

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

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**Waste Management, Inc.**

v.

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

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**Procedural Order No. 2 concerning Disclosure of Documents**

**Introduction**

1. By an Order of 1 October 2002, the Tribunal gave indications to the parties as to the disclosure, in the context of requests made by the Respondent for certain classes of documents, some of which requests were opposed by the Claimant. The Tribunal expressed the hope that the indications given in that Order would be sufficient to allow remaining disclosure issues to be resolved, but noted that unresolved issues could be referred back by either party for a prompt ruling.

2. By a letter of 23 October 2002 to the Claimant's counsel, the Respondent, having reviewed documents provided on 1 October 2002, renewed its request for certain classes of documents described in its initial request of 3 September 2002, at the same time indicating that the most important documents sought were "3. Acaverde's operating (production) costs statement, for each fiscal year for 1994-1998". The Claimant also

noted that it had requested documents from a Mexican company, Servicios de Tecnología Ambiental, SA de CV (Setasa), which had contracted in 1997 to acquire Acaverde. The documents in question had been provided by a predecessor of the Claimant under cover of a confidentiality clause, to enable Setasa to assess the value of Acaverde. As Setasa was unable to provide the documents without being released from the confidentiality clause, the Respondent requested the Claimant's consent to the hand-over of the documents.

3. By a letter of 30 October 2002 to the Respondent, the Claimant explained aspects of earlier dealings between Acaverde and its competitors, affirmed that when Acaverde entered into negotiations with Setasa in 1997, Waste Management Inc. had no ownership interest whatsoever in Setasa, and objected to any direct disclosure to the Respondent by Setasa of documents covered by the confidentiality agreement. Instead it offered to disclose directly to the Respondent any responsive documents which were returned to it by Setasa. The Claimant further sought 9 classes of documents from the Respondent, to be delivered by 29 November 2002, i.e. the due date of the Counter-Memorial.

4. By a letter of 11 November 2002 to the Claimant, the Respondent identified a number of documents not yet disclosed concerning transactions in the period 1994-1995 concerning Acaverde and other companies.

5. By a further letter of 11 November 2002 to the Claimant, the Respondent objected to the Claimant's arguments to deny access to the information in Setasa's possession. The Respondent advised the Claimant that it would seek a direction from the Tribunal in this regard. The Respondent also explained its reasons for opposing the Claimant's request for disclosure of documents and indicated that, in any event, disclosure could not be made by 29 November 2002, the due date of its Counter-Memorial.

6. By a letter of 12 November 2002 to the Tribunal, the Respondent explained further the reasons for its request to the Claimant to waive confidentiality under its agreement with Setasa, and called on the Tribunal to order that the Respondent have access to this information.

7. By a letter of 15 November 2002, the Claimant outlined aspects of the history of its relations with Setasa, supporting this account with an affidavit by one of its officers responsible for operations in Mexico at the relevant time. It noted that the contract for the sale of Acaverde had not been completed, that the confidential documents provided to Setasa had not been returned, and that there had been earlier litigation between Setasa and the Claimant regarding Setasa's compliance with the confidentiality agreement. In the Claimant's view, it could not be required by Mexico (and should not be required by the Tribunal) to take positions inconsistent with the position it had taken in the litigation with Setasa and which might be construed as a waiver of the Claimant's rights under the contract with Setasa. It offered again to review the Setasa documents and to disclose any responsive documents to the Respondent directly. The Claimant also called on the Tribunal to order immediate disclosure by the Respondent of the documents requested in the Claimant's letter of 30 October 2002.

8. By a letter of 15 November 2002 to the Tribunal, the Respondent sought directions from the Tribunal as to what it characterized as "the Claimant's substantial failure to comply with the Tribunal's order". In particular, it sought directions as to two classes of documents not disclosed. The first concerned USA Waste's conveyance of its Mexico operations in 1997: it was suggested that as a result of that conveyance, the Claimant could not have had standing to commence the arbitration under NAFTA Article 1121. The second concerned certain alleged discrepancies as to the effective date on which Claimant's predecessor acquired Acaverde: it was suggested that this acquisition did not occur until some seven months after the grant of the concession in October 1994. The Respondent drew attention to certain passages of the Claimant's Memorial which, it said, contained relevant discrepancies on that point. The Respondent noted that although certain documents relating to the acquisition of Acaverde had been disclosed, others had not been. It sought an order from the Tribunal requiring prompt disclosure from the Claimant of these documents, or best efforts by the Claimant to obtain them from certain named persons.

9. By a letter of 20 November 2002 to the Tribunal, the Respondent summarised the disclosure so far made by the Claimant. This amounted to 641 pages, mostly the

documents relied on by the Claimant's financial expert. It emphasised in particular the paucity of documents disclosed in relation to the ownership or control of Acaverde in the period 1994-1995 and the conveyance of 1997. It set out in further detail reasons why the Respondent should be given access to documents in the control of Setasa. It argued that any disclosure request by the Claimant should be entertained only after the deposit of the Counter-Memorial, when it could be considered in the light of the arguments and documents contained in that filing.

10. By a letter of 21 November 2002 to the Tribunal, the Claimant commented on the Respondent's 15 November 2002 requests for orders. As to the 1997 conveyance, it asserted that the agreement in question expressly excluded Acaverde from the conveyance, and that it was in all other respects irrelevant to the dispute. It offered to make available to the Respondent a redacted version of the agreement, or to file with the Tribunal an unredacted copy, which the Tribunal could confirm did indeed exclude Acaverde from the sale. As to the Respondent's second request, the Claimant noted that the difference between October 1994 and June 1995 in terms of the completed acquisition of Acaverde was irrelevant to standing under NAFTA Chapter 11. It stressed that all parties throughout treated the Claimant as making an investment in relation to the concession, an investment which it did in fact make.

11. By a letter of 21 November 2002 to the Tribunal, the Respondent rejected both proposals the Claimant had made as to the Agreement of 1997. The Respondent further rejected the Claimant's argument regarding the information requested in connection with the Cayman Islands transactions.

12. By a letter of 22 November 2002 to the Tribunal, the Claimant attached a redacted version of the 1997 Agreement. Article 4.6 of that Agreement provides that the stock of Aca Verde, S.A. de C.V. and Aca Servicios, S.A. de C.V., "will not be contributed to [word redacted]".

13. In the meantime, the Respondent sought and was granted an extension of a week to file its Counter-Memorial, with the result that the deadlines for filing of the Reply and the Rejoinder were likewise put back by one week.

#### **The Tribunal's Views**

14. The Tribunal, having carefully considered the positions of the parties, makes the following order.

15. In the first place, the Tribunal declines to reach any conclusions on the substance of the issues in dispute between the parties at this stage. The voluminous correspondence has already brought into relief some of the issues which the Tribunal may need to decide in terms of the Claimant's control over Acaverde at relevant times. In their remaining filings, it will be for the parties to deal with these issues. As for the Tribunal, the time for drawing adverse inferences will be when it is considering the merits, and not at this interlocutory stage. Following the Tribunal's Order of 1 October 2002, the Claimant is on notice that its control over Acaverde at relevant times is an issue in the case, and that it has the burden of proof on that issue. To the extent that documents identified by the Respondent are relevant to the question of ownership or control but the Claimant has neither disclosed them nor explained why they are not available, the Tribunal may draw corresponding inferences. On the other hand, the Tribunal does not believe that any additional order is presently required as to documents pertaining to control over Acaverde in the period 1994-1995.

16. The redacted Stock Contribution Agreement of 8 December 1997, which the Claimant attached to its letter of 22 November 2002, appears to show that Acaverde and Aca Servicios were excluded from the scope of that Agreement; this is the position the Claimant has consistently taken on this point. In the circumstances, the Tribunal does not understand that Agreement to be relevant to the present dispute, and accordingly it does not need to be further disclosed.

17. As to the Setasa documents, even assuming that it could properly call on the Claimant to waive its contractual rights to non-disclosure of documents with an adverse

third party, the Tribunal declines to do so. The Claimant has pointed to potential adverse consequences of waiver in terms of its relations with Setasa, relations which have led to litigation between them. Instead, the Claimant has offered to review the documents provided to Setasa and to disclose promptly to the Respondent all relevant documents not yet disclosed. In the Tribunal's view this is an appropriate solution, which should be expeditiously implemented to the extent possible. The Tribunal is aware that this solution depends on the cooperation of Setasa in returning documents received from the Claimant, or at least in identifying such documents. In view of the circumstances, such cooperation may not be assumed, and the Tribunal has no power to order it. If Setasa does not promptly return the documents or provide a list of them, the Claimant should check again that it has no further responsive documents in the categories requested which might have been given to Setasa in the context of the Agreement of 8 December 1997, and should provide an explanation of the situation to the Tribunal within 7 days of the date of this order.

18. As to the Claimant's request for disclosure of certain documents by the Respondent, the documents in question are as follows:

1. All documents reflecting communications with Servicios de Tecnologia Ambiental, S.a. de C.V. ("Setasa") between September 1995 and December 1998 regarding the City's waste collection and disposal services.
2. All Contracts, concessions or other agreements with Setasa between 1995 and the present regarding Setasa's providing waste collection and disposal services for the City.
3. All documents, if any, demonstrating that Acaverde failed to comply with any obligation under the May 12, 1995 Concession Title (the "Concession").
4. All notices, if any, provided to Acaverde setting forth any deficiencies in the performance of Acaverde's obligations under the Concession.
5. All invoices presented by Acaverde to the City and/or Banobras for services provided to the City by Acaverde between September 1995 and November 1997.
6. All communications between Banobras and the City and/or Banobras for services provided to the City by Acaverde between September 1995 and November 1997.
7. All communications between Banobras and the City and/or the State regarding Banobras' agreement to guarantee the City's payment obligations to Acaverde under the Concession.

8. All documents relied upon by any expert witness retained by Respondent in this arbitration.
9. All witness statements obtained by Respondent in this arbitration.

19. Categories 1 and 2 concern correspondence and agreements between Setasa and the City regarding waste disposal services. In the Tribunal's view the request in Category 1 is too wide and unspecific. By contrast, the existence and terms of any actual agreements with Setasa concerning waste disposal services for Acapulco concluded during the period between the commencement and the termination of Acaverde's concession are potentially relevant. If such agreements exist, they should be disclosed.

20. Category 3 in effect calls on the Respondent to provide documentary support for a potential defence to the claim. This is a matter for the Respondent to take up in its pleadings and is not an appropriate subject for a discovery request.


21. As to Categories 4 and 5, these are documents provided to or by Acaverde and they should therefore be in Acaverde's possession. No order for disclosure is required.

22. Categories 6 and 7 concern general classes of internal communications between the entities on the Mexican side responsible for performance or payment. As they stand, having regard to the terms of the IBA Rules, these requests are wide and even speculative. The Tribunal does not exclude, however, that following the deposit of the Counter-Memorial the Claimant may be able to point to specific documents, or discrete classes of documents in existence, which should in fairness be disclosed. Without prejudice to that possibility, the Claimant's request for documents in these two Categories is denied.

23. As to Category 8, the Claimant has provided documents relied on by its financial expert. To the extent that the Respondent adduces expert evidence in its Counter-Memorial, the Claimant is entitled, within 7 days of the filing of the Counter-Memorial, to copies of documents relied on by the Respondent's expert(s).

24. As to Category 9, the Claimant's request is denied. It is for the Respondent to decide which witnesses to call, and to provide witness statements for those witnesses with its filings.

25. As to the timing of the disclosure of documents by the Respondent, pursuant to the indications given in the preceding paragraph, the Tribunal would hope that the bulk of these can be disclosed at the same time of the Counter-Memorial (if not actually annexed to the Counter-Memorial). In any event, however, they should be disclosed within 7 days of the filing of the Counter-Memorial.



President

27 November 2002