

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

BETWEEN

- - - - -	x
CANFOR CORPORATION,	:
Claimant/Investor,	:
and	:
UNITED STATES OF AMERICA,	:
Respondent/Party.	:
- - - - -	x Volume 2

Thursday, January 12, 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 9:08 a.m., before:

PROFESSOR ALBERT JAN VAN DEN BERG
PROFESSOR ARMAND DE MESTRAL
MR. DAVIS R. ROBINSON

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

09:08:40 2 PRESIDENT VAN DEN BERG: Can we go on
09:08:55 3 record for day two in the hearing on the
09:08:58 4 preliminary question.
09:09:00 5 Before we start, I have the usual
09:09:02 6 question, are there any matters of procedural or
09:09:04 7 administrative nature you would like to raise?
09:09:07 8 Mr. Landry, your side?
09:09:09 9 MR. LANDRY: I just have one correction
09:09:12 10 for the record and clarification. Beside that,
09:09:15 11 nothing. Do you want me to?
09:09:17 12 PRESIDENT VAN DEN BERG: Yes, please.
09:09:18 13 MR. LANDRY: I don't have the exact page
09:09:20 14 reference in the transcript, it relates to some
09:09:23 15 questioning from Professor de Mestral relating to
09:09:26 16 NAFTA and WTO cases, and I wanted to make it clear

09:09:30 17 for the record, even though I will provide the
09:09:35 18 summary that Professor de Mestral asked for at the
09:09:40 19 end of the hearing yesterday, but it turns out that
09:09:42 20 the number I used of 24 is actually 23, because I
09:09:48 21 was not aware that the de minimis determination
09:09:53 22 that was made by -- or the calculation that results

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09:09:55 1 in de minimis that was made by the DOC in the
09:09:59 2 latest remand determination by the DOC has not been
09:10:03 3 ruled upon yet by the Chapter 19 panel. I am not
09:10:07 4 even sure when that is expected. I can find that
09:10:10 5 out, and I will make a notice of that when I do the
09:10:13 6 review.

09:10:14 7 Just for the record, so everybody is
09:10:17 8 aware of which determinations we are talking about,
09:10:20 9 it was -- it will take me a second here, but it was
09:10:22 10 the preliminary countervailing duty determination,
09:10:26 11 the WTO panel decision on that; the preliminary
09:10:29 12 critical circumstances determination, the WTO panel
09:10:32 13 ruling on that.

09:10:34 14 In relation to the final countervailing
09:10:37 15 duty determination, the WTO decisions were the
09:10:43 16 panel report, the appellate body, the Section 129
09:10:49 17 panel report, the Section 129 appellate body
09:10:55 18 report; and on the final countervailing duty
09:10:58 19 determination in relation to Chapter 19, it was the
09:11:01 20 Chapter 19 original decision and the four remand
09:11:07 21 decisions on redeterminations; and then going to
09:11:12 22 the next one, which is the final antidumping, it

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09:11:15 1 was the final -- sorry, the panel report of the

09:11:19 2 WTO, the appellate body report of the WTO on the
09:11:24 3 Chapter 19 side, it was the Chapter 19 decision,
09:11:27 4 and the three remands, and there are -- there is
09:11:33 5 still a fourth ongoing, but that is not included in
09:11:36 6 that.

09:11:36 7 And then, of course, the final ITC
09:11:39 8 injury, threat of injury, it is the WTO panel
09:11:44 9 report and -- and this was another correction I had
09:11:48 10 to make -- the one I was referring to was indeed
09:11:51 11 the section 129 report that came down November 15
09:11:54 12 of 2005, and on the Chapter 19 side, it was the
09:12:00 13 original Chapter 19 decision and the remands and
09:12:06 14 the ECC.

09:12:14 15 I might add, sorry, I understand the
09:12:17 16 preliminary CVD determination and critical
09:12:21 17 circumstances determination also went to the
09:12:24 18 appellate body, but what I will do to make it clear
09:12:27 19 is that we will prepare as requested by Professor
09:12:32 20 de Mestral a chart showing the cases.

09:12:36 21 PRESIDENT VAN DEN BERG: If it may be of
09:12:37 22 assistance, apparently there is a chart, two charts

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09:12:40 1 on the web site of the Government of Canada. I am
09:12:52 2 also looking to the United States, are they aware
09:12:54 3 of that web site of the Government of Canada, and
09:12:58 4 they have two charts, two tables, actually, one
09:13:02 5 about the Chapter 19 proceedings and one about the
09:13:05 6 WTO proceedings.

09:13:06 7 Now, I do not know whether they are
09:13:08 8 complete or not or up-to-date, but for the actual
09:13:13 9 decisions for WTO, I think that at least what I
09:13:17 10 did, I went to the WTO web site because that looks

09:13:21 11 to me more original as source material, but perhaps
09:13:27 12 you could simply look at that table because that
09:13:32 13 would be of assistance to you, and see whether that
09:13:34 14 table is in your view correct?

09:13:37 15 MR. LANDRY: I will, and my colleagues
09:13:39 16 will look at that, that are more familiar with
09:13:40 17 that, to make sure we have the exact references for
09:13:46 18 Professor de Mestral and the exact number, which
09:13:49 19 always causes me a bit of concern. I will say for
09:13:51 20 the record, in my discussion yesterday, I was not
09:13:56 21 referring to the Byrd Amendment.

09:14:02 22 ARBITRATOR MESTRAL: And just to clarify□
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09:14:03 1 on my side, I am not pressing you to give me a
09:14:07 2 summary of every one of these, but to indicate what
09:14:10 3 in each of these cases you feel would lead us to
09:14:17 4 decide that we should take jurisdiction, what
09:14:20 5 aspect.

09:14:23 6 MR. LANDRY: Assuming I have my numbers
09:14:25 7 right, 21 out of the 23, we say they were
09:14:28 8 non-compliant. We will inform you why they were
09:14:31 9 non-compliant, whether it is international or
09:14:35 10 domestic law, if that helps.

09:14:38 11 PRESIDENT VAN DEN BERG: Anything else on
09:14:39 12 the procedural, Mr. Landry?

09:14:42 13 MR. LANDRY: No, that is the last item we
09:14:44 14 have.

09:14:45 15 PRESIDENT VAN DEN BERG: Then I turn to
09:14:45 16 the United States. Is there any item, Ms. Menaker?

09:14:52 17 MS. MENAKER: Just one item. We do have
09:14:54 18 a copy of the CFTA, pursuant to the Tribunal's

09:14:58 19 request, we have copies for the Tribunal and for
 09:15:00 20 claimants' counsel, whenever you would like us to
 09:15:03 21 distribute it, and we were able to do a Compare
 09:15:07 22 write between Chapter 19 of the CFTA and Chapter 19□

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09:15:11 1 of the NAFTA, so we have copies of them.

09:15:16 2 PRESIDENT VAN DEN BERG: I am impressed
 09:15:18 3 by the work you have done so quickly. Can you hand
 09:15:21 4 it over now, because it might be helpful if we have
 09:15:24 5 questions?

09:15:26 6 MS. MENAKER: Sure.

09:16:48 7 PRESIDENT VAN DEN BERG: Ms. Menaker, we
 09:16:51 8 discussed where the corresponding articles could be
 09:16:55 9 found. Chapter 19 of NAFTA is the same as Chapter
 09:16:59 10 19 of the CFTA, but I think the investment part,
 09:17:03 11 that was a difference in numbering of three
 09:17:05 12 articles, or two. I recall you pointing that out
 09:17:11 13 yesterday. Could you please help us?

09:17:22 14 MS. MENAKER: Financial services I
 09:17:23 15 believe is Chapter 17 and investment is Chapter 14,
 09:17:28 16 if I have that correct. And one of the other
 09:17:56 17 numbering differences is Chapter 18 is
 09:18:00 18 state-to-state dispute resolution.

09:21:15 19 (Pause.)

09:21:21 20 PRESIDENT VAN DEN BERG: Thank you very
 09:21:22 21 much.

09:21:23 22 Then I think we can proceed with the□

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09:21:25 1 opening statement by the claimants. I think,
 09:21:28 2 Mr. Mitchell, it is now your turn.

3 OPENING STATEMENT BY CLAIMANTS

09:21:30 4 MR. MITCHELL: Thank you, Mr. President.
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09:21:34 5 The focus of my submission is on the
09:21:37 6 proper or the correct interpretation of Article
09:21:42 7 1901(3), and the textual and other considerations
09:21:47 8 which, on the one hand, support the claimants'
09:21:50 9 interpretation, and correspondingly those textual
09:21:54 10 and other considerations which demonstrate that the
09:21:58 11 United States submission cannot prevail.

09:22:01 12 I am mindful that the Tribunal has read
09:22:03 13 the transcripts of the Canfor hearing and all of
09:22:06 14 the material that has been filed here, so I am
09:22:09 15 going to endeavor not to be unduly repetitive of
09:22:15 16 what has already been stated, and in that regard, I
09:22:18 17 may, in my oral submissions, not respond to some
09:22:22 18 matters that the United States has raised in their
09:22:25 19 oral submissions to the extent that those have
09:22:28 20 already been fully canvassed and fully responded to
09:22:31 21 in our written material, and in that regard, an
09:22:35 22 example is the submissions with regard to the UPS

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09:22:39 1 abandoned argument which I think is sufficiently
09:22:42 2 canvassed in our written material.

09:22:46 3 I am hopeful that in the course of my
09:22:48 4 remarks, I am able to anticipate and respond to
09:22:51 5 some of the questions the Tribunal has posed,
09:22:56 6 subject of course to our ability to clarify in our
09:22:59 7 post-hearing submission.

09:23:01 8 My first observation before addressing
09:23:05 9 specifically the interpretation to be given to
09:23:11 10 Article 1901(3) is that the essence of the United
09:23:16 11 States's position is that Article 1901(3) is a
09:23:20 12 jurisdictional provision which bars recourse to

09:23:25 13 dispute resolution under Chapter 11 for any matter
09:23:29 14 that in any way touches upon antidumping or
09:23:34 15 countervailing duty matters.

09:23:36 16 And yet, when one looks at the provision,
09:23:40 17 one is compelled to note that on its face it does
09:23:43 18 not mention jurisdiction, it does not mention
09:23:46 19 Chapter 11, it does not mention Chapter 11 dispute
09:23:50 20 settlement or indeed dispute settlement at all, and
09:23:54 21 is not on its face drafted in a manner that would
09:23:59 22 appear to be a choice-of-forum clause like Article

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09:24:03 1 2005 or a reservation clause as those clauses are
09:24:06 2 drafted throughout the treaty.

09:24:08 3 My second point, which should be clear by
09:24:11 4 now, is that this claim has to be put in its
09:24:14 5 context. The claim is not about measuring the
09:24:19 6 United States's conduct against its municipal
09:24:22 7 standards. As Mr. Landry has already noted, when
09:24:25 8 the United States conduct is measured against those
09:24:29 9 standards or other international standards, it has
09:24:32 10 repeatedly been found wanting, but the essence of
09:24:36 11 these claims is that they challenge conduct which
09:24:38 12 has been arbitration, discriminatory,
09:24:40 13 discretionary, abusive and politically motivated,
09:24:45 14 which ignores its municipal obligations, which
09:24:49 15 floats or ignores the rulings of properly
09:24:52 16 constituted tribunals, so as to undermine Chapter
09:24:56 17 19 dispute resolution, and which has targeted
09:25:00 18 investors like the claimants and so utterly failed
09:25:01 19 to meet the standards under which the United States
09:25:05 20 has committed itself under Chapter 11. These
09:25:07 21 claimants have taken the extraordinary step of

09:25:10 22 bringing these proceedings because of the□
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09:25:12 1 extraordinary circumstances that give rise to them.

09:25:18 2 The importance of this case to the

09:25:21 3 claimants and to dispute resolution under NAFTA

09:25:22 4 generally cannot be understated. This is nothing

09:25:25 5 less than a case about whether the United States

6 will be held to account for its failure to comply

09:25:29 7 with its treaty obligations and the harm caused by

09:25:30 8 a breach of them.

09:25:32 9 My submissions proceed in this way. I

09:25:34 10 first set out the proper interpretation of Article

09:25:40 11 1901(3). I will then review the textual and other

09:25:44 12 factors that support the interpretation I espouse,

09:25:48 13 and I will conclude with some observations on how

09:25:51 14 the claimants' interpretation is consistent the

09:25:53 15 object and purpose of the treaty, and that the U.S.

09:25:56 16 interpretation undermines it.

09:25:59 17 Let me turn to the proper interpretation.

09:26:03 18 We say that Article 1901(3) means nothing more and

09:26:09 19 nothing less than that no provision of any Chapter

09:26:12 20 of the NAFTA other than Chapter 19 shall be

09:26:16 21 interpreted as imposing a duty or a responsibility

09:26:20 22 or an obligation on a NAFTA party to do something□
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09:26:25 1 or not do something, such as amend or not amend,

09:26:28 2 that party's countervailing or antidumping duty law

09:26:32 3 as those terms are specifically defined in Article

09:26:37 4 1902 sub 1, and 1904 sub 2. The reference in our

09:26:43 5 materials is paragraph 126 and 127 of our initial

09:26:46 6 memorial, at paragraph 26 of our subsequent

09:26:50 7 submission.

09:26:51 8 I have several points as to why this is
09:26:54 9 the correct interpretation. My first point is
09:26:58 10 based on the plain meaning, we say, of the terms
09:27:01 11 actually used in Article 1901(3), and we join issue
09:27:07 12 with the United States on that plain meaning and
09:27:11 13 say that the United States's interpretation of what
09:27:15 14 the plain meaning is cannot be sustained, whereas
09:27:20 15 that sustained by the claimants is supported by the
09:27:23 16 plain language when read in context.

09:27:27 17 The starting point is this: On its face,
09:27:30 18 Article 1901(3) is confined in its application to
09:27:34 19 the specifically defined phrase antidumping duty
09:27:38 20 law and countervailing duty law. The use of that
09:27:43 21 phrase manifests a deliberate choice and a clear
09:27:47 22 statement of the intention of the parties that the

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09:27:50 1 operation of Article 1901(3) was limited in ambit
09:27:55 2 to the subject matter specifically defined in
09:27:59 3 Article 1902, namely, the parties' antidumping duty
09:28:04 4 laws and countervailing duty laws.

09:28:06 5 If I could just pause for a moment on
09:28:10 6 Article 1902. In Article 1911, we had some
09:28:25 7 discussion of this yesterday, there is a definition
09:28:28 8 of domestic law which begins with the words for the
09:28:31 9 purposes of Article 1905 means, and so there is a
09:28:36 10 qualifier for the purposes of 1905 with respect to
09:28:40 11 domestic law. In 1904 sub 2, which is the second
09:28:50 12 place that antidumping duty law and countervailing
09:28:56 13 duty law, 1904 sub 2, in the fifth line, there is
09:29:04 14 again this phrase, for this purpose, the
09:29:07 15 antidumping consists of -- interesting that it is

09:29:12 16 consists of rather than includes or means, I note
09:29:16 17 that, but in 1902, the definition of antidumping
09:29:20 18 law and countervailing duty law is not confined.
09:29:26 19 It is not -- for the purposes of Article 1902,
09:29:30 20 antidumping duty law means.

09:29:36 21 And so, in 1901 sub 3, we have the
09:29:45 22 provision that is centrally at issue in this□

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09:29:50 1 objection, and the immediately following provision
09:29:54 2 defines antidumping law and countervailing duty law
09:30:01 3 without limitation to the provisions of Article
09:30:06 4 1902.

09:30:07 5 PRESIDENT VAN DEN BERG: Mr. Mitchell,
09:30:08 6 may I ask a question on this point? You rightly
09:30:11 7 pointed out that 1911 and 1904(2) use the words for
09:30:20 8 the purposes of, which appears to limit the
09:30:24 9 definition to the use of that article.

09:30:33 10 MR. MITCHELL: That is an interpretation,
09:30:37 11 yes.

09:30:40 12 PRESIDENT VAN DEN BERG: If you look at
09:30:41 13 1902, to paragraph 1, I understand your submission
09:30:45 14 to be that since the words for the purposes of are
09:30:50 15 lacking, it has a more general application --

09:30:55 16 MR. MITCHELL: Correct.

09:30:56 17 PRESIDENT VAN DEN BERG: You submit it
09:30:57 18 also applies then to the word law appearing two
09:31:01 19 times in 1901(3).

09:31:06 20 MR. MITCHELL: I would say the definition
09:31:09 21 in 1902(1) applies to 1901(3).

09:31:16 22 PRESIDENT VAN DEN BERG: 1902 paragraph□

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09:31:18 1 1, in its entirety, because a sentence preceding
09:31:23 2 the definition, which reads, each party reserves
09:31:26 3 the right to apply its antidumping law and
09:31:28 4 countervailing duty law to goods imported from the
09:31:33 5 territory of any other party, more or less a scope
09:31:39 6 provision. Immediately thereafter the text says
09:31:42 7 what is to be understood by antidumping duty law
09:31:47 8 and countervailing duty law.

09:31:48 9 Could it be that that definition actually
09:31:51 10 is also for the purposes of, and I use deliberately
09:31:56 11 the words for the purposes of, although they are
09:31:58 12 not appearing here, for the purposes of the first
09:32:01 13 sentence of this paragraph?

09:32:05 14 MR. MITCHELL: Certainly it is for the
09:32:09 15 purposes of the first sentence of that paragraph.
09:32:12 16 I think the question is, is it limited only to the
09:32:17 17 first sentence of that paragraph? And then the
09:32:21 18 question would be why then is that same phrase used
09:32:25 19 in the general provisions but with apparently no
09:32:30 20 definition being given to it?

09:32:33 21 It would seem odd if the general
09:32:37 22 provision, which states that general provisions□

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09:32:46 1 respecting the chapter, used a phrase that then in
09:32:50 2 the second obligation or the second article in the
09:32:54 3 chapter sets out the general right to apply and
09:32:57 4 amend in certain circumstances. I am unable to
09:33:02 5 fathom why the phrase in 1901(3) ought to be given
09:33:08 6 a different definition than is given in what is
09:33:12 7 another general provision in Article 1902 sub 1.

09:33:21 8 PRESIDENT VAN DEN BERG: Let me add a
09:33:22 9 layer of complexity then. 1901 paragraph three

09:33:28 10 talks about imposing other obligations, and if you
 09:33:32 11 read 1902, it does not concern so much an
 09:33:35 12 obligation as a right, the right to retain your
 09:33:38 13 law.

09:33:39 14 MR. MITCHELL: I will come to this in my
 09:33:41 15 submission, but I disagree with that proposition.

09:33:45 16 PRESIDENT VAN DEN BERG: It is simply
 09:33:47 17 trying to test various propositions, but I have not
 09:33:51 18 taken a position at this point in time. Let me be
 09:33:56 19 very clear on that.

09:33:58 20 MR. MITCHELL: Let me foreshadow what I
 09:34:00 21 say 1902 does. It is correct that 1902 sub 1
 09:34:05 22 reserves a right to apply, and I note the apply²¹

09:34:11 1 provision which distinguishes from the law, and I
 09:34:14 2 will come to that in my submission as well, but
 09:34:18 3 1902 sub 2 clearly is a provision that imposes
 09:34:28 4 obligations on a party with respect to its law, and
 09:34:34 5 I will come to this and explain it in more detail,
 09:34:37 6 but I say there are two clear provisions in Chapter
 09:34:42 7 19 that impose obligations on the NAFTA parties
 09:34:47 8 with respect to their law in the sense that we
 09:34:52 9 define -- in the sense in which we interpret
 09:34:58 10 Article 1901(3). Those are 1902 sub 2, which
 09:35:03 11 imposes obligations on a party with respect to
 09:35:06 12 their law if they wish to amend it, and 1904 sub
 09:35:13 13 15, which imposes specific, and in the case of
 09:35:17 14 Mexico, extensive obligations to amend their law.

09:35:28 15 PRESIDENT VAN DEN BERG: I can see that,
 09:35:29 16 but 1902(2) is half a right and half an obligation.
 09:35:35 17 It is a mixed proposition because it states I have

09:35:40 18 a right by a state and then is qualified.

09:35:46 19 MR. MITCHELL: That is the way we look at
09:35:47 20 it.

09:35:49 21 PRESIDENT VAN DEN BERG: Further
09:35:49 22 questions because I can see my fellow arbitrators□
22

09:35:53 1 are quite excited about this.

09:35:57 2 ARBITRATOR MESTRAL: Can I ask you to
09:35:58 3 comment on why 1911, the definition section,
09:36:02 4 defines antidumping and countervailing duty
09:36:06 5 statutes and domestic law in a general sense but
09:36:11 6 contains no definition of law or, if you will,
09:36:20 7 antidumping duty law or countervailing duty law?

09:36:27 8 MR. MITCHELL: I can answer that in a
09:36:29 9 preliminary way. The definition of antidumping
09:36:50 10 statutes references the statutes as defined in
09:36:54 11 Annex 1911. So if you turn to Annex 1911, what you
09:37:03 12 see is an extensive definition of what is meant by
09:37:10 13 antidumping statute as applicable to each of the
09:37:13 14 parties. So in Canada, Special Measures Act as
09:37:17 15 amended in successor statutes; in the United
09:37:21 16 States, Title VII; the Tariff Act in Mexico, the
09:37:25 17 Foreign Trade Act implementing Article 131, and the
09:37:29 18 provisions of any other act.

09:37:33 19 So 1903, which deals with the amendments
09:37:36 20 of statutes, has incorporated a shorthand
09:37:38 21 definition which is set out in Article 1911, and it
09:37:47 22 would have been unwieldy to have included like as□
23

09:37:52 1 has been done in 1902 sub 1, a shorthand definition
09:37:58 2 right within the text of the article itself.

09:38:07 3 PRESIDENT VAN DEN BERG: Mr. Robinson has
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09:38:08 4 a question.

09:38:10 5 ARBITRATOR ROBINSON: Thank you,

09:38:11 6 Mr. President.

09:38:12 7 Mr. Mitchell, I notice that in the
09:38:14 8 definition in 1911, the verb that is used is the
09:38:23 9 verb means. In 1904(2), the sentence starting for
09:38:35 10 this purpose uses the verb consists of, and I would
09:38:43 11 be interested if you think there is any difference
09:38:48 12 in the verb consist of with the verb means? And
09:38:53 13 then Article 1902(1), the verb is include, and then
09:39:05 14 there is a clause that follows it, as appropriate
09:39:12 15 for each party, and I wonder if you could provide
09:39:16 16 any edification as to the difference between the
09:39:23 17 three verbs and the qualifying clause in 1902(1),
09:39:26 18 as appropriate for each party?

09:39:31 19 MR. MITCHELL: I can offer some
09:39:32 20 observations that might be of assistance to the
09:39:35 21 Tribunal, and I think it bears going back to the
09:39:41 22 submissions in our memorials and in Mr. Landry's

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09:39:44 1 oral submissions on the Vienna Convention
09:39:47 2 interpretive principles of interpreting the words
09:39:50 3 in their context, and their context includes their
09:39:54 4 immediately surrounding context, so the use of the
09:39:57 5 words means or consists or includes is one aspect
09:40:01 6 of that context.

09:40:04 7 But while you noted in Article 1902 sub
09:40:11 8 1, the qualifying phrase as appropriate for each
09:40:15 9 party, which indicates that some things may be
09:40:18 10 appropriate for a party and some things may not be
09:40:22 11 appropriate for a party, it includes is a term that

09:40:27 12 means there may be other things that may be
09:40:30 13 encompassed in the definition, although you would
09:40:34 14 look to an adjustum generis interpretive principle
09:40:38 15 to determine what those things could be, and as we
09:40:41 16 have discussed in our written material, we say that
09:40:42 17 refers to the normative standards or the material
09:40:45 18 that informs the normative standards.

09:40:48 19 If you look to 1911, the definition of
09:40:55 20 domestic law, it uses means, but the definition
09:41:02 21 there is broader. As you noted yesterday, it
09:41:06 22 includes constitution, statutes, regulations and□
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09:41:08 1 judicial decisions, but it too, the context of the
09:41:13 2 definition of domestic law in 1911 includes the
09:41:19 3 words to the extent they are relevant. So, again,
09:41:23 4 that is an aspect of the context that has to be
09:41:26 5 taken into account in determining the relevance --
09:41:32 6 the meaning of those words, and that definition is
09:41:39 7 for the purposes of Article 1905, so it has to be
09:41:42 8 interpreted in relation to the purposes being
09:41:45 9 achieved under Article 1905.

09:41:48 10 You referred to 1904 sub 2 and the words
09:41:55 11 consists of, and in 1904 sub 2 there is the initial
09:42:03 12 words we have discussed, for this purpose, the
09:42:06 13 antidumping and countervailing duty law consists
09:42:08 14 of, but here there are two qualifiers. They are
09:42:13 15 the relevant statutes, so relevant is a qualifier;
09:42:18 16 and the second qualifier is the phrase or clause to
09:42:23 17 the extent that a court of the importing party
09:42:26 18 would rely on such materials in reviewing a final
09:42:29 19 determination of the competent investigating
09:42:32 20 authority.

09:42:35 21 So that also qualifies what for the
09:42:39 22 purposes of the panel review, based on the□
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09:42:46 1 administrative record of a final AD/CVD
09:42:54 2 determination, would be based upon.

09:42:58 3 ARBITRATOR ROBINSON: Are you arguing
09:42:59 4 that there is no difference between means and
09:43:03 5 consists of, or that there is a difference?

09:43:23 6 MR. MITCHELL: The words can be
09:43:24 7 interpreted as -- both words, means or consists of,
09:43:32 8 describe the ambit of what can be considered, but
09:43:36 9 in each case, in 1904 and in 1911, those words are
09:43:41 10 qualified by the remaining words in the clause. So
09:43:47 11 I think to answer your question, something that is
09:43:49 12 not one of the things described in either 1904 or
09:43:54 13 1911 could not be included within either
09:43:59 14 countervailing duty law or antidumping dumping law,
09:44:04 15 in the one case of 1904, or domestic law in the
09:44:08 16 case of 1911.

09:44:11 17 ARBITRATOR ROBINSON: Then to get to
09:44:12 18 Article 1902(1), the use of the verb include, if I
09:44:24 19 understand your position, you are arguing that a
09:44:31 20 determination is not included within that
09:44:33 21 definition.

09:44:35 22 MR. MITCHELL: Yes, thank you,□
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09:44:36 1 Mr. Robinson. That is an important point. Quite
09:44:40 2 clearly that is our argument, and I will come to
09:44:43 3 that more in my prepared remarks, but let me again
09:44:48 4 say, the United States said yesterday that a
09:44:51 5 determination falls within administrative practice.

09:44:57 6 That was simply a bald assertion with no
09:45:01 7 reference to any authority to support the
09:45:07 8 proposition that whether under American municipal
09:45:11 9 law or under international law, an administrative
09:45:14 10 practice -- a determination can be considered to be
09:45:19 11 administrative practice.

09:45:20 12 So we challenge the proposition that a
09:45:23 13 determination is included within administrative
09:45:26 14 practice. We say that the United States has
09:45:31 15 presented no authority whatsoever for that
09:45:33 16 proposition. And the text of Chapter 19 itself
09:45:38 17 distinguishes between administrative practice and
09:45:41 18 determination. The determination, of course, being
09:45:44 19 the outcome of a particular case, and
09:45:49 20 administrative practice falling within a listing of
09:45:56 21 materials -- a listing of sources that set out
09:45:58 22 either the normative rules to be applied to a

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09:46:02 1 particular case or the material that informs the
09:46:07 2 interpretation of those informative rules.

09:46:10 3 ARBITRATOR ROBINSON: So if I understand
09:46:11 4 it, the use of the verb include is supposed to
09:46:19 5 refer to norms in addition to those items that are
09:46:26 6 specifically listed and is not intended to mean
09:46:32 7 that the specific list is not an exhaustive list?
09:46:43 8 That is a double negative.

09:46:45 9 What I am trying to understand is the use
09:46:47 10 of the verb include would lead one to think, or
09:46:52 11 narrowly, I would think, that there are other
09:46:59 12 similar items that might fall within this
09:47:07 13 enumeration but are not specifically identified.

09:47:11 14 So if I understand what you are saying

09:47:13 15 is, the verb include is not to indicate that there
 09:47:22 16 are additional categories such as statutes,
 09:47:27 17 legislative history, regulations, administrative
 09:47:30 18 practice, judicial precedents -- for example, one
 09:47:36 19 might say a determination, and you are saying, no,
 09:47:40 20 a determination is not included, or is not
 09:47:45 21 something that might be added on, because the list
 09:47:49 22 itself is exhaustive and the include is to indicate

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09:47:54 1 the appropriateness of norms that should also be
 09:48:01 2 read into the sentence, rather than additional
 09:48:06 3 items such as those specifically listed.

09:48:13 4 MR. MITCHELL: I want to be careful so I
 09:48:17 5 don't misapprehend your question or give you an
 09:48:19 6 answer that is not responsive.

09:48:24 7 Using the example of a determination, our
 09:48:28 8 case is that a determination does not fall within
 09:48:31 9 this definition. A determination is a horse of a
 09:48:34 10 different color from the things that are listed in
 09:48:39 11 Article 1902 sub 1. So the use of the word
 09:48:45 12 includes, I don't say, although I can't say what
 09:48:51 13 additional things might be, I don't say that
 14 relevant statutes, legislative history,
 09:48:56 15 regulations, administrative practice and judicial
 09:48:58 16 precedents are exhaustive of the things that might
 09:49:01 17 be considered antidumping duty law or
 09:49:05 18 countervailing duty law, I don't say that.

09:49:08 19 The United States hasn't pointed to
 09:49:11 20 anything other than the determination which they
 09:49:13 21 say falls within that definition, and we say it
 09:49:15 22 does not.

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09:49:17 1 what I say is that if the United States
09:49:21 2 was to come forward and say this is antidumping and
09:49:23 3 duty law, that wasn't one of the enumerated things,
09:49:31 4 they would have to identify how that thing that was
09:49:34 5 identified was sufficiently similar, *adjustum*
09:49:41 6 *generis*, to fall within that definition.

09:49:45 7 I hope that is responsive.

09:49:48 8 ARBITRATOR ROBINSON: Yes. Thank you
09:49:49 9 very much.

09:49:52 10 PRESIDENT VAN DEN BERG: I am afraid,
09:49:53 11 Mr. Mitchell, that I have a follow-up question, a
09:49:56 12 difference not this time between law and
09:49:59 13 administrative practice, but this time between law
09:50:02 14 and statute.

09:50:06 15 Can you help us again in refreshing our
09:50:09 16 memories? Because I look to Article 1902, and in
09:50:16 17 the first paragraph as we have seen there is a
09:50:19 18 definition of antidumping law and countervailing
09:50:24 19 duty law to include as appropriate for each party,
09:50:27 20 relevant statutes, legislative history, et cetera.

09:50:31 21 Then you go to 2, you see reservation of
09:50:36 22 the right of a party to change or modify its

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09:50:39 1 antidumping duty law or countervailing duty law.
09:50:41 2 If you pause there, you think, hey, wait a minute,
09:50:45 3 that is the same as we see in paragraph 1, the
09:50:49 4 definition. And then it goes on, provided that in
09:50:51 5 the case of an amendment to a party's antidumping
09:50:57 6 or countervailing duty statute. Statute is one of
09:50:59 7 the sources of law defined in paragraph 1, and if
09:51:03 8 you then go on to the next article, 1903, the

09:51:07 9 review of the statutory amendment, that is also on
09:51:11 10 its face limited to statute.

09:51:15 11 Could you enlighten the Tribunal about
09:51:17 12 the difference between law and statute? I give you
09:51:22 13 a particular example. If there is a certain
09:51:28 14 statute, but the courts interpret the statute in a
09:51:33 15 certain way, then you have what they call in the
09:51:38 16 common law, at least my understanding is, case law,
09:51:43 17 which may expound or limit the application of a
09:51:46 18 certain law.

09:51:48 19 How does this all tie into 1902 or 1903?

09:51:58 20 MR. MITCHELL: Again, I will answer as
09:52:00 21 best I can at the present time. If you take the
09:52:08 22 case law example, if a court, the Supreme Court of

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09:52:13 1 the United States, were to overturn a line of
09:52:17 2 cases, interpreting a particular provision of a
09:52:23 3 countervailing duty statute, that Supreme Court of
09:52:29 4 the United States judgment, which would have the
09:52:34 5 effect of -- I am not sure how it is done in the
09:52:39 6 United States, arguably changing the law, there is
09:52:45 7 some view that may interpret that as simply
09:52:48 8 declaring what the law has always been and the
09:52:51 9 prior interpretations were wrong, but that would
09:52:55 10 not fall within the limitations in 1902 sub 2
09:53:01 11 because it is not -- I am going to pause there.

09:53:07 12 There is a possibility it may, but it may
09:53:10 13 be that that is one interpretation, that such a
09:53:16 14 court decision may not -- reinterpreting the law
09:53:21 15 may not fall within 1902 sub 2. So I would want to
09:53:26 16 reflect on that.

09:53:29 17 PRESIDENT VAN DEN BERG: When you talk
09:53:29 18 about an interpreting decision, the Supreme Court,
09:53:34 19 the emerging line of cases, would that not fall
09:53:35 20 under the definition of judicial precedent as
09:53:38 21 appearing in 1902 paragraph 1?

09:53:48 22 MR. MITCHELL: I am not sure it would, □
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09:53:50 1 and again, that is the distinction between the body
09:53:52 2 of case law, precedent, and an individual decision,
09:53:59 3 and so the question would be what is the nature of
09:54:04 4 an individual judgment of the Court interpreting a
09:54:09 5 provision of the countervailing duty statute, for
09:54:16 6 instance. And again, I want to reiterate, that is
09:54:21 7 removed from what we are dealing with, which is
09:54:24 8 determination.

09:54:26 9 PRESIDENT VAN DEN BERG: We are trying --
09:54:28 10 I am afraid that I have to reread the book of -- I
09:54:32 11 think it is Rawls' General Theory of Law, to
09:54:39 12 understand this. A long time ago, my college
09:54:45 13 course it is called Philosophy of Law, in this
09:54:49 14 country I think it is called General Theory of Law.
09:54:53 15 I take it one step further and then I stopped, I
09:54:56 16 must admit, because I am puzzled.

09:55:00 17 You see this right for amendment, and
09:55:03 18 then there are notification obligations about an
09:55:08 19 amendment, but that is limited to a statute. And
09:55:11 20 also, if you look under D of paragraph 2, Article
09:55:18 21 2, you see that the amendment of the statute should
09:55:21 22 not be inconsistent with the GATT and a number of □
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09:55:25 1 principles under the NAFTA.

09:55:28 2 MR. MITCHELL: Yes.
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09:55:29 3 PRESIDENT VAN DEN BERG: Now, that
09:55:30 4 applies to amendment of a statute. But what if the
09:55:32 5 Supreme Court of the United States would render a
09:55:36 6 decision interpreting AD/CVD law that is
09:55:41 7 inconsistent with the GATT or NAFTA, what would
09:55:47 8 happen next? Can the other NAFTA parties invoke
09:55:54 9 1903 or anything else?

09:56:34 10 (Pause.)

09:56:35 11 MR. MITCHELL: Again, Mr. President,
09:56:36 12 obviously the complexity of this language poses
09:56:40 13 many vexing interpretive challenges, and that makes
09:56:46 14 it worthwhile to take a step back and remember or
09:56:50 15 recall that this chapter, and what we are dealing
09:56:54 16 with here again focuses on the party's municipal
09:56:59 17 law.

09:57:05 18 So whether -- I am not in a position to
09:57:09 19 say whether there would be a right of review under
09:57:12 20 1903 on -- for a reversal of a judicial precedent,
09:57:20 21 although on its face that seems to reflect
09:57:24 22 statutes, but I would say it wouldn't have any

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09:57:28 1 impact on, obviously, what we say the claimants are
09:57:34 2 under the international principles.

09:57:38 3 PRESIDENT VAN DEN BERG: I am aware that
09:57:39 4 nothing would turn on it for our present purposes
09:57:43 5 but the exercise for us is to understand in the
09:57:45 6 final analysis what is meant by the word law in
09:57:49 7 paragraph C of 1901, and I think that Mr. Robinson
09:57:55 8 has another question.

09:57:57 9 ARBITRATOR ROBINSON: I would like to
09:57:57 10 pursue, upon further reflection, the use of the

09:58:04 11 verb include in the following manner.

09:58:07 12 Suppose, for example, as I understand
09:58:10 13 U.S. law, sometimes I get very, very murky on our
09:58:16 14 own U.S. system, but suppose the United States Code
09:58:25 15 of Federal Regulations had a regulation that called
09:58:30 16 upon various departments of the government, in
09:58:33 17 pursuit of that regulation, to promulgate rules
09:58:45 18 pursuant to that regulation. In your view, would
09:58:48 19 those departmental rules be included under
09:58:55 20 regulations?

09:59:04 21 MR. MITCHELL: That is -- the question
09:59:08 22 would be whether those rules would fall within the

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09:59:13 1 words as appropriate for each party --

09:59:17 2 ARBITRATOR ROBINSON: No. What I am
09:59:18 3 trying to do, and I am not in any way attempting to
09:59:22 4 trap you, or anything of that nature, I am simply
09:59:25 5 trying to figure out regulations, and then I was
09:59:28 6 going to go into administrative practice because I
09:59:32 7 am not sure I understand what is meant there by the
09:59:36 8 term practice.

09:59:38 9 I might have asked, for example,
09:59:42 10 statutes. In the United States we have joint
09:59:45 11 resolutions of the Congress. They are not
09:59:51 12 statutes. The president would not ordinarily sign
09:59:59 13 those.

10:00:06 14 what I am trying to figure out is whether
10:00:09 15 the verb include is supposed to mean that one can
10:00:12 16 take each of these categories, relevant statutes,
10:00:16 17 legislative history, regulations, administrative
10:00:19 18 practice, and judicial precedents, and then figure
10:00:23 19 out what each of those terms means, and if there

10:00:26 20 are subsidiary items such as a rule that is adopted
10:00:32 21 by a department subject to a regulation, would that
10:00:39 22 rule be viewed as included in the term regulation?□

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10:00:45 1 And I am trying, I am struggling
10:00:49 2 enormously with the issue of whether a
10:00:53 3 determination falls under administrative practice,
10:00:55 4 which to me is made even more complicated by not
10:00:59 5 understanding what the practice is in
10:01:03 6 administrative practice.

10:01:20 7 MR. MITCHELL: In some respects it is
10:01:22 8 easy to say what subcategories of these defined
10:01:26 9 things are. I use the example of Canada, and I
10:01:30 10 look at relevant statutes, and we have a federal
10:01:32 11 system, so we have federal statutes and provincial
10:01:36 12 statutes both of which would fall within the
10:01:39 13 definition of statutes to the extent they met the
10:01:43 14 other requirements in the provisions.

10:01:44 15 There are some things that may not fall
10:01:48 16 within the definition, so in each case you would
10:01:50 17 have to look at what is meant by regulation, does
10:01:53 18 that have a defined and common meaning in Canada,
10:01:58 19 Mexico and the United States? If not, how are we
10:02:02 20 meant to interpret that provision? And then in
10:02:06 21 each case say, is this thing I am looking at to try
10:02:10 22 and figure out whether it is -- falls within the□

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10:02:21 1 definition of what is the common element that goes
10:02:23 2 through each -- it sets forth the normative rules
10:02:28 3 to be applied, or is material that informs those
10:02:35 4 normative rules to be applied.

10:02:37 5 ARBITRATOR ROBINSON: So then to go to
10:02:38 6 administrative practice, what in your view falls
10:02:42 7 within administrative practice?
10:02:51 8 You are arguing that a determination is
10:02:55 9 not supposed to fall under administrative practice.
10:02:57 10 In your view, what does fall under administrative
10:03:01 11 practice?

10:03:05 12 MR. MITCHELL: In my submission,
10:03:08 13 administrative practice, in the context, certainly,
10:03:10 14 of U.S. trade law, refers to the normative
10:03:13 15 standards that are established by a body of prior
10:03:16 16 administrative decisions. It doesn't refer to the
10:03:24 17 application of a set of rules in a particular case.

10:03:30 18 ARBITRATOR ROBINSON: So administrative
10:03:31 19 practice is a normative -- is a normative phrase
10:03:37 20 rather than a regulatory phrase? It is not
10:03:46 21 supposed to have significance in terms of the
10:03:50 22 application of whatever administrative practice is. □

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10:04:03 1 MR. MITCHELL: I am not sure I
10:04:04 2 understand.

10:04:05 3 ARBITRATOR ROBINSON: I am not sure I
10:04:06 4 understand either, to be honest with you. I am
10:04:07 5 simply trying to understand what in your view
10:04:09 6 administrative practice includes, and what it
10:04:12 7 excludes.

10:04:19 8 MR. MITCHELL: It includes a body of
10:04:20 9 rules that will be applied that have developed as a
10:04:22 10 result of prior administrative practice. It
10:04:26 11 excludes the application of those rules in a
10:04:31 12 particular case under review.

10:04:34 13 ARBITRATOR ROBINSON: All right, fine,

10:04:34 14 thank you.

10:04:36 15 PRESIDENT VAN DEN BERG: Mr. Mitchell, I

10:04:37 16 apologize.

10:04:39 17 If I follow your line of argument that
10:04:41 18 the definition of law as is used in paragraph three
10:04:50 19 of Article 1901 is to be found in 1902. If I take,
10:04:58 20 then, the whole paragraph which applies to imposing
10:05:01 21 obligations, and if I look to 1902, paragraph 1, as
10:05:07 22 we have seen earlier is not an obligation but is a □

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10:05:11 1 right, and paragraph 2 starts with also is a right
10:05:15 2 concerning law, but then the obligation is only
10:05:18 3 with respect to statute. Now, is it correct to
10:05:23 4 infer from your line of reasoning that then in that
10:05:27 5 case I have to read law in Article 1901 paragraph
10:05:31 6 three as meaning statute?

10:05:36 7 MR. MITCHELL: No. If I can ask you to
10:05:39 8 turn to Article 1904(15). In order to achieve the
10:05:48 9 objectives of this Article, the parties shall amend
10:05:51 10 their antidumping and countervailing duty statutes
10:05:54 11 and regulations and other statutes and regulations
10:06:05 12 to do the various things that are described and
10:06:14 13 then to make the further amendments that are set
10:06:17 14 out in Article -- in annex 1904(15).

10:06:32 15 PRESIDENT VAN DEN BERG: But is that
10:06:33 16 limited, that to paragraph 15 of 1904 to the
10:06:36 17 situations that existed at the time of entry into
10:06:39 18 force of the agreement, of the NAFTA, or is this a
10:06:44 19 continuing obligation?

10:06:49 20 MR. MITCHELL: The obligation to amend?

10:06:51 21 PRESIDENT VAN DEN BERG: Yes.

10:06:52 22 MR. MITCHELL: In the manner set out
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10:06:54 1 in --

10:06:56 2 PRESIDENT VAN DEN BERG: 15.

10:06:58 3 MR. MITCHELL: 1904(15). I will take
10:07:02 4 that under advisement, but my preliminary answer is
10:07:06 5 that is a continuing obligation to amend the
10:07:09 6 statutes and regulations in that manner.

10:07:12 7 PRESIDENT VAN DEN BERG: Assuming that it
10:07:13 8 is, statutes and regulations, prima facie
10:07:20 9 encompasses less than what is defined in paragraph
10:07:24 10 1 of 1902.

10:07:35 11 MR. MITCHELL: That may be.

10:07:39 12 PRESIDENT VAN DEN BERG: So have you then
10:07:41 13 to read 1901 paragraph three for the word law,
10:07:46 14 statutes and regulations?

10:07:48 15 MR. MITCHELL: In our submission, no.
10:07:56 16 Examined contextually, 1902 sub 1, following
10:08:01 17 immediately after 1901 sub 3 provides the
10:08:06 18 definition for -- no, let me --

10:08:57 19 (Pause.)

10:08:58 20 Obviously, the examination of this
10:09:00 21 chapter is something that is being done in a great
10:09:04 22 deal of depth and with a great deal of

10:09:06 1 consideration. And we had not advanced that
10:09:08 2 argument in our written materials, but it is -- it
10:09:17 3 may be possible that that is the manner in which
10:09:20 4 1903 sub 1 should be interpreted.

10:09:26 5 PRESIDENT VAN DEN BERG: I am not trying
10:09:27 6 to create an argument. What I am trying to do is
10:09:30 7 to see what it brings us, what you submit to us, at

10:09:35 8 least what we think at this point in time might be
 10:09:39 9 the consequence of your submission. We may be
 10:09:44 10 wrong in the reasoning, and please correct us if we
 10:09:48 11 are wrong in the reasoning, but we simply try to
 10:09:51 12 follow up what you are saying to us, and if you
 10:09:53 13 tell us, well, look, you have to look for the
 10:09:57 14 definition of law in 1901 paragraph 3 to 1902, then
 10:10:03 15 these might be the consequences.

10:10:05 16 You know the position of the United
 10:10:07 17 States, the United States. The United States has
 10:10:08 18 said, well, look, all these definitions are
 10:10:10 19 inapplicable to 1901(3). I am simply looking to
 10:10:15 20 the United States. Is that a fair summary or do I
 10:10:18 21 do injustice to the submissions made yesterday?
 10:10:22 22 There were three definitions set in 1901 -- I'm

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10:10:24 1 sorry, 1902 paragraph 1, the 1902 paragraph 4, and
 10:10:28 2 1905(1) in conjunction with 1911, and my
 10:10:32 3 understanding of the United States yesterday was
 10:10:34 4 all these three definitions are not relevant for
 10:10:38 5 1901 paragraph 3?

10:10:41 6 MS. MENAKER: That is correct. We say
 10:10:42 7 that they are not a definition. We had alternative
 10:10:46 8 arguments, of course.

10:10:48 9 PRESIDENT VAN DEN BERG: But I don't want
 10:10:48 10 to mischaracterize your arguments again.

11 MS. MENAKER: Thank you.

12 PRESIDENT VAN DEN BERG: So that's --
 10:10:53 13 Mr. Mitchell said that's their position and your
 10:10:54 14 position is, no, says the definition of law you
 10:10:56 15 find in 1902 paragraph 1, and what the Tribunal

10:11:00 16 during the last half hour tries to find out, what
10:11:03 17 is the logical consequence of that position. And
10:11:08 18 of course, there are all kind of digressions about
10:11:09 19 what is administrative practice and statutes and
10:11:13 20 regulations or statutes without regulations, and
10:11:15 21 case law. Anyway, it is seeing where it would
10:11:19 22 bring us.□

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10:11:20 1 MR. MITCHELL: And we will certainly
10:11:21 2 reflect further on that in our post-hearing
10:11:24 3 submissions to the extent that we can provide
10:11:26 4 additional assistance to the Tribunal in following
10:11:32 5 through the consequences of our interpretation.

10:11:38 6 PRESIDENT VAN DEN BERG: Fair enough.
10:11:39 7 But I might remind you of one thing, and here
10:11:46 8 perhaps I should turn to Mr. Bettauer because he,
10:11:49 9 in his closing yesterday -- I don't know whether
10:11:51 10 Mr. Bettauer did it on purpose or not, he said,
10:11:55 11 well, look -- he describes 1901 paragraph 3 and
10:12:00 12 says well, look, you, Tribunal, you don't have
10:12:02 13 jurisdiction over antidumping law or
10:12:04 14 countervailing -- no, sorry, strike it.

10:12:06 15 what he said, in my recollection is you
10:12:08 16 don't have jurisdiction of antidumping and
10:12:11 17 countervailing duty matters. I don't know whether
10:12:14 18 he used it on purpose, the word "matters. But it
10:12:18 19 struck me because I thought well, wait a moment, we
10:12:20 20 changed from "law" to "matters.

10:12:23 21 Mr. Bettauer, is it correct that you said
10:12:25 22 that yesterday in your closing, your final closing?□

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10:12:29 1 MR. BETTAUER: It is correct that I said
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10:12:30 2 that.

10:12:32 3 PRESIDENT VAN DEN BERG: And you said it,
10:12:32 4 was it on purpose?

10:12:34 5 MR. BETTAUER: It was intended to be a
10:12:36 6 broad sweep because of the -- with respect to
10:12:41 7 relationship. So we had the -- it was intended to
10:12:44 8 encompass claims with respect to AD/CVD law. So I
10:12:52 9 was using a summing up clause.

10:12:55 10 PRESIDENT VAN DEN BERG: That was the way
10:12:56 11 the United States reads this, but as with respect
10:12:59 12 to antidumping duty law and countervailing duty
10:13:03 13 law. Read it context, it means the Tribunal has no
10:13:08 14 jurisdiction over antidumping and countervailing
10:13:12 15 duty law matters.

10:13:15 16 MR. BETTAUER: Right.

17 PRESIDENT VAN DEN BERG: And that's
18 different because you focus on law --

19 MR. MITCHELL: Indeed, we do, and in
10:13:16 20 fact, if you look through United States submissions
10:13:18 21 from the beginning, there are the use of various
10:13:23 22 terms, antidumping duty matters, antidumping duty

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10:13:28 1 claims, antidumping duty sphere, an array of claims
10:13:34 2 or an array of framing that, and what we understood
10:13:36 3 from that is that the United States' position has
10:13:39 4 been that a Chapter 11 Tribunal has no jurisdiction
10:13:44 5 by virtue of 1901(3) over any Chapter 11 claim that
10:13:49 6 has any connection to the antidumping duty sphere
10:13:53 7 in the United States or CVD sphere.

10:13:58 8 PRESIDENT VAN DEN BERG: Are we moving
10:13:59 9 from "matters" to "sphere"?

10:14:06 10 MR. MITCHELL: And again, "universe.
10:14:08 11 Professor de Mestral used the word "universe. And
10:14:12 12 that is not what the treaty says. It comes back to
10:14:15 13 our essential point. The Tribunal's task is to
10:14:17 14 interpret the words in their context and the
10:14:20 15 drafters used the word "law. And perhaps that might
10:14:28 16 be useful for me to turn to address the issue of
10:14:33 17 the deliberate selectin of the word 'law' in that
10:14:39 18 provision.

10:14:41 19 PRESIDENT VAN DEN BERG: There is one
10:14:42 20 last question and then we have the Tribunal for at
10:14:48 21 least 15 minutes.

22 ARBITRATOR ROBINSON: I promise. But□
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10:14:50 1 this I would like to ask of the United States just
10:14:54 2 to make sure I understand. The United States is
10:14:56 3 saying that the word "law" in 1901(3) is not the
10:15:02 4 same as law or antidumping and countervailing duty
10:15:09 5 law in 1902(1), 1904(2), 1911, 1905(1). Now, what
10:15:19 6 I would like to ask is, 1905(1) and 1911, there is
10:15:26 7 means, which is a limiting verb. 1904(2) uses the
10:15:36 8 verb "consists of" which one could say is also
10:15:47 9 limiting. So one could put those two in the one
10:15:49 10 category whereas 1902(1) uses the verb "include.
10:15:55 11 which is not exhaustive. So why is the United
10:16:03 12 States against the argument of Mr. Mitchell that
10:16:08 13 1901(3) law should be interpreted as meaning law as
10:16:16 14 defined in 1902(1), because your view, if I
10:16:23 15 understand it, is more expansive than Canfor's, and
10:16:28 16 yet 1902(1) is more expansive than 1911 in
10:16:34 17 combination with 1905(1), and more expansive than
10:16:41 18 1904(2) which includes the words "consist of.

10:16:44 19 So you are not of the view that the
10:16:49 20 definition in 1902(1), even though it uses the verb
10:16:55 21 "includes. You do not argue that that is the
10:16:59 22 definition we should use for 1901(3)?

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10:17:10 1 PRESIDENT VAN DEN BERG: International
10:17:12 2 arbitration is a flexible process. At least the
10:17:15 3 opening statement for the claimants, there is a
10:17:18 4 question, so if the United States minds to answer
10:17:21 5 this question, it would be appreciated.

10:17:25 6 MS. MENAKER: Certainly. Our arguments
10:17:29 7 are in the alternative. So if one were to use the
10:17:33 8 definition in Article 1902(1), then certainly that
10:17:38 9 would still serve the same purpose as we are
10:17:42 10 suggesting Article 1901(3) serves, because, as you
10:17:47 11 say first, the definition in Article 1902(1) is not
10:17:51 12 exhaustive, but even if it were, the term
10:17:55 13 "antidumping countervailing duty determination" we
10:17:59 14 think is encompassed within the term
10:18:01 15 "administrative practice. And even furthermore,
10:18:06 16 even if the definition of AD/CVD law was even more
10:18:11 17 limited and only said statute, our other arguments
10:18:16 18 which I won't repeat here still stand, because an
10:18:19 19 obligation imposed on a party with -- it would
10:18:24 20 still be an obligation imposed on a party with
10:18:27 21 respect to its statute.

10:18:28 22 To the extent that you hinder a party's

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10:18:31 1 ability to apply its statute, you are imposing an
10:18:35 2 obligation on the party with respect to its
10:18:37 3 statute. So all of those arguments still stand and

10:18:41 4 our initial argument was just to say that there is
10:18:45 5 no reason as a starting point to import that
10:18:48 6 definition because if it were a general definition
10:18:51 7 that applied chapterwide, it would have been
10:18:54 8 defined in Article 1911. It is not, and that these
10:18:57 9 are all definitions for the purposes of those
10:19:01 10 specific articles.

10:19:03 11 ARBITRATOR ROBINSON: I thank you, and I
10:19:05 12 will be quiet.

10:19:06 13 MS. MENAKER: Thank you.

10:19:07 14 PRESIDENT VAN DEN BERG: Mr. Mitchell,
10:19:08 15 you were at a point still about the proper
10:19:10 16 interpretation of 1901(3), and you were about to
10:19:17 17 tell us what the various meanings of law as used in
10:19:20 18 NAFTA. Is that correct where you were, before this
10:19:23 19 exchange between you and the Tribunal?

10:19:27 20 MR. MITCHELL: Yes. I told you
10:19:28 21 yesterday, 17 pages. I will move to page four.

22 PRESIDENT VAN DEN BERG: Please proceed. □
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10:19:36 1 MR. MITCHELL: The area that I want to
10:19:37 2 turn to, and it picks up on Ms. Menaker's remarks
10:19:44 3 and it's the parties chose the word "law" in
10:19:48 4 Article 1901 sub 3. They could have chosen an
10:19:54 5 array of different words. They could have chosen
10:19:59 6 to use the word "measure" and had they used the
10:20:11 7 word "measure. Maybe there might be some force to
10:20:15 8 the United States's argument and nowhere in the
10:20:24 9 United States' submission have they addressed that
10:20:30 10 distinction between the deliberate selection of the
10:20:33 11 word "law" in Article 1901(3), and the use of the
10:20:41 12 term "measure. Now, I don't want to dwell at

10:20:53 13 length on the difference between a law and a
10:20:55 14 measure, but obviously --

10:20:58 15 PRESIDENT VAN DEN BERG: That is in
10:20:59 16 Article 201.

10:21:03 17 MR. MITCHELL: Article 201, and the
10:21:04 18 Chapter 11 tribunals have considered this, and you
10:21:08 19 can find the discussion in our original memorial at
10:21:11 20 paragraphs -- starting at paragraphs -- sorry, of
10:21:14 21 our second memorial at paragraphs 15 and 16. The
10:21:21 22 cases have commented on the breadth of the word

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10:21:26 1 "measure" and we say that it is -- in its meaning
10:21:35 2 it refers to any act attributable to a state
10:21:40 3 according to the applicable laws of state
10:21:44 4 responsibility. And a law is but a subset, and a
10:21:51 5 narrow subset of a measure. And so in Lowen, for
10:22:01 6 instance, the term "measure" was described, quote,
10:22:03 7 as embracing any action which affects the rights of
10:22:07 8 any person coming within the application of the
10:22:09 9 relevant treaty provision.

10:22:14 10 ARBITRATOR ROBINSON: Might I just ask in
10:22:17 11 Chapter -- in Article 201, "measure" is defined as
10:22:22 12 including, it doesn't use the word "means" or
10:22:26 13 "consists of. It says measure includes any law,
10:22:32 14 regulation, procedure, requirement or practice.

10:22:35 15 In your view, does "measure" include a
10:22:38 16 determination?

10:22:43 17 MR. MITCHELL: Yes. A determination is a
10:22:46 18 measure because it is an act attributable to the
10:22:54 19 state for which the state has responsibility. Just
10:22:57 20 like in Lowen the judgment of the Mississippi court

10:23:00 21 was a measure for which the state has
10:23:05 22 responsibility. And so --□

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10:23:13 1 ARBITRATOR ROBINSON: What I am trying,
10:23:14 2 again, just to make sure I understand, if it is
10:23:18 3 possible, is that Article 1902(1), "law" includes
10:23:25 4 "measure. And 201 uses the same verb. "Measure"
10:23:32 5 refers to "law. 1902(1) refers to relevant
10:23:38 6 statutes. "Measure" does not refer to legislative
10:23:43 7 history. "Measure" does refer to regulation.
10:23:49 8 "Measure" applies to procedure, which is not in
10:23:53 9 1902(1). "Measure" includes requirement, which is
10:23:57 10 not in 1902(1). "Measure" includes practice,
10:24:02 11 whereas 1902(1) refers to administrative practice.

10:24:09 12 So why would "measure. In your view, as
10:24:15 13 defined in Article 201 include a determination,
10:24:20 14 whereas the definition of antidumping law and
10:24:24 15 countervailing duty law in Article 1902(1) not
10:24:30 16 include a determination?

10:24:34 17 MR. MITCHELL: Because a law as defined
10:24:36 18 in 1902 sub 1 is a normative standard. A measure
10:24:40 19 as defined in Article 201 is an act for which a
10:24:45 20 state is internationally responsible, and that
10:24:50 21 is -- includes determinations.

10:24:57 22 ARBITRATOR ROBINSON: Fine. Thank you.□

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10:24:59 1 MR. MITCHELL: It may assist the
10:25:03 2 Tribunal, and we quoted it, I believe, at
10:25:05 3 paragraphs 15 and 16. The Ethyl case makes the
10:25:12 4 case that the term "measure" is nonexhaustively
10:25:19 5 defined and it is a broad definition.

10:25:24 6 But that leads to what we say is a

10:25:28 7 critical weakness in the United States' argument.
 10:25:33 8 You heard Mr. McNeill talk at length about in
 10:25:38 9 particular in supporting his interpretation two
 10:25:41 10 articles, Article 1607 and Article 2103, and if you
 10:25:50 11 turn up Article 1607, you will see that the
 10:26:19 12 drafters in this case have used a different
 10:26:24 13 structure. Here, the drafters say, except for this
 10:26:31 14 Chapter, et cetera, no provision of this agreement
 10:26:35 15 shall impose any obligation on a party regarding
 10:26:38 16 its immigration measures. And so, in Chapter 16,
 10:26:48 17 the parties were at pains to use the broader term
 10:26:52 18 "measures.

10:26:58 19 Then if you can turn up Article 2103, you
 10:27:17 20 will see that it is drafted in these terms except
 10:27:25 21 to set out in this Article, nothing in this
 10:27:28 22 agreement shall apply to taxation measures, not

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10:27:32 1 taxation laws.

10:28:16 2 If I can just refer back to a point, and
 10:28:19 3 I want to go back and I apologize for taking this
 10:28:23 4 out of context but it is responsive to the
 10:28:25 5 discussion we were having about the distinction
 10:28:28 6 between "law" in 1902 sub 1 and "measure. And
 10:28:33 7 Mr. Robinson asked me the question why a
 10:28:36 8 determination could be a measure and not a law, and
 10:28:39 9 I would just ask you to flag footnote 14 which is
 10:28:44 10 on page nine of my -- of Canfor's rejoinder, and
 10:28:55 11 there is a reference there to the Washington
 10:29:01 12 composite and the Virginia composite in the
 10:29:05 13 drafting history, and it makes clear that the
 10:29:09 14 United States was prepared to agree to the

10:29:11 15 definition of "measure" in Article 201, provided
10:29:16 16 that it was understood that the word "measure" was
10:29:20 17 agreed to on the condition the definition of
10:29:23 18 measure included single actions, so something like
10:29:28 19 a determination. The idea was an individual
10:29:30 20 wrongful act of a state falls within the definition
10:29:34 21 of "measures. I apologize for taking that out of
10:29:38 22 context, but I hope that is helpful.□

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10:29:59 1 I don't expect I am going to be a huge
10:30:02 2 amount longer, subject to the Tribunal's wishes.
10:30:18 3 And so what I have just highlighted is
10:30:20 4 the distinction between 1607, 2103 and 1901(3), the
10:30:24 5 use of "measure" versus the use of "law. And
10:30:28 6 nowhere is that, the reason for that distinction,
10:30:31 7 explained by the United States.

10:30:39 8 My third point on the textual
10:30:41 9 interpretation relates to, and it is being
10:30:47 10 canvassed in various ways through the discussion,
10:30:49 11 so I am not going to dwell on it at length, but
10:30:52 12 it's the differ manner in which where the parties
10:30:55 13 intended to exclude a particular topic from
10:30:58 14 coverage under the treaty, they were able to do so
10:31:05 15 clearly.

10:31:06 16 And I do think it is worthwhile referring
10:31:09 17 to a few of the examples, and what one sees when
10:31:17 18 one looks at these examples that I am going to
10:31:19 19 refer to is that 1901 sub 3 is anything but clear
10:31:24 20 in terms of having the effect the United States
10:31:27 21 contends. And so, there are some clear examples of
10:31:33 22 straightforward exclusions from coverage in the□

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10:31:36 1 treaty.

10:31:38 2 Article 1101 is the first example. It
 10:31:45 3 says, this chapter applies to measures adopted or
 10:31:48 4 maintained by a party relating to, so it defines
 10:31:52 5 the scope. And then Article 1101 sub 3: this
 10:31:59 6 chapter does not apply to measures adopted or
 10:32:03 7 maintained by a party if they are covered by 14.
 10:32:06 8 So, very clear example of a manner or a drafting
 10:32:09 9 technique when the parties wanted to exclude
 10:32:12 10 something from dispute resolution coverage.

10:32:16 11 I have already referred to 1607 and 2103,
 10:32:20 12 which say that essentially nothing in this
 10:32:23 13 agreement shall apply to a particular kind of
 10:32:27 14 measures. That is another clear drafting technique
 10:32:31 15 that could have been used.

10:32:35 16 The president, and I believe this was in
 10:32:39 17 the course of the United States's submissions --
 10:32:42 18 there was reference to the exclusions respecting
 10:32:45 19 competition under Chapter 15, and there was
 10:32:50 20 reference to Article 1501 and Article 1501 sub 3
 10:32:57 21 which says no party may have recourse to dispute
 10:33:00 22 settlement under this agreement or for any matter□

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10:33:03 1 arising under this article. That was a clear
 10:33:07 2 example of excluding dispute resolution for a
 10:33:12 3 party.

10:33:12 4 If one turns to the notes to the treaty,
 10:33:16 5 note 43 -- another crystal clear example of the
 10:33:25 6 manner in which they have done so, and similarly,
 10:33:29 7 there has already been reference -- I think I made
 10:33:32 8 reference yesterday to Article 1138 sub 2 in an

10:33:35 9 exchange I had with Mr. Robinson.

10:33:39 10 So those examples are all clear examples
10:33:42 11 of manners in which an exclusion is clearly
10:33:46 12 drafted. And we say Article 1901 sub 3 is very
10:33:55 13 different. It is tied to the defined terms
10:33:59 14 antidumping laws and CVD laws. It is not tied to
10:34:05 15 conduct. And we say had the parties intended to
10:34:08 16 exclude conduct that otherwise would violate the
10:34:14 17 obligations under Articles 1105 or 1102 simply
10:34:15 18 because it has a connection to antidumping or CVD,
10:34:19 19 they would have done so more clearly.

10:34:24 20 I am not going to -- my fourth factor we
10:34:27 21 have already covered in the exchange of questions,
10:34:30 22 but it relates to the fact that obligations are

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10:34:35 1 imposed on AD and CVD law in Articles 1902 and
10:34:41 2 1904. And so when you look at the treaty and you
10:34:47 3 see that 1901 sub 3 says no provisions of any other
10:34:51 4 chapter of this agreement shall be construed as
10:34:54 5 imposing obligations on the law, the implication is
10:34:58 6 that something in Chapter 19 will impose
10:35:00 7 obligations on the law, and we say that is found in
10:35:03 8 1902 and 1904.

10:35:11 9 ARBITRATOR ROBINSON: Mr. Mitchell, I
10:35:12 10 have -- again, I am struggling with all of this.
10:35:16 11 Article 1138(2), just as an example, is a negative.
10:35:25 12 It says "shall not apply. That is the technique
10:35:32 13 that was used in that case. 1901(3) appears,
10:35:44 14 subject to the views of the party, appears to be a
10:35:49 15 double negative technique in that it says no
10:35:55 16 provision but then it has except for, which one
10:36:01 17 might equate to a double negative or -- well, I

10:36:06 18 don't know, maybe it is not a double negative, it's
10:36:09 19 a negative with a positive. I don't know how quite
10:36:13 20 you would...

10:36:22 21 And the difference in that technique, and
10:36:25 22 the effect of it is obviously important for us, and

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10:36:33 1 I would be interested in your views as to how the
10:36:40 2 fact that 1901(3) is not a simple negative but has
10:36:49 3 the negative of no provision, but then it is
10:36:54 4 subject to an exception clause, what is the effect
10:37:00 5 of that.

10:37:00 6 And then I might also add at some point
10:37:04 7 before we finish, I would like to ask the two
10:37:07 8 parties about the exception for Article 2203, entry
10:37:12 9 into force, and the wording of Article 2203, and
10:37:18 10 how that is to be read in the section. But for the
10:37:21 11 time being, I'd be very interested in the
10:37:24 12 technique, the difference between, again, let's say
10:37:28 13 1138(2) which is a straight negative, and 1901(3),
10:37:34 14 which appears to be maybe not a double negative,
10:37:37 15 but a negative with a positive exception.

10:37:42 16 MR. MITCHELL: I am not sure I can give a
10:37:44 17 clear -- or an answer that will be satisfactory to
10:37:47 18 you to that question because the provisions deal
10:37:50 19 with different things. So 1138 excludes dispute
10:37:56 20 settlement and it does so in a clear way. The
10:38:04 21 provisions of 1901(3) provide that other provisions
10:38:13 22 of the agreement won't be construed as imposing

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10:38:17 1 obligations with respect to a domestic law. And I
10:38:23 2 am not sure I understand the import of the

10:38:27 3 question to --

10:38:28 4 ARBITRATOR ROBINSON: well, I guess what
10:38:29 5 I am struggling with is that the verb in 1901(3) is
10:38:35 6 a passive verb, whereas Article 1138(2) is an
10:38:47 7 active verb, "shall not apply. This is a passive
10:38:52 8 verb, no provision "shall be construed. Are we
10:38:59 9 supposed to make any difference as a result of the
10:39:02 10 use of the active verb in one case, and the passive
10:39:06 11 verb in another?

10:39:10 12 MR. MITCHELL: well, I think that
10:39:12 13 highlights the distinction not so much between 1901
10:39:17 14 sub 3 and 1138, but the distinction between 1901(3)
10:39:22 15 and 1607. I hope I am being responsive, but if you
10:39:32 16 turn to 1607, there you have "no provision of this
10:39:38 17 agreement shall" impose any obligation, whereas in
10:39:42 18 1901 sub 3, you have the phrase "no provision shall
10:39:49 19 be construed as" imposing obligations.

10:39:57 20 And in a preliminary way to answer one of
10:40:00 21 the questions posed by the Tribunal, are we to
10:40:03 22 attribute different interpretations to the fact□

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10:40:06 1 that there are different negotiating teams, I am
10:40:11 2 not familiar with that as a principle of treaty
10:40:14 3 interpretation, and it would create enormous
10:40:19 4 difficulties to say that we are not going to
10:40:21 5 interpret the treaty as a unified whole and we are
10:40:24 6 going to not presume that when different words are
10:40:28 7 used, different things are meant, and we are going
10:40:31 8 to look behind or, in a case like this, speculate,
10:40:37 9 absent any reference in the negotiating history to
10:40:39 10 the rationale for the distinction.

10:40:43 11 So I do say that you should look at the

10:40:47 12 difference in phraseology and say that that is a
10:40:51 13 significant matter. And it is significant in, we
10:40:56 14 say, saying that where someone is called upon to
10:41:01 15 interpret a provision of the treaty, they should
10:41:06 16 not interpret it in a manner that will impose
10:41:10 17 obligations on the party to do something or not do
10:41:14 18 something to their municipal CVD or AD law.

10:41:28 19 I hope that is somewhat responsive,
20 Mr. Robinson.

10:41:31 21 ARBITRATOR ROBINSON: Yes, thank you very
10:41:32 22 much. □

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10:42:15 1 MR. MITCHELL: I want to briefly address
10:42:20 2 this question of "with respect to. And the fact
10:42:25 3 that different words were used, apply in the
10:42:33 4 context of taxation measures, it's -- the word used
10:42:36 5 is "apply. In the context of immigration measures,
10:42:42 6 the context is, or the word used is "regarding. And
10:42:45 7 in the context of 1901(3), the words are obligation
10:42:50 8 with respect to the defined phrase.

10:42:58 9 Our submissions are contained within our
10:43:00 10 memorials. I just only want to emphasize this
10:43:04 11 point, and it's, again, it comes back to the task
10:43:07 12 always being to apply the Vienna Convention
10:43:10 13 principles of treaty interpretation, and look at
10:43:13 14 the context, and here the immediate context of with
10:43:17 15 respect to is the word "obligations" and the words
10:43:21 16 "countervailing duty law" and "antidumping law. So
10:43:24 17 with respect to is a relational concept of imposing
10:43:28 18 an obligation on those municipal laws.

10:43:45 19 ARBITRATOR ROBINSON: I am sorry,
10:43:46 20 Mr. Mitchell, might I ask on that score whether the

10:43:49 21 French and the Spanish text of the NAFTA have any
10:43:54 22 bearing on this subject, not only with respect to □
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10:44:01 1 "with respect to. But also with respect to
10:44:08 2 "regarding" -- or should I say regarding
10:44:14 3 "regarding" or with respect to "with respect to"?

10:45:03 4 MR. MITCHELL: My French and Spanish
10:45:05 5 being perhaps the equivalent of Ms. Menaker's
10:45:10 6 French, or worse by far, I apologize for that.

10:45:27 7 I am not going to address, and I
10:45:28 8 apologize for not being able to immediately address
10:45:33 9 the words "with respect to. And "regarding," but I
10:45:36 10 do note the difference between the English and the
10:45:39 11 French text with respect to the word "law. And in
10:45:43 12 the -- in 1901(3), the French word for law
10:45:50 13 is "legislacion.". The norm -- the general power or
10:45:56 14 authority of rulemaking. And so I think that's a
10:46:14 15 -- the legislacion supports the notion of not a
10:46:16 16 determination in an individual case. And so I
10:46:20 17 think you may find that that strengthens the
10:46:23 18 claimant's interpretation.

10:46:26 19 PRESIDENT VAN DEN BERG: What is the
10:46:27 20 Spanish text?

10:46:30 21 MR. MITCHELL: I apologize. I don't have
10:46:31 22 the Spanish text. □
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10:46:35 1 PRESIDENT VAN DEN BERG: Do you have the
10:46:37 2 text of the Spanish?

10:46:44 3 MS. MENAKER: Yes, I do have it, and the
10:46:46 4 Spanish text says "disposicion"-- excuse me, I am
10:46:55 5 nervous now that my language skills are on trial,

10:47:02 6 but "disposiciones juridicas. which my
10:47:03 7 understanding, the translation would be "legal
10:47:05 8 provisions. So, quite different. And we do have
10:47:08 9 the translations for the "with respect to. And the
10:47:11 10 Spanish text is "con respecto a" which I think
11 roughly translates "with respect to. While in the
10:47:15 12 French text it is "relativment a" which I would
10:47:17 13 roughly translate as "relating to.

10:47:32 14 PRESIDENT VAN DEN BERG: Thank you,
10:47:33 15 Ms. Menaker.

10:47:42 16 MR. MITCHELL: Mr. President, lastly, I
10:47:49 17 want to turn to the implications of the American
10:47:54 18 approach, and there has been --

10:47:56 19 PRESIDENT VAN DEN BERG: Excuse me,
10:47:57 20 before we do that, you had just finished your
10:48:01 21 presentation about the textual and contextual?

10:48:06 22 MR. MITCHELL: Yes. □
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10:48:07 1 PRESIDENT VAN DEN BERG: I had still one
10:48:09 2 question on the textual, and that simply goes back
3 to basics, if I may call it that way.

10:48:16 4 Do you agree that with respect to Article
10:48:18 5 1901 paragraph 3 that the words "provision of any
10:48:22 6 other chapter" can include the provisions of
10:48:27 7 Chapter 11?

10:48:33 8 MR. MITCHELL: The phrase, "the provision
10:48:34 9 of any other chapter. Refers to all of the chapters
10:48:40 10 of the treaty except Chapter 19. The task is to --
10:48:47 11 the remaining words "impose obligation with respect
10:48:49 12 to" --

10:48:51 13 PRESIDENT VAN DEN BERG: Yes, but as a
10:48:53 14 textual exercise, if it is mentioned, "provision of

10:48:56 15 any other chapter of this agreement. That may
10:49:01 16 include, as the case may be, provisions in Section
10:49:07 17 A of Chapter 11 and Section B of Chapter 11.

10:49:16 18 MR. MITCHELL: If properly interpreted
10:49:17 19 those provisions had the effect described in the
10:49:22 20 remainder of the clause.

10:49:24 21 PRESIDENT VAN DEN BERG: Sure, I
10:49:25 22 understand that. But the starting point here is □
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10:49:27 1 that this may include provisions in Sections A
10:49:30 2 and/or B of Chapter 11.

10:49:37 3 MR. MITCHELL: It, as a matter of
10:49:38 4 drafting, could include those. As a matter of
10:49:41 5 fact, we say it does not. That is, what we say is
10:49:46 6 that the provisions of Section A and Section B do
10:49:49 7 not do those things, but you can look to Sections A
10:49:52 8 A and Sections B of Chapter 11 to determine whether
10:49:56 9 they do.

10:49:58 10 PRESIDENT VAN DEN BERG: One step
10:49:58 11 further. Sections A and B of Chapter 11, do they
10:50:03 12 contain obligations for a state?

10:50:08 13 MR. MITCHELL: Section A clearly contains
10:50:10 14 obligations. Section B contains a mechanism for
10:50:14 15 the vindication of the rights of investors. I, and
10:50:24 16 again, I don't mean to be being semantical, but
10:50:28 17 that is not what obligation is meant -- means under
10:50:31 18 the treaty. A mechanism by which a party can
10:50:37 19 adjudicate their rights is not an obligation as
10:50:42 20 that is understood.

10:50:44 21 PRESIDENT VAN DEN BERG: I see your
10:50:45 22 point, but may I ask you to go then, to turn to □

10:50:47 1 Section B of Chapter 11. And how the mechanism
10:50:54 2 works -- please help me if I am wrong here -- the
10:51:03 3 starting point in the mechanism is 1122 paragraph
10:51:06 4 1; is that correct?

10:51:09 5 MR. MITCHELL: Assuming we are over the
10:51:12 6 conditions for --

10:51:14 7 PRESIDENT VAN DEN BERG: Yes.

10:51:15 8 MR. MITCHELL: Yes.

10:51:16 9 PRESIDENT VAN DEN BERG: But the starting
10:51:17 10 point is 1122 provided 1121 has been fulfilled.

10:51:22 11 MR. MITCHELL: Yes.

12 PRESIDENT VAN DEN BERG: And what it says
10:51:23 13 is each party consents, each party being a state
10:51:26 14 party to submission of a claim to arbitration in
10:51:29 15 accordance with the procedures set out in this
10:51:32 16 provision. That is a mechanism.

10:51:35 17 MR. MITCHELL: Yes.

10:51:36 18 PRESIDENT VAN DEN BERG: Then there comes
10:51:37 19 the investor and says, look, I take up your consent
10:51:43 20 and I also consent to the arbitration.

10:51:46 21 MR. MITCHELL: Yes.

22 PRESIDENT VAN DEN BERG: And that is --
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10:51:48 1 MR. MITCHELL: It is the conditions
10:51:50 2 precedent, 1121 sub 1, sub A.

10:51:58 3 PRESIDENT VAN DEN BERG: Once you have
10:51:59 4 that, then the arbitration agreement between the
10:52:02 5 parties is complete; is that correct?

10:52:04 6 MR. MITCHELL: Correct.

10:52:06 7 PRESIDENT VAN DEN BERG: That analysis,
10:52:07 8 and the arbitration agreement itself creates rights

10:52:11 9 and obligations; is that correct?

10:52:20 10 MR. MITCHELL: The arbitration agreement
10:52:26 11 creates -- back up a step. The arbitration
10:52:35 12 agreement creates a process by which rights and
10:52:39 13 obligations are adjudicated.

10:52:44 14 PRESIDENT VAN DEN BERG: That are the
10:52:45 15 merits, but now procedurally, because you're
10:52:48 16 talking about substance, but now procedurally can
10:52:51 17 -- simply an example -- in a NAFTA arbitration,
10:52:57 18 assume now you don't have any jurisdictional
10:52:59 19 obligation, you are somewhere in the middle of the
10:53:01 20 merits, a state party says well, why should I be
10:53:05 21 here, I resign.

10:53:08 22 MR. MITCHELL: Okay. □
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10:53:10 1 PRESIDENT VAN DEN BERG: whilst a claim
10:53:13 2 under section A is being adjudicated, is it not the
10:53:16 3 obligation of the state to stay in the arbitration
10:53:19 4 under the agreement, and not simply say, well, I
10:53:22 5 walk out.

10:53:24 6 MR. MITCHELL: I am not prepared to go
10:53:25 7 that far without considering that further. There
10:53:31 8 may be a consequence upon the state for choosing
10:53:36 9 not to participate in an arbitration to adjudicate
10:53:41 10 its responsibilities to the investor. Whether the
10:53:53 11 state has a continuing responsibility to
10:53:57 12 participate is enforceable by the investor --

10:54:00 13 PRESIDENT VAN DEN BERG: An arbitration
10:54:02 14 agreement as such creates rights and obligations
10:54:06 15 for the parties to the arbitration agreement,
10:54:11 16 doesn't it?

17 MR. MITCHELL: And again, I go back to my
 10:54:13 18 answer. It creates a procedural mechanism by which
 10:54:16 19 those --

10:54:16 20 PRESIDENT VAN DEN BERG: No, no, no,
 10:54:18 21 that -- excuse me, they are two different things,
 10:54:21 22 one is the rights and obligations which have to be

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10:54:24 1 adjudicated when we talk about the merits or the
 10:54:28 2 substance and those are Section A, possibly.

3 MR. MITCHELL: Yes.

10:54:31 4 PRESIDENT VAN DEN BERG: But the other
 10:54:32 5 thing is procedurally, there are rights and
 10:54:35 6 obligations of the parties.

10:55:06 7 MR. MITCHELL: The reason for my pause in
 10:55:09 8 responding is the word you are pressing me on,
 10:55:20 9 obligations, may impart with it various meanings,
 10:55:29 10 and so I have tried to give you back an answer to
 10:55:41 11 what I say that arbitration agreement does, which
 10:55:44 12 is create the mechanism, and then that triggers
 10:55:46 13 your next question, well, well, is that an
 10:55:49 14 obligation, and the answer to that is, well, that
 10:55:53 15 depends on what an obligation means.

10:55:58 16 And so I don't mean to be parsing the
 10:56:03 17 words too finely, but I think that is the answer to
 10:56:08 18 the question.

10:56:11 19 PRESIDENT VAN DEN BERG: Thank you.
 10:56:14 20 How many more minutes do you anticipate?

10:56:17 21 MR. MITCHELL: Less than five.

10:56:19 22 PRESIDENT VAN DEN BERG: Okay, please

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10:56:20 1 proceed. Take your time. If you need more, then
 10:56:23 2 we will break and you can continue, because we have

10:56:28 3 interrupted you to a fairly large degree.

10:56:32 4 MR. MITCHELL: I am really just going to
10:56:34 5 turn to my concluding remarks and those relate to
10:56:40 6 the implications of the American approach, and this
10:56:44 7 relates to the question of whether that approach
10:56:47 8 advances or hinders the attainment of the objects
10:56:50 9 and purposes of the treaty.

10:56:54 10 It is our position that denying a remedy
10:56:58 11 for a violation of the minimum standard of
10:57:01 12 treatment in customary international law cannot
10:57:06 13 foster the objective of efficient dispute
10:57:09 14 resolution. Mr. Landry in his opening referred you
10:57:14 15 to the text of some of the decisions, and in
10:57:21 16 particular the Chapter 19 decision relating to the
10:57:25 17 ITC threat of injury, and I say that is instructive
10:57:29 18 reading when one wants to consider whether the
10:57:33 19 process of effective dispute resolution is being
10:57:37 20 advanced by what is occurring.

10:57:40 21 We have said before and I will say again,
10:57:42 22 the objects and purposes of the treaty must be

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10:57:45 1 looked at as a whole. You can't parse them and say
10:57:49 2 this object refers to trade, this object refers
10:57:53 3 to -- this provision refers -- relates to effective
10:57:58 4 dispute resolution. The claimants are integrated
10:58:05 5 operations with substantial cross-border
10:58:08 6 investments and operations. They operate as
10:58:12 7 integrated traders in goods, and investors in the
10:58:22 8 United States.

10:58:23 9 The treaty should equally operate as an
10:58:25 10 integrated whole, recognizing the role of the NAFTA

10:58:34 11 is to enhance the economic integration of the three
10:58:39 12 economies by strengthening both trade and
10:58:41 13 investment.

10:58:45 14 we say that the United States approach
10:58:48 15 would provide a safe harbor for wrongful conduct
10:58:52 16 and an immunity for liability to an investor for
10:58:55 17 acts that which otherwise violate its obligations
10:58:58 18 under the treaty. It is our submission when
10:59:01 19 interpreted in context that the United States
10:59:04 20 places too much weight on the language of Article
10:59:08 21 1901(3) to suggest that in the absence of any
10:59:11 22 evidence that this is what it was intended for, it

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10:59:15 1 excludes -- excuses the United States from
10:59:19 2 responsibility to an investor for its conduct that
10:59:23 3 would otherwise violate the treaty.

10:59:27 4 we say that if we meet the standard in
10:59:29 5 respect of the conduct we complained of that is set
10:59:33 6 out in section A of Chapter 11, the political
10:59:36 7 interference, the refusal to comply with orders,
10:59:41 8 the willful misapplication of law, that conduct is
10:59:44 9 opposed to the rule of law, is not with respect to
10:59:47 10 the law, and entitles the claimants to a remedy.

10:59:52 11 There has been some discussion of this in
10:59:54 12 the panel's questioning of the United States, but
10:59:59 13 we say that it cannot be the intention that the
11:00:03 14 United States can invoke Article 1901(3) as a
11:00:07 15 defense to a claim brought by a Canadian investor
11:00:12 16 under Chapter 11, but would have no such defense to
11:00:16 17 a claim brought by an investor from a BIT state
11:00:21 18 with the United States that did not have a parallel
11:00:25 19 to Chapter 19. An investor from a state that has a

11:00:33 20 bilateral investment treaty with the United States
 11:00:37 21 that is subject to AD and CVD consequences in the
 11:00:41 22 United States, could proceed in the United States□

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11:00:46 1 domestic system before the CIT to vindicate their
 11:00:51 2 rights and proceed under the provisions of their
 11:00:54 3 bilateral investment treaty.

11:00:57 4 It can't be the case that in a treaty
 11:01:01 5 between Canada, the United States and Mexico, whose
 11:01:06 6 economies are so intertwined, whose relations are
 11:01:11 7 so close, it can't be the intent, without any
 11:01:16 8 evidence before the panel, that Canadian investors
 11:01:22 9 were intended to be treated in a manner worse than
 11:01:27 10 would be the investors of a BIT state. Yet that is
 11:01:31 11 exactly the implications of the United States'
 11:01:33 12 approach.

11:01:34 13 PRESIDENT VAN DEN BERG: Mr. Mitchell, do
 11:01:35 14 you have an example where that happens, where in a
 11:01:37 15 BIT case antidumping and countervailing duty laws
 11:01:42 16 were relied upon?

11:01:45 17 MR. MITCHELL: I can't point to an
 11:01:47 18 example where they have been -- where an investor
 11:01:51 19 has brought an investor state claim, but there is
 11:02:00 20 no reason why that could not have happened, and
 11:02:04 21 that is the consequence of the interpretation.

11:02:12 22 At the end of the day, the investors here□

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11:02:14 1 have invested hundreds of millions of dollars in
 11:02:21 2 the United States. Their investments have been
 11:02:24 3 harmed by the operation -- by the actions of the
 11:02:26 4 United States. Those harms include damage to the

11:02:29 5 investments, the harm from changes to the
11:02:32 6 operations, the harms from price pressures, various
11:02:35 7 harms suffered in addition to the amounts the
11:02:38 8 claimants have paid in duties. We say they are
11:02:41 9 entitled to show this Tribunal that the United
11:02:44 10 States has not lived up to its international
11:02:47 11 obligations under Chapter 11. We say they are
11:02:50 12 entitled to put before this Tribunal the array of
11:02:53 13 circumstances, the array of facts, and the evidence
11:02:56 14 which show that the United States has not met that
11:02:59 15 standard.

11:03:00 16 The interpretation that the United States
11:03:03 17 advances provides a safe harbor for conduct no
11:03:09 18 matter how egregious providing it has a connection
11:03:12 19 to AD and CVD law, and that in our submission you
11:03:15 20 ought not to give effect to an interpretation that
11:03:21 21 has such an effect.

11:03:27 22 Mr. President, those are our opening
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11:03:29 1 submissions, and for those reasons, it is our
11:03:33 2 submission that the United States' objection to the
11:03:37 3 Tribunal's jurisdiction must be dismissed.

11:03:41 4 PRESIDENT VAN DEN BERG: Thank you very
11:03:41 5 much, Mr. Mitchell, but unfortunately for you
11:03:43 6 probably, or not, the Tribunal has still further
11:03:46 7 questions.

11:03:53 8 Article 1901(3), is it an all or nothing
11:03:58 9 provision? And let me explain what the Tribunal
11:04:02 10 means by "all-or-nothing provision. Is it your
11:04:08 11 case that any matter relating to antidumping law or
11:04:14 12 countervailing law is within the jurisdiction of
11:04:17 13 the Chapter 11 Tribunal, or, is it not an

11:04:24 14 all-or-nothing provision in the sense that some
11:04:27 15 matters are not within the jurisdiction of the
11:04:55 16 Tribunal?

11:04:57 17 (Pause.)

11:04:58 18 PRESIDENT VAN DEN BERG: would you like
11:04:59 19 to reflect on this? And then I would break and we
20 have further questions after the break for you, and
21 mindful that we should have a break at a certain
22 point in time because I think this may carry on a

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1 little further, the questions.

11:05:10 2 And thereafter, simply for scheduling
11:05:14 3 purposes, we have our walking through the
11:05:16 4 legislative history materials. I am looking to the
11:05:19 5 United States because they are first. They are
11:05:21 6 prepared of doing that. Mr. Clodfelter.

11:05:24 7 MR. CLODFELTER: We are not sure what you
11:05:26 8 are expecting us to do.

11:05:30 9 PRESIDENT VAN DEN BERG: what we expect
11:05:31 10 you to do physically is actually take us to the
11:05:34 11 bundles where you have these legislative materials
11:05:37 12 and could you point out to us what, according to
11:05:40 13 the United States, are the documents we should take
11:05:45 14 notice of.

11:05:46 15 MR. CLODFELTER: We are prepared to do
11:05:48 16 that.

11:05:49 17 PRESIDENT VAN DEN BERG: Although I
11:05:50 18 understand your conclusion that they are not
11:05:52 19 helpful.

11:05:54 20 MR. CLODFELTER: Short presentation.

11:05:58 21 PRESIDENT VAN DEN BERG: Perhaps you

11:05:58 22 could point out in the documents why they are not
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11:06:01 1 helpful.

11:06:02 2 And same sorry, of course, for Canfor and
11:06:05 3 Terminal.

11:06:07 4 Recess for ten minutes.

11:06:09 5 (Recess.)

11:29:15 6 PRESIDENT VAN DEN BERG: Mr. Mitchell,
11:29:17 7 remember the question of the Tribunal just before
11:29:19 8 the break, which was, is Article 1901(3) an all-or-
11:29:28 9 nothing provision? And I hope during the break you
11:29:31 10 have been able to reflect on this.

11:29:34 11 MR. MITCHELL: I think I understand the
11:29:35 12 import of the question. In our submission, the
11:29:48 13 provision is not an all-or-nothing provision in
11:29:56 14 that -- let me say this. Everything that the
11:30:01 15 claimants have pled or that Terminal will plead
11:30:05 16 when it pleads a statement of claim fall within the
11:30:10 17 scope of Chapter 11 and are not excluded by Article
11:30:15 18 1901 sub 3.

11:30:22 19 Is it conceivable that at a hearing on
11:30:26 20 the merits, the Tribunal could conclude that some
11:30:30 21 aspect of the claim pled fell within an exclusion
11:30:39 22 under Article 1901 sub 3. That would be a question
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11:30:47 1 to be determined at the merits and dependent upon
11:30:51 2 the interpretation given to that provision by the
11:30:57 3 Tribunal.

11:31:06 4 PRESIDENT VAN DEN BERG: The claims as
11:31:08 5 submitted by Canfor in this case and Terminal in
11:31:12 6 its notice, according to you, are within the
11:31:22 7 purview of 1901(3) --

11:31:25 8 MR. MITCHELL: Are not within the
11:31:26 9 purview?

11:31:28 10 PRESIDENT VAN DEN BERG: Yes, yes.

11:31:33 11 Could you give me examples where
11:31:36 12 according to Canfor claims concerning antidumping
11:31:44 13 and countervailing matters would not fall within
11:31:51 14 the jurisdiction of a Chapter 11 Tribunal because
11:31:55 15 of 1901(3)?

11:32:40 16 MR. MITCHELL: Mr. Landry and I have a
11:32:41 17 different understanding of the question. Was the
11:32:43 18 question an example of a matter that would be
11:32:47 19 excluded by 1901(3)?

11:32:50 20 PRESIDENT VAN DEN BERG: Yes.

11:33:15 21 MR. MITCHELL: Because it is our position
11:33:19 22 that the matters we have pled are not excluded by
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11:33:24 1 1901(3) because they don't impose obligations with
11:33:27 2 respect to the law as we define that provision. We
11:33:31 3 haven't turned our minds to identification of a
11:33:36 4 specific provision that does impose an obligation
11:33:41 5 with respect to the law as we define it. We will
11:33:48 6 certainly address that in the post-hearing brief.

11:34:04 7 PRESIDENT VAN DEN BERG: The enactment of
11:34:05 8 an antidumping or countervailing duty law that
11:34:08 9 would violate provisions of 1902, would that fall
11:34:15 10 under 1901(3) in relation to Chapter 11?

11:34:23 11 MR. MITCHELL: So I understand the
11:34:24 12 hypothetical, a state party enacts --

11:34:28 13 PRESIDENT VAN DEN BERG: An amendment, to
11:34:30 14 be more precise.

11:34:32 15 MR. MITCHELL: Amends an existing

11:34:33 16 antidumping or CVD law not in accordance with the
 11:34:36 17 requirements of 1902 sub 2?

11:34:42 18 PRESIDENT VAN DEN BERG: Yes.

11:34:44 19 MR. MITCHELL: They fail to give
 11:34:45 20 notice --

11:34:46 21 PRESIDENT VAN DEN BERG: Give the notice
 11:34:50 22 out, but assume it is D because it is more

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11:34:54 1 substantive.

11:34:57 2 MR. MITCHELL: That would not preclude --
 11:35:00 3 1901(3) would not preclude a Chapter 11 claim if
 11:35:06 4 the investor can establish the violation of the
 11:35:09 5 substantive obligations of Chapter 11. Again, the
 11:35:19 6 obligations of Chapter 11 being the international
 11:35:22 7 obligations, 19 being directed to the municipal
 11:35:28 8 law.

11:35:36 9 PRESIDENT VAN DEN BERG: Other example.
 11:35:41 10 The failure of a state party to comply with a
 11:35:48 11 ruling of a panel under 1904, would that be
 11:35:56 12 precluded by 1901 paragraph 3?

11:36:00 13 MR. MITCHELL: No. And to clarify, that
 11:36:13 14 is not to say that the investor does not have to
 11:36:17 15 comply with the obligations of satisfying the
 11:36:20 16 Tribunal that there has been unlawful
 11:36:24 17 discrimination under 1102 or denial of fair and
 11:36:29 18 equitable treatment or a denial of justice under
 11:36:32 19 1105.

11:36:35 20 PRESIDENT VAN DEN BERG: Okay, but you
 11:36:36 21 haven't established those causes of action.

11:36:41 22 MR. MITCHELL: Yes.

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11:36:52 1 PRESIDENT VAN DEN BERG: Does it mean
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11:36:54 2 then that Article 1901 paragraph 3 is not only an
11:37:02 3 interpretive provision as you state, but may also
11:37:08 4 be in some respects an exclusion of jurisdiction of
11:37:14 5 a Chapter 11 tribunal, as the United States
11:37:19 6 submits?

11:37:26 7 MR. MITCHELL: No more so than any
11:37:31 8 provision which may impact upon the -- or has a
11:37:39 9 defined element to it. Clearly the provision is an
11:37:49 10 interpretive provision. Might it amount on the
11:38:01 11 facts to a defense in part in certain
11:38:05 12 circumstances, depending on the Tribunal's
11:38:08 13 interpretation? Maybe, but that doesn't turn the
11:38:12 14 provision into a jurisdictional provision.

11:38:45 15 PRESIDENT VAN DEN BERG: Professor de
11:38:47 16 Mestral.

11:38:48 17 ARBITRATOR MESTRAL: Following up on this
11:38:50 18 with a concrete example, which of course we flagged
11:38:53 19 in our questions. Does the fact, the existence of
11:38:56 20 the Byrd Amendment legislation and whatever has
11:39:01 21 been done under it, give rise to jurisdiction of
11:39:04 22 this Tribunal? □

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11:39:20 1 MR. MITCHELL: One of us is hearing a
11:39:22 2 negative and one is not. To clarify, Professor,
11:39:26 3 the question was does the existence of the Byrd
11:39:29 4 Amendment preclude this Tribunal's jurisdiction?

11:39:35 5 ARBITRATOR MESTRAL: No, does it give
11:39:36 6 rise? Is it one of the factors you are pleading?
11:39:39 7 You mentioned it in your pleadings on several
11:39:42 8 occasions, but you haven't mentioned it in the last
11:39:44 9 three or four hours. Are you pleading the Byrd

11:39:48 10 Amendment before us as something which we must
11:39:50 11 consider and is a factor which will cause us to
11:39:54 12 take jurisdiction?

11:39:57 13 MR. MITCHELL: Yes, that is one factor in
11:39:59 14 our pleading.

11:40:08 15 PRESIDENT VAN DEN BERG: Mr. Robinson has
11:40:10 16 a question.

11:40:12 17 ARBITRATOR ROBINSON: Thank you,
11:40:12 18 Mr. President.

11:40:15 19 I have two lines that I would like to get
11:40:18 20 into, but the first, if I might, I would like to go
11:40:21 21 back to Article 1901(3), and maybe either this time
11:40:29 22 or at a later time, maybe the United States could

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11:40:32 1 also comment on this. I have been trying to figure
11:40:35 2 out the meaning of the exception in Article
11:40:39 3 1901(3), which says, except for Article 2203, entry
11:40:46 4 into force, no provision, so on and so forth.

11:40:51 5 Now, if you go to Article 2203, Article
11:40:58 6 2203 reads, this agreement shall enter into force
11:41:04 7 on January 1, 1994, on an exchange of written
11:41:12 8 notifications certifying the completion of
11:41:17 9 necessary legal procedures.

11:41:24 10 So I would be, first of all, just for
11:41:27 11 edification, what is the intent, the meaning of
11:41:31 12 this exception? What is it supposed to implicate?
11:41:38 13 What is it supposed to imply, what is the meaning
11:41:41 14 of it, please, in light of the language of Article
11:41:44 15 2203 itself?

11:41:49 16 MR. MITCHELL: If I could have one
11:41:50 17 moment, Mr. Robinson.

11:42:53 18 (Pause.)

11:42:53 19 MR. MITCHELL: I was looking for the
11:42:55 20 transcript reference that was sitting right in
11:42:58 21 front of me, and that was an issue that was
11:43:00 22 addressed by Professor Howse in the original Canfor

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11:43:08 1 jurisdictional hearing, and the reference can be
11:43:13 2 found -- Professor Gaillard asked for a similar
11:43:18 3 question at page 592 of the transcript, and
11:43:22 4 Professor Howse's answer begins at line seven --

11:43:43 5 PRESIDENT VAN DEN BERG: Actually it was
11:43:44 6 you.

11:43:45 7 MR. MITCHELL: And I quite quickly
11:43:46 8 deferred to Professor Howse, on the next line.

11:43:54 9 ARBITRATOR ROBINSON: I am on page 592.
11:43:58 10 Line seven starts, "Mr. Mitchell, just briefly if I
11:44:03 11 could go back to your twofold question."

11:44:09 12 MR. MITCHELL: I am on day two of the
11:44:11 13 final transcript, and the question posed was do you
11:44:14 14 have a determination as to the impact on your case
11:44:17 15 of the introduction of the exclusion of the entry
11:44:21 16 into force provision of Article 1901(3) --

11:44:26 17 PRESIDENT VAN DEN BERG: What you have is
11:44:27 18 the version that has the rep, but the version
11:44:33 19 submitted by the United States has different
11:44:36 20 pagination.

11:44:39 21 MR. MITCHELL: I apologize for that.
11:44:43 22 This version is not time stamped.

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11:44:46 1 PRESIDENT VAN DEN BERG: I see it is page
11:44:48 2 594 on the mini-script provided by the United
11:44:59 3 States, and line eight, I will turn that to

11:45:03 4 Professor Howse.

11:45:05 5 MR. MITCHELL: Yes, that is the
11:45:05 6 transcript reference, and Professor Howse explained
11:45:09 7 that as a matter of state responsibility, if that
11:45:12 8 exception wasn't made it would be either the absurd
11:45:17 9 result that someone could come along and say that
11:45:19 10 by virtue of 1901(3), one doesn't have to make --
11:45:25 11 to amend their laws to make the provision -- to
11:45:28 12 make the treaty effective. So I would refer you
11:45:33 13 there to Professor Howse's response.

11:45:39 14 ARBITRATOR ROBINSON: All right. Thank
11:45:40 15 you for the reference, and I will read it again
11:45:43 16 with care.

11:45:46 17 The follow-up question is why then do you
11:45:51 18 think that what appears to be such a narrow item
11:46:00 19 and narrow purpose, why would Article 2203 have
11:46:08 20 been the sole exception to Article 1901(3), what is
11:46:16 21 the reason for having that as the sole exception,
11:46:19 22 and how are we to interpret the fact that this is

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11:46:23 1 the only exception when the exception appears to be
11:46:26 2 a very narrow one?

11:46:28 3 MR. MITCHELL: The exception is the
11:46:30 4 necessary one to bring 1901(3) into force. 1901(3)
11:46:35 5 in turn has the effect we have described of
11:46:39 6 imposing the obligations in 1902 and 1904 with
11:46:45 7 respect to the amendments to the laws. So it was
11:46:49 8 necessary to result in the obligation in 1901(3)
11:46:52 9 and the remainder of Chapter 19 to be effective.

11:47:03 10 ARBITRATOR ROBINSON: So therefore, what
11:47:04 11 is the implication in your view of that sole
11:47:11 12 exception as to the broader reading, or the broader

11:47:19 13 meaning, reading or meaning of Article 1901(3)?
11:47:26 14 Does it have any implications for us, in your mind,
11:47:31 15 that there was such an exception and it is the only
11:47:34 16 exception?

11:47:41 17 MR. MITCHELL: No. The function of 2203
11:47:45 18 is to bring the provision in the chapter into
11:47:54 19 effect, and one then goes from 2203 to 1901 sub 3,
11:47:59 20 and it says that the provisions of other chapters
11:48:02 21 of the treaty don't impose an obligation to amend
11:48:08 22 one's laws, but the provisions of 1902 and 1904 do. □
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11:48:15 1 The existence of 2203 doesn't go beyond that.

11:48:22 2 ARBITRATOR ROBINSON: If I understand it,
11:48:23 3 then the only exception to the words no provision
11:48:29 4 of any other chapter, is this Article 2203, and
11:48:34 5 there is no other exception because that is the
11:48:37 6 only one mentioned?

11:48:39 7 MR. MITCHELL: That is the only exception
11:48:41 8 mentioned.

11:48:42 9 ARBITRATOR ROBINSON: Fine. Thank you.

11:48:44 10 On a broader question, and I might ask
11:48:47 11 the President if he would please stop me if I get
11:48:55 12 into areas I should not because I find it in this
11:48:58 13 case very difficult to separate the jurisdiction
11:49:03 14 from the merits in terms of the context that we are
11:49:08 15 dealing with, and I know I could certainly
11:49:10 16 personally benefit from more learning about the
11:49:15 17 overall context.

11:49:22 18 I am struggling with the relationship
11:49:26 19 between those rights and obligations that a private
11:49:34 20 party is given under NAFTA with those that are

11:49:39 21 given to the state parties, and if I understand the
 11:49:51 22 drift of your ultimate arguments, it is that the

11:50:03 1 United States allegedly has so failed to abide by
 11:50:12 2 the provisions of Article -- of Chapter 19 that it
 11:50:20 3 in effect is a violation of the NAFTA and that they
 11:50:26 4 are in breach of NAFTA, that they have in effect
 11:50:33 5 committed an international wrong against you as the
 11:50:39 6 private parties, and if I understand the schema,
 11:50:49 7 under Chapter 20, your government has made a choice
 11:51:03 8 as between whether to proceed in disputes arising
 11:51:13 9 under the NAFTA, there is a choice that is given,
 11:51:18 10 if a dispute regarding any matter arises under both
 11:51:22 11 this agreement and the GATT, and if I understand
 11:51:26 12 it, the Government of Canada has chosen the GATT or
 11:51:32 13 what is now the WTO, and in their choice of these
 11:51:44 14 forums under 2005, and 2005, of course, as we know
 11:51:51 15 from Article 2004. Says except for matters covered
 11:51:56 16 in Chapter 19, and I am presuming that that is
 11:52:08 17 there, without knowing, because of the fact that
 11:52:15 18 the Chapter 19 disputes, similarly to Chapter 11,
 11:52:24 19 may involve private parties, and again, I may be
 11:52:32 20 mistaken. I am really attempting to educate myself
 11:52:36 21 here, so I might be speaking off the top of my
 11:52:40 22 head.

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11:52:40 1 But what I am driving at is if you are
 11:52:46 2 correct in your argument as I understand it, that
 11:52:51 3 the United States is in breach of Chapter 19,
 11:52:59 4 setting aside Chapter 11, let's assume there is no
 11:53:06 5 Chapter 11, would your only recourse in that case
 11:53:11 6 be to ask for the help -- the espousal of what in

11:53:21 7 your view is an international wrong by your
11:53:25 8 government, that in effect, while Chapter 19
11:53:33 9 includes municipal laws, it is a chapter that falls
11:53:44 10 under the umbrella of an international agreement,
11:53:48 11 so while Chapter 19 involves the domestic laws of
11:53:52 12 the three parties, the provision is found in an
11:53:55 13 international agreement.

11:54:01 14 Furthermore, in Article -- in Chapter 19,
11:54:15 15 if I understand it, a private party, in
11:54:24 16 conjunction -- I may be confusing myself here, in
11:54:29 17 conjunction with -- strike that. Let me go back a
11:54:34 18 minute.

11:54:34 19 If I understand it, there are
11:54:38 20 opportunities in 19 and 20 where an aggrieved
11:54:46 21 private party could go to its government and plead
11:54:49 22 for the help of its government, and what I am

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11:54:58 1 struggling with is to figure out here whether your
11:55:08 2 ultimate grievance in the scheme overall, and
11:55:14 3 again, I am just looking for the general overview,
11:55:18 4 whether one might say, well, if a chapter has been
11:55:26 5 so violated as to constitute an international
11:55:33 6 wrong, that that wrong is a wrong that has been
11:55:37 7 done against your government, and it should be, for
11:55:44 8 the private party to go to its government and get
11:55:49 9 the government to issue the complaint. That is a
11:55:55 10 broad -- and I am struggling with that. That is
11:55:59 11 without the presence of Chapter 11.

11:56:04 12 Now we have Chapter 11, and is there a
11:56:08 13 line in your mind, and I would ask for the United
11:56:12 14 States maybe to help me out here too ultimately, is
11:56:17 15 there a line in your mind as between what may be

11:56:21 16 appropriate for a Chapter 11 consideration as
11:56:31 17 between what is appropriate for you to raise with
11:56:36 18 your government and ask your government to address
11:56:40 19 what you see as an international wrong with the
11:56:45 20 United States government?

11:56:47 21 I am sorry, that is a very long, very
11:56:51 22 complex, I am not sure it is right, and it sort of

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11:56:54 1 violated going beyond jurisdiction, but I want to
11:56:58 2 know in effect an overview of this issue, please.

11:57:01 3 MR. MITCHELL: You are asking for, I
11:57:04 4 think, a question of how Chapter 11 dispute
11:57:07 5 resolution on behalf of investors fits within the
11:57:11 6 scheme of the NAFTA?

11:57:14 7 ARBITRATOR ROBINSON: well, it is in the
11:57:15 8 relief area that I am struggling because if what
11:57:19 9 you allege is so, then there has been a violation
11:57:24 10 of this international agreement by the United
11:57:30 11 States. It constitutes an international wrong of
11:57:33 12 some kind, and the question is to what extent is
11:57:40 13 only your government able to seek redress for that
11:57:45 14 wrong as distinguished from a private party seeking
11:57:51 15 to send that wrong into Chapter 11?

11:57:57 16 MR. MITCHELL: And this is something we
11:57:59 17 will certainly try and elucidate in the
11:58:03 18 post-hearing brief to provide a straightforward
11:58:09 19 trend, to put in context our response to that
11:58:13 20 question.

11:58:15 21 My general response is simply this: The
11:58:18 22 question, and it is not a question before the

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11:58:22 1 Tribunal on this objection, but the question for
11:58:27 2 whether an investment tribunal, Chapter 11
11:58:31 3 Tribunal, can ultimately grant relief, depends upon
11:58:36 4 whether the violation established by the investor
11:58:38 5 is a violation of the obligations set out in
11:58:42 6 section A of Chapter 11.

11:58:45 7 The obligations that are violated, and
11:58:48 8 again, the obligations are described in general
11:58:51 9 terms, national treatment, expropriation, minimum
11:58:56 10 standard of treatment, performance requirements
11:59:00 11 provisions, those obligations cover an array of
11:59:04 12 spectrums as can be seen from the claims that have
11:59:09 13 been brought under the Chapter 11 procedure so far,
11:59:13 14 the Pope and Talbot case dealing with the softwood
11:59:19 15 lumber environment, UPS dealing with government
11:59:22 16 monopolies, Myers dealing with the export PCB's and
11:59:30 17 investment in the environmental sector, so the
11:59:32 18 obligations cover an array of responsibilities.

11:59:36 19 So for the investor to bring before a
11:59:40 20 Chapter 11 Tribunal a claim, they must ultimately
11:59:44 21 establish that the requirements of Article 1101 --
11:59:48 22 that the measures relate to are satisfied, plus the

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11:59:52 1 obligations in the provisions of which they
11:59:55 2 complain are breached. If they do that, the
11:59:59 3 Tribunal has jurisdiction.

12:00:01 4 Equally, the state under Article 2004 and
12:00:05 5 1115 can bring that same claim, albeit the relief
12:00:10 6 would be different, the remedy would be different
12:00:12 7 if the state was espousing the claim.

12:00:21 8 So I think the shortest answer is if the
12:00:25 9 claimant makes out a claim that Chapter 11 has been

12:00:28 10 violated, they have the entitlement to bring that
 12:00:31 11 claim directly, and that is the ultimate question
 12:00:35 12 for the Tribunal.

12:00:38 13 ARBITRATOR ROBINSON: Thank you. So if I
 12:00:40 14 understand it, if this alleged international wrong
 12:00:44 15 of the dimensions which you argue have occurred,
 12:00:52 16 only to the extent that that wrong amounts to an
 12:00:56 17 investment of an investor within the meaning of
 12:00:59 18 Chapter 11 would it fall, in your argument, within
 12:01:05 19 the chapter of the NAFTA, 11, and whatever other
 12:01:12 20 aspects of this alleged international wrong would
 12:01:16 21 be for the two governments to work out?

12:01:22 22 MR. MITCHELL: No. I hate to stray into
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12:01:26 1 argument, but I will tell you what the position
 12:01:29 2 would be on the merits, and the analogy is the
 12:01:33 3 Myers case. Just to put Myers into context, Myers
 12:01:40 4 was a large American PCB disposal company. Their
 12:01:46 5 investment in Canada was the setting up of an
 12:01:49 6 operation to acquire PCB's from Canada and to
 12:01:54 7 export them to the United States for destruction.

12:01:58 8 The measure complained of was an order of
 12:02:01 9 the minister of environment shutting the border to
 12:02:06 10 exports, so Myers could not use their investment in
 12:02:10 11 Canada, this marketing arm, to acquire PCB's to
 12:02:16 12 export to the United States for destruction.

12:02:21 13 The claimant successfully established
 12:02:23 14 that that was a breach of the treaty. My
 12:02:29 15 recollection is it was an 1102 violation, and the
 12:02:33 16 issue was are the damages confined to the harm to
 12:02:37 17 the investment itself or to the investor and

12:02:40 18 investment as an integrated whole, and the Tribunal
12:02:44 19 found that it was the integrated whole. So the
12:02:48 20 analogy would be the same here.

12:02:53 21 I hope that is helpful.

12:02:56 22 ARBITRATOR ROBINSON: Thank you very
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12:02:57 1 much.

12:02:58 2 The other aspect I would like to ask as
12:03:00 3 an overview and a contextual matter, the fact that,
12:03:05 4 as I understand it, and I may be wrong, but if I
12:03:09 5 understand it, the government of Canada has chosen
12:03:13 6 under Article 2005 exclusively to bring the
12:03:21 7 softwood lumber dispute as a state party under the
12:03:25 8 WTO and not here; is that accurate?

12:03:33 9 MR. MITCHELL: I don't know that, so I am
12:03:34 10 not in a position to respond. I certainly will
12:03:40 11 inquire into that. Clearly Canada has initiated
12:03:45 12 Chapter 19 proceedings and has initiated WTO
12:03:51 13 proceedings, and I am not aware -- we can check --
12:03:54 14 that Canada has initiated NAFTA proceedings outside
12:03:59 15 of the Chapter 19 proceedings and proceeding under
12:04:05 16 WTO.

12:04:07 17 ARBITRATOR ROBINSON: And that is because
12:04:07 18 of the exception?

12:04:10 19 MR. MITCHELL: I don't know that, but in
12:04:11 20 respect of the disputes that have been filed so
12:04:15 21 far, to the best of our knowledge, they have been
12:04:18 22 filed -- the GATT disputes have been filed at the

12:04:23 1 WTO and not in front of a NAFTA 2005 panel.

12:04:30 2 ARBITRATOR ROBINSON: I didn't phrase
12:04:31 3 that right because of the exception falling within

12:04:35 4 Article 2004, that is what allows, if I understand
12:04:39 5 it, the Chapter 19; am I correct? That is what
12:04:43 6 allows the --

12:04:46 7 MR. MITCHELL: Proceedings can proceed
12:04:47 8 under Chapter 19 --

12:04:51 9 ARBITRATOR ROBINSON: And then you make
12:04:52 10 the exclusive choice for the rest.

12:04:58 11 MR. MITCHELL: Yes, and I am not sure if
12:04:59 12 that is on a case-by-case basis. I assume it is.

12:05:04 13 ARBITRATOR ROBINSON: I am only asking
12:05:05 14 because I am endeavoring to find out what, if any,
12:05:09 15 implications do these WTO proceedings have for this
12:05:14 16 proceeding? Is there anything that we are supposed
12:05:18 17 to do here with the interpretation of Article
12:05:29 18 1901(3) that could implicate any of the awards, the
12:05:35 19 decisions, that have been rendered in the WTO?

12:05:41 20 MR. MITCHELL: With respect to 1901(3), I
12:05:44 21 think the answer is no. WTO decisions are relevant
12:05:51 22 in that they -- we will say, will be offered as

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12:05:55 1 providing evidence of repeated arbitrary and
12:05:58 2 legally unfounded decision-making, and we will site
12:06:03 3 the findings of those panels in the appellate body
12:06:08 4 as evidence of that in support of our Chapter 11
12:06:11 5 claim that the obligations under Chapter 11 have
12:06:16 6 been violated. But beyond that, I am not
12:06:24 7 understanding there to be implications for the WTO
12:06:28 8 proceedings by virtue of this Tribunal's
12:06:31 9 jurisdiction.

12:06:33 10 ARBITRATOR ROBINSON: I was just
12:06:34 11 endeavoring to make sure whether in your view

12:06:39 12 whether the Tribunal should have recourse to any
12:06:43 13 learning in the WTO cases in our endeavor to figure
12:06:48 14 out Article 1901(3).

12:06:53 15 MR. MITCHELL: Article 1901(3) predates
12:06:56 16 the WTO cases, and I am not aware of how -- not
12:07:02 17 aware of -- we are not arguing that those decisions
12:07:12 18 inform the interpretation of that provision. That
12:07:15 19 provision means what it means based on the
12:07:19 20 arguments that are advanced by the parties with
12:07:22 21 respect to context, purpose, and text. So I
12:07:29 22 distinguish between the relevance of the findings□
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12:07:32 1 of those tribunals in showing the pattern that we
12:07:40 2 allege and the relevance of those findings for the
12:07:42 3 interpretation of 1901(3), and I don't find them
12:07:46 4 relevant to the latter.

12:07:48 5 ARBITRATOR ROBINSON: So, in other words,
12:07:49 6 if I understand it, there may be factual relevance,
12:07:53 7 but there is no legal relevance?

12:07:56 8 MR. MITCHELL: At the hearing on the
12:07:57 9 merits there is both factual and legal relevance,
12:08:00 10 and we would argue that those demonstrate the
12:08:03 11 pattern of conduct that meets the standard of the
12:08:07 12 international wrong we allege.

12:08:10 13 ARBITRATOR ROBINSON: Fine. Thank you
12:08:12 14 very much.

12:08:14 15 PRESIDENT VAN DEN BERG: Professor de
12:08:16 16 Mestral has a follow-up.

12:08:19 17 ARBITRATOR MESTRAL: Do you interpret the
12:08:20 18 WTO proceedings at the WTO concerning the Byrd
12:08:26 19 Amendment as dealing with matters outside of the
12:08:30 20 ambit of antidumping and countervailing duty laws

12:08:33 21 or as dealing with an abuse of countervailing duty
12:08:38 22 and antidumping laws which have done injury to
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12:08:43 1 Canfor?

12:08:47 2 MR. MITCHELL: Our position is
12:08:52 3 articulated in the pleadings and in the earlier
12:08:56 4 transcript, but the United States, we say, whatever
12:09:03 5 the meaning of 1901(3), can't rely on 1901(3) as a
12:09:07 6 safe harbor for the Byrd Amendment because they
12:09:10 7 didn't comply with 1902. So no matter what the
12:09:15 8 Byrd Amendment is, and no matter what the safe
12:09:20 9 harbor of 1901(3), the Byrd Amendment cannot fall
12:09:25 10 within it because they failed to do what was
12:09:27 11 required before enacting it.

12:09:31 12 PRESIDENT VAN DEN BERG: Here you are
12:09:32 13 specifically referring to the notification
12:09:34 14 requirements?

12:09:36 15 MR. MITCHELL: The notification
12:09:37 16 requirements, yes, and I would have to check this,
12:09:40 17 there are two requirements, one that you be
12:09:43 18 notified that it is contemplated being enacted, and
12:09:47 19 two, that it applies to you, and I believe both
12:09:51 20 were not followed, but I would have to check that,
12:09:53 21 to confirm that.

12:10:08 22 ARBITRATOR MESTRAL: You are not
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12:10:09 1 addressing yourselves to the Byrd Amendment, you
12:10:11 2 are simply saying there is a procedural problem and
12:10:14 3 that is why you can attack the Byrd Amendment?

12:10:18 4 MR. MITCHELL: No. We have pled the
12:10:22 5 consequences of the Byrd Amendment in triggering

12:10:27 6 the initiation of the proceedings, and -- the
12:10:44 7 essence of the Byrd Amendment is something that is
12:10:47 8 so far out of the realm of what is contemplated by
12:10:51 9 an antidumping and CVD regime that is designed to
12:10:57 10 level a playing field, and definitionally the Byrd
12:11:02 11 Amendment does something other than that, we also
12:11:04 12 say it does not fall within any protection.

12:11:08 13 ARBITRATOR MESTRAL: So you consider that
12:11:09 14 you can -- or invite us to address ourselves to the
12:11:15 15 Byrd Amendment. Is it because there was a failure
12:11:17 16 to follow an essential procedural requirement on
12:11:22 17 behalf of the United States or is it because you
12:11:25 18 characterize it as something which is outside of
12:11:29 19 the normal realm of antidumping and countervailing
12:11:33 20 duty law?

12:11:35 21 MR. MITCHELL: Yes. Let me clarify that.
12:11:38 22 Yes. The notice requirement goes to the

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12:11:43 1 entitlement to rely upon 1901(3). The U.S. cannot
12:11:53 2 claim that something falls within the phrase
12:11:56 3 antidumping law if they don't follow the
12:11:59 4 requirements set out in the treaty to amend it.

12:12:03 5 In any event, that law is so far outside
12:12:08 6 the realm of AD and CVD law that we say if we can
12:12:14 7 establish to the Tribunal's satisfaction that it,
12:12:17 8 either alone or together with other factors,
12:12:20 9 violates the standards in Chapter 11, 1102, 1105, a
12:12:23 10 claim can be advanced.

12:12:30 11 PRESIDENT VAN DEN BERG: Thank you, very
12:12:30 12 much, Mr. Mitchell, and Mr. Landry. That completes
12:12:34 13 the questioning by the Tribunal, and I think that
12:12:36 14 completes your opening statement.

12:12:39 15 MR. MITCHELL: It does, Mr. President.

12:12:41 16 PRESIDENT VAN DEN BERG: We move now on
12:12:42 17 to what may be called the walk-through of the
12:12:47 18 legislative history documents.

12:12:50 19 Looking to the United States, who of the
12:12:52 20 United States counsel is going to take the lead on
12:12:55 21 this? I see Mr. McNeill is flashing his light.

12:13:01 22 MR. MCNEILL: I will be the tour guide. □
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12:13:03 1 PRESIDENT VAN DEN BERG: Before the tour
12:13:04 2 guide, can you point us to the bundles we have to
12:13:07 3 take in front of us?

12:13:10 4 MR. MCNEILL: Our walk-through begins in
12:13:11 5 a two-volume set, has a Bates number beginning
12:13:17 6 01139, two-volume set titled "Negotiating Text of
12:13:23 7 the Chapter on Review and Dispute Settlement" --

12:13:28 8 PRESIDENT VAN DEN BERG: We lost our
12:13:30 9 secretary. Perhaps some of your team can help us
12:13:41 10 identify the documents.

11 (Pause.)

12:24:32 12 PRESIDENT VAN DEN BERG: Mr. Landry, and
12:24:34 13 Mr. Mitchell, are you ready?

12:24:38 14 Mr. McNeill, please proceed. Thank you
12:24:41 15 for your patience. Would you please then use the
12:24:45 16 page numbers, the Bates numbers. First you refer
12:24:50 17 to the tab and then the Bates numbers.

12:24:53 18 MR. MCNEILL: The Bates numbers, I will
12:24:55 19 refer to the Bates numbers. We are discussing a
12:24:57 20 two-volume set of draft documents, draft
12:25:01 21 negotiating text titled "Negotiating Text of the
12:25:06 22 Chapter on Review and Dispute Settlement in □

12:25:07 1 Antidumping and Countervailing Duty Matters of the
12:25:12 2 North American Free Trade Agreement," and they
12:25:16 3 begin at Bates number 01139, and you will see on
12:25:16 4 the cover it says maintained by Canada and
12:25:19 5 distributed to Mexico and United States. That
12:25:25 6 indicates simply that Canada acted as the informal
12:25:29 7 secretariat of the drafts. As the drafts were
12:25:31 8 completed Canada maintained a record of those
12:25:35 9 drafts.

12:25:36 10 The first composite draft that was
12:25:38 11 completed is dated June 3, 1992 and it begins at
12:25:43 12 Bates number 01142 and it is titled "Virginia
12:25:50 13 Composite AD/CVD," and you will see at the top
12:25:59 14 there is a legend and the legend indicates how the
12:26:04 15 editorial markings are to be interpreted, and you
12:26:08 16 will see number three in the legend suggests there
12:26:10 17 is a bracket and underline, that that is new
12:26:13 18 language.

12:26:14 19 The provision that ultimately became
12:26:16 20 Article 1901(3) appears on this first page under
12:26:21 21 Article XX01, general provisions. I apologize, it
12:26:30 22 appears on the next page, Bates number 01143, and□
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12:26:35 1 it provides no other provision of this Chapter
12:26:38 2 shall be construed as imposing obligations on the
12:26:42 3 parties with respect to the parties' antidumping or
12:26:44 4 countervailing duty law, and the text is underlined
12:26:48 5 and bracketed and then a there is a USA outside of
12:26:52 6 the brackets which indicates that this language was
12:26:55 7 introduced -- it was new language that was
12:26:58 8 introduced by the United States in this draft, but

12:27:03 9 that it had not been accepted as of that time by
12:27:06 10 the other parties.

12:27:11 11 The brackets stay on -- the text stays --
12:27:15 12 the proposed text stays in that state for several
12:27:21 13 drafts, with brackets and underline, until August
12:27:23 14 6, 1992. The August 6, 1992, draft begins at Bates
12:27:29 15 number 01337. Tab number 6.

12:27:52 16 ARBITRATOR ROBINSON: I am sorry. You
12:27:53 17 said page -- tab 6 at page?

12:27:59 18 MR. MCNEILL: 01337, and you will see
12:28:06 19 that the brackets have come off and it says no
12:28:08 20 provision of any other chapter of this agreement
12:28:11 21 shall be construed as imposing obligations on the
12:28:14 22 parties with respect to the parties' antidumping
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12:28:16 1 law or countervailing duty law. The text is
12:28:19 2 unchanged, but the brackets have come off,
12:28:22 3 indicating that at least tentatively the text has
12:28:25 4 been accepted by the other parties.

12:28:46 5 The next significant change occurs in the
12:28:46 6 August 25, 1992, draft called the watergate
12:28:49 7 Composite, and it is called the final draft, and
12:28:58 8 you will see the difference in the provision there
12:29:02 9 is that the exception of the entry into force --

12:29:06 10 ARBITRATOR ROBINSON: What is the tab?

12:29:09 11 MR. MCNEILL: Tab 9 and Bates number
12:29:10 12 01452.

12:29:14 13 ARBITRATOR ROBINSON: Thank you.

12:29:32 14 MR. MCNEILL: The change to the text is
12:29:35 15 that it now provides with the exception of the
12:29:36 16 entry in force provision of article blank, and the

12:29:37 17 blank is there because obviously the article number
12:29:40 18 has not been designated at that time, so the entry
12:29:44 19 into force exception has been added without an
12:29:48 20 article number.

12:29:50 21 PRESIDENT VAN DEN BERG: Help me,
12:29:51 22 Mr. McNeill. This was the period during which
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12:29:54 1 there was legal trouble?

12:30:06 2 MR. MCNEILL: I believe that is correct,
12:30:07 3 and I believe that is what final indicates up at
12:30:10 4 the top, that at least the negotiators had
12:30:13 5 finalized their -- negotiated their process, and
12:30:18 6 then it was being reviewed by the lawyers.

12:30:22 7 PRESIDENT VAN DEN BERG: My understanding
12:30:23 8 was that the NAFTA agreement was signed off between
12:30:25 9 the governments somewhere in the beginning of
12:30:28 10 August, mid-August, subject to legal scrubbing?

12:30:36 11 MR. MCNEILL: I believe that is correct.

12:30:40 12 PRESIDENT VAN DEN BERG: Although it is
12:30:42 13 not yet mentioned headline of lawyers' revision --

12:30:48 14 MR. MCNEILL: That is correct.

12:30:52 15 PRESIDENT VAN DEN BERG: But it may be
12:30:52 16 that the lawyers started their work on this draft.

12:30:56 17 MR. MCNEILL: It is possible, but I
12:30:58 18 cannot be certain. I believe that is correct.

19 PRESIDENT VAN DEN BERG: I see that these
12:31:14 20 drafts do not have lawyers' revision. It
12:31:18 21 apparently only has Chapter 11.

12:31:33 22 MR. MCNEILL: Mr. President, as far as we
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12:31:34 1 are aware, the scrubbing of the text occurred
12:31:37 2 during the watergate sessions, and you will see at
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12:31:40 3 the top it is called the watergate composite which
12:31:43 4 indicates that it probably was that the August 25
12:31:45 5 draft probably does reflect revisions by lawyers.

12:31:52 6 PRESIDENT VAN DEN BERG: Bear with me one
12:31:53 7 moment. Yeah, it is interesting to see because if
12:31:56 8 you look to the Chapter 11 drafts on investment,
12:32:03 9 then you see that already the 2 August 1992 draft
12:32:09 10 of Chapter 11 has the mention of lawyers'
12:32:12 11 revisions, and also the 26 August 1992 draft has
12:32:18 12 lawyers revisions mentioned. So probably this one
12:32:21 13 as well is lawyers revision, although not mentioned
12:32:25 14 explicitly.

12:32:29 15 MR. MCNEILL: I believe that is correct.
12:32:30 16 That is my interpretation as well.

12:32:33 17 The next significant change, the next
12:32:37 18 notable change occurs on September 3rd, 1992, page
12:32:52 19 01560.

12:32:54 20 ARBITRATOR ROBINSON: That is tab 12, I
12:33:06 21 believe.

12:33:06 22 MR. MCNEILL: And you will see that the
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12:33:07 1 entry into force Article has been added, Article
12:33:12 2 2203 open parens, entry into force, close parens,
12:33:17 3 and that is the only change to the text there.

12:33:20 4 And I will note, while we are on the
12:33:22 5 topic of the legal scrubbing of the text, that it
12:33:26 6 was noted before that different negotiating teams
12:33:28 7 worked on different chapters and so the timing of
12:33:31 8 the scrubbing likely would have been different for
12:33:35 9 each Chapter. So it is difficult to say
12:33:37 10 definitively that this is the legal scrubbing part,

12:33:44 11 but I believe it is.

12:33:46 12 ARBITRATOR ROBINSON: Pardon me, so if I
12:33:48 13 understand it, the legal scrubbing was done by the
12:33:50 14 members of the same team that had done the original
12:33:54 15 drafting rather than an integrated team?

12:34:12 16 MR. MCNEILL: It is how it is done now
12:34:14 17 with our current treaties that we are drafting, but
12:34:18 18 I am not search how it was done -- whether
12:34:22 19 additional lawyers were brought in or it was the
12:34:25 20 same team. I am not certain.

12:34:28 21 MS. MENAKER: But we do know, for
12:34:29 22 instance, that there were investment lawyers that

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12:34:30 1 were working on the investment chapter. Those are
12:34:33 2 the people that did the scrubbing for the
12:34:36 3 investment chapter. And just as we, the lawyers
12:34:39 4 that work on investment matters, we never do the
12:34:41 5 legal scrubbing on the chapters in our FTAs dealing
12:34:47 6 with trade in goods or, you know, in this case,
12:34:50 7 with AD/CVD matters, I don't suspect it was
12:34:53 8 different then.

12:34:54 9 ARBITRATOR ROBINSON: But there was no
12:34:55 10 umbrella team, in effect, that was brought in to
12:35:00 11 endeavor to make all the various chapters
12:35:03 12 consistent in their language, as far as you know?

12:35:09 13 MR. MCNEILL: There certainly was an
12:35:10 14 effort to read across the chapters and make sure
12:35:13 15 there was consistency among the chapters. And when
12:35:16 16 that occurred and the degree to which that
12:35:18 17 occurred, I cannot say.

12:35:21 18 MS. MENAKER: And there is no, as far as
12:35:21 19 we know, there was no team of people that came in

12:35:25 20 specifically to do that, and certainly, again, the
12:35:28 21 only -- we can draw inferences. We are drawing
12:35:32 22 them from the way that we do the practice now and

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12:35:35 1 in all of our current FTAs we have separate teams
12:35:38 2 of people that do the legal scrub for the different
12:35:42 3 chapters. And we don't -- for instance, I don't
12:35:43 4 look at those other chapters unless there is some
12:35:45 5 interrelationship that is called to our attention
12:35:50 6 but there are different teams of people who do the
12:35:52 7 legal scrubbing on the different chapters now.

12:34:54 8 ARBITRATOR ROBINSON: Thank you.

12:35:57 9 MR. MCNEILL: The next change occurs in
12:35:58 10 the October 3, 1992 draft at tab 16, and it begins
12:36:03 11 on Bates number 01672. And there is no notation at
12:36:12 12 the top. It is just called Chapter 19, and the
12:36:16 13 only difference is that the text now reads except
12:36:21 14 for Article 2203, entry into force, no provision of
12:36:25 15 any other Chapter of this agreement shall be
12:36:28 16 construed as imposing obligations on a party,
12:36:32 17 singular, with respect to the parties', plural
12:36:36 18 possessive, antidumping law or countervailing duty
12:36:39 19 law.

12:36:54 20 The next change occurs on October -- in
12:36:56 21 the October 3, 1992 draft of the same date. Begins
12:37:02 22 on Bates -- it's at tab 17, begins Bates number

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12:37:05 1 01698 and this text reads, except for Article 2203,
12:37:13 2 entry into force, no provision of any other chapter
12:37:17 3 shall be construed as imposing obligations on a
12:37:20 4 party with respect to the party's, possessive

12:37:27 5 singular, antidumping law or countervailing duty
12:37:28 6 law and then the text remains unchanged thereafter.

12:38:02 7 PRESIDENT VAN DEN BERG: That completes
12:38:02 8 your presentation?

12:38:04 9 MR. MCNEILL: It does.

12:38:06 10 PRESIDENT VAN DEN BERG: Thank you.
12:38:06 11 Mr. Landry or Mr. Mitchell?

12:38:09 12 MR. LANDRY: Mr. President, we thought
12:38:09 13 the best way to deal with how and what the
12:38:11 14 claimants referenced in the travaux would be to
12:38:13 15 look at -- we actually took extracts out and put
12:38:16 16 them into our authorities --

12:38:21 17 PRESIDENT VAN DEN BERG: You know what
12:38:22 18 that entails, we have to hunt again for your
12:38:26 19 bundle.

12:38:28 20 MR. LANDRY: Well, I mean, I will give
12:38:29 21 you page numbers and you can --

12:38:31 22 PRESIDENT VAN DEN BERG: No, no, I
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12:38:32 1 prefer to --

12:38:34 2 MR. LANDRY: It is the rejoinder volume.

12:39:02 3 As we go through it, I will give you a
12:39:06 4 page number so you can go back to the one we are
12:39:10 5 looking at and determine where it was.

12:39:12 6 It starts at Tab 11. The first comment I
12:39:15 7 would make, apropos some of the questions that were
12:39:18 8 ongoing from Mr. Robinson, is that to our knowledge
12:39:22 9 there is no information on the record in these
12:39:24 10 documents or in the SAA or otherwise that would
12:39:27 11 indicate how indeed -- and you are using a
12:39:32 12 terminology I know from something else, a legal
12:39:37 13 scrubbing took place in relation to this. There is

12:39:39 14 just no information on the record as to how that
12:39:42 15 occurred from the documents.

12:39:45 16 Now, this, just so you know, the first
12:39:48 17 reference that we made to the travaux is at Tab
12:39:53 18 11. It is actually, for the record, the page
12:39:55 19 numbers similar to the page numbers that
12:39:58 20 Mr. McNeill was referring to, 04540. It comes from
12:40:03 21 the Washington composite investment side and you
12:40:07 22 will see it final, and the date is May 22nd '92, □
114

12:40:12 1 and the reference that was made to this document by
12:40:14 2 us is in reference to the footnote, that you will
12:40:19 3 see footnote one down at the bottom of that first
12:40:22 4 page where it says: U.S. agrees on the condition
12:40:24 5 that the definition of, quote, measure, close
12:40:27 6 quote, includes single actions.

12:40:30 7 You'll recall Mr. Mitchell dealing with
12:40:33 8 that today. And just so that you can make a note,
12:40:35 9 that is at page 9, paragraph 14 -- yes, paragraph
12:40:44 10 14 -- sorry, page nine, footnote 14 of --

12:40:48 11 ARBITRATOR MESTRAL: The Bates number is?

12:40:51 12 MR. LANDRY: 4540, but in our rejoinder,
12:40:55 13 it is at page 9 of the rejoinder at footnote 14,
12:41:04 14 where we refer to this document to save a full
12:41:05 15 reference as to where this comes from.

12:41:07 16 So that is the first reference to the
12:41:09 17 travaux that we make.

12:41:14 18 If you go to tab 12 --

12:41:17 19 ARBITRATOR ROBINSON: Pardon me one
12:41:19 20 second, sir, can I just ask, what was the purpose
12:41:21 21 of the reference? why did you refer to this

12:41:24 22 footnote?[]
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12:41:27 1 MR. MITCHELL: There was a discussion of
12:41:29 2 the distinction. It was in connection with the
12:41:33 3 discussion of the distinction between "law" and
12:41:34 4 "measure. And in response to questions posed by
12:41:38 5 you, concerning the reasons for the difference.
12:41:44 6 These and the following two extracts from the
12:41:48 7 travaux that Mr. Landry is going to refer to both
12:41:52 8 make clear that it was the United States that
12:41:56 9 required an agreement that -- or an understanding
12:42:01 10 that "measure" included even single actions, so a
12:42:05 11 broad and expansive definition of "measure" before
12:42:11 12 they agreed to the definition.

12:42:15 13 ARBITRATOR ROBINSON: Is there any
12:42:15 14 learning on what single action -- single actions is
12:42:21 15 supposed to mean?

12:42:23 16 MR. MITCHELL: We didn't identify
12:42:26 17 anything in the travaux that would shed light onto
12:42:30 18 that, but we would say it refers to any action,
12:42:36 19 whether singular or -- it is to make clear that a
12:42:42 20 pattern is not required or that a -- that any -- a
12:42:48 21 state has responsibility for even a single event
12:42:52 22 that doesn't comply with their international[]

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12:42:55 1 obligations.

12:42:59 2 ARBITRATOR ROBINSON: Thank you.

12:43:00 3 MR. LANDRY: And then, as Mr. Mitchell
12:43:01 4 just indicated, 12 and 13 -- 12 which is at
12:43:06 5 page 04571, which is the Virginia composite, June
12:43:11 6 4, 1992. You can see that the similar footnote is
12:43:19 7 continued there at footnote 1. And, again, it is

12:43:25 8 the same reference in the rejoinder memorial,
12:43:28 9 page 9, footnote 14.

12:43:38 10 The third reference to the travaux is at
12:43:40 11 Tab 13 and again, for the same purpose, it is the
12:43:43 12 June 4, 1992 draft called "crystal composite. And
12:43:49 13 it is page 04606 and again has that same footnote
12:43:58 14 at the bottom, footnote 1. And that is the -- that
12:44:03 15 references the -- sorry, the same reference in the
12:44:06 16 rejoinder memorial, page 9, footnote 14.

12:44:44 17 The next few references, and I'll go
12:44:47 18 through them as a general proposition is from Tab
12:44:48 19 14 through Tab 18, and that starts -- Tab 14, the
12:44:53 20 page number starts at 20877 --

12:45:09 21 ARBITRATOR MESTRAL: 02877?

12:45:13 22 MR. LANDRY: 02877, yes. And I believe
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12:45:14 1 that it goes up to 02895. And just so you can make
12:45:20 2 a note, the reference in this is to paragraph 26 of
12:45:23 3 the rejoinder, footnote 16, and just so you can
12:45:37 4 make a note, in Tabs 15, 16, 17 and 18, that is the
12:45:47 5 same reference.

12:45:55 6 MR. MITCHELL: And if we could just
12:45:56 7 clarify, the reason for the inclusion of this
12:45:59 8 reference is that the lawyers group review -- and
12:46:06 9 it is not clear what the lawyers group is, whether
12:46:10 10 this is a group for Chapter 11, for Chapter 19 or
12:46:14 11 for everything. There is just nothing on the
12:46:16 12 record that shows that. But in describing Chapter
12:46:23 13 19, they state that -- the general proposition that
12:46:27 14 the NAFTA establishes the mechanism for the
12:46:31 15 binational panels under 1904, and to highlight our

12:46:35 16 argument concerning the text supporting what is
12:46:38 17 meant by obligations, the lawyers group review
12:46:43 18 emphasizes that each country will amend its laws to
12:46:47 19 implement the obligations of this section. And so
12:46:52 20 we take so "implement the obligations of this
12:46:56 21 section" to be what is meant by 1901 sub 3. And,
12:47:01 22 again, the reference is footnote 16, page 12 of our

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12:47:04 1 rejoinder.

12:47:15 2 That takes us through to Tab 18, various
12:47:19 3 drafts of that. And that takes us to tab 19, which
12:47:31 4 this is the last reference that we --

12:47:33 5 PRESIDENT VAN DEN BERG: Excuse me,
12:47:33 6 Mr. Mitchell. You just referred to implement the
12:47:35 7 obligations of this chapter or section. The first
12:47:42 8 one where that appears is 02889; is that correct?

12:47:50 9 MR. MITCHELL: That is my understanding.

12:47:53 10 PRESIDENT VAN DEN BERG: And could you
12:47:53 11 help me verify that on that page?

12:47:56 12 MR. MITCHELL: In the first paragraph.

12:50:12 13 (Pause.)

12:50:14 14 Mr. President, we cannot find the
12:50:16 15 reference now. I don't know if you want us to just
12:50:19 16 continue trying to find it or whether we just --
12:50:22 17 well, we'll get back to you and give you where it
12:50:24 18 is specifically quoted from.

12:50:26 19 PRESIDENT VAN DEN BERG: Please proceed.

12:50:35 20 MR. LANDRY: We will get back to you with
12:50:36 21 that reference. The last reference in the travaux
12:50:40 22 is at Tab 19, and that reference starts at page

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12:50:49 1 04851. It is what is called the lawyers' revision,
Page 85

12:50:56 2 August 27, 1992 document. And you will recall,
12:51:02 3 Mr. President, that that is the document that I
12:51:04 4 referred to last evening which has as a section of
12:51:08 5 it provisions that were to be placed outside of the
12:51:12 6 investment chapter which -- that section is at page
12:51:15 7 04870, and just so you have a reference, the
12:51:36 8 reference in the rejoinder where this is dealt with
12:51:40 9 is paragraphs 62 to 67.

12:52:14 10 And Mr. President, the only other
12:52:16 11 reference, it is not specifically on the travaux
12:52:19 12 itself, but where we referred to the SAA, that
12:52:23 13 is -- you don't have to bring it up, but it is at
12:52:27 14 Tab 25 of the reply -- of the reply authorities,
12:52:37 15 and it is page 194 in that tab. And that
12:52:46 16 references the same paragraphs in the rejoinder.

12:52:51 17 PRESIDENT VAN DEN BERG: That completes
12:52:52 18 your presentation?

12:52:54 19 MR. LANDRY: That completes it with the
12:52:57 20 exception that I think Mr. Mitchell probably has
12:52:59 21 now found the references that you were requesting.

12:53:02 22 MR. MITCHELL: The references in the
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12:53:04 1 documents to the provision of the NAFTA explicitly
12:53:07 2 preserves the right of each country to retain its
12:53:09 3 AD and CVD laws. Each country may amend its CVD --
12:53:17 4 sorry, let me go back. At 2850 of the Bates
12:53:38 5 numbering, under the heading Retention of AD/CVD
12:53:46 6 Laws.

12:53:56 7 PRESIDENT VAN DEN BERG: Excuse me, which
12:53:57 8 tab are you now? That is Tab 18, apparently.

12:54:07 9 MR. MITCHELL: At Tab 17 -- at Tab 17 you

12:54:12 10 can find the reference at page 2854 under the
12:54:17 11 heading Retention of AD and CVD Laws, the first
12:54:21 12 three lines.

12:54:39 13 ARBITRATOR MESTRAL: I think this is the
12:54:40 14 negotiating -- process of negotiating of an agreed
12:54:44 15 text so there are a series that get progressively
12:54:50 16 more complex.

12:54:52 17 MR. MITCHELL: This is the lawyers group
12:54:53 18 review.

19 ARBITRATOR MESTRAL: Exactly. But there
20 are several series, there are several of them and
12:54:55 21 they get more complex and there is a final one that
12:54:58 22 puts together all of them, I think, toward of end□
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12:55:01 1 of your series right there.

12:55:33 2 MR. LANDRY: Professor de Mestral, you
12:55:37 3 will see at Tab 14 the date August 12, 1992, which
12:55:43 4 obviously is close to the time that you were
12:55:44 5 talking about earlier, and as you go to Tab 15, it
12:55:48 6 is July 22 -- well actually, sorry, that was 2004.
12:55:54 7 I think that was just a reference. It is a mix and
12:55:55 8 match of the dates.

12:56:18 9 I think the one you were referring to I
12:56:19 10 think is maybe as much as I can say at this point
12:56:19 11 is Tab 14, in other words, the one that became more
12:56:23 12 comprehensive. The other ones are shorter, and I
12:56:28 13 apologize for referencing that July 22, 2004 date.
12:56:33 14 I actually don't know what that means. I believe
12:56:39 15 also that it is a mistake. But to go back to the
12:56:42 16 very specific point of where the reference is to
12:56:45 17 what we said in the footnote, maybe Mr. Mitchell
12:56:48 18 can now help us where that is.

12:57:21 19 MR. MITCHELL: I think Tab 15, the
12:57:27 20 reference is on page 2869 under the heading
12:57:31 21 Retention of AD and CVD Laws. Tab 16 --

12:57:54 22 ARBITRATOR MESTRAL: It builds up. □
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12:57:57 1 MR. MITCHELL: Yes. So, 2869.
12:58:03 2 Tab 17, 2854; Tab 18, 2850.

12:58:23 3 MR. LANDRY: With that very confused
12:58:24 4 ending, that is the walk through the travaux as
12:58:27 5 referenced by the claimants.

12:58:31 6 PRESIDENT VAN DEN BERG: Thank you very
12:58:32 7 much. I think it is time now for the break for
12:58:34 8 lunch. After lunch we will have the closing
12:58:37 9 statements in which the parties also are invited to
12:58:44 10 address the questions to the extent they have not
12:58:46 11 addressed them unless they feel not comfortable to
12:58:50 12 addressing them now.

12:58:51 13 There is one additional point that the
12:58:54 14 Tribunal would like to ask the parties to consider
12:58:56 15 carefully, that is the apparent difference between
12:59:00 16 the French and English text of 1901 paragraph 3 and
12:59:05 17 the Spanish. So if that could be looked into as
12:59:13 18 well. I would appreciate receiving the answers
12:59:17 19 possibly this afternoon.

12:59:19 20 And I think that for scheduling purposes,
12:59:20 21 I look first to the United States, how much time do
12:59:28 22 you need, Mr. Clodfelter, Ms. Menaker and □
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12:59:35 1 Mr. McNeill and Mr. Bettauer?

12:59:38 2 MR. CLODFELTER: The first question is
12:59:40 3 whether it is the Tribunal's intention to complete

12:59:43 4 the proceedings today?

12:59:46 5 PRESIDENT VAN DEN BERG: Yes, if
12:59:47 6 possible.

12:59:49 7 MR. CLODFELTER: We estimate we need
12:59:50 8 about an hour to deliver our rebuttal, more or
12:59:51 9 less, but we need more than the lunch break to
12:59:54 10 prepare, however.

12:59:56 11 PRESIDENT VAN DEN BERG: Not taking into
12:59:57 12 account this active Tribunal.

13:00:01 13 MR. CLODFELTER: Well, that is the words
13:00:02 14 from our side, it will be about an hour, at least
13:00:06 15 the intended planned words. But we will need more
13:00:11 16 time than that, obviously, to prepare.

13:00:14 17 PRESIDENT VAN DEN BERG: But first let's
13:00:14 18 see from the claimants.

13:00:17 19 MR. LANDRY: Mr. President, the
13:00:19 20 attempt that we -- in providing our opening
13:00:22 21 statement was hopefully to be responsive also to
13:00:24 22 the original opening statement, so it really is

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13:00:27 1 going to depend on what the United States says in
13:00:32 2 the reply. But I would suspect at this point in
13:00:37 3 time it would be less than half an hour.

4 PRESIDENT VAN DEN BERG: I think that we
13:00:48 5 should resume, if that's fine, one half hour at
13:00:48 6 2:30.

13:01:38 7 MR. CLODFELTER: Perhaps slightly more
13:01:39 8 time; if 2:45 would work for the Tribunal, we would
13:01:44 9 appreciate that.

13:01:46 10 PRESIDENT VAN DEN BERG: Any problem for
13:01:47 11 the claimants?

13:01:49 12 MR. MITCHELL: That is fine, Mr.

13:01:49 13 President. The only other thing I wanted to
13:01:51 14 mention is that apropos your question about the
13:01:54 15 French and Spanish versions of the texts, we will
13:01:57 16 try, we will make enquiries, but we may not be able
17 to do that. But having said that, we will
13:02:04 18 definitely do it in the post-hearing briefs.

19 PRESIDENT VAN DEN BERG: But anyway,
13:02:08 20 perhaps your first reaction would be welcome, and
13:02:10 21 you can pull them off the web in any event. I
13:02:13 22 understand that those texts are published -- the

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13:02:15 1 French text, anyway, is also on the Canadian
13:02:18 2 government's web, and if you surf to the Mexican
13:02:21 3 government's web, then you will find the Spanish
13:02:28 4 text.

13:02:30 5 PRESIDENT VAN DEN BERG: There is one
13:02:31 6 question by Mr. Robinson.

13:02:34 7 ARBITRATOR ROBINSON: If I might, because
13:02:35 8 of the importance of the meaning of the word
13:02:38 9 "law" -- well, the meaning of Article 1901(3), if
13:02:46 10 in addition to the Spanish and French texts of that
13:02:49 11 section, we could also have remarks on whatever the
13:02:53 12 differences are in 1902(1), 1904(2), 1905, and
13:03:02 13 1911, and then the definition of "measure" in
13:03:07 14 Article 201. It seems to me we should know, since
13:03:11 15 all three languages, as I understand it, are
13:03:17 16 equally authentic under Article 55, at least
13:03:22 17 ultimately that will be an important subject for
13:03:25 18 us, I would think.

13:03:33 19 MR. LANDRY: You -- in your questioning
13:03:34 20 of Mr. Mitchell, you canvassed those areas. Are

13:03:39 21

you wanting further commentary?

13:03:42 22

ARBITRATOR ROBINSON: well, I was just
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13:03:43 1

simply asking whether the French and the Spanish

13:03:46 2

text of those same articles have any impact on our

13:03:53 3

consideration, I guess, especially with respect to

13:03:55 4

whether a determination is included.

13:03:59 5

MR. LANDRY: I apologize. I didn't quite

13:04:01 6

understand your question. I now understand it and

13:04:03 7

we will look at that.

13:04:07 8

ARBITRATOR ROBINSON: All right, fine.

13:04:07 9

Thank you.

13:04:09 10

PRESIDENT VAN DEN BERG: Thank you. we

13:04:10 11

recess until 2:45.

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(Whereupon, at 1:04 p.m., the hearing was

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recessed to reconvene at 2:45 p.m. that same day.)

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AFTERNOON SESSION

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(3:00 p.m.)

14:58:42 3

PRESIDENT VAN DEN BERG: Let's go on the

14:58:44 4

record.

14:58:44 5

Now is the time for the closing

14:58:46 6

statements. I would like to mention that we have

14:58:50 7 now received here copies of the Spanish and French
14:58:53 8 versions of the NAFTA, at least a number of
14:58:58 9 chapters. I note Chapter 11 we have, Chapter 16,
14:59:14 10 19, and 21.

14:59:18 11 I understand, Mr. Landry, that the
14:59:23 12 claimants are having a faxing problem and have not
14:59:26 13 received it yet.

14:59:28 14 MR. LANDRY: We had a logistical problem
14:59:30 15 at lunch, so we apologize, but we will make sure we
14:59:34 16 deal with the questions asked in our post-hearing
14:59:39 17 briefs.

14:59:42 18 PRESIDENT VAN DEN BERG: Maybe when you
14:59:43 19 listen to the submission by the United States, you
14:59:45 20 will have comments.

14:59:48 21 MR. LANDRY: We may have comments, but we
14:59:49 22 will have to leave substantive comment to the

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14:59:53 1 post-hearing briefs.

14:59:55 2 PRESIDENT VAN DEN BERG: Mr. Bettauer?

3 CLOSING STATEMENTS BY RESPONDENTS

14:59:57 4 MR. BETTAUER: Mr. Clodfelter will begin
15:00:00 5 and then Mr. McNeill, and then I will come back for
15:00:03 6 a second.

7 MR. CLODFELTER: Thank you, Mr.
15:00:04 8 President. I intend to make some general comments
15:00:12 9 about our basic position in the case and respond to
15:00:13 10 one issue regarding the underlying dispute.

15:00:15 11 The proposition of our jurisdictional
15:00:18 12 objection is quite simple, and that is, the
15:00:21 13 assertion of jurisdiction by this Tribunal over the
15:00:25 14 claims would result in the imposition of Chapter 11
15:00:29 15 obligations with respect to U.S. antidumping law

15:00:33 16 and U.S. countervailing duty law, in violation of
15:00:36 17 Article 1901(3).

15:00:39 18 This is because an assertion of
15:00:42 19 jurisdiction would subject the AD/CVD
15:00:48 20 determinations at issue here to Chapter 11
15:00:51 21 obligations. So again, assertion of jurisdiction
15:00:55 22 would impose Chapter 11 obligations with respect to □
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15:00:59 1 United States AD and CVD law because they would
15:01:04 2 subject the AD/CVD determinations at issue here to
15:01:09 3 Chapter 11 obligations.

15:01:14 4 First, the assertion of jurisdiction
15:01:16 5 would subject those determinations to the standards
15:01:20 6 set forth in the provisions of section A of Chapter
15:01:25 7 11. Second, the assertion of jurisdiction would
15:01:30 8 require that compliance -- compliance by those
15:01:36 9 determinations with those standards be arbitrated
15:01:39 10 under the provisions of section B of Chapter 11.

15:01:44 11 Now, we were surprised to hear this
15:01:46 12 morning that in fact there are no obligations in
15:01:50 13 section B, and that we were not obligated to be
15:01:55 14 here to defend these claims. We choose to stay,
15:01:58 15 however, because we recognize, indeed we are
15:02:00 16 obligated to arbitrate this issue before you.

15:02:05 17 By subjecting the determinations to these
15:02:09 18 Chapter 11 obligations, the assertion of
15:02:13 19 jurisdiction over the claims would result in the
15:02:15 20 imposition of obligations of Chapter 11, a chapter
15:02:20 21 other than Chapter 19, with respect to U.S.
15:02:24 22 antidumping law and countervailing duty law. There □
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15:02:30 1 are two principal arguments why this is so.

15:02:33 2 First, even if the determinations
15:02:37 3 themselves are not part of USA AD/CVD law
15:02:48 4 themselves, if the determinations that arise from
15:02:51 5 that law must conform to Chapter 11 standards and
15:02:54 6 be subject to Chapter 11 arbitration, it is clear
15:02:57 7 that Chapter 11 obligations are being imposed with
15:03:00 8 respect to that law.

15:03:01 9 So even if the determinations themselves
15:03:04 10 are not part of the law, since they arise from that
15:03:08 11 law, subjecting them to Chapter 11 obligations is
15:03:12 12 the imposition of Chapter 11 obligations with
15:03:16 13 respect to that law. This we believe is the proper
15:03:21 14 interpretation of Article 1901(3).

15:03:27 15 Second, and in the alternative, we
15:03:30 16 believe that these AD and CVD determinations are in
15:03:35 17 any event part of our AD and CVD law within the
15:03:39 18 meaning of 1901(3). Ms. Menaker in a few minutes
15:03:46 19 will respond to the four different interpretations
15:03:49 20 we have heard from the claimants in this case and
15:03:51 21 in the 1120 case concerning the meaning of 1901(3)
15:03:57 22 and will show why in fact the interpretations we

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15:04:01 1 have offered are correct.

15:04:02 2 Before she does that, I just want to
15:04:06 3 comment briefly on the claimants' expressions of
15:04:12 4 disgruntlement with their experiences in the
15:04:16 5 Chapter 19 binational process.

15:04:20 6 First of all, let me say, of course, that
15:04:23 7 we deny that we are in noncompliance with 21 of 23
15:04:26 8 decisions that have been rendered in connection
15:04:29 9 with this softwood lumber dispute. All of these

15:04:33 10 proceedings are either ongoing or subject to
15:04:35 11 follow-on proceedings.

15:04:40 12 with respect in particular to the Chapter
15:04:42 13 19 proceedings, let me just note that in compliance
15:04:47 14 with the remands of the antidumping panel including
15:04:52 15 that panel's reversal of its own earlier decision
15:04:56 16 with respect to the use of zeroing, the Department
15:05:01 17 of Commerce has recalculated all dumping margins
15:05:06 18 and the panel's decision on that is awaited. It is
15:05:10 19 late. It was due in October. We don't know why it
15:05:13 20 is late, but the panel has requested even further
15:05:16 21 briefing this week.

15:05:17 22 with respect to the countervailing duty□
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15:05:20 1 panel, on November 22, 2005, the Department of
15:05:26 2 Commerce responded to the latest of the remand
15:05:29 3 decisions of that panel by reaching a de minimis
15:05:34 4 countervailing duty rate, and the panel's decision
15:05:39 5 on that action is also pending.

15:05:42 6 with respect to the material injury
15:05:44 7 panel, in September 2004, the International Trade
15:05:53 8 Commission revoked its threat of injury
15:05:56 9 determination in compliance with the panel's latest
15:06:01 10 decision granted after a period of differences of
15:06:04 11 opinion about what was required in the way of
15:06:07 12 action not inconsistent with the panel's decision.

15:06:11 13 In the meantime, a new threat of injury
15:06:13 14 determination had been issued by the ITC and was
15:06:18 15 submitted to the WTO panel that had been invoked by
15:06:22 16 the Government of Canada. On November 15 of last
15:06:26 17 year, that panel upheld the ITC's threat of injury

15:06:30 18 determination.

15:06:33 19 Currently -- and the U.S. position is
15:06:37 20 that valid threat of injury determination continues
15:06:40 21 to be the legal basis for the antidumping and
15:06:43 22 countervailing duties that are assessed. Canada□
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15:06:47 1 has taken issue with that conclusion and it is now
15:06:50 2 before the Court of International Trade.

15:06:54 3 Now, claimants may be dissatisfied with
15:06:56 4 how these Chapter 19 proceedings have unfolded. To
15:07:00 5 that extent they are in no different position than
15:07:03 6 was counsel for Tembec who was equally dissatisfied
15:07:07 7 with how both its 1120 and now its 1126 proceedings
15:07:10 8 unfolded, but this dissatisfaction does not mean
15:07:15 9 that the United States has defaulted in any way
15:07:19 10 with respect to its obligations. Nor does it mean
15:07:23 11 that the Chapter 19 proceedings have been
15:07:27 12 ineffective, as we heard yesterday. Most
15:07:30 13 importantly, whether they are ineffective or not is
15:07:33 14 irrelevant to the question before this panel.

15:07:37 15 The only question here is whether Article
15:07:44 16 1901(3) has made those proceedings exclusive with
15:07:46 17 respect to the complaints that have been raised in
15:07:49 18 this proceeding.

15:07:52 19 With that I will turn the floor over to
15:07:54 20 Ms. Menaker to show in her rebuttal how that is
15:08:04 21 exactly what Article 1901(3) does.

15:08:08 22 Thank you.□
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15:08:10 1 PRESIDENT VAN DEN BERG: Thank you.

15:08:11 2 Ms. Menaker, please proceed.

15:08:14 3 MS. MENAKER: Thank you.
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15:08:15 4 This morning counsel for Canfor and
15:08:18 5 Terminal conceded that it is conceivable that at a
15:08:23 6 merits phase of these proceedings, Article 1901(3)
15:08:28 7 could bar some aspect of their claim, some or all
15:08:33 8 of their claim.

15:08:38 9 Now, Canfor and Terminal nevertheless
15:08:42 10 argued that this is not something that the Tribunal
15:08:45 11 should be concerned about now because Article
15:08:49 12 1901(3) in their words is just an interpretive
15:08:53 13 provision and doesn't have jurisdictional effect.

15:08:56 14 The meaning of this is unclear to us, it
15:08:59 15 has never been quite clear to us what an
15:09:02 16 interpretive provision is. Every provision in the
15:09:06 17 treaty needs to be interpreted, but Article 1901(3)
15:09:11 18 is of a jurisdictional nature, and certainly at
15:09:15 19 this point in time it is this Tribunal's duty to
15:09:21 20 determine whether or not it has jurisdiction, and
15:09:23 21 the approach suggested by claimants is at odds with
15:09:26 22 the approach accepted, generally speaking and

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15:09:32 1 specifically by international arbitral tribunals,
15:09:36 2 and I point in particular to the Methanex tribunal
15:09:41 3 which accepted that a Tribunal must definitively
15:09:45 4 interpret jurisdictional provisions at the outset.

15:09:50 5 So that is, we contend, the task before
15:09:54 6 this Tribunal, to definitively interpret Article
15:10:00 7 1901(3) and then determine whether claimants have
15:10:03 8 pled facts that confer jurisdiction upon this
15:10:08 9 Tribunal, and in our submission they have not done
15:10:14 10 so.

15:10:16 11 Now, in response to a question when

15:10:18 12 claimants conceded that it is possible that Article
15:10:23 13 1901(3) might bar a claim or part of a claim from
15:10:29 14 Chapter 11 jurisdiction, they nevertheless declined
15:10:33 15 to give any such example of when that might occur,
15:10:41 16 and we suspect that is because this concession
15:10:45 17 highlights the fundamental problem with their
15:10:48 18 argument and is internally contradictory to their
15:10:53 19 argument that Article 1901(3)'s sole function is to
15:10:57 20 prevent an imposition of an obligation on a party
15:11:00 21 to amend its countervailing duty or antidumping
15:11:05 22 duty law. □
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15:11:06 1 As I noted in my opening, a Chapter 11
15:11:09 2 Tribunal cannot order a party to amend its AD or
15:11:15 3 CVD or any law for that matter, nor is there any
15:11:18 4 other mechanism in the NAFTA by which a party can
15:11:22 5 be compelled to amend its law. So by conceding
15:11:27 6 that Article 1901(3) might bar part or some of a
15:11:31 7 Chapter 11 claim, in essence it is a concession
15:11:31 8 that Article 1901(3) must perform some function
15:11:34 9 other than simply preventing the imposition of an
15:11:38 10 obligation on a party to amend its countervailing
15:11:44 11 duty and antidumping law.

15:11:46 12 In addition, claimants have never
15:11:49 13 explained how their interpretation of Article
15:11:53 14 1901(3) comports with that article's ordinary
15:11:59 15 meaning and how by giving it that restrictive
15:12:01 16 interpretation, that it only prevents the
15:12:05 17 imposition of an obligation to amend one's law, how
15:12:09 18 that is consistent with the words in Article
15:12:11 19 1901(3) and how they are not adding those words,
15:12:14 20 specifically the words to amend, to Article

15:12:16 21 1901(3).

15:12:20 22 Now, Professor de Mestral asked
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15:12:25 1 claimants' counsel as a follow-up to this line of
15:12:28 2 questioning questions regarding the Byrd Amendment,
15:12:31 3 and specifically how can this Tribunal -- or does
15:12:34 4 this Tribunal have jurisdiction over a claim
15:12:39 5 challenging the Byrd Amendment.

15:12:41 6 You will recall during my opening I used
15:12:42 7 this as an example of how claimants have no answer
15:12:45 8 to the question of how this Tribunal exercising
15:12:51 9 jurisdiction over a challenge to the Byrd Amendment
15:12:54 10 would not impose obligations on the United States
15:12:58 11 with respect to its AD/CVD law.

15:13:04 12 During the Canfor hearing Canfor's
15:13:07 13 counsel conceded that indeed such a challenge to
15:13:10 14 the law itself might indeed be barred by Article
15:13:14 15 1901(3), and today by again conceding that Article
15:13:19 16 1901(3) might bar some claims, I believe that this
15:13:23 17 position remains unchanged.

15:13:26 18 In response to Professor de Mestral's
15:13:31 19 question, Canfor and Terminal did not say, no, it
15:13:34 20 is not barred under the words of 1901(3), but
15:13:38 21 instead they offered two explanations as to why
15:13:41 22 this Tribunal would, notwithstanding Article
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15:13:44 1 1901(3), still have jurisdiction over that claim.

15:13:48 2 And the two reasons they gave was first
15:13:52 3 because the United States had not notified that
15:13:54 4 amendment pursuant to the terms of Article 1902,
15:13:59 5 and second, they argued that the Byrd Amendment was

15:14:03 6 so far outside the realm of antidumping and
15:14:06 7 countervailing duty law that it couldn't be barred
15:14:09 8 by Article 1901(3).

15:14:11 9 Now, these arguments too are internally
15:14:15 10 inconsistent with one another. Under Article 1902
15:14:19 11 a party only has the obligation to notify its other
15:14:24 12 NAFTA parties of amendments that it is going to
15:14:27 13 make to its antidumping and countervailing duty
15:14:30 14 law.

15:14:31 15 So if Canfor and Terminal are contending
15:14:35 16 that we have violated Article 1902 because we did
15:14:39 17 not give that notification, they have in essence
15:14:41 18 conceded that the Byrd Amendment is a part of our
15:14:45 19 antidumping and countervailing duty law. If that
15:14:47 20 is not the case, then there is no Article 1902
15:14:57 21 violation. Indeed, I believe it is indisputable
15:15:00 22 that the Byrd Amendment is a part of our AD/CVD law

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15:15:04 1 as it is an amendment to Title VII of the Tariff
15:15:08 2 Act of 1930, and AD/CVD statute is defined as such
15:15:12 3 in Annex 1911.

15:15:22 4 So, as I said, simply it cannot be the
15:15:28 5 case that we have violated Article 1902 and yet a
15:15:32 6 claim challenging the Byrd Amendment is not barred
15:15:35 7 by Article 1901(3). Now, claimants contend that we
15:15:40 8 should be denied the so-called safe harbor of
15:15:44 9 Article 1901(3) because of this violation, because
15:15:48 10 we have not given the requisite notification.

15:15:52 11 As I noted during the Canfor hearing,
15:15:56 12 such an interpretation is not only contrary to the
15:16:00 13 ordinary meaning of Article 1901(3) because it just
15:16:06 14 references AD/CVD law, it does not say -- I don't

15:16:11 15 even know how it would be framed if it were to have
15:16:14 16 this meaning, but it does not say or reference
15:16:18 17 anything with respect to a notification. But it
15:16:21 18 would lead to the utterly absurd result that a
15:16:27 19 NAFTA party could rid itself of all of its Chapter
15:16:32 20 19 obligations simply by failing to notify the
15:16:35 21 other parties that it had amended its laws, and
15:16:37 22 certainly the chapter can't be read in such a

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15:16:42 1 manner.

15:16:42 2 The Article 1902 notification requirement
15:16:45 3 was there for a purpose, it was to notify. It was
15:16:48 4 a matter of transparency, so the parties would know
15:16:52 5 right away when another party was going to change
15:16:55 6 its antidumping countervailing duty law, it could
7 take a look at that law, it could ascertain whether
8 it thought it complied with the other party's NAFTA
15:17:01 9 obligations, if it had a problem, it could seek
15:17:03 10 consultations, then it could challenge that law
15:17:06 11 under Article 1903, for example, if it thought it
15:17:12 12 was not in compliance, and it is simply absurd to
15:17:16 13 suggest that a party could get rid of all of its
15:17:22 14 obligations under Chapter 19 by simply failing to
15:17:26 15 notify the other parties that it had changed its
15:17:29 16 laws.

15:17:30 17 So, again, in this respect, it is our
15:17:32 18 contention that claimants' argument is internally
15:17:37 19 inconsistent and they have given no rationale and
15:17:42 20 no explanation as to how imposing an obligation on
15:17:45 21 a party because of its law is not imposing an
15:17:49 22 obligation on that party with respect to its law.

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15:17:54 1 PRESIDENT VAN DEN BERG: Ms. Menaker,
15:17:54 2 could you help me, please. You say this argument
15:17:57 3 is internally inconsistent. What if a party, with
15:18:03 4 capital P, believes itself that a certain piece of
15:18:09 5 legislation is not part of AD/CVD law and therefore
15:18:12 6 does not notify, may the other parties to NAFTA
15:18:16 7 then believe that indeed that piece of legislation
15:18:18 8 is not part of the AD/CVD law?

15:18:24 9 MS. MENAKER: I missed the last part of
15:18:26 10 the question.

15:18:28 11 PRESIDENT VAN DEN BERG: The other
15:18:28 12 parties may then assume -- may they then assume
15:18:36 13 that indeed because that party has not notified the
15:18:39 14 legislation, that indeed the legislation in
15:18:41 15 question is not -- or does not pertain to AD/CVD
15:18:48 16 law?

15:18:49 17 MS. MENAKER: No, that would not be a
15:18:51 18 safe assumption at all. The other party would have
15:18:53 19 to determine for itself whether it believed that
15:18:56 20 law was a AD/CVD law because they have the right to
15:18:59 21 challenge that under Article 1901(3), and you would
15:19:03 22 not want to be bound by the other party's

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15:19:05 1 description of that law, for example.

15:19:08 2 PRESIDENT VAN DEN BERG: I understand
15:19:09 3 that, that another party, with a capital P, to the
15:19:12 4 NAFTA, may take a different view, that is an AD/CVD
15:19:19 5 law and you should have notified them.

15:19:21 6 But if there is a dispute between two
15:19:23 7 parties, whether or not it is AD/CVD, then there is
15:19:27 8 a mechanism to resolve that one, isn't there? But

15:19:30 9 the party can take the initial position that there
15:19:35 10 is no AD/CVD law and no duty for me to notify. You
15:19:39 11 can see that happening?

15:19:41 12 MS. MENAKER: Yes.

15:19:42 13 PRESIDENT VAN DEN BERG: In that context,
15:19:44 14 the claimants make the argument, because it is not
15:19:47 15 notified, the United States does not believe it is
15:19:50 16 AD/CVD law. So in that context it would not be
15:19:56 17 internally inconsistent.

15:19:59 18 MS. MENAKER: I think in that context it
15:20:01 19 is -- I think there it is still the Tribunal's task
15:20:05 20 to determine whether -- what is the nature of the
15:20:09 21 law and whether it is barred, and again, here, I
15:20:13 22 would just say that is not the United States's

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15:20:16 1 position.

15:20:17 2 The United States has noted that the Byrd
15:20:19 3 Amendment is in fact an amendment to our Tariff Act
15:20:22 4 of 1930 which is our principal AD/CVD statute, and
15:20:26 5 as the Tribunal is probably well aware, the
15:20:30 6 claimants have referred to statements we made in
15:20:33 7 the WTO proceeding which were on a quite different
15:20:38 8 issue. They were whether the Byrd Amendment was a
15:20:42 9 specific action against dumping and a specific
15:20:46 10 action I think against subsidization and whether it
15:20:50 11 violated the various WTO agreements, and we argued
15:20:54 12 it did not, but we also lost that position. So I
15:20:58 13 don't see any inconsistencies there.

15:21:03 14 PRESIDENT VAN DEN BERG: I understood
15:21:03 15 that the United States before the WTO, at least
15:21:07 16 according to the claimants, stated that the Byrd

15:21:10 17 Amendment did not belong to AD/CVD law; is that
15:21:14 18 correct? But you have a different story in that
15:21:18 19 respect, I remember.

15:21:21 20 MS. MENAKER: Yes. I don't think that is
15:21:23 21 a -- I think that is an overgeneralization of the
15:21:27 22 position and perhaps is not entirely accurate. I
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15:21:30 1 believe that the United States's position before
15:21:33 2 the WTO was that it was not a specific action
15:21:37 3 against dumping or subsidization, but in any event,
15:21:41 4 we did lose before that Tribunal, and so it is not
15:21:46 5 surprising that our view with respect to the Byrd
15:21:51 6 Amendment has since changed, since we recognize the
15:21:55 7 authority of that body, and they did decide that it
15:21:59 8 was a specific action against dumping and
15:22:01 9 subsidization, so that may very well have changed
15:22:06 10 the nature in which the United States discusses the
15:22:11 11 Byrd Amendment.

15:22:12 12 PRESIDENT VAN DEN BERG: When was the
15:22:13 13 decision by the WTO, approximately? I believe it
15:22:17 14 is 2003 or 2004.

15:23:28 15 (Pause.)

15:23:29 16 PRESIDENT VAN DEN BERG: 16 January 2003?

15:23:31 17 MS. MENAKER: I think that is correct,
15:23:32 18 and I have a note here that the report was adopted
15:23:36 19 on the 27th of January 2003.

15:23:41 20 PRESIDENT VAN DEN BERG: Since then, has
15:23:44 21 the U.S. taken steps to notify?

15:23:47 22 MS. MENAKER: Not of which I am aware,
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15:23:48 1 but we have taken steps to have the Byrd Amendment
15:23:52 2 repealed.

15:23:53 3 PRESIDENT VAN DEN BERG: But the first
15:23:54 4 step here is to notify unless you thought that
15:23:57 5 notification had become redundant because you
15:24:00 6 wanted to repeal in the first place?

15:24:03 7 MS. MENAKER: Not only redundant, but it
15:24:05 8 would serve no purpose because it is very obvious
15:24:08 9 that Canada and Mexico are very well aware of the
15:24:12 10 Byrd Amendment. The notification requirement
15:24:16 11 serves the purpose of letting the other parties
15:24:18 12 know that you have enacted an amendment to their
15:24:21 13 AD/CVD laws, and it is clear that Canada and Mexico
15:24:26 14 had very early notice of that amendment, actual
15:24:30 15 notice, although not pursuant to 1902.

15:24:34 16 PRESIDENT VAN DEN BERG: Now it is your
15:24:36 17 position that notification is not necessary if the
15:24:39 18 others know it?

15:24:41 19 MS. MENAKER: I am not taking a legal
15:24:43 20 position for all time. This issue came up at the
15:24:46 21 Canfor hearing and at that time, I suspect that the
15:24:49 22 view was that would be an act that would be futile,□
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15:24:55 1 in essence, and might cause some confusion with our
15:25:00 2 NAFTA partners were they to receive such a thing.

15:25:08 3 PRESIDENT VAN DEN BERG: We will leave
15:25:09 4 notification aside for the moment.

15:25:12 5 I think you were far outside the AD/CVD
15:25:15 6 law, I think that was the other argument by the
15:25:18 7 claimants.

15:25:19 8 MS. MENAKER: Yes. My point on that is
15:25:21 9 that they say it is so far outside the realm of
15:25:24 10 AD/CVD law, but again, my point is that is

15:25:27 11 inconsistent with their argument that we have
15:25:30 12 violated Article 1902 because if it was so far
15:25:33 13 outside AD/CVD law then it would not be anything
15:25:37 14 that would need to be notified pursuant to Article
15:25:53 15 1902.

15:25:55 16 ARBITRATOR ROBINSON: My I ask a
15:25:56 17 follow-up? Where I am confused, I think the line
15:26:00 18 of the questioning of the President, if I
15:26:03 19 understand it, was more directed at would the lack
15:26:06 20 of notification, whether they had actual notice or
15:26:11 21 not, would the lack of notification under NAFTA as
15:26:18 22 required justifiably lead the claimants to believe
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15:26:24 1 that the United States did not think the Byrd
15:26:28 2 Amendment was an antidumping or countervailing duty
15:26:33 3 law? I think that is the question as we understand
15:26:35 4 it.

15:26:38 5 PRESIDENT VAN DEN BERG: Then Ms. Menaker
15:26:40 6 has responded to it and also provided it to the WTO
15:26:43 7 and finally we came to the conclusion that maybe
15:26:47 8 they should have been notified afterwards, but then
15:26:49 9 the idea came that Byrd should be repealed and then
15:26:53 10 there was some question whether or not notification
15:26:56 11 was still necessary because they knew it in any
15:26:59 12 event, and I think Ms. Menaker was a little far
15:27:03 13 outreached and emphasized that the notification is
15:27:06 14 not required if you know it as a neighboring state.
15:27:09 15 I think that is a fair summary of the discussion.

15:27:28 16 MS. MENAKER: So claimants in our view
15:27:30 17 have not offered an explanation of how imposing
15:27:34 18 liability on a party because of its antidumping and
15:27:36 19 countervailing duty law does not impose an

15:27:39 20 obligation on a party with respect to that law, and
 15:27:43 21 rather than focus on the ordinary language of
 15:27:47 22 Article 1901(3), claimants in our submission place

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15:27:53 1 undue emphasis on supplementary means of
 15:27:57 2 interpretation, particularly the travaux and the
 15:28:04 3 statements contained in the statement of
 15:28:07 4 administrative action, and I just have a few
 15:28:11 5 remarks to make with respect to both of those.

15:28:22 6 with respect to the travaux, there have
 15:28:24 7 been some references to the orders issued by the
 15:28:26 8 Canfor Tribunal for the United States to produce
 15:28:30 9 the travaux, and I did not want to leave any
 15:28:34 10 misimpression in this Tribunal's mind as to the
 15:28:37 11 reasons for the United States's resistance to
 15:28:40 12 claimants' request in the first place, and it was
 15:28:43 13 absolutely --

15:28:45 14 PRESIDENT VAN DEN BERG: I think there is
 15:28:46 15 no need to go into that. The Tribunal understands
 15:28:49 16 it and the Tribunal has the documents in front of
 15:28:53 17 it. There is no need to go into the procedural
 15:28:56 18 history of the case. There is enough history with
 15:28:59 19 that. You may simply move on to the substance. In
 15:29:02 20 any event, the Tribunal has no doubt in its mind at
 15:29:06 21 this point.

15:29:08 22 MS. MENAKER: The point was simply that

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15:29:09 1 we are not hiding from anything in the travaux.
 15:29:11 2 It was a matter of principle, and our understanding
 15:29:14 3 of how the correct way to proceed in interpreting a
 15:29:20 4 treaty in accordance with the Vienna Convention,

15:29:23 5 and I won't go through the history, but I would
15:29:25 6 direct the Tribunal's attention to the final award
15:29:29 7 in the Methanex case, and specifically in part 2,
15:29:33 8 Chapter H, page 10, footnotes 14 and 18 on that
15:29:38 9 point.

15:29:41 10 Part 2, Chapter H, page 10, footnote 14,
15:29:55 11 and then in that same section, footnote 18. We do
15:30:01 12 believe that that Tribunal's approach to treaty
15:30:04 13 interpretation and their decision to not order the
15:30:10 14 United States to produce travaux to Methanex when
15:30:14 15 it asked for those materials, was the correct one,
15:30:17 16 because they hadn't made the requisite showing that
15:30:20 17 supplementary means of interpretation were
15:30:24 18 necessary in that case, and in that respect the
15:30:27 19 Methanex Tribunal explicitly disagreed with the
15:30:31 20 reasoning of the Canfor Tribunal on that note, and
15:30:33 21 I mention that because it is important to us as a
15:30:36 22 matter of principle and -- as to how this Tribunal

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15:30:40 1 ought to go about the work of interpreting the
15:30:44 2 treaty.

15:30:47 3 PRESIDENT VAN DEN BERG: You are
15:30:47 4 referring to order number 4?

15:30:52 5 MS. MENAKER: Yes.

15:30:53 6 Also, looking at the travaux that we
15:30:55 7 have just gone through, I think it is important to
15:30:58 8 recognize what that is and what it is not. All it
15:31:04 9 is is a series of drafts that were produced at the
15:31:08 10 beginning of each negotiating session, and the
15:31:13 11 parties are simply governments. They are not an
15:31:18 12 organization. This task of negotiating the NAFTA
15:31:21 13 cannot be equated to the task that the United

15:31:26 14 Nations and, say, the UNCITRAL committee undertakes
15:31:30 15 when it created the UNCITRAL model law or the
15:31:35 16 UNCITRAL arbitration rules where it has a
15:31:36 17 secretariat in place and where detailed notes are
15:31:40 18 taken of the negotiations and the discussions and
15:31:42 19 the positions of each party, and at the end of each
15:31:45 20 session the parties review this -- what will become
15:31:49 21 the travaux and they make corrections to that, and
15:31:52 22 the positions are all laid out and you can really

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15:31:55 1 follow the discussions and the evolution of the
15:31:59 2 positions.

15:32:02 3 Here, that simply is not the case. We
15:32:05 4 did not have anyone performing that function. We
15:32:08 5 did not have any secretary that takes minutes of
15:32:11 6 the negotiating sessions during the negotiation of
15:32:13 7 the NAFTA.

15:32:15 8 So in our submission, nothing can be
15:32:19 9 taken from the fact that there is no so-called
15:32:23 10 discussion as to what 1901(3) meant. These are
15:32:28 11 just seriatim draft text. There is no discussion
15:32:33 12 of what any of the provisions mean, and Canfor,
15:32:37 13 with respect, we submit, reads too much into that.

15:32:43 14 Now, Canfor has made a few arguments with
15:32:50 15 respect to some of the things that do appear in the
15:32:54 16 travaux, and I would like to respond to just three
15:32:57 17 of those.

15:32:59 18 The first is, you will recall this
15:33:01 19 morning, they pointed to one of the drafts that
15:33:11 20 stated, and I quote, each country will amend its
15:33:14 21 laws to implement the obligations of this section,

15:33:17 22 end quote, and they pointed to that as support for

15:33:22 1 their proposition that, again, the obligations that
15:33:26 2 we were talking about when we used that word were
15:33:30 3 the obligations to amend one's laws.

15:33:33 4 For the reasons I stated in my opening, I
15:33:36 5 don't think you can draw any such conclusion
15:33:38 6 because the word obligations in Article 1901(3) is
15:33:41 7 open-ended, it doesn't have any restrictive words
15:33:45 8 connected to it, but in any event, this statement
15:33:49 9 supports rather than undermines the United States's
15:33:54 10 position because, again, the Tribunal will recall
15:33:57 11 that the United States did amend its laws to bring
15:34:01 12 itself into compliance, and one of the ways in
15:34:04 13 which it did that, it amended the Tariff Act to
15:34:08 14 transfer exclusive jurisdiction over AD/CVD claims
15:34:11 15 from the Court of International Trade to the
15:34:15 16 binational panels established under Article 1904
15:34:19 17 when there was a request made for binational panel
15:34:23 18 reviews.

15:34:24 19 Again, that is an obligation to amend its
15:34:26 20 laws that the United States undertook in order to
15:34:30 21 enter into the agreement, and it again confirms one
15:34:34 22 of the questions asked by the President earlier

15:34:36 1 this morning as to whether that -- the obligation
15:34:39 2 to arbitrate is an obligation, and indeed it is,
15:34:43 3 and that is one manner in which we amended our laws
15:34:46 4 in order to accept an additional obligation, which
15:34:49 5 was the obligation to submit the disputes to
15:34:52 6 Article 1904 binational panel review.

15:34:58 7 And while I am on this subject matter, I

15:35:01 8 will note in response to some of the questions this
15:35:04 9 morning regarding the impact of the carve-out for
15:35:09 10 Article 2203, the entry into force provision, and I
15:35:15 11 would just note that our reading of this provision
15:35:21 12 simply states here that except for Article 2203, no
15:35:25 13 other provisions have -- can be construed to impose
15:35:29 14 obligations.

15:35:30 15 If you look at the entry into force
15:35:33 16 provisions, it says that the agreement shall enter
15:35:36 17 into force on a certain date on an exchange of
15:35:38 18 written notifications certifying the completion of
15:35:41 19 necessary legal procedures. So that could be
15:35:44 20 construed as imposing an obligation on the parties
15:35:48 21 to exchange these written notifications. It was a
15:35:51 22 prerequisite to the entry into force of the

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15:35:56 1 agreement, and indeed that is how the United States
15:35:59 2 viewed that requirement, because if you take a look
15:36:07 3 at the statement of administrative action on page
15:36:16 4 6, it discusses the entry into force provision, and
15:36:20 5 it states, Article 2203 of the agreement requires
15:36:24 6 the three governments to exchange notes certifying
15:36:28 7 that they have each completed necessary legal
15:36:31 8 procedures as a final condition of entry into force
15:36:33 9 of the NAFTA.

15:36:34 10 So, again, the United States viewed the
15:36:37 11 entry into force provision as requiring it to do
15:36:41 12 something, and that is, again, consistent with our
15:36:44 13 reading of Article 1901(3), and as Mr. Robinson
15:36:49 14 noted this morning, the fact that there is this one
15:36:54 15 very limited exception to Article 1901(3)

15:36:59 16 underscores the breadth of the exception from
15:37:02 17 obligations accorded by Article 1901(3).

15:37:17 18 Now, the second conclusion -- or the
15:37:21 19 second thing that counsel sought to draw from the
15:37:27 20 travaux, the drafts, was the footnote to the word,
15:37:34 21 I guess it was a footnote to Article 201, the
15:37:38 22 definitional section, of measure, and the footnotes

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15:37:43 1 that stated that the United States wanted to make
15:37:47 2 certain that this took into account single acts.

15:37:58 3 In this respect, this is yet another
15:38:02 4 example where counsel points to differences used in
15:38:08 5 words between different provisions but then doesn't
15:38:12 6 explain why that difference has any significance
15:38:17 7 with respect to the interpretation that they are
15:38:19 8 espousing.

15:38:20 9 And here, yes, measure includes a single
15:38:25 10 act, and perhaps that was not clear back when the
15:38:28 11 NAFTA was being negotiated, and we wanted to make
15:38:31 12 certain of that. But AD/CVD law or -- AD/CVD law
15:38:38 13 also includes a single act, a statute is a single
15:38:42 14 act, and that is encompassed within the definition
15:38:45 15 of AD/CVD law; so again, we see no import to the
15:38:50 16 fact that the NAFTA parties sought to make clear
15:38:54 17 that measure also could encompass a single act.

15:39:00 18 On the broader note as to the difference
15:39:04 19 between using the term measure and using the term
15:39:10 20 law, certainly a different word was used. The
15:39:14 21 NAFTA parties did not use the word measure in
15:39:17 22 Article 1901(3), but again, counsel seemed to

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15:39:22 1 suggest or in fact actually suggested today that if

15:39:26 2 we had, that might bar their claims, but they
15:39:29 3 didn't give any explanation of why their claims
15:39:33 4 would be barred if Article 1901(3) used the term
15:39:37 5 measure and didn't use the term law, and in fact,
15:39:41 6 that concession undermines their theory that
15:39:46 7 somehow Article 1901(3) doesn't have any
15:39:48 8 jurisdictional effect, but more importantly, they
15:39:52 9 have not identified what it is in the definition of
15:39:55 10 measure that would encompass the conduct of which
15:39:59 11 they complain. That is not encompassed within the
15:40:04 12 definition -- or that is not encompassed within
15:40:07 13 Article 1901(3) as it is phrased. Let me expound
15:40:13 14 on that for a moment.

15:40:15 15 The definition of the word measure, of
15:40:17 16 course, includes law, and if the claimants are
15:40:21 17 challenging a law, the Byrd Amendment for example,
15:40:25 18 that would be a measure, but in our contention it
15:40:29 19 is also AD/CVD law. There is no difference there.

15:40:33 20 If they are challenging a practice, they
15:40:38 21 have not said what that practice is, but also the
15:40:44 22 term AD/CVD law encompasses administrative

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15:40:49 1 practice, so they would have to explain how the
15:40:52 2 practice they are challenging is a practice but yet
15:40:56 3 is not an administrative practice, and so on, and
15:40:59 4 they have given us no indication of why Article
15:41:02 5 1901(3) would be broader in scope and would bar
15:41:05 6 their claims if it stated you can't impose an
15:41:08 7 obligation on a party with respect to that party's
15:41:11 8 AD/CVD measures, but it doesn't bar their claims if
15:41:17 9 it says with respect to their AD/CVD law.

15:41:22 10 The last point that I wanted to make, I
 15:41:27 11 think the only other time that claimants resorted
 15:41:30 12 to the travaux was when they looked to the section
 15:41:35 13 or to the draft, excuse me, that had the section
 15:41:39 14 headed provisions to be placed outside of Chapter
 15:41:42 15 11, and we discussed this yesterday, so I will make
 15:41:47 16 only a few very brief points.

15:41:49 17 First, it is clear that that list was not
 15:41:54 18 exhaustive. There is no indication that it is
 15:41:57 19 exhaustive, but I as I pointed out yesterday,
 15:42:00 20 procurement is also exempted from Chapter 11 and is
 15:42:03 21 not on that list.

15:42:04 22 In any event, it is interesting to note□
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15:42:07 1 that that draft was dated August 27, 1992, and that
 15:42:11 2 postdates the draft in which Article 1901(3) first
 15:42:15 3 appeared, which was back in June. So, again, if
 15:42:18 4 you have already treated the entire subject matter
 15:42:23 5 in a different chapter and have already included it
 15:42:29 6 in Article 1901(3), at least there is a suggestion
 15:42:32 7 that you would not necessarily think to include it
 15:42:34 8 on a list of matters to be dealt with outside of
 15:42:38 9 Chapter 11.

15:42:47 10 I would like to turn to the statement of
 15:42:52 11 administrative action, and that statement claimants
 15:43:02 12 rely --

15:43:04 13 PRESIDENT VAN DEN BERG: Do you want me
 15:43:05 14 to take it in front of me? Please direct me to --

15:43:10 15 MS. MENAKER: It is just --

15:43:12 16 PRESIDENT VAN DEN BERG: It is one of the
 15:43:13 17 exhibits you have filed. Those I can find because
 15:43:20 18 that was not a late receipt.

15:45:19 19 (Pause.)

15:45:19 20 PRESIDENT VAN DEN BERG: It is the
15:45:20 21 appendix to the in tab 24, Volume IV.

15:45:30 22 MS. MENAKER: Claimants have relied on
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15:45:32 1 this repeatedly, the latest in their filing the
15:45:35 2 Friday before the hearing where they quote this
15:45:37 3 language, and they say here that Articles 1901 and
15:45:41 4 1902 make clear that each country retains it is
15:45:45 5 domestic antidumping and countervailing duty laws
15:45:47 6 and can amend them, and then they jump to the last
15:45:52 7 section which says these provisions are identical
15:45:55 8 to Articles 1901 through 1903 of the CFTA except
15:45:59 9 for technical changes necessary to accommodate the
15:46:03 10 addition of a third country.

15:46:11 11 I will address their argument first that
15:46:14 12 all 1903 was was a technical change to accommodate
15:46:21 13 the addition of a third country, Mexico. As we
15:46:24 14 noted in our opening and as you will be able to see
15:46:28 15 from the red line we provided to the Tribunal this
15:46:31 16 morning, the vast majority of changes that were
15:46:33 17 made to Articles 1901 through 1903 in the NAFTA as
15:46:39 18 compared with the CFTA were technical changes to
15:46:44 19 accommodate the addition of a third country. They
15:46:44 20 are simply changes that say the other party's
15:46:48 21 goods, to the goods of another party, and things of
15:46:51 22 that nature, to take into account that instead of

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15:46:54 1 two parties you now have three parties to the
15:46:57 2 treaty, and that is -- that explains, that sentence
15:47:06 3 there. Claimants rely on this sentence and yet

15:47:10 4 still have never offered an explanation as to how
15:47:13 5 Article 1903 in any way could be interpreted as a
15:47:20 6 provision that simply accommodates the addition of
15:47:24 7 a third country to the treaty.

15:47:30 8 So then Canfor also looks at the other
15:47:33 9 sentence and says Articles 1901 and 1902 make clear
15:47:38 10 that each country retains its domestic
15:47:42 11 antidumping and countervailing duty laws and can
15:47:44 12 amend them, so they say there Article 1903 can't be
15:47:49 13 doing anything other than that.

15:47:52 14 But in fact Articles 1901 and 1902, that
15:47:59 15 is an accurate description of what they do. They
15:48:02 16 permit the parties to retain their antidumping and
15:48:05 17 countervailing duty laws, and during my opening I
15:48:09 18 talked about articles -- Article 1902, which is
15:48:13 19 entitled "Retention of Domestic AD/CVD Law," and
15:48:17 20 then in subparagraph 1 it says that each party
15:48:19 21 reserves the right to apply its AD/CVD law. So
15:48:23 22 that much is very clear. □

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15:48:26 1 Now, Article 1901(3) reinforces this
15:48:32 2 right by expressly providing that obligations
15:48:35 3 outside of Chapter 19 can't be imposed with respect
15:48:38 4 to the law. Now, the right to retain and apply
15:48:41 5 your trade law is compromised and in fact is an
15:48:46 6 empty right if you are subject to liability for
15:48:48 7 having retained the law or having applied the law.

15:48:54 8 So, before I gave the example of a
15:48:57 9 challenge to the Tariff Act of 1930. Article 1902
15:49:03 10 grants the United States the right to retain that
15:49:06 11 act. If a provision of that act was challenged in
15:49:12 12 a Chapter 11 arbitration and the United States was

15:49:15 13 found liable and was ordered to pay money, that
15:49:19 14 would be inconsistent with Article 1902's grant of
15:49:23 15 authority for the United States to retain that act.
15:49:27 16 we would have had the right to retain it, yet we
15:49:29 17 have to pay money for retaining it. It is
15:49:32 18 inconsistent, and Article 1901(3) makes this clear
15:49:36 19 by stating that no obligations from other
15:49:38 20 provisions of other chapters can be construed to
15:49:41 21 impose an obligation on us with respect to that
15:49:45 22 law. By the same token that applies to your

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15:49:59 1 right to retain your law which means nothing if you
15:50:01 2 don't have the right to apply the law. The law
15:50:02 3 sits on the books but if you can never apply it,
15:50:03 4 you don't have the right to retain the law. By the
15:50:06 5 same token, the right to apply the law assumes the
15:50:10 6 right to retain the law.

15:50:13 7 Now, in Article 1902 we are expressly
15:50:16 8 granted both rights. We don't even have to read
15:50:19 9 that one into the other because, like I said, it
15:50:21 10 specifically says we can retain it and in
15:50:23 11 subparagraph 1 it specifically provides that we may
15:50:27 12 apply it.

15:50:30 13 So if a party applies its antidumping and
15:50:34 14 countervailing duty laws and then is subject to
15:50:37 15 challenge and then is forced to pay money because
15:50:40 16 of that, that also is inconsistent with that
15:50:44 17 party's rights under Article 1902 to apply its
15:50:50 18 laws.

15:50:50 19 And so just as imposing obligations on a
15:50:53 20 party because of the substance of the law is

15:50:55 21 inconsistent with the right to retain the law,
15:50:58 22 imposing obligations on a party because of a
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15:51:03 1 party's application of the law is similarly
15:51:05 2 inconsistent with permitting the parties to apply
15:51:10 3 their AD/CVD laws. So, again, Article 1901(3)
15:51:15 4 simply reinforces the rights that are contained in
15:51:18 5 Article 1902's grant of authority, and thus -- I
15:51:21 6 mean, the SAA statement is entirely accurate in
15:51:26 7 that respect.

15:51:28 8 Now, Canfor wants the SAA to do more than
15:51:32 9 that. It says that, you know, there is no mention
15:51:37 10 of dispute resolution in there. But, again, I
15:51:39 11 remind the Tribunal of what this document is and
15:51:43 12 what it is not. We need to interpret treaty in
15:51:47 13 accordance with its text. This is merely a general
15:51:50 14 summary of provisions of the treaty. It is
15:51:54 15 accurate, but it is not going to specify every
15:51:57 16 single thing and every single implication of every
15:52:01 17 Article.

15:52:02 18 But, as we stated, as far as Article
15:52:07 19 1901(3) is concerned, the fact that in Article
15:52:09 20 1901(3) it doesn't mention Chapter 11 is irrelevant
15:52:12 21 because its effect would be no different if in
15:52:15 22 Chapter 11 itself we had an Article that said no
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15:52:18 1 provision of this chapter shall be construed to
15:52:21 2 impose an obligation on a party with respect to its
15:52:24 3 AD/CVD laws.

15:52:25 4 Now, Canfor's counsel this morning
15:52:28 5 pointed to the UPS case, and Article 1501(3), which
15:52:34 6 they stated was a clear exclusion from
Page 118

15:52:38 7 state-to-state arbitration for competition matters
15:52:42 8 and then pointed to the note 43, as you stated with
15:52:46 9 respect to investor state arbitration. And they
15:52:50 10 call that a clear exclusion, although, of course,
15:52:53 11 that was at issue in the UPS case, so apparently it
15:52:58 12 was not perceived to be so clear by those claimants
15:53:01 13 in that case.

15:53:03 14 Now, I would direct the Tribunal's
15:53:06 15 attention in the -- and I don't know if these pages
15:53:11 16 are provided, but in the statement of
15:53:16 17 administrative action, if you look at Chapter 15,
15:53:25 18 and you look at 1501(3), the description --

15:53:31 19 PRESIDENT VAN DEN BERG: Is that in the
15:53:32 20 record?

15:53:35 21 MS. MENAKER: I don't believe the
15:53:36 22 entirety of the statement of administrative
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15:53:39 1 action --

15:53:41 2 PRESIDENT VAN DEN BERG: We have two
15:53:43 3 portions in two different places, because the Tab
15:53:46 4 29 has only pages 40 and something. Page 194
15:53:48 5 relied on by the claimant is somewhere else. I
15:53:51 6 couldn't find the reference that quickly.

15:53:54 7 Mr. Landry and Mr. Mitchell, do you have
15:53:56 8 an objection that Ms. Menaker quotes from pages
15:54:01 9 that are not in the record, although other portions
15:54:04 10 of that same document are in the record?

15:54:07 11 MR. MITCHELL: No, provided that we can
15:54:10 12 respond, if necessary, in the post-hearing
15:54:11 13 submissions. We don't have a copy of it.

14 PRESIDENT VAN DEN BERG: So you don't

15:54:14 15 have a copy of it. It would have been useful then,
15:54:16 16 in any case, you could follow it, if you had a
15:54:19 17 copy. Ms. Menaker, you have only one copy there?

15:54:23 18 MS. MENAKER: I have two copies. I am
15:54:26 19 just looking to see if I have them marked up.

15:54:31 20 I could lend this to plaintiff's counsel
15:54:36 21 temporarily.

15:54:41 22 PRESIDENT VAN DEN BERG: Ms. Menaker
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15:54:42 1 offers you an unannotated version of the SAA.

15:54:47 2 Mr. Landry, and Mr. Mitchell. What you
15:54:56 3 have is an incomplete copy and what Ms. Menaker is
15:55:01 4 going to quote you from something which is
15:55:04 5 apparently not in the record. I don't mind because
6 part of this document is in the record. Why not
7 quoting from other parts, provided, of course, that
8 you agree, your side agrees to it and also that you
15:55:17 9 have a copy in front of you.

15:55:18 10 MR. MITCHELL: I have a copy of pages 173
15:55:21 11 and 174.

15:55:23 12 MS. MENAKER: Yes.

15:55:25 13 PRESIDENT VAN DEN BERG: Then the problem
15:55:26 14 is solved.

15:55:28 15 MS. MENAKER: I am happy to provide this
15:55:30 16 to the Tribunal.

15:55:48 17 This is in response to claimant's
15:55:50 18 arguments that if Article 1901(3) barred claims
15:55:56 19 under Chapter 11, there would have been a mention
15:55:58 20 of this in the SAA and what I am doing is pointing
15:56:01 21 to one of the -- what has termed a clear exclusion
15:56:05 22 in Article 1501(3) which states that no party may
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1 have recourse to dispute settlement under this
15:56:10 2 agreement for any matter arising under this
15:56:12 3 article.

15:56:12 4 And if you look at the description of
15:56:15 5 Article 1501 in the Statement of Administrative
15:56:18 6 Action at page 173, that states that Article 1501
15:56:24 7 provides that each NAFTA government will adopt or
15:56:28 8 maintain antitrust measures and cooperate on issues
15:56:30 9 of competition law enforcement policy, including
15:56:32 10 mutual legal assistance, notification, consultation
15:56:34 11 and exchange of relevant information. But the
15:56:37 12 United States and Canada have long had strong
15:56:40 13 antitrust laws. Mexico adopted a comprehensive
15:56:44 14 antitrust law in mid-1993.

15:56:47 15 So there it is clear there is no mention
15:56:49 16 of dispute resolution or the carve-out for the
15:56:53 17 obligation to submit disputes concerning
15:56:57 18 competition law to dispute resolution. It is
15:57:02 19 simply an overview of what that article generally
15:57:05 20 does, and no inference can be drawn from the lack
15:57:08 21 of a specific mention of dispute resolution in the
15:57:11 22 SAA. Similarly, the same is true with respect to

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15:57:15 1 the description given for Articles 1901 through
15:57:19 2 1903.

15:57:40 3 Now, the United States stands by each of
15:57:42 4 the arguments that we have made concerning the
15:57:48 5 proper definition of the term antidumping and
15:57:51 6 countervailing duty law in Article 1901(3), and I
15:57:56 7 won't repeat all of those here. As you know, it is
15:57:59 8 our contention that the definitions supplied in

15:58:02 9 Articles 1902(1) and 1904(2) do not apply
15:58:07 10 ipso facto to Article 1901(3) because they are
15:58:10 11 definitions for the purposes of those articles.
15:58:15 12 However, even if they were to apply, duty
15:58:19 13 determinations are antidumping law and
15:58:21 14 countervailing duty law. They are an example of an
15:58:27 15 administrative practice, and I would direct the
15:58:30 16 Tribunal's attention also to page -- you need not
15:58:34 17 look now, but to page 310 of the Canfor transcript
15:58:39 18 where Canfor concedes that duty determinations
15:58:43 19 could be administrative practice. However, they
15:58:47 20 say that while -- let me just -- I apologize. Just
15:59:04 21 so as not to mischaracterize the argument -- they
15:59:08 22 say here that while they could -- a past duty□

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15:59:14 1 determination might be an example of administrative
15:59:17 2 practice, a duty determination is not
15:59:21 3 administrative practice for the purposes of Article
15:59:26 4 1901(3) because you interpret the term duty
15:59:33 5 determinations as falling within administrative
15:59:36 6 practice only if they are past duty determinations
15:59:39 7 that you may rely on. It is essentially the same
15:59:43 8 normative law argument, that it is only normative
15:59:47 9 law that the parties were referring to in Article
15:59:52 10 1901(3).

15:59:55 11 And again, I just refer the Tribunal to
15:59:57 12 our arguments in that regard, that there is no
16:00:00 13 reason to import the context in which the term
16:00:02 14 "duty determinations" is used in Article 1904 into
16:00:06 15 Article 1901(3).

16:00:08 16 Now, I just wanted to take this
16:00:14 17 opportunity to briefly look at the French and

16:00:18 18 Spanish texts which in our view fully support the
 16:00:24 19 United States' position in this regard.

16:00:30 20 The first point is regarding the term
 16:00:41 21 "with respect to" and we have made several
 16:00:44 22 arguments about that term, which, again, I won't
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16:00:47 1 repeat. But in response to claimant's arguments
 16:00:49 2 that that term has an unduly restrictive and narrow
 16:00:53 3 meaning and can't be equated with other terms such
 16:00:56 4 as in connection with, regarding, relating to. I
 16:01:00 5 would direct the Tribunal's attention to the French
 16:01:04 6 version of the NAFTA in Article 1901(3) where the
 16:01:10 7 term "with respect to" is -- or where the term
 16:01:14 8 "with respect to" appears in the English version,
 16:01:18 9 the term "relativment" appears in the French
 16:01:23 10 version, which I believe can be translated as
 16:01:25 11 "relating to." And so that is further support that
 16:01:28 12 the NAFTA parties did not intend to impart a
 16:01:32 13 particularized narrow definition to that term.

16:01:37 14 Now, with respect to the term
 16:01:38 15 "antidumping countervailing duty law." First, the
 16:01:42 16 Spanish provision, as I noted, uses the term
 16:02:01 17 "disposiciones juridicas" and which I believe
 16:02:02 18 translates as "legal provisions." And in fact, in
 16:02:07 19 the English version, you will recall 1901(3) says
 16:02:11 20 no provision of any other chapter of this
 16:02:14 21 agreement, and in the Spanish version it says
 22 "ninguna disposicion." So it is the same word,
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1 "disposiciones" so I believe that should be
 16:02:24 2 translated in the same manner, which is "legal

16:02:25 3 provisions." Again, a broad term, certainly not
16:02:28 4 confined to statutes.

16:02:33 5 If you look at -- and this is consistent
16:02:37 6 because if you look at Articles 1902(1) and
16:02:41 7 1904(2), the Spanish version similarly uses the
16:02:46 8 term "disposiciones juridicas" throughout. So they
16:02:53 9 use that term consistently.

16:02:58 10 PRESIDENT VAN DEN BERG: As opposed to
16:03:04 11 "ley. "Leyes"?

12 MS. MENAKER: Exactly. As opposed to
16:03:05 13 "ley" which means "statute." And that is confirmed
16:03:07 14 by looking at Article 1911. When they have the
16:03:11 15 definition of antidumping and countervailing duty
16:03:15 16 statute they use the term "ley," and they also use
16:03:18 17 that term when defining the word "measure" in
16:03:21 18 Article 201 where in the English version it has the
16:03:26 19 term "statute. And the Spanish version it has the
16:03:29 20 term "ley."

16:03:39 21 So, again, that is all consistent with
16:03:41 22 the conclusion that the term "law" is indeed
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16:03:44 1 broader than the term "statute.

16:03:48 2 And the French version similarly confirms
16:03:52 3 this view. In the French version of Article
16:04:03 4 1901(3), it uses --

16:04:07 5 PRESIDENT VAN DEN BERG: Sorry. This a
16:04:08 6 wonderful linguistic exercise, but I must tell you
16:04:13 7 that in Article 1911, for the domestic law, they
16:04:20 8 use the word "direcchio interno," and that should
16:04:28 9 tie in with 1905(1).

16:04:58 10 MS. MENAKER: Yes, it does.

11 PRESIDENT VAN DEN BERG: You see that?
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16:05:00 12 Because I don't know whether the Spanish language
 16:05:03 13 is richer than the English language, and I think we
 14 should not, you and I, engage in a debate on that,
 15 not being native speakers in that respect.

16:05:11 16 But I know that "direcchio" is law as
 16:05:12 17 such but then they use -- and that they use in 1905
 16:05:16 18 as well. I see that 1905 has fallen off this copy.
 16:05:29 19 That is the copy I have.

16:05:29 20 MS. MENAKER: They do use "direcchio"
 16:05:34 21 also in 1905.

22 PRESIDENT VAN DEN BERG: Yeah, "direcchio"
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16:05:35 1 interno. why is it, then, that there they use the
 16:05:36 2 word "direcchio" whereas in 1901 paragraph 3 does
 16:05:41 3 not use "direcchio" because it would also be "law."
 16:05:46 4 But instead of that, "disposiciones juridicas."

16:05:54 5 MS. MENAKER: And I have to answer
 16:05:57 6 provisionally, but consulting others.

7 PRESIDENT VAN DEN BERG: I would take it
 8 under advisement. That's simply is the question,
 16:05:58 9 asking whether you and I should not engage in a
 16:06:01 10 debate since we both are not a Spanish-speaking
 16:06:05 11 persons. That may be very subtle, these
 12 distinctions.

16:06:09 13 MS. MENAKER: I would have thought
 14 without looking at the text, I would have thought
 16:06:13 15 that the word "direcchio" roughly translated as
 16:06:15 16 "law" and just doing a word-by-word definition of
 16:06:21 17 "disposiciones juridicas," "legal provisions" to me
 16:06:24 18 sounds somewhat broader.

16:06:28 19 PRESIDENT VAN DEN BERG: But the English

16:06:30 20 text does not say in 1901(3) "legal provisions. It
 16:06:32 21 says more.

16:06:34 22 MS. MENAKER: I understand that. So I am
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16:06:35 1 just saying, you know, that is just a direct
 16:06:36 2 translation. That would be the connotation, but I
 16:06:40 3 would like to consult with our language services or
 16:06:42 4 people that do legal definitions to see if there is
 16:06:45 5 any import to that change, but I think that the --
 16:06:48 6 one of the important points is that they certainly
 16:06:51 7 don't use word -- the same word that they use when
 16:06:53 8 translating for the word "statute." But as far as
 16:06:57 9 that difference, we would have to consult further.

10 PRESIDENT VAN DEN BERG: The same as you
 16:07:08 11 see in the French text, then, "legislacion sur le
 16:07:12 12 droit." That is in 1901(3). And in 1911, indeed
 16:07:22 13 they use "legislacion entrieur. So there it seems
 16:07:26 14 that they are more or less consistent.

16:07:34 15 MS. MENAKER: In the French text I
 16:07:36 16 thought that they used, and maybe this is what you
 16:07:38 17 are saying, that they used the term "legislacion"
 16:07:42 18 in 1903 for "law. Whereas in --

16:07:47 19 PRESIDENT VAN DEN BERG: In 1911 they do
 16:07:48 20 the same --

21 MS. MENAKER: Right.

16:07:49 22 PRESIDENT VAN DEN BERG: -- in the
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16:07:49 1 definitions, whereas the Spanish text doesn't do
 16:07:53 2 that.

16:07:54 3 MS. MENAKER: well, in 1911 for the
 4 definition for antidumping and countervailing duty
 16:08:03 5 statute they use "le loi," right?

16:08:04 6 PRESIDENT VAN DEN BERG: Now we are
16:08:05 7 looking for the definition 1905(1) and that
8 definition you find in 1911 and there they use
9 "legislacion entrieur" and the Spanish uses
16:04:25 10 "direcchio interno."

16:08:20 11 Now, nothing may turn on all this, it may
16:08:22 12 simply be a quirk in the translations, but we have
16:08:25 13 to accord an equal force to the various texts.

14 MS. MENAKER: Unless I'm
16:08:36 15 misunderstanding, I think the French text is akin
16:08:38 16 to the English one --

16:08:40 17 PRESIDENT VAN DEN BERG: Yes. The
16:08:40 18 Spanish text is a little bit different.

16:08:44 19 MS. MENAKER: Yes, yes, yes, exactly.
16:08:45 20 But there I would also note because there may have
16:08:49 21 been something I thought on the record where Canfor
16:08:51 22 and Terminal this morning said that the term

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16:08:58 1 "legislacion" in the French test in Article 1901(3)
16:08:58 2 supported them and I do not think that it does at
16:09:01 3 all because that term doesn't -- cannot be
16:09:06 4 translated as, you know, although perhaps the
16:09:10 5 English cognate might be "legislation," it doesn't
16:09:14 6 translate as "statute" as you can see from the 1911
16:09:18 7 which translates "statute" as "le loi" as well as
16:09:25 8 1904(2) and 1902(1) they use the term "le loi."

16:09:26 9 ARBITRATOR MESTRAL: But you might, in
16:09:26 10 your review you might want to consider the question
16:09:30 11 whether "legislacion" as used here is as abstract a
16:09:35 12 term as "law" as we, I'm sure, can all opine, can
16:09:40 13 be seen as a fairly abstract term. Is

16:09:46 14 "legislacion" as broad? I think that is the
16:09:48 15 question for you.

16:10:01 16 PRESIDENT VAN DEN BERG: Mr. Robinson
16:10:03 17 also has a question.

18 ARBITRATOR ROBINSON: Thank you, Mr.
16:10:05 19 President. It would be helpful since under
16:10:09 20 Article 55 we have three equally authentic texts.
16:10:18 21 And, of course, the more in number of equally
16:10:21 22 authentic texts the more difficult the question□

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16:10:26 1 becomes. It would be helpful at least for me if
16:10:30 2 the parties would provide any learning on the
16:10:34 3 interpretation of three equally authentic texts in
16:10:40 4 three languages where there are any differences,
16:10:45 5 what is the rule of interpretation, are there any
16:10:48 6 precedents, is there any scholarly learning as to
16:10:52 7 what one does in endeavoring to bring them into
16:10:56 8 some kind of equilibrium.

16:11:03 9 MS. MENAKER: We will certainly endeavor
16:11:05 10 to do that and to look into these other language
16:11:09 11 issues. But the one point which I do want to
16:11:13 12 reemphasize is that there is no sound basis in our
16:11:20 13 view for interpreting the term "antidumping and
16:11:23 14 countervailing duty law" to mean simply
16:11:25 15 "antidumping and countervailing duty statute. But
16:11:30 16 nevertheless, even if you were to do that, so even
16:11:35 17 if you were to somehow come to that conclusion,
16:11:39 18 whether it is, you know, by looking at the other
16:11:42 19 language texts or however, even if you were to
16:11:45 20 accord it its most narrow definition, if you
16:11:49 21 regulate a party's application of the statute, you
16:11:54 22 are imposing obligations on a party with respect to□

16:11:57 1 that statute. And, of course, these AD/CVD
16:12:00 2 determinations that were made, they were all made
16:12:03 3 pursuant to provisions in the Tariff Act.

16:12:07 4 The administrators at -- the agency
16:12:10 5 officials at Commerce and ITC, that is the statute,
16:12:14 6 that is the law that they are looking to when they
16:12:16 7 make their determinations, and if you impose an
16:12:20 8 obligation on the United States when we apply our
16:12:27 9 law, then you are imposing an obligation on us with
16:12:31 10 respect to that law.

16:12:33 11 So, again, our arguments are consistent,
16:12:38 12 yet alternative in that regard because while we do
16:12:41 13 believe that antidumping and countervailing duty
16:12:45 14 determinations are part of the AD/CVD law, we also
16:12:50 15 believe that even if 1901(3) was worded in a more
16:12:54 16 narrow fashion, that it would not make a
16:12:57 17 difference, that claimants claims would still be
16:13:00 18 barred.

16:13:08 19 PRESIDENT VAN DEN BERG: Mr. Robinson has
16:13:10 20 a question, Ms. Menaker.

16:13:13 21 ARBITRATOR ROBINSON: Thank you, Mr.
16:13:15 22 President. One, it would be interesting to know, □
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16:13:17 1 if this is not inappropriate, Mr. President, to
16:13:21 2 know whether rolling texts in French were
16:13:23 3 maintained by Canada, and whether rolling texts in
16:13:27 4 Spanish were maintained by Mexico similarly to the
16:13:36 5 rolling texts that were maintained in English.

16:13:38 6 I gather that the negotiations were
16:13:42 7 carried out in English and that the government of

16:13:45 8 Canada very kindly offered its services as a
16:13:48 9 secretary for the maintains of these rolling texts.
16:13:51 10 But if it is not inappropriate, I would think it
16:13:54 11 would be useful to know whether the government of
16:14:01 12 Canada through the process maintained a rolling
16:14:04 13 text, whether the government of Mexico in the
16:14:06 14 process maintained a Spanish text, and if they did,
16:14:11 15 if it is appropriate, if they would be willing to
16:14:14 16 please hand them over to the parties and to the
16:14:16 17 Tribunal.

16:14:40 18 MS. MENAKER: I want to confirm the
16:14:44 19 answer before giving it, so we will contact others.
16:14:50 20 I don't know of any rolling texts in Spanish and
16:14:54 21 French, but I don't want to answer definitively,
16:14:57 22 but I would state that in your question you said if

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16:15:00 1 the government of Canada, for instance, had some
16:15:03 2 text in French, rolling text, and if Mexico had
16:15:06 3 some in Spanish, and again, even if this Tribunal
16:15:12 4 were to look at that travaux, the only travaux
16:15:14 5 that they ought to be looking at or the only thing
16:15:14 6 that is travaux are the documents that are shared
16:15:18 7 among all three parties.

16:15:20 8 So if those documents were simply
16:15:22 9 internal documents, if Mexico, for instance,
16:15:24 10 translated some of the chapters as they were going
16:15:27 11 along so internally they could discuss them, but
16:15:29 12 they were never shared with United States and
16:15:32 13 Canada, that would shed no light on anything in our
16:15:35 14 review.

16:15:35 15 So I think, you know, what we are talking
16:15:37 16 about here are only the texts that were shared, and

16:15:39 17 we will confirm whether or not such things exist.

16:15:45 18 ARBITRATOR ROBINSON: well, I understand
16:15:46 19 that, and if I remember from the Canfor transcript,
16:15:56 20 there was at least an oral request as to whether,
16:16:03 21 even if the documents had not been handed over,
16:16:07 22 whether, in this instance, the government of the

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16:16:11 1 United States had any internal documents that would
16:16:17 2 be revelatory of the meaning even if they were
16:16:19 3 internal, and as I understand it, the answer there
16:16:23 4 was no. So it might be similarly very helpful even
16:16:30 5 if the French and the Spanish are not in the nature
16:16:33 6 of formal travaux, if we were to know whether
16:16:38 7 there was anything internal that would be helpful ,
16:16:43 8 just in yes or no, not in terms of asking for it,
16:16:46 9 but just to understand if there was anything, and
16:16:49 10 then if there is, maybe we could figure out how to
16:16:52 11 address that situation.

16:16:59 12 The last issue I might have, I guess, is
16:17:02 13 where I remain a little surprised, and this is for
16:17:06 14 both parties, is there any explanation for why
16:17:15 15 there is no definition of the term "administrative
16:17:20 16 practice" either in Article 201 or Article 1911,
16:17:30 17 and similarly, is there any explanation for why the
16:17:34 18 word "determination" was not included in the
16:17:40 19 laundry list, as I will call it, in 1901(3),
16:17:46 20 1902(1), 1904(2), 1905(1), 1911, and 201.

16:18:00 21 MS. MENAKER: As far as explanations as
16:18:02 22 to why certain terms weren't defined or included,

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16:18:06 1 the rolling text doesn't shed any light on that

16:18:09 2 because it is not a transcript of any discussions
16:18:12 3 that took place during the negotiations. So that
16:18:18 4 we simply do not know.

16:18:20 5 As far as the definition of
16:18:23 6 administrative practice, and we mentioned at the
16:18:26 7 Canfor hearing as well, that is not defined. We
16:18:32 8 did find a definition to it in the CFTA which we
16:18:35 9 noted at that hearing, to the extent it is at all
16:18:39 10 helpful. It was in the Financial Services Chapter,
16:18:42 11 Article 1706, and I can read that to you.

16:18:46 12 It says: administrative practices means
16:18:48 13 all actions, practices and procedures by any
16:18:52 14 federal agency having regulatory responsibility
16:18:55 15 over the activities of financial institutions
16:18:58 16 including, but not limited to, rules, orders,
16:19:01 17 directives, and approvals.

16:19:06 18 So there, that definition, if that were
16:19:12 19 accepted and -- to draw an analogy, if that
16:19:19 20 definition were used in the context of AD/CVD
16:19:23 21 matters, it would encompass duty determinations
16:19:27 22 because duty determinations are akin to a rule, an

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16:19:32 1 order, a directive, not an approval, but you could
16:19:35 2 see that an approval by an agency would be here an
16:19:41 3 administrative practice, and that certainly an
16:19:43 4 order is akin to a determination in that regard.

16:19:48 5 ARBITRATOR ROBINSON: Is there any
16:19:49 6 explanation as to why the definition from the CFTA
16:19:55 7 was not carried forward into the NAFTA?

16:20:03 8 MS. MENAKER: Again, I don't -- the
16:20:04 9 travaux doesn't shed any light on that and that
16:20:06 10 was in a different chapter to begin with. It was

16:20:09 11 in the Financial Services chapter.

16:20:12 12 ARBITRATOR ROBINSON: But if I understand
16:20:13 13 it, there was no similar definition in what is
16:20:19 14 now -- what would the similar chapter be?

16:20:23 15 MS. MENAKER: It is in Chapter 14, and
16:20:24 16 there is not.

16:20:27 17 ARBITRATOR ROBINSON: And there is no
16:20:28 18 travaux or learning as to why it was dropped.

16:20:34 19 MS. MENAKER: Again, the rolling text, it
16:20:36 20 doesn't give any explanation, so you wouldn't see
16:20:38 21 an explanation from there but we have not -- we
16:20:42 22 have not done the search that we did for 1901(3)□

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16:20:46 1 with respect to, say, this provision.

16:20:51 2 ARBITRATOR ROBINSON: So the definition,
16:20:52 3 in effect, was never in the rolling text of the
16:20:54 4 NAFTA.

16:20:57 5 MS. MENAKER: That I don't know. I don't
16:20:59 6 know if we have searched through and studied the
16:21:02 7 rolling text of Chapter 14. In fact, I can say I
16:21:04 8 haven't. No, we have not, and so I would have to
16:21:08 9 go and in fact I don't even know if that is
16:21:13 10 compiled. Actually, that is not -- I don't even
16:21:22 11 think it is all compiled. The NAFTA parties at
16:21:26 12 some point in time might compile and release the
16:21:30 13 rolling text, but what had occurred was it was in
16:21:35 14 reaction to the Canfor order that we had to do that
16:21:39 15 for Chapter 11 and once it was released, we
16:21:43 16 released it publicly. But it was a rather large
16:21:47 17 endeavor just because the different parties have
16:21:53 18 different things in their files and had to

16:21:56 19 ascertain whether certain documents were indeed the
16:22:00 20 ones that were exchanged among the parties. And I
16:22:03 21 don't -- well, I know that has not been done with
16:22:05 22 every chapter. I don't know if it will be done. □

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16:22:08 1 ARBITRATOR ROBINSON: All right, thank
16:22:09 2 you. One of the final questions, you will be glad
16:22:12 3 to know is just to see if you had any comment on
16:22:15 4 maybe the rather rambling and maybe imprecise
16:22:24 5 exposition and questions that I asked this morning
16:22:29 6 with respect to the relationships of Chapter 19 and
16:22:35 7 Chapter 20 and Chapter 11, and maybe to save the
16:22:39 8 government from even acknowledging that such an
16:22:43 9 allegation could be true, if hypothetically we were
16:22:47 10 to assume that a U.S. company was making similar
16:22:53 11 allegations against the government of Canada as to
16:22:57 12 conduct under Chapter 19, what in your view is the
16:23:07 13 situation as to the relief or the remedy that is
16:23:10 14 the appropriate one? Is it that the U.S. company
16:23:17 15 would have to come to the United States government
16:23:22 16 and ask for espousal of its complaint fully or
16:23:28 17 would the U.S. company also to the extent there was
16:23:34 18 an investment -- an investor within the definitions
16:23:39 19 of Chapter 11 -- to that extent, would the U.S.
16:23:43 20 company be able to have any complaint under Chapter
16:23:49 21 11 on the theory that the behavior of the Canadian
16:23:54 22 government had been so extreme, so extraordinary, □

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16:23:59 1 whatever the adjectives we wish to apply, that in
16:24:03 2 fact it was outside of Chapter 19 and became an
16:24:07 3 international wrong, a denial of justice, whatever.

16:24:26 4 MS. MENAKER: Let me offer perhaps a -- I
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16:24:29 5 hope it is not too simplistic of an answer, if I
16:24:34 6 have misunderstood the import of the question. But
16:24:37 7 if the tables were reversed, so to speak, that U.S.
16:24:41 8 company could and probably would go to the USTR and
16:24:45 9 petition it to bring a Chapter 19 claim against
16:24:51 10 Canada and similarly -- the same way in which they
16:24:56 11 do if they have a grievance before the WTO. And
16:25:02 12 actually I should clarify that. They don't even
16:25:05 13 need to do that. The U.S. Government may itself
16:25:08 14 may bring a Chapter 19 claim, but the claimant
16:25:11 15 itself can claim directly under Chapter 19. So it
16:25:15 16 would file a claim under Chapter 19, just like
16:25:19 17 Canfor has done here, and just like Tembec did
16:25:23 18 before the Chapter 19 panels.

16:25:28 19 Now, the issue of Chapter 11 is just
16:25:32 20 whether or not this -- we have added a dispute
16:25:37 21 resolution system for direct claims by investors,
16:25:41 22 but the scope of jurisdiction is limited by -- it

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16:25:45 1 is a limited scope of jurisdiction over certain
16:25:48 2 claims. And so if the Tribunal does not have
16:25:52 3 jurisdiction in this case because of Article
16:25:56 4 1901(3), the claimant has to seek redress elsewhere
16:26:00 5 if there is some, and there may not be any. It
16:26:03 6 would be the same as if there was no treaty at all.
16:26:06 7 In that case, like you said, they could always
16:26:09 8 resort to seeking espousal, seeking diplomatic
16:26:16 9 protection on asking their government to, through
16:26:17 10 diplomatic measures, try to resolve the dispute.
16:26:21 11 But it is no difference in effect than if there had
16:26:25 12 been no treaty.

16:26:26 13 Here you have a treaty that grants
16:26:29 14 jurisdiction over a limited scope of disputes. If
16:26:31 15 you are outside of that, you have to seek redress
16:26:36 16 elsewhere if it's available.
16:26:38 17 ARBITRATOR ROBINSON: Well, to follow
16:26:38 18 this a bit, if the Canadian government so abused
16:26:47 19 the Chapter 19 process that it rose to a violation
16:26:55 20 of the international agreement in which the Chapter
16:27:06 21 19 reliance upon the municipal law is a part, is
16:27:15 22 there a situation where that conduct would lift the

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16:27:21 1 U.S. claimant out of Chapter 19 because the
16:27:24 2 behavior of the Canadian government had been so
16:27:30 3 egregious that, in effect, it would be lifted to
16:27:34 4 the international level and then could be somehow
16:27:38 5 transposed into Chapter 11 to the extent that an
16:27:42 6 investment or an investor was involved and would be
16:27:46 7 subject to the international law standards of
16:27:50 8 Chapter 11 because the behavior of the Canadian
16:27:55 9 government had been so outrageous that it was no
16:28:00 10 longer a Chapter 19 subject because it had been
16:28:05 11 violated and had become subject to international
16:28:08 12 agreement standards.

16:28:24 13 MS. MENAKER: The very short answer to
16:28:26 14 that question is no. I think that in that case if
16:28:29 15 the United States believed that Canada had so
16:28:32 16 abused the Chapter 19 process, then our remedy
16:28:35 17 would be to resort to Article 1905, which sets
16:28:39 18 forth a mechanism to safeguard that process by
16:28:43 19 requesting consultations with the government. If
16:28:45 20 that fails, ultimately by withholding the benefits
16:28:49 21 of the agreement, and --

16:28:56 22 ARBITRATOR ROBINSON: If that would be
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16:28:57 1 the U.S. Government, what would the U.S. claimant
16:29:00 2 do, in that situation, a private party?

16:29:04 3 MS. MENAKER: The claimant is in no
16:29:07 4 different of a situation than right now they have
16:29:09 5 their Chapter 19 remedies and then they would
16:29:12 6 petition their government to proceed under Article
16:29:16 7 1905, but I think, again, that when, in your
16:29:21 8 question, when you talked about so abusing the
16:29:24 9 Chapter 19 process, and here, you know,
16:29:27 10 claimant's -- I mean, there the remedy is clearly
16:29:31 11 to have the government proceed under Article 1905
16:29:36 12 if that is indeed the allegation. But as far as
16:29:40 13 what you were saying, if what the claimant believes
16:29:46 14 is that this has occurred because the agencies of
16:29:52 15 the other party have so abused their AD/CVD system,
16:29:59 16 have so misapplied and abused their AD/CVD laws,
16:30:03 17 that is still, again, is barred by Article 1901(3).
16:30:08 18 That doesn't turn it into a Chapter 11 claim
16:30:11 19 because it would still be imposing an obligation on
16:30:13 20 the party with respect to its AD/CVD laws.

16:30:17 21 ARBITRATOR ROBINSON: Well, under my
16:30:18 22 hypothetical, which it is a pure hypothetical,
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16:30:21 1 under international law, is it possible for the
16:30:29 2 conduct to reach a level of violation or bad faith
16:30:35 3 or whatever that an aggrieved party reaches the
16:30:41 4 point where it is unable to rely at all upon the
16:30:47 5 process within the international agreement so,
16:30:51 6 therefore, it is as if the Chapter 19, including

16:30:56 7 1901(3), no longer is in existence. It is sort of
16:31:01 8 gone because the level of violation in the
16:31:04 9 hypothetical by the Canadian government is so
16:31:08 10 violative of international norms in an
16:31:12 11 international agreement that it becomes an
16:31:14 12 international wrong and does, because of the
16:31:20 13 presence of Chapter 11, to the extent that the U.S.
16:31:24 14 company had investments as an investor in Canada,
16:31:29 15 would that U.S. private claimant, other than going
16:31:33 16 to the U.S. Government and complaining and saying
16:31:38 17 please go under 1905, is there any situation in
16:31:42 18 your view that such a U.S. company would have any
16:31:46 19 claim in that situation under Chapter 11 against
16:31:51 20 the Canadian government?

16:32:04 21 MR. CLODFELTER: If I might,
16:32:05 22 Mr. Robinson, your first question was related to
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16:32:08 1 abuses of the Chapter 19 process and so Ms. Menaker
16:32:14 2 answered that that is what Article 1905 is designed
16:32:18 3 to take care of, within its scope, obviously, but a
16:32:20 4 state-to-state proceeding with respect to a defined
16:32:24 5 number of such abuses, for example. And I think
16:32:25 6 the question shifted to abuses of antidumping and
16:32:28 7 countervailing duty law by a state. Is that what
8 you're addressing?

16:32:33 9 ARBITRATOR ROBINSON: I am sorry, I may
16:32:35 10 just be inarticulate. No, I wasn't attempting to
16:32:38 11 shift the hypothetical. I was attempting to focus
16:32:41 12 on recognizing that the sovereign state of the
16:32:46 13 United States would have recourse under 1905 and
16:32:50 14 that a private U.S. claimant could go and complain
16:32:57 15 to its sovereign master and say: will you please

16:33:00 16 take up my gripe and go and talk with the
 16:33:04 17 government of Canada.

16:33:06 18 what I was attempting to focus on was the
 16:33:09 19 private claimant which has been given under the
 16:33:15 20 treaty, as I understand it, Chapter 11 rights, as
 16:33:20 21 well as Chapter 19 rights. So if the private
 16:33:26 22 claimant runs into a brick wall under Chapter 19, □

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16:33:36 1 and to such an extent that it can show that the
 16:33:38 2 conduct of the government of Canada is an
 16:33:40 3 international wrong, is a cognizable violation of
 16:33:45 4 the treaty and violation of international law, is
 16:33:49 5 that private U.S. company -- would it have any
 16:33:55 6 residual right somehow under Chapter 11 that it
 16:34:00 7 would not otherwise have because of Article
 16:34:06 8 1901(3). But Article 1901(3), in effect, is no
 16:34:09 9 longer in existence because the private claimant
 16:34:13 10 has been lifted out of 19 because it can no longer
 16:34:16 11 rely on it. It is as if it is a dead letter
 16:34:19 12 because of the conduct of -- the alleged conduct of
 16:34:21 13 the government of Canada. Is that something under
 16:34:25 14 international law that is at all recognized? Is
 16:34:28 15 that a principle? Is there any recourse, either as
 16:34:31 16 a matter of the conventional law or of the
 16:34:33 17 customary law?

16:34:36 18 MR. CLODFELTER: It is very difficult at
 16:34:37 19 this level of generality to determine. Yesterday
 16:34:41 20 Ms. Menaker stated our position with respect to the
 16:34:44 21 kind of claim that was brought here and whether it
 16:34:48 22 could be brought under a BIT, for example, that □

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1 doesn't have a chapter relating to antidumping and
16:34:50 2 countervailing duty and we do take the -- and we
16:34:50 3 would take the position in such a case that it
16:34:53 4 doesn't relate to the claimant in their capacity as
16:34:57 5 an investor, and we couldn't conceive of how it
16:35:01 6 could be otherwise, that we would oppose
16:35:03 7 jurisdiction in that case anyway. So that is a
16:35:06 8 partial answer that we gave yesterday to the
16:35:09 9 situation.

16:35:10 10 The first question, of course, is does it
16:35:12 11 somehow come within Chapter 19 and that question
16:35:14 12 has to be answered independent of whether or not
16:35:18 13 the conduct is somehow so egregious that it
16:35:23 14 rises to a -- it also constitutes violations of
16:35:26 15 other principles of international law or something
16 like that.

16:35:29 17 And this is kind of the situation that
16:35:31 18 arose in the Fisheries case, where Spain
16:35:35 19 essentially maintained they have to ignore Canada's
16:35:38 20 reservation because what was being done was a
16:35:40 21 violation of international law. And the Court
16:35:43 22 rejected that, and we mentioned yesterday Judge

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16:35:47 1 Koroma's separate opinion, a very short opinion in
2 the Fisheries case. We'd recommend that you look
16:35:50 3 at that because that is exactly what he said.

16:35:51 4 It just doesn't matter what the broader
16:35:53 5 law context is, the job of the Tribunal to
16:35:57 6 determine whether or not the claim falls within the
16:36:00 7 strict subject matter jurisdiction of the Tribunal.
16:36:04 8 And if it doesn't, it cannot entertain the claim.

16:36:10 9 I think that is as far as we can take our
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16:36:12 10 answer at this point. There are other mechanisms,
16:36:17 11 but partly it is a recognition that not every wrong
16:36:21 12 has a mechanism in international law short of
16:36:26 13 espousal by a person's state, and obviously, free
16:36:30 14 trade agreements business only provides some
16:36:31 15 remedies for some wrongs. There are some
16:36:33 16 mechanisms for some wrongs, but not all of them.

16:36:35 17 ARBITRATOR ROBINSON: All right. Thank
16:36:37 18 you very much.

16:36:41 19 PRESIDENT VAN DEN BERG: Slightly on a
16:36:42 20 different note, by way of comparison, you are aware
16:36:47 21 of a line of cases in the United States, by the
16:36:51 22 United States Supreme Court about no arbitrability□
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16:37:01 1 in matters of antitrust. You know that first the
2 United States Supreme Court -- the original
16:37:02 3 position was that matters relating to antitrust are
16:37:03 4 not arbitrable. Then the first Supreme Court
16:37:07 5 decision said, well, look for international cases.
16:37:13 6 That is different. There it's arbitrable but for
16:37:16 7 domestic cases, not. And then the second came
16:37:21 8 down, says well, look, we go also for domestic
16:37:23 9 cases. Why? Because I'm making a distinction
16:37:26 10 after all.

16:37:27 11 The rationale of the original position
16:37:30 12 was that in matters relating to antitrust were
16:37:34 13 perceived to be some form of public policy, public
16:37:38 14 interest, could not be left to private individuals
16:37:41 15 to be adjudicated. Only judge's who had been
16:37:46 16 trained as judge were qualified to deal with this,
16:37:49 17 a number of these type of policy considerations.

16:37:52 18 Now, if I understand the United States'
16:37:55 19 argument correctly, Article 1901 paragraph 3 is
16:38:01 20 also provision to the effect that it causes non
16:38:05 21 arbitrability of AD/CVD matters, insofar as it
16:38:09 22 concerns Chapter 11 arbitrations.□
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16:38:18 1 MS. MENAKER: Yes.

16:38:19 2 PRESIDENT VAN DEN BERG: My question is
16:38:20 3 what is the rationale for that. whilst it is
16:38:23 4 arbitrable under 1904 binational panel, are they
16:38:31 5 higher gods than private arbitrators under Chapter
16:38:34 6 11? I am injecting this as a joke.

16:38:37 7 MS. MENAKER: That is a trick question,
16:38:39 8 but, I think there is an analogy there because the
16:38:43 9 parties, when -- prior to the CFTA, they reserved
16:38:50 10 all jurisdiction just to their domestic courts and
16:38:54 11 to the United States it was to the Court of
16:38:59 12 International Trade, and that was all. And then as
16:39:00 13 you heard us say during negotiations for the CFTA,
16:39:04 14 Canada and the United States tried to change that,
16:39:07 15 tried to come up with substantive law rules or a
16:39:09 16 common set of AD/CVD rules. They failed, but there
16:39:13 17 was discomfort with leaving the system the way it
16:39:20 18 was because neither party -- because there were
16:39:23 19 suggestions that perhaps the parties, they had a
16:39:27 20 lot of trade disputes between one another, they
16:39:31 21 didn't trust one another's domestic courts, they
16:39:34 22 thought that they were biased in favor of their own□
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16:39:37 1 producers, et cetera. So they decided to create
16:39:39 2 the special mechanism that they put forward in
16:39:43 3 Chapter 19 and the Chapter 19 panelists, and not

16:39:56 4 that anybody thinks they are better qualified than
16:39:58 5 any of the Chapter 11 arbitrators, but they are a
16:40:02 6 specialized panel. They have here they have to
16:40:07 7 have trade law expertise.

16:40:10 8 when we appoint panels for Chapter 11
16:40:13 9 disputes, it is not something that we are terribly
16:40:16 10 concerned about since we look for people that have
16:40:19 11 public international law expertise, investment law
16:40:23 12 dispute expertise, the panel here --

16:40:27 13 PRESIDENT VAN DEN BERG: I understand.
16:40:27 14 You don't have to explain the human aspect of this,
16:40:30 15 if I may call the word, or whether the lawyers are
16:40:31 16 qualified or not. The question is the rationale.
16:40:36 17 why is it that these type of matters are not
16:40:38 18 arbitrable like you had -- I used as a comparison
16:40:45 19 because may be familiar with this, with antitrust,
16:40:47 20 and perhaps it is an area akin to antitrust, and
16:40:51 21 actually that raises another question, to see
16:40:53 22 whether the comparison is correct, under U.S.□

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16:40:56 1 federal arbitration law are AD/CVD matters
16:41:01 2 arbitrable, if it would arise, on the federal
16:41:04 3 level, I don't talk about the state level, because
16:41:08 4 then anything can be different:

16:41:13 5 I know, for example, the validity of a
16:41:15 6 patent, that is typically not arbitrable even on
16:41:19 7 the federal level. But now AD/CVD matters, are
16:41:24 8 they not arbitrable, whilst at the same time on the
16:41:27 9 federal level antitrust matters are arbitrable?

16:41:32 10 MS. MENAKER: I don't know that there
16:41:33 11 have been any decisions in that regard, but in

16:41:35 12 order for them to be arbitrable, since AD/CVD
16:41:39 13 determinations are issued by a government agency,
16:41:42 14 that would suggest -- the government itself would
16:41:46 15 have had to have given its consent to arbitrate,
16:41:50 16 and I can say with almost complete certainty that
16:41:56 17 the U.S. Government has not done that.

16:42:00 18 Outside of this mechanism, the Chapter 19
16:42:03 19 mechanism, the United States has not entered into
16:42:07 20 arbitration agreements with any individual
16:42:10 21 companies that are importing or exporting products
16:42:13 22 to the United States and said, okay, you don't like□
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16:42:16 1 our duty determination, let's arbitrate this
16:42:19 2 dispute. And there are certainly no preexisting
16:42:23 3 consent to arbitration out there in any of our laws
16:42:26 4 that would give that grant of jurisdiction.

16:42:29 5 But I would direct the Tribunal's
16:42:32 6 attention to the SAA when, in the Chapter 19
16:42:42 7 portion of the statement, the SAA, on page 199,
16:42:48 8 they talk about selection of panelists and
16:42:51 9 committee members, and it is quite a lengthy
16:42:55 10 discussion, and stands out in contrast to many
16:42:59 11 other sections because the United States spent so
16:43:04 12 long describing this one section. It is almost --
16:43:10 13 it is a little over two pages, and it talks about
16:43:13 14 how judges and former judges are to be appointed to
16:43:18 15 the binational panels to the extent practicable,
16:43:22 16 and that is in the agreement itself, but then USTR
16:43:28 17 here is telling Congress that it is going to
16:43:30 18 endeavor to do that, and they are -- they think
16:43:37 19 that that is very important because those judges
16:43:40 20 are going to be very familiar with administrative

16:43:44 21 law, U.S. administrative law, and also with the
16:43:47 22 standard of review, the municipal law standard of
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16:43:51 1 review which was so important to them.

16:43:53 2 So I think that is another, you know,
16:43:55 3 perhaps a further elaboration on my answer to your
16:43:58 4 question, as to why the parties consented to have
16:44:04 5 these sensitive disputes or felt comfortable having
16:44:09 6 them resolved before these binational panels, and
16:44:13 7 yet perhaps not in any other forum.

16:44:18 8 PRESIDENT VAN DEN BERG: Thank you.

16:44:20 9 Professor de Mestral has a question.

16:44:24 10 ARBITRATOR MESTRAL: Our president has
16:44:25 11 taken us into the heady realms of comparative law
16:44:30 12 and philosophy. So I will follow him for a moment,
16:44:33 13 if I may, but tell me if you feel that is an unfair
16:44:36 14 question and I will bear that in mind.

16:44:37 15 European community law for the first 35
16:44:43 16 years knew several express treaty remedies against
16:44:49 17 different measures, whether it be community
16:44:52 18 measures or national measures taken pursuant to
16:44:56 19 European community law, and then somewhat
16:45:00 20 unexpectedly, the European Court of Justice, when
16:45:04 21 asked, what should we do when faced with a very
16:45:08 22 serious violation of community law which causes
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16:45:12 1 prejudice to private individuals.

16:45:14 2 And they responded, in the first case
16:45:16 3 where a group of workers should have had a remedy
16:45:19 4 and they were not provided the remedy, a financial
16:45:23 5 remedy. They said, yes, the state in its

16:45:26 6 application of community law should pay damages,
16:45:29 7 and they have gone a little further, and they've
16:45:32 8 now said, well, when there has been an egregious, a
16:45:36 9 most serious and patent violation by a state that
16:45:41 10 must have known better, there should be liability
16:45:43 11 to pay damages.

16:45:48 12 And my question to you is that Chapter 11
16:45:50 13 is essentially similar to that, is it not? And
16:45:54 14 here we have not something that is not invented, no
16:45:57 15 arbitrator is trying to invent Chapter 11. It is
16:46:01 16 there, it is part of the process. And what we are
16:46:04 17 being asked by the other party is to say Chapter 19
16:46:09 18 seems to have gone awry, we are not able to really
16:46:14 19 take full advantages of Chapter 19. Of course, you
16:46:18 20 don't necessarily agree with that, but the argument
16:46:20 21 is being made, is it so surprising that Chapter 11
16:46:24 22 should not be used to try to -- or at least on a

16:46:32 1 prima facie basis to examine whether there ought to
16:46:34 2 be a remedy or not. You think that is an unfair
16:46:40 3 question perhaps.

16:46:43 4 MS. MENAKER: It is not an unfair
16:46:45 5 question, but I do not agree that Chapter 11 could
16:46:49 6 or should be used in that manner, and I am not as
16:46:53 7 -- not familiar with EC community law, but
16:46:58 8 certainly there is no basis for ordering -- holding
16:47:06 9 a state liable, ordering it to pay money, when it
16:47:10 10 has not consented to jurisdiction over a specific
16:47:16 11 type of action. And the argument that Chapter 19
16:47:24 12 is ineffective cannot create jurisdiction where
16:47:29 13 none exists. The lack of an effective remedy or
16:47:33 14 indeed the lack of any remedy at all just does not

16:47:36 15 create jurisdiction where there was none, and we
16:47:39 16 can think of, I am sure, the room full of lawyers
16:47:44 17 could think of multitudes of examples where
16:47:47 18 individuals have been wronged, and they have no
16:47:50 19 remedy, and it is an international wrong, but
16:47:56 20 maybe -- they definitely don't have any direct
16:47:59 21 recourse against the other state because there is
16:48:04 22 no agreement granting jurisdiction to anybody to

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16:48:07 1 settle a dispute of that nature, and they may not
16:48:10 2 even have recourse, say, to a state-to-state
16:48:14 3 dispute resolution in the ICJ.

16:48:18 4 Perhaps they have not -- they don't have
16:48:20 5 jurisdiction over that type of dispute, or they
16:48:23 6 have not accepted the Court's jurisdiction over
16:48:25 7 that type of dispute, and in some cases there is
16:48:28 8 simply no remedy. But that is never a reason to
16:48:33 9 find jurisdiction where it doesn't exist. I think
16:48:39 10 that also goes back to Mr. Robinson's question
16:48:43 11 about whether you can be lifted out of Article
16:48:47 12 1901(3) because you can't rely on Chapter 19.

16:48:51 13 Now, let's assume, and we dispute that
16:48:54 14 Chapter 19 has been proven ineffective, but even if
16:48:58 15 it were the case, what if the NAFTA contained
16:49:03 16 nothing in Chapter 19 other than Article 1901(3)?
16:49:06 17 what if, for some reason, the parties decided to
16:49:09 18 just put in Article 1901(3), and this gets back to
16:49:12 19 those hypotheticals, I think it would have been an
16:49:15 20 odd thing to do because the subject matter wouldn't
16:49:20 21 have been covered, so you would not have had to
16:49:25 22 have taken the next step of cabining off those

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1 obligations off from everything else.

16:49:26 2 But, say, our BIT, for example, had an
16:49:30 3 Article 1903 in it and let's assume we dispute that
16:49:34 4 this type of claim, that a BIT arbitral Tribunal
16:49:39 5 would have jurisdiction over this type of claim,
16:49:41 6 but, there, for example, you could not argue that
16:49:46 7 because -- simply because the claimants have no
16:49:49 8 other remedy, because that BIT doesn't create a
16:49:51 9 Chapter 19 mechanism, that therefore you should
16:49:55 10 have jurisdiction under the BIT. And this is apart
16:49:58 11 from all of the other arguments why they may not
16:50:00 12 have jurisdiction under the BIT, but if you had a
16:50:04 13 1901(3) provision, we would say we have two
14 arguments: you don't have jurisdiction anyway, but
16:50:10 15 look at 1901(3) and that's not -- I think that puts
16:50:11 16 it just in the starkest example of you just don't
16:50:14 17 create jurisdiction where none exists just because
16:50:17 18 you feel that you lack a remedy elsewhere.

16:50:21 19 And in that respect, I would also just
16:50:24 20 say that 1901(3) also does not say -- it doesn't
16:50:28 21 say that you can impose obligations on a party with
16:50:32 22 respect to any matter that is subject to the

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16:50:35 1 dispute resolution mechanism in Chapter 19. It
16:50:39 2 doesn't say that. So it is not as if the Tribunal
16:50:42 3 has to look at every claim that claimants are
16:50:46 4 bringing and decide, oh, do they have a remedy in
16:50:50 5 Chapter 19 because that is what Article 1901(3)
16:50:53 6 carves out. It is not framed in that manner.

16:50:56 7 So there could perhaps be an instance
16:50:59 8 where something still would impose an obligation on

16:51:02 9 the United States with respect to its AD/CVD law
16:51:05 10 and perhaps hypothetically there is either not a
16:51:08 11 remedy under Chapter 19 or if you want to term it
16:51:11 12 an ineffective remedy, but legally it doesn't make
16:51:15 13 any difference insofar as the Tribunal's
16:51:25 14 jurisdiction is concerned.

16:51:27 15 PRESIDENT VAN DEN BERG: I see we have to
16:51:28 16 take a break for ten minutes.

16:51:36 17 Okay, we recess for ten minutes.
18 (Discussion off the record.)

17:22:05 19 PRESIDENT VAN DEN BERG: We can go back
17:22:06 20 on record. I suggest that we discuss that at the
17:22:11 21 conclusion of the hearing, but now first we
17:22:16 22 continue the closing statements by the United
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17:22:22 1 States, and, Ms. Menaker, I think I inadvertently
17:22:27 2 cut you off at the end of the presentation, but
17:22:30 3 before doing that, Mr. Robinson has a question.

17:22:33 4 ARBITRATOR ROBINSON: I would like to
17:22:38 5 ask, if we assume that there was no Article 1901(3)
17:22:48 6 in Chapter 19, and if we assume the facts as
17:22:54 7 alleged by the claimants for this purpose, would in
17:22:58 8 your view they have any legitimate claim within
17:23:04 9 Chapter 11 in terms of the jurisdiction of the
17:23:07 10 claim, not that it would succeed, but would there
17:23:11 11 be a claim that would fall within Chapter 11?

17:23:15 12 MS. MENAKER: No, because you will recall
17:23:20 13 that we have two additional jurisdictional
17:23:23 14 arguments, one based on Article 1101(1) which is I
17:23:29 15 think is more on point for purposes of your
17:23:31 16 question, but also on Article 1121 subparagraph 1,

17:23:36 17 and in our view both of those articles -- the
17:23:40 18 application of both of those articles deprive this
17:23:44 19 Tribunal of jurisdiction over claimants' claims,
17:23:50 20 but the Tribunal is not addressing those at this
17:23:53 21 stage.

17:23:55 22 ARBITRATOR ROBINSON: If I made it even
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17:23:55 1 more hypothetical, if there was no 1101, no 1121
17:23:59 2 hindrance, would the absence of 1901(3), at least
17:24:05 3 as far as the Chapter 19 allegations, to the extent
17:24:12 4 that they are an investment by an investor, would
17:24:17 5 they be eligible for consideration under Chapter
17:24:20 6 11?

17:24:23 7 MS. MENAKER: No, again. First of all,
17:24:26 8 1101 sets forth the scope of the jurisdiction for
17:24:29 9 the chapter, but if we want to assume that there
17:24:34 10 was no scope provision, so 1101 wasn't there, 1121
17:24:37 11 wasn't there, we still don't believe that they --
17:24:43 12 this claim -- it is hard to say it would not fall
17:24:46 13 within the -- hard to articulate precisely since
17:24:52 14 you are talking away the jurisdictional provisions
17:24:55 15 that grant the Tribunal jurisdiction, but
17:24:58 16 nevertheless, if you look at Article 1102,
17:25:03 17 subparagraph 1, for example, one of the articles
17:25:05 18 that claimant claims has been breached, it says
17:25:09 19 each party shall accord to investors of another
17:25:12 20 party treatment no less favorable than that it
17:25:16 21 accords in like circumstances to its own investors
17:25:18 22 with respect to the establishment, acquisition,
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17:25:20 1 operation, et cetera, or disposition of its
17:25:24 2 investments, and there, again, for the same reasons
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17:25:29 3 that we were to argue that this claim doesn't fall
17:25:32 4 within the scope of Chapter 11 or within Article
17:25:36 5 1101(1), we would state that it is not -- the facts
17:25:42 6 that they have alleged cannot form the basis for a
17:25:46 7 violation of Article 1102(1) because it is not a
17:25:50 8 claim with respect to their investment, but
17:25:54 9 granted -- the hypothetical is difficult to answer
17:25:57 10 because, of course, I am turning this into a
17:26:00 11 jurisdictional argument, and admittedly I am
17:26:05 12 looking to the substantive arguments and then
17:26:07 13 making somewhat of an admissibility argument in
17:26:12 14 that regard because you are taking out the 1101(1).

17:26:17 15 ARBITRATOR ROBINSON: Fine. Thank you
17:26:18 16 very much.

17:26:20 17 PRESIDENT VAN DEN BERG: Before I forget
17:26:20 18 it, the question asked this morning to the
17:26:24 19 claimants we would also like to ask of the United
17:26:29 20 States, is, in your submission, Article 1901
17:26:33 21 paragraph 3 an all-or-nothing provision? I think I
17:26:42 22 know the answer, but --
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17:26:46 1 MS. MENAKER: I think the way in which
17:26:48 2 when you were elaborating on that question for
17:26:50 3 claimants, you said are there any claims that a
17:26:54 4 Chapter 11 Tribunal would not have jurisdiction
17:26:57 5 over because of 1901(3), and yes, our answer to
17:27:02 6 that question is yes, because it does deprive a
17:27:07 7 Chapter 11 Tribunal of jurisdiction over many
17:27:11 8 claims, and an example of course are claimants'
17:27:14 9 claims.

17:27:16 10 PRESIDENT VAN DEN BERG: All claims

17:27:16 11 relating to AD and CVD matters?
17:27:22 12 MS. MENAKER: All claims that if a
17:27:24 13 Tribunal accepted jurisdiction over those claims,
17:27:27 14 all claims that would impose an obligation on the
17:27:31 15 United States with respect to its AD/CVD law.

17:27:34 16 So we are not -- the general effect of
17:27:39 17 that, I have not thought of a claim that would be
17:27:46 18 excluded if, as you say, it excludes claims over
17:27:51 19 AD/CVD matters. I think that is a colloquial way
17:27:56 20 of stating what our position is, and I think that
17:27:58 21 is accurate, but we are in no way asking the
17:28:04 22 Tribunal to say substitute the words in Article

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17:28:06 1 1901(3), that is certainly not necessary. We are
17:28:10 2 just asking the Tribunal to interpret that article
17:28:14 3 in accordance with its ordinary meaning.

17:28:17 4 PRESIDENT VAN DEN BERG: Thank you.
17:28:18 5 You may proceed.

17:28:20 6 MS. MENAKER: Thank you. I wanted to sum
17:28:22 7 up by responding to some -- one additional argument
17:28:26 8 that claimant made at the end of its submission,
17:28:29 9 and this also refers or has significance for some
17:28:33 10 of the questions that the Tribunal members have
17:28:36 11 been asking right before the break, and that is
17:28:41 12 their argument, when they were summing up, they
17:28:45 13 stated that it would be simply inconceivable if
17:28:49 14 this Tribunal didn't have jurisdiction over their
17:28:52 15 claims because other claimants from other countries
17:28:57 16 would have recourse to investor-state arbitration,
17:29:02 17 and it would be absurd to conclude that the United
17:29:12 18 States would have granted broader rights to those
17:29:15 19 claimants than they would to Canadians because the

17:29:20 20 United States and Canada have such a close
17:29:23 21 relationship.

17:29:24 22 And we have responded to these questions □
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17:29:26 1 or to this argument, I think our written response
17:29:29 2 is actually in the Tembec submissions that we
17:29:32 3 submitted, and we responded, I believe, somewhat
17:29:36 4 orally. But I just wanted to make a few comments
17:29:39 5 on that, and the first is, to be clear, that
17:29:43 6 claimants are not using this argument as a basis
17:29:50 7 for jurisdiction.

17:29:51 8 This is simply an argument that they are
17:29:53 9 making, that they are saying, look, do not
17:29:57 10 interpret Article 1901(3) in accordance with its
17:30:01 11 ordinary meaning because it would lead to this
17:30:04 12 result, and we think this result is an absurd one,
17:30:07 13 so it should be interpreted in a manner that grants
17:30:10 14 this Tribunal jurisdiction, but they are not
17:30:15 15 making -- for instance, they are not making an MFN
17:30:21 16 jurisdictional argument, and that was made clear
17:30:24 17 first of all in their notice of arbitration.

17:30:26 18 They have not based their claim for this
17:30:29 19 Tribunal's jurisdiction upon Article 1103, and that
17:30:34 20 was made clear also in questioning by the Canfor
17:30:36 21 Tribunal. So the result of that is that it is not
17:30:39 22 necessary for this Tribunal to determine whether a □
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17:30:44 1 claimant from a BIT partner country would have
17:30:48 2 jurisdiction to -- or whether a BIT Tribunal would
17:30:53 3 have jurisdiction over a claimant's claim if it
17:30:55 4 were brought under a BIT.

17:30:57 5 You would have to make that
17:30:58 6 determination -- or you might have had to have made
17:31:02 7 that determination if that was the basis for their
17:31:05 8 jurisdictional argument, but it is not a basis on
17:31:08 9 which they are asking this Tribunal to find
17:31:11 10 jurisdiction.

17:31:12 11 However, I also want to again note that
17:31:15 12 the premise on which claimant's argument is based
17:31:19 13 is simply wrong. It would not, even if you were to
17:31:24 14 accept their premise that a Chilean investor, and
17:31:31 15 they say this in their written submissions, would
17:31:35 16 have the right to bring an investor-state claim
17:31:39 17 against the United States under the U.S.-Chilean
17:31:43 18 Free Trade Agreement or under one of our new BITs
17:31:49 19 another country partner would have the right to do
17:31:52 20 that, and therefore they ask you to draw the
17:31:55 21 inference that they must to have had that right
17:31:59 22 because the United States would not grant lesser

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17:32:04 1 rights to Chapter 11 arbitration than we granted to
17:32:08 2 our BIT partners, and that is simply not the case.

17:32:11 3 As I mentioned, they stated, for
17:32:14 4 instance, that one claimant under a BIT would have
17:32:16 5 the choice of going to the CIT, the Court of
17:32:18 6 International Trade, or bringing the bit
17:32:22 7 arbitration, and they shouldn't be denied that
17:32:25 8 right to the Chapter 11 arbitration.

17:32:26 9 But as I mentioned, under our post-NAFTA
17:32:28 10 BITs and FTA's we have granted investors rights to
17:32:32 11 bring investor-state claims for breaches of
17:32:33 12 investment authorizations and investment
17:32:35 13 agreements, so if they have an investment agreement

17:32:40 14 or an investment authorization and they allege it
17:32:42 15 has been breached, they can go to domestic court
17:32:46 16 or -- a Canadian investor does not have that
17:32:51 17 choice. It may only go to domestic court. We have
17:32:57 18 not granted jurisdiction under the NAFTA for
17:32:58 19 breaches of investment authorizations or investor
17:33:00 20 agreements.

17:33:01 21 So the whole premise on which claimant's
17:33:03 22 argument is based is faulty because you cannot
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17:33:06 1 assume that the United States has granted broader
17:33:10 2 rights to investor-state dispute resolution to
17:33:12 3 Canadian and Mexican investors than to our other
17:33:15 4 partner -- investors of our other partner
17:33:18 5 countries, so it would not at all lead to a
17:33:21 6 so-called absurd result if this Tribunal were to
17:33:26 7 find that they didn't have these rights to bring
17:33:28 8 these claims under investor-state arbitration even
17:33:31 9 if you believed that an investor under one of our
17:33:33 10 bits could bring the claim.

17:33:35 11 And that gets me to the last point which
17:33:38 12 is it is our submission that an investor could not
17:33:41 13 bring -- or a claimant, I should say, could not
17:33:45 14 bring an investor-state arbitration under our BITs
17:33:48 15 for the claims that claimants are bringing here,
17:33:50 16 and as I mentioned, that is because we do not
17:33:54 17 believe that this would be within the scope of the
17:33:56 18 BIT.

17:33:57 19 We have talked a little about this, and I
17:33:59 20 know that the President asked a hypothetical
17:34:02 21 regarding the Florida Thrills Company -- Kingdom,

17:34:08 22 excuse me, and I just wanted to be certain that the

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17:34:14 1 United States's position on this was clear, that we
17:34:18 2 fully understand that this is a complex area and
17:34:28 3 one could imagine perhaps certain different
17:34:32 4 hypotheticals where different results might ensue.

17:34:37 5 Generally speaking, certainly with
17:34:42 6 claimant's claims we do not believe that a BIT
17:34:45 7 arbitral tribunal would have jurisdiction, but --
17:34:50 8 and we think that the award in the Methanex case
17:34:54 9 supports that result, but we think that it would do
17:34:57 10 an injustice to our Article 1101(1) arguments and
17:35:03 11 would indeed prejudice our arguments in that regard
17:35:07 12 were this Tribunal to in fact make a ruling on that
17:35:11 13 issue without having the benefit of having had that
17:35:14 14 issue being fully briefed and argued by the parties
17:35:18 15 because indeed the relationship between trade and
17:35:20 16 investment is a very complex one, and we don't mean
17:35:23 17 to understate that complexity, and claimants have
17:35:27 18 cited to decisions like SD Myers and I am sure the
17:35:32 19 Tribunal is aware of the Methanex decision
17:35:35 20 regarding the interaction between trade and
17:35:38 21 investment, and there would be a lot to say about
17:35:41 22 that. □

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17:35:41 1 So, again, we just wanted to make sure
17:35:44 2 the Tribunal understood from our perspective that
17:35:48 3 not only is it unnecessary for the Tribunal to rule
17:35:52 4 on that because that is not a basis upon which
17:35:55 5 claimants are arguing that this Tribunal has
17:35:58 6 jurisdiction, but in fact we would ask that you not
17:36:02 7 do so.

17:36:03 8 we would have been happy for the Tribunal
17:36:05 9 to have ruled on it had it decided to treat that
17:36:10 10 objection as a preliminary one, and we would have
17:36:13 11 briefed it and fully argued it, but we have not
17:36:16 12 done that, since that was not the shape of the
17:36:19 13 order, so now we feel that it would be prejudicial
17:36:25 14 on the basis of the record before you to make that
17:36:30 15 decision.

17:36:31 16 So finally, I just want to state that
17:36:36 17 once again, if the operation or the application of
17:36:42 18 a party's trade laws is subjected to the
17:36:48 19 disciplines and procedures set forth in Chapter 11,
17:36:53 20 that in the United States's view that necessarily
17:36:55 21 means that Chapter 11 is imposing obligations on
17:36:58 22 the party with respect to that trade law, and it is

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17:37:02 1 for this reason that the United States submits
17:37:06 2 claimants' claims are barred by Article 1901(3),
17:37:11 3 and unless the Tribunal has further questions,
17:37:14 4 Mr. McNeill will make a few rebuttal points on the
17:37:21 5 context and object and purpose points.

17:37:25 6 PRESIDENT VAN DEN BERG: Thank you. I
17:37:25 7 quickly give the word to Mr. McNeill. Please take
17:37:30 8 all the time you need for making your rebuttal
17:37:36 9 points. I briefly give the point because we
17:37:39 10 otherwise might be tempted to ask further
17:37:42 11 questions.

17:37:43 12 MR. MCNEILL: Thank you Mr. President,
17:37:47 13 members of the Tribunal. I will briefly respond to
17:37:48 14 some of the arguments made by the claimants
15 yesterday and today on context and object and
17:37:52 16 purpose.

17:37:52 17 I will begin by making comments on
 17:37:56 18 claimants' global theory of treaty interpretation.
 17:38:00 19 You will notice that in claimants' written and oral
 17:38:03 20 submissions that they first start with object and
 17:38:06 21 purpose, and then they address context, and then
 17:38:09 22 finally they get to interpreting the words of the

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17:38:12 1 treaty, and in fact in their first submission on
 17:38:16 2 jurisdiction, they didn't get to the treaty
 17:38:20 3 interpretation exercise until the last few pages of
 17:38:24 4 their brief.

17:38:25 5 Claimants rely on a statement in a
 17:38:29 6 Chapter 20 case, Canada tariffs on certain U.S.
 17:38:33 7 origin agricultural products. Quote, any
 17:38:37 8 interpretation adopted by the panel must promote
 17:38:41 9 rather than inhibit trade, unquote.

17:38:46 10 They suggest that denying a Chapter 11
 17:38:49 11 forum would somehow frustrate the promotion of free
 17:38:55 12 trade and the expansion of investment opportunities
 17:38:58 13 in the free trade area. And that interpretive
 17:39:03 14 method we submit is not consonant with accepted
 17:39:08 15 canons of treaty interpretation.

17:39:10 16 It is not the Tribunal's role to promote
 17:39:14 17 free trade. Rather, its role is to interpret the
 17:39:17 18 treaty's terms. Under claimants' interpretive
 17:39:20 19 method, every exclusion that denies rights to
 17:39:23 20 claimants could be interpreted as contrary to the
 17:39:27 21 treaty's objectives. We believe that a correct
 17:39:30 22 statement of the interpretive exercise before the

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17:39:34 1 Tribunal was that enunciated in the ADF case. If I

17:39:40 2 may read that to you, the ADF Tribunal provided --

17:39:45 3 PRESIDENT VAN DEN BERG: The paragraph
17:39:46 4 number you are quoting there?

17:39:48 5 MR. MCNEILL: The award of January 9,
17:39:49 6 2003, and it is paragraph 147, and it is cited at
17:39:57 7 page 23 of our reply brief of August 6, 2004.

17:40:05 8 The Tribunal stated, we understand the
17:40:07 9 rules of interpretation found in customary
17:40:09 10 international law to enjoin us to focus first on
17:40:12 11 the actual language of the provisions being
17:40:15 12 construed. The object and purpose of the parties
17:40:18 13 to a treaty in agreeing upon any particular
17:40:20 14 paragraph of that treaty are to be found in the
17:40:23 15 first instance in the words in fact used by the
17:40:26 16 parties in that paragraph. The general objectives
17:40:28 17 of NAFTA may frequently cast light on the specific
17:40:32 18 interpretive issue, but they are not to be regarded
17:40:36 19 as overriding and superseding the latter.

17:40:40 20 we submit that the entire structure and
17:40:43 21 thrust of claimants' arguments is one that seeks to
17:40:46 22 override the ordinary terms of Article 1901(3) and

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17:40:50 1 other provisions of the NAFTA, which is
17:40:52 2 inconsistent with Article 31 of the Vienna
17:41:01 3 Convention.

17:41:02 4 I will now briefly say a few words about
17:41:06 5 redundant proceedings or parallel proceedings, and
17:41:11 6 I would like to clarify one issue in particular,
17:41:14 7 and that is that claimants have fundamentally
17:41:18 8 misconstrued our argument in that respect.

17:41:19 9 They have relied on the SGS versus
17:41:22 10 Pakistan case and the CMS case and other cases that

17:41:31 11 are similar that have raised the issue of an
17:41:31 12 exclusive form clause in a concession agreement
17:41:33 13 under domestic law and whether that clause deprives
17:41:39 14 a Tribunal established under a treaty applying
17:41:43 15 international law of jurisdiction or whether the
17:41:45 16 claims are essentially the same and they are
17:41:48 17 redundant or whether they are different and the
17:41:51 18 Tribunal can proceed.

17:41:52 19 we submit that those line of cases have
17:41:55 20 nothing to do with our arguments on parallel
17:41:58 21 proceedings or redundant proceedings. We have
17:42:02 22 never said that this Tribunal lacks jurisdiction□

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17:42:05 1 because this proceeding would be redundant with the
17:42:09 2 Chapter 19 proceedings. Rather, it is purely a
17:42:12 3 context argument, and we have asked why would a
17:42:16 4 state party to a treaty create a treaty in which
17:42:26 5 antidumping and countervailing duty cases were
17:42:30 6 resolved under one set of law in one forum and the
17:42:34 7 very, very similar claims are resolved in another
17:42:38 8 forum under another set of laws.

17:42:40 9 If you have had the pleasure of reading
17:42:42 10 any briefs in the Chapter 19 proceedings you will
17:42:46 11 see they are quite weighty. These are extremely
17:42:50 12 complex issues, and we submit no state party would
17:42:53 13 have intentionally submitted itself to that sort of
17:42:56 14 regime. Rather, you draft a treaty, ordinarily you
17:43:00 15 would have one forum and one set of laws with
17:43:03 16 respect to one type of measure, and we submit that
17:43:06 17 is exactly what was done here in Chapter 19 with
17:43:08 18 the binational panels.

17:43:11 19 Now, claimants also make another
17:43:13 20 redundancy argument and they rely on Article 1115,
17:43:19 21 and 1115, just to refresh your recollection,
17:43:23 22 provides that without prejudice the rights and

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17:43:26 1 obligations of the parties under Chapter 20, this
17:43:31 2 section sets forth -- establishes a mechanism for
17:43:34 3 the settlement of disputes, and so forth.

17:43:36 4 So, in other words, a private claimant
17:43:41 5 that brings a claim under Chapter 11 does not waive
17:43:44 6 the right of a NAFTA party to bring a claim on the
17:43:49 7 same measures as Chapter 20, and claimants seek to
17:43:53 8 use this to establish that there is a presumption
17:43:58 9 under the NAFTA of parallel proceedings, and we
17:44:01 10 submit that Article 1115 in fact demonstrates just
17:44:04 11 the opposite. It shows that -- Article 1115 shows
17:44:10 12 that -- is an exception to the general presumption
17:44:14 13 against parallel proceedings, and you wouldn't need
17:44:17 14 a provision that expressly says that one forum is
17:44:20 15 not waived if another forum is seized of
17:44:23 16 jurisdiction. And it demonstrate the NAFTA
17:44:27 17 parties' intent to maintain their paramountcy in
17:44:31 18 the treaty, that they would have broader rights
17:44:34 19 over private claimants, so it is the exception, I
17:44:37 20 believe, and not the rule, and we have stated if
17:44:41 21 the NAFTA parties actually intended to have
17:44:44 22 antidumping and countervailing duty cases litigated

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17:44:49 1 simultaneously in the Chapter 19 binational panels
17:44:53 2 and before Chapter 11 tribunals, one would expect a
17:44:57 3 reference similar to 1115 in the treaty. Perhaps
17:45:01 4 you would find a reference in Article 1515 itself.

17:45:05 5 That seems maybe a little backwards, but
17:45:08 6 you might actually see a reference to 1115 in
17:45:11 7 Chapter 19 itself, and it might say, without
17:45:14 8 prejudice to a private claimant's rights to bring a
17:45:18 9 case, this chapter establishes a procedure for the
17:45:21 10 settlement of AD/CVD disputes. Instead, what you
17:45:26 11 have is Article 1901(3), which is quite different.

17:45:40 12 Now I would like to turn to the issue of
17:45:42 13 inconsistent decisions and address respondent's
17:45:50 14 argument that there is no possibility of
17:45:54 15 inconsistent decisions because Chapter 11 and
17:45:58 16 Chapters 19 use different legal regimes. One
17:46:04 17 applies international legal regimes, international
17:46:07 18 law, and the other incorporates domestic law, and
17:46:11 19 they rely on the fact that there are cases pending
17:46:16 20 before the WTO and Chapter 19 simultaneously.

17:46:22 21 We submit that claimants' claims give
17:46:26 22 rise -- the possibility of inconsistent results in

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17:46:29 1 several respects.

17:46:33 2 First, unlike in the WTO and Chapter 19
17:46:36 3 context, claimants' claims involve parallel
17:46:42 4 proceedings under the same treaty. Chapter 11 does
17:46:47 5 not just address customary international law
17:46:52 6 obligations. It also includes conventional
17:46:55 7 international law obligations, and Chapter 19, in
17:47:03 8 Article 1904(2), provides that for the purpose of
17:47:06 9 panel review, quote, the antidumping and
17:47:07 10 countervailing duty statutes of the parties are
17:47:11 11 incorporated into and made a part of the agreement.

17:47:17 12 So we are not just talking about

17:47:18 13 international law versus domestic law. Rather,
17:47:23 14 this proceeding, when viewed in conjunction with
17:47:29 15 the Chapter 19 proceedings, raises the possibility
17:47:32 16 that one NAFTA Tribunal could say that the measures
17:47:37 17 at issue here comply with the NAFTA, and at the
17:47:41 18 same time, another NAFTA Tribunal would say that
17:47:44 19 they do not comply with the NAFTA.

17:47:49 20 PRESIDENT VAN DEN BERG: Perhaps you
17:47:49 21 would make a distinction, because what springs to
17:47:52 22 mind of course is the regrettable decisions in CME
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17:47:57 1 and Lauder versus the Czech Republic.

17:48:04 2 One thing is that if you base it on the
17:48:05 3 same factual matrix, that you may have inconsistent
17:48:09 4 findings on the facts. That is one thing.

17:48:12 5 The other aspect is applying different
17:48:17 6 legal regimes may lead to different outcomes. That
17:48:23 7 is to be distinguished. In the CME case, in the
17:48:30 8 Lauder case, it was almost two BITs that were
17:48:34 9 virtually identical in every respect, and
17:48:38 10 nevertheless, they came to a different conclusion,
17:48:41 11 which obviously is to be avoided.

17:48:50 12 MR. MCNEILL: We agree, that is to be
17:48:51 13 avoided.

17:48:54 14 PRESIDENT VAN DEN BERG: Now, if you
17:48:55 15 apply it here to the present situation, if you
17:48:59 16 follow claimants' argument, it could bring the same
17:49:03 17 factual matrix before two different tribunals.
17:49:07 18 what would happen? And the same question obviously
17:49:10 19 for the claimants later.

17:49:13 20 MR. MCNEILL: Yes, we view that as a far
17:49:15 21 worse decision. Having inconsistent decisions
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17:49:20 22 arising out of the same treaty. It is not
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1 necessarily the result as much as, and again this
17:49:29 2 goes to our context argument. Why would a party to
17:49:31 3 a treaty draft a treaty in which you could have
17:49:35 4 inconsistent results arising from two different
17:49:38 5 fora in the same treaty? And the inconsistent
17:49:42 6 results not only arise from -- in the manner that I
17:49:47 7 just described, but they also arise from
17:49:50 8 inconsistent findings of fact.

17:49:52 9 As I mentioned, these antidumping
17:49:55 10 countervailing duty cases are extremely complex,
17:49:58 11 and the administrative record in the antidumping
17:50:01 12 and countervailing duty cases are extremely complex
13 and the administrative record in the antidumping
17:50:05 14 and countervailing duty cases are tens of thousands
17:50:05 15 of pages, and there are many opportunities for
17:50:08 16 inconsistent findings of fact.

17:50:10 17 Then you also have the opportunity for
17:50:12 18 inconsistent findings on U.S. law, and if you look
17:50:17 19 at claimants' -- if you look at Canfor's statement
17:50:23 20 of claim, and Terminal only has a notice of
17:50:27 21 arbitration of course, but particularly if you look
17:50:32 22 at Canfor's statement of claim, you will see a lot
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17:50:35 1 of references to U.S. law. You will see many
17:50:38 2 citations to the Tariff Act, and you will see many
17:50:41 3 allegations of violations of U.S. law, and you
17:50:44 4 might wonder if their goal is to show that there is
17:50:47 5 a violation of Chapter 11, if the international law
17:50:51 6 standards in Chapter 11, why are there all these

17:50:53 7 references to U.S. law, and that is, because, of
17:50:57 8 course, their claims are based on the argument that
17:50:59 9 the United States's application of that law was so
17:51:04 10 egregious that it rises to the standard of an
17:51:09 11 international delict.

17:51:12 12 It is in that predicate finding that they
17:51:17 13 ask you to make that there was a violation of
17:51:18 14 international law that gives rise to the
17:51:20 15 possibility of a conflict with the legal issues
17:51:23 16 that are before the Chapter 19 panelists.

17:51:27 17 I will cite to you some examples to
17:51:30 18 illustrate exactly how those conflicts are evident
17:51:34 19 in this particular case.

17:51:39 20 Canfor's statement of claim at paragraph
17:51:45 21 113, they allege in total disregard of the
17:51:49 22 requirements under United States law, the

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17:51:53 1 Department of Commerce declined to use in-country
17:51:56 2 benchmarks, and in the Chapter 19 brief, which we
17:52:03 3 submitted with our materials, the joint -- the
17:52:10 4 Canadian parties' joint brief dated August 2, 2002,
17:52:12 5 at C5, the petitioners argue that the reliance on
17:52:18 6 out-of-country benchmarks is contrary to U.S. law.
17:52:22 7 There you have the same claim with reference to
17:52:25 8 U.S. law, and there you have a direct opportunity
17:52:29 9 for there to be conflicting findings of law. There
17:52:33 10 are many examples of this.

17:52:36 11 In Canfor's statement of claim at
17:52:38 12 paragraph 11, and they make a very similar
17:52:41 13 allegation at paragraphs 123 to 126, they state
17:52:47 14 Commerce failed to provide any reasonable analysis
17:52:51 15 in coming to its determination that provincial

17:52:54 16 stumpage programs are a financial contribution in
17:52:58 17 violation of respondent's domestic law, and there
17:53:01 18 is a directly analogous allegation made in the
17:53:06 19 Chapter 19 panel proceedings.

17:53:09 20 I will give you one more example, and
17:53:12 21 that is from Canfor's statement of claim at
17:53:14 22 paragraph 92, and there are nearly identical²²⁹

17:53:19 1 allegations at paragraphs 85 and 139, and they
17:53:25 2 allege the Department of Commerce stated that under
17:53:28 3 United States CVD law there was no right to an
4 individual subsidy rate in a case where a
17:53:36 5 countrywide rate was established despite clear
17:53:37 6 United States law to the contrary.

17:53:40 7 If you reviewed Canfor's statement of
17:53:44 8 claim you would find many more references to
17:53:47 9 violations of U.S. law.

17:53:49 10 So at the end of the day claimants'
17:53:51 11 argument that there is no possibility for a
17:53:53 12 conflict because Chapter 11 applies international
17:53:58 13 legal standards and Chapter 19 applies domestic law
17:54:04 14 standards does not mean that this case would not
17:54:10 15 give rise to inconsistent decisions, but to be
17:54:14 16 clear, we are not saying that there is a
17:54:18 17 jurisdictional argument again. This is an argument
17:54:21 18 of context, that the NAFTA parties would not have
17:54:25 19 intentionally submitted themselves to the type of
17:54:28 20 regime that would allow for such anomalous results.

17:54:35 21 Finally, I will address an issue raised
17:54:40 22 by the President yesterday in his question about²³⁰

17:54:44 1 whether the responsibility of double recovery or
17:54:48 2 double jeopardy --

17:54:50 3 PRESIDENT VAN DEN BERG: That is
17:54:51 4 different.

17:54:52 5 MR. MCNEILL: Yes, and we submit the
17:54:54 6 possibility for both are present here. You have
17:54:57 7 the same claimants, you have the same claims, you
17:54:59 8 have the same respondent. At the end of the day,
17:55:03 9 they are pursuing the same money, the same relief
17:55:09 10 at the end of the day, and they characterize their
17:55:12 11 relief differently, and they note that the two --
17:55:17 12 that Chapter 11 and Chapter 19 provide different
17:55:21 13 remedies, and we don't deny that, but at the end of
17:55:24 14 the day they seek almost identical relief.

17:55:32 15 In Canfor's notice of arbitration Canfor
17:55:35 16 says that it seeks damage to Canfor -- damage to
17:55:40 17 Canfor includes duties paid or to be paid. Now,
17:55:45 18 certainly this is an investment, this is an
17:55:48 19 investment chapter and claimants are trying to
17:55:52 20 construe their claim as an investment claim, so
17:55:55 21 they tell you a little BIT in their statement of
17:55:56 22 claim about their investments, about their

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17:55:58 1 vendor-managed inventory facilities and about their
17:56:02 2 reload centers, but you recall, particularly in the
17:56:06 3 context of the consolidation dispute, when
17:56:09 4 claimants were telling you about the urgency of
17:56:12 5 their claim, they weren't telling you about
17:56:14 6 imminent threat to their U.S. investments. They
17:56:18 7 were telling you repeatedly about the mounting
17:56:21 8 duties, and they were mounting every day, they were
17:56:23 9 mounting every week, and that is why they needed to

17:56:26 10 have relief in this form right away.

17:56:30 11 So when it comes down to it, that is
17:56:32 12 essentially what we are doing here. Canfor would
17:56:35 13 like a refund of its duties paid, but in Chapter 11
17:56:42 14 you can't get a refund, of course. You can get
17:56:45 15 damages. What they would like is damages in the
17:56:47 16 amount of that, and they may also say they want
17:56:50 17 damages for the effects to their investments, but
17:56:52 18 that is essentially what they are doing here.

17:56:55 19 Now, in Chapter 19, this is the relief
17:56:58 20 that Canfor has requested there. They stated, and
17:57:03 21 let me give you the citation for the statement of
17:57:07 22 claim first, statement of claim paragraph 149.□

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17:57:13 1 Then the Chapter 19 proceedings, I am looking at
17:57:17 2 the final affirmative countervailing duty
17:57:20 3 determination brief of Canfor dated August 2, 2002,
17:57:24 4 at page 14. Canfor states, Canfor respectfully
17:57:30 5 requests that this panel order the return slash
17:57:33 6 refund of all estimated duty deposits.

17:57:39 7 So you see, they are asking for
17:57:42 8 essentially the same thing. In Chapter 19 they are
17:57:45 9 asking for a refund, and in Chapter 11 they are
17:57:47 10 asking for damages in the amount of that refund.
17:57:52 11 What was interesting yesterday was that claimants
17:57:56 12 essentially conceded, they said if there were an
17:57:59 13 overlap then we would no longer have a right to
17:58:04 14 claim for damages in that amount in this
17:58:08 15 proceeding.

17:58:09 16 Claimant said something slightly
17:58:12 17 differently at the Canfor hearing, but I think it

17:58:15 18 is also instructive. I draw your attention in the
17:58:26 19 transcript submitted by the United States to page
17:58:30 20 228, beginning on line 10, and this was statements
17:58:33 21 by my friend Mr. Landry, and he said, when asked by
17:58:39 22 the Tribunal, won't there be double recovery, he

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17:58:43 1 said, quote, Canfor is more than willing in this
17:58:46 2 proceeding to covenant that if it does get the
17:58:49 3 return of the duties back from the Chapter 19 panel
17:58:52 4 process, that it would not be claiming for those
17:58:55 5 duties here. In fact, if we can have the United
17:58:59 6 States's assurance that if the extraordinary
17:59:02 7 challenge is dismissed and the matter set aside and
17:59:07 8 the duties would be refunded in that case, in that
17:59:10 9 case we would withdraw the claim.

17:59:14 10 PRESIDENT VAN DEN BERG: I don't remember
17:59:15 11 that. Are you on the correct page. Page 228?

17:59:21 12 MR. MCNEILL: Yes, I am on page 228.

17:59:25 13 PRESIDENT VAN DEN BERG: The statement
17:59:26 14 you just quoted is at page 229, isn't it?

17:59:32 15 MR. MCNEILL: No. In the copy we
17:59:35 16 submitted to the Tribunal, it is on page 228
17:59:39 17 beginning on line 10. It is the second sentence in
17:59:42 18 the paragraph beginning, but I would say on this
17:59:45 19 point.

18:00:01 20 PRESIDENT VAN DEN BERG: It is 229.

18:00:07 21 MR. MCNEILL: Apparently we have two
18:00:09 22 different versions. Let me read the correct cite

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18:00:13 1 into the record. It is page 229, beginning lines
18:00:18 2 12 to lines 20.

18:00:26 3 PRESIDENT VAN DEN BERG: Here I have a
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18:00:27 4 general question. Is there not one of the inherent
18:00:33 5 aspects of investment treaties that there is
18:00:38 6 possibility of double recovery, and that a number
18:00:42 7 of tribunals tried to address that, to neutralize
18:00:46 8 that possibility, for example, in the Occidental --
18:00:52 9 what is it, Ecuador case?

18:00:57 10 MR. MCNEILL: Yes. I think that is a
18:00:58 11 different situation. If you are looking at a case
18:01:00 12 under bilateral investment treaty, for instance,
18:01:03 13 and then in the same claim it is bringing a claim
18:01:07 14 under -- in domestic court under a concession
18:01:10 15 agreement, for instance, there is a possibility
18:01:12 16 there for double recovery.

18:01:14 17 In fact, there was a case cited by the
18:01:17 18 claimants in which that possibility arose, and the
18:01:23 19 solution to -- the Tribunal's solution was to stay
18:01:30 20 the claim pending the result of the domestic
18:01:33 21 proceeding.

18:01:34 22 But, of course, you have a vastly
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18:01:36 1 different situation under the same treaty, and,
18:01:39 2 again, this is not -- we are not asking you to deny
18:01:44 3 jurisdiction because of the possibility that there
18:01:48 4 might be double recovery or overlap and recovery.
18:01:52 5 We are simply stating that we do not believe that a
18:01:57 6 party to a treaty would ordinarily draft a treaty
18:02:01 7 that gave rise to that possibility of double
18:02:05 8 recovery in two different chapters of the same
18:02:09 9 treaty, and we submit they didn't do that here.

18:02:21 10 PRESIDENT VAN DEN BERG: What would arise
18:02:22 11 if you apply, what is it, 1115 -- you have an

18:02:26 12 investor-state arbitration, and then you have
18:02:29 13 state-to-state arbitration.

18:02:32 14 MR. MCNEILL: Yes, that is true -- there
18:02:35 15 is a possibility that in theory that if a claimant
18:02:38 16 brought a case under Chapter 11, that you still
18:02:42 17 have a remedy, the state still has a remedy, and I
18:02:45 18 believe that reflects a principle in international
18:02:47 19 law, that a private claimant cannot waive the right
18:02:49 20 of its own state to espouse a claim on its behalf,
18:02:54 21 and that is a principle in the international
18:02:58 22 dredging case and other cases, and that is□
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18:03:00 1 something that is inherent to the international
18:03:04 2 legal system.

18:03:13 3 Ms. Menaker reminds me of the limitations
18:03:16 4 of Chapter 20, and that is in Chapter 20 you cannot
18:03:19 5 get monetary relief. There is a very different
18:03:22 6 remedial mechanism in Chapter 20, so in that case
18:03:26 7 you would not have the risk of double recovery.

18:03:44 8 That concludes my remarks, and I am
18:03:46 9 pleased to take any questions from the Tribunal.

18:03:54 10 PRESIDENT VAN DEN BERG: There are no
18:03:54 11 further questions, Mr. McNeill. Thank you for your
18:03:57 12 presentation.

18:03:58 13 Mr. Bettauer, I think you are the last --

18:04:02 14 MR. BETTAUER: The time has come to
18:04:04 15 conclude our presentation. Mr. President and
18:04:07 16 members of the Tribunal, we have heard in these
18:04:11 17 last two days many alternative and inventive
18:04:17 18 analyses of the texts.

18:04:25 19 We have seemed to analyze the NAFTA text
18:04:28 20 at many levels. We have looked for nuances and

18:04:31 21 layers of meaning and the slightest variations of
18:04:37 22 words. It has seemed at times as if it is like a □
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18:04:43 1 search for symbolism in literature, whereas you,
18:04:49 2 Mr. President, pointed out, an exercise in legal
18:04:53 3 philosophy.

18:04:55 4 Lawyers no doubt have an uncanny ability
18:04:58 5 to complicate things. But we should not let that
18:05:03 6 ability prevent us from understanding and accepting
18:05:06 7 the most simple, straightforward explanation, that
18:05:13 8 is, that Article 1901(3) means what it says and is
18:05:19 9 to be given its ordinary meaning.

18:05:24 10 The paragraph says that no provision of
18:05:27 11 any chapter other than that chapter itself shall be
18:05:33 12 construed as imposing an obligation on a party with
18:05:36 13 respect to the party's antidumping law or
18:05:39 14 countervailing duty law.

18:05:43 15 This language, I submit, is clear on its
18:05:46 16 face. The meaning, I submit, is that antidumping
18:05:52 17 and countervailing duty matters, as I pointed out
18:05:57 18 earlier, are not subject to Chapter 11 dispute
18:06:01 19 settlement. This I think we have demonstrated, and
18:06:07 20 I think we have demonstrated that it is in fact the
18:06:10 21 result that is obtained as well by applying Article
18:06:14 22 31 of the Vienna Convention which, after all, is □
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18:06:19 1 the accepted and standard method of treaty
18:06:22 2 interpretation, and is the method called for under
18:06:26 3 the NAFTA's applicable law provision.

18:06:31 4 That method of interpretation focuses,
18:06:35 5 above all, on the ordinary meaning of the text, and

18:06:39 6 where the text is clear, as Mr. McNeill just
18:06:43 7 pointed out, it must prevail.

18:06:47 8 Now, here we have also noted that the
18:06:50 9 context and object and purpose in our view support
18:06:54 10 that meaning, but there is actually no need to go
18:06:58 11 to them. We also think the history doesn't add
18:07:05 12 much, but it is a subsidiary means, and Article 32
18:07:10 13 recourse in our view is not necessary.

18:07:20 14 Yesterday, Mr. Landry made clear the
18:07:23 15 bitterness of claimants and charged U.S. officials
18:07:27 16 with abusing the very regime of the NAFTA.

18:07:36 17 I submit, Mr. President, that to the
18:07:39 18 extent there is an abuse of the regime, it is these
18:07:43 19 proceedings. We maintain that challenging
18:07:49 20 antidumping and countervailing duty measures under
18:07:54 21 Chapter 11 is the abuse. Claimants believe
18:08:00 22 themselves wronged. Mr. Clodfelter explained that□
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18:08:06 1 we contest that. We do not think it is the case.
18:08:09 2 But even assuming it were the case, even assuming
18:08:14 3 that, that would not give this Tribunal
18:08:17 4 jurisdiction.

18:08:19 5 Even if the Tribunal were to suspect
18:08:23 6 claimants did not have an effective direct remedy
18:08:26 7 under Chapter 19, which, as I said, we do not
18:08:30 8 agree, that would not authorize this Tribunal to
18:08:34 9 rewrite the NAFTA to give it that remedy. We must
18:08:39 10 take the treaty text as we find it. Chapter 11
18:08:43 11 arbitration is just not available for the claims
18:08:47 12 asserted in this proceeding. Thus, Mr. President,
18:08:52 13 and members of the Tribunal, the United States
18:08:55 14 requests that you dismiss the claims in this case,

18:08:59 15 and that you award costs to the United States.

18:09:03 16 I thank you for your attention.

18:09:07 17 PRESIDENT VAN DEN BERG: Thank you Mr.

18:09:08 18 Bettauer. Thank you, also, the team for the

18:09:10 19 presentation, for the closing statements on behalf

18:09:12 20 of the United States. I turn now to the claimants

18:09:16 21 for their closing statements. Mr. Landry and

18:09:19 22 Mr. Mitchell, do you need time to collect your□
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18:09:23 1 notes or can you immediately start?

18:09:25 2 MR. LANDRY: We will comment now.

18:09:29 3 PRESIDENT VAN DEN BERG: Please.

4 CLOSING STATEMENT BY CLAIMANTS

18:09:30 5 MR. LANDRY: Mr. President, as I

18:09:32 6 indicated earlier, in an attempt to be responsive

18:09:36 7 to the U.S. positions that they advocated yesterday

18:09:43 8 in our oral submissions, and outside of the

18:09:48 9 post-hearing submissions which obviously may

18:09:51 10 reflect some additional comments based on the

18:09:54 11 transcript and perhaps it is late and there might

18:09:58 12 be other additional comments we may have, we have,

18:10:03 13 from our perspective -- what we have heard largely

18:10:07 14 is reargument of the same issues that have been

18:10:10 15 debated over the last two days and over the hearing

18:10:17 16 that was held before the Canfor Tribunal, and the

18:10:21 17 Tribunal has a transcript of that.

18:10:27 18 So we are not going to be doing a very

18:10:29 19 lengthy reply. There are a few comment we would

18:10:31 20 like to make, and I will make a couple of comments

18:10:33 21 and so will Mr. Mitchell, and then I will conclude

18:10:37 22 with one overall comment regarding the□
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18:10:40 1 circumstances of inclusion in the treaty.

18:10:44 2 First of all, a couple of quick comments.

18:10:47 3 Really just effectively for context, and that is, I

18:10:51 4 would like to go back to the various statements

18:10:54 5 that were made this afternoon on the Byrd Amendment

18:10:57 6 just to put the point into focus.

18:10:59 7 The Byrd Amendment was discussed

18:11:01 8 extensively before the Canfor Tribunal. The

18:11:05 9 pleadings stand. There were some inquiries about

18:11:08 10 it, there were follow-up questions that will be

18:11:11 11 answered in the post-hearing papers, or at least

18:11:15 12 reference to where the answers are, but effectively

18:11:18 13 this is the way it went. The United States passed

18:11:21 14 in an omnibus bill by way of an amendment, by way

15 of and amendment to the

16

17

18:11:37 18 and the United States took the position that it was

18:11:40 19 not law that related to antidumping and CVD. They

18:11:44 20 said specifically as we indicated to the Canfor

18:11:49 21 Tribunal, and I believe I am quoting here, but it

18:11:50 22 is on the record, there is nothing in relation to

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18:11:52 1 the Byrd Amendment that related to the

18:11:55 2 administration of antidumping and countervailing

18:11:58 3 duty law.

18:11:59 4 That was the reason why no notification

18:12:02 5 was given, and for the United States to come back

18:12:09 6 now and say, well, now we are in a different

18:12:12 7 context, to try to argue that it is law, in my

18:12:23 8 submission, quite frankly, is disingenuous. They

18:12:27 9 say there is no need to notify now because we are
18:12:29 10 going to repeal it. We heard they were going to
18:12:33 11 repeal it last December, in 2004. It has not been
18:12:36 12 repealed to this date.

18:12:37 13 The present draft, as I understand it, in
18:12:39 14 terms of the repeal of the Byrd Amendment would
18:12:44 15 continue it through to October of 2007. That is
18:12:47 16 hardly a law that is not affecting the two other
18:12:53 17 parties in NAFTA. So, again, I just wanted to put
18:12:58 18 that -- it is so -- the Byrd amendment, for those
18:13:02 19 who are familiar with antidumping and CVD is so
18:13:10 20 fundamentally contrary to the concept -- or the
18:13:11 21 fair and effective resolution of unfair trade
18:13:14 22 practices, that it is just not the type of statute

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18:13:19 1 that can be considered antidumping law and CVD law
18:13:27 2 in the first place and that was the position the
18:13:29 3 United States took from the beginning on this.

18:13:31 4 The second point, Mr. President, that I
18:13:34 5 would like to make just a very quick comment to --
18:13:37 6 I know there's a few questions in the questions
18:13:43 7 that the Tribunal has prepared, and there will be
18:13:44 8 some response to that -- and this is the point just
18:13:46 9 a few minutes ago made by Mr. McNeill about double
18:13:50 10 recovery.

18:13:51 11 First of all, they are not identical
18:13:53 12 remedies at all, if they exist, but we can sort of
18:13:58 13 put that one to bed because they don't exist. No
18:14:02 14 matter what Canfor put in the letter that was sent,
18:14:05 15 the fact of the matter is the United States takes
18:14:08 16 the position, and we indicated this, that there is

18:14:13 17 no capability for the Chapter 19 panels to refund
18:14:19 18 the duties, period. We have the ECC decision that
18:14:23 19 came down. We talked about that, and there are no
18:14:26 20 duties that have been refunded. This is the
18:14:29 21 position that the United States has been
18:14:32 22 advocating. □
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18:14:36 1 Now, Mr. President, Mr. Mitchell has a
18:14:42 2 few reply comments and then I will conclude with a
18:14:45 3 couple-of-minute summary.

18:14:48 4 PRESIDENT VAN DEN BERG: Thank you,
18:14:48 5 Mr. Landry.

18:14:50 6 Mr. Mitchell, please. And take your
18:15:00 7 time, because I would like to give claimants full
18:15:05 8 opportunity to present their case.

18:15:07 9 MR. MITCHELL: Thank you, Mr. President.

18:15:10 10 Obviously, the Tribunal has read the
18:15:15 11 transcripts and the submissions, and we appreciate
18:15:21 12 that, and so it is in that respect that I need to
18:15:27 13 comment on a few matters raised in Ms. Menaker's
18:15:31 14 reply in which they made some submissions
18:15:41 15 purporting to represent what the claimants had
18:15:45 16 argued. And so this morning -- or this afternoon
18:15:53 17 Ms. Menaker talked at length about a so-called,
18:15:59 18 quote, concession that Article 1901(3) might bar
18:16:06 19 the claimant's claim on the merits, and I will just
18:16:13 20 ask you to note the transcript timing was at 11:29
18:16:17 21 this morning, and you can have regard to the
18:16:21 22 comments that were made, and they simply were not □
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18:16:24 1 that.

18:16:31 2 Likewise, Ms. Menaker made the assertion
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18:16:39 3 that the claimants concede, she said, that if
18:16:47 4 Article 1901(3) had referred to measures instead of
18:16:54 5 law, that the claims would be barred. The
18:17:00 6 reference to my submissions was at 10:19 this
18:17:03 7 morning and the comment was maybe there might be
18:17:08 8 some force to the United States' argument. So I
18:17:16 9 would ask you to look with care at the submissions
18:17:18 10 that have in fact been made in the oral and written
18:17:22 11 submissions by Canfor rather than the United
18:17:25 12 States' representations of them.

18:17:29 13 The United States in talking about the
18:17:37 14 SAA and the reference to the technical change
18:17:42 15 passage that the claimants have noted for the
18:17:47 16 Tribunal in which the United States has explained
18:17:50 17 the changes in the Article 1901 through 1903 as a
18:17:58 18 technical change to facilitate the addition of a
18:18:03 19 third party, the United States has twice in this
18:18:06 20 hearing said that the claimants have still never
18:18:08 21 offered an explanation as to why or what technical
18:18:13 22 change might be incorporated by reference to the

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18:18:21 1 addition of Article 1901(3), and I will make two
18:18:25 2 points. First, it is their words, not ours, and if
18:18:29 3 anyone should be called upon to explain what they
18:18:32 4 meant, it should be the United States.

18:18:36 5 But secondly, in the transcript of the
18:18:41 6 Canfor hearing, we did offer a hypothesis, and you
18:18:46 7 will find it at approximately page 293, which means
18:18:52 8 that it will be within two pages or so of page 293,
18:18:57 9 given that it is 293 on the transcripts that I
18:19:00 10 have, where I responded to a question from

18:19:03 11 Professor Gaillard as to what the change -- what
18:19:10 12 the technical change might be, and hypothesized
18:19:14 13 that it might be because of the operation of -- or
18:19:16 14 the ability of the Mexican courts to directly
18:19:20 15 enforce NAFTA obligations. Nowhere has the United
18:19:29 16 States offered any explanation as to why that
18:19:33 17 hypothesis might not be correct.

18:19:44 18 Ms. Menaker made the argument with
18:19:47 19 reference to the statement of administrative action
18:19:50 20 and Chapter 15, and it is an argument that I don't
18:19:54 21 think I made, that was ascribed to me, that some
18:19:59 22 reference should have been made in the SAA to

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18:20:03 1 Chapter 15 that wasn't there. That wasn't the
18:20:06 2 argument that was advanced. The argument that was
18:20:10 3 advanced was that the SAA for Chapter 19 said
18:20:15 4 something and the United States' interpretation is
18:20:18 5 inconsistent with that.

18:20:24 6 Mr. Robinson asked a question of the
18:20:29 7 United States during the closing as to why the word
18:20:33 8 "determination" was not included in the laundry
18:20:40 9 list of matters in the definition in 1902 and 1904
18:20:50 10 and the simple answer to that is, as we have tried
18:20:53 11 to explain in our submissions, that a determination
18:20:57 12 does not embody the normative standards that are
18:21:00 13 applied to decision-making and, therefore, doesn't
18:21:03 14 fall within the categories of matters that are
18:21:05 15 encompassed within those definitions.

18:21:16 16 And lastly, with respect to Mr. McNeill's
18:21:19 17 comments on treaty interpretation, and the treaty
18:21:28 18 interpreter's of looking at the ordinary meaning of
18:21:33 19 words, and the fact is there is no ordinary meaning

18:21:42 20 of words. Words are means of expressing
 18:21:47 21 communication in a relevant context, and it is for
 18:21:54 22 that reason that the Vienna Convention does not say□
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18:21:58 1 that one just looks to the ordinary meaning of
 18:22:01 2 words. One looks to the ordinary meaning of words
 18:22:04 3 in their context. And as we have tried to
 18:22:08 4 demonstrate, the immediate context of Chapter 19,
 18:22:12 5 and the entire context of the treaty, including its
 18:22:17 6 objects and purposes, support the interpretation
 18:22:21 7 advanced by the claimants rather than the
 18:22:27 8 interpretation advanced by the United States.

18:22:31 9 we have tried in our oral submissions to
 18:22:34 10 be responsive to as many of the questions as we
 18:22:37 11 have been able to, given the resources we have had
 18:22:42 12 here, and appreciate the opportunity to identify
 18:22:47 13 where we have made those answers to the Tribunal in
 18:22:50 14 our post-hearing submission, and to respond to any
 18:22:53 15 questions that will be left outstanding there.

18:22:59 16 PRESIDENT VAN DEN BERG: Thank you very
 18:23:00 17 much, Mr. Mitchell.

18:23:01 18 Mr. Landry?

18:23:05 19 MR. LANDRY: Mr. President, I want, as a
 18:23:08 20 final point, finish off where I also ended
 18:23:11 21 yesterday, and to a certain extent it is repetitive
 18:23:15 22 and I admit to that up front, but it is important.□
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18:23:19 1 And I want to return to the issue of the
 18:23:21 2 circumstances of the conclusion of the treaty,
 18:23:25 3 really especially in light of the comments made by
 18:23:28 4 the United States today, relating to the travaux

18:23:31 5 and the SAA. Now, to be very clear, it was the
18:23:38 6 United States which first raised the issue of the
18:23:43 7 circumstances at the conclusion of the treaty in
18:23:46 8 their objection. And with that, they relied on and
18:23:51 9 referenced contemporaneous discussions,
18:23:54 10 contemporaneous commentaries relating to the
18:24:01 11 negotiation of the NAFTA. Of course, that would
18:24:05 12 include the SAA.

18:24:10 13 Now, when faced with, to say the least, a
18:24:17 14 sparse amount of information on the key point that
18:24:19 15 they want to argue, they want you to effectively --
18:24:23 16 effectively, ignore the travaux, and the various
18:24:31 17 lawyers' texts, I think they were called today, as
18:24:34 18 being of little relevance in the interpretive
18:24:39 19 exercise.

18:24:40 20 The problem with the U.S. position is
18:24:42 21 they look at the documents that they did finally
18:24:45 22 produce, is that when it supports their position, □
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18:24:48 1 it is fine. When it does not support their
18:24:51 2 position, effectively they go back and ask you to,
18:24:54 3 like I said, either ignore it or downplay it.

18:25:02 4 In this case, on numerous occasions, and
18:25:04 5 I will give you few references for future
18:25:08 6 reference, they boldly -- and I say boldly --
18:25:12 7 emphasize the importance of 1901(3) from this
18:25:16 8 perspective. It had to be done because Chapter 11
18:25:18 9 allowed private parties to bring forward investor
18:25:22 10 state claims. It needed to ensure that it couldn't
18:25:27 11 be done -- that the antidumping and CVD relators
18:25:32 12 could not be done in Chapter 11.

18:25:34 13 A number of references I give for you is
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18:25:37 14 pages 84 and 85, Mr. McNeill's comments at the
18:25:43 15 Canfor transcript. Ms. Menaker made the point very
18:25:50 16 strongly yesterday at page 53 of the transcript.
18:25:53 17 what it really comes down is to this. They say it
18:25:56 18 was a very intentional thing that was done, and it
18:26:02 19 was very important that it be done. But here is
18:26:05 20 the glaring problem with that proposition. There
18:26:10 21 are no notes, there is no mention in any of the
18:26:12 22 documents, even unilaterally created documents by

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18:26:21 1 the United States of this proposition. Documents
18:26:24 2 like the lawyers' text we talked about earlier
18:26:27 3 talks about exceptions, no mention of antidumping
18:26:31 4 and CVD matters no mention of Chapter 19.

18:26:36 5 The text of Chapter 11, we talked about
18:26:41 6 that yesterday, where they talked about things that
18:26:43 7 were to be outside of Chapter 11, no mention of
18:26:48 8 Chapter 19 or antidumping or CVD matters. The SAA,
18:26:54 9 when it comes to that, they talk about a technical
18:26:55 10 change in relation to 1901(3). They have to get
18:26:59 11 around that problem because, of course, they say
18:27:02 12 this is not a technical change. They say they were
18:27:05 13 only referring to the other technical matters, not
18:27:08 14 to this one. No mention anywhere else that that is
18:27:11 15 indeed the case. They answered in a question from
18:27:13 16 the Tribunal in the Canfor matter about were there
18:27:17 17 other documents. There were no other unilaterally
18:27:21 18 created documents that mentioned this whatsoever.

18:27:30 19 Given that there is no information, given
18:27:32 20 that there are no documents, given that there is
18:27:35 21 nothing in the record to show that this important

18:27:40 22 and intentional matter was put into the treaty, it□
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18:27:50 1 just defies common sense, it defies intuitive

18:27:55 2 sense.

18:28:01 3 There was no need then to come to that

18:28:04 4 agreement, there was no intention, and, just as I

18:28:08 5 said yesterday, because there was no such

18:28:11 6 agreement. This is an after-the-fact attempt to

18:28:14 7 get around the claim that is being brought forward

18:28:17 8 by the claimants. This claim is brought under

18:28:23 9 another regime, another legal regime, different

18:28:27 10 standards of review, different norms than what is

18:28:30 11 under Chapter 19 and there is no mention whatsoever

18:28:34 12 between the two in any of that material, and I say

18:28:37 13 that is telling at the end of the day.

18:28:40 14 Those are my submissions.

18:28:44 15 PRESIDENT VAN DEN BERG: Thank you,

18:28:44 16 Mr. Landry. Mr. Robinson has a question?

18:28:52 17 ARBITRATOR ROBINSON: It may be the

18:28:56 18 lateness of the hour or a senior moment or both.

18:29:01 19 Am I correct that, with regard to the Byrd

18:29:07 20 Amendment, the cases that have been brought have

18:29:12 21 been only in the WTO? That is, by the government

18:29:18 22 of Canada?□

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18:29:21 1 MR. LANDRY: That is correct.

18:29:22 2 ARBITRATOR ROBINSON: There has been no

18:29:23 3 proceeding that has been instituted under the NAFTA

18:29:26 4 with regard to the Byrd Amendment; is that correct?

18:29:31 5 MR. LANDRY: To my knowledge,

18:29:32 6 Mr. Robinson, that is correct.

18:29:38 7 ARBITRATOR ROBINSON: So if I understand

18:29:43 8 it, and I may not, and I think I was misspeaking
18:29:48 9 maybe this morning, but I am not sure, under
18:29:56 10 Article 2005, does that mean that the government of
18:30:05 11 Canada has made a choice under 2005(6) that it is
18:30:21 12 disputing the Byrd amendment to the exclusion of
18:30:28 13 any challenge under NAFTA, and it is challenging it
18:30:32 14 only under the WTO, the successor to the GATT?

18:30:42 15 MR. LANDRY: Mr. Robinson, I can't answer
18:30:44 16 that question. That question would have to be a
18:30:46 17 question asked of Canada. I just do not know the
18:30:50 18 answer to that question.

18:30:53 19 ARBITRATOR ROBINSON: Well, I would say,
18:30:54 20 Mr. President, if it is appropriate, that it might
18:30:57 21 be useful for the government of Canada to shed some
18:31:02 22 light on this so we understand, at least that I

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18:31:16 1 understand what this means with respect to 2004 and
18:31:18 2 2005.

18:31:30 3 where I am very confused is the
18:31:33 4 government of the United States did not provide any
18:31:37 5 notice with regard to the Byrd Amendment. Under
18:31:44 6 Chapter 19, and in the WTO, if I understand it,
18:31:48 7 argued that the Byrd Amendment was not an
18:31:52 8 antidumping or countervailing duty law. Now, I
18:32:05 9 find a somewhat similar situation, if I understand
18:32:08 10 it, whereby the government of Canada that might
18:32:13 11 have chosen, if I understand it, to bring at least
18:32:18 12 an argument under Chapter 19 with regard to the
18:32:21 13 Byrd amendment, has affirmatively chosen not to,
18:32:27 14 and has instead brought action in the WTO with
18:32:35 15 regard to the Byrd Amendment, which under the terms

18:32:39 16 of Article 2005(6), if I am understanding this, is
 18:32:45 17 now to the exclusion of any action under Chapter 19
 18:32:55 18 of NAFTA, and the reason why I am giving this
 18:32:59 19 long-winded surmise, all of which may be wrong, so
 18:33:03 20 please correct me if I am wrong, which could easily
 18:33:07 21 happen, does this mean -- does the accumulation of
 18:33:12 22 this mean that whatever the references to the Byrd

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18:33:19 1 Amendment in the statement of claim and in the
 18:33:24 2 Chapter 11 proceeding, in effect the Tribunal
 18:33:31 3 should discount or even pay no attention to because
 18:33:35 4 the two governments, the United States by not
 18:33:40 5 submitting the notice and by arguing in the WTO
 18:33:44 6 that the Byrd Amendment is not an antidumping or
 18:33:48 7 countervailing duty law, and on the other hand, the
 18:33:52 8 government of Canada not having brought any action
 18:33:57 9 under NAFTA with regard to the Byrd Amendment but
 18:34:00 10 having acted under the WTO, does this mean that we,
 18:34:06 11 the Tribunal, in light of the actions of the two
 18:34:10 12 governments, should understand that we are to pay
 18:34:14 13 absolutely no attention to the Byrd Amendment in
 18:34:19 14 our deliberations with respect to Article 1901(3)
 18:34:24 15 as it relates to Chapter 11?

18:34:28 16 That is a normally long-winded Robinson
 18:34:33 17 question which may be wrong on the underlying
 18:34:36 18 premise -- but anyway, that is the best I could do.

18:34:40 19 MR. LANDRY: Mr. Robinson, and I would
 18:34:41 20 apologize for doing this, and it might be late, but
 18:34:46 21 from our perspective, our arguments that we have
 18:34:49 22 made in relation to the Byrd Amendment stand, and

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18:34:53 1 that includes the pleadings. So I think I would

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18:34:56 2 have to leave it at that. I don't have a specific
18:34:59 3 answer for you in terms of what the Canadian
18:35:03 4 government did, intended to do or anything. So I
18:35:06 5 can't go much further than that, and I apologize.

18:35:12 6 ARBITRATOR ROBINSON: All right, fully
18:35:12 7 understood.

18:35:13 8 Again, to the extent that I have phrased
18:35:15 9 an understandable and meaningful question, does the
18:35:18 10 United States have any comment on the question, and
18:35:20 11 to the extent it is appropriate, does the
18:35:23 12 government of Canada have any comment on the
18:35:28 13 question?

18:35:35 14 MS. MENAKER: I would just as a matter of
18:35:37 15 clarification, I would -- I said it today, I don't
18:35:40 16 have the transcript in front of me, the page
18:35:42 17 numbers, but also on page 624 of the Canfor
18:35:46 18 Tribunal 's transcript, that I just think it is
18:35:50 19 important to characterize the United States'
18:35:53 20 argument before the WTO accurately, which was that
18:35:57 21 the issue was whether the Byrd amendment was a
18:36:00 22 specific action against dumping or a specific

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18:36:05 1 action against subsidization within the meaning of
18:36:11 2 those terms as they are understood in WTO
18:36:12 3 jurisprudence and whether they violated the
18:36:14 4 antidumping code and SCM agreement. So, that is
18:36:17 5 the first point, and not whether it was AD/CVD law,
18:36:27 6 quote-unquote. So it is inaccurate in our view to
18:36:31 7 state that our position was that it is not AD/CVD
18:36:34 8 law, quote-unquote. That is not what we were
18:36:35 9 arguing in the WTO.

18:36:37 10 But in any event, you know, as I said, we
18:36:40 11 lost that case. So the WTO found that it was a
18:36:45 12 specific action against dumping. It was a specific
18:36:48 13 action against subsidization. There is no reason
18:36:54 14 or logic to -- instead of having this Tribunal make
18:37:00 15 its own determination as to what the Byrd Amendment
18:37:03 16 is, whether it is an AD/CVD law, to say that
18:37:06 17 somehow we are not going to make that
18:37:08 18 determination, we are instead going to rely on a
18:37:12 19 position that the United States took before another
18:37:15 20 Tribunal, not only was it a position that we took
18:37:18 21 there, but it was a position that we took that we
18:37:21 22 lost on, and I don't understand why our

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18:37:25 1 characterization of the law that we took before the
18:37:30 2 WTO has -- is conclusive in any respect regarding
18:37:37 3 this Tribunal's task, which is to decide whether,
18:37:41 4 if the claimants challenge the Byrd Amendment in
18:37:47 5 this case, whether that would impose an obligation
18:37:49 6 on us with respect to our AD/CVD law.

18:37:53 7 PRESIDENT VAN DEN BERG: I follow your
18:37:55 8 first part of the argument. The second part of the
18:37:58 9 argument I also follow but it gives rise to another
18:38:03 10 question. Is it your submission that this Tribunal
18:38:06 11 is bound by decisions of the WTO panels or bodies?

18:38:14 12 MS. MENAKER: No, it's -- you're not --

18:38:18 13 PRESIDENT VAN DEN BERG: When you argue,
18:38:19 14 we lost, then you imply, probably, that we should
18:38:26 15 follow what the WTO has said.

18:38:29 16 MS. MENAKER: No, you are correct in that
18:38:30 17 regard. You are not bound by those. You could --

18:38:35 18 PRESIDENT VAN DEN BERG: At least not
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18:38:36 19 legally bound. So perhaps the argument might be
18:38:41 20 too -- goes to persuasive authority, but that is
18:38:42 21 something else.

18:38:43 22 MS. MENAKER: Exactly. And my comment is
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18:38:44 1 simply that that is a task that you have to
18:38:45 2 determine, and again, a party's arguments -- first,
18:38:49 3 I don't think that that is a correct -- that it's
18:38:50 4 correct to say that we argued that it wasn't part
18:38:52 5 of AD/CVD law. You should look at, you know,
18:38:54 6 precisely what we were arguing, but even if that
18:38:58 7 were the case, that that would not be
18:39:00 8 determinative, and you might be persuaded
18:39:04 9 otherwise, not that we couldn't make the same
18:39:07 10 argument that we had lost before the WTO, make an
18:39:10 11 argument here and prevail on it. That wasn't what
18:39:13 12 I was suggesting.

18:39:14 13 ARBITRATOR ROBINSON: Well, I guess what
18:39:14 14 I am asking is whether or not we are bound in the
18:39:20 15 sense of Article 38(1) of the statute of the
18:39:24 16 International Court of Justice, is the WTO ruling
18:39:33 17 something that we should take into account in
18:39:38 18 making our decisions. Is it something that rises
18:39:42 19 to the kind of evidence that can have some
18:39:47 20 implication for whatever we do here. What is
18:39:50 21 the -- maybe Article 38(1) isn't the proper
18:39:54 22 reference, that was off the top of my head. But
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18:39:58 1 what is it, if anything, that we should do with
18:40:02 2 respect to the history of the Byrd Amendment, what
18:40:06 3 happened with the Byrd Amendment in the WTO, if

18:40:09 4 anything? In other words, does it have any effect
18:40:18 5 upon us whatsoever or are we simply an independent
18:40:21 6 separate body that should pay no attention to
18:40:25 7 anything that the WTO has said on any subject for
18:40:27 8 any purpose?

18:40:31 9 MS. MENAKER: It depends on the nature of
18:40:34 10 the issue before you, and whether a decision of the
18:40:38 11 WTO would have any relevance for that. If the
18:40:43 12 decision before you was does the Byrd Amendment
18:40:48 13 violate the WTO antidumping code or the SCM
18:40:56 14 agreement, then it would be relevant that the WTO
18:41:00 15 itself has made a legal finding in that regard.
18:41:03 16 That is a fact that would be relevant, but, that,
18:41:08 17 of course, is not before you.

18:41:10 18 So, again, I am not sure that I am
18:41:14 19 answering your question completely, but certainly
18:41:19 20 you can look to the WTO to see what cases were
18:41:23 21 filed, and you would really have to look at the
18:41:26 22 specific nature of the question before you to see

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18:41:30 1 if it had any relevance at all there, either
18:41:33 2 factual or legal findings.

18:41:35 3 ARBITRATOR ROBINSON: Well, I am asking
18:41:37 4 because as a result of the nature of the arguments
18:41:42 5 by Canfor with respect to the -- whatever
18:41:46 6 adjectives we wish to use, that they have utilized
18:41:51 7 egregious, politically-determined, you know, this,
18:41:55 8 that and the other thing, and to the extent that
18:41:59 9 they cite the Byrd Amendment as exhibit number one,
18:42:03 10 so to speak, of the behavior of the United States,
18:42:08 11 and to the extent that that behavior has been shot
18:42:15 12 down in the WTO, are we supposed to take into

18:42:21 13 account at all the WTO handling of the Byrd
18:42:26 14 Amendment, what they have said about the Byrd
18:42:31 15 Amendment, in attempting to appraise the arguments
18:42:35 16 of the claimants.

18:42:42 17 MR. CLODFELTER: Let me suggest,
18:42:44 18 Mr. Robinson, you can take into account what the
18:42:47 19 WTO said the Byrd Amendment did in respect to the
18:42:51 20 laws that it was testing it against, and that may
18:42:55 21 inform your decision whether or not it is part of
18:42:58 22 USA AD/CVD law. □

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18:43:02 1 MS. MENAKER: And if I could also add,
18:43:05 2 that doesn't -- what the WTO said, insofar as they
18:43:09 3 said that the Byrd amendment was inconsistent --
18:43:17 4 and actually, I just retract that.

18:43:23 5 ARBITRATOR ROBINSON: Fine. Thank you.

18:43:25 6 PRESIDENT VAN DEN BERG: Professor de
18:43:27 7 Mestral has a question.

18:43:30 8 ARBITRATOR MESTRAL: I think it can be
18:43:30 9 answered with a yes or a no, to Mr. Landry. But
18:43:35 10 perhaps the United States would also wish to
18:43:38 11 consider it.

18:43:39 12 If this Tribunal were to that 1901(3) did
18:43:44 13 bar us from considering the impact upon Canfor of
18:43:47 14 the U.S. countervailing duty and antidumping final
18:43:52 15 determinations, would it still be open to us to
18:43:55 16 consider the impact of the Byrd Amendment upon
18:43:58 17 Canfor?

18:44:05 18 MR. LANDRY: Yes.

18:44:10 19 MS. MENAKER: No.

18:44:19 20 PRESIDENT VAN DEN BERG: If I may add to

18:44:21 21 this question, for once we got only yes or no. The
18:44:28 22 point may be this, that following up on the
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18:44:33 1 hypothetical, or the assumption by Professor de
18:44:41 2 Mestral that if this Tribunal were to find that
18:44:45 3 1901 paragraph 3 indeed bars jurisdiction over AD
18:44:53 4 and CVD matters, considering the position taken by
18:44:55 5 the United States with respect to the Byrd
18:44:57 6 Amendment, by not notifying it and saying that it
18:45:02 7 does not fall under the AD/CVD laws, would the
18:45:07 8 Tribunal have jurisdiction in respect of the Byrd
18:45:10 9 Amendment. Now, I know immediately the answer -- I
18:45:12 10 think I know the answer by Ms. Menaker and
18:45:18 11 Mr. Clodfelter and Mr. McNeill, being that that was
18:45:23 12 different before WTO because it related to the
18:45:26 13 question of whether it fell under the various
18:45:29 14 codes, the dumping codes and the subsidy
18:45:32 15 arrangement at WTO.

18:45:38 16 Is my assumption correct that that would
18:45:40 17 be your answer?

18:45:42 18 MS. MENAKER: That would be a partial
18:45:43 19 answer.

18:45:44 20 PRESIDENT VAN DEN BERG: Then if you
18:45:45 21 would do the other part.

18:45:47 22 MS. MENAKER: I also think that we can't
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18:45:49 1 assume that the reason that the United States did
18:45:52 2 not notify the Byrd Amendment was because we in any
18:45:56 3 way made any -- drew any conclusion that it did not
18:46:00 4 fall within 1902. There is no evidence in the
18:46:05 5 record on that for that reason. It could be, one,
18:46:08 6 it could have just been an oversight. It could

18:46:11 7 have been the fact that the Byrd Amendment, as we
18:46:13 8 all know, was very, very well publicized. It was
18:46:17 9 no secret when it was being considered. There was
18:46:19 10 a lot of press about it. It was something that
18:46:22 11 Canada has been concerned about for a long time,
18:46:26 12 since the beginning, and there were claims filed
18:46:30 13 with reference to the Byrd Amendment rapidly.

18:46:34 14 So there, again, I wouldn't draw the
18:46:37 15 conclusion, and I don't think there is anything on
18:46:39 16 the record on which to base a conclusion that our
18:46:43 17 lack -- our not complying with the notification
18:46:48 18 provisions, I don't think you can draw any
18:46:50 19 conclusion as to the United States'
18:46:52 20 characterization of the Byrd Amendment in that
18:46:55 21 regard. So that is one point.

18:46:58 22 Another point is that even if that were □
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18:47:04 1 the case, and for some reason the Tribunal,
18:47:09 2 notwithstanding the fact that AD/CVD statute is
18:47:12 3 defined as amendments to Title VII of the Tariff
18:47:15 4 Act, which the Byrd Amendment is, but
18:47:18 5 notwithstanding that, if the Tribunal were to say
18:47:22 6 okay, then, how, if we don't have jurisdiction to
18:47:24 7 hear challenges to duty determinations, how do we
18:47:27 8 have jurisdiction to hear these challenges to the
18:47:30 9 Byrd Amendment, we submit you wouldn't because the
18:47:33 10 way in which the Byrd Amendment allegedly affected
18:47:36 11 claimants was that they claim that it improperly
18:47:41 12 influenced Commerce's and ITC's decisions to
18:47:48 13 initiate the investigations.

18:47:48 14 Under U.S. law, under the Tariff Act, in

18:47:50 15 order for those agencies to initiate an
18:47:53 16 investigation, they have to have the support of a
18:47:56 17 requisite percentage of the U.S. industry that is
18:47:59 18 affected by the alleged dumping and subsidization.
18:48:06 19 And so there is this standing prerequisite.

18:48:09 20 Now, what claimants allege is that the
18:48:12 21 very act of initiating those investigations was
18:48:15 22 wrongful and was wrongful under U.S. law because□
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18:48:19 1 the U.S. industry, the softwood -- the lumber
18:48:22 2 industry in the United States was improperly
18:48:25 3 motivated to support the petition because the Byrd
18:48:29 4 Amendment basically said if the petition prevails
18:48:31 5 and we collect duties, if you support the petition,
18:48:35 6 you are going to get some of those duties, they
18:48:37 7 will be distributed to only those industry
18:48:40 8 participants that supported the petition. So they
18:48:44 9 allege that we did not meet the standing
18:48:47 10 requirement.

18:48:48 11 Now, notably in the Byrd Amendment
18:48:51 12 decision that we have been talking about, the WTO,
18:48:54 13 that claim was made, and the WTO rejected that
18:48:58 14 claim. They found that the argument that -- the
18:49:02 15 standing argument, the argument that this
18:49:05 16 improperly incentivized or that somehow the United
18:49:10 17 States did not have the requisite support of the
18:49:14 18 industry because of the effect of the Byrd
18:49:16 19 Amendment failed, that that was an argument that
18:49:18 20 did not prevail. The United States prevailed on
18:49:22 21 that argument.

18:49:24 22 But my point is that claimants -- that is□
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18:49:28 1 their opposition to the Byrd Amendment and the
 18:49:30 2 decision to initiate an investigation is an
 18:49:32 3 integral part of Commerce's and ITC's
 18:49:36 4 administration of the U.S. antidumping and
 18:49:39 5 countervailing duty laws. It is the very first
 18:49:42 6 step in the process of issuing a determination. So
 18:49:45 7 if this Tribunal finds that it has no jurisdiction
 18:49:50 8 over challenges toward determinations, then
 18:49:50 9 naturally it can't have jurisdiction over -- there
 18:49:54 10 is no additional claim that the claimants bring
 18:49:58 11 with respect to the Byrd Amendment other than the
 18:50:01 12 fact that it was part of the process in getting to
 18:50:06 13 those determinations that they allege was wrongful.

18:50:10 14 MR. CLODFELTER: Let me add something.

15 PRESIDENT VAN DEN BERG: Sure,
 16 Mr. Clodfelter.

18:50:12 17 MR. CLODFELTER: The question, I think,
 18:50:13 18 for the Tribunal is an objective one, to determine
 18:50:16 19 whether or not in fact the Byrd Amendment is part
 18:50:18 20 of AD/CVD law. The definition of 1902 is not
 18:50:24 21 changes to AD/CVD law, it should be defined as
 18:50:28 22 "those changes notified. It is "changes shall be

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18:50:31 1 notified. And so objectively, they're either
 18:50:35 2 changes to the AD/CVD law or they're not. And I
 18:50:37 3 think that is the test for the Tribunal. And given
 18:50:41 4 the evidence, there can be no question about it
 18:50:43 5 here.

18:50:47 6 PRESIDENT VAN DEN BERG: Mr. Robinson.

18:50:49 7 Before you ask the question, I would ask
 18:50:52 8 the claimants to comment on the position taken by

18:50:55 9 the United States.

18:50:57 10 MR. MITCHELL: Yes. I have four
18:50:58 11 observations, and two relate to what I just heard
18:51:08 12 from Ms. Menaker, and throughout, there has been
18:51:12 13 this almost implicit assertion that Title VII of
18:51:16 14 the Tariff Act is the antidumping statute. That is
18:51:21 15 not what the treaty provides. The treaty provides
18:51:26 16 in annex 1911 that for the United States, it is the
18:51:32 17 relevant provisions of Title VII of the Tariff Act
18:51:37 18 of 1930, as amended. So it is not anything to do
18:51:40 19 with the Tariff Act that ipso facto falls within
18:51:47 20 antidumping and CVD law. That point is clear.

18:51:53 21 Number two, my second point in respect of
18:51:56 22 what Ms. Menaker said was -- she said the Byrd
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18:52:00 1 Amendment and what was going on was well known at
18:52:03 2 the time. I would urge the Tribunal not to
18:52:07 3 speculate on what was known or what was known to
18:52:10 4 Canada or what was understood by Canada about the
18:52:15 5 applicability of the Byrd Amendment to Canada,
18:52:19 6 absent the United States, if they want to rely on
18:52:22 7 that proposition, leading some evidence to that
18:52:25 8 effect.

18:52:27 9 And then my two answers to why the Byrd
18:52:31 10 Amendment would remain within the scope of the
18:52:33 11 claim are the two that I have already given. If
18:52:36 12 you don't notify, then it would be outside any safe
18:52:39 13 harbor granted by 1901 sub 3, if any, and two, the
18:52:46 14 Byrd Amendment, for the reasons given by
18:52:48 15 Mr. Landry, is the antithesis of what is properly
18:52:52 16 understood known as an antidumping or
18:52:54 17 countervailing duty law.

18:53:04 18 PRESIDENT VAN DEN BERG: Mr. Robinson has
18:53:06 19 another question.

18:53:08 20 ARBITRATOR ROBINSON: Thank you,
18:53:09 21 Mr. President.

18:53:10 22 Now what I am struggling with, if the

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18:53:15 1 test is an objective one as to whether the Byrd
18:53:19 2 amendment is antidumping or a countervailing duty
18:53:24 3 law for the purposes of Chapter 19, and Canada, the
18:53:33 4 government of Canada under a different regime with
18:53:40 5 not the same language, but has made arguments in
18:53:43 6 that other forum under that separate international
18:53:50 7 agreement, if those arguments having been advanced
18:53:56 8 by the government, where in this case we are
18:53:58 9 dealing with a private claimant, from that
18:54:03 10 nation-state, should the -- or must the Tribunal
18:54:11 11 take into account the argumentation advanced by the
18:54:17 12 government of Canada in those WTO proceedings to
18:54:23 13 the extent that by analogy or otherwise, they can
18:54:29 14 implicate the meaning, the objective meaning of
18:54:33 15 antidumping or countervailing duty law, in this
18:54:38 16 case for Chapter 19.

18:54:40 17 And I ask that of both parties, and,
18:54:43 18 again, I would, of course, if it is appropriate,
18:54:47 19 encourage the government of Canada to say
18:54:50 20 something.

18:55:00 21 MR. MITCHELL: The interpretation of
18:55:02 22 1901(3) is guided by the provisions of the Vienna

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18:55:11 1 Convention, the interpretive guidelines set out in
18:55:14 2 the treaty. And those refer, and while we join

18:55:20 3 issue in various respects with the United States as
18:55:27 4 to perhaps how exactly those ought to be
18:55:28 5 approached, the words in the treaty must be
18:55:31 6 interpreted in their ordinary meaning having regard
18:55:36 7 to their object and purpose -- context and
18:55:38 8 purpose -- context, object and purpose. It is
18:55:41 9 getting late in the day.

18:55:45 10 And so we say that at the end of the day
18:55:50 11 on a merits hearing, as I indicated in my
18:55:57 12 submissions earlier, the determinations of the
18:56:01 13 appellate body of the WTO panels of the Chapter 19
18:56:09 14 panels will be evidence upon which the Tribunal can
18:56:19 15 give consideration to, to the degree the Tribunal
18:56:24 16 considers that appropriate.

18:56:26 17 To the extent that the parties at that
18:56:30 18 stage rely upon or urge the Tribunal to rely on
18:56:34 19 arguments advanced by one or the other party, or
18:56:38 20 not advanced by one or the other party, the
18:56:39 21 Tribunal would at that stage have to determine
18:56:43 22 whether to give significance to those things.□

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18:56:48 1 PRESIDENT VAN DEN BERG: All right, thank
18:56:49 2 you.

18:56:51 3 Does the United States wish to make any
18:56:53 4 comment on the last observation by the claimant
18:56:56 5 because that was an answer to a question by the
18:56:59 6 Tribunal member?

18:57:00 7 No. Okay, you rest your case at this
18:57:03 8 point in time.

18:57:06 9 Thank you then. The Tribunal has no
18:57:08 10 further questions and we come to the conclusion of
18:57:10 11 the hearing.

18:57:13 12 First of all, before dealing with the
18:57:19 13 schedule of the post-hearing briefs is the
18:57:22 14 tentative list of questions. The Tribunal would
18:57:24 15 like to proceed in this way, that a number of
18:57:28 16 questions we will ask. The Tribunal for that
18:57:30 17 purpose will meet tomorrow morning.

18:57:32 18 But before that, and I have a great
18:57:35 19 hesitation to ask the parties that, but
18:57:38 20 nonetheless, it would be very helpful if the
18:57:40 21 following could happen: Before 10:00 tomorrow
18:57:42 22 morning we would receive from the parties the

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18:57:47 1 suggested changes in the questions insofar as the
18:57:53 2 parties feel that the question mischaracterizes a
18:57:57 3 position of that party.

18:58:01 4 I give you an example, for example, we
18:58:04 5 stumbled yesterday over, what was it, question 31,
18:58:18 6 and Ms. Menaker said this was a
18:58:21 7 mischaracterization. Ms. Menaker also had found
18:58:27 8 another mischaracterization, I think, in question
18:58:29 9 63. So only that type of matters. If it would be
18:58:34 10 possible to let us know tomorrow which of those
18:58:38 11 questions are incorrectly reflecting the position
18:58:41 12 of the parties, it would be very helpful.

18:58:42 13 The Tribunal fully understands if the
18:58:45 14 parties say, well, look, that is a little but too
18:58:47 15 much for us, we'll let you know later. But we
18:58:52 16 would like to update the list tomorrow morning for
18:58:54 17 ourselves and then it would be helpful better if we
18:58:57 18 could have the input already of the parties so that
18:58:59 19 we can send as early as possible an updated list.

18:58:59 20 It may be an exercise for only ten minutes for
18:59:02 21 counsel, but there comes a point in time that
18:59:04 22 counsel says well, enough is enough. I fully
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18:59:07 1 understand.

18:59:09 2 MR. MITCHELL: Mr. President, just one --

18:59:13 3 PRESIDENT VAN DEN BERG: Or you have to
4 already know so we can note them, so that's very
5 simple.

18:59:16 6 MR. MITCHELL: I don't have them now,
18:59:18 7 although we have started --

18:59:18 8 PRESIDENT VAN DEN BERG: Okay, then,
18:59:18 9 simply send them by e-mail, a marked-up version.

18:59:23 10 MR. MITCHELL: My question is there were
18:59:24 11 one or two, and again, I don't have the reference
18:59:25 12 where we didn't understand -- the question could be
18:59:29 13 interpreted in one of several ways, and if we note
18:59:32 14 that to the panel in our communication, would
18:59:36 15 that --

16 PRESIDENT VAN DEN BERG: Simply what you
18:59:39 17 say, that please clarify, or simply clarify.

18:59:48 18 MR. MITCHELL: We'll say "please."

19 PRESIDENT VAN DEN BERG: Same also for
20 the United States.

18:59:48 21 MR. CLODFELTER: We would be happy to do
18:59:52 22 this for the Tribunal. A couple things. Would it
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18:59:53 1 be satisfactory just to do it in our brief?

18:59:56 2 PRESIDENT VAN DEN BERG: No, the point
18:59:57 3 is. This is only about that if we have not
19:00:01 4 correctly reflected what the parties' position is
19:00:03 5 and we would like to have correct questions and we

19:00:06 6 are going to update because we will have a number
19:00:09 7 of other questions to put forward, which we will
8 put under A, B, and C so that the numbering will
19:00:13 9 not change.

10 MR. CLODFELTER: Could I ask this of the
19:00:13 11 Tribunal: Has the Tribunal checked off ones that
19:00:16 12 they feel have been answered now and do not expect
19:00:20 13 to include in their final list, is that premature?

19:00:22 14 PRESIDENT VAN DEN BERG: That exercise is
19:00:24 15 also for tomorrow morning.

19:00:27 16 MR. CLODFELTER: I see. Well, we will do
19:00:27 17 our best for tomorrow morning.

19:00:30 18 PRESIDENT VAN DEN BERG: If possible.

19:00:31 19 Then the next point is that the schedule
19:00:35 20 for the post-hearing briefs, first of all, the good
19:00:39 21 news for the governments of Canada and Mexico, the
19:00:45 22 parties here before us and the Tribunal has decided
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19:00:50 1 to extend your one week by one week, so we have two
19:00:57 2 weeks. Order number one.

19:00:58 3 Then after these two weeks, we will have
19:01:01 4 the first simultaneous finding by both parties, and
19:01:08 5 then the reply brief, which are the dates. Yeah,
19:01:12 6 two weeks to file because we believed that one week
19:01:17 7 was a little but too much to draft everything after
19:01:20 8 what you have heard. But two weeks to file. What
19:01:26 9 is the agreed schedule?

19:01:29 10 MR. LANDRY: I believe, subject to
19:01:29 11 Ms. Menaker correcting me, that the time for the
19:01:33 12 first simultaneous filing is February 17th -- do I
19:01:37 13 have that right? -- February 17th, and then the

19:01:39 14 second filing, the reply filing, March 10th. I
19:01:43 15 believe I have that date right.

19:01:54 16 PRESIDENT VAN DEN BERG: Thank you. Are
19:01:55 17 there other matters of procedural or organizational
19:01:58 18 nature that you would like to address at this point
19:02:00 19 in time. I look first to the claimants.

19:02:04 20 MR. MITCHELL: No.

19:02:06 21 PRESIDENT VAN DEN BERG: Mr. Bettauer,
19:02:07 22 Mr. Clodfelter, Ms. Menaker, Mr. McNeill?

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19:02:14 1 All right, then, my task is only to thank
19:02:17 2 Mr. Flores, Emilio for their help, Cathy for the
19:02:21 3 wonderful work and patience for the making of the
19:02:25 4 transcript, and also I would like to, on behalf of
19:02:28 5 the Tribunal, I would sincerely like to commend
19:02:31 6 counsel on both sides, for the excellent
19:02:34 7 presentations they have made here before us, and
19:02:37 8 also in the atmosphere which was friendly among
19:02:40 9 counsel and professional.

19:02:42 10 There is one additional thing, being in
19:02:45 11 the United States, I almost am inclined to say that
19:02:53 12 this is a Miranda statement, but now for
19:02:56 13 arbitration, you are all aware of the provisions of
19:03:01 14 Article 15, paragraph 1 of the UNCITRAL rules, and
19:03:05 15 the provisions of Article 30 of the UNCITRAL rules.

19:03:14 16 Article 30 concerns the waiver. In
19:03:15 17 short, if you do not object timely, then you waive
19:03:20 18 your position. And Article 15 contains the basic
19:03:25 19 provision that the parties are treated with
19:03:29 20 equality and that at any stage of the proceedings
19:03:33 21 each party is given a full opportunity of
19:03:36 22 presenting his -- and I take liberty to have an

19:03:41 1 expansive reading -- or her case, or perhaps we
19:03:46 2 should say "its" case.

19:03:48 3 In any event, question to the claimants,
19:03:52 4 have these provisions have been adhered to by the
19:04:01 5 Tribunal?

19:04:02 6 MR. MITCHELL: There is nothing the
19:04:03 7 claimant raises at this time.

19:04:08 8 PRESIDENT VAN DEN BERG: Respondent?

19:04:12 9 MR. BETTAUER: No.

19:04:14 10 PRESIDENT VAN DEN BERG: Thank you.

19:04:15 11 Then I conclude this case -- Ms. Menaker?

19:04:21 12 MS. MENAKER: I am very sorry. It is not
19:04:22 13 with respect to your last question, but just an
19:04:24 14 issue of procedure that I had neglected to bring
19:04:28 15 up.

19:04:28 16 The Tribunal, when we were talking about
19:04:30 17 cost submissions, I think you said we would --

19:04:35 18 PRESIDENT VAN DEN BERG: Very good. Cost
19:04:35 19 submissions, shall we say one week after reply
19:04:37 20 briefs. Is that okay? I look to counsel also for
19:04:59 21 claimants.

19:05:00 22 MR. MITCHELL: Is the question about cost
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19:05:01 1 submissions, is this tied to Tembec --

19:05:07 2 PRESIDENT VAN DEN BERG: We have to
19:05:08 3 invite Tembec also for the cost submissions. As
19:05:12 4 you remember, the order was subject to the cost
19:05:16 5 submissions to be made. We will inform them.

19:05:27 6 But is one week, is that okay?

19:05:30 7 MR. MITCHELL: Is it an impediment if we

19:05:33 8 make it two weeks?

19:05:48 9 MS. MENAKER: I'm sorry, I didn't know
19:05:49 10 you were waiting. So, two weeks after the reply?

19:05:54 11 PRESIDENT VAN DEN BERG: Yes. And the
19:05:54 12 format to be agreed between the parties, and if
19:06:00 13 there is no agreement between the parties, then
19:06:00 14 they can come to the Tribunal for the format.
19:06:02 15 There usually is a long discussion between parties
19:06:04 16 about how detailed cost submissions should be,
19:06:08 17 whether all hours should be specified or whether
19:06:10 18 general numbers will do.

19:06:12 19 There are very different thoughts amongst
19:06:16 20 counsel about that, but I suggest you agree amongst
19:06:21 21 yourself about it. One line of thought, and I have
19:06:23 22 met a number of counsel who say to me, well, look, □
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19:06:25 1 I don't want to disclose what I did on Wednesday to
19:06:27 2 the other side, because otherwise they know that we
19:06:31 3 were discussing a specific type of strategy. I
19:06:35 4 give you an example.

19:06:37 5 So then, I leave that to the parties to
19:06:40 6 agree which format and also on which detail in the
19:06:42 7 sense of what -- whether you would like to the
19:06:44 8 backups. I don't need all of the travel tickets,
19:06:48 9 but --and all kind of other meal tickets. We have
19:06:50 10 enough paper. I think just an itemized account
19:06:54 11 will do. But again, that is subject to agreement
19:06:59 12 of the parties.

19:07:04 13 One point by Mr. Flores.

19:07:07 14 MR. FLORES: Thank you, Mr. Chairman, and
19:07:09 15 only because it will save me a transmittal letter.
19:07:11 16 I will distribute to the parties certified copies

19:07:16 17 of Procedural Order No. 2 of the Tribunal and of
19:07:20 18 the order of the Tribunal on determination of the
19:07:21 19 arbitral proceedings with respect to Tembec.

19:07:24 20 That would be it.

19:07:28 21 PRESIDENT VAN DEN BERG: Then I conclude
19:07:31 22 on a hypothetical which we have used yesterday in
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19:07:34 1 this case, but we slightly amend the hypothetical
19:07:38 2 for the Tribunal. This case is the Kingdom of
19:07:41 3 Arbitration Thrills.

19:07:46 4 And on that note, I close the hearing.

19:07:49 5 (Whereupon, at 7:07 the hearing was
6 closed.)

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