Waste Management, Inc.

v.

United Mexican States (ICSID Case No. ARB(AF)/00/3)

Mexico's Preliminary Objection concerning the Previous Proceedings

Decision of the Tribunal

Introduction

1. On 27 September 2000, the Secretary-General of ICSID registered a notice for the initiation of arbitration proceedings, lodged by Waste Management Inc. ("Claimant") under the ICSID Additional Facility Rules, in relation to a claim against the United Mexican States ("Respondent"). The claim arose out of a dispute concerning the provision of waste management services under a concession granted by the Municipality of Acapulco de Juárez ("Acapulco") in the Mexican State of Guerrero ("Guerrero"). The Claimant alleged that certain conduct of Mexican organs or entities, including Acapulco and Guerrero, was a violation of NAFTA Articles 1105 and 1110. The Tribunal was constituted on 30 April 2001: its members were Mr. Benjamin R. Civiletti (United States of America) appointed by the Claimant, Mr. Guillermo Aguilar Alvarez (United Mexican States) appointed by the Respondent, and as President, Professor James R. Crawford (Australia) appointed by the Secretary-General of ICSID pursuant to Article 1124 (2) of NAFTA.

2. This was the second occasion on which the Claimant had brought proceedings in respect of its claim. On the first occasion a Tribunal (consisting of Mr. Bernardo Cremades, President; Messrs. Keith Highet and Eduardo Siqueiros T.) held by majority that it lacked jurisdiction.[1] The reason was a breach by the Claimant of one of the requirements laid down by NAFTA Article 1121 (2) (b) and deemed essential in order to proceed with submission of a claim to arbitration; viz., the waiver of the right to initiate or

continue before any tribunal or court, dispute settlement proceedings with respect to the measures taken by the Respondent that are allegedly in breach of the NAFTA, which waiver has to be included in the submission of the claim to arbitration. The Tribunal held that the waiver deposited with the first request did not satisfy Article 1121 and that this defect could not be made good by subsequent action on the part of the Claimant.[2]

3. In these second proceedings (as we will call them), the Claimant's submission was accompanied by an unequivocal waiver in terms of Article 1121. The Respondent now argues, however, that the effect of the first unsuccessful proceedings is to debar the Claimant from bringing any further claim with respect to the measure that is alleged to be a breach of NAFTA. At the initial procedural hearing, held at the seat of the World Bank in Washington, D.C. on 8 June 2001, the parties acknowledged that this Tribunal had been duly constituted pursuant to Article 1120 of NAFTA and in accordance with the ICSID Additional Facility Rules. An exchange of views took place on the venue of the arbitration and on the procedure for dealing with the Respondent's objections to jurisdiction based on the previous proceedings, and in particular on the decision of the previous Tribunal. In its Procedural Order No. 1, the Tribunal laid down timetables for written observations on the question of venue and on the preliminary objection. Subsequently, by Order dated 26 September 2001, the Tribunal decided that the venue of the present proceedings would be the same as those of the first proceedings, viz., Washington, D.C.

4. Following a communication from the Respondent dated 16 November 2001 which did not, however, amount to a challenge, one of the Arbitrators, Mr. Guillermo Aguilar Alvarez, tendered his resignation from the Tribunal. Pursuant to Article 15 (3) of the Additional Facility Rules, the Tribunal accepted his resignation. Pursuant to Article 18 (1) of the Rules, Mexico thereupon nominated Mr. Eduardo Magallón Gómez to fill the vacancy so created. The Tribunal was reconstituted on December 14, 2001, following Mr. Magallón Gómez' acceptance of his appointment.

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[1] *Waste Management, Inc. v. United Mexican States*, Arbitral Award of 2 June 2000, 40 ILM 56 (2001); also in 15 *ICSID Review-Foreign Investment Law Journal* 211 (2000).

[2] Award, §31, 40 ILM 56 (2001), at pp. 69-70.

5. Pursuant to the Procedural Order No. 1 of 8 June 2001, Respondent lodged a Memorial on Jurisdiction of 8 August 2001. Claimant lodged a Counter-Memorial on jurisdiction on 9 October 2001. The hearing initially scheduled for 3 December 2001 having been postponed in order to allow the vacancy on the Tribunal to be filled, the Tribunal convened at the premises of the World Bank, Washington D.C. on 2 February 2002 to hear the parties' oral arguments on the questions dealt with in those pleadings. The parties were represented as follows:

Attending on behalf of the Claimant:

Mr. J. Patrick Berry, Baker Botts LLP
Mr. Richard King, Baker Botts LLP
Ms. Lorena Perez, Baker Botts LLP
Mr. Jay L. Alexander, Baker Botts LLP
Mr. Bob Craig, Assistant General Counsel, Waste Management, Inc.

Attending on behalf of the Respondent:

Mr. Hugo Perezcano Díaz, Lead Counsel, Ministry of Economy, Government of Mexico
Mr. Salvador Behar La Valle, Ministry of Economy, Government of Mexico
Ms. Adriana González Arce Brilanti, Ministry of Economy, Government of Mexico
Mr. Cameron Mowatt, Thomas & Partners
Mr. Carlos García, Thomas & Partners
Mr. Robert Deane, Thomas & Partners
Mr. Stephan E. Becker, Shaw Pittman
Mr. Sanjay Mullick, Shaw Pittman
Ms. Brooke Bentley, Shaw Pittman

The Tribunal heard, on behalf of the Respondent, Mr. Hugo Perezcano Díaz, and on behalf of the Claimant, Mr. Jay Alexander.

6. In response to certain questions from the Tribunal concerning both the case as argued before the previous Tribunal and the proceedings brought by the Claimant in Mexico, the parties provided certain additional information and argument by letters both dated 19 February 2002.

7. Representatives of the other two NAFTA parties attended the hearing on 2 February 2002:

Attending on behalf of the United States of America:

> Mr. Barton Legum, Office of Legal Adviser, Office of International Claims, Department of State
> Mr. David A. Pawlak, Office of International Claims, Department of State

Attending on behalf of the Government of Canada:

> Mr. Douglas Heath, Embassy of Canada in Washington, D.C.

The Decision of the First Tribunal

8. Article 1121 of NAFTA is headed "Conditions Precedent to Submission of a Claim to Arbitration". Paragraph 1 provides in relevant part that:

> "A disputing investor may submit a claim under Article 1116 to arbitration only if:
> …
> b) the investor and, where the claim is for loss or damage to an interest in an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, the enterprise, waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party."

9. The first Tribunal noted that the Claimant's waiver was qualified in the following terms:

> "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."[3]

[3] Award, §5, 27, 40 ILM 56 (2001), at pp. 59, 67.

In a subsequent letter responding to an inquiry from the ICSID Secretariat, the Claimant "confirm[ed] that the waiver contained in the Notice of Institution applies to dispute settlement proceedings in Mexico involving allegations of breaches of any obligations, imposed by other sources of law, that are not different in substance from the obligations of a NAFTA State Party under Chapter Eleven of the NAFTA…"[4]

10. The first Tribunal stressed that the lodging of a waiver in conformity with Article 1121 is a condition precedent to the submission of a claim to arbitration under Chapter 11.[5] As an aspect of its power to determine its jurisdiction, the first Tribunal had to determine both that the waiver conformed to NAFTA requirements and that it was a genuine waiver, expressing the true intent of the Claimant at the time it was lodged.[6] This did not mean that the Tribunal was entitled or required to ensure actual compliance with the waiver. That would be a matter for the Respondent to plead in any Mexican court before which proceedings were brought contrary to the terms of the waiver.[7] But it was for the Tribunal to determine that the waiver was valid as such; if it was not, then the Respondent had not consented to arbitration and the Tribunal lacked jurisdiction.[8]

11. The first Tribunal began by saying that a waiver had to be "clear, explicit and categorical",[9] and that it had to be effective as a waiver at the time it was lodged.[10] The Claimant's waiver was valid in point of form,[11] but that left open the question whether it was valid *ratione materiae*.

12. In the first Tribunal's view, an Article 1121 waiver could not be limited to claims specifically made under NAFTA itself. Rather it must cover any claim concerning a "measure" of a NAFTA Party which was in dispute,[12] even if the basis of claim, i.e. the specific cause of action pleaded, was a purely domestic one. The test was whether the

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4 Award, §5, 40 ILM 56 (2001), at p. 60.
5 Award, §13, 40 ILM 56 (2001), at p. 62.
6 Award, §14, 40 ILM 56 (2001), at p. 63.
7 Award, §15, 40 ILM 56 (2001), at p. 63.
8 Award, §16, 40 ILM 56 (2001), at p. 63.
9 Award, §18, 40 ILM 56 (2001), at p. 64.
10 Award, §19, 40 ILM 56 (2001), at p. 64.
11 Award, §23, 40 ILM 56 (2001), at p. 65.
12 Award, §27, 40 ILM 56 (2001), at pp. 67-68.

measures complained of in the national proceedings were "measures that are also invoked in the present arbitral proceedings as breaches of NAFTA provisions".[13] In the present case, the Mexican proceedings did concern claims (non-compliance with guarantees, non-payment of invoices) which were part of the Claimant's NAFTA claim, i.e., which were part of the disputed "measures" of Mexico which had been submitted to arbitration.[14] Moreover the Claimant's continued pursuit of the Mexican proceedings at the time of and subsequent to the commencement of the first arbitration demonstrated that it did not have the required intent to waive those claims.[15] Its subsequent action in seeking to "explain" the waiver amounted to "an *a posteriori* interpretation of its waiver" made in light of the vicissitudes of the Mexican actions and Mexico's insistence before the Tribunal on a waiver complying with Article 1121.[16] As the waiver had to conform with Article 1121 at the time it was lodged, the Claimant's "explanation" came too late to remedy the deficiency.

13. The first Tribunal thus concluded that the Claimant's waiver was not valid for the purposes of Article 1121, and that it lacked jurisdiction to consider the merits of the claim:

> "…this Tribunal cannot deem as valid the waiver tendered by the Claimant in its submission of the claim to arbitration, in view of its having been drawn up with additional interpretations, which have failed to translate as the effective abdication of rights mandated by the waiver. In the light of the foregoing, the claims of the Respondent must necessarily be allowed…"[17]

It ordered that the Claimant pay the Tribunal's expenses but not the Respondent's costs, "there being no evidence of recklessness or bad faith on the Claimant's part".[18]

14. Mr. Highet dissented. In his view NAFTA Article 1121 is not specific as to the form or precise terms of a waiver. Given that the Claimant had eventually expressed its qualification in terms of an "understanding" which was given "*[w]ithout derogating from*

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13 Award, §27, 40 ILM 56 (2001), at p. 68.
14 Award, §27, 40 ILM 56 (2001), at pp. 67-68.
15 Ibid.
16 Award, §28, 40 ILM 56 (2001), at p. 68.
17 Award, §31, 40 ILM 56 (2001), at p. 70.
18 Ibid.

the waiver required",[19] it was open to the Tribunal to interpret the waiver as being effective and sufficient for the purpose. In any event, in his view, the Claimant's underlying interpretation of Article 1121 was correct, since "claims relating to Mexican remedies for Mexican wrongs are not the same as claims for NAFTA remedies for NAFTA wrongs".[20] Moreover the measures specifically complained of in the Mexican proceedings were not as such actionable under NAFTA, and were "therefore not the kind of 'measure' contemplated by Article 1121".[21] It was true that Article 1121 does not contemplate concurrent proceedings before national courts and a NAFTA Tribunal concerning the very same issue, but "[s]uch a risk is not raised… by collateral domestic proceedings that only relate to a portion of the factual background underlying or supporting the NAFTA claim".[22]

15. Mr. Highet thus disagreed with the majority both as to the scope of Article 1121 and as to the interpretation of the waiver. He also disagreed with the Tribunal's treatment of the waiver in this case as going to its jurisdiction rather than to the admissibility of the claim.[23] By doing so, in his view, the Tribunal's decision had a "drastically preclusive effect"[24] with the result that "the entire NAFTA claim has been undone".[25]

The positions of the Parties

16. Both Article 1136 of NAFTA and Article 53 (4) of the ICSID (Additional Facility) Rules clearly provide that an award is final and binding on the parties, unless action is duly taken to set aside or annul the award (which has not happened here). The parties in the present case agreed that the first Tribunal's decision was *res judicata* and had to be given effect as such. They also agreed that the first Tribunal did not proceed to consider the merits of the dispute but dismissed the claim for want of jurisdiction. In our view, this is clearly correct. The first Tribunal expressly disclaimed any intention to embark on "an

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[19] Dissent, para. 6, 40 ILM 56 (2001), at p. 71 (emphasis in original).
[20] Dissent, para. 7, 40 ILM 56 (2001), at p. 72.
[21] Dissent, para. 13, 40 ILM 56 (2001), at p. 73.
[22] Dissent, para. 42, 40 ILM 56 (2001), at p. 78; cf. para. 47, 40 ILM 56 (2001), at p. 78.
[23] Dissent, paras. 56-59, 40 ILM 56 (2001), at p. 80.
[24] Dissent, para. 9, 40 ILM 56 (2001), at p. 72, citing *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, Decision on Jurisdiction of 14 April 1988, 3 ICSID Reports 131 at p. 144, para. 63.

analysis of the merits of the question",[26] nor did it do so in fact. In his dissenting opinion, Mr. Highet criticized the Tribunal for treating the issue as one of jurisdiction. But he had no doubt that this was what it had done.

17. The disagreement between the parties concerned not so much the characterization of the first Tribunal's decision as its legal consequences under NAFTA Chapter 11. According to the Respondent, it is implicit in Chapter 11, and especially Article 1121, that an election under that provision is irrevocable and allows a Claimant a single opportunity to vindicate its NAFTA claim before a Chapter 11 tribunal. Whatever the grounds on which it failed, its failure put an end to NAFTA procedures in respect of the claim. In any event, the Respondent argued, the Tribunal did in law decide the claim against the Claimant, whether or not it considered the merits of that claim, and its decision should be considered as *res judicata*. Finally the Respondent argued, in deliberately choosing to maintain a variety of claims at domestic and international level, including two separate Chapter 11 arbitrations, the Claimant had engaged in an abuse of process. Its current claim should be disallowed in consequence.

18. The Claimant argued that the only issues the first Tribunal actually decided, and thus the only issues which were *res judicata*, were that the first waiver was invalid and that accordingly the Tribunal lacked jurisdiction. In such a case, the commencement of new arbitral proceedings under NAFTA accompanied by a valid waiver was not expressly prohibited by Chapter 11, nor was it contrary to its object and purpose. In the present case, none of the tribunals to which the Claimant had resorted had considered the substantial merits of its claim; yet NAFTA Chapter 11 clearly contemplated that such a forum would exist. In the circumstances the Claimant's conduct did not involve any abuse of process or want of good faith.

The present Tribunal's conclusions

19. During argument and in subsequent written responses, the parties placed considerable emphasis on what the first Tribunal perceived it was doing in dismissing the

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[25] Dissent, para. 63, 40 ILM 56 (2001), at p. 81.

proceedings. On the face of the award (as analyzed above), all the first Tribunal did was to hold the initial waiver invalid and thus ineffective to amount to the condition precedent expressly required by Article 1121 for the invocation of arbitral jurisdiction. The first Tribunal did not say in so many words whether a new claim accompanied by a valid waiver was or was not open. The Respondent however stressed Mr. Highet's statement that "the entire NAFTA claim has been undone".[27] In its view, this indicated much more than a procedural error immediately curable by new proceedings.

20. On a careful reading of the first Tribunal's reasons and decision, we cannot find any expression of opinion on the point which now has to be decided. The first Tribunal did not need to decide what effect its decision had for the future, and there is no indication in the Award that it did so.

21. It is true that the question whether the Claimant might validly resubmit its claim was discussed in argument before the first Tribunal. In its Memorial, the Claimant indicated its intention to resubmit the claim, if it lost on the point concerning the effect of its waiver.[28] The Respondent noted that any new claim would have to take into account what had happened in the domestic proceedings: "The Claimant would have to present a new claim taking into consideration what happened since [the first claim]."[29] It said further that "if this [sc. the first] Tribunal decides, as we believe it should, that in the particular circumstances of this case it lacks competence and the Claimant decides to present again a claim, we would have to evaluate it on its own merits".[30] In fact it appears that the Claimant has resubmitted the very same claim to arbitration, since it does not rely on the later domestic proceedings in any way in terms of its current claim. On the other hand, those proceedings are facts which either party may bring to the Tribunal's attention, to the extent they may be relevant.

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[26] Award, §27 a), 40 ILM 56 (2001), at p. 67.

[27] Dissent, para. 63, 40 ILM 56 (2001), at p. 81.

[28] Claimant's Memorial in the first proceedings, para. 4.18, as cited in Claimant's Response of 19 February 2002, p. 1.

[29] As noted in Respondent's Additional Submission of 19 February 2002.

[30] Ibid.

22. The Tribunal does not suggest that in the passage set out above, or otherwise, the Respondent agreed that a later arbitration complying with NAFTA's procedural requirements would be permissible. Indeed, it expressly reserved its position. But the fact that the issue was discussed before the first Tribunal, which failed to express a view on the point, is relevant. It supports the conclusion that the issue was not decided by the first Tribunal.

23. In the present Tribunal's view, the dissenting arbitrator's characterization of the effect of the decision cannot be decisive, even if that characterization was clear and unambiguous (which it is not). Only a majority of the Tribunal could determine the effect of its decision, and as noted there is no indication on the face of the award that the majority expressed any view on the matter.

24. In these circumstances it is unnecessary for us to decide whether the first Tribunal *could* have precluded a later action, or whether such a decision would by definition have been outside the scope of its inquiry.

25. On this basis we turn to the three main legal grounds on which Respondent grounded its objection.

Does Article 1121 allow only a single claim for arbitration?

26. The Respondent's principal argument was based on the language and intention of Article 1121, which in its view implies that a disputing investor may have one but only one attempt at an international arbitration under Chapter 11. To put it in colloquial terms, a Claimant may have only one bite of the apple.

27. It should be noted that Chapter 11 of NAFTA does not say this in so many words. Moreover neither Party referred to any material in the *travaux préparatoires* of NAFTA that suggested this was the common intention of the parties, or indeed shed any light on the question at all. No doubt the concern of the NAFTA parties in inserting Article 1121 was to achieve finality of decision and to avoid multiplicity of proceedings. But where the

first proceeding produces no decision on the merits because of a jurisdictional barrier, there is nothing in Chapter 11 which expressly or impliedly prohibits a second proceeding brought after the jurisdictional barrier has been removed.

28. Neither of the other NAFTA parties wished to make submissions on this issue, as they were entitled to do under Article 1128. In the *Methanex* case, however, the United States, faced with what it considered a non-complying waiver, recognized…

> "that if this Tribunal were to dismiss Methanex's claim on jurisdictional grounds solely for failure to submit waivers in accordance with Article 1121, Methanex would be free to refile its claim upon the submission of complying waivers. If that were to occur, these proceedings would take longer to conclude… Recognizing this, in the interests of efficiency, if Methanex finally supplies the United States with waivers that fully comply with the requirements of Article 1121, the United States consents in advance to the reconstitution of this Tribunal to be composed of its current members — on the condition that this Tribunal issue an order deeming the arbitration to be duly commenced only as of the date that Methanex submits the effective waivers."[31]

Evidently the United States there relied on the decision of the first Tribunal in *Waste Management*,[32] but took the view that this did not prevent a claimant resubmitting the case to arbitration with a valid waiver. On the other hand, such a view of one NAFTA Party is not opposable to another.

29. Chapter 11 of NAFTA does not contain any express provision requiring a claimant to elect between a domestic claim and a NAFTA claim in respect of the same dispute. Such "fork in the road" provisions are not unusual in bilateral investment treaties, although their language varies. For example Article 8 (2) of the French-Argentine Agreement on the reciprocal promotion and protection of investments of 3 July 1991[33] provides that:

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[31] *Methanex Corporation v. United States of America*, Memorial on Jurisdiction and Admissibility of Respondent United States of America, 13 November 2000, p. 77.

[32] Before the first Tribunal, Canada likewise argued that a conditional waiver such as that lodged by Waste Management did not meet the requirements of Article 1121: letter of 17 December 1999, referred to in Award, §3, 40 ILM 56 (2001), at p. 58.

[33] *United Nations Treaty Series*, vol. 1728, p. 298 (English translation).

> "Once an investor has submitted the dispute to the courts of the Contracting Party concerned or to international arbitration, the choice of one or the other of these procedures is final."

By contrast, Article 11 (3) of the Australia-Czech Agreement of 30 September 1993 provides for reference of disputes to international arbitration "irrespective of whether any local remedies available pursuant to action under paragraph (2) of this Article have already been pursued or exhausted",[34] apparently implying that, at least so far as jurisdiction is concerned, the proceedings may be continued in parallel.

30. Chapter 11 of NAFTA adopts a middle course. A disputing investor is evidently entitled to initiate or continue proceedings with respect to the measure in question before any administrative tribunal or court of the respondent State in accordance with its law, without prejudice to eventual recourse to international arbitration. It is only when submitting a claim under Article 1120 that the requirement of waiver arises. Even then there is a potentially important exception for proceedings for injunctive, declaratory or other extraordinary relief. In common with almost all investment treaties, there is no requirement of exhaustion of local remedies. These remain open and available up to the time of submission of the dispute to international arbitration under Chapter 11 of NAFTA.

31. A further point to note is that – as the parties agreed in response to a question from the Tribunal – it seems that the waiver contemplated by Article 1121 (1) (b) is definitive in its effect, whatever the outcome of the arbitration. The waiver concerns the right "to initiate or continue" domestic proceedings for damages or similar relief. A dismissal of the NAFTA claim would, it seems, be final not only with respect to NAFTA itself but also any domestic proceedings with respect to the measure of the disputing Party that was alleged to be a breach of NAFTA. Such proceedings may not be initiated or continued (except as permitted by Article 1121) at any time after the claim has been submitted to arbitration.

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[34] *United Nations Treaty Series*, vol. 1819, p. 456. Article 11 (2) provides for recourse to the competent judicial or administrative bodies of the Contracting Party concerned.

32. The question, then, is what amounts to a submission of a claim within the meaning of Article 1121? Is it sufficient that a claimant, having given due notice of intent under Article 1119, has purported to commence the arbitration? Or must its notice be effective to attract the jurisdiction of the Tribunal under Chapter 11, at least in the sense that the conditions precedent for submission under Article 1121 are satisfied? There are three reasons for preferring the latter view.

33. The first reason is to be found in the language of Article 1121 itself. The normal meaning of "condition precedent" is that of a condition *sine qua non*, a requirement without which any subsequent action is invalid or ineffective in law. The language of Article 1121 is to the same effect as its title: "A disputing investor may submit a claim under Article 1116 to arbitration "*only if*"[35] two conditions are satisfied. In other words, if those conditions are not satisfied the dispute may not be submitted to arbitration under Chapter 11 of NAFTA. It was on this basis that the first Tribunal held that Claimant's failure to lodge a valid waiver meant that it had no jurisdiction. The same would be true, evidently, of a failure by a claimant to comply with Article 1121 (a), that is, to consent to arbitration in accordance with the procedures set out. By contrast, merely procedural requirements which had to be satisfied in lodging an application would not necessarily go to jurisdiction but could be capable of subsequent correction by the Claimant.

34. Thus, even if it were the case that a Claimant could only submit a claim under Article 1120 on one occasion, this would not necessarily apply to a submission which was defective by reason of a failure to comply with a condition precedent under Article 1121, such that the Tribunal lacked jurisdiction. What Article 1120 contemplates is a submission of a claim for adjudication on the merits.

35. The second reason concerns the underlying purpose of the arbitration provisions in Chapter 11, which was to "create effective procedures… for the resolution of disputes".[36] An investor in the position of the Claimant, who had eventually waived any possibility of a local remedy in respect of the measure in question but found that there was no

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35 NAFTA Article 1121 (1) (emphasis added).

36 NAFTA Article 102 (1) (e); cf. Article 1115, referring to "due process before an impartial tribunal".

jurisdiction to consider its claim at the international level either, might be forgiven for doubting the effectiveness of the international procedures. The Claimant has not had its NAFTA claim heard on the merits before any tribunal, national or international; and if the Respondent is right, that situation is now irrevocable. Such a situation should be avoided if possible.

36. The third reason is that there is no equivalent rule under general international law. In international litigation the withdrawal of a claim does not, unless otherwise agreed, amount to a waiver of any underlying rights of the withdrawing party. Neither does a claim which fails for want of jurisdiction prejudice underlying rights: if the jurisdictional flaw can be corrected, there is in principle no objection to the claimant State re-commencing its action. This applies equally to claims which fail on (remediable) grounds of inadmissibility, such as failure to exhaust local remedies. As the International Court said in the *Barcelona Traction* case:

> "It has been argued that the first set of proceedings 'exhausted' the Treaty processes in regard to the particular matters of complaint, the subject of those proceedings, and that the jurisdiction of the Court having once been invoked, and the Court having been duly seised in respect of them, the Treaty cannot be invoked a second time in order to seise the Court of the same complaints. As against this, it can be said that the Treaty processes are not in the final sense exhausted in respect of any one complaint until the case has been either prosecuted to judgment, or discontinued in circumstances involving its final renunciation – neither of which constitutes the position here."[37]

37. Under Article 1131 (1), Chapter 11 tribunals are to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law". In the Tribunal's view, neither the express terms of NAFTA nor the applicable rules of international law preclude a claimant who has failed to comply with the prerequisites for submission to arbitration under Article 1121 (1) from commencing arbitration a second time in compliance with those prerequisites. That is what the Claimant has done here.

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[37] *Case concerning the Barcelona Traction, Light and Power Company, Ltd. (New Application: 1962), Belgium v. Spain, Preliminary Objections*, ICJ Reports 1964, p. 6, at p. 26. See also *Amoco International Finance Corporation v. Government of the Islamic Republic of Iran*, (1987) 15 Iran-US CTR 189 at p. 196 (paras. 16-18); *Islamic Republic of Iran v. United States of America, Cases Nos. A15 (IV) and A24*, award of 28 December 1998, para. 75: "Settlement of a claim, by definition, requires its resolution on the merits".

The principle of res judicata

38. Alternatively, the Respondent argued that, even if the first Tribunal had not actually considered the merits of the claim, it had nonetheless effectively dealt with the merits in dismissing the claim for want of jurisdiction. This decision was *res judicata* and bound the Claimant in the present proceedings. The Claimant on the other hand argued that the principle of *res judicata* only applies to those questions which the first Tribunal actually decided, and that its decision was limited to the interpretation of Article 1121 and the effect of an invalid waiver.

39. There is no doubt that *res judicata* is a principle of international law, and even a general principle of law within the meaning of Article 38 (1) (c) of the Statute of the International Court of Justice.[38] Indeed both parties accepted this.[39] However, a judicial decision is only *res judicata* if it is between the same parties and concerns the same question as that previously decided.

40. This was stated, for example, by the Franco-Venzuelan Mixed Claims Commission in the case of the *Compagnie Générale de l'Orénoque*:

> "The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed…"[40]
>
> "It is only the particular matter in controversy which is decided."[41]

41. The American-British Claims Tribunal in a decision of 1921 likewise held that:

> "It is a well established rule of law that the doctrine of *res judicata* applies only where there is identity of the parties and of the question at issue… [I]t is impossible to say that the question of the liability of the United States is

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[38] See e.g. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (London, Sweet & Maxwell, 1953; repr. Grotius, Cambridge, 1987) pp. 336-372 and authorities there cited.

[39] See Transcript in English of the hearing on jurisdiction of February 2, 2002, p. 33ff and p. 77ff.

[40] (1905) Ralston's Report, p. 244 at p. 355, quoting *Southern Pacific Railroad Co. v. United States*, 168 Sup. Ct. Rep. 355 (1897), at p. 377.

[41] (1905) Ralston's Report, p. 244 at p. 357.

> concluded by the decision of His Britannic Majesty's Court, when that Court, on the contrary, held that it had no jurisdiction to deal with that question."[42]

42. Similarly in its advisory opinion concerning the *Polish Postal Service in Danzig*, the Permanent Court of International Justice said:

> "Once a decision has been duly given, it is only its contents that are authoritative, whatever may have been the views of its author… [I]t is certain that the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the Parties concerned."[43]

The same rule should be applied in the context of Chapter 11 arbitration.

43. Thus there is no doubt that, in general, the dismissal of a claim by an international tribunal on grounds of lack of jurisdiction does not constitute a decision on the merits and does not preclude a later claim before a tribunal which has jurisdiction.[44] The same is true of decisions concerning inadmissibility. As Amerasinghe notes:

> "the success of an objection based on the [exhaustion of local remedies] rule has never been regarded as rendering the case *res judicata*, as might otherwise be logically required if the rule is considered truly one of substance pertaining to the merits of the case. The success of such an objection has always had the effect of delaying the justiciability of a claim on the basis that it is inadmissible because of a defect in the procedure of litigation…"[45]

It is not necessary for present purposes to explore the distinction between "substance" and "procedure", which is not necessarily the same as the distinction between jurisdiction or admissibility on the one hand and the merits of a claim on the other. The point is simply that a decision which does not deal with the merits of the claim, even if it deals with issues of substance, does not constitute *res judicata* as to those merits.

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42 *In the Matter of the S.S. Newchang, Claim No. 21*, reprinted in (1922) 16 *AJIL* 323 at p. 324.

43 PCIJ, Ser. B, No. 11 (1925) at pp. 28-30.

44 In the *Trail Smelter* arbitration, the proposition "that a decision merely denying jurisdiction can never constitute *res judicata* as regards the merits of the case at issue" was described as undoubtedly correct: see 35 *AJIL* 684 at p. 702 (1941).

45 C.F. Amerasinghe, *Local Remedies in International Law* (Cambridge, Grotius, 1990), p. 354.

44. It should be noted that exactly the same rule is applied by the courts of the NAFTA parties. For example, the Mexican Supreme Court in a decision in 2001 observed that:

> "…[P]ara considerar desestimada una demanda (…) la sentencia que lo concluye forzosamente debe ser aquella que decida el negocio en lo principal, ocupándose para ello de la litis planteada mediante la acciones deducidas y las excepciones opuestas, y respecto de la cual la ley común no conceda ningún recurso ordinario por virtud del cual pueda ser modificada o revocada, ya condenando o absolviendo, según proceda, en forma tal que la litis quede definitivamente juzgada…
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> … [C]uando en la resolución que ponga fin al proceso se declare procedente alguna excepción dilatoria o procesal que no hubiere sido resuelta … se abstendrá el Juez o tribunal de fallar la cuestión principal y hará reserva de los derechos de las partes. Es decir, que la falta de integración de la relación jurídica procesal sólo tiene por efecto el de absolver de la instancia, o sea, dejar a salvo los derechos de los contendientes, dado que esa excepción no destruye la acción, por ser su efecto dilatorio únicamente; de ahí que en ese supuesto, no pueda jurídicamente tenerse por desestimada la acción ejercitada…"[46]

45. The Respondent argued that, in deciding whether or not it had jurisdiction, an international tribunal might be required to decide some issue which also went to the merits. It cited in that regard *The Sennar*,[47] a decision of the English House of Lords. In that case, an issue decided by a Dutch court in declining jurisdiction was held to be *res judicata* in proceedings on the merits in an English court. Lord Brandon said:

> "The argument… was that the judgment of the Dutch Court of Appeal was procedural in nature, in that it consisted only of a decision that a Dutch court had no jurisdiction to entertain and adjudicate on the appellants' claim, and did not pronounce in any way on the question whether the claim itself, or any

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[46] "In order to consider a claim dismissed… the judgment that concludes it [the proceeding] must be one that decides on the merits, dealing with the *litis* set out in the complaint, through the causes of action relied on and the defenses made to them, and in respect of which the law will not grant any ordinary recourse by virtue of which it can be modified or reversed, either imposing liability or dismissing the claims on the merits, as the case may be in such a way that the *litis* is definitively decided…
…[W]hen a judgment that puts an end to the proceedings dismisses the claims by reference to a preliminary or procedural defense… the judge or tribunal shall refrain from ruling on the merits, and should reserve the rights of the parties. Furthermore, the lack of integration of the procedural legal relation has only the effect of terminating the proceedings, that is, it leaves untouched the rights of the parties, because these defenses do not destroy the action, and have only a dilatory effect…": Suprema Corte de Justicia de la Nación (México), IUS 2001, Registro 189,629. Novena Epoca, Instancia: Tribunales Colegiados de Circuito, Fuente: Semanario Judicial de la Federación y su Gaceta; Tomo XIII, mayo de 2001; Tésis VII.1º. C.72 C, pág. 1200.

[47] *DSV Silo- und Verwaltungsgesellschaft mbH v. Owners of the Sennar and thirteen other ships (The Sennar)* [1985] 2 All ER 104.

> substantive issue in it… would succeed or fall. In my opinion, this argument is based on a misconception with regard to the meaning of the expression 'on the merits' as used in the context of the doctrine of issue estoppel… Looking at the matter negatively a decision on procedure alone is not a decision on the merits. Looking at the matter positively a decision on the merits is a decision which establishes certain facts proved or not in dispute, states what are the relevant principles of law applicable to such facts and expresses a conclusion with regard to the effect of applying those principles to the factual situation concerned. If the expression 'on the merits' is interpreted in this way… there can be no doubt whatever that the decision of the Dutch Court of Appeal in the present case was a decision on the merits for the purposes of the application of the doctrine of issue estoppel."[48]

The Tribunal agrees with this statement in so far as it concerns the principle of *res judicata* in international law. In cases where the same issue arises at the level of jurisdiction and of merits, it may be appropriate to join the jurisdictional issue to the merits.[49] But at whatever stage of the case it is decided, a decision on a particular point constitutes a *res judicata* as between the parties to that decision if it is a necessary part of the eventual determination and is dealt with as such by the tribunal.[50]

46. The difficulty for the Respondent in the present case, however, is that there is no indication in the Award of the first Tribunal that it considered any issue pertaining to the merits, let alone that it decided any such issue. It is true that the first Tribunal considered aspects of the proceedings brought by the Claimant in Mexico. But it did so only with a view to determining the relation between those proceedings and the NAFTA claim, and only for the purpose of deciding on the validity of the waiver. In the circumstances, therefore, there was no decision by the first Tribunal between the parties which would constitute a *res judicata* as to the merits of the claim now before us.

47. In reaching this conclusion, the present Tribunal in no way denies the value of the principle of *res judicata*, nor its potential application in the present proceedings to the extent that any issue already decided between the parties may prove to be relevant at a

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[48] Ibid., at pp. 110-111.

[49] See e.g. *Tradex Hellas SA v. Republic of Albania*, decision on jurisdiction of 24 December 1996, 14 *ICSID Review – Foreign Investment Law Journal* 161 (1999).

later stage. In this respect it draws attention to what was said in *Azinian v. United Mexican States*: a NAFTA tribunal does not have "plenary appellate jurisdiction" in respect of decisions of national courts, and whatever may have been decided by those courts as to national law will stand unless shown to be contrary to NAFTA itself.[51]

Abuse of process on the part of the Claimant

48. Finally, the Respondent argued that the Claimant had committed an abuse of process in commencing serial proceedings both under Chapter 11 and before domestic courts and tribunals in respect of the same claim, and that the Tribunal should exercise its inherent power to prevent such an abuse of process. For its part, the Claimant accepted that such an inherent power might exist in extreme cases, but denied that it was applicable here. In particular it stressed the finding of the first Tribunal that in qualifying the waiver as it did, the Claimant was not acting recklessly or in bad faith.[52]

49. It is not necessary to decide whether NAFTA Chapter 11 tribunals possess any inherent power to dismiss a claim on grounds of abuse of process, or what circumstances might justify the exercise of any such power.[53] No specific provision of Chapter 11, or of the ICSID Convention or Rules, confers such a power – by contrast, for example, with Article 294 (1) of the United Nations Convention on the Law of the Sea of 1982. It may be inferred that if such a power exists, it would only be for the purpose of protecting the integrity of the Tribunal's processes or dealing with genuinely vexatious claims. In the *Phosphate Lands* case, the International Court dealt with an objection related to abuse of process rather summarily, although without denying that there might be some inherent power in the matter. It noted:

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[50] But see the *Second South West Africa* cases, where the International Court went so far as to say that "a decision on a preliminary objection can *never* be preclusive of a matter appertaining to the merits": ICJ Reports 1966, p. 6 at p. 37 (para. 59) (emphasis added).

[51] *Azinian v. United Mexican States*, decision of 1 November 1999, 39 ILM 537 at p. 552 (para. 99).

[52] Award, §31, 40 ILM 56 (2001), at p. 70.

[53] In its helpful submission of 19 February 2002, the Respondent agreed "that the doctrine of abuse of process could be applicable in appropriate circumstances, perhaps not as a general legal principle, but as an inherent authority of the tribunal to safeguard the process". It noted also the prohibition in Mexican law against multiple claims in *amparo*: Law on *Amparo*, Article 73, sections III and IV.

> "…that the Application by Nauru has been properly submitted in the framework of the remedies open to it. At the present stage, the Court is not called upon to weigh the possible consequences of the conduct of Nauru with respect to the merits of the case. It need merely note that such conduct does not amount to an abuse of process."[54]

The Respondent's objection at the present stage is of an entirely different character from that in the *Phosphate Lands* case. Nonetheless the Tribunal believes it appropriate to apply the same basic approach. Without prejudice to the possibility that the outcome of the subsequent proceedings in Mexico might be relevant in some way to the merits, the Tribunal concludes that the Claimant's application has been on this occasion properly submitted within the framework of the remedies open to it.

50. In particular, the Tribunal does not consider that, on the evidence available to it, there is any basis for saying that the present claim was brought in bad faith or that it is not a *bona fide* claim. Procedurally the Claimant no doubt erred in the manner in which it commenced the first proceedings, but it was open in its approach and the first Tribunal expressly found that it was not acting in bad faith. That episode does not provide any legal ground for disqualifying the present proceedings, nor is there any basis for putting an end to these proceedings as an abuse of process.

Conclusion

51. For these reasons, the Tribunal rejects the Respondent's submission that the Claimant is precluded from bringing the present proceedings on any of the three grounds alleged.

52. The first Tribunal dealt with the issue of costs, requiring the Claimant to pay the Tribunal's costs but not those of the Respondent. In the present case, the basis of the Respondent's objection was the failure of the Claimant to produce a valid waiver in the first proceedings. The Respondent was fully entitled to take that objection, which raised novel questions about the relation between NAFTA and local remedies. In the

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[54] *Certain Phosphate Lands in Nauru, Nauru v. Australia, Preliminary Objections*, ICJ Reports 1992, p. 240, at p. 255 (para. 38).

circumstances, the Tribunal makes no order for the expenses of the Tribunal or the costs of the parties in dealing with the objection. This is without prejudice to any eventual order for costs that may be equitable, having regard to the outcome of the proceedings as a whole.

Decision

53. For the foregoing reasons, the Tribunal unanimously:

(a) decides that the Claimant is not prevented from bringing the present proceedings for the reasons presented by the Respondent;

(b) reserves to a later stage questions relating to the costs and expenses of the present phase of the proceedings.

Done at Washington, D.C. in the English and Spanish languages, both languages being authoritative.

PROFESSOR JAMES CRAWFORD, SC, FBA
President of the Tribunal
Date:

BENJAMIN R. CIVILETTI
Member
Date:

EDUARDO MAGALLÓN GÓMEZ
Member
Date: