

IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE  
NORTH AMERICAN FREE TRADE AGREEMENT  
AND THE UNCITRAL ARBITRATION RULES, 1976

CARLOS SASTRE AND OTHERS,

*Claimants*

*-and-*

UNITED MEXICAN STATES,

*Respondent.*

ICSID CASE NO. UNCT/20/2

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**SUBMISSION OF THE UNITED STATES OF AMERICA**

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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 interpretation offered below applies to the facts of this case, and no inference should be drawn from the absence of comment on any issue not addressed below.

**Article 1131 (Burden of Proof)**

2. Article 1131 provides in relevant part that the Tribunal “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”

3. General principles of international law concerning the burden of proof in international arbitration provide that a claimant has the burden of proving its claims, and if a respondent raises any affirmative defenses, the respondent must prove such defenses.<sup>1</sup>

4. 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,

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<sup>1</sup> BIN CHENG, *GENERAL PRINCIPLES OF INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS* 334 (2006) (“[T]he general principle [is] that the burden of proof falls upon the claimant[.]”); *Marvin Roy Feldman Karpa v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/99/1, Award ¶ 177 (Dec. 16, 2002) (“[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence.” (quoting Appellate Body Report, *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, at 14, WT/DS33/AB/R (May 23, 1997))).

it is well-established that where “jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage.”<sup>2</sup> As the tribunal in *Bridgestone v. Panama* 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.”<sup>3</sup>

### **Article 1116 (Standing to Bring a Claim)**

#### Continuous Nationality

5. Article 1116(1) provides, in pertinent part, that “[a]n investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under” Chapter Eleven, Section A.<sup>4</sup>

6. An investor must be a national of a Party other than the respondent NAFTA Party continuously at three critical dates and at all times between them: (i) the time of the purported breach, (ii) the submission of a claim to arbitration, and (iii) the resolution of the claim.<sup>5</sup>

#### *Time of the Purported Breach*

7. As provided in Article 1116, in pertinent part, an investor of a Party may submit to arbitration a claim that “another Party has breached” an obligation under Chapter Eleven, Section A.<sup>6</sup> Article 1101 (Scope and Coverage) clarifies that Chapter Eleven applies to measures

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<sup>2</sup> *Phoenix Action, Ltd. v. Czech Republic*, ICSID Case No. ARB/06/5, Award ¶ 61 (Apr. 15, 2009); *Vito G. Gallo v. Canada*, NAFTA/PCA Case No. 2008-03, Award ¶ 277 (Sept. 15, 2011) (citation omitted) (“Both parties submit, and the Tribunal concurs, that the maxim ‘who asserts must prove,’ or *actori incumbit probatio*, applies also in the jurisdictional phase of this investment arbitration: a claimant bears the burden of proving that he has standing and the tribunal has jurisdiction to hear the claims submitted. If jurisdiction rests on the existence of certain facts, these must be proven at the jurisdictional phase[.]”); *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, Ratione 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) (“*Bridgestone Licensing Services Decision*”) (stating that “[w]here an objection as to competence raises issues of fact that will not fall for determination at the hearing of the merits, the Tribunal must definitively determine those issues on the evidence and give a final decision on jurisdiction.”); *Cortec Mining Kenya Limited, Cortec (Pty) Limited and Stirling Capital Limited v. Republic of Kenya*, ICSID Case No. ARB/15/29, Award ¶ 250 (Oct. 22, 2018) (finding that “[t]he Claimants bear the onus of establishing jurisdiction under the BIT and under the ICSID Convention. The onus includes proof of the facts on which jurisdiction depends.”).

<sup>3</sup> *Bridgestone Licensing Services Decision*, ¶ 153.

<sup>4</sup> NAFTA Article 1116(1) (emphasis added).

<sup>5</sup> In the case of Article 1117(1), an investor of another Party must own or control directly or indirectly the relevant enterprise continuously between the critical dates discussed herein.

<sup>6</sup> NAFTA Article 1116(1) (emphasis added).

adopted or maintained by a Party relating to, *inter alia*, “investors of *another Party*” and “investments of investors of *another Party* in the territory of the Party[.]”<sup>7</sup>

8. Thus, because the substantive obligations of Section A apply to “investors of *another Party*,” or “investments of investors of *another Party* in the territory of the Party,” the investor must be “an investor of *another Party*,” *i.e.*, a Party other than the respondent Party at the time of the purported breach. If the requisite difference in nationality does not exist, there can be no breach, as there was no obligation under Chapter Eleven, Section A, at the time of the purported breach.<sup>8</sup> And, pursuant to Article 1116, what may be submitted to arbitration under Chapter Eleven, Section B, are claims that the respondent State “*has breached*” an obligation under Section A.<sup>9</sup>

#### *Submission of the Claim to Arbitration*

9. Article 1116(1) permits an investor of a Party to “submit to arbitration under this Section [*i.e.*, Section B] a claim that another Party has breached an obligation” under Chapter Eleven, Section A.<sup>10</sup> Accordingly, the investor must also be a national of a Party other than the respondent NAFTA Party at the time of submission of the claim to arbitration.

#### *Date of the Resolution of the Claim*

10. An investor must also be a national of a Party other than the respondent Party through the resolution of the claim. Article 1116 refers to submitting a claim under Chapter Eleven, Section B, which encompasses relevant dispute settlement procedures leading up to, during, and through the resolution of a claim. Multiple articles in Section B concerning aspects of the dispute settlement process subsequent to the submission of a claim refer to the “disputing investor” or the “disputing parties.” For example, Article 1124 (Constitution of a Tribunal), Article 1125 (Agreement to Appointment of Arbitrators), Article 1126 (Consolidation), Article 1130 (Place of Arbitration), Article 1134 (Interim Measures of Protection), and Article 1136 (Finality and Enforcement of an Award), among other provisions, all refer to the “disputing investor” or the “disputing parties.” Article 1139 clarifies that the “disputing parties” are “the disputing investor and the disputing [NAFTA] Party.” A “disputing investor” is further defined under Article 1139 as an investor “that makes a claim under Section B,” which, as discussed above, must be “an investor of *another Party*”. This degree of textual specificity makes clear that an investor must remain a national of another Party throughout the resolution of the claim.

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<sup>7</sup> NAFTA Article 1101(1) (emphasis added).

<sup>8</sup> This is consistent with the principle reflected in Article 13 of the International Law Commission’s Draft Articles on the Responsibility of States for Internationally Wrongful Acts, which provides that “[a]n act of a State does not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs.” International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 13, U.N. Doc. A/56/10 (2001).

<sup>9</sup> NAFTA Article 1116(1) (emphasis added).

<sup>10</sup> Article 1137(1) clarifies the time when a claim is submitted to arbitration; namely, when the request for arbitration or notice of arbitration is received – either by the ICSID Secretary General or the disputing Party, depending on the instrument and rules under which the claim is submitted.

11. Further, Article 1136(5) provides that a “Party whose investor was a party to the arbitration” can invoke the procedures of NAFTA Chapter Twenty and seek a decision from a panel established by the Free Trade Commission enforcing the award against the “disputing Party.” The procedure established by this provision contemplates a continuing connection between an investor of a Party other than the respondent Party and such non-disputing Party through the time of the award and allows the non-disputing Party to pursue a State-to-State arbitration to seek compliance with that award.

12. The conclusions above are consistent with the well-established principle of international law<sup>11</sup> that an individual or entity cannot maintain an international claim against its own State.<sup>12</sup> As the United States has long maintained<sup>13</sup> with respect to the rule of “continuous nationality,” and as the tribunal in *Loewen v. United States of America* explained: “In international law parlance, there must be continuous national identity from the date of the events giving rise to the claim, which date is known as *dies a quo*, through the date of the resolution of the claim, which date is known as the *dies ad quem*.”<sup>14</sup> In the absence of continuous nationality of the claimant as

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<sup>11</sup> NAFTA Article 1131(1) (“Governing Law”) provides that a Chapter Eleven tribunal “shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.”

<sup>12</sup> JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXTS, AND COMMENTARIES* 264–265 (2002). See also MEG KINNEAR ET AL., *INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11*, at 1116-5 – 1116-6 (2006) (observing that “[u]nder the law of State responsibility for injuries to aliens, a State has certain responsibilities to the nationals of foreign states. Those responsibilities generally do not extend to nationals of the State itself. Thus, an international law claim may not be made against a State by a national of that State, but only by another State on behalf of its national. This is the principle of non-responsibility of States for injuries to its own nationals.”) (footnotes omitted).

<sup>13</sup> See International Law Commission, *Comments and Observations Received by Governments*, at 41-43, U.N. Doc. A/CN.4/561 (Jan. 27, Apr. 3 and 12, 2006) (comments of the United States of America on Draft Article 5 of the ILC Draft Articles on Diplomatic Protection) (urging that the ILC Draft Articles state that nationality must be continuously maintained from the date of injury to the date of the resolution of the claim); *accord Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Memorial of the United States of America on Matters of Jurisdiction and Competence Arising from the Restructuring of The Loewen Group, Inc., at 10-20 (Mar. 1, 2002); *B-Mex, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/16/3, Second Submission of the United States of America ¶¶ 2-9 (Aug. 17, 2018); *Ballantine v. Dominican Republic*, CAFTA-DR/PCA Case No. 2016-17, Submission of the United States of America ¶ 6 (July 6, 2018); *Vento Motorcycles, Inc. v. United Mexican States*, NAFTA/ICSID Case No. ARB(AF)/17/3, Submission of the United States of America ¶¶ 26-33 (Aug. 23, 2019); *Angel Samuel Seda v. Republic of Colombia*, U.S.-Colombia TPA/ICSID Case No. ARB/19/6, Submission of the United States of America ¶¶ 14-21 (Feb. 26, 2021).

<sup>14</sup> *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, NAFTA/ICSID Case No. ARB(AF)/98/3, Award ¶ 225 (June 26, 2003) (“*Loewen Award*”); see ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW: PEACE* 512-13 (9th ed. 1992) (“[F]rom the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.”) (footnote omitted). In this connection, the *Loewen* tribunal in dismissing Raymond Loewen’s Article 1117 claim for lack of jurisdiction also noted that he had failed to show the requisite ownership or control at the time of TLGI’s restructuring (i.e., through to the resolution of the claim). *Loewen Award*, at 69-70. See also Andrea K. Bjorklund, *Commentary on NAFTA Chapter 11: Article 1117*, in *COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES* 503, n.193 (Chester Brown ed. 2013).

set forth above, a tribunal lacks jurisdiction over the relevant claim.<sup>15</sup>

### Dual Nationality

13. Articles 1116 and 1117 affirmatively grant the right to submit a claim to arbitration to an “investor of a Party” under the conditions specified in those articles, including that “another Party” has breached Section A of Chapter Eleven, Article 1503(2), or Article 1502(3)(a).

14. Article 1139 of the NAFTA defines the term “investor of a Party” to include a natural person who is “a national . . . of such Party, that seeks to make, is making or has made an investment.” Article 201 of the NAFTA defines the term “national” as “a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1.” Read together, and by their ordinary meaning, these express terms of the NAFTA provide that both citizens and permanent residents of a Party “may submit” a claim to arbitration on behalf of themselves (Article 1116) or an eligible enterprise of another Party (Article 1117) alleging such other Party breached a NAFTA obligation.

15. Notably, however, Article 1131(1) requires Tribunals constituted under Chapter Eleven to decide the issues “in dispute in accordance with [the NAFTA] and applicable rules of international law.” One such rule of international law is the above-noted principle of “non-responsibility,” *i.e.*, that no international claim may be asserted against a State on behalf of the State’s own nationals,<sup>16</sup> subject to the rule set forth in *United States ex rel. Mergé v. Italian Republic*, and adopted by *Iran v. United States*, Case No. A/18.<sup>17</sup> That rule in effect states that a State is not responsible for a claim asserted against it by one of its own nationals, unless the claimant is a dual national whose dominant and effective nationality is that of another State.<sup>18</sup>

### **Articles 1119 (Notice of Intent to Submit a Claim to Arbitration) and 1122(1) (Consent to Arbitration)**

16. A State’s consent to arbitration is paramount.<sup>19</sup> Indeed, given that consent is the

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<sup>15</sup> *Loewen Award*, at 69-70 (deciding, in the dispositif, that the tribunal had no jurisdiction due to a lack of continuous nationality).

<sup>16</sup> JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXTS, AND COMMENTARIES* 264–265 (2002). *See also* ROBERT JENNINGS & ARTHUR WATTS, *OPPENHEIM’S INTERNATIONAL LAW: PEACE* 512-513 (9<sup>th</sup> ed. 1992) (“[F]rom the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the state by whom it is put forward, and (b) not having the nationality of the state against whom it is put forward.”) (footnote omitted).

<sup>17</sup> *See Mergé Case (Italian-U.S. Claims Commission)*, 14 R.I.A.A. 236 (1955); *Iran v. United States*, Case No. A/18, Decision No. 32-A18-FT (Apr. 6, 1984), 5 IRAN-U.S. CL. TRIB. REP. 251 (1984).

<sup>18</sup> The United States has long held the view that dual nationals are treated as having the nationality of their “dominant and effective” nationality for purposes of bringing a claim under international law. KENNETH VANDEVELDE, *U.S. INTERNATIONAL INVESTMENT AGREEMENTS* 144 (2009) (citing to U.S. dual nationality positions before the Iran-U.S. Claims Tribunal).

<sup>19</sup> *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

“cornerstone” of jurisdiction in investor-State arbitration,<sup>20</sup> it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party’s consent to arbitrate.<sup>21</sup>

17. Article 1122(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 Eleven, Section B, where an investor submits a “claim to arbitration in accordance with the procedures set out in this Agreement.” Moreover, an agreement to arbitrate is formed upon the investor’s corresponding consent to arbitrate *in accordance with those procedures*.<sup>22</sup> Thus, the NAFTA Parties have explicitly conditioned their consent upon satisfaction of the relevant procedural requirements. All three NAFTA Parties agree on this point,<sup>23</sup> and the Tribunal must, in accordance with the customary international law principles of treaty interpretation reflected in

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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.”).

<sup>20</sup> 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).

<sup>21</sup> *Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 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” (Peter Muchlinski et al., eds., 2008) (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 ARBITRATION 219 (2008) (explaining also that “[t]he consent of the parties is the basis of the jurisdiction of all international arbitration tribunals”).

<sup>22</sup> NAFTA Articles 1122(1), 1121(1)(a), and 1121(2)(a).

<sup>23</sup> See, e.g., *Mesa Power Group LLC v. Government of Canada*, Submission of the United States of America ¶ 2 (July 26, 2014) (stating that pursuant to Article 1122, no Chapter Eleven claim may be submitted to arbitration unless the required procedures were satisfied); *Clayton/Bilcon v. Government of Canada*, Submission of the United States of America ¶ 22 (Dec. 29, 2017) (“Under Article 1122, the scope of a NAFTA Party’s consent to arbitrate an investment dispute is conditioned on compliance with the procedural requirements of Chapter Eleven.”); *Resolute Forest Products Inc. v. Government of Canada*, Submission of Mexico pursuant [to] NAFTA Article 1128, ¶¶ 2, 3 (June 14, 2017) (noting its agreement with Canada that consent to arbitration cannot be established pursuant to Article 1122 unless the claim has been brought in accordance with NAFTA’s procedural requirements); *Detroit Int’l Bridge Co. v. Government of Canada*, Submission of Mexico pursuant [to] Article 1128 of NAFTA ¶ 3 (Feb. 14, 2014) (stating that Article 1122’s offer to arbitrate required compliance with the requirements of Article 1121); *Methanex Corp. v. United States of America*, Second Submission of Canada pursuant to NAFTA Article 1128, ¶ 52 (Apr. 30, 2001) (explaining that “the NAFTA Parties’ consent to investor-State dispute settlement” is conditioned upon “*accordance with the procedures set out in this Agreement*” (emphasis in original) and that the “[f]ailure to observe these requirements means that an investor cannot access the dispute settlement mechanism under Section B of Chapter Eleven.”); *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Second Submission of Canada Pursuant to NAFTA Article 1128, ¶¶ 7-31 (July 7, 2001) (accord).

Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties, take their common understanding into account.<sup>24</sup>

18. 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.<sup>25</sup> 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.

19. Article 1119 (Notice of Intent to Submit a Claim to Arbitration) is one of the procedural conditions 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;

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<sup>24</sup> See, e.g., *Clayton v. Government of Canada*, NAFTA/UNCITRAL, PCA Case No. 2009-04, Award on Damages ¶ 379 (Jan. 10, 2019) (“[T]he consistent practice of the NAFTA Parties in their submissions before Chapter Eleven tribunals . . . can be taken into account in interpreting the provisions of NAFTA. Thus, the NAFTA Parties’ subsequent practice militates in favour of adopting the Respondent’s position on this issue[.]”); *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶¶ 103, 104, 158, 160 (July 13, 2018) (explaining that the approach advocated by claimant had “clearly been rejected by all three NAFTA Parties in their practice subsequent to the adoption of NAFTA,” as evidenced by “their submissions to other NAFTA tribunals,” and that “[i]n accordance with the principle enshrined in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, 1969, the subsequent practice of the parties to a treaty, if it establishes the agreement of the parties regarding the interpretation of the treaty, is entitled to be accorded considerable weight.”); *Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction ¶¶ 188, 189 (Jan. 28, 2008) (explaining that “the available evidence cited by the Respondent,” including submissions by the NAFTA Parties in arbitration proceedings, “demonstrates to us that there is nevertheless a ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its applications[.]’”); International Law Commission, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, with Commentaries, Conclusion 4, cmt. 18, UN Doc. A/73/10 (2018) (stating that subsequent practice under Article 31(3)(b) of the Vienna Convention “includes not only official acts at the international or at the internal level that serve to apply the treaty . . . but also, *inter alia*, . . . statements in the course of a legal dispute . . .”).

<sup>25</sup> *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, First Partial Award ¶ 120 (Aug. 7, 2002) (“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.” (emphasis added)); see also *Detroit Int’l Bridge Co. v. Government of Canada*, NAFTA/PCA Case No. 2012-25, ¶ 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*”).

- (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.<sup>26</sup>

20. A disputing investor who does not deliver a Notice of Intent at least 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.<sup>27</sup> Under such circumstances, a tribunal will lack jurisdiction *ab initio*. A respondent's consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration.<sup>28</sup>

21. The procedural requirements in Article 1119 are explicit and mandatory, as reflected in the way the requirements are phrased (*i.e.*, "shall deliver;" "shall specify"). These requirements serve important functions, including to provide a NAFTA Party time to identify and assess potential disputes, to coordinate among relevant national and subnational officials, and to consider, if they so choose,<sup>29</sup> 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[.]"<sup>30</sup>

22. For the foregoing reasons, a tribunal cannot simply overlook an investor's failure to comply with the procedural requirements of Article 1119. Rather, satisfaction of the requirements of Article 1119 through submission of a valid Notice of Intent must precede submission of a Notice of Arbitration by at least 90 days in order to engage the respondent's consent to arbitrate.

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<sup>26</sup> NAFTA Article 1119 (emphasis added).

<sup>27</sup> 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).

<sup>28</sup> 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.

<sup>29</sup> 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.

<sup>30</sup> *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).



## **Article 1126 (Consolidation)**

23. Article 1126 permits the consolidation of claims submitted to arbitration under Article 1120 where they “have a question of law or fact in common” and where consolidation serves “the interests of fair and efficient resolution of the claims.”<sup>31</sup> Article 1126 provides specific procedures for a disputing party to request consolidation (Article 1126(3)); for the establishment of a consolidation tribunal to assess such a request and, if granted in whole or in part, to oversee the consolidated proceeding (Article 1126(5)); and for disputing investors not identified in the initial consolidation application to make a separate request that their claims be consolidated as well (Article 1126(6)).

24. Except as provided for by Article 1126, the dispute settlement mechanism established in Chapter Eleven, Section B assumes a single investor as claimant and a single NAFTA Party as respondent. For example, Articles 1116 and 1117 pertain to claims by “[a]n investor” of one NAFTA Party against another NAFTA Party;<sup>32</sup> Article 1119 obligates “[t]he disputing investor” to deliver a Notice of Intent to “the disputing Party”; and Article 1120 states that “a disputing investor may submit the claim to arbitration,” “provided that six months have elapsed since the events giving rise to a claim.” Each of these provisions is written in the singular: one investor making a claim against one NAFTA Party. This is further confirmed by Article 1139, which defines “disputing parties” as “the disputing investor and the disputing Party.” This definition contemplates two parties: a *single* investor and a *single* NAFTA Party.

25. Apart from the procedures set out in Article 1126, the only way for multiple claimants to have their NAFTA claims heard and determined together is by separately obtaining the consent of the Respondent NAFTA Party to informal consolidation of the claims. Allowing multiple claimants to consolidate their claims unilaterally by, for example, submitting them together in a single Notice of Arbitration or Request for Arbitration without either invoking Article 1126 or obtaining the consent of the Respondent NAFTA Party would impermissibly ignore the limits that the NAFTA Parties have placed on their consent to the consolidation of proceedings.<sup>33</sup>

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<sup>31</sup> NAFTA Article 1126(2).

<sup>32</sup> Article 1117(3) acknowledges the possibility that claims arising out of the same events may be submitted to arbitration on behalf of both an enterprise (under Article 1117) and one or more investors in that enterprise (under Article 1116). It expressly provides, however, that such claims “should be heard together by a Tribunal *established under Article 1126*” (emphasis added) unless “the interests of a disputing party would be prejudiced thereby,” without drawing any distinction based on whether or not the claims were initially submitted together. As noted in the next paragraph, the Respondent NAFTA Party may also consent to the informal consolidation of claims in such a scenario, obviating the need to establish a Tribunal under Article 1126.

<sup>33</sup> See, e.g., MEG KINNEAR ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, at 1126-11 (2006) (“The procedures in Article 1126 do not contemplate a claim commencing in the first instance as part of consolidated proceedings.”). See also *Canfor Corp. v. United States of America*; *Tembec v. United States of America*; *Terminal Forest Products Ltd. v. United States of America*, NAFTA/UNCITRAL, Order of the Consolidation Tribunal ¶ 78 (Sep. 7, 2005) (“[T]he dispute settlement mechanism contained in Section B of Chapter 11 of the NAFTA is the result of an international treaty negotiated by three States. They provided for dispute settlement between them and investors by means of arbitration governed by international law. In doing so, the State Parties to the treaty are entitled as sovereigns to set certain conditions.”).

26. Article 1126 does not permit consolidation of claims submitted to arbitration under the NAFTA with claims submitted to arbitration under a treaty other than the NAFTA. Article 1126 applies only to claims that “have been submitted to arbitration under [NAFTA] Article 1120.”<sup>34</sup> Accordingly, the NAFTA Parties did not consent in the NAFTA to the consolidation of NAFTA and non-NAFTA claims. Again, a NAFTA Party might choose to consent to the informal consolidation of NAFTA and non-NAFTA claims in specific cases but, in the absence of such express, case-specific consent, a tribunal has no jurisdiction to hear and determine NAFTA and non-NAFTA claims together.

27. Nor can provisions of the applicable arbitral rules overcome the absence of the Respondent NAFTA Party’s consent. As one NAFTA tribunal observed with respect to Article 15(1) of the UNCITRAL Rules (1976):

While the provision is plainly important, it is about the procedure to be followed by an arbitral tribunal in exercising the jurisdiction which the parties have conferred on it. It does not itself confer power to adjust that jurisdiction to widen the matter before it by adding as parties persons additional to those which have mutually agreed to its jurisdiction or by including subject matter in its arbitration additional to what which the parties have agreed to confer.<sup>35</sup>

### **Article 1139 (Definition of Investment)**

28. Article 1139 provides an exhaustive list of what constitutes an investment for purposes of NAFTA Chapter Eleven. While Article 1139 does not expressly provide that each type of investment must be made in accordance with applicable law, it is implicit that the protections in Chapter Eleven only apply to investments made in compliance with applicable law.<sup>36</sup> As a

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<sup>34</sup> NAFTA Article 1126(2).

<sup>35</sup> *United Parcel Service of America Inc. v. Government of Canada*, NAFTA/ICSID Case No. UNCT/02/1, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae ¶ 39 (Oct. 17, 2001). *See also Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae” ¶ 27 (Jan. 15, 2001) (“As a procedural provision, however, [Article 15(1)] cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party.”).

<sup>36</sup> This requirement is necessarily implied, for example, in the definition of “enterprise,” the first item listed in Article 1139, which is defined at Article 201 as “any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.” *See also* CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES ¶ 6.110 (2d ed. 2017) (“[A]n investment that is made in breach of the laws of the host State will not qualify as an investment under an investment treaty. *This will be the case even where the applicable treaty does not contain an express requirement of compliance with the laws of the host State.*” (emphasis added)). *See also Ampal-American Israel Corp. v. Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Jurisdiction ¶ 301 (Feb. 1, 2016) (concluding, in applying a treaty that lacked an express legality requirement (the United States-Egypt bilateral investment treaty), that “[i]t is a well-established principle of international law that a tribunal constituted on the basis of an investment treaty has no jurisdiction over a claimant’s investment which was made illegally in violation of the laws and regulations of the Contracting

general matter, however, trivial violations of the applicable law will not put an investment outside the scope of Article 1139.<sup>37</sup>

*Respectfully submitted,*



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State.”); *Mamidoil Jetoil Greek Petroleum Products S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award ¶¶ 359-60 (Mar. 30, 2015) (“[T]he Tribunal shares the widely-held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State. States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments in international conventions. In doing so, they cannot be expected to have agreed to extend that mechanism to investments that violate their laws; likewise, it cannot be expected that States would want illegal investments by their nationals to be protected under those international conventions. This principle . . . applies to the substance of the protection when the relevant international instrument, such as the ECT in this case, does not specifically refer to a requirement of legality.”); *Blusun S.A. v. Italian Republic*, ICSID Case No. ARB/14/3, Award ¶ 264 (Dec. 27, 2016) (“[I]t is true that the ECT does not lay down an explicit requirement of legality, but the Tribunal concludes that it does not cover investments which are actually unlawful under the law of the host state at the time they were made because protection of such investments would be contrary to the international public order.”).

<sup>37</sup> See, e.g., *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶¶ 85-86 (Apr. 29, 2004) (noting, in a dispute under a treaty that included an express legality requirement, that “to exclude an investment on the basis of . . . minor errors would be inconsistent with the object and purpose of the Treaty”); *Metal-Tech Ltd v. Uzbekistan*, Award, ¶ 165 (Oct. 4, 2013) (stating with respect to the underlying treaty’s legality requirement that “the subject-matter scope of the legality requirement” covers issues including “non-trivial violations of the host State’s legal order”).