

Submission of the Government of Canada

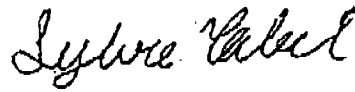
1. Pursuant to NAFTA Article 1128, the Government of Canada (Canada) makes this submission to address a question of interpretation of NAFTA Article 1121 ("Conditions Precedent to Submission of a Claim to Arbitration") raised in the arbitration between Waste Management, Inc. and the United Mexican States.
2. Canada agrees with the interpretation of Article 1121 presented by the United Mexican States.
3. NAFTA Article 1121 sets the "conditions precedent to" the right to submit a claim to arbitration. Pursuant to Article 1121 (1), (2) and (3), a disputing investor may submit a claim under Chapter 11 "only if" the conditions enumerated in the article are met: the investor must a) provide a consent to arbitration and b) submit with its Notice of Arbitration a waiver of its rights to initiate or continue domestic court proceedings or other dispute settlement procedures with respect to the measure that is alleged to be a breach of Chapter 11. The waiver should not be qualified except to the extent specifically provided for by Article 1121: "except for proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages...".
4. The NAFTA Parties made certain commitments towards investors of other NAFTA Parties allowing for special recourse to arbitration for breaches of Chapter 11. These commitments were made on the condition that domestic court proceedings or other dispute settlement procedures with respect to the same measure would not be initiated or continued if the Investor elected to pursue the matter under the NAFTA Chapter Eleven arbitration.
5. The same measure therefore cannot be the subject of both a Chapter 11 arbitration and domestic court proceedings. The investor has a clear choice and can choose one or the other -- but not both.
6. The purpose of NAFTA Article 1121 is to avoid a multiplication of proceedings, forum shopping and double jeopardy.
7. Waste Management, Inc. argues in its response to the counter-memorial filed by the United Mexican State that : " NAFTA Article 1121, however, merely requires a claimant to provide the NAFTA Party respondent with a written waiver, which may be used to

affect other legal proceedings. A waiver offers an affirmative defense by which a defendant may preclude a court action. To do so, the defendant - not the plaintiff - has the burden of presenting the waiver to an appropriate court."

8. Canada disagrees. The text of the NAFTA does not support this interpretation. Furthermore, such an interpretation contradicts the clear purpose of the provision which is to avoid duplication of recourse and cost. The investor has an obligation to waive its right to initiate or continue domestic legal proceedings concerning the measure which is alleged to be a breach of Chapter 11. It follows from a good faith interpretation of this obligation that the investor is required to act in conformity with the waiver that it is required to produce. In other words, the waiver must be made effective by the investor. Waste Management, Inc.'s interpretation would amount to giving the NAFTA provision a technical reading not consistent with the purpose of the provision.
9. Moreover, a Party may not necessarily be aware of all other proceedings against it, its many agencies or other emanations, or against sub-national governments within its territory. Therefore, it would be difficult from a practical perspective to require the NAFTA Party to ensure that the investor has respected its undertaking not to initiate or continue proceedings in domestic courts.
10. It is critical that the conditions precedent to submitting a claim to arbitration under Chapter Eleven be strictly observed.
11. The NAFTA Parties have consented in advance to arbitration with respect to matters falling within the scope of Chapter Eleven. Article 1122(1) provides that: "each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement". Therefore, if the conditions spelled out by the NAFTA Parties in Article 1121 are not met the NAFTA Party cannot be assumed to have consented to the arbitration and the Tribunal lacks jurisdiction to hear the case.
12. The Tribunal should enforce Article 1121 by ensuring that a proper waiver has been provided by the investor and that accordingly no domestic proceeding has been initiated or continued with respect to the measure alleged to be in breach of Chapter 11. The requirements of Article 1121 are not just technicalities - non-respect of these requirements, in particular a failure to provide a proper waiver, could result in real prejudice to the respondent that may have to incur additional expenses and efforts to defend itself in several concomitant proceedings related to the same measure.

failures to provide waivers in the form prescribed by Article 1121 cannot be cured *post facto*. Otherwise, if non-respect of the terms and purpose of Article 1121 bore no consequences it would render the article meaningless against the clear intention of the NAFTA Parties.

Respectfully Submitted



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