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

# POST-HEARING SUBMISSION OF CANFOR CORPORATION AND TERMINAL FOREST PRODUCTS LTD.


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## I. INTRODUCTION

1. This post hearing submission is filed on behalf of Canfor Corporation ("Canfor") and Terminal Forest Products Ltd. ("Terminal"). Except where expressly noted, the submissions are made on behalf of both Canfor and Terminal.

2. This submission proceeds by responding first to several of the arguments advanced by the United States in its oral submissions, in particular, with respect to the question of commonality and with respect to the meaning of *"fair and efficient"* under NAFTA Article 1126 followed by specific responses to the outstanding questions posed by the Tribunal at the conclusion of the oral hearing on June 16, 2005.

## II. SPECIFIC RESPONSE TO UNITED STATES' ORAL SUBMISSIONS

### *A. Overview*

3. The United States has failed to articulate the common questions of fact and law, or to establish, in a manner that can credibly satisfy this Tribunal, that the fair and efficient resolution of these claims requires that they be consolidated and, accordingly, the United States has failed to meet the onus upon it to establish that these three divergent claims warrant consolidation.

### *B. Common Question of Law or Fact*

#### (i) United States has not satisfied the test set out in Article 1126

4. While the United States asserted in oral argument that NAFTA Article 1126 represents a *"breakthrough innovation in arbitration"*,[1] the reality is that Article 1126 simply recognizes that, in some circumstances, the fair and efficient resolution of claims with a sufficient degree of commonality may best be achieved through a consolidation of those claims into a single proceeding. While such a procedure has been commonly available in the domestic courts of many nations for many years, such a process presents considerable problems in arbitral regimes

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[1] *Canfor Corporation, Tembec Investments Inc., Tembec Industires Inc., and Terminal Forest Products Ltd. v. The United States of America*, Consolidation Proceedings under Article 1126 of the *North American Free Trade Agreement*, Transcript of the Oral Hearing on Consolidation, June 16, 2005, Submission of the United States of America, p. 15, l. 8-9, [hereinafter *Softwood Consolidation, Oral Hearing*].

because of the consensual nature of arbitration (which is defined by the terms of the arbitration agreement between the parties), which does not readily lend itself to consolidation absent the consent of the parties. However, the fact that a consolidation mechanism exists in Chapter 11 of NAFTA does not determine when it may be appropriately invoked. In the present case, the United States simply has not presented evidence or argument which demonstrates that the test set out in Article 1126 has been met in this case. In short, this Tribunal does not have before it sufficient information upon which it can be *"satisfied"* that there are common questions or that given the circumstances, fairness and efficiency requires consolidation.

### (ii) Treaty requires commonality, not similarity

5. The NAFTA grants the Tribunal a discretion to order consolidation if multiple claims have questions *"in common"*. The United States, however, in its oral submission, distorts the test, and recasts it as whether the claims have *"legal and factual similarities"*.[2] With respect, the requirement of the treaty is for commonality not for similarity. In the present case (perhaps with the exclusion of the already argued Article 1901(3) objection), although the cases may have some facial similarities, they do not have the commonality the treaty requires. Commonality requires identity, whereas similarity acknowledges none.

### (iii) The United States misstates the test of commonality

6. In its oral submissions the United States asserts that

> *"Under claimants' test, claims could not be consolidated under Article 1126, unless the claimants share a common identity or affiliation, their investments are identical, they are located in the same geographical area, they produce the identical product, they employed the same legal arguments and strategy, they emphasized the same aspects of their cases, and apparently they suffered the same beetle infestation."*[3]

7. Canfor and Terminal say nothing of the sort. The United States' rhetoric is far too simplistic and, in any event, is incorrect. The issue for this Tribunal's determination remains

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[2] *ibid* p. 19, l. 5. See especially *ibid* p. 20, l. 18-21 where, on behalf of the United States, Mr. Clodfelter says, "*we propose to focus on the relevant issue at hand; namely, whether consolidation of the claims is appropriate now based on the* ***similarity*** *of the claims*" (emphasis added). See also, *ibid* p. 30, l. 6, p. 32, l. 16-17, p. 42, l. 14-17, and p. 312, l. 16-18.

[3] *ibid* p. 21, l. 6-14

whether the United States has identified and articulated sufficient questions in common that, when all considerations of fairness and efficiency are examined, consolidation is appropriate.

8. What the United States does do, however, by setting out what it says is the Claimants' test, is identify numerous factors that this Tribunal must consider in deciding whether or not there are common questions. While all of the factors listed need not necessarily exist in any given case for consolidation to be appropriate, each of those factors is relevant and must be considered in assessing whether there is a sufficient degree of commonality, and whether fairness and efficiency require consolidation.

### (iv) The United States has not established commonality

9. While the United States has asserted that it has established commonality, the record does not support its assertion. The differences between the three claims is specifically identified in the response to the Tribunal's Questions #9 later in this submission.[4]

10. For the moment we simply note that, with respect to the jurisdiction of the Tribunal, the record of the Canfor proceeding is clear and unequivocal. Article 1121 is not in issue in Canfor, and the United States has expressly reserved Article 1101 to the merits, and then only on a contingent basis. The only arguably common issue is that related to the United States' legal argument on Article 1901(3).

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[4] We note again that in its discussion of commonality at the oral hearing, the United States continues to misrepresent the nature of Canfor's claim. For instance, it said at p. 31, l. 17-20 of the *Softwood Consolidation, Oral Hearing*: *"Each claim challenges the antidumping and countervailing duty determinations that imposed duties on exports of Canadian softwood lumber into the United States."* The United States well knows this is incorrect. A NAFTA Chapter 11 Tribunal has no authority to do anything with respect to those determinations. Canfor's complaint is about the conduct of the United States directed towards it, measured against the standards in NAFTA Chapter 11. It does not challenge United States countervailing duty or antidumping law.

Similarly, the United States seeks to confine the nature of Canfor's claims as merely respecting the duties being collected by the United States government. It says at p. 33, l. 10-19 of the *Softwood Consolidation, Oral Hearing* *"In an attempt to persuade this Tribunal that their claims are different claimants cite every conceivable factual and legal distinction among them. None of those distinctions, however, provides a reason for not consolidating. Claimants contend, for example, that the different effects of the measures on the various U.S. investments give rise to unique issues of fact with respect to each claimant.* ***Claimants' claims, however, concerned the duties collected on exports of softwood lumber.***" (emphasis added) While the duties are one aspect of the claim, assuming the United States does not comply with its obligation to repay them, it is by no means the extent of the claim, which will ultimately take into account the harm to the investor's market share, the harm to its investments, the losses caused by the impact of the duties on the market and on demand, to name but a few.

11. Furthermore, with respect to merits, the United States has not yet articulated its defences, so it is impossible at this stage to say whether there are, or are not, common issues. Indeed, the best the United States can say where it attempts to argue commonality is that it *"anticipates"* it would raise *"many of"* the same defences in the various proceedings.[5]

12. Anticipation for the purposes of consolidation is insufficient. The Tribunal can only be satisfied on the basis of evidence or pleadings, not mere anticipation or expectation, particularly when the United States has demonstrated that its representations of its expectations both with respect to the arguments it intends to raise on jurisdiction, (when it said to the Canfor Tribunal that the only preliminary issue it intended to raise was in relation to Article 1901(3)) and with respect to its position on consolidation (when it said to the Canfor Tribunal that it did not intend to apply for consolidation) have not been a reliable indicator of its future actions.

### *C. Fair and Efficient*

#### (i) The United States is not entitled to seek consolidation simply because risks it anticipated, but was prepared to accept, have materialized

13. The United States made a carefully considered determination that it did not intend to seek consolidation well after the three cases were submitted to arbitration. Mr. Clodfelter articulated this point to the Tribunal in the United States' oral submissions as follows:

> *"For its part, the United States considered the risks that inconsistent decisions would be issued and that public resources would be wasted if the cases proceeded separately. We also carefully weighed those risks in the context of other factors, including the very different procedural postures of the three cases. Although it was a close question, we determined that we could live with those risks and forgo consolidation because the Canfor case was so much further advanced than the other cases, and it was likely to result in an early decision on jurisdiction. And the existence and persuasive value of that decision would sufficiently reduce the chances of an inconsistent award in either of the other two cases."*[6]

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[5] For instance, the United States said: *"Finally, although the United States is not in a position at this time to comprehensively articulate its defenses to the merits of claimants' claims, given the similarities and factual allegations and claims of breach, the United States anticipates that should these cases proceed to the merits, it would raise many, if not all, of the same legal defenses to all three claims"*: (*Softwood Consolidation, Oral Hearing*, p. 32, l. 13-20.)

[6] *ibid.* pp. 16-17.

14. Every party to litigation makes choices. They examine various strategic options, and evaluate the potential risks and the potential benefits of their possible strategies. They make their choices knowing that sometimes, the choice they make may not bring about the results they desire.

15. The United States' entire application is premised on its assertion that it weighed the risks of seeking to consolidate against not seeking to consolidate, that it made a calculated choice, and that now that its decision has not worked as planned, it seeks to resile from that strategic decision and to pursue a different strategy[7] to the severe prejudice of Canfor.

16. With respect, even if the requirements to support consolidation were otherwise made out, it is now far too late in the day for the United States to obtain such an order, when other parties have suffered severe prejudice because of the delay caused by its failed strategy.[8]

17. While Article 1126 does not expressly state a time limit by which a consolidation application must be brought, it does, however, couch its terms in language of fairness as well as efficiency. Fairness and efficiency necessarily must consider the impact upon the disputing

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[7] We note, on this point, that the NAFTA Article 1126 considerations do not, on their face, include a *"risk of inconsistent decisions"*. As there is no *stare decisis* in NAFTA Chapter 11 disputes, a concern over *"inconsistent decisions"* seems overstated at best. In that regard, we note that earlier NAFTA Chapter 11 tribunals took varying approaches to, for instance, the interpretation of Article 1105 (contrast *Pope and Talbot Inc. v. Canada*, April 10, 2001 at para. 118 where the Tribunal *"interpreted 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries"* with *S.D. Myers Inc. v. Canada*, Final Partial Award, November 13, 2000 http://www. investmentclaims.com/decisions/SDMyers-Canada-1stPartialAward-13Nov2000.pdf at para. 263 where the Tribunal found that *"a breach of Article 1105 occurs only when it has been shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from an international perspective."*) Despite these conflicting approaches, the administration of the Treaty was not undermined, and indeed, where the three NAFTA Parties were of the view that Tribunals had misinterpreted NAFTA Article 1105, they were able to remedy that with the adoption of the July 31, 2001 Interpretive Note. (*NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions*, (31 July 2001), online: DFAIT http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp.

[8] The *travaux preparatoires* cited as authoritative by the United States in its Response of Respondent United States of America to Tembec's Motion to Dismiss, July 12, 2005 (see p. 3 fn 5) indicates that it was the intention of the Parties that requests for consolidation be made in a timely manner. In Article XX07(7) of the Draft Negotiating text of the Investment Chapter of the North American Free Trade Agreement, June 4, 1992, Article XX07.9.3. [hereinafter *Virginia Composite*], the Canadian Government proposed a consolidation procedure which provided that a respondent State had 90 days from receipt of a notice of arbitration claiming against a measure in which it could request that a consolidation Tribunal be established to hear all potential claims regarding a measure. This clause indicated the Parties' concern that the Chapter 11 consolidation procedures be fair and is now reflected in the wording of Article 1126 which allows a Tribunal to order consolidation where it is *"in the interests of fair ... resolution of the claims"* to do so.

parties of the choices made by the litigants. Fairness is a relative concept: it examines the position of the disputing parties relative to one another in connection with the possible methods of dispute resolution.

18. If the United States is correct it would be entitled to bring a consolidation application right up until an Article 1120 Tribunal has issued its final award. Surely that cannot be the case. The right to pursue consolidation certainly must be exercised prior to the point at which an issue has been fully briefed and argued before one of Article 1120 Tribunals, especially an issue which the moving party alleges is a common issue. There is no warrant for permitting a party dissatisfied with its performance at a hearing, (or with the reaction from a Tribunal to its arguments), to seek to disable that Tribunal from completing its task after the arguments have already been made. Simple fairness requires otherwise.[9] This is even more so when the stage at which the Article 1120 proceeding is presently at was determined by the United States.

19. The United States strategically elected to advance a jurisdictional objection in Canfor's case. It determined the scope of the objection it wished to raise, and it chose to pursue that objection as a preliminary matter. Canfor objected to that approach. It argued that the United States' jurisdictional objection should be joined to the merits. But Canfor did not succeed in that argument and therefore was forced to fully brief and argue the United States' objection. Given the United States specifically elected to have that matter heard before a properly constituted Article 1120 Tribunal over Canfor's objections, Canfor should not now be required to reargue before another tribunal, not of its choosing, the same jurisdictional objection.

20. The United States is bound by the choices it makes. It would be extraordinary for one party to be compelled to reargue a motion not brought by it, and which it did not wish to have dealt with in a preliminary way, simply because the other party has now changed its mind about how it perceives the risk of inconsistent judgments materializing.[10]

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[9] One has little doubt that, if Canfor, Terminal or Tembec had sought consolidation subsequent to the jurisdictional hearing, and while awaiting a jurisdictional award, the United States would immediately cry foul, accusing the moving litigant of engaging in tactical manoeuvring in a relentless pursuit of *"baseless"* or *"meritless"* litigation.

[10] Again, we reiterate that if the United States is correct, that the claims advanced are *"baseless" "meritless"*, without merit, (or in the case of Tembec *"so absurd as to not require response"*), then the risk of inconsistent

21. In that regard, at the June hearing counsel for the United States made the suggestion that Canfor has *"twice" "sought to leave you with"* a *"misleading impression"* concerning the United States' position on consolidation.[11] Again, leaving aside the unnecessarily inflammatory tone of the submission, Canfor has done nothing of the sort. Canfor has not said that the Tribunal *cannot* entertain the application, on the basis of a representation made by the United States as to its position. Rather, Canfor and Terminal say that the conduct of the United States, including the representations made by it, ***even if they purported to reserve some right to revisit matters in the future***, are highly relevant factors in determining why this application should be dismissed.

22. Of course, the simple reality is that, notwithstanding the representations made by the United States, and its purported reservation of rights, Canfor did rely upon them by preparing for and arguing the motion the United States now seeks to have it reargue. The actions of the United States not only induced Canfor to rely upon their representations, they compelled Canfor to act and therefore to expend significant funds to prepare for, brief and argue the United States' jurisdictional motion.

### (ii) The United States brings this application for tactical reasons

23. In Canfor and Terminal's earlier written submission and at the oral hearing, Canfor and Terminal demonstrated a pattern of United States' conduct including its conduct in relation to the issue of consolidation that can only be explained as having been embarked upon for purely tactical reasons. The United States cannot deny that conduct, and therefore sought to explain its conduct in its oral submissions as *"involve[ing] the proper insistence by the United States upon observance of its rights under NAFTA as a matter of principle or the pursuit of some other legitimate end."*[12] With respect, the use, or more properly abuse, of the processes before the Article 1120 Tribunals, as well as consolidation process under Article 1126, simply mirror the conduct of the United States in the underlying softwood lumber dispute. It is no different than

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outcomes (if a holding in favour of one claimant and against another could be so described), would seem so small as to not warrant the United States' concern nor the considerable expense to which it has put all of the claimants in this application.

[11] *Softwood Consolidation, Oral Hearing, supra* note 1 at p 18, l. 1-3.

[12] *ibid.* p. 20, l. 8-12.

the United States' actions in failing to repeal the Byrd Amendment,[13] in steadfastly refusing to repay unlawfully retained duties,[14] and in ignoring and inappropriately chastizing the determinations of Chapter 19 panels.[15] The United States' conduct in the NAFTA Chapter 11 cases is simply an extension of the approach adopted by the United States to the softwood lumber issue designed to waste resources, delay proceedings, and hinder the fair resolution of a claimants' rights in hope that the Claimants and the Canadian industry capitulate. That disrespect for the international legal processes, and therefore for the rights of those such as Canfor and Terminal cannot be justified as *"a matter of principle or the pursuit of some other legitimate end."*

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[13] At the jurisdiction hearing in the Canfor proceeding when it was to the United States' advantage to say that the United States intended to repeal the Byrd Amendment and that no duties had been (and therefore implicitly would be) paid out in relation to the softwood lumber dispute, they quite readily did so at a time when their statements could not be reasonably tested - - yet history has shown once again the United States acted out of convenience rather than substance - - the Byrd Amendment has not been repealed by the United States and there is no reasonable prospect of that occurring in the short term. Further, when it made this representation to the Canfor Tribunal, the United States must have been aware that Customs announced disbursements of softwood duties under the Byrd Amendment on March 15, 2004 (see: http://www.cbp.gov/xp/cgov/import/add_cvd/cont_dump/cdsoa_03/cdsoafy03_annual_report.xml case C-122-839 on pages 109-111). Finally, on December 17, 2004, only days after the December 4 hearing, Customs announced a second disbursement of softwood lumber duties under the Byrd Amendment. (see: http://www.cbp.gov/linkhandler/cgov/import/add_cvd/cont_dump/cdsoa_04/fy2004_annual/annual_disbursement.ctt/annual_disbursement.pdf at case C-122-839 on pages 22-24.)

[14] As discussed at the oral hearing representatives of the United States have unabashedly stated that even if the Canadian victory in the Chapter 19 Panel proceeding dealing with the United States International Trade Commission ("ITC") determination is upheld, the United States will not pay back the duties: see 151 Cong. Rec. S136-7 (daily ed. Jan 24, 2005) (statement of Sen. Crapo).

[15] Reference is made to the extraordinary attitude of the United States' agency (ITC) in its answer to the third remand by the Chapter 19 Panel. In reviewing this decision the majority of the Panel stated:

> *"The Commission 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 the 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."*

An American Panelist, Mark Jolsen, was not so generous in his separate opinion:

> *"The Commission has made it plain by its actions and words that it is disinclined to accept the Panel's review authority under Chapter 19 in this case. Given this situation ... issuing yet another open ended remand instruction to the Commission would be to allow the Chapter 19 process to become a mockery and an exercise in futility."*

(see: *In the Matter of Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Injury Determination (Canada v. United States)*, USA-CDA-2002-1904-07, August 31, 2004, (Ch. 19 Panel: Second Remand Decision), online: NAFTA Secretariat http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/USA/ua02072e.pdf (accessed: July 20, 2005) at p. 3 and p. 12 respectively.

### (iii) The withdrawal of Mr. Harper does not have the effect the United States contends

24. The United States states in its oral submission that the withdrawal of Mr. Harper changed the circumstances, and did so *"quite dramatically"*. It suggests that because of Mr. Harper's resignation the *"one factor"* that weighed most heavily against consolidation, that being a lack of procedural alignment, was removed.

25. The United States submission regarding Mr. Harper must be examined with care.

26. First, it is unnecessary to further respond to the circumstances surrounding the withdrawal of Mr. Harper. The material is before the Tribunal, and the Tribunal can form its own conclusions. Just as Canfor would be concerned with any member of this Tribunal engaging in *ex parte* communications with the United States Office of the Legal Advisor while this Tribunal were engaged in its deliberations, it was equally entitled to be concerned with Mr. Harper having done so. That is all the more so when Mr. Harper was, uncontestably, a directing mind of substantial high profile litigation with the United States. Canfor would be equally concerned were any member of this Tribunal to be involved in any activity in which some advantage would be sought from the United States.[16]

27. Second, the assertion that the alleged *"challenge"*, to Mr. Harper *"guaranteed that the ...Canfor Tribunal's decision would necessarily be delayed"* does not withstand any probing examination.[17] The United States had complete control over when it appointed a replacement arbitrator. It has numerous nominees on the ICSID list, which presumably reflects a predetermination as to the skills and abilities of those individuals. It was able to determine its

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[16] With the greatest of respect, Canfor does not view *ex parte* communications as *"frivolous"*, as the Respondent suggests. And, contrary to the submission of Mr. Clodfelter, who purports to describe what the involvement of Mr. Harper *"would have been"* in the Harvard litigation, he fails to note that two members of the 7 person board of Harvard recused themselves from involvement in the case, the President of Harvard testified in it, and Mr. Harper specifically cleared himself for the purposes of *"acting with respect to"* the case (see email from Mr. Harper to Canfor and Canfor Tribunal dated February 3, 2005: *First Canfor Consolidation Submission*, Appendix tab 3(t)). If the United States has further information about Mr. Harper's role, it should provide specifics of it, including the basis for that information. If it does not, it ought not to assert to this Tribunal as truth that for which it has presented no evidence.

[17] *Softwood Consolidation, Oral Hearing, supra* note 1 at p. 18, l. 10-11.

position with respect to Professor Greenwood within 20 days, and Mr. Robinson within 3 days. If the United States did not wish the cases to be, as it describes them (albeit inaccurately), procedurally aligned, then it was within its power to ensure that did not occur.

28. Rather, the United States relies upon a purported policy of taking 90 days to appoint a replacement arbitrator, which it asserts in its oral submissions is a matter of *"principle"*, and it was this that ensured that the Canfor proceeding was delayed. That position is not only not supported by its action in other Chapter 11 proceedings, [18] it is inconsistent with the UNCITRAL Rules which govern this proceeding, and with the time limits set out in the ICSID Additional Facility. There is no good reason why the United States delayed, other than to attempt to bolster their consolidation application. If the United States was actively seeking to appoint an arbitrator, one would have expected there to be some evidence of that. Instead, the United States is driven to rely upon a policy whose rationale is never stated, and which materializes as a matter of *"principle"*, only when the United States is required to explain its delay.

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[18] The purported taking of 90 days as a matter of principle is inconsistent with the United States stated practice of appointing within *"30 to 60 days"*, as set out in the letter from Mr. Mitchell to Mr. Legum, confirming the advice provided by the United States, (see: *First Canfor Consolidation Submission*, Appendix tab 3(t)) as well as with its advice following the withdrawal of Mr. Harper that it *"United States is making every effort to appoint a replacement arbitrator and hopes to be in a position to make its appointment soon"* (see: letter from the United States to Mr. Roberto Danino of ICSID dated April 18 2005). Moreover, the United States position of *"principle"* is not supported by past practice involving the United States, the other NAFTA Parties or indeed, investor-state arbitration generally. For instance, in *Methanex*, where the Arbitrator (Warren Christopher) appointed by the United States withdrew following an issue of conflict, the United States appointed Mr. Reisman as his replacement in less than 35 days from when Mr. Christopher had resigned on September 20, 2002. (See the Investment Law and Sustainable Development (IISD) Weekly News Bulletin, Oct.25, 2002 at http://www.iisd.org/pdf/2003/investment_investsd_oct_2002.pdf. While this Bulletin does not indicate the exact date of the Reisman appointment, it was clearly before October 25, 2002 (the date of the Bulletin).

Several other examples demonstrate that States are able to appoint arbitrators in far less time than the United States contends is necessary. For instance, in *S.D. Myers, Inc. v. Canada* a replacement arbitrator was appointed by Canada 21 days following withdrawal. Mr. Robert Rae resigned on June 3, 1999 and Canada appointed his replacement, Mr. Edward C. Chiasson on June 24, 1999. See at paras. 29, 32: *supra* note 6. Likewise, in *Waste Management, Inc. v. Mexico*, a replacement arbitrator was appointed in 30 days: On December 3, 1999, Mr. Julio C. Treviño Azcué tendered his resignation as arbitrator for health reasons. On 9 December 1999, the Arbitral Tribunal accepted the resignation submitted by Mr. Treviño. On 4 January 2000 the Government of Mexico appointed Mr. Eduardo Siqueiros as the new arbitrator. At para. 2: http://www.investmentclaims.com/decisions/WasteMgmt-Mexico-Jurisdiction-2Jun2000.pdf. To like effect is *Waste Management, Inc. v. Mexico* (Number 2), where a replacement arbitrator was appointed in 28 days: On 16 November 2001, Mr. Guillermo Aguilar Alvarez, , Mexico's appointment, tendered his resignation from the Tribunal. Mexico thereupon nominated Mr. Eduardo Magallón Gómez to fill the vacancy so created and the Tribunal was reconstituted on December 14, 2001, following Mr. Magallón Gómez' acceptance of his appointment. At para. 4: http://www.investmentclaims.com/decisions/WasteMgmt-Mexico-2-Jurisdiction-26Jun2002.pdf

29. Finally, the United States never explains in any convincing way in its oral submissions why *"procedural alignment"* is so significant. In that regard, we once again note that the cases are not procedurally aligned, but even if their alignment was closer, the fact remains that NAFTA Chapter 11 awards are binding only as between the disputing parties. It is not uncommon for the law to take time to develop, and even if different cases adopt different analytical approaches to the evidence placed before the respective tribunals, that is not a matter that need cause concern. Rather, it allows the law to evolve and develop over time as consensus develops as to the correct approach.[19]

**(iv) Consolidation in these circumstances is not fair and efficient.**

30. Canfor does not intend to repeat the submissions it advanced in writing or at the oral hearing with respect to fairness and efficiency. Instead, it will confine itself to responding to the oral submissions made by the United States, and offering its observations upon them.

31. In its oral submissions, the United States stated *"it is certainly more efficient to have one tribunal hear these claims than to have two or three tribunals decide them. The burden on the United States as respondent is considerably lessened in a consolidated proceeding. Consolidation offers the opportunity for cost sharing on the claimants' side as well."*[20]

32. Again, the United States is proceeding simply by assertion, with no evidence to support its view. However, when subjected to examination, the assertions of the United States cannot stand.

33. No definition of *"efficient"* is given in the treaty. Canfor and Terminal submit that *"efficiency"* implies *"effectiveness"* and *"manageability"*. Another aspect of efficiency relates to the cost of the process; a process that is more costly, either in the aggregate or to some or all of the parties is less *"efficient"* than a process which is less costly. A third aspect, related to the

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[19] As well, the NAFTA Free Trade Commission has the power, if all Parties agree, to issue a binding interpretive statement (see Articles 1131(2) and 2001(2)(c)). One notes that such has not occurred with respect to the present case.

[20] *Softwood Consolidation, Oral Hearing*, *supra*, note 1, p. 35, l. 14-20.

second, would be the time consumed in the process. A process that takes longer, or is more complicated, is less *"efficient"* than one that takes less time or is less complicated.

34. A consolidated proceeding in this situation is less efficient than allowing each of the claims to proceed as they are currently being managed. For example, a consolidated proceeding would not only require strict controls over the access to and use of confidential information (as discussed in more detail below), it would require extensive, complicated and potentially confusing mixture of public and *in camera* hearings. Further, it would also raise serious questions relating to procedure (and fairness of any procedure chosen), questions that remain unanswered by the United States. A few such questions include:

- Would evidence tendered by Canfor or Terminal be considered in the case brought by Tembec?
- Would the answer to that question depend upon whether the evidence was received *in camera*?
- How would equality between the parties be assured if evidence of Tembec, (which evidence Canfor or Terminal did not wish to be led), could be evidence against Canfor or Terminal?
- How would equality be assured if the United States and the Tribunal had access to greater information than did Canfor, Terminal or Tembec?
- Would Terminal be entitled to file a Statement of Claim prior to the consideration of a jurisdictional objection, and if not, on what basis, (given that the jurisdictional objection could dispose of Terminal's claim without that claim being fully articulated)?

35. Furthermore, a consolidated proceeding in this situation is less cost efficient, and more time consuming, than separate proceedings.

36. First, if the proceedings are consolidated, it is already acknowledged by the United States that the proceedings would of necessity be lengthier. Therefore, Canfor, Terminal and Tembec would each be required to attend at, and participate in, a proceeding that would be longer than if any of them proceeded on their own. Further, while it is impossible to predict in advance whether the aggregate length of the proceedings would be less than if each proceeded on its own,

there is absolutely no guarantee that a consolidated case will indeed be shorter given the complexity involved in dealing with a case involving three competitors.

37. Second, there would be no cost savings for the Claimants because consolidated proceedings will necessarily be more expensive. Each Claimant would be required to prepare for the full hearing and each of the Claimants would be required to know and understand the cases of the other two Claimants so that they could respond to any matters implicating their interests that arose during the hearing. That requires additional preparation with all its associated cost.

38. Finally, while one can speculate that the amount paid to the Tribunal for its fees *may* be less in a consolidated proceeding, that would not by any means be certain.

39. To answer these obvious conclusions, the United States simply asserts in its oral submissions that because it is an inherent incident of consolidation that the proceedings may be lengthier or more costly, the Tribunal should simply ignore these considerations in undertaking its analysis.[21] With respect, that cannot be correct.

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[21] For instance, the United States argues:

> *"Claimants' arguments against consolidating on the merits are based largely on factors that are inherent in the consolidation process, and therefore should not be taken into account by this Tribunal. Claimants contend, for example, that it would be unworkable to have a hearing at which multiple counsel representing several claimants advanced different theories of their cases. In raising these objections, however, claimants are objecting to the Article 1126 process itself. But they consented to that possibility, the possibility that that process would be used, when they submitted their claims to arbitration under Chapter 11, and they cannot be heard now to complain about its inherent features."* (*Softwood Consolidation, Oral Hearing, supra* note 1, p. 49, l. 12-16);
>
> *"The claimants' third approach is to allege a host of supposed prejudices they would suffer if the cases were consolidated, all of which are, in fact, inherent to the consolidation process itself, therefore, should not be taken into consideration by this Tribunal. Claimants contend, for example, that Article 1126 would deprive them of the right to choose their own arbitrator. Likewise, they complain that a consolidated hearing would not be as speedy as a separate hearing because it would be more participants. But these circumstances are inherent in consolidation. The fact that claimants do not like the Article 1126 process, a process to which they consented when they submitted their claims to arbitration under Chapter 11, is not a ground for favoring separate proceedings."*(*ibid*, p. 21-22, l. 19-13); and
>
> *"Even in an ideal situation, consolidating a claim with other claims may result in a slower resolution of that claim simply by virtue of the fact that there are multiple parties in a*

40. The Treaty requires the Tribunal to assess whether consolidation is necessary for the fair and efficient disposition of the claims. That requires that the Tribunal assess all considerations, whether they are inherent in the process or not, and determine whether, when compared with the prospect of permitting each of the claims to proceed on its own, the fair and efficient resolution of the three claims requires consolidation. Nothing in the Treaty warrants ignoring relevant considerations, simply because they are a common incident of multi-party proceedings.

### (v) The United States acknowledges the efficiency of allowing the Canfor proceeding to continue

41. The United States argues that, if the proceedings are not consolidated, it will *"request that a reconstituted Canfor Tribunal schedule at least a truncated rehearing to allow the newly appointed arbitrator an opportunity to have his or her questions answered"*.[22] Leaving aside, of course, that whether any rehearing is held is a matter of the Tribunal's discretion, as well as the fact that if the United States had appointed a replacement arbitrator such a hearing would likely have already occurred, the United States itself acknowledges that such a hearing would be *"truncated"*. It is hard to imagine how compelling Canfor to participate in a proceeding in which arguments not even raised against it in the Canfor proceeding are addressed, would be more *"efficient"* than proceeding with a *"truncated rehearing"*. The answer, of course, is that it would not.

### (vi) The United States has not raised an Article 1121 objection against Canfor, and has already deferred its "conditional" Article 1101 objection to the merits.

42. The United States asserts that a consolidated Tribunal *"ought to consider all three of our jurisdictional objections in a preliminary phase if these cases are consolidated"*.[23] It says:

> *"Tembec and the United States have already briefed those objections. Canfor and Terminal can address those objections in short order. As set forth in our written submission, both Canfor and the United States made their positions on these issues known at the jurisdictional hearing in December, and as noted, those objections*

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*consolidated proceeding, but that is inherent in a consolidation and does not render consolidation either unfair or inefficient."* (*ibid*, p. 51-52, l. 16-3).

[22] *ibid*, p. 41, l. 18-22.

[23] *ibid*, p. 46, l. 1-4.

> *constituted a small portion of the written submissions made in the Tembec arbitration".*[24]

43. The United States cannot avoid the record.[25] In the Canfor proceeding, after the United States' contested application, the United States was specifically ordered to and did file a statement of defence setting out all its jurisdictional objections. It is undeniable that the United States did not raise an Article 1121 objection in its Statement of Defence. The Statement of Defence the United States did file in response to the Tribunal Order, articulates all of the defences it can raise, and determines the scope of this Tribunal's jurisdiction. This Tribunal cannot assert jurisdiction to hear a claim that has not been raised in Canfor's proceeding.

44. Moreover, it is also undeniable that the United States cannot now raise Article 1101 as a preliminary matter against Canfor given that that issue has already been determined in the Canfor proceeding. The United States, after it was invited to, expressly stated that it was not seeking to raise Article 1101 as a preliminary matter and further that whether or not such an objection would actually be raised on the merits, would be dependent upon the evidence led on the merits. In its Statement of Defence it states:

> *"The United States does not propose that the Tribunal take up this question as a preliminary matter...the question of whether the measures "relate to" Canfor as an investor or to its investments in the United States is, on the facts of this case, bound up with the merits of the dispute."*[26]

45. The Canfor Tribunal has already ruled that the only preliminary jurisdictional objection that the United States may raise against Canfor is the one that has already been argued. This Tribunal does not and cannot sit in appeal from that determination.

46. The United States, however, argues that once this Tribunal assumes jurisdiction over jurisdictional questions it can then decide what jurisdictional questions should proceed as

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[24] *ibid*, p. 46, l. 4-12.

[25] The United States asserts: *"Here, the jurisdictional questions before the Article 1120 tribunals are identical. **There is no distinction among the jurisdictional arguments that the United States has made or intends to make in each of the cases."*** (Emphasis added) (ibid. p. 56, l. 8-12.) As the record shows, that is simply not the case.

[26] *Canfor Corporation v. United States of America*, Arbitration under Chapter 11 of the North American Free Trade Agreement, Statement of Defence on Jurisdiction of the Respondent United States of America, February 27, 2004, online: http://www.naftaclaims.com/Disputes/USA/Canfor/USA%20-%20Statement%20of%20Defence.pdf at para. 9.

preliminary matters and further whether the United States has waived its ability to make an Article 1121 objection. With respect, this puts the cart before the horse. This Tribunal cannot assume jurisdiction over a matter not in issue in Canfor's proceeding. Nor can it base its decision on the fact that a matter *"might"* be in issue in Canfor's proceeding. The Tribunal is obliged to take the record as it finds it. That includes an unequivocal pleading that does not raise Article 1121, and an express statement that Article 1101 would not be, and indeed cannot be, raised as a preliminary objection. Accordingly, the United States submission fails on all grounds.

### (vii) This Tribunal should not consolidate on either jurisdiction or the merits

47. The United States, both in its written argument and in its oral submissions, makes a somewhat weak attempt to assert that this Tribunal ought to consolidate on merits as well as jurisdiction. Even the United States, however, does not seem persuaded by its own position. That is not surprising.

48. The United States has approached the claims at the highest level of generality. It notes that the same provisions of NAFTA are in issue in each case, and that the Claimants each rely, to varying degrees (and to the extent that Terminal's claim is articulated) on the same determinations of the Department of Commerce and the ITC.

49. As noted below, however, the claims are not only presented quite differently, they are different.

50. The United States has not been able to show that common issues are indeed raised on the merits. Instead, as previously noted, the United States asserts that it *"anticipates"* that it will raise the same defences, or that it *"would likely make the same defences"* in the different proceedings, yet it is not even able to articulate what those defences are. Argument for consolidation which anticipates commonality is totally inadequate. Based on the pleadings to date and based on the scant evidence presented by the United States on this point, there is no basis for this Tribunal to consolidate the three claims on the merits.

### (viii) The risk of disclosure of confidential information argues against consolidation

51. The United States dismisses as *"without merit"* each Claimants' argument that consolidation is not warranted because of the risk of disclosure of confidential information that would occur if the proceedings were heard together. The United States misconstrues Canfor and Terminal's argument.

52. In each of their claims Canfor and Terminal will be obliged to establish harm to their investments or harm to them as investors. To do so, they will need to lead a substantial amount of confidential evidence which will include:

- evidence of their actual or proposed investments in the United States;
- evidence as to how they operate those investments in relation to the United States' market and in relation to their Canadian operations,
- evidence as to what their business plans are,
- evidence as to how the United States investments are being affected by the United States' conduct,
- evidence as to what their future strategies are, (or changes in strategies to mitigate the losses being caused by the United States' conduct), and
- evidence on many other highly confidential matters.

53. This is not, as the United States would have the Tribunal believe, about what is contained within the administrative record before the Department of Commerce or the International Trade Commission. The issue relates to confidential information in the possession of each Claimant. The United States repeated reference to the administrative record is designed to confuse the claims being advanced from what they actually are with something they most clearly are not.[27]

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[27] To repeat once again, Canfor does not seek to overturn or challenge the determinations of the Department of Commerce ("DOC") or ITC in this forum. That is a function of the Chapter 19 panels or the municipal courts applying the municipal law of the United States. In those cases, the administrative record which the United States refers to is clearly relevant, and in that regard there are extremely complex processes to ensure confidential information is kept confidential, and extremely serious sanctions for any party or counsel who violates their obligations of confidentiality. Such arrangements, while very cumbersome and complex, are commonplace in antidumping and countervailing duty cases, and indeed are a necessary by-product of them.

54. It is also no surprise to the United States that such confidential evidence was bound to be led. The United States noted that itself when it filed its Statement of Defence:

> *"5. It is the claimant that bears the burden of proving each of these elements,* ***each of which is essential to any claim.*** *Canfor, by invoking the jurisdiction of this Tribunal to adjudicate its claim, has assumed the burden of proving that it is an investor and that the measures in question relate to it and its investments in the United States within the meaning of the NAFTA's investment chapter.*
>
> *6. Canfor has alleged that it is "an investor of a party" and that it has "investment to [sic] the territory of the United States as contemplated by Article 1101. It also has alleged* ***a relation*** *in various respects between the measures complained of and it and its investments. ...*
>
> *8. The United States has no reason at this point in time either to doubt or to credit these allegations. The United States has not attempted to conduct a factual investigation on this subject...The United States is, therefore, not able at this point to take a definitive position on whether the threshold requirements of article 1101 are met in this case.* ***It will be able to take such a definitive position only after Canfor has introduced evidence on the subject.*** *It is for this reason that the United States conditionally objects to the Tribunal's jurisdiction on this ground.*
>
> *9. The United States does not propose that the Tribunal take up this question as a preliminary matter...the question of whether the measures "relate to" Canfor as an investor or to its investments in the United States is, on the facts of this case, bound up with the merits of the dispute. (Emphasis added)*[28]

55. Accordingly, as the United States acknowledges, the nature of the investors and their investments, and the impact of the measures upon them is a central issue in this proceeding and obviously requires that confidential information be introduced into evidence to prove the allegations raised in the pleadings.

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By contrast, for example in Canfor's claim, Canfor challenges the abusive, arbitrary and discriminatory conduct of the United States, directed at Canfor, under the standards established in the NAFTA – and, in particular, whether that conduct, when examined in its entirety, and in connection with its impact upon Canfor, failed to meet the standards of treatment that the United States agreed to provide Canfor under the specific provisions of Chapter 11 named by Canfor in its Notice of Arbitration and Statement of Claim. The case is not based upon the application of United States' municipal standards, but rather, upon the use, or abuse, of the United States' discretionary powers in a manner that causes harm to an investor and its investments.

[28] *ibid.* paras. 5,6,8 and 9

### (ix) Reducing the risk of inconsistent decisions is not the Tribunal's overriding goal

56. The United States has argued that the claims should be consolidated to eliminate the risk of inconsistent decisions, and that this should be the *"overriding goal"* for this Tribunal.[29] There are a number of complete answers to this submission.

57. First, the NAFTA on its face does not accord the risk of inconsistent decisions the status the United States urges. In fact, it does not mention that risk at all. At best, reducing or eliminating the risk of inconsistent decisions is but one factor the Tribunal may take into account in its analysis of fairness and efficiency.

58. Second, the United States has clearly accepted the risk that the Canfor and Tembec tribunals will approach issues in different ways. In its own submission it acknowledged that it was prepared to accept that risk and it proceeded accordingly. It cannot now assign the risk of inconsistent decisions an overriding importance when it is not based on the text of the treaty nor supported by even its own conduct.

59. Third, and in any event, as noted earlier, given the absence of precedential weight, the concern for consistent decisions cannot assume the importance the United States would give it.

### (x) Conclusion

60. Accordingly, for all of the above noted reasons and for the reasons outlined in Canfor and Terminal's previous written and oral submissions, fair and efficient resolution of Canfor and Terminal's claims require those claims to be heard separately by properly constituted Article 1120 Tribunals, not by an Article 1126 Tribunal.

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[29] *Softwood Consolidation, Oral Hearing, supra* note 1, p. 52.

## III. RESPONSES TO THE TRIBUNAL'S QUESTIONS

61. Although Canfor and Terminal attempted to provide preliminary answers to most of the questions raised by the Tribunal at the June 16 hearing, counsel indicated that a more detailed response to the questions would be provided in the Post Hearing Submission. The more detailed responses are outlined below.

**Question 1:**

What is the rationale for the inclusion of Article 1126 in the NAFTA?

**Canfor and Terminal Response**

62. In Canfor and Terminal's submission, the rationale behind NAFTA Article 1126 is to provide a mechanism for the efficient resolution of multiple claims against a Party arising out of one or more events, where there is a sufficient degree of commonality between the proceedings that fairness and efficiency require the proceedings to be heard together.

63. In this regard, Article 1126 might be an appropriate mechanism to use in the examples outlined in answer to question 13 or in the disposition of numerous claims arising out of a single measure, such as arises in American mass tort litigation. However, we have not been able to identify anything in the *travaux* or the available literature which suggests that the intention behind Article 1126 was that when two or three Claimants from the same industry brought claims which might require the interpretation of the same treaty provision (in the context of specific facts found in each of the respective cases) that those cases should be consolidated.

64. We note the inclusion of language in the draft negotiating text which supports this view.[30] Article XX07.9.3 of the June 4, 1992 negotiating text was framed in terms that imposed upon a Party seeking consolidation the obligation to:

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[30] Note, however, that without explanation, in the Watergate Daily Update, Draft Negotiating text of the Investment Chapter of the North American Free Trade Agreement, dated August 4, 1992, (doc. 00456) Art. 1126, or Art. 2129 as it was then, was inserted in the draft Chapter 11. In the previous draft, the Watergate Daily Update, Draft

*"give notice of its request to establish an arbitral panel to all known claimants and to the Party or Parties of the claimants."*[31]

65. The unmistakeable implication from the wording in this draft is that the negotiators contemplated that there may be *"unknown"* claimants as well, which suggests that multiple, or mass claims were the intended focus of the Article.

66. The logic of such a provision would be undeniable. Rather than be faced with 50 or 100 separate claims, a Party could seek to consolidate those claims to address the common issue, again much as is done in class action litigation. But that rationale does not exist when only a small number of claims are advanced, and when there are no proven efficiencies in time savings, cost or effective disposition of the claims. This is especially so when a Tribunal is faced with the confidentiality complexity discussed in answer to question 8.

**Question 2:**

Discuss negotiating history of 1126, and produce.

**Canfor and Terminal's Response**

67. Please see response to question 1 and footnote 8.

**Question 3:**

How should the words *"fair and efficient"* used in Article 1126 be interpreted (what are the elements of this - or the factors - to be considered)? and should this be interpreted as 'stand alone' or relative to the existing arbitrations?

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Negotiating text of the Investment Chapter of the North American Free Trade Agreement, dated August 4, 1992, (doc. 00437), the dispute settlement portion had no provisions and stated *"see subgroup text"*. Any relevant negotiating history would likely be included in this *"subgroup text"* which the United States has not produced.

[31] *Virginia Composite*, supra note 8

**Canfor and Terminal's Response:**

68. Canfor and Terminal have, through the course of this submission, in their earlier written submission, and the oral submissions, articulated some of the considerations which must be weighed by the Tribunal in evaluating the fairness and efficiency of the proceedings. Such factors as cost to all parties, length of hearings, procedural complexity, extent of commonality, stage of the proceedings, the parties' wishes, the parties' conduct or representations to each other, the impact on party autonomy, the importance and complexity of confidentiality, the timing of the consolidation application, and the progress that has been made in the underlying parties' Article 1120 arbitration are all relevant considerations.

69. Further, the fact that there are only a small number of claims is a factor to be taken into consideration in refusing consolidation. Unlike a case where there are numerous potential claimants (like in the class action proceedings in American or Canadian municipal law), in the present case there are only three claimants, and unlikely to be more given the existence of the NAFTA's limitation period. Although consolidation may be appropriate to prevent an abundance of proceedings where numerous participants in an industry are affected by a Party's measure in the same way (as is occurring by consent, we understand, in the *Cattle* cases against the United States), where the claimant group is small, the claimants are competitors, and the geographic and legal environments in which the claimants operate differ so markedly, these factors argue strongly against consolidation.

70. In answer to the second part of the Tribunal's question, fairness and efficiency are to be considered relative to the positions of the individual disputing parties in their respective proceedings. That is, the Tribunal is bound to take into account the interests of each disputing party, whether claimant or respondent, and assess whether, having regard to their interests, consolidation is fair and efficient. Fairness and efficiency cannot be interpreted in the abstract.

**Question 4:**

Can the Tribunal consolidate some stages of the arbitration without consolidating it all? (see p. 155). What are the reasons for the distinction between Article 1126(2)(a) and (b) given that (a) allows consolidation of *"all or part of the claims"* while (b) refers to *"one or more of the claims"*.

**Canfor and Terminal Response**

71. Under Article 1126(2)(a), *"all or part of the claims"* means every one of the claims (all) or some aspect of every one of the claims (part). *"Part"* refers to some aspect that is common to each of the claims. That is, the Tribunal could not assume jurisdiction over Claim A, to address an argument raised only in that claim, and over Claim B to address a different argument. That would be an abuse of the role of the Tribunal.

72. However, if the same issue was extant in both Claim A and Claim B (and the other considerations of fairness and efficiency warranted it), the Tribunal could assume jurisdiction over simply that issue.

73. There are, however, obvious practical problems with assuming jurisdiction simply over an issue, or a portion of the proceedings. For instance, in the Canfor case, the United States argued that its objection to jurisdiction could be resolved as a preliminary issue. Canfor asserted that the United States objection was wrong in law, first, but in the alternative, that the Tribunal should only address it at the merits (as has occurred in, *inter alia*, *The Loewen Group Inc. and Raymond L. Loewen v. The United States of America*,[32] and *United Parcel Service of America Inc. v. Government of Canada*).[33] If the Consolidation Tribunal were to assume jurisdiction simply over that issue, but then to determine that it could not be resolved in a preliminary way, then, by default, the Tribunal would be assuming jurisdiction over the merits, without having

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[32] NAFTA Chapter 11 Arbitration, ICSID Case No. ARB(AF)/98/3, Decision on hearing of Respondent's objection to competence and jurisdiction, January 5, 2001, online: http://naftaclaims.com/Disputes/USA/Loewen/Loewen%20-%20Jurisdiction%20I%20-%20Award%20-%2005-01-2001.pdf. at para. 74.

[33] NAFTA Chapter 11 Arbitration, Award on Jurisdiction, November 22, 2002 http://naftaclaims.com/Disputes/Canada/UPS/UPSAwardOnJurisdiction.pdf at paras. 115 and 137.

undertaken the necessary analysis to determine that was best for the fair and efficient resolution of the claims.

74. Article 1126(2)(b), by contrast, allows the Tribunal to assume jurisdiction over one or more proceedings if doing so would assist in the resolution of the other proceedings. On its face it appears that the requirement would be to assume jurisdiction over the entirety of the proceeding. Jurisdiction under Article 1126(2)(b) should be exercised most sparingly, as it deprives the parties of the right to their consensually appointed tribunals and given it is hard to envisage a situation where such a Tribunal's determination would assist more in the effective resolution of the claims than would the Award of a consensually appointed tribunal.

**Question 5:**

Not used

**Question 6:**

To what extent should there be questions of law or fact (considering that the Spanish text at least refers to the plural and the English to the singular) in common before consolidation is ordered. Is one common question enough or is it a matter of degree of some sort?

**Canfor and Terminal Response**

75. The questions of law or fact must be of sufficient significance as to warrant interference with the parties right to select their own arbitrators and control their own cases. The issue or issues should be central to the disposition of the proceedings. One question may be sufficient, provided that the question is of such importance that the resolution of each of the proceedings depends upon the answer to the question. A common question which is not dispositive, or which does not substantially advance the litigation in that way, is insufficient.

**Question 6A:**

Does the whole decision on consolidation have to be made at once, or can questions be held over pending a decision on the substantive issues raised in the relevant phase of the proceeding?

**Canfor Response**

76. A tribunal must hear and determine the application for consolidation once and for all. It can assume jurisdiction over some portion of the proceeding, over all of the proceeding, or over none of the proceeding.

77. A consolidation tribunal may not, however, assume jurisdiction over one aspect of the proceedings and then leave it to itself to decide at a later date whether to assume jurisdiction over some additional or other aspect of the proceedings. The Consolidation Tribunal's only powers are those set out in Article 1126(2). Those powers do not include the right to reserve judgment on whether to subsequently assume jurisdiction over further aspects of the proceeding at a later date.

78. And, moreover, that is not what the United States is asking the Tribunal to do. The Tribunal has before it the United States' motion to consolidate entirely, or on jurisdiction alone. The Tribunal has jurisdiction to (and should) deny the application, or it has jurisdiction to grant one of the alternative orders requested. It has no jurisdiction to hold over certain questions.

**Question 7:**

What is the legal basis (national or international) on which the doctrine of laches or estoppel rests, and what are the requirements for the operation of the doctrine?

**Canfor Response**

79. Canfor does not rely upon the doctrines of either laches or estoppel, as it is unnecessary to do so. The Treaty articulates the test in terms of commonality, fairness and efficiency. Elements

such as delay, or representations made by a party, while they may be relevant to aspects of those doctrines, indisputably fall within the terms fairness and efficiency, which are the touchstones upon which the Tribunal must base its decision.

**Question 8:**

In what respects would confidentiality differ *"from proceedings before national and international authorities such as the ECC, the Competition Commission, the antidumping authorities in the United States, Canada, and Mexico, where all these authorities have specific mechanisms in place to preserve confidentiality?"*[34]

**Canfor and Terminal Response**

80. There is no question that various tribunals in different fora have different means of protecting confidential information from disclosure to the public and to competitors. Each such mechanism is extremely thorough and is adapted to address the particular circumstances necessary for the particular decision maker. And in relation to AD and CVD investigations that are at the heart of this case, how confidential information is protected is set out in significant detail in legislation and regulations.

81. For example, in Canadian Dumping or Countervailing duty proceedings, thorough and complex confidentiality arrangements are used by the regulatory authorities to ensure that neither the public and nor *competitors* (that are also parties to the proceeding) have access to the confidential information being used to determine whether a dumping or countervailing duty order should be made. These arrangements include:

(a) the provision of confidentiality undertakings;

(b) the redaction of documents;

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[34] *Softwood Consolidation, Oral Hearing, supra* note 1, p. 157, l. 10-15.

(c) express prohibitions on the use of email or facsimile devices to transmit the confidential documents;

(d) a prohibition on making any copies of confidential information;

(e) to ensure compliance with such obligations, violations are punishable by a significant fine, and the potential prohibition against practicing law before the Tribunal; and

(f) in camera hearings at which only the party giving evidence, counsel who have signed undertakings, and the Tribunal are present.

We understand the United States' provisions are equally thorough and complex.

82. Where such confidentiality provisions have developed, they have been developed very carefully over time for the very purpose of ensuring utmost protection of confidentiality information while limiting the disruption they cause to the efficiency of the particular proceedings. The creation of these processes was efficient because of the economies of scale that come from use and reuse. That is unlike the present case, where such procedures would necessarily be developed on an *ad hoc* basis.

83. In the present case, the point of a confidentiality order would be to keep confidential information from the public, and from the other Claimants. However, counsel cannot effectively prosecute the claims without their clients being aware of the entirety of the record. Yet, given the need for a confidentiality order, confidential evidence could not be provided to the clients without impairing the business operations of the other Claimants. Further, what none of these mechanisms do, is provide a means for redressing the inequality that necessarily results in a consolidated proceeding where the Claimants are unaware of all the evidence led in the proceeding, but the Respondent is.

84. Finally, if this Tribunal orders consolidation, it would have to put in place a confidentiality order that replicates all of the protections created by the mechanisms in these other types of proceedings. In drafting the order it would also have to ensure that Claimants' rights to a fair hearing, and to equality, were not impaired. This will be an enormously complex and difficult task. In fact, fairness and equality cannot reasonably be assured when one is faced with various claimants who are competitors. Their ability to present their cases will necessarily be impaired by the complexity of a confidentiality order. As the *Corn Products* Tribunal said

> *"The Tribunal considers that the competition between the claimants will adversely affect their ability in a consolidated proceeding to be fully able to present their cases. Due process is fundamental to any dispute resolution procedure and the parties should not have to calculate which items of information, evidence, documents and arguments they can share with their competitors and which ones they cannot share. The Tribunal hearing the claim should not have to require separate procedures to accommodate the competitive sensitivity of the evidence and submissions of the different claimants. Under such circumstances, a consolidation order cannot be in the interests of a fair and efficient resolution of the claims. Two Tribunals can handle two separate cases more fairly and efficiently than one Tribunal where the two claimants are direct and major competitors, and the claims raise issues of competitive and commercial sensitivity."*[35]

85. This quote is equally (if not more so) applicable in this case. Possible impairment of Canfor and Terminal's right to a fair hearing alone is more than sufficient reason to deny the United States' request for consolidation especially when separate proceedings will ensure both a fair hearing and equality.

**Question 9:**

Provide chart/matrix comparing claims.

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[35] *Corn Products International Inc. v. United Mexican States* ICSID Case No. ARB(AF)04/5 and *Archers Daniel Midland Company and Tate & Lyle Ingredients Americas Inc. v. United Mexican States*, ICSID Case No. ARB(AF)04/5, Order of the Consolidation Tribunal, May 20, 2005, online: http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Consolidacion/acuerdos/050520_Orden_de_Tribunal_de_Acumulacion.pdf at para. 9. [hereinafter *Corn Products/ALMEX*]]

**Canfor and Terminal Response**

86. The Tribunal has requested that the parties prepare a *"matrix"* placing, on one axis, the legal claims advanced under NAFTA Articles 1102, 1103, 1105 and 1110, on the one hand, and on the other, the claims of each Claimant. The Tribunal has requested that the Claimants prepare a chart which identifies the differences between each of the claims.

87. Canfor and Terminal have endeavoured to do so with the matrix attached as Schedule A to this submission.[36] However, such a table is, in our respectful submission, of little utility, as even to the extent there may be facial similarity in aspects of the claims, the matrix obscures the fact that the essence of each of these claims is by definition different. The use of a matrix in this situation introduces an artificial simplification of what are in fact unique and complex claims. The essential analysis under Article 1126 should not be undermined in that way.

88. The matrix also focuses on the individual components of each of the claims[37] which obscures the collective impact of the United States' conduct on Canfor. It is important to emphasize that it is the impact of the aggregation of United States' actions undertaken arbitrarily, discriminatorily, and abusively upon Canfor and its investments which lies at the core of Canfor's claim. The collective impact upon Canfor is necessarily different than the collective impact on the other Claimants. The same can be said for Terminal.

89. Further, actions of States that are in some way connected with, or dressed up in guise of antidumping actions, are, by definition, particularized to a company as the underlying allegation in those proceedings is that a specific company has exported goods at less than fair market value. It is clear that the evidence to be led by one company in support of a Chapter 11 claim that arises in connection with its treatment by the United States state organs, will not be the same as that led

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[36] This matrix does not attempt to deal with all the allegations in the various claims. It simply uses the various similarities outlined in the United States' original matrix in order to demonstrate that in fact there are fundamental differences amongst the three claims in relation to those items.

[37] The claims of all of the Claimants are for violations of various Chapter 11 provisions by organs of the United States government during the course of the current softwood lumber battle. Other than for certain specific examples relating to measures of general application (such as claims made in connection with the Byrd Amendment as a measure in and of itself), that is where the commonality of the claims ends.

by any other, just as it is clear that a Chapter 11 violation could be found with respect to one company but not with respect to another.

90. Countervailing actions, or actions dressed up in the guise of a legitimate countervailing action are, of course, of much broader application. Nevertheless, they remain specific states acts targeted at specific issues. In this case, the underlying basis for the countervail actions of the United States is subsidies alleged to be provided by stumpage programs administered by Canadian provinces – the British Columbia stumpage program was the target of a countervail action and the Quebec stumpage program was also the target of a countervail action. This is why it is relevant that Canfor and Terminal are British Columbia producers and Tembec is a Quebec producers. The evidence led by Canfor or Terminal in support of their Chapter 11 claims based on the United States' actions dressed up as legitimate CVD actions will not be the same as the evidence led by Tembec.

91. This discussion illustrates the need for commonality rather than mere similarity when considering consolidation. Commonality requires that the question to be disposed of in each case be identical. It is only where that occurs can efficiency be enhanced and fairness not compromised. Consolidation because of the similarity of claims cannot result in increased efficiency as the evidence will not be common, and neither will the ultimate questions before the Tribunal.

92. It is incumbent upon this Tribunal to recognize the reality of the differences underlying the claims made in these Chapter 11 proceedings without being blinded by generalities based on the abstractions contained in the pleadings. To the extent that similar facts may be raised concerning the United States' conduct, those facts are, one would expect, largely uncontested. Each of the Determinations which form the backdrop to the individual claims, clearly say what they say. Each of the Chapter 19 reviews of those decisions, and the United States' actions in response to the remand directions, should be equally uncontested. Facts that are uncontested, or which will take little time in proving at a hearing ought not to form the basis for a consolidation order.

93. In addition to the concerns identified above, the attached matrix is provided with several qualifiers. First, beyond what is set out in the Tembec Notice of Arbitration and Statement of Claim, Canfor and Terminal have no knowledge whatsoever of the claims advanced, or intended to be advanced, by Tembec, nor of the underlying factual or evidential record upon which Tembec will rely. Without the benefit of any discussions with Tembec about the nature of their claim, or how it will be pursued, Canfor and Terminal cannot comment upon it.

94. Second, this comparison is based on the Notice of Arbitrations and Statement of Claims of Tembec and Canfor, and the Notice of Arbitration of Terminal. Obviously those pleadings were drafted without regard to identifying or establishing differences between the particular claimants. Those differences, which have already been discussed at length, relate in particular to the market segments in which the parties operate, the geographic location of the parties, the regulatory regimes under which the parties operate, as well as the differing impact of the various United States actions upon the investors and their differing investments, are all matters that will be addressed in evidence, rather than in a pleading, and necessarily are unique to each claimant.

95. Third, to the extent there is any similarity between the claim advanced by Tembec with that advanced by Canfor, that may well be a function of the fact that the Canfor claim had been made publicly available prior to Tembec advancing its claim, so Tembec would have had the benefit of seeing the pleading and how the claims of Canfor were being advanced. That there may be similarities in pleading does not create common issues of fact or law, however. Nor should Canfor be prejudiced because Tembec took into account Canfor's pleading in formulating its own claim. The fact remains that Canfor and Tembec are very different entities, advancing very different claims.

96. Fourth, the nature and scope of the evidence, as well as the legal issues that will need to be addressed in respect of that evidence, will in each of the claims depend upon, of course, the outcome of the United States' jurisdictional objection.

**Question 10:**

How does present case differ from the *Corn Products* case?

**Canfor and Terminal Response**

97. Although there are a number of significant differences between the *Corn Products* case and this situation, all such differences argue strongly in favour of dismissing the United States' application for consolidation. The key differences between the two situations relate to timing and complexity of the measures at issue in each case.

98. Firstly, in the *Corn Products* case, Mexico requested consolidation in a timely manner that did not render consolidation unfair *a prioi*. While Mexico applied for consolidation at its first opportunity, the United States waited almost a year after Terminal filed its Notice of Arbitration on March 3, 2004, and well over a year after Tembec filed its Notice of Arbitration on December 3, 2003 before applying for consolidation. Further, at the time of Mexico's request, Mexico had not unilaterally brought forward (and fully argued) a substantive matter on jurisdiction in any of the Article 1120 proceedings. Therefore, in the *Corn Products* case there were none of the significant inefficiencies (and unfairness) issues that exist in these cases caused by the United States' strategic decision to bring forward two separate jurisdictional objections in the Article 1120 proceedings.

99. Secondly, even if one accepted that there is some procedural alignment in the Canfor, Tembec and Terminal cases (which Canfor and Terminal do not accept), there was considerably more procedural alignment in the Mexican cases and yet the *Corn Products* Tribunal did not perceive such alignment to be sufficient to require consolidation of those claims.[38]

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[38] Outside of a filing of a single Memorial on State Responsibility, the only substantive steps taken in *Corn Products* and *ALMEX* cases were procedural. Given the briefing schedule that had been established by CPI's 1120 Tribunal, it would seem a relatively simple matter (not creating excessive delay) to allow the ALMEX Shareholders to provide a memorial of their own. *Corn Products International Inc. v United Mexican States*, NAFTA Chapter 11 Arbitration, ICSID Case No. ARB(AF)/04/1, Procedural Order No. 3, March 29, 2005, online: http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Corn/ordenes/orden3.pdf, at para. 7

100. Thirdly, there is a significant difference between the cases in terms of the allegations made. In the Mexican situation the investors each claimed that one measure, that is an act of the Mexican legislature, violated their rights under Chapter 11. In the Canfor, Tembec and Terminal cases each claimant claims that certain administrative actions in relation to numerous and complex matters including the imposition of duties on softwood lumber imports violate their rights under Chapter 11. Notwithstanding the claims of the investors in the Mexican cases by their very nature are far more similar (and contain common questions) than is the case between Canfor, Tembec and Terminal's claim, the *Corn Products* consolidation tribunal found that *"numerous distinct issues of state responsibility . . . confirm[ed] the need for separate proceedings."*[39]

101. Finally, Canfor and Terminal note that it is not only the differences between the circumstances before the *Corn Products* consolidation tribunal and this Tribunal that demand that this Tribunal deny the application for consolidation but the similarity in circumstances as well. As discussed in more detail in previous submissions both situations involve claimants who are competitors and therefore the complex confidentiality issue which ultimately was the determining factor in denying consolidation in the *Corn Products* case is equally applicable in this case.[40]

**Question 11:**

Not used.

**Question 12:**

The disputing parties have been asked to give an estimate of the costs of the three separate proceedings versus one proceeding, and to have that estimate broken down with respect to the

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[39] *Corn Products/ALMEX, supra* note 35, para 15.

[40] In addition, other similarities which were considered important in denying Mexico's request for consolidation also exists here. For example, all of the Claimants in both consolidation proceedings were, and are, against consolidation. In the *Corn Products/ALMEX* award the tribunal deemed this to be a relevant factor in denying consolidation in light of the principle of party autonomy (see paras. 11-12 in the *Corn Products/ALMEX, supra*, note 35).

three phases of jurisdiction, liability, and quantum. The estimates are to be given in rough orders of magnitude to give a realistic indication of costs.

**Canfor And Terminal Response**

102. As all counsel can attest, estimating the cost of litigation with any degree of reliability is notoriously difficult. That is all the more so in a case where one is asked to estimate the costs associated with three cases, without knowledge of the strategies, evidence, issues or arguments intended to be pursued in one of the claims. In the NAFTA context, this would be the first arbitration of its kind, making such a task even more problematic.

103. Accordingly, what can be done is to identify costs which are known to have been incurred in other Chapter 11 claims where that information is publicly available, as well as to examine, with respect to the various steps in the actions, whether more, or less, time and expense will be involved in those steps if the proceedings are consolidated.

104. Some general comments can also be made. Because each of the three Claimants must be represented by its own counsel, and each counsel will prepare and present its own case on behalf of its Claimant, a consolidation provides no substantial savings of Counsel time - the same amount of work must be done on the substantive arguments of the case either way. In fact, consolidation will result in a significant net increase in the resources that will be expended as each Claimant's counsel will have to be present for and respond to the submissions of the other Counsel.[41]

105. Further, the United States will have to prepare to meet all three cases in a consolidated action.[42] The saving in arbitration resources resulting from any decisions that can be made in

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[41] UNCITRAL Arbitration Rules, Art. 15 (online: www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf requires equal treatment as between the Parties. Under a consolidated proceeding, this equal treatment can only be effected if each Claimant was provided the same opportunity as the United States to respond to the arguments of the others. As seen during the oral hearing on consolidation, the positions taken by the Claimants are not necessarily going to be identical.

[42] As noted in the table, the United States will only have to meet two cases if it is successful in its objection based on Art. 1901(3) as in such case, Terminal would not proceed. Additionally, there should be no difference for the United

common (i.e. strictly legal decisions interpreting various NAFTA provisions) will pale in comparison to the additional costs which will inevitably have to be incurred to ensure each Claimant's counsel is aware of, and able to respond to, matters raised by other claimant's counsel. A conservative estimate would be an increase of between 25-100% in extra expense to each Claimant under a consolidation process. The effect on Counsel for the United States would at best be neutral.[43]

106. While there is no doubt that greater time and expense will be incurred in a consolidated proceeding, the burden is borne disproportionately by claimants, as each retain private counsel, compensated on the basis of hourly rates charged by them. By contrast, the United States is represented by salaried in-house counsel, dedicated to the defence of Chapter 11 claims and whose costs are, accordingly, substantially lower.

107. Furthermore, arbitration costs for a consolidation tribunal will be considerably more than that of a single Article 1120 tribunal due to the increased number of submissions to be reviewed, increased complexity of the process (discussed in detail above), the necessity of procedural rulings which inevitably will arise, and the additional length of time in hearings.

108. With respect to arbitration costs, one could conservatively estimate that a consolidation tribunal would incur at least double the costs of a single Article 1120 Tribunal.

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States on preparation of its defences whether the three actions are heard separately or together as in either case the United States will be required to prepare defences to each of them.

[43] In terms of order of magnitude, publicly available documents in connection with the *Methanex v. US* arbitration indicate that *Methanex* incurred costs in the order of US$11-12 million dollars to prosecute that claim, including arbitration costs, (See: http://www.state.gov/documents/organization/34640.pdf) while the United States has indicated that it has incurred total costs of US$3 million. Total arbitration costs would appear to be approximately US$2 million. (See: http://www.state.gov/documents/organization/34641.pdf) In the *S.D. Myers v. Canada* arbitration, the Investor claimed costs of CAN$3.5 million, while Canada indicated its counsel had spent hours equivalent to the Claimant's counsel. (See: http://naftaclaims.com/Disputes/Canada/SDMyers/SDMyersCostsAward.pdf and http://.naftaclaims.com/Disputes/Canada/SDMyers/SDMyersSeperateOpinionCosts.pdf) In the *Pope & Talbot v. Canada* arbitration, Investor legal costs claimed were US$4.2 million, and costs claimed by Canada were US$4 million. (See: http://naftaclaims.com/Disputes/Canada/Pope/PopeAwardOnCosts.pdf) The Tribunal costs in both the *Myers* and *Pope & Talbot* arbitrations were approximately $1.5 million.

**Question 13:**

Claimants provide three examples or less where consolidation would apply.

**Canfor and Terminal Response**

109. Examples of where consolidation may be appropriate in Chapter 11 cases is in relation to the following legal requirements:

- definition of investments (shared investments by different investors),
- definition of investors (related corporate entities as *"investors"*), and
- the phrase *"events giving rise to a claim"* in Article 1120.

110. The example of the *CME* and *Lauder* arbitrations against the Czech Republic[44] provides three examples of instances where consolidation may be appropriate in relation to these legal requirements.[45] In those claims, Mr. Lauder, the controlling shareholder of CME, brought a separate and personal arbitration claim under another treaty against the Czech Republic at roughly the same time CME brought its own claim. The subject matter and legal grounds underlying the two arbitrations were essentially identical, with the main differences being that the arbitrations were under different treaties brought by different, if related, claimants with respect to the same investment. While Mr. Lauder lost his arbitration, CME won handsomely against the Czechs.

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[44] *CME Czech Republic B.V.* v. *Czech Republic*, Final Award, March 14, 2003 (UNCITRAL, Netherlands/Czech Republic BIT)("CME"). See: http://www.investmentclaims.com/decisions/CME-Czech-FinalAward- 14Mar2003.pdf; and *Ronald S. Lauder* v. *Czech Republic*, Final Award, September 3, 2001 (UNCITRAL, United States/Czech Republic BIT)("Lauder"). See: http://www.investmentclaims.com/decisions/Lauder-Czech-FinalAward-3Sept2001.pdf.

[45] Although not sufficient to meet the requirements of *res judicata* in the Svea Appeal Court's review of the CME Tribunal's award, the claimants in both the CME and Lauder arbitrations proposed that the two arbitrations be consolidated. The Respondent rejected these overtures. See: Review by Svea Court of Appeal, 15 May 2003, at 69-71: http://www.investmentclaims.com/decisions/CME-Czech-AppealofFinalAward2003-15May2003.pdf

111. The first example provided by these arbitrations relates to the alignment of investments.[46] If the two claims had been made under the provisions of NAFTA Chapter 11, consolidation would have been particularly appropriate as the facts concerning a shared investment were anticipated in Article 1117(3) which provides:

> *"3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby."*[47]

112. A second example of a fact pattern which may be appropriate for consolidation concerns the identity of claimant *"investors"*. In the case of Article 1126, and in light of Articles 1116 and 1117, it is clear that the NAFTA anticipates the possibility of multiple investors being able to bring a Chapter 11 claim through a broad category of investment vehicles in the same enterprise.

113. As recent case law has shown,[48] and consistent with the Article 1139 definition of *"investment of an investor of a Party"*,[49] legally distinct, but related, investors may make separate claims. The *CME* and *Lauder* arbitrations provide the example of related corporate entities bringing separate claims and why consolidation in such a circumstance might be appropriate. One investor, like Mr. Lauder, may be the controlling investor of the investment,

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[46] It is important to keep in mind the definition of investment in Article 1139 as there are many examples of situations in which multiple investors could have shared involvement in *"investments"* and *"enterprises"*. For example, a single enterprise could be subject to investments in the form of equity security, debt security, loans, or an interest in an enterprise that entitles the owner to share profits. In addition, as set out in Article 201(1), an *"enterprise"* can include not only the corporate form, but be a trust, partnership, sole proprietorship, joint venture or *"other association"*.

[47] Recall that Article 1116 permits an investor with a non-controlling shareholding to make a claim on its own behalf, while Article 1117 permits the controlling or owning investor to make a claim on behalf of the entire enterprise/ investment that is the subject of the claim.

[48] The question of the standing of shareholders to bring investment claims has recently been raised in numerous jurisdictional decisions under bilateral investment treaties, in particular with respect to BITs involving Argentina. In these cases, the respondents objected to the standing of the claimants on the basis that they were merely an indirect shareholder and as such did not have the status to bring a claim separately from the entity with the direct investment: (See eg.: *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, Decision on Jurisdiction, August 2, 2004 (ICSID Case No. ARB/01/3) (http://ita.law.uvic.ca/documents/Enron-DecisionJurisdiction-Final-English.pdf) at para. 17. This principle has also been applied in Chapter 11 arbitrations. See eg: *GAMI Investments, Inc. v. United Mexican States*, Final Award, November 15, 2004 (http://naftaclaims.com/Disputes/Mexico/GAMI/GAMIFinalAward.pdf) at para. 26.

[49] Article 1139 provides: *"**investment of an investor of a Party** means: an investment owned or controlled directly or indirectly by an investor of such a party."* [bold in original]

but it is possible that there are also intermediate related entities, like *CME*, in the corporate family that may also be considered *"investors"* in the same investment. Because of the risk of overlapping damage awards in such a situation, it makes sense that such claims by related investors might be an appropriate situation for consolidation.

114. The third example of where consolidation could apply relates to the phrase in Article 1120*"events giving rise to a claim"*. Under that Article, when a claimant submits its claim to arbitration, it is required that six months will have elapsed since the *"events giving rise to a claim"*. Article 1117(3) makes it clear that consolidation should be considered when separate Article 1116 and 1117 claims are made *"arising out of the same events that gave rise to the claim"*.

115. Accordingly, the events giving rise to a claim, in particular as those events relate to *"measures"*, become an important factor in determining factual commonality. These *"events"* must by definition also be directly related to who the investors are, the nature of the investment, and the *"loss or damage"* incurred by each investor and its investment. In the examples above, in addition to there being some form of alignment with respect to investors and investments, there may also be a commonality concerning the events giving rise to a claim. Again, the *CME* and *Lauder* claims provide an example of the convergence of these factors that would support consolidation. In particular, in those cases the conduct of government officials that was directed at the shared investment was by definition common as between the cases.

**Question 14:**

Where do consolidation proceedings pick up if they are ordered - if you resume where the others stopped, what happens with the jurisdictional objections? and What happens with Terminal?

**Canfor and Terminal Response**

116. Canfor and Terminal submit that consolidated proceedings must pick up at the stage at which those proceedings are. So, for instance, if a jurisdictional award had been issued in Canfor,

and the proceedings were subsequently consolidated, Canfor could not be compelled to revisit jurisdiction, although a different claimant, who had not addressed jurisdiction, could not be deprived of their right to raise it. Similarly, Terminal cannot be deprived of its right to articulate a claim in a statement of claim.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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July 22, 2005

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