CASE Num. ARB(AF)/98/2

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ADDITIONAL FACILITY)

B E T W E E N:

WASTE MANAGEMENT, INC.
Claimant

and

UNITED MEXICAN STATES
Respondent

ARBITRAL AWARD

Before the Arbitral Tribunal
constituted under Chapter Eleven
of the North American Free Trade
Agreement, and comprised of:

Mr. Keith Highet
Mr. Eduardo Siqueiros T.
Mr. Bernardo M. Cremades (President)

Date of dispatch to the parties: June 2, 2000

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In the City of Washington, D.C., on June 2, 2000.

In the following arbitration before the International Centre for Settlement of Investment Disputes, file number ARB(AF)/98/2, between:

(i) WASTE MANAGEMENT, INC., a company having its corporate domicile at First City Tower, 1001 Fannin, 40th, Houston, Texas 77002, United States of America (Claimant) of the first part, and

(ii) the GOVERNMENT OF THE UNITED MEXICAN STATES (Respondent) of the second part,

(hereinafter jointly referred to as the Parties)

the Tribunal hereby makes and renders the following

ARBITRAL AWARD

I. PROCEDURAL BACKGROUND

§1 On September 29, 1998, WASTE MANAGEMENT, INC., formerly known as USA Waste Services, Inc. (hereinafter referred to as WASTE MANAGEMENT or the Claimant), acting on its own behalf and on behalf of ACAVERDE S.A. de C.V. (hereinafter referred to as ACAVERDE), requested from the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID), approval of access to the Additional Facility for the Administration of Proceedings by the Secretariat of ICSID (hereinafter referred to as Additional Facility) and, jointly, filed a notice for the institution of arbitration proceedings against the Government of the UNITED MEXICAN STATES (hereinafter referred to as the Government of Mexico), in accordance with Article 2 of the Additional Facility Arbitration Rules (Schedule C).

The request for arbitration seeks compensation by way of damages for an alleged breach on the part of the state-owned entities, BANCO NACIONAL DE OBRAS Y SERVICIOS PÚBLICOS,

S.N.C. (hereinafter referred to as BANOBRAS), the MEXICAN STATE OF GUERRERO (hereinafter referred to as GUERRERO), and the CITY COUNCIL OF ACAPULCO DE JUÁREZ (hereinafter referred to as ACAPULCO) of the obligations laid down by Articles 1105 and 1110 of the North American Free Trade Agreement (hereinafter referred to as NAFTA).

The rules applicable to these arbitration proceedings shall be those contained in the Additional Facility Arbitration Rules, save to the extent that they may be amended by NAFTA Chapter XI, Section B, which establishes a dispute settlement procedure in investment-related matters.

In this regard, NAFTA Article 1120 lays down that, provided that six months have elapsed since the events giving rise to the claim, said claim may be submitted to arbitration by a disputing investor under the Additional Facility Rules.

§2 Upon receipt of the request for approval of access and of the notice of institution of arbitration proceedings by the Secretary-General of ICSID, copies thereof and of the accompanying documentation were dispatched to the Respondent. On 18 November 1998, the Secretary-General notified the parties of his approval of the request for access to the Additional Facility and registered the Notice, thereby initiating these arbitration proceedings.

The Arbitral Tribunal was constituted on 3 June 1999 and was composed of Mr. Julio Treviño Azcué (appointed by the Government of Mexico), Mr. Keith Highet (appointed by WASTE MANAGEMENT) and Mr. Bernardo M. Cremades (appointed as President of the Tribunal by agreement of the parties). At the first session of the Arbitral Tribunal, which took place at The Hague, Holland, on July 16, 1999, the Parties acknowledged that the Tribunal had been properly constituted.

On December 3, 1999, Mr. Julio C. Treviño Azcué tendered his resignation as arbitrator for health reasons. Pursuant to the provisions established in Article 15 the of Additional Facility Arbitration Rules, on 9 December 1999, the Arbitral Tribunal accepted the resignation submitted by Mr. Treviño, and duly advised the ICSID Secretary-General of the same. Accordingly, on 4 January 2000 the Government of Mexico appointed Mr. Eduardo Siqueiros T. as the new arbitrator, who thereupon accepted his appointment, in accordance with the provisions of Article 18 of the Additional Facility Arbitration Rules.

In this arbitration, WASTE MANAGEMENT is represented by Counsel, Mr. Peter A. Moir of Baker & Botts, L.L.P., a Washington, D.C. based law firm. The Government of Mexico is represented by Mr. Hugo Perezcano Díaz, Legal Counsel serving with the Directorate-General of the Negotiations Legal Advisory Board, Subsecretariat for International Trade Negotiations, Ministry of Commerce and Industrial Development (*Secretaría de Comercio y Fomento Industrial*—SECOFI).

§3 At its first session, the Arbitral Tribunal decided that the Claimant would file its memorial of claim, containing all points of fact and law relating to jurisdiction and the substance of its claims, against the Respondent, by no later than 29 September 1999. Similarly, the Respondent was to file a counter-memorial, in which it would contend all arguments of fact and law relating to jurisdiction, by no later than 29 October 1999, said deadline being extended at the Respondent's request to November 5, 1999. Subsequently, on 9 November 1999, the Claimant filed pleadings addressing the question of jurisdiction as raised by the Respondent. In view of these submissions, the Respondent then petitioned for leave to file a rejoinder dealing with the matter of the Tribunal's jurisdiction, a petition to which this Arbitral Tribunal acceded, 16 November 1999 being set as the maximum time limit for the filing thereof. Finally, on 19 November 1999, the Arbitral Tribunal decided to resolve the question of jurisdiction prior to examining the issue in dispute, and to convoke a hearing for this purpose on 6 December 1999. Said hearing had to be postponed until 31 January 2000, owing to the arbitration proceedings being suspended by reason of the above-mentioned resignation of the arbitrator, Mr. Julio Treviño.

. On 31 January 2000, the above indicated hearing took place in Washington, D.C., and was, moreover, marked by the presence of the Canadian Government and the Government of the United States of America represented by Ms. Sylvie Tabet and Ms. Andrea Menaker, respectively. The Government of Canada submitted to the Tribunal, on 17 December 1999, a written presentation in regard to the interpretation of NAFTA Article 1121. During the course of the hearing the representative of Canada declined the President of the Tribunal's invitation to address the Tribunal, referring to the said presentation. The representative of the United States of America also declined the President of the Tribunal's invi-

tation to address the Tribunal. During the course of the hearing, all parties presented their respective arguments concerning this Arbitral Tribunal's jurisdiction.

After the hearing, the Arbitral Tribunal met and concluded as follows:

II. FACTUAL BACKGROUND

§4 On 22 July 1998, Baker & Botts, L.L.P., acting for and on behalf of WASTE MANAGEMENT and ACAVERDE, filed with the Secretary-General of ICSID a notice of institution of arbitration proceedings pursuant to Article 2 of the Additional Facility Arbitration Rules. One of the heads of the above request dealt with the so-called Conditions Precedent laid down by NAFTA Article 1121 for the submission of a claim to arbitration. These conditions entail consent by the Claimant to the submission of the claim to arbitration and waiver of its right to initiate or continue before any other courts or tribunals, dispute settlement proceedings with respect to the measures of the Respondent that are alleged to be a breach of NAFTA. Said waiver was submitted by the Claimant, couched in the following terms:

> *"Additionally, 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 Respondent has violated duties imposed by other sources of law, including the municipal law of Mexico***." (emphasis is not from the original).

In view of the waiver tendered, on 29 July 1998 ICSID, acting through its Counsel, Mr. Alejandro A. Escobar, requested WASTE MANAGEMENT to confirm that the additional state-

ment (shown in bold type above) issued by WASTE MANAGEMENT did not stray from the waiver required by NAFTA Article 1121. In reply to this request, on 23 September 1998 WASTE MANAGEMENT sent a letter to ICSID to the following effect:

> *"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****."* (emphasis is not from original).

In any event, due to one of the procedural requirements to be met by the Claimant, namely, mandatory notice of intent to submit the claim to arbitration under NAFTA Article 1119 having been filed on 6 February 1998 with a body other than that designated by the Government of Mexico pursuant to the provisions of NAFTA Article 1137(2), ICSID, by letter dated 25 August 1998, duly advised the Claimant of the impossibility of continuing proceedings if said notice were not filed with the pertinent body for such purpose, namely the SECOFI Directorate-General for Foreign Investment.

§5 On 29 September 1999, once the formal defect referred to above had been remedied by notice of intent to submit a claim to arbitration being forwarded to the body designated by the Government of Mexico and being duly registered on 30 June 1999, WASTE MANAGEMENT again proceeded to lodge notice of request for arbitration with the Secretary-General of ICSID, thereby complying with the waiting period established under NAFTA Article 1119, which requires 90 days to elapse between service of notice on the disputing party of intent to submit a claim to arbitration and filing of the notice of request for arbitration with ICSID Secretary-General. This latter notice was submitted in the following terms insofar as it pertained to the NAFTA Article 1121 waiver:

> *"Additionally, 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 in 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.* ***Without derogating from the waiver 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."*** (emphasis is not from the original).

In view of the terms in which this last-mentioned waiver was expressed, on 3 November 1998 ICSID, acting through its Legal Adviser, Mr. Antonio A. Parra, sent a letter to WASTE MANAGEMENT seeking confirmation that the waiver tendered was applicable to any such dispute settlement proceedings in Mexico as might involve allegations of breaches of any obligations, imposed by other sources of law, which in substance were not different from those of a Party State under NAFTA Chapter XI, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages.

In answer to this request, WASTE MANAGEMENT sent a letter dated 3 November 1999, expressed in the following terms:

> *"With respect to the inclusion in the Notice of Institution, of the waiver required by NAFTA Article 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 the 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 a party."*** (emphasis is not from the original).

§6 Parallel to these events, the Government of Mexico issued a series of letters and repeatedly voiced its disagreement—as to both form and content—with the terms of the waiver submitted by WASTE MANAGEMENT, contending that the Claimant had not issued said waiver in the terms laid down by NAFTA Article 1121, and alleging as proof thereof, the existence of legal proceedings pending resolution that had been initiated by ACAVERDE in internal fora, namely, two suits brought against BANOBRAS and one arbitration proceedings against ACAPULCO.

Likewise, the Government of Mexico asserted that said proceedings dealt with measures which had, moreover, been cited by WASTE MANAGEMENT as breaches of the NAFTA. Specifically, these were ACAPULCO's alleged refusal to pay the invoices submitted by ACAVERDE under the Concession Agreement entered into by both parties and BANOBRAS' alleged refusal to pay such invoices, as guarantor for ACAPULCO under a line of credit agreement entered into by both parties.

In its Memorial of Claim dated 29 September 1999, WASTE MANAGEMENT, insisting once again in the meaning ascribed to the waiver as issued, made the following statement:

> *"While WASTE MANAGEMENT did indeed express its "understanding" of the scope of the waiver, WASTE MANAGEMENT has affirmed since it first provided the waiver that, whatever the waiver means under NAFTA, WASTE MANAGEMENT intended to give and has given it."*

Likewise, on the matter of the internal proceedings initiated by ACAVERDE, the Claimant contended that, in this regard, the former had alleged no NAFTA-related breach of international law in said proceedings. Accordingly, none of these

proceedings could be held to have either caused prejudice to Mexico or forced it to defend duplicate allegations of NAFTA breaches simultaneously.

For its part, on 5 November 1999, the Government of Mexico filed a counter-memorial concerning the issue of the Tribunal's jurisdiction, stressing the formal and material defects of the waiver as submitted by the Claimant and the continuance of the actions instituted by ACAVERDE before other courts or tribunals in breach of the provisions of NAFTA Article 1121.

In reply, WASTE MANAGEMENT then sent written pleadings to this Arbitral Tribunal on 9 November 1999, addressing the question of jurisdiction, in which the waiver as tendered was referred to anew in the following terms:

> *"As recounted in its Memorial, Claimant has provided that waiver on several occasions, and on several occasions has affirmed that the waiver is effective to the full extent of the scope intended by NAFTA."*

The Government of Mexico submitted a rejoinder, dated 16 November 1999, on the question of jurisdiction, principally underscoring the duplication of relief sought by the Claimant in the internal proceedings and the claim brought before this Arbitral Tribunal, since in both cases these dealt with identical matters and had been initiated against state-run organisations and political subdivisions for whose actions the Mexican Government was liable.

Finally, on 17 January 2000, WASTE MANAGEMENT presented its observations to the above-mentioned presentation made by the Government of Canada on December 17, 1999, attaching a copy of the Decision on Jurisdiction issued by the Arbitral Tribunal in the case of *Ethyl Corporation v. The Government of Canada* on 24 June 1998.

IN CONCLUSION:

§7 The question of this Arbitral Tribunal's jurisdiction arises from the point in time when the Claimant deemed that, in the terms submitted, the waiver conformed in all respects to the provisions of NAFTA Article 1121, and the Mexican Government, on

the contrary, deemed that said waiver had not been couched in the form required by said Article nor had the Claimant's subsequent conduct been consistent with the terms of such waiver.

III. FINDINGS OF LAW

A. LEGISLATION APPLICABLE TO THE FACTS OF THE CASE

§8 Prior to setting forth the grounds on which this decision is based, this Tribunal deems it necessary that the issue raised be examined afresh and reduced to its essentials, something which, for the purposes hereof, translates as this Tribunal's duty to analyse the validity of the waiver issued by the Claimant under NAFTA Article 1121 paragraph one, subsection (b), the provisions of which reads as follows:

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

With regard to the interpretation of this rule, NAFTA Article 1131 states that:

> *"A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law."*

§9 The thrust of this Article permits this Arbitral Tribunal to be guided, in matters of interpretation, by the rules laid down by the Vienna Convention on the Law of Treaties signed on 23 May 1969, which establishes the general rule of interpretation of treaties at Article 31:

> *"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."*

B. NAFTA CHAPTER XI DISPUTE SETTLEMENT PROCEDURE

§10 Chapter XI of the NAFTA establishes a mechanism for the settlement of investment disputes, which seeks to assure both equal treatment among investors of the Parties in accordance with the principle of international reciprocity, and due process before an impartial tribunal (NAFTA Article 1115).

§11 Hence, an investor of one of the Parties who maintains that a host Government has breached its obligations relating to the investment, as envisaged under Chapter XI, shall be entitled to submit its claim to arbitration on giving prior notice of its intent to the disputing party at least 90 days before said claim is formally submitted to the Secretary-General of ICSID, pursuant to NAFTA Article 1119.

The above-mentioned NAFTA Article 1119 establishes the mandatory nature of giving notice of intent to submit a claim to arbitration to the disputing Party. Said notice, in the present case, was served by WASTE MANAGEMENT on its own behalf and on behalf of ACAVERDE, in accordance with the provisions of NAFTA Articles 1116 and 1117.

Specifically, NAFTA Article 1117, paragraph 1, allows for submission of a claim to arbitration on behalf of an enterprise coming within the jurisdiction of the other Party, in cases where the investor controls said enterprise directly or indirectly. For such purposes, WASTE MANAGEMENT has, in the exhibits filed along with its Memorial of Claim, provided evidence of its status as "investor of a Party, on behalf of an enterprise," ACAVERDE S.A.

The notice referred to in NAFTA Article 1119 was registered by the Directorate-General for Foreign Investment (the body designated by the Mexican Government to this end) on 30 June 1998, as is evident from the content of the letter dated 5 July 1998, sent by the Directorate-General for Foreign Investment to Baker & Botts, L.L.P.

§12 Once this formality has been duly completed, NAFTA Article 1120 provides that the disputing investor may then formally submit its claim to one of a number of arbitration mechanisms, including ICSID Additional Facility, the procedure chosen for the present dispute.

For the purposes thereof, the Additional Facility Arbitration Rules, in Article 2, paragraph 1, provide that:

> *"Any State or national of a State wishing to institute arbitration proceedings (hereinafter called the "Claimant") shall send a notice to that effect in writing to the Secretariat at the seat of the Centre. It shall be drawn up in an official language of the Centre, shall be dated and shall be signed by the party sending it."*

Acting in accordance with this Article, the Claimant submitted its notice of arbitration to the Secretary-General of ICSID on 29 September 1998, which was duly registered on 18 November of said year.

§13 Finally, NAFTA Chapter XI, Section B, Article 1121 lays down a series of conditions precedent to submission of a claim to arbitration proceedings, namely, the placing on record of the Claimant's consent, as well as a waiver of its right to initiate or continue before any administrative tribunal or court any proceedings with respect to the measure that is alleged to be a breach of Article 1117 of the NAFTA, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages.

Prior to embarking upon an analysis of the waiver submitted by the Claimant, this Tribunal deems it necessary to establish the purpose of the so-called conditions precedent to the submission of a claim to arbitration, conditions which are contained in NAFTA Article 1121 and include the mandatory obligation to present said waiver.

C. CONDITIONS PRECEDENT TO SUBMISSION OF A CLAIM TO ARBITRATION

§14 Under NAFTA Article 1121 a disputing investor may submit to arbitration proceedings, to quote literally, *"Only if"* certain prerequisites are met, comprising, in general terms, consent to and waiver of determined rights.

In the light of this Article, it is fulfilment of NAFTA Article 1121 conditions precedent by an aggrieved investor that entitles this Tribunal to take cognisance of any claim forming the subject of arbitration held in accordance with the dispute settlement procedure established under Chapter XI of said legal text. Accordingly, it thus falls to this Tribunal: to monitor the production, both of the consent and of the waiver, in the terms laid down by NAFTA Article 1121; and, in addition, when it comes to ascertaining the existence of a genuine show of intent in line with the terms required in the waiver, to evaluate the conduct of the waiving party vis-à-vis effective compliance therewith.

§15 However, this Tribunal is unable to agree with the assertions put forth by the Mexican Government to the effect that the purported function of the Arbitral Tribunal, in view of Article 1121, is to ensure that the disputing investors will make their waiver effective before every tribunal or in any judicial or administrative proceeding, in order to comply with the procedure established under NAFTA Chapter XI Section B, and, in this manner, validate or perfect the consent to said Treaty. This Tribunal cannot but reject such an interpretation, since it lacks the necessary authority to bar the Claimant from initiating other proceedings in fora other than the present one.

In this case, it would legitimately fall to the Mexican Government to plead the waiver before other courts or tribunals.

a. Consent to arbitration by the Parties to the dispute

§16 The essential constituent elements which constitute the institution of arbitration are the existence of a conflict of interests, and an agreement expressing the will of the parties or a legal mandate, on which the constitution of an Arbitral Tribunal is founded. This assertion 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.

In light of this affirmation, this Tribunal deems it necessary to analyse, albeit only briefly, the treatment that NAFTA Chapter XI accords to consent of the parties, when it comes to submitting a claim to arbitration under the dispute settlement procedure established therein.

NAFTA Article 1122, paragraph one, reads as follows:

> *"Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."*

From the literal tenor of this Article, it is understood, for those effects of interest to us at present, that fulfilment, *inter alia*, of the prerequisites laid down in Article 1121, would translate as consent by NAFTA signatory parties to the dispute settlement procedure established under NAFTA Chapter XI, Section B.

§17 On the basis of the above, it is the understanding of this Tribunal that any analysis of the fulfilment of the prerequisites established as conditions precedent to submission of a claim to arbitration under NAFTA Article 1121 calls for the utmost attention, since fulfilment thereof opens the way, *ipso facto*, to an arbitration procedure in accordance with the commitment acquired by the parties as signatories to said international treaty.

Accordingly, this Arbitral Tribunal proposes to undertake a detailed analysis of the scope and content of the waiver required under NAFTA Article 1121.

b. Waiver required under NAFTA Article 1121

(i) Concept and scope of the waiver

§18 The act of waiver *per se* is a unilateral act, since its effect in terms of extinguishment is occasioned solely by the intent underlying same. The requirement of a waiver in any context implies a voluntary abdication of rights, inasmuch as this act generally leads to a substantial modification of the pre-existing legal situation,

namely, the forfeiting or extinguishment of the right. Waiver thus entails exercise of the power of disposal by the holder thereof in order to bring about this legal effect.

Whatever the case, any waiver must be clear, explicit and categorical, it being improper to deduce same from expressions the meaning of which is at all dubious.

On the basis of the foregoing, any waiver submitted pursuant to the provisions of NAFTA Article 1121(2)(b) must, depending upon the petition or request filed, be clear in all its terms with regard to abdication of given rights by the party proposing to make said waiver.

(ii) Time at which the waiver comes into force

§19 NAFTA Article 1121, paragraph three, provides that the waiver shall be included in the submission of a claim to arbitration.

In this regard, NAFTA Article 1137(1)(b) states:

> *"1. A claim is submitted to arbitration under this Section when:*
>
> *b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General;"*

In light of these rules, it is evident that submission of the waiver must take place in conjunction with that of the notice mandated by Article 2 of the Additional Facility Arbitration Rules, and that from this date it will come into full force and effect with regard to the commitment acquired by the waiving party to comply with all the terms thereof.

In the case in point, and for the purposes hereof, WASTE MANAGEMENT submitted notice of request for arbitration to the Secretary-General of ICSID on 29 September 1998, so that it was from this date onwards that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals with respect to those measures pleaded as constituting a breach of the provisions of the NAFTA.

(iii) Formal requirements of the waiver submitted by WASTE MANAGEMENT

§20 Any waiver, and by extension, that one which is now the subject of debate, implies a **formal and material act** on the part of the person tendering same. To this end, this Tribunal will therefore have to ascertain whether WASTE MANAGEMENT did indeed submit the waiver in accordance with the formalities envisaged under NAFTA and whether it has respected the terms of same through the material act of either dropping or desisting from initiating parallel proceedings before other courts or tribunals.

§21 The word "form" must be deemed a natural element of any legal act, since any declaration of intent must be voiced, must be made known to others. In a life of interrelationships, it is its form that renders an act recognisable to others. Hence, there is no legal transaction, dealing or act that is bereft of some given form, however simple.

In a more technical and precise sense, the concept of form refers to a given, specific medium that is demanded by the legal system or the will of the individual for the purpose of voicing intent. The effectiveness of legal acts is thus rendered dependent upon the observance of certain forms, which are the only ones permitted as vehicles for expressing such intent.

Thus, *a priori*, formalism seeks to achieve certain practical ends, which can substantially be summed up as the attainment of clarity with regard to the circumstances of the document issued, the content matter thereof and assurance of proof of its existence.

§22 A distinction has traditionally been drawn between so-called *ad substantiam* or *ad solemnitatem* and *ad probationem* formalities. The former are those that require a class of legal act in order to exist or come into being. In their case, form is substance, in that the transactions, dealings or acts do not exist as such, unless they are executed in the legally regulated form.

The *ad probationem* form is only required as evidence of legal transactions, dealings or acts. It in no way conditions the effectiveness of legal acts, other than in the sense of being thoroughly "legitimated", whereby it is established that it may only be proved by means of the legally prescribed form. However, the actual existence

and validity of the dealing or act is unimpaired by the lack of its observance.

The subsumption of the above considerations into the terms of NAFTA Article 1121 translates as the need for any waiver submitted by an aggrieved investor to comply with certain formal or *ad substantiam* requisites clearly set out in paragraph three:

> *"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."*

§23 This Article is clear when it comes to establishing the formalities for said waiver: presentation of the waiver in writing, delivery to the disputing party and inclusion in the submission of the claim to arbitration. All these requisites were duly complied with by the Claimant, as is evident from the written text that was dispatched by same to the disputing Party and registered on 30 June 1998, and subsequently included in the notice of request for arbitration dated 29 September of that same year.

This Tribunal accordingly finds that the waiver as tendered by the Claimant is free of the formal defects attributed to it by the Respondent with regard to the alleged need for legalisation or notarisation for possible/potential use in pleadings before other fora, since, provided that the waiver has been submitted in the terms laid down by the NAFTA, that is to say, in writing and in duplicate to both the ICSID and the disputing Party, any appraisal thereof by other courts, tribunals or parties does not fall within the purview of this Tribunal.

(iv) Material requirements of the waiver submitted by WASTE MANAGEMENT.

§24 As has been pointed out by this Arbitral Tribunal, the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued.

Indeed, such a declaration of intent must assume concrete form in the intention or resolve whereby something is said or done (conduct of the deponent). Hence, in order for said intent to assume legal significance, it is not suffice for it to exist internally.

Instead, it must be voiced or made manifest, in the case in point by means of a written text and specific conduct on the part of the waiving party in line with the declaration made.

It thus becomes necessary to assess both the conduct of the party making the waiver, as well as the liability that said party must assume should there be a divergence between the sentiments manifested and the conduct actually engaged in, the reason being that said party, and only said party, is liable for the effectiveness of such declaration, due to the so-called principle of self-responsibility.

In light of the above, it is clear that the waiver required under NAFTA Article 1121 calls for a show of intent by the issuing party vis-à-vis its waiver of the right to initiate or continue any proceedings whatsoever before other courts or tribunals with respect to the measure allegedly in breach of the NAFTA provisions. Moreover, such an abdication of rights ought to have been made effective as from the date of submission of the waiver, namely, 29 September 1998. The above declaration of intent also calls for a certain type of conduct on the part of the issuing party, WASTE MANAGEMENT, the party making public the commitment acquired by virtue of the above-mentioned waiver.

§25 Hence, by subjecting the Claimant's conduct to scrutiny, this Arbitral Tribunal will hereupon proceed to verify the public manifestation of the declaration of intent that said Claimant expressed in the waiver referred to in NAFTA Article 1121.

In the following order of consideration and by means of an analysis of the statements and documentation furnished by the Parties, this Arbitral Tribunal deems the following points of fact proven with respect to internal proceedings initiated by ACAVERDE prior and/or subsequent to the tendering of the NAFTA Article 1121 waiver:

1. With reference to the first suit filed by ACAVERDE against BANOBRAS, it has been shown that on 31 January 1997, ACAVERDE initiated a mercantile action against BANOBRAS, involving a claim for a monetary sum plus damages for non-payment of invoices, arising out of a breach by BANOBRAS of a credit line agreement, under which it stood as guarantor for the City Council of ACAPULCO in the event that the latter should fail to fulfil its payment obligations under the Concession Agree-

ment. Said action was decided in favour of BANOBRAS on 7 January 1999, leave for appeal being granted on 18 January 1999. On 11 March 1999, the Second Court of the First Circuit (*Segundo Tribunal Unitario del Primer Circuito*) upheld the decision at the first instance.

Contesting this decision, ACAVERDE filed an appeal for relief on 7 April 1999, which was dismissed on 6 October 1999 by the Sixth Collegiate Tribunal on Civil Matters of the First Circuit (*Sexto Tribunal Colegiado en Materia Civil del Primer Circuito*), thus rendering the judgement as handed down, final and binding.

2. Similarly, on 11 August 1998 ACAVERDE brought a second suit against BANOBRAS for breach of payment of certain invoices under the credit line agreement. On 12 January 1999, the Second District Court on Civil Matters of Mexico City (*Juez Segundo de Distrito en Materia Civil de la Ciudad de México*) dismissed said action. ACAVERDE appealed against this decision on 20 January 1999, which appeal was dismissed on 18 February of the same year by the First Court of the First Circuit (*Primer Tribunal Unitario del Primer Circuito*), on procedural grounds. On 24 February 1999, ACAVERDE filed a plea of annulment or reversal with the aim of reviving the appeal, a petition that was rejected by the relevant Court on the following day. Finally, ACAVERDE filed an appeal for relief on 9 March 1999, which was decided in favour of BANOBRAS on 20 May of the same year, thereby definitively confirming the decisions handed down by the previous Courts.
3. Lastly, on 27 October 1998, ACAVERDE filed a suit in arbitration against the City Council of ACAPULCO under the auspices of the City of Mexico Chamber of Commerce Permanent Arbitration Committee, claiming damages for non-payment of services and breach of a series of obligations under the Concession Agreement, which proceedings it then subsequently abandoned on 7 July 1999.

(v) <u>Conduct prohibited by waiver of Article 1121 of the NAFTA</u>

§26 Finally, and given the Claimant's interpretation concerning actions that it may bring before other courts or tribunals without violating the content of the waiver established in Article 1121 of

the NAFTA, this Arbitral Tribunal deems it necessary to define the conduct proscribed by that Article, even though its wording is clear and should not lead to any confusion or deviation.

§27 As revealed in the factual background, WASTE MANAGEMENT has expressed its interpretation of the waiver in various written communications, which are quoted below:

> Notice of institution of arbitration proceedings dated 22 July 1998:
>
> *"This waiver does not apply, however, to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by other sources of law, including the municipal law of Mexico."*
>
> Notice of institution of arbitration proceedings dated 29 September 1999:
>
> "*Without derogating from the waiver 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."*

According to the interpretation of the waiver maintained by the Claimant, said waiver would refer exclusively to proceedings that expressly invoke failure to comply with obligations of international law set forth in Chapter XI of NAFTA.

Following this line of reasoning, the Claimant would have acted in accordance with the terms of its waiver since, in fact, ACAVERDE did not expressly invoke those provisions of NAFTA that it considered breached before other courts or tribunals, but instead, making use of the domestic instruments available to it under Mexican legislation, instituted several claims for monetary compensation in respect of unpaid invoices and non-compliance with various obligations under a line of credit agreement and a Concession Agreement, considering such conduct "permissible" in light of its own interpretation of said waiver. This justification of its conduct is unsustainable for the following reasons:

a) It is clear that one and the same measure may give rise to different types of claims in different courts or tribunals. Therefore, something that under Mexican legislation would constitute a series of breaches of contract expressed as non-payment of certain invoices, violation of exclusivity clauses in a concession agreement, etc., could, under the NAFTA, be interpreted as a lack of fair and equitable treatment of a foreign investment by a government (Article 1105 of NAFTA) or as measures constituting "expropriation" under Article 1110 of the NAFTA. In any case, it is not the mission of the Tribunal, at this stage of the proceedings, to make an in-depth analysis of alleged breaches of the NAFTA invoked by the Claimant, since that task, should it become necessary, belongs to an analysis of the merits of the question.
b) For purposes of considering a waiver valid when that waiver is a condition precedent to the submission of a claim to arbitration, it is not imperative to know the merits of the question submitted for arbitration, but to have proof that the actions brought before domestic courts or tribunals directly affect the arbitration in that their object consists of measures also alleged in the present arbitral proceedings to be breaches of the NAFTA. The term "alleged" ("presuntamente" in the Spanish version) appearing in Article 1121 is clearly indicative of the framework within which we have to operate at this very early stage of the arbitration proceedings, which means that the elements of comparison to be used at the time of verifying compliance with the waiver are the presumed or supposed violations of NAFTA invoked by the Claimant and the actions effectively in progress before other courts or tribunals at that time. All of this without prejudice to the possibility, following an examination of the merits, of the Arbitral Tribunal verifying compliance or non-compliance as asserted by the Claimant.

In effect, it is possible to consider that proceedings instituted in a national forum may exist which do not relate to those measures alleged to be in violation of the NAFTA by a member state of the NAFTA, in which case it would be feasible that such proceedings could coexist simultaneously with an arbitration proceeding under the NAFTA. However, when both legal actions have a legal basis derived from the same measures, they can no longer

continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages. This is precisely what NAFTA Article 1121 seeks to avoid.

In the present hypothesis, this Tribunal understands that the domestic proceedings initiated by ACAVERDE fall within the prohibition of NAFTA Article 1121 in that they refer to measures that are also invoked in the present arbitral proceedings as breaches of NAFTA provisions, namely non-compliance with the obligations of guarantor assumed under a line of credit agreement requiring BANOBRAS to defray invoices not paid by ACAPULCO city council, and non-compliance by ACAPULCO city council through its failure to pay said invoices.

This point was recognised by the Claimant in its written presentations concerning the question of jurisdiction of 9 November 1999, which stated the following:

> "*Claimant's allegations against Mexico in this NAFTA arbitration are based on five separate "measures" constituting violations of NAFTA, only one of which relates to non-payment under contract.*"

The fact, expressly admitted by the Claimant, that the object of the proceedings initiated against BANOBRAS and ACAPULCO referred to one of the measures allegedly breaching NAFTA provisions is sufficient proof, in the spirit of NAFTA Article 1121, to include it within the framework of conduct that the waiver should cover, as referred to in said Article and as proscribed for obtaining access to an arbitration proceeding as contemplated under NAFTA.

It remains clear that at no time did WASTE MANAGEMENT intend to abandon the domestic proceedings, rather, on the contrary, its manifest intention was to continue legal proceedings against BANOBRAS and ACAPULCO, as revealed by the communication sent by the Claimant's representative to the Mexican Government's representative on 10 February 1999, in which it is established that:

> *"…Regarding your request about the ongoing arbitration proceeding in Mexico, we do not believe that our client is required to suspend any proceedings in Mexico that it is otherwise entitled to institute…"*

§28 In conclusion, an interpretation such as the one proposed by the Claimant and which, as seen by the documentation provided, has been used, conflicts with the purpose of the waiver established in NAFTA Article 1121, the wording of which clearly sets forth the spirit and intent of said waiver, which expressly proscribes the initiation or continuation of proceedings under the law of either party with respect to a measure allegedly breaching the provisions referred to in Article 1116 of NAFTA. It is clear that the provisions referred to in the NAFTA constitute obligations of international law for NAFTA signatory States, but violation of the content of those obligations may well constitute actions proscribed by Mexican legislation in this case, the denunciation of which before several courts or tribunals would constitute a duplication of proceedings.

The Claimant has been perfectly aware of the situation here described since it reserved the right to bring action in domestic courts or tribunals and, subsequently, in light of the vicissitudes of those actions and also of the arbitral proceedings initiated under the NAFTA, when it forced an *a posteriori* interpretation of its waiver, asserting that in the actions before other courts or tribunals NAFTA provisions had not been invoked, although there is no doubt that they directly affected the international obligations assumed by the Mexican Government, given that they had their origin in the same measures invoked by the Claimant.

If the Claimant, upon formulating its waiver, had clearly adopted the interpretation it now maintains, it would not have conditioned its waiver with the terms as it did, because under said interpretation, it would have been able to take parallel action in domestic courts or tribunals without expressly invoking NAFTA provisions and without thereby affecting these arbitral proceedings.

§29 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 sufficient credit through the Respondent's written pleadings concerning the issue of jurisdiction.

§30 Based on the foregoing, it is clear that the Claimant issued a statement of intent different from that required in a waiver pursuant to NAFTA Article 1121, since it continued with the proceedings initiated against BANOBRAS after the date of submission of the waiver,

29 September 1998, until all avenues of recourse had been exhausted. Likewise, it has also been shown that subsequent to submission of this claim for arbitration, ACAVERDE initiated arbitral proceedings against ACAPULCO, which are still ongoing today, although ACAVERDE requested the return of documents based on its action of 7 July 1999, as revealed by the documentation accompanying its memorial, despite the fact that the pertinent forum, i.e. the Arbitral Tribunal, had not declared the arbitral proceeding closed.

c. Validity of the waiver submitted by WASTE MANAGEMENT

§31 In view of the above, this Tribunal has arrived at the following conclusions regarding the validity of the waiver tendered:

1. With respect to the content of the text of the NAFTA Article 1121 waiver, it is obvious that the Claimant did not limit itself to a full transcription of the content of this Article, which in itself is sufficiently complete and clearly reflects the scope of the waiver, but instead additionally introduced a series of statements that reflected its own understanding of the waiver submitted, as is evident from the findings of fact outlined in this arbitral award now issued hereunder.

This Tribunal cannot concur with the Claimant's earlier assertions regarding its intention to present the waiver in accordance with the scope of Article 1121, given that it has been established that for more than 14 months, it systematically failed to comply with the actual agreement that the waiver of NAFTA Article 1121 requires from those parties seeking to submit a claim to arbitration in accordance with the dispute settlement procedure set forth in Chapter XI of the NAFTA. The fact is that the Claimant did not have the intention of presenting the waiver within the terms prescribed in NAFTA Article 1121, rather, it had the intention to present it in accordance with its own interests.

2. With respect to clarifications made by WASTE MANAGEMENT in its Memorial of Claim of 29 September 1999 and written submission of pleadings of 9 November 1999, it is true that, at the date on which the latter was tendered, WASTE MANAGEMENT had instituted no proceedings before any other courts or tribunals. Yet this fact cannot remedy the breach by WASTE

MANAGEMENT of one of the NAFTA Article 1121 requirements, namely, delivery of a waiver in accordance with the terms laid down by Article 1121 to the disputing party, and inclusion thereof in the submission of the claim to arbitration. In view of WASTE MANAGEMENT's conduct and the text of its declaration of intent, neither the waiver submitted on 29 September 1998 nor the subsequent attempts to clarify the content thereof correspond to the terms prescribed for these purposes under NAFTA Article 1121, which requires the waiving party to abstain from initiating or continuing legal proceedings in any administrative or judicial tribunal or other dispute settlement procedures (save for petitions for injunctive, declaratory or other extraordinary relief, not involving the payment of damages).

Accordingly, this Tribunal cannot deem as valid the waiver tendered by the Claimant in its submission of the claim to arbitration, in view of its having been drawn up with additional interpretations, which have failed to translate as the effective abdication of rights mandated by the waiver.

In the light of the foregoing, the claims of the Respondent must necessarily be allowed, along with the ensuing order against the Claimant for costs. Nevertheless, on there being no evidence of recklessness or bad faith on the Claimant's part, this Tribunal is of the opinion that it would be improper to make an award for such legal costs as the Respondent may have incurred in the defence of its interests in this arbitration.

IV. ARBITRAL AWARD

On weighing up all that has been set forth hereinabove, the documentary exhibits and pleadings drawn up by the parties, this Arbitral Tribunal is compelled to hold that it lacks jurisdiction to judge the issue in dispute now brought before it, owing to breach by the Claimant of one of the requisites laid down by NAFTA Article 1121(2)(b) and deemed essential in order to proceed with submission of a claim to arbitration, namely, waiver of the right to initiate or continue before any tribunal or court, dispute settlement proceedings with respect to the measures taken by the Respondent that are allegedly in breach of the NAFTA, the aforesaid being in overall accordance with the provisions of said legal text and the ICSID Additional Facility.

This Tribunal orders the Claimant to pay the costs of the present arbitration proceedings, and each of the disputing parties to defray the respective costs occasioned by its own defence.

The present arbitral award has been adopted by a majority of the Arbitral Tribunal

Bernardo M. Cremades
President of the Tribunal

Date: May 26, 2000

Keith Highet
Arbitrator
(subject to the attached dissenting opinion)

Date: May 11, 2000

Eduardo Siqueiros T.
Arbitrator

Date: May 16, 2000