

**INTERNATIONAL CENTRE FOR THE  
SETTLEMENT OF INVESTMENT DISPUTES**

**ADDITIONAL FACILITY**

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**WASTE MANAGEMENT, INC. (formerly known as USA WASTE SERVICES, INC.)**

**Claimant**

**v.**

**THE GOVERNMENT OF THE UNITED MEXICAN STATES,**

**Respondent**

**ICSID Case # ARB(AF)98-2**

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**MEMORIAL**

**SUBMITTED BY**

**WASTE MANAGEMENT, INC.**

**Claimant**

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**Exhibits**

Explanatory Note: This Memorial includes six separate volumes of Exhibits. The volumes of exhibits include Exhibit Volume A - Witness Statements, Exhibit Volume B - Concession Documents and Regulations, Exhibit Volume C - Expert Reports and Affidavits, Exhibit Volume D - Factual Support Documents, Exhibit Volume E - Corporate Documents, and Exhibit Volume F - Videos.

Translations have been provided for the text of this Memorial and for all or the relevant portion of each document in the Exhibits. To the extent that only a portion of a document in an Exhibit has been translated, the translated portion of the original language document has been marked in yellow. The events portrayed in the video are self-explanatory and, as such, do not require translations. In the event of a conflict or ambiguity between the two language versions of the Memorial, the English language version governs. For the Exhibits, the relevant document's original language governs.

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## CHAPTER ONE

### INTRODUCTION

1.1 Mexican officials representing the City of Acapulco, the State of Guerrero, and Banobras, a Mexican national development bank, actively encouraged the Claimant, Waste Management, to make a long-term investment in a Mexican enterprise to provide waste management services to the City of Acapulco. Pursuant to a legislative decree, Waste Management's Mexican subsidiary was granted a fifteen-year exclusive Concession Title to provide street sweeping and trash collection services and to build and operate a permanent landfill in Acapulco (the "Concession"). These improvements would correct serious environmental problems that threatened to mar Acapulco's reputation as an attractive tourist destination. Banobras and the State of Guerrero each agreed to guarantee Acapulco's payment obligations under the Concession.

1.2 In performing the Concession, Waste Management invested more than twelve million dollars in equipment, construction and other start-up costs, retained and paid more than one hundred employees, and for two years consistently provided the services required of it. In contrast, the Mexican government completely ignored its obligations under the Concession. The City paid virtually nothing for the services it received, despite its obligation to pay substantial monthly fees. The City also failed to perform other key responsibilities under the Concession, such as providing land and permits for the landfill site. Further, the City not only ignored but thwarted the exclusivity provision of the Concession by allowing and even encouraging other waste collection providers to operate in the Concession Area. Ultimately, Waste Management learned that the City and State had arranged for a Mexican waste collection company to begin servicing Acaverde's exclusive territory.



1.3 In short, despite Waste Management's substantial up-front investment in what was to be a long-term development project, the City effectively revoked the Concession unilaterally and without cause. These actions violate the North American Free Trade Agreement ("NAFTA").

1.4 Under NAFTA, an "investor of a Party" who has suffered "loss or damage" may bring a claim on its own behalf or on behalf of an entity it owns or controls, for breach of an obligation under NAFTA Chapter Eleven, entitled "Investment". The facts presented here represent at least two violations of NAFTA Chapter Eleven, Section A. First, Mexico's conduct breached Article 1110, which provides that "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." By revoking Waste Management's Concession without compensation, Mexico effectively expropriated the fair market value of Waste Management's investment.

1.5 Second, Mexico's conduct breached Article 1105, which provides that "[e]ach 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." 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.

1.6 The very purpose of NAFTA Chapter Eleven is to protect foreign investment. According to NAFTA's terms, this Tribunal must interpret and apply NAFTA to further its stated goals of substantially increasing foreign investment and facilitating the cross-border movement of goods and services.<sup>1</sup> NAFTA does so by providing a remedy for the deprivation of rights suffered

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<sup>1</sup> NAFTA Chapter 1, Article 102.

by Waste Management at the hands of the Mexican government. In this case, the remedy is an award to Waste Management of the fair market value of its investment. Without the protection provided by NAFTA, Mexican governmental bodies will feel free to mistreat other investors without fear of legal responsibility, and potential investors will be wary of investing in Mexico because of the high degree of risk of similar arbitrary State action.

1.7 Claimant requests that this Tribunal award it the damages provided for in NAFTA Article 1110(2) and costs allowed under Article 1135. The Concession provides a formula for calculating the economic damage from actions such as those taken here by Mexico. Under that formula, calculated in accordance with Article 1110(2), Waste Management is entitled to an award in excess of thirty-six million dollars. NAFTA Article 1135 allows for the recovery of the costs of this proceeding, including attorneys' and experts' fees and expenses, those costs continue to accrue. Finally, Claimant is entitled to its demobilization costs resulting from the revocation of the Concession itself, which costs exceed \$630,000. Claimant requests an award from Respondent in the total amount of these foregoing damages and costs.

## **CHAPTER TWO**

### **THE PARTIES AND RELATED ENTITIES**

2.1 The Claimant, **Waste Management, Inc.**, ("**Waste Management**" or "**Claimant**") is a publicly traded company incorporated under the laws of the State of Delaware of the United States of America. The United States of America is a "Party" as defined by NAFTA.

2.2 Waste Management is an "investor of a Party" entitled to bring a claim under NAFTA Chapter Eleven, Articles 1116 and 1117, on its own behalf and on behalf of Acaverde, S.A. de C.V. ("**Acaverde**"), the Mexican subsidiary it owns and controls through the following chain of

ownership.<sup>2</sup> Waste Management owns 100% of the outstanding shares of common stock of Waste Management Holdings, Inc.; Waste Management Holdings, Inc. owns 100% of the outstanding shares of common stock of Waste Management of North America, Inc.; Waste Management of North America, Inc. owns 100% of the shares of common stock of Sanifill de Mexico (US), Inc.; Sanifill de Mexico (US), Inc. owns 99% of the outstanding shares of common stock of Sanifill de Mexico S.A. de C.V.; and Sanifill de Mexico S.A. de C.V. owns 99% of Acaverde.<sup>3</sup> Acaverde is a sociedad anónima de capital variable that was incorporated in Mexico on October 3, 1994, and is thus an "enterprise of a Party" as defined in NAFTA Chapter Eleven, Article 1139.<sup>4</sup> Acaverde was the Concessionaire under the Concession at issue in this proceeding.

2.3 The Respondent is the **Government of the United Mexican States ("Mexico")**, also a Party to NAFTA. Mexico's breaches of NAFTA resulted from actions of three state organs of Mexico: **Banco Nacional de Obras y Servicios Públicos, S.N.C. ("Banobras")**, a Mexican national development bank owned and supervised by the Mexican

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<sup>2</sup> NAFTA Chapter 11, Article 1139 defines "investor of a party" to include an enterprise of a Party that "seeks to make, is making or has made an investment." An "enterprise of a party" is an enterprise organized under the law of a Party. Further, an "investment of an investor of a Party" means "an investment owned or controlled directly or indirectly by an investor." "Investment" includes "an enterprise," an "equity security of an enterprise," "an interest in an enterprise that entitles the owner to share in income or profits," "real estate or other property . . . used for . . . business purposes," and "interests arising from the commitment of capital or other resources in the territory of a party to economic activity in such territory, such as under . . . concessions."

<sup>3</sup> Attached as Exhibit E-1 are true and complete copies of corporate documents evidencing the relationship between Acaverde and Waste Management, Inc. As a matter of convenience throughout this Memorial, Waste Management will be used to refer to Waste Management and all of its subsidiaries other than Acaverde.

<sup>4</sup> See Statement of Jaime Herrera ("Herrera Statement") ¶ 2, attached as Exhibit A-1.

Secretaría de Hacienda y Crédito Público;<sup>5</sup> the Mexican State of Guerrero ("Guerrero"), and the Municipality of Acapulco de Juarez, Guerrero ("Acapulco" or "the City").

2.4 In NAFTA Article 105, Mexico agreed to ensure that:

all necessary measures are taken in order to give effect to the provisions of [NAFTA], including their observance, except as otherwise provided in [NAFTA], by state and provincial governments.

Pursuant to Article 105, Respondent is responsible for the actions of Guerrero and Acapulco.

2.5 Guerrero, a state in Mexico, clearly is encompassed by the provisions of Article 105. Acapulco also falls within Article 105 because, under the Mexican Federal Constitution (the "Constitution"), it is an integrated political subdivision of Mexico and Guerrero. Pursuant to Article 115 of the Constitution, a municipality is a territorial division of a state created for administrative purposes, and is responsible for certain local public services such as sanitation and the administration of parks, streets and gardens. Article 93 of the Guerrero State Constitution grants the municipalities within its territory the authority to carry out the public services for which they are responsible pursuant to the federal Constitution. Thus, based on the federal and state constitutional structures, in granting and administering the Concession, Acapulco was acting as a State organ of Mexico.

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<sup>5</sup> See Ley Orgánica del Banco Nacional de Obras y Servicios Públicos, S.N.C., Articles 6, 12 and 17, January 20, 1986, attached as Exhibit D-1. See also Letter dated July 12, 1999, from Mr. Perezcano Díaz, representing Respondent, to this Tribunal (Exhibit D-2) at ¶ 9 ("Banobras . . . is a part of the Government of the United Mexican States.").

## CHAPTER THREE

### FACTUAL OVERVIEW

#### **A. The Origin Of The Concession And Banobras' Guarantee.**

3.1 Acapulco, a city of more than one million people on the Pacific coast in the State of Guerrero, is the primary revenue source for Guerrero. Because the vast bulk of Acapulco's revenue comes from tourism, the City's appearance and cleanliness are vital. By mid-1994, Acapulco had developed serious environmental contamination problems due primarily to its inefficient handling of waste collection and lack of technologically advanced, environmentally sound landfills. Acapulco dumped solid waste in two open-air dumps where the environmental contamination was exacerbated by scavengers ("pepenadores") and continuous burning of waste. [Statement of David Harich Statement ("Harich Statement") (Exhibit A-2), ¶ 4; Photographs of Carabalí and Paso de Texca dumps taken in 1994 (Exhibit D-3)]. In addition, most of Acapulco's waste collection resources were devoted to the tourist and commercial zones at the expense of the rest of the City, where waste collection efforts were inefficient and inadequate. [Minutes of Municipal Council meeting ("Minutes") (Exhibit D-4); January 3, 1995 State of Guerrero Decree (Exhibit D-5); Statement of Rod Proto ("Proto Statement") (Exhibit A-3), ¶ 4]

3.2 To address these problems, the City determined that it needed a modern sanitary landfill and waste collection services in Acapulco's tourist and commercial zones that were self-supporting and/or self-funded so that City resources could be used to clean up the rest of the City.

3.3 Sanifill, Inc., an American company with broad-ranging expertise in waste collection, street sweeping and landfill construction and operation, learned of Acapulco's interest and

needs regarding both a landfill and waste collection services.<sup>6</sup> In the spring of 1994, the Governor of Guerrero met with Waste Management representatives to discuss the possibility of its providing Acapulco's waste management services. From that point through June 1995, negotiations regarding an agreement between Waste Management, acting through its Mexican subsidiary, Acaverde, and the City continued. At various times, the negotiations and discussions regarding the Concession included representatives of the City, State and Federal governments in Mexico. During the negotiation process, the concept of Acaverde providing waste management services generally received widespread support from both government and private business interests in Acapulco. [Public Notices of Support for Acaverde dated October 3, 1994 (Exhibit D-7)]

3.4 In August 1994, Waste Management made a detailed presentation and proposed that it be allowed to provide the City's waste collection and disposal services. [Proposal dated August 1994 (Exhibit D-8)] In response to the City's inquiry, Waste Management provided detailed financial information demonstrating its ability to fund the significant start-up costs that would be required. [Proto Statement (Exhibit A-3), ¶ 6] Given the intended size and length of the project, Waste Management's financial capability was important to the City. [Herrera Statement (Exhibit A-1), ¶ 3; Proto Statement (Exhibit A-3), ¶ 6]

3.5 At the same time, Waste Management, acting through Acaverde, was concerned about potential liquidity problems on Acapulco's part and sought a guarantee of payments to be made to Acaverde under the proposed agreement. Banobras, the Mexican federal bank that encourages and assists in financing investment in waste management projects, became an active participant in the negotiations and ultimately agreed to serve as a guarantor. [See Guideline For

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<sup>6</sup> Sanifill is the predecessor by merger to Claimant Waste Management, formerly known as USA Waste Services; Sanifill will be referenced hereinafter as Waste Management.

Financing Sanitation Service Programs (Exhibit D-9); Letter from Banobras dated November 7, 1994 (Exhibit D-10) (asking Acaverde's attorney to protect the interest of the Mexican government); Proto Statement (Exhibit A-3), ¶ 7; Herrera Statement (Exhibit A-1), ¶¶ 7-9]

3.6 On October 29, 1994, the City held a Municipal Council meeting to which Acaverde was invited. The Mayor and the City Council discussed the City's difficulty in providing efficient and effective waste management services, and Acaverde outlined its proposal. Also present at the meeting was a Banobras representative, who described possible project financing. At the conclusion of the meeting, the City voted to grant a fifteen-year exclusive concession to Acaverde to provide waste collection services within a designated area of the City ("Concession Area") and to construct and operate a modern sanitary landfill. [Minutes (Exhibit D-4)]

3.7 Under Mexican law, a "concession" is defined as an administrative act through which the government authorizes a private person or entity to provide a public service.<sup>7</sup> Because of the duration of this Concession, it required State approval. On January 3, 1995, the State of Guerrero authorized Acapulco to delegate its responsibilities for the provision of public waste management services to a private party through the grant of a fifteen-year concession. The Governor's decree announcing this authorization describes in detail the reasons why Acapulco needed the Concession. [State of Guerrero Decree (Exhibit D-5)] On February 9, 1995, the City and Acaverde signed a fifteen-year concession authorizing Acaverde to provide street sweeping, waste collection and landfill services.

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<sup>7</sup> Ley que Establece las Bases para el Regimen de Permisos, Licencias, y Concesiones para la Prestación de Servicios Públicos y la Explotación y Aprovechamiento de Bienes de Dominio del Estado y los Ayuntamientos, art. 3, Periódico Oficial del Gobierno del Estado de Guerrero, 10 de octubre, 1985.

3.8 Although the Concession was signed in February 1995, issues relating to Banobras' guarantee, as provided in the Concession, remained outstanding. [Herrera Statement (Exhibit A-1), ¶¶ 7-9]. When the City requested that Banobras open the line of credit required by the Concession, Banobras submitted its own requests for corporate and financial information to Waste Management, and consulted with the Governor of Guerrero. [Letter from Banobras to Internal Credit Committee dated March 2, 1995 (Exhibit D-11); See Letter from Banobras to Internal Finance Committee dated March 2, 1995 (Exhibit D-12)]

3.9 In April 1995, Banobras proposed a number of modifications to the Concession. Indeed, Banobras insisted that it would only establish the line of credit if its modifications were accepted. [Letter dated May 12, 1995 from Banobras to Mayor of Acapulco (Exhibit D-13); Herrera Statement (Exhibit A-1), ¶ 8]

3.10 Banobras' modifications to the Concession included the addition of a clause giving Acapulco title to the landfill and landfill equipment upon termination of the Concession. Banobras also increased the amount of the performance bond to be posted by Acaverde from 3.5 million to 6 million pesos.<sup>8</sup>

3.11 As part of its modification of the Concession, Banobras also clarified terms of the proposed line of credit agreement. Among other provisions, Banobras added language providing that invoices received by the City from Acaverde would be deemed accepted if the City failed to issue a counter invoice within twenty days of receipt of Acaverde's invoice. [Concession, Condition Eleventh]

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<sup>8</sup> Throughout this Memorial, references to U.S. dollars are "\$\_\_\_." References to Mexican pesos are "\_\_\_ pesos" and refer to new pesos.



3.12 On May 12, 1995, a modified Concession was signed by the City, Banobras and Acaverde. [Concession Title dated May 12, 1995 ("Concession") (Exhibit B-1)] The modified Concession included all of the revisions insisted upon by Banobras. [Herrera Statement (Exhibit A-1), ¶ 8] Acaverde had little choice but to accept Banobras' modifications; without them, Banobras would not execute the line of credit agreement. [Herrera Statement (Exhibit A-1), ¶ 8]

3.13 On May 26, 1995, Banobras informed Acaverde that the line of credit agreement had been approved in accordance with the terms of the Concession and in an amount up to six million pesos. [Letter from Banobras to Acaverde (Exhibit D-14)] Banobras also informed Acapulco that it had approved the line of credit and requested the City to sign the documentation as soon as possible. [Letter From Banobras to City dated May 26, 1995 (Exhibit D-15)] The line of credit agreement was signed on June 9, 1995 and registered in the federal registry of public debt on June 15, 1995 (the "Line of Credit Agreement"). [The Line of Credit Agreement is attached as Exhibit B-2] Acaverde (the "Company") had little input in the drafting and negotiation of the Line of Credit Agreement. [Herrera Statement (Exhibit A-1), ¶ 9]

3.14 Banobras refused to make any modifications to the Line of Credit Agreement, notwithstanding Acaverde's requests. Banobras did inform Acaverde, however, that the Company was completely protected and guaranteed in accordance with the Concession. [Letter from Banobras to Sanifill dated June 19, 1995 (Exhibit D-16)]

## **B. The Terms Of The Concession.**

### **1. The Benefits Provided To The City And Acaverde.**

3.15 The benefits of the Concession to the City were obvious. Over a fifteen year period, the City would receive first-class sweeping and collection services in the Concession Area, a permanent landfill that would benefit the entire City, and a more efficient allocation of City

resources. Some of the cost of waste collection would be shifted to private individuals and businesses in the Concession Area, who would pay City-approved fees to Acaverde. All City residents would benefit from the improved aesthetic and environmental condition of the City. Under the Concession, Acapulco also would receive a yearly credit, which would lower the cost of the Concession to the City, as Acaverde's operations (and the amounts invoiced to and collected from residents and businesses) increased. [Concession (Exhibit B-1), Annex B, Article II]

3.16 The Concession also conferred significant economic rights on Acaverde. First, Acaverde had the exclusive right to provide concession services to businesses and residences within the Concession Area and to enter into waste collection contracts with them at rates approved by the City. Second, Acaverde was entitled to charge tariffs approved by the City for waste deposited by third parties in the new permanent landfill. Finally, Acaverde would receive from the City a monthly payment of one million pesos, adjusted for inflation, for the services provided by Acaverde under the Concession. This payment was guaranteed by Banobras.

## **2. Acaverde's Obligations In The Concession.**

3.17 As modified, the Concession specified Acaverde's obligations and performance requirements as follows:

3.18 *Initial Investment:* Acaverde agreed to make an initial investment of "up to" \$12.8 million to improve waste management services in Acapulco and to otherwise satisfy its obligations under the Concession. [Concession (Exhibit B-1), Declaration II.2]

3.19 *Exclusivity and Contracts:* Acaverde was granted the right to be the exclusive provider of waste collection services in the Concession Area. [Concession (Exhibit B-1), Condition Fifteen] Acaverde was required to contract with individuals and businesses in the Concession Area for these services at rates approved by the City. [Concession (Exhibit B-1), Annex B, Article V.5.1]

3.20 *Waste Collection:* Acaverde was required to use its "best efforts" to provide waste collection services. "Best efforts" is defined in the Concession as "a level of effort that is reasonably calculated . . . to achieve the expected result, but that implies a level of effort, or expense, or both, that is commercially reasonable in accordance with the circumstances . . . ." [Concession (Exhibit B-1), Annex A, Articles VI.1, II.2 and II.3] Acaverde also was required to acquire necessary equipment and to hire and train drivers and other employees needed to perform its waste collection operations. [Concession (Exhibit B-1), Annex A, Articles IV.1, V.2(b)4]

3.21 *Street Sweeping:* Acaverde was required to use its "best efforts" to manually and mechanically sweep streets in the Concession Area and to pick up garbage in public areas. To satisfy its street sweeping obligation, Acaverde was required to provide twenty manual sweepers, three mechanical sweepers and two supervisors. [Concession (Exhibit B-1), Annex A, Article II.3, List No. 1]

3.22 *Permanent Landfill:* Acaverde was required to design, construct and open a sanitary landfill, which would serve as the exclusive disposal site for solid waste generated in Acapulco for the term of the Concession. Until the permanent landfill opened for operations, Acaverde was granted gratuitous access to Acapulco's existing garbage dumps to deposit all waste collected under the Concession. Acaverde had the right to establish the rules for operation of the permanent landfill as long as certain minimum standards were met. [Concession (Exhibit B-1), Annex A, Article II.4]

3.23 *Invoicing:* Acaverde was required to deliver invoices for its services to the City within the first five days of every month. [Concession (Exhibit B-1), Annex B, Article IV]

3.24 *Performance Bond:* To guarantee compliance with its obligations under the Concession, Acaverde was required to establish a performance bond in the amount of six million pesos. [Concession (Exhibit B-1), Condition Eighteenth]

**3. The City's Obligations In The Concession.**

3.25 Among other things, the City's obligations under the Concession included the following:

3.26 *Exclusivity:* The City agreed to enforce Acaverde's right to exclusivity in the Concession Area by establishing rules and ordinances necessary to prohibit waste collection by any individual or company other than Acaverde, including regulations that would impose fines and other penalties reasonably calculated to eliminate the prohibited conduct. [Concession (Exhibit B-1), Annex A, Articles II.1, 2] Further, the City was expressly prohibited from granting to any person or entity any right or concession incompatible with Acaverde's rights. [Concession (Exhibit B-1), Condition Fifteenth]

3.27 *Assistance with Contracting:* With respect to the collection of waste from private residents and businesses in the Concession Area, the City "agree[d] and acknowledge[d] that the provision of waste collection services to businesses, and the right to establish rates for such services, are *indispensable elements of the consideration to the Concessionaire.*" [Concession (Exhibit B-1), Annex B, Article VI, 6.2 (emphasis added)] Accordingly, the City was required to issue rules and impose sanctions necessary to ensure that residents and businesses within the Concession Area contracted with Acaverde and paid the published rates for Acaverde's services. [Concession (Exhibit B-1), Annex B, Articles VI, 6.1, 6.3]

3.28 *Permanent Landfill:* The City was required to provide, through a gratuitous loan, a municipally-owned piece of land for Acaverde's use as a permanent landfill. The City was also

required to sign a loan agreement establishing that Acaverde had the authority to develop, control and operate the permanent landfill site. [Concession (Exhibit B-1), Annex A, Article II.4] The City was required to provide Acaverde with the assistance it required to design, construct and operate the landfill, including (a) providing all municipal permits and authorizations needed and (b) helping Acaverde obtain all federal and state permits. [Concession (Exhibit B-1), Annex A, Article II.4]

3.29 *Assistance with Planning, Mobilization and Public Awareness:* The City agreed to use its "best efforts" to provide all of the assistance and support required by Acaverde for the planning and mobilization of its operations. [Concession (Exhibit B-1), Annex A, Articles V.1(a), V.2] Also, because the Concession represented a significant change in the manner in which waste collection services were provided, City inspectors, along with Acaverde, were responsible for developing and implementing public education programs relating to the collection, utilization and disposal of waste generated within the Concession Area. [Concession (Exhibit B-1), Annex A, Article III.2]

3.30 *Service Facility:* The City agreed to provide, through a gratuitous loan, a municipally-owned piece of land upon which Acaverde could design and construct a service facility to administer its operations and store its trucks and other equipment. [Concession (Exhibit B-1), Annex A, Article II.5(b)]

3.31 *Payment:* The City was required to pay Acaverde within five business days after receipt of a monthly invoice. [Concession (Exhibit B-1), Annex B, Article IV]

3.32 *Financial Guarantee:* The City was required to create with Banobras, and with Guerrero as joint obligor, a contingent and irrevocable line of credit in favor of Acaverde, with a minimum revolving fund equal to six months' payment. [Concession (Exhibit B-1), Condition Eleventh]

3.33 *Enforcement of Rules:* The City agreed that its inspectors would directly enforce the rules, ordinances and municipal policies relating to the concessioned service. [Concession (Exhibit B-1), Annex A, Article III.2 (b)(i)] The City also agreed to adopt all necessary measures to obtain fast and efficient execution of the rules and ordinances relating to the Concession. [Concession (Exhibit B-1), Annex A, Articles II.1.(d), 2.(d)]

3.34 Several of the City's obligations under the Concession were conditions precedent to Acaverde's performance. For instance, Acaverde was not required to fulfill any of its obligations, including any act of planning or mobilization, until the City enacted the ordinances called for in the Concession. [Concession (Exhibit B-1), Annex B, Article 6.4] Acapulco also agreed that Acaverde was not required to begin performing any of its obligations until the Line of Credit Agreement was executed. [Concession (Exhibit B-1), Condition Eleventh] Furthermore, Acaverde's obligation to construct and open the new permanent landfill was contingent upon the City's signing an agreement to loan the land gratuitously to Acaverde for use as a landfill. [Concession (Exhibit B-1), Annex A, Article II.4] And Acaverde's obligation (in coordination with the City) to close the Carabalí and Paso de Texca open-air dumps accrued only upon the opening of the permanent landfill. [Concession (Exhibit B-1), Annex A, Article II.4 (g)]

#### **4. Provisions Of The Concession Addressing Non-Performance.**

3.35 The Concession also set forth specific procedures to be followed in the event Acaverde failed to perform its obligations. These provisions anticipated minor and easily remedied breaches of service by requiring the City to notify Acaverde in writing of any deficiencies in service, and allowing Acaverde twenty-four hours to correct the problem. If Acaverde failed to correct the problem promptly, the City could fine Acaverde. [Concession (Exhibit B-1), Annex B, Article VII]

3.36 The Concession also provided that Acapulco could cancel the Concession if Acaverde's service became irregular or substandard. [Concession (Exhibit B-1), Condition Thirteenth] To invoke this cancellation provision, however, Acapulco had to notify Acaverde in writing of the cause that allegedly permitted cancellation. Furthermore, the cancellation would not become effective unless (a) the cause or deficiency that allegedly supported the cancellation was material and substantially impeded the enjoyment of all of the benefits provided to the City and to the population in general; and (b) Acaverde failed to correct the situation within thirty days. [Concession (Exhibit B-1), Condition Fourteenth] Nothing in the Concession provides that, without notice and opportunity to cure, Acapulco can suspend payments or not comply with any of its other obligations, simply based on Acaverde's alleged lack of performance.

3.37 Although the Concession does not expressly give Acaverde the right to terminate, it does establish a mechanism to value Acaverde's interest in the event that Acapulco deprives Acaverde of its rights under the Concession. The Concession provides a formula to calculate the value of Acaverde's lost investment if the City "take[s] any action or series of actions directly imputable to the City, that prevent[s] or hinder[s] [Acaverde] from receiving all or any material portion of the benefits or rights under this Concession . . . ." [Concession (Exhibit B-1), Condition Tenth] The formula is based upon Acaverde's gross annual income and recognizes that any lost investment value to Acaverde resulting from arbitrary acts of the City will be greatest at the beginning of the fifteen-year Concession and will decrease over time.

### **C. The Terms Of The Line Of Credit Agreement.**

3.38 The Line of Credit Agreement is straightforward. Under it, Banobras agreed to open a contingent and revolving line of credit in the amount of six million pesos for a fifteen-year term. The line of credit, which was to be regularly replenished from Guerrero's share of federal tax

revenues, could be accessed by Acaverde if the City failed to make payments under the Concession. If amounts owed by the City to Acaverde were not paid, Acaverde was required to notify Banobras. The Agreement states that once Banobras is notified, it "*shall have the obligation to provide the necessary funds to cover the unpaid amounts.*" [Line of Credit Agreement (Exhibit B-2), ¶ Condition Sixth] The State of Guerrero counter-guaranteed all payment obligations of the City under the Line of Credit Agreement. Nothing in the Line of Credit Agreement, however, gives either Banobras or the City the right to suspend its guarantee obligations based on Acaverde's alleged lack of performance.

**D. Acaverde Satisfied Its Obligations Under The Concession.**

**1. Preliminary Operations**

3.39 Other than what it was prevented from doing by the City, Acaverde performed every obligation and met every requirement imposed on it under the Concession.

3.40 Acaverde was not obligated to begin operations under the Concession until the Line of Credit Agreement was signed in June 1995. Even before that time, however, Acaverde undertook and financed numerous activities so that it could commence operations under the Concession in a timely manner. Acaverde surveyed, identified and entered into its computer system thousands of commercial and residential customers within the Concession Area. Acaverde also designed collection routes and interviewed, hired and trained employees, organized its administrative, accounting and sales staff, met frequently with local businesses and government officials, and purchased equipment. [Statement of James Herak ("Herak Statement") (Exhibit A-4), ¶ 2]

3.41 In contrast, Acapulco dragged its feet in performing its preliminary obligations. For example, Acapulco was required to establish municipal ordinances to protect Acaverde's exclusive right to collect waste in the Concession Area and to require residents and businesses to



contract with Acaverde. Acapulco also was required to establish fines and other penalties reasonably calculated to ensure compliance with the ordinances. Although Acapulco promised that the requisite ordinances would be in place soon after the Concession was granted, in fact they were enacted much later. [Herak Statement (Exhibit A-4), ¶ 5]

3.42 After consistent urging from Acaverde over two months, the City finally passed the required ordinances on July 18, 1995 (the "July 1995 Ordinances"). The July 1995 Ordinances stated that "[i]t is strictly prohibited . . . that any individual or company other than the concessionaire collect any class or type of solid waste within the awarded area . . . ." [July 1995 Ordinances (Exhibit B-3), Article 16(I)] The Mayor of Acapulco, the Director of Municipal Public Services, and City inspectors were expressly responsible for applying the substantial fines referenced as penalties in the ordinances. [Exhibit B-3, Article 21]

3.43 The July 1995 Ordinances also mandated that all residents and businesses in the Concession Area contract with Acaverde and pay the published rates for Acaverde's services. [Exhibit B-3, Articles 8 and 9]

3.44 During its negotiations with the City, Acaverde had expressed concern that the littering problem that existed in Acapulco would hinder Acaverde's street sweeping and collection operations. Accordingly, the July 1995 Ordinances also addressed littering and established mandatory fines for discarding trash within the Concession Area. [Exhibit B-3, Articles 16 and 25]

3.45 Finally, the July 1995 Ordinances set forth the procedures to be followed and the penalties to be applied in the event of poor performance by Acaverde. Specifically, the ordinances made clear that the City had to notify Acaverde in writing of any deficiencies in service so that Acaverde could correct the problem. The ordinances also established fines for Acaverde. Thus, the July 1995 Ordinances echoed what the Concession already established: Acaverde had twenty-four

hours to remedy any deficiencies in service, and Acapulco could levy fines against the Company if those deficiencies continued. [Exhibit B-3, Article 26]

3.46 After the July 1995 Ordinances were enacted, Acaverde finalized its start-up preparations and began mobilizing its operations.

## **2. Acaverde's Complete Performance**

3.47 On August 15, 1995, Acaverde began collecting solid waste in the Concession Area and continued to do so until November 12, 1997. After a three-month phase-in period during which it established full operations, Acaverde provided full street sweeping operations from November 13, 1995 until November 12, 1997. [Herak Statement (Exhibit A-4), ¶ 6; Letter From Acaverde to the Mayor of Acapulco dated November 13, 1995 (Exhibit D-17) (stating that Company fulfilled obligation to begin service in a timely manner)]

3.48 Acaverde also worked diligently to develop the permanent landfill. Acaverde identified, surveyed and selected a site for the landfill. Acaverde arranged for the selected property to be transferred to the City. Acaverde obtained architectural plans and environmental impact studies for the landfill and provided these and other information to state and municipal authorities. [Harich Statement (Exhibit A-2), ¶¶ 12-16]

3.49 In the interim period before the permanent landfill was operational, Acaverde designed, developed, paid for and operated a state-of-the art temporary landfill. Acaverde even allowed the City to use the temporary landfill at no charge to dispose of waste collected from outside the Concession Area. [Harich Statement (Exhibit A-2), ¶¶ 5-11; Statement of Francisco Larequi ("Larequi Statement") (Exhibit A-5), ¶¶ 15-17]

3.50 During the two years in which the Company performed under the Concession, Acaverde promptly addressed and remedied all complaints of which it had notice. Attached as

Exhibit D-18 are letters from Acaverde to the City in which Acaverde responds to notifications received by the City.<sup>9</sup> The City never fined Acaverde for service problems or for failure to timely address a service complaint. [Statement of Joe Coradetti ("Coradetti Statement") (Exhibit A-6), ¶ 16; Larequi Statement (Exhibit A-5), ¶¶ 19-20]

3.51 The City also never provided Acaverde with written (or oral) notification that the City had any basis for canceling the Concession. [Larequi Statement (Exhibit A-5), ¶ 20; Herrera Statement (Exhibit A-1), ¶ 15] Although the City raised complaints regarding service during negotiations to modify the Concession, at no time did the City claim that such complaints rose to the level of a cause for cancellation. [Larequi Statement (Exhibit A-5), ¶ 20; Proto Statement (Exhibit A-3), ¶ 20]

3.52 In summary, although Respondent undoubtedly will argue in this arbitration that Acaverde failed to perform its obligations, there is overwhelming evidence to the contrary. Acaverde provided consistent and effective service throughout the life of its operations in Acapulco. [Coradetti Statement (Exhibit A-6), ¶¶ 12-15; Proto Statement (Exhibit A-3), ¶ 20; Larequi Statement (Exhibit A-5), ¶¶ 3-4, 6; Statement of Bill Johnson ("Johnson Statement") (Exhibit A-7), ¶ 4] More than 88% of Acaverde's customers rated Acaverde's service as excellent, and approximately 95% rated the services as good or excellent. [Coradetti Statement (Exhibit A-6), ¶ 14] The City never notified Acaverde that its service was irregular, substandard or otherwise a cause for

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<sup>9</sup> The vast majority of the service-related complaints received by Acaverde arose from factors over which Acaverde had no control. For example, many of the complaints involved waste that was dumped in the Concession Area by unauthorized waste collectors from outside the Concession Area; other incidents involved customers or non-customers of Acaverde who put their trash on the street for collection after Acaverde's trucks had passed by on their daily schedule; still other service issues arose from people simply littering in the Concession Area without fear that the City would enforce anti-littering ordinances. [Coradetti Statement (Exhibit A-6), ¶ 16] Had the City fulfilled its obligations and enforced its own ordinances, these situations would have been avoided.

cancellation of the Concession. Although it is impossible for any provider of waste management services implementing large-scale operations to eliminate all deficiencies, Acaverde timely responded to every service complaint received from the City, and Acapulco never fined Acaverde for any service deficiency. Acaverde's witnesses and customer surveys reveal the truth — despite arbitrary acts and a complete lack of cooperation from the City, Acaverde consistently and completely performed its Concession obligations. [Johnson Statement (Exhibit A-7), ¶ 4; Coradetti Statement (Exhibit A-6), ¶¶ 12-15] Indeed, Acaverde went beyond its obligations in many respects.

**E. The City's Arbitrary Acts And Failure To Perform Material Obligations.**

3.53 While Acaverde used its best efforts to perform under the Concession, the City failed to satisfy even the simplest of its obligations. Furthermore, the City undertook a series of arbitrary, bad faith acts designed to undermine Acaverde's efforts and revoke the Company's rights under the Concession.

**1. Exclusivity**

3.54 Enforcement of the exclusivity provisions was vital to the success of the Concession because prior to the Concession, unauthorized waste collectors ("pirates") and City trucks had collected garbage from citizens and businesses, who either contracted at very low rates with the pirates or simply tipped the City drivers. [Proto Statement (Exhibit A-3), ¶ 12] Thus, Acapulco's citizens were unaccustomed to paying for professional waste collection services. [Larequi Statement (Exhibit A-5), ¶¶ 11-12] Most of Acaverde's revenue under the Concession, however, was to come from contracts with private individuals and businesses in the Concession Area to collect their waste at rates approved by the City. [Coradetti Statement (Exhibit A-6), ¶ 9]

3.55 For these reasons, Acaverde insisted on provisions in the Concession requiring the City to establish and enforce ordinances necessary to ensure Acaverde's exclusivity rights. [July

1995 Ordinances (Exhibit B-3)] In addition, Acaverde received other written and oral assurances from the City that Acaverde's exclusivity rights would be protected. [Proto Statement (Exhibit A-3), ¶ 12] For example, the City promised in writing to approve a regulation ensuring Acaverde's exclusivity within the Concession Area and to use City supervisors to enforce compliance with the regulation. [February 10, 1995 Letter from City to Acaverde (Exhibit D-19)] Without the exclusivity provision and the City's assurances that Acaverde's exclusivity would be protected, Acaverde would not have agreed to the terms of the Concession. [Proto Statement (Exhibit A-3), ¶ 12]

3.56 The City's promises to enforce Acaverde's right to exclusivity were never kept. In fact, Acapulco took affirmative steps that guaranteed that Acaverde would never enjoy the exclusivity provided in the Concession. During the entirety of Acaverde's operations, City trucks (from the Sanitation Department) continued to collect waste in the Concession Area. [Proto Statement (Exhibit A-3), ¶ 13; Coradetti Statement (Exhibit A-6), ¶ 10; Larequi Statement (Exhibit A-5), ¶ 8; Herak Statement (Exhibit A-4), ¶ 7; Johnson Statement (Exhibit A-7), ¶ 6] The drivers of these trucks would collect tips and charge Acaverde's potential and existing customers rates lower than those set forth in the ordinances (and the rates ultimately charged by Acaverde). [Larequi Statement (Exhibit A-5), ¶ 8; Herak Statement (Exhibit A-4), ¶ 7; Coradetti Statement (Exhibit A-6), ¶ 10] Acaverde wrote dozens of letters to the City complaining about the Sanitation Department trucks and requesting that the City discipline its drivers. A summary of these complaints is attached as Exhibit D-20. [See also, Letters to City (Exhibit D-20)] Despite Acaverde's repeated complaints, the City never took any steps to stop its own trucks from violating Acaverde's exclusivity rights. [Coradetti Statement (Exhibit A-6), ¶ 10; Proto Statement (Exhibit A-3), ¶ 14]

3.57 From the very beginning of Acaverde's waste collections operations in August 1995, other unauthorized vehicles also collected waste within the Concession Area. [Coradetti

Statement (Exhibit A-6), ¶ 9; Herak Statement (Exhibit A-4), ¶ 8] Acaverde wrote dozens of letters to the City complaining about the presence of these pirates. A summary of these complaints is attached as Exhibit D-21. [See also, Letters to City (Exhibit D-21)] Acaverde also provided detailed information to the City about specific vehicles that were violating the exclusivity regulations, which included photographs and a videotape of the unauthorized collection. [Larequi Statement (Exhibit A-5), ¶ 9; Videotape of Unauthorized Waste Collectors (Exhibit F-1)] Acaverde repeatedly asked the City to enforce the exclusivity provisions and explained that the presence of the pirates was hindering Acaverde's ability to contract with private parties. [Proto Statement (Exhibit A-3), ¶¶ 13-14; Larequi Statement (Exhibit A-5), ¶ 8] Despite the overwhelming amount of evidence presented to the City, Acapulco never took any action; no unauthorized waste collectors were fined or otherwise sanctioned. [Coradetti Statement (Exhibit A-6), ¶ 9; Proto Statement (Exhibit A-3) ¶¶ 13-14]

3.58 Although the City had issued permits that purported to allow pirates to collect waste within the Concession Area through 1995, the City assured Acaverde that all such permits would be revoked. [Proto Statement (Exhibit A-3), ¶ 15] However, the City's Transportation Department continued to grant collection permits to pirates through February 1996, almost a year after the Concession was granted. [Letter from Acaverde to Mayor of Acapulco dated February 17, 1996 (Exhibit D-22); Videotape of Unauthorized Waste Collectors (Exhibit F-1) (showing permits)] The City also informed citizens and businesses in Acapulco that other collectors could pick up trash within the Concession Area — even though the Concession and the City's own ordinance said otherwise. [See Letter From City to Acapulco Port Authority dated December 1, 1995 (Exhibit D-23)]

3.59 In addition, the Concession and the July 1995 Ordinances clearly required residents and businesses in the Concession Area to contract with Acaverde. [Concession (Exhibit B-1), Annex A, Article II, 2.2(d); July 1995 Ordinances (Exhibit B-3), Articles 8 and 9] Within months after the ordinances were promulgated, however, the Mayor of Acapulco informed the public that contracting with Acaverde was not a requirement. On October 13, 1995, an article appearing in the *Sol de Acapulco* newspaper read:

**Acaverde Is Not Obligatory: ROA<sup>10</sup>**

Imposition will be terminated

**We request that the company make adjustments  
to fit the Mexican standards**

The mayor, Rogelio de la O Almazán, said that the obligation to contract Acaverde's services will be eliminated in order to remove that which was previously interpreted as an imposition.

[Article published in the *Sol de Acapulco* October 13, 1995 (translated) (Exhibit D-24)] This statement was false, directly contradicted the terms of the Concession and the July 1995 Ordinances, and ensured that Acaverde would never enjoy the exclusive right to contract with all residents and businesses in the Concession Area. Additionally, Acapulco never enforced the ordinances requiring customers to contract with Acaverde despite consistent pleas from the Company. A summary of these complaints is attached as Exhibit D-25. [See also, Letters to the City (Exhibit D-25)]

3.60 The exclusivity problem only grew worse over time. [Coradetti Statement (Exhibit A-6), ¶ 9] Eventually, some of Acaverde's customers began canceling their contracts to sign

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<sup>10</sup>

"ROA" are the initials of Rogelio de la O Almazán, Acapulco's mayor.

up with unauthorized waste collectors. [Letter dated February 11, 1997 from Acaverde to City (Exhibit D-26); Letter dated March 31, 1997 from Acaverde to City (Exhibit D-27) (enclosing customer's cancellation request); Larequi Statement (Exhibit A-5), ¶ 14] The effect of the City's actions was to reduce the benefits Acaverde was supposed to receive under the Concession. Instead of providing service to 100% of the customers in the Concession Area at 100% of the rates set by the City in the July 1995 Ordinances, Acaverde was collecting from less than 50% of the customers at rates less than 50% of the published rates. [Coradetti Statement (Exhibit A-6), ¶¶ 8, 11; Proto Statement (Exhibit A-3), ¶ 14] Acapulco's actions effectively restricted the scope of the Concession by 50%.

3.61 In summary, Acaverde repeatedly requested compliance with the exclusivity provisions of the Concession, but to no avail. Although the City could not and did not deny responsibility to enforce the exclusivity provisions, it continued to ignore its obligations, affirmatively violated the Concession and encouraged others to do likewise. By directly competing with Acaverde, by issuing permits to other waste collectors, by misinforming the public, and by not enforcing ordinances designed to protect the Company, Acapulco substantially impaired, and eventually eliminated, Acaverde's investment and its rights under the Concession.

## **2. Non-Payment**

3.62 Acaverde performed under the Concession for twenty-seven months — until the City effectively revoked the Concession in November 1997. Acaverde timely presented twenty-six monthly invoices to the City for payment of the monthly fee provided in the Concession. [Herrera Statement (Exhibit A-1), ¶¶ 22-24] The City did not reject any of these, but paid only one invoice



in full (December 1995) and two others partially (January and February 1996). [Herrera Statement (Exhibit A-1), ¶¶ 22-24]<sup>11</sup>

3.63 After unsuccessful discussions with the City regarding payment of its invoices, Acaverde was forced to draw on the guarantee of Banobras. The Company sent two requests for payments to Banobras under the Line of Credit Agreement. [Letter dated March 28, 1996 to Banobras (Exhibit D-30); Letter dated May 3, 1996 to Banobras (Exhibit D-31)] After some initial resistance, Banobras recognized its clear obligations under the Line of Credit Agreement and paid 4.9 million pesos for services provided by Acaverde from January through April 1996 [Herrera Statement (Exhibit A-1), ¶ 23; Larequi Statement (Exhibit A-5), ¶ 25] Unfortunately, this was the last time that Banobras would fulfill its obligations under the Line of Credit Agreement.

3.64 Acaverde made several other demands on Banobras for payment under the Line of Credit Agreement. [Letter dated July 23, 1996 to Banobras (Exhibit D-32); Letter dated August 28, 1996 to Banobras (Exhibit D-33); Letter dated October 17, 1996 to Banobras (Exhibit D-34); Letter dated October 28, 1996 to Banobras (Exhibit D-35)] In all, twenty-one invoices totaling more than thirty-eight million pesos were submitted, first to the City and then to Banobras. Neither the City nor Banobras honored any of these subsequent requests for payment.

3.65 In fact, Acapulco and Banobras conspired not to pay Acaverde under the Concession and the Line of Credit Agreement. Acapulco sent a letter to Banobras alleging that

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<sup>11</sup> Early on in the Concession term, Acapulco acknowledged that it could not meet its payment obligations under the Concession and attempted to renegotiate its financial obligations. [Letter from Acapulco to Acaverde dated April 6, 1996 (Exhibit D-28)] Although it was not obligated to do so, Acaverde worked in good faith with the City to lessen the financial burden on Acapulco and preserve the contemplated fifteen-year relationship. [Proto Statement (Exhibit A-3), ¶¶ 18-19] Throughout these negotiations, however, Acaverde always insisted that the City comply with its other obligations, such as enforcing its municipal ordinances. [See e.g., Letter dated April 24, 1996 from Acaverde to Acapulco (Exhibit D-29)]

Acaverde had not complied with its obligations under the Concession.<sup>12</sup> [Letter dated September 11, 1996 from Acapulco to Banobras (Exhibit D-36)] Banobras then informed Acaverde that the bank could not pay under the Line of Credit Agreement because the City had objected to Acaverde's performance — even though Acaverde's performance was not a condition precedent to payment by Banobras. [Letter dated August 2, 1996 from Banobras to Acaverde (Exhibit D-37); Letter from Acaverde to Banobras dated August 6, 1996 (Exhibit D-38)] Even though it refused to make payment, Banobras admitted indirectly to Acaverde, and directly to Acapulco, that it had no legal right to withhold payments. [See Letter dated November 15, 1996 from Banobras to Acapulco (Exhibit D-39)]

### **3. Landfill Site**

3.66 Despite all its preparatory efforts, before Acaverde could begin construction on the permanent landfill, it needed two things from the City. First, Acaverde needed a proper construction permit from the City. On September 6, 1996, after several requests, Acaverde received for the first time a construction permit from the City, but it was defective. [Construction permit (Exhibit D-40)] The permit provided by the City was not for the site of the proposed landfill, and Acaverde returned the defective permit and requested that a proper one be issued. [Letter from Acaverde to Acapulco dated November 7, 1996 (Exhibit D-41)] Acaverde followed up on its request several other times. [Letter dated December 11, 1996 from Acaverde to Acapulco (Exhibit D-42);

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<sup>12</sup> The City's claims of non-performance were patently false. Specifically, Acapulco claimed that Acaverde: failed to close the existing open-air dumps (which were only to be closed after the permanent landfill was constructed); failed to build the permanent landfill (which could not be built because, as discussed in paragraphs 3.66 to 3.68, the City neither executed the Gratuitous Loan Agreement nor provided a proper construction permit); and inadequately performed sweeping services in the Concession Area. Of course, Acaverde used more street sweepers than called for by the Concession, and the City never fined Acaverde for service deficiencies or complained of Acaverde's failure to cure them.

Letter dated January 17, 1997 from Acaverde to City Director of Urban Development (Exhibit D-43)] Despite these requests, Acapulco never provided a proper construction permit. [Herrera Statement (Exhibit A-1), ¶ 17; Larequi Statement (Exhibit A-5), ¶ 22]

3.67 Second, the City had to execute a Gratuitous Loan Agreement authorizing Acaverde's use of the land for a landfill. [Concession (Exhibit B-1), Annex A, Article II, 2.4(c)] Without the loan agreement, Acaverde had no legal right to construct and operate the permanent landfill. [Herrera Statement (Exhibit A-1), ¶ 18)] Acaverde delivered the required agreement to the City in early August 1996, and throughout the fall and winter of that year, Acaverde repeatedly requested in writing that the City sign the Gratuitous Loan Agreement. [Letters dated August 2, September 17, December 20, 1996 and January 17, 1997 (Exhibits D-44 to D-47)] Despite these requests, the City never signed the Gratuitous Loan Agreement. [Larequi Statement (Exhibit A-5), ¶ 21]

3.68 Although Acaverde invested significant sums in preparing to build and operate the permanent landfill, it was never able to do so because of the City's inaction. Once again, Acapulco had deprived Acaverde of a valuable right it had been granted — namely, the ability to collect revenues from third parties wanting to use the permanent landfill.

#### **4. Service Facility Site**

3.69 The City also was obligated to provide land for Acaverde's service facility, which was needed for the administration of Acaverde's operations and to maintain and store its equipment. [Concession (Exhibit B-1), Annex A, Article II, 2.6(b)] The City was obligated to provide the land, through another Gratuitous Loan Agreement, within thirty days after execution of the Concession. Despite repeated requests that the City provide a site for the service facility, the City never complied. [Letter dated March 15, 1996 from Acaverde to Acapulco (Exhibit D-48)] Instead,

the Company was forced to rent the land for the service facility at its own cost. [Coradetti Statement (Exhibit A-6), ¶ 17; Larequi Statement (Exhibit A-5), ¶¶ 15-17]

#### **5. Failure To Enforce Anti-Littering Ordinances**

3.70 During Acaverde's operations, littering was an enormous problem in the Concession Area. [Coradetti Statement (Exhibit A-6), ¶ 16] Acaverde wrote many letters to the City complaining about the littering problem, requesting that the City enforce ordinances against littering and explaining the adverse effects that littering had on Acaverde's operations. [See Letters dated March 1, March 15, May 7 and May 15, 1996 (Exhibits D-49 to D-52)] Although the municipal ordinances prohibited littering and established specific fines for violators, Acapulco never enforced these ordinances. [Proto Statement (Exhibit A-3), ¶ 17; Coradetti Statement (Exhibit A-6), ¶ 16]

#### **F. The City's Actions Effectively Revoked The Concession.**

3.71 The City's failure to meet its most basic Concession obligations completely undermined the relationship between it and Acaverde. Acaverde and its corporate parent had made a significant initial investment and were incurring daily operating costs, but were receiving virtually no revenues under the Concession. The City had not notified Acaverde of any cause for non-payment or termination, and because Acaverde had assumed the public obligation of providing waste management services to the community, it was reluctant to abandon its operations despite mounting monthly operating losses. [Johnson Statement (Exhibit A-7), ¶¶ 18-19]

3.72 Despite the City's non-performance, Acaverde expended significant effort and money to comply with its obligations. It continued to sweep the streets in the Concession Area. [Johnson Statement (Exhibit A-7), ¶ 4] It continued preparations to build the permanent landfill. [Harich Statement (Exhibit A-2), ¶¶ 15-16] It even allowed the City to use the temporary landfill that Acaverde had developed at its own cost. [Harich Statement (Exhibit A-2), ¶ 9; Larequi Statement

(Exhibit A-5), ¶ 17] It continued to attempt to enforce its exclusivity rights within the Concession Area even absent the required support from the City. It continued to respond to service complaints by the City, even when it bore no responsibility for the cited deficiencies. [Larequi Statement (Exhibit A-5), ¶¶ 10-11, 18-19; Coradetti Statement (Exhibit A-6), ¶ 16] Meanwhile, it was receiving no compensation other than what little it could collect from its private customers within the Concession Area. Efforts to obtain payments due from the City proved fruitless, even when Acaverde offered, with a reservation of rights, to accept less than the amounts provided for in the Concession just in order to recoup some of its mounting losses. [Johnson Statement (Exhibit A-7), ¶ 10]

3.73 The City's actions, including its non-payment of invoices, refusal to enforce its own ordinances regarding Acaverde's exclusivity rights, and refusal to fulfill its obligations with respect to the permanent landfill, effectively revoked the Concession. Notwithstanding Acaverde's investment and efforts to perform under the Concession, Acaverde was receiving none of the benefits the Concession was supposed to provide. [Johnson Statement (Exhibit A-7), ¶ 17]

3.74 In October 1997, Acaverde learned that a Mexican waste collection company, Setasa, was beginning to collect waste in the Concession Area at the specific request of the City. [Notary Public Certification dated October 30, 1997 (Exhibit D-55) (certifying that Setasa's trucks collected waste from Concession Area residences and hotels)] Acaverde also learned that Setasa had moved sufficient equipment into Acapulco to assume waste collection efforts in the Concession Area. [Larequi Statement (Exhibit A-5), ¶¶ 27-28] Acaverde subsequently learned that the City and/or Guerrero had arranged for Setasa to perform waste collection services in the Concession Area — in effect to replace Acaverde. [Johnson Statement (Exhibit A-7), ¶¶ 12-16]

3.75 The City's effective revocation of the Concession forced Acaverde to file a notice of intent to withdraw from the Concession, which it did on October 27, 1997. [Johnson

Statement (Exhibit A-7), ¶ 18; Letter dated October 27, 1997 from Acaverde to Acapulco (Exhibit D-53)] On November 3, Acapulco responded with a "counter-offer" that proposed to (1) cancel ninety percent of the City's existing debt to Acaverde, (2) require Acaverde *to pay* a "Concession fee" of eighty-four million pesos, and (3) redefine the terms under which Acaverde would be paid, the amounts it would be paid, and the scope of its operations so that all terms would be subject to unilateral amendment by Acapulco. [Letter from Acapulco to Acaverde dated November 3, 1997 (Exhibit D-54)] This proposal would have created an entirely new arrangement consisting of a series of short-term service contracts, without a set fee structure — an alternative that was financially impossible for Acaverde. Moreover, to enter this new arrangement, Acaverde would have had to invest even more money in addition to that already invested under the Concession.

3.76 The City's invitation to Setasa to oust Acaverde, together with the City's arbitrary acts and continued non-performance, confirmed that the City effectively had revoked the Concession and confiscated Acaverde's rights under it. Based on this information and pursuant to the notice it had provided, Acaverde ceased operations under the Concession on November 12, 1997. [Larequi Statement (Exhibit A-5), ¶ 30; Johnson Statement (Exhibit A-7), ¶ 19; Harich Statement (Exhibit A-2), ¶ 11]

## CHAPTER FOUR

### **CLAIMANT SATISFIED NAFTA'S PROCEDURAL AND JURISDICTIONAL REQUIREMENTS**

4.1 To ensure predictability and fairness in cross-border business planning and investment, Chapter Eleven of NAFTA establishes "a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal."<sup>13</sup>

4.2 Chapter Eleven establishes certain procedural and jurisdictional requirements. As shown below, questions concerning these requirements that Mexico had raised in letters to the Tribunal are without merit. Waste Management has satisfied all procedural requirements under NAFTA, and the Tribunal should proceed to the merits of this claim.

#### **A. Waste Management Is An "Investor" And Entitled To Bring A Claim Under Articles 1116 And 1117.**

4.3 NAFTA Chapter Eleven, Articles 1116 and 1117 allow Waste Management, on its own behalf as an "investor of a Party," and on behalf of Acaverde, which is "an enterprise of another Party" owned and controlled by Waste Management, to submit to arbitration a claim that Mexico has breached an obligation under Chapter Eleven resulting in loss or damage to Waste Management.

4.4 It is clear that Mexico's challenge to Waste Management's standing is dilatory, at best. As set forth above in paragraph 2.2, Waste Management is an "investor" as defined in Article 1139 and can therefore bring a claim under Article 1116. Because Waste Management owns and controls Acaverde, it also is entitled to bring this claim on behalf of Acaverde under Article 1117. Mexico has asserted that it could find no indication that Claimant was registered as an investor in

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<sup>13</sup> NAFTA Chapter 11, Article 1115.

Mexico. As noted in paragraph 2.2, Claimant's investment in Mexico and ownership of Acaverde is through a chain of ownership. [See Exhibit E-1; Herrera Statement (Exhibit A-1), ¶ 16 (describing Waste Management's investment in Acaverde of more than eighty-four million pesos)]

**B. The Representatives Of Claimant And Acaverde Are Duly Authorized To Act On Their Companies' Behalf.**

4.5 Mexico also has questioned whether the undersigned are authorized to represent Waste Management and Acaverde. Again, this issue warrants little attention.

4.6 Both Waste Management and its Mexican subsidiary, Acaverde, have properly authorized the law firm of Baker & Botts, L.L.P. to execute any notices, correspondence and waivers and take all other reasonably necessary measures on their behalf in this arbitration.<sup>14</sup> [See Exhibit E-2] All notices, correspondence, and waivers that have been filed by these duly authorized representatives are therefore valid.

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<sup>14</sup> On July 1, 1998, the President and CEO of USA Waste Services, Inc. (now Waste Management, Inc.), Rod Proto, authorized the law firm of Baker & Botts, L.L.P. to act on behalf of USA Waste Services, Inc. and Acaverde in this arbitration proceeding. The authorization was granted by a duly authorized officer in accordance with the bylaws of USA Waste Services, Inc. This authorization and supporting documentation were provided to ICSID on July 22, 1998 and September 23, 1998. Furthermore, on December 21, 1998, John Stankiewicz, the sole administrator of Acaverde, authorized Baker & Botts, L.L.P. to act on behalf of Acaverde and confirmed Mr. Proto's authorization of Baker & Botts, L.L.P. to act on behalf of Acaverde. This authorization and supporting documentation was provided to ICSID on December 21, 1998. In addition, as of April 8, 1999, the shareholders of Acaverde provided a power of attorney to several members of the law firm of Baker & Botts, L.L.P., including Mr. Peter Moir and Mr. J. Patrick Berry, to act on Acaverde's behalf in this arbitration proceeding. Mr. J. Patrick Berry, who signed the submissions to ICSID, is a partner of Baker & Botts, L.L.P. and is authorized to act on its behalf. Mr. Peter Moir is also a partner of Baker & Botts, L.L.P. and is authorized to act on its behalf.



**C. Claimant's Article 1121 Waiver Is Valid, And Mexico Faces No Parallel Proceeding.**

4.7 Mexico also complains about the adequacy of Waste Management's Article 1121 waiver and the pendency of other proceedings. These concerns likewise provide no legal or practical basis to delay the Tribunal from proceeding to the merits of this claim.

4.8 Articles 1121(1)(b) and 1121(2)(b) require that Waste Management and Acaverde each provide to Mexico a written waiver of the

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 [of NAFTA Chapter Eleven, Section A], 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.

Both Waste Management and Acaverde provided this written waiver *verbatim* to Mexico on July 22, 1998, and Waste Management later repeated this written waiver precisely as prescribed by Article 1121.<sup>15</sup>

4.9 While Waste Management did express its "understanding" of the scope of the waiver,<sup>16</sup> Waste Management has affirmed since it first provided the waiver that, whatever the waiver means under NAFTA, Waste Management intended to give and has given it.<sup>17</sup> Waste Management

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<sup>15</sup> Claimant's Notice of Intent to Submit a Claim to Arbitration dated July 22, 1998; Claimant's Notice of Institution of Arbitration Proceedings dated September 29, 1998.

<sup>16</sup> Claimant has never "changed" its waiver, as Respondent has contended. By stating its understanding of the implication of the waiver, Claimant has done the same thing as Respondent — express an opinion. *See, e.g.*, letter from Mexico to ICSID dated August 4, 1998, ¶23 ("En opinión de Mexico, éste claramente es 'otro procedimiento de solución de controversias' amparado por el artículo 1121.")

<sup>17</sup> As the Secretary-General of ICSID noted in his January 5, 1999 letter to Respondent on this matter, Claimant's "understanding . . . did not derogate from the waiver required by NAFTA Article 1121." Letter of January 5, 1999 from Mr. Shihata to Mr. Perezcano Díaz.

has complied in full with Article 1121. Mexico is free to use the waiver whenever and however it sees fit.

4.10 Nevertheless, Respondent repeatedly has complained of alleged defects in the written waiver provided. In a letter dated November 27, 1998 to ICSID, Mexico insisted that the waiver be legalized or notarized. Nothing in NAFTA purports to impose such a requirement. In a letter addressed to the Tribunal dated July 12, 1999, Mexico claimed that the waiver did not appear to be enforceable in Mexican courts. Claimant is unaware of any proceeding in which such an issue has been raised or determined.

4.11 This Tribunal need not address the interpretation or enforceability of the waiver, an issue more appropriately heard by a Mexican court or tribunal presented with a motion to dismiss. How Mexico might use the waiver, and the scope of its effect in Mexican courts, are matters for other adjudicators on another day. The written waiver provided to Mexico is identical to that prescribed by NAFTA, which should conclude this Tribunal's consideration of Article 1121. This Tribunal should not write into NAFTA additional procedural hurdles not included by its drafters.

4.12 Respondent apparently has never attempted to use the waiver, and with good reason — there is no proceeding in which it would need to do so. Respondent complains of three proceedings Acaverde commenced in Mexico, but none of these affects the ability of this Tribunal to proceed to the merits of this claim under NAFTA.

4.13 The three domestic proceedings commenced by Acaverde were two lawsuits filed against Banobras and one arbitration initiated against Acapulco. In 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.

None of these three domestic proceedings has resulted in prejudice to Mexico. Nor did these domestic proceedings force Mexico to defend dual allegations of NAFTA violations simultaneously.

4.14 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. 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.

4.15 Acaverde had in fact initiated such domestic arbitration proceedings under that clause. [Herrera Statement (Exhibit A-1), ¶ 32] Remarkably, in November 1998, in those arbitration proceedings, and in an ancillary lawsuit instituted to block that arbitration, Acapulco argued that the arbitration clause in the Concession was null and void. [Legal brief filed by Acapulco dated November 24, 1998, (Exhibit D-56), p. 11]

4.16 None of Acapulco's legal arguments, nor any issues on the merits, however, were ever addressed in the domestic arbitration. Instead, when the Chamber of Commerce administering the arbitration requested an advance payment of 2.5 million pesos from each party as a condition of continuing the arbitration, Acaverde withdrew its claims and has not filed any other claims.<sup>18</sup>

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<sup>18</sup> See Letter dated July 7, 1999 from J. Herrera to the Mexican Chamber of Commerce (Exhibit D-57). In response to Acaverde's request, the Mexican Chamber of Commerce has returned to Acaverde its submissions in the domestic arbitration. See Letter of September 14, 1999, from J. Herrera to the Mexican Chamber of Commerce (Exhibit D-58); Herrera Statement (Exhibit A-1) ¶¶ 34-35.

4.17 The enforceability of claimant's NAFTA waiver is no longer an issue — to the extent it ever was — because of Waste Management's and Acaverde's decision not to pursue the above-mentioned proceedings. Mexico therefore has no need to use the waiver, other than as a defensive shield against future claims, none of which are contemplated by Waste Management.

4.18 Finally, were there some defect in the waiver provided, Waste Management would merely refile a revised waiver and commence these same proceedings again. Claimant intended to comply with Article 1121 and did so by adopting the language of Article 1121. 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.

## **CHAPTER FIVE**

### **MEXICO BREACHED CHAPTER ELEVEN OF NAFTA**

5.1 The very purpose of Chapter Eleven of NAFTA is to protect foreign investment. NAFTA's stated goals include the substantial increase of foreign investment and the facilitation of cross-border movement of goods and services.<sup>19</sup> Here, Mexico's conduct undermining the Acapulco Concession breached two provisions of Chapter Eleven designed to protect Claimant's rights and interests in that concession, which are "investments" explicitly protected by NAFTA.

#### **A. "Investments" Protected By NAFTA Include Waste Management's Rights In, And Anticipated Returns From, The Concession.**

5.2 NAFTA Chapter Eleven protects rights, interests and expectations emanating from concession agreements and similar arrangements for long-term economic development projects, such as the Acapulco Concession.

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<sup>19</sup> NAFTA Chapter 1, Article 102.

5.3 There is no doubt that Waste Management is an "investor," as defined by NAFTA Article 1139. An "investor" includes an enterprise that "seeks to make" or "has made" an "investment."

5.4 "Investment," in turn, also is defined broadly by means of a list of examples in Article 1139, which expressly includes concessions and the rights granted under them:

Investment means

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(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or *concessions*, . . . .

(Emphasis added.) Other definitions of "investment" listed in Article 1139 include: (1) the value of a business entity;<sup>20</sup> (2) property owned by, and resources committed to, the business;<sup>21</sup> and (3) entitlement to income owed to the business.<sup>22</sup> As defined by NAFTA, therefore, Waste Management's protected investments include income owed for services rendered under the Concession, capital committed to operations under the Concession, and the value of Acaverde as the business entity operating the Concession.

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<sup>20</sup> NAFTA Chapter 11, Article 1139(a) and (b) provide that "investment means . . . an enterprise, [or] . . . an equity security of an enterprise." An "enterprise" is defined by NAFTA as "any entity constituted or organized under applicable law, whether or not for profit . . . , including any corporation, trust, partnership, sole proprietorship, joint venture or other association." NAFTA Chapter 2, Article 201(1).

<sup>21</sup> NAFTA Chapter 11, Article 1139(g) provides that "investment means . . . real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes."

<sup>22</sup> NAFTA Chapter 11, Article 1139(e) provides that "investment means . . . an interest in an enterprise that entitles the owner to share in income or profits of the enterprise."

5.5 Waste Management also is an investor that has suffered "loss or damage," as provided in Articles 1116 and 1117. Waste Management invested more than twelve million dollars to secure long-term concession rights that included guaranteed monthly payments for fifteen years and the exclusive right over the same period to collect waste in the Concession Area from private residents and businesses for set fees. While Acaverde performed its obligations for over two years, its rights were arbitrarily ignored, then effectively revoked, and Waste Management was denied substantially all the promised return on its investment.

**B. Mexico Breached NAFTA Article 1110(1).**

**1. Mexico's Conduct Violates The Broad Prohibitions In Article 1110(1) On State Action Depriving An Investor Of Its Investment.**

5.6 NAFTA Article 1110(1) broadly prohibits the deprivation of the value of a NAFTA-protected investment:

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.

Mexico breached this prohibition by effectively revoking Waste Management's rights under the Concession.

5.7 By prohibiting direct and indirect activities, by defining "expropriation" to include any measures "tantamount to" expropriation,<sup>23</sup> and through its application to the broad term

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<sup>23</sup> A 1987 article reviews the use of the term "expropriation" and other terminology describing State action that deprives an investor of the value of an investment.

"investment," Article 1110(1) affords expansive protection to foreign investors. The use of the word "indirect" shows that Article 1110(1) prohibits "constructive" and "creeping" expropriations, terms referring to a series of acts that results in wealth deprivation, in addition to prohibiting the direct seizure of assets or cancellation of economic rights by decree.<sup>24</sup> This view has been espoused even by counsel representing Mexico during NAFTA negotiations, who described Article 1110(1) as prohibiting any "measure that substantially interferes with an investor's use of property."<sup>25</sup>

5.8 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

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Ignaz Seidl-Hohenveldern, *Semantics of Wealth Deprivation and Their Legal Significance*, 2 Foreign Investment in the Present and A New International Economic Order 218 (Dicke ed. 1987). The author concludes by noting that wealth deprivation by a State, other than a "bona fide fine or tax," is illegal under international law, and that the "word used to designate the wealth deprivation is immaterial." *Id.* at 238.

<sup>24</sup> See, e.g., Restatement (Second) of the Law of Foreign Relations of the United States, § 712 cmt. g (1986) (describing "creeping expropriation" as responsibility for "takings" not only for "avowed expropriations in which the government formally takes title to property, but also to other actions of the government that have the effect of 'taking' the property, in whole or in large part, outright or in stages"); see generally Burns H. Weston, "Constructive Takings" under International Law: A Modest Foray into the Problem of "Creeping Expropriation", 16 Va. J. Int'l L. 103 (1975).

<sup>25</sup> Richard G. Dearden, *Arbitration of Expropriation Disputes Between an Investor and the State Under the North American Free Trade Agreement*, Journal of World Trade, February 1995 at 113, 119 (opining that although some might argue that Chapter 11 should be "interpreted restrictively to mean a total taking (i.e. 100 percent) of an investor's property (real or intangible)", instead "the concept of expropriation should also include a 'constructive taking' (e.g. an unreasonable interference with the use, enjoyment or disposal of the investor's property)," and adding that "a measure that substantially interferes with an investor's use of property is clearly, directly or indirectly, 'tantamount' to an expropriation"). The byline citation in this article identifies Mr. Dearden as "one of the Canadian counsel representing the Government of Mexico during the negotiations of the North America Free Trade Agreement."

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.

5.9 Article 1131(1) provides that Waste Management's claim must be decided in accordance with NAFTA. Because the plain language of Article 1110(1) so clearly prohibits the conduct at issue here, support for Claimant's interpretation of NAFTA in international law is not necessary. Nevertheless, Claimant's construction of Article 1110(1) is supported by relevant decisions of international tribunals, the practice of States in concluding bilateral investment treaties, and prohibitions generally accepted in international law against expropriatory action.

**2. Previous International Tribunals Have Recognized State Responsibility For The Direct Or Indirect Repudiation Of A Concession.**

5.10 The plain text of Article 1110(1) prohibiting acts "tantamount to expropriation" prohibits deprivations of wealth broadly, including both the outright annulment of a concession by public decree and measures that amount to an effective repudiation of a concession. These broad protections are supported by the decisions of international tribunals discussed below.

5.11 Under international law, a State is responsible for official acts that amount to the outright annulment of the rights and interests of foreign investors.<sup>26</sup> International tribunals and

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<sup>26</sup> See, e.g., *Shufeldt Claim*, (Guatemala v. United States of America), 1 R.I.A.A. 1079, 1098; *Phelps Dodge and OPIC v. Iran*, decision of March 19, 1986, 10 Iran-U.S. Cl. Trib. Rep. 21(1987); *Liberian American Oil Co. ("LIAMCO") v. Government of the Libyan Arab Republic* (1977), 62 I.L.R. 140, 197; *Texas Overseas Petroleum Co. ("TOPCO") And California Asiatic Oil Co. v. Government of the Libyan Arab Republic* (1977), 53 I.L.R. 389, 483; *BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Republic* (1973), 53 I.L.R. 297, 329; see also *Anglo-Iranian Oil Case*, 1952 I.C.J. 83-84 (1952 I.C.J. Pleadings) (United Kingdom v. Iran) (Memorial submitted by United Kingdom), and cases cited therein; *Phillips Petroleum Co. v. Iran*,



publicists recognize that this State responsibility also arises when a government abuses its authority in order to escape an obligation undertaken in an agreement with a foreign investor. "The use of the sovereign authority of a State, contrary to the expectations of the parties, to abrogate or violate a contract with an alien, is a violation of international law."<sup>27</sup> Accordingly, under international law, State responsibility arises not only from the outright annulment of a concession, but also from interference with the underlying investment through indirect actions.<sup>28</sup>

5.12 A State is responsible, for example, for concluding agreements with third parties that effectively nullify the rights of an initial concessionaire. The tribunal in the *Aramco* case held the Saudi government responsible for granting a second agreement that effectively deprived the initial concessionaire of the exclusivity right granted in the initial concession.<sup>29</sup>

5.13 Other indirect action attributable to State authority can constitute an expropriation under international law. In the *Phillips Petroleum* decision, the Iran-U.S. Claims Tribunal noted its prior holdings "in a number of cases" that "expropriation by or attributable to a State of the property of an alien gives rise under international law to liability for compensation, *and this is so whether the expropriation is formal or de facto*."<sup>30</sup> That tribunal concluded that the claimant "was deprived of its property by conduct attributable to the Government of Iran, including

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21 Iran-U.S. Cl. Trib. Rep. 79 (1989).

<sup>27</sup> Stephen M. Schwebel, *On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law*, 3 Essays in Honour of Roberto Ago 401, 409 (1987).

<sup>28</sup> Cf. Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 Recueil des Cours 259, 324 (1982) ("[I]nterferences which significantly deprive the owner of the use of his property amount to a taking of that property").

<sup>29</sup> *Saudi Arabia v. Arabian American Oil Co. (Aramco)* (1958), 27 I.L.R. 117, 205.

<sup>30</sup> *Phillips Petroleum Co. v. Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79, par. 76 (1989).

[the National Iranian Oil Company], [which] rests on a series of concrete actions rather than any particular formal decree . . . .<sup>31</sup>

**a. The *LET*CO Decision.**

5.14 Where a State effectively revokes a concession by preventing profitable operations by the concessionaire, through measures that frustrate or undermine the purposes of the concession or that demonstrate bad faith constituting arbitrary conduct, responsibility under international law attaches. The 1986 decision resulting from the ICSID-administered arbitration *LET*CO v. Liberia<sup>32</sup> is analogous to the current case.

5.15 The *LET*CO dispute arose from the grant of a concession with terms similar to the Acapulco Concession. *LET*CO involved a twenty-year timber concession intended to be exclusive within the concession zone, an expectation that substantial early investments would be earned back over the concession period, application by the investor of state-of-the-art technology and methods, and an agreement that the fixed assets used to conduct operations under the concession would remain in the hands of the government upon the concession's natural termination.<sup>33</sup>

5.16 The government's treatment of the concessionaire in *LET*CO is also similar to the facts before this Tribunal. Shortly after *LET*CO established operations in the concession zone, the Liberian forestry agency began seeking renegotiation of the concession, much as Acapulco did beginning in early 1996 and continuing through 1997.<sup>34</sup>

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<sup>31</sup> *Id.* par. 100.

<sup>32</sup> *Liberian Eastern Timber Corporation (LET)CO v. the Government of the Republic of Liberia*, award rendered March 31, 1986, reprinted in 26 I.L.M. 647 (1987).

<sup>33</sup> *LET*CO at 19-21, 26 I.L.M. 658-59.

<sup>34</sup> See Letter from Acapulco to Acaverde dated April 6, 1996 (Exhibit D-28); Proto Statement (Exhibit A-3), ¶¶ 18-19.

5.17 The Liberian forestry agency then began alleging breaches of the concession and reduced the area in which LETCO could conduct operations.<sup>35</sup> Similarly, Acapulco allowed other waste collectors, including its own employees, to serve customers in Acaverde's exclusive territory.<sup>36</sup> The City also refused to enforce the exclusivity provision or tariff requirements,<sup>37</sup> which reduced the rates that Acaverde could charge to private residents and businesses.

5.18 LETCO challenged the government's allegations and asserted that the government's own actions had made profitable operations under the concession impossible, so that the concession was "essentially nullified."<sup>38</sup> After soliciting the assistance of higher levels of the Liberian government to no avail, LETCO ultimately was forced to abandon its operations under the concession, and commenced an ICSID-administered arbitration against the Liberian State. Acaverde took the same actions with respect to the Mexican authorities.

5.19 In evaluating the conduct of the Government of Liberia, the *LETCO* tribunal placed particular emphasis on the concession's provisions for addressing performance complaints through a mechanism requiring notice of any complaints and an opportunity to cure.<sup>39</sup> The Acapulco Concession has similar provisions.<sup>40</sup>

5.20 Emphasizing the special status of economic development agreements under international law, the *LETCO* tribunal commented that the notice and cure provisions were "logical

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<sup>35</sup> *LETCO* at 22, 26 I.L.M. 660.

<sup>36</sup> See paragraphs 3.56 to 3.58.

<sup>37</sup> See paragraph 3.59.

<sup>38</sup> *LETCO* at 22, 26 I.L.M. 660.

<sup>39</sup> *Id.* at 24-26, 26 I.L.M. 661-62.

<sup>40</sup> See paragraphs 3.35 to 3.37.

in a contract of this type," that is, "a long-term development agreement."<sup>41</sup> Such a notification procedure is a "crucial element" of such an agreement, and failure to conduct operations in accordance with that procedure "entirely nullifies [its] purpose."<sup>42</sup>

The Government grants a long-term concession to a foreign party who in turn makes extensive investments which will bear fruit over many years. The Agreement is meant to last; small or easily remedied breaches are to be notified so that the foreign party is given an opportunity to rectify the situation before losing his long-term investment. This sort of agreement has very little to do with the typical sales agreement which usually requires perfect performance. In such a contract, any small delay or imperfection in the goods may cause the purchaser to suffer substantial hardship due to the vagaries of a volatile market. A long-term development contract is not speculative in nature and is meant to last, despite an occasional lack of proper performance.<sup>43</sup>

Like the concession in *LETCO*, the Acapulco Concession was meant to last over an extended period. It specifically contemplated that minor deficiencies would be cured quickly after notice to the concessionaire, or else fines could be imposed. It also granted Acaverde thirty days to cure any fundamental problem that would authorize the City to cancel the Concession outright. As noted above, fines were never imposed on Acaverde and no notice of cancellation was ever tendered.

5.21 The Liberian government's decision to reduce the zone within which LETCO could conduct profitable operations, coupled with its failure to follow the steps prescribed by the notification procedure outlined in the concession, "had the effect of greatly reducing the concession area and of effectively rendering the investment by LETCO useless."<sup>44</sup> These actions were an

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<sup>41</sup> *LETCO* at 25, 26, I.L.M. 661.

<sup>42</sup> *Id.* at 26, 26 I.L.M. 662.

<sup>43</sup> *Id.* at 25-26, 26 I.L.M. 661-62.

<sup>44</sup> *Id.*

"effective revocation"<sup>45</sup> of the concession, contrary to its terms, in particular the terms addressing complaints of performance. The *LETCO* tribunal labeled those actions a "confiscation"<sup>46</sup> and an "expropriation,"<sup>47</sup> and proceeded to award LETCO damages for its lost investment and future profits foregone.

5.22 The Liberian government's effective revocation of the concession in *LETCO* is echoed by Mexico's conduct with respect to the Acapulco Concession. After Waste Management, through Acaverde, had invested more than twelve million dollars, and after Acaverde had begun operations under the Concession, the City refused to pay the amounts provided in the Concession.<sup>48</sup> The only complaints Acaverde received were promptly and timely cured.<sup>49</sup> When Acaverde sought payment from Banobras under the guarantee, the City conspired with Banobras, another State organ, to deny payment to Acaverde under Banobras' guarantee.<sup>50</sup>

5.23 The City consistently refused to enforce the exclusivity provision in favor of Acaverde, and affirmatively violated that provision by collecting waste with City trucks and granting permits to other collectors in the Concession Area.<sup>51</sup> The City also failed to enforce its own regulations requiring residences and businesses in the Concession Area to contract with Acaverde,

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<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 37, 26 I.L.M. 667.

<sup>47</sup> *Id.* at 44, 26 I.L.M. 671, and at 48, 26 I.L.M. 673.

<sup>48</sup> See paragraphs 3.62 to 3.64.

<sup>49</sup> See paragraphs 3.50 to 3.52.

<sup>50</sup> See paragraph 3.65.

<sup>51</sup> See paragraphs 3.56 to 3.58.

and to enforce the tariffs to which it previously had agreed.<sup>52</sup> To the contrary, the City announced that Acapulco residents were not bound by such requirements.<sup>53</sup> These actions had the same effect on Acaverde as the Liberian government's reduction of the zone in which LETCO could operate — profitable operations for Acaverde were rendered impossible.

5.24 Further, without any justification, the City prevented Acaverde from building and operating the permanent landfill by failing to provide a construction permit or sign the Gratuitous Loan Agreement.<sup>54</sup> The City never invoked the detailed provisions of the Concession requiring that Acaverde be given notice and an opportunity to cure any claimed non-performance on its part.<sup>55</sup> Rather, the City made demands for renegotiation of the Concession,<sup>56</sup> while secretly arranging for a Mexican entity to replace Acaverde's services in the Concession Area.<sup>57</sup> As in *LETCO*, the effect of these measures was to expropriate Acaverde's Concession rights, as sure as if the same result had been accomplished by official decree.

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<sup>52</sup> See paragraph 3.59.

<sup>53</sup> See paragraph 3.59.

<sup>54</sup> See paragraphs 3.66 to 3.68.

<sup>55</sup> See paragraph 3.52.

<sup>56</sup> See paragraph 3.75.

<sup>57</sup> See paragraph 3.74.

**b. The *Sapphire* Decision**

5.25 State responsibility for the effective revocation of an investors' rights under an economic development agreement also was recognized by the decision of the arbitrator in the *Sapphire* case.<sup>58</sup> *Sapphire* commenced that arbitration pursuant to a twenty-five-year agreement for petroleum exploration and production executed with the National Iranian Oil Company ("NIOC"), a state-owned corporation.

5.26 The initial agreement in the *Sapphire* case called for a two-year start-up period in which *Sapphire* would conduct geological studies in the Iranian desert, report on its plan for exploration of petroleum prospects, and commence drilling operations. *Sapphire's* ability to conduct these operations depended on the cooperation of representatives of the Iranian government and officials of NIOC. A series of difficulties in achieving basic cooperation with those authorities, and the failure of NIOC to carry out the program envisioned in the initial agreement, led *Sapphire* to abandon its operations and initiate arbitration proceedings.

5.27 NIOC was obligated under the concession agreement to collaborate with *Sapphire* and to give *Sapphire* the benefits of NIOC's familiarity with the region. NIOC's specific contractual obligations included registration of the joint company, verification of amounts expended by *Sapphire* in its preliminary exploratory work and participation on the board of the joint company.

5.28 In analyzing the development agreement in order to choose a governing law that would comport with the parties' intent, the *Sapphire* arbitrator noted the importance of the agreement's status as a long-term economic development agreement. "It must be remembered that the present agreement is fundamentally different from the usual commercial contract envisaged by the

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<sup>58</sup> *Sapphire International Petroleums Ltd. v. National Iranian Oil Co.* (1963), 35 I.L.R. 136.

traditional rules of private international law." This conclusion was based on the fact that the agreement was concluded between a foreign investor and a state-owned entity, and also that the "aim" of the agreement was

to grant Sapphire the long term exploitation of natural resources on Iranian territory, and this exploitation involves an obligation to make important investments and to establish permanent installations. It creates rights which are not merely "contractual" but are concessions giving Sapphire, for the time being, possession and, to a certain extent, control over the territory.<sup>59</sup>

These characteristics of the agreement, which necessitated implementation in accordance with principles of good faith and good will, led the arbitrator to apply to the dispute the "principles of law generally recognized by civilized nations."<sup>60</sup>

5.29 The *Sapphire* arbitrator ultimately awarded full damages, including investments lost and profits foregone, to Sapphire. This award was based on the "flagrant" behavior and attitude of the Iranian officials throughout the operation of the concession which led to its ultimate termination. "[W]hile Sapphire faithfully carried out its obligations, the defendant deliberately broke its own, by hiding behind reasons which it must have known were without validity, and was once again taking up a wholly negative attitude and failing to perform duties which were clearly defined in the agreement of the parties."<sup>61</sup> The determination of liability in the *Sapphire* arbitration was based on these factors and "[i]n addition, and this is decisive, where a foreign company agreed to take considerable risks it was a necessary condition of their activity that they should receive the proper and close collaboration of the State organ, NIOC."<sup>62</sup>

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<sup>59</sup> *Id.* at 172.

<sup>60</sup> *Id.* at 175.

<sup>61</sup> *Id.* at 181.

<sup>62</sup> *Id.* at 184.



5.30 The *Sapphire* decision exemplifies State responsibility for undermining the investor-to-government relations on which a long-term economic development agreement is based. In particular, the decision holds a State responsible for such conduct even where neither the State nor any State organ terminates the agreement outright.<sup>63</sup> The decision also shows that a State may be liable for losses suffered by an investor even where the government's actions force the investor to abandon further concession operations after the investor determines that further operations would be uneconomical and futile.<sup>64</sup>

5.31 The governmental conduct in *Sapphire*, like that in *LETCO*, is analogous to the facts before this Tribunal. Although the City's collaboration was critical to the long-term success of the Concession, the City refused to perform its obligations and affirmatively subverted the most important Concession provisions. Acapulco withheld payment without justification under the Concession, then insisted that Banobras could not pay on its guarantee without the City's consent.<sup>65</sup> Acapulco refused to provide a construction permit or Gratuitous Loan Agreement for the permanent landfill,<sup>66</sup> and trampled on the exclusivity provisions of the Concession.<sup>67</sup> In doing so, the City deprived Acaverde of the revenue stream intended by the parties to be the return on Acaverde's substantial up-front investment of capital. Despite Acaverde's repeated pleas for the City to perform its obligations under the Concession, the City refused to act in good faith, and ended up extracting over two years of service from Acaverde while paying Acaverde virtually nothing.

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<sup>63</sup> *Id.* at 185; accord *Phillips Petroleum, supra*, par. 100.

<sup>64</sup> *Id.* at 185.

<sup>65</sup> See paragraphs 3.62 to 3.65.

<sup>66</sup> See paragraphs 3.66 to 3.68.

<sup>67</sup> See paragraphs 3.56 to 3.61.

**3. Other Sources Of International Law Confirm Broad Protections Against The Repudiation Of Concession Rights And Interests.**

5.32 Other decisions and commentaries in the field of international law, as well as relevant State practice, support a finding that Mexico's conduct was an expropriation of Waste Management's vested rights under the Concession as prohibited by NAFTA Article 1110(1).

**a. Long-Term Economic Development Agreements Like The Concession Are Subject To Special Protection Under International Law.**

5.33 The Concession is a long-term economic development agreement, a type of commercial arrangement subject to special protection under international law. A State assumes greater responsibility when issuing a concession to a foreign investor that assumes the long-term participation by the foreign investor in developing the economy of the State. This State responsibility is particularly heightened when the arrangement requires a large initial investment by the foreign investor, which can be recouped only if the investor is allowed to continue economic operations in accordance with the concession agreement and for the duration of its term.

5.34 As early as 1961, Professor Robert Jennings noted "a strong body of authority" supporting the view "that certain classes of State contract such as long-term economic development agreements differ by their very nature from other State contracts and are therefore subject in some respects to different rules; and that a contract can for this or that reason be invested as it were with a specifically international character and so be placed upon a different footing from some other State contracts."<sup>68</sup>

5.35 After entering this type of contract, a State cannot disregard obligations that were integral to the original development agreement without incurring responsibility for resulting

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<sup>68</sup> Robert Y. Jennings, *State Contracts in International Law*, 37 Brit. Y.B. Int'l L. 156, 177 (1961).

damages. "[T]o decide otherwise would in fact recognize that all contractual commitments undertaken by a State have been undertaken under a purely permissive condition on its part and are therefore lacking of any legal force and any binding effect. . . . [S]uch a view would gravely harm the credibility of States since it would mean that contracts signed by them did not bind them; . . . . In law, such an outcome would go directly against the most elementary principle of good faith and for this reason it cannot be accepted."<sup>69</sup>

5.36 The importance in international law of such long-term economic development agreements is reflected in decisions such as the *LETCO* and *Sapphire* cases discussed above and the *Revere Copper and Brass* case.<sup>70</sup> *Revere* involved a claim by a U.S. investor against the Overseas Private Investment Company ("O.P.I.C."), a United States government agency, for losses caused by actions of the Government of Jamaica. The claimant made its initial investment pursuant to a twenty-five-year agreement with the government for a bauxite mining and conversion operation. The government effectively abrogated the agreement through a series of measures that the tribunal found to be expropriatory under the relevant O.P.I.C. contract. Although this holding was based on the definition of "expropriation" in the O.P.I.C. contract, it is relevant to this NAFTA arbitration because the *Revere* tribunal also examined whether such a breach would be contrary to the responsibility of States under international law.<sup>71</sup>

5.37 In evaluating this issue, the *Revere* tribunal recognized the special treatment given under international law to long-term development agreements. The tribunal found that the

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<sup>69</sup> *Texas Overseas Petroleum Co. ("TOPCO") and California Asiatic Oil Co. v. Government of the Libyan Arab Republic* par. 91 (1977), 53 I.L.R. at 495.

<sup>70</sup> *Revere Copper and Brass, Inc. v. Overseas Private Investment Corp.*, (1978), 56 I.L.R. 258.

<sup>71</sup> *Id.* at 56 I.L.R. 271.

obligation of a government not to breach such agreements must be determined not only by domestic law, but also derives from responsibility on an international level.

The reason for this is that such contracts, while not made between governments and therefore wholly international, are basically international in that they are entered into as part of a contemporary international process of economic development, particularly in the less developed countries. The very reason for their existence is that the private parties entering into such agreements and committing large amounts of capital over a long period of time require contractual guarantees for their security; governments of developing countries in turn are willing to provide such guarantees in order to promote much needed economic development.<sup>72</sup>

*Revere* described the special attributes of a long-term development agreement that give rise to obligations under public international law as (1) a long duration, (2) a broad commercial program involving construction of facilities and provision of services important to the nation or community, and (3) an intent to balance "the general interests of the Government, on the one hand, and the protection of [the investor] on the other . . . ."<sup>73</sup>

5.38 Each of these elements was present with respect to the Acapulco Concession: (1) an agreement of long duration (fifteen years) (2) to provide a broad program of services important to the community (modern waste management services in a large portion of the City that not only provided essential environmental protections but also generated significant tourist revenues to the City and Guerrero) with (3) protection of the interests of the foreign investor (through Banobras' guarantee).

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<sup>72</sup> *Id.* at 271-72; *cf.* 1 Oppenheim's International Law § 407, p. 915 (9th ed. 1996) (discussing necessity for a balance "between the legitimate interests of the territorial state and the need to protect from arbitrary action by that state those who provide the foreign capital, particularly since such capital is essential to the full development of the natural resources of many states and will not be forthcoming unless assured of reasonable protection").

<sup>73</sup> *Revere*, 56 I.L.R. at 277.

5.39 As *LETCO, Sapphire* and *Revere* confirm, it is appropriate to evaluate Waste Management's rights and interests in the Concession according to international law as applied to long-term economic development agreements. Those cases and others discussed above provide an ample basis for concluding that the conduct of the Mexican government was an illegal expropriation under accepted principles of international law as well as a breach of Article 1110(1) of NAFTA.

**b. Other Interpretations Of Language Similar Or Identical To That In Article 1110(1) Demonstrate That It Provides A Broad Prohibition.**

5.40 NAFTA is the international agreement that constitutes the law governing this dispute. A review of the language of other international agreements on foreign direct investment, however, reveals the use of language virtually identical to that in Article 1110(1), and further supports a broad reading of the prohibition in NAFTA.

5.41 A recent study published by the Organization for American States, for example, explains the meaning of language like that chosen by the NAFTA parties in adopting Article 1110(1).<sup>74</sup> That study examined the provisions of thirty-five bilateral investment treaties ("BITs") that had been signed by countries within the Western Hemisphere as of September 1995.

With respect to clauses prohibiting wealth deprivation, the authors commented that

[t]reaties use broad language and refer to either expropriation or nationalization (or to both), without differentiating between them. The most common formulation refers to "expropriation, nationalization or measures which have a similar effect." In general, the U.S. BITs refer to "expropriation or nationalization (directly or indirectly through measures tantamount to expropriation or nationalization)" . . . . *In all cases the language is broad and allows for coverage of so-called*

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<sup>74</sup> Investment Agreements in the Western Hemisphere: A Compendium, Prepared by the Trade Unit of the OAS for the FAA Working Group on Investment (1996).

*"creeping" or "indirect" expropriations, that is, measures having the same effect as expropriation or nationalization.*

(Emphasis added.)

5.42 This language, or equivalent language involving slightly different wording, but always the words "directly or indirectly," "expropriation or nationalization," and "tantamount to," has been included in BITs concluded between the United States and a number of other States. The United States often sets forth its understanding of the provisions being adopted. For example, with respect to the BIT signed with Ecuador in 1993,<sup>75</sup> just a few months before NAFTA came into effect, Secretary of State Warren Christopher explained that

Article III [of the Ecuador-U.S. BIT] incorporates into the Treaty the international law standards for expropriation and compensation. Paragraph 1 describes the general rights of investors and nationalization. These rights also apply standards to direct or indirect state measures "tantamount to expropriation or nationalization," and thus apply to "creeping expropriations" that result in a substantial deprivation of the benefit of investment without taking of the title to the investment.<sup>76</sup>

**C. Mexico Also Breached Article 1105(1) Because An Arbitrary Repudiation of A Government's Contractual Obligations Violates International Law.**

5.43 As demonstrated above, the conduct at issue here was an expropriation in breach of NAFTA Article 1110(1). The same conduct also violates NAFTA Article 1105, which provides an alternative and overlapping basis for recovery by Waste Management.

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<sup>75</sup> Treaty Concerning the Encouragement and Reciprocal Protection of Investment, August 27, 1993, U.S.-Ecuador, S. Treaty Doc. No. 103-15.

<sup>76</sup> Letter of Submittal, S/S 9320385, Warren Christopher, Department of State, September 7, 1993, *reprinted in* S. Treaty Doc. No. 103-15.

5.44 NAFTA Article 1105(1) requires Mexico to "accord to" investors "treatment in accordance with international law, including fair and equitable treatment and full protection and security." To further NAFTA's objectives of promoting cross-border investment and economic development, the "international law" which Article 1105(1) mentions must be the area of international law relevant to foreign investment. That law prohibits a State from breaching in an arbitrary manner agreements entered with an investor.

5.45 State responsibility under international law for expropriation of a concession exemplifies the protections against arbitrary breaches, because the expropriatory acts are often arbitrary as well. As described below, however, an arbitrary breach of any investor-State agreement, whether or not based on a concession, also violates international law, and therefore Article 1105(1).<sup>77</sup>

5.46 As articulated by the four-member American-Turkish Claims Settlement Commission in the *Singer Sewing Machine* case, international law is "concerned with the action authorities of a government may take with respect to contractual rights."<sup>78</sup> In *Singer*, the Ministry of War of the Turkish Government had failed to pay the balance owed for sewing machines it had earlier agreed to purchase. The Commission found the failure to pay was a violation of international law and ordered full payment of the balance of the purchase price.

If a government agrees to pay money for commodities and fails to make payment, the view may be taken that the purchase price of the commodities has been confiscated, or that the commodities have been

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<sup>77</sup> *Accord* F. A. Mann, *State Contracts and State Responsibility*, 54 *Amer. J. Int'l L.* 572, 574 (1960) (noting that repudiation of a State contract without justifying the repudiation in its own law "clearly" involves a violation of international law: "In this situation it is the arbitrary exercise of sovereign power, coupled with the disregard of the alien's legitimate interests, that constitutes internationally unlawful conduct").

<sup>78</sup> *Singer Sewing Machine Co. v. The Republic of Turkey*, The American-Turkish Claims Settlement Commission, Opinions and Report 490 (Fred K. Nielsen ed., 1937).

confiscated, or that property rights in a contract have been destroyed or confiscated.<sup>79</sup>

Because the Turkish government failed to offer any credible explanation under its municipal law for its failure to satisfy its payment obligations, the Commission ordered compensation for the unpaid balance owed to Singer.<sup>80</sup>

5.47 The rule of international law in such circumstances also was confirmed in the *Cook* decision, which resulted from a prior arbitration between a U.S. investor and Mexico.<sup>81</sup> The case involved a claim by Mr. Cook for payment from Mexico on several postal money orders he held. Mexico had argued that the money orders were issued by a governmental entity not authorized to bind the Mexican federal government. Mexico also argued that Cook's claims were barred by a statute of limitations, although Cook had requested payment before the expiration of the relevant limitations period. As in *Singer*, the arbitrators in *Cook* found none of these explanations to be credible and awarded full damages under principles of international law.<sup>82</sup>

5.48 Acapulco's and Banobras' failure to honor their obligations to pay on approved invoices closely tracks the facts in the *Singer* and *Cook* cases. The Line of Credit Agreement executed by Banobras, for example, stated unequivocally that payment was owed upon presentation

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<sup>79</sup> *Id.* at 491.

<sup>80</sup> *Id.* For a more expansive discussion by the Commission of the principles establishing the relationship between claims founded in domestic contract law and rights founded in international law, see *Hofmann and Steinhardt v. The Republic of Turkey*, *id.* at 286, 287-88 (concluding that, although contractual rights are "determined in the first instance by application of the proper domestic substantive law . . . [t]he ultimate question of international responsibility for acts of authorities with respect to contractual rights must be decided in accordance with international law," and that "in a more comprehensive treatment" of that question under international law, "effect may properly be given to legal principles with respect to confiscation").

<sup>81</sup> *Cook v. United Mexican States* (1927) 4 I.L.R. 213.

<sup>82</sup> *Id.* at 215.



of approved invoices.<sup>83</sup> Banobras in fact honored its guarantee in June 1996 for amounts owed by the City over the first four months of the year. Shortly thereafter, in September 1996, however, Banobras arbitrarily refused to honor its guarantee.<sup>84</sup> Banobras even explained to the City in a letter of November 15, 1996, that the mechanism in the Line of Credit Agreement required Banobras to pay upon presentation of approved invoices. [Letter from Banobras to Acapulco dated November 15, 1996 (Exhibit D-39)] As in *Cook*, "payment of the orders should have been made when they were presented."<sup>85</sup>

5.49 State responsibility thus arises when a State enters an agreement with a foreign investor and subsequently takes actions deemed "arbitrary." In this context, the International Court of Justice has labeled a contractual breach or repudiation as "arbitrary," and therefore violative of international law, where it is "a willful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."<sup>86</sup> The term arbitrary has also been defined by a Mexico-U.S.A. claims commission, when ruling on Mexico's liability for cancellation of a concession held by a U.S. investor based on Mexico's non-performance. The commissioners first considered a breach by a State of an agreement "in accordance with its express terms" or that makes "use . . . of a right given to it by the contract," and then contrasted such a breach with an "arbitrary act," which

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<sup>83</sup> See paragraph 3.38.

<sup>84</sup> See paragraphs 3.64 to 3.65.

<sup>85</sup> *Cook* at 216.

<sup>86</sup> Case Concerning *Eletronica Sicula S.P.A. ("ELSI")* (United States of America v. Italy), par. 128, 1989 I.C.J. 15, 76.

it described as "a violation of a duty abhorrent to the contract and which in itself might be considered as a violation of some rule or principle of international law."<sup>87</sup>

5.50 The actions taken by the Mexican government toward Acaverde cannot be explained in terms of any provision of the Concession, nor have the breaches been justified under Mexican law, nor have damages been paid pursuant to either the terms of the Concession or relevant Mexican law. With respect to monthly invoices for services rendered, the Concession provided that the City could either reject an invoice, or it would assume an obligation to pay the amount of the invoice.<sup>88</sup> For over two years, the City failed either to reject an invoice or to pay it.

5.51 Similarly, the Line of Credit Agreement, registered as a public debt of Banobras, established an unconditional obligation to pay upon presentation of approved invoices. Banobras recognized in writing the binding nature of this obligation in November 1996. Having been pressured by Acapulco and perhaps other governmental bodies, Banobras subsequently refused to continue paying on approved invoices presented, without offering any justification for that refusal under the Line of Credit Agreement or any provision of Mexican law.<sup>89</sup> The Concession provided that the City was to sign a Gratuitous Loan Agreement for the landfill site. It inexplicably failed to do so.<sup>90</sup> The Concession sets forth numerous actions the City was to take to enforce Acaverde's exclusivity rights. It failed to take those actions and the Mayor announced to the whole city that there was no exclusivity.<sup>91</sup>

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<sup>87</sup> *International Fisheries Company (U.S.A.) v. United Mexican States*, 4 R.I.A.A. 691, 699-700 (1931).

<sup>88</sup> See Concession (Exhibit B-1), Condition Eleventh.

<sup>89</sup> See paragraph 3.64.

<sup>90</sup> See paragraph 3.67.

<sup>91</sup> See paragraphs 3.56 to 3.61.

5.52 In summary, this arbitrary abrogation of Claimant's vested rights expropriated the entire value of Claimant's business enterprise under the Acapulco Concession and thereby breached Articles 1105 and 1110. Through its initial investment to improve the City's waste management infrastructure, Claimant had relied in good faith on the promises and guarantees of the Mexican government. Failing to hold Mexico accountable for these Chapter Eleven breaches will deter future investment in long-term development agreements. Foreign participation in long-term development projects requires cooperation in good faith under the type of international business ethic represented by the requirements of Chapter Eleven. To promote that ethic and to further the stated goals of NAFTA, Mexico must be held responsible here.

## **CHAPTER SIX**

### **THE APPROPRIATE STANDARD FOR COMPENSATING WASTE MANAGEMENT**

6.1 The revocation of the Concession and expropriation of Acaverde's rights under it deprived Waste Management of the value of capital it committed to Concession operations, the value of income owed to Acaverde, and the value of Acaverde as an enterprise, all of which are "investments" explicitly protected under Chapter 11 of NAFTA. Articles 1116 and 1117 allow Claimant to bring this proceeding to recover its damages and losses. The following discussion analyzes the standard of compensation designated by NAFTA as the appropriate remedy and applies that standard to the economic injury suffered by Claimant.

#### **A. Waste Management Is Entitled To Full Compensation Under NAFTA.**

6.2 NAFTA Article 1110(2) defines compensation required in connection with expropriation of an investment:

Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in

value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

This provision sets forth unequivocally the accepted standard of full compensation.<sup>92</sup>

6.3 Prior international arbitral tribunals have used the "fair market value" valuation required by NAFTA when awarding the full compensation necessary to make an investor whole. In the *Phillips Petroleum* case, the Iran-U.S. Claims Tribunal used the standard of awarding "compensation . . . in an effectively realizable form and . . . represent[ing] the full equivalent of the property taken" by awarding "compensation . . . for the 'fair market value' of the property . . . ."<sup>93</sup> The tribunals in both *LETCO* and *Sapphire*, which presented facts similar to Waste Management's claim, also awarded full compensation through a fair market value analysis of all present and future assets.<sup>94</sup>

**B. Compensation Should Be Based On The Parties' Prior Estimate Of The Value Of The Concession.**

6.4 NAFTA directs that compensation should be paid in the amount of the "fair market value" of any "investment" expropriated. The term "investment" as defined in NAFTA includes an "enterprise" itself.<sup>95</sup> For enterprises with ongoing operations and commercial agreements

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<sup>92</sup> The 1996 study compiled by the Organization of American States discussed in Chapter Five of this Memorial observed that most investment-protection treaties in the Western Hemisphere, including NAFTA, direct that compensation for expropriation should be "prompt, adequate, and effective," the accepted phrase used to denote full compensation. *Investment Agreements in the Western Hemisphere: A Compendium*, Prepared by the Trade Unit of the OAS for the FAA Working Group on Investment (1996).

<sup>93</sup> *Phillips Petroleum v. Iran*, 21 Iran-U.S. Cl. Trib. Rep. at 118-19.

<sup>94</sup> *LETCO* at 37-43, 26 I.L.M. at 667-70; *Sapphire* at 185-190.

<sup>95</sup> NAFTA Chapter 11, Article 1139(a).

on which cash flows can be calculated, compensation is owed under NAFTA for the value of that enterprise as a "going concern" as required by Article 110(2).

6.5 Here, the parties themselves expressly provided in the Concession a means of calculating the value of Acaverde as a "going concern" in the event of early termination or effective revocation by the City. The Tenth Condition of the Concession included a payment clause that applied in the case of termination by the City, or any "action or series of actions" by the City that would "prevent or hinder" Acaverde from receiving "all or any material portion of its rights and benefits" under the Concession. This clause clearly applies if the City takes action "tantamount to expropriation" as provided in NAFTA Article 1110(1).

6.6 The clause bases damages on the value of the enterprise as a going concern, rather than simply an arbitrary number, by calculating the amount owed by the City based on Acaverde's actual billings under the Concession. The formula ties its valuation to billings in the year immediately preceding the "date of expropriation," in conformance with Article 1110(2). In addition, the formula changes depending on how many years remain in the Concession at the time of the termination or effective revocation. That formula attempts to calculate the lost profits to Acaverde in the event the City effectively revokes the Concession by impeding Acaverde from receiving the benefits of the Concession. It is, therefore, a formula agreed to by Acapulco (and Banobras and Guerrero) for valuing Acaverde's rights under the Concession in the event of expropriatory actions by the City.

6.7 Based on the calculation agreed to by the parties in the Concession, the compensation owing for the City's effective revocation of the Concession is \$36,010,283.<sup>96</sup>

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<sup>96</sup> See Report of Dr. Daniel Slottje ("Slottje Report") (Exhibit C-1) ¶ 16, Table 9.

**C. In The Alternative, Claimant Is Entitled To Compensation Based On Its Lost Profits.**

6.8 If the parties had not expressly provided the method of determining Acaverde's economic damage, the alternative approach to calculating "fair market value" would be to apply the lost profits analysis recognized by international tribunals. In similar cases of expropriation of the business enterprise of a company operating a concession, "fair market value" is based on a calculation of lost profits over the expected lifetime of operations.<sup>97</sup> The sum of lost profits is discounted to present value, so that a calculation of compensation takes "the claimant's prospective net earnings over the term of the [commercial agreement] and discounts them to give their value as of the date of taking, using a discount rate that takes into account the perceived risks."<sup>98</sup>

6.9 In undertaking an analysis of future profits foregone, "it is sufficient for the Tribunal to use reasonable and consistent criteria in determining future profits."<sup>99</sup> The *Sapphire* tribunal, for example, after concluding that an accurate evaluation of the expropriated company as a "going concern" must account for lost profits, proceeded to calculate the fair market value of a company undertaking oil drilling and prospecting by using probabilities based on evidence presented by an expert geologist.<sup>100</sup> Similarly, the *LETCO* tribunal calculated lost profits using a discounted cash flow analysis that took into account the value of timber that the expropriated company likely

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<sup>97</sup> See, e.g., *American Independence Oil Co. ("Aminoil") v. Government of the State of Kuwait*, 21 I.L.M. 976, 1038 (1982) (awarding compensation by taking into account "all the elements of the undertaking," including separate appraisals of the value "of the undertaking itself as a source of profit," as well as the value of its assets).

<sup>98</sup> *Phillips Petroleum* at 123.

<sup>99</sup> *LETCO* at 42, 26 I.L.M. at 670.

<sup>100</sup> *Sapphire* at 188.

could have collected over the period of the concession, and checked these estimates against the company's ability to collect timber in areas unimpeded by government interference.<sup>101</sup>

6.10 Calculation of lost profits for Waste Management does not involve the level of speculation needed to predict lost profits for extracting mineral resources. The Concession contemplated a prescribed revenue stream from the City, including monthly adjustments based on an inflation index. Although anticipated revenues from private customers cannot be forecast precisely, they can be estimated with much higher accuracy than can prospects for petroleum extraction. The revenues depend on known factors: the number of residences and business in the Concession Area, the exclusive nature of the Concession, and the pre-determined and mandatory tariffs established in the Concession. Unlike the uncertain markets for commodities like timber and petroleum, the Concession granted Acaverde a specific market at specific prices. Acaverde's profits were intended to be collected over the life of the Concession, as compensation for a significant initial investment. Compensation for the loss of these profits is appropriate because they were "in the contemplation of both parties."<sup>102</sup>

6.11 Attached as Exhibit C-1 is the report of Dr. Daniel Slottje, the Chief Economist with KPMG, L.L.P.'s Forensic and Litigation Services practice in the Southwest Region, and Professor of Economics of Southern Methodist University in Dallas, Texas. In his report, and the supporting tables, Dr. Slottje describes his analysis of Acaverde's costs of operation and its projected revenue stream. Under his very conservative analysis, converted to U.S. dollars and reduced to present value, the "fair market value" of the enterprise that was expropriated as a result of

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<sup>101</sup> *LETCO* at 42-50, 26 I.L.M. at 670-74.

<sup>102</sup> *Shufeldt Claim*, (Guatemala v. United States of America), 1 R.I.A.A. 1079 (1928).

the City's expropriatory acts and effective revocation of the Concession is \$29,408,947. Slottje Report (Exhibit C-1), ¶ 14, Table 6.

**D. The Claimant Also Is Entitled To Compensation For Costs Resulting From The Expropriation Itself, Including Demobilization Costs And The Costs Incurred In Pursuing This Claim.**

6.12 In addition to awarding the fair market value of assets expropriated, international tribunals typically award additional costs to make an investor whole. NAFTA permits such an award,<sup>103</sup> which compensates the investor for costs it would not have incurred but for the NAFTA violation. An award of those additional costs achieves the object of "plac[ing] the party to whom they are awarded in the same pecuniary position that they would have been if the contract had been performed in the manner provided for by the parties at the time of its conclusion . . . ."<sup>104</sup>

6.13 To be placed in the same pecuniary position as if Acapulco and Banobras had honored their obligations, Waste Management is entitled to compensation for its attorneys fees and related costs. In *LETCO*, the tribunal awarded costs incurred in carrying out the arbitration and costs for legal representation.<sup>105</sup> The arbitrator in *Sapphire* similarly exercised the discretion allowed him under the applicable arbitration agreement, by imposing all attorneys fees and related costs on the Government of Iran.<sup>106</sup>

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<sup>103</sup> Article 1135 of NAFTA provides that a tribunal constituted under NAFTA may "award costs in accordance with the applicable arbitration rules." Article 59(1) of the ICSID Arbitration (Additional Facility) Rules provides that the tribunal "shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne."

<sup>104</sup> *Sapphire* at 186.

<sup>105</sup> *LETCO* at 52-53, 26 I.L.M. at 675-76.

<sup>106</sup> *Sapphire* at 190.



6.14 Aside from the costs of pursuing its remedies under this arbitration, Claimant also should recover the costs it incurred as a direct result of the expropriation itself. The panel in *LETCO* awarded expenses specifically resulting from Liberia's expropriatory acts, such as additional financial penalties, as "costs and expenses to be awarded as a result of the expropriation."<sup>107</sup> These costs include those incurred in demobilizing and wrapping up operations prematurely as a result of the revocation of the Concession.

6.15 Waste Management has incurred costs to resolve this dispute, including through arbitration before this tribunal, in excess of \$1.2 million. [Berry Statement, (Exhibit C-2)] Waste Management's costs of demobilization total \$630,600. Slottje Report (Exhibit C-1), Table 10. Waste Management is entitled to these costs.

## **CHAPTER SEVEN**

### **SUBMISSIONS**

7.1 Claimant requests that the Tribunal make the following determinations:

1. That Claimant is an investor protected by NAFTA.
2. That Claimant's investments protected under NAFTA include:
  - a. Resources committed to Acaverde's economic activity under the Concession;
  - b. Entitlement to income owed to Acaverde for services rendered under the Concession;
  - c. The value of Acaverde as an enterprise.
3. That Mexico is responsible for actions of Banobras, Guerrero, and Acapulco

that violate Chapter Eleven of NAFTA.

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<sup>107</sup> *LETCO* at 51-53, 26 I.L.M. 674-75.

4. That the actions of Banobras, Guerrero, Acapulco effectively revoked the Concession and effected a deprivation of wealth that was an expropriation of Claimant's rights in the Concession, in violation of NAFTA Article 1110.


5. That through these actions, Banobras, Guerrero, and Acapulco arbitrarily failed to comply with their material obligations under the Concession and the Line of Credit Agreement, and that, independent of whether they constituted violations of NAFTA 1110, these acts violated NAFTA Article 1105.

6. That the Government of Mexico shall pay Claimant \$36,010,283 for the fair market value of Acaverde as a going concern with rights under the Concession.

7. That the Government of Mexico shall pay Claimant \$630,600 for costs resulting from the expropriation itself.

8. That the Government of Mexico shall pay Claimant its costs incurred with respect to this proceeding, which costs currently exceed \$1,200,000.

Dated: September 29, 1999

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