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

DOMTAR INC.

Claimant/Investor,

v.

THE UNITED STATES OF AMERICA,

Respondent.

NOTICE OF ARBITRATION AND STATEMENT OF ARBITRATION CLAIM

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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 Claimant, Domtar Inc., hereby submits its Statement of Claim.

I. DISPUTING PARTIES

1. Domtar Inc. ("Domtar") is a Canadian paper products company that also manufactures and markets softwood lumber for sale in the United States and Canada.

2. Domtar is incorporated under the laws of Canada.

3. Domtar's address is 395 Blvd. de Maisonneuve West, Montreal (Quebec), Canada, H3A 1L6. Domtar's address for service of documents in connection with this proceeding is c/o Baker & Hostetler LLP, 1050 Connecticut Avenue, N.W., Suite 1100, Washington, D.C. 200036, attention Elliot J. Feldman, Esq., (Telephone: 202-861-1679; Facsimile: 202-861-1783).

4. Domtar owns and controls the following enterprises in the United States: Domtar Enterprises Inc. and Domtar Industries Inc. (collectively, "U.S. Enterprises"). Domtar submits this claim on its own behalf and on behalf of its U.S. Enterprises.

5. Domtar Industries Inc. ("DII") is a U.S. corporation wholly-owned by Domtar Enterprises Inc. ("DEI"), another U.S. corporation, which in turn is wholly-owned by Domtar. U.S. sales revenues of softwood lumber flow through DII to Domtar. DII is the importer of record for all of Domtar's softwood lumber shipments to the United States.

6. Domtar and its U.S. Enterprises market and distribute softwood lumber products in the United States. They have invested substantially in creating a customer base and maintaining market access in the United States.

7. Respondent, the Government of the United States of America ("United States"), is a Party to NAFTA, an agreement 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 (L/EX), Office of the Legal Adviser, U.S. Department of State, Washington, D.C. 20520, USA.

II. INTRODUCTION

8. 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 ("AD") and countervailing duty ("CVD") investigations with respect to softwood lumber products imported from Canada into the United States. At the conclusion of the investigations, the agencies determined that affirmative AD and CVD duty orders should be issued. Upon issuing AD and CVD orders, the United States began requiring importers to pay cash deposits to cover liability for a combined AD/CVD duty rate of 29% *ad valorem* on Canadian softwood lumber shipments.

9. As a result of the AD and CVD orders, U.S. Customs and Border Protection ("Customs") collected more than $200 million dollars from Domtar's U.S. subsidiary, Domtar Industries Inc., as cash deposits in the amounts of estimated AD and CVD duties on all of Domtar's softwood lumber products entering the United States.

10. The United States' collection of cash deposits under those orders was unlawful under United States law. The ITC's affirmative threat of injury determination (a mandatory prerequisite for imposing AD or CVD duties) and Commerce's affirmative CVD determination lacked the required legal bases.

11. The United States also instituted annual administrative reviews that ignored the prior rulings and issued AD and CVD results that violated U.S. and international law.

12. Even though national courts and international tribunals determined the duties to be unlawful in 2004, 2005, and 2006, the United States would not respect those decisions, would not stop collecting duty deposits, and would not return the AD and CVD cash deposits already collected as the decisions required. The United States' decisions to maintain its unlawful duty orders violated domestic and international law, including NAFTA Chapter 19.

13. Meanwhile, the United States aggravated the injury caused by the duty collections by applying legislation known as the Continued Dumping and Subsidy Offset Act of 2000 (more commonly referred to as the "Byrd Amendment"). Through the Byrd Amendment, the United States threatened that the estimated duties collected from Canadian producers would be distributed to U.S. lumber industry competitors to subsidize their competitive position in the U.S. market.

14. U.S. law and Article 1902 of NAFTA both prohibited the application of the Byrd Amendment to Canadian producers. The World Trade Organization ("WTO") Appellate Body ruled that the Byrd Amendment was illegal under the WTO Agreements to which the United States is a party. Nevertheless, the United States began distributing

collected duties to U.S. lumber companies in 2004 as purportedly authorized by the Byrd Amendment.

15. Domtar, through an Ontario lumber association to which it belonged, was forced to obtain an injunction and judgment from U.S. federal courts to prevent any further distributions to its U.S. competitors. The Court ruled that the application of the Byrd Amendment also violated United States law.

16. The United States' measures were discriminatory against Domtar, denied Domtar and its U.S. Enterprises the minimum international standards for justice and due process, and unlawfully prevented the timely transfer of profits from Domtar's investments in the United States.

17. The United States did not provide Domtar and its U.S. Enterprises with most favored nation treatment when it imposed duties on Canadian softwood lumber but not on lumber from other countries importing softwood lumber into the United States.

18. The United States also did not provide Domtar with the better of treatment required by NAFTA Articles 1102 and 1103.

19. Thus, the United States' measures violated NAFTA Articles 1102, 1103, 1104, 1105, and 1109.

20. Domtar and its U.S. Enterprises incurred loss or damage by reason of, or arising out of, the United States' breaches of its NAFTA obligations. Even though the United States eventually refunded Domtar's estimated duty deposits, it did so only under the conditions of an agreement with the Government of Canada, pursuant to which twenty percent of Domtar's refunds were transferred to the United States Government and Domtar's U.S. competitors. Even with respect to the funds that Domtar recovered,

Domtar and its U.S. Enterprises lost the benefit of using those funds when they should have been available, lost U.S. softwood lumber sales and market share, incurred losses due to intervening currency fluctuations, and lost other profitable opportunities.

III. CONSENTS AND AUTHORIZATIONS

21. The United States consented, in Article 1122 of NAFTA, to arbitrate this claim. 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 Article 1120.

22. Domtar has taken all necessary internal actions to authorize this claim. Domtar 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 Article 1120. Domtar, on behalf of itself and its U.S. Enterprises, waives its rights to initiate or continue before any administrative tribunal or court under the laws 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 Articles 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 laws of the United States. Domtar has elected to proceed under UNCITRAL Arbitration Rules, as is its option under NAFTA Article 1120.

IV. STATEMENT OF FACTS

A. Background On AD/CVD Law

23. The United States' AD and CVD laws are set forth principally in Title VII of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act ("Tariff Act"), the regulations of the Import Administration of the U.S. Department of Commerce, and the regulations of the U.S. International Trade Commission. The Tariff Act purports to implement the United States' obligations under the WTO Agreements with respect to the imposition of AD and CVD duties.

24. Under U.S. law, the Tariff Act directs Commerce to establish whether a product from an exporting country is being "dumped," and to calculate the margin of dumping (normal value minus export price). Any remedial antidumping duty imposed by the U.S. cannot exceed the margin as calculated by Commerce, and an investigation must be terminated where Commerce finds a product is not being dumped. In such instances, all collections of deposits against estimated duties must cease.

25. Under U.S. law, the Tariff Act directs Commerce to establish that a countervailable subsidy is being provided by a foreign government and to calculate the amount of subsidy. The remedial CVD rate cannot exceed the amount of subsidy as calculated by Commerce. Commerce must terminate an investigation when it finds that a countervailable subsidy is not being provided, and any collection of deposits against estimated duties must cease.

26. Under U.S. law, the Tariff Act requires the International Trade Commission ("ITC") to make an affirmative determination of material injury or threat of material

injury by reason of imports of merchandise subject to the AD and CVD investigations before the United States lawfully can impose an AD or CVD order. In its determination, the ITC must consider the volume of imports, the effect of imports on prices in the United States, and the impact of imports on domestic producers. The ITC also must evaluate all relevant economic factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry. A negative determination by the ITC terminates the AD or CVD investigation upon publication of notice of that negative determination, and Commerce is subsequently required to instruct Customs to cease the collection of cash deposits and refund any already collected.

27. Following entry into force of an AD or CVD order, the United States collects cash deposits from importers on each entry of the subject merchandise at the rates calculated in the investigation. Each subsequent year, on the anniversary month of the order's entry into force, Commerce provides an opportunity to interested parties to request administrative reviews. In the administrative review process, Commerce calculates the rates at which duties are to be assessed for the period since the orders entered into force, or since the most recent administrative review. When the assessment rate calculated in the administrative review is lower than the duty rate at which the United States collected cash deposits from importers, the United States must refund the difference between the assessment and the cash deposit rates, with interest. The assessment rate also serves as the cash deposit rate for the subsequent period, until the next administrative review determination. The United States collects cash deposits on import entries until the assessment rate for that period is determined in the

administrative review results, and following the appeal of those results, and then refunds the difference, if any.

28. Determinations under the Tariff Act are reviewed by a U.S. court or, when the goods in question are of Mexican or Canadian origin, by a NAFTA binational panel established under NAFTA Chapter 19.[1]

B. NAFTA Chapter 19 Panel Review Obligations

29. Under NAFTA Chapter 19, a binational panel "replaces judicial review of final AD and CVD determinations," and decides whether the determination was in accordance with U.S. law.[2]

30. When a NAFTA panel finds that an AD or CVD order is contrary to domestic law, the NAFTA panel remands the determination to the agency responsible for that determination.[3]

31. The NAFTA Parties are bound by the decisions of the NAFTA panel reviewing the AD or CVD determination.[4]

C. History Of The Softwood Lumber Dispute

32. On May 22, 2002, the United States imposed AD and CVD orders on imports of softwood lumber products from Canada.[5] Domtar and its U.S. Enterprises were

[1] 19 U.S.C. § 1516a(a)(2)(B), (g)(2). A NAFTA panel is convened only when at least one party to the proceeding elects to have the appeal proceed there instead of in court.

[2] NAFTA Art. 1904.1 and 2.

[3] NAFTA Art. 1904.8.

[4] NAFTA Art. 1904.9.

required to pay cash deposits on all import entries of softwood lumber products from Canada at estimated AD and CVD duty rates.

33. Three U.S. agency determinations that purportedly provided the legal basis for the United States to impose the measures were ruled unlawful by multiple NAFTA tribunals, by the U.S. Court of International Trade, and by the World Trade Organization ("WTO").

1. ITC

34. The ITC concluded in its final determination on May 22, 2002 that the domestic industry was not materially injured by imports of softwood lumber from Canada, but was "threatened with material injury" from Canadian imports.

a. NAFTA Binational Panel Reviews

35. On September 5, 2003, a NAFTA binational panel held that the ITC affirmative threat of material injury determination was unsupported by substantial evidence and contrary to law.[6] In its conclusion, the panel noted that it was "particularly troubled by the extensive lack of analysis 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."[7] The panel remanded the case to the ITC.

(continued)
[5] Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 36,068 (Dep't Commerce May 22, 2002) (notice of amended final determination of sales at less than fair value and notice of antidumping order); Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 36,067 (Dep't Commerce May 22, 2002) (notice of amended final affirmative countervailing duty determination and notice of countervailing duty order).

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

36. On December 15, 2003, the ITC issued a remand determination,[8] reaching again the same conclusion – that the U.S. industry was threatened with material injury by reason of imports of softwood lumber from Canada.

37. On April 19, 2004, the NAFTA panel ruled that the ITC determination continued to be unsupported by substantial evidence and continued to be contrary to law.[9] The panel concluded that the ITC relied on the exact same record evidence,[10] rewrote its original findings on remand,[11] and adopted arguments that the panel already had found to be "nothing more than a *post-hoc* rationalization."[12]

38. In the subsequent remand determination, the ITC again affirmed its own finding of a threat of material injury to the domestic industry.[13] The ITC provided neither new evidence from the record nor further analysis to support its finding.

39. On August 31, 2004, the NAFTA panel issued its third decision, once again rejecting the ITC's threat of material injury finding and holding it was unsupported by substantial evidence and contrary to law. The NAFTA panel gave the ITC ten days to

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(continued)
[7] *Id.* at 107.

[8] Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Remand), USITC Pub. 3658 (December 15, 2003).

[9] In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination, Remand Decision of the Panel, USA-CDA-2002-1904-07 (Apr. 19, 2004)

[10] *Id.* at 22.

[11] *Id.* at 30-31.

[12] *Id.* at 34.

[13] Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Final) (Second Remand), ITC Pub. 3715 (June 2004).

issue a new determination consistent with its decision.[14] The panel concluded that the ITC had refused to follow instructions and that it relied on the same record evidence that the panel twice before held insufficient as a matter of law to support an affirmative threat of injury finding. The panel stated the following:

> "The {ITC} has made it abundantly clear to this Panel that it is simply unwilling to accept this Panel's review authority under Chapter 19 of the NAFTA and has consistently ignored the authority of this Panel in an effort to preserve its finding of threat of material injury. This conduct obviates the impartiality of the agency decision-making process, and severely undermines the entire Chapter 19 panel review process."[15]

40. The panel specifically instructed the ITC to enter a negative threat of material injury determination. The panel concluded "that a remand on the substantive issues would be an 'idle and useless formality,' as it would not result in anything but another insupportable affirmative threat of material injury finding."[16]

41. In its subsequent remand determination, dated September 10, 2004, the ITC determined that the U.S. industry was not threatened with material injury by reason of imports of softwood lumber products from Canada.[17]

42. On November 24, 2004, the United States challenged the NAFTA panel determination before an Extraordinary Challenge Committee ("ECC") – the reviewing authority in NAFTA. The ECC, chaired by the retired Chief Judge of the United States

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[14] In the Matter of Certain Softwood Lumber Products from Canada, USA-CDA-2002-1904-07, Remand Decision, at 2 (Aug. 31, 2004).

[15] *Id.* at 3.

[16] *Id.* at 5.

[17] Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Third Remand), USITC Pub. 3815 (September 2004).

Court of International Trade, unanimously dismissed the United States' challenge on August 10, 2005 and affirmed the NAFTA panel's decision that the U.S. measures were unlawful.[18]

43. With the ECC decision, all possible reviews of the NAFTA panel's decision rejecting the ITC's determination were exhausted and the final determination on remand was conclusive. Well-established U.S. law provides that a negative injury determination cannot support an AD/CVD order; cash deposits for estimated AD/CVD duties may not be collected lawfully without an AD/CVD order. Any legal pretext for maintaining the orders was now eliminated.

44. The United States unlawfully continued to maintain the AD/CVD order, unlawfully collected cash deposits on Domtar's imports, and unlawfully retained those cash deposits previously collected.

45. Indeed, throughout all of the NAFTA panel review process, the United States violated NAFTA Article 1904 by continually maintaining the AD/CVD order and collecting deposits without regard to any of the NAFTA panel decisions that held that the threat of material injury determination was unsupported by substantial evidence.

b. WTO Review And U.S. Court Action

46. Canada requested WTO panel review of the ITC's threat of injury determination for consistency with the WTO Agreements. The WTO panel reached the same conclusion as the NAFTA panel and ruled that the ITC determination was inconsistent

[18] In the Matter of Certain Softwood Lumber Products from Canada, ECC-2004-1904-01-USA, Opinion and Order of the ECC (Aug. 10, 2005).

with the obligations of the United States under WTO rules.[19] The United States did not appeal the panel report.

47. This decision constituted a second independent basis for rejecting the legality of the AD/CVD orders. The United States, nonetheless, continued to maintain the orders and collect deposits, and started a diversionary legal proceeding in order to claim that it was acting legally.

48. On August 5, 2004, the ITC instituted a proceeding under Section 129 of the Uruguay Round Agreements Act, which provides the U.S. statutory basis for implementing adverse WTO decisions.

49. On November 24, 2004 – the same day that the United States challenged the NAFTA panel determination and requested formation of an ECC – the ITC issued yet another finding of an affirmative threat of material injury, in its specious Section 129 administrative proceeding.[20] The United States then professed to have amended the AD and CVD orders to base them on this affirmative Section 129 determination.

50. In January 2005, following the United States' continuing disregard of the NAFTA binational panel review process, the Canadian softwood lumber industry filed an action before the U.S. Court of International Trade ("CIT"). Domtar's interests were represented in the suit by the Canadian Lumber Trade Alliance ("CLTA"), a pan-Canadian organization representing provincial trade associations of lumber producers,

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[19] Report of the WTO panel, United States-Investigation of the International Trade Commission in Softwood Lumber from Canada, WT/DS277/R (Mar. 22, 2004).

including the Ontario Forest Industries Association of which Domtar is a member.

51. On July 21, 2006, the CIT, in a rare three-judge panel chaired by the Chief Judge, unanimously held that the United States did not have legal authority to "implement" the ITC's affirmative threat of injury determination under Section 129.[21] The Court held that the U.S. action was *ultra vires* and, therefore, void.[22]

52. On October 13, 2006, the CIT held that the United States must refund all cash deposits to Canadian importers of softwood lumber "in accordance with the final negative decision of the NAFTA panel,"[23] including all cash deposits illegally collected since the date the orders entered into force, May 22, 2002.

53. Nonetheless, even after a U.S. federal court ruling rejected the United States' specious tactic, the United States refused to be bound by the NAFTA panel decisions and continued to maintain the AD/CVD order, collect cash deposits from Domtar on imports, and refused to return any deposits collected.

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[20] Softwood Lumber from Canada, Inv. Nos. 701-TA-414 and 731-TA-928 (Section 129 Consistency Determination), USITC Pub. 3740 (November 2004).

[21] Tembec Inc. v. United States, 441 F. Supp. 2d 1302 (Ct. Int'l Trade 2006).

[22] Canada also challenged the United States' Section 129 determination before the WTO. Although a WTO panel initially found that the Section 129 Determination was not inconsistent with the United States WTO obligations, *Report of the WTO Panel – Investigation of the International Trade Commission in Softwood Lumber from Canada,* WT/DS277/RW (Nov. 15, 2005), Recourse to Art. 21.5, the WTO Appellate Body overturned that decision and found that the panel failed to apply the proper standard of review in assessing the Section 129 consistency, *Report of the WTO Appellate Body, United States – Investigation of the International Trade Commission in Softwood Lumber from Canada,* WT/DS277/AB/RW (Apr. 13, 2006), Recourse to Art. 21.5.

[23] Tembec Inc. v. United States, No. 05-00028, slip op. 06-152 (Ct. Int'l Trade Oct. 13, 2006).

2. Commerce CVD Determination

54. A third, independent ground for rejecting the CVD order came in response to Commerce's CVD determination.

55. Commerce concluded in its final determination that Canadian producers of softwood lumber products were unfairly subsidized by Canadian provincial governments. Commerce calculated a countervailable subsidy rate of 18.79 percent *ad valorem* and required Canadian exporters to provide cash deposits in that amount on all import entries of softwood lumber from Canada.[24]

a. NAFTA Binational Panel Review

56. On August 13, 2003, a NAFTA binational panel held that Commerce's calculation of the subsidy rate of 18.79 percent *ad valorem* in its CVD determination was unsupported by substantial evidence and contrary to law.[25] It remanded the case to Commerce with instructions to issue a determination "not inconsistent" with the panel's conclusions.

57. Commerce issued five more remand determinations over the next two years. Each determination produced a slightly lower subsidy calculation, and each time the NAFTA panel found that the determination was unlawful.

58. Finally, on November 22, 2005, Commerce recalculated the subsidy rate to 0.80 percent *ad valorem*. This rate was *de minimis* by U.S. law and could not lawfully

[24] Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products from Canada, 67 Fed. Reg. 36070 (May 22, 2002).

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

support a CVD order.

59. On March 17, 2006, the NAFTA panel issued its sixth decision, this time upholding Commerce's calculation methodology that resulted in a *de minimis* countrywide subsidy rate.[26] U.S. law thus required the United States to revoke its CVD order *ab initio* and cease the collection of cash deposits.

60. For the third time, the United States continued to maintain the order, and continued to collect cash deposits from Domtar on allegedly subsidized imports, without regard to the NAFTA panel decisions. These decisions by Commerce also violated NAFTA Article 1904.

b. Annual Administrative Reviews

61. While the NAFTA panel review of the final determination was continuing, Commerce proceeded to conduct annual administrative reviews to determine the amounts it would assess against the cash deposits collected for each annual period of review. For example, on February 24, 2005, Commerce issued the final results in its first administrative review, which set the duty assessment rate for the previous year, and the cash deposit rate for the coming year, at 16.37 percent *ad valorem*.[27]

62. The United States maintained the order and continued to collect cash deposits, but at the new rate.

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[26] NAFTA Panel Fifth Remand Determination, Certain Softwood Lumber from Canada Final Affirmative Countervailing Duty Determination, File No. USA-CDA-2002-1904-03 (Mar. 17, 2006).

[27] Amendment to Notice of Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber from Canada, 70 Fed. Reg. 9046 (Feb. 24, 2005).

63. On December 12, 2005, Commerce issued the results of its second administrative review, establishing a new cash deposit rate on imports of Canadian softwood lumber at 8.70 percent *ad valorem*.[28] Commerce then collected cash deposits from Domtar against alleged countervailing duties at the rate of 8.70 percent.

64. These determinations were not consistent with the NAFTA panel decisions declaring the Canadian subsidy to be *de minimis.* These determinations were also unlawful. They reflected additional decisions by the United States to conduct itself as if it were not bound by NAFTA binational panel decisions and were additional violations of NAFTA Article 1904.

3. Commerce's Dumping Determination

65. Commerce found in its final determination that Canadian exporters sold softwood lumber products in the United States at less than fair value (LTFV).[29] It calculated antidumping margins for individual respondents ranging from 2.18 percent to 12.44 percent. Domtar was not individually investigated; hence, Commerce collected cash deposits from Domtar at the "all others" rate of 8.43 percent (in addition to the cash deposits required under the CVD order, as described above). In reaching this determination, Commerce manipulated the calculation unlawfully, as determined by NAFTA and WTO tribunals. Commerce collected cash deposits for inflated estimated AD duties from Domtar on imports of softwood lumber from Canada, and without a lawful injury or threat of injury determination.

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[28] Notice of Final Results of Countervailing Duty Administrative Review: Certain Softwood Lumber from Canada, 70 Fed. Reg. 73448 (Dec. 12, 2005).

66. "Zeroing" is a technique used by Commerce to inflate AD duty rates. After a WTO panel ruled that "zeroing" as applied by the United States in the softwood lumber investigation was illegal under the WTO Agreements,[30] the NAFTA panel concluded that "zeroing" conflicted with the United States' international obligations and instructed Commerce to recalculate the AD margins for all respondents without "zeroing."[31]

67. Commerce nonetheless continued to inflate the dumping margins unlawfully by "zeroing,"[32] and refused to stop despite the NAFTA and WTO tribunals ruling that "zeroing" was unlawful. It is contrary to U.S. law, and to international obligations, to collect more in duties or duty deposits than permitted by lawful calculations. Yet again, the United States violated NAFTA Article 1904 through these decisions.

(continued)
[29] Certain Softwood Lumber from Canada, 67 Fed. Reg. 36,068 (Dep't Commerce May 22, 2002) (notice of amended final determination of sales at less than fair value and notice of antidumping order).

[30] Report of the WTO Panel, United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/R (Apr. 13, 2004).

[31] In the Matter of Certain Softwood Lumber from Canada: Final Affirmative Antidumping Determination, File No. USA –CDA-2002-1904-02 (second remand) (June 9, 2005). The WTO Appellate Body upheld the panel decision against the United States' use of zeroing, and later reaffirmed the position when it found that the United States' second attempt at zeroing in the case remained inconsistent with the WTO Agreements. *See* Report of the WTO Appellate Body, United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 11, 2004); *see also* Report of the WTO Appellate Body, United States – Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/RW (Aug. 11, 2006), Recourse to Art. 21.5.

[32] Commerce 2nd Remand Determination, Certain Softwood Lumber from Canada Final Affirmative Antidumping Determination, File No. USA-CDA-2002-1904-02 (Apr. 21, 2004) (Commerce unlawfully recalculated the all others rate – applicable to Domtar – to 8.85 percent); Commerce 3rd Remand Determination, Certain Softwood Lumber from Canada Final Affirmative Antidumping Determination, File No. USA-CDA-2002-1904-02 (Jul. 11, 2005) (Commerce unlawfully recalculated the all others rate to 10.52 percent).

D. Procedures For Collecting Cash Deposits

68. When Commerce issued the AD/CVD Orders, and each time the final results of an administrative review were announced, Commerce issued to Customs instructions for the liquidation of customs entries covering Canadian softwood lumber shipments.

69. These liquidation instructions directed Customs to collect cash deposits at the AD or CVD rates as calculated by Commerce and as contained in the Orders or the final results of each administrative review.

70. Commerce continued to issue liquidation instructions to Customs requiring it to collect cash deposits notwithstanding the decisions of NAFTA panels that the underlying Orders were invalid.

71. Customs retains custody of shipments of goods into the United States until the entry of merchandise process is completed. That process requires importers of record to submit certain documentation—typically electronically—regarding the classification, value, and origin of the shipped goods, and an estimate of duties payable.

72. Upon receipt of liquidation instructions from Commerce, Customs required softwood lumber importers to pay cash deposits in the amount of estimated AD and CVD duties on each shipment to the United States in connection with the process of entering merchandise into the U.S. stream of commerce. DII, Domtar's "importer of record" for Customs purposes, was required to pay the AD and CVD cash deposits for each shipment in order for the goods to be released from Customs' custody and be available for use by consumers in the U.S. market.

E. Byrd Amendment

73. Under the Continued Dumping and Subsidy Offset Act of 2000 ("Byrd Amendment"), the AD and CVD duties collected by the United States are deposited into "special accounts" established within the U.S. Treasury for each respective AD or CVD order. U.S. Customs then distributes annually all monies collected in the special accounts, once entries have been liquidated, to "affected domestic producers."

74. U.S. law and Article 1902 of NAFTA both prohibited the application of the Byrd Amendment to Canadian merchandise. The CIT ruled that U.S. Customs violated the NAFTA Implementation Act in applying the Byrd Amendment to AD and CVD duties on goods from Canada and Mexico.[33] The WTO Appellate Body determined that the Byrd Amendment was illegal under the WTO rules.[34]

75. Notwithstanding the WTO decision, and prior to the CIT decision, the United States applied the Byrd Amendment and distributed approximately $13 million in collected cash deposits on entries of softwood lumber products to Domtar's direct competitors – the U.S. lumber industry. Moreover, the United States threatened to distribute all collected cash deposits to Domtar's competitors, thus aggravating the effect of the U.S. measures as applied to Domtar and its U.S. Enterprises.

F. Political Context – Protectionist Intent

76. The U.S. lumber industry applied strong political pressure on the U.S. agencies conducting the AD/CVD proceedings as they were in the process of making their

[33] Canadian Lumber Trade Alliance v. United States, 425 F. Supp. 2d 1321 (Ct. Int'l Trade 2006).

determinations. Although U.S. and international law require that the administrative proceedings be conducted in a neutral, unbiased fashion, the U.S. agencies were profoundly influenced outside of the formal proceedings to reach conclusions favorable toward the U.S. industry.

77. For example, a press release from Senator Max Baucus (D-Mont.) (Chairman of the Senate Finance Committee) dated September 6, 2001, celebrated 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."

78. Former U.S. Trade Representative Robert Zoellick, who worked directly for the President of the United States and was the designated government advocate for the U.S. industry, boasted about his role in influencing Commerce's determinations. 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

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[34] Report of the WTO Appellate Body, United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R (Jan. 16, 2003).

> appropriate. And so we now do have the preliminary countervailing duty and antidumping duties.[35]

Even though Commerce was supposed to be a neutral arbiter (an "investigating authority"), this exchange evidences the close coordination among the political branches of the United States Government to bring about predetermined results favorable to the U.S. industry in the case of softwood lumber.

79. The ITC, also expected to be neutral when investigating unfair trade allegations, faced intense and directed political pressure from the U.S. Senate, upon which the ITC relies directly for its budget. 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.

80. 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, and even letters from petitioner's counsel were not put on the public record, contrary to U.S. law.

[35] The "critical circumstances" finding was a political decision threatening to charge and retain duties on softwood lumber imports retroactively prior to the issuance of AD/CVD orders, thus increasing the pressure on Canadians to capitulate on U.S. terms.

81. On March 21, 2002, the very day that Commerce was required to issue its final determination, a senior Commerce official had an *ex parte* meeting with the petitioner's counsel, 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 all *ex parte* meetings. Thus, Canadian lumber producers never were 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.

82. The investigations were not performed in a fair, objective and impartial manner, and the final determinations were unlawful trade protectionist acts. 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 representatives of the U.S. lumber industry. Many of these *ex parte* communications were not disclosed as required by law, and Commerce undertook efforts to keep the communications from ever being revealed.

83. In order to justify the unlawful duties, Commerce employed methodologies 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 agencies' records and were in violation of U.S. and international law. The resulting duties provided U.S. lumber producers with a competitive advantage over their Canadian competitors, including Domtar and its U.S. investments.

84. Members of the U.S. Congress publicly declared that the Bush Administration would not comply with the decisions of the international panels reviewing the U.S. agencies' AD and CVD determinations. The only way duties would be returned, they said, would be through a settlement that would handicap access to the U.S. market for Canadian softwood lumber and would protect unlawfully the U.S. industry.

G. Background On Softwood Lumber Agreement

85. The Government of Canada, convinced that the United States would continue to defy legal decisions, signed the Softwood Lumber Agreement 2006 ("SLA") on September 12, 2006 with the United States, and made subsequent amendments on October 12, 2006.

86. Domtar and its U.S. Enterprises were not parties to the SLA, nor were they participants in its negotiation. The SLA was implemented by the Governments of the United States and Canada without the consent of Canadian exporters of softwood lumber products, including Domtar and its U.S. Enterprises.

87. Under the SLA, the United States agreed to revoke the AD and CVD orders and refund all cash deposits collected since May 22, 2002. Canada agreed to forfeit $1 billion of Canadian lumber companies' AD/CVD refunds to the United States, including $500 million to the U.S. petitioners in the *Softwood Lumber from Canada* matters. Canada also agreed to implement an export tax on softwood lumber products of up to 22.5 percent *ad valorem*, and an additional tax on Canadian lumber producers' refunds from the United States to reimburse the Government of Canada for advancing forfeited

funds to the United States (the Government of Canada asserted that U.S. Customs said it would take up to two years to refund the unlawfully collected cash deposits).

88. The United States claims the SLA as its only official basis for revoking the AD/CVD orders, notwithstanding the multiple NAFTA panel decisions finding no legal support for the imposition of the orders, and notwithstanding a decision by the U.S. Court of International Trade requiring full refund of cash deposits as required in NAFTA binational panel review.

V. CLAIMS FOR BREACHES OF NAFTA

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

89. Under NAFTA Article 1102, the United States is obligated to accord Domtar 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.
>
> 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

90. The United States has breached its obligations to Domtar and its investments under Article 1102 through its imposition of AD and CVD duties and its enactment and implementation of the Byrd Amendment.

91. The United States imposed AD and CVD duties on each of Domtar's shipments of softwood lumber from Canada. On each shipment of Canadian softwood lumber to the United States, U.S. Customs collected cash deposits in the amounts of estimated AD and CVD duty rates, and held those deposits until final duty assessment. Meanwhile, the products of U.S. softwood lumber manufacturers were not subject to any comparable duty or tax.

92. The imposition of duties put Domtar at a competitive disadvantage in the U.S. market relative to U.S. lumber producers. As a result, the United States' treatment of Domtar and its US Enterprises was less favorable than its treatment of US producers of softwood lumber in like circumstances.

93. The AD and CVD duties were unlawful; therefore, the United States' discriminatory treatment did not have a reasonable nexus to rational government policies, and violated the United States' obligations under NAFTA Article 1102.

94. The United States, relying on the Byrd Amendment, took a portion of the duty deposits collected from Canadian lumber producers and distributed it among U.S. lumber producers who had supported the AD and CVD investigations, placing Domtar and Canadian lumber producers at even more of a competitive disadvantage.

95. The Byrd Amendment was found to be unlawful; therefore, it also did not have a reasonable nexus to a rational government policy and violated Article 1102.

96. The United States also breached its obligations to Domtar and Domtar's U.S. Enterprises under Article 1102 by refusing to abide by the decisions of the NAFTA

panels. The United States disregarded those decisions as long as possible so it could obtain a settlement with Canada on terms favorable to U.S. investors.

97. Domtar and its U.S. Enterprises were accorded treatment less favorable than U.S. lumber companies who benefited from the United States continued disregard of the NAFTA panel decisions in violation of the provisions of Article 1904.

98. Consequently, the United States imposed measures on Domtar and its U.S. Enterprises that accorded them treatment "less favorable than that it accords, in like circumstances, to its own investors" with respect to the management, conduct and operation of investments.

99. Domtar and its U.S. Enterprises have been injured by the United States' violation of Article 1102 in an amount to be determined at the hearing of this claim.

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

100. Under NAFTA Article 1103, the United States is obligated to accord Domtar 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.

101. The United States has breached its obligations to Domtar and its investments under Article 1103.

102. The imposition of AD and CVD duties on the softwood lumber products of Domtar and its US Enterprises put them at a competitive disadvantage in the U.S. market relative to lumber producers from other countries, and the duties were unjustified as a matter of law.

103. The United States also breached its obligations to Domtar and Domtar's U.S. Enterprises under Article 1103 by refusing to abide by the decisions of the NAFTA panels.

104. The United States' policy toward NAFTA panel decisions was that they did not provide Canadians with the same treatment to which they would have been entitled under the U.S. system of judicial review. This policy was advanced by the United States as one of the rationales for prolonging the litigation against Canadians and continuing the collection of AD/CVD deposits.

105. Judicial review at the U.S. Court of International Trade is open to foreign manufacturers of merchandise subject to AD/CVD orders, but it is denied to Canadians in the event that any party to the investigations or administrative reviews requests NAFTA panel review, including U.S. competitors. Thus, foreign manufacturers from non-NAFTA countries would have avoided the prolonged maintenance of the AD/CVD orders and would have recovered full refunds of deposits collected, even though the United States was denying those rights to Canadians on the basis of NAFTA.

106. Hence, Domtar and its U.S. Enterprises were accorded treatment less favorable than companies from other countries, based on the United States' continued disregard of the NAFTA panel decisions in violation of the provisions of Article 1904.

107. The United States imposed measures on Domtar and its U.S. Enterprises according them treatment "less favorable than that it accords, in like circumstances," to other investors with respect to the management, conduct, and operation of investments.

108. Domtar and its U.S. Enterprises have been injured by the United States' violation of Article 1103 in an amount to be determined at the hearing of this claim.

C. Claim 3: Breaches Of Standard Of Treatment Obligations Under Article 1104

109. Under NAFTA Article 1104, the United States is obligated to accord Domtar and its investments the better of the treatment required by Articles 1102 and 1103.

110. By imposing AD and CVD duties, enacting and implementing the Byrd Amendment, and disregarding the decisions of the NAFTA panels, the United States violated Article 1104.

D. Claim 4: Breaches Of Obligations Of Treatment In Accordance With International Law (Minimum Standard) Under Article 1105

111. Under NAFTA Article 1105, the United States is obligated to accord Domtar's investments the 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.

112. The U.S. agency determinations necessary to provide a legal basis for the United States measures were repeatedly ruled unlawful by NAFTA and WTO tribunals and U.S. federal courts. Despite NAFTA Articles 1904.1 and 1904.9, the United States did not abide by the decisions of the NAFTA panels finding that the determinations supporting the AD/CVD orders were unlawful. Rather than respect those rulings as required under both domestic and international law, the United States continued to impose the unlawful measures and collect cash deposits on softwood lumber products entering the United States.

113. The United States ceased collecting cash deposits only after the SLA entered into force on October 12, 2006. The United States cited the SLA, and not the legal decisions of the NAFTA panels or U.S. courts, as the basis for refunding the cash deposits. Hence, the United States agreed to do what the law required only with a payoff of $1 billion and the self-imposition by Canada of long-term restrictions on Canadian exports to the United States.

114. The United States' refusal to respect the decisions of international tribunals and U.S. federal courts, and its disregard of procedures to ensure fair adjudication of trade disputes, denied Domtar and its U.S. Enterprises the minimum international standards of justice and due process.

115. The U.S. agency determinations that provided the basis for the United States measures were unlawfully influenced by *ex parte* communications and intense political pressures outside of their formal proceedings, breaching the United States' obligations under Article 1105.

116. Consequently, the United States imposed numerous measures on Domtar's U.S. Enterprises, according them treatment that was not "in accordance with international law, including fair and equitable treatment and full protection and security."

117. Domtar and its U.S. Enterprises have been injured by the United States' violation of Article 1105 in an amount to be determined at the hearing of this claim.

E. Claim 5: Breach Of Article 1109 Obligations Related To Transfers Of Investments

118. Under NAFTA Article 1109, the United States is obligated to permit all transfers related to Domtar's investments in the United States to be made freely and without delay. NAFTA Article 1109 states:

> 1. Each Party shall permit all transfers relating to an investment of an investor of another Party in the territory of the Party to be made freely and without delay. Such transfers include:
>
> a) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind and other amounts derived from the investment;
> b) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
> c) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
> d) payments made pursuant to Article 1110; and
> e) payments arising under Section B.
>
> 2. Each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.

119. The United States breached Article 1109 when it unlawfully collected, and subsequently delayed refund, of Domtar's AD and CVD deposits. The United States continued to collect and retain deposits for years even though there was no legal basis for collecting or retaining them. The United States' measures to collect AD and CVD

cash deposits were not "equitable, non-discriminatory and good faith application of its laws," and they denied Domtar of the timely transfer and use of its funds from sales in the U.S. market in violation of Article 1109.

120. The United States violated its obligations under international law (including NAFTA Articles 1904.1 and 1904.9) to respect and be bound by decisions of the NAFTA panels. Domtar and its investments were harmed by those violations which denied the free transfer of funds from Domtar's U.S. investments.

121. Consequently, the United States imposed numerous measures on Domtar and its U.S. Enterprises that did not permit transfer of its funds freely and without delay.

122. Domtar and its U.S. Enterprises have been injured in an amount to be determined at the hearing of this claim.

VI. DAMAGES

123. Domtar received a refund of its cash deposits with interest from the United States in a series of disbursements made between November 2006 and January 2007. The refund of Domtar's cash deposits, however, did not make Domtar whole.

124. The imposition of AD/CVD duties on Domtar's softwood lumber products selling in the United States artificially raised the price of Domtar's products, making them more expensive relative to competing products manufactured in the United States or in other countries outside of Canada. Domtar lost U.S. market share and profits that were not recovered by virtue of a refund of the cash deposits.

125. The unavailability of Domtar's cash deposits during the four years in which the deposits were collected by the United States deprived Domtar of cash flow for valuable investment opportunities. Those opportunities were lost while the deposits were unavailable, and were not restored by virtue of the United States' refund.

126. Domtar also suffered losses as a result of currency fluctuations during the time that the deposits were not refunded. The Canadian dollar appreciated significantly relative to the U.S. dollar between 2002 and 2006, and the refund amount paid to Domtar in U.S. dollars is less in value, notwithstanding the payment of interest, than what Domtar paid when deposits were being collected.

127. Domtar was unable to recover fully even the cash deposits paid. The United States' disrespect for the dispute settlement mechanisms forced the Government of Canada into the SLA with the United States, which forced Domtar to give up approximately 20% of the cash deposits to which it was rightly and lawfully entitled.

128. Domtar incurred legal representation costs to defend itself against the United States' unlawful imposition of duties, which were exacerbated by the United States' unwillingness to respect the decisions of NAFTA panels, the WTO, and U.S. courts.

129. Domtar has incurred these and other losses or damages 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

Whether the actions of the United States as described herein failed to accord Domtar and its U.S. Enterprises national treatment under NAFTA Article 1102?

Whether the actions of the United States as described herein failed to accord Domtar and its U.S. Enterprises most-favored-nation treatment under NAFTA Article 1103?

Whether the actions of the United States as described herein breached NAFTA Article 1104?

Whether the actions of the United States as described herein failed to accord Domtar's U.S. Enterprises a minimum standard of treatment under NAFTA Article 1105?

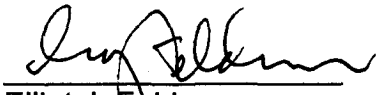
Whether the actions of the United States as described herein breached NAFTA Article 1109?

Whether Domtar and its U.S. Enterprises should be awarded damages under NAFTA Articles 1116 and 1117 in the amount of at least $200,000,000?

VIII. REQUEST FOR RELIEF

130. Domtar and its U.S. Enterprises seek an award against the United States for monetary damages in an amount not less than $200,000,000, plus any applicable interest thereon, attorneys' fees, the costs of this proceeding, and such other relief as the Tribunal finds just and proper.

Respectfully submitted,



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