with.

PROFESSOR HOWSE: Well, we are saying, I think, three things, but one of them is that there is no necessity of parallelism, and another is that we would disagree with the characterization of the differences in rights here as giving more. We think it's different rights related to different remedies.

And finally, we are not persuaded that one of the purposes of the NAFTA was to achieve some kind of equality between, whatever that may mean, between the investor-state and state-to-state proceedings. But instead it was to craft dispute-settlement mechanisms that would fulfill the whole variety of the purposes of NAFTA, some of which would need--you would need to craft remedies available to investors to do. Others states,
others both, but the parties in the negotiation, as we understand it, or to put it differently, the arrangements that we have before us are driven by the purposes that are stated in the Treaty and not the attempt to seek some equality or parallelism between state-to-state and investor-state procedures.

PRESIDENT GAILLARD: Right, your position is very clear on this, thank you.

On the U.S. side, do you have any comments on this particular issue? Other than what you wrote in your briefs, which obviously we have read very carefully.

MR. McNEILL: I think our position is set forth in our written and oral pleadings, and unless the Tribunal has questions, I think we have made our position clear.

PRESIDENT GAILLARD: No, no, just to give you an opportunity to answer what was just said, that's all, but your position is very clear, as in writing?

MR. McNEILL: Yes.

PRESIDENT GAILLARD: Then, if you take taxation, you have an exclusion in Article 2103(1) which applies to both state-to-state arbitration and investor-state arbitration with some caveats, some specific things which may not be excluded. So
basically you have an exclusion, but you have some
rights which you can exercise. For instance,
Article 2103(6) would apply in the context of an
investor-state dispute. Is that a fair
characterization?
MS. MENAKER: Yes.
MR. MITCHELL: Yes.
PRESIDENT GAILLARD: I guess a question
which comes to mind is that in light of the fact
that the travaux are very limited on this language
of Article 1901(3), and given what we have seen a
moment ago--I'm not going through it, if that's all
there is--I would like some explanations on the
contrast between this situation and situations like
competition law or taxation where you have--tell me
if I'm wrong, I'm just thinking out loud--you have
a type of measures or a type of law, a subject

matter which is difficult, which is sensitive; the
states want to carve it out, to exclude the normal
application of Chapter 11. And that's understood,
I mean, the rationale for doing that is perfectly
understood, but if you look at competition law, if
you look at taxation--and I'm not going through the
travaux for this purpose--they seem to have given
rise to more discussion, and a system which frankly
prima facie seems a little more elaborate with an
exclusion, but there is a back door: you may lose
everything but the expropriation provision;
And my question, I guess, is twofold. Is that characterization fair; and second, if it is fair, what is the reason for it?

(Pause.)

PRESIDENT GAILLARD: Who is answering?

MR. McNEILL: Yes. Mr. President, I think you asked a very general question, why are some of these provisions more elaborate than some others and I will start with a general answer and then I'll address some of the specific provisions.

I think a lot of these exclusions are performing different functions, and you have to look at each chapter and each provision and see what function that is performing and why it is performing that particular function in that context.

I will also add as well, since we looked at the negotiating history that each chapter was drafted by a separate negotiating team, so sometimes you would find some language that may not be identical from one chapter to the other. But the primary point is that each of these exclusions is performing a different function.

Now, if you look at 1501(3), for instance, there you have an exclusion which is no more complex, I would say, than 1901(3). It simply says
no party may have recourse to dispute settlement under this agreement, but you notice a big difference here it excludes just dispute settlement. It doesn't exclude substantive obligations.

If you look at 1901(3), however, it excludes everything. In fact, it is so exclusive of everything that the drafters thought it was necessary to reincorporate the entry into force provision, otherwise you might exclude the provision itself from the entry into force. And I think that was driven by, as we've made in our submissions, the parties need to cabin off Chapter 19 from the rest of the agreement entirely, the antidumping and countervailing duty matters are a very politically sensitive topic and the thought was it should function as a stand-alone part of the agreement.

And I think that's what Article 1901(3) reflects. No provision in any other chapter shall be construed to give rise to obligations with respect to a party's antidumping and countervailing duty law.

If we look at the exclusion in 2103, I think there it's performing again a different function. It says except as set out in this Article, nothing in this agreement shall apply to
taxation measures and then you see certain carve-outs from that and certain things are added in, and I think that's driven by the particular needs of taxation measures, that it was thought that particular things that there would be an exclusion and then there'd be some things added back in, but you contrast that again with 1901(3), it was a total exclusion, it was an exclusion for dispute settlement, it was an exclusion for obligations.

What is most interesting, I think, when you--go ahead, I'm sorry.

PRESIDENT GAILLARD: Please continue.

Finish what you were saying--I'm sorry, I thought you were done. Go ahead.

MR. McNEILL: You also pointed to 1101(3) as an exclusion, provides this chapter does not apply to measures adopted or maintained by a party to the extent they are covered by Chapter 14. Then if you look at the provisions in Article 1401, you see that the dispute settlement mechanism and certain substantive obligations from

Chapter 11 are incorporated directly into Chapter 14.

And you have to look at those two provisions together. There's not--counsel for
Canfor said first it was taken out and then it had to be reincorporated. Really it done sequentially that way. They were put in the Treaty together, and what they mean together is that the parties assumed that investor-state did not automatically apply outside of Chapter 11, to subject matters outside of Chapter 11.

As I mentioned in my oral submission, I believe, Chapter 11 and Chapters 14 cover very similar topics. Chapter 11 covers investment. Chapter 14 covers a subcategory of investment, investment in financial services.

I think it's a very important fact that the parties thought it was necessary to clarify that these provisions had to be incorporated into this chapter. In other words, there was no 1401, there was no 1101(3), that it would not be clear that it would apply at all. They felt it necessary to clarify, even in a chapter that has such a similar topic to Chapter 11 that had to be incorporated in a very specific way. The substantive obligations and the dispute-settlement mechanism.

And then you go back to Chapter 19, and you don't see that incorporation of Chapter 11 obligations. And there you have a chapter that covers a very different subject matter, covers antidumping and countervailing duty law, and you
see general provisions in the NAFTA that suggest that the parties intended to treat investment and trade differently. Trade is handled in Chapters—in Parts 22 and three. Investment is in Part Five. If you look at Article 1139, definition section of Chapter 11, it says investment does not mean claims to money that arise solely from commercial contracts for the sale of goods or services by nationals or enterprises. So, there is a general intent not to include trade matters in Chapter 11. Antidumping countervailing duty disputes are arguably one subcategory of those matters. So if it was necessary to incorporate these provisions directly into Chapter 14, such a similar chapter, then certainly one would expect to find similar provisions in Chapter 19, had the parties intended the antidumping matters to be subject to the substantive obligations and to the dispute-settlement mechanism in Chapter 11.

PRESIDENT GAILLARD: Thank you, Mr. McNeill. It was very clear. The question I wanted to ask at one point was that in certain cases you have the carve-out of the expropriation. It's not excluded specifically. Can you explain why? I'm referring to taxation. We discussed it a moment ago. You have an exclusion in 2103(1), but then you have the back door. Certain things are
arbitrable. Maybe I could ask the question
differently or ask a second question.

Does that take care of the labeling argument?

(Pause.)

MS. MENAKER: I think to the best of our

knowledge, the provision in Article 2103(6), we
believe, is there to provide an exception so that
the exclusion for tax measures will not apply where
there might have been an expropriation, but it
recognizes that one could--conceivably make the
argument that any tax is an expropriation, someone
is taking your money, and that is a fear that
regulatory agencies often have is that their
taxation powers will be challenged as expropriatory
in the normal course of business, and I think it's
well accepted that ordinary taxes are not
expropriations.

But there is the issue that as you said,
it can arise in two instances, but I don't think
it's confined to the labeling instance. I think--

PRESIDENT GAILLARD: It goes a little

further than that.

MS. MENAKER: Yes.

PRESIDENT GAILLARD: But it's one way to
take care of that problem.

MS. MENAKER: Exactly. Because if you
have something that is an expropriatory measure,
1 you label it as a tax, you can't get away with
2 that, but by the same token, I think there could be
3 a case where something perhaps is legitimately
4 characterized as a tax, but yet it is
5 expropriatory.
6 So, what this does is it provides the
7 state parties with a means to ensure that their
8 ordinary taxation measures are not--that they are
9 not subject to dispute resolution for that ordinary
10 taxation measures and only--that's why you need to
11 go through this mechanism if you are challenging a
12 tax, and it is only if the tax authorities of the
13 two state parties that are involved, including the
14 party of which the national who was the claimant,
15 if both parties agree that the taxation measure is
16 not an expropriation, the claim will then not go
17 forward.
18 So, it grants some prerogative to the
19 states to basically stop claims that are frivolous
20 in that regard, and if there is no consensus on
21 that matter, then the claim can go forward.
22  
23          PRESIDENT GAILLARD: Thank you,

1 Ms. Menaker.
2 On Canfor's side, on the same issues, you
MR. MITCHELL: Just briefly, if I could go back to your twofold question which was related to whether the characterization of the approach the parties took the carve-outs for competition, national security, and taxation was more elaborate than that taken in respect of what it is argued as a carve-out in 1901(3).

Absolutely. The approach taken was more elaborate, and your second question, was what was the reason for that, and it's our submission that the reason for that is simply that 1901(3) was not intended to have the effect that the United States contends. And if I can just elaborate on that from what we do know from the negotiating history, and we have just--in the course of submissions immediately heard reference to the national security carve-out, the taxation carve-out, and the competition and state enterprises carve-out. In respect of each of those, the lawyers' revision makes clear that those are provisions to be placed outside the investment chapter. The parties turned their mind to that and dealt with that extensively.

In the absence of any corresponding indication with respect to Article 1901(3) and CVD and AD suggests that that intention was not the same.

Sorry, just one other matter that came up, and I believe this is Mr. McNeill's point. He made
the assertion that matters of trade—trade is dealt with in parts two and three and investment is dealt with in part five, and therefore trade and investment are dealt with separately under the Treaty. That again is a point that has already been litigated in Chapter 11 arbitrations, and the easiest example is the Pope and Talbot case, where Canada argued that the measures of which Pope and Talbot complained were measures relating to trade in goods, and therefore they didn't fall within Chapter 11. The Tribunal did not accede to that assertion, and noted that matters can relate to more than one chapter of the Treaty.

PRESIDENT GAILLARD: Thank you. Do you

have a determination as to the impact on your case of the introduction at some point of the exclusion of the entry into force provision of the scope of Article 1901(3)?

MR. MITCHELL: I will turn that to Professor Howse.

PROFESSOR HOWSE: Yes. As a matter of state responsibility, the entry into force of the Treaty would require changes to antidumping and CVD laws within the meaning that Canfor attributes to that expression based on the definition in 1902, and so very simply, because what the parties--it is our surmise that because what the parties had in mind when they were thinking about what they wanted
to do with the provision like 1901(3) was to protect Chapter 19 against the interpretation, an interpretation that would lead to obligations of a nature involving amendment or conditions on amendment or retention of the law. They would have had to have made this exception because again, as just a matter of basic rules of state responsibility, if they didn't make the exception, there could be just the absurd result that someone would come along and say that 19--by virtue of 1901(3) you don't even have to amend your laws in order to make the Treaty effective.

It's a pretty--I would say that that would be the reasons.

And again, just as 1901(3) could be argued to be concerned with being very cautious about the possibility of improper interpretations, this rider is also an expression of caution, the exception to the exception is an expression of caution that someone could come along and just say, well, we don't have to do any changes to our laws, even if those changes are implied by state responsibility to implement the Treaty.

So, in our view, it confirms our view that what 1901(3) is about is something that would make a party do something to its law or conditions related to amending or changing or retaining law.

PRESIDENT GAILLARD: Thank you, Professor
That exhausts my questions for the time being. The Tribunal still has a number of questions but if the parties are prepared to go on for as long as the Court Reporter doesn't collapse, i.e. 45 minutes to an hour max, we can go on, and maybe we can be done. I need to speak to my co-arbitrators before I confirm that.

So, you would be amenable, I take it, to stay for another hour, if we had to?

(Pause.)

PRESIDENT GAILLARD: We will go on for a little while, and we will ask questions, but if you feel that you want to reflect on certain issues, we are certainly available tomorrow morning as planned, and you can—we can decide by the end of the day, but we are certainly available to hear your answers tomorrow, if you prefer to answer certain questions tomorrow as opposed to rushing and answering tonight.

Joseph, do you want to start your questions?

ARBITRATOR WEILER: At least I can start. I have still maybe a couple of questions to both parties. One question to Mr. McNeill, can I go back to the waiver issue. Because again it might
2 be of some consequence, if 1121....
3 I just need you to clarify, if I
4 understood you correctly, and I apologize if I
5 didn't, you said that the kind of procedure covered
6 by Chapter 19 proceedings was not the kind of
7 procedure envisaged by the waiver. Maybe to
8 sharpen the question, let's imagine that it was not
9 Chapter 19, but that it was just the Court of
10 International Trade, the regional thing of which
11 Chapter 19 binational panels are meant to be a
12 substitute.
13 Would you still say that because it maybe
14 doesn't go to the Tribunal but actually to the
15 notion of relief being sought.
16 Canfor replied to that, but it's almost
17 like giving you the possibility for a rejoinder.
18 MR. MCNEILL: Our main point on the
19 exclusion from the waiver requirement was really
20 that it provides an exception to that requirement
21 for administrative tribunals or courts under the
22 law of the disputing party. And I think you have

1 to look at that language and decide whether the
2 parties intended to include within that language
3 the binational panels. A binational panel is not
4 an administrative tribunal, and it's not a court.
5 In response the Canfor said well, that raises these
6 constitutional issues if you say binational panel
7 is not a court.
And to the contrary, if the parties had intended to include the binational panels within this language, they would have said the binational panels and by saying binational panels, it doesn't raise a constitutional issue. Now, in terms of the type of remedy that is available in Chapter 19, I merely pointed out that the relief they seek there, and the potential of getting back at the end of the day a check for your duties paid plus interest, at least makes Canfor's claims inconsistent with the intention of this Article, which is to prevent dual proceedings in which there could be the possibility of double recovery.

So, could this refer to the Court of International Trade? I would say that the Court of International Trade is, in fact, a court under the law of a disputing party. So I would say yes, the Court of International Trade would apply to this, but the binational panels would not.

So, that means I at least partially misunderstood your original reply because I thought your original reply went to the nature of relief sought, not to the status of the body before whom the relief would be sought. And because I had understood your, or one of your colleague's, argument before that said the binational panels was simply substituting for the
14 Court of International Trade, and if therefore they
15 were substituting for the Court of International
16 Trade, maybe it wasn't thought necessary to specify
17 also before binational panels because they were
18 just anything that would apply before the Court of
19 International Trade might be thought to—in fact,
20 that would mean that the Court of International
21 Trade—the binational panels were not a full
22 substitute but in some respects at least an

1 inferior substitute because this type of thing
2 would be barred. Whereas if it remained in
3 national hands, it would not have been barred. Is
4 that a correct implication of what you're saying?
5 And again I apologize if I misunderstood. It's
6 late, and we are all tired.
7          (Pause.)
8          MR. McNEILL: If I understand your
9 question correctly, first of all, I guess you're
10 asking whether the—whether 1121 could be drafted
11 loosely to mean binational panels because the
12 binational panels stand in the shoes of the court,
13 and so it was just thought that this would be a
14 general term that might capture the binational
15 panels; is that correct?
16          ARBITRATOR WEILER: That's in response to
17 your argument that it doesn't cover binational
18 panels.
19          MR. McNEILL: Right. I think our response
is that it would be extraordinarily sloppy drafting
if the parties had intended--had actually conceived
that this provision would grant jurisdiction under

two separate chapters of the NAFTA with respect to
antidumping and countervailing duty measures and
countervailing duty determinations, and this is the
way they did it. They didn't make it explicit.
They didn't say this chapter--that the same claims
can be submitted to Chapter 11 and to Chapter 19.
Instead they referred to it in an exception to the
waiver requirement as the court. So I think it
would be an implausible reading of that to say that
that is what they meant because it would have been
very easy certainly for the parties to say before
an administrative Tribunal, a court, or the
binational panels under Chapter 19. I think that's
what you would expect to see if there were going to
be such an extraordinary result that you could
bring claims--that a NAFTA party would actually
agree to subject itself to claims under two
chapters of the NAFTA with respect to the same
measures. I think you would expect to see some
clear language, that that's what the parties
intended than what you see in the exception in
Article 1121.
ARBITER WEILER: It's something that I might be interested to hear the response of Canfor.

MR. LANDRY: I will make one comment to that and then I'll pass it over to Professor Howse. Firstly, let's not forget that the binational panels in the system of review is now in the domestic law of the United States, so those binational panels are actually part of the domestic law in the United States. The terminology administrative tribunal or court is--is an encompassing term on a lot of different types of tribunals or courts.

Professor Howse, do you want to add to that?

PROFESSOR HOWSE: Yes, first of all, thank you for this opportunity. The question of whether proceedings are possible under more than one chapter of the NAFTA and I understood the United States to have just said that claims under two chapters of NAFTA with respect to the same measures were simply excluded. I only wished to note that there have been cases where claims under more than one chapter of NAFTA have been fully adjudicated, and one that comes to mind is--again I'm going from memory here--I believe the trucking dispute between the United States and Mexico which went to a Chapter 20 panel involved claims under both the
6 investment and services chapters of NAFTA, if I'm not mistaken, but if we have the chance to--I mean, if we don't end today and we have a chance, I would be prepared to be more precise about the cases where provisions in more than one chapter have been adjudicated.

And apparently in Myers, my colleague is suggesting that the Tribunal was prepared to consider that a services case could be brought in addition to investment based on the same measures and the same claims.

But the second observation is that the consequence of saying that for purposes of 1121(2) a binational panel is not an administrative tribunal or court under the law of the disputing party, would in our submission be contrary to the purposes of NAFTA and indeed to many statements, and again we would have to take a bit of time to find them, that not only would the replacement of Court of International Trade review by binational panels preserve fully rights and obligations of those affected, but actually would in some sense enhance them, that it was better, that it would provide it more rights. But the implication of saying that here binational panel is not such an administrative tribunal or court under the law of the disputing party would be to say now that you have Chapter 19, you have fewer rights with respect
to relief. And that doesn't seem to us to be consistent with the purposes.
And the second observation is really and again with the Tribunal's indulgence if we have the time overnight we will look into this more carefully, but under statutes, it is our understanding that you will find under domestic statutes some language that says for purposes of this statute a binational panel shall be considered to be a court, but again we would have to look into this and I'm just going from memory, and if we have a chance to do so, and the Tribunal will indulge us, we might want to make a more detailed submission about the way in which under the law of disputing parties a binational panel is deemed in that law or legislation to be an administrative Tribunal or in particular a court.

ARBITRATOR WEILER: Thank you. Can I ask a different question again first to the United States and maybe--I want to go back, when you explained very lucidly the different rationales for exclusions, I had two difficulties with it. One was at some level I thought that it was a non sequitur because you had assumed that the effect of 1901(3) was to be a total exclusion on the--and then you explained why this made sense, and what we really were trying to understand is whether or not it was a total exclusion, so one could not put the
PRESIDENT GAILLARD: You look at the result—you look at the position and you say does it make sense. I mean, it doesn't strike me as odd, but—

ARBITRATOR WEILER: But the alternative made equal sense to me, so I just didn't find it pulling one way or another. But do you remember we talked about the comparative advantage of the investors, et cetera? Here, if I understood you correctly, and again apologies if I didn't, you said that antidumping and countervailing duty being so delicate and political, sensitive, et cetera, they wanted to carve it out and not allow it. When you replied to my question earlier this morning about whether or not this construction of 1901(3) put NAFTA investors into a situation inferior to BIT investors, for example, I understood your argument to be, well, in some cases there are modern BITs or that are other BITs which are better than NAFTA in some respects, that one might come back to that, but if it thought, why wouldn't it have been thought in relation to all those BITs if antidumping, et cetera, is so delicate. It's true that they don't have a Chapter 19, but Chapter 19 is just meant to be a binational panel still.
applying American law and all the rest.

Wouldn't the same rationale, at least in some respect, have to be applied, that you don't want to allow something that was subject to the Court of International Trade and all the rest to be subject independently to a Chapter 11 type?

MS. MENAKER: Unless I'm misunderstanding your question, I think the clear answer is we don't have a similar type of exclusion in our BITs because BITs don't cover antidumping and countervailing duty measures. It's the same type of problem that we have been having here when we have been couching our answers in terms of we can't conceive of a claim that would fall within Chapter 19 and yet give rise to an investment dispute over which a Tribunal would have jurisdiction under Chapter 11 absent 1901(3).

So, we do have BITs out there. They cover—they offer investor-state dispute resolution for investment disputes, but we don't think that anybody could properly bring a claim under a BIT to challenge an antidumping or countervailing duty determination, even though there is no sort of 1901(3) provision just because you would look at the scope and coverage of the BIT itself, and it wouldn't cover it. So, you would make a
jurisdictional objection based on the scope and coverage of the BIT that it covers investment disputes, and that would not qualify.

ARBITRATOR WEILER: But you did think, that according to your construction, you did think that it was sufficient and important to exclude it by putting in 1901(3).

MS. MENAKER: Yes.

ARBITRATOR WEILER: If it was so far out and unthinkable, why would it?

MS. MENAKER: Because NAFTA is—what we have here is we have a Free Trade Agreement with a BIT inside of it, so just by virtue of being in the same actual document makes it a bit of a higher risk that a claimant will take advantage of different opportunities in that respect.

And I would also just mention with respect to our BIT partners, we don't have Free Trade Agreements with most of those BIT partners either, so they're not in a situation where they—where there would be an international obligation that we have accepted with respect to our antidumping and countervailing duty law that they would bring in any regard.

ARBITRATOR WEILER: But they're subject to—since NAFTA antidumping law is American antidumping law, Canadian antidumping law, Mexican antidumping law, they are subject to antidumping
law, and they are subject to determinations, and you might have taken the same precaution in saying we want you to know that is we consider outside, but I understand your answer.

I just have one question to, unless Canfor wants to comment, I have one question to Canfor. The question to Canfor is to rephrase in my way something that Mr. Harper asked before and I still, even I'm not yet--I wasn't quite satisfied by the answer given, and I'm going to try again. 1901(3) says that no other part of the--no other chapter of the agreement shall be construed to imposing obligations on the party with respect to the parties' antidumping law, so what we really would like to know, apart from the answer that the President's question is still pending, is those aspects of the Statement of Claim specific where you would argue that relief granted by a Chapter 11 proceeding should not be construed as imposing an obligation in relation to antidumping law. So, not the generic argument which I think we understood, but actually if one could walk through the Statement of Claim and say relief in relation to this, this, this, and this would not be construed as imposing an obligation in relation to anti-dumping law submission, and we can break for five minutes so both parties can get these documents before we ask the questions. Thank you.
17 (Brief recess.)

18 PROFESSOR HOWSE: We could certainly walk
19 through the Statement of Claim. Do you have a
20 copy? And we would be prepared to respond with
21 respect to each of the matters that we're asking
22 for relief on.

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1 But also bearing in mind that part of the
2 damage to Canfor has occurred through the pattern
3 of conduct, and that we are also submitting that,
4 besides the individual acts, the whole pattern of
5 conduct has--is a violation of, in particular, the
6 minimum standard of treatment. So, in looking at
7 individual provisions, we just would like that to
8 be borne in mind.

9 So, I have the Statement of Claim in hand,
10 which contains our various assertions or claims
11 concerning the conduct with which we seek relief.
12 And I would be--and my colleagues would be happy
13 to, if the Tribunal wished to point to particular
14 paragraphs there to explain why the provision of
15 relief would not create an obligation with respect
16 to antidumping or countervailing duty law.

17 I mean, if there are particular provisions
18 that are giving the Tribunal concern on that front,
19 I would be happy to look at those and talk about
20 why they don't create such an obligation.

21 ARBITRATOR WEILER: We think that we would
22 just be happy to listen to anything you would like
1 to point out and that Canfor would like to point
2 out under that direction, rather than us taking you
3 through Canfor's Statement of Claim.
4 PROFESSOR HOWSE: First of all, I would
5 like to emphasize that we view each of the acts as
6 such that--of such a nature that the relief we are
7 asking for will not impose an obligation with
8 respect to AD and CVD laws, as we understand that
9 expression. So, one thing I could do or we could
10 do, which would take a long time, would be to go
11 through every single act we describe and then talk
12 about our view of the pattern of conduct as a
13 whole. Or I could look--I could give you some
14 examples and reason through an example.
15 ARBITRATOR WEILER: Why don't you reason
16 through one or two examples.
17 PROFESSOR HOWSE: Certainly. Let's take
18 our examples concerning the claims of the Byrd
19 Amendment which might seem to be a very hard
20 example because in the Byrd Amendment we are
21 referring to a statute. I just need to find the
22 exact paragraphs of our allegation--

PRESIDENT GAILLARD: Can you start at
paragraph 141.

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PROFESSOR HOWSE: So, let's start with 141. The actions of the respondent in adopting the Byrd Amendment and its application or intended application to softwood lumber countervailing and antidumping duties levied on Canfor such that those duties will be redistributed from Canfor to the petitioners who are already receiving the benefit of being able to subject Canfor and its investors to a costly, arbitrary and discriminatory legal process that has resulted in the imposition of prohibited duties upon them is blatantly discriminatory and violates NAFTA's Articles 1102, 1103, and 1105.

PRESIDENT GAILLARD: Before you go on—you just read the paragraph—but before you go on, do you still maintain the words "in adopting" in the first line?

PROFESSOR HOWSE: Yes. And in wording the Statement of Claim in this fashion, we relied upon the characterization by the United States before a panel of the World Trade Organization of the Byrd Amendment.

And if I may, I would like to read that characterization. It's summarized or quoted by--

PRESIDENT GAILLARD: I don't understand, I'm sorry. This is a clarification point because I understand your latest submissions to say, for instance, at paragraph 26 of the rejoinder, that
the adoption of a law is not a problem, but what's
the problem, you say, it's the application. To me,
it's the thrust of your argument that the adoption
itself may not be caught by this provision we are
discussing, but its application is different
because you read the word "law" in a particular
way.

So, how do you reconcile these two ideas?

PROFESSOR HOWSE: And this is why I wanted
to look at specific examples because I think the
examples play themselves out differently,
Mr. President, because in this particular case this
law has--the United States has characterized this
law as, quote-unquote, having nothing to do with

the administration of antidumping and
countervailing duty laws. Those are the words that
the United States used before the WTO panel,
nothing to do with the administration of the
antidumping and countervailing duty laws.

So, in this particular instance, we would
argue that we could--here we relied on the United
States's own characterization that this particular
law had nothing to do with antidumping or
countervailing duty laws. But if the United
States's own characterization before the panel
proceedings which is what we relied on in drafting
the Statement of Claim is erroneous, then you're
right, we may have a problem with adoption here.
That's right.

PRESIDENT GAILLARD: My understanding was that you had implicitly dropped these terms, because I'm surprised you insist on those terms. I'm not saying it's right or wrong. I was just questioning the consistency of that with your most recent pleadings, but that's fine. I mean, whatever is your position is your position. I don't want to put the words into your mouth.

PROFESSOR HOWSE: Mr. President, I believe you're correct in the way that you've read our latest submission in that we have clarified the focus of our concerns. I was meaning more to just explain how we could--how we could have come to a conclusion here that the adoption itself posed a problem, given our general theory that it's really where the application of the law is concerned that 1901(3) doesn't exclude. So, that was only the point I wished to make. In fact, you have completely understood our gloss in the rejoinder on the main focus of our claim about the Byrd Amendment.

PRESIDENT GAILLARD: Thank you.

Mr. Clodfelter, you want to answer specifically on this?

MR. CLODFELTER: Actually, I was confused. We did hear this morning that the claim is not based upon the Byrd Amendment, not based upon the
statute, which is, of course, contrary to the text of the paragraph 143. So, we are a little confused still. What's the claim about here?

PRESIDENT GAILLARD: I guess it's not a question, it's just a remark; right?

MR. LANDRY: For the record, Mr. President, we do not withdraw paragraph whatever it was that Mr.--I don't have it in front of me because he's using my paragraph.

PRESIDENT GAILLARD: It's paragraph--it's the words "in adopting" in paragraph 141 of the Notice of Arbitration and Statement of Claim. So, it's noted. The position--there are two different things here. The position of the parties, the contention, what is it that your position is, and what the argument is. Now, one thing has to be crystal clear is what the position is and what you're requesting.

So, what you're saying here is: we don't drop a word of what we said in the initial pleading, the Notice of Arbitration and Statement of Claim. That's your position; correct?

MR. LANDRY: With respect to the Byrd Amendment as referenced by Professor Howse, you're correct.
PRESIDENT GAILLARD: Right. So, that's one thing.

Then comes the argument--and I don't want to mix the two levels--when we heard a lot of argument on this, and I don't think as far as we are concerned we have any questions. We think the positions of the parties are very clear, but I want you to have an opportunity to further elaborate on it if you so wish, but it's not a question from the Tribunal. So, on Canfor's side, Mr. Mitchell or Mr. Howse?

PROFESSOR HOWSE: Yes, exactly. As Mr. Landry suggested, my comments go to the argument, and I think that we have--in our most recent submission we have enriched the argument, but we--and focused the argument about the Byrd Amendment. But no, we have not actually dropped the claim.

But I did want to--and I also wanted to explain how not dropping it is consistent with our general theory because of the way in which the United States itself has characterized this particular statute as, quote-unquote, having nothing to do with the administration of AD and CVD law.

PRESIDENT GAILLARD: Thank you for clarifying the rationale, the argument. We have no questions on this, but on the
MR. CLODFELTER: Mr. President, we may want to return to this later before the evening is out, but not right now.

PRESIDENT GAILLARD: This is fine. Professor Weiler has no further questions. Mr. Harper, do you have a few questions?

ARBITRATOR HARPER: Oh, yes.

PRESIDENT GAILLARD: Maybe more than a few.

(Pause.)

PRESIDENT GAILLARD: Let's have two minutes. The Court Reporter would like a two-minute pause, so let's have a two-minute pause.

(Brief recess.)

PRESIDENT GAILLARD: We are back on the record. Mr. Harper will have a few questions, and we will see in a moment if we need to reconvene tomorrow or not. We are completely in your hands, and we are available tomorrow to hear you, so we will decide when we hear your answer to the question, and frankly it would be your call, so we would want you to make a determination on that, after Mr. Harper has asked his questions.

Conrad, do you want to go ahead?

ARBITRATOR HARPER: Thank you, Mr.
President.

Professor Howse, is Canfor asking this Tribunal to adjudicate the issue of whether the Byrd Amendment is or is not an antidumping law or a countervailing duty law?

(Pause.)

PROFESSOR HOWSE: Well, in this particular instance, Mr. Harper, I'm not sure that the Tribunal would need to adjudicate it in the sense that our position is the same, it appears, as the position that the United States has stated in this matter before the World Trade Organization. So, I think both parties are essentially of one mind that, as the United States put it, the legislation in question, the CDSOA, has nothing to do with the administration of antidumping and countervailing duty laws. It would seem very odd, and we would take the position--we have a legal position on this, too, if the United States were now to claim otherwise that it claimed at the time before the WTO panel, and--but you would have to ask them that question, if they changed their view of the Byrd Amendment since they made that submission to the WTO panel.

And if they have changed their view, then we would want to say something about the legal implications of their now taking a different view than the one they have taken in their oral
ARBITRATOR HARPER: Let me take this opportunity—it would have occurred to me anyway—to inquire of the respondent what is the position of the United States on that question.

MS. MENAKER: Our position is that all of Canfor’s claims based on the Byrd Amendment are, indeed, barred by Article 1901(3), as we stated in our written submission since the very first submission that we made, is that any obligation imposed on the United States with respect to the application of that law, although it has never been applied or insofar as Canfor’s claims are concerned would be imposing an obligation on the United States with respect to its antidumping and countervailing duty law in contravention of Article 1901(3).

I discussed, I believe it was, yesterday and in our written submissions that again the only way in which the Byrd Amendment has had any effect on Canfor could be their contention that the—-it improperly incentivized the domestic industry to support the petitions before the DOC and ITC, and therefore it is essentially an argument that the Commerce Department and the International Trade
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1 Commission improperly instigated the investigations when, if they had applied U.S. law on the issue of standing properly, they would not have instigated those investigations.

2 And the instigation of an investigation is, of course, conduct that is inextricably intertwined with the administration and application of the antidumping and countervailing duty laws. So, in that respect, their claim with regard to the Byrd Amendment is barred by 1901(3).

3 ARBITRATOR HARPER: Because the matter seems to be one of some subtlety and perhaps complexity, I should perhaps pursue the matter, Ms. Menaker, by asking you whether the United States has a position as to whether or not the Byrd Amendment is itself a measure that is an antidumping law or a countervailing duty law.

4 MS. MENAKER: Yes, I would direct the Tribunal's attention to the definition of an antidumping and countervailing duty statute that is in Annex 1911, and that is defined as the relevant provisions of Title VII of the Tariff Act of 1930, as amended. And, in fact, the Byrd Amendment or the Subsidy Offset Act of 2000 is an amendment to Title VII of the Tariff Act. So, I believe that answers your question and responds very briefly to remarks that Canfor made.
The issue before the WTO was a different issue. The issue was whether the Byrd Amendment was an action against dumping or an action, a specific action against dumping or in a specific action against subsidization within the meaning as those terms are understood in WTO jurisprudence and whether they thus violated the antidumping code and the SCM agreement; and indeed, the United States argued they did not. We lost that case. We appealed it, as was our right, and the WTO appellate body upheld the panel's decision in most respects, not in all respects and not with respect to this improper standing question.

I think that there is certainly tension in Canfor's argument insofar as it criticizes the United States for complying with a Chapter 19 Panel's decision, albeit begrudgingly. So, they criticize us because we were unhappy that we did not prevail, and yet we did comply.

To now suggest that the United States is somehow at fault for having made an argument before another international tribunal that it lost, and that it cannot--that it is bound by arguments or particular statements that it made to that Tribunal, insofar as they are even relevant in this context and cannot itself reform its view to some extent based on the decision rendered by that Tribunal I don't think is a fair position. Thank
ARBITRATOR HARPER: In light of Ms. Menaker's statement, Professor Howse, does Canfor have a different view, or any view as to whether or not the Byrd Amendment is an antidumping law or a countervailing duty law?

PROFESSOR HOWSE: Very briefly, I think the United States has made some explanation of the change of what appears to be a change of position from that it took in characterizing municipal law before the WTO panel.

I would only say that the panel and the appellate body were careful to rule only under the question of whether the Byrd Amendment fell within the meaning of certain provisions in the WTO agreements. My understanding is that the panel and the appellate body could not have, as it were, overruled the overall characterization by the United States that the Byrd Amendment, quote-unquote, had nothing to do with the administration of antidumping and countervailing duty laws. It could only find that that characterization by the United States nevertheless did not mean that for purposes of particular provisions of the WTO agreements that the U.S. had not violated those particular provisions.

PRESIDENT GAILLARD: With respect, it's
not the question. The question was: What do you
think about this issue?

PROFESSOR HOWSE: With respect, sir, I
think we need to talk among ourselves because we
had understood it as something that was not in
dispute. Now you're asking what we think
independently of the U.S. characterization. Can we
have a moment?

PRESIDENT GAILLARD: Of course. Please,
you can speak among yourselves.
(Pause.)

PROFESSOR HOWSE: Thank you for your
indulgence.

It's our understanding that where a party
has changed or modified its antidumping law or
countervailing duty law under 1902(2) of NAFTA,
it's required to follow certain requirements which
include a notification requirement that they're
engaging in such an amendment of their antidumping
and countervailing duty law.

And it is also our understanding that no
such notification was made by the United States
under the terms of 1902(2). And in our submission,
having not followed 1902(2) requirements with
respect to changes or modifications of antidumping
or countervailing duty law, the United States
cannot come now and take advantage of an exception
which, even on their theory, on its very words, only applies to law that is, quote-unquote, antidumping and countervailing duty law. In other words, if it is antidumping and countervailing duty law, then they would need to do what they have to do and modifying that law into 1902(2). If they haven't done it, then we don't believe it would be open even on their interpretation of 1901(3) to say it's not.

PRESIDENT GAILLARD: In what you say there is a point of fact and an argument, and on the fact I would like to turn to the U.S. Is it a correct assertion that the Byrd Amendment has not followed Article 1902(2) requirements?

MS. MENAKER: I apologize, but I could not say so definitively. I would have to check with my colleagues from the USTR.

PRESIDENT GAILLARD: That's fine.

ARBITRATOR WEILER: Do you accept that it's germane to the question?

MS. MENAKER: Not at all. I don't think it has anything to do with Article 1901(3).

PRESIDENT GAILLARD: We have a factual allegation, and I wanted to see that, and then we go back to the argument.
argument, maybe we won't elaborate on the argument now. Do you want to say a word on the argument part?

MS. MENAKER: First, just to respond to Canfor's argument that somehow our position has changed. Just to be clear, our position has never changed in this arbitration. From the very beginning, we said all of Canfor's claims were barred by virtue of 1901(3), and in our reply we specifically addressed their Byrd Amendment claim and said for specific clarify all of their claims, including all claims relating to the Byrd Amendment, are barred by Article 1901(3). So, our position has remained clear throughout this arbitration.

I don't think this Article 1902 issue—let us presume now. Like I said, I do not know factually whether or not Article 1902 had been complied with or whether it even applies, but let us just presume for the sake of argument that Canfor is correct and that there had been some violation of Article 1902. That does—that does nothing, has no bearing on the issue of whether 1901(3) applies. In fact, it's somewhat circular in this regard because the obligation is to notify an amendment to your antidumping and countervailing duty law, and then Canfor is now arguing that if you don't do that notification, that somehow the
amendment therefore becomes not an antidumping or countervailing duty law, and any obligation you impose on it is not in violation of 1901(3). So, that begs the question, then couldn't a party completely get around any notification requirements because any time it ceased to notify, then the amendment would be deemed to be not a part of its antidumping and countervailing duty law, and he would not have to comply with all of the requirements in Chapter 19 relating to amendments.

ARBITRATOR HARPER: I sense in this dialogue a resurgence of the issue that from time to time my colleagues have pursued, namely the issue of labeling and whether or not one could avoid an obligation by mislabeling or incur an obligation by correctly labeling. And I see, if I may, that this issue admits at least a number of arguments along that line. I think it would be helpful for us to know what the facts are--and I think I speak for my colleagues in that regard--and then we would be glad to entertain the arguments as well, but I think we need to know what the facts are.

PRESIDENT GAILLARD: I made a note of that. Ms. Menaker, can you make a note that we want to know what the answer is on a factual basis on the use or not of Article 1902 with respect to the Byrd Amendment.
MS. MENAKER: We certainly can, but again--

PRESIDENT GAILLARD: I understand the argument that it's not relevant, but we have a point of fact disputed, and we want clarity on that.

MR. LANDRY: Mr. President, I wonder if I could just add one thing in response to a point that Ms. Menaker made.

PRESIDENT GAILLARD: Certainly.

MR. LANDRY: I will leave it very short. The protections that are provided for under 1902(2)(D) regarding the amendment, it's very clear now that amendment was made--and for sake of argument let's assume there was no notice given--it was an amendment that did not comply with the WTO requirements under the--as required under that section. And that was the only point I wanted to make in response.

PRESIDENT GAILLARD: I understand the argument.

So, Mr. Harper will continue his questions for a little while, and then we will break shortly.

ARBITRATOR HARPER: Let me turn to a different subject.

(Pause.)

PRESIDENT GAILLARD: Mr. Harper will ask the question, and then we will see--or I'm asking
the parties whether they prefer to discuss it tomorrow when they know the topic or they prefer to answer now. It would be your call, keeping in mind the fact that we cannot go on forever because of the Court Reporter, who has been on for a long time.

ARBITRATOR HARPER: Thank you,

MR. President.

Let me ask counsel for Canfor the following question: Suppose Chapter 11 of the NAFTA had an Article that stated, "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 includes relevant statutes, legislative history, regulations, administrative practice, and judicial precedents."

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?

MR. LANDRY: I think Canfor would prefer to answer that question tomorrow when we are fresh.

PRESIDENT GAILLARD: I think it's fair because that's obviously a question which may lead
to follow-up questions. I mean, I don't think you

so it's only fair. So, we would resume tomorrow,

if you would agree, at nine. Is that all right for

both sides? What do you have in mind in this

respect?

MR. MITCHELL: My only constraint is I

need to be at the airport by 3:30, so hopefully we

won't be going that long.

PRESIDENT GAILLARD: On the U.S. side? Do

you have any particular time requirements?

MS. MENAKER: 9:00 is okay with us.

PRESIDENT GAILLARD: So, we will resume

tomorrow at nine.

And my guess is we should be done
certainly in the morning. We had in mind an hour
discussion, something like that, but forecasts are
always subject to certain caveats. So, I adjourn
the meeting for the day. Thank you very much, and
we will meet tomorrow at nine. Thank you.

(whereupon, at 6:58 p.m., the hearing was
adjourned at 9:00 a.m. the following day.)
CERTIFICATE OF REPORTER

I, David A. Kasdan, RDR-CRR, Court Reporter, do hereby testify that the foregoing proceedings were stenographically recorded by me and thereafter reduced to typewritten form by computer-assisted transcription under my direction and supervision; and that the foregoing transcript is a true record and accurate record of the proceedings.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to this action in this proceeding, nor financially or otherwise interested in the outcome.
of this litigation.  

DAVID A. KASDAN, RDR-CRR