

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF
THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES

BETWEEN:

MERRILL & RING FORESTRY L.P.

CLAIMANT

AND

THE GOVERNMENT OF CANADA

RESPONDENT

(ICSID Administered Case)

DECISION ON A MOTION TO ADD A NEW PARTY

1. The Tribunal is called upon to decide on a Motion submitted by the Claimant requesting the addition of Georgia Basin Holding L.P. (“Georgia Basin” or “Georgia”) as a party to this arbitration and the amendment of the Statement of Claim to such effect pursuant to Article 20 of the UNCITRAL Arbitration Rules. The Motion is dated December 12, 2007 and both parties have had the occasion to submit comments in writing.
2. The Claimant explains that Georgia Basin is a Limited Partnership constituted under the laws of the State of Washington and that it owns certain timberlands in the Province of British Columbia. Merrill & Ring, the Claimant in this case, had a right to harvest timber from those properties but as from 2007 that right reverted to Georgia Basin, which also intends to harvest timber for export from those lands in the future.
3. The Claimant submits that the measures concerned and the facts relied on by Merrill & Ring in this arbitration are the same as those that could be invoked by Georgia Basin in a separate NAFTA claim. In permitting an amendment to the Statement of Claim to add such a new party, the Tribunal would avoid the needless constitution of a new NAFTA arbitration tribunal and the filing of a motion for consolidation under NAFTA Article 1126.

The Claimant’s arguments in support of the Motion

4. The Claimant asserts that the Amendment requested falls within the scope of the arbitration agreement as required under Article 20 of the UNCITRAL Arbitration Rules. Such agreement is in the instant case Section B of NAFTA Chapter 11. In particular, the Claimant asserts that Georgia Basin satisfies all the

requirements in Chapter 11 to bring a claim: it is an investor of a Party who owns real estate and other property for the purpose of an economic benefit or other business purposes (Article 1139), Canada has allegedly breached its obligations just as it did in respect of Merrill & Ring (Article 1116(1)), and the claim is brought within the period of three years of first acquiring knowledge of the breach and knowledge of loss or damage (Article 1116(2)).

5. Moreover, the Claimant argues that the claim raises no issues beyond those the Tribunal decided to join to the merits in this arbitration, six months have elapsed since the pertinent events (Article 1120), and Georgia Basin consents to this arbitration and waives its rights to pursue domestic remedies (Article 1121(1)(a) and (b)).
6. It is further argued that there has been no delay in the application because the motion has been made shortly after counsel discovered that Georgia Basin owned a small portion of the overall timber harvest subject to this claim, and the acceptance of the Motion would not upset the timelines set by the Tribunal.
7. Because the claim in question does not raise new issues and the same measures are challenged, there cannot be any prejudice to Canada. To the contrary, the addition would help the efficient resolution of the dispute, avoiding a different NAFTA claim and questions of consolidation under Article 1126(2), all of which would result in considerable delay.
8. The Claimant invokes the *Ethyl* decision to the effect that technical mistakes may be corrected by amendment, without the need to file a new claim, as “a dismissal of the claim at this juncture would disserve, rather than serve, the object and purpose of NAFTA” (*Ethyl Corporation v. Canada*, Award on Jurisdiction, June 24, 1998, para. 85). Also *Mondev* allowed for the correction of

a minor technical failure (*Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, para. 44). Reference to the *SPP* ICSID decision is also made as an example of the parties' agreement to add as a new party the initial claimant's parent company by amendment of the claim (*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award, May 20, 1992).

The Respondent's arguments opposing the Motion

9. The Respondent opposes the Motion to Add a New Party because it does not meet the test of Article 20 of the UNCITRAL Arbitration Rules. Georgia Basin never applied for an export permit under Notice 102, the main measure discussed in this arbitration, nor was it ever refused one. It follows, it is said, that any amendment to the Statement of Claim on this basis would fall beyond the scope of this arbitration. The Respondent further asserts that the Claimant has known of Georgia's existence at all relevant times and there is no justification for the delay in bringing the Motion.
10. The Respondent also argues that an acceptance of the Motion would cause Canada substantial prejudice by omitting express safeguards of NAFTA, introducing a vague and speculative claim, doubling the amount of damages claimed and potentially causing substantial procedural disruption. Chapter 11 is available if Georgia wishes to pursue the normal course for its claim.
11. In the Respondent's view, the Claimant has failed to demonstrate that Georgia has a stand-alone claim or any claim within the scope of the arbitration clause. In particular, it is argued that it has not been established that Georgia exported logs from its lands or that the harvest rights invoked relate to exported logs, just as there is no justification of any loss or damages resulting from a breach of the

NAFTA, and even less so of a claim of US\$ 25 Million. It is contended that Notice 102 never applied to Georgia and the company was never denied a permit by Canada under such Notice. In fact, it never even applied for an export permit as explained in an affidavit of the Deputy Director of the Export Controls Division at the Department of Foreign Affairs and International Trade.

12. The Respondent explains that the arbitration agreement in this case is NAFTA Chapter 11 and is governed by the specific clauses of Articles 1101 and 1116. Pursuant to the former, the impugned measure, Notice 102, must relate to Georgia Basin and under the latter it has to be demonstrated that there has been loss or damage incurred by reason of a breach of Canada's obligations. None of this has been addressed and the claim is thus speculative and hypothetical, thus failing to make out a *prima facie* claim under Article 1116. Moreover, Article 1116 does not apply to future breaches.
13. Because Georgia Basin is an affiliate of Merrill & Ring, the Respondent maintains that the Claimant knew about Georgia at all relevant times and there is thus an inappropriate delay in submitting the Motion under Article 20 of the UNCITRAL Arbitration Rules, caused by the Claimant's own negligence.
14. Canada also asserts that it would suffer substantial prejudice if the Motion is accepted, particularly because Georgia would avoid compliance with NAFTA Articles 1119 and 1120 and thus circumvent procedural safeguards concerning appropriate notice and a cooling-off period. Such preconditions are not mere technical violations, as those envisaged in *Ethyl* and *Mondev* (see references above), but entail the specific satisfaction of all the requirements of Articles 1118-1121 as held in *Methanex Corp. v. United States*, (First Partial Award, August 7, 2002, para. 120).

15. An entirely new claim would thus be introduced outside the scope of the arbitration clause and characterized by the serious deficiencies noted. Being outside the scope of Chapter 11, any such claim would not qualify for consolidation under NAFTA Article 1126. If there is any merit to such a claim it would have to be pursued in the usual fashion. The Respondent accordingly requests to dismiss the Motion with costs.

The Tribunal's Findings

16. The Tribunal notes that both parties agree that the arbitration agreement in this case is NAFTA Chapter 11, but they hold entirely opposite views about whether the test of Article 20 of the UNCITRAL Arbitration Rules has been met and as to whether the specific conditions set out in NAFTA Articles 1101 and 1116 have been satisfied.
17. While, at first sight, it appears that Article 20 of the UNCITRAL Arbitration Rules facilitates the motion of a party to amend or supplement a Statement of Claim or Defence (by indicating first that a party may do so unless the arbitral tribunal considers it inappropriate in the light of certain standards, and only in the second sentence referring to the prohibition against introducing an amendment if the amended claim falls outside the scope of the arbitration clause), the proper interpretation of the Article leads in the opposite direction.
18. This is because the Article contains an overall and absolute prohibition against introducing amendments which go beyond the scope of the arbitration clause. This is what the literature has considered a *prima facie* "absolute limitation" (David D. Caron, Matti Pellonpää and Lee M. Caplan, *THE UNCITRAL ARBITRATION RULES: A COMMENTARY* (Oxford University Press, 2006), 468). It is only if the Tribunal is satisfied that no such result will ensue that it can then

proceed to the second step, that is to determine whether the standards set out in the Article have been complied with and do not bar the approval of the motion. These standards envisage the delay in making the pertinent request, prejudice to the other party or any other circumstances. Only after the Tribunal is satisfied that the standards have been met will it be in a position to allow the requested amendment.

19. The Tribunal must accordingly begin by examining whether the amendment requested by the Claimant's Motion to add a new party is compatible with the scope of the arbitration clause, i.e., do the impugned measures relate to Georgia Basin (Article 1101), and are there credible allegations that it has been damaged by reason of alleged breaches of Section A (Article 1116).
20. As to these questions, the Tribunal notes that there are arguments on each side that, at least at first sight, appear to support their respective views. To the extent that the land acquired by Georgia Basin is related to an export business, the possibility that such business has allegedly been affected by given measures adopted by the Respondent could result in a claim that the value of the land has been equally affected. On the other hand, however, the allegation that Georgia Basin, as explained by the Respondent in the affidavit noted above, has not been an exporter and has made no application under Notice 102, could be taken to mean that Georgia Basin intends to claim about the future effects that measures in force could have on potential exports of timber from such lands that it might seek to make in the future.
21. Whether a measure can be said to relate to an investor by reason only of an effect which would arise from that investor's possible behaviour in the future is not an easy question. But even if, *arguendo*, the Tribunal were to accept that

Georgia Basin's claim as pleaded in the Draft Amended Statement of Claim falls within the scope of the arbitration agreement, there is still the need to examine whether this is a proper case for the exercise of our discretion under Article 20 of the UNCITRAL Rules.

22. As to this, we deal first with the nature of the two claims which are proposed to be advanced together. While the parties do not dispute that Georgia Basin owns forest lands in the Province of British Columbia, there is disagreement about whether the nature of the amended claim envisaged in the Motion is identical to that of the original claim by Merrill & Ring, as argued by the Claimant, or if it is essentially different, as the Respondent believes.
23. On this point, we are inclined to see as many differences as we see similarities, not least because the jurisdictional question of whether Notice 102 "relates to" Georgia Basin (that would inevitably arise if the amendment were allowed) is not raised in the instant case by the claim of Merrill & Ring. The same holds true of the determination of who is to be considered an exporter. And while the Claimant is correct in arguing that Article 1116 does not require actual proof of loss or damage arising from the claimed breach (a matter which belongs to the merits), and it suffices that a credible allegation to this effect be made, the damage claimed would nevertheless have to be specific enough to make a determination of the amount of damage feasible.
24. Moreover, having regard to the new issues that emerge from the requested Amendment, it is not evident that the original and the new claim have enough questions of "law or fact" in common as would allow one to conclude, in the context of this Motion, that the requirements for consolidation under NAFTA

Article 1126 (2) would be satisfied and thus that the requested amendment would clearly serve the “fair and efficient resolutions of the claims”.

25. Turning next to the timeliness of the proposed amendment, the Tribunal does not question Claimant’s counsel’s assertion that the Motion was submitted shortly after he found out about the interests of Georgia Basin in the matter of this claim. However, this does not detract from Respondent’s contention that Georgia Basin’s claim cannot be a newly discovered fact, having regard to the two companies’ corporate affiliation. This situation required further explanation.
26. Prejudice is another element the Tribunal needs to examine under Article 20. Canada’s assertion that granting the Motion would cause substantial prejudice is based on two NAFTA requirements. The first is that under Article 1119 the Respondent has to be put on notice of a claim before proceedings are commenced. The second is the related cooling-off period, which is designed to facilitate a resolution of the matter concerned as mandated under Article 1120. In addition, Canada believes that significant procedural delays would ensue as a result of an acceptance of the Motion.
27. The Tribunal notes that the provisions of NAFTA Articles 1119 and 1120, like other related provisions, contain specific requirements as to the dispute settlement arrangements to be followed. Some tribunals have taken the view that this kind of requirement is essentially procedural and can thus be subject to remedy in case of defects in their compliance so as to avoid the delays that would ensue from reintroducing a claim or bringing a new claim (*Western NIS Enterprise Fund v. Ukraine*, ICSID Case No. ARB/04/2, Order of March 16, 2006, paras. 4-7; *SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13, Decision of the Tribunal on

Objections to Jurisdiction, August 6, 2003, para. 184). Other tribunals, however, have held it to be a serious jurisdictional matter (*Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on Jurisdiction, August 2, 2004, para. 88) or have discussed it in the light of admissibility (*Antoine Goetz and others v. Republic of Burundi*, ICSID Case No. ARB/95/3, Award, February 10, 1999, paras. 90-93). One tribunal has pointed out that if these requirements are considered a remediable procedural question, this would encourage investors to ignore them at their discretion (*Generation Ukraine Inc. v. Ukraine*, ICSID Case No. ARB/00/9, Award, September 16, 2003, para. 14.3).

28. In the specific context of NAFTA, as argued by the Claimant, both *Ethyl (cit., paras. 85, 95)* and *Mondev (cit., para. 44)* have followed the first approach - considering that minor technical failures to comply with such requirements can be corrected for the sake of efficiency and the avoidance of multiple proceedings to decide a dispute which is, in substance, within the scope of Chapter 11. The *Methanex* tribunal, however, as the Respondent pointed out, was of the view that consent to arbitration under NAFTA requires a claimant to satisfy not only Articles 1101 and 1116 or 1117, but also that “all pre-conditions and formalities required under Articles 1118-1121 are satisfied” (*cit., para. 120*). Only then will the consent to arbitration under Article 1122 be perfected.
29. The Tribunal has no doubt about the importance of the safeguards noted and finds that they cannot be regarded as merely procedural niceties. They perform a substantial function which, if not complied with, would deprive the Respondent of the right to be informed beforehand of the grievances against its measures and from pursuing any attempt to defuse the claim announced. This would be hardly

compatible with the requirements of good faith under international law and might even have an adverse effect on the right of the Respondent to a proper defence.

30. Thus, even if it were to be concluded that Merrill & Ring's and Georgia Basin's claims are similar, the compliance with the above mentioned safeguards would still need to be satisfied. This would take a number of months. If these proceedings were to be delayed by waiting for such compliance there would indeed be a serious procedural prejudice. At that point consolidation would not serve the efficient resolution of the claims as the present proceedings will be much advanced.

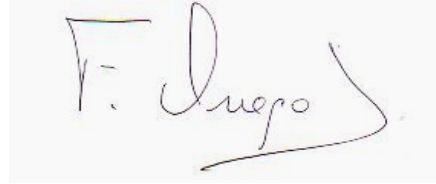
31. There is, lastly, one other consideration that relates to the "any other circumstances" that Article 20 offers as a guideline to grant or deny a Motion for Amendment. This is the fact that, in the circumstances of this case, it does not appear that the claim by Georgia Basin is just an amendment of the original claim by Merrill & Ring. Rather, it entails the assertion of an entirely new claim by an entirely new claimant even if such a claim were considered similar in nature to that already before us. This is an added reason why such a new claim needs to comply with the requirements and safeguards of NAFTA Chapter 11. The notion of an amended statement of claim is narrower than that involved in this Motion which makes the Motion before us dissimilar to the minor technical failures that other NAFTA tribunals have considered.

Decision

32. In the light of the above considerations the Tribunal considers it inappropriate to allow the Amendment of the Statement of Claim requested.

33. Costs are reserved.

For the Tribunal,

A handwritten signature in black ink, appearing to read "F. Orrego". The signature is written in a cursive style with a long, sweeping underline.

Francisco Orrego Vicuña
Presiding Arbitrator

January 31, 2008