

**ARBITRATION 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 COUNTER-MEMORIAL TO THE JURISDICTIONAL
OBJECTIONS OF THE UNITED STATES**

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I. INTRODUCTION

Tembec meets all the criteria for this Tribunal's jurisdiction.¹ A Canadian investor with investments in the United States, Tembec has submitted a Statement of Claim alleging that the United States violated certain obligations under NAFTA Chapter 11. There is no dispute that Tembec has followed all of the procedures required for this arbitration as set out in NAFTA.² There is nothing in Chapter 11 nor in any other Chapter of NAFTA that excludes Tembec's claims from the scope of Chapter 11.

The objections of the United States to the Tribunal's jurisdiction, based on Articles 1901(3), 1101, and 1121, amount to a single proposition: that Tembec cannot bring its claims because the contested measures "concern determinations made under

¹ Tembec refers collectively to Tembec Inc., Tembec Investments Inc., Tembec Industries Inc., and the U.S. enterprises which are Tembec Investments USA Inc., Tembec Woodsville Inc., Temboard Sales Inc., and Tembec USA LLC.

² See NAFTA Articles 1101, 1121.

the authority of U.S. antidumping and countervailing duty laws.”³ The United States, however, has consented explicitly to this arbitration in Article 1122(1). 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.

The United States, relying on Article 1901(3), argues that it has not consented to this arbitration because Chapter 19 of NAFTA provides exclusive jurisdiction for any claims “with respect to” the antidumping or countervailing duty laws. The United States’ own Statement of Administrative Action (“SAA”), however, defines the more modest purpose of Articles 1901 and 1902: to “make clear that each country retains its domestic antidumping and countervailing duty laws and can amend them.” The United States neglects to inform the Tribunal that the SAA explains Article 1901(3) simply and explicitly.

Articles 1901, 1902, 1903 and 1904 are integral and must be read together, yet the United States does not mention Article 1902, which immediately defines and limits Article 1901 in the plain language and organic structure of the Agreement. Instead, the United States places extraordinary weight on the ambiguous phrase “with respect to” in Article 1901(3), which has no defined meaning, while explaining not at all the phrase “antidumping and countervailing duty law,” which is defined with precision in Article 1902(1).

Article 1901(3) permits the NAFTA Parties to retain their trade laws. Article 1902 permits them to apply those laws. Nothing in Article 1901(3) insulates the

³ Objection to Jurisdiction of Respondent United States of America, Feb. 4, 2005 at 2 (hereinafter “U.S. Objection”).

Parties from obligations in other NAFTA chapters when they abuse or misapply their trade laws. Tembec's claims are about abuse and misapplication. Use of the narrow term "law" in Articles 1902 and 1904 is consistent with the narrow purpose for Article 1901(3) described in the SAA.

The United States' interpretation of Article 1901(3) is also inconsistent with the ordinary meaning of the relevant Chapter 11 articles, which have specific exclusions but none related to trade, and the interpretation of Chapter 11 in the SAA as encompassing all measures affecting investors. There is no evidence in the *travaux préparatoires*, nor are there any unilateral documents in the United States' possession, supporting its view.⁴

The consequence of the United States' interpretation, if adopted, would be that Canadian and Mexican investors in the United States would be disadvantaged relative to investors from Chile, Morocco, Singapore, El Salvador, Nicaragua, Honduras, the Dominican Republic, and other countries that have signed free trade agreements or bilateral investment treaties with the United States providing for investor-state arbitration, but have no equivalent to NAFTA Article 1901(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.

The United States also argues that jurisdiction of Tembec's claims is prohibited by Article 1101 because the United States' unlawful acts affect trade, but do

⁴ The United States represented to the Tribunal that it had no internal documents discussing Article 1901(3). See First December 22, 2004 Letter from United States to the Tribunal at 2.

not affect Tembec “as an investor” in the United States. That argument pretends that engagement in trade is divorced from investment, as if inclusion of an investment chapter in a trade agreement were some kind of accident or drafting error. Tembec’s claims satisfy the requirements of Article 1101 because the measures about which Tembec complains “relate to” Tembec and its U.S. investments.

The United States’ argument that Tembec has violated the commitment it made in providing required Article 1121 waivers by defending itself against antidumping and countervailing duty allegations and responding to investigations “initiate[d] and continue[d]” by U.S. agencies is contrary to the ordinary meaning and purpose of that article. The ordinary meaning and purpose of Article 1121 does not require Tembec to default when it is a respondent, forfeit C\$250 million in duty deposits, and forego efforts to mitigate the damages caused by the unlawful conduct of the United States. The United States does not define any of the key terms in Article 1121 or identify what proceedings it thinks Tembec should abandon.

As in its argument under Article 1901(3), the United States overstates the purpose of Article 1121, which is to ensure that Tembec does not seek damages through a domestic proceeding while also seeking damages through Chapter 11. Tembec is not seeking damages through any other proceeding and, therefore, has not violated its waivers.

The placement of Chapter 11 in NAFTA, a comprehensive trade agreement among three countries, reaffirms the relationship existing between trade and investment. The United States attempts to deny that relationship by generalizing provisions that have precise definitions and purposes, and by ignoring conflicting

interpretations. That approach is inconsistent with the ordinary meaning of the NAFTA provisions at issue. The Tribunal should dismiss the United States' jurisdictional objections and schedule a hearing on the merits of Tembec's claims.

II. A NOTE ON A DISTRACTION

The United States has spent considerable space in its memorial on non-jurisdictional issues, particularly on the merits of Tembec's claims. The excuse offered for this distraction is the argument that Tembec should not be permitted to relitigate its Chapter 19 claims before this Chapter 11 Tribunal.

Tembec does not intend to distract the Tribunal into the merits of its claims while the Tribunal has before it a jurisdictional motion. Tembec is not relitigating here the issues argued before Chapter 19 binational panels, in which it has been defending itself in investigations and reviews initiated and continued by the United States, including seven additional actions launched by the United States since Tembec filed its Chapter 11 Notice of Intent.⁵ Tembec comes before this Tribunal seeking compensation for damages inflicted by unlawful conduct of the United States, based on the principles set forth in Chapter 11. It has no claims for damages in any other forum.

While Tembec will not be drawn into this distraction, it will broadly correct certain misrepresentations. Despite often extreme deference accorded by Chapter 19 binational panels to the International Trade Commission and the Department of Commerce, under intense public pressure and naked threats, the binational panels to date have found no injury or threat of injury (and therefore no basis for any

⁵ The United States has initiated first and second administrative reviews of the countervailing duty and antidumping orders, and Section 129 compliance proceedings purportedly to implement adverse WTO decisions in antidumping, countervailing duties, and injury.

countervailing duty or antidumping orders). The antidumping rates are rapidly diminishing despite the Department of Commerce's efforts to prop them up by repeatedly shifting formulas and using methodologies found illegal at the WTO. The countervailing duty rate that began with the Department of Commerce at 18.79 percent is now only 1.88 percent, notwithstanding that the Department of Commerce refused to implement certain instructions from the panel that likely would have reduced the rate to *de minimis* and forced the conclusion that there are no subsidies on softwood lumber in Canada. Tembec has neither need nor interest in relitigating these results.⁶

Senior members of the U.S. Administration and members of the Senate Finance Committee have declared that, no matter what may happen before NAFTA and WTO panels, the United States will not return to Canadians their \$3.9 billion in duty deposits (C\$250 million from Tembec), and will not terminate antidumping and countervailing duty orders. This willingness to disregard both domestic and international rules of conduct illustrates the United States' animus against Tembec and the Canadian parties. The resulting discrimination in the proceedings and in the results is the source of the harm done to Tembec and the basis for Tembec's damages claims under Chapter 11.

⁶ The United States also presents an inaccurate account of Freedom of Information Act litigation in United States District Court, which is also irrelevant to its jurisdictional objection. See U.S. Objection, fn. 44. The central facts of that litigation are that the federal judge on three occasions already has ordered the United States to release documents and information previously withheld (or whose very existence had been denied), and is now examining more *in camera* for which the United States claims privilege. The United States has tried unsuccessfully for over two years to have this litigation dismissed because the federal judge has not been satisfied with U.S. claims of full disclosure. The released documents already provide important evidence of the United States' bias in the conduct of the antidumping and countervailing duty proceedings, as does the Department of Commerce's conduct in resisting the Freedom of Information Act requests.

ARGUMENT

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

A. The United States Has Consented To Arbitrating Tembec's Chapter 11 Claim

The United States has consented to this arbitration. Article 1122(1) provides the United States' arbitration consent in unambiguous terms, stating:

Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

Article 1122(1) is without any limitations on consent other than that the claimant follow the procedures in the Agreement.⁷ Article 1901(3) is not a procedural provision under either Party's interpretation.

Tembec has complied with the procedures required for submission of a Chapter 11 claim. Tembec's claim satisfies the threshold criteria for the Tribunal's jurisdiction under Chapter 11. Tembec, as a Canadian enterprise, is an investor of another Party.⁸ Tembec has investments in the United States.⁹ Tembec submitted a Notice of Intent to Arbitrate in accordance with Article 1127. Tembec submitted its Statement of Claim with the required Article 1121 waivers and, in response to the United States' challenge, the appointing authority, the International Centre for Settlement of Investment Disputes ("ICSID"), determined that the waivers were satisfactory to institute the proceedings.¹⁰ None of the exclusions or exceptions to

⁷ The United States emphasizes this very point, that consent is given to arbitration when the requisite procedures within an agreement are followed. See U.S. Objection, fn. 83.

⁸ See Article 1101(1); Article 1139, definition of "investor of a Party."

⁹ See Statement of Claim at ¶¶ 12-14.

¹⁰ See Letter from Antonio R. Parra to Tembec and the United States dated June 28, 2004.

jurisdiction in Chapter 11 applies to Tembec's claim.¹¹ Where these criteria have been met, NAFTA Chapter 11 tribunals have assumed jurisdiction over Chapter 11 claims.¹² Under the ordinary meaning of Chapter 11, the United States has consented to this arbitration.

B. Article 1901(3) Permits The NAFTA Parties To Retain And Amend Their Trade Laws

The United States' argument that Chapter 19 provides the exclusive jurisdiction for claims "concerning determinations made under authority of the U.S. antidumping and countervailing duty laws"¹³ is contrary to the ordinary meaning of Article 1901(3).¹⁴ Article 1901(3), when read in conjunction with the definitions and limitations contained in Articles 1902 and 1904, does not have the grand exclusory purpose proposed by the United States. Instead, it has the more modest purpose set

¹¹ Article 1101(3) excludes claims arising under NAFTA Chapter Fourteen. None of Tembec's claims falls under that Chapter. None of the reservations and exceptions taken by the NAFTA Parties in Article 1108 references matters relating to Tembec's claims. Article 1139 contains a detailed definition of "investment," which specifically excludes certain types of claims, but does not exclude claims subject to antidumping laws or countervailing duty laws.

¹² See *Ethyl Corp. v. Canada*, Award on Jurisdiction (June 24, 1998); *Pope & Talbot v. Canada*, Award on Measures Relating To Investment Motion (June 26, 2000). Parts III and IV of this brief respond in further detail to the United States' arguments that Articles 1101 and 1121 prohibit the Tribunal's jurisdiction in this case.

¹³ U.S. Objection at 2.

¹⁴ NAFTA Article 1131 requires the Tribunal to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law." NAFTA Tribunals have found Articles 31-33 of the Vienna Convention On The Law Of Treaties ("Vienna Convention") to be statements of customary international law. See, e.g., *Mondev International Ltd. v. United States*, Award (Oct. 11, 2002) at ¶43. Article 31 states:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

After the ordinary meaning of the words is determined in context with their placement in the Agreement, the Tribunal can review the object and purpose of NAFTA generally, as well as the object and purpose of the relevant chapters, which are set forth in NAFTA's Preamble and in Articles 102, 1115 and 1904(1). The Tribunal also may take recourse "to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion..." to confirm the ordinary meaning when the relevant provisions remain "ambiguous or obscure" or the result would be "manifestly absurd or unreasonable." Vienna Convention Article 32.

forth in the U.S. Statement of Administrative Action, to “make clear that each country retains its domestic antidumping and countervailing duty laws and can amend them.”¹⁵ It does not insulate the Parties from the consequences of improper applications of these laws.

There is a compelling logic to the structure of these provisions. They are appropriately sequenced. 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 but provides a limiting definition of “laws,” distinguishing the laws from their applications. The reservation is limited to maintaining the laws and to applying them, but not without respect for due process and international norms that are specifically incorporated in Article 1902(2). Article 1902 (2) then reserves the Parties’ rights to amend their statutes, but places procedural and substantive conditions on amendments. Article 1903 establishes the procedures for binational panel review of amendments to the “laws.” Finally, Article 1904 explains the specific rights of Chapter 19 generally, to appeal final determinations made under the domestic antidumping and countervailing duty laws.

Nowhere in this logical scheme is there any reference to or any need for a reference to Chapter 11, which provides rights to investors distinct from those granted to trading partners in Chapter 19.¹⁶ As the tribunal in *S.D. Myers v. Canada* found,

¹⁵ See 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).

¹⁶ Trading partners may be, but are not necessarily, also investors.

NAFTA is a single undertaking and rights should be interpreted as complementary or cumulative unless there is a conflict between them.¹⁷ There is no conflict here.

1. The Scope Of Article 1901(3) Is Limited To Domestic Laws

Article 1901(3) states:

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

In order to understand Article 1901(3), the key phrase to define is "with respect to the Party's antidumping law or countervailing duty law."

Articles 1902(1) and 1904 define the terms "antidumping law and countervailing duty law" and limit Article 1901(3) to laws (statute and regulations), administrative practice, and interpretative materials (legislative history and judicial precedents). Article 1902(1) authorizes Parties to "apply" the laws, but this article does not contain the same limiting language as Article 1901(3). There is no language in Chapters 19 or 11 that insulates a Party's applications of its trade laws from other NAFTA obligations. Article 1902(2) authorizes a Party to amend its trade statutes, but provides a procedure and sets limitations on amendments.

Of the key terms in Article 1901(3), only "antidumping law or countervailing duty law" is given a specific definition in NAFTA. Article 1902(1) states, in relevant part:

Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice and judicial precedents.

¹⁷ See *S.D. Myers, Inc. v. Canada*, Partial Award (Nov. 13, 2000) at ¶¶ 291-294.

Each of the definitional terms shows that the NAFTA Parties intended “antidumping law and countervailing duty law” to be limited to the established body of jurisprudence that a Chapter 19 panel would apply when reviewing a final determination. The definition does not include any aspect of application of the laws, such as investigations, preliminary determinations, final determinations, or duty orders. If Article 1901(3) were as broad as the United States argues, there would be no reason for the Parties to exclude application terms from the definition.

Article 1904(2) confirms the NAFTA Parties’ limited meaning for “antidumping law and countervailing duty law” when it states:

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. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents *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.*” (Emphasis added).

Article 1904(2) expressly distinguishes antidumping and countervailing duty law from final determinations. Final determinations cannot be part of antidumping law and countervailing duty law, as the United States argues, because a court cannot “rely” on a final determination while reviewing it. This article also confirms that “administrative practice” means past administrative practice that can be used as a legal standard to review a current final determination, and not the “practice” in dispute.¹⁸

¹⁸ Administrative practice in the context of U.S. trade law refers to the normative standards established by a body of prior administrative decisions. See, e.g., *United States v. Zenith Radio Corp*, 562 F.2d 1209,

The Tribunal should conclude that the Parties intentionally used the limited term “law” when they were granting permission for Parties “to retain” their antidumping and countervailing duty laws. It is the “law,” and only the “law,” that is referenced in Article 1901(3).

2. Article 1902(1) Distinguishes Between The Law And Its Applications

After limiting the definition of antidumping law and countervailing duty law, the Parties did not extend the restrictions in Article 1901(3) to the law’s applications when they specifically addressed applications. Article 1902(1) states, in relevant part:

Each Party reserves the right to *apply* its antidumping law and countervailing duty law to goods imported from the territory of any other Party. (Emphasis added).

The United States, by attempting to assign a single meaning to both law and its application, seeks to insulate the United States from claims of misconduct and misapplication, but there are no such protections in NAFTA. To the contrary, NAFTA distinguishes between the terms.

According to the definitions, Article 1901(3) addresses the trade laws, while Article 1902(1) addresses applications of the law. Article 1902(1) reserves a Parties’ rights to “apply” its trade laws, but does not protect those applications from other NAFTA obligations. Had the Parties intended applications to be included in Article 1901(3), this sentence (Article 1902(1)) would be superfluous because other Chapters would not affect applications of the law.

1219 (C.C.P.A. 1977) (“A long-continued, uniform administrative practice, if not contrary to or inconsistent with law, is entitled to great weight.”).

A treaty should not be interpreted in a manner that makes language superfluous.¹⁹ The absence of the Article 1901(3) restriction in Article 1902(1) is significant because it discloses the Parties' intent of not relieving investigations and other applications from other NAFTA obligations.²⁰

3. Applications Of The Trade Laws Are Not "With Respect To" The Laws

Articles 1902(1) and 1904 define and limit the terms "antidumping law and countervailing duty law." The United States, to make its case here, must demonstrate that the Parties intended Article 1901(3) to have a more expansive coverage than established by these articles.

The United States' argument rests entirely on the ambiguous phrase "with respect to," which it contends, without elaboration, means anything to do with the trade laws. "With respect to," however, has no formal legal meaning that would require a

¹⁹ See, e.g., *Feldman v. Mexico*, Award (Dec. 16, 2002) at ¶¶ 72-73 (interpreting Chapter 11 as waiving the local remedies rule in order to preserve the meaning of Art. 1121); *S.D. Myers, Inc. v. Canada*, Partial Award (Nov. 13, 2000), at ¶¶ 291-95 (viewing the chapters of NAFTA as part of a single undertaking and expressing a preference for avoiding interpretations that produce conflict between provisions); *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, Decision on Jurisdiction, Case No. ARB/01/13, 42 I.L.M. 1290, 1319 (I.C.S.I.D. 2003) (rejecting claimant's broad interpretation of an article in a bilateral investment treaty on the grounds that it would render certain other provisions "substantially superfluous"); *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, Case No. ARB/87/3, 30 I.L.M. 577 (I.C.S.I.D. 1991), in 86 Am.J.Int'l L. 371, 373 (1992) (discussing the Tribunal's finding that the claimant's reading of one part of a bilateral investment treaty would render another treaty provision "superfluous, contrary to established canons of construction"); *United States—Standards for Reformulated and Conventional Gasoline*, W/DS2/AB/R, Report of the Appellate Body, Apr. 26, 1996, at 23; (reading the chapeau of GATT Article XX as applying to all of the GATT obligations so as to avoid rendering the language meaningless).

²⁰ See, e.g., *Waste Management, Inc. v. Mexico*, Award ("Waste Management II") (Apr. 30, 2004) at ¶ 85 (refusing to read additional requirements into Chapter 11 and noting that "[i]f the NAFTA Parties had wished to limit their obligations of conduct to enterprises or investments having nationality of one of the other Parties they could have done so"); *Argentina – Safeguard Measures On Imports Of Footwear* WT/DS121/R, Report of the Panel, June 25, 1999, at ¶ 8.58-8.67 (declining to read an unforeseen circumstances provision into the WTO Safeguards Agreement).

broad interpretation, and dictionary definitions are not particularly helpful.²¹ Under the ordinary meaning approach of the Vienna Convention, the phrase “with respect to” should be limited to the ordinary meaning of the words to which it relates here, “antidumping law and countervailing duty law.” If the Parties intended to cover applications of the law in Article 1901(3), they would have expressed their intent by including application language in the definitions, or by using a broader term.

When the Parties wanted to refer to applications of law, they used specific language. For instance, Article 1901(1) provides:

Article 1904 applies only *with respect to* goods that the competent investigation 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 another Party. (Emphasis added).

On each other occasion when the Parties used “with respect to” in Chapter 19, the ordinary meaning of the words applied to specific, stated matters.²² The United States’ proposed interpretation would be the sole expansive use of the phrase.

²¹ The term does not appear in Black’s Law Dictionary. The Oxford English Dictionary Vol. XIII (2d ed. 1989) contains the following definitions: the phrase “with respect” is defined as “with reference or regard to something.” “To have respect to” is defined as “to have regard or relation to, or connection with, something,” “to have reference, to refer, to something,” “to turn to, refer to, for information,” or “to give heed, attention, or consideration to something; to have regard to; to take into account.” “Respect” is also generally defined as “an aspect of a thing; a relative property or quality; a relationship,” or “a relationship of one person or thing to another; a reference to some thing or person.” Such definitions, typically dependent upon repeating the very term being defined, do not impart particular meaning.

²² See Article 1904(9)(“with respect to the particular matter between the Parties”), Article 1904(10)(“with respect to determinations other than final determinations”), Article 1905(15)(“with respect to antidumping and countervailing duty proceedings involving goods of the other Parties”), Article 1905(10)(b)(“with respect to any person within its jurisdiction”), Article 1905(7)(“with respect to one of the grounds specified in paragraph 1”), Article 1905(8)(a)(“with respect to the Party complained against”), Article 1905(9)(“with respect to the Party complained against”), Article 1905(10)(b)(“with respect to which the committee has made an affirmative finding”), Article 1905(11)(“with respect to one of the grounds specified in paragraph 1”).

The meaning of Article 1901(3) is definite and precise because it is limited to the definitions. The United States' interpretation creates ambiguity where there is none, placing excessive weight on the connecting phrase "with respect to," instead of on the substantive and defined terms. There is no reason to believe that the Parties would draft the agreement in such a vague manner when they could have included application language in the definition.

4. Article 1902(2), Unmentioned By The United States, Establishes That The United States Exaggerates Article 1901(3)

In addition to definitional boundaries, Article 1901(3) is limited temporally by Article 1902(2), which reserves the rights of the NAFTA Parties to amend their antidumping or countervailing duty laws, but subjects amendments to strict procedural and substantive conditions. Article 1902(2) states:

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...

(a) such amendment shall apply to goods from another Party only if the amending statute specifies that it applies to goods from that Party or from the Parties to this Agreement;

(b) the amending Party notifies 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;

(c) [consultation provision]; and

(d) such amendment, as applicable to that other Party, is not inconsistent with

(i) [GATT], [the Antidumping Code] or [the Subsidies Code], or any successor agreement to which all of the original signatories to this Agreement are party, or

(ii) 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.

A statutory amendment to the antidumping and countervailing duty laws, therefore, must meet the procedural and substantive requirements of Article 1902(2) and be consistent with the WTO Agreements and with the “object and purpose of the Agreement and this Chapter. ... *such object and purpose to be ascertained from the provisions of this Agreement.*”²³

The United States’ argument does not address Article 1902 because it seeks to expand the meaning of Article 1901(3) out of the context of Chapter 19, and out of the context of NAFTA. Article 1902 establishes conclusively that the United States’ interpretation of Article 1901(3) is overbroad.

C. Tembec’s Interpretation Of Article 1901(3) Is Consistent With The U.S. Statement Of Administrative Action

Tembec’s interpretation of Article 1901(3) is supported by the SAA that accompanied the United States’ implementing legislation. The SAA represents the contemporaneous understanding of the United States regarding the meaning of NAFTA. In describing Chapter 19, the SAA provides:

²³ The United States did not comply with any of these requirements in enacting the Byrd Amendment, but it is still threatening to distribute Tembec’s duty deposits to its U.S. competitors.

Articles 1901 and 1902 make clear that each country retains its domestic antidumping and countervailing duty laws and can amend them.²⁴

This language is identical to Tembec's interpretation of these Articles, including the subordinate sentence in Article 1901(3). The SAA acknowledges the relationship between Articles 1901 and 1902, which the United States' argument ignores, and describes the purpose of the articles as accomplishing exactly what Tembec understands: the articles retain the existing laws and provide a procedure for amendments. The SAA does not address or foreclose the possibility that a NAFTA Party's implementation or abuse of such law may, to the extent that it violates a NAFTA Party's international obligations to an investor, be challenged under Chapter 11.

The SAA's broad language in describing Chapter 11 also supports the inclusive nature of that chapter. The SAA 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. (emphasis added.)²⁵

By using the phrase "all government measures," and excluding only but specifically "financial services," the SAA includes antidumping and countervailing duty orders within the scope of Chapter 11. The SAA parallels the language of Article 1101(3), excluding measures governing financial services from the provisions of Chapter 11, emphasizing the fact that if the NAFTA parties had intended for antidumping and countervailing duty

²⁴ 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).

²⁵ *Id.* at 140.

investigations to be excluded from Chapter 11 proceedings, they would have stated such exclusion expressly in both the text of NAFTA and the SAA.

D. Tembec's Interpretation Of Article 1901(3) Is Consistent With NAFTA's Object And Purposes

NAFTA's objects and purposes are served when investors pursue claims under Chapter 11 related to the conduct and application of the trade laws. A contrary interpretation would promote barriers to trade, discourage fair competition, deter investment opportunities, and deprive investors of certain express rights to dispute resolution. The limited remedies of Chapter 19 cannot reasonably preclude different remedies under Chapter 11.

1. NAFTA's Objectives Are Well Served By Tembec's Claims

Article 102(1) states that the objectives of NAFTA are to, among other things:

- (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
- (b) promote conditions of fair competition in the free trade area;
- (c) increase substantially investment opportunities in the territories of the Parties [and]...
- (e) create effective procedures for...the resolution of disputes...

The Preamble also has repeated references to expanding trade and reducing trade distortions. Chapter 11 is an integral part of the Agreement, and therefore also is in service of these objects and purposes.

The panel in *In the Matter of Cross-Border Trucking Services* stated:

Article 102(2) provides a mandatory standard for the interpretation of the detailed provisions of NAFTA: "The Parties shall interpret and apply the provisions of this Agreement in the light of its

objectives set out in paragraph 1 and in accordance with applicable rules of international law.”

The objectives develop the principal purpose of NAFTA, as proclaimed in its Preamble, wherein the Parties undertake, *inter alia*, to “create an expanded and secure market for the goods and services produced in their territories.” Given these clearly stated objectives and the language of the Preamble, the Panel must recognize this trade liberalization background. As the Panel in *Dairy Products* observed:

[A]s a free trade agreement, NAFTA has the specific objective of eliminating barriers to trade among the three contracting Parties. The principles and rules through which the objectives of NAFTA are elaborated are identified in NAFTA Article 102(1) as including national treatment, most-favored-nation treatment, and transparency. Any interpretation adopted by the Panel must, therefore, promote rather than inhibit NAFTA’s objectives. Exceptions to obligations of trade liberalization must perforce be viewed with caution.²⁶

Tembec has articulated claims against the United States that demonstrate a practice of inequitable and discriminatory treatment in direct contravention of the United States’ Chapter 11 obligations. Allowing Tembec to pursue these claims is consistent with and serves NAFTA’s stated objectives. An award would encourage the NAFTA Parties to maintain and expand free trade through the threat of actions for compensatory damages when they abuse the trade laws contrary to the object and purpose of the overall Agreement. To the argument that damages have never been awarded in connection with trade actions, the NAFTA Preamble responds that the Parties are resolved to “Build on their respective rights and obligations under the *General Agreement on Tariffs and Trade* and other multinational and bilateral

²⁶ *In the Matter of Cross-Border Trucking Services*, USA-MEX-98-2008-01 (Feb. 6, 2001) at ¶219 (citing *In the Matter of Tariffs Applied by Canada to Certain United States Origin Agricultural Products*, CDA 95-2008-01, Final Panel (Dec. 2, 1996) at ¶122). *Cross-Border Trucking Services* was a NAFTA Chapter 20 dispute involving the United States’ violations of obligations under Chapters 11 and 12 of NAFTA.

instruments of cooperation.” Chapter 11 Tribunals have confirmed this understanding of the Preamble by making awards involving trade actions.²⁷

The United States’ unfair treatment of Tembec does not serve any of the purposes of NAFTA. To the contrary, it operates in direct opposition to these express purposes and hinders foreign investment and free trade. An alternative interpretation of Article 1901(3) that would preclude Tembec’s Chapter 11 claim is unsustainable given the purpose of NAFTA, because such an interpretation would prohibit investors from recovering their financial losses as a result of the unfair and discriminatory administration of domestic antidumping and countervailing duty laws.

2. Tembec’s Interpretation Of Article 1901(3) Is Consistent With The Purposes Of Chapters 11 and 19

The purposes of Chapters 11 and 19 are served well by Tembec’s claims.

The purpose of Chapter 11 is set forth in Article 1115, which states:

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

Tembec is not receiving equal treatment or international reciprocity when it has to pay unlawful duties to which its U.S. and other foreign competitors are not subjected. In addition, this unfair treatment is expanded, and Tembec is expressly disadvantaged,

²⁷ See *Pope & Talbot*, Award in Respect of Damages (May 31, 2002) (awarding damages in arbitration involving export control measures on softwood lumber exported from Canada to the United States); *S.D. Myers v. Canada*, Second Partial Award (Oct. 21, 2002) (awarding damages for violations of Chapter 11 related to measures restricting the export of PCB waste from Canada).

when the United States threatens to take monies from Tembec and hand them over to Tembec's U.S. competitors.²⁸

The United States misconstrues in its Objection the purpose of Chapter 19's panel review process, which does not adjudicate the international obligations of the NAFTA Parties to each other nor to their respective investors. Instead, Article 1904 provides for the replacement of domestic judicial review with binational panels for final antidumping and countervailing duty determinations in accordance with domestic law. This purpose does not conflict in any way with Chapter 11's purpose, which is to afford relief to investors of NAFTA Parties who have suffered damages as the result of another NAFTA Party's breach of international obligations. Awards available pursuant to Chapter 11 for the breach of international obligations are not available under Chapter 19 for failures to respect domestic law.²⁹

E. Chapter 11 And Chapter 19 Proceedings Are Not Inconsistent

The heart of the United States' jurisdictional accusation, comprising more than half of its Objection, is that Tembec is seeking to relitigate challenges to final determinations. To this end, the United States recites a version of Chapter 19 litigation

²⁸ The United States does not attempt to argue that the Byrd Amendment is lawful, but does try to absolve the United States from the consequences of its application by claiming that the United States has declared an intention to eliminate it. Since January 2003, the date chosen in the U.S. Objection at p. 18, fn. 89 as the date of absolution, the Administration has distributed approximately \$474 million to U.S. industries under the terms of the Byrd Amendment, in contravention of international obligations. See U.S. Customs and Border Protection, "Continued Dumping and Subsidy Offset Act of 2000", *available at* <http://www.customs.ustras.gov>.

²⁹ The United States argues that the absence of any reference to Chapter 19 in Article 1115 bars Tembec's Chapter 11 claim. See U.S. Objection at 23-24. Article 1115 recognizes 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. See, e.g., *In the Matter of Cross-Border Trucking Services*, USA-MEX-98-2008-01 (Feb. 6, 2001). Neither Tembec nor Canada could bring before an Article 1904 binational panel claims that the United States had breached obligations under Chapter 11; consequently, Article 1115 does not reference Chapter 19 and Tembec has brought its Chapter 11 claim to the only viable forum.

history that is at once inaccurate and irrelevant. The question presented to this Tribunal by the United States' objection has nothing to do with what Chapter 19 panels have decided, or continue to decide. The only question now is whether Tembec's attempt to mitigate, through Chapter 19, damages arising from the United States' abuse of the trade laws, bars Tembec from seeking the damages that remain.³⁰

Contrary to the United States' argument, NAFTA Chapters 11 and 19 are not inconsistent, nor do they risk conflicting judgments. These chapters are intended to resolve different issues and contain separate and independent dispute resolution procedures. They accept different claims, require different legal standards to be applied, and provide different remedies:

NAFTA Chapter 11		NAFTA Chapter 19 (Review of U.S. Agency Determinations)
Claims	Article 1102 – violation of national treatment obligation; Article 1103 – violation of most-favored-nation obligation; Article 1105 – violation of minimum standard of treatment; Article 1110 – violation of proscription against expropriation; and other standards in Section A of Chapter 11.	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...."
Legal Standards Applied By Tribunal/ Panel	Article 1131(1): "A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of	Article 1904(3): "The panel shall apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent

³⁰ See U.S. Objection at pp. 35ff.

	international law.”	investigating authority.” 516A(b)(1)(B) of the Tariff Act of 1930 (19 U.S.C. § 1516a(b)(1)(B); see Annex 1911): “The court shall hold unlawful any determination, finding, or conclusion found ... to be unsupported by substantial evidence on the record, or otherwise not in accordance with law....”
Remedies Available	Article 1135: “[T]he Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution. A tribunal may also award costs in accordance with the applicable arbitration rules.”	Article 1904(8): “The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision.” Article 1904(15): “ ... the Parties shall amend their [trade laws and regulations] ... to ensure that existing procedures concerning the refund ... operate to give effect to a final panel decision that a refund is due; ... “ NAFTA Article 1904 Panel Rule 32: “Each participant shall bear the costs of, and those incidental to, its own participation in a panel review.”

The United States has argued that permitting the adjudication of Tembec’s Chapter 11 claim following the conclusion of the Chapter 19 proceedings would be contrary to NAFTA’s purpose of creating an effective means of dispute resolution by wasting time and resources, increasing the potential of conflicting findings, and creating a risk of double recovery.³¹ Tembec is seeking in this proceeding damages for violations of the international law standards set forth in Chapter 11.³² Tembec is not

³¹ See U.S. Objection at 27. This argument presumably is necessary to overcome the difficulty the United States faces with its argument to follow on waivers. Were Tembec to have waited until the completion of all Chapter 19 proceedings, the United States would have no basis of any kind to claim any violation of a waiver, so it must have a subsequent in time contention.

³² Contrary to the United States’ view, see U.S. Objection at 21, it is not unusual for governments to provide rights to private parties that they do not retain for themselves. For example, NAFTA and most

seeking a review of the Chapter 19 binational panels' decisions, nor is it asking this Tribunal to duplicate those panels' responsibilities.³³ The United States' argument disregards the procedural and subject matter differences that distinguish proceedings under Chapter 11 from proceedings under Chapter 19.

There is no possibility of conflicting findings among the tribunals because the Chapter 19 proceedings were limited to decisions whether the United States' antidumping and countervailing duty final determinations violated United States law, whereas this arbitration will constitute a review of whether the United States' treatment of Tembec in its trade proceedings violated the international principles and rules in Chapter 11. Judgments are rendered on different legal standards.

The United States argues that refunds of Tembec's C\$250 million in duty deposits are at issue in both proceedings. By operation of U.S. law, the United States should return Tembec's duty deposits following the conclusion of an Extraordinary Challenge in March or April 2005.³⁴ However, the U.S. Undersecretary of Commerce, Grant Aldonas, has said that Canadian softwood lumber companies cannot recover

recent BITs provide private parties a right to sue a foreign government for monetary damages, but do not provide a right for the governments to sue each other directly for damages.

³³The United States' contention that "Without access to ... proprietary information [covered by administrative protective order], it would not be possible for this Tribunal to decide Tembec's claims on the merits," is incorrect and mischaracterizes Tembec's claims. U.S. Objection at 25. Tembec is not relitigating the Chapter 19 claims here and has no need for proprietary data from other interested parties covered by administrative protective order ("APO"). Moreover, 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.

³⁴ The United States refused for weeks to name a single ECC member, thus violating its formal obligation and delaying that proceeding. See Letter from The Honourable James Scott Peterson, Minister of International Trade to The Honourable Robert B. Zoellick, United States Trade Representative, December 22, 2004.

their duties except through negotiations with the United States.³⁵ Senator Michael Crapo (R-ID) and other members of the Senate Finance Committee have declared before Congress, “There is zero likelihood that the countervailing duty, antisubsidy, order will disappear absent settlement of the lumber subsidy and dumping issues, no matter how often a NAFTA panel tries to achieve this outcome.”³⁶

In a recent remand determination, Commerce adopted this position contrary to Article 1904(15) and any sense of good faith and fairness. Were the United States, in this one case, not to obey its own laws,³⁷ Tembec would include the deposits as an element of damages in this proceeding. That concern, however, is not yet before this Tribunal, does not constitute an issue of “double recovery,” and can be addressed by the Tribunal in its final award.

Chapters 11 and 19, thus, serve different purposes and apply different laws and standards of review, are complementary, not redundant. They provide different remedies, not double recovery.

³⁵ See Barrie McKenna, “Talks Only Way To End Softwood Fight, U.S. Official Says,” *The Globe and Mail*, Jan. 26, 2005, at B8. (“Mr. Aldonas said he doesn’t have the power to return the duties, nor does a North American free-trade panel, which has ruled that combined U.S. duties of 21 per cent are illegal. ‘I’m not in a position to give [Canada] back the duties,’ he said bluntly, citing what he called well-recognized ‘quirks’ of the North American free-trade agreement’s dispute settlement system. He said the ‘easiest way’ for Canada to recover any of the \$4-billion is to negotiate.”)

³⁶ 151 Cong. Rec. S137 (daily ed. Jan. 24, 2005) (statement of Sen. Crapo). Through a “colloquy,” Senators Crapo, Larry Craig (R-ID), and Max Baucus (D-MT) advised Tembec and other parties that the United States has no intention of living up to its legal obligations under Chapter 19, nor its international obligations arising from the WTO rejection of the Byrd Amendment. See *id.*

³⁷ Senators Baucus and Craig introduced legislation for the immediate distribution of duty deposits to U.S. competitors, effectively acknowledging that such distribution could not take place under current law. See *Softwood Lumber Duties Liquidation Act of 2004*, S. 2992, 108th Cong. (2004). The bill was to distribute deposits to competing U.S. companies notwithstanding other provisions of the trade laws and the decisions of Chapter 19 panels. No such threat, to confiscate money to which the United States and Tembec’s competitors are not entitled by law, has been made in proposed legislation against any other products from Canada, nor against products from any other country.

F. Tembec's Claims Do Not Impose Obligations On The Trade Laws

Tembec's claims do not impose obligations on the United States "with respect to" its "antidumping law or countervailing duty law" as defined in Chapter 19. Tembec does not challenge the "relevant statutes, legislative history, regulations, administrative practice, or judicial precedents" in U.S. antidumping or countervailing duty law. Tembec challenges only the manifest abusive misapplication of that law as a result of political pressure and discriminatory agency bias.

G. The NAFTA Parties Did Not Exclude The Trade Laws From Chapter 11 Claims

Had the NAFTA Parties intended to exclude trade-related claims from Chapter 11, the Parties would have drafted a NAFTA provision directed specifically to that purpose, instead of relying on a provision outside of Chapter 11 to accomplish more than one purpose, with only one stated and the others *sub silentio*.

The Parties used precise language when they intended to exclude either a NAFTA provision or a subject matter from one of the three dispute settlement mechanisms contained in the Agreement. The Parties explicitly cross-referenced other NAFTA provisions when they intended those provisions to be excluded. Subjects reserved from the scope of Chapter 11 were enumerated in the NAFTA Annexes. The omission from NAFTA (and even from U.S. bilateral investment treaties negotiated subsequent to NAFTA) of an explicit exclusion of investor-state claims for the government's abuse of antidumping and countervailing duty measures shows that Article 1901(3) was never intended to bar Chapter 11 claims.

There is, for example, no exclusion from Chapter 11 of claims concerning antidumping and countervailing duties such as the exclusion that exists in Article

1101(3) for claims concerning financial services measures:

This Chapter [11] does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).

The NAFTA Parties also exempted certain subjects from the reach of claims made under Articles 1102, 1103, 1106, and 1107 by listing those subjects in Article 1108, “Reservations and Exceptions,” and the corresponding sections of NAFTA Annexes I, II, III and IV. Numerous subjects are excepted from certain Chapter 11 claims by Article 1108. “Procurement by a Party or a state enterprise” is exempt from claims made under Articles 1102, 1103, 1107, and certain claims under 1106.³⁸ Exceptions to the obligations under Article 1703 (Intellectual Property—National Treatment) are exempt from Articles 1102 and 1103.³⁹ The United States took reservations in Annex I as to existing measures concerning customs brokers’ licenses, export licenses, nuclear power, communications, mining, and air transportation. In Annex II, the United States took reservations as to future measures concerning telecommunications services, legal services, water transportation and Canadian ownership of oceanfront land. Measures relating to antidumping and countervailing duties were not among these reservations and exceptions to Chapter 11.⁴⁰

The NAFTA Parties might have added to Chapter 11 an exception for Chapter 19 as they did in Article 2004 of Chapter 20 to express an intention to bar Chapter 11 claims relating to antidumping or countervailing duty matters:

³⁸ NAFTA Article 1108(7) and (8).

³⁹ See NAFTA Article 1108(5).

⁴⁰ It is noteworthy that even those sectors and subject matters that were important enough to warrant a government’s unilateral reservation under Article 1108 were not exempted from claims made under Articles 1105 and 1110.

Except for the matters covered in Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters) and as otherwise provided in this Agreement, the dispute settlement provisions of this Chapter shall apply

Chapter 11 contains no such exception.⁴¹

The NAFTA Parties drafted a note to Chapter 15 stating, “Article 1501(Competition Law): no investor may have recourse to investor-state arbitration under the Investment Chapter for any matter arising under this Article.”⁴² They did not draft a similar note for Chapter 19.

The NAFTA Parties drafted exceptions to the Agreement in Chapter 21. Among them is an exception for “taxation measures,” with very detailed instructions regarding the conditions under which Articles 1102, 1103, 1106, 1110 and others yet may be claimed concerning such measures. None of the exceptions in Chapter 21 includes antidumping or countervailing duty measures. The wording of exclusions in Chapters 15, 20 and 21 all confirm that the Parties used explicit and broad language when they intended the type of broad exclusion for which the United States is arguing here.⁴³

The United States, according to the *travaux préparatoires*, appears to

⁴¹ The United States reaches the opposite conclusion quoting this same provision. The U.S. argument, however, requires the conclusion that there is neither discipline nor remedy anywhere in NAFTA for a Party’s abuse of its trade laws. Article 1905 provides for potential conflict between domestic law and obligations regarding panels, but not for abuse of the law itself as it may affect a panel. Hence, Chapter 19 does not exclude provisions elsewhere in NAFTA to deal with trade law abuse.

⁴² NAFTA Note 43.

⁴³ The core interpretive legal theory of the United States’ Objection is that NAFTA must be understood entirely in terms of express linkages between articles. See discussion at pp. 33-35, U.S. Objection. However, this theory fails in two ways. First, it assumes without comment that there is an express link between Chapters 11 and 19 when there is none at all. Second, it fails to recognize that the organizing concept of NAFTA is careful definitions and express exclusions and exceptions, as indicated here. What is not excluded is not excluded.

have introduced Article 1901(3) to the draft text of NAFTA during negotiations.⁴⁴

However, nothing in the draft rolling texts of Chapters 11 or 19, the additional *travaux préparatoires* released by the United States or, apparently, even in unreleased internal documents in the United States' possession,⁴⁵ expresses the view that the United States or other NAFTA Parties intended Article 1901(3) to bar NAFTA Chapter 11 claims.

Thus, the United States claims that the NAFTA Parties drafted Article 1901(3) to exclude Tembec's (and other similar) claims from Chapter 11, despite the facts that:

- Chapter 19 does not cross-reference Chapter 11;
- Chapter 11 does not cross-reference Chapter 19;
- none of the Parties claimed antidumping or countervailing duty measures as a reservation or exception to Chapter 11 jurisdiction;
- none of the *travaux préparatoires* indicates that Article 1901(3) was intended to exclude Chapter 11 claims; and
- the United States' own interpretation of the meaning of Article 1901(3) in the SAA is limited to retention and amendment of trade laws.

These facts confirm that the intention of the NAFTA Parties and the ordinary meaning of Article 1901(3) were not to exclude Tembec's Chapter 11 claim.

H. NAFTA Investors Do Not Have Fewer Rights Than Investors Under Other Free Trade Agreements With The United States

Since the implementation of NAFTA, the United States has signed free

⁴⁴ The earliest reference in the *travaux préparatoires* to language that now comprises Article 1901(3) is accompanied by a note saying, "USA," which suggests that the language was introduced by the United States during the negotiations.

⁴⁵ The United States represented to the Tribunal that it had no internal documents discussing Article 1901(3). See First December 22, 2004 Letter from United States to the Tribunal at 2.

trade agreements with Chile, Singapore, Morocco, and the countries of the Central America Free Trade Agreement. Each of those agreements contains a chapter on investment providing for investor-state arbitration, but none contains a chapter for binational panel review of antidumping and countervailing duty determinations.⁴⁶ Had the United States intended NAFTA Article 1901(3) to bar claims relating to antidumping or countervailing duty matters from investor-state arbitration, one would have expected the United States to include a similar provision in its subsequent free trade agreements with other countries, even if there were no dispute resolution mechanism specifically for trade matters. However, none of the United States' post-NAFTA free trade agreements that has investor-state provisions contains a provision similar to Article 1901(3) as interpreted here by the United States.

Given the object and purpose of NAFTA, and the United States' continuing most-favored-nation obligations to Canada and México under that agreement, it is inconceivable that investors of these other countries would have greater rights than those of the NAFTA Parties.⁴⁷ Yet, the position of the United States in this proceeding is apparently that Canadians, and Tembec in particular, are deprived of rights enjoyed by other U.S. trade partners.

⁴⁶ An agreement with Australia contains neither a chapter for binational panel review of antidumping or countervailing duty determinations, nor an investor-state arbitration mechanism, although the treaty states that the Parties may request consultations to develop investor-state arbitration procedures.

⁴⁷ In *Pope & Talbot v. Canada*, the Tribunal, when interpreting the language of Article 1105, refused to adopt a reading that "would permit a NAFTA Party to take measures against investors and investments from other NAFTA countries that its domestic law would prevent it from taking against its own investors and investments and that BITs would preclude taking against investors and investments from a number of other countries." *Pope & Talbot v. Canada*, Award on the Merits of Phase 2 (Apr. 10, 2001) at ¶ 116. The Tribunal also noted that "[o]n general principles of interpretation, it would be difficult to ascribe to the NAFTA Parties an intent to provide each other's investments more limited protections than those granted to other countries not involved jointly in a continent-wide endeavor aimed, among other things, at 'increas[ing] substantially investment opportunities in the territories of the Parties.'" *Id.* at ¶ 115.

Tembec's view of the meaning of Article 1901(3) is consistent with the difference between these international agreements and NAFTA. The equivalent of Article 1901(3) was unnecessary in the United States' other free trade agreements because those agreements contained no "Chapter 19" dispute settlement provision for antidumping and countervailing duty matters. In the absence of such a mechanism, there was no need "to make clear that each country retains its domestic antidumping and countervailing duty laws and can amend them."

IV. TEMBEC AND ITS U.S. INVESTMENTS SATISFY THE REQUIREMENTS OF ARTICLE 1101

The United States argues that Article 1101(1) precludes the Tribunal from accepting jurisdiction of Tembec's claims because the offending U.S. measures do not relate to Tembec "as an investor." The argument is not consistent with the ordinary meaning of Article 1101.⁴⁸

A. The Ordinary Meaning of Article 1101 Does Not Support The United States' Argument

The ordinary meaning of Article 1101(1) does not impose the test that the United States articulates. Article 1101 states:

1. This Chapter applies to measures adopted or maintained by a Party relating to:

⁴⁸ The United States argues that the antidumping and countervailing duty laws assigned to Chapter 19 do not "relate to" investments, thereby denying jurisdiction of a Chapter 11 tribunal over matters relating to those laws or their application. U.S. Objection at pp. 30-31. Whether Tembec as an investor has been harmed by U.S. abuse of the trade laws in their application is a question to be answered, however, on the merits, and is not a jurisdictional question. Nor does the United States argue that Tembec is not an investor in the United States. Instead, the United States contends that Tembec's investments in the United States could not have been harmed, or otherwise even "relate to," the antidumping and countervailing duty laws. *Id.* at 32. This assertion, too, goes to the merits of Tembec's claims, not to jurisdiction.

- (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.

The United States does not dispute that Tembec is an “investor of another Party.”⁴⁹ The Statement of Claim identifies thirteen forms of U.S. investments that satisfy the definitions of investment in Article 1139, including 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 goodwill, and intellectual property.⁵⁰ The only remaining test under Article 1101 is whether the measures in question “relate to” Tembec and its investments, not whether the measures relate to Tembec as an investor.

B. The United States’ Measures Relate To Tembec And Its U.S. Investments Explicitly

The U.S. measures relate to Tembec in the simplest of terms: the measures explicitly target Tembec and the products that it sells into the United States. The final antidumping duty determination, final countervailing duty determination, and antidumping and countervailing duty orders all refer to Tembec by name.⁵¹ The final antidumping determination and order assigned an antidumping duty rate specifically to

⁴⁹ Nor could the United States. Tembec is “an enterprise of such Party, that seeks to make, is making or has made an investment.” Article 1139.

⁵⁰ Statement of Claim ¶¶ 12-14.

⁵¹ See Notice of Amended Final Determination of Sales at Less Than Fair Value and Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 36067, 36069 (May 22, 2002); *see also* Memorandum from Faryar Shirzad to Bernard T. Carreau, Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Softwood Lumber Products from Canada (Mar. 21, 2002).

Tembec. The final countervailing duty determination produced the countervailing duty order, which applies to virtually all non-Maritimes Canadian companies selling softwood lumber to the United States, including Tembec.

These measures and the administrative proceedings that produced them relate to Tembec in name and in substance. Tembec is a respondent interested party in the administrative proceedings that led to the final determinations which authorized the antidumping and countervailing duty orders.⁵² The United States directed Tembec to respond to questionnaires regarding Tembec's sales of softwood lumber in the United States market, costs of production, corporate structure and business practices. Tembec has been paying cash deposits. Over C\$250 million of Tembec's money is being held by the United States pursuant to the measures that Tembec claims violated Chapter 11.

The United States' measures also relate to Tembec's U.S. investments. For example, Tembec's Statement of Claim alleges that the measures disrupted Tembec's supply of certain softwood lumber products to established customers in the U.S. market.⁵³ Tembec's access to the U.S. market was impaired by the measures, and Tembec lost valuable customers in that market. Tembec Woodsville depended on a steady supply of Eastern White Pine, a specialized softwood lumber specie, to fulfill supply commitments to prominent home improvement stores in the United States. The measures disrupted the supply of Eastern White Pine, leading to the closure of Tembec Woodsville and the disintegration of Tembec's U.S. customer base for that product.

⁵² U.S. law defines Tembec's relationship to the United States in the administrative proceedings as a "respondent interested party." See 19 C.F.R. § 351.102(b); 19 U.S.C. §1677(9).

⁵³ Facts alleged by Tembec must be deemed true for purposes of the Tribunal's jurisdiction analysis. See *Methanex v. United States*, Award on Jurisdiction (Aug. 7, 2002) at ¶112 (noting the agreement of Methanex and the United States as to treatment of alleged facts for jurisdictional purposes); *Pope & Talbot v. Canada*, Award on Measures Relating to Investment Motion (June 26, 2000) at ¶25.

The U.S. measures bear a significant, adverse relation to Tembec and its investments. Article 1101(1) is no impediment to the Tribunal's jurisdiction here.

C. The Tribunal Has Jurisdiction Of Tembec's Claims Consistent With Prior NAFTA Chapter 11 Decisions Concerning Article 1101(1)

The United States argues that the offending U.S. measures relate only to Tembec's products destined for the U.S. market and, therefore, cannot relate to Tembec "as an investor in the United States," nor to any of Tembec's investments in the United States. The notion that a government's measures relate to the goods produced by an investor or investment rather than the investor or investment itself was rejected previously in *Ethyl Corp. v. Canada*, *Pope & Talbot v. Canada*, and *S.D. Myers v. Canada*.⁵⁴

Canada objected to the jurisdiction of the tribunal in *Ethyl Corp. v. Canada* claiming that the law prohibiting Ethyl Corp.'s import of MMT (a gasoline fuel additive) from the United States did not constitute a measure relating to an investor or investment because it related only to the company's goods.⁵⁵ Canada argued that a measure relating to goods would be subject to NAFTA Chapter 3 and could not, therefore, also be subject to Chapter 11. The tribunal observed that Canada provided no explanation "why the two necessarily are incompatible."⁵⁶ Canada also had conceded, apparently, that the issue did not need to be resolved at the hearing on jurisdiction.⁵⁷

Consequently, the tribunal held that it could not exclude the investor's claim on the

⁵⁴ See *Pope & Talbot v. Canada*, Award on Measures Relating to Investment Motion (June 26, 2000); see also *Ethyl Corporation v. Canada*, Award on Jurisdiction, (June 24, 1998); *S.D. Myers v. Canada*, Partial Award (Nov. 13, 2000).

⁵⁵ See *Ethyl Corporation v. Canada*, Award on Jurisdiction, (June 24, 1998) at ¶ 45.

⁵⁶ *Id.* at ¶ 63.

⁵⁷ See *id.* at ¶ 64.

basis of Canada's objection. The tribunal upheld jurisdiction of the claim in all respects, and the case was settled before any further award could be made on the merits.

Canada later objected to the tribunal's jurisdiction over Pope & Talbot's claims under Article 1101, arguing that the export control measures at issue related solely to goods (Pope & Talbot's softwood lumber destined for the United States) rather than to the investor or its investment.⁵⁸ Pope & Talbot was a U.S. wood products company owning a Canadian subsidiary, which manufactured and shipped softwood lumber to the U.S. market. In 1996, Canada and the United States had entered into the Softwood Lumber Agreement, according to which Canada agreed to constrain the flow of softwood lumber shipped into the United States in exchange for a five-year moratorium on U.S. trade remedy investigations of Canadian softwood lumber.⁵⁹ Pope & Talbot claimed that Canada's implementation of the regulatory regime controlling sales of softwood lumber to the United States violated NAFTA Articles 1102, 1105, 1106, and 1110.⁶⁰

⁵⁸ Canada also argued that the Softwood Lumber Agreement ("SLA") was not a "measure" for purposes of Chapter 11. The tribunal stated that it was "not concerned with the SLA directly," because the investor complained about only "the steps taken by Canada to implement its obligations under the SLA." *Pope & Talbot* at ¶ 37.

⁵⁹ The U.S. Objection, at p. 7 characterizes the SLA as an "amicable" settlement, but there was nothing to "settle." Canada already had prevailed in litigation over whether its softwood lumber was subsidized. Canada capitulated to consultations and negotiations to restrict trade in large part to get the United States to release Canadian monies it was holding illegally.

⁶⁰ The U.S. investor in *Pope & Talbot v. Canada* contended that Canada's implementation of the Softwood Lumber Agreement with the United States violated Articles 1102, 1105, 1106 and 1110. Pope & Talbot, a U.S. forest products company with a subsidiary in British Columbia, complained of measures in Canada's export control regime that unfairly restricted the export of softwood lumber products from Canada to the United States, required payment of export permit fees, and inequitably allocated export quota amounts.

Canada characterized Pope & Talbot's claims as a dispute over the free trade of goods rather than an investment dispute.⁶¹ México took the same positions in an Article 1128 submission to the tribunal.⁶²

The *Pope & Talbot* tribunal rejected the governments' arguments, finding that "[t]here is no provision to the express effect that investment and trade in goods are to be treated as wholly divorced from each other." The tribunal noted that Article 1106, for example, refers to certain restrictions on dealing with goods as breaches of the Parties' obligations with respect to performance requirements, and held that measures specifically directed at goods produced by an investment could also relate to that investment:

[T]he fact that a measure may primarily be concerned with trade in goods does not necessarily mean that it does not also relate to investment or investors. By way of example, an attempt by a Party to require all producers of a particular good located in its territory to purchase all of a specified necessary raw material from persons in its territory may well be said to be a measure relating to trade in goods. But it is clear from the terms of Article 1106 that it might affect an enterprise owned by an investor of a Party.

For these reasons, the Tribunal rejects Canada's submissions that a measure can only relate to an investment if it is primarily directed at that investment and that a measure aimed at trade in goods *ipso facto* cannot be addressed as well under Chapter 11.⁶³

The *S.D. Myers* tribunal found, again over the objections of Canada and México, that the reasoning of the *Pope & Talbot* tribunal was "sound and compelling."⁶⁴

The governments were unable to persuade the *S.D. Myers* tribunal that measures

⁶¹ See *id.* at ¶19.

⁶² See *id.* at ¶13.

⁶³ *Id.* at ¶¶ 33-34.

⁶⁴ *S.D. Myers v. Canada*, Partial Award (Nov. 13, 2000) at ¶294.

restricting the export of PCB waste from the investor's Canadian subsidiary were measures concerning only trade in goods (under NAFTA Chapter 3) and not measures relating to investment:

A measure that relates to goods can relate to those who are involved in the trade of those goods and who have made investments concerning them. The thrust of a dispute under Chapter 11 is that the impugned measure relates to an investor or an investment. If it were to do so, it would be covered by Chapter 11 unless excluded. [If it] were not to do so, it would not be covered.⁶⁵

The United States made an Article 1101(1) objection to jurisdiction in a different context, in *Methanex Corporation v. United States*.⁶⁶ Methanex produced and sold methanol, a liquid petrochemical used to make MTBE, which in turn is used in the production of gasoline. In its Chapter 11 claim, Methanex argued that certain legislation, regulations, and an executive order in the State of California unfairly restricted the use of MTBE in gasoline in violation of NAFTA Articles 1102, 1105 and 1110. Methanex and its investments neither produced nor sold MTBE.

The United States argued that the measures concerning MTBE did not relate to Methanex or its investments as required by Article 1101(1). It claimed that in order for the measures to relate to Methanex and its investments, the measures had to have a "legally significant connection" to the claimant investor or investment, particularly

⁶⁵ *Id.* at ¶295. Canada also argued that the claimant's claims should have been governed only by NAFTA Chapter 12 (trade in services). The *S.D. Myers* tribunal found that issue to be relevant only to the question of damages, and not to the question of liability. See *id.* at ¶ 300. However, the *S.D. Myers* tribunal applied "the cumulative principle" again to its analysis of potential overlap between Chapters 11 and 12. The tribunal held that "the fact that SDMI as a cross-border service provider may have recourse to the dispute provisions of Chapter 12, does not deprive it of the right to claim as an investor under Chapter 11. Extending to it rights as a cross-border service provider under Chapter 12 does not take away from SDMI rights conferred on it by Chapter 11." *S.D. Myers v. Canada*, Second Partial Award (Oct. 21, 2002) at ¶138.

⁶⁶ See *Methanex Corp. v. United States*, Award on Jurisdiction (August 7, 2002).

where the offending measures are of general application, such as those aimed at the protection of health and the environment.⁶⁷ That connection could not be established in Methanex's case, according to the United States, because the measures applied only to MTBE, a product that Methanex did not make.

The *Methanex* tribunal agreed with the United States that Article 1101(1) required "a legally significant connection between the measure and the investor or the investment," and stated that "the dispute must arise in respect of 'a defined legal relationship.'"⁶⁸ The tribunal then concluded that Methanex's Original Statement of Claim did not satisfy Article 1101(1) because "[a]s there pleaded, the measures do not relate to methanol or Methanex."⁶⁹ However, the tribunal allowed Methanex to amend its pleadings to argue that the measures were intended to harm foreign-owned investors or investments, and found that evidence of such intent could satisfy the "relating to" requirement of Article 1101(1).⁷⁰

Tembec's Statement of Claim satisfies the jurisdictional test applied by the tribunal in *Methanex*. Tembec has alleged facts that demonstrate a legally significant connection between the offending measures and Tembec and its investments. These facts are distinct from the facts alleged by Methanex as to jurisdiction. Tembec complains, *inter alia*, of antidumping and countervailing duty orders that specifically targeted the products Tembec manufactures and sells to the U.S. market. Methanex and its investments did not make or sell the products subject to the measures of which it

⁶⁷ *Id.* at ¶130.

⁶⁸ *Id.* at ¶¶139-40.

⁶⁹ *Id.* at ¶150.

⁷⁰ *Id.* at ¶169. The United States had already accepted that interpretation of Article 1101(1) during the *Methanex* hearing on jurisdiction. See *id.* at ¶152.

complained. The U.S. measures in this case target Tembec by name. In *Methanex* the measures did not refer to Methanex at all. The United States required Tembec to provide information in administrative proceedings which was used to Tembec's detriment. The United States did not impose a similar requirement on Methanex. The United States currently holds over C\$250 million of Tembec's money on the basis of administrative orders that have been found invalid. Methanex had no such complaint of the United States.

D. The United States' Artificial Distinction Between Trade And Investment Is No Basis For The Tribunal To Decline Jurisdiction Of Tembec's Claims

The tenor of the United States' objection to jurisdiction seems to be that there are certain measures that, whatever the circumstances, should not give rise to an investment claim under NAFTA Chapter 11. Antidumping and countervailing measures, the United States contends, are matters of trade, not matters of investment.

The United States and the other NAFTA Parties have enumerated measures specifically in Articles 1101(3) and 1108 and the related annexes that cannot give rise to an investment claim under Chapter 11. However, antidumping and countervailing duty measures are not enumerated, nor is there an inherent distinction between trade and investment that would preclude a Chapter 11 claim from arising from the restricted flow of an investor's goods.

The United States' view that measures relating to the goods of an investor or investment may not be the subject of a Chapter 11 claim ignores the fact that the success of a foreign investment may, depending on the company's business orientation, be a function of (*i.e.*, "relate to") the goods that it sells in that market. The decisions of

the NAFTA Chapter 11 tribunals in *Ethyl Corp.*, *Pope & Talbot*, and *S.D. Myers* all confirm this point.

NAFTA recognizes the interrelationship of trade and investment by incorporating the disciplines into the same agreement. The objectives to “eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties,” and to “increase substantially investment opportunities in the territories of the Parties” coexist in NAFTA because they relate to and reinforce each other.⁷¹ A NAFTA Party’s abusive, unlawful imposition of trade barriers cannot “ENSURE a predictable commercial framework for business planning and investment” any more than it can “ESTABLISH clear and mutually advantageous rules governing ... trade.”⁷²

Globalization has changed the way that goods are sold. Companies routinely make substantial investments in foreign countries to facilitate the sale of their products in foreign markets. A North American investor cannot lose his rights to protect his foreign investment merely because the host government’s violations of its obligations under Chapter 11 are done in the name of trade.

V. ARTICLE 1121 DOES NOT BAR THE TRIBUNAL’S JURISDICTION OF TEMBEC’S CLAIMS

The United States has failed to explain how Article 1121 bars Tembec’s claims in this case. The sum of the United States’ argument that Tembec’s claims are barred by Article 1121 is found on pages 37-38 of the U.S. Objection to Jurisdiction:

⁷¹ NAFTA Article 102(1)(a).

⁷² NAFTA Preamble.

Tembec continues to this day – nearly ten months after submitting the waivers – to prosecute its claims before bi-national panels constituted under Chapter Nineteen of the NAFTA in which it seeks return of the duties it has paid pursuant to the antidumping and countervailing duty orders that it challenges in this arbitration. Tembec's failure to comply with the condition precedent in Article 1121 therefore deprives this Tribunal of jurisdiction.

The United States does not explain to which Chapter 19 claims it is referring, nor how such claims constitute failure to comply with the language of Article 1121. The United States has merely cited Article 1121 without defining the terms "initiate or continue;" "administrative tribunal or court ... or other dispute settlement procedure;" "proceeding;" "measure;" "injunctive, declaratory or other extraordinary relief, not involving the payment of damages;" or even the "claims" Tembec supposedly is "prosecuting." The United States then, having neither defined nor explained any of the terms, fails to explain how such terms apply to bar jurisdiction of Tembec's Chapter 11 claim.

Tembec is not pursuing claims for damages against the United States in any forum except this Chapter 11 arbitration. Tembec is seeking through NAFTA Chapter 19 proceedings to mitigate further damages imposed on it by the United States, but those proceedings cannot provide for Tembec any award for damages.

The United States would require Tembec to default in the trade proceedings that the United States initiated and is continuing, forfeit its C\$250 million in duty deposits, and forego mitigation of the harm that the United States has been inflicting on the company and its U.S. investments. Article 1121 waivers are not articles of surrender.

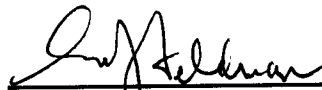
The United States has provided no reason why Article 1121 prohibits this Tribunal's jurisdiction of Tembec's claims. As with the objections under Article 1901(3)

and Article 1101, the Tribunal should dismiss the United States' objection under Article 1121.

CONCLUSION

The United States' Article 1901(3) objection contravenes the ordinary meaning of that provision in the context of Chapter 19 and the United States' own interpretation of that provision in the U.S. Statement of Administrative Action. The Article 1101 objection misapplies the *Methanex* decision and ignores three other contrary decisions, one of which granted both jurisdiction and an award for damages to an investor shipping softwood lumber from Canada to the United States. The United States referred to Article 1121, but did not explain why that article operates as a bar to the tribunal's jurisdiction here. For the foregoing reasons, the United States' jurisdictional objections are frivolous and should be dismissed. Costs and expenses, including attorneys' fees for defense against this motion, should be awarded against the moving party in this jurisdictional objection.

Respectfully submitted,



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