

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.

**REPLY IN FURTHER SUPPORT OF REQUEST FOR BIFURCATION OF
RESPONDENT UNITED STATES OF AMERICA**

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In accordance with the schedule established by the Tribunal and Article 21(4) of the UNCITRAL Arbitration Rules, the United States respectfully submits this Reply in Further Support of its Request for Bifurcation.

The United States' jurisdictional objections ought to be considered in a preliminary phase. Claimants err in asserting that some of the objections raised by the United States are not jurisdictional. Those objections address the application of NAFTA Articles 1101(1), 1116(2) and 1117(2), 1119, 1120 and 2103. As the tribunal explained in the First Partial Award in *Methanex Corp. v. United States of America*, determining whether the requirements set forth in Articles 1101 and 1116-1121 have been met is a necessary step in deciding jurisdiction.¹ Moreover, like Article 1101, Article 2103,

¹ See *Methanex Corp. v. United States of America*, First Partial Award of the Tribunal on Jurisdiction (Aug. 7, 2002), at <http://www.state.gov/documents/organization/12613.pdf> ("*Methanex* 1st Partial Awd.") ¶ 120 ("This Tribunal is faced with the same issue of whether the necessary consensual base for its jurisdiction is

which limits the application of the NAFTA with regard to taxation measures, concerns the scope of the United States' consent to arbitrate. That article, therefore, is similarly jurisdictional.

With respect to those objections that claimants concede are jurisdictional, claimants dispute the validity of those objections. That determination, however, is not before this Tribunal. The sole question at issue is whether, in accordance with the presumption in Article 21(4) of the UNCITRAL Arbitration Rules, the United States' objections should be accorded preliminary treatment.

As demonstrated in its prior submission and as further demonstrated below, bifurcating these proceedings into jurisdictional and merits phases (with an additional phase devoted to quantum, if necessary) is not only proper, but is the most efficient way to proceed. The United States raises issues in its jurisdictional objections that are distinct from those that would need to be determined at a merits phase. In addition, if the United States were to prevail on each of its objections, the claims would be dismissed in their entirety, thus avoiding the time and expense of a merits phase. Furthermore, proceeding to a full hearing on the merits if the United States has not consented to arbitrate the claims would undermine the NAFTA Parties' intent and unfairly burden the United States. The Tribunal should not take lightly failings by the claimants to satisfy jurisdictional prerequisites. “[T]here is no presumption of jurisdiction – particularly where a sovereign State is involved – and the Tribunal must examine [a sovereign’s] objections [to jurisdiction] . . . with meticulous care, bearing in mind that jurisdiction in

present. . . . In order to establish the necessary consent to arbitration, 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).”)

the present case exists only insofar as consent thereto has been given by the Parties.”²

Accordingly, the Tribunal should determine the United States’ jurisdictional objections preliminarily, before putting the United States to the burden of defending the case on the merits.

I. THE TRIBUNAL SHOULD ADDRESS THE UNITED STATES’ OBJECTION TO THE TIME-BARRED CLAIMS AS A PRELIMINARY MATTER

The United States objects to the jurisdiction of this Tribunal to hear the vast majority of the claims on the grounds that those claims are time-barred under the limitations provisions in NAFTA Articles 1116(2) and 1117(2). Such an objection is indisputably jurisdictional in nature: the NAFTA Parties only gave their consent to arbitrate claims submitted in accordance with the procedures set forth in the NAFTA.³

Among those requirements is that claims must be submitted within three years of the date claimants knew or should have known of the alleged breach and resulting damage.⁴

In their Submission on Whether to Bifurcate the Proceedings, claimants do not seriously dispute the jurisdictional nature of this objection.⁵ Rather, claimants take issue

² *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, 3 ICSID REPORTS 131, 143 (Decision on Jurisdiction of Apr. 14, 1988).

³ NAFTA art. 1122(1).

⁴ *Id.* arts. 1116(2) & 1117(2); *see also, e.g., Methanex 1st Partial Awd.* ¶ 120 (finding “that a claim has been brought by a claimant investor in accordance with Articles 1116 and 1117” to be among the steps “to establish the necessary consent to arbitration”); *Ethyl Corp. v. Government of Canada*, Award on Jurisdiction, 38 I.L.M. 708 (June 24, 1998) (“*Ethyl Awd. on Jur.*”) ¶¶ 54, 61 (finding at preliminary jurisdictional phase that it was “beyond doubt that Claimant has acted within three years of the time when it ‘first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that [it] incurred loss or damage’ as stipulated in Article 1116(2).”); *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”).

⁵ Submission on Whether to Bifurcate the Proceedings (Sept. 12, 2005) (hereinafter “Opposition” or “Opp’n”). Although claimants make the blanket assertion in the introductory portion of their Opposition that “none of the Respondent’s objections go to the root of the Tribunal’s competence to hear the Investors’ claims,” in the section addressing the United States’ time bar objection they argue only that the objection is not “credible.” Compare *id.* at 1, with *id.* at 3-4. Elsewhere, claimants concede that the time bar objection is jurisdictional. See *id.* n.3 (stating that the tribunal in *Mondev International Ltd. v. United States of*

with the validity of the objection itself, a matter not currently before the Tribunal.⁶ The Tribunal need only determine at this stage whether the objection is appropriate for preliminary consideration.

Granting preliminary treatment to this jurisdictional objection would be the most efficient way to proceed with the arbitration. The Tribunal can address this objection by making straightforward predicate determinations that are entirely separate from the more complex determinations that would be required to decide the merits. If the United States prevails on this objection, all of the claims – other than those relating to the Michigan and Minnesota “equity assessments,” which are addressed by other jurisdictional objections – will be dismissed.

Claimants’ insistence that a full merits hearing is necessary to decide the United States’ time bar objection is not credible.⁷ The Tribunal can decide this issue without the need for any document discovery.⁸ The United States has already identified evidence in its Statement of Defense that it intends to adduce to establish that claimants knew or should have known of the alleged breach and alleged resulting damages more than three years before they submitted their claim to arbitration. Substantial savings in terms of

America, which addressed a time bar objection, determined “*jurisdictional* objections not unlike those raised before this Tribunal” (emphasis added).

⁶ *Id.* at 4 (asserting that “the Investors’ claims are timely.”). Even accepting claimants’ contention that they are not challenging the Master Settlement Agreement (“MSA”) but, rather, are challenging the Escrow Statutes and Complementary Legislation, their claims are nonetheless time-barred. *See* Statement of Defense of Respondent United States of America (Aug. 29, 2005) ¶¶ 65-76 (demonstrating that claimants knew or should have known of the Escrow Statutes and Complementary Legislation and the alleged resulting loss or damage more than three years prior to submission of their claims to arbitration); *see also* Particularized Statement of Claim (June 30, 2005) (“Stmt. of Claim”) ¶ 60 (admitting that Escrow Statutes required funds to be placed in escrow on April 15, 2000, more than three years prior to the submission of their claims). The United States is prepared to fully counter claimants’ arguments in this regard when the time comes to submit its memorial on jurisdiction.

⁷ Opp’n at 3.

⁸ Claimants propose a schedule that includes exchanging and responding to document requests and interrogatories prior to a hearing. *Id.* at 8-9.

time and cost will be achieved if this narrow jurisdictional question is decided before the burdens of discovery and full briefing and a hearing on the merits are imposed on the Tribunal and the United States.

II. THE UNITED STATES' OBJECTION THAT THE CLAIMS ARE OUTSIDE THE SCOPE AND COVERAGE OF NAFTA CHAPTER ELEVEN SHOULD BE DECIDED PRELIMINARILY

The United States also objects to the jurisdiction of this Tribunal on the grounds that the challenged measures do not relate to claimants or to their alleged investments, as required by NAFTA Article 1101(1). The NAFTA Parties consented to arbitrate only those claims within the scope and coverage of NAFTA Chapter Eleven. The Tribunal thus should not embark on a time-consuming and costly foray into the merits until it is satisfied that the alleged claims are within the scope of Chapter Eleven.

Claimants concede that preliminary treatment is appropriate for an objection that the alleged measures do not “relate to” the purported investor or its investment.⁹ Claimants, however, dispute the validity of the United States’ objection, and argue that other elements of Article 1101(1) are not jurisdictional in nature. Whether claimants’ factual allegations are sufficient to show that the measures at issue “relate to” them, however, is itself the question to be decided on the United States’ objection, and is not properly before the Tribunal at this time.

The Statement of Claim contains many vague, conclusory allegations and omissions of predicate facts. Such pleading cannot suffice to establish jurisdiction.¹⁰ Rather, the facts as pleaded need to show with particularity how the measures at issue

⁹ *Id.* at 2 (citing *Methanex* 1st Partial Awd. ¶ 137) and 4 (citing same for the proposition that “an objection based upon non-compliance with Article 1101 may be heard on a preliminary basis.”).

¹⁰ *Cf. Methanex* 1st Partial Awd. ¶ 112 (“the correct approach is to assume that [claimant’s] factual contentions are correct (insofar as they are not incredible, frivolous or vexatious)”).

relate to each of the claimants. The United States has credibly countered that claimants' allegations fail in this regard. For example, there is nothing in the Statement of Claim that supports claimants' contention that the Escrow Statutes (which apply to tobacco product manufacturers) or the Complementary Legislation (which applies to tobacco product manufacturers and, in some instances, tobacco product distributors who act as stamping agents) "relate to" Arthur Montour, Jr., who is neither a manufacturer nor a stamping agent of tobacco products.

Furthermore, each of the elements set forth in Article 1101(1) must be satisfied before a tribunal may assume jurisdiction over a claim. Among these prerequisites is the requirement that the claimant be "an investor of another Party" with an investment "in the territory of the Party" – in this case, a Canadian investor with an investment in the United States.¹¹ As demonstrated by the United States in its Request for Bifurcation, tribunals in investor-State arbitrations frequently treat that question as a preliminary issue.¹² In their Statement of Claim, claimants fail to identify any United States enterprise in which Grand River, Jerry Montour, or Kenneth Hill has any ownership or controlling interest. Conclusory statements that claimants are investors of a Party with investments in the territory of another Party cannot suffice to establish jurisdiction if no facts are pleaded with particularity in support of those legal conclusions.

These issues are not, as claimants contend, "inextricably bound up with determinations of facts" that must be decided at a merits stage.¹³ These objections can be

¹¹ See, e.g., *id.* ¶ 127 (tribunal satisfying itself that the claimant qualified as an investor of another Party); *Ethyl Awd. on Jur.* ¶ 61 (same).

¹² Request for Bifurcation of Respondent United States of America (Aug. 29, 2005) ("U.S. Request") at 5 & n.8.

¹³ Opp'n at 4.

addressed without delving into the full merits of the claims. No document production would be required to address this objection. Both the burdens of production and proof rest on claimants for the threshold showing of whether they own or control U.S. enterprises, and any evidence of this – if it exists – is in claimants’ possession. In addition, the question of whether the Escrow Statutes and Complementary Legislation “relate to” Arthur Montour, Jr. is a legal one that can be determined by analyzing the legislation at issue. Addressing this objection as a preliminary issue, therefore, is not only warranted to ensure that the United States is not burdened with defending against a claim which it has not consented to arbitrate, it is also the most efficient way to proceed.

III. NATIONALITY IS A THRESHOLD ISSUE BEST DECIDED PRELIMINARILY

In addition, the United States objects to the Tribunal’s jurisdiction to hear claims submitted by any claimant failing to show that he possesses the requisite nationality. Claimants admit that deciding nationality is within the Tribunal’s competence, but downplay the seriousness of this objection.¹⁴ Unless Arthur Montour, Jr. can demonstrate that he possesses the alleged and requisite Canadian nationality, however, his claim should be dismissed.

This objection requires a very limited, straightforward determination by the Tribunal. The Statement of Claim’s allegations of fact cast doubt on whether Arthur Montour, Jr. is a proper claimant. Claimants’ factual allegations indicate that Arthur Montour, Jr. is a long-term resident of the United States.¹⁵ In addition, as set forth in its

¹⁴ *Id.* at 5 (stating that “the Respondent actually demurs . . . [and] does not appear to be raising an objection based upon a challenge to [Arthur Montour Jr.’s] nationality *per se*,” but acknowledging that “the Tribunal clearly possesses the competence to determine whether Mr. Montour is a national of Canada.”).

¹⁵ Stmt. of Claim ¶ 8.

prior submission, the United States is aware that Arthur Montour, Jr. possesses a U.S. social security number. While Jerry Montour and Kenneth Hill have presented copies of their Canadian passports to the United States, Arthur Montour, Jr. has submitted only a letter stating that he was born in Canada.¹⁶ The inconclusiveness of the proof submitted by Arthur Montour, Jr., his possession of a U.S. social security number, and claimants' own allegations of his long-term residence, together provide a sufficient basis for the Tribunal to question – and determine preliminarily – whether he qualifies as “an investor of another Party” as is required by Article 1101(1).

Ruling on this objection could result in a significant reduction in the time and costs of any future phase of the proceedings, and does not present questions intertwined with the merits. Claimants inexplicably contend that nationality needs to be “tested in the fire of a merits hearing.”¹⁷ There is certainly no need for a lengthy hearing on the merits of several substantive claims under Chapter Eleven if the only claimant who alleges ownership or control of any U.S. enterprise lacks the requisite nationality to submit a claim to arbitration against the United States. Efficiency in these proceedings is best served by making this straightforward determination first so that unwarranted further proceedings on Arthur Montour's claims may be avoided if it is determined that he is not entitled to submit a claim to arbitration.

IV. OBJECTIONS TO JURISDICTION BASED ON THE TAX EXCEPTION OUGHT TO BE CONSIDERED PRELIMINARILY

Like the United States' objection based on Article 1101(1), its objection based on Article 2103, which bars certain types of claims challenging taxation measures, is

¹⁶ *Id.* Exhs. 2-4.

¹⁷ Opp'n at 5.

jurisdictional and ought to be decided in a preliminary phase. Article 2103 is analogous to Article 1101(1) in that it limits the coverage of Chapter Eleven and the United States' consent to arbitrate. Article 2103(1) clearly constrains a Chapter Eleven tribunal's jurisdiction to hear challenges to taxation measures: "Except as set out in this Article, nothing in this Agreement shall apply to taxation measures." The determination of whether the Minnesota and Michigan equity assessments challenged by claimants are "taxation measures" and, therefore, whether claimants' Article 1105(1) and Article 1110 claims challenging these measures are barred raises a jurisdictional issue that is proper for preliminary consideration.¹⁸

Resolving this limited issue preliminarily is also efficient because it will entail a separate inquiry that does not touch upon the essential facts needed to support the merits of the case and could substantially narrow the issues before the Tribunal. Even if the parties need to call upon tax experts to opine on the nature of these statutes as taxation measures, the inquiry will be a distinct and more limited one than would be entailed in hearing the merits of the challenges to these measures under NAFTA Articles 1105(1) and 1110.

V. OBJECTIONS CONCERNING FAILURE TO COMPLY WITH THE NOTICE OF INTENT AND SIX MONTH COOLING OFF PERIOD SHOULD BE DECIDED PRELIMINARILY

Unlike claimants' challenge to the measures related to the Master Settlement Agreement ("MSA") discussed above, their claims challenging the "equity assessment

¹⁸ See, e.g., *Canfor Corp. v. United States of America*, Decision on the Place of Arbitration, Filing of a Statement of Defence and Bifurcation of Proceedings ¶ 47 (Jan. 23, 2004) at <http://www.state.gov/documents/organization/28637.pdf> (finding that the United States' objection pursuant to NAFTA Article 1901(3) – which provides that no provision of any other chapter of the Agreement shall be construed to impose obligations on a Party with respect to its antidumping or countervailing duty law – was jurisdictional and appropriate for preliminary treatment).

laws” in Michigan and Minnesota are not time-barred, but rather are improperly and prematurely submitted to arbitration. Deciding this objection as well as the time bar objection in the United States’ favor would result in the dismissal of all of the claims, eliminating entirely the need for further proceedings. It is therefore efficient to decide the jurisdictional objections to the claims challenging these measures along with the United States’ other jurisdictional objections in a preliminary phase.

Claimants’ suggestion that the Tribunal should not treat these objections preliminarily because other Chapter Eleven tribunals have dismissed similar objections is irrelevant and unavailing. Claimants’ belated addition in their Statement of Claim of a Minnesota statute to the measures being challenged contravenes Article 1119 and prejudices the United States.¹⁹ Claimants’ Notice of Intent and Notice of Arbitration clearly indicated that the only measures being challenged were those that had been adopted by the states that were signatories to the MSA.²⁰ Minnesota, however, is not one of the 46 MSA states. The United States was thus not on notice that any actions taken by the state of Minnesota would be at issue in this arbitration. Accordingly, attorneys responsible for defending the United States in this arbitration had no reason to contact Minnesota state representatives concerning this claim. Were the Tribunal to hear claimants’ challenge to the Minnesota statute that was not identified in either the Notice

¹⁹ See *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003), at <http://www.state.gov/documents/organization/16586.pdf> ¶¶ 142-46 (finding that tribunal lacked jurisdiction over claimant’s claims that “should have been set out as early as in its Notice of Intention to Submit a Claim to Arbitration” and that permitting claimant to pursue belated claims “could impose material prejudice upon the Respondent.”).

²⁰ See, e.g., Notice of Intent to Submit a Claim to Arbitration (Sept. 12, 2003) ¶¶ 11, 32, 40, 50, 53 (referring to actions by “the MSA States”); Notice of Arbitration (Mar. 10, 2004) ¶¶ 19, 26, 39, 49, 52, 60 (same; also describing Michigan’s “equity assessment” as “part of the ongoing application of the MSA by the 46 MSA States”).

of Intent or Notice of Arbitration, this would contravene the NAFTA's requirements and prejudice the United States.

As to the Michigan equity assessment, the claimants identified this measure in their Notice of Arbitration, but not their Notice of Intent. In addition, the measure had not been in effect for six months before the submission of the claim to arbitration, thus flouting Article 1120. Claimants should not be heard to blithely assert that waiting six months would have been futile. The NAFTA Parties' intent in precisely stipulating the terms of Article 1120 should be respected.

The United States seeks dismissal of all claims that have not been properly submitted to arbitration. Granting this objection would eliminate from consideration the only measures not addressed by the time bar objection and avoid the necessity of proceeding with a merits phase.

VI. CLAIMANTS' PROPOSED SCHEDULE IS UNACCEPTABLE

In its Request for Bifurcation, the United States proposed a schedule for these proceedings that would be both fair and efficient.²¹ Claimants' proposed schedule, on the other hand, provides for one round of simultaneous submissions and contemplates interrogatories, both of which are inappropriate in these proceedings.

Claimants have filed a claim for hundreds of millions of dollars against a sovereign State. Their alleged desire for an expeditious resolution of these proceedings cannot override the United States' right to a full and fair opportunity to present its defense. Claimants' proposal to truncate the proceedings by having one round of simultaneous submissions is inappropriate and should be rejected. *First*, claimants'

²¹ U.S. Request at 9.

purported rationale for their proposal is that they are incurring losses as a result of the challenged measures. If the claimants were to prevail on their claim, however, this Tribunal would have authority only to award monetary damages: it cannot order the United States to repeal the challenged measures or insulate claimants from application of the measures.²² Because claimants, if they prevail, could be compensated for the total extent of their damages, there is no reason to sacrifice the United States' opportunity to present a full defense to serve claimants' purported need for expediency.

Second, while simultaneous submissions on procedural matters may be appropriate under certain circumstances, it is not appropriate for the parties' memorials on jurisdiction or liability. Claimants' statement that "both parties know the case they have to meet" illustrates their error.²³ On issues of liability, it is claimants who bear the burden of proving their case. The United States has no burden or case to meet in this regard. Should this case proceed to the merits, the United States, as respondent, would be entitled to see both the factual evidence on which claimants rely, as well as their legal arguments, before setting forth its factual and legal defenses. Similarly, it would make little sense for claimants to submit their response to the United States' jurisdictional objections before the United States has set forth its legal arguments in their entirety and adduced supporting evidence. In addition, claimants' proposal to limit briefing to one round of memorials in any jurisdiction or merits phase is inappropriate. A hearing on jurisdiction and, if necessary, on the merits, will proceed most efficiently if the issues before the Tribunal have been fully briefed and both parties are aware of the other's

²² See NAFTA art. 1135(1) (providing that "the Tribunal may award, separately or in combination, only: (a) monetary damages and any applicable interest; (b) restitution of property" at the option of the respondent State).

²³ Opp'n at 8.

position. This is best achieved by granting the parties an opportunity to respond to the other party's arguments in a reply and rejoinder, respectively.

Finally, claimants propose a schedule that includes “the exchange of interrogatory questions” without stating any justification for requesting this extraordinary form of discovery.²⁴ Interrogatories are practically unknown in international arbitration.²⁵ The Tribunal should, at the very least, require a showing by claimants of exceptional circumstances before granting the use of such extraordinary discovery methods. In all likelihood, that showing cannot be made and the use of interrogatories should not be permitted.

²⁴ *Id.*

²⁵ *See, e.g.*, IBA RULES ON THE TAKING OF EVIDENCE IN INTERNATIONAL COMMERCIAL ARBITRATION (1999) (containing no mention of interrogatories); Gabrielle Kaufmann-Kohler, *Globalization of Arbitral Procedure*, 36 VAND. J. TRANSNAT'L L. 1313, 1328 (2003) (“[I]nterrogatories have not found their way into arbitration procedure and are practically never used.”); Siegfried H. Elsing & John M. Townsend, *Bridging the Common Law-Civil Law Divide in Arbitration*, 18 ARB. INT'L 59, 61 (2002) (“[T]he IBA Rules contain no provision for depositions or interrogatories. Both are rare in international arbitration. Interrogatories are almost never used.”); Markham Ball, *Dispute Resolution: Controlling the Process of Arbitration*, 752 PRAC. L. INST. CORP. L. & PRAC. 285, 294 (1991) (“[D]epositions and interrogatories are not a proper part of international arbitration in [the United States and England] or any other [nation]”).

CONCLUSION

For the foregoing reasons, and those stated previously in the United States' Request for Bifurcation, the United States respectfully requests that the Tribunal decide its own jurisdiction in this matter as a preliminary question. The United States also requests that the Tribunal establish a schedule for briefing the jurisdictional objections in accordance with that proposed in the United States' Request for Bifurcation.

Respectfully submitted,

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