

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.

**REPLY ON JURISDICTION OF
RESPONDENT UNITED STATES OF AMERICA**

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Pursuant to Article 21 of the UNCITRAL Arbitration Rules, respondent United States of America respectfully submits this Reply on Jurisdiction.

PRELIMINARY STATEMENT

As the United States demonstrated in its Objection to Jurisdiction, the ordinary meaning of Article 1901(3) compels dismissal of Tembec's claims. In that Objection, the United States also showed that the measures Tembec challenges do not relate to it or its investments in the United States, within the meaning of Article 1101(1), thus depriving this Tribunal of jurisdiction. Finally, it demonstrated that Tembec has failed to comply with a condition precedent to the submission of its claims in Article 1121.

Tembec fails to show otherwise in its Counter-Memorial. *First*, Tembec errs in contending that Article 1901(3) merely permits the Parties to "retain and amend" their trade remedy laws, but

does not bar challenges to the application of those laws. Tembec's interpretation would render Article 1901(3) redundant of Article 1902, contrary to the principle of effectiveness. In addition, Tembec's attempt to distort the ordinary meaning of certain phrases in Article 1901(3) finds no support in the NAFTA's text. Nor does Tembec provide any explanation of how its claims comport with the circumstances of conclusion of the Treaty or its object and purpose.

Second, Tembec's contention that the determinations at issue "relate to" its U.S.-based investments within the meaning of Article 1101(1) because they allegedly *affected* those investments is without merit. Tembec's theory has been rejected by all three NAFTA Parties and the Chapter Eleven tribunal in *Methanex Corp. v. United States of America*. That the determinations refer to Tembec's Canadian parent company by name does not confer jurisdiction on this Tribunal.

Finally, Tembec's effort to demonstrate that its ongoing participation in the Chapter Nineteen proceedings does not contravene Article 1121 fails. It unsuccessfully attempts to create the misleading impression that it is a respondent in those proceedings. That is not the case, however, and Tembec's continued participation in those proceedings deprives this Tribunal of jurisdiction.

Below, we first show why Tembec's arguments concerning Article 1901(3) fail. We then demonstrate why Tembec's contentions regarding Article 1101(1) are without merit. Finally, we show why Tembec's arguments regarding Article 1121 cannot withstand scrutiny. For the reasons that follow, and those set forth in our Objection to Jurisdiction, the United States respectfully requests that Tembec's claims be dismissed in their entirety.

ARGUMENT

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

The text, context and object and purpose of the NAFTA confirm that the Parties intended the specialized binational panels constituted under Chapter Nineteen to have exclusive jurisdiction under the NAFTA over claims that seek to impose obligations on a Party with respect to its antidumping and countervailing duty laws. Tembec fails to demonstrate otherwise in its Counter-Memorial.

A. Article 1901(3)'s Ordinary Meaning Confirms That The United States Did Not Consent To Arbitrate Tembec's Claims

As the United States demonstrated in its Objection to Jurisdiction, Article 1901(3) expressly precludes Tembec's claims. That article provides:

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.

Exercising jurisdiction over Tembec's claims and subjecting the measures Tembec challenges to review under Chapter Eleven's substantive standards would impose obligations from another chapter of the NAFTA on the United States with respect to its antidumping and countervailing duty laws, in contravention of Article 1901(3). Moreover, granting the relief Tembec has requested would require construing the substantive provisions of Chapter Eleven to impose the obligation on the United States to pay damages with respect to its antidumping and countervailing duty laws. Tembec's claims are therefore barred under the ordinary meaning of Article 1901(3). Tembec's attempt to distort Article 1901(3)'s ordinary meaning should be rejected by the Tribunal.

1. Tembec's Interpretation Of Article 1901(3) Would Render It Superfluous

In its Counter-Memorial, Tembec argues that Article 1901(3) does not preclude its claims, but merely permits the Parties to “retain and amend” their trade remedy laws.¹ Tembec contrasts Article 1901(3) with Article 1902, which Tembec claims merely reserves the Parties’ right to “apply” their laws.² Tembec also relies on a general statement in the U.S. Statement of Administrative Action (“SAA”) that does not specifically address Article 1901(3).³ Tembec’s interpretation of Article 1901(3) cannot withstand scrutiny.

First, Tembec’s interpretation would render Article 1901(3) redundant of Article 1902. Article 1902 is entitled “*Retention of Domestic Antidumping Law and Countervailing Duty Law.*”⁴ In Article 1902(1), the Parties retained the right to apply their antidumping and countervailing duty laws to goods imported from another Party. And Article 1902(2), as Tembec acknowledges, reserves the Parties’ right to “change or modify” their antidumping and countervailing duty laws, subject to certain limitations.⁵ If Article 1901(3) merely permitted the Parties to “retain and amend” their laws, as Tembec contends, it would serve no purpose beyond that already served by

¹ See Tembec’s Counter-Memorial to the Jurisdictional Objections of the United States (“Counter-Memorial”) at 8 (Feb. 17, 2005) (“Article 1901(3) Permits The NAFTA Parties To Retain And Amend Their Trade Laws.”); *see also id.* at 8-9 (“[Article 1901(3)] has the more modest purpose . . . to ‘make clear that each country retains its domestic antidumping and countervailing duty laws and can amend them.’”).

² *See id.* at 2 (“Article 1901(3) permits the NAFTA Parties to retain their trade laws. Article 1902 permits them to apply those laws.”); *see also id.* at 9 (“Article 1901(3) guarantees the Parties’ rights to retain their antidumping and countervailing duty laws. Article 1902(1) reserves the Parties’ rights to apply their laws . . .”).

³ *See id.* at 2, 8-9, 16-17.

⁴ NAFTA art. 1902 (emphasis added). Tembec itself acknowledges that Article 1901(2) permits the Parties to “maintain” their antidumping and countervailing duty laws. *See Counter-Memorial* at 9.

⁵ NAFTA art. 1902(2) (“Each Party reserves the right to change or modify its antidumping law or countervailing duty law”); *see also Counter-Memorial* at 9 (“Article 1902(2) then reserves the Parties’ rights to amend their statutes . . .”).

Article 1902. Interpreting the Treaty in the manner suggested by Tembec would therefore render Article 1901(3) superfluous, contrary to the interpretive principle of effectiveness.⁶

Second, Tembec's distinction in the context of Chapter Nineteen between "retaining" one's laws and "applying" those laws is baseless. The right to *apply* laws necessarily encompasses the right to *retain* those same laws. Similarly, the right to retain certain laws would be meaningless without the corresponding right to apply those laws. Indeed, Article 1902 subsumes the rights to "apply," "change," or "modify" one's laws under the rubric of "Retention" of those laws.

Notably, Chapter Nineteen of the predecessor agreement to the NAFTA, the Canada-U.S. Free Trade Agreement ("CFTA"), is nearly identical to NAFTA Article 1901. One difference is that the CFTA does not include a provision similar to NAFTA Article 1901(3). Tembec's distinction, if accepted, would lead to the absurd conclusion that, under the CFTA, the United States and Canada had the right to *apply* their laws, but did not have the right to *retain* those laws.

By including Article 1901(3) in Chapter Nineteen of the NAFTA, the United States did not intend to alter the substantive rights or obligations it had under Chapter Nineteen of the CFTA.⁷ Rather, Article 1901(3) simply clarifies Chapter Nineteen's relationship with the rest of the Treaty. Under the CFTA, there was no danger that the United States or Canada would circumvent the specialized mechanism they established in Chapter Nineteen, and seek to impose obligations in another chapter on each other with respect to the other Party's antidumping and countervailing duty laws. The inclusion of an investor-State mechanism under the NAFTA, however, opened the door

⁶ See *Territorial Dispute (Libya v. Chad)*, 1994 I.C.J. 6 ¶ 51 (Feb. 3) ("[O]ne of the fundamental principles of interpretation of treaties, consistently upheld by international jurisprudence, [is] that of effectiveness."); *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4, 24 (Apr. 9) ("It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purpose or effect.").

⁷ See NORTH AMERICAN FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1stst Sess. ("SAA") at 194 (1993) ("[Articles 1901 through 1903] are identical to Articles 1901 through 1903 of the CFTA, except for technical changes necessary to accommodate the addition of a third country.").

to that possibility, prompting the inclusion of Article 1901(3). Thus, contrary to Tembec's interpretation, Article 1901(3) was not included in the NAFTA to reiterate a right the Parties already had under Article 1902. Rather, it was included to preclude precisely the type of claims brought by Tembec in this arbitration.

Finally, Tembec's reliance on the SAA is misplaced. The SAA is a report to Congress that accompanied the implementing legislation for the NAFTA.⁸ The SAA states that it "briefly summarizes" certain NAFTA provisions.⁹ The section pertaining to Chapter Nineteen explains that it provides only a selective overview of the chapter, and that the Statement of Administrative Action to the CFTA – which Tembec does not reference – more fully describes the binational panel system established under the NAFTA.¹⁰ While the SAA may shed light on the meaning of certain provisions of the NAFTA, it cannot be used, as Tembec suggests, to override the Treaty's express terms.

Tembec relies on a general statement in the SAA that Articles 1901 and 1902 "make clear that each country retains its domestic antidumping and countervailing duty laws and can amend them."¹¹ Tembec is incorrect in inferring from this statement that Article 1901(3)'s purpose is limited to "retaining and amending" antidumping and countervailing duty laws, given that Article 1902, unlike Article 1901(3), expressly provides for the "Retention" and "change or modif[ication]" of those laws. The Statement of Administrative Action accompanying the CFTA

⁸ *See id.* at 1.

⁹ *See id.*

¹⁰ *See id.* at 194 ("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.").

¹¹ *See* Counter-Memorial at 9 (*quoting* SAA at 194).

confirms that Article 1902(1) “*retains* the [Party’s] right to apply its national AD and CVD laws.”¹² Similarly, Canada’s Statement of Implementation for the NAFTA provides that “Article 1902 *retains* the right of each Party to apply its AD and CVD laws to goods imported from the other Parties.”¹³ Thus, both documents confirm that Article 1902 performs the function Tembec seeks to ascribe to Article 1901(3). Rather than supporting Tembec, the SAA statement on which Tembec relies is consistent with the United States’ interpretation: Article 1901(3) reinforces the Parties’ right under Article 1902 to retain their antidumping and countervailing duty laws by explicitly providing that those rights cannot be infringed by the imposition of obligations from other chapters of the NAFTA on the Parties’ laws.

In sum, Tembec’s interpretation of Article 1901(3) is contrary to the Treaty’s ordinary meaning and to accepted canons of treaty construction. It is also contrary to common sense: the Parties did not draft two consecutive provisions in the NAFTA to perform precisely the same function. Tembec’s attempt to circumvent Article 1901(3) by ascribing to it a superfluous function should therefore be rejected by the Tribunal.

2. Tembec’s Interpretation Of “With Respect To” Is Unsupportable

As the United States demonstrated in its Objection, Tembec’s claims impose obligations “with respect to” U.S. antidumping and countervailing duty law, within the meaning of Article 1901(3). In support of its theory that Article 1901(3) merely permits the Parties to “retain and amend” their trade remedy laws, Tembec advances a narrow interpretation of the phrase “with

¹² UNITED STATES-CANADA FREE TRADE AGREEMENT, IMPLEMENTATION ACT, STATEMENT OF ADMINISTRATIVE ACTION, H.R. Doc. No. 100-216, 100th Cong., 2nd Sess. at 98 (1988).

¹³ Department of External Affairs, *North American Free Trade Agreement: Canadian Statement of Implementation*, in CANADA GAZETTE 68, 198 (1994) (“SOI”) (emphasis added).

respect to” in Article 1901(3).¹⁴ It argues that “with respect to” is used solely to refer to “specific, stated matters.”¹⁵ Tembec’s argument is without merit.

The United States’ interpretation of “with respect to” is consistent with that phrase’s ordinary meaning in its context. In this arbitration, Tembec challenges Commerce’s and the ITC’s administration of U.S. antidumping and countervailing duty laws. Tembec alleges, for example, that the ITC “never made an effort to apply the criteria required under U.S. law to make th[e] determination” that Flangestock was a like product.¹⁶ Likewise, Tembec alleges that Commerce “adopted practices in implementing the countervailing duty and antidumping laws in the softwood lumber proceedings that discriminated against Tembec.”¹⁷ In its own words, “Tembec’s claims are about abuse and misapplication” of U.S. antidumping and countervailing duty laws.¹⁸ Claims concerning the “application,” “implementation” – or even the supposed “abuse”¹⁹ – of U.S. antidumping and countervailing duty laws, are claims *with respect to* those laws within the ordinary meaning of that phrase.

¹⁴ See Counter-Memorial at 13-15.

¹⁵ See *id.* at 14.

¹⁶ Tembec Notice of Arbitration and Statement of Claim (undated) (“Statement of Claim”) ¶ 71.

¹⁷ *Id.* ¶ 101(g).

¹⁸ Counter-Memorial at 3.

¹⁹ Tembec’s claim that the United States supposedly “abused” its trade remedy laws is based on its allegations of political influence and anti-Canadian bias in the softwood lumber proceedings. See Counter-Memorial at 26 (“Tembec challenges only the manifest abusive misapplication of that law as a result of political pressure and discriminatory agency bias.”). Even if true, such allegations would nonetheless be *with respect to* U.S. trade remedy laws and would thus be barred by Article 1901(3). Indeed, partiality in agency decision-making is precisely what Chapter Nineteen was designed to address. See, e.g., SOI at 198 (“[The Chapter Nineteen panel mechanism] is designed to ensure *objective and impartial decision-making* by administrative agencies. . . .”) (emphasis added). Tembec did, in fact, make similar allegations of political bias in the Chapter Nineteen countervailing duty proceeding. 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. (rejecting Tembec’s political bias allegations *sub silentio* by upholding Commerce’s findings in essential respects).

Merriam-Webster's Dictionary defines the phrase "with respect to" as "with reference to" or "in relation to."²⁰ Merriam-Webster's Thesaurus likewise provides the following synonyms for the phrase: "apropos," "as for," "as regards," "as respects," "as to," "concerning," "regarding," "respecting" and "touching."²¹ The Oxford English Dictionary, cited by Tembec, defines "with respect" as "with reference or regard to something."²² And Tembec itself concedes that its claims "aris[e] in connection with the trade laws."²³ Tembec's claims challenging the application, implementation or so-called "abuse" of U.S. antidumping and countervailing duty law are undoubtedly claims *in relation to, concerning, regarding, touching on, with reference to, or arising in connection with* that law. Accordingly, the United States' interpretation of "with respect to" in Article 1901(3) comports with the ordinary usage of that phrase, even as defined by Tembec.

Likewise, Tembec's suggestion that the phrase "with respect to" is used solely in a restrictive sense in the NAFTA is baseless.²⁴ A review of the NAFTA, and of contemporaneous statements made by the United States and Canada in connection with the implementation of the Treaty, confirms that the Parties used the phrase "with respect to" interchangeably with "concerning" and other prepositions that suggest a broad and general relationship. For example, NAFTA Article 603(1) provides that "the Parties incorporate the provisions of the General Agreement on Tariffs and Trade (GATT), *with respect to* prohibitions or restrictions on

²⁰ See Merriam-Webster Online Dictionary, available at <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=with+respect+to&x=14&y=13> (last visited Mar. 24, 2005).

²¹ See Merriam-Webster Online Thesaurus, available at <http://www.m-w.com/cgi-bin/thesaurus?book=Thesaurus&va=with+respect+to> (last visited Mar. 24, 2005).

²² Counter-Memorial at 14, n.21 (*quoting* The Oxford English Dictionary Vol. XIII (2d ed. 1989)).

²³ *Id.* at 2 ("There are no exceptions within Chapter 11, and no exceptions anywhere else in NAFTA, for claims within Chapter 11 *arising in connection with* the trade laws.") (emphasis added).

²⁴ See *id.* at 14.

trade”²⁵ The SAA, however, states that “Article 603 incorporates by reference GATT rules *concerning* import and export restrictions.”²⁶ Thus, the United States considered “with respect to” to be synonymous with “concerning” in Article 603(1).

Similarly, NAFTA Article 1607 excludes obligations on a Party “regarding” its immigration measures. Canada’s SOI, however, states that “Article 1607 establishes that . . . no other part of NAFTA imposes obligations on any of the countries *respecting* immigration measures.”²⁷ Canada thus considered “respecting” – a term similar to “with respect to” – to be interchangeable with “regarding” in Article 1607.

Likewise, Article 1121(1)(b) requires investors to “waive their right to initiate or continue . . . any proceedings *with respect to* the measure”²⁸ The SAA explains that “Article 1121 requires [claimants] . . . to waive the right to initiate or continue any actions in local courts or other fora *relating to* the disputed measure[s]”²⁹ Thus, in the context of Article 1121(1)(b), the United States considered “with respect to” to be synonymous with “relating to.” Tembec’s claims challenging the application, implementation or so-called “abuse” of U.S. law are claims *concerning, regarding or relating to* that law.³⁰ The United States’ interpretation of “with respect to” in the context of Article 1901(3) thus comports with the manner in which that phrase is used elsewhere in the NAFTA.

²⁵ NAFTA art. 603(1) (emphasis added).

²⁶ SAA at 62 (emphasis added).

²⁷ SOI at 187 (emphasis added).

²⁸ NAFTA art. 1121(1)(b) (emphasis added).

²⁹ SAA at 147 (emphasis added).

³⁰ The same conclusion can be drawn from the fact that “with respect to” in Article 1901(3) is translated in the French version of the NAFTA posted on the NAFTA Secretariat’s website as “relativement à,” but that same phrase is translated as “se rapportant à” in Article 1121, “au regard” in Article 1901(1) and “en ce qui concerne” in Article 301(2). See <http://www.dfait-maeci.gc.ca/nafta-alena/agree-fr.asp> (last visited Mar. 24, 2005).

Finally, unlike Tembec's interpretation, the United States' interpretation of the phrase "with respect to" in Article 1901(3) also comports with the interpretation of that phrase adopted by another Chapter Eleven tribunal. The tribunal in *Waste Management, Inc. v. United Mexican States* rejected a narrow reading of the phrase "with respect to," as urged by Tembec here.³¹ In that case, the tribunal held that the phrase "proceedings with respect to the measure" in NAFTA Article 1121(1)(b) encompassed proceedings that "have a legal basis derived from," "refer to" or "hav[e] their origin in" the measure, rejecting the dissenting arbitrator's view that the proceedings must "primarily concern" the measure – a formulation similar to the one Tembec advances here.³² In accordance with that decision, Tembec's claims would be precluded because they clearly *have a legal basis derived from, refer to and have their origin in* U.S. antidumping and countervailing duty law. The Tribunal should reject Tembec's attempt to distort the ordinary meaning of Article 1901(3) by advancing an unduly restrictive interpretation of the phrase "with respect to."

3. Tembec's Argument That Article 1901(3) Does Not Bar Challenges To The Application Of U.S. Trade Remedy Laws Is Without Merit

Tembec's contention that Article 1901(3) excludes only challenges to the *substance* of the Party's antidumping and countervailing duty laws, but not the *application* of those laws, is without merit.³³ This argument is but another means of ascribing to Article 1901(3) the function of

³¹ ICSID Case No. ARB(AF)98/2 (Award of June 2, 2000) ("*Waste Management I Award*").

³² *Id.* ¶ 27 ("[W]hen 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.") (emphasis added); *id.* ("[T]he domestic proceedings initiated by ACAVERDE fall within the prohibition of NAFTA Article 1121 in that they *refer to* measures that are also invoked in the present arbitral proceedings as breaches of NAFTA provisions . . .") (emphasis added); *id.* ¶ 28 ("[T]here is no doubt that [the Mexican proceedings] directly affected the international obligations assumed by the Mexican Government, given that they *had their origin in* the same measures invoked by the Claimant.") (emphasis added).

³³ See Counter-Memorial at 9-15. Notably, Tembec nowhere explains how this distinction salvages its claims challenging the *Continued Dumping and Subsidy Offset Act of 2000*. To the extent that Tembec challenges that law, its claims are barred by Article 1901(3). And, Tembec does not allege that this law has ever been applied to it.

reserving the Parties' rights to "retain and amend" their trade remedy laws. For the reasons set forth above, that interpretation is unmeritorious.³⁴

It is undisputed that Chapter Nineteen provides a specialized mechanism for challenges to the application of a Party's trade remedy law in the form of antidumping and countervailing duty determinations. Tembec's interpretation – that Article 1901(3) does not bar challenges to the application of a Party's trade remedy laws – compels the conclusion that antidumping and countervailing duty determinations can be challenged simultaneously under *both* Chapters Eleven and Nineteen. Tembec offers no explanation, however, for why the Parties would have created such an elaborate mechanism in Chapter Nineteen if claimants could simply bypass it and submit their antidumping and countervailing duty claims to Chapter Eleven arbitration. The NAFTA Parties created the specialized mechanism in Chapter Nineteen as the *exclusive* forum under the NAFTA for challenges with respect to a Party's antidumping and countervailing duty laws. Tembec's suggestion to the contrary defies logic.

Furthermore, the only Chapter Eleven tribunal to have thus far addressed this issue has rejected the interpretation advanced by Tembec. In *United Parcel Service of America Inc. v. Government of Canada*, the claimant alleged that Canada failed to enforce its Goods and Services tax against Canada Post as it did against foreign competitors in violation of Article 1105.³⁵ UPS argued that Article 2103(1), which provides in pertinent part that "nothing in this Agreement shall

³⁴ Tembec itself appears to conflate antidumping and countervailing duty *law* with the *application* of that law in the form of tariffs. See Statement of Claim ¶ 20 ("International trade regulations, like the countervailing duty and antidumping laws, affect the management, conduct, operation and disposition of investments by foreign companies in the United States. The imposition of tariffs at the border can affect the prices foreign competitors can charge in the U.S. market or the volume of its [sic] sales.").

³⁵ See *United Parcel Service of America Inc. v. Government of Canada*, Statement of Claim ¶ 95 (Apr. 19, 2000); see also *United Parcel Service of America Inc. v. Government of Canada*, Amended Statement of Claim ¶ 33 (Nov. 30, 2001).

apply to taxation measures,” was inapplicable because UPS did “not challenge a taxation measure itself,” but rather “the failure of Canada to *apply* its laws.”³⁶

Both Canada and the United States rejected UPS’s distinction. Canada argued that “UPS’s attempt to draw a distinction between a challenge to the taxation measure itself and its *application* has no merit.”³⁷ The United States likewise noted in its Article 1128 submission that “no valid distinction exists between a taxation measure and a practice with respect to the *application* of a taxation measure [J]ust as Article 1105 does not apply to challenges to the adoption or imposition of a tax, it does not apply to a practice of *applying* a tax.”³⁸

Without explanation, UPS abandoned this claim at the hearing on jurisdiction.³⁹ Although the claim was moot, the tribunal confirmed in its award on jurisdiction that a claim cannot be brought under Article 1105 with respect to taxation measures, rejecting the same application *versus* substance distinction advanced by Tembec here.⁴⁰ In sum, Tembec’s argument that Article 1901(3) does not preclude challenges to the application of U.S. trade remedy law is without merit.

³⁶ *United Parcel Service of America Inc. v. Government of Canada, Counter-Memorial of the Investor (Jurisdiction Phase)* ¶ 123 (Mar. 26, 2002) (emphasis added).

³⁷ *United Parcel Service of America Inc. v. Government of Canada, Reply Memorial of the Government of Canada on Preliminary Jurisdictional Objections* ¶¶ 112-15 (Apr. 12, 2002); see also *United Parcel Service of America Inc. v. Government of Canada, Reply of the Government of Canada to the United States’ and Mexico’s Submission Pursuant to Article 1128 on Canada’s Preliminary Jurisdictional Objections* ¶ 20 (May 21, 2002) (agreeing with U.S. position in ¶¶ 13-15 of its second Article 1128 submission).

³⁸ *United Parcel Service of America Inc. v. Government of Canada, Second Submission of the United States of America* ¶¶ 13-15 (May 13, 2002) (emphasis added).

³⁹ *United Parcel Service of America Inc. v. Government of Canada, Hearing on Jurisdiction*, Tr. Vol. 1 at 156:18-157:1 (July 29, 2002) (“We are abandoning our claims with respect to goods and services taxes only insofar as they relate to Article 1105 of NAFTA, and in particular, Section – or Paragraph 33(a) of the Amended Statement of Claim.”).

⁴⁰ See *United Parcel Service of America, Inc. v. Government of Canada, Award on Jurisdiction* (“UPS Award on Jurisdiction”) ¶ 117 (Nov. 22, 2002) (“We simply note that while article 2103 provides that nothing in the Agreement applies to taxation measures, one of the limits to that exception is that article 1102 (but not article 1105) does apply to taxation measures Accordingly the position taken by the two parties appears to conform exactly with the agreement.”).

4. Tembec's Interpretation Of "Antidumping Law Or Countervailing Duty Law" Is Unsupportable

Tembec's contention that the term "antidumping law or countervailing duty law" in Article 1901(3) does not encompass the application of the law in the form of antidumping and countervailing duty determinations is without merit. Tembec claims that Article 1901(3)'s scope is limited by the definitions of "antidumping law and countervailing duty law" in Articles 1902(1) and 1904(2).⁴¹ Both articles provide that "antidumping law and countervailing duty law" includes "relevant statutes, legislative history, regulations, administrative practice and judicial precedent." Tembec's argument fails for several reasons.

First, contrary to Tembec's contention, the sentences in Articles 1902(1) and 1904(2) do not provide a definition of the term "antidumping law or countervailing duty law" for purposes of Article 1901(3). Had the Parties intended to define the term chapter-wide, they could have done so in the "Definitions" section in Article 1911, which defines terms "for purposes of this Chapter." Article 1911 contains definitions for "antidumping statute," "countervailing duty statute" and "domestic law," but not for "antidumping law and countervailing duty law." The Parties could also have defined the term in Article 1901, which sets forth "General Provisions," but they did not.

Furthermore, had the Parties intended the definition in Articles 1902(1) and 1904(2) to apply to the entire chapter, there would have been no need to define the term *twice*. Doing so confirms that the Parties did not intend for the sentences in those two articles to provide a general definition of the term. To the contrary, as Article 1904(2) makes clear, the term is defined therein solely "for th[e] purpose" of that provision.⁴²

⁴¹ See Counter-Memorial at 10-12, 15.

⁴² See NAFTA art. 1904(2) ("*For this purpose*, the antidumping or countervailing duty law consists of . . . ") (emphasis added).

Indeed, other references to antidumping law and countervailing duty law in Chapter Nineteen do not incorporate the definitions in Articles 1902(1) and 1904(2). For example, Article 1902(2) provides that “[e]ach Party reserves the right to change or modify its antidumping law or countervailing duty law.” Article 1902(2) cannot be read to incorporate the definition in Article 1902(1) because it would make no sense to provide for the amendment of “legislative history” or “judicial precedents.”⁴³ If the definition in Article 1902(1) does not even control another reference to the same term in the same article, there is no basis to assume, as Tembec does, that it controls a reference to that term in a different article.

Second, assuming, *arguendo*, that the definition of antidumping law and countervailing duty law in Article 1902(1) applied to Article 1901(3), Tembec is incorrect in contending that the definition does not encompass antidumping and countervailing duty determinations.⁴⁴ The non-exhaustive list in Article 1902(1) includes “administrative practice.” Determinations by Commerce and the ITC are examples of administrative practice. Commerce and the ITC administer the U.S. trade remedy laws. The manner in which they administer those laws is by conducting investigations and, in some cases, administrative reviews, and making antidumping and countervailing duty determinations. Those agencies’ administrative practices are embodied in the determinations they make.

Tembec’s argument that Article 1902 is “temporally” limited because it refers only to pre-existing laws that the Parties can apply, and that such temporal limitation should likewise be

⁴³ Likewise, both the SAA and the SOI contain references to the Parties’ rights to amend or change their “antidumping law and countervailing duty law” that would make no sense if the definitions in Articles 1902(1) and 1904(2) applied chapter-wide, as Tembec contends. *See* SAA at 194 (“Articles 1901 and 1902 make clear that each country retains its domestic antidumping and countervailing duty laws and can amend them.”); *see also* SOI at 198 (“Chapter Nineteen . . . provides for binding binational panel review of changes to existing anti-dumping and countervailing duty laws of the Parties.”)

⁴⁴ *See* Counter-Memorial at 11.

incorporated into Article 1901(3), is without merit. The ordinary meaning of “administrative practice” includes ongoing investigations and determinations. Tembec seeks to reject that ordinary meaning and instead import the *context* in which that term appears in Article 1902 into Article 1901(3). No accepted canon of construction supports Tembec’s interpretive method.

Moreover, the Parties are free to “change or modify” existing antidumping and countervailing duty laws, so long as those amendments comply with Article 1902(2). New or modified laws are thus included within the definition of antidumping law and countervailing duty law in Article 1902(1). Tembec’s argument that items listed in Article 1902(1) are strictly historical is therefore inaccurate.

Finally, even if one were to accept Tembec’s arguments that “antidumping law or countervailing duty law” in Article 1901(3) incorporated the definition in Article 1902(1), and that the term referred only to pre-existing law, Tembec’s claims still fail. A claim challenging the application, implementation or “abuse” of preexisting antidumping and countervailing duty laws is a claim that seeks to impose obligations “with respect to” those laws.

5. Tembec’s Reliance On Other International Agreements Is Without Merit

Tembec’s argument that the NAFTA must be interpreted in a manner that provides equal or greater rights to investors from NAFTA Parties, as compared with investors from non-NAFTA Parties, fails on both legal and factual grounds.⁴⁵

First, Tembec’s supposition that this Tribunal must have jurisdiction to decide its claims if investor-State arbitration of its claims were available under any one of the United States’ other free

⁴⁵ See Counter-Memorial at 3 (“The United States’ reading of Article 1901(3), disadvantaging Canadian and Mexican investors, compared to investors from every other country that has a bilateral investment agreement with the United States, is implausible.”); *id.* at 30 (“[I]t is inconceivable that investors of these other countries would have greater rights than those of the NAFTA Parties.”).

trade agreements is unsound as a matter of treaty interpretation. A treaty must be interpreted in accordance with its ordinary meaning, in context, in light of its object and purpose. Tembec's presumption cannot override specific treaty language, such as that contained in Article 1901(3).

Second, Tembec provides no authority for its speculative proposition that one of the NAFTA's objectives is to provide equal or greater access to investor-State arbitration for NAFTA Parties vis-à-vis other States. In fact, the plain text of the NAFTA belies any such overriding objective. For example, investors from all other U.S. BIT and FTA partner countries who have rights to submit claims to investor-State arbitration against the United States may submit claims for breaches of an investment agreement or an investment authorization.⁴⁶ Canadian and Mexican investors in the United States have no such rights under the NAFTA.⁴⁷ It is, therefore, simply incorrect to assume that the NAFTA grants greater rights to arbitrate investment disputes than other international agreements.

Finally, Tembec's theory is misplaced in any event as it incorrectly presumes that an investor-State arbitral tribunal constituted under one of the United States' bilateral investment treaties or under the investment chapter of one of its free trade agreements necessarily would have jurisdiction to decide challenges to the United States' antidumping and countervailing duty determinations. 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. Moreover, those agreements

⁴⁶ See, e.g., Sing.-U.S. FTA art. 15.15(1)(a), (b) (May 6, 2003) (providing that a claimant may submit a claim to investor-State arbitration on its own behalf or on behalf of an enterprise that the claimant owns or controls that alleges that the respondent has breached an obligation under the applicable treaty section, an investment authorization or an investment agreement); Chile-U.S. FTA art. 10.15(1)(a), (b) (June 6, 2003) (same); Morocco-U.S. FTA art. 10.15(1)(a), (b) (June 15, 2004) (same); Alb.-U.S. BIT art. IX(1), (3) (Jan. 11, 1995) (same).

⁴⁷ See NAFTA arts. 1116 & 1117 (providing for investor-State arbitration of claims that the respondent State has breached specified treaty provisions, but not for breaches of an investment agreement or an investment authorization).

do not provide any means for an exporter or producer to challenge antidumping and countervailing duty determinations under domestic law before a binational panel. The NAFTA and the CFTA are unique in this regard: they permit exporters and producers to seek municipal law review of antidumping and countervailing duty determinations before a Chapter Nineteen binational panel.⁴⁸ The very fact that the NAFTA and the CFTA uniquely provide this avenue of relief undermines Tembec's argument that under the United States' interpretation, the NAFTA confers fewer rights than other agreements and treaties.

B. Article 1901(3)'s Context Confirms That The United States Did Not Consent To Arbitrate Tembec's Claims

In its Counter-Memorial, Tembec fails to address the United States' arguments concerning Article 1901(3)'s context. It ignores the United States' arguments regarding Article 2004 and with respect to the fact that no provision is made for the use of business proprietary information in Chapter Eleven proceedings. Nor does Tembec respond directly to the United States' argument concerning Article 1115. Instead, it focuses on a different portion of that article, misconstruing it as a jurisdictional provision. Finally, Tembec fails to explain how its claims are consistent with the circumstances of conclusion of the NAFTA.

1. Tembec Fails To Respond To The United States' Arguments Concerning Article 2004

The United States demonstrated in its Objection that exercising jurisdiction in this case would be inconsistent with Article 2004, which excludes "all matters covered in Chapter Nineteen"

⁴⁸ Claimants' counsel concedes that the NAFTA and the CFTA are the only free trade agreements entered into by the United States that provide a forum expressly for challenges to antidumping and countervailing duty determinations. *See Baker & Hostetler, Duties and Dumping: What's Going Wrong With Chapter 19?*, 14 n.29 (June 2004) ("One measure of Chapter 19's success at reining in AD and CVD actions has been the U.S. unwillingness to extend the concept to subsequent free trade agreements . . ."); *see also* Elliot J. Feldman, *Focus on the Real Future: The Defense of NAFTA As Canadian Sovereignty's Last Stand*, House of Commons, Subcommittee on International Trade (Mar. 8, 2005) ("[Chapter 19] is unique and uniquely valuable to Canada. The United States has refused to negotiate anything like it with anyone else . . ."). Chapter Nineteen would not be "uniquely valuable" if private parties could challenge determinations in investor-State arbitration under all of the United States' FTAs and BITs.

from State-to-State dispute resolution. As stated there, it is inconceivable that the NAFTA Parties would have consented to investor-State dispute settlement over a subject matter not amenable to State-to-State dispute settlement. Tembec fails to explain in its Counter-Memorial how exercising jurisdiction over its claims would be consistent with the general presumption that the NAFTA authorizes a broader scope for State-to-State dispute resolution than for investor-State arbitration.⁴⁹ Instead, it points out that Chapter Eleven and its annexes contain several specific exclusions, but none that are similar to Article 2004 concerning antidumping and countervailing duty matters.⁵⁰ Based on the absence of such an exclusion in Chapter Eleven, Tembec concludes that the Parties must have consented to submit antidumping and countervailing duty matters to arbitration under that chapter.⁵¹ Tembec's reasoning is flawed.

Antidumping and countervailing duty claims are expressly excluded from Chapter Eleven's scope by Article 1901(3). No canon of treaty interpretation supports Tembec's theory that only an exception in Chapter Eleven can exclude matters from that chapter's scope. There would be no difference in effect, for example, if, instead of Article 1901(3), the NAFTA contained a provision in every chapter other than Chapter Nineteen that provided that "*this* chapter shall not be construed as imposing obligations on a Party with respect to the Party's antidumping law and countervailing duty law." A more efficient means of accomplishing the same result, however, was to include a single provision in the *only* chapter that imposes obligations. The location of this exception is legally insignificant. In fact, the NAFTA Parties commonly placed exemptions to one chapter's

⁴⁹ See *UPS Award on Jurisdiction* ¶ 61 ("NAFTA authorizes a broader scope for State-State arbitration than for investor-State arbitration. . . . 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].").

⁵⁰ See Counter-Memorial at 27-28.

⁵¹ See *id.*

obligations in other chapters – particularly exemptions like Article 1901(3) that exclude a particular subject matter from obligations in most or all of the Agreement.

Tembec's interpretation would also render ineffective other exclusionary provisions in the NAFTA. Article 1607, for example, excludes immigration measures from obligations contained in other parts of the NAFTA. Under Tembec's theory, because this exclusion is located outside of Chapter Eleven, a claimant could submit a claim seeking to impose an obligation on a Party with respect to its immigration laws to Chapter Eleven arbitration. Similarly, Article 2103(1) provides that, with certain exceptions, nothing in the Agreement shall apply to taxation measures.⁵² The effect of these exceptions is clear: a tribunal established under the NAFTA has no jurisdiction over immigration or taxation measures except as specifically provided.

Moreover, in contrast to Chapter Twenty, which confers plenary jurisdiction over all subject matters under the NAFTA except one, Chapter Eleven confers only limited jurisdiction over "investment disputes."⁵³ Articles 1116 and 1117 confer jurisdiction over claims with respect to alleged breaches of the provisions in Section A of Chapter Eleven and two articles in Chapter Fifteen. Because of the limited scope of disputes subject to arbitration under Chapter Eleven, unlike Chapter Twenty, there would be no perceived need for Chapter Eleven to contain an express exclusion like Article 2004 for every other type of dispute that would not be subject to investor-State arbitration.

In sum, Tembec's interpretive method is untenable. Article 2004's exclusion of antidumping and countervailing duty matters from State-to-State dispute resolution confirms that those matters are likewise excluded from Chapter Eleven arbitration.

⁵² *See also* NAFTA art. 2102 ("Subject to Articles 607 [] and 1018 [], nothing in this Agreement shall be construed . . . to prevent any Party from taking any actions that it considers necessary for the protection of its essential security interests . . .").

⁵³ NAFTA art. 1115.

2. Tembec Fails To Respond To The United States' Arguments Concerning Business Proprietary Information

The United States demonstrated in its Objection that the absence of legal authority providing for the use of business proprietary information in Chapter Eleven proceedings confirms that the Parties did not consent to submit antidumping and countervailing duty determinations to Chapter Eleven arbitration. 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 proceeding.⁵⁴ Tembec's argument, however, is irrelevant to the issue of whether the Parties consented to arbitrate antidumping and countervailing duty claims under Chapter Eleven.

Moreover, Tembec's argument is incorrect as a factual matter. These proceedings could not be conducted without access to that proprietary information. For example, in its Statement of Claim, Tembec alleges that Commerce misallocated joint costs in the antidumping investigation by "refus[ing] to recognize the effect of size on the value of lumber products."⁵⁵ Commerce's findings regarding the correlation between lumber size and price, however, were based on a comparison of proprietary pricing information submitted by Slocan, Weyerhaeuser, Canfor and other softwood lumber producers subject to the duty order. That information cannot legally be introduced in this proceeding. Without access to the proprietary information in the administrative records, this Tribunal could not sit in judgment of Commerce's cost allocation, or numerous other decisions by Commerce and the ITC on which Tembec's claims are based.

⁵⁴ See Counter-Memorial at 24 n.33.

⁵⁵ Statement of Claim ¶ 46(c).

3. Tembec Fails To Respond To The United States' Arguments Concerning Article 1115

As the United States noted in its Objection, where parallel proceedings were contemplated, that possibility is expressly noted in the NAFTA. Article 1115, for example, provides that the Chapter Eleven dispute resolution mechanism is established without prejudice to a NAFTA Party's ability to refer a dispute based on the same measure to dispute resolution under Chapter Twenty. That no NAFTA provision contemplates parallel proceeding under Chapters Eleven and Nineteen is further contextual support for what Article 1901(3) plainly says: the Parties intended to have their antidumping and countervailing duty determinations reviewed under the NAFTA solely in the forum provided in Chapter Nineteen.

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."⁵⁶ Tembec contends that the United States has not accorded it treatment equal to that accorded to U.S. investors.⁵⁷ It concludes that its own interpretation of Article 1901(3) is therefore consistent with the purpose of Chapter Eleven.⁵⁸ Once again, Tembec's argument has no bearing on the question of jurisdiction before this Tribunal. Its argument is no different in substance than its claim on the merits that it has been denied national treatment as required by Article 1102. Nor does Tembec's argument shed any light on the proper interpretation of Article 1901(3).

Tembec also contends that, as a matter of fairness, the Tribunal should assume jurisdiction because the NAFTA does not permit it to bring claims under Chapter Nineteen based on

⁵⁶ See Counter-Memorial at 20.

⁵⁷ See *id.*

⁵⁸ See *id.*

substantive obligations in Chapter Eleven.⁵⁹ Tembec's argument is without merit. That Chapter Nineteen applies only domestic law standards does not confer jurisdiction on this Tribunal. Rather, it reflects the Parties' agreement – made explicit in Article 1901(3) – to subject their antidumping and countervailing duty determinations to dispute resolution only under the procedures set forth in Chapter Nineteen and the standards of review set forth in domestic law.

Had the Parties intended to subject their antidumping and countervailing duty determinations to the substantive obligations in Chapter Eleven, they would have done so expressly. Article 1101(3), for example, carves out matters arising under Chapter Fourteen (Financial Services) from the scope of Chapter Eleven. Article 1401(2), in turn, incorporates specific substantive provisions from Chapter Eleven into Chapter Fourteen.⁶⁰ That Chapter Nineteen does not, like Article 1401(2), expressly incorporate any of the substantive provisions from Chapter Eleven further confirms that the Parties did not intend to subject their antidumping and countervailing duty determinations to the international law standards set forth in Chapter Eleven.

4. Tembec Fails To Respond To The United States' Arguments Concerning The Circumstances Of Conclusion Of The NAFTA

In its Objection, the United States demonstrated that the NAFTA Parties could not agree on an international antidumping and countervailing duty law and, instead, adopted a procedural mechanism of binational panels to review each Party's antidumping and countervailing duty determinations for consistency with that Party's domestic law. Tembec fails to explain how its claims are consistent with this aspect of the circumstances of conclusion of the Treaty.

⁵⁹ *See id.* at 21 n.29.

⁶⁰ NAFTA art. 1401(2) (“Articles 1109 through 1111, 1113, 1114 and 1211 are hereby incorporated into and made a Part of this Chapter.”).

Tembec's argument that the United States' interpretation of Article 1901(3) "requires the conclusion that there is neither discipline nor remedy anywhere in NAFTA for a Party's abuse of its trade laws"⁶¹ ignores the Parties' chosen device for addressing challenges to their trade laws in the NAFTA. In Chapter Nineteen, the Parties provided a mechanism to address challenges to amendments made to one another's trade remedy laws. They also devised the binational panel mechanism to address complaints that a Party had acted inconsistently with its trade remedy laws by making certain antidumping and countervailing duty determinations.

Tembec's alleged displeasure with the Chapter Nineteen process cannot confer jurisdiction on this Tribunal. Nor can Tembec's resort to general statements in the NAFTA's preamble that the Parties may *in the future* adopt further disciplines for trade justify imposing on the Parties obligations that they have not accepted.⁶² 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.⁶³ Applying the substantive international law obligations under Chapter Eleven to the Parties' determinations, as Tembec seeks to do in this arbitration, would impose on the Parties a solution that they could not, and did not, reach. Article 1901(3)'s prohibition on imposing obligations from NAFTA chapters other than Chapter Nineteen – *i.e.*, chapters that contain substantive, international law standards – is consistent with this aspect of the circumstances of conclusion of the NAFTA.

⁶¹ See Counter-Memorial at 28 n.41.

⁶² *Id.* at 19-20 (quoting the NAFTA's preamble providing that the Parties are resolved to "[b]uild on their respective rights and obligations under the *General Agreement on Tariffs and Trade* and other multinational and bilateral instruments of cooperation.").

⁶³ See *id.* at 22-23.

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

Tembec's contention in its Counter-Memorial that assuming jurisdiction in this case would advance the NAFTA's general objective of promoting free trade is without merit.⁶⁴ *First*, Tembec's argument is at odds with accepted principles of treaty interpretation. Article 102(1), which sets forth the Treaty's objectives, specifies that these general objectives are "elaborated more specifically through its principles and rules." As the NAFTA Chapter Eleven tribunal in *ADF Group Inc. v. United States of America* explained:

We understand the rules of interpretation found in customary international law to enjoin us to focus first on the actual language of the provision being construed. The object and purpose of the parties to a treaty in agreeing upon any particular paragraph of that treaty are to be found, in the first instance, in the words in fact used by the parties in that paragraph [T]he general objectives of NAFTA . . . may frequently cast light on a specific interpretive issue; *but [they are] not to be regarded as overriding and superseding the latter.*⁶⁵

Tembec's attempt to displace specific treaty provisions – namely Article 1901(3) – on the ground that interpreting Article 1901(3) in accordance with its ordinary meaning in context does not advance the treaty's general objective of promoting free trade cannot be sanctioned.

Second, Tembec's theory that promoting the NAFTA's free trade objectives requires that it have *two* fora under the NAFTA to challenge the United States' antidumping and countervailing duty determinations is unsound. To the contrary, the Parties intended to "create effective

⁶⁴ *See id.* at 18.

⁶⁵ *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1 ¶ 147 (Award of Jan. 9, 2003) (internal citations omitted; emphasis modified). Moreover, Tembec's interpretive method violates a fundamental convention of treaty interpretation, *generalia specialibus non derogant*. *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1); *see also Asian Agric. Prods. Ltd. v. Sri Lanka*, 30 I.L.M. 577, 636 (Final Award of June 21, 1990) ("Since Article 4 contains specific rules governing the particular case of investment losses sustained in civil disturbances – the situation presented by this case – this provision must, in accordance with a well-settled principle of treaty interpretation, prevail over the general property protection provision in Article 2(2). This principle . . . is captured by the maxim: 'Generalia specialibus non derogant'"); *Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803 ¶ 28 (Dec. 12) (holding that an article in a treaty providing that "there shall be enduring peace and sincere friendship" "must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied," but cannot be the basis on which a breach of the treaty could be found).

procedures . . . for the resolution of disputes.”⁶⁶ For the reasons set forth in the United States’ Objection, parallel proceedings under the same Treaty are hardly an effective way to resolve disputes. Tembec’s complaint that the United States’ interpretation of Article 1901(3) would “deprive” it of the remedies in Chapter Eleven is hollow rhetoric. The Treaty’s objective of creating effective dispute resolution is consistent with Article 1901(3)’s requirement that challenges to the Parties’ antidumping and countervailing duty determinations be resolved under the NAFTA only before Chapter Nineteen binational panels.

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

Tembec has failed to demonstrate that the antidumping and countervailing duty determinations at issue relate to it or its U.S. investments in any legally cognizable way, as required by Article 1101(1). As an initial matter, Tembec errs in suggesting that whether its U.S.-based investments were harmed by the determinations is a factual question reserved for the merits. To the contrary, the issue before the Tribunal is a legal one: whether Tembec’s claims fall within the scope of Chapter Eleven. Tembec’s Counter-Memorial confirms that its claims do not. To satisfy Article 1101(1)’s jurisdictional requirement, Tembec relies solely on the alleged economic impact of those determinations on its U.S. investments – a test that has been rejected by all three Parties to the NAFTA and the Chapter Eleven tribunal in *Methanex Corp. v. United States of America*. Because the determinations do not relate to Tembec or its U.S. investments within the meaning of Article 1101(1), its claims must be dismissed for lack of jurisdiction.

⁶⁶ NAFTA art. 102.

A. The Measures At Issue Do Not Relate To Tembec's U.S. Investments

Tembec's allegations that its U.S. investments have been adversely affected by the duty determinations are insufficient to satisfy Article 1101(1)'s jurisdictional requirement. All three NAFTA Parties have expressed their agreement that a mere effect on an investment is insufficient to satisfy Article 1101(1)'s requirement that a measure relate to the investment.⁶⁷ Notably, the Government of Canada has opined that accepting an "effects" test, as Tembec proposes, would lead to an "absurd result":

*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.*⁶⁸

The NAFTA Parties' shared views concerning Chapter Eleven's scope should be considered authoritative and must be taken into account by the Tribunal.⁶⁹ Furthermore, as set forth in the

⁶⁷ See, e.g., *Methanex Corp. v. United States of America, Memorial on Jurisdiction and Admissibility of Respondent United States of America* at 48 (Nov. 13, 2000) ("Given the potential of [government] measures to affect enormous numbers of investors and investments, with respect to any such specific measure, there must be a legally significant connection between the measure and a claimant investor or its investment. Otherwise, untold numbers of local, state and federal measures that simply have an incidental impact on an investor or investment might be deemed to 'relate to' that investor or investment."); *Methanex Corp. v. United States of America, Submission of Mexico Pursuant to NAFTA Article 1128 ¶ 7* (May 15, 2001) ("Mexico agrees with the position of the United States, and disagrees with Methanex's contention that measures that merely "affect" investors or investments are covered by Chapter Eleven."); *Methanex Corp. v. United States of America, Second Submission of Canada Pursuant to NAFTA Article 1128 ¶¶ 22-23* (Apr. 30, 2001) ("The NAFTA Parties clearly did not intend that every regulatory measure of general application which merely affects or has an incidental, minimal, or inadvertent effect on an investor, or its investment, would give rise to a claim under NAFTA Chapter Eleven. Furthermore, Canada agrees with the United States that the term 'relating to' requires a 'significant connection' between the measure at issue and the essential nature of investment."); *S.D. Myers v. Government of Canada, Counter-Memorial of the Government of Canada ¶ 206* (Oct. 5, 1999) ("[Claimant's] argu[ment] that any measure that merely affects an investor or an investment falls within the scope of Chapter Eleven . . . cannot be supported by either the terms or the context of Article 1101 or by the object and purpose of the NAFTA and of Chapter Eleven."); *S.D. Myers v. Government of Canada, Submission of the United Mexican States Pursuant to NAFTA Article 1128 ¶ 15* (Jan. 14, 2000) ("The language used in Article 1101 indicates . . . that the Parties did not intend to subject any and all government measures that might incidentally or indirectly affect an investor or investment of an investor of another Party to investor-state arbitration.").

⁶⁸ *S.D. Myers, Inc. v. Government of Canada, Counter-Memorial of the Government of Canada ¶ 210* (Oct. 5, 1999) (emphasis added).

⁶⁹ See Vienna Convention art. 31(3)(a); see also *International Status of South West Africa, Advisory Opinion*, 1950 I.C.J. 129, 135 ("Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument."); *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1 ¶ 177 (Award of Jan. 9,

United States' Objection, the *Methanex* Chapter Eleven tribunal similarly rejected an "effects" test for jurisdiction, explaining that such an interpretation "in a legal instrument such as the NAFTA . . . would produce a surprising, if not absurd result."⁷⁰

Tembec's reliance on other Chapter Eleven cases for a contrary interpretation is misplaced. The *Ethyl* tribunal, for instance, did not even rule on the issue.⁷¹ The *Pope & Talbot* tribunal rejected Canada's argument that a measure primarily concerned with trade in goods could not relate to investments or investments, a proposition that the United States does not advance here.⁷² And the *S.D. Myers* tribunal found that the "relating to" requirement in Chapter Eleven was satisfied because "the prospect that SDMI would carry through with its plans to *expand its Canadian operations* . . . was the specific inspiration for the export ban," which "was raised to address specifically the *operations* of SDMI and its *investment*."⁷³ Here, by contrast, there is no allegation that the antidumping and countervailing duty determinations were made in order to specifically address the operation of Tembec's investments in the United States.

In sum, Tembec has pointed to no authority to support the proposition that a Chapter Eleven tribunal has jurisdiction over claims that challenge measures that merely have an effect on a claimant's investment in the territory of the State that has adopted the measure. To the contrary, that theory has been repeatedly rejected. Because Tembec alleges no more than a mere effect on its U.S. investments by the antidumping and countervailing duty determinations, those determinations

2003) ("[W]e have the Parties themselves – all the Parties – speaking to the Tribunal. No more authentic and authoritative source of instruction on what the Parties intended to convey in a particular provision of NAFTA, is possible.").

⁷⁰ *Methanex Corp. v. United States of America*, ¶ 138 (First Partial Award of Aug. 7, 2002), 14:6 WORLD TRADE & ARB. MATERIALS 109, 156 (Dec. 2002).

⁷¹ See *Ethyl Corp. v. Government of Canada* ¶ 64 (Award on Jurisdiction of June 24, 1998) (noting that because Canada indicated that it was not critical for the Tribunal to address this issue at this stage of the proceedings, "further treatment of this issue, if any, must abide another day.").

⁷² See *Pope & Talbot, Inc. v. Government of Canada* ¶¶ 33-34 (Award on Motion to Dismiss of Jan. 26, 2000).

⁷³ *S.D. Myers, Inc. v. Government of Canada* ¶ 234 (Partial Award of Nov. 13, 2000) (emphasis added).

do not relate to Tembec's U.S.-based investments within the meaning of Article 1101(1). The Tribunal thus lacks jurisdiction over those claims.

B. The Measures At Issue Do Not Relate To Tembec With Respect To Its Investments In The United States

Tembec also errs in suggesting that it satisfies the “relating to” requirement because the final duty orders refer by name to Tembec Inc., the Canadian parent company.⁷⁴ To be the subject of a claim under Chapter Eleven, however, a measure must relate to the investor with respect to the establishment or acquisition of new investments in the territory of the host Party, or with respect to certain activities of existing investments in that territory. The antidumping and countervailing duty measures at issue here do not relate to Tembec with respect to the establishment or acquisition of investments in the United States or with respect to activities of its existing investments in the United States.

The only NAFTA provisions at issue governing treatment of investors – Articles 1102(1) and 1103(1) – require the Parties to “accord investors of another Party treatment . . . with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” in its territory.⁷⁵ The determinations at issue, however, do not accord Tembec Inc. any treatment with respect to any activities of its U.S. investments. They do not regulate Tembec's Inc.'s ability to establish or acquire any new investments in the United States, nor do they regulate Tembec Inc.'s management or operations of its existing investments. Indeed, the determinations do not mention or contemplate those investments at all. That they merely refer

⁷⁴ See Statement of Claim at 32.

⁷⁵ The other NAFTA provisions alleged by Tembec to have been breached govern treatment with respect to “investments.” See NAFTA art. 1102(2) (“Each Party shall accord to investments”); *id.* art. 1103(2) (“Each Party shall accord to investments”); *id.* art. 1105(1) (“Each Party shall accord to investments”); *id.* art. 1110(1) (“No Party may directly or indirectly nationalize or expropriate an investment”).

to the Canadian parent company by name is insufficient to establish a legally significant connection with the U.S. investments that is necessary for jurisdiction under the investment chapter.⁷⁶

Under Tembec's theory, *all* antidumping determinations – which typically refer to respondent parties by name – and most countervailing duty determinations (except those conducted on a country-wide basis) would be subject to challenge under the investment chapter. Such a result would chill and disrupt the Parties' trade remedy regimes. As noted above, the NAFTA Parties did not intend such a result.⁷⁷

Finally, Tembec's reliance on the statement in the SAA that Chapter Nineteen "applies to all government measures relating to investment, with the exception of measures governing financial services" is unavailing.⁷⁸ Tembec argues that the reference to *all* government measures, and the exclusion of only those governing financial services, demonstrates that Chapter Eleven was intended to apply to challenges to antidumping and countervailing duty determinations.⁷⁹ The SAA, however, specifies that, to be subject to Chapter Eleven, a governmental measure – including one that accords treatment to the investor – must "*relat[e] to investment.*" The financial services chapter similarly "applies to measures . . . relating to . . . investments."⁸⁰ 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

⁷⁶ The legislative materials accompanying the CFTA provide examples of treatment of investors with respect to their investments in the host country that is proscribed by the national treatment provision: the Parties may not "establish requirements that : 1) investors must sell investments by reason of their nationality, or 2) their own nationals must hold a particular level of equity in investments by investors of the other country." UNITED STATES-CANADA FREE TRADE AGREEMENT, STATEMENT OF REASONS AS TO HOW THE UNITED STATES – CANADA FREE TRADE AGREEMENT SERVES THE INTERESTS OF U.S. COMMERCE, H.R. Doc. No. 100-216, 100th Cong., 2nd Sess., at 33. The measures at issue do not impose any such requirements on Tembec's U.S.-based investments.

⁷⁷ See *supra* n.68.

⁷⁸ See Counter-Memorial at 17 (*quoting* SAA at 140).

⁷⁹ See *id.*

⁸⁰ NAFTA art. 1101(1)(b) (emphasis added).

antidumping and countervailing duty determinations could “relate to” investments in the host Party’s territory within the meaning of Article 1101(1).

In sum, no legally significant connection exists between the antidumping and countervailing duty determinations at issue and Tembec or its U.S. investments. That Tembec, Inc., the Canadian parent company, is named in the duty orders, or the fact that the orders allegedly affected the markets in which Tembec’s U.S.-based investments operate, does not confer jurisdiction on this Tribunal. Accordingly, Tembec’s claims do not fall within the scope of Chapter Eleven and should be dismissed.

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

Throughout its Counter-Memorial, Tembec repeatedly states that it has complied with the procedural pre-requisites for submitting its claim to arbitration under Chapter Eleven.⁸¹ Tembec, however, ignores the fact that Article 1121 sets forth a condition precedent to the submission of a claim. As demonstrated in the United States’ Objection, Tembec has failed to comply with this condition.

All three NAFTA Parties agree that the mere submission of a written waiver in writing does not satisfy Article 1121’s requirement when the claimant takes action contrary to the waiver’s conditions.⁸² This agreement comports with the *Waste Management* tribunal’s holding that Article 1121 requires the waiving party immediately to “drop[]” any “parallel proceedings before other

⁸¹ See, e.g., Counter-Memorial at 1, 4, 7.

⁸² See *Waste Management Inc. v. United Mexican States, Submission of the Government of Canada Pursuant to Article 1128* ¶ 8 (Dec. 17, 1999) (“It 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.”); *Waste Management Inc. v. United Mexican States, Counter-Memorial Regarding the Competence of the Tribunal of the United Mexican States* ¶ 98 (Nov. 5, 1998) (“The 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.”); *Tembec Inc. et al. v. United States of America, U.S. Statement of Defense* ¶¶ 8-10 (Dec. 15, 2004); *Tembec Inc. et al. v. United States of America, U.S. Objection to Jurisdiction* at 35-38 (Feb. 4, 2005).

courts or tribunals” and “abstain from initiating” any new proceedings.⁸³ Tembec offers no argument disputing this interpretation of Article 1121.

Tembec, however, has failed to act consistently with its pledge to “waive [its] right to initiate or continue . . . any proceedings with respect to the measures” at issue in this arbitration. Tembec continues to pursue its challenges to the same antidumping and countervailing duty determinations that it complains of here in proceedings before Chapter Nineteen binational panels.⁸⁴ In each of these proceedings, Tembec is a *complainant*. Contrary to the misimpression that Tembec seeks to create in its Counter-Memorial, it is not defending itself in any of these actions.⁸⁵ Rather, Tembec has chosen to challenge the antidumping and countervailing duty determinations that were made by Commerce and the ITC before binational panels established under Chapter Nineteen of the NAFTA.

Tembec’s continued participation in the Chapter Nineteen proceedings runs afoul of its waiver. The only claims that may be initiated or continued after submitting a claim to Chapter Eleven arbitration are those “before an administrative tribunal or court under the law of the disputing Party” for injunctive, declaratory, or other extraordinary relief.⁸⁶ Tembec’s claims clearly fall outside of this exception because they are being pursued before Chapter Nineteen panels. Such binational panels established under a multilateral treaty are not administrative

⁸³ *Waste Management I Award* ¶¶ 19, 20.

⁸⁴ See *Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination*, Secretariat File No. USA-CDA-2002-1904-02 (Decision of the Panel of 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 of 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 of Sept. 5, 2003).

⁸⁵ See, e.g., Counter-Memorial at 4 (“The ordinary meaning and purpose of Article 1121 does not require Tembec to default when it is a respondent”); *id.* at 5 (Tembec “has been defending itself in investigations and reviews initiated and continued by the United States”); *id.* at 41 (“The United States would require Tembec to default in the trade proceedings that the United States initiated and is continuing”).

⁸⁶ NAFTA art. 1121(1)(b), (2)(b).

tribunals or national courts established under the law of the United States. Tembec's Chapter Nineteen claims therefore do not fall within the Article 1121 exception. Accordingly, its failure to withdraw its Chapter Nineteen claims in accordance with its written waiver bars its claims in this proceeding.

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,

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