

In the Consolidated Arbitration Pursuant to Article 1126
of the North American Free Trade Agreement (NAFTA)
and the UNCITRAL Arbitration Rules
between

CANFOR CORPORATION
V.
UNITED STATES OF AMERICA

TEMBEC *ET AL.*
V.
UNITED STATES OF AMERICA

AND

TERMINAL FOREST PRODUCTS LTD.
V.
UNITED STATES OF AMERICA

JOINT ORDER
ON THE
COSTS OF ARBITRATION
AND FOR THE
TERMINATION OF CERTAIN ARBITRAL PROCEEDINGS

Before the Arbitral Tribunal established under Article 1126 of the NAFTA and
comprised of:

Professor Armand L.C. de Mestral, Arbitrator
Davis R. Robinson, Esq., Arbitrator
Professor Albert Jan van den Berg, Presiding Arbitrator

Secretary of the Tribunal:
Mr. Gonzalo Flores, ICSID

Washington, D.C., 19 July 2007

**Representing the United States
of America:**

Mr. Mark A. Clodfelter

Assistant Legal Adviser

Office of the Legal Adviser

Ms. Andrea J. Menaker

Chief, NAFTA Arbitration Division

UNITED STATES DEPARTMENT OF STATE

Washington, DC 20520

United States of America

**Representing Canfor Corporation
and**

Terminal Forests Products, Ltd.:

Mr. P. John Landry

DAVIS & COMPANY LLP

2800-666 Burrard Street

Vancouver, British Columbia

Canada V6C 2Z7

and

Mr. Keith E. W. Mitchell

HARRIS & COMPANY

1400 – 550 Burrard Street

Vancouver, British Columbia

Canada V6C 2B5

Representing Tembec Inc.,

Tembec Investments Inc.,

and

Tembec Industries, Inc.:

Mr. Elliot J. Feldman

Mr. Mark A. Cymrot

Mr. Michael S. Snarr

Mr. Ronald J. Baumgarten

BAKER & HOSTETLER LLP

Washington Square, Suite 1100

1050 Connecticut Avenue, N.W.

Washington, D.C. 20036-5304

United States of America

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I. INTRODUCTION

1. To consider and decide on costs in international arbitration is a relatively simple exercise. Not so in this case. The controversy between Claimant Tembec, Inc., Tembec Investments, Inc., and Tembec Industries, Inc. (together, “Tembec”) and Respondent United States of America (the “United States”) over the allocation of costs has consumed unusual amounts of time and energy, not only by the two parties but by the Tribunal as well.
2. The allocation of costs as between Claimants Canfor Corporation (“Canfor”) and Terminal Forest Products Ltd. (“Terminal”) and Respondent United States, on the other hand, is a more mundane affair not only because of the express terms of the 12 October 2006 Softwood Lumber Agreement between the Governments of Canada and the United States and an annex thereto but also because of the actions subsequently taken by Canfor, Terminal and the United States, all as more fully explained in this Joint Order.
3. The costs debate between Tembec and the United States has required not less than four rounds of written submissions, a questionnaire of the Tribunal with more than twenty-five questions, answers by these two parties to those questions, and a separate hearing on the subject. That extensive pleading between the two may seem surprising in light of the amount of legal costs claimed by the United States: to wit, some US\$ 150,000 (not including reimbursement of its advances on costs). This amount may be contrasted with the US\$ 242 million that was paid to Tembec within less than three weeks after the Softwood Lumber Agreement entered into force on 12 October 2006. However, the United States submits that this contentious issue between Tembec and the United States constitutes a matter of principle: the United States argues that it is entitled to costs “because Tembec abandoned its claim on the eve of the jurisdictional hearing . . . ,” and that the failure to award costs in favour of the United States under the circumstances

“would open the door to abusive tactics by future Chapter Eleven claimants.”¹
The issue also involves grave accusations by these two parties against each other. The United States contends that Tembec has misled the Tribunal, while Tembec asserts misrepresentation, undue influence, duress, coercion, and bad faith by the United States. Those circumstances and accusations have thereby necessitated an order on costs of an extraordinary length.

4. As an introductory matter, the Tribunal notes that, by its Order of 10 January 2006, the Tribunal terminated these NAFTA Article 1126 consolidated proceedings with respect to Claimant Tembec, save for the costs of arbitration, as further described herein. Thus, this final Joint Order of the Tribunal constitutes both (i) an order for the termination of the arbitral proceedings with respect to the other two Claimants, Canfor and Terminal, as well as with respect to the Respondent, the United States, and (ii) an order on the allocation of the costs of the consolidated arbitration with respect to the three Claimants and the Respondent.

II. RELEVANT COSTS PROVISIONS OF THE UNCITRAL ARBITRATION RULES

5. Before addressing the facts and procedure, it is useful to quote at the outset the relevant provisions contained in Articles 38 to 40 (“Costs”) of the UNCITRAL Arbitration Rules:

Article 38

The arbitral tribunal shall fix the costs of arbitration in its award.
The term “costs” includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;

¹ United States submission of 4 December 2006 at p. 10.

- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

Article 39

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.
2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.
3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.
4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after

consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

Article 40

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

III. BACKGROUND

A. Introduction

6. The initiation of the arbitration by Canfor, Tembec and Terminal and the subsequent proceedings are described in the Order of the Consolidation Tribunal of 7 September 2005 (the “Consolidation Order”).²

² Available online at: <http://www.state.gov/documents/organization/53113.pdf>, at ¶¶ 21-23.

7. In the Consolidation Order the Tribunal decided that it:

(1) ASSUMES JURISDICTION over all claims in the Article 1120 arbitrations *Canfor Corporation v. United States of America, Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. The United States of America*, and *Terminal Forest Products Ltd. v. The United States of America*, within the meaning of Article 1126(2)(a) of the NAFTA;

(2) DENIES Tembec's Motion to Dismiss of 27 June 2005; and

(3) RESERVES the decision on the costs of the present proceedings to a subsequent order, decision or arbitral award.

8. The reasons for Decision No. 3 quoted above are stated at ¶ 225 of the Consolidation Order:

The Tribunal reserves the decision on the award of costs of the present proceedings as referred to in Articles 38-40 of the UNCITRAL Arbitration Rules to a subsequent order, decision or arbitral award, having regard to the fact that none of the parties has made submissions on costs. Reservation of the decision on costs is also appropriate in light of the alternative relief sought by Canfor and Terminal in their reply post-hearing brief to the effect that, if consolidation is ordered, "the United States should be ordered to pay Canfor and Terminal's costs that have been thrown away by virtue of the United States having been dilatory in bringing this consolidation application," [footnote omitted] to which relief the United States has not had an opportunity to respond because of the timing of the relief sought.

9. Three months later, on 17 December 2005, the Tribunal issued Procedural Order No. 1.³ The Preamble of the Order gives an overview of the procedure and the circumstances as a result of which it took more than three months after release of the Consolidation Order to issue the Procedural Order. The Order itself is concerned with a preliminary and separate phase of the proceedings with respect to

³ Available online at: <http://www.state.gov/documents/organization/58579.pdf>.

the objection raised by the United States on the basis of Article 1901(3) of the NAFTA⁴ against the Claimants' NAFTA Chapter Eleven claims.

B. The Costs Dispute, Especially as between Tembec and the United States

10. In the meantime, by letter of 7 December 2005, Tembec advised that:

Tembec removes its Statement of Claim from these Article 1126 arbitration proceedings, and is filing in U.S. District Court for the District of Columbia a notice of motion to vacate the Tribunal's decision and order of September 7, 2005, which terminated Tembec's Article 1120 arbitration proceedings,

and requesting that:

the Tribunal order its Secretary to terminate the Article 1126 proceedings as to Tembec, and make a final accounting of arbitration fees and costs up until today's date.

11. As previously noted, on 10 January 2006, the Tribunal issued a Termination Order with respect to Tembec in which it decided:

1. Termination

1.1 The Tribunal hereby terminates the present proceedings with respect to Tembec, subject to the provisions of this Order, considering that Canfor, Terminal and the United States have not raised justifiable grounds for objection as provided in Article 34(2) of the UNCITRAL Arbitration Rules. The United States has not shown to the satisfaction of the Tribunal that this Tribunal has the competence referred to in Sub-section 1.3 below and, as a consequence, the United States has not raised a justifiable ground for objection.

⁴ Article 1901(3) of the NAFTA provides: "Except for Article 2203 (Entry into Force), no provision of any other Chapter of this Agreement shall be construed as imposing obligations on a Party with respect to the Party's antidumping law or countervailing duty law."

1.2 The Tribunal rejects Tembec's request in its letter of 7 December 2005 that "the Tribunal order its Secretary to terminate the Article 1126 proceedings as to Tembec . . ." since the power to terminate pertains to the Tribunal.

1.3 The Tribunal does not declare the termination referred to in Sub-section 1.1 above either with prejudice to reinstatement or without prejudice to reinstatement of Tembec's NAFTA claims as filed in its Notice of Arbitration and Statement of Claim on 3 December 2004, considering (i) that neither any of the provisions of Chapter 11 of the NAFTA nor Article 28(1) or Article 34(2) or any other provision of the UNCITRAL Arbitration Rules confers upon the present Tribunal competence to issue such a declaration; and (ii) that the question whether or not the termination as to Tembec is with or without prejudice to reinstatement is to be considered and decided upon by the Article 1120 tribunal, if any, to which Tembec may resubmit the aforementioned NAFTA claims, notwithstanding, *inter alia*, the provisions of Article 1121(1)(b) of the NAFTA, Tembec's waiver made thereunder and the provisions of Article 1126(8) of the NAFTA.

2. Costs

2.1 The Tribunal will determine at an appropriate time whether, and if so to what extent and in which manner, Tembec is to bear the costs of arbitration referred to in Articles 38 through 40 of the UNCITRAL Arbitration Rules, considering (i) that the Tribunal reserved its decision concerning costs to a subsequent order, decision or arbitral award in Decision No. 3 of the Consolidation Order of 7 September 2005; (ii) that the United States requested in its letter of 13 December 2005 "the opportunity to make a submission detailing its costs in defending against Tembec's claim;" and (iii) that Canfor, Tembec and Terminal have not made a submission on the question of costs as to Tembec either.

2.2 For the purposes of the determination referred to in Sub-section 2.1 above, the Tribunal will invite Tembec, Canfor, Terminal and the United States to submit their views in a manner and according to a schedule to be determined by the Tribunal in consultation with Tembec, Canfor, Terminal and the United States.

2.3 Accordingly, at present, the Tribunal rejects Tembec's request in its letter of 7 December 2005 that "the Tribunal order its Secretary to . . . make a final accounting of arbitration fees and costs up until today's date" and to "provide a refund to Tembec of any remaining balance of the deposit paid."

3. Competence

3.1 The Tribunal notes the pendency of Tembec's Petition and Notice of Motion to Vacate Arbitration Award, i.e., the Tribunal's Consolidation Order of 7 September 2005, filed with the United States District Court for the District of Columbia on 7 December 2005.

3.2 In regard of Sub-section 3.1 above, the Tribunal further notes that it is unaware of any applicable existing international or national law or other governing circumstance that affects the Tribunal's competence to decide any matters before it, including but not limited to the issuance of this Order for Termination of the present proceedings with respect to Tembec.

12. The Article 1126 proceedings thereafter continued only with Canfor, Terminal and the United States, subject, however, to the reservation for costs in the previously recited Tembec Termination Order. A hearing on the preliminary question referred to in ¶ 9 above was held in Washington on 11-12 January 2006.
13. On 7 February 2006, Tembec filed a "Motion to Vacate Arbitration Award" and a Memorandum in support of the Motion with the U.S. District Court for the District of Columbia, seeking a setting aside of the Consolidation Order.⁵
14. Canfor, Terminal and the United States filed Cost Submissions in the present NAFTA Article 1126 proceedings on 7 April 2006. The Submission on Costs of the United States was accompanied by witness statements of Mr. Gregory K. Holobaugh (Budget Analyst in the Office of the Executive Director of the Legal

⁵ Civil Action No. 05-2345. Available online at: <http://www.state.gov/documents/organization/64890.pdf>.

Adviser's Office at the United States Department of State); Ms. Andrea J. Menaker (Chief of the NAFTA Arbitration Division of the Office of International Claims and Investment Disputes in the Legal Adviser's Office at the United States Department of State); and Ms. Mary T. Reddy (Personnel Officer and Attorney Recruitment Coordinator in the Office of the Executive Director in the Legal Adviser's Office at the United States Department of State).

15. On 6 June 2006, the Tribunal rendered a Decision on the Preliminary Question.⁶ Having recalled the procedural history described above, the Tribunal stated in that Decision: "Tembec is no longer a party to the present proceedings, subject to the matter of costs."⁷

16. In the Decision on the Preliminary Question of 6 June 2006, the Tribunal decided that it:

(1) DETERMINES that Article 1901(3) of the NAFTA establishes that the United States did not consent to arbitrate under Chapter Eleven the claims of Canfor and Terminal filed in *Canfor Corporation v. United States of America* and in *Terminal Forest Products Ltd. v. The United States of America*, respectively, except to the extent that they concern the Byrd Amendment;

(2) DECLARES to lack jurisdiction over the claims of Canfor and Terminal filed in *Canfor Corporation v. United States of America* and in *Terminal Forest Products Ltd. v. The United States of America*, respectively, except to the extent that they concern the Byrd Amendment; and

(3) RESERVES the decision on the costs of the present phase of the proceedings to a subsequent order, decision or arbitral award.

17. The reasons for Decision No. 3 quoted above are stated at ¶ 351 of the Decision on the Preliminary Question:

⁶ Available online at: <http://www.state.gov/documents/organization/67753.pdf>.

⁷ At ¶ 28.

Canfor, Terminal and the United States filed cost submissions on 7 April 2006. The Tribunal reserves the decision on the award of costs of the present proceedings as referred to in Articles 38-40 of the UNCITRAL Arbitration Rules to a subsequent order, decision or arbitral award, having regard to the fact that this decision will depend on the next phase or phases of the proceedings as to which of the parties is to bear the costs or whether costs should be apportioned between the parties. Moreover, costs related to Tembec need to be addressed by affording Tembec an opportunity to present its case regarding costs.⁸

18. In the meantime, the Governments of Canada and the United States had engaged in settlement discussions regarding the Softwood Lumber Dispute. On 1 July 2006, in Geneva, the Minister of International Trade of Canada, Mr. David Emerson, and the United States Trade Representative, Ms. Susan Schwab, initialed a text that was to become the 2006 Softwood Lumber Agreement (hereinafter the “SLA 2006”). The initial text was subject to a “legal scrub.”⁹ The text of the SLA 2006 contemplated the termination of all actions (the “Covered Actions”) set out in paragraph 1 of a Termination of Litigation Agreement (hereinafter the “TLA”), annexed to the SLA 2006, upon entry into force of the SLA 2006, and provided for participants in the Covered Actions, by their signing of the TLA, to consent in advance to termination of each Covered Action if certain conditions were subsequently met.
19. Accordingly, on 8 September 2006, the Canadian Trade Law Bureau (hereinafter the “CTLB”) and the United States Trade Representative (hereinafter the “USTR”) jointly sent copies of the TLA to representatives of all parties and participants to twenty “Covered Actions” set out in paragraph 1 of the TLA attached to the letter,

⁸ The accompanying footnote 369 reads: “*See* Termination Order of 10 January 2006, ¶ 27 *supra*, at ¶ 2.”

⁹ Letter of 8 September 2006 from the Canadian Trade Law Bureau the United States Trade Representative, ¶ 19 *infra*, footnote.

requesting that they execute the TLA and return it by 20 September 2006.¹⁰ One of the recipients of the 8 September letter was Tembec’s counsel, Mr. Elliot J. Feldman of the law firm Baker Hostetler, LLP, who also represented a large number of other softwood lumber companies (as was shown on the second signature page of the attached TLA). The TLA consisted of thirteen signature pages containing fifty-two signature blocks, while paragraph 12 provided that the TLA “may be executed in counterparts.” The twenty Covered Actions included:

....

Tembec et al. v. United States (Consol. Ct. No. 05-00028 (CIT)) and the cases consolidated therein;¹¹

....

Tembec et al. v. United States (Civil Action No. 05-2345 (U.S. District Ct. for the District of Columbia));¹²

....

NAFTA Chapter 11 claim of *Tembec Inc., Tembec Investments Inc., and Tembec Industries Inc. v. United States of America* (collectively “Tembec”); and

The Consolidated Arbitration Pursuant to Article 1126 of the North American Free Trade Agreement (NAFTA) and the UNCITRAL Arbitration Rules between Canfor Corporation v. United States of America and Terminal Forests Products Ltd. v. United States of America.

¹⁰ Annex A to the United States’ submission of 29 January 2007.

¹¹ A three-judge panel constituted at the United States Court of International Trade (hereinafter the “CIT”) had ruled on 21 July 2006 that the antidumping and countervailing duty orders imposed in May 2002 by the United States were not supported by a valid injury determination.

¹² See ¶ 13 *supra*.

20. Paragraph 5 of the TLA provided:

No party to this Termination Agreement shall seek to hold any other party liable to pay its costs and expenses of litigation relating to the Covered Actions.

21. In the letter of 8 September 2006, the recipients were asked to do, *inter alia*, the following:

You are either counsel for, or an authorized representative of, one or more parties or participants to one or more Covered Actions. The TLA, two copies of which are enclosed, therefore provides a designated line for your signature. We ask that you indicate you client's (or clients') agreement to the termination of the actions to which they are a party by signing and dating, on the line above your name, each copy of the TLA and returning your signature pages to the Government of Canada and the Government of the United States. (In accordance with paragraph 12 of the TLA, it is being signed in counterpart.)

22. On 12 September 2006, Canada and the United States executed the SLA 2006.¹³ As mentioned above, Article II ("Entry into force") provided in relevant part:

1. The SLA 2006 shall enter into force on a date designated by the Parties in an exchange of letters (the "Effective Date"). The exchange of letters shall confirm that:

(a) the Termination of Litigation Agreement in Annex 2A has been signed:

(i) by counsel on behalf of all represented parties and participants to the actions set out in the Termination Agreement, and

(ii) by authorized representatives of any unrepresented parties or participants to the actions set out in the Termination Agreement;

¹³ Annex (i) to the United States' letter to the Tribunal of 16 November 2006; *see* ¶ 60 *infra*. Available online at: <http://www.international.gc.ca/eicb/softwood/pdfs/SLA-en.pdf>.

....

23. Annex 2A to the SLA 2006 contained the TLA sent to the parties and participants in the twenty Covered Actions on 8 September 2006. The copy of the TLA set forth in the Annex to the SLA 2006 had the caption “Annex 2A,” which caption was lacking on the version sent on 8 September 2006.
24. By facsimile dated 20 September 2006, Mr. Feldman wrote to DFAIT¹⁴ (Ms. Meg Kinnear) and USTR (Mr. James Mendenhall)¹⁵:

Dear Meg and Jim:

We will not be able to return to you today the form provided with your letter of September 8, 2006. As I explained to Hugh Cheetham [of DFAIT] by phone a couple of days ago, our fiduciary duties run specifically to each client in each matter, and we are unable, therefore, to act for all clients in all matters in common. Moreover, we do not represent all of our clients in all of the cases listed on your form

I must further note that we will not be responding on behalf of all clients today. Some are instructing us to act on their behalf today; others, especially the Associations that have complex procedural requirements, are not ready or have not taken decisions as to every litigation matter.

Finally, all of our letters, each addressing each matter for each client, may not be the same. In some instances we are receiving instructions that involve conditions that must be added, and in some instances clients are declining to subscribe to all of the terms of termination as set out in the form

25. Attached to the 20 September facsimile were seventeen individual forms, each captioned “Annex 2A – Termination of Litigation Agreement,” and each addressing one of the twenty Covered Actions set out in the TLA annexed to the

¹⁴ The abbreviation “DFAIT” stands for: Department of Foreign And International Trade, Canada.

¹⁵ Exhibit B of the United States’ submission to the Tribunal of 4 December 2006.

SLA 2006 (pages 6-41 of the facsimile). Some forms mentioned several companies, others a single company. Ten of the forms were signed by Mr. Feldman on behalf of Tembec Inc. These forms relating to Tembec concerned each a Covered Action, including at pages 40-41 of the facsimile:

NAHA [*sic*] Chapter 11 claim of *Tembec Inc., Tembec Investments Inc., and Tembec Industries Inc. v. United States of America* (collectively “Tembec”).

26. As mentioned in Mr. Feldman’s 20 September facsimile, a number of the forms signed by him had provisions that differed from the TLA submitted by CTBL and USTR on 8 September 2006. The forms relating to Tembec, for example, contained an added condition to the effect that the Government of Canada irrevocably committed to pay Tembec Inc. no later than 60 days after the date that the SLA 2006 entered into force at least 90 percent of the amount to be paid to Tembec Inc. (paragraph 2(d)). Paragraph 5 of the forms included the provisions on costs identical to paragraph 5 of the TLA quoted at ¶ 20 above, except that the expression “Covered Actions” was put in the singular: “Covered Action.”
27. As noted in ¶ 63 of this Joint Order, the Tribunal only received a copy of Mr. Feldman’s explanatory 20 September cover facsimile letter on 4 December 2006, and not from Tembec or its counsel but rather by means of an attachment to a letter of that date from the United States to the Tribunal.
28. The Tribunal invited Tembec to make its submissions on the costs of the arbitration on or before 15 September 2006 by letter of 1 September 2006. In the letter, the Tribunal referred, *inter alia*, to the press reports according to which the Softwood Lumber Dispute was in the process of being settled, and noted that Canfor, Terminal and the United States had already sufficiently set out their position regarding the costs of the proceedings in the Cost Submissions of 7 April 2006.

29. As the Tribunal explained at the hearing on costs held at the seat of ICSID in Washington, D.C., on 31 January 2007, due to a clerical error at ICSID and unbeknownst to the Tribunal, the 1 September letter was not transmitted to Tembec.¹⁶ Having discovered the miscommunication, a letter with the same content was sent by the Secretary, on instructions of the President of the Tribunal, to Tembec on 22 September 2006, the time limit to file its submissions on the costs of the proceedings now having been set at 6 October 2006.
30. On 24 September 2006, the U.S. District Court for the District of Columbia ordered a stay of the action seeking to vacate the Consolidation Order and further ordered that “the parties submit a joint status report concerning the status of the international agreement between the United States and Canadian governments” no later than 22 December 2006.¹⁷
31. In a press release of 29 September 2006, Canada advised that Canada and the United States agreed to extend the entry-into-force date of the SLA 2006 to “no later than November 1, fulfilling a commitment to assist Canadian companies as they finalize implementation issues.”¹⁸ It was also noted in the press release: “The limited extension comes after close consultation with and in direct response to requests from industry. It should have no impact on the swift return of billions of dollars to Canadian softwood producers.”
32. On 5 October 2006, Tembec renewed its request to the CIT in the matter *Tembec et al. v. United States* (Consol. Ct. No. 05-00028 (CIT))¹⁹ that the Court resolve

¹⁶ Tr. pp. 61-63.

¹⁷ Exhibit A-1 to Tembec’s submission to the Tribunal of 30 January 2007.

¹⁸ Exhibit B-1 to Tembec’s submission to the Tribunal of 30 January 2007.

¹⁹ See n. 11 *supra*.

the remedies issues as soon as it practically can. In the letter, Mr. Feldman wrote on behalf of Tembec to the CIT,²⁰ amongst other things:

Even though 120 days have elapsed since the United States requested a 90-day stay, no settlement has been finalized, and resolution of the remaining settlement issues is not imminent. The Governments of the United States and Canada have agreed on a settlement subject to a number of significant conditions precedent that remain unsatisfied. Although the two Governments had hoped that these preconditions would be met by October 1, 2006, they have now recognized and agreed that, at a minimum, at least another month will be required, a new timetable that may also prove to be optimistic.

33. The Tribunal learned of Mr. Feldman's 5 October 2006 letter to the CIT not from Mr. Feldman or from Tembec but rather from the United States which attached a copy of this letter to its own letter to the Tribunal of 13 October 2006.
34. Mr. Feldman's letter of 5 October 2006 to the CIT was not accompanied by a copy of the form attached to the 20 September facsimile concerning the Covered Action "*Tembec et al. v. United States* (Consol. Ct. No. 05-00028 (CIT)) and the cases consolidated therein" (pages 34-35 of the facsimile) and signed by Mr. Feldman on 20 September 2006.
35. One day later, on 6 October 2006, Mr. Feldman wrote on behalf of Tembec to this Tribunal in response to the invitation of 22 September 2006 (see ¶ 27 above). Again, in this letter of 6 October 2006 to the Tribunal, Mr. Feldman made no reference to the letter that he had dispatched the previous day to the CIT. In his 6 October 2006 letter, Mr. Feldman stated, amongst other things:

As explained below, any allocation of arbitration costs and expenses should be governed by a recent agreement between Tembec and the United States, which demonstrates the intent of

²⁰ Annex to the United States' submission to the Tribunal of 13 October 2006.

the two parties that neither party shall seek to recover its costs and expenses from the other party.

....

Annex 2A of the SLA is a “Termination of Litigation Agreement,” (“Termination Agreement”) according to which the parties to various legal actions in the *Softwood Lumber* dispute have agreed to terminate those actions, effective upon the SLA’s entry into force. The Governments of the United States and Canada requested Counsel for Tembec to sign a Termination Agreement on behalf of Tembec with respect to Tembec’s NAFTA Chapter 11 claim and its lawsuit in D.C. District Court seeking [to] vacate the Tribunal’s decision of September 7, 2005. We signed the Termination Agreement on Tembec’s behalf for both actions and returned the signed copies to the Governments of the United States and Canada as instructed on September 20, 2006. Pursuant to the terms of the Termination Agreement, upon the SLA’s entry into force, Tembec and the United States will have terminated their litigation as to Tembec’s NAFTA Chapter 11 claim and the related lawsuit in D.C. District Court. Copies of the Termination Agreement are attached hereto as Exhibit A.

Tembec has done all it can, under the terms of the SLA and the Termination Agreement, to enable the SLA to enter into force. We have not yet seen signed copies of the Termination Agreement from Counsel for the United States with respect to the two Tembec actions. However, all indications are that the United States will sign in furtherance of implementing the SLA. The Termination Agreement provides that it may be signed in counterparts, so it is possible that Counsel for the United States already have signed. We are unaware of whether Canfor or Terminal have signed Termination Agreements with respect to their Chapter 11 NAFTA claims. Their decisions whether to sign should have no effect on Tembec for purposes of allocating costs in the Consolidation Tribunal’s proceedings.

....

36. Various arguments were made in the 6 October letter. Tembec relied in particular on paragraph 5 of the Termination of Litigation Agreement according to which no party would hold any other party liable to pay its costs and expenses of litigation relating to the Covered Action (see ¶¶ 19 and 24 above).

37. In contrast to the 5 October letter to the CIT, Mr. Feldman's letter of 6 October 2006 to this Tribunal was accompanied, under Exhibit A, by a copy of two of the forms attached to the 20 September facsimile: one concerning the Covered Action "*Tembec et al. v. United States* (Civil Action No. 05-2345 (U.S. District Ct. for the District of Columbia))" and the other concerning the Covered Action "NAHA [*sic*] Chapter 11 claim of *Tembec Inc., Tembec Investments Inc., and Tembec Industries Inc. v. United States of America* (collectively 'Tembec'))" (pages 38-42 of the facsimile) signed by Mr. Feldman on 20 September 2006. While the copies in Exhibit A to the 6 October letter were labeled "Annex 2A – Termination of Litigation Agreement," they were not identical to the TLA set out in Annex 2A to the SLA 2006. That discrepancy was not mentioned in Mr. Feldman's cover letter to the Tribunal.
38. Also on 6 October 2006, the Governments of Canada and the United States filed a joint motion with the CIT for leave to submit a status report.²¹ In the motion, the Governments mentioned that on the same date they tentatively agreed to amendments to the SLA 2006 and that the "two governments currently expect that, pursuant to the amended Agreement, the Agreement will enter into force on October 12, 2006." Mr. Feldman was served a copy of the motion.
39. The TLA set forth in Annex 2A to the SLA 2006 was subject to further negotiations between Canada and the United States on their own behalf and on behalf of their nationals. In this regard, each of the two Governments consulted with their respective interested private nationals for the purpose of considering their concerns. Thus, in the case of Tembec, any such private contacts were held with the Government of Canada and not with the Government of the United

²¹ Annex E to the United States' submission to the Tribunal of 29 January 2007.

States.²² Those subsequent negotiations between the two Governments resulted in a Settlement of Claims Agreement (hereinafter “SCA”).²³ Paragraphs 1 and 2 of the SCA provide:

1. On the Effective Date of the Softwood Lumber Agreement 2006, this Settlement of Claims Agreement (Claims Settlement Agreement) will constitute a full and complete settlement of the claims asserted in the actions referenced in this paragraph. On the Effective Date, Canada and the United States shall file a joint stipulation of dismissal of Canada’s complaint in *Canada v. United States* (Ct. No. 05-00033(CIT)). Further, on the Effective Date:

The United States and Tembec Inc. and its affiliates shall file a joint stipulation of dismissal in *Tembec et al. v. United States* (Civil Action No. 05-2345 (U.S. District Ct. for the District of Columbia));

the United States shall withdraw its request for an Extraordinary Challenge in Certain Softwood Lumber Products from Canada, Secretariat File No. ECC-2006-1904-01USA; and

Canfor Corporation shall withdraw its claim against the United States in *Consolidated Arbitration Pursuant to Article 1126 of the North American Free Trade Agreement (NAFTA) and the UNCITRAL Arbitration Rules between Canfor Corporation v. United States of America and Terminal Forests Products Ltd. v. United States of America*.

2. In addition, on the Effective Date, Canada and the United States shall seek to dismiss the following actions:

²² With the limited exception of the text of the stipulation of dismissal of the action before the U.S. District Court for the District of Columbia, which was negotiated between Tembec and the United States on 10-12 October 2006, *see* ¶¶ 50-51 *infra*.

²³ Annex (iii) to the United States’ submission to the Tribunal of 16 November 2006; *see* ¶ 60 *infra*.

Certain Softwood Lumber Products from Canada (Original AD Investigation), Secretariat File No. USA-CDA-2002-1904-02;

Tembec v. United States (Consol. Ct. No. 05-00028 (CIT)) and the cases consolidated therein; and

Coalition for Fair Lumber Imports Executive Committee v. United States (Civil Action No. 05-1366 (D.C. Cir.)).

40. The SCA does not contain any reference to the NAFTA Chapter Eleven claim of Tembec or of Terminal, in contrast to the express mention of both claims in the TLA (see ¶ 19 above).

41. Paragraph 8 of the SCA contains a provision similar to paragraph 5 of the TLA:

No party to this Claims Settlement Agreement shall seek to hold any other party liable to pay its costs and expenses of litigation relating to any action referenced in this Claims Settlement Agreement.

42. The SCA had three signature pages, containing thirteen signature blocks (contrary to the TLA which consisted of thirteen pages containing fifty-two signature blocks, see ¶ 19 above).

43. On Wednesday, 11 October 2006 at 12:00 pm, Mr. Colin Bird of the Canadian Trade Bureau sent the following email to Canada's outside counsel in this matter, Ms. Jean Anderson at the law firm Weil, Gotshal & Manges, LLP, in Washington D.C., with copies to Mr. Hugh Cheetham of DFAIT and Mr. Jeff Weis of USTR, mentioning as subject "Settlement of Claims Agreement for Circulation to Counsel":

Please circulate the attached document to all counsel for Canadian parties listed therein. You can indicate that International Trade Canada has been in contact with their clients, who have indicated a willingness to sign this document. You can also indicate that they will need to return signed copies of their signature pages TODAY to Hugh [Cheetham] and Jeff

[Weiss] as per the instructions in the original instruction letter for the original TLA.²⁴

[capitals as in original text]

44. Mr. Feldman was one of the counsel to whom Ms. Anderson forwarded the SCA. She did so in the afternoon of the same Wednesday, 11 October 2006, in an email of 3:42 pm:

Attached is the Settlement of Claims Agreement that must be signed by the designated signatories before the SLA 2006 enters into force. As you know, that is expected to occur tomorrow, October 12. Consequently, signatures to the Settlement of Claims Agreement are needed today. As you undoubtedly know from your clients, in conversations with International Trade Canada, your clients have indicated their willingness to have this document signed on their behalf.²⁵

45. Mr. Feldman responded to Ms. Anderson by an email on the same day at 6:09 pm, writing, *inter alia*:

. . . . We anticipated a concern about Chapter 11, but having already signed Termination agreements in all other matters, we don't understand why we are confronting a lengthy and complex document involving other matters

As you have indicated that time is of the essence, perhaps you could lead us through the reasoning behind the Agreement so that we could understand better what we are being asked to sign. Especially perplexing is our inability to advise clients why these steps are required in view of the statements from the Government beginning last Friday that termination of litigation agreements no longer would be applicable to entry into force, recognizing that many had not been submitted and now may not be required pursuant to new but undisclosed amendments²⁶

²⁴ Annex C to the United States' submission to the Tribunal of 29 January 2007.

²⁵ *Id.*

²⁶ *Id.*

46. At 6:16 pm, Ms. Anderson sent Mr. Feldman and others “the final Settlement Agreement,” which contained a few corrections in comparison with the version sent in the afternoon, together with a redline version showing the changes.²⁷
47. At 6:18 pm, Ms. Anderson replied to Mr. Feldman’s email of 6:09 pm:
- Elliot -- the final document, with redline, have been sent to you. We do need signatures today. You (and everyone else) should feel free to call me with any questions. Jeanie.²⁸
48. Mr. Feldman sent Ms. Anderson an email at 6:20 pm, stating: “We will look at the document now, but perhaps you could send us an e-mail with a more detailed response to our queries.”²⁹ At 6:46 pm, Mr. Feldman sent Ms. Anderson another email, discussing the “without prejudice” clause and cross-references.³⁰
49. Mr. Feldman signed the SCA on behalf of Tembec Inc. and its affiliates later in the evening of 11 October 2006. In his facsimile,³¹ sent on 9:39 pm and 9:52 pm, Mr. Feldman wrote to Mr. Cheetham and Mr. Weiss:

Dear Hugh and Jeff:

Accompanying this facsimile, and enclosed with the original of this letter, is our signature page to the Settlement of Claims Agreement. I want to raise with you, nonetheless, as counsel to various clients in the *Softwood Lumber* dispute, three particular concerns.

First, this document was presented to us in final form for signature today around 6:00 P.M. We have had virtually no time to study it, and do not understand why we were given no notice

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ Exhibit D to the United States’ submission to the Tribunal of 4 December 2006.

that it was being prepared and were not consulted at all about its contents. Some of the drafting problems we believe might have been avoided had we been given notice, and had the Government then been willing to correct the errors called to its attention.

Second, among the errors, we note especially the inconsistency between paragraph 6 and paragraph 8 of Annex 2A³² of the signed Softwood Lumber Agreement. Annex 2A did not apply the contents of paragraph 9³³ in this agreement to the countervailing duty NAFTA appeal. We had proposed that paragraph 6 be modified, very very modestly, to retain consistency with Annex 2A, but our request was rejected.

We have heard two reasons for rejecting this request. The first is that the contents of paragraph 9 are now “boilerplate,” but objections were raised throughout the negotiations over the “without prejudice” clauses, communicating unambiguously to the Government that industry did not regard these clauses as boilerplate. The second is that the intended interpretation of this language is that each party retains their own position without prejudice.

We believe (our third concern), assuming this intended meaning, that the statement should have read, “A party’s signature on this Termination Agreement is without prejudice to the positions of that party in the Covered Actions.” On behalf of all our clients, including here especially Tembec, I am asserting that we interpret paragraph 9 to have this meaning – without prejudice to one’s own positions and no one else’s – within this Agreement.

50. At the same time and in contemplation of paragraph 1 of the SCA, Mr. Alexander Haas of the U.S. Department of Justice engaged in an email exchange with Mr. Feldman concerning the text of a stipulation of dismissal with prejudice to the

³² Paragraph 6 of Annex 2A provides: “This Termination Agreement is without prejudice to the position of any party on any issue in the Covered Actions.” Paragraph 8 of Annex 2A provides: “For the purposes of paragraphs 4, 5, and 7, *Certain Softwood Lumber Products from Canada (Original CVD Investigation)*, Secretariat File No. USA-CDA-2002-1904-03 shall be treated in the same manner as a Covered Action.”

³³ Paragraph 9 of Annex 2A provides: “This Termination Agreement may not be altered, amended, modified, or otherwise changed other than through the written agreement of all parties hereto.”

action seeking to set aside the Consolidation Order before the U.S. District Court for the District of Columbia.³⁴ The exchange was commenced by Mr. Haas on 10 October 2006 at 5:39 pm. On 12 October 2006, at 5:42 pm, he and Mr. Feldman reached agreement on behalf of the United States and Tembec, respectively, on the following text:

Pursuant to Fed. R. Civ. P. 41(a)(1), the parties herewith stipulate that this civil action brought by Tembec, Inc. Tembec Investments Inc., and Tembec Industries, Inc. (collectively Petitioners), against Respondent the United States of America is dismissed with prejudice, subject to the terms and conditions of the Softwood Lumber Agreement 2006. The parties agree that each will bear its own costs and attorneys fees.

51. With the permission of Mr. Feldman, Mr. Haas filed electronically the stipulation with the U.S. District Court for the District of Columbia on 12 October 2006 at 11:17 pm.³⁵ The District Court approved the stipulation on 17 October 2006.
52. In the evening of 12 October 2006, at around 11:10 pm, the Governments of Canada and the United States executed an agreement amending the Softwood Lumber Agreement” of 12 September 2006 (hereinafter “SLA 2006 Amendments”).³⁶ Two amendments merit to be mentioned here:
53. First, Article II(1)(a) of the SLA 2006, quoted at ¶ 21 above, was amended as follows:

ARTICLE I

Article II(1)(a) of the SLA 2006 shall be deleted and replaced by the following:

³⁴ Exhibit C to the United States’ submission to the Tribunal of 4 December 2006.

³⁵ Exhibit D to the United States’ submission to the Tribunal of 29 January 2007.

³⁶ Annex (ii) to the United States’ submission to the Tribunal of 16 November 2006; *see* ¶ 60 *infra*. Available online at: <http://www.international.gc.ca/eicb/softwood/pdfs/Agreementamending-en.pdf>.

“(a) the Settlement of Claims Agreement in Annex 2A has been signed by counsel on behalf of the parties set out therein;”

54. Second, the SLA 2006 Amendments added the following provision:

ARTICLE XI

Annex 2A [i.e., TLA] of the SLA 2006 shall be deleted and replaced by Annex 2A [i.e., the SCA].

55. Less successful was the United States’ motion to dismiss the CIT action (Consol. Court No. 05-00028), filed in the evening of 12 October 2006, as contemplated by paragraph 2 of the SCA, since the CIT denied the motion and granted Tembec’s motion for summary judgment, in a judgment of 13 October 2006.³⁷ By Motion for Reconsideration and to Vacate Tembec II dated 13 November 2006, the United States requested the CIT to vacate its judgment and dismiss the case as moot.³⁸
56. Tembec asserts that it learned of the amendments to the SLA 2006 only when they were made public in the course of 13 October 2006 and after it had signed the SCA on 11 October 2006 and agreed to the stipulation on 12 October 2006. But it is difficult for the Tribunal not to conclude that Tembec was aware of the increasing problems experienced by both Governments late in September of 2006 in seeking to implement the SLA 2006 and the TLA as drafted. Its counsel, Mr. Feldman, was aware of these difficulties as was evidenced in his letter of 5 October 2006 to the CIT, quoted in ¶ 32 above, which letter the United States disclosed to the Tribunal on 13 October 2006.
57. In this 13 October 2006 communication to the Tribunal, the United States submitted to this Tribunal a response to Tembec’s submission of 6 October 2006.³⁹

³⁷ Exhibit E to the United States’ submission to the Tribunal of 4 December 2006.

³⁸ Exhibit G to the United States’ submission to the Tribunal of 4 December 2006.

³⁹ See ¶¶ 35-37 *supra*.

In that letter, the United States requested the Tribunal to reject Tembec's request to allocate the costs of the Tembec arbitration equally between the parties and to order Tembec to bear all costs and fees incurred by the United States in defending against Tembec's NAFTA Chapter Eleven claim. The United States argued, *inter alia*, that Tembec's NAFTA Chapter Eleven Claim was not among the claims terminated pursuant to the SCA. The United States also asserted that the document attached to Mr. Feldman's letter of 6 October 2006 to the Tribunal "labeled Annex 2A, Termination of Litigation Agreement, is not a true and correct copy of the Settlement of Claims Agreement which was concluded in connection with the Softwood Lumber Agreement," and that that "document was not countersigned on behalf of the United States." The United States further contended that "Tembec's attempt to mislead the Tribunal by asserting that its claim was terminated pursuant to the Softwood Lumber Agreement, when the same claim was terminated nine months earlier, should not be countenanced . . ."

58. Tembec reacted on 8 November 2006 by filing with the U.S. District Court for the District of Columbia a Notice of Reinstatement of Action or in the Alternative Rule 60(b) Motion to Set Aside Stipulation of Dismissal.⁴⁰ Tembec argued that "the stipulation of dismissal was subject to the terms of the SLA but that the terms of the SLA were changed without Tembec's agreement or knowledge." Tembec alternatively moved "for relief from the dismissal order pursuant to Rule 60(d) based on the United States' misrepresentation and misconduct regarding the applicable terms of the SLA."

59. Having attempted in vain to organize a hearing on the issues that had arisen regarding the costs of arbitration in the course of November 2006, the Tribunal invited in its letter of 9 November 2006, *inter alia*, (i) Canfor, Tembec *et al.* and

⁴⁰ Exhibit F to the United States' submission to the Tribunal of 4 December 2006. Exhibit A-2 to Tembec's submission to the Tribunal of 30 January 2007.

the United States to submit each a certified copy of the settlement agreement on which they rely, and (ii) counsel for Tembec *et al.* to submit any observations they may have on the United States' submission of 13 October 2006, by 16 November 2006.

60. On 16 November 2006, the United States, also on behalf of Canfor, submitted (i) a final executed copy of the Softwood Lumber Agreement that was signed by Canada and the United States on 12 September 2006; (ii) a final executed copy of the Amendments to that Agreement signed on 12 October 2006; and (iii) the signature pages of Annex 2A (i.e., the SCA) to the 12 October 2006 Amendments, signed by all of the relevant parties on 11 or 12 October 2006, including by Mr. Feldman for Tembec. In the accompanying letter, the United States certified that "the attached [copies] collectively constitutes a true and correct copy of the Softwood Lumber Agreement."
61. Also on 16 November 2006, Tembec submitted to the Tribunal its observations on the United States' submission of 13 October 2006, requesting that the Tribunal deny the United States' request to recover arbitration costs and fees from Tembec.
62. The United States filed a response with the U.S. District Court to Tembec's motion to reinstate its setting aside proceeding on 22 November 2006.⁴¹ The United States argued that its request for costs is fully within its rights because Tembec's NAFTA Chapter Eleven claim is not covered by the SCA's express terms. The United States also argued that the document on which Tembec relied, i.e., its 20 September revision of the TLA, was signed only by Tembec, whereas the controlling document is the final document signed by both Tembec and the United States, and that document is the SCA.

⁴¹ Exhibit A-3 to Tembec's submission to the Tribunal of 30 January 2007.

63. Having been invited by the Tribunal to do so, the United States filed a response to Tembec's submission of 16 November 2006, on 4 December 2006, reiterating its request that full costs in defending against Tembec's NAFTA Chapter Eleven claim be awarded to the United States. To this response, the United States attached a copy of Tembec's letter of 20 September 2006 to DFAIT and USTR, which Tembec itself had not previously submitted to the Tribunal.⁴²
64. Tembec filed a Reply Memorandum in support of its Notice of Reinstatement or, in the alternative, Motion under Rule 60(b) with the U.S. District Court for the District of Columbia also on 4 December 2006.⁴³
65. The United States' submission of 4 December 2006 led Tembec, by letter of 5 December 2006, to request the Tribunal for permission to file a response, to which the United States objected by letter of 6 December 2006, complaining of excessive rounds of correspondence on the subject. The Tribunal granted Tembec's request by letter of 7 December 2006 to submit any observations it might have by 15 December 2006.
66. Accordingly, Tembec submitted its observations on 15 December 2006, in which Tembec responded to the United States' assertion of "feign[ed] umbrage" ("Tembec is genuinely outraged") and the United States' reference to Tembec's CIT action; contended that the United States' other arguments were "self-contradictory;" and raised seven questions regarding the United States' position.
67. Together with its submission of 15 December 2006, Tembec produced a copy of a letter dated 14 December 2006 from Ms. Andrea Lyon, Chief Trade Negotiator

⁴² See ¶ 26 *supra*.

⁴³ Exhibit A to Tembec's submission to the Tribunal of 15 December 2006. Exhibit A-4 to Tembec's submission to the Tribunal of 30 January 2007.

North America of DFAIT, to Mr. James Lopez, President and CEO of Tembec, which reads as follows⁴⁴:

Dear Mr. Lopez:

This letter is in response to your request of December 11, 2006, that the Government of Canada set out its understanding of the October 12, 2006 Softwood Lumber Agreement (the “Agreement”), in particular with respect to certain provisions of the Settlement of Claims Agreement (“SCA”).

The version of the Agreement signed on September 12, 2006 contemplated complete termination of all softwood lumber related litigation. The vehicle for terminating the litigation was the Termination of Litigation Agreement (“TLA”), incorporated into the Agreement as Annex 2A. Among other things, the TLA provided for the termination of listed actions without costs. In order to expedite entry into force of the Agreement, Canada and United States found it necessary to negotiate, amongst other things, revisions to the TLA, beginning October 4, 2006. The objective of the renegotiation of the TLA was to settle a sufficient number of claims to satisfy the United States that it had legal authority to revoke the duty orders on softwood lumber.

In the negotiation of these revisions, the costs provision in the TLA (paragraph 5) was simply carried over to what became paragraph 8 in the SCA, albeit reflecting the change in name from TLA to SCA and changing the reference to “Covered Actions” to read “any action referenced in this Claims Settlement Agreement”. Canada and the United States both recognized that the SCA would be signed by fewer parties than the TLA, but the United States never raised with Canada the suggestion that those parties who did sign the TLA should receive less favourable treatment under the SCA than they would have received under the TLA.

In short, the replacement of the TLA with the SCA reflected the decision by Canada and the United States to seek to dismiss only those actions necessary for the United States to exercise its

⁴⁴ Exhibit B to Tembec’s submission to the Tribunal of 15 December 2006.

authority to revoke the anti-dumping and countervailing duty orders in order to permit entry-into-force of the Agreement. The renegotiation was not an attempt to modify the understanding reflected in the TLA that no costs would be sought for covered actions.

Paragraph 8 of the SCA provides that “No party to this Claims Settlement Agreement shall seek to hold any other party liable to pay its costs and expenses of litigation relating to any action referenced in this Claims Settlement Agreement”. The consolidated NAFTA Chapter 11 proceeding is an action specifically listed in paragraph 1 of the SCA. In Canada’s view, this was sufficient to ensure that no claim for costs would be made against any party in the consolidated proceeding, including Tembec.

The TLA included a specific reference to the Tembec Chapter 11 claim that was not carried over into the SCA. It was necessary in the TLA because, at the time the TLA was negotiated (May-June 2006), Tembec’s NAFTA claim had not matured (or reverted) into an independent action, but there was a possibility that this would occur before the entry into force of the SLA 2006 as a result of the U.S. District Court proceeding where Tembec was seeking the re-establishment of the original NAFTA Tribunal. The inclusion of a stand-alone reference to Tembec’s NAFTA claim in the TLA covered off that possibility. However, such a possibility disappeared when the U.S. District Court issued an indefinite stay order on September 24, 2006.

The absence of the separate Tembec reference in the SCA does not reflect a change in the terms of settlement for Tembec. Rather, it reflects a change in the status of the claim at the time the SCA was negotiated, that is, that it would not become an independent action prior to the intended date for entry-into-force of the revised Agreement on October 12, 2006. At no point in the negotiation of the SCA did the United States raise any suggestion that the SCA as redrafted should alter the terms of settlement for Tembec.

[emphasis as in original text]

68. At the request of the Tribunal, both the United States and Tembec submitted chronologies on 22 December 2006.

69. Having consulted the parties and being assured of their availability, the Tribunal determined in a letter dated 17 January 2007 that a hearing on the cost issues pending between Tembec and the United States would be held in Washington on 31 January 2007 (the “Costs Hearing”).
70. As anticipated in its letter of 17 January 2007 to the parties, the Tribunal submitted a list of questions to the parties by letter of 22 January 2007. The answers were provided by the United States on 29 January 2007 and by Tembec on 30 January 2007.
71. On 30 January 2007, Tembec filed with the District Court for the District of Columbia in the reinstatement proceedings a “Memorandum of Points and Authorities in support of Motion for Leave to File Supplemental Brief,” asserting to have discovered new information and correcting certain statements in Tembec’s moving papers.⁴⁵ The new information is the letter of 14 December 2006 from Ms. Lyon to Mr. Lopez, quoted at ¶ 67 above, which shows, according to Tembec, that the “Government of Canada is now on record that Tembec’s interpretation of the SLA and SCA is correct,” as well as Terminal’s notification of 22 January 2007, referred to at ¶ 80 below, which shows, according to Tembec, that the “United States appears to have singled out Tembec as the only NAFTA Chapter 11 claimant against whom it would seek to extract arbitration costs and fees, notwithstanding the terms and conditions of the SLA.”⁴⁶

⁴⁵ Exhibit A-5 to Tembec’s submission to the Tribunal of 30 January 2007.

⁴⁶ The Tribunal takes notice of the Memorandum Opinion issued by the United States District Court for the District of Columbia in *Tembec Inc. et al v. United States of America* on 19 April 2007 (available online at: <http://www.state.gov/documents/organization/83552.pdf>). The Memorandum Opinion denied Tembec’s motion to set aside its 12 October 2006 stipulation of dismissal previously described in ¶¶ 50, 51 and 58 *supra*. The Tribunal does not rely in any way upon the Memorandum Opinion of this separate and independent judicial body but does note that the reasoning contained therein is generally in keeping with that of the Tribunal in this Joint Order.

72. Tembec and the United States, through their counsel, presented oral argument and responded to the Tribunal's inquiries at the Costs Hearing in Washington, D.C., the place of arbitration as agreed by the parties, on 31 January 2007.
73. Pursuant to the Tribunal's directions given at the Costs Hearing, the United States submitted a Supplemental Submission on Costs dated 7 February 2007, claiming US\$ 20,579.06 in legal fees during the period 22 September 2006 through 31 January 2007, as well as the Tribunal's expenses and administrative fees incurred from 22 September 2006 "through the date this proceeding is terminated with respect to Tembec's claim." The Submission of the United States was accompanied by further witness statements of Mr. Holobaugh, Ms. Menaker, and Ms. Reddy (see ¶ 14 above).
74. Tembec also submitted a "Costs-on-Costs" Submission dated 7 February 2007, claiming US\$ 101,052.50 as Tembec's costs of representation and US\$ 2,019.36 in disbursements as of 13 October 2006.
75. By an unsolicited letter dated 1 June 2007, Tembec wrote to the Tribunal: "Regardless of whether an action is referenced specifically in Annex 2A of the [SLA], all *Softwood Lumber* actions continue to be dismissed with no party bearing the fees or costs of any other," referring to the unopposed motions to dismiss their appeals in *Tembec Inc. et al. v. United States*,⁴⁷ filed by the United States and the Coalition for Fair Lumber Imports. Tembec argued: "Were this Tribunal to conclude that the United States' NAFTA Chapter 11 cost claim against Tembec is a *Softwood Lumber* action in which a cost award is appropriate, that decision would be conspicuously unique among the tens of different actions from the *Softwood Lumber* dispute now resolved."

⁴⁷ U.S. Court of Appeals for the Federal Circuit, No. 2007-1102 and 2007-1111.

76. Upon invitation by the Tribunal, the United States responded by letter of 18 June 2007, noting first that the Tribunal did not authorize Tembec's submission. The United States further argued that it is irrelevant that the parties in other softwood lumber-related cases have stipulated that they would not seek costs against one another.
77. The Tribunal deliberated at various occasions, including deliberations in Washington, D.C.

C. Withdrawal of Claims by Canfor and Terminal

78. By letter dated 12 October 2006, Canfor, as contemplated by Paragraph 1 of the SCA (as quoted in ¶ 39 above), advised the Tribunal:

Pursuant to a Settlement of Claims Agreement (a copy of which is attached) entered into between Canfor Corporation ("Canfor") and the United States of America, among others, in connection with the 2006 Softwood Lumber Agreement Canfor hereby withdraws its claim against the United States under NAFTA Chapter Eleven and requests that the Tribunal issue an order terminating the proceedings with respect to Canfor.

79. On 3 November 2006, the United States wrote to the Tribunal:

On behalf of respondent United States of America and in accordance with the Secretary's request, we write to confirm that we do not object to Canfor's withdrawal, by its letter of October 12, 2006, of its claim against the United States in this proceeding in accordance with Paragraph 1 of the Settlement of Claims Agreement (an executed copy of which is appended to the United States' letter to the Tribunal of October 13, 2006). The United States further confirms that, in accordance with Paragraph 8 of that agreement,⁴⁸ Canfor and the United States have agreed not to seek from the other party costs and expenses incurred in this proceeding.

⁴⁸ Quoted at ¶ 41 *supra*.

80. On 22 January 2007, Terminal notified the Tribunal:

Further to my conversation with Mr. Flores, Terminal writes to notify the Tribunal that it has advised the United States that it wishes no longer to pursue its NAFTA Chapter Eleven claim. Accordingly, Terminal and the United States have agreed to terminate the Chapter Eleven proceedings with respect to Terminal, without costs to either party, and request that the Tribunal to issue an order to that effect.

81. As noted in ¶ 40 above, Terminal's NAFTA Chapter Eleven claim was mentioned in the TLA but there was no reference to it in the SCA. Consequently, Terminal's claim was not subject to its terms. Subsequent to the conclusion of the SLA and the SCA, Terminal apparently decided independently not to pursue its claim further and thus submitted this letter of 22 January 2007 to the Tribunal requesting termination. In a letter of 18 June 2007, the United States confirmed that, as stated in Terminal's letter of 22 January 2007, the United States has agreed to terminate the proceedings with respect to Terminal, with each party bearing its own costs.

82. In both cases, *Canfor v. United States* and *Terminal v. United States*, the parties agreed not to seek from the other party costs and expenses incurred in this proceeding. That is different for *Tembec v. United States*, to which matter the Tribunal will now turn.

IV. SUMMARY OF THE POSITIONS OF TEMBEC AND THE UNITED STATES AS TO COSTS

A. Position of the United States

83. The United States submits that Tembec should bear all of the United States' costs associated with defending against Tembec's claims, both in the *Tembec* Article 1120 arbitration and in the consolidation proceeding. According to the United States, by submitting its claim to arbitration, Tembec consented to all the procedures in the NAFTA Chapter Eleven, including the consolidation procedure

in Article 1126. The United States relies on NAFTA Article 1121(1);⁴⁹ Tembec's Notice of Arbitration of 3 December 2003 at ¶ 11;⁵⁰ and the Order of the Consolidation Tribunal of 7 September 2005 at ¶ 86.⁵¹ The United States submits that "[b]ecause Tembec unilaterally abandoned its claim in the eleventh hour of this proceeding, Tembec should be deemed to be the unsuccessful party, and should bear all of the costs it imposed on the United States."⁵²

84. With respect to the *Tembec* Article 1120 arbitration, the United States claims an amount of costs of US\$ 125,086.71, comprising an advance deposit of US\$ 75,000 for arbitration expenses and US\$ 50,086.71 of legal fees of its in-house attorneys.
85. In respect of the consolidation proceeding under Article 1126, the United States contends that all three Claimants⁵³ should bear the costs incurred by the United States in the consolidation proceeding between 7 March 2005 (the date on which the United States requested consolidation)⁵⁴ and 10 January 2006 (the date on which Tembec was permitted to withdraw from the proceeding"). The United States argues that the consolidation was decided in its favour; that this phase

⁴⁹ Article 1121 ("Conditions Precedent to submission of a Claim to Arbitration") of the NAFTA provides in paragraph 1: "A disputing investor may submit a claim under Article 1116 to arbitration only if: (a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and (b) . . ."

⁵⁰ Tembec's Notice of Arbitration states at ¶ 11: "[Tembec] has consented to the submission of this claim to arbitration before a three arbitrator Tribunal appointed in accordance with the procedures set forth in NAFTA Chapter 11."

⁵¹ The Order of the Consolidation Tribunal states at ¶ 86: "[M]embers of an Article 1126 Tribunal are appointed by a neutral person, i.e., the Secretary-General of ICSID, a method to which all parties have consented as a result of Articles 1121 and 1123 of the NAFTA."

⁵² United States' Submission on Costs of 7 April 2006 at p. 4.

⁵³ Having regard to the agreements subsequently made with Canfor and Terminal (*see* Section III.C *supra*), the Tribunal understands the reference to the three Claimants to have become a reference to Tembec insofar as costs incurred by the United States are attributable to Tembec.

⁵⁴ The Tribunal has decided upon 6 May 2005 (the date of the constitution of the Tribunal) rather than 7 March 2005 as the start date for the accounting for the costs of the Tribunal and ICSID because neither the Tribunal nor ICSID incurred any costs before that date. *See also* the Tribunal's Costs Chart at ¶ 176 *infra*.

included a challenge by Claimants to the appointment of one of the Tribunal members, which was decided by the Secretary-General of ICSID in favour of the United States and against Claimants; and the unscheduled submission by Tembec of a “Motion to Dismiss” of 27 June 2005, to which the United States was required to respond separately on 12 July 2005, and which was decided in favour of the United States in the Consolidation Order at ¶ 226. The United States claims that the total costs for this phase of the consolidation proceeding were US\$ 122,164.73, comprising an advance deposit to ICSID of US\$ 50,000 and legal fees of its in-house attorneys of US\$ 72,164.73.⁵⁵ The United States also requests an allocation of a portion of the advance it paid on 29 December 2005 (i.e., US\$ 300,000) in light of the Tribunal’s statement in its letter of 29 December 2005 that the requested amount covered outstanding costs of the Tribunal as well as future costs.⁵⁶

86. As mentioned in ¶ 73 above, the United States also claims US\$ 20,579.06 in legal fees during the period 22 September 2006 through 31 January 2007, as well as the Tribunal’s expenses and administrative fees incurred from 22 September 2006 “through the date this proceeding is terminated with respect to Tembec’s claim.”
87. With respect to the agreement on costs as alleged by Tembec, the United States contends that Tembec’s representation is incorrect. According to the United States, the 2006 Softwood Lumber Agreement was finalized and came into effect as of 12 October 2006; Tembec’s NAFTA Chapter Eleven claim, however, was not among the claims that were terminated pursuant to the Softwood Lumber Agreement.⁵⁷

⁵⁵ United States’ Submission on Costs of 7 April 2006 at p. 5.

⁵⁶ United States’ Submission on Costs of 7 April 2006 at p. 6 n. 11.

⁵⁷ United States’ submission of 13 October 2006; *see also* ¶57 *supra*.

88. With respect to Tembec's submission of 16 November 2006, the United States responds in its submission of 4 December 2006:
- (a) Tembec's representation that the United States itself created the 20 September documents and that Tembec merely signed and returned them, is false because of the changes that Tembec unilaterally made to the form of the TLA sent by the Governments of Canada and the United States to Tembec on 8 September 2006 for the sole purpose of execution by Tembec of counterpart signature pages. Tembec's 20 September documents can at best be considered as eighteen separate counteroffers.
 - (b) It is undisputed that the United States never signed Tembec's 20 September documents and that the TLA never came into force.
 - (c) Tembec could not have reasonably believed that the SCA "supplemented" the TLA. The SCA was irreconcilable with the TLA in numerous respects. Moreover, the SCA did not state that it supplemented or amended the TLA, while the TLA provided at ¶ 9 that it "may not be altered, amended, modified, or otherwise changed other than through the written agreement of all parties hereto." Furthermore, Article XI of the SLA 2006 Amendments stipulated that "Annex 2A [i.e., the TLA] shall be deleted and replaced . . ." ⁵⁸ and not that it shall be "supplemented."
 - (d) Tembec's contention that it was stonewalled, when it supposedly demanded an explanation for the SCA, is not credible. Tembec's letter of 11 October 2006 does not reveal concerns with the SCA other than a single "very very modest[]" edit Tembec requested that was not accepted. Tembec's letter

⁵⁸ See ¶ 54 *supra*.

evidences that it had detailed discussions with Government of Canada representatives after receiving the SCA from Canada.

- (e) Tembec's failure to file any document in this arbitration regarding its contentions in respect of costs on or before 12 October 2006 betrays Tembec's understanding that there was no agreement with respect to its already-dismissed claim. Had Tembec truly believed that it had reached an agreement with the United States under the TLA concerning its Chapter Eleven claim, it would have contacted the United States to discuss the form and substance of the submission to be filed with this Tribunal contemporaneously with the entry into force of the SLA, but Tembec never contacted the United States (either directly or through the Government of Canada, Tembec's point of contact in the negotiations), nor filed any document in the arbitration.
- (f) Tembec's statement in its 6 October letter that an "agreement" had been reached with the United States regarding its claim in this arbitration, based on the eighteen documents it sent to the governments on 20 September, and its continued reliance on that point, are in sharp contrast to its representations before the CIT.
- (g) The United States does not base its request for costs solely, or even primarily, on the outcome of the consolidation dispute. Rather, the United States is entitled to costs because Tembec abandoned its claim on the eve of the jurisdictional hearing. Tembec is therefore the "unsuccessful party" under the UNCITRAL Arbitration Rules that Tembec chose to govern the arbitration (Article 40(1) of the UNCITRAL Rules). Awarding costs in favour of the United States under the circumstances is not only fair, but failing to do so would open the door to abusive tactics by future Chapter Eleven claimants.

- (h) The United States did not “abandon” Tembec’s Article 1120 claim when it sought consolidation.
- (i) The consolidation dispute did not raise novel legal issues warranting an equal apportionment of costs.
- (j) Finally, Tembec’s accounting of the costs sought by the United States is erroneous.

89. The United States’ answers to the Tribunal’s questions of 22 January 2007 (*see also* ¶ 70 above) as well as the arguments it presented at the Costs Hearing are addressed directly or indirectly in the Tribunal analysis in Chapter V below.

B. Position of Tembec

90. Tembec contends that any allocation of arbitration costs and expenses should be governed by the agreement between Tembec and the United States evidenced by Annex 2A to the SLA 2006, “which demonstrates the intent of the two parties that neither party shall seek to recover its costs and expenses from the other party.”⁵⁹

91. Accordingly, Tembec argues, the Tribunal should make no award of costs for expenses under UNCITRAL Rules: Article 38(c), cost of expert advice; 38(d), travel and other expenses of witnesses; or 38(e), reasonable costs for legal representation.⁶⁰

92. With respect to Article: 38(a), fees of the arbitral tribunal; 38(b), travel and other expenses incurred by the arbitrators; and 38(f), expenses of the appointing authority, Tembec asserts that Tembec and the United States each should bear their own respective shares of those costs during the proceedings until 7 December

⁵⁹ Tembec’s submission of 6 October 2006 at p. 2. *See also* ¶ 35 *supra*.

⁶⁰ *Id.*

2005. Tembec contends that those costs should be divided by the parties with 50% to be paid by the United States and 50% to be divided evenly among the three Claimants, “as proposed by the Tribunal in its letter of November 22, 2005.” Tembec adds that the costs should be offset by the US\$ 50,000 advance deposits paid by each of the parties.⁶¹

93. Tembec also argues that it should have no liability for any costs or expenses after 7 December 2005 when it notified all parties to the proceedings that it had removed its claim from the consolidated proceedings and had begun proceedings in the U.S. District Court for the District of Columbia to vacate the Consolidation Order of 7 September 2005. Tembec contends that, to the extent that there were any costs under Article 38(a), (b) or (f) associated with Tembec after 7 December 2005, “those costs were incurred by the United States to protest to the Tribunal that Tembec should not be allowed to remove its claim from the proceedings when it already had done so.”⁶²
94. In response to the United States’ assertions in its letter of 13 October 2006, Tembec states that: “For the United States to assert that Tembec did not provide a ‘true and correct copy’ of settlement terms on October 6 is a shameful misrepresentation, an act of bad faith,” arguing that the document that the United States claims is a “true and fully executed copy of the Settlement of Claims Agreement dated October 12, 2006” had not been provided to Tembec, even in draft form, until 11 October 2006, five days after Tembec’s submission to the Tribunal.⁶³

⁶¹ *Id.*

⁶² Tembec’s submission of 6 October 2006 at pp. 2-3.

⁶³ Tembec’s submission of 16 November 2006 at p. 2.

95. As regards the SCA, “which does not make specific reference to Tembec’s NAFTA Chapter 11 Claim,” Tembec asserts that when Canada and the United States presented Tembec with that document on 11 October 2006 and demanded Tembec to sign it the same day, Tembec “reasonably believed that the document was supplemental to, and not in place of, the earlier Termination of Litigation Agreements.”⁶⁴
96. Tembec further alleges that when Canada and the United States announced the 19 pages of amendments to the SLA 2006 on 12 October 2006, which includes the amendments quoted at ¶¶ 53-54 above, they had not consulted with or obtained the agreement of Tembec.⁶⁵
97. Tembec further asserts that regardless whether there ever was a “meeting of the minds” between Tembec and the United States not to seek fees and costs from each other with respect to the NAFTA Chapter Eleven arbitration, the Tribunal should deny the United States’ request as it “comes to its claim with unclean hands,” as “it has acted in bad faith by its ‘bait and switch’ of the SLA documents that it required Tembec to sign and by its misrepresentation to this Tribunal about the veracity of Tembec’s October 6 submission.”⁶⁶
98. With respect to the merits of the United States’ claim, Tembec argues that the United States appears to expect costs and fees on a theory of being the prevailing party on consolidation, but the United States has not necessarily prevailed on the issue as Tembec has moved in the U.S. District Court to reinstate its motion to vacate the Consolidation Order. Tembec states that “The most prudent action for

⁶⁴ *Id.* at p. 3.

⁶⁵ *Id.* at p. 3.

⁶⁶ *Id.* at p. 5.

this Tribunal under the circumstances would be for the Tribunal to leave the parties where they are and forego ruling on this issue.”⁶⁷

99. Tembec then submits that even were the Tribunal to decide that the United States was the prevailing party as to consolidation, it still would be inappropriate to require Tembec to pay the United States’ arbitration costs, let alone its legal fees. According to Tembec, while the United States had repeatedly represented that it did not plan consolidation and Tembec and the United States had already argued the issue of jurisdiction before an Article 1120 tribunal, the United States and not Tembec moved for consolidation.⁶⁸
100. Tembec also contends that most of the deposit of US\$ 75,000 for the Article 1120 arbitration went unused⁶⁹ and that Tembec should not be forced to pay for a jurisdictional briefing on a motion that was never resolved as to Tembec.⁷⁰
101. Tembec further contends that it should not be punished for exercising its NAFTA right to file and pursue a Chapter Eleven claim, and should not be compelled to finance its opponents’ procedural motions for its opponents’ unique interests.⁷¹
102. Finally, Tembec submits that the nature of the consolidation action further counsels against reallocation of fees and costs, even were the Tribunal to conclude that the United States was the prevailing party, arguing that consolidation under

⁶⁷ *Id.* at p. 5.

⁶⁸ *Id.* at pp. 5-6

⁶⁹ ICSID refunded Tembec and the United States part of the advances. *See* ¶¶ 156 and 163 *infra*.

⁷⁰ *Id.* at p. 6.

⁷¹ *Id.* at p. 6-7.

NAFTA Article 1126 presented novel legal issues that had been treated only once before.⁷²

103. In response to the United States' submission of 4 December 2006, Tembec contends in its submission of 15 December 2006, relying in particular on the letter dated 14 December 2006 by Ms. Lyon (quoted at ¶ 67 above):

- (a) The United States is unable to deny that it: altered the Settlement of Claims Agreement signed by Tembec by adding the words "Annex 2A;" never objected to Tembec's TLA prior to 13 October 2006; never responded to Tembec's 6 October 2006 letter prior to 13 October 2006; never informed Tembec that the SCA would replace the TLA or that the TLA would become irrelevant by 13 October 2006; changed the terms of the SLA 2006 after it obtained Tembec's stipulation of dismissal in the D.C. District Court case subject to the terms of the SLA 2006; and did not inform Tembec that it changed the SLA terms before filing the joint dismissal.
- (b) The United States' arguments in reference to Tembec's CIT action are irrelevant to whether the United States may recover costs and fees for Tembec's NAFTA Chapter Eleven arbitration. Any grievance the United States might have against Tembec in the CIT action should be argued before the CIT, not before this Tribunal.
- (c) The United States' assertion regarding Tembec's failure to file any document regarding its claim on or before 12 October 2006 is denied. In Tembec's submission of 6 October 2006, Tembec stated: "Pursuant to the terms of the Termination Agreement, upon the SLA's entry into force, Tembec and the United States will have terminated their litigation as to

⁷² *Id.* at p. 7-8.

Tembec's NAFTA Chapter 11 claim and the related lawsuit in D.C. District Court.”

- (d) As to the point about Tembec's “already-dismissed claim,” all parties to the arbitration knew that Tembec was pursuing legal action in the U.S. courts in furtherance of Tembec's NAFTA Chapter Eleven claim, and that when this Tribunal terminated the arbitration proceedings as to Tembec, it did not dismiss “with prejudice” as the United States had demanded.
 - (e) The TLA's language, stating that the “Agreement may not be altered, amended, modified, or otherwise changed other than through the written agreement of all parties hereto” supports Tembec's interpretation that the SCA had to be supplemental instead of a replacement.
 - (f) Tembec's participation in the jurisdictional hearing would have increased costs for the United States.
 - (g) The United States motive for recovery is retribution for Tembec's challenge of the Consolidation Order.
 - (h) The United States is looking for fees and costs associated primarily with the Article 1120 proceeding.
 - (i) The Tribunal should award Tembec its costs and fees with respect to the United States' request for costs, and if the Tribunal does so, it should allow Tembec to submit evidence establishing the amount to be awarded.
104. As mentioned in ¶ 74 above, Tembec also submitted a “Costs-on-Costs” Submission dated 7 February 2007, claiming US\$ 101,052.50 as Tembec's costs of representation and US\$ 2,019.36 in disbursements as of 13 October 2006.

105. Tembec's answers to the Tribunal questions of 22 January 2007 (*see also* ¶ 70 above) as well as the arguments it presented at the Costs Hearing are addressed directly or indirectly in the Tribunal analysis in Chapter V below.

V. **ANALYSIS BY THE TRIBUNAL OF THE POSITIONS OF TEMBEC AND THE UNITED STATES AS TO COSTS**

A. **Introduction**

106. In the analysis below, the Tribunal has not only considered the positions of Tembec and the United States as summarized in the preceding Chapter but also their numerous detailed arguments in support of those positions and in their responses to the questions of the Tribunal. To the extent that these arguments are not referred to expressly, they must be deemed to be subsumed in the analysis.

B. **Jurisdiction**

107. The jurisdiction of this Tribunal to decide over the cost claims of the United States and Tembec arises out of Articles 38-40 of the applicable UNCITRAL Arbitration Rules.⁷³ Jurisdiction over claims for costs was retained in the Tribunal's Termination Order with respect to Tembec of 10 January 2006.⁷⁴ Tembec's objection to this Tribunal's jurisdiction was previously rejected in the Tribunal's Consolidation Order of 7 September 2005.⁷⁵

108. Tembec, therefore, is incorrect when it argues that the "matter, whether the United States can claim costs and fees from Tembec, arises from the SLA, specifically from the Settlement of Claims Agreement that amended the SLA."⁷⁶ The matter arises from the provisions of Chapter Eleven of the NAFTA, and in particular from

⁷³ Reproduced under Chapter II *supra*.

⁷⁴ At ¶ 2, reproduced at ¶ 11 *supra*.

⁷⁵ *See* ¶¶ 6-8 *supra*.

⁷⁶ Tr. p. 56 at 21-22 and 57 at 1.

Article 1126 that, in turn, refers to the UNCITRAL Arbitration Rules. Those Rules contain provisions concerning the costs of the arbitration in Articles 38-40.⁷⁷ That matter is certainly within the jurisdiction of the present Tribunal.

109. Tembec also denies that the present Tribunal has jurisdiction over disputes arising out of the SLA and the Annexes to it (i.e., the TLA and its replacement, the SCA).⁷⁸ Tembec further contends that the letter by Ms. Lyon of 14 December 2006⁷⁹ is Canada's official statement of the intent of the State Parties to the SLA – Canada and the United States – with respect to the termination of litigation in connection with the implementation of that agreement.⁸⁰ Tembec asserts that the letter also means that the issue of costs is a matter of an international agreement, and that that agreement has its own mechanism for settling disagreements between the parties who negotiated it.
110. Tembec is correct that Article XIV of the SLA contains its own dispute resolution mechanism.⁸¹ However, Tembec's contentions denying jurisdiction of this Tribunal in relation to costs of the proceedings are irrelevant since the question before this Tribunal is whether Tembec and the United States have made an agreement on the costs of the present proceedings in the form of an annex to the SLA. Although initially the TLA, and subsequently the SCA, forms an integral part of the SLA,⁸² as it will be seen below, the TLA purported to be, and the SCA

⁷⁷ Quoted in Chapter II *supra*.

⁷⁸ Tembec's answer to Question 1 of 30 January 2007.

⁷⁹ See ¶167 *supra*.

⁸⁰ Tembec's answer to Question 4 of 30 January 2007.

⁸¹ Article XIV of the SLA is reproduced online at: <http://www.international.gc.ca/eicb/softwood/pdfs/SLA-en.pdf>.

⁸² Article XI(3) of the SLA provides: "The Annexes are an integral part of the SLA 2006. No Person may assert any rights under the SLA 2006." The word "Person" is defined Article XIX(42) as: "a natural person, sole proprietorship, partnership, corporation, union, or association."

is, not simply an agreement between two States, but rather an agreement between the United States, Canada and, *inter alia*, Tembec.

111. With respect to Ms. Lyon’s letter of 14 December 2006, that is a letter by a Canadian Government official to the CEO of a Canadian corporation. The Tribunal does not regard it as “Canada’s official statement of the intent of the parties to the SLA – the United States and Canada – with respect to the termination of litigation in connection with the implementation of that agreement” or as evidence under Article 31(4) of the Vienna Convention on the Law of Treaties of 1969, as it is contended by Tembec.⁸³ Nor does the letter qualify as a supplementary means of interpretation pursuant to Article 32 of the Vienna Convention.⁸⁴ The 14 December 2006 letter does not purport to be a submission by Canada under Article 1128 of the NAFTA either, as it is correctly pointed out by the United States.⁸⁵ At best, the letter is an untested witness statement that was not subject to cross-examination by the other State Party to the SLA, the United States. The Tribunal further notes that the United States chief negotiator with respect to the TLA and SCA, Mr. Jeff Weiss of USTR’s Office of General Counsel (who attended the Costs Hearing), according to the United States’ submission, which was not contested by Tembec, does not recall having had any discussions

⁸³ Tembec’s answer to Tribunal Question 4 of 31 January 2007. Article 31(4) of the Vienna Convention provides: “A special meaning shall be given to a term if it is established that the parties so intended.” As mentioned in the Consolidation Order, n. 2 *supra*, at ¶ 59, while the 1969 Vienna Convention is not in force among the three NAFTA State Parties (the United States has never ratified it), Articles 31 and 32 are regarded as reflective of established customary international law.

⁸⁴ Tr. pp. 154-160. Article 32 of the Vienna Convention provides: “Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.”

⁸⁵ Article 1128 (Participation by a Party) of the NAFTA provides: “On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.” *See* Tr. p. 142.

with Ms. Lyon regarding the TLA or SCA and that all discussions between Canada and the United States regarding the TLA and SCA appear to have been handled on Canada's side by lawyers from Canada's Trade Law Bureau.⁸⁶

C. The Alleged Agreement on the Costs of Arbitration

112. Tembec asserts that it has agreed with the United States in respect of Tembec's NAFTA Chapter Eleven claim that each party bears its own costs and that the fees and disbursements of the Arbitral Tribunal and expenses of the administering authority are to be equally divided between the Tembec and the United States. Tembec bases that assertion on the provision in the TLA (8 September 2006), reading: "No party to this Termination Agreement shall seek to hold any other party liable to pay its costs and expenses of litigation relating to the Covered Actions,"⁸⁷ or at least on the "no costs no fees" provision in Tembec's version of the TLA (20 September 2006) in which the plural "Covered Actions" is set forth in the singular "Covered Action."⁸⁸ Tembec further bases the assertion on the provision in the SCA (11-12 October 2006), reading: "No party to this Claims Settlement Agreement shall seek to hold any other party liable to pay its costs and expenses of litigation relating to any action referenced in this Claims Settlement Agreement."⁸⁹ There being no reference to Tembec's NAFTA Chapter Eleven claim in the SCA, the United States denies that an agreement as contended by Tembec has been entered into.
113. The Tribunal concludes that no agreement was reached between Tembec and the United States regarding the costs of Tembec's NAFTA Chapter Eleven claim, as contended by Tembec, for the following reasons.

⁸⁶ United States' answer to Question 4 of 29 January 2007. *See also* at ¶ 135 *infra*.

⁸⁷ *See* ¶ 20 *supra*.

⁸⁸ *See* ¶ 26 *supra*.

⁸⁹ *See* ¶ 41 *supra*.

114. The Tribunal has to start its analysis with the TLA as submitted by Canada and the United States to Tembec (and others) on 8 September 2006. That version of the TLA included both Tembec’s NAFTA Chapter Eleven claim and a “no costs no fees” provision. However, neither Tembec nor the United States signed that version of the TLA. By the terms of the TLA, signature was required “[a]s evidence of their consent to this Termination Agreement.”⁹⁰ Failing any convincing evidence of consent to the TLA of 8 September 2006 by either Tembec or the United States, it must be concluded that it has not become legally binding on Tembec and the United States.
115. The next version of the TLA is the one prepared and signed by Tembec and submitted to Canada and the United States on 20 September 2006. That version of the TLA also included both Tembec’s NAFTA Chapter Eleven claim and a “no costs no fees” provision. At the Costs Hearing on 31 January 2007, Mr. Feldman explained the reason why he was obliged to amend the format of the TLA. The 8 September version mentioned beneath his signature block a number of his clients. Several of them could not agree to the 8 September version. As a consequence, it would have been unethical for Mr. Feldman to execute the 8 September version of the TLA.⁹¹ In that respect, the Tribunal finds Mr. Feldman’s ethical conduct commendable. Nonetheless, the 20 September version deviated from the 8 September version in various respects,⁹² while the cover letter from the two Governments of 8 September 2006 did not contemplate any changes to the text of the TLA. All that was asked for was the execution of the counterpart signature pages and their return. And that Tembec did not do.

⁹⁰ TLA of 8 September 2006, at ¶ 11 (“As evidence of their consent to this Termination Agreement, the parties, through their duly-authorized Representatives, have signed below with respect to each of the actions to which they are a party.”)

⁹¹ Tr. p. 95 and p. 102. *See also* Tembec’s answer to Question 7 of 30 January 2007.

⁹² *See* ¶ 26 *supra*.

116. Moreover, the 20 September version was never signed by the United States. Here again, by the terms of the 20 September TLA, signature was required “[a]s evidence of their consent to this Termination Agreement.”⁹³ Nor has Tembec been able to produce any evidence that the United States has consented to the 20 September version in any other manner. At best, therefore, the 20 September version constituted a counteroffer that has not been accepted by the United States. Failing any convincing evidence of United States consent to the TLA of 20 September 2006, it must be concluded that that document never became legally binding on Tembec or on the United States either.
117. In this connection, the Tribunal is troubled by the manner in which Tembec presented the TLA to the Tribunal through its letter of 6 October 2006. That letter opened with the announcement: “As explained below, any allocation of arbitration costs and expenses should be governed by a recent agreement between Tembec and the United States . . .”⁹⁴ While the letter mentioned later on that the signature of the United States has not been provided but was expected, Tembec did not mention that the documents attached to the letter of 20 September 2006 were not a copy of the TLA of 8 September 2006 nor did Tembec attach a copy of, or even mention, the cover letter of 20 September 2006 transmitting Tembec’s version of the TLA to the Governments of Canada and the United States. The letter of Tembec’s counsel of 6 October 2006 to this Tribunal is also in sharp contrast to his letter of 5 October 2006 to the CIT.⁹⁵ The United States, therefore, is justified

⁹³ TLA of 20 September 2006, at ¶ 11 (“As evidence of their consent to this Termination Agreement, the parties, through their duly-authorized Representatives, have signed below.”)

⁹⁴ See ¶ 35 *supra*.

⁹⁵ See ¶ 37 *supra*. Tembec’s answer of 30 January 2007 to Question 9, inquiring about the differences between the letters of 5 and 6 October, is, in the Tribunal’s view, not helpful. Tembec relies on the press release of the Canadian Government of 29 September 2006 (*see* ¶ 31 *supra*), but omits to mention the status report of Canada and the United States of 6 October 2006 to the CIT (*see* ¶ 38 *supra*). Nor does Tembec’s answer to Question 27 advance the matter any further.

when it complains about Tembec's letter of 6 October 2006 as being less than forthcoming.

118. Contrary to the TLAs of 8 and 20 September, the SCA was signed by both Tembec and the United States. They did so on 11 – 12 October 2006. As recalled above, the SCA contains a “no costs no fees” provision, but does not mention Tembec's NAFTA Chapter Eleven claim.
119. Tembec asserts that the document presented by the United States to this Tribunal on 13 October 2006 is not a “true” copy of the SCA executed by Tembec because it is labeled “Annex 2A” at the top, while the version signed and returned by it on 11 October 2006 did not have such label.⁹⁶ However, contrary to the documents submitted by Tembec on 6 October 2006, which differed in substance from the TLA submitted by Canada and the United States on 8 September 2006, the copy of the SCA submitted by the United States to this Tribunal on 13 October 2006 appears to have a content that is identical to the one signed and returned by Mr. Feldman on Tembec's behalf on 11 October 2006. The SCA provided that it could be executed in counterparts.⁹⁷ Tembec's contention that: “Where there is a dispute over authenticity, only the documents submitted by Tembec would qualify”⁹⁸ must be rejected in light of the foregoing and the considerations in ¶ 117 above. Furthermore, for reasons given below, Tembec should have, and in any event could have, known as of 11 October 2006 that the SCA would replace the TLA and, as a consequence, also replace the TLA in Annex 2A to the SLA as amended.
120. Tembec contends that it has been misled by the United States by a “bait and switch” scheme. Tembec also asserts that it “was induced in signing the SCA

⁹⁶ Tembec's submission of 16 November 2006 at fn. 4.

⁹⁷ At ¶ 14.

⁹⁸ Tembec's submission of 16 November 2006 at p. 3.

through misrepresentation by the United States.”⁹⁹ Tembec further contends that “Tembec’s signature on the SCA also was obtained through undue influence, duress, and coercion.”¹⁰⁰ Tembec then argues that the SCA supplements the TLA rather than replacing it. All these arguments are to no avail for Tembec if one looks at what actually happened on and around 11 October 2006, which is set out in detail in ¶¶ 39-51 above. In short:

- (a) Tembec negotiated with the Government of Canada and not the Government of the United States (except for the text of the Joint Stipulation of Dismissal) because in the negotiations between Canada and the United States concerning the SLA and its Annexes (including first the TLA and subsequently the SCA), the Government of Canada represented, *inter alia*, the interests of the Canadian softwood lumber producers, amongst which was included Tembec;¹⁰¹
- (b) Tembec had already indicated to the Government of Canada their willingness “to have this document [i.e., the SCA] signed on their behalf;”¹⁰²
- (c) Canada’s outside counsel in Washington (Ms. Anderson) offered Tembec’s outside counsel in Washington (Mr. Feldman) to call her “with any questions” that he may have;¹⁰³

⁹⁹ Tembec’s answer to Question 11 of 30 January 2007.

¹⁰⁰ *Id.*

¹⁰¹ Tr. p. 45. *See also* Tembec’s answers to Questions 6, 7 and 8 of 30 January 2007. United States’ answer to Question 8 of 29 January 2007. Tembec was also aware of the increasing problems experienced by both Governments late in September of 2006 in seeking to implement the SLA 2006 and the TLA as drafted, *see* ¶ 56 *supra*.

¹⁰² *See* ¶ 44 *supra*.

¹⁰³ *See* ¶ 47 *supra*.

- (d) Mr. Feldman appears to have had contact with Ms. Anderson during the evening of 11 October;¹⁰⁴
- (e) Mr. Feldman appears also to have had contact with his clients during the evening of 11 October;¹⁰⁵
- (f) Mr. Feldman acknowledged to Canada’s outside counsel that he knew about “the statements from the Government beginning last Friday that termination of litigation agreements no longer would be applicable to entry into force, recognizing that many had not been submitted and now may not be required pursuant to new but undisclosed amendments;”¹⁰⁶
- (g) Mr. Feldman further appears to have been able to study the SCA and to comment on it during the evening of 11 October; actually, he had proposed that “paragraph 6 be modified, very very modestly . . .”¹⁰⁷ and he stated in some detail the reasoning therefor.

121. A cursory comparison between the 8 and 20 September versions of the TLA, on the one hand, and the SCA, on the other, reveals that the SCA does not supplement the TLA but rather replaces the TLA. As it is rightly pointed out by the United States,¹⁰⁸ under the TLA all of the cases that were referenced therein were to be terminated. Under the SCA, only a few of those same cases were to be terminated,

¹⁰⁴ Tr. p. 72. If Ms. Anderson had answered, as Mr. Feldman declared: “I don’t know. I would have to call Ottawa, and it’s rather late,” and Mr. Feldman was dissatisfied with that answer, Mr. Feldman should have refused to sign the SCA. Mr. Feldman later stated at the hearing: “And I believe that [during] the interval she [Ms. Anderson] was on the phone with the folks in Vancouver.” Tr. p. 88 at 11-13. It seems that Mr. Feldman was also in contact with a “confidential Canadian source” that evening (*see* ¶ 127 *infra*). The cover letter of 11 October 2006 from Mr. Feldman shows that substantive aspects of the SCA were discussed (*see* ¶ 49 *supra*).

¹⁰⁵ Tr. p. 82 at 21-22 and p. 83 at 1-2.

¹⁰⁶ *See* ¶ 45 *supra*.

¹⁰⁷ *See* ¶ 49 *supra*.

¹⁰⁸ Tr. pp. 38-39.

while others were subject to a joint motion to dismiss, and again others were not to be terminated at all. Thus, the same cases were treated differently in the TLA and the SCA. An example in point is Canfor's case, which is mentioned in both documents. If the documents supplemented each other, there would be no need to mention Canfor's case twice.

122. In addition, Tembec's 20 September version of the TLA contained an additional condition that the Government of Canada should pay Tembec within 60 days.¹⁰⁹ Tembec contends that the condition is "based on verbal assurances from Canada at Cabinet level" and that Canada in fact paid Tembec within eighteen days of the entry into force of the SLA. Tembec argues that that commitment did not affect the United States.¹¹⁰ The Tribunal notes that, while sent to both Canada and the United States, the 20 September version of the TLA, prepared by Tembec, provides for signatures by Tembec and the United States only, and not Canada.
123. Furthermore, the TLA provided: "This Termination Agreement may not be altered, amended, modified, or otherwise changed other than through the written agreement of all parties hereto."¹¹¹ That being the case, if the TLA was legally binding and if the SCA supplemented the TLA, the SCA would have stated that it altered, amended, modified, or otherwise changed the TLA. Such a provision was absent from the SCA. For this reason too, and contrary to what Tembec argues, Tembec had no basis to assume that the SCA supplemented the TLA rather than "deleting and replacing" it as expressly specified in the SLA 2006 Amendments.
124. Importantly, Tembec would and should have noted that its NAFTA Chapter Eleven claim was no longer mentioned in the SCA. Supported by certain

¹⁰⁹ See ¶ 26 *supra*.

¹¹⁰ Tembec's answer to Question 7 of 30 January 2007 and its Reply Memorandum in support of its Notice of Reinstatement or, in the alternative, Motion under Rule 60(b) at p. 18.

¹¹¹ TLA at ¶ 10; Tembec's TLA, ¶ 25 *supra*, at ¶ 9.

observations in Ms. Lyon’s letter of 14 December 2006, Tembec now argues that the reference to the set aside action before the U.S. District Court for the District of Columbia covered Tembec’s NAFTA Chapter Eleven claim because the “possibility [of a re-establishment of the original NAFTA Tribunal] disappeared when the U.S. District Court issued an indefinite stay order on September 24, 2006.”¹¹² That argument is unpersuasive since an indefinite stay of court proceedings does not mean that a case is dismissed. The distinction is also shown in the present case where, by a separate step, Tembec and the United States filed a joint stipulation of dismissal with the U.S. District Court for the District of Columbia.¹¹³ Moreover, irrespective of the distinction between an indefinite stay and a dismissal, a U.S. District Court does not re-establish an arbitral tribunal; it may decide on the setting aside of an order or an arbitral award, which is a different matter. Tembec itself also made the latter distinction at the time. In its letter of 6 October 2006 to this Tribunal (i.e., well after the stay order of 24 September 2006), it mentioned specifically: “We signed the Termination Agreement on Tembec’s behalf for *both actions* . . .” (emphasis added),¹¹⁴ to which letter were attached two separate forms of Tembec’s version of the TLA, one concerning the setting aside action before the District Court, and the other concerning Tembec’s NAFTA Chapter Eleven claim.¹¹⁵

125. For the same reason, Ms. Lyon’s argument in her letter of 14 December 2006, adopted by Tembec,¹¹⁶ that the word “action” in the reference to Canfor’s NAFTA Chapter Eleven claim in the SCA covered Tembec’s NAFTA Chapter Eleven claim must fail. The reference is very specific in that it concerns the consolidated

¹¹² See ¶ 67 *supra*.

¹¹³ See ¶¶ 50-51 *supra*.

¹¹⁴ See ¶ 35 *supra*.

¹¹⁵ See ¶ 37 *supra*.

¹¹⁶ Tembec’s answer to Question 18 of 30 January 2007.

proceedings of *Canfor v. the United States* and *Terminal v. the United States*.¹¹⁷ There is no reference to Tembec, which, in contrast, is specifically mentioned in the same paragraph in connection with the set aside action before the U.S. District Court for the District of Columbia.

126. Moreover, if the SCA were to supplement the TLA, Tembec itself would surely have inquired as to the status of the signature by the United States to the TLA prior to indicating its willingness to have the SCA signed on its behalf. Such an inquiry would certainly have ensued when its outside counsel received the SCA on 11 October. That is in particular so since, in its letter of 6 October 2006, Tembec represented to this Tribunal that “all indications are that the United States will sign in furtherance of implementing the SLA.”¹¹⁸ As mentioned before, signature of the TLA was required “[a]s evidence of their consent to this Termination Agreement.”¹¹⁹ In contrast, there is no indication in the record that Tembec even made an attempt to ascertain whether the United States had signed the TLA. It, therefore, must be inferred that, at the time, Tembec too was of the view that the SCA replaced the TLA and, in any event, that either version of the TLA had not acquired the status of a legally binding agreement. It may be added that Ms. Lyon in her letter of 14 December 2006 also refers to “the replacement of the TLA with the SCA”¹²⁰ rather than a supplementing of the TLA by the SCA, as Tembec argues.

127. Tembec claims to have had a conversation with a “confidential Canadian source asking for confidentiality” on the evening of 11 October 2006. The source allegedly indicated, *inter alia*, that “the Governments could not satisfy the TLA

¹¹⁷ See ¶ 39 *supra*.

¹¹⁸ See ¶ 35 *supra*.

¹¹⁹ See ¶¶ 114-115 *supra*.

¹²⁰ See ¶ 67 *supra*.

condition precedent for entry into force of the SLA and would take other action enabling entry into force, including a possible substitution of the SCA [*sic*].”¹²¹ The Tribunal is in no position to verify the veracity of what the undisclosed confidential Canadian source said. In any event, if the statement is correct, it would have been yet another reason for Tembec to inquire about the status of the TLA. Moreover, the alleged communication shows that matters relating to the SLA, TLA and SCA were treated by the Government of Canada, and not by the Government of the United States, insofar as Canadian subjects were concerned.

128. At the Costs Hearing on 31 January 2007, the United States stated that the reference to Tembec’s NAFTA Chapter Eleven claim in the TLA submitted to Tembec (Mr. Feldman) on 8 September 2006, was “in error,” although “[i]t had no legal effect whatsoever”.¹²² The United States further stated that it “never occurred to the United States that its absence would not be noticed.”¹²³ The United States adds that “[t]here was no trickery here.”¹²⁴ In light of the circumstances described above, the Tribunal finds that explanation credible. Under those circumstances, Tembec could and should have noticed the absence of the reference to its NAFTA Chapter Eleven claim in the SCA and, if it had been opposed to it, Tembec should have raised an objection or refrained from signing the SCA. Furthermore, the Government of Canada subscribed to the new SCA and must be presumed as a State Party to the SLA 2006 Amendments to have been aware of the changes that occurred between the TLA and the SCA.

¹²¹ Tembec’s answer to Question 16 of 30 January 2007. *See also* Tembec’s Memorandum of Points and Authorities in support of Motion for Leave to File Supplemental Brief,” ¶ 71 *supra*, at p. 4 n. 1, filed with the U.S. District Court for the District of Columbia.

¹²² Tr. p. 23 at 7-12.

¹²³ Tr. p. 29 at 20-22. *See also* United States’ answer to Question 5 of 29 January 2007.

¹²⁴ *Id.*

129. Tembec argues that its NAFTA Chapter Eleven claim somehow survived because this Tribunal did not dismiss it with prejudice to reinstatement. However, Tembec's NAFTA Chapter Eleven claim was legally no longer pending before this Tribunal (save for the costs of arbitration) or any other tribunal or court because Tembec had the claim removed. An action for setting aside an order or award is not equivalent to a continuation of a claim on the merits. In the Termination Order, the Tribunal declared that it lacked the power to dismiss Tembec's claim with prejudice or without prejudice to reinstatement. In that Order, the Tribunal also stated that the question whether or not the termination as to Tembec is with or without prejudice to reinstatement is "to be considered and decided upon by the Article 1120 tribunal, if any, to which Tembec may resubmit the afore-mentioned NAFTA claims notwithstanding, *inter alia*, the provisions of Article 1121(1)(b) of the NAFTA, Tembec's waiver made thereunder and the provisions of Article 1126(8) of the NAFTA."¹²⁵ In September 2006, therefore, Tembec's NAFTA Chapter Eleven claim was not extant or pending as a legal matter.
130. The Tribunal finds it difficult to accept that Tembec was forced to sign the SCA "because what we were also told, that if we didn't sign, there would be no Softwood Lumber Agreement."¹²⁶ Rather, the facts show that the following happened on 11 October 2006: Mr. Feldman received the SCA around 6:00 pm, sent emails at 6:09 pm and 6:20 pm to Ms. Anderson inquiring about the SCA, then studied the SCA and sent another email at 6:46 pm with some technical comments.¹²⁷ Mr. Feldman signed the SCA around 9:00 pm and sent it via facsimile to the Governments of Canada and the United States. It is significant to note that the cover letter of Mr. Feldman does not contain any reservation of rights, or even complaint, regarding duress or other lack of consent or

¹²⁵ See ¶ 11 *supra*, at ¶ 1.3.

¹²⁶ Tr. p. 73 at 1-3.

¹²⁷ See ¶¶ 44-48 *supra*.

understanding regarding the SCA; nor does the cover letter mention in any manner either version of the TLA.¹²⁸ To the contrary, the cover letter merely suggested a “very very modest[.]” modification of the SCA.

131. Tembec also invokes the negotiations regarding the stipulation of dismissal with prejudice of the set aside action with respect to the Consolidation Order before the U.S. District Court for the District of Columbia.¹²⁹ Tembec contends that it relied on the TLA in the email exchange with Mr. Haas of the U.S. Department of Justice. The relevant passage is in an email of Mr. Feldman to Mr. Haas of 11 October 2006 at 5:18 pm in response to a proposed text for a stipulation of dismissal by Mr. Haas in his email of 10 October 2006 at 5:39 pm.¹³⁰ Tembec’s reference to the TLA, however, was made prior to Tembec’s receipt of the SCA on 11 October 2006. In the email exchange subsequent to Mr. Haas’ email of 10 October 2006, the TLA was not mentioned or even alluded to. At that point in time, Tembec must have been aware that the TLA was being replaced by the SCA.
132. The reference in the draft of the stipulation of dismissal to the parties’ agreement that each will bear its own costs and attorney fees of the action before the District Court¹³¹ should have made Tembec particularly aware regarding the issue of the costs of its NAFTA Chapter Eleven claim. Tembec knew that the issue of costs was, as contemplated by the Termination Order of 10 January 2006,¹³² still

¹²⁸ See ¶ 49 *supra*.

¹²⁹ See ¶¶ 50-51 *supra*.

¹³⁰ “I have just been authorized to sign a stipulation as attached. It adds a sentence taken directly from the Termination of Litigation Agreements fashioned by the two federal governments and already signed by Tembec, and then the clarification of fees. Please confirm that you agree to this version of the stipulation.” Exhibit C to the United States’ submission to the Tribunal of 4 December 2006. The added sentence read: “This Termination Agreement is without prejudice to the position of any party on any issue in the Covered Actions.” (Tr. p. 131 at 18-21)

¹³¹ See ¶ 50 *supra*.

¹³² See ¶ 11 *supra*.

pending before this Tribunal, as it is shown by Tembec's letter to this Tribunal of 6 October 2006.¹³³

133. In light of the foregoing, the fact that the SLA Amendments included a provision to the effect that the TLA was replaced by the SCA should not have come as a surprise to Tembec. As it is seen in the foregoing, when Tembec signed and returned the SCA on 11 October 2006, it knew, or should have known, that the TLA was being replaced by the SCA. It is then logical that the SLA 2006 between Canada and the United States was amended by the two States as well in order expressly to confirm that fact. Canada and the United States, therefore, did not need to consult with, or obtain agreement from, Tembec regarding the SLA Amendments, to which, moreover, Tembec was not a party.
134. In her letter of 14 December 2006, Ms. Lyon states that the “renegotiation [of the TLA] was not an attempt to modify the understanding reflected in the TLA that no costs would be sought for covered actions.”¹³⁴ That may have been the intent of Canada, but the United States rightly points out that the renegotiated SCA no longer lists Tembec's NAFTA Chapter Eleven claim as “any action referenced in this Claims Settlement Agreement,” which, according to Ms. Lyon, was a change from the reference to “Covered Actions” in the TLA.
135. Ms. Lyon further states in her letter of 14 December 2006: “At no point in the negotiation of the SCA did the United States raise any suggestion that the SCA as redrafted should alter the terms of settlement for Tembec.” The United States disputes the reliability of Ms. Lyon's statement, contending that she was not closely involved in the (re)negotiations.¹³⁵ Whatever may be Ms. Lyon's direct

¹³³ See ¶ 35 *supra*.

¹³⁴ See ¶ 67 *supra*.

¹³⁵ Tr. pp. 141-144.

knowledge of the (re)negotiations – she was not tendered for cross-examination before this Tribunal¹³⁶ – if what Ms. Lyon states is correct, one wonders what the reason was for Canada not to raise the question with the United States as to why the reference to Tembec’s NAFTA Chapter Eleven claim had been deleted. Canada after all was the second State Party to the SLA and thereby is responsible for its contents as well as for those of annexes to the SLA, especially when one takes into account the fact that the standard operating procedure was for the Government of Canada to look after the affected interests of its private nationals and for the United States to look after the affected interests of its private nationals. Failing evidence to the contrary beyond what is set forth in Ms. Lyon’s untested letter, it must be assumed that Canada has accepted the deletion as a State Party to the SLA 2006 Amendments.

136. Finally, as part of its “bait and switch” contention, Tembec asserts that the United States waited with its cost claim against Tembec until 13 October 2006,¹³⁷ after Tembec had signed the SCA and the SLA had entered into force. However, the United States had specifically requested in its letter of 13 December 2005 “the opportunity to make a submission detailing its costs in defending against Tembec’s claim,” so that Tembec was on notice that the United States was to claim costs from Tembec following its withdrawal from the proceedings. The United States filed its cost claim against Tembec with this Tribunal on 7 April 2006.¹³⁸ At that time, Tembec received a copy. The Tribunal followed up on the cost claim in September 2006 by allowing Tembec to respond to the United States’ cost claim.¹³⁹ Tembec did so on 6 October 2006.¹⁴⁰ It may be a coincidence that

¹³⁶ See also ¶ 111 *supra*.

¹³⁷ See ¶ 56 *supra*.

¹³⁸ See ¶ 14 *supra*.

¹³⁹ See ¶ 27 *supra*.

¹⁴⁰ See ¶¶ 35-37 *supra*.

the United States responded on 13 October 2006, but a week for a response is timely and cannot be viewed as part of an alleged “bait and switch” scheme. Rather, when the Tribunal in mid-August 2006 began again to pursue the United States’ cost claim, Tembec should have been on the alert that the cost claim was very much alive and in process. It is not the mandate of this Tribunal to repair mistakes that Tembec may have made in that respect.

137. In conclusion, Tembec has failed to prove that it has made a legally binding agreement with the United States in respect of Tembec’s NAFTA Chapter Eleven claim that each party bears its own costs and that the fees and disbursements of the Arbitral Tribunal and the expenses of the administering authority are to be equally divided between the Tembec and the United States.

D. Determination of Which of Tembec and the United States Shall Bear the Costs

138. Article 1135 of the NAFTA provides: “. . . . A tribunal may also award costs in accordance with the applicable arbitration rules.” The UNCITRAL Arbitration Rules being the applicable rules in the present case, the principle for awarding costs of arbitration is, according to those Rules, that an arbitral tribunal shall determine that the costs shall in principle be borne by the unsuccessful party, unless it finds an apportionment of the costs between the parties reasonable under the circumstances of the case (Article 40(1)).¹⁴¹ With respect to the costs of legal representation and assistance, the UNCITRAL Rules provide that the arbitral tribunal, taking into account the circumstances of the case, is free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable (Article 40(2)).¹⁴² Article 40(1)

¹⁴¹ Article 40(1) of the UNCITRAL Arbitration Rules is reproduced at ¶ 5 *supra*.

¹⁴² Article 40(2) of the UNCITRAL Arbitration Rules is reproduced at ¶ 5 *supra*.

and (2) grant a wide discretion to an arbitral tribunal in awarding costs of arbitration.¹⁴³

139. The Tribunal is aware of a certain practice in investment arbitrations that each party bears its own costs and the parties bear the fees and costs of the tribunal and administering arbitral institution equally. That practice is not binding on this Tribunal, which prefers the more recent practice to apply also in investment arbitration the general principle of “costs follow the event,” save for exceptional circumstances such as issues concerning access to justice.¹⁴⁴ That approach is the more compelling in the present case which is governed by the UNCITRAL Arbitration Rules that expressly contemplate the rule of “costs follow the event” in Article 40(1) by its emphasis on “success” or lack thereof.
140. Tembec has advanced a number of arguments why the costs of arbitration should not be awarded in favour of the United States.

¹⁴³ For the question of the difference between the first and second paragraph of Article 40, see *S.D. Myers v. Canada*, UNCITRAL (NAFTA), Final Award, 30 December 2002, at ¶ 34, online at <http://ita.law.uvic.ca/documents/SDMyersFinalAward.pdf>; *International Thunderbird Gaming Corporation v. Mexico*, UNCITRAL (NAFTA), Arbitral Award, 26 January 2006, at ¶ 213, available online at: <http://ita.law.uvic.ca/documents/ThunderbirdAward.pdf>.

¹⁴⁴ See *Thunderbird*, n. 143 *supra*, at ¶ 214. See also U.S. District Court for the District of Columbia, *International Thunderbird Corporation v. Mexico*, Civil Action 06-00748, 14 February 2007, rejecting the petition to set aside the Award of 26 January 2006, at ¶ 3: “Undeterred by the rule’s [i.e., Article 40(1)-(2) of the UNCITRAL Rules] plain language, Thunderbird cites prior NAFTA and UNCITRAL arbitrations for the proposition that precedent has narrowed the rule’s wide scope. Nothing in those decisions, however, persuades the court that they have meaningfully narrowed the discretion granted in the rule. Even if Thunderbird had identified such precedent, its argument would still fail, as Thunderbird has not shown that the panel expressly recognized that precedent as controlling and nonetheless refused to apply it,” available online at: <http://ita.law.uvic.ca/documents/Thunderbird-setside.pdf>; *Generation Ukraine, Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, 16 September 2003, at ¶ 24.8, available on line at: http://ita.law.uvic.ca/documents/GenerationUkraine_000.pdf; *Fireman’s Fund Insurance Company v. Mexico*, ICSID Case No. ARB(AF)/02/01, Final Award, 17 July 2006, at ¶ 221, available online at: <http://ita.law.uvic.ca/documents/FiremansFinalAwardRedacted.pdf>; *Telenor Mobile Communications AS v. Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006, at ¶ 107: “Though aware of a common practice in ICSID arbitrations for the parties to bear their own costs and bear the costs of ICSID and the tribunal equally regardless of the outcome of the case, this Tribunal is among those who favour the general principle that costs should follow the event,” available online at: http://ita.law.uvic.ca/documents/Telenorv.HungaryAward_000.pdf.

141. A first argument of Tembec is that the United States has not necessarily prevailed on the issue of consolidation because Tembec has moved to reinstate its motion before the U.S. District Court for the District of Columbia to vacate the Consolidation Order.
142. In this regard, the Tribunal has already noted in footnote 46 above that the District Court denied Tembec's motion on 19 April 2007.
143. Furthermore, the United States prevailed on the issue of consolidation. The success of a party in an arbitration cannot be undone by the other party merely filing an action for setting aside the order or award, let alone by seeking to reinstate a set aside action that has already been dismissed with prejudice. Tembec's first argument, therefore, must fail.
144. A second argument of Tembec is that the United States moved for consolidation while it had repeatedly represented that it did not plan to do so, and that Tembec and the United States had already argued the issue of jurisdiction before an Article 1120 tribunal.
145. Tembec's argument is factually incorrect as the *Tembec* Article 1120 Tribunal did not hold a hearing on the jurisdictional challenge by the United States before the consolidation proceedings were instituted. In the Consolidation Order of 7 September 2005, the Tribunal also rejected Tembec's assertion that the United States was too late with requesting consolidation pursuant to Article 1126 of the NAFTA.¹⁴⁵ Tembec's second argument, therefore, must fail as well.
146. A third argument by Tembec is that it should not be punished for exercising its NAFTA right to file and pursue a Chapter Eleven claim, and should not be

¹⁴⁵ Consolidation Order at ¶¶ 163-169, available online at: <http://www.state.gov/documents/organization/53113.pdf>.

compelled to finance its opponents' procedural motions for its opponents' unique interests. In this connection, Tembec refers to the Tribunal's finding in the Consolidation Order that the consolidation provision in the NAFTA was intended to "alleviat[e] the resources of the State Parties in defending multiple claims"

147. Tembec's fourth argument is that the nature of the consolidation action further counsels against reallocation of fees and costs, even were the Tribunal to conclude that the United States was the prevailing party, arguing that consolidation under NAFTA Article 1126 presented novel legal issues that had been treated only once before.
148. Tembec's third and fourth argument might have carried weight if Tembec had not unilaterally withdrawn as claimant from the proceedings. When Tembec availed itself of the dispute resolution mechanism of NAFTA Chapter Eleven for its claim against the United States, Article 1126 of the NAFTA concerning consolidation was part and parcel of the mechanism. Tembec disagreed with the outcome of the United States' request for consolidation, but such a disagreement does not entitle a claimant to withdraw unilaterally without consequences, and in particular cost consequences.
149. The UNCITRAL Arbitration Rules do not address expressly the issue of a unilateral withdrawal by a claimant. However, the issue can be resolved on the basis of an interpretation of the UNCITRAL Rules. Accordingly, the Tribunal interprets the reference to "the unsuccessful party" in Article 40(1) of the UNCITRAL Rules to include a party that unilaterally withdraws its claim. It triggers also the general principle of "costs follow the event," which, according to this Tribunal, is the guiding principle for the application of Article 40(2) of the Rules. The rule that a claimant is liable for the costs of the proceedings when that claimant unilaterally withdraws from the proceedings is in accord with many national legal systems.

The Tribunal recognizes that the rule may not be applicable in exceptional circumstances, which, however, are not present in the instant case.

150. Tembec did unilaterally seek to withdraw from the proceedings by its letter of 7 December 2005.¹⁴⁶ The Tribunal's 10 January 2006 Termination Order meant that Tembec had indeed withdrawn its claims under Chapter Eleven of the NAFTA (save for the costs of arbitration). As it is explained in the Consolidation Order, in the case of an order for consolidation under Article 1126(2), the Article 1126 Tribunal takes over the proceedings, in the capacity of an arbitral tribunal, to hear and determine the disputes from the respective Article 1120 Tribunals.¹⁴⁷ Thus, this Tribunal took over the jurisdiction from the *Tembec* Article 1120 Tribunal to hear and determine Tembec's NAFTA Chapter Eleven claim. Accordingly, when Tembec "remove[d] its Statement of Claim from these Article 1126 arbitration proceedings,"¹⁴⁸ it withdrew its NAFTA Chapter Eleven claim altogether, and this is so even though the Tribunal's Order of 10 January 2006 was neither with nor without prejudice to the question of reinstatement.
151. Tembec advances one further argument, which is that it is singled out by the United States, motivated by retribution for Tembec's challenge of the Consolidation Order, while the United States treated Canfor and Terminal differently. That argument is of no avail to Tembec either. Pursuant to the applicable UNCITRAL Arbitration Rules, the United States is entitled to seek the costs of arbitration from Tembec, and, in the absence of an abuse of right, motive for the use of a right is irrelevant when an arbitral tribunal exercises its discretion in awarding costs. Moreover, the situation of Tembec differs from that of Canfor and Terminal. Tembec unilaterally withdrew from the proceedings, while Canfor

¹⁴⁶ Quoted at ¶ 10 *supra*.

¹⁴⁷ Consolidation Order, n. 2 *supra*, at ¶ 100.

¹⁴⁸ Tembec's letter of 7 December 2005, ¶ 10 *supra*.

and Terminal continued the proceedings. When Tembec did so, the United States made it clear that it would seek costs from Tembec.^{149 150}

152. Consequently, Tembec shall have to bear the costs of arbitration referred to in Articles 38 and 39 of the UNCITRAL Arbitration Rules insofar as it concerns the Article 1120 and Article 1126 proceedings between it and the United States.

VI. THE COSTS OF THE PROCEEDINGS AS BETWEEN CLAIMANTS CANFOR AND TERMINAL AND RESPONDENT UNITED STATES

153. With regard to the costs of Claimants Canfor and Terminal and Respondent United States, this Joint Order has previously referred (1) in ¶¶ 78 and 79 above to the correspondence of Canfor of 12 October 2006 and of the United States of 3 November 2006 with the Tribunal, confirming their adherence to the SCA and thus agreeing “not to seek from the other party costs and expenses incurred in this proceeding” and (2) in ¶ 83 above to the 22 January 2007 letter from Terminal to the Tribunal, noting agreement with the United States “to terminate the Chapter Eleven proceedings with respect to Terminal, without costs to either party. . .” and the letter of the United States of 18 June 2007, confirming that “Terminal and the United States have agreed to terminate the proceedings with respect to Terminal, with each party bearing its own costs”.
154. In this connection, the Tribunal recalls that Article 40(3) of the applicable UNCITRAL Arbitration Rules provides:

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in

¹⁴⁹ United States’ letter of 13 December 2005, quoted in the Termination Order of 10 January 2006, ¶ 11 *supra*, at ¶ 2.1.

¹⁵⁰ The Tribunal’s considerations in this paragraph are also responsive to Tembec’s submission of 1 June 2007 referred to in ¶ 75 *supra*, assuming that the Tribunal would have taken into account that unauthorized submission.

article 38 and article 39, paragraph 1, in the text of that order or award.

Thus, with regard to Claimants Canfor and Terminal and Respondent United States, this Joint Order addresses not only a fixing of costs but also a termination of the proceedings. As previously reported, Claimant Tembec's participation in these proceedings was terminated by order of the Tribunal on 10 January 2006 but subject to the condition subsequent of an award of costs as between Tembec and the United States, an award that is later set forth in this Joint Order as well.

155. In view of the agreements on costs made between Canfor and the United States and between Terminal and the United States mentioned above, the Tribunal need only to fix its fees and those of ICSID, as required by Article 38(a) of the UNCITRAL Arbitration Rules, and then to allocate those costs as agreed by those parties.¹⁵¹ In the present case, as previously mentioned, the arbitrators' fees are determined in accordance with the ICSID schedule as provided in Article 39(2) of the UNCITRAL Rules.¹⁵²

VII. THE COSTS OF THE NAFTA ARTICLE 1120 PROCEEDINGS

156. The Tribunal is obliged to consider the costs in the Article 1120 proceedings separately. The financial practice appears to be that, with the constitution of a NAFTA Article 1126 tribunal, fresh advances for fees and expenses are requested and the balance of any advance stemming from the NAFTA Article 1120 tribunals is refunded to the parties. Such a financial practice leaves unaltered the legal

¹⁵¹ Article 38(a) provides: "The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39." Article 39 of the UNCITRAL Rules is quoted at ¶ 5 *supra*.

¹⁵² Article 39(2) provides: "If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case."

principle that the case remains the same and that a NAFTA Article 1126 tribunal merely takes the place of the Article 1120 tribunals.¹⁵³

157. The Article 1120 proceeding in *Canfor* was not administered by ICSID. The fees and expenses of the NAFTA Article 1120 Tribunal in *Canfor* are (amounts in US\$):

		(i) Fees	(ii) Expenses	(iii) Total
(a)	Professor Emmanuel Gaillard, Presiding Arbitrator	134,950.00	24,873.29	159,823.29
(b)	Professor Joseph H.H. Weiler, Arbitrator	68,750.00	12,569.27	81,319.27
(c)	Conrad K. Harper, Esq., Arbitrator	15,000.00	169.05	15,169.05
(d)	Yas Banifatemi, Esq., Administrative Secretary	79,242.00	18,741.29	97,983.29
(e)	Expenses		18,328.35	18,328.35
(f)	Total			372,623.25

158. Pursuant to their agreement, Canfor and the United States are to bear the fees and expenses of the Article 1120 Tribunal in *Canfor* in equal shares. The Tribunal notes that the Article 1120 Tribunal in *Canfor* has refunded to Canfor and the United States US\$ 163,688.38 each on account of the advances made by Canfor and the United States in the amount of US\$ 350,000 each (in total US\$ 700,000). As a result, the Tribunal need not make any further determination in that regard.
159. No NAFTA Article 1120 Tribunal was constituted in *Terminal*. Again, the Tribunal need not make any further determination in that regard.
160. As mentioned, in both cases the parties agreed that each party was to bear its own costs.

¹⁵³ See Consolidation Order, n. 2 *supra*, at ¶ 100.

161. As analyzed in Section V.C above, no such agreement was reached between Tembec and the United States. The United States claims on account of the *Tembec* Article 1120 arbitration an amount of costs of US\$ 125,086.71, comprising an advance deposit of US\$ 75,000 for arbitration expenses and US\$ 50,086.71 of legal fees of its in-house attorneys.¹⁵⁴
162. The Article 1120 proceeding in *Tembec* was administered by ICSID. The fees and expenses of the Article 1120 Tribunal in *Tembec* are (amounts in US\$):

		(i) Fees	(ii) Expenses	(iii) Total
(a)	Judge Florentino P. Feliciano, Presiding Arbitrator	16,590.00	0	16,590.00
(b)	Professor James R. Crawford, Arbitrator	4,800.00	0	4,800.00
(c)	Professor Kenneth W. Dam, Arbitrator	4,800.00	0	4,800.00
(d)	ICSID's administrative charges		8,139.15	8,139.15
(e)	Total			34,329.15

163. The Tribunal notes that ICSID refunded to Tembec US\$ 62,409.99 on 20 December 2006 on account of the advance made by Tembec in the amount of US\$ 75,000, and that ICSID refunded to the United States US\$ 62,683.69 on 31 January 2007 on account of the advance made by the United States in the amount of US\$ 75,000. The refunds included interest accrued on the advances. The difference between the amounts of reimbursement is due to interest accrued on the advances and the different dates of reimbursement. Consequently, Tembec is to pay the United States (75,000 – 62,683.69=) US\$ 12,316.31 on account of the cost of arbitration in the *Tembec* Article 1120 proceedings. The legal fees claimed by the United States for that part of the proceedings will be considered in Chapter XI below.

¹⁵⁴ See ¶ 84 *supra*.

VIII. ADVANCES OF THE PARTIES IN THE NAFTA ARTICLE 1126 PROCEEDINGS

164. As of 10 January 2006, the date of the Tribunal's Tembec Termination Order, Canfor, Tembec and Terminal, as Claimants, and the United States, as Respondent, had, upon request from the Tribunal, each previously advanced in June of 2005 US\$ 50,000 on account of the Article 1126 proceedings. This equality was in keeping with UNCITRAL Article 41(1) that provides: "The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c)."
165. Subsequently, in response to a 29 December 2005 request from the Tribunal pursuant to UNCITRAL Article 41(2),¹⁵⁵ Claimants Canfor and Terminal made a further advance of US\$ 100,000 each and Respondent United States made a further advance of US\$ 300,000, all such payments being received by ICSID before the Tribunal's 10 January 2006 Termination Order with respect to Tembec. For its part, Tembec never responded to the Tribunal's 29 December 2005 request that Tembec also make a further advance of US\$ 100,000 on account of the Article 1126 proceedings. The 29 December 2005 request of the Tribunal was based on its conclusion that each of the Claimants should deposit one-sixth each of the total then requested advance and Respondent United States one-half.
166. In August of 2006, upon further request from the Tribunal pursuant to UNCITRAL Article 41(2),¹⁵⁶ Claimants Canfor and Terminal made a further advance of US\$ 50,000 each (or one-quarter each of the then total requested deposit) and the United States made a further advance of US\$ 100,000 (or one-half of the then total requested deposit).

¹⁵⁵ Article 41(2) of the UNCITRAL Rules provides: "During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties."

¹⁵⁶ See n. 155 *supra*.

167. Lastly, in July 2007, upon another further request from the Tribunal pursuant to UNCITRAL Article 41(2),¹⁵⁷ Claimant Tembec and the United States made a further advance of US\$ 50,000 each.
168. In sum, during the course of this NAFTA Article 1126 proceeding, Claimants Canfor and Terminal have advanced US\$ 200,000 each, Claimant Tembec has advanced US\$ 100,000 and Respondent United States has advanced US\$ 500,000. These advances have thus totaled US\$ 1,000,000. The following chart depicts these advances by the parties:

Advances from the Claimants and the Respondent (in US Dollars)

Date	Canfor	Tembec	Terminal	USA	All Parties
Jun-05	50,000	50,000	50,000	50,000	200,000
Dec-05/ Jan-06	100,000	0	100,000	300,000	500,000
Aug-06	50,000	0	50,000	100,000	200,000
Jul-07	0	50,000	0	50,000	100,000
Totals	200,000	100,000	200,000	500,000	1,000,000

IX. THE THREE SEPARATE PHASES OF THE NAFTA ARTICLE 1126 PROCEEDING FOR PURPOSES OF ALLOCATION OF COSTS

169. In light of the analysis contained in Part V hereof, the Tribunal has determined that the NAFTA Article 1126 proceedings, for costs purposes, fall into three separate and distinguishable time periods: the first, from 6 May 2005 (the date of the establishment of the Tribunal, before which neither the Tribunal nor ICSID

¹⁵⁷ See n. 155 *supra*.

incurred any costs) until 10 January 2006 (the date of the issuance by the Tribunal of the Order for the Termination of the Arbitral Proceedings with respect to Tembec), this first period involving as Claimants Canfor, Tembec and Terminal (“Phase I”); the second, from 11 January 2006 (the day after the issuance by the Tribunal of the Tembec Termination Order) until 6 June 2006 (the date of the issuance by the Tribunal of the Decision on the Preliminary Question), this second period involving as Claimants only Canfor and Terminal (“Phase II”); and the third, from 7 June 2006 (the day after the issuance by the Tribunal of the Decision on the Preliminary Question) until the date of this Joint Order, this third period involving all three initial Claimants but for differing reasons and in varying proportions as hereafter explained (“Phase III”).

170. In light of the agreements on costs made as between Canfor and the United States and between Terminal and the United States mentioned above and in light of the Tribunal’s previous conclusions on costs as between Tembec and the United States, the Tribunal has decided to allocate the costs among the parties for each of the three Phases of the case described in the preceding paragraph as follows:

- (1) The fees and expenses of the Article 1126 Tribunal during Phase I from 6 May 2005 until 10 January 2006 are to be borne in the following fashion: two-thirds of such costs are allocated to Canfor, Terminal and the United States, on the one hand, and this two-thirds portion of such costs is to be borne by Canfor and Terminal at 25% each and by the United States at 50%; and one-third of such costs is allocated to Tembec and the United States, on the other hand, and this one-third portion of such costs is to be borne 100% by Tembec and 0% by the United States;
- (2) The fees and expenses of the NAFTA Article 1126 Tribunal during Phase II from 11 January 2006 until 6 June 2006 are to be borne by Canfor and

Terminal at 25% each and by the United States at 50%. This is so because Tembec did not participate in the case during Phase II; and

- (3) The fees and expenses of the NAFTA Article 1126 Tribunal during Phase III from 7 June 2006 until the date of this Joint Order are to be borne in the following fashion: 10% of such costs are allocated to Canfor, Terminal and the United States, on the one hand, and this 10% portion of such costs is to be borne by Canfor and Terminal at 25% each and by the United States at 50%; and 90% of such costs are allocated to Tembec and the United States, on the other hand, and this 90% portion of such costs is to be borne 100% by Tembec and 0% by the United States. With regard to this 10%-90% distribution, this is so because the Tribunal has concluded that Phase III was only minimally engaged with issues as between Canfor and Terminal as Claimants on the one hand and the United States as Respondent on the other hand whereas Phase III was largely dominated by the prolonged and accusatory battle over costs as between Tembec on the one hand and the United States on the other hand. The vast bulk of the arbitrators' time during Phase III, for example, was devoted to absorbing and contending with the factual and legal charges and counter-charges of Tembec and the United States. This 10%-90% disparity is generally evidenced in the proportions of this Joint Order that are devoted to issues involving Canfor, Terminal and the United States, on the one hand, and Tembec and the United States, on the other hand.

171. With regard to Phase I, the Tribunal notes that after the issuance of the Consolidation Order on 7 September 2005, it took more than three months of consultations with the parties in order to issue Procedural Order No. 1, which set into motion a preliminary and separate phase of the proceedings with respect to the objection raised by the United States on the basis of Article 1901(3) of the

NAFTA against the Claimants' NAFTA Chapter Eleven claims.¹⁵⁸ As previously noted, when the Tribunal was about to issue Procedural Order No. 1, Tembec advised, on 7 December 2005, that it sought to withdraw from the proceedings. Tembec's withdrawal was accepted by the Tribunal in its Termination Order of 10 January 2006, except for the costs of arbitration.¹⁵⁹

172. At this point, it is to be recalled that Tembec argues that it should have no liability for any costs or expenses after 7 December 2005 when it notified all parties to the proceedings that it had removed its claim from the consolidated proceedings and had begun proceedings in the U.S. District Court for the District of Columbia to vacate the Consolidation Order of 7 September 2005.¹⁶⁰ However, the fact that the United States opposed the withdrawal was a consequence of Tembec's decision to withdraw in the first place. Moreover, as provided in ¶ 1.2 of Procedural Order No. 1 of 17 December 2005, Tembec continued to be a party to the proceedings.¹⁶¹ It was only in the Termination Order of 10 January 2006 that the proceedings were terminated with respect to Tembec, save for the issue of costs.¹⁶² The Tribunal, therefore, determines that the cut-off date for Tembec's liability for costs in Phase 1 is the date of the Termination Order, i.e., 10 January 2006, subject to its potential liability for costs as expressly saved under the terms of the 10 January 2006 Termination Order.

¹⁵⁸ See ¶ 9 *supra*.

¹⁵⁹ See ¶ 11 *supra*.

¹⁶⁰ See ¶ 93 *supra*.

¹⁶¹ Procedural Order No. 1 provides at ¶ 1.2: "Pending resolution of Tembec's request, Tembec is considered to continue to be a party to the present proceedings and, accordingly, is referred to in this Order on the same footing as the other Claimants. Upon resolution of that request, this Order may be modified as will be required, having regard to Tembec's position as resolved."

¹⁶² See ¶ 11 *supra*.

173. Prior to quantifying the costs of the arbitration, the Tribunal must fix itself its fees for each arbitrator separately, as required by Article 38(a) of the UNCITRAL Arbitration Rules.¹⁶³
174. In the present case, the fees are determined in accordance with the ICSID schedule as provided in Article 39(2) of the UNCITRAL Rules,¹⁶⁴ considering that the Secretary-General of ICSID is the Appointing Authority under Article 1126 of the NAFTA.
175. There follows a chart that sets forth for Phase I, Phase II and Phase III of this proceeding the costs of the Tribunal (including the respective fees of each arbitrator):

[continued next page]

¹⁶³ Article 38(a) provides: “The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39.” Article 39 of the UNCITRAL Rules is quoted at ¶ 5 *supra*.

¹⁶⁴ Article 39(2) provides: “If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.”

Arbitrators' fees and expenses for Phases I, II and III

Arbitrator	Period	Hours	Days	Fees	Expenses	Travel Expenses	Total Paid
AdM¹⁶⁵	6 May - 15 June 2005	40	5.00	12,000.00	6.93	1,478.08	13,485.01
	6 July - 7 Sep. 2005	72	9.00	27,000.00	116.55	958.88	28,075.43
	8 Sept. - 7 Dec. 2005	5	0.56	1,687.50	0.00	0.00	1,687.50
	8 Dec. 2005 - 10 Jan. 2006	44	5.50	16,500.00	0.00	0.00	16,500.00
	Phase I - 6 May 2005 – 10 Jan 2006	161	20.06	57,187.50	123.48	2,436.96	59,747.94
	11 Jan. -15 Jan. 2006	32	4.00	12,000.00	944.92	1,081.10	14,026.02
	15 Jan. - 30 May 2006	88	11.00	33,000.00	0.00	0.00	33,000.00
	Phase II -11 Jan 2006 – 6 June 2006	120	15.00	45,000.00	944.92	1,081.10	47,026.02
	31 Jan. 2007	0	0.00	0.00	119.00	1,434.00	1,553.00
	1 Jan. - end	56	7.00	21,000.00	0.00	0.00	21,000.00
	Phase III - 7 June 2006 - Date of Order	56	7.00	21,000.00	119.00	1,434.00	22,553.00
Totals		337	42.06	123,187.50	1,187.40	4,952.06	129,326.96
	Period	Hours	Days	Fees	Expenses	Travel Expenses	Total Paid
DRR¹⁶⁶	6 May - 5 July 2005	63	7.88	18,900.00	843.85		20,020.75
	6 July - 7 Sep. 2005	115	14.38	43,125.00	736.10	276.90	43,861.10
	8 Sep. 2005 - 10 Jan. 2006	132	16.50	49,500.00	41.65	0.00	49,541.65
	Phase I - 6 May 2005 – 10 Jan. 2006	310	38.75	111,525.00	1,621.60	276.90	113,423.50
	11 Jan. - 31 Mar. 2006	95	11.88	35,625.00	1,608.00	0.00	37,233.00
	1 Apr. - 5 June 2006	189	23.63	70,875.00	1,936.86	226.80	73,038.66
	Phase II -11 Jan. 2006 – 6 June 2006	284	35.50	106,500.00	3,544.86	226.80	110,271.66
	9 Oct. 2006 - 24 Feb. 2007	65	8.13	24,375.00	734.97	0.00	25,109.97
	25 Feb. - end	96	12.00	36,000.00	0.00	0.00	36,000.00
	Phase III - 7 June 2006 - Date of Order	161	20.13	60,375.00	734.97	0.00	61,109.97
Totals		755	94.38	278,400.00	5,901.43	503.70	284,805.13

¹⁶⁵ Professor Armand L.C. de Mestral.

¹⁶⁶ Davis R. Robinson, Esq.

	Period	Hours	Days	Fees	Expenses	Travel Expenses	Total Paid
AJB¹⁶⁷	6 May - 30 June 2005	152	19.00	45,600.00	1,205.44	3,121.77	49,927.21
	6 July - 7 Sept. 2005	328	41.00	123,000.00	1,645.65	3,691.33	128,336.98
	8 Sept. 2005 - 10 Jan. 2006	296	37.00	111,000.00	2,419.44	3,657.19	117,076.63
	Phase I - 6 May 2005 – 10 Jan 2006	776	97.00	279,600.00	5,270.53	10,470.29	295,340.82
	February 3 – 10 June 2006	336	42.00	126,000.00	1,147.56	2,212.07	129,359.63
	Phase II - 11 Jan 2006 – 6 June 2006	336	42.00	126,000.00	1,147.56	2,212.07	129,359.63
	20 June 2006 - end	240	30.00	90,000.00	1,462.26	0.00	91,462.26
	Phase III - 7 June 2006 - Date of Order	240	30.00	90,000.00	1,462.26	0.00	91,462.26
Totals		1,352	169.00	495,600.00	7,880.35	12,682.36	516,162.71
TOTALS		2,444	305.44	897,187.50	14,969.18	18,138.12	930,294.80

176. On the basis of the above chart, and adding the administrative charges of ICSID, Phase I, Phase II, and Phase III show the following totals (hereinafter the “Tribunal’s Cost Chart”):

Totals by Phase, including ICSID’s Administrative Charges

	Arbitrators	ICSID	Total
Phase I	468,512.26	9,666.17	478,178.43
Phase II	286,657.31	41,538.64	328,195.95
Phase III	175,125.23	14,009.98	189,135.21
Totals	930,294.80	65,214.79	995,509.59

¹⁶⁷ Professor Albert Jan van den Berg.

X. COMPUTATION OF AMOUNTS OWING IN THE NAFTA ARTICLE 1126 PROCEEDINGS

177. It is to be noted as a preliminary matter that the UNCITRAL Arbitration Rules contemplate the principle that advances for the costs of arbitration by one party are to be balanced with the advances by the other party, and that such balancing may result into an entitlement of one party against the other. Article 41(1) of the UNCITRAL Rules provides that a tribunal, “upon its establishment,” may request advances by the parties in “an equal amount.”¹⁶⁸ It also provides that those advances are applied to the costs referred to in Article 38(a), (b) and (c). The latter costs cover the fees and expenses of the Tribunal as well as ICSID’s administrative charges in the present case. Article 41(2) provides that during the course of the arbitral proceedings the tribunal may request supplementary deposits “from the parties.” Article 41(5) of the UNCITRAL Rules further provides that “any unexpended balance” of the deposits received shall be returned to the parties. Consequently, a party which has deposited more than the amount of the costs referred to in Article 38(a), (b) and (c) that it owes, becomes entitled to be paid the balance by the party which has deposited less than the amount that the latter party owes, as determined by the tribunal in question.

¹⁶⁸ Article 41 of the UNCITRAL Rules provides:

“1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the

178. The following six charts set forth (a) the allocation (as heretofore determined as between the parties) of the costs of the Tribunal and of ICSID for each of Phase I, Phase II, and Phase III; (b) the total amounts owed by each of the four parties; and (c) a comparison of the advances made by each of the four parties (*see* Chapter VIII above) and of the respective amounts consequently owing by Tembec to the other three parties:

**Allocation of Tribunal's Fees and Expenses and
ICSID's Administrative Charges (in US Dollars)**

Phase I (6 May 2005 - 10 January 2006)

Total from Tribunal's Costs Chart	478,178.43
2/3 Allocation	318,785.62
Claimants – Canfor and Terminal 1/4 of 2/3 each	
Canfor	79,696.41
Terminal	79,696.41
Respondent – 1/2 of 2/3	
United States	159,392.81
1/3 Allocation	159,392.81
Claimant – Tembec – 100% of the 1/3 Allocation	159,392.81

required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.”

Phase II (11 January 2006 - 6 June 2006)

Total from Tribunal's Costs Chart	328,195.95
Claimants – Canfor and Terminal - 1/4 each	
Canfor	82,048.99
Terminal	82,048.99
Respondent – 1/2	
United States	164,097.98

Phase III (7 June 2006 - Date of Order)

Total from Tribunal's Costs Chart	189,135.21
10% Allocation	18,913.52
Claimants – Canfor and Terminal - 1/4 of 10% each	
Canfor	4,728.38
Terminal	4,728.38
Respondent – 1/2 of 10%	
United States	9,456.76
90% Allocation	170,221.69
Claimant – Tembec – 100% of the 90% Allocation	170,221.69

Total Amounts Owed by Each of the Four Parties (in US Dollars)

	Canfor	Tembec	Terminal	USA	Totals
Phase I	79,696.41	159,392.81	79,696.41	159,392.81	478,178.43
Phase II	82,048.99	0	82,048.99	164,097.97	328,195.95
Phase III	4,728.38	170,221.69	4,728.38	9,456.76	189,135.21
Totals	166,473.77	329,614.50	166,473.77	332,947.55	995,509.59

Advances vs. Amounts Owed (in US Dollars)

	Canfor	Tembec	Terminal	USA	Totals
Advances	200,000.00	100,000.00	200,000.00	500,000.00	1,000,000.00
Amounts Owed	166,473.77	329,614.50	166,473.77	332,947.55	995,509.59
Unused Advance					4,490.41
Unused Advance Apportioned ⁶⁹	898.08	449.04	898.08	2,245.21	4,490.41
Balance	32,628.15	-230,063.54	32,628.15	164,807.25	

Tembec Owes Canfor, Terminal, and the United States (in US Dollars)

Canfor	32,628.15
Terminal	32,628.15
United States	164,807.25
Total	230,063.54

XI. DETERMINATION OF UNITED STATES LEGAL COSTS VIS-À-VIS TEMBEC IN THE NAFTA ARTICLE 1120 AND 1126 PROCEEDINGS

179. The United States' claim for its legal costs vis-à-vis Tembec is set forth in various submissions.¹⁷⁰ It can be summarized as follows (amounts in US Dollars):

(a)	Article 1120 <i>Tembec</i> arbitration	50,086.71
(b)	Consolidation proceedings	72,164.73
(c)	Tembec 1/3 of (b)	24,054.91
(d)	Costs-of-Costs	20,579.06
(e)	Total (a)+(c)+(d)	94,720.68

¹⁶⁹ ICSID will refund Canfor, Tembec, Terminal and the United States the unused advance as apportioned here (i.e., 20%, 10%, 20% and 50%, respectively).

¹⁷⁰ United States' Cost Submission of 7 April 2006, ¶¶ 14, 84-85 *supra*; 4; United States' submission of 4 December 2006, ¶ 63 *supra*; United States answers to Tribunal Questions of 29 January 2007, ¶ 70 *supra*, at Question 29; United States' Supplemental Cost Submission of 7 February 2007, ¶ 73 *supra*. See also ¶ 161 *supra*.

180. Line item (a) refers to the NAFTA Article 1120 proceedings in *Tembec* mentioned at Chapter VII above.
181. Line item (b) is the amount set forth in Part III of the Respondent's Submission on Costs on 7 April 2006.
182. Line item (c) is exclusive of the two-thirds portion of the amount in line item (b) that the United States absorbs pursuant to its respective agreements with Canfor and Terminal described in Chapter VI above.
183. Line item (d) was agreed by the parties at the Costs Hearing of 31 January 2007 as constituting an issue for Tribunal decision. In light of the extensive efforts by the parties in presenting their case on the costs of arbitration, the question was raised whether they wished to submit costs claims regarding those efforts (the so-called question of "Costs-of-Costs").¹⁷¹ The parties answered that question in the affirmative and submitted costs claims for the "Costs-of-Costs" on 7 February 2007.
184. The above claimed legal fees concern the costs for legal representation and assistance under Article 38(e) of the UNCITRAL Arbitration Rules. In the present case, it consists of portions of the salaries of the lawyers of the State Department corresponding to the number of hours that they have worked on the case.
185. The Tribunal notes that the amounts claimed by the United States are very modest. To take the example of "Costs-of-Costs" (i.e., line item (d), where the efforts of both sides during Phase III of this proceeding were comparable, the United States claims US\$ 20,579.06, while Tembec claims almost five times that amount: US\$

¹⁷¹ Tr. pp. 133-136; 170-171.

101,052.50.¹⁷² The United States claims merely the amounts corresponding to the salary of its lawyers. It does not claim any other cost, and notably not overhead (or any indirect costs for that matter), stating that it does not have a system for tracking those costs.¹⁷³

186. The claim of the United States is for gross salaries, which includes tax. That gave rise to the issue whether, in case of a costs award, the United States would receive approximately twice the same amount (i.e., one time from the employee in the form of income tax, and a second time from the party ordered to pay the gross salary, which includes the same amount of income tax).¹⁷⁴ That may be theoretically so, but the amount relating to tax is to be spent for public purposes, which takes away the character of a possible double recovery.
187. Contrary to what Tembec argues, the United States' costs claim does not include costs relating to the consideration of the Tribunal during Phase II of the proceedings with respect to the jurisdictional objection of the United States.¹⁷⁵
188. In conclusion, the costs as claimed by the United States are, for purposes of Article 38(e) of the UNCITRAL Arbitration Rules, reasonable by any standard and, for the reasons stated, can be awarded against Tembec, and Tembec is not entitled to any costs award in these proceedings.
189. The Tribunal notes that the United States has not claimed interest over the amounts of costs it seeks to recover. The Tribunal is aware of the fact that interest

¹⁷² Tembec's Costs-on-Costs Submission of 7 February 2007 at p. 2, to which Tembec adds that it "has incurred US\$ 2,019.36 in long-distance telephone, delivery services, duplicating, automated legal research, postage, and telecopier expenses."

¹⁷³ Tr. pp. 137-138.

¹⁷⁴ Tr. pp. 138-139; United States' Supplemental Submission of 7 February 2007, at p. 3.

¹⁷⁵ See also ¶ 172 *supra*.

over costs of arbitration is rarely claimed in international arbitration, although the rationale for that practice is not entirely clear.

190. Consequently, in addition to the sums owing by Tembec to the United States on account of the NAFTA Article 1120 proceedings (i.e., US\$ 12,316.31), and pursuant to the final chart contained in Chapter X hereof (i.e., US\$ 164,807.25), Tembec is ordered also to pay to the United States as a part of its legal costs the further sum of US\$ 94,720.68, or a total of US\$ 271,844.24.

XII. DECISIONS

For the foregoing reasons, the Tribunal renders the following decisions:

- (1) TERMINATES (i) the present proceedings with respect to Canfor, Terminal and the United States, and (ii) the proceedings with respect to Tembec insofar as costs are concerned, the latter proceedings having already been terminated in all other respects by the Tribunal's Termination Order of 10 January 2006;
- (2) DETERMINES that Canfor, Terminal and the United States bear their own costs pursuant to their respective agreements;
- (3) DETERMINES that Tembec shall have to bear the costs of arbitration referred to in Articles 38 and 39 of the UNCITRAL Arbitration Rules insofar as it concerns the NAFTA Article 1120 and Article 1126 proceedings between it and the United States;
- (4) NOTES that the fees and expenses of the Article 1120 Tribunal in *Canfor*, which amount to US\$ 372,623.25, and the fees and expenses of the Article 1120 Tribunal in *Tembec* and ICSID's administrative charges in the latter proceedings, which amount to US\$ 34,329.15, have been paid out of the advances made by Canfor, Tembec and the United States, the surplus having been refunded to Canfor, Tembec and the United States;
- (5) NOTES that the fees and expenses of the Article 1126 Tribunal and the administrative charges of ICSID, which amount to US\$ 995,509.59, have been paid out of the advances made by Canfor, Tembec, Terminal and the United States, the surplus of which (US\$ 4,490.41) shall be refunded by ICSID to Canfor (20%), Tembec (10%), Terminal (20%) and the United States (50%);

- (6) NOTES that Canfor, Terminal and the United States have advanced more than their respective share of such costs as determined in this Joint Order with respect to all parties, to the effect that Tembec owes Canfor and Terminal US\$ 32,628.15 each and the United States US\$ 164,807.25;
- (7) ORDERS Tembec to pay Canfor and Terminal US\$ 32,628.15 each for the costs referred to in Decision (6) above, within 15 (fifteen) days after the date of notification of this Joint Order; and
- (8) ORDERS Tembec to pay the United States US\$ 271,844.24, which amount comprises US\$ 12,316.31 for the NAFTA Article 1120 proceedings, US\$ 94,720.68 for legal costs in both the Article 1120 and the Article 1126 proceedings and US\$ 164,807.25 for the costs referred to in Decision (6) above, within 15 (fifteen) days after the date of notification of this Joint Order.

Made in Washington, D.C., this 19th of July 2007,

THE TRIBUNAL:

/s/

Professor Armand L.C. de Mestral
Arbitrator

/s/

Davis R. Robinson, Esq.
Arbitrator

/s/

Professor Albert Jan van den Berg
Presiding Arbitrator