

INTERNATIONAL CENTRE FOR THE
SETTLEMENT OF INVESTMENT DISPUTES

Waste Management, Inc.

v.

United Mexican States (ICSID Case No. ARB(AF)/00/3)

DECISION ON VENUE OF THE ARBITRATION

Introduction

1. On 27 September 2000, the Secretary-General of ICSID registered a notice for the initiation of arbitration proceedings, lodged by Waste Management Inc. (“Claimant”) pursuant to Article 2 of the ICSID Arbitration (Additional Facility) Rules, in relation to a claim against the United Mexican States (“Respondent”). The claim arises out of a dispute concerning the provision of waste management services under a concession granted by the Municipality of Acapulco de Juarez in the Mexican State of Guerrero. Claimant alleges that certain conduct of Mexican organs or entities, including the Municipality and the State, was a violation of NAFTA Articles 1105 and 1110.

2. This was the second occasion on which Claimant had brought proceedings in respect of its claim. On the first occasion a Tribunal (consisting of Mr. Bernardo Cremades, President; Messrs. Keith Highet and Eduardo Siqueiros T.) held by majority that it lacked jurisdiction to judge the issue in dispute.¹ The reason was a breach by the Claimant of a requirement laid down by NAFTA Article 1121 (2) (b); viz. the waiver of certain local remedies with respect to the measure of the disputing Party

¹ 40 ILM 56 (2001).

that is alleged to be in breach of NAFTA, which waiver has to be included in the submission of the claim to arbitration. The Tribunal held that the waiver deposited with the first request did not satisfy Article 1121 and that this defect could not be made good by subsequent action on the part of the Claimant.

3. In these second proceedings (as we will call them), the Claimant's submission was accompanied by an unequivocal waiver in terms of Article 1121. The Respondent now argues that the effect of the first proceedings is to debar Claimant from bringing any further NAFTA claim with respect to the same cause of action. At the initial procedural hearing of the second proceedings, held at the seat of the World Bank in Washington, D.C. on 8 June 2001, the parties acknowledged that the present Tribunal had been duly constituted pursuant to Article 1120 of NAFTA and in accordance with the ICSID Arbitration (Additional Facility) Rules. An exchange of views took place on the venue of the arbitration and on the procedure for dealing with the Respondent's objections to jurisdiction based on the previous proceedings, and in particular on the decision of the previous Tribunal. The Tribunal laid down timetables for written observations on the question of venue and on the preliminary objection. This order deals with the question of venue.

Applicable Provisions with Respect to the Place of Arbitration

4. Article 1120 of NAFTA provides that:

- “1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:
 - (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
 - (b) the Arbitration (Additional Facility) Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
 - (c) the UNCITRAL Arbitration Rules.

2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.”

Article 1130 further provides that:

“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 Arbitration (Additional Facility) Rules if the arbitration is under those Rules or the ICSID Convention;
- (b) the UNCITRAL Arbitration Rules if the arbitration is under those Rules.”

In the present case, the United States (the party of the investor) is a party to the ICSID Convention but Mexico is not. Accordingly the claim was submitted under the Arbitration (Additional Facility) Rules, which the parties agree are applicable to the question of venue.

5. Chapter IV of the Arbitration (Additional Facility) Rules deals with the place of arbitration. Article 20 provides that arbitration proceedings “shall be held only in States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards.” All three NAFTA States are parties to the 1958 Convention. Article 21, entitled, “Determination of Place of Arbitration,” provides:

“(1) Subject to Article 20 of these Rules the place of arbitration shall be determined by the Arbitral Tribunal after consultation with the parties and the Secretariat.

(2) The Arbitral Tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. It may also visit any place connected with the dispute or conduct inquiries there. The parties shall be given sufficient notice to enable them to be present at such inspection or visit.

(3) The award shall be made at the place of arbitration.”

Unlike arbitration under the ICSID Convention, arbitration under the Arbitration (Additional Facility) Rules is not quarantined from legal supervision under the law of the place of arbitration. The possible requirements of that law are specifically referred to in the Arbitration (Additional Facility) Rules (see Articles 1, 53 (3), (4)). Thus the determination of the place of an Additional Facility arbitration can have important consequences in terms of the applicability of the arbitration law of that place.

The Views of the Parties as to Venue

6. In accordance with the directions of the Tribunal, both parties made written observations on the question of venue.

7. The Claimant argued for Washington, D.C., on three grounds: (a) neutrality; (b) the clarity and adequacy of United States law on international arbitration, and (c) the balance of convenience. On the question of neutrality, which it regarded as of dominant importance, it noted that the Government of Canada had intervened in the first proceedings in favour of the Mexican position; that Government had also intervened in the proceedings before the British Columbia Supreme Court in the *Metalclad* case, supporting Mexico's challenge to a decision in a NAFTA arbitration held under the Arbitration (Additional Facility) Rules. For its part the Government of the United States had not intervened in the first proceedings. The Claimant further argued that following the British Columbia Supreme Court's ruling of 2 May 2001,² there was substantial uncertainty about the extent and standard of review of Additional Facility decisions in Canada. Although there had not yet been a challenge before a United States court to an Additional Facility award, there was substantial United States experience with international arbitration, and the Federal Arbitration Act clearly embodied the standards of the New York Convention.³

8. The Respondent agreed that neutrality was a dominant consideration, but argued that this favoured Canada rather than the United States since "the courts that might be called upon to exercise curial review of the award should be those of the NAFTA Party that is neither the disputing Party nor the Party of the disputing investor." It stressed that the Govern-

² *United Mexican States v. Metalclad Corporation*, 2001 BCSC 664.

³ Claimant's submission of 18 June 2001.

ment of Canada's intervention in the first proceedings on an issue of NAFTA interpretation in no way bound the Canadian courts, which would decide the legal issues on their merits, as they had done in *Metalclad*. It observed that legal issues would arise under United States' law analogous to those which arose in the *Metalclad* case before the British Columbia Supreme Court, and that in the absence of specific precedents the standard of review in the United States was also unclear. It noted that the essential issue was which courts would be competent to review any eventual award; where the Tribunal was actually to sit was "an entirely separate issue."⁴

9. Upon further consideration of the issues, it appeared to the Tribunal that a question might arise as to whether the provisions of the New York Convention would be relevant in a United States court if the United States was selected as the place of arbitration. It was at least arguable that the provisions of the Inter-American Convention on International Commercial Arbitration of 1975 (the Panama Convention)⁵ would apply, pursuant to section 305 of the Federal Arbitration Act, to the exclusion of the New York Convention.⁶ Having regard to certain differences between the two Conventions and to the apparent intention of the drafters of NAFTA that the New York Convention be applicable to Chapter 11 arbitrations, this raised the question whether one or other party might have

⁴ Respondent's submission of 18 June 2001.

⁵ 14 ILM 336 (1975); 1438 UNTS 248.

⁶ Section 305 of the Federal Arbitration Act provides as follows:

"Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

1. If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.
2. In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply."

This is not well adapted to dealing with a case where one of the parties is the State itself, but neither party in the present case argued that Mexico should be treated other than as a citizen of a State party for the purposes of section 305.

a legitimate juridical advantage in the selection of a Canadian venue. Canada is not a party to the Panama Convention and the question of the relationship between the two would not arise there. The Tribunal invited the parties to comment on that question and both did so.

10. In its response, the Claimant agreed that, pursuant to section 305 of the Federal Arbitration Act, a United States court called to deal with an issue arising in the present proceedings would apply the Panama Convention rather than the New York Convention. But it argued that there was no material difference between the two. This was true in particular as far as the present proceedings are concerned; these are already commenced and the rules of procedure are already established. As to the standards for enforcement of awards under the two Conventions, it saw these as “nearly identical.” In the event that Mexico preferred the application of the New York Convention, it expressly offered to agree to that course, as permitted by section 305.⁷

11. The Respondent likewise agreed that “if the place of arbitration were Mexico or the United States, the Panama Convention would apply to the recognition and enforcement of the award”, whereas if Canada were selected, the New York Convention would apply. It saw the potential uncertainties as to the application of the Panama Convention in the United States as a further reason for the choice of a Canadian venue.⁸

Assessment of the Relevant Considerations

12. Turning to the Tribunal’s own view of the matter, it is relevant to note, at the outset, that the place at which the first arbitration proceedings were held was Washington, D.C. Indeed this does not seem to have been an issue before the first Tribunal.⁹ This factor appears to the Tribunal to have a certain relevance, especially since a major preliminary issue in the present proceedings is the legal effect of the conduct of the Claimant in the first proceedings. *Prima facie* it would seem desirable that the same curial

⁷ Claimant’s further submission of 27 August 2001.

⁸ Respondent’s further submission of 27 August 2001.

⁹ See the first Tribunal’s Award of 2 June 2000, §3, where it is simply stated that the jurisdictional hearing took place in Washington, D.C. The question was decided at the initial procedural hearing on 16 July 1999, apparently without controversy.

law be applicable to both proceedings, involving as they do the same dispute and the same cause of action.

13. As a pure matter of convenience, Washington, D.C. was and is an appropriate place for the arbitration. The representation of both parties includes lawyers from firms based in Washington, D.C. ICSID facilities are available there at little or no cost to the parties. Were the arbitration to be held, for example, in Toronto there would be additional expenses in the travel of the members of the Tribunal, the Secretariat and the representatives of the parties, as well as in the hiring of a venue and associated services. Should the Tribunal reach the merits of the dispute, it is possible that an evidentiary hearing might more conveniently and economically be held in Mexico, where the dispute arose. But provision is made for this eventuality in Article 21 (2) of the Arbitration (Additional Facility) Rules, without prejudice to the actual place of the arbitration, and in fact neither party finally argued that the place of the arbitration should be in Mexico.

14. The Respondent's arguments for a Canadian venue are essentially ones of principle. If they are valid, they could well prevail over considerations of convenience and cost. Essentially, two issues are raised: (a) the adequacy and clarity of the applicable law, and (b) the neutrality, actual or perceived, of the place of arbitration. As noted, the parties are sharply divided on each of these issues.

The Adequacy of the Proper Law of the Arbitration

15. An initial question concerns the relevance of the Panama Convention of 1975. Both parties agree that by virtue of section 305 of the Federal Arbitration Act, a court dealing with the present proceedings in the United States would apply the Panama Convention rather than the New York Convention. The question is whether this conclusion (assuming it is correct) provides a reason for selecting a Canadian venue, it being clear that in a Canadian court the Panama Convention would be irrelevant.

16. Evidently the drafters of NAFTA had the 1958 Convention in mind, since they required the proceedings to be held in a State party to that Convention.¹⁰ At the same time they were aware of the potential inter-

¹⁰ NAFTA, Art. 1130, cited in paragraph 4 above. To the same effect Arbitration (Additional Facility) Rules, Art. 20, cited in paragraph 5 above.

action of the New York and Panama Conventions, as indicated by NAFTA Article 1122, which provides that:

- “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 11 of the ICSID Convention (Jurisdiction of the Centre) and the Arbitration (Additional Facility) Rules for written consent of the parties;
 - (b) Article I of the Inter-American Convention for an agreement.”¹¹

In these circumstances the Tribunal concludes that the application of the Panama Convention rather than the New York Convention to a NAFTA Chapter 11 arbitration raises no question of principle, unless it is possible to point to some specific disadvantage which one party or another may suffer from the application of the former rather than the latter.

17. The question of the relationship between the Panama and New York Conventions has been the subject of some discussion in the literature. For example van den Berg concludes that the two Conventions are generally compatible, but he notes that “the Panama Convention does not contain provisions regarding its field of application, the referral by a court to arbitration, and the conditions to be satisfied by the party seeking enforcement of the award.”¹² Unlike the New York Convention, the Panama Convention also provides for its own residual set of arbitral rules, where no other arbitral rules are agreed between the parties.

¹¹ See also NAFTA Art. 1136 (6) & (7).

¹² A.J. van den Berg, “The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?” 5 *Arbitration International* 214 (1989) at 229. See also J. Jackson, “The 1975 Inter-American Convention on International Commercial Arbitration: Scope, Application and Problems” 8 *Jnl of Intl Arb* 91 (1991); J.P. Bowman, “The Panama Convention and its Implementation under the Federal Arbitration Act,” 11 *American Review of International Arbitration* 116 (2000).

18. In the present case, having regard to the stage which the proceedings have reached, most of the differences between the two Conventions are irrelevant. Of the matters referred to by van den Berg, only the question of enforcement might possibly arise as an issue. Neither party has however raised any difficulty on that score. In this case it was primarily for the Claimant to do so, but it is evidently content to accept that the Panama Convention should apply to any issue of recognition or enforcement arising in a United States court. If this presents any difficulty for the Respondent, it is still open for it to accept the Claimant's offer to apply the New York Convention instead of the Panama Convention, a course specifically permitted by section 305 of the Federal Arbitration Act. For these reasons the Tribunal does not believe that the potential application of the Panama Convention, if Washington, D.C. be chosen as the venue, should be treated as determinative.

19. The Tribunal turns to the other issues concerning the applicable law which were debated by the parties. It is no doubt the case that more international arbitrations occur in the United States than Mexico or Canada, and that there is a body of jurisprudence on the Federal Arbitration Act and the New York Convention which indicates a generally supportive attitude on the part of the United States courts to international arbitration. On the other hand the specific issue of the applicable law and the standard of review in NAFTA arbitration has arisen in Canada while it has not (yet) arisen in the United States. The Tribunal is inclined to agree with the Respondent that legal issues of the same general order as those which arose in *Metalclad* would arise in the United States courts in the event of a challenge to a Chapter 11 arbitration held in the United States. What answers would be given remain to be seen, but commentators do not regard all questions as closed in the United States. Nor, in these early days of Chapter 11 arbitration, could they be. It would be invidious, and is unnecessary, to compare the actual or hypothetical performance of United States and Canadian courts in such cases. It is sufficient on this point to say that the Tribunal cannot identify any particular issue on which there is likely to be a significant difference of approach by the courts of the two NAFTA states.

The Neutrality of the Place of Arbitration

20. As noted already, both parties regarded the question of neutrality as the dominant one for present purposes, though they disagreed as to

which forum would be neutral. Earlier decisions, both under the Arbitration (Additional Facility) Rules and the UNCITRAL Rules, have likewise treated neutrality as a relevant factor.¹³ It has certainly been treated as relevant in the context of international commercial arbitration generally. On the other hand, in the specific context of NAFTA Chapter 11 arbitration it is perhaps of lesser importance. The three NAFTA parties are associated in a wide ranging agreement aimed, *inter alia*, at free trade and protection of investments. There is as yet no indication that NAFTA arbitrators are likely to suffer attacks on their integrity, or their nerves, from sitting in one of the States parties as compared with another. There was evidently no difficulty in the first tribunal sitting in Washington, D.C., and feeling able to decide in that city in favour of the Respondent. The present Tribunal, for its part, does not apprehend that its independence or capacity to decide is likely to be affected by the question where it is to sit.

21. There are only three parties to NAFTA. If the principle of neutrality were treated as dominant in relation to NAFTA Chapter 11 arbitration, it would produce a rule that the tribunal would always sit in the state party other than that of the claimant and respondent. The drafters of NAFTA laid down no such rule;¹⁴ rather they left the matter for each tribunal to decide, having regard to relevant factors. It may be accepted that neutrality could be one of these—although it is specifically not mentioned in the UNCITRAL Notes which provide a guide to choice of forum in cases under the UNCITRAL Rules.¹⁵ But the NAFTA parties themselves do not seem to have treated it as decisive.

22. One difficulty with “neutrality” as a criterion is that it can tend to lead to a confusion between the position taken by the executive govern-

¹³ See, e.g., *Ethyl Corporation v. Government of Canada*, decision on venue of 28 November 1997; *Methanex Corporation v. United States of America*, decision on venue of 7 September 2000. These were both arbitrations held under the UNCITRAL Rules, but the question has also arisen in Additional Facility cases.

¹⁴ This contrasts with the rule laid down for interstate arbitration under NAFTA Chapter 20. In accordance with Rule 22 of the Model Rules of Procedure, a Chapter 20 tribunal is to sit on the territory of the respondent State party. Normally a strong rule of neutrality is applied to interstate arbitration, with interstate tribunals invariably sitting in a third state. This is a further indication that the parties to NAFTA do not regard the neutrality of an arbitral venue as the overriding consideration. See also *Ethyl Corporation v. Government of Canada*, decision on venue of 28 November 1997, pp. 4–5.

¹⁵ Cf. *Ethyl Corporation v. Government of Canada*, decision on venue of 28 November 1997, p. 10 note 12.

ment of a NAFTA party on the one hand and that taken by its courts on the other. Under the principles of the separation of judicial power constitutionally guaranteed in all three states parties, it is for the courts to decide on issues concerning the functioning of arbitral tribunals and the recognition and enforcement of their awards and to do so in accordance with the law. If there were any indication that the courts of a state party were deferring to executive pronouncements on these issues, that would be highly relevant to the choice of venue. It is almost needless to say that there is no evidence or suggestion of this.

23. By parity of reasoning the Tribunal is not persuaded that the intervention of Canada to present its views in the previous proceedings, still less its intervention before the British Columbia Supreme Court in *Metalclad*, entails that Canada is somehow unneutral in the present case. In taking these steps the Government of Canada was merely exercising procedural rights which it had, respectively, under Article 1128 of NAFTA and under Canadian law. In each case it was a matter for the tribunal or court to take into account as it saw fit the comments made.

Conclusion

24. In the Tribunal's view the dominant consideration in this case is that the very same claim has already been presented between the same parties in proceedings held, without apparent objection or difficulty, in Washington, D.C. The claim failed on procedural grounds, and the legal implications of that failure are a key issue, indeed the first substantive issue, for the present Tribunal to decide. In these circumstances it would be, to say the least, unfortunate if the arbitral law should now be different as a result of a different decision as to the venue of the second arbitration. No compelling reason has been presented for such a decision in any event, having regard to what has been said above, and especially to the marginal balance of convenience in favour of Washington, D.C.¹⁶

25. For these reasons the Tribunal decides unanimously that the venue of the arbitration shall be Washington, D.C. Unless otherwise agreed or decided, hearings will be held at the ICSID facilities within the World Bank building.

¹⁶ See paragraph 13 above.

As at Washington, D.C., 26 September 2001:

James Crawford
Chairman

Guillermo Aguilar Alvarez

Benjamin R Civiletti