BAKER BOTTS L.L.P.

THE WARNER
1299 PENNSYLVANIA AVE., NW
WASHINGTON, DC
20004-2400
202.639.7700
FAX 202.639.7890

AUSTIN
BAKU
DALLAS
HOUSTON
LONDON
MOSCOW
NEW YORK
WASHINGTON

August 27, 2001

VIA HAND DELIVERY

Ms. Gabriela Alvarez-Avila
Secretary of the Tribunal
International Centre for Settlement
of Investment Disputes
1818 H Street, N.W., Rm. 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:

On August 6, 2001, the Tribunal requested the parties' views on the relevance, if any, of the Panama Convention of 1975 to its venue decision. Waste Management, Inc. ("Waste Management") respectfully states that, for two independent reasons, the accession of the United States to the Panama Convention supports a decision that the proper venue for this arbitration is ISCID's World Bank headquarters in Washington, D.C. First, while the Panama Convention will apply in the United States unless the parties agree to apply the New York Convention of 1958, application of the Panama Convention is to be embraced because its implementation in the United States is wholly consistent with the New York Convention.[1] In fact, application of the Panama Convention by United States courts is far more consistent with the principles of international arbitration, ICSID Additional Facility procedures and the proper role of the forum's courts than is application of the New York Convention by Canadian courts. Second, because there is no material difference between the two Conventions, Waste Management will expressly agree — pursuant to 9 U.S.C. § 305 — to apply the New York Convention instead of the Panama Convention if the United Mexican States ("Mexico") objects to the Panama Convention. If, therefore, Mexico has any genuine concern about the Panama Convention, it is free to obtain application of the New York Convention in the United States by accepting Waste Management's offer.

[1] The requirements for application of the New York and Panama Conventions are both met by this dispute. Because both the United States and Mexico have ratified the Panama Convention, United States law gives precedence to the Panama Convention, unless otherwise expressly agreed. *See* 9 U.S.C. § 305.

The United States Applies The Panama And New York Conventions In Parallel To Best Facilitate The Principles Of International Arbitration

As adopted and applied in the United States, the New York and Panama Conventions achieve the same pro-arbitration results through essentially the same legal standards. Although the two Conventions are not perfectly parallel, they are nearly so.[2] Moreover, discrepancies that do exist between the two Conventions have essentially been eliminated in the United States because Congress enacted implementing legislation for the Panama Convention that, insofar as necessary, supplements the terms of the Panama Convention to ensure its uniformity with the New York Convention. *Compare* 9 U.S.C. § 301 *et seq.* (Chapter 3 of Federal Arbitration Act ("FAA"), implementing Panama Convention) *with* 9 U.S.C. § 201, *et seq.* (Chapter 2 of FAA, implementing New York Convention); *see especially* 9 U.S.C. § 302 (incorporating, by reference, §§ 202, 203, 204, 205 & 207); 9 U.S.C. §§ 208 & 307 (incorporating, by reference, Chapter 1 of FAA for residual application).[3] Thus, the House of Representatives, in its report on the Panama Convention's implementing legislation, states:

> The New York Convention and the [Panama] Convention are intended to achieve the same results, and their key provisions adopt the same standards, phrased in the legal style appropriate for each organization. It is the Committee's expectation, in view of that fact and the parallel legislation under the Federal Arbitration Act that would be applied to the Conventions, that courts in the United States would achieve a general uniformity of results under the two conventions.[4]

---

[2] The Panama Convention was "modeled" after the New York Convention. *See Progressive Cas. Ins. v. C.A. Reaseguradora Nacional de Venezuela*, 802 F. Supp. 1069, 1073 (S.D.N.Y. 1992), *rev'd on other grounds*, 991 F.2d 42 (2d Cir. 1993). The material distinction between the two Conventions is that Article 3 of the Panama Convention establishes default rules of procedure while the New York Convention does not. *See* Panama Convention, art. 3. This difference, however, is not implicated in a NAFTA arbitration because Section B of Chapter 11 of NAFTA clearly mandates the applicable rules of procedure.

[3] For ease of reference, copies of the Federal Arbitration Act (Tab A), the New York Convention (Tab B), and the Panama Convention (Tab C) are attached to this submission.

[4] H.R. REP. NO. 101-501, at 5 (1990), *reprinted in* 1990 U.S.C.C.A.N 675, 678. The Senate Foreign Relations Committee reached the same conclusion in its report on the Panama Convention:

> Modeled after the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, to which the United States is a party, the [Panama] Convention does not represent a new departure. It will simply extend to a significant number of countries in Latin America the relationship which the United States already has, through the New York Convention, with over 65 countries around the world.

S. EXEC. REP. NO. 99-24, at 1 (1986).

Recognizing Congress's intent, United States courts have uniformly rejected efforts to create any meaningful distinction between the two Conventions.[5] Accordingly, as described in detail below, there are no material distinctions between the New York and Panama Conventions in the context of a NAFTA arbitration.

Fields of Application: Because this arbitration addresses a commercial dispute between a citizen of the United States and the Government of Mexico, both Conventions apply and any distinctions in their fields of application are irrelevant to the venue question presented. But even so, the fields of application of the two Conventions are identical in the United States. *See* 9 U.S.C. §§ 202 & 302.[6]

Referral of Disputes to Arbitration: Because this dispute is already in arbitration with appointed arbitrators, any distinctions in the United States' application of the New York and Panama Conventions with regard to the referral of disputes to arbitration also has no potential relevance to the venue question presented. But again, as implemented, the two Conventions have no material distinctions.[7]

---

[5] *See Employers Ins. v. Banco de Seguros del Estado*, 199 F.3d 937, 942 n.1 (7th Cir. 1999) (accepting parties' decision to apply the Panama Convention and explaining that "the outcome would not be affected if [the court] instead applied the New York Convention"); *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 44-45 (2d Cir. 1994) (rejecting arguments to define scope of court's subject matter jurisdiction more narrowly because "Congress intended the [Panama] Convention to reach the same results as those reached under the New York Convention"); *Siderurgica del Orinoco (SIDOR), C.A. v. Linea Naviera de Cabotaje, C.A.*, No. 99 CIV. 0075(TPG), 1999 WL 632870, at * 4-6 (S.D.N.Y. August 19, 1999) (rejecting arguments to draw distinctions between standards for determining validity of parties' arbitration clause under the two Conventions); *Progressive Cas. Ins.*, 802 F. Supp. at 1074-75 (rejecting party's argument that textual differences required different results as contrary to public policy and an impermissible elevation of form over substance); *see also* John P. Bowman, *The Panama Convention and Its Implementation Under the Federal Arbitration Act*, 11 AM. REV. INT'L ARB. 1, 23 (2000) (finding that United States courts have achieved "a general uniformity of results" under the two Conventions).

[6] While Article I of the New York Convention defines the outer limits of that Convention's field of application, Section 202 of the FAA confines that field of application to comply with the "reciprocity" and "commercial relationships" reservations asserted by the United States. *See* 9 U.S.C. § 202. The Panama Convention has no article defining the limits of its field of application. Section 302 of the FAA, however, which incorporates Section 202 by reference, establishes that the field of application of the Panama Convention in the United States is exactly the same as the field of application of the New York Convention. *See* 9 U.S.C. § 302; *see generally Productos Mercantiles*, 23 F.3d at 44 (applying field of application in Panama Convention in accordance with the field of application in New York Convention).

[7] Article II of the New York Convention contains standards for the referral of matters to arbitration. Section 206 of the FAA, as supplemented by Sections 2 through 5 of the FAA, implements these New York Convention standards. 9 U.S.C. §§ 2, 3, 4, 5 & 206; *see* 9 U.S.C. §

Enforcement of Arbitral Awards: Of significance to this arbitration would be any differences in the United States between the New York and Panama Conventions' standards for confirming and enforcing arbitral awards. But again, there is no difference. Articles III, V and VI of the New York Convention establish standards for confirming and enforcing arbitral awards.[8] Article III requires recognition and enforcement of an arbitral award unless the party against whom it is sought proves one of seven objections to enforcement that are listed in Article V. Article VI permits an enforcing court to defer its decision on enforcement pending a proper challenge to the arbitral award in the nation in which the award was granted. Article VI further permits the enforcing court to condition its deferral on the posting of security. Articles 4, 5 and 6 of the Panama Convention establish nearly identical standards for recognition and enforcement of arbitral awards, in some places using nearly verbatim language. *Compare* Panama Convention, arts. 4, 5 & 6 *with* New York Convention, arts. III, V & VI; *see also* Albert Jan van den Berg, *The New York Convention 1958 and Panama Convention 1975: Redundancy or Compatibility?*, 5 ARB. INT'L 214, 218 (1989) ("The drafters of the Panama Convention incorporated Article V of the New York Convention almost verbatim").[9] The uniform

---

208 (incorporating, generally, §§ 1-16 of the FAA to proceedings under the New York Convention). Article 1 of the Panama Convention similarly establishes the validity of arbitration agreements, although it does not explicitly call upon the courts to refer recalcitrant parties to arbitration. Again, however, the FAA fills any void in the Panama Convention with standards that are identical to those under the New York Convention. Thus, Section 303(a) of the FAA is identical to Section 206, and Section 307 incorporates Sections 2 through 5. *Compare* 9 U.S.C. § 303(a), *with* 9 U.S.C. § 206. (Section 303(b) of the FAA – which instructs United States courts to apply the default rules of the Inter-American Commercial Arbitration Commission regarding place of arbitration and appointment of arbitrators if the arbitration agreement does not specify other procedures – provides additional support to the arbitral process that the New York Convention and its implementing legislation do not even provide.)

[8] Article IV of the New York Convention specifies that a party seeking confirmation and enforcement of an arbitral award must submit an authenticated original or certified copy of the award, and an original or certified copy of the arbitration agreement under which the award was obtained. Chapter 2 of the FAA implements this provision of the New York Convention via Section 208, which incorporates Sections 6 and 13 of the FAA into Chapter 2. Sections 6 and 13 require a party seeking enforcement to file a motion with a proposed order containing the documents specified in Article IV, plus several additional documents. 9 U.S.C. §§ 6 & 13. Although the Panama Convention has no article identifying what a party seeking confirmation and enforcement must submit, Chapter 3 of the FAA fills this gap, ensuring uniformity with the New York Convention by incorporating Sections 6 and 13 of the FAA into Chapter 3. *See* 9 U.S.C. § 307.

[9] The only conceivable distinctions in the standards for enforcement in the two Conventions are more semantic that real: (i) while Article III of the New York Convention prohibits the United States from imposing "substantially more onerous conditions or higher fees" on enforcement of awards under the Convention than under domestic awards, Article 4 of the Panama Convention simply requires enforcement "in the same manner as that of decisions handed down by national or foreign ordinary courts"; (ii) while Article 5(b) of the Panama

enforcement standards in the two Conventions are directly implemented by Sections 207 and 302 of the FAA, which expressly direct United States courts to confirm an arbitration award "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention." 9 U.S.C. §§ 207 & 302.[10]

The United States' success in achieving uniformity between the two Conventions is consistent with its substantial efforts to promote the efficacy and independence of international arbitration. Thus, while neither the New York Convention nor the Panama Convention contains any articles addressing the power of local courts to facilitate the arbitrators' conduct of the arbitral proceedings, the FAA empowers United States courts to respond to requests for assistance from arbitrators acting under *both* Conventions. *See* 9 U.S.C. § 208 (incorporating § 7 of FAA into New York Convention); 9 U.S.C. § 307 (incorporating § 7 of FAA into Panama Convention); *see also* 9 U.S.C. § 7 (empowering district court to compel attendance of witnesses and the production of documents during arbitration). Moreover, the United States Supreme Court's clear ruling in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 642 (1985), should provide this NAFTA Tribunal with confidence that the courts of the United States will not provide an unfair juridical advantage to either party to this proceeding. As the Court emphasized more than fifteen years ago:

> concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.

Id. at 629. United States courts have carefully heeded that admonition. *See, e.g., Genesco, Inc. v. Kakiuchi & Co., Ltd.*, 815 F.2d 840, 847 (2d Cir. 1987) (explaining "that if international arbitral institutions are to take a central place in the international legal order as Congress envisioned," national courts will have to heed the international policy favoring commercial arbitration).

By contrast, if the venue of this arbitration were to be in Canada, serious issues about the efficacy and independence of this arbitration would exist. Canadian laws on arbitral procedure are incapable of providing the necessary degree of certainty, consistency and predictability necessary to facilitate the conduct of Chapter 11 arbitral proceedings. It has, for example, recently come to Waste Management's attention that ICSID has given written notification to the

---

Convention permits the United States to refuse to enforce an award if the party against whom enforcement was sought was not duly notified "of the arbitration procedure to be followed", Article V(d) of the New York Convention permits the United States to refuse enforcement if "the arbitral procedure was not in accordance with the agreement of the parties [or] the law of the country where the arbitration took place".

[10] The remaining articles of both Conventions contain general treaty-type language that does not affect their application in the United States.

parties in *Metalclad* that the Canadian judicial procedures in that case are incompatible with the operation of ICSID's Additional Facility. (A copy of the letter to the *Metalclad* parties should be available from ICSID.). *See also, generally*, Claimant's Submission on Place of Arbitration, June 18, 2001, at 9-11. Quite simply, Canada's treatment of Mexico's challenge to the *Metalclad* award evidences Canada's continuing hostility to the independence of international arbitration proceedings. *See generally* Cecil O. S. Branson, *The Enforcement of International Commercial Arbitration Agreements in Canada*, 16 ARB. INT'L 19, 52 (2000) (explaining that some judges adhere to the old approach — precluding arbitration on certain legal issues and closely supervising the arbitration process — while other judges follow a more policy-oriented and pragmatic approach); 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, 200 (Spring 2001) ("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 11 may not make the right decisions.").

The New York Convention May Be Applied To This Arbitral Proceeding If Mexico Has Any Concern With The Adequacy Of The Panama Convention

Where, as here, concurrent applicability exists under both the New York and Panama Conventions, United States legislation permits the parties to elect which Convention will be applied to their arbitration. 9 U.S.C. § 305 (establishing objective standard for selection of Convention "unless otherwise expressly agreed" by the parties). Because the two Conventions are applied the same in the United States, Waste Management is indifferent to which Convention is followed so long as the arbitration is conducted in the pro-arbitration forum of the United States. Accordingly, if Mexico has a preference between use of the New York and Panama Conventions in the United States, Waste Management will expressly agree to whichever Convention Mexico prefers. By this accommodation, any genuine concern by Mexico will be eliminated.

Conclusion

The most neutral, legally suitable, and convenient forum for this arbitration is ISCID's World Bank headquarters in Washington, D.C. Mexico's preference for Canada, we respectfully submit, evidences Mexico's effort to gain an unfair juridical advantage in a non-neutral and inconvenient forum. Accordingly, for all the reasons stated in this letter and our original submission of June 18, 2001, Waste Management urges the Tribunal to select ISCID's World Bank headquarters in Washington, D.C. as the forum for this proceeding.

Respectfully submitted,

Jay L. Alexander

Counsel for ClaimantWaste Management, Inc.

cc: Mr. Hugo Perezcano Díaz
(via facsimile)