

Robert Azinian and others v. United Mexican States
(ICSID Case No. ARB(AF)/97/2)

Introductory Note

The award rendered on November 1, 1999, in the proceeding brought by Mr. Robert Azinian, Mr. Kenneth Davitian and Ms. Ellen Baca against the United Mexican States, is the first arbitral decision on the merits to be given by a tribunal established under Chapter 11 of the North American Free Trade Agreement (NAFTA). It would thus seem to be the first such decision ever given in an investor-to-State dispute instituted under the provisions of a multilateral international instrument governing investment.

The November 1, 1999 award is also the first to be rendered under ICSID's 1978 Additional Facility Rules. The Additional Facility Rules apply to disputes where either the State party to the dispute or the State whose national is a party to the dispute, but not both, is not a Contracting State to the ICSID Convention. In this case, the Claimants are nationals of an ICSID Contracting State (the United States of America), whereas the Respondent (the United Mexican States) is not an ICSID Contracting State.

The Claimants instituted proceedings, and sought access to the Additional Facility, on March 17, 1997. The notice of institution was registered, and access to the Additional Facility was approved, on March 24, 1997.

NAFTA Article 1123 provides that the arbitral tribunal shall consist of three members, one appointed by each party and the third arbitrator, who shall be the President of the Tribunal, to be appointed by agreement of the parties. NAFTA Article 1125 contains provisions which, in effect, amount to an exception to the restriction under ICSID's rules on the nationality of party-appointed arbitrators. Thus, in arbitration proceedings initiated under the NAFTA, each party may appoint an arbitrator of its own or of the other party's nationality. In this case, the Claimants appointed Mr. Benjamin R. Civiletti, a former Attorney-General of the United States. The Respondent appointed Mr. Claus von Wobeser Hoepfner, a leading Mexican arbitration specialist, and a former member of the ICC International Court of Arbitration. By agreement between them, the parties appointed as President of the Tribunal Mr. Jan Paulsson, a national France, a prominent international arbitrator and practitioner, and now a Judge of the World Bank's Administrative Tribunal.

The Claimants invoked rights as shareholders in a Mexican enterprise, Desechos Solidos de Naucalpan S.A. de C.V., or DESONA, which had held a concession for the collection and disposal of solid waste in the municipality of Naucalpan, a suburb of Mexico City. The Claimants sought damages resulting from the annulment of the concession by the municipality. The annulment had been declared on the grounds that the concession was either void due to misrepresentations or rescindable for failure of performance. DESONA had unsuccessfully sought the reversal of the concession's annulment before the State Administrative Tribunal and its Superior Chamber, and then before a Mexican federal circuit court.

The Arbitral Tribunal observed that, while DESONA's recourse to Mexican courts did not foreclose submission of the dispute to arbitration, the Arbitral Tribunal's

jurisdiction was not a general appellate one, but was instead confined to determining whether a substantive obligation of Chapter 11 of NAFTA has been breached. Such obligations include minimum standards of treatment under international law and obligations regarding expropriation. The Tribunal held that a mere breach of a concession contract did not amount to a breach of NAFTA Chapter 11, and that the issue before it was therefore whether the annulment of the concession could be considered to be an act of expropriation.

Observing that the annulment of the concession had been found by Mexican courts to be in conformity with applicable Mexican laws, and that the standards contained in such laws were not being challenged, the Arbitral Tribunal considered that the only grounds to sustain the claim would be a finding of denial of justice or of pretence of form to achieve an internationally unlawful end on the part of the Mexican courts. The Tribunal found that the evidence before it could not support any such finding and dismissed the claim entirely.

During the proceeding, the Tribunal had the occasion to deal with a number of procedural questions which are mentioned in the award. Such questions include the Claimants' standing, the scope and purpose of written pleadings, and access to third party witnesses proposed by the opposing party. Of particular interest may be the rationale adopted by the Tribunal in deciding to distribute the costs of the proceeding equally between the parties.

The Tribunal's award of November 1, 1999 was rendered in English and Spanish, both languages being equally authentic. Both parties have given us their consent for the award to be published. The English text of the award is published here. Both the English and Spanish texts of the award are posted in PDF format on ICSID's website at www.worldbank.org/icsid.

Alejandro A. Escobar
Counsel, ICSID