Court File No.: **CV-19-625689-00CL**

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

IN THE MATTER OF AN APPLICATION TO SET ASIDE AN ARBITRAL AWARD UNDER RULE 14.05(2) OF THE *RULES OF CIVIL PROCEDURE* AND ARTICLE 34 OF THE *UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION*, BEING THE SCHEDULE TO THE INTERNATIONAL COMMERCIAL ARBITRATION ACT, R.S.O. 1990, C. 1.9, AS AMENDED

B E T W E E N:

THE UNITED MEXICAN STATES

Applicant

- and -

GORDON G. BURR, ERIN J. BURR; JOHN CONLEY; NEIL AYERVAIS; DEANA ANTHONE; DOUGLAS BLACK; HOWARD BURNS; MARK BURR; DAVID FIGUEIREDO; LOUIS FOHN; DEBORAH LOMBARDI; P. SCOTT LOWERY; THOMAS MALLEY; RALPH PITTMAN; DANIEL RUDDEN; MARJORIE "PEG" RUDDEN; ROBERT E. SAWDON; RANDALL TAYLOR; JAMES H. WATSON JR.; B-MEX, LLC; B-MEX II, LLC, OAXACA INVESTMENTS, LLC; PALMAS SOUTH, LLC; B-CABO, LLC; COLORADO CANCUN, LLC; SANTE FE MEXICO INVESTMENTS, LLC; CADDIS CAPITAL, LLC; DIAMOND FINANCIAL GROUP, INC.; J. PAUL CONSULTING; LAS KDL, LLC; MATHIS FAMILY PARTNERS, LTD.; PALMAS HOLDINGS, INC.; TRUDE FUND II, LLC; TRUDE FUND III, LLC; VICTORY FUND, LLC

Respondents

- and -

UNITED STATES OF AMERICA and ATTORNEY GENERAL FOR CANADA

Interveners

FACTUM OF THE INTERVENER UNITED STATES OF AMERICA

Date: 10 January 2020

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PART 1: NATURE OF THE APPLICATION

1. Applicant, The United Mexican States ("Mexico"), applies to set aside a Partial Award dated 19 July 2019 ("Partial Award") in the arbitration *B-Mex, LLC and others v. United Mexican States*, ICSID Case No. ARB (AF)/16/3. The *B-Mex* arbitration is being conducted under Chapter Eleven of the North American Free Trade Agreement ("NAFTA").

PART 2: NATURE OF THE INTERVENTION

2. The Intervener, the United States of America ("United States"), is one of the three parties to the NAFTA, along with Mexico and Canada. The United States intervenes as a friend of the court pursuant to the Order of Conway J. dated 11 December 2019. The United States takes no position on the merits of the application or the merits of the underlying dispute.

PART 3: ISSUES, LAW, AND ARGUMENT

3. Mexico raised several preliminary objections to the Tribunal's jurisdiction over the arbitration proceeding, including that the Claimants failed: (i) to comply with the obligations of Article 1119, thereby failing to engage Mexico's consent to arbitrate under NAFTA Article 1122(1) with respect to claimants not identified in the Notice of Intent to arbitrate; and (ii) to deliver to Mexico consent to arbitration and to include such consent with the submission of their claim to arbitration, as required under NAFTA Article 1121 thereby failing to engage Mexico's consent to arbitrate.

4. The Partial Award rejected Mexico's jurisdictional objections on the basis, among other things, that: (1) the NAFTA Parties' consent to arbitration "is not conditioned upon the satisfaction of the requirement of Article 1119(a)";[1] and (2) "the requirements of Article 1121(3) as to the manner in which [the Claimants'] consent is to be conveyed to the Respondent do not bear on the Tribunal's jurisdiction."[2] Arbitrator Vinuesa dissented from the majority's holding with respect to Article 1119.

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[1] Partial Award ¶ 120.
[2] Partial Award ¶ 60.

5. The United States submits that the Tribunal's conclusions on the interpretation of NAFTA Articles 1119 and 1121 are flawed. The NAFTA Parties consented to arbitrate only claims submitted in accordance with the procedures set out in the NAFTA. Those procedures include a requirement to submit, at least 90 days in advance of submitting a claim to arbitration, a written Notice of Intent to Submit a Claim to Arbitration identifying the names and addresses of the disputing investors and, if applicable, the names and addresses of the enterprises on whose behalf the investors intend to submit a claim (Article 1119). The NAFTA Parties' consent to arbitration is also contingent upon the disputing investors and enterprises submitting the requisite consent(s) to arbitration and waiver(s) of rights to pursue relief before other tribunals (Article 1121).

6. Thus, the requirements of Articles 1119 and 1121 are prerequisites for engaging the NAFTA Parties' consent to arbitration, and failure by a disputing investor to comply with these requirements deprives a tribunal of jurisdiction over an investor's claims.

7. As will be discussed further below, all three NAFTA Parties have demonstrated agreement on these issues through their respective submissions to the Tribunal. NAFTA Article 1128 permits non-disputing NAFTA parties to submit views on interpretation of the NAFTA before Chapter 11 tribunals. The United States provided three non-disputing Party submissions to the Tribunal, addressing interpretation issues raised in Mexico's jurisdictional objections. Canada also filed non-disputing Party submissions. Consistent with customary international law principles of treaty interpretation, as reflected in Article 31(3)(a)-(b) of the Vienna Convention on the Law of Treaties ("VCLT"), such agreement of the parties to a treaty regarding its interpretation or application "shall be taken into account, together with the context" when interpreting the treaty. The Tribunal majority appears to have disregarded these treaty interpretation rules. Indeed, the Tribunal majority did not even acknowledge the non-disputing NAFTA Parties' submissions under Article 1128.

I. Pursuant to NAFTA Article 1122, the NAFTA Parties Consented to Arbitrate Only Claims Submitted in Accordance with the Procedures Set out in the NAFTA

8. A State's consent to arbitrate is paramount.[3] Indeed, given that consent is the "cornerstone" of jurisdiction in investor-State arbitration,[4] it is axiomatic that a tribunal lacks jurisdiction in the absence of a disputing party's consent to arbitrate.[5]

9. NAFTA 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 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." [6] In addition, an agreement to arbitrate is only formed upon the investor's corresponding consent to arbitrate *in accordance with those procedures*.[7]

10. The NAFTA Parties have therefore explicitly conditioned their consent upon satisfaction of the relevant procedural requirements. All three NAFTA Parties agree on this point, as reflected in their submissions in the *B-Mex* arbitration,[8] as well as in their submissions in previous arbitrations.[9] Pursuant to Article 31(3)(a)-(b) of the *Vienna*

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[3] *See, e.g.*, ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 74 (1st ed. 2009); *William Ralph Clayton v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction and Liability ¶ 229 (Mar. 17, 2015).

[4] 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).

[5] *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, ¶ 71 (July 15, 2016). *See also* CHRISTOPH SCHREUER, THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW 831 "Consent to Arbitration" (2008) (Peter Muchlinski et al., eds.); CHRISTOPHER F. DUGAN ET AL., INVESTOR STATE ARBITRATION 219 (2008).

[6] A fuller discussion of the U.S. positions on the interpretation of the relevant NAFTA articles is contained in the U.S. submissions in the underlying arbitration: US Article 1128 Submission, 25 February 2018, JAR Tab 256; U.S Second Article 1128 Submission, 17 August 2018, JAR Tab 261; US Third Article 1128 Submission, 21 December 2018, JAR Tab 262.

[7] NAFTA Articles 1122(1), 1121(1)(a) and 1121(2)(a).

[8] *B-Mex, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB (AF)/16/3, Submission of the Government of Canada Pursuant to NAFTA Article 1128, ¶¶ 2-3 (Feb. 28, 2018).

[9] *See, e.g., Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2012-17, Submission of the United States of America ¶ 2 (July 26, 2014); *William Ralph Clayton v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2009-04, Submission of the United States of America ¶ 22 (Dec. 29, 2017); *Resolute Forest Products Inc. v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2016-13, Submission of Mexico ¶¶ 2, 3 (June 14, 2017); *Detroit Int'l Bridge Co. v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2012-25, Submission of Mexico ¶ 3 (Feb. 14, 2014); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada ¶ 52 (Apr. 30, 2001); *Mondev Int'l Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB (AF)/99/2, Second Submission of Canada ¶¶ 7-31 (July 6, 2001).

Convention on the Law of Treaties, this subsequent agreement or subsequent practice of the NAFTA Parties "shall be taken into account" in interpreting the NAFTA.[10]

11. The phrase "in accordance with the procedures set out in this Agreement" refers to all procedures relevant to arbitrating a Section B claim and necessarily includes procedures relevant to submitting a claim, *i.e.*, the procedures in Article 1119 (Notice of Intent to Submit a Claim to Arbitration) and Article 1121 (Conditions Precedent to Submission of a Claim to Arbitration). Notably, the *Methanex* tribunal, in examining whether the "necessary consensual base for its jurisdiction [wa]s 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.[11]

12. Moreover, by conditioning their consent in Article 1122(1) upon satisfaction of the "procedures set out in this Agreement," the NAFTA Parties explicitly made satisfaction of these procedures jurisdictional (not admissibility) requirements.

II. A Claimant Must Satisfy the Requirements of NAFTA Article 1119 in Order to Engage a NAFTA Party's Consent to Arbitrate

13. The requirement under NAFTA Article 1119 for a disputing investor to deliver a Notice of Intent to Submit a Claim to Arbitration is one of the procedural conditions that must be satisfied before a NAFTA Party's consent to arbitrate under Article 1122(1) is

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[10] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) ("VCLT"), arts. 31(3) (a)-(b). The International Court of Justice concluded that Article 31 of the VCLT reflects customary international law. *See, e.g., Kasikili/Sedudu Island (Botswana v. Namibia)*, 1999 I.C.J. 1045, 1059 (Judgment of Dec. 13). Although the United States is not a party to the VCLT, it has recognized that the Convention is the "authoritative guide" to treaty law and practice. *See* Letter of Submittal from Secretary of State Rogers to President Nixon transmitting the VCLT (Oct. 18, 1971), *reprinted in* 65 DEP'T ST. BULL. 684, 685 (1971). NAFTA Article 1131(2) also provides a manner by which the Parties may interpret the NAFTA, but nothing in that article states that it is the exclusive means by which the Parties may interpret the Agreement.

[11] *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, ¶ 320 (Apr. 2, 2015); *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").

engaged. The NAFTA Parties demonstrated agreement on this point in their submissions to the Tribunal.[12]

14. In accordance with NAFTA Article 1119, a disputing investor who does not deliver a Notice of Intent 90 days before submitting a Notice of Arbitration or Request for Arbitration fails to satisfy this procedural requirement, and therefore fails to engage the respondent NAFTA Party's consent to arbitrate. Under such circumstances, a tribunal lacks jurisdiction *ab initio*. A respondent's consent cannot be created retroactively; consent must exist at the time a claim is submitted to arbitration.[13]

15. 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 allow 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,[14] amicable settlement or other courses of action prior to arbitration. Such courses of action may include preservation of evidence and/or preparation of a defence. 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 [.]"[15]

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[12] *B-Mex, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB (AF)/16/3, Memorial on Jurisdictional Objections ¶¶ 48-77 (May 30, 2017); *B-Mex, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB (AF)/16/3, Submission of the United States of America ¶¶ 2-9 (Feb. 28, 2018); *B-Mex, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB (AF)/16/3, Submission of the Government of Canada Pursuant to NAFTA Article 1128, ¶ 8 (Feb. 28, 2018).

[13] 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 the selected arbitral rules.

[14] 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.

[15] *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).

16. For the foregoing reasons, the procedural requirements of Article 1119 are mandatory preconditions to Chapter 11 arbitrations. Claimants or claims[16] 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. A tribunal cannot simply overlook this failure to comply with these requirements.

III. A Claimant Must Also Satisfy the Requirements of NAFTA Article 1121 in Order to Engage a NAFTA Party's Consent to Arbitrate

17. NAFTA Article 1121 also contains procedural requirements upon which the NAFTA Parties have conditioned their consent to arbitrate. The NAFTA Parties also demonstrated agreement on this point in their submissions to the Tribunal.[17]

18. 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 Agreement."[18] 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.

19. 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

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[16] 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.

[17] *B-Mex, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB (AF)/16/3, Memorial on Jurisdictional Objections ¶¶ 78-93 (May 30, 2017); *B-Mex, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB (AF)/16/3, Submission of the United States of America ¶¶ 10-12 (Feb. 28, 2018); *B-Mex, LLC v. United Mexican States*, NAFTA/ICSID Case No. ARB (AF)/16/3, Submission of the Government of Canada Pursuant to NAFTA Article 1128, ¶ 3 (Feb. 28, 2018).

[18] 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.

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.[19] Additionally, the "consent" required by Article 1121 must be "clear, explicit and categorical[.]"[20] If the requirements regarding a claimant's "consent" have not been satisfied – including both the fact of consent and the manner in which consent is communicated – the NAFTA Party's consent is not engaged, and the tribunal lacks jurisdiction *ab initio*.[21] As will be discussed in more detail in Section IV.B below, there is no basis in the text of Article 1121 for the Tribunal's conclusion that, while a failure to provide consent in the specified manner may affect a claim's admissibility, it does not deprive the Tribunal of jurisdiction over the claim. A claimant does not have the option to comply with some of Article 1121's requirements and ignore others, as the Tribunal concluded.

20. A tribunal is required to determine whether a disputing investor has consented in accordance with the requirements of Article 1121 and must look to the disputing investor's submissions to make that determination. However, a tribunal itself has no authority to remedy an invalid consent under Article 1121. The discretion to permit a claimant either to proceed under or remedy an invalid consent lies with the respondent NAFTA Party as a function of the respondent's general discretion to consent to arbitration, not with a tribunal.[22]

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[19] *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.

[20] *Waste Management [I]* Award ¶ 18.

[21] *Commerce Group Corp. v. 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.

[22] *See, e.g., Waste Management [I]* Award ¶ 31; *Railroad Development Corp. 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).

IV. The Tribunal's Interpretation of The Requirements of Articles 1119 and1121

A. The Requirements in Article 1119 Are Jurisdictional

21. The Tribunal majority stated that "[a]rbitration being a creature of consent, lack of consent equates lack of jurisdiction."[23] The Tribunal then concluded, however, that "the Respondent's consent in Article 1122 is not conditioned upon the satisfaction of the requirement of Article 1119(a) . . . e"[24]

22. The Tribunal majority's conclusion rested primarily on three reasons: (1) the requirements of Article 1119 are, at most, procedures "to be followed *prior to* an arbitration" and not procedures, by contrast to those specified in Articles 1123 to 1136, "with which the subsequent *arbitration* itself, if any, must accord";[25] (2) unlike Article 1121, Article 1119 is not expressly identified as a condition precedent to submission of a claim to arbitration nor, unlike Articles 1116 and 1120, does it expressly bar the submission of a claim that does not comply with its requirements;[26] and (3) the NAFTA's objectives would not be "furthered" by a strict application of Article 1119.[27] The conclusion of the Tribunal on each of these points is flawed.

23. *First*, the Tribunal's purported distinction between procedures prior to arbitration and procedures for arbitration has no textual support in the NAFTA. The language of Article 1122 is framed broadly to encompass "the procedures set out in this Agreement," *i.e.*, the NAFTA, and there is no distinction, express or implied, between procedures relevant to the submission of a claim and procedures relevant to the conduct of an arbitration once a claim has been submitted. If, by contrast, the NAFTA Party's standing offer of consent were understood to refer only to the subset of procedures set forth in Articles 1123 to 1136, as the Tribunal majority stated, the NAFTA Party would be consenting in advance to arbitrate claims with investors *regardless* of their compliance even with the waiver requirement in Article 1121. Such an interpretation is untenable and contrary to the decisions of multiple NAFTA tribunals finding that compliance with the

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[23] Partial Award ¶ 46.
[24] Partial Award ¶ 120.
[25] Partial Award ¶ 97; *see also id.* ¶¶ 104-106.
[26] Partial Award ¶¶ 107-13.
[27] Partial Award ¶¶ 114-17.

waiver requirement is a prerequisite to engage the NAFTA Party's consent.[28] Other tribunals interpreting nearly identical provisions in other treaties are in accord.[29]

24. *Second*, whether Article 1119 is expressly labeled a condition precedent to submission of a claim to arbitration is irrelevant. As explained above, Article 1121 requires that an investor consent to arbitrate "in accordance with the procedures set out in this Agreement." This condition means that the investor must accept all procedures in the NAFTA that may pertain to arbitration under Chapter Eleven, Section B, including but not limited to, the procedures in Article 1119. An investor that has not accepted the NAFTA procedures has not consented to arbitration under Chapter Eleven. Because the acceptance of these procedures forms part of the investor's consent as a "condition precedent" to arbitrate, there is no need to insert the phrase "conditions precedent" in the header of each and every relevant NAFTA article containing a procedure that could be relevant to an arbitration under Chapter Eleven, Section B. The status of the NAFTA procedures as conditions precedent is thus clear from the header of Article 1121, combined with that Article's incorporation through the investor's consent of all "the procedures set out in this Agreement."

25. Likewise, nothing can be inferred from Article 1119 noteexplicitly stating the consequences for a failure to comply with its terms. As noted, Article 1119 frames, in mandatory terms, both the requirement to deliver the Notice and the required content of the Notice: "[t]he disputing investor *shall* deliver to the disputing Party written notice of its intention to submit a claim to arbitration" and the "notice *shall* specify . . e" (emphasis added). Thus, there is no question that the disputing investor *must* deliver the Notice and that the Notice *must* contain the specified information. In addition, Article 1119 provides a timeframe for delivering a valid Notice that establishes the Notice as a prerequisite for filing a claim: the disputing investor must deliver the Notice "at least 90 days before the

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[28] *Waste Management [I]* Award ¶¶ 16, 23, 31; *see also Detroit Intèl Bridge Co. v. Government of Canada*, UNCITRAL/PCA Case No. 2012-25, Award on Jurisdiction ¶¶ 336-37 (Apr. 2, 2015); *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, First Partial Award ¶ 120 (Aug. 7, 2002).

[29] For example, the tribunal in *RDC v. Guatemala* found that the waiver requirement must be met "before the consent of the Respondent to arbitration is perfected." *Railroad Development Corp. v. Republic of Guatemala*, CAFTA/ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction CAFTA Article 10.20.5, ¶ 56 (Nov. 17, 2008); *see also Renco Group v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction ¶ 193 (July 15, 2016).

claim is submitted." In other words, the disputing investor cannot submit a claim unless: (1) it has delivered a valid Notice to the disputing NAFTA Party; and (2) 90 days have passed since delivery of the Notice. A failure by the disputing investor to comply with Article 1119 will bar such investor from submitting a claim.

26. *Third*, the Tribunal majority substituted its own judgment about what constitutes a fair and effective dispute resolution mechanism for the judgment of the NAFTA Parties with respect to whether the requirements of Article 1119 are jurisdictional. The NAFTA Parties made the submission of a valid Notice under Article 1119 mandatory to the dispute resolution process, and the Tribunal is not empowered to waive or disregard this requirement. Furthermore, as explained above, the Notice serves a number of important purposes which would be undermined by permitting disputing investors to proceed with a claim without meeting the requirements of Article 1119.

27. Finally, the Tribunal majority failed to address the non-disputing NAFTA Parties' submissions under Article 1128. As the United States explained in its Article 1128 submissions, it has long maintained that the "procedures set out in this Agreement" that are required to engage the NAFTA Parties' consent and form the agreement to arbitrate necessarily include Articles 1116 to 1121.[30] As noted above, all three NAFTA Parties agree that their consent to the submission of any claim to arbitration is conditioned upon the satisfaction of the relevant procedural requirements. In accordance with Article 31(3)(a)-(b) of the *Vienna Convention on the Law of Treaties*, the NAFTA Parties' common, concordant, and consistent views form a subsequent practice that "shall be taken into account" by the Tribunal in interpreting the NAFTA. As the recent decision of the *Mobil II* tribunal correctly noted after examining the views (many contained in non-disputing Party submissions) of "all three NAFTA Parties in their practice subsequent to the adoption of NAFTA," subsequent practice establishing agreement of the parties

[30] *See, e.g., B-Mex, LLC and Others v. United Mexican States,* NAFTA/ICSID Case No. ARB (AF)/16/3, Submission of the United States of America ¶ 4 (Feb. 28, 2018).

regarding the interpretation of the treaty is "entitled to be accorded considerable weight."[31] Other tribunals have reached the same conclusion.[32]

28. The Tribunal majority, however, gave no weight to the NAFTA Parties' agreement on the proper role of Article 1119; indeed, the Tribunal did not even mention the non-disputing NAFTA Parties' Article 1128 submissions. This is inconsistent with customary international law principles of treaty interpretation, as reflected in Article 31(3)(a)-(b) of the *Vienna Convention on the Law of Treaties*.

B. The Requirements in Article 1121 Are Jurisdictional

29. The Tribunal concluded that Article 1121(1) "sets out two substantive conditions precedent that an investor must satisfy before it can pursue a claim in arbitration: consent and waiver," and that "a NAFTA Party cannot be compelled to arbitrate where thosee conditions are not met."[33] The Tribunal then determined, however, that "the requirements of Article 1121(3) as to the manner in which that consent is to be conveyed to the Respondent do not bear on the Tribunal's jurisdiction."[34]

30. Having acknowledged the jurisdictional requirements of the first paragraph of Article 1121, the Tribunal's conclusions with respect to the requirements imposed by the

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[31] *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility ¶ 158 (July 13, 2018).

[32] *See, e.g.*, *Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction ¶¶ 188-90 (Jan. 28, 2008); *William Richard Clayton v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2009-04, Award on Damages ¶¶ 376-79 (Jan. 10, 2019). Respondents argue that because the NAFTA Parties are "respondent[s] in other arbitrations" they take positions in their non-disputing party submissions that are "advantageous to the respondent [state] . . e." Factum of the Respondents ¶ 80. Respondents' simplistic argument wrongly assumes that the NAFTA Parties provide interpretive views only when they align with the States' defensive interests. This is not so. In fact, the United States has, where appropriate, made submissions pursuant to Article 1128 that align with the investor's positions. For example, the tribunal relied on one of the U.S. non-disputing party submissions in *Bridgestone Licensing Services, Inc. v. Republic of Panama* in rejecting Panama's attempt to invoke the treaty's denial of benefits provision with respect to one of the claimants. *See Bridgestone Licensing Services, Inc. v. Republic of Panama*, NAFTA/ICSID Case No. ARB/16/34, Supplemental Submission of the United States of America (Sept. 25, 2017); *Bridgestone Licensing Services, Inc. v. Republic of Panama*, NAFTA/ICSID Case No. ARB/16/34, Decision on Expedited Objections ¶¶ 290,e302 (Dec. 13,e2017). Likewise, the claimant in *Eli Lilly & Co. v. Government of Canada* successfully relied on a U.S. non-disputing party submission in its effort to rebut Canada's time bar objection. *See Eli Lilly & Co. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America ¶ 3 (Mar. 18, 2016); *Eli Lilly & Co. v. Government of Canada*, NAFTA/UNCITRAL, Final Award ¶¶ 152, 156, 163 (Mar. 16, 2017).

[33] Partial Award ¶ 44(a).

[34] Partial Award ¶ 60.

third paragraph of Article 1121 are unsupported by treaty analysis or customary international law principles of treaty interpretation reflected in the Vienna Convention on the Law of Treaties.

31. Article 1121 does not distinguish between requirements that are jurisdictional and requirements that potentially could be relevant only to the admissibility of a claim. All requirements in the Article should be treated as "conditions precedent to submission of a claim to arbitration." Again, the Tribunal cannot substitute its judgment for the judgment of the NAFTA Parties, as memorialized in the text of the treaty itself, on the issue of what should be a "condition precedent to submission of a claim to arbitration."

V. CONCLUSION

32. For these reasons, the United States respectfully submits the Application raises serious questions about the correctness of the Tribunal's interpretation of NAFTA Articles 1119 and 1121 in the Partial Award.

Date: 10 January 2020

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Malcolm N. Ruby

TAB A

SCHEDULE A
LIST OF AUTHORITIES

Awards and Decisions

1. *Bridgestone Licensing Services, Inc. v. Republic of Panama*, NAFTA/ICSID Case No. ARB/16/34, Decision on Expedited Objections (Dec. 13, 2017).

2. *Canadian Cattlemen for Fair Trade v. United States of America*, NAFTA/UNCITRAL, Award on Jurisdiction (Jan. 28, 2008).

3. *Commerce Group Corp. v. Republic of El Salvador*, CAFTA-DR/ICSID Case No. ARB/09/17, Award (Mar. 14, 2011).

4. *Detroit Int'l Bridge Co. v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction (April 2, 2015).

5. *Eli Lilly & Co. v. Government of Canada*, NAFTA/UNCITRAL, Final Award (Mar. 16, 2017).

6. *Kasikili/Sedudu Island (Botswana v. Namibia)*, 1999 I.C.J. 1045 (Judgment of Dec. 13).

7. *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, ICSID Administered Case, Decision on Motion to Add a New Party (Jan. 31, 2008).

8. *Mesa Power Group LLC v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2012-17, Submission of the United States of America (July 26, 2014).

9. *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, First Partial Award (Aug. 7, 2002)

10. *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility (July 13, 2018).

11. *Railroad Development Corp. v. Republic of Guatemala*, CAFTA-DR/ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction Under CAFTA Article 10.20.5 (Nov. 17, 2008).

12. *The Renco Group Inc. v. Republic of Peru*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction (July 15, 2016).

13. *Waste Management, Inc. v. The United Mexican States*, ICSID Case No. ARB (AF)/98/2, Award (June 2, 2000).

14. *William Ralph Clayton v. Government of Canada*, NAFTA/UNCITRAL, Award on Jurisdiction and Liability (Mar. 17, 2015).

15. *William Richard Clayton v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2009-04, Award on Damages (Jan. 10, 2019).

SECONDARY SOURCES AND OTHER DOCUMENTS:

16. B-Mex and Others v. The United Mexican States NAFA/ICSID Case No. ARB (AF)/16/3, Memorial on Jurisdictional Objections of the United Mexican States (May 30, 2017).

17. B-Mex, LLC and others v. United Mexican States NAFA/ICSID Case No. ARB (AF)/16/3, Submission of the Government of Canada Pursuant to NAFTA Article 1128 of the Departments of Justice and Global Affairs Canada (Feb. 28, 2018).

18. *Bridgestone Licensing Services, Inc. v. Republic of Panama*, NAFTA/ICSID Case No. ARB/16/34, Supplemental Submission of the United States of America (Sept. 25, 2017).

19. *Detroit Int'l Bridge Co. v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2012-25, Submission of Mexico (Feb. 14, 2014).

20. Dugan, Christopher, et al, Investor State Arbitration (2008)

21. Douglas, Zachary, The International Law Of Investment Claims (1st ed. 2009).

22. *Eli Lilly & Co. v. Government of Canada*, NAFTA/UNCITRAL, Submission of the United States of America (Mar. 18, 2016).

23. Letter of Submittal from Secretary of State Rogers to President Nixon transmitting the Vienna Convention on the Law of Treaties (Oct. 18, 1971)

24. *Methanex Corp. v. United States of America*, NAFTA/UNCITRAL, Second Submission of Canada (Apr. 30, 2001).

25. *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).

26. *Mondev Int'l Ltd. v. United States of America*, NAFTA/ICSID Case No. ARB (AF)/99/2, Second Submission of Canada (July 7, 2001).

27. Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Mar. 18, 1965).

28. *Resolute Forest Products Inc. v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2016-13, Submission of Mexico (June 14, 2017).

29. Scheuer, Christoph, *CONSENT TO ARBITRATION* IN THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW (Peter Muchlinski et al. eds., 2008).

30. *William Ralph Clayton v. Government of Canada*, NAFTA/UNCITRAL PCA Case No. 2009-04, Second Submission of the United States of America (Dec. 29, 2017).

TAB B

SCHEDULE "B"
STATUTES and LEGISLATION

NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

Part Five: Investment, Services and Related Matters
Chapter Eleven: Investment

...

Article 1118: Settlement of a Claim through Consultation and Negotiation

The disputing parties should first attempt to settle a claim through consultation or negotiation.

Article 1119: Notice of Intent to Submit a Claim to Arbitration

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.

Article 1120: Submission of a Claim to Arbitration

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:

(a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;

(b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or

(c) the UNCITRAL Arbitration Rules.

2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

Article 1121: Conditions Precedent to Submission of a Claim to Arbitration

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:

(a) consent to arbitration in accordance with the procedures set out in this Agreement; and

(b) waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.

3. A consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.

4. Only where a disputing Party has deprived a disputing investor of control of an enterprise:

(a) a waiver from the enterprise under paragraph 1(b) or 2(b) shall not be required; and

(b) Annex 1120.1(b) shall not apply.

Article 1122: Consent to Arbitration

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

2. The consent given by paragraph 1 and the submission by a disputing investor of a claim to arbitration shall satisfy the requirement of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent of the parties;

(b) Article II of the New York Convention for an agreement in writing; and

(c) Article I of the InterAmerican Convention for an agreement.

...

Article 1128: Participation by a Party

On written notice to the disputing parties, a Party may make submissions to a Tribunal on a question of interpretation of this Agreement.

...

Article 1137: General

Time when a Claim is Submitted to Arbitration

1. A claim is submitted to arbitration under this Section when:

(a) the request for arbitration under paragraph (1) of Article 36 of the ICSID Convention has been received by the Secretary-General;

(b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General; or

(c) the notice of arbitration given under the UNCITRAL Arbitration Rules is received by the disputing Party.

Service of Documents

2. Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 1137.2.

Receipts under Insurance or Guarantee Contracts

3. In an arbitration under this Section, a Party shall not assert, as a defense, counterclaim, right of setoff or otherwise, that the disputing investor has received or will receive, pursuant to an insurance or guarantee contract, indemnification or other compensation for all or part of its alleged damages.

Publication of an Award

4. Annex 1137.4 applies to the Parties specified in that Annex with respect to publication of an award.

VIENNA CONVENTION ON THE LAW OF TREATIES

Article 31, GENERAL RULE OF INTERPRETATION

...

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

Court File No.: CV-19-625689-00CL

THE UNITED MEXICAN STATES Applicants	**and**	**GORDON G. BURR et al.** Respondents	**and**	**UNITED STATES OF AMERICA, et al.** Inteveners

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

(PROCEEDING COMMENCED AT TORONTO)

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