

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

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,
JERRY MONTOUR, KENNETH HILL AND ARTHUR
MONTOUR, JR.,

Claimants/Investors,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**REQUEST FOR BIFURCATION OF
RESPONDENT UNITED STATES OF AMERICA**

Mark A. Clodfelter
Assistant Legal Adviser
Andrea J. Menaker
Chief, NAFTA Arbitration Division
CarrieLyn D. Guymon
Attorney-Adviser
Office of International
Claims and Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

August 29, 2005

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

GRAND RIVER ENTERPRISES SIX NATIONS, LTD.,
JERRY MONTOUR, KENNETH HILL AND ARTHUR
MONTOUR, JR.,

Claimants/Investors,

-and-

UNITED STATES OF AMERICA,

Respondent/Party.

**REQUEST FOR BIFURCATION OF
RESPONDENT UNITED STATES OF AMERICA**

In accordance with the schedule established by the Tribunal at its First Session on March 31, 2005 (as modified by letter from the Secretary of the Tribunal dated June 13, 2005) and Article 21(4) of the UNCITRAL Arbitration Rules, the United States respectfully requests that the Tribunal determine its jurisdiction as a preliminary question. The United States also requests that, if necessary, the Tribunal hear and determine separately the merits and damages in two subsequent phases.

The United States raises several objections to jurisdiction in its Statement of Defense, submitted herewith. *First*, the claims are time-barred under Articles 1116(2) and 1117(2) of the NAFTA. *Second*, the claims are not within the scope and coverage of NAFTA Chapter Eleven as prescribed by Article 1101(1). *Third*, claimant Arthur Montour, Jr. has not submitted proof of nationality sufficient to demonstrate that he is an “investor of another Party,” as required by Article 1101(1). *Fourth*, claims under Articles 1105(1) and 1110 with

respect to taxation measures are barred by Article 2103. *Finally*, claims that were not included in the Notice of Intent and for which the claimants did not wait six months after the events giving rise to the claims are not properly submitted pursuant to Articles 1119 and 1120.

These objections raise questions distinct from the merits of the claims. In addition, if decided in the United States' favor, these objections would dispose of the claims in their entirety. For these reasons, along with those elaborated below, it would be most efficient to decide the United States' jurisdictional objections in a preliminary phase.

ARGUMENT

Consistent with the governing arbitration rules, the United States' objections to jurisdiction should be addressed as a preliminary matter separate from the merits of the dispute. Article 21(4) of the UNCITRAL Arbitration Rules provides that “[i]n general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question.” Moreover, it is standard practice in international arbitrations to separate proceedings on jurisdiction from the merits of the dispute.¹ As one leading commentator explains: “In general, the more prudent course is to conduct a preliminary proceeding on the question of jurisdiction. That permits the parties to fully address the issue and, if jurisdiction is lacking,

¹ See, e.g., STEWART A. BAKER & MARK D. DAVIS, *THE UNCITRAL ARBITRATION RULES IN PRACTICE: THE EXPERIENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 106 (1992) (“In many cases, the potentially dispositive issue of the tribunal’s jurisdiction should be decided before the parties have been put to the trouble and expense of making out a full case on the merits. The *travaux* show that the drafters recognized the substantial savings to the parties if the arbitrators recognize jurisdictional bars early in the proceedings.”); Robert B. von Mehren, *Enforcement of Foreign Arbitral Awards in the United States*, 771 PLI/COMM. 147, 163-64 (Feb. 1998) (noting preference in international arbitration to hear and decide jurisdictional issues before the merits).

avoids the expense of presenting the case on the merits.”² This practice is particularly pertinent where, as here, a State is a party to the proceedings.³

The United States objects to the jurisdiction of this Tribunal based on the straightforward application of several provisions of the NAFTA. *First*, Articles 1116(2) and 1117(2) provide that a claim must be made within three years of the date on which the investor or enterprise “first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor [or enterprise] has incurred loss or damage.” Limitations periods such as the one in Chapter Eleven are upheld in international law.⁴ They prevent the airing of stale claims, for which evidence may no longer be available and witness recollections may be infirm, and provide certainty for potential respondents.

The application of the time bar is precisely the kind of matter that should be considered as a preliminary, jurisdictional question.⁵ The NAFTA parties demonstrated a

² GARY BORN, *INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES* 57 (1994).

³ *See, e.g.*, SHABTAI ROSENNE, *THE WORLD COURT: WHAT IT IS AND HOW IT WORKS* 99 (5th ed. 1995) (noting “basic rule of international law and a principle of international relations that a State is not obliged [to] give an account of itself on issues of merits before an international tribunal which lacks jurisdiction or whose jurisdiction has not yet been established.”); *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, 3 ICSID REPORTS 131, 143 (Decision on Jurisdiction of Apr. 14, 1988) (confirming, in deciding to bifurcate, that “there is no presumption of jurisdiction – particularly where a sovereign State is involved – and the Tribunal must examine [a sovereign’s] objections to the jurisdiction of the Centre with meticulous care, bearing in mind that jurisdiction in the present case exists only insofar as consent thereto has been given by the Parties.”).

⁴ *See, e.g.*, *United States of America v. Islamic Republic of Iran*, Award No. 574-B36-2 ¶ 61 (Iran-U.S. Cl. Trib., Dec. 3, 1996) (“the provision of Article 8 of the 1974 U.N. Convention that ‘the limitation period shall be four years’ is . . . a provision of treaty law binding on the Parties”); J.L. SIMPSON AND HAZEL FOX, *INTERNATIONAL ARBITRATION LAW AND PRACTICE* 123 (1959) (“Treaties have imposed express time limits barring claims not made or presented within a certain time.”); BIN CHENG, *GENERAL PRINCIPLES OF LAW* 376 (1987) (“Prescription is, therefore, the principle underlying municipal rules of limitation. . . . [The] rule is essentially practical and, moreover, binding.”) (internal quotation and citation omitted); THOMAS OEHMKE, *INTERNATIONAL ARBITRATION* § 6:5 (1990) (“If the parties have contractually imposed a ‘statute of limitations’ on themselves, the courts will uphold this.”).

⁵ *See Riahi v. Iran*, Award No. 600-485-1 ¶ 68 (Iran-U.S. Cl. Trib., Feb. 27, 2003) (finding certain claims barred by the “jurisdictional cut-off date established by [the one year limitation period] of the Claims Settlement Declaration”); *see also* Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35 (Nov. 4, 1950) (“The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and *within a period of six months* from the date on which the final decision was taken.”) (emphasis added); *Koval v. Ukraine*, App. No. 65550/01, Eur. Ct. H.R.

clear intent to bar stale claims from being submitted under its investor-State dispute resolution provisions. Were all NAFTA claims allowed to proceed to the merits without consideration of their timeliness, the purpose of such limitations periods would be undermined. Applying the time bar will be an exercise much more limited in scope than consideration of the merits of all of the claims presented by claimants Grand River Enterprises Six Nations, Ltd. (“Grand River”), Jerry Montour, Kenneth Hill and Arthur Montour, Jr. Further, if the United States prevails on its jurisdictional objection, the burden of proceeding to the merits will be eliminated because the claims will be dismissed.⁶

Second, the United States objects to jurisdiction over these claims because they do not relate to claimants or their alleged investments, as required by Article 1101(1). Grand River, and its shareholders, Jerry Montour and Kenneth Hill, are not “investors” entitled to submit claims under Chapter Eleven because they do not own or control any investments in the territory of the United States. Arthur Montour, Jr. also lacks standing to bring claims under Chapter Eleven. Arthur Montour, Jr. alleges ownership interests in U.S. enterprises, Native Wholesale Supply and Native Tobacco Direct. The measures challenged by claimants, however, “relate to” manufacturers of tobacco products and, in some cases, distributors of those products that are state-authorized tax stamping agents. Native Wholesale Supply and Native Tobacco Direct are neither manufacturers nor authorized tax stamping agents. Therefore, in accordance with Article 1101(1), these claims are outside the Tribunal’s jurisdiction.

at 17 (Mar. 30, 2004) (holding that applicant’s complaints not raised until more than six months after the cessation of the alleged wrong were “introduced out of time and must be rejected”); *A.L.M. v. Italy*, App. No. 35284/97, Eur. Ct. H.R. ¶ 19 & *dispositif* (Jul. 28, 1999) (holding that the Court was “unable to take cognisance of the merits of the case” because “the Government’s application . . . was made out of time.”).

⁶ The only claims that would remain if the United States prevails on its timeliness objection are those relating to the Michigan and Minnesota taxation measures, claims which are subject to the fourth and fifth grounds for the United States’ objections to jurisdiction, as explained herein.

In making this objection, the United States asks the Tribunal to determine a core jurisdictional question: whether or not claims submitted to arbitration are within the scope and coverage of the agreement to arbitrate. It is a “fundamental principle of international judicial settlement” that a tribunal “not uphold its jurisdiction unless the intention to confer it has been proved beyond reasonable doubt.”⁷ Tribunals established to hear investor-State disputes commonly consider as a preliminary jurisdictional question whether the claimants qualify as investors with investments in the territory of the other Party to the investment treaty.⁸ This Tribunal should likewise decide first whether claimants qualify under Article 1101(1) before proceeding to the merits. Considering whether the claimants are investors of a Party with investments in the territory of that Party and whether the measures “relate to” each of the claimants will involve questions distinct from the merits. That consideration will also be more limited than a full consideration of the merits. If the United States succeeds on this objection, the claims will be dismissed in their entirety, avoiding the unnecessary time and expense of proceeding on the merits.

Third, the United States objects to the jurisdiction of the Tribunal over claims brought by Arthur Montour, Jr. in the event that he does not produce sufficient proof of his nationality. Article 1101(1) permits claims to be submitted against a Party by investors of another Party. Arthur Montour, Jr. – unlike Jerry Montour and Kenneth Hill – has not presented a copy of

⁷ *Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. 9, 58 (July 6) (separate opinion of Lauterpacht, J.).

⁸ *See, e.g., SGS v. Philippines*, ICSID Case No. ARB/02/6 (Decision on Objections to Jurisdiction) (Jan. 29, 2004) ¶¶ 8, 17, 99-112 (tribunal suspended proceedings on the merits to consider objections to jurisdiction as preliminary question, including objection that there was no investment in the Philippines as required by the agreement); *Tokios Tokelès v. Ukraine*, ICSID Case No. ARB/02/18 (Decision on Jurisdiction) (Apr. 29, 2004) ¶¶ 12, 72-86 (tribunal granted respondent’s request to bifurcate the proceedings to determine, among other preliminary questions, whether the claimant made an investment in accordance with the laws of Ukraine).

his passport as proof of Canadian nationality.⁹ Arthur Montour, Jr. is a long-time resident of the United States with a U.S. Social Security Number. The Tribunal should not assume jurisdiction over any claims brought by Arthur Montour, Jr. absent adequate proof of nationality.

Where, as here, nationality is a requirement for submitting claims to arbitration under a treaty, it is appropriate for a tribunal to satisfy itself that claimants possess the requisite nationality before proceeding to the merits.¹⁰ Determining nationality is a matter wholly divorced from the merits. Proceeding to the merits and the time and cost that would entail without first deciding this threshold issue would be unfair to the United States, as well as a waste of resources.

Fourth, the United States objects to the Tribunal's jurisdiction to hear any claim under Articles 1105(1) or 1110 related to Michigan's law requiring nonparticipating manufacturers to pay an equity assessment (Michigan Compiled Laws §205.426d), Minnesota's law imposing a fee on the sale of nonsettlement cigarettes (Minnesota Statutes § 297F.24), or any similar taxation measures imposed by any state requiring payments by tobacco product manufacturers which have not settled with the states.¹¹ NAFTA Article 2103, among other things, exempts taxation measures from the application of Article 1105(1). Article 2103(6) (the "tax filter") requires that, before submitting a claim for expropriation based on a taxation measure, a claimant must refer the matter to the competent authorities in the territories of the claimant and the respondent for a determination of whether the taxation measure is not an

⁹ See *Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, Particularized Statement of Claim ("Stmt. of Claim"), Exhs. 2-4 (June 30, 2005).

¹⁰ See MATTI PELLONPÄÄ & DAVID D. CARON, *THE UNCITRAL ARBITRATION RULES AS INTERPRETED AND APPLIED* 385 (1994) (collecting extracts showing the practice of the Iran-United States Claims Tribunal to consider as a preliminary matter the issue of the claimant's nationality).

¹¹ Stmt. of Claim ¶¶ 72-74.

expropriation. Claimants failed to refer their claims to the competent authorities in Canada and the United States and allow them the requisite six-month period to consider the issue before submitting this claim to arbitration.

This objection to jurisdiction is also appropriate for preliminary consideration because it concerns the scope of the parties' agreement to arbitrate. Article 2103's exclusion of certain claims regarding tax measures from the jurisdiction of Chapter Eleven tribunals is the type of threshold requirement that should be considered prior to the merits of a claim. The Tribunal, therefore, should rule as a preliminary matter that claimants may not pursue claims relating to the Michigan and Minnesota tax measures under Articles 1105(1) or 1110, but only under Articles 1102 and 1103 of the NAFTA. This will be a straightforward consideration, not bound up with the merits of the claim. The ruling on Article 2103 will also result in efficiencies because it will narrow the scope of the claims, should it be necessary for the Tribunal to proceed to the merits.

Finally, claimants failed to observe two important prerequisites for submitting their claims. They failed to give proper notice of their intent to file claims based on the Michigan equity assessment statute (Michigan Compiled Laws §205.426d) and Minnesota's law imposing a fee on the sale of nonsettlement cigarettes (Minnesota Statutes § 297F.24), as required by Article 1119. Article 1119 provides that a claimant must deliver a notice of intent identifying the challenged measures at least 90 days prior to submitting its claims to arbitration. No notice of intent to submit claims regarding the Michigan or Minnesota statutes was ever delivered to the United States. Claimants also failed to observe the "cooling-off" period prescribed by Article 1120. Article 1120 requires that six months must elapse after the events giving rise to a claim before the claim may be submitted to arbitration. Less than six

months had passed between the time the Michigan equity assessment took effect and the time claimants submitted their notice of arbitration. Claimants have thus failed to comply with these jurisdictional prerequisites for submission of their claims.

This objection likewise is appropriate for preliminary treatment. Claimants should not be permitted to flout the notice and cooling-off period provisions of Chapter Eleven. The Tribunal should apply the notice and six-month waiting period requirements in accordance with their plain meaning. This analysis will be straightforward, with no complex factual or merits-related determinations. Dismissing these claims as a preliminary matter would also eliminate one category of measures challenged by the claimants, thus narrowing the claims, should it prove necessary to proceed to the merits.

In sum, bifurcation is not only consistent with the governing arbitration rules, it is the most fair, efficient and economical way to proceed in this matter. If the United States prevails on its objection to the timeliness of these claims, there will be no need for the Tribunal to proceed any further. Likewise, if the United States prevails on its objections under Article 1101(1), the claims will be dismissed in their entirety. Decisions on the other objections to jurisdiction raised by the United States will substantially narrow the focus of any further proceedings, either eliminating some claimants or removing from consideration entire categories of measures under challenge. Each of the United States' jurisdictional objections also involves issues distinct from the merits of the claims. Therefore, all of the jurisdictional objections of the United States should be determined as a preliminary matter.

Assuming the Tribunal grants this request for bifurcation, the United States proposes the following tentative schedule for the proceedings on jurisdiction:

U.S. Memorial in Support of its Objections to Jurisdiction	90 days after Tribunal's decision on bifurcation
Claimants' Counter-Memorial on Jurisdiction	90 days after U.S. Memorial on Jurisdiction
U.S. Reply on Jurisdiction	45 days after Claimants' Response
Claimants' Rejoinder on Jurisdiction	45 days after U.S. Reply
Hearing on Jurisdiction	To be determined

The United States respectfully requests the opportunity to revisit the exact dates for the schedule after the Tribunal has issued its decision on bifurcation to prevent scheduling conflicts.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Tribunal decide its own jurisdiction in this matter as a preliminary question. If necessary, further proceedings should be subdivided into merits and damages phases.

Respectfully submitted,

Mark A. Clodfelter
Assistant Legal Adviser
Andrea J. Menaker
Chief, NAFTA Arbitration Division
CarrieLyn D. Guymon
Attorney-Adviser
Office of International
Claims and Investment Disputes
UNITED STATES DEPARTMENT OF STATE
Washington, D.C. 20520

August 29, 2005