

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.*

**REPLY SUBMISSION OF RESPONDENT UNITED STATES OF AMERICA  
IN SUPPORT OF REQUEST FOR CONSOLIDATION**

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The United States respectfully submits this Reply in support of its request for consolidation pursuant to NAFTA Article 1126(2). In their post-hearing submissions, claimants hardly contest that consolidation for purposes of deciding the United States' jurisdictional objections would be fair and efficient. Instead, they focus on the merits of their claims, propounding arguments that, if accepted, would preclude consolidation in virtually all circumstances. The United States briefly responds below.

**Consolidation For Purposes Of Jurisdiction Should Be Granted**

Claimants do not dispute that the United States' jurisdictional objections raise common legal issues that are dispositive of the claims.<sup>1</sup> And they offer no reason why consolidation for

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<sup>1</sup> See Post-Hearing Submission of Canfor Corporation and Terminal Forest Products Ltd. (July 22, 2005) ("Canfor & Terminal Post-Hearing Submission") ¶ 5 (conceding that the United States' objection based on Article 1901(3) has "the commonality the treaty requires"); see also *id.* ¶ 9. Canfor also fails to respond to the United States' arguments at the June 16 hearing in reiterating its claim that the United States waived its objection based on Article 1121(1).

the purpose of deciding those objections would not be fair and efficient. Nor do they provide any reason why the Tribunal could not reserve on whether to consolidate for purposes of the merits pending its decision on jurisdiction.<sup>2</sup> As Tembec concedes, no proprietary information would be necessary at the jurisdictional phase.<sup>3</sup> Consolidation for purposes of jurisdiction also presents significant cost savings and avoids the risk of conflicting interpretations of the treaty.<sup>4</sup> For these reasons, consolidation on jurisdiction is warranted in this case.

Tembec's newly-minted argument that the Tribunal may not consolidate unless the Article 1120 tribunals have determined they have jurisdiction, like its argument based on Article 21(3) of the UNCITRAL Arbitration Rules, is without merit.<sup>5</sup> Tembec bases its argument on the fact that Article 1126 provides for the consolidation of "claims," and concludes that this indicates that only claims over which jurisdiction has been established may be consolidated. NAFTA Articles 1116 through 1122, however, address the submission of a "claim" to

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*See id.* ¶¶ 40-50; Transcript of the June 16, 2005 Hearing on Consolidation ("Hrg. Tr.") at 181:22-186:16 (explaining that the objection was reserved).

<sup>2</sup> Canfor and Terminal likewise cite no authority for their contention that the Tribunal is barred from addressing issues in a preliminary phase that were not accorded preliminary treatment by an established Article 1120 tribunal. As Tembec concedes, consolidation tribunals are not bound by procedural decisions made by Article 1120 tribunals. *See* Hrg. Tr. at 319:15-17; Post-Hearing Submission of Respondent United States of America in Support of Request for Consolidation (July 22, 2005) ("U.S. Post-Hearing Submission") at 26; UNCITRAL Arbitration Rule Article 15.

<sup>3</sup> *See* Tembec's Post-Hearing Brief in Opposition to Consolidation (July 22, 2005) ("Tembec Post-Hearing Submission") at 2. Canfor's contention that the United States' objection based on Article 1101(1) raises factual issues is called into doubt by the fact that the parties in the *Tembec* arbitration briefed the same objection without either party introducing any factual evidence.

<sup>4</sup> As Canfor and Terminal recognize, the NAFTA Parties empowered the Free Trade Commission ("FTC") to issue binding treaty interpretations. *See* Canfor & Terminal Post-Hearing Submission at n.7. That mechanism further demonstrates the Parties' intent to avoid conflicting decisions. Canfor's and Terminal's suggestion that a consolidation tribunal should not seek to avoid conflicting interpretations because the treaty already contains a mechanism for resolving interpretive disputes after they arise is nonsensical. Moreover, that argument ignores the fact that the FTC is authorized only to interpret the treaty, whereas consolidation may avoid conflicting determinations of fact and of legal issues unrelated to the treaty's interpretation.

<sup>5</sup> Notably, the argument runs counter to Tembec's assertion that requests for consolidation are themselves objections to jurisdiction. *See* Tembec's Motion to Dismiss (June 27, 2005) at 5-6. It also contradicts Canfor's and Terminal's contention that consolidation must be sought *before* any issue has been briefed and argued before an Article 1120 tribunal. *See* Canfor & Terminal Post-Hearing Submission ¶ 18.

arbitration. That term does not embody any presumption regarding the validity of the claim or of the tribunal's competence.

In addition to lacking legal merit, Tembec's interpretation would render ineffective one of Article 1126's purposes, which is to "avoid procedural harassment" by claimants.<sup>6</sup> Under Tembec's theory, consolidation would be unavailable where multitudes of claimants – such as the claimants who filed more than one hundred claims challenging the closure of the U.S. border to imports of Canadian cattle – submit claims to arbitration that are clearly outside the scope of Chapter Eleven. In such cases, the respondent would need to constitute multiple Article 1120 tribunals to contest jurisdiction in each proceeding.

#### Consolidation On The Merits Is Warranted

Claimants' contentions that their claims lack sufficient common questions of law or fact to merit consolidation are unsupportable. Claimants seek to distinguish their claims by focusing on the alleged impact of the measures, but fail to explain how those measures give rise to distinct liability issues. Claimants' charts prepared in response to Question 9 starkly illustrate that failure. By claiming that the "like circumstances" inquiry under Article 1102 is inherently claimant-specific,<sup>7</sup> that "the very nature of the fair and equitable treatment obligation . . . under Article 1105 is not a common question of fact or law"<sup>8</sup> and that the "question of expropriation . . . is inherently specific to the Claimant and its investments,"<sup>9</sup> claimants ignore their pleadings,

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<sup>6</sup> See U.S. Post-Hearing Submission at 2-3.

<sup>7</sup> Canfor & Terminal Post-Hearing Submission Chart at 1.

<sup>8</sup> *Id.* at 2.

<sup>9</sup> Tembec Post-Hearing Submission at 34.

and instead advance the proposition that every Chapter Eleven claim is inherently unique and can never be consolidated. That proposition would vitiate Article 1126 and should be rejected.<sup>10</sup>

As illustrated in the United States' earlier submissions, these three claims contain numerous common issues of law and fact.<sup>11</sup> Canfor, in fact, concedes the close resemblance of its pleading with Tembec's by suggesting that Tembec must have plagiarized.<sup>12</sup> And, although Canfor and Terminal caution the Tribunal not to be "blinded by the generalities based on the abstractions contained in the[ir] pleadings," they fail to explain on what other basis the Tribunal should judge commonality.<sup>13</sup> There can be no dispute that Article 1126's commonality requirement is satisfied here.

Likewise, claimants' contention that proprietary information would "permeate every aspect of the case," and render it unmanageable, is baseless.<sup>14</sup> *First*, it is based on the mistaken premise that this Tribunal, unlike other tribunals, is incapable of protecting proprietary information.<sup>15</sup> As the United States has demonstrated, this Tribunal could fashion appropriate procedures for that purpose.<sup>16</sup>

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<sup>10</sup> Notably, the factual distinctions in Tembec's "East is East" chart are nowhere evident in Tembec's chart prepared in response to Question 9, thus confirming their irrelevance to any liability issues. Moreover, even when focusing on differences with respect to damages, claimants fail to acknowledge that the primary distinction arises from the differing amounts of duties paid by each claimant – a factual issue that is unlikely to be contested in this proceeding. *See, e.g.*, Canfor Post Hearing Submission Chart at 3.

<sup>11</sup> *See* U.S. Post-Hearing Submission, Exhibit A; Hr. Tr. at 29:5-31:4.

<sup>12</sup> *See* Canfor & Terminal Post-Hearing Submission ¶ 95.

<sup>13</sup> *See id.* ¶ 92.

<sup>14</sup> *See* Tembec Post-Hearing Submission at 45; *see id.* at 37-49; Canfor & Terminal Post-Hearing Submission ¶¶ 34, 51-55.

<sup>15</sup> *See, e.g.*, U.S. Post-Hearing Submission, Appendix Exhibit 18 (*ad hoc* rules established by the WTO Panel in the antidumping softwood lumber dispute).

<sup>16</sup> *See* U.S. Post-Hearing Submission at 11-18.

*Second*, claimants cannot explain how proprietary information would be material to the disposition of any liability issues.<sup>17</sup> It is unexplained, for example, how claimants' business plans would be needed to demonstrate that the Department of Commerce's use of "zeroing," or cross-border benchmarks, violates the minimum standard of treatment under Article 1105(1). In any event, it is difficult to credit Tembec's supposed fears that its sensitive business information may be leaked to its "direct competitors" when, according to claimants, they sell "dramatically different" products in "vastly different . . . markets."<sup>18</sup>

*Third*, claimants cannot explain why consolidation would be unworkable here, whereas in the Chapter Nineteen panel proceedings, Canfor and Tembec have jointly commenced proceedings and filed submissions along with other softwood lumber competitors.<sup>19</sup> Notably, the complainants in that proceeding have not sought "to undermine each other's claims," as Tembec contends would be the case here.<sup>20</sup> And, in any event, a blanket statement that a claimant has an interest in undermining another claimant's claim – not because the legal positions advanced are

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<sup>17</sup> See Tembec Post-Hearing Submission at 43 (listing "business plans" and other proprietary information Tembec asserts is necessary to resolve its claim); see also Canfor & Terminal Post-Hearing Submission ¶¶ 51-53 (same).

<sup>18</sup> Hrg. Tr. at 144:2-3, 15-17; Canfor & Terminal Post Hearing Submission Chart at 5. Tembec's sole example of how it competes with Canfor is that the two companies once bid to acquire the same company. See Tembec Post-Hearing Submission at 42; Hrg. Tr. at 285:9-14. The proprietary information claimants allegedly seek to protect, however, is not related to that transaction.

<sup>19</sup> In the Chapter Nineteen panel proceedings, Canfor and Tembec make many of the same allegations with respect to the same final measures at issue here. See *Canfor Corp. v. United States of America*, Objection to Jurisdiction of the United States of America (Oct. 16, 2003) at 16-18 (chart comparing Canfor's claims in the Chapter Eleven and Chapter Nineteen proceedings), available at <http://www.state.gov/documents/organization/25567.pdf>; *Tembec Inc. et al. v. United States of America*, Objection to Jurisdiction of the United States of America (Feb. 4, 2005) at 12-15 (chart comparing Tembec's claims in the Chapter Eleven and Chapter Nineteen proceedings), available at <http://www.state.gov/documents/organization/42165.pdf>.

<sup>20</sup> See Tembec Post-Hearing Submission at 49. It is difficult to reconcile Tembec's estimate that it would need to expend \$750,000 rebutting its co-claimants' witnesses and arguments when it concedes that "[i]nformation presented by Tembec regarding its operations is not necessarily relevant to Canfor and Terminal, and vice versa." See *id.* at 50. The need for witness testimony is in any event doubtful, given that none was needed to resolve the same claims before the Chapter Nineteen panels. Tembec's conclusion that a consolidated merits hearing would be five times more expensive than the same proceeding before an Article 1120 tribunal is thus based on faulty assumptions and is void of any meaningful analysis.

incompatible, but simply because of the claimant's desire that another claimant lose its case – provides no justification to deny consolidation.

*Fourth*, Tembec's argument that consolidation is "impossible" where parties are direct competitors is at odds with its recognition that consolidating the claims filed by Canadian cattlemen against the United States "would seem likely to be fair and efficient."<sup>21</sup> Claimants make no attempt to explain why the claimants in those cases – all of whom import cattle from Canada into the United States – should not be considered to be "direct competitors."

*Finally*, claimants' repeated suggestion that the United States would receive an unfair advantage in a consolidated proceeding because it would have access to all of the proprietary information, while claimants would have access only to their own proprietary information, overlooks the fact that as a respondent, the United States will have access to all of the information introduced in the proceeding, whether the proceeding is consolidated or not.<sup>22</sup> If the claims proceed before separate Article 1120 tribunals, none of the parties will have any more or less access to any proprietary information than if the claims are consolidated. In sum, claimants' contentions concerning the role and effect of proprietary information in these proceedings provide no grounds for denying consolidation.

#### The United States' Application Is Not Time-Barred

Three of the parties appear to agree that the doctrines of laches and estoppel have no place in this arbitration.<sup>23</sup> Tembec's arguments to the contrary that the United States is estopped from seeking consolidation do not withstand scrutiny. Canfor and Terminal concede that the

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<sup>21</sup> *Id.* at 24; *see also id.* at 28.

<sup>22</sup> *See id.* at 45; Canfor & Terminal Post-Hearing Submission ¶ 83; Hrg. Tr. at 50:5-51:4.

<sup>23</sup> *See* U.S. Post-Hearing Submission at 9; Canfor & Terminal Post Hearing Submission ¶ 79.

United States never made a representation that it would not seek consolidation of their claims.<sup>24</sup>

And Tembec's contention that the United States represented that it would seek consolidation of its claim only if an additional softwood lumber claim was filed is belied by the record.<sup>25</sup>

Claimants, moreover, are unable to demonstrate any prejudice they allegedly would suffer by having their claims consolidated now, as opposed to at any earlier point in time.<sup>26</sup>

Tembec's asserted prejudice based on its concern that ICSID may not return unspent funds from the Article 1120 proceeding is unfounded.<sup>27</sup> Nor is Tembec's repeated contention that massive amounts of work will need to be redone by this Tribunal supportable.<sup>28</sup> Accordingly, Claimants fail to demonstrate that the United States' application is time-barred.

#### Claimants' Attempt To Vitiolate Article 1126(2) Should Be Rejected

Accepting claimants' arguments would render Article 1126(2) a nullity. Claimants' additional examples of situations where they believe consolidation under Article 1126(2) would be appropriate illustrate this fact. They claim that consolidation under Article 1126(2) would be appropriate in situations that resemble the *CME/Lauder v. Czech Republic* cases.<sup>29</sup> Claimants fail to acknowledge, however, that Article 1117(3) presumptively provides for consolidation where an investor files one claim on its own behalf and another claim on behalf of an enterprise

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<sup>24</sup> See Canfor & Terminal Post-Hearing Submission ¶ 21 (noting that the United States "reserve[d] some right to revisit the matter [of consolidation] in the future.").

<sup>25</sup> See Tembec Post-Hearing Submission at 13-14; see also Hrg. Tr. at 37:3-15; Letter from Barton Legum to Mark A. Cymrot (Feb. 27, 2004) ("If circumstances change, however (if, for example, another Canadian softwood lumber company submits a similar claim to arbitration under Chapter Eleven of the NAFTA), the United States will need to reconsider the issue [of consolidation].").

<sup>26</sup> Claimants' suggestion that the United States was dissatisfied with the *Canfor* hearing and seeks a "second bite of the apple" through consolidation is belied by the fact that the United States resisted Canfor's challenge to one of the arbitrators and urged the tribunal to continue deliberating. It is also not supported by a review of the pleadings and hearing transcript in that matter. See generally <http://www.state.gov/s/l/c7424.htm>.

<sup>27</sup> See Tembec Post-Hearing Submission at 51.

<sup>28</sup> First, the evidence demonstrates that the arbitrators in the *Tembec* case did not yet have the opportunity to devote any significant time to the case. Second, the submissions already made by the parties may be utilized by this Tribunal and do not need to be redone.

<sup>29</sup> See Canfor & Terminal Post-Hearing Submission ¶¶ 110-15; Tembec Post-Hearing Submission at 26-27.



and those claims arise out of the same events. In addition, those cases were brought under separate treaties, whereas claimants' claims have all been filed under the identical treaty, making them even more appropriate for consolidation.

Claimants also intimate that consolidation under Article 1126(2) of the claims filed by the Canadian cattlemen against the United States would be appropriate. In addition to being at odds with Tembec's faulty argument that consolidation is only appropriate *after* jurisdiction has been established, this example serves to highlight the appropriateness for consolidation of claimants' claims. As here, the United States is likely to raise identical jurisdictional objections to each of the claims filed by the Canadian cattlemen. Moreover, although Canfor and Terminal argue that consolidation is appropriate where there is a class of claimants – some known and unknown – they fail to explain why companies challenging duties placed on imports of Canadian softwood lumber into the United States constitutes any less of a “class” than cattlemen challenging a ban on imports of Canadian cattle into the United States.<sup>30</sup>

Finally, Tembec offers that consolidation would be appropriate where all parties consent – in which case Article 1126(2) would be superfluous.<sup>31</sup> Claimants effectively urge the Tribunal to act as if Article 1126(2) does not exist in deciding consolidation. The Tribunal should reject that argument and order consolidation of all three claims.

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<sup>30</sup> See Canfor & Terminal Post-Hearing Submission ¶¶ 63-66.

<sup>31</sup> See Tembec Post-Hearing Submission at 27.

## CONCLUSION

For the foregoing reasons, and the reasons set forth in the United States' prior written and oral 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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