Robert Azinian et al	**Claimants**
vs	
United Mexican States	**Respondent**

ICSID Case No. ARB(AF)/97/2

INTERIM DECISION CONCERNING RESPONDENT'S MOTION FOR DIRECTIONS

Before the Arbitral Tribunal comprised of:

Benjamin Civeletti
Claus von Wobeser
Jan/ Paulsson, President

22 January 1998

GENERAL OUTLINE OF THE PROCEEDINGS TO DATE

1. On 24 November 1996, the Claimants sent to the Respondent a "Preliminary Notice of Intention to File a Claim and Consent of Investors" which recited that it was made "under Part 5, Chapter 11, Subchapter B of NAFTA as a result of an expropriation of a business venture by the City of Naucalpan de Juarez, Estado de Mexico and against the Federal Government of Mexico." The Claimants thereby explicitly waived their rights to "further court or administrative proceedings regarding this claim pursuant to [NAFTA] Article 1121(1) and (2)."

2. A more detailed document from the Claimants entitled "Notice of Intent to Submit a Claim to Arbitration" was received by the Respondent on 10 December 1996; on 16 December, it received a slightly modified version, entitled "Amended Notice of Intent to Submit a Claim to Arbitration."

3. By a Notice of Claim dated 10 March 1997, the Claimants requested ICSID to approve and register their application for access to the ICSID Additional Facility, and submitted their claim to arbitration under the ICSID Additional Facility Rules.

4. On 24 March 1997, the Acting Secretary-General of ICSID informed the Parties that the requirements of Article 4(2) of the ICSID Additional Facility Rules had been fulfilled and that the Claimants' application for access to the Additional Facility was approved, and issued a Certificate of Registration of the case.

5. Following nominations in due course, the Acting Secretary-General of ICSID informed the Parties that the Arbitral Tribunal was "deemed to have been constituted and the proceedings to have begun" on 9 July 1997, and that Mr Alejandro A. Escobar, Counsel, ICSID, would serve as Secretary of the Tribunal.

6. The first session of the Tribunal was held, with the Parties' agreement, in Washington on 26 September 1997. It resulted in further agreement on a number of

procedural matters reflected in written minutes signed by the President and Secretary of the Tribunal.

THE PRELIMINARY ISSUE

7. In the course of informal oral presentations on the occasion of the first session of the Tribunal on 26 September 1997, the Respondent indicated that it had doubts as to the standing of the Claimants which should be resolved before consideration of the merits.

8. Accordingly, it was agreed (under point 12 of the Minutes of that session) that the Respondent would submit a written motion regarding the issue of the Claimants' standing, to which the Claimants would be given an opportunity to reply, with a further opportunity for the Respondent to respond.

9. The Parties' pleadings in this particular matter have thus been as follows:

6 October 1997: the Respondent's "Motion for Directions" (hereafter "the Motion")

5 November 1997: the Claimants' "Reply to Motion for Directions" (hereafter "the Reply")

12 December 1997: the Respondent's Response (hereafter "the Response")

THE PARTIES' CONTENTIONS

Issues Raised

10. The Motion calls upon the Claimants to "establish their standing" and "clarify the basis of their claim," failing which, it contends, the claim should be dismissed with prejudice.

11. According to the Motion, there are two "purported corporate entities" that have the same name, date of incorporation and notarial deed number "as the 'enterprise' referred to in the Notice of Claim and other pleadings," and that a third corporate entity with "substantially the same name" appears to have become the assignee of the concession at the heart of the substantive dispute. None of the Claimants is identified as a shareholder in the latter; as for the two others, neither appears to have all the Claimants among its shareholders. This is said to create uncertainty as to the Claimants' standing, compounded by confusion as to whether their claims are direct (i.e. under NAFTA Article 1116) or derivative (i.e. under NAFTA Article 1117, arising by virtue of alleged loss and damage suffered by the corporate entity).

12. Moreover, the Motion queries whether the two "purported corporate entities that have the same name, date of incorporation and notarial deed numbers" were duly incorporated, and whether they so remained at times material for the purposes of this arbitration.

13. In summary, the Motion contends that the Claimants must demonstrate:

> "(i) *for each of them*, their standing to invoke Section B of Chapter Eleven;
>
> (ii) if they have such standing, whether they are advancing a claim under Article 1116 for damages each of them suffered as investors or whether the claim is made under Article 1117;
>
> (iii) if the claim is being asserted under Article 1117, whether it is being asserted by the investor who owns or controls the enterprise; and
>
> (iv) in either event, that the enterprise which any of them claim to own or control, or in which any of them claim to have an equity security or other interest was, at the material times, a valid and subsisting corporate entity, duly incorporated under applicable Mexican law."

14. The Motion also states that it is critical, if the case is initiated under Article 1117, that the enterprise alleged to have been harmed "has validly authorised the submission of the claim to arbitration."

The Motion

15. The Respondent's own analysis of these issues is as follows (paragraphs 16 through 19).

16. The three claimants have, in their three Notices (described in paras. 1-3) identified themselves as "U.S. Investors" who collectively "own and control 74% of Desechos Solidos de Naucalplan, S.A. de C.V." (DESONA). The same Notices identify the latter as the "Enterprise." The Claimants have purported to advance a claim under Article 1116 of the NAFTA (*Claim by an Investor ... on its Own Behalf*) and only in the alternative under Article 1117 (*Claim by an Investor ... on Behalf of an Enterprise*). But the basis of their claim is the nullification of a concession granted to "a company called DESONA," and the Motion asserts that no claim can therefore be advanced under Article 1116.

17. The Motion further notes that the Claimants have alleged that they were all shareholders in DESONA, which they say was incorporated "as evidenced in public deed number 6,477 dated November 4, 1992, granted before Notary Public number 7 for the District of Cuautitlán Izcalli." But according to the Motion, there were *two* versions of DESONA evidenced by the same deed number 6,477, and moreover there is another entity called "DESONA 1" which the Claimants' Amended Notice of Intent explains, at para. 7, was incorporated "pursuant to erroneous instructions given by officials of Naucalpan."

18. The Respondent has located and produced before the Arbitral Tribunal two public deeds granted on 4 November 1992 by the same Notary Public and bearing the number 6,477. In one of these, Robert Azinian is listed as a 54% shareholder but

neither of the other two Claimants appear. In the other Robert Azinian is again listed as a 54% shareholder, Kenneth Davitian as a 20% shareholder, but the third Claimant (Ellen Baca) does not appear.

19. The concession was in fact "transferred" to DESONA 1. Since *none* of the Claimants appears in the public record as a shareholder of DESONA 1, the enterprise which "under Mexican law actually held the concession," the Motion concludes that none of the Claimants is an investor (within the meaning of NAFTA Article 1139) entitled to bring these proceedings, and at any rate none has a stake in the Enterprise for the purpose of bringing a case under Article 1117.

The Reply

20. The Claimants' Reply begins by noting that the NAFTA does not require an election between Articles 1116 and 1117.

21. As to Article 1116, the Reply disputes the Respondent's suggestion that only the original incorporators of DESONA could qualify as "investors" on the basis of "Article 1139's broad definition of investment."

22. As to Article 1117, the Reply maintains that the Claimants' Notices:

> "delineates both the investors and the enterprise itself, and contains the requisite authority for counsel to proceed respectively on behalf of the investors and on behalf of the enterprise." (p. 3)

23. Accordingly the Reply proceeds to demonstrate that in the Claimants' Submission each of them:

- is a US national;
- has made an investment in Mexico;

- owns, controls, and has "an interest in the enterprise and its concession contract," and

- "would have shared in the profits of the enterprise."

24. In the case of Ellen Baca, Mr Davitian represents (Exhibit C of the Reply) that he "assigned my stock interest in the concession to her by corporate assignemnt on Dec. 15th 1993;" she confirms (Exhibit D) that "he transferred to me 1000 shares" of DESONA at that date.

25. As for DESONA, the Reply explains that the entity as initially contemplated, which it styles "DESONA A," was "a draft of the corporation which was never perfected by incorporation and registration." (p. 8) The entity registered in November 1992 with both Messrs Azinian and Davitian as shareholders, which the Reply refers to as "DESONA B," is therefore the relevant enterprise. DESONA 1, for its part, was at one time considered to be established as a possible transferee of DESONA B's concession rights, but nothing came of it.

26. With the Reply, the Claimants submit inter alia what they say is the "*Contrato de constitucion*" of DESONA B contained in public deed number 6,477 (Exhibit J). They also submit the signature page of the contract which has given rise to this dispute (Exhibit F), bearing the signature Mr Azinian as Chairman of the Board of Directors of DESONA B, as well as a copy of the Decree by which DESONA B was approved as concessionaire (Exhibit H).

27. The Reply concludes (p. 11) that since the NAFTA does not require an election between Articles 1116 and 1117, since the NAFTA definition of "investor" is not limited to incorporators, and since the Claimants have shown that DESONA B was lawfully formed, the case should now proceed to the merits.

The Response

28. The Response challenges the adequacy of the Reply in several respects.

29. First, it asserts that the Motion was not intended to force the Claimants to make an election; rather, it questioned the Claimants' standing in connection with the specific claim(s) they advance.

30. Second, the fact that Mr Davitian transferred his shares to Ms Baca in December 1993 means, or so the Response contends, that he is not an "investor" for NAFTA purposes.

31. Third, the Response argues that the Reply reveals that part of Mr Azinian's claim proceeds on the footing that he is partly proceeding as an assignee of the interest in DESONA B of Mr Ariel Goldenstein, who is not a claimant (and could not be, as a non-US citizen); the Response considers that such a surrogate claim would circumvent the NAFTA, and that "Mr Azinian's shareholding in DESONA should be counted as at the date the concession was nullified." (para. 19)

32. Fourth, the Response suggests that Messrs Azinian and Davitian seek to lay a foundation for claims in their capacity as lenders or capital contributors to DESONA. Such claims, it maintains, are without the agreement to arbitrate as created pursuant to the NAFTA and the Notice put forward in this case, which relates only to a claim which "focuses on the alleged *de facto* expropriation of DESONA" (para. 23)

33. Fifth, the Response argues that the Claimants' description of DESONA as the only relevant entity is belied by the fact that the municipal council of Naucalpan believed it was dealing with DESONA A; it did not request and obtain documentation concerning DESONA B until February 1994. The various exhibits to the Reply show corporate actions taken by DESONA without any evidence of which version (A or B) was involved. As she is unable to show that DESONA B was the concessionaire,

Ms Ellen Baca must be denied standing as a claimant, given that she has never appeared as a shareholder in DESONA A.

DIRECTIONS BY THE ARBITRAL TRIBUNAL

34. The pleadings summarised above raise a number of complex issues which may have the effect of restricting the competence of the Tribunal. Nevertheless, they seem unlikely to eliminate altogether the need to consider the merits. In considering whether anything would be gained by making definitive interim determinations with respect to any of these issues, the Tribunal has been mindful of the following factors:

35. (A) There are some matters of fact and law about which the Tribunal would be likely to ask for additional submissions before deciding any of the issues raised by the Motion. In other words, they do not appear mature for decision at this stage. Moreover, a special hearing could be required. The more particular circumstances considered in paragraphs 36-39 suggest that little would be gained – while time and costs would be expended – by attempting to examine these issues in such a fashion before considering the merits.

36. (B) If it is true that part of Mr Azinian's claim is made by him as an impermissible surrogate for Mr Goldenstein, that may be determined by the Arbitral Tribunal at a later stage. It would affect the quantum, but not Mr Azinian's standing *pro se*.

37. (C) If it is true that Mr Davitian was not a shareholder at the material time(s), this might defeat his standing but would not obviate consideration of the merits; nor would, it seems, his provisional presence as a claimant complicate the facts to be tried on the merits.

38. (D) If it is true that Messrs Azinian and Davitian are seeking to introduce claims outside the Arbitral Tribunal's jurisdiction as established by the NAFTA and

the various Notices articulated in this case, the Tribunal can also deal with that in due course, e.g., in dismissing claims that are in effect *ultra petita*.

39. (E) Whatever may be said about DESONA A and DESONA B, neither of them is a claimant. The complications relating to the incorporation, formal actions, and treatment by Mexican administrative and judicial authorities of DESONA (in any of its alleged versions) seem to be part and parcel of the merits, it being noted that the Claimants have identified the entity harmed by the allegedly wrongful actions of the Respondent as the one they define (see paragraphs 25-26) as "DESONA B."

40. Accordingly, the Tribunal directs the parties to proceed in accordance with para. 14 of the minutes of the first session as since adjusted, so that the Claimants' full Memorial is lodged on 29 January 1998, the Respondent's Counter-Memorial 90 days later. The Arbitral Tribunal expects the Claimants' Memorial to be particularly attentive to the matters reflected in paras. 36-39 above.

Jan Paulsson, President

Alejandro Escobar, Secretary