

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

BETWEEN:

J. M. LONGYEAR, LLC

Claimant/ Investor

v.

GOVERNMENT OF CANADA ("CANADA")

Party

REDACTED REQUEST FOR ARBITRATION

Pursuant to Article 1117 of the *North American Free Trade Agreement* (NAFTA), JM Longyear, LLC, (the "Investor") submits this request for arbitration under the UNCITRAL Rules of Arbitration (Resolution 31/98 Adopted by the General Assembly on 15 December 1976) on behalf of J.M. Longyear Canada, ULC (the "Enterprise").

A. DEMAND THAT THE DISPUTE BE REFERRED TO ARBITRATION

Pursuant to Article 1119, written notice of the intention to submit a claim to arbitration (the "Notice of Intent") was served on February 14th, 2014, more than ninety days before this claim has been submitted.

Six months have elapsed since the events giving rise to the claim have elapsed, as required under NAFTA Article 1102(1). Not more than three years have elapsed from the date on which the Enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the Enterprise incurred loss or damage, as required by NAFTA Article 1117(2).

B. NAMES AND ADDRESSES OF THE PARTIES

INVESTOR: **J. M. LONGYEAR, LLC**
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MARQUETTE, MI 49855

ENTERPRISE: **J.M. LONGYEAR CANADA, ULC**
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C. THE GENERAL NATURE OF THE CLAIM AND AN INDICATION OF THE AMOUNT INVOLVED

The Government of Ontario has engaged, and continues to engage, in conduct inconsistent with the following provisions of NAFTA Chapter 11:

- (i) Article 1102, National Treatment; and
- (ii). Article 1103, Most Favoured Nation Treatment, in respect of the obligation to accord fair and equitable treatment to the investments of foreign investors.

NAFTA Articles 1102 and 1103 provide, in relevant part:

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

Article 1103: Minimum Standard of Treatment

1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

D. FACTUAL BASIS FOR THE CLAIM

1. On May 27, 2011, the Enterprise purchased approximately 63,000 acres of land near Bancroft, Ontario from Domtar Inc. for the sum of CDN \$17,266,822 and since then has operated a working forest on that land (the "Investment").
2. Pursuant to the Government of Ontario's Managed Forest Tax Incentive Program (MFTIP), the Enterprise should have been eligible for realty taxation at 25% of the municipal tax rate set for residential properties.
3. The only reason the Enterprise is not eligible for MFTIP is because more than 50% of the Enterprise's shareholders are U.S. citizens. The fact that the Enterprise has not been eligible for the 25% rate has resulted in a tax penalty to the Enterprise of approximately [REDACTED] per year.
4. The disqualification from the MFTIP on the basis of nationality constitutes a clear breach of the Government of Canada's obligation to provide American investors treatment no less favourable than it accords to Canadian investors, in like circumstances, under NAFTA Article 1102(3), and in respect of the obligation to accord fair and equitable treatment to the investments of foreign investors, under Article 1103.
5. Disqualification from the MFTIP on the basis of nationality imposes increased costs as a result of the residential tax rate being imposed on the Investment when it is solely used as a working forest.

The Investor, the Enterprise and the Investment

6. Individuals who are U.S. nationals own all of the shares issued by JML Heirs LLC. It is the sole shareholder of J.M. Longyear, LLC, both of which are Michigan companies. J. M. Longyear, LLC is the sole shareholder of J.M. Longyear Canada, ULC, which was established under the laws of Alberta, Canada.
7. The landmass of the Investment extends over the borders of six townships in the Province of Ontario, near the Town of Bancroft, namely: Centre Hastings, Tudor and Cashel, Madoc, Marmora and Lake, Limerick, and Wollaston.
8. The Enterprise operates a working forest on its Investment and has cut and produced 20,000 to 32,000 cord equivalent units (CEUs)¹ of wood per year between mid-2011 through 2013. The sale of wood products from the Forest, to both local and regional mills, contributes significantly to the economy and helps to support wood product businesses and their employees.
9. The Enterprise's management and operation of the Forest is directly responsible for the employment of four Canadian foresters and one Canadian forest products marketing specialist. The Forest currently provides an additional 25 full-time jobs through contract services in the harvesting of our forest products. Additional contract services for tree marking, road building and maintenance, and transportation of forest products provides work for an additional 20 to 25 people, who work part of their time on Longyear forestlands.

The MFTIP Program

¹ A cord of wood occupies a volume of 128 cubic feet (3.62 m³). This corresponds to a well stacked woodpile 4 feet (122 cm) high, 8 feet (244 cm) long, and 4 feet (122 cm) deep.

10. The MFTIP provides that land being utilized pursuant to a Managed Forest Plan shall be taxed at a rate of 25 percent of the applicable tax for the residential rate (the "Managed Forest Property Tax Rate").
11. The MFTIP rate is available to any landowners who possess property rights in four hectares or more of forestland, and agree to prepare and follow a Managed Forest Plan ("Plan") to guide their operations.
12. Under the MFTIP program, the landowner has its land assessed pursuant to Section 19(5.2) and 19(5.2.1) of the Ontario Assessment Act and Section 32.1 of Regulation 282/98, and classified as Managed Forest pursuant to Regulation 282/98. Once the property has received its classification under the MFTIP, the lands are taxed at 25% of the municipal tax rate set for residential properties.
13. The purpose of the MFTIP is to provide a tax rate for forestry lands that is appropriate to its current use. Because it is a working forest, the usage value of the land is below that of land used for residential purposes. Thus, a program is needed to appropriately assess and tax forestry lands. This policy objective was confirmed by the MFTIP Guide published by the Ontario Ministry of Natural Resources, which provides, in relevant part:

Certain forestlands in Ontario may be privately owned, but they benefit all Ontarians. The Ontario Managed Forest Tax Incentive Program (MFTIP) recognizes the importance of these lands. The goal of the MFTIP is to bring greater fairness to the property tax system by valuing forestland according to its current use. The program is designed to increase landowner awareness about forest stewardship. This guide contains information on how to enter the MFTIP and the program's ongoing administrative requirements. Landowners who apply and qualify for the program have the eligible portion of their property classified and assessed as Managed Forest under the Managed forests property class. The eligible land is taxed at 25 percent of the municipal tax rate set for residential properties. ("Emphasis Added")²

²The MFTIP Guide, published by the Ministry of Natural Resources of the Government of Ontario http://www.mnr.gov.on.ca/en/Business/Forests/2ColumnSubPage/STEL02_166346.html (last visited, 14-04-02)

14. The Enterprise is currently ineligible to participate in the MFTIP because nationals of Canada do not hold a majority of shares in the Enterprise. Article 9(2) of Ontario Regulation 282/98 under the *Assessment Act* provides:

(2) Land that is covered by a forest, and including outbuildings used for forest operations, is eligible land if the following requirements are satisfied:

1. The land is owned by ...

i. an individual who is a Canadian citizen or has been lawfully admitted to Canada for permanent residence, ..

ii. a corporation that has issued and allocated shares to which are attached more than 50 per cent of the voting rights ordinarily exercisable at meetings of the shareholders and that are owned by individuals described in subparagraph i,

15. Section 9(2)1.ii of the Regulation provides that a corporation must have "more than 50 per cent of the voting rights ordinarily exercisable at meetings of the shareholders owned by individuals who are Canadian citizens."
16. The MFTIP provides that any land in which property rights have been transferred under terms of a contract for purchase/sale shall be removed from the program. It also provides that "[a] new landowner must apply to the program within 90 days of the sale to keep the property in the program" and that "[the application] must be received within 90 days of the closing of the sale, or [the property] will be removed from the program."
17. Prior to the purchase, counsel for the Enterprise communicated with the administrator of the MFTIP to express its intent to maintain the land's MFTIP qualification. The MFTIP Administrator advised counsel for the Enterprise that, once the Investment was acquired, it could only continue qualifying for MFTIP if the Enterprise could satisfy the corporate nationality requirement prescribed under Article 9(2)(1(ii)). The Enterprise was further informed that, as part of the re-application process, it would be required to provide an

affidavit indicating that it did satisfy the corporate nationality requirement of Article 9(2)(1)(ii).

18. Since the Enterprise acquired the property, it has been taxed at the full residential tax rate, which is 400% greater than the Managed Forest Property Tax Rate. This inappropriate, residential, rate inequitably penalizes the Enterprise by failing to reflect the property's use as a working forest.
19. The Enterprise's working forest would comply with the requirements of the MFTIP if the nationality requirement did not exist. Section 9 of the 282/98 provides, in relevant part:

9(2)2. The forest including any area included under subsections (3) and (4) is at least four hectares in size.

9(2)3. The land is all or part of a single parcel of land or, if the land consists of land from more than one parcel, the forest on land in each parcel satisfies the requirement in paragraph 2.

20. The Investment consists of land that is composed of multiple parcels. Of the 63,000 acres in the Gilmour Forest, which is made up from roughly 180 tax roll numbers, only a single roll number is less than 4 hectares (10 acres). As this single parcel is 5.3 acres, it is the only parcel that would not form part of the MFTIP application. As such, more than 99.9% of the acreage, of which the Investment is composed, satisfies all of the substantive aspects of the Regulation.

21. Section 9 of Regulation 282/98 further provides:

9(2)(4). Subject to subsections (3) and (4), the forest has, per hectare, at least,

- i. 1,000 trees of any size;
- ii. 750 trees that, at a height of 1 1/3 metres, are more than 5 centimetres in diameter;
- iii. 500 trees that, at a height of 1 1/3 metres are more than 12 centimetres in diameter, or

- iv. 250 trees that, at a height of 1 1/3 meters, are more than 20 centimetres in diameter.
22. Other than the single parcel noted above, the necessary amount and diameter of timber can be found on the Investment, on a per hectare basis, to satisfy this provision of the Regulation. The Investment initially qualified for MFTIP in 1998 for a 10 year term, when Domtar owned the land, and then again in 2008, for a 10 year term. As of 2011, the land qualified for MFTIP as a result of Domtar's nationality.³
23. Section 9 of Regulation 282/98 also provides:
- 9(3) An area in a parcel of land that does not contain enough trees to satisfy the requirements in paragraph 4 of subsection 2 forms part of the eligible land in the parcel,
 - (a) If the area does not exceed 10 percent of the forest area on the land or parcel that satisfies the requirements described in paragraph 4 of subsection (2)
 - 9(4) An area in a parcel of land that does not contain enough trees to satisfy the requirements in paragraph 4 of subsection (2) forms part of the eligible land in the parcel, ...
 - (b) If the area does not exceed 25 percent of the total area of the eligible land, excluding any area that forms part of the eligible land by virtue of subsection (3) ...
24. The Investment meets these requirements, as the unproductive forest area of any single parcel does not make up more than 10% of the parcels in question. Further, the unproductive total area of the eligible land does not exceed 25%.

E. LEGAL BASIS FOR THE CLAIM

25. The MFTIP's nationality requirement constitutes a *prima facie* breach of NAFTA Article 1102 because it accords less favourable treatment to U.S. investors than it accords to Canadian investors. It further contravenes the standard of fair and equitable treatment by conditioning access to an

³ Domtar last performed a complete inventory of the land in 1998 and thereafter, updating their volume numbers in a more general manner for each MFTIP renewal application thereafter.

otherwise universal program on the status of an investor's nationality. This unlawful conduct is underscored by the fact that Domtar, a major pulp and paper company which owned and forested the same land, qualified for the MFTIP and enjoyed the Managed Forest Property Tax Rate, from 1998 until 2011, when its property rights were acquired, through purchase, by the Enterprise.

NAFTA Article 1102, National Treatment

26. The Government of Ontario's unwillingness to accord the same property tax treatment under the MFTIP that it accords to other investors, in like circumstances, is inconsistent with NAFTA Article 1102(1) because it accords more favourable treatment to those similarly situated investors.

Article 1102(1): Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

27. The same analysis applies, under NAFTA Article 1102(2), to the treatment received by the Enterprise, *qua* investment.
28. NAFTA Article 1102(3) confirms the Respondent's responsibility for measures applied within the territory of each Province by subsidiary levels of government.
29. Conditioning MFTIP eligibility on proof of Canadian nationality affects the expansion, management, conduct and operation of the Enterprise by reducing its cash flow. It also affects the sale of the Investment because the only way the Enterprise can satisfy Article 9(2)(1)(ii) and thereby qualify for MFTIP is to convey a 51% interest in the Investment to a Canadian national.

NAFTA Article 2103, Taxation Measures

30. NAFTA Article 2103 provides, in relevant part:

(1) Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.

...

(4)(b) Articles 1102 ... shall apply to all taxation measures, other than those on income, capital gains or on the taxable capital of corporations, taxes on estates, inheritances, gifts and generation-skipping transfers and those taxes listed in paragraph 1 of Annex 2103.4,

31. With Article 2103, the NAFTA Parties provided themselves with a limited exemption, from the application of NAFTA provisions to certain taxation measures. The provision begins with a general exclusion for taxation measures, followed by a lengthy list of circumstances in which a variety of tax measures shall be subjected to various NAFTA disciplines. As indicated in subparagraph 4(b), The Parties intended for Articles 1102 and 1103 to apply in respect of all tax measures, other than those specifically delineated in the same subparagraph. Municipal land taxes are not included on the list. Nor does Annex 2103.4, mentioned in the list, address itself to such measures. Accordingly, the MFTIP tax rate must be maintained in a manner consistent with Canada's obligations under Article 1102.
32. A provision that discriminates, *de jure*, on the basis of nationality is *prima facie* inconsistent with a NAFTA Party's obligations under NAFTA Article 1102. The only issues to be determined in a case of *de jure* discrimination are whether less favourable treatment has been accorded to investors/investments, in like circumstances, and whether "loss or damage" has been incurred as a result.
33. It is evident that the terms upon which the MFTIP tax rate is granted accords more favourable treatment to Canadian nationals and their investments than it does to U.S. nationals and their investments. When Domtar maintained the Enterprise's land, it was granted MFTIP status and enjoyed the Managed Forest Property Tax Rate. Now that the very same land is held

by the Enterprise, it no longer qualifies for the MFTIP rate. It is only because of the nationality requirement of Article 9(2)(1)(ii) that the Enterprise pays a municipal tax at a rate 400% greater than it would pay if this unlawful nationality requirement did not exist.

34. And if any further evidence were needed that the MFTIP nationality requirement constitutes a *prima facie* breach of NAFTA Article 1102, paragraph (4) provides it:

4. For greater certainty, no Party may:

(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

35. The Respondent is responsible for this patent breach of Article 1102.

Article 1103: Most Favoured Nation Treatment

36. Pursuant to NAFTA Article 1103, U.S. investors are entitled to receive treatment no less favourable than the treatment the Respondent accords to any other foreign investors. The Respondent provides more favourable treatment to investors from Ukraine, Latvia, Barbados, Ecuador, Egypt and Armenia, and their respective investments, than it does to U.S. investors, and their investments, because it did not take the same reservations in its bilateral investment treaties with the States of these investors as it did with NAFTA Article 2103.

37. With NAFTA Annex IV, the Respondent took a reservation for certain of its measures under Article 1103, as follows:

Annex IV

Canada takes an exception to Article 1103 for treatment accorded under all bilateral or multilateral international agreements in force or signed prior to the date of entry into force of this Agreement.

For international agreements in force or signed after the date of entry into force of this Agreement, Canada takes an exception to Article 1103 for treatment accorded under those agreements involving:

- (a) aviation;
- (b) fisheries;
- (c) maritime matters, including salvage; or
- (d) telecommunications transport networks and telecommunications transport services (this exception does not apply to measures covered by Chapter Thirteen (Telecommunications)).

38. After January 1, 1994, the date upon which the NAFTA came into force, the Respondent negotiated bilateral investment treaties with Ukraine, Latvia, Barbados, Ecuador, Egypt and Armenia. None of these treaties contain a provision akin to NAFTA Article 2103. Investors from these States, and their investments, would accordingly be entitled to claim damages, under other provisions of their respective treaties, if they were standing in the shoes of the Investor or the Enterprise in this case, including the promise to accord "fair and equitable treatment" to the investments of treaty investors. For example, an Armenian would be entitled to bring a claim under the following provision:

Article II

Establishment, Acquisition and Protection of Investments

1. Each Contracting Party shall encourage the creation of favourable conditions for investors of the other Contracting Party to make investments in its territory.
2. Each Contracting Party shall accord investments or returns of investors of the other Contracting Party
 - a. fair and equitable treatment in accordance with principles of international law
 ...⁴

⁴ NAFTA Article 1105(1) also contains a reference to "fair and equitable treatment," although – as a result of binding interpretative statement, which was issued by the North American Free Trade Commission on 1 July 2001 – that version of the "fair and equitable treatment" standard must be construed as part and parcel of the "customary international law minimum standard of treatment of aliens." In any event, NAFTA Article 2103(1) operates to exclude the Article 1105 version of the standard from application to tax measures. It is only as a function of the Article 1102 MFN standard – which applies to the measure at issue in this claim, by virtue of NAFTA Article 2103(4)(b) – that the autonomous version of the "fair and

39. Compelling a foreign landholder to pay a tax rate 400% higher than a Canadian landholder, even though both operate their investments in like circumstances, is manifestly unfair and inequitable. The only reason for this difference in treatment is nationality, which is contrary to the customary international law prohibition against discrimination on the basis of nationality and is, in any event, arbitrary and capricious in respect of the interests of the foreign investor.
40. Because investors from countries such as: Ukraine, Latvia, Barbados, Ecuador, Egypt and Armenia would be entitled to obtain damages from the Respondent – once they were refused the MFTIP tax rate on the basis of the Canadian nationality requirement – the Investor and Enterprise must also be entitled to pursue its claim under the same “fair and equitable treatment” standard that would be available to investors from Ukraine, Latvia, Barbados, Ecuador, Egypt and Armenia. Otherwise, the Claimant and Enterprise would be accorded less favourable treatment, vis-à-vis these other foreign investors and their investments.
41. The Respondent’s Annex IV reservation stands as an explicit admission that its Article 1103 obligation to investors/investments from other NAFTA Parties extends to the more favourable treatment it has promised, under bilateral investment treaties, to investors/investments from other States. Given how the tax measures at issue in this claim do not relate to any of the economic sectors excluded from coverage under Annex IV, the Respondent must also be held to the test of an autonomous fair and equitable treatment treaty standard in this case.

F. RELIEF SOUGHT AND APPROXIMATE AMOUNT OF DAMAGES CLAIMED

equitable treatment” standard, which can be found in treaty provisions such as Article II of the Canada – Armenia Foreign Investment Promotion and Protection Agreement, excerpted above, is applicable to the tax measure at issue in this claim.

42. The Enterprise has incurred, and continues to incur, loss and damages as a result the nationality requirement included in Regulation 282/98. The Investors claim damages on behalf of the Enterprise for the following:

- a. Based on the use of the subject working forest in a sustainable manner that is consistent with a Managed Forest Plan, the application of the proper Managed Forest Property Tax Rate to that use would result in tax savings of [REDACTED] per year; and
- b. Based on a lifespan of the property of thirty (30) years, these tax savings amount to \$12,000,000.00.

43. The municipal property taxes charged to the Enterprise since the property was purchased are provided below, along with a comparison of the MFTIP taxes that would have been charged if the property qualified for the Managed Forest Property Tax Rate:

REDACTED

Date of Service: May 20th, 2014

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