

**UNDER CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT**

**TEMBEC INC.
TEMBEC INVESTMENTS INC.
TEMBEC INDUSTRIES INC.,**

Claimants/Investors

v.

THE GOVERNMENT OF THE UNITED STATES OF AMERICA,

Respondent/Party

**TEMBEC'S REJOINDER TO THE JURISDICTIONAL
OBJECTIONS OF THE UNITED STATES**

Elliot J. Feldman
Mark A. Cymrot Michael S. Snarr
Ronald J. Baumgarten BAKER &
HOSTETLER LLP 1050
Connecticut Avenue, N.W.
Washington, D.C. 20036 Counsel
for Claimants

April 28, 2005

TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENT	4
I. ARTICLE 1901(3) DOES NOT BAR TEMBEC'S CHAPTER 11 CLAIM	4
A. The Ordinary Meaning of Article 19 Does Not Provide For Exclusive Jurisdiction	5
B. Tembec Agrees With The U.S. Statement of Administrative Action; The United States Apparently Does Not	8
C. "With Respect To" Refers To The Laws, Not The Applications	12
D. Administrative Practice In The Definition Of Law Refers to Precedential Materials	13
Article 1902(2) Supports Tembec's Interpretation.....	15
F. The United States And The Other NAFTA Parties Did Not Intend Article 1901(3) To Bar Claims Under Chapter 11 For Abuse Of Antidumping and Countervailing Duty Laws	16
G. Tembec Responded To The U.S. Arguments To Which Tembec Allegedly Did Not Respond	19
II. THE UNITED STATES HAS MISTAKEN TEMBEC FOR METHANEX; THE U.S. MEASURES RELATE TO TEMBEC AND ITS INVESTMENTS	22
III. THE UNITED STATES HAS NOT SHOWN ANY FAILURE TO COMPLY WITH ARTICLE 1121	27
IV. CONCLUSION	31
ATTACHMENT 1	after 31

INTRODUCTION

A thesaurus of adverbs and adjectives cannot replace reasoning. The United States variously accuses Tembec's legal arguments of being "without merit" (eight times), "unsupportable," and "unmeritorious;" they are said to be "baseless;" "flawed," "incorrect," "inconceivable," "untenable," "unsound;" they "cannot withstand scrutiny;" they "must fail;" they are "contrary to common sense;" "def[y] logic;" are "unavailing," and "hollow rhetoric." Several of these terms appear multiple times. Sometimes these terms constitute the entire argument.

The internal contradictions of the United States' Reply make it especially challenging. At page 4, the United States argues that every word in an international agreement must have its own meaning, but at page 5 some words "encompass" other words so that different words all take on the same meaning (according to the United States, "retain," "apply," "change" and "modify" all mean the same thing, and the contrary view - that these words may indeed have their own meaning - is "baseless"). On page 5 the U.S. Statement of Administrative Action ("SAA") is authoritative (footnote 7), but on page 6 "it cannot be used, as Tembec suggests, to override the Treaty's express terms" and is merely "a report to Congress that accompanied the implementing legislation for the NAFTA." Issues joined by Tembec in its Counter-Memorial are sometimes declared unanswered, with the answer entirely ignored. For example, the United States insists that without administrative protective orders Chapter 11 cannot comprehend trade disputes, yet Tembec already has noted that the WTO seems to

have managed for a decade without them. Through this device - ignoring the contents of the Counter-Memorial - arguments are resurrected and repeated, but there is not much that might be considered new.

The essential argument of the United States is that Article 1901(3) bars Canadian investors from seeking damages pursuant to Chapter 11 of NAFTA when they allege injuries arising from U.S. application of its antidumping and countervailing duty laws. In two briefs, the United States has attempted to marshal evidence to support this thesis.

The core problem with the United States' position is that there is no evidence to support it, and there is substantial evidence to the contrary. The United States argues, for example, that both Article 1901(3) and Chapter 11 were new to NAFTA (from the prior Canada-United States Free Trade Agreement), but the United States finds not a word anywhere demonstrating any connection: in thousands of pages of *travaux preparatoires* there is not a single word linking Article 1901(3) to Chapter 11, nor is there any link in the SAA presented by the Administration when it introduced NAFTA for congressional implementation.

The contrary evidence is significant. Article 1901(3) fits into a logical statutory scheme with subsequent Articles 1902, 1903, and 1904. That scheme neither makes reference to Chapter 11, nor needs to do so to make sense on its own. The ordinary meaning of Articles 1901 and 1902 separate the laws; from applications of the laws, and amendments to the laws, and treat each differently. Nor is there any reference in Chapter 11 to Chapter 19. There is no evidence that the authors of NAFTA

¹ See Tembec Counter-Memorial at 24, n.33.

linked the two chapters in any way at all. The SAA provides an explanation for the addition of Article 1901(3) in NAFTA, and it has nothing at all to do with Chapter 11: "Articles 1901 and 1902 make clear that each country retains and can amend their antidumping law and countervailing duty law." The United States claims this explanation is inaccurate but provides no support for its position.

The best the United States seems able to do at this point is to focus on a *chapeau* that was carried over from the Canada-United States Free Trade Agreement to NAFTA unchanged, and ascribe to it the kind of outsized importance the United States has ascribed to the undefined term "with respect to" in both its briefs. The interpretation of the *chapeau*, however, needs to be consistent with the ordinary meaning of the articles and the explanation for Article 1901(3) provided by the SAA. The explanation offered by the United States for the *chapeau* is unrelated to both the SAA and the ordinary meaning of Articles 1901, 1902, and 1903.

The second main argument advanced by the United States, repeated in its second brief, is that Tembec's waivers required unilateral disarmament and acceptance of the damages inflicted by the American abuse of the trade laws. This position requires the substitution of semantic ambiguity for simple meaning, arguing, for example, that because Tembec is the "complainant" when it appeals adverse and improper determinations of agencies, it is "initiating" legal actions instead of defending itself. Tembec thoroughly answered this argument in its Counter-Memorial.

This rejoinder, then, will concentrate on those few items that might be considered new in the United States' Reply. Those items include the argument that Articles 1901 and 1902 are, by Tembec's interpretation, redundant; that Tembec is

trying to relitigate challenges to final determinations underway in Chapter 19 (not really new, and already answered, but perhaps worthy of an additional word); that the not-yetpronounced determination in an ongoing investigation is already "administrative practice;" that "a written waiver in writing" is not an adequate waiver; that the Chapter 19 and Chapter 11 actions are "parallel" (again not new, but perhaps repackaged); and that the argument about the "circumstances of conclusion of the NAFTA," whatever those in fact may be and whatever the argument is, are not addressed. For those assertions already answered, Tembec provides a summary of its responses in Part I.G, below. This brief otherwise deals with these "new" arguments.

ARGUMENT

I. ARTICLE 1901(3) DOES NOT BAR TEMBEC'S CHAPTER 11 CLAIM

The United States' argument that Chapter 19 provides "exclusive jurisdiction" over NAFTA claims with respect to the antidumping and countervailing duty laws is divorced from the ordinary meaning and purpose of Articles 1901 and 1902, either in the context in which they are written or in the context of the NAFTA negotiations. In claiming that Article 1901(3) is an exclusive jurisdiction provision, the United States ignores the ordinary meaning of the definition given for "antidumping law or countervailing duty law;" disregards the distinctions made among the law in Article 1901(3), applications of the law in Article 1902(1), and changes to the laws in Article 1902(2); and contradicts the United States' own Statement of Administrative Action.

A. The Ordinary Meaning of Article 19 Does Not Provide For Exclusive Jurisdiction

Were Article 1901(3) intended as an exclusive jurisdiction provision, that purpose could have been stated in plain language and in one article. The Parties, instead, separated Article 1901(3), 1902(1) and 1902(2), which means the articles have separate meanings and purposes.

Article 1901(3) allows the Parties to retain their "laws," in the narrow way "law" is defined. "With respect to" the laws refers only to the "statute, legislative history, regulations, administrative practice, and judicial precedents." The definition of "law" in Articles 1902(1) and 1904(2) could have, but does not, refer to any aspect of applying or enforcing the laws, such as investigations or orders. Tembec's claims do not seek to impose obligations on the United States "with respect to" the laws.

In Article 1902(1), the Parties reserved "the right to apply" their laws, but this article does not contain the same limitations as Article 1901(3). The Parties are not insulated from obligations imposed by other NAFTA chapters in applying the laws.² The Parties, thus, must conduct investigations and impose orders in a manner consistent with other NAFTA chapters, including Chapter 11. Tembec's claims principally arise from the discriminatory and inequitable ways in which the United States has conducted the softwood lumber investigations and imposed duty orders; Article 1902(1) does not

² The decision cited by the United States in *UPS v. Canada* is of no consequence to Tembec's arguments here. The UPS tribunal never ruled on whether NAFTA recognizes a distinction between law and its application, nor could it because the claim that allegedly made such an argument in reference to Article 2103 was withdrawn. See *United Parcel Service Inc. v. Government of Canada*, Award on Jurisdiction (Nov. 22, 2002) at ¶¶ 116-117. Moreover, the distinction between the law and its application is explicit in Chapter 19, and should not be wiped out of the Agreement based upon a decision as to an abandoned claim, involving a different provision of NAFTA, that the UPS tribunal never did make.

bar those claims, and the Chapter 19 and Chapter 11 proceedings are not "parallel" because one concerns final determinations and the other the conduct of the agencies.

In Article 1902(2), the Parties reserved their rights to change or modify their laws, but with limitations. Tembec has one claim that challenges the impact of the Byrd Amendment on the softwood lumber investigations. The United States did not comply with Article 1902(2) when it enacted the Byrd Amendment.³ Tembec is seeking damages for the impact that the Byrd Amendment has had on the investigations and, therefore, on Tembec and its U.S. investments.

The distinct role of each article is logical: when NAFTA was negotiated, the laws were known to the Parties; the ways in which the laws could be applied (or misapplied) or amended were unknowable. The Parties, therefore, treated the knowable differently than the unknowable. The Parties negotiated the knowable, specific changes to their laws, as set forth in Annex 1904.15, including the antidumping law and countervailing duty law. Once the Parties had enacted the negotiated amendments, Article 1901(3) insulated the Parties from the obligations imposed by other NAFTA chapters with respect to the laws. The Parties had made their deal and were preserving it through Article 1901(3). The exception in Article 1901(3) for the Entry into Force provision, Article 2203, was necessary because the Parties were

³ The amendment does not specifically refer to Canada and Mexico, which makes it inapplicable to them under Article 1902(2)(a); the United States did not notify Canada and Mexico as required by Article 1902(2)(b); the United States, having not notified Canada, also did not afford consultations, violating Article 1902(2)(c); and the WTO has found the Byrd Amendment to violate the United States' WTO obligations, which means the amendment does not conform to Article 1902(2)(d). The impact of these violations has been that the United States has discriminated against Tembec in the investigations.

entitled to satisfy themselves that the agreed amendments had been made before the treaty went into force.⁴ Hence, Article 1901 addressed what was knowable.

In Article 1902, the Parties dealt with the unknowable. They reserved their rights to apply their laws, but they did not protect future actions, what could not be known or foreseen, from obligations imposed by other NAFTA chapters. They also addressed the other unknowable, amendments to the laws, and imposed restrictions on changes or modifications. The Parties took three articles to make the distinctions among the laws, their applications, and their amendments because the three articles contain different rights and limitations.

Only the United States' interpretation of Article 1901(3), not the article itself, makes Articles 1901 and 1902 redundant. Were the application of the law "encompassed" in the retention of the law, Article 1902 would have no purpose. It is the

⁴ Under U.S. law, the President was required to review the changes Mexico made to its law before NAFTA could be implemented:

(b) Conditions for entry into force of Agreement. The President is authorized to exchange notes with the Government of Canada or Mexico providing for the entry into force, on or after January 1, 1994, of the Agreement for the United States with respect to such country at such time as

(1) the President

(A) determines that such country has implemented the statutory changes necessary to bring that country into compliance with its obligations under the Agreement and has made provision to implement the Uniform Regulations provided for under article 511 of the Agreement regarding the interpretation, application, and administration of the rules of origin, and

(B) transmits a report to the House of Representatives and the Senate setting forth the determination under subparagraph (A) and including, in the case of Mexico, a description of the specific measures taken by that country to

(i) bring its laws into conformity with the requirements of the Schedule of Mexico in Annex 1904.15 of the Agreement, and

(ii) otherwise ensure the effective implementation of the binational panel review process under chapter 19 of the Agreement regarding final antidumping and countervailing duty determinations; and

(2) the Government of such country exchanges notes with the United States providing for the entry into force of the North American Agreement on Environmental Cooperation and the North American Agreement on Labor Cooperation for that country and the United States.

19 U.S.C. § 3311(b).

distinction among the three concepts of law, applications, and amendments that gives Article 1902 its purpose.

Tembec Agrees With The U.S. Statement of Administrative Action; The United States Apparently Does Not

The SAA's explanations of the relevant provisions of both Chapter 19 and Chapter 11 are consistent with Tembec's interpretation of Article 1901(3), but not with the United States' arguments. The SAA states: "Articles 1901 and 1902 make clear that each country retains its domestic antidumping and countervailing duty laws and can amend them."⁵ The United States now disputes its own statement but gives no alternative explanation for this unambiguous statement to Congress.

The United States relies on the SAA to support its arguments in many instances,⁶ but when it comes to the SAA's commentary on the meaning and purpose of Articles 1901, 1902 and 1903, the United States discounts the SAA as merely a "report to Congress" that "briefly summarizes" certain NAFTA provisions.' Tembec agrees with the United States that "the SAA may shed light on the meaning of certain provisions of the NAFTA."⁵ The SAA says nothing about Article 1901 being intended to exclude Chapter 11 claims, or providing exclusive jurisdiction for claims arising under the antidumping or countervailing duty laws. It does say that Articles 1901 and 1902 are

⁵ North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1st Sess., at 194 (1993).

⁶ See, e.g., U.S. Objection to Jurisdiction at 5 n.7, 6 n.11, 20 n.96, 27 n.113; U.S. Reply at 5 n.7, 10 n.26.

Under U.S. law, the NAFTA SAA is considered more authoritative than legislative history such as Senate or House committee reports. Congress formally adopted the SAA as a matter of law. See 19 U.S.C. § 3311(a)(2).

⁶U.S. Reply at 6.

related provisions and have a more modest purpose than the United States ascribes to Article 1901(3). It says nothing about exclusive jurisdiction.

The SAA description for Chapter 11 (which Tembec cited but the United States ignored in its response) is also consistent with Tembec's interpretation when it says:

The chapter applies to all government measures relating to investment, with the exception of measures governing financial services, which are treated in Chapter Fourteen.⁹

The United States takes the position that the SAA does not mean what it says, but the United States does not explain why the SAA explains Article 1901 and Chapter 11 differently than the United States understands it now.

The United States, attempting to downplay the significance of the U.S. administration's "report to Congress," quotes the following language:

Except for certain innovations introduced in the NAFTA that are described below, the Statement of Administrative Action accompanying the CFTA Implementing Act ... fully describes the panel system that will be established under the NAFTA.¹⁰

The SAA continues where the United States left off:

This Statement concentrates on the new elements of the system introduced by the NAFTA and certain elements of the system common to both the CFTA and the NAFTA that warrant

emphasis."

The United States said that Article 1901(3) was an innovation in NAFTA's Chapter 19 resulting from the introduction of Chapter 11, but nowhere in the SAA for

⁹ SAA at 140.

¹⁰ U.S. Reply at 6 n.10 (quoting SAA at 194).¹¹
SAA at 194.

Chapter 19 (or in any other Chapter of NAFTA) is it written that the United States had introduced any provision to preclude Chapter 11 claims. The innovation of Article 1901(3) was the required amendments to the Parties' laws in Annex 1904.15 and Article 2203, to which specific reference is made in Article 1901(3).

The United States recommends reference to the Statement of Administrative Action of the Canada-U.S. Free Trade Agreement ("CFTA") to better understand Article 1901(3), but as the United States points out, CFTA had no Article 1901(3) or comparable language in Chapter 19. A comparison of the two Statements of Administrative Action reaffirms that the United States viewed NAFTA 1901(3) as a part of the statutory scheme in Articles 1901 and 1902 to allow countries to "retain and amend" their own antidumping and countervailing duty laws. The CFTA statement says that, "Under Article 1902, each party retains the right to apply its national AD and CVD laws to goods of the other party, and also reserves the right to amend those laws." It says nothing about Article 1901 which, at that time, contained only Articles 1901(1) and 1902(2), which are identical in the two agreements. Then, when Article 1901(3) was introduced in NAFTA, the SAA stated that not just 1902, but "*Articles 1901 and 1902* make clear that each country retains its domestic antidumping and countervailing duty laws and can amend them."¹²

The SAA also states that NAFTA Articles 1901, 1902 and 1903 "are identical to Articles 1901 through 1903 of the CFTA, except for technical changes necessary to accommodate the addition of a third country."¹³ When one

¹² *Id.* (emphasis added).

¹³ *Id.*

compares Articles 1901, 1902 and 1903 from the CFTA and the NAFTA, it becomes apparent that the only substantive difference among these otherwise identical articles is the addition to NAFTA of Article 1901(3).¹⁴ Article 1901(3), therefore, must be the "technical change" to which the SAA refers.

The introduction of Article 1901(3) in NAFTA, which is, after all, not the only change from CFTA to NAFTA, was never prompted by the inclusion of investor-state arbitration under Chapter 11, but instead, according to the U.S. administration, was a "technical change" made to accommodate the addition of Mexico to dispute settlement under Chapter 19. Article 1901(3) concerns retention of the Parties' own antidumping law and countervailing duty law, and insulates the Parties from any requirements to change that law by virtue of obligations imposed by other chapters in NAFTA. There is but one exception, referenced specifically in connection with Entry Into Force under Article 2203.

The title to Article 1902, to which the United States gives great significance, is a carryover from CFTA. "Retention of Domestic Antidumping Law and Countervailing Duty Law," however, is consistent with the interpretation of the purpose of Article 1902 as expressed in the SAA and accepted by Tembec. Following the United States' logic, one would have to conclude that Article 1902 has nothing to do with applications of law or amendments of law because, notwithstanding their place in the text of Article 1902, and their plain language, there is no mention of them in the *chapeau* of 1902.

¹⁴ See Attachment 1, comparing text of Articles 1901, 1902 and 1903 of the Canada-U.S. Free Trade Agreement and NAFTA.

C. "With Respect To" Refers To The Laws, Not The Applications

The United States' argument for the powerful meaning of Article 1901(3) as a bar to Chapter 11 actions is built around the ambiguous phrase "with respect to." The United States, however, has preferred convenience to consistency in this argument.

The United States has equated the phrases "with respect to" and "in relation to," yet gives a very broad interpretation of "with respect to" in Article 1901(3), while giving a very narrow interpretation of "relating to" in Article 1101.¹⁵ Were the interpretations reversed, the United States could not advance its arguments for either article. It is but convenience that in one instance the interpretation is broad, in the other narrow.

The objects of the prepositional phrases "with respect to" and "relating to" are more important than the connecting phrases, and in both instances - in Chapter 19 and in Chapter 11 - they are terms defined where they are located.

The object of "with respect to" in Article 1901(3) is "antidumping law or countervailing duty law," which is defined in the immediately following Article 1902(1): "Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents."¹⁶ The United States argues that this sentence could not have been

¹⁵ See U.S. Reply at 30 (interpreting "relating to" to mean a "legally significant connection").

¹⁶ The objects of "relating to" in Article 1101 are "investors of another Party" and "investments of investors of another Party in the territory of the Party." Investors of a Party are defined in Article 1139 to mean "a national or an enterprise of such Party, that seeks to make, is making or has made an investment." Investments of an investor of a Party are defined in Article 1139 to mean "an investment owned or controlled directly or indirectly by an investor of such Party." The definition of investment includes U.S. subsidiaries; tangible property owned in the United States and "used for the purpose of economic benefit or other business purposes;" "intangible property" such as good will; and intellectual property.

(continue)

intended as a definition of "antidumping law and countervailing duty law" because it was not presented separately in Article 1911, but the United States does not contend that the sentence could have any meaning other than definitional.¹⁷

D. Administrative Practice In The Definition Of Law Refers to Precedential Materials

To expand the purpose of Article 1901(3), the United States argues that the phrase "administrative practice" includes the determinations, orders, and U.S. Government actions about which Tembec has complained. No authority is cited in support of this assertion, and it is inconsistent with the ordinary meaning of Article 1904(2), which provides that "administrative practice" can be used "to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority." A panel could not rely on a final determination as law while it was in the process of reviewing the very same final determination.¹⁸

(continued)

Antidumping and countervailing duty orders preventing the supply of goods from a Canadian investor to its U.S. investments, for example, are measures relating to the investor and those investments.

"The United States contends that the definition had to be in Article 1911, making the location of language critical, yet the United States also argues, as a matter of statutory interpretation, that, "[t]he location of this exception [Article 1901(3)] is legally insignificant." U.S. Reply at 19.

¹⁸ The other aspects of the definition of antidumping and countervailing duty law also refer to interpretative materials concerning the law. The United States uses "legislative history" to interpret statutes. *See, e.g., Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 859863 (1984) (investigating language and structure of statute, canons of statutory construction, and legislative history to ascertain legislators' intent). Regulations interpret and expand upon the law within the authority granted to the administrative agency in the statute. *See id.* at 843-844 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation."). Judicial precedents are used to apply the doctrine of *stare decisis*, which provides that a party in litigation should be treated in the same manner as others similarly situated. *See Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring) ("The doctrine of *stare decisis* protects the legitimate expectations of those who live under the law, and, as Alexander Hamilton observed, is one of the means by which exercise of 'an arbitrary discretion in the courts' is restrained.").

The language in Article 1904(2) is consistent with the manner in which U.S. agencies and courts treat administrative practice.¹⁹ Administrative practice is not precedent that must be followed, but departures from administrative practice must be fully explained. Otherwise, participants in administrative proceedings would have no basis for anticipating how administrative agencies might respond to their conduct, and could not choose actions that would conform with agency expectations. Because predictability is an important value of public administration, administrative practice requires consistency;²⁰ departures are permitted only when circumstances dictate and reasoned explanations are provided.²¹

A fresh determination subject to appeal could not be established administrative practice because it could not provide any predictability. Neither a court,

¹⁹ See, e.g., *Preliminary Results of Antidumping Duty Administrative Review: Extruded Rubber Thread from Malaysia*, 62 Fed. Reg. 6,758, 6,759 (Dep't Commerce Feb. 13, 1997) ("In accordance with section 773(b) of the Act, and longstanding administrative practice [citing prior agency determinations], if over ninety percent of respondent's sales of a given model were at prices above the cost of production, we did not disregard any below-cost sales because we determined that the below-cost sales were not made in substantial quantities."); *Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From Taiwan*, 64 Fed. Reg. 15,493, 15,502 (Dep't Commerce Mar. 31, 1999) ("Through its administrative practice, the Department has developed a reasonable standard for analyzing allegations of middleman dumping."). U.S. courts understand "administrative practice" in the same context. See, e.g., *PPG Indus. Inc. v. United States*, 978 F.2d 1232, 1242 (Fed. Cir. 1992) ("[T]he ITA has a longstanding administrative practice of not reinvestigating a program determined not to be countervailable unless the petitioner presents new evidence justifying reconsideration of a prior finding.").

²⁰ See, e.g., *Slater Steels Corp. v. United States*, Consol.Ct. No. 02-00551, 2005 Ct. Intl. Trade LEXIS 26, at 13 (Ct. Intl Trade Feb. 17, 2005) (noting that "[c]onsistency is a cornerstone of administrative action" and citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) for the proposition that "[t]he level of deference afforded an agency's action ' will depend upon ... its consistency with earlier and later pronouncements.'").

²¹ See *Slater Steels Corp.*, 2005 Ct. Intl. Trade LEXIS 26, at 14 ("Commerce may reach different determinations in separate administrative reviews, but it must either employ the same methodology or give reasons for changing its practice."); *Cinsa, S.A. de C.V. v. United States*, 966 F. Supp. 1230, 1238 (1997) (noting that it is "a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure") (citation omitted); *Hussey Copper, Ltd. v. United States*, 834 F. Supp. 413, 418 (1993) (same); see also *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) ("There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms.").

nor an agency, nor even a party could have been counting on a practice that had not yet taken place.

E. Article 1902(2) Supports Tembec's Interpretation

Article 1902(2) further demonstrates why the right to apply laws does not "necessarily encompass" the right to retain those laws. Article 1902(2) expressly reserves each Party's "right to change or modify its antidumping law and countervailing duty law." The Parties are free to amend their antidumping and countervailing duty laws under Article 1902(2), but not required to amend their laws because of Article 1901(3). Should the Parties choose to amend an antidumping or countervailing duty statute,²² Article 1902(2)(a) states that the amendment may be applied to the goods of another NAFTA Party "only if the amendment specifies that it applies to goods from those Parties. The failure to specify that the amendment applies to the NAFTA Parties does not render the amendment "meaningless," nor does the right to amend the law "necessarily encompass" the right to apply the amendment to the other NAFTA Parties. The United States could, pursuant both to 1902(2)(a) and U.S. statute, amend its antidumping or countervailing duty law and apply it to goods from China, Chile, or any number of other countries, but not to Canada and Mexico without specifying that it applies to them. The United States thus could retain the amended statute, but could not apply it to the other NAFTA Parties.²³

²² The phrase "antidumping law or countervailing duty law" has a defined meaning and was not used carelessly by the Parties in Article 1902. The conditions for amendment in 1902(2) apply not to the "law" but only to the "statute": "Each Party reserves the right to change or modify its antidumping law or countervailing duty law, provided that *in the case of an amendment to a Party's antidumping or countervailing duty statute* [conditions (a) through (d) of 1902(2) must be met.]" (emphasis added).

²³ See also SAA at 203. ("Section 408 of the [NAFTA Implementation Act] implements the requirement of Article 1902 that amendments to the AD and CVD laws shall apply to a NAFTA country only if the amendment so states explicitly.") The Continued Dumping and Subsidy Offset Act of 2000 (the "Byrd

(continue)

F. The United States And The Other NAFTA Parties Did Not Intend Article 1901(3) To Bar Claims Under Chapter 11 For Abuse Of Antidumping and Countervailing Duty Laws

The United States takes the position that no investor-state arbitration provision in any of its free trade agreements would allow claims such as Tembec's for the United States' abuse of its antidumping and countervailing duty laws, and therefore that the United States has not consented to authorize Tembec's claims. In support of this position, the United States has advanced two mutually inconsistent propositions.

The United States wants the Tribunal to conclude that Article 1901(3)'s absence from the CFTA and subsequent appearance in NAFTA is the direct, intended result of the introduction of an investor-state arbitration provision in NAFTA's Chapter 11.²⁴ The United States also wants the Tribunal to believe that the language of Article 1901(3) is unnecessary to prevent any investor-state claims in subsequent free trade agreements for abuse of antidumping or countervailing duty laws.²⁵ The contradiction: "it is difficult to conceive" that abuses of the antidumping and countervailing duty laws could be the subject of investor-state arbitration claims, yet, according to the United

(continued)

Amendment") does not specify that it applies to goods from Canada, yet the United States has applied the Byrd Amendment to Canadian softwood lumber imports by distributing duties to U.S. competitors of Tembec and other Canadian lumber manufacturers.

²⁴ See U.S. Reply at 5-6 ("The inclusion of an investor-State mechanism under the NAFTA, however, opened the door to that possibility, prompting the inclusion of Article 1901(3). Thus, contrary to Tembec's interpretation, Article 1901(3) ... was included to preclude precisely the type of claims brought by Tembec in this arbitration.").

²⁵ See *id.* at 17 ("It is difficult to conceive how such determinations, which accord treatment to goods located in foreign countries that are sought to be imported, could be the subject of investment protection dispute resolution in any of those agreements."); see also *id.* at 30-31 ("Thus, an exclusion for measures governing financial services would need to be made express in Chapter Eleven since the subject matter would otherwise have been covered. By contrast, it is difficult to conceive how antidumping and countervailing duty determinations 'relate to' investments in the host Party's territory within the meaning of Article 1101(1).").

States, Article 1901(3) was written for the sole and express purpose of prohibiting such inconceivable claims.

Were it "difficult to conceive" that an investor and its investments could sue under an investor-state arbitration provision for harm from another country's abusive application of the antidumping and countervailing laws, then Parties could not have conceived the need for Article 1901(3) to bar such claims, and the provision would have had to have been introduced to NAFTA by the United States for some reason other than an intent to prohibit such claims.

Were it conceivable that an investor and its investments could raise Chapter 11 claims for abuses of the antidumping and countervailing laws, then any exclusion from Chapter 11 for such claims "would need to be made express in Chapter Eleven since the subject matter would otherwise have been covered," as the United States claims was done with Chapter 14. Were it conceivable that claims such as Tembec's could arise under NAFTA's Chapter 11 but for the presence of Article 1901(3), the United States would have included provisions such as Article 1901(3) in each of its subsequent BITs and FTAs with other countries, lest investors from those countries try to raise claims similar to Tembec's. The United States thus is arguing that Article 1901(3) was created to prohibit the inconceivable, and for no other reason.

There are other inconsistencies with the United States' asserted intent behind Article 1901(3). The NAFTA SAA discusses "innovations" to Chapter 19 of the CFTA, but does not discuss any attempt to circumscribe Chapter 11 claims as one of those innovations. The United States can point to nothing among thousands of pages of NAFTA *travaux preparatoires* demonstrating that the drafters of Article 1901(3) had

Chapter 11 in mind. Nor does the United States have any internal documents supporting its interpretation of 1901(3), even though the United States apparently was the Party who introduced that language to NAFTA.²⁶

The only "authority" cited in the U.S. Reply for the proposition that the NAFTA Parties did not intend antidumping or countervailing duty determinations to be implicated in any Chapter 11 claim is part of an argument made in a brief by the Government of Canada to the *S.D. Myers* tribunal:

Even tariff measures, such as the imposition of anti-dumping duties, would be subject to challenge under Chapter Eleven provided that some investor or investment was merely affected by the measure.²⁷

That statement, made in the context of an argument that measures relating to trade in goods have no application to investors or investments,²⁸ failed to persuade the *S.D. Myers* tribunal that the investor's Chapter 11 claim was prohibited by Chapter 3 of NAFTA: "The reasoning in the [*Pope & Talbot*] case is sound and compelling. There is no reason why a measure which concerns goods (Chapter 3) cannot be a measure relating to an investor or an investment (Chapter 11)."²⁹ The tribunal's decision in *S.D. Myers*, like *Pope & Talbot*, supports the proposition that tariff measures are indeed subject to challenge under Chapter 11.³⁰ The United States apparently could find

²⁶ See Tembec Counter-Memorial at 29 nn. 44, 45.

²⁷ U.S. Reply at 27 (quoting *S.D. Myers, Inc. v. Government of Canada*, Counter-Memorial of the Government of Canada (Oct. 5, 1999) at ¶ 210).

²⁸ See *S.D. Myers, Inc. v. Government of Canada*, Counter-Memorial of the Government of Canada (Oct. 5, 1999) at ¶¶ 210-211.

²⁹ *S.D. Myers, Inc. v. Government of Canada, Partial Award* (Nov. 13, 2000) at ¶ 294.

³⁰ The United States argues only that Article 1901(3) prohibits Chapter 11 claims implicating antidumping and countervailing duties, not other kinds of duties or tariffs.

nothing more than the unsuccessful argument of one of the NAFTA Parties in a different case as authority for its view of the Parties' intended purpose in writing Article 1901(3).

G. Tembec Responded To The U.S. Arguments To Which Tembec Allegedly Did Not Respond

The United States incorrectly alleges in pages 18-25 of its Reply that Tembec failed to respond to four arguments raised in the Objection to Jurisdiction. Tembec briefly reiterates the responses given in its Counter-Memorial to those four arguments.

The United States contends that Tembec failed to respond to its arguments concerning Article 2004 as to a presumption that states always afford each other more rights in treaties than they afford to private parties.³¹ Tembec responded to the argument on page 23 at note 31 of its Counter-Memorial, even citing to the page in the U.S. Objection where the argument began. Tembec pointed out that the NAFTA Parties provided rights to private parties that they did not retain for themselves. For example, the NAFTA Parties may not sue each other for monetary damages under Chapter 20, but an investor may under Chapter 11. Thus, the fact that NAFTA Parties gave some rights to private parties that they did not retain for themselves means that the exclusion referenced in Article 2004 is not material as to Tembec's Chapter 11 claims here.

The United States argues that Tembec failed to respond to its arguments concerning the use of business proprietary information, then refers obliquely to

³¹ See U.S. Reply at 18-19.

Tembec's response.³² The United States even presumes to know better than Tembec what information Tembec would need to prove its claims.³³ Lest Tembec's response be construed as unclear,³⁴ the United States' argument about business proprietary information is incorrect and irrelevant. As Tembec noted in its Counter-Memorial, "WTO panelists and Appellate Body members routinely perform thorough reviews of U.S. trade proceedings even though they are given no access to APO information."³⁵ Were it true that the United States only consented to dispute settlement proceedings about unlawful trade barriers where it made APO information available, one would have to conclude that the United States never consented to any WTO proceedings.

The United States alleges that Tembec failed to respond to its arguments about Article 1115-that the absence of any reference to Chapter 19 is contextual support for the notion that Article 1901(3) bars Tembec's claims-then refers to and quotes part of Tembec's response.

³⁶ In addition to the argument referenced by the United States, Tembec explained that there would have been no reason for Article 1115 to refer to Chapter 19 in light of its purpose to recognize that "a claim for breach of the obligations under Chapter 11 may be raised by private parties in proceedings under Chapter 11, or by the NAFTA Parties in proceedings under Chapter 20."³⁷

³² See *id.* at 21 ("Tembec fails to respond to this argument in its Counter-Memorial. Instead, Tembec argues that, as a factual matter, there would be no need for proprietary information in this proceedings [sic].").

³³ See *id.*

³⁴ See Tembec Counter-Memorial at 24, n.33. ³⁵

Id.

³⁶ See U.S. Reply at 22 ("Tembec Fails To Respond ... In response, Tembec relies on the language in Article 1115 stating that the Chapter Eleven dispute resolution mechanism was established to ensure `equal treatment among investors of the Parties.").

³⁷ Tembec Counter-Memorial at 21, n.29.

The United States asserts that Tembec failed to respond to arguments concerning the circumstances of the conclusion of NAFTA, such as the fact that there exists a binational panel review process for final determinations. Tembec's CounterMemorial addressed these arguments at length, as indicated also by the United States' reference to those arguments.³⁸ The United States concedes in its Reply that Chapters 11 and 19 apply different law; apply different standards of review; and provide different remedies. Tembec's Chapter 11 claims, therefore, are distinct from its Chapter 19 appeals and raise no concerns about inefficient, duplicative dispute settlement proceedings. Tembec is not relitigating Chapter 19 disputes, which stand on their own. To these points, Tembec has now added the significance of the negotiated amendments to the laws found in Article 1904.15 and Article 2203.

The Parties' inability to agree on an international antidumping and countervailing duty law (e.g., a "substitute system of rules in both countries for antidumping and countervailing duties as applied to their bilateral trade"³⁹) is different from an agreement among the Parties that they may apply antidumping and countervailing duty laws in complete derogation of the fundamental obligations of NAFTA and, specifically, Chapter 11.

The United States argues that the NAFTA Parties' acceptance of the unique value of Chapter 19 panel review necessarily meant that the Parties sacrificed

³⁸ See U.S. Reply at 24 ("As the chart in Tembec's Counter-Memorial illustrates, the Chapter Nineteen mechanism differs from investor-State arbitration under Chapter Eleven in important respects, from the law applicable to the claims to the legal standards applied by the decision-maker to the remedies available.").

³⁹ CFTA Article 1906.

rights under Chapter 11 in exchange.⁴⁰ Chapter 19 panel review is uniquely valuable, but it does not follow that Chapter 11 was the consideration for the Parties' bargain. Tembec could have chosen not to exercise its rights under Chapter 19, opting instead for review of final determinations in U.S. courts. Presumably, the United States would not then claim any bar to this suit under Chapter 11. Tembec's rights under Chapter 19 have no connection to its rights under Chapter 11, and cannot therefore be used by the United States as a bar against Tembec's claims here.⁴¹

II. THE UNITED STATES HAS MISTAKEN TEMBEC FOR *METHANEX*; THE U.S. MEASURES RELATE TO TEMBEC AND ITS INVESTMENTS

The United States first argued in its Objection to Jurisdiction that its conduct does not relate to "Tembec in its capacity as an investor in the United States," nor does it "'relate to' Tembec's investments in the United States within the meaning of Article 1101(1)."⁴² Tembec identified three NAFTA Chapter 11 cases in its CounterMemorial where similar arguments had been rejected.⁴³ Now in its Reply, the United States asserts that it does not advance the proposition "that a measure primarily concerned with trade in goods could not relate to investments or investments [*sic*]" to

⁴⁰ See U.S. Reply at 18.

⁴¹ The chapters of NAFTA are "a single undertaking" like the WTO Agreement. See *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Nov. 13, 2000) at ¶¶291-295. Therefore, the Parties' obligations under different provisions of NAFTA are cumulative and must be performed simultaneously unless there is "a formal 'conflict' between them." *Id.* (relying on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/396/R, at ¶738). The United States has agreed that Chapter 11 and 19 apply different law, different legal standards, and provide different remedies. See U.S. Reply at 24. The rights extended under Chapter 19 cannot therefore withdraw Tembec's rights under Chapter 11.

⁴² U.S. Objection to Jurisdiction at 31.

⁴³ See Tembec Counter-Memorial at 34-37.

support its objection under Article 1101.⁴⁴ There now appears to be agreement between the parties that the Tribunal may not deny jurisdiction of Tembec's claims under Article 1101 on the proposition that Tembec's complaint concerns primarily trade in goods.

The United States asserts five times in its five pages of argument about Article 1101 that Tembec alleges that measures having a "mere effect" on Tembec's U.S. investments are necessarily within the Tribunal's jurisdiction under Chapter 11. Not one of these assertions provides a citation to Tembec's Counter-Memorial because Tembec did not make the argument that the United States asserts. Tembec's argument is that the measures are "relating to" Tembec and its investments in the United States, which is all that Article 1101 requires.

The United States wants to apply the *Methanex* award to a materially different factual setting. In *Methanex*, the relevant measures were directed at a different product than the one *Methanex* sold. The measures did not mention the claimant investor, its investments, or any products produced by the claimant, as they do in this case. *Methanex* argued unsuccessfully for an "effects" test for jurisdiction, and the tribunal decided that, in the absence of any apparent relationship between the measures and the claimant, jurisdiction would be attained only if an intent to discriminate against *Methanex* were shown.

This case is not *Methanex*.⁴⁵ Tembec is a named respondent in the antidumping and countervailing duty proceedings and the unlawful duties imposed by

as U.S. Reply at 28.

⁴⁵ See Tembec Counter-Memorial at 37-39.

the United States in those proceedings have been directed at Tembec's investments both in physical assets in the United States and its goodwill and market share. In fact, one of the principal arguments in the trade proceedings is that the United States needs to reduce the market share of Canadian lumber in the United States, which includes Tembec's market share.⁴⁶

The new argument advanced by the United States appears to be that Tembec has not alleged intent, i.e., that the measures were intended to address Tembec's investments in the United States. The argument ignores many of the allegations of Tembec's claim. There cannot be anything more intentional than naming Tembec as a respondent interested party, repeatedly ignoring the decisions of NAFTA Chapter 19 binational panels and the WTO, and holding C\$250 million of Tembec's deposits. But more importantly, perhaps, the United States miscites *S.D. Myers*.⁴⁷ Allegations of intent were not required by the tribunal in *S. D. Myers*, as the complete reference to ¶¶234-235 of the *S.D. Myers* award shows:

234. In this case, the requirement that the import ban be "in relation" to SDMI and its investment in Canada is easily satisfied. It was the prospect that SDMI would carry through with its plans to expand its Canadian operations that was the specific inspiration for the export ban. It was raised to address specifically the operations of SDMI and its investment.

⁴⁶ See *Softwood Lumber From Canada*, Investigations Nos. 701-TA-414 and 731-TA-928 (Final), 2002 ITC LEXIS 594 at 165, USITC Publication 3509 (May 1, 2002) ("[M]any U.S. producers expressed concern that domestic softwood lumber production will continue to decline in the short term and increasingly cede market share to imports of softwood lumber from Canada.").

⁴⁷ See U.S. Reply at 28 (citing *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Nov. 13, 2000) at ¶234) (emphasis provided in U.S. Reply).

235. That is sufficient to dispose of the "relating to" requirement for the immediate purpose of determining liability in this case.⁴⁸

The tribunal in *S.D. Myers* did not require that the claimant's plans to expand its Canadian operations be "the specific inspiration for the export ban," but found that the "relating to" requirement was "easily satisfied" by the claimant where a discriminatory intent was found.

Allegations of intent are not required by the text of Article 1101, nor by the text of the articles raised as breaches in Tembec's Statement of Claim (Articles 1102, 1103, 1105 and 1110). Article 1101 (1) states:

This Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of another Party; (b) investments of investors of another Party in the territory of the Party; and (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

A requirement to show the government's intent in Article 1101 likely would have frustrated the purposes for which Chapter 11 was drafted, because any government could cloak protectionist, arbitrary or discriminatory measures in the guise of some other regulatory purpose. The NAFTA Parties did not intend that result.⁴⁹

Nor is there any intent requirement in the text of Articles 1102, 1103, 1105 or 1110. Again, the *S.D. Myers* award refutes the necessity of a showing of intent:

254. Intent is important, but protectionist intent is not necessarily

decisive on its own. The existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102

⁴⁸ *S.D. Myers, Inc. v. Government of Canada*, Partial Award (Nov. 13, 2000) at ¶¶234-235. Canada's arguments that other provisions of NAFTA relating to the trade of goods barred claims under Chapter 11 were rejected. See *id.* at ¶¶289-298.

⁴⁹ *Cf.* SAA at 147 ("To ensure that a host country cannot frustrate an arbitration by withholding its own consent, Article 1122 itself constitutes advance consent by the three NAFTA governments to arbitration.").

of the NAFTA if the measure in question were to produce no adverse effect on the non-national complainant. The word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.⁵⁰

The United States also argues that the Tribunal can only have jurisdiction of Tembec's claims under Articles 1102 and 1103 if the United States accorded Tembec treatment "with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments" in the United States.⁵¹ Here, again, the United States eschews the broad interpretation of "with respect to" that it espouses for its arguments about Article 1901(3).⁵² The United States interprets the phrase "with respect to the ...conduct, operation, and sale or other disposition of investments" so narrowly as to exclude the factual scenario where its measures "allegedly affected the markets in which Tembec's U.S.-based investments operate."

The ordinary treaty language that the United States quotes directly contradicts the United States' conclusion. Antidumping and countervailing duty orders affecting the markets in which Tembec's investments operate have a "legally significant connection" to the operation of Tembec's investments in those markets. In addition, Tembec's claim is not limited to the measures' impacts on the market for Tembec's goods; they had an impact on almost every aspect of its U.S. investments, including the establishment, acquisition, expansion, management, and operation of those investments.

⁵⁰ *S.D. Myers, Inc. v. Government of Canada, Partial Award (Nov. 13, 2000)* at ¶254. ⁵¹ U.S. Reply at 29.

⁵² *See id.* at 31.

III. THE UNITED STATES HAS NOT SHOWN ANY FAILURE TO COMPLY WITH ARTICLE 1121

The United States has failed to establish that Tembec's claims should be barred by Article 1121. The United States contends that Tembec was still participating in binational panel reviews under Chapter 19, and therefore must be denied jurisdiction under Article 1121.

⁵³ The continuation of the binational panel reviews, the United States apparently contends, negates "a written waiver in writing."⁵⁴ The United States, however, has made no effort to parse the ordinary meaning of Article 1121 and demonstrate that a respondent's defense in proceedings initiated by the United States falls within it.

Tembec has not "initiated or continued" any "proceeding." The United States has initiated each of the "proceedings" in which Tembec is or has participated and named Tembec as a respondent interested party each time. Each time it loses before a NAFTA binational panel or the WTO the United States tries to perpetuate the litigation.

Tembec is not "continuing" proceedings. Only the United States has the power to halt the proceedings. Tembec is defending itself by participating in appeals before Chapter 19 binational panels in order to mitigate the damages caused by the United States' unlawful conduct. The United States may want Tembec to surrender in

⁵³ Article 1121 requires claimants to "waive their right to *initiate or continue* before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any *proceedings* with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article [1116/1117], 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." (emphasis added).

sa U.S. Reply at 31.

those appeals, forfeit c\$250 million in duty deposits, and forego mitigation of damages that it has inflicted on Tembec, but the United States has not shown that Article 1121 requires such a severe result.

After ignoring its initial burden to demonstrate that Tembec has initiated or continued a proceeding, the United States focuses on the exception language contained in Article 1121. The United States complains of Tembec's participation in three binational panel reviews, each of which began (and yielded remand decisions adverse to the United States) before Tembec filed its Statement of Claim on December 3, 2003.⁵⁵ The United States does not dispute that Tembec cannot obtain damages from the Chapter 19 panels in any of those three reviews. The United States argues only that the panels are not administrative tribunals or courts under the law of the United States. The United States offers no legal authority, explanation, reasoning or substantiation of any kind in its belated argument. Nor can the argument be reconciled with the United

⁵⁵ See U.S. Reply at 32, n.84 (citing *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); *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); *Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Material Injury Determination*, Secretariat File No. USA-CDA-2002-1904-07, Decision of the Panel (Sept. 5, 2003)).

The United States has appealed to an Extraordinary Challenge Committee the panel decision in USA-CDA-2002-1904-07, which required the U.S. International Trade Commission to reverse its affirmative threat of injury determination. After some delay by the United States to appoint members to the Committee that it requested, the Extraordinary Challenge is now underway. Should the panel's decision be affirmed, the panel review will be terminated.

In USA-CDA-2002-1904-03, the panel's remands have required the U.S. Department of Commerce to lower the initial countervailing duty rate from 18.79% to 1.88%, and even at the lowest rate, the Department openly refused to adopt certain remand instructions from the panel. The panel is deliberating on the Department's latest actions in connection with the panel's remand instructions.

In USA-CDA-2002-1904-02, the U.S. Department of Commerce announced it would not return the cash deposits of even those companies for whom it was determined in the panel review the original antidumping order should not have applied. The panel held a hearing in September 2004 on that subject and regarding a calculation methodology found by the WTO to be illegal. The panel's final decision is still pending.

States' own statements about the relationship between Chapter 19 panels and the U.S. courts that they replace, the purpose of Chapter 19 panels, or the NAFTA Parties' understanding of "administrative tribunals."

It is a well-known maxim, adopted and often repeated by the United States, that the NAFTA binational panels "step into the shoes of the Court of International Trade and the Court of Appeals for the Federal Circuit."⁵⁶ The right to participate in binational panel reviews of U.S. antidumping and countervailing duty determinations arises under the same statute authorizing review of those determinations by the Court of International Trade.⁵⁷ Chapter 19 panels apply the same domestic law and use the same standard of review as the Court of International Trade and the Court of Appeals for the Federal Circuit.⁵⁸ When a Chapter 19 panel finds an agency determination not to be in accordance with U.S. law or unsupported by substantial evidence, it remands to the agencies for action not inconsistent with the panel's decision, just as the Court of International Trade does.⁵⁹ The United States has given no reason why the Chapter 19 panels are not courts for purposes of Article 1121.

⁵⁶ *Antidumping and Countervailing Duty Investigations of Certain Softwood Lumber Products From Canada: NAFTA Panel Decision*, 69 Fed. Reg. 69,584, 69,585 (Dep't Commerce Nov. 30, 2004) ("Because NAFTA panels step into the shoes of the courts they are replacing, they must apply the law of the national court that would otherwise review the administrative determination."); *Live Swine from Canada*, Secretariat File No. USA-1994-1904-01, Decision of the Panel (May 30, 1995) at 5 ("The Panel steps into the shoes of the Court of International Trade and the Court of Appeals for the Federal Circuit and is to apply the standards and the substantive law (including legislative history, case law, etc.) that those courts apply when they review a countervailing duty determination by Commerce.").

⁵⁷ See 19 U.S.C. §§ 1516a(a)(2), (g)(8)(a).⁵⁸

See Article 1904(2), (3).

⁵⁹ See Article 1904(8) ("The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision."); see also CFTA SAA at 96 ("If it finds that the administrative agency erred, it will remand the case to the agency for action not inconsistent with the panel's decision, as do courts under current law.")

NAFTA Chapter 19 Panels equally may be considered administrative tribunals for purposes of Article 1121. The term "administrative tribunal" is not defined in Chapter 11, but in Chapter 18 the term refers to a body responsible for reviewing administrative agency actions. NAFTA Article 1804 addresses standards for "administrative proceedings" that apply "laws, regulations, procedures or administrative rulings of general application" on matters covered by NAFTA. Article 1805.1 requires NAFTA members "to establish or maintain judicial, quasi-judicial or administrative tribunals or procedures for the... prompt review and... correction of final administrative actions regarding matters covered by this Agreement." Administrative tribunals are "impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter."⁶⁰ Thus, an administrative tribunal is not an agency taking administrative action in the first instance, but rather a body that reviews such actions that have been taken.

Chapter 19 panels fit the description of administrative tribunals given in Chapter 18. They review and correct the final administrative actions of the U.S. Department of Commerce and U.S. International Trade Commission, who are entrusted with administrative enforcement of the antidumping and countervailing duty law.⁶¹ The panels are impartial and independent of those administrative agencies.⁶² Chapter 19

⁶⁰ Article 1805.1.

⁶¹ See Article 1904(2) ("An involved Party may request that a panel review, based on the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party.").

⁶² See Annex 1901.2(1) ("Candidates [for binational panels] shall not be affiliated with a Party, and in no event shall a candidate take instructions from a Party.").

panels maybe considered administrative tribunals for purposes of Article 1121. The United States has given no reasons to consider them something else.

The United States has not met the minimum showing necessary to claim a denial of jurisdiction under Article 1121.

IV. CONCLUSION

The United States' challenge to this Tribunal's jurisdiction should be dismissed for all of the reasons set out in Tembec's Counter-Memorial and this Rejoinder. The United States has presented neither reason, nor evidence, nor law to bar Tembec's claims from Chapter 11 arbitration.

Respectfully submitted,


Elliot J. dman
Mark A. ymrot Michael Snarr
Ronald J. Baumgarten BAKER &
HOSTETLER LLP 1050
Connecticut Avenue, NW Suite
1100
Washington, DC 20036
Counsel to Tembec Inc.
Tembec Investments Inc.
Tembec Industries Inc.

ATTACHMENT 1

Comparison Of Changes From CFTA To NAFTA Between Articles 1901-1903

The chart below highlights the changes made to Articles 1901, 1902 and 1903 of the Canada-United States Free Trade Agreement ("CFTA") as incorporated in the North American Free Trade Agreement ("NAFTA"). Words highlighted in strikethrough format (e.g., ~~text~~) are words that appeared in Articles 1901-1903 of the CFTA, but not in Articles 1901-1903 of NAFTA. Words in double-underlined format (e.g., text) are words that appear in Articles 1901-1903 of NAFTA, but did not appear in CFTA. All other words are common to Articles 1901-1903 of CFTA and NAFTA.

Article 1901: General Provisions

1. ~~The provisions of~~ Article 1904 ~~shall apply~~applies only with respect to goods that the competent investigating authority of the importing Party, applying the importing Party's antidumping or countervailing duty law to the facts of a specific case, determines are goods of the ~~eranother~~ Party.
2. For the purposes of Articles 1903 and 1904, panels shall be established in accordance with the provisions of Annex 1901.2.
3. 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.

Article 1902: Retention of Domestic Antidumping Law and Countervailing Duty Law

1. Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of ~~theany~~ other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice; and judicial precedents.
2. Each Party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to a Party's antidumping or countervailing duty statute:
 - La) such amendment shall apply to goods from ~~the other~~another Party only if the amending statute specifies that it applies to oods from that Part or from the Parties to this A reement;

 - kb) the amending Party notifies the other Party in writing the Parties to which the amendment applies of the amending statute as far in advance as possible of the date of enactment of such statute;

Lc) following notification, the amending Party, upon request of the otheran Party to which the amendment applies, consults with ~~#ve-~~ herthat Party prior to the enactment of the amending statute; and

Ld) such amendment, as applicable to the other Party, is not inconsistent with

Li) the General Agreement on Tariffs and Trade (GATT), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (the Antidumping Code), or the Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (the Subsidies Code), or any successor agreement to which all the original signatories to this Agreement are party. or

Lii) the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the ' Parties to this Agreement while maintaining effective and fair disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the Parties.

Article 1903: Review of Statutory Amendments

1. A Party m ^{request} in ^{writing} hatto which an amendment to the otherof another Party's antidumping statute or countervailing duty statute applies may request in writing that such amendment be referred to a binational panel for a declaratory opinion as to whether:

La) the amendment does not conform to the provisions of sub-paragraph Article 1902(2)(d)(i) or (d)(ii) of paragraph 2 of Article 1902W; or

kb) such amendment has the function and effect of overturning a prior decision of a panel made pursuant to Article 1904 and does not conform to the provisions of subparagraph Article 1902(2)(d)(i) or (d)(ii) of paragraph 2 of Article 1902.L.

Such declaratory opinion shall have force or effect only as provided in this Article.

2. The panel shall conduct its review in accordance with the procedures of Annex 1903.
2.

3. In the event that the panel recommends modifications to the amending statute to remedy a non-conformity that it has identified in its opinion:

La) the two Parties shall immediately begin consultations and shall seek to achieve a mutually satisfactory solution to the matter within 90 days of the issuance of the panel's final declaratory opinion. Such solution may include

seeking remedialcorrective legislation with respect to the statute of the amending Party;

kb) if remedialcorrective legislation is not enacted within nine months from the end of the 90-day consultation period referred to in subparagraph (a) and no other agreementmutually satisfactory solution has been reached, the Party that requested the panel may

(i) take comparable legislative or equivalent executive action, or

Lii) terminate thei s Agreement upon-60-with regard to the amending Party on 60day written notice to the ot.erthat Party.