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Arbitration of Investment Disputes: The Order of the Consolidation Tribunal in the *Softwood Lumber* Dispute

Anne-Marie LOONG*

This note seeks to inform readers about the nature and operation of Article 1126(2)(a) under the North American Free Trade Agreement following the most recent Chapter 11 decision where three claims submitted to three arbitrations under Article 1120 of the NAFTA were consolidated: Canfor Corporation v. USA, Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. USA and Terminal Forest Products Ltd. v. U.S.A. (collectively referred to as “Order”). The author attempts to extract some important principles that emerge from the Order, specifically, relating to the scope of discretionary powers reserved for a consolidation tribunal under Article 1126.

I. INTRODUCTION

This note seeks to inform readers about the nature and operation of Article 1126(2)(a) under the North American Free Trade Agreement (NAFTA)¹ following the most recent Chapter 11 decision where three claims submitted to three arbitrations under Article 1120 of the NAFTA were consolidated: *Canfor Corp. v. United States*, *Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. United States* and *Terminal Forest Products Ltd. v. United States* (collectively referred to as the “Order”).² This Order is the second case to have been resolved by an arbitral tribunal established for the purposes of ruling on consolidation requests, the first being *Corn Products Int’l, Inc. v. United Mexican States* and *Archer Daniels Midland Company & Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (*Corn Products*), decided approximately four months earlier, which ruled against Mexico’s request for consolidation.³ The note attempts to extract some important principles that emerge from the Order, specifically relating to the scope of discretionary powers reserved for a consolidation tribunal under Article 1126.

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¹ North American Free Trade Agreement, December 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289 (chs. 1–9); 32 I.L.M. 605 (chs. 10–22). NAFTA art. 1126 provides for the consolidation of art. 1120 claims under certain conditions. See *infra* for an in-depth discussion.

² See Order of the Consolidation Tribunal: *Canfor Corp., Tembec et al. and Terminal Forest Products Ltd. v. United States*, available at U.S. Department of State, <<http://www.state.gov/documents/organization/53113.pdf>> [hereinafter “Order”].

³ *Corn Products Int’l, Inc. v. United Mexican States and Archer Daniels Midland Co. & Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, Order of the Consolidation Tribunal, May 20, 2005, available at <http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Consolidacion/acuerdos/050520_Orden_de_Tribunal_de_Acumulacion.pdf>.

The Order deserves study because it is the first of its kind. The eloquent legal reasoning, comprehensive assessment of the legal issues and sheer eighty-four-page length of the Order suggest that the consolidation tribunal for the *Softwood Lumber* dispute (the “Tribunal”) was attempting to provide a platform for the development of substantive standards in NAFTA arbitration. Considering the in-depth analysis of Article 1126, it is clear that the Tribunal was speaking to a much broader audience than the parties themselves, which makes the Order all the more important. Considering the developmental stages of the application of Article 1126 in international law, the principles that emerge from the Order may therefore serve to influence future Article 1126 proceedings. Further, given the scarcity of contemporaneous commentary pertaining to Article 1126 of the NAFTA, the legal reasoning in the Order is useful from an academic perspective.

The necessary legal and procedural background is provided in the first part of this note, which reviews Article 1126 of the NAFTA Chapter 11 and describes the procedural history of the individual Article 1120 claims leading up to the Article 1126 proceeding. The second part of this note attempts to highlight some important principles that emerge from the Order. Specifically, the Order contains several noteworthy insights relating to the discretionary power of an Article 1126 consolidation tribunal, the most significant concerning the proper interpretation to be given to the provision’s terms, “a question of law or fact in common” as well as “in the interests of fair and efficient resolution of the claims.”

This article is guided by several assumptions. First, despite the absence of binding panel decisions under NAFTA, a *de facto* jurisprudence, which includes prior panel decisions and the surrounding *opinio juris*, is beginning to evolve. Second, counsel and arbitration tribunals in NAFTA Chapter 11 cases are increasingly likely to rely on that jurisprudence. Third, the principles and interpretations arising out of Chapter 11 jurisprudence are likely to influence governmental and investment practice over time.⁴

II. ARTICLE 1126 OF THE NAFTA CHAPTER 11

Provision for the consolidation of Chapter 11 claims is an innovative feature of NAFTA’s dispute settlement mechanism.⁵ Article 1126 provides that a disputing party, whether a State Party or an investor, may request the establishment of a special tribunal to hear a request to consolidate its claims with other pending Chapter 11 claims. The consolidation tribunal, consisting of three arbitrators, is appointed by the Secretary General of the International Centre for the Settlement of Investment Disputes (ICSID), pursuant to United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules. The presiding arbitrator is to be selected from the roster established by the State Parties. If no arbitrator is available from the State Parties’ roster, the Secretary General

⁴ A similar set of assumptions is utilized by Leon E. Trakman, *Arbitrating Investment Disputes Under the NAFTA*, 18 J. INT’L ARB. 385 (No. 4, 2001).

⁵ Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT’L L. 727, 733 (1993).

will appoint a presiding arbitrator from the ICSID Panel of Arbitrators.⁶ Article 1126(5) requires that one member of the consolidation tribunal be a “national of the disputing Party”⁷ and that another “shall be a national of a Party of the disputing investors.”⁸ If an Article 1126 tribunal determines that claims “have a question of law or fact in common” and that “the interests of fair and efficient resolution of the claims” favour consolidation, “the tribunal may ... (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.”⁹ Two other express conditions are found in Article 1126(2), namely that the “claims have been submitted to arbitration under Article 1120” and “the disputing parties have been heard.”¹⁰ Pending its decision under Article 1126(2), the “tribunal may also order that the proceedings of a previously established Chapter 11 tribunal be stayed for the purposes of consolidation.”¹¹ In the event that the consolidation tribunal assumes jurisdiction, “the previously constituted tribunal loses its jurisdiction over the part which is assumed by the consolidation tribunal,”¹² regardless of the rules under which the previous proceedings may have been commenced.¹³ Despite its detail, Chapter 11 does not resolve every possible question that may arise during consolidation. Daniel Price, one of the lawyers involved in the negotiations of NAFTA, notes that “many issues will need to be worked out by the tribunal in consultation with the disputing parties.”¹⁴

There are advantages and disadvantages to consolidation. Those in favour of consolidation argue that the effort and costs expended by the parties are minimized, and a more “expeditious resolution of the claims” results.¹⁵ Further, consolidation is said to reduce the risk of inconsistent decisions, thereby avoiding the creation of uncertainty for claimants and respondents as to the type of action that gives rise to state responsibility.¹⁶ Arguably, consistent decisions may also lead to the possible development of a single arbitral

⁶ See NAFTA, *supra* note 1, art. 1124(3).

⁷ See *id.* art. 1124(2).

⁸ Section C of Chapter 11 denotes a State Party to the NAFTA with an uppercase “P.” Where reference is made to a party without distinguishing between whether it is a State or a private entity, the legislation uses a lowercase “p.” Thus, “disputing Party” means a State Party against which a claim is made, while the expression “disputing party” means the disputing investor or the disputing Party. This Note uses State Party versus disputing investor.

⁹ See NAFTA, *supra* note 1, art. 1126(2).

¹⁰ *Id.* See also Order, *supra* note 2, sec. 89.

¹¹ See Henri C. Alvarez, *Arbitration Under the North American Free Trade Agreement*, 16 ARB INT’L 393, 412 (No. 4, 2000); see also NAFTA, *supra* note 1, art. 1126(9).

¹² See Alvarez, *supra* note 11. See NAFTA, *supra* note 1, art. 1126(8). See also Order, *supra* note 2, secs. 155–158.

¹³ The Order of the Consolidation Tribunal for the *Software Lumber* dispute notes that the term “assume jurisdiction” in both art. 1126(2) and (8) indicates nothing more than an action of a procedurally administrative nature, “in which two or more arbitral tribunals are replaced by one arbitral tribunal with respect to the same disputes,” see Order, sec. 100. In other words, an art. 1126 tribunal “takes over the proceedings, in the capacity of an arbitral tribunal, to hear and determine the disputes from the respective Article 1120 Tribunals,” see *id.* The actual assumption of jurisdiction does not have any relevance to the question of whether the jurisdiction of the art. 1120 tribunal or of the art. 1126 tribunal is justified, see *id.* sec. 101.

¹⁴ See Price, *supra* note 5, at 734. For other discussions on art. 1126, see generally Alvarez, *supra* note 11, at 412–15; TODD WEILER, NAFTA INVESTMENT LAW AND ARBITRATION: PAST ISSUES, CURRENT PRACTICE, FUTURE PROSPECTS (2004).

¹⁵ See United States, Submission on Consolidation, June 3, 2005, at 15–21, available at <http://www.naftaclaims.com/disputes_us_10.htm>.

¹⁶ See *id.* at 22.

interpretation of the legal implications of a given fact pattern.¹⁷ Overall, the consolidation of similar claims is said to uphold the integrity of process and the legitimacy of the NAFTA dispute settlement mechanism as a whole.¹⁸ Those who view consolidation in a more negative light underscore its potentially extensive effects. In addition to “overriding the principles of consent and privity by joining arbitrations between different parties, consolidation may also override the choice of the parties with respect to the applicable procedural rules and the composition of the tribunal.”¹⁹ As ruled by the tribunal in *Corn Products*, if the claimants are direct competitors, the consolidation process, “including essential confidentiality agreements, discovery, written submissions and oral arguments would have to be carried out in substantial measure on separate trials,” which may affect the confidentiality of proceedings and result in delayed or complex proceedings.²⁰ Those not in favor of consolidation also argue that the costs of proceedings will increase—in separate proceedings the tribunal’s expenses would be split evenly between the claimant and the respondent whereas in a consolidated proceeding, each claimant would bear only one-fourth of the costs.²¹ Despite the potentially far-reaching implications of consolidation, it is clear that consent to arbitration under NAFTA Chapter 11B includes agreement to the possibility of consolidation.²² Note that in cases where public interests are at stake, all of the above advantages (disadvantages) are public benefits (detriments) as well.²³

¹⁷ See Paolo Di Rosa, *The Recent Wave of Arbitrations against Argentina Under Bilateral Investment Treaties: Background and Principal Legal Issues*, 36 U. MIAMI INTER-AM. L. REV. 41 (2004).

¹⁸ Emmanuel Gaillard, *Canfor Corp. v. United States*, Hearing on Jurisdiction, Hrg. Tr. (“Canfor Hrg. Tr.”), vol. 1, 19:6–9 (2004) as cited in United States, Submission on Consolidation, *supra* note 15, at 5. In discussing the problems of inconsistent decisions, recent academic articles have based their discussions on the *CME v. Czech Republic* and *Lauder v. Czech Republic* decisions. See Wolfgang Kuhn, *How to Avoid Conflicting Awards: The Lauder and CME Cases*, 5 J. WORLD INV. & TRADE 7 (No. 1, 2004); Charles N. Brower & Jeremy K. Sharpe, *Multiple and Conflicting International Arbitral Awards*, 4 J. WORLD INV. 211, 216 (No. 2, 2003); Thomas Wälde, *Introductory Note to Svea Court of Appeals: Czech Republic v. CME Czech Republic BV*, 42 I.L.M. 915 (2003) as cited in United States, Submission on Consolidation, *supra* note 15, at 23 n.59.

¹⁹ See Alvarez, *supra* note 11, at 413. However, parties have been able to determine by advance agreement the method of constituting an arbitral tribunal or to “contract around” the provisions of art. 1126 with the affirmative participation and agreement, or at least without objection, from NAFTA Parties. See *Corn Products*, *supra* note 3, at sec. 11. See also Order, *supra* note 2, sec. 85; NAFTA, *supra* note 1, art. 1123.

²⁰ See *Corn Products*, *supra* note 3, sec. 8. Such aspects were also argued by the claimants in the *Softwood Lumber* dispute. For all claimants’ submissions (i.e. Terminal Submission Opposing Consolidation, Tembec Submission Opposing Consolidation, Canfor Submission Opposing Consolidation, Tembec’s Motion to Dismiss, Canfor & Terminal Submission on Tembec Motion to Dismiss, Tembec Post-Hearing Submission, Canfor & Terminal Post-Hearing Submission, Tembec’s Post-Hearing Rebuttal Brief, Canfor & Terminal Post-Hearing Rebuttal Brief), see Todd Weiler’s NAFTA Claims website, available at <http://www.naftaclaims.com/disputes_us_10.htm>. See also Alvarez, *supra* note 11.

²¹ *Corn Products*, *supra* note 3; United States, Submission on Consolidation, *supra* note 15, at 16.

²² This principle was confirmed by the Consolidation Tribunal in the *Softwood Lumber* dispute, based on art. 1121 of the NAFTA, which provides that a disputing investor opts for arbitration under sec. B only if “the investor consents to arbitration in accordance with the procedures set forth in this Agreement.” See NAFTA, *supra* note 1. Further, this result is stated in the exception formulated in art. 1123 of the NAFTA: “Except in respect of a Tribunal established under Article 1126, and unless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties” (emphasis added). See also Order, *supra* note 2, sec. 79 n.31; Alvarez, *supra* note 11, at 413.

²³ Due to the persistence of public demands, the interaction between public and private arbitration interests is increasingly recognized. Chapter 11 arbitral tribunals now have a precedent to follow which accepted the submission of *amicus curiae* briefs by non-governmental organizations (NGOs). On January 15, 2001, the *Methanex v. United States* tribunal became the first known Chapter 11 case to decide that it had the power to accept the submission of *amicus curiae* briefs from several NGOs under the tribunal’s “more general procedural powers” included in art. 15(1) of the UNCITRAL Arbitration Rules.

III. THE *SOFTWOOD LUMBER* DISPUTE

Three Canadian producers of softwood lumber—Canfor Corporation (“Canfor”), Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. (“Tembec”) and Terminal Forest Products Ltd. (“Terminal”) (collectively referred to as the “claimants”)—filed separate Chapter 11 claims against the Government of the United States. All three parties alleged that in May 2002, the United States adopted certain countervailing duty and anti-dumping measures on imports of Canadian softwood lumber to the United States, in breach of the NAFTA Articles 1102 (National Treatment), 1103 (Most-Favoured-Nation Treatment), 1105 (Minimum Standard of Treatment) and 1110 (Expropriation). Canfor further claimed damages for losses caused by the allegedly illegal Byrd Amendment, enacted by the United States in 2000, which provides that duties assessed pursuant to countervailing duty or anti-dumping orders shall be distributed annually to affected domestic producers. Procedural details such as the filing dates of the Notice of Intent or Notice of Arbitration and dates at which the Article 1120 tribunals were constituted are provided in Appendix 1.

On March 7, 2005, the United States requested that the Secretary General of the ICSID consolidate the *Canfor*, *Tembec* and *Terminal* claims in accordance with Article 1126(2). A consolidation tribunal was subsequently established on May 6, 2005.²⁴ The United States applied to the Tribunal for a stay of Canfor’s and Tembec’s Article 1120 proceedings on May 9, 2005,²⁵ which the Tribunal granted on May 19, 2005 after due consideration. On June 3, 2005, the United States filed a submission to ICSID particularizing its request for consolidation. The Tribunal was asked to “assume jurisdiction over, and hear and determine together, the entirety of the claims submitted by [Canfor, Tembec and Terminal].”²⁶

Later that month, Tembec submitted a motion requesting the Tribunal to either:

make a preliminary decision on whether the United States’ request for consolidation should be dismissed for lack of jurisdiction pursuant to Rule 21(3) of the UNCITRAL Arbitration Rules,²⁷ or in the alternative because of the ethical problems²⁸ arising from Article 1126 of NAFTA in this

²⁴ The Secretary-General of ICSID appointed Mr. Davis R. Robinson (United States), Prof. Armand de Mestral (Canada) and, as presiding arbitrator, Prof. Albert Jan van den Berg (Netherlands).

²⁵ Note that sec. 5 of the Order, *supra* note 2, states that “the United States applied to the Consolidation Tribunal for a stay of the *Canfor* and *Tembec* proceedings” on May 9, 2005; however, at sec. 20, the Order states that “the United States . . . made an application for a stay of the *Canfor* proceedings on May 11, 2005.”

²⁶ See United States, Submission on Consolidation, *supra* note 15. Note that the Tribunal regards the request of the United States as falling under subparagraph (a) of art. 1126(2) since the qualifier “hear and determine together” in subparagraph (a) “contemplates claims in two or more Article 1120 arbitrations be heard and determined in whole or in part in a single proceeding.” See Order, *supra* note 2, sec. 106. In contrast, subparagraph (b) contemplates “claims in one or more of the Article 1120 arbitrations, but not in all, may be singled out by an Article 1126 Tribunal from the total of the Article 1120 arbitrations that have a question of law or fact in common so that a decision on the claims in the Article 1120 arbitration(s) that has (have) been singled out by the Article 1126 Tribunal would assist the other Article 1120 Tribunal(s) in the resolution of the claims before them.” See *id.*

²⁷ Art. 21(3) of the UNCITRAL Model Law on International Commercial Arbitration of 1985 provides: “A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defense.”

²⁸ The ethical problems to which Tembec refers are inherent to art. 1126, which allegedly “gives the Tribunal members personal financial incentives to consolidate the claims because they would be paid by the parties to undertake what is expected to be a lengthy arbitration.” Further, “an Article 1126 Tribunal necessarily includes one arbitrator

particular proceeding [to deny] the motion of consolidation ... for lack of jurisdiction before this Tribunal.²⁹

Tembec further requested that the Tribunal stay the briefing on the merits, pending resolution of the motion. The United States, Canfor and Terminal subsequently submitted observations on Tembec's motion. The Tribunal denied Tembec's motion to make a preliminary decision and decided to consider and rule on the matters raised by Tembec in the Order on the merits of the United States' request for consolidation. Accordingly, the Tribunal also denied Tembec's request for a stay of the briefing on the merits of the United States' request for consolidation. Following this ruling, post-hearing briefs and reply post-hearing briefs were submitted on July 22, 2005 and August 12, 2005, respectively. In the former, the parties answered a number of questions set forth by the Tribunal at the hearing.

IV. PRINCIPLES THAT EMERGE FROM THE ORDER OF THE CONSOLIDATION TRIBUNAL

Some academics promote the development of over-arching concepts in NAFTA arbitration, given the abstract manner in which the substantive obligations in Chapter 11 have been formulated and especially considering the large degree of uncertainty in relation to the extent of the obligations on governments.³⁰ Clarification of the content of the Chapter 11 obligations is useful because it would: (i) allow State Parties to better assess the bases upon which they may be liable as well as the risks associated with the exercise of their sovereign power, and; (ii) allow investors to assess when they have suffered violations and consequently when they could have a reasonable claim. Greater certainty concerning principles for the protection of environment, health and employment conditions would undoubtedly benefit all involved. For these reasons, this note attempts to distil some potentially useful concepts from the Order. An examination of the key principles of the Order may provide useful insights for the future application of Article 1126.

It is important to note, however, that, since there is no rule of *stare decisis* in international arbitration, it is highly likely that consolidation tribunals in later cases will rule differently on similar fact patterns. Further, as demonstrated by the post-award litigation which followed the *Metalclad Corp. v. United Mexican States*³¹ and *S.D. Myers Inc. v. Government of Canada* decisions,³² once a NAFTA award has been rendered, national courts may still assume a prominent role.³³

selected from the Respondent's appointees to ICSID list of arbitrators [however] the appointing authority consulted no comparable list of arbitrators nominated by Claimants." Thus, the ethical problems are the alleged unfair and unbalanced formation of the Tribunal. See Tembec, Motion to Dismiss, June 27, 2005, at 3, available at <http://www.naftaclaims.com/disputes_us_10.htm>.

²⁹ Tembec's Motion to Dismiss, *id.* at 1.

³⁰ See, e.g., Leonel Pereznieta & Sergio Puig, *The Future of NAFTA Investment Arbitration: A Mexican Perspective*, in WEILER, *supra* note 14, at 425.

³¹ *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, August 26, 2000, 16 ICSID REV. 168 (No. 1, 2001).

³² *S.D. Myers Inc. v. Government of Canada*, Final Award on the Merits, November 13, 2000.

³³ Jack J. Coe, Jr., *Domestic Court Control of Investment Awards: Necessary Evil or Achilles Heel Within NAFTA and the Proposed FTAAs?*, 19 J. INT'L. ARB. 185 (No. 3, 2003).

A. INTERPRETATION OF THE TERM “MAY”: DISCRETIONARY POWERS UNDER ARTICLE 1126(2)

The Consolidation Tribunal of the *Softwood Lumber* dispute declared that, since the text of Article 1126 uses the expression “*may ... order*” (emphasis added), an Article 1126 Tribunal has discretionary powers to make an order under Article 1126(2), albeit subject to certain conditions. The Tribunal further claimed that discretionary powers derive from NAFTA’s legislative history, which evidence a transition from mandatory determination in the first (Canadian) draft to the adoption of a discretionary mission of the tribunal in subsequent drafts.³⁴ Thus, according to the Order, even if the express conditions of Article 1126(2) are met,³⁵ the power of an Article 1126 tribunal to assume jurisdiction pursuant to subparagraphs (a) and (b) depends on the manner in which the tribunal chooses to exercise its discretion.³⁶ For instance, the tribunal could assert its discretionary power to “reign-in any frivolous requests for consolidation.”³⁷

Having established its discretionary power in the above manner, the Tribunal proceeded to exercise discretion in several key areas of the dispute. First, discretion was exercised to determine the appropriate conduct and sequence of the consolidated proceedings. Second, discretion was exercised with respect to the main points of contention faced by the Tribunal, namely the appropriate interpretation of the Article 1126 requirements that the order be “in the interests of fair and efficient resolution of the claims” and the question of whether the claims submitted to arbitration have “a question of law or fact in common.”³⁸ Thus, with its discretionary power in hand, the Tribunal established criteria for the requirements of Article 1126. Using *Corn Products* as a point of reference, these criteria will now be discussed.

B. PROCEDURAL ISSUES: CONDUCT AND SEQUENCE OF CONSOLIDATION PROCEEDINGS

The Tribunal asserted that an Article 1126 tribunal has discretionary power to determine the conduct and sequence of the consolidated proceedings.³⁹ Since the three claimants were at different procedural stages, certain questions arose with respect to whether consolidation would deprive the parties of some of their procedural rights. The United States submitted that, if the Article 1120 claims were consolidated, the Tribunal should start anew procedurally. Terminal, the party with the least advanced Article 1120

³⁴ The proposal made by Canada, dated June 4, 1992 (called the “Virginia Composite”) appeared after some 10 published drafts. See Order, *supra* note 2, sec. 74.

³⁵ The express conditions are that: (i) “claims have been submitted to arbitration under Article 1120;” (ii) these claims have “a question of law or fact in common;” (iii) the order is “in the interests of fair resolution of the claims;” and (iv) the disputing parties have been heard. See Order, *supra* note 2, sec. 89; NAFTA, *supra* note 1, art. 1126.

³⁶ See Order, *supra* note 2, secs. 88–91.

³⁷ *Id.* sec. 91.

³⁸ *Id.* secs. 95–96.

³⁹ *Id.* sec. 153. A noted limitation is that this discretion will be “exercise[d] ... in consultation with the parties.” See *id.*

arbitration,⁴⁰ was concerned that it would lose its right to articulate a claim in a Statement of Claim. Those who had not had the opportunity to address jurisdiction were concerned about being deprived of their right to raise that issue due to the commencement of consolidation proceedings. In considering the perspectives of the parties, the Tribunal ruled that it had discretionary power to determine where consolidated proceedings should begin. Citing Article 14 of the UNCITRAL Arbitration Rules, the Order proposed that the assumption of jurisdiction by an Article 1126 Tribunal is analogous to a situation in which one or more arbitrators in a case are replaced. As such, any prior hearings should be repeated (as in the case of the replacement of a sole or presiding arbitrator) or repeated at the discretion of the tribunal (as in the case of a replacement of any other arbitrator).⁴¹ Under this rationale, the Tribunal established its discretion to determine the conduct and sequence of the consolidation proceedings; however, a possible exception to this opinion was articulated with respect to the untimely raising of an objection to jurisdiction:

If a party has failed to raise the plea as to jurisdiction in the Article 1120 arbitration at the latest in the statement of defense (assuming that the Article 1120 arbitration has reached that stage), a party is in principle barred from raising the plea in the consolidation proceedings.⁴²

This passage *prima facie* suggests that the United States' objections to jurisdiction should be barred;⁴³ however, in a footnote, the Tribunal cites Article 16(2) of the UNCITRAL Model Law on International Commercial Arbitration which stipulates: "The arbitral tribunal may ... admit a later plea if it considers the delay justified."⁴⁴ Thus, the Order of the Consolidation Tribunal leaves the door open—the issue of whether a plea as to jurisdiction can be raised by the United States will continue to be argued in post-Order hearings and the Tribunal will exercise its discretion to determine which, if any, jurisdictional claims will be admitted. With respect to the incorporation of previous submissions, the Tribunal implies that it will accept the use of the claimants' proceedings in future decisions. For instance, in its discussion on costs, the Tribunal asserts that the expenditures of *Canfor* will not go to waste "since a fair amount of the work product submitted in the *Canfor* proceedings to date can be used again in the consolidation proceedings."⁴⁵ Thus, the Tribunal reserved its right to determine the conduct and sequence of proceedings and implicitly stated that, by exercising its discretion in a manner analogous to an arbitral tribunal subject to Article 14 of UNCITRAL, prior hearings of the claimants will not be repeated and untimely jurisdictional objections of the United States may be accepted.

⁴⁰ As evident in Appendix 1, Terminal had not taken any steps to prosecute its claim since filing a Notice of Arbitration.

⁴¹ See UNCITRAL Model Law, *supra* note 27.

⁴² See Order, *supra* note 2, sec. 103.

⁴³ See *supra* for procedural history.

⁴⁴ UNCITRAL Model Law, *supra* note 27.

⁴⁵ See *id.* sec. 216.

C. INTERPRETATION OF THE PHRASE “IN THE INTERESTS OF FAIR AND EFFICIENT RESOLUTION OF THE CLAIMS”

When applying the term “in the interests of fair and efficient resolution of the claims,” the Tribunal first outlined its discretionary powers with respect to this condition⁴⁶ and then ruled that “efficiency in the sense of procedural economy is the operative goal of consolidation under Article 1126.”⁴⁷ Determination of this type of efficiency is said to rest on an “objective, fact-driven standard which an Article 1126 Tribunal can apply as it deems appropriate under the circumstances.”⁴⁸ It thus “suffices that the Article 1126 Tribunal is convinced,” under the given circumstances, “that efficiency in the resolution of claims will be served by a consolidation.”⁴⁹ Fairness comes into play when determining efficiency. In considering what is “fair,” it is said that “the interests of all parties involved should be balanced.”⁵⁰ A guiding test for determining efficiency is “a comparison of the situation as it exists, and would continue to exist, if no consolidation were ordered.”⁵¹ In making such a comparison, the Tribunal accepted the United States’ suggested approach of looking to three factors: time, costs and the avoidance of conflicting decisions.⁵²

The approach of the Order is contrary to the party-centric conception of fairness and efficiency advanced in *Corn Products*, which the Tribunal of the *Softwood Lumber* dispute expressly opposed. When deciding whether consolidation would be “in the interests of fair and efficient resolution of the claims,” the *Corn Products* tribunal focused on issues of confidentiality and due process, ultimately concluding that “two 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.”⁵³ It was said that the parties should not have to calculate which items of information, evidence, documents and arguments they can or cannot share with their competitors. In other words, the intense competition between the claimants and the consequent need for complex confidentiality measures throughout the arbitration process were considered to be factors that would render consolidation in whole or in part undesirable.⁵⁴ Due to the possibility of significant procedural inefficiencies, *Corn Products* ruled that consolidation was not in the interest of fair and efficient resolution of the claims.

⁴⁶ See *id.* sec. 96.

⁴⁷ See Order, *supra* note 2, sec. 124. Efficiency, defined in the sense of “procedural economy,” is not a concept which is clearly defined in the Order, yet procedural economy is used generally to refer to “an effective administration of justice,” *id.* sec. 76, and to a desire to “relieve a State Party from the hardship of having to defend multiple claims arising from the same measure.” See Alvarez, *supra* note 11, at 414 as cited in Order, *supra* note 2, sec. 73. Further, the objectives of procedural economy include considerations of saving costs and time for parties. *Id.* sec. 75. This concept is to be distinguished from “judicial economy,” a term which carries various meanings in both national and international law. See *id.* sec. 76.

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.* sec. 125.

⁵¹ See *id.* sec. 126.

⁵² See *id.*

⁵³ See *Corn Products*, *supra* note 3, sec. 8.

⁵⁴ See *id.*

D. INTERPRETATION OF THE PHRASE “A QUESTION OF LAW OR FACT IN COMMON”

The Tribunal for the *Softwood Lumber* dispute attempted to establish the elements that may constitute “a question of law or fact in common.” The basis of this criterion was the Tribunal’s alleged discretionary power to determine whether there was a question of law or fact in common. This discretionary power was said to derive from the requirement that the Tribunal be “satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common,” ultimately found in the combined reading of the English, French and Spanish texts of Article 1126(2).⁵⁵ The confines within which this discretion may be exercised related to whether “the issue to which the invocation of a provision of Section A of Chapter 11 of the NAFTA give rise, [was] in common in the Article 1120 arbitrations.”⁵⁶ Merely invoking the same NAFTA provision was insufficient. Further, it was not sufficient to claim that a fact was in common in the Article 1120 arbitrations—there should be an issue concerning that fact that was in common.⁵⁷ In effect, the notion of “question” in the term “a question of law or fact in common” as appearing in Article 1126(2) signalled the necessity of a factual or legal issue—one whose nature was disputed in two or more Article 1120 arbitrations such that a finding to dispose of a claim was required.⁵⁸ The Tribunal further noted that a determination must be made regarding whether the resolution of that “question” by way of consolidation was in the interests of fair and efficient resolution of the claims advanced before the Article 1120 tribunals, a stage which involved extensive powers of discretion, as described above. Moreover, the Tribunal suggested that the common questions of law or fact should be material to the disposition of an award, yet the Order refrained from establishing any such qualifiers since “they could be interpreted to unduly curtail the explicit discretionary power given to an Article 1126 tribunal.”⁵⁹ Thus, discretionary powers are central to the requirement of Article 1126(2) that there be a question of law or fact in common.

The decision on consolidation in *Corn Products* was silent about what Article 1126(2) required for satisfying the term “a question of law or fact in common.” Without discussion, the consolidation tribunal for *Corn Products* accepted, without further analysis, that the claims submitted to arbitration had questions of law or fact in common. Comparatively, *Corn Products* thus focused on the issue of whether consolidation was in the interest of fair and efficient resolution of the claims.⁶⁰

E. COMMON ISSUES OF LAW INCLUDE CLAIMS THAT ARE MERELY ANTICIPATED

The fact that the Tribunal accepted anticipated claims within the purview of Article 1126(2) demonstrates a favourable approach to consolidation and a willingness to implement

⁵⁵ See *id.* sec. 95.

⁵⁶ See *id.* sec. 110.

⁵⁷ See *id.* secs. 110–11.

⁵⁸ See *id.* secs. 109, 113.

⁵⁹ See *id.* sec. 115.

⁶⁰ *Corn Products*, *supra* note 3, sec. 6.

a broad interpretation of what constitutes a common question of law within the scope of Article 1126(2). In the respondent's brief,⁶¹ the United States "anticipate[d] that ... it would raise many of the same legal defenses to the claims of all three claimants."⁶² While brief examples were provided in a footnote,⁶³ no specific defences were delineated. An important query thus arose in the proceedings regarding whether the Tribunal must be satisfied on the basis of evidence or pleadings—not mere anticipation or expectation—that common questions of law existed.⁶⁴ The Tribunal ruled that "a mere anticipation or expectation" is insufficient for satisfying the condition that there exist "a question of law or fact in common"; however, the tribunal nevertheless proceeds to accept the anticipated claims within the purview of Article 1126(2). By way of explanation, the Order instructed that an Article 1126 tribunal may legitimately take such anticipated issues into account if the "issue has been raised in one or more Article 1120 proceedings" and the party shows, with a degree of certainty, that the anticipated issues will be raised in other Article 1120 proceedings that are the subject of the request for consolidation.⁶⁵ As with the determination of fairness and efficiency, procedural economy is said to drive this opinion.⁶⁶

This aspect of the Order is rather curious. The fact that a question is or will be raised in several proceedings does not detract from its anticipatory nature. While it is clear that the Tribunal is willing to exercise its discretion to accept the anticipated claims of the United States, the basis of this acceptance is less clear. The conclusion of the Order provides some clues, where it is noted that, unlike Mexico in *Corn Products*, the State Party in the *Softwood Lumber* dispute had indicated that it intended to raise jurisdiction *and* liability as the basis of the common questions of law and fact. Apart from jurisdiction, Mexico in *Corn Products* did not indicate any intention to raise any other common defences.⁶⁷ Thus, the Order seems to be saying that, in addition to the certainty that the anticipated questions will be raised in other Article 1120 proceedings subject to consolidation, the type of common defence that may be raised is another factor to consider. Regardless, the fact that the Order accepted the anticipated defences of the United States indicates a general and liberal interpretation of what constitutes common questions of law within the purview of Article 1126(2).

⁶¹ See United States, Submission on Consolidation, *supra* note 15.

⁶² *Id.* at 12. See also Order, *supra* note 2, sec. 27.

⁶³ The United States writes in its Submissions on Consolidation that these defences "would demonstrate, among other things, that the [U.S. Department of Commerce's] determinations did not constitute nationality-based discrimination in violation of Article 1102 or Article 1103, but rather applied equally to any entity of any nationality, including U.S.-owned Weyerhaeuser Company, that exports subsidized or unfairly-priced softwood lumber from Canada to the United States. Likewise, the United States would demonstrate, among other things, that no standard of customary international law is implicated by the administrative processes that resulted in the determinations at issue and, therefore, the minimum standard of treatment under Article 1105(1) was not breached by the determinations. Finally, the United States would demonstrate, among other things, that the determinations were not expropriatory, and therefore did not contravene Article 1110." See United States, Submission on Consolidation, *supra* note 15, at 12 n.28.

⁶⁴ See Canfor & Terminal, Post-Hearing Briefs, July 22, 2205, secs. 11–12, available at <http://www.naftaclaims.com/disputes_us_10.htm>.

⁶⁵ See Order, *supra* note 2, sec. 118.

⁶⁶ See Order, *supra* note 2, sec. 119. For a loose definition of this term, see *supra* note 58.

⁶⁷ See *Corn Products*, *supra* note 3, sec. 14.

V. CONCLUSION

The decision reached by the Tribunal for the *Softwood Lumber* dispute, chaired by Professor Albert Jan van den Berg, establishes an important precedent. Not only is the Order the first NAFTA Chapter 11 decision to rule in favour of consolidation, it also inadvertently addresses one of the most pressing issues in NAFTA Chapter 11 dispute settlement cases: how can investment protection, including the corollary rights of private investors, be balanced with public control over governmental policy-making? In a most noteworthy approach, the Tribunal highlights the discretionary powers granted to an Article 1126 tribunal with respect to the terms “common questions of law or fact” and “in the interests of fair and efficient resolution of the claims” as well as the sequence and conduct of proceedings once consolidation occurs.

While the substantive content of consolidation has yet to coalesce, the Order provides some interesting principles that could potentially play an important role in future consolidation decision-making.

Appendix 1

Investor and the amount of damages claimed	Notice of Intent	Notice of Arbitration	Constitution of Art. 1120 Tribunal	Summary of Proceedings
CANFOR (seeks \$250m with costs)	November 5, 2001	July 9, 2002 (8 months later)	July 22, 2003	<ul style="list-style-type: none"> • First organizational hearing held on October 16, 2003. • Two weeks prior to the first organization hearing, the U.S. sought bifurcation of the proceedings to address its jurisdictional objection. Canfor opposed the request for bifurcation, seeking to have any jurisdictional objection addressed with the merits. <i>Canfor</i> Tribunal ordered bifurcation on January 23, 2004. Hearing on jurisdictional issue held December 7–9, 2004. • While Canfor Tribunal deliberated on the jurisdictional issue, arbitrator Mr. Conrad Harper, Esq. resigned on March 2, 2005, citing an alleged conflict of interest. • U.S. made an application for a stay of the <i>Canfor</i> proceedings on May 9, 2005.
TEMBEC (seeks \$200m with costs)	May 3, 2002	December 3, 2004 (almost 3 years later)	August 4, 2004	<ul style="list-style-type: none"> • Organization meeting held November 30, 2004. • Jurisdictional challenge raised by U.S. on February 4, 2005. • Hearing on jurisdictional issue was scheduled June 2–3, 2005. • Filing of request to consolidate (March 7, 2005) occurred after the parties had filed their initial submissions on jurisdiction, but before filing their reply and rejoinder. U.S. informed the <i>Tembec</i> Tribunal of its request to consolidated and applied for a stay of proceedings. • <i>Tembec</i> Tribunal held the request for a stay in abeyance and the parties completed briefing the jurisdictional issues. • The United States then made an application to the Consolidation Tribunal for a stay of the <i>Tembec</i> proceedings on May 7, 2005.
TERMINAL (seeks at least \$90m)	June 12, 2003	March 31, 2004 (9 months later)	—	<ul style="list-style-type: none"> • Since filing its Notice of Arbitration, Terminal did not take further steps to prosecute its claim. Further, unlike Canfor and Tembec, the Notice of Arbitration submitted by Terminal did not serve as a Statement of Claim, since Terminal stated in its Notice that it “will more fully articulate its basis for the claim in its Statement of Claim when filed.”¹

¹ See para. 9 of Terminal’s Notice of Arbitration as cited by Order at para. 24.

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