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 1 (Final)

Tuesday, December 7, 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 9:18 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,

Senior Counsel, ICSID

Court Reporter:

DAVID A. KASDAN, RDR-CRR
Miller Reporting Company, Inc.
735 8th Street, S.E.
Washington, D.C. 20003
(202) 546-6666

APPEARANCES:

On behalf of the Claimant/Investor:

P. JOHN LANDRY
JEFFREY HORSWILL
TODD WEILER
PROFESSOR ROBERT L. HOWSE
DAVID M. CALABRIGO
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
Harris & Company

14th Floor Bentall 5
550 Burrard
Vancouver, British Columbia
Canada V6C 2B5
(604) 684-6633
kmitchell@harrisco.com

APPEARANCES: (Continued)

On behalf of the Respondent/Party:

WILLIAM H. TAFT, IV
Legal Adviser
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

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

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

C O N T E N T S

P R O C E E D I N G S

PRESIDENT GAILLARD: Good morning, ladies

and gentlemen. I open the hearing in the arbitration between Canfor Corporation and the United States of America under the UNCITRAL Rules and NAFTA Chapter 11.

I will first introduce the Arbitral Tribunal. I am Emmanuel Gaillard, the presiding arbitrator in this matter. The other members of the Arbitral Tribunal are to my right, Mr. Conrad Harper, and to my left Professor Joseph Weiler.

Further to my right, Ms. Yas Banifatemi is assisting the Tribunal as the Administrative Secretary, and further to my left--I don't know where he is now--here he is--Mr. Gonzalo Flores from ICSID is also assisting the Arbitral Tribunal.

At this juncture, I would like to take this opportunity to thank ICSID for hosting this procedural hearing. It's very kind of them. These premises are very well suited for that. Although this is not an ICSID case per se, they have pledged to host NAFTA cases, so I really would like to

thank them for that.

Now, I would like also to introduce our Court Reporter; Mr. David Kasdan is here from Miller Reporting Company, and I turn to the parties. I would like each side to introduce their teams, and then we will turn to the other delegations. So, on the claimant's side. Mr. Landry, would you like to introduce your team

on behalf of claimant, or maybe if you prefer, each member can introduce himself or herself. It is your turn.

MR. LANDRY: Mr. President, I will introduce the people at our table. Myself, my name is P. John Landry, and next to me is my co-counsel Mr. Keith Mitchell, and next to Mr. Mitchell is Professor Robert Howse from the University of Michigan. Next to Mr. Howse is Professor Todd Weiler from the University of Windsor in Canada. And beside Mr. Weiler is David Calabrigo, who is the General Counsel of Canfor, and beside Mr. Calabrigo is my colleague Mr. Jeffrey Horswill.

PRESIDENT GAILLARD: Thank you. In

speaking to you, I realize that this layout is a little weird in that the Tribunal is not exactly in the middle between the two parties, and we will fix that by the afternoon. It is odd to speak on one side and have a different angle for the other side, but it's purely a mechanical issue.

I also want to say that we have circulated a list of attendees. It's for each group. It's in alphabetical order, so if you would be kind enough to sign in front of your name, there is a box across your name, and that is being circulated at the moment.

I now turn to the respondent's side, Mr. Taft. Would you be kind enough to introduce

your team.

MR. TAFT: Yes, Mr. President. My name is William Taft, and I'm the Legal Adviser for the Department of State. Immediately to my right is Ronald Bettauer, who is the Deputy Legal Adviser for the department. Next to Mr. Bettauer is Mark Clodfelter, who is the Assistant Legal Adviser for International Claims and Investment Disputes. Next

to him is Andrea Menaker, I believe, yes, there you are, Andrea, Chief of the NAFTA Arbitration Division in the Office of International Claims and Investment Disputes. And next to her is Mark McNeill, who is a member of the NAFTA Arbitration Division. Next to him, I think, if I got it, yes, is Jennifer Toole, who is also a member of the NAFTA Arbitration Division. And we have two more people down there from that same division, David Pawlak. Are you there, David?

MR. PAWLAK: Yes.

MR. TAFT: And CarrieLyn Guymon. Are you there?

MS. GUYMON: Yes.

MR. TAFT: Very good. Okay. So, that is our team. Thank you, Mr. President.

PRESIDENT GAILLARD: Thank you very much. Also attending this hearing are delegates from the other NAFTA Parties pursuant to the NAFTA rules, Canada and Mexico. Would you be kind enough to

introduce yourselves? Maybe Canada first.

MR. NEUFELD: I'm Rodney Neufeld from the

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Trade Law Bureau, Canada.

MR. BECKER: I'm Steven Becker from the law firm of Shaw Pittman, external counsel to the Government of Mexico.

PRESIDENT GAILLARD: We also understand that other members of the two states are in attendance. Maybe you want to give your name for the record.

MR. BLACK: John Black with the State Department.

MS. SPOT: Laura Svat with the State Department.

MS. BOYLE: Michelle Boyle, State Department.

MS. EVANS: Kimberly Evans, U.S. Treasury Department.

MR. FEIGHERY: Timothy Feighery, guest of ICSID.

MR. PALMER: Jason Palmer, State Department.

PRESIDENT GAILLARD: Thank you very much. Finally, as you know, the parties have agreed to

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make the hearing open to the public. The hearing

is thus broadcast live in a separate room within the ICSID premises. I want also to welcome those, if any, attending the hearing in the other room. We don't see you, but you see us. We will say hello for once, and we will forget about you going forward.

So, as far as we are concerned here, we have a three-day hearing. The parties have been kind enough to agree to the schedule. This morning we will have a presentation of the U.S. argument which should last the whole morning. Then we have a lunch break. We will this afternoon have Canfor's response. And tomorrow morning we have a U.S. reply and Canfor surreply--shorter presentations.

As far as we are concerned, we have decided to ask only clarification questions in the course of those presentations. We will let you express yourselves as you wish. We may interrupt to ask some clarifications when we don't understand and really on the point. But we will refrain from

asking more systematic questions and engaging into a debate at this stage, and we will not disrupt something you may want to say later or something you want to present differently, so we will keep our questions. We do have a number of questions, of course, and other than for clarification purposes, we would like to ask those questions in

the end.

This will be tomorrow morning at the end of the morning, if we have very short presentations in the morning, more likely tomorrow afternoon, or we could start in the morning and finish in the afternoon. But I would caution you against filling in your calendars too early because we do have questions, and we want to have enough time to address those questions. Even the third day that is reserved should not be disposed of before the Tribunal asks you to do so because we have reserved the three days and we may well use the three days. At this stage we are not sure to be in a position to go faster than that. It's not our intention to rush anything. We want to have ample time to ask

the questions. So don't worry if we don't have too many substantive questions at this stage during your presentations. We will do this afterwards.

And as to the questions, we plan to ask questions to both parties. Some questions will be more directed to one party or, the other, but we will have some opportunity to comment on the answers going forward.

MS. MENAKER: Mr. President, I apologize for interrupting. I just wanted to ask if other people's feed is working? Our LiveNote is not picking up any of the transcript.

PRESIDENT GAILLARD: It should be working.

Mine is working.

MS. MENAKER: Okay. So, perhaps during a break.

PRESIDENT GAILLARD: So maybe we can break for a second. Would you like, Mr. Kasdan, try to fix it.

(Pause.)

PRESIDENT GAILLARD: For each party the LiveNote is working? Good. All right.

So, we will this morning hear the U.S. side, but before we do that, we have another set of comments or remarks that I would like to make on behalf of the Arbitral Tribunal.

I have three remarks. The first has to do with the fact that we have read very carefully --you hear that in every arbitration--the Tribunal has read very carefully the pleadings and the documents filed together with the pleadings, and we want to commend both parties for having done such an excellent job. The quality of these pleadings is extraordinary, and it was a pleasure to read the briefs. Of course, it makes our life at the same time easier and more difficult, because not everybody can be right. But it was really a pleasure to read this, and it's an outstanding work, so I wanted to say that for the record, and we really mean it.

The second remark is more substantive.

The Tribunal is well aware that there are parallel proceedings on similar issues which have issues in common or which are likely to have issues in

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common. We have not studied those other than through what is available on the various Web sites, but we understand, at least from that record--and it was no secret in this arbitration--that other parties similarly situated as compared to Canfor in this matter may have an interest in starting their own proceedings and that at least some of them have done so.

Here, we would like to make a series of remarks on this. We are very mindful of the existence of Article 1126 of NAFTA which provides for the possibility of consolidation, at the request of any party in any of these proceedings. The parties could have another Tribunal decide on the issues which would be similar, and they could dispose of these issues for the sake of consistency and for the sake of fair and efficient resolution of the claims, to track the language of Article 1126 of NAFTA.

Our own position on this is probably irrelevant, but I would like to make it clear for the record and for the parties. We believe that

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there is no right to be an arbitrator or arbitrators. We believe that we are here to serve the parties and to resolve disputes when they need to be resolved. So, if you want us to resolve these disputes, we'll do so. We will not shy out. We have no problem in addressing the issues which you have been kind enough to put before us.

That being said, we are equally comfortable, if you were to use the tools which NAFTA provides you, which for the sake of consistency, is consolidation. It goes without saying again, we have no right to be arbitrators, and you should be assured that we are perfectly comfortable with that. And indeed, from our standpoint, we wonder if it would not be a good idea to ensure consistency by using these tools.

I had brief phone calls with each party on this issue, and I, of course, disclosed to the other party where I was calling the other party. I did it the same day: within five minutes after I called one party, I called the other, and that was completely transparent. Both parties said that at

this stage, they had no intention of using Article 1126. This is fine, but I would like the parties to think hard about that.

And, in fact, I would like the parties to think about the mechanism according to which they

would tell us their views on this either tomorrow or after the hearing. At some point during this three-day hearing, I would like both parties to express their views on this. We could give you a time frame in mid-January--when we are going to start meeting, or a little bit before we start to meet--to think about it and let us know your views on this, because we want to make sure--we are sure that you think hard about all the issues in this case--but we want to make sure in an official way that you have considered this issue carefully, and you have made a determination that, for the time being, you prefer not to use Article 1126.

This is not to mean that we want you to waive, after this period of time (say, mid-January, or whatever we will decide) any right to do so. If in January you tell us that you don't want to

consolidate, and then three weeks later you change your mind, that's perfectly fine. This is a right you have, and we are not trying to pressure you to waive that right. Rather, it would be to have an indication, and more formally than a couple of phone calls about this very important issue for the integrity of NAFTA, for the integrity of the process, for the sake of consistency, and the way the whole treaty works. So, we want the parties not to take this issue lightly.

It also goes without saying--and here I'm

not talking to the other room, but I'm talking to the parties--that we are all mindful that this matter is not just in our hands or in your hands. It's you, but it's also other related parties. So, the U.S. has several hats, but other parties also have their own relationship with the U.S.

So, I think everybody should think hard about that and then tell us what they think about this process, or this process issue.

And then again, don't read it the other way around. We don't want anyone to waive

anything. But just to make a statement at a given point in time.

So, if there are no questions on that, you can address this at your leisure this afternoon. Don't take it on your time of presentation, maybe before the questions or when we discuss procedural steps you may want to address these issues and tell us what you think, not on the merits, but on the process. That's the second remark.

The third point is also procedural. We have a major point which basically is all the jurisdictional questions which surround--I say "surround" vaguely because there are other provisions, of course, which would surround--Article 1901(3). That's the major issue which you have addressed and briefed fully and extensively, and that's where your briefs are of

the utmost quality. We have seen your writings on this. We will hear you today about that. So, we think that this issue is procedurally ripe. We can dispose of that issue after having heard you orally and after the Q and A session. That's clear.

At some point, as you may know, as you will remember, the Tribunal would have liked to have the same level of development for the other potential jurisdictional issues which the U.S. has raised surrounding the idea of the existence of an investment, who is an investor, who qualifies under Chapter 11 as an investor/investment. We suggested that to be addressed by the parties in the same time frame as these Chapter 19 defenses.

Apparently, the parties have not embraced that idea with great enthusiasm, although we understand that the defense has been raised. So, on the U.S. side there is an argument that the claimant is not an investor, does not qualify anyway; even if the claimant is right as to the true meaning of Article 1901 and the relationship between Chapter 19 and Chapter 11, the respondent says that the claimant is not an investor.

Now, we understand that this defense exists, but in our mind, it's clear that it has not been briefed extensively. It has not been developed to the same degree as the other argument.

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So, although we tried to induce you to sort of do it in the same track, at this point being realistic, we realize that it has not been the case. This issue, in our view, is not ripe. I don't know if you intended to discuss it at length today, but I would tell you immediately--so that you can adjust your presentations and certainly tell us if that was consistent with your own expectations--that we think that it would be a waste of time. You are certainly free to address this, but we think that the issue is not ripe. Unlike the other issue, this issue has not been briefed adequately due to your procedural choices, which we respect, of course, and we are leaning--what we wanted to avoid is piecemeal arguments because we don't think it's fair to have several jurisdictional phases before the merits.

So, as a result of this, if our determination is that we have to go forward, depending on what we say on the issues surrounding Article 1901, we would join that to the merits. So, we acknowledge the existence of this argument,

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but we don't want to have a second phase only dedicated to that in any event, whatever we decide. Either we say there is a bar in Chapter 19, and the U.S. is right on this--so it's the end of the

story--or we say the U.S. is wrong on their interpretation of Chapter 19 and the relationship between Chapter 19 and Chapter 11, so we have to go forward. We will acknowledge the existence of other jurisdictional arguments, but those will be heard on the merits if this is what we decide.

So, in essence, I'm simply saying--and please correct me if I'm wrong, and if both parties have a different understanding as to the exercise today and tomorrow--that in our view this is not an issue which we expect you to address fully, because in any event, whatever we decide on the other issues, it would be something which will be decided later on or never, depending on whether the first argument prevails.

I would certainly, at some point, expect a reaction from a pure procedural standpoint, as to what is in front of us and what we have to decide

at this stage in the proceedings. Is that clear? I don't want to prolong those opening remarks further, unless you have specific questions on these issues. Right now very briefly, maybe on claimant's side, before we hear the presentation which we were to hear this morning? Do you have anything to add or a question on this, Mr. Landry?

MR. LANDRY: Thank you, Mr. President. The only point I would make on your last, your third comment, is that we had understood that if,

indeed, we get by this first jurisdictional phase, that that jurisdictional question would be dealt with at the merits.

PRESIDENT GAILLARD: So, in a sense--maybe I should hear the U.S. side--but in a sense there would be an agreement on this; is that correct on the U.S. side? Maybe Mr. Taft?

MR. TAFT: Yes, Mr. President. We have the same understanding with respect to those other jurisdictional questions.

PRESIDENT GAILLARD: Right. So, on this I can close the discussion in saying there is an

agreement that this is not part of this three-day hearing, and it would be reserved for future steps in the proceedings, if any, to be fair to both parties; we can characterize it like this. So, this is not something on the table at this stage. Thank you.

Now, I'm sorry, Mr. Taft. We have delayed your presentation. The floor is yours.

OPENING STATEMENT BY COUNSEL FOR THE U.S. DEPARTMENT OF STATE

MR. TAFT: Thank you, Mr. President, members of the Tribunal, it's a pleasure to open the United States's presentation today. I speak on behalf of the entire United States team in saying that we are honored to appear before you.

This is a case of immense importance. As

you have alluded to, there have now been three claims challenging the antidumping and countervailing duty determinations on Canadian softwood lumber which have been filed against the United States under NAFTA Chapter 11.

The decisions of this Tribunal, while not

binding on any other Tribunal, will clearly have, therefore, wide future ramifications, and it is critical for us, therefore, that this case be decided correctly. In this connection, I should say that we will respond in due course to your inquiry about the 1126 process, but it will not be part of our presentation this morning.

Today, we will demonstrate why this Tribunal lacks jurisdiction over Canfor's claims. We already demonstrated this in our written pleadings and, of course, we stand by the written arguments put forward in them. So, I will briefly outline here our presentation.

Let me get to the heart of the matter. The United States's jurisdictional objection is straightforward. The United States did not consent to arbitrate challenges to decisions in antidumping and countervailing duty cases such as Canfor's claims here under the investment chapter of the NAFTA. Rather, the NAFTA parties established a specialized binational panel mechanism in Chapter 19 and provided those binational panels with

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exclusive jurisdiction over such matters. They explicitly excluded antidumping and countervailing duty matters from state to state dispute resolution under Chapter 20.

To ensure no ambiguity as to their intent, the parties also included Article 1901(3). That provision reads, and I'm quoting it, except for Article 2203, entry into force, no provision of any other chapter of this agreement shall be construed as imposing obligations on a party with respect to the party's antidumping law or countervailing duty law, unquote.

It could not be clearer. Chapter 11 cannot be construed as imposing any obligations with respect to antidumping or countervailing duty laws. Thus, there can be no Chapter 11 arbitration concerning the enforcement of those laws and duties imposed pursuant to them, and there is no basis for this Tribunal to assume jurisdiction in this case.

The softwood lumber dispute between Canada and the United States is decades old. Canada has challenged the determination imposing duties on

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Canadian softwood lumber before the WTO and under Chapter 19 of the NAFTA. Canfor has also taken

advantage of the Chapter 19 process and has challenged these duties in that forum.

Despite the NAFTA's express terms and the clear intention of the NAFTA parties, Canfor now seeks resort to investor-state arbitration to challenge, yes, these same duties. Canfor's arguments before this Tribunal, however, ignore the treaty's express terms. Acceptance of those arguments would be contrary to the NAFTA parties' intent. Although Canfor acknowledges that its claims arise out of U.S. antidumping and countervailing duty law, it argues that somehow the arbitration of its claims in this forum will not impose obligations on the United States, quote, with respect to, unquote, such laws. This is untenable. Canfor's argument's seeking to draw a distinction between a law and the application of that law are similarly untenable.

The context of Article 1901(3), as well as the NAFTA's object and purpose, confirm that claims

such as Canfor's are reserved for exclusive review under the NAFTA by Chapter 19 Panels. Canfor's arguments, if accepted, would completely undermine the effort of the NAFTA parties to restrict such matters to the specialized mechanism of Chapter 19.

Given the NAFTA's express terms, it is clear that the NAFTA parties, in establishing a Chapter 19 mechanism, did not intend to provide for

investor-state arbitration of claims such as Canfor's. Pursuing such claims is an abuse of the Chapter 11 process. We therefore request that the Tribunal dismiss Canfor's claim for lack of jurisdiction and award full costs to the United States.

This morning, we will proceed in our presentation as follows: Mr. Clodfelter first will provide the factual background of the jurisdictional issue for you. Ms. Menaker will demonstrate that the ordinary meaning of Article 1901(3) deprives this Tribunal of jurisdiction over Canfor's claims. Mr. McNeill will explain how Article 1901(3)'s context and the object and

purpose of the treaty confirm this result. And finally, Mr. Bettauer will briefly conclude the first round presentation of the United States.

Before asking the Tribunal to give Mr. Clodfelter the floor, I would like to make one more point. Mr. President, members of the Tribunal, it is an important function, and the President alluded to this in his opening remarks, it is an important function of an oral hearing to provide an opportunity to answer any questions or concerns that the Tribunal may have, and we will certainly respond in the same form as the President suggested will be the preference of the panel, and my colleagues welcome those questions.

We will, of course, try to answer them in the course of this hearing when they are raised. However, I would say that because my colleagues and I represent the government, it may at times be necessary to request the Tribunal's indulgence so that we can confer with our colleagues from other agencies at a break, perhaps about a particular question, and then respond with the position of the

United States Government thereafter. I think this will work efficiently, but I wanted to alert you to that situation and the responsibilities we have in responding to your questions.

Mr. President, members of the Tribunal, thank you for your attention. I would now invite the Tribunal to turn the floor over to Mr. Clodfelter.

PRESIDENT GAILLARD: Thank you, Mr. Taft. Before I do so, on the point you raised, your point is well-taken, and I don't know if Mr. Landry has anything to say on that--we'll ask him--but as far as we are concerned, we understand that. That's why, although your agreement uses a day and a half, I didn't want people to fill in their calendars because we may need the rest of the time for our questions and that would allow certain, hopefully, short pauses to have a position, especially on the respondent's side, which reflects the position of the government as a whole and not any specific

department or agency. We understand that.

Mr. Landry, do you have an issue with

that?

MR. LANDRY: Mr. President, we don't have any issue in responding to questions to be dealt with in that way.

PRESIDENT GAILLARD: So, that will be the way in which we will operate. At your request, you will tell us, when you answer a question, that on the issue you prefer to consult and you may need a 10-minute break or something. Thank you.

MR. TAFT: Thank you, Mr. President.

PRESIDENT GAILLARD: Thank you very much.

Mr. Clodfelter, you want to continue the presentation on respondent's side?

MR. CLODFELTER: Thank you, Mr. President, members of the Tribunal, I believe we are ready to proceed. Before we get into our legal arguments, as Mr. Taft said, I would like to go over some of the factual background relevant to the jurisdictional issue before you.

Let me begin by saying that we agree with Canfor that in deciding this issue you may accept as true for purposes of the argument the facts as

alleged by Canfor. However, this does not mean

that, as Canfor stated in its briefs, you must accept the legal conclusions that Canfor would have you draw on the basis of those assumed facts. Thus, for example, it is not among the facts to be assumed that Canfor has been subject to arbitrary, discriminatory, or abusive conduct that failed to meet the standards of Chapter 11 of NAFTA. Canfor may wish to have you dwell on those proffered conclusions in hopes that they will color your consideration of the jurisdictional issue; but these are legal conclusions, and they go to the merits of Canfor's claims. We strongly deny any such conclusions, but don't intend to address them further here.

We also disagree with the assertion made by Canfor that you should confine yourselves to the facts pled by it, the investor. Indeed, in paragraph 47 of your January 23rd decision on bifurcation, you invited the parties to, quote, discuss any evidence of fact or law, unquote, and we will discuss certain facts not pled by Canfor.

In any event, I don't believe that any of the factual points I will discuss are contested.

So, this morning, I begin by providing an overview of the antidumping and countervailing duty law of the United States. I will then describe the circumstances leading up to the inclusion of Chapter 19 in NAFTA and its relationship to the

other chapters of NAFTA. I will then turn to a description of the Chapter 19 specialized binational panels for addressing challenges to the NAFTA party's antidumping and countervailing duty determinations. Then I will describe the underlying dumping and subsidy dispute and the antidumping and countervailing duty determinations made on that dispute.

Finally, before summing up, I will describe Canfor's reactions to those determinations and compare the claims Canfor submitted to Chapter 19 panels and to this Tribunal with respect to those determinations.

So, let's begin with a simplified overview of the administration of antidumping and

countervailing duty cases under U.S. law and using this screen to illustrate. Canfor challenges antidumping and countervailing duty determinations concerning softwood lumber from Canada that were made by the United States Department of Commerce and the United States International Trade Commission or ITC. The Commerce Department is an agency in the Executive Branch of the Federal Government headed by a member of the President's cabinet. The ITC is an independent nonpartisan quasi-judicial Federal agency that was established by Congress.

Under U.S. law, specifically the Tariff

Act of 1930, domestic industries may petition the Commerce Department and the ITC for relief from unfairly low priced--that is, dumped--imports and unfairly subsidized imports. The Commerce Department and the ITC conduct parallel investigations. The Commerce Department determines whether dumping or subsidies exist, and if they do, the margin of dumping or the amount of the subsidy. It also determines whether certain critical

circumstances exist that would allow for the retroactive application of duties.

The ITC, in turn, determines whether the dumped or subsidized imports materially injure or threaten to materially injure the U.S. industry producing a like product. The Commerce Department and the ITC each make preliminary and final determinations. If both agencies make affirmative final determinations, an antidumping duty order or a countervailing duty order will be imposed, and duties on the imports will be assessed to offset the dumping or subsidies.

As a general matter, preliminary determinations by Commerce and the ITC may not be reviewed under U.S. law. Final determinations, however, are reviewable under U.S. law. They are appealable to the U.S. Court of International Trade, which is a national court established pursuant to Article Three of the U.S. Constitution

consisting of nine judges appointed by the President with the advice and consent of the Senate. Decisions of the Court are further

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appealable to the Federal Circuit Court of Appeals and by certiorari to the U.S. Supreme Court.

Historically, the Court of International Trade had exclusive jurisdiction to review challenges to U.S. antidumping and countervailing duty determinations. This changed with the Canada-U.S. Free Trade Agreement when it came into force in 1989.

During the negotiation of the Canada-U.S. Free Trade Agreement, Canada and the United States sought to agree on a common set of rules to govern disputes over dumping and subsidies. First, they considered a number of approaches to the question of substantive rules. These ranged from the possibility of abandoning the idea of special antidumping and countervailing duty mechanisms altogether in favor of reliance upon competition laws, to the possibility of substituting a common set of substantive rules to govern dumping and subsidies for the existing municipal law-based rules. However, they were not able to agree upon a common set of substantive rules.

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Instead, the U.S. and Canada opted for a procedural mechanism that left the existing national mechanisms and standards in place, but gave each party the option of having antidumping and countervailing duty determinations reviewed by special ad hoc binational panels instead of by their national courts.

The binational panels would decide such challenges by applying the respective parties' domestic antidumping and countervailing duty law. Accordingly, the Canada-U.S. Free Trade Agreement required the United States to amend its laws to transfer exclusive jurisdiction over final antidumping and countervailing duty claims from the U.S. Court of International Trade to the binational panels whenever a panel proceeding had been requested.

This binational panel mechanism set forth in the U.S.-Canada Free Trade Agreement was essentially carried over into NAFTA Chapter 19, of course, on a trilateral basis.

So, let us turn to that mechanism as it is

provided for in Chapter 19.

Chapter 19 is entitled "Review and Dispute Settlement in Antidumping and Countervailing Duty Matters." It establishes a special, self-contained dispute resolution for all antidumping and

countervailing duty matters, including the review of a NAFTA party's final antidumping and countervailing duty determinations. Article 1904(1) provides, and I quote, As provided in this Article, each party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review. And as provided in Annex 1901.2, binational panels consist of five members who are nationals of the parties involved. They must be experts in International Trade Law, and active or former judges are to be appointed, to the extent possible.

As required in paragraph eight of the United States schedule under Annex 1904.15, the United States accordingly amended the Tariff Act of 1930 to prohibit review by the Court of International Trade when binational panel review

has been requested.

The binational panel mechanism is intended to mimic the parties' domestic court review of antidumping and countervailing duty matters. In other words, the binational panels stand in the shoes of the domestic courts of the importing party, in this instance the Court of International Trade. The binational panels must apply the domestic laws of the parties, including the domestic law standard of review. When reviewing antidumping or countervailing duty determinations,

for instance, Article 1904(3) requires that, as you can see on the screen, the panels shall apply the standard of review set out in Annex 1911, and the general legal principles that a court of the importing state or party otherwise would apply to a review of a determination of a competent investigating authority.

Taking a look at that Annex 1911, you will see that the standard of review to be applied to U.S. determinations is that set out in the Tariff Act of 1930 as amended, specifically Section 516(a)

subparagraph (B)(1)(b), which is the substantial evidence standard. I will quote, The Court or under Chapter 19 the binational panel, shall hold unlawful any determination, finding, or conclusion found to be unsupported by substantial evidence on the record, or otherwise not in accordance with law. Thus, the Chapter 19 panel may not substitute its own judgment for that of the agency or engage in de novo review. Moreover, just as the Court of International Trade has jurisdiction only over final antidumping and countervailing duty determinations with a few exceptions, the Chapter 19 Panel is authorized to review only final U.S. determinations, not preliminary determinations. This is provided in Article 1904 as well, as you can see on the screen.

What power does a binational panel have?

As provided for in Article 1904(8), Chapter 19 binational panels are authorized to uphold final determinations or remand them, quote, for action not inconsistent with the panel's decision.

One final point on the process, I

mentioned the decisions on the Court of International Trade may be appealed to higher U.S. courts. The parallel is that a Chapter 19 Panel decision may be subject to the extraordinary challenge procedure provided for in Article 1904(13).

So, that, in a nutshell, is how the Chapter 19 mechanism works. As can be seen, Chapter 19 reflects a number of fundamental decisions of the parties with respect to antidumping and countervailing duty law.

First, the parties decided that the preexisting substantive standards that each country applied in deciding whether sanctionable dumping or subsidization has occurred would continue to be the standards under the NAFTA.

Second, they decided that the preexisting municipal law procedures, practices, and procedural standards in place for deciding claims of unfair dumping and subsidies and setting corrective duties would continue to be the mechanisms for deciding these questions under NAFTA.

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Third, they decided that challenges to the decisions emanating from these mechanisms as well as the conduct leading to those decisions could, at the option of the challenging party, be reviewed by binational panels instead of binational courts.

Fourth, they decided that in deciding challenges to decisions and the conduct underlying them, binational panels had to apply the legal standards of municipal law.

Those are the four essential decisions reflected in the provisions of Chapter 19, but having made these decisions, the parties took the additional necessary step to make them effective, to ensure that antidumping and countervailing duty matters could not be subject to obligations under other chapters of NAFTA, including substantive obligations of treatment and any obligation to submit challenges to the decisions of the national mechanisms to dispute resolution fora other than national courts or binational panels, the parties included Article 1901(3).

Let me repeat what Mr. Taft quoted

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earlier. Article 1901(3) provides, except for Article 2203, no provision of any other chapter of this agreement shall be construed as imposing obligations of a party with respect to the party's

antidumping and countervailing duty law. With this provision and in this manner, the parties effectively cabined Chapter 19 from the rest of the NAFTA.

Now, let's turn from how Chapter 19 works to the claim at issue here. The claim before you has its origins in 1901, when a U.S. industry group filed petitions with the Commerce Department and the ITC, requesting investigations into the practices of Canadian softwood lumber producers. The petitions allege that the United States softwood lumber industry was being materially injured by reason of dumped and subsidized softwood lumber imports from Canada. In response to these petitions, the Commerce Department and the ITC initiated the antidumping and countervailing duty investigations, and the material injury investigation that led to the determinations at

issue in this arbitration.

During the course of these investigations, the Commerce Department issued preliminary determinations that Canadian softwood lumber was being subsidized by Canada and dumped on the U.S. market. Commerce also made a preliminary critical circumstances determination.

And then in March and May of 2002, respectively, the Commerce Department and the ITC issued final determinations which resulted in the

imposition of specific antidumping duties upon Canfor and countrywide countervailing duties on Canadian imports of softwood lumber, including those imported by Canfor. However, the Commerce Department did not find the critical circumstances it had made in its preliminary determination.

Well, what was the reaction to these determinations? As you know, the Government of Canada has challenged these determinations before the WTO. For its part, Canfor took two actions in response to the determinations. First, as it is entitled to do under NAFTA Chapter 19, in April and

May 2002, it joined the Canadian government and other parties in requesting Chapter 19 binational panel proceedings to review those determinations. Those panel reviews are still continuing. And while remands, in part, have been made with respect to all of the final determinations, the panels have upheld much of what Commerce and the ITC finally determined and the manner in which they made those final determinations.

I would only add that the most recent panel decision on the ITC's material injury determination is now the subject of an extraordinary challenge under Article 1904(13).

So, that's the first action that Canfor took. And, of course, the second action that it took a few months after joining the Chapter 19

proceedings was to file the NAFTA Chapter 11 claim before you. In doing so, Canfor has targeted the same actions of the United States, and its claims before this Tribunal essentially mirror those that were brought before the binational panels under the exclusive mechanism of Chapter 19.

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Let's compare Canfor's challenges under the two chapters. In both proceedings Canfor challenges the same antidumping, countervailing duty, and material injury determinations made by the Commerce Department and the ITC. It also asserts many of the same grounds for its challenges that it asserts in the Chapter 19 proceedings. For example, in both sets of proceedings, Canfor complains that Commerce misinterpreted and misapplied U.S. antidumping and countervailing duty laws as can be seen by comparing the notice of arbitration with the briefs in the Chapter 19 proceedings.

As an example as depicted on the slide, Canfor alleges that Commerce improperly engaged in a zeroing technique in calculating dumping margins. In the case before you, Canfor alleges that Commerce, quote, continued to utilize zeroing, thereby skewing the average dumping margins, unquote. Before the Chapter 19 Panel, Canfor argued, quote, Commerce created artificial dumping margins through the unlawful practice of zoning--of

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zeroing, excuse me. You can see these parallel quotations on the first row on the slide.

As another example, in both proceedings Canfor claims that Commerce improperly allocated production costs for Canadian producers. In the case here, it alleges that Commerce, quote, allocated costs based only on a difference in grade of lumber and not differences in value attributable to dimension or length, unquote. It argued before the Chapter 19 Panel that Commerce allocated costs only for, quote, different grades of lumber, but did not carry that methodology through to different sizes. These are depicted on the two rows, second row of the slide.

Canfor also argued here--also argues here that Commerce used an unfair comparison between softwood lumber prices in Canada and similar products in the United States. It made the same argument before the Chapter 19 Panel, as you can see in the third row of the slide.

Canfor's allegations also echo each other in both sets of proceedings with respect to

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Commerce's countervailing duty determination. This can be seen on the next slide. Canfor has alleged

before this Tribunal, and that's on the first column, that Commerce, quote, failed to provide any reasonable analysis in determining that provincial stumpage programs are a financial contribution, unquote, and that Commerce erroneously, quote, concluded that the provincial stumpage programs are specific, unquote, to an industry or enterprise.

And then in the third row on that first column, you will see that Canfor also alleges here that Commerce improperly denied Canfor a company-specific subsidy rate. It argues that Commerce, quote, arbitrarily determined that a countrywide rate would be utilized, unquote. As can you see, before the Chapter 19 Panel reviewing Commerce's countervailing duty determination, Canfor has raised the same complaints as shown in the second column of the slide.

These are only a few of the grounds relied upon by Canfor in challenging the Commerce and ITC determinations common to this proceeding and to the

Chapter 19 binational panel proceedings.

In sum, Canfor is seeking to challenge the same actions of the United States Government simultaneously under two different chapters of NAFTA under two different dispute resolution processes. But in relation to this area of government action at least, that is the area of antidumping and countervailing duty regimes, the

parties expressly excluded this possibility. They carefully provided that the country's antidumping and countervailing duty mechanisms would remain in place, contradicting any notion that those mechanisms could be attacked as violating provisions of other chapters. They provided that the decisions that emerged from those mechanisms could only be reviewed against the standards of municipal law, not de novo and not against the standards of international law. And they provided that the only NAFTA dispute resolution process available for such review is the binational panel process of Chapter 19.

And they did this through the terms of

Article 1901(3). My colleague, Ms. Menaker, will now demonstrate how by its plain meaning Article 1901(3) deprives this Tribunal of jurisdiction over Canfor's claims.

ARBITRATOR HARPER: Mr. Clodfelter, perhaps Ms. Menaker will address this matter, perhaps not, so I thought I would begin with you.

I would like to know the position of the United States in terms of clarification of Article 1901(3) which talks about antidumping law and countervailing duty law.

Is it the position of the United States that those terms include the preliminary and final determinations of Commerce and ITC, and in that

respect, what is the position of the United States insofar as that term, antidumping law and countervailing duty law in 1901(3) as compared to Article 1902.1, which defines antidumping law and countervailing duty law to include administrative practice?

MR. CLODFELTER: Mr. Harper, actually, I think Ms. Menaker will be addressing that, but she

can give you a preliminary answer now.

ARBITRATOR HARPER: I'm content to hear her presentation as she intended it. I just wanted to make sure, having heard you talk about Article 1901(3), that the matter was addressed by someone on the United States's side.

MS. MENAKER: Yes, we will be--I will be addressing that, but just not to keep you in suspense, the answer is that, yes, it is our contention that the phrase "antidumping law" and "countervailing duty law" does, indeed, encompass the preliminary and final determinations that are at issue in this case, and that is done specifically by looking at the definition as you pointed out that is in Article 1902, subparagraph one which, as you noted, does include the term "administrative practice." And, indeed, a determination by the Department of Commerce or the International Trade Commission is, indeed, an administrative practice.

PRESIDENT GAILLARD: Mr. Clodfelter, before we turn to Ms. Menaker for the ordinary

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meaning argument, since you have addressed the question of duplication, do you want to answer at this stage, or do you intend to answer later when the argument is raised by Canfor? I'm sorry, if I misstate the argument, and I'm sure we will hear about the argument: You may point to some areas of duplications, and to the extent duplication is relevant--and I know that Canfor says it doesn't matter anyway--but in addition to the "it doesn't matter anyway" argument, there is an argument which in a sense I understand--and I'm sure this afternoon I will be corrected if I don't understand it well--as: maybe there is some element of duplication, but you would have the burden of proof to show that everything is duplicative. So what if some is not duplicative? Do you want to address that, maybe with the questions, or with the type of arguments relating to the burden of proof of the extent of duplication, to the extent duplication is relevant at all?

MR. CLODFELTER: Yes, I believe Mr. McNeill will be addressing that issue in part

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in his presentation because even though there is

enormous overlap between the two sets of proceedings, we don't maintain that every allegation they made in one is made in the other. Nor do we have to. Our position is we have no such burden of demonstration whatsoever, and Mr. McNeill will make clear why the similarities between the two sets of proceedings are relevant to the interpretation of 1901(3).

PRESIDENT GAILLARD: So, as long as you address it at some point, it's fine. And again, if I caricature your argument, you will also tell me.

For the record, we have received the slides of the presentation. It's 18 pages, and I take it that Canfor Corp. has received the same document, which is the slides which were shown and used during Mr. Clodfelter's presentation.

And we just received a moment ago the slides which I understand will be used by Ms. Menaker; is that right? So, claimant has received the same two sets of slides. Can you confirm that for the record?

MR. LANDRY: Yes, we have.

PRESIDENT GAILLARD: Right. So can you go on, I guess, Ms. Menaker. Thank you.

MS. MENAKER: Thank you. Before I begin, if I may ask Mr. Flores if it would be possible for me to remove the podium. Just it will make it, I think, easier to read from the screen.

PRESIDENT GAILLARD: Also, if I may, you can pause at any time. We are not going to tell you when to have a pause. I think that is for the parties to decide. In particular the party presenting the argument could tell us during the course of the morning when is the most convenient time to stop. We are not going to suggest any break.

MR. FLORES: In that same line, Mr. President, if we can have a five-minute break, we can get rid of the podium.

PRESIDENT GAILLARD: All right. So, we have a five-minutes break, and you want the podium to be removed?

MS. MENAKER: Yes, it will just make it

easier for me to read the screen.

PRESIDENT GAILLARD: Fine. Let's have a five-minute break, and we will reconvene in five minutes. Meanwhile, the podium will be removed. Thank you.

(Brief recess.)

PRESIDENT GAILLARD: We go back on the record. On the claimant's side, are we ready? Mr. Landry?

MR. LANDRY: Yes, we are ready, thank you.

PRESIDENT GAILLARD: Ms. Menaker, the floor is yours.

MS. MENAKER: Yes, thank you. And I would

just note that Mr. Taft sends his apologies that he had to leave the hearing at this time.

PRESIDENT GAILLARD: Understood.

MS. MENAKER: Mr. President, members of the Tribunal, I will now demonstrate that the NAFTA, by its clear terms, deprives this Tribunal of jurisdiction over Canfor's claims.

As my colleague Mark Clodfelter just described, challenges to a party's antidumping law

and countervailing duty law and their antidumping and countervailing duty determinations are heard by Chapter 19 binational panels which apply domestic law. The NAFTA parties did not consent to investor-state arbitration of challenges to their antidumping or countervailing duty determinations. Nor did they consent to having those determinations governed by the international law standards in NAFTA Chapter 11.

This is made clear by the NAFTA's text. Article 1901(3), which you've already heard quoted to you many times today, and which I have placed on the screen, provides that, quote, except for Article 2203 entry into force, no provision of any other chapter of this agreement shall be construed as imposing obligations on a party with respect to the party's antidumping law or countervailing duty law. The ordinary meaning of this phrase, this provision, is unambiguous. It requires dismissal

of Canfor's claims.

My argument will follow in two parts. I will begin by focusing on the first half of the

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sentence in Article 1901(3) and explain how exercising jurisdiction over Canfor's claims would impose obligations on the United States from provisions of the NAFTA that are outside of Chapter 19. I will then review the remainder of the article and demonstrate that the obligations Canfor seeks to have imposed are with respect to the United States's antidumping law or countervailing duty law. In some cases I may refer to antidumping law and countervailing duty law for ease of reference as AD/CVD law.

Now, if this Tribunal were to exercise jurisdiction over Canfor's claims, it would result in the imposition of obligations on the United States that derive from chapters of the NAFTA other than Chapter 19. Two distinct types of obligations would be imposed. First, the obligation to arbitrate derives from provisions in Chapter 11 of the NAFTA. To compel the United States to arbitrate a dispute in accordance with the procedures that are set forth in Section B of NAFTA Chapter 11 would be to impose an obligation on the

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United States that derives from provisions of a chapter outside of Chapter 19.

Second, Canfor seeks to apply the substantive international law standards that are set forth in Section A of Chapter 11 of the NAFTA to its claims. Canfor asks this Tribunal to review the AD/CVD determinations and assess whether in imposing duties on lumber that is imported by Canfor, the United States violated the national treatment, the most-favored-nation treatment, the minimum standard of treatment, and the expropriation Articles. All of these obligations derive from the NAFTA's investment chapter, Chapter 11.

Subjecting the U.S. antidumping and countervailing duty determinations to review under the international legal standards in Chapter 11 imposes obligations on the United States from a chapter outside of Chapter 19. For example, under Canfor's theory, a Chapter 11 Tribunal could consider whether the United States applied its trade law in a manner that accorded Canfor

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treatment that was less favorable than that which was accorded to a softwood lumber producer from a non-NAFTA country such as Russia. Were it to do so and were it to then impose liability on the United States for a violation of the most-favored-nation

treatment provision, it would be construing provisions in the NAFTA other than those that are set forth in Chapter 19 to impose an obligation on the United States with respect to its antidumping and countervailing duty law.

Canfor argues that exercising jurisdiction over its claims would not impose obligations on the U.S. that derive from chapters outside of Chapter 19. It claims that the international legal obligations contained in Chapter 11 are customary international legal obligations that the United States would be bound to adhere to even in the absence of a treaty.

This argument is wrong for three reasons. First, whether or not customary international law is the basis for the substantive provisions of Chapter 11, Canfor's claim is based upon the

provisions themselves. Because those provisions are in a chapter other than Chapter 19, they may not be invoked to impose obligations on the U.S. in contravention of Article 1901(3).

Second, the fact is that several of the international legal obligations that Canfor seeks to impose on the United States are not customary international law obligations, but are conventional treaty obligations. Examples of these are the obligation to provide national treatment and most-favored-nation treatment. In the absence of

Articles 1102 and 1103, the United States would have no such obligation.

So, it is simply incorrect to state that the obligations Canfor seeks to have imposed on the United States do not emanate from a chapter outside of Chapter 19.

And finally, even for those international legal obligations that do form a part of customary international law, the United States would have no obligation to arbitrate a dispute with a private claimant such as Canfor, absent the provisions in

NAFTA Chapter 11. In provisions in NAFTA Chapter 11, the United States gave its consent to investor-state arbitration. Absent those provisions, Canfor would have no ability to commence an arbitration against the United States alleging a violation of the national treatment, most-favored-nation treatment, minimum standards of treatment, and expropriation provisions.

Exercising jurisdiction over any of Canfor's claims would thus impose obligations on the United States that derive from chapters outside of Chapter 19.

I will now turn to the second half of the sentence that comprises Article 1901(3), and I will demonstrate that the obligations that would be imposed on the United States if the Tribunal exercised jurisdiction in this case would be

imposed with respect to the United States's antidumping law or countervailing duty law.

Canfor has argued that despite challenging the USA AD/CVD determinations, its claim does not impose obligations on the United States with

respect to its AD/CVD law. It makes arguments based both on the phrase "with respect to" and the phrase "antidumping law or countervailing duty law," both of which appear in Article 1901(3).

I will first address why Canfor's construction of the phrase "with respect to," and I will show why Canfor's interpretation of that phrase is at odds with the term's ordinary meaning.

I will then demonstrate why Canfor's interpretation of the phrase "antidumping law or countervailing duty law" is also inconsistent with that phrase's ordinary meaning, would be at odds with the parties' intention and would render Article 1901(3) ineffective, which would violate one of the cardinal principles of treaty interpretation.

So, I will first turn to addressing their interpretation, Canfor's interpretation of the term "with respect to" in Article 1901(3).

In its notice of arbitration, as I've projected on the screen, Canfor acknowledges that its claims are brought in connection with the

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United States's alleged violations of the NAFTA that, quote--well, I will read the quote in its entirety so it's grammatically correct. Canfor alleges that it brings this claim in connection with the Government of the United States's violations of NAFTA Articles 1102, 1103, 1105, and 1110, arising out of, and in connection with, conduct of the Government of the United States which resulted in the issuance of the determinations.

In its reply, Canfor concedes that the violations it alleges, and I quote, arise out of, end quote, the application of the United States's antidumping law and countervailing duty law.

Canfor, nevertheless, argues that its claims do not impose obligations on the United States with respect to its AD/CVD law because, and I quote from Canfor's rejoinder, its claims, quote, have as their genesis unfair, inequitable, and discriminatory treatment of Canfor by the U.S. designed to ensure a predetermined, politically motivated, and results-driven outcome for the

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purpose of harming Canfor, end quote, and that is found at paragraph seven of Canfor's rejoinder.

But how did this treatment supposedly harm Canfor? It allegedly did that through the

imposition of the AD/CVD determinations. The imposition of the duties on Canfor is the only way in which Canfor has been treated by the United States, and that is the only way in which it has allegedly been harmed.

Canfor, of course, recognizes this, and tellingly the paragraph of Canfor's rejoinder from which I just so quoted cites to its notice of arbitration. If you look at the paragraph in Canfor's notice of arbitration from which I just cited, you will see that the full sentence which Canfor partially quoted states that its claim, quote, arises from unfair, inequitable, and discriminatory treatment of Canfor by the U.S. designed to ensure a predetermined, politically motivated, and results-driven outcome to the investigations resulting in the countervailing duty preliminary determination, the critical

circumstances preliminary determination, the antidumping duty preliminary determination, the countervailing duty final determination, the antidumping duty final determination, and the final determination of the ITC.

So, whether or not Canfor wishes to characterize its claims here as antidumping or countervailing duty claims is beside the point. Canfor is challenging the interpretation and the application of the United States's antidumping and

countervailing duty laws that resulted in the imposition of the determinations and the duties at issue here. Claims that challenge the interpretation and application of a party's law are necessarily claims that seek to impose obligations with respect to that law. Canfor concedes that its claims arise out of and are connected with antidumping and countervailing duty law. Its arguments that those claims do not impose obligations with respect to the law is at odds with the ordinary meaning of the term "with respect to."

Meriam Webster's dictionary, for example,

defines the phrase "with respect to," as, with reference to and in relation to. And that same thesaurus provides the following synonyms for the phrase "with respect to." Apropos, as for, as regards, as respects, as to, concerning, re, regarding, respecting, and touching.

The obligations that Canfor seeks to have imposed on the United States undoubtedly concern U.S. trade law. Canfor has advanced no plausible argument why the term "with respect to" in Article 1901(3) should be interpreted in a manner that is inconsistent with its ordinary meaning. There is no sound basis for reading the term "with respect to" more narrowly than any of the terms I just mentioned or any other commonly used synonyms such "as arising out" of or "in connection with."

In fact, in most contexts, the term "with respect to" would be understood as broader than the term "arising out of" because that latter term may connote some type of causal connection.

Canfor relies principally on the dissent in the Chapter 11 case of Waste Management versus

Mexico, and This is the first Waste Management case. It relies on that case for its view that the term "with respect to" has a narrow meaning. As we noted in our written submissions, the majority in that case rejected the dissent's reading of that phrase. Instead, the Tribunal interpreted the phrase "with respect to" in accordance with its ordinary meaning.

The question before the Tribunal in that case was what did the phrase, and I quote, "proceedings with respect to a measure," which appears in Article 1121 of the NAFTA, the question was, what does that phrase include? The Tribunal held that proceedings with respect to a measure encompassed proceedings that referred to that measure. It also held that the phrase included proceedings that have a legal basis derived from that measure. Finally, it held that proceedings with respect to a measure include proceedings that have their origin in that measure.

Similarly, Canfor's claims are precluded here. They clearly refer to, have a legal basis

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derived from, and have their origin in antidumping law and countervailing duty law. Moreover, in concluding that the phrase "with respect to" had a narrower meaning than other commonly used synonyms, the dissenting arbitrator in the Waste Management case relied on the fact that the phrase in the French version of the NAFTA had a particular translation, and I would hesitate to speak French in any setting, and I hesitate even more to do so in this particular one, given the constitution of our Tribunal members, so I ask you to literally pardon my French.

But the dissenting arbitrator did indeed rely on the fact that the phrase "with respect to" appeared in the French version as "se rapportant a"--

PRESIDENT GAILLARD: You passed.

MS. MENAKER: Thank you.

He opined that this was different than saying that the proceedings related to or concerned the measure.

As we noted in our written submissions,

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however, when describing the function of Article 1121, that very same Article that was at issue in

the Waste Management case, in its statement of administrative action, the United States said that Article 1121 requires the investor--and in certain cases the enterprise--to waive the right to initiate or continue any actions in local courts or other fora relating to the disputed measure.

Thus, the United States did consider the term "with respect to," as appears in Article 1121 to be synonymous with the phrase "relating to."

In addition, the dissent failed to note the phrase "with respect to" is not always translated in the same manner in the French version of the NAFTA's text. So, for example, as I previously mentioned, we have the trans--the phrase "with respect to" appears in the French version of the NAFTA's text in Article 1121 as "sa rapportant a." The phrase "with respect to" also appears in Article 1901(3), in the English version of the NAFTA's text. In the French version, that phrase appears as "relativement a."

And in Article 1901(1), again, the English version of the NAFTA contains the phrase "with respect to." The French version, however, contains the phrase "au regard des."

And in Article 301(2), the English version similarly contains the phrase "with respect to," while the French version of the NAFTA contains the phrase "en ce qui concerne."

And finally, we have both Article 2106 and the annex to Article 2106. In the English version, the phrase "with respect to" appears in both the Article and the annex, but in the corresponding French version that phrase appears as "por ce qui concerne" and "en ce qui a trait aux." That concludes my French for the day.

So, the same English language term appears as various terms in the French text, indicate the breadth and the flexibility of the term "with respect to," and is further evidence that the NAFTA parties did not ascribe any particularized narrow meaning to the term "with respect to."

Finally, Canfor argues that the United

States is not entitled to the so-called protection of Article 1901(3) because it argues that the United States's agencies allegedly acted arbitrarily and in bad faith when they issued the determinations. This argument ignores the plain meaning of the term "with respect to" in Article 1901(3).

According to Canfor, if the determinations were issued in violation of U.S. trade law, then any obligation imposed on the United States concerning that conduct cannot be said to be with respect to its law.

The determinations at issue, however, were issued by U.S. Government agencies that applied

U.S. AD/CVD law. Whether those agencies properly applied U.S. law is the precise question that the NAFTA parties reserved for Chapter 19 binational panels. If Canfor's interpretation of the phrase "with respect to" AD/CVD's law were accepted, then anytime a Chapter 19 binational panel found a NAFTA party to have violated its obligations under Chapter 19, that party's AD/CVD determinations

would then become open to challenge under Chapter 11. Chapter 19, however, sets forth the manner in which a party's determinations may be challenged, and the remedies that may be granted when such determinations are found to have been wrongly issued.

If a Chapter 19 Panel finds that a party's determinations violated that party's domestic law, the Chapter 19 Panel can remand the determination to the responsible agency. Under Canfor's theory, however, any determination found to have violated domestic law could then become the subject of a challenge under Chapter 11's international law standards and an investor-state arbitration. Such a result cannot be reconciled with the ordinary meaning of the NAFTA provisions or the circumstances surrounding the treaty's conclusion. A finding by a Chapter 19 Panel that the determinations were unlawful under domestic law does not change the fact that the determinations

were made with respect to that law.

Canfor concedes that its claims arise out

of U.S. antidumping and countervailing duty law. Submitting antidumping and countervailing duty determinations taken under authority of that law to investor-state arbitration under Chapter 11 would thus impose obligations on the United States with respect to its antidumping law or countervailing duty law.

I will now turn to explain why Canfor is incorrect when it argues the term "antidumping law" or "countervailing duty law" in Article 1901(3) refers only to the substance of the law; that is, the actual piece of legislation, and not to the application of that law in the form of an antidumping or countervailing duty determination. Claims such as Canfor's that assert that the United States misinterpreted and misapplied its antidumping law and countervailing duty law in issuing determinations necessarily impose obligations on the United States with respect to its AD/CVD law. The term "law" in Article 1901(3) incorporates the interpretation and the application of that law by a party. In seeking to separate the

interpretation and the application of the law from

the law itself, Canfor calls for a reading of the phrase with respect to a party's AD/CVD law that is unsupportable.

According to Canfor, Article 1901(3)'s sole function is to prevent provisions in chapters other than Chapter 19 from imposing obligations on a party with respect to the substance of their AD/CVD laws, and I will address this argument in two parts. First, I will demonstrate that the ordinary meaning of the term "antidumping law or countervailing duty law" confirms that this term incorporates a party's application of that law in the form of AD/CVD determinations. And second, I will show that interpreting the phrase antidumping law or countervailing duty law in the manner in which Canfor suggests would frustrate the parties' intent and would render Article 1901(3) ineffective.

So, the ordinary meaning of the phrase "antidumping law or countervailing duty law" does, indeed, encompass a party's application of that law

in the form of an antidumping or a countervailing duty determination. Canfor appears to argue that the term "antidumping law or countervailing duty law" refers only to the actual statute itself. But this is not the case. As can you see, in Annex 1911, the parties defined the terms "antidumping statute" and "countervailing duty statute." For

the United States, that terms is defined, or those terms are defined as Section 303 and the relevant provisions of Title VII of the Tariff Act of 1930, as amended, and any successor statutes.

The NAFTA parties, however, did not use the term "antidumping statute" or "countervailing duty statute" in Article 1901(3). They used the term "antidumping law or countervailing duty law." And the term "law" in Article 1901(3) is broader than the term "statute."

Article 1902(1) which I've also projected on the screen provides that, and I quote--this is from the second sentence in subparagraph one of that Article--Antidumping law and countervailing duty law include, as appropriate for each party,

relevant statutes, legislative history, regulations, administrative practice, and judicial precedents, end quote.

Antidumping and countervailing duty determinations are examples of administrative practices. Commerce and the ITC administer certain of the United States's trade laws. The manner in which they administer those laws is by conducting investigations and in some cases administrative reviews, and making antidumping, countervailing duty, and material injury determinations. Those agencies' administrative practices are embodied in the determinations that they make.

Thus, the definition of antidumping law or countervailing duty law in Article 1902 confirms that the parties intended to prevent provisions outside of Chapter 19 from imposing obligations on them with respect to their antidumping and countervailing duty determinations.

In addition, if the term "law" in Article 1901(3) referred only to the substance of the law, then Article 1901(3)'s sole function would be to

prevent any provisions outside of Chapter 19 from being construed to impose obligations on a party with respect to the substance of its AD/CVD laws, and this, according to Canfor, is Article 1901(3)'s function. Canfor argues that Article 1901(3) simply prevents provisions outside of Chapter 19 from being construed to impose obligations on a party to amend its antidumping or countervailing duty law.

Article 1901(3), as can you see, however, uses the term "obligations" without any limitation. By its clear terms, Article 1901(3) thus prohibits the imposition of any obligations on a party with respect to its AD/CVD law. If, as Canfor contends Article 1901(3's) sole function was to prohibit other chapters of the NAFTA from imposing obligations on a party to amend its trade laws, Article 1901(3) would read as follows, and I've put this on the screen as well. (Reading) No provision

of any other chapter of this agreement shall be construed as imposing obligations on a party to amend its antidumping or countervailing duty

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statute. It does not say that, however, and there is no justification for reading those additional terms into Article 1901(3).

Finally, the decision on jurisdiction in the UPS versus Canada NAFTA Chapter 11 case comports with the United States's reading. In that case, UPS claimed that Canada had violated Article 1105. It alleged that Canada had failed to enforce its goods and services tax in a nondiscriminatory manner. Canada argued that UPS's Article 1105 claim was barred by Article 2103, subparagraph one. Article 2103 provides, and I quote, Except as set out in this Article, nothing in this agreement shall apply to taxation measures, end quote.

Like Canfor does in this case, UPS argued that Article 2103(1) does did not deprive the Tribunal of jurisdiction because the Article only barred challenges to a tax law, but did not prevent a claimant from challenging the application of that law. UPS withdrew its Article 1105 claim before the Tribunal rendered its decision, but nevertheless the UPS Tribunal confirmed in its

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award on jurisdiction that it did not have jurisdiction over any claim under Article 1105 by virtue of Article 2103(1).

The same principle that applied in the UPS claim--excuse me case--applies here. Interpreting the term "antidumping law or countervailing duty law" in Article 1901(3) to prohibit only the imposition of obligations with respect to the substance of a party's trade law is contrary to that term's ordinary meaning.

I will now explain why reading Article 1901(3) in such a matter would also frustrate's the parties' intent and would render Article 1901(3) ineffective contrary to accepted principles of treaty interpretation. First, the NAFTA parties may challenge both the substance as well as the application of another party's antidumping or countervailing duty law under Chapter 19. Article 1903, for example, provides that a party may challenge the substance of another party's law if that law is amended. Article 1904, however, provides a means for a party to challenge another

party's application of its law because it permits challenges to antidumping and countervailing duty determinations.

Under Canfor's reading of Article 1901(3), that is, interpreting that Article to apply only to

prohibit the imposition of obligations with respect to the substance of a party's AD/CVD law, it would be possible to challenge the application of that law under both Chapters 11 and 19. But then one is forced to ask why would the NAFTA parties have created such a particularized dispute resolution mechanism in Article 1904 to hear challenges to a party's antidumping and countervailing duty determinations?

The proceedings set forth in Article 1904 provides that domestic law will govern such determinations and that the review is conducted with a high degree of deference to the agency's factual findings and conclusions of law.

Chapter 19 also provides that the persons who serve on panels will be sitting or former judges, to the extent practicable. Numerous and

detailed rules of procedure are also prescribed in Chapter 19. Why would the parties have gone through the trouble of creating such an elaborate system if the claimant could choose to have its claim heard before a Chapter 11 investor-state Tribunal that would apply Chapter 11's international legal standards in reviewing those same determinations de novo? The obvious answer is that they would not have done so. Yet, Canfor's reading of the term "law" in Article 1901(3) requires one to conclude that the NAFTA parties

intended to give claimant the choice of challenging antidumping and countervailing duty determinations under either Chapter 11 or Chapter 19 or, indeed, under both chapters as Canfor has done so here. Such a reading is untenable and should be rejected by this Tribunal.

Second, the history behind Article 1901(3)'s inclusion in the NAFTA also confirms that the Article bars the imposition of obligations from other chapters with respect to the application of a party's antidumping and countervailing duty law.

Article 1901(3) did not have a counterpart in the Canada-U.S. Free Trade Agreement, the predecessor agreement to the NAFTA. Canfor asserts that the Article was added to the NAFTA as a technical change to accommodate the addition of Mexico. Canfor, however, does not explain how Article 1901(3) carries out this purported technical accommodation.

As both the U.S. statement of administrative action and Canada's statement of implementation make clear, the Chapter 19 mechanism that is established in the NAFTA remained essentially unchanged from the mechanism that was in the Canada-U.S. Free Trade Agreement. The Canada-U.S. Free Trade Agreement contained a chapter governing investment, but did not provide for investor-state arbitration. Thus, provisions

similar to Article 1901(3) was unnecessary in a Canada-U.S. Free Trade Agreement as only the two state parties had the ability to bring claims under that agreement.

Parties, unlike private claimants, have

both rights and obligations under the treaty. The parties are well aware of the fact that they agreed to have their AD/CVD determinations subjected only to the obligations set forth in Chapter 19. Although several dozen binational panels have been established under the Canada-U.S. Free Trade Agreement and under the NAFTA, no party has ever argued that obligations contained in chapters outside of the antidumping and countervailing duty chapters should be imposed on another party. This is no surprise. Each NAFTA party knows that such an argument might result in its determinations being subjected to those same obligations. And the NAFTA parties know what they agreed to, and they did not agree to have obligations outside of Chapter 19 imposed on their antidumping and countervailing duty law.

With the addition of investor-state arbitration under the NAFTA, the parties sought to make clear that Chapter 19 was the exclusive mechanism within the NAFTA for challenging antidumping and countervailing duty determinations.

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Article 1901(3) bars private claimants, like Canfor here, from bringing such claims under Chapter 11, and thereby from imposing obligations beyond those in Chapter 19 on a party's antidumping and countervailing duty law.

Without recourse to investor-state arbitration under the Canada-U.S. Free Trade Agreement, no such prohibition was deemed necessary.

Finally, Canfor's reading of Article 1901(3) would render that Article ineffective. Article 1902 is entitled Retention of Domestic Antidumping and Countervailing Duty Law. That Article grants the NAFTA parties the right to amend their antidumping law and countervailing duty law so long as such modifications are done in accordance with the procedures set forth in Chapter 19.

And Canfor acknowledges Article 1902's purpose. In its reply, the paragraph of which I have projected on the screen, it states, and I quote, Article 1902 reserves to the NAFTA parties

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the right to retain and apply their municipal antidumping laws, but any such change can only occur after the amending party notifies the other parties of the amendment and its application to

them, end quote.

Canfor also claims, however, and this is also a paragraph from its reply, that Article 1901(3) merely ensures the parties' right to maintain antidumping and countervailing duty laws which laws can only be changed within the context of the processes established under that chapter.

The right to retain one's law necessarily incorporates the right to be free from obligations to change that law. Canfor's interpretation of Article 1901(3) would make that Article redundant with Article 1902. The NAFTA parties would not have included two articles placed one immediately after the other to perform the same function. Interpreting Article 1901(3) in such a manner runs counter to the Article's ordinary meaning and would render that Article ineffective.

In sum, Article 1901(3) is clear that

Chapter 19 is the exclusive mechanism under the NAFTA for challenging antidumping and countervailing duty determinations. Those determinations are not subject to review under international legal standards. Whether those determinations conformed with domestic law is a question that is reserved for Chapter 19 Panels. Subjecting antidumping and countervailing duty determinations to investor-state arbitration and reviewing those determinations under Chapter 11's

international law rules, would be imposing obligations on the United States from chapters outside of Chapter 19 with respect to its antidumping and countervailing duty laws. Such action is expressly prohibited by Article 1901(3).

ARBITRATOR HARPER: Ms. Menaker, if I may, Mr. President.

PRESIDENT GAILLARD: Please.

ARBITRATOR HARPER: Two questions. First, is it the position of the United States that imposing an obligation, as the term is used in the NAFTA, includes a determination by a tribunal of

arbitration that damages should be paid by the United States to an investor like Canfor?

MS. MENAKER: Yes. Imposing an obligation on the United States would include--an obligation would be the obligation to pay damages, but even short of that, the obligation to arbitrate in accordance with procedures that are set forth in Chapter 11 is also an obligation that is being imposed on the United States.

So, even if this Tribunal were to exercise jurisdiction over Canfor's claims, yet dismiss them on the merits, the United States would have still been subjected to an obligation. An obligation still would have been imposed on us with respect to our AD/CVD laws.

ARBITRATOR HARPER: My second question

relates to the Byrd Amendment which is drawn in the question in paragraphs 141 and following of the Statement of Claim, and in this connection let me ask you whether the position of the United States, or whether what is the position of the United States with respect to the Byrd Amendment in this

arbitration, taking note of the fact that in footnote 17 of page 13 of the Rejoinder on Jurisdiction by Canfor, Canfor takes the position that the Byrd Amendment cannot be construed as a part of the antidumping law or countervailing duty law, safeguarded under Article 1901(3) because the Byrd Amendment violated the obligation of the United States not to amend its antidumping and countervailing duty law.

So, what is the position of the United States? Is the Byrd Amendment an antidumping measure or a countervailing duty measure that is or is not within the meaning of Article 1901(3)?

MS. MENAKER: Exercising jurisdiction over Canfor's claim which includes a challenge to the Byrd Amendment would also impose an obligation on the United States that is with respect to its antidumping and countervailing duty law. With regard to the footnote in Canfor's rejoinder from which you just quoted, Canfor appears to be making the same argument that if a--whether it be the WTO or a Chapter 19 Panel, if they find that the United

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States violated its law, then any action taken by the United States cannot be said to have been taken with respect to that law. And that we contend is at odds with the ordinary meaning of the term "with respect to."

In the same manner, in some instances, the Chapter 19 Panels that are reviewing the antidumping and countervailing duty determinations and the material injury determinations have disagreed with the United States's interpretation of its own law and has remanded those determinations back to the responsible agencies. That doesn't make that action that was taken by the agencies any less of an action that was taken by them in interpreting and applying their own law, and any obligation imposed on the United States with respect to that action would still be with respect to our law.

I would also just note that the Byrd Amendment, Canfor has not explained precisely in what manner it is challenging the Byrd Amendment or how the Byrd amendment has allegedly harmed them.

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It is an undisputed fact that the duties that have been collected on softwood lumber have not yet been

liquidated, so those duties have not been sent out to any of the domestic lumber producers.

So, as far as we can see, the only allegation that Canfor can be making with respect to the Byrd amendment is that the piece of legislation itself actually provided an improper incentive for the domestic industry to support the petitions that were made to Commerce and the ITC to initiate their investigations. And as we noted in a footnote to our reply, the decision to initiate an investigation and the manner in which that investigation is conducted is an integral part of applying your antidumping and countervailing duty law. So, the decision by the Commerce Department, for instance, to instigate its antidumping duty investigation cannot be separated from the determination that it ultimately issued, which is really the subject of Canfor's complaint.

PRESIDENT GAILLARD: Ms. Menaker, before we move on, can you take your slides at page 18, or

if you have a set.

MS. MENAKER: Yes.

PRESIDENT GAILLARD: This is your argument that Canfor's interpretation would add language to Article 1901(3).

Are your two arguments--like you say, it would have to be read with the language to "amend" on the one hand and "statute" on the other

hand--are your two arguments independent, or is it the same argument?

MS. MENAKER: I apologize. Can you repeat that question.

PRESIDENT GAILLARD: You have underlined two modifications which, in your view, would be necessary to follow Canfor's approach to Article 1901(3). Are you making two arguments or only one combined argument?

MS. MENAKER: They are related arguments, but what Canfor is saying is that 1901(3) only provides protection for a party from being compelled by provisions outside of Chapter 19 to change its law. And our understanding is when

they're talking about the law, they're only talking about the actual legislation. So, if that reading were correct or that interpretation was correct, then the argument is that the Article would have to have used the term "statute," which is a defined term referring specifically to the statutes as opposed to the broader term "law." Because once you include the term "law," it includes everything that's in 1902. I think I understand a little better your question because of course--

PRESIDENT GAILLARD: My question is: if you accept that it's not "statute" but is "law", do you still need to add the word "amend" to be right, if you are Canfor?

MS. MENAKER: If you wouldn't mind, if I can just think about that over the next break and get back to you.

PRESIDENT GAILLARD: That's perfectly fine.

I have another question, and then we have other questions. Can you take your presentation at page 19--I'm sorry, 20. That's the duplication

argument. So, you say, well, if their interpretation of Article 1901(3) is right, it's completely duplicative with Article 1902.

Would you accept an interpretation which would say that Article 1902 is the principle and Article 1901(3) says: well, what we have secured in Article 1902 cannot be modified implicitly by reference to other chapters, so it's a belt-and-suspenders approach? I'm not saying we buy this argument. We certainly will hear on the other side also, but what do you have to say to that kind of argument at this stage? Or do you prefer to keep it for the discussion?

MS. MENAKER: I don't think that that argument is a tenable one. I don't think that that is a common practice in drafting treaty provisions. A belt-and-suspenders argument sometimes will work when the parties indicate that for greater clarity they're going to say something that is redundant from what has been previously said or where a

portion of a provision overlaps in its effect with another provision. But here, what you would be

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accepting would be that any time the NAFTA parties retained for themselves a right or undertook an obligation that you would in essence be expecting to find a corollary, another provision that basically said, "and nothing else in this agreement shall be construed to affect that right that we have reserved or that obligation that we have undertaken," and that seems to be redundant and certainly is not the way in which we have seen treaties being drafted, and we have seen no other such example in the NAFTA for instance.

PRESIDENT GAILLARD: Thank you. Of course, on this we will hear the claimant, but I don't think we'll do it now. We will do it in the normal course of conduct.

Now, Professor Weiler has a question as well.

ARBITRATOR WEILER: Have you actually finished your presentation?

PRESIDENT GAILLARD: But Mr. McNeill has not.

ARBITRATOR WEILER: Has Ms. Menaker

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finished her presentation?

MS. MENAKER: I have.

ARBITRATOR WEILER: So, could you just go over again with me, there is one point I'm not clear on your position. What actually would define the limit of this that which would be AD and CVD on the American position? Is it anything that is taken in the course of the proceedings before Commerce, for example, the ITC? What if they did something that even the United States court, if it were in another context a binational panel declared they were acting outside the jurisdiction, they were acting with no authority to act in that way, and yet it was part of those proceedings? Would that still be AD/CVD in the sense of your argument and shielded from any other, for example, remedy under NAFTA, even if it caused damage to an investor? I mean, is there any material limit? Or is it simply because it was done in that kind of procedure?

PRESIDENT GAILLARD: Ms. Menaker, you can obviously answer now, but that's the type of issues

we would like to address in greater depth tomorrow afternoon. I'm not saying you shouldn't ask it now. It's good for us to flag questions and that's the type of questions we want to address maybe in more depth tomorrow afternoon. But maybe you could answer preliminarily, if you want.

MS. MENAKER: Sure, if you would like me

to maybe answer in a short manner and then elaborate more either tomorrow afternoon or Thursday, I would be happy to do that.

Of course, answering this in a hypothetical manner without actually having hypothetical facts is somewhat difficult, but certainly if it--if what we are talking about are factual findings and legal conclusions that the agencies made that were part and parcel of their determinations, then that is action that if challenged would impose an obligation with respect to the United States's AD/CVD law.

And certainly one could imagine the situation where an agency took a decision that they really didn't have authority to take. They did

something that was outside of their jurisdiction, or maybe they even acted in a manner that did not provide a right for someone to respond or something along those lines that would normally be subject to a court review.

But those types of issues are precisely what the Chapter 19 Panel mechanism reviews. The Chapter 19 Panel is--has to apply domestic trade law, so certainly if one of the agencies did something where they clearly were acting outside the scope of their authority, the Chapter 19 Panel, in applying U.S. trade law, would then make that determination and remand it. So, that would not

take that conduct outside of 1901(3), so to speak, and subject it to investor-state arbitration, or arbitration in any other forum, because that conduct still would have been taken with respect to the implementation and application of the U.S. trade laws.

PRESIDENT GAILLARD: Thank you. Again, I guess that's a note for both parties, the type of issues with precise examples. Maybe I can suggest

that on both sides you think of examples outside of this case. That's not to say: well, in this case this and that, but like in the law school approach, take hypotheticals which are not real, but make the point, and we would like to hear both sides about those issues. That is an issue of interest for the Tribunal.

Thank you. Is that a good time for a pause, or how long do you want to continue? We still have two people to speak on behalf of the U.S.

MR. McNEILL: I'm at the Tribunal's pleasure. I will go about 30 or 40 minutes.

PRESIDENT GAILLARD: And then Mr. Bettauer?

MR. BETTAUER: Another 10 minutes beyond then, so if you would like, this would be a fine time for a break. We'll be done in another 40 to 50 minutes after the break.

PRESIDENT GAILLARD: Maybe I don't think we want to start claimant's side this morning anyway, so maybe it's a good time to have a what,

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10 or 15 minutes break? Let's meet at half past, half past 11. I'm sorry, my watch does not say the same thing as the World Bank's watch. Let's meet in 13 minutes.

(Brief recess.)

PRESIDENT GAILLARD: We go back to the record, and it's for Mr. McNeill to continue the presentation on the U.S. side. Thank you, Mr. McNeill.

MR. MCNEILL: Thank you. Good morning, Mr. President, members of the Tribunal.

You heard from Ms. Menaker how Article 1901(3) by its plain terms deprives this Tribunal jurisdiction over Canfor's claims. I will now demonstrate that Article 1901(3)'s context and the NAFTA's object and purpose confirm that the NAFTA parties did not consent to arbitrate Canfor's antidumping and countervailing duty claims under the investment chapter.

Rather, the context, object, and purpose of the treaty demonstrate that the parties intended the specialized binational panels in Chapter 19 to

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have exclusive jurisdiction under the NAFTA over antidumping and countervailing duty claims.

I will begin by addressing Article 1901(3)'s context and demonstrate why certain articles in the NAFTA, including Article 2004 and the provisions for the use of business proprietary information in the binational panel proceedings, confirm that Chapter 19 was intended to be the exclusive mechanism under the NAFTA for challenging antidumping and countervailing duty claims--determinations, excuse me.

I will then address the object and purpose of the NAFTA and demonstrate how Canfor's attempt to submit under Chapter 11 the same claims it litigated in Chapter 19 is inconsistent with the treaty's objective of promoting effective dispute resolution.

To begin with, Article 31 of the Vienna Convention on the Law of Treaties, provides that a treaty must be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in light of their context and in light of

its object and purpose. Paragraph two of that Article provides that the relevant context includes the treaty's text, its preamble and annexes, and any related agreements or instruments.

The first element of the NAFTA's context I

will examine is Article 2004. That Article demonstrates the NAFTA parties' intent, that the binational panels be the exclusive forum for antidumping and countervailing duty disputes.

Chapter 20 governs disputes between the NAFTA parties. Article 2004 describes Chapter 20's broad jurisdiction. It provides the dispute settlement provisions of this chapter shall apply with respect to all disputes between the parties regarding the interpretation or application of this agreement or wherever a party considers that an actual or proposed measure of another party is or would be inconsistent with the obligations of this agreement.

Significantly, the only subject matter Article 2004 specifically mentions as being outside of Chapter 20's jurisdiction are those, quote,

matters covered in Chapter 19, review and dispute settlements in antidumping and countervailing duty matters. The NAFTA parties excluded obligations with respect to their antidumping and countervailing duty laws, even from the broad dispute settlement mechanism in Chapter 20 because they established in Chapter 19 a specialized mechanism for resolving such disputes. As provided in the United States statement of administrative action, which was issued contemporaneously with the entry into force of the NAFTA, quote, Chapter 20

does not apply to disputes arising under Chapter 19, however, which sets out specific mechanisms for dispute resolution in antidumping and countervailing duty cases.

The mechanism for challenging antidumping and countervailing duty determinations is found in Article 1904, which is on the screen. Under paragraph two of that Article, the NAFTA parties can request that a panel review a final antidumping or countervailing duty determination. And under paragraph five, private claimants can challenge

antidumping and countervailing duty determinations. Both NAFTA parties and private claimants are precluded from challenging final antidumping and countervailing determinations outside of Chapter 19 because Article 1904 sets forth a specialized binational panel mechanism for both NAFTA parties and the private claimants to challenge such determinations.

Thus, the NAFTA's context, as reflected in Article 2004 and 1904, confirms what Article 1901(3) plainly says, that binational panels exclusively govern challenges under the NAFTA to a party's antidumping and countervailing duty determinations.

Now, Canfor does not contest that private claimants can invoke the binational panel mechanism. In fact, Canfor did so with respect to

the final determinations at issue in this case. And Canfor concedes that Article 2004 precludes NAFTA parties from challenging antidumping and countervailing duty determinations outside of Chapter 19. Rather, what Canfor argues is that

private claimants can also submit determinations to arbitration under the NAFTA's investment chapter. If that were true, however, it would result in private claimants having far broader rights to challenge antidumping and countervailing duty determinations than the NAFTA parties themselves. That result would make no sense, in light of the far broader scope for state-to-state dispute resolution in the NAFTA, and as I will demonstrate, in light of the absence of any express authority that would be required to submit such claims to investor-state arbitration.

Chapter 20, as I demonstrated applies to all subject matters in the NAFTA, except where specifically excluded. Chapter 11, on the other hand, confers limited jurisdiction over investment disputes. Article 1116 and 1117, which is projected on the screen, provides that an investor may submit to arbitration under the section of claim that another party has breached an obligation under Section A of Chapter 11 or two provisions in Chapter 15.

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As the Supreme Court of British Columbia stated in Mexico versus Metalclad, quote, The right to submit a claim to arbitration is limited to alleged breaches of an obligation under Section A and to two Articles contained in Chapter 15. It does not enable investors to arbitrate claims in respect of alleged breaches of other provisions in the NAFTA, end quote.

Now, where the NAFTA parties intended Chapter 11 obligations to apply to matters covered in other chapters of the NAFTA, they made that intention clear by incorporating the relevant provisions of Chapter 11 directly into the chapter in question.

For example, the financial services chapter expressly incorporates some of the substantive obligations in Chapter 11 as well as the investor-state mechanism of Chapter 11. Article 1401, paragraph two, provides, Articles 1115 through 1138, which is the investor-state dispute resolution mechanism in Chapter 11, are hereby incorporated into and made a part of this

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Chapter solely for breaches by a party of Articles 1109 through 1111, 1113, and 1114.

Article 1401 demonstrates the very deliberate means the NAFTA parties used to apply

the substantive obligations, and the investor-state dispute resolution mechanism to matters arising under other chapters in the NAFTA. Thus, for example, a private claimant could submit a claim to investor-state arbitration, alleging that a party's measures expropriated its financial services investment in violation of Article 1110. But it could not bring a claim alleging that the same measures violated the national treatment obligation in 1102 or the minimum standard of treatment obligation in 1105 because those obligations are not expressly incorporated into Chapter 14.

Rather, such claims could be brought only by a NAFTA party under Chapter 20.

In Fireman's Fund versus Mexico, for example, the NAFTA Tribunal, considering the effect of Article 1401 stated, quote, Article 1102 on national treatment and Article 1105 on the minimum

standard of treatment are not incorporated into Chapter 14. Accordingly, if the measures at issue are covered by Chapter 14, this Tribunal lacks jurisdiction over the claims under Articles 1102 and 1105. And indeed, the Tribunal dismissed the claims on that basis.

Likewise, that Chapter 19 does not incorporate, expressly or otherwise, any of the substantive obligations contained in Chapter 11, nor the investor-state dispute resolution

mechanism, confirms that the NAFTA parties did not intend to subject such matters to Chapter 11 arbitration.

Now, there is a significant commonality between Chapter 11 and Chapter 14. Chapter 11 applies to investments generally, and Chapter 14 applies to investments in financial services. If Chapter 11 obligations applied to subject matters in other chapters outside of Chapter 11, as Canfor suggests, one might expect to--that they would apply to the investments in financial services in Chapter 14 because of this commonality. That the

NAFTA parties thought it necessary expressly to incorporate those obligations into Chapter 14, suggests they did not intend Chapter 11 obligations to apply to other chapters in the NAFTA in the absence of a similar provision expressly incorporating the obligations of Chapter 11, such as Chapter 19, which does not address investments.

This conclusion is reinforced by the exclusion of all antidumping and countervailing duty matters from the broader dispute resolution mechanism in Chapter 20. The decision of the Chapter 11 Tribunal in UPS versus Canada supports this conclusion. The Tribunal in that case considered the effect of Article 1501(3), which is projected on the screen, which provides that, quote, No party may have recourse to dispute

settlement under this agreement for any matter arising under this Article.

The Tribunal concluded based on this provision that, quote, NAFTA authorizes a broader scope for state-state arbitration than for investor-state arbitration and nowhere confers

express authorization to bring claims respecting Article 1501 under investor-state proceedings. The natural inference then would be that there is no jurisdiction under Chapter 11.

In other words, the Tribunal concluded that the exclusion of competition law matters from Chapter 20 necessarily implies their exclusion from Chapter 11.

First of all, because of Chapter 20's broader scope, in other words, if the NAFTA were to give private claimants the right to submit to investor-state arbitration, the subject matter in another chapter that could not be subject to state-to-state dispute resolution, and there is no such example in the NAFTA, it would be expressly stated.

Second of all, it necessarily implies the exclusion from Chapter 19 because of the absence of any express authority to submit such matters to Chapter 11 arbitration, and that is what the UPS Tribunal found.

Likewise, the exclusion of antidumping and

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countervailing duty matters from Chapter 20 and the absence of express authority to submit such claims to investor-state arbitration, confirms that the NAFTA parties did not intend or consent to have antidumping or countervailing duty claims subject to Chapter 11 arbitration.

Now, Canfor argues that allowing private claimants to submit antidumping and countervailing duty claims to arbitration under Chapter 11 would not confer on them broader dispute resolution rights with respect to antidumping and countervailing duty matters. Rather, according to Canfor, private claimants and NAFTA parties would simply have different bundles of rights.

The chart on the screen illustrates why that argument does not comport with reality. This chart compares the rights and remedies that are available under Chapter 19, which is in the column on the left, and those that would accrue to private claimants if Canfor's argument were accepted, and that appears in the left-hand column.

Now, the chart not only will show that

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private claimants would have far broader rights than NAFTA parties, it also illustrates the

anomalous situation that would result under Canfor's theory.

First, the binational panel mechanism in Chapter 19 is exclusive. It ensures claimants have only one forum for antidumping and countervailing duty claims. Under Canfor's interpretation of the NAFTA however, private claimants would be accorded two fora to challenge the same final determinations. Canfor offers no explanation as to why the NAFTA parties would have accorded private claimants two fora when they limited themselves to one forum to challenge such matters. Nor is there any conceivable reason why the parties would have subjected themselves to the risks and burden of defending multiple proceedings with respect to the same measure.

Second, only final antidumping and countervailing duty determinations can be challenged under Chapter 19. As Mr. Clodfelter noted, the Court of International Trade has

jurisdiction only over final antidumping and countervailing duty determinations. Because Chapter 19 Panels stand in the shoes of that court, Chapter 19 Panels likewise have jurisdiction only over final determinations.

Under Canfor's interpretation of the NAFTA however, private claimants could also challenge preliminary antidumping and countervailing duty

determinations under Chapter 11. Again, Canfor offers no explanation why the NAFTA parties would have accorded private claimants alone this right that does not exist under Chapter 19, and does not even exist in U.S. court.

Third, Chapter 19 Panels are required to apply the antidumping and countervailing duty laws of the importing party. The NAFTA parties required that determinations be reviewed under their domestic law because they could not agree to apply an international body of law to those determinations. Under Canfor's interpretation, however, claimants could also subject those determinations to the international law standards

in Chapter 11. Canfor's interpretation would thus impose on the NAFTA parties an agreement they could not, and did not, reach.

Finally, Chapter 19 Panels must apply the domestic law standard of review. When reviewing determinations made by the U.S. Department of Commerce or the International Trade Commission, for example, the Court of International Trade must apply the substantial evidence standard. Under that standard, the court must defer to the agency's reasonable statutory interpretations and may not substitute its own judgment for that of the agency's or engage in de novo review, even if it would have reached a different conclusion.

The Chapter 19 Panels are required to apply the same standard of review as would the Court of International Trade. As the U.S. Statement of Administrative Action notes, strict adherence by the binational panels to that standard is, quote, the cornerstone of the binational panel process. Article 1904(13) of the NAFTA provides that a binational panel that fails to apply the

correct standard of review will, per se, be considered to have manifestly exceeded its powers, authority, or jurisdiction.

Under Canfor's theory, however, private claimants could not only challenge determinations before the binational panels, they could also seek review of those same determinations de novo under Chapter 11. It would make no sense for the parties to have insisted that the binational panels apply the same deferential standard of review that is applied in U.S. courts, but permit Chapter 11 tribunals to review their agencies' legal and factual findings de novo.

In sum, as you can see from this chart, Canfor's interpretation would clearly accord broader rights to private claimants than to NAFTA parties with respect to antidumping and countervailing duty matters. Private claimants would have all the rights and remedies that parties have in their Chapter 19, plus the rights and

21 remedies available under Chapter 11. That result
22 would defy the purpose of having created the

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1 binational panel mechanism in the first place, and
2 as I demonstrated, it would be contrary to the
3 general scheme of the NAFTA as supported by the UPS
4 and Fireman Fund's decisions that presumes a
5 broader jurisdiction for state-to-state proceedings
6 and requires express authority for Chapter 11's
7 obligations to apply to matters outside of that
8 chapter. Rather, the NAFTA parties created the
9 specialized binational panels in Chapter 19 to be
10 the exclusive forum for antidumping and
11 countervailing duty disputes for both NAFTA parties
12 and private claimants such as Canfor.
13 Now, after having conceded that Article
14 2004 is a clear exclusion, Canfor changes its
15 position in its rejoinder submission. It argues
16 there that the NAFTA parties would have the same
17 rights as private claimants under Chapter 11.
18 Canfor states, and I quote from that submission,
19 Nothing under NAFTA Article 2004 precludes a state
20 from advancing the same claims brought by Canfor in
21 the independent exercise of the state's rights for
22 an alleged violation of NAFTA Chapter 11.

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1 In other words, Canfor contends that

because NAFTA parties can bring claims based on the substantive obligations in Chapter 11, NAFTA parties can use that chapter to sidestep the binational panels.

This argument is flawed for two reasons. First, Canfor wrongly assumes a yes answer to the very question raised in the United States objection to jurisdiction; namely, whether antidumping and countervailing duty claims are subject to Chapter 11 arbitration in the first place.

Second, while it is true that NAFTA parties can submit claims with respect to the substantive obligations in Chapter 11, they can do so only under the mechanism in Chapter 20 which includes Article 2004's exclusion for all antidumping and countervailing duty matters.

Contrary to Canfor's assertion, Chapter 11 does not provide private claimants or NAFTA parties a back door to evade the binational panel mechanism in Chapter 19.

Canfor also argues that if the United

States's interpretation of Article 1901(3) were correct, there would have been no need for Article 2004 because Article 1901(3) applies to all other provisions in the treaty. That argument is also unsound.

Article 2004 does not suggest that the exclusion in Article 1901(3) is limited in scope.

To the contrary, it underscores that exclusion.

For example, in the UPS case, the claimant made a similar argument that there would have been no need for note 43 of the NAFTA which clarifies that competition law is excluded from Chapter 11 arbitration if Article 1501 accomplished that task. The Tribunal rejected that argument, concluding that any redundancy between note 43 and Article 1501 simply, quote, evidenced the drafters' caution. This Tribunal, likewise, should reject Canfor's argument.

Moreover, Article 2004 reflects a common drafting method for at least two of the NAFTA parties. As can you see from the text of the Canada-U.S. Free Trade Agreement which is on the

screen. Article 1701 of that agreement, which is in the financial services chapter, provides that, quote, No other provision of this agreement confers rights or imposes obligations on the parties with respect to financial services, end quote.

Now, that Article prevents a party under the Canada-U.S. Free Trade Agreement from submitting claims with respect to financial services to state-to-state dispute resolution. Article 1801 of that treaty, which is in the state-to-state dispute resolution chapter, provides that, quote, except for the matters covered in Chapter 17, Financial Services, the provisions of

this chapter shall apply with respect to the settlement of all disputes. That Article 1801 reflects the exclusion in Article 1701 does not somehow limit or render ineffective that exclusion.

To the contrary, like Article 2004, it underscores its importance to the parties.

Finally, Canfor argues that had the NAFTA parties intended to exclude antidumping and countervailing duty matters from Chapter 11, they

would have included in that chapter a provision similar to Article 2004. Canfor points to Article 1103(1) which provides that Chapter 11 does not apply to financial services matters as the type of provision that would have been included. This argument is backwards.

Canfor's reliance on Article 1101(3) is inapt for several reasons. First, the financial services chapter, as I demonstrated, incorporates specific substantive obligations of Chapter 11 and the investor-state dispute resolution mechanism of Chapter 11 into that chapter. Article 1101(3) clarifies that the list of Chapter 11 obligations that are incorporated into Chapter 14 is exhaustive. Chapter 19, in contrast, does not incorporate any Chapter 11 obligations, and no similar exclusion would thus be necessary.

In fact, as I demonstrated, it is the absence of any similar incorporation of Chapter 11

obligations in Chapter 19 that confirms that no jurisdiction exists for Canfor's claims.

Second, as I mentioned, unlike Chapter 14,

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which applies to investors and their investments in financial services, Chapter 19 does not, on its face, apply to investments. It addresses antidumping and countervailing duty matters. Thus, there is no basis to assume that investor-state arbitration would even apply to antidumping and countervailing duty matters in the first place.

Finally, unlike Chapter 14, Chapter 19 contains an express exclusion that applies to all other chapters in the NAFTA. No additional exclusion is needed in Chapter 11 to bar Canfor's claims. In sum, Article 1901(3)'s context, as reflected in Articles 2004, 1904, and 1401 confirms that the NAFTA does not confer jurisdiction on Chapter 11 tribunals with respect to antidumping and countervailing duty claims such as Canfor's.

Another aspect of the NAFTA's context that confirms Chapter 19's exclusive jurisdiction over antidumping and countervailing duty matters are the provisions relating to the use of business-proprietary information in binational panel proceedings. In its antidumping and

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countervailing duty investigations, the Department of Commerce often gathers business-proprietary information from companies that are subject to the investigations. That information includes prices, product costs, and customer lists. To protect that information from disclosure to the subject company's competitors and others, U.S. law restricts its dissemination. Only Department of Commerce and International Trade Commission personnel who are directly involved in the investigations at issue are permitted to have access to the proprietary information.

As can you see on the screen, provisions are made in the NAFTA for the use and protection of proprietary information in Chapter 19 Panel proceedings. Annex 1904(15) to the NAFTA provides, quote, the United States shall amend its laws to provide for the disclosure to authorized persons under Protective Order of proprietary information in the administrative record if binational panel review of a final determination is requested.

The U.S. Tariff Act was amended

accordingly at the time of entry into force with the NAFTA. It provides that, quote, If binational panel review of a determination under this subtitle is requested pursuant to Article 1904 of the NAFTA, Commerce or the ITC, as appropriate, may make

available to authorized persons under a Protective Order a copy of all proprietary materials in the administrative record.

Authorized persons as defined in that provision include the binational panel members, counsel, and their respective support staff. No corresponding provision is found in the NAFTA or under U.S. law for proprietary information to be used in arbitration under Chapter 11.

Thus, neither the Tribunal nor counsel in these proceedings have access to proprietary information contained in the administrative records to the determinations at issue. Indeed, the use of such proprietary information in these proceedings would result in the strict--the imposition of strict penalties under U.S. law. This confirms the NAFTA parties did not contemplate or consent to the

submission of antidumping or countervailing duty disputes to Chapter 11 arbitration. Had the parties intended to confer jurisdiction on Chapter 11 tribunals to review antidumping and countervailing duty determinations, they would have ensured those tribunals had access to the information necessary to carry out their functions.

Furthermore, without access to proprietary information in the administrative record, it would be impossible for this Tribunal to decide all of Canfor's claims on the merits. For example, in its

notice of arbitration, Canfor alleges that Commerce, quote, did not properly allocate joint costs by allocating costs based only on differences in grade and not differences in value attributable to dimension or length.

Commerce's cost allocation, however, was based on a comparison of proprietary pricing information from the companies subject to the investigation. On the screen is a page from the Department of Commerce's brief in the Chapter 19 antidumping proceeding. Commerce explains how it

compared the prices from the subject companies and found no pricing pattern attributable to length--to the length of the softwood lumber.

Now, this page is somewhat blurry. Perhaps I would refer you to the hard copy, page 15, and I will just point out a few items on this page. First, you will notice it says in the upper right-hand corner, proprietary information removed.

Here, the Department of Commerce is explaining the basis for its conclusion that there is no significant correlation between the size of lumber and lumber prices. You can see in the second line of that paragraph it says, As demonstrated in Exhibit A to this brief, pricing evidence does not show a consistent trend that larger or wider dimensions always demand a higher price. For example, in the case of, and then as

you see, the pricing information that Commerce relied on has been redacted from this page. You see at bottom of the page it refers to an exhibit, and the information in that exhibit is also redacted.

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Now, this Tribunal would have no access to the redacted pricing information. Without reviewing that proprietary information, it would be impossible for this Tribunal to sit in judgment of Commerce's cost allocation determination as Canfor asks it to do. Nor could the United States, for that matter, even respond to these allegations, since the State Department does not have access to this information, either.

I will now demonstrate that the object and purpose of the NAFTA also confirm the NAFTA party's intent to establish Chapter 19 as the exclusive forum for antidumping and countervailing duty disputes. NAFTA Article 102 provides the objectives of this agreement as elaborated more specifically through its principles and rules are to create effective procedures for the resolution of disputes, end quote.

A review of the NAFTA's various dispute resolution provisions also demonstrates an overriding concern with promoting effective dispute resolution. Article 1121, for example, provides

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that as a condition precedent to submitting a claim under Chapter 11, an investor must waive its rights, quote, to initiate or continue before any administrative Tribunal or court under the law of any party, or other dispute settlement procedures, any proceedings with respect to the measures of the disputing party that is alleged to be a breach referred to in Article 1116.

Article 1121 reflects the parties' intent to deny claimants the ability to pursue claims for damages with respect to the same measures in two fora. As the Tribunal in the Chapter 11 Waste Management case stated, quote, When both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the claimant may obtain the double benefit of its claim for damages. This is precisely what NAFTA Article 1121 seeks to avoid.

Where the NAFTA parties intended to allow for two proceedings with respect to the same measures to continue simultaneously, the treaty

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specifically provides for such. Article 1121, for example, does not require claimants to waive their right to pursue injunctive or declaratory relief in a domestic administrative tribunal or the courts of

a party.

Article 1115 of the NAFTA provides that the arbitral mechanism in Section B of Chapter 11 is, quote, without prejudice to the rights and obligations of parties under Chapter 20, end quote.

As the United States noted in its reply submission, this Article simply reflects the international law principle that a private claimant cannot waive the rights of a state to submit a claim on behalf of its national. It does not sanction the submission of antidumping and countervailing duty claims to Chapter 11 arbitration.

Submitting the same determinations to dispute resolution under two chapters of the NAFTA would not be consistent with the NAFTA's objective of promoting effective dispute resolution for several reasons. First, relitigating the findings

of fact and law made by the binational panels based on tens of thousands of pages of administrative records would be a waste of resources.

Second, as the Waste Management Tribunal noted, parallel proceedings risk double recovery. As you can see on the screen, the Chapter 19 countervailing duty in a Chapter 19 countervailing duty proceeding Canfor seeks, quote, the return/refund of all estimated duty deposits. Likewise, in its notice of arbitration in this

case, Canfor alleges as an element of its damages, quote, duties paid or to be paid.

Finally, assuming jurisdiction over this case would risk producing conflicting findings of fact and law. For example, the Chapter 19 Panel in the countervailing duty case affirmed Commerce's finding that Canadian provincial stumpage practices constitute a financial contribution that is specific to an industry. In this arbitration, however, Canfor alleges that Commerce, quote, failed to provide any reasonable analysis in determining that provincial stumpage programs are a

financial contribution.

In other words, Canfor asks this Tribunal to render a decision that is directly at odds with that made by the Chapter 19 binational panel.

Conflicting decisions by different tribunals with respect to the same claims by the same parties under the same treaty would not be consistent with the goal of effective dispute resolution. Canfor's argument that the United States has selectively focused on only one NAFTA objective and has ignored those pertaining to the liberalization of trade is without merit. It cannot be said that denying Canfor the chance to submit under Chapter 11 the same claims it already litigated in Chapter 19 would somehow advance the treaty's goals of promoting free trade.

Canfor also argues that the binational panel proceedings have not been effective, and that an effective resolution of its claims requires it to have access to Chapter 11. Canfor's dissatisfaction with the outcome of the Chapter 19 proceedings, however, does not confer jurisdiction

over Canfor's claims in this case. Chapter 11 is not an appellate body for Chapter 19.

Finally, Canfor contends that submitting the same claims to Chapter 11 and to Chapter 19 simultaneously would actually promote effective dispute resolution and would not result in conflicting judgments because the two chapters apply different sets of laws. This argument is legally and factually unsound.

First, the NAFTA parties consented to subject their antidumping and countervailing duty determinations to review only under their domestic laws. That Chapter 11 applies international law standards is not a reason to grant Canfor a second forum for its claims. To the contrary, as I explained previously, it is one reason why there is no jurisdiction in this case over those claims.

Second, contrary to Canfor's assertion, Canfor does seek review of antidumping and countervailing duty determinations under U.S. law standards in this proceeding, as are applied in Chapter 19 proceedings. For example, as you see on

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the screen, in the Chapter 19 countervailing duty proceeding, Canfor alleged that, quote, Commerce's refusal to calculate a company-specific subsidy rate for Canfor constituted a clear violation of U.S. law.

Likewise, in its notice of arbitration in this proceeding, Canfor alleges that the Department of Commerce determined that there was no right to an individual subsidy rate, quote, despite clear United States law to the contrary.

Similarly, before the Chapter 19 countervailing duty panel, Canfor alleged that the Department's standing determination was, quote, contrary to U.S. law. In this arbitration, Canfor alleges that Commerce failed to determine that the petition was filed on behalf of the U.S. industry, quote, as required by United States law.

Again, in the Chapter 19 countervailing duty panel proceedings, Canfor alleged that Commerce's quote, reliance on out-of-country benchmarks is contrary to U.S. law. Similarly, in this arbitration, Canfor alleges that Commerce

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applied in-country benchmarks, quote, in total disregard of requirements of United States law.

Finally, in the Chapter 19 countervailing duty proceeding, Canfor alleged that the Department's conclusion that stumpage programs constituted a benefit was, quote, contrary to U.S. law. Similarly, in this arbitration, Canfor alleges that Commerce failed to provide any reasonable analysis for its finding that stumpage programs were a financial contribution, quote, in violation of respondent's domestic law.

In sum, Canfor's argument that it makes different claims under different laws in two NAFTA proceedings and that there is, therefore, no risk of conflicting findings, is untrue. Relitigating the same claims Canfor submitted to the binational panels would not promote the effective resolution of disputes. Rather, dismissing Canfor's claims as required under the plain terms of the NAFTA would be consistent with that objective.

In conclusion, Article 1901(3)'s context and the object and purpose of the NAFTA are fully

consonant with the plain meaning of Article 1901(3), and demonstrate beyond question the NAFTA parties' intent to preclude the claims that Canfor submits in this arbitration. That concludes my remarks, I would be pleased to take any questions.

PRESIDENT GAILLARD: Thank you, Mr. McNeill. Before we hear Mr. Bettauer on the following of the argument of the U.S. side, we may

have a few questions. I have a couple of questions, and my co-arbitrators may have questions, being understood that you may answer only the clarification part of the question, and you may want to discuss tomorrow afternoon or at a later stage the other questions, and of course it's also a signal for the other side of what we are interested in.

If you go to your slide which discusses--would you go to your slide 10, I'm sorry, yes, your slide 10 which discusses Article 1501 of the NAFTA and note 43--it's in the context of your answer to the argument according to which Article 2004 would be rendered duplicative or

irrelevant by the U.S. interpretation of 1901(3), and you say: well, look at UPS, they said that note 43 was a mere clarification. Would you agree with me that here it's the belt-and-suspenders approach?

MR. MCNEILL: Yes I think that's a fair characterization, that the inference that Canfor seeks to draw here is that if Article 1901(3)--if our interpretation of Article 1901(3) were correct, then there would have been no need for Article 2004 because 1901(3) applies to the entire treaty.

PRESIDENT GAILLARD: And you say sometimes there is no need, but it's clearer in spelling it out, and look at what happened with note 43 and 1501. It was a clarification as discussed in UPS,

and sometimes the treaty does feel the need to spell out things which would, in a certain interpretation, go without saying.

So, you agree with me that it's a belt and suspenders here? It may happen.

MR. MCNEILL: It's a clarification, and also I would argue it emphasizes the importance of the parties that someone who's reading the NAFTA

gets it right. That's particularly the case here with Article 2004.

Now, Article 2004 could have been drafted any number of ways. You will notice it says, except as otherwise provided. And it could have not mentioned Chapter 19.

PRESIDENT GAILLARD: I'm not suggesting it's determinative of anything. I'm just clarifying the position and your views on this.

MR. MCNEILL: Yes, the analogy is that this was belt and suspenders. Article 2004 was belt and suspenders but it also serves other purposes as well. I think it emphasizes the importance of the exclusion 1901(3), and it's also a matter of drafting convenience. If it just said as otherwise provided, you would have to search through the entire NAFTA to determine what was, in fact, not covered.

PRESIDENT GAILLARD: It adds clarity--

MR. MCNEILL: Yes, it adds clarity.

PRESIDENT GAILLARD: --and guidance to the users of NAFTA, which is not easy, so the drafters

wanted to make easier and clearer in certain respects.

MR. MCNEILL: That's correct.

PRESIDENT GAILLARD: I understand your answer. Of course we will hear--not now--but the other side's determination on these type of issues in due course this afternoon.

Now, my second question to you has to do with the waiver. If you go to your slide 17, I'm also referring to the footnote 105 of page 28 of your first brief, which is the objection to jurisdiction of respondent United States of America dated October 16, 2003. It's page 28, footnote 105.

MR. MCNEILL: Okay.

PRESIDENT GAILLARD: That's where you discuss the same type of argument.

I understand the argument in the context of the legal argument. You take the requirement of the waiver, and you discuss it in the context of what you want to show in terms of interpretation. Now, if you look at footnote 105, it seems to go a

little further, and it says, Canfor's purported

waiver under Article 1121 is therefore arguably ineffective. I understand the argumentative part of the footnote which is more or less what you said this morning, and this morning it was completely clear. I understand this footnote to be to the same effect, that is to say it's an argument; and you're not making the technical claim that Canfor's waiver under Article 1121 is, indeed, invalid, and that, in and of itself, that is a ground for denying Canfor's claim or standing or whatever the consequences of that would be, because the language is substantive. It's arguably ineffective. So I would like a clarification of the position of the U.S. in this respect.

Is the U.S. making the case that the waiver is ineffective and therefore that's an additional ground we have to decide on, or is it just in the context of the argument that we should take this argument into account to follow your line of reasoning, which I believe I understand perfectly well?

You don't have to answer now, but at some point this is one of the questions I want to ask because we have to know on what we need to decide at this stage. To me, subject to your clarification, it's not a separate ground. It's part of the argument, but if it is, I would like you to clarify that, and certainly we want the

other side to elaborate and announce their answer on this particular aspect. Again, maybe you can answer now, maybe you want to answer later. Either way is fine with me, but by the end of this three-day hearing we want a determination on that.

MR. MCNEILL: I think the United States will revert to you with a fuller answer tomorrow. I can tell you that the United States is not making a jurisdictional objection on this basis.

PRESIDENT GAILLARD: On a stand-alone basis.

MR. MCNEILL: At this time. We reserved our right to make other jurisdictional objections, and that's what the footnote is about. We are not making the objection at this time.

PRESIDENT GAILLARD: Thank you for your clarification. Again for all of these issues, Canfor will have an opportunity to elaborate their position.

Now, my co-arbitrators?

ARBITRATOR HARPER: Thank you, Mr. President.

PRESIDENT GAILLARD: Mr. Harper.

ARBITRATOR HARPER: Mr. McNeill, let me draw your attention to Article 1112 of the NAFTA, and I want to know whether it's the position of the United States that there is any inconsistency between Chapter 11 and Chapter 19.

MR. MCNEILL: No. On the face of the text there is no inconsistency. The two chapters perform different functions. They each have dispute resolution mechanisms that handle different types of claims, so there is no inconsistency between the two chapters. The only point we made in our brief was that if you took antidumping and countervailing duty claims, which the NAFTA specifies are supposed to be resolved in a very

specific way in a very specific forum, and you submitted those claims to Chapter 19 and Chapter 11 simultaneously, that that in itself would give rise to critical inconsistencies that would have to be resolved in favor of Chapter 19.

ARBITRATOR HARPER: And so, if I'm to understand you correctly, the U.S. position, returning to your slide nine, which lists rights and remedies under Chapter 19 in one column and rights and remedies sought by Canfor in the other, is it the position of the United States that that chart illustrates what would be an inconsistency as applied as between Chapters 11 and 19?

MR. MCNEILL: Again, well, yes, in a sense that this would be an example, and again the inconsistency arises from how these types of disputes are intended to be resolved, and the two proceedings have entirely different mechanisms for resolving disputes. Chapter 19 has five panelists

that are drawn from the two countries involved in the proceeding. Chapter 11 has three arbitrable members. They have completely different

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proceedings.

And this list, in fact, could be far longer. For instance, in the Chapter 19 proceeding, it's basically an appellate proceeding, and it's supposed to mimic the Court of International Trade, which is also an appellate court, and it's supposed to limit its review to the administrative record. When you submit the claims, these claims to Chapter 11, you no longer have this restriction. There is the possibility of discovery, and that was not something that the NAFTA parties contemplated or consented to. And that would yet be another inconsistency that would arise if you submitted these claims to these two chapters.

PRESIDENT GAILLARD: Professor Weiler.

ARBITRATOR WEILER: I just want to repeat what the Chairman said that what I'm about to ask is for my purposes of clarification, but you may want to take it just as flagging an issue that would be interesting for me if you came back to it. It's a very tentative question. And also as the

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Chairman in his question says, the answer is not necessarily injurious to your position.

I was trying to work out as you were outlining your argument and also before in reading the briefs how would the NAFTA investor compare to a non-NAFTA investor in a similar situation? And I just want to understand, if I understood your position correctly, actually the NAFTA investor would be in a situation which is inferior to non-NAFTA investors because, on the assumption and that, of course, might be a contestable assumption that there might be aspect of antidumping and countervailing duty law which actually would violate the international law equivalent to 1105.

So, a non-NAFTA investor would have his or her own remedy before the United States authorities, instead of going before a binational panel which is just a substitute for the Court of International Trade, they would go directly to the Court of International Trade and could appeal to an appeals court rather than to the extraordinary challenge under the NAFTA. But then their country

could still bring independently of that or if there was no adequate relief in either of their countries, there could be a normal claim in international law for protection of an alien, assuming that standard, et cetera, whereas you said

that if I understood you correctly, that a NAFTA state would not even be able to bring a claim because it would go on the 20 and 20 makes envois to 19 and say you are not allowed to use 20, you have to go to 19.

So if I understood it all correctly, it might be that the NAFTA investor is actually in a position inferior to a normal investor.

Maybe another hypothesis comparing a NAFTA investor to an investor that would be covered by a standard bilateral investment treaty, that investor would seem to be in a position better than a NAFTA investor because there would not be the bar to bringing a claim which was contemporaneous.

Now, as I said, it's not necessarily injurious to your case. That might have been what the parties wanted. That's how they wrote the

NAFTA. But still would be useful for me if that point was clarified.

PRESIDENT GAILLARD: In fairness, this may be the type of question you wish to reflect on, and we would understand completely if you were to answer tomorrow afternoon. Certainly we want an answer to that during the course of this three-day hearing, but not necessarily at this stage.

MR. MCNEILL: I think we will, in fact, reflect on that and give you a response.

ARBITRATOR WEILER: Can I pose two other

questions?

PRESIDENT GAILLARD: Absolutely. That doesn't mean we don't ask the questions now. It gives you more time to think, and it's all the better.

ARBITRATOR WEILER: In the same spirit with the two caveats that I made before, I would find it useful, and maybe this would have been a question which I would have better posed to Mr. Clodfelter, if one could compare actual remedies, not what Canfor is requesting the way you

did, which was very helpful and for which I'm very grateful, but what are the type of remedies that a Chapter 19 process can end up compared to the remedies that Chapter 11 can provide? And is there total overlap or are there gaps between the two? In other words, are there types of injuries that could be suffered as a result of a violative antidumping law countervailing duty, a remedy for which could be given by Chapter 19 and not by Chapter 11 or vice versa? Again, it's not necessarily today.

The final question, if I may.

PRESIDENT GAILLARD: Certainly, please. Go ahead.

ARBITRATOR WEILER: And that I should have posed maybe to Ms. Menaker before, so I apologize if I didn't. I take you back to your reference to

the definition part of what is covered by Chapter 19, that it's not "statute", and there was a future reference in that definition, any practice, et cetera, now or in the future. I'm speaking from memory, but am I right? I think I am.

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MS. MENAKER: Are you talking about the definition of statute when it says as amended, or the definition of antidumping law and countervailing duty law?

ARBITRATOR WEILER: Definition of antidumping and countervailing duty law.

MS. MENAKER: It's--perhaps if I just read it, it says, include as appropriate for each party relevant statutes, legislative history, regulations, administrative practice, and judicial precedents.

ARBITRATOR WEILER: Maybe it was then the definition of the statute which made a reference to future statutes?

MS. MENAKER: I think that's correct. That's Title VII, as amended, and any--in fact, let me just quote it accurately.

ARBITRATOR WEILER: I apologize for being inaccurate.

MS. MENAKER: Let me note also in Article 1904(2), from which the sentence that I just previously read, it also says, solely for purposes

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of the panel review, provided for in this Article, the antidumping and countervailing duty statutes of the parties are those statutes, the word "that" is missing, but that may be amended from time to time and incorporated into and made a part of this agreement, which conforms with the definition of antidumping and countervailing duty statute in Annex 1911 because it refers to the statutes as amended and any successor statutes.

ARBITRATOR WEILER: So here comes my question, not maybe exactly for now but for reflection, as a flagging question. Assume that one of the parties amends the antidumping law in a way that compromises some other NAFTA provisions. They expand it or--what remedies are available to the other NAFTA parties to challenge such an amendment? Would they not be shielded and simply said you have to go--is my understanding correctly that the U.S. position is because it would be a dispute about an antidumping measure, it would have to be under Chapter 19, and it couldn't be, for example, under Chapter 20?

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PRESIDENT GAILLARD: I think it goes for the same treatment. Both parties are invited to elaborate on this in due course. Maybe a short answer now, but we would like an elaboration, and

also time to answer follow-up questions. I mean, it's opening up a whole host of questions, I guess. I would like to have time to address that properly.

MS. MENAKER: Sure. Perhaps I could give a short answer now, and I would be happy to elaborate further, but Article 1903 is drafted for that express purpose. What Chapter 19 does when it went into effect, the parties brought their--they were permitted to retain their antidumping and countervailing duty laws, and they were permitted to amend them, as they saw fit.

Now, if a party believes that another party has amended their laws in such a manner that it causes them harm or it's inconsistent with what the parties agreed to subject their antidumping and countervailing duty laws to, the remedy for that is in Article 1903 which is entitled Review of Statutory Amendments, and it provides that a party

to which an amendment of another party's antidumping or countervailing duty statute applies may request in writing that such amendment be referred to a binational panel for declaratory opinion as to whether it conforms with the provisions set forth in Chapter 19.

So, I think clearly if a party amended their countervailing duty law in a manner which unsettled another party, it would still be prevented by virtue of Article 1901(3) and 2004

from bringing that complaint before any other forum under the NAFTA.

PRESIDENT GAILLARD: If I may, it goes a little further, I guess, the question, because it goes to the labeling argument: what if sheer expropriation is labeled competition, not antidumping or countervailing duty laws. So that's something I don't want to address now, but I want an explanation from both parties on that kind of issue later on in the course of this hearing. If you understand what I mean, I guess you do, if not, we will ask more specific questions. Joseph, is

that all at this stage?

ARBITRATOR WEILER: Thank you very much.

PRESIDENT GAILLARD: Conrad, is that all?

ARBITRATOR HARPER: Yes.

PRESIDENT GAILLARD: So at this stage, it concludes our questions to Mr. McNeill.

Mr. Bettauer, you want to pick up on this?

MR. BETTAUER: Mr. President, members of the Tribunal, I'm pleased to appear before you today to close the United States's first round presentation. I would like to step back for a moment and look at the broader perspective. What are Canfor's claims in this case about? If you look at Canfor's notice of arbitration and statement of claim, you can see that its claims exclusively concern preliminary and final

determinations made by the Department of Commerce and the International Trade Commission on Canadian softwood lumber antidumping and countervailing duty petitions. Those determinations all concern the importation of softwood lumber. So, the Canfor claim relates solely to trade. The claim really

has nothing--nothing--to do with any measure or treatment of a Canfor investment in the United States. Indeed, all of the allegations focus on actions subject to review by binational panels under Chapter 19.

Chapter 11 was meant to forward NAFTA's objective of increasing opportunities for cross-border investment by establishing a dispute-settlement mechanism that allows investors to challenge measures involving investment when they believe such measures are not consistent with the rules in Section A of Chapter 11. It was not meant to deal with disputes that are purely trade disputes. It was not meant to deal with antidumping or countervailing duty matters.

In his introduction, Mr. Taft said Canfor's pursuit of the claims here is an abuse of Chapter 11. This is true not only because the claims are expressly excluded from Chapter 11, but also because the claims are not even investment claims to begin with.

Now, the United States could make many

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arguments based on the provisions of Chapter 11 to show that Canfor's claims fail, but as the President pointed out at the beginning of this morning's session, and as both parties agreed, those arguments will not be made at this hearing, but are reserved. So, we focus on why Chapter 19 precludes this claim.

We have shown that Chapter 19 is the exclusive mechanism for dealing with antidumping and countervailing duty matters, that it is a very specialized mechanism, and that it is the only avenue available for Canfor for this dispute, and it is an avenue Canfor has taken. It is, indeed, a party to Chapter 19 proceedings now in which it makes the very same allegations, the same allegations that it makes now in a Chapter 11 proceeding.

But Canfor cannot be allowed to succeed in turning its Chapter 19 complaint into a Chapter 11 claim. This isn't what the NAFTA parties agreed to, and it isn't what the NAFTA text provides. Article 1901(3) of the NAFTA makes that clear. The

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NAFTA parties did not consent to arbitrate antidumping and countervailing duty claims under

Chapter 11. We have demonstrated this by reviewing for you in some detail the terms of Article 1901(3) in their context, and in light of NAFTA's object and purpose as well as analogous precedent of other NAFTA Arbitral Tribunals.

Now, Canfor has argued that the Chapter 19 mechanism has proved ineffective. Even if this were true, this is not a reason to find jurisdiction where there is none. Chapter 11 is not a review mechanism for Chapter 19. And to say that Chapter 19 mechanism is ineffective is simply not true. Those procedures are continuing, and there is absolutely no basis for this Tribunal to sit in judgment of a Chapter 19 binational panel. We have shown that Canfor's arguments are completely without merit and that it has no basis to bring this claim. We therefore ask the Tribunal to dismiss Canfor's claims in their entirety.

One has to ask why was this case brought? We do not question that Canfor feels aggrieved. It

had every right to participate in the Chapter 19 binational panel proceeding to seek to vindicate its position. But it most certainly did not have every right to bring a Chapter 11 proceeding based on a contorted reading of the NAFTA, a reading so far removed from reasonableness that this Tribunal should not tolerate it. To tolerate such claims would be an invitation for every company that feels

aggrieved to contort the NAFTA to allow it to bring a Chapter 11 claim, no matter how far removed the claim is from being covered by Chapter 11.

It is, of course, understandable that a claimant may think we have a shot at winning. We have a shot at winning a Chapter 11 claim, so let's try to turn our claim into a Chapter 11 claim. But this Tribunal should not let that claimant think we have nothing to lose.

Mr. President, members of the Tribunal, that's why the Tribunal should award costs in this case. Allowing frivolous claims creates undue burdens on the NAFTA governments. It exacts funding and staffing costs. Ultimately it can

undermine support of the governments and the public for the NAFTA. In this case, Chapter 19 clearly provides that no other chapter of the NAFTA is to impose obligations on a party with respect to antidumping and countervailing duty matters. Requiring the United States to defend this case has already imposed obligations on the United States. We have expended significant financial and personal resources to litigate this claim. This includes our preparation of submissions for this Tribunal as well as the burdensome search we were forced to undertake in responding to Canfor's discovery request for the negotiating history of various chapters of the NAFTA, all of which are irrelevant

to Canfor's claim.

Under Article 40, paragraph one of the UNCITRAL Rules, and I quote, The costs of the arbitration shall, in principle, be borne by the unsuccessful party, closed quote. Canfor chose to arbitrate under this rule. In the present case, Canfor has disregarded the express language of the NAFTA which bars its claim and proceeded on the

basis of frivolous arguments. As I just said, the Tribunal should not tolerate this and the consequences it may bring. The United States submits that the Tribunal should dismiss Canfor's claims, and award the United States full costs.

Mr. President, members of the Tribunal, that concludes the United States's first round presentation. Thank you for your attention.

PRESIDENT GAILLARD: Thank you very much, Mr. Bettauer. I see that we are a little bit behind schedule, but that's because of the questions, so you have respected your time, and we have used maybe half an hour of questions.

Mr. Landry? It's up to you, at what time would you like to resume? We were supposed to break at 12:30 and resume at two. Do you want to resume at 2:30, or do you still want to be back, for instance--I guess 2:15 would be fine? We are at your disposal. It doesn't matter for us.

MR. LANDRY: 2:15 would be fine.

PRESIDENT GAILLARD: 2:15 would be fine? It's fine for respondent as well? So, the meeting

is adjourned. We'll resume at 2:15. Thank you.

(Whereupon, at 12:53 p.m., the hearing was adjourned until 2:15 p.m., the same day.)

AFTERNOON SESSION

PRESIDENT GAILLARD: We resume our meeting. It's 2:30. We are a little late, but you will have all the time you need this afternoon to make your presentation.

So who starts on claimant's side? Mr. Landry?

OPENING STATEMENT BY COUNSEL FOR CLAIMANT

MR. LANDRY: Thank you, Mr. President.

Mr. President, both Mr. Mitchell and I will be dealing with Canfor's argument in the oral submissions and in relation to certain questions we may call upon Professor Howse to answer some portions of it. I assume that would be okay from the Tribunal's perspective.

PRESIDENT GAILLARD: Absolutely. You can do what you want and have people speak whenever you feel appropriate. It's your call. I mean, this afternoon is yours.

MR. LANDRY: Thank you.

I would first like to just ensure that the panel has before it material that I will be

referring to because I do not have a PowerPoint presentation, so if we could just take a moment to get the material before you so that we don't switch and change during the submissions, I will be referring to the four memorials that have been filed, both the two by the U.S. and the two by Canfor.

I will also be referring to the three volumes of authorities that Canfor filed, two volumes with the original reply and one with the rejoinder.

PRESIDENT GAILLARD: Will you need the documents which were distributed to us this morning by respondent?

MR. LANDRY: No.

PRESIDENT GAILLARD: We could put that aside for the time being?

MR. LANDRY: Yes.

MS. MENAKER: Excuse me, I apologize for interrupting, but it doesn't appear that either of our two LiveNote feeds are working.

PRESIDENT GAILLARD: Maybe Mr. Kasdan can

take care of that.

(Pause.)

PRESIDENT GAILLARD: Thank you. I understand now that the technical problem has been taken care of, so, Mr. Landry, if you would like to resume. And I confirm that we have in front of us all the pleadings, including the notice of arbitration, and we have one set of all of the exhibits, but we have only one set for the Tribunal, so if you would take your time when you refer us to certain documents, we will tell you when we are ready.

MR. LANDRY: And I assume that you do have

a copy, obviously, of the Statement of Claim available.

PRESIDENT GAILLARD: Yes.

MR. LANDRY: One last item, Mr. President, is that I have handed up what I have called a Canfor Corporation handout, a two-page document, which is really nothing more than just an ease of reference for the Tribunal on various Articles both within NAFTA and the Vienna Convention that I will

be referring to in my oral submissions.

PRESIDENT GAILLARD: We have received it, and I take it it's equally true for the respondent? Can respondent confirm that?

MR. BETTAUER: Yes.

PRESIDENT GAILLARD: For the record.

MR. BETTAUER: Yes. Thank you, Mr. President, we have it.

MR. LANDRY: Now, Mr. President, in general, our oral submissions will be dealt with under the following general topics. Firstly, I will be deal with an overview from Canfor's perspective of the interpretive enterprise that this panel must undertake; and then secondly, I then intend to have a fairly detailed discussion of the two key elements that are essential backdrop to that interpretive exercise, those being the actual NAFTA objectives, and secondly the context within which Article 1901(3) is found within the NAFTA.

Then thirdly, I will respond to a number of issues raised by the United States, including these matters, in relation to how the United States

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dealt with the context issue in their objection.

Secondly, regarding the issues raised in relation to parallel proceedings, more particularly concerns raised by the U.S. relating to redundancy and the possibility of conflicting judgments. And also the U.S. argument on the circumstances of conclusion of the NAFTA.

That will effectively be the main part of the presentation that I will be presenting to you today, and then Mr. Mitchell will then look in detail at what Canfor says is the proper interpretation of Article 1901(3) in light of the context within which Article--the Article is found, and in light of obviously the NAFTA's object and purpose.

And then finally Mr. Mitchell will end with some closing remarks.

Now, both the parties appear to agree that the starting point for the interpretive exercise that the Tribunal must undertake begins with Article 1311 of the NAFTA which mandates the Tribunal to decide the issues in accordance with

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international law which, of course, leads to Article 31 of the Vienna Convention. A related Article in NAFTA is Article 102, which helps to inform that interpretive exercise. Both of those are referred to on page one of the handout.

Now, although the parties agree as to the starting point, the approach taken as to how the Tribunal must undertake its interpretive exercise is quite different. In our submission, the approach taken by the United States is deficient in two material respects which I will come to in a moment.

Just looking at the handout, as the Tribunal is aware, the Vienna Convention Article 31 embodies the customary international law relating to the interpretation of treaties, but it highlights the key elements when interpreting a treaty like the NAFTA. Firstly, it must be interpreted in good faith. Secondly, it must be interpreted in accordance with the ordinary meanings of the terms of the treaty in their context which includes, specifically includes in

Article 31, the text of the treaty, the preamble, and the annexes. And finally, it must be interpreted in the light of the treaty's object and purpose.

And, of course, a similar approach is

mandated under the NAFTA under Article 102(2) which states that the parties, in interpreting the NAFTA, must do so obviously in light of its objectives, the objectives being specifically articulated in that Article, and also in accordance with rules of international law which obviously incorporates the Vienna Convention.

Therefore, although there is no doubt that the Tribunal must focus on the ordinary meaning of the words in the NAFTA, it must do so taking into account two important principles: It must only do so in the context of the provisions which it is interpreting, which we say requires in this case a rigorous review of the NAFTA and more specifically the provisions of Chapter 11 and Chapter 19 and the interrelationship between them. It must also take into account, as I've said, the object and purpose

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of the NAFTA, and we say that once the objects and purpose are identified, the Tribunal must interpret the relevant provisions of the NAFTA in a manner which promotes rather than inhibits the objectives of the NAFTA.

Now, as can be seen from our written arguments, in our submission, the United States analysis in this respect is deficient in two material respects. But firstly, although the United States gives lip service to the need to look at the object and purpose of NAFTA, it

simplistically focuses on one objective, and that is the objective to create effective procedures for the resolution of disputes while ignoring other key objectives which are important to the Tribunal's exercise, interpretive exercise.

Secondly, the United States argument fails to fully develop the context within which Article 1901(3) must be interpreted, and as a result it fails to critically analyze the nature and purpose of, and the fundamental differences between, Chapters 11 and 19, the rights and duties that they

establish, and the different legal regimes they describe when such an analysis is of utmost importance to the Tribunal's interpretive exercise.

In Canfor's submission, it's only once that context is properly reviewed, and the objects and purposes of NAFTA are more thoroughly articulated that any conclusion can be reached as to the improper interpretation of Article 1901(3).

So, the balance of this part of my oral submissions I will take some time to review in detail those two key issues which, as we have seen, as contemplated by Article 31 of the Vienna Convention, forms the necessary backdrop for the interpretive exercise that the Tribunal must undertake.

Firstly, I would like to make a couple of preliminary points. In order to better appreciate

18 submissions that I will be making in respect of the
19 importance of the NAFTA objectives and the context
20 within which Article 1901(3) must be interpreted, I
21 would like to highlight at a high level the essence
22 of the debate that exists between the parties, and

1 when I'm doing that it's not getting into the
2 details of the specific words of Article 1901(3)
3 and the precise interpretation that each party is
4 advocating.
5 Now, the U.S. position is that all of
6 Canfor's claims are antidumping and countervailing
7 duty claims, and Chapter 19 is the only dispute
8 resolution mechanism that can deal with any conduct
9 which is in any way related to antidumping and CVD
10 matters or investigation, including the conduct
11 about which Canfor complains. Now, that's the U.S.
12 position. It has to be compared to the Canfor
13 position which is as follows.
14 Canfor's position that its claims are not
15 antidumping and countervailing duty claims, they
16 are claims that are premised on U.S. conduct which
17 violates international norms, Chapters 11 and 19
18 establish two distinct dispute resolution
19 mechanisms based on fundamentally different legal
20 regimes. One is based on municipal norms, and the
21 other is based on international norms. And the
22 conduct being complained about by Canfor can be

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subjected to review under both dispute resolution mechanisms, regardless of whether the conduct is in any way related to antidumping and CVD matters or investigations. So, that's the first preliminary point.

The second preliminary point that I would like to highlight was something that was dealt with by the United States this morning, and that is another important consideration to keep in mind while you're hearing the oral submissions of Canfor is that for the purposes of the motion, the Tribunal must accept the facts as set out in Canfor's statement of claim as true. Contrary to the United States's position, it is Canfor's position that it must assume that Canfor has been subject to treatment that violates international norms set out in Articles 102, 1102, 1103, 1105, and 1110, simply for the purposes of this jurisdictional motion. Once we get to merits, that will have to be proven.

So therefore, at one level, the sole question for this Tribunal is whether a claim in

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respect of otherwise objectionable treatment is precluded by virtue of Article 1901(3), and of course Canfor's submission is that it is not.

Now, firstly, turning to the issue of the

NAFTA object and purpose, I want to do two things. I would like to review both the key objectives in the NAFTA, and I would also like to talk a little bit about how other NAFTA tribunals have dealt with the relevance and importance of the NAFTA objectives in interpreting the NAFTA.

As I noted earlier, the U.S. focus in this regard in their arguments is on one objective, the objective to create effective procedures for the resolution of disputes. I want to just make an important point at the outset. Canfor does not resile from that objective. Canfor embraces it, and would argue that it is, indeed, one of the key objectives that must be in the Tribunal's mind when interpreting the relevant provisions of NAFTA.

The U.S. is also critical of Canfor's argument that a wide-ranging category of objectives is relevant to the Tribunal's interpretive task in

this case, questioning, and I quote, how these principles have any relevance to a proceeding under the investment chapter, and the reference for that is page 23 of the U.S. reply.

So, before I get to the specific objectives, I would like to respond directly to this point. The myopic approach suggested by the United States is far too simplistic, and is not at all in keeping with the interpretive exercise that must be undertaken by the Tribunal. Although

Canfor's claim can be reasonably--can reasonably be categorized as an investment dispute, the interpretive exercise being undertaken by this Tribunal is to interpret among other provisions the provisions of Chapters 11 and 19, and the interrelationship between them, and on a more specific level Article 1901(3).

In that exercise, the Tribunal must take into account all objectives which are relevant to that interpretive exercise. The objectives of NAFTA cannot be individually examined and then assigned to a particular chapter of the treaty.

The treaty as a whole must be read having regard to all of the objectives.

Now, if I could just take a moment to go to the specific objectives that are articulated in the NAFTA and for that purpose I will go to the handout that we passed out earlier, and if we just start with the preamble, which as you know Section 31 of the Vienna Convention says is, indeed, relevant to the interpretive exercise, and this informs the reader about the purpose of NAFTA, so if I start with the preamble it says, and I'm quoting, create an expanded and secure market for the goods and services produced in their territories, reduce distortions to trade, establish a clear and mutually advantageous rules governing their trade, ensure a predictable commercial

framework for business planning and investment, build on the respective rights and obligations under the general agreement on tariffs and trade and other multilateral and bilateral instruments of cooperation, and enhance the competitiveness of their firms in global markets.

So, that's the setup for them which leads then into the objectives which are articulated in 102, and they are as follows, and again I quote, The objectives of this agreement as elaborated more specifically through its principles and rules, including national treatment, most-favored nation are transparency are to, A, eliminate barriers to trade and facilitate in the cross-border movement of goods and services between the territories of the parties, promote conditions of fair competition in the free trade area, increase substantially investment opportunities in the territories of the parties, provide adequate and effective protection and enforcement of intellectual property rights in each party's territories, create effective procedures for the implementation and application of this agreement, For its joint administration and for the resolution of disputes, and establish a framework for further trilateral regional and multilateral cooperation to expand and enhance the benefits of this agreement.

Very broad, very powerful, but the

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articulation of the objectives and the purpose of NAFTA was not confined only to Article 102. Even in connection with Chapter 19, the very chapter relied on by the United States to limit the protection provided by Chapter 11, the drafters of the treaty thought it would be appropriate to reiterate the underlying objectives of the NAFTA. And if I could take you to that provision on page two of the handout, and under Article 1902(2)(d), it says, Each party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to the parties antidumping or countervailing duty statute, such amendment as applicable to the other party is not inconsistent with the object and purpose of this agreement and this chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the parties to this agreement while maintaining effective and fair disciplines and unfair trade practices, such object and purpose to be ascertained from the provisions of this agreement,

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its preamble and objectives, and the practices of the parties.

So, these are the clearly articulated objectives which form the backdrop against which the Tribunal must undertake its analysis and must be kept foremost in your mind as you're looking at the various interpretations that are being advocated by the parties.

Now, the second part of this is how have tribunals approached the NAFTA objectives? How have they looked at the importance of the NAFTA objectives in the interpretive exercise? And, Mr. President this is where I would like to refer to one of the authorities, and it's at volume one of Tab 10 of our--the authorities that were filed with our preliminary reply.

PRESIDENT GAILLARD: Yes, we have it.

MR. LANDRY: Now, that was a case regarding tariffs applied by Canada to certain U.S. origin agricultural products. It's a report of a panel in December of 1996, and the case involved a dispute between Canada and the United States

relating to the U.S. complaint that Canada was applying duties to certain agricultural products higher than specified in the NAFTA, and this panel was established under Article 2008 of NAFTA, and that the U.S. was invoking Articles 301(1) and (2) and it was alleging that under the NAFTA Canada could not increase custom duties beyond what was in existence as of the date of the NAFTA.

So, again, it's a fairly complicated judgment that dealt with a number of different things, but, of course, the interpretive exercise was of utmost importance to that panel. And if I could take the Tribunal to pages 33 and 34 of that report where they dealt with the issue of interpreting statutes, and you can see starting at paragraph 118 on page 33--do you have that, Mr. President?

PRESIDENT GAILLARD: Yes, we do.

MR. LANDRY: You can see where they find the starting point, Article 102(2) which we have gone through, and then it starts at 119. It says, "The applicable rules of international law include

the parties agree Articles 31 and 32 of the Vienna Convention which are generally accepted as reflecting customary international law." And they go on to quote from that, and after the quote they say, "The panel must therefore commence with the identification of the plain and ordinary meaning of the words used. In doing so, the panel will take into consideration meaning actually to be attributed to the words and phrasing, looking at the text as a whole, examining the context--the context in which the words appear and considering them in the light of the object and purpose of the treaty."

Then it goes on to talk further about

subsequent agreement, subsequent practice. I would like to take you to paragraph 122 which says this. "The panel also attaches importance to the trade liberalization background against which the agreements under consideration here must be interpreted. Moreover, as a free trade agreement, the NAFTA has the specific objective of eliminating barriers to trade amongst the three contracting

parties. Principles and rules so rich the objectives of the NAFTA are elaborated are identified in NAFTA Article 102(1) as including national treatment, most-favored-nation treatment, and transparency.

"Any interpretation adopted by this panel must therefore promote rather than inhibit the NAFTA's objectives. Exclusions to obligations of trade liberalization must perforce be viewed with caution."

And that type of an approach, Mr. President, panel members, is the approach that NAFTA tribunals have traditionally taken to this exercise that we are talking about.

So, given these explicitly articulated objectives and the importance of the objectives to the interpretive exercise, where does that lead us? And again, I'm just focusing on the effect that the U.S. interpretation has in relation to those explicit objectives. That's the focus of my

comments, and I would like to actually refer to my--our original memorial, which is called the

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reply memorial, Canfor.

PRESIDENT GAILLARD: Are we done with this document, or do you want to get back to it?

MR. LANDRY: We are done with that document, I believe. Thank you.

And I would like to go to page 18, which summarizes succinctly what our position is in this regard. And realize once again that the focus here is on the effect that the U.S. interpretation has in relation to the explicit objectives that we just talked about, and it's on page 18 under the heading United States Interpretation is Not in Keeping with the Object and Purpose of NAFTA.

PRESIDENT GAILLARD: I'm sorry, page 18 of what?

MR. LANDRY: Of the reply memorial which is the first memorial that we filed.

PRESIDENT GAILLARD: Yes, thank you.

MR. LANDRY: Now, on page 18 under that heading, under paragraph 54 I would like to pick up, and again we are focusing on the effect of the U.S. interpretation, in the second line of

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paragraph 54 where it starts, "It is noteworthy."

Do you have that, Mr. President?

PRESIDENT GAILLARD: Yes, we do.

MR. LANDRY: I'm quoting, it is noteworthy that the interpretation advanced by the United States ignores the progressive widening of state responsibility that the NAFTA parties have expressly agreed to throughout NAFTA, including in relation to the protections given to investors under Chapter 11. Notwithstanding this progressive widening of state responsibility, the United States now advocates an interpretation of Article 1901(3) which would allow its officials to treat Canfor in a way which violates the standard of treatment it agreed to--sorry, it agreed it would accord foreign investors, including Canfor under Chapter 11, so long as its contact relates in some way to the exercise of any discretion, right, or power it may have in relation to antidumping and countervailing duty matters, simply because the NAFTA parties reserved their right under NAFTA to maintain their antidumping and countervailing duty law. Surely,

the NAFTA parties could not have intended that the right to maintain antidumping and countervailing duty laws could be used so as to provide a cover for arbitrary discretionary conduct by officials under color of law. If the respondent was correct about Article 1901(3), the specific objectives set out in Article 1902(2)(d)(ii) and the objectives of

the NAFTA as a whole, and Chapter 11 in particular, could be easily frustrated by a party labeling the most patently offensive government conduct as being undertaken with respect to its antidumping or countervailing duty law, particularly if that law existed as of the date the NAFTA came into force. Serious harm could be visited upon an investor whose trading activity was targeted by the measure with no right of compensation, despite the open promise of protection plainly afforded to qualified investors under Chapter 11.

PRESIDENT GAILLARD: This is the labeling argument which I alluded to this morning?

MR. LANDRY: Yes.

Now, it's important to understand and

important to emphasize and understand that Canfor is not advocating an interpretation of NAFTA which requires the Tribunal to override the specific wording of NAFTA or any specific objective of NAFTA, such as the objective to create effective procedures for the resolution of disputes. Canfor is simply advocating an interpretation of NAFTA which is in accord with the ordinary meaning of the words and used in Article 1901(3) which promotes rather than inhibits the objectives of NAFTA.

Now, before turning to a more detailed discussion and context, I would like to specifically respond to this U.S. argument

regarding the one objective it considers of utmost importance, and for that purpose I would like to refer to our rejoinder memorial at page 24, starting at paragraph 53, Mr. President.

PRESIDENT GAILLARD: Yes.

MR. LANDRY: And I quote, finally, the United States submission that denying Canfor access to the dispute resolution mechanism of Chapter 11 is necessary to facilitate the creation of

effective procedures for the resolution of disputes cannot be sustained. Clearly, in the context of the softwood lumber dispute it cannot be contended that the Chapter 19 process has been an effective process for dispute resolution. An effective dispute resolution is effective for both investors and state parties. However, despite binational and international tribunals continually ruling the United States's conduct has been inconsistent both with its municipal and its international obligations, the United States has consistently either intentionally delayed implementation of necessary corrective action, and I pause there to note that the example used in the footnotes is the Byrd Amendment--flaunted, ignored, or chastised the constituted panel rulings, and I use those words carefully, and I would only ask the Tribunal to refer to the most recent decision of the Chapter 19 Panel in relation to the ITC matter--or take

untenable positions on important issues. And I pause there to say that an example of that which is referred to here is in the antidumping Chapter 19

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proceedings where there is no doubt in the discussion that is presently ongoing between the Chapter 19 Panel and the DOC, that they have ruled in respect of a certain company out of British Columbia called West Fraser that they made an error of law which meant that duties were collected under an error of law, and yet the position of the United States in that proceeding is that those duties should not be paid back to West Fraser.

All of which clearly demonstrate the United States has little intention of complying with its international obligations in good faith. More specifically--

PRESIDENT GAILLARD: Mr. Landry, can I interrupt at this stage because I had a question there, and maybe I can ask this question now as opposed to tomorrow, unless you--

MR. LANDRY: By all means.

PRESIDENT GAILLARD: You can answer now or tomorrow, whichever you prefer, but I would like to know, when referring to your paragraph 54 which you just discussed again, about the actions or lack

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thereof which you complain about: can you tell us your position about which provisions of Chapter 11 Section A would be violated by the fact of not implementing decisions which have been rendered pursuant to Chapter 19? In your opinion, it violates which provisions of Chapter 11 Section A? You may answer tomorrow, but you don't have to right now.

MR. LANDRY: My first response to that, Mr. President, would be obviously 1105, fair and equitable treatment.

PRESIDENT GAILLARD: I thought you would say that, but okay, you may elaborate on that tomorrow.

MR. LANDRY: Thank you.

Just going beyond paragraph 54 to 55, keeping in mind what we are looking at here is the effective dispute resolution process alleged by the United States, and I quote, More specifically, the dispute resolution process under Chapter 19 in connection with the latest iteration of the dispute has been underway for an excess of two years, I

believe it's three years, during which time over--and I had over $2 billion there, I might just a little bit of an update to that. It's actually approximately $3.8 billion of duties have been levied against the Canadian industry. And several

hundred million--

PRESIDENT GAILLARD: As of when? If you make the update: 3.8 is as of now?

MR. LANDRY: I believe that we checked as of today. I believe, Mr. President, and I will confirm that, but I believe it's as of today. And again, it's an approximation.

PRESIDENT GAILLARD: Thank you.

MR. LANDRY: And we have here several hundred million dollars against Canfor. In fact, that's in excess of $500 million against Canfor.

I continue. In that regard, the recent pattern of conduct of the United States authorities in relation to Chapter 19 is consistent with the approach taken by the United States throughout this dispute. In fact, the attitude of the United States that supposedly effective dispute resolution

process embodied under Chapter 19 has been nothing short of a wanton denial of the Chapter 19's Tribunal's authority such, and I quote, obviate the impartiality of the agency decision-making process and severely undermine the entire Chapter 19 review process. In fact, one panelist in the Chapter 19 Panel used the word mockery.

This is serious stuff. Nothing short of permitting Canfor to advance its claims respecting the egregious government misconduct of the United States can allow it to vindicate its rights or

achieve the objective of effective dispute resolution.

I want to just stop here to say this to the Tribunal. This claim, this Chapter 11 claim, is of immense importance to Canfor. This is not an issue of questioning Chapter 19 Panel proceedings. This is an issue that the only relief, the only remedy that it can get relative to the damages it has suffered as a result of this egregious conduct is through a Chapter 19 proceeding. It's a remedy of necessity. Chapter 11. Sorry. It's a remedy

of necessity.

So, contrary to the U.S. argument, Canfor's interpretation does create effective procedure for resolution of disputes, more particularly unlike the U.S. position. It allows for all disputes, whether they're based on international norms or municipal norms, to be resolved between the parties.

I would like to just switch topics a little bit and go over to the issue of context which again, as I indicated earlier, is another key element of the interpretive exercise that Article 31 of the Vienna Convention mandates. We set out in pages, and I will just make this reference for the record, we set out in pages 21 to 26 of our original memorial a general description of the provisions of Chapters 11 and 19, and I will not go

through them in detail here, but just mention that for the record.

Now, the U.S. interpretation of Article 1901(3) is premised, in our submission, on a fundamental misconception of the architecture of

NAFTA and rules of Chapters 11 and 19. Properly understood, these two chapters deal with fundamentally different legal regimes which are maintained for different purposes. In essence, Chapter 11 is an investor state arbitration regime utilizing international norms, international law standards of review to scrutinize treatment of foreign investors and their investments by the NAFTA parties. Whereas in essence Chapter 19 is a municipal law regime which allows for judicial review by binational panels of final antidumping and countervailing duty determinations, and they utilize municipal norms and standards all focused on scrutinizing unfair trade practices in relation to goods being imported into the NAFTA countries.

If we take a little bit of time with 11 versus 19, if we look at Chapter 11, Chapter 11 is rooted in customary international law in relation to state responsibility. It provides protection for, amongst other things, arbitrary, unjust, and inequitable or expropriatory treatment against foreign investors. The remedies under Chapter 11

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are limited to damages, and it's important to emphasize that fact because the remedies under Chapter 11 do not allow investors to seek relief that mandates a change or modification in any way of the municipal antidumping or CVD law, or any municipal law.

If we switch to Chapter 19, Chapter 19 is a political bargain which substitutes binational judicial review for municipal judicial review of final antidumping and CVD determinations again as I indicated, based on municipal law and utilizing municipal law standards of review. It preserves each party's right to continue to maintain and apply their domestic antidumping and CVD law which laws are aimed at remedying unfair trade practices.

It also, Chapter 19, imposes on the parties obligations, Chapter 19 does, imposes obligations on the parties with respect to their domestic antidumping and CVD law. More particularly in NAFTA, it imposes an obligation to change their laws, their antidumping and CVD laws in a certain manner, which is more particularly,

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for the record, laid out, for example, in Article 1904(15). There is a long list of things where the parties have agreed in NAFTA that they will change or modify their law. So, it's imposing an

obligation on the party in NAFTA to change their law. It doesn't change their law. It simply imposes an obligation on them to change their law. And, of course, as we now know, United States, Canada and Mexico did, as a result of undertaking that obligation, have now changed their law.

Secondly, Chapter 19 imposes an obligation on the parties that when they amend their domestic antidumping or countervailing duty law, it must be consistent with the WTO agreements and the object and purpose of the NAFTA. Article 1902 provision that we discussed earlier.

So, again, once again, there is an imposition of an obligation on the United States with respect to its law as to what it is to do or not to do in that respect.

So, contrary, in our submission, contrary to the U.S. argument, Chapters 11 and 19 are

complementary and completely reconcilable with each serving its own distinct purpose. They applied different laws, they're focused on very different issues, treatment of foreign investors versus unfair trade practices, and provide different remedies. Any contact being scrutinized within the two different dispute resolution mechanisms established under the two chapters will be used--will be reviewed using different norms against different standards of review, and will

give rise to different types of relief.

Now, in this type of context in terms of our discussion about Chapter 11 and Chapter 19 is extremely important to understand what Canfor's claim is and what it is not. Canfor's claim is not an appeal or a judicial review of a final antidumping or CVD determination of the DOC or ITC under U.S. law. More specifically, the primary focus of Canfor's claim is not whether the preliminary and final antidumping and CVD determinations of the DOC and ITC were made consistent with U.S. municipal law. Canfor's claim

is independent and arises in a different legal regime than those challenges.

Further, Canfor's claim is not premised on a finding of this Tribunal, that the United States has violated its own municipal laws. Those issues are being dealt with under the municipal law regime established under Chapter 19. The principal focus of Canfor's claim is the arbitrary, discriminatory, and abusive treatment the incidence of which treatment taken individually and collectively failed to meet the standards of treatment the U.S. obliged itself to accord to foreign investors.

A summary, Mr. President and panel members, of effectively the claims that are being made by Canfor, the best summary that I could find in the Statement of Claim for the purposes of our

discussion is at--starting paragraph 20 of the statement of claim, if--Mr. President, do you have the statement of claim?

PRESIDENT GAILLARD: Yes, we do.

MR. LANDRY: That's at page 5, and I will read from paragraph 20. It says, "The present

claim arises from the unfair and inequitable and discriminatory treatment of the Canadian softwood lumber industry, including Canfor, or more particularly Canfor and its 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 listed there."

And then if you would go to paragraph 109 which is at page 30. And I might note, Mr. Chairman, we apologize for this, but there is a numbering problem in the statement of claim. You will see just if you look at page 30 and page 32, you end up having two paragraph 109s. Seems to be the numbering got a problem with the claim.

In any event, the 109--

PRESIDENT GAILLARD: The one you want is the first one?

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MR. LANDRY: The one I want is the first one, thank you.

And it says there, and again this is effectively an overview of the violations of NAFTA that are being claimed by Canfor, and it says, and I quote, The actions of the respondent, particularly as evidenced by the conduct of the DOC and ITC as described herein and as will be more fully elaborated at the hearing in this proceeding, whether considered individually or collectively or as part of a campaign against the Canadian softwood lumber industry, all are such as to fall below the standard required of a state under NAFTA's 1102, 1103, and 1105. That's the standards against which the conduct that we are going to be complaining about have to be tested.

PRESIDENT GAILLARD: In other words, Mr. Landry, when you say in your briefs that the conduct of respondent has violated U.S. laws with respect to antidumping and countervailing duties, you say that in passing, but it's not the basis of your claim--this morning respondent quoted certain

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passages of your briefs in which you do say that U.S. law has been violated.

So, your answer to that is: we say that for the context, but that's not the legal basis for our claim; is that correct?

MR. LANDRY: That's absolutely correct, Mr. Chairman. In fact, just because there is an unlawful exercise of a discretionary right under municipal law, it goes without saying that that does not necessarily meet the standard that we have to meet, or vice versa.

In fact, in following up on that, Mr. Chairman, it's irrelevant that the same factual matrix may give rise to a Chapter 19 remedy and a Chapter 11 remedy. Simply stated, the conduct in question is being tested under different norms and different standards of review.

Therefore, although the dispute resolution mechanism procedures under Chapters 11 and 19 are similar in that their goal is to safeguard the interests of individual economic actors, their difference lies in the manner in which they achieve

that goal. Well, Chapter 11 establishes a legal regime under recognized and developing standards of international law that provides a mechanism to obtain compensation to foreign investors for harm caused by a breach of those international law standards. Chapter 19 provides simply a complementary remedy by which one can seek from a binational panel review from final determinations

made under a party's antidumping and countervailing duty law aimed at protecting the domestic industry in accordance with municipal law standards of judicial review of administrative action.

Now, that provides a context, and what I would like to do is to turn to how the U.S. has dealt with the context issue in their original objection and respond to a number of points that were made by the U.S., and the U.S. reply--sorry, the U.S. objection at pages 23 and 25 is where they deal with the issue of context.

Now, they start by--with the conclusion, and I quote, they say that an examination of the context of Article 1901(3) confirms that Chapter 19

provides an exclusive forum under the NAFTA for a dispute arising under party's antidumping and countervailing duty law. And then what they do is they selectively analyze several provisions of NAFTA which they say conclusively support their proposition, and they refer to Articles 2004, 1112, and 1115.

Taking each one of them in relation to Article 2004, the U.S. argues that since the provisions specifically excludes matters covered under 19--you will recall that discussion this morning--it would make no sense not to allow the states to pursue state-to-state dispute resolution relating to antidumping and CVD laws, but to allow,

and I quote, private claimants the privilege of doing so under Chapter 11.

In relation to Article 1112, which mandates resolution of any inconsistency between Chapter 11 and other chapters, in favor of the other chapter, the U.S. states, and I quote, It would be particularly odd for investor-state arbitrations under Chapter 11 to afford greater

private rights to private claimants than the NAFTA parties given the subordinate position of the investment chapter in the treaty, closed quotes.

In relation to 1115, the U.S. says that the parties obviously acknowledge the certain overlap between investor-state arbitrations under Chapter 11 and state-to-state dispute resolution in relation to the same matter, and therefore this confirms state-to-state rights in Article 1115, notwithstanding the private parties' right to bring forward an investor-state proceeding. U.S. argues that if the parties intended that the same measure could be subjected to dispute resolution under 11 and 19, surely that there would be some mention of that, so they implicitly argue that this, therefore, signifies that they didn't--that the parties did not want to subject the same measure to dispute resolution under Chapters 19 and 11. Those are the three basic propositions under this heading.

None of these arguments, in our submission, withstand scrutiny.

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In general, the fundamental misconception which arises out of the U.S. argument is that they assume that what Canfor is attempting to do, to claim under Chapter 11 is for matters that are covered under Chapter 19. That is not so. As I've stated on a number of occasions this afternoon, Canfor's Chapter 11 claim does not subject conduct to scrutiny under municipal law. It subjects the U.S. conduct to scrutiny under international law, and an international standard of review.

Canfor's involvement in the Chapter 19 proceedings relates to a completely different legal regime and standard of review. In that proceeding, it's subjecting the conduct of the U.S. to scrutiny under municipal law. There is no question about that. But Canfor is not invoking Chapter 11 dispute resolution to question the antidumping and CVD laws of the application of those laws pursuant to municipal norms and municipal standards of review. It is simply not claiming under Chapter 11 for matters covered under Chapter 19. So, that takes us to Article 2004.

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Canfor's argument does not provide foreign

investors with more rights than NAFTA parties. It is simple as that, given that argument. The same type of proceedings that is that--would be taken by Canfor under Chapter 11, the same complaints, we say, can be raised by the states in Chapter 20. Because we are not, Canfor is not raising matters that are covered by Chapter 19, just like the states, the NAFTA parties would not be raising matters that were otherwise covered under Chapter 19.

So, the U.S. point in relation to Article 2004, given Canfor's position is without merit.

They then, going to Article 1112, the inconsistency provision, again under that, I repeat there is no attempt to afford greater rights to private claimants than the NAFTA parties have in regard to the claim that Canfor is rining (inaudible) have in this regard.

There is no inconsistency between Chapter 11 and Chapter 19 or Chapter 20. The U.S. raises

in its argument the concern that the fact that Canfor can pursue under Chapters 11 and 19 would give rise to critical inconsistencies, but yet they don't identify any critical inconsistencies that would arise. Again, fundamentally different claims based on fundamentally different legal regimes. They're complementary. They don't overlap.

In relation to Article 1115, which is the one that effectively reserves the rights, and you can see that in the handout that we passed up. It says on page two, 1115 says without prejudice to the rights and obligations of the parties under Chapter 20, and it talks about Chapter 11 proceedings for private parties. Well, the reason that is mentioned there is because we are talking about the exact same type of claim that would be raised by a state in relation to Chapter 11 that a foreign investor would raise in respect of Chapter 11. That's why it's mentioned there. There is no need to mention Chapter 19 in the context of that type of provision because Chapter 19 is a completely different legal regime.

Neither of the claims that, as I mentioned earlier, under Article 2004, if brought by--that claim that would be brought by a NAFTA party would be the same type of claim that the private investor would be taking.

PRESIDENT GAILLARD: Mr. Landry, the Tribunal will have questions on this, so I'm saying that to both parties. This is an area which we want to explore further tomorrow afternoon.

MR. LANDRY: Thank you.

PRESIDENT GAILLARD: I don't want to engage into a Q and A session now because I don't want to disrupt your presentation, but that's just

to flag the fact that we would like further elaboration on this tomorrow.

MR. LANDRY: You're speaking specifically--

PRESIDENT GAILLARD: The scope of the state-to-state versus investor-state arbitrations pursuant to NAFTA when it has to do--and here I'm vague on purpose because I don't want to put words in the mouth of either party--when it has to do

with antidumping and countervailing duties. Do you understand the question, the topic?

MR. LANDRY: I do.

PRESIDENT GAILLARD: Thank you.

MR. LANDRY: I would also like to take a look quickly at Article 1121, Mr. President, panel members, which in our submission points out that Chapter 11 itself recognizes the ability to pursue proceedings in relation to the same measure which allows for investor-state arbitration in relation to damages to go ahead at the same time as proceedings for extraordinary relief and not involving payment of damages.

This morning, the United States quoted from Article 1121, but they left out a portion of 1121, and the portion that they left out is at the bottom of the clause that I've recounted here, which effectively says they have to waive--the investor has to waive the right to initiate or

continue before the court any proceedings with respect to a measure that is alleged to be breached of Article 1116, except for proceedings for

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injunctive, declaratory, or other extraordinarily relief not involving the payments of damages.

So, the NAFTA, under 1121, actually contemplates the possibility that one would bring a claim for damages under the investor-state provision and at the same time be able to seek relief in a domestic court in relation to proceedings--for extraordinary relief not involving the payment of damages.

PRESIDENT GAILLARD: Just to be clear, your contention is that whatever actions Canfor is taking pursuant to Chapter 19 fall under the characterization of injunctive relief pursuant to the meaning of these provisions; is that correct?

MR. LANDRY: Extraordinary relief. It's injunctive. It says injunctive, declaratory, or other extraordinary relief.

PRESIDENT GAILLARD: So, you're saying it's not injunctive, but it doesn't fall under the injunctive relief category, but under the--

MR. LANDRY: Extraordinary relief category.

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And also, as my friend pointed out, it does not involve the payment of damages, of course. It is simply for judicial review of an action of various stripes, in this case the DOC and the ITC.

PRESIDENT GAILLARD: We understand the argument on this. We just wanted to know under which category you would justify what was called the duplication at the other side of the bar.

MR. LANDRY: Extraordinary relief not involving the payment of damages.

PRESIDENT GAILLARD: Thank you.

MR. LANDRY: I might add, Mr. President, that of course extraordinary relief could involve declaratory relief, but I'm wasn't focusing for sure on injunctive relief.

PRESIDENT GAILLARD: All right. Thank you.

MR. LANDRY: So just to sum up this part of my argument, so, accordingly, in response to the what we called the simplistic approach or analysis undertaken by the United States to justify its interpretation based on context, we say it's

patently insufficient for the purposes of interpreting 1103. It does not take undertake the rigorous analysis that we say is necessary in order to determine the context, and furthermore, in any event, the provision on which it relies,

Article 2004, Article 1112, and Article 1115, just do not support their interpretation. Sorry, do not support the interpretation being advocated by the United States.

Now, I would like to switch topics a little and go to a point that I raised at the very beginning, which relates this whole concept of parallel proceedings and the allegations of redundancy and conflicting judgments. On the written arguments there is a substantial amount of discussion concerning parallel proceedings and what NAFTA said or presumed about so-called parallel proceedings.

In reviewing those arguments in preparing for today, it was clear to me there was no real specific definition of a parallel proceeding which was used to inform the debate which may have had

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the effect of confusing what conclusions could be drawn from the analysis undertaken by both the parties. And I would just like to talk through that a little bit, and I would like to start with where the debate, I believe, started, which is at page 27 of the U.S. objection, I believe. Just one second, Mr. President.

PRESIDENT GAILLARD: I think you're correct.

MR. LANDRY: Page 27 of the U.S. objection.

So, the debate started with the U.S. allegation that the NAFTA's object and purpose confirmed that the U.S. did not consent to arbitrate Canfor's claims under the investment chapter. More particularly, actually, it started in relation to the U.S. analysis concerning the one specific objective of the NAFTA that it did discuss, that being the objective to create effective procedures for the resolution of disputes.

Now, the U.S. position was that the NAFTA

rules for dispute resolution revealed an overriding concern to promote effective dispute resolution procedures and to avoid deficiencies resulting from, and I quote, redundant proceedings between the same parties before different dispute resolution panels. They argued that their interpretation of Article 1901(3) making Chapter 19 the exclusive forum under NAFTA for the resolution of antidumping and CVD matters was fully consistent with that object and purpose of the treaty.

It then went on to talk about the proliferation of international tribunals outlining one consequence of that being expanded opportunities to subject the same disputes simultaneously or consecutively to multiple fora giving rise to redundant proceedings. And then it used a specific example of redundant proceedings

from the NAFTA arising under Annex 1120.1, and if you would refer to the footnote 66 on page 29 of their argument, you will see--sorry, 106. 106 on page 29 of the argument. You will see the Annex 1120.1, and again it's quoted there. It says,

"With respect to the submission of a claim to arbitration, sub A, an investor of another party may not allege that Mexico has breached an obligation under Section A both in an arbitration under this section and in proceedings before a Mexican court or administrative tribunal."

And then it said that this provision, and again I quote, was evidence of the parties' intent to avoid providing the claimants with the ability to submit under Chapter 11 the same claims that were submitted elsewhere.

Now, the U.S.'s veiled concern that allowing Canfor claims to proceed while at the same time Chapter 19 panels are proceeding would result in redundant proceedings is just, in our submission, totally without merit.

Let me be very clear. What Canfor's position is is allowing Chapter 11 and Chapter 19 proceedings to proceed at the same time will not result in redundant proceedings. Redundant proceedings are proceedings where the exact same dispute, parties, the objects and cause of action

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is the subject matter of the dispute resolution in two different processes. Like, for example, the type that the U.S. actually cited from Annex 1120.1.

The argument that Chapter 11 or Canfor's claims and Chapter 19 claims will result in redundant proceedings is just fundamentally not the case. Even assuming the conduct at issue is the same, the Chapter 11 proceeding will scrutinize the conduct, as I've said many times, under international law, according to international law norms and standard of review. The Chapter 19 will test that same conduct under municipal law norms and municipal law standards of review.

The decisions arising from the two legal processes will not be conflicting because they will be dealing with different causes of action, different claims and different remedies. It's no different than allowing a Chapter 11 proceeding to go forward and a Chapter--sorry, allowing a Chapter 11 and Chapter 19 proceeding--processes to proceed at the same time is no different than or no more

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redundant than the same conduct being scrutinized under Chapter 19, according to municipal law, and under the WTO dispute resolution mechanism. Where, of course, conduct is being--that same conduct

could be scrutinized in relation to its consistency under the WTO agreement. Different causes of action, different types of claims, different types of remedies.

And it's also no different than many recent investor-state arbitration cases where investor-state--tribunals explicitly recognized the inherent and fundamental difference between claims based on domestic law and domestic courts and treaty claims in relation to the exact same conduct. Such claims are obviously not found to be redundant and were allowed to proceed. And of course, I would reference here, there are a number of cases, but the one case in particular I would reference is the SGS versus Pakistan case, which I would like to refer to which is at volume two of the authorities, Mr. President.

PRESIDENT GAILLARD: We'll have it in

front of us in a second.

MR. LANDRY: And it's at Tab 16.

Do you have that, Mr. President?

PRESIDENT GAILLARD: Yes, you may proceed.

MR. LANDRY: Thank you. Now, again, this case involved the jurisdictional motion by the state of Pakistan, and I know, Mr. President, you are familiar with the case, but Pakistan objected to the jurisdiction of the Tribunal on a number of various grounds. The claim, the case involved the

alleged breach of a pre-shipment inspection agreement between SGS and Pakistan, whereby SGS provided customs services to Pakistan, and the principal focus of the motion is that the BIT claim arose under contract, and the parties had previously agreed that any breach of contract would be referred to arbitration under domestic law in Pakistan. And Pakistan alleged that the arbitral process under the contract predated the request for the investor-state arbitration under the BIT by 11 months, and Pakistan asked the Tribunal to recognize the primacy of the parties freely

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negotiating dispute resolution mechanism over the jurisdiction of the Tribunal. And as I said, there were numerous issues raised by both parties, but the discussion relating to whether or not the Tribunal had jurisdiction to determine the BIT claims in light of the fact that arbitration--of the arbitration under the contract had been initiated is of most relevance to this proceeding.

And I think the importance of the case is the way in which the Tribunal differentiated between BIT claims from contract claims and whether and how claims under domestic law were different than BIT claims. And there have been a number of cases even since the SGS-Pakistan case, and I reference a couple of them, the CMS case, the Occidental case, and a number of others in the

authorities. And a number that arose out of the economic crisis that arose in Argentina.

I would like to reference a number of paragraphs in this case. I would like to start at paragraph 321 which is at page--sorry, paragraph 43 at 321. I apologize.

PRESIDENT GAILLARD: When you refer to the cases which arise from the Argentine crisis, which cases are you referring to?

MR. LANDRY: There are a number of recent cases, Mr. President.

PRESIDENT GAILLARD: You may tell us tomorrow which ones you have in mind. I have in mind the CMS case and Occidental, but if you have specific references to other cases, I would be interested.

MR. LANDRY: We will. The one that comes to mind that I do recall--

PRESIDENT GAILLARD: I mean, of course, on this particular point of duplication.

MR. LANDRY: The one that comes to mind, Mr. President, is the Enron case, but we will provide you with references tomorrow.

Starting with paragraph 43, just to get a context within which the debate happens later on in the discussion, this is effectively giving what Pakistan was asserting, and it says that paragraph 43, and I quote, Pakistan asserts that this

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Tribunal does not have jurisdiction over any of the claims set forth in the Request for Arbitration. It observes that SGS has acknowledged that the present dispute arises out of Pakistan's actions and omissions with respect to the pre-shipment inspection program and the PSI agreement. The claims, irrespective of how SGS labels them, are entirely contractual in nature.

So, that was the point being raised by Pakistan to suggest that they did not--the Tribunal did not have jurisdiction. The SGS position is at page 332 on this point. Here, you will see at paragraph 83--Mr. Chairman, do you have that?

It says SGS responds to Pakistan's objections by firstly pointing out that it does not accept the characterizations of SGS's claims as contract defamation and BIT claims. All of SGS claims are BIT claims in the sense that they are brought before this Tribunal on the basis of the BIT. And so, the Tribunal then deals with the dispute between the parties on this key element.

And if you would then go to page 351, at

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the bottom of page 351 is where the Tribunal deals with characterization of the claims, and basically

concludes that at this point, i.e. at the time of the jurisdictional motion, the characterization of the claims by SGS is the key, and, of course, the characterization of the claims by SGS in their claim are BIT claims as opposed to contractual claims under domestic law.

So then they go on to page 352 to go to the key issue that was being dealt with by the Tribunal, and it is indicated there, it's sub three at the top of the page where it says, does the Tribunal have jurisdiction to determine the claimant's BIT claims, that is claims of violations of certain provisions of BIT, and then it goes down at paragraph 147, and that's where I would like to start my reference. And it quotes. It says, "As a matter of general principle, the same set of facts can give rise to different claims grounded on different legal orders, the municipal and international legal orders. Both the claimant and respondent in the present case do not dispute the

soundness of this proposition. In the event this proposition has recently been discussed and documented in extensio in the Vivendi Annulment Decision where the Annulment Committee said--and again, this is a quote from there, and this is of importance to this differentiation we're making here, as to the relation between the breach of contract and breach of treaty in the present

case--it must be stressed that Articles 3 and 5 of the BIT do not relate directly to breach of a municipal contract. Rather, they set an independent standard. A state may breach a treaty without breaching a contract, and vice versa," and this is certain true of these provisions of the BIT. The point is made clear in Article 3 of the ILC articles which is characterization of an act of a state as internationally wrongful, and they quote from that.

The characterization of an act of a state as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as

lawful by internal law. In accordance with this general principle, which is undoubtedly declaratory of general international law, whether there has been a breach of the BIT and whether there has been a breach of contract are different questions. Each of those claims will be determined by reference to its own proper or applicable law. In the case of the BIT, by international law. In the case of the concession contract, by the proper law of the contract, in other words, the law of the province that was in issue there.

For example, in the case of a claim based on a treaty, international law rules of attribution apply with the result that the State of Argentina

is internationally responsible for acts of its provincial authorities. By contrast, the State of Argentina is not liable for the performance of the contracts entered into by the state which possesses separate legal personality under its own law and is responsible for the performance of its own contracts.

The distinction between the role of

international and municipal law and matters of international responsibility is stressed in the commentary to Article 3 of the ILC Articles which reads, in relevant part, as follows. Sub four, The international court is often referred to and applied the principal. For example, in the reparation for injuries case, it noted as the claim is based on the breach of an international obligation on the part of the member held responsible, the member cannot contend that this obligation is governed by municipal law.

In the ELSI case, a chamber of the court emphasized this rule stating that, and they quoted, Compliance with municipal law and compliance with the provisions of a treaty are different questions. What is a breach of a treaty may be lawful in the municipal law, and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision. Even if the Prefect held the requisition be entirely justified in Italian

law, this would not exclude the possibility that it was a violation of the FCN treaty.

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Just because there has been a violation of the municipal law of antidumping and CVD does not necessarily mean that there has been a violation of the standard under international law. Different standards, different standards of review.

And then it goes on. Conversely, as the chamber explained, the fact in an act of public authority may have been unlawful in municipal law does not--does not necessarily mean that an act was unlawful in international law as a breach of a treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary, but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. Nor does it follow from a finding of municipal court that an act was unjustified or unreasonable or arbitrary, that that act is necessarily to be classed as arbitrary in international law. Though the qualification given to the impugned act by the municipal authority, i.e. the determination they make, according to the municipal law and their standard, may be a valuable

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indication.

The rule that the characterization of conduct as lawful in international law cannot be affected by the characterization of the same act as unlawful in internal law, makes no exception for cases where rules of international law require a state to conform to the provisions of its internal law, for instance, by applying to aliens the same legal treatment as to nationals.

It is true in such a case compliance with internal law is relevant to the question of international responsibility, but this is not because the rule of international law makes it relevant, for example, by incorporating the standard of compliance with internal laws to applicable international standard or as an aspect of it, especially in the fields of injury to aliens and their property and of human rights, the content and application of internal law will often be relevant to the question of international responsibility. In every case it will be seen on analysis that either the provision of the internal

law are relevant as facts in applying the applicable international standard or else they are actually incorporated in some form conditionally or unconditionally into that standard.

And then they go on. The Tribunal in this case goes on to talk about the difference between the BIT claims and the contract claims and then

again refer to the Vivendi decision, which is on the next page which states as follows. In a case where the essential basis of a claim brought before an international tribunal is a breach of contract, the Tribunal will give effect any valid choice of forum clause in the contract.

They go on. On the other hand, where the final basis of the claim is a treaty laying down an independent standard by which the conduct of the parties is to be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state cannot operate as a bar to the application of the treaty standard. At most it might be relevant as municipal law will often be relevant in assessing

whether there has been a breach of a treaty.

They ultimately conclude in this case that notwithstanding that the basis upon which the conduct that's being complained about may involve a breach of contract that at the end of the day, notwithstanding the fact that SGS did pursue its contractual claims in domestic courts, it was allowed to proceed with its BIT claims because it was a different proceeding, a different cause of action based on a different standard and different standards of review.

I would like to just refer to one--a couple of final passages that I would ask the

Tribunal to look at in this case, and they're in paragraphs 186, 187, and 188. I won't quote from them, but again it deals with this context of the interrelationship between domestic law and international law and how the domestic law plays in determinations and domestic law play into a BIT claim.

So, if I just put this type of analysis into the case that we are talking about here, just

because the facts, the factual matrix is related in some way to the antidumping--to an antidumping or CVD matter does not make them antidumping or CVD claims. It just did not make them antidumping or CVD claims. Those facts will be subjected to review by this Tribunal according to the international standards to determine whether or not any of the measures is in violation--give rise to the violation of an international law standard recognized in Chapter 11.

And again, I go back to a point that I understand we will be talking more about, but go back to the point of 1121, Article 1121 specifically allows for an investor-state arbitration to proceed at the same time as proceedings by the same person in relation to the same measures seeking extraordinary relief. It envisages parallel proceedings, in our submission, of the type that we have here.

PRESIDENT GAILLARD: Mr. Landry, at some point will you also address the issue of whether or not you can seek money, some kind of monetary

relief pursuant to Chapter 19, or do you agree that this is something which can be asked? Because there are two types of arguments. One is, is there a possibility of duplication, and at one point you said well, there is none because we cannot seek monetary relief--again, I'm also vague on purpose here--under Chapter 19 so there is not even a risk of duplication. And on the U.S. side they said no, you can get some money back, so it is--it does create a risk of duplication. Are you going to address that? I understand that there is another level which is--it doesn't matter because it's a different cause of action which you have just developed now, but are you also going to address the other aspect, or do you recognize there is a risk overlapping under different umbrellas, if I may put it this way?

MR. LANDRY: The simple answer to the question, Mr. President, is that there are no--there is no claim for damages being made in the Chapter 19 proceeding.

PRESIDENT GAILLARD: What do you answer to

the respondent's argument when they say: well, you could ask your money back, there is some kind of refund which may happen under Chapter 19. Do you say, no, it's not true, or do you say it's true, but it doesn't matter because it's under a different rule or a different norm?

MR. LANDRY: Let me try to answer it in this way, Mr. Chairman, Mr. President.

Firstly, I can assure this Tribunal that Canfor is not seeking double recovery. I can assure the Tribunal of that.

PRESIDENT GAILLARD: In any event, that would be a question for the merits, but I'm asking on the theoretical level. I'm not saying anyone is looking for a dual recovery or anything like that. That would be for the merits, but at the moment I'm asking you to answer in a sort of hypothetical manner to understand how these two sets of rules interact.

MR. LANDRY: Let me try to answer that. Firstly, as I indicated to you, there is no damages in the Chapter 19 proceeding.

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Secondly, Canfor is not seeking double recovery, and it can assure this Tribunal that it is not seeking double recovery. There is no question that in the Chapter 19 proceeding the quote that was raised by my friends in relation to

Canfor is correct. Assuming there is--that the ITC order is ultimately set aside, Canfor has requested that there be return of the duties.

But I would say this on that point, Mr. President. Canfor is more than willing in this proceeding to covenant that if it does get the return of the duties back from the Chapter 19 Panel process that it would not be claiming for those duties here. In fact, if we could have the United States assurance that if the extraordinary challenge is dismissed and the matter set aside and that the duties would be refunded in that case, in that case we would withdraw the claim.

Secondly, in specific response, we could do exactly, or this Tribunal could do exactly what the Occidental Tribunal did in a very similar case in relation to the same type of issue, and if I may

take you to the Occidental case to see how the Occidental Tribunal dealt with this issue.

PRESIDENT GAILLARD: We are well aware of that, but please go ahead, if you want to, but to clarify your position, you're saying: yes, we can get some money back, it's return of the duties, it's not damages, but it's an Article 1121(1)(b) problem, and it's not a problem of fundamental inconsistency between the two chapters. Is that a fair characterization of your position?

MR. LANDRY: What I would like to do is

refer you to the Occidental case, and Professor Howse, I think, can respond a bit more specifically to that question, but could I just take to you see--

PRESIDENT GAILLARD: Forgive me if I'm disrupting the order of your presentation. Maybe we should refrain from asking questions.

MR. LANDRY: No, no, we would like to respond specifically to that, so if I could just take to you the Occidental case which is at Tab 8 of the rejoinder brief of authorities,

Mr. President, in that case that was a--this is a tax-related case by Occidental against Ecuador, and in that case there were two different types of proceedings that were ongoing. There were domestic proceedings, and there was a BIT claim being made, and there was the possibility that in the domestic proceedings that they were successful that they would have to be return of certain taxes that were being claimed by the Occidental company. And so if you go to page 73 of the decision, after they awarded Occidental the damages, which included the taxes which had been paid, they dealt with this difficulty that you're talking about in paragraph 10 of the order.

Do you see that, Mr. President?

PRESIDENT GAILLARD: Yes.

MR. LANDRY: And I quote. It says, In

order to clearly forestall any possible double recovery of value-added tax by Occidental, the Tribunal holds that Occidental shall not benefit from any additional recovery, directs the claimant to cease and desist from any local court actions,

administrative proceedings or other actions seeking refund, et cetera.

And Canfor is looking to get the duties paid back, not twice. Once. And the information that we have is that the United States is going to be taking the position if the extraordinary challenge is successful--is not successful, sorry, that the duties will not be paid back. But on the assumption that the extraordinary challenge is found not to be successful, and the U.S. could assure us that they are going to give the duties back, that part of the claim would be withdrawn.

But in any event, we would be willing to agree to any reasonable covenants to assure that there was no double recovery.

And then I would ask Professor Howse if he could respond to your specific question.

PRESIDENT GAILLARD: Yes. Also, tell us at which point you want to break. We are not going to interrupt because it's for you to choose what's the best time to have a break in the afternoon. It's really up to you. You tell us. Maybe now,

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maybe later. We don't mind.

MR. LANDRY: We will.

Professor Howse.

PROFESSOR HOWSE: I believe that Mr. Landry has now mostly addressed the question in the same way that I would. I would just add one footnote, which is to make it clear that the powers of a Chapter 19 Tribunal under NAFTA do not include the power, as we understand it, to make an order for the refund of duties that have been collected on the basis of an interpretation or application of U.S. countervailing duty or antidumping law that has been determined by that panel to be illegal or improper.

We are of the view that there is state responsibility under the NAFTA for the United States to return duties that have been illegally collected, but the fact of the matter is that given the limited powers that are conferred on the NAFTA Chapter 19 Panels, those panels cannot make an enforceable order, and indeed, arguably no specific order at all for refund of the duties, and

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therefore to enforce the requirement under international law to return monies illegally taken would require either relying on the good offices of the United States which, to our understanding,

takes the position that they don't have to refund the duties as part of their state responsibility, or it's unclear what remedy could be had to have the United States perform that responsibility to refund duties illegally taken. We just don't see that we have another remedy available under the language of the NAFTA, as I say, except to point out to them that it is a legal responsibility to restore funds taken not in accord with law, and that really isn't sufficient.

So, we are here today making a claim that is under Chapter 11 for--that includes restitution of the duties, but as Mr. Landry said, if the United States were to change its position or to clarify its position and to state unequivocally that it's under responsibility to refund those duties, if they're found under Chapter 19 to have been collected illegally, that would alter the

nature of our claim because, as Mr. Landry stated, we have no intention to ask for anything like double recovery.

PRESIDENT GAILLARD: I understand that in limited terms you don't want double recovery, but is it correct that the position of Canfor on this is that it is either a question for the merits to avoid unfair results or duplication of payments that tribunals may take into account--in the context of illegal taking they may take into

account some monies which were partially paid; it's not the proper measure of the expropriation, but they do take it into account as a fact, that's one aspect--or, in the context of NAFTA, it may be dealt with as an Article 1121(1)(b) problem, a waiver problem. Is that your legal position?

MR. LANDRY: Could I have just one moment, Mr. President?

PRESIDENT GAILLARD: Again, that's something we can discuss tomorrow, but I just want to have both parties make their position very clear, and I think it's for Canfor Corporation to

start to have a position clear on this, and then the U.S. would be able to answer.

My intention is not to rush you in any way, but that's something we would like to discuss.

MR. LANDRY: Mr. Chairman, we would like to consider that position. I think we would like to get through that issue in the sense that Professor Howse has indicated and I have indicated, Canfor is not here in an attempt to try to get double recovery.

PRESIDENT GAILLARD: That's what I understand, but then we want further elaboration on the more legal, juridical level.

MR. LANDRY: I understand that, and we will consider that overnight, and provide a position for the Tribunal tomorrow.

PRESIDENT GAILLARD: Thank you.

ARBITRATOR WEILER: So I understand what we are after, it's one issue whether you're after or not after double-dipping, but at some point it seemed that you were arguing that these are two different causes of action, and therefore there was

no possibility of overlap or doubled, and then suddenly it emerged that in fact, there might be a possibility because one had to resort to the extraordinary device of saying that if we gain in one we will not take in the other, et cetera. That's where we would seek clarification, because at some point at least, it seemed for you to say these are two mutually exclusive proceedings.

PRESIDENT GAILLARD: I guess you no longer say that. I mean, at some point in your pleadings you say: well, there is no risk of duplication simply because under Chapter 19 there is no money back; I mean, in general terms, no money back, no damages. Then the U.S. says: well, no damages, is too simple an answer because there may not be damages, but it may be money back nonetheless, because it may lead to the return of the duties.

So, there is some kind of, they say--I'm not taking sides here--they say there is some risk of monetary duplication. And your answer now is: that may be the case, but it's no different as the kind of duplication you may have when you receive

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something from a local court in a BIT situation, you receive some money from a local court. Therefore you say: I have been expropriated, I need the fair price of my property, and I'm seeking to get the difference; no double accounting here, I'm seeking to get the difference before an international tribunal. That's one answer, which we understand. We don't say it's right or wrong, but we understand that answer.

We believe that there is also another level which is simply due to the specific language of NAFTA which, of course, does not exist when you refer to Occidental or SGS Pakistan. You have this waiver issue, the same facts must be addressed with respect to the waiver requirement, and you say: yes, but it's a question of the waiver. We said we are not going to address it at this point. The U.S. has reserved its rights on this, but I take it that you're saying that, on a more fundamental level, even if all that has to be taken into account and sorted out one way or the other, on a conceptual level there is no risk of duplication

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between Chapters 19 and 11 because it's two different causes of action, the nature of the

rights in dispute is different, and that's your answer on a conceptual level, which you developed earlier; is that correct?

MR. LANDRY: That's correct.

PRESIDENT GAILLARD: Thank you. So, we will hear more about that tomorrow.

MR. LANDRY: We will hear more about that tomorrow, and of course at the end of the day we're talking somewhat in terms of damages in this proceeding, and we will have to prove our damages, whatever they may be.

PRESIDENT GAILLARD: Right. That's for the merits phase, if any. So, we understand all that. Thank you.

You may proceed or call for a pause at any time. I don't know how the parties feel about that.

The Court Reporter would like to have a pause, and I think that's understood. So, we pause now for what? 15 minutes would be good enough?

MR. LANDRY: 15 minutes.

PRESIDENT GAILLARD: 15 minutes, thank you.

(Brief recess.)

PRESIDENT GAILLARD: We resume the hearing, and, Mr. Landry, you have the floor.

MR. LANDRY: Mr. President, we considered the issue that was raised just prior to the break,

and what we will endeavor to do is to have a more complete and concise answer to the issues that you raised regarding that tomorrow, if that's okay with the Tribunal.

PRESIDENT GAILLARD: That's perfectly fine. That's exactly why we asked the questions, to raise certain issues and have you think about it, and we will discuss it further tomorrow. That's perfectly fine.

MR. LANDRY: And on that basis I would like to turn over the microphone to my friend, Mr. Mitchell, to continue the balance of the submissions, subject to any questions that the Tribunal might have.

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PRESIDENT GAILLARD: The Tribunal has a few questions to you because it relates to what you said before the pause. We asked the questions now being understood that you may want to answer briefly now, or you may tell us that you will answer those questions tomorrow, and that will be equally acceptable, of course. Joseph, do you want to start.

ARBITRATOR WEILER: So, while the usual caveats apply to the question, and it's really trying to clarify it to make sure that I understand fully the positions you're taking.

In reply to the Chairman's question, and I think I understood that you said that a violation

of the domestic law was not necessary in order to have a violation of international legal obligation, although it might be relevant, something unlawful could be probative to showing that something was also arbitrary, but it does not necessarily follow that anything that's unlawful is arbitrary, et cetera.

So, just to press this and better to

understand the concept that you are putting to us, would it be the case that it might even be that the antidumping measures of a NAFTA party, and I think we should really for a moment in order to understand the conceptual apparatus, leave the particular circumstances of the Canfor case and just think about it, the antidumping or countervailing duty measures of a NAFTA party, be it Canada, the United States, or Mexico, might not violate Canadian, Mexican, or United States law, respectively, and in that respect might even be fully consistent with Chapter 19 globally. In other words, that a Chapter 19 Tribunal--a panel would appropriately, in other words, it wouldn't be a claim that they in some way erred, found that there was no Chapter 19 violation, but do I understand your position correctly that you would say even in those circumstances there might be situations where the antidumping measures or countervailing duty measures might constitute a

violation of Article 11? If this is the case, it would really be helpful for me to have examples

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which are not necessarily from the Canfor case, in other words not to argue by what they did to us, et cetera, but give an example, maybe tomorrow, of antidumping violations putative antidumping or countervailing duty violations of say the Canadian government which would be consistent with Canadian law which would, in your view, not be inconsistent with Chapter 19, and yet where you would have thought that both Mexico and/or the United States may have a reasonable party for an investor on Mexico, an investor from the United States or the United States Government, or Mexico under Chapter 20 would have a reasonable claim to say, although they are compliant with Canadian law and we are not claiming that there is a violation of any aspect of Chapter 19, nonetheless they violate some other obligation. To me, that would clarify things, and I would find it helpful if you could maybe tomorrow discuss this more at length and give some examples.

And setting aside the particular conduct whether what happened in the Canfor case represent that type of situation. That's my first question.

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My second question is also maybe for

reflexion for tomorrow just to flag it, does the recent Loewen case have any bearing on this? The reason I ask this, and I really am asking, does it just have a bearing on it, because even if there is a different cause of action, and it's a different legal obligation, which according, if I understand your concept correctly, there is one that informs the Chapter 19, and another that would inform a Chapter 11 or a Chapter 20, if it were a state claimant, it flows from the same acts, so to speak.

And then we saw also that there can be, and consistent with what the Chairman said, there can be some feature of duplication, and you were very careful to say it in this particular case, Canfor is not--certainly will not claim both things.

Is Loewen in any way pertinent in suggesting that since the acts that give rise to your--to a would-be claim under Chapter 11 or if it's a state thing under Chapter 20 originated in an AD/CVD, that that has to be exhausted in some

way or completed before you--it's only if you didn't get relief and you didn't get any of the money back, and therefore you could quantify your damages, et cetera, then you would move to a Chapter 11 or a Chapter 20. But in that respect the Chapter 19 procedure should be taken like the legal procedure in the law, and that has to be

completed before the cause of action in Chapter 11, assuming, of course, your construct is correct, and of course we have not taken any decision of that would be triggered, so I would be interested if you could respond to that. Thank you.

Those were my two questions.

PRESIDENT GAILLARD: In fairness, that's more questions for tomorrow than to answer immediately, I would guess, but not to preclude an answer now, but--

MR. LANDRY: I would like to do a better job in terms of answering that, and I know Mr. Mitchell has some time that will take us for a while, so perhaps the best way to respond would to be say we will respond more fully tomorrow to both

those points, Professor Weiler, and I understand them both very well, and I do have an answer, but it would take some time to develop them with you, so I think I will defer until tomorrow so it could be a little more concise on them.

PRESIDENT GAILLARD: I think it makes sense.

Mr. Harper also has a few questions in the same spirit of asking the question now to make the debate tomorrow more interesting.

ARBITRATOR HARPER: Thank you, Mr. President.

Mr. Landry, let me just put a few things

before you, and as the President has indicated, if you would feel more at ease in responding tomorrow, that certainly is appropriate.

Are the actions of the U.S. Commerce Department and the ITC as alleged in the Statement of Claim administrative practice under antidumping law and countervailing duty law? That's question number one.

MR. LANDRY: Mr. Harper, first of all, the

issue of administrative practice I know is going to be dealt with by Mr. Mitchell, so I would like to defer that question, and I thank you for the question, but I know he's going to deal specifically with that, and I will allow him to elaborate on that point.

ARBITRATOR HARPER: Is the Byrd Amendment an antidumping law? Is the Byrd Amendment a countervailing duty law?

MR. LANDRY: Well, Mr. Harper, that's a very good question, and I'm not sure I heard an answer to the question this morning. I would say this, to my understanding in reading the material that was presented by the United States to the WTO, they, I think, would answer that question it is not an antidumping or CVD law, and so it's hard for me to contemplate how it is not in some fashion related to antidumping and CVD, but it was my understanding that that was the position that was

taken by the United States in the WTO.
Now, that can be clarified somewhat, but--
ARBITRATOR HARPER: I guess I'm asking,

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though, what the position of Canfor is about that statute.
MR. LANDRY: Well, I think the position of Canfor is that it is clearly a matter that relates to the antidumping and CVD regime that they have in place.
ARBITRATOR HARPER: Does Canfor allege that municipal norms and standards are not part of Chapter 11?
MR. LANDRY: They're not part of Chapter 11 in the sense that those are the norms or standards that are reviewed by the--by this Tribunal in Chapter 11. So, determinations by domestic tribunals that would effectively be done according to municipal standards and municipal standards may be relevant in the context of a Chapter 11 claim, but this Tribunal does not--applies international law standards, not domestic law standards.
ARBITRATOR HARPER: Would an order by this--I'm sorry, Mr. Chairman.
PRESIDENT GAILLARD: Just for the record.

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The record, I guess, will reflect the fact that we have a question and an answer. Here it seems like it's only a question, so we have to be clear that there is a question and the rest of the language is the answer.

ARBITRATOR HARPER: I take it the reporter has made note of that.

Mr. Landry, would an order by this Tribunal that the U.S. repay the duties that Canfor has paid be an obligation imposed on the U.S.?

MR. LANDRY: Imposed on the U.S., and I assume you're asking that imposed on the U.S. in the sense of imposing an obligation under 1901(3). Is that--

ARBITRATOR HARPER: Yes.

MR. LANDRY: First of all, the Tribunal cannot order that. The only order that this Tribunal can order is a payment of damages. In other words, that's the only claim that's allowed under Chapter 11.

ARBITRATOR HARPER: That was going to be my next question.

MR. LANDRY: That's not something that can be ordered. You have to basically determine damages. And the issue of what 1901(3) what type of obligation it imposes is obviously the issue that my friend, Mr. Mitchell--my colleague

Mr. Mitchell will be dealing with.

ARBITRATOR HARPER: Well, let me just put it on the record. The question would be, would an order by this Tribunal that the United States pay damages to Canfor be an obligation imposed on the United States? And I take it you're telling me that Mr. Mitchell is going to address that question?

MR. LANDRY: Yes, but clearly the answer to that is based upon our interpretation of--if you're talking about specifically in relation to Article 1901(3), our interpretation is that that would not be such an obligation imposed as envisaged under 1901(3).

ARBITRATOR HARPER: Is it Canfor's position that the only claims in the statement of claim and nothing else are the matters subject to

the U.S. objection on jurisdiction?

MR. LANDRY: I'm sorry, I'm not sure I understand the question, and I don't want to respond to a question I'm not sure I understand.

ARBITRATOR HARPER: That's certainly wise. Let me see if I could adumbrate it.

During your argument today and in the papers submitted by Canfor, we have been told of a number of actions taken by the United States that are not pleaded in the statement of claim. Are you with me so far?

MR. LANDRY: Yes.

ARBITRATOR HARPER: I'm trying to find out whether, in effect, Canfor is asking for anything more than what it pleaded for in the statement of claim; namely, that it's only the statement of claim--statements of claim and nothing else that are the matters addressed by the U.S. objection on jurisdiction.

MR. LANDRY: If I could just have a moment.

(Pause.)

MR. LANDRY: Obviously, Mr. Harper, the relative to the jurisdictional motion you have the statement of claim as is. The evidence that will be brought forward that will be used to show that the conduct of the United States has effectively violated the international norms that we say they have violated, will depend at the time on when we come forward with the Tribunal on the merits. And at that point in time, the evidence will be brought forward will effectively be evidence up to the time that we are before the Tribunal.

PRESIDENT GAILLARD: Mr. Landry, are you sure this is right? You want to reflect on that? Because my understanding upon reading your documents, your briefs, is that your initial statement of claim has been somewhat amended. Maybe implicitly, in particular by your latest

submission called the Rejoinder on Jurisdiction of September 24, 2004, and I can quote a number of pages in which you sort of at least update the situation and possibly amend or at least supplement your position on this. So, I don't want to put

words in your mouth, of course, but since what you just said doesn't seem to be consistent with the record, I would urge you to think about it.

And maybe we will give you time to clarify your position in writing, because that's something I want--one concern we have, and let me raise the question right now: we want to know what is requested and what is in front of us, and that's one of the questions which belong to a series of questions geared at establishing that. You have seen a number of questions this morning and this afternoon as to what is in front of us today, and there is, in my view, some gray area here. So, if you tell us the request is the request, and the rest is evidence of the same thing, that's one thing. Has it been updated or supplemented, that's another answer. I don't know which is right. And in any event, we want the respondent to comment on this also. So, please just note the question for the time being, and that's one thing we want to discuss tomorrow.

MR. LANDRY: We do a more thorough answer

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to the question tomorrow on that, Mr. Harper, and taking into account the President's comments because I think it goes beyond, quite frankly beyond Mr. Harper's question, and it's important, and we will respond to that.

ARBITRATOR HARPER: Actually, the President did not go beyond my question. Exactly what he's talking about is the fulcrum upon which the question is based. I do want to know, we all want to know what it is that's before us.

MR. LANDRY: And I understand it, Mr. Harper, and now that it's been articulated in the that way, we will provide a full response to that question.

ARBITRATOR HARPER: I have one final question, if I may, Mr. President.

PRESIDENT GAILLARD: Please, certainly.

ARBITRATOR HARPER: Is it Canfor's position that all of the treatment of which Canfor complains is rooted in determinations by the U.S. Commerce Department and by the ITC and the Byrd Amendment?

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MR. LANDRY: When you say determination, you're talking about formal determinations?

ARBITRATOR HARPER: I'm talking specifically, and you brought our attention to it

in your statement--with respect to the preliminary determinations and other things set forth in the Statement of Claim. You talked particularly about paragraphs 20 and 109, and I'm simply trying to be sure that I understand the outer boundaries of the "treatment" and "conduct" and other general words that Canfor has used. Sometimes--in fact, I'll go further and say many times in the submissions by Canfor words like treatment and conduct are used unanchored to any specific claims.

And what I'm trying to make sure of, and to find out what Canfor's position is, is whether or not all, without exception, of Canfor's allegations about wrongful conduct or treatment by the United States Government, in fact, are rooted in the administrative actions of the Department of Commerce and the ITC and the Byrd Amendment.

MR. LANDRY: I think that to a certain

extent Mr. Harper is related to the previous question.

ARBITRATOR HARPER: It is, indeed.

MR. LANDRY: And I believe to properly answer it, because there is a crossover, and we will take that under advisement. It's all of the conduct. Now, the question is you've asked a more specific one, a specific point on that which I do understand and will respond to that again tomorrow.

PRESIDENT GAILLARD: In the same spirit of

flagging questions for an answer tomorrow, we have a number of questions on the Byrd Amendment. I don't mean to ask them now, but you should be prepared to be grilled on the Byrd Amendment, and that goes for both sides.

MR. LANDRY: Okay.

PRESIDENT GAILLARD: Maybe you want to resume, and Mr. Mitchell?

MR. LANDRY: Mr. Mitchell will now--

PRESIDENT GAILLARD: To present the case on behalf of Canfor Corporation.

Thank you, Mr. Landry.

MR. MITCHELL: Thank you, Mr. President. Members of the Tribunal, the focus of my submission is going to be on the proper or the correct interpretation of Article 1901(3), and the textual and other considerations which on the one hand support Canfor's interpretation and correspondingly those textual and other considerations which demonstrate that the United States submission cannot prevail.

Before doing so, I want to make some general remarks about the Tribunal's jurisdiction on this motion. First, it is not contended by the U.S. on this motion that Canfor has not satisfied every jurisdictional hurdle contained within Chapter 11 itself. Rather, the essence of the U.S. submission that we have to deal with today is that

although for the purposes of this motion, Canfor has properly established the jurisdiction of the Tribunal based on the four corners of Chapter 11, its claim is barred on the basis of a provision of another chapter, namely Article 1901(3), that on its face does not mention jurisdiction at all, that

does not mention Chapter 11, does not mention Chapter 11 dispute settlement, or, indeed, dispute settlement at all, and is not, on its face, drafted in a manner that would appear to be a choice of forum clause, like Article 2005, or a reservation clause as those clauses are drafted throughout the treaty.

Second, this claim must be put within its context, and if the point is not abundantly clear by now, I will reiterate it. This claim is not about measuring the United States's conduct against its municipal law standards, but rather the essence of Canfor's claim is that the conduct of which it complains, the arbitrary, discriminatory, discretionary, abusive, and politically motivated conduct which targets Canfor and investors like it has failed to meet the standards to which the United States has committed itself at the international plane, and indeed the standards which the United States must comply with at customary international law.

Third, Canfor has not brought this claim

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lightly. Chapter 11 claims are difficult and are expensive, and by their very nature challenge the actions of a government and, indeed, the government of a country with which Canada has extremely friendly relations and a country in which Canfor has invested literally hundreds of millions of dollars.

Canfor has not brought this claim to solve the softwood lumber dispute at large, a dispute which has plagued relations between Canada and the United States for decades. Rather, Canfor has brought this claim because as an investor in the United States, it has suffered direct and severe effects of the United States's conduct towards it. Canfor has taken the extraordinary step of bringing this proceeding because of the extraordinary circumstances that give rise to it, including conduct of the United States which has repeatedly been condemned by binational and international tribunals as inconsistent with both the municipal law and international law responsibilities of the United States, which has included delaying or

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wholly failing to remedy violations of such responsibilities, and which has included organs of

the United States Government floating or ignoring the rulings of properly constituted tribunals so as to completely undermine the Chapter 19 dispute resolution context.

Canfor agrees with Mr. Taft's comment when he said that this is a case of immense importance. It is a case of immense importance to Canfor. It is in that context that I make the submissions that follow.

Now, my submissions proceed on the following basis. First, I'm going to state what I say the proper interpretation is of Article 1901(3). Second, I'm going to review the textual and other factors that in my submission support the interpretation I espouse. In the course of that I will also refer to the textual and other factors that again in my submission demonstrate that the approach of the United States cannot prevail. Where possible, I'll try and provide you with references to our memorials and where the

submissions are advanced in more detail.

But suffice it to say that it goes without saying that in addition to the submissions advanced orally, we continue to stand upon the submissions contained in our memorials, and where those more fully elaborate our submissions, we rely upon them.

PRESIDENT GAILLARD: That's absolutely clear to us.

MR. MITCHELL: So, let me turn to the proper interpretation.

In Canfor's respectful view, Article 1901(3) means nothing more and nothing less than the no provision of the chapter of the NAFTA other than Chapter 19 imposes a duty or a responsibility or an obligation on a NAFTA party to do something or not do something such as amend or not amend that party's countervailing duty or antidumping duty law as those terms are specifically defined in Article 1901--1902(1). That submission is made in particular in paragraphs 126 and 127 of our memorial, and paragraph 26 of our rejoinder.

Now, why do we say this is so? I have

several points. My first point is based on the plain meaning, we say, of the terms actually used in Article 1901(3). Now, it's interesting but not uncommon for opposing parties to advance diametrically opposed plain meanings of a provision, each contending that theirs is obvious and that that advanced by the other side is untenable. That, indeed, is the tenor of the United States's submission and to some extent the tenor of ours.

What I say, however, is that the textual factors that I'm going to refer to demonstrate that there are compelling reason why is the plain meaning advanced by the claimant should prevail.

And the starting point is this: The starting point is that on its face, Article 1901(3) is confined in its application to a specifically defined phrase, antidumping duty law and countervailing duty law.

This, we say, manifests a deliberate choice and a clear indication, clear statement of the intention of the parties that the operation of Article 1901(3) was limited in ambit to the subject

matter specifically defined in Article 1902; namely, the parties' antidumping duty laws and countervailing duty laws which are defined as--as appropriate for each party, relevant statutes, legislative history, regulations, administrative practice, and judicial precedents.

Now, by using a specifically defined term in Article 1901(3), the parties obviously turned their mind to what they intended that provision to apply to. Clearly, it was intended to apply to the antidumping and countervailing duty laws as specifically defined.

Now, Mr. Harper questioned Mr. Clodfelter and Ms. Menaker on the meaning of antidumping duty law and countervailing duty law, and there was a discussion of whether a determination, be it a preliminary determination, a final determination is administrative practice and, therefore, within the definition of countervailing duty law or antidumping duty law.

Let me say clearly that it is the submission of Canfor that a determination is not in

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any sense an antidumping duty law or a countervailing duty law as that term is defined in the treaty.

And so now, I'm a little lower tech than most people, and so I'm actually relying on the hard text of the Treaty, but if you were to look at Article 1902(1), where antidumping duty law and countervailing duty law is first defined, you see a commonality amongst the terms that are used in defining the scope or ambit of what is meant. First, you see relevant statutes and legislative history. So, for instance, in the United States the legislative history would include the statement of administrative action. Then you see regulations, administrative practice, and judicial precedents.

The commonality or the common element within those provisions is that they relate to the rules to be applied in arriving at a particular determination. They relate to, in other words, the normative standards that a decision maker, be it in Canada, the United States, or Mexico, would apply.

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And I ask you to note that in defining

antidumping duty law and countervailing duty law, there is no mention of a decision in a particular case or a determination; and, indeed, I can contrast Article 1902(1) where there is a definition of what is meant by antidumping duty law with Article 1904(2).

And so, 1904(2) is just over the page, but it says, in its introductory words, An involved party may request that a panel review based on the administrative record--may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of competent investigating authority of an importing party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing party. That is, the determination is measured against the rule or standard to determine whether it complies or not.

And so, if I take a step back to Article 1902(1), where we have the first definition of

antidumping law or countervailing duty law, I note again the use of the phrase "judicial precedents" at the end. Judicial precedent is used instead of another term such as judicial decision or again determination. The significance of a precedent is once again that it relates to the rules to be applied by the decision maker. And so, a

determination or outcome in a particular case may over the course of time become part of the body of precedent that then would embody law, but a determination in a case that is subject to challenge or in circumstances where that conduct is subject to challenge, is not law, as that term is defined.

So, when you look at administrative practice, Ms. Menaker said, well, yes, to paraphrase, a determination is administrative practice, that's said without any authority in support, but my submission would be to the contrary: Administrative practice would be rules or guidelines or procedures established that the parties could follow in a particular case leading

up to a determination. They do not, in my submission, relate to a determination in any particular case.

The second textual factor that I want to look at in Article 1901(3) is the use of the term "law," and in my submission this is an extremely important term that the parties chose to use when agreeing upon the text of Article 1901(3). They chose to say that Article 1901(3) shall not be construed as imposing obligations on a party with respect to the party's antidumping law or countervailing duty law.

Now, the parties could have said if they

wanted something of broader ambit that no provision of any other chapter of the NAFTA shall be construed as imposing obligations on a party with respect to its AD or CVD measures. They could have used the term "measures." But, by using "law" in place of "measure" in Article 1901(3), the parties intended and demonstrated a clear intention that they intended that Article 1901(3) was to be of narrower ambit than the United States contends.

Why do I say this? I have two main points. First, measure is a well understood term in international law. It is recognized as broader simply than a law. Indeed, it refers to any act attributable to a state according to the applicable law of state responsibility. This is not a point that has not been litigated before in the Chapter 11 context, and at paragraphs 15 and 16 of our rejoinder, we reference some of those other authorities.

Now, I'm not going to take you--copies of all the cases are obviously in the authorities we provided, and I'm not going to take you directly to them, but I do want to highlight some of these provisions.

So, in one of the earliest, in fact, it may have been--it was probably the second Chapter 11 arbitration, the ethyl case, in the motion on jurisdiction the Tribunal endorsed a broad

interpretation of the word "measure," and the context there was an express discussion of the difference between a law and a measure. And the

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Tribunal said this, and just for references it's at the top of page nine of our rejoinder, "In addressing what constitutes a measure, the Tribunal notes that Canada's statement on implementation of the North American Free Trade Agreement states that, quote, the term measure is a nonexhaustive definition of the ways in which governments impose discipline in their respective determinations. This is borne out by Article 201(1) which provides measure includes any law, regulation, procedure, requirement, or practice. So, again, measure and law are used in contra distinction to one another.

Continuing the quote, Clearly something other than a law, even something in the nature of a practice, which may not even amount to a legal stricture may qualify.

The issue was raised again in the Loewen case, and the term "measure" was described as, quote, embracing any action which affects the rights of persons coming within the application of the relevant treaty provision.

Now, I should say this, and I have

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included a reference to this at note 14. The United States in the course of negotiations of Chapter 11 was insistent upon a--an agreement that the term "measure" be considered such a term that could embrace even individual actions, a single action could amount to a measure as is consistent with the general international law.

And so, a measure has to be understood in contra distinction to simply a law.

Now, when you start from that proposition that there is a well recognized difference between a measure and a law--

PRESIDENT GAILLARD: Mr. Mitchell, could I interrupt you at this stage. Since we are at it, you have in front of you your second, your rejoinder, second memorial at paragraph 16.

MR. MITCHELL: Yes.

PRESIDENT GAILLARD: You talk about, you contrast the measures and the parties' laws, plural.

Do you see that?

It's paragraph 16 on page nine.

MR. MITCHELL: Yes.

PRESIDENT GAILLARD: And then you say: "but also the manner and conduct of the Party in the application or purported application of such laws", plural.

Do you see that?

MR. MITCHELL: Yes.

PRESIDENT GAILLARD: Today, you said you contrasted measures and law because Article 1901(3) says the "law", and if you say "laws", plural, I take it that it's simply because on the one hand you have the antidumping law, and on the other hand you have the countervailing duty law. That's why you use the plural; right? You don't mean to suggest laws in the meaning of statute? That's correct?

MR. MITCHELL: Yes.

PRESIDENT GAILLARD: Thank you.

MR. MITCHELL: I want to go back to the distinction between a law and a measure because it's significant when one examines the arguments that are advanced by the United States. Now, at

pages four to seven of its reply submission, reply memorial, the United States places great stock on two other Articles of NAFTA. They rely in particular on Article 1607, and they rely on Article 2103, and they rely on these as supporting their interpretation of Article 1901(3).

With the greatest of respect to the United States, those Articles support exactly the opposite conclusion. So, if I could ask you to turn up Article 1607, Article 1607 says this. Except for this chapter and various other chapters, no

provision of this agreement shall impose any obligation on a party regarding its immigration measures.

Now, the parties by saying that clearly demonstrated an appreciation that immigration measures was broader in ambit than immigration law, and they intentionally chose to use the broader phrase. And yet, by contra distinction, they did not do so in Article 1901(3).

By the same token, if you turn up Article 2103--

PRESIDENT GAILLARD: On taxes?

MR. MITCHELL: Yes. And I will have some additional comments on this with respect to the submissions on UPS. Article 2103 on taxation says except as set out in this Article, nothing in this agreement shall apply to taxation measures. Again, far broader in demonstrating clearly that if the parties had intended to cover something more than the specifically defined term in Article 1902(1), they knew how to do it. And they didn't. And it would be wrong for this Tribunal to presume that that was merely the function of sloppy drafting.

My third point in a textual interpretation relates to--or in support of textual factors that support the interpretation I urge upon you is this, and it builds upon the point that I just described relating to Articles 1607 and 2103, but the point

is that where the parties intended to exempt a particular subject matter from dispute settlement, the parties were able to do so, and they were able to do so clearly. By contrast, the language used in 1901(3) is anything but clear if it was intended

to exempt all matters in any way touching upon or connected with an AD or CVD investigation or determination. The submissions found at pages 48 to 52 of--or pages 48 to 52 of our reply memorial, but there are several examples that I want to touch upon, and I have included the text of them in the memorial so that it's not necessary, hopefully, to refer to the treaty.

But at paragraph 137 we set out Article 1101(1), and this is the typical formulation of what is covered by and what is not covered by provisions of the treaty. So, Article 1101(1) says this chapter applies to measures adopted or maintained by a party relating to investors of a party, investments, et cetera, and then it clearly defines what is beyond the scope of this chapter, where it talks about in Article 1101(3), this chapter does not apply to measures adopted or maintained by a party to the extent that they are covered by Chapter 14.

Now, in my submission, this is a very clear example of how the drafters structured what

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was included in the provision and what was excluded.

Now, I need to pause because I believe it was Mr. McNeill made a point of referencing Chapter 14 specifically and how the parties demonstrated their intention to exclude certain matters. And the reference on the transcript that I have is at paragraph 109 starting at line nine, and Mr. McNeill begins, (reading) For example, the financial service chapter expressly incorporates some of the substantive obligations in Chapter 11 as well as the investor-state mechanism of Chapter 11, Article 1401 provides the various provisions of Chapter 11 provide--what they provide, and then he says, Article 1401 demonstrates the very deliberate means the NAFTA parties used to apply the substantive obligations and the investor-state dispute resolution mechanism to matters arising under other chapters in the NAFTA.

This is an important point if you actually look at what, how the Chapter 11 obligations that are made available in connection with Chapter 14

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are, in fact, imposed. What happens is they are taken away, that is the first thing that happens is Article 1101(3) says this chapter doesn't apply to Chapter 14 matters unless they're put back in, and

then it's in Chapter 14 that you go and find specific obligations relating to Chapter 11 are added back. But they're added back after having been removed from the scope of Chapter 11 by Chapter 11 itself. There is no analogous provision here, and in my submission Mr. McNeill's submission cannot be sustained.

There is an additional point that demonstrates how the parties intended to exclude matters, and as other Tribunal members don't have copies, I'm just going to reference so you know where to look when you have the chance to deliberate. But in Tab 19 of the authorities in support of Canfor's rejoinder, there is a lawyer's revision of the draft treaty, and it is the--it's the lawyer's revision dated August 27th, 1992. And the reason I want to identify this document as of significance is because if you turn to or make a

note of page 4870 and following, the parties during the course of negotiations clearly were able to identify specific provisions that they intended to be placed outside of the scope of Chapter 11, and so, for instance, page 4870 is headed "Provisions to Be Placed Outside of the Investment Chapter," and then there is a reference to national security, to competition and state enterprises, which we have already seen the exclusions put up on the overheads relating to Article 1501 to monopolies and state

enterprises again which is embodied in Article 1501, and to taxation, which is embodied in Article 2103.

But what we do not see is any reference whatsoever in the provisions to be placed outside the scope of Chapter 11 to countervailing duty or antidumping duty factual circumstances that might otherwise violate the obligations under the treaty.

I have already averted to it, but clear examples of how the parties intended to exempt certain matters from dispute resolution can be found again as we referred to Article 2103, which

provides 2103(1) "Except as set out in this Article, nothing in this agreement shall apply to taxation measures."

Note 43 is interesting because note 43 which relates to competition law relates to Article 1501, and it provides that specifically no investor may have recourse to investor-state arbitration under the investment chapter for any matter arising under this Article. Again, there is no analogous provision for matters that have some connection to antidumping or countervailing duty matters.

With respect to national security, which I flagged for you was one of the matters to be specifically placed outside of Chapter 11, it is explicit. It says the dispute-settlement provisions of this section and of Chapter 20 shall

not apply to the matters referred to in Annex 1138(2), and then Article 1501(3), no party may have recourse to dispute resolution under this agreement for any matter arising under this Article.

So, all of those are clear and precise and

explicit examples where the parties indicated an intention to exclude matters from the coverage of the NAFTA.

Article 1901(3) is, in my submission, very different. It is specifically tied to a party's antidumping and CVD laws rather than any sort of conduct. And had the parties intended to exclude conduct which otherwise would violate the obligations under Article 1105 or 1102 simply because they have a connection to antidumping or CVD matters, they should have done so more clearly.

Now, Mr. Landry made some comments on Article 1904(15) and Article 1902. I am not going to repeat them, but I do want to elaborate upon them.

Our premise is that the obligation being imposed upon a countervailing duty law or an antidumping duty law is an obligation to do something to that law or an obligation not to do something to that law. But the introductory words of Article 1901(3) can't be ignored, and they say no provision of any other chapter shall do what the

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rest of the provision provides.

The necessary implication if other provisions--if provisions of other chapters cannot do something is that provisions of Chapter 19 do do something with respect to the parties' antidumping duty law, countervailing duty law, as those terms are specifically defined in Article 1901 or 1902(1).

And so, the task is to look at the provisions that are contained within Chapter 19 and examine what obligations are imposed with respect to the antidumping duty law and the CVD law as those terms are defined.

Article 1902 deals with one such obligation. It is the obligation to, if you amend your law, to do so in a certain process compliant with your WTO obligations following consultations. That is an obligation with respect to the law. It operates directly upon the law. If you want to amend the law, you must go through that process. And so, those are obligations imposed upon the law.

But the better example, in my submission,

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and even more explicit is Article 1904(15). And Article 1904(15) is explicit, and it says, "In

order to achieve the objectives of this Article, the parties shall amend their antidumping and countervailing duty statutes and regulations with respect to antidumping and countervailing duty proceedings involving the goods of the other proceedings and other statutes and regulations to the extent that they apply to the operation of the antidumping and countervailing duty laws. In particular, and without limiting the generality of the foregoing, each party shall," and then some specific obligations are imposed.

And these obligations are imposed on the party, Canada, the United States, or Mexico, with respect to the law, an obligation to do something specific.

And, indeed the--with respect to Mexico, with respect to Mexico when we were dealing with the adoption of the NAFTA, the obligations of the--of Mexico to amend its countervailing duties, statutes and antidumping duty statutes and

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regulations and other statutes and regulations, is extensive. And it's set out in Annex 1904(15), and it provides basically 21 substantive amendments or changes, fundamentally different changes, that must be made to Mexico's CVD and AD law to ensure for instance transparency, to ensure due process, to ensure the right of an appeal, to ensure the right of a written decision, to ensure many other

substantive matters, such as notice, access to information, obligations with respect to service, right to individual review.

The provisions are extensive, and they all operate upon a party with respect to doing something to their law. And in my submission those are--provide a clear indication of what the parties were thinking when they talked about imposing obligations with respect to the law, and they support the investors' contention.

There are some other textual indicators that we submit support our interpretation, and they're covered in detail in our memorial. I'm only going to briefly highlight them to identify

some other points the Tribunal should bear in mind.

First, we have seen this contradistinction between Article 1607 which is the closest in parallel language that the United States has relied upon to what's in 1901(3), but again I have already made the point that that deals with measures and not law.

The other difference between Article 1607, which is prescriptive and provides that no provision of any other part of the treaty shall impose obligations. In 1901(3), the reference is no provision shall be construed as imposing obligations. So, there is this difference in structure by not only the fact that one provision

uses the word law and the other measures, but also by the addition of the phrase "shall be construed as." And in my submission, that's indicative of the fact that Article 1901(3) is intended to provide decision makers with an interpretive guideline, that they should not interpret provisions of any other provision of NAFTA so as to impose an obligation to do something to a party's

antidumping law or CVD law.

Second, and there was some discussion this morning relating to the use of the words "with respect to"--

PRESIDENT GAILLARD: You say, Mr. Mitchell, that this is an interpretation of something which preexists in any event, or is also, I should say, is also stated in Article 1902?

MR. MITCHELL: I'm not sure that I have your question, Mr. President.

PRESIDENT GAILLARD: Could you say it's an interpretive guideline?

MR. MITCHELL: It's an interpretive guideline.

PRESIDENT GAILLARD: If it's only an interpretation, does it mean that the rule exists somewhere else? You have the rule, the principle, and then you have the interpretation. Is that your submission that the rule is expressed somewhere else, and this is just an interpretation, or do you

21 see some independent rule in Article 1901(3) which
22 you do not find anywhere else other than the

1 interpretation?
2 MR. MITCHELL: What I say under 1901(3),
3 the parties were at pains to distinguish between
4 imposing an obligation and interpreting something
5 as imposing an obligation, and there must have been
6 a reason for that. I don't say that the obligation
7 is found outside the obligation with respect to a
8 party's AD or CVD law as those terms are defined in
9 Chapter 19, is found outside of--is found in
10 another provision.
11 What I say is that the Tribunal should not
12 interpret a provision that clearly seems to be
13 focused only on giving interpretive guidance as the
14 United States would have you have it, depriving the
15 Tribunal of jurisdiction with respect to a matter
16 simply because it touches a sphere, the provision
17 was not intended to be that broad.
18 PRESIDENT GAILLARD: Yes, but I'm focusing
19 on your interpretation in order to understand your
20 rebuttal, if you will, of the argument which has to
21 do with duplication because the respondent says:
22 well, if you're right, it doesn't add anything to

1 Article 1902.

So, you are saying: well, yes, it does add something. It is a rule to avoid a wrong interpretation of 1902 and the other chapters which may lead someone to think that in other chapters you have other duties with respect to the laws; i.e., you also need to change this and that because you want to be consistent with another chapter; is that correct?

MR. MITCHELL: Or that some party could say that by virtue of a provision of another chapter, a state was obligated to do something with respect--

PRESIDENT GAILLARD: I.e. your contention to change a law with respect to antidumping and countervailing duties also. Someone would say that you have to change everything which is to be changed pursuant to Chapter 19, but also implicitly something which has to be changed because of another general principle found elsewhere, and therefore you also have to change this and that. You're saying this is a rule which says clearly:

no, the member states, the Parties to NAFTA have to change whatever is agreed upon in Chapter 19, but nothing else, and you make it crystal clear by using the language of 1901(3).

MR. MITCHELL: Yes.

PRESIDENT GAILLARD: That's all there is?

MR. MITCHELL: Yes.

PRESIDENT GAILLARD: In your contention, and that's all there is in 1901(3), paragraph three.

MR. MITCHELL: Yes.

PRESIDENT GAILLARD: That's a correct understanding of your contention, of your understanding of 1901(3)?

MR. MITCHELL: Yes.

PRESIDENT GAILLARD: Thank you.

MR. MITCHELL: Starting to make some observations on the United States's reliance on the words "with respect to." And I want to focus my submission, and again this has been canvassed in the memorials, but the phraseology used in Article 1607 and Article 2103 is regarding,

regarding its immigration measures, and applied to taxation measures. Again, you have my point on measures as opposed to law, but I also say that the words "apply to" and "regarding," when used in their ordinary course, are broader than "with respect to."

And in my submission, "with respect to," and you can't parse the phrase and define "with respect to" in one particular provision of the treaty and say that meaning shall have--be applied throughout all others because the significance of the phrase "with respect to" is that it is relational. It describes the matter upon which

that which precedes it operates. So, it is a relational matter here; the obligation must be with respect to, and I say that means directly operating upon the defined matter CVD or antidumping law. Our submission is at paragraphs 30 to 34 of our rejoinder, but again, my general proposition is that the terms used in the other provisions, "apply" or "regarding" are broader in their ordinary use than the phrase "with respect to."

I have already touched on this to some extent, but I'm going to elaborate upon it because Ms. Menaker made some submissions about a law and the application of the law, and I understand the tenor of the submission to be that the application of a law is subsumed within the law, and therefore a matter with respect to the law also includes a matter with respect, or anything touching the application of the law.

In my submission first, the language of Article 1902 clearly refers to the normative rules. That is the antidumping duty law or countervailing duty law relate to the rules to be applied. And I've made this point as well, that the text itself in Article 1904 distinguishes between laws and the application of them. It's explicit, indeed, it's explicit in Article 1901 or 1902(1) as well.

But, Ms. Menaker made some submissions with respect to the UPS decision, and the

20 submission, as I understand it, and I'm not sure
21 that I do, is that somehow the UPS Tribunal
22 decision with respect to antidumping--with respect

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1 to Article 2103 somehow assists the United States
2 here. Our submission is at paragraph 41 of the
3 rejoinder, but the point is really simply twofold.
4 First, the provision that was going to be an issue
5 in the UPS case dealt with taxation measures. It
6 did not deal with the circumstance that we are
7 dealing with, a law, and of course a measure can
8 encompass the application of a rule or the
9 application of a law, and therefore fundamentally
10 the circumstances are entirely different.
11 More significantly, though, the point was
12 never argued. It was simply abandoned by counsel,
13 and the Tribunal in passing made reference to the
14 fact that the position that had been agreed to
15 between a UPS and Canada about how the argument
16 would proceed seemed to them to comport with the
17 treaty. There was no argument. There was no
18 debate. There was no discussion, and so it places
19 in my submission far too much freight to bear upon
20 that award for it to make any difference in this
21 Tribunal's decision.
22 I want to turn to the context, and why we

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say that the context and the circumstances surrounding the conclusion of the treaty do not support the United States's interpretation, but rather the reality is they support the contrary.

This originally was raised in the United States's original objection where in footnotes 109 and 110 the United States cited various quotes from various individuals which purport to explain the reasons behind Chapter 19. When looked at carefully, the quotes seem nothing more than that the parties had attempted to come to agreement on new approaches to unfair trade practices in relation to cross-border trade and goods. They confer nothing more than that the parties were looking at a very technical subject in an attempt to come to a new approach. There was no suggestion whatsoever that in discussing those matters they were at all concerned with the issues of customary international law as it relates to foreign investors or the obligations that were being imposed by Chapter 11.

Now, there are two specific points that I

want to make. Throughout the day, we have heard the United States rely, and they've done so in their memorials on the statement of administrative action which they say demonstrates the United States's contemporaneous understanding of what was

occurring when the treaty was enacted or was concluded.

And the United States said in its statement of administrative action with respect to Chapter 19 the following: Articles 1901 and 1902, and just for your reference for the transcript can be found at Tab 27 of the authorities of the claimant on the rejoinder at page stamped 643 at the top, it says Articles 1901 and 1902 make clear that each country retains its domestic antidumping and countervailing duty laws and can amend them. Article 1903 provides that the NAFTA country can request a binational panel to review whether an amendment to another NAFTA country's antidumping or countervailing duty statutes is consistent with Chapter 19. Quote, These provisions are identical to Articles 1901 through 1903 of the CFTA except

for technical changes necessary to accommodate the addition of a third party.

So, this morning we heard from the United States that it was for Canfor to somehow explain what these technical changes were that--that 1901(3) facilitated the addition of a third party.

Well, with respect, it's my submission that it is for the United States to explain the stark discrepancy from the broad and encompassing implications of the approach they now advocate, and the approach that they advocated when they were

explaining the treaty to Congress.

PRESIDENT GAILLARD: If I may interrupt here, this is a question we want to ask, it was in our list of questions, so I may as well flag it now. That's more of a question for the U.S. to answer the specific argument of the language and the views in the aggregate of those two provisions as described by Mr. Landry a moment ago.

MR. MITCHELL: Mr. Mitchell.

PRESIDENT GAILLARD: I'm sorry.

MR. MITCHELL: That's quite all right.

PRESIDENT GAILLARD: You switched the seats.

MR. MITCHELL: I have been called worse.

We can't speculate on what those technical changes were. I can hypothesize. I mean, I guess maybe I am speculating rather than hypothesizing. The--under Mexican law, as the United States has pointed out, proceedings can occur directly for a NAFTA violations under--in the domestic courts of Mexico, the notion of direct effect of the treaty exists in Mexico. It may be that it was that notion that it was felt necessary to have a provision such as this to ensure that a Mexican court did not do something so as to impose an obligation on Mexico with respect to its CVD or AD law, but we don't and we can't know. We are faced solely with the statement from the United States

that this is simply a technical change designed to facilitate the addition of a third party.

Second, what I can say is that after this Tribunal made its order that additional documents be produced relating to the negotiating history and

the negotiating text of the NAFTA, nowhere in any of those documents, anywhere that the United States has produced is there any suggestion of the approach that they now advocate. Indeed, I have referred you already to the documents which are found at Tab 19 of the rejoinder of authorities which was the lawyers' revision which does not include matters that touch upon AD or CVD as matters to be excluded from Chapter 11, although it does make that--make such references, for instance, for taxation, national security, competition, et cetera.

So what are the implications of the U.S. approach? And in this regard this is essentially a question of examining the policy implications of the approach they advocate or put a different way, asking whether the approach of the United States advances or hinders the attainment or achievement of the objects and purposes of the treaty.

Mr. Landry has already spoken about effective dispute resolution, and I don't need to repeat it. We have included in Tab 1 of the

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rejoinder materials the latest ITC or Chapter 19 decision relating to the ITC finding of threat of injury, which is instructive reading when one wants to consider whether the process of effective dispute resolution is being advanced by what is occurring.

And I want to emphasize the submission again that the objects and purposes must be looked at as a whole, and one cannot parse them and say this object relates to effective dispute resolution. That's what this case is about, and this object relates to something else. These objects relate to trade. These objects relate to investment. A company like Canfor is an integrated operation with substantial cross-border investments and operations. It is both an investor and a party that trades in goods. These are--the objects of the treaty do not define themselves as these are our trade objects and these are our investment objects. They are all to be interpreted together.

We say that the United States's approach would provide it with an immunity from liability to

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an investor for acts which otherwise violate the obligations under customary international law. We know that Article 1105 embodies that standard, and equally that there are customary international law

obligations of nondiscrimination. It is, in our submission, once again placing too much weight upon the language of Article 1901(3) to suggest that that provision was in the absence of any information to support it intended to excuse the United States from responsibility to an investor that would otherwise violate its customary international law obligations.

Put slightly differently, Canfor complains about arbitrary and discriminatory conduct. And when we say arbitrary, we mean arbitrary in the international sense, conduct that was described in the ELSI case as being not of law but opposed to law or opposed to the rule of law, and we say that if we meet that standard that the conduct we complain of and that we are able to demonstrate to this Tribunal on the evidence is arbitrary in an international way, and is therefore opposed to the

rule of law that that conduct cannot be with respect to law.

Professor Weiler raised a question this morning of the implications for Canadian investors vis-a-vis investors if I've got the question right, vis-a-vis investors from a BIT state with the United States and vis-a-vis investors from a non-BIT state with the United States, postulating a hypothesis where a matter connected with the antidumping or countervailing duty spheres and the

conduct of the United States officials violated the customary international law obligations, and the question, as I understood it, was what are the implications of that vis-a-vis Canfor, and is it correct that Canfor or a Canadian investor would be disadvantaged vis-a-vis an investor, say, from Lithuania, Albania or Georgia or one of the states that does not have a BIT with the United States. It's our submission that that is exactly the implication of the approach that the United States contends, and it's our implication that, or it's our submission that when you are dealing with

parties with a relationship as close and as friendly, and as important as the relationship between Canada and the United States, given the strength and the size of the trading relationship simply, for instance, that it would be extraordinary if the parties intended in the absence of any evidence that that was the intention to provide an Albanian investor Georgia investor or investor from a third party state with greater rights and greater protections that would be afforded to a Canadian investor.

PRESIDENT GAILLARD: Mr. Mitchell, are you using that as an argument with respect to the interpretation which you put forward? Or are you using that as a separate argument based solely on the MFN provision?

MR. MITCHELL: No, this is an argument that is independent of the MFN argument. This argument is an interpretation argument in the sense that what we are addressing is the consequences or the implications of the United States's approach.

PRESIDENT GAILLARD: You're saying it

cannot have been the intent of the NAFTA Parties to do something which, in a sense, is going to mean that close friends like the three Parties to NAFTA are going to be treated worse than any beneficiary of any BIT in the world; right?

MR. MITCHELL: Right.

PRESIDENT GAILLARD: It's one thing to say that, and I understand the argument--I'm not saying it's right or wrong, but I understand the argument--it's another thing to say, even if we are wrong in the interpretation of the NAFTA provisions, since any beneficiary of a BIT would be protected in your view better, then since we have in NAFTA an MFN provision, we can also access that protection through the MFN provision. And if that is also your contention, possibly in the alternative, then have you to deal with the issue of the relationship between the MFN provision and the jurisdictional requirements in the specific context of NAFTA, which has specific language.

MR. MITCHELL: I think I can address your question. We rely upon the MFN provision in the

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event that the obligations, for instance, in the Albanian treaty or the Lithuanian treaty provide a greater degree of protection than is provided under 1102, 1105, 1110, so we rely upon MFN in that respect.

PRESIDENT GAILLARD: If I may clarify just to follow you step by step, this is on the merits of the protection. The extent provided by Chapter 11 Section A.

MR. MITCHELL: Yes.

PRESIDENT GAILLARD: So you're saying: this is what it means, in addition, look through the MFN, I can take the language of other treaties. That, I understand perfectly.

MR. MITCHELL: Okay. As I understand the United States's argument--

PRESIDENT GAILLARD: I'm not talking about the argument of the United States at this stage. I'm saying that's all I have seen in your memorial so far regarding the MFN. Are you contending today that through the MFN you would have, in case you lose on your jurisdictional arguments, a broader

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jurisdiction which you would get through the MFN? I do not understand the written pleadings to be to

that effect, but can you confirm that for the record, please.

MR. MITCHELL: I have to do that in connection with our understanding of the United States's interpretation because what I understand and may want to reflect on this overnight is that the United States contends that if their interpretation is correct, then there is no MFN because the entirety of the Section A and Section B obligations fall away.

PRESIDENT GAILLARD: Right, because their argument is, as presented, of a jurisdictional nature.

MR. MITCHELL: And so they say that those obligations that consent to Section A and Section B arbitration would disappear, and therefore we could not rely upon the MFN provision.

PRESIDENT GAILLARD: That's right. As to the argument, I want to know your views on that.

MR. MITCHELL: As an aide to your

interpretation of 1901(3), I say that that can't have been the intention because the consequence would be what Professor Weiler was asking about earlier; namely, that these other parties, these other states, would have greater protections in this sphere, and Canada would not be--a Canadian investor would not be able to attract the MFN protections, and that strikes me as an

extraordinary proposition.

PRESIDENT GAILLARD: So, you're using that comment in the context of the interpretation of 1901(3) and not as a stand-alone basis for jurisdiction?

MR. MITCHELL: Yes.

PRESIDENT GAILLARD: Thank you.

MR. MITCHELL: I'm not going to revisit the submissions with respect to Articles 1115 and Article 2004. We have the Tribunal's point that those are matters that we will be talking about tomorrow.

But at the end of the day, Canfor's claim is that as an investor having invested hundreds of

millions of dollars in the United States, developing its integrated softwood lumber operations, if, in its investment had been seriously harmed by the extraordinary conduct of the United States, the stakes to Canfor are immense, as you've heard, without accounting for the other harm that has been suffered, the harm from loss of opportunity to develop investments, the harm from changes to its operations, the harm from price pressures, all of the various harms that Canfor has suffered in addition it has paid over half a billion dollars in duties.

Canfor submits that it's entitled to the opportunity to show this Tribunal that the United

States has not lived up to the international standards which bind it under customary international law, and that it's entitled to put before this Tribunal the array of circumstances, the array of facts, and the evidence which show that the United States has not met that standard.

Canfor says that the interpretation that the United States would have you adopt, providing a

safe harbor for conduct no matter how egregious providing it has a connection to the CVD or AD spheres is not sustainable.

In summary, I say you ought not to give effect to an interpretation which has such a severe implication with no evidence produced in support, that, in our submission, goes against the plain meaning of the words used--here in particular again I refer to the fact the 1901(3) uses the specifically defined phrase and does not use the phrase measure. That is an unusual formulation at best for a provision supposedly intended to exclude the operation of Chapter 11, and here I rely on the different formulations in note 43, Article 1501, Article 1101 and 8, Article 2103 and 1138 as well as the interpretive guideline construe and with respect to.

An interpretation that advances no policy or purpose or object of the treaty, but indeed goes against them by denying Canfor a right to advance

its claim. That does nothing to promote conditions of fair competition. That does nothing to promote

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the liberalization of trade. That does nothing to promote investment and does nothing to provide a fair, predictable, and efficient dispute resolution mechanism.

As well, it's unsupported by and is indeed directly contrary to the contemporaneous record that we have talked about. In light of the significant implications of the United States interpretation, one would have expected some record to exist rather than the characterization of mere technical changes.

Lastly, Canfor says that it is important to bear in mind that this is an extraordinary case. It is highly unlikely that the U.S. will violate its international obligations under Chapter 11 simply because it applies its CVD and municipal, CVD and antidumping municipal laws when it does so in good faith and in a manner consistent with its WTO obligations, but that is not this case. Every dumping or CVD case is not going to lead to a Chapter 11 proceeding, but where the conduct of the United States officials gives rise to a consistent

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pattern of arbitrary, discriminatory treatment of

foreign investors, and where its conduct flagrantly disregards the rule of law and undermines the Chapter 19 dispute resolution process, then Canfor is entitled to an opportunity to vindicate its rights before this Tribunal.

For all of these reasons, it's my submission on behalf of Canfor that the United States's objection to this Tribunal's jurisdiction must be dismissed.

PRESIDENT GAILLARD: Thank you, Mr. Mitchell.

Do my co-arbitrators have questions? Yes, Conrad. You want to start.

ARBITRATOR HARPER: Thank you, Mr. President.

Mr. Mitchell, I want to make sure I have it clear in my mind, that the Tribunal has clear in its mind, exactly what the position is of Canfor, so let me put a series of questions.

Does a body of administrative decisions, in Canfor's view, constitute administrative

practice?

MR. MITCHELL: I am going to defer to Professor Howse.

PROFESSOR HOWSE: That, as I think both Mr. Mitchell and Mr. Landry have put it, would depend upon whether those decisions have normative weight of a precedential nature. So, it really

just depends upon that factor. If the fact is that the meaning of law that we are dealing with here looks at those normative materials to be applied in deciding an individual case, rather than the application of an individual case, and administrative decisions could be part of the normative material, depending upon their force as precedent in that particular municipal law system.

ARBITRATOR HARPER: Do the preliminary and final determinations of the Department of Commerce and the ITC with respect to antidumping and countervailing duty law constitute a body of administrative practice?

MR. MITCHELL: No.

ARBITRATOR HARPER: Are judicial

decisions, judicial precedents--

MR. MITCHELL: Well, I think the question could be answered quite so simply. I will use this hypothetical: In the municipal regime in Canada and the United States, if I am a party to a particular proceeding, and I take it that proceeding, A versus B, to an appellate level, the decision of the court of first instance is not a precedent. It is the very application of rules to a set of facts as found that is the subject of the debate.

The judicial decisions can form the body in a common law system of precedent, and when one

thinks of that, again in the common law system in Canada and the United States--and this, of course, would differ from the civil law--

PRESIDENT GAILLARD: It may well be the same in the civil law system.

MR. MITCHELL: --we would look at the judicial precedent, and what we would mean by that is the specific--and again, the common law system the ratio decedendi, the specific rule that is the

guidance, but the entirety of the case is not a precedent in that sense. I don't know if that's clear enough. I may want to elaborate upon that.

PROFESSOR HOWSE: May I just give an example. Let's say that at the time the NAFTA came into force it turned out that the U.S. agency in question was using a particular past determination as a rule or guideline for deciding future cases. Certainly, in that instance, it would--what these various provisions of Article 19 say is that there is no obligation imposed upon the United States and its authorities to stop using that determination as a precedent. If it has been using such determinations as precedents or drawing rules from them to decide future cases, it is not obliged to stop doing that. Just as it is not obliged to change its statutes, it is not obliged to change or refrain from using other normative materials even if they're embodied in past rulings. But the

essential issue is whether the administrative practice or whatever is being used as normative material to decide cases. And what the provisions

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in question say is you could continue to use it, subject to the specific conditions imposed by Chapter 19.

ARBITRATOR HARPER: Let me draw your attention to two provisions that I know you know well, Mr. Mitchell. Now, the first is Article 201, that portion of it that states, "measure includes any law, regulation, procedure, requirement, or practice," and the other provision--again very famous in these proceedings--Article 1902(1), second sentence, "antidumping law and countervailing duty law include as appropriate for each party relevant statutes, legislative history, regulations, administrative practice, and judicial precedents."

Is Canfor asking this Tribunal not to read those provisions literally?

PRESIDENT GAILLARD: That may be difficult to answer as such. I mean, can you elaborate, Conrad, on the question?

ARBITRATOR HARPER: Yes. The question grows out of an argument which seems to suggest

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that we should read, for example, the word "administrative practice" as something different from the decisions that administrative agencies yield. I take it that was part of the thrust of what Professor Howse was saying, and there are many other examples of that in your presentation. I'm simply probing, if I may, to find out whether Canfor's position is that none of these words is to be understood as literally written on the page, but rather to be interpreted in light of all the circumstances you say are relevant. In other words, should we read those words as they are, or must we understand them by virtue of some elaboration of interpretation?

MR. MITCHELL: I'm going to just make some initial observations and then provide it to Professor Howse and reserve the right to come back to it.

The starting point in any circumstance is that you don't read the words literally. You read them in accordance with the requirements set out specifically in 102(2) in light of the objectives

set out in paragraph one and in accordance with the applicable rules of international law that Mr. Landry referred to, which are the ordinary meaning of the words in their context.

Now, the context of the definition of law,

countervailing duty and antidumping duty law that you refer to in 1902(2), includes the nature of the matters surrounding it. They are with--and I think the area that you're struggling with or focusing upon is the phrase "administrative practice," but all of the words around that phrase demonstrate an intention that what is being contemplated here is the rules to be applied; whereas when one looks at definition of measure, it is a clearly far broader and as the context here we were able to demonstrate the United States's insistence in negotiating Chapter 11 that measure can include a single act.

So, the words take meaning from their immediate context and their context within the Treaty as a whole. But I would challenge the proposition that a decision from an administrative decision maker--and here what we are talking about

particularly because we are in the CDV regime, a decision, a determination that they make is administrative practice, because when the drafters intended to refer to the determinations, they used the word "determination." And "administrative practice," in my submission, takes the meaning that Professor Howse has articulated, and I will turn it over to Professor Howse to elaborate.

PRESIDENT GAILLARD: I think we understand, but please, if you have a short answer on this.

PROFESSOR HOWSE: No, I think that clearly you understand that our response just flows out of our interpretation of the Vienna Convention Article 31, which has already been presented by Mr. Landry and Mr. Mitchell to the panel, that the ordinary meaning does not entail a literal interpretation, and then you go to context to confirm or alter a literal interpretation that ordinary meaning means ordinary meaning in context. There is no such thing as contextless ordinary meaning.

PRESIDENT GAILLARD: This is for

consideration by both parties. I don't understand this debate myself. I understand the distinction between a body of rules which may include administrative practice or precedents, and individual determination that a particular party is subject to a particular rule. If that's the difference, in legal theory, between the rule and the decision in the purest meaning, we understand that. So, I guess the debate surrounds that. When a party says what "law" means is whatever source of the law is, it's the body of rules as opposed to the decisions. There is some debate on the other side as to using the language, but I think we are perfectly clear on this.

And that's a comment which I make for further elaboration on the U.S. side, if they feel that it's appropriate or relevant.

ARBITRATOR HARPER: Mr. Mitchell, with respect to Canfor's claims under Chapter 11, is the only international law that you claim the United States has violated customary international law?

MR. MITCHELL: No, because we have alleged

a violation of Article 1105 which the United States will urge embodies solely the customary international law obligations. We have alleged the violation of Article 1110, the expropriation provision, the MFN provision, which is not a customary international law obligation additionally to our arguments under Article 1102 which the United States says are not customary international law obligations. And while there may be some debate upon that, our claim is tied to those provisions and the obligations that are embodied within them. So, that's my initial response, but I would like to take note of the question and reflect upon it further.

ARBITRATOR HARPER: Well, just in that connection, if you would also consider specifically whether it's Canfor's position that 1102 and 1103 are statements of customary international law or not.

MR. MITCHELL: We will give you our response tomorrow.

PRESIDENT GAILLARD: Conrad, are you done

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with your questions?

ARBITRATOR HARPER: Yes.

PRESIDENT GAILLARD: Joseph, do you want to ask your questions, in the same spirit of answering now if it's a short answer or more likely we will have more time tomorrow. And also in each of those questions I want to have both sides' determinations.

ARBITRATOR WEILER: This is the part that I find--I really believe I understand your argument--this is the part that I find most difficult with it. If I go back to 1901(3), and let's say I pursue your conceptual framework, and let's say you are right, and in the case such as this, a panel such as ours would go to evaluate the claim based on Chapter 11, and let's say it found for the claimant, and let's say it indicated damages, wouldn't the indication of damages mean that in some way the law on which those--the determination pursuant to the laws which gave the rise to a wrong for which the panel says damages have to be paid, doesn't that mean that there is

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some kind of obligation for the NAFTA party to change the law, if that law--if the proper application of that law can cause an injury which gives rise to damages?

I mean, just to pursue my thought, could it be the case that a Chapter 11 Panel said damages flow on the basis of a correct application of your law and there is nothing wrong with that law? Isn't there some kind of an obligation? Isn't there at least in some circumstances--let me even further elaborate.

You said that in some cases there could be a wrongful application of the domestic law, could be unlawful and that could cause international arbitrariness, and therefore damages would flow and that would not be problematic, because the implication would be just get your own law right and you won't fall afoul of your international obligation.

But I think your position is also that there could be a correct application of domestic law. There are millions of instances of injuries

to aliens where national law is not violated, and yet there would be a violation of Chapter 11 for which damages would be awarded, but doesn't that necessarily implicate that the law, the correct application of which made a determination which caused some damages in some sense is contrary to the NAFTA and therefore has to be change, and wouldn't that mean that there is an obligation in relation to that law?

MR. MITCHELL: I'm going to take the

question under advisement, but refer the initial response to Professor Howse.

PROFESSOR HOWSE: This is just an initial response. Canfor's position is not that 1901(3) could have no effect on the ruling--on a ruling on the merits, so on the hypothetical that you give, if it turns out that the failure to meet the standards in Chapter 11 stems directly and of necessity from the law itself, it may be that 1901(3) would function in such a way that that part of the relief that flows from violating the Standards of Conduct that comes from the law itself

purely and simply might not be available. But it would be our submission that that's really a matter for the merits, and it goes back to our submission that 1901(3) is not jurisdictional in the sense that it's not a carve-out of jurisdiction. It may have some meaning in terms of the way in which this Tribunal approaches the merits of particular claims of Canfor and how it views its approach to relief under particular claims.

But, until we thoroughly understand the sources of the violations of the standard of treatment under Chapter 11, and to what extent they might come inexorably from the status of the law itself, we wouldn't be able to resolve that question. And Canfor's contention is, of course, that our view of these violations is that they stem

from conduct that is not mandated, or we cannot see as mandated by U.S. law, but that, in fairness, would be subject to argumentation and an analysis.

PRESIDENT GAILLARD: All right. So, we have no further questions at this stage, so you have the floor, Mr. Mitchell. Are you done with

your presentation?

MR. MITCHELL: Those are my submissions on behalf of Canfor.

PRESIDENT GAILLARD: I understand this concludes the presentations of both parties for today.

We are scheduled to meet tomorrow at nine. Is that still on? Mr. Clodfelter, you have a comment? Ms. Menaker.

MS. MENAKER: Thank you. I spoke with counsel for Canfor at the break, and we were thinking that, well, first because we have gone a little later than we had originally anticipated today and because it seems more likely than not that we will, indeed, take most, if not all, of the day tomorrow, where we had first envisioned perhaps finishing our arguments in the morning, we were thinking that it might be helpful for both of parties since we do have a lot to ponder this evening if we started tomorrow morning perhaps a little later than 9:00?

PRESIDENT GAILLARD: What do you have in

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mind?
MS. MENAKER: Would 9:30, if that would be amenable?
PRESIDENT GAILLARD: We're in your hands. If it's agreed by the parties, 9:30 is fine.
I'm a little worried by what you just said, Ms. Menaker, that you would take the whole day just for the reply and surreply? Or does that include questions?
MS. MENAKER: Yes, Mr. President, I did not want to--I apologize if I worried you.
PRESIDENT GAILLARD: I'm not worried, it's simply at odds with what you had agreed to initially, so I want to make clear what we are talking about.
MS. MENAKER: No, that is correct. The only reason that our anticipation has changed is because the Tribunal did indicate this morning that it expected to have a number of questions for us tomorrow afternoon. So, we don't--
PRESIDENT GAILLARD: So, the current--well, it's your turn to speak, so let's

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address this in turn. On the side of the United States, you think that initially you had a two-hour

presentation in mind, so you stick to that.

MS. MENAKER: That's correct.

PRESIDENT GAILLARD: So, you have something in mind like an hour and a half, two hours?

MS. MENAKER: Yes.

PRESIDENT GAILLARD: You can assume we have read very carefully everything. That goes to both sides, as we have read very carefully everything, we think we understand what you're saying. If we do not, or if we have queries about the meaning of an argument or anything, don't worry, we will ask you. So, you will have an opportunity to elaborate on whatever we think is unclear in our minds, in addition to answering the other side. So, you can rest assured that we know all of your arguments as they stand in the pleadings so far.

So, if you can use an hour and a half or something like that, I think it's in order. You

can have your two hours, but I think if I were in your shoes, the most important thing is to get, not our reactions, but certainly our questions because you want to spend most of the time of your argument where we think there is a problem or a question or something which is unclear, but certainly we have another two days, so we certainly have plenty of time to do both. But I think an hour and a half,

for instance, would be good, but you do it as you wish.

So, if the U.S. side uses, say, an hour and a half or two hours, or whatever you think is appropriate, then on claimant's side, what do you have in mind? The same time frame? Or do you want a break? If we start at 9:30, that would mean that we would have the U.S. reply, and we would be done at, say, 11:30. Do you want to break at that stage? Or how do you see the rest of the day?

MR. LANDRY: Mr. President.

PRESIDENT GAILLARD: Mr. Landry.

MR. LANDRY: Just so we understand what is being discussed here, we had discussions with the

United States on this very point for the time frame that was put forward, and the thing that we were anxious to have the United States agree--and they did agree--was that our entire arguments, both sides' entire arguments, would be presented in the first day--in effect, the presentations that you have heard today--and that reply and surreply would be limited simply to replying to the other side's points. Having said that, we both acknowledged the fact and hoped that there would be questions from the Tribunal that both parties would have to respond to.

So, in that respect, from our perspective, we don't envisage a lengthy, in the way it's used

there, surreply, but obviously there are numerous questions here that have to be dealt with already, and I'm assuming, Mr. President, that there will be others that you would like us to respond to, and we will respond to that. That's the first point I wanted to make.

I had a second point, if I could, Mr. President, that when we spoke with the United

States and came to the conclusions that we did in terms of timing, obviously, as can you see the timing, we thought it would get us through midday tomorrow approximately. Unfortunately--and I've told Ms. Menaker this--that Mr. or Professor Howse has a commitment tomorrow afternoon. There are a number of questions which I think we would like to have Mr. Howse or Professor Howse's input. He is available, obviously, all day Thursday, and I spoke to Ms. Menaker about the possibility that if there were a few questions that we did want Professor Howse to deal with and couldn't deal with in the morning that we could deal with it on Thursday morning. So, I raised it as nothing more than a timing issue that we have.

PRESIDENT GAILLARD: From when to when would you be unavailable, Mr. Howse?

PROFESSOR HOWSE: Mr. President, I would be unavailable for the afternoon session tomorrow only.

PRESIDENT GAILLARD: For the whole afternoon?

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PROFESSOR HOWSE: Yes. The unfortunate fact is that I have an obligation that I cannot otherwise--I cannot escape from, and I apologize for that. As Mr. Landry said, our discussions on the time frame were a little different than what's now emerged, and I don't want to go into detail about the personal circumstances, but suffice it to say that these are--

PRESIDENT GAILLARD: No, no, it's perfectly fine. We are not asking any details. We are trying to organize the three days in an efficient way. Simply, what we had in mind is a Q-and-A session which would be quite active on our side, and what we don't want to do is ask questions and then take notes and you have 15 questions, and then you speak for an hour and a half about these 15 questions. We don't find that terribly useful for us. It's useful to do it once, like you have done today--it's useful, and I thank both sides for doing this--but afterwards it should be more active, and frankly we should ask questions. What we had in mind is something more like we have

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certain questions. We start with, say, a small

question for the U.S., and we have the answer, and then we ask for your comments, possibly a little reply or clarification. When I see that the question is understood, I would tell you, and then we go to another question and so on. Not like a long list of questions where you can carve out questions which would fall under your jurisdiction, if I may say so, or something you would like to answer more than another member of the team.

So, we may jump from a topic to another, so it's not very easy to say tomorrow we are going to address a number of questions but not those which you would be the one answering. So, maybe we can just work on the time frame which accommodates your personal needs, and we certainly sympathize with whatever needs you have and use the time effectively.

So, maybe what I would like to do, frankly, if we could have at the same time the reply and surreply and the answer to the existing questions in the morning, and there again you would

make your presentation, then we start asking questions in an interactive way, and then we break altogether, unless Canfor wants to proceed without you, Mr. Howse, we could do that, and then resume the following morning. But in that case, for sure we would need the following morning, at least the morning--not tomorrow, but the day after tomorrow.

MR. LANDRY: May I address that?
PRESIDENT GAILLARD: Please.
MR. LANDRY: From the claimant's perspective--and I apologize for the U.S. in not being able to have this discussion off the record to be able to deal with that, but we have no difficulty with that concept, to finish the reply and surreply, which we would expect is not that long, and to the questions that you have dealt with today by the end of tomorrow morning, and then we would have no difficulty breaking until Thursday morning and dealing with the balance of your questions so Professor Howse could be available on Thursday morning.
PRESIDENT GAILLARD: Would that be all

right on the U.S. side? Of course, I must also state that although we sympathize with your personal needs, we also had reserved three days and the parties have probably made arrangements to that effect. I mean, having that in mind.
Mr. Clodfelter.
MR. CLODFELTER: Mr. President, if we could have a few minutes off the record to speak with counsel on the matter.
PRESIDENT GAILLARD: That's fine. Why don't we break for five minutes. Tell us when you are ready to resume.
(Brief recess.)

PRESIDENT GAILLARD: I go back to the record for a second for everybody's concern, including people in the other room--if anyone is still there--tomorrow we have decided to resume at 9:30. We will hear the reply of the U.S., and then the surreply of Canfor, and then we will have a series of questions and answers during the course of the day and, if need be, the following morning. And if need be, we will give you some time to

answer in writing. If there are specific questions which emerge which need further elaboration, we will see when we get there.

Thank you very much. The hearing is adjourned for the day, and we meet tomorrow at 9:30. Thank you.

(Whereupon, at 6:42 p.m., the hearing was adjourned until 9:30 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