

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

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

Claimants/Investors,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**RESPONSE OF RESPONDENT UNITED STATES OF AMERICA
TO TEMBEC'S MOTION TO DISMISS**

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UNITED STATES DEPARTMENT OF STATE

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On behalf of respondent United States of America, and in accordance with the Tribunal's letter of July 5, 2005, we respectfully provide observations on the motion to dismiss of Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. (collectively "Tembec") dated June 27, 2005. The United States respectfully requests that the Tribunal deny Tembec's frivolous motion and award costs to the United States.¹

Below, the United States first addresses Tembec's objection based on Article 21(3) of the UNCITRAL Arbitration Rules. Next, the United States addresses Tembec's arguments that jurisdiction should be declined because Article 1126 of the NAFTA has

¹ Tembec's filing of its unauthorized motion and its request for a stay is difficult to square with Tembec's supposed desire for a prompt resolution of its claim. Its filing is also difficult to reconcile with Tembec's representation at the June 16 hearing that it would be unable to file its post-hearing submission in less than four weeks due to conflicting demands. See June 16, 2005 Hearing Transcript ("Hrg. Tr.") at 333:19-334:7.

“ethical problems.” Finally, we briefly comment on Tembec’s assertions concerning its access to publicly available documents.

A. *The United States Is Not Barred From Requesting Consolidation*

Tembec’s contention that the United States has waived its right to seek consolidation by not raising the issue in its statement of defense is baseless. Its argument rests on the mistaken premise that a request for consolidation under Article 1126 is a “plea that the arbitral tribunal does not have jurisdiction” within the meaning of Article 21(3) of the UNCITRAL Rules. That argument fails under the plain terms of the UNCITRAL Rules and the NAFTA.

The mere possibility that a tribunal established under Article 1126 may in the future assume jurisdiction over all or part of a claim is not a defense to the jurisdiction of an existing Article 1120 tribunal. In requesting consolidation, a party does not contend that “the particular dispute does not fall within the scope of the parties’ [arbitration] agreement,” that “the arbitrators were not validly authorized to function as arbitrators” or that an arbitration agreement is non-existent or invalid.² Rather, a request for consolidation is a request that the Article 1126 tribunal prospectively assume jurisdiction over all or part of claims pending before one or more Article 1120 tribunals. Unless and until an Article 1126 tribunal assumes jurisdiction over all or part of those claims, the

² See *Report of the Secretary-General: preliminary draft set of arbitration rules for optimal use in ad hoc arbitration relating to international trade*, [1976] 7 UNCITRAL Y.B. 174, U.N. Doc. A/CN.9/112/Add.1/1976. By contrast, with respect to the United States’ jurisdictional objections based on Articles 1901(3) and 1101(1) of the NAFTA, the United States asserts that claimants’ antidumping and countervailing duty claims do not fall within the scope of the parties’ agreement to arbitrate under Chapter Eleven. Likewise, with respect to its objection based on Article 1121(1), the United States asserts that an agreement to arbitrate is non-existent with respect to two of the claimants that failed to comply with a condition precedent to the submission of their claims.

Article 1120 tribunals retain jurisdiction to hear them.³ Article 21(3) of the UNCITRAL Rules is therefore inapplicable.

Tembec's interpretation of the NAFTA and the UNCITRAL Rules is not only at odds with the very nature of jurisdictional pleas, but would lead to anomalous results. *First*, while consolidation under Article 1126 is available to both respondents and claimants, Tembec's interpretation would impose a temporal limitation on the right of respondents to seek consolidation that would not apply to claimants, since the latter do not file statements of defense and thus are not subject to Article 21(3).⁴ Such a temporal limitation on respondents would be inconsistent with Article 1126's purpose, which is primarily "intended to relieve a *State Party* from the hardship of having to defend multiple claims arising from the same measure."⁵

Second, Tembec's interpretation would all but eliminate respondent Parties' ability to seek consolidation in many cases. Consolidation would not be available unless two claims were filed before a respondent filed a statement of defense in either case.⁶

³ Nothing in Article 21(3) prevents the later assertion of jurisdictional defenses based upon facts or circumstances that did not exist at the time of the filing of the statement of defense. Indeed, a decision of an Article 1126 tribunal to assume jurisdiction over a case would serve as a ground for objecting to the subsequent assertion of continuing jurisdiction over the case by an Article 1120 tribunal, even though made after the filing of a statement of defense in the Article 1120 proceeding.

⁴ Claimants are subject to Article 21(3) of the UNCITRAL Rules only to the extent that a respondent Party files a counterclaim, a situation not relevant here.

⁵ Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 ARB. INT'L 393, 412 (2000) (emphasis added). Support for this notion is also found in the negotiating history for Article 1126, which demonstrates that the Parties originally contemplated that only respondent Parties would need to resort to consolidation, and provided for claimants to seek consolidation only in subsequent drafts. Compare June 4, 1992 Draft, Article XX07(7) (allowing only respondent Parties to seek consolidation) with August 4, 1992 Draft, Art. 2129 (providing that all disputing parties may request consolidation), available at http://www.ustr.gov/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Triilateral_Negotiating_Draft_Texts/Section_Index.html.

⁶ The *Canfor* tribunal apparently disagrees with Tembec's interpretation as well. At the December 7-9, 2004 hearing in that case, the tribunal informed the parties that it was aware of other cases raising similar issues with respect to the same U.S. antidumping and countervailing duty measures. President Gaillard requested that the parties consider the possibility of consolidation under Article 1126, notwithstanding that

Any claimant wishing to avoid consolidation would only have to wait until a respondent filed its statement of defense in another case before submitting its claim to arbitration.⁷ Nothing in the text of the NAFTA suggests that the Parties intended to restrict Article 1126's application in such a manner.

Tembec's objection is utterly meritless and should be dismissed.

B. *Tembec's Facial Challenge To Article 1126 Cannot Succeed*

Tembec's request for a dismissal of the United States' consolidation request on the basis that Article 1126 is facially defective is without merit. *First*, Tembec is seeking relief that is beyond the Tribunal's power to grant. A tribunal established under Article 1126 is empowered to determine whether to assume jurisdiction over all or part of certain claims. If it assumes jurisdiction, a consolidation tribunal, like all Chapter Eleven tribunals, is authorized to determine whether measures adopted or maintained by a NAFTA Party violate certain provisions of Section A of Chapter Eleven. It may award only monetary damages, and may not rule on the validity or constitutionality of any part of the Treaty or a Party's law.⁸ Tembec's request that the Tribunal dismiss these proceedings on the basis that Article 1126 is inherently flawed should be rejected.

the United States had already submitted its statement of defense on jurisdiction. *See Canfor Corp. v. United States of America*, Transcript of Hearing on Jurisdiction, Day 1 at 16:10-19, 17:8-16, 18:19-19:10, Day 3 at 767:19-769:2, 773:15-774:4 (Dec. 7, 2004) Neither the tribunal nor Canfor suggested that Article 21(3) of the UNCITRAL Rules barred the United States from invoking its rights under Article 1126.

⁷ Moreover, Tembec's interpretation would vary the timeframe in which a respondent Party could seek consolidation by virtue of the arbitration rules chosen by claimants. For example, under the ICSID Additional Facility Rules, a respondent Party may raise an objection to the competence of the tribunal no later than in its counter-memorial. *See* ICSID Additional Facility Rules art. 45(2). Pleas to the jurisdiction of a tribunal established under the UNCITRAL Arbitration Rules, however, must be made no later than in the statement of defense, which is typically ordered relatively early in the proceedings. *See* UNCITRAL Arbitration Rules, art. 23 ("The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defense) should not exceed forty-five days.").

⁸ A Chapter Eleven tribunal may award restitution, but must allow the respondent Party the option of paying monetary damages in lieu of restitution. *See* NAFTA art. 1135(2).

Second, even if the Tribunal were so empowered, Tembec’s challenge to Article 1126 is futile. By submitting its claim to arbitration under Chapter Eleven, Tembec “consent[ed] to arbitration in accordance with the procedures set out in [the NAFTA]” – including the procedure for consolidation in Article 1126.⁹ Tembec’s contention in its motion that it “did not knowingly or willingly consent” to that provision is without foundation.¹⁰

Third, Tembec’s contention that Article 1126 has “ethical problems” is in any event misguided. Tembec contends that it has been unfairly deprived of its choice of arbitrator. As noted, however, Tembec fully consented to the Article 1126 process – including the possibility that the tribunal members would be chosen from ICSID’s roster of arbitrators in the event that a request for consolidation was made.¹¹ Tembec’s argument that Article 1126 improperly presents the Tribunal with “personal pecuniary incentives to favor consolidation” is also baseless.¹² The United States faces the analogous situation in every arbitration – including this one – in which it seeks to dismiss claims for lack of jurisdiction, and requests that its plea be ruled on as a preliminary question.¹³ Tembec’s argument thus is not unique to Article 1126 consolidation.¹⁴ Rather, it is an indictment of the arbitration process generally.

⁹ Tembec’s Notice of Arbitration and Statement of Claim dated Dec. 3, 2003 ¶ 11.

¹⁰ Motion at 14.

¹¹ Tembec in any event overstates the supposed imbalances in the Article 1126 appointment process. As in the *High Fructose Corn Syrup* (“HFCS”) consolidation proceeding, claimants here exercised a significant degree of control over the selection process by objecting to many of the arbitrators proposed by ICSID. Moreover, like claimants, the United States did not have an opportunity to choose an arbitrator to adjudicate this dispute. Rather, that decision was made by ICSID.

¹² *Id.* at 15.

¹³ Tembec apparently concedes this analogy by citing to William Park’s comment that arbitrators may “be more likely than courts to *find jurisdiction*, since arbitrators get paid if they hear a dispute.” Motion at 16 (citing to William W. Park, *Bridging the Gap in Forum Selection: Harmonizing Arbitration and Court Selection*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 19, 50 (1999)) (emphasis added).

It is an inherent feature of arbitration that the parties place their trust in the tribunal to rule in accordance with the merits of the dispute, and not in accordance with the personal interests of its members. If Tembec is so distrustful of arbitrators' motivations, the United States respectfully suggests that it would have been better served to have chosen a different forum for its claims.

C. *Tembec Errs In Asserting That It Has Been Denied Access To Documents*

Finally, Tembec's complaint in its motion that the United States somehow has denied it access to publicly available documents is without merit. Mexico posted the *HFCS* materials to its website shortly after the *HFCS* tribunal issued its May 20, 2005 order.¹⁵ Tembec thus had access to those documents approximately two weeks before its June 10 submission, and nearly three weeks before the June 16 hearing. The United States was surprised by claimants' assertions at the hearing that they did not have access to those materials, especially in light of Tembec's reliance on the *HFCS* proceedings in its pre-hearing correspondence and submission.¹⁶ Likewise, Tembec's assertion that it has been denied access to documents concerning a supposed consolidation proceeding in

¹⁴ Tembec's reliance on the *High Fructose Corp Syrup* ("*HFCS*") consolidation proceeding is also misplaced. Tembec offers mere speculation that the parties in that case deviated from the consolidation process because they concluded that Article 1126 was inherently flawed. There is no basis for the Tribunal to draw such an inference. In any event, the inference that Tembec seeks to draw cannot justify the action that it requests, which is beyond the Tribunal's jurisdictional reach.

¹⁵ Those materials include a transcript of the public hearing on consolidation held at the World Bank on April 18, 2005. See http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Consolidacion/Corn_consolidacion.htm. As the Tribunal indicated, those materials were also available on other websites. See Hrg. Tr. at 1116:13-1117:11. Tembec's suggestion in its motion that the United States intentionally delayed creating a hyperlink to Mexico's website to avoid disclosing those materials to claimants is without foundation and irresponsible. See Motion at 13 & n.21.

¹⁶ See Tembec Letter of June 8, 2005 nn. 1 & 2 (describing the *HFCS* consolidation proceeding, including the nature and schedule of briefing); Tembec Submission In Opposition To Request For Consolidation of June 10, 2005 nn. 29 & 62 (citing Order of the *HFCS* consolidation tribunal of May 20, 2005). Moreover, the United States provided copies of the *HFCS* arbitration materials to claimants. See United States Submission in Support of Request for Consolidation of June 3, 2005 (attaching copies of the Order of the Consolidation Tribunal of May 20, 2005 and Opposition of Corn Products to Mexico's Request for Consolidation of April 11, 2005).

the *Cases Regarding the Border Closure Due to BSE Concerns* is baseless speculation.¹⁷
In fact, no consolidation request has been made by any party in those cases.

At the June 16 hearing, the Tribunal directed Tembec to make an application to the Tribunal to the extent it sought access to any specific document not in the public domain. Tembec has failed to make any such application. Tembec's continued complaints that it is disadvantaged by its purported lack of access to relevant documents is unfounded and provides no support for its request.

For the reasons set forth above, the United States respectfully requests that the Tribunal deny Tembec's motion in its entirety and direct that Tembec bear the costs incurred by the United States associated with responding to the motion.

Respectfully submitted,

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¹⁷ See Motion at n.26.