

**INTERNATIONAL CENTRE FOR  
SETTLEMENT OF INVESTMENT DISPUTES  
ADDITIONAL FACILITY**

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**WASTE MANAGEMENT, INC.**

**Claimant**

**v.**

**THE GOVERNMENT OF THE UNITED MEXICAN STATES**

**Respondent**

**ICSID Case # ARB (AF)/00/3**

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**CLAIMANT'S RESPONSE TO THE TRIBUNAL'S REQUEST  
FOR ADDITIONAL INFORMATION**

**SUBMITTED BY**

**WASTE MANAGEMENT, INC.**

**Claimant**

## INTRODUCTION

At the conclusion of the February 2, 2002, hearing on jurisdiction, the Tribunal invited the parties to supplement their positions and submit pertinent information regarding two issues: (i) the extent to which the jurisdictional issue *sub judice* was addressed by the parties and the Tribunal in the 1998 proceedings; and (ii) the three domestic proceedings brought by Acaverde in Mexico. Claimant Waste Management, Inc. respectfully provides the supplemental information contained herein and submits the documents attached at Tabs 1 through 28.

## CLAIMANT'S RESPONSES

### **I. The 1998 Tribunal and the Respondent Were Fully Aware that Waste Management Intended to Refile Its Claim if the 1998 Tribunal Determined that It Lacked Jurisdiction to Proceed to the Merits of that Claim.**

During the 1998 arbitral proceeding, the 1998 Tribunal and the United Mexican States ("Mexico") knew that Waste Management intended to file a revised waiver and commence a new NAFTA Chapter 11 arbitral proceeding if the waiver submitted to the 1998 Tribunal were deemed jurisdictionally ineffective. In its Memorial, Waste Management explained:

Finally, were there some defect in the waiver provided, Waste Management would merely refile a revised waiver and commence these same proceedings again. . . . A decision that Claimant's written waiver is somehow defective would result only in duplication, inefficiency, and injustice by further postponement of a review by this Tribunal of the merits of Waste Management's claim.

Tab 1 at ¶ 4.18 (Excerpt from Waste Management's Memorial).

In response, Mexico argued that Waste Management would face serious hurdles under Article 1121 and NAFTA's three-year limitations period if Waste Management refiled its claim. *See* Tab 2 at ¶ 101 (Excerpt from Mexico's Counter-Memorial Regarding the Competence of the Tribunal). But, most importantly, Mexico argued that the 1998 Tribunal need not concern itself with Waste Management's ability to proceed anew. *Id.* at ¶ 102 (explaining that the 1998 Tribunal "need not determine whether Waste Management would be successful in initiating another NAFTA arbitration").

At the January 31, 2000, oral hearing on jurisdictional issues, the 1998 Tribunal expressly addressed this issue. Apparently concerned about the inefficiency and delay that would be created by a dismissal and refile, President Cremades asked Mexico whether it would cooperate in reestablishing the NAFTA proceedings if the 1998 Tribunal decided it had no jurisdiction and Waste Management refiled its claim the very next day:

If we suppose that the Tribunal manifests itself on the basis of what Mexico said here and if we decided there is no jurisdiction, what would be the point of view of the Mexican Government if the next day the Claimant

presents a new – submits anew arbitration procedures with ICSID? Is the Government of Mexico ready to cooperate for the reestablishment of the proceedings once there is a new submission by the claimant to ICSID? Or, am I going ahead of myself?<sup>1</sup>

Tab 3 at 1 (Excerpt from Informal Transcription of English Audio Recording).

In response, Mexico explained that it would have to evaluate the substantive merits of the refiled claim to ensure that it presented a Chapter 11 violation (as opposed to a mere contractual dispute), but that “[i]f the procedural previous conditions are met as happened in three other cases, then regarding the procedural matters the Government of Mexico wouldn’t have anything else to say.” *Id.* at 26-27. In other words, Mexico provided the 1998 Tribunal with an assurance that a jurisdictional dismissal would not present the type of *per se* bar that Mexico now asks this Tribunal to impose.

In light of Mexico’s two statements — (i) that the 1998 Tribunal need not address the effect of a jurisdictional dismissal on a subsequent Tribunal, and (ii) that Mexico would not “have anything else to say” about the procedural pre-conditions if Waste Management complied with the NAFTA preconditions in a re-filed claim — it is not surprising that the 1998 Tribunal recognized in its Award that, despite its dismissal, a review of the merits of Waste Management’s claim might still become necessary:

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 NAFTA invoked by the Claimant, since that task, should it become necessary, belongs to an analysis of the merits of the question.

Tab 4 at § 27(a) (Excerpt from Award).

Notably, nowhere in its Award did the 1998 Tribunal — majority or dissent — state that Waste Management was barred from refiling its claim, even though everyone knew Waste Management would refile in response to the majority’s decision. Furthermore, fully aware of the defect in Waste Management’s waiver, and fully aware that Waste Management would refile its claim, the 1998 Tribunal held that there was no evidence of “recklessness or bad faith on the Claimant’s part.” Tab 4 at §31(2) (Award) (Excerpt). Because all of Waste Management’s efforts to obtain relief have been undertaken in good faith, there has been no abuse of process.

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<sup>1</sup> The questions posed by Dr. Cremades in Spanish were: “¿Cuál sería la postura del Gobierno de México después, si al día siguiente la Demandante presentara de nuevo el procedimiento arbitral ante el CIADI . . . ?” and “¿el Gobierno de México estaría dispuesto a cooperar para que se reestableciera el procedimiento una vez presentada de nuevo por la demandante su solicitud ante el CIADI?”

## II. The Domestic Proceedings In Mexico.

Waste Management initiated three domestic proceedings relating to the treatment of its investment by the City of Acapulco and Banobras. The first two proceedings, addressing the collateral issue of Banobras's payment obligations to Acaverde under the Line of Credit Agreement ("Agreement") guaranteeing Acapulco's monthly fee payments, were both instituted in Mexico's federal courts, and were pursued to judgment on those collateral issues. The third proceeding, a domestic arbitration against Acapulco, was terminated without an award on the merits. As explained more fully below, all three proceedings were begun before September 28, 1998 — the date Waste Management requested access to ICSID's Additional Facility, and the date Waste Management's Article 1121 waiver became effective. See Tab 5 (Claimant's Notice of Institution of NAFTA Arbitration Proceedings dated September 29, 1998); Tab 4 at § 19 (Award) (Excerpt). A brief summary of the three proceedings follows.<sup>2</sup>

### A. The First Banobras Litigation

On January 27, 1997, Acaverde sued Banobras in Mexican Federal District Court for Banobras's failure to meet its obligations under the Agreement that guaranteed Acapulco's payment of the monthly concession fees for the period from May to December 1996. See Tab 6 (Acaverde's Complaint) (Spanish Document/English Certified Translation). On February 14, 1997, Banobras moved to dismiss on grounds that (i) the District Court lacked jurisdiction because the Concession Agreement required disputes to be resolved through arbitration; (ii) Acaverde was not a party to the Agreement, and, therefore, Acaverde had no right to disbursements; and (iii) Acaverde had not fulfilled its obligations under the Concession. See Tab 7 (Banobras's Answer) (Spanish Document/English Summary Translation). On April 10, 1997, the City of Acapulco and the State of Guerrero filed a third-party response, arguing that (i) the District Court lacked jurisdiction because the dispute should be resolved through domestic arbitration; (ii) Acaverde had not fulfilled its obligations under the Concession; and (iii) the suit suffered various other legal defects. See Tab 8 (Third-Parties' Response) (Spanish Handwritten Summary Document/English Certified Translation).

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<sup>2</sup> Because there is no dispute that Waste Management had concluded all three of its local claims in Mexico before refiling its NAFTA claim, Waste Management respectfully submits that those domestic proceedings are irrelevant to the issue presently before this Tribunal. Because, however, the circumstances of those proceedings were raised during the February 2, 2002, oral hearing, we are providing the Tribunal with documents (i) presenting Acaverde's claims in each proceeding, (ii) presenting the defenses asserted against Acaverde's claims, and (iii) providing the resolution of each proceeding. Waste Management has not included documents relating to the direct appeals and Amparo proceedings, but can make those documents available to the Tribunal upon request. With respect to the attached documents, Waste Management has submitted copies of the original Spanish documents, or in the case of one document, a Spanish summary of the original document. Since February 2, 2002, Waste Management has been unable to translate all of the documents. Each translation is clearly identified as (i) a certified translation, (ii) a non-certified translation, or (iii) a summary translation. Translations, including summaries, are submitted to assist the Tribunal, and are not intended to serve as substitutes to the original documents.

On January 7, 1999, the District Court dismissed Acaverde's suit. The District Court ruled that (i) Acaverde had failed to meet its burden of proving that Acapulco's failure to pay was due to its lack of liquidity, as required by the Agreement; and (ii) because the Agreement only required Banobras to pay against invoices that had been faxed to Acapulco, Acaverde's hand delivery — rather than faxing — of its invoices to Acapulco excused Banobras from its obligation under the Agreement. *See* Tab 9 (District Court Decision) (Spanish Document/English Certified Translation). Acaverde unsuccessfully challenged the District Court's decision in a direct appeal, and then through an Amparo.

#### B. The Second Banobras Litigation

On July 31, 1998, Acaverde sued Banobras in Mexican Federal District Court for its failure to meet its obligations under the Agreement during the period from January to October 1997. *See* Tab 10 (Acaverde's Complaint) (Spanish Document/English Summary Translation). On August 26, 1998, Banobras answered Acaverde's complaint, asserting defenses similar to those presented in the first Banobras litigation. *See* Tab 11 (Banobras's Answer) (Spanish Document/English Summary Translation). On October 13, 1998, Acapulco, as a third-party defendant, filed a response, arguing that (i) the District Court lacked jurisdiction; (ii) Acaverde was not a party to the Agreement, and, therefore, Acaverde had no right to disbursements; and (iii) Acapulco had not failed to pay the invoices. *See* Tab 12 (Acapulco's Third-Party Response) (Spanish Document/English Certified Translation).

On January 12, 1999, the District Court dismissed Acaverde's suit, ruling that because the Agreement was a product of the Concession, the dispute should have been submitted to domestic arbitration pursuant to the arbitration clause of the Concession Agreement. *See* Tab 13 (District Court Decision) (Spanish Document/English Certified Translation). Acaverde unsuccessfully challenged the Court's decision in a direct appeal, and then through an Amparo.

#### C. The Domestic Arbitration

On December 3, 1997 — more than ten months before September 28, 1998, the date Waste Management requested access to the ICSID Additional Facility for a NAFTA arbitration, and the date Waste Management's Article 1121 waiver became effective — Acaverde informed Acapulco of its intent to initiate commercial arbitration before the National Chamber of Commerce of Mexico City. *See* Tab 14 (Acaverde's Letter to Acapulco) (Spanish Document/English Certified Translation).<sup>3</sup> On January 9, 1998 — more than nine months before Waste Management requested access to the ICSID Additional Facility and its Article 1121 waiver became effective — Acaverde wrote to the Permanent Commission of Arbitration of the National Chamber of Commerce of Mexico City (the "Commission") and notified Acapulco of the commencement of arbitration and the designation of a board of arbitration, thereby formally initiating the domestic arbitration proceeding. *See* Tab 15 (Acaverde's Notification of

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<sup>3</sup> An attempt to hand-deliver Acaverde's December 3, 1997 letter was made by a Notary Public. Acapulco refused to accept service of the letter, and that fact was duly recorded by the Notary Public.

Arbitration to the Commission) (Spanish Document/English Certified Translation).<sup>4</sup> Cf. Tab 16 (Acaverde's Notification of Arbitration to Acapulco, stamped "received" by Acapulco).<sup>5</sup>

Not only did the domestic arbitration begin more than nine months prior to Waste Management's request to ICSID for resolution of the NAFTA claim, but Acapulco responded to Acaverde's Notification of Arbitration and moved to dismiss the domestic proceedings in July 1998, more than three months before the NAFTA claim was submitted. See Tab 18 (Acapulco's Response) (Spanish Document/English Summary Translation); Tab 19 (Acapulco's Motion to Dismiss) (Spanish Document/English Summary Translation). Acapulco's response and motion to dismiss — wholly inconsistent with the position it had taken in the earlier Banobras litigation — argued that despite the terms of the Concession Agreement, public policy prohibited the dispute from being heard in arbitration. See *id.* at 21.

When the Commission rejected Acapulco's jurisdictional defense on June 18, 1998, see Tab 20 (Commission's Order) (Spanish Document/English Certified Translation), Acapulco filed a lawsuit on September 4, 1998, seeking a declaration that the arbitration clause in the Concession Agreement was null and void *ab initio* under principles of administrative law and, therefore, the on-going arbitration before the Commission was without effect. See Tab 21 (Acapulco's Complaint) (incorporating as exhibits, documents from the on-going arbitration proceedings) (Spanish Document/English Certified Translation); see also Tab 22 (Acaverde's

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<sup>4</sup> The Arbitration and Mediation Rules of the National Chamber of Commerce for the City of Mexico establish that an arbitration is "initiated on the date on which the notification is received by 'The Commission' and by the defendant." Cámara Nacional de Comercio de la Ciudad de México, Reglamento de Mediación y Arbitraje, art. 3 (1997) (the "Arbitration Rules"). Article 3, in relevant part, provides:

Notification of Arbitration.

1. The party that initially resorts to arbitration (hereinafter "claimant"), shall notify the Permanent Commission of Arbitration of the National Chamber of Commerce of the City of Mexico (hereinafter "The Commission") and the other party or other parties (hereinafter "defendant").
2. It is considered that the arbitral proceeding is initiated on the date in which the notification of the arbitration is received by "The Commission" and by defendant.

Tab 17 (Arbitration Rules).

<sup>5</sup> In answer to a question from the Tribunal during the February 2, 2002, oral hearing, undersigned counsel incorrectly stated that the domestic arbitration against Acapulco was instituted in October 1998 — after Waste Management had initiated the first NAFTA proceeding before the 1998 Tribunal. That was wrong. We apologize for the error, but our exhaustive review of the documentary record of those proceedings and the Rules of the National Chamber of Commerce for the City of Mexico make perfectly clear that the domestic arbitration was in fact instituted in January 1998, not in October 1998.

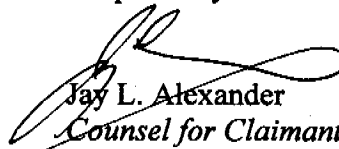
Answer) (Spanish Document/English Summary Translation). In October and November 1998, while Acapulco's suit was pending, Acaverde submitted its document of claim as required by the Arbitration Rules, and Acapulco submitted its required grounds of defense. See Tab 23 (Acaverde's Document of Claim) (Spanish Document/English Summary Translation); Tab 24 (Acapulco's Response).<sup>6</sup>

On March 30, 1999, the Guerrero Commercial Court declared that it had jurisdiction to declare the arbitration clause null and void, and to terminate the arbitration. See Tab 25 (Guerrero Commercial Court's Decision) (Spanish Document/English Summary Translation). Shortly thereafter, without the merits of Acaverde's claims ever having been adjudicated, Acaverde discontinued its arbitration claims by requesting the return of its documents. See Tab 26 (Letter from Acaverde) (Spanish Document/English Summary Translation). In September 1999, the Commission agreed to the discontinuance and returned the documents, see Tab 27 (Chamber of Commerce's Letter) (Spanish Document/English Summary Translation).<sup>7</sup> Acaverde then sent a letter re-confirming that the arbitration proceedings were over, see Tab 28 (Acaverde's Letter) (Spanish Document/English Summary Translation).

### CONCLUSION

Waste Management respectfully submits that the refile of its claim before this Tribunal is fully consistent with the 1998 Tribunal's award. As described in the materials at Tabs 1 through 4, the 1998 Tribunal was fully aware that Waste Management would refile its claim if that Tribunal granted Mexico's jurisdictional challenge, and recognized in § 27 of its Award that its ruling did not foreclose Waste Management from obtaining a decision on the merits of its claim. Waste Management further submits that its earlier efforts to obtain relief in Mexico, as described in the materials at Tabs 5 through 28, pose no bar to this Tribunal's jurisdiction. In fact, as the 1998 Tribunal expressly ruled, Waste Management's domestic efforts evidenced neither recklessness nor bad faith. Accordingly, Mexico can offer no colorable argument that Waste Management has committed any abuse of process. To the contrary, a rejection of Waste Management's pending NAFTA claim on the basis of Waste Management's earlier—and now forever waived— attempts to obtain some domestic relief would constitute a complete, final, and wholly unfair denial of justice.

Respectfully submitted,



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<sup>6</sup> Acaverde's document of claim was submitted to the 1998 Tribunal as Exhibit 7 to Mexico's Counter Memorial Regarding the Competence of the Tribunal, and apparently formed the basis for that Tribunal's statement that the domestic arbitration proceedings had been initiated after the NAFTA claim was instituted. See text at 4-5 & n.4, *supra*.

<sup>7</sup> Mexican Arbitration Rules do not permit a claimant to unilaterally terminate an arbitration. See Tab 17 at art. 34(1) and (2) (Mexican Arbitration Rules).