International Decision: *Waste Management, Inc. v. Mexico*

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Author: William S. Dodge
Source: American Journal of International Law
Citation: 95 Am. J. Int'l L 186 (2001).
Title: International Decision: Waste Management, Inc. v. Mexico

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On September 29, 1998, Waste Management, Inc., submitted a claim to arbitration in connection with a concession agreement between its subsidiary, Acaverde S.A. de C.V. (Acaverde), and the City Council of Acapulco. Waste Management alleged that Mexico had breached the provisions of Chapter 11 of the North American Free Trade Agreement (NAFTA) regarding expropriation and minimum standard of treatment. Along with its claim, Waste Management submitted a waiver of rights to initiate or continue other legal proceedings, which is required by NAFTA Article 1121. Waste Management expressed its understanding that the waiver did not apply to claims under Mexico’s municipal law. After the waiver was filed, Acaverde continued to prosecute two suits against a state-owned bank and initiated an arbitral proceeding against the City Council of Acapulco for breaches of contract under Mexican law. The Arbitral Tribunal (Tribunal) held that Chapter 11 requires a claimant to waive other legal proceedings challenging any measure alleged to violate NAFTA, and that although Waste Management’s waiver was formally sufficient, Acaverde’s subsequent conduct rendered the waiver invalid. The Tribunal concluded that it therefore lacked jurisdiction.

The concession agreement between Acaverde and the City Council of Acapulco was guaranteed by a state-owned bank, Banco Nacional de Obras y Servicios Públicos (Banobras). When Acapulco and Banobras failed to pay invoices for services under the agreement, Acaverde brought two suits against Banobras in Mexican court for breach of contract. Waste Management was evidently reluctant to give up these domestic remedies when it filed its Chapter 11 claim. The first waiver it submitted to the secretary-general of the International Centre for the Settlement of Investment Disputes (ICSID) on July 22, 1998, stated explicitly that “[t]his waiver does not apply...to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by other sources of law, including the municipal law of Mexico.” After some correspondence with ICSID, Waste Management sent a second waiver with the submission of its claim to arbitration on September 29, 1998. This waiver stated:

Without derogating from the waiver required by NAFTA Article 1121, Claimants here set forth their understanding that the above waiver does not apply to any dispute settlement proceedings involving allegations that Respondent has violated duties imposed by sources of law other than Chapter Eleven of NAFTA, including the municipal laws of Mexico.


2 See Waste Management, Inc. v. Mexico (NAFTA Ch. 11 Arb. Trib., June 2, 2000), 15 ICSID REV. FOREIGN INVESTMENT L.J. 214, 239 (2000) [hereinafter Award], obtained from <http://www.worldbank.org/icsid/cases/awards.htm>. Bernardo M. Cremades (president) and Eduardo Siqueiros T. constituted the majority. The late Keith Highet dissented. The online version of the Award, including the dissenting opinion, id. at 241–270 [hereinafter Highet dissent], has the same pagination as the version at 15 ICSID REV. FOREIGN INVESTMENT L.J. 214.

3 See Award, supra note 2, at 232–33. The two suits were filed on January 31, 1997, and August 11, 1998. See id.

4 Id. at 219. This waiver was sent with Waste Management’s notice of intent to submit a claim, which NAFTA Article 1119 requires a claimant to file at least 90 days prior to submitting a claim to arbitration. Waste Management was not required to file a waiver, however, until its claim was actually submitted to arbitration. See NAFTA, supra note 1, Art. 1121(3), 32 ILM at 643.

5 See Award, supra note 2, at 219–21. In section 5, the Award mistakenly refers to the claim as having been submitted in 1999 rather than 1998.

6 Id. at 221.
Acaverde continued to prosecute its two suits against Banobras and, on October 27, 1998, also initiated an arbitration against the City Council of Acapulco before the City of Mexico Chamber of Commerce Permanent Arbitration Committee claiming damages for non-payment of the invoices under Mexican law.\(^7\)

The Tribunal began its analysis by reading Article 1121 to require a waiver strictly in accordance with its terms.\(^8\) The Tribunal reasoned that its jurisdiction depended on the consent of the parties to arbitration and that, because Mexico had consented under Article 1122 "to arbitration in accordance with the procedures set out in this Agreement,"\(^9\) fulfillment of Article 1121's conditions precedent for arbitration required "the utmost attention."\(^{10}\) "Any waiver must be clear, explicit and categorical, it being improper to deduce same from expressions the meaning of which is at all dubious."\(^{11}\) Article 1121 (3) provides that the "consent and waiver required by this Article shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration."\(^{12}\) The Tribunal characterized these formal requirements as ad substantiam, so that a waiver that failed to comply with them would "not exist as such."\(^{13}\) The Tribunal concluded, however, that Waste Management's waiver was free from such formal defects and rejected Mexico's attempt to add an additional requirement of notarization to those set forth in Article 1121 (3).\(^{14}\)

The Tribunal also rejected Mexico's argument that the Tribunal was obliged "to ensure that the disputing investors will make their waiver effective before every tribunal or in any judicial or administrative proceeding," noting that the Tribunal "lacks the necessary authority to bar the Claimant from initiating other proceedings in fora other than the present one."\(^{15}\) Critically, however, the Tribunal was willing to review Waste Management's postwaiver conduct. The Tribunal reasoned that

the act of waiver involves a declaration of intent by the issuing party, which logically entails a certain conduct in line with the statement issued.

... Hence, in order for said intent to assume legal significance, it is not sufficient for it to exist internally. Instead, it must be voiced or made manifest, in the case in point by means of a written text and specific conduct on the part of the waiving party in line with the declaration made.\(^{16}\)

\(^{7}\) See id. at 232–33. Acaverde’s suits against Banobras were dismissed in January 1999, and its appeals were unsuccessful. Acaverde abandoned its arbitration against Acapulco on July 7, 1999. Id.

\(^{8}\) NAFTA Article 1121 (1), entitled “Conditions Precedent to Submission of a Claim to Arbitration,” provides in relevant part:

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

Article 1121 (2) requires the same waiver for claims under Article 1117 on behalf of an enterprise that the investor owns or controls.

\(^{9}\) NAFTA, supra note 1, Art. 1122 (1), 32 ILM at 644.

\(^{10}\) Award, supra note 2, at 228; see id. at 227–28. The Arbitral Tribunal (Tribunal) also noted that Article 1121 provides for the submission of a claim "only if" the proper waiver is filed. See id. at 227.

\(^{11}\) Id. at 229.

\(^{12}\) NAFTA, supra note 1, Art. 1121 (3), 32 ILM at 643.

\(^{13}\) Award, supra note 2, at 230; see id. at 230–31. Consistent with this position, the Tribunal also concluded that "submission of the waiver must take place in conjunction with" the submission of the claim to arbitration. Id. at 229.

\(^{14}\) See id. at 231. This argument suggests that the reason Mexico did not use the waiver to seek dismissal of Acaverde's two suits against Banobras was that the waiver, absent the requisite formalities, would not have been deemed sufficient in a Mexican court.

\(^{15}\) Id. at 227.

\(^{16}\) Id. at 231–32.
The Tribunal read Article 1121 to require Waste Management and Acaverde not simply to avoid invoking NAFTA in other fora, but to forgo domestic law claims based on the same measures.\footnote{See id. at 233–38. The Tribunal assumed that the purpose of requiring such a waiver was to avoid the possibility that a claimant might recover twice for the same damages—once in a domestic forum and once before a Chapter 11 tribunal. See id. at 235–36.}

The domestic proceedings initiated by ACAVERDE fall within the prohibition of NAFTA Art. 1121 in that they refer to measures that are also invoked in the present arbitral proceedings as breaches of NAFTA provisions, namely non-compliance with the obligations of guarantor assumed under a line of credit agreement requiring BANOBRAS to defray invoices not paid by ACAPULCO city council, and non-compliance by ACAPULCO city council through its failure to pay said invoices.\footnote{Id. at 236.}

The Tribunal concluded that it could not “deem as valid the waiver tendered by the Claimant in its submission of the claim to arbitration, in view of its having been drawn up with additional interpretations, which have failed to translate as the effective abdication of rights mandated by the waiver,” and dismissed the claim for lack of jurisdiction.\footnote{Id. at 239.}

In dissent, the late Keith Highet disagreed with the Tribunal’s understanding of the word “measure” in Article 1121. While he acknowledged that NAFTA’s definition of “measure” is broad,\footnote{Highet dissent, supra note 2, at 246.} he argued that Article 1121 uses that word in a more limited sense.\footnote{Id. at 247.}

The reference in Article 1121 is to a State act that is itself a breach of international obligations under NAFTA. Article 1121 cannot be read as applying to local components of such an act which are not themselves breaches of international obligations at the international treaty level and which would not be actionable under NAFTA.\footnote{Id. at 253.}

In Highet’s view, the purpose of Article 1121 was not to bar local remedies for related commercial claims, but to protect the NAFTA parties from “parallel actions in their own judicial systems that would raise NAFTA claims.”\footnote{See Highet dissent, supra note 2, at 245–46; NAFTA, supra note 1, Art. 201, 32 ILM at 298 (“measure includes any law, regulation, procedure, requirement or practice”).} He read Article 1121 as providing “the same kind of protection” as Annex 1120.1, which bars investors from alleging a breach of Chapter 11 both in arbitration and before a Mexican court.\footnote{Id. at 258. See NAFTA, supra note 1, Annex 1120.1, 32 ILM at 648 (“an investor of another Party may not allege that Mexico has breached an obligation under NAFTA both in an arbitration under this Section and in proceedings before a Mexican court or administrative tribunal”).} Highet also noted that “it would be an extreme price to pay in order to engage in NAFTA arbitration for a NAFTA claimant to be forced to abandon all local remedies relating to commercial law recoveries that could have some bearing on its NAFTA claim.”\footnote{Highet dissent, supra note 2, at 260.} Because nonpayment of invoices is not itself a violation of Chapter 11,\footnote{See id. at 247.} he reasoned that Waste Management and Acaverde were not required to forgo alternative remedies under Mexican law for such nonpayment.

Highet’s position on the appropriateness of a Chapter 11 tribunal reviewing the claimant’s postwaiver conduct is not entirely clear. At one point in his dissent, he seemed to agree with the majority, stating that “[i]f the Article 1121 waiver had been intended to cover any and all concurrent legal activity, then clearly Claimant’s course of conduct in Mexico would be inconsistent with it and would vitiate the waiver.”\footnote{Id. at 253.} Later, however, he criticized the majority for...
"read[ing] into the text of Article 1121 the additional requirement that litigations subject to the waiver be affirmatively withdrawn." He noted that "[i]t is hard to find fault" with Waste Management's argument "that, once the waiver had been prepared and delivered . . . , it was up to Respondent to use it as it saw fit." In the end, relying on the award on jurisdiction in *Ethyl Corporation v. Canada*, Highet took the position that a claimant's postwaiver conduct should be reviewed by a Chapter 11 tribunal, but as a matter of admissibility rather than jurisdiction. The proper remedy for conduct inconsistent with the waiver, he suggested, would be to disallow that portion of the claim that had also been raised in the domestic proceedings, not to dismiss the entire claim for want of jurisdiction.

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This case raises two specific questions concerning the proper relationship between national courts and Chapter 11 arbitration. First, as a precondition to bringing a claim before a Chapter 11 tribunal, is an investor required to waive its right to alternative legal proceedings only with respect to its NAFTA claims or also with respect to claims for damages under domestic law? Second, who should monitor the claimant's postwaiver conduct: the Chapter 11 tribunal or national courts?

On the first question, the Tribunal is clearly correct in concluding that Article 1121 requires a waiver of the right to seek damages in other fora for violations of both NAFTA and domestic law. The text of Article 1121 focuses not on whether the legal basis for the proceedings under NAFTA and domestic law is the same, but on whether the same measure is being challenged. It requires an investor to waive its "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]." Furthermore, Highet's interpretation of Article 1121 as requiring a waiver only of claims based on NAFTA would make the waiver requirement redundant. As the dissent itself acknowledges, Annex 1120.1 already protects Mexico against an investor claiming violations of NAFTA both in domestic courts and before a Chapter 11 tribunal. Canada and the United States enjoy similar protection because their implementing legislation effectively prohibits private parties from raising NAFTA violations in their courts at all.

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27 Id. at 256.
28 Id. Highet also faulted the Tribunal for looking to Waste Management's postwaiver litigation to eviscerate the waiver while ignoring its subsequent abandonment of those suits. See id. at 263 ("[E]ven if the substance of the Article 1121 waiver had been—as the majority of the Tribunal believes—eviscerated in 1998 or 1999, why was that substance not restored . . . later in 1999 or in January 2000?"). Acaverde abandoned its litigation against Banobras, however, only after exhausting its appeals. See Award, supra note 2, at 233. Acaverde did abandon the domestic arbitration against the City Council of Acapulco in July 1999, see id., although the arbitral tribunal never formally declared the proceeding closed, see id. at 258.
30 See Highet dissent, supra note 2, at 264–68.
31 See id. at 267.
33 Article 1121 expressly permits a claimant to seek damages from a Chapter 11 tribunal and simultaneously or subsequently to seek declaratory or injunctive relief in domestic court—relief that Chapter 11 tribunals are not capable of granting. See NAFTA, supra note 1, Art. 1125, 32 ILM at 646.
34 Id., Art. 1121(1), (2), 32 ILM at 643 (emphasis added).
35 See Highet dissent, supra note 2, at 258.
36 See North American Free Trade Agreement Implementation Act, 19 U.S.C. §3312(c)(2) (1994) ("No person other than the United States . . . may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political
require that an investor, contrary to what Highet suggests, completely abandon its local remedies in order to pursue a Chapter 11 claim. An investor is free to pursue local remedies for up to three years before it submits a claim to NAFTA arbitration.8

The Tribunal’s conclusion that it ought to monitor the claimant’s postwaiver conduct is more questionable. The text of Article 1121 simply requires that a waiver “shall be in writing, shall be delivered to the disputing Party and shall be included in the submission of a claim to arbitration.”39 As Highet observed, it is hard to find fault with Waste Management’s position that it was up to Mexico to raise the waiver as a defense in the other proceedings.40 Moreover, the Tribunal’s decision to dismiss for lack of jurisdiction may have little practical effect. Waste Management was free to refile its Chapter 11 claim within three years of the breach and resulting loss,41 and it did so on September 27, 2000.42

By grafting onto Article 1121 a requirement that a claimant affirmatively discontinue other legal proceedings, the Tribunal seems to have departed from its position that a Chapter 11 tribunal must adhere strictly to NAFTA’s text. This inconsistency, however, is ultimately less troubling than the inconsistency between Waste Management and other Chapter 11 awards, specifically those in Ethyl Corp. v. Canada43 and Pope & Talbot, Inc. v. Canada.44 Where the Tribunal in Waste Management stressed that compliance with Article 1121 required “the utmost attention”45 and that a waiver that did not meet the formal requirements of Article 1121(3) would “not exist as such,”46 the Ethyl tribunal expressly rejected any notion that Chapter 11’s procedural requirements should be interpreted “strictly.”47 Where Waste Management held that “submission of the waiver must take place in conjunction with” the submission of the claim to arbitration,48 both Ethyl and Pope & Talbot allowed claimants to submit waivers later.49 Where Waste Management said that “any waiver must be clear, explicit and categorical, it being improper to deduce same from expressions the meaning of which

subdivision of a State on the ground that such action or inaction is inconsistent with [NAFTA . . . .]; North American Free Trade Agreement Implementation Act, R.S.C., ch. 44, §6(2) (1993) (Can.) (“Subject to Section B of Chapter Eleven of the Agreement, no person has any cause of action and no proceeding of any kind shall be taken, without the consent of the Attorney General of Canada, to enforce or determine any right or obligation that is claimed or arises solely under or by virtue of the Agreement.”).

37 See Highet dissent, supra note 2, at 260.
38 Indeed, I have argued that Article 1121 is structured to encourage investors to pursue local remedies before resorting to Chapter 11. See Dodge, supra note 32, at 381–83. Of course, an investor who does pursue its domestic remedies before turning to Chapter 11 runs the risk that the Chapter 11 tribunal will treat the domestic decision as res judicata. See, e.g., Azinian v. Mexico, Merits, Award (NAFTA Ch. 11 Arb. Trib., Nov. 1, 1999), reprinted in 39 ILM 537 (2000), obtainable from <http://www.worldbank.org/icisid/cases/awards.htm>. For further discussion of res judicata in the context of Chapter 11, see Dodge, supra note 32, at 376–83.
39 NAFTA, supra note 1, Art. 1121(3), 32 ILM at 643.
40 See supra note 28 and accompanying text.
41 See NAFTA, supra note 1, Arts. 1116(2), 1117(2).
43 Ethyl arbitration, supra note 29.
44 Pope & Talbot, Inc. v. Canada, Award in Relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record (the “Harmac Motion”) [NAFTA Ch. 11 Arb. Trib., Feb. 24, 2000), 23 HASTINGS INT’L & COMP. L. REV. 447 (2000) [hereinafter Pope & Talbot Harmac motion]. As of this writing, there has not been a final award in the Pope & Talbot case. There has been a series of interim awards, however, dealing with such issues as the scope of Chapter 11, the waiver requirement, performance requirements, expropriation, and the submission of new claims. Four of these awards (including the award on the Harmac motion) are reprinted in 23 HASTINGS INT’L & COMP. L. REV. at 431–93. The final award will be reported in a subsequent issue of the journal.
45 Award, supra note 2, at 229.
46 Id. at 230.
47 Ethyl arbitration, supra note 29, 38 ILM at 723.
48 Award, supra note 2, at 229.
49 See Ethyl arbitration, supra note 29, 38 ILM at 729 (allowing waiver to be submitted with statement of claim filed nearly six months after submission of the claim to arbitration); Pope & Talbot Harmac motion, supra note 44, at 452 (allowing waiver submitted nearly two years after the submission of a claim to have “retroactive effect”).
is at all dubious, Ethyl suggested and Pope & Talbot held that the necessary waiver could be implied from the act of submitting a claim to arbitration under Chapter 11. And where the Ethyl tribunal was apparently persuaded to read Chapter 11’s procedural requirements flexibly to avoid the inefficiency of requiring the claimant to refile, the Tribunal in Waste Management either ignored this possibility or thought it irrelevant.

As a formal matter, the Tribunal in Waste Management was not bound to follow the awards in Ethyl and Pope & Talbot. NAFTA Article 1136 provides that “[a]n award made by a Tribunal shall have no binding force except between the disputing parties and in respect of the particular case.” Nevertheless, these conflicting positions leave future Chapter 11 parties without adequate guidance and may discourage resort to a dispute resolution process that provides such inconsistent results.

The continuing problem is to provide a system of control for, and possibly a means of appeal from, Chapter 11 arbitrations. Chapter 11 provides a limited system of control by giving NAFTA countries the authority under Article 1131(2) to issue binding interpretations of its text. Canada, Mexico, and the United States ought to use this power to resolve differences in interpretation by different tribunals, thus providing guidance and predictability for future cases. But Chapter 11 does not provide any system of appeal to correct errors in individual cases, in sharp contrast with GATT 1994, which established an Appellate Body to review the legal determinations of individual WTO panels. The Chapter 11 negotiators seem to have assumed that Chapter 11 claims (at least against Canada and the United States) would be relatively infrequent and would not often challenge important national policies, so that appellate review would be an unnecessary and costly burden. Both of these assumptions, however, have proven to be incorrect. Each of the NAFTA parties has seen a number of claims filed against it—many of them challenging important policies ranging from environ-
mental regulation to the awarding of punitive damages. If these trends continue, Canada, Mexico, and the United States might be well advised to consider amending Chapter 11 to provide for a system of appellate review.

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Sovereign immunity from suit—agreement between a local-government entity and a foreign state—distinction between public and private acts—waiver of immunity—effect of choice-of-law clause on immunity


Högsta Domstolen (Supreme Court of Sweden), December 30, 1999.

Swedish courts, and particularly the Supreme Court (Högsta Domstolen), seldom find the opportunity to opine on the issue of a foreign state's immunity from suit. One such uncommon occasion arose in December 1999 when the Supreme Court, on grounds of immunity from suit, affirmed the dismissal of an action brought by the Local Authority of Västerås (Local Authority)—one of Sweden's 289 town districts—against the Republic of Iceland for monies due under a contract.

The origin of the dispute is a contract (Contract) dated December 1, 1992, between the Icelandic Ministry of Education and Culture (Icelandic Ministry) and the Local Authority, which is responsible for schools in the Swedish town district of Västerås. According to Article 3 of the Contract, the Local Authority undertakes to give flight-technician education to Icelandic students and to examine them at the end of their studies. The Icelandic Ministry agrees, according to the same article, to "defray any possible costs of educating Icelandic students that are not covered by the Swedish government according to the Agreement between the Nordic countries concerning education at the upper-secondary-school level." Article 7 of the Contract provides that disputes concerning the implementation of the Contract will be settled according to Swedish law.

The agreement referred to in the Contract is the Agreement on a Nordic Common Education at the Upper Secondary School Level (1992 Agreement), which had been signed by

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58 See, e.g., Ethyl arbitration, supra note 29, 38 ILM at 711 (noting Ethyl's claim that Canada's MMT Act violated Chapter 11 provisions on national treatment, performance requirements, and expropriation); Metalclad Corp. v. Mexico, Merits Award (NAFTA Ch. 11 Arb. Trib., Aug. 30, 2000) <http://www.pearcelaw.com/metalclad.html> (holding that denial of claimant's right to operate a landfill on environmental grounds was a denial of fair and equitable treatment and an expropriation); Notice of Intent to Submit a Claim (July 2, 1999), Methanex Corp. v. United States (NAFTA Ch. 11 Arb. Trib.) <http://www.methanex.com/investorcentre/mtbe/noticeofintent.pdf> (alleging that California's decision to ban the gasoline additive MTBE is an expropriation and a denial of fair and equitable treatment). The Metalclad award will be reported in a subsequent issue of the Journal.

59 See Notice of Claim (Oct. 30, 1998), Loewen Group, Inc. v. United States (NAFTA Ch. 11 Arb. Trib.) (on file with author) (claiming that punitive damages judgment constitutes inter alia an expropriation and a denial of justice).

1 The total number of Supreme Court cases having any connection to state immunity is not more than ten. Half of these cases belong to the period before World War II.

2 This contract (on file with author) is a revised version of a contract on the same subject concluded in May 1991. It is written in Swedish. Translations of the contract and of all other Swedish documents cited in this case report are by the author. This report uses contract for the Swedish word avtal, and agreement for the Swedish word överenskommelse. Both Swedish terms can, in principle, be used broadly to describe any sort of agreement. Although it is rather common to use överenskommelse for agreements between states, avtal is also used for international agreements, particularly those that have a rather limited subject matter. Avtal is almost always used to describe commercial contracts. The implications of these different words were not at issue in the case, and the use of contract in this report is not intended to resolve the underlying issue regarding the nature of the instrument.