

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)**

**SUBMISSION OF CANFOR CORPORATION
OPPOSING REQUEST OF UNITED STATES
FOR CONSOLIDATION OF THE CLAIMS OF
CANFOR CORPORATION, TEMBEC INC. ET AL AND
TERMINAL FOREST PRODUCTS LTD.**

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

P. John Landry
Phone: 604.643.2935
Fax: 604.605.3588

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

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

COUNSEL TO CANFOR CORPORATION

June 10, 2005

INDEX

	Page No.
I. INTRODUCTION	1
II. OVERVIEW OF CANFOR POSITION	3
III. OVERVIEW OF RESPONSE TO UNITED STATES' SUBMISSION	4
IV. ARTICLE 1126(2) AND (3) OF NAFTA	5
V. RELEVANT FACTS RELATING TO STATUS OF PROCEEDINGS	5
A. Introduction	5
B. Canfor Corporation Proceeding.....	6
C. Terminal Forest Products Ltd. Proceedings.....	12
D. Tembec Inc. Proceedings.....	12
VI. LEGAL PRINCIPLES APPLICABLE TO CONSOLIDATION	13
VII. THE UNITED STATES HAS FAILED TO SATISFY ARTICLE 1126(3)	14
VIII. THE UNITED STATES HAS FAILED TO ESTABLISH THE EXISTENCE OF COMMON QUESTIONS OF FACT OR LAW	16
A. Requirement for common questions.....	16
B. Common questions relating to jurisdiction.....	17
C. Common questions of law.....	19
D. Common questions of fact.....	20
IX. IT IS NOT NECESSARY FOR THE FAIR AND EFFICIENT RESOLUTION OF THE CLAIMS FOR CONSOLIDATION TO OCCUR	21
A. The cases raise different issues.....	21
B. The Softwood Lumber industry is intensely competitive.....	23
C. Consolidated proceedings will be unworkable.....	24
D. The United States conduct in bringing an application for consolidation at a late date justifies denying the application	26
E. Canfor should not be required to reargue the jurisdictional objection	30
F. Cost considerations warrant denying the consolidation application.....	31
G. Consolidation will result in delay.....	32
H. The Parties ought to be able to choose their own arbitrators.....	33
I. There is no risk of inconsistent decisions.....	34
X. CONCLUSION	35

I. Introduction

1. In accordance with the direction of the Tribunal outlined in Mr. Flores letter of May 19, 2005,¹ as modified by his subsequent correspondence dated June 1, 2005,² concerning the filing of written submissions responding to the United States' application for consolidation under NAFTA Article 1126,³ Canfor Corporation ("Canfor") makes the following submissions.

2. Canfor opposes the United States' application to this Tribunal to consolidate its proceeding with those proceedings being prosecuted by Tembec Inc. ("Tembec") and Terminal Forest Products Ltd. (Terminal). This application by the United States is yet another attempt by it to delay, to hinder, and to frustrate Canfor's right to pursue their proceedings under NAFTA Chapter 11.⁴ Rather than advancing the NAFTA's objective of creating effective procedures for the resolution of disputes arising under NAFTA,⁵ the United States, by its conduct, is impeding the efficient resolution of Canfor's claim.

3. Canfor submits that in light of that lengthy history, it lies ill for the United States to now assert, after the parties have fully briefed and argued the jurisdictional objection the United

¹ *Canfor Corporation v. United States of America*, Arbitration under Chapter 11 of the *North American Free Trade Agreement*, *Terminal Forest Products Ltd. v. United States of America*, Arbitration under Chapter 11 of the *North American Free Trade Agreement*, *Tembec Inc. et al. v. United States of America*, Arbitration under Chapter 11 of the *North American Free Trade Agreement*; letter from Mr. Flores of ICSID, May 19, 2005.

² Letter from Mr. Flores, June 1, 2005 to United States of America, Canfor, Tembec et al and Terminal.

³ *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico, and the Government of the United States*, 17 December 1992, Can T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA]

⁴ In Canfor's case, that conduct has included: unilaterally determining that Canfor's claim had not been properly brought thus further delaying its prosecution (see Appendix, Tab 1); challenging Canfor's nominee to the Tribunal; delaying in the appointment of its first nominee (see Appendix, Tab 3); resisting production of negotiating texts and negotiating documents; resisting the production of a statement of defence; insisting upon bifurcation of the proceedings, delaying in and failing to appoint a replacement arbitrator when its nominee resigned; seeking a stay of Canfor's claim, and now bringing this application for consolidation.

⁵ NAFTA, *supra* note 3, Art. 102(1)(e)

States had brought before a consensually appointed tribunal⁶ (which argument was heard long after the Tembec and Terminal claims were initiated),⁷ and after making repeated representations that it did not wish consolidation to occur,⁸ that it is in the interests of either “fair” or “efficient” dispute resolution to consolidate Canfor’s claim (which is significantly advanced) with that of Terminal (in which only a Notice of Arbitration has been filed) and with Tembec, a major competitor.

4. This submission proceeds by (1) outlining the status of and relevant factual circumstances concerning the various proceedings; (2) identifying the applicable legal principles that should guide this Tribunal; (3) responding to the United States’ submission that there are common questions of fact or law in issue in the proceedings; and (4) demonstrating that it is in the interests of neither the fair nor efficient resolution of these proceedings for consolidation to occur.

5. This submission is also made without prejudice to Canfor’s position that the Tribunal’s direction that submissions on this critical application be filed on an expedited basis, without knowing the facts and legal issues which the United States says are common to the three proceedings, and where there is no urgency requiring that expedited schedule, has denied Canfor

⁶ *Canfor*, Objection to Jurisdiction of Respondent, United States, October 16, 2003; *Canfor*, Reply to the United States’ Objection to Jurisdiction, May 14, 2004; *Canfor*, Reply on Jurisdiction of Respondent, United States, August 6, 2004; *Canfor*, Rejoinder on Jurisdiction of the Claimant, Canfor, September 24, 2004; *Canfor*, Volume 1 of Transcript of hearing on jurisdiction, December 7, 2004; *Canfor*, Volume 2 of Transcript of hearing on jurisdiction, December 8, 2004; and *Canfor*, Volume 3 of Transcript of hearing on jurisdiction, December 9, 2004 (“*December 9 Transcript*”), all online at http://www.naftaclaims.com/disputes_us/disputes_us_2.htm.

⁷ To the best of Canfor’s understanding, the Notice of Intention in *Tembec* was filed with the United States on May 3, 2002 and the Notice of Intention in *Terminal* was filed with the United States on June 12, 2003 - both prior to the United States’ objection to jurisdiction in *Canfor*. The Notice of Arbitration and Statement of Claim in *Tembec* was filed with the United States on December 2, 2003, prior to a schedule being set for submissions on the United States’ Objection to Jurisdiction in *Canfor* and well before Canfor’s Reply to the United States’ submission. The Notice of Arbitration in *Terminal* was filed with the United States on March 14, 2003, also well before Canfor’s reply to the United States Objection to Jurisdiction.

⁸ See eg. *December 9 Transcript* at pp. 770 and 772.

an opportunity to fully present its case to the Tribunal. Given the limited time frame available and the importance of this proceeding, Canfor's ability to advance a fully responsive submission has been significantly impaired as Canfor has not been provided with a reasonable opportunity to prepare for this application.⁹

II. Overview of Canfor Position

6. Canfor respectfully submits that there is no basis upon which this Tribunal should conclude that the requirements of Article 1126(2) have been satisfied. More specifically, the Tribunal should not be "satisfied" that the three proceedings have "question[s] of law or fact in common"¹⁰ that, "in the interests of fair and efficient resolution of the claims"¹¹ ought to be heard and determined together. Moreover, the markedly different status of each of the proceedings, the significant time and expense that has already been incurred by Canfor, and the procedural challenges any consolidated proceeding would create, also warrant dismissing the application. Finally, the conduct of the United States in delaying any consolidation application and repeatedly representing it did not intend to consolidate, militate against consolidation. The putative basis upon which the United States seeks to justify, or at least rationalize, its late application to consolidate the three proceedings, namely the withdrawal of an arbitrator from Canfor's proceeding during its deliberations, do not withstand scrutiny, when *all* of the other arguments on which the United States seeks to rely could easily have been made long ago.

⁹ In that regard, we note that an electronic copy of the United States' submission was not even sent until the early morning on Saturday, June 4, 2005, which did not include either the schedule attached to the submission or the appendix (or even an index thereto), that the appendix was not received by Mr. Landry until Tuesday, June 7, 2005 (four days after the Tribunal's deadline), and that the United States misdirected the package intended for Mr. Mitchell, which did not arrive until Wednesday June 8, 2005, only two days prior to the submission of our response being due. We note as well that even within that short time frame, ICSID or the Tribunal has also been requesting submissions be filed concerning Mr. Robinson's appointment as well as the procedural conduct of the June 16, 2005 hearing.

¹⁰ NAFTA, *supra* note 3, Art. 1126(2)

¹¹ *ibid.*

III. Overview of Response to United States' Submission

7. The United States' submission in support of its application for consolidation contains irrelevant and inaccurate statements, statements that mischaracterize the nature of the claims made by Canfor, and statements that, through the selective exclusion of relevant facts, give rise to an inaccurate picture of the proceedings to date. Accordingly, as necessary, those mischaracterizations and inaccuracies are corrected throughout the course of this submission.

8. Canfor also wishes to record its objection to the United States selectively placing certain materials, unavailable to the Claimants, before the Tribunal. The unfairness is patent. By way of example, the United States has placed the submission of Corn Products International, Inc.,¹² and the Consolidation Tribunal's order rejecting that application,¹³ before the Tribunal. However, despite that it has access to these materials and the Claimants do not, it has not put any of the other submissions, (for instance, of ADM/Tate & Lyle, or of Mexico), before this Tribunal, nor provided copies of them to the Claimants. The Claimants are not, therefore, in a position to respond to the material so selectively placed before this Tribunal, and extreme caution should be exercised before any reliance is placed upon it. The Tribunal can have no confidence that the material before the *Corn Products* Consolidation Tribunal, which is the only other proceeding in which a consolidation application has been made, is fairly represented by the material provided by the United States.

9. More fundamentally, however, it is Canfor's submission that the United States' has failed to meet even the bare threshold upon which any consolidation could be ordered. The United States has not articulated, let alone established the existence of, sufficient common questions of

¹² See Tab 8 of United States Appendix to Submission in Support of Request for Consolidation

¹³ *Corn Products International v. United Mexican States*, Order of the Consolidation Tribunal, ICSID Case No. Arb(AF)/04/1, May 20, 2005.

fact or law in dispute that require consolidation for the fair and efficient resolution of these proceedings. And, it has failed to give any consideration to the myriad differences between the claims, the claimants and their investments. Accordingly, the Tribunal should dismiss its application and order the United States to pay the full costs of this consolidation proceeding, including counsel fees, forthwith.

IV. Article 1126(2) and (3) of NAFTA

10. For ease of reference, Article 1126(2) and (3) provide:

1126(2). Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims; or

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General to establish a Tribunal and shall specify in the request:

(a) the name of the disputing Party or disputing investors against which the order is sought;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.¹⁴

V. Relevant Facts Relating to Status of Proceedings

A. Introduction

11. As noted, the United States has a unique advantage in pursuing this consolidation application, as in addition to the information it has in connection with other NAFTA proceedings (such as Corn Products), which it obtains by virtue of its status as a signatory to NAFTA, it has

¹⁴ NAFTA, *supra* note 3

access to information relating to each of the proceedings that is unavailable to Canfor. Other than the various correspondence which we as counsel for Canfor have received during the consolidation process, or that the United States has now included in their Appendix to their submission on this application, Canfor is limited in its access to information about Terminal and Tembec and their proceedings to only that information which has been made publicly available by the parties to those claims. Accordingly, Canfor is unable to comment knowledgeably about matters which may have arisen in the Tembec proceeding or before the Tembec tribunal, as neither transcripts of any proceedings before it nor any of its procedural orders have been made available to us. These submissions are, accordingly, made based upon the limited scope of the information that Canfor has.

B. Canfor Corporation Proceeding

12. The Canfor proceeding is the most advanced of the three proceedings which the United States seeks to consolidate. Canfor delivered its Notice of Intention to initiate a claim against the United States over three and a half years ago, on or about November 5, 2001. It submitted its Notice of Arbitration and Statement of Claim in July 2002, some 35 months ago, which the United States unilaterally asserted was not properly brought until November 2002.¹⁵ The proceedings were then further delayed while the United States challenged the constitution of the Tribunal, and in particular, Canfor's appointment of the Honourable Frank McKenna to it. After the Tribunal was finally constituted, the United States, in October 2003, raised an objection to the Tribunal's jurisdiction to adjudicate Canfor's claim, on the basis that the matters of which

¹⁵ See Appendix, Tab 1

Canfor complained were the subject exclusively to dispute resolution under NAFTA Chapter 19.¹⁶

13. Between October 2003 and December 2004, the parties then addressed a number of procedural issues, including a strongly contested dispute over production of the negotiating texts of the NAFTA and other documents created during the negotiating process, which resulted in directions by the Tribunal that the United States produce for the Tribunal extensive documents relating to the negotiating history of the NAFTA.¹⁷ Concurrently, the parties embarked upon an extensive briefing of the jurisdictional issue raised by the United States.

14. The United States argued that the question of jurisdiction should be treated as a preliminary matter.¹⁸ Canfor, on the other hand, argued that jurisdiction should be joined to merits and that the United States should be required to file a Statement of Defence.¹⁹ In the course of its briefing on this issue, the United States said:

Canfor's main argument for a statement of defence is that it would "ensure that all jurisdictional issues that the United States intends to raise are articulated now." Because the UNCITRAL Arbitration Rules require that objections to jurisdiction be raised "no later than in the statement of defence," requiring the submission of that document, Canfor argues, would prevent the United States from continually raising new jurisdictional objections. Canfor contends that its fear of such an event is well founded based on a reservation of rights in the United States' Objection to Jurisdiction. This argument is without merit.

¹⁶ *Canfor*, Objection to Jurisdiction of Respondent, United States, October 16, 2003, online: www.naftaclaims.com/disputes_us/disputes_us_2.htm

¹⁷ The negotiating documents produced amounted to thousands of pages of material, all of which were reviewed by the Canfor Tribunal and the parties for the purposes of arguing the United States' Objection to Jurisdiction.

¹⁸ *Canfor*, United States of America's Submission on Place of Arbitration, Bifurcation and Filing of a Statement of Defence of Respondent United States, November 25, 2003; and *Canfor*, United States of America's Rejoinder Submission on Place of Arbitration, Bifurcation and Filing of a Statement of Defence of Respondent United States, December 11, 2003, online at http://www.naftaclaims.com/disputes_us/disputes_us_2.htm.

¹⁹ *Canfor*, Investor's Submission on Place of Arbitration and Request that the United States Provide a Statement of Defence, November 11, 2003; and *Canfor*, Investor's Reply Submission on Place of Arbitration and Request that the United States Provide a Statement of Defence, December 3, 2003, online at http://www.naftaclaims.com/disputes_us/disputes_us_2.htm.

The only jurisdictional argument the United States is making – and, to be clear, *the only one for which it seeks preliminary treatment* – is the one stated in its Objection to Jurisdiction. In that document, the United States reserved its rights “to contest the merits at a later time should it be necessary, as well as to defend the case on grounds that Canfor has not proven elements of its case that could be considered jurisdictional.” As the United States explained at the October 28 hearing, it made that reservation simply as a precaution against any future argument that it has waived its rights with respect to factual defences that could be construed to have jurisdictional aspects. Given that the United States seeks preliminary treatment only for the objection stated in its Objection to jurisdiction, the question whether any other defence is of a jurisdictional or merits nature is purely academic as it would in no way affect the shape of these proceedings....[emphasis in original]²⁰

15. Later, it said:

Finally, contrary to Canfor’s assertion, as in UPS, the United States has confirmed that it has made all the jurisdictional objections that it intends to make.²¹

16. On January 23, 2004, the Tribunal determined to bifurcate the jurisdictional issue raised by the United States. However, it also said:

Indeed, the Tribunal shares the Claimant’s legitimate concern that “all jurisdictional issues that the United States intends to raise [be] articulated now” and that the Respondent in this case has “reserved its ability to advance other arguments that may be characterized as jurisdictional, but without articulating what they might be.”...

The Respondent may find a strategic advantage in presenting the Tribunal, at this stage, with one jurisdictional argument, “the only one for which it seeks preliminary treatment”...However, the Tribunal should not be constrained, when conducting the arbitration, by any of the parties’ procedural and strategic choices. The Tribunal must conduct this arbitration in a way that is compatible with the equal treatment of the parties. The Tribunal would indeed be treating the parties without equality if it were to allow the Respondent to make piecemeal objections to its jurisdiction. It is also unquestionable that the efficiency of the arbitral procedure would be seriously impaired by the duplication of the phases of the proceedings, one jurisdictional phase regarding Chapter Nineteen of the NAFTA and, if any, one phase on the merits which may include jurisdictional and other preliminary arguments to be considered before the examination of the merits.

The Tribunal considers that the Respondent is, at this stage, in a position to determine whether it has, or may have, any other jurisdictional or preliminary objections....

²⁰ *Canfor*, United States of America’s Submission on Place of Arbitration, Bifurcation and Filing of a Statement of Defence of Respondent United States, November 25, 2003 at pp. 17-18, online at www.naftclaims.com/disputes_us/disputes_us_2.htm.

²¹ *ibid* at p. 19

On the basis of the above, the Tribunal decides that:

(1) The Respondent shall file a Statement of Defence limited to and setting forth all of its jurisdictional objections.²²

17. In addition to the argument set out in its objection to jurisdiction filed in October 2003, the only additional jurisdictional issue which the United States raised, and which it reserved to address at the merits hearing, was whether the claims submitted by Canfor fell within NAFTA Article 1101.²³ *The United States has not objected to the Canfor Tribunal's jurisdiction on the basis of NAFTA Article 1121*, which it apparently has placed in issue in the claim commenced by Tembec. Given the Canfor Tribunal's ruling, the United States is precluded from raising such an issue now, and cannot now use, or misuse, the Article 1126 consolidation process to change this result.²⁴

18. Canfor and the United States then each submitted two lengthy memorials, fully setting out their positions on the jurisdictional issue raised by the United States.²⁵ A three day hearing was held in December 2004 for full argument of those issues. Transcripts and audio recordings were made of that hearing. No witness statements or *viva voce* evidence was presented. Both

²² *Canfor*, Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings, January 23, 2004 at paras. 48, 52 and 53, online at http://www.naftaclaims.com/disputes_us/disputes_us_2.htm.

²³ *Canfor*, United States of America's Statement of Defence on Jurisdiction of Respondent United States, February 27, 2004 see especially p. 1 and para 9, online at http://www.naftaclaims.com/disputes_us/disputes_us_2.htm.

²⁴ At page 18 of its submission, the United States makes reference to some request to "treat preliminarily its jurisdictional objections based on Articles 1101(1) and 1121". Canfor does not understand this reference. The United States only objection to jurisdiction in the Canfor proceeding which has been reserved to the merits is based on Article 1101, which the United States recognized could not properly be addressed at a preliminary phase. The United States did not, and given the order of the Canfor Tribunal, cannot, raise an objection to jurisdiction on the basis of Article 1121. Indeed, an examination of its Statement of Defence, in which it had been ordered to raise all its jurisdictional objections, shows no reference to Article 1121, nor did the United States raise Article 1121 as a jurisdictional objection at the hearing in Washington on December 7 through 9, 2004. Indeed, it represented that it was not raising such a jurisdictional objection. It ought not now be permitted to raise by the back door an objection not previously raised once the jurisdictional phase of the proceeding has been completed.

²⁵ *supra* note 6

Canfor and the United States, after full deliberation, advised the Tribunal that, having considered consolidation, neither party wished the Canfor proceedings consolidated with any other case.

19. Following the oral hearing on jurisdiction, the Tribunal required the parties to make submissions with respect to the costs of the jurisdictional phase. Both Canfor and the United States had incurred over 2000 lawyer hours in connection with, in the case of the United States, advancing its jurisdictional motion and addressing preliminary hearing matters such as the production of the negotiating texts, place or arbitration and bifurcation, and in the case of Canfor, in connection with defending the jurisdictional objection and those procedural matters related to the jurisdictional portion of the proceeding. Canfor accordingly submitted an entitlement to approximately \$1,000,000 in costs for that portion of the proceedings, as well as claiming the costs of the Tribunal.²⁶

20. Canfor has also advanced \$350,000 US to cover the costs incurred by the Canfor Tribunal to date, which costs Canfor also seeks to recover.

21. Subsequently, on March 2, 2005, but prior to an Award on jurisdiction being rendered, the tribunal member appointed by the United States withdrew, having identified that a matter in which he had been involved for several years could place him in a position of conflict of interest.²⁷

22. The United States wrongly asserts to this Tribunal that Canfor "challenged" the appointment of Mr. Harper for conflict of interest. That is not an accurate representation of events.

²⁶ For reasons of confidentiality, copies of those submissions are not being placed before this Tribunal.

²⁷ See Appendix, Tab 3

23. The simple facts are that neither the United States nor the United States' appointee disclosed to Canfor the facts which clearly placed Mr. Harper in a position where his interests in the neutral adjudication of the Canfor proceeding was in conflict with his duty to Harvard University to negotiate the best possible settlement with the Government of the United States.

24. Although Mr. Harper had identified to the parties that he was a Director of Harvard University, he did not disclose to Canfor that Harvard had been sued by the Government of the United States, that he was one of the (at most) five individuals directing that litigation, that two of the other members of the Board (coincidentally also former United States' government officials) had recused themselves from participating in it because of a perceived conflict, or that Harvard University had been unsuccessful in the liability phase of that litigation.

25. To compound matters, once Mr. Harper says that he "realized for the first time that [his] Harvard position could be in conflict with [his] role as arbitrator", rather than consider whether that was indeed so or disclose the facts giving rise to the conflict to the parties, he engaged in *ex parte* communications with the very office that had appointed him and that was defending Canfor's claim.

26. As a result, when the President of the Tribunal asked for the parties' observations on the facts now being disclosed by Mr. Harper, Canfor advised of its view that he should withdraw from the arbitration. Before matters could proceed further or any challenge was commenced, Mr. Harper resigned his appointment.

27. Despite the lapse of in excess of 90 days since his resignation, the United States has been dilatory in appointing a replacement, which, under the UNCITRAL Arbitration Rules was

required to occur within a 30 day period.²⁸ As a result, Canfor has once again been forced to request the Secretary General appoint a replacement on the United States' behalf, which process has unfortunately been superceded by this Tribunal's order staying Canfor's proceeding and declining to amend its stay to permit the United States to appoint.

28. Finally, in relation to the Canfor proceeding, to date, the United States has not filed a Statement of Defence, and there is, therefore, no record of the defences the United States intends to raise. Beyond the simple assertion that Canfor's claims lack merit, one can only speculate as to the United States' position on the specific allegations made by Canfor.

C. Terminal Forest Products Ltd. Proceedings

29. Terminal submitted a Notice of Intent to Submit a Claim to Arbitration on June 2, 2003, and submitted a Notice of Arbitration on March 31, 2004. No further steps have been taken in connection with that claim. In particular, neither Terminal nor the United States have, prior to the United States submitting its consolidation application, taken any steps to appoint a tribunal. Terminal has not submitted a Statement of Claim.

D. Tembec Inc. Proceedings

30. Canfor's knowledge of Tembec's claim is confined to the material available to the public on the United States' State Department website and in correspondence passing during the consolidation process. Based on that information it appears that Tembec submitted its claim to arbitration in December 2003 (after the United States had challenged the jurisdiction of the Canfor tribunal), and that some 12 months later, the United States challenged the jurisdiction of

²⁸ *United Nations Commission on International Trade Law (Uncitral) UNCITRAL Arbitration Rules*, General Assembly Resolution 31/98, approved by the General Assembly 15 December 1976, at Arts. 7(2) and 13(1), online: www.uncitral.org/english/texts/arbitration/arb-rules.htm

the Tembec tribunal on several grounds. We understand that but for this Tribunal's order staying Tembec's claim, some at least of the United States' jurisdictional objections to Tembec's claim were to be heard by the Tembec Tribunal on June 2 and 3, 2005.

VI. Legal principles applicable to consolidation

31. The NAFTA provides, by Article 1126, an extraordinary mechanism that allows one party to unilaterally initiate a process whereby consensually appointed arbitration tribunals can be stripped of their authority, not because they otherwise lack jurisdiction, but because one party (most likely a respondent) asserts that a particular claim should be heard together with one or more other claims, by a different tribunal. The extraordinary nature of such an order, and the fact that no such orders have been made under the NAFTA, ought to give this Tribunal pause before any consolidation order is made.

32. Article 1126(2)²⁹ establishes several preconditions that must be satisfied before any consolidation order can be made.

33. First, the Tribunal must be *satisfied* that the requirements for consolidation are met. That, in Canfor's submission, imposes an evidentiary and legal onus upon the moving party, here the United States, to establish them.

34. Second, the Tribunal must determine that there are common questions of law or fact. This in turn presupposes that those questions in common are identified by the moving party so that a searching examination of them can be undertaken. It also requires the Tribunal to consider what is meant by "common question of law or fact."

²⁹ NAFTA, *supra* note 3

35. Third, the Tribunal must conclude that it is "in the interests of fair and efficient resolution of the claims" for matters to be heard together.

36. Only if all of those conditions are satisfied is the consolidation tribunal empowered, but not required, to assume jurisdiction over all or a portion of the various claims. However, even if the preconditions permitting consolidation are established, it remains a discretionary decision.

VII. The United States has failed to satisfy Article 1126(3)

37. Article 1126(3)(c)³⁰ requires the United States to set out the grounds on which consolidation is sought. Yet, the entirety of the statement of grounds provided by the United States and contained in its letter of March 7, 2005, reads:

The relevant issues of fact and law in the three notices of arbitration are nearly identical. Canfor, Terminal Forest Products and Tembec each allege breaches with respect to the same U.S. government measures, including: (i) the U.S. International Trade Commission's ("ITC") May 2001 preliminary material injury determination concerning softwood lumber imports from Canada; (ii) the U.S. Department of Commerce's ("Commerce") August 2001 preliminary antidumping and countervailing duty determinations (as well as its preliminary critical circumstances finding); (iii) Commerce's March 2002 final antidumping and countervailing duty determinations; (iv) the ITC's May 2002 final material injury determination; and (v) the *Continued Dumping and Subsidy Offset Act of 2000* (the "Byrd Amendment"). Likewise, Canfor, Terminal Forest Products and Tembec allege breaches of the same NAFTA provisions, including Article 1102 (national treatment), Article 1103 (Most Favored nation treatment), Article 1105 (minimum standard of treatment) and Article 1110 (expropriation).

In addition, for purposes of the United State's objection to jurisdiction, the legal issues with respect to the three arbitrations are nearly identical. In a consolidated proceeding the United States would object to the jurisdiction of the tribunal over the claims of all three claimants on the basis of Articles 1901(3) and 1101(1), and over the claims of Canfor and Tembec on the basis of Article 1121(1).³¹

³⁰ *ibid*

³¹ While the United States asserts that the legal issues in the claims are "nearly identical", it does so without defining those issues. On its face, however, that identity does not exist. For instance, no jurisdictional objection is made in Terminal, and no Article 1121 objection can be made in Canfor.

38. Canfor notes that, unlike in the *Corn Products* consolidation proceeding, the Respondent has provided only the vaguest statement as to the grounds for its request for consolidation. In *Corn Products*, the Tribunal noted that the request for consolidation was supported by “a detailed request”.³² Again, that document would be in the possession of the United States, although it is not accessible to Canfor or its counsel.

39. Article 1126(3) requires, as a precondition to the exercise of the Tribunal’s powers under Article 1126(2), a far more particularized statement of the grounds upon which consolidation is sought than the United States has provided.³³ It is not sufficient for the United States simply to assert as grounds for consolidation that there are questions of fact or law in common. Although a common question of fact or law is a necessary precondition for consolidation, the superficial approach taken by the United States in articulating the “grounds” is not sufficient to allow for meaningful response.

40. Accordingly, if this Tribunal concludes, contrary to Canfor’s submission, that any common issues have been identified, the failure of the United States to adequately articulate the basis for its application (and the coincident prejudice to our ability to respond to it) is a factor weighing in favour of the Tribunal exercising its discretion to deny the consolidation application.

³² *Corn Products International*, supra note 13, at para. 2

³³ That is all the more so, when the Tribunal proceeds on such an expedited basis, with such a short hearing, and when Canfor’s counsel only received the United States’ full submission, in one case three days, and in the other case two days, before the Canfor submission was due.

VIII. The United States has failed to establish the existence of common questions of fact or law

A. Requirement for common questions

41. The requirement of NAFTA Article 1126(2) is that there be a common "question". Implicit in this formulation is the requirement that there be factual or legal issues in dispute between a claimant and a respondent in one proceeding, and that there exist another legal proceeding in which those exact same facts or legal issues are raised and disputed in the same way. Consolidation does not occur under NAFTA Article 1126 simply because there may be some factual or legal overlap between claims. It is a precondition that the common facts or legal issues give rise to "questions". Given the extraordinary nature of a consolidation order, those questions must be of sufficient importance to the ultimate disposition of the proceeding before consolidation can ever be considered. They must also be clearly articulated so they can be assessed against the standard set out in Article 1126(2): does fairness and efficiency require consolidation?

42. Again, regrettably, the United States has not indicated, except at the highest level of generality, what issues raised in each of the proceedings are in dispute, and with respect to those issues, what questions it alleges are common. Without the United States filing a Statement of Defence, it is impossible to say what questions are disputed, or whether they arise in each case. The vague and general way in which the United States has articulated its position makes it impossible for Canfor to meaningfully respond.³⁴

³⁴ For instance, the entire submission on common questions of jurisdiction is as follows:

"Numerous issues of law are common to each of the three claims. The United States objects to the jurisdiction of all three claims on the basis that NAFTA Article 1901(3) expressly bars the submission of claims with respect to antidumping or countervailing duty law to arbitration under Chapter Eleven. The United States also objects to the jurisdiction of the Tribunal on the basis that the claims do not "relate to" claimants or their U.S. based investments in any legally

43. Despite the United States' failure to abide either the requirements of Article 1126(3), or the directions of the President of this Tribunal to provide "fully particularized" submissions,³⁵ Canfor will attempt, as best possible, to respond to the assertions of commonality made by the United States. The common elements the United States appears to rely upon are threefold: (1) common jurisdictional issues; (2) common legal issues; and (3) common factual issues. Each will be dealt with in turn.

B. Common questions relating to jurisdiction

44. Canfor acknowledges that the United States has brought forward a jurisdictional challenge in both Tembec and Canfor based on its interpretation of Article 1901(3), alleging that a NAFTA Article 1120 Tribunal has no jurisdiction to adjudicate a dispute under NAFTA Chapter 11 if the dispute also arises in connection with governmental actions that in some way are connected to antidumping or countervailing duty matters. Put a different way, the United States has argued that Canfor's or Tembec's claims are barred in their entirety by the operation of Article 1901(3).

45. While the United States has decided to articulate one of its jurisdictional objections to both cases in the same way, it is far too simplistic to suggest this gives rise to a common question

cognizable way, as required by NAFTA Article 1101(1). Finally, the United States contends that jurisdiction is lacking over Tembec's and Canfor's claims because those claimants are currently pursuing claims before NAFTA Chapter Nineteen bi-national panels with respect to the same measures at issue here, in violation of NAFTA Article 1121(1)."

Leaving aside that the United States has not challenged jurisdiction in Terminal, and that the United States cannot raise an Article 1121(1) objection in Canfor, the United States once again fundamentally misstates the nature of Canfor's claim, as being "with respect to antidumping or countervailing duty law". As the United States well knows from the memorials filed by Canfor on jurisdiction and the three days of oral hearing, Canfor's claim is not challenging the United States municipal antidumping or countervailing duty law, nor is its claim "with respect to antidumping or countervailing duty law". Rather, Canfor complains that the conduct of United States' officials and State Organs has violated the obligations the United States assumed under various articles of NAFTA Chapter 11.

³⁵ Letter from ICSID to Canfor, Terminal, Tembec and United States, May 19, 2005.

of law, fact or mixed fact and law. As Canfor argued in the jurisdictional phase of its proceeding:

As this memorial will demonstrate, Article 1901(3) is drafted in a very different manner than clauses in NAFTA that bar or exclude the jurisdiction of Chapter 11 Tribunals over certain kinds of disputes. On its ordinary meaning it is not a jurisdictional clause.

Furthermore, to succeed, the United States must establish that Article 1901(3) precludes the Investor from advancing each and every claim set out in the Statement of Claim. While the United States has selectively identified allegations, or parts of allegations in the Investor's claim, that is not sufficient for it to succeed. Given the nature of this application, such selectivity cannot be countenanced. *The United States has challenged the entirety of the Investor's claim and accordingly each allegation must be shown to be precluded by Article 1901(3).*³⁶ [emphasis added]

46. Accordingly, given the United States' obligation to demonstrate how, assuming its interpretation of Article 1901(3) is correct, Article 1901(3) arises to bar each allegation in each proceeding, the United States has not established the existence of a common issue on jurisdiction. The Tribunal hearing argument on Article 1901(3) will be required to interpret it in connection with its application to specific facts as those facts are alleged in the various proceedings.

47. In any event, even if the Tribunal were to determine that a common question did arise in connection with Article 1901(3), as the United States has not raised an Article 1121 objection in Canfor,³⁷ nor any jurisdictional objection in Terminal, there are no other common jurisdictional questions, and, accordingly, for these reasons and for the reasons articulated later in these submissions, the United States' objection on the basis of Article 1901(3) does not justify consolidation of the proceedings.

³⁶ Canfor, Objection to Jurisdiction, *supra* note 16, at paras. 31-32.

³⁷ Canfor, Statement of Defence on Jurisdiction, *supra* note 23.

C. Common questions of law

48. The United States asserts that common questions of law arise. This argument, the entirety of which is contained in only one paragraph and one footnote of its submission, is based upon the proposition that Canfor, Terminal and Tembec allege violations of the same provisions of NAFTA. That, however, does not create a common question as that term is contemplated under Article 1126(2). Given that an investor can only make a claim based on violations of the provisions of section A of Chapter 11 of NAFTA, it is inevitable that multiple claimants will put the same provisions in issue. The fact that Canfor alleges that United States' conduct violates Article 1102 or 1105, thereby requiring a Tribunal to interpret those provisions, does not give rise to a common issue with another case where Article 1102 or 1105 must also be interpreted. The meaning of a particular treaty provision is not a common question between Canfor, Tembec and Terminal, any more than it is a common question with any of the other NAFTA Chapter 11 cases that have nothing to do with the softwood lumber dispute where the tribunals are required to interpret those provisions.

49. The second prong of the United States assertion that there are common questions of law is based on its assertion that, in its defense, "the United States anticipates that...it would raise many of the same legal defenses to the claims of all three claimants." With respect, that is patently insufficient and cannot be relied upon for the purposes of this application. The United States does not even say that it *will* raise the same defenses, nor state what those defenses are. Its assertions are unreliable. The United States had the opportunity to raise these defences in both the Canfor and Tembec proceedings. It has chosen not to do so. Until formal pleadings are filed, in relation to the merits, questions of fact and law cannot be identified or determined by this Tribunal. The Tribunal must be "satisfied" that common issues *do* exist, not that they *might*

exist. These Claimants cannot be called upon to reply to the United States' speculation as to what it might do at a subsequent phase of this proceeding. The Tribunal can only act upon what the United States actually does. There is no information before the Tribunal which would allow it to conclude that at the merits phase of Canfor's claim, question of law or fact in common with the claims of either Terminal or Tembec will arise. At best, the application to consolidate on the merits is premature.

D. Common questions of fact

50. As noted, the United States has not abided the direction of the Consolidation Tribunal to fully particularize the "factual and legal issues connected with the question of consolidation". Its submission with respect to common issues of fact, contained at pages 13 and 14, does little more than set out again the same information as contained in its statement of grounds for bringing this application outlined in its March 7, 2005 letter. Nowhere does it fully articulate, elaborate or explain what the common "questions" are. It does not identify whether, or on what basis, those "questions" are contested. It does not identify how these supposedly common questions impact upon the Claimants as investors, or the different investments of each of the Claimants, which investments vary significantly in nature, extent, and location from Claimant to Claimant.

51. Further, while the United States may be correct that some of the same facts arise in the different proceedings (for instance, the United States is correct that the various Claimants refer to certain of the Preliminary and Final Determinations in their claims), the United States has not shown how those Determinations give rise to common questions. The Determinations are what they are. There will be no dispute over them. Likewise, the existence of the Byrd Amendment cannot be denied. The fact, however, that these undisputed government actions form part of the factual matrix of each claim does not create a common question.

52. Finally, as noted above, the United States comes before this Tribunal seeking consolidation, on the merits, without ever stating what its position is with respect to the facts implicated in the claims advanced by any of the Claimants. While the lack of a response to Terminal's claim is understandable given the preliminary stage to which that claim has advanced, it is not defensible with respect to Canfor or Tembec. Just as it was able to articulate its jurisdictional defences, the United States must be able to articulate its legal and factual defences to Canfor's claim. Only with that information would the Tribunal be in a position to assess whether common questions of fact or law arose. The United States does not satisfy the test for commonality simply by advancing broad generalities and bold assertions, without scrutinizing the actual claims advanced and the defenses raised to them. In the absence of an articulation by the United States of its position on the merits, this Tribunal cannot conclude that there are common questions.

IX. It is not necessary for the fair and efficient resolution of the claims for consolidation to occur

53. Even if this Tribunal accepts that there are common questions, although they have not been articulated, the United States has still failed to meet the burden on it to establish that the fair and efficient resolution of the claims requires consolidation. Below we specifically identify why it is neither fair nor efficient for the claims to be consolidated.

A. The cases raise different issues

54. The essence of the United States' argument in favour of consolidation appears to resolve itself down to the simple proposition that as each of the three potential cases arises out of the softwood lumber dispute between Canada and the United States, the cases therefore can be addressed together.

55. What the United States fails to have any regard for, however, is that while certain conduct of the United States may be relevant to each of the proceedings, there are numerous highly relevant distinctions between the cases which warrant treating them separately.

56. For instance, the impact of the United States measures is different upon each of the investors and their investments. The obligation of any Tribunal hearing a case will be to examine the conduct complained of as it impacts upon the particular investors and their investments, each of whom must individually establish harm caused by the United States' actions. Those investors and investments differ markedly. Yet, the United States fails to give any consideration whatsoever to these fundamental differences between the various claimants, their role in the softwood lumber industry, and the nature of their businesses and operations. Moreover, each claimants' damages will differ, and must inevitably be assessed separately.

57. Similarly, there are fundamental differences between the respective Claimants. Tembec's Canadian operations are, as far as Canfor is aware, undeniably focussed on eastern Canada. Canfor, on the other hand, is one of Canada's largest integrated forest products companies and is the largest Canadian softwood lumber producer, whose Canadian operations are based in, and primarily focussed on, British Columbia and Alberta. It operates extensive woodlands operations and is a major producer of SPF lumber, bleached kraft pulp, specialty kraft paper, and panels. By contrast, Terminal's operations are focussed on a particular form of high value lumber – Western Red Cedar – which is not part of Canfor's business and which, to Canfor's knowledge, does not form any part of Tembec's business.

58. Canfor and Tembec are public companies traded on major stock exchanges. Accordingly, those companies are obliged to make certain public filings that disclose

information to the investing public. Terminal, on the other hand, is a wholly private, family owned business, that, to Canfor's knowledge, as a matter of practice, has kept and keeps all its affairs extremely confidential from competitors.

B. The Softwood Lumber industry is intensely competitive

59. The softwood lumber industry is intensely competitive. Canfor and Tembec compete with each other and with other North American and European softwood lumber companies for a share of a commodity based market. Each company seeks vigorously to sell its products into the United States, and has made significant investments in the United States to do so. Each company keeps its affairs strictly confidential. They do not share the details of their investments, business strategies, cost structures or the like with each other, nor could they, without severely prejudicing their own economic and legal interests.

60. Indeed, the United States has already attempted to make much of the fact that confidential information is of necessity an issue in at least the Canfor proceeding, when it urged the Canfor Tribunal to find that it lacks jurisdiction. The United States, in its jurisdictional arguments in Canfor, asserted that the drafters must have intended Canfor's claim to have been barred by Article 1901(3) because the United States was bound to amend its laws to establish certain confidentiality requirements in municipal antidumping or countervailing matters.³⁸ Despite that position, it now urges that proceedings in which Canfor will of necessity rely upon its confidential information (such as its cost structures, volumes, business plans, or the impact of the United States' conduct on Canfor and its investments), should be heard together with the claims of competitors, each of whom have similar information that will need to be disclosed in the proceedings.

³⁸ see eg., *Canfor*, Objection to Jurisdiction of Respondent, *supra*, note 16 at p. 26.

C. Consolidated proceedings will be unworkable

61. If the proceedings are consolidated, the practical conduct of them will become wholly unmanageable. Consolidation raises inevitable procedural difficulties, which the United States fails to address. Different counsel for Claimants raise, and will wish to argue, different issues and different facts in support of their respective cases. There is no arbitral guidance as to the operation of the principle of equality embodied within the UNCITRAL Arbitration Rules rule 15 in NAFTA Chapter 11 claims where claimants are represented by multiple counsel advancing different theories of their proceedings and different allegations of wrongdoing. Will, for instance, evidence which Canfor may wish to lead be used against Tembec, if Tembec does not wish to lead that evidence? Will the Tribunal decide the case on the basis of an argument raised by Tembec but not by Canfor? How will the Tribunal address jurisdictional objections raised in one proceeding but not another? All of these considerations militate in favour of each party being able to prosecute their own case.

62. Moreover, Canfor will not consent to the disclosure of its confidential information to Terminal, Tembec or the public.³⁹ Further, each claimant will inevitably insist on its right, granted by UNCITRAL Arbitration Rule 25(4),⁴⁰ to have their proceedings heard *in camera* insofar as confidential business information will be in issue, at which the other Claimants and their counsel will not be entitled to attend.

63. Even if it were workable, it would be grossly unfair if a claimant and their counsel were to be excluded from a portion of the proceeding while confidential information concerning

³⁹ NAFTA Free Trade Commission. *Notes of Interpretation of Certain Chapter 11 Provisions*, (31 July 2001), online: <http://www.dfait-maeci.gc.ca/tna-nac/NAFTA-Interpr-en.asp>, affirms the protection of confidential business information in Chapter 11 proceedings.

⁴⁰ *supra* note 28

another was tendered in evidence. The principles of equality and due process, embodied in UNCITRAL Arbitration Rule 15, would be violated. It would not be fair nor would it accord the parties equal treatment or due process, if a claimant were required to base their arguments only on that portion of the hearing in which they were allowed to be present, while the Respondent could rely upon all of the evidence tendered at a hearing.

64. Moreover, the record would be unworkable, as portions would need to be kept confidential from the various parties, although not from the United States. Each Claimant would require a separate record, containing only their *in camera* evidence, but not that of their competitors. In this regard, the comments of the *Corn Products* Consolidation Tribunal are directly on point:

The direct and major competition between the claimants, and the consequent need for complex confidentiality measures throughout the arbitration process, would render consolidation in this case, in whole or in part, extremely difficult. The parties would not be in a position to work together and share information. The process, including essential confidentiality agreements, discovery, written submissions and oral arguments would have to be carried out, in substantial measure, on separate tracks. The consolidation of the claims of direct and major competitors would necessarily result in complex and slow proceedings in order to protect the confidentiality of sensitive information.

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 claims 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 interest of fair and efficient resolution of the claims.⁴¹

Accordingly, separate proceedings will make the protection of confidential information far more manageable.

65. The Claimants have a right to fully present their cases. The right to fully present one's case is denied if a claimant is given the Hobson's choice of either disclosing their confidential

⁴¹ *Corn Products*, *supra* note 13, at paras. 8-9

information to their competitors (or risking the exposure of confidential information to their competitors), or not presenting the evidence they require to establish their claim. As noted by the *Corn Products Consolidation Tribunal*, competitors who file claims, as it is their right to do under the NAFTA, ought not to be compelled to risk not being able to fully present their case, on the one hand, or having to share confidential and sensitive business information with their competitor, on the other. Nor should they be required to participate in a cumbersome process of *in camera* and open hearings, resulting in a disjointed record, all in the pursuit of a “fair” and “efficient” resolution of their claims.⁴²

66. Accordingly, while the United States asserts that it is “unquestionably more efficient” to have a single hearing on jurisdiction, than to have two or three tribunals hold separate hearings, that proposition is not self-evident. Indeed, Canfor submits the opposite is true. In any event, this is a matter that the United States could have and should have raised prior to the briefing and argument of the jurisdictional motion in Canfor. This factor cannot weigh in the analysis when the United States has only raised consolidation at this late date.

D. The United States conduct in bringing an application for consolidation at a late date justifies denying the application

67. In the almost three years that Canfor’s claim has been outstanding, the United States did not, until its request for consolidation was made on March 7, 2005, pursue consolidation. To the contrary, the United States repeatedly indicated it did not wish consolidation and would not be seeking it. It unilaterally chose to advance a jurisdictional objection to Canfor’s claim. That motion was briefed and argued well after the Tembec and Terminal claims were initiated.⁴³

⁴² *ibid* at para 9

⁴³ *supra* notes 6 and 7

Further, in the case of the Canfor tribunal, it would now be deliberating upon that motion, but for the United States' failure to appoint a replacement arbitrator.

68. The United States gave careful consideration to consolidation.⁴⁴ It determined it did not wish to consolidate. To confirm its position with respect to consolidation, at the conclusion of the jurisdiction hearing on December 9, 2004, counsel on behalf of the United States, in response to a specific question from the President of the Tribunal, said:

We have no intention of invoking Article 1126 in this proceeding. That being said, we have on numerous occasions talked with claimants' counsel, who is also counsel for one of the other claimants that has filed a Notice of Arbitration and have asked them if they would agree to voluntary consolidate that claim before this Tribunal. If they change their minds on that score between now and the time that a decision is rendered, if they agreed to do that, we are still open to having them do that.

But that being said, we have no intention of invoking Article 1126 with respect to this particular proceeding.⁴⁵

Later, she said:

Mr. President, may I inquire? I think we have made, I believe, our position clear, and I can assure you that we have given it considerable thought, that we have no intention of invoking Article 1126 in this proceeding.⁴⁶

69. Accordingly, any assessment of "fairness" or "efficiency" must be measured against the United States' actions, in actively and aggressively continuing to pursue its jurisdictional objection after the Tembec and Terminal proceedings were initiated, and in the face of its repeated representation that consolidation was not wanted. The United States had many opportunities, had it thought fit, to seek consolidation at an earlier stage. It expressly and with deliberation, decided that it did not wish to consolidate. Now, it seeks a second opportunity to argue the same point before a differently constituted Tribunal at great cost and effort to Canfor. That simply is not fair, nor is it efficient.

⁴⁴ See eg. Appendix, Tab 4(a)

⁴⁵ *Canfor, December 9 Transcript* at p. 770

⁴⁶ *ibid* at p. 772

70. Canfor submits that it is patently unfair and unreasonable for the United States to now attempt to rely upon grounds for consolidation that existed as much as two years ago, and existed when it forced Canfor to respond to its jurisdictional motion. Accordingly, to succeed in this application, the United States must identify grounds for consolidation that would not have given rise to the position taken in December 2004. If other grounds would warrant consolidation, fairness required that they be raised long ago.

71. The United States, however, seeks to justify its late application and overcome its repeated representations on two bases. First, it relies upon the withdrawal of the United States' nominee to the Canfor Tribunal as bringing the cases into procedural "alignment". Second, it references comments made by President Gaillard at the Canfor jurisdictional hearing concerning the possibility of consolidation.

72. With respect to the former, it wholly does not withstand scrutiny. The cases are not procedurally aligned. And, to the extent that there is not yet a jurisdictional award in the Canfor claim, the responsibility for that lies with the United States.

73. The current status of the proceedings can be summarized as follows:

	Canfor	Tembec	Terminal
Notice of Intent	November 5, 2001	May 3, 2002	June 12, 2003
Submission of Claim to Arbitration (Article 1120)	July 9, 2002	December 2, 2003	March 31, 2004
Statement of Claim	July 9, 2002	December 2, 2003	n/a
Jurisdictional Challenge by US -	October 16, 2003	February 4, 2005	n/a
Hearings on Jurisdiction	December 7-9, 2004 (completed)	June 2-3, 2005 (scheduled - not held)	n/a

74. Most obviously, the Terminal claim is not aligned with any proceeding. No Statement of Claim has been filed, no Tribunal appointed and no objection to jurisdiction made.

75. And, with respect to the suggestion that Canfor and Tembec's proceedings are "aligned", they are not. Canfor has briefed and argued the only United States' objection to jurisdiction raised as a preliminary matter. It awaits a decision from its Tribunal. The Tembec Tribunal has not yet considered the matter or other jurisdictional arguments raised by the United States because of the stay issued by this Tribunal. And, in any event, the sole reason why the Canfor Tribunal has not concluded its deliberations is the United States' continued delay in appointing a replacement arbitrator. Mr. Harper withdrew well over three months ago. There is no reason why the United States has not appointed an arbitrator, except to further delay these proceedings and bolster this application.

76. With respect to the United States selective reference to observations made by President Gaillard at the oral hearing of the United States' jurisdictional motion, those comments are simply irrelevant to the question whether this Tribunal should order consolidation. Leaving aside that the Canfor Tribunal was provided no information about either the Tembec or Terminal proceedings beyond the fact of their existence, the comments of President Gaillard in no way address the question of whether consolidation *should* occur, which question has been remitted to this Tribunal to assess against the standards set out in NAFTA Article 1126. Indeed, even in the face of the comments of President Gaillard, the United States was unequivocal in its statement to the Tribunal that it did not wish consolidation.

E. Canfor should not be required to reargue the jurisdictional objection

77. If the proceedings are consolidated, Canfor will be required to reargue a matter which its consensually appointed Tribunal was already able to deliberate upon. If consolidation does not occur, Canfor will not be subjected to the cost, delay and inconvenience of preparing for and rearguing a jurisdictional objection. Contrary to the United States' submission, given the existence of transcripts and audio recordings of those proceedings, and the views expressed by the President of the Canfor Tribunal, there is no reason to believe that any rehearing would be required. The United States does not advance any credible reason in support of a full new hearing.

78. If the United States intends to argue jurisdictional matters in the Tembec case, then it is inevitable that Tembec and the United States will be put to the effort and costs of preparing for and arguing that matter, whether consolidation occurs or not. However, Canfor has already argued all the jurisdictional objections the United States wished to raise against it as preliminary matters. It is unfair and inefficient to require Canfor to engage in a re-argument, before a

different panel, of those issues (or, for that matter to require Terminal to participate in a proceeding where no jurisdictional issue has been raised and where the likelihood of such an objection being raised seems logically to depend upon whether that matter proceeds). Accordingly, there is no efficiency gained by the United States in consolidating, but there is clear inefficiency and severe prejudice to Canfor should consolidation occur.

F. Cost considerations warrant denying the consolidation application

79. The United States suggests that consolidation is "cost efficient". Canfor fails to understand how being compelled to incur costs a second time for a matter that has already been fully briefed and argued is "cost efficient". Canfor has already submitted a claim to the Canfor Tribunal for the over \$1,000,000 in costs that have been incurred simply at the jurisdictional stage. Having to incur further costs to reargue that jurisdictional motion is not warranted. Both Tembec and the United States necessarily need to participate in one further jurisdictional hearing. Those costs will be faced in any event. Accordingly, if consolidation occurs, the aggregate costs for the jurisdictional objections necessarily increase.

80. Similarly, there is no evidence before this Tribunal that cost efficiencies will result, in respect of the costs of counsel, particularly when the Respondent is represented by salaried in house counsel from a department specifically charged with the defence of NAFTA Chapter 11 claims.

81. Likewise, the United States' objection that additional lawyer time may be involved in three (or perhaps more accurately two) separate proceedings cannot be accorded any weight. Because a consolidated proceeding would be so complex, the costs of such a proceeding would inevitably be higher. Even if one were able to argue (although again there is no evidence that

would support this) that it would be marginally more efficient for the United States to brief and argue multiple cases together, it is decidedly less efficient for each of the Claimants to be required to participate in a proceeding that is of necessity far lengthier than would otherwise be the case, and where evidence and argument is led on matters not even in issue in each Claimant's proceeding.

82. Nor is there any basis upon which the United States' speculations on the cost efficiency of one tribunal as compared to two or three can be accorded weight. First, the amount of cost incurred by the Tribunal of necessity depends upon the length of the hearing and the complexity of the matters raised. Canfor has already paid \$350,000 to its Tribunal to cover the costs of all the preliminary matters and the jurisdiction phase of the proceeding. The Consolidation Tribunal has requested a deposit of \$200,000 simply to cover the costs of considering the consolidation application. If consolidation occurs, the money spent on the Canfor Tribunal is simply thrown away.

83. In any event, if cost were indeed an important factor to the United States, it surely would have been raised at an earlier stage. Any cost consideration could have been taken into account when the United States first considered seeking to consolidate the proceedings. Moreover, it is hard to give any real weight to considerations of cost, when the United States is already unlawfully holding well in excess 750 million dollars of Canfor's wrongly collected duties.

G. Consolidation will result in delay

84. The United States urges the untenable proposition that consolidation will result in the expeditious resolution of these claims. The only impediment to the expeditious resolution of Canfor's claim is the United States' own delay in failing to appoint a replacement arbitrator.

That delay has hampered that Tribunal's ability to deliberate. Equally, the United States' urging that there would need to be a rehearing of its jurisdictional objection to the Canfor claim by any new arbitrator, is not sustainable, as whether or to what extent any further hearing is necessary is wholly within the discretion of the Tribunal, and there is no credible reason advanced why a new hearing is necessary.

85. If consolidation is to occur, the proceedings will necessarily be further delayed. Terminal has not even filed a Statement of Claim in its proceeding. It is entitled to a reasonable time in which to do so. Given the requirement that all parties, including Terminal, be treated with equality and due process, there is no reason to believe that a Consolidation Tribunal could even hear the jurisdictional objection before the Canfor Tribunal could conclude its deliberations and issue its Award.

H. The Parties ought to be able to choose their own arbitrators

86. The parties ought to be permitted to choose their own arbitrators. The legitimacy of arbitration derives from its consensual nature. If a proceeding is consolidated over the objection of the Claimants, the consensual nature of the proceedings diminishes. Here, all Claimants object to the consolidation of these proceedings.⁴⁷ While the NAFTA allows for Tribunals to be appointed by the appointing authority, that is not the preferable route. The Canfor Tribunal and, to the best of our knowledge, Tembec Tribunal were both appointed by consent. Questions over the legitimacy of the parties' consent, and the corresponding integrity of the arbitral process, is heightened in the present case where there is an undecided challenge to the appointment of one of the Arbitrators.

⁴⁷ The Corn Products Tribunal noted the relevance of the parties objection to consolidation in the exercise of its discretion: see *Corn Products*, *supra* note 13 at para. 12

I. There is no risk of inconsistent decisions

87. If the proceedings are as “unlikely to proceed to the merits” as the United States suggests, then there is little realistic risk of inconsistent decisions, and the most efficient manner of proceeding is to allow the parties’ consensually appointed tribunals to do their work. If the claim were as “clearly outside of the tribunal’s jurisdiction” as the United States submits, one would have thought it would be a simple matter for the consensually appointed tribunal to address during the jurisdictional phase of their proceedings, and the outcome the United States asserts would be a foregone conclusion.

88. Moreover, the United States had not, as late as March, 2005, considered that the so-called “risk of inconsistent decisions” was such as to warrant consolidation. It ought not to be given credence now.⁴⁸

89. More significantly, however, the fact is that the decisions in the present case will not be inconsistent, as each will measure the impact of the United States’ actions on each of the investors and their investments. There is nothing inconsistent for one Tribunal to find that one claimant has made out its claim, on the evidence led and argument made in its proceeding, while another has not, even if there may be some factual or legal overlap between the two proceedings. Whether two decisions can be considered inconsistent depends, in the first instance, upon an identification and clear articulation of the elements of commonality between them.⁴⁹ Again, for

⁴⁸ The United States now seeks to rely, at footnote 59, on various commentary concerning the CME and Lauder cases. The United States fails, however, to address the fact that the situation that arose in CME and Lauder is expressly covered under NAFTA Article 1117(3). In CME and Lauder, Lauder was the controlling shareholder of the claimant CME. No such similar factual relation exists amongst the claims at issue in this consolidation proceeding.

⁴⁹ For instance, in the *Corn Products* case, where the exact same measure was in issue in two proceedings, the Tribunal observed as follows:

all the reasons outlined above, the United States has failed to put sufficient information before this Tribunal on which such a question could be addressed.

X. Conclusion

90. For all these reasons, Canfor submits that the consolidation request should be denied and Canfor awarded its full costs including counsel fees, forthwith.

All of which is respectfully submitted.


P. John Landry
Keith E. W. Mitchell

VANLIT Library:267616.1

Mexico maintains, also with persuasive force, that separate proceedings risk inconsistent awards, to the prejudice of Mexico, and that inconsistent awards cannot constitute a "fair" resolution of the claims. The claimants, on the other hand, are willing to accept the risk of inconsistent awards. The Tribunal believes that inconsistent awards are not a major risk in these cases since the claims do appear to be sufficiently different, with respect to both state responsibility and quantum. This Tribunal does not have before it a large number of identically or very similarly situated claimants. The impact of the tax may well differ in terms of the potential liability of Mexico. The tax could, for example constitute an expropriation as to one claimant, but not another. Assuming expropriation, which will certainly be contested by Mexico, the quantum calculations will differ among the three claimants. *Different awards as to liability and damages do not necessarily indicate inconsistent awards.*

In any event, the Consolidation Tribunal is satisfied that the risk of unfairness to Mexico from inconsistent awards resulting from separate proceedings cannot outweigh the unfairness to the claimants of the procedural inefficiencies that would arise in consolidated proceedings for the reasons explained above. (para. 10-11)