INTERNATIONAL CENTRE FOR THE

SETTLEMENT OF INVESTMENT DISPUTES

ADDITIONAL FACILITY

WASTE MANAGEMENT, INC.

Claimant

v.

THE GOVERNMENT OF THE UNITED MEXICAN STATES

Respondent

ICSID Case # ARB (AF)/00/3

COUNTER-MEMORIAL ON JURISDICTION

SUBMITTED BY

WASTE MANAGEMENT, INC.

Claimant

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Introduction

Waste Management, Inc. ("Waste Management") has asked this Tribunal to find that the Government of the United Mexican States ("Mexico") denied Waste Management the minimal levels of equal treatment and due process required by NAFTA and expropriated Waste Management's substantial investment in Mexico. Waste Management's claim has never been decided on its merits. In fact, Mexico has never even answered it.

Rather, when Waste Management first presented its claim in 1998, Mexico challenged the jurisdiction of the NAFTA tribunal that was constituted to hear the claim (the "1998 Tribunal"). At that time, Mexico argued that Waste Management had failed to satisfy a condition precedent to the 1998 Tribunal's jurisdiction because Waste Management had not adequately waived its right to initiate or continue local proceedings. The 1998 Tribunal agreed that Waste Management had not satisfied a condition precedent to jurisdiction, and dismissed Waste Management's claim for lack of jurisdiction.

Waste Management has now filed a new claim, and ICSID has constituted this new Tribunal. Mexico again seeks a pre-merits dismissal, arguing now that the 1998 Tribunal's dismissal for lack of jurisdiction is *res judicata*, forever barring the claim Waste Management seeks to present. Mexico further asserts that because Waste Management had previously filed claims relating to the present dispute in local Mexican tribunals, Waste Management has irrevocably elected those local remedies and is barred from ever seeking relief under Chapter 11 of NAFTA. Notably, Mexico does not argue that Waste Management has failed to deposit an effective waiver now, or that any other condition precedent to this Tribunal's jurisdiction is lacking.

Waste Management respectfully submits that its new claim is not subject to dismissal. First, the dismissal of a claim on jurisdictional grounds does not estop a claimant from refiling that claim before a tribunal with jurisdiction, and the present Tribunal has jurisdiction. International law clearly establishes that "[w]here a tribunal has merely declared itself to have no jurisdiction to entertain a suit, this does not prevent the same issue from being presented before another tribunal which may be competent." Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 337-38 (1953). None of the authorities cited by Mexico supports the application of *res judicata* to the circumstances presented here — and we are aware of no authority that would. Second, the election of remedies doctrine is inapplicable here. As the 1998 Tribunal correctly ruled, NAFTA expressly contemplates that investors may discontinue other proceedings in order to pursue relief under NAFTA. *See* NAFTA, art.1121(b) (requiring investor to waive, *inter alia*, right to "continue" pre-existing proceedings); *see generally* 40 I.L.M. 56 § 19. Mexico's contrary argument is irreconcilable with the text of NAFTA and inconsistent with general principles of international law.

Factual and Procedural Background

Prior to 1995, the Municipality of Acapulco suffered from grossly inadequate trash collection services and two open-air garbage dumps that threatened both public health and the tourist industry. Aware of its serious environmental (and potentially economic) problem, Acapulco adopted a municipal plan calling for, *inter alia*, a modern system of collection and disposal of its solid waste. After substantial negotiation, Waste Management agreed to make the significant, long-term investments necessary to meet Acapulco's needs in exchange for a fifteen-year, exclusive concession to collect and dispose of solid waste. That concession had substantial value.

Pursuant to its commitment, Waste Management (through its wholly-owned Mexican subsidiary, Acaverde) made substantial investments to establish a modern solid waste system in Acapulco. But no sooner did Waste Management invest than Acapulco began a systematic campaign of mistreatment and creeping expropriation. Ultimately, in November 1997, Acapulco wholly stripped away Acaverde's exclusive concession, and replaced Acaverde with a Mexican-owned waste collection company.

In September 1998, Waste Management requested access to ICSID's Additional Facility. In its Memorial, filed in September 1999, Waste Management provided a detailed description of the mistreatment and expropriation it had suffered. Mexico did not respond to the merits of the claim, but instead challenged the 1998 Tribunal's jurisdiction to reach the merits of the claim. Specifically, Mexico argued that because Waste Management had not discontinued its pursuit of all local remedies in Mexico before submitting its NAFTA claim to ICSID, Waste Management had violated NAFTA Article 1121. Waste Management defended the 1998 Tribunal's jurisdiction, explaining that it had provided a proper waiver, and that its waiver was not invalidated by the pendency of Mexican proceedings that presented limited breach of contract issues.

On June 2, 2000, a divided tribunal ruled that Waste Management had failed to satisfy a condition precedent to the 1998 Tribunal's jurisdiction, and dismissed Waste Management's claim without reaching its merits. The majority of the 1998 Tribunal explained that Article 1121 requires an investor to discontinue all local proceedings by no later than the date the investor submits its claim for arbitration under NAFTA (40 I.L.M. 56 § 19):

> NAFTA Article 1121, paragraph three, provides that the waiver shall be included in the submission of a claim to arbitration. . . . In light of these rules, it is evident that submission of the waiver must take place in conjunction with that of the notice . . . and that from this date it will come

> into full force and effect with regard to the commitment acquired by the waiving party to comply with all the terms thereof.
>
> In the case in point, and for the purposes hereof, WASTE MANAGEMENT submitted notice of request for arbitration . . . on 29 September 1998, so that it was from this date onwards that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals. (Emphasis added.)

The majority of the 1998 Tribunal then held that because Waste Management had local proceedings pending at the time it submitted its claim to ICSID, a condition precedent was not satisfied and, therefore, it lacked jurisdiction to decide the merits of Waste Management's claim (*id.* Part IV):

> this Arbitral Tribunal . . . lacks jurisdiction to judge the issue in dispute now brought before it, owing to breach by the Claimant of one of the requisites laid down by NAFTA Article 1121(2)(b) and deemed essential in order to proceed with submission of a claim to arbitration, namely, waiver of the right to initiate or continue . . . dispute settlement proceedings with respect to the measures taken by the Respondent that are allegedly in breach of the NAFTA.

Arbitrator Highet issued a strong and extensive dissent.

By the time the 1998 Tribunal issued its ruling, Waste Management had already discontinued any effort to obtain local relief. Accordingly, upon receipt of the 1998 Tribunal's ruling, Waste Management immediately deposited a new waiver and requested the already constituted 1998 Tribunal to proceed to the merits. On June 8, 2000, ICSID informed Waste Management that a tribunal's jurisdictional ruling "normally represents the tribunal's final disposition of the case." June 8, 2000, Letter from ICSID Secretary-General to Waste Management. Recognizing it would need to start anew, Waste Management promptly complied with all conditions precedent to a new tribunal's jurisdiction, and again requested access to ICSID's Additional Facility. ICSID granted access, and this new Tribunal was constituted. Mexico now challenges this Tribunal's jurisdiction to decide Waste Management's claim.

Legal Issues

Mexico challenges this Tribunal's jurisdiction under the doctrines of *res judicata* and election of remedies. But neither doctrine impairs this Tribunal's jurisdiction to decide this case. In fact, as explained throughout this Counter-Memorial, authorities cited by Mexico reject the application of those doctrines to the circumstances of this arbitration.

International law clearly establishes that a dismissal on jurisdictional or other procedural grounds is never *res judicata*. That well-established rule is based on the principle that a dismissal for lack of jurisdiction is not a determination of the claim, but only a refusal to hear it. Upon satisfying whatever conditions precedent to jurisdiction previously were not satisfied, a claimant is always free to proceed anew and obtain a ruling on the merits.

The election of remedies doctrine, as Mexico acknowledges, is premised on a claimant's selection of one of two mutually incompatible forms of relief. Because NAFTA expressly contemplates that investors may seek local relief before proceeding to a Chapter 11 tribunal, those two types of remedies cannot be mutually incompatible under NAFTA so long as they are properly sequenced. Here, because Waste Management terminated all local efforts before presenting its claim to this Tribunal, the pending claim complies fully with NAFTA.

Finally, NAFTA is premised on principles of fundamental fairness, and must be interpreted and applied in good faith to achieve its purposes. One of NAFTA's basic purposes is to assure fair and equal treatment of all investors, and to provide due process before an impartial tribunal when questions about fair and equal treatment arise. In this case, where Waste Management has a substantial and *bona fide* dispute about the way its investment was treated by Mexico, and where Waste Management has at all times attempted to resolve that dispute in good faith, NAFTA requires a resolution of that dispute on its merits by this Tribunal.

I. *Res Judicata* Does Not Bar This Tribunal From Deciding The Merits Of Waste Management's Claim

Mexico argues that because the Award of the 1998 Tribunal is "final and binding," this Tribunal is barred by *res judicata* from reaching the merits of Waste Management's claim. Memorial on Jurisdiction ¶ 9. The 1998 Tribunal, however, did not reach the merits of Waste Management's claim, holding only that it "lacks jurisdiction to judge the issue in dispute." 40 I.L.M. 56, Part IV. Thus, as the 1998 Tribunal explained, "it is not the mission of the Tribunal, at this stage of the proceedings, to make an in-depth analysis of alleged breaches of the NAFTA invoked by the Claimant, since that task, should it become necessary, belongs to an analysis of the merits of the question." *Id.* § 27(a). Mexico's argument — which never explains how a tribunal that lacks jurisdiction to reach the merits of a dispute can nonetheless issue a final and binding ruling on those merits — is wrong.[1]

Because the 1998 Tribunal lacked jurisdiction to reach the merits of Waste Management's claim, those merits have not been adjudicated and there can be no *res judicata* as to them. International law clearly establishes that the denial of a claim on a preliminary issue such as jurisdiction does not preclude the claimant from reasserting its claim after curing that preliminary defect. Any other rule would lead to an unjust and unreasonable result that other NAFTA tribunals have already rejected.

[1] The key to — and fundamental error in — Mexico's *res judicata* argument is contained at Paragraph 35 of its Memorial. In that paragraph, Mexico asserts that a dismissal for lack of jurisdiction "in principle, does not differ from one that resolves to reject the claim on its merits." Mexico provides no authority or reasoning for that key assertion. And, as explained in this Counter-Memorial, all of the authority and reasoning is contrary to Mexico's position.

A. International Law Recognizes That The Award Of The 1998 Tribunal Cannot Be *Res Judicata* Because That Award Was Limited To A Finding That The 1998 Tribunal Lacked Jurisdiction

Dr. Bin Cheng, whose international law treatise is relied upon by Mexico in its Memorial, explains that *res judicata* is inapplicable under international law to a dismissal for lack of jurisdiction:

> [*res judicata*] only attaches, however, to a final judgment of a competent tribunal. Where a tribunal has merely declared itself to have no jurisdiction to entertain a suit, this does not prevent the same issue from being presented before another tribunal which may be competent.

Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* 337-38 (1953). Thus, Dr. Bin Cheng readily concludes, while the decision of the Permanent Court of International Justice's decision in *Panevezys-Saldutiskis Railway Case* dismissing the action on the ground of failure to exhaust local remedies "possesses all the attributes of *res judicata* on that particular question[, it] need hardly be mentioned that, since the Court thus declined to entertain the claim, the force of *res judicata* in this instance did not affect the merits of the case." *Id.* at 355 (citing PCIJ: *Panevezys-Saldutiskis Railway Case*, A/B 76 (1939)).

Ambassador Shabtai Rosenne, whose treatise is also approvingly cited in Mexico's Memorial, echoes Dr. Bin Cheng on this point:

> even where the [preliminary] objection is upheld, so that the proceedings on the merits are terminated, the judgment in principle leaves unaffected the substantive rights of the parties on all other aspects. The scope of *res judicata* is limited to matters necessary to the determination of the preliminary question.

1 Shabtai Rosenne, *The Law and Practice of the International Court* 463 (1965). Ambassador Rosenne, in his discussion of *res judicata*, further explains that a tribunal must exercise care in defining the "scope of the binding force of a decision." *Id.* at 627 (Vol. 2). In this case, the scope of the binding force of the 1998 Tribunal's Award is limited to its finding that Waste

Management had failed, in September 1998, to satisfy a condition precedent to that tribunal's jurisdiction.[2]

Finally, the Spencer Bower treatise, which Mexico also relies upon, is equally clear:

> A decision of arbitrators that a claim was brought out of time was held to bar an action on the same claim for "the appellant's claim has been dealt with by these arbitrators." On the other hand, where an action or application has been dismissed for want of jurisdiction, there is no decision on the merits to estop the plaintiff from proceeding before a tribunal with jurisdiction. (Footnotes omitted.)

George Spencer Bower *et al.*, *Res Judicata* (3d ed. 1996) at 30.[3] Because Waste Management

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[2] Under the doctrine of issue estoppel, Waste Management might be precluded from relitigating the issue decided by the 1998 Tribunal: whether a NAFTA tribunal would have jurisdiction over Waste Management 's claim if Waste Management had failed to deposit an effective waiver and to discontinue all other dispute settlement proceedings. But Waste Management does not seek to relitigate that issue. There is no dispute that Waste Management deposited an effective waiver and discontinued all local proceedings before submitting its claim to this Tribunal. Accordingly, this Tribunal is not being asked to revisit the ruling of the 1998 Tribunal or to act as an appellate body, and issue estoppel has no application here.

[3] The Spencer Bower treatise further states, in the apparent application of issue preclusion, that "such a dismissal precludes a further claim before the tribunal which refused jurisdiction, unless jurisdiction is conferred by a later statute." *Id.* at 30. The authority cited for this statement, *Hines v. Birkbeck College and Another*, [1991] 3 W.L.R. 557, 1991 WL 837907 (CA), is instructive. The claims of the plaintiff in that case had previously been dismissed by the lower court for lack of subject matter jurisdiction. Thereafter, a statute was enacted granting the same court subject matter jurisdiction over the very type of dispute at issue in the first case. The plaintiff re-filed the identical claim in the same court. That court dismissed this second lawsuit on *res judicata* grounds. The Court of Appeals reversed, explaining: "But before you can say that there is a res judicata you must identify the res upon which an adjudication has been made. What did [the earlier court] decide? Only that before 29 July 1988 the court did not have jurisdiction. [It] did not decide that the court did not have jurisdiction after that date. Nor did [it] decide any of the issues raised in the first action. How then can the plaintiff be estopped from asserting that the court does now have jurisdiction or, by virtue of the first of *Spencer Bower and Turner's* propositions, from suing again in that court?" *Id.* In this case, not only has the previously unmet jurisdictional condition precedent now been satisfied, but Waste Management's claim has been presented to an altogether new Tribunal.

has now deposited an effective waiver, this Tribunal — unlike the different, 1998 Tribunal — has the jurisdiction to reach the merits of Waste Management's claim.

Rulings of many international tribunals, including those described below, have held that decisions on preliminary issues such as jurisdiction can never be *res judicata* as to the merits of the dispute, and confirm this Tribunal's power to reach the merits of Waste Management's claim.

1. *Williams v. Islamic Republic of Iran*

In *Williams*, the Iran-United States Claims Tribunal was presented with a claim by Mr. Williams on two letters of credit. 17 Iran-U.S. C.T.R. 269 (1998), IRAN AWARD 342-187-3 (Westlaw 1987). Before Mr. Williams' claim was decided, the identical claim was submitted to the Claims Tribunal by Mr. Williams' company, K&S Irrigation Company. *Id.* The company's claim was rejected by Chamber One of the Tribunal because it was filed after the deadline for presenting claims. *Id.* One of the defendants then argued that Mr. Williams' case must also be dismissed — on grounds of *res judicata* — because the "claim was once considered and refused by Chamber One of the Tribunal." *Id.* The Claims Tribunal rejected the defendants' argument, holding that the doctrine of *res judicata* does not apply because (*id.*):

> the present claim was timely filed. The rejected claim was refused solely on the procedural ground of late filing, without prejudice as to the merits.

Cf. Amoco International Finance Corp. v. Government of the Islamic Republic of Iran, 15 Iran-U.S.C.T.R. 189, IRAN AWARD 310-56-3 (Westlaw 1987) (explaining that "in most, if not all, legal systems" *res judicata* bars a claimant from prosecuting a claim "the merits of which have been finally determined by this Tribunal") (emphasis added); *Trail Smelter Arbitral Tribunal*, 35 Am. J. Int'l. L. 684, 701-02 (Oct. 1941) (explaining that "a decision denying jurisdiction can never constitute *res judicata* as regards the merits of the case at issue").

2. *Islamic Republic of Iran v. United States of America*

In *Iran v. United States*, the Full Claims Tribunal addressed whether the United States had violated General Principle B of the Algiers Declarations by permitting claims dismissed by the Claims Tribunal to be pursued in United States courts. IRAN AWARD 590-A15(IV) (Westlaw 1998).[4] Iran argued that "the United States has breached General Principle B by permitting cases dismissed by the Tribunal for want of jurisdiction to be revived in United States courts." *Id.* The Claims Tribunal rejected Iran's position, explaining that because the dismissal of claims on jurisdictional grounds is not a "termination of such claims," Principle B cannot reasonably be read to preclude the pursuit of claims in United States courts simply because the Claims Tribunal finds that it lacks jurisdiction to decide them. *Id.* ("termination of a claim through binding arbitration means resolution of that claim on the merits"). Thus, in *Iran v. United States*, the Claims Tribunal held that the dismissal of a claim on jurisdictional grounds could not be treated as a permanent termination or extinguishment of that claim.

3. *South West Africa Cases*

During the first phase of the *South West Africa Cases*, the International Court of Justice decided that it had jurisdiction over the dispute presented by the claimants. *See* 1966 I.C.J. 6. During the second phase of the proceedings, the Court then dismissed the claims upon finding that the claimants lacked standing. *Id.* Although the members of the Court in the second phase disagreed about the preclusive effect of the first phase decision, all agreed that the jurisdictional ruling in the first phase could not be *res judicata* as to the merits of

[4] General Principle B states that "the United States agrees to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises . . . to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration."

the dispute. The majority held that "a decision on a preliminary objection can never be preclusive of a matter appertaining to the merits" because "[w]hen preliminary objections are entered . . . the proceedings on the merits are . . . suspended." *Id.* ¶59.[5] Judge Jessup, in dissent, interpreted the preliminary ruling to have resolved the issue of the claimants' standing. Unlike the majority (*see* n.5, *supra*), Judge Jessup concluded that a decision on a preliminary issue is *res judicata* with regard to the actual issue that was decided on the preliminary objection. *Id.* § II. Significantly, however, Judge Jessup recognized the importance of properly defining the scope of the *res judicata* effect of a preliminary ruling. Viewing the majority's decision in the second phase of this case as a ruling on a preliminary or procedural issue, Judge Jessup's dissent expressly states that the dismissal "does not constitute a final binding judicial decision on the real merits of the controversy litigated in this case [but rather] rejects the Applicants' claims *in limine* and precludes itself from passing on the real merits." *Id.* § I.

4. *In the Matter of the S.S. Newchwang Claim No. 21*

In *In the Matter of the S.S. Newchwang Claim No. 21*, the American and British Claims Arbitration Tribunal had no difficulty deciding the merits of a dispute that had previously been dismissed for lack of jurisdiction. 16 Am. J. Int'l. L. 323-28 (Apr. 1922). In that case, the claim presented to the Arbitration Tribunal had previously been filed as a counter-claim before a British court, and dismissed by that court "for lack of jurisdiction." *Id.* The *S.S. Newchwang* tribunal, although faced with other questions of *res judicata*, identified no issue of *res judicata* with respect to the re-filed claim, and had no difficulty reaching its merits and ruling in favor of the claimant.

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[5] The majority also noted, without holding, that a ruling on a preliminary issue may not even have issue preclusive effect on the preliminary issued that is decided.

5. *Case Concerning the Barcelona Traction, Light and Power Company*

The Permanent Court of Internal Justice extensively analyzed and resolved the right of a claimant to re-file following a dismissal of its claim in the *Case Concerning the Barcelona Traction, Light and Power Company*. 1964 I.C.J. 6 (ruling on preliminary objections). In that case, Belgium initially presented its claim against Spain in 1958, but then informed the Court in 1961 that it wished to dismiss the claim. In an Order dated April 10, 1961, the Permanent Court issued the requested order, and dismissed the claim. One year later, in June 1962, Belgium reintroduced the identical claim and Spain objected. Even though the merits were never reached when the claim was first before the Court, Spain argued that the earlier dismissal finally disposed of Belgium's claim. The Permanent Court rejected Spain's argument. As the Court explained, Spain could have obtained the protection of *res judicata* and avoided the re-presentation of Belgium's claim by having insisted, the first time around, that the claim be decided on its merits. *Id.* at 20. As the Permanent Court explained (*id.* at 26):

> It has been argued that the first set of proceedings "exhausted" the Treaty processes in regard to the particular matters of complaint, the subject of those proceedings, and that the jurisdiction of the Court having once been invoked, and the Court having been duly seised in respect of them, the Treaty cannot be invoked a second time in order to seise the Court of the same complaints. As against this, it can be said that the Treaty processes are not in the final sense exhausted in respect of any one complaint until the case has been either prosecuted to judgment, or discontinued in circumstances involving its final renunciation . . . . If, for instance, to recall an illustration given earlier (and other instances are possible) proceedings brought under the Treaty were discontinued because it was found that local remedies had not been exhausted (and it is of course at the moment of the application to the Court that they require to be), it would be difficult to contend that (this deficiency being remedied) a new application could not be made in the case, merely because it would have to be preceded by a repetition of the Treaty processes.

The Court declined to apply *res judicata* against Belgium's reasserted claim.

Consistent with the reasoning and analysis in each of the preceding cases, Mexico's effort to apply *res judicata* should be denied. Waste Management's failure to satisfy a condition precedent to the 1998 Tribunal's jurisdiction does not impair its right to have the merits of its claim decided by this Tribunal. There is no *res judicata* because the merits of Waste Management's claim were never reached.[6]

B. Application Of *Res Judicata* Would Require This Tribunal To Reach An Unjust Result That Other NAFTA Tribunals Have Already Rejected

Mexico's argument — that the dismissal of Waste Management's claim on a preliminary, jurisdictional ground precludes Waste Management from ever reasserting that claim — not only violates well-established principles of international law, but would also lead to unreasonable results. Chapter 11 of NAFTA imposes several conditions precedent in addition to the submission of an effective waiver. Thus, Article 1118 states that the "disputing parties should first attempt to settle a claim through consultation or negotiation;" Article 1119 states that the investor "shall give to the disputing Party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted, which notice shall specify [various specified items];" Article 1120 states that the investor may submit its claim to arbitration "provided that six months have elapsed since the events giving rise to a claim." Mexico's argument, if accepted, would not only require an arbitral tribunal to dismiss the claim of an

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[6] Although this Tribunal's deliberations are governed by principles of international law, it is not surprising to note that it is also a universal principle of national law that *res judicata* will not bar the reassertion of a claim that has been dismissed on a preliminary issue such as jurisdiction. *See, e.g., Costello v. United States*, 365 U.S. 265, 285 (1961); *Hughes v. United States*, 71 U.S. 232, 237 (1866); Charles Alan Wright et al., 18 *Federal Practice and Procedure* § 4436 at 339-340 (1981); James W. Moore, 18 *Moore's Federal Practice* §131.30[3][b] (3d ed. 1997); Fed. R. Civ. P. 41(b); *Ingram v. Maclean* [1995] 128 Sask.R. 319 (Sask. C.A.); *Lloyd v. Imperial Oil Ltd.* [1999] CarswellAlta 1269 (Alta C.A.); *Habitations Louisbourg Inc.*, [1998] CarswellQue 752 (Que. C.A.); Donald Lange, *The Doctrine of Res Judicata in Canada* 147 (2000).

investor that violated any of the foregoing provisions, but would preclude that investor from complying with the condition precedent and reasserting its claim because, according to Mexico, the original dismissal would constitute *res judicata*. Two NAFTA tribunals have rejected that result.

In *Pope & Talbot, Inc. v. Government of Canada*, the State Parties argued that the claimant could not include post-filing misconduct in its claim because the claimant could not have satisfied Articles 1118 through 1120 with respect to such misconduct. In the course of rejecting this argument, the tribunal observed that even if it accepted the State Parties' argument, "it would still be open to the Investor to institute a new claim to be handled by a new tribunal." Award at 13 n.4 (Aug. 7, 2000) (copy attached at Tab 1). The NAFTA tribunal in *Ethyl Corporation v. Government of Canada* faced similar arguments by Canada: that Ethyl Corporation failed to comply with Articles 1119 and 1120 because one of the governmental acts about which Ethyl complained had not taken effect more than six months before Ethyl Corporation submitted its claim to arbitration, and Ethyl Corporation's written notice failed to reference that act. That tribunal ruled that dismissal of the claim would serve no purpose because "[i]t is not doubted that today Claimant could resubmit the very claim advanced here (subject to any scope limitation)." 38 I.L.M. 708 at ¶ 85 (1999). This Tribunal should follow the correct and just analysis in those cases, and proceed to the merits of this dispute.

II. Waste Management Is Entitled To Proceed Under NAFTA Chapter 11 After Discontinuing Local Proceedings

Anticipating the error in its *res judicata* argument, Mexico argues that even if the 1998 Tribunal's Award is not *res judicata*, the jurisdictional deficiency on which that award was based cannot be cured. According to Mexico, because Waste Management's Mexican subsidiary had previously sought relief in local Mexican proceedings, Waste Management irrevocably

elected those local fora to the exclusion of any NAFTA tribunal. Again, Mexico's argument misstates the law. First, Chapter 11 expressly authorizes a claimant that has brought local proceedings to discontinue those proceedings in favor of a NAFTA action. Second, several NAFTA tribunals — including the 1998 Tribunal — have recognized that an investor's assertion of local proceedings does not bar action under Chapter 11 so long as those local proceedings have been discontinued. Third, Mexico's argument is inconsistent with general principles of international law.

A. NAFTA Expressly Recognizes The Right Of Investors To Discontinue Local Proceedings And File A Claim Under Chapter 11

By its express terms, Article 1121 anticipates that investors like Waste Management may seek relief in the local courts of a host nation before turning for relief to an impartial NAFTA tribunal. Thus, Article 1121 states that, as a condition precedent to submitting a claim to arbitration, the investor and the enterprise must "waive their right to initiate or continue . . ., any proceedings with respect to the measure of the disputing Party that is alleged to be a breach." NAFTA, art. 1121(1)(b). For three reasons, this language clearly entitles Waste Management to bring this NAFTA proceeding after discontinuing all local damages actions.

First, Article 1121 entitles investors to proceed under NAFTA if they waive the right to "continue" local proceedings. By requiring investors to agree not to "continue" local proceedings, Article 1121 necessarily recognizes that the investor may have previously conducted local proceedings — and that those local proceedings do not disqualify the investor from proceeding under NAFTA, provided the investor waives its right to continue them. Mexico's contrary argument — that an investor that elects to proceed locally is forever barred from bringing a NAFTA arbitration — is wholly inconsistent with the inclusion of the clause "or

continue" in Article 1121.[7] Waste Management submits that this Tribunal must interpret NAFTA in accordance with this plain meaning. *See* Vienna Convention on the Law of Treaties, art. 31.

Second, Article 1121(1)(b) is written to be forward-looking. An investor may submit a claim to arbitration under NAFTA only if the investor and its enterprise "waive their right to initiate or continue" local proceedings. The waiver obligation is written in the present tense. Thus, Article 1121 does not require the investor to have previously foregone or to have previously waived its right to seek relief in local tribunals. Rather, to satisfy the condition precedent in Article 1121, the investor must, at the time it submits its claim, waive its right thenceforth.

Third, the imposition of an irrevocable election of remedies in Article 2005(6) of NAFTA demonstrates that the NAFTA Parties knew how to impose such a requirement when they intended one. Chapter 20 of NAFTA addresses the resolution of interpretive disputes between the three NAFTA Parties. Article 2005 acknowledges that some disputes might be reviewable under either NAFTA or the General Agreement on Tariffs and Trade ("GATT"). To avoid multiple proceedings, Article 2005(6) subjects the Parties to an irrevocable election of remedies. Unlike Article 1121, Article 2005(6) reads: "Once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a

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[7] In paragraph 107 of its Memorial, Mexico seems to concede this point, stating, "once a proceeding provided in Chapter Eleven of the NAFTA is triggered, Article 1121 of the treaty expressly prohibits concurrently bringing any claims for damages before a Chapter Eleven tribunal and before Mexican tribunals, or by any other means of dispute resolution." (Emphasis added.) Of course, "a proceeding provided in Chapter Eleven of the NAFTA" is a NAFTA arbitration. Notably, there is absolutely nothing in Chapter 11 that requires an investor, upon bringing a proceeding in a local tribunal, to waive its right to proceed under NAFTA.

request pursuant to paragraph 3 or 4." Had the NAFTA Parties intended for an investor's filing of a local proceeding to preclude the investor's subsequent presentation of a claim under NAFTA, the NAFTA Parties would have expressly said so — as they did in Article 2005(6).

B. Other NAFTA Tribunals, Including The 1998 Tribunal, Have Recognized That An Investor May — And Perhaps Should — Seek Local Remedies Before Proceeding Under NAFTA Chapter 11

Throughout its decision, the 1998 Tribunal recognized that Waste Management's pursuit of local remedies before submitting its notice of request for arbitration under NAFTA was perfectly appropriate. In its Award, the 1998 Tribunal unambiguously explained (40 I.L.M. 56 § 19):

> NAFTA Article 1121, paragraph three, provides that the waiver shall be included in the submission of a claim to arbitration. . . . In light of these rules, it is evident that submission of the waiver must take place in conjunction with that of the notice . . . and that from this date it will come into full force and effect with regard to the commitment acquired by the waiving party to comply with all the terms thereof.
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> In the case in point, and for the purposes hereof, WASTE MANAGEMENT submitted notice of request for arbitration . . . on 29 September 1998, so that it was from this date onwards that the Claimant was thus obliged, in accordance with the waiver tendered, to abstain from initiating or continuing any proceedings before other courts or tribunals. (Emphasis added.)

See also id. § 24 (explaining that the "abdication of rights [to initiate or continue] ought to have been made effective as from the date of submission of the waiver, namely 29 September 1998"); *id.* § 27 (explaining that when proceedings in a local forum and under NAFTA "have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the Claimant may obtain the double benefit in its claim for damages") (emphasis added); *cf. id.* § 15 (explaining that Mexico, not Waste Management, bears the burden of pleading waiver before local tribunals in which proceedings were pending and thereby

recognizing that pre-existence of local proceedings is not fatal to NAFTA arbitration).[8] As a matter of issue preclusion, Mexico is bound by this portion of the 1998 Tribunal's holding, which clearly interprets Article 1121 to permit Waste Management to have pursued local remedies prior to filing its notice of request for arbitration under NAFTA.[9]

The 1998 Tribunal was not the first NAFTA tribunal to conclude that Article 1121 anticipates prior resort to local proceedings. The tribunal in *Azinian v. United Mexican States* recognized that NAFTA tribunals not only may — but perhaps should — be the forum of last resort. 39 I.L.M. 537 (2000). In *Azinian*, the claimants sought relief in the Mexican administrative and judicial system for an alleged expropriation of a concession. Only after losing in the Federal Circuit Court did the claimants proceed under NAFTA with a waiver of their rights to "'further court or administrative proceedings regarding this claim.'" *Id.* ¶¶ 23, 24 & 36 (emphasis added). In the course of explaining that the claimants' earlier resort to the Mexican courts had no preclusive effect on the NAFTA arbitration, the *Azinian* Tribunal explained (*id.* ¶ 86):

> Although the parties to the Concession Contract accepted the jurisdiction of the Mexican courts, the Claimants correctly point out that they did not exclude recourse to other courts or arbitral tribunals — such as this one — having jurisdiction on another foundation. Nor is the fact that the Claimants took the initiative before the Mexican courts fatal to the jurisdiction of the present Arbitral Tribunal. The Claimants have cited a

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[8] Although Mexico asserts (at Paragraph 90 of its Memorial to this Tribunal) that the 1998 Tribunal held that Waste Management's "election in favor of its Mexican domestic rights was irrevocable, and that decision is res judicata", the excerpts that Mexico quotes from the 1998 Tribunal's Award do not support that assertion.

[9] Mexico should be judicially estopped from asserting its current position. Before the 1998 Tribunal, Mexico expressly recognized that "Article 1121 forces a would-be claimant to decide at the time that it invokes the NAFTA arbitral process to forego or discontinue domestic proceedings for damages." Counter-Memorial Regarding the Competence of the Tribunal, ¶ 97 (emphasis added). Having succeeded before the 1998 Tribunal, Mexico is not free to reject the legal positions on which it relied.

> number of cases where international arbitral tribunals did not consider themselves bound by decisions of national courts. Professor [ ] in his oral argument, stressed the following sentence from the well-known ICSID case of *Amco v. Indonesia*: "An international tribunal is not bound to follow the result of a national court." As the Claimants argue persuasively, it would be unfortunate if potential claimants under NAFTA were dissuaded from seeking relief under domestic law from national courts, because such actions might have the salutary effect of resolving the dispute without resorting to investor-state arbitration under NAFTA. (Emphasis added.)[10]

The decisions of the 1998 Tribunal and the *Azinian* Tribunal on this issue not only follow the plain meaning of Article 1121, but are reasonable. There are many reasons why investors might seek relief in local tribunals before presenting a claim under NAFTA. Where, for example, a NAFTA Party engages in a creeping expropriation, the investor might seek local relief for each incremental violation, none of which by itself might constitute an expropriation. Only when those incremental violations have added up to an expropriation is the investor permitted to seek relief under Article 1110 of NAFTA. It would defeat the purpose of Chapter 11 to deny such investors the equal treatment and due process of a NAFTA tribunal guaranteed by Article 1115. *See* NAFTA, art. 1115 (explaining that purpose of Chapter 11 is to "assure[] both equal treatment among investors . . . and due process before an impartial tribunal").

C. Mexico's Argument Violates Accepted Principles Of International Law

Mexico asserts, without any explanation or analysis, that local proceedings and NAFTA proceedings are "mutually incompatible," and that once "the litigation proceeds, that [investor's] election is irrevocable." Memorial ¶ 101. Mexico points to the general election of remedies principles found in the national laws of the United States, Mexico and Canada to

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[10] Notably, Mexico does not appear to have presented in *Azinian* the argument that it now asserts: *i.e.*, that a claimant's decision to pursue relief in a local proceeding forever forecloses its access to an impartial NAFTA tribunal. *See id.*

support this argument. The transparent flaw in Mexico's analysis is the unsupported — and wrong — assertion that local proceedings and NAFTA proceedings are "mutually incompatible." In fact, as described above, NAFTA anticipates that local proceedings will be pursued, and only requires them to be discontinued in order for the investor to proceed under NAFTA Thus, as the 1998 Tribunal has already held, Article 1121 merely requires an investor to waive — prospectively — all local remedies in order to proceed under NAFTA.

Mexico's assumption that local proceedings and NAFTA proceedings are mutually incompatible is not only inconsistent with the provisions of NAFTA, but it is also inconsistent with accepted principles of international law. NAFTA's respect for efforts at local dispute resolution follows the international law principle of encouraging disputants to exhaust local remedies before bringing an international proceeding against a State. *See, e.g., Amco v. Indonesia*, 1 ICSID Rep. 377, Decision on the Application for Annulment ¶¶ 62, 63 (May 16, 1986) (discussing the "general international law rule on exhaustion of local remedies"). Mexico's exclusive reliance on supposed election of remedies principles in the United States, Mexico and Canada is misplaced because NAFTA disputes are governed by NAFTA and applicable rules of international law. NAFTA art. 1131(1); *see also* Memorial ¶ 29 (arguing that Article 1131 requires "this Tribunal to decide the controversy in accordance with the NAFTA and applicable rules of international law").[11]

[11] Mexico's description of national law is not accurate. We are aware of no bar on seeking relief in multiple fora. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974) (holding that discharged employee entitled to seek relief for his discharge through both (i) arbitration of his contractual rights to continued employment and (ii) litigation of his statutory rights not to be discriminated against by his employer); *R. (M.) v. R. (M.L.)* [1998] 26 A.R. 295 (Alta Q.B.); *Lifeview Emergency Servs., Ltd. v. Alberta Ambulance Operators' Ass'n* [1995] 101 F.T.R. 43 (Fed.T.D.).

There was nothing legally or factually inconsistent about Waste Management's having proceeded in local Mexican tribunals on particular contract claims before presenting its unfair treatment and expropriation claims to this NAFTA Tribunal. To the contrary, both NAFTA and general principles of international law recognize the propriety of Waste Management's course of action.

III. Principles Of Fundamental Fairness Underlying Chapter 11 Require Denial Of Mexico's Motion To Dismiss Waste Management's Claim

International agreements, such as NAFTA, must be interpreted and applied "in good faith . . . and in the light of [their] object and purpose." Vienna Convention on the Law of Treaties, art. 31. Among NAFTA's most basic objectives is to provide "effective procedures . . . for the resolution of disputes." NAFTA, art. 102(1)(e). This fundamental objective is supported by Article 1115, which explains that the dispute settlement procedures contained in Chapter 11 are intended to "assure[] both equal treatment among investors of the Parties . . . and due process before an impartial tribunal." NAFTA, art. 1115. NAFTA must be interpreted and applied in light of these objectives. *See* NAFTA art. 102(2).

The good faith application of NAFTA in light of its objects and purposes requires this Tribunal to reject Mexico's jurisdictional challenge. Waste Management has a serious, substantial and *bona fide* dispute concerning the manner in which Mexico treated its investment. Waste Management has sought to resolve that dispute in utmost good faith. *See* text at 3-5, *supra*; 40 I.L.M. 56 ¶31 ("there being no evidence of recklessness or bad faith on the Claimant's part"). Unfortunately, Waste Management's good faith interpretation of Article 1121 led it to take steps that a majority of the 1998 Tribunal found to violate a condition precedent to NAFTA arbitration. Compounding Waste Management's misfortune, the majority of the 1998 Tribunal departed from the earlier rulings of NAFTA tribunals in *Ethyl* and *Azinian,* and found that the

omission of a condition precedent to arbitration was jurisdictional and compelled dismissal of Waste Management's claim. Waste Management accepted the 1998 Tribunal's ruling in good faith, promptly took corrective action, and presented its claim to a new Tribunal.

Mexico now seeks to take advantage of Waste Management's innocent missteps, and to bar it from ever obtaining fair and equal treatment before an impartial tribunal. For the reasons stated above, Mexico's arguments are entirely unfounded and Waste Management's claim is properly before this Tribunal. A good faith interpretation and application of NAFTA in light of its worthy objectives requires that this Tribunal reject Mexico's jurisdictional challenge and proceed to address Waste Management's claim on its merits.

Conclusion

For the foregoing reasons, Waste Management respectfully requests that this Tribunal deny Mexico's challenge to this Tribunal's jurisdiction and promptly schedule further proceedings on the merits.

Respectfully submitted,

BAKER BOTTS L.L.P.

By: _____

Jay C. Alexander
Richard C. King
Lorena Perez
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 639-7747

Attorneys for Claimant
Waste Management, Inc.

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