

ICSID Case No. ARB(AF)/02/01

International Centre for Settlement of Investment Disputes
(Additional Facility)

FIREMAN'S FUND INSURANCE COMPANY
Claimant

and

THE UNITED MEXICAN STATES
Respondent

AWARD

Before the Arbitral Tribunal constituted under Chapter Eleven of
the North American Free Trade Agreement (NAFTA), and comprised of:

Professor Andreas F. Lowenfeld
Mr. Alberto Guillermo Saavedra Olavarrieta
Professor Albert Jan van den Berg (President)

Secretary of the Tribunal
Ms. Claudia Frutos-Peterson

Date of dispatch to the parties: 17 July 2006

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ANNEX: Decision on the Preliminary Question dated 17 July 2003.

I. INTRODUCTION

1. This is the first case under the North American Free Trade Agreement (NAFTA) to be heard under Chapter Fourteen, devoted to cross-border investment in Financial Services. As spelled out in more detail in the Decision on the Preliminary Question in this case, the architects of the NAFTA were aware that the Governments of each of the State Parties regulated in considerable detail the activities of financial institutions engaged in securities transactions, insurance, banking and related activities. These regulations were often of a macro-economic character and involved prudential considerations of various kinds.

2. The regulations concerning financial services were not the same in all three countries, but each of the State Parties was clear that challenges to such regulations or interpretations of the regulations and the relevant authorities should not be committed to investor-State arbitration under the NAFTA. On the other hand investment in financial institutions across borders was to be encouraged, and investors were to be protected through the NAFTA from expropriation and measures tantamount to expropriation.

3. The solution arrived at in the NAFTA was to include a separate Chapter Fourteen on Financial Services. The expropriation provisions of the NAFTA as set out in Chapter Eleven, including the provisions for investor-State arbitration, were made applicable to claims under Chapter Fourteen, but claims based on other provisions designed to protect cross-border investors and investments, including provisions for National Treatment and Most-Favored-Nation Treatment, are excluded from the competence of an arbitral tribunal in a case involving investment in financial institutions. Chapter Fourteen contains no counterpart to Article 1105 concerning Minimum Standard of Treatment.

4. In its Decision on the Preliminary Question, the Tribunal held that the dispute between Claimant Fireman's Fund and Respondent Mexico did involve an investment in a financial institution as defined in Article 1416 of the NAFTA. Accordingly, the competence of the Tribunal and the scope of the Award in the present case are limited to the issue of whether an expropriation of Claimant's property has occurred, and if so, what compensation may be owing.

II. THE CLAIM

5. Fireman's Fund claims that the Government of Mexico expropriated its investment in Grupo Financiero BanCreceer, S.A. in violation of Article 1110 of the NAFTA. The Government of Mexico deprived Fireman's Fund of the use and value of its investment, and did so in a discriminatory and arbitrary manner. Further, according to Fireman's Fund, the Government of Mexico failed to compensate Fireman's Fund for the fair market value of that investment as required by Article 1110. In so doing, the Government of Mexico violated its obligations under Article 1110.
6. Fireman's Fund seeks the following relief:

For the foregoing reasons [set forth in the Reply to the Merits], and those set forth in Fireman's Fund Memorial on the Merits, Fireman's Fund respectfully requests that the Tribunal find that the Government of Mexico, through its acts and omissions described above and in its Memorial, expropriated Fireman's Fund's investment in dollar-denominated debentures issued by Grupo Financiero in violation of Article 1110 of the NAFTA. Accordingly, Fireman's Fund will request that the Tribunal award it compensation for the full value of its investment—that is, for US\$ 50 million plus interest based on a 90-day LIBOR rate plus

four percent from the taking until the date of payment, compounded annually.

Claimant also respectfully requests an award of its legal fees and other costs incurred in connection with this proceeding.¹

7. Respondent Mexico does not accept the version of the facts of Fireman’s Fund but maintains that in any event whatever losses Claimant may have sustained were not the result of an expropriation within the meaning of the NAFTA.
8. Respondent Mexico seeks the following relief:

Por lo expuesto, el gobierno de México sostiene que el Tribunal debe desechar la reclamación de Fireman’s Fund en su totalidad, con la correspondiente condena en costas a favor de México.²

[Translation:

For the foregoing reasons, the Government of Mexico submits that the Tribunal should reject the claim of Fireman’s Fund in its totality, with the corresponding award of costs in favour of Mexico.]

III. THE PARTIES

9. Claimant:

Fireman’s Fund Insurance Company

¹ Reply on the Merits ¶¶ 116-117, amending Memorial on the Merits ¶¶ 139-140.

² Counter-Memorial on the Merits ¶ 316; Rejoinder on the Merits ¶ 279.

777 San Marin Drive
Novato, CA 94998
United States of America

herein: “Fireman’s Fund,” “FFIC,” or “Claimant.”

10. Fireman’s Fund is incorporated under the laws of the State of California, United States. It is a wholly-owned subsidiary of Allianz of America, Inc., a Delaware corporation that is in turn wholly-owned by Allianz AG of Munich, Germany. It is a sister corporation to Allianz México, S.A. It has as its principal business the provision of various types of insurance, including accident and fire insurance. *See also* ¶ 51 below.
11. In these proceedings, Fireman’s Fund was initially represented by Mr. Lawrence W. Newman and Mr. Raymundo E. Enriquez of the law firm Baker & McKenzie and from 9 August 2002, by Mr. Daniel M. Price and Mr. Stanimir Alexandrov of the law firm Sidley, Austin, Brown & Wood LLP, and Mr. Raymundo E. Enriquez of the law firm Baker & McKenzie.
12. Respondent:

THE UNITED MEXICAN STATES
General Directorate of Foreign Investments
Ministry of Commerce and Industrial Development
Mexico, DF, Mexico

herein: “Mexico” or “Respondent.”

13. In these proceedings, the Government of Mexico is represented by Mr. Hugo Perezcano Díaz, Director General of the *Consultoría Jurídica de Negociaciones, Secretaría de Economía*.

IV. PROCEDURAL HISTORY

14. On 30 October 2001, Fireman's Fund submitted a Notice of Arbitration against Mexico pursuant to the provisions of Chapter Eleven of the NAFTA and requested that the claims set forth therein be submitted to arbitration under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes ("ICSID").
15. In the Notice of Arbitration, Fireman's Fund alleged violations by Mexico of Articles 1102, 1105, 1110 and 1405 of the NAFTA and sought, with respect to each of its claims under those Articles, "an award of damages in its favor and against Mexico of US\$ 50,000,000, together with applicable interest, its attorneys' fees and the costs incurred by it in this proceeding, together with such further and additional relief as the Arbitral Tribunal may deem appropriate." (Notice, ¶ 40).
16. Fireman's Fund supplemented its Notice of Arbitration by two letters dated 27 November 2001 and 11 January 2002.
17. Mexico submitted a letter dated 11 December 2001 in which it raised concerns about the applicability of Chapter Eleven of the NAFTA in the present case.
18. On 15 January 2002, the Secretary-General of ICSID informed the parties that Fireman's Fund's application for access to the Additional Facility was approved and issued on the same day a Certificate of Registration of the Notice.
19. On 17 May 2002, the Arbitral Tribunal was constituted. The Tribunal was composed of Professor Albert Jan van den Berg (appointed as President of the Tribunal by the Secretary-General of ICSID), of Dutch nationality, residing at

Tervuren, Belgium, Professor Andreas F. Lowenfeld (appointed by Claimant), of US nationality, residing at New York, New York, and Mr. Francisco Carrillo Gamboa (appointed by Respondent), of Mexican nationality, residing at Mexico, DF, Mexico. Ms. Claudia Frutos-Peterson of ICSID was designated to serve as Secretary to the Tribunal. All subsequent written communications between the Tribunal and the parties were made through the ICSID Secretariat.

20. The first session of the Tribunal was held, with the parties' agreement, in Washington, D.C., on 22 July 2002. The Summary of the First Session is deemed incorporated into this Award.

21. At the first session it was agreed by the parties that the proceedings in the present case would be divided into three phases. The first phase would concern the Preliminary Question, the second phase would concern the merits of the case only as to liability, and the third phase, if necessary, would concern the quantification of damages.

22. By a Decision on the Preliminary Question dated 17 July 2003, which was communicated to the parties on 13 August 2003 and is attached to this Award as an Annex, the Tribunal rendered the following decisions:

(1) HOLDS that Claimant's claims brought under Articles 1102, 1105 and 1405 of the NAFTA are not within the competence of the Tribunal, but that claims brought under Article 1110 are within its competence;

(2) RESERVES decision on the costs of the present phase of the arbitration;

(3) DETERMINES that the further conduct of the arbitration will be determined by the Tribunal after consultation with the parties.

23. By letter of 26 August 2003, the Tribunal invited the parties to agree on an appropriate schedule for the next stage of the proceedings. By letter of 9 September 2003, the parties submitted an agreed schedule for the merits phase (the “Schedule”), which the Tribunal approved on 8 October 2003.
24. Except as set out below, each party made numerous requests for documents of the other party, and eventually these requests were either granted or ordered by the Tribunal or rejected. Throughout the proceedings, the parties’ numerous procedural applications were promptly and unanimously decided by the Tribunal. The Tribunal is persuaded that no document that should have come before the Tribunal was missing in any way that affected the outcome of the case.
25. On 25 June 2004, FFIC submitted a Memorial on the Merits with accompanying witness statements and exhibits.
26. On 31 January 2005, Mexico filed its Counter-Memorial on the Merits (*Escrito de Contestación*) with accompanying exhibits.
27. On 28 July 2004, FFIC had solicited the Tribunal’s assistance in producing a legal opinion authored by Mr. Francisco Carrillo Gamboa, at that time one of the members of the Tribunal, and addressed to Grupo Financiero Bancrecer S.A. de C.V. (the “Carrillo Opinion”).³ On 23 February 2005, FFIC informed the Tribunal

³ See also ¶ 85 *infra*.

that it had located a copy of the Carrillo Opinion and enclosed a copy thereof. On 2 March 2005, Mr. Carrillo wrote to the Secretary-General of ICSID and the other members of the Tribunal to advise them of his decision to resign as arbitrator in the present case. On 3 March 2005, the ICSID Secretariat declared the proceedings suspended in accordance with Article 16(2) of the Additional Facility Arbitration Rules and invited the Tribunal to consider the reasons for Mr. Carrillo's resignation and decide whether it consented thereto. On 7 March 2005, the Tribunal consented to the resignation of Mr. Carrillo as arbitrator. On 15 April 2005, Mexico appointed Mr. Alberto Guillermo Saavedra Olavarrieta as arbitrator in replacement of Mr. Carrillo. On 26 April 2005, the ICSID Secretariat informed the parties that Mr. Saavedra had accepted his appointment as arbitrator and that the proceedings were resumed.

28. On 26 April 2005, the ICSID Secretariat also circulated three letters from FFIC dated 4 and 8 March 2005 and 25 April 2005, as well as a letter from Mexico dated 16 March 2005, all received during the suspension of the proceedings.

29. By letter of 4 March 2005 (circulated on 26 April 2005), FFIC alleged that Mexico had exerted pressure on the witness Mr. Fernández García not to testify in the second phase of these proceedings, and requested, *inter alia*, that the Tribunal issue an order calling for Mr. Fernández García to give testimony. Mr. Fernández García was formerly the President of the Comisión Nacional Bancaria y de Valores ("CNBV") and had testified for FFIC in relation to the Preliminary Question. Mexico denied FFIC's allegations in a letter of 27 April 2005. By Order No. 6 dated 12 May 2005, Mr. Fernández García was called to give testimony at the upcoming hearing, and the parties were requested to use their best efforts to agree upon all practical aspects relating to his testimony. Following

correspondence between the parties regarding the ability of Mr. Fernández García to testify, on 23 June 2005, the Tribunal advised the parties that it had noted the unavailability of Mr. Fernández García as witness in the present phase of the proceedings, deciding in this respect that the evidence that he had given in the first phase of the proceedings would not be declared inadmissible, without prejudice to its relevance, weight or materiality.

30. On 31 May 2005, FFIC filed a Reply on the Merits with accompanying witness statements and exhibits.
31. On 5 August 2005, Mexico filed a Rejoinder on the Merits (*Escrito de Dúplica*) dated 4 August 2005 with accompanying exhibits and witness statements. A corrected version of which was submitted on 10 August 2005.
32. On 18 August 2005, the parties filed witness notifications.
33. On 2 September 2005, the Government of Canada filed a submission pursuant to Article 1128 of the NAFTA. The Government of the United States of America did not make any submission.
34. On 8 September 2005, following FFIC's request for reconsideration of its ruling of 24 August 2005, the Tribunal advised the parties that it maintained its refusal to strike certain witness statements as requested by FFIC, but gave permission to the parties to file a pre-hearing brief on any matter deemed relevant for the forthcoming hearing, which the parties did on 21 September 2005.

35. On 22 September 2005, Mexico filed objections regarding the admissibility of FFIC's Pre-Hearing Brief and the exhibit and two witness statements attached thereto. The objections were rejected by the Tribunal on 26 September 2005.

36. On 22 September 2005, a pre-hearing telephone conference was held between the President of the Tribunal and the parties to discuss procedural matters relating to the hearing to be held on the merits (the "Hearing").

37. In September 2005, Mr. Eduardo Cepeda Fernández, the representative of JP Morgan in Mexico, proposed to be called as a witness by Claimant, advised FFIC that he would not be able to testify. By letter of 20 September 2005, FFIC alleged that Mexico had pressured Mr. Cepeda not to appear further in these proceedings. Mexico denied said allegations by letter of 21 September 2005. Pursuant to a request by the President made during the pre-hearing telephone conference, FFIC wrote on 22 September 2005 to Mr. Cepeda inviting him to reconsider his decision not to appear as witness at the Hearing. Mr. Cepeda maintained his refusal.

38. The Hearing was held from 27 September until 1 October 2005 in Washington D.C. Mr. Daniel M. Price, Mr. Stanimir A. Alexandrov, Mr. Raymundo E. Enriquez, Judge Stephen M. Schwebel, Dr. Gerhart Reuss, Ms. Katherine Crocker, Mr. Peter Lefkin, Mr. David J. Lewis, Ms. Marinn Carlson, Ms. Jennifer Haworth McCandless, Mr. Gus Kryder, and Ms. Dara Levinson appeared on behalf of FFIC. Mr. Hugo Perezcano Díaz, Mr. Máximo Romero, Mr. Luis Ramón Marín, Mr. Salvador Behar, Mr. Stephan Becker, Mr. Cameron Mowatt, Mr. Christopher Thomas, Mr. Sanjay Mullick, Mr. Alejandro Barragán, Ms. Zuraya Tapia-Alfaro, Mr. Luis Mancera, Ms. Maria Teresa Fernández, Mr. Enrique Barrera, Mr. Manuel Guerrero, Mr. Mario Taméz, Mr. Carlos Guadarrama, and Mr. Alfonso Orozco appeared on behalf of Mexico.

39. At the Hearing, the Government of Canada was represented by Mr. Rodney Neufeld and Ms. Yannick Mondy. The U.S. Government was represented by Mr. Keith Benes, Ms. Renee Gardner, Ms. CarrieLyn Guymon, Mr. Mark McNeill, Ms. Andrea Menaker, Ms. Laura Svat, Mr. Jason Kearns, Mr. Jonathan Kallmer, Ms. Kimberly Evans, and Mr. Gary Sampliner.
40. At the Hearing, the following witnesses appeared on behalf of FFIC: Mr. William M. Isaac, Mr. José Antonio García, Mr. Rubén Acosta Carrasco, and Dr. Gerhart Reuss; and on behalf of Mexico: Mr. José Vicente Corta Fernández, Mr. Fernando Luis Corvera Caraza, Dra. Patricia Armendáriz Guerra, Mr. José Angel Gurría, Mr. Sergio Méndez Santa Cruz, Mr. Alfonso Orozco, Lic. Guillermo Zamarripa Escamilla, and Mr. Carlos Sempé Minvielle.
41. On 29 September 2005, Mr. Saavedra made a disclosure pursuant to Article 14 of the ICSID Additional Facility Rules. By letters of 11 and 25 October 2005, Claimant and Respondent advised the Tribunal that they had no objection to Mr. Saavedra's continued service on the Tribunal following his disclosure of 29 September 2005.
42. In the course of the Hearing, the parties submitted an agreed List of Dramatis Personae, as well as a Consolidated List of Exhibits (which was updated by FFIC on 6 October 2005).
43. By letter of 24 March 2006, FFIC drew the Tribunal's attention to the Partial Award rendered on 17 March 2006 in *Saluka Investments BV (The Netherlands) v.*

The Czech Republic.⁴ At the request of the Tribunal, FFIC submitted brief comments on the relevance of the *Saluka* award on 21 April 2006, and Mexico responded on 17 May 2006.

44. The Tribunal declared the proceedings closed on 7 July 2006.

45. The Tribunal deliberated at several occasions.

V. FACTS

46. In the Decision of 17 July 2003, the Tribunal made a number of factual findings relevant to the Preliminary Question without prejudice to its factual findings on the merits of this case. The factual findings in the present Chapter (and Chapter VII below) are based on the entire record in this case, including the merits phase.

47. At the outset it is useful to give a brief overview of the relevant competent authorities in Mexico:

- *Banco de México* is the central bank of the country and is an independent legal person of public law. Its primary objective is to maintain the stability of the national currency and, additionally, to promote the proper development of the financial system and to foster the proper functioning of the payment system.

⁴ Available at: <http://www.pca-cpa.org/ENGLISH/RPC/SAL-CZ%20Partial%20Award%20170306.pdf>.

- The *Comisión Nacional Bancaria y de Valores* (“CNBV” or “Commission,” formerly *Comisión Nacional Bancaria*) is authorized to supervise and regulate financial entities in order to provide for their stability and proper functioning as well as to maintain and promote the proper and balanced development of the financial system and, in connection therewith, the protection of the public interest.

- The *Secretaría de Hacienda y Crédito Público* (“SHCP” Ministry of Finance and Public Credit, also referred to as Ministry of Finance) is a division of the federal executive power, whose principal function is to define the policies of the federal Government in matters of tax, public spending, financing, creditworthiness, banking, money, currency and pricing, and tariffs for goods and services of the public sector.

- The *Fondo Bancario de Protección al Ahorro* (“FOBAPROA,” Fund for the Protection of Bank Savings) is a Trust Fund (*fideicomiso*) established pursuant to Article 122 of the *Ley de Instituciones de Crédito* (Act of Credit Institutions, also called Banking Act) whose objective was to take preventive measures in order to avoid financial problems of “*instituciones de banca múltiple*” [multiple service banking institutions] as well as compliances of those institutions with their obligations. The Fund functioned as a form of deposit insurance. The *Comité Técnico* [Technical Committee] of FOBAPROA was charged with the approval of FOBAPROA’s measures.

- The *Instituto para la Protección al Ahorro Bancario* (“IPAB,” Institute for the Protection of Bank Savings) took over FOBAPROA’s responsibilities in January 1999.

- The *Grupo de Trabajo* (“Working Group”), consisting of representatives of Banco de México, the CNBV, the SHCP, and FOBAPROA (IPAB as of January 1999), is an inter-agency taskforce that was formed to address the financial crisis that arose in Mexico in November – December 1994. CNBV was the lead agency. The Working Group is considered in more detail in Section VII.C below.

48. End 1994, a serious financial crisis broke out in Mexico. The Mexican peso declined significantly in relation to the United States dollar and interest rates soared. In the first semester of 1995, the Peso declined in value not less than 96%. That had a significant effect on the financial position of many Mexican banks.

49. In order to combat the financial crisis which could lead to a collapse of the Mexican financial system, the Mexican authorities adopted a series of measures, *inter alia*, to support banks and depositors and to re-establish their viability. One of those measures was the *Programa de Capitalización y Compra de Cartera* [Program of Capitalization and Acquisition of Portfolio] (the “PCCC”). The PCCC consisted of a scheme under which the Government, through FOBAPROA, assumed non-performing loan portfolios from the participating banks in exchange for interest bearing notes issued by FOBAPROA payable in 10 years, and guaranteed by the Government. The assumption of the loans 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. The assumption of the loan portfolio and the issuance of the notes were conditioned upon the bank securing additional funds to increase the capitalization of the bank. As a rule, for each peso contributed by the shareholders or others to capital, the Government assumed two pesos’ worth of loan portfolio.

Some 11 banks participated in the PCCC, including BanCrecer.⁵ When a bank participated, it entered into an agreement called “*Bases de Capitalización*” with CNBV and FOBAPROA.⁶

50. Grupo Financiero BanCrecer, S.A. de C.V., (hereinafter: “GFB”), a Mexican corporation, is the holding company of, *inter alia*, BanCrecer, S.A., Institución de Banca Múltiple, (hereinafter: “BanCrecer” or the “Bank”). In 1995, GFB was owned by public shareholders (43.4%) and a so-called Core Investor Group (56.6% [*REDACTED*]).

In 1995, GFB was in serious financial difficulties.

51. As mentioned before, Claimant Fireman’s Fund Insurance Company (“FFIC” or “Fireman’s Fund”) of Novato, California, United States of America, is an insurance company founded some 150 years ago, whose principal business is the provision of various types of insurance, including accident and fire insurance.

⁵ Banco Nacional de México, S.A.; Bancomer, S.A. (merged with Banco Bilbao Vizcaya – “BBV”); Banco Mercantil del Norte, S.A.; Banca Serfin, S.A. (Serfin); Banco Internacional, S.A.; Banco Vizcaya-México, S.A.; Banco del Atlántico, S.A. (Atlántico); Banca Promex, S.A. (Promex); Confía, S.A. (Confía); BanCrecer, S.A. (BanCrecer); BanOro, S.A. (BanOro, merged with BanCrecer); and Banco Mexicano, S.A. Exh. R2346.

⁶ [

REDACTED

]

⁷ [*REDACTED*]

FFIC is part of the Allianz Group of companies, a global player in the property, life, and casualty insurance industry. FFIC is a wholly owned subsidiary of Allianz of America, Inc., a Delaware corporation (“Allianz of America” or “AZOA”), which also owns Allianz México, S.A. (“Allianz México” or “AZMEX”), a Mexican company involved in the provision of insurance services. Thus, FFIC and Allianz México are sister companies within the Allianz Group. Allianz of America is in turn owned by Allianz AG of Munich, Germany. Two persons who played a significant role within the Allianz Group in this case need to be mentioned here: Dr. Gerhart E. Reuss, Chairman of Allianz México, and Mr. Herbert Hansmeyer, member of the Board of Allianz AG and Chairman of the Board of Directors of FFIC.

52. In the mid-1990s, Allianz México wanted to strengthen its existing industrial insurance business in Mexico. In particular, it was interested in building up a business of so-called “personal lines” of insurance (life insurance, automobile insurance and household insurance). Allianz México believed that the best way to expand its business was to seek an alliance with an existing Mexican bank whose branch offices could be used as outlets for sales of insurance products.⁸ Allianz México identified BanCrecer for that purpose.

53. [*REDACTED*], Allianz AG and GFB signed a [*REDACTED*] GFB was to pass over to the Joint Venture Company all its

⁸ Reuss II, ¶ 4.

⁹ [*REDACTED*]

life insurance business and Allianz México was to do the same with respect to its life and health insurance.

54. On the same date, JP Morgan, retained by Allianz, made a presentation to Allianz México concerning [*the bank holding company.*

] On 4 September 1995, JP Morgan
[*provided additional analysis of that company.*

]

55. On 20 September 1995, GFB issued US\$ 50 million in dollar-nominated mandatorily convertible five year subordinated debentures,¹² which were purchased by FFIC on 29 September 1995 (the “Dollar Debentures”).

56. Also on 20 September 1995, GFB issued similar convertible subordinated debentures denominated in Mexican pesos, the value of which was equivalent to US\$ 50 million at the time (the “Peso Debentures”).¹³ It is common ground between the parties that the Peso Debentures were purchased by Mexican nationals.

¹⁰ [*REDACTED*]

¹¹ [*REDACTED*]

¹² Exh. R0086-0106; *see also* Exh. R0128-0145.

¹³ Exh. R0107-0127; *see also* Exh. R0146-0164.

57. The issuance of the Peso and Dollar Debentures had previously been approved by Banco de México on 15 September 1995.¹⁴

58. On 29 September 1995, the following documents were executed:

(a) [*An agreement that provided for an increase of BanCreceer’s capital including the issuance by GFB of the Peso Debentures and Dollar Debentures; and provided for the assumption by FOBAPROA of part of the loan portfolio of BanCreceer against notes issued by FOBAPROA and guaranteed by the Mexican Government.*

]

(b) [*An agreement between GFB and FFIC concerning the purchase of dollar debentures.*

]

¹⁴ Exh. R0050-0055.

¹⁵ [*REDACTED*]

¹⁶ [*REDACTED*] “CMM” refers herein to the exhibits to Claimant’s Memorial on the Merits.”

¹⁷ [*REDACTED*

]

¹⁸ [*REDACTED*]

- (c) [*An agreement between GFB and Allianz of America, Inc. regarding the establishment of a joint venture in Mexico.*

]

59. In October 1995, Dr. Gerhart Reuss was elected to serve as member of the Board of Directors of GFB and as a “*miembro suplente*” [“alternate member”] of the Board of Directors of BanCreceer.
60. Some MPX 5,467 million worth of loan portfolio were transferred by BanCreceer and BanOro to FOBAPROA [*REDACTED*] with value date 28 September 1995. [*REDACTED*] In a report dated 20 September 1996 addressed to BanCreceer, BanOro and CNBV, Mancera, S.C. Ernst & Young determined that loans totalling MPX 426 million out of the MPX 5,467 million had the risk level “E” and that the loan portfolio required MXP 448 million of “*provisiones preventivas*” [“contingent reserves”] in addition to those determined by the Banks.²⁰ That and other related matters

¹⁹ [*REDACTED*]

²⁰ Exh. C0765-777, CMM 10. [

REDACTED

]

caused further discussion between BanCrecer (and BanOro) and FOBAPROA about the loans that qualified for the transfer and the required reserves.

61. [] a “Master Agreement” [

REDACTED

] was to the effect that the life insurance business was left in the hands of Allianz México, while BanCrecer would continue to make available its branch network to Allianz México for the sale of life insurance as well car and household insurance. Allianz México “bought out” BanCrecer by a US\$ 30 million debt instrument and a US\$ 10 million in the purchase of an equity interest in GFB by Allianz México (which acquired as result a 3.16% interest in GFB). [

REDACTED

]

62. In the meantime, the financial position of BanCrecer further deteriorated. It necessitated another [

REDACTED

] capital injection [

REDACTED

] against a further assumption by FOBAPROA of part

²¹ [*REDACTED*]

²² [*REDACTED*]

²³ [*REDACTED*]

of BanCreceer’s loan portfolio [

REDACTED

]

63. In the year 1997, the financial position of BanCreceer again deteriorated. One of the reasons was that on 1 January 1997 new accounting principles for financial institutions entered into force in Mexico. On 28 August 1997, GFB deposited its entire paid up shareholding in BanCreceer in favour of FOBAPROA with S.D. Ineval, S.A. de C.V., Institución para el Depósito de Valores. On 25 November 1997, GFB retained JP Morgan to assist it in the evaluation of GFB’s current financial position and in making an estimation of the capital needs and projected performance of BanCreceer.
64. At the same time, and according to FFIC unbeknownst to it, BanCreceer sought permission from CNBV by two letters of 17 November 1997 to create a trust to “repurchase” the Peso Debentures at par value.²⁶ According to BanCreceer, a number of Peso Debenture holders had claimed that the documentation for acquiring those Debentures was legally deficient. The Trust (“Fideicomiso No. 9285-9 BanCreceer”) was created on 28 November 1997,²⁷ which was controlled by BanCreceer. The “repurchase” of the Debentures by the Trust was financed by a

²⁴ [*REDACTED*]

²⁵ [*REDACTED*]

²⁶ Exh. R0166-0168 and C0744-0751, CMM 7.

²⁷ Exh. R0169-0171.

loan of BanCreceer, originally of MXP 250 million and later increased to the full amount of the par value of the Peso Debentures of MXP 500 million to the Trust.²⁸ By letter of 8 December 1997, CNBV gave BanCreceer permission to “repurchase” the Debentures, subject to a number of conditions.²⁹

65. At the end of 1997 and in the beginning of 1998, BanCreceer and JP Morgan developed a Recapitalization Plan to rescue BanCreceer for submission to the Mexican financial authorities.³⁰ The Recapitalization Plan as developed by BanCreceer and JP Morgan met resistance of the Government officials who insisted that the entire existing equity capital in BanCreceer should be written off to zero against previous losses and capital deficits. The Recapitalization Plan would have involved a new foreign strategic partner for 40% of BanCreceer equity. JP Morgan and the Allianz Group (in particular Dr. Reuss) contacted various foreign banks for that purpose, including in particular Argentaria, a Spanish bank.
66. The Recapitalization Plan was the subject of an urgent meeting in the evening of Thursday 26 February 1998, convened at the office of Governor of Banco de México. At that meeting participated Dr. Reuss (FFIC/Allianz), Mr. Eduardo Cepeda (JP Morgan), Mr. Alcántara (GFB/BanCreceer), Mr. Guillermo Ortiz (Governor of Banco de México), Mr. Eduardo Fernández García (President of CNBV), and Mr. Javier Arrigunaga (Director General of FOBAPROA). The Plan

²⁸ The original loan of MXP 250 million was authorized by BanCreceer’s Executive Committee on 21 February 1998 (Exh. C0800, CMM 15), and the increase to MXP 500 million on 19 May 1998 (Exh. C0801, CMM 16).

²⁹ Exh. R0172-0173.

³⁰ [*REDACTED*]

discussed at that meeting³¹ consisted in essence of a separation into a “Good Bank” and a “Bad Bank,” a merger of GFB and its other subsidiaries with BanCreceer, and a 40-40-20 split in shareholding, 40% for the existing Mexican shareholders, 40% for a new foreign strategic partner and 20% for FFIC in the cleaned-up bank. FFIC’s 20% equity participation would consist of its US\$ 50 million Debentures and an additional US\$ 50 million investment. The non-performing loan portfolio would be taken over by the Government in a trust. The new foreign partner was to contribute US\$ 200 million in equity. FFIC (Allianz) would attract the foreign strategic partner. If it failed to do so, the Government would repay FFIC US\$ 25 million of the US\$ 50 million Debentures. The parties to the present case disagree whether the Plan as discussed at this meeting constituted an agreement between FFIC and Mexico.

67. The next day, Friday 27 February 1998, FOBAPROA’s Technical Committee met. The parties disagree whether the minutes of the meeting [*REDACTED*] which were unknown to GFB, BanCreceer, FFIC and JP Morgan at the time, show that the Technical Committee approved the plan allegedly adopted the evening before.
68. On the same day, Friday 27 February 1998, GFB and JP Morgan issued a press release.³³ The three bullet points in the heading of the press release read:

³¹ [*REDACTED*] “CMPQ” refers herein to the exhibits to Claimant’s Memorial on the Preliminary Question.

³² [*REDACTED*]

³³ Exh. C0103, CMPQ 8; *see also* R2930.

- Se aprueban las medidas para el saneamiento definitivo de BanCrecer.
- Nuevos inversionistas, conjuntamente con un grupo de los accionistas actuales aportarán recursos por \$ 500 millones de dólares.
- El nuevo capital de BanCrecer estará representado en su mayoría por capital extranjero.

[Translation:

- The measures for the definitive restructuring of BanCrecer are approved.
- New investors, jointly with a group of current shareholders, will contribute resources of US\$ 500 million.
- The majority of the new capital of BanCrecer will be represented by foreign capital.]

69. Claimant contends that the draft of the press release was discussed with, and approved by, Mexican officials. Mexico denies this. In any event, the press release was reported in the Mexican newspapers the next day³⁴ and the Mexican authorities did not seek a rectification of the press reports or otherwise made known that the reporting was incorrect.

³⁴ Exh. C01180-1187, CRM 69.

70. By letter of 16 April 1998, BanCreceer sent CNBV the trust agreement of 28 November 1997.³⁵ That letter was shown to Dr. Reuss a few days later by [a government official. Dr. Reuss reported to his management on the circumstances surrounding the repurchase of the peso-dominated debentures.

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71. [Dr. Reuss also reported to his management on his meeting with a high-ranking government official regarding the repurchase of the peso-dominated bonds.

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[

³⁵ Exh. C0104-0107, CMPQ 9.

³⁶ [REDACTED]

REDACTED

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72. [

REDACTED

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73. The Peso Debenture “repurchase” by the Trust controlled by BanCreceer was substantially completed July 1998.³⁷ While the “repurchase” was initiated due to alleged deficiencies in certain subscriptions (referred to as “*sin contrato*”

³⁷ See letter of 13 July 1998 from BanCreceer to CNBV, Exh. C0108-0110, CMPQ 10.

[“without contract”]), in the course of 1998, the decision was taken to apply it to all Peso Debentures because, as alleged by Mexico in the present arbitration, it was impossible to distinguish between Peso Debentures “*sin contrato*” [“without contract”] and “*con contrato*” [“with contract”]. On 12 August 1998, CNBV wrote to GFB that it had taken note (“*se ha tomado nota*”) of the procedure.³⁸ On the same day, CNBV wrote to BanCreceer with reference to the letter to GFB that its letter of 8 December 1997 had become “without effect” (“*sin efecto*”).³⁹ FFIC infers from those letters that CNBV had approved the “repurchase” and that CNBV had lifted the restrictions set forth in its letter of 8 December 1997. Mexico disputes that inference.

74. The follow up of the discussions regarding the Recapitalization Plan on 26 and 27 February 1998 was the preparation by JP Morgan of a “*Programa de Saneamiento y Capitalización – Resumen de Términos y Condiciones*” [“Summary of Terms and Conditions of the Restructuring and Capitalization Program”] dated May 1998.⁴⁰ The header on each page of this document reads: “May 1998. Terms and Conditions Sheet. DRAFT FOR DISCUSSION.” The last page is a signature page for SHCP, Banco de México, FOBAPROA, CNBV and “Grupo de Inversionistas” (by: Mr. Alcántara). The document is referred to in this arbitration as the “Memorandum of Understanding” or the “Memorandum of Intent.” The italicized introduction to the Memorandum of Intent states:

³⁸ Exh. C0029, CMPQ 11.

³⁹ Exh. C0802, CMM 17.

⁴⁰ Exh. C0046-0055, CMPQ 5=C0703-0712, unofficial English translation at C0713-C0721.

The following terms and conditions reflect the agreement reached between the Grupo Financiero BanCreceer, S.A. de C.V. (the “Group”) shareholder group led by Mr. Roberto Alcántara Rojas (the “Investor Group”), the Ministry of Finance and Public Credit (“SHCP”), the Bank of Mexico, the Mexican Banking and Securities Commission (“CNBV”), [and] the Bank Fund to Protect Savings (“Fobaproa”), which have been ratified by FOBAPROA’s Technical Committee to carry out the Restructuring and Capitalization Program for BanCreceer, S.A. Institución de Banca Múltiple, Grupo Financiero BanCreceer (the “Bank”). The execution and validity of this document are subject to the approval of the Interministry Financing Expense Committee of the SHCP and of the Group’s corporate bodies. In view of the foregoing, no obligation included herein shall be enforceable until the respective approvals are obtained. The terms of the program described herein shall be documented in the final contracts executed to formalize these agreements to the satisfaction of the parties.

75. The stated purpose of the Memorandum of Intent is: “Define the terms and conditions pursuant to which the Investor Group intends to participate, with the support of the Federal Government, in the Bank’s Restructuring and Capitalization Program” (clause 1). The Memorandum of Intent deals with: Restructuring of the Bank (clause 2); Capitalization and Sale of the Bank (clause 3); Shareholder Structure (clause 4); FOBAPROA Funding (clause 5); Trust Administration (clause 6); Investor Group Commitments (clause 7); Indemnities (clause 8); Authorizations (clause 9); and Confidentiality (clause 10).
76. Mr. José Antonio García, Senior Executive Vice-President of GFB from June 1997 until July 1999, testified that the Memorandum of Intent was developed by JP

Morgan “in discussions with the Mexican financial authorities.”⁴¹ On the other hand, the witnesses appearing for Mexico in the arbitration testified that they had not seen the Memorandum of Intent until the present arbitration.

77. In March – April 1998, the Mexican Government presented financial reform legislation to the Mexican Congress. Congress then embarked on a critical examination of the financial authorities dealing with the crisis, in particular, FOBAPROA. In late 1998, Congress requested an audit of FOBAPROA. Thereafter, FOBAPROA was replaced by IPAB pursuant to the *Ley de Protección al Ahorro Bancario* [Law for the Protection of Bank Savings] adopted by Congress in December 1998 and published in the *Diario Oficial* [Official Gazette] of 19 January 1999 (entry into force on 20 January 1999).⁴² Article Ninth of the Transitional Provisions of the Law⁴³ refers to a Section Four of the “*Resumen Ejecutivo de las Operaciones realizadas por [FOBAPROA]*” [“Executive Summary of the Operations carried out by [FOBAPROA]”] in which it is mentioned that “*se prevén los montos necesarios para las operaciones de saneamiento financiero correspondientes a Banco del Atlántico, S.A., Banca Promex, S.A. y BanCrecer, S.A., y que a la fecha no se han finalizado.*” [“The amounts needed for the operations of financial restructuring corresponding to Banco del Atlántico, S.A., Banca Promex, S.A. and BanCrecer, S.A., have been planned for, but as of this

⁴¹ García I, ¶ 34.

⁴² Exh. C0217-0235, Exh. CMPQ 17. Any person who had been Secretary of SHCP, Governor of the Banco de México, or President of CNBV and in that capacity member of the Technical Committee of FOBAPROA during the period 1995-1997 was prohibited from being a member of the Executive Committee or Executive Secretary of IPAB (Second Article of the Transitional Provisions, Exh. C0231).

⁴³ Exh. C0233-0234, CMPQ 17.

date have not been finalized.”] Article Ninth required IPAB to proceed to “*evaluar, auditar y, en su caso, concluir, dichas operaciones*” [“evaluate, audit, and, as the case may be conclude said operations”]. One of the conditions imposed by Article Ninth for concluding the operations was that “*Se aplicará integralmente el capital de las instituciones mencionadas a cubrir sus pérdidas*” [“The capital of the afore-mentioned institutions shall be fully applied to cover its losses”].

78. In the meantime, FFIC and JP Morgan were actively seeking a strategic foreign partner. In the arbitration FFIC claims that it could not really interest foreign banks to participate since the Memorandum of Intent had not been signed. Moreover, it was unclear whether the split in the new bank would be 40-40-20 as foreseen in the plan but not yet legally possible in Mexico. The plan anticipated that Mexican law would change in that regard, but Congress did not adopt legislation to that effect. It was then envisaged that a foreign party would have 51% control via a subsidiary, which was possible under Mexican law. That, in turn, required convincing Mr. Alcántara, the principal shareholder of GFB, who initially resisted the concept of foreign control.
79. In fall 1998, the situation was described in another letter from Dr. Reuss to Mr. Hansmeyer (captioned [*REDACTED*]) as follows:⁴⁴

⁴⁴ [*REDACTED*]

[

REDACTED

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[

REDACTED

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[capitals as in original]

80. On 11 November 1998, FOBAPROA advised BanCrecer that it had returned the entire loan portfolio.⁴⁵ [*REDACTED*] GFB appears to have accepted the return in a letter of 14 October 1999.⁴⁷
81. In January 1999, JP Morgan continued its discussions with BBV to interest them in a participation in a sanitized BanCrecer.⁴⁸
82. As mentioned above, in January 1999 the *Instituto para la Protección al Ahorro Bancario* (“IPAB” Institute for the Protection of Bank Savings) took over FOBAPROA’s responsibilities. IPAB devised a new plan for BanCrecer, whereby it would take over BanCrecer and auction it to the highest bidder.
83. By letter of 5 April 1999 from Allianz México (Dr. Reuss) to SHCP, Banco de México, and CNBV,⁴⁹ Dr. Reuss recalled the agreement allegedly made in February 1998 on the recapitalization of BanCrecer, and in particular that US\$ 25 million of the Dollar Debentures would be returned if no foreign strategic partner could be found (*see* ¶¶ 66-67 above). Dr. Reuss wrote:

⁴⁵ Exh. C0215-0216, CMPQ 16.

⁴⁶ [*REDACTED*]

⁴⁷ Exh. R1923-1924.

⁴⁸ *See* Memorandum of 26 January 1999 and proposal to BBV (Exh. C0113-C0131, CMPQ 13, and C0132-0208, CMPQ 14).

⁴⁹ Exh. C0236-0237 (CMPQ 18).

[N]os permitimos dirigirnos a Ustedes con referencia al proceso para la futura venta o fusión de BanCrecer.

Como Ustedes están enterados, el Grupo Allianz suscribió en Octubre de 1996 una emisión de obligaciones de BanCrecer, denominados en Dólares, por valor de US Dólares 50 millones. Al mismo tiempo, BanCrecer hizo una emisión de obligaciones en pesos, por un monto equivalente, suscrita por tenedores mexicanos. Esta emisión de obligaciones suscrita por inversionistas nacionales fue totalmente liquidada por BanCrecer en 1998, con la aprobación de todas las autoridades financieras competentes.

En el caso de Allianz, habíamos ofrecido a las autoridades en Febrero de 1998 el volver a invertir la totalidad de los mencionados US Dólares 50 millones en obligaciones, una vez liquidados, mas inversiones adicionales de otros US Dólares 50 millones, en un plan de recapitalización de BanCrecer en conjunto con un socio bancario extranjero, programa que había sido aprobad[o] por la Junta de Gobierno de FOBAPROA en el primer trimestre 1998.

En la consideración original por parte de las autoridades del plan de recapitalización de BanCrecer, también habíamos aceptado el que solamente se liquidaría a Allianz un monto de US Dólares 25 millones en caso de que el plan de recapitalización no pudiese llevarse a cabo por falta de socios extranjeros interesados.

Por los retrasos lamentables y ataques políticos que sufrieron los programas pendientes de FOBAPROA, la Junta de Gobierno del FOBAPROA nunca llegó a entregar a BanCrecer o a J.P. Morgan, los agentes financieros de BanCrecer, una carta formal de intenciones, firmada por el FOBAPROA y cuyos términos ya se habían redactado. Esta carta de intenciones, tantas veces solicitada, era la base fundamental para que los bancos que en aquel tiempo estuvieron interesados en adquirir o recapitalizar a BanCrecer, pudiesen concretizar sus intenciones de inversión, ya que, evidentemente, los términos de participación del FOBAPROA y su acuerdo al plan de recapitalización eran condiciones

imprescindibles para cualquier entrada de un socio bancario extranjero.

Actualmente, con la inminente formación del IPAB y con la intención de someter el caso de BanCrecer a un proceso de licitación, la venta o fusión de BanCrecer posiblemente se afectaría dentro de un corto plazo.

Es por esta razón que Allianz quisiera respetuosamente volver a plantear el tema de las obligaciones para solicitar se liquiden las obligaciones, como parte del programa de reestructuración de BanCrecer, tal como se procedió hacer para el caso de las obligaciones en posesión de tenedores nacionales.

Confirmamos, en este contexto, nuestro compromiso, una vez liquidadas las obligaciones suscritas por el Grupo Allianz, de volver a invertir, dentro del capital de la institución absorbente de BanCrecer, con el fin de fortalecer su posición financiera, la totalidad de los US Dólares 50 millones de obligaciones liquidadas. Claro está que tal re-inversión por parte de Allianz, así como el compromiso de Allianz para inversiones adicionales, dependerían de si una inversión de Allianz sería bienvenida por la institución absorbente y se otorgue en condiciones aceptables, y si la institución absorbente quisiera llegar a acuerdos satisfactorios para el Grupo Allianz en cuanto a una continuación de la colaboración en el sector de banca-seguros.

[Translation:

[W]e take the liberty of addressing you in reference to the process for the future sale or merger of BanCrecer.

As you are aware, in October of 1996 the Allianz Group subscribed to an issuance of dollar-denominated debentures by BanCrecer, for a value of US Dollars 50 million. At the same time, BanCrecer carried out the issuance of peso-denominated debentures, for an equal amount, which was acquired by Mexican holders. That issuance of debentures, acquired by Mexican

holders, was liquidated in its entirety by BanCrecer in 1998, with the approval of all the competent financial authorities.

In the case of Allianz, in February of 1998 we offered to the authorities that we would reinvest the entire afore-mentioned US Dollar 50 million debentures, once they were liquidated, plus an additional investment of US Dollar 50 million, in a recapitalization plan for BanCrecer, jointly with a foreign banking partner, the program which had been approved by the Governing Board of FOBAPROA, in the first quarter of 1998.

In the original consideration by the authorities of the recapitalization plan of BanCrecer, we had also accepted that only an amount equal to US Dollar 25 million was to be liquidated with respect to Allianz, in case the recapitalization plan could not be carried out by the lack of interested foreign partners.

Given the regrettable delays and political attacks suffered by the pending FOBAPROA programs, the Governing Board of FOBAPROA was never able to deliver, either to BanCrecer or to JPMorgan, the financial agents of BanCrecer, a formal letter of intent signed by FOBAPROA whose terms had already been drafted. This letter of intent, so many times requested, was the fundamental basis on which the banks that at that time were interested in acquiring or recapitalizing BanCrecer, would have been able to realize their investment intentions, given that, evidently, the terms of participation of FOBAPROA and its agreement to the recapitalization plan were essential conditions to the entry of any foreign banking partner.

Currently, with the imminent creation of IPAB and with the intention of submitting the BanCrecer case to a public bidding process, the sale or merger of BanCrecer possibly would be effected within a brief period.

It is for this reason that Allianz, respectfully, would like to revert to the issue of the debentures, in order to request their payment as part of the restructuring program of BanCrecer, just as it was

carried out in the case of the debentures in possession of the national holders.

In this context, we confirm our commitment to re-invest in the equity of the entity absorbing BanCreceer the entire 50 million US Dollars, with the objective of strengthening its financial position, once the debentures acquired by the Allianz Group are liquidated. It is clear that such re-investment by Allianz as well as the commitment by Allianz for additional investments, would depend on whether an investment by Allianz would be welcomed by the absorbing entity and be granted on acceptable conditions, and whether the absorbing entity would be willing to reach agreements satisfactory to Allianz Group, regarding a continuity in the collaboration within the banking-insurance sector.]

84. [

REDACTED

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85. On 15 June 1999, GFB sought legal advice from Bufete Carrillo Gamboa, S.C. on the return of the loan portfolio by FOBAPROA. The legal opinion dated 23 June 1999 from Bufete Carrillo Gamboa, S.C. concludes that FOBAPROA's letter of 11

⁵⁰ [*REDACTED*]

November 1998,⁵¹ by which it returned the entire portfolio the BanCrecer (and BanOro), was “of questionable legality since it stems from unilateral conduct.”⁵² The legal opinion was based on a number of assumptions, in particular the proper fulfilment by BanCrecer, BanOro and the shareholders of the obligations undertaken in the various agreements. It does not appear that BanCrecer took action on the basis of the Carrillo opinion.

86. On 7 July 1999, FFIC requested GFB to seek permission from Banco de México for it to acquire the Dollar Debentures on the same terms as the Peso Debentures had been “repurchased.”⁵³ GFB sought the permission at Banco de México by letter of 16 July 1999, to which it attached FFIC’s letter of 7 July 1999.⁵⁴ On 16 August 1999, Banco de México denied GFB’s request, asserting that “anticipated payment” of convertible debentures is not allowed under Mexican law.⁵⁵

87. [*CNBV submitted a “Note for Discussion” to IPAB, which is summarized as follows:*

⁵¹ See ¶ 80 *supra*.

⁵² Exh. C1188-1199, CRM 70. Although the opinion was mentioned on his disclosure statement in the present case at the time of his appointment in May 2002, Mr. Francisco Carrillo Gamboa resigned as arbitrator in March 2005 when it became apparent that FFIC relied on this opinion in the merits phase of the arbitration. See ¶ 27 *supra*.

⁵³ Exh. R0174-0175.

⁵⁴ Exh. R0176.

⁵⁵ Exh. C0238, CMPQ 19.

⁵⁶ [*REDACTED*]

• *As background, it refers to the two issues of subordinated debentures with mandatory conversion into capital by GFB: one for 500 million pesos which were placed in the market, distributed among a large number of investors; and the other for a value of USD 50 million which were subscribed by the Allianz Group. It addresses the establishment of a trust with the knowledge of the Mexican financial authorities to acquire in the market the peso-denominated debentures, with the object of re-issuing them once the capitalization plan materialized. It also refers to the recapitalization plan that was submitted for consideration of FOBAPROA's Technical Committee at its 27 February 1998 meeting. According to such recapitalization plan, the debentures acquired by the Allianz Group would be considered as part of the investment it would make in BanCreceer, to be supplemented with an additional USD 50 million and, in the event that it would not be possible to conclude the capitalization plan on account of the foreign interested partners, Allianz would be reimbursed a sum of USD 25 million.*

• *It addresses Allianz' complaint to the financial authorities, and its request that it be reimbursed for the totality of its investment in convertible debentures issued by BanCreceer, asking for the same treatment as the national holders of the peso denominated debentures that had been liquidated. It notes that the Allianz Group has made reference to their rights under investment treaties.*

• *It discusses the Allianz Group's willingness to negotiate and the risks of litigation as well as the ability to attract potential foreign investors when it becomes known that unequal treatment of a foreign investor was intended. At FOBAPROA's Technical Committee meeting on 27 February 1998, those present decided to negotiate with Allianz and the group of shareholders which control GFB, on terms that would avoid disputes brought up by the debenture holders.*

- *In conclusion, the CNBV recommended to negotiate with the Allianz Group.*

[

REDACTED

]

88. [

REDACTED

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89. On 14 September 1999, by letters addressed to the Banco de México and CNBV,⁵⁸ GFB attempted to convert the Dollar Debentures (and Peso Debentures) into shares of GFB prior to the maturity date, 12 October 2000. FFIC asserts that this attempt was made at the instigation of IBAP.⁵⁹ On 4 October 1999, FFIC was able

⁵⁷ [*REDACTED*]

⁵⁸ Exh. R0177-0178.

⁵⁹ Notice of 14 September 1999, published in the Diario Oficial, Exh. R0179.

to obtain a court injunction (*amparo*) to block the anticipatory conversion.⁶⁰ By letter of 12 October 1999, Banco de México denied GFB authorization to convert the Dollar Debentures prematurely.⁶¹ By a decision dated 10 November 1999,⁶² the Federal Mexican Court dismissed the *amparo* proceeding initiated by FFIC against actions by Banco de México, the CNBV and other authorities, in connection with the delivery of an alleged authorization for the anticipated conversion of the Debentures issued by GFB. By a decision dated 24 April 2000,⁶³ the Court considered firm and final the dismissal of the *amparo* proceeding and thus confirmed the judgment issued on 10 November 1999.

90. In October 1999, GFB ceased to pay FFIC interest on the Dollar Debentures.
91. On 3 November 1999, two shareholders' meetings of GFB resolved that: (1) IPAB would take control of BanCreceer; (2) BanCreceer would cease to be a subsidiary of GFB; and (3) GFB would be dissolved and liquidated.⁶⁴
92. On 29 November 2000, FFIC submitted to the *Dirección General de Inversiones Extranjeras – Secretaría de Comercio y Fomento Industrial* [General Directorate of Foreign Investments – Ministry of Commerce and Industrial Development] an amended Notice of Intent to Submit a Claim to Arbitration, replacing an earlier

⁶⁰ Order of the Court, Exh. C-0246-0249, CMPQ 21. The Banco de México subsequently refused authorization for the conversion on 12 October 1999, Exh. C0250, CMPQ 22.

⁶¹ Exh. C0250, CMPQ 22.

⁶² Exh. R1865-1868.

⁶³ Exh. R1869.

⁶⁴ Exh. C0815-0830, CMM 24, and C0831-C0858, CMM25=R0180-0198. *See also* letter of 14 October 1999 from GFB and BanCreceer to FOBAPROA (Exh. R1923-1928).

Notice dated 15 November 1999. The negotiations for a settlement of the dispute did not yield a result. On 30 October 2001, Claimant filed a Notice of Arbitration against Respondent with ICSID.

93. By letter dated 12 October 2001, SHCP notified GFB that it approved the resolutions of 3 November 1999 referred to in ¶ 91 above.⁶⁵
94. In 2001, BanCreceer was auctioned by IPAB and acquired by Banorte, a Mexican bank.
95. Mexico contends that it had to spend [*a large amount in pesos*] to rescue BanCreceer.⁶⁶
96. IPAB discussed the question of FFIC's Dollar Debentures again at its session of 13 February 2002. [

REDACTED

]

⁶⁵ Exh. C0859-0860, CMM 26=R2750-2751.

⁶⁶ [REDACTED]

⁶⁷ [*REDACTED*]

⁶⁸ [*REDACTED*]

[

REDACTED

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97. [

REDACTED

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98. The discussions at IPAB's meeting on 13 February 2002 were inconclusive. [

REDACTED

]

⁶⁹ [*REDACTED*]

⁷⁰ [*REDACTED*]

⁷¹ [*REDACTED*]

[

REDACTED

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99. GFB appears to be still in the process of liquidation. FFIC has not submitted a claim in the liquidation process.⁷³
100. The Dollar Debentures are physically with S.D. Indeval, S.A. de C.V., Institución para el Depósito de Valores. It is unclear whether they are actually converted into shares in GFB and, more generally, what their current status is.⁷⁴
101. The Peso Debentures appear to be still in the Trust controlled by BanCreceer. It is again unclear whether they were converted into shares in GFB at the maturity date in 2000.⁷⁵ At 30 September 2002, they were valued at MXP 0.97479 per Debenture.⁷⁶

VI. OVERVIEW OF THE PARTIES' POSITIONS

102. The following two Sections provide an overview of the numerous factual and legal arguments of FFIC and Mexico as made in their written and oral submissions. The

⁷² [REDACTED]

⁷³ Transcript of the hearing 1292:7-9.

⁷⁴ Transcript of the hearing 1287:16 – 1294:1.

⁷⁵ Transcript of the hearing 1287:16 – 1294:1.

⁷⁶ Exh. C0112, CMPQ 12. The total asset value (“*Portafolio de Inversiones, Valorización según Precio de Mercado*”) is, according to the financial statement, MXP 486,615,168.00 for 499,200,000 Peso Debentures at a market price (“*Precio de Mercado*”) of MXP 0.97479, while the corresponding liability (“*Pasivo del Fideicomiso*”) is MXP 422,604,377.86.

Tribunal will consider them in more detail, and to the extent relevant those made at the hearing, in the various Sections of Chapter VII below.

A. FFIC

103. In support of its claim, FFIC asserts that expropriation under NAFTA includes deprivation of the use or value of a covered investment.⁷⁷ FFIC further asserts that Mexico permanently deprived it of the use and value of its investment and thereby expropriated it within the meaning of Article 1110 of the NAFTA, as informed by international law authorities and precedent, by the following:

- (i) In early 1998, the Government of Mexico compelled FFIC to use its investment to further the Government's Recapitalization Plan for BanCrecer.⁷⁸
- (ii) After compelling FFIC to participate in the Government's Recapitalization Plan, the Government proceeded to thwart the Program to which it had committed itself, thereby depriving FFIC of the value of its investment as envisioned under the Program.⁷⁹
- (iii) At or around the same time that the Government approved and then subsequently failed to carry out the Recapitalization Plan for BanCrecer,

⁷⁷ Memorial on the Merits ¶¶ 86-96.

⁷⁸ Memorial on the Merits ¶¶ 98-99. At the hearing, FFIC asserted that the alleged expropriation occurred in November 1997 (Transcript of the hearing 1117:8-9).

⁷⁹ Memorial on the Merits ¶¶ 100-104.

the Government discriminated against FFIC by refusing to authorize the repurchase of FFIC’s Dollar Debentures at face value, as the Government had done for the Mexican investors of the Peso Debentures.⁸⁰

- (iv) The Government of Mexico also deprived FFIC of the value of its investment by returning, in November 1998, the non-performing loan portfolios assumed by FOBAPROA from 1995-1997.⁸¹
- (v) The Government of Mexico, through IBAP, took the ultimate step to deprive FFIC of the value of its investment by taking control of BanCreceer in November 1999.⁸²

104. FFIC adds that the deprivation of the use and value of its investment is not merely “ephemeral.”⁸³

105. FFIC also contends that even if the Tribunal were to find that no single one of the Government’s actions individually is sufficient to support a finding of expropriation, it is clear that the totality of the acts and omissions of the Government, considered cumulatively, had the effect of depriving FFIC of the use and value of its investment, thereby expropriating it.⁸⁴

⁸⁰ Memorial on the Merits ¶¶ 105-119.
⁸¹ Memorial on the Merits ¶¶ 120-122.
⁸² Memorial on the Merits ¶ 123.
⁸³ Memorial on the Merits ¶ 124.
⁸⁴ Memorial on the Merits ¶¶ 126-129.

106. Finally, FFIC asserts that it did not receive fair market value for its investment in violation of Article 1110 of the NAFTA.⁸⁵
107. In its Memorial on the Merits, FFIC also alleges that it is entitled to the full value of its investment, being US\$ 50 million, on which compound interest should be awarded.⁸⁶ In its Reply on the Merits, FFIC limited itself to observing that it would present its full argument on damages when the parties reach the third phase of these proceedings.⁸⁷
108. In its Reply on the Merits, FFIC first asserts that Mexico mischaracterizes or ignores key facts regarding its expropriation of its investment. According to FFIC, these include: (a) the role of the Working Group;⁸⁸ (b) the Peso Debentures Repurchase;⁸⁹ (c) the Recapitalization Program;⁹⁰ (d) FFIC’s request for repurchase;⁹¹ (e) FFIC’s participation in the Recapitalization Program;⁹² and (f) Mexico’s destruction of the Recapitalization Program: failure to sign the Memorandum of Intent and unilateral return of the entire loan portfolio.⁹³

⁸⁵ Memorial on the Merits ¶ 130.

⁸⁶ Memorial on the Merits ¶¶ 130-138.

⁸⁷ Reply on the Merits ¶ 115.

⁸⁸ Reply on the Merits ¶¶ 4-8.

⁸⁹ Reply on the Merits ¶¶ 9-17.

⁹⁰ Reply on the Merits ¶¶ 18-24.

⁹¹ Reply on the Merits ¶¶ 25-35.

⁹² Reply on the Merits ¶¶ 36-41.

⁹³ Reply on the Merits ¶¶ 42-53.

109. FFIC also contends that the Tribunal has competence to hear all facts and legal arguments pertaining to FFIC’s expropriation claim.⁹⁴
110. FFIC denies that the measures that form the basis of FFIC’s expropriation claim are covered by the prudential measures exception.⁹⁵
111. Finally, FFIC asserts that its expropriation claim falls within the core norms of expropriation prohibited under Article 1110 of the NAFTA.⁹⁶
112. In its Supplemental Submission of 21 September 2005, FFIC submits that: (a) the Working Group is a State organ under international law; (b) that Mexico directed and controlled the Working Group and that, in any event, its actions are attributable to Mexico; and (c) that the Government of Mexico acknowledged and adopted the acts of the Working Group.⁹⁷
113. In the Supplemental Submission, FFIC addresses again the Recapitalization Plan in rebuttal of Mexico’s defenses and in reliance on what FFIC describes as “new testimony.”⁹⁸

⁹⁴ Reply on the Merits ¶¶ 54-62.

⁹⁵ Reply on the Merits ¶¶ 63-93.

⁹⁶ Reply on the Merits ¶¶ 94-114.

⁹⁷ Claimant’s Supplemental Submission ¶¶ 7-17.

⁹⁸ Claimant’s Supplemental Submission ¶¶ 18-24.

114. FFIC also addresses again the return by FOBAPROA of the loan portfolio to BanCreceer, arguing, *inter alia*, that the unilateral return by the Government made it impossible to pursue the Recapitalization Plan.⁹⁹
115. Finally, in the Supplemental Submission, FFIC responds to the *dictamen* of SHCP of 3 August 2005, produced by Mexico in conjunction with its Rejoinder on the Merits.¹⁰⁰ FFIC summarizes the *dictamen* “that all of the Government activities in its various bank rescue efforts during Mexico’s financial crisis were directed to prudential ends.” FFIC contends that: “What is relevant here, however, is whether the Government’s specific measures with respect to Fireman’s Fund’s investment in GFB were ‘reasonable prudential measures.’”¹⁰¹

B. Mexico

116. Mexico emphasizes that, while being a sophisticated investor, FFIC made a risky investment in a bank at a time that there was a very serious financial crisis in Mexico.¹⁰²
117. Mexico addresses and partially disputes a number of the facts as alleged by FFIC, including those relating to:¹⁰³ (a) the financial rescue;¹⁰⁴ (b) the deteriorating

⁹⁹ Claimant’s Supplemental Submission ¶¶ 25-32.

¹⁰⁰ Exh. R2934-2947.

¹⁰¹ Claimant’s Supplemental Submission ¶¶ 33-38.

¹⁰² Counter-Memorial on the Merits ¶ 5.

¹⁰³ See also Annex 2 to Counter-Memorial on the Merits (“Admissions and Denials of the Government of Mexico with respect to Claimant’s Memorial”).

¹⁰⁴ Counter-Memorial on the Merits ¶¶ 47-58.

financial situation of BanCrecer and GFB between 1994 and 1999;¹⁰⁵ (c) the programs implemented by FOBAPROA;¹⁰⁶ (d) the participation by GFB and BanCrecer in the PCCC;¹⁰⁷ (e) the *Ley de Protección al Ahorro Bancario* [Law for the Protection of Bank Savings];¹⁰⁸ (f) the Debentures;¹⁰⁹ and (g) the premature conversion of the Debentures by GFB.¹¹⁰

118. With respect to the legal arguments, Mexico contends that FFIC makes three fundamental errors in its reasoning as presented in the Memorial on the Merits:

- (a) First, in that it presents an inadmissible claim for denial of national treatment, disguised as a claim for expropriation.
- (b) Second, in that it attempts to prove an expropriation on the basis of an analysis of alleged violations of the requirements set forth in paragraphs (a) through (d) of Article 1110, instead of establishing that there was an expropriation and then proceeding to an analysis of the fulfilment of those requirements.

¹⁰⁵ Counter-Memorial on the Merits ¶¶ 59-77.

¹⁰⁶ Counter-Memorial on the Merits ¶¶ 78-112.

¹⁰⁷ Counter-Memorial on the Merits ¶¶ 113-148.

¹⁰⁸ Counter-Memorial on the Merits ¶¶ 149-168.

¹⁰⁹ Counter-Memorial on the Merits ¶¶ 169-192.

¹¹⁰ Counter-Memorial on the Merits ¶¶ 193-196.

(c) Third, in that it extends the concept of expropriation much beyond any concept recognized until now as an expropriation under international law.¹¹¹

119. Mexico further raises a number of questions relating to the competence of the Tribunal: (1) jurisdictional limits;¹¹² (2) the claim is based on facts and arguments that are outside the competence of the Tribunal;¹¹³ (3) the United States has considered bringing a State-to-State claim under Chapter Twenty of the NAFTA;¹¹⁴ and (4) the Tribunal must ignore large portions of the Memorial on the Merits.¹¹⁵

120. With respect to the merits of FFIC’s claim, Mexico contends that the challenged measures concern prudential measures authorized by Chapter Fourteen of the NAFTA, in particular Article 1410.¹¹⁶

121. Mexico further contends that FFIC gives an incorrect interpretation of Article 1110 of the NAFTA, which, moreover, is dangerous, extensive and without precedent.¹¹⁷

¹¹¹ Counter-Memorial on the Merits ¶ 197.

¹¹² Counter-Memorial on the Merits ¶¶ 198-210.

¹¹³ Counter-Memorial on the Merits ¶¶ 211-215.

¹¹⁴ Counter-Memorial on the Merits ¶¶ 216-217.

¹¹⁵ Counter-Memorial on the Merits ¶¶ 218-222.

¹¹⁶ Counter-Memorial on the Merits ¶¶ 223-232.

¹¹⁷ Counter-Memorial on the Merits ¶¶ 233-286.

122. Mexico concludes that the application of the law to the facts of the present case shows that there was no expropriation.¹¹⁸
123. With respect to FFIC’s request for damages, as set forth in FFIC’s Memorial on the Merits, Mexico points out that, in the present phase of the arbitration, the Tribunal is not to deal with damages since the proceedings were bifurcated.¹¹⁹
124. In its Rejoinder on the Merits, Mexico first disputes a number of factual allegations made by FFIC in its Reply on the Merits: (a) the Working Group;¹²⁰ (b) the “temporal acquisition” of the Peso Debentures;¹²¹ (c) the Recapitalization Program;¹²² (d) the proposal to liquidate the Dollar Debentures;¹²³ and (e) the return of the loan portfolio.¹²⁴
125. Mexico also maintains that Article 1410 of the NAFTA (Exceptions relating to prudential measures) covers the measures in question relating to the claim.¹²⁵
126. Mexico further contends that FFIC did not respond to two central arguments in Mexico’s Counter-Memorial on the Merits: (1) Mexico’s objection that FFIC is in

¹¹⁸ Counter-Memorial on the Merits ¶¶ 287-293.

¹¹⁹ Counter-Memorial on the Merits ¶¶ 294-315. *See also* Rejoinder on the Merits ¶¶ 275-278.

¹²⁰ Rejoinder on the Merits ¶¶ 16-31.

¹²¹ Rejoinder on the Merits ¶¶ 32-60.

¹²² Rejoinder on the Merits ¶¶ 61-121.

¹²³ Rejoinder on the Merits ¶¶ 122-131.

¹²⁴ Rejoinder on the Merits ¶¶ 132-158.

¹²⁵ Rejoinder on the Merits ¶¶ 159-176.

reality a claim for violation of Article 1405 of the NAFTA (National Treatment); and (2) FFIC ignores that both the United States and Mexico coincide in that there is error in interpreting the NAFTA if an expropriation is shown on the basis of the criteria set forth in paragraphs (a) through (d) of Article 1110 for the purposes of determining whether an expropriation took place legally.¹²⁶

127. Mexico also voices other criticisms on FFIC’s Reply on the Merits, including FFIC’s response to allegations that Mexico never made; FFIC’s contentions regarding creeping expropriation; and the use of State funds as a concession *ex gratia*. Further, Mexico asserts that BanCreceer never complied with [REDACTED]; that FFIC’s investment had practically no value in February 1998; that FFIC voluntarily acquired the Dollar Debentures as part of the PCCC; that there was no willing buyer of the Dollar Debentures in 1998; that the Government did not “repudiate” its “agreement” by returning the loan portfolio in November 1998; that the Memorandum of Intent of May 1998 was merely a draft; and that it is a factual and legal question whether FFIC held an investment in an insolvent bank and had an acquired right for demanding a rescue by the Government.¹²⁷
128. In its Rejoinder on the Merits, Mexico reiterates that the Tribunal has no competence to address a claim for denial of National Treatment.¹²⁸

¹²⁶ Rejoinder on the Merits ¶ 177.

¹²⁷ Rejoinder on the Merits ¶¶ 178-197.

¹²⁸ Rejoinder on the Merits ¶¶ 202-231.

129. Mexico further argues that the Tribunal has no competence to determine whether acts of the Mexican financial authorities were “inappropriate.”¹²⁹
130. Mexico also contends that the Tribunal does not have competence over questions of internal law.¹³⁰
131. With respect to FFIC’s contentions regarding the Working Group, Mexico submits that the Working Group cannot create acquired rights.¹³¹
132. Finally, with respect to FFIC’s allegations concerning discrimination, without prejudice to its position that FFIC’s claim is a disguised claim for denial of national treatment, Mexico contends that no discrimination occurred in regard of FFIC.¹³²
133. In its Pre-hearing brief of 21 September 2005, Mexico submitted that its arguments in its Rejoinder on the Merits responded to FFIC’s arguments in its Reply on the Merits.

¹²⁹ Rejoinder on the Merits ¶¶ 232-238.

¹³⁰ Rejoinder on the Merits ¶¶ 239-253.

¹³¹ Rejoinder on the Merits ¶¶ 255-259.

¹³² Rejoinder on the Merits ¶¶ 260-274.

VII. CONSIDERATION BY THE TRIBUNAL

A. Introduction

134. The Tribunal has considered all written and oral submissions of the parties and the written and oral evidence produced by them as well as the submission of the Government of Canada in the present phase of the proceedings. Every question submitted to the Tribunal is expressly or implicitly addressed below.
135. In addressing the questions below, the Tribunal will adhere to the principle set forth by Article 1131(1) of the NAFTA according to which “A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and the applicable rules of international law.”
136. When interpreting the NAFTA, the Tribunal will follow the rules of interpretation set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties of 1969. Accordingly, the text of the NAFTA is in the first place to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Recourse can be had to supplementary rules of interpretation under the conditions stated in Article 32 of the Vienna Convention.

B. Observations as to Competence¹³³

137. In its Counter-Memorial on the Merits, Mexico raises four points under the heading “*Cuestiones de competencia.*”¹³⁴

138. The *first point* relates to the position of Allianz AG, the ultimate parent company of FFIC and incorporated under the laws of Germany.¹³⁵ According to Mexico, while FFIC is an investor within the meaning of the NAFTA, a distinction should be made between the acts of FFIC and those of Allianz AG. Allianz AG concluded with GFB [*a memorandum of intent to form a company in Mexico.*

] Allianz of America, Inc. in turn concluded with GFB [*an agreement.*] That agreement contemplates [*the setting up of a joint venture in Mexico.*

] In this manner, Mexico argues, the two principal parties are GFB and Allianz. Mexico adds that Dr. Reuss represented Allianz during the period 1995-1999 and that no document shows that he ever received instructions from FFIC. Mexico submits that FFIC cannot include claims on behalf of Allianz

¹³³ In the present Award, the Tribunal uses the terms “competence” and “jurisdiction” as equivalent legal concepts. It is to be noted that the NAFTA refers to “jurisdiction” (*see, e.g.,* Article 1126(2)); 1126(8)) and the Additional Facility Rules to “competence” (Article 46).

¹³⁴ Counter-Memorial on the Merits ¶¶ 198-222.

¹³⁵ Counter-Memorial on the Merits ¶¶ 198-209.

¹³⁶ [REDACTED]

¹³⁷ [REDACTED]

AG on the basis of the Bilateral Investment Treaty between FR Germany and Mexico of 25 August 1998.

139. The Tribunal notes that FFIC does not dispute the fact that it cannot present claims of Allianz AG under the German-Mexican BIT in the present arbitration. However, FFIC has not made such a claim and FFIC’s claim in the present arbitration is based on Article 1110 of the NAFTA concerning expropriation. Mexico expressly recognizes that FFIC is entitled to bring the latter claim.¹³⁸ The Tribunal’s mandate is indeed only concerned with that claim. The point raised by Mexico, therefore, need not be addressed further.

140. With respect to Dr. Reuss’ authority to act on behalf of FFIC, FFIC points out that he used “Allianz” as a shorthand for the Allianz Group of which FFIC forms part and that it was clear that he acted for FFIC in the matters relevant to the present case.¹³⁹ A review of the record indeed confirms that Mexico could not reasonably have understood Dr. Reuss’ authority differently.

141. The *second point* is Mexico’s submission that FFIC’s claim is based on facts and arguments that are outside the competence of the Tribunal.¹⁴⁰ Mexico contends that at the hearing concerning the Preliminary Question, FFIC recognized that its claims were mainly concerned with a violation of the obligation of national treatment and not expropriation, but that its claim in the present phase of the

¹³⁸ Counter-Memorial on the Merits ¶ 210.

¹³⁹ Reuss III ¶ 4.

¹⁴⁰ Counter-Memorial on the Merits ¶¶ 211-215.

arbitration is a resuscitation of its claim alleging denial of national treatment, in particular in respect of allegations of discriminatory treatment. This is denied by FFIC.¹⁴¹

142. It is indeed the case that, at the hearing on the Preliminary Question, FFIC focussed on the alleged violation of the obligation of national treatment and not on expropriation. However, at that hearing, FFIC did not abandon in any manner its claim based on alleged expropriation.
143. More generally, the Tribunal wishes to recall that its competence in the present phase of the arbitration is solely concerned with FFIC's claim under Article 1110 of the NAFTA. As the Tribunal ruled in its Decision on the Preliminary Question of 17 July 2003:

66. Several provisions of Chapter Eleven are incorporated into Chapter Fourteen, including, as here relevant, Article 1110 concerning Expropriation and Compensation, and Articles 1115-1138 concerning the procedural aspects of dispute resolution by a tribunal such as the present one. Article 1102 on National Treatment and Article 1105 on Minimum Standard of Treatment are not incorporated into Chapter Fourteen. Accordingly, if the measures alleged to have been taken on behalf of the Government of Mexico are covered by Chapter Fourteen, this Tribunal lacks jurisdiction of the claims under Articles 1102 and 1105. Chapter Fourteen contains no counterpart to the Minimum Standard of Treatment provision of Chapter Eleven; it does contain, in Article 1405, a counterpart to the national treatment provision in Chapter Eleven, and indeed a claim for breach of Article 1405 is made in the present arbitration. However, Article 1405 is not included

¹⁴¹ Transcript of the hearing 1283-84.

among the provisions to which the procedural provisions of Chapter Eleven apply (Articles 1115-1138), and Article 1414 makes clear that claims under Article 1405 are subject to state-to-state dispute settlement pursuant to Chapter Twenty, not to investor-state dispute settlement under Chapter Eleven.

67. In sum, if the measures challenged in this arbitration are covered by Chapter Fourteen, the claims brought under Articles 1102, 1105, and 1405 must be dismissed, and only the claim for expropriation pursuant to Article 1110 remains to be decided by this Tribunal. If, on the other hand, the conditions for application of Chapter Fourteen are not met, the claims under Article 1102 (National Treatment) and Article 1105 (Minimum Standards of Treatment) remain before this Tribunal, along with the expropriation claim under Article 1110.

(. . .)

112. . . (1) HOLDS that Claimant's claims brought under Articles 1102, 1105 and 1405 of the NAFTA are not within the competence of the Tribunal, but that claims brought under Article 1110 are within its competence;

144. The *third point* is that, according to Mexico, the United States is considering bringing a claim against Mexico under Chapter Twenty of the NAFTA, including a possible claim based on Article 1405 (National Treatment).¹⁴² Mexico contends that, although the present Tribunal has already rejected (*desechado*) a claim based on Article 1405, it cannot put at risk its legal position in that respect.

¹⁴² Counter-Memorial on the Merits ¶¶ 216-217, and Exh. R1882, containing a letter by Ambassador Robert B. Zoellick to Secretary Fernando Canales Clariond of 28 June 2004.

145. The Tribunal takes note of Mexico's observation. However, it needs to be made clear that, in the Decision on the Preliminary Question of 17 July 2003, the present Tribunal did not "reject" a claim based on Article 1405 of the NAFTA, as stated by Mexico, but only held that FFIC's claims brought under Article 1405 (as well as under Articles 1102 and 1105) are not within the competence of the present Tribunal.
146. The *fourth point* is Mexico's contention that the Tribunal should ignore substantial parts of FFIC's Memorial.¹⁴³ The parts to be ignored concern, according to Mexico, those related to a treatment that is less favourable to FFIC than to the Pesos Debentures and discrimination as they are in fact a National Treatment claim. This is denied by FFIC.¹⁴⁴
147. As previously stated, the Tribunal is well aware of its limited competence under Chapter Fourteen, and it makes no determination concerning claims based on alleged failure to accord national treatment to FFIC. However, the Tribunal notes that FFIC makes those allegations in connection with its effort to establish expropriation within the meaning of Article 1110, which are within the competence of the Tribunal. *See* ¶ 143 above.

¹⁴³ Counter-Memorial on the Merits ¶¶ 218-222; *see also* Rejoinder on the Merits ¶¶ 198-254.

¹⁴⁴ Reply on the Merits ¶¶ 54-62.

C. Working Group

148. In this Section, the Tribunal will examine the nature of the Working Group and the question whether acts of the Working Group can be attributed to the Mexican State.
149. One of the claims made in the arbitration on behalf of FFIC was based on the negotiation, development, and ultimate rejection of a Recapitalization Program of BanCrecer by the so-called Working Group (*Grupo de Trabajo*). Mexico did not deny the existence of the Working Group, but took the position that no legal claims could be based on its activities, because under Mexican law the Working Group was not a governmental organization with decision-making authority or power to bind the State.¹⁴⁵ FFIC replied, in essence, that regardless of its internal administrative law, Mexico could not, under international law, avoid responsibility for the conduct of a body that acts on its behalf vis-à-vis third parties such as FFIC.¹⁴⁶
150. Put in this abstract form, FFIC's statement is correct. However, the evidence submitted to the Tribunal does not show a case of a commitment made on behalf of Mexico by the Working Group and subsequently repudiated by the State. Rather, the Working Group was a forum in which proposals of various kinds were discussed among the relevant Mexican agencies and with interested outside parties, subject at all times to ratification or rejection by the competent government authorities.

¹⁴⁵ Rejoinder on the Merits ¶¶ 255-259.

¹⁴⁶ Claimant's Supplemental Submission ¶¶ 7-11.

151. The evidence before the Tribunal, principally from Dr. Reuss on behalf of FFIC and Dra. Armendáriz Guerra on behalf of Mexico, showed clearly that – like other working groups established to coordinate the search for solutions for financial institutions caught in the Mexican financial crisis – the Working Group for BanCreceer consisted of representatives of the principal agencies of government with responsibilities in the financial sector – the Banco de México, the Ministry of Finance (*Secretaría de Hacienda y Crédito Público*), the National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores* or CNBV), and the Fund for Protection of Bank Savings (*Fondo Bancario de Protección al Ahorro* or FOBAPROA), later replaced by the Institute for the Protection of Bank Savings (*Instituto para la Protección al Ahorro Bancario* or IPAB). The Working Group concerned with the situation of BanCreceer met frequently, usually with the respective agencies represented by senior civil servants, such as Dra. Armendáriz Guerra on behalf of CNBV. Though no fixed schedule of meetings was in effect and no formal minutes were kept, the BanCreceer Working Group was clearly a body that interested parties, including the creditors and shareholders of BanCreceer and GFB, had to communicate and reckon with. Correspondingly, approaches by such parties, including FFIC, to individual agencies were often met with the response that the matter in question would have to be considered by the Working Group.
152. As the Tribunal views the considerable evidence on the function of the Working Group, no major decision – whether acceptance of a given Recapitalization Plan, approval of the issuance of new securities by GFB, rejection or postponement of a Recapitalization Plan, assumption of BanCreceer's loan portfolio by FOBAPROA, or return of the loan portfolio to BanCreceer – would be taken without substantial consensus within the Working Group and (where appropriate) its Technical

Committee. If the Working Group rejected a proposal, or agreement to adopt it could not be reached within the Working Group, the proposal would go no further, regardless of whether the proposal had originated in one of the Working Group's constituent agencies or had been submitted by an outside party such as FFIC or BanCreceer. No formal resolution was required to reach that result. If, on the other hand, the Working Group endorsed a given plan or proposal, it was up to the relevant agency or agencies that would have responsibility for carrying out the plan or proposal or issuing the required permit or license to give its (or their) approval at the level of Governor (for the Banco de México), Minister (for Hacienda), Director General (for FOBAPROA) or President (for CNBV). It is clear to the Tribunal that the representatives of FFIC, in particular Dr. Reuss, understood this process.¹⁴⁷

153. It is certainly credible, in the estimation of the Tribunal, that FFIC and JP Morgan believed that the Government of Mexico and all the relevant agencies would approve a Recapitalization Plan discussed in the Working Group and advised to representatives of BanCreceer and FFIC on 26 February 1998.¹⁴⁸ Evidently JP Morgan, acting for or in cooperation with FFIC, also believed this, and accordingly issued a Press Release on 27 February 1998 jointly with GFB, announcing approval of the Plan.¹⁴⁹ But no document was produced in the

¹⁴⁷ See, e.g., letter from Dr. Reuss to Mr. Hansmeyer of 26 February 1998, Exh. C1178-1179=R2533-2534.

¹⁴⁸ See Reuss II ¶ 11; Transcript of the hearing 392-400.

¹⁴⁹ The representative of JP Morgan, Mr. Eduardo Cepeda Fernández, submitted an Affidavit stating that the press release would not have been issued “if we had not had the full assurance that the Mexican government had, in fact, approved the recapitalization of BanCreceer on the terms stated in the release.” (See Cepeda Fernández II ¶ 7). Unfortunately, Mr. Cepeda did not testify at the

footnote cont'd

arbitration purporting to be approval of the Recapitalization Plan, whether by the Working Group or by its member agencies on recommendation of the Working Group. It appears to the Tribunal that one or more of the principals did not agree with the recommendation of the Working Group, or at least wanted to postpone the decision. The Tribunal concludes that the outsiders who had been negotiating with the Working Group on behalf of BanCrecer, FFIC, and JP Morgan should have known and did know that while the recommendations of the Working Group were crucial to approval of any recapitalization or reorganization, they were recommendations, not actions and by definition not final. Indeed negotiations over various documents related to the proposal continued for several months after issuance of the Press Release, suggesting that both the government representatives and the representatives of the private parties regarded the process as incomplete. While the reluctance of Mr. Fernández García, the President of CNBV, either to publicly endorse or to repudiate the press release is equivocal,¹⁵⁰ it cannot, in the view of the Tribunal, be regarded as an undertaking to be imputed to the State, the breach of which gives rise to a legal claim.

154. If FFIC and those consulting or collaborating with it, such as JP Morgan, placed more reliance on informal recommendations not officially communicated than was justified, the consequence cannot, in the view of the Tribunal, be attributed to the Working Group and through it to the State.

hearing. While the thrust of Mr. Cepeda's statement that JP Morgan would not have issued the press release on 27 February 1998 without assurance from the Government is credible, without the possibility of cross-examination about the scope of the alleged assurance and the context in which it was given, the Tribunal could not give credence to Mr. Cepeda's statement, which was inconsistent with the evidence of Dra. Armendáriz Guerra (Second Declaration ¶¶ 45-50.)

¹⁵⁰

See testimony of Dra. Armendáriz Guerra, Transcript of the hearing 892-899.

155. In conclusion, putting aside the question whether rejection of the Recapitalization Plan of February 1998 could be regarded as an expropriation or element of expropriation within the meaning of Article 1110 of the NAFTA – see Section E below – the relations of the Working Group with Claimant do not give rise to liability on the part of the Government of Mexico under the NAFTA.

D. Prudential Measures

156. Mexico contends that the measures in question are “reasonable measures for prudential reasons” within the meaning of Article 1410 (Exceptions) of the NAFTA. FFIC denies that the measures fall under Article 1410, and submits that, in any event, the measures were not “reasonable.”

157. The Tribunal notes that since the present arbitration is the first case brought under the Financial Services Chapter of the NAFTA, this is the first occasion for an international tribunal to set forth its interpretation of Article 1410(1).

158. Article 1410(1) (Exceptions) of the NAFTA provides:

1. Nothing in this Part [Five, i.e., “Investment, Services and Related Matters”] shall be construed to prevent a Party from adopting or maintaining reasonable measures for prudential reasons, such as:

(a) the protection of investors, depositors, financial market participants, policyholders, policy claimants, or persons to whom a fiduciary duty is owed by a financial institution or cross-border financial service provider;

(b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions or cross-border financial service providers; and

(c) ensuring the integrity and stability of a Party's financial system.

159. The Tribunal notes, first, that the Article is entitled “Exceptions,” that is, it provides that a measure otherwise prohibited under “this Part” (i.e., including Chapter Eleven and Chapter Fourteen) will not constitute a violation of the NAFTA if it qualifies as a “reasonable measure taken for prudential reasons.”
160. Claimant argued that if a measure adopted or maintained by Respondent is found not to be reasonable or taken for prudential reasons, it would give rise to liability, or at least to a presumption of liability, under Article 1110. The Tribunal rejects this contention. As the Tribunal understands Article 1410 within the anatomy of the NAFTA, a judgment as to whether the exception applies is called for only after an initial, at least tentative, conclusion that Article 1110 or another applicable provision of the NAFTA may have been violated.
161. Claimant argued that if a measure is discriminatory, it cannot be regarded as reasonable, and therefore gives rise to liability under the NAFTA. Respondent contended that Claimant misreads Article 1410, in an attempt to bring before the Tribunal a claim for discrimination under Chapter Fourteen, when such claims are expressly excluded.
162. The Tribunal, noting that the exception applies to all provisions of Part Five (“Investments, Services and Related Matters”) of the NAFTA applicable to Financial Services, including the National Treatment article (Article 1405), concludes that Article 1410(1) permits reasonable measures of a prudential character even if their *effect* (as contrasted with their motive or intent) is

discriminatory. The Tribunal rejects the contention that a measure discriminatory in effect is *eo ipso* unreasonable.

163. In his book on the Financial Services Chapter of the NAFTA, Olin L. Wethington, the principal negotiator of that Chapter on behalf of the United States of America, writes:

Article 1410(1)(a) . . . carves out of the national treatment and other obligations of the financial services chapter a right to take reasonable measures even though discriminatory in application, to protect the safety and soundness of the financial system. This regulatory prerogative to protect the integrity of the financial system is accepted internationally.¹⁵¹

164. The author goes on to point out that the prudential exception covers only “reasonable” measures, such as measures relating to capital adequacy, loan loss reserve requirements, cash reserve and liquidity requirements and various regulations pertaining to diversification of risk. However, evidently focusing on Mexico, he writes:

However, the exception cannot be used as a guise or an indirect means for discriminating against United States or Canadian entities or for taking arbitrary action in connection with individual firm applications or approval or licensing requests. It does not constitute an exception which permits backhanded avoidance of the national treatment and other significant obligations in the financial services chapter.

¹⁵¹ Olin L Wethington, FINANCIAL MARKET LIBERALIZATION, at § 5.07 (Sheppard’s McGraw Hill 1994).

165. The Tribunal accepts this exposition of Article 1410(1). It does not, in the context of the present case, believe that it is called upon to determine whether the challenged measures, even if they fell unevenly on Claimant, were reasonable or arbitrary, since the condition precedent for invocation of the Prudential Measures Exception, a finding of expropriation, has not been fulfilled as it will be seen later in this Award.
166. The question was also raised, though not pressed by Respondent, whether Article 1410(1) is a self-judging provision. The Tribunal rejects this suggestion. The Tribunal is clear that Article 1410(1) makes available to a State-Party an affirmative defense to be established before an impartial panel or committee.
167. The Tribunal notes that Article 1415 of the NAFTA makes special provision for decision of a defense under Article 1410 by the Financial Services Committee (i.e., by government officials of the three Parties to the NAFTA¹⁵²), rather than by a tribunal such as the present one established pursuant to Section B of Chapter Eleven. However, that procedure depends on a request by the disputing State Party, and no such request was made on behalf of Mexico in the present case. Article 1415(4) provides that when no request for decision by the Committee has been presented to the tribunal concerning the validity of a defense under Article 1410, the validity of the defense is to be decided by the Tribunal. Either way, while (i) the provision of a separate Chapter on Financial Services, (ii) the express provision of a prudential measures defense, and (iii) the provision for

¹⁵² See Article 1412 and Annex 1412.1 for the composition and mission of this Committee.

determination of the validity of such a defense at political level, suggest a consensus in favour of substantial deference to the State Party, it is also clear that when such a defense is presented in the context of an investor-State dispute, acceptance or rejection of the defense must be made on a collegial basis, and not unilaterally by the State that has taken the challenged measure.

168. The Tribunal concludes with respect to prudential measures that Article 1410 of the NAFTA provides a defense to the State-Party if a tribunal has found a challenged measure to constitute an expropriation in violation of Article 1110 of the NAFTA. The validity of that defense, if necessary to decide a claim under Article 1110, is to be judged either by the Financial Services Committee, or if no request has been submitted for invoking the Committee procedure, by the arbitral tribunal. In the present case, the issue whether the challenged measures were reasonable or arbitrary is moot, because the Tribunal has not found these measures to constitute expropriation under the NAFTA for reasons examined in the next Section of this Award.

E. Expropriation

169. Having examined various aspects concerning the dispute in the preceding Sections, the Tribunal will now turn to FFIC's claim that the use and value of its investment, i.e., the US\$ 50 million Debentures, were expropriated by Mexico and that Mexico thereby has violated its obligations under Article 1110 of the NAFTA.

170. Article 1110 (Expropriation and Compensation) of the NAFTA provides:

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take

a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

- (a) for a public purpose;
- (b) on a non-discriminatory basis;
- (c) in accordance with due process of law and Article 1105(1);
and
- (d) on payment of compensation in accordance with paragraphs 2 through 6.

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6. On payment, compensation shall be freely transferable as provided in Article 1109.

7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).

8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

171. It may be recalled that Article 1131(1) of the NAFTA requires the Tribunal to apply “this Agreement and applicable rules of international law.” The latter includes customary international law.

172. In this connection, the parties to the present case have debated the relevance of international case law relating to expropriation. It is true that arbitral awards do not constitute binding precedent. It is also true that a number of cases are fact-driven and that the findings in those cases cannot be transposed in and of themselves to other cases. It is further true that a number of cases are based on treaties that differ from the NAFTA in certain respects. However, cautious reliance on certain principles developed in a number of those cases, as persuasive authority, to the extent that they cover the same matters as the NAFTA, may advance the body of law, which in turn may serve predictability in the interest of both investors and host States.

173. The parties have in particular debated the relevance of the case law of the Iran-US Claims Tribunal. It is true that the Algiers Accords give a notion of expropriation different from Article 1110 of the NAFTA and also partially depart from customary international law (in particular: “other measures affecting property rights”). It is also true that some arbitral awards of the Iran-US Claims Tribunal are contradicted by others. However, keeping these caveats in mind, it is justified to rely on certain awards, or at least portions thereof, in determining the customary international law meaning of expropriation in the present case.
174. In determining whether a State Party to the NAFTA has violated its obligations under Article 1110 of the NAFTA, an arbitral tribunal has to start with the analysis whether an expropriation has occurred. Mexico correctly points out that one cannot start an inquiry into whether expropriation has occurred by examining whether the conditions in Article 1110(1) of the NAFTA for avoiding liability in the event of an expropriation have been fulfilled. That would indeed be putting the cart before the horse (“*poner la carreta delante de los caballos*”).¹⁵³ Paragraphs (a) through (d) do not bear on the question as whether an expropriation has occurred. Rather, the conditions contained in paragraphs (a) through (d) specify the parameters as to when a State would not be liable under Article 1110.

¹⁵³ Counter-Memorial on the Merits ¶ 237.

175. FFIC seems to concede this point but argues that arbitral tribunals have relied on discrimination in their determination whether expropriation has taken place. That argument will be discussed below.¹⁵⁴
176. NAFTA does not give a definition for the word “expropriation.” In some ten cases in which Article 1110(1) of the NAFTA was considered to date, the definitions appear to vary. Considering those cases and customary international law in general, the present Tribunal retains the following elements.
- (a) Expropriation requires a taking (which may include destruction) by a government-type authority of an investment by an investor covered by the NAFTA.¹⁵⁵
 - (b) The covered investment may include intangible as well as tangible property.¹⁵⁶

¹⁵⁴ See ¶ 203 *et seq. infra*.

¹⁵⁵ A failure to act (an “omission”) by a host State may also constitute a State measure tantamount to expropriation under particular circumstances, although those cases will be rare and seldom concern the omission alone. See *Draft Articles on Responsibility of States for International Wrongful Acts*, adopted by the International Law Commission at its fifty-third session (2001), Article 2, hereinafter “ILC Draft Articles,” available at: http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm.

¹⁵⁶ *Mondev International Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, Award, 11 October 2002, at 98, available at: <http://ita.law.uvic.ca/documents/Mondev-Final.pdf>. The tribunal in *Methanex* observed: “[I]n *Pope & Talbot Inc. v. Canada*, the tribunal held ‘the Investor’s access to the U.S. market is a property interest subject to protection under Article 1110 [n. 159 *infra*, at ¶ 96]. Certainly, the restrictive notion of property as a material ‘thing’ is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing. In the view of the Tribunal, items such as goodwill and market share may, as Professor White wrote, ‘constitute [] an element of value of an enterprise and as such

footnote cont’d

- (c) The taking must be a substantially¹⁵⁷ complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment).
- (d) The taking must be permanent, and not ephemeral or temporary.
- (e) The taking usually involves a transfer of ownership to another person (frequently the government authority concerned), but that need not necessarily be so in certain cases (e.g., total destruction of an investment due to measures by a government authority without transfer of rights).¹⁵⁸
- (f) The effects of the host State’s measures are dispositive, not the underlying intent, for determining whether there is expropriation.
- (g) The taking may be *de jure* or *de facto*.

may have been covered by some of the compensation payments’ [Gillian White, NATIONALISATION OF FOREIGN PROPERTY, 49 (1961)]. Hence, in a comprehensive taking, these items may figure in the valuation.” *Methanex Corp. v. United States of America*, Final Award, 3 August 2005, at ¶ 17, available at: <http://ita.law.uvic.ca/documents/MethanexFinalAward.pdf>.

¹⁵⁷ A number of tribunals employ the adjective “significant,” “fundamental,” “radical” or “serious.”

¹⁵⁸ “A deprivation or taking of property may occur under international law through interference by a state in the use of that property or the enjoyment of its benefits, *even where legal title to that property is not affected*” (emphasis added), *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award No. 141-7-2, reprinted in 6 Iran-United States Cl. Trib. 219 (1984).

- (h) The taking may be “direct” or “indirect.”¹⁵⁹
- (i) The taking may have the form of a single measure or a series of related or unrelated measures over a period of time (the so-called “creeping” expropriation).
- (j) To distinguish between a compensable expropriation and a non-compensable regulation by a host State,¹⁶⁰ the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized;¹⁶¹ and the bona fide nature of the measure.¹⁶²

¹⁵⁹ “Indirect” expropriation is contemplated by Article 1110(1) of the NAFTA: “No Party may directly or *indirectly* nationalize or expropriate . . . or take a *measure tantamount* to nationalization or expropriation . . .” (emphasis added). According to certain case law, the expression “a measure tantamount to nationalization or expropriation” in Article 1110 of the NAFTA means nothing more than “a measure equivalent to nationalization or expropriation.” *Pope & Talbot Inc. v. The Government of Canada*, Interim Award, 26 June 2000, at ¶¶ 96 and 104, available at: <http://ita.law.uvic.ca/documents/Pope-InterimAward.pdf>; *S.D. Myers Inc. v. The Government of Canada*, Partial Award, 13 November 2000, at ¶¶ 285-286, available at: <http://ita.law.uvic.ca/documents/SDMeyers-1stPartialAward.pdf>; *Marvin Roy Feldman Kappa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, at ¶ 100, available at: http://ita.law.uvic.ca/documents/feldman_mexico-award-english.pdf.

¹⁶⁰ *S.D. Myers Inc. v. The Government of Canada*, Partial Award, 13 November 2000, at ¶ 281, available at: <http://ita.law.uvic.ca/documents/SDMeyers-1stPartialAward.pdf>, observed that regulatory action by public authorities is unlikely to be the subject of legitimate complaint under Article 1110 of the NAFTA, although the possibility cannot be ruled out. The present Tribunal believes that the issue is more subtle than the proposition of “unlikely” in *S.D. Myers*.

¹⁶¹ The Tribunal notes that this factor was relied upon in *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, at ¶ 122 *et seq.*

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(k) The investor's reasonable "investment-backed expectations" may be a relevant factor whether (indirect) expropriation has occurred.¹⁶³

177. In retaining the above elements, the Tribunal notes the doubts expressed concerning the definition of expropriation given by the *Metalclad* tribunal as being too broad.¹⁶⁴ However, even if the definition as expounded by the tribunal in

available at: http://ita.law.uvic.ca/documents/Tecnicas_001.pdf. The factor is used by the European Court of Human Rights, *id.* at n. 140, and it may be questioned whether it is a viable source of interpreting Article 1110 of the NAFTA.

¹⁶² The factors attempt to close the perceived "gaping loophole" of a "blanket exception for regulatory measures" as articulated in *Pope v. Talbot*, *supra* n. 159, at ¶ 99. For a useful overview, see Jack Coe, Jr., and Noah Rubins, *Regulatory Expropriation and the Tecmed Case: Context and Contributions*, in Todd Weiler, Ed., INTERNATIONAL INVESTMENT LAW AND ARBITRATION: LEADING CASES FROM THE ICSID, NAFTA, BILATERAL TREATIES AND CUSTOMARY INTERNATIONAL LAW (2005) 597 at 632-643; see also L. Yves Fortier and Stephen L. Drymer, *Indirect Expropriation in the Law of International Investment: I Know It When I See It, or Caveat Investor*, Vol. 19, No. 2, ICSID Rev.–FILJ (2004) 293-327. See also *Saluka Investments BV (The Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006, at ¶¶ 253-265, available at: <http://www.pca-cpa.org/ENGLISH/RPC/SALCZ%20Partial%20Award%20170306.pdf>.

¹⁶³ "Under a common view of international investment law, the foreign investor and host State are entitled to have the governmental interference with the investor's enterprise considered in light of the investor's chosen business model, the nature of the enterprise, the regulatory regime in place at the time of investment, and associated expectations," Jack Coe, Jr., and Noah Rubins, n. 162 *supra*, at 624. See also L. Yves Fortier and Stephen L. Drymer, n. 162 *supra*, at 306-308.

¹⁶⁴ *Metalclad Corp. v. United Mexican States*, Case No. ARB(AF)/97/1, Award, 30 August 2000, at ¶ 103, available at: <http://ita.law.uvic.ca/documents/MetacladAward-English.pdf> ("Thus, expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State."). In his judgment of 2 May 2001 on the application for setting aside the award, Typsoe J. observed at ¶ 99: "The Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110" but held that such finding by the tribunal was a question of law that is not reviewable in the setting aside proceedings under the applicable arbitration law (available at: <http://ita.law.uvic.ca/documents/Metaclad-BCSCReview.pdf>). FFIC also acknowledges that it "did not cite *Metalclad* for its definition of expropriation" (Reply on the Merits at ¶ 110).

Metalclad were controlling, the Tribunal would not have reached a different result in the present case.

178. Against the background of the foregoing, the Tribunal will turn to the question whether there was an expropriation with respect to FFIC’s investment within the meaning of Article 1110 of the NAFTA.

179. Before making the analysis, a preliminary observation is in order. It relates to the nature of FFIC’s investment, which were the Dollar Debentures in GFB. GFB’s main asset was BanCrecer. At the time of the purchase in December 1995, BanCrecer was in a delicate financial condition (i.e., a “troubled bank”) and Mexico was in the process of recovering from a major financial crisis. In its report of 4 September 1995, JP Morgan [*advised Allianz about the performance and medium- to long-term prospects of the bank holding company and its assets.*

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180. FFIC, therefore, took a commercial risk that its investment could be adversely affected. It took that risk in light of its desire to have an “admission ticket” to the “personal lines” insurance business in Mexico.¹⁶⁷
181. It soon appeared that the first Recapitalization Plan, in the context of which FFIC’s Dollar Debentures had been contributed, was insufficient as the financial position of BanCreceer further deteriorated.¹⁶⁸ It required another Recapitalization Plan in June 1996, as amended on 31 December 1996, to which Mexico made significant further contributions. In 1997, the financial position of BanCreceer again deteriorated.
182. At that point in time, it can be fairly assumed that, although interest bearing, the Dollar Debentures had significantly decreased in value. A buyer would take into account that BanCreceer may collapse, which would probably have meant a default by GFB on the interest payments and make a conversion into shares illusory. In short, the Dollar Debentures had acquired a status comparable to that of junk bonds.
183. FFIC’s contention that Mexico had somehow the obligation to preserve the value of FFIC’s investment, therefore, is already factually incorrect to large extent as there was very little value left.

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See for the development of the financial position of BanCreceer and GFB, in particular, Counter-Memorial on the Merits at ¶¶ 59-77, which FFIC has not rebutted convincingly.

184. In this connection, the Tribunal is mindful of the observation by the tribunal in *Waste Management*:

It is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State amounting to a virtual taking or sterilizing of the enterprise.¹⁶⁹

185. As mentioned in ¶ 103 above, FFIC asserts that Mexico permanently deprived it of the use and value of its investment because of five acts or omissions. For reasons of convenience, those acts and omissions are reproduced here:.

(i) In early 1998, the Government of Mexico compelled FFIC to use its investment to further the Government's Recapitalization Plan for BanCreceer.

(ii) After compelling FFIC to participate in the Government's Recapitalization Plan, the Government proceeded to thwart the Program to which it had committed itself, thereby depriving FFIC of the value of its investment as envisioned under the Program.

(iii) At or around the same time that the Government approved and then subsequently failed to carry out the Recapitalization Plan for BanCreceer, the Government discriminately refused to authorize the repurchase of FFIC's Dollar Debentures at face value, as the Government had done for the Mexican investors of the Peso Debentures.

¹⁶⁹ *Waste Management, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, at ¶ 160, available at: http://ita.law.uvic.ca/documents/laudo_ingles.pdf. See also *Robert Azinian et al. v. Mexico*, Case No. ARB(AF)/97/2, Award, 1 November 1999, at ¶¶ 83, 87, 90-91, available at: <http://ita.law.uvic.ca/documents/Azinian-English.pdf>.

(iv) The Government of Mexico also deprived FFIC of the value of its investment by returning, in November 1998, the non-performing loan portfolios acquired by FOBAPROA from 1995-1997.

(v) The Government of Mexico, through IBAP, took the ultimate step to deprive FFIC of the value of its investment by taking control of BanCrecer in November 1999.¹⁷⁰

186. The *first* act alleged by FFIC cannot be considered by any standard a taking that deprived FFIC of the economic use and enjoyment of the Dollar Debentures.
187. In early 1998, BanCrecer, which, as mentioned, was GFB's most important asset, was in a critical situation. [

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¹⁷⁰ This reflects the final position put forward by FFIC. The Tribunal notes that at other times counsel for FFIC suggested other dates, going back to November 1997. *See* Transcript of the hearing p. 1117:8-9.

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188. If no action had been taken at that time, by way of recapitalization or otherwise, it would have been highly likely that BanCreceer would have collapsed (as it is borne out by the subsequent events). [

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] As a consequence, the FFIC's Dollar Debentures must be deemed to have had a very low value in early 1998. Without the Recapitalization Plan, they would have become totally worthless.

189. Assuming that the Government of Mexico "compelled" FFIC to participate in the Recapitalization Plan in early 1998, it was for the purposes of rescuing FFIC's investment, rather than taking it away from FFIC.

¹⁷¹ [REDACTED] See also Transcript of the hearing 631:12–632:14 (examination of Mr. José Antonio García, agreeing with the assessment by JP Morgan of the financial condition of BanCreceer).

¹⁷² [

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] The Tribunal wishes to make it clear that these findings relate to the alleged taking of property, and not to a quantification of possible damages.

190. Moreover, it cannot be said that the Government of Mexico “compelled” FFIC to participate in the Recapitalization Plan. Actually, the facts show that GFB and BanCreceer, assisted by JP Morgan, took the initiative for a recapitalization plan at the end of 1997 in consultation with FFIC and the Government authorities, because of the deteriorated financial condition of BanCreceer.
191. The Tribunal does not see how the alleged “requirement” of the Government of Mexico would have deprived FFIC of its ability to sell the investment to an interested buyer early 1998. FFIC never raised that option at the time; rather it sought to recapitalize BanCreceer. In addition, it is highly unlikely that FFIC would have found a willing buyer, at least for an amount of US\$ 50 million. As mentioned, in early 1998, the financial condition of BanCreceer was such that FFIC’s Dollar Debentures had very little value. The Tribunal does not consider the Trust that repurchased the Peso Debentures as a willing buyer of the Dollar Debentures for reasons explained later.¹⁷³
192. The contentions regarding the *second* act as alleged by FFIC must also fail. It is based on a Recapitalization Program that never materialized. FFIC’s Dollar Debentures were never redeemed and FFIC never made the additional US\$ 50 million capital contribution. Nor was the participation by a foreign bank accomplished. Consequently, the Mexican authorities cannot have proceeded “to thwart the Program” or “destroy” that Program.

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See ¶ 209 *infra*.

193. Assuming that the Government authorities had made promises, as it is alleged by FFIC, those promises did not include “the Government’s promise that Fireman’s Fund would receive full value for its debentures.”¹⁷⁴ Rather, the Dollar Debentures would have been redeemed as capital but the Government authorities did not promise to give FFIC a guarantee about the face value of that capital.

194. The alleged promises are based on a meeting in the evening of 26 February 1998 at the office of the Governor of Banco de México.¹⁷⁵ The Tribunal considers it likely that what was discussed at that meeting is what FFIC has contended factually in the present proceedings and that those present at the meeting adopted the main features of the Recapitalization Plan. [

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inconclusive, the witnesses of Mexico, to the extent that Mexico has called them, have not convinced the Tribunal of the contrary. Moreover, the Mexican authorities did not oppose in any manner the press release of GFB and JP Morgan of 27 February 1998.¹⁷⁷

195. However, FFIC must be deemed to have been aware that what was discussed at the meeting did not yet constitute a binding agreement between the parties. The reasons are set forth in ¶¶ 153-154 above. Furthermore, the introduction to the Memorandum of Intent of May 1998, designated as a “DRAFT FOR DISCUSSION,”

¹⁷⁴ Memorial on the Merits ¶ 103.

¹⁷⁵ See ¶ 66 *supra*.

¹⁷⁶ [*REDACTED*]

¹⁷⁷ See ¶ 68 *supra*. See also n. 149 *supra*.

makes clear that: “[N]o obligation included herein shall be enforceable until the respective approvals are obtained,” and that: “The terms of the program described herein shall be documented in the final contracts executed to formalize these agreements to the satisfaction of the parties.”¹⁷⁸

196. It should also be added that the agreement envisaged a participation of 40-40-20, the new foreign bank retaining 40%.¹⁷⁹ When the discussion about the agreement took place, a participation of 40% by a foreign company was legally not possible in Mexico. Subsequently, it was envisaged to have a participation of 51% via a subsidiary. Such change reinforces the finding that no definite agreement had been concluded.
197. Mexico, therefore, cannot be considered to have “repudiated” an agreement on a recapitalization in 1998. At best, the understanding reached at the meeting of 26 February 1998 constituted an agreement to agree, subject to further negotiations.
198. On the basis of the record before it, the Tribunal is of the view that the Mexican authorities did not behave appropriately in failing to pursue the conclusion of an agreement. The Tribunal is persuaded that the Mexican authorities had at least read a copy of the Memorandum of Intent at the relevant time. The reason for Mexico’s failure to sign the Memorandum of Intent and to conclude the agreement may have been a change in the political climate in Mexico at the time.¹⁸⁰ It may

¹⁷⁸ See ¶ 74 *supra*.

¹⁷⁹ See ¶ 78 *supra*.

¹⁸⁰ See ¶ 77 *supra*.

also be due to fact that Mexico amended its legislation in December 1998 to the effect that any rescue plan of a bank required that the existing capital be first applied to losses.¹⁸¹

199. Yet, such a failure cannot be elevated to interference by a host State in the rights of an investor in the sense that it constitutes a deprivation of the investor's rights in its investment within the meaning of Article 1110 of the NAFTA. The object of the proposed agreement was to rescue BanCrecer with the participation of the Government, FFIC, shareholders of GFB and a new foreign bank. It would have had as effect that FFIC's investment was to be redeemed as capital in BanCrecer. At the time, FFIC's investment was almost valueless, due to the financially poor condition of BanCrecer. That condition was not caused by any government act or omission, but rather by the economic circumstances prevailing at the time. A failure to enter into a binding agreement to improve that condition, and possibly FFIC's investment, does not deprive FFIC's investment of its economic use since there was virtually none at the time of the Government's failure.
200. The *third* act is more troubling but does not constitute a taking under Article 1110 of the NAFTA either.
201. The Tribunal finds that the Peso Debentures repurchase discriminated against FFIC.¹⁸² It may be that the origin of the repurchase in November 1997 was a deficient documentation for a number of Mexican purchasers of Peso Debentures

¹⁸¹ Counter-Memorial on the Merits at ¶ 288, 3d bullet.

¹⁸² See ¶¶ 64, 70-73 and 86 *supra*.

(“*mal colocadas*”). However, the Tribunal finds it inexplicable that, subsequently in the beginning of 1998, the repurchase of the Peso Debentures at face value was applied to *all* Peso Debentures purchases. It is unconvincing, as Mexico alleges, that it was impossible to distinguish between “*sin contrato*” and “*con contrato*,” having also regard to the large amount and number of purchasers involved. The Tribunal is further troubled by the fact that the repurchase of the Peso Debentures was organized by means of a trust set up, controlled and financed by BanCreceer, a subsidiary of GFB. The acquisition was not “temporal” either, as on 30 September 2002 the Peso Debentures were still on the Trust’s books at almost their face value.¹⁸³ Worse even, the whole repurchase scheme, as it evolved, was not disclosed to FFIC, which discovered it accidentally in April 1998 when it had been completed for some 65%.¹⁸⁴ It is also clear that the Government authorities were, at a minimum, aware of the repurchase program and its financing as from its inception.¹⁸⁵

202. The understandable reaction of FFIC was to ask for equal treatment by the Mexican authorities. On various occasions, the Mexican authorities refused to allow FFIC via GFB to have the Dollar Debentures repurchased at face value. While the Tribunal does not pass judgment on Mexican law or its interpretation and application, it is not convinced by the justification offered by Banco de

¹⁸³ See ¶ 101 *supra*.

¹⁸⁴ Even though some 645 Mexican holders of debentures were involved.

¹⁸⁵ As becomes clear from, *inter alia*, the letters of 8 December 1997 from CNBV to BanCreceer (Exh. R0172-0173) and 12 August 1998 from CNBV to GFB and BanCreceer (Exh. C0029-30, C0111, C0737-38, C0802). A copy of the Trust Agreement was sent by BanCreceer to CNBV by letter of 16 April 1998 (Exh. C0104-07).

México that “anticipated payment” of convertible debentures is not allowed under Mexican law.¹⁸⁶ If that were so, one can ask the question why all the Peso Debentures were allowed to be repurchased. The distinctions that Mexico attempts to make between the two are formalistic and cannot mask that, in substance, there was discrimination. Moreover, FFIC did make it clear to the Mexican authorities that it was flexible as to the manner in which the repurchase of the Dollar Debentures was to be formalized.

203. In the Tribunal’s view, this is a clear case of discriminatory treatment of a foreign investor. If there is a “haircut” for holders of debentures, all should be shaven.¹⁸⁷ Conversely, if one is allowed to escape the hands of the barber, the other should be allowed to escape as well. That was also recognized by CNBV in its Note for Discussion of 9 September 1999.¹⁸⁸ Such treatment might have given rise to claim by an investor under Articles 1102 (National Treatment), Article 1105 (Minimum Standard of Treatment), or Article 1405 (National Treatment) of the NAFTA, or under two or all of them. The question before the Tribunal is whether it could also give rise to a claim under Article 1110 (Expropriation and Compensation) of the NAFTA since the Tribunal lacks competence over claims under Articles 1102, 1105 and 1405.¹⁸⁹ The Tribunal concludes that it does not rise to a claim under Article 1110.

¹⁸⁶ See ¶ 86 *supra*.

¹⁸⁷ Transcript of the hearing 912:6–925:12 and 953:2–956:2 (examination of Dra. Armendáriz Guerra).

¹⁸⁸ See ¶ 87 *supra*.

¹⁸⁹ See ¶ 22 *supra*.

204. FFIC relies upon a number of precedents in which discriminatory treatment was considered a factor in expropriation cases. These cases address discriminatory treatment in relation to expropriation in two settings.
205. First, discriminatory treatment is used to determine whether the expropriation was unlawful. In the *LIAMCO* case, quoted by FFIC, the tribunal considered that “a purely discriminatory nationalization is illegal and wrongful” under international law.¹⁹⁰ However, it presupposes the presence of a nationalization (or expropriation). In the present case, the question is whether there was expropriation. It cannot be argued that because there is discrimination, there is expropriation.
206. Second, as mentioned before, discriminatory treatment is used as one of the factors to distinguish between a compensable expropriation and a non-compensable regulation by a host State.¹⁹¹ In *Schering Corp.*, also quoted by FFIC, the tribunal considered: “[t]he exchange restrictions could constitute a taking subject to compensation under international law” and that such finding “is dependent upon such factors as whether such restrictions are non-discriminatory, whether such restrictions are justified on bona fide economic grounds and whether such

¹⁹⁰ Memorial on the Merits ¶ 111. *Libyan American Oil Co. v. The Government of the Libyan Arab Republic*, Award, 12 April 1977, 20 I.L.M. 1, 59 (1981).

¹⁹¹ See ¶ 176 at (h) *supra*.

restrictions, in effect, extinguish a foreign national’s enjoyment and use of its currency.”¹⁹²

207. Assuming that the conduct of the Mexican authorities complained of by FFIC pertained to regulatory conduct, as it is argued by FFIC, it did not involve a taking. FFIC’s case is premised on: “The Government undertook to recapitalize the Bank, with the necessary effect of preserving investors’ value in that enterprise.”¹⁹³ That premise is incorrect for two reasons. First, the Tribunal has not been presented with convincing evidence that there was a specific undertaking of Mexico to recapitalize BanCreceer vis-à-vis FFIC in 1995 and onwards. With respect to the Recapitalization Plan of 1998, the Tribunal has found that it did not amount to a definite agreement.¹⁹⁴ Nor were there reasonable investor-backed expectations created by Mexico, even though Mexico should have pursued the conclusion of an agreement. Second, as pointed out above, there was little or no value left of

¹⁹² Memorial on the Merits n. 239. *Schering Corp. v. The Islamic Republic of Iran*, Award No. 122-38-3, 13 April 1984, 5 Iran U.S. C.T.R. 361 (R. Mosk dissenting). FFIC also relies (Memorial on the Merits ¶ 114) on the *Middle East Cement* case, in which the tribunal considered a claim for “incurred damages” allegedly arising out of a bank loan, foreign employees’ compensation, and liquidation expenses. The tribunal rejected those claims, observing: “To accept a claim in this regard under the BIT, the Tribunal would have to find ‘measures the effect of which would be tantamount to expropriation’ (Art. 4). The provision, thus, does not cover any losses occurring to an investor due to commercial risks or due to procedures of the State authorities and courts as long as they are under due process of law and not discriminatory (Art. 4a) and b)).” *Middle East Cement Shipping and Handling Co. S.A., v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6. Award, 12 April 2002, at ¶ 153, available at: <http://ita.law.uvic.ca/documents/MECement-award.pdf>. This reliance by FFIC is unjustified since the tribunal in *Middle East Cement* considered relief sought for compensation of an alleged expropriation rather than considering the question whether there was a measure tantamount to expropriation. In any event, the passing observation by the tribunal in *Middle East Cement* cannot be relied upon in support of the proposition that if there is discrimination, there is expropriation (or a measure tantamount to expropriation).

¹⁹³ Memorial on the Merits ¶ 116.

¹⁹⁴ See ¶ 193 *et seq. supra*.

FFIC's investment in 1998. A discriminatory lack of effort by a host State to rescue an investment that has become virtually worthless, is not a taking of that investment.

208. FFIC further argues that international tribunals have recognized that in expropriation cases it is significant whether government's acts or omissions are unfair or inequitable.¹⁹⁵ FFIC makes that proposition by relying on paragraph (c) of Article 1110(1) of the NAFTA which prohibits expropriation except "in accordance with due process of law and Article 1105(1)." Article 1105(1) concerns Minimum Standard of Treatment. FFIC's argument must fail since, as mentioned before,¹⁹⁶ it must be determined first whether an expropriation has occurred, while paragraphs (a) through (d) specify the parameters as to when a State would not be liable under Article 1110. Moreover, FFIC's argument would conflate an Article 1110 claim with an Article 1105 claim, which is clearly inconsistent with the exclusion of Article 1105 claims from investor-State arbitration under Chapter Fourteen.

209. A final point regarding the Trust is that it cannot be considered a "willing buyer," as is contended by FFIC in support of its argument that the Dollar Debentures were worth the equivalent of US\$ 50 million in 1997-1998. The Trust was set up, controlled and financed by BanCreceer, a subsidiary of GFB. Its initial objective was to restitute the original purchase price to those Mexican buyers of the Peso Debentures who claimed to have deficient documentation. The fact that,

¹⁹⁵ Memorial on the Merits ¶ 117.

¹⁹⁶ See ¶ 174 *supra*.

subsequently, the restitution amount (i.e., the face value of the Peso Debentures) became the repurchase price for all Mexican buyers of the Peso Debentures – a matter that is indeed surprising – does not make the Trust a genuine willing buyer who would have been prepared to pay a price in an open market.¹⁹⁷

210. The *fourth* act is the return of the loan portfolio by FOBAPROA in November 1998. The Tribunal can be relatively short with this claim of FFIC.

211. One would have thought that after the audit of the initial loan portfolio by Mancera, S.C. Ernst & Young, the matter was settled.¹⁹⁸ However, BanCreceer and FOBAPROA continued discussions about the loans that qualified for the assumption and the required reserves [

REDACTED

]. More discussions ensued after the further recapitalizations. In the latter cases, which added significantly to the non-performing loan portfolio purportedly assumed by FOBAPROA, no such auditing appears to have taken place, at least it is not part of the record. [

REDACTED

]

212. The back-and-forth between FOBAPROA and BanCreceer about the various loan portfolios and the reserves is well explained [*REDACTED*]

¹⁹⁷ See also ¶ 182 *supra*.

¹⁹⁸ See also n. 6 and ¶¶ 60, 62 and 80 *supra*.

¹⁹⁹ [*REDACTED*]

[*REDACTED*]. The facts show that BanCrecer and FOBAPROA were unable to agree on the loans that qualified and the required reserves. It does not appear that BanCrecer opposed the return of the portfolio, although one may be puzzled by the fact why *all* loans were returned.

213. GFB took advice from Bufete Carrillo Gamboa, S.C. some seven months later. In its opinion of 23 June 1999, Bufete Carrillo Gamboa, S.C. concluded that the return of the portfolio was of questionable legality.²⁰² The advice is qualified by assumptions which turned out not to be correct. In particular, it assumed the proper fulfillment by BanCrecer of the obligations undertaken in the various agreements. The Tribunal infers from the record that that was one of the main issues in the discussions between FOBAPROA and BanCrecer. Since BanCrecer did not oppose the return of the portfolio, it seems that FOBAPROA's position in the discussions was not unlawful. Actually, by letter of 14 October 1999, GFB and BanCrecer accepted the cancellation of the taking-over of the portfolio, at least that part that concerned the Recapitalization Plan of 28 June 1996.²⁰³

214. In any event, the effect of the return of the portfolio in November 1998 cannot be said to have taken away the value of FFIC's investment. At that point in time, the financial position of BanCrecer was so bad, that it was *de facto* already in a state

200 [*REDACTED*]

201 [*REDACTED*]

202 See ¶ 85 *supra*.

203 Exh. R1923. FFIC contends that this letter was orchestrated by the Mexican authorities. The Tribunal has not been presented with convincing evidence that such orchestration took place.

of insolvency. Moreover, the effect of the return of the portfolio appears to be included in BanCreceer's financial statements for 1999 only.

215. FFIC is also incorrect about its argument relating to reasonable reliance on commitments made by FOBAPROA.²⁰⁴ Those commitments concerned the initial loan portfolio. The assumption of that portfolio appeared to be subject to problems of a technical nature. In addition, the next batch of non-performing loans was not only significantly larger but was also assumed by FOBAPROA well after December 1995. Hence, no legitimate expectations could have been created in that regard.
216. Finally, the *fifth* act is the taking of control by IPAB of BanCreceer in November 1999. Here again, the Tribunal can be relatively brief. It appears that the shareholders of BanCreceer, i.e., GFB, voted in favour of a taking of control by IPAB over BanCreceer and a dissolution and liquidation of GFB.²⁰⁵ They did so in light of the hopeless financial position of BanCreceer and as a consequence of GFB. The facts do not demonstrate that the action by IPAB constituted a taking by IPAB in the sense of an expropriation on behalf of the State.
217. In conclusion, none of the acts and omissions alleged by FFIC constitutes individually, or taken together, an expropriation of FFIC's investment under

²⁰⁴ Memorial on the Merits ¶¶ 121-122.

²⁰⁵ See ¶ 91 *supra*.

Article 1110 of the NAFTA and the elements identified in ¶ 176 above.²⁰⁶ As a consequence, FFIC's claim to find that that the Government of Mexico, through its acts and omissions, expropriated FFIC's investment in Dollar Debentures issued by GFB in violation of Article 1110 of the NAFTA, must be rejected.

F. Conclusion

218. While Claimant FFIC has clearly demonstrated injury - indeed loss of its investment - none of its claims, separately or in the aggregate, satisfy the concept of expropriation as understood in the NAFTA and in international law in general. FFIC undertook an investment that was risky both in terms of the economic conditions in Mexico at the time, and in terms of the specific financial institution that issued the Dollar Debentures that FFIC purchased. The NAFTA, like other free trade agreements and bilateral investment treaties, does not provide insurance against the kinds of risks that FFIC assumed, and Chapter Fourteen addressed to cross-border investment in financial institutions, places further limits on the scope of investor-State arbitration. In rejecting the claim of Fireman's Fund submitted to it in this arbitration, the Tribunal does not mean to suggest that Claimant was not subject to discriminatory and perhaps inequitable treatment by officials of the host State. It holds only that the evidence submitted to the Tribunal has not demonstrated a right to compensation under Article 1110 of the NAFTA, as incorporated by reference in Article 1401 of the NAFTA.

²⁰⁶ The reliance by FFIC on the award in *Saluka*, see ¶ 43 *supra*, is to no avail to it since the issue of failure to accord fair and equitable treatment on which that award was based is not within the jurisdiction of this Tribunal.

G. Damages

219. Since the Tribunal has found that the acts and omissions as alleged by FFIC do not constitute expropriation under Article 1110 of the NAFTA, FFIC is not entitled to compensation on that account. Consequently, the Tribunal rejects FFIC's claim for compensation. As a further consequence, the next phase of the arbitration concerning quantification of damages (*see* ¶ 21 above) is no longer necessary.

VIII. COSTS

220. The parties agreed at the hearing that no cost submissions were to be made in the present phase of the arbitration.²⁰⁷ The Tribunal understands this agreement to be premised on the assumption that cost submissions would be made during a next phase concerning quantification of damages. In light of the conclusions reached in this Award, such a phase will not take place. Separate cost submissions are also not required since the Tribunal has reached the conclusion that each Party shall bear its own costs and shall share 50% each of the Tribunal's costs. The latter corresponds to the advances for cost made by each Party.

221. Mexico prevailed on the Preliminary Question and in the present phase on the merits. On the basis of the principle set forth in *International Thunderbird Gaming Corp. v. United Mexican States*,²⁰⁸ it would mean that costs should be awarded in favour of Mexico. However, the circumstances of the present case are

²⁰⁷ Transcript of the hearing 1299.

²⁰⁸ Final Award, 26 January 2006, NAFTA (UNCITRAL), at ¶¶ 210-215, available at: <http://www.investmentclaims.com/decisions/Thunderbird-Mexico-Award.pdf>

such that the Tribunal believes that it is justified to deviate from that principle. The Preliminary Question was a close one and lost by Fireman's Fund on a technicality, while Fireman's Funds had respectable claims on the merits under Section A of Chapter Eleven of the NAFTA, over which, however, the Tribunal had no jurisdiction in this case except Article 1110 concerning expropriation.

IX. RESERVED INFORMATION AND RESTRICTED ACCESS

222. In Procedural Order No. 3 of 31 March 2004, the Tribunal ruled at paragraph 7:

If and to the extent that the Tribunal makes use of Confidential Documents or information derived therefrom in any decision, including an arbitral award, it shall designate the portions relating to such documents or information as confidential and those portions shall not be published by the persons authorized under paragraphs 3 and 4 of the present Order to third parties.

223. In Procedural Order No. 5 of 23 August 2004, the provisions of Procedural Order No. 3 were ruled to apply *mutatis mutandis* to documents submitted in response to Respondent's Request that contain business confidential information.

224. All submissions by the parties subsequent to the issuance of Procedural Orders Nos. 3 and 5 are designated as "This Document Contains Reserved Information" (FFIC) and "*Este Documento Contiene Información con Acceso Restringido*" (Mexico), while a number of exhibits and witness statements bear similar language. Having regard to this situation, it is not entirely clear to the Tribunal whether, and if so to what extent, it has relied on Confidential Documents or information derived therefrom in the present Award.

225. The parties, therefore, are ordered to attempt to reach agreement, within 30 days after the date of dispatch of this Award, on which portions, if any, of the present Award shall be redacted for the purposes of Orders Nos. 3 and 5.

X. DECISIONS

226. FOR THE FOREGOING REASONS, the Arbitral Tribunal renders the following decisions:

- (1) REJECTS FFIC's request to find that the Government of Mexico, through its acts and omissions, violated Article 1110 of the NAFTA by expropriating FFIC's investment in dollar-denominated debentures issued by Grupo Financiero BanCreceer S.A. de CV;
- (2) REJECTS FFIC's request that the Tribunal award it compensation for the full value of its investment;
- (3) DETERMINES that each Party shall bear its own costs and that the Parties shall share the Tribunal's costs in equal shares corresponding to the advances on cost made by them;
- (4) ORDERS the Parties to attempt to reach agreement, within 30 days after the date of dispatch of this Award, on which portions, if any, of the present Award shall be redacted for the purposes of complying with Procedural Orders Nos. 3 and 5.

Made in Toronto, Ontario, Canada, being the place of arbitration, in English and Spanish,

[SIGNED]
Professor Andreas F. Lowenfeld,
Arbitrator
Date: July 14, 2006

[SIGNED]
Mr. Alberto Guillermo Saavedra Olavarrieta,
Arbitrator
Date: July 11, 2006

[SIGNED]
Professor Albert Jan van den Berg,
President
Date: July 14, 2006