

**ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE  
AGREEMENT AND UNCITRAL RULES OF ARBITRATION**

**TEMBEC INC. *et al.* v. UNITED STATES OF AMERICA  
CANFOR CORP. v. UNITED STATES OF AMERICA  
TERMINAL FOREST PRODUCTS LTD. v. UNITED STATES OF AMERICA**

**TEMBEC'S POST-HEARING REBUTTAL BRIEF  
IN OPPOSITION TO CONSOLIDATION**

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## I. INTRODUCTION

The United States' motion for consolidation of the claims of Tembec, Canfor, and Terminal has featured ridicule, indifference, and cynicism. The United States' preferred rhetorical style is ridicule (terms like "absurd" substituting for argument); its response to concepts of fairness and efficiency is indifference (the notion of an absolute standard argues that consolidation could mean something less fair and more inefficient and not matter); and its regard for consistency and reasoning is cynical (having waived jurisdictional defenses, and with different defenses against different Claimants, Article 1126 could be used to resurrect waived defenses and the requirement for commonality would be discarded; legal results can be ignored<sup>1</sup>).

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<sup>1</sup> The most recent example of this cynicism is the U.S. response to the August 10, 2005 decision of the Extraordinary Challenge Committee affirming a NAFTA Chapter 19 binational panel's decision that there was no threat of material injury to justify the antidumping and countervailing duty orders in *Certain Softwood Lumber Products from Canada*. See *In the Matter of Certain Softwood Lumber Products from Canada*, Opinion and Order of the Extraordinary Challenge Committee (Aug. 10, 2005). Based on that decision, the law requires the United States to terminate the duty orders and refund all cash deposits collected from Tembec, Canfor, Terminal and hundreds of other Canadian lumber companies. However, as soon as the decision had been released, the Office of the United States Trade Representative stated that it would not abide by it:

We are, of course, disappointed with the ECC's decision, but it will have no impact on the antidumping and countervailing duty orders given the ITC's November 2004 injury determination. We continue to have concerns about Canadian pricing and forestry practices. We believe that a negotiated solution is in the best interests of both the United States and Canada, and that litigation will not resolve the dispute.

Statement from USTR Spokesperson Neena Moorjani Regarding the NAFTA Extraordinary Challenge Committee decision in Softwood Lumber (Aug. 10, 2005) available at [http://www.ustr.gov/Document\\_Library/Spokesperson\\_Statements/Statement\\_from\\_USTR\\_Spokesperson\\_Neena\\_Moorjani\\_Regarding\\_the\\_NAFTA\\_Extraordinary\\_Challenge\\_Committee\\_decision\\_in\\_Softwood\\_Lumber.html](http://www.ustr.gov/Document_Library/Spokesperson_Statements/Statement_from_USTR_Spokesperson_Neena_Moorjani_Regarding_the_NAFTA_Extraordinary_Challenge_Committee_decision_in_Softwood_Lumber.html).

The Government of Canada (as signed by five Cabinet members) has responded to this statement:

Canada is calling on the United States to stop collecting duties at the border and return the money immediately. We respect our NAFTA obligations and partners and expect nothing less from our fellow NAFTA members. It is time for the United States to do the right thing. Decision after decision has come in Canada's favour. A legal, binding decision must be respected. . . . This isn't about rules being established it is about partners abiding by them.

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The United States admits it has presented different defenses on jurisdiction against Tembec and Canfor. It acknowledges no inconsistency. It claims that it had no relevant proximate cause for seeking consolidation, and treats that fact as irrelevant. It admits that it repeatedly promised Claimants it would not seek to consolidate, but claims such promises did not matter because a Chapter 11 claimant must always know of the possible invocation of Article 1126. The United States admits that the Claimants may have relied on these representations, but insists that they did not spend so much, or rely on the representations too much, and so the representations did not matter. The United States admits that its motion could produce proceedings less fair and less efficient than the alternative, but because, it says, such unfairness and inefficiency are inherent in Article 1126, it is permissible, even as the very purpose of Article 1126, so the United States also cynically argues, is to achieve fairness and efficiency.

The United States' inconsistent and dismissive arguments do not satisfy the multi-step test set forth in NAFTA Article 1126. This Tribunal is not authorized by Article 1126 to take away from Article 1120 tribunals decisions they were about to make on the United States' jurisdictional objections. Consolidation of the jurisdictional objections is not permitted by Article 1126, nor could it be more fair and efficient than allowing the Article 1120 tribunals to decide jurisdiction. The appearance, and probably the reality, that the United States has demanded consolidation because it is worried

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Joint Statement By International Trade Minister Jim Peterson, Industry Minister David Emerson, Transport Minister Jean-C. Lapierre, Lucienne Robillard, President Of The Queen's Privy Council For Canada And Minister Of Intergovernmental Affairs, And Leader Of The Government In Senate, Senator Jack Austin On The Canada-U.S. Softwood Lumber Dispute, Ottawa, August 11, 2005/CNW/Telbec.

about what the Article 1120 tribunals would decide on jurisdiction, undermines the credibility of the entire arbitration process.

The United States' arguments for consolidation have evolved with these proceedings. The focus of the United States' request for consolidation has moved away from consolidation of the merits of the Claimants' claims, and shifted to the United States' objections to jurisdiction.

Even in its request that this Tribunal address the United States' jurisdictional objections in a consolidated proceeding, the focus has shifted away from two of the three objections raised against Tembec, to only the Article 1901(3) objection, as the United States never raised Article 1101(1) as an objection to be addressed before the merits phase, nor Article 1121 in any manner, for the other two Claimants.<sup>2</sup> The United States concedes that its jurisdictional challenges are different for each of the three Claimants, yet insists that these differences do not matter. Hence, even the threshold question is different, in each of the Article 1120 tribunals and as they would come together before this Tribunal, and the United States asserts that, although they are not common, they should be consolidated.

The Tribunal must answer the substantive question whether it can address jurisdiction at all. Article 1126 authorizes the Tribunal to assume jurisdiction, under limited circumstances, only over claims, and the defense of jurisdiction is not a claim. It must answer the procedural question whether it can address different defenses erected against different Claimants, were it to think that the ordinary meaning of "claims" in

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<sup>2</sup> See, e.g., Post-Hearing Submission of Respondent United States of America in Support of Request for Consolidation (July 22, 2005) ("U.S. Post-Hearing Br.") at Exh. B, 5 ("[T]he United States does not object to Terminal's claim on the basis of Article 1121(1).").

Article 1126 could be overcome. And it must address the procedural question of when it is too late for the Respondent to seek consolidation of claims made to the Article 1120 tribunals.

The United States believes that, apparently because of its status as a NAFTA Party, it repeatedly may “represent[t] that it was not seeking or did not intend to seek consolidation,” and yet at any time may “reserv[e] its right to later seek consolidation should the circumstances so warrant.”<sup>3</sup> Meanwhile, the United States seeks a consolidated Tribunal to bar Tembec’s Chapter 11 claims on contention that Tembec has changed its position with respect to its Article 1121 waiver.<sup>4</sup> The United States’ inconsistent expectations for consistent legal positions demonstrate why arbitration rules such as UNCITRAL Rules Article 21(3), and doctrines of international law<sup>5</sup> such as waiver, estoppel and laches, must be applied to deny the request for consolidation.

The ordinary meaning of the UNCITRAL Rules applicable here requires a request for consolidation be raised in the Statement of Defense, or be waived. The United States has called that legal proposition “absurd,”<sup>6</sup> but has offered no principled explanation for when a request for consolidation may be considered too late. It argues a low threshold for consolidation so the governments can “‘avoid procedural harassment’ by claimants,”<sup>7</sup> but ridicules the notion that NAFTA and the UNCITRAL rules would establish any checks to avoid the governments’ harassment of claimants.

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<sup>3</sup> U.S. Post-Hearing Br. at 9.

<sup>4</sup> See *Tembec v. United States*, U.S. Statement Of Defense On Jurisdiction (Dec. 15, 2004) at 3.

<sup>5</sup> See NAFTA Article 1131(1).

<sup>6</sup> Hearing Transcript at 22 (Statement of Mr. Clodfelter).

<sup>7</sup> U.S. Post-Hearing Br. at 2-3.

In investment dispute arbitration, investors, just like states, are “disputing parties.” Claimants therefore are entitled to equal treatment with Respondent under applicable rules and time-honored principles of international law.<sup>8</sup>

The United States would impose upon Claimants, who have unequivocally expressed their desires not to consolidate, all of the burdens of these consolidation proceedings for the primary purpose of having this Tribunal decide the United States’ Article 1901(3) objection, after that question was ripe for decision by the *Canfor* and *Tembec* Tribunals and would be settled now but for the intervention of this Tribunal. The only possible explanation for invoking this Tribunal is that the United States is forum shopping, afraid of the results expected from the Article 1120 tribunals and seeking to try again with another tribunal it expects to be more favorable.

## II. THE TRIBUNAL MAY NOT CONSOLIDATE THE CASES TO DECIDE JURISDICTION OF THE CLAIMANT’S CLAIMS

### A. The U.S. Jurisdictional Objections Are Not Claims

The Tribunal is authorized by Article 1126 to consolidate claims, but not objections to jurisdiction that determine whether there are any claims to be consolidated.<sup>9</sup> Even the United States attaches significance to the meaning of the word “claims.” It argues that the doctrine of laches applies only to “claims” and cannot apply to the United States’ request for consolidation because “[a]n application for consolidation is not the filing of a claim to which the doctrine of laches applies.” The United States’ objections to jurisdiction under Articles 1901(3), 1101(1) and 1121—

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<sup>8</sup> See, e.g., *Canfor v. United States*, Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of the Proceedings (Jan. 23, 2004) at 13 (establishing deadline for U.S. objections to jurisdiction); *Feldman v. Mexico*, ICSID Case No. ARB (AF)/99/1, Award (Dec. 16, 2002) paras. 174-77 (drawing adverse inferences from Mexico’s failure to produce certain documents).

<sup>9</sup> See NAFTA Article 1126(2).

which, like an application for consolidation, are merely pleas that the Article 1120 tribunals do not have jurisdiction—are no different. They are not “claims” for which the Article 1126 tribunal would have authority to consolidate.

The Article 1126 negotiating history confirms that the NAFTA Parties meant for Article 1126 tribunals to consolidate only claims and not preliminary objections to jurisdiction. The initial draft text for consolidation, proposed by Canada, granted tribunals the authority to resolve “issues” deemed appropriate by the disputing Party.<sup>10</sup> Negotiators narrowed the scope of Article 1126 tribunals’ jurisdiction in successive draft texts. The original version of Article 1126, which appeared a few months later, charged consolidation tribunals with resolving all or part, or one or more, of the “investment disputes.”<sup>11</sup> The ratified Article 1126 text confines tribunals to deciding all or part, or one or more, of the “claims.”<sup>12</sup> Had negotiators intended for preliminary jurisdictional questions to be the subject of consolidation, they would not have replaced the general terms “issues” or “disputes” with the more precise term “claims.”

This interpretation is reinforced by the principle of judicial economy.<sup>13</sup> It is logical that the NAFTA Parties would not want Article 1126 tribunals to consolidate claims that might be dismissed as invalid depending on the Article 1120 tribunals’ decisions on preliminary jurisdictional objections. When there are no claims to

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<sup>10</sup> Article XX07(9)(4), Virginia Composite, June 4, 1992.

<sup>11</sup> Article 2129(4)(a) & (b) Watergate Daily Update, Aug. 4, 1992.

<sup>12</sup> NAFTA Article 1126(2)(a) & (b).

<sup>13</sup> See Tembec’s Submission In Opposition To Request For Consolidation (Jun. 10, 2005) (“Tembec Pre-Hearing Br.”) at 27-28.

consolidate, there is no reason for Article 1126 proceedings. The question whether there are claims to consolidate has not yet been answered for any of the Claimants.

B. The United States Waived Consolidation Under Article 21(3) Of The UNCITRAL Rules

The United States conceded, as it must, that “[b]y assuming jurisdiction, the consolidation tribunal would oust the jurisdiction of any other tribunal established under the Investment Chapter to decide that issue.”<sup>14</sup> A request for consolidation, therefore, is a plea that the Article 1120 tribunals do not have jurisdiction over claims before them, and such pleas are required by Article 21(3) of the UNCITRAL Rules to be made in the Statement of Defense, which the United States failed to do.<sup>15</sup> The United States’ response to this argument relies, not on the ordinary meaning of the language of Article 21(3) of the UNCITRAL Rules,<sup>16</sup> nor on the ordinary meaning of the language of NAFTA Article 1126, which plainly and repeatedly states consolidation means the Tribunal “assumes jurisdiction” over “claims,” and only claims, before the Article 1120 tribunal.<sup>17</sup> Instead, the United States’ argument depends on mischaracterizing provisions of the UNCITRAL Rules that were drafted more than twenty years before consolidation of investor-state disputes had been introduced in NAFTA,<sup>18</sup> and on persuading the Tribunal that, notwithstanding the rules and the treaty language,

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<sup>14</sup> U.S. Post-Hearing Br. at 4. The United States identified this purpose of Article 1126 in early drafts of Article 1126 and, according to the United States’ own explanation, it was not modified by any of the drafts that followed.

<sup>15</sup> See Tembec’s Motion to Dismiss (June 27, 2005) at 5-11.

<sup>16</sup> “A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counterclaim.”

<sup>17</sup> See NAFTA Article 1126(2) (“[T]he Tribunal may ... *assume jurisdiction* over ... all or part of the claims.”); see also NAFTA Article 1126(8) (“A Tribunal established under Article 1120 *shall not have jurisdiction* to decide a claim, or a part of a claim, over which a Tribunal established under this Article has *assumed jurisdiction*.”)(emphases added).

<sup>18</sup> See Tembec’s Post-Hearing Brief In Opposition To Consolidation (Jul. 22, 2005)(“Tembec Post-Hearing Br.”) at 5-6.

governments should be able to raise consolidation at any time in Chapter 11 arbitration, and over any outstanding issues, not just claims.

The United States' argument would negate the very purpose of Article 21(3), because it would mean that, if the United States were to find a tribunal that doubted its arguments or were the United States to exploit consolidation as a tactic to delay, it could get a second and different tribunal by seeking consolidation. Moreover, the consolidated actions would need have nothing at all in common, only the defenses the United States chose to raise as to jurisdiction. Thus, the United States would define commonality through procedural defenses, arguing that merits could be returned to the Article 1120 tribunals later on, and then "oust" those tribunals through creation of a preferred forum on a procedural pretext of jurisdiction. Neither NAFTA nor the UNCITRAL Rules allow such cynical conduct. The UNCITRAL Rules expressly limit the presentation of jurisdictional pleas for just such reasons, promoting fair and efficient arbitrations and avoiding prejudicial delay.

The United States' new focus on jurisdiction as a reason to consolidate should be particularly disturbing to the Tribunal. That focus erases the need for common questions of law and fact pertaining to the claims, which is the explicit requirement of Article 1126(2), because consolidation would be justified according to the jurisdictional defenses the United States would choose and have nothing to do with the claims. Any Article 1120 tribunals could be ousted, any cases consolidated, were it permissible to consolidate for the purpose of deciding on jurisdictional defenses.

The United States ironically portrays Article 1126 as designed to protect against harassment from claimants, while it continues in default of its obligation under

the UNCITRAL Rules to appoint its own member of the partially-constituted *Canfor* Tribunal.<sup>19</sup> By the United States' own admission (indeed, assertion), Tembec was dragged into these proceedings only because Mr. Harper withdrew from the *Canfor* Tribunal,<sup>20</sup> although Mr. Harper's recusal may also have been little more than pretext.<sup>21</sup> Rather than appoint its own new tribunal member as required by the applicable rules, the United States decided to reverse its prior representations and seek consolidation. Thus, while claiming that Article 1126 was designed to protect Respondents from the harassment of multiple claims, the United States is using Article 1126 to harass the Claimants to consolidate where it would serve the United States' forum shopping and defensive tactics for delay.

The NAFTA Parties specifically adopted the UNCITRAL Rules, including the limitations on when jurisdictional pleas may be raised. The Parties could have modified those rules in Article 1126, but they did not. Thus, the United States has waived the right to consolidation by not asserting it prior to or in its Statements of Defense.

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<sup>19</sup> UNCITRAL Rules Articles 13 and 7 required the United States to re-appoint its arbitrator within 30 days of Mr. Harper's withdrawal.

<sup>20</sup> See 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. (Jun. 3, 2005) ("U.S. Pre-Hearing Br.") at 10; see also U.S. Post-Hearing Br. at 10.

<sup>21</sup> Even though Mr. Harper thought the alleged conflict was not sufficient to precipitate recusal, upon Canfor's objection he did so. See Submission Of Canfor Corporation Opposing Request Of United States For Consolidation Of The Claims Of Canfor Corporation, Tembec Inc. et al. And Terminal Forest Products Ltd. (Jun. 10, 2005) ("Canfor Pre-Hearing Br.") at 11. Recently, on the eve of a WTO decision the United States expected to lose, it challenged a panel chairman who had been serving already for over two years, and although the challenge was obviously pretextual, consistent with the comity that normally prevails in international arbitrations, the panelist recused.

C. The Jurisdictional Objections Are Not Common Among Claimants

Even were jurisdictional objections subject to consolidation (and they are not), the question of jurisdiction pending before the *Tembec* Tribunal is unique. That tribunal must decide as a preliminary matter whether it has jurisdiction over Tembec's Chapter 11 claims based on three objections raised by the United States, referring to Articles 1901(3), 1101(1) and 1121 of NAFTA. The *Canfor* Tribunal need not interpret Articles 1101(1) and 1121 to decide the jurisdictional question that it faces because the United States chose not to raise those questions for decision, in the case of Article 1101(1), prior to argument on the merits or, in the case of Article 1121, ever at all. No jurisdictional objections have been raised in *Terminal Forest Products v. United States*, which could be because there is no (and there may never be a) *Terminal* Tribunal, but also possibly for other reasons, as the United States has demonstrated that it does not intend to raise the same jurisdictional objections in the same time and manner with respect to Chapter 11 claims brought by Canadian lumber companies:<sup>22</sup>

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<sup>22</sup> Under NAFTA and the UNCITRAL Rules, the United States could have compelled Terminal to begin appointment of members of an Article 1120 tribunal. However, the United States was content not to compel the appointment of such a tribunal in the year that passed since Terminal's Notice of Arbitration was filed. Nor should the United States be allowed to use Article 1126 to address any unfairness it perceives in the fact that Terminal has not appointed any tribunal members. The United States still refuses to appoint its own member of the *Canfor* Tribunal, even though the deadline for that appointment expired four months ago and a decision on jurisdiction was pending.

Jurisdictional Objections Raised In Tembec Statement of Defense <sup>23</sup>	Canfor	Tembec	Terminal
Article 1901(3)	Raised as a preliminary objection in Article 1120 proceedings. <sup>24</sup>	Raised as a preliminary objection in Article 1120 proceedings. <sup>25</sup>	Not raised in any Article 1120 proceedings, but the United States promises to raise it against Terminal if the Tribunal will first consolidate. <sup>26</sup>
Article 1101(1)	Not raised as a preliminary objection in Article 1120 proceedings, but as an objection that “ <i>may be</i> ” raised during the merits phase, except that the United States promises to raise it as a preliminary objection against Canfor if the Tribunal will first consolidate. <sup>27</sup>	Raised as a preliminary objection in Article 1120 proceedings. <sup>28</sup>	Not raised in any Article 1120 proceedings, but the United States promises to raise it against Terminal if the Tribunal will first consolidate. <sup>29</sup>

<sup>23</sup> The United States’ request for consolidation under Article 1126, though a plea as to the Article 1120 tribunal’s jurisdiction, was not raised in the U.S. Statement of Defense for Tembec.

<sup>24</sup> See *Canfor v. United States*, U.S. Statement Of Defense On Jurisdiction (Feb. 27, 2004) at 1.

<sup>25</sup> See *Tembec v. United States*, U.S. Statement Of Defense On Jurisdiction (Dec. 15, 2004) at 1.

<sup>26</sup> See Letter from Mark A. Clodfelter to Roberto Danino (Mar. 7, 2005)(“U.S. Request for Consolidation”) at 3 (“In a consolidated proceeding, the United States would object to the jurisdiction of the tribunal over the claims of all three claimants on the basis of Articles 1901(3) and 1101(1), and over the claims of Canfor and Tembec on the basis of Article 1121(1).”).

<sup>27</sup> See *Canfor v. United States*, U.S. Statement Of Defense On Jurisdiction (Feb. 27, 2004) at 2; see also Hearing Transcript at 46 (statement of Ms. Menaker) (“[T]his Tribunal ought to consider all three of our jurisdictional objections in a preliminary phase if these cases are consolidated. Tembec and the United States have already briefed those objections. Canfor and Terminal can address those objections in short order.”).

<sup>28</sup> See *Tembec v. United States*, U.S. Statement Of Defense On Jurisdiction (Dec. 15, 2004) at 2.

<sup>29</sup> See notes 24 and 25, *supra*.

Article 1121	Not raised against Canfor at all in Article 1120 proceedings, but the United States promises to raise it against Canfor if the Tribunal will first consolidate. <sup>30</sup>	Raised as a preliminary objection in Article 1120 proceedings. <sup>31</sup>	Not raised against Terminal in the Article 1120 proceedings and the United States promises not to raise it against Terminal even if the cases were consolidated. <sup>32</sup>
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The United States has argued that even the Article 1901(3) objections are not common between Tembec and Canfor. When Tembec asked to brief jurisdiction expeditiously before the *Tembec* Tribunal because the United States had said it would raise the same objection against Tembec, the United States declined with the explanation that:

not only does Claimant’s Statement of Claim differ on its face from that in the *Canfor* case, but even should Claimant be faced in this case with an objection like that raised in *Canfor* [meaning, Article 1901(3)], Claimant itself has stated that it ‘do[es] not plan to brief the issue in the same way that Canfor has.’<sup>33</sup>

The United States indeed presented the issues differently, and briefing was not the same.

D. Estoppel Is Part Of The “Governing Law” Under Article 1131 And Bars Consolidation Here

Canfor and Terminal incorrectly argue that estoppel doctrines

“indisputably fall within the term of fairness and efficiency, which are the touchstones

<sup>30</sup> See *id.*

<sup>31</sup> See *Tembec v. United States*, U.S. Statement Of Defense On Jurisdiction (Dec. 15, 2004) at 3.

<sup>32</sup> See, e.g., U.S. Post-Hearing Br. at Exh. B, 5 (“[T]he United States does not object to Terminal’s claim on the basis of Article 1121(1).”). However, as evidenced by these proceedings, it is difficult to predict with certainty what objections the United States will raise, notwithstanding its representations.

<sup>33</sup> Letter from Mark A. Clodfelter to Jose Antonio Rivas (Oct. 1, 2004) at 2.

upon which the Tribunal must base its decision.”<sup>34</sup> As Tembec has demonstrated, and the United States agrees,<sup>35</sup> estoppel is a widely-recognized principle of international law and forms part of the “governing law” that the Tribunal must apply. This Tribunal is bound under NAFTA Article 1131 to “decide the issues in dispute in accordance with...applicable rules of international law,” including estoppel. Contrary to Canfor’s and Terminal’s interpretations, estoppel provides the Tribunal with an independent ground, apart from “fairness and efficiency” concerns, for rejecting the United States’ request for consolidation.

Estoppel should bar the United States’ request for consolidation. The United States’ repeated and emphatic representations that it did not intend to consolidate, its actions to pursue separate decisions from each of the Article 1120 tribunals, and its decision not to seek consolidation when Terminal filed its Notice of Arbitration, all demonstrated a clear position against consolidation upon which the Claimants reasonably relied.<sup>36</sup> Claimants had advised the United States from the beginning that the decision whether to consolidate was important and that a delay or reversal in that decision would be prejudicial to the Claimants.<sup>37</sup> Were the reasons that the United States now gives for consolidation so compelling, those same reasons should have moved the United States to seek consolidation before it exchanged briefs on jurisdiction with Tembec in February 2005.

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<sup>34</sup> Post-Hearing Submission Of Canfor Corporation And Terminal Forest Products Ltd. (Jul. 22, 2005) (“Canfor/Terminal Post-Hearing Br.”) at 26.

<sup>35</sup> U.S. Post-Hearing Br. at 9 (citing Ian Brownlie, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 615-16 (6<sup>th</sup> ed. 2003)).

<sup>36</sup> See Tembec Pre-Hearing Br. at 30-31; Tembec Post-Hearing Br. at 13-14.

<sup>37</sup> See Letter from Mark A. Cymrot to Mark A. Clodfelter (Jan. 29, 2004) at 2.

There has been no change to the commonality or lack of commonality among the claims, as neither Canfor nor Tembec has filed an amendment. As briefing continued, consolidation has become less fair and efficient than continuation of the Article 1120 tribunals. That the United States did not seek consolidation in February 2005 confirms that the primary excuse for the United States' request for consolidation is Mr. Harper's withdrawal from the *Canfor* Tribunal and the effect of that withdrawal on the United States' litigation tactics, but it has nothing to do with any of the rationale the United States ascribes to Article 1126.<sup>38</sup>

The United States attempts to dismiss Tembec's detrimental reliance on the United States' representations by citing arguments that Tembec never made in its pre- and post-hearing briefs. Tembec, however, has explained thoroughly how it was prejudiced by the United States' representation concerning estoppel.<sup>39</sup> Tembec has spent money and resources in proceeding before the Article 1120 Tribunal in reliance on the United States' promise, and the United States consequently should be estopped from consolidation.<sup>40</sup>

E. Fairness And Efficiency Require That The 1120 Tribunals Finish Their Decisions On Jurisdiction

Fairness also prohibits the Tribunal from consolidating the United States' objections. It is not in the interests of fairness for the Tribunal to decide that a disputing party may invoke Article 1126 at any point of a Chapter 11 arbitration, notwithstanding

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<sup>38</sup> See U.S. Post-Hearing Br. at 2-3 in response to "What is the rational for NAFTA Article 1126?".

<sup>39</sup> See Tembec Pre-Hearing Br. at 31-32; Tembec Post-Hearing Br. at 14-15.

<sup>40</sup> The United States ridiculed Tembec's arguments about the substantial investment made in the establishment of the *Tembec* Tribunal (U.S. Post-Hearing Br. at 21-22); then reversed course again by arguing that formation of an Article 1120 tribunal for Terminal would force the United States "to expend significant attorney resources" (U.S. Post-Hearing Br. at Exh. B, 6).

that party's repeated representations to the contrary by word and deed. The United States had notice of the Claimants' claims for many months before it requested consolidation, yet it apparently saw no fairness or efficiency in the consolidation of jurisdictional objections argued against Tembec until Mr. Harper's withdrawal from the *Canfor* Tribunal, which gave the United States the excuse it thought it needed to impose more cost and delay on the Claimants, in keeping with its stated policy of tactical delay in the *Softwood Lumber* dispute.

The United States has explained its prior strategy to this Tribunal. It intended to obtain a decision on Article 1901(3) from the *Canfor* Tribunal, then introduce that decision (which it presumed would be a decision denying jurisdiction) to the *Tembec* Tribunal while that tribunal considered the United States' jurisdictional objections.<sup>41</sup> The United States tried to ensure this sequence by postponing the Tembec proceeding as much as possible on pretexts of various kinds (including that the cases were not common) that the Tribunal indulged. First, the United States refused to address jurisdictional questions at the first session of the *Tembec* Tribunal in November 2004, arguing that it was premature to know what objections would be raised since *Canfor's* and *Tembec's* claims were "different on their face."<sup>42</sup> Then, the United States successfully pressed for a hearing on jurisdiction to be deferred until June 2005.<sup>43</sup> The U.S. thus has been gaming the proceedings and forum shopping, practices that consolidation would reward when they should be condemned, and has advanced arguments expressly contrary to the logic of consolidation (claims "different on their

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<sup>41</sup> See U.S. Pre-Hearing Br. at 21-22; see also *Tembec* Pre-Hearing Br. at 48-49.

<sup>42</sup> Letter from Mark A. Clodfelter to Tribunal (Oct. 1, 2004) at 2.

<sup>43</sup> See *Tembec* Pre-Hearing Br. at 5.

face;” no intention to consolidate) with the cynical conviction that, at the appropriate time (now) it would not matter

The United States chose its litigation strategy. It assumed the risk that the timing of the *Canfor* and *Tembec* cases might be disrupted, and that the *Canfor* and *Tembec* Tribunals, facing different claimants, with different arguments and different counsel, might reach different conclusions. The United States’ strategy had consequences for *Canfor* and *Tembec*, who each committed resources to preserve their claims before the Article 1120 tribunals in the face of the United States’ objections. Fairness requires that the United States live by its tactical choice, and not be permitted to continue gaming the process. Even now, in proposing further carving (separating jurisdiction from merits and damages; merits from damages; possibly some claims from others), the United States is suggesting that it may yet want to cashier this Tribunal, as well, should it start thinking that it has not shopped successfully.

Efficiency and the principle of judicial economy require that the Tribunal decide only what it must. The *Canfor* Tribunal, the *Tembec* Tribunal, or both, could decide that there are no claims to be consolidated when they decide jurisdiction. Terminal might never proceed with its claim against the United States. It would be inefficient for the Tribunal to begin the review of jurisdictional defenses already reviewed by Article 1120 tribunals, and more inefficient still to consolidate claims before it is decided that there are any claims to survive the United States’ jurisdictional objections.

### III. THE UNITED STATES HAS NOT ESTABLISHED COMMONALITY

#### A. The Burden Rests With The United States

The United States contends that Claimants have not established sufficient factual differences to avoid consolidation,<sup>44</sup> but the Claimants have no such burden. A request for consolidation by a NAFTA Party, or by any other disputing party, does not create a presumption of consolidation. The party affirmatively advocating a change to the *status quo* has the burden, consistent with the principle of *actori incumbit probatio*, to prove that change should take place.<sup>45</sup> The burden rests with the requesting party to persuade the Tribunal of the commonality among the three claims, as well as the fairness and efficiency of consolidation, and compliance with governing law. The essential principles of litigation are no different here than any in any other proceeding when a litigant moves for change, and the United States, as the moving party, must meet its burden in order to prevail on its request for consolidation under Article 1126.

#### B. Common Laws Or Facts Are Not Common Questions Of Law Or Fact

Although the United States agrees that, under Article 1126, common questions of law or fact must be “dispositive,”<sup>46</sup> it has failed to carry its burden of demonstrating the commonality of any dispositive question of law or fact among the three claims. Instead, the United States has provided a recitation of superficial commonalities that have nothing to do with the real questions for resolving the Tembec,

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<sup>44</sup> See, e.g., U.S. Post-Hearing Br. at 19 (“[T]he claimants in the *HFCS* case identified factual differences among their claims that the tribunal concluded might affect issues of liability. Claimants have failed to do that here.”).

<sup>45</sup> See Tembec Post-Hearing Br. at 20-21 n.39 (describing doctrine of *actori incumbit probatio*).

<sup>46</sup> U.S. Post-Hearing Br. at 8.

Canfor, and Terminal claims.<sup>47</sup> The United States' post-hearing submission supplies yet another laundry list of supposed commonalities in an attempt to distract the Tribunal from the multitude of differences as demonstrated by Tembec. The United States has identified some common facts and laws among the three claims, but has not established that there are common questions of fact or law that, if decided by the Tribunal, would "assist in the resolution of" the other claims.

The fact that the claims arise from the same unlawful softwood lumber duties does not create common questions of law or fact. The Commerce Department's and International Trade Commission's preliminary and final determinations and their universal rejection on appeal are indisputable facts that raise no questions for a Chapter 11 tribunal to resolve. The questions will arise from the different investments Tembec, Canfor and Terminal have in the United States, to some extent to the different measures applied to them, and to the different ways in which these investments were affected by the measures. Each claimant will have to present its own case based almost entirely on confidential business information, and the tribunal deciding the cases will have to decide the dispositive questions of law or fact for each claimant. Those questions will not be common.

The United States' matrix of "Allegations Common to the Three Claims" shows even less in common among Claimants' claims than Mexico demonstrated in its comparison of the *HFCS* claims, which the *HFCS* Tribunal decided not to consolidate.<sup>48</sup>

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<sup>47</sup> See U.S. Pre-Hearing Br. at 11-15. In *HFCS*, the Mexican Government provided from the outset an even longer, more detailed list of alleged common questions of law and fact, and the tribunal refused to order consolidation. Compare U.S. Post-Hearing Br. at Exh. A with *HFCS*, Letter from Hugo Perezcano Diaz to Roberto Danino (Sept. 8, 2004) 4-18, attached hereto as Exh. A.

<sup>48</sup> See *id.*

The United States' attempt at proving commonality here is insufficient for the purposes of consolidation.

C. The Dispositive Questions Of Law And Fact Are Not Common

Contrary to the United States' assertions, Tembec has explained to this Tribunal how the dispositive questions are different among the three claims. The United States has done nothing to counter how this lack of commonality weighs against consolidation. The United States has not rebutted Tembec's first example of how the United States' violations of Chapter 11 harmed Tembec's Eastern White Pine investments in the United States, which are unique to Tembec. The United States accuses Tembec of listing "every conceivable factual difference,"<sup>49</sup> while it lists every conceivable factual similarity, and ignores the material and substantial differences that Tembec repeatedly has demonstrated are dispositive of the claims.<sup>50</sup> The very existence of substantial differences defeats the U.S. claim for consolidation, where the dispositive questions should be identical.

In another reversal of its positions, the United States concedes that, "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."<sup>51</sup> Tembec agrees with that statement, which is why there is insufficient commonality among the claims and there are no efficiencies that could be gained from consolidation.

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<sup>49</sup> U.S. Post-Hearing Br. at 18.

<sup>50</sup> See Tembec Post-Hearing Br. at 33-35.

<sup>51</sup> U.S. Post-Hearing Br. at 17.

#### IV. CONSOLIDATION WOULD BE UNFAIR AND INEFFICIENT, NOT MERELY INCONVENIENT

##### A. Submission Of Confidential Information Will Be Unavoidable In The Merits And Damages Phases

The United States has taken contradictory positions as to whether confidential information will need to be disclosed during the merits phase of the Claimants' claims. The United States argued in its post-hearing brief that "claimants have failed to explain why confidential business information would be needed at the merits phase in the first place."<sup>52</sup> But the United States argued to the *Tembec* Tribunal that Claimants must demonstrate how the measures in question "relate to the investor with respect to the establishment or acquisition of new investments in the territory of the host Party, or with respect to certain activities of existing investments in that territory."<sup>53</sup> In its post-hearing brief, the United States tried to distinguish the jurisdiction and merits phases by arguing that disclosure of confidential information would be unnecessary in a consolidated hearing on jurisdiction, implying that such information would need to be disclosed during the merits phase.<sup>54</sup>

The United States also argued to the *Tembec* Tribunal that, "[w]ithout access to the proprietary information in the administrative records, this Tribunal could not sit in judgment of Commerce's cost allocation, or numerous other decisions by

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<sup>52</sup> U.S. Post-Hearing Br. at 16.

<sup>53</sup> *Tembec v. United States*, Reply On Jurisdiction Of Respondent United States Of America ("U.S. Reply On Jurisdiction") (Mar. 28, 2005) at 29.

<sup>54</sup> See U.S. Post-Hearing Br. at 11 (distinguishing jurisdictional phase from other phases of claims regarding disclosure of confidential information); *id.* ("[C]onsolidation for the merits would not pose any insurmountable problems regarding the protection of confidential information."); *id.* at 12 ("[T]his Tribunal has at its disposal the tools necessary to ensure the protection of confidential business information introduced at any merits phase of these proceedings.").

Commerce and the ITC on which Tembec's claims are based."<sup>55</sup> But Tembec' claims are not based on those subsidiary decisions, and the proprietary information to which the United States referred was "proprietary pricing information submitted by Slocan, Weyerhaeuser, Canfor and other softwood lumber producers subject to the duty order."<sup>56</sup> Thus, the United States curiously argues that for Tembec to prove the merits of its claims as to its own investments, Tembec would need access to every other lumber company's proprietary business information contained on the APO-protected portions of the *Softwood Lumber* administrative records, but would not need any of the proprietary information that it could provide freely about itself and its own investments for adjudication on the merits (but not share with competitors).

It is unavoidable that Claimants will need to provide information "with respect to certain activities of existing investments" in the United States during the merits phase and that much (perhaps almost all) of that information will be proprietary information that the Claimants would not choose to disclose to their competitors under any circumstances. That information is not the same information as was provided in the *Softwood Lumber* cases—different facts are needed to prove different claims under different laws and for different purposes. The *Softwood Lumber* cases have had nothing to do with damages, and they do not involve specific company information about business plans, strategies, and U.S. investments. Nor are they in any way at issue here, as much as the United States appears to be intent on relitigating them.<sup>57</sup> Information provided by other parties in those cases would not be necessary for

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<sup>55</sup> *Tembec v. United States*, U.S. Reply on Jurisdiction at 21.

<sup>56</sup> *Id.*

<sup>57</sup> *See, e.g.*, U.S. Post-Hearing Br. at 16, n.66.

Tembec,<sup>58</sup> which has no need for the APO data of other companies to “reconstruct” Commerce’s calculations for its Chapter 11 claims.<sup>59</sup>

That Tembec could not disclose business proprietary information to Canfor and Terminal without subjecting itself to competitive harm does not compel a conclusion that the claims are common. Tembec’s products and investments are not the same as Canfor’s products and investments, even though they compete with each other. Different companies who sell identical products to the same customers formulate different business strategies, assign different product prices, fashion different marketing plans, and make different investments. Their claims regarding liability and damages are completely different, and it is the information related to liability and damages that would have to be presented and protected.

That Tembec, by the U.S. theory, would not be able to disclose its own proprietary information because of its self-imposed acceptance of an APO reveals more the Department of State’s ignorance of international trade proceedings and confidentiality than insight into how to solve a problem only created by the U.S. motion to consolidate. Without consolidation, virtually all of the confidentiality problem never emerges.

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<sup>58</sup> Tembec would not need that information to present its own claims, but were similar business proprietary information submitted to the Tribunal by Canfor in a consolidated proceeding, counsel for Tembec would still have to review that information to ensure that it could not be used by the United States to undermine Tembec’s claims.

<sup>59</sup> See U.S. Post-Hearing Br. at 16, n.66.

B. Fairness Requires Protection Of Confidential Information, But Protection In A Consolidated Proceeding Here Would Make Adjudication Unfair And Inefficient

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The problems with preserving confidentiality between strong competitors in a consolidated proceeding were confronted by the *HFCS* Tribunal. The same kinds of information that Claimants would need to disclose to present their claims are the same kinds of information that the *HFCS* Tribunal found would make consolidation unfair and inefficient.<sup>60</sup> The *HFCS* Tribunal considered implementing confidentiality procedures, but decided that it would be “extremely difficult” given the “fierce” competition between the *HFCS* claimants.<sup>61</sup> “The process, including essential confidentiality agreements, discovery, written submissions and oral arguments would have to be carried out, in substantial measure, on separate tracks,”<sup>62</sup> and would be an inefficient way to resolve the pending claims.

The same problems would confront this Tribunal with any of the sets of confidentiality procedures that have been raised. Any procedures that the Tribunal might adopt would leave the Claimants with fewer rights than they would have before Article 1120 tribunals because they necessarily would constrain attorney-client communications and limit the ability of Claimants’ counsel to have the assistance of their clients during briefing and hearings. This limitation would make it difficult for

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<sup>60</sup> *Compare HFCS*, Opposition Of Corn Products To Mexico’s Request For Consolidation Under NAFTA Article 1126 (Apr. 11, 2005) at 27-29 (“CPI has adduced evidence of its sales, investment costs, production costs, customer lists, pricing, technology, plant design, business strategies and other sensitive confidential information. Even the very details of its HFCS investments are confidential. So are its expectations in making those investments.”) *with* Tembec Post-Hearing Br. at 43-44.

<sup>61</sup> *HFCS* Order at ¶ 8.

<sup>62</sup> *Id.*

Tembec to comment on arguments made by other Claimants, even while those arguments might impact the Tribunal's deliberations of Tembec's claims.

Under the laws governing disclosure of business proprietary information in U.S. administrative proceedings, only the legal representatives of the interested parties who submit to the administrative protective order ("APO") procedures have access to the proprietary information, and interested parties know that there are severe sanctions that can be enforced against those who even inadvertently violate those rules and laws, including disbarment from practice before the agencies.<sup>63</sup> The same holds true for disclosures of business proprietary information to NAFTA Chapter 19 binational panels under U.S. law.<sup>64</sup> U.S. courts have similar procedures.<sup>65</sup> Thus, with the increased risk of disclosure that is present in multi-party proceedings involving the submission of business proprietary information to a tribunal, there is an offsetting enforcement mechanism with stern and enforceable penalties so powerful that even inadvertent disclosures are avoided.<sup>66</sup>

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<sup>63</sup> See 19 U.S.C. 1677f(c)(1)(B); see also *Sanctions for Breach of Commission Administrative Protective Order*, 68 Fed. Reg. 69718 (Dec. 15, 2003) (suspending attorney's access to APO information in ITC proceedings for a period of 6 months due to violation of APO). The United States is too casual in its discussion of the APO procedures. It is not true that "Canfor's and Tembec's counsel have already shared many proprietary documents in the context of [the Chapter 19] proceedings," U.S. Post-Hearing Br. at 17, because Messrs. Landry and Mitchell have not signed the APO for those proceedings. Nor is the United States correct when it states that "Business proprietary information may then be shared among all interested parties to the proceeding that are subject to the protective order." U.S. Post-Hearing Br. at 13. Counsel for the interested parties are granted access to the business proprietary information, but the interested parties themselves are not.

<sup>64</sup> See 19 U.S.C. § 1677f(f).

<sup>65</sup> See, e.g., Rules of the U.S. Court of International Trade, Rule 73.2(c) & Appendix on Access to Business Proprietary Information Pursuant to Rule 73.2(c).

<sup>66</sup> The United States' reliance on the WTO panel review of the United States' final dumping determination on softwood lumber from Canada (U.S. Post-Hearing Br. at 15) is ironic because the United States refused in that proceeding to provide information to the panel that Canada wanted disclosed regarding the flawed initiation of the dumping investigation; the United States objected that the information could not be disclosed in the WTO because it was protected under U.S. APO. See Report of the Panel, *United States Final Dumping Determination On Softwood Lumber From Canada*, WT/DS264/R (Apr. 13, 2004) at (continue)

Article 1126 tribunals do not have the ability to enforce strict compliance with any confidentiality procedures they may choose to adopt because the NAFTA Parties have not empowered the tribunals with enforcement under domestic law. Any confidentiality procedures to govern consolidated proceedings would have to be adopted by the unanimous consent of the parties as in a privately-contracted confidentiality agreement. Nothing in the history of these proceedings suggests that the United States would agree to reasonable confidentiality procedures. But such an agreement, if it could be reached, would not provide the Claimants with the security that enforcement measures normally provide to offset the risks of disclosure in multi-party proceedings. Normally, the remedy for violation of private confidentiality agreements is a lawsuit to recover from the breaching party damages for the harm from disclosure. In a consolidated proceeding, the parties would have to resolve whether they all (including the United States, ICSID and the members of the Tribunal) would agree to waive immunity from suit for breach of the confidentiality agreements preventing disclosure of another party's business proprietary information.

Article 1120 tribunals are no more empowered to enforce confidentiality procedures than Article 1126 tribunals, but an Article 1120 tribunal involves only one claimant submitting business proprietary information. The risk of even inadvertent disclosure to competitors is drastically reduced by the absence of competitors in the proceedings; enforcement of confidentiality becomes a non-issue. The Article 1120

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paras. 4.238-40. ("Canada made the following arguments: ...The United States, hiding behind the pretense of confidentiality, has not provided the Panel with any information that was before Commerce about the two US surrogate mills. These US mills were at the heart of Commerce's decision to initiate...").

tribunal can proceed more expeditiously and can ensure that a Claimant has due process to present its claim unhindered by fears of competitive harm.

Even were the Tribunal able to adopt effective confidentiality procedures, the result in this case would be that each of the consolidated claims would proceed on its own confidential track, multiplying the time and expense necessary to resolve the pending claims. Consolidated proceedings, therefore, would never really lead to a consolidated hearing of the claims. They would be nothing more than a takeover by one tribunal of the work of two (or potentially three) others.

C. Confidentiality Concerns May Make Consolidation Rare, But Not Obsolete

The United States discounts the problems that confidentiality poses by saying that, were they correct, consolidation would rarely occur.<sup>67</sup> Yet consolidation is so rare it has never happened, and the *HFCS* case suggests for this very reason. High thresholds for certain procedures are indicative of drafters' intentions that the procedures rarely be used.<sup>68</sup>

The *CME* and *Lauder* cases, which the United States first cited in support of its rationale for consolidation, would not have been subject to the same confidentiality problems as presented here because the investor-claimants in each of those cases were not direct competitors with each other. Nor would confidentiality problems arise in scenarios implicating NAFTA Article 1117(3).<sup>69</sup> Of all the possibilities evoked in these proceedings, the proposition before this Tribunal is the worst.

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<sup>67</sup> See U.S. Post-Hearing Br. at 16.

<sup>68</sup> See Section VI. A. below.

<sup>69</sup> See Tembec Post-Hearing Br. at 26-29.

D. These And Any Subsequent Consolidated Proceedings Before This Tribunal Are Unfair Because The United States Has A Party-Appointed Arbitrator While The Claimants Do Not

Mr. Davis Robinson's appointment to the Tribunal is effectively a party-appointment to the Tribunal for the United States because he was selected from the United States' own designated list of pre-approved American arbitrators on the ICSID Panel of Arbitrators. The requirement to appoint an American from the Panel of Arbitrators did not mean appointment from a list furnished by the Respondent, while neither the Claimants nor their government has furnished lists at all. Even without the serious and specific conflicts that this particular Tribunal member presents, the decision to appoint from Respondent's list is contrary to the expectations for balance in Article 1126(5), contrary to Article 6(4) of the UNCITRAL Rules,<sup>70</sup> contrary to the conventions of international arbitration, and palpably unfair. The Tribunal should recuse itself rather than render any decision while its constitution disproportionately favors one of the disputing parties in these proceedings.

E. By The United States' Own Absolute Fairness/Efficiency Standard, These Cases Should Not Be Consolidated

The United States has stated that the Article 1126(2) standard, "in the interests of a fair and efficient resolution of claims" is "an absolute, and not a relative, standard."<sup>71</sup> By that standard, the Tribunal should not consolidate the claims. The United States recognizes the unfair and inefficient delays, expenses, and burdens of

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<sup>70</sup> Article 6(4) provides: "In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."

<sup>71</sup> U.S. Post-Hearing Br. at 5.

Article 1126 proceedings, but excuses them as “inherent” to the process. Where the process itself guarantees an unfair and inefficient resolution of claims, the process is unavailable, but the United States wants to argue that the process must be available so these inherent problems cannot matter.

This argument is literally amazing: because what is unfair and inefficient is inherent, it is excusable. That it may be more unfair and less efficient than an alternative is not a suitable standard, the United States argues, because the standard must be absolute. Therefore, the system that was created in the interest of achieving fairness and efficiency must be embraced, even though it is inherently unfair and inefficient, precisely because what is unfair and inefficient is inherent. The United States walked into this maze, and the Tribunal has no way to lead it out without rejecting outright the notion that something less fair and more inefficient would be consistent with the object and purpose of Article 1126.<sup>72</sup>

The United States admits that consolidation would “inherently” mean a slower, more expensive, longer process, but in its zeal to consolidate it reduces all these infirmities to “inconveniences” and ignores that they contradict, fundamentally, the very reason why consolidation might ever be an option.

## V. THE U.S. COST ESTIMATES ARE INACCURATE AND UNRELIABLE

The Claimants, unlike governments, are profit-motivated businesses.

Were consolidation likely to be the efficient, cost-saving exercise portrayed by the

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<sup>72</sup> According to the United States, the consolidation hearings “inherently” will “not be as speedy as a separate hearing,” “result in a slower resolution of that claim,” and “be more lengthy than in a single separate proceeding.” See Hearing Transcript at 22, 51, and 178. In addition to the fact that “Article 1126 would deprive them of the right to choose their own arbitrator,” the “host of supposed prejudices [Claimants] would suffer if the cases were consolidated ... are, in fact, inherent to the consolidation process itself....” See *id.* at 22 and 21.

United States, the Claimants surely would embrace it. The fact that all of the Claimants oppose consolidation and foresee only waste and delay as its result should cause the Tribunal to view the United States' cost estimates with skepticism.

The United States admits, and all of the disputing parties agree, that “it is not possible to ascertain with precision the amount of costs that may be incurred in the future in a particular proceeding,” but nevertheless provides a detailed estimate of the supposed cost savings from a consolidated proceeding.<sup>73</sup> As Tembec indicated to the Tribunal, it is impossible to ascertain reliably future arbitration expenses. Tembec has no way of knowing what Canfor and Terminal intend to spend in connection with their Article 1120 claims, any more than the United States can ascertain how much time the arbitrators would spend reviewing the parties' briefs, deliberating, and reaching a decision.<sup>74</sup> Even were Tembec able to project its own expenses, it would be extremely reluctant to disclose to its competitors—Canfor and Terminal—the amounts of money it intends to divert from business investment to the prosecution of its Chapter 11 claim.

The United States' estimates represent an exercise in arbitrariness, failing to account for many of the key assumptions that actually would increase costs for the Claimants. Were the Tribunal to order consolidation, it would be required to adopt procedural firewalls to protect the Claimants' business proprietary information, all of which would complicate and prolong the briefing and hearing process. Yet the United States ignores this basic assumption in estimating costs of the consolidated proceeding, and assumes only a slight increase in its own “attorney time” because of “somewhat

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<sup>73</sup> U.S. Post-Hearing Br. at 21 & Exh. B thereto. The United States is so confident in its methodology that it announces a 77% cost savings.

<sup>74</sup> See, e.g., U.S. Post-Hearing Br. at 2 (assuming without further analysis that the arbitrators would spend 750 hours in deliberating and drafting a jurisdictional award).

longer” proceedings on the merits and damages.<sup>75</sup> And whereas the United States, whether before one tribunal or three, would have to be engaged in all three cases, the Claimants would have to be engaged in each other’s cases only in consolidation. The United States thus multiplies the cost, expense and burden for the Claimants, while not reducing its own.

The United States assumes that it will save attorneys’ fees in a consolidated jurisdictional hearing because it presumes the jurisdictional objections are common and the United States will not have to prepare the same defenses more than once. Yet the United States also assumes that it would save nothing were the claims to be heard by separate Article 1120 tribunals, even though it already completed all briefing and participated in a jurisdictional hearing. If the jurisdictional objections truly were so common among the Claimants, the United States should have been able to resubmit the same defenses in different Article 1120 proceedings with little additional effort or expense. Consolidation will not make the jurisdictional objections more common, and therefore more efficient. They are as different now as they ever will be (unless, of course, the United States eventually comes up with still more creative objections to Terminal).

The United States’ cost estimates assume the necessity of a new jurisdictional hearing in *Canfor*,<sup>76</sup> even though no new hearing is required by the governing rules.<sup>77</sup> They assume the necessity of a jurisdictional hearing in *Tembec*,<sup>78</sup>

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<sup>75</sup> U.S. Post-Hearing Br. at Exh. B, 10.

<sup>76</sup> See U.S. Post-Hearing Br. at Exh. B, 2-3.

<sup>77</sup> Article 14 of the UNCITRAL Rules states “If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior

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even though Tembec requested that tribunal to forego a hearing in the absence of any questions it might have for the disputing parties, and this Tribunal stayed the *Tembec* proceedings before a decision could be made on the pending request. The cost estimates also assume the necessity of a jurisdictional hearing for Terminal,<sup>79</sup> even though Terminal evidenced no intention to continue with a claim against the United States. These assumptions are too speculative (and unlikely) to form a reliable basis for cost comparisons.

Were the United States concerned primarily about saving the expense of multiple hearings before different tribunals, the most cost-efficient course of action would have been to (1) promptly appoint its member to the Canfor tribunal and allow that third member to submit any additional written questions he or she might have to the parties after reviewing the briefs, the written transcript, and even the actual recording of the proceedings of the *Canfor* Tribunal's hearing on jurisdiction; (2) agree to Tembec's proposal that the Tribunal decide jurisdiction on the arguments contained in the briefs without a hearing; (3) ignore Terminal, which has shown almost no interest in prosecuting its claim.

Instead, the United States requested consolidation, which required a full-day hearing, and now requests another three-day hearing on jurisdiction before another tribunal that has yet to become familiar with the arguments on jurisdiction raised in the

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hearings *may be repeated at the discretion of the arbitral tribunal.*" (emphasis added) Mr. Harper was not the sole or presiding arbitrator in *Canfor*.

<sup>78</sup> See U.S. Post-Hearing Br. at Exh. B, 3.

<sup>79</sup> See *id.*

two active cases. The United States prefers two hearings through consolidation instead of none in Tembec's and Canfor's cases.

The United States also presumes, incorrectly, that the Tribunal will be able to do less work (charging fewer arbitrator's fees) in a consolidated proceeding than each of the Article 1120 tribunals combined. What the United States misunderstands is that the Claimants (Tembec for certain) will not understate their claims merely because they may be subjected to a consolidated proceeding.<sup>80</sup> One Claimant will not risk its claims on the arguments made by another Claimant. Nor could the Tribunal force the Claimants to limit their claims under the governing UNCITRAL Rules:

Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.<sup>81</sup>

The Tribunal, therefore, will have to hear the same arguments that the Claimants would present in their separate Article 1120 proceedings and there will be no time savings from consolidation. Table 3 of the United States' cost estimates should show the total hours of arbitrators' fees for the consolidation tribunal calculated as a minimum of the sum total hours for the three Article 1120 proceedings.<sup>82</sup> In addition, the Claimants likely will comment on each others' arguments and evidence where those arguments and evidence conflict, leading to even more time that the Tribunal will have to devote to the arbitration.

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<sup>80</sup> However, Tembec would be constrained from fully presenting its claims were it obligated to disclose in consolidated proceedings confidential business information to its competitors. That outcome would unfairly deny Tembec the right to present its claims in violation of UNCITRAL Rules Article 15(1) and the fairness obligations of NAFTA Article 1126(2).

<sup>81</sup> Article 15(1) of the UNCITRAL Rules.

<sup>82</sup> See U.S. Post-Hearing Br. at Exh. B, 8. Thus, at least 11,000 hours rather than 4,320 should be allocated to the calculation of arbitrator fees for the consolidated tribunal.

Attorney's fees for the Claimants will be affected by consolidation in the same way. Counsel for Tembec would present thoroughly all of the arguments and evidence necessary for Tembec's claims to be successful, and would be ethically bound to monitor and comment on any of the other Claimants' arguments or evidence that might conflict with Tembec's presentation of claims. The obligation to protect one's claim from other Claimants' submissions necessarily means that a consolidated proceeding would be more costly and time-consuming than a separate Article 1120 proceeding.

The United States' cost estimates for Terminal's proceedings are particularly exaggerated. There is as much likelihood of Terminal proceeding with a claim, as there is that Terminal would allow the claim to lapse or even withdraw it. In the United States' Table 2, it calculates attorneys' fees for Terminal that more than double the attorneys' fees it assigns to Tembec, and triples the attorneys' fees assigned to Canfor.<sup>83</sup> The expressed rationale is that before a hearing on jurisdiction occurs for Terminal (and the United States assumes it must), "the United States would need to expend significant attorney resources constituting a tribunal in the Terminal case."<sup>84</sup> Yet the United States does not account for the "significant attorney resources" already incurred in the constitution of this Tribunal for an adequate comparison, nor does it add to the expense of consolidation the "significant attorney resources" that Canfor and

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<sup>83</sup> See *id.* at 5.

<sup>84</sup> *Id.* at 6. The United States' great appreciation for the significant investment of attorney's resources in forming Terminal's Article 1120 tribunal shows that the United States is disingenuous when it states that Tembec's claims of prejudice due to loss of a significant investment in the formation of the *Tembec* Article 1120 tribunal are "absurd."

Tembec invested in their Article 1120 tribunals, which expenses would be wasted (and therefore an additional cost) as a result of consolidation.

Further casting doubt on the United States' cost estimates are the mathematical errors in Table 4 for "Attorneys' Fees & Other Expenses In Merits & Damages Phases." The United States "estimates that it would spend \$582,000 for attorneys' and experts' fees as well as miscellaneous expenses in separate proceedings for any merits and damages phase, while it would spend \$325,000 for those same expenses in a consolidated proceeding."<sup>85</sup> These estimates are based on a chart that shows the United States' total attorneys' fees for consolidation as \$180,000, which the United States erroneously calculates as the product of 6,000 hours multiplied by \$300.00/hour. The calculation is wrong by a factor of 10, and should have seemed implausible immediately when written on the basis of the United States' experience in other arbitration cases.

Even were the calculation corrected, the United States fails to acknowledge that while it is obligated to respond to each of the Claimants' claims, the Claimants are not because they may proceed with their own Article 1120 tribunals. Assuming Tembec incurred the same attorneys' fees, expert fees, and photocopying charges as the United States projects in Table 4, the consolidated tribunal would be more expensive for Tembec than the Article 1120 tribunal.

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<sup>85</sup> *Id.* at 9.

VI. THE UNITED STATES HAS NOT MET THE HIGH STANDARD FOR CONSOLIDATION

A. The NAFTA Parties Drafted Other High Threshold Procedural Standards

That consolidation may be difficult in many cases is not an argument that the Tribunal should consolidate this case. Article 1126 is not written as an easy standard to be satisfied. The text of NAFTA Article 1126 intentionally sets a high bar to consolidation. Consolidation is permitted only when the parties' claims share common questions of law or fact that are dispositive for resolution of the claims, *and* neither fairness nor efficiency is sacrificed by consolidating, *and* consolidation is consistent with the applicable rules and governing law, *and* the Tribunal, in its limited discretion, does not decline consolidation.

The United States suggests that such a high bar would make consolidation a rarity, and that Article 1126 would have been left out if the NAFTA Parties had wanted its effectuation to be so difficult.<sup>86</sup> The high bar, however, reflects a paramount concern for due process in the resolution of the claims, consistent with the purpose of NAFTA's Chapter 11 to provide investors with meaningful dispute resolution that would protect their foreign investments. Due process requires that each party have the opportunity to argue its own claims without the interference of co-parties. In the only prior instance where consolidation was requested, consolidation was denied because co-plaintiffs were direct competitors, and the requirement to share or work around confidential information necessary to prosecute claims was precluded on grounds of fairness and efficiency.

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<sup>86</sup> See, e.g., U.S. Post-Hearing Br. at 16.

Article 1126 is not unique in demanding that a high legal threshold be met before a new dispute settlement proceeding is commenced. The NAFTA Parties drafted the Article 1904.13 Extraordinary Challenge Procedure to allow Chapter 19 binational panel decisions to be vacated or remanded by the Extraordinary Challenge Committee (ECC) only in circumstances of egregious misconduct.

In order to vacate or remand, the ECC requires satisfaction of a three-prong test. First, the ECC must find that the panel “seriously departed from a fundamental rule of procedure” or it “manifestly exceeded its powers, authority, or jurisdiction.” Next, the ECC must find that the misconduct materially affected the panel’s decision. Finally the ECC must find that allowing the decision threatens the integrity of the binational panel review process. Examples of particularly egregious misconduct include employing panelists with a personal interest in the outcome or applying the law of the wrong country.

Article 1904.13 sets a bar so high that, between its existence in the Canada-United States Free Trade Agreement and in NAFTA, it has never resulted in the vacatur or remand of a Chapter 19 binational panel decision. The United States, the only Party to avail itself of ECC challenges, has brought 1904.13 petitions on six occasions. No ECC has ever found a Panel’s misconduct to be so egregious as to fulfill each prong in the test,<sup>87</sup> and each one has reminded the United States that the bar is

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<sup>87</sup> See, e.g., *In the Matter of Fresh, Chilled, or Frozen Pork from Canada*, Memorandum Opinion and Order Regarding Binational Panel Remand Decision II (Jun. 14, 1991) (affirming panel decision despite finding that it satisfied part of the three-prong test by manifestly exceeding its power when it impermissibly reweighed record evidence); *In the Matter of Live Swine from Canada*, Memorandum Opinion and Order Regarding Bipanel Remand Decision and Order (Apr. 8, 1993) (affirming panel decision because it applied appropriate procedure even though the ECC report suggested that the panel erred in its decision); *In the Matter of Certain Softwood Lumber Products from Canada*, Memorandum Opinions and Order (Aug. 3, 1994) (affirming panel decision despite a undisclosed conflict of interest for one of the

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high and that the United States has not appreciated properly the standard it has been expected to meet.<sup>88</sup>

Both consolidation and extraordinary challenges are important safeguards to overcome redundancy and procedural injustice, respectively. Nonetheless, as safeguards they are intended to be used only in unique circumstances. Under the case at bar, consolidation would sacrifice fairness *and* efficiency. The Claimants would be denied due process as a result of the burdens that consolidation would impose. Rejecting consolidation of these claims would give weight to both the language and purpose of Article 1126, just as setting the bar high fulfills the purpose of Article 1904.13.

B. No Claims Have Ever Been Consolidated, Even When In Dispute Was A Single Measure Of A Single Government

The only other case where consolidation has been requested is *HFCS*, where a single government measure was in dispute. Even those claims, involving but

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Panelists because the conflict was not found to be material); *In the Matter of Gray Portland Cement and Clinker from Mexico*, Opinion and Order of the Extraordinary Challenge Committee (Oct. 30, 2003) (affirming panel decision even though the United States raised legitimate questions about the accuracy of the panel decision because the ECC is only seeking to correct systemic errors); *In the Matter of Pure Magnesium from Canada*, Decision and Order of the Extraordinary Challenge Committee (Oct. 7, 2004) (affirming panel decision despite the panel's failure to apply the correct standard of review because this was insufficient to threaten the integrity of the Chapter 19 review process); and *In the Matter of Certain Softwood Lumber Products from Canada*, Opinion and Order of the Extraordinary Challenge Committee (Aug. 10, 2005) ("*Softwood Lumber* ECC Decision") (affirming panel decision after the first-prong of inquiry and finding it "not necessary for us to determine whether, if the Panel had committed any of the errors alleged, they would have been material to the Panel's decision or threatened the integrity of the binational review process."). The Extraordinary Challenge Committee decisions are available at the NAFTA Secretariat's online website at [http://www.nafta-sec-alena.org/DefaultSite/index\\_e.aspx?DetailID=76](http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=76).

<sup>88</sup> See, e.g., *Softwood Lumber* ECC Decision, at para. 55 ("It is important to repeat that in reviewing the Panel's decision, greater deference is required of the ECC than of an appellate court. As previously noted, while the bar cannot be set so high that an Extraordinary Challenge can never succeed, it is reserved for truly egregious situations."); see also *In the Matter of Pure Magnesium from Canada*, Decision and Order, at para. 13 (calling the ECC process "a safety net to deal with mistakes that are so egregious as to undermine the functioning and acceptance of the entire Chapter 19 of NAFTA").

one measure in common to all participants, were not sufficiently common to allow fair and efficient consolidation.

By contrast, Tembec's claims involve multiple measures that injured different investors in different ways. The United States argues that the differing application of U.S. trade laws to each of the Claimants is somehow "irrelevant" to the issue of whether their claims raise common questions of liability under NAFTA.<sup>89</sup> Unlike the United States, Tembec does not seek to relitigate the underlying investigation as part of the Chapter 11 proceedings, but the Tribunal must consider how the U.S. measures taken in connection with the *Softwood Lumber* cases were applied to, and affected, Tembec, Canfor, and Terminal differently. Each Claimant must demonstrate how it was injured by the U.S. measures during the liability phase of adjudication on the merits, and the quantum of damages arising from that injury in the damages phase.

The United States misunderstands, or chooses to ignore, how the trade laws were applied to each company in a different manner. As Tembec demonstrated in its pre-hearing brief, and explained at the hearing, the U.S. cross-border benchmarks varied depending on where a company was based in Canada. The benchmark for Ontario, where most of Tembec's mills are located, relied on Midwestern U.S. states, while that for British Columbia, where Canfor and Terminal operate, used prices from the U.S. Pacific Northwest. The choice of benchmark affected the measurement of the provincial subsidy in Ontario and BC, and dictated litigation choices and business decisions for each of the claimants in a different manner.<sup>90</sup> Companies could be

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<sup>89</sup> U.S. Post-Hearing Br. at 28.

<sup>90</sup> The United States also claims that Tembec did not "allege wood chip sales as part of its claim in its Notice of Arbitration." U.S. Post-Hearing Br. at 28 n.111. The United States once again contorts

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excluded from the CVD order based on whether their province's stumpage programs were found to be unsubsidized.<sup>91</sup> The United States investigated Canfor and Tembec individually in the dumping investigation, and applied different duty rates to them based on different assessments of the companies' business operations. The only material fact in common is that NAFTA and WTO panels consistently found the U.S. agencies operating contrary to law and contrary to international obligations, but the impact of all that illegality is different for each of the Claimants.

#### VII. NONE OF THE UNITED STATES' ARGUMENTS REGARDING THE "RISK" OF INCONSISTENT DECISIONS SUPPORTS CONSOLIDATION

The "risk" of inconsistent decisions repeated by the United States as a reason to consolidate appears nowhere in Article 1126 and is not part of the legal standard that this Tribunal should apply to determine whether to consolidate these claims. Moreover, time and again the United States has contradicted itself as to such arguments.

The legal scholars cited by the United States for the proposition that consolidation should be used to avoid inconsistent decisions expressly stated that different decisions were an inherent part of arbitration.<sup>92</sup> The lone arbitration case cited

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Tembec's argument. As Tembec explained at the consolidation hearing, the treatment of wood chip sales factored into how the Commerce Department determined differing antidumping rates for Canfor and Tembec. The wood chip example merely demonstrates how the U.S. measures impacted the claimants differently, and Tembec was not required to make a detailed allegation concerning such calculations in its Notice of Arbitration.

<sup>91</sup> See Certain Softwood Lumber Products from Canada, Final Affirmative Countervailing Duty Determination, USA-CDA-2002-1904-03, Panel Decision (May 23, 2005) at 22-23.

<sup>92</sup> See U.S. Pre-Hearing Br. Appendix Exh. 11, Wolfgang Kuhn, *How to Avoid Conflicting Awards: The Lauder and CME Cases*, 5:1 World Inv. & Trade 7,10-11 (Feb. 2004) (recognizing the possibility of conflicting decisions in international arbitration); see also *id.* Exh. 12, Thomas W. Walde, *Introductory Note to Svea Court of Appeals: Czech Republic v. CME Czech Republic*, 42 I.L.M. 915, 918 (July 2003) ("The fact that two tribunals issued contradictory awards is often decried as compromising the arbitration

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by the United States to support its position is inapposite to the facts of this proceeding for the reasons provided by those very scholars.<sup>93</sup>

The United States' concern for inconsistent decisions was nowhere to be found when the United States tactically sought a decision on jurisdiction first from the *Canfor* Tribunal that it could later set before the *Tembec* Tribunal. When Mr. Harper was serving on the *Canfor* Tribunal, the United States was prepared to assume that risk, but when he withdrew, the United States changed its strategy on jurisdiction. The change in strategy had no reasonable relationship to the concern for inconsistent decisions because, regardless of when the two Article 1120 tribunals decided jurisdiction, different factors (different tribunal members with different areas of expertise; different counsel for different claimants; different objections raised by the United States; different arguments made in different ways) could explain different results. The same differences would apply to any decision made by this Tribunal that might arise before future tribunals.

The United States argues for inconsistent decisions even while it contends that Article 1126 should be used to avoid them. The United States does not agree with much of the reasoning and the results of the *HFCS* Tribunal.<sup>94</sup> The United States has struggled to distinguish the issues in this proceeding from those arising in *HFCS*, which weighed against consolidation. So, it advocates that this Tribunal should avoid the

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method. But it is far from unnatural that two sets of arbitrators--like two sets of judges or just two lawyers--reach different results.").

<sup>93</sup> It also supports Tembec's view that the United States has waived those pleas regarding the jurisdiction of the Article 1120 tribunals that were not raised in the Statement of Defense consistent with Article 21(3) of the UNCITRAL Rules. See Tembec Motion to Dismiss at 7-8; Tembec Pre-Hearing Br. at 25.

<sup>94</sup> See, e.g., U.S. Post-Hearing Br. at 19 n.78, 20.

reasoning and results of the *HFCS* Tribunal and make a different decision based on similar issues, such as concerns about disclosure of confidential business information and respect for party autonomy.

Finally, and perhaps most importantly, the NAFTA Parties recognized that different decisions were an inherent part of arbitration. Article 1136 provides that “[a]n award made by a Tribunal [which includes Article 1126 tribunals] shall have no binding force except between the disputing parties and in respect of the particular case.”<sup>95</sup>

#### VIII. NAFTA ARTICLE 1126 DOES NOT GRANT THE TRIBUNAL BROAD DISCRETION TO CONSOLIDATE WITHOUT CONSENT OF THE DISPUTING PARTIES

The United States’ argument that the NAFTA Parties intended “to grant Article 1126 tribunals wide latitude to resolve issues arising in a consolidation proceeding” is wrong.<sup>96</sup> NAFTA does not provide an open grant of discretion to Article 1126 tribunals to consolidate claims when and how they see fit. The Tribunal’s authority is derived from, and limited by, the text of Article 1126. The Tribunal may not increase its authority beyond the text of Article 1126:

[I]t is primarily the common intention as set out in the text which is to be enforced. The text of a treaty cannot be "enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the treaty, but for which no provision is made in the text itself."<sup>97</sup>

Tembec already has demonstrated the limits that Article 1126 places on the Tribunal’s authority to consolidate:

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<sup>95</sup> Similarly, Article 1904(9) provides that “[t]he decision of a panel under this Article shall be binding on the involved Parties with respect to the particular matter between the Parties that is before the panel.”

<sup>96</sup> U.S. Post-Hearing Br. at 7.

<sup>97</sup> Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 115-19 (Cambridge 1987) (citing PCIJ: *Lighthouses Case* (1934), France/Greece, S.O. by Séfériadés, A/B 62, p. 47; PCIJ: *Polish War Vessels in Danzig* (1931) Adv.Op., A/B. 43, p. 144).

- The Tribunal has no authority to decide jurisdiction, as it is limited to claims.<sup>98</sup>
- The Tribunal may not consolidate claims with uncommon questions of law or fact.<sup>99</sup>
- The Tribunal may not consolidate where it would be unfair or inefficient to do so.<sup>100</sup>
- The Tribunal may not consolidate out of concern for inconsistent decisions.<sup>101</sup>
- The Tribunal must be established and function in accordance with the UNCITRAL Rules.<sup>102</sup>
- The Tribunal has no authority to force a claimant to submit a statement of claim.<sup>103</sup>

The United States again mischaracterizes the authorities on which it relies when citing to an article by Dan Price, “one of the drafters” of NAFTA’s Chapter 11, for the proposition that the Tribunal has “wide latitude to resolve issues arising in a consolidation proceeding.” Regarding consolidation of claims under Chapter 11, Mr. Price wrote: “The chapter does not resolve all the questions that may occur during consolidation. Many issues will need to be worked out by the tribunal in consultation with the disputing parties.” The reference to the “disputing parties” includes the Claimants.<sup>104</sup> Thus, to the extent that there are questions unresolved by Article 1126 regarding these proceedings, the Tribunal may have some latitude to resolve the

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<sup>98</sup> See, e.g., Tembec Post-Hearing Br. at 15-19.

<sup>99</sup> See, e.g., id. at 21-22.

<sup>100</sup> See, e.g., id. at 22.

<sup>101</sup> See, e.g., Tembec Pre-Hearing Br. at 51-56.

<sup>102</sup> See, e.g., Tembec Motion to Dismiss at 1-12.

<sup>103</sup> See, e.g., Tembec Post-Hearing Br. at 38-39.

<sup>104</sup> See Article 1136 (“**disputing parties** means the disputing investor and the disputing Party”) (emphasis in original).

questions only by taking into account the wishes of not only the United States, but also of the Claimants. Mr. Price's statement conveys the opposite of the United States' interpretation that the NAFTA Parties gave Article 1126 tribunals unwritten authority and broad discretion to resolve such questions on their own.<sup>105</sup>

Mr. Price's statement is consistent with the decision by the *HFCS* Tribunal and the positions advocated by Mr. Price on behalf of the Claimants Tate & Lyle Ingredients in the *HFCS* case.<sup>106</sup> The Claimants agreed with Mexico that, were the claims to be consolidated, a different tribunal would be appointed mutually by Claimants and Mexico to hear the consolidated case on the merits, and the *HFCS* Tribunal respected that decision.<sup>107</sup> The Tribunal was persuaded by the Claimants' arguments about the importance of party autonomy in arbitration and took into account the fact that three of the four parties in that case (all of the Claimants) opposed consolidation when it decided that the claims should not be consolidated.<sup>108</sup>

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<sup>105</sup> U.S. Post-Hearing Br. at 5 ("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."). Because the United States contends that Article 1126 was created out of concern only for governments, it may presume that Article 1126 Tribunals, acting on their own discretion, would appropriately be acting for governments. Mr. Price, the authority on whom the United States relies for this proposition, does not support it.

<sup>106</sup> See *HFCS*, Observations On The Question Of Consolidation Submitted On Behalf Of Archer Daniels Midland Company And Tate & Lyle Ingredients Americas, Inc. (April 11, 2005) at 3.

<sup>107</sup> See *HFCS* Order at ¶¶ 2, 11.

<sup>108</sup> See *id.* at ¶ 12. Mutual consent among the disputing parties is a fundamental tenet of arbitration because it facilitates the resolution of claims. As the experience of the disputing parties in *HFCS* and as Mr. Price's article suggests, were the disputing parties to agree to consolidation, they could agree to "contract around" procedural limitations or ambiguities presented by Article 1126. The parties could agree, for example, that jurisdiction be resolved first by the Article 1120 tribunals with consolidation of the merits, or that jurisdiction be resolved first by the Article 1126 tribunal with the merits being left to Article 1120 tribunals. They could elect, by consent, to consolidate everything. The rules may be broken, but only by consent. Procedural dilemmas become irrelevant when the disputing parties have a mutual interest in consolidation, as there appears to be in the Cases Regarding the Border Closure due to BSE Concerns. There, with common counsel filing identical claims on the same day, there may be a common interest in immediate consolidation, which by consent the parties are free to pursue.

The United States claims that “[t]he *HFCS* tribunal’s consideration of the claimants’ opposition to consolidation is difficult to reconcile with Article 1126’s purpose,”<sup>109</sup> yet Mr. Price’s statement, cited repeatedly in the United States’ post-hearing brief, validates the decision: “Many issues will need to be worked out by the tribunal in consultation with the disputing parties,” which does not mean that the Tribunal should consult only with the government to decide how best to protect it from claimants through consolidation proceedings. Although 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,’”<sup>110</sup> the United States submitted no Article 1128 comments in the *HFCS* proceedings to express a contrary view, nor has Canada or Mexico chosen to make such submissions here. Given the chance, the United States did not object to the mutual decision of all parties in the *HFCS* case to work around those aspects of Article 1126 that are inherently unfair and inefficient. Yet, here, the United States is in zealous pursuit of an outcome it admits may be unfair and inefficient, while ascribing to the Tribunal powers it does not have so that it may achieve a result that negates the very purpose of Chapter 11.

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<sup>109</sup> U.S. Post-Hearing Br. at 19, n.78.

<sup>110</sup> *Id.*

## IX. CONCLUSION

The United States has not presented a single compelling reason to consolidate any of the claims presented by Tembec, Canfor, and Terminal. Consolidation would be less fair and more inefficient. The United States would get to reargue defenses it expects otherwise to lose. It would get to resurrect arguments it has waived. It would diminish the capacity of Claimants to present fully and fairly their claims by complicating proceedings with insurmountable problems of confidentiality. It would replace imminent decisions with starting over. It would replace consensual tribunals with one it has tried to stack. It would confer powers upon that Tribunal that are not conferred in Chapter 11, while taking from Claimants fundamental rights of due process. Although unusual, perhaps, to introduce a new quotation in a conclusion, the penultimate word is offered here to the United States' cited expert. Mr. Price addressed the only other consolidation tribunal in NAFTA's history:

[W]e urge the Tribunal to bear in mind that the consolidation of claims has been provided in Article 1126 of NAFTA as a limited exception to the general rule that each claim proceeds on its own. Arbitration of investment claims normally takes place on the basis of the mutual consent of an investor and the host State, and that consent does not contemplate or imply an additional consent to consolidation with other claims by other parties. ... We submit that a Tribunal should err on the side of non-consolidation in order to ensure that the separate arbitration rights afforded by Chapter Eleven of NAFTA are not compromised.<sup>111</sup>

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<sup>111</sup> *HFCS*, Observations On The Question Of Consolidation Submitted On Behalf Of Archer Daniels Midland Company And Tate & Lyle Ingredients Americas, Inc. (April 11, 2005) at 3.

No conscientious and fair tribunal could subscribe to the contradictory positions advanced by the United States, nor condone the cynicism with which they have been presented.

Respectfully submitted,

/s/

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