

**Todd Weiler**

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**From:** Todd Weiler [tweiler@umich.edu]  
**Sent:** 11-May-04 4:00 PM  
**To:** NAFTA News  
**Subject:** NAFTA News Flash - Waste Management II and More

Dear NAFTA News subscribers:

My friends at the Government of Mexico's Ministry of the Economy have been very busy lately, and now have something to show for it: victory in the long-running Waste Management II case. The following is my customary, tentative, first-read-through impression of the award and its significance. Please do not quote or cite it without obtaining prior approval from me.

The Waste Management II case arose from a frustrated investment in the Acapulco area, which began approximately ten years ago. The investment entered into a concession agreement with the municipal government to provide waste management services in a high-density tourist zone. The agreement did not guarantee a monopoly in the sense that it was not to be accompanied by a rule requiring waste producers to use the investment's services – although it did contain a non-competition clause which was intended to prevent officials from aiding competitors or competing for the delivery of waste management services itself. Also part of the deal was the promise to provide the investment with land that would house a state-of-the-art treatment facility. Due to a number of factors (including competition from unregulated service providers and the Mexican Peso Crisis), the investment's business was not profitable. From the Investor's perspective, there was also a unmistakable current of resentment against a foreigner being granted the opportunity to carry on this service, which ran throughout the case.

Perhaps it was this latent discrimination that explained why a state-controlled bank – which could have exercised the right to dip into federal funding destined for the local state government to pay the municipality's unpaid bills to the investment through a line-of-credit agreement – chose not to pay out all of the amounts owing to the investment for services rendered. The Tribunal never fully answered the question, but it did conclude that this bank (for which it was assumed State responsibility could theoretically apply) was within its rights not to pay off these debts. The existence of a dispute between the municipality and investment over performance of the contract and the reverberations emanating from the currency crisis were both seen as valid reasons for the bank not to make such payments.

Waste Management unsuccessfully sought remedies against the bank in local courts, suing on the line-of-credit agreement, and in domestic arbitration, proceeding on the terms of the concession agreement it had concluded with the municipality. The courts denied the claims and the domestic arbitration was allegedly moving at a snail's pace.

Waste Management accordingly brought a NAFTA claim, arguing that the treatment it had received from the municipality, the bank and the Mexican courts did not amount to the "fair and equitable treatment" required under Article 1105 and was tantamount to expropriation without the payment of compensation, contrary to Article 1110. It's first claim was dismissed by the majority decision of a NAFTA Tribunal because Waste Management failed to provide a complete waiver of its proceedings in Mexico while attempting to proceed with the NAFTA claim. Upon facing this dismissal, the investor ceased all local actions (including the local arbitration with the municipality under the concession agreement) and refilled the case. Perhaps to save time, Waste Management chose to rely on its original merits memorial, rather than taking the opportunity to refine its arguments in light of the direction in which NAFTA jurisprudence and the evidence was developing. Mexico accordingly enjoyed a probably the longest time in the history of mixed claims arbitration to reply to the written arguments of the investor (given the intervening period caused by the jurisdictional hearing and dismissal in Waste Management I).

#### THE AWARD

The Tribunal quickly dispatched Mexico's preliminary arguments about the standing of the investor to bring a claim in relation to its investment (based upon alleged defects in proof of its ownership and/or control of the

investment). Interestingly, it appears that Mexico makes this kind of preliminary argument in almost every case against it (despite the fact that the NAFTA is very specific – and very broad – concerning what qualifies as an investor and that it takes any one of the following to have standing to bring a claim under its provisions: (1) direct ownership; (2) indirect ownership; (3) direct control; or (4) indirect control. Accordingly, it is not surprising that Mexico has – as of yet – failed to impress a Tribunal with the logic of its more narrow reading of the relevant provisions (Articles 1116 and 1117) as applied to the facts of any case. But the Mexicans are likely not worried about this very minor side-issue, because with this case they impressed the Tribunal where it clearly mattered – on the merits.

In a nutshell, the Tribunal pursued a balanced approach to Article 1105 that would neither satisfy the NAFTA government lawyers who want it to be treated as an effectively “minimal” standard of treatment (i.e. the kind of standard that no government ever breaches so long as it provides access to a court system); nor the claimants’ lawyers who want it to provide them with a chance to challenge the fairness and equity of a government act on a purely subjective, case-by-case basis. Instead, the tribunal concluded that the standard was one which existed as a matter of customary international law (and because of its inclusion in the NAFTA under Article 1105), but that which could be informed by recourse to all relevant forms of international law (rather than merely discrete rules of custom). It seemed to conclude that arbitrariness is the hallmark of a breach of the standard, while acknowledging that the amount of deference due in any given case would largely depend upon the type of measure at issue (e.g. an administrative decision versus a judicial decision).

Concerning Article 1110, the Tribunal’s application of the applicable law to the facts was sometimes quite hard to follow. Nonetheless, the Tribunal was certainly within the bounds of its jurisdiction and the ultimate result could not be characterised as being patently unreasonable. On the law, the Tribunal rightly concluded that the “investment” which might be the subject of a taking could be the entire enterprise, but could also be a discrete element of that enterprise’s business (such as the rights to money generated through performance of a contract). The Tribunal’s reasoning thus diverged from the Pope and Feldman Tribunals’ analyses (which suggested that while one must look to the nature of an investment enterprise’s business in context to conclude whether a taking has occurred, one should only find a taking when the entire business of the investment enterprise itself has been lost – rather than a portion). If followed in future cases, the Waste Management II analysis affords investors the ability to make claims for discrete chunks of the business operated by their investment enterprises (so long as they can be separately defined as an “investment” under the NAFTA), no matter whether the investment enterprise itself has not been destroyed or otherwise taken.

In its articulation of the facts, the Tribunal appeared to rely heavily on the fall-out from the Mexican Peso Crisis to excuse the conduct of the bank, the municipality and the courts. But in truth, it never really needed to excuse anything – at least given the facts as found. There was no proven denial of justice on the judicial level and the “fair and equitable treatment” and expropriation analyses appeared inextricably linked to the quasi-commercial (i.e. non-regulatory) relationship that existed between the investment and the municipality and bank. The Tribunal was not about to set itself up as either a court of review for Waste Management to further litigate its failed business venture against the bank or to short-circuit the domestic arbitration process to which it had agreed in the original concession agreement. Accordingly, it found for Mexico on both counts.

As such, the Waste Management case really belongs with the other recent “umbrella clause” cases decided within the context of bilateral investment treaties with overlapping contract claims. These cases similarly involved overlapping claims arising under concession agreements and international investment treaty obligations. Pairing the Waste Management II case with the Azinian v. Mexico case, one senses that the NAFTA is not developing as a promising alternative for investors who would like to circumvent dispute settlement processes provided in their concession agreements with NAFTA governments, or those who are merely displeased with the result of a business venture entered into with a governments that does not work out as well as hoped.

Given this particular set of facts, the Waste Management II case says very little about the newer breed of “regulatory” cases made popular in the Metalclad, Feldman, Myers or Pope cases – although the Tribunal’s discussion of the applicable law, in *dicta*, certainly does conform with the positions taken by the investors in these cases (e.g. on the scope of the standards to be applied in Articles 1105 and 1110 to harmful regulatory measures). On balance, it is a fine addition to the jurisprudence of the NAFTA, the odd blemish notwithstanding.

A copy of the award can be found at: [www.naftalaw.org](http://www.naftalaw.org).

IN BRIEF:

Mexican officials have also had a busy spring, responding to other NAFTA claims. Within the past six weeks, the merits hearings for both the Thunderbird claim (in which I am involved) and the GAMI claim were held in Washington. Given the NAFTA experience, one might expect to see decisions emerge from both tribunals before the end of the year, but there are no clear indications in either case to support any definitive timetable.

We held a very successful book launch conference at the Washington College of Law of American University, in Washington DC, recently. I would like to express my gratitude again to all who attended. Copies of the book, entitled NAFTA Investment Law and Arbitration: Past Issues, Current Practice, Future Prospects, are available from Amazon.com or from the publisher, Transnational, at:

<http://www.transnationalpubs.com/showbook.cfm?bookid=10260>

Kindest regards,

TJW

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