

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.*

**SUBMISSION OF UNITED STATES OF AMERICA IN SUPPORT OF REQUEST  
FOR CONSOLIDATION OF THE CLAIMS OF CANFOR CORP., TEMBEC INC.  
ET AL. AND TERMINAL FOREST PRODUCTS LTD.**

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I.	BACKGROUND FACTS AND STATUS OF EACH PROCEEDING.....	2
A.	<i>Canfor Corp. v. United States of America</i> .....	2
1.	Submission of the Claim to Arbitration.....	2
2.	Constitution of the Tribunal.....	2
3.	Proceedings Prior to Jurisdictional Hearing .....	3
4.	The Hearing on Jurisdiction.....	4
5.	Canfor’s Challenge to Mr. Harper .....	6
B.	<i>Tembec Inc. et al. v. United States of America</i> .....	8
1.	Submission of the Claim to Arbitration.....	8
2.	Constitution of the Tribunal.....	9
3.	Proceedings to Date .....	9
C.	<i>Terminal Forest Products Ltd. v. United States of America</i> .....	11
II.	COMMON ISSUES OF LAW AND FACT FAVOR CONSOLIDATION .....	11
A.	Common Issues of Law .....	11
B.	Common Issues of Fact.....	13
III.	CONSIDERATIONS OF FAIRNESS AND EFFICIENCY FAVOR CONSOLIDATION .....	15
A.	Consolidation Conserves Resources.....	15
B.	Consolidation Will Result in an Expeditious Resolution of the Claims.....	17
1.	Canfor .....	17
2.	Tembec.....	18
3.	Terminal.....	19
4.	The Merits.....	20
C.	Consolidation Is The Only Way To Eliminate The Risk And Unfairness of Inconsistent Decisions .....	21
	CONCLUSION.....	24

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By submitting claims to arbitration under NAFTA Chapter Eleven, each of the three claimants consented to have its claim consolidated with other claims that share common issues of law and fact, where consolidation would result in a fair and efficient resolution of the claims. The three claims subject to this request are emblematic of the type of claims that NAFTA Article 1126 was designed to address: they make similar allegations with respect to the same measures, and raise identical legal issues as to the Tribunal's jurisdiction and on the merits. Moreover, whereas the claims were once procedurally far apart, as a result of recent events beyond the United States' control, the claims are now on the same procedural footing.

Below, the United States first summarizes the factual background and procedural posture of each of the three softwood lumber cases that has been submitted to arbitration.

It then demonstrates that these cases share common issues of law and fact. Finally, the United States demonstrates that consolidating the claims is a fair and efficient way of resolving the disputes. By consolidating these claims, this Tribunal will minimize effort and cost to the parties, provide for an expeditious resolution of the claims and eliminate the risk of inconsistent decisions.

## **I. BACKGROUND FACTS AND STATUS OF EACH PROCEEDING**

The United States summarizes below the relevant facts of each of the three softwood lumber claims and the procedural posture of each case, thereby demonstrating that consolidation will lead to a fair and efficient resolution of those claims.

### **A. *Canfor Corp. v. United States of America***

#### **1. Submission of the Claim to Arbitration**

Canfor filed its Notice of Intent on November 5, 2001. Eight months later, on July 9, 2002, Canfor filed a Notice of Arbitration. In its Notice of Arbitration, Canfor alleged that measures adopted by the United States in May 2002 violated the NAFTA. Those measures, however, had not been identified in its Notice of Intent and six months had not passed since the adoption of those measures as required by Article 1120.<sup>1</sup> The United States consequently informed Canfor that its claim could not be submitted to arbitration until November 22, 2002.

#### **2. Constitution of the Tribunal**

Eighty-nine days after filing its Notice of Arbitration, Canfor appointed Mr. Frank McKenna to the tribunal. Canfor shortly thereafter petitioned ICSID to appoint the

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<sup>1</sup> See NAFTA art. 1120(1) (“[P]rovided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit a claim to arbitration . . . .”); see also NAFTA art. 1119 (providing that a Notice of Intent identifying the issues and factual basis for the claim must be submitted at least 90 days before the claim is submitted to arbitration).

United States' party-appointed arbitrator on the basis that the 90-day period for appointment had allegedly elapsed.<sup>2</sup> ICSID, however, agreed with the United States that Canfor's request was premature.<sup>3</sup> The United States proceeded to appoint Mr. Conrad Harper to the tribunal on February 4, 2003.

On February 20, 2003, the United States challenged Mr. McKenna after discovering that he had delivered a speech to a Canadian government council in which he questioned the validity of the very measures in dispute in the arbitration. Among other things, Mr. McKenna publicly described those measures as intentional "harassment" by the United States of Canadian softwood lumber producers.<sup>4</sup> Canfor disagreed with our challenge, and Mr. McKenna refused to resign. Only after ICSID informed Mr. McKenna that it would uphold the challenge did Mr. McKenna resign from the tribunal on April 10, 2003. On May 30, 2003, Canfor appointed Professor Joseph Weiler to replace Mr. McKenna, and on July 18, 2003, the parties agreed to appoint Professor Emmanuel Gaillard as the president of the tribunal.

### **3. Proceedings Prior to Jurisdictional Hearing**

The tribunal scheduled the first organizational hearing for October 16, 2003. Recognizing that Canfor's claim was clearly outside of the tribunal's jurisdiction and seeking to have the claim dismissed as soon as possible, the United States submitted its memorial objecting to the Tribunal's jurisdiction two weeks prior to the hearing, and sought bifurcation of the proceedings to address this objection. Canfor opposed the

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<sup>2</sup> See NAFTA Article 1124(2).

<sup>3</sup> See Letter from ICSID to Keith E.W. Mitchell & Barton Legum dated February 3, 2003 at 1 (stating that ICSID's appointment authority would arise only if a vacancy remained on the tribunal as of February 19, 2003).

<sup>4</sup> See Letter from Mark Clodfelter to Ko-Yung Tung, Secretary General of ICSID, dated February 20, 2003 at 8.

United States' request for bifurcation and argued that the United States ought to submit a full statement of defense on jurisdiction and the merits.

Over the next several months, the parties briefed the issues of place of arbitration, bifurcation and whether the United States should submit a statement of defense. On January 23, 2004, the *Canfor* tribunal issued a decision designating Washington, D.C. as the place of arbitration, ordering bifurcation of the United States' jurisdictional objection based on Article 1901(3), and ordering the United States to submit a statement of defense on jurisdiction only.

In mid-May 2004 – a full seven months after the United States submitted its Memorial on Jurisdiction – Canfor submitted its response. The parties then submitted a reply and rejoinder, respectively, and briefing was completed in late September 2004. On December 7-9, 2004, the tribunal held a three-day hearing on the United States' jurisdictional objection.

#### **4. The Hearing on Jurisdiction**

At the start of the hearing, President Gaillard raised the issue of consolidating Canfor's claim with the other softwood lumber claims. He noted that "there are parallel proceedings on similar issues,"<sup>5</sup> and that "other parties similarly situated as compared to Canfor in this matter may have an interest in starting their own proceedings and that at least some of them have done so."<sup>6</sup> He stated that a consolidation tribunal established pursuant to NAFTA Article 1126 "could dispose of these issues for the sake of

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<sup>5</sup> *Canfor Corporation v. United States of America*, HEARING ON JURISDICTION, Hrg. Tr. ("Canfor Hrg. Tr."), Vol. 1 at 15:20-21 (Dec. 7, 2004).

<sup>6</sup> *Id.* at 16:4-8.

consistency and for the sake of fair and efficient resolution of the claims . . . .”<sup>7</sup> The tribunal urged the parties to consider seriously the possibility of consolidating the softwood lumber claims, and President Gaillard commented that “from [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].”<sup>8</sup>

After acknowledging that the parties, in telephone calls with him, had indicated that they were not seeking consolidation, President Gaillard remarked that the parties should continue to consider the issue and stated that “[i]f in January you tell us that you don’t want to consolidate, and then three weeks later you change your mind, that’s perfectly fine. This is a right you have . . . .”<sup>9</sup> Finally, President Gaillard noted that consolidating similar claims is a “very important issue for the integrity of NAFTA, for the integrity of the process, for the sake of consistency, and the way the whole treaty works.”<sup>10</sup>

Before declaring the hearing closed, the tribunal again revisited the issue of consolidation. President Gaillard asked the parties to give the tribunal an indication of whether they might seek consolidation, but noted that whatever view was expressed “would not be viewed as a bar to consolidate afterwards, which I do not think would be fair to do . . . .”<sup>11</sup> Canfor indicated that it did not wish to consolidate its claims with others.<sup>12</sup> The United States remarked that it did not intend to seek consolidation, but

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<sup>7</sup> *Id.* at 16:14-19.

<sup>8</sup> *Id.* at 17:14-16.

<sup>9</sup> *Id.* at 18:21-19:3.

<sup>10</sup> *Id.* at 19:6-9.

<sup>11</sup> Canfor Hrg. Tr., Vol. 3 at 768:13-19 (Dec. 9, 2004).

<sup>12</sup> *Id.* at 769:5-9 (Mr. Mitchell).

added that it “would, of course, inform the Tribunal immediately if our views on that subject changed.”<sup>13</sup> President Gaillard concluded the discussion by noting that “if any party were to change their minds, . . . [and] [i]f any party wants to avail itself of [the Article 1126] mechanism[], it’s perfectly understood.”<sup>14</sup>

### **5. Canfor’s Challenge to Mr. Harper**

On February 4, 2005, Mr. Conrad Harper sent an e-mail to the parties.<sup>15</sup> He noted that he was an unpaid, outside director of the Harvard Corporation (a fact that had been disclosed on the *curriculum vitae* submitted to the parties when Mr. Harper was appointed). Mr. Harper reported that he had recently updated his financial disclosure form and, in so doing, he disclosed the payment he received for his service on the *Canfor* tribunal. At that time, he recalled that Harvard University was adverse to the United States in an unrelated litigation. That dispute arose in the mid-1990s and concerned a grant made by the United States Agency for International Development to Harvard University for work in Russia. The United States sued Harvard for breach of contract and violations of the False Claims Act in connection with that grant. The U.S. Attorney’s Office in Boston is prosecuting the case. The litigation has been widely reported by newspapers.

Mr. Harper told the parties that he had drawn no connection between this litigation and his service as an arbitrator in the *Canfor* case before filling out the financial disclosure form. He also told the parties that he had contacted the General Counsel’s office at Harvard University and was told that his role as an arbitrator posed no conflict

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<sup>13</sup> *Id.* at 772:15-17 (Ms. Menaker).

<sup>14</sup> *Id.* at 773:15-774:3.

<sup>15</sup> *See* E-mail from Conrad Harper to Canfor Tribunal Members and counsel for parties dated February 3, 2005.



of interest with respect to Harvard. In addition, he said that he had contacted the ethics department in the Office of the Legal Adviser for the State Department and was told that he was not in breach of any government ethics code.

In response to Mr. Harper's disclosure, Canfor demanded his resignation, arguing that Mr. Harper had a conflict of interest and had engaged in improper *ex-parte* communications by calling the State Department's ethics department.<sup>16</sup> The United States urged Mr. Harper to reject Canfor's request that he withdraw, noting that a "resignation at this late stage of the proceedings would be exceedingly inefficient and costly to the parties."<sup>17</sup> The United States further remarked that "Canfor's baseless objection should not provide a ground for delay, and the United States urges the Tribunal to proceed with its deliberations."<sup>18</sup>

Unfortunately, in response to Canfor's demand, Mr. Harper resigned on March 2, 2005, three months after the hearing on jurisdiction.<sup>19</sup> In light of the inefficiencies thus created, and mindful of the heightened risk of inconsistent decisions in *Canfor* and *Tembec*, which had suddenly become procedurally aligned, three days after Mr. Harper withdrew, the United States submitted its application to consolidate the softwood lumber claims.

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<sup>16</sup> See Letter from Keith E.W. Mitchell to Members of the *Canfor* Tribunal dated February 18, 2005 at 1-2.

<sup>17</sup> See Letter from Andrea J. Menaker to Members of the *Canfor* Tribunal dated February 28, 2005 at 2.

<sup>18</sup> *Id.*

<sup>19</sup> The resignation of an arbitrator, of course, in no way implies that the grounds for the challenge were valid. See UNCITRAL Arbitration Rules art. 11(3).

**B. *Tembec Inc. et al. v. United States of America***

**1. Submission of the Claim to Arbitration**

Tembec filed its Notice of Intent on May 3, 2002, the day after the U.S. International Trade Commission (“ITC”) announced its final threat of material injury determination. Nineteen months later, on December 2, 2003, Tembec filed its Notice of Arbitration. On February 19, 2004, Tembec appointed Professor James Crawford to the tribunal.

Tembec’s Notice of Arbitration was accompanied by a letter on the letterhead of Tembec’s outside counsel, Baker & Hostetler, and signed by Elliot J. Feldman, purporting to waive the rights of the investors and the U.S. enterprises to pursue other claims with respect to the U.S. measures at issue. The United States informed Tembec that Mr. Feldman lacked apparent authority to waive the rights of those corporations. The United States also told Tembec that other NAFTA claimants had met Article 1121’s requirement by submitting waivers on the letterhead of each of the investors and enterprises, signed by an authorized corporate officer. Not until February 5, 2004, did Tembec submit acceptable waivers with respect to the investors.<sup>20</sup> Tembec did not submit acceptable waivers with respect to its enterprises until April 5, 2004.<sup>21</sup>

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<sup>20</sup> On January 9, 2004, Tembec sent the United States a letter from Tembec Inc.’s president to Mr. Feldman stating that Mr. Feldman was authorized to “represent Tembec in all proceedings with respect to the [Chapter Eleven] claims” but stating nothing about Mr. Feldman’s authority to waive the rights of the claimants and their enterprises to pursue other proceedings. See Letter from Frank Dottori to Elliot J. Feldman dated December 3, 2003, attached to letter from Mark A. Cymrot to Barton Legum dated January 9, 2004. The United States informed Tembec that the letter did not satisfy Article 1121, and reiterated that the simplest way to comply with the waiver requirement was to follow the lead of other NAFTA claimants by “supplying waivers executed by duly authorized officers of each corporation submitting such a waiver.” See Letter from Barton Legum to Mark A. Cymrot dated January 23, 2004 at 1-2.

<sup>21</sup> In Tembec’s February 5 waiver, Tembec Industries, Inc., a shareholder in the U.S. enterprises, purported to waive rights to pursue other proceedings on behalf of those enterprises. The United States informed Tembec that the investors’ waivers were acceptable, but that Tembec Industries, Inc.’s attempt to waive

## **2. Constitution of the Tribunal**

On April 6, 2004, one day after submitting the required waivers with respect to its enterprises, Tembec filed a request with ICSID to appoint the remaining two arbitrators to the tribunal. The United States argued that ICSID's authority to appoint the remaining tribunal members would not arise until July 5, 2004 – 90 days after Tembec's claim had been submitted to arbitration in accordance with the required procedures.<sup>22</sup>

On June 28, 2004, ICSID wrote the parties stating that it would proceed to constitute the tribunal. On July 1, 2004, the United States appointed Kenneth W. Dam as the second arbitrator. On July 7, 2004, ICSID notified the parties that it was considering the appointment of Judge Florentino Feliciano as the president of the tribunal. The parties both responded that the proposed appointment was acceptable to them, and Judge Feliciano was appointed on August 4, 2004.

## **3. Proceedings to Date**

In a letter dated September 23, 2004, ICSID informed the parties that the tribunal proposed to hold an organizational meeting at ICSID on November 30, 2004. Tembec, in turn, proposed that the first organizational hearing be transformed into a hearing on jurisdiction. Tembec argued that this would result in no prejudice to the United States because Tembec's case – like Canfor's – “also arises out of the United States' unlawful

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rights on behalf of other corporations was not legally valid. *See* Letter from Mark A. Clodfelter to Mark A. Cymrot dated March 4, 2004 at 1.

<sup>22</sup> In its request to ICSID, Tembec disclosed for the first time a legal opinion dated March 18, 2004, from Tembec Inc.'s general counsel declaring that the waivers on behalf of the U.S. enterprises were enforceable in U.S. court, despite the fact that the author of the opinion was not a U.S. lawyer. On May 26, 2004, ICSID wrote the disputing parties stating that it would determine that the Article 1121 waiver requirement was not “manifestly unfulfilled” by Tembec's February 5 waivers if Tembec could produce additional information demonstrating that Tembec Industries, Inc. was authorized to act on behalf of the U.S. enterprises. *See* Letter from Antonio R. Parra, Acting Secretary General of ICSID, to the United States and Tembec dated May 26, 2004 at 1. Instead of providing new information, however, Tembec merely redirected ICSID to the March 18 letter from its general counsel, and cited inapt legal authorities. *See* Letter from Barton Legum to Roberto Dañino dated June 23, 2004.

restrictions on softwood lumber products from Canada,” and the United States had already fully briefed the issue of jurisdiction in *Canfor*.<sup>23</sup> Tembec sought an expedited resolution of its claim because, as Tembec stated, it “would not want to wait for or be prepared to rely upon the *Canfor* result in this case.”<sup>24</sup> Thus, before the United States even indicated its intent to object to the tribunal’s jurisdiction, Tembec urged the tribunal to hold a hearing on jurisdiction on November 30 – one week before the *Canfor* hearing on jurisdiction was to take place.

The tribunal rejected Tembec’s suggestion and held an organizational meeting by telephone on November 30. At that time, in accordance with an agenda item that it had proposed, the United States informed the Tribunal that it was considering whether to seek consolidation of Tembec’s claim with Terminal’s claim. The United States represented that if it sought consolidation, it would inform Tembec and the tribunal immediately.<sup>25</sup>

In setting a briefing schedule, Tembec volunteered that it would need only two weeks to respond to the United States’ jurisdictional objection. An expedited briefing schedule was thus established, and a jurisdictional hearing was scheduled for June 2-3, 2005.

On March 7, 2005, the United States wrote to counsel and the tribunal informing them that, as a result of the withdrawal of Mr. Harper and the resulting delay to the *Canfor* proceeding, it had filed an application for consolidation and was requesting a stay of the *Tembec* proceeding. At that time, the parties had filed their initial submissions on jurisdiction, but had not yet filed their reply and rejoinder, respectively. The tribunal

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<sup>23</sup> See Letter from Elliot J. Feldman to Francisco Ceballos dated September 27, 2004 at 1.

<sup>24</sup> See *id.* at 2.

<sup>25</sup> *Tembec Inc. et al. v. United States of America*, MINUTES OF THE FIRST SESSION OF THE TRIBUNAL at 8 (Nov. 30, 2004).

decided to hold the United States' request for a stay in abeyance, and directed the parties to proceed in accordance with the schedule unless and until an affirmative decision on the stay request was issued. Upon submitting its rejoinder on April 28, and in subsequent correspondence, Tembec proposed that the parties rest on their written submissions on jurisdiction and forgo any oral hearing. The United States requested that, in accordance with UNCITRAL Arbitration Rule 15(2), the tribunal hold a hearing on jurisdiction in the event the proceedings were not stayed pending a decision on consolidation. On May 19, 2005, this Tribunal stayed the *Tembec* arbitration.

**C. *Terminal Forest Products Ltd. v. United States of America***

Terminal, which is represented by the same counsel as Canfor, filed its Notice of Intent on June 12, 2003, and its Notice of Arbitration on March 31, 2004. Since filing its Notice of Arbitration, Terminal has taken no steps to prosecute its claim.

**II. COMMON ISSUES OF LAW AND FACT FAVOR CONSOLIDATION**

Article 1126(2) empowers this Tribunal to assume jurisdiction over, and determine together, claims sought to be consolidated if it “is satisfied that [those] claims . . . *have a question of law or fact in common.*”<sup>26</sup> The claims of Canfor, Tembec and Terminal contain numerous common issues of law and fact. This identity of legal and factual issues strongly supports consolidation.

**A. Common Issues of Law**

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 and

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<sup>26</sup> NAFTA art. 1126(2) (emphasis added).

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 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). These objections present straightforward issues of treaty interpretation that are common among the claims.<sup>27</sup>

All three claimants allege that the same measures breach the same provisions of the NAFTA, namely, Article 1102 (National Treatment), Article 1103 (Most-Favored-Nation Treatment), Article 1105 (Minimum Standard of Treatment), and Article 1110 (Expropriation). Although the United States has neither submitted a statement of defense on the merits in any of these cases, nor briefed the merits, the United States anticipates that, in the unlikely event that any of these claims proceeds to the merits, it would raise many of the same legal defenses to the claims of all three claimants.<sup>28</sup> This high degree of commonality of legal issues among the three claims strongly favors consolidation.

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<sup>27</sup> In this respect, the United States’ application can be differentiated from Mexico’s application for consolidation of the claims filed by Corn Products International Inc. (“CPI”), Archer Daniels Midlands Co. and Tate & Lyle Ingredients Americas, Inc. (“ADM and Tate & Lyle”) (collectively, the “HFCS claims”). See, e.g., *Corn Products International v. United Mexican States* and *Archer Daniels Midland Company and Tate & Lyle Ingredients, Inc. v. United Mexican States*, Opposition of Corn Products to Mexico’s Request for Consolidation Under NAFTA Article 1126 (“CPI Opposition”) at n.55 (Apr. 11, 2005) (arguing that Mexico’s “lack of identification of common defenses stands in contrast to the recent Request of the United States to consolidate three Chapter 11 cases brought against it by Canadian investors. In that request, the United States has highlighted its intention to assert a common jurisdictional objection to all three cases. Moreover, this assertion is consistent with jurisdictional objections that the United States had raised previously in the unconsolidated proceedings.”) (internal citations omitted).

<sup>28</sup> For example, the United States would demonstrate, among other things, that the determinations did not constitute nationality-based discrimination in violation of Article 1102 or Article 1103, but rather applied equally to any entity of any nationality, including U.S.-owned Weyerhaeuser Company, that exports subsidized or unfairly-priced softwood lumber from Canada to the United States. Likewise, the United States would demonstrate, among other things, that no standard of customary international law is

## B. Common Issues of Fact

Numerous issues of fact are also common to each of the three claims.<sup>29</sup> Claimants are all Canadian softwood lumber producers, with harvesting and mill operations in the Province of British Columbia and elsewhere in Canada, that export softwood lumber to the U.S. market. Claimants base their claims on the same U.S. government measures, including (i) the U.S. Department of Commerce's ("Commerce") August 2001 preliminary countervailing duty determination;<sup>30</sup> (ii) Commerce's August 2001 preliminary critical circumstances determination;<sup>31</sup> (iii) Commerce's October 2001 preliminary antidumping determination;<sup>32</sup> (iv) Commerce's March 2002 final countervailing duty determination;<sup>33</sup> (v) Commerce's March 2002 final antidumping determination;<sup>34</sup> (vi) the ITC's May 2002 final material injury determination;<sup>35</sup> and (vii) the *Continued Dumping and Subsidy Offset Act of 2000* ("the Byrd Amendment"), enacted by the U.S. Congress in October 2000.<sup>36</sup>

The determinations and legislation apply to claimants in the same manner.

Commerce's antidumping and countervailing duty determinations impose duties on claimants' softwood lumber exports from Canada to the United States. The ITC's

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implicated by the administrative processes that resulted in the determinations at issue and, therefore, the minimum standard of treatment under Article 1105(1) was not breached by the determinations. Finally, the United States would demonstrate, among other things, that the determinations were not expropriatory, and therefore did not contravene Article 1110.

<sup>29</sup> See, e.g., Table attached hereto at Tab A.

<sup>30</sup> See Canfor Statement ¶¶ 19, 110-15; Terminal Notice ¶ 23; Tembec Statement ¶¶ 32-40.

<sup>31</sup> See Canfor Statement ¶¶ 19, 116-19; Tembec Statement ¶¶ 41-44. Terminal does not base a claim on this determination.

<sup>32</sup> See Canfor Statement ¶¶ 19, 120-22; Terminal Notice ¶ 24; Tembec Statement ¶¶ 45-47.

<sup>33</sup> See Canfor Statement ¶¶ 19, 123-26; Terminal Notice ¶ 25; Tembec Statement ¶¶ 51-67.

<sup>34</sup> See Canfor Statement ¶¶ 19, 127-30; Terminal Notice ¶ 26; Tembec Statement ¶¶ 51-67.

<sup>35</sup> See Canfor Statement ¶¶ 19, 149; Terminal Notice ¶ 27; Tembec Statement ¶¶ 68-72, 101(f).

<sup>36</sup> See Canfor Statement ¶¶ 141-47; Terminal Notice ¶¶ 41-49; Tembec Statement ¶¶ 26-27, 101(a), (g).

material injury determination is an industry-wide determination that is necessary for the duties to be imposed on claimants' softwood lumber exports. The critical circumstances determination is a determination that the surge of imports justifies applying the duties retroactively to claimants' exports. And the Byrd Amendment provides for the distribution of duties assessed on claimants' exports to certain affected domestic producers.

Claimants also allege that the determinations and legislation breach the same provisions of NAFTA Chapter Eleven.<sup>37</sup> Moreover, claimants assert the same factual bases for those alleged breaches. For example, claimants assert that, in the antidumping investigation, Commerce improperly employed a technique known as "zeroing" to calculate claimants' dumping margins,<sup>38</sup> used an unfair price comparison between different products,<sup>39</sup> improperly applied a cross-border analysis in the countervailing duty investigation,<sup>40</sup> failed to determine that the antidumping and countervailing duty petitions were submitted on behalf of a U.S. industry,<sup>41</sup> neglected to account for the effects of the 1996 Softwood Lumber Agreement,<sup>42</sup> made its determinations without consideration of the evidence before it,<sup>43</sup> and was improperly motivated by political influences,<sup>44</sup> all in breach of the United States' obligations under NAFTA Chapter Eleven. Likewise, claimants allege that the Byrd Amendment improperly distorted the U.S. industry's

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<sup>37</sup> See Canfor Statement ¶ 19; Terminal Notice ¶ 6; Tembec Statement ¶¶ 100-10.

<sup>38</sup> See Canfor Statement ¶¶ 122, 129(4); Terminal Notice ¶ 26(c); Tembec Statement ¶ 46(b).

<sup>39</sup> See Canfor Statement ¶¶ 95, 129(3); Terminal Notice ¶¶ 24(b), 25(d); Tembec Statement ¶ 46(d).

<sup>40</sup> See Canfor Statement ¶ 113; Terminal Notice ¶¶ 23(b), 25(e); Tembec Statement ¶ 86(a).

<sup>41</sup> See Canfor Statement ¶ 129(1); Terminal Notice ¶¶ 24(a), 26(a); Tembec Statement ¶¶ 25, 101(a).

<sup>42</sup> See Canfor Statement ¶¶ 114(15), 119(5); Terminal Notice ¶ 23(c)(i); Tembec Statement ¶ 46(a).

<sup>43</sup> See Canfor Statement ¶ 129(2); Terminal Notice ¶¶ 25(b), 27(c); Tembec Statement ¶¶ 5, 101(c), 101(d).

<sup>44</sup> See Canfor Statement ¶ 20; Terminal Notice ¶ 29; Tembec Statement ¶¶ 25, 96.



support for the petitions,<sup>45</sup> created a systemic bias in favor of the petitions to meet the standing requirements under U.S. law,<sup>46</sup> and over-remedied the subsidization of the Canadian industry, in violation of the NAFTA.<sup>47</sup> This extraordinary overlap in factual allegations among the three claims weighs strongly in favor of consolidation.<sup>48</sup>

### **III. CONSIDERATIONS OF FAIRNESS AND EFFICIENCY FAVOR CONSOLIDATION**

Article 1126(2) provides that a tribunal established under that Article may consolidate like claims in the interest of a fair and efficient resolution of the disputes. Consolidation of the softwood lumber claims promotes these objectives. First, effort, cost and waste would be eliminated for the Article 1120 tribunals and minimized for all of the parties. Second, the claims could be resolved in an expeditious manner by a consolidation tribunal, thus avoiding any delay prejudicial to the claimants. And, third, given the identity of legal and factual issues and the procedural alignment of the claims, consolidation is the only way to eliminate the risk of inconsistent decisions.

#### **A. Consolidation Conserves Resources**

Absent consolidation, the United States would have to participate in hearings – in both the *Canfor* and *Tembec* cases – challenging each tribunal’s jurisdiction over

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<sup>45</sup> See Canfor Statement ¶¶ 144(1), 144(2), 144(4); Terminal Notice ¶¶ 45(a), 45(b); Tembec Statement ¶ 26.

<sup>46</sup> See Canfor Statement ¶ 144(6); Terminal Notice ¶ 45(f); Tembec Statement ¶ 101(a).

<sup>47</sup> See Canfor Statement ¶ 144(5); Terminal Notice ¶ 45(e); Tembec Statement ¶ 26.

<sup>48</sup> Moreover, the factual similarities between the claims of Canfor and Tembec (which submitted complete Statements of Claim), as opposed to that of Terminal (which submitted only an abbreviated Notice of Arbitration), are even more apparent. For example, in addition to the commonalities cited above, Canfor and Tembec both allege that Commerce misallocated production costs in the antidumping investigation (see Canfor Statement ¶ 129(6); Tembec Statement ¶ 46(d)), failed to accord company-specific duty rates in the countervailing duty determinations (see Canfor Statement ¶ 140(1); Tembec Statement ¶ 48), failed to afford claimants sufficient opportunity to make submissions in the investigations (see Canfor Statement ¶¶ 135(5), 135(8); Tembec Statement ¶¶ 5, 58, 80), and held undisclosed *ex parte* meetings with petitioners (see Canfor Statement ¶ 135; Tembec Statement ¶¶ 5, 58, 77-82).

identical claims. In addition, the United States might need to constitute yet another tribunal to hear Terminal's claims, which would result in a third jurisdictional hearing on the same issues for the United States, and a third tribunal deliberating on identical legal questions. And, in the unlikely event that the claims were to proceed to the merits, the United States would have to participate in three separate proceedings and three evidentiary hearings.

It is unquestionably more efficient to have this Tribunal hold a single hearing on jurisdiction (and a single hearing on the merits should that become necessary) and deliberate, than to have two or three tribunals hold separate hearings and deliberate separately on identical questions.

Consolidation is also cost efficient for all of the parties. For the United States, each separate case requires significant attorney, paralegal and secretarial time, even when the issues presented mirror issues previously briefed and argued. Preparation for any hearing inevitably requires time, and that time is not diminished because there has been a prior hearing on similar issues. In addition, the United States would have to make deposits to cover the costs of six or nine arbitrators if the cases are not consolidated, whereas in a consolidated proceeding, it will need only to make deposits to cover its share of the costs of three arbitrators. The costs for claimants in a consolidated proceeding are fewer as well. In separate proceedings, deposits would be split evenly between the claimant and the respondent. By contrast, in a consolidated proceeding, each claimant bears only one quarter of the tribunal's expenses.

Moreover, the fact that the parties have already expended sums in connection with the arbitration of their separate claims does not render consolidation inefficient. The

majority of the costs to date have been incurred in connection with preparing the written submissions made by the parties in the *Canfor* and *Tembec* proceedings.<sup>49</sup> There are no inefficiencies in having the parties and the Tribunal rely on those already-prepared submissions in a consolidated proceeding.

**B. Consolidation Will Result in an Expeditious Resolution of the Claims**

The softwood lumber claims can be resolved expeditiously in a consolidated proceeding. Because consolidation will not result in any undue delay in the resolution of these claims, consolidating is fair and results in no prejudice to claimants.

**1. Canfor**

In *Canfor*, absent consolidation, the tribunal would need to be reconstituted and the newly-appointed arbitrator would need to familiarize himself or herself with the written submissions made by the parties. To provide the replacement arbitrator with the opportunity to ask questions, a re-hearing on jurisdiction would likely be necessary. After the hearing, deliberations by the *Canfor* tribunal will begin anew. If this Tribunal were to consolidate the claims and order preliminary treatment of the United States' Article 1901(3) objection, this Tribunal could schedule a jurisdictional hearing in the near future and begin deliberations at least as soon as the *Canfor* tribunal could do so.<sup>50</sup>

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<sup>49</sup> A substantial portion of the tribunal expenses in the *Tembec* case have not yet been incurred because the first organizational meeting took place by phone, no substantive hearing has yet been held, and no deliberations have taken place. Similarly, in the *Canfor* case, the expenses incurred by the tribunal in deliberating and drafting its award have not yet been realized, and the parties and tribunal members would in any event need to expend further resources in connection with a likely re-hearing on jurisdiction. Finally, there have been no tribunal or administrative expenses incurred in connection with Terminal's claim, as no tribunal has yet been constituted in that case.

<sup>50</sup> In the event that Terminal, which is represented by the same counsel as Canfor, requested an opportunity to make a written submission prior to any hearing, and the Tribunal granted the request, a jurisdictional hearing still could be scheduled in the near future. *See infra* at 20.

Moreover, to the extent that the claims are consolidated and this Tribunal grants the United States' request to treat preliminarily its jurisdictional objections based on Articles 1101(1) and 1121, in addition to that based on Article 1901(3), the United States' jurisdictional objections could still be decided expeditiously. If the Tribunal were to decide to hear those objections in a preliminary phase, Canfor will have the benefit of having seen a full briefing of those objections by the parties in the *Tembec* proceedings. Canfor could choose to respond to those objections at the hearing, or it could file a written submission responding to those objections prior to a consolidated hearing on jurisdiction. In either event, a hearing on jurisdiction could be scheduled soon.<sup>51</sup>

## **2. Tembec**

Consolidation similarly will enable an expeditious resolution of Tembec's claim. The United States and Tembec have fully briefed the three jurisdictional issues that the United States will seek to have treated preliminarily by this Tribunal if it consolidates the claims. If this Tribunal were to decline to consolidate, the *Tembec* tribunal would need to schedule a date for a jurisdictional hearing and then proceed to deliberate. Similarly, if this Tribunal were to assume jurisdiction over Tembec's claims, this Tribunal likewise would schedule a jurisdictional hearing and then begin deliberations. Under either circumstance, the parties will be prepared to present their cases on jurisdiction as soon as

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<sup>51</sup> The United States' jurisdictional objections based on Articles 1101(1) and 1121 are straightforward and would require minimal effort on Canfor's part if it chose to respond to them in writing in addition to responding orally at a hearing. In *Tembec*, for example, the United States devoted only seven pages of its 38-page Memorial to its Article 1101(1) and Article 1121 objections, and Tembec similarly used only ten out of 42 pages in its Counter-Memorial to respond to those objections. Furthermore, at the hearing on jurisdiction, the United States and Canfor each addressed the meaning of Articles 1101(1) and 1121 when those issues arose in connection with related arguments and in response to the tribunal's questions. *See, e.g.,* Canfor Hrg. Tr., Vol. 1 at 126-128, 204-207, 225-235; Canfor Hrg. Tr., Vol. 2 at 384-385, 400-402, 410-413, 418-420, 595-599, 600-603 (Dec. 8, 2004).

a hearing can be scheduled.<sup>52</sup> Consequently, there is no prejudice to Tembec by having this Tribunal assume jurisdiction over its claim, particularly where a jurisdictional hearing could be scheduled in short order.

### **3. Terminal**

Finally, consolidating Terminal's claim would be efficient and fair in that it would end the long delay Terminal has created by failing to take any action with respect to its claim. If Terminal's claim is not consolidated, the United States faces two options, neither of which is fair or efficient. The United States could maintain the status quo, leaving Terminal's case inactive. Permitting Terminal effectively to toll the NAFTA's three-year limitations period is unfair to the United States, however, because it leaves open the possibility of having to defend against Terminal's claims years from now. This possibility eviscerates the purpose of the NAFTA's limitations period.

Alternatively, the United States could compel the constitution of a tribunal under Article 1124(2) to address Terminal's claim. Doing so, however, is less efficient and less fair to the United States than having Terminal's claim addressed by this Tribunal, as the United States would have to incur costs much greater than would be required in a consolidated proceeding. Constituting yet another tribunal to address Terminal's claims would be inefficient and costly for both parties.

The United States' jurisdictional objection to Terminal's claim could be resolved most expeditiously by consolidating it with those of Canfor and Tembec. No prejudice would result to the other claimants. Terminal has the benefit of having seen a full briefing of the United States' jurisdictional objections in the *Canfor* and *Tembec*

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<sup>52</sup> As noted above, even if this Tribunal were to grant Canfor and/or Terminal an opportunity to make a written submission on the jurisdictional issues that they have not briefed, given the nature of the issues and counsel's familiarity with those issues, a jurisdictional hearing could be scheduled in short order.

proceedings, as well as the transcripts of the *Canfor* jurisdictional hearing. Terminal's counsel is already familiar with the United States' objections as it serves as counsel for Canfor as well. Terminal could choose to rest on the claimants' filings already made in the *Canfor* and *Tembec* proceedings and respond to the United States' objections orally at the hearing, or it could file a written submission responding to these objections in advance of such a hearing. In either case, a hearing could be scheduled in the near future.<sup>53</sup> Thus, there is no risk of delay for any of the parties in consolidating Terminal's claims with those of Canfor and Tembec.

#### **4. The Merits**

Finally, it is both fair and efficient to consolidate the entirety of the three claims – however unlikely it is that they will ever proceed to the merits. It clearly would be more efficient to have the merits of the cases heard in a consolidated proceeding, given the overwhelming overlap in factual and legal issues among the claims, and the common defenses likely to be raised by the United States. Consolidating the cases on the merits also would be far more cost efficient than holding three separate evidentiary hearings.<sup>54</sup>

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<sup>53</sup> Terminal, in essence, has acted as a free-rider to Canfor's proceedings. To the extent that this Tribunal declines to expedite the United States' jurisdictional objections to Terminal's claim, the Tribunal still should consolidate the *Canfor* and *Tembec* proceedings.

<sup>54</sup> In the HFCS cases, the tribunal found that consolidation would be unfair because claimants could not prosecute their claims without using business proprietary information, and there was no efficient way to shield that information from the other claimants in a consolidated proceeding. *See Corn Products International v. United Mexican States* and *Archer Daniels Midland Company and Tate & Lyle Ingredients, Inc. v. United Mexican States*, ORDER OF THE CONSOLIDATION TRIBUNAL ("HFCS ORDER") ¶ 10 (May 20, 2005). This is not the case here. The relevant proprietary information in the administrative record in the softwood lumber proceedings – which forms the basis for the Commerce and ITC decisions about which claimants complain – cannot legally be introduced in this proceeding. Moreover, even if proprietary information outside of the administrative record were introduced in a merits phase, this Tribunal could accommodate any concerns without prejudicing claimants, two of whom are co-complainants in NAFTA Chapter Nineteen proceedings and have coordinated the introduction of business proprietary information in that forum. In any event, no proprietary information would need to be introduced at the jurisdictional phase in this proceeding.

Additionally, there would be no prejudicial delay with respect to any of the claims, as there has been no activity on the merits in any of the proceedings.<sup>55</sup>

**C. Consolidation Is The Only Way To Eliminate The Risk And Unfairness of Inconsistent Decisions**

Failure to consolidate these proceedings would risk different tribunals deciding identical factual and legal questions inconsistently. Such a result would be unfair to all the parties and would undermine the legitimacy of investor-State arbitration.

*First*, absent consolidation, there is a risk of inconsistent decisions in these cases. Because the United States raises identical jurisdictional objections in all three cases, it would be impossible to reconcile a finding of no jurisdiction in one case with a finding of jurisdiction in another.<sup>56</sup> Likewise, if those cases were to proceed to the merits, because all three claimants are similarly situated and their claims raise identical legal issues, the United States would raise many of the same legal defenses in each case, giving rise to the risk of irreconcilable decisions.

The current procedural posture of claimants' cases also increases the risk of inconsistent decisions. Canfor submitted its claim to arbitration almost one and one-half years before Tembec properly submitted its claim. And, the *Canfor* jurisdictional hearing took place only one week after the first organizational meeting in *Tembec*. Thus, at that time, it appeared that the cases were sufficiently far apart that the *Tembec* tribunal would have the opportunity to take into account a decision on jurisdiction in the *Canfor* case

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<sup>55</sup> Compare HFCS ORDER ¶ 18 (noting that “CPI is before an established tribunal and has submitted its Memorial on Issues of State Responsibility, ADM/Tate & Lyle as yet have no tribunal.”).

<sup>56</sup> By contrast, in the HFCS claims, the consolidation tribunal found that the legal issues raised by the three claims were sufficiently dissimilar such that different conclusions as to liability among the claims would not necessarily be inconsistent. See HFCS ORDER ¶ 16. Unlike here, Mexico had not identified common legal defenses to all of the claims.

long before it rendered its decision on jurisdiction, thus decreasing the risk of inconsistent decisions.<sup>57</sup>

As a result of recent events, however, the *Canfor* and *Tembec* claims are now on the same procedural footing. Canfor's decision to challenge Mr. Harper months after the jurisdictional hearing, along with Tembec's attempt to accelerate its claim ahead of Canfor's so that it would not have to "rely upon the Canfor result in [its] case," placed the two arbitrations in exact alignment. Thus, although the risk of inconsistent decisions in the *Canfor* and *Tembec* cases was at one time minimized by the disparate timing of those claims, this is no longer the case. At present, absent consolidation, the *Canfor* and *Tembec* tribunals would need to schedule a re-hearing and a hearing, respectively, on the United States' jurisdictional objections, and would deliberate simultaneously on identical issues of treaty interpretation. The risk of inconsistent decisions is therefore apparent.

*Second*, inconsistent decisions in the softwood lumber cases also would be unfair to all parties. A respondent should not incur liability in one case where another tribunal interpreting identical legal and factual issues has determined that it is not liable. Similarly, it would be unfair to any claimant to fail in its case, while another similarly-situated claimant prevails on identical issues before a different tribunal. Inconsistent decisions are unfair because they create uncertainty for claimants and respondents as to the type of behavior that gives rise to State responsibility.<sup>58</sup>

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<sup>57</sup> Likewise, the HFCS consolidation tribunal confronted a circumstance of cases with distinct procedural postures like that which *used to* exist among the softwood lumber claims. *See* CPI Opposition at 38 (noting that CPI's claim was sufficiently far advanced of ADM's and Tate & Lyle's claims that the tribunal addressing those latter claims would have the opportunity to "consider any relevant findings in the CPI case without causing undue delay for [ADM and Tate & Lyle].").

<sup>58</sup> In the context of the dozens of claims brought against Argentina, for example, there are several instances in which the same arbitrators have been appointed to multiple tribunals to mitigate this risk. *See, e.g., Electricidad Argentina S.A. and EDF International S.A. v. Argentine Republic* (Case No. ARB/03/22) (Arbitrators: William W. Park, Gabrielle Kaufmann-Kohler, Fernando de Trazegnies Granda); *EDF*



Finally, inconsistent decisions would undermine the legitimacy of the NAFTA dispute settlement mechanism by creating confusion as to the interpretation of various provisions of the NAFTA. Indeed, the consequences of failing to consolidate proceedings that raise similar factual and legal issues have given rise to prolific commentary on the issue of avoiding inconsistent decisions in international arbitration.<sup>59</sup> This concern no doubt led President Gaillard, at the *Canfor* hearing, to encourage the parties to consider seeking consolidation of the various softwood lumber claims “for the sake of consistency.”<sup>60</sup>

Given the common issues of fact and law and the procedural posture of the claims, consolidating the softwood lumber claims is the only way to eliminate the risk of inconsistent decisions and, consequently, is “very important . . . for the integrity of

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*International S.A., SAUR International S.A. and Léon Participaciones Argentinas S.A. v. Argentine Republic* (Case No. ARB/03/23) (same); *Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic* (Case No. ARB/03/17) (Arbitrators: Jeswald W. Salacuse, Gabrielle Kaufmann-Kohler, Pedro Nikken); *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic* (Case No. ARB/03/18) (same); *Pioneer Natural Resources Company, Pioneer Natural Resources (Argentina) S.A. and Pioneer Natural Resources (Tierra del Fuego) S.A. v. Argentine Republic* (Case No. ARB/03/12) (Arbitrators: Lucius Caflisch, Piero Bernardini, Brigitte Stern); *El Paso Energy International Company v. Argentine Republic* (Case No. ARB/03/15) (same), available at ICSID LIST OF PENDING CASES, <http://www.worldbank.org/icsid/cases/pending.htm>.

<sup>59</sup> The *CME v. Czech Republic* and *Lauder v. Czech Republic* decisions, for instance, have been the focus of numerous articles and conferences. See, e.g., THE 10TH GENEVA GLOBAL ARBITRATION FORUM (3-4 Dec. 2003), proceedings published in 5:1 J. WORLD INV. & TRADE (Feb. 2004); AMERICAN SOCIETY OF INTERNATIONAL LAW 99TH ANNUAL MEETING, Apr. 1, 2005 session on *Parallel Proceedings in International Litigation and Arbitration* (publication forthcoming in *ASIL Proceedings*); Wolfgang Kuhn, *How to Avoid Conflicting Awards: The Lauder and CME Cases*, 5:1 J. WORLD INV. & TRADE 7 (Feb. 2004) (“The ‘CME cases’ are currently intensively discussed in the legal literature.”); Charles N. Brower and Jeremy K. Sharpe, *Multiple and Conflicting International Arbitral Awards*, 4:2 J. WORLD INV. 211, 216 (Apr. 2003) (calling the “CME Debacle” “[t]he most graphic example of this troubling phenomenon” of the risk of multiple and conflicting awards and praising the NAFTA Parties for taking “steps to mitigate the problem of multiple and conflicting awards”); Thomas Wälde, *Introductory Note to Svea Court of Appeals: Czech Republic v. CME Czech Republic B.V.*, 42 I.L.M. 915 (July 2003) (“The fact that two tribunals issued contradictory awards is often decried as compromising the arbitration method.”).

<sup>60</sup> *Canfor Hrg. Tr.*, Vol. 1 at 17:8-11; see also *id.* at 17:14-16 (“[F]rom our standpoint, we wonder if it would not be a good idea to ensure consistency by using these tools [provided by Article 1126].”)

NAFTA, for the integrity of the process, for the sake of consistency, and the way the whole treaty works.”<sup>61</sup>

## CONCLUSION

Each of the three claimants now opposing consolidation consented to arbitrate in accordance with “the procedures set out in” the NAFTA, including consolidation under Article 1126.<sup>62</sup> Their claims raise identical legal issues and factual allegations. They are now procedurally aligned. Their fair and efficient resolution requires that they be heard and determined together. Claimants’ preference for separate proceedings does not change this calculus. The circumstances for consolidation are undoubtedly satisfied here.

For the foregoing reasons, the United States respectfully requests that this Tribunal assume jurisdiction over, and hear and determine together, the entirety of the claims submitted by Canfor Corp., Tembec Inc. *et al.* and Terminal Forest Products Ltd. The United States further requests that, pursuant to Article 40 of the UNCITRAL

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<sup>61</sup> Canfor Hrg. Tr., Vol. 1 at 19:4-9 (Pres. Gaillard).

<sup>62</sup> NAFTA art. 1122(1).

Arbitration Rules, claimants be required to bear all costs of the arbitration, including costs and expenses of counsel.

*Respectfully submitted,*

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