IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE
NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ICSID ADDITIONAL FACILITY RULES BETWEEN

B-MEX, LLC AND OTHERS,

Claimants

-and-

UNITED MEXICAN STATES,

Respondent

ICSID CASE NO. ARB(AF)/16/3

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement (NAFTA), the United States of America makes this submission on questions of interpretation of the NAFTA. The United States does not take a position, in this submission, on how the interpretations offered below apply to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

Article 1122(1) (Consent to Arbitration)

2. A State’s consent to arbitration is paramount. Indeed, given that consent is the “cornerstone” of jurisdiction in investor-State arbitration, it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party’s consent to arbitrate.

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1 See, e.g., ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 74 (1st ed. 2009) (“Arbitral tribunals constituted to hear international or transnational disputes are creatures of consent. Their source of authority must ultimately be traced to the consent of the parties to the arbitration itself.”); William Ralph Clayton et al. v. Government of Canada, NAFTA/UNCITRAL, Award on Jurisdiction and Liability ¶ 229 (Mar. 17, 2015) (“General international law also provides that a state is not automatically subject to the jurisdiction of international adjudicatory bodies to decide in a legally binding way on complaints concerning its treatment of a foreign investor, but must give its consent to that means of dispute resolution. The heightened protection given to investors from other NAFTA Parties under Chapter Eleven of the Agreement must be interpreted and applied in a manner that respects the limits that the NAFTA Parties put in place as integral aspects of their consent, in Chapter Eleven, to an overall enhancement of their exposure to remedial actions by investors.”).

2 As explained by the Executive Directors of the International Bank for Reconstruction and Development (World Bank) when submitting the then-draft ICSID Convention to the World Bank’s Member Governments, “[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre.” Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ¶ 23 (Mar. 18, 1965).

3 The Renco Group Inc. v. Republic of Peru, ICSID Case No. UNCT/13/1, ¶ 71 (July 15, 2016) (“It is axiomatic that the Tribunal’s jurisdiction must be founded upon the existence of a valid arbitration agreement between Renco and Peru.”). See also CHRISTOPH SCHREUER, THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 831 “Consent to Arbitration” (2008) (Peter Muchlinski et al., eds.) (explaining that “[l]ike any form of arbitration, investment arbitration is always based on agreement. Consent to arbitration by the host State and by the investor is an indispensable requirement for a tribunal’s jurisdiction.”); CHRISTOPHER F. DUGAN ET AL., INVESTOR STATE
3. Article 1122 (Consent to Arbitration), paragraph (1), provides that: “Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.” Thus, the NAFTA State Parties have only consented to arbitrate investor-State disputes under Chapter 11, Section B, where an investor submits a “claim to arbitration in accordance with the procedures set out in this Agreement.” And, an agreement to arbitrate is formed upon the investor’s corresponding consent to arbitrate in accordance with those procedures. Thus, the NAFTA Parties have explicitly conditioned their consent upon satisfaction of the relevant procedural requirements. All three NAFTA Parties agree on this point.

4. The “procedures set out in this Agreement” required to engage the NAFTA Parties’ consent and form the agreement to arbitrate are found principally in Articles 1116-1121. Notably, the Methanex tribunal, in examining whether the “necessary consensual base for its jurisdiction [was] present” explained that:

In order to establish the necessary consent to arbitration [under Chapter 11], it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party’s consent to arbitration is established.

ARBITRATION 219 (2008) (explaining also that “[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals”).

5 NAFTA Articles 1122(1), 1121(1)(a) and 1121(2)(a).

6 Methanex Corp. v. United States of America, NAFTA/UNCITRAL, First Partial Award ¶ 120 (Aug. 7, 2002) (emphasis added); see also Detroit Int’l Bridge Co. v. Government of Canada, NAFTA/PCA Case No. 2012-25, ¶
5. Moreover, by conditioning their consent in Article 1122(1) upon the satisfaction of the “procedures set out in this Agreement”, the NAFTA Parties explicitly made the satisfaction of these procedures jurisdictional (not admissibility) requirements.

Article 1119 (Notice of Intent to Submit a Claim to Arbitration)

6. Article 1119 (Notice of Intent to Submit a Claim to Arbitration) is another example of a procedural condition which must be satisfied before a NAFTA Party’s consent to arbitrate under Article 1122(1) is engaged. Article 1119 provides that:

   The disputing investor shall deliver to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify:
   (a) the name and address of the disputing investor and, where a claim is made under Article 1117, the name and address of the enterprise;
   (b) the provisions of this Agreement alleged to have been breached and any other relevant provisions;
   (c) the issues and the factual basis for the claim; and
   (d) the relief sought and the approximate amount of damages claimed.

   (Emphasis added.)

7. A disputing investor who does not deliver a Notice of Intent ninety (90) days before it submits a Notice of Arbitration or Request for Arbitration fails to satisfy this procedural requirement and fails to engage the respondent’s consent to arbitrate. Under such circumstances, a tribunal will lack jurisdiction ab initio. As discussed below with respect to Article 1121(3), a respondent’s consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration.7 Unlike the Claimant’s consent required by Article 1121(3), however, which must accompany and be in conjunction with a Notice of Arbitration, satisfaction of the requirements of Article 1119 through submission of a valid Notice of Intent must precede submission of a Notice of Arbitration by 90 days.8

8. The procedural requirements in Article 1119 are not merely technical “niceties” but are explicit treaty requirements (i.e., “shall deliver;” “shall specify”) that serve important functions. These functions include allowing a NAFTA Party time to identify and assess potential disputes,

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320 (Apr. 2, 2015) (affirming with respect to the waiver requirement in Article 1121 that “the absence of a valid waiver prevents the Tribunal from having jurisdiction in this case.”); Waste Management [I], Inc. v. United Mexican States, NAFTA/ICSID Case No. ARB(AF)/98/2, Award ¶ 31.2 (June 2, 2000) (“Waste Management [I] Award”).

7 NAFTA Article 1137(1) defines when a claim is considered “submitted to arbitration” as being when the “request for arbitration” or “notice of arbitration” is received, depending on which set of arbitral rules has been selected.

8 See Waste Management [I] Award ¶¶ 4-5 (noting ICSID’s refusal to accept a request for arbitration under the NAFTA because of claimant’s failure to satisfy “one of the procedural requirements to be met by the Claimant, namely, mandatory notice of intent to submit the claim to arbitration under NAFTA Article 1119,” and noting that the claimant’s request was not accepted until “the formal defect . . . had been remedied by notice of intent to submit a claim to arbitration being forwarded to the body designated by the Government of Mexico” and the elapse of more than 90 days).
coordinate among relevant national and subnational officials, and to consider, if they so choose, amicable settlement or other courses of action prior to arbitration. Such courses of action may include preservation of evidence and/or the preparation of a defense. As recognized by the tribunal in *Merrill & Ring v. Canada*, rejecting a belated attempt to add a claimant in that case, the safeguards found in Article 1119 (among other requirements) “cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim.”

9. For all of the foregoing reasons, a tribunal cannot simply overlook an investor’s failure to comply with the procedural requirements of Article 1119, including in the context of determining whether the receipt of a Notice of Arbitration constitutes the valid and timely submission of a claim. Articles 1116(2) and 1117(2) provide that investors may not make a claim if more than three years have elapsed from the date on which the investor or enterprise first acquired, or should have first acquired, knowledge of the alleged breach and loss. Because an Article 1119 Notice of Intent must precede a Notice of Arbitration by 90 days, an investor has two years and 275 days to take steps that can lead to the submission of a valid and timely claim to arbitration under Chapter Eleven. Thus, for example, claimants or claims included in a Notice of Arbitration that were not included in a Notice of Intent delivered at least 90 days earlier have not been validly submitted to arbitration, and that Notice of Arbitration cannot toll the period of limitations for those claims or claimants. As the *Grand River* and *Feldman* NAFTA tribunals observed, the time-limitations provisions contained in Articles 1116(2) and 1117(2) are “clear and rigid” and not subject to any “suspension,” “prolongation,” or “other qualification.”

**Article 1121 (Conditions Precedent to Submission of a Claim to Arbitration)**

10. As noted above, some of the procedural requirements upon which the NAFTA Parties have conditioned their consent can be found in Article 1121. Article 1121(1) and (2) provide that a disputing investor may submit a claim to arbitration “only if” the investor (or the investor and the enterprise) “consents to arbitration in accordance with the procedures set out in this

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9 In this regard, NAFTA Article 1118 (Settlement of a Claim through Consultation and Negotiation) provides that the disputing parties “should first attempt to settle a claim through consultation or negotiation.” (Emphasis added.) Such consultations or negotiations are not required.

10 *Merrill & Ring Forestry L.P. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/07/1, Decision on a Motion to Add a New Party ¶ 29 (Jan. 31, 2008).

11 Article 1116(2) in its entirety provides that “[a]n investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.” Article 1117(2) in its entirety provides that “[a]n investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.”

12 Article 1119 requires a disputing investor to specify in a Notice of Intent: “(b) the provisions of this Agreement alleged to have been breached and any other relevant provisions; [and] (c) the issues and the factual basis for the claim[.]” For example, in *Mondev* where the claimant did not reference a claim under Article 1117 in its notice of intent to submit a claim to arbitration as required by Article 1119, the United States explained that its consent to arbitrate “encompassed only those claims as to which the NAFTA’s procedures had been followed, including Article 1119.” *Mondev Int’l Ltd. V. United States of America*, NAFTA/ICSID Case No. ARB(AF)/99/2, Counter-Memorial on Competence and Liability of Respondent United States of America (June 1, 2001), at 74.

13 *Grand River v. United States of America*, UNCITRAL, Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006); *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002).
Further, Article 1121(3) requires that “[a] consent and waiver required by this Article [1] shall be in writing, [2] shall be delivered to the disputing Party and [3] shall be included in the submission of a claim to arbitration.” The three requirements found in Article 1121(3) apply to both the consent and the waiver.

11. Each claimant must satisfy the requirements of Article 1121 for the tribunal to have jurisdiction over the NAFTA Party with respect to that claimant’s putative claims. As the text of Article 1121(3) makes clear, a consent must be “included in the submission.” Article 1137(1)(b) further states that, with respect to arbitrations proceeding under the ICSID Additional Facility Rules, a claim is “submitted to arbitration” when the Notice of Arbitration is received by the ICSID Secretary-General. Thus consent must accompany and take place in conjunction with the Notice of Arbitration. Additionally, the “consent” required by Article 1121 must be “clear, explicit and categorical[.]” If the requirements regarding a claimant’s “consent” have not been satisfied, the NAFTA Party’s consent is not engaged, and the tribunal lacks jurisdiction ab initio. A Notice of Arbitration unaccompanied by valid consent does not present a claim that is capable of being submitted to arbitration.

12. A tribunal may determine whether a disputing investor has consented in accordance with the requirements of Article 1121. However, a tribunal itself has no authority to remedy an invalid consent. The discretion whether to permit a claimant either to proceed under or remedy an ineffective consent lies with the respondent as a function of the respondent’s general discretion to consent to arbitration and not with a tribunal. Where a valid consent is filed subsequent to the Notice of Arbitration, the claim will be considered submitted to arbitration on the date on which the valid consent was filed, assuming all other requirements have been satisfied, and not the date of the Notice of Arbitration.

Article 1139 (Definition of “Investment”)

13. Article 1139 provides an exhaustive, not illustrative, list of what constitutes an investment for purposes of NAFTA Chapter Eleven. Article 1139(g) defines “investment” as

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14 Articles 1121(1)(a) and (2)(a) (emphasis added). Under Articles 1121(1)(b) and 2(b) the investor (or the investor and the enterprise) must also submit the requisite waivers.

15 Waste Management I Award ¶ 19. Although that tribunal was referring to the “waiver” requirement of Article 1121, Article 1121(3) treats the requirements for investor consent and waiver in the same provision and does not distinguish between them.

16 Waste Management I Award ¶ 18.

17 Commerce Group Corp. and San Sebastian God Mines, Inc. v. The Republic of El Salvador, CAFTA-DR/ICSID Case No. ARB/09/17, Award ¶¶ 79-80, 115 (Mar. 14, 2011). The Commerce Group tribunal was discussing the “waiver” requirement in Article 10.18.2 of the CAFTA-DR. Both the “waiver” and “consent” requirements are found in Article 10.18.2, and there is no textual basis for treating them differently. See also Waste Management I Award ¶ 31.2.

18 See, e.g., Waste Management I Award ¶ 31 (holding that the waiver deposited with the first notice of arbitration did not satisfy Article 1121 and that this defect could not be made good by subsequent action on the part of the claimant); Railroad Development Corporation v. Republic of Guatemala, CAFTA-DR/ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction Under CAFTA Article 10.20.5, ¶ 61 (Nov. 17, 2008) (stating with respect to the analogous waiver provision in the CAFTA-DR that “the Tribunal has no jurisdiction without agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver” and that “[i]t is for the Respondent and not the Tribunal to waive any deficiency under Article 10.18 or to allow a defective waiver to be remedied[].”).

19 See Grand River Enterprises Six Nations, Ltd., et al. v. United States of America, NAFTA/UNCITRAL, Award ¶ 82 (Jan. 12, 2011) ("Grand River Award") ("NAFTA’s Article 1139 is neither broad nor open-textured. It prescribes
“real estate or other property, tangible or intangible, acquitted in the expectation or used for the purpose of economic benefit or other business purposes[.]” In this connection, Chapter Eleven tribunals have consistently declined to recognize as “property” mere contingent “interests.”20 Moreover, it is appropriate to look to the law of the host State for a determination of the definition and scope of the “property right” at issue.21

14. In order to bring a claim under Chapter Eleven, a claimant has the burden of proving that its proffered investment or investments fall within one of the enumerated categories of investments listed in Article 1139. In the context of an objection to jurisdiction, the burden is on the claimant to prove the necessary and relevant facts to establish that a tribunal has jurisdiction to hear its claim. Further, it is well-established that where “jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.”22 As the tribunal in Bridgestone

See, e.g., Methanex Corp. v. United States of America (Methanex Corp.), NAFTA/UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent United States of America, at 32 (Nov. 13, 2000) (“Article 1139 of the NAFTA identifies an exhaustive list of property rights and interests that may constitute an ‘investment’ for purposes of Chapter Eleven. None of the property rights or property interests identified in the definition of ‘investment’ in Article 1139, however, encompass a mere hope that profits may result from prospective sales[,]”); Methanex Corp., Second 1128 Submission of Canada ¶ 59 (Apr. 30, 2001) (“The definition of ‘investment’ in NAFTA Article 1139 . . . is exhaustive, not illustrative.”); Methanex Corp., Second 1128 Submission of Mexico ¶ 19 (May 15, 2001) (“[A]n investment as defined in Article 1139 . . . while inclusive of several categories, is also exhaustive.”). 20 See Merrill & Ring Forestry L.P. v. Government of Canada, NAFTA/UNCITRAL, Award ¶¶ 142, 257-58 (Mar. 31, 2010) (finding that “[e]xpropriation cannot affect potential interests[,]” and that the expectation of contracts executed in the future was an “uncertain expectation, like the goodwill considered in Oscar Chinn, [that] does not appear to provide a solid enough ground on which to construct a legitimately affected interest”); Bayview Award ¶ 118 (finding no property rights where, among other things, exploitation or use of the water requires the grant of a concession under Mexican law, which such concession does not guarantee the existence or permanence of the water); International Thunderbird Gaming Corp. v. United Mexican States, NAFTA/UNCITRAL, Award ¶ 208 (Jan. 26, 2006) (“[C]ompensation is not owed for regulatory takings where it can be established that the investor or investment never enjoyed a vested right in the business activity that was subsequently prohibited.”); Marvin Roy Feldman Karpa v. United Mexican States, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 118 (Dec. 16, 2002) (finding no “right” to tax rebates where the right was conditioned upon presentation of certain invoices); see also Methanex Corp., Final Award on Jurisdiction and Merits, Part IV, Chapter D ¶ 17 (Aug. 3, 2005) (noting that “items such as goodwill and market share may . . . in a comprehensive taking . . . figure in valuation,” “[b]ut it is difficult to see how they might stand alone” as an investment under Article 1139 (“Methanex Final Award”).

21 See, e.g., Rosalyn Higgins, The Taking of Property by the State: Recent Developments in International Law, in 176 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 263, 270 (1982) (for a definition of “property . . . [w]e necessarily draw on municipal law sources”). It is well-established under U.S. law, for example, that that revocable government-granted licenses do not confer property interests that give rise to claims for compensation. See Dames & Moore v. Regan, 453 U.S. 654, 674 n.6 (1981) (holding that attachments subject to “revocable” and “contingent” licenses, which the President could nullify, did not provide the plaintiff with any “property” interest that would support a constitutional claim for compensation); Mike’s Contracting, LLC v. United States, 92 Fed. Cl. 302, 310 ( Ct. Fed. Cl. 2010) (holding that helicopter airworthiness certificates, subject to U.S. Federal Aviation Administration revocation or suspension, were not property interests that could give rise to a takings claim). This is particularly true when a person voluntarily enters a heavily regulated field.

22 Phoenix Action Ltd v. Czech Republic, ICSID Case No. ARB/06/5, Award ¶ 61 (Apr. 15, 2009); Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on Jurisdiction ¶ 2.8 (June 1, 2012) (finding “that it is impermissible for the Tribunal to found its jurisdiction on any of the Claimant’s CAFTA claims on the basis of an assumed fact (i.e., alleged by the Claimant in its pleadings as regards jurisdiction but disputed by the Respondent). The application of that ‘prima facie’ or other like standard is limited to testing the merits of a claimant’s case at a jurisdictional stage; and it cannot apply to a factual issue upon which a tribunal’s jurisdiction directly depends, such as the Abuse of Process, Racione Temporis and Denial of Benefits issues in this case.”); see also Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama, ICSID Case No. ARB/16/34, Decision on Expedited Objections ¶ 118 (Dec. 13, 2017) (stating that “[w]here an objection as to
v. Panama recently stated when assessing Panama’s jurisdictional objections regarding a claimant’s purported investments under the U.S.-Panama Trade Promotion Agreement, “[b]ecause the Tribunal is making a final finding on this issue, the burden of proof lies fairly and squarely on [the claimant] to demonstrate that it owns or controls a qualifying investment.”

**Article 1117 (Claim by an Investor of a Party on Behalf of an Enterprise)**

15. Article 1117 further authorizes an investor of a Party to bring a claim on behalf of an enterprise that the investor “owns or controls directly or indirectly.” The NAFTA does not define “control.” The omission of a definition for “control” accords with long-standing U.S. practice, reflecting the fact that determinations as to whether an investor controls an enterprise will involve factual situations that must be evaluated on a case-by-case basis.

Respectfully submitted,

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