

**IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF
THE NORTH AMERICAN FREE TRADE AGREEMENT AND THE UNCITRAL
ARBITRATION RULES**

BETWEEN:

KBR, INC.

Claimant / Investor

AND:

THE UNITED MEXICAN STATES

Respondent / Party

ICSID Case No. UNCT/14/1

**SUBMISSION OF THE GOVERNMENT OF CANADA
PURSUANT TO NAFTA ARTICLE 1128**

July 30, 2014

Departments of Justice and of
Foreign Affairs, Trade and
Development
Trade Law Bureau
Lester B. Pearson Building
125 Sussex Drive
Ottawa, Ontario
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CANADA

1. Canada makes this submission pursuant to Article 1128 of the *North American Free Trade Agreement* (“NAFTA”) and the letter of the Tribunal to the non-disputing NAFTA Parties dated April 28, 2014.

2. Article 1128 entitles a non-disputing Party to make submissions on questions of interpretation of the NAFTA. Canada takes no position on any factual issues or on how the following interpretation applies to the facts in this dispute. No inference should be drawn by the Tribunal from the absence of comment on any issue not addressed below.

Jurisdiction of a NAFTA Tribunal

3. The jurisdiction of any arbitral tribunal rests upon the consent of the parties before it to arbitrate a particular dispute.¹ Under Article 1122(1), the NAFTA Parties have offered consent to arbitrate with investors provided that certain conditions are met at the time the claim is submitted to arbitration.² Compliance with Articles 1116 to 1121 is necessary to perfect the consent of a NAFTA Party to arbitrate and establish the jurisdiction of the tribunal.³

4. Article 1121, entitled “Conditions Precedent to Submission of a Claim to Arbitration,” is a prerequisite to the formation of a valid arbitration agreement between the disputing investor and the NAFTA Party involved. Article 1121 stipulates that a claimant may submit a claim to arbitration “*only if*” the investor and its enterprise:

[W]aive 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

¹ Without a party’s consent, there “can be no valid arbitration.” Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Thomson, Sweet & Maxwell, 2004), at p. 5-7.

² NAFTA Article 1122(1) states: “Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.”

³ *Waste Management Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/98/2, Arbitral Award, June 2, 2000, ¶¶ 16-17 (hereinafter *Waste Management*) (Article 1122 “serves to confirm the importance of the autonomy of the will of the parties, which is evinced by their consent to submit any given dispute to arbitration proceedings. Hence, it is upon that very consent to arbitration given by the parties that the entire effectiveness of this institution depends.”); *Methanex Corporation v. United States of America*, (UNCITRAL) Preliminary Award on Jurisdiction, August 7, 2002, (hereinafter *Methanex*, Partial Award), ¶¶ 120-121 (in order to establish jurisdiction, a tribunal “must establish that the requirements of Articles 1116-1121 have been met by a claimant...”).

to the measure of the disputing Party that is alleged to be a breach referred to in Article 1117, 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.⁴

5. There is no consent to arbitration under Article 1122(1), and hence no jurisdiction for a NAFTA tribunal, unless a claimant complies with the conditions precedent to the submission of a claim to arbitration set out in Article 1121.⁵ This includes a requirement for the claimant to file a valid waiver with its notice of arbitration and act consistently with that waiver by abstaining from initiating or continuing domestic proceedings with respect to a measure alleged to breach the NAFTA.⁶ This has been the longstanding position of the NAFTA Parties.⁷

⁴ Article 1121(2)(b). Article 1121(1)(b) stipulates the same with respect to an investor submitting a claim on its own behalf under NAFTA Article 1116.

⁵ *Waste Management*, ¶¶ 14, 16. See also *Commerce Group Corp et al v. The Republic of El Salvador*, ICSID Case No. ARB/09/17, Award, March 14, 2011, ¶¶ 83-84, 102, 107, 115 (hereinafter *Commerce Group*) (interpreting NAFTA Article 1121's equivalent provision in the Dominican Republic-Central America-U.S. Free Trade Agreement ("CAFTA-DR"), stating at ¶ 115: ("[i]f the waiver is invalid, there is no consent. The Tribunal, therefore, does not have jurisdiction over the Parties' CAFTA dispute."); *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Decision on Objection to Jurisdiction, CAFTA Article 10.20.5, November 17, 2008, ¶ 56 (referring to CAFTA-DR's waiver provision: "the conditions set forth in Article 10.18 need to be met before the consent of the Respondent to arbitration is perfected.").

⁶ *Waste Management*, ¶ 19. See also *Commerce Group*, ¶¶ 80-84 stating at ¶ 80: ("[a] waiver must be more than just words; it must accomplish its intended effect.").

⁷ See *Waste Management*, Counter-Memorial Regarding the Competence of the Tribunal of the United Mexican States, November 5, 1999, ¶¶ 25-30, 93-98; *Waste Management*, Submission of the Government of Canada, December 17, 1999, ¶¶ 8, 11 (hereinafter *Waste Management – Canada Article 1128 Submission*): ("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 [...] [I]f 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"); *Tembec Inc., Tembec Investments Inc. and Tembec Industries Inc. v. United States of America*, Objection to Jurisdiction of Respondent United States of America, February 4, 2005, p. 36: ("Compliance with Article 1121 requires that the claimant not only provide a written waiver, but that it act consistently with that waiver by abstaining from initiating or continuing proceedings with respect to the same measures in another forum. All three NAFTA Parties have confirmed in submissions to NAFTA tribunals that a claimant's failure to terminate parallel claims invalidates any purported waiver under Article 1121."); Canada DIBC Memorial on Jurisdiction, ¶ 84; Canada DIBC Reply Memorial, ¶ 60; *Detroit International Bridge Company v. Canada*, PCA Case No. 2012-25, Submission of the United States of America, February 14, 2014, ¶¶ 4-6 (hereinafter *DIBC – U.S.A. Article 1128 Submission*); *Detroit International Bridge Company v. Canada*, PCA Case No. 2012-25, Submission of Mexico Pursuant to Article 1128 of NAFTA, ¶ 18 (hereinafter *DIBC – Mexico Article 1128 Submission*).

6. A claimant cannot *ex post facto* cure Article 1121 jurisdictional defects absent the express consent of the responding NAFTA Party.⁸

Scope of Article 1121

7. Article 31(1) of the *Vienna Convention on the Law of Treaties* sets out the general rule of treaty interpretation in international law: “A treaty shall be interpreted in good faith with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”

8. The ordinary meaning of the term “with respect to” in the context of Article 1121(1)(b) and (2)(b) in all three official NAFTA languages is synonymous with “relating to,” “concerning,” and “as regards; with reference to.”⁹ The United States NAFTA Statement of Implementation states that “Article 1121 requires the investor...to consent in writing to arbitration, and to waive the right to initiate or continue any actions in local courts or other fora *relating to* the disputed measure...”¹⁰ In describing Article

⁸ See *Railroad Development Corporation v. Republic of Guatemala* (ICSID Case No. ARB/07/23) Decision on Objection to Jurisdiction CAFTA Article 10.20.5, November 17, 2008, ¶ 61: (“The Tribunal has no jurisdiction without the agreement of the parties to grant the Claimant an opportunity to remedy its defective waiver. It is for the Respondent and not the Tribunal to waive a deficiency under Article 10.18 or to allow a defective waiver to be remedied...”); *Methanex*, Partial Award, ¶ 93 (the challenge to the defective waiver submitted by the Claimant was amicably settled with the agreement of the United States); See also *Waste Management – Mexico Counter Memorial*, ¶ 25: (“The NAFTA does not authorize a tribunal to cure a defect in a waiver after it has been constituted.”); *Waste Management - Canada Article 1128 Submission*, ¶ 13: (“Failure to provide waivers in the form prescribed by Article 1121 cannot be cured *post facto*. Otherwise, if non-respect of the terms and purposes of Article 1121 bore no consequences it would render the article meaningless against the clear intention of the NAFTA Parties.”).

⁹ See http://www.oxforddictionaries.com/definition/english/respect?q=with+respect+to#respect_24 (Oxford Dictionary- Online definition of “with respect to”). The equally authoritative French and Spanish texts of the NAFTA use similarly broad language. In French, “des procédures *se rapportant* à la mesure...” is used and means proceedings “relating to” or “in logical relation with.” *Accord de libre-échange nord-américain, Loi portant mise en oeuvre de l’*, ch. 44, 1991-92-93, Statutes of Canada. The Spanish text uses “respecto a la medida...” which means proceedings “respecting” the measure. *El Tratado de Libre Comercio en America del Norte, Executive Decree of December 14, 1993, Diario Oficial*, December 20, 1993. See also *Consolidated Softwood Lumber*, Decision on Preliminary Question, ¶ 201 n. 214 (citing use of “with respect to” in the French and Spanish versions of NAFTA); *DIBC – U.S.A. Article 1128 Submission*, ¶ 6 (referring to its previous pleadings in *Consolidated Softwood Lumber Proceedings*, Reply Post-Hearing Submission of Respondent United States of America, March 10, 2006, at 2, n. 2 and *Canfor Corporation v. United States of America*, Reply on Jurisdiction of Respondent United States of America, August 6, 2004, at 12: (“Thus, in the context of Article 1121(1)(b), the United States considered “with respect to” to be synonymous with “relating to.”)); *DIBC - Mexico Article 1128 Submission*, ¶ 8.

¹⁰ The North American Free Trade Agreement Implementation Act, United States Statement of

1121, Canada's NAFTA Statement of Implementation states that the investor and its enterprise must "waive their right to initiate or continue legal proceedings...concerning the measure in question."¹¹ Accordingly, the ordinary meaning of the phrase "with respect to" requires a broad interpretation.¹²

9. A broad construction of "with respect to" is consistent with the object and purpose of Article 1121. One of the goals of Article 1121 is to avoid "conflicting outcomes (and thus legal uncertainty) or lead to double redress for the same conduct or measure."¹³ To achieve this purpose, the NAFTA Parties put in place a waiver requirement to ensure that they would not have to defend against claims relating to government measures in multiple proceedings at the same time and from having to continue to defend against such claims after the NAFTA arbitration is concluded.

10. Thus, interpreting Articles 1121(1)(b) and 2(b) in accordance with the *Vienna Convention on the Law of Treaties*, and with due regard to the findings of other tribunals¹⁴ and the past positions of the NAFTA Parties,¹⁵ determining whether a

Administrative Action, November 1993, at 147 (emphasis added).

¹¹ The North American Free Trade Agreement, Canadian Statement of Implementation, January 1994, at 154 (emphasis added).

¹² *Canfor Corporation v. United States of America and Terminal Forest Products Ltd v. United States of America* (UNCITRAL) Decision on Preliminary Question, June 6, 2006, ¶ 201. The NAFTA Parties have taken the same position in previous arbitrations. See *Canfor Corporation v. United States of America*, Reply on Jurisdiction of Respondent United States of America, August 6, 2004, at 10-12; *DIBC – Canada Memorial on Jurisdiction*, ¶ 94; *DIBC – Canada Reply Memorial on Jurisdiction*, ¶ 76; *DIBC – U.S.A. Article 1128 Submission*, ¶ 6; *DIBC - Mexico Article 1128 Submission*, ¶ 7.

¹³ *International Thunderbird Gaming Corporation v. The United Mexican States* (UNCITRAL) Award, January 26, 2006, ¶ 118.

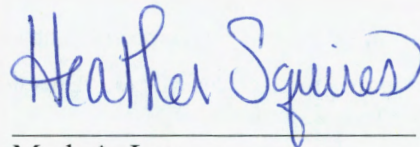
¹⁴ *Waste Management*, ¶ 27, *Commerce Group*, ¶¶ 111-112.

¹⁵ See e.g., *DIBC - Canada Memorial on Jurisdiction*, ¶ 95: ("[a] domestic proceeding that requires for its disposition making determinations of facts or determinations of legal rights, or that might award compensation, "in regards to or with reference to" a measure that is alleged to breach the NAFTA"); *DIBC – U.S.A. Article 1128 Submission*, ¶ 6 (citing *Commerce Group* "[T]he waiver provision permits other concurrent or parallel domestic proceedings where claims relating to different measures at issue in such proceedings are "separate and distinct" and the measures can be "teased apart." Article 1121 does not require a waiver of domestic proceedings where the measure at issue in the NAFTA arbitration is, for example, only tangentially or incidentally related to the measure at issue in those domestic proceedings."); *DIBC - Mexico Article 1128 Submission*, ¶ 6: ("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.", citing *DIBC - Canada Reply Memorial*, ¶ 78).

claimant has complied with Article 1121 involves considering whether a measure alleged to breach the NAFTA plays more than an incidental or tangential role in the domestic proceeding and whether a measure impugned in a domestic proceeding is separate and distinct from a measure alleged to breach the NAFTA.

11. The only exception to the waiver rule in Article 1121 is the right of the claimant to initiate or continue "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." In other words, proceedings with respect to a measure alleged to breach the NAFTA are permitted before the courts and tribunals of the respondent NAFTA Party as long as such proceedings do not involve the payment of damages.

Respectfully submitted on behalf of
the Government of Canada
this 30th day of July, 2014



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