



IN THE ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH
AMERICA FREE TRADE AGREEMENT AND THE UNCITRAL RULES

DETROIT INTERNATIONAL BRIDGE COMPANY
CLAIMANT

V.

GOVERNMENT OF CANADA,
RESPONDENT

(PCA CASE NO. 2012-25)

SUBMISSION OF MEXICO PURSUANT ARTICLE 1128 OF NAFTA

1. Pursuant to NAFTA Article 1128, the Government of Mexico is providing its views on certain matters of interpretation of the NAFTA arising from the Government of Canada's request that the Tribunal dismiss the claims of Detroit International Bridge Company ("DIBC") on the ground that the Tribunal lacks the requisite jurisdiction.

2. No inference should be drawn from the fact that Mexico has chosen to address only some of the issues raised by the disputing parties. Mexico takes no position on the facts of the dispute.

I. ARTICLE 1121 WAIVER

A. The Meaning of the Phrase "With Respect to the Measure"

3. Article 1121 sets out the requirements that must be met by a disputing investor in order to accept a Party's offer to arbitrate set out in Article 1122, as follows:

1. A disputing investor may submit a claim under Article 1116 to arbitration only if:

(a) the investor consents to arbitration in accordance with the procedures set out in this Agreement; and

(b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any party, or other dispute settlement

procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party.¹

4. Thus, Article 1121 precludes a claimant from simultaneously commencing or continuing proceedings for damages under Chapter Eleven and in any other *fora*, including the U.S. domestic courts, based upon the measure that is alleged to be a breach of Chapter Eleven. As confirmed by the tribunal in *Waste Management Corporation v. United Mexican States*, ICSID Case No. ARB (AF)/98/2 (“*Waste Management I*”), the waiver applies to domestic proceedings with respect to a measure that is alleged to be a breach of Chapter Eleven, even if the legal grounds for the domestic action is not the NAFTA, but rather domestic law.²

5. Specifically, In *Waste Management I*, the tribunal determined that one of the measures complained of in the NAFTA claim was with respect to one that was the subject of the claimant’s allegations in domestic legal proceedings, concerning non-payment. However, the tribunal did not require that the domestic proceedings “expressly invoke” a NAFTA obligation. Rather, the tribunal stated that “something that under Mexican legislation would constitute a series of breaches of contract expressed as non-payment of certain invoices ... could under the NAFTA be interpreted as a lack of fair and equitable treatment” and that the applicable test is whether there is a violation “of the content of those obligations.” The tribunal added that a key point was whether “both legal actions have a legal basis derived from the same measures.”³

6. In its pleadings, DIBC focuses only on the word “measures,” stating that in its view Article 1121 “only requires a waiver of claims with respect to *the same measures* being challenged in the NAFTA arbitration.”⁴ However, for purposes of a proper analysis of the scope of the waiver requirement under Article 1121, it is also necessary to apply the term “with respect to.” Mexico agrees with Canada’s statement that “[a]ny domestic proceeding in which the measure, its application, or its implications on a claimant’s rights are put into question or are relevant to the determination of the proceeding is ‘with respect to’ the measure under Article 1121.”⁵

7. In this regard, the tribunal in *Canfor Corporation v. United States*, NAFTA (UNCITRAL) (“*Canfor*”) stated that “the words ‘with respect to’ are to be interpreted broadly.”⁶

¹ Article 1117, which sets out the requirements for the submission of a claim by an investor of a Party on behalf of an enterprise, is virtually the same.

² The word “measures” in the NAFTA is used in the same way as it had been used in the General Agreement on Tariffs and Trade (GATT 1947) as it then was. The word “measure” is used in several places in the GATT. For example, GATT Article X, which deals generally with the obligation of transparency, refers to “measures of general application” in paragraph 2; paragraph 1 of that article refers to “Laws, regulations, judicial decisions and administrative rulings of general application ...” in parallel fashion. Article XI(1), Article XX, and Article XXIII(1)(b) are other examples of places in which the GATT uses the term “measures.”

³ *Waste Management I* at paras. 27-28.

⁴ See, e.g., Claimant’s Counter-Memorial on Jurisdiction and Admissibility (“Counter-Memorial”), Aug. 23, 2013, at para. 154 (emphasis in original).

⁵ Canada’s Reply Memorial on Jurisdiction (“Reply”), Dec. 6, 2013 at para. 78.

⁶ *Canfor* at para. 201.

In doing so, the *Canfor* tribunal rejected the argument of the claimant in that case that “with respect to” covered “only those things identified.”⁷

8. In *Canfor*, the United States noted that the Statement of Administrative Action submitted by the U.S. Administration to the U.S. Congress when NAFTA was submitted for approval in 1993 reflecting its contemporaneous understanding that “with respect to” was synonymous with “concerning” and with “relating to,” and likewise that Canada’s Statement of Implementation equates the similar term “respecting” with “regarding.” Mexico agrees that all three Parties “used the phrase ‘with respect to’ interchangeably with ‘concerning,’” which suggests “a broad and general relationship.”⁸ Mexico also agrees with Canada’s views expressed in this proceeding, that “[t]he ordinary meaning of the words ‘with respect to’ is ‘as regards; with reference to,’ not ‘identical’ or ‘same as.’”⁹

9. Accordingly, DIBC’s argument that it is permissible to continue a domestic action that “does not challenge the exact same measures as in this arbitration” is significantly oversimplified.¹⁰

B. Object and Purpose of the Waiver Requirement

10. More broadly, it is also important to keep in mind the object and purpose of the waiver provision in Article 1121.

11. In *Waste Management I*, the tribunal found that the purpose of the waiver was to prevent “double benefit”.¹¹ In other words, a claimant cannot pursue monetary compensation in two different *fora* relating to the same measures.

12. The Tribunal in *International Thunderbird Gaming Corporation v. United Mexican States*, NAFTA (UNCITRAL) (“*Thunderbird*”) re-affirmed this principle:

In construing Article 1121 of the NAFTA, one must also take into account the rationale and purpose of that article. The consent and waiver requirements set forth in Article 1121 serve a specific purpose, namely to prevent a party from pursuing concurrent domestic and international remedies, which could either give rise to conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure.¹²

13. The *Waste Management I* tribunal found it relevant that the Mexican Government would be responsible for payment of the damages in both the NAFTA arbitration and the domestic legal proceedings, stating:

Also, we are facing proceedings with identical subjects for purposes of NAFTA Article 1121 since, pursuant to such treaty, the Mexican Government would have to be liable for those actions attributable to BANOBRAS and ACAPULCO. This point has been give

⁷ See *Canfor* at paras. 198-199.

⁸ United States Reply on Jurisdiction in *Canfor*, Aug. 6, 2004, at pp. 11-12.

⁹ Reply at para. 75.

¹⁰ Counter-Memorial at para. 132.

¹¹ *Waste Management I* at para. 27.3.

¹² *Thunderbird* at para. 118.

[sic] sufficient credit through the Respondent's written pleadings concerning the issue of jurisdiction."¹³

The situation in the instant case appears analogous, as Canada is the defendant in the litigation proceedings as well as in the NAFTA arbitration.

14. Even beyond particular concerns about duplication of relief, the NAFTA's waiver provisions reflect a concern about redundancy of proceedings generally. The *Canfor* tribunal recognized this element, stating that "the drafters of the NAFTA sought to avoid concurrent or parallel proceedings" and that, "[i]n the Tribunal's opinion, the presumption of the NAFTA is that, in the absence of an express provision to the contrary, concurrent or parallel proceedings are to be avoided."¹⁴ Mexico agrees that this is one of the principal goals of Article 1121.

C. Obligation to Terminate Domestic Proceedings

15. With regard to the question whether Article 1121 allows DIBC to pursue injunctive relief in the U.S. courts with respect to a measure that is a subject of its NAFTA claim, Mexico agrees with Canada that a proceeding in a U.S. court is not a proceeding "under the domestic law" of Canada. Civil litigation in the U.S. courts is conducted pursuant to the U.S. Federal Rules of Civil Procedure, 28 U.S.C. Appendix. Any injunctive or declaratory relief ordered by a U.S. court would be issued and enforced pursuant to U.S. domestic law.

16. For this reason, DIBC's attempted parsing of the negotiating history of Chapter 11 is beside the point. U.S. court proceedings are proceedings under U.S. law.

17. DIBC cites a paragraph in Mexico's Counter-Memorial on Preliminary Questions in the case *Marvin Feldman v. United Mexican States*, ICSID Case No. ARB(AF)/99/1 ("*Feldman*"). In that paragraph (para. 106), Mexico generally described the requirements for submitting a claim to arbitration. The issue arose in the context of the claimant's argument that the three-year limitations period should be deemed to have been satisfied when he submitted his notice of intent to file a claim, rather than when he submitted the claim to arbitration. In paragraph 206, Mexico discussed some of the reasons why an arbitration could not be considered initiated until the actual notice of arbitration was filed. The content of that paragraph has no relation to the issue of whether a claimant may maintain a domestic law proceeding seeking injunction relief in a country other than that of the respondent nation.

18. Mexico emphasizes that the waiver obligation must be given substantive meaning. If a claimant acts inconsistently with its written waiver by continuing domestic proceedings, the claimant's conduct would demonstrate that the waiver has not actually been provided, and therefore that the conditions precedent for submission of a NAFTA claim have not been satisfied.

D. DIBC's Theory of Continuing Acts

19. DIBC's reliance on the *Feldman* case for support for its theory that the limitations period can be extended based on the theory of "continuing acts" is misplaced. DIBC's error derives from a superficial depiction of the claims in the *Feldman* case. In fact, the claimant in *Feldman*

¹³ *Waste Management I* at para. 29.

¹⁴ *Canfor* at paras. 237, 242.

did not allege that he was continually denied tax rebates beginning in 1991; to the contrary, he alleged that he received rebates during various periods up to the end of 1997.¹⁵ In addition, there were court decisions and amendments to the tax law throughout the 1990s that changed the tax rules at issue, sometimes in favor of the claimant.¹⁶ The events that actually led to the NAFTA claim were (i) the decision of the Mexican tax authorities to refuse rebates to the claimant in later 1997¹⁷ and (ii) a tax audit in 1998 that led to an assessment of approximately US\$25 million.¹⁸ Those actions were clearly within the three-year limitations period.

20. The *Feldman* claimant also asserted that various earlier administrative actions of the Mexican tax authorities constituted a “creeping expropriation.” That theory of the claimant was introduced after the arbitration had been initiated on other grounds. Mexico strongly disputed that this new claim was admissible, particularly on the basis of the requirements of NAFTA Article 2103(6) (which imposes special procedural limitations on claims based on tax measures), and because the claimant had failed to describe actions that constituted an expropriation.¹⁹ Further, measures taken prior the entry into force of the NAFTA were outside the tribunal’s jurisdiction, as were later measures that were beyond the limitations period. Ultimately, the tribunal agreed that there was no expropriation, and that measures prior to the NAFTA and beyond the limitations period were not justiciable.²⁰ In summary, under the circumstances of the *Feldman* case, there was no need to address the concept of a “continuing breach” tolling the limitations period.

21. Mexico agrees with Canada that the three-year limitations period cannot be extended by an allegation that the alleged violation has continued. The term “first acquired” must be given meaning. To do otherwise would be inconsistent with the principle of effectiveness (*ut res magis valeat quam pereat*), under which :

...interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.²¹

22. As Canada has demonstrated, all three NAFTA Parties have agreed that the term “first acquired” means that the time limitation starts when an investor first acquires knowledge of an alleged breach and loss at a particular moment in time. Mexico observes that the unanimity of opinion of the three NAFTA Parties, as expressed through their Article 1128 submissions, constitutes a “subsequent agreement between the parties regarding the interpretation of the

¹⁵ *Feldman* at para. 16.

¹⁶ *Feldman* at paras. 7-21.

¹⁷ *Feldman* at para. 21.

¹⁸ *Feldman* at para. 22.

¹⁹ *Feldman* at paras. 244-55.

²⁰ *Feldman* at paras. 51, 111. The claimant in *Feldman* also argued that the limitations period should be deemed “tolled” for several years based on an allegation that the claimant thought he had entered into some type of settlement with the tax authorities. The tribunal rejected that theory as well. *Feldman* at paras. 60-65.

²¹ *United States - Standards for Reformulated and Conventional Gasoline*, (WT/DS2/AB/R), at 23 (May 20, 1996) (WTO Appellate Body). See also *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, (Second Phase)* – (Advisory Opinion of the International Court of Justice of July 18, 1950), ICJ Reports, 1950, p. 229.

[NAFTA] or the application of its provisions” and/or a “practice ... establish[ing] the agreement of the parties regarding [the NAFTA’s] interpretation” within the meaning of Article 31(3)(a) and (b) of the Vienna Convention. The NAFTA has been negotiated and administered by the NAFTA Parties and their shared views should be considered authoritative on a point of interpretation.

23. As Mexico has previously expressed in other cases, NAFTA Chapter Eleven Tribunals should be loath to diverge from such shared interpretations. As the drafters and signatories to the NAFTA, the NAFTA Parties stand in a position to both articulate their intent, and to convey policy-based positions that will ensure proper application of the NAFTA, bearing in mind their shared interests in its long-term success and acceptance by the citizens of their respective nations.

Each Party seeks to ensure that its investors receive the appropriate level of protection in each of the other Parties as intended by Chapter Eleven. Each necessarily balances its interests (the protection of its investors vs. the level of its exposure to claims) when formulating its position on interpretative issues. Therefore, where all three Parties clearly agree on a particular point, their views should be considered highly authoritative by tribunals.

All of which is respectfully submitted,



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cc: Mr. Yves Derains, the Hon. Michael Chertoff, Mr. Vaughan Lowe, Q.C., Mr. Jonathan D. Schiller, Mr. William Isaacson, Mr. Hamish Hume, Ms. Heather King, Mr. Edward H. Takashima, Mr. Mark A. Luz, Ms. Sylvie Tabet, Ms. Cheryl Fabian-Bernard, Ms. Ana Paula Montans and Ms. Evgeniya Goriatcheva.