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NORTH AMERICAN TRADE – THE CURRENT STATUS OF NORTH AMERICAN TRADE

Session Chair – Chios Carmody
United States Speaker – M. Jean Anderson
United States Speaker – Richard O. Cunningham
Canadian Speaker – J. Michael Robinson

INTRODUCTION

Chios Carmody

MR. CARMODY: For those of you I have not met, my name is Chi Carmody. I am an associate professor at the Faculty of Law, University of Western Ontario¹ and also the Canadian National Director of the Canada-United States Law Institute.² I am very pleased to be here today and to have an opportunity to chair this session on the Current Status of North American Trade. In this session, we are going to be taking a look at what the current status of trade is. We have with us today an extremely distinguished panel of trade law and investment practitioners. On my far left is Jean Anderson. Jean is a partner at Weil Gotshal in Washington, D.C.³ She is an international trade strategist and litigator at that firm and has worked in the trade field for over two decades. She joined Weil in 1989, has a Bachelors of the Arts from Northwestern University in Chicago, and her Juris Doctor from Georgetown.⁴ She has served with great distinction as council for Canada in a number of matters, and she has also been a terrific resource for me personally in a couple of matters that I was looking into. I am very happy to have Jean here with us today.

¹ See Canada-United States Law Institute, Founding Institutions and National Directors, http://cusli.org/about/founding_institutions.html (follow “Chris Carmody” hyperlink) (last visited Sept. 14, 2009).

² See *id.*

³ See Weil Gotshal, People, <http://www.weil.com/jeananderson> (last visited Sept. 14, 2009).

⁴ See *id.*

Following Jean, we will hear from Dick Cunningham, or Richard O. Cunningham as he is formally known. Dick is with Steptoe & Johnson, LLP⁵ in Washington D.C. and a senior international trade partner at that firm. He is known I guess informally as one of the Deans of the Washington Trade Law Bar.⁶ He has had a very distinguished career. But almost as important as that, he has shepherded a number of leading trade litigators through the process of their early formative years, such luminaries as Charlene Barshesky,⁷ Sue Esserman,⁸ and many others onto positions of great prominence. And he continues to contribute to international law and international trade in so very many ways currently serving as counsel for a wide range of individuals and interests including I believe most recently the government of Korea.⁹

On my right we have with us today one of the leading investment lawyers in Canada. J. Michael Robinson is a graduate of The University of Western Ontario and also of the University of Toronto Law School¹⁰ where I believe, if I am not mistaken, he was in the same law school class as Paul Martin, Jr.,¹¹ am I correct?

MR. ROBINSON: Paul Martin, Bill Graham,¹² and Ed Roberts.¹³ All very distinguished; not me.

MR. CARMODY: Michael is with the firm of Fasken, Martineau, DuMoulin, LLP¹⁴ where he specializes in domestic and international trade and

⁵ See Steptoe & Johnson, Professionals, Richard O. Cunningham, <http://www.steptoec.com/professionals-168.html> (last visited Sept. 14, 2009).

⁶ See The Legal 500, Steptoe & Johnson LLP, <http://www.legal500.com/firms/2774/offices/52981> (last visited Sept. 14, 2009) (noting that Richard Cunningham is considered to be the dean of the International Trade Bar).

⁷ See generally Wilmer Hale, Biographies, http://www.wilmerhale.com/charlene_barshesky/ (last visited Sept. 14, 2009) (discussing Barshesky's achievement as the architect and chief negotiator of China's historic WTO agreement).

⁸ See Steptoe & Johnson, Professionals, Susan G. Esserman, <http://www.steptoec.com/professionals-182.html> (last visited Sept. 14, 2009) (noting Esserman's many achievements in international law).

⁹ See Steptoe & Johnson, Professionals, Richard O. Cunningham, *supra* note 5 (noting that Cunningham advised the Korean Government in their free trade agreement negotiations).

¹⁰ See The University of Western Ontario, Faculty and Staff, <https://www.law.uwo.ca/lawsys/pages/contents.asp?contentName=Instructors&contentFileName=jrobin69> (last visited Sept. 14, 2009).

¹¹ See *id.* (noting that Robinson graduated from the University of Toronto Law school in 1964); see also The Right Honorable Paul Martin, Biography, <http://www.paulmartin.ca/en/biography> (last visited Sept. 14, 2009) (noting that Paul graduated from the University of Toronto Law School in 1965).

¹² See Graham Fraser, *U.S. Relations Main Concern*, THE TORONTO STAR, Jan. 17, 2002, at A6 (discussing Bill Graham's role as Canada's minister of foreign affairs).

¹³ See Government House, Profiles of Governors, <http://www.heritage.nf.ca/govhouse/governors/g79.html> (last visited Sept. 14, 2009) (noting that Roberts was the Lieutenant Governor for Newfoundland for six years).

project finance including investment and a wide range of other internationally related issues. I should also point out that we are very fortunate that both Dick and Michael give of their very limited time to be members of our executive board here at the Institute, and I know that we have often called on their expertise to provide us with insight, guidance, and something of a vision for the future. So we look forward to hearing from everybody today, and I'd like to invite to the podium Jean to start us off.

UNITED STATES SPEAKER

*M. Jean Anderson**

MS. ANDERSON: Well, good morning everybody. I am going to address briefly three issues that I think are going to be with us for a long time between the United States and Canada. And so you will have a choice of subjects when you enter the fray and the discussion period. The first is the reopening of the North American Free Trade Agreement (NAFTA).¹⁵ The second is trade enforcement measures to address climate change.¹⁶ And the third is some new developments involving Chapter 19 of NAFTA.¹⁷

Starting with the reopening or maybe even renegotiation of NAFTA. As I am sure you know, this became an issue last summer at the time of the Michigan, Ohio, and Pennsylvania primaries in the United States Presidential

¹⁴ See Canada-United States Law Institute, Executive Committee and Advisory Board, http://cusli.org/about/advisory_board.html (last visited Sept. 14, 2009).

* Jean Anderson, a partner in Weil Gotshal's International Arbitration and Trade practice, is an international trade policy strategist and litigator for companies and governments around the world. She has been counsel in more than twenty WTO panel and Appellate Body proceedings; she was lead respondents' counsel in the softwood lumber dispute. Before joining Weil Gotshal in 1989, Ms. Anderson was Chief Counsel for International Trade at the United States Department of Commerce. Ms. Anderson has been a member of the Council of the International Law Section of the American Bar Association and has chaired the Section's International Trade and Canada Committees. She has taught international trade law at Georgetown University Law Center, and is on the faculty of the Academy of WTO Law and Policy at Georgetown. She holds degrees from l'Institut d'Etudes Politiques of the University of Paris, Northwestern University, and Georgetown University Law Center, where she was executive editor of the *Georgetown Law Journal*.

¹⁵ See Editorial, *Reopening NAFTA Could be Dangerous, Trade Pact with Canada, Mexico Creates Jobs for US*, THE DETROIT NEWS, March 5, 2008, at A8.

¹⁶ See Editorial, *Trade and Climate*, N.Y. TIMES, June 19, 2009, at WK9 (discussing that trade-related enforcement measures "must include commitments" to protect the environment).

¹⁷ See Steven Chase, *MPs Told U.S. Aims to Erode NAFTA Power*, GLOBE AND MAIL, March 9, 2005, at B5 (noting that the possible negotiation of NAFTA is partly motivated by the dispute concerning Chapter 19).

Election when NAFTA took a significant beating from voters and heavily unionized states that had lost manufacturing jobs,¹⁸ although parenthetically I would say I do not think they had lost those manufacturing jobs because of NAFTA but rather because of technological change, competition from other countries and so forth.¹⁹ But in any event, NAFTA took a beating. Hillary Clinton faulted NAFTA,²⁰ and I think it was apparent that anybody who didn't find NAFTA wanting might well lose the election.²¹ So Barack Obama said he would reopen NAFTA, at least as to the labor and environment side agreements.²² And the upshot is this, we have a President who by all lights seems to believe strongly in internationalism and trade liberalization.²³ In fact, he has also committed to fairness and economic opportunity for the middle class,²⁴ and not just the middle class, and even more committed to consensus and to getting some major initiatives such as health care through the United States Congress.²⁵ So in that context, he has committed to reopening what is, I think by most objective assessments, a highly successful free trade agreement that is still open and recently integrated North America.

Of course, when that happened in Canada and Mexico, a number of alarms were set off, and officials were sent to work devising lists of what

¹⁸ See Todd Spangler, *What to Do About NAFTA: Positions on Free Trade Look to Level Playing Field*, DETROIT FREE NEWS, May 4, 2008, at NWS13 (noting that American manufacturing unions complained about NAFTA during the 2008 presidential race).

¹⁹ See generally Barbara Hagenbaugh, *U.S. Manufacturing Jobs Fading Away Fast*, U.S. TODAY, Dec. 12, 2002, available at http://www.usatoday.com/money/economy/2002-12-12-manufacture_x.htm (noting that United States manufacturing jobs are facing competition from other countries and technological innovations).

²⁰ See David Sirota, *Hillary Clinton's NAFTA U-Turn Says Something About Her – and Us*, SEATTLE TIMES, Feb. 25, 2008, available at http://seattletimes.nwsourc.com/html/opinion/2004198705_sirota25.htm (explaining that Hillary Clinton criticized NAFTA partly because of her recent presidential run).

²¹ See Jim Tankersley, *NAFTA Foes Dems' Words Turn into Action*, CHI. TRIB., March 25, 2008, at C1 (noting that the 2008 election partly depends on voters who believe that changing NAFTA will help produce more manufacturing jobs in the United States).

²² See Gordon Laxer, *Bitten by the Deal that Once Fed Us*, GLOBE AND MAIL, June 23, 2008, at A15 (noting that Obama wants to discuss NAFTA with Canada, with a focus on environment and labor issues).

²³ See generally Editorial, *Reviving an Economic Engine: Can Barack Obama clear up his mixed party's signals and get trade liberalization moving?*, WASH. POST, Dec. 17, 2008, at A16 (explaining that Obama's goal of liberalization and international may be either helped or hindered by his pick for United States trade representative).

²⁴ See Editorial, *Abandoned Working Class Needs a Champion*, THE STAR-LEDGER, Aug. 25, 2008, at 99 (contrasting Obama's position with McCain by stating that Obama's economic positions supports the middle class).

²⁵ See Sheryl G. Stolberg & Jeff Zeleny, *Obama Keeps Up Health Care Push, Citing Uninsured*, N.Y. TIMES, Sept. 11, 2009, available at <http://www.nytimes.com/2009/09/11/us/politics/11obama.html?sq=&st=nyt&adxnnl=1&scp=1&adxnnlx=1255944491-C4QvJjPzdQgOZyDsUuujhA> (explaining President Obama's push for health care access).

they would demand if the United States wanted to be in NAFTA.²⁶ So the question is, will NAFTA be reopened? The talk about it has sort of died down, but the question is still on the table.²⁷ I think it will be reopened. My guess is that President Obama keeps his political promises, so I think that there will be some reopening, at least to attempt to conform the labor and environment side agreements more closely to the deal of free trade agreements that was reached last May between the United States Congress and the Executive Branch.²⁸ Under that deal, on the environmental side, free trade agreements were to include a list of multilateral environmental agreements that the parties adhere to.²⁹ On the labor side, free trade agreements were to incorporate certain internationally recognized labor principles, including things like the freedom of association³⁰ and collective bargaining rights.³¹ On the labor side, the deal couldn't say we must include international labor agreements or ILO agreements and so forth because the United States hasn't signed on to a number of those, so the deal was to incorporate the principles but not the agreements.³² And then once these principles or agreements were incorporated as standards that the countries adhere to, the obligation is to effectively enforce those principles or agreements.³³ And the alleged viola-

²⁶ See generally Elisabeth Malkin, *Re-Examining NAFTA in Hopes of Curing U.S. Manufacturing*, N.Y. TIMES, Apr. 22, 2008, available at <http://www.nytimes.com/2008/04/22/business/worldbusiness/22nafta.html?scp=1&sq=1&sq=reexaminingnafta&st=Search> (explaining that Mexico will not renegotiate NAFTA unless the United States eases legal migration or protecting corn farmers); see also Jonathan Ferguson, 'Not Perfect' but We'll Sign NAFTA *Chrétien Says*, TORONTO STAR, Dec. 3, 1993, at A1 (noting that protecting Canada's energy needs as one of their demands).

²⁷ See generally John Ibbitson, *Clinton and Obama Vow To Reopen NAFTA*, GLOBE AND MAIL, Feb. 27, 2008, at A1.

²⁸ See *id.*

²⁹ See Steve Charnovitz, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, And American Treaty-making*, 8 TEMP. INT'L & COMP. L.J. 257, 258 (1994) (noting that the parties were to adhere to high levels of environmental protection and enforcement of environmental procedures).

³⁰ See NORTH AMERICAN FREE TRADE AGREEMENT: U.S. EXPERIENCE WITH ENVIRONMENTAL, LABOR, AND INVESTMENT DISPUTE SETTLEMENT CASES, H.R. Doc. No. 02-933, at 23 (2001) [hereinafter DISPUTE SETTLEMENT CASES] (noting that freedom of association is a key principle under the labor trade agreement).

³¹ See *id.*

³² See generally JOHN MURPHY, TRADE AGREEMENTS AND LABOR RIGHTS: TOWARD A BIPARTISAN CONSENSUS (2009), <http://www.uschamber.com/NR/rdonlyres/erqnisaoftvnlufbcw5hani5g7vp7duqap3verhkmqu5watsasfocwltvebd3gs7vtasgheo2kczzea4f7rfgtwdb/IPB7TradeandLabor.pdf> (last visited Sept. 23, 2009) (asserting that the United States was concerned about the labor principles of the trade agreements).

³³ See United States Council for International Business, Policy Advocacy, <http://www.uscib.org/index.asp?documentID=825> (last visited Sept. 21, 2009) (noting that enforcement of the labor principles is critical for the agreements to be effective).

tion must affect trader investment between the parties.³⁴ If you look at those concepts against the existing NAFTA side agreements, they are not so far apart.³⁵

The major change is that labor and environment principles under this Congress administration deal are to be subject to the same dispute settlement provisions as other obligations with the same procedures, remedies, and sanctions including withdrawal of free trade agreement benefits.³⁶ The United States-Peru Free Trade Agreement³⁷ is sort of the state of the art for the United States, and that agreement arguably goes even further.³⁸ It requires significant change in Peru's forestry laws to deal with the illegal logging of tropical woods and wildlife protection in addition to incorporating international labor standards and multilateral environmental agreements, and subjecting all of it to dispute settlement.³⁹

So where is this going to take us? I personally hope that if and when the labor and environment side agreements get incorporated into the body of NAFTA and perhaps strengthened to match this deal I just described, I hope that they do not completely throw out aspects of the dispute settlement system that is in the current side agreements. Those side agreements have come in for great criticism, partly on the ground that they were not subject to the same dispute settlement provisions as other obligations under NAFTA,⁴⁰ but you can look at it another way. The dispute settlement systems in the labor and environment side agreements, generally they provide for studies, complaint studies, along a fairly elaborate process for the offending country to come up with an action plan to resolve whatever failure of enforcement was alleged and found.⁴¹ And in the end, if they do not do it, there are monetary penalties.⁴² And if they don't pay those, eventually there's a limited right to

³⁴ See generally DISPUTE SETTLEMENT CASES, *supra* note 30.

³⁵ See generally *id.*

³⁶ See generally Doug Palmer, *U.S., Canada Labor Groups Press NAFTA Reform*, REUTERS, Feb. 28, 2009, available at <http://www.reuters.com/article/latestCrisis/idUSN18475137> (discussing how the renegotiation of the side agreements should include adherence to the ILO).

³⁷ See Paul Blustein, *U.S., Peru Strike Free-Trade Agreement*, WASH. POST, Dec. 5, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/12/07/AR2005120702791.html>.

³⁸ See *id.* (noting that the agreement will "eventually eliminate all trade barriers to commerce among the participating countries in manner similar to" NAFTA).

³⁹ See generally *id.*

⁴⁰ See Jonathan Riskind, *Obama Says He Wants To Renegotiate NAFTA*, COLUMBUS DISPATCH, Oct. 25, 2008, at A5 (contending that Obama wants to renegotiate NAFTA partly because it does not have enforceable labor agreements and environmental agreements).

⁴¹ See Editorial, *Side Issues Settled, But Battle To Be Won in Congress*, THE HOUSTON CHRONICLE, Aug. 15, 2003, at 2 (discussing the enforcement procedures for the violation of the labor and environmental areas).

⁴² See *id.* (discussing that there could be monetary sanctions for failure to enforce the side

withdraw FTA benefits.⁴³ Well, that may not be effective if what you want to do is say that country is not enforcing its labor or environment principles the way we do, and that gives them an advantage, and so we have to take trade action against them. If you want that kind of approach, then the settlement provisions do not do that.⁴⁴ But what the existing dispute settlement provisions did do or currently do is actually create a system where the goal is “let's get everybody into compliance.”⁴⁵ It was a much more cooperative approach designed to be sure that what was going on within NAFTA was actually over time going to enhance the enforcement of labor and environmental standards.⁴⁶ So I hope that we don't sort of throw that baby out with the bath water in incorporating the side agreements into NAFTA.

The next and crucial question of course is what else might be up for renegotiation if NAFTA is reopened for the sake of incorporating labor and environment? One possibility is change to Chapter 11,⁴⁷ perhaps to provide that foreign interests have no greater rights than domestic parties, but I will leave that to Michael Robinson.

MR. ROBINSON: Heresy, heresy.

MS. ANDERSON: There is certainly been some talk about changes in intellectual property.⁴⁸ I do not know what else. I think that gets opened beyond dealing with labor and the environment. It is sort of everything is up for grabs, and I am hopeful and actually think that it is not likely to happen. But we will wait and see.

The second issue on which we will also have to wait and see is climate change in trade. Of course, climate change and how to deal with it is one of the overriding global policy issues that the world's going to be dealing with for decades.⁴⁹ And it is such a complex issue; I would not pretend to be able

agreements).

⁴³ See generally Tim Shorrock, *Bill Would Force U.S. To Quit NAFTA Unless Standards Met*, J. OF COM., Mar. 6, 1997, at 3A (noting that the United States may be forced to withdraw from NAFTA if its trade deficit with other NAFTA parties is excessive).

⁴⁴ See generally Jack Garvey, *Current Development: Trade Law and Quality of Life – Dispute Resolution under the NAFTA Side Accords on Labor and Environment*, 89 AM. J. INT'L L REV. 439 (1995) (providing background information on the side agreement's dispute resolution procedures).

⁴⁵ See generally *id.*

⁴⁶ See generally *id.*

⁴⁷ See generally Daniel Adams, Comment, *Back to the Basics: The Predeceased Failure of Chapter 19 and Its Lessons for the Design of International Trade Regimes*, 22 EMORY INT'L REV. 205, 234 (2008) (providing background information on litigation surrounding Chapter 11).

⁴⁸ See generally Cherie Taylor, *The Changing Tide of Trade: The Social, Political and Environmental Implications of Regional Trade Agreements: Article: Regionalism*, 29 ST. LOUIS U. PUB. L. REV. 155 (2008) (explaining the intellectual property provisions of NAFTA).

⁴⁹ See Lisa Schenck, *Climate Change “Crisis” – Struggling for Worldwide Collective Action*, 19 COLO. J. INT'L ENVTL. L. & POL'Y 319 (2008) (explaining the global climate change

to talk to you about climate change as such. The key points about dealing with climate change, though, from a trade perspective I will try to address. And to give you just a little bit of background in case you don't follow climate change issues. The major approaches to dealing with carbon emissions are cap and trade systems, carbon pacts, or various forms of regulation on emissions.⁵⁰ In the United States, cap and trade is the current administration's choice,⁵¹ although there will be a lot of Republican pushback on the ground that it is nothing but a huge tax on business.⁵² So there is no agreement right now in the United States even though there is a push for cap and trade.⁵³

There is also as far as I can tell, and someone in the audience may be able to correct me on this, there is no agreement within Canada on the approach Canada should take.⁵⁴ Although I understand the Canadian Environmental Minister Prentice apparently proposed an integrated cap and trade system between the United States and Canada⁵⁵ that reportedly received a fairly tepid response from the Obama Administration⁵⁶ who I suspect think that trying to do an integrated cap and trade system is premature⁵⁷ and that the United States first has to get something going in the United States Congress and really make progress domestically.⁵⁸

Some people think that if various countries develop their own cap and trade systems, it should not be hard to link them later on.⁵⁹ Well, if there is no agreement yet within the United States or within Canada, there certainly is

issue and efforts to confront it).

⁵⁰ See James Kanter, *Group Says European Cap-and-Trade System Reduced Emissions*, N.Y. TIMES, Feb. 16, 2009, available at <http://greeninc.blogs.nytimes.com/2009/02/16/group-says-european-cap-and-trade-system-reduced-emissions/?scp=1&sq=Group%20Says%20European%20Cap-and-Trade%20System%20Reduced%20Emissions&st=cse>.

⁵¹ See Paul Krugman, *It's Easy Being Green*, N.Y. TIMES, Sept. 24, 2009, available at <http://www.nytimes.com/2009/09/25/opinion/25krugman.html?scp=1&sq=It%E2%80%99s%20Easy%20Being%20Green&st=cse>.

⁵² See *id.*

⁵³ See generally *id.*

⁵⁴ See generally Lorrie Goldstein, *One Blunder on Climate Was Enough*, TORONTO SUN, May 4, 2009, at 16, available at <http://www.torontosun.com/comment/editorial/2009/05/04/9336456-sun.html> (noting that while there is no agreement reached, there have been talks about implementing a cap-and-trade system in Canada).

⁵⁵ See Peter Gorrie, *Obama's Doomed Carbon Plan Should Please Ottawa*, TORONTO STAR, Mar. 7, 2009, at IN3, available at <http://www.thestar.com/article/598053> (noting Prentice's opposition to the cap-and-trade system).

⁵⁶ See *id.*

⁵⁷ See *id.* (noting that President Obama's plan may be premature).

⁵⁸ See *id.*

⁵⁹ See Jonathan Stearns, *EU Outlines Its Plan for Global Trade in Emissions*, TORONTO STAR, Nov. 14, 2006, at D6, available at <http://www.thestar.com/article/119151> (noting that the EU plans on linking countries as early as 2013).

not total agreement in the rest of the developed world or even the whole carbon-emitting world.⁶⁰ But there is a growing consensus that the only way to resolve the global warming issue, assuming it still can be resolved, is by achieving an agreement obligating all of the major emitting countries to reduce greenhouse gas emissions by specified amounts.⁶¹ That would include the United States, all of Canada, Mexico, all of Europe, major Latin American countries, and major Asian countries including China and India.⁶² There may be also, as part of that agreement, ways to incentivize clean energy using trade mechanisms to some extent; for example, by negotiating the equivalent of an international technology agreement for emission control technology and equipment,⁶³ and provisions for assistance to developing countries to help them adapt to the requirements of emissions control.⁶⁴

As you surely have read, there is a meeting scheduled for December of this year in Copenhagen that is hopefully going to come up with a successor to Kyoto,⁶⁵ and there are preparatory meetings going on in Bonn right now.⁶⁶ But in Washington there is a sense that the United States has been on the wrong side of this issue for way too long;⁶⁷ that global warming is accelerating at alarming speed,⁶⁸ and it is high tide for the United States to exercise some political leadership, or at least get into position to do so.⁶⁹ Consequently, President Obama's budget outlined a cap and trade plan.⁷⁰ And on the Hill, there is an accelerated calendar for legislation to deal with climate change.⁷¹ The express goal is to pass a bill this year.⁷² There is some hope

⁶⁰ See generally Goldstein, *supra* note 54 (providing background information on the lack of agreements with respect to combating climate change).

⁶¹ See Michael Richardson, *Action on Warming Needs Climate for Cooperation*, CARBERRA TIMES, Apr. 28, 2009, at A11 (noting that Obama wants to bring together the major emitting countries).

⁶² See *id.* (providing a list of countries).

⁶³ See generally *id.*

⁶⁴ See generally *id.*

⁶⁵ See Lisa Friedman, *Health Care to be a Stumbling Block on Road to Copenhagen*, N.Y. TIMES, Sept. 9, 2009, available at <http://www.nytimes.com/cwire/2009/09/08/08climatewire-health-care-to-be-a-stumbling-block-on-road-to-414.html>.

⁶⁶ See *id.*

⁶⁷ See John M. Border & James Kanter, *Europeans Say U.S. Lacks Will on Climate*, N.Y. TIMES, Sept. 21, 2009, at A4, available at <http://www.nytimes.com/2009/09/21/world/europe/21climate.html> (noting the criticism that the United States has received for its lack of ambition in combating climate change).

⁶⁸ See *id.*

⁶⁹ See *id.* (noting an "ambition gap" between the United States and the European Union).

⁷⁰ See Darren Samuelson, *Cap and Trade in Limbo as Obama Makes All-Out Push on Health Care*, N.Y. TIMES, Sept. 9, 2009, available at <http://www.nytimes.com/cwire/2009/09/08/08climatewire-cap-and-trade-in-senate-limbo-as-obama-makes-92462.html?scp=2&sq=obama%20cap%20and%20trade&st=cse>.

⁷¹ See Editorial, *A Second Wind Is Needed on Climate and Energy Bill*, OREGONIAN, Sept 8, 2009 (discussing Congressional efforts to pass an energy bill).

that that might happen by 2010,⁷³ although even that is probably unrealistic. In any event, for such a huge issue, the legislative timetable is going to be compressed.

In that legislative process there are two issues that directly affect trade and investment. One of them has to do with competitiveness concerns,⁷⁴ particularly by energy intensive industries, which are usually identified as iron and steel, aluminum, cement, glass, paper and pulp and basic chemicals.⁷⁵ The question is, if those industries like others are subjected to emissions control requirements by a cap and trade system, for example, will there be what is called leakage? That is, will investment and jobs move to the lower emission control countries, thus reducing or leaking the effects of emission control regimes?⁷⁶ The other issue is whether and to what extent border measures might be used to compensate for the failure of some countries to impose emission control measures of the same stringency as the United States.⁷⁷

Now, both of these trade issues I think matter or could matter greatly to Canada-United States trade. Taking the competitiveness proposals, for example, which are usually in the form of proposals to give allowances under the cap and trade system or exemptions.⁷⁸ To the extent that the United States, for example, was more generous than Canada to energy intensive industries, production might shift from Canada to the United States.⁷⁹ And that might be especially true in some integrated industries where shifting the amount of production is fairly simple.⁸⁰ As to the border measures, those are usually not thought of as something that would hit Canada; they are thought of as ways to deal with China. China is always the focus.⁸¹

I am sure many of you read in the last couple of weeks the little brouhaha in the press when United States Energy Secretary Steven Chu in testimony

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See Rebecca Urban, *Emissions Trading May Start an Exodus*, WEEKEND AUSTRALIAN, July 5, 2008, at F33 (discussing the competitiveness concerns of other countries).

⁷⁵ See *id.*

⁷⁶ See Peter Jean, *Unions, Business Fear for Jobs*, HERALD SUN, July 5, 2008, at 6 (noting that jobs may go to countries that have less stringent emissions requirements).

⁷⁷ Shawn McCarthy, *U.S. Climate Laws Risk Trade War, Study Warns*, N.Y. TIMES, July 10, 2009, at B7.

⁷⁸ See Mike Boyer, *Cap and Trade: Price and Control*, CINCINNATI ENQUIRER, July 26, 2009 (discussing the allowances for cap-and-trade systems).

⁷⁹ See Nicole Mordant, *U.S. Winning Race for Green Investment*, TORONTO STAR, Aug. 17, 2009, at B3 (explaining how Canada's renewable energy companies are competing for investment from the United States).

⁸⁰ See *id.*

⁸¹ David J. Lynch, *Senate to Debate Bill Regulating Greenhouse Gases*, USA TODAY, May 27, 2008, at B4.

before Congress suggested that the United States should consider import duties on products from countries that don't impose costs on carbon.⁸² The Chinese response was swift and quite definite.⁸³ The first response from one of their climate negotiators was that consumers should pay the cost, meaning that if the United States were going to import those products from China, the United States would have to pay the carbon cost.⁸⁴ And the Senior Environmental Negotiator from China then underscored that instead all this should be done in a global negotiation, and there should not be border measures that are just disguised protection.⁸⁵

Anyway, these battles are going to go on. And there is going to be major lobbying on both in the United States Congress over the next few years.⁸⁶ The good news is that last week a bill was introduced by Congressmen Waxman and Markey.⁸⁷ It is called the American Clean Energy and Security Act of 2009,⁸⁸ which would provide for rebates to energy intensive industries.⁸⁹ And if that is not sufficient to ensure that they don't lose competitiveness because of a cap and trade system, the bill authorizes the President to establish a border adjustment program under which foreign producers and/or importers would have to pay for and hold special allowances to cover the carbon in the products they imported to the United States.⁹⁰ In other words, it is a compensatory border tax.⁹¹ That said, this bill looks pretty moderate. The administration would have until 2017 to figure out if any of these United States industries that fear for their competitiveness had been harmed by imports from countries that weren't imposing costs on carbon, and there would be another couple of years for the administration to decide what they ought to do about it.⁹² It creates a lot of time and certainly is probably intended to create some negotiating leverage in the meantime to achieve and implement a global agreement. Now, I am always skeptical of thinking that a provision in legislation is okay because it won't ever be used because they almost always

⁸² Rachel Brewster, *The Problem with Carbon Tariffs: They Aren't Fair*, CHRISTIAN SCI. MONITOR, Apr. 20, 2009, at 9.

⁸³ *See id.* (discussing China's response).

⁸⁴ *See generally id.*

⁸⁵ *See generally id.*

⁸⁶ *See* Julie H. Davis, *Lobbying for Concessions Congress Feels Heat*, STAR LEDGER, May 12, 2009 (noting an increase in lobbying).

⁸⁷ *See* Edward Markey, *The Race for Clean-Energy Innovation*, BOSTON GLOBE, June 6, 2009, at 11.

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.*

⁹¹ *See generally* H.R. 2998, 111th Cong. (2009); *see also* S.1733, 111th Cong. (2009) (both bills noting the creation of a border adjustment program).

⁹² *See generally* Markey, *supra* note 87 (providing background information on the American Clean Energy and Security Act of 2009).

are eventually used. That said, this bill is a lot more moderate than it might have been.

I see I am just about out of time. So I want to just come back with the question of, how does any of this affect Canada? And I will leave Chapter 19 and see if we have time for it later. These border measure issues in the climate change context, as I said, should not really be thought of as targeting Canada because it is very likely, it seems to me, that Canada and the United States are going to end up with similar, if not identical, targets for reducing emissions, and some kind of compatible systems for accomplishing that.⁹³ But nonetheless, I think there may be issues that will arise down the road. It might again be the question, for not just Canada but every country: are they enforcing their own emissions control regulations or systems? And would that kind of issue be subject to dispute settlement? Would it fall, for example, within the NAFTA environmental agreement? I do not know the answers to those questions, but I think that they could come up.

In addition, if the United States were, for example, to impose a border tax on Chinese products, one effect of that might be to divert Chinese exports to every country but the United States.⁹⁴ So in a situation like that, Canada like some other countries could suffer from being sideswiped by the unilateral action the United States was taking.

MR. CUNNINGHAM: That has never happened before.⁹⁵

MS. ANDERSON: No. Of course not. And I add a very important point. You know, although there is a lot of lobbying going on saying that border taxes and so on would be incomplete, World Trade Organization [WTO] consistent.⁹⁶ I think that is an incorrect analysis. I think they are very likely to be WTO inconsistent. And I think it is important for in the climate change negotiations in Copenhagen, they need to continue to think about ensuring that whatever climate agreement is reached takes into account international trade principles. They already did that to some extent in Kyoto,⁹⁷ and I think it is likely to continue. And so that may solve the problem. And if there needs to be any back-up trade measure, perhaps over the next five or ten

⁹³ See Jonathan Montpetit, *Ontario and Quebec to Explore Cap-and-Trade*, GLOBE AND MAIL, May 31, 2008, at A11 (comparing the United States and Canadian proposed emission policies).

⁹⁴ See Nayan Chanda, *Talk of Borders just Fogs the Issue*, STRAITS TIMES, May 26, 2009 (discussed the proposed tax on Chinese exports).

⁹⁵ See generally *id.* (providing background information on the proposed tax on Chinese exports).

⁹⁶ See generally Daniel M. Price, *Free Trade, Green Trade*, N.Y. TIMES, May 6, 2009, at A29 (providing background information on border taxes and the World Trade Organization).

⁹⁷ See Gary Sampson, *Kyoto Pact Must Be Consistent with Trade Laws*, DAILY YOMIURI, Sept. 18, 1998 (explaining that Kyoto agreement should “minimize adverse impact on international trade”).

years, there will have to be some flexibility developed in the WTO to deal with globally-agreed ways to deal with climate change issues through trade.

UNITED STATES SPEAKER

*Richard O. Cunningham**

MR. CUNNINGHAM: Good morning. As Chi Carmody promised you a few minutes ago, I am Mick Jagger. Actually I am not, but I do like to tell people whenever I can that all of the principles that I find useful in my international trade practices are principles that I learned from the Rolling Stones. Perhaps the most fundamental is the principle that Canada's always lived by in international trade which the United States has never understood, and that principle is, cue the Vienna Boys Choir here, "You can't always get what you want, but if you try sometimes, you find you get what you need."⁹⁸

Barack Obama ran as the 'Candidate of Change,' in initial caps.⁹⁹ And Canada needs to think about what that's going to mean for the United States' trade policy because when Obama said change, he meant it, and he meant it in all sorts of very fundamental ways. And trade isn't fully formulated in this administration, but it is clear this change is going to really come in United States trade policy.¹⁰⁰ A month or so ago the Administration put out a very short piece entitled "*The Administration's Trade Agenda: Making Trade*

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⁹⁸ ROLLING STONES, *YOU CAN'T ALWAYS GET WHAT YOU WANT* (Decca Records/ABKCO 1969).

⁹⁹ See Op-ed, *Comparing the Candidates to JFK*, S. F. CHRON., Feb. 3, 2009, at E6 (discussing Obama as standing for change).

¹⁰⁰ See Steven Greenhouse, *Tire Tariffs are Cheered by Labor*, N.Y. TIMES, Sept. 15, 2009, at B1 (discussing Obama's trade policy).

*Work for America's Families.*¹⁰¹ That itself is a radical difference from the Bush Administration.¹⁰² All of those documents as I recall were entitled Making Trade Work for Halliburton. It is going to be a while, probably four to six months before this administration begins to address trade policy specifically in any comprehensive way. But you can already begin to see the changes taking shape.¹⁰³ And what is significant for Canada I would suggest is that the new administration's approach to trade will not only differ sharply from the previous administration, but also differ sharply from the path that Canada has been on in recent years in trade.¹⁰⁴

Let me begin with trade liberalization. Canada has pressed hard to bring the Doha round to an early conclusion.¹⁰⁵ At the same time, it has conducted a very active program of free trade agreement negotiations with a whole raft of countries.¹⁰⁶ Some were brought to conclusion, some struggling to get to the conclusion, and some particularly ambitious as trade agreements with Europe, lots of luck, you are just starting. But in both of these respects, multilateral and bilateral, the Bush Administration pursued a policy very similar to what Canada pursued.¹⁰⁷ It is already clear that the new administration will have a completely different approach on both levels.¹⁰⁸

Let us continue by focusing on Doha. Canada and the Bush Administration are on the same wavelength.¹⁰⁹ Pursue Doha as it is currently constructed, try to bridge the gaps that remain at the end of 2008, and try to move forward this year if possible, next year at the latest, to a Doha agreement.¹¹⁰ The Obama Administration is sharply diverging from that. The Obama Administration, I will tell you, does not accept the fundamental architecture of the Doha development agenda.¹¹¹ There is not enough market access for American companies and for American farmers.¹¹² What they see,

¹⁰¹ See generally *id.* (giving background information on Obama's trading policies).

¹⁰² See generally *id.*

¹⁰³ See generally John Ibbitson, *Global Trade Wars or Voter Revolt? Let Obama's Difficult Decisions Begin*, GLOBE AND MAIL, Jan. 30, 2009, at A1 (providing background information on Obama's trade policies).

¹⁰⁴ See generally *id.* (noting Obama's trade policies may conflict with that of Canada's).

¹⁰⁵ Editorial, *Transatlantic Free Trade*, GLOBE AND MAIL, Apr. 30, 2009, at A14.

¹⁰⁶ See *id.*

¹⁰⁷ Jack Chang, *Officials, Experts Expect a Dramatic Shift in Trade Policy Strategy under Obama*, STAR-LEDGER, Dec. 7, 2008, at 29.

¹⁰⁸ *Id.*

¹⁰⁹ See generally Roger Lowenstein, *Tariff to Nowhere*, N.Y. TIMES, June 15, 2008, at MM15 (providing background information on the Bush administration and Doha).

¹¹⁰ See Editorial, *Trade Boom*, WASH. POST, Feb. 3, 2007, at A14.

¹¹¹ See generally Editorial, *Tangled Trade Talks*, N.Y. TIMES, July 11, 2009, at A18 [hereinafter *Tangled*] (providing background information on Obama's stance on Doha).

¹¹² See Brian Knowlton, *U.S. Trade Chief Says Obama Will Open on Pacts*, N.Y. TIMES, Apr. 24, 2009, at B3 (noting the efforts to protect American businesses).

and I think what any observer rightly sees, is a basic dilemma in the Doha Round.¹¹³ The Doha Round was constructed as a development agenda.¹¹⁴ The developing world quite logically took this as, “hey, it is time for us to catch up, you are going to give us things, and we do not have to give you much of any significance at all.”¹¹⁵ But that cannot work for countries that have to submit Doha agreements to their congresses or parliaments to get ratification.¹¹⁶ If they do not bring back the goods, it is not going to get ratified.¹¹⁷ And particularly in a time when for developed country exporters in general and United States exporters in particular, both agricultural and NAMA, Non-Agricultural Manufacturing Goods, the growing markets are in the developing world, and the barriers that need to be reduced are in the developing world.¹¹⁸ We have always succeeded in a whole bunch of rounds in reducing developed world, developed country barriers.¹¹⁹ That is where the gains have to be for the United States. The Doha Round is set up in a way that it is not going to lead to that.¹²⁰ And therefore, the Obama Administration has sent signals out that it is going to pause and reassess Doha and trade in general.¹²¹ No details yet except it's clear they are going to insist on a more ambitious agenda of trade opening.¹²² And there are a couple of reasons for this that you need to understand. Concretely and immediately, the administration believes, I think correctly, that the current Congress, a Congress that is much more skeptical of both globalization and trade agreements,¹²³ would be likely to reject a Doha agreement that is anything like what's now on the table in the Doha round.¹²⁴ And it is not just the Congress. Big organizations like the National Association of Manufacturers, the American Farm Bureau Federation have said this round just doesn't have it for the United States; we cannot take what is on the table or anything close to it.¹²⁵

¹¹³ See *id.* (discussing the dilemma in the Doha talks).

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See generally Hardev Kaur, *New Hope Next Week for Development Promised*, NEW STRAITS TIMES, Sept. 11, 2009 (discussing generally the issues involved in completing the Doha agreement since they are many countries participating).

¹¹⁷ See generally *id.*

¹¹⁸ See Catherine Ashton & Simon Crean, *The Recipe for Doha's Revival*, AUSTRALIAN, June 26, 2009, at F25.

¹¹⁹ See James L. Rowe Jr., *U.S. Requests Easing Bans on Trading*, WASH. POST, Nov. 2, 1977, at D1.

¹²⁰ See *Tangled*, *supra* note 111.

¹²¹ See Brian Knowlton, *U.S. Trade Chief Says Canada Will Push Ahead on Pacts*, N.Y. TIMES, Apr. 24, 2009, at B3.

¹²² See *id.*

¹²³ See Alvin Foo, *U.S. Has Trade Policy on Backburner*, STRAITS TIMES, Mar. 20, 2009 (noting that Congress may be more skeptical because of the economic crisis).

¹²⁴ See generally David Hale, *Obama Must Back Free Trade*, AGE, Apr. 3, 2009, at B8.

¹²⁵ See Letter from American Business Coalition members to WTO Trade Ministers, Trade

So Congress would probably reject this. And you all remember what happened to the League of Nations.¹²⁶ I think the worst result for Doha would be an agreement and then United States rejects it. That's catastrophe for the WTO. There is a broader reason that is related to this administration's fundamental view of the world economy of the current economic crisis that we are in, and it has to do with the great imbalances. Yes, we have had a financial crisis, a housing collapse, which triggered all this.¹²⁷ But the great imbalances are what has really lead to the economic crisis that we have here: the imbalance between the surplus countries which have massive trade surpluses now, most notably China,¹²⁸ but also countries like Germany and Japan.¹²⁹ And the deficit countries, particularly the United States, that are running massive deficits which have had to be fueled by consumption levels inflated by borrowing,¹³⁰ and that is where we get to the crisis that we have now.

I would recommend to any of you to read the series of articles that Martin Wolf is writing in the Financial Times on this issue.¹³¹ It is very perceptive, and it coincides with the thought at Treasury and at State, Congress yet doesn't have much of a way of thoughts because they are only just getting people in place,¹³² but that the United States needs to move toward becoming a relatively more export-focused economy.¹³³ China and the surplus countries need to focus on becoming more domestic demand driven.¹³⁴ And that has a corollary in trade, which is that for the deficit countries, a Doha Round that opens up market access in the markets that are growing around the world, the developing countries, is critical toward resolving the great imbalances of the real problem with trade in the economy today in the world.¹³⁵

Resource Center (June 16, 2006), available at http://trade.businessroundtable.org/news/06-13-2006_dohalight.html.

¹²⁶ See Unog.ch, Organization and Establishment, [http://www.unog.ch/80256EE60057D930/\(httpPages\)/84C4520213F947DDC1256F32002E23DB?](http://www.unog.ch/80256EE60057D930/(httpPages)/84C4520213F947DDC1256F32002E23DB?) (last visited Nov. 17, 2009) (noting that the League of Nations was created "prevent future wars"); see, e.g., Unog.ch, The Last Assembly, [http://www.unog.ch/80256EE60057D930/\(httpPages\)/02076E77C9D0EF73C1256F32002F48B3?OpenDocument](http://www.unog.ch/80256EE60057D930/(httpPages)/02076E77C9D0EF73C1256F32002F48B3?OpenDocument) (last visited Nov. 17, 2009) (noting the League ultimately failed to prevent World War II and was subsequently assimilated into the United Nations).

¹²⁷ See Foo, *supra* note 123.

¹²⁸ See Editorial, *The U.S. and China*, GLOBE AND NEWS, June 3, 2009, at A16.

¹²⁹ See generally *id.*

¹³⁰ See *id.*

¹³¹ See Jim O'Leary, *How the Seeds of Global Financial Meltdown Were Sown*, IRISH TIMES, Feb. 9, 2009, at 17 (discussing Martin Wolf's book).

¹³² See generally *id.*

¹³³ See Greg Ng, *Singapore-China Top Meeting to Discuss Common Challenges*, STRAITS TIMES, Sept. 11, 2009.

¹³⁴ See *id.*

¹³⁵ See *Tangled*, *supra* note 111.

Let me turn now to free trade agreements. As we noted, Canada and the Bush Administration both pursued free trade agreements.¹³⁶ There was little difference.¹³⁷ You pursued economically interesting free trade agreements,¹³⁸ and we, except for Korea,¹³⁹ pursued free trade agreements without Bilateral Investment Treaties [BITs] like Bahrain, Columbia, which are not so much economic as geopolitical focus.¹⁴⁰ Obama personally and his administration in general, is much more skeptical of free trade agreements.¹⁴¹ And in particular, they think multilateralism is the way to liberalize trade.¹⁴² But more particularly, they are skeptical of trade agreements with countries that are lower in economic development than the United States.¹⁴³ They buy into the proposition that opening up our market to lower wage rate countries carries a risk for American industries that are vulnerable to import competition,¹⁴⁴ and we have to be very cautious about that.

We do not have trade promotion authority. There is no intent to seek trade promotion authority in the near future for this administration.¹⁴⁵ So here, again, the United States and Canada are going to be on different paths. And there is one exception in the free trade agreement and the regional trade agreement area that Canada needs to be aware of and needs to think about how it participates in this.

The United States has a real problem in the Pacific.¹⁴⁶ Ten years ago our great scheme in the Pacific was that trade liberalization and economic integration were going to proceed in a way that the United States had a major role and was going to be conducted by APEC.¹⁴⁷ A funny thing happened; the Association of Southeast Asian Nations took the ball, and ran with it.¹⁴⁸ ASEAN now has a number of interlocking trade agreements in the Pacific, has trade agreements with China,¹⁴⁹ trade agreements with India,¹⁵⁰ and the

¹³⁶ See Donald R. Dinan, *Free Trade Agreements and the Bush Administration*, <http://www.allianceforeconomicjustice.org/pdf/FreeTradeAgreements2.pdf> (last visited Oct. 5, 2009).

¹³⁷ *Id.*

¹³⁸ *See id.*

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See* Editorial, *Obama's Trade Agenda*, N.Y. TIMES, Mar. 11, 2009, at A30.

¹⁴² *See id.*

¹⁴³ *See id.*

¹⁴⁴ *See id.*

¹⁴⁵ *See* Michael Richardson, *Pressure Is on, But Resist Protectionism*, STRAITS TIMES, Jan. 26, 2009.

¹⁴⁶ *See, e.g.*, Lawrence B. Krause, *APEC Marches on*, S.D. UNION TRIB., Sept. 7, 1994, at B5.

¹⁴⁷ *See id.*

¹⁴⁸ *See* Derwin Pereira, *Hitch a Ride From the Dynamos China and India*, STRAITS TIMES, Apr. 6, 2005.

¹⁴⁹ *See id.*

United States has very little influence in ASEAN.¹⁵¹ The United States needs to find a way to get back into the ball game. They have a plan to take what is called the P4,¹⁵² a collection of juggernaut countries, Singapore, New Zealand, Chile, and Brunei, the global trade leaders,¹⁵³ and use that to wedge their way back in by expanding into other countries.¹⁵⁴ They are going to need to do more. They are going to need to have a better plan; a more expansive plan that is going to have to involve Korea, but it also should involve Canada because Canada is a Pacific country in exactly the same sense that United States is a Pacific country.¹⁵⁵ For Canada, in the east we think of strategically about getting into that game and what role you should be playing in that game.¹⁵⁶ So what are we going to be doing if we are not going to be negotiating a lot of trade agreements here in the United States? And we are not, if you listen to the new trade representative's confirmation testimony.¹⁵⁷ If you look at the Administration's trade agenda, "Making Trade Work for American Families,"¹⁵⁸ you see that what they have planned to do is focus on enforcement of our current rights under existing trade agreements.¹⁵⁹ There is supposed to be trumpets when I say that, like a clarion call to battle.

MR. ROBINSON: Lawyer's battles.

MR. CUNNINGHAM: There are reasons for that. That buys time, for one thing, to get trade policy together.¹⁶⁰ It also is a way, if they do it properly, to begin rebuilding the consensus for trade liberalization¹⁶¹ because if they are doing this right, and focusing on enforcement of trade agreement rights that led to the demolition of market access barriers, the result will be good. That is trade expanding, and it takes attention away from the import restriction approach to trade that is so near and dear to the hearts of so many in the Congress.¹⁶² It is also great in this administration because it is a contrast with

¹⁵⁰ *See id.*

¹⁵¹ *See generally id.*

¹⁵² *See Kay Martin, US Role in Finance Talks a 'First Step' to Trade Deal*, DOMINION POST, Feb. 6, 2008, at 5.

¹⁵³ *Id.*

¹⁵⁴ *See id.*

¹⁵⁵ *See Marcus Gee, Politics Are Slamming Our Trade Doors Shut*, GLOBE AND MAIL, Nov. 26, 2008, at B11.

¹⁵⁶ *See id.*

¹⁵⁷ *See Anthony Failoa, U.S. To Toughen Its Stance on Trade*, WASH. POST, Mar. 10, 2009, at A1 (noting Robert Kirk's confirmation testimony).

¹⁵⁸ *See generally id.*

¹⁵⁹ *See id.*

¹⁶⁰ *See generally Sheryl G. Stolberg, Obama Makes Overtures to Canada's Leader*, N.Y. TIMES, Feb. 19, 2009, available at <http://www.nytimes.com/2009/02/20/world/americas/20prexy.html> (providing background information on trade policy).

¹⁶¹ *See Editorial, Reviving an Economic Engine*, WASH. POST, Dec. 17, 2008, at A16 (discussing trade liberalization).

¹⁶² *See generally Anthony Faiola & Glenn Kessler, Trade Barriers Toughen with Global*

the Bush Administration. The Bush Administration only brought five WTO cases,¹⁶³ the previous administration brought eleven.¹⁶⁴ This administration has plans to be much more active.¹⁶⁵ It is also a subset of that worldview about redressing the imbalances, to get the United States more access to foreign markets.¹⁶⁶ And as I say, it accommodates congressional pressure. And I might add Congress is clearly picking up the ball, and there is always a danger of going down this route because Congress will pick up the ball. There is something in the hopper called the Trade Enforcement Act of 2009,¹⁶⁷ which would establish Super 301,¹⁶⁸ which would make it more difficult for the United States Trade Representative's Office to turn down cases that are brought to them.¹⁶⁹ It would appoint a congressional trade enforcement czar; there is a terrible idea if you ever heard one, because you do not want Congress politicizing this. Politicizing this turns it inward toward import protection.¹⁷⁰ Indeed if you read that bill, there is a lot of import protection stuff in there reversing some of the trade decisions that have brought more balance to anti-dumping enforcement,¹⁷¹ reversing the WTO zeroing decisions, or close to reversing them,¹⁷² things like that. Canada needs to watch this.

There is going to be activity enforcement, and Canada needs to watch this. Every year the United States Trade Representatives Office comes out with something called the National Trade Estimate.¹⁷³ It is a wonderful thing

Slump, WASH. POST., Dec. 22, 2008, at A1 (noting that there may be more trade restrictions because of the economy).

¹⁶³ See generally Richard Lawrence, *Trade Policy: Busy Year Ahead*, J. OF COM., Jan. 10, 2005, at 68 (providing background information on the Bush Administration and the World Trade Organization).

¹⁶⁴ See Doug Palmer, *U.S. Trade Bulldogs' Aide in Line for Key USTR Post*, REUTERS, Feb. 17, 2009, <http://www.reuters.com/article/politicsNews/idUSTRE51G6BR20090217>.

¹⁶⁵ *Id.*

¹⁶⁶ See Damien Reece, *Immelt Fears U.S. Protectionism Foreign Nations*, DAILY TELEGRAPH, June 30, 2009, at 1.

¹⁶⁷ H.R. 496, 111th Cong. (2009); see also EDWARD T. HAYES, THE TRADE ENFORCEMENT ACT OF 2009 (HR 496) (2009), available at http://www.alfainternational.com/files/tbl_s12Publications%5CFileUpload92%5C205%5CThe%20Trade%20Enforcement%20Act%20of%20202009.pdf.

¹⁶⁸ See Press Release, Brookings Institute America's Trade Agenda: Examining the Trade Enforcement Act of 2007 (May 22, 2009), http://www.brookings.edu/testimony/2008/0522_trade_brainard.aspx (noting TEA would "reauthorize a carefully crafted version of Super 301").

¹⁶⁹ See HAYES, *supra* note 167.

¹⁷⁰ See generally *id.*

¹⁷¹ See *id.*

¹⁷² See generally George N. Grammas et. al, *New Trade Enforcement Legislation Introduced at Start of New Congress*, MARTINDALE-HUBBELL, Feb. 9, 2009, available at http://www.martindale.com/international-law/article_squire-sanders-dempsey-llp_608764.htm.

¹⁷³ See Rosaline Mclymont, *Still the One*, J. OF COM., Jun. 25, 2007, at 16.

to read for people who think, gee, we are the good guys in trade, we do not do anything wrong. And you read there, and there are about eight pages of things that make you the evilest villain in world trade, and indeed there are eight-and-a-half pages on Canada's scurrilous practices. The Ways and Means Committee has written a letter to the Administration with very specific things that ought to be done to enforce United States law and our agreements against these national trade estimate problems,¹⁷⁴ and they particularly single out problems from specific countries. Now, the good news for you is that Canada is not the "baddest" of the bad boys. Everybody knows who the "baddest" of the bad boys is. Would anybody like to take a guess?

MR. CARMODY: China.

MR. CUNNINGHAM: Give that man a prize. China.¹⁷⁵ But Canada's tied for second with the European Union and Korea with four specific things that Congress wants the United States government to take action against through either WTO actions or some other means.¹⁷⁶ Those are; another case on dairy product matters,¹⁷⁷ a Trade Related Aspects of Intellectual Property Rights [TRIPS] case,¹⁷⁸ possible Special 301 action for failure to protect United States firms' intellectual properties,¹⁷⁹ a case against subsidies to aircraft development by Bombardier,¹⁸⁰ my apologies Mr. Desjardins, and of course all sorts of bilateral WTO actions on lumber.¹⁸¹

Let me close, however, on that note. I truly believe, as Jeanie does,¹⁸² I think, that this is not an administration whose philosophy is protectionist, nor is it nationalist in the sense that the Bush Administration viewed most international issues as problems to be addressed by the United States in a "my way or the highway" method. But Barack Obama is a man who sees today's

¹⁷⁴ See generally Press Release, Ways and Means Committee, U.S. Must Enforce Laws to Break Down Trade Barriers (Mar. 28, 2008), available at <http://waysandmeans.house.gov/News.asp?FormMode=Release&ID=631> (discussing addressing United States rights under trade agreements).

¹⁷⁵ See generally Rick Barrett & Thomas Content, *Trade Ruling Against China May Open Doors*, MILWAUKEE J. SENTINEL, Aug. 13, 2009, at A1 (discussing the trade ruling against China).

¹⁷⁶ See Editorial, *International Briefing*, WASH. POST, Mar. 25, 2009, at D2 (discussing the World Trade Organization problems with the European Union and Korea).

¹⁷⁷ See *Outcry Over New U.S. Dairy Export Subsidies*, FARM ONLINE, Sept. 7, 2009, <http://sl.farmonline.com.au/news/state/agribusiness-and-general/general/outcry-over-new-us-dairy-export-subsidies/1563816.aspx>.

¹⁷⁸ See Editorial, *International News*, WASH. POST, Sept. 25, 2008, at D8.

¹⁷⁹ See Barrett & Content, *supra* note 175.

¹⁸⁰ See Nicola Clark, *Five-Year Dispute on Aircraft Claims Loses Its Urgency*, N.Y. TIMES, Sept. 4, 2009, at B5.

¹⁸¹ See Thomas Walkom, *Any Hopes of Only Being Side-Swiped by Recession Lost in Shocking Job Stats*, TORONTO STAR, Feb. 7, 2009, at A1.

¹⁸² See generally Weil Gotshal, People, <http://www.weil.com/jeananderson/> (last visited Oct. 9, 2009) (providing background information on Jean Anderson).

world as one where we're increasingly dealing with problems that are global in scope and need multilateral, not unilateral, solutions.¹⁸³ Moreover, he is a believer in trade liberalization, particularly on a multilateral basis.¹⁸⁴ You have only to look at his appointments. You have a free trade former mayor of Dallas as the United States Trade Representative and as the Secretary of Commerce,¹⁸⁵ the Agency that is traditionally the spear-carrier for industries seeking protection,¹⁸⁶ and in particular, that everybody looks to go bash China.¹⁸⁷ You have the former Governor of Washington, a free-trader of Chinese descent.¹⁸⁸ The steel industry must have torn its hair out when they saw that.¹⁸⁹

There are of course, I think, two reasons to be watchful of the position this administration takes. First, as I said, it is going to be under continual pressure from Congress to push it toward more protectionism, less globalization.¹⁹⁰ So far there are some pretty good indications the administration will resist that.¹⁹¹ You saw one in the economic package that they put forward where the Congress said we want a Buy America program on all manufactured goods, all steel, everything.¹⁹² And the Administration insisted that be changed, not in the best way, which would have been to eliminate it, but at least to make it inapplicable to anyone who is a signatory to the General Agreement on Tariffs and Trade [GATT] procurement code, the WTO procurement code, or has a bilateral agreement on procurement with the United States.¹⁹³ You guys are okay. And let us hope that that is a sign of things to come. The second reason to be watchful, and in my mind, the more important reason, is that trade per se is pretty far down the Administration's list of priorities.¹⁹⁴ And what that means is that trade issues are going to be focused on in the early months of this administration, maybe all throughout the first year as, quote, "that trade issue we have to deal with as an impediment to our valiant effort to address the much more important social environmental eco-

¹⁸³ See Mohamed Ariff, *Liberal Trade Policies Vital to Global Recovery*, STRAITS TIMES, Apr. 16, 2009, at 18.

¹⁸⁴ See *id.*

¹⁸⁵ See Peter Kammerer, *A Good Friend of China*, S. CHINA MORNING POST, Feb. 28, 2009, at 12.

¹⁸⁶ See generally *id.*

¹⁸⁷ See generally *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See generally *id.*

¹⁹⁰ See Irwin Stelzer, *Barack a Buck Away*, COURIER MAIL, Feb. 28, 2009, at 63.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See *id.*

¹⁹⁴ See James O'Toole, *Trade Issue May Prove Balancing Act for Obama*, PITTSBURGH POST-GAZETTE, Sept. 13, 2009, available at <http://www.post-gazette.com/pg/09256/997664-482.stm>.

conomic issue of X.”¹⁹⁵ X could be global warming as we talked about a moment ago.¹⁹⁶ It could be food product safety.¹⁹⁷ It could be auto trade-in deals that are subsidized by the government.¹⁹⁸ Then the danger of course, is the impetus to implement the higher priority social or economic policy might affect how they come out on the trade aspects.¹⁹⁹ So be optimistic, and there's good reason for that. However, also be watchful in Canada because there's good reason for that, too.

CANADIAN SPEAKER

J. Michael Robinson *

MR. ROBINSON: Obviously we are saving questions until after presentations. I do not do PowerPoint, but what I am going to do, and one of the nice students is going to do it for me, is pass out some speaking notes so that when I go too long and don't finish what I am supposed to say, you at least have some of it written down. And they also leave a little column down the side for you to scribble your questions. Now you have to have a pen and be able to write, not just type. I know that is a throwback. So while that is being passed around, I will do my little Trivial Pursuit item. I do not do jokes because I do them all badly, but here is one that you can get some mileage out of at cocktail parties and other places; did you know that you are right now in what was part of Canada? After a thing called the French and Indian Wars (Canadians have called it something else, The Battle of the Plains of

¹⁹⁵ See, e.g., John M. Broder, *In Obama's Team, 2 Camps on Climate*, N.Y. TIMES, Jan. 3, 2009, at A10.

¹⁹⁶ See *id.*

¹⁹⁷ See Bob Keefe, *Food Safety Revamp on Way*, ATL. J.-CONST., Mar. 12, 2009, at A3.

¹⁹⁸ See Editorial, *Hitting the Gas*, L.A. TIMES, May 20, 2009, at A30 (discussing Obama's automobile plan).

¹⁹⁹ See O'Toole, *supra* note 194.

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Abraham) England took over the rest of Canada, the British government enlarged Canada, and it went all the way South to the Mississippi. South included Cleveland, Ohio and Detroit, Michigan, all the way to Mississippi.²⁰⁰ That was the province or the colony of Canada, right where we are sitting here. And then we had this unpleasantness where you decided that you were being taxed too badly and decided to become independent.²⁰¹ And then of course the border went back up to the Great Lakes.²⁰² But for some decades this was Canada. Okay. That is my Trivial Pursuit note, and the speaking notes have gone around. The reason I do not do PowerPoint is that I am a Luddite, and I do it wrong anyway. This is something you can take away.

I am going to focus on the investment side. When the description of this session came around, I was very relieved to find that the word "investment" was also included because I said, "oh my goodness, I have to go on a panel with Jeanie and Dick and talk about trade? I will be just done like dinner." So I thought investment is worth talking about. And this is fairly specific; it's pretty well related to Chapter 11 only.

Let me say one thing, though. If you have not already thought of this question, ask this question of Richard and Jeanie in the question period: "Why is, as I believe it is, the Senate qualification to the Buy America provision in the stimulus bill²⁰³ just smoke and mirrors?" Because the provinces and states and municipalities which are going to get the money are not bound by either the World Trade Organization (WTO) Procurement Code or the North American Free Trade Agreement (NAFTA) respecting procurement.²⁰⁴ So ask them that and see what they say. That is as far as I will trench on their area.

Okay. Everybody seems to hate Chapter 11 in Canada,²⁰⁵ that is my Part A here. Part B is going to be our new national security provision that we have taken in our investment control statute.²⁰⁶ To start out, nationalists say

²⁰⁰ See generally Rob Love, *History Should Sometimes Just be History*, GLOBE AND MAIL, Jan. 27, 2009, at A15 (providing background information on the Battle of the Plains of Abraham).

²⁰¹ See generally *id.*

²⁰² See generally *id.*

²⁰³ See David Sanger, *Senate Agrees to Dilute 'Buy America' Provisions*, N.Y. TIMES, Feb. 5, 2009, at A22.

²⁰⁴ See C. Christopher Parlin, Seamus Curley, & David S. Christy, Jr., *The stimulus package: does the Buy American provision affect you?* DLA PIPER, Mar. 13, 2009, available at <http://www.dlapiper.com/does-the-stimulus-packages-buy-american-provision-affect-you> (noting that ARRA's "Buy America" can be applied in compliance with WTO and NAFTA).

²⁰⁵ See Drew Fagan, *NAFTA's Chapter 11 and U.S. Blackmail*, GLOBE AND MAIL, May 8, 2002, at B11 (noting that Chapter 11 is the "most mischaracterized component" of NAFTA).

²⁰⁶ See Editorial, *Canadians Called on to Fight Corporations*, GLOBE AND MAIL, Jan. 13, 2009, at A12.

Chapter 11 trenches too much on environmental and health protections.²⁰⁷ The leading nationalist organization is called the Council or Company of Canadians;²⁰⁸ it is led by a very fiery and articulate, and not always entirely truthful in my view, lady named Maude Barlow.²⁰⁹ Now, Maude has gone off to head a new United Nations (UN) organization on water resources management for the whole world,²¹⁰ and of course one of her big themes is, "Hidden in NAFTA is that fact that the Americans can grab all our water," which of course is nonsense.²¹¹ Anyway, so that is an unhappy group.

Second, unsuccessful claimants. There is a case that I teach, a NAFTA and trade law sort of thing up at Western.²¹² In that class I make all the students read, *Loewen v. U.S.*²¹³ Mr. Loewen was a Canadian operator and owner of funeral homes that was expanding like mad, and he bought one in Mississippi, and he got himself in a bit of trouble.²¹⁴ There was an action against him saying that he underpaid by about thirty million USD.²¹⁵ And by the time the jury had finished with him, he was ordered to pay \$400 million USD in punitive damages as well as another \$150 million for whatever it was, the small amount that had been in dispute.²¹⁶ It went to Chapter 11.²¹⁷ The panel actually used the words to describe the jury verdict and the whole judicial system in Mississippi as a "disgrace" and "a miscarriage of justice."²¹⁸ However, there was a little technical problem. Mr. Loewen, when he was desperately trying to reconstruct his company, did a reorganization that turned his head corporation into a United States corporation.²¹⁹ The tribunal said there was no continuity of citizenship.²²⁰ The case was then an American suing the United States. You were not one when you started; too bad; you are now so you are out, no jurisdiction.²²¹ And besides, you did not go to the Supreme Court of the United States against this jury verdict. You

²⁰⁷ *See id.*

²⁰⁸ *See id.*

²⁰⁹ *See id.*

²¹⁰ *See* Erin Anderson, *Maude Barlow: The Al Gore of H2O*, GLOBE AND MAIL, Oct. 25, 2008, at F3.

²¹¹ *See id.*

²¹² *See* Western Ontario School of Law, Michael Robinson, <https://www.law.uwo.ca/lawsys/pages/contents.asp?contentName=Instructors&contentFileName=jrobin69> (last visited Oct. 12, 2009).

²¹³ *Loewen v. U.S.*, No. 04-2151, 2005 U.S. Dist. LEXIS 44999 (D.C. 2005).

²¹⁴ *Id.* at *2.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *See* The Loewen Group Inc. & Raymond L. Loewen v. U.S.A., ICSID Case No. ARB(AF)98/3.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

only tried to go to the Court of Appeal of Mississippi and found that, if you did that, you had to post a bond equal to 150 percent of the award against you.²²² And he was a little short; he did not have a loose three-quarters of a billion around to post the bond. Anyway, people like Ray Loewen are very unhappy.

Now the Canadian public, what do they think about this? Well, they do not understand it.²²³ It is a bit complicated; it does not get a lot of press. But when it does, some people, including yours truly in a recent thing I wrote for the National Post²²⁴ at their request, realized that foreigners under Chapter 11, namely Mexicans and Americans, get much better protection for property rights than Canadians do because of our equivalent to your Bill of Rights²²⁵ called the Charter of Rights and Freedoms.²²⁶ It is fairly new, and it only protects personal rights.²²⁷ It does not protect corporations; it does not protect commercial or business rights.

So, as we find in the unhappy list, Canadian provinces are unhappy with Chapter 11,²²⁸ until they realize how it really works.²²⁹ In December 2008, Danny Williams, a rather fiery and outspoken critic of the federal government²³⁰ and Premier of Newfoundland and Labrador,²³¹ got very cross at a big pulp and paper company called AbitibiBowater,²³² which had just closed a mill. So he put through in the legislature in one day a bill expropriating all the assets of AbitibiBowater in Newfoundland, all the ones that were of any value.²³³ The bill says no party may sue the government or any agent etcetera, of the government as a result of anything done under this statute.²³⁴ Compensation may be paid if the Governor in Consul, read Premier, decides that he will pay some, and he will decide and how much and it will not be

²²² See *id.*

²²³ See generally *id.*

²²⁴ See generally Canada United Law Institute, at Executive Committee, <http://cusli.org/about/executive.html> (providing background information on Michael Robinson).

²²⁵ See generally *id.*

²²⁶ Constitution Act, Part I, 1982, as reprinted in Canada Act 1982, ch. 11 (Schedule B), available at <http://dsp-psd.pwgsc.gc.ca/Collection/CH37-4-3-2002E.pdf>.

²²⁷ See *id.*

²²⁸ See Dana Gabriel, *Chapter Eleven of NAFTA Remains a Threat to National Sovereignty*, CENTRE FOR RESEARCH ON GLOBALIZATION, Oct. 22, 2008, <http://www.globalresearch.ca/index.php?context=va&aid=10640>.

²²⁹ See generally *id.*

²³⁰ See Bill Dymond, *Newfoundland Hurts Itself with Abitibi Seizure*, GLOBE AND MAIL, Feb. 9, 2009, at B2 (discussing Danny Williams's agenda).

²³¹ See *id.*

²³² See *id.*

²³³ See *id.*

²³⁴ See *id.*

reviewable.²³⁵ Since NAFTA is an agreement among countries, who responds to the inevitable claim if AbitibiBowater, A, survives; and, B, cannot settle some reasonable compensation with Newfoundland? Who pays? Canada pays.²³⁶ People say, well, Danny Williams cannot do that.²³⁷ Surely there is something wrong there. Well, if AbitibiBowater were a Canadian, the doctrine of the supremacy of Parliament would govern,²³⁸ and it would have no claim under the Charter for an illegal expropriation because the Parliament is supreme.²³⁹ So Canada pays. Then does Canada just send a bill to Newfoundland saying please give me this money back? Well, there is another little problem in Canada. There is a case called the *Labor Conventions Case*²⁴⁰ which was decided by the English Privy Council, then in the final court of appeal in Canada, in the 1930s which said, the federal government can sign these international agreements, but if and to the extent that they effect exclusive provincial rights, then the provinces have to approve as well.²⁴¹ That case has never been overruled by the Canadian Supreme Court,²⁴² nor has it been challenged because neither the province nor the federal government wants to run the risk of something bad happening.²⁴³ So we did the usual Canadian thing; we just kind of ignored it, and assumed that the provinces will be somehow bought off and will not object to the fact that they never signed NAFTA, and they have never passed bills approving it.

So Mr. Williams may be able to say, "Well, you signed that thing, I did not. You defend my expropriation, my indefensible expropriation under Chapter 11, and then you pay, and do not come to me for the money back." I gave him that, in effect, free legal advice in my comment in the *National Post*.²⁴⁴

²³⁵ See Dymond, *supra* note 230.

²³⁶ See *id.*

²³⁷ See generally *id.*

²³⁸ See generally Editorial, *Paper Tiger Pounces*, *GLOBE AND MAIL*, Dec. 18, 2008, at A22 (providing background information on AbitibiBowater and the Charter of Rights and Freedoms).

²³⁹ See generally *id.*

²⁴⁰ See generally BONNI R. KETTNER, DISSERTATION, CANADIAN FEDERALISM AND THE INTERNATIONAL ACTIVITIES OF THREE PROVINCES: ALBERTA, ONTARIO, AND QUEBEC 26-27 (1980), available at <http://ir.lib.sfu.ca/bitstream/1892/4884/1/b12238569.pdf> (noting the Labor Convention Case).

²⁴¹ See *id.* at 27.

²⁴² See generally GREGORY S. MAHLER, *NEW DIMENSIONS OF CANADIAN FEDERALISM: CANADA IN A COMPARATIVE PERSPECTIVE* 45 (1987) (providing background information on the Labor Conventions case).

²⁴³ See generally *id.*

²⁴⁴ See generally J. Michael Robinson, *Danny's NAFTA Mess*, *FINANCIAL POST*, Jan. 6, 2009, available at <http://network.nationalpost.com/np/blogs/fpcomment/archive/2009/01/06/danny-s-nafta-mess.aspx>.

Okay. So there are all the reasons why nobody likes Chapter 11. What is wrong with it? It is too new; there is not enough jurisprudence on it.²⁴⁵ Many important terms are undefined like “measures tantamount to expropriation.”²⁴⁶ What does “tantamount” mean? All the dictionaries seem to say “equivalent.”²⁴⁷ But then why did they not say “equivalent?” Well, “tantamount” seemed like a nice word; however, it is not defined.

What is “fair and equitable treatment?” There is a lot of international law on that,²⁴⁸ but it is undefined. What is “full protection and security?” Again undefined. Are there any appeals available from determinations by arbitral tribunals under Chapter 11? No.²⁴⁹ Can they be challenged? Yes, as unregistrable under whatever arbitration rules were used, be they International Centre for Settlement of Investment Disputes [ICSID]²⁵⁰ or the United Nations Commission on International Trade Law [UNCITRAL] rules.²⁵¹ And there is one case in which a British Columbia judge said transparency is not an obligation recognized by either Chapter 11 or international law.²⁵² Therefore, the tribunal’s finding that Mexico was not transparent in its actions that resulted in the claim is not in compliance with the terms of reference, the terms of the arbitration, and therefore I won’t register it.²⁵³ However, there was an expropriation.²⁵⁴ So everybody said, “Oh my God, thank goodness, at

²⁴⁵ See generally Editorial, *Cone of Silence*, GLOBE AND MAIL, Aug. 26, 1998, at A14 (discussing issues with Chapter 11).

²⁴⁶ See generally Eric Reguly, *Read NAFTA Before Hitting Auto Insurers*, GLOBE AND MAIL, July 25, 2003, at B2 (providing that Chapter 11 includes “measures tantamount to expropriation”).

²⁴⁷ See, e.g., Merriam-Webster Dictionary Online, <http://www.merriam-webster.com/dictionary/tantamount> (last visited Oct. 15, 2009) (“equivalent in value, significance, or effect”).

²⁴⁸ See generally Elizabeth Whitsitt & Damon Vis-Dunbar, *Glamis Gold Ltd. v. United States of America: Tribunal Sets a High Bar for Establishing Breach of “Fair and Equitable Treatment” under NAFTA*, INVESTMENT TREATY NEWS, July 15, 2009, at 1, available at <http://www.investmenttreatynews.org/documents/p/172/download.aspx> (discussing one of the cases analyzing “fair and inequitable treatment”).

²⁴⁹ See Steven Chase, *Ottawa to Fight NAFTA Ruling in Federal Court*, GLOBE AND MAIL, June 13, 2002, at B6.

²⁵⁰ See generally Michael J. Robinson, *Oil is Canada’s Ace in any Revisiting of NAFTA*, GLOBE AND MAIL, Mar. 10, 2008, at B2 (providing background information on Chapter 11 and International Centre of for Settlement for Investment Disputes).

²⁵¹ See NAFTA Arbitration under the UNCITRAL Arbitration Rules and the North American Free Trade Agreement, http://www.economia.gob.mx/work/sneci/negociaciones/Controversias/Casos_Mexico/Thunderbird/escritos/Post_Hearing_Thunderbird.pdf (last visited Oct. 15, 2009); see also *Int’l Thunderbird Gaming Corp. v. Mexico*, 2006 WL 247692 (2005).

²⁵² See ALAN MACEK, *THE STANDARD OF REVIEW IN CHAPTER 11 ARBITRATIONS: DEFERENCE 4* (2003), available at <http://www.alanmacek.com/legal/Chapter11StandardOfReview.pdf> (discussing *Metalclad*); see also *Metalclad v. Mexico*, 2001 BCS 664 (2001).

²⁵³ See *id.*

²⁵⁴ See *id.*

least he said that there was a “bad act” of expropriation that the tribunal did find,²⁵⁵ and so that case just stood as a comment by a court on potential limitations on enforcement of arbitral awards. But there are certainly no appeal rights.²⁵⁶ There is no *stare decisis* applicable to Chapter 11 awards.²⁵⁷ NAFTA clearly said that in Article 1136.²⁵⁸ Provinces and states are exempt from certain provisions.²⁵⁹ Claims based on changes to taxation can be blocked by a political decision.²⁶⁰

I have to wave around for you such a political decision. It is one page. That nice little letter with the coat of arms of Canada, that went to Mr. Gottlieb, et al. on his claim against the government of Canada for changing the income trust taxation laws.²⁶¹ “This is to inform you that in accordance with Article 2103 (6) of NAFTA, a determination has been made by the appropriate competent authorities.”²⁶² Who are the appropriate competent authorities? The ministers, the elected ministers or cabinet members, who determine that the matters at issue are not expropriations. And that section of the agreement says that politicians can decide whether they are expropriations or not.²⁶³ Therefore, the measure at issue, namely changes in the tax law, cannot be the object of any claim under Article 1110. So that is a problem with Chapter 11.

So why do we keep Chapter 11? Well, there are over 2,400 bilateral investment treaties worldwide encouraging and protecting foreign investors.²⁶⁴ The good professor, Steven Schwebel, the dean of international arbitration²⁶⁵, said in the article that I just read in November of 2008 that he counted 2,600 BITs, of which around 1,700 are in force,²⁶⁶ including NAFTA, the Energy

²⁵⁵ See generally *id.*

²⁵⁶ See NAFTA Arbitration under the UNICITRAL, *supra* note 251.

²⁵⁷ See *id.*

²⁵⁸ See *id.*

²⁵⁹ See *id.*

²⁶⁰ See *id.*

²⁶¹ See generally Letter from Bob Hamilton, Tax Policy Branch, to Eric Solomon, Assistant Secretary, Office of Tax Policy (Apr. 22, 2008), available at <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/EricSolomonfromBob%20Hamilton.pdf> (explaining trust taxation laws in regards to the Gottlieb case).

²⁶² *Id.*

²⁶³ See generally *id.*

²⁶⁴ Luke E. Peterson, *International Investment Rules: Is the GATS Campaign Becoming a Red Herring?*, Apr. 2002, <http://www.union-network.org/uniflashes.nsf/0/580fe89ed1ceebed1c1256bf1004040d4?OpenDocument> (last visited Oct. 16, 2009).

²⁶⁵ See generally Chambers and Partners, at Stephen Schwebel, <http://www.chambersandpartners.com/PersonProfile.aspx?CPK=221342&ssid=32833> (last visited Oct. 16, 2009) (providing background information on Stephen Schwebel).

²⁶⁶ See generally Mahnaz Malik, *International Investment Agreements*, BEST PRACTICES BULLETIN #1 (Int'l Inst. for Sustainable Dev.), Aug. 2009, http://www.iisd.org/pdf/2009/best_practices_bulletin_1.pdf (last visited Oct. 16, 2009) (providing background infor-

Charter,²⁶⁷ the Caribbean Free Trade Agreement,²⁶⁸ et cetera. He also said he thinks it is a good argument that investment protection is now part of international law because states have demonstrated that by signing 2,600 of these things show that they think investors should be protected.²⁶⁹ And what do these BITs look like? They look like Chapter 11.²⁷⁰ Why do they look like Chapter 11? Because they are based on the United States model, bilateral investment treaty, the current one being I think 2004,²⁷¹ but the first one came out in the 1960s.²⁷² So the rest of the world recognizes it. And why would Canada in any renegotiation of NAFTA want to antagonize its principal trading partner and investor, the United States, by saying we would like to water down Chapter 11 because we do not like the fact that claims are being made against us? That does not sound like good trade policy. So let us examine the facts.

I did a little box score there on Page 2,²⁷³ which shows that there have been very few cases actually brought.²⁷⁴ The interesting thing is that there are thirteen cases pending against Canada,²⁷⁵ only three against the United States.²⁷⁶ That scared me enough that I actually went and printed out these claims so that I could read them. I did not print them all because in one claim against Canada, the defense by Canada, is 400 pages.²⁷⁷ Anyway, it seems to be fairly small beer in terms of what is actually happening in the world of investment claims.

Can it be improved? Some say, let us have a permanent arbitral tribunal.²⁷⁸ Richard may answer this question in the question period. I think there are a lot of United States lawyers and constitutional experts who say that is unconstitutional because you cannot have a foreign judge making decisions

mation on bilateral investment treaties).

²⁶⁷ See *id.*

²⁶⁸ See *id.*

²⁶⁹ See Chambers and Partners, *supra* note 265.

²⁷⁰ See generally Malik, *supra* note 266.

²⁷¹ Damon Vis-Dunbar, *United States Reviews Its Model Bilateral Investment Treaty*, INVESTMENT TREATY NEWS, June 5, 2009, http://www.bilaterals.org/article.php3?id_article=15332 (last visited Oct. 17, 2009).

²⁷² See generally *id.*

²⁷³ See Table of NAFTA "Chapter 11" Foreign Investor-State Cases and Claims, Jan. 2009, available at <https://www.citizen.org/documents/Ch11CasesChart-2009.pdf> (showing table of NAFTA Chapter 11 claims against US, Mexico, and Canada dating back to 1995).

²⁷⁴ See generally *id.*

²⁷⁵ See generally *id.*

²⁷⁶ See generally *id.*

²⁷⁷ See generally Chapter 11 NAFTA Table, *supra* note 273.

²⁷⁸ See *NAFTA's Threat to Sovereignty and Democracy: The Record of NAFTA Chapter 11 Investor-State Cases 1994-2005*, PUBLIC CITIZEN, Number E9010, Feb. 2005, available at <https://www.citizen.org/documents/Chapter%2011%20Report%20Final.pdf> (providing that delegation of judicial authority may be unconstitutional).

about the rights of United States persons.²⁷⁹ Others say, 'well, let us have an appeal tribunal like at the WTO for anti-dumping and countervailing duty cases.'²⁸⁰ Well, that becomes the same issue as the previous suggestion. Although I still do not understand why the WTO Dispute Settlement Understanding and all these BITs are not challenged as unconstitutional also if that's a valid argument, and I am sure Richard and Jean can tell us.

Some say scrap it, and let us have the WTO try and do what it was supposed to do a long time ago, and put in investor protection.²⁸¹ Well, the Organization for Economic Co-operation and Development [OECD] tried that in the 1990s, the Multilateral Agreement on Investment.²⁸² Drafts of it circulated all around; they were supposed to be secret,²⁸³ but Jim McIlroy managed to get me copies. I have a whole shelf full of these drafts of the MAI, and it flopped because there was not enough multi-national acceptance.²⁸⁴ So if the OECD could not do it in the 1990s, how is the WTO going to do it now when we cannot even get the Doha round done? What does Canada do about it if President Obama says let us renegotiate it?²⁸⁵ I am not going to talk about that because Jeanie has covered that very well. However, I would just follow up a little bit on what Jean said, that if you open the Pandora's box to renegotiate any part of NAFTA, does not everything else go on the table? And would the United States be interested in having Canada now try to withdraw from its proportionality obligations under the famous Article 605(a) of NAFTA which in effect guarantees the United States that Canada will not sell its oil and gas to anybody else but the United States?²⁸⁶ (I am sure you will want to know the details of that, but I can prove that that's how it works).

So my conclusion on this is simply look at the box score. It is not that big a problem. Work with it as we have done since 1992. Do not fool around with it for various reasons, just carry on with it. And I think that is what will happen. I do not think anybody is going to touch it if we get into any renegotiating of NAFTA. And of course Richard, if the decision had been in a renegotiation a provision were inserted to say your rights can be no higher than

²⁷⁹ See *id.*

²⁸⁰ See generally Peter Kennedy, *U.S. Won't Appeal WTO Lumber Decision*, *GLOBE AND MAIL*, Nov. 2, 2002, at B2 (providing background information on the appeal tribunal).

²⁸¹ See Tim Colebatch, *Inquiry Call over Veil of Secrecy*, *AGE*, Mar. 4, 1998, at 6 (discussing investor protection in the context of Organisation for Economic Co-Operation and Development).

²⁸² See *id.*

²⁸³ See *id.*

²⁸⁴ See Freedy Heylen & Gerdie Everaert, *Success and Failure of Fiscal Consolidation in the OCED: A Multivariate Analysis*, *PUBLIC CHOICE*, 103-24 (2000).

²⁸⁵ See Laura Carlsen, *Obama Reaffirms Promise to Renegotiate NAFTA*, *HUFFINGTON POST*, Jan. 12, 2009, http://www.huffingtonpost.com/laura-carlsen/obama-reaffirms-promise-t_b_157316.html (last visited Oct. 19, 2009).

²⁸⁶ See John McCallum, *NAFTA and Energy*, *GLOBE AND MAIL*, Oct. 20, 2005, at A24.

they are for the citizens of the country in which the claim arose, then that is great for Canada because business interests have no rights²⁸⁷ under our charter. If Parliament says you are expropriated and you are a corporation, too bad. You are expropriated, go elsewhere.

The last item, it is the new Canadian national security investment blocking powers which came into effect only last month.²⁸⁸ And this is our version of the United States National Security provision.²⁸⁹

MR. CUNNINGHAM: Like Committee on Foreign Investment in the United States.²⁹⁰

MR. ROBINSON: Like Committee on Foreign Investment in the United States, except so far we have no rules and regulations. All we know is that the cabinet of Canada can block a foreign investment and even unwind it.²⁹¹ It is retroactive.²⁹² And whether it is control or not, minority interests are covered if it is found to be or could be injurious to National Security.²⁹³ So we are all waiting for the regulations to come out. You can feel a little bit better because the only investment that is ever been blocked under the Investment Canada Act²⁹⁴ - and this National Security thing is just going to be an amendment addition to the Investment Canada Act,²⁹⁵ - is the purchase in 2008 by Alliance of the United States of a company called McDonald Detweiler.²⁹⁶ Somebody may remember that it is the successor to Spar Aerospace.²⁹⁷ Spar Aerospace produces the Canadarm,²⁹⁸ which is the only good advertising they ever got. Every time they are up there in the space station, they have to have this Canadarm reach out and turn the screws and whatever, and it says "Canada" on the side.²⁹⁹ Well, anyway, McDonald Detweiler makes this wonderful sky spy satellite stuff and everybody sort of panicked that this was going to go to the United States, and that was the only one that's

²⁸⁷ See generally Charles Lewis, *The Treaty No One Could Read*, WASH. POST, June 27, 1993, at C1 (providing background information on the North American Free Trade Act and the business interests that are involved).

²⁸⁸ See Mark Katz, *Canada's New Foreign Investment Review Standard Raises Concerns*, LAWYERS WEEKLY, May 15, 2009, <http://www.lawyersweekly.ca/index.php?section=article&articleid=918> (last visited Oct. 19, 2009) (providing information on the Investment Canada Act).

²⁸⁹ See *id.*

²⁹⁰ See Treas.gov, The Committee on Foreign Investment in the United States, <http://www.treas.gov/offices/international-affairs/cfius/> (last visited Oct. 19, 2009).

²⁹¹ See Katz, *supra* note 288.

²⁹² See *id.*

²⁹³ See *id.*

²⁹⁴ See *id.*

²⁹⁵ See generally *id.*

²⁹⁶ See *U.S. Firm Buys Canadarm Builder*, TORONTO STAR, Jan. 9, 2008, at B05.

²⁹⁷ See *id.*

²⁹⁸ See *id.*

²⁹⁹ See generally *id.*

ever been blocked.³⁰⁰ However, who is the main target? Two days ago, the Financial Post had an article titled, *China Buys More Oil Sands*.³⁰¹ Now if Canada's regulations extend National Security to include economic security and energy, is this going to mean that China should go away? The subheading is 'Now Owns 50 Percent of Proposed Mine.'³⁰² Now we can get into the question period.

DISCUSSION FOLLOWING THE REMARKS OF M. JEAN ANDERSON,
RICHARD O. CUNNINGHAM, AND J. MICHAEL ROBINSON

MR. CARMODY: We have about fifteen minutes for some questions.

MR. MOORE: I want to follow up on the oil sands comment and 605(a) that Michael talked about and Richard alluded to before. If you assume that there is a tighter fuel and oil import standard coming in the United States led by the California AB 32 status,³⁰³ but adopted widely by at least eleven western states, then it is possible that Canada cannot ship the oil sands products, bitumen, and slightly upgraded residuals into the United States; they just won't be able to meet that quality standard.³⁰⁴ There has been a proposal recently to put another pipeline in from Fort McMurray out to Port Hardy and ship unprocessed bitumen out to China.³⁰⁵ Does that confluence of forces put Alberta, and by reference, Canada, in jeopardy with regard to their NAFTA obligations? And how could or would they be able to meet an attractive deal with China? And I will just go one step further. Two years ago China acquired a majority of interest in at least Canadian oil sand companies.³⁰⁶

MR. ROBINSON: And more two days ago.³⁰⁷

MR. MOORE: And so the upshot of that was that at least in one board conversation at an unnamed Canadian company in Alberta, they referred to the policy for the company and indicated that the company directive would

³⁰⁰ See Sharon Lem, *This Space for Sale? U.S. Military Contractor's Bid for Canadarm and Satellite Sparks Fears We May Endanger Our Sovereignty*, TORONTO STAR, Apr. 5, 2008, at 24.

³⁰¹ See Claudia Cattaneo, *China Buys More of Oil Sands*, FIN. POST, Apr. 2, 2009, available at <http://www.financialpost.com/news-sectors/energy/story.html?id=1453914>.

³⁰² See generally *id.*

³⁰³ See generally Warren Brown, *Only the Innovative Truckmakers Will Survive*, WASH. POST, May 6, 2007, at G02 (providing background information on the tighter fuel standards).

³⁰⁴ See Robert Collier, *California Standards Could Crimp Canada Oil Boom*, S. F. CHRON., June 6, 2007, at A12 (noting that the low carbon-emissions standards may have an adverse impact on Canada's oil production).

³⁰⁵ See Evelyn Iritani, *A New Player in the Sandbox*, L.A. TIMES, July 17, 2005, at C1 (discussing the new pipeline that comes from Fort McMurray).

³⁰⁶ See generally *id.*

³⁰⁷ See *Total Sells Part in Northern Lights Project*, GLOBE AND MAIL, Apr. 2, 2009, at B9.

be to send more unprocessed bitumen to China; before it had been just sent into upgraders in Wyoming.³⁰⁸ Can you tackle that a little bit? Just because it seems to me it is fraught with legal and trade or economic implications.

MR. ROBINSON: I can answer that, I think. The short answer is “no.” 605(a) says we have to sell it to you if you want it.³⁰⁹ If the United States starts to say we do not want it because it is dirty, then we are not in breach of 605(a). What 605(a) says is, on a rolling three-year average, the amount of energy shipped to the United States cannot be reduced over the amount of energy that Canada uses or exports to third parties.³¹⁰ So that is in effect a guarantee that if the United States wants it, they can have it.³¹¹ Now, if Canada wants to produce a heck of a lot more, fine, or use less, you can change the proportion. But remember 605(a) went in at a time when the policy of the United States government was ‘let us become self-sufficient in energy; let us take that stuff out of Texas and out of the Gulf of Mexico and everywhere else in the United States,’³¹² and Canada thought ‘that means border tariffs on Canadian oil and gas.’³¹³ We do not want that; we want to be able to ship that stuff.’ So the horse trade was okay; we will agree no border tariffs, no border measures at all on energy, free back and forth or south; however, you have to give us this proportionality undertaking.³¹⁴ So Canada said, well, that is fine. That is where it is going to end up going anyway, to the United States, so that was the horse trade.

Now, the United States policy seems to be a bit different. The United States wants to deal only with safe and secure suppliers. And who is that? That is Alberta.³¹⁵ Does that answer the question? The legal answer is no. If they block exports, if they could then they cannot use the proportionality undertaking in their favor.³¹⁶ We only have to sell it if they ask for it.

³⁰⁸ See generally Nathan Vanderklippe, *TransCanada Pushing Ahead with Pipeline Expansion*, GLOBE AND MAIL, Feb. 4, 2009, at B3 (discussing Alberta’s plans to send more unprocessed bitumen outside of Canada).

³⁰⁹ See Eric Reguly, *Oil Deals with U.S Could See Canada Empty*, GLOBE AND MAIL, Oct. 14, 2000, at B9.

³¹⁰ See generally *id.*

³¹¹ See generally *id.*

³¹² See generally *id.*

³¹³ See generally *id.*

³¹⁴ See *id.*

³¹⁵ See Don Martin, *Alberta Ignores U.S. Oil Critics at Its Peril*, NAT’L POST., June 25, 2008, available at <http://www.nationalpost.com/m/story.html?id=613475> (noting that Alberta is America’s most reliable energy supplier).

³¹⁶ See generally Michael Robinson, *Oil Is Canada’s Ace in any Revisiting of NAFTA*, GLOBE AND MAIL, Mar. 10, 2008, at B2 (discussing the proportionality requirement in NAFTA).

MR. CUNNINGHAM: And if it were an actual export agreement to ban exports by Canada, you would have WTO problems.³¹⁷

MR. ROBINSON: Right. But if it just says your oil is dirty, well, has not the Congress already passed a law that says the United States government, in particular the military, cannot buy oil from the oil sands?

MR. KERGIN: No. Not yet.

MR. ROBINSON: Not yet?

MR. KERGIN: But it may come back again.³¹⁸

MR. CARMODY: Let us get some more questions.

MS. TODGHAM-CHERNIAK: As a follow-up with one of your comments with Mick Jagger, in the March 2009 Lexpert magazine, which is Canada's equivalent to the New York Lawyer,³¹⁹ I actually picked a different tune, Pink Floyd's *The Wall*,³²⁰ and that each new regulation is another brick in the wall, and that under Bush, you did not want bad people and bad things to get in. Now, you know, with the new regulations, the protectionism might be that you do not want jobs to get out, that there is going to be a higher wall, a thicker wall on that protectionism and the Buy American provisions.³²¹ My understanding is that with the provisions for the Buy America, is that it still applies to Canada.³²² The obligation is that the actions will be consistent with trade obligations. And when we look at softwood lumber, you can say that something is consistent with trade obligations, and then you can fight about it later, but there still could be a period of three years where there is protectionism where Canadian steel and Canadian equipment and machinery might not be able to –

MR. CUNNINGHAM: Well, I suppose as a practical matter you might be right, which I wanted to preface my answer by saying "Teacher, leave those kids alone."³²³ But at any rate, we cannot have a provision. Canada and the United States are both signatories to the procurement agreement.³²⁴ We cannot have a procurement provision that discriminates at federal levels from procurement against you.³²⁵ Yes, if we did it, you would be able to go to the WTO, and it might take a couple more years. I agree with that, that is

³¹⁷ See generally *id.*

³¹⁸ See Martin Mittlestaedt, *Alberta Crude May Be Too Dirty; U.S. Law Says*, GLOBE AND MAIL, Jan. 15, 2008, at A7.

³¹⁹ See generally Lexpert, <http://www.lexpert.ca> (last visited Oct. 23, 2009) (providing background information on Lexpert).

³²⁰ PINK FLOYD, *THE WALL* (Capitol Records 1979).

³²¹ See Barrie McKenna, *U.S. Pledge Leaves Canada Exposed*, GLOBE AND MAIL, Feb. 6, 2009, at A11 (explaining the Buy American provision).

³²² See *id.*

³²³ PINK FLOYD, *Another Brick in the Wall pt. 2, on THE WALL* (Capitol Records 1979).

³²⁴ McKenna, *supra* note 321.

³²⁵ See generally *id.*

the problem we have in anything. If you want two hours on problems with the WTO dispute settlement, I can do that. That would be —

MS. ANDERSON: And only two hours.

MR. CUNNINGHAM: The United States tactic in this is always to say we are going to implement fully and completely, but it is like the old cocaine blues song, the doctor said it would kill me, but he did not say when.³²⁶ And the United States says they will implement, but they did not say when and they did not say how. But at any rate, I do not think that the United States is going to do that at the federal level.³²⁷ I do think as Michael said, that there will be problems at the state level. There will be state procurements where Canada will not have it.³²⁸ There is an interesting question about federal funding of state procurement and how that will interface, and that has yet to be worked out. But I think in actual federal procurement, I do not think the federal government is going to discriminate against Canadian producers; I really do not. And no matter what the pressure of the oil industry, no matter what the pressure of the steel industry or whatever, that is not going to work. The steel industry, you know, is dealing with this in another way.³²⁹ We are going to have, sometime in the next month, another barrage of anti-dumping and countervailing duty cases that may or may not include cases against Canada.³³⁰

MR. ROBINSON: You already own most of the steel companies in Canada.³³¹

MR. CUNNINGHAM: There are a few left.

MR. ROBINSON: Well, they are owned by Indians.³³²

MR. CUNNINGHAM: To some extent that is been dealt with by policy decisions in these big global steel companies with United States as their biggest market. They will hamper their other subsidiaries in other countries by bringing cases against them.³³³ At any rate, my other point is that the United States industries are already convinced enough that the United States government is serious about not discriminating against foreign suppliers in pro-

³²⁶ See BOB DYLAN, *Cocaine Blues*, on GASLIGHT TAPES (Columbia Records 1962).

³²⁷ See generally Ian Austen, *To the North, Grumbling over Trade*, N.Y. TIMES, Aug. 8, 2009, at B9 (discussing the provision at the federal level).

³²⁸ See Steven Chase & Josh Wingrove, *Obama Underplays Buy American Provision*, GLOBE AND MAIL, Aug. 11, 2009, at A4.

³²⁹ See Christina Spencer, *Steel Union Boss Backs Protection*, TORONTO SUN, Feb. 2, 2009, at 10.

³³⁰ See generally Daniel Leblanc, *Chinese Group Warns of Trade Backlash*, GLOBE AND MAIL, Mar. 12, 2009, at B9 (discussing the issues that may arise in the anti-dumping cases).

³³¹ See Boyd Erman, *Algoma Joins Ranks of Firms Foreign Owed*, GLOBE AND MAIL, Apr. 16, 2007, at A1 (discussing the rapid expansion of Indian owed steel companies in Canada).

³³² See *id.*

³³³ See generally *id.*

curement; that they are looking to other methods of protections in other cases.³³⁴

MS. IRISH: Maureen Irish from Windsor. Just a quick question following up on government procurement. If some of the funding winds up in peace re-deals, public or private, whatever, how far does the government procurement obligation go? Is not there a difficulty –

MR. CUNNINGHAM: You cannot discriminate the use of federal money.³³⁵ You have to segregate the private money out, then you have to have essentially separate from the other private money to avoid the non-discrimination provisions.³³⁶ Do you agree with that, Jean?

MS. ANDERSON: [Indicating agreement].

MR. ROBINSON: But, Richard, I have to ask this, if the federal money is handed to Illinois, does the string stay attached when Illinois then says, you know, we're going to build a highway, and by the way we do not want any Canadians bidding on these contracts? Does the federal strings still say, 'wait a minute, you cannot do that?' Or when Washington handed the money to Illinois, did the string get cut? It is a tricky question.

MR. CUNNINGHAM: I can teach that round or I can teach it flat. My guess is that there is probably a WTO discrimination issue somewhere if there is discrimination by the state government.³³⁷

MR. ROBINSON: Well, there was a report in the press in Toronto.³³⁸

MS. ANDERSON: And Steptoe & Johnson's address is –

MR. ROBINSON: Right, exactly. There was a report in the press in Toronto a couple of weeks ago about a chap who supplies wastewater treatment equipment, and he apparently sounded out somebody in Illinois and was told 'no, we are not taking any bids from Canada, go away.'³³⁹ And this is a company that supplies a great deal of equipment.³⁴⁰ Now, here is the real problem: that company also has operations in the United States, it has a footprint in the United States.³⁴¹ So what it is going to do is make the stuff in the United States and close the Canadian plant. Or at least lose a bunch of Canadian jobs. And that is the whiplash that people have picked up on.

³³⁴ See David Lazarus, *Stimulus Proposal Revives Bad Idea*, L.A. TIMES, Feb. 1, 2009, at C1 (discussing the alternatives proposed by the steel industry).

³³⁵ See Ian Austin, *To the North, Grumbling Trade*, N.Y. TIMES, Aug. 8, 2009, at B3.

³³⁶ See generally *id.*

³³⁷ See generally Laura MacInnis, *WTO Head Warns on Impact of Bailouts*, GLOBE AND MAIL, Jan. 28, 2008, at B10 (noting that discrimination violates the tenants of the World Trade Organization).

³³⁸ See Antonella Artuso, *Open Pipe Creates a Legal Stink*, TORONTO STAR, Sept. 20, 2009, at 3 (discussing the legal issues of the wastewater treatment equipment).

³³⁹ See *id.*

³⁴⁰ See *id.*

³⁴¹ See *id.*

MR. CUNNINGHAM: The history of the United States trading policy, folks.³⁴²

MR. ROBINSON: Yeah, it is scary.

MR. CARMODY: I am going to use the Chair's prerogative to ask one question of our panel. And particularly Jean, you tantalized the audience with a subject that you said you might talk about, and then had to take off the agenda because you had no time to do so. We have at least one former Chapter 19 panelist in the audience, and I would like to know what it is that you foresee coming out of potential changes to Chapter 19. Many of you will be aware that Chapter 19 is that provision of the NAFTA that deals with the binational review of anti-dumping and countervailing duties.³⁴³ Jean?

MS. ANDERSON: Well, I think they are two pretty important things. Many of you may know that since Lumber Three in the early 1990s,³⁴⁴ since the United States government has taken the absolutely outrageous and untenable position –

MR. ROBINSON: Says counsel for Canada.

MS. ANDERSON: No, as United States negotiator for Chapter 19, absolutely outrageous and untenable position, that if you go to a NAFTA panel to challenge the agency decision in an original dumping or countervail investigation and you win at the NAFTA panel so that the panel declares the original determination in the case to be invalid, the United States has been saying well, you do not get your money back. You only get your money back from the date the panel decision is final.³⁴⁵ Well, you know, you usually don't get to just collect duties or taxes.³⁴⁶

MR. CUNNINGHAM: It is worse than that. If you only get your money back on imports entered after the dates.³⁴⁷

MS. ANDERSON: Right.

MR. CUNNINGHAM: So they can continue to –

MR. CAMERON: Thank God we have the judiciary.

MR. CUNNINGHAM: Yes.

MS. ANDERSON: Yeah. Well, obviously if you instead go to a United States court to challenge an agency decision in an original AD or CVD inves-

³⁴² See Bruce Bartlett, *The Truth about Trade in History*, Cent. for Trade and Policy, <http://www.freetrade.org/new/buch1.html> (last visited Oct. 26, 2009) (discussing the protectionism history of the United States trade policy).

³⁴³ See SEAN MURPHY, 2 UNITED STATES PRACTICE IN INTERNATIONAL LAW 175 (Cambridge Univ. Press 2002) (2006).

³⁴⁴ See generally Daniel N. Adams, Comment, *Back to the Basics: The Predestined Failure of NAFTA under Chapter 19 and Its Lessons for the Design Of International Trade Regimes*, 22 EMORY INT'L L. REV. 205 (2008) (discussing, in general, the lumber disputes).

³⁴⁵ See generally *id.*

³⁴⁶ See generally *id.*

³⁴⁷ See generally *id.*

tigation and the same thing happens though, the order is declared invalid, obviously you get back all your cash deposits.³⁴⁸ So this is just an absolutely outrageous position.

MR. CUNNINGHAM: May I just interject that that precise decision with the WTO context was argued ten days ago in Geneva.³⁴⁹ This is what the appellate body of the panel had rejected, the United States view, that retrospectivity turns on date of entry and, therefore, you cannot go back to previous entries and get your money back,³⁵⁰ although they put some other limitations on it.³⁵¹ There is a decision that will be due out on the WTO context within another six weeks that will be really interesting.³⁵²

MR. ROBINSON: But, Dick, does not the WTO say that there is no retroactivity to their orders, however NAFTA is silent on this issue.³⁵³

MR. CUNNINGHAM: But the question is: What is retroactive? I think everybody would say, okay, from the date of the decision of the binational panel or the WTO, you cannot go back and ask for reliquidation of duties that were paid that have already been liquidated. But the question is are we going to keep unliquidating duties on previous entries; that is the main issue. And the question becomes, is that retroactive? The United States says yes, the rest of the world says no.³⁵⁴

MS. ANDERSON: The rest of us say no.

MR. ROBINSON: And as Jean knows as counsel for Canada, when we settled Lumber Four, the compromise was, you Americans can keep only one billion of the illegal duties, you will give Canada back the other four billion.³⁵⁵

MS. ANDERSON: But let me get to the point about Chapter 19. That is the United States' outrageous position since the early 1990s, and it is been used really to pressure Canada into settling lumber cases among other things.³⁵⁶ So what has happened is that in softwood lumber before the Softwood Lumber Agreement in 2006³⁵⁷ was reached, there was of course litiga-

³⁴⁸ See Kathleen W. Cannon, *Symposium, Trade Litigation before the WTO, NAFTA, and U.S. Courts: A Petitioner's Perspective*, 17 TUL. J. INT'L & COMP. L. 389, 424 (2009) (providing background information on United State courts' treatment of agency decisions).

³⁴⁹ See generally *id.* at 393.

³⁵⁰ See generally *id.*

³⁵¹ See generally *id.*

³⁵² See Cannon, *supra* note 348.

³⁵³ See generally *id.*

³⁵⁴ See generally *id.*

³⁵⁵ See generally Sydney M. Cone, *Canadian Softwood Lumber and "Free Trade" under NAFTA*, 51 N.Y.L. SCH. L. REV. 840 (2007) (providing background information on the lumber dispute).

³⁵⁶ See generally Adams, *supra* note 344.

³⁵⁷ See Norman Spector, *Lumber Trouble Has Hint of Irony*, GLOBE AND MAIL, at S1 (2006) (discussing the Softwood Lumber Agreement).

tion in United States courts challenging the United States refusal to refund duties all the way back to the beginning.³⁵⁸ In other words, trying to get a United States court to say “no, a panel decision has full effect under United States law.” And, in fact, we succeeded hugely on that issue. Unfortunately the court decision came out the day after the Softwood Lumber Agreement 2006, was entered into.³⁵⁹ So it eventually was, while the opinion is still out there for whatever persuasive value it has, the judgment had to be vacated.³⁶⁰ And there was no judgment that could be appealed to the Court of Appeals for the Federal Circuit, so that you might have gotten a Federal Circuit decision hopefully upholding this court decision.

So what happened after that is that it seems that the United States, in order to look like it was acting consistently, took exactly the same position in the case against Canadian wheat and when the order was declared invalid through the NAFTA panel review.³⁶¹ And the United States refused to refund duties on entries before the date of that panel decision.³⁶² So we have taken that case again to the Court of International Trade CIT, essentially the same set of issues.³⁶³ We won.³⁶⁴ Again, the CIT said no, NAFTA panel review occurs under United States law the way United States law implementing the NAFTA is set up.³⁶⁵ As a matter of United States law, the United States has to refund all the duties in those circumstances. The United States since then has basically asked for reconsideration on every kind of silly jurisdictional argument they could come up with, and so we are still awaiting a final decision from the Court of International Trade, but when that decision comes, assuming we win, it will be the beginning of putting this issue to rest.³⁶⁶ Then we will see if it gets appealed to the Court of Appeals for the Federal Circuit.

MR. CUNNINGHAM: I would also point out one other thing, if we were ever going to get around to changing Chapter 19, or if we could ever do it by way of a really aggressive decision within Chapter 19. The thing that I find most offensive about the practice is the way the first of the two criteria were extraordinarily challenging.³⁶⁷ The second one is the decision is wrong and it

³⁵⁸ See generally *id.*

³⁵⁹ See generally *id.*

³⁶⁰ See Weil Gotshal, Government & Regulatory Experience (follow hyperlink Practice Areas), <http://www.weil.com/industries/Transactions.aspx?service=1883> (last visited Oct. 29, 2009) (discussing the vacating of the judgment).

³⁶¹ See generally *id.*

³⁶² See generally *id.*

³⁶³ See *id.* (discussing the duties of entries case that was taken to the Court of International Trade).

³⁶⁴ See *id.*

³⁶⁵ See generally *id.*

³⁶⁶ See generally *id.*

³⁶⁷ See generally Adams, *supra* note 344 (providing background information on the dis-

is so wrong that it fundamentally undermines the whole process of Chapter 19.³⁶⁸ I have no problem with that. The first one is you can challenge bias.³⁶⁹ That has become such an abused, nasty, outrageous process, that there came a point where you could not get panelists because no panelist would go on and subject her or himself to the possibility that all of a sudden the United States, once in a while Canada, but mostly the United States, was going to come in and say you have no ethics, you are biased, this is a fraud. Nobody would do it. It is a crazy, malicious, nasty, mean proceeding and ought to be taken out of the process.

MR. ROBINSON: Well, we should ask Jim for a comment. Were you challenged, Jim, extraordinarily challenged, A, and, B, you said I do not want to be on the panel anymore, on the roster?

MR. McILROY: Technically it was not an extraordinary challenge, it was a behind-the-scenes lynching. But it accomplished its objective, which was to get trade practitioners off those darn panels because they were snooping into the affairs of officials, and they understood where the bodies were buried. And so now you have academics that can opine on what is happening, but they do not know where the bodies are buried. And Canada, basically, we bailed out of Chapter 19, and we are going back to court because the idea was you had to get out of court because the judges did not know anything and they wanted the practitioners to look at it because they knew. But once the practitioners were driven out of the process, now we are back in court.³⁷⁰

MR. ROBINSON: Or the WTO, Jim, would you find?

MR. McILROY: Yes. Yes, I think so.

MR. ROBINSON: Jean, do you tell them to –

MS. ANDERSON: I think there is a little bit of the same trend that is likely to happen in the United States, that assuming this CIT decision comes out and so on, I think people will tend to, there is more confidence in the Court system dealing with these things now than there used to be,³⁷¹ and I think there will be more cases where Canadian respondents do not want to go to a panel. You know, that may be okay. The reason Chapter 19 should not happen because somebody was wrongly accused of things when they were serving in the panel. I mean, that is outrageous. But, it may not be so terrible for parties in both countries to say well, our courts do a good job of this, as long as the courts are doing a good job. When Chapter 19 was negotiated,

putes regarding Chapter 19).

³⁶⁸ See generally *id.*

³⁶⁹ See generally *id.*

³⁷⁰ See Weil Gotshal, *supra* note 360.

³⁷¹ See generally *id.*

it took so long to get decisions out of the United States courts that that was one of the main reasons for having a Chapter 19.³⁷²

MR. CARMODY: I would like to go on with this very, very interesting discussion on trade in North America, but our schedule this morning is very tightly packed. I noticed that we have gone five minutes over the time limit for the session this morning. I would like to extend a very warm hand of thanks to all of our panelists.

MR. CARMODY: I would invite you to take a BlackBerry moment to refresh yourselves before we begin again at 10:45.

³⁷² See Adams, *supra* note 344.

