

Técnicas Medioambientales Tecmed, S.A.
v. United Mexican States
(Case No. ARB(AF)/00/2)

Introductory Note

In August 2000, Técnicas Medioambientales Tecmed, S.A. (TECMED), a company incorporated in Spain, submitted before the Centre a request for arbitration against the United Mexican States (Mexico). The request invoked the dispute settlement clause contained in the bilateral investment treaty (BIT) between Mexico and Spain and was administered under the ICSID Arbitration (Additional Facility) Rules.

The Arbitral Tribunal was composed of Mr. Horacio Grigera Naón (an Argentinean national appointed by the two party appointed arbitrators), as President, and Prof. José Carlos Fernández Rozas (a Spanish national appointed by TECMED) and Mr. Carlos Bernal Vera¹ (a Mexican national appointed by Mexico) as arbitrators.

On February 6, 1996, TECMED acquired through a bid procedure the land, buildings and other assets to operate a hazardous waste landfill in Hermosillo, Sonora, Mexico. The dispute concerned Mexico's denial in November 1998 of a license renewal for the operation of this hazardous waste landfill. TECMED brought a claim pursuant to the BIT for alleged violations by Mexico of the BIT provisions regarding expropriation, fair and equitable treatment and full protection and security.

The two main preliminary questions raised by the Respondent were the jurisdiction *ratione temporis* of the Tribunal and the three-year time limitation to file a claim provided in the BIT.²

¹ Mexico previously appointed Mr. Guillermo Aguilar Alvarez, who resigned on November 16, 2001.

² This time limitation is similar to the one provided in NAFTA.

Regarding the jurisdiction *ratione temporis* of the Tribunal, the Respondent argued that the BIT did not apply to the conduct of the Respondent, which predated the entry into force of the treaty. The Tribunal first considered the wording of the treaty and pointed out that, although the treaty covered investments that existed prior to the entry into force of the treaty, the substantive obligations were drafted as projected into the future. According to the Tribunal, this made impossible the retroactive application of those substantive obligations. In this regard, the Tribunal dismissed the Claimant's argument in connection to the most-favored-nation (MFN) clause, indicating that such principle could not be applicable to questions related to the *ratione temporis* application of the treaty. However, the Tribunal further stated that this conclusion did not mean that conduct that predated the entry into force of the treaty might not be relevant, if pursuant to Article 28 of the Vienna Convention on the Law of Treaties, the conduct continued to occur or to exist after the entry into force of the treaty.

Regarding the time limitation for filing a claim under the BIT, the Tribunal found that this defense did not concern the competence of the Tribunal but the admissibility of some claims. It further indicated that the cut-off date of the three-year limitation period was not relevant, because the claims that predated the cut-off date were already excluded from the competence of the Tribunal by its previous findings.

With respect to the merits of the case, the Tribunal first examined the question of an alleged expropriation under the BIT and admitted the claim. The Claimant's key contention was that the Mexican authorities, by denying the renewal of the license to operate the landfill, expropriated its investment, causing damages to TECMED. The Tribunal first analyzed the expression "tantamount to expropriation" or "indirect expropriation," pointing out the absence of a relevant definition in the BIT. It considered that a measure could be a *de facto* indirect expropriation by its effects when the measure was adopted by the State, whether being of a regulatory nature or not, was permanent and irreversible, and the assets and rights object of such a measure were affected in such a way that was impossible to exploit such assets and rights, thus depriving them of any economical value. It also stated that a regulatory measure could be an indirect expropriation by its characteristics when there was a lack of proportionality between the measure, the interest sought to be protected by such a measure and the protection of the investment, and as a result the economic value of the investment was destroyed.³

The Tribunal, after analyzing in detail the facts of the case, concluded that the decision of the Mexican authorities was (i) by its effects a *de facto* indirect expropriation, *i.e.*, the investment was permanently deprived of econom-

ic value and could not be exploited; and (ii) by its characteristics was also an indirect expropriation, *i.e.*, the means used by the Mexican authorities did not keep a reasonable proportionality between the interest protected (the environment) and the protection of the investor's rights (TECMED was actually deprived of operating the landfill and lost thereby its investment). The Tribunal pointed out that the lack of proportionality between the interest pursued and the permanent loss of the economical value of the Claimant's investment. In this regard, the Tribunal considered the following facts: (a) although TECMED had committed breaches to the environmental regulations,⁴ the Mexican authorities at the time of the breaches considered them as minor; (b) the social opposition⁵ to the operation of the landfill never amounted to a social unrest; and (c) TECMED had agreed to relocate the landfill and was waiting for new land that the Mexican authorities would provide. The Tribunal finally concluded that the Respondent by expropriating *de facto* the Claimant's investment and not paying an adequate compensation violated Article 5(1) of the BIT.

The Tribunal then examined the question of an alleged violation of the standard of fair and equitable treatment under the BIT. The Tribunal explained that fair and equitable treatment standard was based on the principle of good faith, and therefore that provision implied that the conduct of the State needed to be coherent, without ambiguities and transparent in relation to the investor. The Tribunal found that the conduct of the Mexican authorities violated that provision, pointing out in particular that they had acted in a contradictory way, by, on the one hand, reassuring TECMED that they could operate the landfill until the relocation was conducted and that new land

³ The Tribunal quoted the European Court of Human Rights decision of February 21, 1986 in *James and others v. the United Kingdom*, available at <<http://hudoc.echr.coe.int>>. The particularly relevant parts of the quote read as follows:

Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim 'in the public interest,' but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized... The requisite balance will not be found if the person concerned has had to bear 'an individual and excessive burden'... The Court considers that a measure must be both appropriate for achieving its aim and not disproportionate thereto. *Id.* at para. 50.

⁴ For example, after an inspection conducted by the Administrative Authorities, TECMED paid some fines, because TECMED had breached security regulations regarding the disposal of hazardous material. The fines did not amount, however, to the maximum amount provided in the relevant regulations.

⁵ Some civil demonstrations occurred against TECMED when operating of the landfill during 1997 and 1998.

would be provided together with licenses to operate the new landfill, and, on the other hand, denying the renewal of the license.

The Tribunal dismissed the claim regarding the alleged violation of the provision on full protection and security and non-discriminatory treatment. The Tribunal considered that Mexico acted in an appropriate way in connection with the demonstrations by the public against the operation of the landfill by TECMED. It further indicated that the full protection and security guarantee was not absolute and did not impose strict responsibility on the State.

The Claimant requested damages in the amount of U.S. \$52 million, plus interest. The Tribunal awarded U.S. \$5.5 million in damages, and based its calculation on the market value of the landfill at the time of purchase, adding the amounts invested and the value of two years of operation. The Tribunal granted interest at an annual rate of 6% from November 1998, and also ordered the Claimant to transfer the property of the landfill, and all the assets related to it, to the Respondent after the payment of the damages awarded.

On the question of costs, the Tribunal decided that the costs of the arbitration should be shared equally and that each party should bear its own expenses, since neither Party completely succeeded in its contentions.

The May 29, 2003, the award in this proceedings was issued in Spanish. The text of the awards is reproduced below with the parties' consent in its original Spanish version. The Spanish text of the award and a courtesy translation into English are posted on ICSID's website at www.worldbank.org/icsid.

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