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November 9, 1999

Mr. Gonzalo Flores
Secretary of the Arbitral Tribunal
International Centre for Settlement of Investment Disputes
1818 H St. N.W.
Washington, D.C. 20433

Re: ICSID Case Number ARB(AF)/98/2; Waste Management Inc. v. United Mexican States

Dear Mr. Flores:

We write to correct certain misstatements in the Counter-Memorial filed by Respondent on November 5, 1999. We also respond to the Counter-Memorial's reliance on two documents that were not in existence when Claimant's Memorial was filed. Claimant requests that this letter be forwarded immediately to the Members of the Tribunal so that they may have time to review it before November 12, 1999, the date on which they are scheduled to decide whether a preliminary hearing on the question of jurisdiction is necessary. We are now having this letter translated into Spanish and will forward the translation tomorrow.

Mexico Misrepresents the Domestic Arbitration As Ongoing

Relying on a letter not in existence when Claimant filed its Memorial,[1] Respondent asserts that "at least as a formal matter, it is not resolved whether the arbitration proceeding [instituted against the City of Acapulco in October 1998] actually has been terminated." (Counter-Memorial par. 60) Acaverde has done everything within its power to stop those proceedings, including requesting and receiving the return of all the documents submitted to the domestic tribunal and declining to pay the requisite advance fee. The domestic arbitration has been terminated.

Further demonstrating this point, Claimant today received from Acaverde's

[1] The Counter-Memorial relies on a letter from the Mexican Arbitration Commission dated September 30, 1999, the day after Claimant's Memorial was filed. The September 30 letter says that it is responding to an inquiry by from Acapulco a few days earlier. Until the Counter-Memorial was filed, Claimant had not received a copy of the September 30 letter, nor has Claimant seen the letter from Acapulco that solicited the September 30 letter.

Mexican counsel a copy of a letter from the City of Acapulco, stamped as received by a performance bond company on October 29, 1999, in which Acapulco acknowledges that the domestic arbitration "IS CONCLUDED WITHOUT ANY ALTERNATIVE FOR ACAVERDE, S.A. DE C.V., because this company requested that all of the documents attached to the initial written claim, including the claim itself, be returned, and that the arbitration proceeding be declared terminated, and the Chamber satisfied its request." (Emphasis in original.) This letter from the City of Acapulco is attached.

Respondent Omits the Context of Claimant's Communication With ICSID

By omitting its context, Respondent misrepresents a November 13, 1998 letter to ICSID from J. Patrick Berry, counsel to Claimant. (Counter-Memorial par. 68) The November 13, 1998 letter followed two previous communications. First, Claimant's September 29, 1998 Notice of Institution stated that Claimant had satisfied the requirements of NAFTA Article 1118 by efforts, over the course of more than a year, to reach a settlement with Respondent. Second, in a November 3, 1998 letter, ICSID asked about those efforts, and whether those "efforts to settle your dispute with the United Mexican States" included any pending legal proceedings. In response, Mr. Berry's November 13, 1998 letter stated that there were "no pending legal proceedings related to [Claimant's dispute with Mexico] in which the Government of the United Mexican States is a named party."

When ICSID inquired about pending litigation against Mexico, ICSID already had been informed of pending proceedings related to the Concession, namely the arbitration initiated by Acaverde against the City of Acapulco. (See October 2, 1998, letter from Respondent to ICSID.) Claimant had initiated litigation to enforce contractual rights against Banobras, but Banobras is a legal entity distinct from the State of Mexico. This distinction is highlighted by Respondent's repeated assertions that its legal counsel was not even aware of the lawsuits filed against Banobras. (See Counter-Memorial para. 63, 75) In addition, although Mexico recently has conceded its responsibility for the actions of Banobras challenged in this NAFTA proceeding (See Letter dated July 12, 1999, from Respondent to this Tribunal (Memorial Exhibit D-1)), Mexico had not previously accepted responsibility for Banobras' contractual obligations raised in the lawsuits. Most importantly, Mr. Berry's November 13, 1999 letter was accurate because, as detailed below, the court proceeding against Banobras presented issues far more limited than those addressed in the efforts to reach a settlement with the United Mexican States.

Respondent Misrepresents Previous Lawsuits As Encompassing NAFTA Claims

The central premise of the Counter-Memorial is an assumption that two lawsuits brought in Mexico against Banobras duplicate the issues presented in Claimant's NAFTA claim. This is simply not so. The Banobras lawsuits, in which Banobras was the

only defendant, were extremely limited in scope, advancing solely a claim for breach of contract with respect to Banobras' failure to pay certain invoices pursuant to its line of credit. At the time those lawsuits were filed, it was unclear whether the United Mexican States would even assume responsibility for the actions of Banobras.

In contrast to the limited claims asserted and relief sought against Banobras in Mexico, Claimant's NAFTA claim seeks recovery for a course of conduct beginning with the inducement of a $12 million investment by Waste Management in Acapulco, and followed by a series of governmental actions designed to undermine the Concession granted to Acaverde. Those actions ultimately resulted in a total expropriation of Waste Management's investment and its reasonable expectation of a substantial return on that investment over the fifteen-year term of the Concession. Claimant's allegations against Mexico in this NAFTA arbitration are based on five separate "measures" constituting violations of NAFTA, only one of which relates to non-payment under contract. (See five sets of governmental actions violating NAFTA listed in Part III.E. of Claimant's Memorial.) These other "measures" are integral to the NAFTA claim and were simply not at issue in the Banobras lawsuit. Nor did Acaverde seek to recover in the Banobras cases the vast majority of the damages sought in the NAFTA claim.

NAFTA Requires A Waiver, Nothing More

Throughout the Counter-Memorial, Respondent argues that the prior existence of the domestic proceedings against Banobras and Acaverde invalidates the waiver provided by Claimant pursuant to NAFTA Article 1121. Respondent attempts to enlarge the NAFTA waiver requirement by engrafting a new requirement that a claimant take other, unspecified actions in proceedings other than the NAFTA arbitration. NAFTA Article 1121, however, merely requires a claimant to provide the NAFTA Party respondent with a written waiver, which may be used to affect other legal proceedings. A waiver offers an affirmative defense by which a defendant may preclude a court action. To do so, the defendant—not the plaintiff—has the burden of presenting the waiver to an appropriate court.

In truth, Mexico has not used the waiver provided by Claimant because it has had no need to do so. The Mexico arbitration has been halted. The Banobras lawsuits are not duplicative of the NAFTA claim, but to the extent there is overlap, Claimant has refrained from taking further action to prosecute the claims against Banobras. Mr. Herrera's witness statement that Claimant "retain[s] the legal right to further litigate the dispute under Mexican law" (Counter-Memorial par. 60) does not contradict Claimant's stated intent not to pursue the domestic proceedings, as asserted by Respondent (Counter-Memorial par. 79), but rather supports it. Although in Mr. Herrera's legal opinion, the decisions rendered against Acaverde in Mexico do not impair the legal right of Acaverde to file further claims, Acaverde has not done so.

The question of Claimant's compliance with the NAFTA waiver requirement depends solely on whether Claimant has provided the written waiver prescribed therein. As recounted in its Memorial, Claimant has provided that waiver on several occasions, and on several occasions has affirmed that the waiver is effective to the full extent of the scope instituted by NAFTA. Claimant expressed even further confirmation of the applicability of the waiver in response to the request from the ICSID Legal Adviser. (See letter dated November 13, 1998 from Claimant to Mr. Antonio R. Parra.) That confirmation was approved by the ICSID Secretary-General before entering this arbitration into the ICSID Additional Facility Register. (See letter dated January 5, 1999 from Mr. Ibrahim F. I. Shihata to Respondent.)

Respondent Refers to an Unpublished Arbitral Decision

Finally, Respondent refers to an ICSID arbitral award in a case entitled *Azinian and Others v. The United Mexican States* and threatens Claimant with the use of that case as precedent in these proceedings, but failed to provide a copy of that award. (Counter-Memorial par. 113) Claimant has sought to obtain the cited case from ICSID and was informed that the parties in *Azinian* have not agreed to its release. It is improper for Respondent to cite the holding of an international decision that has not been made public. Accordingly, Claimant respectfully requests the Tribunal to disregard paragraph 113 of the Counter-Memorial in its entirety.

Respectfully,

Ewell E. Murphy, Jr.
B. Donovan Picard
J. Patrick Berry
Peter A. Muir
BAKER & BOTTS, L.L.P.