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

January 11, 2006

The World Bank
1818 H Street, N.W.
MC Building
Conference Room 13-121
Washington, D.C.

The hearing in the above-entitled matter came on, pursuant to Notice, at 9:40 a.m., before:

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PROFESSOR ARMAND DE MESTRAL

MR. DAVIS R. ROBINSON

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1 P R O C E E D I N G S

09:27:40 2 PRESIDENT VAN DEN BERG: Then I open the
09:42:01 3 hearing in the NAFTA Article 26 proceedings in the
09:42:06 4 case of Canfor versus United States.
09:42:19 5 I think there is no need to introduce
09:42:21 6 each other again. I think we have done that at the
09:42:25 7 consolidation hearing. I understand that all those
09:42:30 8 appearing for the parties are entered into the
09:42:32 9 record in the transcript. Cathy, that is correct?
09:42:37 10 Then I may welcome the representatives of,
09:42:41 11 I think Canada just arrived, but I see Mr. Behar of
09:42:46 12 Mexico. Welcome.
09:42:52 13 The schedule as agreed at the prehearing
09:42:55 14 conference on Monday night is that we will have an
09:42:59 15 opening statement first by the respondent of
09:43:02 16 approximately two hours, and that is followed by an
09:43:05 17 opening statement by the claimants of approximately
09:43:08 18 two and a half hours, and then we have closing
09:43:11 19 statements first by the respondent, I think more or
09:43:16 20 less the same time, for the closing statements.

09:43:20 21 What do you anticipate, in timing?
09:43:30 22 MR. CLODFELTER: We will have to wait and

09:43:31 1 see, of course, how the discussion ensues. I
09:43:35 2 assume you mean closing after the questioning
09:43:37 3 period. It could be as long, but we doubt it.
09:43:43 4 PRESIDENT VAN DEN BERG: Mr. Landry and
09:43:44 5 Mr. Mitchell, same for you?
09:43:48 6 MR. LANDRY: I suspect the closing
09:43:50 7 statement will be shorter.
09:43:52 8 PRESIDENT VAN DEN BERG: Talking for the
09:43:52 9 claimants, Mr. Landry and Mr. Mitchell, the
09:43:56 10 Tribunal assumes, if you address the Tribunal, that
09:43:59 11 you talk both on behalf of Canfor and Terminal,
09:44:03 12 unless you clearly indicate that you talk for only
09:44:06 13 one of them.
09:44:08 14 MR. LANDRY: That is agreeable.
09:44:17 15 PRESIDENT VAN DEN BERG: As requested by
09:44:18 16 the parties at the prehearing, the Tribunal has
09:44:22 17 sent you last night a tentative list of questions.
09:44:27 18 The Tribunal would like to add, it was somewhat
09:44:31 19 hesitant in sending this list. Having been counsel
09:44:36 20 in cases myself, I know what it is on the eve of
09:44:39 21 trial to receive your questions. That is not very
09:44:43 22 conducive to your counsel's night of sleep. Let me

09:44:53 1 add, it cost us a night of sleep to draft the
09:44:58 2 questions. We thought it was better to give you
09:45:02 3 guidance, where the Tribunal is with these
09:45:06 4 questions, and also that you could emphasize more
5 certain points in your presentations and
09:45:17 6 deemphasize other points in your presentations.

09:45:18 7   The list of questions is tentative. As
09:45:21 8   you may have seen, some questions are probably not
09:45:24 9   on the proper heading. Other questions are
09:45:26 10   overlapping. And on top of that there may be more
09:45:31 11   questions by the Tribunal in the course of the
09:45:34 12   hearing. We will probably update this list of
09:45:37 13   questions for future reference, about which I will
09:45:43 14   deal shortly.
09:45:44 15   Now, how to deal with the questions.
09:45:46 16   What we suggest is you address them, to the extent
09:45:48 17   you can do it, in your opening statements and your
09:45:51 18   closing statements, and if you do so, could you
09:45:54 19   please identify for the record which number of the
09:45:58 20   questions you are talking about? Because that is
09:46:00 21   easy for reference later, if you can find it back
09:46:05 22   on the record.

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09:46:07 1   Then there is the question whether we
09:46:09 2   should have in between the two the session as
09:46:13 3   anticipated by the Tribunal of a Q&A going to these
09:46:20 4   questions seriatim, and the Tribunal believes
09:46:25 5   another solution may be better, may do more justice
09:46:30 6   to the due process rights of the parties, due to
09:46:33 7   the large number of questions, and we are aware
09:46:37 8   that these questions may require research, and in
09:46:40 9   this respect the Tribunal would like to propose to
09:46:44 10   take up Section 11 of Order No. 1. It deals with
09:46:47 11   the post-hearing briefs.
09:46:50 12   What the Tribunal has in mind is that the
09:46:53 13   parties submit a post-hearing brief simultaneously
09:46:59 14   and a short while after also simultaneously reply

09:47:05 15   briefs. It is my experience with post-hearing
09:47:10 16   briefs, almost always a party says, wait a moment,
09:47:13 17   there is a new point you raise, and I would like to
09:47:17 18   answer that. So I order also reply briefs.
09:47:21 19   Now the question is, of course, about,
09:47:23 20   whether (A) that is agreeable to the parties to do
09:47:26 21   it that way, and (B) what periods of time. Now,
09:47:31 22   the periods of time, the Tribunal suggests to leave
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09:47:35 1   that to consultation between the parties, what
09:47:37 2   suits them best, because there is also one
09:47:40 3   additional factor, the possible 1128 submissions by
09:47:43 4   the governments.
09:47:47 5   Talking about that, Mr. Behar, I see you
09:47:50 6   for the government of Mexico, does Mexico intend to
09:47:54 7   make an 1128 submission?
09:48:08 8   MR. BEHAR: Thank you, Mr. President.
09:48:10 9   Mexico would like to reserve its right after the
09:48:13 10   hearing so we can consult with our authorities and
09:48:17 11   see whether Mexico will submit. May I propose
09:48:21 12   probably we can have one week to make consultations
09:48:25 13   in Mexico and reply to the Tribunal and the parties
09:48:29 14   whether Mexico will submit.
09:48:34 15   PRESIDENT VAN DEN BERG: Have you seen a
09:48:35 16   copy of Procedural Order No. 1 in this case?
09:48:39 17   MR. BEHAR: No, I haven't seen it.
09:48:42 18   PRESIDENT VAN DEN BERG: I think the
09:48:42 19   government of the United States -- I have to be
09:48:45 20   careful what is an obligation in this case -- has
09:48:49 21   some form of obligation to copy you in on it.
09:48:53 22   Anyway, let me tell you what Order No. 1
11

09:48:56 1 says under 12, section 12(1), the governments of
09:49:01 2 Canada and Mexico may make submissions to the
09:49:06 3 Arbitral Tribunal on a question of interpretation
09:49:08 4 of the NAFTA in a manner and a time to be
09:49:09 5 determined by the Tribunal, the governments, and
6 the parties to those proceedings.
09:49:12 7 And then 12(2) says, with respect to the
09:49:15 8 preliminary questions, the Tribunal will invite the
09:49:19 9 governments of Mexico and Canada to make
09:49:22 10 submissions one week after the hearing. You are
09:49:25 11 referring to one week of advisement. If you think
09:49:28 12 that is too short for you, please let us know, but
09:49:32 13 we would like, nonetheless, to proceed with due
09:49:36 14 dispatch in this case.
09:49:38 15 MR. BEHAR: Certainly, Mr. President. If
09:49:40 16 we could have a copy of the questions, I can send
09:49:44 17 them back to Mexico and start with the process
09:49:47 18 right away and have either response to the
09:49:50 19 questions or comments to the questions or final
09:49:52 20 decision of the government not to submit any
09:49:55 21 comment on that point.
09:49:57 22 Thank you.

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09:50:00 1 MR. CLODFELTER: Representative of
09:50:00 2 Canada?
09:50:05 3 MR. COCHLIN: Canada simply reserves its
09:50:07 4 right to submit an 1128 submission, and if it does,
09:50:11 5 it will do so within the time lines prescribed by
09:50:15 6 the panel.
09:50:16 7 PRESIDENT VAN DEN BERG: You are aware of
09:50:16 8 the provisions of the order? You have it in your

09:50:21 9 hand. Perhaps you can share it with your colleague
09:50:23 10 of Mexico.
09:50:25 11 Simply for scheduling purposes, you can
09:50:27 12 take this into account? Because in the
09:50:29 13 post-hearing brief, the parties can also deal with
09:50:32 14 the submissions, if any, by Canada and Mexico.
09:50:37 15 Then what the Tribunal has in mind is that in the
09:50:40 16 post-hearing briefs, what the parties could do, of
09:50:43 17 course, is make the presentation as they wish in
09:50:47 18 relation to the matters that have arisen in --
09:50:50 19 during the hearing, but in addition, and the
09:50:56 20 Tribunal really appreciates, if you could summarize
09:50:59 21 your answers to the questions, and you can do that
09:51:02 22 either by simple reference to the transcript
13

09:51:04 1 because if you have already answered the question,
09:51:07 2 and if a question was put on hold by a party
09:51:12 3 because it required further reflection or research,
09:51:15 4 then the question can be answered at that point in
09:51:19 5 time.
09:51:21 6 That would dispense, as such, the Q&A
09:51:25 7 period at the hearing, so we would have only
09:51:28 8 opening statements and closing statements, although
09:51:31 9 the Tribunal, as you have noticed also from the
09:51:35 10 consolidation order hearing, is a rather active
09:51:38 11 tribunal in asking questions.
09:51:41 12 But first of all, the questions of the
09:51:44 13 Tribunal to the three parties is, is this proposal
09:51:49 14 agreeable? Mr. Landry and Mr. Mitchell, and
09:51:53 15 perhaps you would like to consult with each other.
09:52:22 16 (Pause.)
09:52:23 17 PRESIDENT VAN DEN BERG: If I may, for

09:52:25 18   greater certainty and clarity, I think that is the
09:52:28 19   expression NAFTA uses, I am told by Mr. David
09:52:33 20   Robinson that there might be confusion, that the
09:52:36 21   answering of the questions is now postponed to the
09:52:39 22   post-hearing briefs. I would like to take away

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09:52:42 1   this confusion, that is by no means the case, but
09:52:44 2   we would like to have the answers already at the
09:52:47 3   hearing. It is only for those questions you really
09:52:50 4   do not know the answer at the hearing, that you can
09:52:54 5   answer them in the post-hearing briefs. But the
09:52:55 6   principle is that the answers are to be given here
09:53:00 7   during the hearing.
09:53:01 8   I hope this clarifies the situation.
09:53:08 9   MR. CLODFELTER: A suggestion, perhaps.
09:53:10 10   That is certainly satisfactory. I guess we
09:53:13 11   certainly had anticipated a separate question-and-
09:53:15 12   answer period, and we take, I think it is a wise
09:53:18 13   suggestion, that most of that be now dedicated to
09:53:22 14   the post-hearing briefs, and we are willing to do
09:53:25 15   that.
09:53:26 16   We would ask a couple things. One is
09:53:26 17   that to the extent that the Tribunal doesn't feel
09:53:30 18   that our opening presentation addressed questions
09:53:32 19   that they would really like to hear answers to now,
09:53:37 20   that at least a portion of the hearing be devoted
09:53:39 21   to a question-and-answer period for those key
09:53:42 22   questions, at least.

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09:53:43 1   And secondly, perhaps at the end of the
09:53:45 2   hearing, if it might not be possible to pare the

09:53:49 3   number of questions down to those which the
09:53:52 4   Tribunal feels they need further information on
09:53:55 5   only because we -- in the Canfor hearing and in
09:54:00 6   this hearing, we will have answered many of them,
09:54:03 7   and it might result in a surprisingly voluminous
09:54:08 8   post-hearing submission otherwise, maybe more than
09:54:10 9   the Tribunal was anticipating. So we would offer
09:54:14 10   those suggestions.
09:54:43 11   MR. LANDRY: I think the suggestion of
09:54:43 12   the United States makes some sense. The only thing
09:54:47 13   I would note, and maybe this is just a nuance on
09:54:50 14   what the United States has suggested, although many
09:54:54 15   of the questions are answered somewhere in the
09:54:56 16   record of the Canfor proceedings, I think it would
09:54:59 17   be helpful for each of the questions in the
09:55:01 18   post-hearing briefings to indicate what that answer
09:55:07 19   is, where it appears in the record. It might be
09:55:08 20   that there is a summary and a reference, but I
09:55:10 21   think that given that the Tribunal has obviously
09:55:15 22   had these inquiries, we think it would probably be
16

09:55:18 1   appropriate to respond to each one of them again,
09:55:21 2   apropo what, you, Mr. President said, either in
09:55:26 3   reference to the transcript already or the other
09:55:30 4   transcript or otherwise.
09:55:31 5   PRESIDENT VAN DEN BERG: That is a good
09:55:32 6   point, not only the transcript, but also to the
09:55:35 7   submissions made by the parties -- to the
09:55:38 8   transcript of the present hearing, the transcript
09:55:41 9   of the Canfor for hearing and the submissions made
09:55:43 10   by the parties in writing.
09:55:46 11   MR. LANDRY: And I think in doing that,

09:55:47 12 that will provide some structure to the questions
09:55:50 13 that have been asked.
09:55:53 14 PRESIDENT VAN DEN BERG: Is that last
09:55:55 15 point also agreeable to the United States?
09:56:19 16 MR. CLODFELTER: That will be
09:56:19 17 satisfactory, in the hopes that we all end up with
09:56:22 18 a narrowed list.
09:56:30 19 PRESIDENT VAN DEN BERG: There will be a
09:56:31 20 narrowed list and also an updated list, but in the
09:56:36 21 end you may have the same volume. Let's see how we
09:56:41 22 go along. The Tribunal is grateful to the parties.
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09:56:44 1 The Tribunal believes this is the most efficient
09:56:48 2 way of dealing with this type of matters.
09:56:56 3 There is one other matter that concerns
09:56:58 4 the legislative history. Two members of the
09:57:04 5 Tribunal have only received last night the boxes
09:57:07 6 with the materials in which were contained the
09:57:16 7 legislative history as produced by the United
09:57:21 8 States in the Canfor proceedings.
09:57:23 9 Obviously the Tribunal here has not had
09:57:26 10 the occasion to go through these materials and we
09:57:28 11 would like to invite the parties, each of the
09:57:31 12 parties, to walk through the Tribunal through these
09:57:36 13 materials, and each side has the possibility to do
09:57:39 14 that and to flag almost literally which documents
09:57:44 15 the party believes are relevant for the preliminary
09:57:48 16 question. That is simply an educational session,
09:57:51 17 if I may call it that way.
09:57:54 18 Now, I don't know when you would like to
09:57:56 19 do that, in a separate round or as part of your

09:58:02 20 opening statement.
09:58:08 21 MR. LANDRY: From our perspective,
09:58:10 22 Mr. President, we will be dealing with what is in
18

09:58:13 1 the negotiating history in a general sense and
09:58:16 2 there might be an odd reference to the material
09:58:19 3 that was in there similar to what was done in
09:58:22 4 Canfor, in the way you are presenting it,
09:58:25 5 Mr. President, date by date, document by document.
09:58:28 6 That is not something that we are in a position to
09:58:31 7 provide today, but would be able to at some point
09:58:34 8 in time to provide.
09:58:38 9 PRESIDENT VAN DEN BERG: When you make a
09:58:39 10 reference, could you bear with the Tribunal, could
09:58:42 11 you say, could you please take a binder and take us
09:58:45 12 to the document? We have read a lot of things
09:58:49 13 here, but --
09:58:51 14 MR. LANDRY: For your information, a lot
09:58:53 15 of those documents are referenced in the memorials
09:58:57 16 and therefore they are in the authorities,
09:58:59 17 effectively those extracts, but I am sure whoever
09:59:04 18 received it understands, we are talking about a
09:59:07 19 tremendous amount of materials and the reference we
09:59:10 20 make in our memorials is relatively modest.
09:59:16 21 MS. MENAKER: Mr. President, if I may,
09:59:18 22 first, I just want to ask an initial question.
19

09:59:21 1 We are quite concerned because you will
09:59:23 2 recall at our earlier hearing by teleconference
09:59:28 3 when we were talking about the United States's
09:59:32 4 submission that we made in late December and we
09:59:34 5 indicated we would not be copying Canfor and

09:59:38 6   Terminal on all of the papers that we submitted to
          7   the Tribunal. They indicated that was quite all
          8   right, but of course we should inform them of what
09:59:43 9   we were submitting to the Tribunal, and we did that
09:59:44 10   in a cover note very expressly stating what we were
09:59:48 11   giving to the Tribunal and ICSID and copying them
09:59:51 12   on things they did not have, but indicating
09:59:55 13   precisely what they were not getting.
09:59:57 14   On January 6, all we received was this
10:00:00 15   five-page letter by e-mail with no indication that
10:00:03 16   anything was submitted to the Tribunal, and I
10:00:05 17   mentioned this on Monday night's conference call
         18   and was told we would receive some indication of
10:00:09 19   the materials that were sent to the Tribunal.
10:00:09 20   Now, presumably -- I have to presume they
10:00:13 21   were just materials that Canfor has filed in the
10:00:17 22   underlying 1120 proceeding, but we still have no

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10:00:20 1   indication of what was sent to the Tribunal, and we
10:00:22 2   really would like that information.
10:00:25 3   PRESIDENT VAN DEN BERG: That is one
10:00:26 4   question. But on the specific question of walking
10:00:28 5   through the materials, how does your side intend to
10:00:33 6   do that, as part of the presentation or you would
10:00:37 7   like a separate round on that?
10:00:40 8   MS. MENAKER: We could do a separate
10:00:41 9   round. It has been our contention from the
10:00:45 10   beginning of these proceedings that the traveaux
10:00:47 11   was not particularly enlightening and first said
10:00:52 12   there was no reason to resort to the traveaux under
         13   principles of treaty interpretation pursuant to the

14 Vienna Convention.
10:00:53 15 It was of course Canfor that sought the
10:00:55 16 traveaux, and then they did not seek to use it
10:00:59 17 affirmatively in the Article 1120 proceeding. If
10:01:02 18 you look through the record, it was only the
10:01:06 19 Tribunal that asked questions about that.
10:01:08 20 As far as we can tell, the record stands,
10:01:11 21 Canfor's position is the traveaux is relevant only
10:01:14 22 in that it does not shed any light on this issue,
21

10:01:18 1 but we are happy to comment on that more. It was
10:01:21 2 not a point that we were really making
10:01:23 3 affirmatively, but in response to a question we can
10:01:26 4 certainly elaborate.
10:01:29 5 PRESIDENT VAN DEN BERG: I recall reading
10:01:30 6 the transcript in the Canfor hearing, after
10:01:32 7 numerous pages where it is walked through, finally
10:01:35 8 one of the arbitrators concluded at page 570, if my
10:01:40 9 memory serves me right, that there was not much
10:01:44 10 light to shed on the question.
10:01:48 11 MS. MENAKER: That is my recollection as
10:01:49 12 well.
10:01:51 13 PRESIDENT VAN DEN BERG: Perhaps that can
10:01:51 14 be done.
10:01:52 15 The question here is simply procedural,
10:01:56 16 mechanical, how will it be presented? Will it be
10:01:59 17 presented by a separate little round by the parties
10:02:03 18 or integrated in your opening statement?
10:02:05 19 And I understand from you, Mr. Landry,
10:02:08 20 you would like to integrate it into your opening
10:02:12 21 statement.
10:02:14 22 MR. LANDRY: Only to a small extent in

1 terms of the actual history itself, similar to what
2 happened in the Canfor tribunal in going through
10:02:17 3 it. We would like to do it as a separate.
10:02:19 4 PRESIDENT VAN DEN BERG: What I suggest
10:02:22 5 then -- what I understand is the United States
10:02:25 6 would do it separately. First we will have the
10:02:28 7 opening statements, both sides, and then we have
10:02:30 8 the little round of walking through the materials
10:02:33 9 of the legislative history. Is that agreeable?
10:02:37 10 MS. MENAKER: That is fine with us.
10:03:00 11 PRESIDENT VAN DEN BERG: Then,
10:03:00 12 Mr. Landry, the question by Ms. Menaker is what is
10:03:04 13 in the box?
10:03:08 14 MR. LANDRY: Mr. President, firstly, so
10:03:10 15 the context can be put in place, the documents that
10:03:13 16 actually were sent to the Tribunal which are
10:03:16 17 specifically referenced in our January 6, 2006,
10:03:19 18 letter are the traveaux prepared by and produced by
10:03:22 19 the United States as the result of an order of the
10:03:25 20 Canfor Tribunal, and it was produced to the
10:03:30 21 Tribunal and reviewed by the Tribunal prior to the
10:03:34 22 hearing, as you can see, from the transcript, and

10:03:39 1 that documentation is referenced in footnote 1 to
10:03:43 2 our January 6 letter, and I apologize to the United
10:03:47 3 States if there was confusion in that regard, but
10:03:49 4 they are simply the documents that were produced by
10:03:51 5 the United States as a result of that original
10:03:55 6 Canfor order.
10:03:57 7 PRESIDENT VAN DEN BERG: I think what

10:03:58 8   Ms. Menaker is looking for a pecking list of what
10:04:02 9   is in the box, because that is what the United
10:04:05 10   States did at the end of their summary submission.
10:04:07 11   They said we produce here, and then came a list,
10:04:11 12   and I think they are simply looking for a list. Is
10:04:15 13   that correct, Ms. Menaker?
10:04:16 14   MS. MENAKER: Yes. That is sufficient,
10:04:17 15   if all you produced was the traveaux we produced,
10:04:20 16   that is a sufficient description. It was unclear
10:04:23 17   from footnote number 1 if that is what was produced
10:04:27 18   or if there was anything else produced as well.
10:04:32 19   MR. LANDRY: I am not aware -- and I
10:04:34 20   could be corrected -- that there was ever a formal
10:04:35 21   list of all of the documents that were produced by
10:04:38 22   the United States.
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10:04:42 1   PRESIDENT VAN DEN BERG: The end of the
10:04:43 2   letter set out, and we herewith submit, and then a
10:04:49 3   long list.
10:04:52 4   There is one additional point about the %
10:04:56 5   freeware, because we have received a CD-ROM, and I
10:05:03 6   commend you for putting this all on CD-ROM, and it
10:05:07 7   includes the traveaux. I don't know if the United
10:05:10 8   States received the CD-ROM.
10:05:11 9   MS. MENAKER: No, we have not.
10:05:13 10   PRESIDENT VAN DEN BERG: That is another
10:05:15 11   thing which came out of the box.
10:05:22 12   Could you please consult each other?
10:07:44 13   MR. LANDRY: I apologize if there was
10:07:45 14   some confusion between the parties. In fact, I
10:07:48 15   think we have now sorted out with the United
10:07:50 16   States, we will provide them with a copy of the

10:07:53 17   letter that was sent to ICSID enclosing all of the
10:07:56 18   various things that were enclosed on the January 5
10:08:01 19   timeframe, and as I indicated to the United States,
10:08:05 20   we did not provide the Tribunal with anything that
10:08:08 21   the United States had not already had.
10:08:12 22   PRESIDENT VAN DEN BERG: I think that was
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10:08:12 1   not the point. The point was a little bit of
10:08:15 2   confusion because what everybody wanted to avoid
10:08:18 3   was cutting more trees than is necessary and
10:08:21 4   paperwork, so that you say, we supply only the
10:08:26 5   Tribunal, but then there was some confusion there,
10:08:29 6   but I am happy to do that as a result of the
10:08:32 7   agreement between the parties.
10:08:34 8   There is indeed a letter which we
10:08:36 9   received on the fifth of January 2006. I wonder
10:08:40 10   whether that has been copied to the United States?
10:08:45 11   MR. LANDRY: That is what we were
10:08:46 12   discussing, and we were going to check to see
10:08:49 13   whether that letter was actually copied to the
10:08:52 14   United States, and my colleague is going to look
10:08:54 15   into that.
10:08:56 16   PRESIDENT VAN DEN BERG: I hand them a
10:08:59 17   copy of the letter.
10:09:17 18   You may keep a copy.
10:09:23 19   MR. LANDRY: Mr. President, just for the
10:09:24 20   record, so there is no confusion, the CD-ROM does
10:09:28 21   not contain the full traveaux.
10:09:31 22   PRESIDENT VAN DEN BERG: Probably not.
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10:09:32 1   That is the reason I would like to have the walk-

10:09:35 2 through, because I saw a number of the traveaux on
10:09:39 3 the CD-ROM, in the timeframe I could check the
10:09:42 4 CD-ROM.
10:09:58 5 Mr. Clodfelter, please proceed.
10:10:02 6 MR. CLODFELTER: It is our understanding
10:10:03 7 that we will receive a copy -- this letter has a
10:10:10 8 copy of all -- and I understand we were going to
10:10:13 9 get a copy of the CD-ROM that was provided to the
10:10:18 10 Tribunal as well.
10:10:19 11 MR. LANDRY: As soon as we can do that,
10:10:21 12 we will.
10:10:22 13 PRESIDENT VAN DEN BERG: I can give you
10:10:23 14 my CD-ROM because I have already downloaded it onto
10:10:28 15 my laptop, because I would like to have the parties
10:10:33 16 have the same platform of material before them.
10:10:37 17 MR. CLODFELTER: That is fine, and with
10:10:39 18 that understanding, we will also look to a separate
10:10:42 19 period to do the walk-through in that case once we
10:10:46 20 have received exactly what was cited.
10:10:51 21 PRESIDENT VAN DEN BERG: I hand off my
10:10:52 22 copy of the Canfor-Terminal CD-ROM.
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10:11:07 1 The Tribunal understands the
10:11:09 2 circumstances under which this all has arisen. We
10:11:13 3 were in a Christmas period and the period was
10:11:15 4 somewhat short, and we appreciate the cooperation
10:11:21 5 of the parties to resolve with these logistical
10:11:26 6 situations.
10:11:27 7 That concludes the preliminary
10:11:30 8 considerations of the Tribunal. I look to the
10:11:31 9 parties, is there anything else of an
10:11:35 10 administrative nature that you would like to add at

10:11:36 11 this stage. Mr. Landry?

10:11:39 12 MR. LANDRY: None from the claimants.

10:11:43 13 PRESIDENT VAN DEN BERG: Mr. Bettauer?

10:11:45 14 MR. BETTAUER: No.

10:11:46 15 PRESIDENT VAN DEN BERG: I think we can

10:11:47 16 continue then with the opening statements, first by

10:11:50 17 the United States.

10:11:52 18 Mr. Bettauer, please proceed.

19 OPENING STATEMENT BY RESPONDENT

10:11:55 20 MR. BETTAUER: Thank you, Mr. President,

10:11:56 21 and members of the Tribunal.

10:11:58 22 As you know from our pleadings and the

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10:12:00 1 transcript of the prior hearing, the United States

10:12:03 2 has a number of defenses that are dispositive of

10:12:06 3 these consolidated claims. Only one of them is

10:12:10 4 before you in this hearing. That one defense

10:12:13 5 presents a central, extremely important issue. I

10:12:17 6 will begin the U.S. presentation today with a very

10:12:21 7 brief summary of our position, and then I will

10:12:24 8 review for you how the U.S. intends to structure

10:12:27 9 its presentation.

10:12:29 10 What is at issue in this hearing is

10:12:33 11 whether this tribunal or any tribunal established

10:12:37 12 under Chapter 11 of the NAFTA has jurisdiction to

10:12:40 13 entertain claims challenging a NAFTA party's

10:12:43 14 determinations under its antidumping and

10:12:46 15 countervailing duty law. The United States

10:12:50 16 contends that such jurisdiction does not exist.

10:12:55 17 Our arguments today will be familiar to

10:12:58 18 the Tribunal, since you have now reviewed the U.S.

10:13:01 19 presentations and briefs in the Canfor and Tembec
10:13:07 20 cases. Our arguments remain the same because they
10:13:12 21 are sound and they demonstrate why no Chapter 11
10:13:16 22 tribunal has jurisdiction over these claims.
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10:13:20 1 Today we will again show that the United
10:13:23 2 States did not consent to arbitrate challenges to
10:13:26 3 decisions in antidumping and countervailing duty
10:13:29 4 cases under the investment chapter of the NAFTA.
10:13:32 5 The NAFTA parties excluded antidumping
10:13:36 6 and countervailing duty matters from disposition
10:13:39 7 under Chapter 11 by operation of Article 1901(3).
10:13:46 8 Article 1901(3) provides, as you know, except for
10:13:55 9 Article 2203, entry into force, no provision of any
10:13:59 10 other chapter of this agreement shall be construed
10:14:03 11 as imposing obligations on the party with respect
10:14:06 12 to the party's antidumping law or countervailing
10:14:11 13 duty law, and I close the quotation.
10:14:14 14 The ordinary meaning of the terms of
10:14:18 15 Article 1901(3) in their context and in light --
10:14:25 16 and the object and purpose of NAFTA, clearly
10:14:27 17 prevents tribunals established under Chapter 11
10:14:32 18 from reviewing determinations under U.S.
10:14:35 19 antidumping and countervailing duty law. Doing so
10:14:40 20 would violate the prohibitions of Article 1901(3)
10:14:45 21 in two ways:
10:14:48 22 First, the assertion of jurisdiction by a
30

10:14:50 1 Chapter 11 tribunal, by obligating a NAFTA party to
10:14:55 2 arbitrate disputes with respect to its antidumping
10:15:00 3 and countervailing duty law would constitute the
10:15:03 4 imposition of an obligation on the NAFTA party with

10:15:07 5   respect to that law.

10:15:10 6   And second, any finding that the

10:15:13 7   operation of a NAFTA party's antidumping and

10:15:18 8   countervailing duty law violated one of the

10:15:21 9   substantive obligations of Chapter 11 would

10:15:24 10   constitute the imposition of an obligation on that

10:15:29 11   NAFTA party with respect to that law.

10:15:35 12   The softwood lumber dispute between

10:15:38 13   Canada and the United States has a long history.

10:15:42 14   The United States has already been burdened with

10:15:45 15   answering challenges to its softwood lumber

10:15:48 16   determinations in multiple other fora including

10:15:51 17   before the WTO and Chapter 19 panels. Imposing the

10:15:56 18   additional burden on the United States of Chapter

10:15:59 19   11 arbitration would be inconsistent with Article

10:16:07 20   1901(3).

10:16:07 21   I would also note that the United States

10:16:10 22   has already been unfairly burdened due to the

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10:16:12 1   claimant's strident opposition to consolidation and

10:16:17 2   lack of cooperation in allowing this tribunal to

10:16:20 3   address its jurisdictional objection. It is past

10:16:25 4   time for the burden of defending these

10:16:27 5   impermissible claims under Chapter 11 to be lifted.

10:16:33 6   Now, the claimants here acknowledge, as

10:16:36 7   they must, that their claims arise out of U.S.

10:16:40 8   antidumping and countervailing duty law, but they

10:16:44 9   assert that their claims can and should be

10:16:47 10   scrutinized by a Chapter 11 tribunal applying

10:16:51 11   substantive international law standards.

10:16:55 12   However, the context of Article 1901(3)

10:17:00 13   as well as NAFTA's object and purpose confirm that
10:17:05 14   challenges such as these are reserved by NAFTA for
10:17:09 15   exclusive review by Chapter 19 panels which must
10:17:14 16   under that chapter's provisions apply domestic law.
10:17:21 17   The NAFTA parties in establishing the
10:17:24 18   Chapter 19 mechanism did not intend to provide for
10:17:28 19   investor-state arbitration claims that arise out of
10:17:31 20   a party's application of antidumping or
10:17:34 21   countervailing duty law.
10:17:36 22   We therefore request that the Tribunal

10:17:39 1   dismiss claimant's claims for lack of jurisdiction
10:17:44 2   and award full costs to the United States.
10:17:49 3   Now, let me indicate how we will proceed
10:17:52 4   in our presentation this morning. Each of my
10:17:56 5   colleagues will address these points in a bit more
10:17:59 6   detail.
10:18:01 7   Mr. Mark Clodfelter will provide the
10:18:04 8   factual background of the jurisdictional issues
10:18:07 9   before you. Andrea Menaker will demonstrate that
10:18:13 10   the ordinary meaning of Article 1901(3) deprives
10:18:19 11   this tribunal of jurisdiction over the claimant's
10:18:23 12   claims. Mark McNeill will explain how Article
10:18:28 13   1901(3)'s context and the object and purpose of the
10:18:32 14   treaty confirm this result. I will briefly
10:18:37 15   conclude the U.S. first-round presentation.
10:18:42 16   Mr. President, and members of the
10:18:44 17   Tribunal, I thank you for your attention. I now
10:18:47 18   invite the Tribunal to call on Mr. Clodfelter.
10:18:51 19   PRESIDENT VAN DEN BERG: Thank you, Mr.
10:18:53 20   Bettauer.
10:18:55 21   I think, Mr. Clodfelter, it is your turn.

10:18:59 22 MR. CLODFELTER: Thank you. Before we
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10:19:01 1 get into our legal arguments, I would like to go
10:19:04 2 over some of the factual background relevant to the
10:19:06 3 jurisdictional issue.
10:19:08 4 As a preliminary matter, it would be
10:19:09 5 appropriate here to set forth a summary of our
10:19:14 6 views on how the factual allegations in the case
10:19:17 7 relate to your consideration of the jurisdictional
10:19:20 8 objection at this preliminary phase of the case.
10:19:24 9 We can elaborate during a subsequent, even if
10:19:31 10 shortened question-and-answer period, but this will
10:19:35 11 be an initial answer to the questions you posed in
10:19:38 12 section B of the questions, so it would be
10:19:41 13 questions 6, 7, 8, 9 and 10.
10:19:47 14 It is the United States's contention that
10:19:50 15 the task of a tribunal in resolving a
10:19:54 16 jurisdictional objection is to make a definitive
10:19:57 17 interpretation of the jurisdictional provision at
10:20:00 18 issue and then to consider whether the facts as
10:20:05 19 credibly alleged fit within the Tribunal's
10:20:09 20 jurisdiction so interpreted.
10:20:11 21 Even though the issue is taken up
10:20:13 22 preliminarily, merely arguable interpretations
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10:20:18 1 cannot be accepted. Thus, it is incumbent upon you
10:20:24 2 here to interpret Article 1901(3) at this stage and
10:20:28 3 to determine whether the facts credibly alleged by
10:20:32 4 the claimants fall within the subject matter
10:20:34 5 excluded from consideration by that provision.
10:20:40 6 We believe this approach is consistent

10:20:43 7   with that set forth in the November 22, 2002, award
10:20:46 8   in the UPS case. There the Tribunal accepted that
10:20:52 9   the party's formulation, that the facts alleged
10:20:56 10   must "be capable of constituting a violation" of
10:21:00 11   the treaty is no different than the formulation
10:21:05 12   used by the ICJ in the oil platforms case, namely,
10:21:11 13   that the violations alleged must "fall within the
10:21:15 14   provisions of the treaty."
10:21:20 15   This was also the approach of the
10:21:22 16   Tribunal in the Methanex case and of Judge Koroma
10:21:27 17   in his separate opinion in the ICJ fisheries
10:21:30 18   jurisdiction case. This is also consistent with
10:21:34 19   the tasks set forth in Canada's April 2, 2002,
10:21:39 20   reply memorial in the UPS case in paragraphs 33 and
10:21:43 21   following, and in paragraph 89.
10:21:46 22   There, Canada relied on the ICJ's oil

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10:21:52 1   platforms case for the concept that merely
10:21:55 2   asserting that claims fall within provisions of a
10:21:58 3   treaty does not suffice, that is, a tribunal must
10:22:03 4   determine whether the facts as pled fall within the
10:22:07 5   jurisdictional provisions of the treaty and must
10:22:10 6   make a definite determination of what those
10:22:13 7   jurisdictional provisions mean in order to do so.
10:22:16 8   Finally, the United States also agrees
10:22:19 9   with the distinction made by Canada in that
10:22:23 10   submission between factual allegations which the
10:22:28 11   Tribunal should accept as true, and legal
10:22:30 12   conclusions which the Tribunal should not accept.
10:22:36 13   Thus, we believe that while you may
10:22:38 14   accept as true for purposes of the argument the
10:22:41 15   facts as alleged by the claimants, or at least as

10:22:46 16   credibly alleged by them, this does not mean that
10:22:49 17   you must accept the legal conclusions that the
10:22:52 18   claimants would have you draw on the basis of those
10:22:56 19   assumed facts.
10:22:56 20   Here, for example, it is not among the
10:22:58 21   facts to be assumed that the claimants have been
10:23:01 22   subject to arbitrary, discriminatory or abusive

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10:23:05 1   conduct that fail to meet the standards of Chapter
10:23:07 2   11 of NAFTA. The claimants may wish you to dwell
10:23:12 3   upon those proffered conclusions in hopes that they
10:23:14 4   will color your consideration of the quite separate
10:23:15 5   jurisdictional issue. But these are legal
10:23:17 6   conclusions and they go to the merits of the
10:23:19 7   claims. We, of course, strongly deny any such
10:23:22 8   conclusions, but I do not intend to address them
10:23:25 9   further here.
10:23:28 10   What I will do with the rest of my time
10:23:30 11   is to lay out certain other factual matters that
10:23:33 12   are important for the Tribunal's understanding of
10:23:36 13   the issue before you today. I will briefly cover
10:23:39 14   three areas:
10:23:41 15   First, I will describe the regime of U.S.
10:23:44 16   antidumping and countervailing duty law.
10:23:49 17   Second, I will discuss the Canada-U.S.
10:23:53 18   Free Trade Agreement or show how the solution
10:23:57 19   adopted in Chapter 19 of that agreement for the
10:24:00 20   resolution of disputes over the operation of
10:24:02 21   antidumping and countervailing duty law was carried
10:24:07 22   over wholesale into NAFTA's Chapter 19, and why,

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10:24:12 1 what differences there are between them were
10:24:15 2 adopted.
10:24:17 3 Third, I will mention the key factors
10:24:20 4 that emerge from the history of the underlying
10:24:23 5 dumping and subsidy disputes including the
10:24:26 6 antidumping and countervailing determinations made
10:24:29 7 with respect to those disputes and the proceedings
10:24:32 8 that have subsequently ensued with respect to those
10:24:35 9 disputes.
10:24:37 10 Let me begin with a simplified overview
10:24:40 11 of the administration of antidumping and
10:24:42 12 countervailing duty cases under U.S. law.
10:24:45 13 The claimants challenge antidumping and
10:24:49 14 countervailing duty determinations concerning
10:24:52 15 softwood lumber from Canada that were made by the
10:24:55 16 United States Department of Commerce and the United
10:24:58 17 States International Trade Commission, or ITC.
10:25:01 18 The Commerce Department is, of course, an
10:25:04 19 agency of the executive branch of the federal
10:25:07 20 government headed by a member of the president's
10:25:09 21 cabinet, and the ITC is an independent,
10:25:14 22 nonpartisan, quasi-judicial agency that was
38

10:25:18 1 established by Congress.
10:25:19 2 Under U.S. law, specifically the Tariff
10:25:22 3 Act of 1930, domestic industries may petition both
10:25:26 4 the Commerce Department and the ITC for relief from
10:25:31 5 unfairly low-priced, that is, dumped, imports and
10:25:36 6 from unfairly subsidized imports.
10:25:40 7 Following such a petition, the Commerce
10:25:43 8 Department and the ITC conduct parallel
10:25:46 9 investigations. The Commerce Department determines

10:25:48 10 whether dumping or subsidies exist, and if they do,
10:25:52 11 the margin of dumping and the amount of the
10:25:56 12 subsidy.
10:25:57 13 It is the job of the ITC to determine
10:26:01 14 whether the dumped or subsidized imports materially
10:26:05 15 injure or threaten to materially injure the U.S.
10:26:09 16 industry producing a like product. In both the
10:26:13 17 Commerce Department and the ITC -- if both the
10:26:17 18 Commerce Department and the ITC make affirmative
10:26:20 19 final determinations, an antidumping duty order or
10:26:26 20 a countervailing duty order would be imposed and,
10:26:29 21 Commerce will instruct the Bureau of Customs and
10:26:32 22 Border Protection to collect estimated antidumping

10:26:34 1 and countervailing duties in the form of cash
10:26:37 2 deposits to offset the dumping or subsidies.
10:26:43 3 Final determinations by Commerce and the
10:26:46 4 ITC are subject to review by means of appeal to the
10:26:50 5 U.S. Court of International Trade, or CIT, which is
10:26:54 6 a nine-judge national court established pursuant to
10:26:58 7 Article III of the U.S. Constitution.
10:27:02 8 Moreover, decisions of the CIT may be
10:27:05 9 further appealed to the Federal Circuit Court of
10:27:09 10 Appeals and by certiorari to the United States
10:27:14 11 Supreme Court. That in a nutshell is how U.S. a
10:27:25 12 AD/CVD works.
10:27:26 13 Now, Canada also has a system in place
14 for determining harm caused by dumping and
10:27:30 15 subsidies. And when Canada and the United States
10:27:33 16 were negotiating the Canada-U.S. Free Trade
10:27:36 17 Agreement that came into force in 1989, how

10:27:39 18   disputes relating to their respective AD/CVD law
10:27:46 19   should be handled was a significant issue. That is
10:27:49 20   the second area of background I would like to go
10:27:52 21   over briefly.
10:27:53 22   During the negotiations, Canada and the
40

10:27:56 1   United States sought to agree on a common set of
10:28:00 2   rules to govern disputes over dumping and
10:28:05 3   subsidies. They considered a number of approaches
10:28:08 4   over what substantive rules should govern. These
10:28:11 5   range from the possibility of abandoning the idea
10:28:14 6   of special duty mechanisms altogether in favor of
10:28:19 7   reliance on competition law, to the possibility of
10:28:23 8   substituting a common set of substantive rules to
10:28:27 9   govern for those existing in municipal law.
10:28:33 10   They were not, however, able to agree
10:28:35 11   upon such a common set of substantive rules.
10:28:39 12   Instead, they adopted an approach which left the
10:28:43 13   existing national mechanisms and the existing
10:28:48 14   national standards in place but gave each party the
10:28:53 15   option of having antidumping and countervailing
10:28:56 16   duty determinations reviewed by special ad hoc
10:29:02 17   binational panels instead of by their national
10:29:07 18   courts. The binational panels would decide such
10:29:13 19   challenges by applying the respective parties'
10:29:16 20   antidumping and countervailing duty law.
10:29:21 21   Accordingly, the Canada-U.S. Free Trade
10:29:25 22   Agreement required the United States to amend its
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10:29:27 1   laws to transfer exclusive jurisdiction for
10:29:30 2   reviewing final determinations from the U.S. Court
10:29:36 3   of International Trade to the binational panels

10:29:38 4 whenever a panel proceeding had been requested.
10:29:43 5 What is important for us here is the fact
10:29:46 6 that this binational panel mechanism set forth in
10:29:51 7 the Canada-U.S. Free Trade Agreement was carried
10:29:55 8 over wholesale into NAFTA Chapter 19 except on a
10:30:00 9 trilateral basis.
10:30:04 10 Much of NAFTA's Chapter 19, which is
10:30:06 11 entitled "Review and Dispute Settlement in
10:30:10 12 Antidumping and Countervailing Duty Matters,"
10:30:14 13 tracks the provisions of the CFTA's Chapter 19.
10:30:21 14 Like the CFTA, it establishes a special self-
10:30:26 15 contained dispute resolution mechanism for all
10:30:32 16 antidumping and countervailing duty matters
10:30:33 17 including a review of a NAFTA party's final
10:30:36 18 antidumping and countervailing duty determinations.
10:30:38 19 Like the CFTA, it substitutes the
10:30:42 20 five-member binational review panel mechanism for
10:30:46 21 judicial review of such determinations. Like the
10:30:50 22 CFTA, it provides that the binational panels must

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10:30:56 1 apply the domestic law of the parties including
10:30:59 2 domestic law standards of review. Like the CFTA
10:31:05 3 NAFTA Chapter 19, binational panels are authorized
10:31:09 4 to uphold final determinations or to remand them
10:31:13 5 for "action not inconsistent with the panel's
10:31:16 6 decision."
10:31:18 7 In fact, there are only two types of
10:31:20 8 differences between the relevant provisions of the
10:31:23 9 CFTA and NAFTA chapters. First, there are changes
10:31:27 10 to the CFTA language necessary to make it
10:31:31 11 applicable to the three parties of NAFTA instead of

10:31:35 12 only the two parties of the CFTA. For example,
10:31:41 13 NAFTA Chapter 19 changes references to quote goods
10:31:46 14 of another -- sorry, goods of another party rather
10:31:51 15 than the CFTA's quote goods of the other party.
10:31:56 16 These are simply conforming changes.
10:32:01 17 Of course, the second difference was the
10:32:05 18 addition of NAFTA article 19 paragraph three
10:32:09 19 itself. Now, the claimants would have you believe
10:32:19 20 that is the binational review scheme. They argue,
10:32:28 21 therefore, the provision is clearly another
10:32:30 22 conforming change and cannot have any other effect.

10:32:42 1 It says that the relevant provisions of
10:32:44 2 the two agreements are identical except, quote, for
10:32:50 3 technical changes necessary to accommodate the
10:32:53 4 addition of a third country, unquote.
10:32:58 5 It is clear, however, that this statement
10:33:00 6 is referring solely to the differences of the first
10:33:05 7 type I described, and this is clear because there
10:33:09 8 is no possible explanation of how the exclusion of
10:33:14 9 obligations set forth in Article 1901(3) relates in
10:33:19 10 any way to the inclusion of a third country to the
10:33:23 11 scheme, and claimants have not even offered--had
10:33:25 12 not even attempted to offer such an explanation.
10:33:31 13 Mr. President, I think this is in partial
10:33:34 14 answer to the question posed in number 63, although
10:33:37 15 I think the question incorrectly ascribes the
10:33:41 16 position to the United States rather than to the
10:33:43 17 claimants.
10:34:02 18 PRESIDENT VAN DEN BERG: That question
10:34:03 19 was based on the SAA because the SAA says -- and
10:34:09 20 the word contended I readily admit is confusing

10:34:13 21 here, as presently perhaps expressed by the United
10:34:19 22 States. Anyway, we find a more neutral word for
44

10:34:24 1 "contended."
10:34:25 2 The point is this, in the SAA, you say,
10:34:27 3 well, these technical changes you refer to and we
10:34:29 4 are still on question 63 here, you say, well, look,
10:34:36 5 that refers only to type one that are the
10:34:38 6 conforming changes, it does not refer to type two.
10:34:41 7 Where in the SAA can I find an explanation of the
10:34:46 8 type two changes? According to your submission,
10:34:49 9 not on page 194 but could you help me to -- refer
10:34:53 10 me to another --
10:34:55 11 MR. CLODFELTER: But the SAA does not
10:34:56 12 make an express reference to 1901(3).
10:35:02 13 PRESIDENT VAN DEN BERG: But to the type
10:35:03 14 two changes in general?
10:35:06 15 MR. CLODFELTER: To the type two change
16 that I mentioned. The particular change that I
17 mentioned does not make reference to it. The point
10:35:11 18 I was making and our position is that the statement
10:35:11 19 was very much a reference to the other kind of
10:35:13 20 changes and only those kind of changes and did not
10:35:17 21 purport to -- and perhaps one way to distinguish
10:35:20 22 it, there are changes to the language that was
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10:35:24 1 employed in the CFTA and those changes are
10:35:26 2 reflected in the corresponding provisions of the
10:35:30 3 NAFTA Chapter 19.
10:35:32 4 Article 1901(3) is not a change to the
10:35:35 5 language in the CFTA, it's an addition to the

10:35:41 6   language and that may have been what led the
10:35:43 7   drafter of that sentence of the SAA to limit the
10:35:44 8   comment to the type one changes that I mentioned --
10:35:48 9   type of differences I mentioned.
10   PRESIDENT VAN DEN BERG: The next
10:35:49 11   question -- I don't know whether you are going to
10:35:51 12   address it -- if the Chapter 19 of NAFTA is copied
10:35:58 13   from the FTA, why was it then necessary to have
10:36:04 14   this type two change introduced, i.e., Article
10:36:11 15   1901(3)?
10:36:12 16   MR. CLODFELTER: Is the question why was
10:36:13 17   the change made as opposed to why it was not
10:36:17 18   commented on?
10:36:19 19   PRESIDENT VAN DEN BERG: No, no, why was
10:36:20 20   it made?
10:36:24 21   MR. CLODFELTER: Okay. I will come to
10:36:25 22   that in a moment.
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1   PRESIDENT VAN DEN BERG: You come to that
2   question, okay.
10:36:27 3   MR. CLODFELTER: So let me leave that
10:36:28 4   point for now, then.
10:36:35 5   Just to conclude it, there is no basis
10:36:39 6   whatsoever in reliance upon that statement for
10:36:42 7   excluding the obvious effect that otherwise emerges
10:36:46 8   from the terms of Article 1901, paragraph (3). It
10:36:53 9   cannot be related in any logical way to the
10:36:57 10   addition of Mexico to the scheme of Chapter 19.
10:37:04 11   So as can be seen, NAFTA Chapter 19
10:37:08 12   reflects a number of fundamental decisions of the
10:37:11 13   parties with respect to how they want it handled,
10:37:17 14   challenges to antidumping and countervailing duty

10:37:20 15   law, decisions first arrived at in the context of
10:37:24 16   the CFTA and then carried over into the NAFTA.
10:37:30 17   First, they decided that the pre-existing
10:37:32 18   substantive standards that each country applied in
10:37:36 19   deciding whether sanctionable dumping or
10:37:38 20   subsidization had occurred would continue to be the
10:37:42 21   substantive standards under the NAFTA.
10:37:44 22   Second, they decided that the municipal
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10:37:47 1   law procedures, practices and procedural standards
10:37:50 2   that had been in place for deciding claims of
10:37:53 3   unfair dumping and subsidies and setting corrective
10:37:57 4   duties would continue to be the mechanisms for
10:38:01 5   deciding these questions under NAFTA.
10:38:05 6   Third, they decided to make a special
10:38:07 7   exception to the exclusive power of the respective
10:38:12 8   court systems to review challenges to decisions
10:38:15 9   emerging from -- emanating from these mechanisms as
10:38:19 10   well as the conduct leading to those decisions by
10:38:22 11   allowing parties to seek binational panel review
10:38:27 12   instead.
10:38:29 13   And fourth, they decided that in deciding
10:38:34 14   challenges to decisions and the conduct underlying
10:38:38 15   them, those binational panels had to apply the
10:38:43 16   legal standards of municipal law. Those are the
10:38:46 17   four central decisions reflected in the provisions
10:38:48 18   of Chapter 19.
10:38:49 19   But having made these decisions, the
10:38:51 20   parties took the additional necessary step to make
10:38:55 21   them effective, especially in light of the
10:38:57 22   introduction into NAFTA of something that had not
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10:39:01 1   been part of the CFTA and that is investor state
10:39:06 2   dispute resolution. To ensure that the antidumping
10:39:09 3   and countervailing duty matters could not be
10:39:10 4   subject to obligations under any other Chapter of
10:39:13 5   NAFTA, including Chapter 11's substantive
10:39:18 6   obligations of treatment, and its obligation to
10:39:22 7   submit disputes to investor state arbitration, the
10:39:26 8   parties included Article 1901(3), and by doing so,
10:39:30 9   they effectively cabined Chapter 19 from the rest
10:39:35 10   of NAFTA.
10:39:44 11   PRESIDENT VAN DEN BERG: What do you mean
10:39:45 12   by "cabined?"
10:39:50 13   MR. CLODFELTER: They circumscribed, they
10:39:51 14   built a cabin around it.
15   PRESIDENT VAN DEN BERG: Oh, you mean a
16   cabin like you find on the beach or in the woods,
10:39:54 17   okay.
10:39:55 18   MR. CLODFELTER: Let me turn, then, to
10:39:55 19   the third area that I want to briefly cover, and
10:39:57 20   that is how Chapter 19 works with respect to the
10:40:02 21   claims at issue here.
10:40:03 22   The claim before you has its origins in

10:40:07 1   2001 when a U.S. industry group filed petitions
10:40:16 2   with the Commerce Department and ITC --
10:40:17 3   PRESIDENT VAN DEN BERG: Before you move
10:40:18 4   on to that, I am still not entirely clear why
10:40:21 5   paragraph 1901(3) was included in Chapter 19 of the
10:40:24 6   NAFTA as opposed to the Canada-U.S. Free Trade
10:40:29 7   Agreement where you did not find such a provision.
10:40:32 8   Is it your position that because what is

10:40:35 9   described, I think, somewhere in your submissions
10:40:36 10   that Chapter 11 being a bit into a free trade
10:40:41 11   agreement, that for that reason, because Chapter 11
10:40:44 12   was included in NAFTA, investor states arbitration,
10:40:48 13   that for that reason, the addition was deemed
10:40:52 14   necessary, the addition being paragraph three of
10:40:57 15   1901?
10:40:59 16   MR. CLODFELTER: Yes, Mr. President, that
10:41:00 17   is the logical conclusion to be drawn from this
10:41:05 18   difference between the CFTA and NAFTA.
10:41:07 19   PRESIDENT VAN DEN BERG: So is it the
10:41:08 20   position of the United States, then, that paragraph
10:41:10 21   three of 1901 was specifically included because you
10:41:12 22   had investor state arbitration under Chapter 11?

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10:41:21 1   MR. CLODFELTER: The terminology employed
10:41:22 2   and the placement of the provision, there could be
10:41:25 3   many explanations for that. Of course, the
10:41:28 4   decision for you is the effect of the terms
10:41:31 5   employed in Chapter 19 and, in effect, they must be
10:41:36 6   given, obviously. The negotiating history does not
10:41:39 7   shed much light on the specific motivation of the
10:41:43 8   parties and the negotiators of the parties, but it
10:41:48 9   cannot be denied that the major difference between
10:41:51 10   the CFTA and the NAFTA in this respect was the
10:42:00 11   additional unsettling effect to the parties' plan
10:42:03 12   to preserve the 19 mechanism as the sole mechanism
10:42:08 13   in the NAFTA to handle these issues posed by the
10:42:12 14   investor state provisions of Chapter 11.
10:42:15 15   I would like to pause for a moment, if I
10:42:18 16   might.

10:42:51 17 (Pause.)
10:42:52 18 MR. CLODFELTER: Ms. Menaker will
10:42:54 19 supplement my comments in a partial answer to
20 answer to a couple of the questions posed in the
10:42:59 21 list of questions.
10:43:00 22 PRESIDENT VAN DEN BERG: And then you
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10:43:00 1 move on with the actual -- but where we are now is
10:43:05 2 the -- actually the circumstance of inclusion
10:43:10 3 situation because what you have been describing is
10:43:11 4 how this came about, this NAFTA treaty, in
10:43:16 5 particular, Article 19, paragraph 3. So that is
10:43:18 6 more the legislative history circumstance of
10:43:25 7 inclusion?
10:43:26 8 MR. CLODFELTER: Yes.
10:43:26 9 PRESIDENT VAN DEN BERG: Ms. Menaker, you
10 would like to give additional comments.
10:43:27 11 MS. MENAKER: Thank you, if I may. Just
10:43:30 12 to elaborate on what Mr. Clodfelter has said, as he
10:43:33 13 noted, the traveaux or the rolling text of the
10:43:37 14 Chapter 11 that we've supplied doesn't shed any
10:43:41 15 light on the reason for the inclusion of Article
10:43:45 16 1901(3), nor does the statement of administrative
10:43:48 17 action. That's just a summary of the general
10:43:50 18 provisions, and, again, when it talks about
10:43:54 19 Chapter 19, it talks about the technical changes
10:43:57 20 made to accommodate the addition of Mexico, and
21 Mr. Clodfelter has shown what those technical
22 changes were.
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10:44:02 1 In our view, the only logical conclusion
10:44:05 2 to draw is that when you look at the substance of

10:44:08 3 the antidumping and countervailing duty Chapter
10:44:11 4 that was contained in the CFTA and the substance of
10:44:14 5 that in Chapter 19, it did not change, and the
10:44:18 6 parties did not expect their substantive
10:44:20 7 obligations to change, nor did they expect the
10:44:23 8 manner in which those disputes were resolved to
10:44:27 9 change. They kept the binational review system and
10:44:30 10 the only addition is Article 1901(3).
10:44:33 11 Now, the other difference between the
10:44:35 12 CFTA and the NAFTA, of course, is the addition of
10:44:38 13 the investor state mechanism. The CFTA did have an
10:44:42 14 investment Chapter that contained substantive
10:44:45 15 investment obligations but it did not permit
10:44:47 16 investor state arbitration. So from that, the
10:44:50 17 natural inference, we believe, to draw is that
10:44:53 18 because what you have here is an agreement that
10:44:56 19 doesn't pose substantive obligations on the parties
10:44:59 20 with respect to their AD/CVD law, the manner in
10:45:03 21 which they administer it, to make entirely certain
10:45:07 22 that nothing else in the agreement can be
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10:45:09 1 interpreted to impose additional obligations on the
10:45:14 2 parties or different obligations on the parties,
10:45:17 3 they added 1901(3) specifically because they were
10:45:21 4 opening the door to allow private claimants to
10:45:25 5 bring claims and they wanted that additional
10:45:28 6 certainty.
10:45:29 7 And we believe this is also supported by
10:45:33 8 looking at our other BITs and FTAs and the Tribunal
9 -- I don't have the number of the question offhand,
10:45:36 10 but you asked what those agreements show and in no

10:45:40 11   other FTA -- well, certainly in no other BIT -- a
10:45:44 12   BIT deals with investment matters and certainly
10:45:47 13   none of our other BITS say anything with respect
10:45:49 14   with respect to AD/CVD matters.
10:45:54 15   With respect to our FTAs, we have not
16   disciplined antidumping and countervailing duty
10:45:59 17   matters with respect to any of our other FTA
10:46:01 18   partners in an FTA. So, there again, there was --
10:46:05 19   you do have an investment chapter in those FTAs and
10:46:09 20   you have investor state arbitration, but there is
10:46:12 21   no need for a 1901(3) type provision because there
10:46:17 22   is no discipline regarding antidumping and
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10:46:19 1   countervailing duty matters in that FTA whatsoever.
10:46:24 2   And I think another illustration of the
10:46:26 3   relationship between the investor state provisions
10:46:32 4   and the fact that you have disciplines on
10:46:35 5   antidumping and countervailing duty matters can be
10:46:38 6   seen if you look at the Canadian free trade
10:46:42 7   agreement with Chile. In that agreement, they do
10:46:46 8   discipline antidumping and countervailing duty
10:46:49 9   matters. They have accepted substantive
10:46:51 10   obligations with respect to those matters.
10:46:53 11   They also -- the difference between that
10:46:55 12   agreement and the NAFTA is that they have agreed
10:46:58 13   that disputes should be settled in the WTO rather
10:47:02 14   than by a binational panel mechanism. But they
10:47:06 15   have an investment Chapter and they have investor
10:47:08 16   state arbitration and in that agreement, they have
10:47:11 17   a provision that is almost verbatim from 1901(3).
10:47:15 18   So that again shows that when you enter
10:47:18 19   into an agreement that is going to discipline

10:47:22 20 AD/CVD law, and you also permit access to dispute
10:47:25 21 resolution by private claimants, the parties, in
10:47:26 22 order to be absolutely certain that there is no

10:47:29 1 misunderstanding, have felt it necessary or at
10:47:32 2 least prudent to include a 1901(3) type provision.
10:47:40 3 PRESIDENT VAN DEN BERG: Ms. Menaker, if
10:47:40 4 I understand the position, then, of the United
10:47:44 5 States to be the following, it is, they say, well,
10:47:47 6 1901 paragraph three has been included in NAFTA
10:47:54 7 specifically because of Section B of Chapter 11,
10:47:59 8 investor state arbitration, and you say that --
10:48:03 9 you, the United States -- on the basis not of
10:48:07 10 contemporaneous evidence, if I may comment that
10:48:12 11 way, because there is no document, you say, in a
10:48:14 12 traveaux which says so. There is not a statement,
10:48:17 13 the SAA doesn't say so. The other NAFTA party
10:48:21 14 states, as far as the record is here, do not have
10:48:24 15 documents either which would show that. But you
10:48:29 16 say that, well, that must be the case, there is a
10:48:31 17 logical inference because why would it otherwise
10:48:34 18 why would it be in, in the NAFTA, in comparison
10:48:38 19 with the FTA, and that is -- you make this
10:48:39 20 inference because of the text. And there what you
10:48:43 21 -- I do not say that you are, rightly or wrongly,
10:48:43 22 you say, well, look, this -- actually there's a

10:48:46 1 contextual argument you are making but not an
10:48:50 2 historical argument.
10:48:52 3 MS. MENAKER: That's absolutely correct.
10:48:53 4 We don't have any contemporaneous evidence to

10:48:57 5   support that. It's just our reading of the text
10:48:59 6   and the logical inference and the lack of any other
10:49:00 7   rationale that we have found. Certainly we don't
10:49:03 8   believe that the statement in the SAA can be
10:49:07 9   attributed to the addition of 1903(3) because we
10:49:09 10   see no explanation as to how that language
10:49:13 11   accommodates the addition of a third party. And by
10:49:15 12   looking at the NAFTA's text, the context, as well
10:49:17 13   as other FTAs, this is the conclusion that we have
10:49:21 14   drawn.
15   PRESIDENT VAN DEN BERG: Is that the
10:49:24 16   other FTAs, is question 80?
10:49:25 17   MS. MENAKER: Yes, thank you.
18   PRESIDENT VAN DEN BERG: Then one thing
10:49:28 19   is if your inference that 1901 paragraph three must
10:49:36 20   have concerned section B of Chapter 11 at the time
10:49:39 21   of conclusion, although you don't have a record, we
10:49:43 22   say, well, that is the only logical explanation of
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10:49:47 1   what had happened at the time. Why is it, then,
10:49:49 2   that paragraph three of Article 1901 does not make
10:49:53 3   express reference to Section B of Chapter 11, but
10:49:56 4   has a more general wording, if I may say so?
10:51:14 5   (Pause.)
10:51:15 6   MR. CLODFELTER: We are ready to proceed
10:51:16 7   when you are ready.
10:51:26 8   PRESIDENT VAN DEN BERG: Ms. Menaker or
10:51:28 9   Mr. Clodfelter, would you like to answer the last
10:51:31 10   question of the Tribunal?
11   MR. CLODFELTER: Let me pick up the
10:51:33 12   string. It might clarify, first of all. Our
10:51:33 13   position isn't the only -- that the only motivation

10:51:38 14   for Article 1901 paragraph three was the threat
10:51:41 15   posed to the efforts to shield Chapter 19
10:51:45 16   procedures or AD/CVD law from other obligations
10:51:50 17   posed by investor state dispute resolution. We
10:51:53 18   don't know that was the only motivation and we
10:51:57 19   wouldn't presume it is. We certainly take note of
10:51:59 20   the breadth of the terminology used in 1901(3)
10:52:04 21   which excludes the imposition by any Chapter of
10:52:07 22   NAFTA of obligations with respect to a party's

10:52:10 1   AD/CVD law.
10:52:13 2   But there is one --
10:52:16 3   PRESIDENT VAN DEN BERG: At this point in
10:52:17 4   time, because then you earlier said, well, if I
10:52:20 5   understood you correctly, the inference must have
10:52:25 6   been from the inclusion of bankruptcy in 1901 that
10:52:30 7   it was done because of investor state arbitration,
10:52:34 8   but the inference is that's what happened at the
10:52:34 9   time. That's what you said. But well, I
         10   understand now is you said, well, we don't know.
10:52:38 11   MR. CLODFELTER: We don't know that it's
10:52:39 12   the only motivation but it is such an obvious
10:52:43 13   difference between the CFTA and the NAFTA, that we
10:52:48 14   think it's logical to infer that it was seen as one
10:52:51 15   threat of the wish of the parties to shield AD/CVD
10:52:56 16   law treatment. And what other ones there might be,
10:53:00 17   we don't know. But there is one historical element
10:53:04 18   which may shed some light on this. It is not,
10:53:06 19   definitive, but it is reflected in the Tribunal's
10:53:10 20   question 18, and that's a recognition of the fact
10:53:14 21   that different teams of negotiators negotiated

10:53:18 22 different chapters of NAFTA. Clearly, the
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10:53:20 1 negotiators of Chapter 19 had foremost in their
10:53:23 2 concerns preservation of the scheme that had been
10:53:28 3 negotiated and its exclusion from other dispute
10:53:31 4 resolution mechanisms.
10:53:33 5 Now, they chose broad language to shield
10:53:39 6 the provisions from any other obligations in NAFTA.
10:53:43 7 Had the negotiators of Chapter 11 been in the room,
10:53:47 8 perhaps they would have chosen different language.
10:53:51 9 The key thing is what is the effect of the language
10:53:54 10 that these particular negotiators chose and that
10:53:57 11 the parties adopted in the final text.
10:54:00 12 And so we don't find that it's
10:54:03 13 significant that it is placed in 1901 rather than
10:54:07 14 Chapter 11 or elsewhere. What's significant is the
10:54:12 15 effect of the terminology adopted and because of
10:54:16 16 its breadth, and because of it's, as we will argue,
10:54:18 17 it's -- the ordinary meaning of its terms in
10:54:21 18 context and in light of the object and purpose of
10:54:24 19 the agreement, there can be no question that it
10:54:27 20 excludes the obligations of Chapter 11.
10:54:37 21 PRESIDENT VAN DEN BERG: There is one
10:54:38 22 additional question. We are trying to reconstruct
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10:54:41 1 history, if I may say, and I don't want to be
10:54:44 2 accused of being a revisionist, but can you help
10:54:48 3 me, you say, well, look, it may not be the only
10:54:53 4 motivation. There may be more motivations, but why
10:54:54 5 is it, then, that in Article 2004 express reference
10:54:58 6 is made to Chapter 19 as an exclusion of
10:55:03 7 state-to-state dispute resolution?

10:55:07 8 MR. CLODFELTER: I am going to defer to
10:55:09 9 Mr. McNeill's presentation who addresses that
10:55:14 10 question at some length, if I might. But now I
10:55:15 11 would just make the comment, we would not read
10:55:16 12 significance into that as well. It is so
10:55:20 13 complicated an agreement, so many different kinds
10:55:23 14 of fixes for problems encountered in the
10:55:25 15 negotiations, it would not do justice to the work
10:55:29 16 of these parties if such questions were given undue
10:55:33 17 weight in the face of the language they adopted,
10:55:38 18 wherever it is they adopted it, here or Chapter 19.
10:55:42 19 But I will defer to Mr. McNeill's further
10:55:47 20 presentation on that.
10:55:48 21 PRESIDENT VAN DEN BERG: I think
10:55:49 22 Mr. Robinson has a question.
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1 ARBITRATOR ROBINSON: Thank you,
2 Mr. President.
10:55:52 3 While we are on the subject, I would like
10:55:54 4 to ask if I could, please, for clarification. The
10:56:00 5 Section 1901(3) includes the words "of any other
10:56:04 6 Chapter." Is there any other Chapter other than
10:56:08 7 Chapter 11 that you believe that language is
10:56:14 8 referring to, and if so, which one or ones?
10:56:45 9 MR. CLODFELTER: Thank you, Mr. Robinson.
10:56:47 10 In answer to your question, I don't think
10:56:49 11 we are in a position to speculate about potential
10:56:52 12 other obligations that might be suggested by
10:56:57 13 disgruntled parties with respect to our AD/CVD law,
10:57:01 14 but we are not in a position to exclude the
10:57:04 15 possibility that such assertions might be made. So

10:57:07 16 in that respect, we are in the same position as the
10:57:14 17 negotiators of Chapter 19 who wanted to make sure
10:57:16 18 it was protected.
10:57:17 19 Now, as I say, we don't know what
10:57:18 20 specific threats they had in mind, if they had
10:57:21 21 specific threats, other than the one which is, must
10:57:23 22 obviously have occurred to them, but they clearly
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10:57:28 1 wanted to protect against any possibility of such
10:57:31 2 threats and that is why they adopted this broad
10:57:34 3 language.
10:57:34 4 So on this point, I would simply say the
10:57:36 5 absence of any indication of specific threats
10:57:38 6 emanating from other chapters should not be taken
10:57:43 7 as any limitation on the effect of the term
10:57:46 8 adopted, and we could, you know, there are various
10:57:54 9 other ways that people could construe NAFTA
10:57:58 10 obligations as impacting on AD/CVD law. I'm not
11 sure it's helpful for us to speculate on that,
10:58:10 12 though.
10:58:10 13 Ms. Menaker will add one point. She will
10:58:14 14 supplement my answer.
10:58:15 15 MS. MENAKER: If I may, the obligation to
10:58:17 16 arbitrate clearly emanates from Section B of
17 Chapter 11, but all of the other chapters of the
10:58:19 18 NAFTA impose substantive obligations on the parties
10:58:22 19 that perhaps a party could try to impose a
10:58:25 20 substantive obligation on another party's
10:58:28 21 administration of its AD/CVD laws. And, for
10:58:32 22 instance, Chapter three is all about national
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10:58:34 1 treatment and market access for goods and imposes

10:58:38 2 all sorts of substantive obligations on the parties
10:58:41 3 with respect to trading goods.
10:58:43 4 And certainly a party could take any one
10:58:47 5 of those substantive obligations and argue that the
10:58:51 6 imposition of an antidumping or countervailing duty
10:58:56 7 runs afoul of that substantive obligation, for
10:58:59 8 instance, and that would be another example of an
10:59:01 9 obligation from a different Chapter of the NAFTA
10:59:04 10 outside of Chapter 11 being construed to impose an
10:59:08 11 obligation of a party's AD/CVD laws.
10:59:12 12 And similarly, we have the competition
10:59:15 13 Chapter, for example, Chapter 15 also imposes a
10:59:17 14 number of different obligations.
10:59:21 15 ARBITRATOR ROBINSON: Thank you very
10:59:22 16 much.
10:59:24 17 PRESIDENT VAN DEN BERG: Professor de
10:59:27 18 Mestral has also some questions about the history
10:59:30 19 because we are still on the history here.
20 ARBITRATOR MESTRAL: Thank you. Just on
10:59:33 21 history and perhaps by way of comment that you
10:59:36 22 might wish to take under advisement -- with the
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10:59:38 1 history you may wish to respond immediately -- one
10:59:38 2 general point, the language of Chapter 19, I think,
10:59:43 3 was largely set, as you rightly say, by the FTA,
10:59:48 4 and so it is largely essentially carried forward,
10:59:51 5 so the issues of the dynamics of the different
10:59:53 6 negotiating groups, there was definitely a huge
10:59:56 7 negotiating issue in 1987 leading to the adoption
11:00:01 8 of FTA.
11:00:02 9 In this case, I would have assumed that

11:00:05 10 clearly there was a negotiating group, but it had a
11:00:08 11 rather small remit, adjust Chapter 19 to the new
11:00:14 12 reality. Second -- and so that may be something
11:00:17 13 that needs to be considered, there wasn't a lot to
11:00:20 14 redraft.
11:00:21 15 On the other hand, I would make the point
11:00:25 16 there were a couple of significant additions. The
11:00:29 17 changes to the language concerning an extraordinary
11:00:34 18 challenge, 1903, paragraph 13 little (a) little
11:00:39 19 (3), addition of the standard of review, was quite
11:00:42 20 a significant change, I think, at the time, and the
11:00:47 21 question of 1905, the whole Article 1905, dealing
11:00:53 22 with essentially the impact of a new member whose
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11:00:58 1 capacity to immediately implement was in some --
11:01:03 2 perhaps apparently in some doubt. So I do suggest
11:01:07 3 there were a couple of changes of some
11:01:09 4 significance. And I don't know if you want to
11:01:12 5 respond to that, but that might be something you
11:01:15 6 should consider in your written comments.
11:01:19 7 MS. MENAKER: Just as an initial
11:01:21 8 response, and we will consider that further, but --
11:01:26 9 and we would need to see if we could find anybody
11:01:29 10 or perhaps talk to other colleagues who that were
11:01:33 11 more involved in the negotiations at the time, but
11:01:36 12 I don't know that just because the substance of the
11:01:39 13 chapters remained essentially unchanged, that that
11:01:43 14 meant that there was not a large negotiating team
11:01:45 15 or that the negotiations were not particularly
11:01:47 16 intense with respect to Chapter 19 and I say that
11:01:50 17 specifically because when you look at the SAA and
11:01:54 18 some other contemporaneous materials, it shows that

11:01:57 19 Mexico indeed had to make quite a lot of changes to
11:02:00 20 their domestic law in order to agree to Chapter 19.
11:02:05 21 And so even though at the end of the day
11:02:07 22 it appears that the obligations remained
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11:02:11 1 essentially unchanged, it might still have been
11:02:14 2 quite a long and difficult negotiation to negotiate
11:02:17 3 with Mexico as to how they were going to bring
11:02:20 4 their laws into compliance so they could meet those
11:02:24 5 new standards and whether they were willing to do
11:02:27 6 so. So that is one other factor to take into
11:02:31 7 consideration.
11:02:37 8 PRESIDENT VAN DEN BERG: Thank you,
11:02:38 9 Ms. Menaker.
11:02:41 10 Mr. Clodfelter, please proceed with your
11 presentation.
11:02:49 12 Whenever there is a natural moment for a
11:02:53 13 break, because I look to Cathy here.
14 MR. CLODFELTER: Thank you, Mr.
11:02:59 15 President. I only have a few more minutes, so I
11:03:02 16 think it might be convenient to break after my
11:03:05 17 presentation.
11:03:06 18 Let me just conclude this point by saying
11:03:09 19 this, that the absence of other definable threats
11:03:13 20 to the cabining, again, if you will, of Chapter 19,
11:03:22 21 should not be taken as any indication that the
11:03:25 22 parties did not have Chapter 11 in mind; rather, as
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11:03:35 1 an emphasis to the depth of the concern that
11:03:44 2 Chapter 19 be protected. And that's, we think, the
11:03:52 3 most that can be concluded by the reference to any

11:03:56 4   other Chapter in this circumstance.
11:04:03 5   It is in no way, however, inconsistent
11:04:06 6   with what we consider to be the obvious effect of
11:04:10 7   the terms used in excluding Chapter 11 obligations.
11:04:14 8   So let me continue, then, with the third
11:04:16 9   part of my presentation which is just a brief
11:04:19 10   overview of the history of the dispute. And
11:04:24 11   because the Tribunal undoubtedly knows much of
11:04:28 12   this, I will be brief.
11:04:32 13   The claims here had their origin in 2002,
11:04:36 14   when an industry group in the United States filed
11:04:40 15   petitions with Commerce and the ITC requesting
11:04:44 16   investigations into the practices of Canadian
11:04:48 17   softwood lumber producers. The petitions alleged
11:04:52 18   that the United States soft wood lumber industry
11:04:56 19   was materially injured by reason of dumped and
11:05:01 20   subsidized soft wood lumber imports from Canada.
11:05:02 21   In response to these petitions, the Commerce
11:05:05 22   Department and the ITC initiated the antidumping
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11:05:08 1   and countervailing duty investigations and the
11:05:12 2   material injury investigation that led to the
11:05:15 3   determinations that are challenged in these claims.
11:05:18 4   As a result of these investigations,
11:05:20 5   therefore, in the spring of -- in 2002, the
11:05:23 6   Commerce Department issued final determinations
11:05:26 7   that Canadian softwood lumber was being subsidized
11:05:31 8   by Canada and was being dumped on the U.S. market.
11:05:35 9   A month or so later, the ITC issued its final
11:05:40 10   determination that the petitioners were threatened
11:05:43 11   with material injury. These final determinations
11:05:45 12   resulted in the imposition of specific antidumping

11:05:49 13   duties upon the claimant's and countrywide
11:05:53 14   countervailing duties on Canadian imports of
11:05:56 15   softwood lumber including those imported by the
11:05:59 16   claimants.
11:06:01 17   As you well know, in reaction to the
11:06:03 18   determinations, Canfor and other Canadian lumber
11:06:09 19   companies joined the Canadian government, as they
11:06:12 20   were entitled to do under NAFTA Chapter 19 in
11:06:17 21   requesting Chapter 19 binational panel review
11:06:20 22   proceedings to review those determinations.

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11:06:22 1   Terminal chose not to exercise the rights provided
11:06:26 2   by Chapter 19.
11:06:28 3   During the Canfor hearing on jurisdiction
11:06:31 4   that was held in December 2004, we provided an
11:06:35 5   overview of the Chapter 19 proceedings and noted
11:06:38 6   the fact of the parallel Canadian government
11:06:42 7   initiated WTO proceedings. At that time, most of
11:06:47 8   those cases were still pending that's still the
11:06:51 9   case for the most part today.
11:06:52 10   We noted there that the Chapter 19 panels
11:06:54 11   had issued remands in part with respect to Commerce
11:06:56 12   and ITC final determinations, upholding much of
11:07:00 13   what the agencies determined and the manner in
11:07:02 14   which the agencies made those final determinations.
11:07:06 15   Since then, additional remands have been made and
11:07:10 16   U.S. agencies have acted in accordance with the law
17   regarding those remands.
11:07:17 18   During the question and answer period, if
11:07:19 19   the Tribunal would like a detailed update on
20   exactly where those proceedings are, we would be

21 happy to provide it.
11:07:22 22 But the main point about the proceedings
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11:07:24 1 is that the claims brought in those Chapter -- in
11:07:31 2 this -- I'm sorry, in these Chapter 11 claims and
11:07:31 3 that are before you essentially mirror those
11:07:36 4 brought before the binational panels under the
11:07:39 5 exclusive mechanism of Chapter 19.
11:07:42 6 When you compare the challenges before
11:07:45 7 the Chapter 19 panels with the claims in these
11:07:49 8 Chapter 11 proceedings, it is clear that the
11:07:50 9 allegations are virtually identical. I would
11:07:53 10 direct the Tribunal, rather than reviewing those,
11:07:55 11 to the chart provided in the United States
11:07:58 12 objection to jurisdiction in the Canfor case at
11:08:01 13 pages 16 through 18, and in that chart you will
11:08:06 14 find a comparison of the allegations made by Canfor
11:08:13 15 here and those made by Canfor before the Chapter 19
11:08:15 16 panel.
11:08:15 17 We did the same for Tembec, as another
11:08:20 18 example, even though Tembec is not present in the
11:08:24 19 case now, and you can find that chart at pages 12
11:08:27 20 to 15 in the United States objection to
11:08:32 21 jurisdiction in that case.
11:08:33 22 In sum, the claimant's challenges are of
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11:08:37 1 a type that the NAFTA parties expressly limited to
11:08:41 2 treatment under Chapter 19. The NAFTA parties
11:08:43 3 carefully circumscribed the review of antidumping
11:08:47 4 and countervailing duty measures to the mechanism
11:08:51 5 set forth in Chapter 19. The parties carefully
11:08:54 6 provided that the country's antidumping and

11:08:56 7 countervailing duty mechanisms would remain in
11:08:59 8 place contradicting any notion that those
11:09:02 9 mechanisms could be attacked as violating
11:09:05 10 provisions of other chapters.
11:09:07 11 They provided that the decisions that
11:09:09 12 emerge from those mechanisms could only be reviewed
11:09:14 13 against the standards of municipal law, not against
11:09:18 14 the standards of, for example, Section A of Chapter
11:09:22 15 11. And it provided that the only NAFTA dispute
11:09:26 16 resolution process available for such review is the
11:09:29 17 binational review panel process in Chapter 19.
11:09:32 18 And they did these things through
11:09:35 19 operation of Article 1901, paragraph three.
11:09:41 20 I will turn -- if the Tribunal pleases to
11:09:46 21 break now, upon the return from their break,
11:09:51 22 Ms. Menaker will demonstrate how the ordinary

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11:09:56 1 meaning of the terms of Article 19, three, deprives
11:09:58 2 this Tribunal of jurisdiction.
11:10:02 3 PRESIDENT VAN DEN BERG: One question on
11:10:03 4 the documents we have in this case, in the records,
11:10:07 5 in any case, you were kind enough, your side, not
11:10:12 6 to inundate us with these decisions of the Chapter
11:10:16 7 19 panels. Nonetheless, in order to make some --
11:10:20 8 to create some understanding also on the part of
11:10:22 9 the Tribunal, they are available on the Web. So I
11:10:27 10 did consult them. I happen to have them in
11:10:39 11 mini-bundled form. Don't worry about it because
12 don't think that I have more than you because it
13 simply wasn't available.
11:10:44 14 But one point is this, instead of

11:10:46 15 submitting all these various documents, there is
11:10:50 16 one decision which describes perhaps fairly what
11:10:55 17 happened in the Chapter 19 proceedings and it's the
11:11:03 18 ECC extraordinary challenge -- ECC decision of -- I
11:11:04 19 thin, what is it -- it is a fairly recent one --
11:11:16 20 it's 10 August 2005. Perhaps you would like to
11:11:22 21 review it briefly and tell the Tribunal that you
11:11:27 22 believe that in any way the procedural description
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11:11:30 1 in that decision is correct for giving an overview
11:11:34 2 of these proceedings.
11:11:37 3 MR. CLODFELTER: We will do that.
11:11:38 4 PRESIDENT VAN DEN BERG: I understand
11:11:39 5 that you may not agree with the decision itself,
11:11:45 6 but that's another story.
11:11:46 7 MR. CLODFELTER: I understand the point.
8 Thank you.
11:11:48 9 PRESIDENT VAN DEN BERG: We have the
11:11:49 10 same, incidentally, for WTO. Another set of
11:11:53 11 mini-bundles. This is WTO decisions, also
11:11:57 12 available on the Web. A bit more difficult to
11:12:01 13 find, but you get them finally. And there is one
11:12:04 14 decision here which may be helpful. That is the --
11:12:13 15 there is also a question, incidentally, for Canfor
11:12:17 16 and Terminal, whether you agree that these
11:12:20 17 decisions describe fairly what happened before both
11:12:24 18 bodies. This is the decision of the recourse to
11:12:29 19 Article 21.5 of the DSU by Canada, report by the
11:12:35 20 panel, and it's 15 November 2005. It came out, I
11:12:42 21 think, already at the end of August, this one, but
11:12:47 22 the date it was published is 15 November 2005. Of
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11:12:55 1 course, you don't need to answer now, but simply
11:12:57 2 for the Tribunal to make work more efficient,
11:13:01 3 whether these two decisions are our lifeline to
11:13:04 4 understand what is going on before the Chapter 19
11:13:07 5 panels and the WTO.
11:13:10 6 MR. LANDRY: Point of clarification,
11:13:11 7 Mr. President. Obviously, especially the WTO cases
11:13:15 8 can be fairly lengthy. Is there a specific part of
11:13:18 9 the passage that you're talking about just to
11:13:19 10 confirm what the procedure is?
11:13:23 11 PRESIDENT VAN DEN BERG: It is simply the
11:13:24 12 descriptive part of these decisions, these two
11:13:27 13 decisions. They don't go into the decision -- the
11:13:32 14 considerations provided in the reports or the
11:13:34 15 panel, but simply the description of what happened.
11:13:40 16 MR. LANDRY: That is helpful.
11:13:42 17 PRESIDENT VAN DEN BERG: Because then the
11:13:42 18 Tribunal can rely on those two simply for saying
11:13:47 19 this is what happened there.
11:13:49 20 Okay, thank you. Ten minutes recess.
21 (Recess.)
11:33:35 22 PRESIDENT VAN DEN BERG: Before I give
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11:33:37 1 the floor to Ms. Menaker, Mr. Clodfelter, one
11:33:42 2 additional question arising out of the questions we
11:33:45 3 sent you last night, a very simple one.
11:33:48 4 The very last question on the question
11:33:50 5 list, 84, contains a brief description, and while
11:33:56 6 we are on history, this is a description made by
11:34:01 7 the Tribunal itself, because perhaps you wondered
11:34:07 8 where it is a quote from, it is a quote from

11:34:09 9   ourselves.
11:34:10 10   We attempted to draft something about the
11:34:12 11   background of the dispute, and the question the
11:34:16 12   Tribunal has to both parties, but this time to you
11:34:19 13   because you are on the history, Mr. Clodfelter, is
11:34:22 14   it a fair description, and there is a typo, it
11:34:29 15   believed, it should read it is believed.
11:34:40 16   MR. CLODFELTER: I was going to point out
11:34:42 17   the typo at the risk of being called a revisionist,
11:34:46 18   but you caught it.
11:34:48 19   If the Tribunal would indulge us, we are
11:34:48 20   having people who are much more steeped in the
11:34:52 21   substance of this area review it, and we will
11:34:57 22   certainly let the Tribunal know tomorrow.

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11:35:04 1   PRESIDENT VAN DEN BERG: I have a
11:35:05 2   question for Mr. Landry. It is not to be answered
11:35:10 3   now, but it is a question of the Tribunal, how to
11:35:13 4   approach the question under A, Canfor's claims, it
11:35:26 5   should read claims of Canfor and Terminal, but you
          6   understand already from the question what was
11:35:33 7   intended, the Tribunal would like you to make a
11:35:37 8   presentation in your opening statement which is
11:35:42 9   along a type of time line, and a time line as if
11:35:47 10   you had fictional novel and you start off with the
11:35:54 11   time line by where it started, complaining domestic
11:36:02 12   producers, and in your submissions today may be
11:36:08 13   conspiring with officials, God knows what have you,
11:36:12 14   and at each point at this time line you indicate
11:36:16 15   where hypothetically it went wrong, and then for
11:36:22 16   each of these points where it went wrong or it
11:36:25 17   could go wrong, you indicate where in that respect

11:36:29 18 a Chapter 11 tribunal has jurisdiction or not.
11:36:33 19 So to give you an example, you have the
11:36:35 20 lead-up in the time line to the petitions to the
11:36:42 21 investigative authorities in the United States.
11:36:46 22 The understanding of the Tribunal is you make a
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11:36:49 1 number of allegations in that respect for that part
11:36:52 2 of the time line, you say that is where it already
11:36:54 3 went wrong. Then you have the time line of the
11:36:57 4 investigation itself, and then you get to the point
11:36:59 5 of a preliminary determination, a final
11:37:03 6 determination, a Chapter 19 proceeding, under 1904,
11:37:07 7 and then you go to an ECC.
11:37:11 8 At each of these turns, and perhaps there
11:37:15 9 are more steps in between, you mention that
11:37:18 10 something goes wrong. Could you then help the
11:37:23 11 Tribunal, when it goes wrong, in what respect the
11:37:28 12 Tribunal would have jurisdiction on that specific
11:37:31 13 matter. It is for the Tribunal to understand,
11:37:35 14 actually, because we saw that in the Canfor case
11:37:39 15 the Tribunal had questions about that, what are
11:37:42 16 your claims, and obviously your claims are related
11:37:46 17 to what you say, to conduct and treatment, but it
11:37:50 18 would be helpful if you could illustrate that by
11:37:54 19 this matter of a time line, so that we better
11:37:58 20 understand what your claims are about. Is that
11:38:02 21 feasible, Mr. Landry?
11:38:07 22 MR. LANDRY: Mr. President, yes. Whether
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11:38:09 1 it is feasible today or not, I am not sure because
11:38:12 2 I am sure you would want a comprehensive answer as

11:38:16 3   opposed to a short time line. We will try to get
11:38:20 4   to it while we are here; if not, we will do it in
11:38:23 5   our post-hearing submissions.
11:38:25 6   PRESIDENT VAN DEN BERG: You understand
11:38:27 7   how we would like the presentation to be on this
11:38:30 8   point, simply to see each step where you say this
11:38:34 9   is within your jurisdiction and this is not within
11:38:37 10   your jurisdiction.
11:38:40 11   MR. LANDRY: I think I understand it and
11:38:41 12   we will have the transcript by then -- at least I
11:38:45 13   believe I understand it. I would have to talk to
11:38:48 14   some of the people here.
11:38:50 15   PRESIDENT VAN DEN BERG: Use your
11:38:50 16   imagination, when something goes wrong, you make a
11:38:55 17   hypothetical, there is a lobbyist going around -- I
11:38:57 18   have to be careful at this point in time in the
11:39:00 19   United States. There is no need to be a Gresham,
11:39:06 20   although not my favorite author --
11:39:10 21   MR. LANDRY: We will try to do it and if
11:39:12 22   not quickly, it will definitely be in our
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11:39:16 1   post-hearing submission.
11:39:18 2   PRESIDENT VAN DEN BERG: Then I turn to
11:39:19 3   Ms. Menaker. You are going to deal with ordinary
11:39:23 4   meaning?
11:39:25 5   MS. MENAKER: Yes.
11:39:25 6   Good morning again. As you noted, I will
11:39:28 7   be dealing with the United States's argument on the
11:39:31 8   ordinary meaning of Article 1901(3), and we will
11:39:37 9   demonstrate that that article deprives this
11:39:41 10   Tribunal of jurisdiction over claimants' claims. I
11:39:44 11   will also be addressing various arguments advanced

11:39:47 12   by the claimants and explain how those arguments
11:39:49 13   are at odds with Article 1901(3)'s ordinary meaning
11:39:53 14   and would render that article ineffective contrary
11:39:56 15   to accepted principles of treaty interpretation.
11:39:58 16   PRESIDENT VAN DEN BERG: Ms. Menaker,
11:39:59 17   what you put here as a PowerPoint, is that also in
11:40:04 18   the folder you have given to us?
11:40:07 19   MS. MENAKER: It is indeed. We have
11:40:08 20   distributed those to counsel and to members of the
11:40:11 21   Tribunal. It is simply a hard copy of the
11:40:14 22   PowerPoint presentation in the event that it is too

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11:40:18 1   difficult for anybody to read the screen.
11:40:23 2   PRESIDENT VAN DEN BERG: Just for the
11:40:23 3   record, the folder that has been submitted by the
11:40:26 4   United States contains two copies of PowerPoint
11:40:32 5   presentations, one about ordinary meaning of
11:40:35 6   Article 1901(3) and the other about ordinary
11:40:43 7   context which will be addressed by Mr. McNeill.
11:40:47 8   I look to the claimants. You have
11:40:49 9   received a copy?
11:40:51 10   Thank you.
11:40:51 11   You may proceed.
11:40:53 12   MS. MENAKER: Thank you.
11:40:54 13   In my presentation today, minding the
11:40:58 14   Tribunal's instruction in its procedural order and
11:41:00 15   recognizing that you have read all of our written
11:41:03 16   submissions as well as the oral transcript, I will
11:41:06 17   not repeat all of the arguments we have made in
11:41:09 18   this regard, but instead I will attempt to focus on
11:41:13 19   the main premise of our argument and then address

11:41:16 20   what we perceive to be claimants' main arguments in
11:41:21 21   opposition.
11:41:22 22   To begin, I have placed the language of

11:41:24 1   Article 1901(3) on the screen and I know you are
11:41:28 2   familiar with this language by now, but because
11:41:30 3   this provision is the central -- or is actually the
11:41:36 4   focus of our jurisdictional objection, and I am
11:41:40 5   addressing the ordinary meaning of that provision,
11:41:42 6   I will quote it.
11:41:45 7   "Except for Article 2203 (Entry into
11:41:48 8   force), no provision of any other chapter of this
11:41:51 9   agreement shall be construed as imposing
11:41:53 10   obligations on a Party with respect to the Party's
11:41:56 11   antidumping law or countervailing duty law."
11:42:00 12   Now, claimants in our view go to great
11:42:02 13   lengths to try to obscure the meaning of this
11:42:06 14   provision, but its meaning is clear. A NAFTA party
11:42:10 15   has no obligations under the NAFTA with respect to
11:42:13 16   its AD/CVD law except for those obligations that
11:42:18 17   are set forth in Chapter 19 itself and the entry
11:42:20 18   into force provision.
11:42:23 19   Exercising jurisdiction over claimants'
11:42:27 20   claims would run afoul of this provision.
11:42:28 21   Claimants' claims involve the United States's
11:42:31 22   interpretation of its AD/CVD laws, the enforcement

11:42:36 1   of those laws, and the issuance of duties imposed
11:42:39 2   pursuant to those laws.
11:42:40 3   Claimants have repeatedly accused the
11:42:43 4   United States of mischaracterizing their claims,
11:42:47 5   but one need only look at the submissions that

11:42:50 6   claimants make themselves and ask -- look at what
11:42:55 7   claimants are asking the Tribunal to do, and it is
11:42:58 8   clear in our view that they are asking the Tribunal
11:43:02 9   to impose obligations on us with respect to our
11:43:05 10   AD/CVD law.
11:43:07 11   The claimants challenge the AD/CVD duty
11:43:12 12   determinations that have been imposed on their
11:43:16 13   exports of softwood lumber to the United States.
11:43:16 14   They are asking this Tribunal to make a finding
11:43:19 15   that those determinations were issued in violation
11:43:21 16   of international law. They seek damages for the
11:43:25 17   harm that they allegedly suffered by having to pay
11:43:28 18   those duties, and this is all clear from the
11:43:31 19   claimants' notices of arbitration and their written
11:43:34 20   submissions.
11:43:34 21   In their latest submission filed last
11:43:37 22   Friday, Canfor and Terminal state that the essence

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11:43:41 1   of their claim is, and I quote, "U.S. officials
11:43:45 2   have, through a pattern of conduct designed to
11:43:48 3   ensure a predetermined, politically motivated and
11:43:52 4   results driven outcome, abused this regime causing
11:43:56 5   claimants harm, and that these actions and the
11:43:59 6   decisions that are the embodiment of this abuse
11:44:03 7   violate the protections afforded to Canfor and
11:44:07 8   Terminal under Chapter 11 of the NAFTA."
11:44:12 9   They then cite to paragraph 20 of
11:44:15 10   Canfor's statement of claim from which a portion of
11:44:18 11   this language is quoted, and this, by the way, is
11:44:22 12   the same paragraph that Canfor at the
11:44:24 13   jurisdictional hearing stated best summarized its

11:44:29 14 claims.
11:44:29 15 Now, on the slide I have placed paragraph
11:44:33 16 20 from Canfor's statement of claim. As you can
11:44:36 17 see, that paragraph states, and I quote, "A review
11:44:42 18 of the treatment received by the Canadian softwood
11:44:45 19 lumber industry over the past 20 years demonstrates
11:44:48 20 a pattern of conduct designed to ensure a
11:44:51 21 predetermined, politically motivated and results
11:44:54 22 driven outcome to the investigations resulting in
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11:44:58 1 the countervailing duty preliminary determination,
11:45:05 2 the critical circumstances preliminary
11:45:08 3 determination, the antidumping duty preliminary
11:45:11 4 determination, the countervailing duty final
11:45:13 5 determination, the antidumping duty final
11:45:17 6 determination, and the final determination of the
11:45:20 7 ITC.
11:45:23 8 As claimants' own submissions make clear,
11:45:26 9 in this proceeding they are challenging the
11:45:29 10 interpretation and the application of the United
11:45:35 11 States's AD/CVD laws that resulted in the
11:45:38 12 imposition of the determinations and the duties
11:45:41 13 that are at issue.
11:45:43 14 All of the conduct which claimants
11:45:45 15 characterize as abusive, discriminatory and
11:45:49 16 violative of international law standards is all
11:45:52 17 conduct that resulted in the adoption of the
11:45:55 18 various AD/CVD duty determinations.
11:45:59 19 The imposition of duties on lumber
11:46:02 20 exported by Canfor and Terminal is the only way in
11:46:07 21 which claimants have been treated by the United
11:46:11 22 States, and that is the only way in which they have

11:46:14 1   allegedly been harmed.
11:46:18 2   As Mr. Bettauer mentioned in his opening,
11:46:22 3   if this tribunal were to exercise jurisdiction over
11:46:26 4   claimants' claims, it would impose on the United
11:46:31 5   States two distinct types of obligations with
11:46:33 6   respect to its antidumping law and countervailing
11:46:38 7   law that derive from a chapter outside of Chapter
11:46:42 8   19, in violation of Article 1901(3).
11:46:46 9   First, the obligation to arbitrate
11:46:49 10   derives from provisions in section (b) of Chapter
11:46:52 11   11 of the NAFTA. In provisions in Chapter 11, the
11:46:56 12   United States gave its consent to investor-state
11:47:00 13   arbitration. Absent these provisions claimants
11:47:03 14   would have no ability to commence an arbitration
11:47:07 15   against the United States.
11:47:08 16   Assuming jurisdiction over claimants'
11:47:11 17   claims and compelling the United States to
11:47:14 18   arbitrate those claims in accordance with the
11:47:16 19   procedures set forth in section (b) of NAFTA
11:47:19 20   Chapter 11 would subject the United States's
11:47:22 21   administration of its AD/CVD laws to the arbitral
11:47:26 22   procedures set forth in Chapter 11 contrary to

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11:47:30 1   Article 1901(3).
11:47:38 2   Second, claimants seek to apply the
11:47:41 3   substantive international law standards that are
11:47:44 4   set forth in section (a) of Chapter 11 to their
11:47:48 5   claims. Claimants ask this Tribunal to review the
11:47:51 6   AD/CVD determinations and assess whether in
11:47:55 7   imposing those duties on lumber exported from

11:47:59 8   Canada to the United States by claimants, the
11:48:02 9   United States violated the national treatment, the
11:48:06 10   most favored nation treatment, the minimum standard
11:48:07 11   of treatment, and the expropriation articles. Each
11:48:12 12   of these obligations that would be imposed on the
11:48:15 13   United States with respect to the administration of
11:48:17 14   its AD/CVD laws derives from NAFTA's investment
11:48:22 15   chapter, which is Chapter 11.
11:48:26 16   So exercising jurisdiction over
11:48:28 17   claimants' claims is contrary to the ordinary
11:48:32 18   meaning of Article 1901(3). To find otherwise
11:48:36 19   would be to accept that even though claimants claim
11:48:39 20   that the United States's administration of its
11:48:43 21   AD/CVD law is subject to the requirements of
11:48:46 22   Chapter 11, and even though the United States must
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11:48:49 1   arbitrate claims based upon the administration of
11:48:52 2   that law, somehow Chapter 11 does not impose
11:48:56 3   obligations on the United States with respect to
11:48:58 4   that law. And that position, we submit, is at odds
11:49:03 5   with the ordinary meaning of Article 1901(3) and is
11:49:07 6   simply untenable.
11:49:09 7   Now, in response, as an initial matter,
11:49:13 8   claimants contend that Article 1901(3) does not
11:49:18 9   perform the function that we ascribe to it. They
11:49:22 10   state that 1901(3)'s sole function is to permit the
11:49:27 11   parties to retain their AD/CVD laws, and this can
11:49:31 12   be seen from the slide which I have posted on the
11:49:35 13   screen, where Canfor has stated, and I quote,
11:49:38 14   "Article 1901(3) merely ensures the party's right
11:49:44 15   to maintain antidumping and countervailing duty
11:49:46 16   laws."

11:49:47 17 So claimants thus contend that Article
11:49:51 18 1901(3) only prohibits provisions outside of
11:49:54 19 Chapter 19 from being construed to impose an
11:49:59 20 obligation on a party to change or amend its AD/CVD
11:50:05 21 laws. They argue that his saves their claims. But
22 I will now demonstrate why this interpretation
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11:50:07 1 cannot stand.
11:50:10 2 Article 1901(3) uses the term obligations
11:50:15 3 without any limitation. Thus, by its clear terms,
11:50:21 4 Article 1901(3) prohibits the imposition of any
11:50:25 5 obligations on a party with respect to its
11:50:29 6 antidumping and countervailing duty laws other than
11:50:34 7 those obligations contained in Chapter 19 itself.
11:50:37 8 If, as claimants contend, Article
11:50:42 9 1901(3)'s sole function is to prohibit other
11:50:44 10 chapters of the NAFTA from imposing obligations on
11:50:48 11 a party to amend its laws, Article 1901(3) would
11:50:52 12 read as follows, it would say no provision of any
11:50:55 13 other chapter of this agreement shall be construed
11:50:58 14 as imposing obligations on a party to amend its
11:51:01 15 antidumping law or countervailing duty law. But
11:51:06 16 Article 1901(3) does not say that, and there is no
11:51:10 17 justification for reading those terms into Article
11:51:15 18 1901(3).
11:51:16 19 At the jurisdictional hearing, Canfor
11:51:18 20 argued that although the term obligations appears
11:51:22 21 in Article 1901(3) and is unrestricted, that term
11:51:28 22 should be understood by reference to the
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11:51:30 1 obligations that are imposed on the parties'

11:51:33 2   antidumping and countervailing duty laws by Chapter
11:51:36 3   19.
11:51:37 4   So counsel noted, for example, that
11:51:40 5   Article 1902 imposes restrictions on the manner in
11:51:44 6   which the parties may amend their AD/CVD laws, and
11:51:48 7   then they also looked to the annex to Article
11:51:51 8   1904(15) which obligated the parties to amend their
11:51:56 9   AD/CVD laws to bring them into compliance before
11:52:04 10   the NAFTA entered into force.
11:52:04 11   Canfor then concluded that Article
11:52:07 12   1901(3) should be similarly construed. It argued
11:52:13 13   that the obligations referred to in Article 1901(3)
11:52:15 14   were the obligations to amend one's AD/CVD laws by
15   reference to the obligations that were indeed
11:52:21 16   imposed on the parties in Chapter 19.
11:52:25 17   But as we pointed out at the hearing,
11:52:27 18   claimants fail to acknowledge one of the most
11:52:31 19   important obligations contained in Chapter 19,
11:52:34 20   which is the obligation in Article 1904 to submit
11:52:38 21   one's AD/CVD duty determinations to binational
11:52:43 22   panels for review. This obligation has been

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11:52:45 1   described in the United States's statement of
11:52:48 2   administrative action as the quote-unquote
11:52:51 3   centerpiece of Chapter 19. It has also been
11:52:55 4   described by Tembec's counsel as uniquely valuable.
11:53:01 5   So clearly, this obligation is of great import.
11:53:03 6   Now, if as Canfor suggests, one should
11:53:07 7   interpret the term obligations in Article 1901(3)
11:53:11 8   with reference to the obligations that are imposed
11:53:14 9   by Chapter 19, this further supports the United
11:53:19 10   States's interpretation.

11:53:20 11 Just as Article 1904 imposes an
11:53:24 12 obligation on the parties to submit their AD/CVD
11:53:28 13 duty determinations to binational panel reviews
11:53:32 14 under the procedures and laws set forth in Chapter
11:53:37 15 19, Article 1901(3) prohibits obligating the
11:53:41 16 parties to submit those AD/CVD determinations to
11:53:45 17 arbitration pursuant to the procedures and laws set
11:53:49 18 forth in Chapter 11 of the NAFTA.
11:53:52 19 Claimants reading of Article 1901(3)
11:53:56 20 would also render that article ineffective contrary
11:54:00 21 to accepted principles of treaty interpretation.
11:54:03 22 Claimants argue that Article 1901(3) merely permits

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11:54:08 1 the parties to retain their AD/CVD laws as I just
11:54:13 2 mentioned. But Article 1902, which is entitled
11:54:18 3 "Retention of domestic antidumping and
11:54:21 4 countervailing duty law, performs that very same
11:54:25 5 function, and Canfor acknowledges that "Article
11:54:29 6 1902 reserves to the NAFTA parties the right to
11:54:32 7 retain and apply their municipal antidumping laws."
11:54:37 8 If Article 1902 provides express
11:54:40 9 authority for the NAFTA authorities to retain their
11:54:44 10 AD/CVD laws, then what additional purpose does
11:54:49 11 Article 1901(3) serve if all that article does is
11:54:53 12 to guarantee the parties' right to retain their
11:54:54 13 laws? According to claimants, it doesn't serve any
11:54:57 14 additional function. But the NAFTA parties would
11:55:00 15 not have included two articles placed one
11:55:03 16 immediately after the other to perform the same
11:55:05 17 function. And interpreting Article 1901(3) in such
11:55:11 18 a manner runs counter to the article's ordinary

11:55:13 19 meaning and the interpretive principle of
11:55:16 20 effectiveness.
11:55:17 21 There is an additional reason why
11:55:20 22 claimants' interpretation would deprive Article
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11:55:24 1 1901(3) of any effect. Claimants concede, as they
11:55:27 2 must, that the U.S. antidumping and countervailing
11:55:30 3 duty statute which is codified in Title VII to the
11:55:36 4 Tariff Act of 1930 is an antidumping and
11:55:38 5 countervailing duty law within the meaning of that
11:55:42 6 term as used in Article 1901(3).
11:55:45 7 Under claimants' theory, Article 1901(3)
11:55:50 8 simply permits the United States to retain that
11:55:53 9 statute and prevents another chapter of the NAFTA
11:55:57 10 as being construed to impose obligations on the
11:56:01 11 United States to amend the Title VII Tariff Act of
11:56:05 12 1930.
11:56:05 13 But a Chapter 11 tribunal, of course,
11:56:07 14 does not have any authority to order declaratory
11:56:13 15 relief. It cannot order a party to rescind or
11:56:17 16 amend its laws. It may only make an award of
11:56:20 17 monetary damages.
11:56:21 18 So for purposes of a hypothetical, if we
11:56:24 19 assume that a claimant filed a Chapter 11 claim
11:56:27 20 against the United States that alleged that the
11:56:32 21 Tariff Act of 1930 violated Articles 1102, 1105 and
11:56:38 22 1110, and assume that a Chapter 11 tribunal
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11:56:41 1 accepted jurisdiction over that claim and agreed
11:56:44 2 with the claimants' contentions, it could not order
11:56:47 3 the United States to amend the Tariff Act to bring
11:56:51 4 it into compliance. It could, however, order the

11:56:54 5   United States to pay monetary damages.
11:56:58 6   If one accepted claimants' argument that
11:57:01 7   Article 1901(3) merely prohibits a tribunal from
11:57:06 8   obligating a party to change its law, then this
11:57:10 9   action would not run afoul of Article 1901(3).
11:57:14 10   Article 1901(3) would have no effect whatsoever
11:57:18 11   because there is no mechanism anywhere in the NAFTA
11:57:22 12   whereby a party could be ordered to amend or to
11:57:25 13   change its law.
11:57:26 14   But clearly in the hypothetical I just
11:57:29 15   gave, that Chapter 11 tribunal would have imposed
11:57:33 16   an obligation on the United States with respect to
11:57:36 17   its an antidumping law and countervailing duty law.
11:57:41 18   The United States would have been ordered to pay
11:57:46 19   damages because its AD/CVD law was found to have
11:57:50 20   violated NAFTA.
11:57:52 21   Claimants' claims are no different from
11:57:54 22   this hypothetical. The starkest example is the

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11:57:57 1   claimants' challenge to the Continued Dumping and
11:58:00 2   Subsidy Offset Act of 2000, commonly referred to as
11:58:04 3   the Byrd Amendment. That statute is an amendment
11:58:08 4   to Title VII of the Tariff Act of 1930. It is
11:58:12 5   unexplained how challenging that statute in a
11:58:15 6   Chapter 11 arbitration does not impose obligations
11:58:20 7   on the United States with respect to its AD/CVD
11:58:24 8   law.
11:58:27 9   Now, claimants appear at some times to
11:58:30 10   recognize the quandary that their interpretation
11:58:35 11   imposes. At the jurisdictional hearing, Canfor
11:58:38 12   conceded that if a claim challenging the law itself

11:58:41 13 was submitted to arbitration under Chapter 11, then
11:58:45 14 Article 1901(3) might have some effect. This can
11:58:49 15 be found at page 319 of the hearing transcript.
11:58:53 16 Our response is this is at page 377.
11:58:57 17 So in doing so, Canfor, we submit,
11:59:01 18 essentially admits that Article 1901(3)'s purpose
11:59:05 19 is not simply to prevent the imposition of an
11:59:09 20 obligation on a party to change or modify or amend
11:59:13 21 its law.
11:59:15 22 Consequently, claimants' argument in
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11:59:18 1 essence boils down to the position that Article
11:59:25 2 1901(3) bars claims that challenge a party's AD/CVD
11:59:29 3 law but does not bar claims that challenge the
11:59:33 4 administration or the application of those same
11:59:36 5 laws. Those arguments, we contend, all contravene
11:59:42 6 Article 1901(3)'s ordinary meaning, and I will
11:59:46 7 address some of them now.
11:59:55 8 First, claimants contend that the phrase
12:00:00 9 antidumping and countervailing duty law in Article
12:00:04 10 1901(3) refers only to the actual statute itself
12:00:06 11 and not to the application of that statute in the
12:00:10 12 form of an AD/CVD duty determination. But the
12:00:15 13 terms antidumping and countervailing statutes are
12:00:18 14 defined for each of the NAFTA parties in Annex
12:00:21 15 1911, and for the United States that term is
12:00:24 16 defined as the relevant provisions of Title VII of
12:00:27 17 the Tariff Act of 1930. But the parties didn't use
12:00:31 18 the term antidumping or countervailing duty statute
12:00:35 19 in Article 1901(3). They used the term antidumping
12:00:41 20 or countervailing duty law, and the term law as
12:00:44 21 used in Article 1901(3) is broader than the term

12:00:50 22   statute and encompasses the application of the law
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12:00:53 1   in the form of AD/CVD duty determinations.

12:00:58 2   Claimants also erroneously suggest that

12:01:01 3   the term antidumping law and countervailing duty

12:01:06 4   law is restricted to the list of items that is set

12:01:09 5   forth in Articles 1902(1) and Article 1904(2), and

12:01:15 6   for your convenience I have placed those

12:01:17 7   definitions on the screen.

12:01:21 8   Now, those articles provide that AD/CVD

12:01:25 9   law include statutes, legislative history,

12:01:29 10   regulations, administrative practice and judicial

12:01:34 11   precedents. Claimants argue that because duty

12:01:38 12   determinations are not contained in that list, duty

12:01:41 13   determinations cannot be considered to be part of

12:01:43 14   AD/CVD law as that term is used in Article 1901(3).

12:01:50 15   This argument in our view is wrong on several

12:01:52 16   counts.

12:01:53 17   First, the definitions that are in

12:01:56 18   Articles 1902(1) and 1904(2) are open-ended. They

12:02:02 19   are not exhaustive definitions. They state that

12:02:06 20   AD/CVD laws include, and in other places of the

12:02:11 21   NAFTA when the parties meant to include an

12:02:15 22   exhaustive definition they did so by stating that
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12:02:18 1   something means X, Y and Z, but that phraseology is

12:02:22 2   not used here.

12:02:23 3   So the mere fact that a particular type

12:02:26 4   of law is not listed does not mean it is not

12:02:29 5   contained within the meaning of AD/CVD law. The

12:02:33 6   definition in Articles 1902(1) and 1904(2) is not a

12:02:38 7   definition that can be applied to Article 1901(3),
12:02:42 8   in any event.
12:02:43 9   Article 1904(2) expressly provides that
12:02:47 10   the term AD/CVD law is defined therein for the
12:02:51 11   purposes of that provision itself. If the
12:02:55 12   definition in Articles 1902(1) and Article 1904(2)
12:03:00 13   were meant to apply chapter-wide the term would
12:03:04 14   have been defined in Article 1911, which defines
12:03:08 15   terms for the entire chapter, and certainly the
12:03:11 16   term would not have needed to be defined twice in
12:03:15 17   two different articles.
12:03:20 18   But even if one were to apply the
12:03:23 19   definition of AD/CVD law in Articles 1902(1) and
12:03:26 20   1904(2) to Article 1901(3), that does not help
12:03:33 21   claimants because antidumping and countervailing
12:03:37 22   duty determinations are examples of administrative

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12:03:39 1   practices.
12:03:40 2   Commerce and the ITC administer the
12:03:42 3   United States's trade laws and the manner in which
12:03:46 4   they administer those laws is by conducting
12:03:50 5   investigations and in some cases administrative
12:03:52 6   reviews, and making antidumping, countervailing
12:03:56 7   duty and material injury determinations.
12:04:00 8   Those agencies' administrative practices
12:04:03 9   are embodied in the determinations that they make.
12:04:07 10   Thus, the definition of antidumping law and
12:04:11 11   countervailing duty law in Article 1902 confirms
12:04:14 12   that the parties intended to prevent provisions
12:04:18 13   outside of Chapter 19 from imposing obligations on
12:04:22 14   them with respect to their duty determinations.
12:04:27 15   Now, claimants spend a lot of time

12:04:29 16 arguing that the term AD/CVD law in Article 1901(3)
12:04:35 17 refers only to what they term normative law or that
12:04:39 18 law that is referenced by lawmakers to reach a
12:04:43 19 decision, and they draw this conclusion by looking
12:04:46 20 at Article 1904(2), which instructs the binational
12:04:50 21 panel to look at the parties' AD/CVD law to
12:04:55 22 determine whether the duty determination is in
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12:04:58 1 compliance with municipal law.
12:05:00 2 As I mentioned, however, the definition
12:05:04 3 given to AD/CVD law in that article is stated to be
12:05:09 4 for purposes of that article. Notwithstanding
12:05:13 5 this, claimants not only try to import the
12:05:17 6 definition of AD/CVD law from Article 1904 into
12:05:21 7 Article 1901(3), but they then claim that the term
12:05:25 8 administrative practice should not be given its
12:05:28 9 ordinary meaning because they also want to import
12:05:31 10 the context in which that term appears in Article
12:05:37 11 1904 into Article 1901(3). But there is no basis
12:05:42 12 for doing this.
12:05:44 13 The error in this approach can be
12:05:47 14 illustrated by looking at Article 1902. Article
12:05:54 15 1902(2), which I have also placed on the screen,
12:05:57 16 provides that each party reserves the right to
12:06:00 17 change or modify its antidumping law or
12:06:02 18 countervailing duty law.
12:06:07 19 Now, if you were to incorporate Article
12:06:13 20 1902(2)'s definition -- excuse me, Article 1902
12:06:19 21 subparagraph 1's definition of AD/CVD law into
12:06:24 22 Article 1902(2), it would make no sense because it
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12:06:28 1 would suggest that a party could change or modify
12:06:32 2 its legislative history or that a party could
12:06:35 3 change or modify its judicial precedents.
12:06:39 4 So if the definition in Article 1902
12:06:44 5 subparagraph 1 does not even apply to the same term
12:06:47 6 in a different part of the same article, there is
12:06:51 7 no reason to assume that it was intended to define
12:06:53 8 that term in other articles in Chapter 19 such as
12:06:58 9 Article 1901(3).
12:07:02 10 The United States's interpretation of
12:07:04 11 AD/CVD law to encompass the application of that law
12:07:08 12 is also confirmed by the decision on jurisdiction
12:07:11 13 in the UPS Chapter 11 case. There the Tribunal was
12:07:17 14 construing Article 2103 subparagraph 1, which
12:07:21 15 provides that except to set out in this article,
12:07:26 16 nothing in this agreement shall apply to taxation
12:07:29 17 measures.
12:07:30 18 UPS, which had claimed that Canada had
12:07:34 19 discriminated in the enforcement of one of its
12:07:39 20 taxes, argued that this article did not deprive the
12:07:43 21 tribunal of jurisdiction because the article only
12:07:47 22 barred challenges to a tax law, but did not bar a
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12:07:50 1 claimant from challenging an application of that
12:07:55 2 law.
12:07:55 3 In response, Canada argued, and I quote,
12:07:59 4 "UPS's attempt to draw a distinction between a
12:08:01 5 challenge to the taxation measure itself and its
12:08:04 6 application has no merit," and in that case the
12:08:09 7 United States filed a submission pursuant to
12:08:13 8 Article 1128 and argued, and I quote, "No valid
12:08:18 9 distinction exists between a taxation measure and a

12:08:20 10 practice with respect to the application of a
12:08:24 11 taxation measure." Just as Article 1105 does not
12:08:29 12 apply to challenges to the adoption or imposition
12:08:33 13 of a tax, it does not apply to the practice of
12:08:37 14 applying a tax.
12:08:38 15 Now, UPS, as you all know, withdrew its
12:08:41 16 Article 1105 claim before the Tribunal rendered its
12:08:45 17 decision, but nevertheless, the Tribunal confirmed
12:08:49 18 in its jurisdictional award that it would not have
12:08:52 19 had jurisdiction over any claim under Article 1105.
12:08:57 20 The same principle that applied in UPS
12:09:01 21 applies here. Interpreting the term AD/CVD law to
12:09:06 22 prohibit only the imposition of obligations with

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12:09:10 1 respect to the substance of a party's trade law as
12:09:13 2 opposed to the application of that trade law is
12:09:16 3 contrary to that term's ordinary meaning.
12:09:28 4 In any event, even if the term AD/CVD law
12:09:32 5 was interpreted to mean only the AD/CVD statute
12:09:37 6 itself and not the AD/CVD duty determinations, this
12:09:42 7 would not save claimants' claims. Their claims
12:09:46 8 still seek to impose obligations on the United
12:09:49 9 States with respect to that AD/CVD law.
12:09:55 10 Claims that challenge the interpretation
12:09:57 11 and the application of the parties' law that arise
12:09:59 12 out of and in connection with that law are
12:10:03 13 necessarily claims that seek to impose obligations
12:10:07 14 with respect to that law, and claimants' arguments
12:10:10 15 to the contrary are at odds with the ordinary
12:10:17 16 meaning of the term with respect to.
12:10:18 17 As you can see, in both its notice of

12:10:20 18   arbitration and in its reply, Canfor acknowledges
12:10:26 19   that its claims arise out of and in connection with
12:10:30 20   the AD/CVD duty determinations, and of a
12:10:34 21   jurisdictional hearing Canfor stated that the
12:10:38 22   conduct complained of relates in many respects to
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12:10:42 1   the discretionary actions of the United States's
12:10:45 2   officials who carry out responsibilities under the
12:10:48 3   AD/CVD regimes and, therefore, it arises from or
12:10:52 4   has a connection to that AD/CVD sphere.
12:10:57 5   Now, claimants nevertheless argue that
12:11:01 6   their claims are not barred by Article 1901(3)
12:11:05 7   because they do not impose obligations on the
12:11:08 8   United States with respect to the United States's
12:11:11 9   AD/CVD law. Claimants have advanced no plausible
12:11:17 10   argument why the term with respect to in Article
12:11:20 11   1901(3) should be interpreted in a manner that is
12:11:24 12   inconsistent with its ordinary meaning. There is
12:11:27 13   sound basis for reading the term with respect to
12:11:30 14   more narrowly than other commonly used terms such
12:11:33 15   as arising out of or in connection with, which they
12:11:37 16   themselves use to describe their claims. In fact,
12:11:40 17   in most contexts, the term with respect to is
12:11:44 18   understood as broader than the term arising out of
12:11:47 19   because the latter may connote a requirement of
12:11:50 20   some causal connection.
12:11:53 21   In our written submissions as well as
12:11:55 22   during the Canfor jurisdictional hearing, we
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12:11:58 1   addressed each of claimants' arguments and explain
12:12:03 2   why the term with respect to should not be given a
12:12:06 3   uniquely narrow interpretation in Article 1901(3).

12:12:08 4   We cited to dictionary definitions and a thesaurus
12:12:12 5   to show that the term with respect to is synonymous
12:12:16 6   with the phrases that I have just mentioned.
12:12:18 7   We also demonstrated that the phrase with
12:12:22 8   respect to appears several times in the English
12:12:26 9   version of the NAFTA, in the French language
12:12:28 10   version of the NAFTA, a variety of different
12:12:30 11   phrases are used indicating that the NAFTA parties
12:12:34 12   did not intend to impart any unique narrow meaning
12:12:40 13   to the phrase. Similarly when describing articles
12:12:42 14   where the phrase with respect to appears, but the
12:12:44 15   United States's statement of administrative action
12:12:47 16   as well as the Canadian statement on implementation
12:12:50 17   use a variety of different terms.
12:12:53 18   And finally, we explain that the
12:12:55 19   interpretation by the first waste management
12:12:59 20   tribunal of the phrase with respect to comports
12:12:59 21   with the interpretation advanced by the United
12:13:03 22   States. Because we have made these arguments at
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12:13:05 1   length in our prior written and oral submissions, I
12:13:09 2   was not going to repeat them all here for you, and
12:13:13 3   I was going to spare you my French language
12:13:17 4   attempts, but all of this we submit illustrates
12:13:21 5   that the NAFTA parties did not ascribe any
12:13:26 6   particularized narrow meaning to the phrase with
12:13:28 7   respect to, and claimants in our view have advanced
12:13:31 8   no plausible argument why that phrase should not be
12:13:35 9   interpreted in accordance with its ordinary
12:13:38 10   meaning.
12:13:38 11   The claimants nevertheless argue that the

12:13:41 12   United States is not entitled to the so-called
12:13:45 13   protection of Article 1901(3) because its agencies
12:13:50 14   allegedly acted arbitrarily and in bad faith when
12:13:53 15   they issued the determinations. In their letter
12:13:56 16   filed last week, Canfor and Terminal, for example,
12:14:00 17   say they accept that honest mistakes can be made
12:14:04 18   when United States's authority is put in place AD
12:14:08 19   and CVD duty orders, but they argue, however, that
12:14:12 20   in this case the U.S. authorities abused the AD/CVD
12:14:17 21   regime because there was a predetermined,
12:14:20 22   politically motivated and results driven outcome.
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12:14:23 1   According to claimants then, if the
12:14:26 2   determinations were issued in violation of U.S.
12:14:31 3   trade law because the investigations were
12:14:34 4   improperly commenced as a result of the Byrd
12:14:39 5   Amendment or because unlawful ex-parte
12:14:41 6   communications took place, or because the outcome
12:14:44 7   of the investigations was politically motivated and
12:14:47 8   predetermined, any obligation imposed on the United
12:14:51 9   States concerning that conduct cannot be said to be
12:14:54 10   with respect to its law.
12:14:58 11   These arguments, however, ignore the
12:15:00 12   ordinary meaning of the term with respect to. The
12:15:04 13   determinations at issue were made by U.S.
12:15:07 14   Government agencies that applied U.S. AD/CVD law.
12:15:13 15   Whether those agencies properly applied the law is
12:15:16 16   the precise question that the NAFTA parties
12:15:19 17   reserved for Chapter 19 binational panels.
12:15:23 18   If claimants' interpretation of the
12:15:26 19   phrase with respect to antidumping and
12:15:28 20   countervailing duty law was accepted, then any time

12:15:32 21 a Chapter 19 binational panel found that a NAFTA
12:15:36 22 party had violated its obligations under Chapter
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12:15:41 1 19, that party's AD/CVD duty determinations would
12:15:46 2 become open to challenge under Chapter 11, but
12:15:51 3 Chapter 19 is the chapter that sets forth the
12:15:54 4 manner in which a party's determinations may be
12:15:58 5 challenged and the remedies that may be granted.
12:16:01 6 If a Chapter 19 panel finds that a
12:16:04 7 party's determinations violated that party's
12:16:07 8 domestic law, the Chapter 19 panel remands the
12:16:11 9 determination to the responsible agency. A finding
12:16:14 10 by a Chapter 19 panel that the determinations were
12:16:17 11 unlawful under domestic law does not change the
12:16:22 12 fact that the determinations were made with respect
12:16:25 13 to that law. Nor can there be any meaningful
12:16:32 14 distinction between honest mistakes or egregious or
12:16:36 15 purposeful violations.
12:16:38 16 One of the reasons that the Chapter 19
12:16:40 17 binational panel system was created was precisely
12:16:45 18 because the NAFTA parties suspected that the
12:16:48 19 domestic agencies that conducted AD/CVD
12:16:52 20 investigations and administered their trade laws
12:16:55 21 were biased and that the investigations were
12:16:57 22 politically motivated and that the outcomes of
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12:17:00 1 those investigations were predetermined. Canfor
12:17:04 2 has made these allegations in the Chapter 19
12:17:08 3 submissions, and the Chapter 19 panels are
12:17:11 4 empowered to rule on those issues.
12:17:18 5 PRESIDENT VAN DEN BERG: You just

12:17:18 6   answered question 30. Question 31, could you
12:17:21 7   please answer that one as well?
8   PRESIDENT VAN DEN BERG: Before the
9   Article 1120 Tribunal -- I mean the, in Canfor
12:17:44 10   proceedings, the United States stated that the
12:17:49 11   panel would have jurisdiction in the event of
12:17:49 12   corruption and frustration of Chapter 19
12:17:52 13   proceedings or in the case of adoption of
12:17:52 14   legislation disguised -- it's in quotation marks --
12:17:56 15   as AD/CVD law.
12:17:59 16   Is this still the position of the United
12:18:03 17   States?
12:18:08 18   MS. MENAKER: Our position has not
12:18:09 19   changed from the position that we advanced at the
12:18:12 20   Canfor hearing, but with due respect, I do not
12:18:17 21   think that the question fairly characterizes our
12:18:21 22   position. And if we turn to page 351 of the Canfor
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12:18:23 1   transcript, what we said there was that -- and I
12:18:24 2   will just quote it. Quote: A party may not avoid
12:18:27 3   Chapter 11 merely by labeling its conduct as
12:18:31 4   antidumping and countervailing duty law. If a
12:18:34 5   matter is not genuinely subject to obligations with
12:18:37 6   respect to AD/CVD law, simply calling it AD/CVD law
7   will not shield a state from Chapter 11
12:18:45 8   implications. The Tribunal is free to look and see
12:18:47 9   if, in fact, it is conduct subject to obligations
12:18:49 10   with respect to antidumping and countervailing duty
12:18:53 11   laws.
12:18:54 12   So, in essence what we were arguing there
12:18:58 13   was it is not enough for us to simply say this
12:19:03 14   Tribunal lacks jurisdiction because Canfor's and

12:19:08 15 Terminal's claims are seeking to impose obligations
12:19:14 16 with respect to our AD/CVD laws. It is this
12:19:19 17 Tribunal's job to look at the claims and determine
12:19:24 18 for itself what claims Canfor and Terminal are
12:19:28 19 making and to see whether those claims fall within
12:19:31 20 the exception to jurisdiction and that is in line
12:19:36 21 with Judge Koroma's separate opinion on the
12:19:39 22 Fisheries jurisdiction case that Mr. Clodfelter
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1 referred to this morning.
12:19:42 2 And in fact, we believe the Tribunal has
12:19:44 3 a very cogent analysis of the nature of the claims
12:19:47 4 in its consolidation order when it was looking and
12:19:52 5 when it made the determination to consolidate on
12:19:55 6 issues of liability, it did state the nature of the
12:20:00 7 claims, but we could not, for example, have a law
12:20:06 8 that was completely detached from antidumping and
12:20:12 9 countervailing duty law, and then apply that and
12:20:16 10 then seek to avoid the jurisdiction of this
12:20:19 11 Tribunal by claiming that the law was labeled
12:20:22 12 AD/CVD law even though had it nothing to do with
12:20:28 13 trade matters. And that was our point there. It
12:20:30 14 was in response to questioning by the Tribunal,
12:20:32 15 whether a label is sufficient, and we have never
12:20:35 16 suggested that it is. We -- it is our position
12:20:40 17 that that's precisely the task before this
12:20:42 18 Tribunal, is to look at the claims and determine
12:20:46 19 for itself whether the claims are indeed in the
12:20:48 20 nature of AD/CVD claims.
21 PRESIDENT VAN DEN BERG: Ms. Menaker,
12:20:57 22 could you please -- you have the transcript in
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12:20:58 1 front of you, of the Canfor hearing. Could you
12:21:01 2 please go to page 351? What you just answered was
12:21:09 3 the second part of question 31. But the first part
12:21:15 4 refers actually to page 351, lines 16 through 18.
12:21:23 5 Your colleague Mr. Clodfelter stated there for the
12:21:26 6 record, quote, so, comma, fraudulent attempts
7 disguise otherwise violative behavior cannot be
12:21:30 8 shielded by follow on describes to describe
12:21:32 9 violative behavior cannot be shielded by 1901(3),
12:21:37 10 end of the quote.
12:21:38 11 Of course, you have always to read
12:21:40 12 through. Then Mr. Clodfelter goes and says: At
12:21:43 13 the same time, however, if, in fact conduct is
12:21:46 14 AD/CVD law or its application, then Chapter 11 is
12:21:50 15 simply not available.
12:21:52 16 But the first part would seem that
12:21:55 17 Mr. Clodfelter is saying, look, if there is fraud,
12:21:58 18 then it may be that a Chapter 11 Tribunal has
12:22:02 19 jurisdiction, but perhaps we should ask the
12:22:07 20 question to Mr. Clodfelter, although I see you are
12:22:09 21 interpreting Mr. Clodfelter, while we have
12:22:12 22 Mr. Clodfelter present here, so...
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12:22:18 1 MR. CLODFELTER: I do, I think, have to
12:22:19 2 say that I think the question mischaracterizes the
12:22:21 3 statement. It doesn't mention anything about
12:22:23 4 corruption or frustration. What it talks about is
12:22:27 5 the same thing it was talking about in the previous
12:22:28 6 sentences, that is, mislabeling. I used a phrase
12:22:31 7 in my answer, "fraudulent attempts to disguise" but
12:22:34 8 clearly what I am talking about there is a

12:22:36 9   mislabeling problem. It has to really be AD/CVD
12:22:42 10   law. It can't be simply disguised as AD/CVD law.
12:22:45 11   The fraud is not in the operation of the law, the
12:22:49 12   fraud is in the attempt of the state to cover up
12:22:52 13   something that really isn't AD/CVD law as it were.
12:23:00 14   Does that clarification suffice?
12:23:00 15   PRESIDENT VAN DEN BERG: Thank you; yes.
12:23:20 16   MR. CLODFELTER: All right, great.
12:23:21 17   PRESIDENT VAN DEN BERG: Ms. Menaker, I
12:23:23 18   have one further question that just relates to a
12:23:27 19   previous point you made. Is this an opportune
12:23:31 20   moment to ask a question or are you in the middle
12:23:34 21   somewhere?
12:23:35 22   MS. MENAKER: No, please.

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1   PRESIDENT VAN DEN BERG: Right. Because
12:23:38 2   you dealt with the question what is to be
12:23:39 3   understood by the law in -- the word "law" in
12:23:40 4   1901(3), and you said, well, look, it is more than
12:23:47 5   only statute, and then also you refer to 1902
12:23:52 6   paragraph 1 and 1904 paragraph 2.
12:23:58 7   However, as you have seen, the Tribunal
12:24:01 8   has also a question, and I think it is question --
12:24:12 9   questions 22 and 23. There is another provision,
12:24:16 10   and we could not find that any of the parties or
12:24:20 11   even at the previous hearing has dealt with, is
12:24:23 12   that 1905 talks, 1905 calls for a safeguard
12:24:29 13   independent review system. And then it says in the
12:24:32 14   beginning -- the opening line of 1905 says in the
12:24:35 15   first paragraph, where a party alleges that the
12:24:37 16   application of another party's domestic law, and

12:24:43 17   then if you turn to 1911, you see a definition of
12:24:51 18   domestic law -- and it reads: For the purposes of
12:24:55 19   1905 one meets a party's constitution, statutes,
12:24:59 20   regulations and judicial decisions, to the extent
12:25:02 21   they are relevant for the antidumping and
12:25:04 22   countervailing duty laws.
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12:25:07 1   My first question is when you used the
12:25:10 2   words 1905 -- in 1905 paragraph one, the words
12:25:14 3   "domestic law," is that the same as law in 1901
12:25:18 4   paragraph three?
5   (Pause.)
6   At that point, although I have to be
12:26:28 7   careful about characterizing questions as simple,
12:26:28 8   what I understand you all along to be arguing as
12:26:29 9   the United States, is well look, this whole chapter
12:26:32 10   only deals with antidumping and countervailing duty
12:26:35 11   laws of the state parties to NAFTA. That cannot be
12:26:41 12   anything else than their domestic laws or am I
12:26:46 13   wrong there?
12:26:50 14   MS. MENAKER: I think when it says with
12:26:51 15   respect to the parties' AD/CVD law, they are
12:26:55 16   talking, obviously, about the parties' internal
12:26:57 17   AD/CVD law, but they did not use the term -- the
12:27:02 18   defined term "domestic law."
19   PRESIDENT VAN DEN BERG: Then it -- but
12:27:07 20   you agree that that 1901 paragraph three law means
12:27:09 21   domestic law, leaving aside whether it fits the
12:27:17 22   definition of 1911. It's a domestic law. It's a
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1   very simple question.
2   MS. MENAKER: It is domestic law, but

3 that is apart from whether the defined term applies
4 because that's -- you understand that I'm saying.
12:27:26 5 PRESIDENT VAN DEN BERG: That is step
12:27:28 6 one. Now there's step two is 1905 -- we are
12:27:33 7 getting there, Mr. Bettauer, don't worry -- 1905
12:27:37 8 are provisions related to safeguard independent
12:27:41 9 review system, so it is a follow-up of 1904; is
12:27:45 10 that correct? So if a state party does not comply
12:27:48 11 with the 1904 ruling, use the words loosely, then
12:27:53 12 there is a mechanism provided in NAFTA in 1905 the
12:27:59 13 state parties can do something about this. So you
12:28:02 14 see here there are a number of instances, and then
12:28:06 15 if you see that, so it fits into 1904, you say,
12:28:12 16 well, 1905 says the application of another party's
12:28:16 17 domestic law, and you go then to the definition,
12:28:20 18 you see in definition again, which you argued
12:28:22 19 earlier it says well, look, these definitions you
12:28:25 20 have to be careful about because 1901 says "for the
12:28:29 21 purposes" and 1902, paragraph -- sorry, 1904
12:28:32 22 paragraph 2 also "for the purposes." Look where
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12:28:35 1 the definition is used. That is the context.
12:28:38 2 And you said, well, in 1901(3) you have
12:28:43 3 to take a broader view. Have I summarized your
12:28:49 4 view correctly?
12:28:51 5 Now, it may be that in 1905 the same
12:28:54 6 happens because the definition in 1911 says, again,
12:28:58 7 "for the purposes of." So it may be limited to
12:29:00 8 this.
12:29:01 9 But what strikes me in these three
12:29:04 10 definitions of law is that in 1911 the

12:29:08 11   administrative practice has gone out of the window,
12:29:11 12   if I may use a colloquial term.
12:29:18 13   And could you please explain why that
12:29:19 14   would be, in 1911. Why have they -- they are not
12:29:22 15   included administrative practices, because I
12:29:25 16   understood earlier from your submissions that
12:29:26 17   administrative practice is also to be considered --
12:29:29 18   and please correct me if I am wrong -- as a source
12:29:32 19   of law.
12:31:32 20   (Pause.)
12:31:33 21   MS. MENAKER: If I may offer a
12:31:34 22   preliminary answer now and then some of my
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12:31:37 1   colleagues, we may want to discuss this further at
12:31:39 2   the next break so I would like to have the
12:31:42 3   opportunity to supplement if we need it. But it
12:31:45 4   appears to us that the term is, in fact, different,
12:31:48 5   that the manner in which they are using the term
12:31:52 6   "domestic law" in Article 1905 is different from
12:31:55 7   the manner in which AD or CVD law is used in
12:32:00 8   1901(3) and that explains why the definition of
12:32:04 9   domestic law in Article 1911 does not -- is not the
12:32:08 10   same and is not as broad because in Article 1905
12:32:12 11   they are not talking about a party's domestic
12:32:15 12   AD/CVD law. They are talking about external laws
12:32:21 13   that may be used by a party in order to frustrate
12:32:25 14   the proper application of the binational panel
12:32:29 15   system, and I think that that, you know, by the
12:32:33 16   context, when you read 1905, I think that's made
12:32:37 17   clear and it's also confirmed by looking at the
12:32:40 18   definition in 1911, when they talk about domestic
12:32:45 19   law, they specifically say -- you can tell it's

12:32:46 20   external law because it says a party's
12:32:49 21   constitution, statutes, regulations and judicial
12:32:53 22   decisions to the extent that they are relevant to
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12:32:55 1   the AD/CVD laws. So they are not talking about
12:33:01 2   those AD/CVD laws themselves, they're talking about
12:33:04 3   these other laws that perhaps are being used in a
12:33:06 4   manner to frustrate the operation of the system.
12:33:09 5   PRESIDENT VAN DEN BERG: I can follow,
12:33:10 6   but not necessarily it should be external laws
12:33:14 7   because it can also be that subsequent to a ruling
12:33:17 8   by the binational panel, a state party, and I use a
12:33:22 9   hypothetical here, amends quickly its AD/CVD law in
12:33:27 10   order to undermine or to -- let's put it this way
12:33:29 11   -- neutralize a ruling by a binational panel in
12:33:34 12   1904. Are you then not within the AD/CVD law?
12:33:39 13   MS. MENAKER: In that example, I think
12:33:41 14   that that law would fall both within the definition
12:33:43 15   of domestic law as used in 1905 and AD/CVD law as
12:33:51 16   used in 1901(3), so there certainly can be some
12:33:52 17   overlaps. So perhaps I overstated it when I said
12:33:57 18   "external" but I think that the manner in which it
12:33:59 19   is used in 1905 definitely does indicate that the
12:34:04 20   parties were looking at laws that were somewhat
12:34:09 21   external to what you would typically think of as
12:34:13 22   their AD/CVD laws when they wrote this provision.
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12:36:06 1   (Pause.)
12:36:07 2   We would simply add that I think this
12:36:09 3   highlights the importance of looking at the
12:36:12 4   particular term in its context because the word

12:36:15 5   "law" in this definition in 1911 has a different
12:36:19 6   meaning in the first and second sentence. In the
12:36:22 7   first sentence that definition is an exhaustive
12:36:26 8   definition. It uses the term "means" and as the
12:36:29 9   Tribunal pointed out, that does not include
12:36:32 10   administrative practice, and yet in the second part
12:36:35 11   of the sentence, when they are talking about
12:36:37 12   antidumping and countervailing duty laws, even if
12:36:40 13   you were to import of definition from Article
12:36:43 14   1904(2) and 1902(1), there that clearly does
12:36:48 15   include administrative practice.
12:36:50 16   So I think it just highlights the manner
12:36:53 17   in which -- the different manners in which the word
12:36:56 18   "law" can be construed, depending on whether it is
12:37:01 19   a precisely defined term in that particular
12:37:03 20   article, and depending on the context in which it
12:37:08 21   appears.
12:37:11 22   PRESIDENT VAN DEN BERG: But then it
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12:37:12 1   leaves the question for 1901(3), how we should read
12:37:16 2   the word law there because what I now understand
12:37:20 3   from you -- please correct me if I'm wrong -- that
12:37:20 4   the definition in 1902 paragraph 1, 1904, paragraph
12:37:29 5   2 and 1905 in conjunction with 1911 are not
12:37:30 6   helpful. And you say, well, look, what you as a
12:37:32 7   Tribunal have to do is take the broad view of law
12:37:35 8   including the application of the law?
12:37:39 9   MS. MENAKER: That's correct. In looking
12:37:40 10   at the ordinary meaning of the term with respect to
12:37:44 11   a law, an obligation with respect to a law, the
12:37:47 12   ordinary meaning of that term encompasses an
12:37:51 13   obligation that is imposed on a party in

12:37:54 14 administering or in applying its law, and, again, I
12:37:59 15 would direct the Tribunal's attention to the UPS --
12:38:04 16 the pleadings in that case as well as the
12:38:06 17 jurisdictional decision, where I think that that
12:38:08 18 same differentiation was sought to be made between
12:38:11 19 the law and its application.
12:38:13 20 But, again, I think if one were to look
12:38:17 21 to the definitions in 1902(1) and 1904(2) for
12:38:25 22 guidance, that that only further confirms the
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12:38:28 1 United States's interpretation because the term
12:38:32 2 "administrative practice" is included within the
12:38:34 3 definition of AD/CVD law and duty determinations
12:38:39 4 are an administrative practice. And the only
12:38:42 5 reason that we have heard from claimants as to why
12:38:45 6 that would not be the case is because -- not
12:38:48 7 because they contend that a duty determination is
12:38:51 8 not an administrative practice, but because they
12:38:54 9 are trying to import the context in which that term
12:38:59 10 appears in 1904(2) into 1901(3) to mean only the
12:39:03 11 past laws and not the current one being looked at.
12:39:08 12 PRESIDENT VAN DEN BERG: If I follow your
12:39:09 13 argument, then, if administrative practice includes
12:39:16 14 duty determinations, why is it, then, that
12:39:19 15 administrative practice is not used in the
12:39:22 16 definition of 1911(4) and 1905. Would it mean,
12:39:28 17 then, to take, and the hypothetical, that if
12:39:30 18 subsequent to ruling by a 1904 binational panel, a
12:39:37 19 duty determination is made in violation of the
12:39:39 20 ruling, that such a duty determination would not
12:39:42 21 fall under the safeguarding of the panel review

12:39:46 22   system?

12:40:20 1   MS. MENAKER: In response to your
12:40:21 2   question, I don't think that that would be the
12:40:23 3   result because in Article 1905, it states that even
12:40:28 4   if the definition of domestic law does not include
12:40:32 5   duty determinations, you would still be able to
12:40:36 6   challenge a party's -- or seek panel review for a
12:40:43 7   duty determination because it says the application
12:40:45 8   of another party's domestic law.
12:40:49 9   PRESIDENT VAN DEN BERG: That is just the
12:40:50 10   point because 1901(3) does not refer to the
12:40:53 11   application, at least not expressly.
12:40:57 12   MS. MENAKER: That's correct, but
12:40:58 13   domestic law, as we've just pointed out, is a
12:41:02 14   defined term, whereas antidumping countervailing
12:41:07 15   duty law first is not a defined term and that
12:41:12 16   phrase with respect to the law does encompass the
17   interpretation, administration, application of that
12:41:14 18   law. And secondly, if you were going to import the
12:41:16 19   so-called defined term of AD/CVD law into 1901(3),
12:41:22 20   you would achieve the same result because that does
12:41:26 21   contain the definition "administrative practice."
12:41:29 22   So either way, duty determinations would be covered

12:41:33 1   within the phrase "with respect to a party's AD/CVD
12:41:36 2   law."
12:41:37 3   PRESIDENT VAN DEN BERG: Thank you. I
12:41:37 4   think Mr. Robinson has some further questions.
12:41:42 5   ARBITRATOR ROBINSON: Thank you,
12:41:42 6   Mr. President.
12:41:43 7   I would like to ask, where I find myself

12:41:47 8   more than somewhat confused, is that in 1911, the
12:41:52 9   term "domestic law" means a party's constitution,
12:41:57 10   which is above a statute. Now, do you, in taking
12:42:04 11   the broad interpretation of antidumping law and
12:42:08 12   countervailing duty law in Article 1901(3) as being
12:42:14 13   very broad on the way down, is it also very broad
12:42:17 14   on the way up? Would it also include the
12:42:40 15   constitution?
12:42:41 16   MS. MENAKER: I think, Mr. Robinson, that
12:42:43 17   the Constitution would certainly be law but I don't
12:42:48 18   think it's AD/CVD law in that same sense, because
12:42:51 19   as far as I am aware, the constitution doesn't deal
12:42:54 20   with antidumping, countervailing duty matters, so I
12:43:09 21   can't conceive of a situation where it would impose
22   obligations on a party with respect to its AD/CVD

12:43:10 1   law and one would be looking at the U.S. Constitution,
12:43:12 2   for instance.
12:43:13 3   ARBITRATOR ROBINSON: Well, I only raise
12:43:14 4   the question because if law in Article 1901(3) is
12:43:20 5   so broad, then that is an obvious question when
12:43:28 6   1911 is the only definitional section that includes
12:43:33 7   the Constitution. Those in 1902 and 1904, there is
12:43:40 8   no reference to the Constitution.
12:43:43 9   MS. MENAKER: But I think that if you
12:43:44 10   look at it in context the word "law" is broad in
12:43:48 11   our view 1901(3) but it is restricted to AD/CVD
12:43:54 12   law. It's the only context in which it makes
12:43:58 13   sense, whereas one could theoretically presume
12:44:03 14   that, say, a country putting a constitutional
12:44:05 15   prohibition from divesting the Article 3 court's --

12:44:11 16   divesting them of jurisdiction over any matters
12:44:14 17   involving -- I don't know how it would be phrased,
12:44:17 18   but some kind of broad constitutional prohibition
12:44:22 19   that would, in effect, interfere with the party's
12:44:27 20   ability to comply by with the 1904 binational panel
12:44:33 21   systems. That seems to be something that another
12:44:37 22   NAFTA party under Article 1905 could challenge.
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12:44:38 1   And so you could foresee the parties trying -- not
12:44:40 2   that you could foresee them trying to frustrate it
12:44:43 3   in that manner, but it is not implausible to think
12:44:45 4   that these external laws, as I have so called them,
12:44:51 5   could be imposed to interfere with the normal
12:44:55 6   operation of 1904.
12:44:57 7   ARBITRATOR ROBINSON: So if I understand
12:44:58 8   it, it is not the word "law" that is being focused
12:45:01 9   on in 1901(3), it's the words "antidumping law" or
12:45:04 10   "countervailing duty law," and that in all
12:45:07 11   likelihood the reason why 1911 included the
12:45:13 12   Constitution, was because the words "domestic law"
12:45:19 13   are there, which necessarily would also be
12:45:23 14   inclusive of the Constitution, whereas if it is
12:45:28 15   antidumping law or countervailing duty law, that
12:45:32 16   would not be inclusive of the Constitution.
12:45:36 17   MS. MENAKER: Yes, I would agree with
12:45:37 18   that.
12:45:39 19   ARBITRATOR ROBINSON: Okay, thank you.
12:45:41 20   PRESIDENT VAN DEN BERG: I have one
12:45:42 21   further question, Ms. Menaker.
12:45:48 22   Do you or the United States read Article
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12:45:54 1   1901 paragraph (3) is with respect to the party's

12:45:55 2 antidumping law or countervailing duty law or its
12:45:58 3 application; is that correct?
12:46:09 4 MS. MENAKER: Yes.
12:46:11 5 PRESIDENT VAN DEN BERG: Then help me
12:46:12 6 because you are dealing with the ordinary meaning
12:46:16 7 and so just one article below that, you go to 1902
12:46:20 8 paragraph 1, and there they know to use the word
12:46:27 9 "apply" or "application," and what it sets out,
12:46:33 10 Article 1902, is retention of domestic antidumping
12:46:36 11 law and countervailing duty law.
12:46:37 12 And what the first sentence says is well,
13 look, each party reserves the right to apply its
12:46:40 14 antidumping law and countervailing duty law to
12:46:40 15 goods imported from the territory of any other
12:46:44 16 party. And then they give the definition of
12:46:47 17 antidumping law.
12:46:48 18 So apparently here is the distinction to
12:46:51 19 be made between application and the law itself.
12:46:55 20 Why is that not done, then, in 1901(3), and I may
12:47:00 21 help you also with application, because, again, the
12:47:03 22 word "application" appears in Article 1905
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12:47:08 1 paragraph 1 where they say where a party implies
12:47:11 2 that the application of another domestic law. So
12:47:15 3 they note -- the drafters knew to use the word
12:47:19 4 "application." They said it belongs probably to
5 the category of the first thousand words you can
12:47:22 6 use in language in any event.
12:47:23 7 MS. MENAKER: We were not interpreting
12:47:25 8 Article 1901(3) in a manner that would make it
12:47:30 9 necessary for the Tribunal to add extra words to

12:47:35 10 Article 1901(3) in order to agree with our
12:47:39 11 conclusion as to its interpretation because we
12:47:41 12 think that the application of the law is
12:47:43 13 encompassed within the phrase as it's used.
12:47:48 14 And if you look at -- I mean, the purpose
12:47:49 15 of -- when you look at 1902, it's telling the
12:47:54 16 parties they have the right to retain their AD/CVD
12:47:58 17 laws. They may apply them. That's what 1902(1)
12:48:03 18 says, and then 1902(2) says, and you can amend them
12:48:06 19 as long as you do so in various ways. And what
12:48:08 20 1901(3) does is it reinforces the parties' ability
12:48:14 21 to retain and apply their AD/CVD laws because it
12:48:20 22 does that by making clear that other provisions
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12:48:24 1 outside of Chapter 19 should not interfere with
12:48:28 2 those rights.
12:48:29 3 So you would not have the right that you
12:48:31 4 have in 1902(1) one to apply your law if another
12:48:36 5 provision of a chapter, say -- and we can take
12:48:40 6 Canfor's claim, for example -- if what we are doing
12:48:43 7 is we have the right to retain our AD/CVD law and
12:48:48 8 then we apply it, and in applying it, we issue
12:48:51 9 determinations.
12:48:52 10 Now, that right is infringed if another
12:48:56 11 provision of another part of the agreement is
12:48:58 12 imposed, is construed to impose an obligation on us
12:49:03 13 with respect to that law. So we don't really have
12:49:06 14 the right to retain and apply it, except in the
12:49:10 15 manner set forth in Chapter 19 if what we have to
12:49:14 16 do is we can retain and we can apply it, but we
12:49:19 17 might be subject to liability under Chapter 11
12:49:21 18 because the Tribunal can assess whether in

12:49:24 19   retaining and applying that law we complied with
12:49:27 20   the substantive obligations in Chapter 11. And we
12:49:30 21   are also subject to the arbitral mechanism in
12:49:34 22   Chapter 11. So that infringes our ability to
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12:49:38 1   retain and apply our AD/CVD law.
12:49:42 2   And so that what the chapter is doing as
12:49:45 3   a whole is it's telling the parties you retain it,
12:49:46 4   you may apply it, if you change it, you have to do
12:49:51 5   so in accordance with these procedures, and if you
12:49:53 6   misapply it, or if a party believes you misapply
12:49:55 7   it, then we will scrutinize it under the 1904
12:49:59 8   mechanism and here those rights are being infringed
12:50:05 9   if you read 1901(3) to permit a party to challenge
12:50:08 10   the application of the law because then they don't
12:50:11 11   have the right to apply the law without suffering
12:50:16 12   or without being burdened with an obligation to
12:50:18 13   also comply with obligations that are set forth in
12:50:20 14   Chapter 11 or other chapters.
12:50:23 15   PRESIDENT VAN DEN BERG: Thank you. How
12:50:23 16   many more minutes do you need for your presentation
12:50:26 17   because I think then we should have a break for
12:50:30 18   lunch. But please finish first your presentation.
12:50:31 19   MS. MENAKER: Sure. Only about five
12:50:34 20   minutes.
12:50:35 21   PRESIDENT VAN DEN BERG: Fine. Please
12:50:36 22   proceed.
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12:50:51 1   MS. MENAKER: We may want to also
12:50:54 2   supplement the comments that I just made.
12:50:57 3   PRESIDENT VAN DEN BERG: That is fully

12:50:59 4   understood because the rules of the game regarding
12:51:00 5   the questions. And the same also applies to the
12:51:03 6   claimants.
12:51:05 7   MS. MENAKER: And really the point on
12:51:06 8   which I wanted to sum up, I have already alluded to
12:51:10 9   it in my last comments, which is not only in our
12:51:13 10   view would claimant's reading be contrary to the
12:51:17 11   ordinary meaning of Article 1903, but it would
12:51:24 12   frustrate the NAFTA parties intent. And it's clear
12:51:26 13   that the NAFTA parties, they can challenge both the
12:51:29 14   substance of an AD/CVD law as well as the
12:51:33 15   application of that AD/CVD law under Chapter 19,
12:51:40 16   because under Article 1903 another NAFTA party can
12:51:41 17   challenge an amendment that one of the other NAFTA
12:51:44 18   parties makes to its AD/CVD laws and as you all
12:51:47 19   know, under Article 1904 a NAFTA party can
12:51:50 20   challenge another state's application of its AD/CVD
12:51:55 21   laws because they are able to challenge duty
12:51:59 22   determinations.
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12:52:00 1   So, under -- if you interpret Article
12:52:01 2   1901(3) to only prohibit the imposition of an
12:52:06 3   obligation with respect to the substance of a law
12:52:08 4   and not with respect to the application of the law,
12:52:11 5   then one has to conclude that the NAFTA parties
12:52:15 6   intended to grant the parties the ability to
12:52:21 7   challenge duty determinations not only under
12:52:26 8   Chapter 19 but also under Chapter 11. And in our
12:52:33 9   view, it is simply untenable to reach that
12:52:37 10   conclusion when one looks at the structure of
12:52:41 11   Chapter 19.
12:52:41 12   It is unexplained as to why the parties

12:52:44 13 would have devised such a particularized dispute
12:52:49 14 resolution mechanism system in Article 1904 to hear
12:52:51 15 challenges to a party's AD/CVD duty determinations
12:52:55 16 if the same determinations could be challenged
12:52:57 17 under Chapter 11.
12:52:58 18 And as I mentioned earlier, the
12:53:01 19 binational panel review system in Chapter 19 was
12:53:05 20 considered to be the centerpiece of Chapter 19 and
12:53:09 21 you need only look at the title of Chapter 19 to
12:53:12 22 confirm that fact because the chapter is entitled
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12:53:14 1 Review and Dispute Settlement in AD and
12:53:19 2 Countervailing Duty Matters. And that's what
12:53:22 3 Chapter 19 is really all about. And the Chapter 19
12:53:23 4 panels, as Mr. Clodfelter mentioned this morning,
12:53:27 5 have to apply domestic law and they also provide
12:53:31 6 Chapter 19 that the persons who serve on the
12:53:33 7 panels, the five-member panels, will be sitting or
12:53:35 8 former judges to the extent practicable, and
12:53:38 9 numerous and detailed rules of procedure are also
12:53:42 10 prescribed in Chapter 19.
12:53:43 11 The review is conducted with a high
12:53:46 12 degree of deference given to the agency's factual
12:53:50 13 findings and conclusions of law. And the failure
14 to apply the domestic law standard of review, in
12:53:54 15 fact, is a per se grounds for review by an
12:53:57 16 extraordinary challenge committee.
12:54:03 17 Professor de Mestral mentioned earlier
12:54:06 18 this morning about -- I think he characterized it
12:54:08 19 as actually a change in the standard of review.
12:54:11 20 But if you look at the United States' statement of

12:54:15 21   administrative action, it was the United States'
22   view that this was always the case, that a Chapter

12:54:20 1   19 panel was strictly bound to apply the municipal
12:54:21 2   law standard of review, but the United States was
12:54:24 3   apparently so concerned that panels that were
12:54:28 4   constituted under the CFTA were not doing so, that
12:54:31 5   they made this even more explicit in the NAFTA.
12:54:34 6   And the NAFTA -- the SAA devotes almost a
12:54:38 7   full page to talking about this standard of review
12:54:42 8   and if it is misapplied, it is a per se reason for
12:54:46 9   having an extraordinary challenge committee.
12:54:50 10   So, one has to ask, then, why would the
12:54:52 11   parties have gone through the trouble of creating
12:54:55 12   an entire chapter of the NAFTA that is devoted
12:54:58 13   review and dispute settlement of AD/CVD matters if
12:55:03 14   those matters could also be resolved in a
15   completely different manner through an entirely
16   different procedure.
12:55:07 17   And why would the United States have
12:55:09 18   assured Congress in the United States' statement
12:55:12 19   of administrative action that the binational panels
12:55:16 20   would apply U.S. legal standards of review when
12:55:16 21   reviewing the duty determinations, and yet never
12:55:20 22   mentioned that, by the way, in addition to this

12:55:23 1   Chapter 19 review, a claimant is also entitled to
12:55:27 2   file a claim before a Chapter 11 ad hoc tribunal
12:55:31 3   that is going to apply substantive international
12:55:35 4   law standards and is going to be able to make an
12:55:38 5   award for monetary damages against the United
12:55:41 6   States.

12:55:41 7   We submit that the NAFTA parties, neither
12:55:43 8   the NAFTA parties nor the United States would have
12:55:46 9   acted in this manner, and yet claimants argument,
12:55:50 10   again, it requires the conclusion that the NAFTA
12:55:53 11   parties intended to give claimants this choice, to
12:55:56 12   challenge the duty determinations under Chapter 19
12:56:00 13   and to also challenge them under Chapter 11, or to
12:56:04 14   do both, as Canfor has done so here.
12:56:08 15   So, in sum, claimant's arguments are at
         16   odds with Article 1901(3)'s ordinary meaning.
12:56:14 17   Article 1901(3) makes cheer that Chapter 19 is the
12:56:16 18   exclusive mechanism under the NAFTA for challenging
         19   antidumping and countervailing duty determinations.
12:56:22 20   In the Canfor jurisdictional hearing,
12:56:24 21   Canfor claimed, and I quote, the conduct being
12:56:27 22   complained about by Canfor can be subjected to
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12:56:30 1   review under both dispute resolution mechanisms,
12:56:35 2   meaning both Chapter 19 and Chapter 11, regardless
12:56:37 3   of whether the conduct is in any way related to
12:56:41 4   antidumping and CVD matters or investigations, end
12:56:45 5   quote, and that is from the transcript at pages 69
          6   to 170.
12:56:50 7   Now, that position is simply
12:56:52 8   irreconcilable with the plain meaning of 1901(3).
          9   And subjecting AD/CVD duty determinations under
12:57:00 10   Chapter 11's international law rules would impose
12:57:04 11   obligations on the United States from chapters
12:57:06 12   outside of Chapter 19 with respect to its
12:57:09 13   antidumping and countervailing duty rules. And we
12:57:13 14   contend that such action is expressly prohibited by

12:57:17 15   Article 1901(3).
12:57:20 16   PRESIDENT VAN DEN BERG: Are you finished
12:57:22 17   with your presentation, Ms. Menaker?
12:57:26 18   But before calling for lunch, I still
12:57:28 19   have a question -- actually two, probably. The
12:57:34 20   first one is, I don't know which number it is on
12:57:35 21   the list, but it is what would be the position if
12:57:41 22   Chapter 19 had not been included in the NAFTA?
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12:57:45 1   Would then disputes related to antidumping and
12:57:52 2   countervailing duty laws and its application, to
12:57:55 3   the extent that they would fall under the
12:57:58 4   substantive provisions of Section A of Chapter 11
12:58:04 5   be possible to be referred to arbitral tribunals
12:58:08 6   under Section B?
12:58:10 7   MS. MENAKER: Our answer to that is no.
12:58:11 8   Even without Article 1901(3), in our review, these
12:58:16 9   claims could not be submitted to arbitration under
12:58:19 10   Section B of Chapter 11 and that is because these
12:58:20 11   claims do not relate to investors or investments
12:58:24 12   within the meaning of Article 1101(1), and as the
12:58:28 13   Tribunal is aware, this is an additional
12:58:30 14   jurisdictional objection which we've raised but
12:58:35 15   which been joined to the merits, so we have not --
16   PRESIDENT VAN DEN BERG: That assumes
12:58:38 17   that -- because that is a different subject matter,
12:58:40 18   but assume now that it is an investment, is a
12:58:43 19   covered investment and a party who has a covered
12:58:49 20   investment is nonetheless assessed with duties
12:58:57 21   under the antidumping or countervailing duty laws.
12:59:05 22   Would such a matter be arbitrable under Section B?
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12:59:13 1   MS. MENAKER: Again, I hope I am not
12:59:15 2   talking past you, but I think that in our view,
12:59:20 3   again, it wouldn't because it still would not fall
12:59:23 4   within the scope of the investment chapter. It is
12:59:26 5   difficult for us to imagine a claim that challenges
12:59:31 6   AD/CVD duty determinations, yet has the connection
12:59:37 7   required to bring it within the scope of an
12:59:39 8   investment claim. By its very nature, AD/CVD duty
12:59:44 9   determinations are issued on goods that are sought
12:59:50 10   to be imported from one party to the another.
12:59:53 11   It does not have the requisite connection
12:59:57 12   with an investment that's in the territory of the
13:00:02 13   other party, and that is, of course, what the
13:00:05 14   investment chapter governs and what investors state
13:00:05 15   arbitration is permitted for. That is why I am
13:00:09 16   asking if that answers your question, because I
13:00:12 17   think you are asking--
13:00:13 18   PRESIDENT VAN DEN BERG: I try then to
13:00:14 19   give you an example. Assume a Canadian investor
13:00:24 20   builds in Florida, the Kingdom of Thrills, and the
13:00:33 21   example comes from the Carl Yazen book.   Assume
13:00:34 22   then further that the Canadian investor wants to

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13:00:39 1   build this Kingdom of Thrills by all kinds of
13:00:44 2   softwood lumber, massive soft wood lumber. Assume
13:00:46 3   then further that this investor, Canadian investor,
13:00:52 4   is then one way or another assessed to pay an AD
13:01:02 5   and CVD duty. Would the investor of the Kingdom of
13:01:05 6   Thrills have a claim that is arbitrable under
13:01:11 7   Section B of Chapter 11?
13:01:16 8   MS. MENAKER: If I may have just a

13:01:19 9 moment.
10 PRESIDENT VAN DEN BERG: Sure.
13:01:20 11 MS. MENAKER: Our answer remains the
13:01:23 12 same, that no, they would not have an investment
13:01:26 13 claim, and we did brief this in the Tembec briefs.
13:01:30 14 But here, granted the individual, the claimant has
13:01:35 15 an investment but the measure that they are
13:01:38 16 challenging is the assessment of the duty on
13:01:41 17 imports of goods that are sought to be imported to
13:01:45 18 the United States, and that measure does not impact
13:01:49 19 them in their capacity as an investor in the United
13:01:52 20 States. It merely impacts them as an individual
13:01:57 21 that wants to import goods into the United States,
13:02:02 22 and the disciplines governing trade in goods are
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13:02:07 1 dealt with in other chapters of the NAFTA.
13:02:15 2 PRESIDENT VAN DEN BERG: But even if the
13:02:16 3 Kingdom of Thrills is built with wood imported from
13:02:21 4 Canada, you would say, well, look, the investment
13:02:25 5 itself, the Kingdom of Thrills, that is fine, that
13:02:29 6 is a covered investment, but not the wood that is
13:02:34 7 used for constructing the Kingdom of Thrills.
13:02:41 8 MS. MENAKER: I would just also direct
13:02:42 9 the panel's attention to the Methanex Tribunals'
13:02:47 10 award on jurisdiction where that panel agreed with
13:02:51 11 the United States that you cannot have Chapter 11
13:02:55 12 jurisdiction simply if a measure affects the
13:03:01 13 claimant. And in this case, the duty assessed on
13:03:06 14 the softwood lumber might, indeed, have an impact
13:03:11 15 on the investment in that it makes that good more
13:03:15 16 expensive. But having a mere effect on the
13:03:18 17 investor is insufficient to satisfy the

13:03:21 18   jurisdictional requirement that the measure relate
13:03:24 19   to and have a legally significant connection to the
13:03:27 20   investor or the investment.
13:03:31 21   PRESIDENT VAN DEN BERG: It is your
13:03:33 22   position, then, that investment tribunal, a state
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13:03:40 1   investment tribunal, will never be able to deal
13:03:44 2   with an antidumping countervailing duty matter for
13:03:48 3   the reasons you stated because it would not be a
13:03:51 4   covered investment?
13:04:25 5   MS. MENAKER: I hesitate to state
13:04:27 6   something categorically like that when we have not
13:04:31 7   -- we obviously haven't thought of every possible
13:04:32 8   hypothetical, and we are not making the argument
13:04:37 9   that trade and investment somehow are completely
13:04:42 10   disparate fears and cannot ever overlap. That is
13:04:45 11   certainly not what we are arguing.
13:04:47 12   However, we do think as a general matter
13:04:50 13   it is safe to assume that no Tribunal constituted
13:04:54 14   under one of our bilateral investment treaties, for
13:04:58 15   instance, would have jurisdiction over a claim
13:04:59 16   concerning an AD/CVD matter. At least we haven't
13:05:03 17   been able to conceive of a claim concerning an
13:05:06 18   AD/CVD matter, certainly not a challenge to an
13:05:10 19   AD/CVD duty determination that would be cognizable
13:05:15 20   under a bilateral investment treaty, you know,
13:05:20 21   which covers the same things that are covered in
13:05:22 22   Chapter 11.
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13:05:22 1   But, again, I think that this only
13:05:25 2   highlights the drafters' prudence in including

13:05:30 3 Article 1901(3) into the NAFTA because this, as I
13:05:38 4 mentioned earlier, the NAFTA, is the only agreement
13:05:41 5 other than the CFTA that the United States has
13:05:46 6 entered into that does discipline these areas and
13:05:49 7 then it makes it perfectly clear that these areas
13:05:54 8 or types of claims cannot be subject to investor
13:05:57 9 state arbitration.
13:06:08 10 PRESIDENT VAN DEN BERG: Mr. Robinson has
11 a question.
12 ARBITRATOR ROBINSON: Thank you,
13 Mr. President.
13:06:08 14 But I guess what I am struggling with is
13:06:13 15 the fact that it is such a very large document. If
13:06:17 16 I understand it, there were relatively few
13:06:21 17 additions that were made to Chapter 19 from the
13:06:26 18 free trade agreement, and the North American Free
13:06:35 19 Trade Agreement and what I am struggling with is
13:06:41 20 why this 1901(3) language is not clearer. We have
21 all these very, very detailed cross-references and
13:06:44 22 it just unbelievably complex and intricate and here
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13:06:50 1 is one of the only changes of any significance that
13:06:53 2 was added and yet it is very uncertain in my mind
13:06:59 3 as to why it was not more express in terms of what
13:07:03 4 it meant to cover and I don't quite see how that
13:07:06 5 occurred, and that is what I find surprising.
13:07:10 6 MS. MENAKER: Well, we do believe that
13:07:12 7 Article 1901(3)'s language is clear, so in our view
13:07:18 8 we think that the language does speak for itself,
13:07:22 9 and we wish in some ways that we had a better
13:07:28 10 history of the negotiations, but we simply don't.
13:07:32 11 So we have no way of knowing what was going through

13:07:35 12 the negotiators' minds and why they included some
13:07:38 13 things and didn't include others.
13:07:40 14 But as far as the cross-references -- and
13:07:44 15 Mr. McNeill will be addressing this in more detail
13:07:47 16 this afternoon -- I think that in the chapters
13:07:49 17 where you see more complex arrangements, for
13:07:54 18 instance in Chapter 14, dealing with financial
13:07:56 19 services, you have a carve-out from Chapter 11
13:08:02 20 jurisdiction in 1101(3), I believe, and then
13:08:03 21 another carve-in in portions of Chapter 14. In
13:08:07 22 Chapter 15 you have, you know, the similar sorts of
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13:08:10 1 arrangements. And I think, again, that reflects
13:08:13 2 the drafters' recognition that there was an overlap
13:08:17 3 of subject matter there.
13:08:19 4 You have -- Chapter 11 deals with
13:08:20 5 investment. Chapter 14 deals with investment in
13:08:24 6 financial services. So there is a natural overlap
13:08:28 7 and a natural -- something that needs to be
13:08:29 8 addressed. Ordinarily if you did not have a
13:08:33 9 carve-out, those types of investment matters and
13:08:37 10 financial institutions would be subject to investor
13:08:39 11 state arbitration with respect to all of the
13:08:42 12 substantive obligations in Chapter 11. I think
13:08:48 13 that that was not necessary to do with respect
13:08:50 14 Chapter 19 simply because the subject matters are
13:08:52 15 so disparate, that antidumping, countervailing duty
13:08:57 16 matters, the issuance of the imposing of duties are
13:09:01 17 not investment matters. So there was no reason to
13:09:05 18 explicitly carve it out of Chapter 11, just like
13:09:08 19 Chapter 11 does not carve out a number of other

13:09:11 20   subject matters that have nothing to do with
13:09:14 21   investment.
13:09:15 22   We could sit around a table for ages and

13:09:16 1   come up with a list of things that are completely
13:09:19 2   different and not affirmatively take action to
13:09:24 3   state something in that chapter.
13:09:26 4   ARBITRATOR ROBINSON: Well, I think it is
13:09:27 5   the use of the words "any other chapter," that is
13:09:35 6   what is bothering me. I don't see how one can say
13:09:41 7   that is absolutely clear, unless there is a chapter
13:09:49 8   other than Chapter 11 that is also implicated by
13:09:54 9   those words. So on its face, the ordinary meaning
13:10:01 10   of Article 1901(3) is made maybe uncertain just by
13:10:09 11   those three words. Otherwise it might be certain
13:10:12 12   on its face, but the use of any other chapter
13:10:16 13   rather thank saying Chapter 11 is where I am having
13:10:21 14   some difficulty.
13:10:25 15   MS. MENAKER: And again, earlier today I
13:10:26 16   think I pointed out to other chapters of the NAFTA
13:10:30 17   that cover subject matters that could -- that do
13:10:32 18   deal with trade, that perhaps if interpreted in a
13:10:38 19   certain matter could be conceived to impose an
13:10:41 20   obligation on a party with respect to an AD/CVD
13:10:47 21   matter. So I don't think that Chapter 11 is the
22   only example there.

13:10:48 1   Over lunch we can give that more thought
13:10:51 2   and see if we have anything further to elaborate in
13:10:55 3   that respect.
13:10:56 4   MR. CLODFELTER: I would like to add one
13:10:58 5   point to that. If you accept the premise that the

13:11:01 6 drafters of Chapter 19 were most interested in the
13:11:06 7 breadth of protection and the certainty of that
13:11:09 8 protection, read in that light, these terms are in
13:11:14 9 fact very clear. It is hard to imagine how they
13:11:18 10 could have written them any clearer. It says "any
13:11:22 11 other chapter" because they wanted to eliminate any
13:11:26 12 risk, and they needed that broad a language to
13:11:33 13 accomplish that completeness and that breadth. So
13:11:34 14 if you accept that that was the goal, the language
13:11:37 15 very clearly accomplishes that goal. That is our
13:11:42 16 suggestion.
13:11:43 17 ARBITRATOR ROBINSON: And I assume that
13:11:44 18 you would argue that that is in keeping with the
13:11:48 19 fact of the "except" language, except for Article
13:11:55 20 2203, entry into force, that the fact that that
13:12:01 21 rather to me unusual exception would appear is in
13:12:08 22 effect supplementary and supportive of your view of

13:12:13 1 the words any other chapter, is that true?
13:12:19 2 MR. CLODFELTER: They felt they needed to
13:12:20 3 except the "entry into force" provision shows they
13:12:25 4 knew the breadth of that language. That is, as you
13:12:29 5 say, very unusual; yes, indeed.
13:12:35 6 ARBITRATOR ROBINSON: Thank you very
13:12:35 7 much.
13:12:40 8 PRESIDENT VAN DEN BERG: What time would
13:12:41 9 you like to have for lunch? If we resume at 2:30,
13:12:49 10 is that acceptable to the parties? Would you like
13:12:52 11 a shorter or longer time?
13:12:56 12 Recess until 2:30.
13:12:59 13 (Whereupon, at 1:12 p.m., the hearing was

14 recessed to reconvene at 2:30 p.m. that same day.)
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1 AFTERNOON SESSION
2 (2:35 p.m.)
14:36:56 3 PRESIDENT VAN DEN BERG: Mr. Bettauer, is
14:37:02 4 your side ready?
14:37:04 5 MR. BETTAUER: We are here, yes.
14:37:07 6 PRESIDENT VAN DEN BERG: Before we
14:37:07 7 continue, Mr. McNeill, it is now your turn for the
14:37:12 8 presentation about, I think it is context and
14:37:14 9 object of purpose.
14:37:17 10 MR. MCNEILL: That is correct.
14:37:19 11 PRESIDENT VAN DEN BERG: Before that, the
14:37:21 12 Tribunal would like to have a comparison between
14:37:24 13 Chapter 19 and the corresponding chapter in the
14:37:27 14 Canadian-U.S. Free Trade Agreement, and actually
14:37:32 15 simply compare versions where changes had been made
14:37:38 16 between these two documents.
14:37:41 17 The Tribunal looks to both parties, who
14:37:44 18 volunteers, or will it be a joint effort?
14:37:50 19 MR. CLODFELTER: Had we not dismissed
14:37:52 20 Tembec, it would be more readily available since
14:37:56 21 they prepared that analysis in one of their
22 pleadings, it might be retrievable from one their

14:38:00 1   pleadings.
14:38:01 2   MS. MENAKER: What Mr. Clodfelter is
14:38:02 3   referring to, it is in Tembec's rejoinder and it is
14:38:08 4   not --
14:38:11 5   PRESIDENT VAN DEN BERG: The Tembec
14:38:12 6   materials are no longer in the record. Perhaps you
14:38:15 7   can copy it and reproduce that.
14:38:19 8   MR. CLODFELTER: We may be able to do
14:38:21 9   that.
14:38:25 10   If I may make a point relevant to this.
14:38:30 11   The comparison that Tembec did was relevant to
14:38:33 12   1901, 1902, 1903, and I think the point in my
14:38:37 13   presentation that might have caused confusion, we
14:38:38 14   are not arguing that all of 19 is a mirror of 19 in
14:38:41 15   the CFTA. Those provisions relating to the process
14:38:49 16   for bipanel review are the same, and so are the
14:38:50 17   references made to technical changes.
14:38:53 18   PRESIDENT VAN DEN BERG: What the
14:38:54 19   Tribunal is looking for is a comparison of the
14:38:57 20   final text, the final text of Chapter 19 --
14:39:00 21   MR. CLODFELTER: All of the articles in
14:39:01 22   the final text?
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1   PRESIDENT VAN DEN BERG: Actually a
14:39:04 2   marked-up version, like you have a compare version
14:39:05 3   of two Word documents.
14:39:09 4   Mr. Landry, the United States has
14:39:12 5   volunteered --
14:39:14 6   MR. LANDRY: That is fine. We will work
14:39:18 7   with them.
14:39:19 8   PRESIDENT VAN DEN BERG: If they do the

14:39:21 9   comparison, you do the copying.
14:39:27 10   Mr. Robinson reminds me, that is only
14:39:30 11   Chapter 19, nothing else.
14:39:56 12   MS. MENAKER: Before I turn the floor
14:39:57 13   over to Mr. McNeill, I wanted to wrap up by just
14:40:01 14   making clear, and I think the record is clear, but
14:40:04 15   that our primary position is that anything that
14:40:09 16   regulates the operation of our AD/CVD laws, by
14:40:16 17   subjecting the disciplines of Chapter 11 on those
14:40:19 18   laws necessarily imposes an obligation with respect
14:40:21 19   to those laws, and that is our primary contention.
14:40:26 20   Now, the other arguments that we stated
14:40:28 21   all regarding the definition of the word law of
14:40:32 22   course are all independent and alternative
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14:40:35 1   arguments, and I just wanted to make sure that was
14:40:38 2   understood and to let the Tribunal know that we do
14:40:41 3   anticipate that in our closing, we will also make a
14:40:43 4   few additional arguments on the basis of Articles
14:40:47 5   1905 and 1911.
14:40:59 6   PRESIDENT VAN DEN BERG: I appreciate
14:41:00 7   that, and your concern that we would be carried
14:41:03 8   away with the other arguments.
14:41:05 9   Mr. McNeill, you will probably invite us
14:41:08 10   to take the big book because we have to -- for
14:41:12 11   context, we have to go to the various articles --
14:41:17 12   MR. MCNEILL: I would recommend that you
14:41:18 13   have not only a copy of the NAFTA, but also a copy
14:41:22 14   of the slides, particularly one slide that is
14:41:26 15   easier to see in hard copy than on the screen.
14:41:34 16   Today I will demonstrate that Article

14:41:38 17   1901(3)'s context and the object and purpose of the
14:41:42 18   treaty confirm that the NAFTA parties did not
14:41:45 19   intend to confer jurisdiction over antidumping and
14:41:49 20   countervailing duty cases on Chapter 11 tribunals.
14:41:53 21   I will begin by responding to some of the
22   points raised in Canfor's and Terminal's letter
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14:41:58 1   last Friday. I will then review some of the NAFTA
14:42:01 2   provisions that vest exclusive jurisdiction over
14:42:04 3   antidumping and countervailing duty cases in the
14:42:07 4   Chapter 19 panels, and I will also look at some of
14:42:11 5   the provisions that provide for the exclusive use
14:42:14 6   of business proprietary information on the
14:42:18 7   administrative records in the Chapter 19 panels.
14:42:20 8   Finally, I will briefly address Article
14:42:24 9   2004, including the question posed by the Tribunal
14:42:29 10   earlier, and then I will demonstrate that assuming
14:42:32 11   jurisdiction over the claims would be inconsistent
14:42:34 12   with the NAFTA's object of creating effective
14:42:38 13   mechanisms for the resolution of disputes.
14:42:43 14   It is fundamental that for a Chapter 11
14:42:46 15   Tribunal to have jurisdiction, there must be clear
14:42:49 16   evidence in the text of the treaty that the NAFTA
14:42:53 17   parties consented to submit the type of claims at
14:42:56 18   issue to investor-state arbitration. As the NAFTA
14:43:01 19   Chapter 11 Tribunal in Firemen's Fund versus Mexico
14:43:06 20   stated, it is not the case that "under contemporary
14:43:10 21   international law a foreign investor is entitled to
14:43:13 22   the benefit of the doubt with respect to the
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14:43:15 1   existence and scope of an arbitration agreement."
14:43:22 2   In this case, however, claimants cannot

14:43:25 3   point to a single provision in the NAFTA that
14:43:28 4   suggests in any way that the NAFTA parties
14:43:30 5   contemplated the submission of antidumping and
14:43:33 6   countervailing duty claims to Chapter 11
14:43:37 7   arbitration. This admission is starkly
14:43:40 8   demonstrated by Canfor's and Terminal's January 6
14:43:42 9   letter.
14:43:43 10   They cannot identify where in the
14:43:45 11   treaty's text is the basis for the Tribunal's
14:43:49 12   jurisdiction over antidumping and countervailing
14:43:52 13   duty claims. Rather, they ask you to base your
14:43:55 14   jurisdiction on a series of inferences. And even
14:43:59 15   those mere inferences do not stand up to scrutiny.
14:44:05 16   For example, in their letter Canfor and
14:44:07 17   Terminal argue that "the same conduct can be
14:44:12 18   scrutinized under different legal standards." They
14:44:15 19   note that the same U.S. determinations have been
14:44:20 20   subject to proceedings for the WTO and Chapter 19
14:44:23 21   panels and they conclude from that that "there is
14:44:27 22   no principled basis upon which to argue that such

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14:44:31 1   conduct cannot be scrutinized under NAFTA Chapter
14:44:35 2   11 as well.
14:44:38 3   PRESIDENT VAN DEN BERG: May I ask a
14:44:39 4   question at this point simply for the scope of your
14:44:42 5   presentation? Did I understand correctly that you
14:44:45 6   just said that Canfor cannot identify the basis for
14:44:48 7   jurisdiction of this Tribunal for antidumping and
14:44:51 8   countervailing duty measures?
14:44:54 9   MR. MCNEILL: That is correct.
14:44:56 10   PRESIDENT VAN DEN BERG: If I understand

14:44:57 11 correctly, rightly or wrongly, Canfor is alleging
14:45:01 12 violations of various provisions of section A of
14:45:06 13 Chapter 11.
14:45:08 14 MR. MCNEILL: That is correct.
14:45:10 15 PRESIDENT VAN DEN BERG: These measures
14:45:11 16 may or may not relate to AD/CVD matters. Who is
14:45:19 17 now to say that these matters are AD/CVD matters?
14:45:24 18 Is that the claimant or the respondent?
14:45:28 19 MR. MCNEILL: Who is to make that
14:45:29 20 determination?
14:45:31 21 PRESIDENT VAN DEN BERG: The
14:45:32 22 determination is made by the Tribunal, but who has
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14:45:35 1 actually the burden of proof?
14:45:41 2 MR. MCNEILL: It is my understanding from
14:45:42 3 case law that there is not a burden of proof on the
14:45:47 4 issue of whether the Tribunal has jurisdiction over
14:45:50 5 certain matters in terms of defining the nature of
14:45:53 6 the claims and in interpreting the provisions of
14:45:59 7 the treaty which grant jurisdiction and which
14:46:02 8 define the scope of jurisdiction. That is a
14:46:04 9 determination for the Tribunal, and I don't believe
14:46:07 10 it is a burden of either party.
14:46:20 11 One addendum to that is that the claimant
14:46:23 12 does have to establish that there is jurisdiction,
14:46:25 13 but it is ultimately for the Tribunal to make that
14:46:29 14 determination.
14:46:30 15 PRESIDENT VAN DEN BERG: Simply from the
14:46:31 16 point of methodology because this is approaching a
14:46:34 17 jurisdiction question. One party says I have a
14:46:37 18 claim against the state, as a claimant, and I base
14:46:41 19 this on alleged violations of 1102, 1103, 1105,

14:46:49 20   1110 of the NAFTA. And the other party then says,
14:46:53 21   wait a moment. They say, in the first place, you
14:46:59 22   as a Tribunal have no jurisdiction to deal with
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14:47:02 1   that. Now, the Tribunal, first under the various
14:47:06 2   rulings, including oil platforms case, for example,
14:47:11 3   you have to assume certain facts for determining
14:47:15 4   jurisdiction, to a certain extent.
14:47:21 5   MR. MCNEILL: Yes.
14:47:22 6   PRESIDENT VAN DEN BERG: But then the
14:47:23 7   question comes that the other side says this is a
14:47:26 8   matter that is excluded from the Tribunal's
14:47:29 9   jurisdiction even assuming these facts. Is then
14:47:33 10   not the burden of proof on the other side, the
14:47:36 11   respondents, to say, well, this is an excluded
14:47:40 12   matter?
14:47:42 13   MR. MCNEILL: I think to start with the
14:47:43 14   first part of your question, it is clear from the
14:47:46 15   case law that we cited earlier that the mere
14:47:48 16   assertion of jurisdiction is not sufficient from
14:47:51 17   the claimant's side, and the claimant must
14:47:54 18   establish that and the claimant is not entitled to
14:47:58 19   the presumption there is jurisdiction, and that
14:48:01 20   applies to defining the scope of the chapter that
14:48:04 21   confers the jurisdiction in the first place.
14:48:06 22   In terms of an exception, I believe an
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14:48:09 1   exception is part and parcel of the scope of the
14:48:12 2   provision. So, in other words, Article 1903 forms
14:48:17 3   the part of the scope of Chapter 11. In that
14:48:21 4   respect, to the extent that the burden is there to

14:48:25 5 show that your claim does fall within the scope of
14:48:29 6 Chapter 11, in 1901(3), by virtue of the fact that
14:48:30 7 it applies to all other chapters, forms part of
14:48:34 8 that scope, then I believe the burden still rests
14:48:37 9 with the claimant.
14:48:40 10 PRESIDENT VAN DEN BERG: I wondered
14:48:41 11 whether you were out of sync with Ms. Menaker,
14:48:45 12 which of course is a presumption that is not the
14:48:48 13 case because she reminded us, our principal
14:48:52 14 submission is that anything that regulates AD/CVD
14:48:57 15 imposes an obligation, I look to 1901(3), and since
14:48:59 16 one of the obligations is to arbitrate, that is the
14:49:03 17 final word on the principal submission.
14:49:06 18 You are saying now, wait a moment, Canfor
14:49:10 19 has to identify that there is jurisdiction for AD
14:49:14 20 and CVD matters. Does that not reverse the burden
14:49:20 21 of proof under 1901(3), is not the burden of proof
14:49:25 22 on you that you have to prove that there is an
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14:49:29 1 exclusion clause?
14:49:33 2 MS. MENAKER: I do not think that it is
14:49:35 3 our burden of proof to show that it is an
14:49:38 4 exclusionary clause because if the claimant has to
14:49:42 5 establish jurisdiction they need to show that the
14:49:45 6 claims -- the alleged facts on which they rely are
14:49:48 7 capable of falling within the provisions of the
14:49:51 8 treaty, and so you look at the scope of
14:49:54 9 jurisdiction which Chapter 11 confers, and you look
14:49:58 10 at the treaty as a whole, and what we are saying is
14:50:01 11 that Article 1901(3) exempts from Chapter 11
14:50:06 12 jurisdiction this type of claim, and so they need
14:50:10 13 to prove to the Tribunal's satisfaction that the

14:50:13 14 facts that they allege are capable of falling
14:50:17 15 within the provisions of Chapter 11, and I would
14:50:19 16 direct the Tribunal's attention to the Plama versus
14:50:28 17 Bulgaria case, the decision on jurisdiction where
14:50:30 18 that language is used also citing to the Methanex
14:50:35 19 and the SGS and Salina cases.
14:50:39 20 In addition, I think that comports with
14:50:40 21 the fisheries jurisdiction case which we referred
14:50:43 22 to earlier and Judge Koroma's separate opinion, and

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14:50:48 1 if the Tribunal wouldn't mind, I would like to
14:50:51 2 quote that language because I think it is directly
14:50:53 3 on point.
14:50:55 4 It says here, since Canada excluded from
14:50:58 5 the jurisdiction of the Court disputes arising out
14:51:01 6 of or concerning conservation and management
14:51:06 7 measures, the question before the Court is entitled
14:51:08 8 to exercise its jurisdiction must depend on the
14:51:10 9 subject matter and not on the applicable law or
14:51:13 10 rules purported to be violated.
14:51:15 11 In other words, once it is established
14:51:17 12 that the dispute relates to the subject matter
14:51:19 13 defined or excluded in the reservation, then the
14:51:23 14 dispute is excluded from the jurisdiction of the
15 Court, whatever the scope of the rules which have
16 purportedly been violated.
14:51:28 17 Stated differently, once the Court has
14:51:30 18 determined that the measures of conservation and
14:51:34 19 management referred to in the reservation contained
14:51:34 20 in the Canadian declaration are measures of a kind
14:51:38 21 which can be categorized as conservation and

14:51:40 22 management of resources of the sea and are

1 consistent with customary norms and
2 well-established practice. The Court is bound to
3 decline to find jurisdiction on the basis of the
14:51:49 4 principles and rules purported to have been
14:51:50 5 violated or said to apply.
14:51:54 6 So in that respect, it is our contention
14:51:55 7 that it is insufficient for Canfor and Terminal to
14:51:58 8 allege that this Tribunal has jurisdiction because
14:52:01 9 it is alleged that the United States has violated
14:52:06 10 Articles 1102 or 1105. Rather, they have to show
14:52:10 11 that the claims they allege -- that the facts they
14:52:13 12 have alleged can give rise to claims that are
14:52:17 13 within the scope of the jurisdiction granted to
14:52:19 14 this tribunal.
14:52:24 15 PRESIDENT VAN DEN BERG: I think we are
14:52:24 16 at cross-purposes. That question depends on how
14:52:28 17 you interpret 1101(3). If you say there is an
14:52:32 18 exclusionary clause, first that has to be decided
14:52:36 19 and then you can take the next step.
14:52:38 20 The question which is before you can
14:52:40 21 state that Canfor has to identify a base for
14:52:45 22 jurisdiction of the AD/CVD, then you have to first

14:52:48 1 decide what 1901(3) means, whether it is an
14:52:54 2 exclusionary clause or what the claimant says, that
14:52:57 3 it is an interpretive clause.
14:52:58 4 MS. MENAKER: We agree, and I think the
14:52:59 5 Methanex tribunal addressed that as well, and they
14:53:00 6 said that when a jurisdictional issue is at issue,
14:53:02 7 that must be definitively interpreted by the

14:53:06 8 Tribunal, and they contrasted that with the
14:53:10 9 substantive provisions.
14:53:12 10 PRESIDENT VAN DEN BERG: Thank you. We
14:53:13 11 are all on the same page.
14:53:15 12 Mr. Robinson still has a question.
14:53:18 13 ARBITRATOR ROBINSON: I just want to make
14:53:19 14 sure I understand. So, in other words, is the
14:53:21 15 argument that the burden is on the claimants to
14:53:27 16 show that there is jurisdiction under Chapter 11 in
14:53:35 17 spite of Chapter 19, or in spite of Article
14:53:52 18 1901(3)?
14:53:53 19 In other words, if I understand your
14:53:55 20 argument, you are saying there is no burden on your
14:53:59 21 behalf to show the Article 1901(3) exception.
14:54:06 22 Instead, the burden remains on the claimants to

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14:54:11 1 show that there is the jurisdiction under Article
14:54:15 2 11 in spite of the provisions of Article 1901(3);
14:54:20 3 is that right?
14:54:22 4 MR. MCNEILL: Yes, that is right. The
14:54:22 5 burden does remain on the claimants. For these
14:54:25 6 jurisdictional questions you have to look at all of
14:54:27 7 the chapters as a whole and not separate out
14:54:31 8 Chapter 11 and say do they have jurisdiction under
14:54:32 9 Chapter 11 and then go somewhere else. You have to
14:54:33 10 look at this holistically and decide looking at
14:54:36 11 Article 1901(3) and Chapter 11 together, is there
14:54:40 12 jurisdiction?
14:54:41 13 Now what claimants have done here is they
14:54:44 14 have said you must assume we have jurisdiction
14:54:46 15 under Chapter 11, and then look at 1901(3) and

14:54:51 16   decide whether 1901(3) divests this Tribunal of
14:54:56 17   jurisdiction, and we submit that is not the correct
14:54:58 18   approach.
14:55:00 19   ARBITRATOR ROBINSON: Thank you.
14:55:05 20   MR. MCNEILL: I would also note on the
14:55:06 21   issue of jurisdiction that claimants still have not
14:55:10 22   given any explanation of what it means to dispute
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14:55:13 1   to be just an interpretive provision. If 1901(3)
14:55:23 2   is an interpretive provision, the question arises
14:55:25 3   what is it interpreting?
4   ARBITRATOR VAN DEN BERG: That is one of
5   the questions and we will not forget to raise that
14:55:30 6   question.
14:55:30 7   MR. MCNEILL: I was discussing an
14:55:31 8   argument that was made in Canfor and Terminal's
14:55:35 9   January 6 letter, and it is also an argument they
14:55:37 10   make throughout their written submissions, and it
14:55:40 11   basically goes as follows, that Chapter 11 and
14:55:42 12   Chapter 19 apply two different legal regimes, and
14:55:46 13   they say there is nothing wrong with parallel
14:55:49 14   proceedings under two different legal regimes, and
14:55:52 15   they point to the fact that there are WTO
14:55:56 16   proceedings and Chapter 19 proceedings with respect
14:55:59 17   to the same measures that are ongoing.
14:56:02 18   Stating in the abstract, however, that
14:56:04 19   there are parallel proceedings in other fora, has
14:56:08 20   no bearing on the interpretive issue before this
14:56:12 21   Tribunal, namely, whether the NAFTA parties
14:56:16 22   consented to Chapter 11 jurisdiction over their
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14:56:20 1   claims.

14:56:21 2   Nor does the fact that Chapters 11 and 19
14:56:25 3   apply different sets of laws suggest any basis for
14:56:27 4   jurisdiction. In fact, the NAFTA's context
14:56:31 5   suggests the contrary. Under Article 1121, the
14:56:34 6   NAFTA parties required as a condition precedent to
14:56:38 7   the submission of a claim under Chapter 11 that a
14:56:41 8   claimant waive its rights to continue or pursue all
14:56:46 9   other proceedings with respect to the same measure,
14:56:48 10   particularly proceedings in domestic court under
14:56:51 11   domestic law.
14:56:52 12   The NAFTA parties thus sought to avoid
14:56:56 13   duplicative proceedings regardless of whether the
14:57:00 14   claims are brought under different sets of laws.
14:57:04 15   The Article 1121 waiver requirement turns on the
14:57:06 16   measure, not the laws under which that measure is
14:57:10 17   challenged. Claimants' argument that they must
14:57:13 18   have access to Chapter 11 because they would
14:57:16 19   otherwise be denied the right to vindicate their
14:57:20 20   claims under international legal standards does not
14:57:24 21   find any support in the text of the treaty or in
14:57:28 22   accepted canons of treaty interpretation.
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14:57:34 1   I will now address the provisions in the
14:57:37 2   NAFTA and under U.S. law that confer exclusive
14:57:41 3   jurisdiction on Chapter 19 panels to hear
14:57:46 4   antidumping and countervailing duty cases.
14:57:48 5   As Mr. Clodfelter noted, before there was
14:57:51 6   a NAFTA and before there was a free trade agreement
14:57:56 7   between Canada and the United States, the Court of
14:58:00 8   International Trade had exclusive jurisdiction to
14:58:03 9   review final antidumping and countervailing duty

14:58:06 10   and threat of injury determinations made by the
14:58:11 11   Department of Commerce and the ITC, respectively.
14:58:12 12   The U.S.-Canada Free Trade Agreement and
14:58:17 13   then subsequently the NAFTA required the United
14:58:21 14   States to amend its antidumping and countervailing
14:58:23 15   duty law to confer jurisdiction on Chapter 19
14:58:28 16   binational panels when panel review is requested.
14:58:31 17   You can see Annex 1904.15, schedule of
14:58:36 18   the United States, paragraph 10 provides the United
14:58:41 19   States shall amend Section 516(a) paragraph (g) of
14:58:45 20   the Tariff Act of 1930 as amended to provide in
14:58:49 21   accordance with the terms of this chapter, for
14:58:52 22   binational panel renew of antidumping and
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14:58:58 1   countervailing duty cases involving Mexican or
14:59:00 2   Canadian merchandise. Such amendment shall provide
14:59:04 3   that if binational panel review is requested, such
14:59:07 4   review will be exclusive.
14:59:09 5   There are parallel provisions in Annex
14:59:13 6   1915 with respect to Mexican law and Canadian law.
14:59:17 7   The party that seeks to challenge a final
14:59:19 8   U.S. agency determination has two choices. It can
14:59:25 9   seek review before the Court of International Trade
14:59:28 10   or it can request a binational panel. If it
14:59:30 11   chooses the latter, jurisdiction rests exclusively
14:59:34 12   in the binational panel.
14:59:36 13   Now, you see there is no mention of
14:59:38 14   Chapter 11 dispute resolution. Paragraph 10 does
14:59:43 15   not say, for instance, that a party can request
14:59:45 16   either a binational panel or initiate Chapter 11
14:59:49 17   arbitration or both. Nor is there any provision
14:59:53 18   elsewhere in the NAFTA or in the Tariff Act that

14:59:57 19   invests Chapter 11 tribunals with jurisdiction to
15:00:03 20   hear antidumping and countervailing duty cases.
15:00:07 21   Had the NAFTA parties in fact intended to
15:00:09 22   subject antidumping and countervailing duty

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15:00:12 1   determinations to Chapter 11 arbitration as
15:00:15 2   claimants suggest, it would make no sense that the
15:00:19 3   parties thought they needed such a precise
15:00:21 4   mechanism to vest jurisdiction in Chapter 11 panels
15:00:26 5   but did not need a similar provision with respect
6   to Chapter 11 -- I apologize. Let me read that
7   sentence again.
15:00:36 8   Beyond that they thought they needed such
15:00:38 9   a specific mechanism to vest jurisdiction in
15:00:40 10   Chapter 19 panels, but they did not believe that
15:00:44 11   such a mechanism, a similar mechanism was necessary
15:00:48 12   to vest jurisdiction in a Chapter 11 tribunal.
15:00:54 13   I will now show you a similar provision
15:00:56 14   in Chapter 19's annex providing for the use of
15:01:00 15   business proprietary information that was collected
15:01:03 16   in the course of the antidumping and countervailing
15:01:07 17   duty investigations, and it provides for the use of
15:01:10 18   that information exclusively in Chapter 19 panel
15:01:13 19   proceedings.
15:01:17 20   In antidumping and countervailing duty
15:01:20 21   investigations the subject companies are typically
15:01:23 22   required to provide Commerce with business

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15:01:25 1   information, including sales information, prices,
15:01:29 2   production costs, customer's information, et
15:01:33 3   cetera, that they may designate as proprietary.

15:01:37 4 The Tariff Act provides that only
15:01:40 5 commerce and ITC personnel who are directly
15:01:44 6 involved in the investigations may have access to
15:01:47 7 that information. Interested parties in an
15:01:51 8 investigation can then petition Commerce or the
15:01:54 9 ITC, as the case may be, for access to that
15:01:58 10 information pursuant to an administrative
15:02:00 11 protective order.
15:02:03 12 As you can see on the screen, the NAFTA
15:02:06 13 required amendment to the Tariff Act to provide for
15:02:09 14 the issuance of protective orders by Commerce and
15:02:11 15 the ITC to allow all of the proprietary information
15:02:15 16 on the administrative record to be used in Chapter
15:02:18 17 19 binational panel proceedings. Thus, Article 19,
15:02:24 18 Annex 1904.15, Schedule of the United States
15:02:29 19 paragraph 12, provides the United States shall
15:02:31 20 amend section 777 of the Tariff Act of 1930 as
15:02:36 21 amended to provide for the disclosure to authorized
15:02:39 22 persons under protective order of proprietary

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15:02:42 1 information in the administrative record if
15:02:44 2 binational panel review of a final determination
15:02:48 3 regarding Mexican or Canadian merchandise is
15:02:53 4 requested.
15:02:54 5 Accordingly, the Tariff Act sets out
15:02:57 6 elaborate procedures allowing for binational panel
15:03:00 7 members and participants in those proceedings to
15:03:02 8 have access to this proprietary information. Now,
15:03:05 9 there is no corresponding provision in the NAFTA or
15:03:09 10 under U.S. law for proprietary information to be
15:03:13 11 used in the Chapter 11 proceedings. Indeed, as
15:03:18 12 paragraph 13 provides, sanctions would be imposed

15:03:24 13 if proprietary information on the record were
15:03:27 14 sought to be introduced into these proceedings, and
15:03:30 15 that omission, the lack of any provision in the
15:03:33 16 treaty for the use of proprietary information in
15:03:37 17 Chapter 11 proceedings, has two major implications
15:03:42 18 for claimants' claims.
15:03:45 19 The first is a practical one. Without
15:03:48 20 access to such proprietary information this
15:03:51 21 Tribunal simply could not decide many of claimants'
15:03:55 22 claims on the merits. For example, with respect to

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15:03:59 1 the antidumping determination, Canfor asserts that
15:04:03 2 Commerce "did not properly allocate joint costs by
15:04:08 3 allocating costs based only on differences in grade
15:04:12 4 and not differences in value attributable to
15:04:16 5 dimension or length."
15:04:23 6 Commerce's cost allocation, however, was
15:04:25 7 based on a comparison of proprietary cost
15:04:28 8 information that Commerce gathered from the
15:04:30 9 companies that were subject to the antidumping
15:04:34 10 investigation.
15:04:35 11 On the screen, although I would refer you
15:04:39 12 to the hard copy, are two pages from a submission
15:04:43 13 that the Department of Commerce made in the Chapter
15:04:47 14 19 antidumping proceedings in August 2002. In it
15:04:53 15 Commerce explains that it did not allocate joint
15:04:57 16 costs based on different dimensions of wood because
15:05:00 17 it found no correlation between dimension and sales
15:05:04 18 price.
15:05:04 19 So you see on the first page, it says
15:05:07 20 proprietary information removed, and paragraph 1

15:05:11 21   begins, within each company price patterns do not
15:05:14 22   support the assertion that larger dimensions

15:05:17 1   consistently command higher prices, and it
15:05:20 2   continues, substantial evidence supports Commerce's
15:05:24 3   determination that the price differences between
15:05:26 4   lumber dimensions did not provide a reliable and
          5   consistent pattern.
15:05:31 6   For example, Slocan, blank; Weyerhauser,
15:05:36 7   blank; blank for Canfor. And then it continues,
15:05:40 8   between companies pricing patterns show wide
15:05:43 9   variation in prices for the same product, and it
15:05:47 10   explains there is a wide variation in prices at
15:05:51 11   which companies are willing to sell the same
15:05:53 12   dimension of grade 2 or better wood. For example,
15:05:54 13   Weyerhauser, blank; Slocan's comparable product
15:05:58 14   sold for an average price of blank, and a
15:06:00 15   difference of blank, above Slocan's average price,
15:06:04 16   and then it continues with blanks for Abitibi and
15:06:09 17   Canfor and Weyerhauser.
15:06:11 18   Then it says see Exhibit 1-A for
15:06:13 19   additional examples, and the exhibit as well also
15:06:17 20   contains many blanks for all of the relevant
15:06:21 21   product information.
15:06:25 22   Without access to that data in the blanks

15:06:28 1   it would be impossible for this Tribunal to decide
15:06:31 2   Canfor's allegation concerning Commerce's cost
15:06:35 3   allocation decision.
15:06:38 4   You may recall from the consolidation
15:06:41 5   hearing in particular that claimants responded that
15:06:45 6   this was not a really a problem because they could

15:06:49 7   always provide their own information, but as you
15:06:52 8   can see in this particular example, that would fill
15:06:58 9   in only one of the blanks. It would only give you
15:07:01 10   Canfor's data with nothing to compare it to.
15:07:05 11   Rather, to decide this and many other allegations
15:07:07 12   in this case, the Tribunal and the parties to this
15:07:12 13   proceeding would have to have access to all of the
15:07:14 14   proprietary information on the administrative
15:07:17 15   record.
15:07:17 16   The second major implication to
15:07:20 17   claimants' claims is that the lack of any
15:07:22 18   information in the NAFTA allowing for the
15:07:25 19   proprietary information on the administrative
15:07:28 20   record to be used in Chapter 11 proceedings
15:07:30 21   confirms that the NAFTA parties did not contemplate
15:07:35 22   or consent to the submission of antidumping and
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15:07:42 1   countervailing duty disputes to Chapter 11
15:07:44 2   arbitration.
15:07:46 3   It makes no sense to conclude that the
15:07:49 4   NAFTA parties would have intended to confer
          5   jurisdiction review of antidumping and
15:07:55 6   countervailing duty determinations on Chapter 11
15:07:57 7   tribunals but then not have allowed access, in fact
15:08:01 8   barred access to the raw materials that would be
15:08:04 9   necessary for those tribunals to carry out that
15:08:09 10   function.
15:08:15 11   The next element of the NAFTA context is
15:08:19 12   Article 2004. Chapter 20 contains --
15:08:24 13   PRESIDENT VAN DEN BERG: Mr. McNeill,
15:08:25 14   Mr. Robinson has a question.

15:08:31 15 ARBITRATOR ROBINSON: If I could back up
15:08:34 16 to page 2 of your handout, Annex 1904.15, just so I
15:08:48 17 understand your argument, are you suggesting that
15:08:52 18 if the intention was to include Chapter 11, that
15:09:03 19 this Annex 1904.15 would have referred in some
15:09:09 20 fashion to an amendment being required in the
15:09:15 21 Tariff Act with regard to Chapter 11?
15:09:20 22 MR. MCNEILL: It wouldn't necessarily
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15:09:21 1 have to reside in this provision itself. The
15:09:24 2 argument is if the NAFTA parties had intended to
15:09:28 3 subject these type of disputes to Chapter 11
15:09:31 4 dispute resolution and they thought such a specific
15:09:36 5 mechanism was necessary to confer jurisdiction on
15:09:39 6 the Chapter 19 panels, then why wouldn't you see a
15:09:43 7 similar provision with respect to Chapter 11?
15:09:47 8 ARBITRATOR ROBINSON: Would there have
15:09:48 9 been any law similar to the Tariff Act if the
15:09:52 10 attention was not to include it in the Tariff Act
15:09:56 11 as an amendment? Is there any investment law that
15:10:02 12 you would argue that it would have appeared in, in
15:10:05 13 other words, that there would have been, in order
15:10:07 14 to have jurisdiction under Chapter 11, there would
15:10:13 15 have been a requirement that some other U.S. law
15:10:15 16 had to be amended?
15:10:22 17 MR. MCNEILL: Thank you for the question.
15:10:23 18 May I just clarify first, you were referring to
15:10:24 19 page 2 --
15:10:26 20 ARBITRATOR ROBINSON: Annex 1904.15, page
15:10:30 21 2. I am just trying to make sure I understand --
15:10:33 22 MR. MCNEILL: The argument with respect
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15:10:34 1 to -- on page 2 is the business proprietary
15:10:39 2 information. The argument with respect to the
15:10:41 3 prior page is the jurisdiction, the conferring of
15:10:44 4 jurisdiction on the Chapter 19 panels, and it seems
15:10:47 5 to me your question pertained to the jurisdiction
15:10:50 6 issue.
15:10:52 7 ARBITRATOR ROBINSON: I might have
15:10:53 8 misspoke. What I am endeavoring to figure out is
15:10:57 9 if there was to have been a similar provision for
15:11:09 10 the proprietary information in a Chapter 11 case,
15:11:12 11 would you have expected, if that had been the
15:11:15 12 purpose, that it would have shown up in Annex
15:11:27 13 1904.15 as requiring an amendment for that purpose
15:11:31 14 as well with regard to the information, or would
15:11:32 15 you have thought there would have been some
15:11:34 16 separate law of the United States that would have
15:11:36 17 had to have been amended for that purpose?
15:11:40 18 MR. MCNEILL: I think you would see two
15:11:41 19 things, you would see some reference in the text,
15:11:45 20 or an annex in the text of the treaty itself, and
15:11:47 21 then you would have to see some reference in the
15:11:49 22 Tariff Act.
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15:11:50 1 The reason for that is, as I noted, the
15:11:55 2 Court of International Trade has exclusive
15:11:56 3 jurisdiction under U.S. law over antidumping and
15:11:59 4 countervailing duty determinations. You cannot
15:11:59 5 bring such a claim in U.S. District Court. You
15:12:03 6 can't bring it in state court. That jurisdiction
15:12:06 7 arises from the statute itself.
15:12:08 8 Now, when you request binational panel

15:12:11 9   proceedings, under the Tariff Act, the Court of
15:12:16 10   International Trade is divested of jurisdiction,
15:12:19 11   and jurisdiction rests in the binational panels
15:12:24 12   exclusively.
15:12:25 13   So the point here is you wouldn't see
15:12:26 14   that word exclusive, most likely, because it would
15:12:28 15   certainly be confusing if there was also
15:12:31 16   jurisdiction in Chapter 11 panels, but more than
15:12:35 17   that, you would almost certainly see some provision
15:12:37 18   vesting jurisdiction in the Chapter 11 tribunals as
15:12:41 19   well because the mechanism would thought to be
15:12:45 20   necessary for the Chapter 11 binational panels.
15:12:55 21   Ms. Menaker is noting that perhaps I
15:12:59 22   misunderstood your question. The exact same
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15:13:01 1   principle applies to business proprietary
15:13:03 2   information.
15:13:03 3   You would also expect to see an amendment
15:13:05 4   to the Tariff Act because the Tariff Act regulates
15:13:09 5   exactly how the proprietary information is used in
15:13:12 6   the CIT, and the requirements arise directly from
15:13:16 7   the statute, and then there is an administrative
15:13:19 8   order mechanism and the parties to the proceedings
15:13:22 9   before Commerce, for the ITC, can request an
15:13:27 10   administrative protective order and in that request
15:13:29 11   they ask for particular information and they
15:13:32 12   provide their reason for that information, and then
15:13:34 13   they are provided access for that information.
15:13:36 14   It functions a little differently in the
15:13:38 15   context of the Chapter 19 panels in that the entire
15:13:42 16   administrative record, including all of the
15:13:46 17   business proprietary information comes into that

15:13:49 18   proceeding together, so it is a little different.
15:13:50 19   But you see these detailed provisions in the Tariff
15:13:55 20   Act itself for handling that information
15:13:57 21   exclusively in the context of the Court of
15:14:00 22   International Trade, and then that is shifted to
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15:14:02 1   the binational panel proceedings, and there is no
15:14:05 2   parallel provision for that with respect to Chapter
15:14:09 3   11, and it is that absence that we believe confirms
15:14:12 4   that the NAFTA parties couldn't possible have
15:14:14 5   intended these type of cases to be brought in
15:14:17 6   Chapter 11.
15:14:19 7   ARBITRATOR ROBINSON: Fine. Thank you.
15:14:23 8   PRESIDENT VAN DEN BERG: You were at
15:14:24 9   Article 2004. To get you back on track.
15:14:34 10   MR. MCNEILL: The next element of the
15:14:36 11   NAFTA's context is Article 2004. Chapter 20
15:14:40 12   contains a state-to-state dispute resolution
15:14:46 13   mechanism.
15:14:47 14   As you can see on the screen, Article
15:14:49 15   2004 describes Chapter 20's broad jurisdiction over
15:14:56 16   "all disputes between the Parties regarding the
15:14:59 17   interpretation or application of this Agreement or
15:15:01 18   wherever a Party considers that an actual or
15:15:04 19   proposed measure of another Party is or would be
15:15:07 20   inconsistent with the obligations of this
15:15:09 21   Agreement."
15:15:11 22   So the dispute resolution mechanism in
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15:15:14 1   Chapter 20 covers every subject matter in the
15:15:17 2   NAFTA, it covers trade and goods in Chapter 3, it

15:15:20 3   covers textiles and apparel in Annex 300, it covers
15:15:26 4   energy and petrochemicals, agriculture,
15:15:28 5   intellectual property, but there is one subject
15:15:32 6   matter that is expressly withdrawn from Chapter
15:15:35 7   20's scope, and that is matters covered in Chapter
15:15:39 8   19, review and dispute settlement in antidumping
15:15:42 9   and countervailing duty matters.
15:15:45 10   Antidumping and countervailing duty
15:15:48 11   matters are withdrawn because the NAFTA parties
15:15:50 12   created a specialized binational panel mechanism in
15:15:53 13   Chapter 19 for those types of cases. Article 2004
15:15:58 14   confirms that the binational panels are the
15:16:01 15   exclusive forum for all antidumping and
15:16:04 16   countervailing duty disputes. It would make no
15:16:07 17   sense for the NAFTA parties to have withdrawn from
15:16:11 18   themselves the right to challenge another party's
15:16:15 19   unfair trade remedies outside of Chapter 19 but to
15:16:16 20   have accorded private claimants that right under
15:16:20 21   Chapter 11.
15:16:24 22   That is in fact precisely what the NAFTA
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15:16:27 1   Chapter 11 Tribunal in United Parcel Service versus
15:16:31 2   Canada held. The Tribunal considered the effect of
15:16:36 3   Article 1501 paragraph 3, which provides, no party
15:16:44 4   may have recourse to dispute settlement under this
15:16:46 5   agreement for any matter arising under this
15:16:49 6   Article. It uses party with capital P, indicating
15:16:55 7   that is a NAFTA party.
15:16:57 8   Article 1501 paragraph 3 is directly
15:16:58 9   analogous to the carve-out in Article 2004 for
15:17:04 10   antidumping and countervailing duty matters in that
15:17:07 11   it says that competition law matters cannot be

15:17:10 12   submitted by a NAFTA party in state-to-state
15:17:13 13   resolution.
15:17:14 14   The UPS Tribunal in interpreting Article
15:17:18 15   1501(3) stated, NAFTA authorizes a broader scope
15:17:23 16   for state-state arbitration than for investor-state
15:17:27 17   arbitration and nowhere confers express
15:17:30 18   authorization to bring claims respecting Article
15:17:34 19   1501 under investor-state proceedings. The natural
15:17:38 20   inference then would be that there is no such
15:17:42 21   jurisdiction over competition law matters under
15:17:46 22   Chapter 11.
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1   In other words, that the NAFTA parties
15:17:49 2   removed the possibility of recourse even among
15:17:52 3   themselves to general dispute resolution under
15:17:52 4   Chapter 20 with respect to the sensitive area of
15:17:55 5   competition law implies that the parties also
15:17:58 6   intended to eliminate recourse by private claimants
15:18:03 7   under Chapter 11 unless there was a specific
15:18:06 8   provision to the contrary.
15:18:09 9   The same logic --
15:18:13 10   PRESIDENT VAN DEN BERG: This says the
15:18:14 11   natural inference. These words, that is what UPS
15:18:20 12   Tribunal said, the natural inference then would be
15:18:26 13   that there is no such jurisdiction.
15:18:29 14   Do you actually need those words when you
15:18:31 15   read the express text of paragraph 3 of Article
15:18:35 16   1501? There is no uncertain terms, the way I read
15:18:40 17   it, it says no party may have recourse to dispute
15:18:43 18   for any matter arising under this Article.
15:18:55 19   I don't see how you can construe that

15:18:57 20   otherwise than saying, forget it, Chapter 11
15:19:00 21   arbitration.
22   MR. MCNEILL: I think the inference was
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15:19:02 1   it says no party, it doesn't say no private
2   claimant, it doesn't say no investor. It says no
15:19:08 3   party, so it only applies expressly here to NAFTA
15:19:10 4   parties, and you have recourse to dispute
15:19:13 5   settlement.
15:19:13 6   PRESIDENT VAN DEN BERG: I see what you
15:19:15 7   mean, and that you apply that to 2004 by analogy.
15:19:20 8   MR. MCNEILL: Yes. The carve-out in
15:19:22 9   2004. The carve-out in 2004 describes Chapter 20's
15:19:25 10   jurisdiction and then it says except for matters
15:19:27 11   arising under Chapter 19 or other provisions of the
15:19:34 12   NAFTA, and it is in that extra piece that an
15:19:39 13   article such as 1501 would fall -- it says or
15:19:41 14   except as otherwise provided, and that is where
15:19:46 15   1501 would fit in to Article 2004.
15:19:53 16   As I was saying, the same logic applies
15:19:57 17   here, that the politically sensitive and complex
15:20:01 18   subject matter of antidumping and countervailing
15:20:02 19   duty law was withdrawn from state-to-state dispute
15:20:05 20   resolution implies that it was likewise not
15:20:08 21   intended for Chapter 11 dispute resolution either.
15:20:14 22   As we noted in our submissions, this
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15:20:16 1   conclusion is further reinforced by Article 1112
15:20:20 2   which subordinates Chapter 11 to all other chapters
15:20:23 3   in the NAFTA and provides that to the extent there
15:20:28 4   is an inconsistency between Chapter 11 and another
15:20:31 5   chapter, the other chapter shall prevail. It would

15:20:35 6   be particularly odd for investor-state arbitration
15:20:38 7   under Chapter 11 to afford broader dispute
15:20:40 8   resolution rights to private claimants than to
15:20:41 9   NAFTA parties themselves given the subordinate
15:20:45 10   position of Chapter 11.
15:20:50 11   Now, the Tribunal asked earlier why does
15:20:53 12   Article 2004 refer specifically to Chapter 19, and
15:21:01 13   yet Article 1901(3) just applies to all other
15:21:05 14   chapters globally?
15:21:06 15   And I think the answer stems from the
15:21:08 16   inherently different nature of the two provisions.
15:21:12 17   Article 1901(3) is an exclusion. It bars
15:21:17 18   obligations, including the obligation to dispute
15:21:19 19   resolution that emanate from all other chapters.
15:21:24 20   Article 2004 is inherently different,
15:21:29 21   however. Article 2004 confers jurisdiction and it
15:21:35 22   describes the scope of jurisdiction with respect to
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15:21:37 1   Chapter 20. Now, it also notes that there are
15:21:40 2   exceptions to jurisdiction, and as I said, Article
15:21:43 3   1501 paragraph 3 would be one of those exceptions,
15:21:48 4   but it specifically references Chapter 19, and it
15:21:51 5   does so, I believe, because it is the only chapter
15:21:54 6   in its entirety that is withdrawn from the scope of
15:21:57 7   state-to-state dispute resolution, and so as a
15:22:01 8   matter of convenience certainly, it notes that
15:22:07 9   Chapter 19 has been withdrawn.
15:22:10 10   This interestingly is a drafting
15:22:12 11   technique that was carried over from the Canada
15:22:16 12   Free Trade Agreement.
13

15:22:27 14 You will note that there was financial services and
15:22:33 15 the parties did not want financial services not to
16 be subject to dispute resolution at all. So in
15:22:37 17 that respect, it differs from Chapter 19. It
15:22:37 18 doesn't contain a specialized dispute resolution
15:22:40 19 mechanism. It says that it is -- will not be
15:22:43 20 subject to dispute resolution anywhere in the
21 treaty and it provides in language that is very
22 similar to Article 1901(3):
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15:22:50 1 No other provision of this agreement
15:22:52 2 confers rights or imposes obligations on the
15:22:55 3 parties with respect to financial services.
15:23:02 4 PRESIDENT VAN DEN BERG: Could you give
15:23:02 5 me the article number, please.
15:23:05 6 MR. MCNEILL: I'm sorry, Article 1701.
7 PRESIDENT VAN DEN BERG: 1701.
15:23:07 8 MR. MCNEILL: It's Chapter 17, Financial
15:23:09 9 Services, Article 1701, Scope and Coverage, and
15:23:13 10 it's paragraph 1, and I read you the second half of
15:23:17 11 the paragraph. It actually begins, "This part --
15:23:22 12 I'm sorry, did I --
15:23:23 13 PRESIDENT VAN DEN BERG: 1401 is the
15:23:24 14 NAFTA.
15 MR. MCNEILL: I apologize, 1701.
15:23:29 16 PRESIDENT VAN DEN BERG: But in the FTA
15:23:31 17 is it 1701?
15:23:34 18 MR. MCNEILL: It's 1701, yes.
19 PRESIDENT VAN DEN BERG: Okay, because
15:23:37 20 there are three numbers in advance in the FTA?
15:23:42 21 MR. MCNEILL: Yes, that's right.
22 PRESIDENT VAN DEN BERG: Could you help

15:23:43 1   me do -- is the FTA in the record somewhere?
15:23:49 2   MR. MCNEILL: I don't know if we've
          3   submitted it in the record. I think it's just,
15:23:49 4   you know, it's a treaty just like the NAFTA.
          5   PRESIDENT VAN DEN BERG: I know, because
          6   it was --
          7   MR. MCNEILL: But we certainly would be
          8   happy to.
          9   PRESIDENT VAN DEN BERG: -- one thing or
15:23:53 10   the other. It is slightly difficult to find it on
15:23:55 11   the Web, since my limited resources on the Google.
         12   But one way or the other they have shelved it
         13   somewhere because they say, well, now, NAFTA
         14   applies.
         15   MR. MCNEILL: Right. Well, it was
15:24:05 16   drafted well before the Internet, and so maybe it
15:24:05 17   doesn't exist on the Web. I'm not sure.
15:24:06 18   PRESIDENT VAN DEN BERG: So, if we could
15:24:07 19   get a copy, it would be helpful.
         20   MR. MCNEILL: Certainly.
15:24:10 21   So, then, if you go to the state-to-state
15:24:13 22   dispute resolution chapter in the Canada-U.S. Free

15:24:14 1   Trade Agreement, which is Chapter 18, Article 1801
15:24:19 2   which is titled Application provides, "Except for
15:24:23 3   the matters covered in Chapter 17, parens,
15:24:26 4   financial services, and then it continues.
15:24:29 5   So you can see this was a drafting
15:24:32 6   technique that was carried over from the
15:24:36 7   Canada-U.S. Free Trade Agreement that when the

15:24:39 8   parties wanted to seal off a chapter entirely,
15:24:42 9   whether there was a dispute resolution mechanism in
15:24:45 10   that chapter or not, they used language that was
15:24:47 11   similar to 1901(3). And then that carve-out is
15:24:51 12   reflected, the mirror image of that is reflected in
15:24:53 13   the state-to-state dispute resolution chapter. So
15:24:57 14   1801 notes the major chapters that were -- that are
15:25:01 15   withdrawn from the scope of state-to-state dispute
15:25:06 16   resolution.
15:25:08 17   PRESIDENT VAN DEN BERG: Is that a fair
15:25:09 18   inference, to think that 1901(3) was drafted either
15:25:15 19   by the U.S. or by Canada at the time, and not by
15:25:21 20   Mexico?
15:25:25 21   MR. MCNEILL: The text, if you have seen
15:25:25 22   the transcript from the Canfor proceeding, where we
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15:25:29 1   go through the text, the text was introduced by the
15:25:33 2   United States.
15:25:52 3   And Article 1901(3) it first appears on
15:25:54 4   the June 3, 1999 draft, and perhaps we'll take the
          5   opportunity to go through this in more detail with
15:26:00 6   you at a future time, but I will give you a
15:26:01 7   preliminary answer at least now.
15:26:02 8   The first iteration of Article 1901(3) --
15:26:06 9   it wasn't labeled 1901(3) -- appears in the June 3,
15:26:09 10   1992 draft, and it appears in brackets. And
15:26:12 11   outside of the brackets it says USA, and that
15:26:15 12   indicates that the United States first introduced
15:26:23 13   Article 1901(3). And then later the brackets come
15:26:29 14   off and the language is accepted. But we will go
15:26:32 15   through this in more detail in the future.
15:26:52 16   If the Tribunal has no further questions

15:26:54 17   on Article 2004, I will now address Canfor's and
15:26:59 18   Terminal's argument that they're -- sorry.
15:27:00 19   PRESIDENT VAN DEN BERG: I do, because
15:27:01 20   except to look -- the drafting technique of 1901(3)
15:27:06 21   was taken from the FTA in the financial services
15:27:11 22   section.
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15:27:12 1   MR. MCNEILL: We have no idea whether it
15:27:14 2   was taken directly from the financial services
15:27:18 3   chapter.
15:27:20 4   PRESIDENT VAN DEN BERG: But now within
15:27:20 5   NAFTA, do you have also have a similar drafting
15:27:24 6   technique for exclusionary clause --
          7   MR. MCNEILL: Yes. Yes, you do.
          8   PRESIDENT VAN DEN BERG: -- for 1901(3)?
15:27:27 9   Could you point us to other clauses in NAFTA where
15:27:29 10   we find the similar technique?
15:27:33 11   MR. MCNEILL: Article 1607 provides that
15:27:53 12   except for this chapter, Chapter 1, 2, 20,
15:27:57 13   Arrangements and Dispute Settlement Procedures, and
15:28:00 14   22, and Articles 1801, 1802 --
15:28:05 15   PRESIDENT VAN DEN BERG: We are now on
15:28:07 16   1607, right?
         17   MR. MCNEILL: Yes.
         18   PRESIDENT VAN DEN BERG: Okay.
15:28:08 19   MR. MCNEILL: It says, except for this
15:28:09 20   chapter, and then it lists a number of specific
15:28:11 21   provisions, no provision of this agreement shall
15:28:15 22   impose any obligation on a party regarding its
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15:28:18 1   immigration measures.

15:28:21 2   And this provision is quite similar,
15:28:23 3   obviously, to Article 1901(3) in that it defines
15:28:27 4   what is included and it excludes everything else
15:28:32 5   outside of the provisions that are included.
15:28:51 6   PRESIDENT VAN DEN BERG: Mr. Robinson has
15:28:53 7   a question.
15:28:54 8   ARBITRATOR ROBINSON: I am sorry, I may
15:28:56 9   be getting myself more confused here. 1607,
15:29:00 10   following the "except," says no provision of this
15:29:05 11   agreement shall impose any obligation, whereas
15:29:13 12   1901(3) says no provision of any other chapter of
15:29:18 13   this agreement. Is there any difference there?
15:29:28 14   MR. MCNEILL: I don't think so. I think
15:29:29 15   that 1901(3), by saying any other chapter, it
15:29:32 16   excludes Chapter 19 itself, and that is the same
15:29:37 17   thing as saying except for this chapter, Chapters
15:29:39 18   1, 2, et cetera, is excluding those from the
15:29:40 19   exclusion itself, no provision of this agreement
15:29:42 20   shall impose. So I think they are quite analogous
15:29:46 21   in their structure.
22   ARBITRATOR ROBINSON: And why, I guess,
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15:29:48 1   why would 1607 have stated "shall impose any
15:29:54 2   obligation," where 1901(3) says "shall be construed
15:30:01 3   as imposing obligations." What is the difference
15:30:05 4   there?
15:30:08 5   MR. MCNEILL: Canfor seeks to make an
15:30:09 6   issue out of the fact that some of the exclusions
15:30:12 7   are drafted with the words "shall be construed" and
15:30:18 8   some are drafted just with the word "shall." And
15:30:24 9   we really see no difference between the two, and we
15:30:25 10   did a comparison, I believe, of the statement of

15:30:26 11 administrative action, and we found that there were
15:30:28 12 instances where one version was used in the text
13 itself and it was translated in the other version
15:30:35 14 in the SAA. In other words, at least the United
15:30:36 15 States interpreted those to be equivalent. So we
15:30:40 16 didn't see any difference between the two.
15:30:43 17 Canfor says that that converts Article
15:30:48 18 1901(3) into an interpretive provision. And as I
15:30:49 19 mentioned before, we don't think that makes any
15:30:52 20 sense and we are not sure what Canfor thinks that
15:30:56 21 Article 1901(3) interprets.
15:30:57 22 Arguably, when you say "no provision of
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15:30:59 1 any other chapter shall be construed," it perhaps
15:31:02 2 even strengthens the provision by barring the
15:31:06 3 possibility that someone will even attempt to bring
15:31:09 4 -- to impose an obligation from outside of the
15:31:12 5 chapter. So perhaps linguistically it even
15:31:15 6 indicates added strength to the exclusion.
15:31:20 7 MS. MENAKER: If I just may add, I can
15:31:22 8 give you those particular examples that Mr. McNeill
15:31:26 9 was referring to. In Article 1401, for example,
15:31:29 10 the text says nothing in this part shall be
15:31:32 11 construed to prevent a party from adopting or
15:31:35 12 maintaining reasonable measures for prudential
15:31:40 13 reasons. And then if you look at the United
15:31:42 14 States' statement of administrative action when
15:31:43 15 describing that article, we state that Article 1410
15:31:46 16 sets out general exceptions that apply to the
15:31:50 17 chapter and the agreement and then we continue by
15:31:51 18 saying Article 1410 provides that nothing in part 5

15:31:57 19   prevents a party from taking certain measures.
15:32:01 20   So there we clearly believed that the
15:32:05 21   term "nothing should be construed to prevent" was
15:32:07 22   the same as saying "nothing prevents."
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15:32:10 1   And another example is in Article 2105.
15:32:13 2   That again uses the term "construed." That article
15:32:18 3   states: Nothing in this agreement shall be
15:32:20 4   construed to require a party to furnish or allow
15:32:24 5   access to information, the disclosure of which
15:32:28 6   would impede law enforcement. And then Canada on
15:32:32 7   its statement on implication stated that Article
15:32:35 8   2105 provides that nothing in the agreement
15:32:39 9   requires a party to disclose or allow access to
15:32:43 10   information.
15:32:44 11   So, clearly, again, Canada is stating
15:32:47 12   that -- its belief that when we say "construed to
15:32:51 13   require," it's equivalent to saying just "require."
15:32:56 14   So in our view, the language in Article 1901(3)
15:32:57 15   that says "nothing should be construed to impose"
15:33:01 16   can simply be interpreted as reading "nothing shall
15:33:06 17   impose."
15:33:09 18   ARBITRATOR ROBINSON: Where I am still
15:33:10 19   having some difficulty, if, for example, it might
15:33:16 20   have said "except for Chapter 11, no provision of
15:33:24 21   this agreement shall impose obligations on a
15:33:29 22   party," and I assume that there would be no doubt
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15:33:35 1   there could be recourse under Chapter 11 had it
15:33:39 2   said that. But would that be so?
15:33:43 3   Now, it does not say that. It says
15:33:46 4   "except for Article 2203." But then, rather than

15:33:54 5   saying no provision of this agreement shall impose
15:34:00 6   any obligation, as is said in Article 1607 after
15:34:08 7   listing a number of excepted provisions, it has
15:34:12 8   this phraseology: "no provision of any other
15:34:17 9   chapter of this agreement shall be construed as
15:34:21 10   imposing."
15:34:22 11   Now, if you take that phrase as a whole,
15:34:26 12   if you compare "no provision of this agreement
15:34:30 13   shall impose any obligation" and compare it to "no
15:34:35 14   provision of any other chapter of this agreement
15:34:38 15   shall be construed as imposing," if I understand
15:34:42 16   it, you are arguing that they are one and the same?
15:34:48 17   MS. MENAKER: That is correct. And with
15:34:49 18   respect, we see no difference between those two
15:34:53 19   phrases on two grounds: first, the "construed as
20   imposing obligations" and "imposing obligations"
21   for the reasons I just stated, it think it shows
15:35:04 22   that the parties believed those were synonymous,

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15:35:09 1   and as Mr. McNeill indicated, perhaps it was even
15:35:10 2   more emphatic to state "construed to impose" but I
15:35:15 3   haven't heard any other interpretation to suggest
15:35:18 4   that makes a substantive difference by saying
15:35:22 5   "construed to impose" as opposed to "impose."
15:35:23 6   And then with respect to the second
15:35:24 7   difference, no provision of this agreement or no
15:35:29 8   provision of any other chapter of this agreement, I
15:35:35 9   don't see that as being any different whatsoever.
15:35:40 10   ARBITRATOR ROBINSON: So, is the
15:35:42 11   implication that the wording is different simply as
15:35:46 12   a result of the fact that the negotiators of

15:35:48 13 Article 16 were not the same as the negotiators of
15:35:53 14 Article 19 -- I'm sorry, Chapter 16 and Chapter 19
15:35:58 15 and that that would be the reason why there might
15:36:00 16 be the difference in the language?
15:36:03 17 MS. MENAKER: Quite possibly, but, again,
15:36:05 18 I say that only by looking at the text, and seeing
15:36:10 19 in the English language I just don't see any
15:36:16 20 difference between no provision in this agreement
15:36:21 21 or no provision from any chapter in this agreement.
15:36:22 22 And so surely it's a possible explanation that it
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15:36:26 1 was just different persons drafting it, but that is
15:36:28 2 my speculation since I do not know.
15:36:32 3 ARBITRATOR ROBINSON: Right, of course.
15:36:33 4 All right, thank you very much.
15:36:44 5 PRESIDENT VAN DEN BERG: Basically what
15:36:44 6 you are saying, Ms. Menaker is this is legalese?
15:36:50 7 MS. MENAKER: Yes.
15:36:52 8 PRESIDENT VAN DEN BERG: Okay, like "this
15:36:52 9 act shall be deemed a tort" or "this act shall be a
15:36:55 10 tort" is the same thing. And there are actually
15:36:57 11 lawyers who are very averse to using "shall be
15:37:08 12 deemed." I'm not one of them, but I know some
13 lawyers who categorically refuse to use the words
15:37:12 14 "be deemed." Perhaps it was an astute lawyer.
15:37:13 15 MR. MCNEILL: I also draw your attention
15:37:15 16 to Article 2103 and I think it illustrates this
15:37:20 17 same issue that we're just talking about now.
15:37:23 18 Article 2103 applies to taxation. Paragraph 1
15:37:25 19 provides except as set out in this article,
15:37:27 20 "nothing in this agreement shall apply to taxation
15:37:34 21 measures." And here we see, "nothing in this

15:37:35 22 agreement," so yet it's different from "no
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15:37:37 1 provision of this agreement," or "no provision of
15:37:41 2 any chapter of this agreement" or "no chapter in
3 this agreement."
15:37:42 4 And we submit that there is no difference
15:37:44 5 between these, that it is just legalese.
15:37:52 6 ARBITRATOR ROBINSON: So you are saying
15:37:55 7 if I understand it, in effect, that there was
15:37:55 8 insufficient legal scrubbing, as the term was used?
15:37:59 9 Is that the implication?
15:38:03 10 MS. MENAKER: Not necessarily, because if
15:38:04 11 it were insufficient legal scrubbing, then one
15:38:08 12 would -- I think you would draw the inference that
15:38:12 13 there was a difference that should have
15:38:17 14 been corrected -- but, I mean, unless it is an
15:38:19 15 object and purpose that you have complete
15:38:23 16 conformity. So if that's the object then, then
15:38:25 17 perhaps incomplete. But otherwise, if it has no
15:38:28 18 substantive difference, I don't know that that is
15:38:29 19 something that we necessarily strive for.
20 PRESIDENT VAN DEN BERG: Professor
15:38:38 21 Mestral has a question.
15:38:47 22 ARBITRATOR MESTRAL: I ask, I think,
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15:38:48 1 probably both parties just to think about this.
15:38:50 2 There might be at some point a reason to use the
15:38:54 3 words "no provision of any chapter" as opposed to
15:38:59 4 "no provision of the agreement" generally because
15:39:00 5 the chapters, all 21 of them, might not well not
15:39:04 6 cover the annexes. The annexes indeed include

15:39:08 7   immense exclusions that all government wanted. So
15:39:12 8   I would invite you simply in your thinking further
15:39:18 9   just to address yourselves to that, and be sure to
15:39:24 10   -- there might not be an issue there.
15:39:29 11   MR. MCNEILL: We will do so, certainly.
15:39:33 12   I will now address Canfor's and
15:39:35 13   Terminal's argument that their claims are not
15:39:38 14   barred because there is no express exclusion in
15:39:40 15   Chapter 11. They rely in particular on Article
15:39:45 16   1101(3) which provides that Chapter 11 does not
15:39:49 17   apply to financial services matters as the type of
15:39:53 18   exclusion that would be required to bar their
15:39:57 19   claims.
15:39:58 20   These arguments are without basis.
15:40:01 21   First, it makes no difference if an exclusion
15:40:06 22   resides in Chapter 11 or elsewhere in the treaty.
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15:40:11 1   When the NAFTA parties sought to exclude a
15:40:15 2   particular subject matter from obligations in most
15:40:18 3   or all of the agreement, they typically placed an
15:40:24 4   exemption in the chapter that deals with the
15:40:27 5   subject matter itself. And we just saw two of
15:40:32 6   those examples, one was 1607 and the other was
15:40:34 7   2103.
15:40:35 8   There would be absolutely no difference
15:40:37 9   in effect if instead of Article 1901(3) the NAFTA
15:40:42 10   parties had inserted a provision in Chapter 11, and
15:40:45 11   in every other chapter of the agreement, other than
15:40:51 12   Chapter 19 that provided that this chapter shall
15:40:55 13   not be construed as imposing obligations on a party
15:40:59 14   with respect to the party's antidumping law and
15:41:02 15   countervailing duty law. A more efficient means of

15:41:07 16   accomplishing the same result, however, is to have
15:41:08 17   a single exclusion in the chapter that does impose
15:41:14 18   such obligations. Article 1901(3)'s location
15:41:18 19   outside of Chapter 11 thus does not deprive it of
15:41:21 20   effectiveness.
15:41:22 21   Second, claimant's reliance on Article
15:41:26 22   1101(3) is misplaced because claimants ignore the
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15:41:34 1   fundamental difference between Chapter 11's
15:41:36 2   relationship with Chapter 14 and its relationship
15:41:39 3   with Chapter 19. Chapter 14's coverage includes
15:41:43 4   measures adopted by a party relating to investors
15:41:46 5   and investments in financial services -- in
15:41:51 6   financial institutions, excuse me.
15:41:53 7   In that respect, it covers essentially a
15:41:57 8   subcategory of the general investment subject
15:42:02 9   matter in Chapter 11. Financial services were
15:42:05 10   separated into a different chapter because of the
15:42:07 11   particular sensitivities the NAFTA parties had to
15:42:10 12   subjecting their regulations in that area to
15:42:14 13   scrutiny under the NAFTA. Thus, it was important
15:42:18 14   to define the precise relationship between the two
15:42:25 15   chapters. Thus, Article 1401 paragraph 2
15:42:27 16   incorporates dispute resolution provisions of
15:42:30 17   Chapter 11 into Chapter 14 as well as certain
15:42:34 18   substantive obligations, most notably Article 1110
19   concerning expropriation.
20   Article 1101(3) then simply insures that
15:42:45 21   nothing residual can fall into general investment
15:42:48 22   provisions of chapter 11.
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15:42:50 1   There is not the same express overlap in
15:42:53 2   subject matter, however, between Chapters 11 and
15:42:57 3   19, as Ms. Menaker pointed out. Chapter 19
15:43:02 4   concerns the imposition of duties on imports from
15:43:05 5   another country and has nothing to do with the
15:43:08 6   treatment of investments or investors. Thus, there
15:43:12 7   is no need to have the same sort of carve-out,
15:43:16 8   carve-in mechanism that you have in Chapters 11 and
15:43:19 9   14. Claimant's reliance in Article 1101 paragraph
15:43:24 10   three is therefore inept.
15:43:26 11   Finally, I will briefly address the
15:43:29 12   object and purpose of the NAFTA and demonstrate
15:43:32 13   that it also confirms the NAFTA parties' intent to
15:43:36 14   establish Chapter 19 as the exclusive forum for
15   antidumping and countervailing duty claims.
15:43:42 16   PRESIDENT VAN DEN BERG: Another question
15:43:42 17   by Mr. Robinson.
15:43:45 18   ARBITRATOR ROBINSON: I'm sorry, I am
15:43:46 19   just trying to understand this as best as I can.
15:43:50 20   If I understand the difference, in
15:43:55 21   Article 1101, there is a reference to Chapter 14,
15:44:04 22   in 1101(3), and in Article 1401(2) there is a
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15:44:09 1   reference to certain sections of Chapter 11. So
15:44:16 2   you have a reference in 11 to 14, and in 14 to 11.
15:44:26 3   In our case, there is a reference in
15:44:31 4   neither one. In other words, there is no reference
15:44:33 5   in 11 going to 19. There is no reference in 19
15:44:39 6   going to 11, and how do you interpret the
15:44:45 7   difference? Are you making the distinction on the
15:44:51 8   basis that there is a reference neither in one or
15:44:54 9   the another which, if I understand it, is not the

15:44:58 10   same. Was it 15? I think you referred to some
15:45:10 11   another chapter where there was a reference in one
15:45:13 12   Chapter but there wasn't a reference in the other.
15:45:14 13   There were three -- there were three
15:45:15 14   possibilities here. You can have a reference in
15:45:17 15   both of the chapters, you can have a reference in
15:45:21 16   neither of the chapters, or you can have a
15:45:24 17   reference to another chapter in one of the
15:45:26 18   chapters. In your mind, is there any difference
15:45:34 19   between where there is no reference in either
15:45:37 20   chapter as to where there might be a reference in
15:45:41 21   one Chapter but not the other. I am not sure that
15:45:44 22   I am articulating that very well.
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1   MR. MCNEILL: I think I understand your
15:45:49 2   point exactly. The point of the relationship
15:45:50 3   between the two chapters, the relationship between
15:45:54 4   the two chapters explains Article 1101(3) and
15:45:58 5   Article 1401(2) and why you have a reference either
15:46:01 6   chapter in -- why you have a reference to the other
15:46:02 7   chapter in each Chapter.
15:46:05 8   ARBITRATOR ROBINSON: Right.
15:46:06 9   MR. MCNEILL: See, Chapter 11 applies
15:46:08 10   to -- under 1101(1) it says this chapter applies to
11   measures adopted or maintained by a party relating
15:46:16 12   to investors of another party, and investments of
15:46:18 13   investors.
15:46:19 14   Then you see Chapter 14 is financial
15:46:22 15   services and this chapter covers both trade and
15:46:25 16   investment. It provides in paragraph 1401, Article
15:46:32 17   1401 paragraph one, this Chapter applies to

15:46:34 18   measures adopted or maintained by a party relating
15:46:37 19   to (a) financial institutions of another party, or,
15:46:40 20   (b), investors of another party, and investments of
15:46:45 21   such investors.
15:46:46 22   So Chapter 14 covers both and then (c)
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15:46:50 1   cross-border trade, so it covers cross-border trade
15:46:54 2   and it covers investors and investment, and to the
15:46:57 3   extent it covers investors or investment, then
15:47:00 4   there is certainly overlap between with Chapter 11,
15:47:03 5   which is the general investment chapter. And if
15:47:03 6   you didn't have some mechanism for determining how
15:47:07 7   you would resolve an investment claim -- if you
15:47:11 8   didn't have such a mechanism between 1101(3) and
15:47:16 9   1401(2) and if you had an investment in a financial
15:47:19 10   institution, you might possibly be able to bring it
15:47:22 11   under Chapter 11. There'd be confusion as to where
15:47:24 12   you should bring that claim. So they specified the
15:47:26 13   exact relationship between the two chapters by
15:47:30 14   carving in certain substantive provisions and
15:47:33 15   Section B, the dispute resolution mechanism
15:47:37 16   directly into Chapter 14.
15:47:40 17   Now, there are other provisions as well
15:47:42 18   in Chapter 14 that require -- that allow for only
15:47:47 19   state-to-state dispute resolution, and then there's
15:47:52 20   also not a minimum standard of treatment provision
15:47:53 21   in Chapter 14, so you could bring that nowhere. So
15:47:56 22   there is very a specific mechanism for how you deal
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15:48:00 1   with disputes concerning financial services that's
15:48:06 2   spelled out in Chapter 14. So that explains the
15:48:06 3   relationship between the two chapters why you see a

15:48:10 4 reference in each chapter, because of the very
15:48:12 5 close relationship in the subject matter.
6 ARBITRATOR ROBINSON: All right, so if I
15:48:17 7 understand it, while so the clearest would have
15:48:21 8 been if Article 1901(3) specifically excluded
15:48:27 9 Chapter 11, the next best is what you are arguing
15:48:31 10 is where 11 and 19 are both silent?
15:48:39 11 MS. MENAKER: I would just say that I
15:48:41 12 don't think -- we don't agree that the first best
15:48:44 13 would be if 1901(3) specifically stated Chapter 11
15:48:50 14 for two reasons. First of all, if it specifically
15:48:56 15 stated Chapter 11, it would have to state every
15:48:59 16 other chapter. If we said something like "no
15:49:01 17 provisions of Chapter 11 or any other provisions of
15:49:05 18 this agreement shall be construed as imposing
15:49:08 19 obligations on a party with respect to the party's
15:49:18 20 AD/CVD law," that would raise all sorts of
21 arguments, I'm certain, about the negative
22 implication, why if you really wanted to exclude
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1 the obligations from Chapter 3 from being imposed
15:49:21 2 on AD/CVD law, why did you specify Chapter 11, yet
15:49:25 3 not Chapter 3.
15:49:26 4 I think drafters typically don't like to
15:49:29 5 do that. If they are going to specify all the
15:49:34 6 exclusions, they do so, or they do something more
15:49:37 7 general, like "no provision in the agreement."
15:49:41 8 But also, I think the important part is
15:49:44 9 that, as Mr. McNeill was stating, you need to look
15:49:45 10 at the subject matters of the chapters that we are
15:49:47 11 talking about to see what their relationship with

15:49:51 12   one another is, and clearly there is a huge overlap
15:49:55 13   between the investment chapter in Chapter 11 and
15:50:00 14   the financial services chapter in Chapter 14 which
15:50:03 15   deals with investment in financial services. So
15:50:06 16   there as Mr. McNeill explained in greater detail,
15:50:09 17   you are going to have cross-references in order to
15:50:11 18   make it clear what obligations are imposed when you
15:50:15 19   are talking about investments in financial
15:50:17 20   institutions.
15:50:18 21   But as we mentioned earlier, in our view,
15:50:21 22   the subject matters covered by Chapter 19 don't
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15:50:25 1   really relate to investment, so it was not
15:50:30 2   obvious to -- I would not believe that it would be
15:50:33 3   obvious to a drafter to address specifically
15:50:36 4   Chapter 11 in Article 1901(3), and that is the same
15:50:43 5   reason that we have offered. For example, if you
15:50:43 6   look at our bilateral investment treaties that deal
15:50:47 7   with investment, they talk about the scope of their
15:50:50 8   coverage as being investment, but then they do not
15:50:53 9   have an express exclusion for everything else that
15:50:57 10   they don't consider to be investment-related. So
15:51:04 11   you don't see a type of 1901(3) exclusion and a
15:51:05 12   laundry list of everything that they think is
15:51:07 13   really outside the scope of the agreement.
14   PRESIDENT VAN DEN BERG: One follow-up
15:51:21 15   question, then, before you move on. The question
15:51:22 16   about 1121 -- excuse me, I have -- it's not 1121,
15:51:45 17   it's 1112, excuse me, paragraph 1. You refer to
15:51:54 18   also in support of your argument that Chapter 19
15:51:57 19   does not apply to Chapter 11 and 1112, paragraph 1
15:52:06 20   provides, and I quote: In the event of any

15:52:09 21   inconsistency between this chapter and another
15:52:12 22   chapter, the other chapter shall prevail to the
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15:52:16 1   extent of the inconsistency. In raising the
15:52:19 2   question we had in this case, first of all, is
15:52:22 3   there an inconsistency between Chapter 11 and
15:52:24 4   Chapter 19, according to the United States?
15:52:29 5   MR. MCNEILL: I think what you have to do
15:52:31 6   to answer that question is to go back first and
15:52:33 7   look at what the NAFTA parties intended by
15:52:38 8   "inconsistency." And I think one thing that really
15:52:39 9   clarifies what the NAFTA parties meant, why they
15:52:43 10   intended to include an underride provision in
15:52:47 11   Chapter 11 is clarified by Canada's statement on
15:52:50 12   implementation, and it provides there at page 152,
15:52:57 13   referring to Article 1112, it says, this Article
15:53:01 14   ensures that the specific provisions of other
15:53:04 15   chapters are not superseded by the general
15:53:07 16   provisions of this chapter.
15:53:11 17   Now, what that means is if there is a
15:53:20 18   chapter that covers a specific subject matter such
15:53:23 19   as investment in the automotive field, which is in
15:53:27 20   Annex 300, I believe, if there were an obligation
15:53:28 21   on a party in that Chapter, in that part of the
15:53:32 22   NAFTA, an obligation in Chapter 11, and the NAFTA
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15:53:37 1   party doesn't know which obligation it is supposed
15:53:39 2   to comply with, you would look to the other
15:53:44 3   chapter. And that would also apply to obligations
15:53:47 4   -- not to substantive obligations, but obligations
15:53:47 5   with respect to dispute resolution and that's is

15:53:50 6   why we believe it is relevant here.
15:53:52 7   If you look at Chapter 19, Chapter 19 is
15:53:54 8   a very specific chapter for dealing with
15:53:58 9   antidumping and countervailing duty laws. The
15:54:01 10   parties -- it is one of the most elaborate chapters
15:54:04 11   in the NAFTA, in fact. And so when you look at --
15:54:08 12   if a NAFTA party must determine what is its
15:54:12 13   obligation in terms of resolving a dispute with
15:54:13 14   respect to antidumping and countervailing duty
15:54:18 15   determinations, that has been specifically set
15:54:21 16   forth in NAFTA Chapter 19.
15:54:24 17   And pursuant to Article 1112, then,
15:54:24 18   Chapter 19 -- the dispute resolution mechanism
15:54:28 19   would prevail.
15:54:57 20   Finally, I will briefly address the
15:55:00 21   object and purpose of the NAFTA and demonstrate
15:55:02 22   that it confirms the NAFTA parties' intent to
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15:55:05 1   establish the Chapter 19 panels as the exclusive
15:55:08 2   forum for resolving antidumping and countervailing
15:55:12 3   duty disputes.
15:55:15 4   NAFTA Article 102 provides that, quote,
15:55:18 5   the objectives of this agreement as elaborated more
15:55:23 6   specifically through its principles and rules are,
15:55:27 7   to, E, create effective procedures for the
15:55:30 8   resolution of disputes. End quote.
15:55:33 9   As we have noted in our submissions, and
15:55:36 10   I won't repeat all of those arguments here,
15:55:39 11   granting private claimants a second forum in
15:55:43 12   Chapter 11 for their antidumping and countervailing
15:55:47 13   duty claims would lead to massive redundancy of
15:55:52 14   resources, would risk the possibility of

15:55:56 15   conflicting determinations of fact and law and
15:55:59 16   would give rise to the possibility of double
15:56:01 17   recovery by claimants contrary to the objective of
15:56:04 18   effective dispute resolution.
15:56:07 19   Claimant's argument that the United
15:56:09 20   States has selectively focused on one NAFTA
15:56:13 21   objective and has ignored those pertaining to the
15:56:17 22   liberalization of trade is without merit. Claimant
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15:56:23 1   simply failed to explain how having access to a
          2   second forum in Chapter 11 for essentially the same
15:56:28 3   claims they submitted to Chapter 19 would in any
15:56:32 4   way advance the trade liberalizing objectives of
15:56:36 5   the NAFTA.
15:56:38 6   Claimant also argued that the binational
15:56:41 7   panel proceedings have not been effective because
15:56:43 8   they allegedly are not satisfied with the relief
15:56:45 9   they have obtained there thus far, and that an
15:56:48 10   effective resolution of their claims therefore
15:56:52 11   requires that they have access to Chapter 11.
15:56:57 12   Canfor's supposed frustration with the
15:57:00 13   Chapter 19 process, however, has no bearing on
15:57:03 14   whether this Tribunal has jurisdiction over the
15:57:06 15   claims. It simply has no bearing on the NAFTA
15:57:09 16   parties' intent when they drafted the treaty over
15:57:12 17   ten years ago.
15:57:14 18   Moreover, the claimant's conclusion that
15:57:16 19   Chapter 19 proceedings, which are ongoing, have
15:57:19 20   been totally ineffective is without basis. In
15:57:24 21   conclusion, Article 1901(3)'s context and the
15:57:29 22   object and purpose of the NAFTA are fully consonant
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15:57:32 1   with the plain meaning of Article 1901(3) and
15:57:36 2   demonstrate beyond question the party's intent to
15:57:39 3   preclude the claims that claimants submit in this
15:57:42 4   arbitration.
15:57:43 5   Thank you.
15:57:45 6   PRESIDENT VAN DEN BERG: Thank you,
15:57:45 7   Mr. McNeill. That concludes your presentation?
15:57:50 8   MR. MCNEILL: It does.
15:57:52 9   PRESIDENT VAN DEN BERG: Then I think
15:57:53 10   Mr. Bettauer announced that he would have the last
15:57:57 11   words on the side of the United States.
15:58:01 12   MR. BETTAUER: Yes, just for five minutes
15:58:02 13   and we will be done.
15:58:04 14   I just want to wrap up our first round
15:58:09 15   presentation. The claims here exclusively concern
15:58:13 16   preliminary and final determinations made by the
15:58:17 17   Department of Commerce and the International Trade
15:58:20 18   Commission on Canadian softwood lumber antidumping
15:58:29 19   and countervailing duty petitions. Those
15:58:31 20   determinations all concern the importation of
15:58:33 21   softwood lumber. They are trade claims. They have
15:58:37 22   nothing to do with any measure regarding the

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15:58:41 1   treatment of an investment in the United States.
15:58:47 2   Instead, all of the allegations focus on
15:58:51 3   actions subject to review by binational panels
15:58:55 4   under Chapter 19. As we made clear in the Canfor
15:58:59 5   hearing, Chapter 11 was meant to forward the
15:59:03 6   NAFTA's objective of increasing opportunities for
15:59:07 7   cross-border investment by establishing a dispute
15:59:11 8   settlement mechanism that allows investors to

15:59:15 9 challenge measures involving investments when they
15:59:21 10 believe such measures are not consistent with the
15:59:23 11 rules in Section A of Chapter 11.
15:59:26 12 It was not meant to deal with disputes
15:59:28 13 that are purely trade disputes. It was not meant
15:59:31 14 to deal with antidumping or countervailing duty
15:59:35 15 matters.
15:59:37 16 We have shown that Chapter 19 is the
15:59:40 17 exclusive mechanism for dealing with antidumping
15:59:44 18 dumping and countervailing duty matters, that it is
15:59:48 19 very specialized, and that it is the only available
15:59:52 20 avenue for settling these disputes in the NAFTA.
15:59:58 21 The claimants here cannot be allowed to
16:00:01 22 succeed in turning their Chapter 19 complaint into
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16:00:05 1 a Chapter 11 claim. That isn't what the NAFTA
16:00:09 2 parties agreed to and it isn't what the NAFTA text
16:00:13 3 provides. Article 1901(3), as we have reviewed for
16:00:19 4 you, makes that clear. The NAFTA parties did not
16:00:24 5 consent to arbitrate antidumping and countervailing
16:00:28 6 duty claims under Chapter 11.
16:00:34 7 The claimants have argued that the
16:00:36 8 Chapter 19 mechanism has proved ineffective. Even
16:00:41 9 if this were true, as has just been noted, that is
16:00:45 10 not a reason to find jurisdiction where there is
16:00:49 11 none. Chapter 11 is not a review mechanism for
16:00:55 12 Chapter 19.
16:00:58 13 We have shown, we believe, in the
16:01:03 14 materials we have filed with you, and in our
16:01:06 15 argument, that the claimant's arguments are
16:01:10 16 completely without merit, and that they have no

16:01:13 17   basis to bring these claims. We, therefore, ask
16:01:17 18   the Tribunal to dismiss the claims in there
16:01:19 19   entirety.
16:01:21 20   For the reasons we set out at the Canfor
16:01:24 21   hearing, we believe an award of costs would be
16:01:28 22   fully justified in this proceeding and we therefore
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16:01:32 1   request full costs to be awarded to the United
16:01:38 2   States. Chapter 19 clearly provides that no other
16:01:41 3   Chapter of the NAFTA is to impose obligations on a
16:01:45 4   party with respect to antidumping and
16:01:47 5   countervailing duty matters. Requiring the United
16:01:52 6   States to defend here as already imposed
16:01:55 7   obligations on the United States. We have expended
16:02:01 8   significant financial and personnel resources to
16:02:03 9   litigate the claims at issue here. Ultimately
16:02:06 10   these types of claims can undermine support of the
16:02:08 11   governments and the public for the NAFTA.
16:02:13 12   We remind you of Article 41 of the
16:02:18 13   UNCITRAL rules on costs. We think that the other
16:02:24 14   party has disregarded the express language of the
16:02:27 15   NAFTA which bars such claims, and we think this
16:02:30 16   Tribunal should take that into account.
16:02:34 17   The United States then submits that the
16:02:39 18   claims should be dismissed and costs should be
16:02:41 19   awarded and that, Mr. President and members of the
16:02:48 20   Tribunal concludes our first round presentation.
16:02:51 21   Thank you for your attention.
22   PRESIDENT VAN DEN BERG: Thank you, Mr.
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16:02:54 1   Bettauer. Thank you also to the other members of
16:02:56 2   the team for their presentation.

16:02:59 3 I think a recess of ten minutes and then
16:03:02 4 Mr. Landry and/or Mr. Mitchell will do the opening
16:03:06 5 statement for the claimant.
16:03:09 6 (Recess.)
16:20:57 7 PRESIDENT VAN DEN BERG: Mr. Landry,
16:20:58 8 would you please proceed with the opening statement
16:21:02 9 on behalf of the claimants.
10 OPENING STATEMENT BY CLAIMANTS
16:21:04 11 MR. LANDRY: Thank you, Mr. President.
16:21:06 12 Both Mr. Mitchell and I will be dealing with the
16:21:09 13 claimants' arguments in our oral submissions and I
16:21:13 14 would just like to or outline what those oral
16:21:18 15 submissions will deal with, and they will
16:21:22 16 effectively go on the following topics.
16:21:24 17 Firstly, I will provide some introductory
16:21:29 18 comments which will set forth what this dispute is
16:21:32 19 about, the nature of Canfor and Terminal's claims,
16:21:36 20 the importance to the investors what the claims'
16:21:38 21 fundamental underpinnings are, and why that conduct
16:21:40 22 in this case is so extraordinary. They will be
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16:21:43 1 introductory comments.
16:21:46 2 Secondly, I will then undertake an
16:21:48 3 overview of the interpretive exercise that this
16:21:52 4 panel must undertake and that you have been
16:21:54 5 discussing with the United States including a
16:21:57 6 discussion of the obvious two key elements that are
16:22:01 7 an essential backdrop to that exercise, which are
16:22:03 8 the NAFTA objectives and the context within which
16:22:06 9 Article 1901(3) is found in the NAFTA.
16:22:13 10 Thirdly, I will then articulate for the

16:22:18 11   Tribunal exactly what Canfor and Terminal say is
16:22:22 12   the proper interpretation of 1901(3).
16:22:26 13   And then finally I will respond to a
16:22:28 14   number of the issues raised by the U.S. including
16:22:31 15   its argument relating to context and the issues
16:22:36 16   raised in relation to parallel proceedings, more
16:22:41 17   particularly the U.S. arguments relating to
16:22:41 18   redundancy and the possibility of conflicting
16:22:44 19   judgments.
16:22:44 20   And I will conclude in talking a little
16:22:47 21   bit about the circumstances at conclusion of the
16:22:49 22   NAFTA. Then that will be the end of my
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16:22:53 1   presentation, Mr. President.
16:22:55 2   After that, Mr. Mitchell will look in
16:22:58 3   detail at why Canfor and Terminal say their
16:23:03 4   interpretation is the proper interpretation of
16:23:06 5   Article 1901(3) in light of the context within
16:23:10 6   which it is found in the NAFTA. So that is
16:23:13 7   basically the structure, Mr. President.
16:23:22 8   Before focusing on the primary issue
9   which the Tribunal must deal with in this
16:23:25 10   application, that is, the proper interpretation of
16:23:27 11   Article 1901(3), I would like to take a few moments
16:23:32 12   to talk in general terms about these investment
16:23:36 13   disputes in the context of the overall Canada-U.S.
16:23:41 14   softwood dispute that has been ongoing, at least
16:23:44 15   the latest iteration, for five years.
16:23:48 16   As a starting point, as a guide post, it
16:23:51 17   is important to keep in mind that these are
16:23:53 18   investment disputes. Both Canfor and Terminal are
16:23:57 19   Canadian companies that have invested millions and

16:24:01 20 millions of dollars in the United States. This
16:24:05 21 commitment of capital has included capital for
16:24:06 22 significant manufacturing facilities, reload
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16:24:10 1 facilities and inventory, including inventory
16:24:13 2 facilities. All of the investments, and I might
16:24:17 3 add Canfor and Terminal's ability to compete with
16:24:21 4 U.S. businesses, are dependent upon their ability
16:24:24 5 to import softwood lumber from Canada.
16:24:30 6 At its very basic level, Canfor and
16:24:33 7 Terminal's complained that they and their U.S.
16:24:38 8 investments have been treated by the United States
16:24:42 9 in a manner which falls below the obligations
16:24:45 10 undertaken by the U.S. under Chapter 11, as you
16:24:47 11 know, and as a result they have suffered
16:24:49 12 significant damages, but I want to emphasize these
16:24:52 13 are damages which go well beyond the duties that
16:24:56 14 have been improperly collected by the United States
16:25:00 15 purportedly under the color of its antidumping and
16:25:07 16 CVD law.
16:25:09 17 PRESIDENT VAN DEN BERG: One question
16:25:10 18 there, Mr. Landry, because you heard this morning
16:25:13 19 the hypothetical that the Tribunal gave, in
16:25:16 20 particular myself, about the Kingdom of Thrills.
16:25:19 21 Of course, I do not want to compare your clients
16:25:23 22 with the kingdom of thrills, but more or less this
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16:25:28 1 would be in your submission then be an investment,
16:25:31 2 and the import of softwood lumber into the United
16:25:36 3 States is part of that investment?
16:25:39 4 MR. LANDRY: Especially for these two

16:25:41 5   companies, it is an integral part of their
16:25:44 6   investment in the United States. We can go into
16:25:47 7   more detail --
16:25:49 8   PRESIDENT VAN DEN BERG: No. It is not
16:25:50 9   an issue that has been joined to the merits, if you
16:25:57 10   reach that stage. But it may be addressed to give
16:26:01 11   an indication to the Tribunal where we are headed.
16:26:08 12   MR. LANDRY: The importance and magnitude
16:26:10 13   of the U.S. and Canada softwood lumber dispute to
16:26:13 14   not only these investors but to Canadians in
16:26:17 15   general cannot be overstated.
16:26:19 16   The softwood lumber dispute is the
16:26:22 17   largest and most significant trading dispute
16:26:25 18   between Canada and the United States. There has
16:26:29 19   been no other dispute that has tested the
16:26:31 20   friendship between Canada and the United States in
16:26:34 21   the same way as this one. It has been on top of
16:26:38 22   Canada's political and trade agenda since its
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16:26:42 1   inception.
16:26:43 2   It is an irritant that goes well beyond
16:26:46 3   normal trading disputes that occurs between two
16:26:49 4   nations that rely heavily on trade between them.
16:26:53 5   Not only has the cost to these Canadian investors
16:27:00 6   who I say rely heavily on their ability to import
16:27:05 7   software lumber been significant, the cost to the
16:27:08 8   Canadian economy and in particular British Columbia
16:27:15 9   economy has been enormous.
16:27:17 10   The economic and social cost experienced
16:27:18 11   by many BC communities that also rely on Canadian
16:27:22 12   softwood industry has been devastating. Although
16:27:25 13   the amount of duties collected to date is but one

16:27:29 14 measure of the magnitude of the dispute, the amount
16:27:31 15 of the duties exemplifies the extraordinary nature
16 of the situation.
16:27:39 17 To date in excess of five billion U.S.
16:27:43 18 dollars has been improperly withheld by the United
16:27:46 19 States, in excess of which $800 million pertaining
16:27:51 20 to these two investors alone. Let no one be under
16:27:56 21 any illusions. The dispute resolution procedures
16:28:00 22 undertaken by Canada to resolve this dispute have
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16:28:05 1 been completely ineffective. In our submission
16:28:08 2 this is so because of the conduct of the United
16:28:12 3 States in the way in which it has dealt with this
16:28:16 4 dispute, which conduct is at the heart of Canfor
16:28:19 5 and Terminal's claims.
16:28:29 6 This is not a case where the U.S.
16:28:32 7 executive and its agencies have acted in a manner
16:28:34 8 so as to maintain effective and fair trading
16:28:36 9 disciplines on unfair trading practices. To the
16:28:41 10 contrary, it is alleged in these cases and the
16:28:44 11 essence of the claimants' claims is that the U.S.
16:28:48 12 officials have engaged in a pattern of conduct
16:28:54 13 designed to ensure a predetermined, politically
16:28:59 14 motivated, and results-driven outcome to force the
16:29:06 15 Canadian softwood lumber industry to enter into an
16:29:11 16 improvident and, we say, legally unnecessary
16:29:15 17 settlement of the softwood lumber dispute, all done
16:29:21 18 so as to protect American investors, i.e.
16:29:24 19 companies, the very investors, companies against
16:29:29 20 whom Canadian investors like Canfor and Terminal
16:29:35 21 must compete in the United States.

16:29:39 22 From the time of the original
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16:29:41 1 investigation to the most recent example of the
16:29:43 2 U.S. agencies' and U.S. officials' reaction to
16:29:47 3 properly constitute a Chapter 19 binational panel,
16:29:52 4 the treatment that the Canadian softwood lumber
5 industry including Canfor and Terminal has been
16:29:58 6 subjected to is so far from the treatment that one
16:30:00 7 would expect from the U.S. given the obligations it
16:30:04 8 has undertaken in relation to the WTO and NAFTA, to
16:30:08 9 suggest that the actions of the United States
16:30:12 10 officials have been undertaking in a genuine
16:30:14 11 attempt to administer in an unbiased and impartial
16:30:20 12 manner its antidumping and CVD regime is, in our
16:30:23 13 submission, simply not credible.
16:30:26 14 This is not a case of U.S. officials and
16:30:29 15 agencies making honest mistakes, being overzealous
16:30:33 16 or even being grossly negligent in coming to the
16:30:36 17 various decisions. It is a case of officials
16:30:38 18 abusing the very regime that NAFTA parties agreed
16:30:42 19 would be maintained under the NAFTA.
16:30:47 20 The extraordinary nature of this dispute
16:30:51 21 and the U.S. actions in this specific case is
16:30:56 22 highlighted by the various WTO and NAFTA Chapter 19
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16:31:01 1 decisions. The sheer volume of the non-compliant
16:31:05 2 agency determinations and the U.S. failure to
16:31:09 3 implement decisions against it is to say the least,
16:31:13 4 unprecedented.
16:31:16 5 Since the beginning of the last iteration
16:31:18 6 of the softwood lumber dispute in 2001, there have
16:31:24 7 been reviews directly or through remands of

16:31:26 8   approximately 24 DOC and ITC softwood lumber
16:31:32 9   determinations arising out of those agencies'
16:31:34 10   original determinations made in 2001 and 2002.
16:31:39 11   There have been 24 by WTO panels or Chapter 19
16:31:44 12   binational panels.
16:31:47 13   In every case initiated by Canada before
16:31:50 14   the WTO in relation to the preliminary and final
16:31:54 15   determinations made by the DOC and ITC in 2001 and
16:31:59 16   2002, which, by the way, are the foundations for
16:32:03 17   the collection and withholding of duties, in every
16:32:06 18   case the WTO has found that the U.S. because of the
16:32:09 19   actions of the DOC and ITC have violated its
16:32:14 20   obligations under the WTO agreements, not once, not
16:32:19 21   occasionally, but in every determination made by
16:32:22 22   every agency involved in this case. This includes
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16:32:25 1   the preliminarily countervailing duty
16:32:28 2   determination, the preliminary critical
16:32:31 3   circumstances determination, the final
16:32:33 4   countervailing duty determination, the final
16:32:36 5   antidumping determination and the final threat of
16:32:41 6   injury determination.
16:32:43 7   Not only has the U.S., in our submission,
16:32:46 8   disregarded the U.S. international law in
16:32:50 9   administering its antidumping and CVD law, it
16:32:51 10   repeatedly made discretionary decisions that are
16:32:54 11   contrary to its domestic law. This result can be
16:32:58 12   seen in the Chapter 19 binational panel decision
16:33:01 13   and the final countervailing duty determination and
16:33:04 14   the three remand determinations arising from that
16:33:08 15   decision, the Chapter 19 binational panel decision

16:33:11 16   and the final AD decision, and the four remand
16:33:15 17   determinations arising from that decision, and the
16:33:19 18   Chapter 19 binational panel decision, and the final
16:33:23 19   threat determination of the ITC and the two remand
16:33:27 20   determinations arising from that decision.
16:33:30 21   In the end, all told, the DOC and ITC
16:33:36 22   have fully complied with the WTO and the U.S.
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16:33:39 1   domestic laws in only two of the 24 determinations
16:33:44 2   that I am talking about. And notwithstanding that
16:33:47 3   those two non-compliant decisions have discredited
16:33:51 4   and overturned the very foundations for the
16:33:53 5   original orders allowing the U.S. to collect
16:33:55 6   duties, the U.S. agencies have acted in a manner
16:33:59 7   that results in neither decision having any effect
16:34:02 8   by continuing to collect duties from companies
16:34:05 9   importing Canadian softwood lumber.
16:34:10 10   I would like to highlight one example.
16:34:21 11   ARBITRATOR MESTRAL: You mentioned 24.
16:34:22 12   Do you include both the NAFTA decision and WTO
16:34:29 13   reports in your count of 24?
16:34:32 14   MR. LANDRY: Yes.
16:34:34 15   ARBITRATOR MESTRAL: Are you including
16:34:35 16   the last, the November 2005 threat of injury panel
16:34:39 17   report?
16:34:40 18   MR. LANDRY: No, I am not. These are the
16:34:43 19   original determinations which were made, which
16:34:44 20   would have been the final determinations made by
16:34:46 21   DOC and the ITC. The November 2004 relates to a
16:34:51 22   different determination made by the ITC.
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16:34:54 1   ARBITRATOR MESTRAL: I was referring to

16:34:55 2   the WTO panel report of November 2005.
16:35:07 3   MR. LANDRY: I think there is more than
16:35:10 4   one that has happened recently, so I am not sure
16:35:11 5   exactly which one. But if you are referencing the
16:35:15 6   November one --
16:35:18 7   ARBITRATOR MESTRAL: On the threat of
16:35:18 8   injury.
16:35:21 9   MR. LANDRY: On the threat of injury.
16:35:21 10   That relates to a different determination than what
16:35:27 11   was made, as I indicated here, in 2001 and 2002.
16:35:27 12   PRESIDENT VAN DEN BERG: The two
16:35:28 13   decisions in which you said there was compliance
16:35:32 14   but no effect given subsequently, which two
16:35:35 15   decisions were those?
16:35:37 16   MR. LANDRY: The decision of the Chapter
16:35:38 17   19 panel -- sorry. The decision the ITC in
16:35:42 18   response to direction by the Chapter 19 panel in I
16:35:46 19   believe it was the third remand, ITC, and the most
16:35:53 20   recent decision, if I have this correct, of the
16:35:55 21   Chapter 19 panel where there was direction given to
16:35:59 22   the DOC. I believe that was the third remand on

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16:36:02 1   the CVD case which effectively resulted in a
16:36:07 2   calculation of the CVD rate that was de minimis
16:36:16 3   from the original order.
16:36:18 4   PRESIDENT VAN DEN BERG: At some point in
16:36:19 5   time you can give the exact references. I
16:36:22 6   understand you don't have them at your fingertips
16:36:25 7   at this point in time, but if you can give them
16:36:28 8   later, and that was also only applied prospectively
16:36:33 9   but not retrospectively, is that also one of your

16:36:37 10   points?
16:36:38 11   MR. LANDRY: I am sorry.
16:36:42 12   PRESIDENT VAN DEN BERG: The refund of
16:36:43 13   the duties that would only be prospectively, did
16:36:45 14   they apply those as no longer duties or de minimis,
16:36:48 15   but they would not refund for the past?
16:36:53 16   MR. LANDRY: They haven't refunded
16:36:55 17   either, Mr. President. They continue to collect
16:37:05 18   duties, and there has been no refund of duties from
16:37:08 19   the past.
16:37:10 20   PRESIDENT VAN DEN BERG: I am talking
16:37:11 21   about what happened with the Byrd Amendment. I am
16:37:15 22   a little bit confused about the history here.
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16:37:18 1   Maybe I am procedurally jet-lagged at this points.
16:37:22 2   MR. LANDRY: The DOC determination was as
16:37:25 3   the result of a direction from the Chapter 19 panel
16:37:28 4   which resulted in de minimis. As a result of that
16:37:32 5   determination, which was of course relative to the
16:37:34 6   original order that was put in place to allow
16:37:36 7   collection of the duties, the point I am making
16:37:37 8   here is that the U.S. continues to collect duties
16:37:40 9   on softwood lumber notwithstanding that, and
16:37:44 10   therefore there are no duties they are willing to
16:37:46 11   pay back from prior to that decision.
16:37:56 12   As I mentioned, Mr. President, I would
16:37:59 13   like to highlight one example of the American
16:38:04 14   intransigence preventing effective dispute
16:38:05 15   resolution under the Chapter 19 processes, and that
16:38:06 16   is its decision not to implement the ECC decision
16:38:10 17   on the ITC's original threat of injury
16:38:14 18   determination. This is one of the two decisions

16:38:17 19 that we are talking about -- that we were talking
16:38:20 20 about, the DOC one and the ITC one recently, two
16:38:25 21 compliant decisions.
16:38:26 22 After three years and three remands, in
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16:38:29 1 two of which the ITC specifically ignored remand
16:38:34 2 instructions of the Chapter 19 panel, the ITC
16:38:37 3 finally complied with the U.S. domestic law and
16:38:41 4 found that Canadian lumber imports did not threaten
16:38:46 5 U.S. producers. This finding was only made after
16:38:50 6 the ITC received explicit instructions from the
16:38:55 7 Chapter 19 panel, and this is in the record at
16:39:00 8 footnote 38 of the Canfor rejoinder, I will quote
16:39:03 9 what was said by the Chapter 19 panel.
16:39:07 10 It said, and I quote, "The commission had
16:39:08 11 made it abundantly clear to the panel that it is
16:39:13 12 simply unwilling to accept the panel's review
16:39:16 13 authority under Chapter 19 of the NAFTA and has
16:39:20 14 consistently ignored the authority of the panel in
16:39:24 15 an effort to preserve its finding of threat of
16:39:27 16 material injury. This conduct obviates the
16:39:31 17 impartiality of the agency decision-making process
16:39:34 18 and severely undermines the entire Chapter 19
16:39:38 19 decision-making process.
16:39:48 20 Essentially this finding means that the
16:39:50 21 duties were not properly imposed and the
16:39:53 22 antidumping and CVD process should never have been
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16:39:55 1 instituted. The U.S. continued to collect duties
16:39:58 2 as it appealed that Chapter 19 panel decision that
16:40:03 3 had ordered the compliance to an extraordinary

16:40:08 4   challenge committee, the ECC.
16:40:11 5   The ECC then upheld the panel's decision.
16:40:14 6   Accordingly, the determination of threat of
16:40:16 7   material injury in which all of the duties, all of
16:40:19 8   the duties were based had finally been revoked by a
16:40:24 9   U.S. agency decision that was finally compliant
16:40:28 10   with U.S. law, notwithstanding that it took four
16:40:32 11   years to do that.
16:40:33 12   Now, one would expect that in any
16:40:36 13   ordinary case, and I might say as in every previous
16:40:41 14   NAFTA Chapter 19 and ECC review, a final decision
16:40:46 15   having been made that one of the necessary
16:40:49 16   conditions for duties to be imposed having been
16:40:52 17   nullified, the CVD and any determinations would be
16:40:56 18   revoked and the duties returned.
16:41:01 19   However, the U.S. has decided to ignore
16:41:03 20   the ECC determination and to continue to collect
16:41:07 21   antidumping and CVD duties. The USTR stated in a
16:41:14 22   press release on the very day the ECC decision came
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16:41:18 1   down, a very lengthy decision of the ECC, and I
16:41:23 2   quote, "We are, of course, disappointed with the
16:41:27 3   ECC's decision, but it will have no impact on the
16:41:32 4   antidumping and countervailing duty orders."
16:41:41 5   Now, the American reaction is
16:41:42 6   extraordinary and demonstrates the very point that
16:41:46 7   underlines the essence of the points made by Canfor
16:41:50 8   and Terminal in this proceeding, that far from this
16:41:52 9   process being any genuine attempt to correct unfair
16:41:57 10   trade practices as these terms are recognized
16:42:01 11   internationally and under the NAFTA, this reaction
16:42:04 12   demonstrates that the actions of the United States

16:42:07 13 through its executive representatives and its very
16:42:12 14 agencies, are simply to use the color of law to
16:42:18 15 force an improvident settlement on the Canadian
16:42:23 16 industry in a situation where if the U.S. allowed
16:42:27 17 in good faith the normal antidumping and CVD
16:42:35 18 processes to proceed before an unbiased and
16:42:36 19 impartial decision-maker undaunted by political
16:42:42 20 lobbying and political pressures, there would be no
16:42:45 21 CVD and antidumping order.
16:42:48 22 Now, I also want to make very clear that
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16:42:51 1 the allegations of improper conduct and
16:42:54 2 maladministration are not something that Canfor and
16:42:58 3 Terminal has creatively come up with. It is
16:43:01 4 conduct that at the highest level of the Canadian
16:43:08 5 government -- that the highest level of the
16:43:09 6 Canadian government has been alleging for some
16:43:11 7 time.
16:43:11 8 There are a plethora of examples of
16:43:15 9 statements made by Canadian ministers and the prime
16:43:17 10 minister that fundamentally question the motive of
16:43:22 11 the United States in this dispute. A recent
12 example will give the Tribunal a sense of the
16:43:25 13 deeply held belief that the U.S. is not acting
16:43:27 14 appropriately in this case.
16:43:31 15 In a speech to the Economic Club of New
16:43:33 16 York on October 6, 2005, the prime minister of
16:43:36 17 Canada had this to say, and I quote: "The softwood
16:43:40 18 lumber dispute" -- this is in New York, talking to
16:43:45 19 a New York audience -- "The softwood lumber issue
16:43:50 20 is basically a disagreement between special

21 interests in the U.S. and your national interest."
16:43:55 22 That is the U.S. interest. "Canada provides about
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16:43:57 1 one-third of your softwood lumber supply. We trade
16:44:01 2 this commodity fairly and within agreed rules of
16:44:05 3 NAFTA. But in the last several years our firms
16:44:08 4 have been charged a total of $5 billion in tariffs.
16:44:12 5 This in spite of the fact that Canada has won panel
16:44:16 6 decision after panel decision under NAFTA's process
16:44:21 7 for the settlement of disputes. Recently we won a
16:44:25 8 unanimous decision which confirmed these findings.
16:44:27 9 This in NAFTA's final court of appeal which
16:44:30 10 included a majority of U.S. judges. The problem is
16:44:33 11 instead of honoring this decision, the United
16:44:36 12 States has decided to ignore it. Forgive my sudden
16:44:43 13 departure from the safe language of diplomacy, but
16:44:48 14 this is nonsense. More than that, it is a breach
16:44:51 15 of faith. Countries must live up to their
16:44:54 16 agreements, the duties must be refunded, free trade
16:44:58 17 must be fair trade."
16:45:08 18 Mr. President, as we now undertake the
16:45:11 19 specific task of interpreting --
16:45:13 20 PRESIDENT VAN DEN BERG: Before you get
16:45:14 21 there, I don't know whether it is the sole remedy,
16:45:17 22 but it seems to me one of the remedies for the
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16:45:20 1 situation that you describe, if this would be
16:45:23 2 correct, that is Article 1905, I heard you mention
16:45:30 3 earlier today. Has any action been taken under
16:45:34 4 1905 by Canada?
16:45:37 5 MR. LANDRY: To my knowledge, no action
16:45:39 6 has been taken under 1905, Mr. President.

16:45:43 7   PRESIDENT VAN DEN BERG: Do you have any
16:45:44 8   knowledge about why Canada has not done that?
16:45:48 9   MR. LANDRY: I do not.
16:45:53 10   PRESIDENT VAN DEN BERG: Mr. Landry, if
16:45:54 11   you don't mind to be interrupted, because normally
16:45:57 12   I would not allow interruptions unless it is of
16:46:04 13   assistance.
16:46:06 14   MR. CLODFELTER: I can't say that it will
16:46:08 15   be of assistance. But this has been a long
          16   exegesis on the merits of the case and the issue at
16:46:09 17   hand is jurisdiction, but aside from that, we will
16:46:12 18   be forced tomorrow to give a fairly long reply
16:46:16 19   because you are only hearing part of the story.
16:46:19 20   You haven't heard about the WTO decision upholding
          21   threat of harm, you haven't heard about Canadian
          22   government's challenge to that before the
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           1   International Court of Trade. There are a lot of
           2   other things you haven't heard about here.
16:46:29 3   It is too bad we have gone into this
16:46:31 4   detour on the merits. They haven't invoked 1905,
16:46:36 5   but they are seeking relief in opposition to the
16:46:39 6   U.S. assertion of legal right. So you should know
16:46:42 7   that.
16:46:44 8   PRESIDENT VAN DEN BERG: I am aware of
16:46:45 9   that. But I will give some latitude to both sides
16:46:48 10   to give context to their arguments. That is one
16:46:52 11   observation.
16:46:53 12   The second observation is that almost
16:46:55 13   every time a decision comes out either from Chapter
16:46:59 14   19 bipanel or WTO, you see press releases from both

16:47:04 15   sides claiming victory. It is very interesting.
16:47:08 16   You never know -- strike that.
16:47:12 17   One side sees a number of decisions that
16:47:16 18   they think are favorable for them and the other
16:47:19 19   side sees the other, and that is being emphasized
16:47:21 20   by either side. So you can be assured that we have
16:47:26 21   read a number of these decisions and the press
16:47:29 22   releases against the background of what the
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16:47:33 1   decisions say, and when you read press releases you
16:47:36 2   always go back to the source to see where they come
16:47:39 3   from. So I would not be overly worried that we
16:47:42 4   have to pay too much to the merits in this phase of
16:47:49 5   the proceedings, although a contextual outline is
16:47:52 6   appreciated to see where the dispute is and where
16:47:56 7   it comes from.
16:47:58 8   MR. LANDRY: I trust, Mr. President, that
16:48:00 9   in my summary of what I was attempting to do, that
16:48:04 10   is exactly why I did my introductory comments,
16:48:09 11   contextual, as to what the dispute is.
16:48:15 12   Now, as I was saying, Mr. President, as
16:48:17 13   we now undertake the specific task of interpreting
16:48:21 14   Article 1901(3), it is the claimants' position that
16:48:25 15   the United States's conduct and fundamental
16:48:29 16   failures of due process that result from that
16:48:32 17   conduct violate the obligations that the United
16:48:37 18   States has assumed under Chapter 11.
16:48:39 19   As will be demonstrated in these
16:48:42 20   submissions and has been shown in our written
16:48:44 21   submissions, this type of conduct is not protected
16:48:49 22   by Article 1901(3). This article serves a very
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16:48:51 1   different function and does not, as the U.S.
16:48:54 2   suggests, protect it from responsibility for the
16:48:57 3   unfair, discriminatory and inequitable conduct
16:49:02 4   directed at the claimants.
16:49:04 5   Now, I would like to move to the second
16:49:07 6   part, Mr. President, of the four parts that I will
16:49:12 7   be dealing with, and that is an overview of the
16:49:14 8   interpretive exercise.
16:49:17 9   As you know, both parties agree that the
16:49:20 10   starting point for that exercise the Tribunal must
16:49:25 11   undertake begins with Article 1131 of the NAFTA
16:49:29 12   which mandates this Tribunal to decide the issues
16:49:33 13   in accordance with international law, which leads
16:49:37 14   to Article 31 of the Vienna Convention. In
16:49:42 15   addition to that, NAFTA Article 102(2) informs that
16:49:49 16   interpretive exercise.
16:49:52 17   Although the parties agree that is the
16:49:54 18   starting point, the approach taken as to how --
16:49:59 19   ARBITRATOR ROBINSON: Pardon me one
16:50:00 20   second. While we are on this subject, am I right
16:50:03 21   that the parties agree that the test in Chapter
16:50:12 22   11 -- not the test, but the statement about the

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16:50:17 1   governing law, is there any difference with Article
16:50:22 2   102(2) that say the parties shall interpret and
16:50:27 3   apply the provisions of this agreement in light of
16:50:30 4   its objectives set out in paragraph 1 and in
16:50:33 5   accordance with applicable rules of international
16:50:37 6   law.
16:50:38 7   I would assume that the parties agree
16:50:40 8   they are the same in their intent, the two

16:50:42 9   sections, that is, Article 1131 talks about the
16:50:48 10   governing law, and then it says -- it is talking
16:50:59 11   about the decision of the issues in accordance with
16:51:02 12   this agreement and applicable rules of
16:51:04 13   international law, and then 1131(2) talks about
16:51:08 14   interpretation by the commission which is not an
16:51:12 15   issue here. I was just attempting to make sure --
16:51:18 16   one is a rule of interpretation, one is stating the
16:51:20 17   governing law, but I assume they interact with each
16:51:24 18   other.
19   PRESIDENT VAN DEN BERG: For the
16:51:28 20   transcript, it is 102(2) -- it should be written
16:51:31 21   102 paragraph 2, the last 2 in brackets. Otherwise
16:51:40 22   we get the wrong reference.
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16:51:41 1   ARBITRATOR ROBINSON: I am sorry, I was
16:51:42 2   mixing apples and oranges, but I want to be sure
16:51:47 3   there is no difference.
16:51:50 4   MR. MITCHELL: The Tribunal's task is to
16:51:52 5   apply the governing law under Article 1131, that is
16:51:57 6   the agreement and applicable laws of international
16:52:01 7   law, while 102(2) deals with the parties'
16:52:04 8   interpretation and application of the agreement in
16:52:09 9   light of its objectives and in accordance with the
16:52:13 10   applicable rules of international law. There is no
16:52:15 11   significant difference. The Tribunal is bound to
16:52:19 12   interpret and apply the provisions of the agreement
16:52:22 13   equally in accordance with the principles under the
16:52:26 14   Vienna Convention including the objects.
16:52:26 15   ARBITRATOR ROBINSON: One is dealing with
16:52:27 16   the parties and the other one is dealing with the
16:52:32 17   Tribunal.

16:52:33 18 MR. MITCHELL: Correct.

16:53:00 19 MR. LANDRY: Although the parties agree
16:53:02 20 to the starting point, the approach taken as to how
16:53:05 21 the Tribunal must undertake the interpretive
16:53:10 22 exercise is very different. In our submission the
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16:53:12 1 approach taken by the United States is deficient in
2 two material respects which I will come to in a
3 minute.

16:53:17 4 If one looks at Article 31 of the Vienna
16:53:22 5 Convention which as you know and has been discussed
16:53:22 6 embodies customary international law relating to
16:53:25 7 the interpretation of treaty, it highlights what
16:53:29 8 are the key elements when interpreting a treaty
16:53:33 9 like NAFTA.

16:53:34 10 Firstly, it must be interpreted in good
16:53:37 11 faith. It must be interpreted in accordance with
16:53:41 12 the ordinary meaning of the terms of the treaty in
16:53:45 13 their context, which specifically is defined to
16:53:47 14 include the text of the treaty and its preamble,
16:53:52 15 and finally, and I am using my words here, finally,
16:53:57 16 it must be interpreted in light of the treaty's
16:54:01 17 object and purpose. So you have the three key
16:54:04 18 components.

16:54:06 19 So, although there is no doubt that the
16:54:10 20 Tribunal must focus on the ordinary meaning of the
16:54:14 21 words in NAFTA, it must do so taking into account
16:54:17 22 two important principles. It must only do so in
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16:54:21 1 the context of the provisions which it is
16:54:23 2 interpreting, which we say requires in this case a

16:54:26 3   rigorous review of the NAFTA and more specifically
16:54:30 4   the provisions of Chapter 11 and 19, and the
16:54:32 5   interrelationship between them.
16:54:37 6   It also must take into account the object
16:54:40 7   and purpose of NAFTA, and we say, once the objects
16:54:45 8   and purpose are identified, the Tribunal must
16:54:48 9   interpret the relevant provisions of NAFTA in a
16:54:52 10   manner that promotes rather than inhibits the
16:54:55 11   objectives of NAFTA.
16:54:58 12   Now, going to the third point, to set the
16:55:02 13   context for the balance of my submissions,
16:55:04 14   Mr. Mitchell will in due course deal with what the
16:55:08 15   claimants say is the proper interpretation of
16:55:11 16   1901(3), but at the outset it is useful to frame
16:55:16 17   what the claimants say that provision means.
16:55:19 18   Firstly, it is important to keep in mind
16:55:21 19   that the interpretation Canfor and Terminal say is
16:55:25 20   the proper interpretation of Article 1901(3) arises
16:55:31 21   from the ordinary words used in that provision
16:55:35 22   especially in light of the context within which
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16:55:39 1   that article is found, and it is also clearly
16:55:41 2   consistent with the object and purpose of NAFTA.
16:55:45 3   We say Article 1901(3), when properly
16:55:48 4   interpreted, in context, means nothing more than no
16:55:53 5   provision of any other chapter of NAFTA is to be
16:55:57 6   interpreted as imposing an obligation on a NAFTA
16:56:03 7   party to do something with their antidumping or
16:56:06 8   countervailing duty law as those terms are defined
16:56:12 9   in Chapter 19, such as to change, amend or modify
16:56:16 10   it, because the parties' obligations to change,
16:56:20 11   modify or amend the law were all encompassed within

16:56:27 12   Chapter 19, and Mr. Mitchell will go into more
16:56:35 13   detail on the specifics of that later an.
16:56:38 14   PRESIDENT VAN DEN BERG: Is it fair to
16:56:39 15   say in shorthand, what your submission is, that
16:56:44 16   Article 1901(3) is a no-import clause -- no import,
17   I mean don't import provisions from other chapters
16:56:56 18   into Chapter 19? Is that shorthand too mystifying?
16:57:02 19   MR. LANDRY: The shorthand might be
16:57:04 20   mystifying, but if I could have a minute.
16:57:17 21   I think the best way to deal with that is
16:57:20 22   to wait for Mr. Mitchell, and perhaps it can be a
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16:57:23 1   little bit more refined because I am not sure I
16:57:26 2   fully understand the question, and I don't want to
16:57:29 3   answer a question I don't understand.
16:57:33 4   PRESIDENT VAN DEN BERG: I only want to
16:57:34 5   simplify matters, but I apparently I have miserably
16:57:41 6   failed, so I leave out the no-import clause.
16:57:41 7   MR. LANDRY: It is late and it may be me,
16:57:45 8   but we want to be precise.
16:57:47 9   I want to turn to what we say are the
16:57:49 10   difficulties with what are the U.S. interpretive
16:57:54 11   analysis.
16:57:55 12   Although the U.S. argues that its
16:57:56 13   interpretation is in keeping with the ordinary
16:58:01 14   meaning of the words, in our view this position is
16:58:04 15   conclusory. It simply does not approach what we
16:58:08 16   say is the proper interpretive exercise necessary
16:58:11 17   to determine the ordinary meaning of the words. In
16:58:16 18   our submission, the U.S. analysis is deficient in
16:58:22 19   two material respects.

16:58:24 20 Firstly, although it gives lip service to
16:58:28 21 the need to look at the object and purpose of
16:58:30 22 NAFTA, it simplistically focuses on one objective,
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16:58:36 1 to create effective procedures for the resolution
16:58:40 2 of disputes while ignoring other key objectives
16:58:43 3 which are important to the Tribunal's interpretive
16:58:46 4 exercise.
16:58:48 5 Secondly, the U.S. argument fails to
16:58:52 6 fully develop the context within which Article
16:58:56 7 1901(3) must be interpreted and as a result it
16:59:01 8 fails to critically analyze the nature and purpose
16:59:04 9 of and the fundamental differences between Chapter
16:59:08 10 11 and 19, the rights and duties they establish,
16:59:12 11 and the different legal regimes they describe when
16:59:16 12 such an analysis is of utmost importance to the
16:59:22 13 Tribunal's interpretive exercise.
16:59:24 14 In our submission, once the context is
16:59:28 15 properly reviewed, and the objects and purposes of
16:59:31 16 NAFTA are more thoroughly articulated, it becomes
16:59:37 17 abundantly clear why the interpretation of Article
16:59:41 18 1901(3) advocated by the U.S. cannot be sustained.
16:59:44 19 Now, in order to better appreciate the
16:59:47 20 submissions that we will be making in regard to the
16:59:50 21 objectives, and the context, I would like to
16:59:54 22 highlight the essence of the debate that exists
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16:59:57 1 between the parties without getting into the
17:00:00 2 specific -- into the detail of specific words of
17:00:04 3 Article 1901(3) and the precise interpretation each
17:00:08 4 party is advocating.
17:00:10 5 The U.S. position is that all of the

17:00:12 6 claims are antidumping and CVD claims, you have
17:00:17 7 heard that many times today, and that Chapter 19 is
17:00:20 8 the only dispute resolution mechanism that can deal
17:00:26 9 with any conduct which is in any way related to
17:00:30 10 antidumping and CVD matters or investigations
17:00:32 11 including the conduct about which the claimants
17:00:36 12 complain.
17:00:38 13 The claimants, on the other hand, take
17:00:40 14 the position that their claims are not antidumping
17:00:44 15 and CVD claims. Their claims are investment claims
17:00:50 16 that are premised on the U.S. conduct which
17:00:53 17 violates international norms. Chapters 11 and 19
17:01:01 18 establish two distinct dispute resolution
17:01:05 19 mechanisms based on fundamentally different legal
17:01:09 20 regimes. One is based on municipal norms. The
17:01:14 21 other is based on international norms. And the
17:01:18 22 conduct being complained about can be subjected to
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17:01:20 1 review under both dispute resolution mechanisms
17:01:25 2 regardless of whether the conduct is in any way
17:01:28 3 related to antidumping and CVD matters or
17:01:33 4 investigation.
17:01:37 5 I would like to highlight another further
17:01:41 6 important consideration which will be dealt with a
17:01:44 7 little further by both Mr. Mitchell and in response
17:01:48 8 to some specific questions, Mr. President, that you
17:01:52 9 had in the cache of questions we received last
17:01:57 10 night. But I would like to highlight it again.
17:02:00 11 That is, it must be kept in mind that for
17:02:03 12 the purposes of this motion, the Tribunal must
17:02:06 13 accept the facts set out in the statement of claim

17:02:10 14   and notice of arbitration as true, and we say it
17:02:18 15   must assume that the claimants have been subjected
17:02:20 16   to treatment that violates international norms set
17:02:24 17   out in 1102, 1103, 1105 and 1110.
17:02:31 18   Therefore, at a very basic level, the
17:02:33 19   sole question for this tribunal is, is whether a
17:02:38 20   claim in respect of otherwise objectionable
17:02:41 21   treatment such as a predetermined, politically
17:02:46 22   motivated and results-driven course of conduct
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17:02:50 1   which abuses as opposed to uses in an unbiased and
17:02:55 2   impartial manner the CVD and antidumping regime is
17:03:01 3   precluded by virtue of Article 1901(3), and of
17:03:08 4   course the claimant says it is not.
17:03:11 5   Now, turning to the issue of the NAFTA
17:03:14 6   objectives and purpose, as I noted earlier, the
17:03:19 7   U.S. focus in this regard is on one objective, to
17:03:24 8   create effective procedures for the resolution of
17:03:29 9   the disputes. You heard Mr. McNeill talk about
17:03:32 10   that one objective.
17:03:33 11   It is important to note that at the
17:03:36 12   outset that the claimants do not recoil from that
17:03:40 13   objective. They acknowledge it is important.
17:03:42 14   Indeed, it is one of the key objectives that must
17:03:45 15   be in the Tribunal's mind when interpreting the
17:03:49 16   relevant provisions of NAFTA.
17:03:53 17   The U.S. is also critical of the argument
17:03:56 18   that a wide-ranging category of objectives is
17:04:01 19   relevant to the Tribunal's interpretive task in
17:04:01 20   this case, questioning, and I quote from the reply
17:04:04 21   at page 23, "how these principles have any
17:04:08 22   relevance to a proceeding under the investment

17:04:11 1   Chapter."
17:04:14 2   I would like to respond directly to that
17:04:16 3   point. The approach suggested by the United States
17:04:21 4   is far too myopic and is not at all in keeping with
17:04:27 5   the interpretive exercise that must be undertaken
17:04:30 6   by the Tribunal. Although these claims are
17:04:34 7   investment disputes. The interpretive exercise is
17:04:36 8   to interpret among other provisions, the provisions
17:04:40 9   of both Chapter 11 and Chapter 19 and the
17:04:43 10   interrelationship between them, and at a more
17:04:46 11   specific level, obviously, Article 1901(3).
17:04:51 12   The Tribunal in our submission must take
17:04:56 13   into account all objectives which are relevant to
17:04:59 14   that interpretive exercise. The objectives of
17:05:02 15   NAFTA in our submission cannot be individually
17:05:05 16   examined and then assigned to a particular Chapter
17:05:07 17   of the treaty. The treaty as a whole must be read
17:05:13 18   having regard to all of the objectives.
17:05:16 19   Now, I don't want to go over in a lot of
17:05:19 20   detail, but you know the objectives of NAFTA are
17:05:23 21   first articulated in Article 102 and, of course,
17:05:29 22   there is the preamble, which as you know the

17:05:34 1   section 31 of the Vienna Convention says is
17:05:38 2   relevant to the interpretive exercise, and all of
17:05:42 3   this informs the reader about the purpose of NAFTA,
17:05:46 4   and you can see, in reading through that, and I
17:05:54 5   won't quote all of the various objectives, but
17:05:57 6   there are numerous objectives, and it is pretty
17:06:01 7   clear from the preamble what the object and intent

17:06:04 8   of the parties is in basically agreeing to NAFTA.
17:06:20 9   And you can see that one of them was
17:06:22 10   mentioned in one of the questions last night, Mr.
17:06:27 11   President, which is one sub C, which is increase
17:06:30 12   substantially investment opportunities in the
17:06:31 13   territories of the parties.
17:06:37 14   Now, the articulation of the objectives
17:06:40 15   and purpose of NAFTA are also dealt with in Chapter
17:06:48 16   19, the very chapter relied on by the United States
17:06:53 17   to limit the protection provided by Chapter 11.
17:06:56 18   The drafters of the NAFTA thought it
17:07:01 19   appropriate to reiterate the underlying objectives
17:07:05 20   of NAFTA, and I am specifically referring here, Mr.
17:07:08 21   President, Members of the Tribunal, to Article 1902
17:07:11 22   sub two, sub D. If I may take you to that Article.
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17:07:31 1   You see, and I will quote, it says, each
17:07:35 2   party reserves the right to change or modify its
17:07:38 3   antidumping law or countervailing duty law provided
17:07:41 4   that in the case of an amendment to a party's
17:07:44 5   antidumping or countervailing duty statute, and
17:07:46 6   then if you go down to D, such amendment is
17:07:50 7   applicable to that other party is not inconsistent
17:07:53 8   with, and then I'll skip a few words, and you and
17:07:55 9   go down to sub 2, it says the object and purpose of
17:07:58 10   this agreement and this chapter, which is to
17:08:01 11   establish fair and predictable conditions for the
17:08:04 12   progressive liberalization of trade between the
17:08:09 13   parties to of this agreement while maintaining
17:08:11 14   effective and fair disciplines on unfair trade
17:08:16 15   practices, such object and purpose to be
17:08:20 16   ascertained from the provisions of the agreement,

17:08:23 17   its preamble and objectives and the practices of
17:08:27 18   the parties.
17:08:28 19   So these are the type of objectives
17:08:30 20   between the two sections that we can see, that are
17:08:38 21   clearly articulated and form the backdrop against
17:08:42 22   which this Tribunal must undertake its analysis.
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17:08:49 1   I might say, Mr. President, that it is
17:08:52 2   also important to note the approach that we are
17:08:54 3   advocating to the Tribunal has been consistently
17:08:58 4   applied by other NAFTA Tribunals. For example, in
17:09:02 5   the Canada tariffs on certain U.S. origin
17:09:04 6   agricultural products at tab 10, for your
17:09:06 7   reference, pages 33 and 34, the Tribunal dealt
17:09:11 8   there with the issue of Article 31 of the Vienna
17:09:16 9   Convention and the importance of NAFTA objectives
17:09:20 10   to their interpretive exercise.
17:09:23 11   And I just pause here to note that
17:09:26 12   another way to get to that is page 13 of the Canfor
17:09:30 13   reply argument, paragraph 40.
17:10:15 14   PRESIDENT VAN DEN BERG: We have
17:10:16 15   paragraph 40 of what you call the reply, but
17:10:19 16   actually is a response submission --
17:10:23 17   MR. LANDRY: It was a response
17:10:24 18   submission. It's actually a reply.
19   PRESIDENT VAN DEN BERG: It's submission
17:10:28 20   as a reply submission, I think. At this point I
17:10:28 21   have to give credit to the United States that they
17:10:31 22   are right on that score. That doesn't matter so
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17:10:34 1   much.

17:10:34 2   MR. LANDRY: It seems that we caused a
17:10:36 3   problem before and it remains.
17:10:40 4   In any event, in paragraph 40, you can
17:10:43 5   see, in the Tribunal in that case, and this was, I
17:10:46 6   believe, Mr. President, this was the first case
17:10:47 7   that dealt with this, and it says, the quote is at
17:10:49 8   the bottom there and it says: The panel also
17:10:51 9   attaches importance to the trade liberalization
17:10:54 10   background against which the agreements under
17:10:57 11   consideration must be interpreted. Moreover, as a
17:11:00 12   free trade agreement, the NAFTA has the specific
17:11:03 13   objective of eliminating barriers to trade among
17:11:08 14   the three contracting parties.
17:11:10 15   The principles and rules through which
17:11:12 16   the objectives in NAFTA are elaborated are
17:11:12 17   identified in Article 102 sub 1 as including
17:11:17 18   national treatment, Most-Favored-Nation treatment
17:11:18 19   and transparency. And here's the important part:
17:11:21 20   Any interpretations adopted by this panel must
17:11:24 21   therefore promote rather than inhibit the
17:11:27 22   objectives.
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17:11:36 1   I am not going to repeat orally,
17:11:38 2   Mr. President, what we have outlined in detail in
17:11:41 3   our memorials on the issue of objectives. I will
17:11:45 4   ask you to just note that it is at page 18 of our
17:11:47 5   titled Reply is where we dealt with the issue.
17:11:52 6   But at a general level, what we do see is
17:11:55 7   that in keeping with these unassailable
17:11:58 8   interpretive guidelines, the only interpretation of
17:12:01 9   the ordinary words of the NAFTA text is one which
17:12:06 10   maximizes all of the liberalizing objectives

17:12:10 11 contained within the NAFTA.
17:12:15 12 PRESIDENT VAN DEN BERG: One point is
17:12:15 13 that both this quote of the Canada tariffs on
17:12:21 14 certain U.S. origin agricultural products and
17:12:25 15 Article 1902, paragraph 2 under D, under little
17:12:33 16 two, refer to the liberalization of trade, and
17:12:39 17 where is the connection made between trade and
17:12:42 18 investment, other than there is a general reference
17:12:47 19 indeed to the preamble and objective purposes as
17:12:50 20 stated in 102. But who makes out the connection,
17:12:56 21 the specific connection between trade and
17:12:57 22 investment?
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17:13:00 1 MR. LANDRY: Who --
17:13:02 2 PRESIDENT VAN DEN BERG: Which Tribunal
17:13:04 3 has done that before?
17:13:07 4 MR. LANDRY: If I may have just a moment.
17:13:10 5 PRESIDENT VAN DEN BERG: Sure.
17:13:28 6 MR. LANDRY: Mr. President, I think
17:13:28 7 Mr. Mitchell has a specific response to that.
17:13:32 8 MR. MITCHELL: Mr. President, I hesitate
17:13:34 9 to quote this without looking at the case, but my
17:13:38 10 recollection is there was a passage in Fireman's
17:13:42 11 Fund that talked about the objectives of the
17:13:46 12 parties in ensuring the connection between the --
17:13:51 13 this being a free trade agreement that had the
17:13:55 14 objective of both the economic integration and
17:13:59 15 investment so the trade and investment were tied
17:14:02 16 together.
17:14:03 17 But another and perhaps better example is
17:14:08 18 the Myers case, where the argument was made by

17:14:13 19   Canada that an investment claim under Chapter 11
17:14:17 20   was precluded because the substance of the claim
17:14:20 21   was a trade in goods claim under Chapter 3 and if
17:14:23 22   it was covered under Chapter 3 it couldn't be
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17:14:27 1   covered under Chapter 11, and to my recollection, a
17:14:29 2   similar argument was made in Pope, and in both of
17:14:33 3   which those cases that argument was rejected, and
17:14:35 4   indeed in Myers the ultimate holding was that the
17:14:38 5   matter could be both under the services Chapter and
17:14:46 6   the investment chapter, 11 and 12, as well.
17:14:46 7   So the Myers case would be an example of
17:14:49 8   a case that is both an investment case and there is
17:14:52 9   a trade in goods side to it.
17:14:58 10   PRESIDENT VAN DEN BERG: Although I would
17:14:59 11   be very careful in discussing Fireman's Fund, as
17:15:03 12   you well understand. But that case involved the
17:15:10 13   section between investment and financial services,
17:15:13 14   and what I recall of the decision, in that case, it
17:15:18 15   was not so much focused on trade -- making the
17:15:22 16   connection between trade and investment -- and I
17:15:26 17   have to be extremely careful here. I don't want to
17:15:29 18   engage in any discussion on the Fireman's Fund case
17:15:34 19   in that respect. My connection was simply where do
17:15:38 20   I find the connection? And you prefer to rely on
17:15:44 21   as the Myers and the Pope. Obviously, I will
17:15:46 22   reread also the other decisions.
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17:15:49 1   MR. LANDRY: Mr. President, there was
17:15:51 2   some suggestion, I think, in the United States
17:16:05 3   argument, in the written submission or perhaps even
17:16:08 4   in their oral submission, that somehow we may be

17:16:11 5 attempting to overrule the ordinary meaning of the
17:16:14 6 words by looking at the objectives.
17:16:16 7 And as I previously noted, far from
17:16:21 8 resigning from the ordinary meaning, we are
17:16:23 9 advocating an interpretation of 1901(3) which is in
17:16:29 10 accord, in our view, with the ordinary meaning of
17:16:33 11 these words and one which we say promotes rather
17:16:36 12 than inhibits the objectives of NAFTA.
17:16:40 13 And furthermore, contrary to the U.S.
17:16:44 14 argument, the claimant's interpretation does create
17:16:46 15 effective procedure for the resolution of disputes,
17:16:48 16 more particularly unlike the United States
17:16:51 17 position, it specifically allows all disputes,
17:16:57 18 whether they are based on international norms or
17:16:59 19 municipal norms, to be resolved between the
17:17:02 20 parties.
17:17:05 21 I now want to, Mr. President, focus on
17:17:09 22 another key element of the interpretive exercise

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17:17:13 1 that we talked about that comes from Article 31 of
17:17:16 2 the Vienna Convention, and that is the context
17:17:19 3 within which Article 1901 sub 3 is found, and,
17:17:23 4 again, I mention once more that that context is
17:17:26 5 defined specifically as being the text, the
17:17:30 6 preamble and the annexes.
17:17:33 7 And I am not going to go through in
17:17:36 8 detail all of the various provisions, and I would
17:17:39 9 only note for your notes that we have set out at
17:17:42 10 pages 21 to 26 of our original reply memorial a
17:17:47 11 general description of chapters 11 and 12 -- sorry,
17:17:52 12 11 and 19, I apologize. And so I won't go through

17:17:56 13   them in detail.
17:17:58 14   Going to the issue of the U.S.
17:18:02 15   interpretation, in our submission, the U.S.
17:18:05 16   interpretation of 1901(3) is premised on the
17:18:09 17   fundamental misconception of the architecture of
17:18:13 18   NAFTA and the rules of Chapter 11 and 19. Properly
17:18:17 19   understood, as I said, those two chapters deal with
17:18:19 20   fundamentally different legal regimes which are
17:18:22 21   maintained for different purposes.
17:18:25 22   In essence, Chapter 11 is an investor
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17:18:27 1   state arbitration regime, utilizes international
17:18:31 2   norms and international law standards of review to
17:18:34 3   scrutinize treatment of foreign investors and their
17:18:39 4   investments, and the investors 'remedies are
17:18:42 5   limited effectively to damages, whereas in essence
17:18:47 6   Chapter 19 is a municipal law regime which allows
17:18:51 7   for judicial review by binational panels, the AD
17:18:56 8   and CVD determinations, utilizing municipal norms
17:19:00 9   and standards of review, all focused on
17:19:05 10   scrutinizing unfair trade practices in relation to
17:19:09 11   goods being imported into the NAFTA countries,
17:19:13 12   fundamentally different propositions.
17:19:18 13   Chapter 19 preserves each party's right
17:19:21 14   to continue to maintain and apply their domestic
17:19:25 15   antidumping and CVD laws which are laws aimed at,
17:19:30 16   and I quote, maintaining effective and fair
17:19:33 17   disciplines on unfair trade practices, close quote.
17:19:44 18   And in the context of the NAFTA parties'
17:19:48 19   agreement to maintain each part's domestic
17:19:50 20   antidumping and CVD law in place at the time of
17:19:55 21   NAFTA, Chapter 19 lays out in detail the

17:19:58 22   obligations that are imposed on each party in terms
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17:20:01 1   of changing or modifying the law as it exists at
17:20:05 2   the time of NAFTA. They have specific obligations
17:20:07 3   as to what they have to do that was agreed to at
17:20:11 4   the time of NAFTA, as well as imposing obligations
17:20:14 5   on parties if they want to change their law in the
17:20:17 6   future. And, again, this issue was more -- will be
17:20:21 7   dealt with in more detail when Mr. Mitchell deals
17:20:25 8   with the proper interpretation of 1901(3).
17:20:29 9   So in our submission, contrary to U.S.
17:20:32 10   argument, Chapters 11 and 19 are complementary and
17:20:36 11   completely reconcilable with each serving its own
17:20:41 12   distinct purpose. They apply different laws. They
17:20:47 13   are focused on very different issues: treatment of
17:20:50 14   foreign investors versus unfair trade practices,
17:20:55 15   and provide different remedies.
17:20:59 16   Any conduct being scrutinized within the
17:21:03 17   different dispute resolution mechanisms established
17:21:07 18   under the two chapters will be reviewed using
17:21:08 19   different norms against different standards of
17:21:12 20   review and give rise to different types of relief.
17:21:17 21   Now, again, for your notes, pages 23 to
17:21:21 22   25 of the U.S. argument. The U.S. purports to
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17:21:26 1   examine the context within which Article 1901(3) is
17:21:31 2   found --
17:21:35 3   PRESIDENT VAN DEN BERG: You mean the
17:21:35 4   objection or the reply?
17:21:38 5   MR. LANDRY: I apologize, the objection,
17:21:40 6   Mr. President.

17:21:44 7   And it starts with the conclusion that,
17:21:44 8   and I quote, examination of the context of 1901(3)
17:21:49 9   confirms provides that Chapter 19 provides an
17:21:52 10   exclusive forum under the NAFTA for disputes
17:21:55 11   arising under a party's antidumping and
17:21:58 12   countervailing duty law. Close quote. And you
17:22:00 13   have heard that today on more than one occasion.
17:22:03 14   But the U.S. argument in context
17:22:05 15   selectively analyzes several provisions of the
17:22:08 16   NAFTA which they say conclusively support their
17:22:11 17   proposition. They refer to Articles 2004, which we
17:22:19 18   heard earlier, Article 1112 sub one, and Article
17:22:26 19   1115, and I would like to deal with each of these
17:22:31 20   ones summarily in turn.
17:22:35 21   In relation --
17:22:41 22   ARBITRATOR ROBINSON: I am sorry,
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17:22:41 1   Mr. Landry. I would just like to ask a question to
17:22:43 2   make sure I am understanding you. Are you saying
17:22:46 3   in your argument with respect to the
17:22:50 4   complementarity and the reconcilability of 11 and
17:22:57 5   19, and that they have different laws, they're
17:23:00 6   different issues and there are different remedies,
17:23:02 7   that there would be no possibility of any
17:23:04 8   inconsistent awards under the two chapters, that
17:23:09 9   they would necessarily have to be consistent
17:23:12 10   because they are entirely separate, they're and
17:23:15 11   entirely different laws and issues?
17:23:28 12   MR. LANDRY: Mr. Robinson, this specific
17:23:29 13   question that you are asking was asked at the
17:23:31 14   Canfor Tribunal and I believe Mr. Mitchell answered
17:23:35 15   it so he's asked me if he could answer it.

16 MR. MITCHELL: I have that tendency.
17:23:39 17 The first observation I want to make is
17:23:43 18 to comment on the premise that may be underlying
17:23:48 19 the question relating to inconsistent remedies, as
17:23:56 20 I think I understood the question. The language of
17:24:00 21 Article 1112 relates to inconsistencies between
17:24:09 22 different -- between a chapter and another chapter
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17:24:15 1 and sets the hierarchy. So the inconsistency of
17:24:22 2 remedy in our submission isn't the inquiry that
17:24:32 3 should be directed at Article 1112.
17:24:35 4 But as a second point, I want to address
17:24:40 5 the word "inconsistency" because while it is used
17:24:44 6 in Article 1112, I am not sure it is the right way
17:24:48 7 of describing an outcome under Chapter 11, say, and
17:24:56 8 Chapter 19. The outcomes are different, and they
17:25:01 9 are different because they apply different laws to
17:25:05 10 facts which may or may not be entirely the same,
17:25:09 11 but are partially the same, and the two tribunals
17:25:15 12 are constrained to only grant different remedies.
17:25:19 13 So that under Chapter 11, the only remedy is a
17:25:24 14 remedy of damages or restitution, and under Chapter
17:25:30 15 19, the only remedy is a remand. So in that sense,
17:25:39 16 they are different.
17:25:46 17 ARBITRATOR ROBINSON: So if I understand
17:25:46 18 it, it would be your argument that you could not
17:25:49 19 have any kind of double recovery because the
17:25:51 20 remedies, the relief in the two instances is so
17:25:56 21 different?
17:25:58 22 MR. MITCHELL: Yes, there would be no
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17:26:03 1 double recovery because the remedies are different,
17:26:06 2 and double recovery from a Chapter 11 Tribunal --
17:26:15 3 if duties were refunded, that aspect of loss could
17:26:20 4 not be proved to a Chapter 11 Tribunal so there
17:26:24 5 would be no right to recover that aspect of the
17:26:27 6 loss because the duties had been recovered in a
17:26:30 7 different forum.
17:26:32 8 PRESIDENT VAN DEN BERG: This is a
17:26:33 9 question which comes up in a number of cases about
17:26:35 10 double recovery, but here you might have double
17:26:39 11 jeopardy for the United States in the sense that --
17:26:44 12 have to take it a little bit too far, but if WTO
17:26:46 13 allows Canada to retaliate, the United States
17:26:50 14 indirectly pays under that retaliation regime.
17:26:55 15 And assume now at the same time that also
17:26:58 16 a claimant would prevail against United States in
17:27:01 17 relation to the same factual matrix, would then not
17:27:05 18 the United States pay twice and I would call that
17:27:18 19 double jeopardy instead of double recovery.
20 MR. MITCHELL: I'd like to offer --
17:27:22 21 PRESIDENT VAN DEN BERG: Double recovery
17:27:24 22 means that the same party gets paid twice but
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17:27:28 1 double jeopardy is the same victim has to pay twice
17:27:32 2 to different parties.
17:27:33 3 MR. MITCHELL: Yes, and I would like to
17:27:35 4 reflect on the question, but offer preliminarily
17:27:40 5 that the consequence of the violation of the WTO
17:27:47 6 regime gives rise to the retaliation by Canada.
17:27:54 7 The consequence of the violation of the investment
17:27:58 8 chapter gives rise to the investor's claim, and the
17:28:03 9 consequence of the violation of the United States

17:28:06 10 domestic law gives rise to the remand under
17:28:14 11 Chapter 19. So I am not -- again, I am not of the
17:28:21 12 view that that amounts to double jeopardy as
17:28:25 13 opposed to being held responsible in the
17:28:34 14 appropriate forums for breaking different sets of
17:28:38 15 rules.
17:28:40 16 MR. LANDRY: If I may, Mr. President, the
17:28:41 17 only additional comment that I would make to that,
17:28:44 18 that as I understand the retaliation concept, and,
17:28:46 19 again, this is on a preliminary basis, it would be
17:28:50 20 that duties would be put in place on certain
17:28:54 21 products coming in, for example, to Canada, and it
17:28:59 22 would be effectively the people bringing in the
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17:29:01 1 products to Canada that would effectively
17:29:03 2 ultimately suffer that additional cost.
17:29:08 3 But, again, I think we are straying into
17:29:12 4 a bit of an area -- I only say this, that we are
17:29:14 5 straying into a bit of an area where we did have
17:29:15 6 another person on our team that was more familiar
17:29:17 7 with the WTO, and he was not available for today,
17:29:21 8 so we might want to revisit it tomorrow.
17:29:26 9 PRESIDENT VAN DEN BERG: One general
17:29:26 10 point I would like to make is when you analyze
17:29:29 11 facts and law, you should also include an economic
17:29:32 12 analysis of the law, and the effects of the law.
17:29:36 13 Please proceed.
17:29:39 14 MR. LANDRY: So, Mr. President, turning
17:29:40 15 to the issue on Article 2004 -- I always have
16 trouble with that, "twenty O four" I guess is the
17:29:50 17 proper way to say it -- the U.S. argues that since

17:29:52 18   that provision specifically excludes matters
17:29:55 19   covered by Chapter 19, it would make no sense not
17:29:58 20   to allow the States to pursue state-to-state
17:30:02 21   dispute resolution relating to antidumping laws,
17:30:05 22   but to allow, and I quote, private claimants the
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17:30:07 1   privilege of doing so under Chapter 11, close
17:30:11 2   quote.
17:30:12 3   Now, in our submission, the U.S.
17:30:14 4   misconstrues our argument. The claimant's argument
17:30:18 5   simply allows that the claimant's claim under
17:30:22 6   Chapter 11, based on international law, and
17:30:27 7   international law standards of review, can also be
17:30:31 8   pursued by the state under Chapter 20 dispute
17:30:34 9   resolution mechanism, which is specifically allowed
17:30:39 10   in the case of Chapter 11 claims under Article
17:30:43 11   1115. Neither claim, whether it was brought by the
17:30:47 12   investor or the state would relate to matters
17:30:53 13   covered by Chapter 19, which is domestic law and
17:31:00 14   norms and domestic law standards of review.
15   ARBITRATOR ROBINSON: I would just like
17:31:12 16   to ask, is there any clarification, Mr. Mitchell,
17:31:13 17   you could give with regard to the fact that 1901(3)
17:31:20 18   has the exception for Article 2203, and then says
17:31:25 19   nothing further? Article 2004 says except for the
17:31:31 20   matters covered in Chapter 19, and as otherwise
17:31:37 21   provided in this agreement.
17:31:40 22   What is that supposed to add, please, for
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17:31:58 1   my edification?
17:31:58 2   MR. LANDRY: Just for clarification,
17:32:00 3   Mr. Robinson, the words that you are asking, as

17:32:04 4   otherwise provided in this agreement, are those the
17:32:07 5   ones that --
17:32:08 6   ARBITRATOR ROBINSON: Yes, I was just
17:32:08 7   wondering what, in your view, those words supposed
17:32:11 8   to mean. I mean, what are they looking at as being
17:32:16 9   included within as otherwise provided? And again,
17:32:28 10   I am only asking mainly for the comparative
17:32:31 11   purpose, with endeavoring to understand, and I
17:32:34 12   believe that's the context for Article 1901(3).
17:32:40 13   MR. MITCHELL: With reference to the
17:32:41 14   words in 2004, "except as otherwise provided in
17:32:47 15   this agreement," I think a good example of the
17:32:51 16   provision that deals where dispute settlement of
17:32:57 17   Chapter 20 is excluded is Article 1138 sub 2, and
17:33:03 18   if you look at Article 38 sub 2, you will see a
17:33:13 19   very clear provision on page 1123 in my draft,
17:33:18 20   where it says the dispute settlement provisions of
17:33:21 21   this section, that is section B of Chapter 11, and
17:33:25 22   of Chapter 20, shall not apply to the matters

17:33:29 1   referred to in Annex 1138 sub 2, and annex 1138
17:33:37 2   sub 2 in this case deals with a review under
17:33:39 3   investment in Canada Act, for instance, or in
17:33:43 4   respect of Canada or a decision by the National
17:33:46 5   Commission on Foreign Investment in the case of
17:33:49 6   Mexico.
17:33:50 7   So there you have a clear example of
17:33:55 8   something that falls within the provisions
17:33:59 9   otherwise provided in the agreement: The dispute
17:34:02 10   settlement provisions of Chapter 20 shall apply
17:34:07 11   with respect to.

17:34:08 12 ARBITRATOR ROBINSON: So if I understand
17:34:09 13 it, a distinction is that in 2004, there is an
17:34:14 14 express exception for Chapter 19. Then there is
17:34:21 15 the undefined exception for "as otherwise provided
17:34:27 16 in this agreement," which, in turn, one of the
17:34:32 17 "otherwise provided in this agreement" is indeed
17:34:36 18 Chapter 11, a part of Chapter 11, i.e., Chapter
17:34:44 19 1138 -- I'm sorry, Article 1138 point 2. So there
17:34:48 20 is a reference indirectly to Chapter 11, i.e.,
17:34:56 21 Article 1138 point 2.
17:35:00 22 MR. MITCHELL: Article 1138(2) two is a

17:35:03 1 clear exception to the application of the Chapter
17:35:06 2 20 dispute resolution procedures. The matters
17:35:14 3 covered under Chapter 19, i.e., review under
17:35:19 4 municipal law standards of final AD and CVD
17:35:25 5 determinations is excluded from Chapter 20.
17:35:36 6 ARBITRATOR ROBINSON: So suppose Article
17:35:41 7 1901(3) hypothetically had stated "except for
17:35:43 8 Article 2203, and as otherwise provided in this
17:35:54 9 agreement," what effect would that have had, in
17:35:58 10 your mind?
17:36:17 11 MR. MITCHELL: I'm sorry, the words you
17:36:18 12 are substituting are--
17:36:20 13 ARBITRATOR ROBINSON: I'm simply adding
17:36:20 14 under 1901(3) hypothetically the additional words
17:36:24 15 found in Article 2004 "and as otherwise provided in
17:36:29 16 this agreement," as to what effect that might have
17:36:35 17 had on Article 1901(3), hypothetically. I am just
17:36:43 18 trying to see if I can compare apples and oranges.
17:36:54 19 MR. MITCHELL: I'm not sure that apples
17:36:55 20 and oranges -- I think that would be what would be

17:36:57 21   happening would be a comparison of apples and
17:37:00 22   oranges, and in that context, 2004 deals with the

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17:37:06 1   specific scope of the course to dispute settlement
17:37:13 2   procedures, and on our arguments under 1901(3),
17:37:16 3   that deals with a very different topic, namely, the
17:37:20 4   obligation to amend or not amend one's domestic
17:37:26 5   antidumping or CVD laws.
17:37:30 6   ARBITRATOR ROBINSON: So in to following
17:37:32 7   what may be logical and may not be logical, for
17:37:37 8   language such as "and as otherwise provided in this
17:37:41 9   agreement" to have been in Article 1901(3), that
17:37:45 10   might have then led hypothetically to a reference
17:37:50 11   similar to that in Article 1138 point 2, but that's
17:37:58 12   not what we have here. We don't have the language
17:38:05 13   in Article 2004 in that exception in Article
17:38:12 14   1901(3), and comparably there is no reference
17:38:18 15   specifically in Chapter 1138 -- I mean, in Chapter
17:38:24 16   11, that is comparable to Article 1138 point 2
17:38:32 17   referring back to Chapter 20. In other words,
17:38:38 18   1901 -- Article 2004 refers not only to Chapter 19
17:38:46 19   but to "as otherwise provided --"
20   MR. MITCHELL: Correct.
17:38:49 21   ARBITRATOR ROBINSON: Which then, one of
17:38:51 22   those examples of "as otherwise provided" is found

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17:38:56 1   in Chapter 11 at Article 1138.
17:39:00 2   MR. MITCHELL: Correct.
17:39:02 3   ARBITRATOR ROBINSON: Article 1901(3), by
17:39:05 4   comparison, does not have the language "and as
17:39:11 5   otherwise provided" in this agreement, and

17:39:14 6   similarly, Chapter 11 does not have any reference
17:39:21 7   back to Chapter 19.
17:39:24 8   MR. MITCHELL: I agree with both of those
17:39:27 9   propositions.
17:39:28 10   ARBITRATOR ROBINSON: So is the absence
17:39:30 11   of those two items, one in Article 1901(3), and one
17:39:34 12   in Chapter 11, are we supposed to read anything
17:39:38 13   into that in trying to understand the meaning of
17:39:44 14   Article 1901(3)?
17:39:48 15   MR. MITCHELL: I will want to reflect
17:39:51 16   upon that. We have not, in our submissions to
17:40:00 17   either the Canfor panel or this panel put stock on
17:40:06 18   the existence in Article 2004 of the phrase "and as
17:40:09 19   otherwise provided" in this agreement for the
17:40:11 20   purposes of interpreting Article 1901(3) because in
17:40:16 21   our view they do very different things and it
17:40:20 22   wouldn't be appropriate in this context to take the
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17:40:23 1   language from one and apply it to the other or draw
17:40:27 2   a conclusion from its absence because of the very
17:40:30 3   different natures of the things they do.
17:40:35 4   ARBITRATOR ROBINSON: I am simply, to
17:40:37 5   parse through all these different sections and the
17:40:39 6   differences and then we have had all these
17:40:43 7   different sections, referred to today, 1904, 1902,
17:40:47 8   and so forth, and 1501, this, that and the other.
17:40:53 9   I am just attempting to see if I can make some
17:40:54 10   sense of why they are the way they are.
17:40:56 11   Thank you very much.
17:41:00 12   PRESIDENT VAN DEN BERG: Mr. Landry,
17:41:00 13   please proceed.
17:41:01 14   MR. LANDRY: Turning now, Mr. President,

17:41:04 15 to Article 1112 which resolves, you will recall,
17:41:15 16 any inconsistency between Chapter 11 and any other
17:41:19 17 chapter in NAFTA in favor of the other chapter, the
17:41:22 18 U.S. states, and, again, I quote: It would be
17:41:25 19 particularly odd for investor state arbitration
17:41:29 20 under Chapter 11 to afford greater private rights
17:41:33 21 to private claimants than to NAFTA parties given
17:41:40 22 the subordinate position of the investment chapter

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17:41:40 1 in the treaty. Close quote.
17:41:42 2 Again, Mr. President, in our submission,
17:41:44 3 the U.S. is misconstruing our argument. Under the
17:41:48 4 interpretation advocated by the claimant, by us,
17:41:51 5 given there is no attempt to afford greater rights
17:41:55 6 to private claimants than NAFTA parties, there is
17:41:57 7 no inconsistency between the claimant's
17:42:00 8 interpretation between of Chapter 11 and Chapter 19
17:42:03 9 or Chapter 20.
17:42:08 10 Now, in relation to Article 1115, the
17:42:17 11 U.S. says that the parties obviously acknowledged a
17:42:20 12 certain overlap between investor state arbitration
17:42:25 13 under Chapter 11 and state-to-state dispute
17:42:28 14 resolution in relation to the same matter and
17:42:31 15 therefore confirms state-to-state rights in Article
17:42:34 16 1115, notwithstanding a private party's right to
17:42:38 17 bring forward an investor state proceeding.
17:42:40 18 And the U.S. argues that if the parties
17:42:43 19 intended, that same measure could be subjected to
17:42:49 20 dispute resolution under Chapter 11 and Chapter 19,
17:42:53 21 surely they would have made mention of that. So
17:42:53 22 they are implicitly arguing that this, therefore,

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17:42:56 1   signifies that the parties did not want to subject
17:42:58 2   the same measure to dispute resolution under 19 and
17:43:04 3   11.
17:43:05 4   The flaw in that reasoning argument is
17:43:06 5   that the U.S. steadfastly, as we have seen, refuses
17:43:08 6   to September the differentiation between the
17:43:10 7   dispute resolution mechanisms based on two
17:43:15 8   different legal regimes between the two chapters.
17:43:20 9   Given the differences between those two different
17:43:22 10   legal regimes, and the fact that they are unrelated
17:43:24 11   to each other, there is no reason for Article 1115
17:43:27 12   to have mentioned Chapter 19.
17:43:30 13   Furthermore, the need to mention state
17:43:33 14   rights under Chapter 20 arises because Chapter 11
17:43:37 15   investor state proceeding would be dealing with the
17:43:41 16   exact same legal cause of action as an investor
17:43:45 17   state arbitration, i.e., measures which are alleged
17:43:49 18   to be in violation or inconsistent with the
17:43:51 19   obligations under Chapter 11 which are
17:43:54 20   international law obligations.
17:43:57 21   Furthermore, Chapter 11 itself recognizes
17:44:01 22   the ability to pursue proceedings in relation to

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17:44:04 1   the same measure. Article 1121 that you heard
17:44:08 2   reference to earlier which allows for investor
17:44:11 3   state arbitration in regard to damages to go ahead
17:44:16 4   at the same time as proceedings for, and I quote,
17:44:19 5   extraordinary relief not involving payment of
17:44:21 6   damages.
17:44:24 7   Accordingly, in response to the U.S.
17:44:26 8   argument in relation to context, the simplistic

17:44:31 9 analysis undertaken by the U.S. to justify the
17:44:35 10 interpretation based on the context in our
17:44:37 11 submission is patently insufficient for the
17:44:40 12 purposes of interpreting 1901(3). It just does not
17:44:44 13 undertake the rigorous analysis necessary and,
17:44:48 14 furthermore, in any event, the provisions which the
17:44:52 15 U.S. says supports their interpretation do not,
17:44:55 16 and, therefore, their submissions in this regard
17:44:59 17 are, in our submission, without merit.
17:45:02 18 Now, Mr. President, I am about to go on
17:45:06 19 another subject. I would suspect that I will be
17:45:08 20 another 15 or 20 minutes -- 15 minutes, maybe. I
17:45:12 21 don't know whether you want to complete what you'd
17:45:18 22 like to do. I leave that -- I notice the court

17:45:33 1 reporter, so...
17:45:34 2 PRESIDENT VAN DEN BERG: The question is
17:45:35 3 what do we do next because I think Mr. Mitchell has
17:45:39 4 how much time? That's one and a half hour, two
17:45:53 5 hours, especially when you go in the details of the
17:45:55 6 provisions, you will have, again, the Tribunal.
17:45:59 7 I am looking to the United States. What
17:46:05 8 do you prefer? Do you prefer that after Mr. Landry
17:46:11 9 has completed his presentation, which is
17:46:14 10 approximately 6:00, that we start tomorrow morning
17:46:17 11 again with Mr. Mitchell or would you like
17:46:19 12 Mr. Mitchell to complete tonight?
17:46:23 13 Be mindful that it will take probably
17:46:26 14 what I estimate one and a half hours to two hours.
17:46:36 15 MS. MENAKER: We are really at the
17:46:37 16 Tribunal's disposal, so we are happy to go for as

17:46:45 17   long as you'd like to go. If we do complete
17:46:45 18   tonight and go rather late, then perhaps we can
17:46:48 19   start a little later tomorrow morning, you know, to
17:46:51 20   allow both parties an opportunity to prepare for
17:46:54 21   rebuttal, but other than that, it's up to you.
17:46:57 22   PRESIDENT VAN DEN BERG: Let me consult
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17:46:57 1   with my members.
2   (Discussion off the record.)
17:47:26 3   PRESIDENT VAN DEN BERG: The preference
17:47:28 4   is of not continuing late, but starting early. So
17:47:46 5   what we would suggest is that Mr. Landry complete
17:47:49 6   his presentation, and to do justice to Mr. Mitchell
17:47:52 7   because at a certain point in time what the
17:47:58 8   Tribunal can digest diminishes, and I think that
17:48:00 9   would not be fair to you, Mr. Mitchell, so we would
17:48:01 10   suggest that we start tomorrow at 9:00. Any
17:48:05 11   problem on the side of the United States to start?
17:48:10 12   MS. MENAKER: That is fine.
17:48:17 13   PRESIDENT VAN DEN BERG: No domestic
17:48:18 14   concerns, anybody? I have to be careful because
17:48:21 15   otherwise I will be sued by the significant others.
17:48:24 16   Mr. Robinson has a question.
17:48:25 17   ARBITRATOR ROBINSON: I just would like
17:48:26 18   to be clear, so that, am I correct that the
17:48:34 19   statement in Article 1115, with reference to
17:48:42 20   Chapter 20 is similar to the reference in Article
17:48:48 21   1138, so now we have two examples of what is "as
17:48:54 22   otherwise provided" in this agreement for purposes
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17:48:57 1   of Article 2004.
17:49:38 2   MR. LANDRY: If I may, I really think

17:49:39 3 this is almost like a follow-up to what
17:49:42 4 Mr. Mitchell was dealing with you on, so I will let
17:49:46 5 Mr. Mitchell answer that.
17:49:48 6 MR. MITCHELL: I hope I understand the
17:49:53 7 question and correct me if I am misunderstanding
17:49:55 8 it, because I don't want to mislead the Tribunal in
17:49:59 9 any way. Is the question, is Article 1115 another
17:50:03 10 provision analogous to 1138, that is, something
17:50:06 11 that is "as otherwise provided"?
17:50:10 12 ARBITRATOR ROBINSON: Yes, that is
17:50:11 13 exactly the question.
17:50:13 14 MR. MITCHELL: I think the answer is no,
17:50:16 15 and let me explain my understanding of Article
17:50:19 16 1115. What Article 1115 states, paraphrased,
17:50:31 17 clearly, is that the purpose of Section B of
17:50:35 18 Chapter 11 is to give an investor the right to
17:50:38 19 bring an investor state claim for a violation of
17:50:44 20 section A, the substantive obligations of Chapter
17:50:48 21 11. That right is without prejudice of the right
17:50:53 22 of a state to advance that same claim on a

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17:50:56 1 state-to-state basis, and then the latter part of
17:51:01 2 the provision is not relevant to answering the
17:51:04 3 question.
17:51:05 4 So in that sense, it is not an exclusion
17:51:12 5 from the right to recourse to dispute settlement
17:51:16 6 under Chapter 20, it simply confirms that a state
17:51:19 7 doesn't lose the right to recourse to dispute
17:51:22 8 settlement under Chapter 20 merely by virtue of the
17:51:28 9 fact that an investor has a claim under Chapter 11.
10 ARBITRATOR ROBINSON: All right, I think

17:51:33 11   I understand. And that is because of the
17:51:34 12   difference in the introductory language. Whereas
17:51:37 13   Article 1115 says "without prejudice to the rights
17:51:41 14   and obligations of the parties under Chapter 20,"
17:51:45 15   Article 1138 says "without prejudice to the
17:51:50 16   applicability or nonapplicability of the dispute
17:51:57 17   settlement provisions of this section or of Chapter
17:51:58 18   20."
17:51:59 19   MR. MITCHELL: Again, I think I
17:52:01 20   understand. Article 1138 takes away the right to
17:52:04 21   recourse to dispute settlement under Chapter 20.
17:52:07 22   Article 1115 confirms the right to dispute
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17:52:11 1   settlement under Chapter 20.
17:52:15 2   ARBITRATOR ROBINSON: All right. Thank
17:52:15 3   you very much.
17:52:17 4   MR. LANDRY: Maybe Mr. Mitchell will get
17:52:19 5   a little bit more of his presentation this evening.
6   PRESIDENT VAN DEN BERG: I think what you
17:52:27 7   call in broadcasting, trade-offs.
17:52:28 8   MR. LANDRY: Mr. President, in the
17:52:29 9   written arguments, there is a substantial amount of
17:52:32 10   discussion about parallel proceedings and what the
17:52:35 11   NAFTA said or presumed about so-called parallel
17:52:39 12   proceedings, and as we were reviewing the
17:52:42 13   arguments, it is clear that there is no specific
17:52:44 14   definition of a parallel proceeding that was used
17:52:47 15   to inform the debate which may have had the effect
17:52:51 16   of confusing what conclusions could be drawn from
17:52:54 17   the analysis undertaken by both parties.
17:52:57 18   And it started effectively with the
17:52:59 19   United States dealing with or alleging that they

17:53:02 20 had not consented to arbitrate the claimant's
17:53:06 21 claims under the investment chapter, and also
17:53:08 22 dealing with their objective that they highlight so
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17:53:13 1 forcefully the objective to create effective
17:53:17 2 disputes for the resolution of -- sorry, effective
17:53:17 3 procedures for the resolution of disputes.
17:53:20 4 Now, the U.S. position was that the NAFTA
17:53:23 5 rules for dispute settlement revealed an overriding
17:53:27 6 concern to promote effective dispute resolution and
17:53:30 7 to avoid deficiencies resulting, and I quote, from
17:53:34 8 redundant proceedings between the same parties
17:53:37 9 before different dispute resolution panels, and we
17:53:40 10 have heard a little bit about that today.
17:53:42 11 The U.S. argued that its interpretation
17:53:45 12 of 1901(3), making Chapter 19 the exclusive forum
17:53:50 13 under NAFTA for the resolution of antidumping CVD
17:53:56 14 matters was fully consistent with that object and
17:53:59 15 purpose of the treaty.
17:54:00 16 And then its analysis went on to talk
17:54:03 17 about the proliferation of international tribunals,
17:54:07 18 outlining one consequence of that being, and I
17:54:10 19 quote, expanded opportunities to subject the same
17:54:13 20 dispute simultaneously or consecutively to multiple
17:54:19 21 fora, giving rise to redundant proceedings, close
22 quote.
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17:54:23 1 Now, let me be very clear from our
17:54:25 2 perspective. Allowing Chapter 11 and 19
17:54:28 3 proceedings to proceed at the same time will not
17:54:30 4 result in redundant proceedings. Redundant
17:54:34 5 proceedings are proceedings which have the exact

17:54:39 6   same dispute, that is, the parties, the objects,
17:54:42 7   and the cause of action, is the subject matter of
17:54:44 8   the dispute resolution in two different processes.
17:54:49 9   And I say that, like, for example, the
17:54:52 10   type of one that was raised by the United States
11   and I'll just reference it to you at this later
17:54:56 12   hour, but it is in relation to Annex 1120 point 1.
17:55:01 13   Now here, even assuming conduct -- the
17:55:05 14   same conduct is at issue, a Chapter 11 proceeding
17:55:09 15   will scrutinize that conduct under international
17:55:13 16   law. The Chapter 19 will test it under municipal
17:55:18 17   law and the decision will not be conflicting
17:55:21 18   because they will be dealing with different causes
17:55:23 19   of action and different remedies, as we've talked
17:55:27 20   about at length.
17:55:29 21   Allowing Chapter 11 and Chapter 19
17:55:31 22   processes to proceed at the same time relating to
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17:55:35 1   the same conduct is no more redundant than the same
17:55:39 2   conduct being scrutinized under Chapter 19, i.e.,
17:55:46 3   municipal law, and under the WTO dispute resolution
17:55:49 4   mechanisms where conduct -- the same conduct is
17:55:51 5   scrutinized in relation to its consistency with the
17:55:55 6   WTO agreements. Different causes of actions,
17:55:58 7   different remedies.
17:56:00 8   It is also no different, Mr. President,
17:56:01 9   than many recent investor state arbitration cases
17:56:06 10   where investor state tribunals explicitly recognize
17:56:09 11   the inherent and fundamental difference between the
17:56:15 12   contractual claim based on domestic law and
17:56:19 13   domestic courts and treaty claims, in relation to

17:56:19 14 the same conduct before obviously, an
17:56:24 15 international, state or -- sorry, investor state
17:56:26 16 arbitration tribunal.
17:56:29 17 Those claims were obviously found not to
17:56:31 18 be redundant and were allowed to proceed and I
17:56:34 19 don't want to, at this late hour, go into a lot of
17:56:37 20 them, but of the references I would give would be
17:56:38 21 the SGS and Pakistan case, the Occidental case and
17:56:43 22 the CMS case, three specific examples where that

17:56:48 1 very point was dealt with and it was determined
17:56:51 2 there would not be redundant proceedings.
3 PRESIDENT VAN DEN BERG: Did they leave
4 out the SGS Philippines?
17:57:20 5 MR. LANDRY: Sorry, Pakistan. I do get
17:57:21 6 them confused but I believe it is SGS Philippines.
17:57:25 7 Mr. Chairman, NAFTA itself recognizes
17:57:29 8 and endorses the type of so-called parallel
17:57:32 9 proceedings that is being debated here, that is,
17:57:35 10 Article 1121.
17:57:44 11 It is important to emphasize,
17:57:46 12 Mr. President, that what the claimants are
17:57:48 13 attempting to do under Chapter 11 is not relitigate
17:57:53 14 domestic law issues being dealt with in front of
17:57:56 15 the binational panel reviews, which make their
17:57:57 16 determinations, as I keep emphasizing based on
17:58:03 17 domestic norms and domestic standards of review.
17:58:06 18 In this case, it is simply taking some of the same
17:58:09 19 conduct, or perhaps related conduct, and testing it
17:58:13 20 against international norms.
17:58:15 21 Now, the determination of a Chapter 19
17:58:17 22 panel as to whether that conduct was not in

17:58:21 1   conformity to U.S. domestic law will be relevant
17:58:25 2   especially in the context of one of the specific
17:58:29 3   allegations the claimants are making in this case,
17:58:30 4   which is the intentional misapplication of the law.
17:58:35 5   However, that issue does not get relitigated under
17:58:38 6   Chapter 11, and furthermore, the finding of the
17:58:42 7   Chapter 19 Tribunal will not be in any way
8   determinative of whether the error identified rises
17:58:49 9   to the level of Chapter 11 claim. Evidence of such
17:58:50 10   a finding by a binational panel will be analyzed in
17:58:55 11   the context of evidence of other U.S. actions, such
17:58:59 12   as the U.S. administration and its agency ignoring
17:59:02 13   the authority of international panels, the U.S.
17:59:06 14   rendering Chapter 19 dispute processes futile in
17:59:10 15   their submission, and other U.S. agencies coming to
17:59:13 16   determinations that we will say cannot be reached
17:59:15 17   by an unbiased impartial decisionmaker.
17:59:20 18   Again, going back to the one objective
17:59:22 19   referenced by the United States in raising the
17:59:25 20   issue of redundant proceedings. In our submission
17:59:29 21   the claimants' interpretation is not only
17:59:33 22   consistent with the objective of NAFTA to create

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17:59:36 1   effective procedures for the resolution of
17:59:39 2   disputes, its interpretation promotes rather than
17:59:45 3   inhibits the resolution of all disputes whether
17:59:48 4   they are based on municipal law or international
17:59:50 5   law.
17:59:53 6   Mr. President, I have one last topic I
17:59:56 7   would like to discuss, and that is the

17:59:59 8   circumstances of the conclusion of the NAFTA, and I
18:00:02 9   would like to turn to the U.S. argument --
18:00:07 10   ARBITRATOR ROBINSON: Might I ask one --
18:00:09 11   again, I am endeavoring to understand the line of
18:00:12 12   argument. Are you in effect posing the situation
18:00:19 13   where the Chapter 19 proceedings are somewhat akin
18:00:29 14   to local remedies, and that the Chapter 11 is
18:00:38 15   something that can somehow spring into being once
18:00:42 16   you have exhausted those local remedies, is that
18:00:50 17   the argument you are advancing, along those lines?
18:00:59 18   MR. MITCHELL: If the United States at a
18:01:01 19   later stage of the proceedings raises an issue of
18:01:08 20   whether it is finality or exhaustion of local
18:01:15 21   remedies, that would be a matter that would be
18:01:17 22   dealt with and would raise an array of different
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18:01:21 1   issues that are not before this Tribunal on this
18:01:25 2   jurisdictional objection relating to the nature of
18:01:29 3   the decision-makers and whether they would be
18:01:33 4   considered analogous to the local courts. So the
18:01:42 5   United States has not raised in any material to
18:01:45 6   date an issue of finality or local remedies.
18:01:53 7   ARBITRATOR ROBINSON: Thank you.
18:02:04 8   MR. LANDRY: In relation to the
18:02:05 9   circumstances of the conclusion of the treaty, the
18:02:07 10   United States says, and I quote, that it confirms
18:02:11 11   "the interpretation that Chapter 11 does not apply
18:02:14 12   to antidumping and countervailing matters." I say
18:02:18 13   this, Mr. President, the claimants fundamentally
18:02:23 14   disagree with this proposition and in fact say
18:02:25 15   this, that the evidence produced by the United
18:02:31 16   States in relation to this argument supports the

18:02:33 17 claimants' and not the United States'
18:02:37 18 interpretation of 1901(3).
18:02:43 19 In its original argument the United
20 States cited various quotes from individuals which
18:02:45 21 purport to explain the reasons behind Chapter 19
18:02:46 22 and I will give you for your reference, it is
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18:02:48 1 footnote 109 and 110 at page 31 of the U.S.
18:02:54 2 objection. When you look at those carefully, the
18:02:58 3 quotes say nothing more than the parties had
18:03:00 4 attempted to come to agreement on new approaches to
18:03:03 5 maintaining fair disciplines on unfair trade
18:03:09 6 practices.
18:03:12 7 PRESIDENT VAN DEN BERG: I think we can
18:03:13 8 be relatively short on this one, Mr. Landry,
18:03:16 9 because this morning I heard from the United States
18:03:18 10 that indeed there is no contemporaneous evidence
18:03:24 11 regarding the drafting and inclusion of Article
18:03:33 12 1901(3). So that would neutralize these quotes,
18:03:44 13 doesn't it?
18:03:47 14 MR. LANDRY: Would neutralize what?
18:03:50 15 PRESIDENT VAN DEN BERG: These quotes you
18:03:51 16 are referring to, and the whole sense of
18:03:53 17 conclusion. As I understand it, not only what the
18:03:58 18 United States said, but please correct me if I am
18:04:02 19 wrong, we base ourselves on the inferences of text
18:04:08 20 and context of what has happened at the time. We
18:04:11 21 are reconstructing history to find out what history
18:04:18 22 might have been. What I understood the United
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18:04:21 1 States not to say, at least not today, is that the

18:04:24 2   history confirms our interpretation. They said
18:04:31 3   that in their submissions that is true but they
18:04:33 4   didn't say that this morning. I see Ms. Menaker
18:04:41 5   looking at me as though I am terribly
18:04:43 6   mischaracterizing her statements. You have the
18:04:47 7   possibility to correct it.
18:04:47 8   MS. MENAKER: Not at all. The look
18:04:49 9   didn't mean to convey that. What you have said is
18:04:52 10   absolutely correct. The only clarification I would
18:04:55 11   like to make is the quotes that I believe Canfor is
18:05:00 12   referring to are contemporaneous accounts of the
18:05:06 13   parties attempting in the CFTA to reach agreement
18:05:12 14   on substantive standards for AV/CVD matters but
18:05:13 15   being unable to and we do believe that that
18:05:16 16   provides evidence as to the circumstances of the
18:05:19 17   conclusion of the treaty insofar as it shows that
18:05:23 18   the parties were unable to agree to substantive
18:05:27 19   standards that would apply to their AV/CVD matters
18:05:32 20   and thus would be unhappy -- or it would not
18:05:34 21   comport with the parties' intent to impose those
18:05:37 22   standards on them, to find the standards in Chapter

18:05:40 1   11 and impose them on them when they could not
18:05:43 2   agree among themselves to a set of standards to
18:05:46 3   have them applied and instead of opted to retain
18:05:50 4   their domestic law.
18:05:53 5   PRESIDENT VAN DEN BERG: So it doesn't go
18:05:54 6   to the central question before us, which is why was
18:06:01 7   Article 1901(3) included in NAFTA if you talk about
18:06:10 8   circumstances of conclusion.
18:06:14 9   MR. LANDRY: There are two pieces of
18:06:16 10   contemporaneous evidence that in our contention

18:06:16 11 support fully the claimants' position, and the
18:06:20 12 first one is -- comes from the statement of
18:06:24 13 implementation -- statement of administration, SAA,
18:06:40 14 and the changes in Chapter 19, and we talked a
18:06:43 15 little bit about that. If I give you a reference,
18:06:46 16 and this was in relation to Articles 1901 to 1903,
18:06:50 17 and I will give you a reference, tab 25 of volume
18:06:55 18 two, page 194 of our authorities. I want to quote,
18:07:03 19 it says, quote, "Articles 1901 and 1902 make clear
18:07:10 20 that every country retains its domestic antidumping
18:07:15 21 and countervailing duty laws and can amend that.
18:07:17 22 Article 1903 provides that a NAFTA country can
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18:07:21 1 request a binational panel to review whether an
18:07:25 2 amendment to another NAFTA party's CVD or
18:07:26 3 antidumping statues is consistent with Chapter 19,"
18:07:28 4 and here is the important part: "Those provisions
18:07:31 5 that are identical to 1901 through 1903 of the CFTA
18:07:36 6 except for technical changes necessary to
18:07:40 7 accommodate the addition of a third party."
18:07:43 8 These are hardly words which confirm the
18:07:45 9 meaning advocated by the United States.
18:07:49 10 In addition, there are documents that
18:07:51 11 were produced by the United States as a result of
18:07:54 12 the Tribunal order in Canfor and here I would like
18:07:58 13 to refer actually to the Tribunal, if you have the
18:08:01 14 document, the tab. It is tab 19 of the rejoinder
18:08:15 15 volume.
18:10:09 16 (Pause.)
17 MR. LANDRY: It is entitled Chapter 21
18:10:09 18 actually, Investments, and this is one of the

18:10:11 19   drafts of the Investment Chapter that is produced
18:10:14 20   in the traveaux that we were talking about earlier.
18:10:18 21   Now, it clearly shows that the Investment
18:10:22 22   Chapter contained an extensive section entitled
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18:10:26 1   Provisions to be Placed Outside of the Investor
18:10:28 2   Chapter, and if you go to page 20, you will see
18:10:32 3   that.
18:10:53 4   You can see they had extensive provisions
18:10:56 5   on what provisions to be placed outside of the
18:10:59 6   Investment Chapter, and there are references made
18:11:02 7   to national security, competition, monopolies and
18:11:08 8   state enterprises and taxation. What is striking,
18:11:12 9   Mr. Chairman, is there is absolutely no mention
18:11:16 10   about antidumping and countervailing duty measures.
18:11:26 11   Clearly, had the parties intended such matters to
18:11:30 12   be excluded from Chapter 11, one would have
18:11:34 13   expected some clear reference in that regard.
18:11:36 14   There is nothing there.
18:11:52 15   PRESIDENT VAN DEN BERG: In this
18:11:52 16   connection, are there other matters in the NAFTA
18:11:56 17   that have been excluded from Chapter 11 which are
18:12:01 18   not mentioned here on this list?
18:12:08 19   MR. LANDRY: If I may have a moment.
18:14:06 20   (Pause.)
18:14:07 21   PRESIDENT VAN DEN BERG: Perhaps
18:14:07 22   Mr. Mitchell can answer that tomorrow?
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18:14:10 1   MR. MITCHELL: We will review it
18:14:12 2   overnight. What we can say with respect to the
18:14:15 3   matters that are specifically identified, the
18:14:18 4   competition and state enterprise monopolies matters

18:14:27 5   became 1501 and 1502 and taxation became 2103 and
18:14:33 6   national security became 2102. We will look to
18:14:38 7   whether there was any other indication of a matter
18:14:41 8   in the traveaux that was indicated to be
18:14:46 9   specifically excluded and whether there was any
18:14:48 10   other specific provision.
18:14:53 11   PRESIDENT VAN DEN BERG: The question is
18:14:54 12   quite simple. We have here in tab 19 a list of
18:14:59 13   matters or provisions to be placed outside of
18:15:03 14   Investment Chapter, and my question is in the final
18:15:07 15   version are there other provisions which are placed
18:15:11 16   outside the Investment Chapter, leaving aside 1901
18:15:16 17   paragraph three because that is a contentious one
18:15:19 18   but can you give me other examples.
18:15:23 19   MR. MITCHELL: Arguably you would say the
18:15:24 20   Financial Services Chapter, although they are both
18:15:28 21   matters related to investments.
18:15:34 22   PRESIDENT VAN DEN BERG: Financial

18:15:34 1   services is referenced at the end, if you go to
18:15:38 2   page 4874. Do you see under 4(a), there is already
18:15:45 3   a reference to financial services. Whether it was
18:15:51 4   here or in the drafting stage, but are there other
18:15:55 5   matters which are not mentioned on these pages
18:15:58 6   which finally have made it to an exclusion with
18:16:02 7   respect to Chapter 11?
18:16:05 8   MR. MITCHELL: I am not aware of a
18:16:07 9   specific exclusion with respect to Chapter 11, but
18:16:09 10   we will check that overnight.
18:16:12 11   PRESIDENT VAN DEN BERG: This will be a
18:16:13 12   question also to the United States, whether they

18:16:15 13 know whether any other matters have made it to an
18:16:18 14 exclusion leaving aside 1901(3).
18:16:25 15 MS. MENAKER: I can perhaps offer an
18:16:29 16 example.
17 PRESIDENT VAN DEN BERG: Offer an
18:16:32 18 example. Then proceed.
18:16:35 19 MS. MENAKER: Government procurement is
18:16:36 20 for the most part excluded from Chapter 11 and that
18:16:40 21 is done in Article 1108. It is not excluded in its
18:16:46 22 entirety but it is dealt with in Chapter 10 and
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18:16:51 1 that is not so dissimilar from taxation which is
18:16:55 2 not excluded in entirety. In taxation, there is a
18:17:00 3 tax filter for an expropriation claim, but once a
18:17:04 4 claimant, if it files a claim alleging that a tax
18:17:08 5 is an expropriation, there is a procedure in place
18:17:13 6 where the respondent and the NAFTA party, the tax
18:17:18 7 authorities meet, and if they both determine that
18:17:21 8 the measure is not an expropriation, the claim
18:17:27 9 cannot go forward. But if there is no agreement,
18:17:31 10 or no action taken, the claim can go forward. So
18:17:33 11 that is an example where the subject matter is not
18:17:39 12 completely excluded from Chapter 11, there are just
18:17:41 13 specific exemptions.
18:17:43 14 PRESIDENT VAN DEN BERG: Taxes are
18:17:44 15 mentioned one way or another in this list but what
18:17:47 16 you mentioned about government procurement, that is
18:17:50 17 not mentioned at least in my quick reading of these
18:17:53 18 pages. That would be an example then.
18:17:56 19 MS. MENAKER: That would be an example,
18:17:58 20 and in fairness, I am not going to -- it is not
18:18:01 21 time for us to make an argument, but we referenced

18:18:06 22   this before, about the overlap in subject matters,
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18:18:09 1   that these things can naturally implicate
18:18:14 2   investment monopolies, the UPS case is an example,
18:18:18 3   that absent an exclusion in Article 15, there would
18:18:20 4   be no reason why that cannot be brought as an
18:18:23 5   investment claim whereas claimants have said
6   subject matters are quite distance between 11 and
18:18:30 7   19.
18:18:30 8   PRESIDENT VAN DEN BERG: We will hear you
18:18:31 9   in rebuttal.
18:18:33 10   MR. LANDRY: I think your question was
18:18:33 11   what other provisions outside of the agreement --
18:18:36 12   outside this Chapter. Ms. Menaker has mentioned
18:18:42 13   one that is excluded within the Chapter. What we
18:18:44 14   were trying to focus on is matters put outside of
18:18:48 15   the Chapter which 1901 sub three is, and we will
18:18:53 16   try to --
18:18:55 17   PRESIDENT VAN DEN BERG: The idea behind
18:18:57 18   this is to look at which methods are to be excluded
18:19:01 19   from Chapter 11. The technique was originally we
18:19:06 20   put them in, in Chapter 11, the exclusions, and
18:19:09 21   then they said, okay, you draft them and we will
18:19:12 22   put them at other places.
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18:19:15 1   MR. LANDRY: Sir, my point was this, if
18:19:18 2   you look at the ones that are mentioned, national
18:19:20 3   security was put outside of Chapter 11, all of them
18:19:25 4   were.
18:19:27 5   PRESIDENT VAN DEN BERG: I understand.
18:19:27 6   The point is at that time they thought about

18:19:31 7   exclusions in relation to Chapter 11. Technique
18:19:34 8   was not a question whether we should put the
18:19:37 9   exclusions inside Chapter 11 or somewhere else.
18:19:45 10   What it was was apparently at that point in time in
18:19:48 11   drafting, the draft included the list of the
18:19:51 12   matters -- the provisions in respect of which no
18:19:58 13   Chapter 11 dispute resolution or even substantive
18:20:02 14   information could be applied. That is not the
18:20:05 15   purpose of this list, isn't it?
18:20:09 16   MR. LANDRY: Yes.
17   PRESIDENT VAN DEN BERG: My question
18:20:10 18   simply is apparently at that point in time the
18:20:13 19   drafters thought about these matters on this list
18:20:16 20   as to be excluded.
18:20:21 21   MR. LANDRY: Yes.
18:20:24 22   PRESIDENT VAN DEN BERG: My simple
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18:20:25 1   question is in the final draft which more matters
18:20:29 2   have made it to an exclusion?
18:20:32 3   MR. LANDRY: We understand the question.
18:20:36 4   PRESIDENT VAN DEN BERG: Ms. Menaker
18:20:37 5   mentions procurement. That is irrespective of the
18:20:43 6   place. Procurement is in Chapter 11 but it is
18:20:45 7   still partly an exclusion.
18:20:48 8   MR. LANDRY: We will take a look and
18:20:50 9   respond to that tomorrow.
18:20:53 10   But I would say this, Mr. President, in
18:20:57 11   our submission, given the importance which the U.S.
18:21:00 12   now gives to Article 11, or 1901(3), as
18:21:08 13   specifically ensuring that conduct related to
18:21:10 14   antidumping and CVD was not reviewable under
18:21:15 15   Chapter 11, it is simply inconceivable that there

18:21:19 16   would be no documentation evidence at that point in
18:21:21 17   the traveaux or in the statement of administrative
18:21:27 18   actions. In the commentaries of the negotiation in
18:21:29 19   the creation of NAFTA or even in the unilaterally
18:21:31 20   created documents that the United States did
18:21:34 21   produce as a result of the Canfor Tribunal order.
18:21:40 22   Just simply inconceivable. It is for that reason

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18:21:44 1   that we fought hard before the Canfor Tribunal to
18:21:49 2   obtain all such documents, because our own
18:21:53 3   inquiries convinced us before we filed the claims
18:21:57 4   that there were no such documents, that there was
18:22:00 5   no such agreement, and, of course, once the
18:22:03 6   material was finally produced in our submission, it
18:22:06 7   confirmed that understanding. There is no evidence
18:22:11 8   of those discussions that they now appear to rely
18:22:16 9   on. There are no documents which confirm the U.S.
18:22:20 10   interpretation, and I say that, Mr. Chairman,
18:22:24 11   because, as the ordinary words of 1901(3)
18:22:30 12   demonstrate, there was no such agreement among the
18:22:33 13   parties on this point.
18:22:37 14   And those, Mr. Chairman, are my final
18:22:40 15   submissions for tonight.
18:22:43 16   PRESIDENT VAN DEN BERG: That is not the
18:22:45 17   final word yet. Professor Mestral has a question.
18:22:50 18   ARBITRATOR MESTRAL: You mentioned 24
18:22:52 19   orders, NAFTA or WTO orders or panel reports which
18:23:01 20   you considered to be indicative of unfair treatment
18:23:05 21   on behalf of the United States. Obviously, you
18:23:08 22   can't do that tomorrow, but I think it would be

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18:23:10 1   important for us to have very specific discussion,
18:23:14 2   references to those, and equally, I think given
18:23:17 3   that during that same timeframe there have been
18:23:20 4   other WTO or NAFTA panel reports, you should refer
18:23:27 5   to those as well, and indicate what the results
18:23:31 6   were so that we have a full picture of not just
18:23:34 7   those that you view as being unfavorable but of the
18:23:38 8   totality, and I think you will have to bear in mind
18:23:41 9   that there are reports where probably both sides
18:23:45 10   are crying victory, and you better be fairly
18:23:50 11   specific about that too. So we have a complete
18:23:53 12   understanding of the WTO and the NAFTA proceedings
18:23:59 13   throughout that period and what conclusions you
18:24:03 14   draw from what particular orders.
18:24:07 15   Thank you.
18:24:10 16   MR. LANDRY: Just a clarification,
18:24:12 17   Professor de Mestral, when you say other WTO, are
18:24:15 18   we talking within the softwood lumber dispute?
18:24:23 19   ARBITRATOR MESTRAL: Within the softwood
18:24:24 20   but including Byrd.
18:24:26 21   MR. LANDRY: We will make a list so you
18:24:28 22   know what is there.
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18:24:30 1   ARBITRATOR MESTRAL: The complete set in
18:24:32 2   any way related to softwood lumber.
18:24:36 3   MR. LANDRY: We will do that, sir.
18:24:39 4   PRESIDENT VAN DEN BERG: Any procedural
18:24:40 5   or administrative matters at this point in time?
18:24:45 6   Then we recess until tomorrow morning at
18:24:47 7   9:00.
18:25:12 8   MR. CLODFELTER: I didn't know there
18:25:13 9   would be an open question. After claimants finish

18:25:18 10   their presentation tomorrow, your plan would be to
18:25:21 11   proceed how?
18:25:22 12   PRESIDENT VAN DEN BERG: We have to walk
18:25:23 13   through the legislative history, and then
18:25:26 14   thereafter we have the closing submissions.
18:25:31 15   Because originally we had planned the Q&A time, but
18:25:36 16   we thought it was better to insert it as we have
18:25:40 17   done it today, the questions into the opening
18:25:43 18   statements. For that reason opening statements
18:25:45 19   were longer but that is due to the Tribunal and not
18:25:49 20   to counsel, and that we also have the opportunity
18:25:53 21   of seeing your responses in the post-hearing
18:25:56 22   briefs.
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18:26:00 1   MR. CLODFELTER: So the thought would be
18:26:02 2   immediately following the conclusion of claimants'
18:26:04 3   opening presentation, we go to the walk through and
18:26:08 4   then immediately to --
18:26:11 5   PRESIDENT VAN DEN BERG: I think at that
18:26:12 6   point in time we will give you time to prepare your
18:26:15 7   notes so that you can make a closing statement.
18:26:24 8   Is that agreeable to the parties?
18:26:27 9   MR. LANDRY: That is fine by the
18:26:28 10   claimants.
18:26:31 11   PRESIDENT VAN DEN BERG: We will check
18:26:32 12   with you whether all of the questions have been
18:26:35 13   asked at least to the extent that you were able to
18:26:37 14   answer them. We will have a final check on the
18:26:40 15   list of questions and see whether anything has been
18:26:45 16   remaining.
18:26:46 17   There is one additional point this

18:26:49 18   morning, could you identify at the end of the
18:26:52 19   hearing the key questions. The Tribunal is a
18:26:55 20   little bit reluctant. We may say this question may
18:27:00 21   need not be addressed because we know enough, that
18:27:06 22   is one thing, but to put it the other way --

18:27:12 1   MR. CLODFELTER: That is really what I
18:27:14 2   meant anyway, to exclude questions where you have
18:27:15 3   heard enough.
18:27:19 4   PRESIDENT VAN DEN BERG: Then recess
18:27:21 5   until tomorrow morning at 9:00.
18:27:24 6   (Whereupon, at 6:27 p.m., the hearing was
18:27:26 7   recessed, to reconvene at 9:00 the following day.)
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