

Waste Management, Inc. v. United Mexican States (ICSID Case No. ARB(AF)/98/2)

Introductory Note

The referenced case is the third ICSID Additional Facility Arbitration proceeding brought to the Centre under the investor-to-State dispute settlement provisions of Chapter Eleven of the North American Free Trade Agreement (NAFTA), the second to be decided and the first one in which jurisdiction has been declined by the Arbitral Tribunal.

The case was brought to ICSID on September 29, 1998, by Waste Management, Inc., a U.S. company incorporated under the laws of the State of Delaware, against the United Mexican States, invoking Mexico's consent to ICSID Additional Facility arbitration set forth in Article 1122 of the NAFTA. The dispute involved a public waste management services concession granted to Acaverde, the claimant's wholly-owned and controlled subsidiary, by the Municipality of Acapulco de Juárez, State of Guerrero, Mexico, and the alleged expropriation and other violations of claimant's concession rights by Mexican public authorities.

In its presentation, Waste Management, Inc. simultaneously requested from the Secretary-General approval of access to the Centre's Additional Facility and instituted arbitration proceedings under the Additional Facility Rules against Mexico. The Secretary-General of ICSID granted access to the Additional Facility and registered the notice of institution of arbitration proceedings on November 18, 1998.

Under Article 1123, of the NAFTA, unless the disputing parties otherwise agree, the Tribunal is to be constituted by three arbitrators, one appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties. Pursuant to NAFTA Article 1125, each party is free to appoint

an arbitrator of its own or of the other Party's nationality, as long as the disputing Party agrees to the appointment of each individual member of a Tribunal. In this case, Waste Management, Inc. appointed Mr. Keith Hight, a national of the United States of America and former President of the Inter-American Juridical Committee of the Organization of American States and the United Mexican States appointed Mr. Julio C. Treviño, a leading Mexican arbitration specialist, member of the ICC International Court of Arbitration. The parties would then agree in the appointment of Dr. Bernardo M. Cremades, a Spanish national and Vice-President of the London Court of International Arbitration, as President of the Tribunal.

The Tribunal was constituted and the proceedings deemed to begun on June 3, 1998. In December 1999, following Mr. Treviño's resignation due to ill health, the proceeding was suspended. It was resumed on January 2000, following the respondent's appointment of Mr. Eduardo Siqueiros, a Mexican national, in Mr. Treviño's place.

In its award, rendered on June 2, 2000, the majority of the Tribunal declined jurisdiction on the grounds that the claimant did not fulfill the waiver requirement set forth in NAFTA Article 1121.¹ The claimant had attached an additional statement or "understanding" to its waiver. Mexico consistently challenged the Tribunal's jurisdiction on the grounds that the waiver should have been made *expressis verbis*. Additionally, Mexico invoked the existence of pending legal proceedings over the same matter, initiated by Waste Management, Inc. in Mexico, which would, in any case, have rendered the waiver moot.

Making a distinction between formal and material requirements of the waiver, the majority of the Tribunal concluded that while the waiver's formal requirements (presentation of the waiver in writing, delivery to the disputing party and inclusion in the submission of the claim to arbitration) "were duly complied with by the Claimant," the material requirements ("a certain conduct in line with the statement issued") were not. In other words, the majority of the Tribunal considered the conduct of the claimant

¹ Under NAFTA Article 1121, a disputing investor who wishes to submit a claim to arbitration shall provide, in writing, its consent to arbitration and a waiver of "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 referred to in [Chapter XI of the NAFTA], 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."

in pursuing remedies in Mexico, while taking part in ICSID arbitration proceeding, to be dispositive of the issue of jurisdiction.

Mr. Keith Highet did not share this position. In his dissenting opinion, attached to the award, Mr. Highet stated that the proceedings initiated in Mexico differed in substance from the ICSID arbitration proceeding, and that, accordingly, pursuing these remedies in Mexico did not render the claimant's waiver moot. In brief, Mr. Highet considered that the waiver required by NAFTA referred to one thing and that the litigation in Mexico concerned another.

The award declining jurisdiction and the attached dissenting opinion, were rendered in English and in Spanish, the procedural languages chosen by the parties. The English texts of the award and of Mr. Highet's attached dissenting opinion, are reproduced below, with the parties' consent.

Gonzalo Flores
Counsel, ICSID