

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

Waste Management, Inc.

v.

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

Procedural Order concerning Disclosure of Documents

Introduction

1. By a letter of 3 September 2002 to the Claimant's legal representative, the Respondent requested disclosure of a series of documents which were said to be "relevant and necessary for the defense of this case". The documents fell into four categories:

- A. Acaverde's financial and operational documents (10 categories of documents)
- B. Documents related to the ownership and control of Waste Management's investments (5 documents or categories of documents)
- C. Documents related to Daniel J. Slottje's Opinion (5 categories)
- D. Other documents (2 categories)

2. By a letter of 17 September 2002, the Claimant made a number of points about the procedure followed in relation to document requests. *Inter alia*, it noted that the

Respondent had had notice of the Memorial since it was filed in the first proceedings, in September 1999; the requests were thus filed at a very late stage. As to the requests themselves, the Claimant accepted that the documents reviewed and relied on by Dr. Slottje (whose expert report on quantum was attached to the Memorial) should be disclosed. According to Dr. Slottje's report, he had reviewed nine documents or classes of document. These included "Financial information for various time periods in 1994 through 1998, including financial statements, invoices, tax returns, general ledger trial balances and other miscellaneous financial data, tables and analyses". The Claimant denied that it had in its possession any documents in Category D.1 ("studies and surveys developed by the U.S. company, Sanifill, Inc.", as mentioned in paragraph 6 of Mr. Larequi Radilla's declaration annexed to the Complaint), but said that, if found, they would be provided promptly to the Respondent. Further, the Claimant declined without an order from the Tribunal to disclose documents in Categories A, B and D.2. It noted that a number of the Respondent's requests were in the nature of interrogatories rather than requests for documents, i.e., they did not relate to documents already in existence but seemingly entailed the preparation of new lists of information. As to other requests, it argued that they were unduly burdensome or that they related to matters not actually in dispute between the parties.

3. By a letter of 23 September 2002 to the Tribunal, the Respondent formally sought an order from the Tribunal requiring disclosure of the documents requested by 3 October 2002. The Respondent noted that its requests concerned two issues which were open at the merits phase, (1) damages and (2) ownership and control of the investment at issue, the local company, Acaverde. Respondent explained certain aspects of its request, in particular as to the price lists used by Acaverde in charging consumers (Item A.6) and as to the production of certain lists. The Respondent made it clear that it was not asking the Claimant to compile lists "but rather to provide documents which, in this case, would have had to exist in order to calculate mandatory line items in its annual financial statements – i.e., 'assets' and 'liabilities'." It offered to provide clarification of any remaining uncertainties as to the financial information sought. As to the question of the Claimant's control of Acaverde, the Respondent denied that this had been the subject of a definitive finding of the First Tribunal, which had said merely that the Claimant had produced

“evidence of standing”. Having regard to the reservation of the issue in para. 112 of its Counter-Memorial on competence in the first proceeding, the Respondent regarded this as an issue which remains open in the present case in the context of the hearing of the merits of the Claim.

4. By a letter of 30 September 2002, the Claimant replied. It noted that it was on the point of delivering to the Respondent’s counsel in Washington the documents sought in Category C, i.e., the documents which formed the basis of Dr. Slottje’s opinion. It further noted that “most, if not all, of the financial information requested by Respondent regarding the issue of damages will be contained in one form or another in those documents”. However it maintained its position as to the documents in Category B, for the additional reason that the Respondent appeared to be bringing an additional preliminary objection on the issue of standing. In the Claimant’s view, the procedure followed by the First Tribunal had ensured that “all arguments of fact and law relating to jurisdiction” were disclosed; these did not include questions of standing.

5. By a further letter of 30 September 2002, the Respondent stressed that it had at no stage waived any right to raise other objections to the claim. In any event, it noted, the Claimant’s ownership and control of Acaverde was relevant to the merits, including, eventually, to the quantum of damages.

General observations of the Tribunal on issues of disclosure

6. Under Article 41 (2) of the Additional Facility Rules, the Tribunal may “if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents...” The parties themselves may be required to indicate under Article 40 “the points to which... evidence shall be directed”. In principle, a party may be called upon to provide any document in its possession or control which is material to the proof or disproof of any fact or proposition on which it relies. The Tribunal would note that under the IBA Rules on the Taking of Evidence in International Commercial Arbitration (1999), which provide useful guidance in the matter, the ultimate sanction for non-disclosure is the drawing of an adverse inference against the non-disclosing party (Article 9 (4)).

7. Following the Tribunal's decision of 26 June 2002, at the next phase of the proceeding the Tribunal will consider the merits of the claim. The Tribunal notes the first Tribunal's remark that Waste Management "has, in the exhibits filed along with its Memorial of Claim, provided evidence of its status as 'investor of a party, on behalf of an enterprise,' ACAVERDE, S.A." (Award, para. 11; 40 ILM 56 at p. 62). It does not interpret that remark as a definitive finding by the first Tribunal as to the relationship between the Claimant and the enterprise at potentially relevant times. While the Respondent has made it clear on several occasions that it does not seek a separate hearing on this question by way of preliminary objection, it may be relevant, for the purposes of NAFTA Article 1117 or otherwise, at the merits hearing. Accordingly, documents directed to establish that relationship which are in the possession and control of a party may be requested under the Rules.

8. The Tribunal agrees with the parties that the present requests concern documents, not information, and that a party is not required to produce new documents or lists.

The Respondent's Requests

9. As to the classes of documents sought by the Respondent in its letter of 3 September 2002, the Claimant agrees that it should make available the documents referred to under category C, the basis for Dr. Slottje's opinion. In principle this would also cover Item D.1; the Claimant accepts that these documents would be disclosable but denies that it has any such documents in its possession or control.

10. As to the documents in Category A concerning Aceverde's finances and operations in relation to the concession, the Tribunal believes that disclosure of these, provided they are sufficiently identified, may be sought. It notes that there is considerable overlap between the documents in Categories A and C. However to the extent that the specific documents or classes of documents under Category A are not included in the documents provided to Dr. Slottje for the purposes of his opinion and disclosed to the Respondent under Category C, in the Tribunal's view they too should be disclosed.

11. Dr. Slottje's "Summary of Documents Received" includes a reference to invoices, and these are being provided. The Tribunal thinks that the Respondent's request, in the alternative, for "copies of all the invoices issued in the period 1994-1998" is *prima facie* too burdensome, since it is likely to include very large numbers of documents all or most of which are not in dispute as such.

12. For the reasons given above, the Tribunal agrees with the Respondent that documents clarifying the extent of Claimant's ownership and control of the investment are relevant. This also covers any specific documents referred to under Category D.2.

Conclusion

13. The Tribunal believes that the indications given above should be sufficient to allow the remaining disclosure issues to be resolved expeditiously. It calls on the parties to cooperate to achieve this. Any remaining issues concerning specific documents can be referred back to the Tribunal by either party for a prompt ruling.



1 October 2002