UNDER ARTICLE 1126 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT

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 SUBMISSION IN OPPOSITION TO REQUEST FOR CONSOLIDATION

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I. INTRODUCTION

The consolidation of claims pursuant to Article 1126 is a drastic step. It requires replacing carefully chosen tribunals in which often substantial investments of time and money have been made with a whole new tribunal selected by a very different process (not through nominations of the parties). The new tribunal has no benefit of experiencing or participating in the prior proceedings, yet must master information pertaining to all of the different claims and claimants. In this case, the United States also asks for a tribunal to redo work already completed by the tribunals the new tribunal would replace. It should not be surprising that the only tribunal known to have convened under Article 1126 concluded that consolidation could not serve the purposes for which the article was written, and that tribunal convened promptly after a second claim was filed.

The United States offers to this Tribunal a history almost entirely divorced from fact, and then relies on this fiction to claim that "this Tribunal will minimize effort and cost to the parties, provide for an expeditious resolution of the claims and eliminate the risk of inconsistent decisions." This proceeding duplicates costs, delays justice, and introduces complexities that were not present in the ongoing separate proceedings. Under the applicable UNCITRAL Rules and the *Tembec* Tribunal's order, the United States waived the right to request consolidation when it failed to assert this jurisdictional defense in its Statement of Defense. Now the United States attempts to recover defenses that were waived against Tembec and Canfor, for which Article 1126 provides no authority. The United States' principal proposition, that a consolidated proceeding will avoid "the risk of inconsistent decisions," is a new invention unrelated to arbitrations, Chapter 11, and particularly Article 1126.

Tembec has spent eighteen months pleading, forming a tribunal, and briefing jurisdictional issues. The process has been expensive. The United States has spent the same eighteen months continuing its pattern of obstruction and delay that it developed during the underlying *softwood lumber* antidumping and countervailing duty proceedings. During this time, the United States objected repeatedly to Tembec's Article 1121 waivers, despite Tembec's continuous and conscientious efforts to satisfy the United States and move the case forward, thus delaying the formation of Tembec's Article 1120 tribunal for months. Ultimately Tembec had to request ICSID's intervention and help, and ICSID dismissed the United States' objection. The United States objected to producing the NAFTA *travaux préparatoires* previously given to Canfor and to preserving evidence, objections overruled by the *Tembec* Tribunal. The United States objected to an expedited briefing schedule on issues that the United States then denied but now claims were identical to those it briefed in *Canfor*, and used this objection to delay proceedings even more.

During these eighteen months, Tembec has continued to pay C$10 million per month (totaling now over C$250 million) in antidumping and countervailing duty deposits that WTO and NAFTA appeals panels have held repeatedly to be unlawful. Rather than comply with these rulings, the United States has taken the position that the *softwood lumber* dispute will be resolved only by a negotiated settlement according to which the U.S. industry would receive a substantial portion of the US$3.5 billion in unlawfully collected duty deposits. Delay and proliferation of proceedings has been a key part of the United States' strategy to capture this money for Tembec's competitors.

The United States' strategy in the underlying softwood lumber dispute, and now in the Chapter 11 proceedings, is to make the dispute so costly and burdensome that no investor could afford to challenge it. There are now more than a dozen softwood lumber proceedings before the U.S. Department of Commerce, the International Trade Commission, the WTO, NAFTA Chapter 19 panels, the U.S. Court of International Trade, and a NAFTA Chapter 19 Extraordinary Challenge Committee. Each time the United States loses a proceeding (and it has yet to win), it starts another proceeding, makes the same findings, and imposes the same duties that the prior appeals panels had rejected in the strongest possible language.

This Tribunal's order to stay the Article 1120 tribunals (without briefing and therefore uninformed of the impact) was yet another successful United States effort to avoid judgment and impose cost and delay on Canadian lumber producers. It is no answer that Tembec may get these funds back in an award: markets are changing, companies are consolidating, and opportunities are being lost that can never be recovered.

Tembec finally formed a tribunal with ICSID's intervention (the United States did not adhere to its deadline to appoint until ICSID advised the United States that it had exhausted its time), and completed the jurisdictional pleading stage, two rounds of briefs, and preparation for a public hearing on the U.S. challenge to the Tribunal's jurisdiction when the United States issued a request for consolidation.

The United States has interrupted Tembec's Article 1120 proceedings, desperately demanding a stay that would avoid the public hearing already scheduled for five months, so that this Tribunal instead can decide, first, whether it should claim

jurisdiction over the Tribunal that already has been convening for a year, and second, whether this Tribunal should have jurisdiction at all. Hence, the United States wants to repeat what it already has taken eight months to argue before Tembec's Tribunal.

To repeat before a second tribunal what already has been heard before another one is not to "minimize effort and cost to the parties." To the contrary, the duplicate proceeding means duplicating effort and cost. Indeed, the entire diversion for consolidation is the antithesis of "expeditious resolution of the claims." Nothing about this process – nothing – is saving parties any costs, expediting resolution of their claims, or minimizing their efforts. Those values are contrary to the United States' strategy in these disputes.

The United States is exploiting Article 1126 with consequences the NAFTA members likely did not intend. It has pressed vigorously a process through which tribunals formed deliberately over many months with consensus of the parties are being replaced by a tribunal whose formation has been controversial and whose membership has been hotly contested. In place of consensus, the United States has chosen, repeatedly, to dispute objections to tribunal nominees while objecting itself to others, following no discernible principles except to fight for nominees it thinks may be favorable to its views. The United States, having been unable or unwilling to keep to any timetables in naming tribunal members according to the rules when claims were filed, demanded that the Article 1126 tribunal be named speedily, overriding the allowances in the UNCITRAL rules for due diligence upon which the United States itself had relied originally.

The United States requests consolidation claiming that its jurisdictional challenge to the *Canfor* Tribunal was identical to its challenge to the *Tembec* Tribunal. Yet, when Tembec sought an expeditious schedule following the *Canfor* proceeding, the United States refused by arguing that the two cases were not the same, saying: "[N]ot 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*, Claimant itself has stated that it 'do[es] not plan to brief the issue in the same way that Canfor has."[1] The United States then proposed a schedule by which it would provide a Statement of Defense almost four months later, to be followed by a brief every 4-6 weeks until a hearing scheduled for June or July of 2005.[2] The tribunal largely adopted the proposed U.S. schedule, yet the United States still requested extensions for a brief and for another submission, even though the initial periods granted by the tribunal already were generous. And when the United States brought its challenge against Tembec, it brought additional issues that it acknowledges were not argued in the *Canfor* proceeding.

The United States expects this Tribunal to permit it to present all over again, and presumably with additional issues, the case it brought against Canfor. Then it expects to confuse the arguments presented to the *Tembec* Tribunal with arguments that had engaged Canfor. Instead of two bites at the apple, the United States is demanding three, and all, entirely, at the Claimants' expense.

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[1] Letter from Mark A. Clodfelter to Jose Antonio Rivas (Oct. 1, 2004) at 2.

[2] *See id.*

The parties' autonomy in arbitration is being sacrificed for the convenience and procedural advantage of the United States. Tembec is now thrown into a joint proceeding with two competitors. Tembec's and Canfor's claims, while involving the same measures, are framed very differently and involve many different facts. Tembec has no information about Terminal's claim or strategy other than what can be gleaned from a skeletal pleading. Terminal's entire approach to Chapter 11 arbitration has been different from Tembec's and should not be consolidated for that reason. Canfor has taken a different approach to Tembec in its jurisdictional arguments and the United States has made different jurisdictional arguments in those two separate proceedings.

The United States asserts that these cases will not likely proceed to the merits. Were consolidation about nothing more than jurisdiction, however, the United States' motion would be transparently pernicious, a naked attempt to relitigate after forum shopping, and nothing more. Perhaps indeed the United States is doing nothing more, but the Tribunal must also consider all that the United States has asked, which includes consolidation of the merits.

As the cases proceed to the merits, they will become understood as even more different. The companies have different types of investments, different customers, and different business strategies. Prices and markets have reacted differently between Eastern and Western Canada to the events related to the claims here. Confidential business information could not be shared by the Claimants, who are fierce competitors, yet will become critical in any discussion of the claims on the merits.

II. FACTUAL BACKGROUND

A. Background Of The Antidumping And Countervailing Duty Proceedings On *Certain Softwood Lumber From Canada*

It is reliably estimated that for the last three years Canadian lumber producers have paid over USD$3.5 billion in cash deposits to the United States under its antidumping and countervailing duty orders ("AD/CVD Orders") on *Certain Softwood Lumber Products from Canada*, and that another USD$3 million continues to be paid every day. This staggering amount of money is being held by the United States as deposits pending the outcome of judicial decisions reviewing whether final determinations by the U.S. Department of Commerce ("Commerce") and the U.S. International Trade Commission ("ITC"), serving as the bases for the AD/CVD Orders, were supported by substantial evidence and were otherwise in accordance with law.

Multiple tribunals convened under NAFTA's Chapter 19 and under the WTO Agreements have ruled that there were no lawful bases for the determinations, and therefore no basis for the AD/CVD Orders issued by the United States. And yet the cash deposits continue to accumulate by the millions each day because the United States and its agencies persistently find ways to delay, circumvent, challenge, appeal, and defy the decisions of these tribunals.

In April 2001, the United States initiated three trade actions against *Certain Softwood Lumber Products from Canada*. The United States currently has at least a dozen trade actions pending with regard to antidumping and countervailing duties on *Certain Softwood Lumber from Canada*: (1) the antidumping investigation initiated by Commerce in April 2001; (2) the countervailing duty investigation initiated by Commerce in April 2001; (3) the import injury investigation initiated by the ITC in April

2001 in connection with the antidumping and countervailing duty investigations; (4) the first administrative review of the antidumping order initiated by Commerce on July 1, 2003; (5) the first administrative review of the countervailing duty order initiated by Commerce on July 1, 2003; (6) the second administrative review of the antidumping order initiated by Commerce on June 30, 2004; (7) the second administrative review of the countervailing duty order initiated by Commerce on June 30, 2004; (8) the third administrative review of the antidumping order initiated by Commerce on May 31, 2005; (9) the third administrative review of the countervailing duty order initiated by Commerce on May 31, 2005; (10) the Section 129 determination on threat of material injury initiated by the ITC on July 27, 2004 at the request of the U.S. Trade Representative; (11) the Section 129 determination on pass-through analysis initiated by Commerce on November 9, 2004, at the request of the U.S. Trade Representative; (12) the Section 129 determination on "zeroing" in the antidumping investigation initiated by Commerce on November 5, 2004.[3]

Tembec is a "respondent interested party" in each of the actions where it is eligible to participate at all (WTO actions are state-to-state). It is not making claims against the United States, but rather is defending itself against the United States' claims that Tembec's products sold in the United States are unlawfully dumped, subsidized,

[3] Commerce also began "expedited review" countervailing duty proceedings on July 17, 2002 that, consistent with the United States' representations to the WTO, were supposed to determine a countervailing duty rate on a company-specific basis. The result of these proceedings should have been that some Canadian companies might pay fewer (or even zero) countervailing duty deposits than the rest of Canada. Tembec participated in the expedited review proceedings, but never was given a company-specific determination; Commerce unlawfully abandoned the expedited review proceedings when it failed to conclude them before the final results in the first administrative review became due on December 20, 2004.

In addition to the proceedings in which Tembec is participating, similar issues arising from the *softwood lumber* proceedings are being argued at the WTO on appeals by the Canadian government. Tembec is not a party to the WTO appeals; they are government-to-government proceedings.

injuring or threatening to injure like domestic products. As a result of the Commerce and ITC final determinations, Tembec has been required to deposit estimated duties with the U.S. Customs Service ("Customs") totaling to date approximately C$250 million, and must continue to deposit approximately C$10 million per month, notwithstanding a series of judicial decisions in Tembec's favor.

In March and May 2002, the Government of Canada, the Canadian provincial governments, provincial industry associations, and Canadian lumber producers including Tembec, appealed the Commerce and ITC final determinations to NAFTA Chapter 19 binational panels, arguing that the determinations were not consistent with U.S. domestic law.[4] The binational panels are authorized by statute to remand final determinations to the regulatory agencies for additional proceedings not inconsistent with the panel's decision.[5] They can provide no other relief.

These appeals commenced prior to Tembec's submission of its Statement of Claim in December 2002. They have continued thereafter in a series of remand orders, with Commerce and the ITC stubbornly clinging to prior determinations. After issuing two remand orders to the ITC, the Chapter 19 panel reviewing the agency's final affirmative threat of injury determination wrote:

> In its Second Remand Determination, the Commission has refused to follow the instructions in the First Panel Remand Decision. The Commission relies on the same record evidence that this Panel

[4] Certain Softwood Lumber Products from Canada: Final Affirmative Antidumping Determination, Secretariat File No. USA-CDA-2002-1904-02; Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, Secretariat File No. USA-CDA-2002-1904-03; Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Material Injury Determination, Secretariat File No. USA-CDA-2002-1904-07.

[5] See 19 U.S.C. § 1516a(b)(1)(B)(i); *see also* NAFTA Art. 1904(8). The purpose of the binational review panels is to replace judicial review in domestic courts for final antidumping and countervailing duty determinations. NAFTA Article 1904(1).

> not once, but twice before, held insufficient as a matter of law to support the Commission's affirmative threat finding. [*clt. omitted*] By the Commission's so doing, this Panel can reasonably conclude that there is no other record evidence to support the Commission's affirmative threat determination. The Commission has made it abundantly clear to this Panel that it is simply unwilling to accept this Panel's review authority under Chapter 19 of the NAFTA and has consistently ignored the authority of this Panel in an effort to preserve its finding of threat of material injury. This conduct obviates the impartiality of the agency decision-making process, and severely undermines the entire Chapter 19 panel review process.[6]

A negative injury finding normally would end both the antidumping and countervailing duty investigations, entitling Tembec to refunds of its duty deposits with interest. The United States, however, has challenged the binational panel's negative decision to a NAFTA Extraordinary Challenge Committee under Article 1904.13, claiming, among other things, a violation of the code of conduct by one of the five panellists, an American.[7] That Committee is now deliberating and is expected to issue a decision in August. Should the Committee affirm the panel's decision, the United States would be required by law to revoke the AD/CVD Orders.

After a WTO panel also rejected the ITC's threat of injury ruling, the United States did not appeal the panel's negative ruling to the WTO Appellate Body.[8] Instead,

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[6] Certain Softwood Lumber Products from Canada: Final Affirmative Threat of Material Injury Determination, Secretariat File No. USA-CDA-2002-1904-07, Aug. 31, 2004 Panel Decision at 3.

[7] *See* Notice of Request for an Extraordinary Challenge Committee, 69 Fed. Reg. 70,235 (Dec. 3, 2004).

[8] A WTO panel reviewing the ITC final determination held that no "objective and unbiased" decision maker could have issued the determination. *See United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, Report of the Panel, WT/DS277/R (March 22, 2004) at ¶ 8.1(a). This ruling was adopted by the WTO Dispute Settlement Body. *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, Action by the Dispute Settlement Body, WT/DS277/5 (April 28, 2004).

it informed the WTO Dispute Settlement Body that it would comply with the ruling.[9] The ITC, at the request of the U.S. Trade Representative on July 27, 2004, instituted a Section 129 action purportedly for that purpose.[10]

The NAFTA panel had instructed that remand determinations be formulated on the basis of the record established during a very long investigation, and the ITC never reopened the record. In the Section 129 action, however, away from the authority of any judicial body, the ITC re-opened the record, accepted a modicum of new evidence, and then re-issued the same final threat of injury determination intended to replace the determination that had failed review before the NAFTA panel.[11] USTR then asked Commerce to "amend" the countervailing duty and antidumping orders, "implementing" the Section 129 determination that contradicts in every respect the conclusions of the WTO panel that required implementation. Commerce complied with this request on December 20, 2004.[12]

The Government of Canada is challenging at the WTO the United States' obvious failure to implement the WTO panel's negative decision.[13] Tembec has challenged the merits of the new determination before a NAFTA panel, and its implementation (through "amendment" of the orders) at the Court of International Trade.

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[9] *See* Office of the United States Trade Representative, Dispute Settlement Update (Jan. 14, 2005) at 22, *available at* www.ustr.gov.

[10] *See, e.g., Softwood Lumber from Canada*, Investigations Nos. 701-TA-414 and 731-TA-928, (Nov. 24, 2004) at 1.

[11] *See generally, Id.*

[12] *See* Amendment to Antidumping and Countervailing Duty Orders on Certain Softwood Lumber Products from Canada, 69 Fed. Reg. 75,916 (Dep't Commerce, Dec. 20, 2004).

[13] *See United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, Recourse to Article 21.5 of the DSU by Canada, WT/DS277/8 (Feb. 15, 2005).

The United States has acted to evade the inescapable legal consequence of the NAFTA and WTO decisions.

The Chapter 19 panel reviewing Commerce's affirmative countervailing duty determination has now given its fourth set of remand orders, all of which have required Commerce to reduce or eliminate the countervailing duty rate of 18.79% found in the original investigation to 1.88%, and further changes are being required by the panel that should recalculate the rate below *de minimis*. Meanwhile, Commerce, on behalf of the Bush Administration, has refused to adopt certain remand instructions from the panel that would yield a finding of no subsidy, and therefore no duties.

The NAFTA Panel reviewing the antidumping final determination ruled on June 9, 2005, that Commerce must order the return of duty deposits when there is no valid underlying dumping or countervailing duty order, and that it must cease to "zero" (a technical device employed by Commerce to inflate dumping margins). The Bush Administration has been ordered by the WTO Appellate Body in the *softwood lumber* dispute that it must cease zeroing, but it has continued nonetheless. Thus, in every aspect of the *softwood lumber* legal proceedings the United States has suffered humiliating defeats, yet continues to collect deposits, multiply proceedings, and bully for a negotiated settlement.

Incredibly, the Bush Administration has announced publicly that it will not comply with WTO and NAFTA orders. President Bush carried the fight personally to Canada's Prime Minister, Paul Martin, telling him that the problem was Canada's despite the many contrary rulings. Earlier this year, Republican Senator Larry Craig reported on the floor of the U.S. Senate:

> President Bush was well prepared to answer the Canadian Prime Minister when they last met. The President told the Prime Minister that the problem of subsidies and dumping is caused by Canada, and the solution lies with Canada, unless Canada wants the solution to be permanent duties to offset the subsidies and dumping.[14]

Republican Senator Michael Crapo explained that the President's policy in response to adverse decisions by the WTO and by NAFTA Chapter 19 binational panels was not to comply with the rulings:

> The Bush Administration has concluded that duty deposits amounting to approximately $3 billion and growing daily, cannot and will not be returned absent a negotiated settlement between the Canadian and U.S. Governments. ... There is zero likelihood that the countervailing duty, antisubsidy, order will disappear absent settlement of the lumber subsidy and dumping issues, no matter how often a NAFTA panel tries to achieve this outcome.[15]

Commerce has been obliged to lower the duty deposit rate in every remand that has followed a binational panel decision. In both the antidumping and the countervailing duty cases, but those changes cannot take effect while the panels continue to receive for review remand determinations from the agencies that are inconsistent with law. Commerce has initiated and even completed some administrative reviews while the agencies prolong final decisions from the NAFTA panel reviews of the original investigation results.

Until December 2004, Tembec had to continue depositing at its original rate of more than 29 percent *ad valorem*, despite five favorable legal decisions

[14] 151 Cong. Rec. S136 (daily ed. Jan 24, 2005) (statement of Sen. Craig).

[15] 151 Cong. Rec. S136-7 (daily ed. Jan. 24, 2005) (statement of Sen. Crapo). Through a "colloquy" on the Senate floor, Senators Crapo, Larry Craig (R-ID), and Max Baucus (D-MT) advised Tembec and other parties that the United States Government would not live up to its legal obligations under NAFTA Chapter 19, nor its international obligations arising from the WTO rejection of the Byrd Amendment.

challenging Commerce determinations, three favorable legal decisions effectively overturning the ITC final determination, and the WTO decision on injury to which the United States pretended to accede and which it promised to implement.[16]

Commerce continues to initiate its annual administrative reviews of the AD/CVD Orders, openly pressing on with plans for more duties at higher rates even after judicial review of the original investigations found no legal basis for any orders at all. Relying on the Continued Dumping and Subsidies Offset Act (also known as the "Byrd Amendment"[17]), which the WTO has found to be unlawful, the United States takes the position that it is entitled to distribute duty deposits to U.S. lumber producers in competition with the Canadians. Thus, should the AD/CVD Orders remain in place, the United States, under the Bush Administration, would give U.S. lumber producers at least USD$3.5 billion (and the sum is growing daily) while Canadian lumber companies continue to pay duty deposits of 25 percent or more for access to the U.S. market. Were Tembec's duty deposits distributed, Tembec's U.S. competitors would reap a huge windfall.

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[16] *See Certain Softwood Lumber Products from Canada: Final Determination of Sales at Less Than Fair Value*, USA-CDA-2002-1904-02, Panel Decisions of July 17, 2003 and March 5, 2004; *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination*, USA-CDA-2002-1904-03, Panel Decisions of August 13, 2003, June 7, 2004, and December 1, 2004; *Certain Softwood Lumber Products from Canada: Final Injury Determination*, USA-CDA-2002-1904-07, Panel Decisions of September 5, 2003, April 19, 2004 and August 31, 2004; *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, Report of the Panel, WT/DS277/R (March 22, 2004).

[17] *See* 19 U.S.C. § 1675c. The Byrd Amendment requires antidumping and countervailing duty deposits to be distributed to the U.S. companies that supported the initial petition. The WTO Appellate Body found that the Byrd Amendment violates the United States' WTO obligations. *United States—Continued Dumping and Subsidy Offset Act of 2000*, Report of the Appellate Body, WT/DS234/AB/R (Jan. 16, 2003). A Congressional Budget Office report subsequently found that the law encourages dumping cases. *See* Congressional Budget Office, *Economic Analysis of the Continued Dumping and Subsidy Offset Act of 2000*, (March 2, 2004) at 5. Despite the Appellate Body ruling, the United States has not repealed the Byrd Amendment, and Commerce has not reconsidered its final determination or withdrawn the duty orders.

Even were the negative threat of injury rulings to become final, Commerce apparently would not plan to end annual reviews, nor does it plan to refund Canadian duty deposits. Commerce declared its intention in a recent remand determination to keep the nearly $4 billion in duty deposits already paid by Canadian lumber producers even if NAFTA panels finally were to determine that the underlying antidumping or countervailing duty orders were never valid and there had never been a legal basis for collecting them. A NAFTA Panel, on June 9, 2005, ruled that retention of monies in such circumstances would be illegal, but no statement has emerged from the United States that it will honor the decision, and the U.S. industry already has denounced it.

B. Background Of Tembec's Chapter 11 Claim

Tembec submitted its Statement of Claim on December 3, 2003. Tembec and its U.S. enterprises waived their Article 1121 rights simultaneously with the submission of the Statement of Claim. Tembec then provided on January 9, 2004, at the request of the State Department, a copy of a December 3, 2003 letter from Tembec's CEO authorizing Tembec's counsel to execute the Statement of Claim and Article 1121 waivers on Tembec's behalf. Two weeks later, the United States wrote to complain that, in its view, neither the Article 1121 waivers, the letter of authority, nor the Statement of Claim were valid.[18] Tembec met with counsel for the United States and, while disagreeing with the United States' position, committed to make whatever changes to the waivers would satisfy the United States' concerns. Tembec was told that, in the view of the United States, waivers needed to be signed on company

[18] See Letter from Barton Legum to Mark A. Cymrot, (Jan. 23, 2004).

letterhead for each of the three Tembec claimants by an officer for each of those claimants.

On February 5, 2004, Tembec provided the United States with additional waivers on behalf of each of the Tembec claimants individually as instructed. Two weeks later, the United States wrote to say that it was still dissatisfied and made the new request that waivers also be signed individually by each of Tembec's enterprises. The United States maintained the position that Tembec's Statement of Claim was invalid until the United States' concerns about the waivers were satisfied.[19]

Meanwhile, Tembec appointed Professor James Crawford on February 19, 2004. The United States refused to appoint its arbitrator by the date required under the UNCITRAL Rules, and took the position that the time allotted to appoint an arbitrator was tolled while there remained questions in its view about the validity of the Tembec waivers.

Tembec prepared a legal opinion from its General Counsel regarding the validity of the waivers that had been submitted and also went about obtaining individually executed waivers from each of its "enterprises" listed in the Statement of Claim. On April 5, 2004, Tembec provided copies of the waivers to the United States.

The ninety days permitted by Article 1124(2) had expired and the United States had yet to appoint its own arbitrator.[20] Tembec requested ICSID, on April 6, 2004, to complete the constitution of the *Tembec* Tribunal and provided a copy of its General Counsel's legal opinion to ICSID and the United States in support of Tembec's

[19] See Letter form Barton Legum to Mark A. Cymrot, (Feb. 17, 2004).

[20] See Letter from Mark A. Cymrot to Barton Legum (Apr. 5, 2004).

position. Three weeks passed before the United States responded to ICSID in opposition to Tembec's request. Tembec and the United States continued to exchange letters on the dispute until June 28, 2004 when ICSID decided: "Having carefully reviewed the correspondence exchanged by the parties on the subject, we consider that we must proceed to comply with [Claimant's] request. In accordance with our normal procedures, we will do so after consultation with the parties as far as possible."[21] ICSID permitted the United States to appoint Professor Kenneth Dam even after its time had expired, and ICSID appointed Judge Florentino Feliciano. Tembec had no objection, thus accepting the first nominee of the United States as well as the first recommendation of ICSID. The United States had virtually doubled the time it should have taken to constitute the tribunal through a campaign of stalling and delay.

In its first meeting with the United States on January 27, 2004, Tembec had requested disclosure of selective NAFTA *travaux préparatoires* and to preserve e-mail evidence that was automatically being deleted under Commerce's computer protocols. The United States delayed its response for months. Then, after the tribunal was formed, the United States opposed release of the *travaux*, saying that Tembec's request for disclosure was premature even though the same documents already had been released to Canfor.[22] During the First Session of the *Tembec* Tribunal, the Tribunal invited the United States to confer with Tembec to reach an agreement concerning Tembec's request for the *travaux préparatoires* and for preservation of

[21] *See* Letter from Deputy Secretary-General Antonio R. Parra to Tembec and the United States (Jun. 28, 2001).

[22] *See* Letter from Andrea J. Menaker to Mark A. Cymrot (Nov. 16, 2004).

evidence.[23] After further negotiations with Tembec, the United States finally released the documents on January 10, 2005, nearly a year after they were first requested, and agreed to preserve certain electronic documents.

Tembec sought expedited briefing and a hearing on jurisdictional issues the United States claimed to have already briefed in *Canfor*. Tembec wrote to ICSID and the tribunal on September 27, 2004 proposing to address the planned U.S. jurisdictional challenge during a scheduled November 30, 2004 conference call.[24] The proposal provided for nine weeks for briefing on a subject the United States had claimed to have addressed already. When the United States opposed, the tribunal gave the United States the time it requested, nearly eight months for briefing and a hearing, ten months from the Tembec proposal.

Tembec gave up equal time allotted to the United States for briefing, hoping to advance the entire schedule at least by the amount of time it was willing to surrender. The United States was pleased to accept Tembec's offer, but declined to move up its filing date in conjunction with Tembec's, thus preserving the overall prolonged schedule for itself. The "expedited" schedule to which the United States refers on page 10 in its brief was expedited only with reference to Tembec filing dates. Even then, Tembec filed its Counter-Memorial on Jurisdiction ahead of that accelerated schedule, and despite receiving from the United States different jurisdictional arguments

[23] See Tembec Inc. et al. v. United States of America, Minutes of First Session of Tribunal, (Nov. 30, 2004) at 7.

[24] The United States claims in it June 3, 2005 Submission that when Tembec proposed addressing jurisdiction on November 30, 2004, it was "before the United States even indicated its intent to object to the tribunal's jurisdiction." However, as Tembec's September 27, 2004 letter confirms, the United States already had advised Tembec of this intention. On October 1, 2004, the United States objected that Tembec was disclosing "confidential conversations" when it reported that the United States already had declared its intention to challenge jurisdiction.

that the United States had not raised in any other proceeding. The United States, however, made no corresponding adjustment of any kind so as to expedite or accelerate the briefing or hearing on its jurisdictional motion.

The United States and Tembec first discussed consolidation in their January 27, 2004 meeting.[25] Tembec requested an early, definitive decision and warned that a delayed decision would be prejudicial:

> Tembec's right under Chapter 11 to proceed with its own claim will be prejudiced to the extent that the United States is unwilling to provide some reasonable deadline for resolving its view on consolidation. Consequently, we would appreciate the earliest communication from you regarding the United States' decision on whether it will seek consolidation.[26]

The United States responded on February 27, 2004 by forwarding to Tembec the language of a letter it had submitted to the *Canfor* Tribunal, which stated:

> In a meeting with Tembec, the United States suggested the possibility of consolidating the *Tembec* and *Canfor* cases before this Tribunal. Tembec informed us that it is not interested in consolidation and intends to pursue a separate arbitration for its claims. Canfor has similarly indicated to us that it is not interested in consolidation of the claims.
>
> After considerable deliberation, the United States has determined not to seek consolidation at this time of the *Tembec* and *Canfor* cases, or portions thereof, pursuant to Aricle 1126 of the NAFTA. If circumstances change, however (if, for example, another Canadian softwood lumber company submits a similar claim to arbitration under Chapter Eleven of the NAFTA), the United States will need to reconsider this issue.[27]

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[25] *See* Letter from Mark A. Cymrot to Mark A. Clodfelter (Jan. 29, 2004) at 2.

[26] *Id.*

[27] Letter from Barton Legum to Mark A. Cymrot (Feb. 27, 2004) at 1.

In negotiations with the United States regarding the agenda for the First Session of the *Tembec* Tribunal, the United States raised the issue of consolidation as a topic for discussion. During the First Session on November 30, 2004, the United States informed the *Tembec* Tribunal that consolidation was a possibility it was yet considering. Tembec raised its concerns about the fairness and propriety of a request for consolidation. The tribunal asked the United States to keep it apprised of its views on consolidation.

On December 9, 2004, the United States changed its position again, telling the *Canfor* Tribunal unequivocally that it would not consolidate the cases, and that it did not need time to reflect and submit a written statement of that decision because the position was clear.[26] We are unaware of any other communications on the subject with the *Tembec* Tribunal, despite the November 30, 2004 request from the tribunal to be kept informed.

The United States, without warning, subsequently submitted to ICSID a request for consolidation on March 7, 2005, on the eve of its due date for a responsive brief and shortly before a jurisdictional hearing in Tembec's Article 1120 proceedings. The United States expected to avoid completing and filing that brief, wanting an immediate stay to also avoid the hearing. The Tribunal, however, required the parties to complete the briefing and postponed a ruling on the motion for stay. Only after this

[26] *See, e.g., Canfor Corporation v. United States*, Hearing Transcript (Dec. 9, 2004) at p. 110, lines 6-7 ("Ms. Menaker: We have no intention of invoking Article 1126 in this proceeding.") *and* at p. 112, lines 9-14 ("Ms. Menaker: Mr. President, may I inquire? I think we have made, I believe, our position clear, and I can assure you that we have given it considerable thought, that we have no intention of invoking Article 1126 in this proceeding.").

Tribunal issued its stay order did the *Tembec* Tribunal stay its proceedings. The United States now wants to delay these proceedings for an indeterminate period of time.

III. GOVERNING LAW, APPLICABLE RULES AND LEGAL STANDARD

NAFTA provides the legal framework for the Tribunal's analysis of whether to grant the United States' request for consolidation. Article 1131 provides that "[a] Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law." The "Section" to which Article 1131 refers is Section B of Chapter 11, which includes Article 1126. Therefore, the Tribunal is required by Article 1131 to decide the question of consolidation in accordance with NAFTA and applicable rules of international law.

A. The Tribunal Must Follow The Legal Standard In NAFTA Article 1126

NAFTA Article 1126(1) requires that this Article 1126 Tribunal be established under the UNCITRAL Arbitration Rules and that the Tribunal "shall conduct its proceedings in accordance with those Rules, except as modified by this Section." The Rules are mandated by Articles 1126(1) and 1131 of "this Agreement." The legal standard for that determination is found in Article 1126(2).

Two important elements must be met to satisfy NAFTA's legal standard for consolidation. First, the Tribunal must be "satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common." Second, the Tribunal must decide that consolidation would be "in the interests of fair and efficient

resolution of the claims."[29] The Tribunal also may make its decision as to consolidation only "after hearing the disputing parties." Should the Tribunal decide that consolidation may be warranted, the Tribunal then must decide the scope of the claims or parts of the claims over which it will assume jurisdiction. The Tribunal does not assume jurisdiction over the entire case merely because one part of the case has a question of law or fact in common with another case, nor is such commonality, on its own, enough to consolidate any part of the claims.

B. The Burden Of Proof For Consolidation Rests With The Moving Party

The language of Article 1126(2) demonstrates that the burden of proof for consolidation is borne by the party moving for consolidation.[30]

The Tribunal may order consolidation only after it is "satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common." The NAFTA Parties' use of the term "satisfied" signifies that the Tribunal must be persuaded by the moving party that consolidation is warranted. The French and Spanish translations of Article 1126(2) support this interpretation of the legal standard. The English word "satisfied" is translated in French as "*convaincu*," meaning that the Tribunal must be convinced of the need to consolidate.[31] The Spanish translation of Article1126 uses the verb phrase "*determine que*" which communicates

[29] *See Corn Products International, Inc. v. United Mexican States and Archer Daniels Midland Company And Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, Order Of The Consolidation Tribunal (May 20, 2005) at ¶¶ 5-6.

[30] *See* UNCITRAL Rules, Article 24(1) ("Each party shall have the burden of proving the facts relied on to support his claim or defence.").

[31] "Un tribunal établi aux termes du présent article qui est convaincu que les plaintes soumises à l'arbitrage en vertu de l'article 1120 portent sur un même point de droit ou de fait..."

that the Tribunal must evaluate the merits of a request for consolidation.[32] The burden of proving commonality naturally must lie with the party seeking consolidation, not the parties opposing it.

The Tribunal may not consolidate cases merely when there appears to be a question of law or fact in common. Early drafts of NAFTA Article 1126 contained language suggesting that consolidation would be appropriate where there "appears" to be questions of law or fact in common, but that language was rejected in favor of the standard "satisfied that claims ... have a question of law or fact in common."[33] The difference between the final and the draft language is material and suggests a scenario where the Tribunal would not be satisfied that consolidation was warranted even though there might appear to be questions of law or fact in common among multiple claims. Commonality must be proven, not merely supposed or speculated.

The second element of the legal standard for consolidation--"in the interests of fair and efficient resolution of the claims"—also must be established before the Tribunal may assume jurisdiction of the claims in place of the Article 1120 tribunals. That element, like the first, can be satisfied only "after hearing the disputing parties." Even where there are claims of law and fact in common, the moving party must demonstrate to the Tribunal that consolidation is in the interest of fair and efficient resolution of the claims.

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[32] "Cuando un tribunal establecido conforme a este artículo determine que las reclamaciones sometidas a arbitraje de acuerdo con el Artículo 1120 plantean cuestiones en común de hecho o de derecho,..."

[33] *See NAFTA Chapter 11 Draft Text*, Lawyer's Revision, Art. 1124 (4) (Sep. 2, 1992) (at http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negotiating_Draft_Texts/asset-upload-file481-5900.pdf) and *compare with* Article 1126(2).

C. Where Standards For Consolidation Are Satisfied, The Tribunal Still Has Discretion Not To Order Consolidation

Even if the Tribunal were to believe that both elements of the legal standard were satisfied, the Article 1126 Tribunal would have discretion to decide not to consolidate the claims. The Parties chose to use the phrase "the Tribunal *may*...by order" and similarly used permissive rather than mandatory verb forms in the French ("pourra ... par ordonnance") and Spanish ("*podrá ordenar que*") translations of Article 1126(2). The Parties' use of permissive verbs in all three translations of NAFTA to express the Tribunal's power to assume jurisdiction of the Article 1120 proceedings, in contrast to mandatory verb phrases found elsewhere in Article 1126,[34] conveys that the Parties gave the Tribunal discretion not to consolidate claims even where the two mandatory elements of the legal standard had been satisfied. The Tribunal does not have discretion to consolidate claims where the mandatory elements of the legal standard for consolidation have not been met.

D. The Panel May Apply Principles Of International Law Consistently With The Applicable Rules And Legal Standard

Rules of general applicability in international law should be applied by the Tribunal as it decides the question of consolidation.[35] These rules should apply to the extent that they do not conflict with the legal standards to which the Parties agreed in

[34] *Compare* use of the mandatory term "shall" in subsections 1,3-6, 10-13; see also subsection 6 ("Where a Tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration under Article 1116 or 1117 and that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request ...") for distinction between mandatory and permissive.

[35] See Statute of the International Court of Justice, Article 38(1)(c). ("The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . the general principals of law recognized by civilized nations . . .").

NAFTA, and may guide the Tribunal in exercising discretion not to consolidate claims.[36] Principles of international law that should apply here are the doctrines of jurisdiction, judicial economy, laches, estoppel, and party autonomy in arbitration.

IV. THE TRIBUNAL SHOULD DENY THE REQUEST FOR CONSOLIDATION AS UNTIMELY AND PREJUDICIAL UNDER THE UNCITRAL RULES AND PRINCIPLES OF INTERNATIONAL LAW

A. The Tribunal Should Deny The Request For Consolidation As Untimely Under Article 21(3) Of The UNCITRAL Rules

The United States has requested that this Tribunal assume the jurisdiction of claims that are properly before the Article 1120 tribunals in *Canfor* and *Tembec*.[37] Article 21(3) of the UNCITRAL Rules provides: "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 counter-claim." The United States did not raise consolidation in Statement of Defense against Tembec's claims, and now has waived its right to that jurisdictional plea.[38]

NAFTA Article 1126 is unambiguous that a request for consolidation is a plea as to the jurisdiction of the Article 1120 tribunals:

> Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by

[36] *See, e.g.*, Vienna Convention On The Law Of Treaties, Article 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

[37] No Article 1120 tribunal has been established in *Terminal*.

[38] *See, e.g.*, *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL Award, 2001 WL 34786542 (Sept. 13, 2001) ("According to UNCITRAL Rules, a defence of jurisdiction is deemed to be waived if not raised in time. This concept derives from the assumption that defences to jurisdiction can be waived by the Parties, with the consequence that a Tribunal is not able to set aside or disregard a Party's waiver in respect to lack of jurisdiction.").

> order: (a) *assume jurisdiction over*, and hear and determine together, all or part of the claims; or (b) *assume jurisdiction over*, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.[39]
>
> * * *
>
> 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*.[40]

The *Tembec* Tribunal required the United States to raise all of its objections to jurisdiction in the *Tembec* Statement of Defense.[41] The United States submitted its Statements of Defense in *Canfor* and *Tembec* regarding its objections to the jurisdiction of the Article 1120 tribunals in each of those cases. Neither of the Statements of Defense contained any U.S. objection to the Article 1120 tribunals' jurisdiction based on Article 1126, notwithstanding that the United States was aware of all three cases at the time each of those Statements of Defense was submitted.[42] Therefore, the United States' plea that jurisdiction of the Claimants' claims properly lies with the Article 1126 tribunal is untimely under the UNCITRAL Rules.

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[39] Article 1126(2)(emphasis added).

[40] Article 1126(8).

[41] *See Tembec v. United States*, Minutes of the First Session of the Tribunal, (Nov. 30, 2004) at 5 (setting schedule for submission of U.S. Statement of Defense on Jurisdiction and briefing for jurisdictional phase). This requirement was explicitly imposed, but as a concession to the United States, as Tembec requested a complete Statement of Defense and the United States asked to submit a complete Statement, but only as to jurisdiction.

[42] The United States submitted its Statement of Defense as to jurisdiction in *Canfor* on February 27, 2004. Tembec and Terminal had already submitted notices of intent to arbitrate on May 3, 2002 and June 12, 2003 respectively. The United States had already received Tembec's Statement of Claim on December 3, 2003.

The United States submitted its Statement of Defense as to jurisdiction in *Tembec* on December 15, 2004. Terminal had already submitted its Notice of Arbitration on March 31, 2004.

B. Jurisdiction Should Be Settled By The Article 1120 Tribunals Before This Tribunal Considers Whether To Consolidate On The Merits

The Tribunal should decide only those matters that are essential to be decided in accordance with the doctrine of judicial economy.[43] It need not decide matters that may be mooted by the Tribunal's decisions on other issues.[44] The mandate of this Tribunal is to decide whether to consolidate on objections to jurisdiction raised in the Article 1120 proceedings, and whether to consolidate on the merits. The *Tembec* and *Canfor* Tribunals are near completion resolving the United States' jurisdictional objections; thus, the most efficient course of action is for this Tribunal to lift the stay for each of those cases to allow the Article 1120 tribunals to complete their decisions.[45]

Were the U.S. objections sustained, the cases would be dismissed and there would be no question for this Tribunal of consolidating claims on the merits. Judicial economy, therefore, would dictate that the Tribunal refrain from deciding whether to consolidate on the merits, while permitting the most economical and efficient path to be followed in deciding jurisdiction.

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[43] *See, e.g., Canada—Certain Measures Affecting The Automotive Industry* (WT/DS139/AB/R, WT/DS142/AB/R) (May 31, 2000) at ¶ 114 ("[A] panel is not, however, required to examine all legal claims made before it. A panel may exercise judicial economy."); *United States—Measure Affecting Imports of Woven Wool Shirts and Blouses from India* (WT/DS33/AB/R,) (April 25, 1997) at 20 ("Previous GATT 1947 and WTO panels have frequently addressed only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues.").

[44] The doctrine of judicial economy applies to the Tribunal through Article 1131.

[45] The United States asserted on page 16 of its brief that it is "unlikely" that Tembec's claims will proceed to the merits based on the jurisdictional objections it raised in *Tembec's* case. Thus, the United States should agree that it would be more efficient for the *Tembec* tribunal to be allowed to proceed and rule on the U.S. objections than to consolidate three claims, rebrief and reargue those objections to this Tribunal.

Should the U.S. objections be dismissed by the Article 1120 tribunals, this Tribunal could then proceed to decide whether the remaining claims should be consolidated. In that event, however, judicial economy still would require the Tribunal not to consolidate the cases. The Tribunal would not be managing one consolidated case, but in effect, three separate Article 1120 arbitrations. The Tribunal could not operate as efficiently as the Article 1120 tribunals, being faced with the burdens of preserving the confidentiality of business information among three competing companies making submissions to the same Tribunal, and the inefficiencies and delays caused for two claimants while the third consumes the Tribunal's attention with requests to present evidence and seek discovery from the United States of evidence unique to the impact of the U.S. measures on their individual companies. For these and the reasons argued elsewhere in this brief, judicial economy would not favor consolidation on the merits.

C. The Tribunal Should Deny The Request For Consolidation By Applying The Doctrine Of Laches

It is a well-established principle in international law that "equity aids the vigilant, not those who sleep on their rights."[46] The doctrine of laches prohibits one party's exercise of a right that has been delayed, either willfully or neglectfully, such that exercise of the right presently would prejudice another party.[47] The doctrine should bar the United States' request for consolidation here.

[46] *See* Black's Law Dictionary 875 (6th ed. 1990); *see also* Ashraf Ray Ibrahim, *The Doctrine of Laches In International Law*, 83 Ya. L. Rev. 647, 647 (1997).

[47] *Id.*

The United States had notice of both Canfor's and Tembec's claims no later than December 3, 2003, when Tembec submitted its Statement of Claim. It also had notice as early as June 12, 2003 of Terminal's intent to arbitrate, and received confirmation of that intention on March 31, 2004. But the United States sat on its right to request consolidation for 12-18 months while Canfor and Tembec both have spent hundreds of thousands of dollars defending themselves against the United States' objections to jurisdiction in their separate proceedings. During this same time, the United States collected over one hundred million dollars in unlawful duty deposits from Tembec alone.

The United States should not be allowed to induce Claimants to spend significant time and resources answering objections to jurisdiction that the United States later intends to reargue before a different tribunal, even though none of the dispositive facts have changed. The delay caused by these proceedings already has prejudiced Tembec because it will delay a resolution of this arbitration by at least several months, during which time Tembec will be forced to pay tens of millions of dollars in unlawful duty deposits.

The alleged cause for the United States' request for consolidation on March 7, 2005—the withdrawal of Conrad Harper from the *Canfor* Tribunal--is immaterial to the legal standards to be applied by the Tribunal with respect to consolidation. The fact that the United States' appointed arbitrator in *Canfor* withdrew after questions were raised as to a potential conflict of interest, did not make the facts or legal issues in *Canfor* any more or less common than the facts or issues in *Tembec*.

Nor did Mr. Harper's withdrawal make consolidation a more fair and efficient way to resolve the claims of the parties. The United States has argued that the withdrawal of Mr. Harper requires, at minimum, that there be a rehearing of the jurisdictional arguments in *Canfor*. That position is a misreading of Article 14 of the UNCITRAL Rules: "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 hearings may be repeated at the discretion of the arbitral tribunal." The question of whether there should be a rehearing is left to the "discretion of the arbitral tribunal," meaning the *Canfor* Tribunal. Yet the United States, by its refusal to appoint its own replacement arbitrator, has prevented that tribunal from making that decision. It is improper for the United States to take advantage of its own inaction as a basis for its consolidation claim.

D. The United States Should Be Estopped As To Its Request For Consolidation

It is a general principle of international law that the doctrine of estoppel acts as "[a] bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been established as true."[48] The United States demonstrated an intent not to consolidate by its statements and actions, which Tembec relied upon by proceeding with its case. The United States should be estopped from changing its position now to Tembec's detriment.

[48] *See, e.g., Black's Law Dictionary* 589 (8th ed. deluxe 2004); North Sea Continental Shelf (F.R.G. v. Den., Neth.), 1969 I.C.J. 3 at 26, para. 30 (commenting that the doctrine of estoppel would preclude a State from denying the applicability of a Conventional regime where "by reasons of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused [another State], in reliance on such conduct, detrimentally to change position or suffer some prejudice.").

Over a year before the United States' request, Tembec urged the United States to inform Tembec promptly as to its position on consolidation so there would be no prejudice to Tembec. The United States responded in writing to Tembec and *Canfor* stating that it did not intend to seek consolidation at that time, but may have wanted to revisit that decision were another claim filed regarding the *softwood lumber* proceedings.[49] Terminal filed its Notice of Arbitration on March 31, 2004, but the United States did not request consolidation until almost a year later, during which time the United States filed different objections to jurisdiction in different cases, told the *Tembec* Tribunal that Tembec's claim was different from Canfor's, and declared to the Canfor Tribunal that it was sure it did not intend to consolidate. The United States relied on the withdrawal of Mr. Harper in the *Canfor* case rather than the filing of any additional cases as the reason for requesting consolidation when it did.

In reliance on the position taken by the United States, Tembec proceeded with its own Article 1120 tribunal. It went through six months of delay and unnecessary expense trying to form an Article 1120 tribunal while the United States declined to appoint tribunal members, claiming technical deficiencies in Tembec's Article 1121 waivers. Tembec met by telephone conference on November 30, 2004 and scheduled the briefing of the United States' objections to jurisdiction. The United States raised preliminary jurisdictional objections against Tembec that it had not raised against Canfor. The United States and Tembec then submitted two briefs each on the U.S. jurisdictional defenses and Tembec expended significant resources defending against the U.S. objections to jurisdiction in its own proceedings.

[49] Letter to Mark A. Cymrot from Barton Legum (Feb. 27, 2004) at 1.

Until March 7, 2005, the United States' words and actions manifested an intention not to consolidate. Tembec relied on those words and deeds to continue with the time and expense of an Article 1120 tribunal. The United States now seeks consolidation before this Tribunal, which effectively would discard all of the *Tembec* Tribunal's efforts to date in the Article 1120 proceeding.

The United States should be estopped now from reversing its position on consolidation. Mr. Harper's withdrawal from the *Canfor* Tribunal is irrelevant to the legal criteria for consolidation, had nothing whatsoever to do with Tembec and its tribunal, and is no excuse for the United States' changed position.

V. THE CLAIMS AS TO THE UNITED STATES' OBJECTIONS TO JURISDICTION LACK COMMONALITY TO JUSTIFY CONSOLIDATION

The United States argued Articles 1101(1) and 1121 only with respect to Tembec. Therefore, those jurisdictional questions are not "in common" with Canfor's claim. The United States argues that consolidation would allow it to introduce these objections against Canfor as preliminary defenses, but that contention is a transparent abuse of the Article 1126 mechanism. The United States cannot make arguments that it failed to raise as to one party by claiming them to be common questions of law or fact through consolidation. The United States' request for consolidation does not meet the "question of law or fact in common" prerequisite and this Tribunal should not allow the United States to consolidate and argue the objections against Canfor.

As for Terminal, the United States has filed no Statement of Defense and filed no jurisdictional objections, making Tembec's claims and "procedural alignment" different. The United States' Submission to this Tribunal arguing in favor of consolidation declares an intention to raise similar objections to jurisdiction against

Terminal in the future, but that pledge was made to Tembec about prior claims against Canfor and soon was contradicted. Not only is the United States' word not reliable, therefore, on what it may or may not raise as defenses, but it is also unknown whether Terminal intends to prosecute actively its claim and so occasion further United States defenses.

VI. THE CLAIMS ON THE MERITS LACK COMMONALITY TO JUSTIFY CONSOLIDATION

Central to the United States' argument for consolidation is the assertion that the merits of the various Chapter 11 claims will never be heard. Were the United States genuinely confident in this assertion, which is based on its presumption about the outcome of its jurisdictional challenges, it would have permitted the *Tembec* Tribunal to complete its analysis and decision on jurisdiction, and it would have restored the *Canfor* Tribunal to full strength so that it could have done the same. Instead, it blocked the *Canfor* Tribunal by failing to appoint a replacement member within the allotted time, and it aggressively demanded a stay of the *Tembec* proceedings to prevent that tribunal from rendering a decision.

Without jurisdictional decisions, which the United States actively has prevented, the United States then claims the merits will not be reached and so presumes that it can rely on the most superficial assessment to persuade this Tribunal that common isues of law and fact are dominant. They are not, and were a single tribunal to try to adjudicate simultaneously the claims of these three different companies, it would find itself confronted with a virtually limitless array of corporate and critical, legal and factual differences that it might never assimilate for arbitral awards. Indeed, the United States' ultimate purpose in this exercise, besides forum shopping for

its jurisdictional defenses, may be to present a tribunal with an impossible task and prevail for that reason if for no other.

Article 1126 requires the Tribunal to be "satisfied" that the claims "have a question of law or fact in common" before ordering consolidation. Although the United States tries to argue that the claims of Tembec, Canfor, and Terminal contain numerous common issues of law or fact, such alleged similarities are entirely superficial and put form over substance.

The protections of Chapter 11 apply to "investors" of a Party and the "investments" of a Party in the territory of another Party. The very answer to what constitutes an "investor" and "investment" differs from one company to another. Tembec, a Canadian "investor," shares no common identity or affiliation with Canfor or Terminal. Rather, Tembec is a competitor of Canfor and Terminal. Tembec's U.S. "investments," likewise, share no common identity or affiliation with Canfor or Terminal, and also compete against the U.S. investments of those companies. All of Tembec's investments in the United States have unique characteristics that set them apart from Canfor and Terminal. Tembec, for example, holds different physical assets, different intellectual property, market share, and goodwill than do the other two companies. Tembec also has its own counsel and is pursuing its own strategies with respect to Tembec's claims.

Although all three companies are based in Canada, their geographical location gives rise to additional factual differences. Tembec is an eastern Canadian company, predominantly based in Ontario and Québec with some small operations in British Columbia, while Canfor and Terminal are predominantly British Columbia

companies. The companies' respective investments are located in the Eastern and Western parts of the United States. The East-West difference is material because the antidumping and countervailing duties injured Tembec differently in the context of different market forces, than they injured companies in British Columbia.

One of the important distinctions in the companies' locations is the types of wood they used and sold in the U.S. markets. Eastern White Pine, as its name suggests, is prevalent in eastern Canada. Companies in British Columbia generally do not have access to and do not harvest Eastern White Pine for sale in the United States. One of the important claims made by Tembec is that the antidumping and countervailing duties harmed Tembec Woodsville, a New Hampshire facility that was used to produce and market Eastern White Pine lumber in the United States.[50] The duties cut off Tembec Woodsville's supply of Eastern White Pine to the point where Tembec Woodsville had to be closed. Tembec was an ardent advocate of issues in the *Softwood Lumber* proceedings specific to Eastern White Pine, but Canfor and Terminal were not. The United States' application of duties to Eastern White Pine products in violation of Chapter 11 is of concern only to Tembec. These facts, arguments and claims all are unique to Tembec. The example of Tembec Woodsville highlights how the merits of each Claimant's claims will involve factual inquiries specific to each Claimant and/or its investments.

The East-West Canada distinction also is important because companies in British Columbia, like Canfor and Terminal, operated under different supply and other market conditions and therefore reacted differently to the imposition of U.S. duties. For

[50] *See* Tembec Statement of Claim at 5.

example, a beetle epidemic in British Columbia drastically changed the supply of timber for those companies and may have affected the way that the companies mitigated harm from the unlawful U.S. duties. Tembec, operating mainly in the eastern part of Canada, was not affected directly, or significantly, by the beetle epidemic.

Each company's Statement of Claim emphasizes different aspects of the U.S. violations of Chapter 11. Tembec's claims are not likely to get into details of the underlying Department of Commerce and U.S. International Trade Commission determinations, focusing instead on the details of improper political influence on agency decision-makers and the United States' acquiescence to unreported *ex parte* communications with representatives of the U.S. lumber industry.[51] Terminal, unlike Tembec, did not participate actively in the underlying *Softwood Lumber* investigations, nor in the NAFTA Panel appeals, and therefore is unlikely to make the same arguments that Tembec will make about how the United States abused the processes of its trade laws under protectionist political influences to favor the U.S. lumber industry, but rather will likely focus on how the outcomes of the softwood lumber proceedings are violations of NAFTA Chapter 11, much in the manner pursued by Canfor.

To the extent that a tribunal would inquire into the details of the underlying investigations, there are further important differences in how the determinations were reached by Commerce and how they affected the three companies. Tembec received a different preliminary and final antidumping duty rate than did Canfor and Terminal based

[51] *Compare, e.g.*, Tembec Statement of Claim at pp. 27-29 to Canfor Statement of Claim at pp. 18-26 and Terminal Notice of Arbitration at ¶¶ 14-19. Canfor, unlike Tembec, also focuses heavily on the historical context of the *softwood lumber* dispute. *See* Canfor Statement of Claim at 5-18.

on different calculations, and different methodologies.[52] Such procedural distinctions created differences in the way that Commerce treated Tembec, Canfor, and Terminal from the outset of the antidumping investigation.

A tribunal examining the underlying dumping determination would be required to consider other methodological differences. Tembec's claim does not focus on individual dumping calculation issues to the extent Canfor's does. Canfor alleges that Commerce's dumping determination was reached without taking into consideration "evidence that Canfor sold its softwood lumber products in the United States at prices that were above its costs and above the prices that similar products were sold in Canada."[53] Canfor argues that Commerce "continued to overstate Canfor's general expense rate" in making the dumping determination.[54] The cost data at issue in the case of Canfor are not the same cost data considered by Commerce when calculating Tembec's and Terminal's rates. An inquiry into Commerce's determination of dumping margins, therefore, must take into account different facts depending on the company.

The countervailing duty investigation is a source of additional differences among the three claims. Commerce used unlawful cross-border benchmarks in calculating the adequacy of remuneration (*i.e.*, the presence of a subsidy). These benchmarks differed depending on the province, with a different impact on companies depending on the principal location of their operations. Commerce based the provincial rate for British Columbia on stumpage prices from the U.S. Pacific Northwest, while the

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[52] *See* Tembec Statement of Claim at 10-27; Canfor Statement of Claim at 18-26; and Terminal Notice of Arbitration at ¶¶ 14-19.

[53] Canfor Statement of Claim at 38, 41.

[54] *Id.*

rates for Ontario and Québec were calculated using prices from the midwest and northeast United States. Companies in British Columbia, such as Canfor and Terminal, were focused on refuting different provincial cross-border benchmarks in the underlying investigation than were companies, such as Tembec, located primarily in eastern Canada. Even as Commerce applied a single "countrywide rate," geography has dictated litigation and negotiation strategies and choices, and management of consequences.

Companies involved in a countervailing duty investigation may request a company-specific rate to avoid paying a country-wide countervailing duty rate. Both Tembec and Canfor requested company-specific rates,[55] but the similarities end there. Each company submitted a separate application to Commerce for a company-specific rate and made its own arguments about why it was entitled to a rate and how Commerce should calculate that rate. The financial impact of Commerce's denial of a specific rate also differs from company to company.[56] In particular, each company made higher cash deposits than it should have, but the extent of this overpayment depends on the rate Commerce would have found for each company using separate calculations.

All of these distinctions pertain to the *softwood lumber* legal proceedings, and it is not yet known to what extent any of the three Claimaints will be seeking to examine those proceedings in detail in their Chapter 11 claims. One may want to revive claims extinguished by NAFTA or WTO panels, another may prefer to rely on the panel

[55] See Tembec Statement of Claim at 20; Canfor Statement of Claim at 44-46.

[56] *See id.*

decisions themselves, and another may focus more on process than substance or outcome. These questions of legal strategy remain open for each Claimant. Were each to choose a different one, an Article 1126 tribunal would be confronted with a bewildering array of different issues being argued in different ways and for different purposes.

The Claimants all allege violations of Articles 1102, 1103, 1105, and 1110. Just because these claims are based on the same Chapter 11 articles, however, does not mean that the parties will address them the same way. There have been many Chapter 11 arbitrations alleging violations of identical provisions of Chapter 11, yet no one would assert that the claimants all framed their arguments in a similar manner.[57] Any tribunal considering the claims of Tembec, Canfor, and Terminal would be burdened by having to consider several different legal arguments about how to interpret the Chapter 11 provisions, and how the competing interpretations applied to the different sets of facts for each company.

Although the three Claimants allege violations of Articles 1102 and 1103, these violations affected the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" of each company in different ways. The impact of expropriation (Article 1110) has varied from company to company. A tribunal must make highly fact-intensive, company-specific inquiries to

[57] See, e.g., *Grand River v. United States*, Notice of Arbitration (March 12, 2004) (Making claims under Articles 1102, 1103, 1104, 1105, and 1110), *Pope & Talbot Inc. v. Canada*, Statement of Claim (March 25, 1999) (Making claims under Articles 1102, 1103, 1105, 1106, and 1110), *Baird v. United States*, Notice of Intent to Submit a Claim to Arbitration (March 15, 2002) (Making claims under Articles 1102, 1103, 1104, 1105, and 1110), *Mondev v. United States*, Notice of Arbitration (Sept. 1, 1999) (Making claims under Articles 1102, 1105, and 1110), *and Loewen v. United States*, Notice of Arbitration/Statement of Claim (Oct. 30, 1999) (Making claims under Articles 1102, 1105, and 1110).

assess the effects of these violations of Chapter 11 on a Claimant's investments in the United States. All three companies' business plans and competitive positions have likely changed as a result of the U.S. violations, but the nature and extent of these changes differ significantly for each company.

Canfor, unlike Tembec, relies heavily upon the example of U.S. Bilateral Investment Treaties ("BITs") in framing its Article 1103 claim. It quotes from both the U.S.-Albania BIT and the U.S.-Estonia BIT, arguing that Canfor must receive treatment no less favorable than that provided investors under these BITs and others like them.[58] Tembec, by contrast, does not depend on, let alone cite, these two specific BITs to make its Article 1103 claim.

Although all three Claimants allege violations of Article 1105, the impact of the United States' violation of the "minimum standard of treatment" differs depending on the Claimant. The nature and effects of the U.S. denial of "fair and equitable treatment"—a minimum requirement under international law specifically enumerated in Article 1105—is company-specific and fact-driven. Tembec, for instance, was deprived of opportunities to participate fully in the underlying antidumping and countervailing duty investigations. Commerce adopted procedures that hindered Tembec's ability to respond, and failed to inform Tembec of all necessary evidence.[59] The other two Claimants also experienced a denial of procedural rights.[60] How Tembec would have participated in the underlying proceedings given a full opportunity to do so varies from what the other two Claimants would have done. In addition, the final determinations

[58] *See* Canfor Statement of Claim at 27-29.

[59] *See* Tembec Statement of Claim at 38-39.

[60] *See* Canfor Statement of Claim at 36-44; Terminal Statement of Claim at ¶¶ 23-27.

reached by Commerce and the ITC due to the denial of minimum standard of treatment impacts each company differently.

Tembec, Canfor, and Terminal all claim damages, but the nature and extent of these damages are not the same for all three. The U.S. violations of Chapter 11 impacted their investments in the United States in different ways. All three Claimants suffered varying financial losses depending on factors such as market share and cost structure, and they chose to mitigate their damages in different ways. Each Claimant's calculation of damages also would involve separate and complex theories and models, using company-specific and highly confidential data.

VII. CONSOLIDATION IS NOT IN THE INTERESTS OF FAIR OR EFFICIENT RESOLUTION OF THE CLAIMS

The only interests served by the United States' request for consolidation are the United States' own litigation strategies to delay the resolution of Claimants' claims; make the arbitration process more expensive for Claimants; avoid decisions by the Article 1120 tribunals; recover jurisdictional defenses that it already has waived, or try to improve upon jurisdictional arguments already made; deny Claimants' rights to party-appointed arbitrators; and convert this Tribunal into a Superior International Court of Arbitration with *stare decisis* authority. It is significant that over the last three years none of the Claimants has exercised a right to consolidation, and even the United States conducted itself previously in a manner contrary to an intent to consolidate.

A. The U.S. Request For Consolidation Imposes More Delay On The Resolution Of Tembec's Claims

After eighteen months of procedural delay entirely attributable to the maneuvering of the United States, Tembec was on the verge of a jurisdictional hearing when the United States moved for consolidation. At a November 30, 2004 telephone

hearing, the United States refused to schedule a hearing for its objections to jurisdiction in Tembec's case any sooner than sixth months after raising those objections in its Statement of Defense on December 15, 2004, even though the United States claims here that the jurisdictional issues it already had briefed and argued in front of the *Canfor* Tribunal on December 7-9, 2004 are common issues of law. Consolidation could only present further unnecessary delay for Tembec's claims. This Tribunal cannot possibly provide any more expeditious or efficient resolution of Tembec's claim through consolidation than the *Tembec* Tribunal can provide were Tembec's claim permitted to proceed.

B. The United States Should Not Be Given Another "Bite At The Apple" On Jurisdiction

The United States should not be given another "bite at the apple" by rearguing its Article 1120 jurisdictional objections before a different tribunal, or by imposing on Canfor jurisdictional objections that it neglected to make in its Statement of Defense, briefing, or hearing on jurisdiction. The United States has stated that it would be "unlikely" for Tembec's claims to proceed to the merits.[61] In that case, the United States should withdraw its request that Tembec be consolidated and allow the *Tembec* Tribunal to render a decision on the objections to jurisdiction without requiring a hearing. The United States, instead, has insisted on a hearing, and apparently not before the *Tembec* Tribunal. Presumably it sees some advantage in rearguing its jurisdictional defenses to a new tribunal.

[61] 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. (June 3, 2005) at 16.

C. The Claimants Are Prejudiced By The United States' Request For Consolidation

Tembec is prejudiced by the United States' request for consolidation at this developed stage of the Article 1120 proceedings. Consolidation would deny Tembec the results of eight months of briefing on the U.S. jurisdictional objections that the *Tembec* Tribunal could resolve imminently and would impose rebriefing based on whatever new theories and arguments the United States could develop. Tembec's tribunal is fully constituted and has reviewed the briefs submitted by Tembec and the United States. The United States had asked for a hearing on jurisdiction before the *Tembec* Tribunal so that the tribunal could ask the parties any questions it may have, but the tribunal was deprived an opportunity (by the intervening stay) to respond to Tembec's letter asking whether there were any questions and, if not, suggesting that the jurisdictional objections should be decided solely on the briefs submitted.

During the protracted eighteen month period, Tembec has expended significant resources to establish rules of procedures and to address jurisdictional objections from the United States with an established tribunal. It would be prejudicial to deprive Tembec's Article 1120 tribunal of jurisdiction and authority to decide issues already before it for more than a year.

Tembec has incurred considerable expense in the prosecution of its Chapter 11 claims, most of which will have been wasted were the Tribunal to consolidate and start anew as the United States has asked. The Tribunal should bear in mind that Tembec has suffered and continues to suffer damages resulting from the United States' duties that both the WTO and NAFTA Chapter 19 panels have held unlawful. The costs of wiping away the progress of the Article 1120 tribunals so the

United States can start over with a fresh tribunal are particularly burdensome for the Claimants.

D. The Parties' Autonomy To Present Their Claims Would Be Compromised By Consolidation

The United States seeks consolidation before a tribunal chosen by ICSID rather than a consensual tribunal. The United States also seeks consolidation despite the fact that all of the parties but the United States oppose consolidation. Each of the parties in the three cases suggested for consolidation has made its own choices about who should hear their claims and how those claims should proceed. Separate arbitral proceedings allow the parties to pursue their own arguments based on their own unique facts without having to make compromises for the claims of other parties. Were the United States' request for consolidation granted, the parties' autonomy to present their claims would be eliminated.

The consolidation tribunal in the High Fructose Corn Syrup ("HFCS") cases recognized the importance of party autonomy in NAFTA Chapter 11 arbitration and that all of the NAFTA Parties have, at least implicitly, endorsed the principle.[62] Party autonomy would be important here not only for the constitution of the tribunals hearing the claims, and the ways in which arguments are being made, but also to allow the parties to submit confidential information regarding their own unique business operations relevant to the resolution of their respective claims.

The United States tries to distinguish the HFCS tribunal's decision about the unfairness and inefficiency that would be created in consolidated proceedings by the

[62] *See Corn Products International, Inc. v. United Mexican States and Archer Daniels Midland Company And Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, Order Of The Consolidation Tribunal (May 20, 2005) at ¶¶ 11-12.

submission of confidential business information from claimants who are competitors in the cases here by referencing the administrative protective orders in international trade disputes. The distinction is irrelevant to the serious problem consolidation presents for the treatment of confidential information.

Tembec, Canfor and Terminal are competitors who often compete head-to-head for the same customer base across the United States and Canada. Tembec and Canfor, for example, sell to many of the same retail customers in the United States. All three companies would be required to submit confidential business information in support of their claims. This information would relate to such highly sensitive matters as marketing, changes in customer base, plant expansions and contractions, and growth strategies.

Tembec should not be required to choose between proving its case and submitting information that could compromise its competitive position vis-à-vis Canfor and Terminal, and Tembec would not expect those companies to share confidential business information either. The sharing of some types of information would be unlawful under antitrust laws in Canada and the United States. The possibility of Tembec's sensitive information, including important business strategies, reaching a competitor would cause undue harm to its ability to compete fairly and effectively in the softwood lumber and pulp markets. Separate proceedings would be much more efficient than a consolidated proceeding because the parties could present their own claims fully without concerns about confidentiality.

The United States mischaracterizes the business information submitted in the *softwood lumber* proceedings. Proprietary business information was submitted by

Canfor and Tembec in certain softwood lumber proceedings under administrative protective order ("APO"). Tembec and Canfor did not "coordinate[] the introduction of business proprietary information" in the softwood lumber proceedings, but followed the statutes, regulations and administrative procedures required under U.S. law for submission of APO information. Under the United States' APO process, confidential business information goes only to counsel. This approach is possible because of the summary nature of domestic trade proceedings. It is not, however, practicable in an arbitration in which company executives will play an important role as witnesses and advisors to their counsel.

This Tribunal would have to assume a burden for three cases that does not exist for any of the Article 1120 tribunals separately: protecting Claimants from the confidentiality risks presented by the prosecution of other Claimants' claims. The Tribunal in effect would have to administer three separate cases to preserve the confidentiality of the Claimants' information, pertaining to the impact of the U.S. measures on their respective business operations and investments. Consolidated proceedings could be only less efficient in those circumstances than separate proceedings administered by separate tribunals. The Claimants should be allowed to maintain their autonomy without being restrained by confidentiality concerns as to the evidence that they could provide to support their claims.

E. Consolidated Proceedings Would Be Inefficient During Arguments, Discovery, And Procedural Issues Unique To The Claimants

Canfor, Tembec and Terminal each will be required to provide testimony and other evidence about the impact of the U.S. measures on their respective companies. Information about the impact of the measures on Canfor would be

irrelevant to Tembec, but would have to be presented to the Tribunal in a consolidated case. In fact, the impact has been very different. For instance, softwood lumber prices rose in Eastern Canada where Tembec is mostly located and fell in Western Canada where Canfor is mostly located. The companies had different business plans, capital and lending resources, and different customers.

Time that the Tribunal would have to spend reviewing evidence relevant to the other Claimants is time lost in the resolution of Tembec's claims, which would be equally true for the other Claimants when evidence pertaining to Tembec is under review. The Claimants potentially would be competing with one another within the proceeding, as the damage claims and related evidence would be subject to ongoing comparison by the Tribunal. They might be disadvantaged were they unable to cross-examine one another, a dilemma that could not arise in separate proceedings. Tembec would be particularly disadvantaged in such an environment where its two competitors are represented by the same counsel.

The United States' reference to Canfor and Tembec being co-complainants in the Chapter 19 proceedings is irrelevant and inaccurate. They both appealed final dumping determinations because they were both mandatory respondents. In that appeal there was no discovery, no witnesses, and indeed no submission of evidence outside the administrative record established below.

F. Consolidation Would Not Be Efficient Even Were Commonality Found Among Claims For Liability

The analysis of damages will necessarily be unique for each of the Claimants, based on their distinct business models, corporate structures, and ownership of investments in the United States. Damages could be addressed only in separate

tribunals. Thus, the Article 1120 tribunals will have to retain jurisdiction of damages issues regardless of what this Tribunal decides as to consolidation of the jurisdiction and liability phases of Claimant's claims.

The Tribunal should decline to assume jurisdiction of the liability phases out of concern for the efficient resolution of claims for damages. The liability awards will have a significant impact on the way that damages are determined. The analysis of damages awards would be performed more efficiently were they performed by the same tribunal because the tribunal already would have understood (and agreed with) the decided theory as to the way in which breaches of Chapter 11 affected the Claimants. The Article 1120 tribunals' analyses of damages awards would become more difficult, costly, and inefficient were they to have been divorced from making awards on liability. Were the liability phase consolidated and assumed by this Tribunal, the Article 1120 tribunals that follow to determine damages awards would have to become completely familiar with a different tribunal's reasoning on liability. Again, the objective of reduced effort would be reversed.

The interests of fair and efficient resolution of claims especially weigh against consolidation of liability issues in the event the Tribunal does not consolidate the jurisdictional phases. It would waste the resources of the parties for the Tribunal to assume jurisdiction over the middle piece of Claimants' claims.

G. Tembec Should Not Bear Through Consolidation The Burdens Of The United States' Frustrations With Canfor And Terminal

The United States is openly frustrated with procedural developments in *Canfor* and *Terminal*. The United States admits to strategizing that, rather than consolidating Tembec's and Canfor's cases, it would obtain a decision from the Canfor

Tribunal first that Article 1901(3) bars claims under Chapter 11 (the United States apparently presumed a favorable outcome), and then introduce that decision in proceedings against Tembec and Terminal to dismiss those claims. [63] The United States did all that it could to delay presentation of arguments on jurisdiction in Tembec's case, even though the United States says it believed the jurisdictional issues to be identical, so that it could obtain a decision first from the *Canfor* Tribunal.[64]

The United States' strategy went awry. Canfor's case took longer than expected, and then the conflict of interest issue arose involving Mr. Harper. His withdrawal from the *Canfor* Tribunal meant that the *Canfor* decision might be delayed too long to be introduced to the *Tembec* Tribunal. It also changed the United States' calculus of how the *Canfor* Tribunal might rule, based on the exchanges between the parties and the *Canfor* Tribunal at the December 2004 hearing. Therefore, the United States shifted its strategy and decided to move for consolidation of all of the claims, force a rehearing of all of the arguments, and introduce new objections to jurisdiction against Canfor that it failed to raise earlier.

The United States also is apparently frustrated that Terminal has taken no action on its Notice of Arbitration.[65] Terminal's apparent strategy has been to wait for a decision from the *Canfor* or *Tembec* Tribunals before deciding to proceed. Were the Tribunals to have decided either on jurisdictional grounds or the merits that there was no basis for a Chapter 11 claim, Terminal presumably would not have wasted money

[63] 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. (June 3, 2005) at 21-22.

[64] *See* Section II.B, *supra*.

[65] 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. (June 3, 2005) at 19.

pursuing its claim. However, were the tribunals to decide that a Chapter 11 claim was sustainable, then Terminal probably would have proceeded with its case. The United States particularly seems bothered by the fact that Terminal should employ this strategy while it is being represented by the same lawyers representing Canfor.

Terminal's strategy of waiting for the first decision and then presuming that decision would influence subsequent claims was no different, and therefore no less fair or efficient, than the United States' original strategy. However, now that the United States' original strategy of obtaining an early decision in *Canfor* did not play out as the United States might have hoped, the United States has requested consolidation, arguing that it would be unfair to allow Terminal to wait for another tribunal's decision before taking action.

Tembec recognizes that counsel must make strategic decisions in the course of litigation and that the strategy behind those decisions may change, but counsel and their clients should bear their own costs and burdens of those choices. It is neither fair nor efficient for the resolution of Tembec's claims that Tembec bear the burden of the United States' frustration with changing strategies in the cases against Canfor and Terminal.

Consolidation with Tembec would not eliminate the unfair burden of the "free-rider" that the United States perceives with Terminal, but merely would shift that burden to Tembec. Even were Terminal seen by the Tribunal as acting any differently than the United States acted in deciding whether to proceed based on the first tribunal decisions issued, Tembec at least, who is demonstrably committed to proceeding with its claims, should not bear the burden of making the case for any "free-rider" claimant.

The proposal for the organization of the hearing on consolidation already reflects this problem. Tembec is to be sandwiched between Canfor and Terminal, even as Canfor and Terminal are represented by the same counsel who are yet to distinguish a single interest or argument between the two in all of the submissions made since the United States moved to consolidate, at least as of the time of this submission.

The United States had the opportunity to request consolidation when it first learned of the three cases, well before the parties incurred significant expenses meeting with tribunals, sorting out procedures and rules, briefing and, in Canfor's case, arguing about the U.S. objections to jurisdiction in a hearing. It chose a different strategy that apparently now it regrets. It would be neither fair nor efficient for this Tribunal to impose on Tembec or the other Claimants the costs of the United States' change in litigation strategy.

VIII. THE ALLEGED RISK OF INCONSISTENT DECISIONS IS NO BASIS FOR CONSOLIDATION

What the United States seeks from this Tribunal is beyond the Tribunal's authority to give. The Tribunal could consolidate these proceedings, but it could not prevent the risk of inconsistent decisions. There is no *stare decisis* in NAFTA Chapter 11 claims, nor in international arbitration generally.[66] Article 1136(1) states that "[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case." The term "Tribunal" as used there

[66] *See SGS Societe Generale de Surveillance S.A. v. Republic of the Philippines*, ICSID Case No. ARB/02/6 (Jan. 29, 2004) at ¶ 97 http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf (explaining that there is "no doctrine of precedent in international law," "no hierarchy of international tribunals," and "no good reason for allowing the first tribunal in time to resolve issues for all later tribunals").

includes Article 1126 tribunals.[67] The consequence of Article 1136(1) is that any tribunal can reach a different decision than the decision of a prior tribunal, reviewing a similar case, even if the prior tribunal were an Article 1126 tribunal. This Tribunal is not and cannot become an appellate body ruling authoritatively on one type of claim. NAFTA makes no provision for it, nor does it make any provision for "risk of inconsistent decisions" within the legal standard that the Tribunal must apply to determine the question of consolidation.

A. The Risk Of Inconsistent Decisions Is Immaterial To The Question Of Consolidation

Neither Article 1126 nor any part of NAFTA supports the view that the risk of inconsistent decisions among different arbitral tribunals should be averted. The risk of inconsistent decisions does not factor into NAFTA's legal standard for consolidation. The legal standard in Article 1126 requires the Tribunal to consider whether there is "a question of law or fact in common" and whether consolidation is "in the interests of fair and efficient resolution of the claims," in addition to any of the UNCITRAL Arbitration Rules, such as Article 21(3), that may apply. The risk of different or inconsistent decisions is conspicuously absent from Article 1126 and has no bearing on the question of consolidation.

B. Consolidation Will Not Obviate The Risk Of Inconsistent Decisions

Even were the Tribunal to consolidate these cases and to award damages to each of the Claimants, nothing would guarantee that all the Claimants would receive the same awards, or that other claimants bringing similar claims in the future would find the same success in front of a different tribunal. A different tribunal could rule differently

[67] *See* Article 1139, definition of "Tribunal."

for any number of reasons, and there is no basis in NAFTA or in the UNCITRAL Rules to expect or command uniformity or consistency.

C. All Of The Parties Already Have Assumed The "Risk" Of Inconsistent Decisions

The United States presupposes that there is some harm from inconsistent decisions. Tembec does not agree, but even were the United States correct, all of the parties to this proceeding, including the United States, already assumed the risk of such harm.

Canfor, Tembec and Terminal all have had the right to request consolidation under Article 1126,[68] yet none of them has chosen to do so. Canfor and Tembec pursued their claims before different Article 1120 tribunals, fully aware that the different tribunals might produce different decisions. Terminal has waited to initiate formation of an Article 1120 tribunal rather than seek consolidation, knowing it may not see consistent decisions come out of the *Tembec* and *Canfor* Tribunals.

The United States had all three claims in its possession for nearly a full year before it requested consolidation on March 7, 2005, and had both the Canfor and Tembec claims in its possession as early as December of 2003. The United States was asked repeatedly about its intent to consolidate claims, and repeatedly stated that it did not intend to consolidate.[69]

[68] In that event, an Article 1126 tribunal still would have had to apply the legal standard for consolidation. Consolidation would have been no more likely or appropriate were it requested by a Claimant, rather than by the United States here.

[69] *See* Section II.B, *supra*. The United States' argument that it was keeping its options for consolidation open while it denied for over a year any intention to consolidate should not be countenanced by this Tribunal. The belated request for consolidation, with all of the procedural delay and expense involved, is prejudicial. Claimants would not have devoted time and resources to the United States' jurisdictional objections before Article 1120 tribunals only to have the United States renew those objections before a different tribunal.

The risk of inconsistent decisions did not bother the United States on December 15, 2004—just one week after the United States concluded its hearing on jurisdiction in *Canfor*—when it chose to raise additional objections to jurisdiction in its Statement of Defense against Tembec than it raised against Canfor. The United States' decision to claim Articles 1101 and 1121 as objections to jurisdiction against Tembec, which it did not raise against Canfor, was an affirmative step taken by the United States toward ensuring that, at minimum, the written awards of the Article 1120 tribunals in those two cases would be different, if not also the outcomes for the two cases. The United States assumed the same risk as the other parties until it changed strategies in March 2005, and now should be estopped from arguing that there is a risk of inconsistent decisions from the Article 1120 tribunals that must be avoided by consolidation.

Any problem associated with the risk of different decisions on jurisdiction is a problem created by the United States. The Claimants should not be compelled to bear the burdens of both the problem created by the United States, and the remedy (consolidation) that it now would impose.

D. The *CME* Case And Accompanying Literature Cited By The United States Are Irrelevant Where There Is No Affiliation Among The Claimants

The United States points to the *CME v. Czech Republic* and *Lauder v. Czech Republic* cases, and articles about those cases, to demonstrate the problem presented by "inconsistent" decisions. But there is a material difference between those cases and what the United States seeks to do here through a request for consolidation. The claimants in *CME* and *Lauder* were affiliated: Ronald Lauder was the controlling shareholder in CME Media Ltd., and the claimant in CME was a holding company that

was part of the CME Media Ltd. Group. One might have reason to debate the merits of a company and its shareholder or affiliate bringing claims on the same set of facts to different arbitral tribunals, but that scenario is inapplicable here.

Tembec is not affiliated with Canfor or with Terminal. It is instead a fierce competitor. The ways in which the United States breached its obligations to each of the Claimants, and the ways in which Claimants sustained damages from those breaches, are different, unlike the case of a company and its shareholder bringing separate suits on the same facts.

The *CME* cases were decided within the last five years, long after the NAFTA Parties negotiated Chapter 11. The United States has given no evidence that the NAFTA Parties intended consolidation to prevent the risk of inconsistent decisions.

The Wolfgang Kuhn article provided by the United States entitled "How to Avoid Conflicting Awards" does not support the United States' arguments for consolidation. Kuhn's article focuses first on the extent to which *lis pendens/res judicata* should apply in international arbitration.[70] *Lis pendens* and *res judicata* cannot apply for purposes of consolidating the Claimants' claims because Canfor, Tembec and Terminal are not the same parties.

Kuhn notes that the Czech Republic failed to raise a jurisdictional defense of *res judicata* and that the *CME* tribunal as well as the reviewing Swedish court confirmed that the jurisdictional defense was therefore waived.[71] Kuhn explains that waiver of the *lis pendens/res judicata* defense may require conflicting awards from

[70] Wolfgang Kuhn, *How to Avoid Conflicting Awards: The* Lauder *and* CME *Cases*, 5:1 J. World Inv. & Trade 7 (Feb. 2004) at 7-10.

[71] *Id.* at 9-10.

different tribunals.[72] As to Canfor, the United States cannot reassert through consolidation jurisdictional defenses that it previously neglected. Nor can the United States now raise the jurisdictional plea of consolidation when it failed to raise that plea in its Statements of Defense before the Article 1120 tribunals.

Kuhn argues that the *lis pendens/res judiciata* defense would not have applied to CME and Lauder because, even though the two claimants were affiliated, there was no common identity between the parties in the two cases.[73] Tembec has no common identity or affiliation with Canfor or Terminal.

Kuhn raises the question of whether there is any need at all for "unanimous decisions of arbitral tribunals" and points to the fact that "[e]ven in state court proceedings, a uniform jurisprudence is not safeguarded in the details."[74] Kuhn concludes: "To me, there is no need for uniform arbitral jurisprudence which could justify the institution of an international arbitral court which would circumvent the character of arbitration, a proceeding which is dominated by the parties' liberty and is an alternative to the extremely regulated and time-consuming proceedings before state courts."[75] The United States' attempt to turn this Tribunal into an appellate-type court, ignoring the parties' liberty to choose their own tribunals and present their own claims independently, with *stare decisis* authority, is an abuse of Article 1126 and should be rejected.

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[72] *Id.* at 10.

[73] *Id.* at 11.

[74] *Id.* at 16.

[75] *Id.* at 17.

IX. CONCLUSION

The United States slept on rights to seek consolidation for more than a year. During that time, when asked, it said either that it was reserving its right or, more affirmatively, that the right would not be exercised. During that time, Claimants invested substantially in their separate claims, and the United States defended itself against the claims with different arguments and in different ways. Then, on the eve of first and critical decisions, the United States aggressively rushed to stay proceedings, avoid decisions, and demand a costly do-over.

The request for consolidation is out of time. It is procedurally defective. The United States has misrepresented its merits. It solves nothing for the Claimants, serves only the interests of the United States, and promises to create boundless complexity and expense. There is no basis, in law or equity, for granting the United States' request, and the Tribunal should not require Tembec to bear any of the costs and fees associated with of this arbitration.

Respectfully submitted,

/S/

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