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

TEMBEC INC. *et al*. *v.* UNITED STATES OF AMERICA
CANFOR CORP. *v.* UNITED STATES OF AMERICA
TERMINAL FOREST PRODUCTS LTD. *v.* UNITED STATES OF AMERICA

TEMBEC'S POST-HEARING BRIEF IN OPPOSITION TO CONSOLIDATION

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* *See* Canfor Corp. v. United States, Tembec et al. v. United States, Terminal Forest Products Ltd. v. United States, Transcript of the First Hearing of the Consolidation Tribunal (June 16, 2005) (available at www.state.gov/s/l/c14432.htm) at 153-162.

I. INTRODUCTION

This post-hearing brief addresses the Tribunal's fourteen questions, but is organized as a brief, grouping answers to questions where they may be presented coherently and consistently. The brief also addresses the United States' reply to Tembec's motion to dismiss this Tribunal, as the relationship between NAFTA Article 1126 and UNCITRAL Rule 21 remains fundamental and at the threshold of any further inquiry into the questions and issues otherwise presented by the Tribunal.

The core concern of this brief is that this Tribunal has no jurisdiction over the motion for consolidation of the United States because the United States waived its right to seek an order for consolidation of the *Tembec* Article 1120 Tribunal. This Tribunal also has no right to arbitrate or adjudicate the United States' pending motions on jurisdiction before Article 1120 tribunals constituted with the consent of Tembec and Canfor because Article 1126 tribunals may assume jurisdiction over claims, but have no authority to decide a prior question as to whether there are cognizable claims that may be consolidated. That question lies exclusively with Article 1120 tribunals.

Finally, tracking the criteria of Article 1126, this Tribunal could not reasonably consolidate any or all of the Chapter 11 claims of these three Claimants because the United States, without Statements of Defense beyond jurisdictional objections, has identified no common *questions* of law or fact, limiting itself instead to superficial arguments about common laws and common facts. Consolidation would be unfair, inefficient, and wildly expensive compared to the alternative of the *status quo ante.* Confidential business information will pervade the merits of the claims (both liability and damages), and the Claimants cannot be expected to disclose such

information to their competitors in a consolidated proceeding. Even were it possible to adopt procedures that adequately safeguarded the Claimants' confidential business information while preserving their rights to fully present their claims, the Tribunal then would be administering three separate proceedings at separate times for each Claimant, which would resolve claims less efficiently than three separate Article 1120 tribunals proceeding at the same time. Both by procedure and on the merits, consolidation is neither permissible nor possible and the United States' untimely request for a consolidation order must be denied.

II. THE REQUEST FOR CONSOLIDATION IS UNTIMELY, IN ACCORDANCE WITH THE ORDINARY MEANING OF ARTICLE 1126(2) AND (8),THE UNCITRAL RULES, AND PRINCIPLES OF INTERNATIONAL LAW

A. The Motion To Consolidate Should Be Dismissed As Untimely

1. The United States Is Too Late According To The Ordinary Meaning Of Article 1126 And UNCITRAL Rule 21

The United States' response to Tembec's motion to dismiss makes no reference to the ordinary meaning of Article 1126(2) and (8), the consolidation provisions that refer repeatedly to "jurisdiction" (*i.e.*, this Tribunal may "assume jurisdiction" over the claims; Article 1120 tribunals "shall not have jurisdiction" to decide a claim over which the Article 1126 tribunal "has assumed jurisdiction"). Instead, the U.S. argues that its own motion to deny "jurisdiction" to a constituted Article 1120 tribunal, and have a newly constituted Article 1126 tribunal "assume jurisdiction," is not jurisdictional. The U.S. argument ignores the ordinary meaning of the words.

The UNCITRAL Rules are adopted specifically by Article 1126(1), including necessarily Rule 21(3). Had the Parties wanted a right to seek consolidation after a complete statement of jurisdictional defenses had been presented, without

having signaled Article 1126 as one of the defenses, or had they been concerned about what the United States calls "anomalous results," they would not have referred repeatedly to "jurisdiction" in Articles 1126(2) and (8). Alternatively, they would have modified Rule 21(3) as it would otherwise apply to Article 1126.

This Tribunal cannot proceed past the threshold of the United States' motion for the simplest of reasons: the United States asks this Tribunal to "assume jurisdiction," which is jurisdictional. The United States was ordered to present all of its jurisdictional defenses, and the United States did so without mentioning Article 1126 or consolidation. UNCITRAL Rule 21(3), which governs Chapter 11 proceedings, requires pleas denying jurisdiction to be raised in the statement of defense. The United States presented its complete statements of defense as to jurisdiction, and made no mention of an Article 1126 defense. "Jurisdiction," as in "assume jurisdiction," can mean only "jurisdiction," and a "complete" statement of defense can only mean "complete."

The article by Henri Alvarez cited by the United States confirms the ordinary meaning of Article 1126:

> In the event the tribunal established under Article 1126 determines that claims have a question of law or fact in common and that the interests of fair and efficient resolution of claims favour consolidation, *it may assume jurisdiction over*, and hear and determine together, all or part of the claims or *assume jurisdiction over* and determine one or more of the claims in order to assist in the resolution of the others. … If the consolidation tribunal *assumes* jurisdiction, the previously constituted tribunal *loses its jurisdiction to the extent it is assumed by the consolidation tribunal*.[1]

[1] Henri C. Alvarez, Arbitration Under the North American Free Trade Agreement, 16 Arb. Int'l 393, 413 (2000).

The United States' argument that consolidation was "intended to relieve a State Party from the hardship of having to defend multiple claims arising from the same measure,"[2] even were it a full and correct statement about Article 1126, only confirms that consolidation is a jurisdictional defense–denying jurisdiction to Article 1120 tribunals—that should have been raised in the United States' statements of jurisdictional defenses.

In arguing that a request for consolidation does not amount to a defense to jurisdiction of an existing Article 1120 tribunal, the United States once again miscites its authorities as to the meaning of a "plea that the arbitral tribunal does not have jurisdiction" under the UNCITRAL Rules. The United States, citing selectively from the *travaux préparatoires* to the UNCITRAL Rules, asserts that jurisdictional objections are limited to situations where a party contends that "'the particular dispute does not fall within the scope of the parties' [arbitration] agreement,'" that "'the arbitrators were not validly authorized to function as arbitrators,'" or that an "arbitration agreement is non-existent or invalid."[3] The *travaux*, and the final language in Article 21(1), make clear that jurisdictional objections *include* "objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement,"[4] but therefore are not exhaustive.

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[2] Canfor Corp. v. United States, Tembec et al. v. United States, Terminal Forest Products Ltd. v. United States, Response of The United States of America to Tembec's Motion to Dismiss (July 12, 2005) at 3.

[3] These three objections are essentially the same. The first objection cited by the United States is merely an example of an objection based on the non-existence or invalidity of an arbitration agreement. *See Report of the Secretary-General: preliminary draft set of arbitration rules for optimal use in* ad hoc *arbitration relating to international trade*, [1976] 7 UNCITRAL Y.B. 174, U.N. Doc. A/CN.9/112/Add.1/1976. As to the second objection, the *travaux* state that objections to the existence or validity of an arbitration agreement "constitute allegations that the arbitrators were not validly authorized to function as arbitrators."

[4] UNCITRAL Art. 21(1)(Emphasis added).

The ordinary meaning of the *travaux* and the rule is unambiguous and demonstrates that the drafters of the UNCITRAL Rules were not limiting the scope of jurisdictional objections to those grounds alone. The Tribunal, thus, must look to the ordinary meaning of Article 1126, which repeatedly refers to jurisdiction. Article 1126 is an uncommon, if not unique treaty provision, which the drafters of the UNCITRAL Rules would not have thought to include in a list of examples made thirty years ago, long before NAFTA was promulgated. The U.S. request for consolidation amounts to a "plea that the arbitral tribunal does not have jurisdiction," and nothing in the *travaux* or the ordinary meaning of the UNCITRAL Rules contradicts this interpretation.

The United States also relies on a comment made during a hearing on jurisdiction by Mr. Gaillard, the President of an Article 1120 tribunal in another case—not Tembec's–a tribunal before which Tembec never appeared or argued. Mr. Gaillard, prior to concluding that the United States had necessarily completed presentation of its jurisdictional defenses before his tribunal, opined that he was prepared still to entertain a motion from the United States to consolidate. The question whether consolidation would be permissible or possible was neither presented, examined nor decided. Mr. Gaillard did not know what jurisdictional defenses, if any, the United States had asserted against Tembec (the United States did not present its statement of defense in the *Tembec* case until after the *Canfor* hearing on jurisdiction). And the United States relies on Mr. Gaillard's inquiry without acknowledging that it told Mr. Gaillard and the rest of that tribunal that it had no interest in consolidation.

The United States' answer to the second basis for dismissal presented by Tembec is that Tembec bargained for whatever infirmities may be embedded in Article

1126 when it made a claim against the United States under Chapter 11. Tembec did not, however, bargain that ICSID would appoint a conflicted arbitrator selected from the United States' list, claiming too little time to even consult with Tembec or any other party before empowering him with decision-making authority; that the United States would move for consolidation after Tembec had been working with an Article 1120 tribunal for more than a year, and long after the United States had supposedly presented its complete jurisdictional defense; that a tribunal so constituted could assume jurisdiction from a tribunal appointed by consensus. Tembec did not consent, in availing itself of NAFTA's Chapter 11, to a biased, inequitable process in which its costs would be multiplied and justice would be interminably delayed. The scenario being played out here was not contemplated by NAFTA's architects, for they could not have contemplated an inequitable process wrought with such inequities.

As proof that Article 1126 cannot be read the way the United States has in this case chosen to read it, Tembec has offered the lone prior example in Chapter 11's history dealing with Article 1126, in which the Mexican government apparently addressed in good faith the dilemmas that could arise by a reading of Article 1126 in the form adopted here by the United States. Rather than explain, or even address, why México and the parties in that case acted as they did, to overcome inequities that arise when insisting upon the interpretation advanced here by the United States, and about which the United States is fully informed and Tembec is not, the United States accuses Tembec of speculation, and offers no information. Here, the United States' opposition to Tembec's motion is not to inform, but rather merely to deny.

2. The United States Continues To Withhold Information

Finally, as to the motion this Tribunal so far has denied without explanation, the United States insists it has withheld no information and offers to provide anything for which Tembec makes a specific request. Tembec requested, specifically, all correspondence and documentation pertaining to the decision to create a two-tiered tribunal process in the *HFCS* case. The United States refused even to look for such correspondence or such documentation, without denying that it may exist. Inasmuch as the United States was a third party in that action and Tembec was not involved at all, the United States would know and have access to such correspondence or documentation, and Tembec would not. It is not possible, therefore, to make a more specific request.

B. The United States Is Too Late According To The Doctrines Of Estoppel And Laches

1. The Doctrines Of Estoppel And Laches Are Recognized Principles Of International Law

This Tribunal has inquired about the applicability of estoppel and laches to international law.[5] The doctrine of estoppel is a long-standing and widely-accepted principle of international law,[6] resting on notions of good faith and consistency.[7] Under

[5] *See* Canfor Corp. v. United States, Tembec et al. v. United States, Terminal Forest Products Ltd. v. United States, Transcript of the First Hearing of the Consolidation Tribunal (June 16, 2005) (available at www.state.gov/s/l/c14432.htm) ("Hearing Transcript"), Question 7 at 156-57.

[6] *See, e.g.*, *Pope & Talbot v. Canada*, Interim Award (June 26, 2000), at ¶ 111 (recognizing the elements of estoppel in international law); *AMCO Asia Corp. v. Republic of Indonesia*, ICSID Arbitral Award on Jurisdiction (Sept. 25, 1985), YCA 1985, at 61, 70 (noting that estoppel is "applicable in international economic relations where private parties are involved"); *Oil Field of Texas, Inc. v. Government of Iran*, Award, Case No. 43, 1 Iran-U.S.C.T.R. 347 (1982) ("This principle has long been accepted as a rule of international law....The doctrine has been invoked [by international tribunals] in varying forms over a century and a half."); *Dalmia Dairy Industries, Cement Company (India) v. National Bank of Pakistan*, Case No. ICC 1512, Second Preliminary Award (Jan. 14, 1970), YCA 1980, at 170, 174 (calling estoppel "a general principle of law, both international and municipal"); *North Sea Continental Shelf*, 1969 I.C.J. 3, 26 (discussing the main elements of estoppel); *Temple of Preah Vihear*, 1961 I.C.J. 6, 32 (holding that (continue)

the doctrine of estoppel, "'[w]here A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the time.'"[8] As one arbitral tribunal explained, "a man shall not be allowed to blow hot and cold—to affirm at one time and to deny at another."[9]

Arbitral tribunals considering international investment disputes frequently apply the doctrine of estoppel.[10] In *Dalmia Dairy Industries, Cement Co. (India) v.*

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Thailand was estopped from denying its earlier acceptance of the boundary with Cambodia); *Arbitral Award Made by the King of Spain*, 160 I.C.J. 192, 213 (precluding Nicaragua from denying its earlier recognition of the validity of an arbitral award); Ian Brownlie, *Principles of Public International Law*, at 616 (6th ed. 2003) ("A considerable weight of authority supports the view that estoppel is a general principle of international law…."); Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*, § 87, at 204 (1927) ("In substance the principle underlying estoppel is recognized by all systems of private law….Where the Anglo-American lawyer refers to estoppel, the continental jurist will usually say that the party is 'precluded' from asserting a fact or putting forward a demand.").

[7] *See Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, Award, Iran-U.S. Claims Tribunal, Case No. 39 (1989), at ¶ 198, *available at* 1989 WL 663859 (noting that estoppel "is grounded on considerations of good faith and consistency"); *AMCO Asia Corp. v. Republic of Indonesia*, ICSID Arbitral Award on Jurisdiction (Sept. 25, 1985), YCA 1985, at 61, 69 (describing estoppel as "based on the fundamental requirement of good faith"); *Oil Field of Texas, Inc. v. Government of Iran*, Case No. 43, 1 Iran-U.S.C.T.R. 347 (1982) (noting that estoppel is "a principle of good faith") (quoting Cheng, *General Principles of Law As Applied by International Courts and Tribunals* 141-42 (1953)).

[8] *AMCO Asia Corp. v. Republic of Indonesia*, ICSID Arbitral Award on Jurisdiction (Sept. 25, 1985), YCA 1985, at 61, 70 (quoting from *Maclain v. Gatty* (1921), A.C. 376, 382). The doctrine of estoppel is also reflected in the recognized international legal principle of "venire contra factum proprium." ("No one may set himself in contradiction to his own previous conduct.") *See, e.g.*, ICC Award No. 6264, Clunet 1991, at 1050, 1052.

[9] *Dalmia Dairy Industries, Cement Company (India) v. National Bank of Pakistan*, Case No. ICC 1512, Second Preliminary Award (Jan. 14, 1970), YCA 1980, at 170, 174 (quoting English Court of the Exchequer in *Cave v. Mills* (1862)); *see also Oil Field of Texas, Inc. v. Government of Iran*, Award, Case No. 43, 1 Iran-U.S.C.T.R. 347 (1982) (quoting same passage).

[10] *See, e.g.*, *SGS Société Générale de Surveillance v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Award (Aug.6, 2003), at ¶ 177; *Pope & Talbott v. Canada*, Interim Award (June 26, 2000), at ¶¶ 106-112; ICC Award No. 6264, Clunet 1991, at 1050, 1052; *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, Award, Iran-U.S. Claims Tribunal, Case No. 39 (1989) at ¶¶ 198-207, *available at* 1989 WL 663859; *AMCO Asia Corp. v. Republic of Indonesia*, ICSID Arbitral Award on Jurisdiction (Sept. 25, 1985), YCA 1985, at 61, 69-71; *American Housing International Inc. v. Housing Cooperative Society of State General Gendarmerie*, Award, Case No. 199, 5 Iran-U.S.C.T.R. 235 (1984); *Oil Field of Texas, Inc. v. Government of Iran*, Award, Case No. 43, 1 Iran-U.S.C.T.R. 347 (1982); ICC Award No. 2520, Clunet 1976, at 992-93; *Dalmia Dairy Industries, Cement Company (India) v. National Bank of Pakistan*, Case No. ICC 1512, Second Preliminary Award (Jan. 14, 1970), YCA 1980, at 170, 174.

National Bank of Pakistan,[11] for example, the ICC arbitrator considered whether the defendant should be estopped from raising a jurisdictional objection. The National Bank of Pakistan argued that the ICC arbitrator handling its dispute with an Indian cement company had become *functus officio* due to the pendency of parallel court proceedings in Pakistan and the issuance of an injunction barring the claimant from pursuing the arbitration. The arbitrator considered that the defendant was estopped from making its jurisdictional argument, reasoning that the defendant had already recognized his authority by submitting to him various proposals and suggestions, despite the ongoing court proceedings in Pakistan. The arbitrator speculated that "[h]ad these suggestions been accepted…, the defendant would not, in all probability, have raised its 'new objection.'"[12]

In *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*,[13] the defendant counterclaimed that the claimant had breached its agreement to carry out activities through a joint operating company in accordance with standards of good oil field practice. The claimant asserted that the defendant was estopped from making this counterclaim because it had participated and concurred in all of the decisions governing the joint operating company. The Iran-U.S. Claims Tribunal found that the defendant had a "substantial opportunity to object to each of the oil field practices it now complains of," but never did so.[14] In addition, the prejudice to the claimant due to the defendant's

[11] Case No. ICC 1512, Second Preliminary Award (Jan. 14, 1970), YCA 1980, at 170.
[12] *Id*. at 174.
[13] Award, Iran-U.S. Claims Tribunal, Case No. 39 (1989), *available at* 1989 WL 663859.
[14] *Id*. at ¶ 203.

acquiescence, was "manifest."[15] The Tribunal held that "as a matter of law…[the defendant] is now precluded from bringing its counterclaim."[16]

The doctrine of laches overlaps with the doctrine of estoppel and sometimes is referred to as "equitable estoppel." It is based on the maxim, "equity aids the vigilant and not those who slumber on their rights." Although the authorities do not agree exactly how to title the doctrine, there is no doubt that negligent delay prejudicing a party may be raised in defense of the claim being brought against it.

Various recognized authorities have examined laches, or equitable estoppel, and have arrived at the same conclusion. Whiteman recognized in 1937 that:

> Delay by an individual in the presentation of a claim has at times been held to bar the right of a state to present the claim subsequently as a valid one in international law. The grounds for the refusal to allow claims under these circumstances have been variously expressed. At times the disallowance is merely stated in terms of the claimant's non-actions or laches, and at other times in terms of prescription or of a limitation on international claims.[17]

Cheng, similarly, in 1953 wrote:

> A review of the various international decisions dealing with the subject will show that the *raison d' être* of prescription may be found in the concurrence of two circumstances: —
>
> 1. Delay in presentation of a claim;
>
> 2. Imputability of the delay to the negligence of the claimant.[18]

Lauterpacht recognized the doctrine exists in international law.[19] And one scholar has traced the doctrine in international law back two centuries.[20]

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[15] *Id*. at ¶ 207.

[16] *Id.*

[17] Marjorie M. Whiteman, *Damages in International Law* at 236 (1937).

[18] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 378-79 (published 1953; reprinted 1987).

The Commission in the *Cadiz* case explained:

> Time itself is an unwritten statute of repose. Courts of equity constantly act upon this principle, which belongs to no code or system of municipal judicature, but is as wide and universal in its operation as the range of human controversy. A stale claim does not become any less so because it happens to be an international one, and this tribunal in dealing with it cannot escape the obligation of a universally recognized principle, simply because the[r]e happens to be no code of positive rules by which its action is to be governed.[21]

This Tribunal is bound under NAFTA Article 1131 to apply "rules of international law," including the generally recognized principle of estoppel (and equitable estoppel, or laches).[22] *Dalmia Dairy Industries* and *Phillips Petroleum Co. Iran* demonstrate the willingness of other international tribunals to apply estoppel and hold defendants accountable for attempting to change their arguments to the detriment of claimants. This Tribunal should act no differently in dealing with the United States' request for consolidation.

2. The United States Is Estopped From Requesting Consolidation

The doctrine of estoppel, which operates to prevent one party from unfairly prejudicing another, is applicable here. As discussed in Tembec's June 10 pre-hearing brief, the United States, by both its words and conduct, led Tembec to believe that it would not move for consolidation. Tembec acted upon this belief by pursuing its

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[19] *See* H. Lauterpacht, *Private Law Sources and Analogies of International Law* 273-75 (1970) (discussing international tribunals recognizing the doctrine).

[20] *See* Ashraf Ray Ibrahim, *The Doctrine of Laches in International Law*, 83 Va. L. Rev. 647 (1997).

[21] The *Cadiz* case, IV John Basset Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, 4203 (1898).

[22] Article 1131(1).

own costly Chapter 11 claim against the United States for over a year. The United States should be estopped from changing its position now to Tembec's detriment.

As to the first element of estoppel,[23] the United States made various representations to Tembec that it would not seek consolidation. Over a year before the United States requested consolidation, Tembec asked the United States to inform it promptly as to its position on consolidation so as to avoid prejudice to Tembec.[24] The United States told both Tembec and Canfor in response that it did not intend to seek consolidation, but may want to revisit the decision were another Chapter 11 claim filed in the *Softwood Lumber* proceedings.[25] Although Terminal filed its Notice of Arbitration on March 31, 2004, the United States waited almost a year before filing its request for consolidation. During the intervening time, the United States filed different objections to jurisdiction in different cases, told the *Tembec* Tribunal that Tembec's claim was different from Canfor's,[26] and declared to the *Canfor* Tribunal that it did not want to consolidate.[27] This conduct established that the United States did not intend to seek consolidation.[28] When the United States finally asked for consolidation, moreover, it relied on the withdrawal of Mr. Harper in the *Canfor* case as the reason for requesting

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[23] *See, e.g.*, *AMCO Asia Corp. v. Republic of Indonesia*, ICSID Arbitral Award on Jurisdiction (Sept. 25, 1985), YCA 1985, at 70 (citing the requirement that one party make a representation to another, either through words or actions).

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

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

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

[27] *See* Canfor Corp. v. United States (Article 1120 proceeding), Hearing Transcript (Dec. 9, 2004)(statement of Ms. Menaker) at 770, 772.

[28] *See AMCO Asia Corp. v. Republic of Indonesia*, ICSID Arbitral Award on Jurisdiction (Sept. 25, 1985), YCA 1985, at 70 (establishing that conduct is sufficient to establish a representation under the doctrine of estoppel); *see also Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, Award, Iran-U.S. Claims Tribunal, Case No. 39 (1989) at ¶¶ 199, *available at* 1989 WL 663859 ("This Tribunal has also recognized that a party by its course of conduct may waive its right to later object.").

consolidation. It did not seek to consolidate because of the filing of another claim, the condition precedent it had established when assuring Tembec that it would not otherwise seek consolidation.[29]

In reliance on the representations made by the United States, Tembec detrimentally altered its own position and proceeded with its Article 1120 tribunal.[30] As discussed in Tembec's June 10 brief, Tembec went through six months of delay and unnecessary expense trying to form an Article 1120 tribunal while the United States declined to appoint arbitrators, alleging technical difficulties with Tembec's Article 1121 waivers. That tribunal then convened to set out rules and schedules with the consent of the parties. On November 30, 2004, the Article 1120 tribunal scheduled the briefing of the United States' objections to jurisdiction. The United States even raised preliminary jurisdictional objections against Tembec that it had not raised against Canfor. The United States and Tembec then submitted two briefs each on the U.S. jurisdictional defenses, and Tembec began preparation for a hearing that the United States refused to waive. Thus, Tembec expended significant resources establishing the Article 1120 tribunal, having rules and schedules established, and defending against the U.S. objections to jurisdiction. All of that activity was undertaken on reliance derived from

[29] Mr. Harper's withdrawal from the *Canfor* Tribunal is irrelevant to the legal criteria for consolidation, had nothing whatsoever to do with Tembec and its tribunal, and is no excuse for the United States' changed position.

[30] *See, e.g.*, ICC Award No. 6363, YCA 1992, at 186, 201 ("Estoppel requires that the party claiming it has relied on a representation by another party with a resulting detrimental consequence to its own interests."); *Phillips Petroleum Co. Iran v. Islamic Republic of Iran*, Award, Iran-U.S. Claims Tribunal, Case No. 39 (1989) at ¶ 207, *available at* 1989 WL 663859 (finding estoppel where the prejudice suffered by the claimant, who had changed its position in reliance on actions by the defendant, was "manifest"); *see also Pope & Talbott v. Canada*, Interim Award (June 26, 2000), at ¶ 112 (indicating the need to show detrimental reliance by one party on the other party's representations).

representations of the United States that it would not seek to have some other tribunal assume jurisdiction over Tembec's claims.

The United States, through words and actions, manifested an intention not to consolidate. Tembec in good faith relied on those words and deeds to continue with the time and expense of an Article 1120 tribunal. The United States now seeks consolidation before this Tribunal, which effectively would discard Tembec's efforts and investment in the Article 1120 proceeding. The United States should not be allowed to "blow hot and cold" on the issue of consolidation. The United States slept on whatever rights it may have had to seek consolidation, while asserting contrary positions that induced Tembec to expend substantial resources in reliance on those representations. The United States is now estopped from reversing its position.[31]

III. THE TRIBUNAL HAS NO AUTHORITY TO CONSOLIDATE THE JURISDICTIONAL QUESTIONS PRESENTED TO THE ARTICLE 1120 TRIBUNALS

The United States' argument at the June 16, 2005 hearing that "consolidating these claims, if only for jurisdictional purposes is fully warranted," could not be more incorrect.[32] The Tribunal's authority under Article 1126 is to consolidate "claims" where the prerequisites for consolidation have been established. The Tribunal "may … assume jurisdiction over, and hear and determine together, all or part of the *claims* [or] one or more of the *claims*…."[33] The United States has argued to the Article

[31] Laches and estoppel are applicable here as threshold propositions, but they are also equitable doctrines and bar the United States' motion because it is unfair.

[32] Hearing Transcript at 47 (statement of Ms. Menaker). Nor can the United States use consolidation, as declared at the hearing, to introduce jurisdictional objections against Claimants that it failed to raise in Article 1120 proceedings, no matter how easy or difficult they might be to rebut. *See* Hearing Transcript at 46 (statement of Ms. Menaker) ("Tembec and the United States have already briefed those objections. Canfor and Terminal can address those objections in short order.").

[33] Article 1126(2)(Emphasis added).

1120 tribunals that Chapter 11 does not apply to Tembec's and Canfor's claims because the United States did not consent to arbitrate under Chapter 11 claims involving U.S. antidumping and countervailing duty orders and determinations. Until the Article 1120 tribunal determines that a claim exists, the ordinary meaning of Article 1126 does not authorize this Tribunal to order consolidation because, as the United States has argued, there may be no claims to consolidate. Whether there are Chapter 11 claims that this Tribunal may consolidate must be determined in the first instance by the Article 1120 tribunals to whom the United States raised its jurisdictional objections.

Nothing in Article 1126 would or could allow this Tribunal to decide in the first instance whether, in light of jurisdictional objections, any Chapter 11 claims exist that may be consolidated. The predicate for an Article 1120 tribunal's existence is the submission of claims under Chapter 11. Thus, the Article 1120 tribunal necessarily must decide whether the submitted claims are jurisdictionally valid, as that question is intrinsic to the tribunal's existence. By contrast, the predicate for the Article 1126 tribunal's existence is that "claims" exist for which there may be common questions of law or fact warranting consolidation. The Article 1126 tribunal must decide whether claims should be consolidated, but that decision can be made only after it has been determined that there are any cognizable Chapter 11 claims at all. Were Tembec's claims jurisdictionally invalid as the United States has asserted before the Article 1120 tribunal, then they would not exist and there would be no claims for the Tribunal to consider for consolidation. Therefore, this Tribunal cannot take any action on consolidation until the Article 1120 tribunals determine first whether there are any claims existing within the jurisdiction of Chapter 11.

Alternatively, were this Tribunal to decide to consolidate and assume jurisdiction over any claims, the jurisdictional defense raised by the United States before the Article 1120 tribunals, that there are no cognizable claims under Chapter 11 in the cases brought by Canfor, Tembec, and Terminal, would necessarily have been waived. This Tribunal's authority is limited, by the ordinary meaning of the terms in Article 1126, to the assumption of jurisdiction over claims, and does not extend to the question whether the claims can be heard at all. The United States, by requesting consolidation, is conceding that claims exist to consolidate. This concession necessarily waives any jurisdictional objection that no claim exists to arbitrate.

When there is no contest over jurisdiction, or after a jurisdictional challenge has been resolved, an Article 1126 tribunal may assume jurisdiction, provided it can satisfy all of the appropriate criteria. In the present case, however, the United States is both too late and premature: too late because it did not raise this jurisdictional defense with its Statement of Defense, neither for Canfor nor for Tembec; too late because it is estopped, both legally and equitably, having actively misled the other parties and having moved for consolidation for reasons wholly divorced from the criteria in Article 1126; and premature because it has left pending and unresolved with Article 1120 tribunals its own challenges to jurisdiction. The United States imposed on the other parties the very substantial expense of responding to its motions to dismiss for lack of jurisdiction, and then after full briefing (and in Canfor's case after a hearing), it abandoned its own challenges. Article 1126 does not extend any authority to resolve these jurisdictional challenges, making the request for consolidation premature.

The procedure available to the United States within the terms of Article 1126 and the UNCITRAL Rules required complete statements of defense, including pleas for consolidation.[34] Because a plea for consolidation presumes jurisdiction in general for Chapter 11, but not for the Article 1120 tribunals named for separate proceedings, it can be acted upon only after Article 1120 tribunals have decided, when challenged, the first and necessarily prior question. The request for consolidation, therefore, must be made in the Statements of Defense, but any request for action on such a request must await a conclusion as to whether there are claims to consolidate.

Article 1126 provides for this necessary sequencing that the United States has ignored. According to Article 1126(2), an Article 1126 tribunal must be "satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common." The inquiry whether the claims "have a question of law or fact in common" necessarily presumes cognizable claims over which jurisdiction may be assumed. A motion challenging the viability of claims therefore must precede a motion to consolidate, and must be heard by the Article 1120 tribunals.

This interpretation of Article 1126(2) explains implicitly Article 1126(3), which refers to "[a] disputing party that seeks an order under paragraph 2." Hence, a disputing party may offer Article 1126 as a jurisdictional defense without requesting an order for consolidation. When the same party chooses also to challenge jurisdiction entirely, it must submit that challenge to resolution by the Article 1120 tribunals (as the

[34] The United States may be inclined to argue that it cannot be obliged to plead for consolidation before a second Statement of Claim may be filed by another party, and that the requirement to plead for consolidation within an original, complete Statement of Defense cannot apply. The problem the United States confronts in such an argument here, however, is that two Statements of Claim had been filed before the United States submitted any Statement of Defense, and the United States filed two Statements of Defense referencing what it now alleges are claims suitable for consolidation without ever suggesting consolidation for either case.

United States did). Were those tribunals to resolve that there were no viable claims, it would be the end of the matter, with no commitment of further resources. But were those tribunals to deny the motion for dismissal of the claims, the moving party could then, having included the challenge for consolidation as required by UNCITRAL Rule 21, "seek[] an order under paragraph 2."

Stating or pleading a defense is not the same as seeking an order. The United States sought an order without stating or pleading the defense, which the NAFTA terms and UNCITRAL Rules do not permit. The United States challenged jurisdiction over any and all claims, and before that challenge could be resolved by either of the relevant Article 1120 tribunals, the United States sought an order for consolidation. These actions, in this sequence, are contrary to the requirements of Rule 21, the authority conferred in Article 1120, the authority and the sequencing in Article 1126. It follows that such violations of so many rules and procedures would yield unfair and inefficient results.

IV. THE PURPOSE AND RATIONALE OF ARTICLE 1126 DO NOT ALLOW CONSOLIDATION IN THIS CASE

The Tribunal should apply Article 31 of the Vienna Convention on the Law of Treaties to questions about consolidation that require interpretation of NAFTA and the UNCITRAL Rules.[35] Article 31 states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their

[35] *See*, *e.g., Mondev International Ltd. and United States*, Award of the Tribunal, ICSID Case No. ARB (AF)/99/2 (Oct. 11, 2002) at para. 43.

context in the light of its object and purpose."[36] Ordinary meaning requires dismissal of the United States' motion for consolidation; it also requires rejection of it.

A. The Text Of NAFTA Provides The Test For Consolidation

The NAFTA Parties established an analytical framework for Article 1126 tribunals to apply when determining whether a request for consolidation should be granted. Article 1126(1) requires the Tribunal to apply the UNCITRAL Rules in the establishment and conduct of these proceedings to the extent that the rules are not preempted by specific provisions in Article 1126. The Tribunal must be satisfied that (1) there are common questions of law and fact; (2) consolidation is in the interests of fairness and efficiency; (3) there are good reasons for the Tribunal to exercise its discretion in favor of consolidation;[37] and (4) the Tribunal should assume jurisdiction over all or part of the claims, or one or more of the claims, the determination of which it believes would assist in the resolution of the others.[38]

The United States bears the burden of persuading the Tribunal that the U.S. request for consolidation should be granted. The United States is the "disputing party that seeks an order under paragraph 2" of Article 1126, and the Tribunal must be "satisfied" that consolidation is warranted. It is a well-established principle of international law that the party affirmatively advancing a position—here, the United States—bears the burden of proving that proposition ("*actori incumbit probatio*").[39]

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[36] Vienna Convention On The Law Of Treaties, Article 31(1), 1155 U.N.T.S. 321 (May 23, 1969).

[37] Article 1126(2) states that the Tribunal "*may* … assume jurisdiction" over matters before the Article 1120 tribunal.

[38] See Article 1126(2).

[39] *See, e.g.,* Mojtaba Kazazi, *Burden of Proof and Related Issues: A Study On Evidence Before International Tribunals* (The Hague / London / Boston 1996) at 116-117 ("While the social and cultural characteristics of each nation as well as particularities of each legal system taints the implementation of

(continue)

B. The Purpose And Rationale Of Article 1126 Are Derived Primarily From The Text Of NAFTA

The Tribunal asked the parties to explain the rationale of Article 1126 and to provide information on what is known about Article 1126 besides the references to the *travaux préparatoires*.[40] The Tribunal asked for examples of cases where consolidation would be warranted.[41]

The purpose of Article 1126 is to consolidate appropriate arbitration cases under NAFTA's Chapter 11, but not for any cases in any circumstances. The language of Article 1126 and other provisions places restraints on the consolidation of cases with common facts or legal issues, and those restraints are indicia of the NAFTA Parties' cautious view of Article 1126:

(1) There must be a "*question* of law or fact in common" among cases to be consolidated, not merely common laws or common facts.[42] Common facts and legal issues may exist in multiple cases. Consolidation, however, would be pointless unless

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(continued)

the rule with a different shade, the essence of the rule remains the same, in that the party who asserts a fact, whether claimant or respondent, is responsible for providing proof thereof."); *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Final Award (June 27, 1990), 30 I.L.M. 577, YCA 1991 at 106, 122 ("'The term actor in the principle *onus probandi actori incumbit* is not to be taken to mean the plaintiff from the procedural standpoint, but the real claimant in view of the issues involved….Hence, with regard to 'the proof of individual allegations advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact' ") (quoting Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Grotius Publications, Cambridge, (1987), pp. 332, 334 and Duruard v. Sandifer, *Evidence before International Tribunals*, University Press of Virginia, Charlottesville, (1975), p.127, footnote 101).

[40] *See* Canfor Corp. v. United States, Tembec et al. v. United States, Terminal Forest Products Ltd. v. United States, Transcript of the First Hearing of the Consolidation Tribunal (June 16, 2005) (available at www.state.gov/s/l/c14432.htm) ("Hearing Transcript"), Questions 1 and 2 at 153.

[41] Hearing Transcript, Question 13 at 161.

[42] The French and Spanish translations of Article 1126 likewise focus on "questions" of law or fact.

resolving certain questions of law or fact for one claimant would also resolve the same questions for another claimant.

(2) Even if there "appear" to be common questions of law or fact, the Tribunal must be satisfied ("*convaincu*") that there are common questions of law or fact. The disruption of the arbitration process and the additional costs and burdens of forming a consolidated tribunal are good indications of why the NAFTA Parties did not agree to a low legal threshold for an Article 1126 tribunal's decision to consolidate.[43]

(3) Consideration of "the interests of fair and efficient resolution of claims" is a check on consolidation. Even where there are common questions of law or fact, the costs and burdens of consolidation or the circumstances surrounding the request may not justify such a severe measure. Fairness and efficiency concerns would preclude consolidation of cases when deliberations by an Article 1120 tribunal are near complete, or would be unnecessarily interrupted; there are too few common questions of fact or law to be resolved; consolidation would allow parties to change their positions on issues already argued or introduce new arguments that had been waived; the right to request consolidation itself had been waived; or consolidation was used as a procedural tactic to disrupt and delay resolution of a claimants' claims.

(4) The Article 1126 tribunal's discretion not to consolidate, even when the basics of the Article 1126 analytical framework are fulfilled, supports the view that the NAFTA Parties left room for reasons other than fairness or efficiency that would

[43] *See* Tembec's Submission in Opposition to Request for Consolidation (June 10, 2005) ("Tembec Pre-Hearing Brief") at 22-23. The *travaux preparatoires* do not contain notes or memoranda regarding the intent of particular provisions of Chapter 11. Whether the United States has such notes or memoranda about the purpose of Article 1126 is unknown, but none has been disclosed and the NAFTA Parties have given no rationale for Article 1126 beyond what may be interpreted from the text of the Agreement.

counsel against denying jurisdiction to an Article 1120 tribunal. Consolidation must be in the overall interest of justice for a tribunal to exercise its discretion.

(5) A request for consolidation must be fair and timely. The UNCITRAL Rules constrain the parties from being able to raise consolidation at any point in the proceedings. The UNCITRAL Rules are clear on the time limitations for jurisdictional pleas; the Parties did not modify those rules in Article 1126, as they could have, had they wanted consolidation to be available at any time.

(6) Consolidation was not intended as a substitute for *stare decisis*. Article 1136(1) provides: "An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case."[44] Consolidation cannot avoid inconsistent decisions because other cases with different parties may raise similar or common questions of law or fact but will not be bound by the decision of an Article 1126 tribunal any more than they would be bound by an Article 1120 tribunal. There are numerous other Canadian lumber companies that could bring claims after these three arbitrations are resolved; the potential for inconsistent awards would still be present because of the explicit language of Article 1136(1) and the inherent nature of arbitration. The United States' argument misconstrues the issue: the issue is not whether the Article 1120 tribunals will reach consistent decisions, but whether it is fair and efficient to hear one or more claims together.

(7) Article 1126 must be considered in the context of Chapter 11, which protects and promotes foreign investment, and was designed to provide foreign investors with a right to make claims under Article 1120 directly against the NAFTA

[44] NAFTA Article 1136(1). The word "Tribunal" is defined in Article 1137 to include tribunals formed under Article 1126.

governments, when that right previously did not exist.[45] If at all possible, Article 1126 should not be construed as impinging on foreign investors' rights to submit claims before consensual tribunals under Article 1120.

C. Consolidation Of Phases Of The Cases Is Impossible Where Parties Are Direct Competitors

The merits phase of these cases includes liability and quantum of damages.[46] Damages are always determined with reference to causation, such that they should be taken together by the same tribunal. The notion that the same tribunal should examine damages and quantum powerfully counsels against an Article 1126 tribunal assuming jurisdiction where parties are competitors in the same industry and damage assessments will require voluminous confidential information.

Questions regarding the causation and quantum of damages will be very detailed and entirely claimant-specific. They are not common questions. Proof of the causation and quantum of damages will come predominantly from the Claimant's confidential business information, including information about business plans, sales prices, profits and losses, customer data and market share and valuation of assets.

The sensitivities of the confidential information being submitted ultimately would require the Tribunal to manage three separate proceedings instead of three Article 1120 tribunals, each managing their own proceedings and maintaining confidential documents separately from non-parties. Facing similar circumstances, the

[45] It is the express intent of NAFTA to protect and promote investment. Article 102(1) (c) and (e) state that "[t]he objectives of this Agreement, as elaborated more specifically through its principles and rules," are to "increase substantially investment opportunities in the territories of the Parties" and to "create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes."

[46] *See* Hearing Transcript, Question 5 at 156 ("We have heard already that I think all the parties actually agreed that if you would assume as consolidation Tribunal liability, then you have also to issue quantum. I think parties are in agreement on that one.").

HFCS Tribunal concluded that "[t]wo tribunals can handle two separate cases more fairly and efficiently than one tribunal where the two claimants are direct and major competitors, and the claims raise issues of competitive and commercial sensitivity."[47] As discussed further below, the same tribunal cannot reasonably hear arguments on liability and damages simultaneously from direct competitors.

D. Consolidation Was Not Meant To Give "Two Bites At The Apple"

Were the Tribunal to consolidate jurisdictional questions, those questions would have to be taken from the Article 1120 tribunals at the *status quo ante*. Article 1126 was intended to consolidate existing claims, not create an artificial opportunity for new rights to be asserted or claims to be made.

The United States has effectively promised to raise new objections against Canfor and Terminal in a consolidated proceeding in order to make consolidation of the jurisdictional and merits phases more likely.[48] But the United States cannot raise new jurisdictional defenses to bolster its consolidation request, any more than one of the Claimants could promise to assert breaches of other distinct articles under Chapter 11 (1106 Performance Requirements, for example) in order to make consolidation less likely. To the contrary, the Article 1126 Tribunal has no authority to resolve the threshold jurisdictional arguments advanced by the United States in the Canfor and Tembec proceedings, let alone to bring new objections against Canfor and Terminal that it to date has brought uniquely against Tembec.

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[47] *HFCS* Order at 5.

[48] *See* Hearing Transcript at 46 (statement of Ms. Menaker) ("[T]his Tribunal ought to consider all three of our jurisdictional objections in a preliminary phase if these cases are consolidated. Tembec and the United States have already briefed those objections. Canfor and Terminal can address those objections in short order.").

Were the Tribunal simply to "start over" substantively, it could not begin with the pending jurisdictional objections, for it has no authority to touch them. The United States could not be allowed to resubmit its Statements of Defense on jurisdiction, because they had to have been submitted in the first instance pursuant to the rules governing Article 1120. The Tribunal would have to begin with those claims it determined shared common questions of law or fact, and which it determined it could hear in the interest of fairness and efficiency.

E. This Case Contrasts With Examples Where Consolidation Would Be Appropriate Under Article 1126

The Tribunal asked for examples of where consolidation would be appropriate.[49] Article 1117(3) provides one example of how consolidation could occur consistent with the purpose of Article 1126 and the context of Chapter 11. Consolidation would be appropriate where an investor and the investor's enterprise submit separate claims, both of which are for the same enterprise and which arise out of the same events.[50] This fact pattern bears some resemblance to the *CME* and *Lauder v. Czech Republic* cases, involving claimants with a common identity pursuing similar claims in different fora, over which the United States has expressed concern.

Consolidation for cases such as *CME* and *Lauder* would address potential problems that could arise from separate proceedings, including forum-shopping, double-recovery of damages, and confusion as to a respondent government's obligations to

[49] *See* Hearing Transcript, Question 13 at 161.

[50] Article 1117(3) states: "Where an investor makes a claim under this Article and the investor or a non-controlling 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 1116, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby."

persons sharing a common identity. It would be unfair to the respondents to allow an investor to make the same claim for the same kinds of damages in multiple Article 1120 proceedings, each in the name of a different subsidiary of the investor.

A claimant should not be allowed to burden the respondent government with multiple defenses of the same claims or a claimant's internal dispute over which subsidiary is entitled to compensation. Article 1126 appropriately would prevent abuse of Article 1120 by a foreign investor; however, it is notable that even in that instance, the Article 1126 tribunal would be required to consider whether "the interests of a disputing party would be prejudiced" by consolidation under Article 1117(3). Even where there was a common identity among claimants and the potential for abuse or gross inefficiency was manifest, the NAFTA Parties did not intend consolidation of Article 1120 claims to be automatic.

Consolidation would be appropriate where multiple claimants file their claims simultaneously (or near simultaneously) to pursue a common claim against the respondent government and mutually consent to a consolidated proceeding. Claimants may perceive cost-saving benefits to pursuing their claims together, and the respondent government similarly would find consolidation to be efficient. This pattern would appear to fit the so-called "Cases Regarding the Border Closure due to BSE Concerns" ("BSE cases"). Tembec has little information about these cases, but according to the State Department's website, five claimants represented by the same counsel submitted to the United States Notices of Arbitration on the same date, with identical wording but for the

names of the claimants.[51] It does not appear that any of the claimants have commenced arguments separately from the other claimants on the substantive issues of the case, nor does it appear that any of the BSE cases have progressed to the appointment of separate Article 1120 tribunals. Consolidation at the beginning of those cases would seem likely to be fair and efficient, based on what little information is publicly available.[52]

Other factual scenarios may be appropriate for consolidation where different claims have common questions of fact or law, jurisdiction under Chapter 11 is not disputed, and the request to consolidate questions has been made prior to argument by the parties separately about the common questions before Article 1120 tribunals. These examples, however, would have to overcome the obstacles that are present in the case before this Tribunal.

There are many distinctions between these hypothetical cases and the case presently before the Tribunal. In the case here, there is no common identity among the Claimants. They are direct competitors. Claimants have chosen to present their claims separately, seeing no efficiencies to be gained from a consolidated proceeding. Only the United States requests consolidation, but the United States made that request while still contesting jurisdiction generally and long after learning of all three claims; while declaring that it did not intend to consolidate; while confirming that

[51] *See* United States Dep't of State website, "Cases Regarding the Border Closure due to BSE Concerns," (available at www.state.gov/s/l/c14683.htm)), attached as Exhibit 1.

[52] The United States did not list the BSE cases under their individual headings on its website, but instead listed them all under a unified title, even though the United States claims that no consolidation request has yet been made. Canfor Corp. v. United States, Tembec et al. v. United States, Terminal Forest Products Ltd. v. United States, Response of The United States of America to Tembec's Motion to Dismiss (July 12, 2005) at 6-7.

declaration by going forward with jurisdictional arguments in separate Article 1120 proceedings; and while presenting all of its jurisdictional pleas in the *Canfor* and *Tembec* Statements of Defense without any reference to Article 1126.

V. THERE ARE INSUFFICIENT COMMON QUESTIONS OF LAW OR FACT TO WARRANT CONSOLIDATION

A. Common Questions Of Law Or Fact Must Be Material To The Disposition Of An Award To Warrant Consolidation

Article 1126 requires that the Tribunal be satisfied that the claims "have a question of law or fact in common" before ordering consolidation. At the June 16, 2005 hearing, the Tribunal queried the parties as to the meaning of the commonality requirement in Article 1126, which is not apparent from the plain text of NAFTA.[53] The United States seems to agree with Tembec and Canfor that the common questions of law or fact must be material to the disposition of an award.[54] A "material" common question is one which is "[i]mportant" to or "having influence or effect" on the ultimate outcome of a case.[55]

The Article 1126 commonality requirement is tempered by the considerations of "fairness and efficiency" that the Tribunal must take into account in reaching a decision on consolidation. Different claims may have certain facts or legal issues in common, but it would not be fair or efficient to consolidate if the answer to such questions would not resolve the questions that must be decided by the Tribunal to

[53] Given the relative novelty of consolidation in international arbitration, arbitral bodies outside the NAFTA context have not had an occasion to address the meaning of such concepts as "common question of law or fact."

[54] *See* Hearing Transcript at 265-66 (statement of Mr. Mitchell) (noting that commonality "revolves around the degree of significance to the proceeding and to its disposition"); 272-73 (statement of Ms. Menaker) (arguing that the Tribunal should consider whether issues of law and fact are "dispositive").

[55] *Black's Law Dictionary* at 674 (abridged 6th ed. 1991).

issue an award. Consolidation based on non-dispositive issues would amount to nothing more than a waste of resources for all of the parties involved.

The application of the commonality requirement in the *HFCS* consolidation proceeding supports Tembec's view that the common questions of law or fact must be material or dispositive to the outcome of the proceeding. Mexico "argued, with persuasive force, that the claims submitted by CPI and ADM/Tate & Lyle are very much the same, that the merits issues of state responsibility would be the same, and that while there might be important differences between the claimants with respect of damages, those differences did not justify separate proceedings."[56] The Tribunal decided that "notwithstanding certain common questions of fact and law, the numerous distinct issues of state responsibility and quantum further confirm the need for separate proceedings."[57] The Tribunal essentially disregarded the existence of certain common issues as a basis for consolidation because they were not dispositive to the proceeding as were the dissimilar questions centering on Mexico's alleged violations of Chapter 11 and damages, and were overcome in any case by concerns about fairness and efficiency in resolving the claims.

The United States must demonstrate that any common questions of law or fact are material to the disposition of an award. As Tembec already has indicated in its pre-hearing brief, the United States cannot prove the existence of common questions sufficient to justify the consolidation of Tembec's claim with any of the others.

The Tribunal asked how much of the cases could be consolidated, how many common questions were enough to consolidate, and where consolidation should

[56] *HFCS* Order at para 13.
[57] *Id*. at 15.

start procedurally.[58] Answers to these procedural questions about partial consolidation are contained, at least implicitly, in the text of Article 1126. Article 1126 permits consolidation, but only of claims, to resolve common questions of law or fact, and not where consolidation would impose burdens of unfairness or inefficiency in the resolution of the claims. Were it first established that Chapter 11 claims exist, one common question of law or fact would meet the initial threshold of consolidation (commonality), but it would not make consolidation appropriate where other questions still had to be resolved separately by the Article 1120 tribunals. The *HFCS* Tribunal acknowledged that "the claims submitted to arbitration do have certain questions of law or fact in common," but the tribunal did not consolidate those questions, finding that the unfairness and inefficiencies of such a consolidation could not be overcome.[59]

B. The United States Has Not Met Its Burden Of Showing That The Questions Material To Disposition Of An Award Are Common

The United States asserts that "[t]he claims for Canfor, Tembec and Terminal contain numerous common issues of law and fact,"[60] but dedicates just four pages of its pre-hearing brief to demonstrating such alleged similarities.[61] The United States frames the supposed commonalities very broadly, and intentionally neglects to focus on the real questions that are at stake to resolve the Tembec, Canfor, and

[58] *See* Hearing Transcript, Question 4 at 155, Question 5 at 155-56, Question 6 at 156, Question 14 at 161-62.

[59] *Corn Products Int'l, Inc. v. United Mexican States and Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, Order of the Consolidation Tribunal (May 20, 2005) ("*HFCS* Order") at paras. 6, 17, 18, 19.

[60] *See* U.S. Pre-Hearing Brief at 11.

[61] By contrast, Tembec dedicated about twice the space to explaining the absence of common issues of law and fact.

Terminal claims. A superficial list of commonalities is insufficient for the purposes of this Tribunal's decision on consolidation.

The United States first provides a cursory treatment of common issues of law.[62] It lists without comment the Chapter 11 provisions that form the basis of each of the party's claims, including Articles 1102, 1103, 1105, and 1110. Such a list is almost generic, for the available grounds for Chapter 11 claims are limited and will be common to virtually all Chapter 11 disputes.

The United States admits that it "has neither submitted a statement of defense on the merits in any of these cases, nor briefed the merits," but that it "anticipates…it would raise many of the same legal defenses to the claims of all three claimants."[63] Without a knowledge of these defenses and how they operate, however, the Tribunal cannot evaluate the degree of commonality on questions of law or fact and whether such questions are dispositive. The *HFCS* Tribunal similarly found that the failure on the part of Mexico to elaborate on its defenses detracted from its ability to determine the importance of the alleged similarities.[64]

The United States similarly relies on superficial arguments regarding what it deems common issues of fact. Many of the broad-brushed U.S. assertions recite common facts, but do not point to common questions of fact or law. None of the parties, for example, disputes that the claims are related to the various *Softwood Lumber*

[62] *See id*. at 11-12.

[63] *Id*. at 12.

[64] As the *HFCS* consolidation tribunal explained, "Mexico did not indicate, apart from jurisdiction, common defenses it intends to raise to the claims." *HFCS* Order at para. 14. The Tribunal found that although "Mexico is not required under Article 1126 to so indicate…it might have been helpful to Mexico's position in terms of evaluating the significance of any common questions of law or fact." *Id*.

determinations that are listed by the United States.[65] The United States tries to hide behind its assertion that "[t]he determinations and legislation apply to claimants in the same manner." However, it is the material question of exactly how these U.S. measures constitute a violation of Chapter 11, and how they have caused damages, that varies from claimant to claimant. The United States is far from demonstrating the existence of commonality sufficient to justify consolidation.

C. The Material Questions Of Law And Fact In These Cases Are Distinct

The questions of law or fact material to resolution of the Claimants' claims differ considerably depending on the claimant. The United States argued to the *Tembec* Tribunal that "[t]o be the subject of a claim under Chapter Eleven, however, a measure must relate to the investor with respect to the establishment or acquisition of new investments in the territory of the host Party, or with respect to certain activities of existing investments in that territory."[66] Thus, according to the United States, the questions of law under Chapter 11 cannot be resolved without specific reference to the investors or investments at issue in the claims.

There is no common identity between Tembec and any of the other Claimants as investors, nor is there any common identity between Tembec's investments and the other Claimants' investments. It should come as no surprise that Tembec and the other Claimants pursue their own respective business plans, which manage and operate their own investments differently, and confront the U.S. measures

[65] *See* U.S. Pre-Hearing Brief at 13.

[66] Tembec et al v. United States (Article 1120 proceeding), Reply On Jurisdiction of Respondent United States of America (Mar. 28, 2005) at 29.

in different ways. Tembec already has given examples of how the U.S. measures were directed differently toward Tembec and Canfor.[67]

The United States has not explained what common questions of law the Tribunal could resolve for all of the Claimants in a consolidated proceeding, when it believes that each Chapter 11 claim must relate specifically to the investor and its investments to be successful. U.S. violations of Articles 1102 and 1103 affected the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition" of all three Claimants' distinct investments in distinct ways. The question of expropriation in violation of Article 1110 is inherently specific to the Claimant and its investments. A tribunal must make highly fact-intensive, company-specific inquiries to assess the effects of these violations on a claimant's investments in the United States. The impact of the U.S. violation of the "minimum standard of treatment" differs depending on the claimant. The nature and extent of such a violation is just as company-specific and fact-driven as the inquiry into violations of other provisions of Chapter 11.[68]

Tembec's business plans and competitive situation changed as a result of the U.S. violations. Tembec cannot be certain, but submits that it is reasonable to believe that Canfor's and Terminal's business plans and competitive situations also changed, although probably not in the same ways because the companies themselves are so very different and are situated differently.[69] Consideration of these claims will be

[67] *See* Hearing Transcript at 325-328.

[68] The Tribunal asked the parties to provide a matrix illustrating what questions of law or fact, if any, were held in common among the three Claimants. *See* Hearing Transcript, Question 9 at 158. *See* Exhibit 2.

[69] *See* Tembec's "East Is East" Chart provided at June 16, 2005 hearing, resubmitted here as Exhibit 3.

unique for each company and will involve the submission and examination of unique, competitively-sensitive, business proprietary information.

For instance, the U.S. Department of Commerce made a determination regarding Eastern White Pine which forced Tembec to close its Eastern White Pine mill in Woodsville, New Hampshire. Canfor has no similar investment and was not affected by that determination. The United States has not begun to identify the common investments or the common impacts on the investments that would create common questions of law or fact. Even if it could, the issues could not be heard in a single hearing because each company would have to present evidence from confidential business information that it cannot disclose to its competitors. As Tembec pointed out in its pre-hearing brief, Eastern and Western Canada had different products, different markets and reacted differently to the U.S. measures. What common questions could be resolved among the three claims remains a mystery that the United States has failed to solve.

Tembec, Canfor, and Terminal claim damages, but the actual measurement of those damages surely is different for all three companies.[70] The U.S. violations of Chapter 11 injured Claimants' U.S. investments to different degrees and in varying ways. All suffered different financial losses depending on market shares and cost structures, and took different steps to mitigate. The calculation of damages also would involve different and complex models, using company-specific, confidential data. The economic models showing the impact of unlawful duties on the Claimants and their

[70] Canfor claimed damages of US$250 million, (*see* Canfor Statement of Claim at 50); Tembec claimed damages of US$200 million, (*see* Tembec Statement of Claim at 45); and Terminal claimed damages of US$90 million (*see* Terminal Notice of Arbitration at 17).

investments are likely to be different, and may be competing. Questions regarding damages doubtless are not common and cannot be resolved in one consolidated proceeding.

The *HFCS* consolidation proceeding is instructive on the issue of commonality as to the merits of the claims. There, both CPI and ALMEX shareholders pointed to "different strategic business plans for the claimants, different investments, markets, technology, costs, and different impacts" of a Mexican tax on high fructose corn syrup.[71] In addition, the Tribunal noted that "[d]iffering expectations in making the investments were also cited [by the claimants], all of which could represent different questions of fact within the meaning of Article 1126(2)."[72] The claimants "were clear that their investments were based on different business strategies, that their market focus and investments were different, and that the tax would have a substantially dissimilar impact on the claimants."[73] Based on these considerations, the Tribunal found that issues going to the merits and damages were "distinct" so as "to confirm the need for separate proceedings."[74]

As in *HFCS*, the dispositive issues of law and fact before this Tribunal are company-specific and centered on the "dissimilar impact" of the government measures on the claimants' investments. Tembec, Canfor, and Terminal were all affected differently by the *Softwood Lumber* determinations, and suffered distinct injuries as a result. The issues of law and fact impacting the actual disposition of an award differ

[71] *HFCS* Order at para. 14.
[72] *Id*.
[73] *Id*.
[74] *Id*. at para. 15.

among all three claims. The United States has failed to satisfy—and as to these three cases, cannot satisfy—its burden of demonstrating common questions of law or fact warranting consolidation under Article 1126.

VI. CONSOLIDATION OF THESE CASES IS NOT IN THE INTERESTS OF FAIRNESS OR EFFICIENCY

The Tribunal may not assume jurisdiction unless consolidation promotes the "fair and efficient resolution of the claims." [75] Consolidation of Tembec's claims with those of Canfor and Terminal, with other jurisdictional challenges already briefed and pending before other tribunals already serving for a year or more and already consuming resources would be neither "fair" nor "efficient."

The ordinary meanings of the terms "fair" and "efficient" as set forth in Article 1126 compel this conclusion.[76] The term "fair" means "impartial; just; equitable; disinterested" [77] or that which is decided "equitably, honestly, impartially, justly; according to rule." [78] The term "efficient" means "acting or able to act with due effect"[79] or "productive of effects" [80]or "productive without waste." [81] Thus, the ordinary meanings of these terms indicate that the Tribunal may not undertake consolidation if

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[75] Art. 1126(2).

[76]The Vienna Convention on the law of Treaties provides the applicable guidance in interpreting the meaning of NAFTA's provisions. *See e.g., Mondev International Ltd. and United States*, Award of the Tribunal, ICSID Case No. ARB (AF)/99/2 (October 11, 2002), at para. 43. Article 31(1) of the Vienna Convention provides that the provisions of a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 321, at Art. 31(1).

[77] *See Black's Law Dictionary*, at 633 (8th ed. 2004).

[78] *See Oxford English Dictionary*, at 673 (2nd ed., vol. 5 1989). *Webster's Ninth New Collegiate Dictionary* defines the term "fair" as that which is "marked by impartiality and honesty; free from self-interest, prejudice, or favoritism . . . : conforming with the established rules. *Webster's Ninth New Collegiate Dictionary,* at 445 (1983). The text further notes that the term "fair" implies an elimination of one's own feelings, prejudices, and desires so as to achieve a proper balance of conflicting interests.

[79] *Ballantine's Law Dictionary*, at 391. (3rd ed. 1969).

[80] *Oxford English Dictionary*, at 84,

[81] *Webster's Ninth New Collegiate Dictionary*, at 397.

doing so would impede or prejudice Tembec's efforts to obtain just and equitable relief, or otherwise hinder or delay prompt and final resolution of the issues.

No reasonable interpretation of the phrase "fair and efficient" permits consolidation under the circumstances presented here. The United States seeks to halt two separate and ongoing proceedings – each of which involves distinct parties and interests, and each of which has required the expenditure of considerable resources defending those interests – and combine them into a single new proceeding before a new tribunal that is unfamiliar with the issues, interests or parties. And the United States wants to use Article 1126 to force Terminal to proceed with its suit against the government for US$90 million, to present a Statement of Claim so the United States can proceed with defending against it. Thus, the United States seeks to consolidate Terminal's claims while speculating on what those claims are, based only on a Notice of Arbitration, not a Statement of Claim.

The United States wants to force Tembec and Canfor to join up with the reluctant litigant, the one whose claims remain unknown, as co-claimants in a consolidated proceeding before a tribunal assuming jurisdiction over common claims. The United States gives no explanation for how consolidation of Tembec's claims with Terminal's (or Canfor's, for that matter) are or could be in the interests of fairly and efficiently resolving Tembec's claims.

The United States' motion is a litigation tactic. It has prevented two Article 1120 tribunals from ruling on the United States' own motions on jurisdiction. It blocked a hearing that the United States, alone, insisted was necessary to resolve an objection

launched by the United States. It delayed the Article 1120 proceedings a minimum of six months, and increased costs for the Claimants exponentially.

Such litigation tactics are contrary to fundamental notions of procedural "fairness" underlying dispute settlement processes.[82] The WTO Appellate Body has recognized that "abusive and disruptive" litigation techniques "frustrate the objectives" of dispute settlement, thereby undermining the "*fair*, prompt and effective resolution of trade disputes".[83] Procedural rules must be interpreted in a manner that ensures proceedings "do not become an arena for unfortunate litigation techniques."[84] The United States already has disrupted Tembec's and stalled Canfor's 1120 proceedings on the eve of jurisdictional decisions, and is forcing Terminal to go forward when it has been reluctant to proceed. Notions of "fairness" and "efficiency" embodied in Article 1126 dictate that this Tribunal may not permit the United States to continue perverting procedural rules so as to disrupt or delay proceedings.

The *HFCS* Tribunal recognized that the "fairness and efficiency" concerns enunciated in Article 1126 require that tribunals minimize procedural burdens to ensure the parties are not hampered in their ability to "present their cases."[85] That tribunal rejected Mexico's consolidation request notwithstanding common questions of law and fact because it was concerned that consolidation would create "procedural

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[82] *See, e.g., European Communities – Trade Description of Sardines*, Report of the Appellate Body, WT/DS231/Ab/R (Sept. 26, 2002), at para. 146.

[83] *Id*. The Appellate Body has also noted that "the procedural rules of WTO dispute settlement are designed to promote . . . the fair, prompt and effective resolution of trade disputes. *Id.* at para. 167, quoting *U.S. – FSC*, Report of the Appellate Body, WT/DS108/AB/R, adopted March 20, 2000, at para. 166.

[84] *Id*., at para. 146.

[85] *HFCS* Order at para. 9.

inefficiencies" and other "delays" that would undermine the fair and efficient resolution of the claims.[86]

The *HFCS* Tribunal also recognized that the preferences expressed by each of the parties regarding consolidation are "relevant" in evaluating the "fairness of the proposed consolidation."[87] As in this case, three of the four parties in *HFCS* adamantly opposed consolidation. The Tribunal noted that, although Article 1126 does not specifically address the relevance of parties' preferences on this issue, nevertheless because "party autonomy" is important to the establishment of a consolidation tribunal and its procedural rules, it follows that "party autonomy" "has been read into Article 1126 and accepted by all three NAFTA treaty states…."[88]

A. The Fairness And Efficiency Of Article 1126 Consolidation Must Be Compared To The Article 1120 Proceedings

The Tribunal asked whether "fair and efficient" should be interpreted in isolation or in comparison to existing arbitrations.[89] The language of Article 1126 requires the Tribunal to consider whether consolidation would be "in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties…." This language suggests that the Tribunal should compare the fairness and efficiency of resolving claims through Article 1126 proceedings to resolving the claims according to the *status quo*.[90] The "resolution of the claims" can take place under Chapter 11 only before an Article 1120 tribunal or an Article 1126 tribunal, and the disputing parties

[86] *Id*., at paras. 17 and 18.

[87] *Id.,* at para. 12.

[88] *Id*.

[89] Hearing Transcript, Question 3 at 153-54.

[90] The language of Article 1117(3) confirms this conclusion. The Article 1126 tribunal is asked in that situation to consolidate "unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby."

would argue for one of only two choices. Moreover, the context of Chapter 11's appearance in NAFTA—protecting investment by granting foreign investors private arbitration rights directly against the respondent governments—and all of the constraints on consolidation built into Article 1126, would require that the investor's rights not be diluted merely because the respondent government for its own perceived procedural convenience wants to consolidate one investor's claims with another's.

The *HFCS* Tribunal rejected Mexico's consolidation request, finding that consolidation in that instance would have created "procedural inefficiencies" that would not promote the "interests of fair and efficient resolution of the claims."[91] One party, CPI, was having its claims heard and considered before an "established" Tribunal, while another, ADM, was still awaiting formation of its arbitral tribunal. The consolidation tribunal indicated its concern "that such a long period has elapsed since the [first] claim was filed."[92] The tribunal noted, *inter alia*, that "delay" in arbitral proceedings is relevant to the question of the fairness and efficiency of consolidation.[93] Moreover, because the two proceedings were not procedurally aligned, consolidation would result in "a very substantial delay in decision making" in the earlier proceeding. Thus, in the Tribunal's judgment, such potential for "delay confirms that the test of 'fair and efficient resolution of the claims,' within the meaning of Article 1126, cannot be met."[94]

The reasoning and conclusions of the *HFCS* Tribunal are directly applicable in this case. The *Tembec* Tribunal was fully constituted and actively

[91] *HFCS* Order at para. 17
[92] *Id.*, at para. 18.
[93] *Id*.
[94] *Id.*, at para. 19.

engaged in reviewing the United States' objections to jurisdiction. The United States successfully stayed Tembec's case so it could raise additional jurisdictional objections that it neglected to raise with Canfor, and to force Terminal into a consolidated proceeding with the other Claimants. Terminal is not procedurally aligned with the other Claimants because it has no arbitral tribunal, has provided no Statement of Claim, and has received no Statement of Defense from the United States. Canfor is not procedurally aligned with Tembec because its Article 1120 tribunal is incomplete. The request for consolidation has halted Tembec's progress while the United States tries to manipulate the procedural alignment of the other two Claimants. Tembec has been trying since September 2004 to dispense with the United States' objections to jurisdiction. The *HFCS* Tribunal found the similar situation, where CPI's progress in the arbitration would have been impeded while ADM caught up procedurally, to be unfair and to weigh against consolidation.

B. The Direct Business Competition Between Tembec And Canfor Make It Unfair And Inefficient To Consolidate The Claims

Tembec and Canfor are direct major competitors, yet their investments and business plans differ.[95] Tembec and Canfor are two of the ten largest lumber producers in Canada. They were direct competitors in the bidding for an acquisition of Slocan, formerly also one of the ten largest lumber companies in Canada.[96] Tembec competes against Canfor in various Canadian and U.S. markets relying in part on competitive advantages it has as a predominantly Eastern Canadian company. The competitive nature of Claimants' businesses makes consolidation a less fair and less

[95] The *HFCS* Claimants also were found to be "fierce competitors" even though they had different business plans and different investments. *Id.* at para. 7.

[96] *See* Hearing Transcript at 285.

efficient means to review the detailed analyses required of the impact of the U.S. antidumping and countervailing duty measures on the Claimants' respective investments and businesses.

1. Tembec Could Not Present Its Claims Were It Required To Disclose Confidential Business Information Before Its Competitors

Tembec will need to disclose confidential business information in any proceeding where it is presenting its claims. As the following table illustrates, confidential information regarding Tembec's business plans, the nature of Tembec's investments, Canadian and U.S. sales and price data, Tembec's customers and business strategies all must be submitted to a tribunal to resolve Tembec's claims under Articles 1102, 1103, 1105 and 1110.

Proprietary Business Information Required to Resolve Tembec's Claims
Ø Budgets Ø Business plans and strategies, including decisions about daily operations, expansion, acquisition, and employment Ø Contract terms Ø Cost and production data Ø Customer data Ø Financial and accounting statements Ø Goodwill data and analysis Ø Internal correspondence, including e-mails Ø Inventory data, including volume and value Ø Logistics analysis Ø Management plans Ø Market and competitor analysis Ø Market share data and analysis Ø Marketing and sales presentations Ø Marketing studies Ø Minutes of Board of Directors meetings Ø Payroll information Ø Price data Ø Program sales data Ø Royalty data Ø Sales data

- Ø Supplier data
- Ø Third-party audits
- Ø Third-party business and economic analysis
- Ø Third-party strategic studies
- Ø Valuation of assets
- Ø Vendor-managed inventory data, including volume and value

Tembec would not be able to plead its claims fully were there any risk that the other Claimants would have access to the business proprietary information that must be disclosed to address the elements of the claims. Tembec has no need for any of the business proprietary information of other parties in the NAFTA Chapter 19 proceedings, which are protected from disclosure by administrative protective order, but Tembec will need to rely on confidential information about its own business operations in the presentation of its claims.[97] There are serious risks of competitive harm from the disclosure of such information, and there are antitrust law considerations implicated by the disclosure of business practices and price information among competitors.

2. Procedures To Guarantee Non-Disclosure Of Proprietary Business Information Could Not Be Instituted And Enforced With Fairness Or Efficiency

Were these cases to be consolidated, the Tribunal would be required to adopt complex confidentiality procedures for Claimants to be able to make their claims without divulging proprietary business information to their competitors. The Article 1120 proceedings have no such restraint because competitors are not present. Any set of procedures would have to be examined carefully and vetted by special counsel for risks

[97] In response to jurisdictional arguments from the United States, Tembec explained to the *Tembec* Tribunal that it had no need to rely on business proprietary information subject to administrative protective order submitted by the various parties in the NAFTA Chapter 19 binational panel review proceedings. *See* Tembec Inc. et al v. United States (Article 1120 proceeding), Tembec's Counter-Memorial to the Jurisdictional Objections of the United States, (Feb. 17, 2005) at 24, n.33.

of competitive harm and antitrust issues. They necessarily would require the Claimants to give up the right to hear all the evidence while the United States would hear it all (an obvious violation of due process and fairness). An Article 1126 proceeding cannot be fair and efficient in comparison to an Article 1120 proceeding when substantial quantities of confidential business information from direct competitors must be presented. The Claimants would have to approve any confidentiality procedures selected by the Tribunal before consolidated proceedings could begin to ensure that the procedures protected Claimants' information while preserving Claimants' ability to fully present their claims. The use of confidential business information will permeate every aspect of the case and require separate hearings on almost every issue. An Article 1126 proceeding on the merits would be consolidated in name only, turning into three Article 1120-type proceedings with each Claimant making separate presentations while the other Claimants are given limited access to the evidence presented.

The Tribunal asked whether the parties could adopt the World Intellectual Property Organization ("WIPO") or some other recognized set of confidentiality procedures.[98] It is not apparent that counsel for any of the parties have had practical experience with the WIPO confidentiality procedures--a fact which, by itself, weighs against indiscriminately importing them into a consolidated Article 1126 proceeding. The WIPO rules on confidentiality would impose substantial additional administrative burdens that would not be required in separate Article 1120 proceedings. Under Article 52 of the WIPO arbitration rules, every time a party wants to invoke confidentiality with respect to a submission, it must make an application to the Tribunal to have it classified

[98] *See* Hearing Trasncript, Question 8 at 157-58.

as confidential.[99] The Tribunal must decide for each submission whether the information for which confidentiality was invoked should be so classified, and then must determine the conditions for disclosure and the persons entitled to receive the submission. In some cases, the Tribunal appoints a separate confidentiality advisor to determine what information should remain confidential and to regulate disclosures.

The procedures used by the NAFTA Chapter 19 binational panels to protect business proprietary information, or confidentiality rules governing administrative proceedings before the U.S. International Trade Commission ("ITC") and Department of

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[99] *See* Disclosure of Trade Secrets and Other Confidential Information -- Article 52, World Intellectual Property Organization Arbitration Rules, Article 52, WIPO Publication No. 446 (effective Oct. 1, 2002)(http://www.wipo.int/freepublications/en/arbitration/446/wipo_pub_446.pdf).

> (a) For the purposes of this Article, confidential information shall mean any information, regardless of the medium in which it is expressed, which is:
>
> (i) in the possession of a party;
>
> (ii) not accessible to the public;
>
> (iii) of commercial, financial or industrial significance; and
>
> (iv) treated as confidential by the party possessing it.
>
> (b) A party invoking the confidentiality of any information it wishes or is required to submit in the arbitration, including to an expert appointed by the Tribunal, shall make an application to have the information classified as confidential by notice to the Tribunal, with a copy to the other party. Without disclosing the substance of the information, the party shall give in the notice the reasons for which it considers the information confidential.
>
> (c) The Tribunal shall determine whether the information is to be classified as confidential and of such a nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality. If the Tribunal so determines, it shall decide under which conditions and to whom the confidential information may in part or in whole be disclosed and shall require any person to whom the confidential information is to be disclosed to sign an appropriate confidentiality undertaking.
>
> (d) In exceptional circumstances, in lieu of itself determining whether the information is to be classified as confidential and of such nature that the absence of special measures of protection in the proceedings would be likely to cause serious harm to the party invoking its confidentiality, the Tribunal may, at the request of a party or on its own motion and after consultation with the parties, designate a confidentiality advisor who will determine whether the information is to be so classified, and, if so, decide under which conditions and to whom it may in part or in whole be disclosed. Any such confidentiality advisor shall be required to sign an appropriate confidentiality undertaking.
>
> (e) The Tribunal may also, at the request of a party or on its own motion, appoint the confidentiality advisor as an expert in accordance with Article 55 in order to report to it, on the basis of the confidential information, on specific issues designated by the Tribunal without disclosing the confidential information either to the party from whom the confidential information does not originate or to the Tribunal.

Commerce ("Commerce"), are incorporated into U.S. law. They would have no legal effect in these proceedings. Confidential information in those proceedings is protected by administrative protective order ("APO"), enforceable by U.S. courts, and the rules contain strict penalties for violations, including loss of privileges to practice in the international trade bar. Even were such rules to be adopted by the Tribunal, they could be enforced only by contractual arrangement among the disputing parties. Tembec, and perhaps the other Claimants would feel similarly, is not willing to submit the proprietary data necessary to make its claims when confidentiality could be enforced only through a separate breach of contract action in U.S. courts.

The APO rules are complex and require practitioners to maintain separate document storage facilities with restricted access, computer systems with firewalls to restrict unauthorized access to APO documents, and rigorous and often time-consuming procedures for submitting separate public and proprietary versions of APO documents. Hearings would have to be confidential and either held separately for each company to prevent disclosure of the competitors' information, or held only in the presence of counsel for the parties. The latter format has been used in APO proceedings before the NAFTA binational panels, but those proceedings also do not require live testimony from company officers regarding proprietary business strategies. The only evidence before the NAFTA Chapter 19 panels is a written administrative record prepared by Commerce or the ITC, in contrast to the witness testimony necessary in Chapter 11 arbitrations.

The complexity of confidentiality rules raises concerns about enforcement of inadvertent violations by the United States, which are much more likely in

consolidated proceedings where information proprietary to different companies is commingled. Should the United States accidentally disclose to another Claimant business proprietary information received from Tembec, it is not at all obvious what recourse Tembec would have. The competitive harm would have been done; Tembec would have to pursue rights, if it has any, against a sovereign government for the inadvertent disclosure of Tembec's confidential business information in violation of the arbitration's rules of confidentiality.

The tribunal rejected consolidation in *HFCS*, in part, because of concerns related to the need for complex procedures that might be required in a consolidated proceeding. The tribunal suggested, for example, that each party's need to protect confidential information from the other would hamper and slow the proceedings, noting that "the process, including essential confidentiality agreements, discovery, written submission and oral arguments would have to be carried out, in substantial measure, on separate tracks."[100] The result would be akin to "a parallel proceeding within one arbitral process that will necessarily be far slower and less efficient than proceedings before separate tribunals."[101]

A similar situation confronts Tembec, Canfor and Terminal. These three companies are competitors who do not wish to share confidential information. Consolidation would require complex confidentiality procedures which would hamper and slow the proceedings. Accommodating such arrangements would be cumbersome in terms of oral argument, as well as briefing and other written submissions. Participants and witnesses might have to be excluded from certain portions of the

[100] *HFCS* Order, at para. 8.

[101] *Id.* at para 10.

hearings or argument, making cross-examination difficult, if not impossible. Parties and witnesses excluded from portions of the proceedings would have a difficult time understanding the nuances of all issues and arguments made, further complicating and slowing down proceedings. Even were the Tribunal able to adopt effective procedures, the Tribunal's proceedings would be less efficient than proceedings before separate Article 1120 tribunals because one or two Claimants' submissions would have to wait while the Tribunal would consider questions of law for another Claimant's claims *in camera*.

3. The Competitive Nature Of The Claimants Creates Other Procedural Problems And Inefficiencies

a. In Consolidated Proceedings, Claimants Would Have An Incentive To Undermine Each Others' Claims That Is Not Present In Separate Proceedings

Because of the direct competition among the Claimants, every dollar that one Claimant wins in an arbitration award against the United States improves that Claimant's competitive position vis-à-vis the other Claimants. Consolidation of Tembec's and Canfor's claims would create a dynamic that would not exist in proceedings before separate Article 1120 tribunals. Tembec and Canfor would have incentives to argue against and to undermine each other's claims. Whereas each Claimant submitted claims against one opponent—the United States—they would be forced to pursue their claims against an additional opponent—the competing Claimant. Consolidation in cases like that would reward a respondent for injuring multiple foreign investors. The competing Claimants could be joined to the same proceeding to undermine each others' claims for the benefit of the Respondent and any domestic interests it favored at the expense of foreign investors.

b. Consolidation Would Raise Difficult Questions Of Claimants' Procedural Rights With Respect To Each Other's Claims

Each Claimant will have its own witnesses, own questions and answers for discovery, and its own arguments to raise in the prosecution of its own claims. Were Claimants allowed to rebut each others' witnesses and arguments, the proceeding would become bogged down, more complex and Claimants would unfairly have their own claims against the United States undermined by other Claimants. Yet, were Claimants in the same proceeding unable to challenge the testimony or evidence of other Claimants, they would be disadvantaged with respect to each other and, even more, with respect to the common Respondent.

The Tribunal would be required to obtain separate factual and other information from Tembec, Canfor, and Teminal regarding the adverse impact of the challenged U.S. actions on each company's respective operations, making the Article 1126 proceedings less efficient than separate Article 1120 proceedings. Information presented by Tembec regarding its operations is not necessarily relevant to Canfor and Terminal, and *vice versa*. Yet, each company's counsel would be required to take the time necessary to review and analyze the information, and determine its relevance, if any, or its potential strategic impact on the outcome of the consolidated proceeding. Consolidation would unfairly require Claimants to rebut or explain the different impact of contested measures on other companies in order to explain the impact of these measures on its own. Tembec's case is not that the U.S. measures breached Chapter 11 obligations and harmed all Canadian lumber companies. Tembec's Statement of Claim addresses only harm done to Tembec and its own investments.

More defenses, more pleadings, and more rebuttals would ensue as Claimants would have to prosecute and defend their claims not only against the United States, but also against competing Claimants. The very suggestion of consolidation is possible only through an extraordinary underestimate of the complexities of the cases and issues in dispute, which would be multiplied, perhaps exponentially, by taking the cases together.

4. Tembec Has Incurred And May Continue To Incur Additional Unnecessary Expenses

ICSID has been less than helpful or responsive in enabling the parties to respond to the Tribunal's request for estimates about costs. Tembec asked ICSID for detailed accounting to date to facilitate such projections.[102] It has provided global figures, without any explanation, for "administrative expenses," and implies that arbitrators serving on this Tribunal have incurred no costs or expenses at all.[103] ICSID apparently collects and spends the money of the parties, but does not account for any of the expenditures until after the money is gone, and even then perhaps without detail. So, at this stage, the only thing Tembec can know in response to the Tribunal's inquiry is that it has handed over $80,000 for its Article 1120 Tribunal, which monies presumably will be gone without any benefit of any kind to Tembec were this Tribunal to assume jurisdiction and remove that tribunal from deliberating and deciding the question of jurisdiction that has been briefed before it. ICSID promises some kind of refund, but will not say how much or on what basis an amount will be calculated. So Tembec can know that, at a minimum, it has spent quite a lot of money on a proceeding that this

[102] *See* Letter from Elliot J. Feldman to Secretary General Roberto Danino (July 8, 2005).

[103] *See* Letter from Gonzalo Flores to Elliot J. Feldman (July 13, 2005) showing that no arbitrators' fees have been expensed for this Tribunal.

proceeding could render entirely lost and wasted, apparently in satisfying the criteria for a decision that must promote what would be "fair and efficient."[104]

Tembec already has expended considerable resources defending its interests for the past nineteen months before an "established" Article 1120 tribunal. Tembec spent more than eight months briefing U.S. jurisdictional objections and preparing for a hearing. Each written submission to Tembec's tribunal regarding the U.S. jurisdictional objections required the substantial attention of several attorneys for weeks. Were this Tribunal to overreach and assert authority over the pending jurisdictional objections as well as over claims, consolidation would deprive Tembec of its previous effort and expense before the Article 1120 tribunal and would require wasteful duplication of effort before this Tribunal.

The Tribunal asked the parties to provide an estimate of costs to compare three separate Article 1120 proceedings to one Article 1126 proceeding.[105] While the Tribunal rightly should be concerned about the relative expense of the two types of proceedings, it is impossible, especially without ICSID's more serious cooperation, to forecast comparative expenses reliably. Tembec has no way of knowing what the costs would be for Canfor's and Terminal's Article 1120 proceedings.[106] Tembec could not say how many witnesses Canfor and Terminal might call upon to testify; what discovery they might undertake; what procedural issues will be important to them; how aggressive

[104] Payments to ICSID of course represent only a fraction of the expenses incurred. Tembec spent time and resources having rules of procedure and schedules established, and the very creation of this Tribunal has injected boundless uncertainty as to the value and utility of all that has gone on before the Article 1120 tribunal.

[105] *See* Hearing Transcript, Question 12 at 160.

[106] The only exception might be the case where Terminal decides not to advance its Chapter 11 case and remain on the sidelines, in which case Tembec would estimate the costs of Terminal's Article 1120 proceedings to be near zero.

they will be in the litigation; how much time they will want to prepare briefs; how many briefs they will want to prepare for what issues; whether they will call experts to give testimony on damages; what those experts might charge; how many attorneys will be working on their cases; what rates the attorneys will charge; or any number of other variables that would factor into a reasonable estimate of costs. Nor is Tembec inclined to disclose to its competitors what amounts of money it intends to divert from business-competitive resources for the prosecution of its own Chapter 11 claims. Tembec notes that the cost submissions requested by the *Canfor* Tribunal subsequent to the hearing on jurisdiction were not made public on the United States' website or on any other website typically devoted to documentation of NAFTA Chapter 11 claims, which may reflect a decision by the parties to that case that such information be kept confidential, or may simply be an omission on the part of the United States in the record of the case.[107] Either way, the information is not available to Tembec, and were Tembec able to project its own expenses as the Tribunal has requested, it would not share that information with Canfor or Terminal.

There is a principled basis for determining that the Article 1126 proceeding will be more time-consuming than separate Article 1120 proceedings, and therefore more expensive. Each of the Claimants likely will press its claims in the Article 1126 proceeding at least as vigorously as it would in Article 1120 proceedings.[108] Each Claimant will raise all of the legal arguments and offer all of the evidence before the Article 1126 tribunal that it would have presented before the Article 1120 tribunal, to

[107] *See* United States Dep't of State website, "Canfor Corporation v. United States of America," (available at http://www.state.gov/s/l/c7424.htm), attached as Exhibit 4.

[108] Terminal may even be more vigorous in prosecuting its Chapter 11 claims before the Article 1126 tribunal than it otherwise has been.

ensure that it had done everything possible to present a successful claim. Therefore, the cost to the Claimants of prosecuting their claims will be at least as great as they would have been in separate Article 1120 proceedings.

The U.S. will likely assert that Claimants could collaborate on arguments and in any event would be dividing costs in a common Article 1126 proceeding. That argument might be correct for situations such as the BSE cases, where multiple parties are represented by the same counsel and have reached an agreement to make group rather than individual submissions, or in an 1117(3) case where the Claimants have a common identity and therefore common interests that can be represented by the same counsel. But those scenarios are different from this case. Claimants here are direct competitors of each other, represented by separate counsel and seeking to pursue separate claims.[109]

Even were the cases consolidated, the Tribunal would not likely be inclined to tell the Claimants that they must submit consolidated briefs. Notwithstanding the Claimants' shared opposition to the U.S. request for consolidation, the Tribunal gave each Claimant equal time to present its arguments. The Tribunal will likely afford each Claimant the opportunity to present its claims individually as each Claimant sees fit because "[d]ue process is fundamental to any dispute resolution procedure, and the parties should not have to calculate which items of information, evidence, documents and arguments they can share with their competitors and which ones they cannot

[109] Tembec is unable to comment on the apparent anomaly of common counsel between Terminal and Canfor. At a minimum the companies must have waived potential conflicts, as apparently they did in selecting common American counsel in the disputed *Softwood Lumber* cases. But Tembec is represented by different counsel, and no other Chapter 11 claimant in claims the United States seeks to consolidate is represented by Tembec's counsel.

share."[110] Thus, there is not likely to be any cost savings from consolidating the claims in this case.

In addition to the same cost required to prosecute each Article 1120 claim separately, Claimants will incur additional costs in the resolution of their claims by having to monitor and respond to other Claimants' arguments and reconcile them with their own arguments. They will have an incentive to rebut their co-Claimants' arguments and evidence given the competitive nature of their businesses, which will lead to rejoinders, none of which would occur in Article 1120 proceedings, and all of which would frustrate the Claimants' rights under Chapter 11 to fair and efficient resolution of their claims. Were the prosecution of each Claimant's claims before an Article 1120 tribunal to cost an estimated US$1 million (and Canfor already has reported expenditures in excess of this sum without any resolution of the first, threshold question[111]), the Claimant would have to spend the same US$1 million in the Article 1126 proceeding, plus an additional estimated US$750,000 per Claimant for monitoring, reviewing, and rebutting two co-Claimants' arguments. The total cost to Claimants of the Article 1126 proceedings would be five times as expensive as the cost of a single Article 1120 proceeding, which therefore would not be offset by a division among more parties.

The potential burden on the Tribunal, and the reflected costs for the Claimants, is also considerable. Each Claimant will be waiting for decisions and resolutions pertaining to all three Claimants, which can reasonably be expected to take

[110] *HFCS* Order at para. 9.

[111] Hearing Transcript at 249, (statement of Mr. Mitchell) ("…Canfor has already spent $350,000 on its Tribunal and over a million dollars getting to where it's got in this proceeding.").

the Tribunal considerably more time than were it making decisions pertaining to a single Statement of Claim. Multiplication of Claimants before a single tribunal would inevitably induce significant delay in resolving claims for any one party.[112]

VII. THE TRIBUNAL SHOULD EXERCISE ITS DISCRETION NOT TO CONSOLIDATE THESE CASES

The Tribunal should exercise its discretion not to consolidate the disputes, even were it to believe that the legal conditions for consolidation were satisfied. Article 1126(2) does not oblige a Tribunal to consolidate, but states merely that it "may" consolidate when it believes common issues of fact or law would be more fairly and efficiently arbitrated in one proceeding.[113] The permissive language indicates that NAFTA Parties contemplated that Tribunals would consider other relevant contextual factors.

In this case, context overwhelmingly dictates against consolidation. First, the U.S. request to consolidate is part of a broader strategy to avoid tribunal decisions and bully a negotiated settlement on *Softwood Lumber*. The Tribunal should protect the integrity of NAFTA Chapter 11 arbitration by refusing to allow it to become tainted by political maneuvering. Second, the Tribunal should proceed with an appreciation for the untested nature of Article 1126 and apply warranted caution by declining the request for

[112] Laches and estoppel, to the extent they are understood as equitable doctrines applicable with reference to Article 1126's requirements for proceedings fair and efficient, also weigh against consolidation. In this brief, they have been treated as threshold doctrines, for their appropriate application should precede consideration of the "fair and efficient" doctrine. Nonetheless, were they not considered dispositive at the threshold, they are again applicable at this stage of consideration.

[113] The NAFTA Parties' use of permissive verbs in all three translations of NAFTA to express the Tribunal's power to assume jurisdiction of the Article 1120 proceedings, in contrast to mandatory verb phrases found elsewhere in Article 1126, conveys that the Parties gave the Tribunal discretion not to consolidate claims even where the two mandatory elements of the legal standard have been satisfied. *Compare* use of the terms "shall" in subsections 1, 3-8, 10-13 with subsection 6 for distinction between mandatory and permissive.

consolidation in light of the United States' conduct, and unclean hands, in these Chapter 11 cases.

A. The United States Has Approached The Consolidation Issue Unfairly As A Means Of Advancing A Negotiated Settlement In *Softwood Lumber*

The United States has approached the consolidation issue unfairly with respect to the Claimants. The United States denied any intent to seek consolidation for twelve to eighteen months, while Canfor and Tembec spent hundreds of thousands of dollars defending themselves against the United States' objections to jurisdiction in separate proceedings. The United States had notice of both Canfor's and Tembec's claims no later than December 3, 2003, when Tembec submitted its Statement of Claim. It also had notice as early as June 12, 2003 of Terminal's intent to arbitrate, and received confirmation of that intention on March 31, 2004.

Were the United States eager for decisions on jurisdiction, as it has claimed to be, it would have briefed promptly, agreed to early hearings (as Tembec expressly requested), and then permitted the Article 1120 tribunals to issue decisions on the U.S. motions. Had there been surviving justiciable claims, it could have sought an order to consolidate them. Instead, the United States advanced different jurisdictional arguments in separate proceedings, stalling progress at every opportunity. It finally filed a request to consolidate on the eve of important jurisdictional decisions -- fifteen months into the *Tembec* proceeding and eighteen months into the *Canfor* proceeding, and without any resolution of its pending motions.

The United States claims disingenuously that the unexpected withdrawal of Mr. Harper in the *Canfor* proceeding caused it to change its position on seeking consolidation. Nothing about Mr. Harper's withdrawal made the questions of law and

fact in Claimants' claims any more or less common. Nor did Mr. Harper's withdrawal have any bearing on what would be the most fair and efficient way to resolve Tembec's claims. The United States has refused to appoint its own replacement arbitrator in accordance with the UNCITRAL rules, thus creating the "problem" that it hopes this Tribunal will resolve through consolidation.[114] It is improper for the United States to take advantage of its own inaction as a basis for its consolidation claim.

The U.S. claims that with a replacement arbitrator in *Canfor*, jurisdictional arguments in that dispute would need to be reheard, placing the *Canfor* and *Tembec* tribunals in procedural alignment.[115] This claim is a misreading of Article 14 of the UNCITRAL Rules.[116]

The United States' conduct belies its purported desire to dispose of the *Canfor* and *Tembec* disputes through jurisdictional objections. The U.S. strategy to forestall arbitral Tribunal decisions while the United States pushes for a negotiated settlement with the Canadian government to end the *Softwood Lumber* dispute is the acknowledged U.S. position. As WTO and NAFTA panel and tribunal decisions adverse to the United States continue in *Softwood Lumber*, the Bush Administration maintains that it will obey none of them.[117] In the most recent examples, Commerce defied NAFTA Panel orders in its Fourth Countervailing Duty Remand Determination and in its

[114] The United States accuses Canfor of "frivolity" in exercising its right to challenge Mr. Harper based on concrete evidence of potential conflict of interest, while it approaches consolidation with unclean hands for refusing to appoint its arbitrator to the *Canfor* tribunal. *See* Hearing Transcript at 167-168. Tembec has no part of that fight and should not be swept into it as part of a strategy to change the composition of the tribunals deciding jurisdictional questions.

[115] *See* Hearing Transcript at 170-71.

[116] *See id*. Article 14 of the UNCITRAL Rules leaves the question of whether hearings should be repeated to the "discretion of the arbitral tribunal."

[117] *See* Tembec Pre-Hearing Brief at 12-15.

Third Antidumping Remand Determination.[118] The administration continues to suggest that the problem lies with Canada and with "flawed" panel decisions.[119] U.S. Trade Representative Robert Portman reported this view to members of the Senate Finance Committee as recently as April 2005, stating that the dispute has been "litigated to death" and that a settlement must be negotiated to "eliminate those Canadian subsidies."[120] The legal process, over the course of three years, has proved that any Canadian subsidies are negligible, a fact of obviously no consequence to the Administration. The United States has never wanted the rule of law to govern, because it knows it cannot win by the rule of law. Instead, it stalls proceedings and bullies for a settlement, while Tembec continues to pay C$10 million every month in duty deposits. This Tribunal is the product of that process.

VIII. CONCLUSION

This Tribunal is the product of legal tactics and political motives. It has no authority to adjudicate threshold issues the United States wants to put before it, and cannot reasonably take on subsequent issues without a permanent appearance of bias. The legal tactic is designed to raise Claimants' costs and deny to Claimants justice.

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[118] *See* United States Dept. of Commerce, *In the Matter of Certain Softwood Lumber Products From Canada: Final Affirmative Countervailing Duty Determination*; No. USA-CDA-2002-1904-03 (July 7, 2002); United States Dept.of Commerce, *In the Matter of Sales at Less Than Fair Value of Softwood Lumber Products from Canada*, No. USA-CDA-2002-1904-02 (July 11, 2005). Commerce has been obliged to lower the duty deposit rate in every remand that has followed a binational panel decision, in both the antidumping and the countervailing duty cases, but those changes cannot take effect while the panels continue to receive for review remand determinations that are inconsistent with the law. *See* Tembec's Pre-Hearing Brief at 7-12.

[119] *See* Hearing Before the Senate Finance Committee on U.S. Trade Representative Nomination, 108th Congress (Apr. 21, 2005) (statement of Senator Max Baucus (D-MT)) ("…because the Canadians have been winning some of these cases for, I think, technical and incorrect reasons, nevertheless, that's the result, and because the U.S. timber industry, the softwood lumber industry, is going to continue to file all these suits, it's going to stay on forever, the only resolution is a settlement.").

[120] *Id.* (Statement of Robert Portman, U.S. Trade Representative nominee) Congressman Bob Goodlatte (R-VA) echoed this sentiment at a June 28, 2005 press briefing, insisting that only negotiation and not litigation will end the dispute.

The law does not allow it, and consolidation therefore, as a matter of law, must be denied.

Respectfully submitted,

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