09:58:37 IN THE ARBITRATION UNDER CHAPTER 11
OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND UNDER THE UNCITRAL ARBITRATION RULES
BETWEEN

CANFOR CORPORATION; TEMBEC, INC.; TEMBEC INVESTMENTS, INC.; TEMBEC INDUSTRIES, INC.; TERMINAL FOREST PRODUCTS LTD.,	
Claimants/Investors,	
and	
UNITED STATES OF AMERICA,	
Respondent/Party.	

Thursday, June 16, 2005

The World Bank
1818 H Street, N.W.
"MC" Building
Room 13-121
Washington, D.C.

The hearing in the above-entitled matter came on, pursuant to notice, at 10:00 a.m. before:

DR. ALBERT JAN van den BERG, President

MR. DAVID R. ROBINSON, Arbitrator

PROF. ARMAND de MESTRAL, Arbitrator

09:58:37 Also Present:

GONZALO FLORES,
Senior Counsel, ICSID

Court Reporter:

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09:58:37 APPEARANCES: (Continued)

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09:58:37 APPEARANCES: (Continued)

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09:58:37 C O N T E N T S

09:59:00 1 P R O C E E D I N G S

2 PRESIDENT van den BERG: I welcome all of
3 you to this hearing in the consolidation
4 proceedings in the arbitration under 1126 of NAFTA
5 between Canfor Corporation, Tembec, Incorporated,
6 Tembec Investments, Incorporated, Tembec
7 Industries, Incorporated, Terminal Forest Products,
8 Limited, on the one side, and the United States of
9 America on the other side.
10 The schedule for today has been set out in
11 proposed schedule in a letter of 8 June, and has
12 been amended following the observations by the
13 parties on the 13th of June. I understand that the
14 claimants have conferred amongst themselves for how
15 they would like to present the arguments this
16 morning and in which order.
17 I think, Mr. Landry, you can inform the
18 Tribunal on record what the claimants have agreed
19 amongst themselves for the presentation this
20 morning, in terms of scheduling.
21 MR. LANDRY: Thank you, Mr. President.
22 Yes, we have agreed that since we represent both

10:09:36 Canfor and Terminal, that we will proceed and provide the submissions on behalf of both of those companies first, and that that will take approximately an hour to an hour and 15 minutes, and the balance of the time can be utilized by Tembec.

PRESIDENT van den BERG: And if we look to the schedule, you are then after the opening statement by the United States of America. If you go for one hour and 15 minutes, it may be a little too much--I'm looking most for the Court Reporter, so--also for those of us who would like to have a fresh-air break, a euphemistic terminology. Those who know me understand what I mean.

I think, if there is a natural moment in your presentation where you can say, well, here we can have a break, I would suggest that we have a break then.

MR. LANDRY: We will do that, Mr. President.

PRESIDENT van den BERG: Is this agreeable also to the United States of America, to proceed in

10:10:36 1 this way?
2 MR. CLODFELTER: Perhaps a point of
3 clarification. Is the proposal to cede time which
4 has been allocated to Canfor and Terminal Forest
5 Products to Tembec so that it will be added on to
6 the time initially allocated to Tembec?
7 PRESIDENT van den BERG: My understanding
8 is that the presentation for Canfor and Terminal
9 will be a joint presentation during a period of 60
10 minutes to 75 minutes, as suggested within the time
11 allocated to them.
12 MR. CLODFELTER: And there was a mention
13 of time being ceded to Tembec. I guess that's what
14 the point of clarification I have is.
15 PRESIDENT van den BERG: Mr. Feldman, I
16 think you have 45 minutes?
17 MR. FELDMAN: We made no request, and we
18 accepted an offer. We don't anticipate we need
19 additional time, but it was just proposed to us
20 this morning when we came in.
21 PRESIDENT van den BERG: Okay, wonderful.
22 This is always a flexible process.

10:11:43 MR. CLODFELTER: It's just a matter of them starting earlier otherwise than they would have otherwise started.

PRESIDENT van den BERG: I understand.

More on scheduling in general, of course, it's a suggested schedule to keep this within a one-day hearing. However, do not feel very much constrained by time limits. If you really would like to finish an argument, the Tribunal will not cut you off. You should your have day in court also in this respect.

The timing for the posthearing briefs, the Tribunal suggests to discuss that at the end of the day to see whether there is a need for, and if so, at what time they should be filed.

And then one question to the representatives of Canada and Mexico, I'm looking where they are sitting. On one side, Mexico, buenos dias. The question is, do the governments wish to make an 1128 submission? And for those who do not know what 1128 says, let me tell you. 1128 says, "Participation by a Party," with a capital P,

10:12:54 and a party is a party to a NAFTA, "as is on written notice to the disputing parties," with a small P, "a Party," with a capital P, "may make submissions to the Tribunal on a question of interpretation of this Agreement," with a capital A.

Although we have not received a notice from either government, it would be useful if they could indicate whether the governments of Mexico and Canada wish to make use of this provision, and if it could be today. I see you are ready.

MS. KINNEAR: I'm Meg Kinnear on behalf of Canada, and I would ask if we could have a short period of time after the hearing to consider whether a written 1128 submission would be appropriate, given what we hear in the course of the hearing. A week or so would be acceptable.

PRESIDENT van den BERG: Fine. Mexico? Mr. Behar.

MR. BEHAR: Thank you, Mr. President. On behalf of the Government of Mexico, we would like to also reserve our right for a week or so to

10:14:05 1 consult with Migues Guarez, my colleagues from
2 Mexico, and consider this issue.
3 PRESIDENT van den BERG: If you may leave
4 out the word "or so," we could agree to one week?
5 MR. BEHAR: Yeah. We submit. I mean, we
6 can notify the Tribunal probably one week after the
7 end of the hearing, whether we go and then request
8 the Tribunal to establish a date for the
9 submission.
10 PRESIDENT van den BERG: For both
11 governments, then, of Canada and Mexico, one week,
12 please, for the notice of 1128.
13 MR. BEHAR: Thank you.
14 PRESIDENT van den BERG: All right.
15 Mesdames and gentlemen, I look first to the
16 claimants. Is there anything else on procedure
17 organization that you would like to raise at this
18 stage? Mr. Landry.
19 MR. LANDRY: No, Mr. President. Thank
20 you.
21 PRESIDENT van den BERG: Mr. Feldman?
22 MR. FELDMAN: No, thank you,

10:14:51 1 Mr. President.
2 PRESIDENT van den BERG: Mr. Landry, if I
3 address you, that means I assume subject that I
4 address both Canfor and Terminal unless you
5 indicate otherwise.
6 MR. LANDRY: Yes, Mr. President.
7 PRESIDENT van den BERG: Mr. Clodfelter?
8 MR. CLODFELTER: Yes.
9 PRESIDENT van den BERG: I think
10 then--then I think I give the floor to the United
11 States of America for the opening argument.
12 OPENING STATEMENT BY COUNSEL FOR THE UNITED STATES
13 OF AMERICA
14 MR. BETTAUER: I will start out. I'm Ron
15 Bettauer, I'm a Deputy Legal Advisor at the State
16 Department. And I would like to introduce our team
17 to you today. To my immediately left is Mark
18 Clodfelter, whom you know by now. He's the
19 Assistant Legal Advisor for International Claims
20 and Investment Disputes, and he will be speaking
21 immediately after I'm done introducing the team to
22 begin the argument.

10:15:44 To his left is Andrea Menaker. She is the Chief of our NAFTA Arbitration Division. She, too, will be participating in today's oral argument.

Other members of our NAFTA arbitration team are to her left. Next is Mark McNeill, also of the NAFTA arbitration team. To his left is Jennifer Toole. To her left is CarrieLyn Guymon, and to her left is David Pawlak.

An important member of our team at end of the table is Jennifer Choe, who is handling the PowerPoint for us today, the slide presentation, and we will also have in the room a number of other U.S. Government representatives who are not at the table.

That's who we have, and I won't prolong this. I just wanted to introduce everybody and turn it over to mark.

MR. CLODFELTER: Thanks, Ron.

Mr. President, members of the Tribunal, I speak on behalf of all of our team in saying we are honored to appear before you today. And we are here today because the drafters of NAFTA had the

10:17:01 foresight to address an issue that has confounded the arbitration world for many years: How to avoid the problems caused by multiple proceedings relating to the same events, how to avoid the waste of resources, and the risk of inconsistent decisions that comes with duplicative proceedings.

And they address this question in NAFTA Article 1126, which represents a breakthrough innovation in arbitration. Article 1126 provides for the consolidation of claims that contain a common issue of factor law, where the Tribunal is satisfied the consolidation will be a fair and efficient means of resolving the claims.

Before you is the request of the United States submitted pursuant to that Article, that this Tribunal consolidate and hear together the claims of three Canadian softwood lumber manufacturers: Canfor Corporation, Tembec Incorporated, and Terminal Forest Products, Limited, all of which have brought claims challenging application of U.S. antidumping and countervailing duty law, all calling into question

10:18:13 1 the same measures taken by the U.S. Department of
2 Commerce and International Trade Commission
3 pursuant to that law, and all alleging that those
4 measures violate the same provisions of NAFTA
5 Chapter 11 and do so in the same way.
6 I'm going to make some preliminary remarks
7 concerning our request, and then I'd like to turn
8 the floor over to my colleague, Andrea Menaker, who
9 will explain in further detail why that request
10 should be granted.
11 Ever since the second notice of
12 arbitration was filed in these cases, all of the
13 parties have been aware of the potential problems
14 posed by multiple proceedings relating to these
15 same events. Indeed, they actively discuss the
16 possibility of consolidating the claims at a number
17 of points in the proceedings, both among themselves
18 and with the other tribunals. For reasons of their
19 own, each of the claimants declined to seek
20 consolidation. For its part, the United States
21 considered the risks that inconsistent decisions
22 would be issued and that public resources would be

10:19:16 1 wasted if the cases proceeded separately.
2 We also carefully weighed those risks in
3 the context of other factors, including the very
4 different procedural postures of the three cases.
5 Although it was a close question, we determined
6 that we could live with those risks and forgo
7 consolidation because the Canfor case was so much
8 further advanced than the other cases, and it was
9 likely to result in an early decision on
10 jurisdiction. And the existence and persuasive
11 value of that decision would sufficiently reduce
12 the chances of an inconsistent award in either of
13 the other two cases.
14 Of course, an award in our favor would
15 also have served to deter the submission of future
16 claims by other Canadian softwood lumber producers,
17 resulting in a savings of significant resources in
18 the future.
19 So, we too declined to seek a
20 consolidation, and were content to await the
21 results of the Canfor Tribunal's deliberations. We
22 so informed the other parties and the other

10:20:23 tribunals. But in doing so, and contrary to the misleading impression Canfor has twice sought to leave you with, we also very clearly pointed out that we would have to reconsider this decision if circumstances changed.

And as you know, the circumstances did change, and quite dramatically when Canfor chose to challenge Mr. Harper in the midst of deliberations. That challenge, and Mr. Harper's subsequent withdrawal, guaranteed that the Canfor Tribunal's decision would necessarily be delayed, eliminating the one factor that had previously weighed most strongly against consolidation. As a result, the Canfor and Tembec cases became aligned procedurally, giving rise to a much increased risk of inconsistent decisions on the key issue of jurisdiction.

It, therefore, no longer made sense for any of the softwood lumber challenges to proceed separately, and the United States immediately made the request before you now. In a moment, Ms. Menaker will demonstrate that particularly in

10:21:35 1 light of these changed circumstances, these cases
2 present one of the classic situations for which
3 Article 1126 was drafted. They involve not just a
4 single common issue of law or fact, but have
5 overwhelming legal and factual similarities between
6 them. In particular, the United States
7 jurisdictional objections raised identical issues
8 of treaty interpretation in all three cases. As
9 Ms. Menaker will show, having one Tribunal address
10 those issues, instead of two or three tribunals,
11 undoubtedly serves the interests of fairness and
12 efficiency.
13 Before Ms. Menaker takes the floor,
14 though, let me make a few comments regarding the
15 claimants' general approaches to this issue. The
16 claimants' opposition to consolidation is based on
17 three themes: First, they spend an inordinate
18 amount of space in their briefs refighting old
19 battles on procedural issues that impacted the
20 schedules of their cases. This they do in an
21 effort to convince you that the aim of the United
22 States all along has been to delay the proceedings

10:22:46 and that our request here must be just another such delaying tactic.

In response, let me say that not only are these allegations irrelevant, but we strongly deny them. To be sure, both Canfor and Tembec have suffered setbacks in their cases. None, however, was the result of any effort on the part of the United States to delay the proceedings. Every such instance involved the proper insistence by the United States upon observance of its rights under NAFTA as a matter of principle or the pursuit of some other legitimate end.

Claimants' theme that the United States is bent on delaying the proceedings is a red herring. The facts are documented in our written submission. However, unless the Tribunal would like us to, we don't intend to address them in any detail here. Instead, we propose to focus on the relevant issue at hand; namely, whether consolidation of the claims is appropriate now based on the similarity of the claims and the balance of fairness and efficiency.

10:23:48 Claimants' second general approach to the issue of consolidation is to try and distinguish their claims by listing every conceivable distinction between them, none of which has any relevance to the issue of consolidation.

Under claimants' test, claims could not be consolidated under Article 1126, unless the claimants share a common identity or affiliation, their investments are identical, they are located in the same geographical area, they produce the identical product, they employed the same legal arguments and strategy, they emphasized the same aspects of their cases, and apparently they suffered the same beetle infestation.

Such a restrictive interpretation would, of course, make it impossible ever to consolidate cases under Article 1126, rendering the provision a nullity.

The claimants' third approach is to allege a host of supposed prejudices they would suffer if the cases were consolidated, all of which are, in fact, inherent to the consolidation process itself,

10:24:52 and, therefore, should not be taken into consideration by this Tribunal. Claimants contend, for example, that Article 1126 would deprive them of the right to choose their own arbitrator. Likewise, they complain that a consolidated hearing would not be as speedy as a separate hearing because it would be more participants. But these circumstances are inherent in consolidation. The fact that claimants do not like the Article 1126 process, a process to which they consented when they submitted their claims to arbitration under Chapter 11, is not a ground for favoring separate proceedings.

While the claimants share these three general themes, they don't agree on everything. In Tembec's view, the United States made its request too late by not raising it as a jurisdictional defense in its statement of defense, an argument too absurd to require a response.

But in Canfor's view, we made our request too early because consolidation cannot be considered until the parties have made formal

10:25:58 1 pleadings on the merits.

2 In fact, however, they are both wrong.
3 And as Professor Gaillard opined at the Canfor
4 hearing, "Under Article 1126 claims may be
5 consolidated any time after their submission to
6 arbitration. The only relevant consideration is
7 whether consolidation would be a fair and efficient
8 means of resolving the claims, given their
9 commonality."

10 Members of the Tribunal, it is hard to
11 imagine circumstances more appropriate for resort
12 to this consolidation mechanism than those before
13 you here. Not only is the overlap between the
14 cases so overwhelming, but consolidation would
15 avoid the risk of inconsistent decisions from the
16 Article 1120 tribunals. It would be impossible,
17 for example, to reconcile a finding of jurisdiction
18 by one tribunal and a finding of no jurisdiction by
19 another. Such a result would be unfair to the
20 claimant whose claim was dismissed, and would be
21 unfair to the United States. No state can
22 administer its laws properly in the face of such

10:27:04 1 inconsistency.
2 Moreover, consolidation is clearly the
3 most efficient means of disposing of these three
4 claims. We urge you to conclude that this
5 innovative tool is, indeed, available in these
6 cases, and for the detailed reasons why you should
7 grant our request, that that tool be applied here.
8 I now turn the floor over to Ms. Menaker.
9 PRESIDENT van den BERG: Thank you.
10 MS. MENAKER: Thank you.
11 Good morning, Mr. President, members of
12 the Tribunal. This morning I'll begin by
13 addressing the standards that govern consolidation
14 under the NAFTA. I will then show that those
15 standards are met here by first demonstrating that
16 claimants' claims raise multiple common issues of
17 law and fact, and by then explaining why
18 consolidating these three claims would be both fair
19 and efficient.
20 As you know, Article 1126, which I have
21 projected on the screen for your convenience,
22 provides, and I quote, "Where a tribunal is

satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, assume jurisdiction over all or part of them."

Claimants assert that the United States bears the burden of demonstrating that consolidation is warranted. Even if this burden is placed on the United States, we have met this burden. Before demonstrating that, however, I will briefly explain why the United States does not bear a burden of proof here. According to the plain language of Article 1126, this Tribunal must decide whether it is satisfied that conditions set forth for consolidation are met. Article 1126 does not provide that a tribunal may order consolidation where the party requesting consolidation demonstrates that there are common issues of law or fact, and that consolidation would be both fair and efficient.

That is, however, how the article would

10:29:14 read had the NAFTA parties intended to place a burden on the parties seeking consolidation. Where drafters intend to impose a burden on the moving party they use phrases not found in Article 1126 such as, "must furnish proof that," or, "must satisfy a court or Tribunal that."

By contrast, it's widely recognized that treaty drafters rely on language like what we find in Article 1126; a tribunal or court is satisfied that where the parties did not intend to impose a burden on the moving party.

And consider, for example, the New York Convention. Article V, which I have also projected on the screen for your convenience, sets forth in two paragraphs the grounds for refusing to recognize or enforce an award that falls under the Convention. The first paragraph provides five grounds for nonenforcement where the party resisting enforcement furnishes proof that the grounds are present.

The second paragraph provides two grounds on which the court may refuse to enforce an award

10:30:18 if it finds that those grounds are met. It is well accepted that the party resisting enforcement bears the burden of proof with respect to proving the grounds in the first paragraph, whereas a court may refuse enforcement on the grounds listed in the second paragraph on its own motion. The phrase used in the second paragraph of the New York Convention, "if the competent authority finds that," is akin to Article 1126's language, "if the Tribunal is satisfied that."

As is the case in the New York Convention, the use of such language in Article 1126 indicates that the respondent does not bear a burden of proof.

Another example is found in the draft revisions to Article 17 of the UNCITRAL model law regarding interim measures. The travaux makes clear that the drafters drew a distinction between the phrases, "shall satisfy the arbitral tribunal that," and, "the court is satisfied that," in the true draft provisions that I have projected on the screen. In the latter provision, the phrase, "it

10:31:19 1 is satisfied that," was used to avoid allocating a
2 burden of proof on that question.
3 Thus, it is clear from the plain language
4 of Article 1126 that the United States does not
5 bear a burden of proof here. The United States,
6 nevertheless, has, in fact, demonstrated that the
7 conditions for consolidation are met in these
8 cases, and thus, even if a burden were to be placed
9 on the United States, we have met that burden here.
10 I will now turn to discuss the many common
11 legal and factual issues among the three claims,
12 and then I will go on to explain why consolidating
13 these claims would result in a fair and efficient
14 resolution of all three of the disputes.
15 The three claims far exceed Article 1126's
16 requirement that they contain a common question of
17 fact or law. Article 1126 does not require perfect
18 identity of the claims as claimants appear to
19 suggest. Rather, it simply provides that claims
20 arising out of the same event may be appropriate
21 for consolidation. As the U.S. statement of
22 administrative action, which I have also projected

10:32:35 on the screen, provides, and I quote, "Article 1126 addresses the possibility that more than one investor might submit to arbitration claims arising out of the same event."

Here, the events giving rise to the claims are identical. Claimants allege that the same seven U.S. Government measures caused them harm. Those measures include the U.S. Department of Commerce's preliminary and final antidumping and countervailing duty determinations and its critical circumstances determination, the International Trade Commission's material injury determination, and the continued Antidumping and Offset Subsidy Act of 2000, which is commonly referred to as the Byrd Amendment.

None of the claimants identifies any other measures that caused it harm. Furthermore, claimants all allege that these same measures violate the same obligations under the same articles of the NAFTA; namely, Articles 1102, 1103, 1105, and 1110.

And claimants allege that these same

10:33:55 1 measures violated the NAFTA in the same manner.
2 For example, claimants complain about many of the
3 same methodologies that Commerce and the
4 International Trade Commission used to derive the
5 determinations. In the interest of time, I will
6 just quickly review some of these similarities, but
7 I would refer you to the appendix to our submission
8 for a more comprehensive list.
9 So, as you can see on the screen,
10 claimants all allege that Commerce improperly used
11 a calculation method known as zeroing to skew
12 dumping margins in the United States's favor.
13 Likewise, claimants allege that Commerce used
14 unfair comparisons between the prices of
15 merchandise being dumped and prices of products
16 injured by that dumping. They allege that Commerce
17 used cross-border benchmarks instead of in-country
18 benchmarks.
19 They all contend that the petitions
20 initiating the antidumping and countervailing duty
21 investigations were deficient in the same respect.
22 They allege that Commerce did not properly account

10:35:05 1 for the effects of the 1996 softwood lumber
2 agreement, and they allege that the Byrd Amendment
3 improperly incentivized U.S. industry participants
4 to subscribe to the petitions.
5 The United States's defenses to claimants'
6 claims also raise multiple common legal issues that
7 weigh heavily in favor of consolidation. For
8 example, it is our contention that all of the
9 claims are expressly barred from Chapter 11 of the
10 NAFTA by virtue of Article 1901(3), which provides,
11 and I quote, "No provision of any other chapter of
12 this agreement shall be construed as imposing on a
13 party obligations with respect to a party's
14 antidumping law or countervailing duty law."
15 Likewise, the United States's objection
16 based on Article 1101(1) is common to all three
17 claims. Each claim challenges the antidumping and
18 countervailing duty determinations that imposed
19 duties on exports of Canadian softwood lumber into
20 the United States. Those determinations do not
21 bear any legally cognizable relationships to
22 claimants as investors in the United States or to

10:36:29 their U.S. investments, as is required by Article 1101(1).

The United States's objection based on Article 1121 also applies to the claims of both Tembec and Canfor. Article 1121 requires that a party waive its rights to pursue claims in another forum with respect to the same measures alleged to breach Chapter 11.

Tembec's and Canfor's continued pursuit of their claims under Chapter 19 of the NAFTA violate that provision, and thus bars their claims for submission under Chapter 11.

Finally, although the United States is not in a position at this time to comprehensively articulate its defenses to the merits of claimants' claims, given the similarities and factual allegations and claims of breach, the United States anticipates that should these cases proceed to the merits, it would raise many, if not all, of the same legal defenses to all three claims.

To give just one example, all three claimants allege that the United States treated

10:37:37 them less favorably than similarly situated U.S.-owned companies in violation of Article 1102. If these claims were to proceed to the merits, the United States would make the same defenses to those claims with respect to each of the claimants. We would, for instance, demonstrate that U.S.-owned companies are treated no less favorably than Canadian-owned companies with respect to the antidumping and countervailing duty orders.

In an attempt to persuade this Tribunal that their claims are different, claimants cite every conceivable factual and legal distinction among them. None of those distinctions, however, provides a reason for not consolidating. Claimants contend, for example, that the different effects of the measures on the various U.S. investments give rise to unique issues of fact with respect to each claimant. Claimants' claims, however, concerned the duties collected on exports of softwood lumber. That is why Tembec and Canfor waste no opportunity to tell this Tribunal that the resolution of their claims is a matter of urgency because those duties

10:38:47 1 are mounting daily. Thus, when one considers the
2 true nature of their claims, it is clear that
3 claimants were all affected in precisely the same
4 manner by having to pay duties on their imports of
5 softwood lumber.
6 In any event, to the extent that the
7 alleged impact of the antidumping and
8 countervailing duty determinations on their U.S.
9 investments is relevant at all, it would have
10 little or no bearing on issues of liability.
11 Rather, it would be relevant to determining damages
12 to be assessed should liability be found.
13 Claimants also note that two of the three
14 claimants are public companies, whereas one is a
15 private company. They assert that two companies
16 are based in western Canada, whereas one is
17 primarily located in the East. They note that the
18 claimants each concentrate on different types of
19 softwood lumber, and that one of the companies was
20 more affected than the others by a beetle
21 infestation.
22 Likewise, they know that their counsel may

10:39:50 1 employ different legal strategies or emphasize
2 different aspects of their cases. If these
3 distinctions were sufficient to warrant separate
4 proceedings, it is difficult to conceive of any
5 circumstance where Article 1126 might be used for
6 consolidation.
7 In sum, the overwhelming identity of
8 factual and legal issues among the claims, and the
9 commonality of legal defenses to those claims, far
10 exceed Article 1126's requirement that the claims
11 have a common issue of law or fact.
12 I will now turn to discuss why
13 consolidating these claims will be both fair and
14 efficient. It is certainly more efficient to have
15 one tribunal hear these claims than to have two or
16 three tribunals decide them. The burden on the
17 United States as respondent is considerably
18 lessened in a consolidated proceeding.
19 Consolidation offers the opportunity for cost
20 sharing on the claimants' side as well.
21 This Tribunal could decide the claims
22 efficiently without causing undue delay to the

10:41:05 1 resolution of any of the claims. And by doing so,
2 this Tribunal could avoid the risk and unfairness
3 of inconsistent decisions.
4 Claimants urge this Tribunal to deny our
5 application because we did not seek consolidation
6 earlier. They contend that the window of
7 opportunity for us to request consolidation was
8 open for only a limited period of time following
9 Tembec's submission of its claim, but it is now
10 closed. Article 1126, however, provides no time
11 frame within which a party must seek consolidation.
12 If it were, per se, unfair to seek consolidation at
13 any time after a claim had been filed, then a
14 deadline would have been imposed in a test, as it
15 in many other provisions of the NAFTA. None is,
16 however. Certainly, in some cases, seeking
17 consolidation immediately after a second claim is
18 filed will be fair and efficient. In other cases,
19 it may not be. One needs to look at all of the
20 circumstances.
21 In this case, consolidating these claims
22 now has become more fair and efficient than it was

10:42:23 two years ago, or even in January of this year, given the procedural alignment of the Canfor and Tembec claims. And claimants are wrong to suggest that the United States is somehow estopped from seeking consolidation now. Claimants have quoted selectively to give the impression that the United States misled them into believing that it would not under any circumstance seek consolidation, but that is simply not the case. The letter quoted by Tembec in its submission, for example, demonstrates that although the United States was not seeking to consolidate at that time, it might need to revisit that question should circumstances change. And circumstances, indeed, did change, making consolidation more fair and efficient.

Similarly, Canfor has repeatedly cited the portion of the transcript from the jurisdictional hearing where the United States represented that it did not intend to seek consolidation, without acknowledging that in the very next sentence we noted that if we changed our view, we would alert the Tribunal immediately. To that, the Tribunal

10:43:32 1 remarked that if either party changed its view and
2 wished to avail itself of the Article 1126
3 mechanism, it would be, quote-unquote, perfectly
4 understood.
5 It is misleading to suggest that the
6 United States ever closed the door on this
7 possibility. And certainly Terminal had no
8 illusions about the possibility of consolidation.
9 That issue has arisen numerous times, and Terminal
10 cannot complain that the United States has sought
11 to have its claim consolidated now.
12 I will now discuss why consolidation with
13 respect to our jurisdictional defenses is fair and
14 efficient, and I will then do the same for
15 consolidation on the merits.
16 Consolidating these claims for purposes of
17 jurisdiction will result in a fair and efficient
18 resolution of those objections. Our Article
19 1901(3) objection has already been fully briefed by
20 both Canfor and Tembec. Although Tembec argues
21 that it would be costly and inefficient for it to
22 have to rebrief the United States's objections, we

10:44:40 1 are seeking no such thing. There is no reason why
2 this Tribunal cannot utilize the written
3 submissions that have already been prepared by the
4 parties.
5 Indeed, had these claims been submitted,
6 had we sought consolidation back when Tembec's
7 claim had been submitted to arbitration, that would
8 have caused far greater delay than will be caused
9 if the claims are consolidated by this Tribunal
10 now. By the time Tembec's claim was submitted to
11 arbitration, Canfor's claim had been before the
12 Canfor Tribunal for about one and a half years.
13 And consolidating on that point would necessarily
14 have delayed the resolution of Canfor's claim.
15 And in this regard, I call the Tribunal's
16 attention to the order that we submitted from the
17 high fructose corn syrup consolidation Tribunal.
18 Before proceeding, because Canfor raised an
19 objection to our submitting that order, and
20 submitting some but not all of the documents from
21 that proceeding, let me just make clear that the
22 documents that we submitted along with the other

10:45:45 documents that Canfor referred to, such as Mexico's and ADM's submissions, are all available on Mexico's Web site, and they can also be accessed via links from our Web site.

In the high fructose corn syrup's case, Mexico sought consolidation shortly after a second case was filed that raised what it considered to be common issues of law and fact. That Tribunal found that consolidating the cases would be inefficient, however, because the earlier case was much farther advanced than the subsequently filed case. The Tribunal found that consolidating would thus be unfair to the claimant whose case would be delayed.

So, again, the time frame when consolidation is sought is not the determinative factor. Various factors must be weighed to decide whether consolidation at any given time is both fair and efficient. And here, consolidating on jurisdiction is both fair and efficient and will cause no undue delay.

Tembec and Canfor are disingenuous in suggesting that their claims would be inordinately

10:46:50 delayed because a jurisdictional hearing will be required before this Tribunal, whereas their respective Article 1120 troubles could simply proceed to deliberate on the written submissions. It would be highly unusual for any tribunal to decide issues of jurisdiction without an oral hearing or for a tribunal that was reconstituted during deliberations not to grant a rehearing if requested. The United States intends to request a hearing on its jurisdictional objections regardless of whether those objections are heard by this Tribunal or the Article 1120 Tribunals. Just as we would not ask this Tribunal to decide our jurisdictional objections on the basis of the written submissions alone without holding a hearing, if consolidation is denied we will request that the Tembec Tribunal hold a hearing on our jurisdictional objections, and we will request that a reconstituted Canfor Tribunal schedule at least a truncated rehearing to allow the newly appointed arbitrator an opportunity to have his or her questions answered.

10:48:03 1 There will thus be no undue delay in
2 having this Tribunal consolidate and schedule a
3 hearing on the United States's Article 1901(3)
4 objection.
5 I will now address two remaining issues
6 with respect to our jurisdictional objections. The
7 first is the fact that Terminal has not
8 participated in any of the proceedings to date.
9 And the second is that Canfor has not briefed two
10 of the objections that were briefed in the Tembec
11 proceedings. I'll address each of these in turn.
12 First, it would be both fair and efficient
13 to consolidate Terminal's claim with Canfor's and
14 Tembec's claims. It would be incongruous to bring
15 about only a partial consolidation by consolidating
16 the Canfor and Tembec cases while leaving a third
17 equally similar case to proceed separately.
18 Moreover, as you know, counsel for Canfor is the
19 same as counsel for Terminal. Terminal argues that
20 this fact counsel is in favor of denying
21 consolidation, but the opposite is true.
22 The United States raises the exact same

10:49:10 1 objection to Terminal's claim as it does to
2 Canfor's claim. Terminal's counsel is undeniably
3 familiar with our Article 1901(3) objection.
4 Having already fully briefed and argued that issue
5 in Canfor, Terminal presumably can address this
6 objection in short order.
7 In fact, since this issue has been so
8 fully developed, this would be true even if
9 Terminal felt it had to retain new counsel.
10 Indeed, it was because this issue had already been
11 briefed in the Canfor case that Tembec, which is
12 represented by separate counsel, advocated for a
13 highly expedited briefing schedule in the Tembec
14 arbitration, requesting only two weeks to file its
15 countermemorial on jurisdiction. Consolidating
16 Terminal's case with Canfor's and Tembec's thus
17 will not unduly delay resolution of either Canfor's
18 or Tembec's claims, and obviously it will speed up
19 rather than delay resolution of Terminal's claim
20 which has been dormant for more than a year.
21 PRESIDENT van den BERG: Ms. Menaker,
22 could you please help me on that one. The Terminal

10:50:18 case, you have only the notice for arbitration, Request for Arbitration and the notice; correct?

MS. MENAKER: Yes, we have the notice of intent and the notice of arbitration.

PRESIDENT van den BERG: Yes. What we do not yet have in that case is a statement of claim.

MS. MENAKER: That's correct.

PRESIDENT van den BERG: The United States early announces in view of what the notice says we will file an objection.

In that case, would a statement of claim first have to be filed, or is it your suggestion that, well, assuming this Tribunal will, indeed be--the case will be consolidated, that it is not necessary anymore to file a statement of claim, but the United States can immediately file a jurisdictional objection?

MS. MENAKER: If I may just have one moment.

(Pause.)

MS. MENAKER: Mr. President, there has been other cases where a claimant filed a notice of

10:51:26 arbitration that was not accompanied by a statement of claim, and the United States has nevertheless agreed to treat its notice of arbitration as its statement of claim, and we would be prepared to do that in Terminal's case and proceed directly to making our jurisdictional objection.

PRESIDENT van den BERG: That does not depend on the claimants, whether to treat its notice as statement of claim rather than on the respondent? I could see the distinct question is whether you can immediately file a jurisdictional objection to even a notice, but that's a different thing.

MS. MENAKER: I believe that we could file our jurisdictional objection just based on their notice of arbitration, given that our jurisdictional--we would object on the same basis, which is clear from looking at their notice of arbitration, but whether or not Terminal would insist upon filing a statement of claim is unanswered at this point.

(Pause.)

10:53:11 1 MS. MENAKER: Second, this Tribunal ought
2 to consider all three of our jurisdictional
3 objections in a preliminary phase if these cases
4 are consolidated. Tembec and the United States
5 have already briefed those objections. Canfor and
6 Terminal can address those objections in short
7 order. As set forth in our written submission,
8 both Canfor and the United States made their
9 positions on these issues known at the
10 jurisdictional hearing in December, and as noted,
11 those objections constituted a small portion of the
12 written submissions made in the Tembec arbitration.
13 Thus, it would not be unduly burdensome
14 for either Canfor or Terminal to address those
15 issues preliminarily in a consolidated proceeding,
16 and doing so will not unduly delay resolution of
17 the United States's jurisdictional objections.
18 If this Tribunal were to disagree,
19 however, it should still order consolidation on
20 jurisdiction. This Tribunal could address our
21 Article 1901(3) objection preliminarily for all
22 three claims, and our additional objections could

10:54:11 be addressed preliminarily for Tembec only. This would cause no delay whatsoever since there would not need to be any briefing on these two objections prior to any jurisdictional hearing. Moreover, because our arguments relating to our Article 1101 and 1121 objections constituted but a small portion of the parties' written submissions, it would be reasonable to assume that the time devoted to those objections at any oral hearing would likewise be less than the time that would be devoted to our Article 1901(3) objection, thus addressing all of these issues will be efficient and will not prejudice any party.

This Tribunal, however, need not decide this question now. As we have demonstrated, consolidating these claims, if only for jurisdictional purposes is fully warranted. Our Article 1901(3) objection is common to all three claims, and as we have shown, it's in the interest of a fair and efficient resolution of those claims to consolidate them for purposes of addressing that objection.

10:55:13 1 Once the claims are consolidated for
2 purposes of jurisdiction, this Tribunal can then
3 decide on which issues it would be most efficient
4 to order bifurcation, and in doing so it can also
5 address Canfor's argument that the United States
6 has waived its Article 1121 article with respect to
7 its claim.
8 Consolidating these claims on the merits
9 is also warranted. As you have seen, claimants'
10 allegations with respect to the breaches of the
11 NAFTA are identical in all relevant respects. They
12 allege that the same measures breached the same
13 provisions of the NAFTA in the same manner. Canfor
14 and Tembec have also challenged these same
15 antidumping and countervailing duty determinations
16 before NAFTA Chapter 19 binational panels alleging
17 the same allegation violations as they do in this
18 proceeding. Just as the United States has defended
19 against those claims jointly and has raised the
20 same defenses to Canfor's and Tembec's claims in
21 that forum, here, too, we would likely make the
22 same defenses to the claims in the event that those

10:56:18 1 claims proceeded to the merits.
2 Claimants' arguments against consolidating
3 on the merits are based largely on factors that are
4 inherent in the consolidation process, and
5 therefore should not be taken into account by this
6 Tribunal. Claimants contend, for example, that it
7 would be unworkable to have a hearing at which
8 multiple counsel representing several claimants
9 advanced different theories of their cases. In
10 raising these objections, however, claimants are
11 objecting to the Article 1126 process itself. But
12 they consented to that possibility, the possibility
13 that that process would be used, when they
14 submitted their claims to arbitration under Chapter
15 11, and they cannot be heard now to complain about
16 its inherent features.
17 Claimants also contend in reliance in the
18 order on the high fructose corn syrup cases that
19 the necessity of introducing business-proprietary
20 information concerning their U.S. investments would
21 deny them a right to a fair hearing. That argument
22 is without merit. As a preliminary matter, it is

10:57:23 highly doubtful that any significant amount of business-proprietary information concerning claimants' investments would be required to resolve issues of liability.

First, all of the information that Commerce collected from the claimants and from other softwood lumber companies that are used to derive its determinations is contained in the administrative record, and that information cannot legally be introduced in this proceeding. Thus, there is no issue regarding protection of that proprietary information.

Second, as noted, claimants' Chapter 11 claims concern the duties collected on exports of softwood lumber. Allegations of injury to claimants' U.S. investments are therefore not likely to be relevant to issues of liability.

To the extent that proprietary information is required, it would likely be relevant for any damages phase and not a liability phase. There would be no impediment to claimants presenting proprietary information concerning their U.S.

10:58:27 1 investments separately in a damages phase or for
2 this Tribunal to otherwise take steps to protect
3 that information from being shared with other
4 claimants.
5 We do agree with Tembec that it is
6 efficient for the same Tribunal to handle both the
7 liability and damages phases, should these cases
8 advance that far. That, however, counsel is in
9 favor of consolidation before this Tribunal and not
10 in favor of having three separate proceedings on
11 damages and thus compelling three separate merits
12 proceedings.
13 This Tribunal can decide these claims
14 expeditiously, and effort and expense will be not
15 be wasted unnecessarily if the claims are
16 consolidated. Of course, consolidation is not made
17 contingent upon a finding that there will be
18 absolutely no delay in resolving a claim. Even in
19 an ideal situation, consolidating a claim with
20 other claims may result in a slower resolution of
21 that claim simply by virtue of the fact that there
22 are multiple parties in a consolidated proceeding,

10:59:33 but that is inherent in a consolidation and does not render consolidation either unfair or inefficient.

Finally, consolidation should be granted because consolidating these cases is the only way to eliminate the risk of inconsistent decisions. Contrary to claimants' contention, ameliorating the risk of inconsistent decisions should be an overriding goal for this Tribunal. Inconsistent decisions are not only detrimental to the institution of international arbitration, they are unfair to all of the parties, and particularly unfair for the respondent NAFTA states.

The high fructose corn syrup consolidation Tribunal recognized that mitigating the risk of inconsistent decisions was one of the factors that it ought to consider in deciding whether to consolidate. It stated, and I quote, "Mexico maintains also with persuasive force that separate proceedings risk inconsistent awards, to the prejudice of Mexico, and that inconsistent awards cannot constitute a, quote-unquote, fair resolution

11:00:51 of the claims."

Similarly, the Canfor Tribunal's stated rationale for urging the parties to consider consolidating Canfor's claims with those of the other softwood lumber producers was to ensure consistency and thus avoid the risk of inconsistent decisions. That Tribunal remarked that ensuring consistency was very important for the integrity of the process. Avoiding inconsistent decisions is a factor that should be considered by this Tribunal, and it is a factor weighing heavily in favor of consolidation.

The United States has submitted several authorities supporting the idea of consolidation in order to demonstrate the widespread concern regarding consistency in international arbitration. Claimants have made much of the fact that the examples cited where claims have been consolidated to avoid this risk all concern claims of affiliated or otherwise related companies, and that's not at all surprising. In an ordinary commercial arbitration agreement, companies typically do not

11:01:56 consent to having their claims heard together with claims of unrelated companies. And absent consent, one would be hard-pressed to find cases where either a court or a tribunal ordered consolidation of claims of companies that were not related by reason of either ownership or contract.

Claimants here, however, have given their consent to such an arrangement in appropriate circumstances. By submitting their claims to arbitration under NAFTA Chapter 11, claimants consented to arbitrate in accordance with the procedures set forth in Chapter B of that agreement, which includes Article 1126.

Claimants' consent is not limited to agreeing to consolidate where affiliated companies filed similar claims or where a company and a shareholder filed separate claims. And the consolidation mechanism in Article 1126 was not created to address that type of situation. Article 1117(3) already does that. That Article, which I have projected on the screen provides, "Where an investor makes a claim under Article 1117, and the

11:03:16 investor or a noncontrolling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby."

This provision addresses the CME Lauder issue. It also accomplishes what ICSID achieved by appointing the same arbitrators to multiple panels in cases against Argentina where multiple claims were filed by affiliated companies or several shareholders in the same enterprise. Had the NAFTA parties intended to address the issue of consolidation of claims only where affiliated companies were concerned or where a shareholder in a company and the company submitted different claims, Article 1117(3) would have sufficed. In those types of situations, there is a presumption in favor of consolidation.

11:04:25 1 Article 1126, however, does something
2 more. It addresses the type of situation that we
3 have here. It was designed for cases where the
4 claimants are not affiliated with one another, but
5 the claims raise a common issue of law or fact and
6 consolidation is in the interest of a fair and
7 efficient resolution of the disputes.
8 Here, the jurisdictional questions before
9 the Article 1120 tribunals are identical. There is
10 no distinction among the jurisdictional arguments
11 that the United States has made or intends to make
12 in each of the cases. A finding of no jurisdiction
13 in one case cannot be reconciled with a finding of
14 jurisdiction in another case. Those two decisions
15 will be inconsistent. In this important respect,
16 these cases differ from the high fructose corn
17 syrup cases.
18 In those cases, although Mexico indicated
19 that it intended to raise common defenses to the
20 claims, it did not specify what those defenses
21 were. Indeed, it did not indicate whether it had
22 jurisdictional objections to one or more of the

11:05:32 claims or what those jurisdictional defenses might be. Corn Products, one of the claimants on the other hand, identified a host of differences between its claim and the claim filed by ADM and Tate and Lyle that could have jurisdictional import.

In addition, the Tribunal found there were fundamental differences in the manner in which the investments operated that could have an impact on issues of liability. These differences led the high fructose corn syrup Tribunal to conclude that different outcomes in the cases would not necessarily be inconsistent. This simply is not the case here. There can be no doubt that a finding that one of the claims is barred by Article 1901(3) is irreconcilable with the finding that another one of the claims is not. The same is true for our other jurisdictional objections.

We also believe that the same will be true with respect to many, if not all, of the legal findings that would need to be made in any merits phase in the event that the cases proceeded that

11:06:35 1 far.

2 Tembec's argument that additional claims
3 may be filed sometime in the future that raise
4 common issues of law or fact, and that this
5 Tribunal's decision will not be binding on any
6 future Tribunal, provides no reason not to
7 consolidate. That future claims may be filed does
8 not mean that this Tribunal should not now employ
9 the tools that Article 1126 provides to eliminate
10 the risk of inconsistent decisions that arise from
11 these claims, the only ones that have been filed to
12 date.
13 And besides, any future Tribunal
14 constituted to hear a subsequently filed claim will
15 have the benefit of having an award from this
16 Tribunal on the very questions that it is
17 addressing.
18 While the risk of inconsistent decisions
19 existed once Tembec submitted its claim to
20 arbitration, that risk was mitigated by the fact
21 that Canfor's claim was more than one year ahead of
22 Tembec's. It was thus reasonable to expect that

11:07:33 the Tembec Tribunal, and any other softwood lumber Tribunal that might be constituted, would have the benefit of considering the decision on jurisdiction rendered by the Canfor Tribunal.

The risk of conflicting decisions was also mitigated by the prospect of the dismissal of Canfor's claims would prompt other softwood lumber claimants to withdraw their claims and would discourage the submission of new claims. That is no longer the case, however, as the Canfor and Tembec cases are now procedurally aligned.

The risk of inconsistent decisions is at its height when two or more tribunals are deliberating simultaneously on identical issues. Absent consolidation, that would be the situation that the United States faces here with respect to Canfor's and Tembec's claims.

In sum, you all of the factors that this Tribunal ought to consider weigh heavily in favor of consolidating these cases. The claims raise identical issues. There will be no undue delay in the resolution of the claims if consolidation is

granted. The cost and effort expended to date will not be wasted, and, in fact, there will be cost savings and efficiencies if the cases are consolidated. No prejudice will befall claimants, and consolidation will eliminate the risk of inconsistent decisions.

For these reasons, as well as those that were set forth in our written submission, the United States respectfully requests that this Tribunal assume jurisdiction over the claims of Canfor, Tembec, and Terminal Forest Products.

Thank you, and I look forward to answering any questions that the Tribunal may have this afternoon.

PRESIDENT van den BERG: Thank you, Ms. Menaker.

Mr. Landry or Mr. Krabbe or Mr. Mitchell, who goes first? So, you are addressing at the same time Canfor and Terminal, or do you make a distinction?

MR. LANDRY: Mr. President, we will be making our submissions, and where applicable, we

11:09:44 will refer to Canfor or Terminal.

PRESIDENT van den BERG: To repeat the assumption of the Tribunal is when you speak, you speak on behalf of both Canfor and Terminal unless the contrary are expressed by you?

MR. LANDRY: Yes.

PRESIDENT van den BERG: Please proceed.

OPENING STATEMENT BY COUNSEL FOR CANFOR CORPORATION AND TERMINAL FOREST PRODUCTS, LTD.

MR. LANDRY: Thank you, Mr. President.

First of all, Mr. President, I would like to introduce the people opposite me who are here on behalf of the two parties. Firstly, my co-counsel is Mr. Keith Mitchell, and to my right, is Mr. David Calabrigo, who is the Vice President of Corporate Development, General Counsel and Corporate Secretary of Canfor.

In addition to the submissions, Mr. President, I will also be referring to the appendix that we filed with our submissions, so perhaps if you could have that before you, it might make matters go a bit quicker.

11:11:22 1 (Brief recess.)
2 PRESIDENT van den BERG: Mr. Landry, I
3 suggest you should restart your presentation
4 because we were lost after two sentences.
5 We do have your submissions in front of
6 us.
7 MR. LANDRY: The submissions and the
8 appendix, Mr. President.
9 Mr. President, I will speak to the motion
10 of the application first and provide some
11 preliminary background remarks to the position of
12 the United States application in the context of
13 Canfor's proceeding, and then review in some detail
14 why Canfor says this Tribunal should not order
15 consolidation, because of the stage that the Canfor
16 proceeding is at, and the extreme prejudice Canfor
17 will suffer in terms of the costs and delay if
18 consolidation is ordered. Mr. Mitchell will then
19 provide his analysis of the reasons why in this
20 case, there is no basis whatsoever to order
21 consolidation on the merits, why the United States
22 does not meet the test of commonality mandated by

11:22:44 NAFTA Article 1126, and why in the circumstances of the three cases it would neither be fair nor efficient to make an order consolidating the three claims.

Now, as a preliminary comment and one which is very important to understand the context of Canfor's oral and written submissions, I would first like to comment on the heightened tone of the statements and the submissions which have been made in the correspondence since the Tribunal was appointed. As the Tribunal should know, Canfor's claims arise out of the conduct of the United States directed at Canfor as an investor in the United States and its significant U.S. investments which conduct is connected to the softwood lumber dispute between Canada and the United States.

Now, this dispute has been ongoing for a lengthy period of time, and Canfor has suffered significant financial harm arising from the United States's conduct in dealing with that dispute which conduct repeatedly has been found to be in violation of not only U.S. domestic legal

11:24:06 1 requirements, but the international obligations
2 undertaken by the United States under NAFTA and the
3 WTO.
4 Now, one example of the significant
5 financial harm Canfor has suffered arising from
6 this conduct is in excess of $700 million of duties
7 Canfor has had to pay which, in its submission, are
8 presently being illegally held by the United
9 States. Now, this is an extraordinary sum for one
10 company, and is growing significantly every day.
11 Now the tone that you have seen in the
12 correspondence results from Canfor's extreme
13 frustration in trying to resolve its complaints
14 through the various legal channels set up to deal
15 with such issues, and the intense dissatisfaction
16 with the attitude and approach the U.S. Government
17 is taking in the various proceedings, including
18 this proceeding.
19 Canfor submits that looked at on any
20 reasonable basis, the strategic approach taken by
21 the United States in every different type of
22 proceeding which has dealt with the issues arising

11:25:25 out of the softwood lumber dispute, has been the same, and I include in that the Chapter 19 binational panel proceedings and the WTO dispute resolution proceedings. It is a pattern of conduct which is designed to frustrate, delay, and hinder proper resolution of the various complaints that have been made about the U.S.'s conduct in the softwood lumber dispute. It is a strategy by which the U.S. Government does everything it can to ensure that Canada and the Canadian industry capitulates to the U.S. view of the softwood lumber dispute, whether or not any properly appointed dispute resolution body agrees with them. And it is this type of conduct which is at the heart of Canfor's claim in this proceeding.

Canfor submits that this strategy is blatantly protectionist, incredibly aggressive, and uses or more importantly misuses the laws that are in existence to resolve these disputes fairly and equitably. Looked at on any reasonable basis, the U.S. steadfastly ignores or blatantly takes on reasonable interpretations of the law put in place

11:26:47 1 to resolve its disputes with Canada in order to
2 completely frustrate the ability of its number one
3 trading partner to obtain a ruling that it is
4 entitled to.
5 The U.S. antidumping and countervailing
6 duty orders have been found by numerous tribunals
7 to be fundamentally flawed, and that is abundantly
8 clear to any reasonable person looking at the
9 dispute. Yet, the U.S. continues to aggressively
10 pursue a strategy which either ignores the rulings
11 or circumvents the rulings by having its agency
12 unreasonably change the reasoning in order to keep
13 the orders in place while purporting to comply with
14 the Tribunal's remands for directions. And I use
15 these two examples, Mr. President, members of the
16 Tribunal, what the United States has done in
17 respect, which is fully on the public record in
18 respect of the Byrd Amendment, and also what the
19 United States, more particularly its agency the
20 ICT--sorry, the International Trade Commission did
21 in respect of the Chapter 19 proceedings which is
22 referenced in the Tembec--the quote from that

11:27:58 proceeding is referenced in the Tembec submission for your review.

Canfor's trust operation and dissatisfaction also exists in relation to the approach the United States has taken in Canfor's Chapter 11 case which has once again followed the same pattern of conduct taken in other proceedings; a strategy which, in this case, has continued to frustrate and hinder Canfor's ability to prosecute its claim by making its proceeding extremely costly, and by delaying resolution of the claim into the indefinite future.

Now, this approach is, in our submission, is most recently manifested in the United States's application for consolidation, which, if successful, will have the effect of usurping the jurisdiction of a consensually appointed Tribunal by having this Tribunal appointed against the wishes of Canfor and Terminal on the eve of the Canfor Tribunal rendering a decision on a key issue in that claim. And by this action, the U.S. will have once again delayed further resolution of its

11:29:11 1 Chapter 11 claim.

2 Canfor will not capitulate. The U.S., in
3 Canfor's submission is illegally holding in excess
4 of $700 million in duties, and in Canfor's
5 submission the U.S. will eventually have to pay it
6 back unless it continues to completely ignore any
7 reasonable interpretation of its international
8 obligations. And Canfor intends to use whatever
9 means it has available to it within the law,
10 including aggressively pursuing the Chapter 11
11 claim to force the United States to live up to its
12 international obligations.
13 Now given this backdrop, Canfor submits
14 the Tribunal must not countenance the U.S. attempt
15 in our submission to misuse Article 1126 to further
16 this improper strategic purpose.
17 Mr. President, as the Tribunal is aware
18 from the written submissions, Canfor and the other
19 two claimants strenuously oppose the United States
20 application and the fact--and that fact alone is
21 very telling. United States is the only party in
22 this proceeding that believes it is fair that

11:30:29 consolidation occur. Canfor and Terminal are both strongly of the view that not only does the United States not meet the test of commonality between the three claims, but most importantly, the consolidation in the circumstances would be patently unfair and grossly inefficient.

Now, as the Tribunal in the corn products case agreed, the parties' wishes in this case, and this case we are talking three out of the four parties that are before you, must be taken into account in reviewing the legal requirements set out in Article 1126, and the wishes of three of the four parties are very clear, that claimants do not want consolidation.

Now, in Canfor's submission, the application obviously--in their submission it should be denied. And as I've indicated, in our submission, it's just a continuation of the United States game playing in connection with all matters associated with the softwood lumber dispute, and I'm going to deal with two primary themes in my submission before Mr. Mitchell follows me, and the

11:31:42 two themes that I'll be dealing with are, firstly, that in our submission the consolidation application is too late; and second theme that I will be emphasizing is that the United States actions in applying for consolidation is a misuse of Article 1126 to support arguments of commonality by raising additional jurisdictional fences against Canfor that they're not entitled to raise.

Now, firstly, to go to deal with the first issue that I would like to deal with, which is the theme that the consolidation application is too late, the issues relating to consolidation, and Ms. Menaker mentioned this earlier, have been in existence since December 2003, at which time the Tembec submission to arbitration was made. I would only pause to note that by that time at least three notices of intent, the three notices of intent of these three claimants had been filed by June 2003. So, it wasn't until December of 2003, that the Tembec notice of arbitration was filed.

Now, in October 2003, the United States chose its strategy. The United States unilaterally

11:33:07 1 decided to bring forward a preliminary
2 jurisdictional motion to dismiss Canfor's claim,
3 which was its right. This motion was actively
4 fought by Canfor. Canfor wanted the jurisdictional
5 issues heard at the merits, but in any event,
6 therefore, the issue of whether it would be heard
7 as a preliminary matter was fully briefed before
8 the Canfor Tribunal.
9 The U.S. was aware both on January 24th,
10 2004, when the Canfor Tribunal ruled that it could
11 bring forward the 1901 sub three matter as a
12 jurisdictional objection, and also further in March
13 of 2004, when the Tribunal set the briefing
14 schedule for that jurisdictional motion, that all
15 three claims had been initiated, and therefore--and
16 this is important--all reasons for bringing forward
17 consolidation, the consolidation application
18 presently before this Tribunal, were crystallized
19 at that time.
20 Now, the U.S. chose to proceed,
21 notwithstanding the fact--notwithstanding that
22 fact--and they forced, in effect, in the Canfor

11:34:34 proceeding, Canfor to deal with a preliminary issue of jurisdiction while at the same time continuing to indicate to the Canfor Tribunal that it did not intend to consolidate. Canfor was adamant throughout, whether in discussions or otherwise, that it had no interest whatsoever in consolidation.

It is unfair, in our submission, in the extreme for the United States to have led Canfor to believe that it was not going to seek consolidation, regardless of whether or not it was leaving open that possibility, to require Canfor to fully brief and argue the United States's only jurisdictional motion in Canfor, and then for no, in our submission, good reason and on the basis of, in our submission, wholly inadequate shallow analysis to now urge this consolidation Tribunal, urge consolidation should occur at this late date, after significant time has gone by, and even more significantly very significant costs have been incurred by Canfor.

In our submission, Mr. President, members

11:35:46 of the Tribunal, the U.S. is the author of its own misfortune. It chose a specific strategy of allowing its jurisdictional motion to proceed in Canfor, independent of consolidation, ignoring there was clearly a possibility of inconsistent decisions.

And then, when it was dissatisfied with how that proceeding was going, it switched strategies, and now wants consolidation.

It cannot now, well after the fact, indicate its desire to deal with this issue, and I'm talking about the jurisdictional issue, which was fully briefed before a consensually appointed Tribunal to the prejudice of Canfor by going to this panel simply because its appointee to the Canfor Tribunal resigned, and I would note, based on information that was available to the United States at the time they appointed Mr. Harper, alleging inevitable delay. When any delay in the Canfor Tribunal's ability to deliberate is caused solely by the United States's decision to delay an appointment of a replacement arbitrator.

11:37:01 This is especially so when the only real difference in terms of the reasons for consolidation beyond those reasons that were in existence since December of 2003, is an allegation of a procedural alignment problem.

When the U.S. chose in January 2004 to continue with its application, the United States accepted the possibility of inconsistent decisions, accepted the possibility of fully having to argue more than one jurisdictional motion, and took the risk, in our submission, that the Tembec Tribunal would not have the benefit of Canfor's decision on jurisdiction before it deliberated.

And I note further, when it was in complete control of ensuring that the Canfor Tribunal could deliberate in an expeditious time frame by attending to the appointment of a replacement arbitrator, it chose to drag its feet and not appoint an arbitrator expeditiously in that proceeding.

The fact that the United States may be dissatisfied with how the Canfor hearing went and

11:38:17 1 therefore it would prefer a second chance to
2 reargue its motion is not, in our submission, what
3 Article 1126 was intended for. Accordingly, the
4 United States advances, in our submission, no good
5 reason for its late application, and on that ground
6 alone this application should be dismissed.
7 Now, the second theme that I mentioned at
8 the beginning of my remarks, Mr. President, was the
9 concept of misuse, in our submission, of Article
10 1126 to support the argument of commonality by
11 raising additional jurisdictional defenses to
12 Canfor, is what I would like to deal with now.
13 It's important to understand what is an
14 issue in relation to the United States's
15 allegations regarding common jurisdictional issues.
16 The United States takes the position that there are
17 common questions of jurisdiction, at least between
18 Tembec and Canfor, and it specifically references
19 Article 1901(3), Article 1101, and Article 1121.
20 And I would, for your reference, for future
21 reference, refer you to pages 17 and 18 of the U.S.
22 submission where they deal, at least on one

11:39:37 1 occasion with respect to that.

2 This position is fundamentally wrong. It
3 inaccurately reflects what the actual record is in
4 the Canfor proceeding in relation to jurisdictional
5 issues, which record, the Canfor record, the
6 Tribunal must take as a given for purposes of this
7 application.

8 With respect to jurisdictional objections,
9 the Canfor Tribunal directed the United States,
10 after the issue of jurisdictional defenses was
11 raised and fully briefed, to file a statement of
12 defense within which it was directed to raise all
13 of its jurisdictional defenses, and I refer you to
14 Tab 2 of our Appendix sub C, D and E, where this
15 issue was dealt with, and also pages seven to nine
16 of Canfor's submission, for your future reference.

17 At no time did the United States indicate
18 to the Canfor Tribunal, formally in pleading or
19 otherwise, that it intended to raise an Article
20 1121 defense. At no time. The record is therefore
21 clear that in the Canfor proceeding, the United
22 States is not entitled to raise that defense, and

11:41:06 1 therefore, it is not a common issue with Tembec in
2 this proceeding.
3 Now, in relation to the Article 1101, it
4 is important to examine what the United States did
5 say in relation to that defense in the Canfor
6 proceeding. The United States did not say it was
7 raising Article 1101 as a defense. It specifically
8 said it could not determine until Canfor had
9 presented its evidence on what investments it had,
10 and the impact the United States conduct on its
11 investments, whether it intended to raise an 1101
12 defense. At best, the United States pleading
13 indicates that it had not evaluated the merits of
14 that issue. In fact, it specifically says it has
15 not undertaken a factual inquiry of that issue.
16 It further says it did not even identify
17 the defenses it would raise even if it chose to
18 raise an Article 1101 jurisdictional issue. And I
19 would like to take you, Mr. President and members
20 of the Tribunal, to that, their statement of
21 defense, the United States statement of defense.
22 And if you could go to Tab 2, sub Tab D, as in

11:42:36 David. Now, I would first start at the first page of the statement of defense, remembering, Mr. President and members of the Tribunal, that the United States was specifically directed to raise all its jurisdictional defenses in its statement of defense. If you look firstly at page one, the bottom of the first paragraph, you will see the last two lines says, "respectfully submits this statement of defense setting forth the entirety," and I emphasize entirety, "of the United States's objections to jurisdiction."

It deals, Mr. President, with Article 1101 on page two. Starting on page two at the statement of defense, you see subitem B.

Do you see that, Mr. President?

And you will see at the end of the first paragraph after it's talking about the 1101, and we will get to a little bit more discussion of this, it says: "The United States, therefore, conditionally objects to the jurisdiction of the Tribunal on this ground." Conditionally objects.

And, of course, if you could go, the

11:44:18 previous sentence says, "For the reasons set out below, the United States," and I put in quotes, "may have," and they put in quotes, "may have a jurisdictional objection on the ground that Canfor may not establish the elements required under the 1101(1) when required to produce evidence on the subject of the Tribunal."

And then, if you go to the next page, page three, you will see they talk about this issue of 1101, and it's relevant, and I'll start at paragraph six, and I'll quote. "Canfor has alleged that it is an investor of a party, and that it has investments to the territory of the United States as contemplated by Article 1101. It also has alleged a relation in various respects between the measures complained of and its investments. Canfor has not yet"--sorry--"has not as yet, however, offered any evidence to prove these allegations as would be its obligation if the Tribunal proceeded to a hearing on the merits or one preliminary addressing these issues. Evidence addressing the truth or falsity of the allegations which concern

11:45:36 Canfor's holdings and the impact of the measures on Canfor's investment and businesses, is principally in control of Canfor. It is not in the control of the United States. The United States has no reason at this point in time either to doubt or to credit these allegations. The United States has not attempted to conduct a factual investigation on this subject, even assuming such an investigation were possible given Canfor's control over the principal evidence. Canfor is, therefore, not able at this point to take a definitive position on whether the threshold requirements of Article 1101(1) are met in this case."

"It," which is referring to the United States, "will be able to take such a definitive position only after Canfor has introduced evidence on the subject. It is not--it is for this reason that the United States conditionally objects to the Tribunal's jurisdiction on this ground."

And then you will see in paragraph nine that the United States says as follows, and I quote, "The United States does not propose that the

11:46:52 Tribunal take up this question as a preliminary matter."

Therefore, Mr. President, it is inaccurate for the United States to say that it has specifically raised an Article 1101 defense in the Canfor proceeding, or that an 1101 defense in Canfor can be dealt with as a preliminary matter. At best, what the U.S. is simply trying to do in this application is to use Article 1126 to raise jurisdictional issues which they can either no longer raise in the Canfor proceeding or cannot raise as a preliminary matter in that proceeding. That is the record you have before you.

Clearly, in our submission, the right to consolidate under Article 1126 was never intended for this purpose, and therefore the United States's attempt to use it in this way is inappropriate and should not be countenanced by this Tribunal.

And again, on this reason alone, Canfor and Terminal submit that the application should be dismissed.

Mr. Chairman, those are all of the remarks

11:48:25 1 that I have, and I would now like to turn the
2 podium over to Mr. Mitchell to deal with the
3 balance of the Canfor's oral submissions.
4 MR. MITCHELL: Thank you, Mr. Chairman,
5 Mr. President.
6 My submissions are going to be divided
7 into really four parts: A very brief overview of
8 the legal position, a brief discussion of the
9 nature of the claimants and their businesses, a
10 discussion of the question of commonality, and to
11 the extent possible, I'm not going to repeat what
12 Mr. Landry has said, but I may have a few points to
13 supplement.
14 And then lastly, a discussion of fairness
15 and efficiency as those terms are referred to in
16 Article 1126 of the NAFTA.
17 Let me start by saying that we rely on the
18 written submissions that are filed by Canfor and
19 Terminal, and nothing that we have heard from the
20 United States this morning changes those
21 submissions.
22 Let me also observe that much of the

11:50:02 submission from the United States in seeking consolidation at this late date is offered to the Tribunal at a very high level of generality, lacking in precision, and lacking in specificity. And that's significant because arbitration derives its legitimacy from its consensual nature, and the United States is correct that there is a consent to participate in the consolidation process provided the requirements of that process are met and the very high standards set out there are met.

But that doesn't change the fact that consolidation is an extraordinary process. I think Mr. Clodfelter referred to it as innovative. But it is an extraordinary process which permits a Tribunal not appointed by consent because, of course, the NAFTA does not provide for the parties to select their own members to a consolidation Tribunal on its face, but it's an option that permits a nonconsensually appointed Tribunal to strip the jurisdiction of a consensually appointed Tribunal against the wishes of the parties. And the Tribunal ought, in our submission, to exercise

11:51:40 1 caution before doing so.
2 Now, Article 1126 sets out the test for
3 the Tribunal, but it doesn't define it. It says
4 that there must be--the Tribunal must be satisfied
5 that there exists a common question of law or fact
6 and that fairness and efficiency require the
7 proceedings be consolidated. But it doesn't define
8 what's meant by satisfied. It doesn't define
9 what's meant by common. It doesn't define what is
10 meant by fair, and it doesn't define what is meant
11 by efficient.
12 But this Tribunal should, we submit,
13 approach those questions requiring a high degree of
14 commonality, and a significant impact on the
15 disposition of clearly articulated questions that
16 are common questions of fact or law, and must be
17 clearly satisfied that fairness and efficiency
18 require a consolidation.
19 And we do take issue with the United
20 States that there is--with their submission that
21 there is no burdens upon them to satisfy the
22 Tribunal. We say that there is, and that the

11:53:01 United States has come to you with no evidence to support the fairness or efficiency arguments, and they have only come to you with only vague generalities as to what the common questions of fact or law may be. In our submission, that is wholly insufficient.

Now, in approaching the question before you and considering whether you are satisfied that there is a question, and again the question has not been articulated that is common, it's important to keep in mind the fact that the nature of the investors and the investments are significantly different. It is not enough for the United States to just assert that those differences are irrelevant; they are not.

For instance, the companies compete in quite different markets. Canfor and Tembec, for instance, compete in a commodity market. The Pope & Talbot NAFTA Chapter 11 Tribunal recognized that the SPF market is a common commodity market in North America. Even though there is a fact that they both compete in that market, they compete in

11:54:39 1 different species.

2 Terminal, on the other hand, competes in a
3 very different segment. In Terminal's segment,
4 Terminal's product is a product called western red
5 cedar. It's an extremely expensive product. It's
6 by a factor several times what one would pay for
7 SPF products, and its products are used for
8 different purposes. For instance, housing siding
9 as opposed to framing, and the market reacts in a
10 different way when duties are imposed upon a
11 producer who has a high value product as opposed to
12 a commodity product.
13 As between Terminal and Canfor, Terminal
14 deals in products that are coastal and have the
15 characteristics associated with the coastal market,
16 whereas Canfor's products are interior-grown
17 products and have the characteristics of the
18 interior market.
19 The simple fact is Canfor and Tembec are
20 not in Terminal's market. Terminal is not in
21 Canfor and Tembec's market.
22 The nature of the investors is different.

11:56:02 Terminal is a private family-run company with operations in British Columbia and Washington State. Canfor and Tembec, which are extremely competitive with each other, Canfor being one of the--in fact the largest softwood lumber producer in Canada, are both publicly traded companies trading on major stock exchanges.

The nature of the regulatory regimes under which the companies operate in Canada is different. The forest industry is subject substantially to provincial regimes. Therefore, the circumstances of each of the companies differs. The effect on Terminal of the United States's is driven by the United States's position with respect to the British Columbia regime, whereas with Tembec, the United States is concerned purportedly with the Quebec regime.

The nature of the investments of the parties differs. They differ in specifics, and they differ in kind. Tembec alleges the ownership of a now-defunct eastern sawmill and enterprise that resold Tembec's products in the sales and

11:57:14 distribution enterprise, cash deposits, bonds, inventory, goodwill, its own intellectual property in a paper mill. Canfor owns a Washington State corporation, secondary manufacturing operation in that state, numerous reload facilities and vendor managed inventory operations throughout nine different states, and has an investment of capital between $50 and $80 million at any given time in the United States.

Terminal's most substantial investment, or among them, is a high tech facility in Washington State into which vast sums have been invested for the purpose of producing western red cedar products, as well as its interests in its Delaware and Washington State subsidiaries, Celco, TLS, and TFP.

The impact of the United States's actions and to the damages differ between investors. Again, Terminal as a western red cedar producer of high value specialty products, is impacted differently by United States's actions. The impact depends on the nature of the market, the nature of

11:58:15 the products, the specific investments, and myriad other factors. Not only does the impact differ, but as is I believe acknowledged, the damages necessarily will differ as well. That, of course, is not surprising as a claim under Article 1105 requires the individual investor to prove matters relating to their treatment, to prove matters relating to their treatment by the state party.

So, in sum, the claimants are different in the nature of their enterprises, their geographic locations, the products they produce, and the markets in which they compete, their regulatory regimes under which they operate in Canada.

And just to understand the significance of the regulatory regime point, one of the things of which Canfor complains is the preliminary determination of critical circumstances. Purportedly made on the basis of a Quebec subsidy benefiting Quebec companies, and yet having national impact. The impact on Canfor as a British Columbia and Alberta company of something occurring in a Quebec regime is very different than the

11:59:30 impact on a Quebec company of something occurring within the Quebec regime.

And so we say all of these differences are significant differences that the Tribunal must take into account when it tries to answer the first question, again not clearly articulated by the United States, of what is in common.

One thing that is in common is the game playing that has gone on with respect to appointing arbitrators or changing positions midstream, but that's not a basis upon which commonality occurs for the purposes of Article 1126.

The issue of commonality can perhaps be divided into three parts: The objection on jurisdiction, the issues of law, and issues of fact or questions of fact.

Now, Mr. Landry has already referred you to the statement of defense in Canfor which makes clear that the United States is not raising, and has not raised, and we say cannot raise--and certainly it's not for this Tribunal to suggest that it can raise a matter before the Tribunal has

12:01:00 1 jurisdiction relating to Article 1121.
2 And I would just like to add an additional
3 reference to what Mr. Landry identified to you, and
4 this is at Tab 2 sub A. This is part of the United
5 States submission on place of arbitration
6 bifurcation and filing a statement of defense. The
7 United States urged bifurcation. We disagreed on
8 place of arbitration, and the United States was
9 resisting filing a statement of defense, but the
10 relevant passage is at the bottom of page 17, if I
11 could just ask you to turn that up. This is--we
12 were urging the United States had to tell us what
13 their jurisdictional--17, Tab 2 A. The bottom of
14 page 17.
15 The United States was resisting the
16 production of a statement of defense, and they said
17 this in the written submissions to the Tribunal.
18 Canfor's main argument for a statement of defense
19 is that it would ensure all jurisdictional issues
20 that the United States intends to raise are
21 articulated now. Because the UNCITRAL Arbitration
22 Rules require that objections to jurisdiction be

raised no later than in the statement of defense, requiring the submission of that document, Canfor argues, would prevent the United States from continually raising new jurisdictional objections. Canfor contends that its fear of such an event is well-founded based on a reservation of rights in United States's objection to jurisdiction.

This argument is without merit.

Now, leaving aside the continual rhetoric that comes through these submissions, the next paragraph is key. The only jurisdictional argument that the United States is making, and to be clear, the only one for which it seeks preliminary treatment, is the one stated in its objection to jurisdiction. That's an objection based on Article 1901(3). In that document, the United States reserved its rights to contest the merits at a later time, should it be necessary, as well as to defend the case on grounds that Canfor has not proven elements of its case that could be considered jurisdictional. As the United States explained at the October 28th hearing, it made that

12:03:13 reservation simply as a precaution against any future argument that it has waived its rights with respect to factual defenses that could be construed to have jurisdictional aspects. Given that the United States seeks preliminary treatment only for the objection stated in its objection to jurisdiction, the question whether any other defenses of a jurisdictional or merits nature is purely academic as it would in no way affect the shape of these proceedings.

The Tribunal then went on to order all defenses, all jurisdictional defenses be filed, and Mr. Landry has pointed that out to you, just the reference is Tab C, page 12, paragraph 54 sub one, which is the second-to-last page, and the reference is: "The respondent shall file a statement of defense limited to and setting forth all of its jurisdictional objections." As Mr. Landry pointed out, the United States did so, and the Tribunal at Tab E confirmed that it had received the statement of defense setting forth the entirety of the respondent's objections to the Tribunal's

12:04:15 1 jurisdiction.

2 So, there is no question that the United
3 States has said it is not raising a 1121 defense in
4 the Canfor proceeding, and if you need another
5 reference to that, it's page 400 of the transcript
6 at line 18--I'm sorry, line 21, and that's the
7 transcript of the December 8th, 2004, hearing.
8 So, Mr. Landry has also pointed out that
9 the 1101 issue where the United States says that it
10 may, but can't yet determine whether it intends to
11 raise an 1101 issue in the Canfor proceeding.
12 With respect to Terminal, all that we have
13 on jurisdiction is a statement of intent that they
14 will object to jurisdiction and the assumption that
15 it will be on the same basis, but there is no
16 jurisdictional objection yet in the Terminal case.
17 And if I could just pause to respond to a point
18 raised by the President in asking Ms. Menaker a
19 question, Terminal--Terminal perhaps filed a
20 slightly more extensive notice of arbitration than
21 is necessarily mandated by the UNCITRAL Arbitration
22 Rules under Rule 3. Rule 3 mandates quite a

skeletal notice of arbitration. Rule 50--I think it's--I'm sorry. The statement of claim rule certainly provides that a party has the right to provide a statement of claim to articulate its case under rule--Article 18, and provides that unless the statement of claim was contained in the notice of arbitration, the claimant shall communicate his statement of claim in writing to the respondent, and to each of the arbitrators, and it shall be a somewhat more fulsome than is necessarily contained in an Article III notice of arbitration.

And Terminal certainly, if the United States were to raise a challenge to its jurisdiction, to the jurisdiction of a tribunal to be appointed in that case, would argue for its right and entitlement to file such a statement of claim.

With respect to the issue of common questions of law, the United States references in the written submission the fact that the same treaty provisions are an issue in various proceedings, but it does not articulate what the

12:07:29 question is that it says is in common that the Tribunal must address. And again, the matter cannot be dealt with at that level of generality.

With respect to questions--indeed, that could go further. The United States, I think, as much as acknowledges that it is not certain what its defenses will be. It hasn't conducted sufficient investigations to be certain of what, of how it will defend the claims. And indeed, that goes to the question of common questions of fact.

Ms. Menaker put up her slides and identified that each of the--other than the notice of arbitration or statements of claim referred to zeroing, and the determination that used the process of zeroing that does have the effect of unfairly skewing dumping margins. The existence of that fact that the United States uses zeroing, and that zeroing has the effect of unfairly skewing dumping margins I doubt is contested. The United States certainly hasn't said that that fact is contested, and so we are not in a position to say what are the questions that any Tribunal would be

12:08:50 1 called upon to address that are common.
2 The determinations are what the
3 determinations are. They say what they say. The
4 WTO has said with respect to the United States's
5 conduct what the WTO has said. The United States
6 has not disputed in these proceedings the facts
7 that are alleged. So, it is not possible for us to
8 identify what the questions of fact that are in
9 common are.
10 Indeed, when it comes to the issue of
11 consolidating on the merits, the United States
12 simply pays lip service to that prospect. It does
13 not, and has not identified a reasonable basis upon
14 which that should occur, or a basis upon which this
15 Tribunal can be satisfied that, on the merits,
16 questions in common exist that fairness and
17 efficiencies require to be dealt with together.
18 I want to turn to the issue of fairness
19 and efficiency in the time that I have remaining.
20 And again, little in the way of particularized
21 substance came from the United States's submission
22 on fairness and efficiency. In large part, it was

12:10:32 argument by assertion, and unsupported by evidence or unsupported by particulars which would allow the Tribunal to be satisfied to reach that burden that fairness and efficiency require these matters to be dealt with together over the objections of all of the claimants.

The fact is, though, fairness and efficiency require the opposite, and I'm going to address the reasons why that is so.

Mr. Landry has talked about the point that the parties seriously considered consolidation and represented throughout that they did not wish consolidation. Whether there exists a legal right, which we do not concede, for the United States to bring forward at a late date an application for consolidation, the fact is, in all the circumstances, consolidation should not occur because of the representations that the United States has made, and the facts, all of the facts and circumstances taken together, the fairness, the costs, the prejudice all warrant consolidation being denied.

12:12:05 Let's put that in the context of the stage at which the Canfor proceeding is at. The Canfor proceeding is not at an early stage. We have--we are sitting here this morning acknowledging that there has been a jurisdictional hearing, and the Tribunal would but for the failure of the United States to appoint a new arbitrator be deliberating, but a great deal has gone into that. The transcripts of the oral argument, which was a very hotly contested oral argument, ran for two and a half lengthy days, ran to 783 pages of oral argument on the jurisdictional question the United States raised in Canfor's proceeding.

That proceeding, that jurisdictional argument followed the lengthy briefing process when consolidation could have been sought, and numerous other disputes that were ongoing at the time, including with respect to the preparation or the production of the travaux. And the Tribunal ordered that the travaux be produced to them, and indeed certain of the negotiating texts be produced to them, and it's several thousands of pages in

12:13:30 1 length, which has been reviewed by the Tribunal in
2 the Canfor case, and upon which there was extensive
3 questioning by the Tribunal at the Canfor
4 proceeding, and on which counsel responded to the
5 questions posed by the Tribunal. A great deal of
6 work has gone into the Canfor proceeding.
7 The United States remarkably asserts the
8 proposition that it is fair and efficient for
9 consolidation to occur because Canfor and Terminal
10 are represented by the same counsel, and glosses
11 over entirely the fact that it is, if Canfor and
12 Terminal are represented by the same counsel in a
13 consolidated proceeding, issues of conflict of
14 interest that would affect Canfor and Terminal's
15 counsel will arise that are unlikely to arise if
16 the proceedings proceed separately.
17 The United States then would be in a
18 position of if Terminal determined it was
19 necessary, depriving Terminal of their choice of
20 counsel by virtue of the late application for
21 consolidation. That question is governed by the
22 applicable rules of professional conduct that

12:15:02 1 governed the counsel working on the case.
2 If Terminal was required to obtain new
3 counsel, it is undeniable that the proceedings
4 would be significantly delayed. The United States
5 asserts that, well, the matter has been briefed,
6 and besides, even if we are allowed to raise the
7 1121 and 1101 issues, they don't take up a lot of
8 space in the argument, a submission which does not
9 address the complexity of the issues, with great
10 respect, that new counsel could easily get up to
11 speed.
12 The softwood lumber dispute and the
13 investment disputes that have arisen out of it,
14 Canfor's claim, Terminal's claim, are extremely
15 complex disputes in an extremely complex and
16 ongoing and perhaps one of the largest trade
17 disputes in the world, that it would be extremely
18 difficult for counsel to in short order get up to
19 speed.
20 The United States, then, says, well, there
21 are concerns raised about confidentiality, and the
22 procedural conduct of how these matters would be

12:16:26 dealt with, if they were consolidated.

They discount those concerns, but they don't address them. They don't address, for instance, whether evidence in one proceeding would be evidence in another. They assert, contrary to the position taken by Canfor and Terminal, that the parties would not need to lead evidence of confidential business information to establish the harm to their investments, and I am extremely doubtful that if the parties did not lead evidence of confidential business information, I'm confident that we would be faced with an argument at the end of the day saying we had failed in our obligations of proof by not leading this, the business information necessary to establish the harm or the impacts of the treatment on the investors and the investments.

No--the United States argues that there are built-in procedural, necessary procedural impacts of the consolidation process so that some delay is inevitable where the proceedings may be longer.

12:17:44 Well, that's not irrelevant as the United States says. That's a matter that shows that it's not fair and not efficient for the claimants to be compelled to participate in lengthier proceedings where evidence has led that may or may not impact upon them, that may or may not be evidence in their case, that the Tribunal may or may not rely on, that may or may not be consistent with the litigation strategy opted by claimants' counsel.

The fact is that as in corn products, and I won't refer you to it here, but I would ask you to look at the corn products decision on consolidation, clearly the procedural complications posed by a consolidation order argue strongly against consolidation.

The United States says that it's unquestionably efficient without defining efficient, to have one Tribunal deal with these matters, deal with the cases together, but it does not say how a lengthier proceeding is efficient or how the necessarily increased costs that would be incurred by claimants in participating in a

12:19:24 lengthier proceeding are efficient. It simply asserts an efficiency. In our submission, there is a burden on the United States, and they have not met it simply by that assertion.

The United States relies on the supposed procedural alignment of the Canfor proceeding with the Tembec proceeding, and clearly, of course, the Terminal proceeding is not procedurally aligned. In our submission, the United States cannot rely upon its own delay to bootstrap a claim for consolidation. It's now over 90 days since Mr. Harper resigned from the Canfor Tribunal, in fact it's three and a half months, roughly three times the time permitted under the UNCITRAL Rules, and yet the United States has not appointed a replacement arbitrator and had not prior to the imposition of a stay by this Tribunal.

There is no good justification for that delay, but yet the United States says, well, this is a matter that was brought about by Canfor's challenge of Mr. Harper. So that the Tribunal is not in any way misled by the incomplete submissions

12:20:54 on that point, we have included, and I'm not going on take you through it, but we have included under Tab 3 of the appendix the documents relating to the, first of all, the initial delay by the United States in refusing to appoint an arbitrator at the very beginning, the subsequent appointment of Mr. Harper, the material that was disclosed by Mr. Harper, followed by after the jurisdictional proceeding, Mr. Harper e-mailing counsel, and the Tribunal apologizing for the impact his late disclosure was going to have, and then disclosing the existence of a matter that clearly put his interests in negotiating directly with the United States in conflict with his neutral adjudication of that claim.

Canfor was asked for their observations on that circumstance, and provided them. They were asked by the President of the Tribunal, we provided them to the President of the Tribunal, and the Tribunal and Mr. Harper appropriately withdrew. It was obvious, and it was inevitable that when a Tribunal member was engaging in--had engaged in ex

12:22:20 parte communication while the Tribunal was going to be deliberating with people in the office defending the claim, plus late disclosure of the conflict, there was no doubt that Mr. Harper would resign.

But if the United States were to appoint a Tribunal member, all that Tribunal member would need to do would be join in the deliberations. The UNCITRAL Rules do not require that there be a rehearing, and at most there would need to be, if the Tribunal determined a truncated hearing where that new representative could, if necessary, ask any questions of counsel.

The proceedings were audiotaped. They were transcribed, and the record is documentary. There was no evidence. Canfor's proceedings have been delayed, but the most efficient thing to do is simply for a new Tribunal member to be appointed and that Tribunal be allowed to deliberate.

The United States is not entitled to a second kick at the can, a second bite at the apple, and they don't explain why after 783 pages of oral argument, two full rounds of briefing. They're now

12:23:54 unhappy with the manner in which the jurisdictional motion was dealt with before the Canfor Tribunal, or why they may not have the optimism they once had. They don't explain that, and they don't justify why Canfor should be put to the obligation of doing it all over again with a different Tribunal that the United States thinks might be more amenable to its views.

The United States consensually selected the Canfor Tribunal. It determined it wished to bring a jurisdictional objection before the Canfor Tribunal. It briefed it, it remitted it to them, and it now seeks to resolve from that choice. At this late stage, it ought not to be permitted to do so.

Similarly, it's not fair or equitable for this Tribunal to assume jurisdiction and allow the United States to raise jurisdictional objections that don't otherwise exist.

In our submission, the United States's arguments on inconsistent decisions hold no water. Those objections, if they were of real concern to

12:25:18 the United States, would have been raised long ago. The risks of an inconsistent decision when there is no precedential weight to and after Chapter 11 awards is minimal.

Moreover, one Tribunal's determination that a claimant has made out their claim while another Tribunal's determination that a claimant has not made out their claim, in each case based on the evidence and argument led before those tribunals is not an inconsistency.

Hesitatingly, I say that it is premature for this Tribunal--this Tribunal should determine that consolidation should not occur. It should not occur on jurisdiction, and it should not occur on the merits. That, I say, is what the Tribunal should decide.

Alternatively, the Tribunal, and I say this only hesitatingly, because again the United States should not be given a second chance, the Tribunal should determine that consolidation should not occur on jurisdiction and leave it open to consider whether, in the future, it may be

12:26:48 appropriate to consolidate on the merits.

But the United States could have articulated the defenses it intends to raise; they didn't. Canfor and Terminal have been put to the expense of attending at this hearing and resisting this application. This should be the United States's opportunity, and it should be denied.

Finally, you have heard aggressive language from the United States throughout, doubtful the cases will proceed, submissions are disingenuous or misleading or without merit. But rhetoric does not substitute for analysis. Fairness doesn't mean for the tactical advantage of the United States. Efficiency does not require Canfor to do again what it has already done, nor Terminal to do what it may never need to do. The United States has advanced no evidence, no comprehensive analysis, nor any compelling explanation for their delay. The Tribunal can only assume that much like their challenge of Tembec's waivers, their challenge to Mr. McKenna, their delay in appointing arbitrators, their refusal to

12:28:11 produce the travaux, their tender to undermine the Canfor's Tribunal's ability to render its jurisdictional award, that this is a purely strategic endeavor that cannot be permitted to undermine NAFTA Article 1120 tribunals and should not be permitted as a misuse of the Article 1126 process.

For all of those reasons, Canfor and Terminal submit that this application should be dismissed, and that Canfor and Terminal should be awarded their full costs of participating in these proceedings.

PRESIDENT van den BERG: Thank you, Mr. Mitchell. So, that completes the oral argument for both Canfor and Terminal?

MR. LANDRY: Yes, Mr. President.

PRESIDENT van den BERG: I thank you. Recess for 10 minutes, and then we will hear Mr. Feldman for Tembec.

(Brief recess.)

PRESIDENT van den BERG: I see you want to ask a question.

12:46:59 Mr. Feldman, is your side ready?

MR. CLODFELTER: Just briefly, Mr. President, we are ready. I just wanted to express the apologies that Mr. Bettauer who was called away, will not be in attendance for the rest of the hearing.

PRESIDENT van den BERG: Thank you.

Before we start, Mr. Feldman, one thing of an organizational nature, the Tribunal has already a number of questions, and it may be a good thing that we give them to the parties after the presentation by Mr. Feldman prior to lunch. Now, we don't like to spoil your lunch, to the extent it hasn't already been spoiled, because you have to prepare the rebuttal, but additional work would be also to find an answer to the questions of the Tribunal instead of waiting until the end of the day. Is that agreeable to the parties?

MR. FELDMAN: That's fine. I hope I won't spoil your lunch either.

PRESIDENT van den BERG: Don't worry about me.

12:47:44 MS. MENAKER: That's fine.

MR. LANDRY: That's fine.

PRESIDENT van den BERG: Mr. Feldman, please proceed. I see you have demonstrative exhibits.

MR. FELDMAN: Yes, we do.

PRESIDENT van den BERG: Do we have copies?

MR. FELDMAN: You should have received them.

PRESIDENT van den BERG: I have many documents on my desk but not that one.

Thank you very much.

You have an hour, Mr. Feldman. Please proceed.

OPENING STATEMENT BY COUNSEL FOR TEMBEC, INC., ET AL.

TEMBEC, INC., ET AL.

MR. FELDMAN: Thank you.

Thank you, Mr. President, members of the Tribunal, and good afternoon. I'm Elliot Feldman, from Baker & Hostetler, appearing before you on

behalf of Tembec. I'm accompanied to my right by my colleagues Mark Cymrot and, acting as Vanna White, Bryan Brown; and by Paul Krabbe of Tembec who is down at the end of the table.

As correspondence preceding this hearing must amply demonstrate, we are dismayed to appear today at a hearing convened by a Tribunal who we do not believe has been properly constituted and which has been making important decisions, notwithstanding profound and continuing questions about its legitimacy and proper authority.

Chapter 11 is supposed to provide investors a forum free of politics in disputes with member state governments. U.S. concern about political influence in the courts of Mexico was a major motivation, perhaps the single most important, for Chapter 11's creation, and yet here we are before a Chapter 11 Tribunal in which the United States itself is itself contributing to a similar concern. We appear, therefore, without prejudice to any of our prior objections.

We also appear noting two handicaps: That

12:49:33 the rush to briefing and this hearing has deprived us of a fair opportunity to prepare, which is not cured by the Tribunal's assurance that we very well a fair opportunity to be heard. To be heard while not being fully prepared does not solve the problem.

And second, and as part of our handicap in preparation, the United States has, we believe, pertinent information that we do not have. It has information about the Canfor and Terminal proceedings, and the State Department Web site indicates its interest in possible consolidation in a matter involving cattle, about which we otherwise have no information at all.

Only when the United States delivered its brief in this proceeding did we learn about another Tribunal's refusal to consolidate claims in the high fructose corn syrup case, and we have very limited information about those cases. What we do now have illustrates well why there is no reasonable basis for consolidation here.

Withholding pertinent information to its

12:50:33 1 own advantage is not peculiar for the United States
2 in this Article 1126 proceeding. It's now the norm
3 apparently in Chapter 11 cases involving the United
4 States.
5 When the United States advanced its
6 jurisdictional claims against Canfor and later
7 Tembec, there was one common legal claim. The
8 others very notably were not in common, as you've
9 heard at some length already today.
10 That common claim was based on an
11 assertion that the very purpose of Article 1901(3)
12 of NAFTA was to bar Chapter 11 claims related to
13 disputes involving international trade. The NAFTA
14 member states possessed the relevant negotiating
15 history, which otherwise was not public, and
16 without the negotiating history one couldn't make a
17 judgment as to the purpose of Article 1901(3). The
18 Government of Canada agreed to release the
19 pertinent negotiating history to Tembec, provided
20 the United States would agree. The United States
21 refused.
22 Indeed, we initially obtained the

12:51:33 documents through a Freedom of Information request in Mexico, and after the Canfor Tribunal ordered release of the documents to Canfor, the United States still refused to release the very same documents to Tembec. Release came only after the Tembec Tribunal also ordered release, and the United States continued to stall. It took a year.

So, with briefs here ordered within a month of the supposed formation of the Tribunal, we could not have even begun to seek the documents and information possessed solely by the United States.

PRESIDENT van den BERG: Mr. Feldman, may I ask you a question. Specifically in relation to the submissions made, first of all, in Canfor and in Terminal, I was able also, for example, for Tembec to get these documents simply from the Web site of "naftalaw.org," if I have the correct Web site. Are you referring to those documents? For example, corn products here I got also in the whole bundle, but you should also find there on the Web site. Are you referring to those submissions, or are you referring to other documents in relation to

12:52:46 information on these two other arbitrations or three arbitrations?

MR. FELDMAN: The first two documents you held up in your hand, I don't know what they are.

PRESIDENT van den BERG: What they are, are simply I can tell you is Canfor, for example, and you may see it, it's the whole list which you find on "naftalaw.org," and it starts with the notice of intents to submit the claim to arbitration, and it ends actually with the hearing transcript of day three.

MR. FELDMAN: Mr. President, we are aware, in our own case, that there are documents that don't get posted on the Web sites.

PRESIDENT van den BERG: Okay. But that are documents--I simply would like to know to what unknown documents you are referring to.

MR. FELDMAN: I don't know. That's because they're unknown. But that is there are documents in these cases, such as correspondence among the parties, that are not necessarily posted on the Web site. So, they're all known to the

12:53:39 United States, and they're now material in a proceeding such as this one, but we don't know what they are.

PRESIDENT van den BERG: But then your objection would apply to the exhibits to those documents, to those submissions which you can find on the Web site?

MR. FELDMAN: I'm not sure I understood your question.

PRESIDENT van den BERG: You are saying, if I understand you correctly, that you are in the dark about what happened in Canfor and in Terminal; is that correct?

MR. FELDMAN: We are saying that we are not fully informed of what happened in those proceedings, that's correct.

PRESIDENT van den BERG: And you used the qualifier not fully.

MR. FELDMAN: That's right. There are some things we can know. There are things that are posted, and there are things that aren't.

PRESIDENT van den BERG: Okay. So, what

12:54:15 1 is posted, that you do know?
2 MR. FELDMAN: Yes.
3 PRESIDENT van den BERG: Okay. Thank you.
4 MR. FELDMAN: We oppose consolidation of
5 these claims, and we believe the United States is
6 seeking consolidation for reasons that have nothing
7 to do with the purposes of Article 1126. The
8 United States is not seeking to reduce costs or
9 increase efficiency. To the contrary, this very
10 proceeding is multiplying our costs. The colossal
11 haste with which the request for consolidation has
12 been accommodated, staying proceedings that were on
13 the brink of resolving a crucial and threshold
14 question after many months of deliberate U.S.
15 delay, has precipitated a colossal waste of time,
16 money, and other resources.
17 The United States launched its request
18 without any particulars, and its brief is not
19 significantly more enlightening. Indeed, this
20 morning, we have heard the United States's
21 rebuttal, but still not its case. Instead, it
22 argued it had no burden to make one. Even after

12:55:13 the detailed request was filed in the corn producers case--I use that term advisedly because that's the term by which the Tribunal--to which the Tribunal referred--months were permitted for briefs and a hearing, and the detailed request came first.

Here, we have been forced to postpone the real business at hand, resolving the United States's effort to block our claim on jurisdictional grounds, and move on to the merits of our claim, in order to deal with yet another tactic in the U.S. arsenal of delay, and we are even expected to explain our objection before the United States explained the basis of its motion.

The motion to consolidate is a jurisdictional motion. We heard frequent reference this morning to a request that this Tribunal assume jurisdiction. It seeks to deny the jurisdiction of the Article 1120 Tribunals duly constituted and already acting in the cases of Canfor and Tembec for over a year.

Article 21(3) of the UNCITRAL Rules, the article to which Mr. Clodfelter said reference was

absurd and required no response--I believe I'm quoting--Article 21(3) of the UNCITRAL Rules that govern this and those proceedings stipulates, quote, a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than in the statement of defense or with respect to a counterclaim in the reply to the counterclaim, unquote. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defense.

There is no counterclaim here. The United States insisted and Tembec's Tribunal acceded that it would postpone a complete statement of defense, but that it would present a complete statement of defense as to jurisdiction. That complete statement for Tembec was delivered to the Tribunal on December 15, 2004. That was when the United States was required to seek consolidation for Tembec at the latest possible time, not later than the submission of its complete statement of defense on jurisdiction, which was December 15, 2004.

For Canfor, the United States had waived a

12:57:37 consolidation claim with its statement of defense on jurisdiction on February 27, 2004. The United States did not move to consolidate Canfor, Tembec, and Terminal, against which it has never raised any jurisdictional objection, on March 7, 2005, 13 months after its effective waiver for Canfor, three months after its complete statement, and therefore waiver for Tembec.

This is a matter of law, not an absurdity. It did not satisfy the unambiguous requirement of Article 21(3). Its motion to consolidate should have been barred. It should be summarily dismissed. The stay in the Tembec Tribunal's proceeding should be lifted immediately, and we should be able to get back to business. That is the only solution that the law here allows.

The United States was out of time when it filed its request for consolidation. Barred by its failure to meet the requirements of Article 21(3). The move, however, has already been wildly successful. It prevented Tembec's Tribunal from convening when scheduled two weeks ago on the

12:58:48 jurisdictional defense of the United States. It prevented the Tembec Tribunal from ruling on jurisdiction on paper submitted had it chosen to do so. Albeit that the United States was insisting that the Tribunal must have questions and must hold a hearing to ask those questions, and it's repeated that this morning, that, indeed, it insists upon a hearing, notwithstanding that its explanation for its request for hearing is to answer questions of the Tribunal, and we've submitted to the Tribunal that if it has no questions, we would welcome it to rule on the papers.

It therefore has set back the Tembec Tribunal at lost a month were this Tribunal to rule summarily and immediately based on Article 21(3) and lift the stay. Every day that this Tribunal takes to reach the right conclusion that consolidation is inappropriate and improper is a day lost to the business at hand and is a day that favors the United States.

We noted in our brief that the United States has introduced every conceivable barrier in

these proceedings to avoid reaching the merits. Indeed, U.S. counsel frequently assert that the merits will never be reached. We heard that again this morning. It is, of course, a cliche of American law that delay is always good for the defendant. Here, where the international proceedings are supposed to put substance over form and prefer fair adjudication of the merits over tactical delay, the United States's conduct is particularly unfortunate, but it does have a purchase. Tembec is paying $10 million every month in duty deposits while the United States blocks and parries and prevents Tembec's claims from being heard.

When we reviewed Canfor's brief in this proceeding, we learned that much of what the United States has been doing to us it has been doing to Canfor. What we have in common is not law and fact, but the way the United States treats us, with tactics of obstruction and delay.

The chart that you have now before you, and it's up on the board here, summarizes some of

13:00:48 1 the tactics used by the United States against both
2 Canfor and Tembec.
3 First, the United States refused to
4 recognize the claims. In Canfor's case it objected
5 to that the claim was premature, and it prevailed
6 on that point. But it had no such claim against
7 Tembec, so it harassed Tembec about its Article
8 1121 waivers until finally ICSID had to step in and
9 say there is nothing wrong with the waivers. And
10 until that time, the United States sustained a
11 campaign. No matter what Tembec did to satisfy the
12 United States, it said the waivers weren't
13 acceptable.
14 Then it delayed making its appointment to
15 the Article 1120 Tribunal. It did this to both
16 Canfor and to Tembec; and, indeed, it required
17 ICSID's intervention to get the tribunals completed
18 by prodding the United States to make their
19 appointments beyond the time that they had been
20 allowed.
21 Then, it withheld pertinent information,
22 as I've just described, with respect to the release

13:01:54 of the travaux, and released them only when ordered. And even when it had the consent of other governments, it refused to release them and had to be ordered by the Article 1120 Tribunals.

Then it did everything it could to extend briefing schedules presenting defenses piecemeal as to Canfor, prolonging the jurisdiction dispute for Tembec for 10 months. And indeed, the United States has described how Tembec requested an expedited schedule, but it provides a very misleading picture when it says yes, and Tembec agreed to brief in only two weeks. We did. Didn't change the schedule.

United States then didn't agree to brief any sooner or any faster, didn't change the date of the United States's brief, didn't change the date of the hearing, and that prolonged schedule was what enabled the United States ultimately to stop the proceeding entirely.

Then it represented to both Tembec and to Canfor that it didn't intend to consolidate. And some of these statements were pretty definitive.

13:02:55 No intention of invoking Article 1126 is a pretty clear statement. And as for Tembec, the United States went so far as to say that the statement of claim differs on its face from Canfor. That same statement of claim, which now is held before you, is being largely the same.

Then there was all kinds of stalling on decisions on the jurisdictional objections in the Canfor case, as you have heard, a refusal to appoint a replacement arbitrator, which was due over two months ago, and certainly would have moved the process along had the United States been able to appoint that arbitrator. That proceeding would have continued.

Instead, it had time to raise a series of objections to nominees for this Tribunal and to participate actively in the appointment and creation of a whole new Tribunal with three members, but it somehow didn't have the time to muster to appoint one Tribunal member by itself on its own, of its own choosing. And in Tembec's case, it prevented our jurisdictional hearing from

13:03:59 1 proceeding by demanding a stay and demanding it
2 quite desperately as we approached the day for the
3 hearing.
4 Finally, as a continuation of the same
5 phenomenon, the same pattern of conduct, we had
6 this move for consolidation. And as you've heard
7 in detail from counsel for Canfor this morning,
8 seeking to argue whole new objections on
9 jurisdiction for Canfor that have effectively been
10 waived because the proceeding is merely waiting for
11 a decision, and seeking to reargue all of those
12 objections and raise we don't know what else with
13 respect to Tembec.
14 These tactics are consistent with a
15 broader purpose that we discussed in our brief, and
16 I will refer you to pages 11 to 15. The United
17 States wants to force a negotiated settlement of
18 all aspects of the softwood lumber disputes, and
19 cares not at all for the requirements of the law.
20 As Senator Crepo reported on his discussions with
21 the Administration, and as we quoted in our brief
22 at page 13, quote, The Bush Administration has

13:05:13 concluded that duty deposits amounting to approximately $3 billion, and growing daily, cannot and will not be returned absent a negotiated settlement between the Canadian and U.S. Governments. There is zero likelihood, says Senator Crepo, reporting on the position of the Bush Administration, zero likelihood that the countervailing duty antisubsidy order will disappear absent settlement of the lumber subsidy and dumping issues no matter how often a NAFTA panel tries to achieve this outcome, unquote. No matter how often the law says the contrary, the Bush Administration intends to stall until the parties must capitulate, negotiate a settlement.

We are part of that concern. In negotiations the United States has demanded that settlement would also require abandonment of Chapter 11 claims, and so stretching these out so that the merits can't be heard, and they are, therefore, continually subject to a settlement in which they would be withdrawn, is part of an overall U.S. strategy quite publicly stated.

13:06:27 In our view, the pattern of conduct just described is simply repeated in the motion that led to the creation of this Tribunal. Consistent with the policy of the Bush Administration as described by Senator Crepo. It is more delay and expense for foreign producers and, in Tembec's case, for a foreign investor in the United States, and nothing more.

The Article 21(3) bar to this action is, unfortunately for the United States, a consequence of all of the United States's maneuvering. The United States refused to provide a complete statements of defense. It insisted upon bifurcation of the proceedings between its jurisdictional defense and defense against the merits of the Tembec claims. It actively denied either intention or interest in consolidating, communicating that position it turns out to both Canfor and Tembec, and it let the cases advance, albeit only with respect to its jurisdictional defenses.

Before the United States ever advanced its

13:07:23 jurisdictional defenses, it could have sought to consolidate. As you can see on the next chart, Tembec's statement of claim was filed more than a year before the United States issued its statement of defense on jurisdiction. It now claims, albeit inaccurately, that its jurisdictional defenses against Tembec and Canfor are the same, identical, indeed, is the word I think that's being used, because the claims share common issues and facts.

During the nearly three months that the United States had Tembec's claims before advancing its jurisdictional defense against Canfor, it had ample opportunity to divine common issues of law and fact, and so ample opportunity to satisfy Article 21(3) with a jurisdictional defense calling for consolidation.

Instead, more than a year passed, and after numerous denials and protestations before the United States asserted a jurisdictional defense calling for consolidation, the United States thus did not waive inadvertently. It waived knowingly.

It is not as if Tembec had not been

13:08:31 concerned about consolidation. It inquired from the United States its intentions at its very first meeting with the United States in January of 2004. It asked the United States about its intentions on several subsequent occasions. Tembec said it feared prejudice arising from a late request. The United States assured there was no request coming, noting that Tembec's statement of claim on its face, as we have just seen a moment ago, differed from Canfor's.

With more than a year gone by from the time when the United States might reasonably have suggested consolidation within the UNCITRAL Rules, the United States now asserts that the cases are procedurally aligned. They are not. Consider the chart.

The United States has failed to replace its arbitrator in the Canfor proceeding, thus preventing that Tribunal from completing its business. It was otherwise poised to decide jurisdiction.

But if this Article 1126 Tribunal did not

13:09:30 exist, there would still be no Canfor Tribunal because the United States has not replaced the missing member. By contrast, there is a Tembec Tribunal, where the stay lifted that was imposed because of this proceeding. That Tribunal, in fact, could decide the jurisdictional question, with or without a hearing.

Even more significantly, both tribunals have completed briefing. Both tribunals presumably have invested in reading the briefs and reading the supplementary materials, including the travaux as noted by counsel for Canfor and Terminal this morning.

There could be only expense and not savings in having this Article 1126 Tribunal read all the briefs again, read all the supplementary materials, and set new hearings. And, of course, there is no statement of defense and no jurisdictional challenge concerning Terminal.

This situation does not describe alignment. It describes investment in two different tribunals setting rules, procedures, and

13:10:31 schedules, reviewing briefs and, in Canfor's case, conducting a hearing. The proceedings are well advanced and represent by far the most efficient and cost-effective option for resolving the jurisdictional question.

Because the Tembec Tribunal is fully constituted and poised to settlement jurisdictional question, it could not be consistent with the objectives of Article 1126 to remove the jurisdictional question to a new Tribunal.

But there is an even more profound problem, and it was outlined, I think, in some appropriate detail this morning. The U.S. jurisdictional defense against Tembec is decidedly different from its defense against Canfor. The United States made new and additional arguments against Tembec, having otherwise completed its case against Canfor.

So, in trying to relitigate both of these cases in a new forum, the United States is trying to bring new arguments against Canfor that it waived and avoid the authority of the Tembec

13:11:32 Tribunal in favor of another. Maybe it even hopes to write new briefs, although there was a representation this morning that that's not the case. It certainly wanted more time to prepare a hearing, and apparently feared relying on its briefs for a decision.

The United States imagines that settlement of its jurisdictional defense should mean the end of these cases. We heard that also again this morning. Indeed, the United States devotes only one short paragraph in its brief to the merits. It did not appear to us that the United States has paid a lot of attention to the issue of alignment with respect to merits or with respect to common issues of law and fact; and, indeed, we don't have a statement of defense that would tell us what the disputes and facts and law that the United States would assert may be.

One thing we can be certain about is that they're different for each company. One would have thought, then, that the United States would have hastened to get those decisions, to get the

13:12:38 jurisdictional decisions, rather than delay them and be finished. If, indeed, it is so persuaded that its jurisdictional arguments are so powerful that they would end these cases, and they were on the brink of having jurisdictional decisions, then why would they not proceed to get them.

Permitting the Canfor and Tembec tribunals to go forward would have most served that purpose and still would, and they cannot reasonably be consolidated because they involve different issues argued differently. Does the United States propose a common jurisdictional hearing in which some arguments are applicable to Canfor, but other arguments are applicable to Tembec and say to one you can be dismissed because of 1121, but you can't be because that was waived?

If the jurisdictional decisions come out the way the United States expects, there remains nothing to consolidate. And there is no reason to consolidate those; indeed, because of the posture the so-called alignment, they can't be consolidated.

13:13:45 If one comes out the U.S. way, there is still nothing to consolidate. If they both come out as we expect, requiring moving forward finally to the merits, consolidation then becomes impossible.

There are two general reasons and many specific ones. First, generally, liability and damages need to be addressed separately, but they must be addressed in each instance by the same Tribunal. We made this point in our brief, and the United States endorsed that point this morning. There can be no sensible assessment of damages without complete knowledge of the reasons why damages are owed, and there is no way damage issues could be consolidated for competing companies in the same industries.

In damages, there are no common issues of law and fact. All of the measures, all of the conduct of the United States, everything at issue, impacts the different companies differently, and the United States has not pretended otherwise in its brief. Indeed, it doesn't address this issue

13:14:47 1 at all.

2 Each complainant is affected differently

3 by the actions of the United States. Each

4 complainant is different enough to absorb different

5 impacts.

6 We will return momentarily to the

7 different situations of each company, but note

8 above all that virtually all the information that

9 would be provided to tribunals on damages would be

10 confidential. With due respect to Ms. Menaker,

11 she's not a trade lawyer. The administrative

12 protective orders in trade cases do not operate the

13 way she presented them this morning. What is

14 protected is the information of other companies.

15 We have control over the information that pertains

16 to Tembec, just as counsel for Canfor has control

17 of Canfor's information.

18 There is no bar there for arising from

19 trade litigation. For the confidential information

20 of a company that would need to be presented to

21 address damages before a Chapter 11 Tribunal, and

22 indeed, there would be no other way to assess

13:15:49 damages except to introduce confidential information, information about sales and inventories.

In our submissions we have noted that these questions also go to Article 1101 and Article 1102. These are also liability questions. For example, Article 1101 requires that we establish that we are an investor and we have investments in the United States. What are some of these investments? Well, for example, we have program sales. We could not conceivably be in a hearing with our competitors and reveal to them with whom we have program sales, what those terms are, and how they have been affected by the conduct of the United States. That information is supremely confidential. It goes not only to damages, but also to the liability. It also goes to establishing the claims under Articles 1101 and 1102.

The information then involves sales, customers, corporate strategies, properties, investments, all subjects of competition that

13:16:52 cannot be shared or revealed. Such information must be presented to different tribunals because it cannot be presented at the same time and must be managed and simulated.

With one Tribunal, there must be a cue, with one company waiting until the completion of another. Two or more tribunals can proceed without reference one to the other.

These damages requirements, then, reflect back on the liability analysis. The United States promises in its brief that it probably will--probably will deploy the same defenses, but such a pledge cannot be considered reliable.

After all, the United States insisted to Tembec that it would advance the same jurisdictional defenses as it did against Canfor and then advance different and additional defenses. Even as the United States said it had already argued the jurisdictional case, it insisted it required extraordinary additional time to argue it again.

And even as it had already had three days

13:17:54 of hearing on the subject, it desperately did not want another hearing before Tembec's Tribunal demanding a stay to avoid all the preparation it said that it required to have a hearing on the same subject, identical; indeed it has said this morning for which it already had a hearing of three days and had already completed two rounds of briefs with two different parties.

So, there is no basis for accepting the U.S. promise of a likelihood of identical defenses when we still haven't seen them.

This justifiable skepticism is reinforced by the U.S. refusal in all three of the claims it seeks to consolidate to issue a comprehensive statement of defense. The United States thus asserts that there are common issues of law, but it has not identified any issues of law, common or otherwise, having not declared any defenses except the jurisdictional defenses, which again were different for Tembec and Canfor, and did not include the consolidation the United States subsequently has invoked and which is a

jurisdictional defense.

With no established common issues of law, the United States must then explain how it proposes to overcome statements of claim that the United States itself declared are different on their face. There may be common words, trade, countervailing duties, dumping, injury, but they're not common claims; and the common facts, there are some, are very limited.

All the claimants refer to NAFTA and WTO decisions pertaining to of the softwood lumber proceeding, but their reliance on these decisions varies. The impact on them from these decisions varies, and the conduct of the United States is directed differently toward them. All the claimants have different investments in the United States, which inevitably are impacted differently by the actions of the United States.

You have heard Mr. Mitchell this morning begin to set out differences on what we're calling an east/west divide, and we, indeed, suggest that east is east and west is west, and in this case

13:20:01 1 never should the complainants meet.
2 There is a profound difference in the
3 geography that dictates consequences for these
4 companies, the impacts with respect to the claims.
5 Tembec is an eastern company. The Canadian
6 east/west divide is effectively a divide between
7 countries, and indeed in the softwood lumber
8 proceedings, the differences among provinces have
9 been treated as differences with respect to the way
10 international law would define them, as differences
11 between countries, because of the application of
12 subsidies regimes.
13 So different are their situations, conduct
14 of business and experiences arising from U.S.
15 conduct that they can't be considered to really be
16 even remotely in the same place or with respect to
17 the same concerns. The chart before you now
18 suggests some of the more dramatic ways in which
19 geography alone, without reference to the
20 particularities of the companies themselves
21 guarantee that the companies are different,
22 impacted differently, and not susceptible to claims

about common issues of law and fact.

The species of trees, dramatically different. Jack pine and black spruce dominating the spruce pine fir species in eastern Canada, Douglas fir and lodge pole pine, bigger, more valuable trees, dominant in British Columbia and Alberta. The eastern white pine/western red cedar difference is hugely important in this case. Canfor doesn't produce western red cedar. Terminal produces essentially western red cedar, and a central part of the Tembec claim refers to eastern white pine. There is no eastern pine in western Canada, there is no western red cedar in eastern Canada. And it's not just that this is a difference of name. These are different products. They go to different uses, they're sold in different markets, they have different impacts, and what happened to them as a result of the U.S. conduct in the softwood lumber proceedings has been quite different.

The damages are different. The exposure of the company is different. The facts that are

13:22:11 applicable different, and indeed, the law, the trade law, was applied differently.

Eastern Canadian mills typically produce lots of different kinds of products because they're dealing with smaller trees, they produce smaller dimension lumber, precision and trim studs. Typically nothing comes out of eastern Canada that's greater than 16 feet in length. Western Canada, with much larger trees and a much more common stock, sell largely commodity grades, all the way up to 24 feet in random lengths.

The spruce pine fir that's produced in eastern Canada doesn't compete directly with the spruce pine fir in the United States. Southern yellow pine is not a comparable species, and it's subjected to different uses. But what's produced in western Canada is the same grade as what's produced by western mills in the western part of the United States.

The typical eastern Canadian mill is much smaller as an enterprise than the mill in western Canada. And by a substantial proportion, as you

13:23:11 1 can see on your chart.
2 There are fewer chips that are going to
3 emerge in western Canada from larger trees.
4 And I believe I understood the United
5 States to make reference to the beetles difference,
6 and to say this in a somewhat disparaging way, but
7 it's not a small matter. The beetle infestations
8 in British Columbia are requiring a rapid harvest
9 of a very substantial volume of trees. That is
10 changing drastically and radically the market for
11 timber and lumber in western Canada, compared to no
12 similar disease at any time in eastern Canada.
13 This changes the way the companies have to respond
14 to the market and how they have to deal with the
15 restrictions and obstructions erected by the United
16 States through the softwood lumber proceedings.
17 The eastern Canadian companies serve an
18 eastern and midwestern market on the continent, and
19 they face growing competition from European
20 imports. The western Canadian companies serve
21 primarily western U.S. markets, although because
22 especially British Columbia's such an important

13:24:20 producer, they penetrate other parts of the continent, but they're not impacted significantly by European imports, and they have a natural Asian market.

Timber is moved in eastern Canada predominantly by truck and rail. In British Columbia, it's moved in booms, coastal riverways.

The eastern Canadian tree is largely a northern growth. It grows slowly. Forests can be sparse. What takes 60 years to grow in northern Ontario or northern Quebec can take 20 years to grow in southern areas.

And western Canada is blessed therefore with a larger old growth, it's faster growing, it's a denser forest. This leads to greater mass production and indeed, as indicated by the larger mills, and more specialized and customized production in eastern Canada.

I note for you just for the moment some of the implications. The impact of the antidumping action against Canada meant largely in eastern Canada that mills had to either try to sustain

13:25:31 their production or reduce it. They had to give up market share.

The impulse in western Canada was exactly the opposite. It was an impulse to increase production because when you are producing a commodity grade, you can drive down your unit costs by increasing your production, which is a reaction to a dumping order. So, the impact from these measures was completely different on Canfor, on the one hand, and Tembec on the other.

There was a similar different reaction and different impact on the companies arising from the countervailing duty order. Where in eastern Canada there were pressures to promote market reforms, and in western Canada in British Columbia as a result of these cases, auctions have been introduced with very different consequences for market behavior on the conduct of the companies.

The Government of Canada is far more concerned about what will happen in these lumber disputes with respect to western Canada, where this industry represents roughly half of the gross

13:26:37 domestic product of the Province of British Columbia, than in eastern Canada, where it is still--where this industry is still very significant, but the Government of Canada still sometimes has to make choices.

There are, of course, all of the differences that are associated with the regimes under which these companies work, the legal regimes. Different environmental controls, different stumpage systems, because the largest part of these forests, well over 95 percent of these forests overall are owned by the governments. And the companies have to do business with governments, and the governments are the provincial governments because, as a condition of the Canadian Constitution, natural resources belong to the provinces.

And each province governs its system, and therefore manages its forests and controls its trees the way it chooses.

The conditions for logging are drastically different because of the Rocky Mountains and

because of the mountains in northern British Columbia, so helicoptering, for example, is a very common way to extract timber in British Columbia and virtually unknown in eastern Canada.

These are geographic descriptions before we would ever get to the differences of the companies which operate differently, which have their own management, which have their own strategies and priorities and acquisitions and so forth. In the process of the last four years, Canfor has undergone a huge consolidation and acquisition with SloCan, making it now one of the two largest producers in Canada. Tembec, by contrast, has been cash poor and has not been able to engage in any of those kinds of activities. The implications from the cases and the impact on the companies themselves and how the companies have had to behave, completely different.

The law requires common issues of law and fact and efficiency and cost saving. None of the threshold requirements is met, and whatever dispute there may be over common issues of law and fact,

13:28:35 there can be no dispute that consolidation necessarily will be more expensive than the alternative of continuing with tribunals previously established under Article 1120. The two Article 1120 tribunals are on the threshold of deciding the jurisdictional question. If the United States is right, these cases are over. If the United States is wrong, then we move to the questions of liability and damages which must be heard by different tribunals for all the reasons that I just set out.

After recognizing that consolidation of the jurisdictional disputes must overcome the overwhelming hurdle of different arguments and claims already completed in the different proceedings, the damages are sui generis, cannot be judged independently or by a different Tribunal from liability, but cannot be judged by the same Tribunal across competing companies, and that the same Tribunal could not reasonably judge damages for different and competing companies, there remains nothing left to consolidate, no basis for

13:29:38 doing it.

There is also perhaps a final consideration of the equities, a point to which Mr. Mitchell alluded this morning, and although this may sound similar, I can assure you there was no consultation or collaboration on this concern. The underlying contempt of arbitration includes consensual proceedings, Article 1126, by forming Tribunals without choices made by the parties already is contrary to the UNCITRAL principles. Here, all the complainants oppose consolidation. All have objected to this particular Tribunal. All have substantial investments put at risk by this maneuver of the United States.

And the United States initiated this process with unclean hands, having pledged it would not seek consolidation. The equities lead to only one possible conclusion as well, and no time should be lost in reaching it. Lift the stays, and let the business continue. Thank you very much.

PRESIDENT van den BERG: Thank you, Mr. Feldman. Before we break for lunch, I promised the

13:30:47 1 questions of the Tribunal has at this stage. There
2 may be more questions, of course, coming up this
3 afternoon with the consent of the parties, let me
4 give them now.
5 I must apologize that the questions are in
6 no particular order because we had no time to
7 reshuffle them, if I may call it that way, so don't
8 see anything sinister or any underlying thought in
9 the way--in the secrets of the questions. Simply
10 as they came up.
11 There are 14 questions. The first
12 question is a very general question: Could the
13 parties be more specific on the rationale of 1126
14 consolidation.
15 Question number two: There were, I think,
16 one or two references in the submissions of the
17 parties to the travaux preparatoires, the
18 legislative history. Is there more known about
19 legislative history of Article 1126? And if so,
20 the Tribunal would like to see that.
21 Question number three: Article 1126,
22 paragraph two, refers to the interests of fair and

13:32:10 efficient resolution of the claims. How should this term be interpreted? Should it be interpreted stand-alone, or should it be interpreted in comparison to the existing arbitrations? In this case, the three arbitrations. So, is the term to be applied only that when the Tribunal finds it fair and efficient to consolidate or is the Tribunal to compare, to say, well, it is fair or more efficient in the consolidated Tribunal proceeding?

Then, in relation to fair and efficient, and still on question three, what are the elements exactly? One of them, is it more cost-efficient, the other one and we heard already argument on that one, if the party is not confronted with inconsistent decisions arising from common questions of law and fact. And another element may be: Is it more efficient to be in one rather than three separate proceedings?

Question number four: That relates to Article 1126, and that is the reference to--in paragraph two under A to all or part of the claims.

13:33:49 1 And you find similar language in paragraph eight of
2 Article 1126. Again, you see there a reference to
3 a part of a claim.
4 How should part of a claim be considered?
5 And in particular, can it be also be considered in
6 this way, and we heard arguments this morning
7 already from the parties to that effect, that you
8 can make a division between jurisdiction, liability
9 and quantum, or damages as it is called.
10 Now, would it be conceivable that you have
11 also partial consolidation on one of those three or
12 two of those three? We heard already that I think
13 all the parties actually agreed that if you would
14 assume as consolidation Tribunal liability, then
15 you have also to issue quantum. I think all
16 parties are in agreement on that one. But anyway,
17 is it--can part of the claims be construed in that
18 way?
19 Then the fifth question is: I think that
20 was--actually that question has been answered
21 because that was the question we had this morning,
22 but as it goes usually question evaporates. That

13:35:21 was the question whether, because Tembec said it very specifically in its submission, if liability the same Tribunal deals with quantum, but I think I heard the other saying the same thing this morning. So I think question five is not used as you see in certain exhibits.

Question six: To what extent should there be a commonality of questions of law or fact, given that the text of 1126 paragraph two refers to, quote, a question of law or fact in common, end quote? Note here that is the English text. The Spanish text apparently is in plural. In other words, if you would have one common question of law or one common question of fact, would that already be sufficient for a tribunal to order consolidation? And here it's a question probably of degree because we are talking about probably not one single one, but how many questions should there be common in law and in fact?

Question number seven: That goes particularly to the claimants, and now it was for both parties. All three claimants have argued

13:36:50 doctrine of latches and estoppel. Could the claimants be more specific? What is the national and/or international legal basis for the invocation of latches or estoppel? And as to that, what are the requirements under those legal system or systems for latches and estoppel?

Question number eight, that concerns confidentiality. The Tribunal has the question as follows: In what respects would it differ--"it" being the confidentiality--from proceedings before national and international authorities such as the ECC, the Competition Commission, the antidumping authorities in the United States, Canada, and Mexico, where all these authorities have specific mechanisms into place to preserve confidentiality.

And as you know, also in arbitration, there are mechanisms to ensure confidentiality of proprietary information, of commercially sensitive information, or even politically sensitive information.

I give you as an example, the rules which are rather elaborated, Arbitration Rules to that

13:38:27 effect are the WIPO rules because they are specifically for IP disputes. And why would this Tribunal, if it would order consolidation, not be in a position as the other authorities or tribunals to ensure confidentiality?

Question number nine: That applies, I think, to both parties, but they may choose which one they would like to address, and I already think that I know who would want to address what. What the Tribunal would like to have is a matrix, and I think Ms. Menaker already this morning referred to the appendix to the United States submission, but we would like to have a more developed matrix, with all due respect, which would set out the four--on the one axis the four claim grants that under the NAFTA which are invoked by both of the parties, which is 1102, 1103, 1105, and 1110, and on the horizon axis, the three claimants, Canfor, Tembec, and Terminal, and then in each of the boxes can be indicated where are the questions of law and fact relating to these four claim grants. The same, and why do they differ?

13:40:04 Now, I think that the claimants would like to prepare the chart where they differ, and I think that the United States would like to prepare the chart where they are the same. It's fine for us because we can then compare the two charts.

I see Mr. Clodfelter wondering whether he should go that rout by making that chart or would you like make two charts, actually, Mr. Clodfelter?

MR. CLODFELTER: We will make as many charts as the Tribunal wishes, but probably none before this afternoon.

PRESIDENT van den BERG: That, I fully understand because I should make as a general point, we don't expect you to make that type of thing before the end of the lunch break that are typically things--you may carry over to the posthearing brief.

All right. Then we have number 10. Could each side give in summing up how the present case differs, if it differs, from the corn products case in relation to consolidation.

Question 11--no, that's not used. That's

13:41:19 already answered.

Question 12: Could each side give an estimate of the costs of the three separate proceedings versus one proceeding, and costs, we could talk costs of arbitration under the two headings. One is, of course, Arbitrators' remuneration and disbursements, and disbursements in a large sense, like also having a hearing room and Court Reporters, on the one hand, and the other hand is in legal assistance.

MS. MENAKER: Excuse me, can I just ask a question.

PRESIDENT van den BERG: Sure.

MS. MENAKER: Do you mean with respect to jurisdiction, the merits, or the entire case?

PRESIDENT van den BERG: That's a good question, because you can break it down in these three phases. That's a good point. I would like to have it--yes, the Tribunal would like to have that for three phases, jurisdiction, liability, and quantum.

And need not be to be the last Canadian or

13:42:27 U.S. dollar. Rough orders of magnitude are, of course, fine, but it simply to give an indication, but a realistic indication, please.

Question 13, and that's a question for the claimants: Could the claimants give three examples or less where a consolidation under Article 1126 would apply.

And the final question, 14: That is assuming that there would be an order of consolidation, where would the Arbitral Tribunal's consolidation proceedings start? Does the Tribunal start again from the beginning of the case, which means, let's say, from the statement of claim, or should the Tribunal start at the point where the other tribunals have stopped? And a sub question there is: If so, if you have to resume where the others have stopped, what happens with the jurisdictional objections? Have to be frozen in the previous ones? Are you prevented from doing it? That's sub question one.

And sub question two is what happens with Terminal, which I think the United States refers to

13:44:05 as the free rider, but which if you may use the term in this case has not come out of the woods.

We are not yet finished with the questions. There are further questions.

(Pause.)

PRESIDENT van den BERG: Mr. Feldman, if I may interrupt, if the--you have one question for your presentation, which is at a certain point in time you stated trade law has been applied differently, quote-unquote. And the very brief question from the Tribunal is how so?

I'm looking at the clock, ladies and gentlemen. I think we should resume instead of 3:00, at 3:15 because we still have to give you somewhat more homework. Recess until 3:15.

MR. FELDMAN: Mr. President, the form of these responses this afternoon?

PRESIDENT van den BERG: Simply orally, and I should have made that clear, thank you, because one thing is, if you can respond to them this afternoon, we will very much appreciate that. If you think, no, wait a moment, I need to reflect

13:46:30 1 further on that question or we need to elaborate on
2 it, please do so in your posthearing brief. You
3 can indicate that this afternoon, and you can also
4 do both. You can do the preliminary question and
5 you say well, look, I'm going to elaborate on it in
6 my posthearing brief.
7 Okay. Then recess until 3:15.
8 (Whereupon, at 1:46 p.m., the hearing was
9 adjourned until 3:15 P.m., the same day.)
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13:46:48 1 AFTERNOON SESSION

2 PRESIDENT van den BERG: Please proceed.

3 MR. CLODFELTER: Thank you, Mr. President.

4 I just wanted to assure Mr. Elliott that our being

5 late was not part of our strategy to delay the

6 proceedings. We have bigger ideas.

7 REBUTTAL ARGUMENT BY COUNSEL FOR THE UNITED STATES

8 OF AMERICA

9 MR. CLODFELTER: You know, I'm going make

10 a few general points in response to some of the

11 points I made earlier today that were general

12 points, and then I'm going to turn the floor again

13 over to Ms. Menaker who will answer some of the

14 general points made by the claimants this morning

15 and then proceed to answer as best we can in the

16 time that we have had the questions posed by the

17 Tribunal. If that suits the Tribunal, we will

18 proceed in that fashion.

19 On the question of delay, we predicted

20 that's what claimants would rest upon, to somehow

21 portray our request for consolidation as merely

22 another tactical effort to delay the proceedings.

15:27:54 1 We've discovered a counter plot. We have
2 discovered a plot on the part of Tembec to delay
3 the proceedings. These are facts that you were not
4 apprised of this morning. For example, Mr. Elliott
5 talked about the issue of the waivers. In fact,
6 complying waivers could have been filed one day
7 after we indicated our dissatisfaction with the way
8 that they had been filed, but Tembec dragged out
9 that process for five months.
10 What you didn't hear this morning was that
11 Tembec took 20 months longer than they were
12 required to under NAFTA to file a notice of
13 arbitration, after they filed their notice of
14 intent.
15 So, clear evidence of a plot, a stratagem
16 on the part of the claimants to delay the
17 proceedings. Of course, there is no more evidence
18 of that than the indications that they made this
19 morning that we are engaged in some planned effort
20 to delay the proceedings. We continue to deny
21 that, and we submit that nothing that you heard
22 today casts any doubt upon our position.

15:28:54 I would just like to address one other issue, and that is what has precipitated our current posture today. Now, if somebody walked into the presentations this morning and only heard the claimants' arguments, you would think that the United States was desperate to terminate the deliberations in the Canfor case because we were unhappy with how the proceedings were going. And, of course, as is obvious, just the opposite is true.

The United States did not impede the deliberations in the Canfor case. We took no steps to stop those deliberations. Those deliberations were interrupted when Canfor chose to challenge Mr. Harper.

You should know, and you will find this in the letters attached as Tab 1 to our submission. First of all, Canfor seems to want to walk away from responsibility for precipitating this event. In their brief, they say that we misrepresented the matter by saying that they challenged Mr. Harper, but there is no question they challenged him. In

15:30:13 their letter to Mr. Harper they cite Article X of the UNCITRAL Rules in asking him to withdraw. And of course, Article X relates to one issue and one issue only, and that is the challenge of arbitrators. There is no question that they had challenged Mr. Harper.

We, on the other hand, opposed that challenge. Had our wishes prevailed, Mr. Harper would not have resigned at the behest of the claimant. Deliberations would have continued, and we may even have an award today. Not only did we oppose the challenge, but we stated in our letter in response to the Tribunal's or the ICSID's request for comments that the Tribunal should continue deliberating, even during the course of the challenge.

So, we were not the ones desperate to end the deliberations of the Canfor Tribunal. We were more than content to have them to completion and to award.

I'd like to make three other points about the precipitating event. First of all, we have

15:31:28 stated in the past, and we still believe, that the challenge to Mr. Harper was frivolous. The circumstances that he felt were of an excessive caution to bring to the parties' attention were about as attenuated as you can get as a member of the Harvard Board of Governors. He obviously was aware, became aware of this lawsuit that was brought against the university before he became a member of the board, and that's what he brought to the parties' attention.

From this, Canfor has extrapolated and we think complete inaccurately, that somehow Mr. Harper was one of the five people directing the litigation, and there is no indication of that. Today, it was mentioned that he was involved in negotiations with the U.S. Government. There is no indication of that.

His involvement would have been as a board member making decisions in relationship to the overall reaction to the litigation. Of course, the litigation has nothing to do with the State Department. It has nothing to do with this case.

15:32:39 Almost even less firm is their reliance upon communications Mr. Harper had with the ethics attorney in the office of the legal advisor to confirm that as a former government official, he was not in violation of any U.S. Government rules. He didn't contact counsel for United States in this case. We are completely unaware of it. A normal and appropriate thing for him to do. Certainly not a ground for challenge.

We don't know what compelled Canfor to bring this challenge, but we certainly feel strongly that it had no basis, and it did not have to be brought. Once it was brought, and once Mr. Harper, being fastidious in the extreme, chose to accede to Canfor's wish to withdraw, and which he did, it was inevitable, then, that a decision by the Canfor Tribunal would be delayed.

Now, claimants would have it that all that needed to be done was to substitute a replacement for Mr. Harper, and deliberations could have continued unabated without delay to an award no later than the original Tribunal would have issued.

15:34:03 And yet, Mr. Mitchell spent some time this morning emphasizing the complexities of the December hearing, the length of the transcript, the number of complex questions from the arbitrators. But Mr. Harper's replacement could have dove right in head first without any preparations, without any opportunity to pose questions himself or herself. It just doesn't work.

The fact of the matter is, once they challenge Mr. Harper and he withdrew, a decision in the Canfor Tribunal, by the Canfor Tribunal was going to be delayed. That's what put the Canfor and Tembec cases in alignment. Almost exact alignment. Tembec awaiting a hearing on the issues which would probably have to be reheard by the Canfor Tribunal anyway.

One last point. We heard many times this morning on how we have delayed in appointing that replacement for Mr. Harper. Claimants maintain that we were required to make that appointment within 30 days of the vacancy under Article VII of the UNCITRAL Rules. We maintain and feel very

15:35:19 1 strongly about this as a matter of principle that
2 we don't have to make an appointment for 90 days as
3 provided in Article 1124 of the NAFTA, and NAFTA
4 gave--the NAFTA states that amount of time for the
5 very reason that it takes longer for governments to
6 arrive at choices like this. That is a matter of
7 principle for us, and we took that position.
8 And to date, even though Canfor has
9 requested ICSID to make that replacement in our
10 stead, they took no action to do so, indicating to
11 us that they do not disagree with our position. In
12 the event this Tribunal's stay came before that
13 90-day period had elapsed. Obviously, if the stay
14 were issued, we would move forward with our
15 appointment promptly, but the point of the matter
16 is that we could not accede to the position of the
17 claimant, that we were restricted by UNCITRAL
18 Article VII, and we lad to insist upon our right to
19 the full 90 days provided by Article 1124.
20 With that, Mr. President, let me turn over
21 the floor to Ms. Menaker.
22 PRESIDENT van den BERG: Yes.

15:36:34 MS. MENAKER: Thank you. Mr. President, members of the Tribunal, I will respond to three general points made by claimants this morning, and then as Mr. Clodfelter noted, I will do my best to answer some of the questions posed by the Tribunal earlier today.

First, claimants, I believe it was both claimants, indicated that for reasons of party autonomy, consolidation should be denied. They indicated that the Tribunal ought to consider the fact that all of them oppose consolidation, whereas only one party in the proceedings, namely the United States, supports it. And in our view, this is not at all a reason to deny consolidation. It's not at all surprising that parties would have differing views on a question of this nature. And the text says nothing about the parties having to give consent after the fact to consolidate in any particular proceeding.

In fact, if consent after the fact for a particular consolidation was required, and the reason why I say after the fact is, of course,

15:37:47 claimants already gave their consent to the possibility of an Article 1126 consolidation when they submitted their claim to arbitration under Chapter 11. But if the NAFTA parties envisioned that we should take into account the claimants' positions on consolidation in any particular case, namely whether they opposed or supported it, and that should be a factor that weighed heavily in the Tribunal's mind, then that would have not only been included in Article 26, but there would likely have been no need for Article 1126 at all. If the primary factor was the parties' agreement to consolidate a case, then you don't need an article to propose consolidation absent consent of the parties.

So, it's our contention that the fact that claimants oppose consolidation is not a factor that is relevant. What is relevant is whether they oppose it because they can show that it would be unfair or inefficient. We contend they cannot make any such showing. We have demonstrated that it is both fair and efficient, and therefore their mere

15:38:58 opposition to it or dislike of the Article 1126 process is not a grounds for denying consolidation.

The next point that I would like to address are various arguments made by claimants this morning regarding the timing of our request. First, as Mr. Clodfelter, although he mentioned very briefly this morning Tembec's argument that we had waived our right to consolidation because we did not raise it as a jurisdictional defense in our statement of defense, we didn't offer any substantive response on that, but since Tembec has raised it again in its arguments, I will do so briefly.

We think it is clear that our application for consolidation is not a defense to the jurisdiction of the Tembec Tribunal. Of course, we allege that the Tembec Tribunal lacks jurisdiction. We think they lack jurisdiction by virtue of Article 1901(3) on the grounds that they--claimants don't fall within the scope of Chapter 11 as set forth in Article 1101(1) and because of article 1121. They do not lack jurisdiction because

15:40:18 1 someone may file for consolidation.
2 We are asking for a transfer of
3 jurisdiction from the Tembec Tribunal to this
4 Tribunal, but that is not a grounds for objecting
5 to the jurisdiction of the Article 1120 Tribunal
6 itself.
7 Now, Canfor has raised a number of issues,
8 arguments complaining that our request for
9 consolidation is also--has been brought too late.
10 And this morning I discussed that Article 1126 does
11 not contain any time frame for bringing an
12 application for consolidation, but rather what is
13 key is to see at the particular time when an
14 application is brought whether consolidating would
15 be fair and efficient.
16 And Canfor complains that consolidating
17 now will be costly. It will lead to delay, and
18 that there was something inherently wrong with our
19 bringing this application on the eve of a decision
20 in the Canfor Tribunal's case.
21 And I would just also in that regard, in
22 addition to the comments that Mr. Clodfelter made,

15:41:38 1 I would direct the Tribunal's attention to the
2 portions of the transcript that we included with
3 our application.
4 Now, certainly the Canfor Tribunal itself
5 should be considered one of the most neutral
6 arbiters of the conflict between--let me rephrase
7 it.
8 They were certainly knowledgeable about
9 the procedure, the entire proceeding between Canfor
10 and the United States, and they are certainly in a
11 neutral position vis-a-vis both Canfor and the
12 United States. And yet that Tribunal at the
13 beginning of the hearing, and even after the
14 hearing ended, urged the parties to consider the
15 prospect of consolidating the cases. So, certainly
16 Professor Gaillard did not consider that there was
17 anything inherently unfair or prejudicial in
18 consolidating the case at that date.
19 Now, with respect to Tembec, it argued
20 that consolidating now would also be inefficient
21 because the Tembec Tribunal has put a lot of time
22 and effort into this case. Now, I already

15:42:58 addressed this morning claimants' arguments with respect to the need for a hearing in this case, but not a need for a hearing in the other cases, which we, of course, refute, and I won't repeat those arguments again.

But claimants made a few additional arguments that I would like to respond to. First, it said that the Tembec Tribunal necessarily had spent a lot of time reading through all of the briefs and reading through the travaux, and all of that, of course, is speculation. Many judges, as many arbitrators, wait until the case is fully briefed before reading things. And certainly we asked for the stay of the Tembec proceeding while that proceeding was only--while our jurisdictional objection was only half briefed. So, it would be perfectly reasonable for that Tribunal to wait and see what happened.

There is no reason to speculate that they continued to read all of the material. But even if they had, that really is a very small consideration for this Tribunal to consider.

15:44:06 And one last note in that regard, and that is with respect to the length of the hearings, and I think it's fair to assume that in a consolidation proceedings, the hearings will be more lengthy than in a single separate proceeding, but again that is one of the inherent features of consolidation and is not a reason not to consolidate.

And in this regard, I would just point out that although the proceedings were separate, there was a Canfor hearing, as you know. Tembec attended that hearing. Tembec asked for permission to attend the hearing, and that was the reason why the United States and Canfor agreed to make arrangements with ICSID to open that hearing up to the public. So, they sat through that entire proceeding.

So, I think that any claims of undue burden on having this little extra time added to a hearing should not warrant--should not argue in favor of not consolidating.

Now, the last point I would like to make is to respond to a few points raised regarding

15:45:13 common questions of law and fact. The first point, which I think I can dispense with rather quickly, is Canfor's argument that although we have identified numerous allegations in the various notices of arbitration that are, indeed, identical, that somehow we have failed to identify questions of law or questions of fact.

And while I won't put you through the tedium of doing this for each and every allegation, quite frankly I don't understand the objection, but it's quite simple to rectify this problem to the extent it's a problem.

If you look at the chart that we appended to our submission, and also or also the slides that we put up this morning, if you look at the first one, for instance, on zeroing--it's on page seven--now here we noted that all three claimants make allegations regarding zeroing, that the process of zeroing skews the average dumping margins.

Now, of course, the question in common is does--did Commerce's and/or the ITC's

15:47:05 1 implementation of zeroing violate the provisions of
2 NAFTA Chapter 11 that claimants allege have been
3 violated? This is true with respect to each and
4 every allegation. All of these, unfair price
5 comparisons, they say Commerce used unfair price
6 comparisons between products allegedly being dumped
7 and the products being allegedly injured or
8 threatened with injury. But the common question of
9 law or fact is, well, did that conduct, first, was
10 it an unfair price comparison, but more
11 importantly, did that conduct violate the articles
12 of Chapter 11 that it alleges were violated?
13 So, we think it is undeniable that we have
14 identified numerous common issues of law and fact.
15 PRESIDENT van den BERG: Ms. Menaker, that
16 was exactly the reasons why the Tribunal asked you
17 this morning at the end please provide a chart
18 where you tie it into the articles and the claims.
19 MS. MENAKER: And we will. We're
20 certainly going to do that and do our best to do
21 that. The--it may be somewhat difficult, given the
22 notices of arbitration, because the violations are

15:48:16 not always--the claimants list their allegations, and then contend that various articles have been breached. They don't always match up the articles to the specific allegations, but nevertheless we will do our best to do that.

Now, the second issue with respect to common issues of law or fact are the United States's jurisdictional objections regarding Articles 1101(1) and Articles 1121, which I would like to devote a few minutes to addressing claimants' arguments in that regard.

First, our Article 1101(1) objection is common to all three claims, as we've stated. That Canfor makes much of the fact that we did not seek preliminary treatment of that objection in the Canfor arbitration, and that is true, but we raised it as a defense, and so it is certainly an issue that is common among the claims. Whether or not it was treated preliminarily or not does not have any impact on whether the issue is a common one among the three claims.

Now, with regard to our Article 1121

15:49:36 defense, there, too, that defense is common between Canfor and Tembec. And you heard a lot this morning from Canfor and even from Tembec alleging that the United States had waived that defense in the Canfor arbitration, and therefore that was no longer or was not a common question of law. In this regard, I would just like to point the Tribunal's attention to a few different documents.

Canfor, as you know, pointed to our statement of defense on jurisdiction that we filed in that case, and it looked through that statement of defense and said there was no mention of Article 1121. It then directed the Tribunal's attention to the UNCITRAL arbitration rule that states that a jurisdiction, a plea to jurisdiction shall be raised not later in the statement of defense.

Now, if you look at the very first paragraph of our statement of defense, we say that the United States hereby incorporates by reference the statements of fact, argument, authorities, and conclusions stated in its objection to jurisdiction of October 16th, 2003. The United States objects

15:51:05 1 to the jurisdiction of the Tribunal on the grounds
2 stated in that objection, the terms of which shall
3 be deemed to be restated herein in their entirety.
4 And you may recall that the United States filed its
5 objection to jurisdiction in the Canfor proceeding
6 before it filed its statement of defense.
7 If you look in our objection to
8 jurisdiction, we, on page 28, note footnote 105, we
9 reserved our right to or we raised a defense to
10 jurisdiction on the grounds of 1121, although we
11 did not brief it at the time. What we stated there
12 was, first we cited this statement of
13 administrative action where we said under Article
14 1121, a claimant who submits a claim to arbitration
15 under Chapter 11 must waive its rights with respect
16 to any action in local courts or other fora. We
17 then added, Canfor did participate in Chapter 19
18 proceedings after it filed its statement of claim
19 in this proceeding. Canfor's purported waiver
20 under Article 1121 is, therefore, arguably
21 ineffective, and we cited the Waste Management
22 case, the same authority that we cite in our

15:52:24 objection to jurisdiction to Tembec's claim, and we added a parenthetical that said the waiver under Article 1121 of right to pursue parallel proceedings is ineffective, where party acts inconsistently with that waiver.

So, therefore, that objection was incorporated by reference into our statement of defense, and was preserved. We mentioned again in our reply to jurisdiction that--and this is in note 75 to that reply--that Article 1121's purpose was to avoid parallel proceedings by requiring claimants as a condition precedent to submitting a claim to arbitration under Chapter 11 to waive their right to pursue claims in other fora with respect to the same measures challenged under Chapter 11.

And then we added that the exception to Article 1121's waiver requirement applies only to claims for certain types of relief before an administrative court--excuse me--an administrative tribunal or court.

And we continued by stating that a Chapter

15:53:34 19 Panel is not an administrative tribunal or a
20 contract, and thus contrary to Canfor's claims,
21 NAFTA Article 1121 does not evidence the NAFTA
22 parties' acknowledgement that claims such as
23 Canfor's could be brought under both Chapters 11
24 and 19. These are, of course, the same arguments
25 that we've made in the Tembec proceeding with
26 respect to our Article 1121 jurisdictional
27 objection.
28 And finally, I would add, and I won't go
29 through all of the references, but in our--at the
30 December hearing on jurisdiction, we said here in
31 response to questions from the Tribunal, and this
32 is on page 139, lines 19 through 22, and this is
33 with respect to a discussion, we were talking about
34 Article 1121, and the President of the Tribunal
35 asked if we were making a jurisdictional objection
36 on a stand-alone basis because we also discuss
37 Article 1121 as a contextual interpretation for the
38 treaty with respect to our Article 1901(3)
39 objection.
40 Mr. McNeill responded, "We are not at this

15:54:44 time. We reserved our right to make other jurisdictional objections, and that's what the footnote is about," talking about the footnote to which I just referred. "We are not making the objection at this time."

And then again, I said something similar at another point in time indicating that we weren't raising the objection to be decided by the Tribunal at that time, meaning at the December hearing, as it had not been fully briefed.

So, it is our contention that that objection has been reserved, that we did not waive our right to raise that defense, and therefore, Article 1121, our defense on that basis, also raises a common issue of law with respect to Canfor's and Tembec's claims.

But again, I reiterate what I said this morning, which is this Tribunal need not decide this issue now. What it needs to decide is whether it ought to consolidate, and as a preliminary matter, whether it ought once to consolidate for purposes of jurisdiction. And our Article 1901(3)

15:55:59 objection is common to all three claims, and it is both fair and efficient to consolidate on those grounds.

Once that is done, the Tribunal can then decide how it is most fair and efficient to proceed, how it wants to structure the proceedings, what jurisdictional objections should be treated preliminarily, and then could hear further argument on this issue should it wish to do so.

I now want to address a few issues regarding Terminal's claim. Terminal, this morning, indicated that it would certainly want to file a statement of claim were this proceeding to be consolidated. While Terminal has a right to file a statement of claim, there is nothing in the rules to indicate at what time it should have that statement filed. There would be nothing wrong with filing the statement of claim after a jurisdictional proceeding.

And we, quite frankly, can't see what benefit filing a statement of claim would serve other than delaying the proceedings. We know

15:57:12 enough, based on Terminal's notice of arbitration, to know that we will raise the same jurisdictional objections to Terminal's claim except for the Article 1121 objection, as we have for Tembec's and Canfor's claims.

And two other points with respect to Terminal's claim. First, as is obvious, there will be no delay in deciding Terminal's claim, if it is consolidated. It will have the opposite effect. It will speed the resolution of that claim. If it is not consolidated, the claim will either continue to sit dormant, or a tribunal, a new Tribunal, will first need to be constituted.

PRESIDENT van den BERG: Ms. Menaker, may it also happen that the reverse is for the other cases because of the statement of claim, if that has to be filed prior to the objection on jurisdiction, which the subject does not express an opinion at this stage. That the others are delayed, the other two, because they have to wait until, A, Terminal has filed its statement of claim, and the United States has filed its

15:58:19 1 objection to jurisdiction.
2 MS. MENAKER: That is correct. If
3 Terminal, if the proceedings are consolidated and
4 Terminal insists on filing a statement of claim,
5 and the Tribunal grants that request, that will
6 necessarily delay the proceedings because the other
7 parties will have to wait. But we question the
8 value of their filing a statement of claim when we
9 know now, based on what they have already submitted
10 in their notice of arbitration, which, is, of
11 course, the document that commences the
12 arbitration, that we will have the exact same
13 jurisdictional defenses based on Articles 1901(3)
14 and Article 1101(1). And a statement of claim will
15 not add anything in that regard, so we question the
16 utility of doing that.
17 Finally on this note, counsel has once
18 again raised the prospect that if there were to be
19 a consolidated proceeding, this might raise a
20 conflict of interest that would go away if there
21 were separate proceedings. But we have heard no
22 specificity on that argument whatsoever.

15:59:33 So, as we noted, our jurisdictional arguments with respect to the claims are identical, and it is hard for us to envision a conflict of interest that would arise from arguing the Article 1901(3) objection for both Canfor and Terminal, but certainly counsel has not aided us in that regard.

Now, the last point that I want to make with respect to common issues of law and fact is to just comment on the multiplicity of issues that counsel has laid out this morning on numerous factual differences between and among the claimants and the manner in which their wood is harvested and things of that nature.

First, all of those differences would be relevant to the issue, if they're relevant at all, would be possibly relevant to the issue of damages. In each of the instances, counsel prefaced his remarks by commenting on the impacts that those differences had on the markets. The impacts that it had on the investments, that the different companies responded to the ADCVD determinations differently, and therefore, that caused different

16:00:55 1 impacts to their markets, et cetera. All of that
2 is an issue of damages, how were they impacted by
3 the antidumping and countervailing duty
4 determinations.
5 So, we continue to believe that these
6 differences would not play a role, certainly they
7 would play no role at all on issues of
8 jurisdiction, and we still have not heard any
9 explanation of how they would play any role with
10 respect to a liability phase.
11 And as for issues of damages, certainly
12 this Tribunal, we believe, could fashion a
13 procedure whereby it could protect confidential
14 business information that was being introduced with
15 respect to a particular investment as regards its
16 damages. And, indeed, it shouldn't be surprising
17 that when it comes to issues of damages, that there
18 are going to be factual differences between and
19 among the claims, and certainly even one claimant
20 that has different investments in the United
21 States. If liability were found, say, Tembec for
22 instance has a mill and also has a sales office, if

16:02:15 damages are found, different evidence with respect to each of the investments is going to need to be introduced, and here that's no difference.

Different evidence with respect to each investment will need to be introduced, but that's certainly not a reason to treat an ordinary arbitration differently to separate out issues of damages and hold separate arbitrations. And here, if the only issue is protection of confidential business information, we believe that can be accommodated by this Tribunal.

Now, if it's convenient, I will now address, try to answer some of the questions, unless the Tribunal would prefer to hear from the claimants first and then do all of the questions at the end.

PRESIDENT van den BERG: I'll ask the claimants what they prefer. Mr. Feldman?

MR. FELDMAN: I think entirely at the discretion of the Tribunal.

PRESIDENT van den BERG: Would you prefer to have the answer, because another type of

16:03:16 1 proceeding we could visit is first you finish your
2 rebuttal, the claimants, and then we go question by
3 question and see who of all of you can answer them.
4 So we could go one, two, three, four.
5 MR. FELDMAN: If that's your preference.
6 PRESIDENT van den BERG: I have no
7 particular preference. We're in the hands of the
8 parties because the arbitrators consider themselves
9 to be in the service industry.
10 MR. FELDMAN: Question is fresh,
11 obviously. We would be happy to have them finish
12 and then move on, but you have just expressed
13 perhaps a preference to have the questions treated
14 by all of the parties one time as questions, and if
15 there's your preference, we don't have an
16 objection.
17 PRESIDENT van den BERG: I would have a
18 slight preference indeed to question by one, two,
19 three, and then see what the answers are to all of
20 them because actually for the note taking it is the
21 easiest way, if I may say so, and if it's not
22 inconvenience to the parties, then I suggest we

16:04:13 1 have first rebuttals and then go to the questions.
2 And then we can see where somebody says, look, I
3 will wait for my posthearing brief in answering
4 that question.
5 I think it would be more useful. If
6 that's agreeable, I also look also to Mr. Landry.
7 MR. LANDRY: That's fine, Mr. President.
8 PRESIDENT van den BERG: All right. So
9 the exams are postponed, and I think, Ms. Menaker
10 and Mr. Clodfelter, do you have anything to add on
11 the rebuttal?
12 MR. CLODFELTER: No, Mr. President.
13 That's the end of our rebuttal.
14 PRESIDENT van den BERG: Thank you.
15 Again, the same sequence. I think
16 Mr. Landry and Mr. Mitchell, are you doing it
17 together, Canfor and Tembec, like did you this
18 morning and Terminal, I should say?
19 MR. LANDRY: Yes, we are. If we could
20 just have a minute, we want to discuss how much
21 rebuttal as opposed to the questions because
22 somewhat are interrelated, so if we could just have

16:05:06 1 one minute.
2 PRESIDENT van den BERG: There is no need
3 to use up your 45 minutes.
4 MR. LANDRY: Don't worry. That was not
5 our intention, but there is some overlap between
6 them, and it may be that we can do it in terms of
7 answering the questions, or in our posthearing
8 submissions, but if we could have one moment.
9 PRESIDENT van den BERG: Take a couple of
10 minutes. I will take some coffee.
11 (Brief recess.)
12 PRESIDENT van den BERG: We will go back
13 on the record.
14 Mr. Landry, please proceed with the
15 rebuttal.
16 REBUTTAL ARGUMENT BY COUNSEL FOR CANFOR CORPORATION
17 AND TERMINAL FOREST PRODUCTS, LTD.
18 MR. LANDRY: Mr. President, we have a few
19 comments in rebuttal. It will be mainly in reply
20 to a couple of points that were raised by my
21 friends this afternoon in reply. It may be that we
22 will have further submissions on them in our

16:10:57 posthearing submissions, but we think it worthwhile to make a couple of comments now. And then it will be relatively short, and then we will defer the rest into our either posthearing submissions or the answers to the questions we provided. So, Mr. Mitchell will start with a couple of comments, and then I have a couple of remarks.

PRESIDENT van den BERG: All right.

MR. MITCHELL: Thank you, Mr. President. I will be mercifully brief and only touch on four points. The first goes back to the question of burden or onus relating to the obligation to satisfy the Tribunal of the matters referred to in Article 1126, and my first observation with respect to that is the importance of exercising care in examining the submissions of the United States.

In her reply submission, Ms. Menaker seemed to make the suggestion that the claimants have not shown that it is not fair and efficient to consolidate the proceedings.

PRESIDENT van den BERG: Always be careful, Mr. Mitchell.

16:12:40 MR. MITCHELL: Indeed, it is not for the claimants to show. It is not a reverse onus. Indeed, the burdens is for the United States to satisfy, and so saying that Canfor, or Terminal or Tembec have not shown that it isn't fair does not show that it is. That said, for all the reasons set out in our written submissions and in our oral submission this morning, we say clearly it's not fair.

Secondly, Mr. Clodfelter feels a need to revisit matters relating to Mr. Harper's decision to withdraw, and so that you have it, the material surrounding his delayed appointment, and his disclosure of the circumstances of his conflict and the reaction of Canfor is in the material before you, and it speaks for itself. There is no doubt but that; however, the matter was one being dealt with by the board of the Harvard corporation, which was down to five individuals because Mr. Summers and another individual had recused themselves participation in it. That said, you have the material in the record before you.

16:14:14 Third, Mr. Clodfelter said that it's a matter of principle that the United States took its 90 days or asserted its entitlement to a 90-day period to appoint a replacement arbitrator. Clearly--first, two points. It's nowhere being shown how the UNCITRAL Rules have been amended by the provisions of the NAFTA so as to permit the United States to take a 90-day period. The relative provisions of the NAFTA simply don't provide that, and unless there is an inconsistency or there is an amendment to the rules, the UNCITRAL Rules govern, and they quite clearly impose a 30-day period.

Secondly, Mr. Clodfelter suggests that ICSID has communicated its agreement with that position to him. Well, it has not done so to us. Indeed, when we requested the appointment of a replacement arbitrator, we have not had a response, and whether there is a communication of which we were unaware, we are simply not in a position to comment on that.

The last point that I want to make is in

16:15:46 response to the submissions made in the reply to the United States's reliance upon Professor Gaillard's questions and considerations at the jurisdictional hearing in the Canfor matter. Obviously, it would be of concern to him that the Tribunal not unduly deliberate, if that was going to have the rug pulled out from under them; but more importantly, what Professor Gaillard used at the hearing does not take away this Tribunal's task and responsibility to apply the relevant test.

This is analogous to the arguments the United States makes about saying something is not difficult because one counsel has briefed it in a five- or six-page argument or their reliance on what counsel in the corn products case said about a different case. The question is remitted to this Tribunal to determine whether the 1126 test has been satisfied, and for the reasons that we have already outlined, we say that it has not. With that, I'm going to ask Mr. Landry to just do our last few points.

MR. LANDRY: Mr. President, I would like

16:17:21 to deal with a couple of points that were raised by Ms. Menaker this afternoon, relating to issues that I spoke of this morning, which are the purported reliance now by the United States on defenses pursuant to Article 1101 and Article 1121.

With respect to Article 1101, Ms. Menaker indicated that it is a common defense to all three claims and that they did not seek preliminary objection in the Canfor proceeding. She acknowledged that, and that they did raise it as a defense. The first two points that I would make to this is, firstly, that they did not raise it as a preliminary matter in the Canfor proceeding. They are requesting of this consolidation Tribunal to deal with it as a preliminary matter of jurisdiction. And please refer to page 18 at the top of the U.S. submissions. It is clearly different, their approach.

And secondly, I ask the Tribunal to muse on this question: Look carefully at the statement of defense as filed by the United States in the Canfor proceeding, and ask the question: Given

16:18:46 their position in that statement of defense, how are we going to have an expedited hearing on that issue, even if they were allowed to raise it as a preliminary matter in relation to Canfor?

It's just another indication of the--in my submission, the United States after the fact changing strategy and realizing in order to have the commonality that's necessary between the proceedings, they need 1101 as a preliminary matter, and they have come up with some way in which they think they will get there, but they can't get there, in my submission.

PRESIDENT van den BERG: Mr. Landry, your point here goes to fair and efficient proceedings because changing it from defense to a preliminary point, that is in your submission goes to fair--is not fair and not efficient in the proceedings in the terminology of 1126 because the question as such may be identical or similar on the 1101, but then that would be the first part of the test question, which are of fact and law which are in common, but now what you're saying is look, since

16:20:12 they're changing their strategy for defense to a preliminary point, that would tie into the second one, which is it's not fair and efficient. Is my understanding correct?

MR. LANDRY: Yes, the answer to that is yes, but it's not the only point. The other point is the point I made this morning, which is, Mr. President, that you have the take the record of the proceedings as they exist today, and the record of the Canfor proceedings is that 1101 is not to be dealt with on a preliminary matter, as a preliminary matter. That was a decision that was made effectively by the United States as after it was directed by the Tribunal to file all of its jurisdictional objections, and we were dealing with at that time what, if anything, should be dealt with on a preliminary basis.

And it wasn't just sort of a question and answer issue that we were dealing with in an organizational meeting. This issue was fully briefed.

If I could have one moment.

16:21:16 1 (Pause.)

2 MR. LANDRY: My colleague, Mr. Mitchell,
3 pointed out to me again, and I will just make a
4 page reference for the Tribunal, page three of the
5 statement of defense, where we they are dealing
6 with this whole issue of 1101 and their inability
7 to determine at that time to decide whether or not
8 they would raise it, that they make the very point
9 that we've been trying to make on the common issues
10 of fact and law. They say, and I quote again at
11 paragraph six on page three, "It is also alleged a
12 relation in various respects between the measures
13 complained of and it, and its investments."
14 That's absolutely correct. And that's
15 absolutely what has to be dealt with in this case,
16 and that's why for this case we don't have that
17 commonality because it will be different for each
18 one of the claimants. There is absolutely no doubt
19 about that.
20 Similar I might add, Mr. President, to the
21 decision in the corn products case, when the
22 Tribunal there said effectively the same thing. In

16:22:27 1 that case it was one measure, one simple measure.
2 It was a taxation measure. And if you look at the,
3 and I will get a reference in a moment,
4 Mr. President. If you look at the corn products
5 case, they talk about, the difference. It will be
6 different how that measure affects each of the
7 individual investors and their investments.
8 Therefore, the commonality issues that is so
9 crucial to the exercise of your jurisdiction, there
10 is a serious problem here.
11 Now, going to the Article 1121 submission
12 that we heard this afternoon was that somehow
13 Ms. Menaker suggests that what the United States
14 has done is reserved its right to raise an 1121
15 defense. Well, with all due respect to
16 Ms. Menaker, that's the first that we have already
17 of that.
18 And secondly, it just cannot be that way,
19 given the process that you can see in the material
20 that has been filed with our--in our appendix which
21 deals with this whole issue of jurisdiction.
22 Yes, in October of 2003, they raised the

16:23:47 possible issue of an 1121 waiver in their submissions. Post that, we had a great debate on whether or not that objection to jurisdiction would ever be heard on a preliminary matter. They were successful in that.

But what they were not successful in doing was to delay whatever jurisdictional issues they wanted until later on. They were direct to file all of their defenses. They filed their defense, the formal pleading that is so key to the identification of issues between the parties, and in there they said this was our--I quoted it this morning, I think you will recall--the entire jurisdictional objection they have, and nowhere to be seen is 1121.

And the reason for that, Mr. President, is because they did not intend to raise it in that way. That's what they--they made that decision. They cannot now try to bootstrap it in order to help them, which was a very serious impediment to their consolidation application, which is commonality of jurisdictional issues between the

16:24:50 parties. They cannot do that, in our submission.

And I would ask the Tribunal to look very carefully at those page references that are talked about by Ms. Menaker and Mr. Mitchell earlier today or what they did say at the jurisdictional hearing. I can say to the Tribunal today if that's what they were trying to say, it didn't get communicated to us, and this is the type of thing that has to be communicated formally in pleadings.

The last issue, Mr. Chairman, and this is a difficult issue for us to deal with as counsel, and that's this whole issue of the representation of Terminal. When we were retained, when we were asked to effectively work for Terminal after we had already begun with Canfor, it was a very difficult issue because it's not normal to have counsel representing two different effectively potential competitors in something like this for the very problems that we were talking about, confidential information.

The issue of consolidation has always been out there. It was looked at carefully by us at the

16:26:05 time. We didn't know whether or not the United States would want to have consolidation. We looked at it. These issues were dealt with.

And the reason--one of the many reasons why is they were dealt with, Mr. President, is because under our professional rules and guidelines, there is a problem with joint representation. It was highlighted to them. We made--a specific agreement had to be made with Terminal. And all I can say is I'm not here, and I cannot answer the question to you as to whether or not Terminal can or will be able to agree or, for that matter, whether I will be able to agree if these matters are consolidated to represent both Terminal and Canfor. I cannot answer that question. It's going to be a very difficult question.

It was dealt with from the perspective of separate proceedings, and now what we have to look at is whether or not we can deal with it in joint proceedings, and we will do whatever we can to try to continue representing both parties, but we just

16:27:07 1 are not in the position to be able to deal with
2 that, nor--Terminal will have to be fully briefed.
3 They will probably have to get separate counsel
4 just to deal with this issue, and we're going to
5 have to make a determination at that point in time.
6 And it's not something that arises other
7 than in the difficulties we have within our own
8 professional guidelines.
9 PRESIDENT van den BERG: Without, if I may
10 say, any rule applicable to your profession,
11 ethical or logical rules, could you help the
12 Tribunal because the Tribunal is a bit puzzled
13 about this aspect, joint
14 presentation--representation.
15 When you took on the case, first of all
16 for Canfor and then for Terminal, your firm
17 represented both in filing the notice for
18 arbitration for each of them.
19 What is, then, the difference between
20 continuing on a separate track and assuring that
21 there would consolidation, that they are in
22 consolidation proceedings?

16:28:22 First of all, could you please--is there a specific rule under your Bar rules, apply the code of ethics at issue, that prohibits you to do that, that makes a distinction between separate representation, separate proceedings and consolidated proceedings? Because, for example, I'm familiar when I was a young lawyer dong divorce cases, which is how you start your legal profession, and you are not allowed to represent both the husband and wife who are separating. That I could understand, although still a number of lawyers do that. I will not go into the details because that's not material today, but the thing is what the Tribunal is a little puzzled about is what is the difference--sorry, let's rephrase the question.

Is there a rule in your code of ethics which says, well, if you represent in separate proceedings you may do it, but as soon as the proceedings are consolidated, you're no longer allowed to do it?

MR. LANDRY: No, Mr. President, if I

16:29:34 indicated that, I misspoke myself. That is not what the rule is. The rule that relates to us is that we cannot represent clients where their interests may, may conflict. And the difficulty, of course, you have is you end up having confidential information for two clients, and the difficulty becomes even more difficult in one proceeding when you have it in one proceeding, you have different information for two clients.

And what I can say to you is simply this: When we made the arrangement, there were separate proceedings. We understood there was consolidation a consolidation possibility. And if there was going to be consolidation, we would definitely have to revisit the issue. That was how it was left because there was concern expressed that there might be that problem. That's why I say I can't answer it because it's not something that we have specifically dealt with, but it is--it raises the whole specter of conflict of interest.

And at the time the parties thought they could deal with it in separate proceedings. Now it

16:30:38 1 will have to be--it will have to be looked at
2 again.
3 PRESIDENT van den BERG: I can understand
4 that if your firm represents clients who have the
5 same problem, but nonetheless don't want to share
6 information with each other. So, what usually
7 clients do is what formerly was called Chinese
8 walls between the lawyers, and the more politically
9 terminology I understand to be ethical screens
10 between the lawyers.
11 So, there are two separate lawyers dealing
12 with two different clients with the same problem.
13 But in your case I don't see any ethical screens
14 unless you have drawn them up yourself, and I
15 wonder whether you can do that with yourself to
16 separate two clients out.
17 MR. LANDRY: I think that is a problem,
18 whether or not you can do that. But if we are in a
19 consolidated proceeding and we have confidential
20 information from both parties, that's where the
21 issue becomes very difficult because, of course, in
22 a trade--well, I won't go there, but it's an issue,

16:31:51 Mr. President, that I must say that we are going to have to consider, and we were asked--and I spoke to Terminal, and it's something we are going to have to deal with.

And, Mr. President, those are all the comments that we have, and we will obviously have further comments in reply to the various questions, yes.

PRESIDENT van den BERG: Thank you, Mr. Landry.

Mr. Clodfelter?

MR. CLODFELTER: I wonder if I just might invoke a point of personal privilege just to clarify. I may not have been clear when I made my comments. What I said was--and this is on the 90-day versus 30-day period for replacing Mr. Harper. What I said was the fact that ICSID has not acted upon Canfor's request that it act as appointing authority to fill the vacancy, allows us to infer that they don't disagree with our positions. So I want to just make sure that you understood what I was saying.

16:32:44 PRESIDENT van den BERG: That's the way I understood as well, because you are not referring to any communication in that respect, and the fewer allegations you have on that level, the better it is in the case because I would like to have strength in my cases.

So, Mr. Mitchell, I hope you accept what Mr. Clodfelter says.

MR. MITCHELL: Yes, I can.

PRESIDENT van den BERG: Thank you.

Mr. Feldman, it's your turn.

REBUTTAL ARGUMENT BY COUNSEL FOR
TEMBEC, INC., ET AL.

MR. FELDMAN: Thank you, Mr. President. I would like to address first three points that have arisen in these rebuttals and then move to the discussions from this morning. The word policy has emerged more than once now. We have learned that there is a policy apparently to prefer an assumption about Chapter 11 to the UNCITRAL Rules as to deadlines, and we have heard about policy in other respects.

16:33:54 I would like to raise three points about policy.

First, we are flattered that the Department of State arranged to open hearings because we asked to attend, but this is incredible. There is a policy that the hearings be open, and we weren't the only ones who attended, and we attended in an anteroom like everyone else. So, this was a matter of policy.

Similarly, I always get a little suspicious about ridicule. Mr. Clodfelter has ridiculed our perception that there is a policy about delay. And we have quoted a passage from a Senator reporting on his communications with the Bush Administration, and we also could provide statements directly from the administration at senior levels, that it is the policy of this administration to delay and stall for negotiated settlement of all of the lumber disputes. That is the policy of the administration. It's not a secret. This is part of that dispute. That is. These issues arise--no one denies, in relationship

16:35:15 to what has gone on in the disputes over softwood lumber. And the administration has raised the question in negotiations of disposing of these claims as a condition of settlement.

And as I read to you from Senator Crepo, it is the policy of administration that the only way these disputes will be settled as far as the administration is concerned is not by law, not by the outcomes in decisions of judicial procedures, but by force negotiation and settlement. And the only way that that will happen is by delaying the judicial procedures because at every step of the process for three years now, the United States agencies have been on the losing end of decisions made by NAFTA and WTO panels and tribunals. And each time it loses, it knows that the Canadian side is reinforced in its view that it ought to get to the finished line on the law, and that the rule of law should govern.

The American response is it doesn't want the rule of law to govern because it can't win on the law, and so it needs to delay and stall and

16:36:29 extend, and we've indicated in our brief that there are at least 16 different matters now, most of them stimulated by the United States, all designed to refuse the results of judicial procedures. In fact, I could name some more. By my count there are now 21 matters related to softwood lumber that are outstanding, and the metastasis of this is arising because it is the policy of the administration not to permit the rule of law to resolve the softwood lumber dispute. And it is in that context that we've suggested here that this proceeding is part of a pattern and consistent with an overall policy.

The first specific matter I wanted to address is jurisdiction again, of course, because I think there was a very important admission made this morning. I understood Ms. Menaker to admit that there was an expectation that the Canfor Tribunal would deliver a decision on jurisdiction which then could be applied to Tembec and to others, and indeed would be a kind of permanent discouragement of later claims. I understood her

16:37:42 to answer our suggestion of what about other companies coming in later with claims as to question of inconsistent decisions, and I understood her answer to be, we expected a decision on jurisdiction which would discourage everyone else from coming forward.

If we looked again at the timetable, at this procedural status of these various claims, we would see how much the Tembec process was stalled in order to get a result from Canfor's Tribunal. And, indeed, it would appear that we were being stalled for that purpose.

And when the Canfor Tribunal fell apart because of the departure of Mr. Harper, the strategy of stalling us to await for a decision from the Canfor Tribunal was no longer applicable. The next available choice was consolidation to stop the Tembec proceeding from reaching a conclusion first and resolving the jurisdictional matter perhaps in a way that the United States didn't want.

So, we were engaged expressly in forum

16:38:50 shopping. Forum shopping in which first it was an expectation about the Canfor Tribunal, then it was a policy to avoid the Tembec Tribunal, and then it was to arrive at this Tribunal. That is forum shopping.

And in all of these steps, Tembec has been effectively a victim of the process. Mr. Harper's resignation had nothing to do with us. The complexities of the relationship between Terminal and Canfor and the relationship of counsel have nothing to do with us. The frustration that the Department of State was having with the very questions now that Mr. Landry has been trying to answer have nothing to do with us. We have simply tried to have our process move forward, and the United States has not wanted it to move forward.

I would like to also in reference to this, Mr. Clodfelter suggested that Tembec was, in fact, responsible for delay itself, and he made two points about this. The first was that Tembec could have resolved the questions about waivers and moved forward. But the fact is that every time Tembec

16:40:08 addressed an objection about the waiver, Tembec received another and different objection about the waivers. These were serial objections. So, there was no simple way to solve the problem except to finally turn to ICSID and say, aren't these sufficient? The United States had said no, and ICSID said yes.

And then on his second suggestion that we didn't file a statement of claim quickly enough for him, of course, the rules forbad us from filing in the first six months, and there is a reason for that, we think, and the reason is that we filed our initial notice to preserve rights because of statutes of limitations as to when certain conduct of the United States, which was going to be the subject of our claims, would have been exhausted, would have expired. So, we filed the notice of intent to preserve claims with respect to a statutory of limitations. Then we took the appropriate six months and more to make sure we were going forward.

The whole purpose of the--of this

16:41:15 provision, in our perception of Chapter 11, is that these things shouldn't be entered frivolously. We all now know how expensive they can be and how demanding they can be. We took the full time we thought required to be sure we were going forward and then filed our statement of claim and did not exhaust the time that was allowed in the rules to do so at all.

So, we were prudent. We were also responsible. We certainly weren't delaying. We were exercising the rights appropriately.

A question has been raised as to what it takes to consolidate, and where the burdens lie, and some of this was just addressed, and some of it we will address in the answers to questions that you've raised. But the proposition that the Tribunal must be satisfied has to mean that it must be persuaded, and the thing it must be persuaded to do is to change the status quo. To change the status quo is a decision as to whether there will be change or no change. The burden plainly has to be on those who want something changed because the

16:42:26 1 default is that it wouldn't be changed.
2 And our position is nothing should have
3 been changed and should be changed, and the United
4 States wants to change the status quo. Clearly the
5 burden, therefore, is on the moving party that
6 wants to change the status quo.
7 And in this regard, I had the same
8 reference that you heard just moments ago as to the
9 corn producers case. That is, that Tribunal
10 decided that even though there were common
11 questions of law and fact, that galaxy was not
12 sufficient to lead to consolidation. And, indeed,
13 there was one law involved that applied equally to
14 all of the companies involved, and that still
15 wasn't enough to consolidate.
16 We here just heard, as I understood it
17 from Ms. Menaker kind of--she was beginning to
18 volunteer to offer us her statement of defense
19 orally because it certainly hasn't been written
20 down, and so we were given a foretaste, perhaps, of
21 what the common issues of law and fact might
22 allegedly be, but they haven't been articulated, at

16:43:39 1 least not in a formal way, previously.
2 If the issue were jurisdiction on 1901(3),
3 the one thing that everybody agrees, I think, that
4 except for Terminal, and we understand it would
5 have been brought against Terminal, but that on
6 that one aspect of jurisdiction that that's common
7 to all of us, that the United States has a defense
8 on jurisdiction as to 1901(3), and in effect it's
9 saying that the United States wants this Tribunal
10 to decide that question. We have noted that's
11 exceedingly difficult for this Tribunal to do
12 because it would have to segregate the other two
13 issues of jurisdiction that were brought uniquely
14 against Tembec and not against Canfor. It would
15 have a secondary difficulty that these haven't been
16 brought against Terminal at all.
17 But let's suppose arguendo that the
18 Tribunal could undertake 1901(3) on its own.
19 First, it's too late because it already has been
20 processed. It's already been argued before two
21 other tribunals. The arguments before those two
22 tribunals weren't the same. The United States

16:44:53 argument wasn't precisely the same, and our argument was certainly not the same as the argument that was advanced by Canfor.

So, these tribunals have heard different arguments. The issues aren't segregable from the other jurisdictional claims, and this means that this option isn't really open, but it does raise a very interesting question, it seems to me, as to United States's position on inconsistent decisions because the United States chose to submit the 1901(3) jurisdictional defense to two different tribunals.

That was a choice made by the United States. It could have sought consolidation on that issue at the time and put it before one Tribunal. Instead, it chose to argue its defense on 1901(3) before two different tribunals. It invited the possibility of inconsistent decisions. And now it comes forward and says, it would be terrible if we had inconsistent decisions. Even if we can't segregate anything else, could this Tribunal not please at least decide that issue already argued,

16:45:57 already briefed before different tribunals.

And that takes me to the question of inconsistency, this theory of inconsistent decision, which are terms I don't find anywhere in the NAFTA. I don't find them in the UNCITRAL Rules.

Mr. Clodfelter opened the proceedings this morning by talking about the innovation of 1126, and it's impressive that he wants to expand on that innovation to this notion of inconsistent decisions.

The theory appears to be that the first Tribunal to contemplate an issue is like the Supreme Court. It will decide what should be said or thought about that issue, and that's it. Everybody else that follows should follow that decision. It doesn't matter how persuasive it was. How qualified that particular Tribunal was on that particular issue. There is nothing in international arbitration about precedent setting by arbitral tribunals. They don't set precedent.

Indeed, it's always been the United

16:47:00 States's position that NAFTA panels don't set precedent and they sit in place of the courts. Judges on the Court of International Trade say they don't set precedent because they're a lower court, and they often disagree with each other.

So, how could it be that the first Tribunal to hear an issue ever under Chapter 11 should decide the issue, and no other Tribunal should think about it or consider it or confront it because that first Tribunal has decided the issue, and we shouldn't have inconsistent decisions, let alone that on 1901(3) the United States already chose to submit it to two different tribunals.

Does the United States mean to say that if different arguments are put before different tribunals, you're not allowed to have different results, that different counsel would be obliged to respond to the same arguments the same way, that it's not permitted to have different interpretations or that a tribunal could say we are not impressed with the persuasive value of another Tribunal's thinking, and we want to make a

16:48:09 1 different decision. This would appear to be
2 impermissible by the reasoning of inconsistent
3 decisions, especially on the question that the
4 United States has already submitted to two
5 different tribunals.
6 Point has been raised about liability and
7 damages. Ms. Menaker was arguing that the
8 differences between the companies are peculiar to
9 damages and that she heard nothing to the contrary,
10 but we did note that 1101 and 1102 are liability
11 provisions, and they go to the investors and the
12 investments, and these issues, therefore, are not
13 separable in that form. They are damages
14 questions. They are also liability questions.
15 The last main point I would like to make
16 in rebuttal refers to the back seat that's been
17 suggested for the UNCITRAL Rules. Mr. Clodfelter
18 said that as a matter of policy, Article 1124
19 should prevail and not Article VII of the UNCITRAL
20 Rules. In the formation of this Tribunal, we were
21 told that Article 1126 was to prevail and not
22 Article 11 of the UNCITRAL Rules.

16:49:27 And here we are again, 1126, we're being told, has, without provision as to timing, somehow replaces Article 21(3). At least this afternoon we didn't hear that our suggestion that Article 21(3) had a place in these proceedings was absurd, but instead we had a change in terminology.

This morning, the request was that this Tribunal should assume jurisdiction. This afternoon, we have been told that this Tribunal should transfer jurisdiction as if this change in semantics would somehow authorize overcoming the very clear requirement of Article 21(3).

So, we request that this Tribunal offer as soon as possible decisions on the following propositions: Is Article 1126 not a jurisdictional provision? Does Article 21(3) of the UNCITRAL Rules not require a statement of defense on jurisdiction and, indeed, a complete statement of defense on jurisdiction which was, in any event, ordered by both Article 1120 tribunals that have already confronted these issues? Does the statement of jurisdiction offered by the United

16:50:59 States in either of these tribunals, Canfor, Tembec, include a defense of consolidation?

If the answer to these questions are as direct as we perceive them to be, then it is not possible to reconcile Article 21(3) with the position of the United States, and this action must be dismissed. We would like a ruling on that.

This is not a transfer. This is a forceable removal, and it is a jurisdictional defense. It is an action to deny the jurisdiction of an Article 1120 Tribunal and to replace that Tribunal--this is not a transfer of venue. The Article 1126 Tribunal didn't exist until this was requested. This was not a transfer of venue. This is a forceable removal to replace the Article 1120 Tribunal and put it out of existence with a different Tribunal, and it is therefore a direct transfer of jurisdiction.

And, indeed, the language of Article 1126 as my partner has just noted to me again, 1126(2)(a), assume jurisdiction over. Article 1126(2)(b), assume jurisdiction over. The word is

16:52:37 1 not transfer.
2 We are paying cash for a Tribunal which,
3 if put out of existence, will necessarily mean that
4 whatever was done there, Ms. Menaker says it's
5 nothing but speculation, but whatever was done
6 there, every penny spent is lost, is of no value to
7 Tembec whatsoever because that Tribunal will not
8 have been permitted to act in any way with respect
9 to Tembec's claim. Whatever we spent there would
10 be wiped out. We don't know what we spent
11 there--that's true--what we are confident of is we
12 put up money, and we haven't gotten it back.
13 So, at a minimum, when we talk about cost
14 effectiveness and efficiency, there are investments
15 that have been made in other tribunals, they have
16 not been permitted to rule. They have not been
17 permitted to act. We'll get no value out of
18 whatever we've paid for those proceedings and for
19 those members of the tribunals.
20 That concludes my rebuttal. Thank you
21 very much.
22 PRESIDENT van den BERG: Thank you,

16:53:39 1 Mr. Feldman.
2 Let me ask you, following up your last
3 number of propositions, is the conclusion, then,
4 justified what you are proposing, that
5 consolidation under NAFTA, under 1126, a request to
6 that effect can be submitted at the latest in
7 conjunction with the statement of defense?
8 MR. FELDMAN: Yes.
9 PRESIDENT van den BERG: Because that's
10 the logical conclusion?
11 MR. FELDMAN: Yes, because it's a
12 jurisdictional motion. 21(3) under the UNCITRAL
13 Rules provided that the UNCITRAL Rules are chosen
14 to govern.
15 PRESIDENT van den BERG: Exactly is the
16 point I would like to add. But for example, if you
17 had straight ICSID or an additional facility, then
18 the rules would be different.
19 MR. FELDMAN: It would be different rules.
20 I don't know if there are different in this regard.
21 I'm not qualified to answer.
22 PRESIDENT van den BERG: I think the

16:54:35 1 facility rules give more or less the same except
2 that they have a escape valve. They are different
3 than the UNCITRAL Rules in that respect. They say
4 in an exceptional case, it may be later. Is that
5 correct?
6 Never ask. Always read the text.
7 MR. FELDMAN: Excuse me, Mr. President,
8 two points. One is that 1126 requires that the
9 proceeding be under the UNCITRAL Rules. It's
10 1126(1). The Tribunal established under this
11 article shall be established under the UNCITRAL
12 arbitration.
13 PRESIDENT van den BERG: But your argument
14 goes, if I'm correct, if the--
15 MR. FELDMAN: Prior to arbitration, prior
16 to 1126.
17 PRESIDENT van den BERG: Then you have to
18 look to that one and not to this one?
19 MR. FELDMAN: Yes, you're right. But in
20 that context there were orders from each of those
21 tribunals for complete statements of defense as to
22 jurisdiction, and we also elected the UNCITRAL

16:55:29 Rules.

PRESIDENT van den BERG: Okay. So, in this case, they're synchronized, let's put it that way.

MR. FELDMAN: That's right. It is plausible that I take your point hypothetically that if we were in proceedings that weren't governed by the UNCITRAL Rules, there may be some other rule that applies. That's not these cases.

PRESIDENT van den BERG: Perhaps you can consider it later because nobody expected any questions on the additional facility rules yet. All right. Thank you very much.

Shall we then start with the questions of the Tribunal? Now, there are at page 164 of the transcript--David, I don't know how we can recall them. Is that a possibility? Can you retrieve page 164 and 165 when I read out the question this morning because I noted the page number, but 14 questions and then the word objection, you have to read that question number one. What is the rationale of 1126 consolidation?

16:59:24 Now, should we get simply ordinary order the claimants first and then the United States, and unless the question is specifically addressed to the United States. Is there any problem with that order?

MS. MENAKER: That's fine with us.

MR. LANDRY: That's fine.

PRESIDENT van den BERG: You had the first one, and hopefully the rest will say yes after you.

MR. FELDMAN: Whatever order you would like.

PRESIDENT van den BERG: If somebody volunteers, I want to answer that question first, tell me.

QUESTIONS FROM THE TRIBUNAL

PRESIDENT van den BERG: All right. Question number one. The question was what is the rationale of 1126 consolidation.

MR. LANDRY: I guess one of the questions--I hate to start with question number one as being one that we had difficulty with right off the bat, but the question that I would ask is, are

17:00:22 you asking what is the rationale for Article 1126 generally or with respect to consolidation at this proceeding at this late date?

PRESIDENT van den BERG: No, generally. Why was Article 1126 included in the first place? If you know the answer, I go to candidate number two.

MR. LANDRY: Even if Mr. Feldman has pushed the button already. I would say this, and I guess to a certain extent, Mr. President, that it's somewhat related to number two. I mean, what was the purpose? What did they have in the back of their minds as to 1126? I'm not--that is not something that we are privy to, nor--we don't have the travaux here. We don't have it here. It's back in our offices, and I can't answer the question on number two. But two sort of speaks to one, two, to a certain extent what is the rationale?

Obviously, the rationale is to provide a mechanism which allows for cases that have common questions. I hate to put it this way, fact and

17:01:34 law, and whether there would be a fair and efficient resolution of the claims to consolidate. But I know that's not really what you're asking. Bump it a little further than what I'm trying to say.

I think on that one from our perspective, Mr. President, we will take that one under advisement and see if we can help a little bit more than just our immediate reaction on it.

PRESIDENT van den BERG: To help you on this point, what I can mention to you is that the "Nellis" Arbitration Act--for once I will mention "Nellis" only once in these proceedings--has rather unique provisions. Article 1046, it provides for judicially ordered consolidation, which means that, indeed, the president of the District Court in Amsterdam can order consolidation of arbitrations and now I give you because it's different from 1126, at least the text is different, let's put it that way, but the subject matters of the two arbitrations are connected with each other. There is a connectivity test, and the rationale at the

17:02:37 time--and there what was the legislative history of that provision was because in the building industry in the Netherlands, they all had their own arbitration institutions, and they could not agree among themselves that there should be one arbitration institute.

Now, here you get a pure consumer who has replaced a window in his house. And who is liable? The architect or the contractor. It turned out then they had to start two arbitrations, and then the Dutch legislature said wait a moment, that's not efficient. In those cases when there is a connection between the two subject matters, you can go to the President of the District Court and ask a judicially ordered consolidation. So there, indeed, the court since 1986, in the beginning there was indeed quite some caution about what is all this.

It turns out that in a number of cases it works satisfactorily, but that's only in the Dutch experience I tell you. So, that's simply to give you a reference point where there is in the world

17:03:44 somewhere some experience and rationale for these type of provisions.

Mr. Feldman?

MR. FELDMAN: I very much appreciate that you offered an example because that's how we thought we should answer was with an example. And the example that we had in mind from our lunch discussion is one that's quite immediate and perhaps in some ways related to the proceeding here.

Several weeks ago, five different parties filed on the same day essentially the same claim against the United States with respect to the Byrd Amendment. You've heard about the Byrd Amendment. The same claim was that the Byrd Amendment does not legally apply to merchandise from Canada. It's a very simple claim, and it's essentially a claim of pure law because there is a provision in the United States statute that was adopted directly from NAFTA, which states that unless an amendment to the trade law since 1994 specifies that it applies to Canada or Mexico, it then doesn't apply. And this

17:04:55 1 has been followed, for example, in the
2 implementation of the Uruguay Round Agreements Act
3 which specified that because it was an amendment
4 from the trade law from before, it applied to
5 Canada and Mexico.
6 But the Byrd Amendment has no such
7 specification. It doesn't say that it applies to
8 Canada or Mexico. So, these five claims were filed
9 on the same day, simultaneously. They were filed
10 by the Government of Canada, and they were filed by
11 the Canadian Lumber Trade Alliance. They were
12 filed by the Ontario Forestries Industries
13 Association and the Ontario Lumber Manufacturers
14 Association, they were filed by Norse HydroCanada
15 and they were filed by the Canadian Wheat Board.
16 Now, the parties are seeking to consolidate because
17 they're identical claims filed on the same day.
18 The awarding might have been a little bit
19 different.
20 The United States has consented to the
21 consolidation of all the private parties, but has
22 objected to the consolidation with the Government

17:05:47 of Canada on the grounds that they have a defense with respect to Government of Canada regarding standing.

So, on standing alone and not on any other issues of common law or fact, no other distinctions about timing or anything else, the United States has refused to consolidate that matter.

This struck me in responding to your question as to what consolidation could be for or what Article 1126 might have been about and what some of the conditions are that might apply. Article 1126 abstractly makes sense. There are certainly situations in which there would be conditions for consolidation of cases. That would be in a fair and efficient and the appropriate use of judicial resources. And indeed, all the private parties in the case I just described have all agreed that their cases ought to be consolidated, and the United States agrees. And yet on the one deviation, on a defense about standing which could otherwise be disposed of by the court in the context of a consolidated case, the United States

17:06:54 1 does not think that should be consolidated.
2 PRESIDENT van den BERG: Thank you,
3 Mr. Feldman.
4 Mr. Clodfelter or Ms. Menaker?
5 MS. MENAKER: Thank you. We think the
6 rationale for Article 1126, the reason why it is
7 there is because this was foreseeable that multiple
8 claims could bring claims that arose out of the
9 same events, and that you can see is the language
10 that the United States's statement of
11 administrative action uses in describing 1126. It
12 says that Article addresses the possibility that
13 more than one investor might submit it to
14 arbitration claims arising out of the same event.
15 And since this chapter deals exclusively
16 with investor-state arbitration, it was foreseeable
17 that a government could be subject to multiple
18 claims brought by multiple claimants all arising
19 out of same government measure, all arising out of
20 the same event.
21 And for interests of resource conservation
22 and in the interests of consistency, Article 1126

17:08:08 1 was thus created.
2 PRESIDENT van den BERG: Then we move on
3 to question two. Mr. Landry, you already mentioned
4 that you have to look it up in your office?
5 MR. LANDRY: We--
6 PRESIDENT van den BERG: That was the
7 question about whether the travaux preparatoires,
8 and there is the legislative history of Article
9 1126.
10 MR. LANDRY: Assuming that we are talking
11 about some definition of travaux preparatoires,
12 which was quite a debate in the Canfor proceeding,
13 we have some documents that have been produced,
14 various drafts of the proceeding. I think
15 Mr. Mitchell mentioned them earlier. They're quite
16 lengthy. We don't have them here, so I can't tell
17 you quickly whether or not there is anything in
18 those drafts that relate to the issue that you're
19 asking specifically at this point in time.
20 PRESIDENT van den BERG: Okay.
21 MR. LANDRY: Sorry.
22 PRESIDENT van den BERG: Mr. Feldman?

17:09:13 MR. FELDMAN: We did look, Mr. President, at the papers we received on the travaux preparatoires. We are quite aware that we don't have a complete set of these travaux as to Chapter 11. Not only were we so informed by the United States that there were other papers that we didn't necessarily receive, but what we received from our Freedom of Information request in Mexico was not identical to what we received from the United States. So, we can't be confident that we have everything we ought to have to answer your question.

As to our examination of the papers that we do have from the travaux as to Article 1126, there was no answer to your question. The travaux, as we were provided them, are a series of drafts, and we saw one adjustment in the draft that might shed some light. It was on this question, if I recall, about satisfying, and we have addressed it in our brief. That's all the light we are able to shed. We are reasonably confident that the United States ought to know more about this than we do.

17:10:24 PRESIDENT van den BERG: Thank you.
Ms. Menaker?
MS. MENAKER: Thank you.
First, let me just respond to counsel's contention that they don't have a complete set of the travaux for Chapter 11 and that they received documents from Mexico that don't exactly match what they were given.
Tembec earlier stated that it had sought from the United States the travaux from Chapter 11 and that the other NAFTA parties agreed to give it, turn it over, but the United States resisted. The full story for that is that all three governments agreed that we should have a common set of the travaux. Individuals who were at the negotiations, of course, have internal drafts that they made in between the negotiating sessions. It was our view, and we believe this view was shared, is that those drafts did not constitute the proper travaux; if they weren't shared among all three parties to the treaty, they could not give any indication of the drafters' intent with respect to one particular

17:11:30 article.

It was only those drafts that were exchanged among the parties that should be considered as indicative of the parties' intent, and we didn't think that internal drafts that may have been exchanged between one negotiator and his or her superior or supervisor shed any light on elucidating the common intent of the NAFTA parties. And that is, of course, the whole reason why you look to the travaux, to see if you can find what the common intent of the parties to that treaty text is.

So, to us it was very important that we go through these papers and we discover which of the drafts were actually exchanged among all three of the parties. And so we started that task. When Tembec first asked for these drafts, we did not have them all compiled, and Canfor had asked for them, too, so we were in the process of doing this.

And when requests were made to Canada and Mexico, all three countries decided we should all sit down, we should exchange what we have, make

17:12:32 sure everything overlaps, make sure that these were actually exchanged among the parties.

In the interim, to the extent that Tembec went through a FOIA-like procedure in Mexico, that's something different. They may have produced documents that were not necessarily exchanged. I'm not familiar with all of their FOIA exemptions. But the same would be true for us. Unless there was a reason for not producing that document pursuant to a FOIA request, it would be produced, but that doesn't make it travaux. That doesn't make it a document that was exchanged among the three parties.

So, that's the background. So, it's very possible they have those documents, but we don't--those documents, there was no indication they were shared among the parties. We don't consider them to be part of the travaux.

Now, that being said, I also wanted to just correct a misimpression because Tembec said we did not produce documents to them until we were ordered to do so by the Tribunal. But that's not

17:13:31 the case. You will see if you look through the procedural orders and some of the correspondence, we agreed voluntarily to give them what we had given to Canfor before the Tribunal ordered us to do anything. We said okay, we will do that--

PRESIDENT van den BERG: I'm sorry, Ms. Menaker, I understand you would like to get the record straight, but may I try to ask you simply, we have a simple question here, do we have the travaux of 1126?

MS. MENAKER: Absolutely. Yes.

Okay. Well, we do, so the travaux for 1126 is contained in the travaux for Chapter 11, which is on our Web site now. We have taken a quick look at that.

The only thing that we have discovered is that Article 1126 was first introduced into the text as far as we can tell on August 4th, 2004--excuse me, 1992. So, 1992.

When we have looked through the subsequent drafts, from our viewpoint, we have seen certain stylistic changes, but we did not see anything that

17:14:30 jumped out at us as being a substantive change. But that, of course, is--

PRESIDENT van den BERG: Were any notes attached to it? Usually one sends a note to the other, and the secretary sends a note explaining it?

MS. MENAKER: No. The travaux for--the only travaux we have a for Chapter 11 is really a what we call the rolling texts, the texts that were produced at each negotiating session.

PRESIDENT van den BERG: That's a more general question. For the travaux you don't have any more session records, for example, when they sit together?

MS. MENAKER: You mean from the negotiating session itself, minutes? No.

PRESIDENT van den BERG: All right. Shall we move on, then, to question three. That was the question about the words fair--the term fair and efficient.

Mr. Landry?

MR. LANDRY: Mr. Mitchell will deal with

17:15:26 this one.

MR. MITCHELL: Thank you, Mr. President. I think the question had two aspects. One related to whether it should be interpreted as a stand-alone question or take into account all of the circumstances of the particular arbitration.

And the second aspect, as I understood the question, was what factors go into the determination of fairness and efficiency in this context.

PRESIDENT van den BERG: That's the second part of the question, but let's first deal with the first part.

MR. MITCHELL: The first part. Again, having just thought about this over the lunch break specifically, on a preliminary basis, it's our view that it can't be interpreted in a stand-alone basis, on a stand-alone basis. Fairness and efficiency are matters that must be considered in the context of the particular circumstances, of the particular arbitrations; so that, for instance, we submit that the Tribunal would err if it didn't

17:16:27 take into account that Canfor has already spent $350,000 on its Tribunal and over a million dollars getting to where it's got in this proceeding. That's an aspect of Canfor's proceeding which goes into the question of fairness.

Similarly, with respect to the question of efficiency, the Tribunal might consider the fact that Canfor has briefed and argued before a tribunal that was well prepared to hear those arguments, and now a subsequent Tribunal would have to do the same thing. That goes to the question of efficiency.

So, again it can't be considered as an abstract matter. Fairness just isn't an abstract concept. It has a relation to the proceedings that the Tribunal is asked to consider consolidating.

I could deal with the second aspect, if you want.

PRESIDENT van den BERG: Please.

MR. MITCHELL: We have identified in our submission a number of the factors that we think go into the question of fairness: That parties'

17:17:40 conduct is one, the cost, the stage for litigation where the particular proceedings are at. The United States discounts this one, but the fact that the proceedings will be extended, should they be consolidated, the considerations of costs are obviously significant. Procedural difficulties, such as the issue of confidentiality about which you have heard much, but also questions relating to how the Article 15 principle of equality will apply in a case where you have multiple counsel presenting multiple arguments.

Fairness and efficiency has to take into account all of the considerations that are relevant to a fair and efficient determination of the proceeding, and I'm sure that in any given proceeding you can identify additional or other considerations that might be unique to a particular proceeding. We have tried to, in our submission, highlight the ones that are of most significance in the case of Canfor and Terminal.

PRESIDENT van den BERG: Thank you, Mr. Mitchell. Mr. Feldman?

17:18:58 1 MR. FELDMAN: Thank you, Mr. President. I
2 enjoyed this question as a nice intellectual
3 challenge in it, and it invites us to read
4 carefully the plain language.
5 The plain language, as I read it, makes it
6 impossible to make 1126 independent of 1120 because
7 it reads that the claims have been submitted to
8 arbitration under 1120, and the Tribunal may in the
9 interest of fair and efficient resolution of the
10 claims, those are the claims that were submitted
11 under Article 1120, and therefore it's not
12 possible, it seems to me in a plain reading of this
13 language, to segregate or eliminate the
14 considerations that arose with respect to the
15 Article 1120 pleadings and tribunals.
16 As to the second part of your question,
17 the points just made, we have no disagreement with
18 them. We emphasized, of course, that the very
19 invocation of this process induces a delay that is
20 extremely costly not only in getting to resolution,
21 but part of our purpose in this proceeding is to
22 try to bring to a fair conclusion all of the

17:20:26 softwood lumber disputes in the context of the $10 million a month that we are having to spend, if the United States were to understand that misconduct and mistreatment within the context of its trade laws and within the context of cases such as the softwood lumber proceedings do include penalties, then perhaps we would see better conduct. And at least the conduct that respects the rule of law.

So, each day that we are delayed in this effort is very costly. As long as we believe that this process could lead to a conclusion that could help bring a stop to the misconduct and maltreatment by the United States.

So, delay becomes a critical dimension, as do the dimensions that were just mentioned with respect to cost effectiveness and expeditious proceedings and so on. I would, however, dissent from one possible element or criterion that you mentioned this morning or I guess this afternoon in setting out these questions for us because my notes at least--

17:21:36 PRESIDENT van den BERG: You don't need to dissent for me because it was only a question.

MR. FELDMAN: I understand. But my notes say that you included inconsistent decisions, and I don't find inconsistent decisions in Article 1126, and I don't find inconsistent decisions in Chapter 11.

So, I don't believe that inconsistent decisions are an element or a criterion that have anything whatsoever to do with whether an Article 1126 Tribunal should assume jurisdiction over matters that were brought under Article 1120. But for a more precise list of elements, we would reserve to answer at least more coherently in a posthearing brief.

PRESIDENT van den BERG: I would like to be very clear about, I asked, what I said literally was you heard the argument that one is that the part is not consistent. I tried to put it as neutral as I could.

MR. FELDMAN: And I'm only taking issue with it being listed all.

17:22:51 PRESIDENT van den BERG: Ms. Menaker, I all the time assume that you will answer the question, unless you would like to leave it to one of your colleagues, one or more of the questions.

MS. MENAKER: Okay, that's fine.

PRESIDENT van den BERG: I suggest incidentally, after your answer that we take a short break. I'm look looking to the Court Reporter because I think we are already over two hours. So, we take a ten-minute break after you. Please respond.

MS. MENAKER: I could answer preliminarily now to the extent we have posthearing briefs, we will give them more thought and elaborate.

Looking at the plain language in Article 1126, we reached a different conclusion than Mr. Feldman. It appears that it is an absolute standard. It says in the interests of a fair and efficient resolution of the disputes. It's not a relevant standard in that it doesn't say it has to be the most fair or the most efficient, or you're comparing this as compared to how it would proceed

17:23:45 in another proceeding because, of course, consolidation can be requested at any time. And it's impossible to know for certain how that other proceeding would have progressed had consolidation not been granted, so you can't ever do an exact comparison.

That being said, of course, when considering fairness and efficiency, when there is an Article 1120 proceeding, you would look to see--you would look to that proceeding to see what has happened there. And given those circumstances, is it fair and efficient for this Tribunal to consolidate.

Now, as far as the second half of that question, as far as fairness and efficiencies are concerned, I think certain factors to be considered are cost efficiencies, whether there will be undue costs, whether there would be undue delay. Certainly the risk of inconsistent decisions which, as we've noted is an unfair result for the reasons that we noted, so we think it is properly a consideration under fairness.

17:24:53 And general issues of arbitral or judicial economy are among the factors that we think should be considered in a fairness and efficiency evaluation.

PRESIDENT van den BERG: Thank you. Recess for 10 minutes.

(Brief recess.)

PRESIDENT van den BERG: We then move on to question number four which concerns the phrase part of the claim.

Mr. Landry?

MR. LANDRY: Mr. Mitchell will respond to that.

PRESIDENT van den BERG: Okay.

MR. MITCHELL: Thank you, Mr. President. The question is somewhat an abstract question which makes it difficult for an immediate response.

The language of Article 1126 speaks simply in terms of hearing and determining together, and I pause to note for that may be a matter different than consolidation, all or part of the claims, but provides no further guidance. It--clearly in some

17:42:18 circumstances a part of a claim could be a jurisdictional question arising in that claim.

Similarly, it could be a question whether a specific measure challenged in each proceeding in the same way violated the same provision. But the myriad of different ways in which proceedings can arise and questions can arise in them would suggest that what is meant by a part of a claim can have that same variability, all of which has to be considered within the context of the commonality, the degree to which there need to be commonality, that is the question of what is the significance of the question in common so as to justify consolidation, and the fairness and efficiency questions.

I think to take it one step further, it's impossible to say what is meant by a part of the claim without a clearly articulated question supposedly in common in the various proceedings.

And so, let me take the jurisdictional 1901(3) objection that the United States has raised in Canfor's claim, and the United States has raised

17:44:05 in Tembec's claim. And the essence of that jurisdictional objection is that Article 1901(3) bars any Chapter 11 proceeding having anything to do in any way with countervailing--with any matter having a connection to countervailing duty or antidumping duty issues.

But what we said in reply in the Canfor argument and what our argument was was that you have to look at whether 1901(3), even assuming that that interpretation is correct, which we would fundamentally disagree with and argue at length as to why, but even if you were to take the United States's position, you would then have to look at each and every one of the allegations made in the claim and determine whether they were, for instance, antidumping or countervailing duty matters that were barred by the claim.

So, there's--in answering what's meant by a part of the claim, you really have to go back to the commonality question and determine exactly what's in common, exactly what is the Tribunal being asked to answer. How significant is that in

17:45:23 the proceedings, and taking into account all of your fairness and efficiency determinations, and what is the outcome going to be once you have done that.

But it's not a simple question that you can say a part of the claim means liability, a part of the claim means damages or part of a claim means jurisdiction. It's intimately tied to the allegations in each of the cases in the determinations of what is the common question that the Tribunal is being asked, or questions that the Tribunal is being asked to address today.

PRESIDENT van den BERG: But you can envisage in the sort of circumstances, and I ask this question hypothetically, that only the matter of jurisdictional questions is being consolidated, but other questions, for example, relating to liability and quantum are not consolidated?

MR. MITCHELL: In a hypothetical circumstance, yes.

PRESIDENT van den BERG: Thank you. Mr. Feldman?

17:46:26 MR. FELDMAN: Once again, Mr. President, you have asked a question that's made us reflect, and as I indicated early this afternoon, I didn't feel fully prepared in coming to this hearing. I did not have an opportunity to read everything that I would have liked to have read. We have only confronted the first articulation of the United States's position argument on Monday with briefs due Friday, and lots of things we didn't look at closely, and this is in some ways one of them, as you've put the question.

The language here is all part of the claims. Didn't say anything about the distinctions that we have been making all day or that any of us made in our briefs. It raises a question about the severability of claims. Doesn't say anything about jurisdiction or preliminary defenses. Doesn't distinguish between liability or quantum. It only talks about separating the claims.

And since nobody has confronted that question in this proceeding, not in the briefing, not in the hearing today, I don't really know how

17:47:35 to answer because I hadn't focused on it and read it quite this way. We had framed the question, and we have all framed the question, and as you presented this question to answer, framed it a different way. Consistent with what you just asked Mr. Mitchell as to distinguishing jurisdiction, liability, and quantum, which is a different question, it seems to me.

PRESIDENT van den BERG: Mr. Feldman, I suggest that you reflect further on this question because you have still an opportunity to respond to it.

MR. FELDMAN: I appreciate that, and would like to do so.

PRESIDENT van den BERG: Thank you.

Ms. Menaker?

MS. MENAKER: Thank you. We do think that Article 1126 provides a consolidation Tribunal with the ability to, as it says, assume jurisdiction over and hear or determine together all or part of the claims. And that in doing so, it provides--it's designed to maximize the Tribunal's

17:48:29 flexibility to arrange a consolidation proceeding that would be fair and efficient, and this would include deciding parts of the claims insofar as that meant deciding issues of jurisdiction that were common, or issues of merits that were common, or dividing up the claims in any other manner that would provide a fair and efficient resolution of the claims.

I think 1126(2)(a) read--also, if you look at 1126(2)(b), which isn't, you know, at issue in this proceeding, but I think it's further evidence of the flexibility that is provided to a consolidation Tribunal because they are permitted to assume jurisdiction over and herein determine one or more claims, if the Tribunal determines that it would assist in the resolution of other claims, and that's yet further evidence of the flexibility.

MR. CLODFELTER: If I can just add one point. One thing that is also clear from this is that whatever it is the Tribunal assumes jurisdiction over does not--is not limited only to those things that they have in common. If there is

17:49:35 a question, a common question of law or fact, the Tribunal is empowered to assume jurisdiction over the entire claim, including parts of the claims that are not in common. I think that's pretty clear.

MR. MITCHELL: Mr. President, just a point of procedural clarification, if I could. We have not necessarily stated in response to each of the questions that this is a matter we may wish to reflect upon.

PRESIDENT van den BERG: That's understood, so don't worry about that.

MR. MITCHELL: Thank you very much.

PRESIDENT van den BERG: While you are at it, because I think everybody except the United States wants to reflect a little bit further on this, but also I would like to suggest the United States to reflect further because there is a further question actually in this one. If you look at the difference between subparagraph A and subparagraph B, subparagraph A refers to all or part of the claims, and B to one or more of the

17:50:20 claims. Why is that distinction there? You don't need to answer this one because reflect on this. It's the only thing I would suggest to you.

So, we move on to six because five was not used. And six was the question about the text again that says a question of law or fact in common.

And the Tribunal also noted that the Spanish equally authentic text refers to the plural. We have not yet checked the French text. But usually the French text follows what the Spanish text says. Mr. Mitchell.

MR. MITCHELL: Thank you, Mr. President. Also again on a preliminary basis, I think the minimum that can be said based on the manner in which the provisions are drafted and what we can take from the Spanish is that the questions must be of a degree of significance to the disposition of the proceedings as a whole, as would warrant the assumption of jurisdiction over them. Where exactly or what exactly the standard is is not a matter that has been articulated by the United

17:51:42 States, and so it was not something that we have responded to and will reflect a further on articulating that. But, of course, one can hypothesize innumerable cases where questions of varying degrees of commonality arise within the proceedings. A common question could be what day did something occur on simply by way of extreme example. That wouldn't justify the consolidation of the proceedings.

So, there is a threshold that I think we would like to reflect on the articulation of the level of, but it revolves around the degree of significance to the proceeding and to its disposition.

PRESIDENT van den BERG: Because, if you assume it's not limited to one question as the English text might suggest if you take it literally, but you say, well, there are questions of law or fact, then comes the question is to what extent, how many questions do you need in the quantitative form that is justified for a tribunal to say, well, look, we should consolidate this?

17:52:48 MR. MITCHELL: On a principled basis, it would not seem to immediately occur that it should be a number of questions by way of quantum, but a question of significance to the disposition of the proceedings as a whole.

PRESIDENT van den BERG: You get also the qualitative.

ARBITRATOR ROBINSON: I would like to ask the parties, if I could, please, Mr. President, whether they believe Article 1126 assumes the consolidation over all the issues that are going to be consolidated at the same time, or whether it could be seriatim; that is, that the Tribunal might say, well, we are going to assume the jurisdiction over only one single matter without any prejudice to thereafter assuming the jurisdiction over other matters. And it's not an issue of all or part or one or more of the claims. It would be just one single part or one single issue and would that be allowed.

PRESIDENT van den BERG: Shall we identify that as question 6 A to distinguish the questions?

17:54:26 As a separate question actually, because it's the, if I rephrase it this way, that you may say look, let's first go for, let's take an example. The issue of consolidation for the jurisdictional question. And only after we have, we do that and render a decision, then we may decide whether or not we will consolidate the next phase. That's what your question is?

ARBITRATOR ROBINSON: Yes.

PRESIDENT van den BERG: Shall we reserve that for question 6 A. Let's first answer question six. I think Mr. Mitchell you have answered it already, the degree of significance, if I may summarize your answer.

Mr. Feldman.

MR. FELDMAN: Based on the corn producers decision, I think at least if we take some persuasive value from that decision, there is no number of questions. It doesn't matter how many questions of law or fact are in common. Indeed, in that case there was obviously a great deal more in common than there is here.

17:55:34 The governing proposition is fair and efficient resolution. Any decision about assuming jurisdiction has to be driven by what's fair and efficient, and we take some exception to the notion that fair and efficient is some kind of relative proposition and that it doesn't need to be more fair and efficient than an alternative. It ought to be the most fair and efficient option. That's the governing proposition.

So, no matter how much is in common, it ultimately doesn't matter if it's not fair and efficient with respect to all the other considerations that have come into play. And one of those would imply at least a first answer to Mr. Robinson's question, which is that if you were to proceed seriatim, what would be happening to the Article 1120 tribunals that have been suspended?

Those arbitrators agreed to serve in reference to their calendars and schedules and availabilities and so on, and if they were left in continuing suspension, they would effectively have been eviscerated. There would be no realistic

17:56:56 expectation that they could all reliably return whenever this Tribunal decided it wasn't going to take on the next matter and that they could then resume their activity.

So, again in the context of fair and efficient, a seriatim approach to examining the proposition of assuming jurisdiction over elements or things that are in sequence because the jurisdictional question, of course, is preliminary, couldn't possibly be fair and efficient with respect at least to the continuation of the Article 1120 Tribunals that are now suspended.

PRESIDENT van den BERG: Mr. Feldman, are you also making this argument because the corn products Tribunal simply one sentence says look, the questions of law are facts in common for the purpose of Article 1126(2), without any further discussion and immediately moves on to the fair and efficient consideration.

MR. FELDMAN: I'm not making it with such a close reading of that text.

PRESIDENT van den BERG: I simply read

paragraph six of the order.

MR. FELDMAN: Indeed, as I suggested earlier, we really have not had the opportunity to fully study that case, and I don't know if there is more related to the order, whether the papers that lead up to it reveal something more about the meaning of the order itself.

So, I'm completely unable to answer your question, Mr. President. I'm only referring to the notion that that Tribunal concluded that notwithstanding the common law or fact was plainly more present there than here because it was, as we've said before, a single law subjecting companies to exactly the same situation, that notwithstanding all of that, they concluded for reasons of fair and efficient that they couldn't consolidate.

Now, I have not derived my interpretation of fair and efficient from that. I was using that as an example.

PRESIDENT van den BERG: You emphasized fair and efficient, and you emphasized, if I may

17:59:00 say so, unless I incorrectly understood you, de-emphasized commonality of question of law and fact.

MR. FELDMAN: That's correct, but I do that because, as I interpret the plain language of 1126(2), it's conditional. The Tribunal may, and it may only in the interest of fair and efficient resolution. That's the prerequisite that before it then conditionally may exercise some authority.

So, my reading of the language is that fair and efficient is the governing language. It is the precondition for anything else that may occur. And I don't derive that from corn products. I have not read the corn products case carefully enough to offer that you interpretation.

PRESIDENT van den BERG: Thank you.

Ms. Menaker?

MS. MENAKER: Thank you.

We believe that the requirement of a common issue of law and fact in Article 1126 is a fairly low threshold. It says in--the English text at least says a common issue of law or fact. And

18:00:08 as you noted, Mr. President, in the corn products Tribunal case, which we have a separate question on that, so I'm not going to elaborate now, but in our view, there were far, far fewer common issues of law and fact in that case than there are here. However, notwithstanding that, there were still undeniably common issues of law and fact, and you can see the Tribunal as you said in one sentence indicated, yes, there are common issues, now let's move on. And I think--I believe the reason they did that is because once you have common issues of law and fact, you have to look at the--in order to see whether consolidation is going to lead to fair and effective resolution of the dispute you have to look at the relative importance of the common issues, and one of the things that I think is a factor to take into account is whether those common issues of law, for instance, are dispositive. If you just had a common issue of fact or law, but it had no particular relevance to any of the legal arguments, you may have satisfied that, but it would be difficult for a tribunal to find that it

18:01:22 would be fair and efficient to consolidate those cases.

That's not the case here obviously where our common issues of law and fact are dispositive. Our 1901(3) objection, which is identical across the three claims, is a common issue of law, but that's not all. It is dispositive of all of the cases.

Now, I didn't know if you wanted me to go on to answer 6 A since I know Tembec did.

PRESIDENT van den BERG: Also because I still have to give the floor to Mr. Mitchell to allow that point.

MS. MENAKER: Sure.

We do believe that as I mentioned earlier that Article 1126 is drafted to give tribunals the maximum flexibility, and we have indeed suggested that one approach this Tribunal could take would be to consolidate on jurisdiction for now because that is the question, the most pressing question, and then you may never need to do any more to the extent you dismiss the claims on our jurisdictional

18:02:28 1 objections.

2 But if you should deny our jurisdictional
3 objections, you could then decide whether it would
4 be fair and efficient and make sense to consolidate
5 on the merits. You could do that even after we
6 submitted a statement of defense, for instance, if
7 that would make the job easier.

8 And in fact, I understood claimants or at
9 least one of the claimants, I believe it was two of
10 the claimants Canfor and Terminal this morning to
11 be suggesting something quite similar, and I
12 believe even in their written submissions they
13 said, as alternatively at best the United States's
14 request for consolidation on the merits is
15 premature, and we would ask that this Tribunal wait
16 to decide that question.

17 Now, we don't think it's premature, but
18 there certainly would be nothing wrong with the
19 Tribunal holding that question in abeyance.

20 We don't believe that answering these
21 questions seriatim is at all unfair or inefficient,
22 and to the contrary, we think that it makes a lot

18:03:31 of sense. If you were to, for example, decide to consolidate on jurisdiction but say, well, we can't make the other decision now, there would be nothing to stop us if you denied our jurisdictional objections. We would go back to the Article 1120 Tribunals. Then we could say, well, look, now we have three these tribunals, and we're going to the merits in all three cases, and they raise common issues, so let's seek consolidation and we would have to re-establish another Article 1126 Tribunal to determine the question of whether consolidation on the merits was appropriate. And that certainly isn't efficient. If this Tribunal is already established, it ought to do that. And if doing so now is not appropriate, it certainly can do so later if, indeed, we ever get to that point in the cases.

PRESIDENT van den BERG: Mr. Mitchell, you have still to answer on the seriatim question.

MR. MITCHELL: Reverse order, so I'm kind of content to go last for a change.

First, the question requires further

18:04:46 reflection, as Mr. Robinson's question arises in connection with the questions posed by Mr. President, which Mr. Feldman commented required further reflection. This is a related matter to what does all or part of the claims mean, so we will need to reflect on that.

With respect, though, as an initial observation, I note that nothing in the language of Article 1126 seems to contemplate in any way a piecemeal adoption of jurisdiction by this Tribunal. We--just to clarify the intent behind my comments in my submissions earlier concerning the United States's failure to make out a case for consolidation on the merits, the primary position is the United States applied for consolidation. They have not met the burden. They have not shown the common questions arise. Therefore, the application should be dismissed.

It doesn't follow from the prospect that the United States may, once it articulates its case on the merits, identify that common questions may arise on the merits. Of course, we say it hasn't

18:06:21 done so here, and then the question would arise whether a consolidation application could be made at that point. Presumably the questioner would arise, whether that would become before this Tribunal or another Tribunal, and that's really not the question before us.

But, in terms of the seriatim nature of a tribunal assuming jurisdiction, the language doesn't contemplate that, and it would seem to frustrate the orderly operation of the arbitral process because the parties would not be--would not know what Tribunal they would be appearing in front of on the next issue. They wouldn't be in a position to have, to know which Tribunal, if any, to go to to determine issues relating to document production or preliminary matters that arose.

These cases take their time to move through the system, and the piecemeal adoption of jurisdiction should a tribunal have the ability to do that is not, in our submission, something that would be a fair and efficient adoption or a fair and efficient process.

18:07:43 PRESIDENT van den BERG: Thank you. May we move then to question seven and that was specifically addressed to the claimants which was--which are the national and/or international legal bases for invocation of latches and estoppel. And if so, what are the criteria, the requirements?

MR. LANDRY: Mr. President, on that one, we will have to defer our comments for the most part in relation to estoppel and latches to our posthearing submission, but we would note that irrespective of the definition of the international law doctrine, the delay, and the way in which we have argued delay, which obviously is part of the latches estoppel type of doctrine, the delay in which we have argued--sorry, the proposition of delay and the way we have argued it, is unquestionably relevant in the terms of fairness and efficiency.

So, we will provide specific in reference to latches and estoppel in our posthearing brief.

PRESIDENT van den BERG: Thank you, Mr. Landry.

18:08:59 1 Mr. Feldman?
2 MR. FELDMAN: Mr. President, in our brief,
3 we addressed only international terms for these
4 propositions, and you have invited us now to
5 address the national bases.
6 PRESIDENT van den BERG: No, there is a
7 question whether you rely on the national or
8 international basis. I think you did, indeed. You
9 relied on your brief on the international rules.
10 MR. FELDMAN: We did very
11 self-consciously.
12 PRESIDENT van den BERG: But I think that
13 Canfor didn't do that, if I recall correctly.
14 MR. FELDMAN: I see. So, am I to
15 interpret that you're not inviting us now to
16 address the national bases?
17 PRESIDENT van den BERG: One thing,
18 Mr. Feldman, could you please get the reference
19 where you say it in the submission? I remember
20 that you said it.
21 MR. FELDMAN: Oh, in our brief? We will
22 locate it.

18:09:47 PRESIDENT van den BERG: If you locate it.

Ms. Menaker, you would like to react on what you have heard, although one defers and another one refers?

MR. FELDMAN: The discussion begins at page 28 of our brief, and runs through to page 32.

PRESIDENT van den BERG: Mr. Feldman, with all due respect, you rely on Black's Law Dictionary. You take the references in Black's Law Dictionary as being the relevant authorities, although you refer to the North Sea Continental Shelf case in footnote 48.

MR. FELDMAN: Yes, and we will be pleased posthearing to address more now that we will presumably have a little more time than we had to prepare this brief.

PRESIDENT van den BERG: Sure, okay. Fair enough.

Ms. Menaker?

MS. MENAKER: I want to make two very brief comments. The first is that claimants, as you have seen, they have not set forth the elements

18:11:25 for any of these legal principles. We don't think any of them applies.

First underlying those types of principles is that we said or did something, and now we are estopped from changing our mind. And as I demonstrated this morning, that's all contingent upon their view that we said irrevocably we would never seek consolidation, and that's just not the case. If you look at the record, I've cited the places and provided the letters and the transcripts.

We've always said that even if at that time we were not consolidating, we reserved our right to do so if circumstances changed.

So, I think given the factual underpinnings of this situation, that none of those doctrines could possibly apply, even assuming they would have any applicability in other circumstances.

The one other thing that I just wanted to bring to the Tribunal's attention, to the extent it's at all relevant because in talking about these

18:12:31 doctrines, the claimants have relied at various times on the UNCITRAL Arbitration Rules, and they have indicated sometimes a tension between what governs this arbitration, whether it's the NAFTA or UNCITRAL Arbitration Rules, and in that regard I would just direct the Tribunal's attention to Article 1122 of the NAFTA, which provides that the applicable Arbitration Rules govern the arbitration except to the extent modified by the NAFTA itself, and I just direct the Tribunal's attention to that.

PRESIDENT van den BERG: Thank you. We move on to question eight about confidentiality. Mr. Mitchell or Mr. Landry?

MR. MITCHELL: Sure. This is one we have to address in our posthearing brief. There are different regimes that govern confidentiality obligations, whether before domestic courts, whether in trade-related matters, whether as you indicated, in the WIPO system before the WTO, and, indeed, the issue of confidentiality has arisen in several other NAFTA Chapter 11 cases in terms of, just to think of one, the Pope & Talbot case, for

18:13:54 instance. It was a significant issue in, as indeed it was in the Myers case.

So, the issue is at one level what are these regimes and how do they operate. The issue at a separate level is, is it fair and efficient to have one obligated to embark upon a proceeding that necessarily is constrained by the difficult issues respecting the protection of confidentiality, which may go well beyond just the practical issues of protecting confidential information from business competitors. But the legal issues that are implicated in disclosing costs and other business-related data when you're dealing with competitors of the size and significance in the industry that these competitors are. So, we will elaborate more fully on that.

PRESIDENT van den BERG: The question is whether, especially from the practical point of view, assuming this consolidation Tribunal would assume jurisdiction, as the language of 1126 says, would it then be practical considerations that we cannot achieve what in other arbitrations and court

18:15:20 proceedings is achieved by all kind of measures, so that commercially sensitive information is not divulged to third parties, and third parties in quotation marks in this case not to the alleged competitors?

MR. MITCHELL: Indeed, the issue is even more complex because I'm not aware of the kind of circumstance where the claims, the confidential information is being sought to be protected from disclosure to a competitor in the context of a claim against another party for damages, where that claimant would be able to or where that respondent would be able to defend their claim on the basis of all of the confidential information they have received from both parties.

So, the issue of confidentiality in a case such as this assumes, I think, a dimension beyond that which you would see in your other regulatory or trade-related proceedings.

PRESIDENT van den BERG: Perhaps you could explain that further in your posthearing brief.

Mr. Feldman, before you answer the

18:16:38 question eight, could you please turn your hat and look to your demonstrative exhibit. East is east and west is west, and east will never meet west. Is that not what you're saying there. So you could please help me. I was wondering when looking at the charts what is the competition element there? Because when east never meets west, how could they compete?

MR. FELDMAN: Well, they're competing ferociously, because--well, I'll give you an example that I can't say much more about, but over the last four years, in the bidding for Canfor and SloCan in their acquisition and merger, Tembec was involved in that. These are companies that are competing head to head as to their relationships with other companies and in relationships with each other. And I can't say more than that here for some of the reasons that question eight addresses.

PRESIDENT van den BERG: Okay. Please then address question eight.

MR. FELDMAN: The notion that the Tribunal could fashion a mechanism for protecting

18:17:44 confidential information is obvious. Of course, it could. The question is what kind of mechanism would it be, how cumbersome would it be, and how would it address therefore fairness and efficiency?

These are proceedings that involve witnesses. They involve the presence of clients. The full and fair presentation of the case requires the advice and presence of clients. For a single Tribunal to try to take on multiple commercial disputes involving significant volumes of confidential information would be to indulge in a series of in camera proceedings, clearing the room, reintroducing people, or segregating into series of common and uncommon issues for multiple hearings. It would be enormously complicated to find the way, although I don't discount that you could find the way, but enormously complicated, cumbersome, and inefficient and expensive to manage a process in which clients would have to be periodically excluded, witnesses couldn't be present, experts would have to be shuffled in and out of sessions in order to proceed with a single company's or

18:19:02 multiple companies' claims.

Before a single Tribunal, each company can be present fully. There is nothing to hide from itself. The clients can be present. The companies can be present. The witnesses and so on throughout and have full knowledge of all of the proceedings, and everything that's happening in the proceedings, which is, as we understand and interpret it, the intention of Chapter 11, to enable a full and fair hearing in its completeness for complaining investors. A structure whereby the participants and their witnesses and experts would have to be excluded would be, therefore, inherently unfair.

It also introduces a further complicating element. The United States, of course, would always be present. It would have knowledge of all the business of all the claimants. The claimants wouldn't have knowledge of each other, so that the United States would be able to proceed with particular knowledge and potential argument against each of the claimants. In our case, with respect to the competition that exists between Canfor and

18:20:15 1 Tembec, this could be quite dramatic.
2 As much as our markets are divided and our
3 businesses are so different, the United States has
4 brought an action that has been intended to have
5 severe consequences for both Canfor and Tembec.
6 They have had differential impacts, different
7 consequences, but they're intended against both.
8 This has obliged both to deal with the
9 governments, both the Federal Government and the
10 provincial governments. It's obliged them to come
11 back and forth to negotiating tables with different
12 agendas and different objectives, so it's not as if
13 they don't interact. They would interact less,
14 perhaps, if they weren't under the pressure of the
15 United States conduct, but nevertheless there is an
16 interaction. It's not the kind of interaction that
17 tells you that they have as businesses things per
18 se in common, but as common victims of the U.S.
19 misconduct, they have something in common.
20 PRESIDENT van den BERG: Thank you.
21 Ms. Menaker?
22 MS. MENAKER: Thank you. First, I would

note that any purported concern about business proprietary information has no relevance whatsoever for the jurisdictional phase of these proceedings. As we mentioned earlier, we have briefed the 1901(3) objection in Canfor and Tembec's cases and we have briefed our Article 1101(1) and 1120 objections in Tembec's proceedings.

All of the documents related to the jurisdictional briefing are fully public. There have been no redactions. They're on our Web site. In fact, Tembec read all of the Canfor stuff. It was all available to Tembec and vice versa.

The Canfor hearing was open to the public just as this one is. There was never a time when the camera needed to be shut of. There was no proprietary information. It just has no relevance to our jurisdictional objections. So, insofar as consolidation on jurisdiction is concerned, this is of no relevance.

And I mention that also with respect to counsel's comments about any supposed conflict in the representation of both Canfor and Terminal. I

18:22:37 1 don't fully understand whatever conflict there may
2 be, but insofar as any conflict was articulated, it
3 was all related to the aspect of confidential
4 business information. And again, none is relevant
5 for the jurisdictional phase.
6 Now, we have also argued that we believe
7 that any business proprietary information has
8 relevance, if at all, in a damages phase. All of
9 the differences that have been articulated as far
10 as we can tell, their only relevance would be to
11 the impact that the antidumping duties and
12 countervailing duties had on the market and things
13 of that nature. And that would not be relevant to
14 issues of liability.
15 Now, furthermore, claimants have not even
16 been able to describe in general terms, very
17 general terms, how they compete, so that makes it
18 very difficult for us to ascertain to what extent
19 this type of information will even be sensitive
20 because we just don't have that sense since we have
21 not been given any indication other than this one
22 example that perhaps they were going to vie for the

same merger or the same acquisition.

And finally, I just--before doing that, even if confidential business information were introduced in a damages phase, as we noted earlier, we have the utmost confidence that this Tribunal could fashion accommodations to allow any of that business proprietary information to come in, just like as the Tribunal mentioned is done in multiple other fora. There is no reason why this Tribunal could not similarly accommodate that type of information.

And just to respond very quickly to some of Tembec's remarks in this regard, there is no reason to think that such a proceeding would be unduly cumbersome or complicated or inefficient.

Tembec made comments that their client might not be able to then attend all of the proceeding, but, of course, if its client was being excluded, it would be because Canfor or Terminal was introducing business-proprietary information, and they would not be privy to that anyway. They would not be, even if these were separate

18:25:21 proceedings, that type of information would be protected via a confidentiality order. If the cameras were on, they would be shut off at that time. They are not losing anything that they otherwise would have had access to. Of course they wouldn't be allowed, then, just as Tembec, just as if Tembec would not want Canfor and Canfor's representatives to sit in the room when that information was being discussed.

So, that is not a prejudice to them. That is just a safeguard to make sure that that information is not revealed. And insofar as the United States having some sort of advantage because we would be here during the dire time, we would be here during the entire time if these cases proceeded separately. If the Tembec Tribunal, the Article 1120 Tribunal went on and the Canfor proceeding proceeded separately, and business-proprietary information were introduced in those proceedings, of course we would be privy to all of that information.

We would not be permitted to use it in

18:26:22 1 another proceeding just as if that information was
2 introduced in a consolidated proceeding. We would
3 be privy to all of that, but we would not be able
4 to use Canfor's business-confidential information
5 vis-a-vis Tembec's claims. So, it's really no
6 different whether the proceedings are consolidated
7 or not.
8 PRESIDENT van den BERG: Thank you.
9 Question nine, I think we can leave for the
10 posthearing briefs because that concerns the
11 charts, unless somebody has already been very
12 active and prepared the chart.
13 Let's move on then to question 10. It was
14 a simple question, at least the question as it
15 looks like. How is the present case different from
16 the corn products case? Mr. Mitchell? Mr. Landry
17 this time.
18 MR. LANDRY: Mr. President, first of all,
19 with respect to the corn products case, when we
20 looked last on the Web site when we were filing our
21 submission, at least in our ability to look at the
22 Web site, the material was not there. We

18:27:30 understand it is now there, and therefore we will have to take an opportunity to look through to fully comprehend what is being dealt with in the corn products case.

Having said that, the decision was available, and obviously one of the differences between the corn products case and this case, albeit that this case is still in argument, is the positions that we have taken on the issue of commonality. The corn products case obviously determined that there were common issues of fact and law, and in a very summary fashion, as Mr. President has indicated, but in this argument, you have heard that Canfor and Terminal take issue as to whether or not there is commonality. So, in that sense it is different.

But again, one of the things that is not different between the two at all is the issue of confidentiality. And as I listened to the debates with Mr. Feldman and Mr. Mitchell and Ms. Menaker on confidentiality, the one thing that was not referred to was paragraph eight and nine of the

18:28:46 corn products decision, which we have referred to for reference purposes, Mr. President, in our submission at paragraph 64.

I would ask this Tribunal to look very carefully at paragraphs eight and nine and ask the question how can one conclude that the same difficulties would not occur in this case.

In fact, in my submission, Mr. President, it is even significantly more complex in this case than not. In that case you had one measure. There was a taxation that was put it on HFCS by the Mexican Government. That was it. One measure, one piece of conduct that was being dealt with. In this case you had numerous actions of the United States that have been put in issue.

You will have the same complexity for every one of those different--all of the actions in the United States that are put in issue as are mentioned in paragraphs eight and nine of the corn products case.

And I would like to make one further mention. I know we're going to deal with

18:30:14 confidentiality in our briefs, and I just wanted to make a comment back to Ms. Menaker on her last couple of points so that she's aware of our position, and that is she said that the issue of business confidentiality will have no relevance, and she said it a number of times to the jurisdictional issues. Well, with all due respect to Ms. Menaker, it does not jive with the position that they put in their statement of defense with respect to Article 1101. Specifically information about the investments in the United States, specifically information about how the conduct of the United States relates to these investments are all relevant on the basis of the record that you have before you, have all been put in as relevant by the United States. So, to say that the business-confidential information not relevant to the jurisdictional issues is, with respect, inaccurate.

I think, Mr. President, those are the only comments we have at the moment on the corn products case, but we will have further to say in our

posthearing briefs.

PRESIDENT van den BERG: Thank you, Mr. Landry.

Mr. Feldman?

MR. FELDMAN: Mr. President, as we indicated earlier, we are not as conversant with this case as we would like to be, but we would like to make a request, if we are to become as conversant as apparently we ought to be, then we would request that the United States provide us with all the correspondence that may have occurred in this case so that we can have whatever documentation there is or give us an assurance that everything that is applicable and appropriate is available on the Web site. If there is anything missing or not there, we would like to have an equal opportunity to examine it in order to answer this question properly.

PRESIDENT van den BERG: You could find it on the Web site of the Mexican Government.

MR. FELDMAN: But what I'm asking, Mr. President, is whether the United States will

18:32:17 assure us that what is on that Web site does indeed include all the documentation, all the correspondence among the parties and so on that would be relevant to answering properly your questions.

PRESIDENT van den BERG: At least for submission on consolidation, they are on Web site. Whether the exhibits are on Web site, I don't know, I don't think so. But if your question would then go to the exhibits?

MR. FELDMAN: Of course.

PRESIDENT van den BERG: Ms. Menaker?

MS. MENAKER: Thank you.

As this Tribunal knows, we are not a party to the high fructose corn syrup cases. Mexico is. The information on which we have relied and on which I'm going to rely on in making the few comments that I'm going to make now, we gleaned from the information that is available on Web site; namely, the submissions made by the parties and the transcripts.

In the course of any third party case, we

18:33:19 1 may receive other documents. We certainly do not
2 receive every piece of correspondence that goes
3 back and forth, just as we don't relay to Mexico
4 and Canada every piece of correspondence in our
5 cases.
6 So, claimants are--they have a full
7 opportunity to access everything that they need to
8 address these questions. It's all available. It
9 has been there for weeks, as far as I'm aware. So,
10 just to say that up front.
11 PRESIDENT van den BERG: If I may suggest,
12 Mr. Feldman, I would suggest you first read the
13 submissions which you can find on the Web site, and
14 if there is a particular document that says, look,
15 I would really like to have that, perhaps you could
16 ask by the Tribunal if the Government of the United
17 States of America can invite the Mexican Government
18 to provide the document. But I tell you, I cannot
19 assure you that you will have the result there
20 because it's kind of disclosure of documents in the
21 second degree, which may be difficult to achieve.
22 MR. FELDMAN: I'm just asking,

18:34:17 Mr. President, that we be equally positioned with the same information that has been available. I think I understood Ms. Menaker to just indicate that she may perhaps have things that perhaps weren't on the Web site and have not been otherwise available.

And as long as we are supplementing, if I may supplement on this question for just a moment, we have also raised a question in our presentation today about the pending cattle case, and which does involve the United States, and which we understand from an indication on the Web site is also raising the question of consolidation. In the interest of all the information that may be available as to the engagement of the United States in consolidation issues, we would like to be provided with whatever documentation and correspondence may have occurred in that matter as well.

PRESIDENT van den BERG: Ms. Menaker or Mr. Clodfelter?

MR. CLODFELTER: Mr. President, these are legal arguments. Mr. Feldman makes a big argument

about the information they cannot disclose to other parties or to us. He's sitting on enormous amounts of information upon which he has based the conclusions he has put before you, none of which we have access to.

Now, there is virtually nothing out there except the claimants' request with respect to consolidation on the BSE case, the mad cow case that he's referring to. I mean, they may have been mentioned, but there are multiple notices of arbitration that have been filed, and those are on our Web site. That's all we have. He's got access to everything we do on this issue.

And until he shows he's entitled to every piece of information we have, or can show that he needs any particular information, we are just not prepared to go to any great lengths to assure him that he has access to everything we have. That's just extreme and uncalled for, and we are not obligated to do so.

PRESIDENT van den BERG: Okay. I suggest doing this case because I think we are getting to

18:36:26 the sidelines of the proceedings where we should be focusing on the question of whether or not we should consolidate.

Mr. Feldman, if there is really a document you would like to have, then you can make what the Brits always call, you are at liberty to apply to the Tribunal, and then we could consider what we can do. For the reminder we should at least at this stage and if we go to the next stage of this Tribunal, keep the Request for Production of Documents at a very minimum, only what is really necessary for your case.

All right. Ms. Menaker, you still owe us the answer on the real question, which was what are the differences, if any.

MS. MENAKER: Yes. There are numerous differences, and I think I have five differences, and I will just reiterate all of which I gleaned from the information that is publicly available.

The first difference is that the high fructose corn syrup consolidation Tribunal was not a tribunal that was constituted pursuant to Article

18:37:28 1 1126 of the NAFTA. The parties in that case
2 derogated from Article 1126. They established by
3 agreement a Tribunal of three members, and then
4 they asked that Tribunal to decide whether or not
5 the cases before it should be consolidated.
6 They asked that Tribunal to apply the
7 standard set forth in Article 1126, and the parties
8 reserved their rights to. After that decision had
9 been made, for example, had the Tribunal decided as
10 it did not to consolidate, then the case was over.
11 If the Tribunal decided that consolidation
12 was warranted, the parties reserved their rights to
13 then decide whether that Tribunal ought to hear the
14 consolidated case or whether they wanted to
15 reconstitute a new Tribunal to hear it. So they
16 derogated in important respects from Article 1126,
17 and that is the first difference.
18 A second difference is that in that case
19 the differences, the factual differences that were
20 identified by the claimants were specifically
21 linked to how those factual differences created
22 legal questions that made the claims distinct, and

18:39:07 let me just provide you a little background for context. In that case, one of the common issues was that all of the claimants challenged a tax that Mexico imposed on soft drinks that contained high fructose corn syrup.

Now, the claimants enumerated numerous factual differences between and among them. Claimant, who I'll call claimant number one, I made clear that it produced high fructose corn syrup that was used in soft drinks in its facility in Mexico, that it had invested in a facility in Mexico that produced the high fructose corn syrup that was put in soft drinks on which the tax was applied.

The other claimant had a facility in Mexico that produced a lower grade of high fructose corn syrup that had to be blended with another grade of high fructose corn syrup that it imported from the United States. The high fructose corn syrup that was produced in Mexico had alternative uses. It could be used for various different things, but it could not be put into soft drinks

18:40:23 directly. They had to also import the other high fructose corn syrup and blend it together.

Now, Mexico had also imposed import restrictions on the importation of that other high fructose corn syrup that had to be blended with the high fructose corn syrup that was manufactured in Mexico. And the claimants--so these were differences that were articulated by the claimants, and then the claimants provided examples of how those differences would create different questions of law. And so, for example, they said there is a difference in causation. Corn products argued that here we can say we are the ones that produced the high fructose corn syrup that gets put into the soft drinks in Mexico, and we can say that that was the cause, the tax was the cause of our loss. Whereas they said the other claimant can't necessarily say that, because the stuff that they produced in Mexico can't even be used in soft drinks, and there were also import restrictions, and the cause of their loss might really have been those import restrictions and not the tax. That

18:41:32 1 was one of the examples they gave.
2 There were also different questions with
3 respect to the application of Article 1101(1), and
4 whether they had identified a measure with respect
5 to an investor and an investment, and this had to
6 deal with the fact that one of the claimants at
7 least was importing a good, and one of the measures
8 dealt with the impartation rather than the tax on
9 the manufacturing facility. And those obviously is
10 a bit more complex than that, but you can see that
11 the different facts created different legal
12 questions, and the Tribunal found that those legal
13 questions could impact liability, and there may be
14 different results because of those facts.
15 What we have had here is claimants listing
16 a host of factual differences, none of which have
17 any relevance to our jurisdictional objections, and
18 none of which, as far as we can tell, will have
19 relevance to the issues of liability. And
20 certainly they have not made out--they have not
21 articulated how these differences are relevant
22 legally.

18:42:47 We, on the other hand, have stated insofar as a national treatment claim is concerned, the measures they challenge are the same. They're the antidumping and countervailing duty determinations at issue, and we don't believe that those determinations, as a matter of law, that they discriminate on the basis of nationality.

They treat Weyerhaeuser, which is a U.S.-owned company that is in Canada that imports softwood lumber from the Canada to the United States the same way that it treats Canfor and Tembec. And therefore, in our view, that is not a national treatment violation. So, that is an example of where we think that all the factual differences they have listed are not relevant to an issue of liabilities, and we do not see how any of them are.

The fact that one of them cuts lumber by helicoptering, I don't see how that will impact a determination of whether there has been a violation of any of those articles of the NAFTA. So, that, in our view, is a significant difference.

18:43:42 A third difference is that Mexico had not sought preliminary treatment of or identified any jurisdictional defenses that it had to any of the claims. Clearly, we have here. We have identified jurisdictional defenses that are the same across all of the claims, so whereas Mexico said that it believed it would likely raise similar defenses to all of the claims, it did not articulate with any specificity what those objections would be, and it had not made any of those objections formally.

Now, here, we have done just the opposite. We have been able to articulate in great detail what our jurisdictional objections are, and thereby show that they are identical among all of the claims.

The fourth distinction is with respect to confidential business information. Now, in the high fructose corn products case, the Tribunal found that consolidating would be unfair in part because of the problems caused by confidential business information, but there claimants articulated very precisely why confidential

18:45:00 business information would be integral to a decision on liability and how they would be prejudiced by sharing that information and how the process could not work efficiently if protection for that information was not made.

And just by way of example, I have already talked about how the investments were structured fundamentally differently. Both ADM and corn products wanted to enter the corn sweetener market in Mexico, but they had very, very different marketing plans for how to do that. One built a facility that produced a certain kind of corn syrup, the other didn't. One blended the stuff. One put it in directly. And all of that information was said to be very highly proprietary information that could not be shared, and yet you would have to look at that information to determine issues of liability, to see what the impact on the particular investment was insofar as an expropriation claim was concerned. That would be highly relevant.

Here, the information pertaining to the

18:46:02 U.S. investments certainly is not at all relevant for jurisdictional purposes, and we don't believe that it is going to be relevant for liability purposes. Here, the measures are again duties that are imposed on the imports of softwood lumber from the U.S. and Canada. If we are at all concerned with the investments that claimants made in the United States, it is only if we find liability and then we accept their theory that you should measure damages by looking at the market impact that those duties had on all aspects of their business. So, I think it is fundamentally distinct from the high fructose corn syrup products case in that regard as well.

Also, which I've mentioned, the difficulties with the business proprietary information in corn products in the high fructose corn syrup cases was a factor arguing against consolidation, whereas here we know for a fact that there is no business proprietary jurisdiction in the jurisdictional phases, so that is not an issue here.

18:47:19 And finally, another difference or the last difference that I will discuss today is the procedural posture of the cases. Here, as we have talked at length Canfor and Tembec are procedurally aligned. If these cases are not consolidated, the next step in both cases will be to have a hearing on jurisdiction, and Tembec to have a hearing on the jurisdictional objections, and in Canfor, as we've discussed, we will request at least a truncated rehearing in front of the reconstituted Canfor Tribunal. Thus, those cases are in procedural alignment. That was not the case in the high fructose corn syrup cases. In those cases, the ADM Tribunal had not yet been constituted, so there was no 1120 Tribunal in place.

By contrast, in the corn products case, not only had the Tribunal been constituted, but the claimant had already put in its memorial which was 170 pages on its memorial on liability.

So, there, those cases were obviously very far apart, and in the hearing transcript, corn products describes in great length all of the

18:48:34 effort that it went through to compile that memorial and the witness statements and everything else that went in along with it which, from that, the--they wanted the Tribunal to draw the inference that in order for ADM to catch up, it would take them necessarily several months to get to that point.

So, that's another distinction insofar as the timing is concerned, not only would it have caused delay to consolidate to give ADM that opportunity to catch up, but also the risk of inconsistent decisions was mitigated because as CPI noted in its memorial and which we quoted in our submission, their case, the corn products case, was far enough advanced that it was reasonable to assume a decision would be issued in that case, and insofar as any of the issues were similar between the two cases, a subsequently constituted ADM Tribunal would have the benefit of seeing that previously issued decision. And again that is obviously not the case here where two tribunals would be deliberating simultaneously on identical

18:49:43 questions.

PRESIDENT van den BERG: We move on to question 12. We are almost there. Question 11 was not used. They are the estimates of the costs. I think that is something that you cannot do as the Dutch put it on the back of the cigar box. So, the Tribunal will see that in the posthearing briefs. The American Express, on the back of an envelope.

Right. Then we move on to 13. That is for the claimant parties. Can you actually give an example where 1126 would apply? I think Mr. Feldman was already alluding to an example, but first, Mr. Landry and Mr. Mitchell.

MR. MITCHELL: Unfortunately, we focused our submissions to this point not on establishing where it would apply, and over the lunch break we were not able to get down to question 13, but we will include those examples in our posthearing submission.

PRESIDENT van den BERG: Mr. Feldman?

MR. FELDMAN: I think there are a number of example, potentially, Mr. President.

18:51:16 Noncompeting companies, companies that are filing at roughly the same time and therefore have not made investments in 1120 tribunals, and have not progressed. Ms. Menaker celebrates the idea that we have all spent an enormous amount of money in Tribunals that should be wiped out. She thinks this is a good reason why we should consolidate. This is exactly the opposite. If you want to consolidate, consolidate claims before they are off the ground when you can argue that there are common issues of law and fact, and there haven't been huge investments made in Article 1120 tribunals. And do it with companies that aren't in direct competition with one another so that you don't have problems of confidential business information.

Do it in instances where you have pure legal issues, so that you don't have to be bound up in factual differences and disputes. Do it with affiliates of companies, common shareholders. I think there are a lot of examples in which Article 1126 could apply.

At the beginning of the United States's

brief, it said that this configuration is, and I think the word used was emblematic of an 1126 situation. Since there are no previous examples of a consolidation, I don't know how we became emblematic, but in terms of the configuration of facts and law here, we are exactly the opposite of what's been described.

We just heard, for example, a description that said that one of the companies hadn't--in the high fructose corn syrup case was way behind, and therefore it would take months to catch up. What does that mean with reference to Terminal? How is that different from Terminal? We just heard a parade of contrasts that sounded to me an awful lot the same.

We also heard more disturbingly, in my mind, we heard a significant intrusion on to the merits of our cases. Now, we have been told that the status of Weyerhaeuser is a defense on claims about national treatment. We are not here to debate the merits of our claims. And if we are, then we would like to have the statement of defense

18:53:42 1 instead of this piecemeal introduction of defenses
2 here and there, a national treatment defense, about
3 the situation of Weyerhaeuser as bootstrapped onto
4 the answer to a question comparing cases.
5 When we come down to the question of
6 whether there are conditions in which Article 1126
7 could apply, and I took this question to mean, does
8 it appear that the complainants are saying they're
9 setting conditions under which 1126 never could
10 apply, the answer is, yes, there are situations in
11 which they could--in which the article could apply.
12 It's not this case. This is not
13 emblematic. We do not have procedural alignment.
14 We have competitors in the same industries. We
15 have complex situations of law and fact with
16 enormous differences. These are not affiliated
17 companies. The obverse of all of that would be
18 susceptible to the application of Article 1126.
19 PRESIDENT van den BERG: Thank you,
20 Mr. Feldman.
21 Mr. Clodfelter wants also to give an
22 example.

18:54:48 MR. CLODFELTER: Three. We haven't heard any examples yet, but I think I just have to comment. We are not here to be debate the merits, but all day long all we have been hearing about is the wrongful conduct of the United States and the suffering of the claimants. They have been arguing merits all day. We gave an example to show commonality, and that's why we offered it.

I just remind Mr. Feldman he agreed that our statement of defense would be limited to the jurisdiction. He wants one now on merits, but it was by consent that we did not supply a complete statement of defense in that case. We hope that they come up with better examples in the posthearing submissions.

MR. FELDMAN: Mr. President, if I may, we didn't agree to that. The Tribunal agreed on their request. We have always asked for a full statement of defense. This was not by our consent.

PRESIDENT van den BERG: The Tribunal you are referring to, the Tribunal in the--

MR. FELDMAN: The Tembec Tribunal in

18:55:36 1 Article 1120.
2 PRESIDENT van den BERG: All right. We
3 can move on, then, to the next question, which is
4 question 14. So, it is the penultimate question we
5 have now. Assuming that there would be
6 consolidation, where would we have to start
7 proceedings? And especially to the jurisdictional
8 objection, and there were two sub questions. One
9 is would the jurisdictional defenses have been
10 frozen, and B, do we have to start actually from
11 scratch, and especially in duration then was also
12 by Terminal.
13 Mr. Landry or Mr. Mitchell.
14 MR. MITCHELL: In answer to the first part
15 of the question, where does the proceedings start,
16 does the Tribunal start again from the beginning of
17 the case? The answer is no. Our preliminary
18 answer is no. The consolidation, and that leads to
19 the answers to the remaining part, what happens to
20 the jurisdictional objections. Are they frozen?
21 Yes. And the reason for that is the consolidation
22 Tribunal is not an appellate body.

18:57:12 The Canfor Tribunal made its determination, for instance, with respect to jurisdictional objections that the United States had to file all of their jurisdictional objections. They didn't. They formulated two, one on 1101 to be dealt with at the merits; one on 1901(3) to be dealt with as a preliminary matter.

The effect of starting over is to allow the United States the second kick at the can and the second chance to plead their case in a different way that they think might be better. That's not what the consolidation process was intended for.

PRESIDENT van den BERG: Mr. Feldman?

MR. FELDMAN: I would suggest, Mr. President, that procedurally you have to start over. This Tribunal has never convened with us as to schedules, rules, terms under which papers are to be filed. We had procedural conferences with our Article 1120 Tribunal, and we organized by consensus how the process was to go forward. That's not happened here.

18:58:20 So, as a procedural matter, we would have to start over. As a substantive matter, can't possibly start over. So, substantively, I'm not sure I would use the term frozen. There has been a waiver here both in terms of coming to the consolidation claim and in terms of certain claims on jurisdiction made against Canfor. Those waivers can't be undone. They have occurred.

So, on the substance, it would appear to me that you have to continue from where you are, but on the procedures, we have never had a beginning, which would be required. And we are still left with the same question that we asked previously on the so-called procedural alignment, therefore, where Terminal fits in this picture is not obvious to us.

And to emphasize once again on this jurisdictional question, there are two tribunals already constituted. They have before them the United States argument on Article 1901(3). They have read the travaux. They have been through the briefs, and they were ready to rule. The rationale

18:59:41 for retrieving waived claims against Canfor and putting all of it before another Tribunal and then having to differentiate so that you get two different decisions because for Tembec two other claims would have to be examined than would be argued for Canfor. Indeed, drives to the question you have asked. Where do you start? Where is the right place to start.

It seems to us that you can't go back to the beginning substantively. You have had no beginning procedurally, and you have had waivers that have already taken place.

PRESIDENT van den BERG: Thank you.

Ms. Menaker?

MS. MENAKER: Thank you. On the first part of the question whether the proceeding starts or could start over substantively, we would like to give that more thought because at least textually, we don't see a clear answer. It's not clear to us from the text. That being said, there certainly is no reason why this Tribunal can't utilize submissions that were made before previous

19:01:00 tribunals to the extent that that would be efficient.

As far as procedurally, yes, this Tribunal starts over. It's a new Tribunal. And because we obviously have a disagreement on our jurisdictional objections with claimants, all agree that we have raised 1901(3) and agreed to address it preliminarily.

I believe all agree that we have raised Article 1101(1), and we agreed not to address that preliminarily, and there is a dispute over whether or not we raised Article 1121. We believe we did raise that, and that has been preserved.

So, for us, it may not be of practical import whether things start over substantively so to speak, because we think all of those defenses are there.

Now, it is certainly within this Tribunal's prerogative, should it assume jurisdiction to decide how best to organize the proceedings, and so just because one Tribunal decided to bifurcate on one question or to treat

19:02:12 something preliminarily does not bind this Tribunal. This Tribunal should take into account all of the circumstances and decide what would be most fair and efficient. If you assume jurisdiction over our jurisdictional objections, as I noted earlier, you can then decide whether on what to bifurcate on, and on what not to bifurcate. That, we believe, is within your authority.

As far as Tembec's comments about the Tembec proceeding being more procedurally advanced, I just want to offer a few observations. I believe that Tembec alluded to having multiple conferences, and just so this Tribunal is aware, we have had far, far more interaction with you than we have had with the Tembec Tribunal.

There was one organizational meeting that was held via telephone. In fact, none of the attorneys here today have even ever set eyes on our party appointed arbitrator from the Tembec Tribunal. So, if he were here today, we would not recognize him. I don't remember if his picture was on his CV when we appointed him or not, but we have

had far more interaction with you than we have had with that Tribunal, and I only bring that up to draw a contrast between the picture that Tembec is trying to create here, and what is in reality what has occurred, which is a brief telephone organizational meeting and some briefing.

We don't know whether the Tembec Tribunal read through the travaux. Maybe they were interested in it. Maybe they weren't. It did not come up a lot in the briefing at all. We don't think it's relevant. We didn't raise it. Maybe they found it intellectually interesting and took it upon themselves to read it, but we don't know. We don't know if they read the briefs.

Certainly as I mentioned before, we saw consolidation after the countermemorial was filed, before the reply and rejoinder were filed. It would be perfectly reasonable to wait and see if a hearing was going to be commenced before putting in more time and effort to reading those briefs.

And I think that's all I have to say on that now.

19:04:28 1 PRESIDENT van den BERG: Thank you.
2 We have one last question, and then I
3 think we could close it for today. Mr. Feldman, it
4 it was addressed to you. You stated trade law has
5 been applied differently, and the question is: How
6 so?
7 MR. FELDMAN: There are several examples
8 available, Mr. President, but I will offer you two,
9 one from the countervailing duty case and one from
10 the antidumping case. In the countervailing duty
11 case, different benchmarks were used. Let me
12 explain briefly what that means.
13 Under Article 14(d) of the Subsidies and
14 Countervailing Measures Agreement of the WTO and
15 its equivalent in U.S. law, the determination of
16 whether something is subsidized is based on whether
17 a government, when it involves a good provided by a
18 government, whether a government is adequately
19 remunerated for the good that it provides, and the
20 determination of whether there is adequate
21 remuneration depends upon whether you could
22 purchase the good from a private party for the

19:06:06 same, better or lesser price than what you paid the government. If the government supplies you the good for less than what it would cost from you to buy from a private party, there is a subsidy.

And, of course, the determination, therefore, of the private market is dependent upon where the transaction takes place. And the WTO agreement and U.S. law both require that that benchmark be in the jurisdiction where the subsidy is found, provided there is some private market where that would be possible.

Now, a series of NAFTA and WTO panels have struck down the United States on this specific point because the United States has repeatedly refused to rely on domestic benchmarks that are within the jurisdiction.

In the case of the principal mills of Tembec, for example, which are in Ontario and Quebec and the mills of Canfor and Terminal which are in British Columbia and Alberta, the United States used entirely different benchmarks. It used the benchmark--in the initial investigation, it

19:07:13 used the benchmark for the eastern mills that went across the border into Minnesota and Wisconsin and so on. In the case of the west, it went across the border into Washington State and Oregon, but it was very selective and it shows some prices in Montana and Idaho and so on.

In subsequent reviews, it has used a benchmark of the Maritime Provinces for Eastern Canada, but it used a cross-border benchmark with the United States for Western Canada. In other words, the law was applied in a completely different way in the countervailing duty case as impacting Canfor on the one hand, Tembec on the other, with respect to the benchmark and hence determining whether there is a subsidy and what the measure of it is.

In the dumping case, one second example. A byproduct of producing lumber is chips. If you have a good and big tree and it produces a good piece of lumber, you won't produce a lot of. And if you have cheaper wood, you may find yourself producing a lot more chips. But the chips are

19:08:22 fundamental to calculating whether you are dumping the product because you sell the chips, and the price you get for the chips is used to determine what, in fact, your cost of production ultimately was in making lumber.

For Canfor and for Tembec, the Department of Commerce has chosen to use different measures on the chips. In the Canfor case, the Department of Commerce used a weight average of a market price for the chips to determine what the value of the chips should have been in Canfor's production. And for Tembec, it used the lower of the market price or an internal transfer price, whichever would produce for it a bigger margin, a bigger dumping result.

So, the law and principle was the same, but it was applied and interpreted very differently by the Department of Commerce to get different results for each of the two companies. There are other examples, but I hope this will be responsive to your question.

PRESIDENT van den BERG: First to

19:09:28 Mr. Landry and Mr. Mitchell, would you like to comment on the answer of Mr. Feldman?

MR. LANDRY: We have no further comment at this time.

PRESIDENT van den BERG: Ms. Menaker, you would you like to comment?

MR. CLODFELTER: No comment.

PRESIDENT van den BERG: We come to the closing, then, of the hearing of today. First thing is first. I have been advised, Mr. Feldman, that your client has not yet--at least advanced payment of your client has not yet arrived. Is that a matter of "the check is in the mail"?

MR. FELDMAN: No. It was actually wired on Tuesday from my office. It may not have been recognized because we paid it, so--but I have a wire confirmation. I'm not carrying it with me, but I regret to say that, indeed, it was paid on Tuesday by wire, as instructed.

PRESIDENT van den BERG: Thank you, Mr. Feldman, for the clarification.

Then the next question is about the

19:11:31 posthearing briefs. How much time do you need?

And let me add one thing. The Tribunal thinks that, indeed, the posthearing briefs should be filed simultaneously, but experience has shown that the simultaneous findings, in most cases, one or more of the parties object, look at what the other side has now written, it's completely new and I want to reply to that. The Tribunal simply anticipates it may also happen in this case, and for that reason the Tribunal will allow very brief period of time all the parties also to submit reply brief, but short reply briefs, to the posthearing findings of the parties. So, you have two simultaneous filings.

Now, first question is, how much time do you need for your posthearing briefs? Let's start first with Mr. Landry and/or Mr. Mitchell.

MR. LANDRY: We were just wondering in terms of the calendar, but if you could just give us one moment.

(Pause.)

MR. MITCHELL: Mr. President, there is the

19:13:15 1 other issue relating to the 1128 submissions which
2 I believe Mexico and Canada reserved a week in
3 which to--
4 PRESIDENT van den BERG: Mexico and Canada
5 have further thoughts. They have reflected on
6 this, and already seeing the humor of the situation
7 because they just advised me, through the secretary
8 of the Tribunal, that they would like to file after
9 you all have filed them, in view of the exchange of
10 views that has taken place today.
11 Do I summarize this correctly, for the
12 representatives of the Governments of Canada and
13 Mexico? One is hidden behind "east does not meet
14 west.
15 MR. de BOER: Stephen de Boer for the
16 Government of Canada.
17 I would like to request to reserve the
18 right to file 1128 after we have seen the
19 posthearing briefs. It does not necessarily mean
20 that Canada will be filing an 1128. We don't know
21 at this point, given the additional questions that
22 were raised for the Tribunal and given the

19:14:25 responses that you will be receiving, whether we will actually file 1128, but we don't think we could reasonably do that or give you an answer within one week, given the questions that have been raised.

PRESIDENT van den BERG: And that's the same position for the Government of Mexico?

MR. BEHAR: Yes, Mr. President.

PRESIDENT van den BERG: My suggestion is that you do the same thing at the time you have seen the posthearing briefs and that you make your filings simultaneously with when the reply briefs come in. Would that be workable?

MR. de BOER: That's quite workable. It obviously depends on your time line, but I'm assuming that that time period is--

PRESIDENT van den BERG: We don't have any slippage in the case.

MR. de BOER: Right.

PRESIDENT van den BERG: Then I come back to Mr. Landry because now you have reflected--

MS. MENAKER: Mr. President? Just on that

19:15:17 1 point, may I just offer an observation?
2 PRESIDENT van den BERG: Yes.
3 MS. MENAKER: We would prefer if Mexico
4 and Canada, if they make 1128s, that they do it
5 after our initial submission, but before our
6 replies because that would give all of the parties
7 the opportunity to respond to the 1128 submissions,
8 to the extent they wanted to do so.
9 PRESIDENT van den BERG: Maybe it depends
10 on the timing. But first to see, Mr. Landry, how
11 many week or weeks do you need?
12 MR. LANDRY: Mr. Chairman, I just spoke to
13 Mr. Feldman to see if we could--given what I heard
14 from Mr. Feldman, I think it's probably better that
15 her go first and then we will comment on the time
16 schedule that he is proposing.
17 PRESIDENT van den BERG: Mr. Feldman, how
18 many week or weeks do you need?
19 MR. FELDMAN: We are confronting here,
20 Mr. President, a number of complicated questions
21 you have asked on which we have deferred on a
22 number of them. We postponed a significant brief

19:16:09 1 that the court agreed to postpone that we had due
2 last week because of this proceeding, and we have
3 two hearings in Geneva. We don't perceive it as
4 reasonable to answer all these questions and handle
5 essentially two other hearings in Geneva and the
6 brief already scheduled in court in less than four
7 weeks.
8 PRESIDENT van den BERG: You need four
9 weeks? Mr. Feldman, you're not out of the
10 business, I see.
11 MR. FELDMAN: But I would like to add,
12 Mr. President, that if you would address our views
13 on Article 21(3) and dismiss this proceeding, none
14 of us would have to go to the expense or trouble of
15 writing these briefs.
16 PRESIDENT van den BERG: Mr. Landry, you
17 share also the idea of four weeks?
18 MR. LANDRY: Mr. President, we actually
19 have a problem the other way, if you understand
20 what I mean, and that is going into that. But
21 having said that, if Mr. Feldman needs four weeks,
22 we will deal with it within that time.

19:17:22 PRESIDENT van den BERG: And for the reply brief, how many weeks, Mr. Feldman?

MR. FELDMAN: That's a completely different question because that's impacted on, I think, in part--

PRESIDENT van den BERG: They have to follow you.

MR. FELDMAN: No, I understood they--right, but if there are 1128 submissions to which we also have to respond, at some interval in between.

PRESIDENT van den BERG: If you follow them, Ms. Menaker's suggestion, the governments come in first and then you go after the governments have made their intervention.

MR. FELDMAN: It's a function of the interval they are requesting after the submission of our briefs.

PRESIDENT van den BERG: Before we get there, you are on short notice for the two governments.

Ms. Menaker, you agree also to the four

19:18:11 1 weeks?
2 MS. MENAKER: In principle, that's fine,
3 although if we could talk about dates, I may be on
4 a very long overdue vacation.
5 PRESIDENT van den BERG: You're not the
6 only one there.
7 MS. MENAKER: I want to push it off a few
8 days until I'm back in the office.
9 (Discussion off the record.)
10 PRESIDENT van den BERG: We go back on the
11 record.
12 I think, Mr. Mitchell, can you announce
13 the results of the consultations with all parties.
14 MR. MITCHELL: Success. We have had to
15 take into account a number of people's vacation
16 schedules and the hearing schedule, and the parties
17 are all agreed that the first round of simultaneous
18 submissions will be filed on or before July 22nd.
19 The 1128 submissions, if any, would be filed within
20 14 days of that, which if I'm not mistaken is
21 August 5th. Then the simultaneous replies and
22 observations on the 1128s would be filed

19:25:10 1 August 12th.
2 PRESIDENT van den BERG: Right. Then to
3 complete--
4 MR. CLODFELTER: The only variation, a
5 week earlier the governments would indicate so we
6 could prepare and plan whether they would file.
7 That would be the 29th.
8 PRESIDENT van den BERG: For the record,
9 the Governments of Canada and Mexico will indicate
10 seven days after receipt of the posthearing briefs
11 whether or not they will file an 1128 submission.
12 Then you will, of course, also want to
13 know when the Consolidation Tribunal comes out with
14 its order. As we see it at present, that will
15 probably be at the end of August, beginning of
16 September. But that will be fast; let's put it
17 this way. We could have done it faster, but, of
18 course, I understand the posthearing briefs which
19 have to be filed and the times that people also
20 have their well-earned vacations.
21 All right. Then I think, are there any
22 further organizational matters or procedural

19:26:22 matters that the parties wish to raise at this stage? Mr. Landry.

MR. LANDRY: None from Canfor.

PRESIDENT van den BERG: Mr. Feldman?

MR. FELDMAN: Just we would like a ruling on 21(3).

PRESIDENT van den BERG: Noted, Mr. Feldman.

Mr. Clodfelter, Ms. Menaker?

MR. CLODFELTER: No.

PRESIDENT van den BERG: All right. Then the Tribunal would like to thank very much ICSID for the facilities given here, especially the secretary, Gonzalo Flores, who has done a wonderful job really and has worked days and nights to get this hearing here so that we could take place.

I would also like to thank David for the court reporting and for the long hours you have sat.

And above all, the Tribunal would like to thank counsel for all parties for the highly professional and also agreeable manner in which

19:27:12 they have conducted the case today.

Now, having said that, you know there is a provision in the UNCITRAL Rules which is a fundamental provision that says that the Tribunal must treat the parties with equality and that each party is given a full opportunity of presenting in the present text of the case which orders his or her case or its case and that is Article 15(1) of the UNCITRAL Rules. The question the Tribunal is, has the Tribunal complied with it until now? Mr. Mitchell or Mr. Landry?

MR. MITCHELL: There are no additional issues that we are raising on behalf of Canfor or Terminal at the present time.

PRESIDENT van den BERG: Thank you.

Mr. Feldman?

MR. FELDMAN: I'm not sure I entirely understood the question.

PRESIDENT van den BERG: The question is whether we have complied with Article 15(1) of the UNCITRAL Rules.

MR. FELDMAN: If I can look at that.

19:28:24 This isn't like buying the car, is it, where the salesman says he has gone through the whole list?

PRESIDENT van den BERG: This is the engine of the car, I could tell you.

ARBITRATOR de MESTRAL: It is a new, not a used car.

MR. FELDMAN: Mr. President, I need to reserve and consider this. I'm unable to respond at this time.

PRESIDENT van den BERG: The point is this: If you go a little bit further in the UNCITRAL Rules, why I asked the question, more specifically is sort of like reading your Miranda rights, is that there is a waiver provision in the UNCITRAL Rules, so I have to simply tell you there is a waiver provision, and now it's the point in time you could tell me, wait a moment, this has not been complied with. And the basic provision in that respect is Article 15(1).

But I give you the waiver provision. It's Article 30, and I will read it to you: A party who

19:29:45 knows that any provision of or requirement under these rules has not been complied it and yet proceeds with the arbitration without promptly stating his or her objection to such noncompliance shall be deemed to have waived his or her rights to object. That's the reason why I ask the question.

MR. FELDMAN: I appreciate that, Mr. President. I believe in our opening remarks the first statement we made this morning renewed and sustained objections we have already raised, and those objections remain. So, I think we have, in fact, addressed this previously today.

PRESIDENT van den BERG: Thank you. Mr. Clodfelter, Ms. Menaker?

MR. CLODFELTER: We have no objections.

PRESIDENT van den BERG: Thank you.

Then I think we can close the hearing. Thank you very much, and I will wish you all a good trip back home.

(Whereupon, at 7:30 p.m., the hearing was adjourned.)

19:30:40 1 CERTIFICATE OF REPORTER

2

3 I, David A. Kasdan, RDR-CRR, Court

4 Reporter, do hereby testify that the foregoing

5 proceedings were stenographically recorded by me

6 and thereafter reduced to typewritten form by

7 computer-assisted transcription under my direction

8 and supervision; and that the foregoing transcript

9 is a true record and accurate record of the

10 proceedings.

11 I further certify that I am neither

12 counsel for, related to, nor employed by any of the

13 parties to this action in this proceeding, nor

14 financially or otherwise interested in the outcome

15 of this litigation.

16

17 _____

DAVID A. KASDAN, RDR-CRR

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