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

WASTE MANAGEMENT, INC.,
CLAIMANT

VS.

THE UNITED MEXICAN STATES,
RESPONDENT

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

REJOINDER REGARDING THE COMPETENCE OF THE TRIBUNAL

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1. Following are brief responses to each of the principle arguments presented in the Claimant's Reply dated November 9, 1999.

I. THE RESPONDENT PRESENTED THE FULL CONTEXT OF THE CLAIMANT'S COMMUNICATIONS WITH THE ICSID

2. The Respondent denies the allegation that it misrepresented the "context" of the November 13, 1998 letter from Baker & Botts to the ICSID. The Counter-Memorial reproduced the paragraph containing the statement by the Claimant that "there are no pending legal proceedings related to that dispute in which the Government of Mexico is a named party" in its entirety. The Respondent also filed full copies of the Claimant's Notice of Institution, the November 3, 1998 letter from the ICSID to the Claimant, and the Claimant's November 13, 1998 response to the ICSID. Thus, all of the relevant information was submitted and the Tribunal can draw its own conclusions.

3. The question put to Mr. Berry by the ICSID was very simple. Were there pending legal proceedings relating to the dispute? The evidence now shows that in addition to the arbitration under the Concession Agreement there were two actions in the Mexican courts against Banobras (an agency of the federal government, and pleaded as such in the Memorial). The Claimant is seeking to impute liability to the Mexican State for the acts of the municipality, the state and the federal development bank[1].

4. It is irrelevant whether the two proceedings against Banobras "presented issues far more limited than those addressed in the efforts to reach a settlement" with Mexico. The NAFTA does not permit a claimant (or a tribunal) to subdivide legal claims and allocate them to different *fora*, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages Article 1121 states plainly that a would-be claimant cannot otherwise initiate or continue claims in domestic *fora* (including under an arbitration, which is an "other dispute settlement" procedure according to Article 1121) and under the NAFTA.

5. In an effort to avoid the consequences of its actions, the Claimant in its Reply now asserts that "Banobras is a legal entity distinct from the State of Mexico", and that "it was unclear whether the United Mexican States would even assume responsibility for the actions of Banobras"[2]. But it included alleged acts of Banobras in its claim against the Mexican

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1. The Claimant also did not disclose the existence of the arbitration proceeding initiated by Acaverde against Acapulco. The Respondent first brought that matter to the attention of the ICSID in a letter dated August 4, 1998 [Counter-Memorial Exhibit 12].

2. Reply at pp. 1 and 2.

government in this proceeding[3]. Its Notice of the Institution of Arbitration Proceedings dated September 29, 1998 stated:

> ...the Respondent is accountable for any acts in violation of the protections of NAFTA taken by Banobras, Guerrero and Acapulco.

In a footnote to this clause, the Claimant added:

> Banobras is a bank, created by the federal law of Mexico, that finances public water, wastewater treatment, and solid waste management projects. Banobras is also the cashier bank for the Secretaria de Hacienda y Credito Publico, a federal agency that serves as the Mexican treasury and the distributor of Mexican federal tax revenues.

The Claimant included similar information about Banobras in its Memorial[4].

6. In support of its assertion that Banobras is "distinct from the State of Mexico", the Claimant argues that "[t]his distinction is highlighted by Respondent's repeated assertions that its legal counsel was not even aware of the lawsuits filed against Banobras"[5]. The Respondent's counsel's initial unawareness of those lawsuits is not evidence that Banobras is not part of the Mexican government. It is evidence that counsel did not know of the extent of the domestic proceedings.

7. On the other hand, Mr. Berry must be taken to have known what his client was doing at the time that he responded to Mr. Parra. The Tribunal can reasonably assume that he took steps to inform himself before responding to the ICSID.

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3. The Respondent has never disputed that Banobras is a federal government entity. The law is clear on this point. Development banks (or national credit institutions) are regulated by the *Ley Orgánica de la Administración Pública Federal*, the *Ley Federal de la Entidades Paraestatales*, the *Ley de Instituciones de Crédito*, and Banobras is further regulated by its own Organic Act, the *Ley Orgánica del Banco Nacional de Obras y Servicios Públicos* (cited by the Claimant in its pleadings). Specifically, Article 1 of the *Ley Orgánica de la Administración Pública Federal*, Article 1 of the *Ley Federal de las Entidades Paraestatales* and Article 30 of the *Ley de Instituciones de Crédito* provide that development banks are part of the Federal Public Administration. Article 46 of the *Ley Orgánica de la Administración Pública Federal* and Article 2 of the *Ley Federal de las Entidades Paraestatales* defines them as State enterprises. Article 32 of the *Ley de Instituciones de Crédito* provides that, at least 66% of the capital stock of development banks be owned by the Federal Government. According to Article 17 of the *Ley Orgánica del Banco Nacional de Obras y Servicios Públicos*, the Board of Directors is chaired by the Secretary of Finance, and five of its eight other members are officials of the Central Administration (the Secretary of Social Development, the Secretary of Tourism, the Secretary of Communications and Transportation, the Chairman of the Bank of Mexico —i.e. the Central Bank— and another official of the Secretariat of Finance). In addition, the CEO is appointed by the President of Mexico through the Secretary of Finance. The relevant legal provisions are included in Annex 1.

4. In the Memorial, the Claimant stated: "Mexico's breaches of NAFTA resulted from actions of three state organs of Mexico: Banco Nacional de Obras y Servicios Publicos, S.N.C. ("Banobras"), a Mexican national development bank owned and supervised by the Mexican Secretaria de Hacienda y Credito Publico . . . ." Memorial at 5. In a footnote to this clause (footnote 5 on page 5), the Claimant cited the Ley Organica del Banco Nacional de Obras y Servicios Publicos, S.N.C., Articles 6, 12 and 17, which it included as Exhibit D-1 to its Memorial.

5. Reply at 2.

8. There is no question that, at the time of the November 13, 1998 letter, counsel for the Claimant was well aware that Banobras was a federal government entity. It cited that fact in its Notice of Institution of Arbitration submitted on September 29, in which it stated that its claim was based in part on the actions of Banobras.

9. Counsel had an obligation to disclose fully the lawsuits against Banobras, especially in light of Mr. Parra's question, since the information would be critical to the Secretary-General's decision as to whether to register the Claim and formally constitute the Tribunal.

10. It is evident that the Secretary-General of ICSID proceeded on an incorrect appreciation of the facts in believing that Acaverde had no pending lawsuits against a Mexican federal government agency.

II. THE RESPONDENT DID NOT ARGUE THAT THE DOMESTIC LEGAL PROCEEDINGS INVOLVED "NAFTA CLAIMS"; RATHER, IT SHOWED THAT THOSE PROCEEDINGS WERE BASED ON THE SAME ALLEGED MEASURES THAT ARE THE SUBJECT OF THIS ARBITRATION

11. The Claimant's letter inaccurately stated the Respondent's arguments, and then responded to its own inaccurate restatement. Under the heading "Respondent Misrepresents Previous Lawsuits As Encompassing NAFTA Claim", the Claimant asserts that "[t]he central premise of the Counter-Memorial is an assumption that two lawsuits brought in Mexico against Banobras duplicate the issues presented in Claimant's NAFTA claim". That "premise" is neither contained in nor implied by the Counter-Memorial.

12. To the contrary, the Counter-memorial stated at paragraph 14 that "a measure may, at the same time, give rise to a claim under municipal law" and that Article 1121 "does not focus on the source of the legal obligation but rather on the measure giving rise to the claim because a measure can give rise to different types of claims in different *fora*". The NAFTA provides that the waiver must encompass proceedings involving the measures that are the subject of the NAFTA claim, not just proceedings in which the same legal issues are being raised.

13. To determine whether the domestic proceedings involve the same measures as in this proceeding requires only a simple comparison of the Memorial and Acaverde's submissions in the domestic proceedings.

14. The alleged measures on which the Claimant has based its NAFTA claim are set out in paragraph 5.8 of the Memorial:

> Mexico's conduct here constitutes "expropriation" under NAFTA. Acapulco's refusal to pay on approved invoices, and Banobras' flagrant failure to honor its public guarantee of those payments after confirming in writing its obligation to do so, were confiscatory. Acapulco further undermined the Concession by ignoring and violating its duty to enforce the exclusivity provisions, by failing to enforce the July 1995 Ordinances, and by abusing its sovereign authority to prevent Acaverde from building and operating the

landfill. Acapulco's abrogation of the notice and cure provisions included in the Concession left Acaverde with neither the payments owed to it nor a mechanism for earning them. As a result of these actions and the obstructive approach adopted by Acapulco, Guerrero, and Banobras in response to Acaverde's attempts to resolve this dispute, Acaverde's rights under the Concession were rendered valueless.[6]

15. In the arbitration proceeding it initiated against Acapulco, Acaverde expressly complained of, *inter alia*,

- With respect to nonpayment:

"The Municipality has taken a series of actions...such as [t]he repeated failure to pay Acaverde, the fees conceived for the services rendered, from August 15 to November 30, 1995 and, from the month of May of 1996 to the month of October 1997, as it should have instructed, with neither basis nor any legal foundation...."[7]

"It is imperative to point out that the guarantees the Authority granted so that the concessioned public service could be provided, and in this case support the investment realized by the private entity, can neither be revoked nor modified unilaterally by the Authority, as is the case now before us, now that this has yielded a lack of legal security, leaving Acaverde defenseless, causing the cessation of the rendering of the service."[8]

- With respect to exclusivity:

"[T]he Municipality, upon awarding Acaverde the Concession in question, granted it the character of Exclusive ..., but it never respected the stated exclusivity, in that it always tolerated the presence of third parties that offered waste collection service in the concessioned area, notwithstanding the innumerable communications sent from Acaverde to the Municipality detailing the said violations...."[9]

- With respect to the landfill:

"The Municipality also obligated itself to provide to Acaverde in gratuitous bailment and for the term of the Concession, two parcels of property of the Municipality or with sufficient title for the same end, one to construct the landfill foreseen in the Title of Concession...and, once the site for the landfill was accepted by Acaverde, it and the Municipality would sign a contract in gratuitous bailment for a term equal to the period of the Concession...in which would be established the authority of Acaverde to develop, use, control, administer and operate the location for the end purposes of a landfill, an obligation which in the form reiterated was not completed by the Municipality, it not having granted the corresponding contract, notwithstanding the requests of our representative to enter into it...."[10]

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6. Memorial at 41.
7. Memorial of Acaverde at 3 [Counter-Memorial Exhibit 7].
8. Id. at 4.
9. Id. at 4.
10. Id.

- With respect to the "service facility site" (not expressly mentioned in Memorial paragraph 5.8, but discussed in Section 3.E.4. of the Memorial):

> "The other property which is made reference to...would be designated by Acaverde for, among others, the operation, maintenance, and storage of the equipment and materials necessary to fulfill the Concession, ... an obligation the Municipality also did not fulfill, because of which Acaverde had to rent, at its own cost, real estate for such purpose...."[11]

16. The lawsuits against Banobras were grounded on the alleged nonpayment of the same invoices that were the subject of the arbitration against Acapulco.

17. It is therefore beyond dispute that, after filing the "waiver", Acaverde pursued damages in domestic legal proceedings based on the same measures that are the subject of this NAFTA arbitration.

18. Apparently as an alternative argument, the Claimant seems to suggest that the Tribunal should base its decision on the relative size of the damages awards requested in the NAFTA arbitration and the domestic legal proceedings. Just as Article 1121 does not permit a claimant to subdivide legal claims for damages and allocate them to different *fora*, it does not permit a claimant to distinguish between damages claims according to their magnitude and pursue some domestically and others internationally[12].

III. THE NAFTA REQUIRES A WAIVER, NOTHING LESS

19. In the Reply, the Claimant repeats its view that, provided that a claimant submits a written waiver of some kind, it does not matter whether it meets the requirements of Article 1121 or whether the claimant complies with it.

20. Evidently realizing the weakness of that argument, the Claimant then states that "[t]he Mexico arbitration has been halted", without addressing the evidence adduced in the Counter-Memorial that Acaverde continued to pursue the arbitration after submitting its purported waiver. Similarly, the Reply states that "Claimant has refrained from taking further action to prosecute the claims against Banobras"; but if the word "Claimant" is to be taken to include Acaverde, this is statement is incorrect[13]. Acaverde's lawsuits against Banobras ended only with the *amparo* decisions on May 20 and October 6, 1999, respectively, and the litigation ended by reason of a court judgment, not by Acaverde's refraining from further pursuit of litigation.

21. The Claimant does not address in any way the final official communication on the waiver– the February 10, 1999 letter from Mr. Berry to Mr. Perezcano, in which Mr. Berry stated

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11. Id. at 5.

12. Nonetheless, the Respondent also notes that, in the domestic arbitration proceeding, Acaverde demanded a total of 246,538,998 pesos in damages, while the Claimant, in its Memorial, alleged that its damages were 253,645,955 pesos (before adjustment to an alleged "present value" of 286,670,658 pesos).

13. See the list of actions taken by Acaverde after the waiver was filed set out on pages 18-19 of the Counter-Memorial.

on behalf of the Claimant that "we do not believe that our client is required to suspend any proceeding in Mexico that it is otherwise entitled to institute". Thus, whatever the meaning of the earlier waiver, the Claimant repudiated that waiver in its February 10 letter.

IV. THE PRECISE STATUS OF ACAVERDE'S DOMESTIC ARBITRATION AGAINST ACAPULCO, ALTHOUGH STILL IN DOUBT, IS NOT A KEY ISSUE

22. Regarding the September 30, 1999 letter from the Permanent Arbitration Commission of the Chamber of Commerce of the City of Mexico ("Commission"), the Respondent had pointed out that, notwithstanding the recent requests by the litigants for the return of their papers, the Commission as a formal matter considered that the arbitration was not terminated and that the arbitral panel still had the authority to issue a ruling. The Respondent brought this matter to the Tribunal's attention to demonstrate that Acaverde's efforts to withdraw from the arbitration are very recent, and that the arbitration remained pending for over one year after the original waiver was submitted.

23. The Claimant, in its Reply, did not respond directly to the legal position of the Commission set out in its September 14 and September 30 letters regarding the authority of the domestic arbitral panel[14]. It did not cite the pertinent domestic law or rules of arbitration[15].

24. Nonetheless, whether the domestic arbitration proceeding, as a technical matter, is still pending today is not a key issue for the Tribunal's decision. The relevant points are (i) that Acaverde continued to pursue the arbitration long after the submission of the purported "waiver", and (ii) as its Mexican counsel has stated, Acaverde may attempt to take further legal action based on the same measures that are the subject of this NAFTA arbitration.

V. PARAGRAPH 133 OF THE COUNTER-MEMORIAL STATES AN IMPORTANT PROPOSITION

25. The Claimant complained about paragraph 113 of the Counter-Memorial and asked the Tribunal to disregard it in its entirety. The pertinent paragraphs are 113 and 114, which state:

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14. The Claimant complains that the September 30 letter was created after it filed its Memorial. Respondent notes that the September 30 letter refers back to and relies upon a September 14 letter sent by the Commission to the parties. That letter indicated that the Commission was returning Acaverde's documents to it, and then stated: "The above does not prejudge any decision that the acting Arbitration Tribunal may decide to issue at its opportunity". Presumably this September 14 letter was in the Claimant's possession before it filed its Memorial on September 29, as Mr. Herrera's letter's letter dated September 14th, submitted as Exhibit D-58 to the Memorial, appears to be responding to the request in the Commission's September 14 letter for confirmation of receipt of the documents. A copy of the Commission's September 14 letter is attached as Annex 2.

15. It seems doubtful that the arbitrating authority would consider the October 29, 1999 request by Acapulco's counsel for execution of a bond, submitted by the Claimant with its Reply, to be dispositive of this issue.

> 113. The Respondent wishes the Claimant to be on notice that, if the Claimant persists in seeking compensation under Chapter Eleven, the Respondent will rely in part on the defense that a claim for breach of contract is not actionable under the NAFTA – especially when the Claimant has had access to judicial process under the domestic legal system, and there is no indication that the domestic judicial proceedings were themselves inconsistent with international law. In particular, the Respondent will rely on the reasons given in the recent award of the Arbitral Tribunal in Azinian and others v. The United Mexican States, wherein a claim for breach of contract in connection with a municipal waste collection concession was dismissed on those very grounds.
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> 114. NAFTA arbitration tribunals are limited to determining whether there has been a violation of the Section A of Chapter Eleven of the NAFTA. To the extent that the question of whether the claim herein falls within Chapter Eleven is a question of jurisdiction of the Tribunal, the Respondent agrees that this question and all related issues should be joined to the merits.[16]

26. The Respondent included these paragraphs because of the Tribunal's direction that the Counter-Memorial address all issues relating to jurisdiction. The Respondent wished to inform both the Tribunal and the Claimant that, should this case proceed, the Respondent will rely in part on the defense that the claim presented is one for breach of contract, and that a claim of contract breach is not actionable under the NAFTA. In the event that the Tribunal were to decide that this was an issue of jurisdiction, the Respondent wanted to avoid being precluded from making the argument on the ground that it had not mentioned that issue in its Counter-Memorial on the competence of the Tribunal. The Respondent expressly stated that this issue should be joined to the merits if the arbitration goes forward. It did not request an immediate ruling from the Tribunal on this question.

27. The decision in the case Azinian and others v. The United Mexican States was issued only a few days before the Counter-Memorial was filed. The Respondent has made the award public and received notice yesterday that the ICSID will proceed to publish the award. The Respondent will ensure that the *Azinian* award is made available to the Claimant and the Tribunal at the earliest appropriate opportunity.

16. Counter-Memorial at 25.

CONCLUSION

28. The Respondent reaffirms its request that the Tribunal dismiss the Claim because of the failure of the Claimant and Acaverde to comply with the requirements of NAFTA Article 1121.

All of Which is Respectfully Submitted:

Hugo Perezcano Díaz
Agent and Counsel for the Respondent,
the United Mexican States

16 November 1999