INVESTMENT AND COMMERCIAL ARBITRATION – SIMILARITIES AND DIVERGENCES

Edited by

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Preface

This book contains the contributions to the *Vienna International Arbitration Forum* on "Investment and Commercial Arbitration – Similarities and Divergences" which took place at the University of Vienna/Law School in November 2008. The conference was co-hosted by the Department for Civil Procedure Law and the Section for International Law and International Relations of the University of Vienna. It focused on topical issues in international investment arbitration and in commercial arbitration. Frequently, procedural questions arising in both of these areas are very similar. Featuring speakers from academia as well as practitioners, the Vienna Arbitration Forum therefore addressed select controversial topics from an investment arbitration perspective as well as a commercial arbitration point of view and explored similarities and divergences.

In four parallel structured sessions Christina Knahr and Julia Mair (both University of Vienna) spoke about "Consolidation of Proceedings in Investment and Commercial Arbitration", Stephan Wittich (University of Vienna) and Franz T. Schwarz (Wilmer Hale, London) addressed "The Limits of Party Autonomy in Investment and Commercial Arbitration", Irmgard Marboe (University of Vienna) and Vladimir Pavic (University of Belgrade) dealt with the issue of "Annulment of ICSID Awards" and "Challenge of Arbitral Awards before Domestic Courts", and Noah Rubins (Freshfields, Paris) and Christopher Kee (Deakin University) spoke about "Independence, Impartiality and Duty of Disclosure in Investment and Commercial Arbitration".

Our special thanks therefore go to the speakers who contributed to the success of the conference by giving excellent presentations and who made this publication possible by timely providing their manuscripts. Finally, we would also like to thank Freshfields Bruckhaus Deringer, Eleven International Publishing (in particular Selma Hoedt and Mirjam van der Heide) and the Austrian Science Fund for generously sponsoring this conference.

Vienna, May 2009
Christina Knahr, Christian Koller, Walter Rechberger, August Reinisch

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these arbitrations certainly contributed to the development of the substantive law on foreign investment. At the same time, however, the ever growing number of cases also created new procedural challenges and risks, one of them being the risk of inconsistent awards. Consolidation could be seen as a remedy to avoid that risk.[1]

Since there is no rule of binding precedent investment tribunals are free to deviate from decisions rendered by previous tribunals and can thus also reach considerably different conclusions on possibly very similar factual or legal issues. Even in the absence of an obligation to follow earlier decisions investment tribunals have, however, frequently referred to the reasoning and findings of previous tribunals in their awards, citing them either in support of their own conclusions or to highlight the differences of the respective cases and to explain why the tribunal came to a different finding.

Practice has shown that so far conflicting awards have been the exception rather than the rule. Nonetheless there have been instances where tribunals came to diametrically opposing results in very similar factual or legal situations. Among them are the famous *CME* and *Lauder* cases[2] and the *CMS* and *LG&E* cases.[3] These cases caused unease in the investment arbitration community[4] and renewed the debate about developing strategies to prevent conflicting dispute settlement outcomes, e.g. through the establishment of an appellate structure similar to the one existing in the WTO.[5] So far, however, this suggestion did not find sufficient support to be implemented in the

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[1] *See e.g.* G. Kaufmann-Kohler, L. Boisson de Chazournes, V. Bonnin, M. Moise Mbengue, *Consolidation of Proceedings in Investment Arbitration: How Can Multiple Proceedings Arising from the Same or Related Situations be Handled Efficiently?*, 21 ICSID Review-FILJ 59 (2006); OECD Working Party of the Investment Committee, Consolidation of Claims: A Promising Avenue for Investment Arbitration?, DAF/INV/WP(2006)2.

[2] *Re An UNCITRAL Arbitration* (Lauder *v.* The Czech Republic), Award, 3 September 2001, 9 ICSID Reports 66; *Re UNCITRAL Arbitration Proceedings* (CME Czech Republic BV *v.* The Czech Republic), Partial Award, 13 September 2001, 9 ICSID Reports 121.

[3] CMS Gas Transmission Company *v.* Argentine Republic, ICSID Case No. ARB/01/8, Award, 12 May 2005, 44 ILM 1205 (2005); LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. *v.* Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, 46 ILM 40 (2007).

[4] On the topic of conflicting awards *see also* C. N. Brower & J. K. Sharpe, *Multiple and Conflicting International Arbitral Awards*, 4 JWIT 211 (2003); A. Reinisch, *Necessity in International Investment Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS and LG&E*, 8 JWIT 191 (2007).

[5] For more on the discussion about the establishment of an appellate mechanism in investment arbitration *see e.g.* B. Legum, *Options to Establish an Appellate Mechanism for Investment Disputes*, *in* K. Sauvant, Appeals Mechanism in International Investment Disputes 231 (2008); D. Bishop, *The Case for an Appellate Panel and its Scope of Review*, TDM Vol. 2 Issue 2 (2005); Ch. Tams, *An Appealing Option? The Debate about an ICSID Appellate Structure*, *in* Ch. Tietje, G. Kraft & R. Sethe (Eds.), Beiträge zum Transnationalen Wirtschaftsrecht, Issue 57, June 2006; D. Gantz, *An Appellate Mechanism for Review of Arbitral Decisions in Investor-State Disputes: Prospects and Challenges*, 39 VJTL 39 (2006); A. Qureshi, *An Appellate System*

investment arbitration context. Joining originally separately instituted arbitral proceedings into one is arguably a valuable option to avoid the undesirable situation that similar issues arising in these arbitrations could be assessed contradictorily by different arbitrators sitting on separate tribunals. That such an outcome is not just a theoretical but a very real possibility was evidenced by the disputes in *Corn Products v. Mexico*[6] and *Archer Daniels Midland and Tate & Lyle Ingredients v. Mexico*[7] where consolidation of the two cases was rejected and the separate tribunals then reached contradictory conclusions on key substantive issues.[8]

On the other hand, as will be shown in more detail below,[9] the advantages of consolidation are certainly not unlimited. Not all parties to the proceedings involved will equally benefit if consolidation is ordered. Issues like providing for an adequate level of confidentiality of sensitive information or questions related to time and costs of the proceedings could make consolidation less attractive and reduce the viability of this procedural tool.[10] Thus, only if the benefit of reducing the risk of inconsistent awards will outweigh the potential downsides of consolidation, will the conclusion be appropriate that this procedural instrument is worth promoting.

2.2. Avoidance of Duplication of Proceedings and Securing Procedural Efficiency

Litigation of the same or similar disputes before different fora is not unusual in international arbitration.[11] In principle, parallel litigation can occur either if a claim is brought simultaneously before an international arbitral tribunal and a domestic court or if two or more international arbitral proceedings are instituted in case of similarly situated claims. The focus of this contribution lies on the latter. Consolidation is only one among a number of options that

in International Investment Arbitration?, *in* P. Muchlinski, F. Ortino & C. Schreuer, The Oxford Handbook of International Investment Law 1154 (2008).

[6] Corn Products International, Inc. *v.* United Mexican States, ICSID Case No. ARB (AF)/04/1, Decision on Responsibility (redacted version), 15 January 2008, available at http://ita.law.uvic.ca/documents/CPI-DecisiononResponsibility-eng.pdf.

[7] Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. *v.* United Mexican States, ICSID Case No. ARB (AF)/04/5, Award (redacted version), 21 November 2007, available at http://ita.law.uvic.ca/documents/ADMTateRedactedAward.pdf.

[8] *See* in more detail *infra* Chapter 3.

[9] *See infra* Chapter 4.

[10] *See id.*

[11] *See e.g.* A. Reinisch, *Issues Raised by Parallel Proceedings and Possible Solutions*, *in* M. Waibel *et al.* (Eds), The Backlash against Investment Arbitration (forthcoming 2009); K. Yannaca-Small, Parallel Proceedings, *in* P. Muchlinski, F. Ortino & C. Schreuer, The Oxford Handbook of International Investment Law 1008 (2008); G. Cuniberti, *Parallel Litigation and Foreign Investment Dispute Settlement*, 21 ICSID Review-FILJ 381 (2006).

could help reduce the occurrence of parallel proceedings. Other possibilities include e.g. the application of the principles of *res judicata* and *lis pendens*,[12] or the inclusion of fork-in-the-road or waiver provisions in international treaties.[13]

Even in the absence of outright conflicting or contradictory awards, the prevailing view is that duplication of proceedings is not desirable. Especially for parties that are respondents in multiple proceedings it will be more efficient if they have to defend themselves in only one instead of a number of arbitral proceedings at the same time. Having these proceedings joined into one can save time and reduce costs.[14] On the other hand, this very argument of time and cost efficiency might not hold true for individual investors who could be much better off with regard to time and costs if the arbitration they instituted was continued separately. Thus, also this at first sight certainly beneficial aspect of consolidation has to be assessed with caution. A weighing of interests of the parties involved and the potential benefits of avoiding duplication of proceedings and the downsides of such a joinder of proceedings should be conducted in order to most accurately assess the value of consolidation.

3. Arbitral Practice

In the absence of a possibility to formally consolidate proceedings under the auspices of ICSID, consolidation has been primarily relevant in the context of NAFTA Chapter 11 arbitrations. NAFTA contains an express consolidation provision in Article 1126.[15] Article 1126(2) NAFTA reads:

> Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:
> (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or
> (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

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[12] *See e.g.* A. Reinisch, *The Use and Limits of Res Judicata and Lis Pendens as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes*, 3 The Law and Practice of International Courts and Tribunals 37 (2004).

[13] *See e.g.* A. Crivellaro, *Consolidation of Arbitral and Court Proceedings in Investment Disputes*, 4 The Law and Practice of International Courts and Tribunals 371 (2005); Ch. Schreuer, *Travelling the BIT Route: Of Waiting Periods, Umbrella Clauses and Forks in the Road*, 5 JWIT 231 (2004).

[14] *See e.g.* J. Chiu, *Consolidation of Arbitral Proceedings and International Arbitration*, 7 J. Int'l. Arb. 53 (1990).

[15] North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States, and the Government of the United States of America (NAFTA), 17 December 1992, 32 ILM 289 (1993).

Also a number of new US BITs[16] and Free Trade Agreements[17] explicitly provide for the option of consolidation.

Article 1126 NAFTA is certainly the most prominent consolidation provision and the most relevant in arbitral practice. It contains a number of conditions under which it is possible that a separate tribunal is established to decide on disputes that would otherwise be pursued before two or more different tribunals. The following decisive elements of Article 1126(2) NAFTA can thus be indentified. Consolidation can be ordered

- upon request by a disputing party;
- if the disputes at hand have a question of law or fact in common; and
- if consolidation is in the interest of fair and efficient resolution of the claims.

Further, there are two possibilities concerning the scope of consolidation: the consolidation tribunal can assume jurisdiction either over all claims or over part of the claims. While seemingly straightforward, the application of these requirements can turn out to be problematic with respect to the specific circumstances where consolidation is requested. It is then in the discretion of the consolidation tribunal to decide, first, whether each of the elements identified above are fulfilled and the tribunal therefore does have jurisdiction, and second, whether it is going to assume jurisdiction over all or just part of the claims.

This contribution will analyze two instances where consolidation was requested, i.e. in *Corn Products, Archer Daniels Midland and Tate & Lyle Ingredients v. Mexico*[18] and in *Canfor, Tembec and Terminal Forest v. United States*.[19] The order of the consolidation tribunal in *Canfor* seems of particular interest since it examined the requirements of Article 1126 NAFTA in detail.

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[16] *See* Article 33 US Model BIT 2004: "1. Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10."

[17] *See e.g.* Art. 15.24 Singapore-US FTA: "1. Where two or more claims have been submitted separately to arbitration under Article 15.15.1 and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10."

[18] Corn Products International Inc. *v.* Mexico, ARB/(AF)/04/1, and Archer Daniels Midland Company and Tate & Lyle Ingredients Americas Inc. *v.* Mexico, ARB/(AF)/04/5, Order of the Consolidation Tribunal, 20 May 2005, available at http://naftaclaims.com/Disputes/Mexico/CPI/CPI-ADM-Consolidation_Tribunal_Award-20-05-05.pdf.

[19] Canfor Corp. *v.* United States, Tembec et al *v.* United States, and Terminal Forest Products Ltd. *v.* United States, Order of the Consolidation Tribunal, 7 September 2005, available at http://naftaclaims.com/Disputes/USA/Softwood/Softwood-ConOrder.pdf.

It follows from the legislative history and earlier drafts of the NAFTA that originally only State Parties could request consolidation. Only at a later stage of the drafting process the right to request the establishment of a consolidation tribunal was extended to investors as well.[20] This aspect seems to be interesting in particular for determining the primary beneficiaries of consolidation. *Prima facie* it will be states, finding themselves in a situation of being respondents in two or more similarly situated disputes that would benefit the most if these separate proceedings could be merged into one. Indeed, the initial main incentive of this provision seemed to be to alleviate the State Parties from the burden of having to defend themselves in multiple arbitral proceedings arising out of the same action or regulatory measure.[21]

Canfor, Tembec and Terminal Forest are all Canadian producers of softwood lumber which brought claims against the United States concerning a number of anti-dumping and countervailing duty measures adopted by the US relating to Canadian softwood lumber products. The United States, being the respondent in all three disputes, requested consolidation of the three cases. The consolidation tribunal examined each of the requirements contained in Article 1126 NAFTA in detail and identified a number of aspects relevant in the context of consolidation that merit closer attention. The issues identified by the *Canfor* consolidation tribunal, which seem, however, generally applicable to consolidation cases will be analyzed more comprehensively in a later part of this contribution.[22]

In *Corn Products v. Mexico* a US company instituted proceedings against Mexico under the ICSID Additional Facility Rules, alleging breaches of Article 1102, 1106 and 1110 NAFTA arising from the imposition of an excise tax on soft drinks containing high fructose corn syrup. Separately, Archer Daniels Midland and Tate & Lyle Ingredients Americas, also two US companies, submitted a similar claim, also under the ICSID Additional Facility Rules, against Mexico based on the same tax measure. Mexico submitted a request for consolidation of these two disputes.

Without mentioning any details concerning the factual or legal situation, the tribunal quickly established that the claims brought in the two disputes had "questions of law or fact in common."[23] According to the tribunal, the main issue was whether consolidation was "in the interest of fair and efficient resolution of the claims."[24]

What was particularly problematic in the situation before the consolidation tribunal was the fact that the claimants in the two disputes were direct competitors and thus were eager to keep confidential various information concerning the nature of their investments, business strategies, costs etc. This

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[20] Canfor, *supra* note 19, at paras. 65–67.
[21] Canfor, *supra* note 19, at para. 73.
[22] See *infra* text at note 35.
[23] Corn Products, Consolidation Order, *supra* note 18, at para. 6.
[24] *Id.*

information, however, was important to be put before the tribunal in order to enable it to decide on the merits of the claims. The tribunal therefore found that under these circumstances consolidation could only be achieved under major difficulties.[25] According to the consolidation tribunal, safeguarding confidentiality could much more easily be achieved in separate proceedings, which would also permit a much more efficient conduct of the arbitral proceedings.[26]

Further, the tribunal did not see a major risk of inconsistent awards if consolidation were denied since the claims would be sufficiently different with regard to issues of quantum and of state responsibility. Moreover, according to the tribunal, the risk of inconsistent awards did not outweigh the unfairness to the claimants of procedural inefficiencies that would arise if the cases were consolidated.[27] As indicated above, however, the tribunal's prediction concerning the consistency of the awards turned out to be wrong. While the tribunal in *ADM v. Mexico* found that a tax measure enacted by Mexico constituted a performance requirement and Mexico violated Article 1106 NAFTA,[28] the tribunal in *Corn Products v. Mexico* found that the same tax measure did not constitute a performance requirement and Mexico did not violate Article 1106 NAFTA.[29] Further, the tribunals also diverged on the question whether the tax measure at issue was justified as a form of countermeasure that Mexico enacted towards the United States. While the *ADM* tribunal concluded that the tax could not be seen as a justifiable countermeasure,[30] the *Corn Products* tribunal found that the doctrine of countermeasures did not apply under Chapter 11 NAFTA.[31]

In examining whether consolidation should be ordered the tribunal also looked at the stages the different arbitral proceedings were at the time of request for consolidation. By comparing the stages the tribunal aimed at determining whether consolidation would possibly cause undue delay for one or the other proceeding. This is certainly an important aspect to be taken into consideration, in particular since it seems unlikely that all arbitral proceedings will be at exactly the same stage of process. In most instances proceedings in one case will be further along than in the other case, bearing the consequence that consolidation could be more beneficial and efficient for the parties to one case than to the other. In the situation at hand the claimant in one case had already submitted a Memorial, whereas in the other case the tribunal had not yet been constituted.[32] The consolidation tribunal was convinced

[25] *Id.*, at paras. 7–9.
[26] *Id.*, at para. 10.
[27] *Id.*, at paras. 16, 17.
[28] ADM *v.* Mexico, Award, *supra* note 7, at para. 227.
[29] Corn Products *v.* Mexico, Decision on Responsibility, *supra* note 6, at para. 80.
[30] ADM *v.* Mexico, Award, *supra* note 7, at para. 180.
[31] Corn Products *v.* Mexico, Decision on Responsibility, *supra* note 6, at para. 191.
[32] Corn Products, Consolidation Order, *supra* note 18, at para. 18.

that consolidating the proceedings would require complex procedures to be established, especially in light of the confidentiality issues that would further aggravate matters. Thus, the tribunal reached the conclusion that consolidation would lead to a substantial delay in the decision making and would therefore not be "in the interest of fair and efficient resolution of the claims" as required by Article 1126 NAFTA.[33]

In determining whether consolidation is "in the interest of fair and efficient resolution of the claims" the tribunal performs a weighing of interests of all parties involved in the disputes. It also compares – what seems to be a certainly sensible approach – the likely progress of the arbitral process in case consolidation were granted with a situation where consolidation would be rejected. Of course, this is a difficult assumption for any tribunal to make, since it seems everything but easy to predict the progress of an arbitration in advance. Nonetheless, a comparison of the two scenarios seems to be an important assessment to make for a consolidation tribunal in order to determine whether to assume jurisdiction over the disputes or whether to refrain from it and rather have the proceedings continue separately.

In the end, the *Corn Products* consolidation tribunal concluded that it was not "in the interest of fair and efficient resolution of the claims" to consolidate the proceedings and therefore rejected consolidation.[34]

4. Controversial Issues

4.1. Consent to Arbitration

In *Canfor*, claimants argued that they did not consent to arbitration under the consolidation tribunal, they only consented to arbitration under the original tribunal established under Article 1120 NAFTA. The consolidation tribunal, however, rejected this argument, stating that consent was implied by generally consenting to arbitration under NAFTA Chapter 11. Since Article 1126 forms part of Chapter 11 of NAFTA this provision was also encompassed by the consent given by investor. There would be no need to explicitly and separately consent to a consolidation tribunal established under Article 1126 NAFTA.[35] Consent is certainly one of the cornerstones of arbitration and the possibility for the parties to appoint one arbitrator to the tribunal is an important feature of this particular form of dispute settlement which parties do not want to dispense with. Nonetheless, the reasoning of the consolidation tribunal in this case seems comprehensible. Investors have to be aware of the fact that when consenting to arbitration under NAFTA Chapter 11 they get

[33] *Id.*, at para. 19.
[34] *Id.*, at para. 20.
[35] Canfor, *supra* note 19, at para. 79.

a 'package deal', which, if the requirements of this provision are met, also includes the possibility that consolidation is ordered and a tribunal for which they cannot appoint an arbitrator will decide the dispute. It could be argued that a restriction like that conflicts with the principle of party autonomy. On the other hand, the potential advantages of consolidating two or more disputes could outweigh the limitation of the parties' rights in this respect. In the end, the *Canfor* consolidation tribunal's approach of interpreting consent broadly to also implicitly cover consent to arbitration under the consolidation tribunal seems to be justified.

Although this question has not come up in practice yet, the same approach seems also to be valid in cases where consolidation can be ordered on the basis of an express consolidation provision included in a bilateral investment treaty like for example in Article 33 US Model BIT. Drawing an analogy to the NAFTA context, it seems reasonable to argue that consent to arbitration under a BIT that expressly provides for the option of consolidation does also cover the treaty provisions in their entirety – thus, also potentially consolidation of two or more disputes into one arbitral proceeding conducted by a tribunal to which the parties have not consented separately and did not have the possibility to appoint the arbitrators.

4.2. Determination of "Question of Law or Fact in Common"

According to the *Canfor* consolidation tribunal,

> [t]he notion of "question" in the term "a question of law or fact in common" as appearing in Article 1126(2) means a factual or legal issue that requires a finding to dispose of a claim. [...][36]

And further,

> An issue to which the invocation of a provision of Section A of Chapter 11 of the NAFTA gives rise, should, therefore, be in common in the Article 1120 arbitrations. The mere invocation of the same provision of the NAFTA is not sufficient.[37]

Therefore, it will not suffice that the disputes have certain facts in common that are not being disputed. Similarly, the mere fact that the parties in the separate proceedings invoke the same provision of NAFTA as allegedly being violated is not sufficient for consolidation to be ordered in accordance with Article 1126 NAFTA. Rather, there has to be an *issue* concerning the facts among the parties and the necessity has to arise for a tribunal to make a finding on this controversial factual or legal issue in order to justify consolidation. Setting a higher threshold in this context and requiring more connection between the

[36] *Id.*, at para. 109.
[37] *Id.*, at para. 110 (footnote omitted).

cases than simply the invocation of the same treaty provisions will certainly be necessary in order to ensure that consolidation is kept within limits and a consolidation tribunal will be able to reasonably perform its task. After all, it is the very purpose of consolidation to merge closely related arbitrations. It would certainly go beyond the idea of consolidation if only marginally related proceedings were joined simply because the same treaty provision was invoked by different investors.

4.3. Determination Whether Consolidation Is "In the Interest of Fair and Efficient Resolution of the Claims"

In determining what is "fair" the *Canfor* consolidation tribunal found that the interests of all parties involved should be balanced and it should be ensured that also in the event consolidation is ordered all parties should continue to receive the right of due process.[38] What is being considered as "fair" is frequently more a matter of perception of the individual concerned rather than an objective standard. It will certainly depend upon the circumstances of each case. Due to the lack of an objective standard it lies in the discretion of the consolidation tribunal to ensure fairness as far as possible. Balancing the interests of the parties involved and guaranteeing them the right of due process seem to be important elements of ensuring a "fair" resolution of the claims as required by Article 1126 NAFTA.

When determining what is "efficient" the *Canfor* tribunal compared the situations that would occur with or without consolidation and considered the following three factors as relevant for determining efficiency in any given context: time, costs, and avoidance of conflicting decisions.[39] The tribunal explained what it would consider under each of these factors, stating that

> [f]actor (i), time, includes consideration of the status of the Article 1120 arbitrations for which a party seeks consolidation and of the delay, if any, that might result in the resolution of the claims. In that connection, the differences in stages in the Article 1120 proceedings may constitute a relevant aspect. Factor (ii), costs, involves an assessment of the costs to all parties involved. Factor (iii), avoidance of conflicting decisions, requires a consideration of whether conflicting decisions on common questions of law or fact, that are before the 1120 Tribunals, can arise.[40]

With regard to time the first question that comes to mind is whether there is any deadline for requesting consolidation and whether there is any specific stage of the proceedings after which consolidation is not possible any more. According to Article 1126 NAFTA, no such time limits exist. Nonetheless, in practice,

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[38] *Id.*, at para. 125.
[39] *Id.*, at para. 126.
[40] *Id.*, at para. 126.

the more advanced the separate proceedings instituted under Article 1120 NAFTA are, the less likely it will be that consolidation will be ordered.[41] At some point it will simply not be feasible and efficient any more to consolidate the separate proceedings. It is highly unlikely that all arbitral proceedings that are potentially to be consolidated will be at the exact same stage of the process. Thus, consolidation might be more time efficient for one investor than for another investor or for a state party. It would make consolidation nearly impossible if a consolidation tribunal had to deny consolidation just because it might be more time consuming for certain disputing parties to the separate proceedings than to others. Rather, it will be the certainly not always easy task of a consolidation tribunal to weigh the interests of the parties involved[42] and to determine on a case by case basis if overall the efficiency requirement is still met despite a potential time delay for one of the parties.

In *Canfor, Tembec and Terminal Forest v. United States*, none of the proceedings were very far along when the United States requested consolidation. None of the tribunals had issued a Decision on Jurisdiction yet or had entered a discussion on the merits.[43] The consolidation tribunal mentioned that the United States could have requested consolidation at an earlier stage of the proceedings, but that delay did not preclude consolidation from being ordered since "none of the Article 1120 proceedings has advanced to such a stage that consolidation would no longer serve procedural economy."[44] The consolidation tribunal examined whether ordering consolidation would lead to a delay for each of the parties involved, finding that Canfor and Tembec would have some delay, while Terminal Forest would not suffer a delay if the separate proceedings were to be merged into one.[45]

As far as the second factor, costs, is concerned the *Canfor* consolidation tribunal saw this as the least problematic aspect not requiring further detailed explanation. It stated that the costs of all parties involved should be assessed when determining whether or not consolidation would be efficient.[46] In the situation before it the tribunal found that the consolidated proceedings would be less expensive for the United States than having to defend itself as respondent in three separate proceedings and that the costs for the three claimants would increase through consolidation, but this increase would not be excessive.[47] Since there is no specific threshold in this regard it will always be in the discretion of a consolidation tribunal to determine when increasing costs – and there will most likely always be one or the other party to the proceedings that will incur additional costs compared to the individual

41 *Id.*, at para. 128.
42 *Id.*, at para. 129.
43 *Id.*, at para. 209.
44 *Id.*, at para. 210.
45 *Id.*, at para. 211.
46 *Id.*, at paras. 126, 127.
47 *Id.*, at para. 215.

proceeding – are still within an acceptable range and when the increase, as the *Canfor* consolidation tribunal expressed it, is "excessive" and thus does not justify consolidation anymore.

With regard to the third factor considered relevant by the *Canfor* consolidation tribunal for determining efficiency, i.e. the avoidance of conflicting awards, the tribunal emphasized the importance of this aspect and the desirability of having consistent decisions, to which consolidation would certainly contribute. As pointed out above,[48] avoiding conflicting awards is seen as one of the main advantages of consolidation. Also the *Canfor* consolidation tribunal found that consolidation can prevent such undesired outcomes, pointing out that this would apply to both consolidation of all claims as well as consolidation of part of the claims.[49] Without going into further detail the tribunal reached the conclusion that

> in light of the numerous common questions of law and fact in the three Article 1120 arbitrations, there is a risk that, if not consolidated, their Tribunal decisions will be inconsistent.[50]

Generally speaking, it seems more likely that the risk for conflicting dispute settlement outcomes will arise in cases where separate tribunals will have to decide on several questions of law or fact common to the disputes. Nonetheless, even where only one aspect is common to different proceedings tribunals can potentially reach diametrically opposing decisions. In order to avoid that undesirable situation consolidation seems to be a valuable tool.

4.4. Scope of Consolidation

As the consolidation tribunal in *Canfor* has pointed out,

> an Article 1126 Tribunal can order the consolidation of all issues relating to liability, leaving damages to the Article 1120 Tribunals. An Article 1126 Tribunal may also order consolidation of a National Treatment claim under Article 1102 and/or a Most-Favored-Nation Treatment claim under Article 1103 and/or a Minimum Standard of Treatment claim under Article 1105, and leave an Expropriation claim under Article 1110 to the Article 1120 Tribunals. Further, an Article 1126 Tribunal may consolidate issues relating to objections to jurisdiction (and/or admissibility) alone, and, to the extent that it rejects those objections, leave the remainder of the dispute to the Article 1120 Tribunals.[51]

To what extent consolidation is ordered can therefore differ considerably from case to case. It lies in the discretion of the consolidation tribunal to determine in each instance individually which parts of the separate arbitral proceedings

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[48] *See supra* text at note 1.

[49] Canfor, *supra* note 19, at para. 131.

[50] *Id.*, at para. 217.

[51] *Id.*, at para. 108 (footnotes omitted).

it deems apt for being consolidated and which parts should remain with the originally instituted tribunals.

The question then will arise as to the fate of the arbitral tribunals established under Article 1120 NAFTA. In this respect the *Canfor* consolidation tribunal clearly stated that

> [i]f an Article 1126 Tribunal orders consolidation in full, the Article 1120 Tribunals cease to function because of the dictates of Article 1126(8). If an Article 1126 Tribunal orders consolidation in part, then the relevant Article 1120 Tribunals no longer have jurisdiction over the part over which the Article 1126 Tribunal has assumed jurisdiction.[52]

In the latter case, if only parts of the claims are consolidated and the Article 1120 tribunals still have jurisdiction over the remainder of the claims and continue their own arbitral proceedings, it might be useful, as a matter of practice, to stay the proceedings until the consolidation tribunal has rendered its decision. In the NAFTA context, this option is provided for in Article 1126(9).

4.5. Confidentiality

Ensuring confidentiality of sensitive information is of particular importance for parties not only in commercial but increasingly also in investment arbitration. In particular over the last couple of years demands for increasing transparency have been taken seriously and led to amendments of arbitration rules to that effect.[53]

In situations where consolidation is at issue it is particularly likely that investors are direct competitors. Since questions of law or fact have to be common to the disputes to be consolidated the probability that the investors in the cases at hand could be in the same economic field and thus perhaps in a competitive relationship seems higher than in cases that deal with completely different subject matters. Therefore, it cannot be denied that if investors are in direct competition to investors in the other case the issue of confidentiality will become even more important. Investors being eager not to disclose sensitive business information for example can be expected to be rather cautions towards consolidation. If originally separate proceedings are being merged into one the risk of information having to be divulged to the other parties

[52] *Id.*, at paras. 156, 157.

[53] *See e.g.* the Amendments to the ICSID Rules and Regulations and the Additional Facility Rules, effective 10 April 2006, available at http://www.worldbank.org/icsid/highlights/04-10-06.htm; for more on the Amendments concerning transparency *see e.g.* C. Knahr, *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration*, 23 Arb. Int'l 327 (2007).