

June 18, 2001

VIA FACSIMILE

Ms. Gabriela Alvarez-Avila
Secretary of the Tribunal
International Centre for Settlement
of Investment Disputes
1818 H Street, N.W.
Room No.: MC12-408
Washington, D.C. 20433

Re: Waste Management, Inc. v. United Mexican States
(ICSID Case No. ARB(AF)/00/3)

Dear Ms. Alvarez-Avila:

As allowed by the Tribunal at the June 8, 2001 Organizational Meeting, Claimant Waste Management, Inc. ("Claimant") hereby submits its observations on the question of venue of this arbitration. Venue is to be established under Article 1130 of the North American Free Trade Agreement ("NAFTA") and Chapter IV of the ICSID Arbitration (Additional Facility) Rules ("Additional Facility Rules"). For reasons set forth below, the Tribunal's decision on venue should be guided by three primary considerations: (1) the neutrality of the host State, (2) the suitability of the host State's local law on arbitral procedure, and (3) cost and convenience factors. Claimant submits that all three considerations favor Washington, D.C. as the place of arbitration for this case.

Contrary to the contentions expressed by Respondent's counsel during the Organizational Meeting, Canada would provide no more neutral a forum than would Mexico because the Government of Canada has chosen to intercede on behalf of Mexico in Claimant's dispute with Respondent. Canada's lack of neutrality - an important consideration by itself - becomes a paramount concern when viewed in combination with the current confusion regarding Canada's laws on arbitral procedure. The dangers posed by combining a non-neutral host State with domestic laws that allow for excessive interference with the arbitral process have been aptly demonstrated by Mexico's ongoing judicial challenge to the award issued in *Metalclad v. United Mexican States*, ICSID Case No. ARB (AF)/97/1 ("*Metalclad*").

In contrast, selecting a place of arbitration within the United States of America presents none of these problems. The United States is the only NAFTA Party that has remained neutral in this arbitration. In addition, by designating the ICSID World Bank headquarters in Washington, D.C. as the seat of the arbitration, any other concerns about neutrality are eliminated. Similarly, the suitability of the laws on arbitration in the United States, at both the federal and state levels, are beyond serious challenge. Finally, ICSID's Washington, D.C. facilities would provide the most cost efficient and convenient location for this arbitration. Each of these points is discussed in greater detail below.

Positions of the Parties on Venue.

Claimant always has proposed and continues to propose Washington, D.C. During the June 8, 2001 Organizational Meeting, Mexico initially proposed Canada as the appropriate place of arbitration, ostensibly because it is a neutral forum. Asked by the President of the Tribunal to name a specific city in Canada for consideration, Respondent's counsel suggested Ottawa.

Claimant's counsel responded that Canada had already formally interceded in this case and formally aligned itself with Mexico and against Claimant. As a result, Canada cannot be viewed as neutral in this dispute. Respondent's counsel then stated that either Canada or Mexico would be appropriate, presumably based on the suitability of local law, convenience and cost. During the July 16, 1999, Organizational Meeting held by the Tribunal in *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB (AF)/98/2 ("First Arbitration"), ICSID's World Bank headquarters facility in Washington, D.C. was designated as the venue of the arbitration. At that time, Mexico made no formal objection to the Tribunal's designation. Nothing has transpired in the intervening 23 months that renders Washington, D.C. any less suitable today as the place of arbitration for this dispute. To the contrary, the conduct of Mexico and Canada during Mexico's challenge to the *Metalclad* award demonstrates that Canada must now be considered an entirely inappropriate venue for this arbitration.

Requirements of NAFTA and the Additional Facility Rules.

NAFTA and the Additional Facility Rules govern the Tribunal's determination of the place of arbitration in this case. NAFTA provides that unless the disputing parties agree otherwise, the "Tribunal shall hold [the] 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 . . ." NAFTA Article 1130. The Additional Facility Rules allow the Arbitral Tribunal to select an appropriate place of arbitration after consultation with the parties and the Secretariat subject to the condition that the arbitration proceedings take place in a state that is a party to the New York Convention. See Additional Facility Rules Articles 20, 21.

Since the United States, Canada and Mexico are all parties to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention"), NAFTA and the Additional Facility Rules fail to provide any concrete guidelines for the selection of venue, other than that the Tribunal must limit its consideration to locations within

the United States, Mexico, or Canada.¹ As a result, prior Chapter Eleven Tribunals have turned to the UNCITRAL Notes on Organizing Arbitral Proceedings ("the UNCITRAL Notes") for guidance.² The UNCITRAL Notes were designed for use in all international arbitrations, not just those conducted under the UNCITRAL Arbitration Rules, and were intended to provide a non-binding, flexible tool for the Tribunal "to use . . . as it sees fit."³

The UNCITRAL Notes should not be considered an exhaustive listing of equally relevant considerations. Specifically, during the June 8 Organizational Meeting, both Parties explicitly stated that neutrality should be the foremost concern. Claimant hereby reaffirms the view that the Tribunal's consideration of neutrality should strongly outweigh its considerations of suitability of local law, cost or convenience.⁴

In the context of NAFTA, neutrality serves to prevent the sovereign from exercising undue influence over domestic courts.

The NAFTA Parties clearly established Section B of Chapter Eleven for the purpose of creating a system that would reinforce the substantive investment protections contained in Section A of that same Chapter. The system chosen to enforce these substantive rules and thereby to give them fuller meaning over time was not State-to-State diplomatic resolution, nor was it litigation in the domestic courts of the three NAFTA countries.⁵ Instead, the drafters of NAFTA chose to empower "private individuals to sue a State before an international tribunal."⁶ While this mechanism is not entirely self-contained under ICSID's Additional Facility Rules, the operation of the international tribunals was clearly intended to be a substitute for, not a prelude

¹ All three countries have signed the 1958 New York Convention: first, the United States on September 30, 1970; second, Mexico on April 14, 1971; and finally, Canada on May 12, 1986.

² See *Methanex Corp. v. United States*, Written Reasons for the Tribunal's Decision of 7th September 2000 on Place of Arbitration at 3 (December 21, 2000); *Ethyl Corp. v. Government of Canada*, Decision Regarding the Place of Arbitration at 3 (November 28, 1997).

³ See UNCITRAL Notes ¶ 1 ("The text, prepared with the particular view to international arbitrations, may be used whether or not the arbitration is administered by an arbitral institution."); ¶ 2.

⁴ Although the UNCITRAL Notes do not specifically address neutrality, the *Ethyl* tribunal found that "Article 16(1) of the UNCITRAL Rules easily accommodates this consideration [of the reality and the appearance of a neutral forum] as one of the 'circumstances of the arbitration.'" *Ethyl Corp.* at 9.

⁵ See Charles N. Brower & Lee A. Steven, *Who Then Should Judge?: Developing the International Rule of Law under NAFTA Chapter Eleven*, 2 *CHI. J. INT'L L.* 193, 195-96 (Spring 2001).

⁶ *Id.* at 196 ("Neither of [the] alternative options, . . . would serve the aims of Chapter Eleven as well as does investor-State arbitration. Investor confidence, for example, is not furthered by requiring domestic litigation.")

to, litigation in domestic courts. The election to use international arbitration over domestic court litigation was made specifically to address the imbalance of power inherent in any private Investor-State contest. *Id.* at 196. If that imbalance were not addressed, Chapter Eleven's investment protections would not work.

NAFTA recognizes that an Investor-State arbitration is very different than a State-to-State arbitration, and accordingly, they receive different procedural treatment. Specifically, under Rule 22 of the Model Rules of Procedure for NAFTA, a State-to-State arbitration under Chapter Twenty will always take place in the capital of the Respondent State. The fact that the Respondent State's capital is expressly designated as the place of arbitration under Chapter Twenty strongly suggests that in the absence of a similar provision in Chapter Eleven, the Respondent's capital is not intended to be the default place of arbitration. See *Ethyl Corp.* at 9.

While NAFTA does not state that a Chapter Eleven arbitration should never be hosted by the Respondent, general principles of neutrality suggests that the seat of the arbitration should not be located in the host State whose very measures form the basis for the private investor's claims without a careful and deliberate analysis. The very purpose of transferring investors' disputes from domestic courts to a transnational organization, such as ICSID or UNCITRAL, is to remove such disputes from the host State's courts. As Prof. Brower has explained:

Indeed, the fundamental reason that the great majority of modern investment protection treaties have opted for international adjudication is that domestic courts are often in fact, and, just as important, usually are perceived to be, biased against alien investors, especially when those courts must evaluate and pronounce upon acts of their own governments. Further, domestic courts often do not have the legal expertise and experience to free themselves from the confines of their own domestic regimes so as to give proper attention and respect to international law (which, along with NAFTA itself, expressly governs Chapter Eleven disputes). Another factor is that the interests of alien investors are more vulnerable than those of local investors because, as aliens, they are cut off from any direct participation in the host State's political process and are therefore in greater need of protection at the international level. An international dispute resolution mechanism best serves Chapter Eleven precisely because the NAFTA Parties are trying to build an international investment protection and promotion regime, a rule-based system that will be elaborated and enforced uniformly and consistently in each of the three NAFTA countries.

Id. Furthermore, if the host State's legal system itself is ever to be challenged for nonconformity with NAFTA and the international legal principles that it incorporates, the arbitration must be removed from that legal system, which can only be accomplished by siting the arbitration outside the Respondent's borders.⁷

⁷ For example, if an investor asserts NAFTA Chapter Eleven claims based on a deprivation of due process stemming from the investor's unsuccessful attempts to obtain just compensation in the domestic court system of Respondent, it would be manifestly unjust to require the investor to

Canada is not neutral in this dispute because it has already aligned itself with Mexico.

Because the decision on venue is constrained by NAFTA Article 1130, the appearance of absolute neutrality may be impossible if the non-Respondent NAFTA countries exercise their right to make submissions under NAFTA Article 1128.⁸ If a non-Respondent country's submission does nothing more than provide its interpretation of the relevant NAFTA articles involved in the case, that country will continue to be viewed as neutral even if its submission tends to favor one side of the dispute over the other.

Instead of providing such an interpretation, however, Canada's Submission in the First Arbitration, dated December 17, 1999, (copy attached) demonstrates that Canada is completely aligned with Mexico on certain issues. See Submission of the Government of Canada, *Waste Management, Inc. v. United Mexican States* at ¶ 2 (December 17, 1999). Canada's Submission essentially reiterated Mexico's arguments, making it clear that there was no room in Canada's interpretation for a procedural ruling in favor of Waste Management. *Id.* at ¶¶ 3-12. Not satisfied to stop there, the Canadian Submission then made a prospective statement of its position on a point that goes to the very heart of the jurisdictional phase of the current proceeding, namely, that "Failures to provide waivers in the form prescribed by Article 1121 cannot be cured *post facto*." Canadian Submission at ¶ 13. Accordingly, Canada is not neutral.

Canada's role in Mexico's *Metalclad* challenge demonstrates its willingness to actively intervene in cases in which it is not a party.

Mexico filed a challenge to the *Metalclad* award in the British Columbia Supreme Court on October 27, 2000. An amended petition was filed on November 14, 2000. The Government of Canada sought the right to intervene on December 22, 2000. The British Columbia Supreme Court judge assigned to the case was thus placed in the situation of being confronted by not one, but two sovereign governments demanding a full hearing and a thorough review of every aspect of the underlying dispute. At a hearing on January 31, 2001, Canada was granted the right to intervene, and the Court scheduled a full hearing on Mexico's challenge, which commenced on February 19, 2001.⁹

then defend any favorable award from the Tribunal in the very same court system that denied it justice in the first place.

⁸ NAFTA Article 1128 provides:

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

⁹ The Court issued its Reasons for Judgment on May 2, 2001, setting aside the Tribunal's decision on two out of the three NAFTA claims asserted by the investor. The case can be located at http://www.worldbank.org/icsid/cases/metalclad_reasons_for_judgment.pdf.

During the *Metalclad* arbitration proceeding, Canada had made an Article 1128 Submission to the Tribunal aligning itself firmly with Mexico, just as it had in Waste Management's First Arbitration. See Canadian Submission in *Metalclad* (July 28, 1999). Without question, Canada had the right to make such submissions to elaborate on the meaning it chooses to give to relevant NAFTA provisions. *Id.* It is another matter altogether for a sovereign to exert its influence once the dispute has moved into that same sovereign's national courts.

Canada's arguments in the judicial challenge of the *Metalclad* award tracked almost identically the arguments made by Mexico. Compare Outline of Argument of Intervenor Attorney General of Canada (December 22, 2000) with Petitioner's [Mexico's] Outline of Argument (November 14, 2000). Just like Mexico, Canada challenged almost every aspect of the Tribunal's analysis in the *Metalclad* arbitration.

Rather than simply weigh in on the proper interpretation to be given Chapter Eleven's substantive protections, Canada asserted arguments that questioned the fundamental role of the arbitrators. Canada challenged the Tribunal's interpretation of its own duties as defined by the Additional Facility Rules. See Intervenor's Outline at ¶¶ 77-78 (asserting that the Tribunal exceeded its jurisdiction when it rejected Mexico's allegations of bribery). Canada even questioned the Tribunal's findings of fact, challenging what were essentially credibility determinations the Tribunal was forced to make due to conflicting evidence presented by the Parties. See Intervenor's Outline at ¶¶ 74-76 (alleging that the Tribunal made "patently unreasonable findings by failing to have regard to relevant evidence").

In light of Canada's Submission in the First Proceeding, there can be little doubt that any award this Tribunal may make in favor of the Claimant will receive the same treatment from Canada that the *Metalclad* investor received.

The United States is the only neutral forum.

The United States is the only NAFTA Party that has not taken a position in Claimant's dispute with Mexico. The United States government refrained from exercising its rights pursuant to Article 1128 to make interpretive submissions in the First Arbitration. Thus, the United States remains neutral on both the jurisdictional and substantive issues presented by this case.¹⁰

¹⁰ Even if the United States were to make a submission on some aspect of this case, it is far from certain that such a submission would be favorable to Claimant. See Brower & Steven, *Who Then Should Judge?*, *supra*, Note 5, at 195 (explaining that both the United States and Canada have evinced distress "caused by the novel and disconcerting fact of having to live up to the same substantive and procedural guarantees they have required of their [bilateral investment treaty] partners)."

Use of ICSID's World Bank Headquarters guarantees neutrality.

Furthermore, any other concerns regarding the perception of neutrality are answered by the Tribunal availing itself of the opportunity to conduct the arbitration at the World Bank's headquarters. *Id.* As the *Methanex* Tribunal explained:

Whilst Washington, D.C. is of course the seat of federal government in the USA, it is also the seat of the World Bank and ICSID. The World Bank is an independent international organization with juridical personality and broad jurisdictional immunities and freedoms (Article VII of its Articles of Agreement); and ICSID similarly has international legal personality and benefits from a wide jurisdictional immunity (Articles 18-20 of the Convention on the Settlement of International Disputes between States and Nationals of Other States). The Tribunal considers that the requirements of perceived neutrality in this case will be satisfied by holding such hearings in Washington, D.C. at the seat of the World Bank, as distinct from the seat of the USA's federal government.

Id. at 15.

In summary, Claimant submits that neither Mexico nor Canada can qualify as neutral in appearance and neutral in fact. Venue for the arbitration should be designated within the borders of the United States as it is the only NAFTA Party that remains neutral with respect to the claims and the parties in this particular case. Of the sites in the United States – indeed, of the sites of any of the Parties to NAFTA – that could serve as a seat for this arbitration, ICSID's World Bank headquarters facility in Washington, D.C. provides the greatest degree of neutrality.

Considerations other than neutrality also favor Washington, D.C.

Although the Tribunal's consideration of an appropriate place of arbitration need go no farther than neutrality, the UNCITRAL Notes on Organizing Arbitral Proceedings provide additional guidance. Paragraph 22 of the UNCITRAL Notes provides as follows:

Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitration procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State and States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; and (e) location of the subject-matter in dispute and proximity of evidence.

Application of these factors to the facts of this case reveals that they decidedly favor Washington, D.C. over any location in Canada or Mexico. First, as to factor (a), there is far greater certainty in the laws on arbitral enforcement in the United States, at both the state and

federal levels, than in either Canada or Mexico. The United States possesses a body of state and federal laws on arbitration that is more highly developed, time-tested, and more supportive of arbitral decisions than that of Canada or Mexico.

Second, as to factor (c), Washington, D.C. is an easily accessible location for the arbitrators, the parties, and their counsel. Third, as to factor (d), arbitration proceedings may be held at ICSID's World Bank headquarters in Washington, D.C. at a much lower cost than comparable commercial locations in Canada or Mexico. Fourth, as to factor (e), ICSID's Additional Facility Rules 21(2) and 29 allow the Tribunal to arrange for a site inspection, or, with the agreement of the Parties, to arrange for an oral hearing to be conducted away from the seat of the arbitration. Finally, as to factor (b), all three NAFTA Parties have acceded to the 1958 New York Convention.

Claimant will now address these factors in greater detail.

Suitable procedures and standards exist for the proper review of arbitration awards in the United States.

Suitable procedures for review of a Chapter Eleven award are available in the United States under both federal law and the laws of Washington, D.C.¹¹ The United States Arbitration Act, 9 U.S.C. §§ 1 *et seq.* (the "Federal Arbitration Act" or "FAA"), which integrates the New York Convention, clearly encompasses proceedings under NAFTA Chapter Eleven. Section 202 of the FAA applies the Convention to arbitration agreements and arbitral awards arising out of commercial legal relationships. ~~NAFTA Article 1136(7) specifically provides that a Chapter Eleven claim "shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the Convention."~~

In establishing the criteria for designating venue, NAFTA refers only to the 1958 New York Convention. See NAFTA Article 1130 ("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. . . .").¹² Any judicial review of an award that is to take place pursuant to NAFTA

¹¹ The United States is one of the leading centers of international commercial arbitration and is highly desirable specifically because its laws on arbitral procedure provide a level of certainty found in few other countries. Many more such arbitrations have been held in the United States than in Canada and Mexico combined. For example, during the year 2000 the United States was chosen as place of arbitration in 43 ICC International Court of Arbitration cases, while Canada and Mexico were chosen as places of arbitration in only 5 cases each. See *ICC International Court of Arbitration Bulletin*, Vol. 12/No. 1 - Spring 2001 at 10.

¹² Section 208 applies Chapter 1 of the FAA generally to "actions and proceedings brought under [Chapter 2] to the extent that [Chapter 1] is not in conflict with this chapter or the Convention as ratified by the United States." United States courts have held that the standards for vacating an award set forth in Chapter 1 of the FAA also apply to awards governed by the New York Convention and Chapter 2 of the FAA. See *Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15 (2d Cir. 1997) (upholding district court's authority to vacate a New York Convention award under Section 10 of Chapter 1 of the FAA).

Article 1136 will be undertaken in a manner consistent with the New York Convention. The fact that the New York Convention speaks in terms of recognition and enforcement of arbitral awards does not mean that it provides *no* guidance for courts to review awards. In the United States, such guidance is set forth in the FAA. A Chapter Eleven award made in Washington, D.C. would be covered by Chapters 2 and 3 of the Federal Arbitration Act (and residually by Chapter 1 in either case), as well as by Chapter 43 of the District of Columbia Uniform Arbitration Act.¹³

Accordingly, there is no merit to any argument that appropriate standards of review are not available in the United States simply because the United States has not adopted the UNCITRAL Model Law. First, NAFTA makes no reference to the UNCITRAL Model Law. Second, the UNCITRAL Model Law is not the standard among nations that are the leading arbitration centers for international commercial disputes. In fact, the Model Law is generally recognized as serving primarily as a model for "countries which have little tradition in the field of international commercial arbitration." Filip de Ly, *The Place of Arbitration in the Conflict of Law of International Commercial Arbitration: An Exercise in Arbitration Planning*, 12 J. INT'L L. BUS. 48, 49 (1991) (U.S. Appendix, Exhibit 11).¹⁴

The standard of review in Canada is uncertain.

In contrast to the laws of the United States, Canada's laws on arbitral procedure are not suitable.¹⁵ Despite the adoption of modern laws on arbitration, Canadian courts have responded inconsistently, with some judges adhering to the old strict constructionist approach, and others following a more policy-oriented and pragmatic approach.¹⁶

¹³ The standards for vacating an arbitral award under Washington, D.C.'s Uniform Arbitration Act are essentially the same as those contained in the FAA. See D.C. Code § 16-4311 (1999).

¹⁴ To date, no decision in a judicial proceeding to review a Chapter Eleven award has been issued in either the United States or Mexico. The one award that has been subjected to review in a Canadian court has exposed uncertainty in the domestic law of Canada and the Government of Canada's enmity toward the Chapter Eleven process.

¹⁵ Prior to 1986, Canadian arbitration law and practice were based on the English Arbitration Act of 1889. Following the model of the English legislation, Canadian courts precluded arbitration on certain legal issues and closely supervised the arbitration process. See Cecil O. S. Branson, *The Enforcement of International Commercial Arbitration Agreements in Canada*, 16 Arb. Int'l 19, 19 (2000). Canadian arbitration law has advanced since the late 1980s, when Ontario and other Canadian provinces passed legislation adopting the 1958 New York Convention and later enacted legislation based on the UNCITRAL Model Law.

Ironically, in the instances in which the Canadian courts have displayed the most respect for the arbitral process, they have often turned to the U.S. Supreme Court for needed authority. See, e.g., *Quinette Coal Ltd. v. Nippon Steel Corp.*, [1991] 1 W.W.R. 219, 229 (B.C.C.A.) (Gibbs, J.A.) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)).

¹⁶ *Id.* at 52.

Mexico's judicial challenge of the *Metalclad* award demonstrates the unsettled nature of Canadian law on judicial review of arbitral awards. In that case, Petitioner Mexico and Intervenor Canada introduced significant questions regarding the proper standard of review to be applied in the review of a Chapter Eleven award. See Petitioner's Outline at ¶¶ 155-237; Intervenor's Outline at ¶¶ 17-30. Furthermore, the question of the standard of review to be applied in challenges brought in Canada, if settled at all by the British Columbia Court's ruling, may now be back in dispute because we understand that Mexico may appeal the Court's decision. This uncertainty will not be resolved for some time.

Although the British Columbia Court stated in its opinion that it was applying the more deferential standard of review urged by the investor, there is little evidence that the Canadian law provides an adequate standard of review. Rather than granting the Tribunal's decisions due deference, the Court essentially conducted an entirely new hearing on the merits of the case. That hearing involved approximately two full weeks of oral testimony and argument.¹⁷

In short, nothing could more clearly demonstrate the lack of predictability and certainty in Canada's laws on arbitral procedure than the Court's decision reversing the *Metalclad* award.¹⁸

The uncertainty in Canada's laws will continue to result in decisions that are irreconcilable with NAFTA and ICSID's Additional Facility Rules.

Mexico proceeded directly to the national courts of Canada to challenge the *Metalclad* award, thereby eliminating any possibility of having its concerns addressed by the Tribunal while it was still constituted.¹⁹ With one exception, the Court failed to appreciate the implications of

¹⁷ In many regards, the Court did not defer to the Tribunal as fact finder. See *Reasons for Judgment* at ¶¶ 2-18 (relating only the "undisputed facts" rather than the facts as determined by the Tribunal). Furthermore, the Court second-guessed the Tribunal's decisions on what were appropriate sources of reference when ascertaining the substantive meaning of Section A of Chapter Eleven's investment protections. See *id.* at ¶¶ 24-26 (disagreeing with the Tribunal's decision to look to the NAFTA preamble and modern bilateral investment treaties as appropriate sources of international law in defining the obligations owed under Article 1105). The Court second-guessed the Tribunal's decisions on what substantive meaning to give Section A of Chapter Eleven's investment protections. See *id.* at ¶¶ 57-76 (disagreeing with the Tribunal's determination of what obligations are owed under NAFTA Article 1105).

¹⁸ See Brower & Steven, *Who Then Should Judge?*, *supra*, Note 5, at 200 ("Canada's real source of unease is not with the substantive rule articulated in Article 1110, but with how the system itself operates. Stated plainly, Canada is apprehensive that the arbitral tribunals constituted pursuant to Chapter Eleven may not make the right decisions.")

¹⁹ The Additional Facility Rules provide for a means of review of a Chapter Eleven award rendered on the merits of the case within the arbitral process. See Additional Facility Rules Article 56 ("Interpretation of the Award"), Article 57 ("Correction of the Award"), and Article 58 ("Supplemental Decisions"). Pursuant to these Rules, either party can request the Tribunal to render an interpretation of the award, correct the award, or make supplementary decisions within

allowing this circumvention to occur. The Court had the ability to require Mexico to voice its disagreements to the Tribunal, so the Tribunal could have addressed the alleged deficiencies in the award in the first instance. Instead, the Court simply ruled that the Tribunal was derelict in its duties.

The Court then compounded the confusion by holding that unless the parties could reach agreement on how to calculate the now modified monetary award, "the matter is remitted to the Tribunal." *Reasons for Judgment* at ¶ 136. In effect, the Court ordered the Tribunal -- whose work on the case was concluded nine months earlier -- to remain "on call" to resolve disputes that the Court itself created by its interjection into the arbitral process. Thus, the confusion in Canadian law creates irreconcilable problems with the operation of ICSID's Additional Facility.²⁰

In sum, the *Metalclad* award exemplifies precisely why, at this time, the laws of Canada do not provide the requisite degree of certainty, consistency, and finality necessary to allow this arbitration to be placed within the borders of Canada.

Mexico's laws are not suitable.

Mexico's laws are equally inadequate.²¹ "Under the Mexican Federal Constitution, commercial law is a field within the exclusive jurisdiction of Congress. Thus, Commercial

45 days of the award. See Additional Facility Rules Articles 56-58. In response, the Tribunal may modify the award in response to the requesting Party's complaints or suggestions.

²⁰ First, ICSID's arbitrators are not generally subject to recall at the request of a national court years after this award was issued. Nevertheless, unless the Tribunal can be reconstituted, there is little incentive for the Respondent to promptly respond, and the investor could be left without the ability to obtain its judgment due to the absence of an available forum. Second, the Tribunal's ability to make corrections or interpretations, or otherwise modify the award, is lost or severely circumscribed by the decisions of the national court to remit only certain issues for re-consideration. For example, in *Metalclad* the Tribunal was denied the opportunity to explain to Mexico in greater detail the basis for its holdings regarding Articles 1105 and 1110 -- topics on which the Court expressed some confusion as to the grounds for the Tribunal's decision. Of course, if the Court had remitted these matters to the Tribunal, and the Tribunal had more fully explained its decision, the cycle of review would have simply started anew. Thus, a potentially interminable cycle of review would begin, terminating only when the previously successful investor finally succumbs to either frustration or lack of funds.

²¹ In large measure this is because Mexico has only recently begun to liberalize its restrictions on investment. As Prof. Brower explained:

Consistent with its BIT policy towards other developing countries, the United States lobbied hard to include Chapter 11's investment protections precisely because it wanted "to liberalize Mexican restrictions on investment and to lock in legal protections for [US] investors." US wariness of Mexico's investment climate was not without precedent. Experience with the Mexican expropriations

arbitration is subject primarily to federal law." Debra Herz, *Effects of International Arbitral Tribunals in National Courts*, 28 N.Y.U. J. Int'l L. & Pol. 217, 265-66 (1995-1996). "The Mexican Constitution states that treaties are part of the supreme law of Mexico and supersede conflicting provisions of Mexican domestic law. Mexico's ratification of [various conventions on commercial arbitration] has rendered [those conventions] supreme law and resulted in major changes to arbitration jurisprudence." *Id.* at 266. In fact, the reforms made to the Mexican Commercial Code, and more specifically the modifications to Articles 1415 through 1463 of the Code (published in the Official Gazette on July 22, 1993), establish nothing more than the framework to support arbitral procedure."²²

The "convenience and cost" of the parties argues for Washington, D.C.

Washington, D.C. is more convenient for the arbitration than Ottawa or any other place in Canada, and more convenient than Mexico. Convenience of the arbitrators, the parties and counsel to parties, including travel distances, favors Washington, D.C. as the place of arbitration. Washington is easily accessible and centrally located.

While both parties maintain counsel in Washington, D.C., only Respondent has NAFTA counsel in Canada. Because the Tribunal in the First Arbitration determined that Washington,

of foreign-owned agrarian and oil concerns in the early part of the twentieth century had prompted US Secretary of State Cordell Hull, in a now famous exchange of notes with the Mexican Minister of Foreign Affairs, to formulate the position that "no government is entitled to expropriate private property, for whatever purpose, without provision for prompt, adequate, and effective payment therefor." Prior to NAFTA, Mexico had long held (consistent with the practice of Latin American countries in general) that foreign investors did not enjoy investment protection beyond that afforded to its own nationals under domestic law.

Brower & Steven, Who Then Should Judge?, supra, Note 5, at 194 (footnotes omitted).

²² "[I]n light of the small number of cases being arbitrated in Mexico, the state of the commercial arbitration framework there today nearly exemplifies the familiar description, 'all dressed up but nowhere to go.'" Michael Tenenbaum, *International Arbitration of Trade Disputes in Mexico - The Arrival of the NAFTA and New Reforms to the Commercial Code*, J. Int'l Arb. (Mar. 1995) at 77-78. Further, "[t]he lack of an arbitration culture is the only explanation for countries like Mexico, which have adopted a modern law on arbitration but are still producing decisions that contravene the willingness of the parties to submit their disputes to arbitration. While it is true that these unfortunate decisions are normally overturned on appeal, the fact that they take place diminishes the efficiency of the procedure and confidence in arbitration in Mexico." Claudia Frutos-Peterson, *International Commercial Arbitration in Latin America: As Healthy as it Could Be? State Bar of Texas - Alternative Dispute Resolution Section - Introduction* (Feb. 27, 2001) <www.texasadr.org/inttarb.html>. "In addition, the fact that Latin American countries are now parties to the major international conventions on arbitration does not guarantee their 'most favorable' application." *Id.*

D.C., would serve as the seat of the arbitration, Claimant was never required to retain Canadian counsel to assist in this case. If the seat of the arbitration is now moved to Canada and the final Award were challenged by Respondent, Claimant would be forced to incur the additional costs of hiring Canadian counsel – while still retaining existing counsel because of their invaluable knowledge of the case. If, on the other hand, the arbitration were held in Washington, D.C., and the final Award were challenged, neither party would have to incur additional expenses for counsel.

Washington, D.C., is also a less costly forum for the arbitration than Canada and Mexico. ICSID's services are significantly less expensive and more easily obtained at ICSID's offices in the World Bank headquarters in Washington, D.C. than at commercial locations in Canada. Also, by holding the arbitration in Washington, D.C., it will not be necessary to incur travel and lodging expenses for ICSID staff.


If necessary, the Tribunal, with the agreement of the parties, may hold a hearing in another location such as Texas or Acapulco to reduce the need to transport witnesses. See ICSID Arbitration (Additional Facility) Rules Article 29 ("the Tribunal shall apply any agreement between the parties on procedural matters").

Conclusion

Claimant Waste Management, Inc. respectfully submits that considerations of neutrality and suitability of local law render Canada and Mexico inappropriate venues for this arbitration. When considered in conjunction with matters of convenience, the appropriate place of arbitration in the present case is ICSID's World Bank headquarters in Washington, D.C.

We would appreciate your forwarding this letter to the Tribunal.

Very truly yours,


Peter J. Moir
Counsel for Claimant
Waste Management, Inc.

cc: Mr. Hugo Perezcano Díaz

Attachment