CITATION: The United Mexican States v. Burr, 2020 ONSC 2376
COURT FILE NO.: CV-19-625689-00CL
DATE: 20200720

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
THE UNITED MEXICAN STATES Applicant	*Robert J. C. Deane*, *Hugh A. Meighen*, and *Christine Campbell*, for the Applicant
– and –	
GORDON G. BURR, ERIN J. BURR, JOHN CONLEY, NEIL AYERVAIS, DEANA ATHONE, 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	*John Terry* and *Emily Sherkey*, for the Respondents
– and –	
UNITED STATES OF AMERICA and ATTORNEY GENERAL OF CANADA Interveners	*Malcolm N. Ruby*, for the Intervener, United States of America *Derek Allen*, for the Intervener, Attorney General of Canada
	HEARD: January 28, 29 and 30, 2020

DIETRICH J.

Overview

[1] This application arises out of an international arbitration involving United States of America ("USA") nationals and the United Mexican States ("Mexico") and concerns the jurisdiction of the arbitral tribunal (the "Tribunal").

[2] A dispute arose between the parties regarding an investment the USA nationals made in gaming businesses in Mexico.

[3] Chapter 11 of the *North America Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) ("*NAFTA*") (now the *United States – Mexico – Canada Agreement*) between the USA, Mexico and Canada promotes the fostering of investment by *NAFTA* nationals in the territories of other *NAFTA* parties. Under this chapter, these investors are given the right to seek to enforce a *NAFTA* party's commitments under the treaty by submitting claims for damages to arbitration.

[4] Thirty-nine USA nationals (the "Respondents") brought claims, individually and on behalf of seven Mexican companies, against Mexico (the "Applicant"). The Respondents alleged that they suffered USD$100 million in damages when the Applicant closed down the casinos the Respondents had been operating in Mexico. Attempts at settlement failed and the Respondents submitted their claims to arbitration.

[5] Two of the three arbitrators that formed the Tribunal (the "Majority") determined that the Tribunal had jurisdiction over all the claims made by the USA nationals and over the claims they submitted on behalf of all but one of the Mexican companies.

[6] The Applicant brings this application to this court for a declaration that the Tribunal had no jurisdiction or had limited jurisdiction to decide the claims before it. It seeks to have the Tribunal's Partial Award and Partial Dissenting Opinion, dated July 19, 2019 (the "Partial Award"), set aside on appeal.

[7] For the reasons that follow, I decline to grant the Applicant's application. I find that the Applicant has not discharged its burden of proof of establishing that the Tribunal was incorrect in its conclusion that it had jurisdiction over all but one of the claims before it.

Relevant *NAFTA* provisions

[8] The principal *NAFTA* provisions under consideration in this application are Articles 1119 and 1121 which read as follows:

> **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 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.

[9] For ease of reference, the other *NAFTA* provisions relevant to this application are set out in Appendix A.

Background

[10] The 1965 ICSID[1] Convention, at Article 25(1), provided for consensual arbitral proceedings against a state party to the Convention in respect of "any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State), and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre." Known as the "investor-state dispute mechanism[2]", it set out a series of obligations and steps that were required in order for a claimant to properly accept one of the party's standing offers to arbitrate investment claims, and for a tribunal to have jurisdiction over those claims at international law.

[11] The *NAFTA* Chapter 11 includes such an investor-state arbitration mechanism. Under Article 1116, a qualifying investor of a party may (if all other conditions are met) submit a claim against another party for damages for an alleged breach of the obligations set out in Section A of Chapter 11 (and two obligations incorporated from Chapter 15).

[12] The *NAFTA* provides that in order to engage a *NAFTA* party's standing offer to consent to international arbitration, an investor seeking to bring a claim shall, in accordance with Article 1119, give notice of that intent and identify any enterprises on behalf of which claims are advanced at least 90 days before filing a request for arbitration.

[13] Article 1121 requires, among other things, that any such investor must also deliver to the state a written consent to arbitration in accordance with the procedures set out in the *NAFTA*, and a written waiver of domestic proceedings in respect of the measure in dispute.

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[1] ICSID refers to the International Centre for the Settlement of Disputes.

[2] J.C. Thomas, "Investor State Arbitration Under *NAFTA* Chapter 11" (1999) 37 Can YB Intl Law 99; H.C. Alvarez, "Arbitration Under the North American Free Trade Agreement" (2000) 16 Arb Intl 393.

[14] On May 23, 2014, three of the USA nationals and five USA companies (the "Original Claimants") submitted a notice of intent to submit a claim to arbitration under Chapter 11 (the "Notice"). In the Notice, they alleged that, through their interest in five Mexican companies, known as the "Juegos Companies", they were investors in casinos in five cities in Mexico. The Juegos Companies were operated through Exciting Games, S. de R.L. de C.V. ("E-Games"), another Mexican company that the Original Claimants claimed to control. The Notice set out the factual background of the claim, including the names of the Mexican companies owning the casinos and the locations of the casinos in question; the *NAFTA* provisions alleged to have been breached and the measures adopted by the Applicant that allegedly breached those provisions; and an estimate of the alleged damages. The Notice identified these eight Original Claimants, who claimed to be the principal owners and controllers of the subject casinos.

[15] When attempts at resolution between the parties failed, some two years later, on June 15, 2016, the Original Claimants filed a request for arbitration (the "Request") with ICSID. All the Original Claimants' claims were brought pursuant to Article 1117 of the *NAFTA* on behalf of the Mexican companies. In addition to the eight Original Claimants, 31 new, previously unidentified United States investors purported to bring claims against the Applicant in the Request (the "Additional Claimants"). Sixteen of these Additional Claimants were minority shareholders in certain of the Mexican companies controlled by the Original Claimants.

[16] The Respondents also delivered to the Applicant powers of attorney authorizing their legal counsel, Quinn Emanuel, Urquhart & Sullivan ("Quinn Emanuel") to initiate the arbitration and to act in that proceeding on their behalf. The Respondents brought Article 1117 claims (claims by an investor on behalf of an enterprise) not only in respect of the Juegos Companies and E-Games, but also on behalf of three additional Mexican enterprises.

[17] The Applicant objected to the registration of the claim by ICSID on the basis that: a) the Additional Claimants had failed to provide a notice of intent at least 90 days prior to the submission of the Request as required by Article 1119; and b) the Respondents had failed to consent to arbitration and to provide waivers in accordance with Article 1121.

[18] Initially, ICSID refused to register the claim because some of the Respondents had not provided the requisite consents and waivers under Article 1121. Consents, by way of powers of attorney, were then provided for those Respondents and ICSID registered the claim to arbitration on August 11, 2016 without prejudice to the Tribunal "in regards to competence."

[19] On September 2, 2016, after the arbitration had been registered, the Respondents delivered an Amended Notice of Intent to Submit a Claim, which included the names and addresses of the 31 Additional Claimants and three new claims on behalf of the additional Mexican enterprises. This Amended Notice of Intent to Submit a Claim did not satisfy the requirement under Article 1119 that a notice of intent be submitted 90 days prior to the Request.

[20] Also, in September 2016, the Respondents appointed as arbitrator Professor Gary Born, and the Applicant appointed as arbitrator Professor Raul Vinuesa. In January 2017, ICSID appointed Dr. Gaetan Verhoosel as presiding arbitrator. The Tribunal was constituted on February 14, 2017.

[21] On April 4, 2017, the Tribunal bifurcated the proceedings into a jurisdiction phase and a merits and damages phase. It also determined that Toronto, Canada would be the seat of the arbitration.

[22] In the jurisdiction phase, the Applicant raised three objections before the Tribunal, including the two objections raised in this application regarding Articles 1119 and 1121. Numerous and voluminous submissions were made in the jurisdictional hearing by each of the Applicant and the Respondents. The USA and the Attorney General of Canada ("Canada") also made submissions, pursuant to Article 1128, in support of the Applicant's position on jurisdiction. Article 1128 permits *NAFTA* parties to make submissions regarding the interpretation of the *NAFTA*.

[23] The third objection made by the Applicant before the Tribunal related to the Original Claimants' standing to bring claims on behalf of the Mexican companies, which the Applicant alleged they did not own or control. The Tribunal rejected this latter argument other than in respect of one Mexican enterprise, Operadora Pesa, S. de R.L. de C.V. ("Operadora Pesa"), which it found the Respondents did not own or control. In this application, the Applicant does not challenge the Tribunal's decision on the matter of ownership and control.

[24] In May 2018, the Tribunal held a five-day hearing on jurisdiction in Washington, DC. It heard evidence from thirteen witnesses or experts. On August 17, 2018, both the Applicant and the Respondents filed post-hearing submissions. In November 2018, they responded to further questions from the Tribunal.

[25] On July 19, 2019, the Tribunal issued the Partial Award, dismissing all three of the Applicant's jurisdictional objections. The Majority found that the Tribunal had jurisdiction over all the claims made by the Respondents, and over the claims submitted on behalf of all but one of the Mexican enterprises, Operadora Pesa. Arbitrator Vinuesa issued a Partial Dissenting Opinion in which he found that the Tribunal lacked jurisdiction over the claims submitted by the 31 Additional Claimants and on behalf of certain of the Mexican enterprises because they failed to comply with Article 1119.

Positions of the Parties

The Applicant

[26] The Applicant asserts that the Tribunal did not have jurisdiction over the Respondents' claims because the Respondents failed to comply with Articles 1119 and 1121. It asserts that, contrary to Article 1119, only eight of the eventual 39 Claimants gave notice of their intention to submit a claim to arbitration at least 90 days before filing a request for arbitration. In respect of the other 31, the Applicant submits that their failure to deliver a notice of intent under Article 1119 and wait at least 90 days before submitting a request for arbitration resulted in their purported submission to arbitration being void *ab initio*.

[27] In addition, the Applicant asserts that, contrary to Article 1121, none of the Respondents delivered a written consent to arbitration in compliance with the *NAFTA*. Instead, they relied on a general power of attorney granted to their counsel and the filing of the request for arbitration.

The Applicant asserts that these means of consenting to arbitration cannot satisfy the requirements under Article 1121 and therefore the Tribunal was deprived of jurisdiction.

[28] The Applicant submits that Articles 1119 and 1121 are mandatory requirements for any claimant seeking to submit a claim to international arbitration under Section B (Settlement of Disputes between a Party and an Investor of Another Party) of Chapter 11 of the *NAFTA*. It submits that the Respondents' failure to comply with these Articles meant that the Applicant's consent to arbitration was never engaged and, without the Applicant's consent, the Tribunal was deprived of jurisdiction.

[29] The Applicant further submits that the Majority made a jurisdictional error in failing to adequately consider the submissions of all three *NAFTA* parties on the existence of a "subsequent agreement" or "subsequent practice" between them regarding the interpretation of Articles 1119 and 1121. That interpretation is that strict adherence to the procedural requirements of Article 1119 conditions any consent given by a *NAFTA* party under Article 1121.

The Respondents

[30] The Respondents assert that the Tribunal had jurisdiction over the claims before it. They submit that the Applicant's argument that the arbitration could not proceed unless the Notice included the names and addresses of every individual claimant was comprehensively assessed and answered by the Majority in favour of the Respondents. The Majority concluded that the Applicant's consent to arbitration was not conditioned upon the satisfaction of this name and address requirement of Article 1119(a). The Respondents assert that the Majority was correct in concluding that the determination of whether a non-compliant claim under Article 1119 should proceed is not a question of jurisdiction, but, rather, a question of admissibility.

[31] The Respondents further assert that the Tribunal was correct in concluding that, having found that it had jurisdiction, it could assess the matter of the defect in the Notice as a matter of admissibility. The Respondents submit that the Majority's finding that the Notice was admissible is not reviewable by this court.

[32] The Respondents further submit that the question of whether they consented to arbitration was correctly assessed and unanimously dismissed by the Tribunal and, therefore, the Applicant's assertions on the form of consent are without merit. The Respondents assert that the Tribunal found that the Respondents did in fact comply with Article 1121 because they provided their consent through the Request delivered on their behalf by Quinn Emanuel, authorized by power of attorney to represent them, and through the Respondents' testimony at the arbitration. The Tribunal also found that the consent was admissible. The Respondents submit that the Tribunal was correct in this determination, which they submit is not reviewable by this court. Accordingly, they submit that the Applicant's application should be dismissed.

[33] The Respondents assert that the Majority committed no jurisdictional error by failing to explicitly mention the submissions that the USA and Canada made, as interveners, pursuant to Article 1128. They argue that such submissions are merely legal submissions by counsel, advanced in a self-interested manner during adversarial proceedings, and cannot constitute a

subsequent agreement or subsequent practice among the *NAFTA* parties that the Majority ought to have considered.

The USA

[34] The USA submits that the Tribunal's conclusions on the interpretation of Articles 1119 and 1121 are flawed because the requirements under those Articles 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. The USA also submits that the Majority ought to have given consideration to the agreement of the *NAFTA* parties that their consent to the submission of any claim to arbitration is conditional upon the satisfaction of the relevant procedural requirements, as demonstrated through their respective submissions to the Tribunal and in other arbitrations.

Canada

[35] Canada submits that the Tribunal's determination resulted in the submission of a claim beyond the Tribunal's jurisdiction and that the Tribunal's conclusion on jurisdiction must be set aside. It asserts that Articles 1119 and 1121, interpreted in accordance with their statutory meaning and context, and in light of the object and purpose of the *NAFTA*, unequivocally require compliance with their precise terms as conditions to arbitration. Canada also submits that when a collective view of the *NAFTA* parties on a question of treaty interpretation is established, a *NAFTA* tribunal is required by customary international law to take that interpretation into account as a subsequent agreement or a subsequent practice by the parties. The Tribunal did not refer to or acknowledge the submissions of Canada or the USA on this point, and Canada submits that this was in error.

Issues

[36] The issues before this court are as follows:

1. Did the Tribunal correctly conclude that it had jurisdiction over the Additional Claimants and the claims they advanced despite their non-compliance with the terms of Article 1119?

2. Did the Tribunal correctly conclude that it had jurisdiction over all the Respondents and the claims they advanced, or had the Respondents failed to provide the required consent in accordance with Article 1121, thus depriving the Tribunal of jurisdiction?

3. Did the Tribunal make a jurisdictional error in its treatment of the submissions of the USA and Canada pursuant to Article 1128?

Legal Framework

[37] The Applicant applies pursuant to s. 11(1) of the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2 Sched. 5 (the "*ICAA*"), enacting the *UNICITRAL Model Law on International Commercial Arbitration*, adopted by the United Nations Commission on International Trade Law on June 21, 1985 (the "*Model Law*"), and Article 34 of the *Model Law*.

[38] The *ICAA* applies because ICSID chose the City of Toronto as the seat of the arbitration. Section 11(1) of the *ICAA* provides that where the majority of the arbitration tribunal determines it has jurisdiction, any party may apply to the Superior Court of Justice to decide the matter. The decision of the Superior Court of Justice is subject to no appeal: *Model Law*, Article 16(3).

[39] Article 34 of the *Model Law* provides as follows:

> Article 34 - Application for setting aside as exclusive recourse against arbitral award
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> …
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
>
> (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
>
> …
>
> (3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received that award or, if a request had been

> made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

[40] *NAFTA* tribunals are directed by Article 1131(1) to decide the issues in a dispute in accordance with the *NAFTA* and the applicable rules of international law. The 1969 *Vienna Convention on the Law of Treaties* Can TS 1980 No 37 (the "*Vienna Convention*") is one of the governing documents that provides such rules. Articles 31(1) and (3)(a) and (b) of that Convention are relevant and provide:

> Article 31. GENERAL RULE OF INTERPRETATION
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
>
> (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 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.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended.

The Standard of Review and Jurisdiction

[41] In this application to set aside the Partial Award on the basis that the Tribunal did not have jurisdiction over the claims, this court must consider the jurisdictional matter anew. In *United Mexican States v. Cargill Inc.*, 2011 ONCA 622, 107 O.R. (3d) 528, leave to appeal to the SCC ref'd, 2012 CanLII 25159 ("*Cargill*"), the Court of Appeal for Ontario determined, at para. 42, that the standard of review on an application to challenge jurisdiction under the *Model Law* is correctness: the tribunal had to be correct in its determination that it had the ability to make the decision it made. All other issues, including issues relating to admissibility, are not reviewable by this court on any standard: *Cargill*, at para. 50.[3]

[42] The Court of Appeal in *Cargill* established four clarifying principles, as set out by Penny J. in *The Russian Federation v. Luxtona Limited*, 2019 ONSC 4503, at para. 32: 1) in hearing an application to set aside an arbitral decision for lack of jurisdiction the court is performing a *review* of the decision; 2) the onus is on the party challenging the award; 3) the court must be satisfied that the challenge raises a "true question of jurisdiction", but once that is satisfied, 4) the tribunal has to be correct in its assumption of jurisdiction and it is up to the reviewing court to determine, without deference, whether it was correct.

[43] This court may review the correctness of the Majority's finding that non-compliance with Article 1119(a) is not a jurisdictional issue, but an issue of admissibility. However, if this court finds that determination to be correct, its analysis must end there. This court may also review the Majority's subsequent finding that the Respondents had satisfied the requirement of Article 1121(1) (that consent was given), but not the Majority's finding that Article 1121(3) (the manner in which the consent was given) had been satisfied, because the latter relates to admissibility of the claims.

[44] An objection to jurisdiction refers to the authority of a tribunal to hear a case, whereas an objection to admissibility refers to the characteristic of a claim and whether it is fit to be heard by the tribunal: *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, at para. 90 ("*Hochtief*").

[45] In *Cargill*, at para. 32, the Court of Appeal held that the approach to determine whether a tribunal exceeded its jurisdiction requires an assessment of what was properly submitted to arbitration. In a Chapter 11 arbitration, the submission includes: a) the agreement of the parties; b) the words of the relevant Articles; and c) any interpretation of these words subsequently agreed to by the *NAFTA* parties.

The Partial Award

[46] In deciding whether it had jurisdiction, the Tribunal considered whether, in fact, each of the Applicant and all the Respondents had consented to arbitration.

[47] The Tribunal took from the Applicant's submission two specific questions for consideration. The first was whether the Tribunal lacked jurisdiction because the Additional Claimants failed to engage the Applicant's consent in accordance with the procedures set out in

[3] See also: J. Paulsson, "Jurisdiction and Admissibility" in Gerald Asken & Robert Briner, eds, *Global Reflections on International Law, Commerce and Dispute Resolution*, Liber Amicorum in honour of Robert Briner (Paris: ICC Publishing, no. 693 2005), at 601.

Article 1122. In other words, was it correct that the Applicant could not consent to arbitration with the Additional Claimants because those Respondents' names did not appear on the Notice as required by Article 1119? The second question was whether the failure by the Additional Claimants to file a timely notice of intent rendered their submission to arbitration void *ab initio*, with the result that their submission to arbitration could not be given any effect. The Majority found that this would be the result whether it had no jurisdiction over the Additional Claimants, or whether it dismissed their claims as inadmissible.

[48] In examining whether the defect in the Notice precluded its jurisdiction over the Additional Claimants, the Tribunal considered the question to be one of consent. Specifically, was the Applicant's consent to arbitration in Article 1122(1) made conditional upon satisfaction of Article 1119(a), the inclusion of the names and addresses of the Additional Claimants? The Tribunal stated that if Article 1119(a) was a condition to which the Applicant had "tethered its consent", then the Tribunal could not have jurisdiction if the condition had not been satisfied. However, if satisfaction of Article 1119(a) was not a condition to which the Applicant had tethered its consent, then a defect in the Notice could not vitiate the Applicant's consent and the Tribunal would have jurisdiction. The Majority found that the defect could affect the admissibility of the Notice, but not jurisdiction.

[49] Ultimately, the Majority concluded that Article 1119 did not condition the Applicant's consent to arbitration in Article 1122. It also concluded that the defect in the Notice raised a question of admissibility, which it resolved in favour of the Respondents. The Additional Claimants' failure to issue a notice of intent on a timely basis therefore did not deprive the Tribunal of jurisdiction over them. The Majority found that the Applicant's consent to arbitration had been engaged.

[50] The Tribunal also concluded that the Respondents consented to arbitration. The fact that the Respondents had provided their consent through their counsel, by power of attorney, was irrelevant to the Tribunal because there was no suggestion that Quinn Emanuel was not duly authorized or that it acted *ultra vires* in issuing the Request conveying the Respondents' consent. The Tribunal unanimously found that the consent was effectively delivered in accordance with Article 1121(3) because it was made in writing, delivered to the Applicant, and included in the submission of the claim. The Tribunal further found that even if there were a failure in the manner in which the Respondents' consent was conveyed, that failure would not bear on the Tribunal's jurisdiction, though it could affect the claim's admissibility. If it were a matter of admissibility, the Tribunal held that the defect in delivery could be cured.

The Partial Dissenting Opinion

[51] Professor Vinuesa dissented with respect to the parties' consent to arbitration. He would have declined jurisdiction over the Additional Claimants on the basis that Article 1119 did condition the Applicant's consent to arbitration under Article 1122. In his view, the use of the word "shall" in Article 1119 creates a mandatory obligation with which a claimant must inexorably comply. He stated that the notice requirement under this Article imposed a duty that conditioned not only the Respondents' consent under Article 1121(1), but also the Applicant's consent under Article 1122. He disagreed with the Majority's conclusion that the phrase "in accordance with the procedures set out in this Agreement" modified the word "arbitration."

Professor Vinuesa stated that "procedures" referenced in Article 1122 included the pre-arbitration steps including Article 1119.

[52] Professor Vinuesa also stated that the Tribunal could not ignore submissions made by the *NAFTA* parties under Article 1128 when they reasserted and unanimously confirmed a recurrent trend to understand that the prerequisites set out in Articles 1119, 1121 and 1122(1) are enforceable and condition the consent of both the Respondents and the Applicant.

Issue 1: Did the Tribunal correctly conclude that it had jurisdiction over the Additional Claimants and the claims they advanced despite their non-compliance with the terms of Article 1119?

[53] In this court's review of the Tribunal's decision to determine whether it was correct to assume jurisdiction over all the Respondents and their claims (other than the claim made on behalf of Operadora Pesa), the Tribunal is not entitled to deference.

[54] The Tribunal focused its analysis by stating a fundamental principle: "Arbitration being a creature of consent, lack of consent equates a lack of jurisdiction." Because the Tribunal's jurisdiction is founded on the parties' consent to arbitrate, if the Applicant imposed conditions on its consent to arbitration, those conditions must be satisfied. If there is no consent, there is no jurisdiction.

[55] In deciding whether it had jurisdiction, the Tribunal considered whether, in fact, each of the Applicant and all the Respondents had consented to arbitration. The Tribunal acknowledged that Article 1119 requires that at least 90 days prior to commencing arbitration, the investor submit a notice of intent specifying: "(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 the *NAFTA*] alleged to have been breached …; (c) the issues and the factual basis for the claim; and (d) the relief sought and the approximate amount of the damages." The Tribunal acknowledged that Article 1122(1) provides that the Applicant consents to "the submission of a claim to arbitration in accordance with the procedures set out in this agreement."

[56] The Notice, submitted on May 23, 2014, provided the names and addresses of the eight Original Claimants and the names of six Mexican companies on behalf of which the Original Claimants made claims, but not the Additional Claimants. The Notice did set out the alleged breaches of the *NAFTA*, the background to the claims, and estimated the damages. The Applicant made no complaint about the contents of the Notice apart from the defect relating to the identity of the Additional Claimants as required by Article 1119(a). The Applicant submitted that this missing information was not only omitted from the Notice, but it was never submitted on a timely basis, i.e. 90 days prior to commencing arbitration. The Applicant further submitted that the omission was not a mere defect, but a failure to file a notice of intent at all.

[57] At the hearing before the Tribunal, and in this application, the Applicant further submitted that this omission was fatal to the Additional Claimants' claims because it vitiated their consent, by failing to engage the Applicant's consent in accordance with the procedures set out under Article 1122, and because the omission rendered their submission to arbitration void. Therefore, the Tribunal had no jurisdiction. The Applicant asserts that the pre-arbitration

procedural requirements contained in Articles 1116 to 1121 all relate to its consent and its offer to arbitrate.

[58] The Respondents argued that the defect did not deprive the Tribunal of jurisdiction. They submitted that a notice of intent was filed by the Additional Claimants, albeit not 90 days prior to the Request. They further argued that the matter was one of admissibility, and the claims should be admitted because the defect caused no prejudice and would not have changed the course of any settlement effort. The Respondents assert that it cannot be presumed that pre-arbitration procedural matters are jurisdictional issues.

The Applicant's Consent – Article 1119

[59] The Tribunal set out to examine the issue of jurisdiction by considering whether it had the power to adjudicate the dispute (jurisdiction), and if so, whether it should exercise that power over a particular claim (admissibility). The distinction is important in this case as this court may review and set aside findings relating to jurisdiction, but not findings relating to admissibility.[4]

[60] Given that the Tribunal's jurisdiction is founded upon the party's consent, the Tribunal examined whether: the defect in the Notice precluded jurisdiction over the Additional Claimants, in which case it would not be able to examine the admissibility of the claims; or whether the defect did not preclude jurisdiction, in which case, it could examine admissibility.

[61] The parties agree that the Tribunal correctly asked itself whether the Applicant's consent under Article 1122(1) was made conditional on the satisfaction of Article 1119(a). If the satisfaction of Article 1119(a) was not a condition to which the Applicant had tethered its consent, then a defect in the Notice could not vitiate the Applicant's consent and the Tribunal would have jurisdiction.

Treaty Interpretation

[62] The Majority concluded that Article 1119 did not condition the Applicant's consent to arbitrate in Article 1121 and that the Additional Claimants' failure to issue a notice of intent that complied with Article 1119 therefore did not deprive the Tribunal of jurisdiction over them. In reaching this conclusion, the Majority correctly set out to interpret the relevant language of the *NAFTA* in accordance with the principles of treaty interpretation as codified in the *Vienna Convention* at Article 31 and following.

[63] Article 31.1 of the *Vienna Convention* provides that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." This interpretation requires consideration of: a) the "ordinary meaning" of the treaty's terms; b) the context; and c) the object and purpose of the treaty. This approach to treaty interpretation has been confirmed by the Supreme Court of Canada.[5]

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[4] See Z. Douglas, *The International Law of Investment Claims* (Cambridge, UK: Cambridge University Press, 2009), at para. 291 and footnote 2.
[5] See *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431.

Ordinary Meaning

[64] To determine the "ordinary meaning" of Articles 1119 and 1122(1), the Majority took care to decipher the Articles. It acknowledged the use of the mandatory term "shall" in Article 1119 but focused on the consequences of the failure to include all of the required information in the Notice. It found that Article 1119: does not refer to Article 1122(1); does not provide that satisfaction of the requirements of Article 1119 was a condition precedent to a *NAFTA* party's consent; and does not state that failure to include all the required information in the Notice vitiates a party's consent. It further noted that Article 1122(1) does not refer back to Article 1119 or the notice of intent but noted that Article 1122(1) does provide that "each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."

[65] The Majority then considered whether the words "in accordance with the procedures set out in this Agreement" modified the word "arbitration." It observed that if the phrase modified "consents" or "submission of a claim", the result would be different; however, it found that the phrase modified "arbitration" and therefore found that the phrase must be construed as providing that the parties' consent is limited to arbitration in accordance with the procedures set out in the *NAFTA*. Accordingly, the Majority concluded that the "procedures" referred to pertained to the procedures with which the arbitration itself must accord. In the result, per Article 1122(1), the parties only consented to an arbitration that accorded with the procedures set out in the *NAFTA*.

[66] The Majority stated that the parties agreed that the phrase "in accordance with the procedures set out in this Agreement" modified "arbitration." The Respondents submit that the Applicant conceded this point at the arbitration. The Applicant disagrees with this characterization of its position and points to its post-hearing brief where it reiterated its position that Article 1119 contains a *sine qua non* condition for the valid submission of any claim to arbitration.

[67] The Majority found that the Notice did not commence arbitration or commit a party to it, stating that until a notice of arbitration is filed, an investor is not committed to arbitration in any way. The Majority held that the meaning of "arbitration" is the procedure commenced by and followed upon the submission of a claim, and the filing of a notice of intent is a pre-arbitration procedure. The "procedures" for an arbitration, therefore, follow the commencement of the arbitration.

[68] The Majority concluded that its interpretation gave meaning to Article 1122(1). That is, that the *NAFTA* parties did not consent to *any* arbitration, but only one which accords to the procedures set out in the *NAFTA*. The Majority rejected the Applicant's interpretation that would include Article 1119 in these "procedures." It found that such an interpretation would be contrary to the ordinary meaning of the terms of Article 1121(1), and that Article 1122(1) did not come into existence until the submission of a claim through the filing of a notice of arbitration (per Article 1137), not a notice of intent. It therefore found that the natural and ordinary meaning of "procedures" with respect to "arbitration" was the "procedures" commenced by and to be followed by the submission of a claim (i.e. the provisions following Articles 1121 and 1122, being the procedures set out in Articles 1123-1136), and that a notice of intent is a "procedure" to be followed prior to an arbitration, if any, and is not a procedure with which the arbitration

must accord. The Majority found that the drafters of the *NAFTA* included nothing in these provisions that conditioned the validity of the submission of a claim to arbitration on the satisfaction of Article 1119.

[69] The Majority rejected the Applicant's argument that Article 1119 is part of the "procedures" referenced in Article 1122. Among the reasons given by the Majority was the finding that Article 1119 was a procedure that occurred prior to an arbitration and therefore could not fall within the scope of Article 1122, which deals directly with the Applicant's consent to arbitration. As observed by the Majority, the drafters of the *NAFTA* did not include language stating that a submission to arbitration is conditioned upon satisfaction of the requirements of Article 1119. By contrast, the drafters did include such language in Articles 1116, 1117, 1120 and 1120(1). Articles 1116 and 1117 set out when an investor of a *NAFTA* party has standing to make a claim on its own behalf or on behalf of an enterprise. Those provisions both provide that "[a]n investor may not make a claim if" the three-year limitation period has elapsed. Article 1120 is entitled "Submission of a Claim to Arbitration," and provides that an investor may submit the claim to arbitration "provided that" six months have elapsed between the events giving rise to the claim and the submission of the claim to arbitration. It does not similarly add "and provided that a notice of intent was served including all the information specified in Article 1119." Article 1121 is headed "Conditions Precedent to Submission of a Claim to Arbitration" and provides that an investor "may submit a claim … to arbitration only if" the investor consents to arbitration in accordance with the procedures set out in this Agreement and waives its right to pursue other proceedings in relation to the same measures that are at issue in the *NAFTA* case.

[70] The Applicant argues that the context of Article 1119 confirms that the notice of intent is mandatory because it is part of the procedures set out in Article 1122. Articles 1121 and 1122 state that a disputing investor can submit a claim to arbitration under Article 1116 or 1117 only if they consent to arbitration in accordance with the procedures set out in the *NAFTA*. It argues that the notice of intent requirements in Article 1119 are part of the *NAFTA* Chapter 11 procedures and the required prerequisites in order for an investor to submit a claim to arbitration. The Applicant submits that, contrary to the Tribunal's finding that the "procedures" consisted only of procedures "commenced *by*, and to be followed *upon*, the submission of a claim, the term "procedures" is not limited to any particular Article or the conduct of the arbitration. It argues that, in context, "procedures" captures Article 1119 and the notice requirement.

[71] Before the Tribunal, the Applicant argued that because an arbitration begins with the submission of a claim, the "procedures" must include the procedures for a "valid" submission of a claim to arbitration, and therefore all of the requirements for a notice of intent under Article 1119 and the requirements under Articles 1120 and 1121. The Majority rejected this argument, because, in its view, it was not supported by the ordinary meaning of the terms of Article 1122(1). The Majority held that that it was axiomatic that the arbitration to which the Applicant consents in Article 1122(1) does not come into existence until the submission of a claim by the filing of a notice of arbitration.

[72] The Majority rejected the Applicant's claim that compliance with Article 1119 is required to "validly" submit a claim to arbitration. It observed that the drafters did not impose this qualification in respect of Article 1119 requirements. By comparison, it noted that Articles 1120

and 1121(1) expressly provide that certain conditions must be met before a claim may be "validly" submitted to arbitration.

The context

[73] Having concluded that the terms chosen by the *NAFTA* drafters, given their ordinary meaning, did not support an interpretation that a failure to satisfy Article 1119(a) vitiates the Applicant's consent, the Majority sought to determine whether that consequence could be implied from the context of those provisions. It considered the provisions that precede, and the provisions that follow, Articles 1119 and 1122(1).

[74] It found that the context strongly militated against reading such an implied term into the *NAFTA*. In nearly all of the provisions of Section B of Chapter 11 immediately following Article 1122, being Articles 1123-1136, the Majority found that the *NAFTA* set out detailed procedures with which an arbitration must accord (e.g., the participation of parties, place, governing law, interim measures, and expert evidence), whereas in nearly all of the provisions of Section B of Chapter 11 that precede Article 1122, the *NAFTA* parties expressly provided a condition precedent to access to arbitration if one was intended (e.g., Articles 1116, 1117, 1120 and 1121(1)(a)). The Majority held that these drafting choices by the *NAFTA* parties could not be ignored.

[75] The Majority reasoned that if the Applicant were correct in its interpretation that Articles 1120 and 1121 necessarily follow Article 1119, sequentially, and without which Articles 1120 and 1121 have no meaning or application, then the "consent" required under Article 1121(1)(a) would not only be consent to the arbitration that lies ahead, but also to a pre-arbitral step that lies in the past. The Majority inclined to the more natural reading of the requirement of giving consent in Article 1121(1)(a) as being prospective in nature. The phrase "in accordance with the procedures" refers to future steps, e.g., consent to arbitration, and not steps prior to the arbitration.

[76] In its contextual review, the Majority also considered Article 1118, which deals with the resolution of claims through settlement to avoid arbitration. The Free Trade Commission's statement on notices of intent to submit a claim reads: "In order to provide a solid foundation for such [settlement] discussions, it is important that the notice of intent clearly identify the investor and the investment and specify the precise nature of the claims asserted." It does not refer to the use of this information in the context of an arbitration or suggest that the failure to provide this information would vitiate a party's consent to arbitration. The Majority found that the parties agreed that the failure to engage in settlement discussions did not bar access to arbitration, and noted that, in the same context, a failure to comply with a step designed to facilitate settlement should not bar such access. The Applicant asserts that Article 1118 is not an expression of the purpose of the dispute resolution provisions of Chapter 11, which is found at Article 1115.

NAFTA's object and purpose

[77] The Majority considered both Articles 1118 and 1115 in its review of the object and purpose of the *NAFTA*. It found that the *NAFTA's* object and purpose supported the Majority's textual and contextual analysis because Article 102, styled "Objectives", includes as an objective

the creation of "effective procedures for … the resolution of disputes"; and Article 1115, styled "Purpose", states that one of the purposes of the dispute resolution provisions of Chapter 11 is to establish a mechanism for the settlement of investment disputes that assures equal treatment among investors of the *NAFTA* parties. The Majority observed that these objectives would not be furthered by barring access to the dispute resolution mechanism on the basis of names having been omitted from the notice of intent.

[78] The Tribunal reasoned that: a) the procedures set out in Article 1119 were procedures to be followed *prior to an arbitration*, and not procedures, by contrast to those set out in Articles 1123 to 1136, with which the subsequent *arbitration* itself, if any, must accord; b) unlike Article 1121, Article 1119 was not expressly identified as a condition precedent to submission of a claim that does not comply with its requirements; and c) the *NAFTA*'s objectives would not be "furthered" by a strict application of Article 1119.

Decisions of Other Tribunals

[79] The Applicant argued before the Tribunal that there is jurisprudence to the effect that all preconditions and formalities under Articles 1118-1119 must be satisfied by the disputing investor in order to engage a disputing party's consent under Article 1122. The Majority was not persuaded by this argument for three reasons.

[80] First, there is no *stare decisis*: the tribunal is to find the terms of the treaty as they are and in accordance with the *Vienna Convention* regardless of whether other tribunals have arrived at a different interpretation of the same mandate. Notwithstanding, the Tribunal reviewed the cases the Applicant submitted.

[81] Second, the Tribunal was not persuaded that the decisions that the Applicant submitted provided useful jurisprudence because, in some of those cases (e.g., *ADF Group Inc. v. United States of America,* ICSID Case No. ARB(AF)/00/1, Award, 9 January 2003 ("*ADF*") and *Chemtura Corporation v. Government of Canada*, UNCITRAL, Award, 2 August 2010 ("*Chemtura*")), the tribunals dismissed the proposition that a failure to satisfy the requirements of Article 1119 must result in the loss of jurisdiction. Accordingly, the Majority found that it was not breaking new ground in concluding that Article 1122 was not tethered to satisfaction of the requirements in Article 1119. The Majority noted that the decision in *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award (Preliminary Award on Jurisdiction and Admissibility), 7 August 2002 ("*Methanex*"), cited by the Applicant, addressed jurisdictional challenges under Article 1101, 1116-1117 and 1121 but not Article 1119 and *Merrill & Ring Forestry L.P. v. Government of Canada*, UNCITRAL, ICSID Administered Case, Decision on a Motion to Add a New Party, 31 January 2008 ("*Merrill & Ring*") cited by the Applicant, considered previous *NAFTA* decisions in a discussion of Article 1119 but without actually construing the text of the treaty. The Majority observed that the case of *Canfor Corporation v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006 *("Canfor*") addressed jurisdictional challenges under Article 1901; *Cargill* dismissed a jurisdictional challenge on the basis that Article 1119 had been fulfilled; *Resolute Forest Products Inc. v. Government of Canada,* UNCITRAL, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, 30 January 2018 ("*Resolute Forest*") addressed challenges under Articles 1116-1117; and *Mercer International Inc. v. Government of Canada*, ICSID Case No.

ARB(AF)/12/3, Award, 6 March 2018 ("*Mercer*") addressed jurisdictional challenges under Articles 1116-1117, 1108 and 1503.

[82] Third, it was not clear to the Majority that any of the decisions cited purported to construe Article 1119 as containing a condition precedent to consent because none of them revealed any attempt to construe Article 1119 in particular at all. Rather, the cases cited by the Applicant reviewed other procedural provisions of the *NAFTA* in particular or approached the procedural provisions as a group, without singling out Article 1119 for analysis.

[83] The Applicant submits that there have been no decisions directly on point. This is the first instance in which a tribunal was asked to determine whether a notice of intent within the requirements of Article 1119 was a condition of the disputing party's consent under Article 1121.

[84] Having concluded that it had jurisdiction notwithstanding the failure by the Additional Claimants to satisfy Article 1119(a), the Majority examined whether it was appropriate to exercise that jurisdiction over the claims; that is, whether the claims were admissible. The Majority concluded that, unlike other Articles of Chapter 11 of the *NAFTA*, the terms of Article 1119 did not require a sanction of dismissal if all of the requirements set out therein were not met. Relying on the principles of an efficient administration of justice and an absence of prejudice to the Applicant, the Majority concluded that the Notice was admissible notwithstanding the defect. This decision on admissibility is not reviewable by this court.

[85] The Applicant disagrees with the approach taken by the Tribunal, which it believes does violence to the clear and unambiguous terms of the *NAFTA*. It further asserts that only a state party could waive non-compliance, not a tribunal.

Analysis

[86] The Applicant disagrees with the Majority's interpretation of the *NAFTA* Articles and its conclusion that it had jurisdiction over the claims of the Additional Claimants. It argues that the Respondents failed to engage the Applicant's consent by failing to comply with Article 1119, and that Article 1119 was a condition of the Applicant's consent. The Applicant makes many of the same arguments in this application that it made before the Tribunal, which the Tribunal rejected. Principal among them is the argument that Article 1119 is mandatory: "[t]he 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" (emphasis added), and the notice shall specify a number of things, including the name and address of the disputing investor and the name and address of the enterprise (for claims under Article 1117). The Applicant is supported in this argument by the USA and Canada.

[87] The Applicant submits that this prescriptive approach was followed in *Philip Morris SARL et al. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Decision on Jurisdiction, 2 July 2013 ("*Philip Morris*"), where the tribunal found, at para. 139, that the sequence of steps to be followed by a claimant when resorting to international arbitration are "part of a binding sequence", as evidenced by the word "shall" before each step, and that the procedures must be complied with and not ignored.

[88] The facts in *Philip Morris* and in *Ethyl Corporation v. Government of Canada*, UNCITRAL, Award on Jurisdiction, 24 June 1998 ("*Ethyl*"), another case relied on by the Applicant, are that the claimants delivered notices prior to the prescribed periods and by the time the jurisdictional question was heard, the time periods would have elapsed. Here the Amended Notice of Intent was filed after the period prescribed. The Applicant asserts that the Respondents could have cured the defect by submitting a fresh notice of intent, waiting 90 days and commencing a new proceeding.

[89] The Applicant also asserts that jurisdictional defects cannot be cured and that to say the issue goes to admissibility is wrong. It argues that the more recent jurisprudence shows that pre-conditions and formalities are mandatory and go to jurisdiction.[6] Because the Additional Claimants did not follow the procedural steps, in order, the Applicant submits that the Amended Notice of Intent submitted by the Respondents after the Request cannot be submitted retroactively and therefore has no legal effect.

[90] The Applicant also rejects the Tribunal's finding that Article 1119 is entirely silent on the consequences of a failure to include all the required information in the Notice and, therefore, a failure to include all the required information did not vitiate a party's consent under Article 1122(1). The Applicant argues that the consequences of a failure to properly accept the unilateral offer to arbitrate is that, as a matter of law, there is no consent to arbitrate at all and the tribunal has no jurisdiction.

[91] However, the Applicant does not explain how the consequence of non-compliance is connected to the Applicant's consent. The Tribunal carefully reviewed the language of Article 1119, in accordance with the principles of treaty interpretation set out in the *Vienna Convention*, and concluded that such non-compliance could only relate to the Applicant's consent if the Applicant's consent under Article 1222 was conditional on the fulfillment of the requirements of Article 1119.

[92] Further, as argued by the Respondents, consequences may flow from a failure to comply with Article 1119 even if the failure does not result in the Applicant's consent being vitiated. If a claimant fails to comply with Article 1119, it risks having its claim dismissed as inadmissible.

[93] The Applicant argues that, in its findings, the Tribunal effectively eliminated the effect of Article 1119. It argues that, without the requirement to provide a notice of intent before commencing an arbitration proceeding, the Article has no purpose. Accordingly, it asserts that the result is a violation of the well-established principle that a treaty should not be interpreted in

[6] *Methanex*, at para. 120; *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), at para. 50 ("*Mondev*"); *Canfor*, at para. 171; *Merrill & Ring*, at paras. 28 and 29; *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/01, Concurrence of Professor Domingo Bello Janeiro, 16 August 2012, at pp. 4-6 ("*Daimler* Concurrence"); *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/02, Award, 18 September 2009, at para. 160 ("*Cargill* ICSID"); *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v. Canada*, UNCITRAL, Award on Jurisdiction and Liability, 17 March 2015, at paras. 228-229 ("*Bilcon*"); *Detroit International Bridge Company v. Government of Canada*, PCA Case No. 2012-25, Award on Jurisdiction, 2 April 2015, at paras. 147, 291, 320 and 336 ("*Detroit International Bridge*").

a way that would make parts of it redundant or *inutile*. The Applicant cites several cases in support of its argument.[7]

[94] Each of the cases cited by the Applicant indicates that it is an established principle of treaty interpretation that a treaty should not be read in such a way so as to make parts of it redundant or *inutile*. This is otherwise known as the doctrine of *effet utile*: *Tenaris*, at para. 151. For example, in *CEMEX*, at para. 107, the tribunal quoted the decision in *Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, at para. 248, in which that tribunal held that "[i]t is a cardinal rule of interpretation of treaties that each and every clause of a treaty is to be interpreted as meaningful rather than meaningless." In *Tenaris*, at para. 151, the tribunal articulated the principle in this way: "the terms of the treaty must *if possible* be interpreted so that they do not become devoid of effect" (emphasis added).

[95] In my view, the cases make clear that the doctrine of *effet utile* is a core principle of treaty interpretation. However, while the doctrine is important, it does not dominate the other requirements of treaty interpretation (e.g., ordinary meaning, object and context, and the requirements of the *Vienna Convention*). In the jurisprudence, some of the tribunals used *effet utile* to bolster their conclusions, but others simply took note of it. For example, in *CEMEX*, the tribunal articulated the principle but then diverged from it. At para. 114, the *CEMEX* tribunal held that "[o]ne must recall that this principle does not require that a maximum effect be given to a text. It only excludes interpretations which would render the text meaningless, when a meaningful interpretation is possible. Thus, in a number of cases, the International Court of Justice, when interpreting agreements or treaties, has given a very limited effect to the text it had to construe."

[96] The jurisprudence demonstrates that *effet utile* is only one aspect of treaty interpretation. No one facet of treaty interpretation dominates the others, but rather all facets (e.g., object, purpose, context) must be balanced against each other.

[97] I disagree that the effect of the Majority's decision is a rendering of Article 1119 as ineffective. As observed by the Majority, Article 1119 is a step that precedes the arbitration and allows the parties to explore settlement on an informed basis. Fulfilling the settlement purpose is not contingent upon strict adherence to all procedural steps set out in Article 1119. Indeed, an overly formalistic interpretation of Article 1119 may stymie the ultimate goal of facilitating settlement. This view is supported by the Free Trade Commission, which states that the "notice of intent naturally serves as the basis for consultations or negotiations between the disputing investor and the competent authorities of a party." It is agreed between the parties that failure to pursue settlement, as was the case here, is no bar to pursuing arbitration. Despite the Applicant's argument that a failure to include certain information in a notice of intent, intended to facilitate settlement, would forfeit the right to arbitration, the Majority held that if failing to pursue settlement discussions does not bar access to arbitration then nor should failure to comply with a

[7] *CEMEX Caracas Investments B.V. and CEMEX Caracus II Investments B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/08/15, Decision on Jurisdiction, 30 December 2010, at para. 107 ("*CEMEX*"); *Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda. v. Bolivarian Republic of Venezuela[I]*, ICSID Case No. ARB/11/26, Award, 29 January 2016, at paras. 151-152 ("*Tenaris*"); *Garanti Koza LLP v. Turkmenistan*, ICSID Case No. ARB/11/20 Dissenting Opinion of Laurence Boisson de Chazournes, 3 July 2013, at para. 27; *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015, at para. 354.

step designed to facilitate such settlement discussions bar access. The Respondents submit that the state party does not respond to a notice of intent because the arbitration is not commenced until the actual pleading, being the request for arbitration, is filed. This approach is consistent with the view that the purpose of Article 1119 is not for the claimant to submit a notice of intent that would be comprehensive in the way a pleading would be.

[98] Rather than rendering the article meaningless, the Majority's reading of it simply rejects the notion that precise fulfillment of each and every term of Article 1119 is necessary to uphold the Article's purpose. In this case, the claims were allowed to proceed even though the precise terms of Article 1119(a) were not fulfilled in an orderly, temporal way, because the breach was considered too minor and technical in nature to defeat the arbitration. This approach indicates that the technical requirements of Article 1119 still have weight.

[99] The Majority's interpretation of Article 1119 emphasized the overall object, text and purpose of the article over a strict technical construction of the statutory language. Such balancing of the factors of treaty interpretation is appropriate and well-established in the jurisprudence.

[100] The Applicant is correct that the drafters of the *NAFTA* used the mandatory language of "shall" in Article 1119. However, treaty interpretation is a balancing exercise and no one aspect (e.g., the ordinary meaning of the statutory language) should dominate over the others.

[101] The Applicant argues that the *Vienna Convention* requires a treaty to be interpreted in light of its object and purpose and the purpose and objectives of the *NAFTA* as set out in Article 102, including the objective of creating "effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes." The Applicant argues that this express purpose of creating "effective procedures" is reflected by the terms of Chapter 11. It further submits that Article 1115 adds that the specific purpose of Chapter 11, Section B is to establish a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the *NAFTA* parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

[102] The Applicant further argues that the Tribunal erred in assuming that the sole purpose of the notice of intent requirement was to promote settlement. It submits that Article 1119 has a number of other purposes, including permitting the responding state to be informed of the individuals or entities raising grievances, and to organize its defence or attempt to defuse the issue(s) in advance of the arbitration. In other words, the Applicant is entitled to know who is intending to sue and on what basis in the same way as it would be entitled to this information in a domestic civil proceeding. The Applicant submits that the Additional Claimants did not simply fail to inform the Applicant of certain facts, they failed to submit a notice of intent altogether, thereby frustrating any possibility of settlement even if that were the purpose of Article 1119.

[103] I am not persuaded by the Applicant's argument that the failure to comply with Article 1119 resulted in frustrating the possibility of settlement. The Tribunal noted that the Applicant declined to participate in settlement discussions. Further, by the time the Applicant received the Amended Notice of Intent, more than five months before the Tribunal was empaneled, the

Applicant had the names and addresses for the Additional Claimants, in addition to all of the other information required pursuant to Article 1119 that had been set out in the Notice.

[104] I disagree that the Tribunal assumed that the sole purpose of the Notice was to promote settlement. In the Partial Award, it referred to the Free Trade Commission Statement on the purpose of a notice of intent: to provide information to a party to assess amicable settlement opportunities. It then stated that it is possible for "that" purpose to be fulfilled where the notice is incomplete but did not conclude that the sole purpose is to promote settlement.

[105] I also disagree that the notice of intent permits the responding state party to organize its defence. The notice of intent is a pre-litigation step that allows the parties to explore settlement on an informed basis. The arbitration is not commenced until the request for arbitration, the actual pleading, is filed.

[106] The Applicant also submits that some investment treaties provide that prior to being able to access international arbitration, the claimant must first seek to resolve the issue in the domestic court of the state party. The Applicant argues that there are a number of similarities between these "prior recourse" requirements and the notice of intent requirement under the *NAFTA*. Some tribunals have found that compliance with a prior recourse requirement goes to the question of whether a tribunal has jurisdiction over a dispute and that the tribunal does not have jurisdiction to waive the requirement as a procedural or admissibility-related matter: see, for example, *Daimler* Concurrence, at pp. 4-6; *Hochtief* Dissent, at para. 31. If the claimant has not complied with the prior recourse requirement, the tribunal does not have jurisdiction over the claim: *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/01, Award, 22 August 2012, at para. 200. Like a prior recourse requirement clause in an arbitration agreement, the Applicant argues that the notice of intent goes to the jurisdiction of the tribunal to hear an arbitral case.

[107] The Applicant asks this court to consider the similarities between these prior recourse requirements under certain investment treaties and the notice of intent requirement under the *NAFTA* on the basis that tribunals have held such requirements to be jurisdictional. The Applicant relies on the decision in *Daimler* and the dissent in *Hochtief* in this regard. The majority in *Hochtief* interpreted the same clause in the same treaty at issue in the *Daimler* case and came to the opposite view, finding, at para. 96, that the prior recourse requirement is a "condition relating to the manner in which the right to have recourse to arbitration must be exercised" and thus a provision going to "admissibility of the claim" and not jurisdiction. Other tribunals have also held these prior recourse requirements to be issues relating to admissibility.[8] The Applicant asserts that subsequent cases relied on by the Applicant show that consensus has evolved and reflects the view of the dissent in *Hochtief* that matching consents are needed for a tribunal to have jurisdiction over a claim: see *Daimler* Concurrence, at pp. 5-6.

[8] See *Ickale Insaat Limited Sirketi v. Turkmenistan*, ICSID Case. No. ARB/10/24, Award, 8 March 2016, at para. 242 ("*Ickale Insaat*"); *Abaclat and Others v. The Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011, at paras. 494-496 ("*Abaclat*"); *Teinver S.A., Transportes de Cercanias S.A., et al. v. Argentina*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012, at para. 130.

[108] The Applicant submits that it was not given any notice at all because the absence of the Additional Claimants, prior to the submission of the Request, frustrated the purpose of Article 1119, being to promote settlement. However, the Majority held, and the Applicant conceded, that the Notice did set out the nature of the investments at issue, the measures impugned, the factual and legal bases for the claim, and the estimate of the damages sought. It was only the names and addresses of the minority investors (most of whom held less than 2% of the shares of the Mexican companies) in the same investments making the same claims that were lacking. The Majority noted that the Notice fulfilled the purpose of facilitating settlement discussions.

[109] The Applicant asserts that tribunals dealing with *NAFTA* Chapter 11 cases have repeatedly found that compliance with conditions precedent is necessary to engage the responding party's consent. In *Methanex*, at para. 120, the tribunal found that the State Party's consent to arbitration is demonstrated if the requirements of Article 1101 are met, if a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 and if all pre-conditions and formalities required under Articles 1118-1121 are satisfied. This finding was followed in *Canfor* and *Merrill & Ring*.

[110] In *Cargill* ICSID, at para. 160, the tribunal found that a claimant "must also provide preliminary notice pursuant to Article 1119 and satisfy the conditions precedent via consent and, where appropriate, waiver, under Article 1121. Consent of the Respondent must be established pursuant to Article 1122." See also *Bilcon*, at paras. 228-229.

[111] The Respondents argue that decisions of other tribunals, both under the *NAFTA* and under other bilateral investment treaties, confirm that non-compliance with procedural requirements, like those in Article 1119, does not affect a tribunal's jurisdiction. None of these cases interprets Article 1119 as the Applicant would have this court do.

[112] In *ADF*, the claimant alleged a new legal breach of a *NAFTA* provision late in the proceeding. The tribunal, at paras. 127-139, rejected the respondent state's argument that it lacked jurisdiction on the basis of non-compliance with Article 1119(b). It dismissed the argument that non-compliance with Article 1119 conditions or affects the Applicant's consent in Article 1122. In *Chemtura*, in which a similar situation arose, the tribunal relied on *ADF* and, at paras. 102-105, came to the same conclusion, noting that *NAFTA* tribunals have interpreted these provisions rather broadly and that the respondent had suffered no prejudice as it had had ample opportunity to respond. In *Ethyl*, at paras. 55, 58-60, 80, 84-85, 87, the tribunal found that the claimant had filed a defective notice under Article 1119 because the measure identified in the notice of intent had not yet come into effect, however, it drew a distinction between jurisdictional and procedural requirements and held that Article 1119 did not relate to the tribunal's jurisdiction.

[113] *NAFTA* tribunals have confirmed that they will not elevate form over substance. For example, in *Mondev*, at para. 86, the tribunal stated that: "[i]nternational law does not place emphasis on mere formal considerations, nor does it require new proceedings to be commenced where a mere procedural defect is involved." In *Pope & Talbot Inc. v. The Government of Canada*, Award Concerning the Motion by Government of Canada Respecting the Claim Based Upon Imposition of the "Super Fee", 7 August 2000, at para. 26 ("*Pope & Talbot*"), the tribunal recognized that the objective of *NAFTA* is to establish a mechanism for investment dispute

resolution and "[l]ading that process with a long list of mandatory preconditions, applicable without consideration of their context would defeat that objective, particularly if employed with draconian zeal."

[114] Outside of the *NAFTA* context, other investment treaty tribunals have recognized that pre-arbitration requirements do not constitute jurisdictional provisions but relate to the admissibility of a claim. In *Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, at paras. 343-345, the tribunal rejected a jurisdictional objection where the claimant had filed its request for arbitration before the six-month cooling off period under the treaty had elapsed. The tribunal found the requirement to be "procedural", the purpose of which was to facilitate settlement, not to impede or obstruct arbitration proceedings where such settlement is not possible. In *Ronald Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, at paras. 189-190, the tribunal similarly held that non-compliance with the six-month waiting period did not deprive it of jurisdiction and that an "overly formalistic approach … would not serve to protect any legitimate interest of the Parties."[9]

[115] The Applicant has not provided this court with any *NAFTA* decision in which a tribunal dismissed, on jurisdictional grounds, an investor's claim simply because of technical non-compliance with Article 1119. The *Methanex* case caused the tribunal to address whether certain environmental measures related to the investor for the purposes of Article 1101, which defines the scope and coverage of Chapter 11. The tribunal was not asked to assess whether an omission in a notice of intent constitutes a jurisdictional bar. In *Canfor*, in which the tribunal followed *Methanex*, the tribunal addressed whether Article 1901 barred the tribunal from considering claims with respect to antidumping and countervailing duties under Chapter 11.

[116] The Applicant also relies on *Merrill & Ring*, which does address pre-arbitration procedures. In that case, the claimant sought to add a new party that wished to raise different issues of fact and law, after the tribunal had been constituted and after both parties had made substantive submissions in the proceeding: see paras. 23-24. In the present case, the Additional Claimants were added upon filing the document that commenced the arbitration, some months before the tribunal had been constituted. The Additional Claimants made no new claims but raised the same claims in the Notice as the Original Claimants.

[117] In reviewing the decision of the Majority with respect to the engagement of the Applicant's consent, the role of this court is to review the Majority's consideration of the text of the treaty and their interpretation of it in accordance with the principles set out in the *Vienna Convention*. In conducting this review, I note that the Majority made several findings on the Applicant's engagement to arbitration. These findings were made following a rigorous review of all the relevant Articles. It concluded, based on its comprehensive review, that the requirements of Article 1119 occur prior to an arbitration and therefore cannot fall within the scope of Article 1122, which relates to procedures relating to the arbitration. The Majority noted that the drafters of the *NAFTA* did not include language stating that submission to arbitration is conditioned on

[9] See also *Ickale Insaat* at para. 242; *Hochtief*, at para. 96; *Abaclat*, at paras. 494-496; and *Occidental Petroleum Corporation Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Jurisdiction, 9 September 2008, at paras. 90-95.

the satisfaction of the requirements of Article 1119, whereas the contextual review of the relevant Articles revealed to the Majority that in Articles 1116, 1117, 1120 and 1121(a), the drafters of the *NAFTA* did employ language expressly setting out conditions.

[118] I find no error in the Majority's consideration of the ordinary meaning of the words used in Articles 1119, 1121 and 1122, its contextual review or its review of the object and purpose of the *NAFTA* respecting the Applicant's consent to arbitration. I find that the review undertaken by the Majority was aimed at giving effect to the words used by the parties to achieve their intended objectives.

Issue 2: Did the Tribunal correctly conclude that it had jurisdiction over all the Respondents and the claims they advanced, or had the Respondents failed to provide the required consent in accordance with Article 1121, thus depriving the Tribunal of jurisdiction?

The Respondents' Consent – Article 1121

[119] The Applicant asserts that the Additional Claimants, including the additional Mexican enterprises on whose behalf claims were sought to be advanced pursuant to Article 1117, failed to comply with Article 1119, but all of the Respondents failed to comply with Article 1121.

[120] The Respondents did not submit consents directly. They submitted identically-worded powers of attorney giving their counsel, Quinn Emanuel, power to take any steps required for the initiation of the arbitral proceedings under the *NAFTA.* The Applicant asserts that this does not constitute express consent in accordance with the *NAFTA* procedures because the powers of attorney only record an intent to bring an arbitration proceeding and cloak the Respondents' counsel with authority to represent them.

[121] The Applicant asserts that the Respondents' failure to comply with Article 1121 means that the Tribunal lacked jurisdiction over all of the claims advanced by the Respondents and not just a subset of them, being the claims of the Respondents that complied with Article 1119. The Applicant also asserts that because the Additional Claimants failed to satisfy the conditions precedent of Article 1119, the Tribunal lacked jurisdiction over the claims submitted by the Additional Claimants and on behalf of the Additional Mexican enterprises. This conclusion would affect the claims submitted on behalf of the five Juegos Companies pursuant to Article 1117 because, in order to bring those claims, the Original Claimants were required to establish that they owned or controlled the Juegos Companies. The Applicant argues that if only the Original Claimants were left to bring the Article 1117 claims on behalf of the Juegos Companies, they could not succeed because they did not hold the majority of the voting shares (other than for JVE Mexico), and therefore did not legally own them. As such, the Applicant argues that the claims advanced on behalf of the Juegos Companies (other than for JVE Mexico) were also beyond the Tribunal's jurisdiction.

[122] The Tribunal held that Article 1121(1) and (3) set out two distinct requirements. In subparagraph (1), the Tribunal found that there are two substantive conditions precedent to submission of a claim to arbitration: consent and waiver. If these conditions are not met, a *NAFTA* party cannot be compelled to arbitrate. By contrast, subparagraph (3) is procedural. It

sets out the manner in which the consent and waiver are to be conveyed. In other words, subparagraph (1) is a jurisdictional requirement, meaning that a claimant may submit a claim to arbitration only if it has consented to arbitration and waived its rights. However, Article 1121(3) is an admissibility requirement, which sets out the manner in which satisfaction of the conditions precedent of consent and waiver are to be conveyed to a respondent state.

Article 1121(1): The Existence of the Respondents' Consent

[123] The Tribunal approached its interpretation of Article 1121 using the same premise it applied to Article 1119. Without consent from both parties, there is no jurisdiction. Consent is the *sine qua non* for *NAFTA* arbitral jurisdiction. The Tribunal found that the Respondents had consented to the arbitration and, therefore, the Tribunal had jurisdiction under Article 1121(1).

[124] Regarding Article 1121(1), the Tribunal noted that this provision requires that a claimant consent to arbitration and that the consent be made in writing, delivered to the *NAFTA* party, and, per Article 1121(3), be included in the submission of a claim to arbitration. The Respondents delivered the Request in which it was stated that they accepted the Applicant's offer to arbitrate in Article 1122. The Request was signed by their counsel, Quinn Emanuel, pursuant to powers of attorney provided to the Applicant. The Applicant argued that these steps were not in compliance with Article 1121.

[125] The consents and waivers of all of the Respondents were not given when the Request was submitted on June 15, 2016. At that time, the Applicant objected to the Request on a number of grounds, including that the Respondents had failed to consent and provide waivers of alternative dispute resolution in accordance with Article 1121. The Respondents responded to this objection by letter dated July 21, 2016 stating that the powers of attorney granted to Quinn Emanuel, together with the Request, constituted consent under Article 1121. At the same time, the Respondents filed statements from each of the Additional Claimants adopting the Notice given by the Original Claimants. ICSID still declined to register the claim until the Respondents produced powers of attorney for the Juegos Companies and waivers on their behalf. ICSID then registered the claim without prejudice to the Tribunal "in regards to competence."

[126] The Applicant rejects the Respondents' argument that the Respondents consented to the arbitration when their counsel filed the Request, because filing a Request does not amount to compliance with Article 1121. If the filing of the Request were sufficient, the Applicant argues, Article 1121 would serve no purpose.

[127] Article 1121 directs that an investor may only submit a claim under Article 1116 or 1117 if the investor (and the enterprise, if applicable): a) consents to arbitration in accordance with the procedures set out in the *NAFTA*, and b) waives the right to certain other dispute resolution procedures. The consent and waiver shall be in writing; shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration. The Article provides that only if these requirements are satisfied may a claimant validly submit a claim to arbitration.

[128] The Applicant argues that interpreting these requirements permissively would render them meaningless and violate the fundamental treaty interpretation principle of *effet utile.*

Certain tribunal decisions have found Article 1121 requirements to be a mandatory precondition to arbitration.[10]

[129] In determining whether it had jurisdiction over all the Respondents, the Tribunal again focused its analysis on whether the Respondents had in fact consented to arbitrate with the Applicant, as required by Article 1121(1), and acknowledged that where a Claimant has not consented, the Tribunal would have no jurisdiction over that Claimant or the claims it made on behalf of another.

[130] The Tribunal unanimously concluded that "the record permits no other conclusion than that the Respondents did in fact consent." The Tribunal found that the consent contained in paragraph 114 of the Request expressly accepted the Applicant's offer to arbitrate in Article 1122 and found that nothing needed to be implied or construed to enable the conclusion that the Respondents did consent.

[131] In the Request, at paragraph 114, the Respondents referred to the Applicant's standing offer to arbitrate under the *NAFTA*, and stated "by this Request for Arbitration, Respondents accept the Applicant's offer, and hereby submit the present dispute to arbitration under the Additional Facility Rules of ICSID." The Tribunal found that this acceptance was given in a document reviewed and agreed to by the Respondents and signed by their counsel pursuant to powers of attorney given by the Respondents authorizing their counsel to "take any steps required for the initiation of, and to represent the [Respondents] and act on [their] behalf against the United Mexican States in, arbitration proceedings under the [Treaty]."

[132] The Tribunal rejected the Applicant's argument that, to properly consent to arbitration, the language in the powers of attorney would require a verbatim recitation of the phrase "arbitration in accordance with the procedures set out in" in the *NAFTA*. It held that the Request clearly stated that the Respondents "accept Mexico's offer", and further, that the paragraph in the Request was already limited to "arbitration in accordance with the procedures set out in this Agreement." Accordingly, a verbatim recitation would have been redundant.

[133] The Tribunal found that, having reviewed the decisions cited by the Applicant in support of its arguments (*Methanex, Canfor, Merrill & Ring, Cargill, Detroit International Bridge, Bilcon, Resolute Forest* and *Mercer*), there was no authority requiring a particular formulation for giving consent under Article 1121(1).

[134] The Tribunal rejected the Applicant's argument that the powers of attorney at best only suggest that the Respondents would have been willing to consent if asked and that the consent in the Request was "implied or constructive". The Tribunal unanimously found that the Respondents gave the consent required by Article 1121(1), which could be found in the plain language of the Request. Accordingly, it had jurisdiction.

[135] In addition to the statements in the Request and the powers of attorney, the Tribunal considered that each of the Respondents testified that they did consent to the submission of their claims to arbitration. These statements were made after the Request was made but were

[10] *Detroit International Bridge*, at paras. 147, 291, 320 and 336; *Cargill* ICSID, at para. 160.

nonetheless considered by the Tribunal in satisfying itself that all Respondents had in fact consented, and therefore, it had jurisdiction.

The Respondents' Consent on behalf of the Mexican Companies

[136] Article 1121(2) requires that the Mexican companies consent to arbitration and waive their right to pursue alternative dispute resolution. Their consent needed to be conveyed in a particular manner per Article 1121(3). The Applicant argued that the Juegos Companies did not consent at all, or at least, did not consent until August 5, 2016 when the relevant powers of attorney were submitted by Quinn Emanuel and that there was insufficient proof of consent by E-Games based on the Applicant's receipt on October 24, 2014 of a letter sent on behalf of E-Games stating that it was "desisting from" the Notice.

[137] The Tribunal accepted that powers of attorney from the Juegos Companies were delivered after the Request because the Respondents did not have de facto control of those companies when the Request was filed but acquired that control by August 5, 2016.

[138] Notwithstanding that the powers of attorney for the Juegos Companies were submitted following the Request, the Tribunal found that they were prospective in nature and they also ratified all steps previously taken by Quinn Emanuel on their behalf in the arbitration, including the filing of the Request. The Tribunal found that there was no evidence to establish that the Juegos Companies could not so ratify all prior actions by their agent, including the acceptance of the Applicant's offer to arbitrate or that such ratification could not produce its effect *ex tunc*, as of the time of the ratified act. Accordingly, the Tribunal concluded that the Juegos Companies consented to arbitration as required by Article 1121(2) and their consent was effective as of the date the Request was filed. The Tribunal held that this type of defect went to admissibility and could be cured.

[139] Notwithstanding that that process by which the Respondents submitted their consents and waivers was not seamless, the Tribunal found that the record permitted no other conclusion than that the Respondents did in fact consent. The Tribunal was unanimous in this conclusion. I see no error in the analysis undertaken by the Tribunal or in its conclusion.

Article 1121(3) – Delivery of the Respondents' Consent

[140] The Tribunal then considered whether the Respondents had conveyed their consent in the manner prescribed by Article 1121(3). The Tribunal found that these requirements did not bear upon jurisdiction but rather were admissibility requirements. This finding is consistent with other *NAFTA* authorities: see *Ethyl*, at paras. 90-91; *International Thunderbird Gaming Corp. v. The United Mexican States*, UNCITRAL, Award, 26 January 2006, at paras. 114-118; *Pope & Talbot,* at para. 26.

[141] Article 1121(3) required the Respondents to give their consent "in writing", to "deliver [it] to" the Applicant and to "include [] [it] in the submission of a claim to arbitration." The Applicant argued that the Request filed by Quinn Emanuel on behalf of the Respondents did not satisfy these requirements because the consent and waivers of all of the Respondents were not given when the Request was submitted on June 15, 2016. At that time, the Applicant objected to the Request on a number of grounds, including the Respondents' failure to provide waivers in

accordance with Article 1121. The Respondents responded to this objection by letter dated July 21, 2016 annexing powers of attorney and waivers for certain of the Respondents that had been previously inadvertently omitted.

[142] The Tribunal disagreed with the Applicant and found that the Request satisfied the requirement and that the cases cited by the Applicant (*Methanex*, *Canfor*, *Merrill & Ring*, *Cargill*, *Detroit International Bridge*, *Bilcon*, *Resolute Forest*, and *Mercer*) did not suggest otherwise. This decision is not reviewable by this court.

[143] The Applicant submits that the failure to comply with the requirements of Article 1121, that is, to submit actual consents, rendered the *NAFTA* Party's consent to arbitrate without effect: *Detroit International Bridge*, at para. 291.

[144] The Respondents submit that the Applicant's submissions respecting the consent pursuant to Article 1121, which are similar to the arguments made before the Tribunal, are without merit.

[145] This court is limited to a review only of the Tribunal's finding that the consent requirement under Article 1121(1) and Article 1121(2) was met. The manner in which the consent was provided is not reviewable by this court.

Issue 3: Did the Tribunal make a jurisdictional error in its treatment of the submissions of the USA and Canada pursuant to Article 1128?

[146] The Majority did not mention the USA and Canada's Article 1128 submissions explicitly. It stated only that it had "carefully reviewed the submissions of all parties." Article 31(3) of the *Vienna Convention* states that a tribunal "shall" take into account any subsequent agreement or subsequent practice between *NAFTA* parties regarding the interpretation of the *NAFTA*. Inferentially, if there is no subsequent agreement or subsequent practice between the parties, the tribunal need not consider submissions to that effect, and no jurisdictional error will have been committed.

[147] While I do not agree with the Respondents' position that legal submissions of the *NAFTA* parties cannot constitute subsequent practice, I find that the legal submissions in this case do not rise to the level of subsequent practice.

[148] The *NAFTA* parties present a united view that their consent to arbitration is explicitly conditioned upon satisfaction of the relevant procedural requirements as set out in the *NAFTA*. Specifically, strict adherence with Article 1119 conditions any consent to arbitration subsequently given under Article 1121. According to the *NAFTA* parties, if the requirements of the notice of intent are not met, as here, the *NAFTA* party's consent is vitiated, and the tribunal loses jurisdiction over the matter.

[149] The *Vienna Convention* codifies the principles with which international treaties such as the *NAFTA* are to be interpreted. Article 31(3) of the *Vienna Convention* states:

> 31 (3) There shall be taken into account, together with the context [of the treaty]:

> (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 […]

[150] The Court of Appeal, in *Cargill*, at para. 84, stated that it is a jurisdictional error for a *NAFTA* tribunal to ignore Article 31(3) submissions by *NAFTA* parties in rendering a decision if those submissions demonstrate a subsequent practice agreed upon by the parties.

[151] The International Law Commission, which was responsible for drafting the *Vienna Convention*, commented with respect to Article 31(3)(a): "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation": *United Nations Yearbook of the International Law Commission 1966* (New York: 1967) (U.N. General Assembly Doc. A/CN.4/SEA.Add.1) Vol II, p. 221, at para. 14 ("*ILC Yearbook*").

[152] The Commission also considered that the subsequent practice of the parties to a treaty, perhaps falling short of an agreement, is also an authentic means of interpreting and applying the treaty: *ILC Yearbook*, at para. 15. According to the Commission, "the importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty": *ibid*. If found, a subsequent practice establishing agreement of the parties regarding the interpretation of the *NAFTA* is "entitled to be accorded considerable weight:" *Mobil Investments Canada Inc. v. Government of Canada*, NAFTA/ICSID Case No. ARB/15/6, Decision on Jurisdiction and Admissibility, 13 July 2018, at para. 158 ("*Mobil II*").

[153] The question of what constitutes "subsequent practice" under Article 31(3) is complex. It has spawned several textbooks on the subject: see George Nolte, ed, *Treaties and Subsequent Practice* (Oxford, UK: Oxford University Press, 2013); Katharina Berner, *Subsequent Agreement and Subsequent Practice in Domestic Courts* (Berlin: Springer, 2017).

[154] While this court is not bound by any decision of any *NAFTA* or international (e.g., International Court of Justice ("ICJ")) tribunal, it is bound by decisions of the Court of Appeal for Ontario, such as *Cargill*. *NAFTA* tribunals are similarly not bound by decisions of other *NAFTA* tribunals. The fact that prior decisions are not binding is counterbalanced by the doctrine of *jurisprudence constante*, which suggests that prior decisions applying a particular legal principle or rule can be persuasive even if they are not controlling: see e.g. *B-Mex LLC and Others v. United Mexican States*, ICSID Case No. ARB(AF)/16/3, Partial Award, 19 July 2019, at para. 118 ("*B-Mex*").

[155] For reviewing courts undertaking decisions under the *ICAA*, it has sometimes been said that there has been a "powerful presumption" that international arbitration tribunals have acted within their authority: *Cargill*, at para. 33. The decisions of international tribunals should be afforded a high degree of deference and reviewing courts should interfere "only sparingly or in extraordinary cases": *ibid*. Appellate intervention is confined to true jurisdictional errors: *ibid*, at para. 46. However, the standard of review for questions relating to jurisdiction is correctness:

ibid, at paras. 41-42. In *Cargill*, Feldman J.A. on behalf of the Court of Appeal commented, at para. 46:

> To the extent that the phrase "powerful presumption" may suggest that a reviewing court should presume that the tribunal was correct in determining the scope of its jurisdiction, the phrase is misleading. If courts were to defer to the decision of the tribunal on issues of true jurisdiction, it would effectively nullify the purpose and intent of the review authority of the court under [*Model Law*] art. 34(2)(iii).

[156] The Applicant, the USA and Canada submit that there is, at minimum, a subsequent practice among the *NAFTA* parties respecting Article 1119. All three parties agree that their united view on the *NAFTA* party's consent being conditional upon the satisfaction of the relevant procedural requirements of Article 1119 is a "common, concordant and consistent view" held by them that rises at least to the level of a "subsequent practice", if not an agreement.

[157] They argue that by ignoring the Article 1128 submissions, the Majority committed a jurisdictional error because, per Article 31(3) of the *Vienna Convention*, the tribunal shall take into account "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

[158] The Applicant further submits that both customary international law and Article 31(3) of the *Vienna Convention* require a *NAFTA* tribunal to consider evidence of a common position between treaty parties with respect to the interpretation of a particular *NAFTA* provision.

[159] Although formal notes of interpretation issued by the Free Trade Commission clearly constitute "agreements" under Article 31(3)(a), it is not necessary for an agreement to be so manifested to fall within the meaning of Article 31(3). The Applicant submits that per *Methanex Corporation v. United States of America*, Final Award, 3 August 2005, Part II, Ch. B, at paras. 19-21 ("*Methanex* Final Award"), common positions of the *NAFTA* parties are also capable of constituting an "agreement" under Article 31(3)(a). However, the *Methanex* decision deals only with Article 31(3)(a), whereas here the Applicant argues that common positions of treaty parties that do not rise to the level of a formal agreed-upon interpretation approved by the Free Trade Commission can not only engage Article 31(3)(a) (regarding subsequent agreement), but also Article 31(3)(b) (regarding subsequent practice).

[160] The Applicant further submits that unlike in *Cargill*, in which the Court of Appeal held that the common meaning of the treaty as between the parties was not precise enough to determine the result in that case, the common meaning as between the parties in this matter is clear as to the intended consequences of non-compliance with Article 1119, and rises at least to the level of a "subsequent practice" under Article 31(3)(b).

[161] Canada argues that its submissions under Article 1128 should have been considered by the Majority, based on the collective view between the *NAFTA* parties, because it is a requirement of Article 31(3). It further argues that the *NAFTA* parties' submissions were not merely legal arguments by counsel, as the Respondents claim, but rather submissions on the

"long held views" of the *NAFTA* parties that provide certainty to the requirements and general operability of Chapter 11.

[162] Canada's submissions emphasize that the *NAFTA* parties have a "systemic interest" in maintaining the clarity and predictability of the dispute resolution mechanism under the *NAFTA* Chapter 11 by availing themselves of arbitral interpretation under Article 1128.

[163] The USA submits that it has "long maintained" that the phrase "procedures set out in this agreement" in Article 1117, the fulfilment of which is required to engage the *NAFTA* parties' consent to arbitrate, necessarily includes Articles 1116-1121 inclusive, citing *B-Mex*, Submission of the United States of America, 28 February 2018, at para. 4. They state that this means compliance with the requirements of Article 1119 is necessary to engage a *NAFTA* party's consent to arbitration under Article 1121. However, I note here that in *B-Mex*, the majority was not persuaded by the *NAFTA* parties that a *NAFTA* party's consent under Article 1122 is conditioned by Article 1119.

[164] The Respondents submit that the *NAFTA* parties' Article 1128 submissions should be dismissed, and no weight should be given to them on appeal. They argue that the *NAFTA* parties' submissions about strict procedural compliance with Article 1119 have been made on multiple occasions and have not been accepted by any *NAFTA* tribunal, though the Respondents provide no authority for this statement. The Respondents point out that none of the *NAFTA* parties has identified jurisprudence that interprets Articles 1119 and 1121 as limiting a *NAFTA* party's consent to strict compliance with Article 1119. By contrast, the Respondents state that they cite several *NAFTA* authorities that explicitly reject a strict technical approach to the *NAFTA*'s procedural provisions. There are, in fact, *NAFTA* authorities that reject a strict technical approach to the procedural provisions of the *NAFTA*. These include *ADF*, *Chemtura*, and *B-Mex*. The Respondents cite two non-*NAFTA* authorities (*Gas Natural SDG, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/10, Decision of the Tribunal on Preliminary Questions of Jurisdiction, 17 June 2005, at para. 47, footnote 12, and *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Objections to Jurisdiction, 11 May 2005, at para. 146) in which those tribunals recognized that such submissions are simply legal arguments by counsel.

[165] The Applicant submits that it cannot provide authority with regard to strict compliance with Article 1119 because, until now, no tribunal has opined on whether consent under Article 1121 is conditioned by compliance with Article 1119. Ultimately, it would seem that the strict technical construction of Article 1119 in relation to Article 1211 has neither been explicitly accepted nor rejected by a *NAFTA* tribunal. Little turns on this point given that the Majority was not bound by either a *NAFTA* tribunal or a non-*NAFTA* tribunal in another matter. However, based on the doctrine of *jurisprudence constante*, prior decisions of similarly situated tribunals can be persuasive even if not binding.

[166] The Respondents urge this court to reject the *NAFTA* parties' Article 1128 submissions because: a) the language of the *NAFTA* does not support granting Article 1128 submissions "special weight" as the *NAFTA* parties suggest; b) the submissions merely reflect the litigation positions of counsel; c) litigation positions do not meet the definition of "agreement" or "subsequent practice" under Article 31(3); and d) even if the submissions do constitute a

subsequent agreement or subsequent practice, the submissions need only to be "taken into account" by the Majority, and because the Majority "carefully reviewed" all submissions, nothing more was required.

What is a "subsequent agreement" and a "subsequent practice"?

[167] Because this court is bound by decisions of the Court of Appeal for Ontario, it is bound by the definition of "subsequent practice" set out in *Cargill*.

[168] In *Methanex,* at para. 20, the tribunal held that the term "agreement" under Article 31(3)(a) is not limited exclusively to formal notes of interpretation issued by the Free Trade Commission, and that based on *Kasikili/Sedudu Island (Botswana v. Namibia)* 1999, ICJ Rep. 1, at para. 49 (a decision of the ICJ), "it appears that no particular formality is required" to create an agreement. The Tribunal also quoted P. Daillier et al. in *Droit International Public'*s commentary that "[i]t is accepted that this subsequent agreement may be tacit and result from the concordant practice of States when they apply the treaty:" *ibid.* As noted, *Methanex* does not discuss Article 31(3)(b).

[169] The parties have cited no authority that provides a specific definition for "subsequent practice." Each relies on different authorities in support of their respective arguments. The Applicant relies on the definition from *Cargill*, while the Respondents rely on *Japan - Alcoholic Beverages II*, WT/DS 8-10-11/AB/R, 4 October 1996, at para. 12 ("*Japan Alcoholic Beverages*"), a decision of the WTO Appellate Body.[11]

[170] In *Cargill*, at para. 84, the Court of Appeal defines a "subsequent practice" as "a clear, well-understood, agreed common position in accordance with Article 31(3)(b)." The Court of Appeal did not further define the three criteria.

[171] In *Japan Alcoholic Beverages,* the WTO Appellate Body defined a "subsequent practice" as "a concordant, common and consistent sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice." The *Japan Alcoholic Beverages* definition stems from Ian Sinclair in *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984), at p. 137, commentary relied upon elsewhere in *NAFTA* tribunal jurisprudence: see *e.g. Canadian Cattlemen for Fair Trade v. United States of America*, Award on Jurisdiction, 28 January 2008, at para. 182 ("*Cattlemen*").

[172] The Respondents seem to accept that a jurisdictional error would have been committed had the *NAFTA* parties shown a subsequent practice, but they rely on the more stringent test used by the WTO Appellate Body in *Japan Alcoholic Beverages* to argue that no subsequent practice was made out. The USA also uses the WTO's definition of subsequent practice and argues that the *NAFTA* parties' concordant, common and consistent views do form a subsequent practice that "shall be taken into account" by a tribunal interpreting the *NAFTA*.

[11] WTO Appellate Body refers to the World Trade Organization Appellate Body.

[173] The Applicant relies on the definition in *Cargill*, in which the Court of Appeal held that it would be a jurisdictional error to ignore Article 31(3) submissions if they evidence a "clear, well-understood, agreed common position." The Applicant concedes that such joint positions must be considered by the tribunal so long as the point of consensus can be discerned.

[174] Canada does not rely on any particular definition of subsequent practice, but argues that in this case, the *NAFTA* parties' submissions on the subject Articles of the *NAFTA* are "long held view[s]" and are "unanimous."

[175] This court is bound to apply the standard set out in *Cargill*, which requires the subsequent practice to be clearly identifiable and the points of consensus to be "clearly discern[able]." Unlike the standard applied in *Japan Alcoholic Beverages*, where a view must be repeated a certain number of times before an arbitral tribunal to constitute a subsequent practice, *Cargill* does not impose such a requirement.

Are the *NAFTA* parties' submissions, being legal submissions by counsel, capable of constituting a "subsequent agreement" or "subsequent practice"?

[176] The Respondents submit that legal submissions by counsel in an arbitration cannot constitute an agreement or subsequent practice because they are merely the litigation positions of the *NAFTA* parties. I disagree. The Respondents have not provided compelling authority for the suggestion that litigation positions cannot be a subsequent practice, while the Applicant has provided persuasive authority indicating that legal submissions can be a subsequent practice.

[177] The Respondents argue that legal submissions cannot constitute subsequent practice in the application of the treaty, which establishes the agreement of the parties regarding its interpretation, for two reasons.

[178] First, they assert that the subsequent practice must constitute "objective evidence" of the state's understanding of a given Article in the *NAFTA*, per *Telefonica v. The Argentina Republic*, ICSID Case No. ARB/03/20 Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006, at para. 112 ("*Telefonica*"). By contrast, submissions made during an adversarial proceeding are by their nature non-objective, taking them outside the ambit of Article 31(3): *ibid*, at para. 113. According to the *Telefonica* tribunal, legal submissions are problematic as subsequent practice because they do not represent a "practice", which the tribunal interpreted to mean "conduct of the parties in their application of the … Agreement" or "performance" by the states concerned, in that they lack a "factual element;" and legal submissions are not directed toward opposing parties, and therefore show no meeting of the minds or intent to agree, as the concept of "agreement" is commonly understood in public international law: *ibid*.

[179] Second, the Respondents assert that even if the Applicant's submissions could be considered objective, they do not constitute any more than a "single example" of the *NAFTA* parties having a shared view on the interpretations of Articles 1119 and 1121.

[180] In support of their argument, the Respondents rely on *Mesa Power Group LLC v. Canada*, UNCITRAL, PCA Case No. 2012-17, 25 March 2016, Concurring and Dissenting Opinion of Judge Charles N. Brower, at para. 30 ("*Mesa Power*") where Judge Brower states: "the interpretation given by a State Party in actual litigation cannot be regarded as authentic

interpretation." However, this case does not comment on the distinction between subsequent agreement and subsequent practice.

[181] The Respondents do concede that two *NAFTA* tribunals have held that Article 1128 submissions can constitute subsequent practice: *Cattlemen*, at paras. 188-190, and *Mobil II*, at para. 158. The Respondents submit that those cases are distinguishable because the "practice" invoked in those cases was based on practices invoked in other cases as opposed to exclusively in the subject case.

[182] The Respondents assert that Canada has only made one submission to a *NAFTA* tribunal advancing an interpretation of Article 1119, in *Mondev Int'l Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Second Submission of Canada (July 7, 2001) ("*Mondev* – Second Submission of Canada"), and that the USA and Mexico have never done so.

[183] The Respondents also argue a policy point that non-disputing *NAFTA* parties are typically respondents in other arbitrations, and they typically take positions consistent with their role as respondents elsewhere.

[184] The *NAFTA* parties do not explicitly address the argument that legal submissions by counsel cannot constitute a subsequent agreement or practice under Article 31(3). Their submissions seem to imply that legal submissions are capable of doing so. Mexico argues:

> The State Parties' past and present submissions, in which the State Parties have consistently stated and conducted themselves in accordance with these propositions, constitute a subsequent "practice" or "agreement" in the application and interpretation of the NAFTA.

[185] In my view, the cases on which the Respondents rely, *Telefonica* and *Mesa Power*, are not persuasive. *Telefonica* seems to have been overshadowed by *Cattlemen* and *Mobil II*, and the Respondents rely on the concurrence/dissent in *Mesa Power.*

[186] The Respondents have not provided majority opinions in support of their position that legal submissions cannot constitute subsequent practice. Their only support for this position arises from *Telefonica* and the concurrence/dissent in *Mesa Power.* In my view, the commentary in dissent warrants less weight than the majority holdings in *Cattlemen* and *Mobil II*.

[187] The *NAFTA* parties are assisted by the Respondents' concession that the *NAFTA* tribunals in *Cattlemen* and *Mobil II* acknowledged that legal submissions can constitute subsequent practice. Though they did not argue it, the *NAFTA* parties are also assisted by the recent decision of *Bilcon of Delaware et al. v. Government of Canada*, UNCITRAL PCA Case No. 2009-04, Award on Damages, 10 January 2019 ("*Bilcon*"), in which, at para. 379, the tribunal found that under Article 31(3)(b):

> [T]he consistent practice of the NAFTA Parties in their submissions before Chapter Eleven tribunals in making a clear distinction between the application of Article 1116 and 1117 can be taken into account in interpreting the provisions of the NAFTA.

> Thus, the NAFTA Parties' subsequent practice militates in favour of adopting the Respondent [Government of Canada]'s position on this issue.

[188] The Respondents' point that legal submissions should not count as subsequent practice because they lack objectivity appears to run contrary to the unanimous decisions in *Cattlemen*, *Mobil II* and *Bilcon.* There may be valid fairness concerns that the submissions are not evidence of a genuine practice so much as they are partisan submissions designed to assist the *NAFTA* parties, if not in the instant matter, then as respondents in outstanding arbitrations of which they are a part. Nevertheless, the majority of the jurisprudence indicates willingness on the part of *NAFTA* tribunals to accept legal submissions as subsequent practice where they meet the appropriate threshold.

[189] The Respondents argue that *Cattlemen* and *Mobil II* are distinguishable from the present case because *Cattlemen* and *Mobil II* require the Article 1128 submissions to be the same not only before the tribunals deciding those cases, but also to have been the same in other cases.

[190] For now, I note simply that there is persuasive authority emanating from the *NAFTA* tribunals in *Cattlemen*, *Mobil II* and *Bilcon* finding that legal submissions can constitute subsequent practice. Overall, I am not persuaded by the Respondents' position that legal submissions by counsel cannot constitute subsequent practice under Article 31(3)(b).

> **If legal submissions by counsel are capable of constituting subsequent practice, do the *NAFTA* parties meet the *Cargill* standard for subsequent practice?**

[191] The Applicant, Mexico, asserts that the *NAFTA* parties have a common position on the interrelationship between Articles 1119 and 1121 and they disagree with the Respondents' assertion that this position is unique to the present case. The USA asserts that the submissions evidence a "longstanding agreement" between the *NAFTA* parties on the correct interpretation of Article 1119. The *NAFTA* parties have submitted before numerous other *NAFTA* tribunals that strict compliance with the procedural provisions of the *NAFTA* is a prerequisite to consent to arbitration. Significantly, the *NAFTA* parties have made this argument before other *NAFTA* tribunals with respect to Articles 1116 to 1121 inclusive; for example, in the *B-Mex* arbitration. Canada does not explicitly argue that the Article 1128 submissions constitute subsequent practice, but this position is implicit in its submissions.

[192] The Respondents argue that the Article 1128 submissions in this case do not meet the threshold for subsequent practice or subsequent agreement under Article 31(3). Specifically, the submissions do not rise to the level of a "common, concordant or consistent … ac[t] or series of pronouncements," being the threshold for subsequent practice developed by the WTO Appellate Body in *Japan Alcoholic Beverages*. By inference, the Respondents submit that the *NAFTA* parties' Article 1128 submissions in this case are an attempt by the *NAFTA* parties to constitute an agreement or subsequent practice that did not exist prior to this litigation. However, unlike the standard applied in *Japan Alcoholic Beverages*, the *Cargill* standard, to which this court is bound, does not emphasize the need for the *NAFTA* parties to repeat their submissions before other *NAFTA* tribunals to the same degree.

[193] As discussed, the Respondents argue that the *NAFTA* parties' submissions do not rise to the level of an agreement or a subsequent practice because the Applicant's evidence is not objective evidence of Mexico's practice, but, rather, a partisan submission made in the course of adversarial litigation, and even if the submissions could be considered as objective evidence, the legal submissions are "at best" a single example of the parties shared view on Articles 1119 and 1121.

[194] In *Mobil II*, at para. 160, the tribunal held that it may be pertinent that the *NAFTA* parties have submitted no formal notice of interpretation to the Free Trade Commission, but there may also be many reasons for the absence of such a decision. The tribunal did not believe that the subsequent practice of the *NAFTA* parties could be disregarded merely because it took a different form than a formal Note of Interpretation from the Free Trade Commission.

[195] In *Telefonica*, the tribunal did reject an assertion of subsequent practice in litigation as mere legal submissions, however, that position has been overshadowed by *Cattlemen*, *Mobil II* and *Bilcon.*

[196] The jurisprudence reveals that the *NAFTA* parties have made arguments before *NAFTA* tribunals about the importance of technical compliance with the procedural provisions of the *NAFTA* (Articles 1116-1121) many times. The Applicant submitted a chart of the jurisprudence titled "*NAFTA Parties' Submissions on Conditions for Consent under Article 1122*." While the title to the chart references submissions regarding Article 1122 in particular, the excerpts show that the *NAFTA* parties' arguments for strict procedural compliance in these cases often advanced beyond that provision. The chart does not illustrate Article 1119 or 1121 submissions specifically.

[197] Based on the record, it would appear that the *NAFTA* parties have never argued at any length that the fulfilment of Article 1121 is contingent upon strict adherence to the requirements of Article 1119, except for Canada's Article 1128 submissions in *Mondev*. The *Mondev* tribunal did not ultimately give effect to Canada's submissions.

[198] Nevertheless, the *NAFTA* parties have made broader arguments about the importance of strict adherence to the procedural requirements of the *NAFTA* Articles 1116-1121 generally, which includes Articles 1119 and 1121.

[199] Further, the *NAFTA* parties have made arguments before *NAFTA* tribunals about the importance of technical compliance with Article 1119 several times. Generally, these submissions have not been successful. In *Mondev*, the tribunal did not give effect to Canada's submissions as to the interdependency of Articles 1119 and 1121. In *ADF*, at paras. 136-138, the tribunal unanimously concluded that jurisdiction was not lost on the basis of technical non-compliance with Article 1119 because the claimant had not intended to inflict tactical surprise upon the respondent by failing to bring its claim in the proper form and the respondent had suffered no prejudice. On statutory construction, the tribunal stated at para. 133: "We see no logical necessity for interpreting the 'procedures set out in the [*NAFTA*]' as delimiting the detailed boundaries of the consent given by either the disputing Party or the disputing investor."

[200] Also included in these cases is *Chemtura* where, at paras. 102-105, the tribunal unanimously found that a party's failure to comply with the technical requirements of Article 1119 did not vitiate consent given under Article 1122 and the tribunal's jurisdiction was not lost on the basis of the technical breach. In that case, the defect in the notice was a failure by the respondent *NAFTA* party to plead an Article 1103 (most favoured nation) breach in the first notice of intent given to the responding party. The tribunal observed, at para. 102, that "*NAFTA* tribunals have interpreted these provisions rather broadly 'within the context of the objective of *NAFTA* in establishing investment dispute arbitration in the first place'" (quoting *Pope & Talbot*, at para. 26). The *Chemtura* tribunal also noted that the technical gaffe caused no prejudice to the respondent, which had had ample opportunity to state its position on the Article in issue in briefs and hearings.

[201] In the *B-Mex* case, which is factually similar to the present case, the tribunal considered whether consent to arbitration given under Articles 1121 and 1122 was conditioned upon the proper fulfilment of the requirements of Article 1119. The defect in the Article 1119 notice in *B-Mex*, as here, was a failure to plead the names of 31 additional claimants in the original notice of intent. The *NAFTA* parties made similar arguments before the *B-Mex* panel as they did before the panel in this case. Canada and the USA intervened and made submissions in support of a strict construction of Article 1119. The majority of the tribunal did not address the interveners' submissions. The *NAFTA* parties were not successful in their submissions on Article 1119 because the panel took the view that a strict technical approach to the language of the *NAFTA* should not outweigh practical considerations such as the cost of the arbitration and the fact that no prejudice was caused by the faulty notice. Further, the majority held, at para. 52, that it was not aware of any arbitral authority requiring any particular formulation for giving consent under Article 1121(1).

[202] Notably, the majority in *B-Mex* rejected the *NAFTA* parties' attempt to construe their past submissions about strict adherence to the procedural requirements of the *NAFTA* as submissions about the interpretation of Article 1119 in particular.

[203] In this case, Mexico, the USA and Canada rely on *Methanex* to support their strict construction of Article 1119; however, the *B-Mex* majority, at para. 113(b), explicitly rejected that the *NAFTA* parties made any submissions regarding the proper interpretation of Article 1119 in *Methanex*.

[204] In his partial dissent in *B-Mex*, Professor Vinuesa disagreed with the majority's interpretation of *ADF* and *Chemtura*. He distinguished those cases from *B-Mex* on the basis that a failure to identify a claimant in an Article 1119 notice of intent is more serious than a failure to identify a breached provision: *B-Mex,* Partial Dissenting Opinion of Professor Raul Vinuesa, at paras. 90-92.

[205] In summary, the *NAFTA* parties have made submissions about the importance of strict compliance with the procedural provisions of the *NAFTA* (Articles 1116-1121) many times, and they have also made submissions about the importance of compliance with Article 1119. However, they have made submissions about the interdependency of the Articles 1119 and 1121 only once (by Canada in *Mondev*) and were unsuccessful. At least one tribunal (*B-Mex*) has rejected the notion that the *NAFTA* parties' general historical submissions about strict

compliance with the procedural requirements of Articles 1116-1121 are sufficient to support a particular interpretation of Article 1119.

[206] Accepting the analysis in *Cattlemen*, *Mobil II* and *Bilcon* that legal submissions are likely capable of constituting subsequent practice, the standard for subsequent practice that is binding on this court comes from *Cargill*. There, the Court of Appeal defined subsequent practice under Article 31(3)(b) as "a clear, well-understood, agreed common position."

[207] It appears to be accepted among all the parties that the *NAFTA* parties share a common view on the interpretation of Articles 1119 and 1121 in this case. The Respondents do not point to any dissention between the *NAFTA* parties with respect to their interpretation of these provisions. The subsequent practice is, therefore, clear.

[208] Similarly, it is fair to say that the *NAFTA* parties' submissions on Article 1119 are well-understood. There is no dissention among the parties about what the *NAFTA* parties believe to constitute a subsequent practice.

[209] The Article 1128 submissions also appear to be agreed between the *NAFTA* parties. They present a united front.

[210] The Respondents argue that even if Mexico's submission can be considered as objective evidence, the legal submissions are but a single example of the parties having a shared view on the interdependency of Articles 1119 and 1121(3).

[211] The Respondents concede that *Cattlemen* and *Mobil II* have acknowledged that legal submissions can constitute subsequent practice, but they assert that these cases require that the Article 1128 submissions be the same not only before the Tribunal in this case, but also to have been the same as the submissions made in other cases. This "repetition" argument also appears in the *Japan Alcoholic Beverages* case, where the WTO Appellate Body opined, at para. 12, that "an isolated act is generally not sufficient to establish subsequent practice." Similarly, in *Mobil II*, in finding a subsequent practice to the contrary, the tribunal commented, at para. 158, that the approach at issue "has clearly been rejected by all three *NAFTA* parties in their practice subsequent to the adoption of the *NAFTA*."

[212] Whether the *NAFTA* parties have repeated their submissions on their interpretation of Article 1119 to meet the *Cargill* standard is not straightforward because the degree of repetition required to meet the threshold is unclear. So too is the specificity of the repeated arguments. The Respondents made no submission in this regard. The jurisprudence is unclear on whether the *NAFTA* parties are required to have made the exact same argument about strict procedural compliance with Article 1119 before other prior *NAFTA* tribunals. If this is the standard, then the *NAFTA* parties in this case would have to have argued before at least one other tribunal that strict compliance to the requirements of Article 1119 specifically is a prerequisite to consent given under Article 1121. Query whether it would be sufficient if the *NAFTA* parties made the exact same argument before a non-*NAFTA* tribunal, or if they made the same argument before a *NAFTA* tribunal with respect to different procedural provisions in the *NAFTA* (as they have done). Query whether the submissions made by the *NAFTA* parties in *B-Mex*, which pertained to

the interdependency of Articles 1191 and 1122 as opposed to Article 1121, as here, are sufficient to meet the threshold.

[213] Notwithstanding these questions, the jurisprudence indicates that the *NAFTA* parties have often been unsuccessful in persuading *NAFTA* tribunals that strict construction of procedural provisions is necessary to support consent to arbitration given under Articles 1121 and 1122: see *B-Mex, ADF* and *Chemtura*.

[214] *Mobil II* sets the timeline for subsequent practice as "subsequent to the adoption of the *NAFTA*", which sets a high bar for continuity of practice. In *B-Mex*, at para. 119, the majority rejected the *NAFTA* parties' submissions that there was *jurisprudence constante* to the effect that "all the preconditions and formalities under Articles 1118-1121 must be satisfied by the disputing investor in order to establish a disputing party's consent under Article 1122" because the majority was not persuaded that the decisions cited by the respondent formed a *jurisprudence constante.* The *B-Mex* majority also rejected the *NAFTA* parties' submission that prior arguments before other *NAFTA* tribunals for strict procedural compliance with Articles 1116-1121 necessarily included Articles 1119 and 1122, being the provisions at issue in *B-Mex*.

[215] The *B-Mex* majority seems to suggest that the bar for specificity of repetition of arguments is high. It implies that a general argument about a range of procedural provisions is not equal to a specific argument about the interpretation of a specific provision. In my view, this reasoning dovetails with the *Cargill* standard, which makes clear that at least a minimum standard of clarity is required for *NAFTA* party submissions to constitute a subsequent practice.

[216] I find there is a distinction to be made between the *NAFTA* parties' historical submissions, which can be paraphrased as: "consent under Article 1121 or 1122 is conditioned by strict compliance with the procedural requirements in Articles 1116 – 1121," and their submissions in this case, which are generally that "consent under Article 1121 is conditioned by strict compliance with the procedural requirements of Article 1119." The majority in *B-Mex* did not rely on *Cargill*, but nevertheless seemed to suggest that the former is not on par with the latter. In *Cargill* itself, the *NAFTA* parties' submissions on subsequent practice were rejected on the basis that they did not provide a specific enough agreement between the parties as to the only compensable damages being those suffered in the territory of the party where the investment is located (not losses suffered by the investor in its home business operation, even when those losses resulted from the breach): *Cargill*, at paras. 79-84.

[217] In my view, in this case, the *NAFTA* parties' submissions under Article 1128 do not meet the *Cargill* standard for subsequent practice. While *Cargill* does not emphasize repeat submissions before other tribunals, I nevertheless find that the submissions made by the *NAFTA* parties are insufficient to constitute a subsequent practice. Unlike in *Cattlemen*, *Bilcon* and *Mobil II*, where legal submissions were found to constitute subsequent practice, this is the first case in which the *NAFTA* parties have offered unanimous submissions on the interdependency of Articles 1119 and 1121 (with the exception of Canada's submissions in *Mondev*, where the tribunal did not give effect to those submissions). Further, generally speaking, a strict technical approach to the procedural provisions of the *NAFTA* was rejected in *ADF, Chemtura* and the majority decision in *B-Mex*. Those arguments pertained to the relationship between Articles 1119 and 1122, whereas it is Article 1121 that is at issue in this case. In my view, there is no

substantive difference between Articles 1121 and 1122 for the purpose of each such Article's relationship to Article 1119. The jurisprudence thus militates against a finding of subsequent practice. While the *NAFTA* parties do have a long history of arguing for strict adherence to procedural requirements, their track record of success is inconsistent.

[218] In para. 86 of *Mondev,* the tribunal found that a claim improperly brought under Article 1116 instead of Article 1117 did not defeat the arbitration, "provided there has been clear disclosure in the Article 1119 notice of intent of the substance of the claim, compliance with Article 1121 and no prejudice to the Respondent State or third parties." The tribunal then commented that "[i]nternational law does not place emphasis on merely formal considerations, nor does it require new proceedings to be commenced where a merely procedural defect is involved" (emphasis added).[12] Based on the jurisprudence and the submissions made before me, I find that the same sentiment applies here.

[219] Having found that the *NAFTA* parties' Article 1128 submissions do not constitute subsequent practice, I find that it was not a jurisdictional error for the Majority to treat the submissions as they did.

Disposition

[220] For the foregoing reasons, I find that the Applicant has not shown that the Tribunal was incorrect in its interpretation of Articles 1119 and 1121 or in its conclusion that it had jurisdiction over all of the Respondents, including the Additional Claimants, and the claims they advanced (with the exception of the claim by Operadora Pesa). I also find that the Tribunal made no jurisdictional error in its treatment of the submissions of the USA and Canada pursuant to Article 1128. The application is therefore dismissed.

Costs

[221] The parties have agreed that the successful party on this application shall be entitled to costs of CAD$100,000. Accordingly, I fix the costs at CAD$100,000, inclusive of disbursements and HST, payable to the Respondents by the Applicant.

Concluding Remarks

[222] I am grateful to all counsel for their thoughtful submissions in this matter and their able assistance to the court.

[12] In support of this proposition, the tribunal cited *Mavrommatis Palestine Concessions (Jurisdiction)*, PCIJ Ser. A No. 2 (1934) at p. 34 and *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Yugoslavia) (Preliminary Objections)*, ICJ Reports 1996, p. 595 at pp. 613-614 / para. 26.

Dietrich J.

Released: July 20, 2020

Appendix A

NAFTA Provisions

The following *NAFTA* provisions are relevant to this application:

Article 102: Objectives

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:

(a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;

(b) promote conditions of fair competition in the free trade area;

(c) increase substantially investment opportunities in the territories of the Parties;

(d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;

(e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and

(f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

Section B - Settlement of Disputes between a Party and an Investor of Another Party

Article 1115: Purpose

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal.

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the investor has incurred loss or damage by reason of, or arising out of, that breach.

2. 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.

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 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.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

4. An investment may not make a claim under this Section.

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 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 1123: Number of Arbitrators and Method of Appointment

Except in respect of a Tribunal established under Article 1126, and unless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

Article 1124: Constitution of a Tribunal When a Party Fails to Appoint an Arbitrator or the Disputing Parties Are Unable to Agree on a Presiding Arbitrator

1. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

2. If a Tribunal, other than a Tribunal established under Article 1126, has not been constituted within 90 days from the date that a claim is submitted to arbitration, the Secretary-General, on the request of either disputing party, shall appoint, in his discretion, the arbitrator or arbitrators not yet appointed, except that the presiding arbitrator shall be appointed in accordance with paragraph 3.

3. The Secretary-General shall appoint the presiding arbitrator from the roster of presiding arbitrators referred to in paragraph 4, provided that the presiding arbitrator shall not be a national of the disputing Party or a national of the Party of the disputing investor. In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties.

4. On the date of entry into force of this Agreement, the Parties shall establish, and thereafter maintain, a roster of 45 presiding arbitrators meeting the qualifications of the Convention and rules referred to in Article 1120 and experienced in international law and investment matters. The roster members shall be appointed by consensus and without regard to nationality.

Article 1125: Agreement to Appointment of Arbitrators

For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator based on Article 1124(3) or on a ground other than nationality:

(a) the disputing Party agrees to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a disputing investor referred to in Article 1116 may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the disputing investor agrees in writing to the appointment of each individual member of the Tribunal; and

(c) a disputing investor referred to in Article 1117(1) may submit a claim to arbitration, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only

on condition that the disputing investor and the enterprise agree in writing to the appointment of each individual member of the Tribunal.

Article 1126: Consolidation

1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules and shall conduct its proceedings in accordance with those Rules, except as modified by this Section.

2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims; or

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General to establish a Tribunal and shall specify in the request:

(a) the name of the disputing Party or disputing investors against which the order is sought;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

4. The disputing party shall deliver to the disputing Party or disputing investors against which the order is sought a copy of the request.

5. Within 60 days of receipt of the request, the Secretary-General shall establish a Tribunal comprising three arbitrators. The Secretary-General shall appoint the presiding arbitrator from the roster referred to in Article 1124(4). In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint, from the ICSID Panel of Arbitrators, a presiding arbitrator who is not a national of any of the Parties. The Secretary-General shall appoint the two other members from the roster referred to in Article 1124(4), and to the extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that Panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of a Party of the disputing investors.

6. Where a Tribunal has been established under this Article, a disputing investor that has submitted a claim to arbitration under Article 1116 or 1117 and that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:

(a) the name and address of the disputing investor;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

7. A disputing investor referred to in paragraph 6 shall deliver a copy of its request to the disputing parties named in a request made under paragraph 3.

8. A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.

9. On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 2, may order that the proceedings of a Tribunal established under Article 1120 be stayed, unless the latter Tribunal has already adjourned its proceedings.

10. A disputing Party shall deliver to the Secretariat, within 15 days of receipt by the disputing Party, a copy of:

(a) a request for arbitration made under paragraph (1) of Article 36 of the ICSID Convention;

(b) a notice of arbitration made under Article 2 of Schedule C of the ICSID Additional Facility Rules; or

(c) a notice of arbitration given under the UNCITRAL Arbitration Rules.

11. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 3:

(a) within 15 days of receipt of the request, in the case of a request made by a disputing investor;

(b) within 15 days of making the request, in the case of a request made by the disputing Party.

12. A disputing Party shall deliver to the Secretariat a copy of a request made under paragraph 6 within 15 days of receipt of the request.

13. The Secretariat shall maintain a public register of the documents referred to in paragraphs 10, 11 and 12.

Article 1127: Notice

A disputing Party shall deliver to the other Parties:

(a) written notice of a claim that has been submitted to arbitration no later than 30 days after the date that the claim is submitted; and

(b) copies of all pleadings filed in the arbitration.

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 1129: Documents

1. A Party shall be entitled to receive from the disputing Party, at the cost of the requesting Party a copy of:

(a) the evidence that has been tendered to the Tribunal; and

(b) the written argument of the disputing parties.

2. A Party receiving information pursuant to paragraph 1 shall treat the information as if it were a disputing Party.

Article 1130: Place of Arbitration

Unless the disputing parties agree otherwise, a Tribunal shall hold an arbitration in the territory of a Party that is a party to the New York Convention, selected in accordance with:

(a) the ICSID Additional Facility Rules if the arbitration is under those Rules or the ICSID Convention; or

(b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules.

Article 1131: Governing Law

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

Article 1132: Interpretation of Annexes

1. Where a disputing Party asserts as a defense that the measure alleged to be a breach is within the scope of a reservation or exception set out in Annex I, Annex II, Annex III or Annex IV, on request of the disputing Party, the Tribunal shall request the interpretation of the Commission on the issue. The Commission, within 60 days of delivery of the request, shall submit in writing its interpretation to the Tribunal.

2. Further to Article 1131(2), a Commission interpretation submitted under paragraph 1 shall be binding on the Tribunal. If the Commission fails to submit an interpretation within 60 days, the Tribunal shall decide the issue.

Article 1133: Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a Tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 1134: Interim Measures of Protection

A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117. For purposes of this paragraph, an order includes a recommendation.

Article 1135: Final Award

1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest;

(b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is made under Article 1117(1):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A Tribunal may not order a Party to pay punitive damages.

Article 1136: Finality and Enforcement of an Award

1. An award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

2. Subject to paragraph 3 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

3. A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules or the UNCITRAL Arbitration Rules

(i) three months have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or

(ii) a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

4. Each Party shall provide for the enforcement of an award in its territory.

5. If a disputing Party fails to abide by or comply with a final award, the Commission, on delivery of a request by a Party whose investor was a party to the arbitration, shall establish a panel under Article 2008 (Request for an Arbitral Panel). The requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and

(b) a recommendation that the Party abide by or comply with the final award.

6. A disputing investor may seek enforcement of an arbitration award under the ICSID Convention, the New York Convention or the InterAmerican Convention regardless of whether proceedings have been taken under paragraph 5.

7. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention and Article I of the InterAmerican Convention.

CITATION: The United Mexican States v. Burr, 2020 ONSC 2376
COURT FILE NO.: CV-19-625689-00CL
DATE: 20200720

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE UNITED MEXICAN STATES

Applicant

– and –

GORDON G. BURR, ERIN J. BURR, JOHN CONLEY, NEIL AYERVAIS, DEANA ATHONE, 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 OF CANADA

Interveners

REASONS FOR JUDGMENT

Dietrich J.

Released: July 20, 2020