

In the matter of consolidated proceedings pursuant to Article 1126 of the NAFTA in:

**(1) Canfor Corporation v. United States of America,**

**(2) Terminal Forest Products Ltd. v. United States of America**

**PROCEDURAL ORDER NO. 2**

10 January 2006

**CONSIDERING :**

- (A) The Order of the Consolidation Tribunal of 7 September 2005 (the "Consolidation Order");
- (B) Procedural Order No. 1 of 17 December 2005;
- (C) The Order for the Termination of the Arbitral Proceedings with respect to Tembec *et al.* of 10 January 2006;
- (D) The letter of 4 January 2006 from Canfor and Terminal, seeking reconsideration of the Consolidation Order; requesting that the present Tribunal discontinue its proceedings and allow Canfor to pursue the Article 1120 arbitration it was engaged in prior to the Consolidation Order; and advising that Terminal will accept the outcome of a determination by the Canfor Article 1120 Tribunal as determinative of the United States' objection to jurisdiction based upon Article 1901(3) to Terminal's claim;
- (E) The telephone conference held on 9 January 2006, in which the members of the Tribunal as well as counsel for Canfor, Terminal, and the United States participated.

**THE ARBITRAL TRIBUNAL HEREBY DECIDES AS FOLLOWS:**

The request of Canfor and Terminal referred to in Preamble (D) above is denied. Article 1126(8) of the NAFTA provides: "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." Pursuant to the Consolidation Order, the Tribunal has assumed jurisdiction over all claims in

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the Article 1120 arbitrations *Canfor Corporation v. United States of America, Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. The United States of America*, and *Terminal Forest Products Ltd. v. The United States of America*, within the meaning of Article 1126(2)(a) of the NAFTA. As it is stated in the Consolidation Order at ¶ 156, if an Article 1126 tribunal orders consolidation in full, the Article 1120 tribunals cease to function because of the dictates of Article 1126(8). The Article 1120 Tribunals, therefore, are *defunctus officio* and the Article 1126 Tribunal lacks the authority to order that their mandate be resuscitated. Furthermore, because of the nature of an order consolidating arbitral proceedings as contemplated by Article 1126 of the NAFTA, the Consolidation Order does not have the same legal status and effect as a procedural order referred to in Section 20 of Procedural Order No. 1, which can be varied if circumstances so require, irrespective of the fact that, in the Tribunal's judgment, the circumstances asserted by Canfor and Terminal would not justify such a variance.

On behalf of the Arbitral Tribunal,



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Albert Jan van den Berg,  
President