

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

CANFOR CORPORATION, TEMBEC INC.,
TEMBEC INVESTMENTS INC., TEMBEC INDUSTRIES INC.,
TERMINAL FOREST PRODUCTS LTD.

Investors
(Claimants)

v.

UNITED STATES OF AMERICA

Party
(Respondent)

CONSOLIDATION PROCEEDING

**REPLY SUBMISSION OF CANFOR CORPORATION AND TERMINAL FOREST
PRODUCTS LTD. TO THE POST HEARING SUBMISSIONS OF
THE UNITED STATES OF AMERICA**

DAVIS & COMPANY LLP
2800 – 666 Burrard Street
Vancouver, British Columbia
V6C 2Z7

P. John Landry
Phone: 604.643.2935
Fax: 604.605.3588

HARRIS & COMPANY
1400 – 550 Burrard Street
Vancouver, British Columbia
V6C 2B5

Keith E.W. Mitchell
Phone: 604.891.2217
Fax: 604.684.6632

**COUNSEL TO CANFOR CORPORATION
AND TERMINAL FOREST PRODUCTS LTD.**

August 12, 2005

Reply Submission of Canfor Corporation and Terminal Forest Products Ltd. to the Post Hearing Submissions of the United States of America

1. This submission replies to the post hearing submission of the United States of America. Canfor and Terminal will confine this submission to the specific new or additional points raised in that brief, but continue to rely upon their previous written and oral submissions to this Tribunal.

I. Question 2

2. While Canfor and Terminal do not take issue with the United States' recounting of the history of the various iterations of what became Article 1126, they do take issue with its assertions concerning the "Parties' intent" with respect to this Article. There are two points.
3. First, it is inconsistent for the United States to rely upon what it identifies as "commentary" of drafters of the NAFTA to determine the intent behind a particular provision, when it has previously argued that the unilateral assertions of intention by a Party are irrelevant to the determination of the intent of a provision.¹
4. Second, and in any event, the material the United States cites does not support the proposition it advances. Thus, while the United States quotes Mr. Price, an American negotiator, writing in an article setting out an "overview" of NAFTA Chapter 11, the article in no way assists in describing the scope or intent behind Article 1126. More specifically, the Article in no way supports the United States' proposition that Article 1126 "intentionally" does not resolve all the questions that may occur during consolidation, so as to accord tribunals a "wide latitude". For clarity, the entirety of Mr. Price's analysis of Article 1126 is as follows:

¹ See e.g. *Canfor Corporation v. United States of America, Letter from the United States to the Tribunal*, Arbitration under Chapter 11 of the North American Free Trade Agreement, April 9, 2004 at p. 2-4 where the United States expounds on its position that "Documents reflecting the unilateral intent of one party to negotiations do not reflect the common intention of the parties and are of little if any value to treaty interpretation."

“The chapter does not resolve all the questions that may occur during consolidation. Many issues will need to be worked out by the tribunal in consultation with the disputing parties.”

II. Question 6

5. Once again, the United States asserts, despite the clear record to the contrary, that its jurisdictional objections are common to the three proceedings. As Canfor and Terminal have repeatedly shown, that is simply contrary to the record. The United States has not raised any jurisdictional objection against Terminal², and has raised only Article 1901(3) and potentially Article 1101 against Canfor.³
6. The United States also asserts that its jurisdictional objections are “dispositive”, and therefore this militates in favour of consolidation. The United States’ argument is unpersuasive. Of course if the United States succeeds in advancing a jurisdictional objection, then that objection is dispositive. That is the nature of a jurisdictional objection. Equally, however, if its objection fails, that objection is not dispositive. The United States, accordingly, misunderstands the term. An issue is “dispositive” if it determines the outcome of the claim, regardless of how the issue is decided. In the present case, the United States objection is not dispositive in that sense. Indeed, on the United States argument, all jurisdictional objections would warrant consolidation, as all such objections would by definition be dispositive.

III. Question 6(a)

7. Contrary to the position advanced by the United States, the Tribunal does not have the power to assume jurisdiction, in stages, over the respective claims. The authority of the Tribunal is limited by what is granted to it under Article 1126 and the UNCITRAL Arbitration Rules. That authority is circumscribed by Article 1126(2), which sets out the

² *Submission of Terminal Forest Products Ltd. Opposing Request of United States for Consolidation of the Claims of Canfor Corporation, Tembec Inc. et. al. and Terminal Forest Products Ltd.*, June 10, 2005, at para. 10.

³ *Submission of Canfor Corporation, Opposing Request of United States for Consolidation of the Claims of Canfor Corporation, Tembec Inc. et. al. and Terminal Forest Products Ltd.*, June 10, 2005, at paras 14-17, and see Tab 2 of *Appendix to the Submission of the Claimants, Canfor Corporation Opposing Request of the United States for Consolidation of the claims of Canfor Corporation, Tembec Inc. et. al. and Terminal Forest Products Ltd.*, June 10, 2005

only orders a consolidation Tribunal can make. It can, *by order*, assume jurisdiction over, and hear and determine all or part of the claims or one or more of the claims. It does not have the power, nor does the United States identify anything in the text which would give it the power, to rule upon the United States' application *seriatum*.

IV. Question 8

8. The United States' response to question 8 demonstrates that the United States either continues to misunderstand, or continues to misstate, the nature of the claim being advanced by Canfor, as it fails to have regard to the actual kinds of evidence that will necessarily be advanced by Canfor.
9. While the United States has identified the different regimes used to address confidential business information in a variety of settings, it has not identified a setting analogous to the present case, where the impact of any confidentiality order would impose an inequality between the parties in that the United States (and the Tribunal) will have access to greater information than would be available to the claimants or their counsel. The United States makes no attempt to demonstrate how a confidentiality provision can be drafted that ensures each party is treated with equality.
10. The United States' assertions that confidential information would not be in issue in the proceedings are patently incorrect. As the United States is aware, it has been an extremely common incident of investor-state arbitration under NAFTA Chapter 11 for the disputing parties to rely upon confidential business information to establish their cases. So, for instance, in an earlier NAFTA Chapter 11 case arising out of the softwood lumber dispute, business information was received in confidence, and has been redacted from the award that the public can access (*Pope and Talbot v. Canada*⁴). In *S.D. Myers v. Canada* detailed and extensive business information was received by the Tribunal in confidence.⁵ And, in UPS,

⁴ *Pope & Talbot Inc. v. The Government of Canada, Award on the Merits of Phase 2*, Arbitration under Chapter 11 of the North American Free Trade Agreement, April 10, 2001, at Tab 1 of *Authorities in Support of Post-Hearing Submission of Canfor Corporation and Terminal Forest Products Ltd.*, July 22, 2005.

⁵ *S.D. Myers Inc. v. Government of Canada, Memorial of the Investor: Initial Phase*, Arbitration under Chapter 11 of the North American Free Trade Agreement, July 20, 1999, (online: DFAIT: <http://www.dfait-maeci.gc.ca/tna->

extensive confidential information is being relied upon by both Claimant and Canada, such that the memorials that have been made publicly available have been extensively redacted.⁶ In the present case, it is inevitable that such information will need to be presented, and equally, that it will need to be kept confidential as between Claimants.

11. Despite this, the United States continues to assert that the only business information that may be relevant to the Tribunal is that contained in the Administrative Record before the various Chapter 19 Tribunals considering the propriety of the United States' conduct under its municipal law. This misses the point. The information that will be put before the Tribunal relates to the operation of the Claimants' enterprises, their business strategies, investments and plans, not to the Administrative Record in the underlying dumping or countervailing duty proceedings.
12. Finally, the United States continues its attempt to recast the claims as something they are not. While each Claimant may well be claiming the return of the duties that have been and continue to be wrongfully withheld by the United States, that is but one aspect of the claim (as should, by now, be obvious). The United States cannot deny that its unlawful conduct⁷ has impacted the ability of the Claimants to sell their lumber into the United States, and has substantially affected the profitability of their enterprises. Those aspects of the claim are as important, and likely as substantial, as the wrongful withholding of the duties, and will

[nac/documents/July201999.pdf](#)). This Memorial has not been included in the book of authorities because of its length, and because it is not submitted for its substantive content.

⁶ See *Investor's Memorial (Merits Phase)*, March 23, 2005, (online: DFAIT: <http://www.dfait-maeci.gc.ca/tna-nac/documents/UPSMarch-05.pdf>) and *Canada's Counter-Memorial*, June 22, 2005, (online: DFAIT: <http://www.dfait-maeci.gc.ca/tna-nac/documents/CanadasCM.pdf>). These Memorials have not been included in the book of authorities because of their length, and because they are not submitted for their substantive content.

⁷ The unlawfulness of the United States' conduct has once again been confirmed in the issuance on August 10th of the Extraordinary Challenge Committee's determination, dismissing the United States challenge on all grounds. Despite this clear affirmation by yet another binational panel (which panel included a former Chief Judge of the United States Court of International Trade), the United States has already signaled its intention to continue to act unlawfully, when the spokesperson for the United States Trade Representative put out a press release stating that the ECC's decision "will have no impact on the antidumping and countervailing duty orders" and that "litigation will not resolve the dispute." The only meaning that can be given to the statement that litigation will not resolve the dispute, when that litigation has been resolved *against* the United States, is that the United States intends simply to ignore the lawful orders of a tribunal constituted under a treaty to which it agreed, and to wrongfully fail to repay the duties. See: *Certain Softwood Products from Canada, Opinion and Order of the Extraordinary Challenge Committee*, Secretariate File No. ECC-2004-1904-01USA, August 10, 2005, online (NAFTA Secretariate: http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ue2004010e.pdf).

continue to exist as a separate element of the claim even if the duty deposits are returned. The magnitude of the impact of the United States' conduct, which can only be understood if one understands the business of the enterprise, is directly relevant to whether Canfor can establish that the United States' conduct has reached a threshold that, by virtue of its impact upon Canfor, amounts to an international wrong.

V. Question 9

13. The Chart provided by the United States once again fails to address the issue posed by the Tribunal – what are the questions which the United States asserts are common and what are the questions that are different? Rather than engage in any searching scrutiny of the claims advanced by each of the claimants, or even attempt to address the questions the Tribunal hearing the merits will need to address, the United States instead selectively takes quotations from the various statements of claim or notice of arbitration, content to rely upon any facial similarity (not commonality). Interestingly, while the United States cavalierly dismisses the differences between the claims, it does not even attempt to defend its assertion that such differences have no relevance to jurisdiction, or more surprisingly, to liability. The United States mere assertion does not make its conclusion correct, however, and common sense dictates the opposite.

VI. Question 10

14. Canfor and Terminal rely upon their earlier analysis of the *Corn Products* decision, but note that, once again, the United States is asserting that it has raised defences to jurisdiction that plainly it has not raised, as if through repetition it somehow will acquire a veneer of truth.
15. In more specific response to the United States' submission, we note that similar to the *Corn Products* case, the United States has not identified any defences that it will raise on the merits of these proceedings, let alone any common defences. And, we have already provided our observations on the United States' suggestion that in the present cases, confidential information will not be in issue. Clearly it will be, and accordingly, as in *Corn Products*, this factor should weigh heavily.

16. Finally, the United States suggests that somehow there is a greater risk of inconsistent decisions in the present case than there was in *Corn Products*. With respect, that cannot be so. Contrary to the United States' assertion, different outcomes in the softwood lumber claims would not be inconsistent with respect to either jurisdiction or merits. As noted, the jurisdictional defences the United States has raised are different, as are the facts pled and the underlying bases of the claims.

VII. Question 12

17. The United States' submissions respecting costs simply are not tenable. As the United States acknowledges, predicting the cost of any litigation is an extremely difficult task. The United States' own calculations demonstrate exactly why this is so. Canfor and Terminal have the following observations.
18. First, the calculations the United States provides are rife with mathematical errors. For instance, in its table predicting the costs of a jurisdictional phase, the United States appears to have included the costs of only one arbitrator presiding over a hearing, so obviously all its figures would need to be adjusted accordingly. Similarly, in its calculation of its assessment of attorney costs on the merits phase, the United States made the calculation error of understating by a factor of 10 the costs it predicts (i.e., Table 4 predicts the costs associated with Canfor to be \$120,000, when it should say, even on the United States' approach, \$1,200,000).
19. Second, the United States says that the extensive sunk costs are not relevant to the Tribunal's determination. Of course they are. The relevant question for the Tribunal in considering costs is to consider the aggregate costs incurred by each party from the inception of the arbitration through to its conclusion. Canfor, Terminal and Tembec have spent what they have spent. The issue is how much more they will have to spend. There is no reason why the amounts spent to get to the present stage are not directly relevant to the Tribunal's inquiry.

20. Third, the United States asserts, with no apparent basis, that the Canfor tribunal has not incurred any costs in deliberating and preparing its award. We have no idea the basis upon which the United States makes such an assertion, but if consolidation is to occur, then it is clear that those costs are costs thrown away. What can be said with certainty is that Canfor and the United States had been billed approximately \$175,000 U.S. by the Tribunal before even reaching the jurisdictional hearing⁸, and that deposits of \$350,000 US have been provided by each of Canfor and the United States to the Tribunal⁹.

21. Fourth, the United States proceeds on the mistaken assumption that, should proceedings be consolidated, it will only be responsible for one quarter of the costs of the Tribunal. There are several problems with this assumption. First, while it is correct that, on an interim basis, the Consolidation Tribunal required deposits against anticipated costs (which the Tribunal anticipated, solely for the consolidation phase, to be \$200,000) to be shared equally amongst the four parties, it made that determination without the benefit of submissions from any of the parties, and indeed, in our submission, made that determination in error. The United States, as a party to each claim, ought to be responsible for 50% of the costs, on an interim basis, as, we understand, is what occurred in the *Corn Products* case. Second, the allocation of costs is ultimately to be determined by the Tribunal based upon the outcome of the proceedings. If the United States is unsuccessful, it is our position that the United States is responsible for the entirety of the costs of arbitration, not simply some proportion of them.

22. Fifth, the United States has based its costs calculation on an assumed hourly rate of \$300 per hour for counsel time. Yet, the United States has not claimed costs on that basis in the Canfor case, nor has the United States incurred such costs.¹⁰ Rather, the United States, in

⁸ *Canfor, Letter from the President of the Tribunal*, October 11, 2004, (which provides an invoice for the costs incurred by the Tribunal between August 28, 2003 and August 31, 2004).

⁹ *Canfor, Procedural Order No. 3*, November 13, 2003, and *Canfor, Procedural Order No. 6, Procedural Order No. 6*, January 7, 2004.

¹⁰ See eg., *Canfor, Submission on Costs of Respondent United States of America*, January 14, 2005, at p. 5-6, where the United States discusses the costs it incurs: “[m]ultiplying the appropriate number of hours spent by each employee during each phase of the proceedings by the hourly cost of salary and benefits for that attorney or paralegal and then adding the results yields the total estimated cost of legal representation by the United States for the relevant phase.” (*Emphasis added.*) Also see the accompanying sworn Witness Statement of Andrea J. Menaker which, at para. 8, states “[i]n this case, the United States claims only for its out of pocket cost for attorney and paralegal time. Such costs can be calculated by multiplying the estimated number of hours devoted by each attorney and paralegal in

each NAFTA Chapter 11 proceeding brought against it has defended that proceeding by using in house counsel from an office dedicated to the defence of such claims. In doing so, the United States substantially reduces the amount of costs that it incurs. It is simply not correct that the United States will incur the amounts it claims.

23. Sixth, the United States' underlying assumptions as to the amount of attorney time spent in preparation for three separate claims belie its assertion that the issues raised in the claims are the same. If indeed that is so, then it is inexplicable why the United States would need to spend 150 or 200 hours, or the equivalent of roughly one full month of lawyer time, to prepare for the separate hearings.
24. Seventh, the United States does not explain how it predicts that it will require 4000 hours (as opposed to, say, 1000 hours or 10000 hours) of attorney time for each separate proceeding, nor how it arrives at only 6000 hours if consolidated. Canfor notes that both it and the United States, in their submissions to the Canfor Tribunal on the costs of the jurisdictional phase, claimed for in excess of 2000 lawyer hours time.¹¹
25. While it would be possible to continue a critique of the United States' submissions on costs at length, the point is really quite simple. It is impossible to predict in advance what the proceedings will cost, whether separate or consolidated. What is clear, and appears undisputed, is that consolidated proceedings will be lengthier, and therefore more costly, to all Claimants. The extent to which the proceedings will be lengthened is simply a guess, until the proceedings are further advanced and the United States delineates what defences it intends to advance on the merits.

the Division to each phase of the Canfor case by the hourly cost of that attorney's or paralegal's services for the Department (*i.e.*, hourly value of salary and benefits)." The United States' purported reservation of rights to claim costs at "market rates" is not relevant to the determination of efficiency that this Tribunal must make here. What matters is the actual costs to be incurred by each Party. As the United States made clear in its cost submissions before the Canfor Tribunal, its actual costs cannot be determined by market rates, and in fact, are likely less than market rates "by almost a full order of magnitude" (see *Menaker Statement* at para. 10).

¹¹ *Menaker Statement*, para. 9 and *Canfor, Reply Submissions of the Claimant, Canfor Corporation on Costs of the Jurisdictional Motion*, January 28, 2005, p. 4.

VIII. Question 13

26. The United States submission is non-responsive to the Tribunal's inquiry. The inquiry of counsel was to identify cases where consolidation would be appropriate. The United States' response, however, argues why the examples given in the oral hearing by counsel for Tembec "provide no basis to deny consolidation"¹².
27. With respect, the examples given are of cases where consolidation would be appropriate. The question in the case before this Tribunal is whether this case is an appropriate one for consolidation, and the examples given provide a useful touchstone for assessing that question. When this case is measured against those criteria, the case for consolidation is not made out.
28. More important, however, is the United States' assertion that, somehow, Canfor and Tembec are not competitors. That simply ignores the fact that the SPF market, in North America, is a commodity market. While the market may comprise different species found in different parts of the country, that does not change the fact that each company sells its commodity throughout the United States. In that regard, the Tribunal will note that Canfor's United States' investments include reload facilities in Florida, Texas, New York, Minnesota, Georgia, Virginia and North Carolina. Any suggestion that the SPF market is not a commodity market, or that Canfor's products are not sold throughout the entire North American market in competition with Tembec, simply is not accurate.

IX. Question 14

29. Canfor takes fundamental issue with the United States' assertion that this Tribunal would, if consolidation were ordered, be at liberty to determine which issues to treat preliminarily. It would not.
30. As already repeatedly noted, Article 1121 is not in issue in the Canfor claim. Article 1101 may not be in issue. The Canfor Tribunal has already ordered the United States to delineate

¹² *Post-Hearing Submission of the Respondent United States of America in support of Request for Consolidation*, July 22, 2005, at p. 24.

all its jurisdictional defences and has ruled on what will be treated in a preliminary way.¹³ If a Consolidation Tribunal were to be able to revisit orders already made by the Canfor Tribunal on matters of substance, then the United States would in effect create a *de facto* appeal process and provide an incentive for a party dissatisfied with how a matter was proceeding to seek consolidation of it to get a second chance.

31. Moreover, we are unaware of the basis upon which the United States asserts that “each of the parties appears to agree that, if the claims are consolidated, this Tribunal may utilize the submissions already made by the parties in the respective Article 1120 proceedings.”¹⁴ As the United States has never consulted Canfor or Terminal on this point, we are not aware of how they make this assertion. However, it is obvious that Canfor and Terminal would wish to respond to any allegation or argument made by any party in submissions before the Tribunal. As we understand that the Article 1901(3) submission is made very differently in the Tembec case, we doubt that existing submissions would suffice, or that Terminal would be content to rely upon submissions not specifically directed to any concerns Terminal may choose to raise.

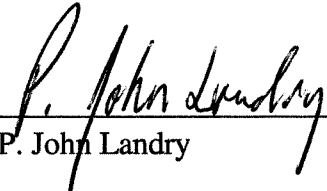
¹³ *Canfor Submission, supra*, note 3.

¹⁴ *U.S. Submission, supra*, note 12, pp. 26-27.

X. CONCLUSION

32. For all of these reasons, together with those advanced orally and in prior written submissions, Canfor and Terminal respectfully request that the application for consolidation be denied. In the alternative, if the Tribunal determines that consolidation ought to be ordered, then the United States should be ordered to pay Canfor and Terminal's costs that have been thrown away by virtue of the United States having been dilatory in bringing this consolidation application. Canfor and Terminal ought not to be compelled to bear any additional expense because the United States made the strategic choice not to bring this application at an earlier date.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



P. John Landry



Keith E.W. Mitchell

August 12, 2005