

PUBLIC VERSION

BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
UNDER THE RULES GOVERNING THE ADDITIONAL FACILITY
FOR THE ADMINISTRATION OF PROCEEDINGS
AND UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT

Fireman's Fund Insurance Company

Claimant,

v.

The United Mexican States,

Respondent.

Case No. ARB(AF)/02/01

CLAIMANT'S MEMORIAL ON THE MERITS

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TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. PROCEDURAL HISTORY.....	2
III. STATEMENT OF FACTS.....	3
A. THE COMMERCIAL BASIS OF FIREMAN'S FUND'S INVESTMENT IN MEXICO.....	3
B. THE GFB DEBENTURES.....	6
C. THE GOVERNMENT WORKING GROUP.....	10
D. THE BANCRECER RECAPITALIZATION PROGRAM.....	12
E. AN UNDISCLOSED ALTERNATIVE: THE PESO DEBENTURE REPURCHASE.....	16
F. DEVELOPMENTS CONCERNING THE RECAPITALIZATION PROGRAM.....	29
G. COLLAPSE OF THE RECAPITALIZATION PROGRAM.....	31
1. <i>Failure to Sign the Memorandum of Intent</i>	31
2. <i>Return of the Loan Portfolio</i>	32
3. <i>Repudiation of the Recapitalization Program</i>	36
H. FIREMAN'S FUND'S PROTESTS AND FORMAL REQUESTS FOR DEBENTURE REPURCHASE ..	37
I. IPAB'S TAKEOVER OF BANCRECER.....	41
IV. THE GOVERNMENT OF MEXICO EXPROPRIATED FIREMAN'S FUND'S INVESTMENT IN VIOLATION OF ARTICLE 1110 OF THE NAFTA.....	43
A. THE GOVERNMENT OF MEXICO EXPROPRIATED FIREMAN'S FUND'S INVESTMENT.....	45
1. <i>Expropriation under NAFTA Includes Deprivation of the Use or Value of a Covered Investment</i>	45
2. <i>The Government of Mexico Permanently Deprived Fireman's Fund of the Use and Value of Its Investment Thereby Expropriating It</i>	53
B. FIREMAN'S FUND DID NOT RECEIVE FAIR MARKET VALUE FOR ITS INVESTMENT IN VIOLATION OF ARTICLE 1110 OF THE NAFTA.....	73
V. FIREMAN'S FUND IS ENTITLED TO THE FULL VALUE OF ITS INVESTMENT.....	74
A. THE VALUE OF FIREMAN'S FUND'S INVESTMENT IS US \$50 MILLION.....	74
B. COMPOUND INTEREST SHOULD BE AWARDED.....	77
VI. RELIEF REQUESTED.....	79

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I. Introduction

1. In September 1995, Fireman's Fund Insurance Company ("Fireman's Fund") of Novato, California invested US \$50 million in debentures issued by Grupo Financiero BanCreceer, S.A. de C.V. ("GFB" or "Grupo Financiero"), a Mexican financial holding company whose principal asset was the bank BanCreceer, S.A., Institución de Banca Múltiple, Grupo Financiero BanCreceer ("BanCreceer" or the "Bank"). A parallel set of debentures denominated in Mexican pesos was issued on the same day, and on the same terms, to Mexican purchasers. When BanCreceer faced financial difficulties requiring restructuring and recapitalization, a Mexican Government Working Group oversaw the process. That Working Group directed and approved the repurchase at full par value of the peso-denominated debentures, but concealed that repurchase from, and then, when discovered, refused equal treatment to, Fireman's Fund with respect to the dollar-denominated debentures.

2. Instead, the Mexican Government coerced Fireman's Fund into participating in the Working Group's recapitalization plan for BanCreceer—only to then cause that very plan to collapse, by unilaterally returning a portfolio of non-performing BanCreceer loans that had been

taken over by the Government, by refusing to execute a Memorandum of Intent required to pursue negotiations with new investors in BanCrecer, and ultimately by publicly repudiating the plan altogether in favor of a Government take-over and auction of the Bank.

3. The Mexican Government thus on the one hand discriminatorily blocked repurchase of Fireman's Fund's debentures, and then on the other hand brought about the collapse of the recapitalization plan and took over BanCrecer directly. These Government measures closed off all avenues by which Fireman's Fund's investment could have retained its value. The Government thus deprived Fireman's Fund of the use, enjoyment and value of its US \$50 million investment.

4. Fireman's Fund hereby submits its Memorial on the merits of its claim against the Government of Mexico under Article 1110 (Expropriation and Compensation) of the North American Free Trade Agreement ("NAFTA"). Following a brief review of the procedural history of the dispute in Part II, Part III of this Memorial describes in detail Fireman's Fund's investment in Mexico and the Mexican Government measures that expropriated that investment. The legal bases for Fireman's Fund's claim of expropriation are set out in Part IV, followed by analysis of damages claimed in Part V. As set forth below, this Tribunal should find that the Government of Mexico has breached NAFTA Article 1110 by impermissibly expropriating Fireman's Fund's US \$50 million investment in the GFB debentures.

II. Procedural History

5. Following the delivery of a notice of intent to seek arbitration under NAFTA on November 15, 1999 and a revised notice of intent on November 30, 2000, as well as numerous

failed efforts to negotiate a mutually agreeable resolution to its dispute with the Government of Mexico,¹ Fireman's Fund filed a Notice of Arbitration with ICSID on October 30, 2001.

6. ICSID registered Fireman's Fund's case under the Additional Facility rules on January 15, 2002, and this Tribunal was constituted on May 17, 2002. A first procedural meeting of the parties was held on July 22, 2002, at which Mexico indicated that it objected to the jurisdiction of the Tribunal over certain of Fireman's Fund's claims under Chapter Eleven of NAFTA.

7. Following briefing by the parties on Mexico's objections, and a hearing on those jurisdictional objections on February 6-7, 2003, the Tribunal on July 17, 2003 held that Fireman's Fund's dispute arises under NAFTA Chapter Fourteen (Financial Services) and that, by virtue of Article 1401(2), the Tribunal has jurisdiction to hear Fireman's Fund's claims that the Government of Mexico violated Article 1110 by expropriating Fireman's Fund's investment without adequate compensation. The instant Memorial sets forth those claims.

III. Statement of Facts

A. The Commercial Basis of Fireman's Fund's Investment in Mexico

8. Fireman's Fund is a United States insurance company founded some 150 years ago in California, whose principal business is the provision of various types of insurance, including in particular accident and fire insurance.² Fireman's Fund is dedicated to the insurance business; it

¹ See Affidavit of Dr. Gerhart E. Reuss, December 16, 2002 at paras. 30-31, 35, 37-38 ("Reuss Affidavit") (C0037-38).

² See Articles of Incorporation and Certificate of Status for Fireman's Fund Insurance Company (C0040-45).

is not in the business of financial intermediation, and has no business activities in the field of commercial or retail banking.³

9. Fireman's Fund is a part of the Allianz group of insurance companies, a global player in the property, life, and casualty insurance industry. Fireman's Fund is a wholly-owned subsidiary of Allianz of America, Inc., a Delaware corporation, which also owns Allianz México, S.A. ("Allianz México"), a Mexican entity likewise involved exclusively in the provision of insurance services.⁴ Fireman's Fund and Allianz México are thus sister companies within the Allianz group.

10. Fireman's Fund subscribed to US \$50 million in debentures issued by Grupo Financiero BanCrece⁵ as an investment vehicle, and to foster a closer relationship with the BanCrece group with a view to promoting the sale of insurance products.⁶ In Mexico, retail insurance products are typically marketed to individual consumers through their local bank branches. To market insurance products successfully in Mexico, therefore, Allianz México, Fireman's Fund's sister company, entered into a marketing joint venture with BanCrece in 1995.⁷ To cement the BanCrece/Allianz México relationship, the Allianz group was invited to participate in capitalizing GFB. BanCrece and GFB expressed a preference for that

³ See Supplemental Affidavit of Dr. Gerhart E. Reuss, June 21, 2004 at para. 3 ("Reuss Supplemental Affidavit") (C0687).

⁴ Allianz of America, Inc. is in turn owned by Allianz AG of Munich, Germany. See Reuss Affidavit at para. 1 (C0031); Reuss Supplemental Affidavit at para. 3 (C0687).

⁵ See Acta de Emisión de Obligaciones Subordinadas Denominadas en Dólares Estadounidenses Convertibles Forzosamente en Títulos Representativos del Capital del Grupo Financiero BanCrece, S.A. de C.V., Serie "L" GFCRECE 95L-D ("Debenture Issuing Document for Dollar Debentures") (R0107-27); see also Receipt of Payment, September 29, 1995 (indicating that Fireman's Fund purchased US \$50 million in dollar-denominated debentures) (R0165).

⁶ See Reuss Supplemental Affidavit at para. 6 (C0688).

⁷ See Reuss Affidavit at para. 5 (C0032); Reuss Supplemental Affidavit at paras. 4-5, 7 (C0687-88).

participation to take the form of an equity stake, but as an insurance company Fireman's Fund opted instead for a debt instrument—the US \$50 million in GFB debentures at issue in this case—instead.⁸ Fireman's Fund's representative in Mexico, Chairman of Allianz México Dr. Gerhart Reuss, was elected to serve as a member of the Board of Directors of GFB and as a *miembro suplente* (alternate member) of the Board of Directors of BanCrecer in October 1995, and held those positions until GFB's dissolution at the hands of the Mexican Government in 1999.⁹

11. Subsequently, in 1996, BanCrecer decided to exit the insurance distribution joint venture with Allianz México, and the parties agreed that Allianz México would buy out BanCrecer for US \$40 million, after which the parties would have a simple contractual relationship for the marketing of Allianz México insurance products through BanCrecer branches.¹⁰ The result of the parties' negotiations was that the buyout payment would take two forms: US \$30 million in another debt instrument (structured as an advance payment from Allianz México for commissions to be collected by BanCrecer on future insurance products sold through their branches), and, at GFB's insistence, US \$10 million in the purchase of a 3.16% equity interest in GFB by Allianz of America.¹¹ This represented the only GFB-related equity position ever held by any Allianz entity during these events.¹²

⁸ See Reuss Supplemental Affidavit at paras. 6-7 (C0688).

⁹ See Reuss Supplemental Affidavit at para. 8 (C0688); see also Reuss Affidavit at para. 3 (C0031).

¹⁰ See Reuss Supplemental Affidavit at para. 13 (C0689).

¹¹ See Reuss Supplemental Affidavit at para. 14 (C0689).

¹² See Reuss Supplemental Affidavit at para. 14 (C0689).

B. The GFB Debentures

12. As noted, Fireman's Fund agreed to subscribe to US \$50 million in debentures issued by GFB in September of 1995. Those dollar-denominated debentures were issued in parallel with US \$50 million worth of debentures denominated in Mexican pesos (*i.e.* MXP \$500 million). The two sets of debentures were issued on the same day, and under the same stock exchange key, with only the final character in that key distinguishing between the dollar-denominated (GFCRECE 95L-D) and the peso-denominated (GFCRECE 95L) debentures. The terms of the debenture issuing documents were also identical, save for provisions reflecting the different currency of denomination and making corresponding exchange rate adjustments.¹³

13. Fireman's Fund subscribed to the entire offering of dollar-denominated GFB debentures. The peso-denominated debentures were subscribed to by an assortment of Mexican investors, ranging from politically well-connected existing major shareholders of BanCreceer and GFB to unaffiliated Mexicans who subscribed through their local BanCreceer branches.¹⁴

14. The participation of Mexican investors in GFB's US \$100 million debenture issuance was critical to Fireman's Fund's decision to invest in those debt instruments. Fireman's Fund drew reassurance from domestic nationals' involvement in the transaction, as it believed that the diversification of the population of debenture-holders would serve as insurance against any future risk of discrimination against foreign investors. Accordingly, Fireman's Fund even went

¹³ Compare Debenture Issuing Document for Dollar Debentures (R0107-27) with Acta de Emisión de Obligaciones Subordinadas Convertibles Forzosamente en Títulos Representativos del Capital del Grupo Financiero BanCreceer, S.A. de C.V., Serie "L" GFCRECE 95L ("Debenture Issuing Document for Peso Debentures") (R0086-106).

¹⁴ See Reuss Affidavit at para. 7 (C0032); see also Affidavit of José Antonio García, June 15, 2004 at paras. 20-21 ("García Affidavit") (C0697); Affidavit of Rubén Acosta Carrasco, June 14, 2004 at para. 17 ("Acosta Affidavit") (C0725 and C0732 PUBLIC); Affidavit of Eduardo Fernández García, December 6, 2002 at para. 11(b) ("Fernández García Affidavit") (C0018); Discussion Note for IPAB Consultative Committee, September 9, 1999, Fernández García Affidavit Exhibit A (referencing "national holders" of peso debentures) (C0023 and C0027); Annex to Letter from BanCreceer to National Banking and Securities Commission, November 17, 1997 (grouping peso debenture holders by Mexican region of residence) (C0746-51).

so far as to condition its subscription to the dollar-denominated debentures upon proof of the subscription and payment of the peso portion of the debenture issuance.¹⁵

15. Also critical to Fireman's Fund's decision to invest in the GFB debentures was the financial condition of BanCrecer, GFB's principal asset, and the Government's measures intended to strengthen the Bank. Specifically, Fireman's Fund invested in the GFB debentures in reliance on measures carried out by the Fondo Bancario de Protección al Ahorro (Fund for the Protection of Bank Savings, hereinafter "FOBAPROA"),¹⁶ that were taken concurrently with Fireman's Fund's investment.¹⁷

16. Like most Mexican banks, BanCrecer had been adversely affected by the Mexican financial crisis of 1994/1995, which resulted in a substantial volume of non-performing loans reflected on the Bank's books. The Government of Mexico through FOBAPROA worked to ameliorate these problems for Mexican banks by taking over tranches of the banks' non-performing loans and replacing them with Government-guaranteed notes.¹⁸ While the terms varied from bank to bank, typically FOBAPROA would agree to take over such loans in conjunction with, and in some proportion to, infusions of fresh capital into the banks. These transactions improved the banks' financial condition by taking non-performing loans off the banks' balance sheets, and adding interest-generating Government notes to the asset side of the banks' books in their stead.¹⁹

¹⁵ See Reuss Affidavit at para. 7 (C0032); Reuss Supplemental Affidavit at para. 9 (C0688).

¹⁶ FOBAPROA, a trust fund, was established to assist in the administration of the financial rescue operations for Mexican banks. Its governing board consisted of representatives from the Finance Ministry, the Commission, and the Central Bank. See Reuss Affidavit at para. 9 (C0032).

¹⁷ See Reuss Supplemental Affidavit at paras. 10-12 (C0688-C0689).

¹⁸ See Acosta Affidavit at para. 7 (C0723 and C0730 PUBLIC); see also García Affidavit at para. 13 (C0695).

¹⁹ See Acosta Affidavit at para. 7 (C0723 and C0730 PUBLIC).

