

DISSENTING OPINION

I have dissented from the Award rendered by a majority of the arbitrators in this case because I disagree both with the result of the Award and with certain key elements of the reasoning. I consider it important to append this opinion of my dissenting views, not to denigrate or undermine the reasoning and logic of the Award, but only to point out the key differences between my views and those of the majority. The precedential significance of this Award for future proceedings under the North American Free Trade Agreement (NAFTA) cannot be underestimated. In addition, the Award will be an important guidance to future potential NAFTA claimants. It is for this purpose that as complete an understanding as possible be expressed of the legal issues involved.

-
1. Respondent has claimed that this Tribunal has no jurisdiction because of an asserted failure on the part of Waste Management to have complied with the formal requirements of NAFTA's Article 1121—either because (i) it did not supply the correct waiver required by that article at the beginning of the arbitration; or because (ii) the waiver that it supplied was subsequently shown to have been inoperative, nonexistent, or disavowed by reason of a subsequent course of conduct of Waste Management. The existence and delivery of this waiver is asserted to be a condition precedent to jurisdiction of the Tribunal under NAFTA. It is claimed that if the waiver had not been given, or had subsequently been disavowed, disqualified or effectively withdrawn, the consent of the United Mexican States to the arbitral process could no longer be presumed.

1. Must the waiver be express?

2. The first question raised by Mexico's objection is whether Article 1121¹ requires that the waiver be *in expressis verbis*. It does not appear so. This NAFTA provision does not require the submission of a waiver in any particular form. It does not specify that any proceedings be withdrawn or suspended. Nor does it require that such proceedings not be initiated. It requires the delivery of evidence of a waiver of the right to initiate or continue them. The waiver requirement expressed in Article 1121, paragraph 1 is general, not specific.
3. Paragraph 3 of Article 1121 is specific. It provides 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." To indicate that it "shall be in writing"—without specifying the form of words to be used—implies without question that the form of words may vary as long as the waiver itself is the "waiver" required by Article 1121. In addition, Article 1121, paragraph 3 of the English version of the NAFTA says that "[a] consent and waiver required by this Article shall be in writing," not that "~~the~~ consent and waiver required by this Article shall be in writing." It thus reinforces the implication that NAFTA claimants have leeway in formulating the language that is to express "a waiver."

2. Did Claimant's conditional language nullify the waiver?

4. In the present case there has been a variety of conditions, limitations, reservations, or understandings attached to the waiver offered

¹ The text of Article 1121, paragraph 1 specifies that

"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 ... waives[s] ... [its] 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."

by Waste Management. By the time of Claimant's letter of September 23, 1998 (Award, § 4, p. 4), and certainly a few days later at the time of its resubmission of the notice of institution of arbitration proceedings to ICSID (September 29, 1998) (Award § 5, p. 5), what might have initially appeared to have been a reservation, qualification, or condition to the waiver had been transformed into an "understanding." The history of the various exchanges is set forth in §§ 4 through 6 of the Award.

5. The question presented is whether Claimant's "understanding," or conditional language, nullified the waiver. Article 1121 makes no mention of any condition or understanding that may, or may not, be appended to the "writing" embodying a waiver. Keeping in mind "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 it stands to reason that a reservation or condition in the written waiver that does not have a negative effect on its substance would be of no moment, but one that does have a negative or diluting effect on its substance would invalidate it.
6. Claimant's "understanding" in this case was also subjected to the express introductory condition: "[w]ithout derogating from the waiver required by NAFTA Article 1121".³ This would appear to have eliminated any potential negative effect on the waiver requirement of Article 1121. The test is one of substance: does the understanding have a substantive effect that would be contrary to the substantive requirements of the waiver, or does it not? If it is stated to be "without derogation" from the waiver, it is hard to see how it could have such an effect.

² The general rule of interpretation in the Vienna Convention on the Law of Treaties is now universally accepted as general international law. It is the rule of interpretation that must be applied by this Tribunal to the provisions of the NAFTA treaty:

"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." The Vienna Convention on the Law of Treaties, Article 31 ("General Rule of Interpretation"), paragraph 1.

³ "*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.*" (Italics added.)

7. Yet even if the “without derogation” language had not been included, the understanding that Waste Management attached to its waiver was not inconsistent with the requirements of Article 1121. The correspondence to and from ICSID⁴ introduced, applied, and accepted the “substance” test: that a waiver would be acceptable if it applies to “dispute 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.”⁵ Waste Management’s conception—although expressed in such a manner as may not, with hindsight, have turned out to “have been the better practice”⁶—was in fact right, for the reason that claims relating to Mexican⁷ remedies for Mexican wrongs are not the same as claims for NAFTA remedies for NAFTA wrongs.
8. There must be, and is, a distinction to be drawn in juridical terms between the legal obligations of Mexico under Mexican law and the legal obligations of Mexico under its international treaty obligations imposed by NAFTA. If this were not true, arbitrations could be commenced under NAFTA for remedies under national law such as actions for payments for money had and received, goods sold and delivered, actions for breach of contract, actions for breach of warranty, lawsuits requesting zoning modifications, litigation concerning unauthorized strikes, lawsuits about collective bargaining, cases on sexual harassment in the workplace, and so forth. It is inconceivable that any of these complaints had been intended, by the NAFTA States Party, to be resolved in NAFTA arbitrations. Proceedings relating to them could never have been “proceedings with respect to the measure of the disputing Party that is alleged to be” a “breach referred to in Article 1116,” within the meaning of Article 1121. They were beyond the scope of the waiver, and would not have been intended to be part of it.

⁴ Award § 5, p. 6.

⁵ Letter of November 13, 1998 to ICSID.

⁶ In the language of the *Ethyl* decision, cited in footnote 48 below.

⁷ “Mexican” and “Mexico” are to be understood for these purposes as meaning the United States of Mexico, including its agencies, instrumentalities, subordinate entities and components, such as Banobras, the Municipality of Acapulco, the State of Guerrero, and so forth.

9. This is also consistent with the normal rule of burden of proof and persuasion in matters such as this. Jurisdiction is never to be presumed; once a respondent has raised a *prima facie* credible claim that jurisdiction does not exist, the normal rule is that the burden shifts to the claimant.⁸ If the claimant then adduces sufficient evidence and argument so that jurisdiction may be perceived to exist by a reasonable preponderance of the evidence, the tribunal must then find that jurisdiction in the matter does exist.⁹ In addition, the present situation cries out for application of the prudential principle, which warns tribunals to tread carefully in respect of legal undertakings of this nature and not to arrive precipitously at “the drastically preclusive effect”¹⁰ of a denial of jurisdiction in a situation where—although procedural complications might have been avoided by the “better practice”¹¹ of dispensing with “understandings” and other conditions—jurisdiction still survives as a legal matter.

3. What does the waiver mean?

10. The preceding paragraphs have dealt with the issue of whether an additional “understanding” could be appended to Claimant’s Article 1121 waiver without disqualifying it. They did not deal with the interpretation of what that waiver really means.

(a) “Measure”

11. What is a “measure”? Article 201 of the English text of NAFTA (“General Definitions”) states that: “*measure* includes any law, regula-

⁸ This is not the *onus probandi* but the *onus proponendi*.

⁹ This is supported by the language of the ICSID arbitral decision on jurisdiction (No. 2) of 14 April 1988 in *Southern Pacific Properties (Middle East) Limited [SPP(ME)] v. Arab Republic of Egypt* (Case No. ARB/84/3) submitted to the Tribunal by Mexico in the present case. (“Materials in Support of Respondent’s Oral Submission,” Tab 1.) The Tribunal in that case stated that:

“...jurisdictional instruments are to be interpreted neither restrictively nor expansively, but rather objectively and in good faith, and jurisdiction will be found to exist if—but only if—the force of the arguments militating in favor of it is preponderant.” (3 ICSID REPORTS at 131, 144, para. 63 (italics added).)

¹⁰ *Ibid.*

¹¹ Quoting the *Ethyl* decision cited in footnote 48 below.

tion, procedure, requirement or practice.” The French text states that: “*mesure s’entend de toute législation, réglementation, procédure, prescription ou pratique.*” The Spanish text states that “*medida incluye cualquier ley, reglamento, procedimiento, requisito o práctica.*”

12. Canada argued extensively in the *Fisheries Jurisdiction* case¹² in the International Court of Justice that a “measure” was virtually any action or act undertaken by a State on an official level.¹³ In response, the Court in its judgment stated that “in its ordinary sense the word [“measure”] is wide enough to cover any act, step or proceeding, and imposes no particular limit on their material content or on the aim pursued thereby.” The question however remains whether individual actions of, *e.g.*, Banobras, or the Municipality of Acapulco, or Guerrero, would be considered as being the right *kind* of measure: *i.e.* a “measure ... *that is alleged to be a breach*” of NAFTA obligations, within the meaning of Article 1121.
13. The “Article 1121 ‘measure’” is a particular and limited kind of action or concept. Although actions such as denial of payment under a letter of credit, or cancellation of a concession contract, can each be viewed as a “measure,” they would not be the type of “measure” that Article 1121 refers to. The reference in Article 1121 is to a State act that is itself a breach of international obligations under NAFTA. Article 1121 cannot be read as applying to local components of such an act which are not themselves breaches of international obligations at the international treaty level and which would not be actionable under NAFTA. The failure to pay on a financial guarantee or letter of credit may be a component of a measure that constitutes nationalization, but it is not itself such a measure unless it is joined with other elements that are also components of the ultimate measure of expropriation. It is therefore not the kind of “measure” contemplated by Article 1121.
14. Of course, a measure of nationalization may be expected to include a law or regulation or nationalization decree by which the

¹² *Fisheries Jurisdiction* case (Spain v. Canada), *Jurisdiction of the Court*, Judgment of 4 December 1998, *I.C.J. Reports 1998*, p. 432; para. 65.

¹³ “Canada ... stresses the very wide meaning of the word ‘measure’. It takes the view that this is a ‘generic term’, which is used in international conventions to encompass statutes, regulations and administrative action.” *Ibid.*

property in question is confiscated. If the nationalization is of the “creeping” variety, it will fall within the meaning of paragraph 1 of NAFTA Article 1110 (“a measure *tantamount to* nationalization or expropriation of such an investment”), but will still require some additional act to be taken beyond the bald denial of payment or cancellation of the contract—an act such as, *e.g.*, a review by a local court or tribunal and denial of the claim on inadequate grounds, refusal to permit access to judicial review, some other form of denial of justice in international law, or a governmental conspiracy to take over the concession.¹⁴

(b) “Breach”

15. What is meant by the word “breach”? Nowhere in Chapter Eleven, Section A, can we find a provision requiring payment of commercial debts, or preventing the cancellation of contracts other than in accordance with their terms. These legal obligations arise under the respective domestic laws of the Parties to NAFTA. They are precisely the type of legal obligations as to which recourse was sought by Acaverde in the proceedings against Banobras and in the arbitration proceeding against Acapulco. Those proceedings set forth causes of actions or complaints that related to non-payment and non-performance, all of which were governed by provisions of the Civil and Commercial Codes of Mexico and none of which was governed by NAFTA.

¹⁴ The *ELSI* case decided by a Chamber of the International Court in 1989 is illustrative of this point. (*Elettronica Sicula S.p.A. (United States v. Italy)*, Decision of 20 July 1989, *1989 I.C.J. Reports*, p. 15.) In that case the factual background included a variety of governmental “measures” undertaken at the local, municipal, state and national level. In addition, the relationship of one “measure” to another formed a central part of the case; a major question presented was whether the United States was bound to prove the existence of a connection between those measures so as to establish a conspiracy, on the one hand, or a pattern of actions sufficient to constitute a nationalization or expropriation, on the other. The pleadings in that case clearly demonstrate that one single act or measure cannot an expropriation make, unless that act or measure is itself the promulgation of a law accomplishing the deed. An act of expropriation may be a single act of a State, but the single act of a State is not necessarily an act of expropriation. Unfortunately for present purposes, the Chamber did not have to resolve this issue, as it had determined that the financial condition of the Elettronica Sicula company had been the primary cause of its failure. *Id.*, p. 71, para. 19.

16. An examination of Chapter Eleven, Section A, confirms this.¹⁵ Article 1105, as to which Waste Management has asserted a claim in this arbitration, contains the requirement for each Party to “accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security;” neither the Banobras lawsuits nor the Acapulco arbitration appear to have asserted a claim for denial of treatment in accordance with international law.¹⁶ Article 1110 concerns “expropriation and compensation,”¹⁷ and is—together with Article 1105—at the heart of Claimant’s case.

¹⁵ Article 1102 requires “national treatment” for investors of another Party; neither the Banobras lawsuits nor the Acapulco arbitration would appear to have asserted a claim for denial of “national treatment.” Article 1103 requires “most-favored-nation treatment” for investors of another Party; neither the Banobras lawsuits nor the Acapulco arbitration would appear to have asserted a claim for denial of “most-favored-nation treatment.” Article 1104 requires a Party to accord to investors and investments of investors of another Party the better of the treatment required by Articles 1102 and 1103—not a cause of action alleged in either the Banobras lawsuits or the Acapulco arbitration.

¹⁶ Articles 1106 through 1109 do not appear to be germane to the issues in the present case. Article 1106 relates to “performance requirements,” which appear to be irrelevant to the claims made in the present arbitration. Article 1107 contains a proscription concerning requirements for composition of “senior management and boards of directors” that is likewise inapplicable. Article 1108 relates to “reservations and exceptions.” Article 1109 concerns the freedom to make transfers, which does not appear to be at issue in the present case.

¹⁷ It provides that: “1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment (“expropriation”) except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1); and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.”

Article 1105(1) as referred to in subparagraph 1(c) of course states that:

“Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.”

17. From the record before the Tribunal, the claims advanced by Waste Management here differ from the claims asserted against Banobras and Acapulco in the local Mexican actions.¹⁸ Claimant's claims under Articles 1110 and 1105 of NAFTA¹⁹ are broader than—and proceed on a plane different from—the claims advanced in either the Banobras lawsuits or the Acapulco arbitration. Not only did they involve numerous additional elements; they also proceed on a distinct and separate juridical plane, since a “creeping expropriation” is comprised of a number of elements, none of which can—separately—constitute the international wrong. These constituent elements include non-payment, non-reimbursement, cancellation, denial of judicial access, actual practice to exclude, non-conforming treatment, inconsistent legal blocks, and so forth. The “measure” at issue is the expropriation itself; it is not merely a sub-component part of expropriation.

¹⁸ Claimant's Memorial described the three domestic proceedings commenced by Acaverde in Mexico, and stated 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.” Claimant's Memorial further described the claims as follows:

“The two lawsuits against Banobras were filed in Mexico City district court on January 27, 1997 and July 31, 1998 and were based on Banobras' breach of the Line of Credit Agreement. The first suit was for the 1996 unpaid invoices and the second suit was for the 1997 invoices.” (*Id.*, p. 6, para. 4.14.)

At the date of the Memorial (September 29, 1999) Claimant stated that:

“Only an *amparo* proceeding remains pending with respect to the first suit against Banobras, and the trial court dismissed the second suit based on an argument submitted by Acapulco. Acapulco appeared at the request of the court and argued that Acaverde's claims related to unpaid invoices should be settled under the arbitration clause in the Concession.”

¹⁹ Claimant's Memorial of September 29, 1999 (p. 2, para. 4) set forth “at least two violations of NAFTA Chapter Eleven, Section A”—specified as breaches of NAFTA Article 1110 and 1105. It characterized them as follows:

“By revoking Waste Management's concession without compensation, Mexico effectively expropriated the fair market value of Waste Management's investment.” (Article 1110 claim; *id.*, p. 2, para. 1.4.)

“Mexico's arbitrary refusal to perform its obligations under the Concession and its affirmative acts to thwart it violate recognized rules of international law, especially those related to long-term economic development.” (Article 1105 claim; *id.*, p. 2, para.1.5.)

18. A nationalization or expropriation—in particular a “creeping expropriation” comprised of numerous components—must logically be more than the mere sum of its parts: see, for example, the assertion made in the Memorial that “When Acaverde sought payment from Banobras under the guarantee, the City [of Acapulco] *conspired with Banobras, another State organ, to deny payment to Acaverde under Banobras’ guarantee.*”²⁰
19. Here reference may be made to the recent award in the *Azinian* case referred to by Respondent.²¹ The *Azinian* Tribunal stated that:

“...a foreign investor entitled in principle to protection under NAFTA may enter into contractual relations with a public authority, and may suffer a breach by that authority, and *still not be in a position to state a claim under NAFTA.*”²²

The award continued:

“The problem is that the Claimants’ fundamental complaint is that they are the victims of a breach of the Concession Contract. *NAFTA does not, however, allow investors to seek international arbitration for mere contractual breaches.* Indeed, NAFTA cannot possibly be read to create such a regime, which would have elevated a multitude of ordinary transactions with public authorities into potential international disputes.”²³

Thus the *Azinian* decision is consistent with a conclusion that Acaverde’s claims against Banobras or Acapulco were not *ipso facto* and by themselves claims under Chapter Eleven and, consequently, that the Article 1121 waiver submitted by Claimant would not have been inconsistent with the maintenance of those claims in the Mexican courts.

²⁰ Memorial, p. 46, para. 5.22. (Italics added.)

²¹ *Azinian et al. v. United Mexican States*, Case No. ARB(AF)/97/2, award dispatched on November 1, 1999 (typescript), p. 27, para. 97 (italics in original).

²² *Azinian*, p. 23, para. 83 (italics in original).

²³ *Id.*, p. 25, para. 87 (italics added).

20. Respondent cited *Azinian* with approval. Indeed, in its Counter-Memorial Respondent indicated that

“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.”²⁴

21. By this statement, Mexico ironically placed Claimant and the Tribunal on notice that its own defense on the merits in these proceedings will be precisely congruent with the *ratio decidendi* of *Azinian*. That legal position however is directly opposite to Respondent’s position in the present jurisdictional phase of these proceedings—a legal position that rests on the inarticulate major premise that the local Mexican claims and the NAFTA claims are in substance the same. By its statement, Respondent in effect conceded that Claimant’s waiver could not have been expected to be applicable to the domestic Mexican litigations.
22. The waiver referred to one thing, and the Mexican litigations concerned another. As *Azinian* cogently points out, and as Respondent has accepted in a different context, litigations concerning mere contract claims alone cannot constitute “proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116” within the meaning of Article 1121. How then could the waiver offered by Claimants have been defective—either on a formal basis or as a result of Claimant’s contemporaneous and subsequent conduct?

(c) “With respect to”

23. Moreover, are the proceedings in this case “*proceedings with respect to* [the] measure ... that is alleged to be a breach referred to in Article 1116?” This question is the other side of the coin of examin-

²⁴ Counter-Memorial, p. 25, para. 113 (italics added).

ing whether the measure contested in domestic proceedings is a “measure” actionable under NAFTA; instead, this question asks whether the proceedings themselves are actually addressed to such a measure.

24. The natural and ordinary meaning of the phrase “with respect to” is specific, narrow, and precise. It means that the proceeding in question must be a proceeding “with respect to” a given measure of the disputing Party; as a legal matter, this means that the proceeding must primarily concern, or be addressed to, that measure. (The French and Spanish texts of NAFTA are in agreement; the result is the same in the plain and ordinary reading of all three languages.²⁵)
25. This precise meaning—that a proceeding be brought that directly concerns or attacks a specific measure—is quite different from the natural and ordinary meaning of a different phrase, such as “relating to” or “concerning.” Many proceedings may “relate to” or “concern” a measure without being proceedings “with respect to” that measure. For example: a sexual harassment case may “relate to” or “concern” the protection of worker’s rights in the workplace, but is not itself a proceeding “with respect to” such protection; a proceeding “with respect to” the protection of workers’ rights would have to be one that is brought as a matter of labor law, in a wholly different context.
26. Thus a claim for theft of office equipment from an alien may “relate to” or “concern” a claim for State responsibility under a treaty

²⁵ The French text of Article 1121.1(b) is:

“...renoncent à leur droit d’engager ou de poursuivre, devant un tribunal judiciaire ou administratif aux termes de la législation d’une Partie ou d’une autre procédure de règlement des différends, *des procédures se rapportant à la mesure de la Partie contestante présumée constituer un manquement visé à l’article 1116.*” (Italics added.)

A “procédure *se rapportant à la mesure de la Partie contestante*” is a procedure that addresses or relates to that measure directly; it is not merely “*en relation avec*” that measure.

The Spanish text is:

“...renuncia a su derecho a iniciar o continuar cualquier procedimiento ante un tribunal administrativo o judicial conforme al derecho de cualquiera de las Partes *u otros procedimientos de solución de controversias respecto a la medida presuntamente violatoria de las disposiciones a las que se refiere el Artículo 1116.*” (Italics added.)

A “procedimiento *respecto a la medida*” is, again, a procedure that addresses or relates to that measure directly, and is not merely “*en relacion con*” that measure.

(in the sense that the host State may not have provided the requisite minimum protection for the alien), but that claim is not a claim “with respect to” such State responsibility. That would have to be a claim directly addressing that issue. It would have to involve other elements, such as a refusal to prosecute, denial of access to the courts—in short, a “denial of justice” under international law for which the State would bear responsibility under the treaty or customary international law.

4. Did Claimant’s conduct render the waiver ineffective?

27. The majority of the Tribunal considers the substantive conduct of Claimant in maintaining and appealing the Mexican actions to be determinative of its lack of jurisdiction in this matter inasmuch as it is viewed as disqualifying or rendering null and void any formal waiver provided at the outset of the NAFTA arbitration. The heart of the Award rests on this reasoning and this conclusion.²⁶ However, if the existence of the Mexican litigations in this case was not incompatible with the terms of the Article 1121 waiver, the conduct of Claimant in maintaining or appealing those litigations could not have been incompatible with it.
28. If the Article 1121 waiver had been intended to cover any and all concurrent legal activity, then clearly Claimant’s course of conduct in Mexico would be inconsistent with it and would vitiate the waiver [given at the institution of arbitral proceedings under NAFTA for failure to satisfy the condition precedent stipulated by Article 1121.1(b)]. This would be so even if the waiver had been formally sufficient on its face at the time it was given. But, if the Article 1121 waiver had been intended only to relate to certain types of concurrent legal activity, then Claimant’s course of conduct in Mexico could only be inconsistent with the waiver if the course of conduct related precisely to that legal activity. The causes of action are different: local commercial claims in the Mexican tribunals, and international treaty claims before this Tribunal.

²⁶ Award, §§ 24-29, pp. 16-19.

5. Other considerations

(a) Relationship to the merits

29. The Award's analysis rests squarely on the premise that the municipal Mexican proceedings fall within the waiver of NAFTA Article 1121, insofar as "*se refieren a medidas que también son invocadas en el presente procedimiento arbitral como violatorias de disposiciones del TLCAN.*"²⁷ Similarly, the Award characterizes the Mexican proceedings as being "con identidad de sujetos a los efectos del artículo 1121 del TLCAN ya que, de acuerdo con este Tratado, el Gobierno Mexicano habría de ser responsable por las acciones indebidas de BANOBRAS y ACAPULCO."²⁸
30. It is important to address the question whether a tribunal may decide a jurisdictional objection on the basis of an *a priori* legal analysis alone, or whether further factual examination of the background of the case is required to support the conclusions to be reached. In the present case, it might well appear that the inquiry would require examination of the terms of the complaints filed in the two Banobras litigations as well as the Acapulco arbitration. To the extent that the Tribunal for these purposes needs to assume a factual record outside the immediate record submitted in connection with the current dispute on jurisdiction, its analysis invades the merits of the dispute between the Parties. The Tribunal should then have deferred its final decision to the merits phase of the arbitration under Article 40, paragraph 4 of the Additional Facility Rules (which would seem to have been tailor-made for just such a situation).
31. Moreover, an inquiry into whether the local claims are the same as the NAFTA claims could readily be assisted by comparing the damages sought in this NAFTA arbitration with the damages sought

²⁷ Award, § 27, p. 19 (italics added).

²⁸ Award, § 29, p. 20. Likewise: "El hecho ... de que *el objeto de los procedimientos iniciados en contra de BANOBRAS y ACAPULCO se refiriera a una de las medidas presuntamente violatorias de las disposiciones del TLCAN* es prueba suficiente, a tenor de lo dispuesto por el propio artículo 1121 del TLCAN, para encuadrarlo dentro las conductas que prohíbe la renuncia a la que se refiere este artículo." Award, § 27, p. 19 (italics added). However, as seen above, what Article 1121 refers to is not just that the "objeto de los procedimientos ... se refiriera a una de las medidas presuntamente violatorias de las disposiciones del TLCAN," but that the proceedings themselves (not just their object) be "*with respect to* the measure of the disputing Party that is alleged to be a breach referred to in Article 1116." What is required is more than a mere reference: it is a direct relationship to the NAFTA measure.

in the Mexican cases. Such an inquiry could have been dispositive of the question of the non-identity of the Mexican cases with the NAFTA claim.²⁹ The Mexican litigations in 1998 and 1999 could therefore not have been, on their face, “*proceedings with respect to the measure*” of expropriation or nationalization complained of by Claimant, since the amount sought in damages in Mexico was more than eight million dollars less than the amount sought in the present proceedings. Although an analysis of this nature could have resolved the matter in Claimant’s favor, it quintessentially enters into the merits of the dispute and should have been deferred to that stage.

(b) Waiver and withdrawal

32. The key element in the majority’s reasoning in this case is the premise that the formal, jurisdictional, requirement of the Article 1121 waiver depends not merely on the compliance of a claimant with the technical prerequisites of Article 1121, Paragraph 3,³⁰ but also upon the conduct of a claimant subsequent to the writing, delivery, and inclusion required by that paragraph.³¹ Thus, the majority

²⁹ For example, it is only necessary to consult the document submitted by Mexico at the hearing on January 31st, which has not been disputed by Claimant, in order to see this. (“Materials in Support of Respondent’s Oral Submission” at Tabs 2 “Legal Proceedings Chronology” and 3 “Extracts from the Pleadings of WMI and Acaverde in Different Fora”). In particular, the last document, “Extracts from the Pleadings of WMI and Acaverde in Different Fora,” demonstrates clearly and succinctly how the Mexican proceedings were not the same as the present NAFTA arbitration. In a rough calculation in United States dollars, and excluding all costs, it is easy to see that the amounts actually claimed by Acaverde in Mexico were ± U.S. \$28,339,343 and that the amounts claimed in the present NAFTA arbitration are \$36,630,000—a difference of some U.S. \$8,290,657, or approximately 23%.

³⁰ “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.”

³¹ Award, § 24, p. 16. Thus, the Award states: “este Tribunal deberá comprobar que WASTE MANAGEMENT ha presentado la renuncia de acuerdo con las formalidades previstas en el TLCAN y que ha respetado los términos de la misma a través del acto material de desistir o no iniciar procedimientos paralelos ante otros tribunales.” (Award, § 20, p. 14.) The Award reasons that:

“Se hace necesaria pues una valoración del comportamiento del sujeto que renuncia así como de la responsabilidad que deberá asumir si se produce una divergencia entre lo manifestado y el comportamiento efectivamente realizado ya que él y solo él responde de la eficacia de tal declaración en virtud del llamado principio de la autorresponsabilidad.” (Award, § 24, p. 16)

has read into the text of Article 1121 the additional requirement that litigations subject to the waiver be affirmatively withdrawn, that no further litigation be instituted, and that no appeals be conducted.

33. In its written pleadings and oral presentation, Claimant insisted on the position that, once the waiver had been prepared and delivered in accordance with Article 1121, paragraph 3, it was up to Respondent to use it as it saw fit. It is hard to find fault with such reasoning. This is precisely the ordinary meaning of the terms of Article 1121, paragraph 3, when read in their context and in the light of the object and purpose of this provision of NAFTA, which (as stressed by Canada in its written submission to the Tribunal) were clearly to avoid a multiplicity of causes of action, duplication of proceedings, and forum-shopping:—all with respect however to the *same* claims or causes of action.
34. However, if Chapter Eleven had affirmatively contemplated the termination of litigation in national courts by claimants, why didn't it say so? The NAFTA Parties were fully competent to agree on language to that effect. Instead, they agreed on the formal requirements of Article 1121, paragraph 3, specifying only that a waiver should be in writing and delivered to the respondent. To require submission of a written waiver at the outset of a NAFTA arbitration, and then to require (as the majority of this Tribunal does) that the pending local litigations be discontinued or terminated by the claimant—not by the respondent—suggests that there was no purpose for the written waiver to begin with. There surely would have been no benefit or

And the majority continues, to find that:

“A tenor de lo hasta ahora expuesto, es claro que la renuncia exigida en virtud del artículo 1121 del TLCAN requiere una manifestación de voluntad por parte de quien la emite en cuanto a la renuncia a iniciar o continuar cualesquiera procedimientos ante otros foros respecto a la medida presuntamente violatoria de las disposiciones a las que se refiere el TLCAN.”
(*Ibid.*)

Its conclusion follows:

“Asimismo, esta dejación de derechos debió hacerse efectiva a partir de la fecha de la presentación de la renuncia, esto es, el 29 de septiembre de 1998. *La referida declaración de voluntad también exige un determinado comportamiento de la declarante, WASTE MANAGEMENT, exteriorizador del compromiso adquirido en virtud de la citada renuncia.*” (*Ibid.*, italics added.)

result from its “delivery” to the respondent in writing; the claimant would have been expected to do—and should already have done—all the work.

35. This conclusion is confirmed when it is recognized that there is no evidence that Respondent did anything whatever to use or exercise the waiver in these proceedings. It is mystifying how this could have been the case when the content of the waiver had been, from 1998 through the fall of 1999, subject to intensive scrutiny and argumentation. Respondent in the present proceedings could not have been ignorant of the existence of the two Banobras litigations or of the arbitration brought by Acaverde against Acapulco; yet there is no evidence that steps were taken to introduce that written waiver into any of those proceedings.
36. Moreover, the reasoning of the majority in this Award does not take into account the issue of the date at which Claimant’s conduct must be viewed as conforming with Article 1121. Is it on the same day, or the day after? Must it be one month after the institution of proceedings? No answer is suggested, perhaps for the simple reason that it would seem absurd to suggest a cut-off—and in particular when a compliant written waiver has already been executed by Claimant and delivered to Respondent. To read Article 1121 as requiring an active discontinuance of proceedings (either simultaneously or subsequently) as well as active delivery of the waiver is, in fact, to dilute the credibility or efficacy of the written waiver and is inconsistent with requiring its delivery in the first place.

(c) Relevance of Annex 1120.1

37. The conclusions just drawn should also be tested against the relevant Mexican Annex (1120.1) to NAFTA. This provision was appended to NAFTA at the insistence of Mexico. It was intended to deal with the problem presented by Mexican constitutional law; in the Mexican system, provisions of treaty law such as NAFTA automatically become provisions of domestic Mexican law and are enforceable as such.
38. In its English version, Annex 1120.1 reads that:

“An investor of another Party may not allege that Mexico has breached an obligation under [Chapter Eleven] ... both

in arbitration under this [NAFTA] and in proceedings before a Mexican court or administrative tribunal.”³²

The meaning of this provision is quite clear. It closes the door, literally and figuratively, on the possibility of any legal action being maintained in the Mexican courts by a foreign investor while at the same time NAFTA proceedings are being conducted. It was a duplication of the same kind of protection that was contemplated by the waiver requirement of Article 1121, but, since NAFTA is automatically incorporated by Mexican constitutional law into Mexican domestic law, Annex 1120.1 to NAFTA would be even more secure than the Article 1121 waiver since it would automatically form part of Mexican law. Annex 1120.1 could then, as a matter of Mexican law, have been asserted in any Mexican court (or in an arbitral tribunal applying Mexican law) as a flat bar against the continuation of any proceeding pending in such a court or tribunal that constituted an allegation that Mexico has breached an obligation under Chapter Eleven.

39. However, the only “obligation” under Chapter Eleven that could have been blocked by Annex 1120.1 in respect of Banobras would have been not to engage in creeping expropriation or other treatment inconsistent with international law. Breaches of obligations such as these were not alleged in the Banobras lawsuits or the arbitration. The fact that Mexico never saw fit to invoke this provision (either in Mexico after July or September of 1998, or in the present proceed-

³² Annex 1120.1 in its French version reads as follows: “En ce qui concerne la soumission d’une plainte à l’arbitrage: (a) un investisseur d’une autre Partie ne pourra alléguer que le Mexique a manqué à une obligation au termes (i) de la section A ou du paragraphe 1503(2) (Entreprises d’État), ou (ii) de l’alinéa 1502(3)a) (Monopoles et entreprises d’État), lorsque le monopole a agi de façon incompatible avec les obligations de la Partie aux termes de la section A, dans le cadre d’un arbitrage aux termes de la présente section et d’une procédure soumise à un tribunal judiciaire ou administratif mexicain” There is no substantive difference in this text from the meaning to be given to the English version. In its Spanish version, Annex 1120.1 reads as follows: “Respecto al sometimiento de la reclamación al arbitraje: (a) un inversionista de otra Parte no podrá alegar que México ha violado una obligación establecida en: (i) la Sección A o en el Artículo 1503(2), “Empresas del Estado”; o (ii) el Artículo 1502(3)(a), “Monopolios y empresas del Estado”, cuando el monopolio ha actuado de manera incompatible con las obligaciones de la Parte de conformidad con la Sección A, tanto en un procedimiento arbitral conforme a esta sección, como en procedimientos ante un tribunal judicial o administrativo mexicano” There is no substantive difference in this text from the meaning to be given to the English version.

ings) further supports the conclusion that the obligations now sought to be enforced in the NAFTA claim are distinct from those in the local Mexican proceedings. The latter could not have involved a breach of obligations under NAFTA since they would then have been blocked by the Annex as a matter of Mexican law. If they were not blocked by the Annex they could not have been proceedings as to which the waiver would have applied. If they were not proceedings as to which the waiver would have applied, then Respondent's jurisdictional objection must fail.

6. What is the policy behind Article 1121?

(a) Views of other NAFTA members

40. Canada presented a written submission to the Tribunal on December 17, 1999. The United States made no statement or submission. In its submission, Canada stated that:

“The same measure ... cannot be the subject of both a Chapter 11 arbitration and domestic court proceedings. The investor has a clear choice and can choose one or the other—but not both.”³³

41. The question is however “begged,” as it is a *petitio principii* to conclude that the “measures” concerned in the Mexican litigations and the “measures” concerned in the present arbitration are necessarily the same. This must be decided on the specific facts of each case. The test to be applied is whether, for example, a non-payment under a guarantee is in fact a “measure” of expropriation or nationalization referred to in Chapter Eleven, or whether it is merely part of such a measure.
42. This analysis is however not inconsistent with Canada's submission. Canada's concern that “no domestic proceeding has been initiated or continued with respect to the measure alleged to be in breach of Chapter 11” is fully justified: a claimant should not be able to litigate expropriation or nationalization in domestic courts and in a NAFTA tribunal at the same time. A determination by one tribunal

³³ “Submission of the Government of Canada” dated December 17, 1999, para. 5.

might conflict with the determination by the other; a classic case of “forum-shopping” would have been presented. Such a risk is not raised, however, by collateral domestic proceedings that only relate to a portion of the factual background underlying or supporting the NAFTA claim.³⁴

43. It is wholly reasonable to assume that Canada, Mexico and the United States could not have desired to have parallel or overlapping litigations in their national courts asserting claims under Chapter Eleven of NAFTA: *i.e.* seeking judgment that such-and-such a State action was violative of an obligation arising under NAFTA. None of the NAFTA Parties would have wished to contemplate parallel actions in their own judicial systems that would raise NAFTA claims, or interpret the provisions of NAFTA, or seek remedies for the alleged breach of obligations imposed by NAFTA. But that is not the same at all as barring local remedies for commercial claims which—if denied—would or could form a component of a subsequent NAFTA proceeding (such as the present case).
44. Indeed, it would be an extreme price to pay in order to engage in NAFTA arbitration for a NAFTA claimant to be forced to abandon all local remedies relating to commercial law recoveries that could have some bearing on its NAFTA claim—but which nonetheless were not themselves NAFTA claims. This could not have been the reasonable intent of the NAFTA Parties.³⁵ It would have been a far more credible objective for the NAFTA Parties—consistent with the observations of Canada—to have sought to eliminate forum-shopping only as to NAFTA claims, since this is where the conflict could arise.
45. When could a NAFTA tribunal be placed in the position of “reversing” a decision of, *e.g.*, the Mexican courts? The NAFTA tribunal would of course have no jurisdiction to do so. What would have to be alleged in respect of those decisions would not be a disguised appeal of these decisions. It would have to be a NAFTA claim, such as for a substantial denial of justice in respect of those proceedings, and that—again—is a separate matter from conducting appeals under local law, but not asserting the protection of the treaty itself.

³⁴ For example, in the present situation since both Banobras litigations—as they did—went against Claimant, would they not be dispositive of the issue of liability *pro tanto* on the guarantee for payment of the unpaid invoices?

³⁵ The record before the Tribunal is unfortunately bare of useful evidence of *travaux préparatoires* of NAFTA in this regard.

46. The *Azinian* case is significant in this context.³⁶ In that award, the Tribunal stated most precisely that “A governmental authority surely cannot be faulted for acting in a manner validated by its courts *unless the courts themselves are disavowed at the international level.*”³⁷ The *Azinian* award then devoted considerable attention to the issue of examining the decision of municipal courts,³⁸ but the majority of this Tribunal did not reach that stage of the analysis.
47. A jurisdictional objection on the grounds advanced by Respondent in the present phase of this arbitration should, for the reasons given, never succeed. This does not violate the principle of effectiveness as to Article 1121, since the Article 1121 waiver could effectively and immediately block (as could also Annex 1120.1) a local Mexican litigation complaining of a nationalization, or of discriminatory conduct actionable under NAFTA. Moreover, Mexico is doubly protected. It is the anomalous nature of Mexico’s jurisdictional objection in the present case that should therefore guarantee its lack of success. It would only be where a lawsuit had been commenced in domestic courts *that essentially alleged the equivalent of a violation of Chapter Eleven* that there would be a clear preemption (either by the Article 1121 waiver or the Annex 1120.1 bar). Such a case or cases would have to allege nationalization, expropriation, taking—direct or indirect—and other action inconsistent with international obligations of the Respondent.
48. In the case of Mexico, at least, those international obligations could be actionable under domestic municipal law and so the risk of collateral and duplicative proceedings is not fanciful. There however the waiver could have immediately been used, and the provisions of Article 1121 would have had genuine meaning. In that instance, both the formal sufficiency of the waiver and its congruence with the Claimant’s conduct could have been examined merely on the face of the pleadings involved. Nor would the Tribunal have been required to trespass on the merits of the dispute.
49. The concern expressed by the Government of Canada in its submission, that “[t]he same measure ... cannot be the subject of both a

³⁶ See footnote 21 *supra*.

³⁷ *Azinian*, p. 27, para. 97 (italics in original).

³⁸ *Id.*, pp. 27-30, paras. 98-105 *et seq.*

Chapter 11 arbitration and domestic court proceedings,”³⁹ would therefore have been addressed and resolved. The Canadian concerns would never apply to partial, incomplete, and subordinate legal activity unrelated to the measure that is itself susceptible of complaint under NAFTA. The local actions and the NAFTA “measures” occupy different planes: the contractual and the tortious, the municipal and the international. However, if Claimant herein had brought a Chapter Eleven nationalization claim before the Mexican courts (a claim that would necessarily have included, but which went beyond, the component of non-payment by Banobras of its guarantees of the payment by Acapulco to Acaverde) the Canadian submission would then apply.

50. Moreover, if a NAFTA claimant does wish to take its chances with pursuing local remedies for constituent elements or component parts of a larger treaty claim, why does this necessarily create conflict between national courts and international arbitration? If, for example, Acaverde’s first claim against Banobras had been decided favorably to Acaverde by the Mexican courts, but its second claim unfavorably, what would this Tribunal have had to deal with on the merits? A nationalization claim, to be sure, would still exist, but it would be reduced *pro tanto* by the amount of the recovery by Acaverde in the successful action for a component of that nationalization claim; Mexico would have been relieved of State responsibility under the NAFTA claim to the extent of those local damages already recovered. “The investor,” wrote Canada, “has a clear choice and can choose one [proceeding] or another—but not both,”⁴⁰ and that is correct.
51. Thus, if a NAFTA claimant should choose to litigate one or more local components of a NAFTA claim in local courts, no harm is done. If it prevails, then its NAFTA claim is reduced *pro tanto* unless, of course, some additional (and new) elements such as denial of justice or proper judicial access is asserted. It is difficult to see how there could be such an additional element if the NAFTA claimant has been successful in its recourse to local remedies. On the other hand, to the extent that the local remedies were unavailing, as in the present case, the NAFTA claimant’s basis of claim against the contesting govern-

³⁹ Submission of the Government of Canada, para. 5.

⁴⁰ Canadian submission, para. 5.

ment would again be reduced by application of the *res judicata* of the unfavorable local result unless, and to the extent that, such unfavorable local result were to be considered itself as an international denial of justice.

52. For example, in *Azinian* the claimants had initiated the NAFTA proceedings two years after the termination of their local appeals in the Mexican court system. What substantive difference, however, is there between that situation and the present one, where the local appeals had been terminated after the initiation of the NAFTA proceedings, but still before the arguments on jurisdiction in January? Even if the Acapulco arbitration may be viewed as merely dormant, Claimant has definitively indicated that it was not proceeding, and would not proceed, with any further recourse to local remedies in the present case,⁴¹ and even went so far as to request guidance from the Tribunal as to what—if any—further steps it could take to eliminate any question concerning the jurisdiction of the Tribunal.
53. Thus, even if the substance of the Article 1121 waiver had been—as the majority of the Tribunal believes—eviscerated in 1998 or 1999, why was that substance not restored in later in 1999 or in January 2000? Unless the Tribunal can conclude that the Article 1121 waiver was defective upon delivery in 1998 *and could never have been restored*, the conclusion must be that the damage done by Claimant's conduct was always subject to remediation and that such conduct could have been brought into line with the waiver before the hearing in the case. But by tacking back the effects of the conduct *nunc pro tunc*, the Tribunal has conflated the ideas of a formal jurisdictional defect in the waiver in September 1998 with a subsequent disqualification of the waiver in 1998 or 1999.
54. That conflation should have only a retrospective and not a prospective effect. Yet if subsequent conduct can disqualify the waiver, the conduct must either be assessed at the moment (a *scintilla juris*) after the delivery of the waiver, or at some other time. Since it would be absurd to require all NAFTA claimants to withdraw all litigation pursuing local remedies simultaneously with the delivery of the waiver—the waiver's delivery would then not have served any

⁴¹ This was done unequivocally in its oral written submission to this Tribunal and less directly in its written pleadings; see Claimant's Memorial of September 29, 1999; pp. 36-37, paras. 4.16 and 4.17. At the hearing of January 31, 2000, Claimant was explicit in stating that it would thenceforth not pursue any local remedies in Mexico.

common-sense objective—there must be a grace period within which claimants may bring themselves into compliance. Why then can a claimant not avail itself of a similar grace period within which, after the termination of all local remedies, the waiver (on this tortuous analysis) can be seen as becoming rehabilitated or revitalized, and once more in full force and effect?

55. The correct conclusion must be that NAFTA claimants can be considered as failing to satisfy the jurisdictional waiver requirements of Article 1121 only as long as and to the extent that inconsistent recourse to local remedies is maintained in the local national courts. The *status quo ante* must be considered as susceptible of restoration once such an inconsistent recourse is terminated or abandoned, and not otherwise resumed.⁴² An elementary application of the principle of effectiveness in the interpretation of international undertakings (*ut magis res valeat quam pereat*) therefore makes it impossible to hold that a defective waiver can never be remedied.

(b) Jurisdiction and admissibility

56. The question also arises whether this case is one of jurisdiction or one of admissibility. The only way in which these proceedings can be viewed as relating to jurisdiction is to add a requirement of consonant subsequent conduct to the jurisdictional requirement of Article 1121. However this is affirmative action not mentioned in Article 1121, paragraph 3, and is actually inconsistent with its ordinary meaning and its object and purpose. By finding that Claimant's conduct subsequent to September 29, 1998⁴³ lacked the necessary "manifestación de voluntad por parte de quien ... emite [la renuncia]," the majority of the Tribunal has transformed what should, if anything, have been a question of admissibility into a question of jurisdiction. The result of this transformation is that the Award is able to dismiss Claimant's case *in limine* on jurisdictional grounds, rather than having to determine whether any portions of that case should subsequently be barred or blocked on grounds of inadmissibility.

⁴² The foregoing discussion must again be premised on the understanding that the only truly conflicting local remedies would, in fact, be local remedies sought "with respect to" the same measure complained of as the actual NAFTA breach.

⁴³ See Award, § 24, p. 16, last paragraph.

57. International decisions are replete with fine distinctions between jurisdiction and admissibility. For the purpose of the present proceedings it will suffice to observe that lack of jurisdiction refers to the jurisdiction of the Tribunal and inadmissibility refers to the admissibility of the case.⁴⁴
58. Jurisdiction is the power of the tribunal to hear the case; admissibility is whether the case itself is defective—whether it is appropriate for the tribunal to hear it. If there is no title of jurisdiction, then the tribunal cannot act.⁴⁵ Such would be the case here if the waiver under Article 1121 had never been given, or were defective. Moreover, a claim of lack of jurisdiction ought normally be decided without trenching upon the merits of the case at all; in some instances, however, this will not be possible.⁴⁶ Likewise, a tribunal may be able to determine a challenge to the admissibility of a claim without invading the merits of the case, but it is more likely that such an examination will have to be postponed and joined to the merits.⁴⁷
59. In the present case it is quite evident that the Award has dealt with a matter of admissibility of the claim rather than the jurisdiction of the Tribunal. The insufficiency of the waiver itself is the only element that could legally affect jurisdiction under Article 1121. Once

⁴⁴ The former is established (or not) at the outset of the proceedings, and the tribunal for these purposes exercises the “*compétence de la compétence*” in order to make this determination. The latter can only be determined if the tribunal has jurisdiction to determine it—not the *compétence de la compétence* relating to jurisdictional matters, but genuine jurisdiction to adjudicate the case.

⁴⁵ If the Claimant’s case is inadmissible, the Tribunal has jurisdiction to hear it, but should decline it on grounds relating to the case itself—not relating to the role or powers of the Tribunal. An example of this might be where a claimant’s nationality is questionable or double, but where the Tribunal otherwise has jurisdiction. Another example might be if the claim is time-barred or where there is a similar substantive defect on the face of the complaint which does not, however, invalidate or depreciate the Tribunal’s jurisdiction as such.

⁴⁶ Article 79 of the Rules of the International Court of Justice contemplates instances where a jurisdictional (or admissibility) objection may not “possess, in the circumstances of the case, an exclusively preliminary character,” and should therefore be considered together with the merits of the case.

⁴⁷ For this purpose, see the recent decision of the International Court of Justice in the *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment of 11 June 1998*, *I.C.J. Reports 1998*, p. 275; and also *South West Africa, Second Phase, Judgment, I.C.J. Reports 1966*, p. 6 at p. 19, para. 7.

that waiver has been delivered, jurisdiction exists and the proceedings under NAFTA could be started. If conduct inconsistent with that waiver requirement subsequently shows that the waiver is hollow or frustrates its object and purpose, this would be a matter of admissibility: it would be inappropriate for the Tribunal to adjudicate the case, insofar as the waiver originally validly submitted in connection with it had in effect been repudiated by the Claimant's subsequent conduct.

60. In the recent NAFTA case of *Ethyl v. Canada*,⁴⁸ the Tribunal considered the distinction between jurisdiction and admissibility. It said that it “has little trouble deciding that Claimant's unexpected delay in complying with Article 1121 is not of significance for jurisdiction in this case,” and added:

“While Article 1121's title characterizes its requirements as ‘Conditions Precedent,’ it does not say to what they are precedent. Canada's contention that they are a precondition to jurisdiction, as opposed to a prerequisite to admissibility, is not borne out by the text of Article 1121, which must govern.”⁴⁹

The Tribunal in *Ethyl* however awarded to Canada its own costs and the costs of the Tribunal “attributable to the proceedings insofar as

⁴⁸ *Ethyl Corporation v. The Government of Canada (Award on Jurisdiction)*, June 24, 1998; 38 I.L.M. 1999 at 708. In that case the issue presented was whether jurisdiction should fail because the written waivers by Claimants “were provided only with the Statement of Claim ... and not with the Notice of Arbitration ... which according to Article 1137(1)(c), is when the ‘claim [was] submitted to arbitration’ under Section B. The sufficiency of the consent and waivers thus provided is not otherwise questioned.” *Id.* at p. 729, para. 89. (See also case note by Alan C. Swan in 94 Am. J. Int'l L. (January 2000) 159, at p. 162.)

⁴⁹ The Tribunal continued, to say: “Article 1121(3), instead of saying ‘shall be included in the submission of a claim to arbitration’—in itself a broadly encompassing concept—, could have said ‘shall be included with the Notice of Arbitration’ *if the drastically preclusive effect for which Canada argues truly was intended*. The Tribunal therefore concludes that jurisdiction here is not absent due to Claimant's having provided the consent and waivers necessary under Article 1121 with its Statement of Claim rather than with its Notice of Arbitration.” (Italics added.)

they have related to issues under NAFTA Articles 1119, 1120 and 1121.”⁵⁰

61. The matter of admissibility is also related to the question of severability. If only one relatively minor conflicting lawsuit had been brought by Acaverde in the district court of Mexico, relating to one particular payment of, *e.g.*, one million pesos, and if such a case had been decided against Acaverde and were now being appealed, should the *entire* nationalization claim under NAFTA Articles 1110 and 1105 (for amounts more than the equivalent of three hundred million pesos) be disallowed on jurisdictional grounds merely because of the pendency of that appeal? This would be the result if the invalidity of the waiver by conduct were held to result in a lack of jurisdiction *a priori*. However, if the matter were considered to be one of admissibility rather than jurisdiction, the Tribunal’s jurisdiction would not have been ousted by the one million peso lawsuit. Only a portion of the claim before the Tribunal would have been inadmissible and thus affected. The rest of the claim, for hundreds of millions of pesos, would still have been admissible, and the Tribunal would have been able to exercise jurisdiction to adjudicate it.
62. It is this latter point that detained the arbitral tribunal in *Ethyl*.⁵¹ In *Ethyl* the Tribunal also engaged in a discussion of the

⁵⁰ See *id.* at 730, para. 92: “... the Tribunal deems it appropriate that claimant be responsible for the costs of the jurisdictional proceedings insofar as they have related to the issues arising in connection with Article 1121. No reason appears why the consent and waivers were not furnished with the Notice of Arbitration, *which would have been the better practice*. Had they been, a certain part of these proceedings would have been obviated.” (Italics added.) (See also para. 3 of the *dispositif*; para. 96.3, *ibid.*)

⁵¹ In *Ethyl* the proceedings had been instituted under the UNCITRAL Arbitration Rules, not the ICSID Additional Facility Rules. See *ibid.*, para. 59: “The sole basis of jurisdiction under NAFTA Chapter 11 in an arbitration under the UNCITRAL Arbitration Rules is the consent of the Parties. Unlike ICSID and its Additional Facility Rules, there exist under the UNCITRAL Rules no other jurisdictional criteria” The Tribunal found that it “is clear that Ethyl has consented to this arbitration by the very act of commencing it” (*ibid.*), and that “[t]he fundamental jurisdictional issue ... therefore, is whether Canada has consented to this arbitration. It has two aspects, as the jurisdictional proceedings have underscored. One is of scope: Is Ethyl’s claim within the types of claims that Canada has consent in Chapter 11 to arbitrate? The other aspect is that of conditions to consent: To what extent, if any, is Canada’s consent to arbitration in Chapter 11 conditioned absolutely on the fulfillment of specified procedural requirements at a given time?” (*Ibid.*, para. 60.) (In a footnote, the Tribunal drew attention to the discussion of ICSID’s objective criteria in *Vacuum Salt Products Limited v. The Government of the Republic of Ghana*, ICSID Case No. ARB/92/1 (Award of 16 Feb. 1994), reprinted in 9 ICSID Rev.—F.I.L.J. 72 (1994).)

“Distinction Between Jurisdictional Provisions and Procedural Rules.” It stated that:

“It is important to distinguish between jurisdictional provisions, *i.e.* the limits set to the authority of this Tribunal to act at all on the merits of the dispute, and procedural rules that must be satisfied by Claimant, but the failure to satisfy which results not in an absence of jurisdiction *ab initio*, but rather in a possible delay of proceedings, followed ultimately, should such non-compliance persist, by dismissal of the claim.”⁵²

63. The Tribunal in this case has failed to acknowledge this important distinction and has heaved the baby, enthusiastically, out with the bath-water: the entire NAFTA claim has been undone. Such a harsh consequence can hardly be presumed to have been the intention of the NAFTA Parties when they executed the Treaty.

(c) Additional considerations

64. The foregoing analysis is consistent with the policy implications of Mexican Annex 1120.1.⁵³ If the Annex were applicable to the domestic Mexican claims—which it is not—it would have avoided the absurd result just described. What was the original purpose of Annex 1120.1? Doubtless the inclusion of Annex 1120.1⁵⁴ was sought by Mexico simply because its constitutional framework could have made it possible for claimants to bring complaints under the NAFTA provisions themselves in the appropriate Mexican courts. This was a risk as to which Mexico naturally did not wish to have double exposure. In consequence, Mexico sought, and obtained, double protection.
65. However, the Annex was also self-limiting. On the example just

⁵² *Id.*, p. 724, para. 58.

⁵³ See discussion above, in paragraphs 37-39 and 47-48.

⁵⁴ See Article 31, para. 2(b) of the Vienna Convention on the Law of Treaties: “(2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, *including its preambles and annexes*: ... (b) any instrument which was made by one or more *parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.*” (Italics added.)

given in paragraph 61, the automatic bar that it would present would have extended to the “obligation” of one million pesos, but not one centavo more; it would not have applied to the entire alleged obligation of Mexico, in the amount of more than three hundred million pesos, but only to the small portion concerned in the lawsuit.

66. It is not known why Mexico did not assert the automatic bar of Annex 1120.1 in this proceeding, except for the reason that it could not have been considered to be applicable. The necessary implication must be that Mexico did not consider that the Annex applied to the contractual disputes before Mexican courts.⁵⁵ A further inference that can be drawn is that Mexico wished to preserve its right to have this arbitration thrown out on jurisdictional grounds and was therefore reluctant to test the waiver in case the waiver worked. Although the local Mexican actions would have been barred, Respondent would have then lost the opportunity of challenging the entire NAFTA arbitration proceedings on the ground that the waiver was defective or rendered defective.
67. Yet, if the waiver did *not* work, it would in all likelihood have been because the Mexican court or tribunal seeking to apply it would have perceived that the waiver applied to NAFTA breaches and not to breaches of the Civil or Commercial Codes of Mexico. In that event Respondent would again have been disappointed—albeit for a different reason—since the waiver would not have succeeded to block the local Mexican actions and, at the same time, Respondent would have lost its ability to successfully challenge the jurisdiction of this Tribunal. By using neither the waiver nor the provision of Annex 1120.1, Respondent has now successfully challenged jurisdiction.
68. It seems moreover artificial for this Tribunal to have concerned itself in painstaking detail with the interpretation and examination of a provision in an instrument that had been made available to Respondent by Claimant for more than a year and half, but which had not once been sought to be tested or applied by the Respondent in these proceedings. The only logical inference to be drawn from this course of conduct is that Respondent had reasons relating to the present arbitration for not seeking to have the waiver so applied or tested. The necessary logic of those reasons reinforces the legal analysis

⁵⁵ As discussed above, to this extent it may also be inferred that Mexico has tacitly conceded that the Article 1121 waiver would not apply to those disputes.

adopted by this dissenting opinion. It appears to support only one conclusion: that the waiver (and Annex 1120.1) did not apply to the local Mexican remedies that had been sought by Acaverde.

69. The conclusion so reached is in fact confirmed by the conclusion urged upon this Tribunal by *Mexico* when it placed Claimant “on notice” that Mexico would later rely on the defense that a local contract claim is not a NAFTA claim.⁵⁶ Mexico thereby accepted the legal distinction between national claims and international remedies; reflected a point of view exactly consistent with the analysis conducted by the NAFTA Tribunal in the *Azinian* case; and confirmed the analysis set forth above in this dissenting opinion. To that extent, therefore, Mexico itself has expressed a position that does not support, and that neatly contradicts, the opinion of the majority constituting the decision contained in the present Award.

Keith Hight

Date: May 8, 2000

⁵⁶ See the language quoted *supra* in paragraph 20.