

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.

**POST-HEARING SUBMISSION OF RESPONDENT UNITED STATES OF
AMERICA IN SUPPORT OF REQUEST FOR CONSOLIDATION**

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The United States respectfully submits this post-hearing submission in support of its request for consolidation of the claims of Canfor Corporation, Tembec Inc., Tembec Investments Inc., Tembec Industries Inc. (collectively “Tembec”) and Terminal Forest Products Ltd. pursuant to Article 1126(2) of the NAFTA. As demonstrated in the United States’ prior submissions and in its oral statements at the June 16 hearing, and as further demonstrated below, consolidation is in the interests of a fair and efficient resolution of claimants’ claims.

The United States’ jurisdictional objections based on Articles 1901(3), 1101(1) and 1121(1) present straightforward issues of treaty interpretation that are common to the claimants. Nothing bars the Tribunal from consolidating the claims to determine those jurisdictional issues, and deferring the question of consolidation on the merits should that question arise. That approach, the United States submits, is consonant with a fair and efficient resolution of the claims. If the Tribunal also considers at this stage whether to consolidate for purposes of the

merits, the significant overlap of legal and factual issues among the claims would make a single, consolidated proceeding a fair and efficient means of resolving those claims.

Below, the United States sets forth the questions propounded by the Tribunal at the hearing. Although the United States orally responded to most of the Tribunal's questions, we take this opportunity to set forth our responses in writing and elaborate on those answers where appropriate.

Question 1: What is the rationale for NAFTA Article 1126?

As the United States explained at the June 16 hearing, the NAFTA Parties established a consolidation provision in the Investment Chapter of the NAFTA to account for the possibility that multiple claimants might bring claims arising out of the same events or measures.¹ The policy objectives underlying Article 1126 include avoiding a multiplicity of parallel claims and promoting their expeditious and cost-effective resolution. As one commentator has noted,

[t]he broad scope of investments with regard to which investors may bring a claim, either on their own behalf or on behalf of an enterprise, without the need for an arbitration clause or even a contract with the State Party, gives rise to the possibility of a large number of claims arising from a single measure taken by a State Party [Article 1126 thus] usefully addresses the possibility of multiple claims arising from a single measure taken by a State Party.²

Although Article 1126 accords the right to seek consolidation to both claimants and respondents, it is primarily “intended to relieve *a State Party* from the hardship of having to defend multiple claims arising from the same measure,”³ and to “provide an effective means . . . to avoid

¹ See Transcript of the June 16, 2005 Hearing on Consolidation (“Hrg. Tr.”) at 240:5-14; see also North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, vol. 1, 103d Cong., 1st Sess., at 147 (1993) (hereinafter “U.S. Statement of Administrative Action”) (“Article 1126 addresses the possibility that more than one investor might submit to arbitration claims arising out of the same event.”).

² Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 ARB. INT’L 393, 413-14 (2000).

³ *Id.* at 414 (emphasis added).

procedural harassment” by claimants.⁴ Another purpose of Article 1126 is to “avoid[] inconsistent results in cases arising from the same measure.”⁵ This policy objective is particularly compelling in this case, as the United States’ jurisdictional objections raise identical issues of treaty interpretation in the three cases.

Question 2: Describe Article 1126’s negotiating history.

As the United States represented at the hearing, the only negotiating history for Chapter Eleven of the NAFTA is the text produced at each of the negotiating sessions of the NAFTA, which is sometimes referred to as the “rolling texts.” Those texts are available on the United States’ website.⁶ The United States summarizes the negotiating history of Article 1126 below.

The origins of Article 1126 are found in the June 4, 1992 draft (the “Virginia Composite”) of the rolling texts.⁷ Article XX07 of that draft is bracketed and marked “CDA,” indicating that Canada introduced the provision, but the provision had not been accepted by the Parties at that time.⁸ Article XX07(7) allowed a disputing Party, within 90 days of receiving notice of the investment dispute, to request that the Secretary of the International Chamber of Commerce establish a consolidation tribunal “if it considers that . . . the dispute and other

⁴ Jonathan T. Fried, *Two Paradigms for the Rule of International Trade Law*, 20 CAN-U.S. L. J. 39, 49 (1994).

⁵ Alvarez, *supra* n.2 at 414; *see also* JULIAN D. LEW, ET AL., *COMPARATIVE INTERNATIONAL ARBITRATION* 378 (2003) (“[consolidation] proceedings have the effect of avoiding conflicting decisions which may arise out of separate arbitration proceedings.”); *Canfor Corp. v. United States of America*, Transcript of Hearing on Jurisdiction (Dec. 7, 2004) at 17:14-16 (“[F]rom [the tribunal’s] standpoint, we wonder if it would not be a good idea to *ensure consistency* by using these tools [provided for in Article 1126]”) (emphasis added); *see id.* at 16:15-18 (“[Article 1126] could dispose of these issues for the sake of *consistency* and for the sake of fair and efficient resolution of the claims.”) (emphasis added).

⁶ *See* http://www.ustr.gov/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Triilateral_Negotiating_Draft_Texts/Section_Index.html.

⁷ The United States represented at the hearing that the first iteration of the consolidation provision appeared in the August 4, 1992 text. Upon further review, however, the United States discovered that a consolidation provision appeared in an earlier draft.

⁸ *See* NAFTA INVESTMENT CHAPTER DRAFT, Virginia Composite art. XX07 (Jun. 4, 1992).

investment disputes in which it is a disputing Party . . . should be consolidated.”⁹ Under the proposed provision, a NAFTA Party could refer to the consolidation tribunal “such issues as it considers appropriate and the [tribunal] shall determine and dispose of those issues.”¹⁰ By assuming jurisdiction, the consolidation tribunal would oust the jurisdiction of any other tribunal established under the Investment Chapter to decide that issue.¹¹

The text of the consolidation provision remained substantially unchanged until the August 4, 1992 draft (the “Watergate Daily Update”).¹² The brackets were removed from Article 2129 of that draft, suggesting that the Parties had agreed to the consolidation provision in principle. Article 2129 modified the prior approach to consolidation in several respects. *First*, it enabled both claimants and respondents to request the establishment of a consolidation tribunal. *Second*, the request was to be made to the Secretary-General of ICSID, rather than to the Secretary of the ICC.¹³ *Third*, the provision providing for a timeframe in which the request needed to be made was deleted. *Fourth*, it enabled the consolidation tribunal to hear “all or part of the investment disputes,” rather than entire disputes.¹⁴ *Finally*, whereas consolidation was mandatory once requested under the prior draft, the August 4, 1992 draft provided that the consolidation tribunal was empowered, “in the interests of fair and efficient resolution of the disputes,” to consolidate where those disputes had “a question of law or fact in common.”¹⁵

⁹ *Id.* art. XX07(7)(b).

¹⁰ *Id.* art. XX07(9)(4).

¹¹ *Id.* art. XX07(9)(6).

¹² *See* NAFTA INVESTMENT CHAPTER DRAFT, Watergate Daily Update art. 2129 (Aug. 4, 1992).

¹³ *See id.* art. 2129(2).

¹⁴ *See id.* art. 2129(4)(a).

¹⁵ *Id.* art. 2129(4).

The Parties further revised the consolidation provision in the September 4, 1992 draft (the “Lawyers’ Revision”).¹⁶ Article 1125 of that draft is similar to the final version of the consolidation provision, except that it did not explicitly provide that the tribunal could stay ongoing proceedings while it considered whether to consolidate.¹⁷ The next revision of the consolidation provision in the October 2, 1992 draft is virtually identical to the final version of Article 1126.¹⁸

Contemporaneous commentary on Article 1126 by some of the drafters of the NAFTA’s Investment Chapter is also available, and sheds some light on the Parties’ intent with respect to that Article.¹⁹ Of particular note, one of the drafters stated that Article 1126 intentionally “does not resolve all the questions that may occur during consolidation,” and that “[m]any issues will need to be worked out by the tribunal in consultation with the disputing parties.”²⁰ The Parties thus intended to accord consolidation tribunals wide latitude to fashion a consolidated proceeding in the interests of fairness and efficiency, without spelling out the tribunal’s authority in detail in the NAFTA’s text.

Question 3: Does “in the interests of a fair and efficient resolution of claims” in Article 1126(2) embody an absolute standard or a relative standard?

As the United States stated at the June 16 hearing, Article 1126(2)’s provision that the tribunal may consolidate “in the interest of a fair and efficient resolution of the disputes sets forth an absolute, and not a relative, standard.”²¹ Article 1126(2) does not provide that consolidation is

¹⁶ See NAFTA INVESTMENT CHAPTER DRAFT, Lawyers’ Revision art. 1125 (Sep. 4, 1992).

¹⁷ Compare *id.* art. 1125(8) & n.1 with NAFTA art. 1126(9).

¹⁸ See NAFTA INVESTMENT CHAPTER DRAFT art. 1126 (Oct. 2, 1992).

¹⁹ See Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 Int’l Law. 727 (1993); see also *supra* n.4.

²⁰ Price, *supra* n.19 at 734.

²¹ See Hrg. Tr. at 254:12-255:6.

available only when it is the most fair and efficient means of resolving the claims, or that the consolidation must be more fair and efficient than proceeding separately before an Article 1120 tribunal. Rather, under the plain terms of Article 1126, a consolidation tribunal's role is to determine, at the time the request is made, whether consolidation would be fair and efficient. As the United States noted at the hearing, when making this determination, the status of ongoing Article 1120 proceedings will be relevant.²²

As the United States also noted at the hearing, the main elements of fairness and efficiency under Article 1126 are: (i) time; (ii) costs; and (iii) the avoidance of conflicting decisions.²³ Consolidation is warranted where time and expense – including judicial or arbitral resources – would likely be saved by addressing the claims on a consolidated basis, and where consolidation would avoid the possibility of multiple tribunals producing conflicting determinations of law or fact.

Here, a consolidated proceeding would be cost-efficient, would result in a timely resolution of the claims and would eliminate the potential for conflicting determinations of law and fact. Claimants cannot demonstrate any undue prejudice they would suffer by having their claims consolidated. Their complaints concerning any supposed inconveniences arising from a slightly longer hearing and the manner in which the consolidation tribunal was constituted are inherent in an Article 1126 consolidation process and do not militate in favor of separate proceedings.

²² *See id.* at 255:7-13.

²³ *See id.* at 255:14-256:3.

Question 4: Does “all or part of the claims” in Article 1126(2)(a) allow the Tribunal to assume jurisdiction for the purpose of deciding the United States’ jurisdictional objections?

The authority granted to consolidation tribunals under Article 1126(2)(a) to “assume jurisdiction over, and hear and determine together, *all or part of the claims*” encompasses the ability to consolidate claims solely for purposes of deciding a preliminary issue that is common to the claims.²⁴ Canfor and Terminal agree with that textual interpretation: as they stated at the hearing, “clearly in some circumstances a part of a claim could be a jurisdictional question arising in that claim.”²⁵ That interpretation also accords with the NAFTA Parties’ intent to grant Article 1126 tribunals wide latitude to resolve issues arising in a consolidation proceeding.²⁶

Question 6: How many common questions of law or fact justify consolidation?

Article 1126 provides that a tribunal may order consolidation if it is satisfied that the claims have “a question of law or fact in common.” The Tribunal noted at the hearing that the Spanish text of Article 1126 is phrased in the plural.²⁷ The French text, like the English text, is phrased in the singular.²⁸ Whether phrased singular or plural, however, the standard for commonality in Article 1126(2) is not purely a quantitative question, but incorporates a qualitative element.²⁹ Thus, once a tribunal determines that one or more common questions of fact or law exist, it should then consider the relative importance of those questions to determine

²⁴ Article 1126(2)(a) (emphasis added).

²⁵ Hrg. Tr. at 256:22-257:2; *see also id.* at 259:13-20 (Tribunal: “But you can envisage . . . that only the matter of jurisdictional questions is being consolidated, but other questions, for example, relating to liability and quantum are not consolidated.” Canfor & Terminal: “In a hypothetical circumstance, yes.”). Tembec did not take a position on this issue at the hearing. *See id.* at 260:1-261:8.

²⁶ *See Price, supra* n.19, and accompanying text.

²⁷ *See Hrg. Tr.* at 264:8-10.

²⁸ *See* NAFTA art. 1126(2) (“Un tribunal établi aux termes du présent article qui est convaincu que les plaintes soumises à l'arbitrage en vertu de l'article 1120 portent *sur un même point de droit ou de fait* pourra, dans l'intérêt d'un règlement juste et efficace des plaintes, et après audition des parties contestantes, par ordonnance.”) (emphasis added), available at http://www.dfait-maeci.gc.ca/nafta-alena/chap11-fr.asp?#article_1126.

²⁹ *See Hrg. Tr.* at 264:17-19; 265:12-14; 266:4-5; 272:12-18.

whether consolidation is in the interests of a fair and efficient resolution of the claims. In particular, common issues that are dispositive of the case as a whole will weigh in favor of consolidation.

The United States' jurisdictional objections, which raise identical issues of treaty interpretation, are not only common to the claims sought to be consolidated, they are dispositive of those claims. This fact weighs heavily in favor of consolidation. Likewise, the three claims contain numerous common questions of law and fact that relate directly to questions of liability.³⁰ Under any interpretation, these claims far exceed Article 1126's requirement that they share a common issue of law or fact.

Question 6A: May the Tribunal consolidate for purposes of deciding the United States' jurisdictional objections without prejudice to its ability thereafter to consolidate on the merits?

As the United States opined at the hearing, the Tribunal is authorized to treat the question of consolidation in a seriatim fashion.³¹ It may assume jurisdiction over the claims for the purpose of resolving the United States' jurisdictional objections without prejudice to its ability thereafter to order consolidation on the merits of the claims, should that be necessary. Nothing in the text of Article 1126 suggests that the Tribunal's powers are limited to making a single decision on consolidation. Rather, Article 1126 grants a tribunal established under that Article the authority to order consolidation when doing so serves the interests of fairness and efficiency. Canfor's and Terminal's objection to this approach, voiced for the first time at the hearing in response to the Tribunal's question, is contrary to the Parties' intent to leave the text of Article 1126 nonspecific so as to grant consolidation tribunals flexibility to fashion a proceeding to fit

³⁰ See Chart attached as Exhibit A; see also Submission of United States of America in Support of Request for Consolidation of the Claims of Canfor Corporation, Tembec Inc. *et al.* and Terminal Forest Products Ltd. (June 3, 2005) ("U.S. June 3 Submission"), Exhibit A.

³¹ See Hrg. Tr. at 273:15-275:17.

the circumstances.³² It is also inconsistent with Canfor's and Tembec's prior suggestion that the Tribunal deny consolidation for purposes of addressing the United States' jurisdictional objections and, if those objections are denied by the Article 1120 tribunals, only then make a decision whether to consolidate on the merits.³³

Question 7: What are the legal bases for the doctrines of laches and estoppel?

Although this question was directed primarily to the claimants, who did not provide an answer at the hearing, the United States makes some preliminary observations below and will provide a response to claimants' arguments in its reply submission.³⁴ Neither estoppel nor laches is applicable here. Estoppel is an equitable principle barring a claim by one party who has made a representation to the contrary, when an opposing party relies on that representation to its detriment.³⁵ Claimants' argument that the United States is estopped from seeking consolidation fails. The United States has a right under the NAFTA to seek consolidation and never waived that right. In every instance where the United States represented that it was not seeking or did not intend to seek consolidation, it reserved its right to later seek consolidation should the circumstances so warrant.³⁶ Claimants thus cannot show that the United States' application for consolidation is contrary to a past representation, as is required for estoppel to apply. In

³² See *id.* at 277:7-16.

³³ See Hrg. Tr. at 108:11-109:1; Canfor's Submission in Opposition to Request for Consolidation (June 10, 2005) at 19-20.

³⁴ See *id.* at 156:20-157:6; 278:7-20; 280:13-16.

³⁵ See generally IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 615-616 (6th ed. 2003); see also *Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, 29 I.L.M. 1345 ¶ 63 (Sept. 13, 1990) (elements of estoppel are "a statement or representation made by one party to another and reliance upon it by that other party to his detriment or to the advantage of the party making it.").

³⁶ See Hrg. Tr. at 37:3-38:11. Cf. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246 ¶ 138 (Oct. 12, 1984) (holding that silence and apparent acquiescence by some government officials for five years did not warrant estopping the United States from contesting the boundary); *North Sea Continental Shelf (F.R.G. v. Den., Neth.)*, 1969 I.C.J. 3 ¶¶ 26-30 (Feb. 20, 1969) (holding that "only a very definite, very consistent course of conduct" could justify invoking estoppel to deny Germany the right to assert its defense).

addition, claimants would be unable to demonstrate any detrimental reliance even if such a representation had been made. Claimants' asserted prejudices – that a consolidated proceeding will be lengthier than a separate proceeding and that they were denied an opportunity to appoint an arbitrator to the consolidation tribunal – result not from any supposed delay or change of position on the part of the United States, but from the Article 1126 process itself.

The doctrine of laches is similarly inapplicable. Laches is “an equitable principle barring a stale claim due to the passage of time.”³⁷ An application for consolidation is not the filing of a claim to which the doctrine of laches applies. The guidance in Article 1126 providing that a tribunal may order consolidation when it is fair and efficient, and not the doctrine of laches, provides the tribunal with the means to deny an untimely application for consolidation. In any event, international tribunals have applied laches to bar stale claims when parties have delayed presenting such claims by several years, and in most cases, decades.³⁸ The United States, however, sought consolidation and informed the claimants and the Article 1120 tribunals promptly when circumstances changed such that it believed consolidation would yield a fair and efficient resolution of the claims. In addition, as demonstrated above, claimants cannot show

³⁷ Ashraf Ray Ibrahim, *The Doctrine of Laches in International Law*, 83 VA. L. REV. 647 (1997); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 902 cmt. c (1987).

³⁸ See, e.g., *Gentini (Italy v. Venez.)* (Italy-Venez. Comm'n 1903) in JACKSON H. RALSTON, VENEZUELAN ARBITRATIONS OF 1903 720, 730 (1904) (barring Italy from asserting a tort claim that was thirty years old); *Spader (U.S. v. Venez.)* (U.S.-Venez. Comm'n 1903), in VENEZUELAN ARBITRATIONS OF 1903 161, 162 (1904) (barring the United States from asserting a contract claim that was over forty-three years old); *Sarropoulos v. Bulgarian State (Greece v. Bulg.)*, 4 Ann. Dig. 263 (Greco-Bulg. Arb. Trib. 1927) (barring Greece from asserting a tort claim that was fifteen years old); *Kahale v. Secretary-General of the United Nations*, 43 I.L.R. 290, 299-300 (U.N. Admin. Trib. 1968) (holding that employer's one-year delay in asserting a right against employee did not justify barring employer's argument under laches); see also *The Doctrine of Laches in International Law*, 83 VA. L. REV. at 678 (describing International Law Commission effort to codify a two-year safe harbor within which the doctrine of laches would not apply, which ultimately resulted in reversion to the reasonableness standard because of consensus disfavoring applying laches to such short periods of time).

any prejudice that they have suffered as a result of the timing of the United States' application, as is required for the doctrine of laches to apply.³⁹

Question 8: Can the Tribunal establish procedures such as those used in other fora to ensure the confidentiality of proprietary business information?

As an initial matter, as the United States noted at the hearing, any purported concern about business proprietary information has no relevance for the jurisdictional phase of this proceeding.⁴⁰ The parties briefed the United States' objections based on Article 1901(3) in the *Canfor* arbitration, and our objections based on Articles 1901(3), 1101(1) and 1121(1) in the *Tembec* arbitration, without a single redaction to any of the submissions. Those submissions are publicly available on the United States' website and all of the attachments to those submissions are public. The *Canfor* hearing was open to the public, and neither party introduced any proprietary information during that hearing. Likewise, *Tembec* has never suggested that it intended to introduce proprietary information at the hearing, nor could it have done so given that no such information was exchanged prior to the hearing. None of this is surprising as the United States' jurisdictional objections raise purely legal issues of treaty interpretation. Thus, if this Tribunal decides to consolidate for purposes of jurisdiction, there would be no need at this time to address the issue of how to treat proprietary information.

Furthermore, consolidation for purposes of the merits would not pose any insurmountable problems regarding the protection of confidential information. *Tembec*, like the United States,

³⁹ See *Case No. B36*, Award No. 574-B36-2 (Iran-U.S. Cl. Trib. 1996) ¶ 74 (holding that United States was not barred from asserting a contract claim that was over thirty years old because Iran had a "reasonable opportunity to gather contemporary evidence to contest the claim."); *Ambatielos Claim (Greece v. U.K.)*, 23 I.L.R. 306, 316 (Arb. Comm'n 1956) (holding that the passage of more than thirty years did not justify barring Greece's contract claim because the "*the facts* which constitute[d] [the claim's] substance ha[d] remained the same from the beginning" and, therefore, the United Kingdom was not prejudiced by such passage of time.) (emphasis in original).

⁴⁰ See Hrg. Tr. at 289:20-290:14.

recognizes that this Tribunal has at its disposal the tools necessary to ensure the protection of confidential business information introduced at any merits phase of these proceedings.⁴¹

Below, the United States first addresses some of the procedures used by other tribunals and courts to manage the submission of confidential information by competitors in multi-party proceedings. We then address claimants' factual assertions concerning the nature and volume of confidential information that might be submitted in a consolidated hearing on the merits.

U.S. Administrative Proceedings: The most pertinent example of a decision-making body that manages confidential information introduced in the same proceeding by competing companies is the U.S. Department of Commerce (or the International Trade Commission, as the case may be) in the course of its antidumping and countervailing duty proceedings. The Tariff Act of 1930 and Commerce's and the ITC's regulations provide that any information designated as proprietary may be disclosed to Commerce or ITC employees directly involved in the relevant investigation, and to counsel to a party in the proceedings – but not to a party itself.⁴² Such information must be accompanied by a non-proprietary summary of the information submitted and a statement permitting Commerce or the ITC to release the proprietary information to interested parties under an administrative protective order.⁴³ Business proprietary information may then be shared among all interested parties to the proceeding that are subject to the

⁴¹ See *id.* at 291:5-11 (U.S.: “[W]e have the utmost confidence that this Tribunal could fashion accommodations to allow any of that business proprietary information to come in, just . . . [as] is done in multiple other fora. There is no reason why this Tribunal could not similarly accommodate that type of information.”); see also *id.* at 285:21-286:2 (Tembec: “The notion that the Tribunal could fashion a mechanism for protecting confidential information is obvious. Of course, it could.”).

⁴² See Tariff Act of 1930, 19 U.S.C. § 1677f(b)(1)(A); 19 C.F.R. §§ 207.7(a) & (b), 354.5(d)(1); see also Tariff Act § 1677f(b)(1)(A)(ii) (permitting disclosure of proprietary information to U.S. Department of Customs employees investigating fraud).

⁴³ See *id.* § 1677f(b)(1)(B)(i)&(ii) (the party may also submit a statement explaining why the information is not susceptible to summary, or a statement that the business proprietary information is of a type that should not be released under an administrative protective order).

protective order.⁴⁴ Commerce or the ITC lists all nonpublic documents on a separate index to the administrative record.⁴⁵

The Tariff Act likewise sets forth procedures for handling business proprietary information in the context of the bi-national proceeding under Chapter Nineteen of the NAFTA. Commerce or the ITC may make proprietary material in the administrative record available only to “authorized persons” under an administrative protective order, which include panel members and counsel for the parties to the proceeding, but not the parties themselves.⁴⁶

European Commission: The European Commission also utilizes procedures for protecting confidential information in the course of its competition investigations.⁴⁷ Parties to the proceeding must specify which documents, if any, they regard as confidential and provide the Commission with non-confidential versions of the same documents, to the extent possible.⁴⁸ Where a party considers that making a non-confidential version is not possible, it may request that the documents be made “non-accessible.”⁴⁹ The Commission reviews these documents and, except where “clearly unjustified,” classifies them as requested by the party.⁵⁰ The Commission

⁴⁴ See *id.* § 1677f(c)(1)(A), (D).

⁴⁵ An example of such a list from the softwood lumber antidumping proceeding involving Tembec and Canfor is attached at Tab 19 to the United States’ Appendix.

⁴⁶ See *id.* §§ 1677f(1)(A) & (B)(i)&(ii); see also 19 C.F.R. §§ 207.7(a) & (b), 354.5(d)(1). U.S. federal courts employ a similar procedure for protecting confidential business information. Courts may enter a protective order pursuant to Rule 26(c) of the Federal Rules of Civil Procedure to protect confidential information produced by one party from being disclosed to another party to the proceeding. Courts may enter orders that restrict disclosure to counsel to a party, but not to the party itself. See, e.g., *Vesta Corset Co., Inc. v. Carmen Foundations, Inc.*, 1999 WL 13257 (S.D.N.Y. 1999) (limiting disclosure of confidential information to counsel and experts); *In re Vitamins Antitrust Litigation*, 267 F.Supp.2d 738, 741 (S.D. Ohio 2003) (providing for two levels of classification, “confidential”, and “confidential and lawyers only”).

⁴⁷ See European Commission Notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles 85 and 86 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council Regulation, 1997 O.J. (C23) 3 (“European Commission Notice”).

⁴⁸ See *id.* at ¶ II.A.1.2.

⁴⁹ See *id.*

⁵⁰ See *id.*

in turn creates a list of all documents in the file, classifying each as “accessible,” “partially accessible” or “non-accessible.”⁵¹ “Non-accessible” documents must be described with sufficient detail such that “the content and subject of the documents [can] be identified, so that any firm having requested access to the file is able to determine in full knowledge of the facts whether the documents are likely to be relevant to its defence and to decide whether to request access despite that classification.”⁵² Parties may request that the Commission release “non-accessible” documents, or provide a non-classified version.⁵³ When the Commission receives such a request, it consults with the owner of the document at issue regarding its sensitivity and whether it can be provided to the requesting party in its entirety or in redacted form.⁵⁴ A document may also be provided to a party over another party’s objection “if the document serves as the basis for a [Commission] decision or is clearly an exculpatory document.”⁵⁵

WIPO: Tribunals constituted under the World Intellectual Property Organization use a similar procedure for managing and protecting confidential information submitted by the parties. Under Article 52 of the WIPO Arbitration Rules, “[a] party invoking the confidentiality of any information it wishes or is required to submit in the arbitration, including to an expert appointed by the Tribunal, shall make an application to have the information classified as confidential by notice to the Tribunal, with a copy to the other party.”⁵⁶ The invoking party must provide reasons as to why it considers the information confidential.⁵⁷ The tribunal must then determine

⁵¹ *See id.* ¶ II.A.1.4.

⁵² *Id.* ¶ II.A.1.4(c).

⁵³ *Id.* ¶ II.C.1.

⁵⁴ *Id.* at ¶ II.A.1.3.

⁵⁵ *Id.*

⁵⁶ Arbitration Rules of the World Intellectual Property Organization, WIPO Pub. No. 446(E) art. 52(b), available at <http://arbitrator.wipo.int/center/publications/e446.pdf>.

⁵⁷ *Id.*

whether to classify the information as confidential such that “the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality.”⁵⁸ If the tribunal classifies the information as confidential, “it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign an appropriate confidentiality undertaking.”⁵⁹

WTO: Panels established under the World Trade Organization Understanding on Rules and Procedures Governing the Settlement of Disputes have also used procedures for protecting business confidential information. The panel reviewing the United States’ final dumping determination on softwood lumber from Canada, for instance, established working procedures for protecting confidential information submitted by parties in that proceeding.⁶⁰ Under those procedures, a Panel Member may request that a party provide a non-confidential summary of confidential submissions.⁶¹ The procedures also provide for the submission of information that was treated as confidential in the course of Commerce’s antidumping investigation.⁶² Such information must be so designated, and “shall only be used for the purposes of submissions and argumentation in this dispute and for no other purpose.”⁶³ Any party referring in a written submission to such information must identify the information as such, and provide a non-confidential version of its submission to the Panel.⁶⁴ The Panel may not disclose in its Report

⁵⁸ *Id.* art. 52(c).

⁵⁹ *Id.*

⁶⁰ *See United States-Final Dumping Determination on Softwood Lumber from Canada (DS 264), Working Procedure for the Panel.*

⁶¹ *See id.* ¶ 3.

⁶² *See id.*

⁶³ *See id.* ann. 1 ¶ 2.

⁶⁴ *See id.* ¶ 3.

any such information, but reserves the right to “make statements of conclusion drawn from such information.”⁶⁵

Claimants’ contention that the volume and nature of the proprietary information required in this proceeding is such that the Tribunal could not fairly and efficiently manage a hearing on the merits is implausible. *First*, claimants have failed to explain why confidential business information would be needed at the merits phase in the first place.⁶⁶ Rather, they merely assert that the measures at issue “have had differential impacts, different consequences.”⁶⁷ The alleged effect of a given measure on a claimant, however, is primarily an issue of damages. Moreover, because claimants’ investments will be differently affected by a given measure in almost every case, that fact does not weigh in favor of separate proceedings. Claimants’ argument based on differential impacts is an argument for never consolidating under any circumstances, and should be rejected.

Second, claimants’ repeated recitations of the amount of duties the United States is collecting from them on their softwood lumber exports makes it clear that claimants’ claims primarily concern “get[ing] these funds back in an award,” and not any alleged indirect impact of the measures on their U.S. investments.⁶⁸ The amount of those duties is a matter of public

⁶⁵ *Id.* ¶ 4.

⁶⁶ The only proprietary information that the United States believes could be relevant to the merits – the pricing, sales and other data submitted to Commerce by the companies subject to the antidumping and countervailing duty investigations – cannot be introduced in these proceedings because it is subject to administrative protective orders. Tembec’s argument at the hearing that it can introduce its own proprietary information in a Chapter Eleven proceeding misses the point. *See* Hrg. Tr. at 138:6-139:3. Many of Commerce’s determinations were derived by averaging or compiling proprietary data from other softwood lumber producers, such as Slocan and Weyerhaeuser. Thus, even if Canfor and Tembec submitted their own proprietary information, the Tribunal could not reconstruct the set of data Commerce used to make many of its determinations.

⁶⁷ Hrg. Tr. at 288:6-7; *see also id.* at 138:2-5 (Tembec: “Each complainant is affected differently by the actions of the United States.”).

⁶⁸ Tembec’s Submission in Opposition to Request for Consolidation (June 10, 2005) (“Tembec’s June 10 Submission”) at 2-3, 7, 9; Hrg. Tr. at 64:4-9; 68:2-8; 124:11-14; 128:20-129:5.

record. Thus, even at a damages phase, no proprietary information would be required to prove the bulk of claimants' alleged damages.

Third, claimants' statements at the hearing that they operate in entirely different industries and in different geographical regions raise doubts concerning the sensitivity of any business proprietary information that might be shared among their counsel.⁶⁹ Indeed, when the Tribunal asked Tembec at the hearing how it competes with Canfor, the only example it could provide was that the two companies had once bid to acquire the same Canadian company.⁷⁰ Unlike competition cases before the European Commission (where one party's confidential information may be highly relevant to the defense of another party), in this case, one claimant's proprietary information relating to its U.S. investments is unlikely to be relevant for another claimant to prove a breach of NAFTA Chapter Eleven or to demonstrate its damages.⁷¹ Furthermore, the parties to the NAFTA Chapter Nineteen softwood lumber antidumping panel proceeding, which include Canfor and Tembec, submitted 428 proprietary documents, including correspondence, accounting records, analyst memoranda, and verification reports.⁷² Thus, Canfor's and Tembec's counsel have already shared many proprietary documents in the context of those proceedings.

⁶⁹ See Hrg. Tr. at 288:2-3 (Tembec: "[O]ur markets are divided and our businesses are so different."); *see also id.* at 142:22-143:1 (Tembec: "[E]ast is east and west is west, and in this case never should the complainants meet."); *id.* at 144:15-17 (Tembec: "[Claimants produce] different products. They go to different uses, they're sold in different markets.").

⁷⁰ See Hrg. Tr. at 285:10-14 (Tembec: "I'll give you an example [of how Tembec and Canfor compete]: . . . over the last four years, in the bidding for Canfor and Slocan in their acquisition and merger, Tembec was involved in that.").

⁷¹ See European Commission Notice, Introduction ("The Commission's task in this area is to reconcile two opposing obligations, namely that of safeguarding the rights of the defence and that of protecting confidential information concerning firms."); *id.* at I.A.1 ("Where business secrets provide evidence of an infringement or tend to exonerate a firm, the Commission must reconcile the interests in the protection of sensitive information, the public interest in having the infringement of the competition rules terminated, and the rights of the defence.").

⁷² See United States Department of Commerce, Import Administration, Index to Administrative Record, Case No. A122838, *Certain Softwood Lumber Products from Canada*, attached at Tab 19 of the United States' appendix.

In sum, it is questionable whether proprietary information would even be relevant for the merits of these cases. The sensitivity of sharing that information is also in doubt. If such information was deemed relevant and sensitive, however, there is no reason why this Tribunal, like the aforementioned tribunals and courts, could not fashion a procedure for handling any business proprietary information.

Question 9: Provide a chart referencing common questions of law and fact.

The United States attaches hereto as “Exhibit A” a chart cross-referencing claimants’ allegations against the specific provisions of Chapter Eleven alleged to have been breached, as requested by the Tribunal. As the United States noted at the hearing, we are somewhat constrained by the fact that claimants do not uniformly tie each allegation to a specific article alleged to have been breached. As the chart amply demonstrates, however, there are numerous common issues of law and fact among the three claims that can be linked to violations of specific articles.

Claimants’ attempt to list every conceivable factual difference among them – for instance, that one claimant harvests timber by helicopter and another by truck,⁷³ or that one claimant was more affected than the others by a beetle infestation⁷⁴ – do not have any relevance to issues of jurisdiction or liability and, thus, provide no reason to deny consolidation.

Question 10: How does this proceeding differ from the HFCS consolidation proceeding?

In response to this question at the hearing, the United States described five key differences between its application for consolidation and the request made by Mexico for

⁷³ See Hrg. Tr. at 149:21-150:4.

⁷⁴ See *id.* at 146:4-16.

consolidation of the claims filed by producers of high fructose corn syrup (“HFCS”).⁷⁵ We summarize those points below.

First, the parties in the *HFCS* cases derogated from Article 1126 by consensually agreeing to establish a tribunal to determine whether the case should be consolidated.⁷⁶ The parties further agreed that if the tribunal ordered consolidation, the parties would retain the right to form yet another tribunal to determine the claims.⁷⁷ This derogation appears to have led the *HFCS* tribunal to conclude that the parties’ preferences with respect to consolidation were a factor that the tribunal ought to consider.⁷⁸ Here, by contrast, the parties have not derogated from Article 1126 in any manner.

Second, the claimants in the *HFCS* case identified factual differences among their claims that the tribunal concluded might affect issues of liability.⁷⁹ Claimants have failed to do that here.⁸⁰

⁷⁵ See *id.* at 302:16-313:1.

⁷⁶ See Confirmación del Acuerdo de las Partes Contendientes sobre Consolidación ¶¶ 1, 3, *Corn Prods., Int’l, Inc. v. United Mexican States, Archer Daniels Midland Co. v. United Mexican States, Tate & Lyle Ingredients Ams., Inc. v. United Mexican States* (“*HFCS Consolidation*”), ICSID Case No. ARB(AF)/04/05 (Apr. 8, 2005) (“Consolidation Agreement”), available at http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Consolidacion/acuerdos/050407_Confirmacion_Acuerdo_esp.pdf.

⁷⁷ *Id.* ¶ 4.

⁷⁸ See Order of the Consolidation Tribunal ¶¶ 11-12, *HFCS Consolidation* (May 20, 2005) (“Consolidation Order”), available at http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Consolidacion/acuerdos/050520_Orden_de_Tribunal_de_Acumulacion.pdf. The *HFCS* tribunal’s consideration of the claimants’ opposition to consolidation is difficult to reconcile with Article 1126’s purpose, which is primarily to provide respondents with a means to avoid the burden of defending against multiple claims. See *supra* n.3. As the United States noted at the hearing, if claimants’ opposition to consolidation were sufficient reason to deny consolidation, there would be little reason for Article 1126. See Hrg. Tr. at 172:7-173:15. In any event, the United States takes issue with the *HFCS* tribunal’s assumption that all three NAFTA Parties agreed that party autonomy “has been read into Article 1126” on the basis that the parties had derogated from Article 1126 and neither Canada nor the United States made submissions pursuant to Article 1128. See Consolidation Order ¶ 12.

⁷⁹ See Consolidation Order ¶¶ 14-15; see also Transcript of Hearing on Consolidation 43:20-45:14, *HFCS Consolidation* (Apr. 18, 2005) (“*HFCS Tr.*”), available at http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Consolidacion/documentos_basicos/0418_transcripcion.pdf; *id.* at 64:16-65:20, 78:11-79:13; Opposition of Corn Products to Mexico’s Request for Consolidation at 19-20, *HFCS Consolidation* (Apr. 11, 2005) (“*CPI Opp.*”), available at http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Consolidacion/documentos_basicos/050411_escrito_CPI

Third, while Mexico had not yet had occasion to identify any common defenses it intended to raise in the *HFCS* cases,⁸¹ the United States has done so and has identified with particularity and briefed its objections to jurisdiction. Therefore, while it may have been difficult for the *HFCS* tribunal to ascertain the extent to which Mexico's defenses to all of the *HFCS* claims would be common, that is not the case here. The United States raises the identical jurisdictional objections on the grounds of Article 1901(3) and 1101(1) with respect to each of the three claims. And, it raises the identical objection based on Article 1121(1) with respect to two of the claims. In addition, as discussed in prior submissions and at the hearing, the United States has articulated commonalities regarding its defenses on the merits as well.⁸²

Fourth, in denying consolidation, the *HFCS* tribunal relied on the fact that claimants contended that a consolidated proceeding would be unfair and inefficient due to the large amounts of confidential information that would be introduced.⁸³ Regardless of whether the *HFCS* tribunal was correct in concluding that it could not accommodate the introduction of confidential information into a consolidated proceeding in a fair and efficient manner, no similar concerns counsel against consolidation here.⁸⁴

consolidacion.pdf (describing the difference in proving proximate causation for the two claimants); *id.* at 20-21 (characterizing one claimant's claims as giving rise to jurisdictional issue under Article 1101(1) that would not arise for the other claimant); *id.* at 22 (claiming that question of a performance requirement in violation of Article 1106 exists for one claimant, but not for the other); *id.* at 23 (claiming that one claimant "benefited from numerous specific assurances related to its investment from Mexican Presidents, cabinet-level officials, and federal, state and municipal government agencies," while the other claimant did not, giving rise to different claims under Article 1110).

⁸⁰ See Hrg. Tr. 307:14-21; see also *supra* Response to Question 9 & *infra* Response to Question 15. In addition, any supposed factual differences have no relevance to the United States' jurisdictional objections.

⁸¹ See *HFCS* Tr. at 86:15-88:17; see also *id.* at 75:16-20; 43:16-17, 46:15-47:5; CPI Opp. ¶ 60 ("Mexico has not identified any common defenses it intends to raise . . .").

⁸² See Hrg. Tr. at 307:1-13; see also Submission of United States in Support of Request for Consolidation at 12.

⁸³ See Consolidation Order ¶¶ 8-9.

⁸⁴ See Response to Question 8, *supra*.

Finally, the *HFCS* tribunal concluded that the risk of inconsistent decisions was not great if the *HFCS* cases proceeded separately. The tribunal reasoned that, because of the factual differences among the claims, different outcomes as to liability would not necessarily be inconsistent.⁸⁵ Different outcomes in the softwood lumber claims, however, necessarily would be inconsistent with respect to jurisdiction and would almost inevitably be inconsistent with respect to the merits.⁸⁶ In addition, because of the different procedural postures of the *HFCS* cases, one tribunal would likely have the benefit of reviewing the decision issued by the other tribunal.⁸⁷ Here, because the *Canfor* and *Tembec* tribunals would be deliberating simultaneously on identical issues if the claims are not consolidated, neither tribunal would likely have that benefit.

Question 12: Provide an estimate of the costs of the three separate proceedings versus one consolidated proceeding.

As a preliminary matter, the United States notes that it is not possible to ascertain with precision the amount of costs that may be incurred in the future in a particular proceeding. More important than the exact figures used throughout this discussion, however, are the cost differences between a consolidated proceeding versus separate proceedings and the assumptions underlying those estimates. What is clear is that consolidating the claims would result in substantial cost savings.

When evaluating the cost efficiencies, this Tribunal's decision on consolidation serves as the pertinent point of departure for comparison. Although claimants repeatedly invoke the

⁸⁵ See *id.* ¶ 16.

⁸⁶ See Submission of United States in Support of Request for Consolidation at 21-22.

⁸⁷ Consolidation Order ¶ 19; see also CPI Opp. ¶ 109. As of the time of the *HFCS* Consolidation Order, no tribunal had yet been constituted to hear ADM/Tate & Lyle's claim. By contrast, CPI had filed its Memorial on the merits, which is 170 pages long and contains 17 witness statements, two expert opinions and over 170 factual exhibits. See *id.* ¶ 11.

amounts spent to date in their respective Article 1120 proceedings, sunk costs are only relevant indirectly in determining the cost efficiencies of consolidation.⁸⁸ As of the date of the Tribunal's decision on consolidation, a comparison between the costs that would be incurred by the parties if consolidation is ordered, as compared with the costs that would be incurred by the parties if consolidation is denied, demonstrates that consolidation indeed is cost efficient.

Attached hereto as Exhibit B are tables detailing the costs, along with the facts and assumptions that we used in making those calculations, that would be incurred if the arbitrations proceeded separately, as compared to the costs that would be incurred if consolidation were ordered. As the Tribunal noted at the hearing, the costs of a proceeding can be roughly divided into arbitral costs and legal fees.

The United States estimates that the costs that it will incur for arbitral fees and administrative expenses would be six times greater if the Tribunal did not consolidate for purposes of jurisdiction than they would be if the Tribunal ordered consolidation.⁸⁹ Moreover, the costs for arbitral fees and administrative expenses for each of the claimants is estimated to be more than twice as great in a separate proceeding than in a consolidated proceeding.⁹⁰

The United States also estimates that it will spend more than three times as much in attorneys' time if it were to defend each of the three cases separately for purposes of jurisdiction than it would spend if the claims were consolidated.⁹¹ In total, the United States estimates that

⁸⁸ See U.S. June 3 Submission at 16-17 (explaining that the majority of the costs incurred to date have been in connection with preparing the written submissions, which this Tribunal may utilize); *id.* at n.49 (explaining that the parties in *Canfor* would need to expend further resources in connection with a likely re-hearing on jurisdiction, the *Canfor* tribunal has not incurred expenses associated with deliberating or drafting its award, and that a substantial portion of the tribunal expenses in the *Tembec* proceeding have not yet been incurred); see also Letter from Gonzalo Flores to Elliott Feldman dated July 13, 2005 (responding to Mr. Feldman's request for a detail of the costs incurred in the *Tembec* proceeding and stating that arbitrators' fees amounted to \$9,600).

⁸⁹ See Exhibit B at Table 1 & accompanying text.

⁹⁰ See *id.*

⁹¹ See *id.* at Table 2 & accompanying text.

by consolidating the cases for purposes of jurisdiction, the United States will save approximately 80% in arbitral, administrative and attorneys' fees.⁹²

Consolidating for purposes of the merits and damages phases of these proceedings would also be cost efficient. The United States estimates that it would spend more than six times as much in arbitral and administrative expenses if the claims are not consolidated on the merits and for damages as it would spend if they were consolidated.⁹³ Each claimant will also realize substantial cost savings with respect to these expenses if the claims are consolidated.⁹⁴

Finally, the United States estimates that it will spend substantially less in fees for attorneys, experts and miscellaneous expenses, such as photocopying costs, if these claims are consolidated for purposes of merits and damages than if the claims proceed separately.⁹⁵ When these costs are combined with the costs for arbitral and administrative expenses to calculate total costs for any merits and damages phase, it is estimated that consolidating for these phases will result in a cost savings to the United States of approximately 77%.

Question 13: Can claimants provide three examples of where they believe consolidation under Article 1126 applies?

Although this question was directed to claimants, the United States offers some preliminary observations on Tembec's response given at the hearing.⁹⁶ Tembec offered the following scenarios in which it believes consolidation under Article 1126 may be appropriate: (i) where claimants "aren't in direct competition with one another so that you don't have problems of confidential business information;"; (ii) where "there haven't been huge investments

⁹² See *id.* at Tables 1 & 2 & accompanying text.

⁹³ See *id.* at Table 3 & accompanying text.

⁹⁴ See *id.*

⁹⁵ See *id.* at Table 4 & accompanying text.

⁹⁶ Canfor and Terminal did not respond to the question at the hearing.

in the Article 1120 tribunals”; (iii) “where you have pure legal issues”; and (iv) where claimants are “affiliated companies.”⁹⁷ These examples are inapposite and provide no basis to deny consolidation.

First, Tembec’s argument that Article 1126 applies only to non-competing companies, and is inapplicable here because claimants “compet[e] ferociously” in the same industry, is riddled with contradictions.⁹⁸ It is factually inconsistent with Tembec’s contention that claimants’ “markets are divided and [their] business are so different.”⁹⁹ And it is irreconcilable with Tembec’s assertions in its pre-hearing submission that Article 1126 applies only with respect to companies that produce the same product in the same geographical region – which, under ordinary circumstances, are competitors.¹⁰⁰ Furthermore, Tembec’s argument wrongly assumes that an Article 1126 tribunal, unlike other courts and tribunals, is incapable of fashioning procedures for protecting proprietary business information.

Second, Tembec’s assumption that consolidation is inappropriate here because the parties have invested heavily in the respective Article 1120 proceedings is factually incorrect. ICSID’s letter of July 13, 2005 confirms that *Tembec’s* share of the tribunal fees incurred to date in the *Tembec* proceeding is \$4,800 – hardly the “huge investment” alleged by Tembec.¹⁰¹ Indeed, the

⁹⁷ Tembec also appears to suggest that recent proceedings commenced by the Government of Canada, the Canadian Lumber Trade Alliance, the Ontario Forest Industries Association, the Canadian Wheat Board, and Norsk Hydro Canada Inc. in the U.S. Court of International Trade are claims that are appropriate for consolidation because they raise issues of “pure law.” See Hrg. Tr. at 237:11-238:19. It is clear that the plaintiffs in these actions – one of which is a government, two of which are trade associations, one of which is a seller and exporter of wheat, and one of which is producer and exporter of alloy magnesium – share far fewer similarities than the claimants here.

⁹⁸ Hrg. Tr. at 285:9-10; *see also id.* at 316:14 (Tembec: “We [are] competitors in the same industries.”); Tembec’s June 10 Submission at 34 (“Tembec is a competitor of Canfor and Terminal.”).

⁹⁹ *Id.* at 288:2-3; *see also id.* at 142:22-143:1 (Tembec: “[E]ast is east and west is west, and in this case never should the complainants meet.”); *id.* at 144:15-17 (Tembec: “[Claimants produce] different products. They go to different uses, they’re sold in different markets.”).

¹⁰⁰ *See* Tembec’s June 10 Submission at 34-35.

¹⁰¹ *See* Hrg. Tr. at 314:8-12; *see also id.* at 133:8-134:5.

parties have far more “invested” in this Tribunal at this point. In any event, as detailed in our response to Question 12, the relevant comparison is between the costs that would be incurred on a going-forward basis if this Tribunal consolidates the claims, as compared with the future costs that would be incurred in the Article 1120 proceedings if the claims proceed separately. As explained in our prior response, the costs of proceeding separately far outweigh the costs of consolidating.

Third, Tembec’s contention that consolidation is appropriate where there are “pure legal issues” involved ignores the plain text of Article 1126, which provides for the consolidation of “claims . . . that have a question of law or *fact* in common.”¹⁰² If consolidation were restricted in the manner Tembec proposes, cases could almost never be consolidated on the merits, which typically give rise to mixed issues of law and fact. Tembec’s theory, in any event, fully supports consolidation for purposes of deciding the United States’ jurisdictional objections, which raise straightforward legal issues of treaty interpretation.

Finally, Tembec’s assertion that consolidation under Article 1126 is appropriate where multiple claims are filed by affiliated companies is unfounded. To the contrary, Article 1126 is intended primarily to consolidate claims of *unrelated* companies, such those presented by claimants here.¹⁰³ As the United States indicated at the hearing, Article 1117(3) of the NAFTA provides for presumptive consolidation where a majority or minority shareholder and the corporation both file claims with respect to the same events under Articles 1116 and 1117, respectively.¹⁰⁴ Article 1126, on the other hand, is “intended to relieve a State Party from the

¹⁰² NAFTA art. 1126(2) (emphasis added).

¹⁰³ See Alvarez, *supra* note 2, at 413-414.

¹⁰⁴ See Hrg. Tr. at 54:14-56:7.

hardship of having to defend multiple claims arising from the same measure.”¹⁰⁵ The United States’ Statement of Administrative Action provides that Article 1126 addresses the possibility that “more than one investor” – not the same investor, or related investors – might submit to arbitration claims arising out of the same event.¹⁰⁶ Requiring a corporate relationship among claimants for consolidation would impose a restriction on the application of Article 1126 that was not intended by the Parties and would compromise the fairness and efficiency goals of that Article.

Question 14: If consolidation is ordered, where would the consolidated proceeding begin? What happens to Terminal’s claim?

The United States and Tembec agree that if the claims were consolidated, this Tribunal would start anew procedurally.¹⁰⁷ Accordingly, this Tribunal has the authority to establish a legal seat for the arbitration, determine whether and which issues to treat preliminarily, order schedules for the making of submissions and set procedures for the hearing, among other things, and is not bound by the determinations made on these matters by the Article 1120 tribunals. Indeed, any other interpretation would be unworkable.¹⁰⁸

Article 1126 provides no direct guidance in terms of whether the claims consolidated by a tribunal under that article begin anew substantively. Rather, a consolidation tribunal should be guided by the principles of fairness and efficiency, as set forth in Article 1126. In this proceeding, none of the parties has requested that the Tribunal begin the proceedings anew from a substantive standpoint. Instead, each of the parties appears to agree that, if the claims are

¹⁰⁵ Alvarez, *supra* note 2, at 414.

¹⁰⁶ U.S. Statement of Administrative Action at 147.

¹⁰⁷ See Hrg. Tr. at 322:3-4 (U.S.: “As far as procedurally, yes, this Tribunal starts over”); 319:15-17 (Tembec: “I would suggest, Mr. President, that procedurally you have to start over”).

¹⁰⁸ A consolidation tribunal could not function were it bound by all of the schedules ordered by different Article 1120 tribunals. Similarly, if the legal place of arbitration were different in various Article 1120 proceedings that were later consolidated, a consolidation tribunal could not be bound by those different determinations.

consolidated, this Tribunal may utilize the submissions already made by the parties in the respective Article 1120 proceedings.

If this Tribunal consolidates the claims, in accordance with Article 15 of the UNCITRAL Arbitration Rules, it may then decide how best to conduct the arbitration. The United States will request that it bifurcate the claims for purposes of hearing its jurisdictional objections. As set forth in our prior written and oral submissions, the Tribunal can then establish a short briefing schedule to give Canfor the opportunity to make written submissions on the two jurisdictional objections which it has not yet briefed, while utilizing the parties' written submissions made on the United States' Article 1901(3) objection. The Tribunal could also extend an opportunity to Terminal to make written submissions on the United States' jurisdictional objections prior to a hearing in the event that Terminal, which shares counsel with Canfor, chooses not to rest on Canfor's submissions. The Tribunal could then schedule a hearing on the United States' jurisdictional objections to be held in the near future.

Question 15: Can Tembec explain how trade law is allegedly applied differently in the three claims?

Although this question was directed to Tembec, the United States takes this opportunity to offer preliminary observations on Tembec's response to the question made at the hearing. Tembec alleged that claimants' claims are not appropriate for consolidation because United States trade law was applied differently to each of the claimants. The factual differences alleged by Tembec, however, are irrelevant to the issue of whether the claims raise common issues of liability under the NAFTA, and are thus irrelevant to the issue of consolidation.

Tembec alleges that Commerce applied "benchmarks" differently with respect to Tembec and Canfor because it compared Tembec's stumpage fees to prevailing timber prices in Minnesota and Wisconsin, whereas it compared Canfor's stumpage fees to timber prices in

Washington and Oregon.¹⁰⁹ In their Notices of Arbitration, however, claimants all contend that the United States violated Articles 1102, 1105 and 1110 of the NAFTA because Commerce did not use benchmarks in Canada, but instead used benchmarks *in the United States*.¹¹⁰ Those claims are not premised on the particular U.S. states from which the benchmarks were derived. The common issue of liability is thus whether or not a “cross border analysis” violates specific provisions of the NAFTA. Tembec’s attempt to dissect the claims for factual differences has not identified any issue relevant to the question of liability.¹¹¹

¹⁰⁹ See Hrg. Tr. at 326:17-327:6. A “benchmark” is a measure of the prevailing market price used to determine whether the government received adequate remuneration for a good – in this case stumpage – or whether the government effectively conferred a subsidy by providing the good at a below-market price. See 19 U.S.C. § 1677(5)(E)(iv); see also Hrg. Tr. at 325:13-327:6.

¹¹⁰ See Canfor Statement of Claim ¶ 113 (“In total disregard of the requirements of United States law and the Respondent’s international obligations, including its obligations under the SCM Agreement, the DOC declined to use ‘in-country’ benchmarks . . . and instead used a ‘cross-border’ benchmark.”) (emphasis added); Tembec Statement of Claim ¶ 86(a) (“Commerce compared prices in Canada to prices in the United States, so-called “‘cross-border benchmarks.’”) (emphasis added); Terminal Notice of Arbitration ¶ 23(b) (“[Commerce] arbitrarily and capriciously us[ed] a *cross-border analysis* previously rejected by it, to determine the existence of a ‘benefit.’”) (emphasis added).

¹¹¹ At the hearing, Tembec also alleged that Commerce’s method for factoring wood chip sales in the cost of production was applied differently for Tembec and for Canfor. See Hrg. Tr. at 327:17-328:15. This argument is perplexing, as Tembec does not allege wood chip sales as part of its claim in its Notice of Arbitration.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the United States' prior submissions, the United States respectfully requests that this Tribunal assume jurisdiction over, and hear and determine together, the entirety of the claims submitted by Canfor, Tembec and Terminal.

Respectfully submitted,

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