

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

DETROIT INTERNATIONAL BRIDGE COMPANY,

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

PCA Case No. 2012-25

SUBMISSION OF THE UNITED STATES OF AMERICA

1. The United States of America hereby makes this submission pursuant to Article 1128 of the North American Free Trade Agreement (“NAFTA”), which authorizes non-disputing Parties to make submissions to a Tribunal on a question of interpretation of the NAFTA. The United States does not, through this submission, take a position on how the following interpretation applies to the facts of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

Articles 1116(1) and 1117(1) (Arbitrable Disputes)

2. In creating Chapter Eleven’s investor-State dispute settlement mechanism, the NAFTA Parties have specified the treaty obligations the breach of which may be submitted to arbitration. NAFTA Articles 1116(1) and 1117(1) provide a Party’s consent to arbitrate only claims based on a breach of either Section A of Chapter Eleven, Article 1503(2) or, under certain circumstances, Article 1502(3)(a). Articles 1116(1) and 1117(1) do not provide consent to arbitrate disputes based on alleged breaches of obligations found in other articles or chapters of the NAFTA or alleged breaches of other treaties or other international obligations.¹

¹ See, e.g., *Grand River Enterprises v. United States*, NAFTA/UNCITRAL, Award ¶ 71 (Jan. 12, 2011) (“The Tribunal understands the obligation to ‘take into account’ other rules of international law to require it to respect the Vienna Convention’s rules governing treaty interpretation. However, the Tribunal does not understand this obligation to provide a license to import into NAFTA legal elements from other treaties, or to allow alteration of an

Articles 1116(2) and 1117(2) (Limitations Period)

3. All claims under NAFTA Chapter Eleven must be brought within the three-year limitations period set out in Article 1116(2) and Article 1117(2). Although a legally distinct injury can give rise to a separate limitations period under NAFTA Chapter Eleven, a continuing course of conduct does not extend the limitations period under Article 1116(2) or Article 1117(2).²

Article 1121(1)(b) (Waiver Requirement)

4. One of the preconditions to the NAFTA Parties' consent to arbitrate claims under Chapter Eleven is the waiver required by Article 1121. That provision is entitled "Conditions Precedent to Submission of a Claim to Arbitration" and states in relevant part:

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

...

(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.

The NAFTA Parties thus conditioned their consent to arbitration on a claimant's waiver (under Article 1121) of its right to avail itself of other forums with respect to a measure alleged to constitute a NAFTA breach. Without an effective waiver, therefore, there is no consent of the Party/Respondent necessary for a tribunal to assume jurisdiction over the dispute.

5. Compliance with Article 1121 requires that the claimant not only provide a written waiver, but that it act consistently with that waiver by abstaining from initiating or continuing

interpretation established through the normal interpretive processes of the Vienna Convention. This is a Tribunal of limited jurisdiction; it has no mandate to decide claims based on treaties other than NAFTA."); *see also Methanex Corp. v. United States*, NAFTA/UNCITRAL, Award, Part II, Chapter B ¶ 5 (holding that NAFTA Chapter Eleven does not "creat[e] any jurisdiction to decide on alleged violations of the GATT"). The NAFTA Parties' view that breaches of other treaties are not arbitrable under NAFTA Articles 1116 and 1117 by virtue of asserting a claim under NAFTA Article 1105 was confirmed by the binding interpretation of the Free Trade Commission issued in 2001. *See* NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, ¶ B(3) (July 31, 2001), available at <http://www.state.gov/documents/organization/38790.pdf> ("A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).").

² The United States' views on the interpretation of NAFTA Articles 1116(2) and 1117(2) are reflected in the attached non-disputing Party submission of July 14, 2008 in the NAFTA Chapter Eleven case *Merrill & Ring Forestry, L.P. v. Canada*.

proceedings with respect to the measure alleged to constitute a NAFTA breach in another forum. As the Tribunal in *Commerce Group v. El Salvador* explained in relation to the similar waiver provision contained in the Dominican Republic-Central America-United States Free Trade Agreement (“CAFTA-DR”), “[a] waiver must be more than just words; it must accomplish its intended effect.”³ Thus, if a claimant continues proceedings with respect to the same measure in another forum despite meeting the formal requirement of filing a waiver, the claimant has not complied with the waiver requirement, and the tribunal lacks jurisdiction over the dispute.

6. Article 1121(1)(b) requires a waiver of a claimant’s “right to initiate or continue . . . any proceedings *with respect to* the measure of the disputing Party that is alleged to be a breach referred to in Article 1116[.]”⁴ As the United States has previously argued, the phrase “with respect to” in Article 1121(b) should be interpreted broadly.⁵ This construction of the phrase is consistent with the purpose of the waiver provision: to avoid the need for a Respondent to litigate concurrent and overlapping proceedings in multiple forums, and to minimize not only the risk of double recovery, but also the risk of “conflicting outcomes (and thus legal uncertainty).”⁶ As the tribunal in *Commerce Group* observed, the waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different measures at issue in such proceedings are “separate and distinct” and the measures can be “teased apart.”⁷ Article 1121 does not require a waiver of domestic proceedings where the measure at issue in the NAFTA arbitration is, for example, only tangentially or incidentally related to the measure at issue in those domestic proceedings.

7. Article 1121(1)(b) includes an exception to the waiver requirement 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.”⁸ The United States agrees with Canada and Mexico that the NAFTA Parties intended this exception to be limited to proceedings before an administrative tribunal or court constituted under the law of the

³ *Commerce Group Corp. and San Sebastian Mines, Inc. v. El Salvador*, CAFTA-DR/ICSID Case No. ARB/09/17, Award ¶ 80 (Mar. 14, 2011); *see also id.* ¶¶ 81-84.

⁴ NAFTA Art. 1121(1)(b) (emphasis added).

⁵ *See, e.g., Consolidated Softwood Lumber Proceedings*, Reply Post-Hearing Submission of Respondent United States of America, at 2 n. 2 (Mar. 10, 2006); *Canfor v. United States*, Reply on Jurisdiction of Respondent United States of America, at 12 (Aug. 6, 2004) (citing North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1, 103d Cong., 1st Sess., at 147 (1993)); *see also id.* (commenting on the “with respect to” construction in other NAFTA provisions); *accord Consolidated Softwood Lumber Proceedings*, NAFTA/UNCITRAL, Decision on Preliminary Question ¶ 201 (June 6, 2006) (“[T]he Tribunal is of the view that the words “with respect to” are to be interpreted broadly.”)

⁶ *International Thunderbird Gaming Corp. v. Mexico*, NAFTA/UNCITRAL, Award ¶ 118 (Jan. 26, 2006) (“In construing Article 1121 of the NAFTA, one must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.”).

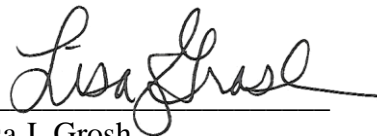
⁷ *Commerce Group* ¶ 111-12 (holding that the waiver barred the claimant from pursuing a claim in a domestic proceeding that was “part and parcel” of its claim in a pending CAFTA-DR arbitration, because the measures subject to the claims in the respective proceedings could not be “teased apart”).

⁸ NAFTA Art. 1121(1)(b).

disputing Party.⁹ This reading is consistent with the NAFTA's negotiating history.¹⁰ The purpose of this exception is to allow a claimant to initiate or continue certain proceedings to preserve its rights during the pendency of the arbitration, in a manner consistent with the broader purposes of the waiver requirement, set forth in paragraph 6 above. It would not be consistent with this purpose to allow a claimant in a NAFTA proceeding to bring a claim for extraordinary relief in one NAFTA Party "under the law of" a different NAFTA Party. The exception in Article 1121(1)(b) thus does not permit a claimant to initiate or continue "proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages," with respect to the measure before an administrative tribunal or court constituted under the law of any other NAFTA Party, or of a non-Party.

Dated: February 14, 2014

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⁹ See *Detroit Bridge International Co. v. Canada*, PCA Case No. 2012-25, Respondent's Memorial on Jurisdiction and Admissibility ¶ 102 (June 15, 2013) (Under NAFTA Article 1121(1)(b), "[i]njunctive, declaratory or other extraordinary relief may thus only be sought before courts of the respondent State . . ."); *Loewen Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/98/3, First Article 1128 Submission of the Government of Mexico ¶ 7 (Oct. 16, 2000) (Under NAFTA Article 1121(1)(b), "[a] would-be NAFTA claimant could initiate or continue before an administrative tribunal or court of the disputing Party only, proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages.").

¹⁰ A previous draft of the provision illustrates that the NAFTA Parties considered creating an exception to the waiver requirement for "proceedings for injunctive, declaratory or other extraordinary relief before an administrative tribunal or court [under the domestic law] of the disputing Party." See Draft Article 1121(b), INVEST1.904 (Sept. 4, 1992). The NAFTA Parties did not bracket the text "administrative tribunal or court" or "of the disputing Party," illustrating their intention to limit the waiver exception to administrative tribunals or courts *of the disputing Party*. The accompanying footnote suggests a choice between several drafting options to be made during legal "scrubbing." *Id.* The Tribunal should not presume that the NAFTA Parties intended to make important substantive changes during this "*toilette finale*."

ATTACHMENT

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

MERRILL & RING FORESTRY, L.P.,

Claimant/Investor,

-and-

GOVERNMENT OF CANADA,

Respondent/Party.

SUBMISSION OF THE UNITED STATES OF AMERICA

1. Pursuant to Article 1128 of the North American Free Trade Agreement (“NAFTA”), the United States of America makes this submission on a question of interpretation of the NAFTA. No inference should be drawn from the absence of comment on any issue not addressed below. The United States takes no position on how the interpretive positions it offers below apply to the facts of this case.
2. All claims under NAFTA Chapter Eleven must be brought within the three-year limitations period set out in Article 1116(2) and Article 1117(2). Although a legally distinct injury can give rise to a separate limitations period under NAFTA Chapter Eleven, a continuing course of conduct does not renew the limitations period under Article 1116(2) or Article 1117(2).
3. Article 1116(2) reads as follows:

“An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”¹

¹ Article 1117(2) likewise imposes a three-year limitations period on claims that are brought by investors on behalf of an enterprise. Under Article 1117(2), investors are barred from bringing a

4. Accordingly, Article 1116(2) requires an investor to submit a claim to arbitration within three years of the date on which the investor *first* acquired knowledge (either actual or constructive) of: (i) the alleged breach, and (ii) loss or damage incurred by the investor. Knowledge of loss or damage incurred by the investor under Article 1116(2) does not require knowledge of the extent of loss or damage.²
5. An investor *first* acquires knowledge of an alleged breach and loss at a particular moment in time: under Article 1116(2), that knowledge is acquired on a particular “date.” Such knowledge cannot *first* be acquired on multiple dates, nor can such knowledge *first* be acquired on a recurring basis.
6. Both the *Grand River* and *Feldman* tribunals observed that Article 1116(2) introduces a “clear and rigid” limitation defense, which is not subject to any “suspension,” “prolongation,” or “other qualification.”³
7. Notably, the *Grand River* tribunal rejected an argument put forward by the claimants that the limitations period under Article 1116(2) or Article 1117(2) applied separately to “each contested measure”⁴ in that dispute:

“[T]his analysis seems to render the limitations provisions ineffective in any situation involving a series of similar and related actions by a respondent state, since a claimant would be free to base its claim on the most recent transgression, even if it had knowledge of earlier breaches and injuries.”⁵
8. Without addressing the *Grand River* decision, however, the *UPS* tribunal adopted a different view, finding that “continuing courses of conduct constitute continuing breaches of legal obligations and renew the limitations period accordingly” under Article 1116(2) or Article 1117(2).⁶ The *UPS* tribunal found that renewal of the limitations period under Article 1116(2) or Article 1117(2) is not contrary to the “first acquired” language in those provisions, because such a reading of that language “logically would mean

claim on behalf of an enterprise “if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.”

² See *Mondev Int’l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award, ¶ 87 (Oct. 11, 2002); *Grand River Decision on Jurisdiction* ¶ 78.

³ *Grand River Enterprises Six Nations Ltd. v. United States of America* (UNCITRAL), Decision on Objections to Jurisdiction ¶ 29 (July 20, 2006); *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award ¶ 63 (Dec. 16, 2002).

⁴ *Grand River Decision on Jurisdiction* ¶ 81 (emphasis omitted).

⁵ *Id.*

⁶ *United Parcel Service v. Canada* (UNCITRAL), Award ¶ 28 (May 24, 2007).

that knowledge of the allegedly offending conduct plus knowledge of loss triggers the time limitation period, even if the investor later acquires further information confirming the conduct or allowing more precise computation of loss.”⁷

9. But as the *Mondev* and *Grand River* tribunals confirmed, knowledge of loss under Article 1116(2) or Article 1117(2) does not require knowledge of the precise amount of loss.⁸ Nor does the *UPS* tribunal provide any reason for renewing a limitations period when an investor acquires “further information confirming” an alleged breach.
10. Under the *UPS* tribunal’s reading of Article 1116(2), for any continuing course of conduct the term “first acquired” would in effect mean “last acquired,” given that the limitations period would fail to renew only after an investor acquired knowledge of the state’s *final* transgression in a series of similar and related actions. Accordingly, the specific use of the term “first acquired” under Article 1116(2) is contrary to the *UPS* tribunal’s finding that a continuing course of conduct renews the NAFTA Chapter Eleven limitations period.
11. Notably, the only support cited by the *UPS* tribunal as “buttress[ing]” its conclusion,⁹ the Interim Decision on Preliminary Jurisdictional Issues in the *Feldman* case, in fact does not support the conclusion that a continuing course of conduct renews the limitations period under Article 1116(2). Rather, the *Feldman* tribunal’s ruling on Article 1117(2) in its Interim Decision was limited to the meaning of “make a claim” under that provision; the tribunal found that an investor “make[s] a claim” under Article 1117(2) upon delivery of its notice of arbitration, and not upon delivery of its notice of intent.¹⁰
12. The *Feldman* tribunal separately observed that the NAFTA has no retroactive effect, and thus could not apply to acts or omissions that occurred before January 1, 1994, the date on which the NAFTA entered into force.¹¹ The tribunal added that if there had been a “permanent course of action” which began prior to the NAFTA’s entry into force, the tribunal would have retained jurisdiction over the “post-January 1, 1994 part” of the alleged activity.¹² But the tribunal’s hypothetical “permanent course of action” addressed a narrow jurisdictional issue: whether the lack of jurisdiction over actions occurring

⁷ *Id.*

⁸ *See supra* note 2.

⁹ *UPS* Award ¶ 28.

¹⁰ *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Interim Decision on Preliminary Jurisdictional Issues ¶ 44 (Dec. 6, 2000).

¹¹ *See id.* ¶ 62.

¹² *Id.*

before the NAFTA's entry into force ruled out the possibility of jurisdiction over the portion of a permanent course of action that might occur after the NAFTA's entry into force. Such a jurisdictional question did not concern the relevance, for time-bar purposes, of an alleged course of action that begins, and continues, after entry into force.

13. Nor does the Award on the merits in the *Feldman* case support the renewal of the limitations period under Article 1116(2) based on a continuing course of conduct.¹³ The time-bar issues considered by the *Feldman* tribunal did not address the “first acquired” language under Article 1116(2) and Article 1117(2) in connection with a continuing course of conduct. Rather, the tribunal considered whether state action short of “formal and authorized recognition” of a claim could “either bring about interruption of the running of limitation or estop the Respondent State from presenting a regular limitation defense.”¹⁴ The tribunal found that no such interruption or estoppel applied.¹⁵
14. Finally, the *UPS* tribunal characterized as “true generally in the law” its finding that limitations periods are renewed by continuing courses of conduct.¹⁶ Whatever the merits of this characterization, such a general rule would not override the specific requirements of Article 1116(2), which operates as a *lex specialis* and governs (together with Article 1117(2)) the operation of the limitations period for claims brought under NAFTA Chapter Eleven.¹⁷
15. In the *Grand River* case, the tribunal did not dismiss the claimants’ challenge to certain later-in-time measures—specifically, “legislative actions occurring within” the three-year limitations period—because the NAFTA time-bar provisions did not “preclude Claimants from seeking to show that they suffered legally distinct injury on account of” those legislative acts.¹⁸
16. At the same time, however, the *Grand River* tribunal made clear that when a “series of similar and related actions by a respondent state” is at issue, an investor cannot evade the limitations period under Article 1116(2) by basing

¹³ See *Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002).

¹⁴ *Id.* ¶ 63.

¹⁵ *Id.*

¹⁶ *UPS* Award ¶ 28.

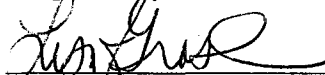
¹⁷ States routinely establish specific rules in international agreements that define governing rights and duties in lieu of general principles of international law, reflecting the maxim *lex specialis derogate legi generali*. The *lex specialis* provision of the International Law Commission’s Articles on State Responsibility confirms this point. Under that provision, the Articles “do not apply where and to the extent that” issues of state responsibility “are governed by special rules of international law.” *Draft Articles on Responsibility of States for Internationally Wrongful Acts Adopted by the Drafting Committee on Second Reading*, art. 55, International Law Commission, 53rd Sess. (2001).

¹⁸ *Grand River* Decision on Jurisdiction ¶ 101.

its claim on “the most recent transgression” in that series.¹⁹ To allow an investor to do so would “seem[] to render the limitations provisions ineffective[.]”²⁰ An ineffective Article 1116(2), in turn, would fail to promote the goals served by time-limit restrictions generally, which include ensuring the availability of sufficient and reliable evidence, as well as providing legal stability and predictability for potential defendants and third parties.²¹

17. Accordingly, once an investor first acquires knowledge of breach and loss, subsequent transgressions by the state arising from a continuing course of conduct do not renew the limitations period under Article 1116(2).

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¹⁹ *Id.* ¶ 81.

²⁰ *Id.*

²¹ *See, e.g.*, GRAEME MEW, *THE LAW OF LIMITATIONS* 13 (LexisNexis, 2d ed. 2004) (“[T]he state has an interest in promoting legal certainty. Not only potential defendants, but third parties need to have confidence that rights are not going to be disturbed by a long-forgotten claim.”) (quoting 1998 consultation paper by the English Law Commission); BIN CHENG, *GENERAL PRINCIPLES OF LAW* 380 (1987) (“It is considered that long lapse of time inevitably destroys or obscures the evidence of the facts and, consequently delay in presenting the claim places the other party in a disadvantageous position. For, if it had not previously been warned of the existence of the claim, it would probably not have accumulated and preserved the evidence necessary for its defence”).