BEFORE THE HONORABLE TRIBUNAL ESTABLISHED PURSUANT TO CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT (NAFTA)

WASTE MANAGEMENT, INC.,
CLAIMANT

VS.

THE UNITED MEXICAN STATES,
RESPONDENT

ICSID Case No. ARB(AF)/98/2

COUNTER-MEMORIAL REGARDING THE COMPETENCE OF THE TRIBUNAL

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I. INTRODUCTION

1. Pursuant to Article 46 of the Additional Facility Arbitration Rules of the ICSID, the Respondent requests a ruling that the Tribunal lacks competence to hear this dispute on the grounds that the Claimant has not complied with the conditions precedent to submitting a claim for arbitration under Section B of Chapter Eleven of the North American Free Trade Agreement ("NAFTA").

2. Article 1122 provides that the respondent Party consents to the submission of a claim to arbitration in accordance with the procedures set out in the NAFTA. Article 1121 requires both a claimant and its investment, at the time of the submission of the claim to arbitration, to waive their rights to initiate or continue domestic legal proceedings for damages with respect to the governmental measures are alleged to be a breach of NAFTA Chapter Eleven. The Claimant has refused to provide waivers in the proper form from itself and its indirect Mexican subsidiary, Acaverde S.A. de C.V., as required by Article 1121. Moreover, since the filing of this NAFTA claim, Acaverde has continued to pursue money damages claims in domestic legal proceedings against both the federal Government of Mexico and the municipality of Acapulco. Under these circumstances, the Respondent cannot be deemed to have consented to the arbitration.

3. The Respondent has consistently expressed its views on this issue —first to the Secretary–General of the ICSID and the Claimant, and then to this Tribunal promptly after it was established. The Respondent now again formally objects to the Tribunal's competence to decide the dispute on the merits.

4. Article 46 of the Additional Facility Arbitration Rules requires the Tribunal to suspend this proceeding upon the receipt of a formal objection to its competence, at which time it must consider the objection. It provides in pertinent part:

> (1) The Tribunal shall have the power to rule on its competence....
>
> (4) Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended. The Tribunal may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, the proceeding on the merits shall be resumed. If the Tribunal decides that the dispute is not within its competence, it shall issue an order to that effect, stating the grounds for its decision.

The Tribunal therefore is authorized under the applicable arbitration rules to deal with the issue of competence separately from the merits of the case, and to dismiss the claim on the basis that it lacks the necessary competence.

5. The Respondent seeks the following specific orders:

a) an order that the proceedings be stayed while the Tribunal determines whether the dispute herein is within its competence;

b) an order that the dispute is not within its competence and that this proceeding is terminated; and

c) an order that the Claimant pay the Respondent's costs of the arbitration, including reasonable counsel fees and expenses.

6. The legal and factual background of the requests is set out below.

II. LEGAL BACKGROUND

A. Principles of Interpretation

7. NAFTA Article 1131 requires this Tribunal to decide the issues in dispute in accordance with the NAFTA and applicable rules of international law. In interpreting the NAFTA, the Tribunal should apply the rules of interpretation of public international law as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), which are generally accepted as reflecting customary international law. This approach has been applied by an arbitration panel convened under NAFTA Chapter Twenty (the Chapter Twenty procedures apply to state-to-state disputes under the NAFTA)[1].

8. Articles 31 and 32 of the Vienna Convention provide:

> Article 31. General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

[1] See In the Matter of Tariffs Applied By Canada to Certain U. S. Origin Agricultural Products, CDA-95-2008-01, Final Panel ¶ 117-24 (Dec. 2, 1996) (1996 LFTAPD LEXIS 10).

> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> Article 32. Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.[2]

9. Thus, the starting point of an interpretation of the NAFTA is the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the Agreement. Accordingly:

> ...the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.[3]

Recourse to supplementary means of interpretation should be made only under the conditions specified in Article 32 of the Vienna Convention.

B. Conditions Precedent For Filing A NAFTA Claim

10. The Tribunal's jurisdiction over claims based on the NAFTA derives from NAFTA Article 1122(1), which provides:

> Article 1121: Consent to Arbitration
>
> 1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement. [Emphasis added.]

11. A respondent Party does not consent to arbitration under the Additional Facility Rules unless the claimant has submitted its claim "in accordance with the procedures set out in" the NAFTA. The claim in this case has not been presented in accordance with those procedures.

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[2] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969).

[3] Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 8 (Advisory Opinion of March 3).

1. Required Content of Waiver

12. NAFTA Article 1121 distinguishes between claims under Article 1116 (Claim by an Investor on Its Own Behalf) and claims under Article 1117 (Claim by an Investor of a Party on Behalf of an Enterprise). It is crucial to examine Article 1121 in full:

> Article 1121: Conditions Precedent to Submission of a Claim to Arbitration
>
> 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.
>
> 2. A disputing investor may submit a claim under Article 1117 to arbitration only if both the investor and the enterprise:
>
> (a) consent to arbitration in accordance with the procedures set out in this Agreement; and
>
> (b) 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 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.

13. These clauses require a waiver of the right to initiate or continue domestic proceedings "with respect to the measure of the disputing Party that is alleged to be a breach" of NAFTA Chapter Eleven. They focus on the act of the respondent said to give rise to the claim under Chapter Eleven (the so-called "measure")[4].

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[4] NAFTA Article 201 (General Definitions) provides: "**measure** includes any law, regulation, procedure, requirement or practice."

14. It is obvious that a measure may, at the same time, give rise to a claim under municipal law. Article 1121 does not focus on the source of the legal obligation but rather on the measure giving rise to the claim because a measure can give rise to different types of claims in different fora.

15. In the special case of Mexico, NAFTA Article 1120 and Annex 1120.1 provide an additional limitation for claims brought against the Respondent. Article 1120(1) states that a disputing investor may submit a claim to arbitration "except as provided in Annex 1120.1". Annex 1120.1 prohibits an investor, or an investment of an investor, from alleging violations of the NAFTA by Mexico in both domestic legal proceedings and a NAFTA arbitration, even where the domestic legal proceedings do not involve the payment of damages. This additional limitation is necessary because the NAFTA is a self-executing treaty under Mexican law, and a person potentially could allege a violation of the NAFTA as a basis for a domestic legal claim in Mexico. (The NAFTA is not self-executing under either United States or Canadian law; consequently, there is no possibility for a person in those countries to allege a violation of the NAFTA in a domestic legal proceeding.)[5]

16. Annex 1120.1 in no way relaxes the conditions precedent of Article 1121; rather, it prevents a situation from arising in which a NAFTA tribunal and a Mexican domestic court might issue inconsistent interpretations of the NAFTA in the same matter.

17. In this case, the Claimant has identified two principal measures that it alleges are breaches of the NAFTA: (i) the alleged failure of Acapulco to make payments under its contract with Acaverde, and (ii) the alleged failure of the Banco Nacional de Obras y Servicios Publicos, S.N.C. ("Banobras"), as the guarantor of Acapulco, to pay Acaverde the debt allegedly owed by Acapulco. (Banobras is a national development bank owned by the Mexican federal government.)

18. These same measures have formed the basis for three separate legal proceedings, two initiated against Banobras in the Mexican courts and one arbitral proceeding initiated against Acapulco under the concession agreement between Acaverde and Acapulco.

19. In its Memorial, the Claimant argues that "[i]n neither the lawsuits against Banobras nor in the domestic arbitration against Acapulco did Acaverde allege any violations of NAFTA or international law, and specifically it did not assert any legal theories based on 'expropriation' or violations of the minimum standard of treatment required under international law"[6]. The Claimant therefore has simply asserted it complied with the requirements of Annex 1120.1. This argument confuses the applicable law with the choice of forum: Article 1121 is concerned with the latter. A claimant cannot pursue claims for damages based on the same measure in a domestic forum and under the NAFTA.

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[5] In the United States and Canada, the law expressly prohibits persons from relying on the NAFTA as the basis for domestic legal claims.

[6] Memorial at 35.

20. The Claimant, although repeatedly advised of the views of the Government of Mexico on the clear requirements of Article 1121, has refused to comply with those requirements, and has continued to pursue damages in the domestic proceedings.

21. The language of Article 1121 is perfectly clear. Nonetheless, should the Tribunal have any doubt that Article 1121 was intended to require waiver of domestic damages claims that do not involve express allegations of a breach the NAFTA, it can examine interpretations of the article published by the United States in the Statement of Administrative Action (submitted by the President to the Congress as part of the process of seeking approval for the agreement) and in Canada's Statement on Implementation (published by the government upon implementation of the agreement). Because of the self-executing nature of international agreements in Mexico, the Mexican President is not required to publish a similar document.

22. The United States Statement of Administrative Action ("SAA") provides in pertinent part:

> c. Jurisdiction Requirements
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> .... Article 1121 requires the investor (and, in certain cases, the enterprise that is owned or controlled by 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, except for actions for actions for injunctive and other extraordinary relief.[7] [Emphasis added.]

23. Similarly, Canada's Statement on Implementation ("CSI") provides in pertinent part:

> Under article 1121, and investor may submit a claim under article 1116 to arbitration only if:
>
> — the investor consents to arbitration in accordance with the procedures set out in the Agreement; and
>
> — the investor, and in those cases where an enterprise that the investor directly or indirectly owns controls suffered the damages claimed, the enterprise, waive their right to initiate or continue legal proceedings (except specific proceedings for injunctive,. declaratory and other extraordinary relief) concerning the measure in question.
>
> Claims made under article 1117 on behalf of investments must meet the same conditions.[8] [Emphasis added.]

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[7] Statement of Administrative Action contained in Message from the President of the United States Transmitting North American Free Trade Agreement, H. Doc. 103-159, Vol. 1 (Nov. 4, 1993) at 596.

[8] Department of External Affairs, Canadian Statement of Interpretation, Canada Gazette, Part I (Jan. 1, 1994) at 154.

24. The views of the other NAFTA Parties therefore are consistent with the Respondent's view that the waiver must encompass all actions for damages that relate to the measures that are the subject of the NAFTA claim.

2. Required Time for Submission of Waiver

a. The Language of the NAFTA Plainly Requires the Waiver To Be Made At The Time The Notice of Arbitration Is Filed

25. NAFTA Chapter Eleven expressly states that the required waivers must be submitted at the time of the filing of the Notice of Arbitration. The NAFTA does not authorize a tribunal to cure a defect in a waiver after it has been constituted.

26. Specifically, Article 1121, entitled "Conditions Precedent to Submission of a Claim to Arbitration", provides that an investor may "submit a claim ... to arbitration only if" it consents to arbitration and waives its rights to initiate or continue domestic proceedings for damages. Article 1121(3) states that "[a] consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration." (Emphasis added)

27. Article 1137(1) defines when a claim is considered "submitted to arbitration":

> A claim is submitted to arbitration under this Section when ... the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General.

In this case, the claim was submitted to arbitration on September 29, 1998[9].

28. The requirement for a written waiver of the right to initiate or continue any actions in local courts or other fora relating to the disputed measure(s) is an absolute condition precedent for submission of a claim to arbitration that must be fulfilled (in claims governed by the ICSID Additional Facility Rules) at the time that the Notice of Arbitration is delivered to the ICSID Secretary-General. It bears emphasizing that:

a) Article 1121 is entitled "Conditions Precedent of Submission of a Claim to Arbitration";

b) Article 1121(1) and (2) state that a claim may submitted to arbitration "only if" the waiver is given; and

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[9] The United States SAA describes the waiver requirement under the heading "Jurisdictional Requirements". SAA at 147. Canada's CSI states: "The consent and waiver are to be included with the submission of the claim to arbitration". CSI at 154.

c) Article 1137 states that the time a claim is submitted is (in the case of ICSID Additional Facility Rules) when the Notice of Arbitration is delivered to the Secretary General.

29. As the plain text of the treaty and the interpretative statements of the other Parties show, the Parties wanted the assurance that, having given a general consent in advance to the arbitration of disputes arising from alleged breaches of Chapter Eleven, tribunals established under Chapter Eleven would ensure that disputing investors would be required to adhere to the procedures set out in Chapter Eleven in order to validate a Party's prior consent. A disputing investor's failure to do so would not secure the necessary consent to arbitrate.

30. Such a failure renders invalid *ab initio* an arbitration thereafter initiated.

31. Neither the Claimant nor Acaverde to date has waived its rights to pursue domestic remedies for damages arising out the measures that are the subject of this arbitration, and the NAFTA precludes them from curing the defect now. Therefore, this Tribunal lacks jurisdiction to adjudicate the dispute and the proceeding claim must be terminated.

b. Ethyl Corporation v. Canada

32. Article 1121's requirement for the delivery of a waiver of domestic claims was the subject of an award on certain jurisdiction issues rendered by a tribunal established under NAFTA Chapter Eleven in Ethyl Corporation v. The Government of Canada[10]. At issue in that case was the claimant's failure to abide a number of the prescribed requirements for submitting a claim to arbitration, including the requirement to give the waiver under Article 1121 simultaneously with the delivery of its notice of claim (under the UNCITRAL rules) to the disputing Party. Instead, the waiver was filed several months later with the claimant's statement of claim.

33. The Ethyl tribunal noted that NAFTA arbitration is exclusive:

> The Tribunal has not gained any insight into the reasons for the formalities prescribed by Article 1121, which on their face seem designed to memorialize *expressis verbis* what normally is the case in any event, namely, that the initiation of arbitration constitutes consent to arbitration by the initiator, whereby access to any court or other dispute settlement mechanism is precluded (except as allowed ancillary to or in support of the arbitration). [Emphasis added.][11]

34. However, given that the waiver had been filed (without dispute as to its form or content) five months before the hearing of jurisdiction issues and Canada had not complained of prejudice arising from late delivery of the waiver, the Tribunal allowed the arbitration to continue but

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[10] Award on Jurisdiction in the NAFTA/UNCITRAL Case Between Ethyl Corporation and The Government of Canada, June 24, 1998, 38 I.L.M. 708 (May 1999).

[11] Id. at paragraph 90.

ordered Ethyl to pay Canada's costs of the jurisdictional proceedings in connection with that issue and several others[12].

35. An important distinguishing feature of the *Ethyl* case was that the waiver was unqualified and the claimant had not initiated any domestic claims for compensation. The Respondent submits that even if the Tribunal in this case were to contemplate whether its competence to decide the case on the merits could be established or perfected if the Claimant were to comply with directions to file an unconditional waiver and pay the Respondent's costs of the jurisdiction issue, the Claimant's conduct would preclude it from making such a finding. Simply put, the Claimant has refused to give a proper waiver throughout the course of these proceedings and the Respondent has suffered prejudice as a result of the initiation and continuation of domestic legal proceedings by Acaverde.

36. The Claimant sought (and continues to seek) whatever juridical advantages it could obtain by "forum shopping", apparently intending to take its remedy in the forum that would render the earliest favorable result. It paid no heed to the requirement of Article 1121 to waive its right to sue in domestic fora, or to the usual expectation among parties to an international arbitration that access to other dispute resolution mechanisms is excluded upon initiation of arbitral proceedings.

37. In the meantime, the Respondent (through two levels of government and a state enterprise) has suffered inconvenience and expense in having to defend the same claim in four proceedings (two actions in the domestic courts, one domestic arbitration and this proceeding) instead of one. It also suffered *de jure* prejudice in being put at risk of suffering an award of damages in four proceedings instead of one.

38. These facts would make it impossible to cure the defect of jurisdiction if the Tribunal were to take the view that the proceeding is not invalid *ab initio* or that the Claimant could otherwise establish the Tribunal's competence to decide the dispute on its merits if it were to belatedly comply with Article 1121. To allow the Claimant to continue prosecuting this arbitration upon the belated filing of a waiver, having engaged in parallel domestic proceedings for 14 months after submitting the claim to arbitration, would require ignoring the mandatory language of Article 1121, upon which the United States, Canada and Mexico relied when they agreed to consent to arbitration of claims pursuant to the procedures prescribed by Section B of Chapter Eleven.

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[12] The Respondent disagrees with the legal reasoning relied upon by the Ethyl panel in deciding that the arbitration could continue. The Respondent nonetheless is bringing the decision to the attention of the Tribunal in the belief that the Tribunal should be aware of all potentially relevant sources of information on issues of NAFTA interpretation.

III. THE FACTS

A. The Claimant, Through Acaverde, Has Been Pursuing Damages in Domestic Mexican Legal Proceedings

39. In its Memorial, the Claimant states that its claim is based on actions of all three levels of government in Mexico:

> Mexico's breaches of NAFTA resulted from actions of three state organs of Mexico: Banco Nacional de Obras y Servicios Publicos, S.N.C. ("Banobras"), a Mexican national development bank owned and supervised by the Mexican Secretaria de Hacienda y Credito Publico; the Mexican State of Guerrero . . .; and the Municipality of Acapulco de Juárez....[13]

40. The Claimant describes the two principal measures that form the basis for its claim: (i) Acapulco's alleged refusal to pay the invoices presented to it by Acaverde under the concession agreement, and (ii) Banobras' alleged refusal, as a guarantor under a line of credit agreement with Acapulco, to pay those invoices[14]. It alleges that "Acapulco and Banobras conspired not to pay Acaverde under the Concession and Line of Credit Agreement"[15].

41. Acaverde has actively pursued money damages claims through domestic litigation, both before and after the initiation of this arbitration by the Claimant. In its Memorial, the Claimant has not complained in any manner about its treatment in these domestic legal proceedings, and those proceedings are not among the measures the Claimant alleges were a violation of NAFTA Chapter Eleven.

42. To date, Acaverde has initiated three legal domestic legal actions: two against Banobras (a federal government agency), and one against the municipality of Acapulco.

1. Acaverde v. Banobras

43. Acaverde has brought two lawsuits against Banobras.

a. First Lawsuit

44. On January 31, 1997, Acaverde filed a complaint in the mercantile court seeking payment from Banobras of $NP15,031, 693.70, plus damages and costs[16].

45. A key element of the case was that Banobras initially had made a payment to Acaverde for some of the invoices that Acapulco had refused to pay. After learning that this payment had

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[13] Memorial at 4-5.

[14] Memorial at 40 ("Acapulco's refusal to pay on approved invoices, and Banobras' flagrant failure to honor its public guarantee of those payments after confirming in writing its obligation to do so, were confiscatory").

[15] Memorial at 26.

[16] Amparo Civil Decision No. D.C. 5026/99 ("Amparo I") at 2. [Exhibit 1.]

been made, the Municipality of Acapulco sent a letter dated September 11, 1996 to Banobras that stated in pertinent part:

> Because the enterprise ACAVERDE, S.A. de C.V. has not complied with the terms and conditions agreed to in the concession that it was granted, in particular those relating to the construction of a permanent sanitary landfill, the closure of the Caraball y Paso de Texca open dumps, and the mechanical and manual cleaning services, principally, this municipality has suspended the payments arising under the concession until the concessionaire strictly complies with the obligations imposed by the concession that it was granted.
>
> Consequently, we request that on the basis of the 3rd paragraph of the 6th provision of the agreement dated 9 June 1995,you refuse any petition for payment that ACAVERDE, S.A. de C.V. may present against the line of credit that we were granted by the contingency and revolving fund provided for under such instrument....[17]

46. On January 7, 1999, the mercantile court ruled in favor of Banobras[18].

47. Acaverde's appeal from the mercantile court's decision was registered on January 18, 1999[19].

48. On March 11, 1999 the Second Unitary Court for the First Circuit of Mexico affirmed the ruling that Acaverde was not entitled to payment from Banobras under the line of credit agreement[20]. Although it acknowledged that Acaverde was an intended third party beneficiary of the line of credit agreement between Banobras and Acapulco, it held that the terms of the line of credit agreement did not apply where Acapulco had not paid Acaverde because it had not fulfilled its obligations under the concession. Because Acaverde had not raised any objections to the September 11, 1996 letter from Acapulco to Banobras, the court concluded it could give the letter full probative value as evidence that Acapulco had not declined to pay the invoices because of a lack of liquidity. The court also noted that the invoices presented by Acaverde lacked the stamps and signatures that would show that they had been accepted by Acapulco as valid.

49. On April 7, 1999, Acaverde filed an *amparo* challenging the constitutionality of the decision of the Second Unitary Court[21].

50. On October 6, 1999, the *amparo* court upheld the actions of the lower courts[22].

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17 Letter from Lic. Alfredo Baquiero Zarate to Lic. Mario Alcara Alcaron (Sept. 11, 1996). [Exhibit 2.]

18 Notification Order, Proceeding 12/97, Acaverde v. Banobras, Plenary Mercantile Proceeding, Federal District, Mexico (Jan. 7, 1999). [Exhibit 3.]

19 Civil Action 16/99-II, Appeal of Acaverde v. Banobras, Second Unitary Court for the First Circuit of Mexico (March 11, 1999) at 6. [Exhibit 4.]

20 See Exhibit 4.

21 Amparo I at 1. [Exhibit 1.]

b. Second Lawsuit

51. On August 11, 1998, Acaverde filed a second mercantile suit against Banobras, seeking an additional NP$21,822, 733.50 for unpaid invoices (relating to a later time period than that covered by the invoices that were the subject of its first lawsuit), plus damages and costs[23]. The theory of this lawsuit was the same as the first one.

52. On January 12, 1999, the mercantile court dismissed Acaverde's suit against Banobras on the basis that Acaverde and Acapulco had agreed to resolve all disputes arising from the concession by arbitration, and therefore a mercantile proceeding was not available by agreement of the parties[24].

53. Acaverde appealed from this decision on January 20, 1999[25]. On February 18, 1999, the First District Civil Judge of the Federal District dismissed the appeal on the procedural basis that the documents filed did not adequately set out the grounds for the appeal[26].

54. On February 24, 1999, Acaverde initiated a revocation proceeding before the First Unitary Court of the First Circuit in an attempt to revive its appeal. Acaverde's request was dismissed on February 25, 1999, because it had erred in initiating a revocation proceeding when the proper procedure was a reinstatement appeal[27].

55. On March 9, 1999, Acaverde filed an *amparo* challenging the constitutionality of the decisions of the mercantile court and the appellate courts[28].

56. On May 20, 1999, the *amparo* court rejected Acaverde's challenge, thus confirming the appropriateness of the prior decisions[29].

2. Acaverde v. Acapulco

57. On October 27, 1998, Acaverde filed a memorial with an arbitration tribunal formed under the auspices of the Permanent Arbitration Commission of the Chamber of Commerce of the City of Mexico ("Commission") asserting that it was entitled to an award of approximately NP$246,000,000 in damages because Acapulco failed to pay for its services, failed to perform

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Footnote continued from previous page

22 Amparo I. [Exhibit 1.]

23 Amparo Civil Decision Number D.C. 2870/99, Resolution of Law of the Seventh Civil Matter Tribunal, Federal District, Mexico (May 20, 1999) ("Amparo II"). [Exhibit 5.]

24 Notification Order, Proceeding No. 89/98, Acaverde v. Banobras, Plenary Mercantile Proceeding, Federal District, Mexico (Jan. 12, 1999) [Exhibit 6.]

25 Amparo II at 5. [Exhibit 5.]

26 Id. at 4

27 Id. at 5.

28 Id.

29 Id. at 1.

several obligations under the concession, and failed to fulfill its obligations under the line of credit agreement with Banobras[30].

58. Acapulco filed its counter-memorial on November 25, 1998[31].

59. As indicated in the Memorial, Acaverde subsequently requested that the Commission return to it the documents it had filed with the arbitration panel[32]. In response to a September 24, 1999 request from Acapulco's counsel to clarify the status of the arbitration, the Commission on September 30, 1999 responded that, although the parties' documents were being returned to them:

> It must be made clear that this Commission does not have the authority to terminate the proceeding, as is incorrectly stated by the parties in their submissions, as the return of the documents referenced was done without prejudging any resolution of law that at its opportunity the Arbitration Tribunal may issue, upon whom it is incumbent upon to resolve the said question.[33]

60. Consequently, at least as a formal matter, it is not resolved whether the arbitration proceeding actually has been terminated. And as stated by Acaverde's Mexican counsel in these domestic legal proceedings, Acaverde has retained the legal right to further litigate the dispute under Mexican domestic law[34].

B. The Claimant Has Not Waived Its Rights to Pursue Damages in Domestic Dispute Settlement Proceedings

61. The Claimant's first effort to provide a purported "waiver" was contained in a letter dated July 22, 1998 submitted by its legal representative, the law firm Baker & Botts, to the Secretary-General of the ICSID. The letter stated:

> 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. This waiver does not apply, however, to any dispute settlement proceedings involving allegations that

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30 Memorial of Acaverde, Arbitral Proceeding 1/98, Arbitral Tribunal of the Chamber of Commerce of Mexico City (Oct. 27, 1998). [Exhibit 7.]

31 Counter-Memorial of the Government of Acapulco, Arbitral Proceeding 1/98, Arbitral Tribunal of the Chamber of Commerce of Mexico City (Nov. 25, 1998). [Exhibit 8.]

32 Memorial at 36, fn. 18.

33 Letter from the Permanent Arbitration Commission of the Chamber of Commerce of Mexico City to Drs. Ramirez and Witker (Sept. 30, 1999). [Exhibit 9.]

34 See Witness Statement of Jaime Herrera, Memorial Exhibit A1 at paragraphs 29-30 (discussed below).

> Respondent has violated duties imposed by sources of law other than Chapter Eleven of NAFTA, including the municipal law of Mexico.[35]

At the time it submitted this purported waiver, Acaverde had already initiated a lawsuit against Banobras for damages in the Mexican domestic courts.

62. In a letter dated July 29, 1998 to Baker & Botts, Mr. Alejandro Escobar, counsel of the ICSID, cited this paragraph, and in particular the final sentence, and stated that "We would appreciate receiving from you confirmation that this additional statement does not derogate from the waiver required by Article 1121 of the NAFTA."[36]

63. Counsel for Mexico informed the ICSID Secretary General by letter dated August 4, 1998 that Waste Management's intended claim was based on a Concession granted to the Mexican company Acaverde by Acapulco, that Acaverde had invoked an arbitration clause in its agreement with the Municipality to seek money damages, and that the arbitration was pending[37]. (At the time of sending this letter, counsel for Mexico was unaware of the two lawsuits against Banobras.)

64. In a letter to Mr. Escobar dated September 23, 1998, Baker & Botts replied to Mr. Escobar's July 29 letter as follows:

> In the Notice of Institution submitted to ICSID on July 22, Claimants effected this waiver, echoing the language in NAFTA Article 1121. Claimants also set forth their understanding of the scope of that required waiver. By setting forth this understanding, however, Claimants did not intend to derogate from the waiver required by NAFTA Article 1121.[38]

This response was evasive and did not seek to explain how setting forth the "understanding" could be anything but a derogation from the waiver required by Article 1121. (Note that over a month earlier, on August 11, 1998, Acaverde had filed its second lawsuit against Banobras.)

65. By letter dated September 29, 1998, Baker & Botts re-submitted the notice of institution of arbitration proceedings to the ICSID[39]. In a letter of the same date addressed to the Direccion General de Inversion Extranjera of SECOFI, Baker & Botts set forth the purported waiver as follows:

> 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

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35 Exhibit 10 at 8.

36 Exhibit 11 at 2.

37 Exhibit 12.

38 Exhibit 13 at 1.

39 Exhibit 14. The Claimant was required by the ICSID to re-submit its notice because of procedural deficiencies in its initial filing unrelated to the waiver issue.

> 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 wavier 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.[40]

Neither the ICSID, nor this Tribunal, nor the Respondent has the power to require Waste Management and Acaverde to discontinue the domestic litigation against Banobras and Acapulco. Consequently, the Claimant's "understanding" of the scope of the waiver is necessarily an integral part of the waiver itself. For this reason, the Respondent disagrees with the assertion in this letter that the "understanding" does not "derogat[e] from the waiver required by NAFTA Article 1121"[41].

66. On September 30, 1998, in reaction to the September 23 letter of Baker & Botts and prior to receiving the September 29 submission of the Claimant, counsel for Mexico sent a letter to Mr. Ibrahim Shihata, the Secretary General of the ICSID, informing him of Government of Mexico's view that the claim should not be registered until the required waivers had been submitted[42].

67. In a letter dated November 3, 1998 to Baker & Botts, Mr. Antonio R. Parra, Legal Adviser to the ICSID, noted the Claimant's modification to the required waiver and stated:

> To the extent that you maintain this additional statement in your Notice, we would need to receive from you confirmation that the wavier set forth in page 8 of your Notice does apply to dispute settlement proceedings in Mexico involving allegations of breaches of any obligations, imposed by other sources of law, that are not different in substance from the obligations of a NAFTA State Party under Chapter Eleven of NAFTA, except for proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages.[43] [Emphasis added.]

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[40] Exhibit 15 at 1. The letter went on to say:

> "This letter is delivered in two languages, Spanish and English. In the event of conflicting interpretations between the two versions, the English version shall govern."

The letter was not accompanied by any evidence that Baker & Botts was authorized to make a waiver on behalf of the Claimant nor Acaverde, nor was it notarized or legalized. Baker & Botts did not seek consent to submit the letter to SECOFI in English, nor to have the English version be deemed controlling. (The Respondent is confident that neither the United States Government nor the Canadian Government would accept to have a document of this nature submitted to them other than in an official language of their respective countries.)

[41] The waiver is a voluntary undertaking of an obligation by Waste Management and Acaverde to the Respondent. Inherently, the waiver can mean only what Waste Management and Acaverde intended it to mean at the time they caused Baker & Botts to submit it on their behalf.

[42] Exhibit 16 at 2.

[43] Exhibit 17 at 1.

The underlined language is neither contained in Article 1121 nor in any other provision of the NAFTA.

68. The November 13, 1998 response of Baker & Botts to that letter stated as follows:

> With respect to the inclusion in the Notice of Institution of the waiver required by NAFTA 1121 and USA Waste's understanding of the scope of that required waiver, USA Waste hereby confirms that the waiver contained in the Notice of Institution applies to dispute settlement proceedings in Mexico involving allegations of breaches of any obligations, imposed by other sources of law, that are not different in substance from the obligations of a NAFTA State Party under Chapter Eleven of NAFTA, except for proceedings for injunctive, declaratory, or other extraordinary relief, not involving the payment of damages. With respect to USA Waste's efforts to resolve its dispute with Mexico outside of the remedies offered by NAFTA, there are no pending legal proceedings related to that dispute in which the Government of the United Mexican States is a named party.[44] [Emphasis added.]

69. In this purported waiver, Baker & Botts repeated the language contained in Mr. Parra's letter dated November 3, which is different from the language of the Claimant's earlier statement of the waiver, and in any event is not the waiver required by NAFTA Article 1121. Further, the final sentence quoted above suggests that the waiver would apply only to domestic legal proceedings in which the federal government of Mexico is a "named party" – another limitation on the waiver not authorized by the NAFTA.

70. The Respondent notes that, at the time of this November 3 letter, Acaverde had two lawsuits pending against Banobras, a federal government financial institution. The statement in the letter that "there are no pending legal proceedings related to that dispute in which the Government of the United Mexican States is a named party" was therefore inaccurate. It appears that Mr. Parra may have been influenced by the fact that the Claimant's counsel had not disclosed the existence of the two lawsuits against a Mexican federal government agency.

71. By letter dated November 18, 1998, without giving the Government of Mexico an opportunity to comment, the ISCID registered the notice for the institution of proceedings[45].

72. By letter dated November 25, 1998 to Mr. Parra, then the Acting Secretary-General of the ICSID, counsel for Mexico described the exchanges of correspondence that had taken place regarding the waiver issue and set out the Government of Mexico's position that neither the Claimant nor Acaverde had submitted the required waivers[46]. Mexico requested that the ICSID withdraw the registration of the institution of proceedings.

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[44] Exhibit 18 at 2.

[45] Exhibit 19.

[46] Exhibit 20.

73. In a letter dated January 5, 1999, Secretary-General Shihata responded to the November 25 letter of counsel for Mexico. Mr. Shihata repeated the incorrect interpretation that the waiver should apply only to dispute settlement procedures "involving allegations of breaches of obligations that are not different in substance from the obligations of a NAFTA State Party under Chapter Eleven of the NAFTA."[47] He added that the Tribunal would be the judge of its own competence.

74. In a letter dated January 25, 1999, counsel for Mexico thanked Mr. Shihata for the efforts made by the ICSID and advised that the Government of Mexico would raise the issue with the Tribunal[48].

75. In a letter dated January 25, 1999 to J. Patrick Berry of Baker & Botts, with the intent of clarifying the scope of the purported waivers, counsel for Mexico asked him directly whether Acaverde had withdrawn its arbitration claim against the municipality of Acapulco or intended to do so in the near future[49]. (At this time, counsel for Mexico was still unaware of the two lawsuits against Banobras.) Counsel also informed Mr. Berry that the Government of Mexico planned to raise the waiver issue with the Tribunal as soon as it was constituted.

76. In a response dated February 10, 1999, Mr. Berry – an authorized representative of the Claimant in this proceeding, and the very same person who had submitted the prior waivers — stated that "we do not believe that our client is required to suspend any proceeding in Mexico that it is otherwise entitled to institute."[50] This February 10, 1999 letter, therefore, re-affirmed that the Claimant and Acaverde had never intended to waive their rights to pursue Mexican legal proceedings for alleged damages arising out of the measures that are the subject of this arbitration.

77. Indeed, by continuing to pursue the lawsuits against Banobras and the arbitration against Acapulco, Waste Management and Acaverde demonstrated that they did not waive their rights to pursue domestic legal proceedings for damages and that the purported waiver submitted earlier on their behalf was meaningless[51].

78. In the Memorial, Baker & Botts asserts that the waiver required by NAFTA

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47 Exhibit 21 at 2.

48 Exhibit 22 at 2.

49 Exhibit 23.

50 Exhibit 24 at 2. Moreover, Mr. Berry went on to state that "[n]evertheless, we [the Claimant and Acaverde] are prepared to discuss the suspension of that proceeding in the exchange of assurances from Mexico that it will not raise further jurisdictional or procedural objections to our client's prosecuting its claim against Mexico before the ICSID". Thus, the Claimant was prepared to withdraw one of its three pending domestic proceedings only in exchange for a commitment by the Respondent not to raise any jurisdictional or procedural objections.

51 Strangely, the Claimant asserted on page 37 of its Memorial that Waste Management and Acaverde have made a "decision not to pursue the above-mentioned proceedings", but on page 36 admitted that its *amparo* proceeding against Banobras was still pending. If Acaverde had decided not to pursue the domestic litigation, it would not have initiated the *amparo* proceeding.

> is no longer an issue . . . because of Waste Management's and Acaverde's decision not to pursue the [domestic legal] proceedings. Mexico therefore has no need to use the waiver, other than as a defensive shield against future claims, none of which are contemplated by Waste Management.[52]

79. The claim by Baker & Botts that Waste Management and Acaverde will not pursue the domestic legal proceedings is contradicted by the witness statement submitted by the attorney authorized to represent Waste Management and Acaverde in Mexico, Jaime E. Herrera[53]. He says in paragraph 29 of his statement:

> Regardless of the result to be obtained in these [domestic] actions for relief, Acaverde will have the right to file a lawsuit again for payment through the channels it deems appropriate.[54]

80. He adds:

> It is important to indicate that, in no proceeding or resolution has there been a determination of possible default by Acaverde, . . . nor do the proceedings impair the right of Acaverde to petition for payment again, utilizing the channels it deems necessary.[55] [Emphasis added.]

81. As made clear in the Memorial, Baker & Botts was authorized by Waste Management and Acaverde to represent those companies only in this arbitration proceeding[56]. Baker & Botts has not shown it has authority to waive the rights of those companies to pursue domestic legal remedies in Mexico, and the evidence is that those companies have not waived any rights they may have under Mexican law. To the contrary, they have continued domestic proceedings.

82. After the filing of the initial "waiver" on July 22, 1998, Acaverde filed its second lawsuit against Banobras on August 11, 1998.

83. After the re-submission of the notice of institution of arbitration on September 29, 1998 with another "waiver", Acaverde filed its memorial in the arbitration proceeding against Acapulco on October 27, 1998.

84. After the Notice of Arbitration was officially registered by the ICSID on November 18, 1998, Acaverde took the following actions:

- With regard to its first lawsuit against Banobras, it filed an appeal with the Second Unitary Court for the First Circuit on January 18, 1999.

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52 Memorial at 37.

53 Mr. Herrera also apparently was an officer of Acaverde.

54 Witness Statement of Jaime E. Herrera, Memorial Exhibit A1, at paragraph 29.

55 Witness Statement of Jaime E. Herrera at paragraph 30.

56 Memorial at 33.

- After losing that appeal, it filed an *amparo* on April 7, 1999.

- With regard to the second lawsuit against Banobras, it filed an appeal on January 20, 1999, and after that appeal was rejected it initiated a revocation proceeding on February 24, 1999.

- After the revocation proceeding was dismissed, it filed an *amparo* on March 9, 1999.

85. The Tribunal therefore need not concern itself with the technicalities of the precise wording of the waiver purportedly submitted on behalf of Waste Management and Acaverde. Those companies made clear through their own acts, through Mr. Berry's February 10, 1999 letter to Mr. Perezcano, and through the witness statement of Mr. Herrera that they never intended to waive their rights to pursue damages in domestic legal proceedings arising out of the same measures that are the subject of this arbitration.

IV. LEGAL SUBMISSIONS

A. The Tribunal Must Strictly Enforce The Conditions Precedent For Initiating A NAFTA Arbitration

86. The Claimant has addressed the issue of the waiver casually, implying that the Tribunal has the discretion not to require compliance with NAFTA Article 1121. The Claimant asserts that "[t]his Tribunal need not address the interpretation or enforceability of the waiver", as though the waiver were irrelevant[57]. However, the Claimant's position is contradicted both by the plain language of the NAFTA and established practice in international arbitration.

1. The Tribunal Lacks Discretion To Eliminate An Express Requirement of the NAFTA

87. The Tribunal's jurisdiction arises from the NAFTA alone[58]. Accordingly, the Tribunal must apply NAFTA in determining whether it has competence. As noted above, Article 1120(2) provides that where the Additional Facility Rules conflict with those of the NAFTA, the NAFTA's requirements take precedence. (In any event, the Arbitration Rules of the Additional Facility of ICSID do not conflict with the conditions precedent established by NAFTA Article 1121.)

88. A corollary to the general rules of interpretation set out in Article 31 of the Vienna Convention is the principle of effectiveness (*ut res magis valeat quam pereat*[59]):

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[57] Memorial at 35.

[58] Mexico is not a member of the ICSID Convention, and there is no independent contractual agreement between the Claimant and the Respondent to arbitrate disputes of this nature.

[59] Meaning, "[t]hat the thing may rather have effect than be destroyed." Black's Law Dictionary at 1547 (6th ed. 1990).

> [I]nterpretation 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.[60]

89. In accordance with the principle of effectiveness, this Tribunal must apply Article 1121 as it is written. Nothing in the NAFTA authorizes the Tribunal to interpret the plain language of Article 1121 as having no effect.

90. In the Respondent's view, the text dictates how the Tribunal must deal with this application. Although it should be unnecessary to do so, the Respondent has set forth below the principal policy reasons underlying Article 1121.

2. In the Absence of the Required Waiver From the Claimant and Acaverde, Mexico Has Not Consented to Arbitration

91. As with any contract, an arbitration agreement must demonstrate the mutual assent of the parties to its terms[61]. As noted by one commentator:

> The contractual element of the arbitration agreement rests with the *bargain*.... [I]n order for a court to recognise an arbitration agreement as valid, it must comply with the established rights and obligations of contracting parties, i.e., the agreement must have mutuality, consideration, etc....[62]

92. A claimant's waiver of domestic remedies is a material term of a NAFTA Party's agreement to arbitrate. Because the Claimant and Acaverde have not waived their rights consistent with the requirements of Article 1121, and have continued to pursue domestic remedies, there is a lack of mutuality and consideration[63]. The Respondent therefore has not agreed to arbitrate this dispute[64].

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[60]. United States - Standards for Reformulated and Conventional Gasoline, (WT/DS2/AB/R), at 23 (May 20, 1996) (WTO Appellate Body). See also Interpretation, 14 Whiteman Digest of International Law §33, at 380-83 (1970).

[61] Black's Law Dictionary defines "mutual assent" as: "The meeting of the minds of both or all the parties to a contract; the fact that each agrees to all the terms and conditions, in the same sense and with the same meaning as the others." Id. at 116 (6th Ed. 1990).

[62] Julian D. M. Lew, Arbitration Agreements: Form and Character in Essays on International Commercial Arbitration, at 59 (Petar Sarcevic ed. 1989) (citing Domke on Commercial Arbitration/The Law and Practice of Commercial Arbitration at 47 (1984)).

[63] In determining the existence of a valid agreement to arbitrate, courts are guided by ordinary contract principles, in particular to whether there was a "meeting of minds" or "mutual assent". For examples under United States domestic law, see Labib v. Younan, 755 F. Supp. 125, 128 (D.N.J. 1991) ("The authority of the arbitrators is derived from the mutual assent of the parties to the terms of submission; the parties are bound only to the extent, and in the manner, and under the circumstances pointed out in their agreement, and no further . . . and have a right to stand upon the precise terms of their contract"(quoting Brick Township Municipal Utilities Authority v. Diversified R.B.&T Construction Co., 171 N.J. Super. 397, 402, 409 A.2d 806, 808 (App. Div. 1979)); Shaffer v. Stratton Oakmont, Inc., 756 F. Supp. 365, 367-69 (N.D. Ill. 1991) (where the "introducing" broker sought to compel

Footnote continued on next page

3. By Refusing to Waive Domestic Legal Remedies, the Claimant Has Not Genuinely Committed to the Arbitration Process

93. Submitting a dispute to arbitration represents a party's deliberate choice to forego otherwise available judicial remedies[65]:

> Arbitration is a consensual process. This means first that for there to be an arbitration, the parties must agree to renounce recourse to ordinary courts in favor of a non-judicial resolution of the dispute.[66]

The waiver required by NAFTA Article 1121 waiver reflects this division between arbitration and adjudication.[67]

94. As a general principle, an arbitration agreement will not be enforced unless it demonstrates with sufficient clarity the parties' intent to enter into arbitration. To this end, a majority of legal systems require the arbitration agreement itself to be in writing[68]. This requirement is also basic to international arbitration, as reflected, for example, in the New York Convention[69], the UNCITRAL Arbitration Rules[70], and the ICSID Convention[71]..

Footnote continued from previous page

arbitration with the customer based on an agreement to arbitrate between the customer and a different ("clearing") broker, the court found that the customer did not agree to arbitrate disputes with the "introducing" broker).

[64] The Respondent previously has expressed concerns about the formalities of the waiver, such as the absence of notarized or legalized statements from the Claimant and Acaverde. Because the Claimant in fact has not made a waiver of any kind, the issue of formality has become a subsidiary point. The Respondent notes, however, that this case helps illustrate that the formalities serve an important function. For example, it has become apparent that the purported "waiver" originally submitted by counsel authorized to represent the Claimant and Acaverde only in this arbitration was not considered binding by the Claimant or Acaverde, or by their Mexican counsel.

[65] See Ferenc Mádl, Competence of Arbitral Tribunals in International Commercial Arbitration, in Essays on International Commercial Arbitration, supra at 93 (noting that arbitration represents "a contractual substitute for national court action"); International Commercial Arbitration for Today and Tomorrow at 129 (John Tackaberry, QC, ed.) ("Traditionally, the parties have had recourse to international arbitration to avoid the jurisdiction of local courts which they considered not rapid enough or not well equipped or in some cases not competent enough to handle international commercial cases.")

[66] W. Michael Reisman, W. Laurence Craig, William Park & Jan Paulsson, International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes 1174 (The Foundation Press, Inc. 1997)

[67] Compare Article 26 of the ICSID Convention, which provides: "Consent to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy."

[68] Julian D.M. Lew, Arbitration Agreements: Form and Character, supra at 59.

[69] New York Convention Art. II ("Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration ...").

[70] UNCITRAL Arbitration Rules Art. 1 ("Where the parties to a contract have agreed in writing that disputes in relation to that contract be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.")

95. The crucial point is that each party must proffer a writing that adequately demonstrates its intent to submit a dispute to arbitration[72]. Whether the parties have clearly and unambiguously consented to arbitration in lieu of court proceedings is a critical threshold question for arbitration tribunals[73].

96. Without an arbitration agreement that meets specific form requirements and is "clearly and adequately defined", an arbitral tribunal lacks competence to rule on the parties' dispute[74]. In situations where a tribunal has been unable to ascertain the common intent of the parties from the arbitration clause, the clause has not been enforced[75].

97. In this case, Waste Management and Acaverde have been seeking to "hedge their bets" by proceeding simultaneously with this arbitration and the domestic litigation for damages[76]. Yet Article 1121 forces a would-be claimant to decide at the time that it invokes the NAFTA arbitral process to forego or discontinue domestic proceedings for damages. The Respondent was entitled, at the time of the Notice of Arbitration and before committing significant resources to this matter, to receive an appropriate commitment from the Claimant to the arbitration process. A key element of that commitment is the waiver of the right to pursue domestic remedies for damages. In the absence of the proper waiver, and action consistent with such a waiver, the Claimant (and Acaverde) have not genuinely committed to resolve the dispute through this NAFTA arbitration.

98. The Claimant's refusal to provide a clear waiver, and to abide by it, must lead to the conclusion that it has not consented to the resolution of the dispute through arbitration. Paradoxically, therefore, although the Claimant initiated the arbitration procedure, it has not agreed to be bound by it.

Footnote continued from previous page

[71] ICSID Convention, Art. 25 ("The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment ... which the parties to the dispute consent in writing to submit to the Centre.")

[72] See Robobar Limited (UK) v. Finncold sas (Italy), 20 Y.B. Com. Arb. 739 (1995) (refusing to enforce the arbitration clause in a purchase confirmation that was not agreed to by supplier through either a document signed by both parties or an exchange of letters or telegrams).

[73] See ICC Case No. 7920, 23 Y.B. Com. Arb. p. 80 (1998) ("Before even proceeding to an interpretation of the obscure or vague terms of this clause, the arbitral tribunal notes that there are in any case two clear and unambiguous elements here, that is: the parties undoubtedly and unambiguously intended to submit possible disputes to *arbitration* and not to a State court ....")

[74] See Competence of Arbitral Tribunals, supra at 102 ("the [arbitration] agreement must be adequately clear and unequivocally defined."); Gary B. Born, International Commercial Arbitration in the United States, at 560 (1994) ("[I]nternational commercial arbitration is consensual: unless the parties have agreed to arbitrate a particular issue, the arbitral tribunal lacks authority to resolve it ... [under] the laws of all leading trading nations.")

[75] See Nokia-Maillefer SA (Switzerland) v. Mazzer (Italy), 21 Y.B. Com. Arb. 681 (1996) (ruling that modified purchase order was not sufficiently clear and unambiguous to operate as a valid arbitration agreement).

[76] Alternatively, the Claimant would seek awards of damages in both fora, a possibility that would be even more clearly at odds with the intent of the NAFTA Parties in providing for this arbitration procedure.

B. The Tribunal Must Terminate This Proceeding Notwithstanding the Claimant's Avowed Willingness to Re-Submit the Claim With a "Revised" Waiver

99. The Memorial asserts that "were there some defect in the waiver provided, Waste Management would merely refile a revised waiver and commence these same proceedings again"[77]. The Claimant's confidence that it could file a new Notice of Arbitration is misplaced.

100. The Respondent notes that it has been prejudiced by the Claimant's refusal to comply with the conditions precedent for submitting a claim to arbitration under the NAFTA. A federal agency of the Respondent, Banobras, has been forced to respond to two lawsuits initiated in the Mexican courts and various appeals, and a municipal government of the Respondent, Acapulco, has been required to participate in a domestic arbitration proceeding initiated by Acaverde – all while this NAFTA arbitration has been pending. If Acaverde had succeeded in any these domestic claims the Claimant would have withdrawn this arbitration. Having knowingly avoided compliance with the waiver requirement of Article 1121, the Claimant assumed the risk that this arbitration would be terminated and that it may not be able to recommence the arbitration later[78].

101. If the Claimant were to attempt to initiate the exact same claim in the future, it would face two major problems:

- First, Article 1121 requires an election of remedies. It does not state that a claimant may pursue damages in domestic litigation simultaneously with a NAFTA arbitration, and then drop the arbitration or domestic litigation depending on its prospects of success in each forum. Article 1121 also does not provide that a claimant may pursue damages in domestic litigation until it loses, and then initiate a NAFTA arbitration. As discussed above, arbitration is a substitute for litigation, not a supplement to it. Thus, in the Respondent's view, the Claimant, by continuing to pursue domestic remedies, has forfeited its right to pursue a NAFTA arbitration. The abandonment of that right cannot be cured simply by submitting a written waiver with the correct language, at a time when that waiver has become meaningless.

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[77] Memorial at 37.

[78] Waste Management is a very large corporation with extensive resources. In addition, the Respondent put Waste Management and its counsel on notice of the various procedural defects in the Claimant's Notice of Claim beginning well over one year ago. The Tribunal should presume that the Claimant has consciously decided to test the limits of Article 1121 and is in no need of the Tribunal's sympathy or assistance in learning how to participate in an arbitration.

- Second, the NAFTA establishes a three-year limitations period for the filing of claims[79]. The Claimant would have to demonstrate that the limitations period had not expired prior to the filing of a new notice of arbitration.

102. This Tribunal need not determine whether Waste Management would be successful in initiating another NAFTA arbitration. The point is that the decision on competence requested by the Respondent is a meaningful one that goes to the very basis of this Tribunal's jurisdiction.

C. The Tribunal's Decision On Its Competence Should Not Be Joined To The Merits

103. At the first session of the Tribunal, President Cremades noted that the Tribunal has the option of joining this issue of competence to the consideration of the merits of the case. Under this alternative, the Tribunal would reserve its position on the waiver issue until after the Respondent had filed its Counter-Memorial on the merits, there had been an exchange of Reply and Rejoinder, and the hearing had been conducted.

104. However, there is no discernable reason, either legal or practical, for joining the issue of competence to the consideration of the merits.

105. With regard to the law, the Respondent reiterates that the Claimant has been seeking to evade a condition precedent for the submission of its claim to arbitration. Allowing the Claimant to engage the Respondent in a full exchange on the merits would be contrary to the language and purpose of Article 1121.

106. With regard to practical efficiencies, the Tribunal directed the Claimant to supply in its Memorial all of the information it had on Acaverde's domestic litigation against Banobras and Acapulco. The Respondent, in turn, has extensively supplemented the information provided by the Claimant

107. Further, the Claimant has not complained of any aspect of the domestic judicial and arbitration proceedings as being a violation of the NAFTA. The measures identified by the Claimant as alleged violations of NAFTA Articles 1105 and 1110 took place well before the domestic litigation was ever initiated.

108. The only factual matter that the Tribunal needs to evaluate to reach a decision on the issue of competence is whether the Claimant or Acaverde have been pursuing damages in domestic dispute settlement proceedings arising out of the same measures that are alleged to be a violation of the NAFTA in this proceeding. All of the facts pertinent to that determination are already before the Tribunal.

109. The issues of competence and the merits of the dispute are completely distinct. To require a complete briefing and a hearing on the merits before the Tribunal rules on the issue of

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[79] Article 1116(2) provides: "An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage."

competence would result in a considerable waste of resources and time for both parties. The Respondent therefore submits that the Tribunal should rule on the issue of competence and terminate the arbitration.

D. Other Possible Questions of Jurisdiction

110. At the First Session of the Tribunal, the Tribunal directed the Respondent to address all of its arguments on question of jurisdiction in its Counter-Memorial on jurisdiction so that the Tribunal could determine whether jurisdiction should be determined as a preliminary matter or whether to join it to the merits of the dispute.

111. The following remarks are without prejudice to the Respondent's submission that this arbitration should be terminated on the grounds stated above.

112. Prior to the First Session of the Tribunal, the Respondent questioned whether the Claimant had adduced sufficient evidence to show that it is entitled to bring a claim on behalf of Acaverde. The Respondent acknowledges that the Claimant has presented *prima facie* evidence that at the time this claim was submitted to arbitration the Claimant indirectly owned or controlled Acaverde. However, the Respondent submits that the question of whether the Claimant was an "investor of a Party" and whether Acaverde was an "investment" of the Claimant at other legally relevant times will depend on evidence yet to be adduced by the parties and thus agrees that this issue should be joined to the merits.

113. The Respondent wishes the Claimant to be on notice that, if the Claimant persists in seeking compensation under Chapter Eleven, the Respondent will rely in part on the defense that a claim for breach of contract is not actionable under the NAFTA – especially when the Claimant has had access to judicial process under the domestic legal system, and there is no indication that the domestic judicial proceedings were themselves inconsistent with international law. In particular, the Respondent will rely on the reasons given in the recent award of the Arbitral Tribunal in Azinian And Others v. The United Mexican States, wherein a claim for breach of contract in connection with a municipal waste collection concession was dismissed on those very grounds.

114. NAFTA arbitration tribunals are limited to determining whether there has been a violation of the Section A of Chapter Eleven of the NAFTA. To the extent that the question of whether the claim herein falls within Chapter Eleven is a question of jurisdiction of the Tribunal, the Respondent agrees that this question and all related issues should be joined to the merits.

V. REQUEST FOR COSTS

115. The Respondent is entitled to an award of costs for the following reasons:

- The Claimant knowingly disregarded the clear and obvious requirement to waive its right to pursue damages in domestic legal proceedings.
- In order to obtain the registration of its claim by the ICSID, the Claimant falsely implied in a letter to the ICSID that Acaverde had not initiated lawsuits against the Mexican federal government.

- Ever since the Claimant first attempted to submit its Notice of Arbitration over one year ago, the Respondent has diligently set forth its views on this issue to both the ICSID and the Claimant. In contrast, the Claimant did not respond to the legal and factual points made by the Respondent until ordered to do so by the Tribunal.

116. The Respondent therefore requests an award of costs including (i) the Respondent's share of the expenses of the Tribunal, and (ii) the Respondent's expenses for outside counsel retained to assist in this matter. The Respondent will be prepared to submit a summary of its expenses at the conclusion of the proceedings on the issue of competence.

VI. ORDERS REQUESTED

117. The Respondent requests that the Tribunal issue an order suspending the proceedings on the merits and deal with the issue of whether it has competence as a preliminary matter.

118. The Respondent requests that the Tribunal dismiss the Claim because of the failure of the Claimant and Teaverde to waive their rights to pursue damages in domestic proceedings arising out of the same measures that the Claimant alleges are a breach of NAFTA Chapter Eleven.

119. The Respondent requests an order that the Claimant pay the Respondent's costs of the arbitration, including counsel fees and expenses.

All of Which is Respectfully Submitted:

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HUGO PEREZCANO DIAZ

Agent and Counsel for the Respondent,
The United Mexican States