

IN THE ARBITRATION UNDER CHAPTER ELEVEN
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES
BETWEEN

TEMBEC INC., TEMBEC INVESTMENTS INC. AND
TEMBEC INDUSTRIES INC.,

Claimants/Investors,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**STATEMENT OF DEFENSE ON JURISDICTION OF
RESPONDENT UNITED STATES OF AMERICA**

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UNITED STATES DEPARTMENT OF STATE

Washington, D.C. 20520

December 15, 2004

CONTENTS

I.	JURISDICTIONAL ISSUES	1
A.	Article 1901(3) Bars Tembec’s Claims.	1
B.	The Measures At Issue Do Not Relate To Tembec As An Investor Or To Tembec’s Alleged Investments In The United States.	2
C.	Tembec Has Acted Inconsistently With Its Waiver Of Its Rights To Pursue Other Proceedings With Respect To The Same Measures.	3
II.	REMEDY SOUGHT	4

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Pursuant to Article 19 of the UNCITRAL Arbitration Rules and in accordance with the schedule set forth in the Secretary of the Tribunal's letter of October 25, 2004, respondent United States of America respectfully submits this statement of defense setting forth its objections to the jurisdiction of the Tribunal. The United States did not consent to arbitrate, under Chapter Eleven of the NAFTA, the claims submitted by Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. (collectively "Tembec").

I. JURISDICTIONAL ISSUES

A. Article 1901(3) Bars Tembec's Claims.

1. The United States objects to the jurisdiction of the Tribunal on the ground that Article 1901(3) of the NAFTA bars Tembec's claims.

2. Article 1901(3), which is in Chapter Nineteen of the NAFTA, provides as follows:

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

3. Tembec alleges in its Notice of Arbitration that certain preliminary and final antidumping and countervailing duty determinations made by the United States Department of Commerce and the International Trade Commission, as well as certain amendments to Title VII of the Tariff Act of 1930, violate NAFTA Articles 1102, 1103, 1105 and 1110.

4. Requiring the United States to arbitrate Tembec's claims under Chapter Eleven, and challenging the United States' administration of its antidumping and countervailing duty laws under the substantive obligations in that chapter, would "impos[e] obligations on [the United States] with respect to [its] antidumping law or countervailing duty law" in violation of Article 1901(3).

5. The United States did not consent to arbitrate Tembec's claims under the investment chapter of the NAFTA. Tembec's claims are barred by Article 1901(3) and must therefore be dismissed.

B. The Measures At Issue Do Not Relate To Tembec As An Investor Or To Tembec's Alleged Investments In The United States.

6. The United States objects to the jurisdiction of the Tribunal on the ground that the measures at issue do not relate to Tembec in its capacity as an investor in the United States or to Tembec's alleged investments in the territory of the United States, as required by Article 1101(1) of the NAFTA.

7. The only manner in which Tembec has been treated by the United States – and the only way the United States’ antidumping and countervailing duty law has allegedly harmed Tembec – is through the imposition of antidumping and countervailing duties on Tembec’s imports of softwood lumber into the United States. The measures complained of do not relate to Tembec as an investor in the United States. Nor do the measures relate to any of Tembec’s alleged investments in the United States. Chapter Eleven, therefore, does not apply to Tembec’s claims.

C. Tembec Has Acted Inconsistently With Its Waiver Of Its Rights To Pursue Other Proceedings With Respect To The Same Measures.

8. The United States objects to the jurisdiction of the Tribunal on the ground that Tembec has engaged in conduct inconsistent with the waivers it submitted in this arbitration, contrary to Article 1121 of the NAFTA.

9. Article 1121(1)(b) requires that claimants, as a condition precedent to the submission of a claim to arbitration under Chapter Eleven, waive their 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 measure of the disputing Party that is alleged to be a breach referred to in Article 1116"

10. After providing written waivers on April 6, 2004, Tembec has continued to pursue claims with respect to the same final antidumping and countervailing duty determinations at issue in this arbitration before bi-national panels constituted under Chapter Nineteen of the NAFTA. Tembec thus has failed to comply with the waiver requirement in Article 1121 of the NAFTA and its claims must therefore be dismissed for lack of jurisdiction.

II. REMEDY SOUGHT

11. The United States respectfully requests that this Tribunal render an award in favor of the United States and against Tembec, dismissing Tembec's claims in their entirety and with prejudice. The United States further requests that, pursuant to Article 40 of the UNCITRAL Arbitration Rules, Tembec be required to bear all costs of the arbitration, including the United States' costs of legal assistance and representation.

Respectfully submitted,

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