

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

TEMBEC INC., TEMBEC INVESTMENTS INC. AND
TEMBEC INDUSTRIES INC.,

Claimants/Investors,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**OBJECTION TO JURISDICTION OF
RESPONDENT UNITED STATES OF AMERICA**

Mark A. Clodfelter

*Assistant Legal Adviser for International
Claims and Investment Disputes*

Andrea J. Menaker

*Chief, NAFTA Arbitration Division, Office
of International Claims and Investment
Disputes*

Mark S. McNeill

Jennifer I. Toole

*Attorney-Advisers, Office of International
Claims and Investment Disputes*

UNITED STATES DEPARTMENT OF STATE

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Pursuant to Article 21 of the UNCITRAL Arbitration Rules, respondent United States of America respectfully objects to the jurisdiction of the Tribunal on the ground that the United States did not consent to arbitrate the claims of Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. (collectively “Tembec”) under the NAFTA’s investment chapter.

PRELIMINARY STATEMENT

The Tribunal lacks jurisdiction over Tembec’s claims for the following reasons. *First*, NAFTA Article 1901(3) expressly bars Tembec’s claims. That article provides as follows:

Except for Article 2203 (Entry into Force), no provision of any other Chapter of [the NAFTA] shall be construed as imposing obligations on a Party with respect to the Party’s antidumping law or countervailing duty law.

Tembec's contention that the United States consented to arbitrate Tembec's claims under a different chapter, Chapter Eleven, cannot be squared with the plain terms of this article. Tembec's claims concern determinations made under authority of U.S. antidumping and countervailing duty laws. Assuming jurisdiction over Tembec's claims, and subjecting the determinations to review under the international law standards in Chapter Eleven, would "impose obligations [from a chapter outside of Chapter Nineteen] on [the United States] with respect to [its] antidumping law or countervailing duty law." Article 1901(3) therefore deprives the Tribunal of jurisdiction over Tembec's claims.

Second, even absent Article 1901(3), the Tribunal would lack jurisdiction because Tembec's claims are not investment-related claims that may be subject to arbitration under Chapter Eleven. The determinations at issue do not relate to Tembec's investments in the United States, or to Tembec in its capacity as an investor in the United States, as required by Article 1101(1). Rather, the determinations relate to duties imposed on softwood lumber sought to be exported from Canada to the United States. Tembec's claims do not fall within the scope of the investment chapter, and the United States has not consented to arbitrate this dispute.

Finally, the Tribunal lacks jurisdiction because Tembec has failed to meet a condition precedent to the submission of its claim to arbitration under Chapter Eleven of the NAFTA. Article 1121 requires that a claimant waive its rights to pursue claims with respect to the same measures alleged to breach obligations in NAFTA Chapter Eleven, except for proceedings for injunctive, declaratory or other extraordinary relief before an administrative tribunal or court under the law of the disputing Party. Tembec, however, has continued to pursue parallel claims under Chapter Nineteen of the NAFTA. These actions bar the submission of Tembec's claim.

Below, we first examine the facts relevant to the Tribunal's jurisdiction. We then demonstrate that the text, context, object and purpose and circumstances of conclusion of the NAFTA establish that Article 1901(3) bars Tembec's claims. Next, we demonstrate that Tembec's claims are excluded from the scope of Chapter Eleven by virtue of Article 1101(1). Finally, we explain why Tembec's failure to comply with Chapter Eleven's waiver requirement deprives this Tribunal of jurisdiction over Tembec's claims.

FACTS

United States Antidumping And Countervailing Duty Laws

The United States' antidumping and countervailing duty laws are principally set forth in Title VII of the Tariff Act of 1930, as amended ("Tariff Act"), the regulations of the International Trade Administration of the U.S. Department of Commerce ("Commerce") and the regulations of the International Trade Commission ("ITC"). Under the Tariff Act, domestic industries may petition Commerce and the ITC for relief from unfairly low-priced ("dumped") and unfairly subsidized imports. Dumping occurs when a foreign producer sells a product in the United States at a price that is below that producer's sales price in its home market, or below its cost of production. Countervailable subsidization occurs when a foreign government provides a financial contribution to a specific enterprise or industry and a benefit is conferred.

A U.S. industry that is threatened by unfair trade practices may petition Commerce and the ITC simultaneously for relief. If an investigation is initiated, Commerce determines whether dumping or subsidies exist and, if so, the margin of dumping or the amount of subsidy. It also determines whether certain "critical circumstances" exist that would allow for the retroactive application of duties. The ITC, an independent, non-partisan agency created by the U.S. Congress,

conducts a parallel investigation to determine whether the dumped or subsidized imports materially injure or threaten to materially injure a U.S. industry.

Commerce and the ITC each make preliminary and final determinations. If both agencies make affirmative final determinations, an antidumping or countervailing duty order is imposed. Commerce then instructs the Bureau of Customs and Border Protection to collect estimated antidumping or countervailing duties in the form of cash deposits to offset the effect of the dumping or subsidization.

The NAFTA Chapter Nineteen Panel Mechanism

NAFTA Chapter Nineteen, entitled “Review and Dispute Settlement in Antidumping and Countervailing Duty Matters,” establishes a unique, self-contained dispute resolution mechanism for claims challenging a NAFTA Party’s antidumping and countervailing duty law. Under Article 1903, a NAFTA Party may request that a binational panel, consisting of five nationals of the involved Parties, review amendments to a Party’s domestic trade law for consistency with the NAFTA and the WTO. Pursuant to Article 1904, both NAFTA Parties and private claimants may seek review by a binational panel of another Party’s final antidumping and countervailing duty determinations.

Prior to the entry into force of the U.S.-Canada Free Trade Agreement (the “CFTA”), the predecessor agreement to the NAFTA, the U.S. Court of International Trade had exclusive jurisdiction over challenges to U.S. antidumping or countervailing duty determinations.¹ Under the NAFTA, that exclusive jurisdiction is transferred to a Chapter Nineteen panel when a claimant requests panel review.²

¹ See 19 U.S.C. § 1516a.

² See NAFTA ann. 1904.15, sch. of U.S. ¶ 10 (“The United States shall amend section 516A(g) of the *Tariff Act of 1930*, as amended, to provide, in accordance with the terms of this Chapter, for binational panel review of antidumping

Chapter Nineteen panel members must be expert in international trade law and active or former judges, to the extent possible.³ When reviewing U.S. antidumping and countervailing duty determinations, Chapter Nineteen panels effectively stand in the shoes of the Court of International Trade. Like that court, binational panels must apply U.S. antidumping and countervailing duty laws, including relevant legislative history, regulations, administrative practice and judicial precedents.⁴ And, like that court, binational panels must review determinations based solely on the administrative record, and may not compel discovery or witness testimony.⁵

Article 1904(3) requires binational panels to apply the same judicial standard of review that a court of the importing Party would apply to review determinations of its investigating authorities. Thus, a panel must uphold a Commerce or ITC determination if such determination is reasonable and is supported by substantial evidence on the record of the case, even if the panel would have reached a different conclusion on the merits.⁶ Strict application of this standard of review is considered by the United States to be the “cornerstone” of the binational panel process.⁷

and countervailing duty cases involving Mexican or Canadian merchandise. Such amendment shall provide that if binational panel review is requested such review will be exclusive.”).

³ See NAFTA ann. 1901.2.

⁴ See *id.* art. 1904(2).

⁵ See *id.* (“An involved Party may request that a Panel review, *based on the administrative record*, a final antidumping or countervailing duty determination”) (emphasis added).

⁶ See 19 U.S.C. § 1516a(b)(1)(B); see also *Chevron, U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984); *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992) (holding that it is not the duty of the panels to weigh the wisdom of Commerce’s legitimate policy choices); *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996) (the question for the court “is not whether we agree with the Commission’s decision, nor whether we would have reached the same result. . . . Ours is only to review those decisions for reasonableness.”); *Thai Pineapple Public Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999) (Commerce “is the ‘master of antidumping law,’ and reviewing courts must accord deference to the agency in its selection and development of proper methodologies.”).

⁷ North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, vol. 1, 103d Cong., 1st Sess., at 195 (1993) (hereinafter “U.S. Statement of Administrative Action”) (“Strict adherence by binational panels to the requirement in Article 1904(3) that panels apply the judicial standard of review of the importing country is the cornerstone of the binational panel process.”).

Like the Court of International Trade, Chapter Nineteen panels review only final determinations by Commerce and the ITC, not preliminary determinations.⁸ A Chapter Nineteen panel is authorized to “uphold a final determination or remand it for action not inconsistent with the panel’s decision.”⁹ Article 1904 also establishes an “extraordinary challenge” procedure whereby a Party may request review of certain alleged panel errors.¹⁰ Failure by a binational panel to apply the appropriate standard of review is *per se* considered a manifest excess of the panel's powers and thus satisfies the first of two elements required for an extraordinary challenge to succeed under Article 1904(13).¹¹

Finally, Chapter Nineteen provides for the protection from disclosure of business proprietary information submitted by companies subject to antidumping and countervailing duty investigations. Annex 1904(15) of the NAFTA required that the United States amend the Tariff Act to allow for disclosure of such proprietary information only to authorized persons subject to an administrative protective order. Authorized persons under the Tariff Act include only counsel for interested parties to a Chapter Nineteen proceeding and Commerce and ITC employees directly involved in the proceeding, but not other Commerce or ITC employees or employees of other U.S. government agencies.¹²

The Determinations At Issue In This Arbitration

The softwood lumber dispute between Canada and the United States is decades old. The dispute centers around stumpage fees charged by Canadian provincial governments to companies

⁸ See NAFTA art. 1904(2) (“An involved Party may request that a Panel review . . . a *final* antidumping or countervailing duty determination . . .”) (emphasis added).

⁹ *Id.* art. 1904(8).

¹⁰ See NAFTA art. 1904(13).

¹¹ See U.S. Statement of Administrative Action at 195-97.

¹² See 19 U.S.C. § 1677f(b) & (c); 19 C.F.R. §§ 207.7(a) & (b), 354.5(d)(1).

that harvest timber on Crown lands. The two countries amicably settled their differences under the 1996 Softwood Lumber Agreement. In April 2001, following that agreement's expiration, the U.S. softwood lumber industry petitioned Commerce and the ITC to commence investigations to determine whether Canadian softwood lumber was being unfairly subsidized and dumped in the U.S. market, and whether the U.S. industry was being materially injured or threatened with material injury as a result.¹³ In response to the petitions, Commerce initiated antidumping and countervailing duty investigations and the ITC initiated an injury investigation.¹⁴

On May 16, 2001, the ITC preliminarily determined, pursuant to sections 705(b) and 735(b) of the Tariff Act, that dumped or subsidized Canadian softwood lumber imports threatened to cause material injury to the U.S. industry.¹⁵ On August 9, 2001, Commerce preliminarily determined, pursuant to section 703(e)(2) of the Tariff Act and section 351.206 of its regulations, that Canadian softwood lumber was being subsidized and that "critical circumstances" existed with respect to imports of softwood lumber from Canada.¹⁶ Commerce imposed a preliminary countrywide duty of 19.31 percent on softwood lumber imports from Canada.¹⁷ And on October 30, 2001, Commerce preliminarily determined that Canadian softwood lumber producers were dumping softwood lumber in the U.S. market.¹⁸ Commerce imposed preliminary, company-specific antidumping duty rates, including a rate of 10.76 percent on softwood lumber imported into the United States by Tembec.¹⁹

¹³ See Tembec Notice of Arbitration and Statement of Claim (undated) (hereinafter "Statement of Claim") ¶ 23.

¹⁴ See *id.* ¶¶ 24, 28.

¹⁵ See *id.* ¶ 29.

¹⁶ See *id.* ¶¶ 36, 41.

¹⁷ See *id.* ¶ 36.

¹⁸ See *id.* ¶ 45.

¹⁹ See *id.* ¶ 46.

On March 21, 2002, Commerce made a final affirmative countervailing duty determination in accordance with sections 705(c)(1)(B)(i)(II) and 777A(e)(2)(B) of the Tariff Act.²⁰ That determination reduced the countrywide countervailing duty rate on Canadian softwood lumber to 18.79 percent.²¹ On the same day, Commerce also made a final affirmative antidumping determination pursuant to section 735(a) of the Tariff Act. Under that determination, Tembec's duty rate was reduced to 10.21 percent.²² As part of the final countervailing duty determination, Commerce also made a final negative critical circumstances determination, and refunded all of the bonds and cash deposits that were posted pursuant to the preliminary critical circumstances determination.²³

In April 2002, the Canadian government and other parties, including Tembec, filed requests for panel proceedings under Chapter Nineteen of the NAFTA to review Commerce's final affirmative antidumping and countervailing duty determinations.

On May 16, 2002, the ITC made a final determination that the United States softwood lumber industry was threatened with material injury.²⁴ Tembec and other Canadian parties subsequently filed a request under Chapter Nineteen for binational panel review with respect to the ITC's final threat of material injury determination. On May 22, 2002, Commerce published the final antidumping and countervailing duty orders.²⁵

On July 17, 2003, the Chapter Nineteen panel reviewing Commerce's affirmative antidumping determination issued its decision. The panel rejected many of Tembec's claims,

²⁰ *See id.* ¶ 59.

²¹ *See id.* ¶ 60. Commerce initially determined a duty rate of 19.34 percent, which it later amended to 18.79 percent after correcting for a ministerial error.

²² *See id.*

²³ *See id.* ¶ 44.

²⁴ *See id.* ¶ 69.

²⁵ *See id.* ¶ 74.

holding, among other things, that Commerce properly determined that eastern white pine was not a separate “class or kind” of merchandise,²⁶ that Commerce complied with due process requirements in rendering its preliminary “class or kind” findings,²⁷ that Commerce did not err in its consideration of the effects of the Softwood Lumber Agreement²⁸ and that Commerce properly applied a methodology known as “zeroing” in calculating dumping margins.²⁹ The panel remanded the determination to Commerce with instructions, among other things, to re-allocate joint production costs to account for dimensional differences³⁰ and to provide further support for Commerce’s finding that finger-jointed flangestock was not a separate “class or kind” of merchandise.³¹ The antidumping remand proceedings are pending.

On August 13, 2003, the Chapter Nineteen panel reviewing Commerce’s affirmative countervailing duty determination issued its decision.³² That panel upheld most of Commerce’s findings, including Commerce’s finding that the U.S. industry petitions were lawful,³³ Commerce’s decision not to undertake an up-stream subsidy analysis,³⁴ Commerce’s denial of Tembec’s request for a company-specific duty rate³⁵ and Commerce’s finding that Canadian provincial stumpage programs constituted a “financial contribution”³⁶ that was specific to an enterprise or industry.³⁷

²⁶ See *Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, Secretariat File No. USA-CDA-2002-1904-02, *Decision of the Panel* (July 17, 2003) (“AD Panel Dec.”) at 157.

²⁷ See *id.* at 185.

²⁸ See *id.* at 21.

²⁹ See *id.* at 56-57.

³⁰ See *id.* at 50.

³¹ See *id.* at 162.

³² See *Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determination*, Secretariat File No. USA-CDA-2002-1904-03, *Decision of the Panel* (Aug. 13, 2003) (“CVD Panel Dec.”).

³³ See *id.* at 16.

³⁴ See *id.* at 65.

³⁵ See *id.* at 74.

³⁶ See *id.* at 20.

The panel remanded the determination with respect to, among other things, Commerce's use of cross-border benchmarks to determine whether provincial stumpage programs confer a "benefit."³⁸

The countervailing duty remand proceedings are also ongoing.

On September 5, 2003, the Chapter Nineteen panel reviewing the ITC's affirmative injury determination issued its decision. The panel upheld the ITC's holdings that eastern white pine and flangestock were part of a single domestic "like product."³⁹ The panel remanded the determination with respect to, among other things, the issue of whether the subject imports' prices were likely to significantly affect domestic softwood lumber prices.⁴⁰

On September 10, 2004, following a third remand by the Chapter Nineteen panel, the ITC made a negative threat of material injury determination. The Chapter Nineteen panel affirmed the third remand determination on October 12, 2004, and the NAFTA Secretariat, at the panel's direction, issued a notice of final panel action on October 25, 2004. The Chapter Nineteen panel's decision is now the subject of an extraordinary challenge under Article 1904(13) of the NAFTA. The orders supported by the ITC's original threat of injury determination remain in place.⁴¹

³⁷ See *id.* at 39.

³⁸ See *id.* at 35.

³⁹ See *Certain Softwood Lumber Products From Canada: Final Affirmative Threat of Material Injury Determination*, Secretariat File No. USA-CDA-2002-1904-07 (September 5, 2003) ("Injury Panel Dec.") at 24 (affirming ITC's findings regarding eastern white pine); *Certain Softwood Lumber Products From Canada: Final Affirmative Threat of Material Injury Determination*, Secretariat File No. USA-CDA-2002-1904-07, *Remand Decision of the Panel* (Apr. 19, 2004) ("Injury Panel Remand Dec.") at 6 (affirming ITC's findings regarding flangestock).

⁴⁰ Injury Panel Remand Dec. at 44.

⁴¹ To comply with the rulings and recommendations of the WTO in a separate dispute involving the ITC's final threat of material injury determination, the ITC issued, at the request of the Office of the United States Trade Representative ("USTR"), a new threat of material injury determination pursuant to Section 129 of the Uruguay Round Agreements Act. At USTR's request, on December 13, 2004, Commerce implemented the new ITC determination by amending the original antidumping and countervailing duty orders. The new determination and the actions to implement that determination are the subject of a new round of litigation recently initiated by Tembec and other Canadian parties. Tembec filed a petition under NAFTA Chapter Nineteen to review the ITC determination. Separately, Tembec and other Canadian parties filed complaints in the Court of International Trade challenging the authority of USTR and Commerce to implement the ITC's determination.

Tembec's Claims Before This Tribunal

On December 3, 2003, several months after joining the Chapter Nineteen panel proceedings, Tembec filed this claim under the investment chapter of the NAFTA. Tembec's Statement of Claim alleges that Commerce's preliminary and final antidumping and countervailing duty determinations and critical circumstances determination and the ITC's threat of material injury determinations violated certain obligations of the United States set forth in Section A of Chapter Eleven of the NAFTA. Specifically, Tembec alleges violations of Article 1102 (national treatment), Article 1103 (most-favored-nation treatment), Article 1105(1) (minimum standard of treatment) and Article 1110 (expropriation).⁴²

Tembec's allegations primarily concern Commerce's and the ITC's methodology for calculating the antidumping and countervailing duty rates.⁴³ Tembec also alleges that Commerce failed to disclose certain communications with petitioners and members of Congress during the investigations, in violation of section 777 of the Tariff Act,⁴⁴ and that Commerce's and the ITC's determinations were motivated by political considerations.⁴⁵ Finally, Tembec alleges that the U.S.

⁴² See Statement of Claim ¶¶ 100-10.

⁴³ See Chart, *infra* at 12.

⁴⁴ See Statement of Claim ¶¶ 5, 19, 57, 77-82. In December 2002, Baker & Hostetler, acting on behalf of Tembec and other Canadian interests, commenced an action in the United States District Court for the District of Columbia seeking the production of documents by Commerce, alleging that Commerce had destroyed evidence of *ex parte* meetings in violation of section 777 of the Tariff Act. See *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, Civ. Action No. 02-2522 (JR), Order of Mar. 31, 2004. The court rejected Baker & Hostetler's charges, holding that there was "no evidence of bad faith that would warrant further discovery." *Id.* at 15. Tembec's allegations in this proceeding largely reiterate the charges rejected by the U.S. District Court.

⁴⁵ See Statement of Claim ¶¶ 5, 22, 33-35, 37, 47, 52-53, 55-56. Tembec made similar allegations of political influence in the Chapter Nineteen countervailing duty proceeding, which were rejected *sub silentio* by the Chapter Nineteen panel. See *Certain Softwood Lumber Products From Canada*, Secretariat File No. USA-CDA-2002-1904-03: *Canadian Parties' Joint Brief*, dated Aug. 2, 2002 ("Joint CVD Br."), Vol. II, at K-24-25; see also CVD Panel Dec. (upholding Commerce's findings in essential respects).

softwood lumber industry was improperly motivated to support the softwood lumber investigations as a result of the *Continued Dumping and Subsidy Offset Act of 2000* (the “Byrd Amendment”).⁴⁶

Tembec’s assertions before this Tribunal are nearly identical to those it advanced in the Chapter Nineteen proceedings. The United States summarizes in the chart below some of the allegations common to both proceedings, and the relevant findings by the Chapter Nineteen panels.

COMMERCE ANTIDUMPING INVESTIGATION

Tembec’s Assertions in this Arbitration	Tembec’s Assertions in the Chapter 19 Proceedings	The Chapter 19 Panel’s Findings
<i>Class or Kind Determination – Eastern White Pine</i>		
Commerce failed “to treat Eastern White Pine . . . as [a] separate class[] or kind[] of merchandise” ⁴⁷	“Eastern White Pine Is A Separate Class Or Kind Of Merchandise” ⁴⁸	“Commerce Correctly Held that Eastern White Pine Did Not Represent a Separate ‘Class or Kind’ of Merchandise” ⁴⁹
<i>Class or Kind Determinations – Due Process</i>		
“Commerce delayed issuing its preliminary class or kind findings,” leaving Tembec an “insufficient period of time” to respond. ⁵⁰	“Complainants were given insufficient time to present their case on the preliminary scope findings.” ⁵¹	“Commerce complied with all requirements of due process under United States law” ⁵²
<i>Effects of Softwood Lumber Agreement</i>		
“Commerce [erred by] declin[ing] to take into account any of the trade distortions created by the SLA” ⁵³	“Commerce Failed To Account Properly For The Effects Of The Softwood Lumber Agreement” ⁵⁴	“Commerce Did Not Err in its Consideration of the Impact of the Softwood Lumber Agreement” ⁵⁵

⁴⁶ See Statement of Claim ¶¶ 26, 85, 101(a) & (g). The Byrd Amendment, an amendment to Title VII of the *Tariff Act* (codified at 19 U.S.C. § 1675c), provides for the distribution of duties assessed pursuant to antidumping and countervailing duty orders.

⁴⁷ Statement of Claim ¶ 62.

⁴⁸ See *Softwood Lumber From Canada: Final Determination of Sales at Less Than Fair Value*, Secretariat File No. USA-CDA-2002-1904-02: *Joint Brief of Complainants*, dated Aug. 2, 2002 (“Joint AD Br.”), Vol. II at 33.

⁴⁹ AD Panel Dec. at 157.

⁵⁰ Statement of Claim ¶ 64.

⁵¹ Joint AD Br., Vol. II at 9.

⁵² AD Panel Dec. at 185.

⁵³ Statement of Claim ¶ 46(a).

⁵⁴ Joint AD Br. Vol. I, at 98.

COMMERCE ANTIDUMPING INVESTIGATION (CONTINUED)

Tembec’s Assertions in this Arbitration	Tembec’s Assertions in the Chapter 19 Proceedings	The Chapter 19 Panel’s Findings
<i>Zeroing</i>		
Commerce erred in “calculat[ing] an average dumping margin . . . by changing all negative dumping margins . . . to zero (hence ‘zeroing’)” ⁵⁶	“Commerce Created Artificial Dumping Margins Through The Unlawful Practice Of Zeroing” ⁵⁷	“Commerce Did Not Err in Employing a Practice of ‘Zeroing’ When Determining Weighted Average Margins of Dumping” ⁵⁸
<i>Cost Allocation</i>		
“Commerce compared prices of different products with difference sizes.” ⁵⁹	Commerce “failed to calculate cost differences between different sized products” ⁶⁰	“Commerce Erred in Failing to Make An Adjustment to Account for Dimensional Differences” ⁶¹
<i>Class or Kind Determinations – Finger-Jointed Flangestock</i>		
Commerce failed “to treat . . . Finger-jointed Flangestock as [a] separate class[] or kind[] of merchandise.” ⁶²	“Finger-jointed Flangestock Is A Separate Class Or Kind Of Merchandise” ⁶³	“Commerce’s Decision Not To Treat Finger-Jointed Flangestock as a Separate Class or Kind . . . is Not Supported by Substantial Evidence” ⁶⁴

⁵⁵ AD Panel Dec. at 21.

⁵⁶ See Statement of Claim ¶ 46(b).

⁵⁷ Joint AD Br., Vol. I, at 90.

⁵⁸ AD Panel Dec. at 56-57.

⁵⁹ Statement of Claim ¶ 46(d).

⁶⁰ Joint AD Br., Vol. I, at 54.

⁶¹ AD Panel Dec. at 50.

⁶² Statement of Claim ¶ 62.

⁶³ Joint AD Br., Vol. II, at 41.

⁶⁴ AD Panel Dec. at 162.

COMMERCE COUNTERVAILING DUTY INVESTIGATION

Tembec’s Assertions in This Arbitration	Tembec’s Assertions in the Chapter 19 Proceedings	The Chapter 19 Panel’s Findings
<i>Lawfulness of Petitions</i>		
“Commerce unlawfully initiated the antidumping and countervailing duty investigations based upon a deficient petition” ⁶⁵	“The Department’s Determination That the Petition Was Filed on Behalf of an ‘Interested Party’ is Contrary to Law and is Not Supported By Substantial Evidence” ⁶⁶	“[T]he Panel concludes that Commerce’s determination that the petition fulfilled the statutory and regulatory requirements was in the main supported by substantial evidence and was otherwise in accordance with the law.” ⁶⁷
<i>Upstream Analysis</i>		
Commerce “refused to make an upstream [subsidy] analysis [contrary to the Tariff Act.]” ⁶⁸	“Commerce’s failure to do an upstream subsidy analysis was contrary to the law and Commerce’s established administrative practice.” ⁶⁹	“[T]he Panel affirms the determination of the Department not to undertake a pass-through analysis” ⁷⁰
<i>Tembec’s Request for a Company-Specific Subsidy Rate</i>		
“Commerce acted unlawfully by refusing to grant Tembec a lower company-specific rate” ⁷¹	“Tembec Was Entitled To a Company-Specific Countervailable Subsidy Rate” ⁷²	Commerce “did not have a[n] obligation to consider . . . Tembec’s request for [a] company-specific duty rate[]” ⁷³
<i>Cross-Border Benchmarks</i>		
“Commerce compared prices in Canada to prices in the United States . . . contrary to . . . the plain meaning of the . . . Tariff Act” ⁷⁴	Commerce considered benchmarks “outside the country under investigation, and [rejected], without reasoned consideration, evidence . . . of in-country benchmarks” ⁷⁵	“Commerce’s determination with respect to the use of cross-border benchmarks . . . is unsupported by substantial evidence and is contrary to law.” ⁷⁶

⁶⁵ Statement of Claim ¶ 101(a); *see also id.* ¶ 25.

⁶⁶ Joint CVD Br., Vol. II, at J-1.

⁶⁷ CVD Panel Dec. at 16.

⁶⁸ Statement of Claim ¶¶ 86(b), 93.

⁶⁹ *Softwood Lumber From Canada*, Secretariat File No. USA-CDA-2002-1904-03, *Tembec Submission*, dated Aug. 2, 2002 (“Tembec CVD Br.”) at 3; *see also* Joint CVD Br., Vol. II, at G-3.

⁷⁰ CVD Panel Dec. at 65.

⁷¹ Statement of Claim ¶ 48.

⁷² Tembec CVD Br. at 5.

⁷³ CVD Panel Dec. at 74.

⁷⁴ Statement of Claim ¶ 86(a).

⁷⁵ Joint CVD Br., Vol. I, at C-1.

⁷⁶ CVD Panel Dec. at 35.

ITC INJURY INVESTIGATION

Tembec’s Assertions in this Arbitration	Tembec’s Assertions in the Chapter 19 Proceedings	The Chapter 19 Panel’s Findings
<i>Like Product Analysis – Eastern White Pine</i>		
<p>“The ITC . . . ignored all of the indications that [Eastern White Pine] was a separate like product . . .”⁷⁷</p>	<p>“The Commission’s Finding That EWP Is Not A Separate Like Product . . . Is unsupported By Substantial Evidence And Is Otherwise Contrary To Law”⁷⁸</p>	<p>“[We] affirm the Commission’s holding[]that . . . [Eastern White Pine [is] part of the single domestic like product . . .”⁷⁹</p>
<i>Like Product Analysis – Flangestock</i>		
<p>The ITC “never made an effort to apply the criteria required under U.S. law to make th[e] determination that . . . Flangestock [w]as a ‘like product’”⁸⁰</p>	<p>“The Commission’s Finding That Flangestock Is Not A Separate Like Product . . . Is Unsupported By Substantial Evidence And Otherwise Contrary To Law”⁸¹</p>	<p>“[T]his Panel finds that the Commission’s remand determination that . . . flangestock [is] . . . a single domestic like product is in accordance with the law and supported by substantial evidence.”⁸²</p>

⁷⁷ Statement of Claim ¶ 71.

⁷⁸ *Softwood Lumber From Canada: Final Affirmative Threat of Material Injury Determinations*, Secretariat File No. USA-CDA-2002-1904-07, *Submission of Tembec Inc.*, dated Oct. 7, 2002, (hereinafter “Tembec Injury Determination Br.”) at 13.

⁷⁹ Injury Panel Dec. at 24.

⁸⁰ Statement of Claim ¶ 71

⁸¹ Tembec Injury Determination Br. at 34.

⁸² Injury Panel Remand Dec. at 6.

ARGUMENT

I. ARTICLE 1901(3) BARS TEMBEC'S CLAIMS

The United States did not consent to investor-State arbitration of challenges to its antidumping and countervailing duty determinations. The jurisdiction of an arbitral tribunal is based on the common consent of the parties to the dispute.⁸³ In arbitrations governed by public international law, international tribunals have repeatedly insisted on an “‘unequivocal indication’ of a ‘voluntary and indisputable’ acceptance” by a sovereign of a tribunal’s jurisdiction.⁸⁴

Here, the NAFTA – the instrument delineating the scope of the United States’ consent to arbitration – clearly and unequivocally excludes any consent to arbitrate this dispute under Chapter Eleven of the NAFTA. The NAFTA provides that it is to be interpreted “in accordance with applicable rules of international law.”⁸⁵ Article 31(1) of the Vienna Convention on the Law of Treaties sets forth the cardinal rule of treaty interpretation: a treaty must be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in

⁸³ See NAFTA art. 1122(1) (“Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.”); see also *id.* art. 1121(1) (“A disputing investor may submit a claim . . . to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; . . .”); FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 29 (Emmanuel Gaillard & John Savage eds., 1999) (in treaty-based investor-State arbitrations such as those under Chapter Eleven, “the arbitrators’ jurisdiction results from the initial consent of the state” expressed in the agreement “and the subsequent consent of the plaintiff, who accepts the arbitrator’s jurisdiction by beginning the arbitration.”).

⁸⁴ *Application of Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.)*, 1993 I.C.J. 325, 342 ¶ 34 (Sept. 13); see also *Fireman’s Fund Ins. Co. v. United Mexican States, Decision on the Preliminary Question*, ICSID Case No. ARB(AF)/02/01 (July 17, 2003) ¶ 64 (“[T]he Tribunal does not believe that under contemporary international law a foreign investor is entitled to the benefit of the doubt with respect to the existence and scope of an arbitration agreement.”).

⁸⁵ NAFTA art. 102(2); see also Department of External Affairs, *North American Free Trade Agreement: Canadian Statement on Implementation*, in *Canada Gazette* 68, 76 (Jan. 1, 1994) (hereinafter “Canadian Statement on Implementation”) (“Paragraph 2 of article 102 affirms a basic provision of customary international law regarding the interpretation of international agreements as set out in the *Vienna Convention on the Law of Treaties.*”); NAFTA art. 1131(1) (“A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and the applicable rules of international law.”).

the light of its object and purpose.”⁸⁶ The relevant context includes the treaty’s text, its preamble and annexes and any related agreements or instruments.⁸⁷

As demonstrated below, the text, context and object and purpose of the NAFTA confirm that the Parties intended specialized binational panels constituted under Chapter Nineteen to have exclusive jurisdiction under the NAFTA over claims that – like those of Tembec here – seek to impose obligations on a Party with respect to its antidumping and countervailing duty laws. Far from consenting to arbitration, the United States unambiguously rejected investor-State arbitration of Tembec’s claims. This Tribunal thus has no jurisdiction in this matter.

A. The Ordinary Meaning Of Article 1901(3) Establishes That The United States Did Not Consent To Arbitrate Tembec’s Claims Under Chapter Eleven

The plain language of Article 1901(3) demonstrates that the United States did not consent to arbitrate Tembec’s claims under Chapter Eleven of the NAFTA. Article 1901(3) states:

Except for Article 2203 (Entry into Force), no provision of any other Chapter of this Agreement shall be construed as imposing obligations on a Party with respect to the Party’s antidumping law or countervailing duty law.

The ordinary meaning and effect of this provision is clear: the United States has no obligations under the NAFTA with respect to its antidumping and countervailing duty laws except those specified in Chapter Nineteen and Article 2203. No provision of any chapter outside of Chapter Nineteen can be construed to impose any obligation on the United States with respect to such laws.

If the Tribunal were to exercise jurisdiction over Tembec’s claims, it would be imposing on the United States obligations that derive from a chapter of the NAFTA other than Chapter

⁸⁶ Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331 (“Vienna Convention”). The International Court of Justice has determined that Article 31 is reflective of customary international law. *See, e.g., Kasikili/Sedudu Island* (Bots. v. Namib.), 1999 I.C.J. 1045, 1059 ¶ 18 (Dec. 13).

⁸⁷ Vienna Convention art. 31(2).

Nineteen. Two distinct types of obligations would be imposed. *First*, the obligation to arbitrate derives from provisions in Section B of Chapter Eleven, which sets forth the chapter's dispute resolution mechanism. Compelling the United States to arbitrate a dispute with a private investor in accordance with the procedures in Section B would impose an obligation on the United States that derives from provisions of a chapter of the NAFTA outside of Chapter Nineteen.

Second, Tembec seeks to apply the substantive international law standards set forth in Section A of Chapter Eleven to the administration by Commerce and the ITC of U.S. trade laws. It asks the Tribunal to assess whether, in imposing duties on lumber exported to the United States by Tembec, the United States violated the national treatment, most favored nation treatment, minimum standard of treatment and expropriation articles in Chapter Eleven.⁸⁸ Applying those provisions to the administration of U.S. trade laws would impose substantive obligations on the United States that emanate from a chapter outside of Chapter Nineteen.

Furthermore, the obligations that would thereby be imposed on the United States are obligations "with respect to" U.S. antidumping and countervailing duty law within the meaning of Article 1901(3). The determinations Tembec challenges were issued by U.S. government agencies in administering U.S. antidumping and countervailing duty laws. Claims that challenge the administration of U.S. trade law impose obligations on the United States "with respect to" that law.

The situation with respect to the Byrd Amendment is no different, and Tembec's claims concerning that amendment likewise fail.⁸⁹ Section 732(c)(4)(A) of the Tariff Act requires that a petition requesting the initiation of an investigation be supported by a minimum percentage of the relevant domestic industry. Tembec alleges that the Byrd Amendment improperly influenced the

⁸⁸ See Statement of Claim ¶¶ 100-10.

⁸⁹ In January 2003, the WTO Appellate Body found that the Byrd Amendment was inconsistent with the United States' WTO obligations. The United States has since proclaimed its intention to bring itself into compliance with its WTO obligations.

U.S. softwood lumber industry's support of the softwood lumber petitions, and the petitioners were therefore unlawful.⁹⁰ Commerce's determination that the petitions were lawful, however, was an action taken by Commerce in the administration of the United States' antidumping and countervailing duty law. Claims that challenge such conduct in a Chapter Eleven proceeding impose obligations on a Party with respect to its trade law, in violation of Article 1901(3).⁹¹

In sum, the result compelled by the ordinary meaning of the terms of Article 1901(3) is clear: Chapter Eleven of the NAFTA cannot be construed to impose any obligation on the United States with respect to the category of claims asserted by Tembec. It cannot be construed to impose the obligation to arbitrate Tembec's claims under the procedures set forth in Section B of Chapter Eleven. Nor can it be construed to subject the U.S. agency determinations at issue to review under the substantive obligations in Section A of that chapter. Because the United States did not consent to investor-State arbitration with respect to Tembec's claims, there is no agreement between the parties upon which the Tribunal's jurisdiction could be founded.

B. The Context Of Article 1901(3) Confirms That The United States Did Not Consent To Investor-State Arbitration Of Tembec's Claims

As noted above, a treaty is to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in the light of its object and purpose."⁹² As demonstrated below, an examination of the context of Article 1901(3) confirms that Chapter

⁹⁰ See Statement of Claim ¶ 26.

⁹¹ To the extent that Tembec also challenges the Byrd Amendment on its face – a question that is unclear from Tembec's Statement of Claim – Tembec's claims likewise would be barred by Article 1901(3). The Byrd Amendment is an amendment to Title VII of the *Tariff Act*. Challenging that amendment in an arbitration under Chapter Eleven would impose obligations on the United States with respect to its antidumping and countervailing duty law.

⁹² Vienna Convention art. 31(1) (emphasis added).

Nineteen provides the exclusive forum under the NAFTA for disputes arising under a Party's antidumping and countervailing duty law.⁹³

First, although the NAFTA establishes in Chapter Twenty a State-to-State dispute resolution mechanism for controversies concerning the Agreement, that mechanism does not apply to antidumping or countervailing duty matters. The Chapter Twenty mechanism has an unusually broad reach: it applies to all disputes concerning “the interpretation or application of this Agreement or wherever a Party considers that an actual or proposed measure of another Party is or would be inconsistent with the obligations of this Agreement”⁹⁴ Pursuant to Article 2004, however, “*matters covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters)*” are expressly excluded from State-to-State dispute resolution under Chapter Twenty.⁹⁵ Thus, the only type of dispute that a NAFTA Party may not under any circumstances bring under Chapter Twenty is that pertaining to another Party's antidumping and countervailing duty laws.

Instead of providing for State-to-State dispute resolution under Chapter Twenty, the Parties established a special mechanism for review of antidumping and countervailing duty matters in Chapter Nineteen itself.⁹⁶ Article 1903, for instance, provides for State-to-State dispute settlement with respect to amendments to a Party's trade law.⁹⁷ Article 1904 permits a State to challenge

⁹³ A treaty's context for these purposes includes the text of the treaty and its annexes, among other things. *See id.* art. 31(2) (“The context for the purpose of the interpretation of a treaty shall comprise . . . the text, including its preamble and annexes . . .”).

⁹⁴ NAFTA art. 2004.

⁹⁵ *Id.* (emphasis added).

⁹⁶ *See* U.S. Statement of Administrative Action at 208 (“Chapter Twenty does not apply to disputes arising under Chapter Nineteen, however, which sets out specific mechanisms for dispute resolution in antidumping and countervailing duty cases.”).

⁹⁷ Article 1903(1) provides, in pertinent part:

another Party's final antidumping and countervailing duty determinations.⁹⁸ And Article 1905 contains a State-to-State dispute resolution mechanism for resolving allegations by a Party that the application of another Party's antidumping or countervailing duty law interferes with the establishment or operation of a Chapter Nineteen panel.⁹⁹

This element of the NAFTA's context confirms what Article 1901(3) plainly says: that Chapter Nineteen exclusively governs disputes concerning antidumping and countervailing duty laws. It would make no sense for the NAFTA to prohibit the *NAFTA Parties themselves* from pursuing State-to-State dispute resolution pertaining to a Party's antidumping and countervailing duty laws outside of Chapter Nineteen, but to accord *private claimants* the privilege of doing so under Chapter Eleven.

Tembec's theory that it may challenge antidumping and countervailing duty determinations under both Chapters Nineteen and Eleven erroneously suggests that the NAFTA Parties intended to accord broader rights to private parties than to the NAFTA Parties themselves with respect to such challenges. For example, Tembec's theory suggests that (i) private claimants would be able to challenge determinations simultaneously in *two* fora under the NAFTA, whereas the NAFTA Parties are limited to one forum; (ii) private parties would have the right to challenge both final and *preliminary* determinations under Chapter Eleven, whereas the NAFTA Parties can challenge only

A Party to which an amendment of another Party's antidumping or countervailing duty statute applies may request in writing that such amendment be referred to a binational panel for a declaratory opinion

⁹⁸ Article 1904(5) provides:

An involved Party on its own initiative may request review of a final determination by a panel and shall, on request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of that final determination, request such review.

⁹⁹ Article 1905(1) provides, in pertinent part:

[A] Party may request in writing consultations with the other Party regarding the allegations [that the application of another Party's domestic law has interfered with the establishment and functioning of a panel].

final determinations under Chapter Nineteen; (iii) private parties could subject determinations to *de novo* review under Chapter Eleven, whereas NAFTA Parties may seek review only by Chapter Nineteen panels applying the applicable standard of review under the importing Party's laws (which, in the case of the United States, is a deferential standard of review); and (iv) private parties could seek a discovery order from a Chapter Eleven tribunal, whereas NAFTA Parties may only have determinations reviewed under Chapter Nineteen based strictly on the administrative record in the investigation.

That arrangement would be contrary to the general presumption that the "NAFTA authorizes a broader scope for State-State arbitration than for investor-State arbitration," as recognized by the NAFTA Chapter Eleven tribunal in *United Parcel Service of America v. Government of Canada*.¹⁰⁰ The *UPS* tribunal concluded that the exclusion of competition law matters from State-to-State dispute resolution necessarily meant that such matters were likewise excluded from investor-State arbitration.¹⁰¹ Similarly, Article 2004's exclusion of antidumping and countervailing duty matters from State-to-State dispute resolution confirms that such matters are likewise excluded from investor-State arbitration under Chapter Eleven.

Second, Tembec's theory that antidumping and countervailing duty determinations can be challenged under both Chapters Nineteen and Eleven would result in critical inconsistencies in the manner in which such challenges are resolved under the NAFTA. In accordance with Article 1112(1) – which provides that "[i]n the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency," – these inconsistencies would be resolved in favor of Chapter Nineteen.

¹⁰⁰ *United Parcel Service of America, Inc. v. Government of Canada* (Award on Jurisdiction of Nov. 22, 2002) ¶ 61 .

¹⁰¹ *See id.* ("The natural inference [from Article 1501(3)'s exclusion of State-to-State proceedings] would be that there is no such jurisdiction [under Chapter Eleven].").

The dispute resolution mechanisms in Chapters Nineteen and Eleven are dramatically different in all respects – from constitution of the panel to the remedies available. Chapters Nineteen and Eleven incorporate and apply different sets of laws: the former incorporates municipal law standards; the latter, international law standards. The proper application of Article 1112 would avoid the anomalous situation where a Party’s antidumping and countervailing duty determinations could pass muster under the specialized dispute resolution process specifically designed for challenges to such determinations, but still be held wrongful under general provisions of Chapter Eleven.¹⁰²

Submitting challenges to a Party’s antidumping and countervailing duty determinations – for which Chapter Nineteen is expressly designed – to Chapter Eleven arbitration would result in, among other things, (i) the application of international law standards to the claim, rather than domestic law standards; (ii) the constitution of a three-member tribunal, as opposed to a five-member panel of experts in trade law; and (iii) the possibility of awarding monetary damages to the claimant, which is not available in a Chapter Nineteen proceeding. Article 1112(1) requires that these inconsistencies be resolved in favor of Chapter Nineteen – compelling the same result as that provided for in Article 1901(3).

Third, provisions in Chapter Eleven indicate that, although the NAFTA Parties expressly envisioned a certain overlap in competence between the investor-State arbitration mechanism established in Section B of Chapter Eleven and the State-to-State mechanism established in Chapter Twenty, they envisaged no such overlap in the dispute resolution mechanisms established in Chapters Eleven and Nineteen for resolving disputes concerning antidumping and countervailing duty matters. Article 1115 provides as follows:

¹⁰² NAFTA art. 1112(1); *see also* Canadian Statement on Implementation at 152 (providing that Article 1112 “ensures that the specific provisions of other chapters are not superseded by the general provisions of this chapter.”).

*Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.*¹⁰³

The opening clause of this Article provides that the submission of a measure to investor-State arbitration does not waive a Party's right to submit the same measure to the State-to-State dispute resolution mechanism set forth in Chapter Twenty. Article 1115 thus contemplates that the same measure could be the subject of dispute resolution under both Chapters Eleven and Twenty, reflecting the customary international law principle that a private claimant cannot waive the right of its State.¹⁰⁴ Article 1115 demonstrates that, where the Parties intended to provide for the possibility of parallel NAFTA proceedings with respect to the same measures, the treaty's text makes that intention clear.

Had the Parties contemplated that the same measure could be the subject of proceedings under both Chapters Eleven and Nineteen, one would expect Article 1115 to mention Chapter Nineteen. That no such mention is made in Article 1115 evidences that the Parties did not intend for the types of measures that are subject to Chapter Nineteen dispute resolution to ever be a subject of arbitration under Chapter Eleven.

Finally, the fact that the NAFTA expressly required amendments to domestic law to permit the use of business proprietary information in Chapter Nineteen proceedings – but contemplated no similar amendments for Chapter Eleven – further confirms that the Parties did not envisage that antidumping and countervailing duty matters could be submitted to Chapter Eleven arbitration. Prior to the entry into force of the CFTA, the Tariff Act provided that proprietary business

¹⁰³ NAFTA art. 1115 (emphasis added).

¹⁰⁴ *See also id.* art. 1138 (contemplating that a measure could be the subject of dispute resolution under either Chapter Eleven or Chapter Twenty).

information could be used only by authorized persons subject to an administrative order and only in proceedings before the Court of International Trade. The CFTA and the NAFTA required the United States to amend the Tariff Act to permit the use of such information in Chapter Nineteen proceedings as well.¹⁰⁵ Despite evident knowledge of this provision of U.S. law on the part of the negotiators, no corresponding NAFTA provision required the amendment of U.S. law to permit the use of such information in Chapter Eleven proceedings. Thus, under U.S. law, such information cannot legally be shared with either the State Department attorneys who generally act for the United States in Chapter Eleven arbitrations, counsel for claimants or the members of tribunals established under that chapter.¹⁰⁶

Without access to such proprietary information, it would not be possible for this Tribunal to decide Tembec's claims on the merits. The antidumping investigation alone contains 428 non-public documents, including correspondence, accounting records, analyst memoranda and verification reports, that contain information Commerce relied on in making the findings at issue in this arbitration.¹⁰⁷ This Tribunal would have no basis to decide Tembec's claims with respect to the antidumping, countervailing duty and threat of injury investigations without access to that proprietary information.¹⁰⁸ Nor could the United States adequately respond to Tembec's claims.

¹⁰⁵ See NAFTA ann. 1904.15, sch. of U.S., ¶ 12.

¹⁰⁶ See 19 U.S.C. § 1677f(b)-(c); *cf. id.* § 1677f(f) (conditionally permitting disclosure of such information to panel members and participants in Chapter Nineteen proceedings). Indeed, the use of such information in a Chapter Eleven arbitration would result in the imposition of strict penalties under U.S. law. See 19 U.S.C. § 1677f(f)(4) ("Any person, except a judge appointed by a binational panel or an extraordinary challenge committee . . . who is found . . . to have [violated a protective order] . . . shall be liable to the United States for a civil penalty and shall be subject to such other administrative sanctions, including but not limited to, debarment from practice before the administering authority or the Commission The amount of the civil penalty shall not exceed \$100,000 for each violation. Each day of a continuing violation shall constitute a separate violation.").

¹⁰⁷ See *United States Department of Commerce, Import Administration, Index to Administrative Record*, Case No. A122838, *Certain Softwood Lumber Products from Canada* (listing 428 non-public documents).

¹⁰⁸ For example, Commerce's allocation of joint costs among different sizes of lumber in the antidumping investigation was based on a comparison of proprietary pricing information submitted by the companies subject to the investigation. See, e.g., *In the Matter of Certain Softwood Lumber Products From Canada*, Secretariat File No. USA-CDA-2002-

Had the NAFTA Parties intended to confer jurisdiction on Chapter Eleven tribunals to review antidumping and countervailing duty determinations, they would have ensured that the tribunals and the parties had access to the information necessary to perform that function. That they did not do so further demonstrates that the NAFTA Parties did not contemplate or consent to the submission of antidumping or countervailing duty disputes to Chapter Eleven arbitration.

C. The NAFTA's Object And Purpose Confirm That The United States Did Not Consent To Arbitrate Tembec's Claims Under The Investment Chapter

The final element of the Vienna Convention's cardinal rule of treaty interpretation focuses on the treaty's object and purpose.¹⁰⁹ NAFTA Article 102 states in pertinent part as follows:

The objectives of this Agreement, as elaborated more specifically through its principles and rules, . . . are to:

. . .

(e) create *effective* procedures . . . for the resolution of disputes¹¹⁰

As demonstrated below, a review of the NAFTA's various rules for dispute resolution reveals an overriding concern with promoting effective dispute resolution procedures and avoiding the inefficacies that result from redundant proceedings between the same parties before different dispute resolution panels. Finding that Article 1901(3) establishes Chapter Nineteen panels as the exclusive forum under the NAFTA for antidumping and countervailing duty matters is fully consonant with this object and purpose of the treaty.

1904-02, *Rule 57(2) Response Brief of the Investigating Authority*, Volume I: General Issues, dated Oct. 21, 2002, at I-37 (showing redactions of non-public pricing information relied on by Commerce in making its cost allocation). The Tribunal would have no basis for deciding Tembec's allegation that Commerce erred in that finding. *See* Statement of Claim ¶ 46(c) ("Commerce refused to recognize the effect of size on the value of lumber products, misallocating joint costs among joint products, thereby yielding an artificially high dumping margin.").

¹⁰⁹ Vienna Convention, art. 31(1) (a treaty is to be interpreted "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and *in the light of its object and purpose*.") (emphasis added).

¹¹⁰ NAFTA art. 102(e) (emphasis added).

Much scholarly attention has been focused on the proliferation of international tribunals in recent decades.¹¹¹ One consequence of this phenomenon is that claimants have expanded opportunities to submit the same dispute simultaneously or consecutively to multiple fora, giving rise to redundant proceedings. Redundant proceedings present the risk of conflicting judgments, undermine the principle of finality, present the possibility of double recovery for claimants, are burdensome and unfair to the respondent, represent a poor use of judicial and arbitral resources and have potentially negative systemic implications for international law and international dispute resolution generally.¹¹²

Several NAFTA provisions in addition to Article 102 demonstrate the treaty's objective of creating effective dispute resolution procedures and avoiding the inefficacies of duplicative proceedings between the same parties. Article 1121, for example, provides that, as a condition precedent to submitting a claim under Chapter Eleven, an investor must waive its rights, if any, "to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceeding with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116"¹¹³ Because Mexican law provides a

¹¹¹ See, e.g., YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (Oxford U. Press 2003); Shane Spelliscy, *The Proliferation of International Tribunals: A Chink in the Armor*, 40 COLUM. J. TRANSNAT'L L. 143 (2001); Roger P. Alford, *The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance*, 94 AM. SOC'Y INT'L L. PROC. 160 (2000); Benedict Kingsbury, *Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679 (1999); Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709 (1999).

¹¹² See generally SHANY, *supra* note 111, at 77-81 (discussing consequences of overlapping jurisdiction); Spelliscy, *supra* note 111, at 152-56 (same); see also *MOX Plant (Ir. v. U.K.)*, Order No. 3 (June 24, 2003), ¶ 28 (Int'l Trib. for the Law of the Sea 2003) (suspending proceedings on the basis that "a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties"); *Southern Bluefin Tuna - Australia and New Zealand v. Japan*, Award on Jurisdiction and Admissibility (Aug. 4, 2000), 39 I.L.M. 1359 (UNCLOS Arb. Trib. 2000) (declining jurisdiction on basis that claim arose primarily under another treaty).

¹¹³ NAFTA art. 1121(1)(b); see also U.S. Statement of Administrative Action at 147 (under Article 1121, a claimant who submits a claim to arbitration under Chapter Eleven must waive its rights with respect to "any actions in local courts or other fora").

private right to assert claims under the NAFTA in Mexican courts, Annex 1120.1 similarly prohibits duplicative proceedings for claims of NAFTA breaches in court and before investor-State arbitral tribunals.¹¹⁴

These provisions evidence the Parties' intent to avoid providing claimants with the opportunity to submit under Chapter Eleven the same claims that are being submitted elsewhere. As the tribunal in *Waste Management, Inc. v. United Mexican States* stated: "when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages. *This is precisely what NAFTA Article 1121 seeks to avoid.*"¹¹⁵

Re-litigating the Chapter Nineteen binational panels' relevant factual and legal findings, such as whether the softwood lumber petitions complied with the Tariff Act or whether Tembec was entitled to a company-specific countervailing duty rate would give rise to the possibility of conflicting judgments and would be burdensome, unfair to the United States and wasteful of resources. Allowing this arbitration to proceed to the merits would therefore be inconsistent not only with the express language of Article 1901(3), but with the NAFTA's objective of creating effective dispute resolution procedures.

¹¹⁴ See NAFTA ann. 1120.1 ("With respect to the submission of a claim to arbitration: . . . an investor of another Party may not allege that Mexico has breached an obligation under: Section A . . . both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal.").

¹¹⁵ *Waste Management Inc. v. United Mexican States, Award on Jurisdiction*, ICSID Case No. ARB(AF)/98/2 (hereinafter "*Waste Management Award*") ¶ 27 (June 2, 2002) (emphasis added); see also *Waste Management Inc. v. United Mexican States, Submission of the Government of Canada Pursuant to Article 1128* (Dec. 17, 1999) (hereinafter "*Waste Management, Canada Article 1128 Submission*") ("[T]he clear purpose of [Article 1121] is to avoid duplication of recourse and cost.").

D. The Circumstances Of Conclusion Of The NAFTA Also Confirm That No Jurisdiction Under Chapter Eleven Exists For Antidumping And Countervailing Duty Matters

Article 32 of the Vienna Convention provides that “[r]ecourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the application of article 31” The circumstances of conclusion of the NAFTA and its predecessor agreement, as reflected in the text of Chapter Nineteen, demonstrate that the Parties *could not agree* on substantive international rules to govern antidumping and countervailing duty matters. Accepting Tembec’s hypothesis – that the substantive international rules of Chapter Eleven *do* apply to such matters – would impose on the Parties an agreement that they could not, and did not, reach. The circumstances of conclusion of the treaty thus confirm the interpretation compelled by the cardinal rule of treaty interpretation: Chapter Eleven does not apply to antidumping or countervailing duty matters.

Chapter Nineteen of the NAFTA adopts, with few modifications, the procedural solution reached by the United States and Canada in Chapter Nineteen of the CFTA. During the negotiation of the CFTA, Canada and the United States tried, but failed, to reach agreement on a common set of antidumping and countervailing duty rules.¹¹⁶ In order to break the impasse, the Parties agreed on a procedural, rather than a substantive, solution: a unique form of international dispute

¹¹⁶ See *United States-Canada Free Trade Agreement: Hearing Before the Comm. on the Judiciary, U.S. Senate*, 100th Cong. 63-64 (1988) (testimony of M. Jean Anderson, Chief Counsel, International Trade Administration, U.S. Department of Commerce) (“Despite very intense negotiations, it proved impossible to agree on subsidies discipline and new approaches to unfair trade practices The two governments agreed instead to retain the existing national AD/CVD laws and procedures.”); see also JAMES R. CANNON, JR., RESOLVING DISPUTES UNDER CHAPTER 19, 151 (1994) (“In the end, Canada and the United States were unable to reach an agreement that would replace domestic AD and CVD laws with jointly agreed rules regarding dumping and subsidy disciplines.”); Homer E. Moyer, Jr., *The Outlook for Chapter 19 Panels: What the Early History Suggests*, 3 S.W. J. L. & TRADE AM. 423, 424 (1996) (“At least two approaches for achieving these objectives were advanced. One was to abandon the dumping laws in favor of competition or antitrust laws; the second was to negotiate a common set of substantive antidumping and subsidy rules. Neither of these proposals succeeded . . . and the negotiations reached an impasse.”) (emphasis added).

resolution that substituted binational panels applying domestic law for domestic courts.¹¹⁷ Chapter Nineteen of the NAFTA reflects precisely such a procedural solution: it sets forth no substantive international rules for antidumping and countervailing duty matters, but relies entirely on the procedural mechanism of binational panels to review antidumping and countervailing duty determinations.

Chapter Eleven, by contrast, prescribes *substantive* standards incorporating rules of international law such as “national treatment” (Article 1102), “most-favored-nation treatment” (Article 1103) and “minimum standard of treatment” (Article 1105), among others. Tembec seeks to have these substantive international law obligations applied to its antidumping and countervailing duty claims. Tembec thus asks this Tribunal to impose on the Parties obligations that they could not – and did not – agree upon. Interpreting the NAFTA in the manner compelled by Article 1901(3) – as providing for Chapter Nineteen as the exclusive forum under the NAFTA for addressing antidumping and countervailing duty matters – is, unlike Tembec’s approach, fully consonant with the circumstances of conclusion of the treaty.

II. THE DETERMINATIONS AT ISSUE DO NOT RELATE TO TEMBEC’S ALLEGED INVESTMENTS WITHIN THE MEANING OF ARTICLE 1101(1)

Tembec’s claims fall outside the scope of the investment chapter and the NAFTA Parties’ consent to arbitrate investment disputes in accordance with the procedures set forth in Section B of Chapter Eleven. Tembec alleges as its relevant investments its sawmill in Woodsville, New Hampshire,¹¹⁸ its sales office in Hagerstown, Maryland,¹¹⁹ its paper mill in St. Francisville,

¹¹⁷ CANNON, *supra* note 116, at 151.

¹¹⁸ See Statement of Claim ¶ 13(a). Tembec acquired the Woodsville mill in November 2001, after the ITC issued its preliminary injury determination and Commerce issued its preliminary affirmative countervailing duty and antidumping determinations. See Tembec 2003 Ann. Rpt. at 62.

¹¹⁹ See Statement of Claim ¶ 13(b). Tembec incorporated Jager Building Systems (U.S.), Inc., which owns the Hagerstown sales office, in June 2001, after Commerce and the ITC initiated the softwood lumber investigations and

Louisiana,¹²⁰ the duties it paid to U.S. Customs on its softwood lumber exports to the United States, its softwood lumber inventory in the United States, its goodwill, market share and access to the U.S. market, its intellectual property rights and its paper and pulp sales business.¹²¹ The antidumping and countervailing duty determinations Tembec challenges, however, do not relate to those alleged investments in any legally cognizable way. Nor do they relate to Tembec in its capacity as an investor in the United States. Consequently, the Tribunal lacks jurisdiction over Tembec's claims.

Article 1101(1) sets forth Chapter Eleven's scope and coverage. That article provides that Chapter Eleven "applies to measures adopted or maintained by a Party *relating to*: (a) *investors of another Party* [or] (b) *investments of investors of another Party in the territory of a Party*;"¹²² As the tribunal in *Methanex Corp. v. United States of America* held, Article 1101(1) "is the gateway leading to the dispute resolution provisions of Chapter 11. Hence the powers of the Tribunal can only come into legal existence if the requirements of Article 1101(1) are met"¹²³

The determinations at issue do not "relate to" Tembec's investments in the United States within the meaning of Article 1101(1). The determinations do not impose requirements with respect to Tembec's "establishment, acquisition, expansion, management, conduct, operation, and

the ITC made its preliminary injury determination. See State of Delaware, Division of Corporations – Online Services, at <http://sos-res.state.de.us/tin/GINameSearch.jsp> (last visited Feb. 4, 2005); see also Jager Building Systems Inc., A History of Jager, at <http://www.jagerbuildingsystems.com/english/history.aspx> (last visited Feb. 4, 2005), (indicating acquisition of Hagerstown business in July 2001).

¹²⁰ See Statement of Claim ¶ 13(k). Tembec incorporated Tembec USA LLC in May 2001 and acquired the paper mill in June 2001, after Commerce and the ITC initiated the softwood lumber investigations and the ITC made its preliminary injury determination. See Tembec 2003 Ann. Rpt. at 19, 62; see also State of Delaware, Division of Corporations – Online Services, at <http://sos-res.state.de.us/tin/GINameSearch.jsp> (last visited Feb. 4, 2005).

¹²¹ See Statement of Claim ¶ 13(c)-(j), (l). The United States reserves the right to demonstrate that several of these alleged items are not "investments" as defined in NAFTA Article 1139.

¹²² NAFTA art. 1101(1)(a)-(b) (emphasis added).

¹²³ *Methanex Corp. v. United States of America, First Partial Award of Aug. 7, 2002* ¶ 106 (Aug. 7, 2002), 14:6 WORLD TRADE & ARB. MATERIALS 109, 156 (Dec. 2002) (hereinafter "*Methanex First Partial Award*").

sale or other disposition” of those investments.¹²⁴ For instance, they do not regulate Tembec USA LLC’s production or sales of paper, or Temboard Sales Inc.’s ability to acquire, expand, operate or sell its pulp sales business. Nor do the determinations impose obligations on Tembec Inc. with respect to its investment activities in the United States. Rather, the determinations impose duties on softwood lumber as a condition to that lumber being exported from Canada to the United States. The duties thus “relate to” Tembec solely in its capacity as a cross-border exporter of goods.

Tembec alleges that the duties have had an incidental *effect* on its U.S. investments.¹²⁵ The alleged *effects* of those duties on Tembec’s U.S. investments, however, even if proven, would be insufficient alone to bring Tembec’s claim within the scope of NAFTA Chapter Eleven. As the *Methanex* tribunal recognized, “the phrase ‘relating to’ in Article 1101 . . . signifies something more than the mere *effect* of a measure on an investor or an investment and that it requires a *legally significant connection* between them”¹²⁶ In rejecting the proposition that a mere effect of a government measure may confer jurisdiction, the *Methanex* tribunal noted that such an interpretation would subject the NAFTA Parties to virtually limitless liability under Chapter Eleven.¹²⁷

¹²⁴ NAFTA art. 1102(2); *see also id.* arts. 1102(1), 1103(1) & (2).

¹²⁵ *See, e.g.*, Statement of Claim ¶ 13(a) (“Due to the adverse impact on the markets caused by the unlawful duties, Tembec Woodsville was forced to close in July 2003.”); *id.* ¶ 20 (“The imposition of tariffs at the border can affect the prices foreign competitors charge in the U.S. market or the volume of its sales.”); *id.* ¶ 66 (“The United States’ actions limiting Eastern White Pine and Finger-Jointed Flangestock supply from Canada created a market uncertainty over supply that drove consumers to alternative materials and damaged Tembec’s investment in Tembec Woodsville and Jager (US)”); *id.* ¶ 67 (“As a result of the supply uncertainty for Eastern White Pine caused by the unlawful duties, Tembec Woodsville lost so many customers that it was forced to close in July 2003.”); *id.* ¶ 44 (“Commerce’s improper finding of critical circumstances adversely affected Tembec’s . . . relations with its U.S. customers.”); *id.* ¶ 13(k) (“The duties have diverted cash flow to U.S. Customs and thus harm the viability and plans for the St. Francisville paper mill.”).

¹²⁶ *Methanex* First Partial Award ¶ 147 (emphasis added).

¹²⁷ The *Methanex* tribunal stated:

If the threshold provided by Article 1101(1) were merely one of “affecting,” as *Methanex* contends, it would be satisfied wherever any impact was felt by an investor or an investment. For example, in this case, the test could be met by suppliers to *Methanex* who suffered as a result of

Likewise, if Chapter Eleven were available for any market participant who is merely *affected* in some way by the imposition of antidumping or countervailing duties, the NAFTA Parties would be subject to damage claims every time they applied their trade remedy laws, whether or not such application was consistent with Chapter Nineteen. The application of an effects test with respect to the softwood lumber determinations at issue, for example, would allow any Canadian- or Mexican-owned business that uses softwood lumber, such as paper manufactures, home builders, furniture makers or lumber retailers, or any other business in any way affected by changes in softwood lumber prices attributable to the duties, to bring a claim for damages under the investment chapter of the NAFTA. The Parties did not intend to confer so broad a range of jurisdiction under Chapter Eleven.

That Chapter Eleven does not provide a remedy with respect to matters covered in Chapter Nineteen – namely, “the appl[ication] of [a] Party’s antidumping law and countervailing duty law to goods imported from the territory of any other Party”¹²⁸ – is plain from the chapter’s text. *First*, had the NAFTA Parties intended Chapter Eleven to govern such matters, one would expect that intent to be made plain in Chapter Eleven’s “Scope and Coverage” provision, Article 1101.¹²⁹ Article 1401(1), for example, which defines the scope and coverage of the financial services chapter, specifies that “[t]his Chapter applies to measures . . . relating to . . . investors of another party, and investments of such investors, in financial institutions in the Party’s territory; and . . .

Methanex’s alleged losses, suppliers to those suppliers and so on, towards infinity. . . . In a legal instrument such as the NAFTA, Methanex’s interpretation would produce a surprising, if not an absurd, result. The possible consequences of human conduct are infinite, especially when comprising acts of government agencies.

Methanex First Partial Award ¶¶ 137-38.

¹²⁸ NAFTA art. 1902(1).

¹²⁹ *See Application of Convention on Prevention and Punishment of Crime of Genocide* (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325, 342 ¶ 34 (Sept. 13) (an “unequivocal indication” of a ‘voluntary and indisputable’ acceptance” by a sovereign of dispute resolution over the subject matter is necessary for a tribunal’s jurisdiction to attach).

cross-border trade in financial services.”¹³⁰ Likewise, Article 300, which sets forth Chapter Three’s scope and coverage, provides that “[t]his Chapter applies to *trade in goods* of a Party.”¹³¹ Article 1101(1)’s lack of any reference to antidumping or countervailing duty matters, or to cross-border trade generally, confirms that the Parties did not intend Chapter Eleven to impose obligations on a NAFTA Party with respect to that Party’s application of its trade laws to goods sought to be exported from another Party.

Second, Chapter Eleven’s substantive provisions confirm that the investment chapter governs measures that accord treatment to investments and investors, and does not govern the imposition of antidumping and countervailing duties on the exportation of goods from another Party. With respect to national treatment, for example, Article 1102(2) provides that “[e]ach Party shall accord to *investments* of investors of another Party treatment no less favorable than it accords, in like circumstances, to its own investors”¹³² And Article 1102(1) likewise requires that Parties “accord to investors of another Party treatment . . . *with respect to . . . investments*.”¹³³ Article 301, by contrast, provides that “[e]ach Party shall accord national treatment to the *goods* of another Party in accordance with Article III of the [GATT].”¹³⁴ Had the Parties intended Chapter Eleven to impose national treatment obligations on them with respect to the application of their trade remedy laws to goods sought to be exported from another Party, as opposed to in-country investments, Article 1102 would have provided so explicitly.

¹³⁰ NAFTA art. 1401(1)(b)-(c).

¹³¹ *Id.* art. 300 (emphasis added).

¹³² NAFTA art. 1102(2) (emphasis added).

¹³³ *Id.* art. 1102(1) (emphasis added).

¹³⁴ *Id.* art. 301(1).

Tembec's claims do not remotely resemble the types of claims the NAFTA Parties consented to submit to Chapter Eleven arbitration. The determinations at issue do not "relat[e] to" Tembec's investments in the United States, or to Tembec in its capacity as a U.S. investor, within the meaning of Article 1101(1). Rather, the determinations relate solely to the treatment accorded to softwood lumber as a condition to that lumber being exported from Canada to the United States. Tembec's claims therefore fall outside the scope of the NAFTA's investment chapter, and this Tribunal thus lacks jurisdiction under that Chapter to decide those claims.

III. TEMBEC HAS FAILED TO COMPLY WITH THE CONDITION PRECEDENT TO THE SUBMISSION OF A CLAIM IN ARTICLE 1121

Finally, the Tribunal lacks jurisdiction over Tembec's claims because Tembec has failed to comply with the waiver requirement in NAFTA Article 1121. Article 1121 is titled "Condition Precedent to Submission of a Claim to Arbitration." It sets forth conditions that must be met for a claim to be submitted to arbitration under Chapter Eleven. One of those conditions is that a claimant must waive its right to "initiate or continue . . . *any proceedings* with respect to the measure . . . alleged to be a breach [of Section A of Chapter Eleven of the NAFTA] except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party."¹³⁵ The NAFTA Parties' consent to Chapter Eleven arbitration is subject to the fulfillment of this requirement by the claimant.¹³⁶ Without a valid waiver, there is no consent of the parties necessary for a tribunal to assume jurisdiction over a dispute.¹³⁷

¹³⁵ NAFTA art. 1121(1)(b) (emphasis added). The waiver requirement applies not only to domestic fora, but to "any proceedings" applying "other dispute settlement procedures." *Id.*; see also U.S. Statement of Administrative Action at 596 (waiver obligation applies with respect to "any actions in local courts *or other fora*") (emphasis added).

¹³⁶ See NAFTA art. 1122 ("Each Party consents to the submission of a claim to arbitration *in accordance with the procedures set out in this Agreement.*") (emphasis added); see also *Waste Management Award* ¶ 16 ("[F]ulfillment,

Compliance with Article 1121 requires that the claimant not only provide a written waiver,¹³⁸ but that it *act consistently with that waiver* by abstaining from initiating or continuing proceedings with respect to the same measures in another forum. All three NAFTA Parties have confirmed in submissions to NAFTA tribunals that a claimant's failure to terminate parallel claims invalidates any purported waiver under Article 1121. The United States has stated its position in this submission and in its Statement of Defense on Jurisdiction in this proceeding. In *Waste Management, Inc. v. United Mexican States*, Canada stated "[i]t follows from a good faith interpretation of this obligation [in Article 1121] that the investor is required to *act in conformity with the waiver* that it is required to produce. In other words, *the waiver must be made effective by the investor.*"¹³⁹ And Mexico likewise confirmed in that same case that "[t]he claimant's refusal to provide a clear waiver, *and to abide by it*, must lead to the conclusion that it has not consented to the resolution of the dispute through arbitration."¹⁴⁰

These submissions constitute a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" within the meaning of Article 31(3)(a) of the Vienna Convention of the Law of Treaties.¹⁴¹ Under the Vienna Convention, such

inter alia, of the prerequisites laid down in Article 1121 would translate as consent by the NAFTA signatory parties to the dispute settlement procedure established under NAFTA Chapter XI, Section B.").

¹³⁷ See *Waste Management Award* ¶ 14 ("[I]t is fulfilment of NAFTA Article 1121 conditions precedent by an aggrieved investor that entitles this Tribunal to take cognisance of any claim forming the subject of arbitration held in accordance with the dispute settlement procedure established under Chapter XI"); see also *Mondev Int'l Ltd. v. United States of America, Award on Jurisdiction*, ICSID Case No. ARB(AF)/99/2 ¶ 44 (Oct. 11, 2002) ("It may be that a distinction is to be drawn between compliance with the conditions set out in Article 1121, which are specifically stated to be 'conditions precedent,' and other procedures referred to in Chapter 11. Unless the condition is waived by the other Party, non-compliance with a condition precedent would seem to invalidate the submission").

¹³⁸ See NAFTA Article 1121(3) ("[A] waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.").

¹³⁹ *Waste Management*, Canada Article 1128 Submission ¶ 8.

¹⁴⁰ *Waste Management Inc. v. United Mexican States, Counter-Memorial Regarding the Competence of the Tribunal of The United Mexican States* (Nov. 5, 1999) ¶ 98 (emphasis added).

¹⁴¹ See Vienna Convention art. 31(3)(a).

an agreement of the parties must be taken into account by the Tribunal in interpreting the NAFTA.¹⁴²

Moreover, the tribunal in *Waste Management* dismissed Waste Management's claims on the basis that the claimant failed to comply with the condition precedent in Article 1121 by continuing to pursue its claims in the Mexican courts after it submitted its written waiver.¹⁴³ The tribunal explained that Article 1121 requires that the claimant affirmatively “drop[] or desist[] from initiating parallel proceedings before other courts or tribunals.”¹⁴⁴ This obligation arises, the tribunal confirmed, immediately upon the submission of the claimant's waiver.¹⁴⁵

The same result obtains here. Tembec provided written waivers on April 5, 2004. In those waivers, Tembec pledged to “waive [its] right to initiate or continue . . . any proceedings with respect to the measures” at issue in this case.¹⁴⁶ Tembec's subsequent conduct, however, confirms that it has no intent to honor those waivers. Tembec continues to this day – nearly ten months after submitting the waivers – to prosecute its claims before bi-national panels constituted under Chapter

¹⁴² *Id.* (“There shall be taken into account, together with the context . . . any subsequent agreement between the parties . . .”) (emphasis added).

¹⁴³ See *Waste Management Award* ¶ 31.

¹⁴⁴ *Waste Management Award* ¶ 20; see also *SGS Société Générale de Surveillance S.A. v. Pakistan, Decision on Jurisdiction*, ICSID Case No. ARB/01/13 (Aug. 6, 2003) ¶ 176 (NAFTA Article 1121 “requires that the would-be claimant must waive its ‘right to initiate or continue before any administrative tribunal or court’ . . . and must desist from pursuing claims for damages in relation to such measure.”) (emphasis added); *Waste Management Award* ¶ 14 (“[I]t thus falls to this Tribunal: to monitor the production . . . of the waiver, in the terms laid down by NAFTA Article 1121; and, in addition, when it comes to ascertaining the existence of a genuine show of intent in line with the terms required in the waiver, to evaluate the *conduct* of the waiving party vis-à-vis effective compliance therewith.”) (emphasis added); *id.* ¶ 31 (Article 1121 “requires the waiving party to abstain from initiating or continuing legal proceedings”); *id.* ¶ 18 (a valid waiver “entails exercise of the power of disposal by the holder thereof in order to bring about this legal effect”); *id.* ¶ 28 (“Article 1121 . . . expressly proscribes the initiation or continuation of proceedings under the law of either party with respect to a measure allegedly breaching the provisions referred to in Article 1116 of NAFTA.”).

¹⁴⁵ See *Waste Management Award* ¶ 19 (“Waste Management submitted notice of request for arbitration to the Secretary-General of ICSID on 29 September 1998, so that it was from this date onwards that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals with respect to those measures pleaded as constituting a breach of the provisions of the NAFTA.”).

¹⁴⁶ See Letter from Mark A. Cymrot to Barton Legum, dated April 5, 2004 (attaching waivers).

Nineteen of the NAFTA in which it seeks return of the duties it has paid pursuant to the antidumping and countervailing duty orders that it challenges in this arbitration. Tembec's failure to comply with the condition precedent in Article 1121 therefore deprives this Tribunal of jurisdiction.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Tribunal render an award in favor of the United States and against Tembec, dismissing Tembec's claims in their entirety and with prejudice. The United States further requests that, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Tembec be required to bear all costs of the arbitration, including costs and expenses of counsel.

Respectfully submitted,

Mark A. Clodfelter
*Assistant Legal Adviser for International
Claims and Investment Disputes*
Andrea J. Menaker
*Chief, NAFTA Arbitration Division, Office
of International Claims and Investment
Disputes*
Mark S. McNeill
Jennifer I. Toole
*Attorney-Advisers, Office of International
Claims and Investment Disputes*
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

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