ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT AND UNCITRAL ARBITRATION RULES

TEMBEC INC.
TEMBEC INVESTMENTS INC.
TEMBEC INDUSTRIES INC.

Claimants/Investors,

v.

THE UNITED STATES OF AMERICA,

Respondent.

NOTICE OF ARBITRATION AND STATEMENT OF ARBITRATION CLAIM

BAKER & HOSTETLER LLP
Elliot J. Feldman
Mark A. Cymrot
John J. Burke
Michael S. Snarr
1050 Connecticut Avenue, N.W.
Suite 1100
Washington D.C. 20036

Counsel to Tembec Inc.
Tembec Investments Inc.
Tembec Industries Inc.

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Pursuant to Chapter 11 of the North American Free Trade Agreement ("NAFTA") and Article 18 of the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL"), the Claimants hereby submit their Statement of Claim.

I. DISPUTING PARTIES

1. Tembec Inc., a corporation organized under the laws of Quebec, is the parent company and sole owner of Tembec Investments Inc. which, in turn, is the sole owner of Tembec Industries Inc., both corporations organized under the laws of Canada (collectively "Tembec"). Tembec's address is 800 René Lévesque Boulevard Ouest Suite 1050 Montréal, Québec H3B 1X9. Tembec's address for service of documents in connection with this proceeding is c/o Baker & Hostetler LLP, 1050 Connecticut Avenue, NW, Suite 1100, Washington, DC 20036, attention Elliot J. Feldman, Esq., (Telephone: 202-861-1679; Facsimile: 202-861-1783). Tembec is bringing this claim on its own behalf and on behalf of Tembec Investments USA Inc., Tembec Woodsville Inc., Temboard Sales Inc. and Tembec USA LLC (collectively "U.S. Enterprises"), which are U.S. corporations or business entities that Tembec owns, directly or indirectly.

2. Respondent, the Government of the United States of America, ("United States") is a Party to the North American Free Trade Agreement ("NAFTA"), entered between the Governments of Canada, the United States and the United Mexican States effective January 1, 1994. The address of the United States for the purposes of this proceeding is Executive Director, Office of the Legal Adviser, United States Department of State, Room 5519, 2201 C Street NW, Washington, DC 20520.

II. INTRODUCTION

3. Tembec owns and operates softwood lumber sawmills, and pulp and paper mills in the United States and Canada that manufacture and sell softwood lumber and other products. Tembec has spent millions of dollars on investments in the United States.

4. In this proceeding, Tembec seeks money damages from the United States arising from the United States' unlawful conduct of protectionist trade proceedings entitled *Certain Softwood Lumber Products from Canada*. Between April 2, 2001 and May 21, 2002, the United States Department of Commerce ("Commerce") and the United States International Trade Commission ("ITC"), agencies of the United States, conducted antidumping and countervailing duty investigations with respect to softwood lumber products imported from Canada into the United States. Tembec was a named respondent in the antidumping investigation and its softwood lumber products were included in the countervailing duty investigation. The final determinations and duty orders in these proceedings require Tembec to make unprecedented cash deposits of estimated duties at a cumulative rate of 29 percent *ad valorem* to the United States on all softwood lumber products and other wood products entering the United States. If affirmed on appeal, these deposits would be converted to cash duties and disbursed to Tembec's U.S. competitors.

5. The investigations were not performed in a fair, objective and impartial manner, and the final determinations were unlawful trade protectionist acts that discriminate against Tembec and its U.S. investments. From the outset, U.S. policy-makers drove the investigations to achieve predetermined results of steep tariffs on softwood lumber imports from Canada. The investigations were fraught with prejudicial, anti-Canadian political pressure and *ex parte* communications from the U.S. Senate, House of

Representatives, executive agencies and the U.S. petitioners. Some of these *ex parte* communications were not disclosed as required by law, and Commerce has 1) posted a false report on its website denying that they occurred and 2) destroyed emails reflecting the communications after Tembec's counsel sought them under the Freedom of Information Act. Tembec therefore has not been informed of all the facts and arguments made by the U.S. petitioners in the proceedings as required by U.S. and international law, nor has Tembec been given a fair opportunity to respond. In order to justify the unlawful duties, Commerce and the ITC employed methodologies that had never before been used and that Commerce itself had rejected on prior occasions as arbitrary and capricious. Commerce's and the ITC's conclusions were not based upon substantial evidence on the record and were in violation of U.S. and international law. These resulting duties have provided U.S. lumber producers with a competitive advantage over their Canadian competitors, including Tembec and its U.S. investments.

6. Confirming the flawed nature of the investigations, the Commerce and ITC final determinations have not been able to withstand scrutiny from World Trade Organization ("WTO") dispute settlement panels or NAFTA binational appeal panels. As of the date of this claim, five WTO and NAFTA appeals panels have rejected almost all of the essential features of Commerce's countervailing duty and antidumping preliminary and final determinations and the ITC's determination that Canadian softwood lumber imports pose a threat of material injury to the U.S. industry. One of the five panels ruled that the retroactive critical circumstances provision applied by the United States against Tembec is in conflict with international law. Two additional WTO panels ruled that the Continued Dumping and Subsidy Offset Act of 2000 ("Byrd Amendment"), which would transfer

antidumping and countervailing duties from Tembec and other Canadian producers to their U.S. competitors, violates the United States' WTO obligations.

7. Despite these seven rulings, the United States has not amended its laws, modified its conduct, withdrawn the unlawful duty requirements, nor returned Tembec's deposits.

8. In the manner in which it conducted and decided these proceedings, the United States denied Tembec and its U.S. investments national treatment, most-favored-nation treatment, treatment in accordance with international law, and treatment in accordance with the standards for expropriation and compensation as required by NAFTA Chapter 11.

9. As a result of the United States' breaches of its obligations under NAFTA Chapter 11, Tembec and its U.S. investments have suffered damages by reason of, or arising out of, the breaches in the amount of at least US$200,000,000. Tembec brings this claim under NAFTA Articles 1116 and 1117 to recover these damages.

III. CONSENTS AND AUTHORIZATIONS

10. The United States consented to arbitrate this claim in Article 1122 of NAFTA, which was adopted by the United States on January 1, 1994. Pursuant to this consent, the United States has agreed to a Tribunal consisting of three arbitrators appointed in accordance with the procedures set forth in NAFTA Chapter 11.

11. Tembec has taken all necessary internal actions to authorize this claim. Tembec has consented to the submission of this claim to arbitration before a three arbitrator Tribunal appointed in accordance with the procedures set forth in NAFTA Chapter 11. Tembec, on behalf of itself and the U.S. Enterprises, waives its rights to initiate or continue before any administrative tribunal or court under the law of any Party, or other

dispute settlement procedures, any proceedings with respect to the measures of the United States that are alleged to be a breach referred to in Article 1116 and 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the United States. Tembec has elected to proceed under UNCITRAL Arbitration Rules, as is its option under NAFTA Article 1120.

IV. STATEMENT OF FACTS

A. Tembec's Investments In The U.S. Market

12. Tembec is an integrated forest products company that manufactures and markets softwood lumber, as well as other forest products. Tembec sells its lumber products in Canada and in other countries around the world, but by far the largest market for Tembec's products is the United States.

13. Tembec has made the following investments in the United States:

(a) Tembec Woodsville Inc. Tembec owns Tembec Investments USA Inc., which, in turn, owns Tembec Woodsville Inc. (collectively, "Tembec Woodsville"), all corporations organized under the laws of states of the United States. Tembec Woodsville operated a sawmill in Woodsville, New Hampshire. Tembec Woodsville produced its own lumber products for sale, and marketed and resold softwood lumber products from Tembec. Due to the adverse impact on its markets caused by the unlawful duties, Tembec Woodsville was forced to close in July 2003.

(b) Jager Building Systems (U.S.) Inc. Tembec has an investment in Jager Building Systems (U.S.) Inc. ("Jager (U.S.)"). Jager (U.S.) is incorporated under the laws of the State of Delaware and operates a sales and distribution facility in Hagerstown, Maryland with a sales distribution network spread throughout the United

States. Jager (U.S.) sells I-joists in the United States that are made by its parent company in Canada from Flangestock. Jager (U.S.) could serve as a marketing vehicle for the sale of Tembec's Flangestock to United States I-joist producers, but the unlawful duties imposed on Flangestock make these sales uneconomical.

(c) Cash deposits for antidumping and countervailing duties. Tembec has been required to pay cash deposits to the United States reflecting the estimated antidumping and countervailing duties on Tembec's softwood lumber products entering the United States. The deposits totaled approximately US$75 million as of September 30, 2003 and continue to accumulate.

(d) Bonds for antidumping and countervailing duties. During periods relevant to this claim, Tembec posted bonds with the United States reflecting estimated antidumping and countervailing duties on softwood lumber imports of US$24.3 million. The bonds now have been released.

(e) Tembec Inventory. Tembec ships softwood lumber inventory into the United States and retains ownership of the inventory in transit until delivery is completed to the customer. Tembec also maintains a substantial portion of its inventory in reload centers in the United States where lumber shipped from the mill by truck is stored until it can be consolidated with other shipments and reloaded to rail cars.

(f) Tembec Vendor-Managed Inventory. Tembec maintains softwood lumber inventory at vendor-managed inventory warehouses located throughout the United States. Tembec retains ownership and control of the inventory held at these facilities. The risk of loss remains with Tembec until Tembec customers withdraw inventory from the warehouse.

(g) Tembec Inventory. Tembec ships a substantial portion of its softwood lumber inventory into the United States.

(h) Program Sales. Tembec engages in program sales with U.S. customers under which Tembec agrees to supply, and the customers agree to purchase, specified volumes of softwood lumber annually at specified prices.

(i) Goodwill, market share and access to the U.S. market. Tembec has invested millions of dollars to establish, acquire, expand and maintain customer goodwill and market share in the United States for softwood lumber. Tembec's competitive prices, high quality, and abundant supply of softwood lumber have made Tembec a strong competitor in the U.S. softwood lumber market. Goodwill, U.S. market share, and access to the U.S. market are intangible property, owned and controlled by Tembec in the United States.

(j) Intellectual property rights. Tembec owns the rights to its trademark logo seen on its softwood lumber products in the United States, the trade dress affiliated with those products, and proprietary business information regarding program sales to Tembec's U.S. customers, all of which constitute intellectual property. Tembec's intellectual property is intangible property, owned and controlled by Tembec in the United States.

(k) St. Francisville Paper Mill. Tembec owns Tembec USA LLC, which, in turn, owns a paper mill located in St. Francisville, Louisiana in the United States that is dependent on cash flow from other investments to ensure its future. The duties have diverted cash flow to U.S. Customs and thus harm the viability and plans for the St. Francisville paper mill.

(l) Temboard Sales Inc. Tembec owns Temboard Sales Inc., which is a U.S. sales agent for Tembec and receives commissions for selling Tembec pulp and paper products in the United States.

(m) Thwarted future investments. Tembec had plans to make additional investments in the United States that have been thwarted by the unlawful countervailing duty and antidumping duties imposed by the United States on its softwood lumber products.

14. Tembec's past, present and planned future investments in the United States make Tembec an "investor of a Party" to NAFTA with standing to bring a Chapter 11 claim against the United States.

B. International Law Regarding Countervailing Duties And Antidumping

15. The Agreement Establishing the World Trade Organization ("WTO Agreement"), the agreements set out in the annexes thereto and the decisions of the Dispute Settlement Body established pursuant to the WTO Agreement comprise international law governing the regulation of international trade. The United States, as a member of the World Trade Organization ("WTO"), has undertaken to comply with the WTO Agreement when imposing trade measures on the goods of other WTO members, including Canada. In the United States, countervailing duty and antidumping tariffs are governed by the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act ("Tariff Act"), which purports to implement the United States' WTO obligations.

16. Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), both set out in Annex 1A of the WTO Agreement, set forth the conditions under which a

WTO member country can impose countervailing duties when a foreign government provides certain subsidies to its industry that materially injure or threaten to injure a domestic industry. A countervailable subsidy occurs when a government or public entity confers a financial contribution that benefits a specific industry with respect to the manufacture, production, or export of a class or kind of merchandise. Countervailing duties only may be imposed pursuant to an investigation initiated and conducted in accordance with the SCM Agreement. The duty may not exceed the countervailable subsidy.

17. Article VI of GATT 1994 and the Agreement on Implementation of Article VI of GATT 1994 ("Anti-Dumping Agreement"), set out in Annex 1A of the WTO Agreement, similarly specifies conditions under which a government may take remedial measures against dumping of merchandise. A product is being dumped - introduced into the commerce of another country at less than normal value - when the export price of the product exported from one country to another is (a) below the cost of production or (b) less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. Like countervailing duties, antidumping duties may be imposed only after a proceeding conducted in accordance with the Anti-Dumping Agreement, and the antidumping duty may not exceed the margin of dumping.

18. The United States has established procedures in the Tariff Act for investigating countervailable subsidies and dumping and imposing countervailing or antidumping duties. When Commerce determines that a government or public entity is providing a countervailable subsidy or a company is dumping and the ITC finds that an industry in

the United States is materially injured or threatened with material injury by reason of the import of the affected merchandise into the United States, a countervailing or antidumping duty shall be imposed. The duty cannot exceed the *ad valorem* value of the countervailable subsidy and the dumping margin.

19. Under the Tariff Act, Commerce and the ITC are required to be impartial arbiters of the facts and law. In order to ensure fair and impartial proceedings, the procedural rules of both agencies require that all relevant factual and legal arguments be placed on the record, including reports of *ex parte* communications between third parties and the agencies, and the agencies must set forth the reasoning of their decisions in written opinions that are subject to review before the WTO, and in the case of NAFTA countries, before NAFTA binational arbitration panels.

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 sales. High tariffs can disrupt customer supply orders and customer relations, undermine the profitability of an investment in the U.S. market, or preclude new investments entirely by making them economically infeasible. When applied properly, the disruptions caused by antidumping and countervailing duties offset the negative effects of unfair competition. In *Certain Softwood Lumber Products from Canada*, however, the United States abused the antidumping and countervailing duty laws to serve protectionist policies. The duties imposed by the United States on softwood lumber imports from

Canada discriminate against Tembec and its U.S. investments in favor of Tembec's U.S. competitors.

C. Initiation Of Trade Proceedings

21. On April 2, 1996, the Governments of the United States and Canada entered into the Softwood Lumber Agreement ("SLA"), a five-year trade agreement under which Canada agreed to implement an export quota system to restrict softwood lumber imports into the U.S. market and the United States agreed not to initiate any new antidumping or countervailing duty investigations against Canadian softwood lumber. As part of the SLA, the U.S. softwood lumber producers agreed in a collection of sworn letters that during the life of the SLA they could not be injured by imports from Canada because whatever subsidies might be alleged were offset by quantitative quotas on Canadian merchandise.

22. On March 28, 2001, days before the SLA expired, several U.S. Senators met with Commerce officials, including Secretary of Commerce Donald Evans, campaigning for duties to be imposed on softwood lumber from Canada. A press release about the meeting from Senator Thad Cochran declared that Mississippi lumber producers were experiencing tough times due to high fuel prices and low lumber prices. Senator Cochran announced that U.S. softwood lumber producers would file two trade cases on April 2, the first business day after the SLA expired on Saturday, March 31. The Senator urged Commerce to act quickly because, in his view, Canadian imports were being subsidized and "{i}t is clear that the industry has been injured."

23. On April 2, 2001, immediately upon expiration of the SLA, the Executive Committee of the Coalition for Fair Lumber Imports ("Executive Committee"), a trade

association of U.S. lumber manufacturers, filed countervailing duty and antidumping petitions against Canadian softwood lumber at Commerce and the ITC. Purporting to speak for the U.S. lumber industry, the Executive Committee dismissed the industry letters signed under the SLA as a "legal fiction" and, contrary to their undertakings under the SLA, claimed Canadian softwood lumber was subsidized and dumped and was causing injury during the period when the SLA was in effect.

24. On April 23, 2001, Commerce initiated a countervailing duty investigation of alleged Canadian government subsidies and an investigation of dumping by Canadian softwood lumber producers, including Tembec. The period of investigation was April 1, 2000 to March 31, 2001, even though the U.S. industry had agreed that the SLA quotas would protect them from injury from Canadian imports during this same period.

25. The petitions did not meet the legal requirements of international or U.S. law. Commerce, however, decided to initiate the investigations due to improper political considerations.

26. The investigations also were initiated due to the unlawful influence of the Byrd Amendment, which provides that companies supporting a successful antidumping or countervailing duty investigation will be compensated with money from the duties paid by foreign producers. As two WTO panels later held, the Byrd Amendment violates international law. The Byrd Amendment constitutes a double penalty on foreign importers: while the antidumping or countervailing duties theoretically offset any unlawful foreign competition, the disbursement of the duties to domestic producers then subsidizes the competitors' operations unfairly. Under both the SCM Agreement and the Anti-Dumping Agreement, an investigation shall not be initiated unless, among other

requirements, the petition is on behalf of the domestic industry, which is defined to mean those domestic producers whose collective output constitutes more than 50 percent of the total production of the like product. U.S. lumber companies' support for the petitions was improperly influenced by the opportunity to be directly rewarded by an unlawful penalty on their Canadian competitors. Any company not supporting the petition would not be eligible to receive the duties, while the law imposes no costs or penalties when a company declares its support and subsequently can be rewarded with payments.

27. Tembec and other Canadian respondents objected to the initiation of the investigations due to this unlawful penalty, but Commerce decided to proceed.

D. ITC Preliminary Determination

28. After Commerce initiated the softwood lumber investigations, the ITC considered whether there was a reasonable indication that the domestic industry producing the competing product had been materially injured or threatened with material injury by reason of unfairly traded imports of the subject merchandise. If the ITC had made a negative preliminary determination, the investigation would have been terminated.

29. On May 16, 2001, the ITC issued its preliminary determination, finding no reasonable indication of current material injury to the U.S. softwood lumber industry from Canadian imports. Instead, based upon the expiration of the SLA, the ITC assumed that Canadian softwood lumber exports to the United States would surge and, therefore, concluded that Canadian imports "threatened material injury" to U.S. softwood lumber producers. This finding was without factual basis and was contrary to law, as a NAFTA binational panel later found. While the Executive Committee claimed

Canadian producers would bury the United States in a “wall of wood,” no factual basis existed for this claim and the flood of imports did not materialize. In addition, the ITC agreed to examine whether the U.S. industry was injured or threatened with injury despite the industry’s pledge that it could not be injured during the period of the SLA, which overlapped with the period of investigation.

30. In making its finding, the ITC was improperly influenced by U.S. political considerations to protect domestic U.S. producers from legitimate competition, including from Tembec and its U.S. investments.

31. Although the investigations should have ended, the ITC’s preliminary finding of threatened material injury meant that Commerce’s countervailing duty and antidumping investigations continued.

E. Commerce’s Countervailing Duty Preliminary Determination

32. After initiating the investigations, Commerce sent questionnaires to the foreign producers of the subject merchandise and the provincial governments in the provinces where foreign producers operate, and reviewed the data to determine on a preliminary basis (a) in the countervailing duty investigation, whether a countervailable subsidy was provided to producers of the subject merchandise or (b) in the antidumping investigation, whether imports of the subject merchandise were being sold at less than fair value (“LTFV”).

33. Although Commerce is supposed to provide an impartial forum for conducting countervailing duty and antidumping investigations, Commerce prejudged the investigation and was determined to discriminate against Canadian softwood lumber producers. Commerce also came under intense political pressure to find against

Canadian lumber producers. Commerce received letters and other communications from powerful Senators, Congressmen and other U.S. officials pressuring Commerce to support U.S. lumber producers.

34. On June 1, 2001, Senator Max Baucus of Montana, then Chairman of the Senate Finance Committee, held a hearing in Missoula, Montana to pressure Commerce to support U.S. softwood lumber producers, including his Montana constituents. As Chairman of the Senate Finance Committee, Senator Baucus was one of the Senators most capable of thwarting the Administration's tax and trade legislative agendas.

35. As an indication of Senator Baucus' influence, Grant D. Aldonas, Under Secretary of Commerce for International Trade, who supervises the agency conducting the investigations, traveled to Missoula to testify in front of an audience of Montana lumber producers. Despite Commerce's legal role as an impartial arbiter, Mr. Aldonas defined his role by saying:

> As Secretary {of Commerce Donald} Evans reminded me before coming out here (and reminds me regularly back in Washington), my main job is to be an advocate for Montana's exporters and U.S. exporters generally. …

The hearing had the effect of applying pressure on Commerce to decide for the petitioner and discriminate against Canadian lumber interests.

36. On August 9, 2001, Commerce issued its preliminary determination in the countervailing duty investigation, finding that Canadian provincial governments were providing countervailable subsidies to the Canadian softwood lumber industry. Commerce imposed a preliminary duty rate of 19.31 percent, to be posted by cash deposits or bonds, on the sales of softwood lumber from Canada to the United States, including from Tembec, after August 16, 2001.

37. A press release from Senator Baucus dated September 6, 2001, acknowledged the role of political pressure on Commerce's preliminary determination, saying, "At the urging of Baucus and other members of Congress, the U.S. Department of Commerce on August 10 {sic} ruled on a U.S. lumber-industry lawsuit accusing Canada of violating trade laws and unfairly subsidizing its lumber industry. Commerce found that American mills have been injured by the Canadian subsidies and imposed a 19.3 percent duty on Canadian lumber entering the U.S."

38. Commerce reached its findings by employing methodologies that had never before been used, that Commerce itself had rejected on three prior occasions as arbitrary and capricious, and that were in violation of U.S. and international law.

39. Without these and other unlawful findings, Commerce could not have found countervailable subsidies or imposed the unlawful duties. The duties imposed to offset purported subsidies have had the effect of discriminating against Tembec and its U.S. investments in favor of U.S. competitors.

40. Tembec and its U.S. investments also have been discriminated against by subsidies and special tax benefits that the United States, state and county governments provide to U.S. lumber producers. In the trade proceeding, Commerce refused to account for these benefits in comparing Canadian to U.S. government sales of standing timber. While Tembec was penalized for alleged subsidies by Canadian governments, no offsetting penalties were included for subsidies that U.S. lumber manufacturers receive. The subsidies and Commerce's failure to account for these benefits, along with the promise of subsidies from Byrd Amendment payments, increased U.S. producers' market advantage over Tembec.

F. Unlawful Critical Circumstance Finding

41. In its preliminary determination, Commerce made an affirmative preliminary finding that critical circumstances existed due to "massive imports of the subject merchandise over a relatively short period of time." As a result of the affirmative critical circumstances finding, Commerce imposed countervailing duty liability for subject merchandise imported up to 90 days prior to the date of the preliminary determination. Commerce required Tembec and other respondents to post bonds or pay cash deposits for the estimated amount of duties for the 90-day period.

42. Commerce had no reasonable basis for finding that there had been massive imports of softwood lumber over a relatively short period because the so-called "wall of wood" never materialized. Even Commerce was forced to abandon this finding in the final determination.

43. The unlawful and baseless critical circumstance finding was not a fair and impartial analysis of the facts; it was a negotiating tool designed to bludgeon Canada into an early, unfair settlement. U.S. Trade Representative Robert Zoellick, who works directly for the President of the United States and is the designated government advocate for the U.S. industry, boasted about his role in this finding. Testifying before the Senate Finance Committee, Ambassador Zoellick said:

> But I think, in general on softwood lumber, you {Senator Baucus} and I are actually in very close agreement in that, as you know, we backed the cases that were filed by the coalition, including – I personally, while it was a Commerce decision, suggested the critical circumstances finding which was important along the way, was the one that was appropriate. And so we now do have the preliminary countervailing duty and antidumping duties.

Even though Commerce was supposed to be a neutral arbiter, this exchange evidences the close coordination among the branches of the United States Government, including Commerce, to bring about predetermined results favorable to the U.S. industry.

44. Commerce's improper finding of critical circumstances injured Tembec because Tembec was required to post retroactive bonds on its softwood lumber imports into the United States from May 5, 2002. In addition to being without any factual basis, the retroactive bond requirement violated the United States' WTO obligations, as a WTO panel later held. While these bonds were later released, they adversely affected Tembec's financial condition and its relations with its U.S. customers.

G. Commerce's Antidumping Preliminary Determination

45. On October 30, 2001, Commerce issued its preliminary determination in the antidumping investigation and imposed a preliminary antidumping duty rate of 10.76 percent on Tembec, to be posted by cash deposits or bonds on sales of softwood lumber to the United States from November 6, 2001.

46. In reaching this decision, Commerce employed methodologies to find dumping that artificially overstated the dumping margin and, in some respects, had already been found unlawful by WTO decisions, including:

(a) Commerce declined to take into account any of the trade distortions created by the SLA, which itself was a United States agreement that Tembec had neither entered into nor endorsed;

(b) Commerce calculated an average dumping margin for all products subject to the investigation by changing all negative dumping margins (*i.e.,* products on which the price to the United States is greater than fair value) to zero (hence "zeroing") before

calculating the average. Zeroing skews the weighted average margin calculations toward a higher dumping margin, and thus violates U.S. and international law;

(c) Commerce artificially inflated the "normal value" to which U.S. prices are compared in the dumping calculation by failing to allocate joint costs to individual products in proportion to their relative values. Commerce refused to recognize the effect of size on the value of lumber products, misallocating joint costs among joint products, thereby yielding an artificially high dumping margin; and

(d) Where identical merchandise was unavailable for comparison, Commerce compared prices of different products with different sizes. Commerce made no adjustment for differences in physical characteristics contrary to the express statutory requirement that it make such adjustments, thus inflating the margin.

47. On November 15, 2001, Senator Baucus, Senator Trent Lott, then the Republican Senate leader, and eight other senators wrote to Secretary Evans praising him for the dumping determination and asking him to "work aggressively to prevent the dumping of Canadian softwood lumber into the U.S. market." The letter also suggested Commerce should make final determinations soon, and urged additional action, saying:

> While today's additional tariff is a step in the right direction and will provide some immediate relief to our softwood producers, much more needs to be done.

The letter placed additional pressure on Commerce to make findings favoring the U.S. industry.

H. Commerce's Refusal To Provide A Company-Specific Rate

48. In December 2001, Tembec asked Commerce to provide it with a company-specific countervailing duty rate to which it was entitled under U.S. and international law. Commerce acted unlawfully by refusing to grant Tembec a lower company-specific rate, and instead relegated Tembec to the countrywide rate for all Canadian companies, including those, unlike Tembec, whose timber supplies came exclusively from allegedly subsidized crown timber. Commerce's refusal to provide Tembec with a company-specific rate violated U.S. law and the United States' international WTO obligations.

49. If Commerce had given Tembec a company-specific rate, the rate would have been lower than the countrywide rate. Thus, even under Commerce's unlawful theory of countervailable subsidies, Tembec is paying more in duties than it is receiving in subsidies and therefore is placed at a competitive disadvantage to its U.S. competitors.

50. As a result of Commerce's and ITC's unlawful decisions, Tembec was required to post bonds for countervailing duty deposits totaling US$16.8 million between the period of August 2001 to December 2001 and to post bonds for antidumping duty deposits totaling US$7.5 million between the period November 2001 and March 2002 on its imports of softwood lumber products into the United States.

I. Commerce's Final Antidumping And Countervailing Duty Determinations

51. After the preliminary determinations, Commerce continued its investigations by performing audits of the respondents (referred to as "verification") by sending its staff to the site of the respondent companies, including Tembec, in the antidumping investigation, or to the Canadian or Provincial Governments in the countervailing duty investigation, to review documentary support for the submitted data.

52. On February 13, 2002, as Commerce was preparing its final determinations, Senator Baucus held another hearing of the Senate Finance Committee to put pressure on Commerce in the softwood lumber dispute and unequivocally expressed his view on the outcome of the investigations, saying:

> The fundamental issue is that Canada maintains a web of interlocking {provincial} policies aimed at subsidizing the lumber industry in the hopes of spurring economic growth.

53. At the hearing, Peter Allgeier, Deputy U.S. Trade Representative, expressed the view of the President by saying:

> We are steadfast in our support for the U.S. industry's right to file antidumping and countervailing duty petitions, vigorous in our enforcement and defense of U.S. trade laws, and unrelenting in our pursuit to eliminate the unfair provincial practices in Canada.

54. These hearings and the opinions concerning the investigation expressed by Senator Baucus, other Senators, the U.S. Trade Representative and his deputy were without legal or factual basis and unfairly maintained the pressure on Commerce and the ITC to make determinations favorable to the U.S. industry.

55. Undersecretary of Commerce Aldonas' testimony at these hearings acknowledged the pressure and implicitly conceded its impact, saying that the Administration was "going to keep the bargain with the American public on trade." He then added:

> {President Bush and Secretary Evans} both know that {} trust is earned through deeds, not just words, and as {an} administration we expect to be held accountable to that standard.
>
> We recognize that the administration's actions on lumber and steel are a part of that process. Turning to lumber, no one knows better than you, Mr. Chairman, how long our

> industry has raised concerns regarding the market distorting effects of Canadian lumber subsidies. …

56. While considering its opinion, the ITC also faced intense and directed political pressure from the U.S. Senate. On March 15, 2002, fifty-one U.S. Senators—precisely a majority of the Senate—signed a letter to the ITC urging the agency to issue a final determination favoring the U.S. industry. Whereas Commerce is an agency of the Executive Branch, the ITC was created by and answers directly to Congress. This letter, thus, amounted to a direction to the ITC to find that the U.S. lumber industry was being injured or threatened with injury by Canadian imports. The timing of the letter also was conspicuous as it assured that the letter would influence Commerce officials when they made their final determinations.

57. In addition to the public communications, senior Commerce officials maintained regular private dialogue with the U.S. petitioners, their counsel, and their Congressional and Administration supporters. Although these *ex parte* communications are required by law to be reported on the public record, frequently they were not. *Ex parte* meeting memoranda were not created and placed on the record as required by U.S. law and Commerce's own policy statements in at least 40 instances. Letters from petitioner's counsel also were not put on the public record, contrary to U.S. law.

58. On March 21, 2002, a senior Commerce official had an *ex parte* meeting with the petitioner but failed to report the meeting on the public record, even though the Court of International Trade had recently criticized Commerce for similar conduct in another case and Commerce had issued a policy statement requiring officials to report *ex parte* meetings. Because Tembec does not know the information exchanged during this meeting and the numerous other *ex parte* contacts, the company has never been given

the opportunity to respond to the facts or arguments presented by the petitioner to the agency responsible for conducting a fair and impartial investigation.

59. Although the statutory deadline for Commerce's final determinations was March 21, 2002, Commerce did not announce positive antidumping and countervailing duty final margins until March 22, 2002 and then did not issue its final determinations, which by law must provide the reasoning to support the final margins, until March 25, 2002.[1] Thus, Commerce announced politically acceptable and unprecedented duty margins on March 22 and then spent an additional three days developing the reasoning to justify its previously announced conclusions.

60. In the countervailing duty investigation, Commerce found a countervailing duty of 18.79 percent and final margins as to Tembec in the antidumping investigation of 10.21 percent.

61. As it had in the preliminary determinations, Commerce made findings and employed methodologies that had never before been used, had previously been repudiated, and were in obvious violation of U.S. and international law. Many of the same infirmities in the countervailing duty preliminary determination were repeated in the final determination. In the antidumping final determination, Commerce also made findings and used methodologies that are contrary to U.S. law and international law.

[1] Commerce's decision memoranda and Federal Register notices were backdated March 21, 2002. *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, Case No. C-122-839, 67 Fed. Reg. 15,545 (Apr. 2, 2002); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, Case No. C-122-838, 67 Fed. Reg. 15,539 (Apr. 2, 2002).

J. Improper Class Or Kind Determinations

62. In responding to the petitions, Tembec asked Commerce to treat Eastern White Pine and Finger-Jointed Flangestock as separate classes or kinds of merchandise because of their distinct characteristics as measured by the criteria to be applied under U.S. law. A separate class or kind finding mandates a separate investigation, including separate analysis of petition adequacy. Because the Executive Committee made no allegations and provided no evidence as to Eastern White Pine or Finger-Jointed Flangestock in its petition, a separate class or kind finding would have required termination of the investigation as to Eastern White Pine and Finger-Jointed Flangestock.

63. In its final determinations, Commerce abdicated to U.S. manufacturers its obligation to define the class or kind of merchandise subject to the investigation and conducted its class or kind inquiry in a manner that denied Tembec procedural due process and accorded unlawful procedural advantages to the Executive Committee.

64. Commerce delayed issuing its preliminary class or kind findings until mere days before it was required by law to issue final determinations on class or kind and the imposition of duties. The results of Commerce's unexplained and inexcusable delay were that Tembec was granted two days for review of the preliminary findings, preparation and presentation of the case brief on class or kind issues; one-half business day for preparation of its rebuttal brief; and twenty-two hours to prepare and present at the public hearing. This schedule also left Commerce an insufficient period of time between the preliminary and final determinations to review and consider any arguments contrary to the proposed class or kind findings.

65. Commerce did not perform fair evaluations of these products, deciding instead to lump them in with all types of softwood lumber.

66. The United States' actions limiting Eastern White Pine and Finger-Jointed Flangestock supply from Canada created a market uncertainty over supply that drove consumers to alternative materials, and damaged Tembec's investment in Tembec Woodsville and Jager (U.S.) as well as in its Canadian production of Eastern White Pine and Finger-Jointed Flangestock.

67. As a result of the supply uncertainty for Eastern White Pine caused by the unlawful duties, Tembec Woodsville lost so many customers that it was forced to close in July 2003. Tembec lost virtually its entire investment in Tembec Woodsville. The business of Jager (U.S.) also has been limited and damaged.

K. ITC Final Determination

68. Following affirmative final determinations by Commerce, the ITC prepared a final determination as to whether the U.S. industry was materially injured or threatened with material injury by reason of the dumped or subsidized imported merchandise.

69. Consistent with the request made in the March 15th letter from 51 Senators, on May 2, 2002, the ITC made a final determination that the U.S. softwood lumber industry was threatened with material injury from Canadian softwood lumber exports.[2] The ITC found no current injury to the U.S. industry. The ITC made its final determination without evidence that Canadian imports have a trade distorting effect, and despite evidence that, contrary to its assumptions in the preliminary determination, there had been no surge in Canadian imports.

[2] *Determination-Softwood Lumber from Canada*, No. 701-TA-414 and 731-TA-928 (final), USITC Pub. 3509, 67 Fed. Reg. 36,022 (May 22, 2002).

70. As it had at Commerce, Tembec asked the ITC to perform separate analyses of Eastern White Pine and Finger-Jointed Flangestock products because of their differences from softwood lumber products and the fact that there are few, if any, Eastern White Pine and Flangestock producers in the U.S. who possibly could be harmed by imports. U.S. Eastern White Pine and Flangestock producers cannot even keep up with U.S. demand.

71. The ITC included Flangestock as a "like product" comparable to softwood lumber products and, therefore, that there is only one domestic like product and only one U.S. industry. However, it never made an effort to apply the criteria required under U.S. law to make that determination. The ITC supposedly applied the "like product" criteria to Eastern White Pine, but ignored all of the indications that it was a separate like product on the basis that it shared one or two characteristics with one unique product within the scope of the investigation.

72. The ITC's final affirmative determination of threat to U.S. lumber producers enabled Commerce to impose antidumping and countervailing duty orders on Canadian softwood lumber. As a result of those orders, Tembec is required to make cash deposits of estimated duties at a rate of 29 percent *ad valorem* and is at risk that Commerce subsequently might exact even higher duties on a retroactive basis pursuant to administrative reviews.

L. Commerce's Duty Orders

73. When both Commerce and the ITC's final determinations are affirmative, Commerce issues an antidumping or countervailing duty order requiring that duties be paid in the amount of the dumping margin or countervailable subsidy. From the date of the order, only cash deposits, not bonds, are accepted to cover the liability.

74. On May 21, 2002, Commerce issued the final antidumping and countervailing duty orders for softwood lumber products from Canada, triggering the obligation for Tembec to pay cash deposits in the amount of the duties on all products entering the United States.[3]

75. As a result of the decisions of Commerce and the ITC, Tembec must make cash deposits on its imports of softwood lumber to the United States at the accumulated rate of 29 percent. For the period May 22, 2002 to September 30, 2003, Tembec has posted deposits of estimated cumulative duties on its softwood lumber sales to the United States in the amount of US$75 million. Additional deposits continue to be made for sales since October 1, 2003.

76. These duties have seriously damaged Tembec, its U.S. investments, and Tembec's ability to invest in the U.S. market.

M. Commerce's Efforts To Cover Up Its *Ex Parte* Contacts With Petitioner

77. On April 2 and July 17, 2002, Tembec's counsel, Baker & Hostetler LLP, made requests for information to Commerce under the Freedom of Information Act ("FOIA"), 5

[3] Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products from Canada, Case No. C-122-839, 67 Fed. Reg. 36,070 (May 22, 2002); Notice of Amended Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada, Case No. C-122-838, 67 Fed. Reg. 36,068 (May 22, 2002).

U.S.C. § 552. The requests were for two categories of information: (a) documents created during the period of March 21-25, 2002, after the statutory deadline for Commerce's countervailing duty and antidumping final determinations but before they were released; and (b) documents containing *ex parte* contacts (that have not been placed on the public record as required by law) between Commerce and members of Congress, their staff or the public. Commerce has identified, but not made available, 12,300 documents in category (a) and 5,700 documents in category (b).

78. Contrary to the explicit requirements of FOIA, Commerce refused to respond to the FOIA requests. One senior Commerce official summed up Commerce's attitude towards the FOIA request by writing in instructions to her staff, "Let the games begin." Because Commerce officials were flaunting the FOIA law, Tembec's counsel filed a lawsuit to force Commerce to make the required disclosures.

79. Under compulsion of a court order, Commerce disclosed documents that uncovered an open dialogue between Commerce, the U.S. petitioners and their supporters. Forty *ex parte* meetings were revealed that had not previously been disclosed on the public record as required by the Tariff Act. The existence of letters from the Executive Committee's counsel to Commerce officials also was disclosed. The Tariff Act and Commerce's policy statement require Commerce officials to place a summary of *ex parte* meetings on the public record so that all participants in proceedings will know what information was presented and have the opportunity to respond. Since the disclosure in the FOIA lawsuit of 40 previously unrecorded meetings, Commerce still has not placed all *ex parte* meeting memos on the public record.

80. In addition, during the litigation, Commerce admitted that at least 110 days after receiving the FOIA request, it unlawfully destroyed emails of Bernard Carreau, Deputy Assistant Secretary for Antidumping Countervailing Duty Enforcement, who was the principal contact between Commerce and petitioner. A second admission forced by the litigation was that emails from other Commerce officials responsive to the second FOIA request for *ex parte* communications were deleted. As a result, additional *ex parte* contacts may be undocumented. Thus, while Tembec and the other respondents were entitled by law to have knowledge of and the opportunity to respond to the facts and arguments of the petitioner, they were denied that right by Commerce's secret meetings and communications with petitioner and its supporters.

81. Even though these meetings were disclosed through the lawsuit, Commerce continued to hide the meetings from the public and other Canadian respondents. On July 30, 2003, Commerce posted on its website a report stating that all *ex parte* meetings required to be disclosed by the Tariff Act had been disclosed. Because Commerce has participated in the defense of the lawsuit, it knew that this report was false when posted.

82. The produced documents support Tembec's contention that Commerce was not engaged in a fair and impartial proceeding as required by international law, but instead was biased in favor of the U.S. petitioner.

N. The United States' Failure To Cure Unlawful Orders

83. The United States' discrimination against Canadian softwood lumber producers, including Tembec, can be seen in the unanimous rejection of the Commerce and ITC preliminary and final determinations by WTO and NAFTA appeal panels. This record on

appeal exposes the lack of basis in fact and law for the damaging duties. To date, five panels, comprised of twenty-one different arbitrators, have rejected the Commerce and ITC reasoning in imposing the duties, finding them to be unsupported by substantial evidence on the record and contrary to U.S. and international law.

84. On September 16, 2002, a WTO Appellate Panel affirmed the award by a WTO review panel that had found the Byrd Amendment violates the United States' obligations under both the SCM Agreement and the Anti-Dumping Agreement by providing an improper penalty for subsidies and dumping.[4] The panel recommended that the law be repealed.

85. Despite the WTO panel ruling, the United States has not repealed the Byrd Amendment, and Commerce has not reconsidered its final determination or withdrawn the duty orders. Commerce, thus, initiated investigations when the U.S. softwood lumber industry was unlawfully offered the opportunity to impose a competitive penalty on its Canadian competitors, including Tembec, as inducement to support the petition.

86. On September 27, 2002, the WTO panel announced its decision rejecting Commerce's countervailing duty preliminary determination.[5] The WTO Panel rejected most of the essential bases for Commerce's preliminary determination, including:

(a) In determining whether Canada was subsidizing softwood lumber producers, Commerce compared prices in Canada to prices in the United States, so-called "cross-border benchmarks." Cross-border benchmarks are contrary to the plain meaning of the SCM Agreement and the Tariff Act, and Commerce had previously

[4] Report of the WTO panel, United States-Continued Dumping and Subsidy Offset of 2000, WT/DS234/R (Sept. 16, 2002).
[5] Report of the WTO Panel, United States-Preliminary Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada, WT/DS235/R (Sept. 27, 2002).

rejected cross-border benchmarks in its earlier *Lumber I*, *Lumber II*, and *Lumber III* investigations. The WTO panel again rejected them as unlawful in this investigation.

(b) Both the SCM Agreement and the Tariff Act require Commerce to conduct an "upstream analysis" to determine whether alleged countervailable subsidies were passed through to downstream producers of the imported merchandise. The WTO panel rejected Commerce's finding that this analysis was not required.

87. Commerce's preliminary determination had additional infirmities on which the WTO panel did not rule, including:

(a) Commerce used forestry conversion factors in its cross-border calculations that its own expert consultants from the U.S. Forest Service repudiated as grossly inaccurate. Had Commerce used the conversion factors provided by its own expert consultants, the margins that it calculated, even under its unlawful cross-border methodology, would have been less than half the margins Commerce found in its final determination.

(b) Commerce received the report of its expert consultants over a month before its final determination, but unlawfully withheld it from the record, and from the Canadian parties. The report was included in the record only because the Canadian parties learned of the existence of this report through other sources and the NAFTA Binational Panel ordered Commerce to add it to the record of the investigation.

88. The WTO panel reviewing the preliminary determination also found that the critical circumstance provision of the Tariff Act was inconsistent with the United States' WTO obligations to the extent that it permitted the retroactive imposition of countervailing duties.

89. Although Commerce then knew that its methodologies violated the United States' international obligations, it took no action to modify its conduct or withdraw the unlawful orders requiring cash deposits. The United States also has not repealed the retroactivity provision in the Tariff Act.

90. On July 17, 2003, a NAFTA binational panel rejected Commerce's antidumping final determination.[6] The panel criticized Commerce's cost-allocation methodology with instructions to apply a different methodology. As a result of its improper allocations, Commerce's antidumping rate for Tembec was inflated.

91. The Panel also remanded Commerce's determination concerning Flangestock because the determination that it was a like class or kind was without support in the record. Jager (U.S.), in which Tembec has a substantial investment, markets and sells engineered wood products like Flangestock through its U.S. facilities, and could sell and market Flangestock in the United States but for the duties imposed.

92. On August 13, 2003, a NAFTA binational panel rejected Commerce's countervailing duty final determination.[7] The NAFTA CVD Panel remanded the case to Commerce on the issue of whether Canada had provided a benefit to its softwood lumber producers. The Panel invalidated Commerce's cross-border benchmark methodology to determine adequate remuneration and the notion that "adequate remuneration" is equivalent to "fair market value."

93. On August 29, 2003, a WTO panel rejected Commerce's countervailing duty final determination for many of the same reasons the earlier WTO panel had rejected the

[6] NAFTA Panel Decision, Certain Softwood Lumber Products from Canada Final Affirmative Antidumping Duty Determination, File No. USA-CDA-2002-1904-02 (July 17, 2003).
[7] NAFTA Panel Decision, Certain Softwood Lumber Products from Canada Final Affirmative Countervailing Duty Determination, File No. USA-CDA-2002-1904-03 (Aug. 13, 2003).

preliminary determination.[8] For instance, Commerce again relied upon cross-border benchmarks and refused to make an upstream analysis to rule against the Canadian industry. In large measure, Commerce ignored the first WTO panel's decision rejecting its methodology in Commerce's preliminary determination.

94. Even though Commerce has two WTO decisions and a NAFTA panel decision rejecting its subsidies methodology, it has taken no action to withdraw its countervailing duty final determination or duty orders. As a result, Tembec and other Canadian softwood lumber producers must continue to make unlawful cash deposits that are distorting the softwood lumber markets and compounding Tembec's damages.

95. On September 5, 2003, a NAFTA binational panel rejected the ITC's injury analysis. On virtually every point of analysis, the panel found the ITC's analysis to be without substantial evidence and contrary to law.[9] In its conclusion the panel rebuked the ITC, stating, "The Panel is particularly troubled by the extensive lack of analysis undertaken by the {ITC} of the factors applicable to a determination of whether there is a threat of material injury to the domestic softwood lumber industry."

96. These decisions collectively provide irrefutable evidence that the United States knowingly imposed unlawful softwood lumber duties because of political considerations and not because of the merits of the investigations. In addition, they demonstrate that the United States is according Canadian softwood lumber producers, including Tembec and its U.S. investments, treatment less favorable than U.S. lumber producers in like circumstances.

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[8] Report of the WTO Panel, United States-Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada, WT/DS257/R (Aug. 29, 2003).

[9] NAFTA Panel Decision, Certain Softwood Lumber Products from Canada Final Injury Determination, File No. USA-CDA-2002-1904-07 (Sept. 5, 2003).

97. Since the imposition of duties on Canadian softwood lumber products, imports of softwood lumber to the United States have surged from Russia, Chile, Finland and other countries. Although U.S. officials have acknowledged that lumber from these countries may be subsidized and imports are being priced below fair value, Commerce has not brought countervailing duty or antidumping proceedings against any such imported products outside of Canada. Tembec and its U.S. investments, thus, are being accorded treatment less favorable than other foreign lumber producers in like circumstances.

O. Post-Order Proceedings

98. On May 22, 2002, Commerce indicated that individual exporters of softwood lumber from Canada could request expedited reviews with respect to the countervailing duty order so that individual companies could obtain a company-specific countervailing duty cash deposit rate prior to commencement of administrative review proceedings, in accordance with the United States' WTO obligations. Tembec promptly submitted such a request, anticipating that it would obtain the company-specific rate that Commerce had refused to provide during the investigation. Although Commerce has completed a limited number of expedited reviews for some companies, more than eighteen months after it made its request, Tembec has yet to receive its own countervailing duty cash deposit rate through expedited review.

99. Commerce initiated administrative reviews of the antidumping and countervailing duty orders on May 1, 2003. In the administrative reviews of the countervailing duty order, and in accordance with U.S. and international law and practice, Tembec requested that Commerce conduct an appropriate company-specific analysis to

determine whether Tembec could receive a zero or *de minimis* countervailing duty rate. Commerce has not acted on Tembec's request.

V. CLAIMS FOR BREACHES OF NAFTA CHAPTER 11 OBLIGATIONS

A. Claim 1: Breaches Of National Treatment Obligations Under Article 1102

100. Under NAFTA Article 1102, the United States is obligated to accord Tembec and its investments national treatment. NAFTA Article 1102 states:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

101. Set forth in greater detail above, the United States has breached its obligations under Article 1102 by the following acts and omissions, individually or collectively:

(a) Commerce unlawfully initiated the antidumping and countervailing duty investigations based upon a deficient petition and when U.S. industry support was unlawfully influenced by the Byrd Amendment;

(b) The ITC's preliminary threat of material injury and critical circumstances findings were not supported by the evidence and were contrary to law. As a result, Tembec was unlawfully required to post bonds for retroactive duties that discriminated against Tembec and its U.S. investments and favored U.S. producers of softwood

lumber, in like circumstances; the investigations continued when they should have ended;

(c) In its preliminary antidumping and countervailing duty determinations, Commerce made findings that were not supported by the evidence and were contrary to law. As a result, Tembec was required to post bonds covering estimated duties on softwood lumber imports that discriminated against Tembec and its U.S. investments and favored U.S. producers of softwood lumber, in like circumstances;

(d) In its final antidumping and countervailing duty determinations, Commerce made findings that were not supported by the evidence and were contrary to law. As a result, Commerce issued duty orders that require Tembec to post cash deposits of estimated duties that discriminate against Tembec and its U.S. investments and favor U.S. producers of softwood lumber, in like circumstances;

(e) Commerce's refusal to provide Tembec with a company-specific rate was not supported by the evidence and was contrary to law, and resulted in Tembec posting inflated deposits that discriminate against Tembec and its U.S. investments in favor of its U.S. competitors, in like circumstances;

(f) The ITC's final threat of material injury findings were not supported by the evidence and were contrary to law. As a result, Tembec was required unlawfully to post bonds for retroactive duties that discriminated against Tembec and its U.S. investments and favored U.S. producers of softwood lumber, in like circumstances, and the investigations continued when they should have ended;

(g) The United States amended the Tariff Act, enacted the Byrd Amendment, promulgated trade regulations and adopted practices in implementing the countervailing

duty and antidumping laws in the softwood lumber proceedings that discriminated against Tembec and its U.S. investments and favored its U.S. competitors in like circumstances;

(h) The United States provides subsidies and special tax benefits to U.S. softwood lumber producers that have the effect of discriminating against Tembec and its U.S. investments and in favor of its U.S. competitors in like circumstances;

(i) The United States has failed to give Tembec a company-specific countervailing duty analysis under expedited review or administrative review proceedings in violation of U.S. law and international law, requiring Tembec to pay excessive cash deposits of estimated duties that discriminate against Tembec and its U.S. investments and favor U.S. producers of softwood lumber, in like circumstances; and

(j) In committing the foregoing acts and omissions, the United States knowingly and intentionally is violating U.S. law, the United States' WTO obligations, and the United States' obligations under NAFTA.

102. As a result, the United States has accorded Tembec and its U.S. investments treatment less favorable than that it accords, in like circumstances, to U.S. softwood lumber producers with respect to the expansion, management, conduct and operation of investments.

B. Claim 2: Breaches Of Most-Favored-Nation Treatment Obligations Under Article 1103

103. Under NAFTA Article 1103, the United States is obligated to accord Tembec and its investments "most-favored-nation" treatment. NAFTA Article 1103 states:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

104. The United States breached its obligation under Article 1103 by bringing trade proceedings against the Canadian softwood lumber industry while not bringing proceedings against softwood lumber producers from other countries, in like circumstances, that export softwood lumber products to the United States.

C. Claim 3: Breaches Of Obligations Of Treatment In Accordance With International Law (Minimum Standard) Under Article 1105

105. Set forth in greater detail above, the United States is obligated to accord Tembec's investments a minimum standard of treatment under international law. NAFTA Article 1105 states:

> Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

106. For the reasons set forth in greater detail above, the United States has breached its obligations under Article 1105 by the following acts and omissions, individually or collectively:

(a) The United States did not conduct the antidumping and countervailing duty investigations in a fair, objective and impartial manner as required by U.S. and international law;

(b) The United States predetermined the results of the investigation of steep tariffs on softwood lumber imports from Canada;

(c) The investigations were subject to prejudicial, anti-Canadian political pressure;

(d) Commerce engaged in a regular dialogue of *ex parte* communications with the U.S. petitioner and its Congressional and Administration supporters;

(e) Many of the *ex parte* communications were not disclosed as required by law, and Commerce has made a concerted effort to cover them up, including making misrepresentations denying that they occurred and destroying documents reflecting the communications once Tembec's counsel sought them under the Freedom of Information Act;

(f) Tembec has not been informed of all the evidence considered by Commerce and did not have an opportunity to respond to it;

(g) Commerce adopted procedures in the investigations that hindered Tembec's ability to respond;

(h) The United States imposed duties on softwood lumber products from Canada that were unlawful under U.S. and international law;

(i) Even after WTO and NAFTA rulings rejecting its determinations, the United States has not amended its laws, modified its conduct, withdrawn the unlawful duty requirements, or returned Tembec's deposits; and

(j) In committing the foregoing acts and omissions, the United States knowingly and intentionally is violating U.S. law, the United States' WTO obligations, and the United States' obligations under NAFTA.

107. Each of the Article 1102 breaches identified in Section V.A. above constitutes a breach of Article 1105 and is incorporated here by reference.

108. As a result, the United States failed to provide Tembec and its U.S. investments treatment in accordance with international law, including fair and equitable treatment and full protection and security.

D. Claim 4: Breach of Article 1110 Prohibition Of Expropriation Without Compensation

109. Under NAFTA Article 1110, the United States is obligated to abstain from expropriating Tembec's investments without compensation or due process of law. NAFTA Article 1110 states:

> No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation") except;
> for a public purpose
> on a non-discriminatory basis;
> in accordance with due process of law and Article 1105(1); and on payment of compensation …

110. Through the acts and omissions stated more fully above, the United States breached its obligations under Article 1110 by taking measures tantamount to expropriation of a substantial portion of Tembec's value through the imposition of unlawful antidumping and countervailing duties and other arbitrary actions that discriminated against Tembec and its U.S. investments, were not in accordance with due process of law and Article 1105(1), and were without payment of the required compensation.

VI. DAMAGES

111. Tembec has incurred loss or damage by reason of, or arising out of, the foregoing breaches by the United States of its international obligations under NAFTA in the amount of at least $200,000,000.

VII. POINTS AT ISSUE

112. Whether the actions of Commerce and the ITC as described herein failed to accord Tembec and its investments national treatment under NAFTA Article 1102?

113. Whether the actions of Commerce and the ITC as described herein failed to accord Tembec and its investments most-favored-nation treatment under NAFTA Article 1103?

114. Whether the actions of Commerce and the ITC as described herein failed to accord Tembec's investments a minimum standard of treatment under NAFTA Article 1105?

115. Whether the actions of Commerce and the ITC as described herein breached NAFTA Article 1110?

116. Whether Tembec and its U.S. enterprises should be awarded damages under Article 1116 and 1117 of NAFTA in the amount of at least $200,000,000?

VIII. REQUEST FOR RELIEF

117. The Tribunal is hereby requested to award Tembec and its U.S. enterprises monetary damages of at least $200,000,000, any applicable interest thereon, attorneys' fees, the cost of this proceeding, and such other relief as the Tribunal finds just and proper.

Respectfully submitted,

_____

Elliot J. Feldman
Mark A. Cymrot
John J. Burke
Michael S. Snarr
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, N.W.
Suite 1100
Washington D.C. 20036

Counsel to Tembec Inc.
Tembec Investments Inc.
Tembec Industries Inc.