

INTERNATIONAL CENTRE FOR THE
SETTLEMENT OF INVESTMENT DISPUTES
ADDITIONAL FACILITY

NOTICE OF INSTITUTION OF ARBITRATION PROCEEDINGS
SUBMITTED PURSUANT TO THE
NORTH AMERICAN FREE TRADE AGREEMENT

USA WASTE SERVICES, INC. and ACAVERDE, S.A. DE C.V.,

Claimants,

v.

THE GOVERNMENT OF THE UNITED MEXICAN STATES,

Respondent.

Submitted in accordance with Chapter II of the ICSID Arbitration (Additional Facility) Rules, and delivered by hand on September 29, 1998 to the

International Centre for the Settlement of Investment Disputes
Secretariat
1818 H St., N.W.
Washington, D.C. 20433

I. Summary of NAFTA Authorization for Submission of Claim to Arbitration

The Claimants listed below, in accordance with Articles 1116 and 1117 of the North American Free Trade Agreement ("NAFTA"), hereby submit to arbitration a claim that the Respondent listed below has breached obligations under Section A of Chapter Eleven of NAFTA, and that Claimants have incurred loss or damage by reason of, or arising out of, that breach. This claim is submitted under the Additional Facility Rules of the International Centre for the Settlement of Investment Disputes ("ICSID") in accordance with NAFTA Article 1120.

II. The Parties to the Dispute and Delivery of Notice as Required by NAFTA

Article 3(1)(a) of the ICSID Arbitration (Additional Facility) Rules states that a Notice of Institution of Arbitration Proceedings shall designate precisely each party to the dispute and state the address of each.

A. Claimants

USAWaste Services, Inc. ("USAWaste") is a company incorporated under the laws of the State of Delaware of the United States of America. USAWaste owns and controls Acaverde, S.A. de C.V. ("Acaverde"), an enterprise of the United Mexican States. The addresses of USAWaste and Acaverde (hereinafter collectively referred to as "Claimants") are:

USAWaste Services, Inc.
First City Tower
1001 Fannin, 40th Floor
Houston, Texas 77002
U.S.A.

Acaverde, S.A. de C.V.
Avenida Ejercito Nacional s/n
Fraccionamiento Joyas De Brisamar
Acapulco, Guerrero
Mexico

B. Respondent

Claimants seek recovery from the Government of the United Mexican States ("Respondent") for economic injury suffered from acts taken by Banco Nacional de Obras y Servicios Públicos, S.N.C. ("Banobras"), by the State of Guerrero ("Guerrero"), and by the Municipality of Acapulco of Juarez, Guerrero ("Acapulco") (collectively, the "Mexican Public Authorities"). Respondent is obligated under Article 105 of NAFTA to ensure that all necessary measures are taken in order to give effect to the provisions of that treaty, including observance by its political subdivisions. Accordingly, Respondent is accountable

for any acts in violation of the protections of NAFTA taken by Banobras,¹ Guerrero and Acapulco.² As published in the Official Gazette of Mexico on June 12, 1996, documentation related to arbitration proceedings authorized under Section B of Chapter Eleven of NAFTA may be delivered to Respondent at the following address:

Dirección General de Inversión Extranjera
Secretaría de Comercio y Fomento Industrial ("SECOFI")
Insurgentes Sur número 1940
Col. La Florida
Mexico, D.F. 01030

C. Delivery of Notice of Intent to Respondent in Accordance with NAFTA Article 1119

NAFTA Article 1119 states that "a disputing investor shall deliver to the disputing [NAFTA] Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted" Claimants notified Respondent, at the address listed above, on June 30, 1998 of their intention to refer this dispute to arbitration under NAFTA. A copy of the Notice of Intent stamped as received by Respondent on that date is included with this submission. By delivering its Notice of Intent to Respondent more than 90 days before the submission of this Notice of Institution of Arbitration Proceedings, Claimants have met the notice requirement set forth in Article 1119 of NAFTA.

III. Agreement of the Parties Providing for Arbitration Under the Additional Facility

Article 3(1)(b) of the ICSID Arbitration (Additional Facility) Rules states that a Notice of Institution of Arbitration Proceedings shall set forth the relevant provisions embodying the agreement of the parties to refer the dispute to arbitration.

¹ Banobras is a bank, created by the federal law of Mexico, that finances public water, wastewater treatment, and solid waste management projects. Banobras is also the cashier bank for *Secretaria de Hacienda y Credito Publico*, a federal agency that serves as the Mexican treasury and the distributor of Mexican federal tax revenues.

² Guerrero and Acapulco are political subdivisions of Mexico. Guerrero is a constituent state of Mexico, and Acapulco is a municipality of the State of Guerrero. Pursuant to Article 115 of the Constitution of Mexico, a municipality is a territorial division of a state created for administrative purposes.

Claimants hereby consent to the arbitration of the dispute described herein under the ICSID Arbitration (Additional Facility) Rules. Additionally, as required by Article 4 of the Additional Facility Rules, Claimants hereby consent to ICSID jurisdiction under Article 25 of the ICSID Convention, in the event that the jurisdictional requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted.

Respondent's consent to arbitration proceedings under the ICSID Additional Facility is contained in NAFTA Article 1122, paragraph one of which states that "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement." Paragraph two of Article 1122 states that this consent "shall satisfy the requirement of . . . Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the Additional Facility Rules for written consent . . ."

IV. Approval of the Parties' Agreement by the Secretary-General of the Centre

Article 3(1)(c) of the ICSID Arbitration (Additional Facility) Rules states that a Notice of Institution of Arbitration Proceedings shall indicate the date of approval by the ICSID Secretary-General of the agreement of the parties providing for arbitration under the ICSID Additional Facility. Under Article 4 of the ICSID Additional Facility Rules, the ICSID Secretary-General shall give his approval only if the parties give their consent to the jurisdiction of ICSID, and under NAFTA Article 1122 a disputing investor provides written consent to jurisdiction of ICSID through submission of a claim to arbitration. Therefore, approval of the parties' arbitration agreement by the ICSID Secretary-General appears to be available only at the time proceedings are instituted, and thus a formal "Request for Approval of Agreement Providing for Arbitration Under the Additional Facility" accompanies this Notice of Institution of Arbitration Proceedings.

V. Indication of the Issues in Dispute and the Amount Involved

Article 3(1)(d) of the ICSID Arbitration (Additional Facility) Rules states that a Notice of Institution of Arbitration Proceedings shall "contain information concerning the issues in dispute and an indication of the amount involved, if any." Accordingly, the following two sections provide general information concerning the issues in dispute and the economic injury incurred. This general information does not restrict either the scope of the allegations Claimants will make or the amount of damages Claimants will request in arbitration. A detailed statement of the relevant facts and law, and a specific request for damages, will be included in Claimants' memorial.

A. Information Concerning the Issues in Dispute

This section describes the legal relationships between Claimants and the Mexican Public Authorities, the rights and interests of Claimants protected by NAFTA, and the violation of those NAFTA protections by the Mexican Public Authorities.

The Title of Concession and Line-of-Credit Agreement. The state of Guerrero and the municipality of Acapulco granted a fifteen-year concession to Acaverde in early 1995. Under the concession, Acaverde was to provide street cleaning and other public waste management services; design, build and operate a solid waste landfill; and have the exclusive right to collect and dispose of all solid waste in a specified area of Acapulco under private contracts. Along with its right to payment under private contracts for waste disposal, Acaverde was to receive monthly payments from Acapulco for services rendered. Acapulco's payments due to Acaverde under the concession were guaranteed by Banobras, and counter-guaranteed by Guerrero, under a separate line-of-credit agreement.

Compliance by Acaverde. On 15 August 1995, Acaverde began collecting solid waste in the concession area, and continued to do so until 12 November 1997. After a three-month phase-in period during which it established full operations, Acaverde began street sweeping operations on 15 November 1995, which likewise continued until 12 November 1997. To dispose of collected waste, Acaverde leased a piece of land on which it operated a temporary landfill. Because Acapulco never provided the land for construction of the new permanent landfill, Acaverde continued to lease and use the temporary site for waste disposal throughout its performance under the concession.

Claimants' Interests Protected Under NAFTA Chapter Eleven. The concession, the line-of-credit agreement, and Acaverde's operations under the concession created certain economic interests for Claimants. Those economic interests fall within the detailed definition of "Investments" protected by Chapter Eleven of NAFTA. Specifically, the following interests are enumerated within the NAFTA definition of "investment":

1. Entitlement to income owed to an enterprise;³
2. Property owned by, and resources committed to, an enterprise, such as under a concession;⁴ and

³ NAFTA Article 1139(e) provides that "investment means . . . an interest in an enterprise that entitles the owner to share in income or profits of the enterprise."

⁴ NAFTA Article 1139(g) and (h) provide that "investment means . . . real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of

3. The value of an enterprise itself.⁵

Claimants' protected investments therefore include income owed for services rendered under the concession, capital committed to operations under the concession, and the value of Acaverde as an enterprise with rights and operations under the concession.

Violation of NAFTA Article 1105. The Mexican Public Authorities did not accord the investments of Claimants "treatment in accordance with international law, including fair and equitable treatment and full protection and security" as required by Article 1105(1) of NAFTA. On the contrary, these governmental entities, after playing a critical role in inducing Claimants' investments, failed to comply with their material obligations and exploited Acaverde's obligation to provide public services.

Of the twenty-seven months for which Acaverde invoiced Acapulco for services rendered, Acapulco made partial or full payments for only the three months, from December 1995 to February 1996. Acapulco withheld later payments without notifying Acaverde of an alleged breach and providing an opportunity for Acaverde to remedy the breach, as required by the terms of the concession. Banobras honored its guarantee by completing Acapulco's partial payments for two months, and by paying two further months in full. Banobras thereafter arbitrarily violated that unconditional guarantee for the remainder of the invoices Acaverde presented. Furthermore, Acapulco failed to enforce Acaverde's exclusivity rights, forcing Acaverde either to operate at a loss or risk incurring liability for forfeiture of the concession. Ultimately, Acaverde's concession rights were unlawfully but effectively transferred by Guerrero and Acapulco to a third party.

Violation of NAFTA Article 1110. In addition to violating Article 1105(1) of NAFTA, the acts of the Mexican Public Authorities violated Article 1110 of NAFTA, as "measure[s] tantamount to . . . expropriation" of Claimants' investments. In particular, Mexico is responsible for depriving Claimants of the value of their protected investments:

1. Claimants were arbitrarily deprived of income owed them under the concession and line-of-credit agreement.

economic benefit or other business purposes; and . . . interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under . . . contracts involving the presence of an investor's property in the territory of the Party, including . . . concessions"

⁵ NAFTA Article 1139(a) and (b) provide that "investment means . . . an enterprise; [or] . . . an equity security of an enterprise."

2. Acapulco's breaches of its other obligations rendered worthless Claimants' rights acquired and investments made under the concession.
3. The Mexican Public Authorities' disregard for Claimants' rights, and their refusal to cooperate within the concession framework, effectively extinguished Acaverde's viability as an enterprise.

This expropriation of Claimants' investments was unlawful because it was discriminatory, was not in accordance with due process of law and standards of international law, and was undertaken without payment of compensation. Moreover, under NAFTA Article 1110, even if the investments had been expropriated in accordance with due process of law and on a non-discriminatory basis, Claimants would still be entitled to compensation.

B. Indication of Amount Involved

In addition to "information concerning the issues in dispute," Article 3(1)(d) of the ICSID Arbitration (Additional Facility) Rules calls for "an indication of the amount involved, if any." Claimants intend to seek damages in the amount of the fair market value of their investments, in conformity with Chapter Eleven of NAFTA, plus the costs of bringing the intended arbitration and legal fees associated therewith. The amount of damages plus costs is likely to be approximately US\$60,000,000. Claimants will request that compensation be made in United States dollars and include interest pursuant to the corresponding terms in Article 1110 of NAFTA.

VI. Agreements Concerning the Number and Appointment of Arbitrators

Article 3(2) of the ICSID Arbitration (Additional Facility) Rules states that a Notice of Institution of Arbitration Proceedings shall set forth any provisions agreed by the parties regarding the number of arbitrators and the method of their appointment.

Claimants and Respondent have as of yet not concluded a specific agreement concerning the number and appointment of arbitrators. The general NAFTA provisions on number and appointment of arbitrators, however, are applicable here. NAFTA Article 1126 states that "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."

Additionally, as required by NAFTA Article 1125, Claimants hereby agree to the appointment of each individual member of the arbitral tribunal to be constituted to hear this dispute.

VII. Conditions Precedent Under NAFTA to Submission of a Claim to Arbitration

A. Consent and Waiver Under NAFTA Article 1121

NAFTA Article 1121 sets forth a consent and waiver as conditions precedent to submission of a claim to arbitration. That consent and waiver is set out in this section and, in compliance with the requirement in NAFTA Article 1121(3), Claimants will deliver this consent and waiver to Respondent in writing.

Consent. Claimants hereby consent to arbitration in accordance with the procedures set out in Chapter Eleven of NAFTA.

Waiver. Additionally, Claimants hereby waive their right to initiate or continue before any administrative tribunal or court under the law of any NAFTA Party, or other dispute settlement procedures, any proceedings with respect to the measures taken by Respondent that are alleged to be a breach of NAFTA Chapter Eleven and applicable rules of international law, except for proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages. Without derogating from the waiver required by NAFTA Article 1121, Claimants here set forth their understanding that the above waiver does not apply to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by sources of law other than Chapter Eleven of NAFTA, including the municipal law of Mexico.

B. Consultation and Negotiation Under NAFTA Article 1118

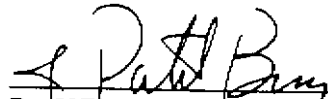
NAFTA Article 1118 states that, before initiating arbitration proceedings, the disputing parties should first attempt to settle a claim through consultation or negotiation. Claimants present this Notice of Institution of Arbitration Proceedings after more than a year of diplomatic and legal efforts to reach a settlement with Respondent. These efforts have included the participation of officials of the executive and legislative branches of the Governments of Mexico and the United States. Unfortunately, these settlement efforts proved fruitless.

VIII. Required Copies and Payment

In accordance with Article 3(3) of the ICSID Arbitration (Additional Facility) Rules regarding required copies and payment, this Notice of Institution of Arbitration Proceedings is accompanied by five additional signed copies and by a non-refundable fee of US\$500, payable to ICSID.

The law firm of Baker & Botts, L.L.P. represents the Claimants named herein and is authorized to receive correspondence related to this matter on their behalf. All correspondence related to this arbitration should therefore be delivered to the undersigned.

Respectfully submitted,



BAKER & BOTTS, L.L.P.

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