

PUBLIC VERSION

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

Fireman's Fund Insurance Company

Claimant,

v.

The United Mexican States,

Respondent.

Case No. ARB(AF)/02/01

CLAIMANT'S MEMORIAL ON THE MERITS

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I. Introduction

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

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

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

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

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

II. Procedural History

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

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

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

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

III. Statement of Facts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. The GFB Debentures

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

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

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

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

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

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

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

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

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

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

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

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

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

17. GFB's issuance of the debentures subscribed by Fireman's Fund, which were intended to strengthen and capitalize BanCrecer, was part of just such a loan transfer transaction with FOBAPROA. Pursuant to an agreement negotiated between BanCrecer and [REDACTED], FOBAPROA, and the [REDACTED], [REDACTED], FOBAPROA would take over a portfolio of the Bank's non-performing loans. They were to be replaced by Government-guaranteed notes, in specified proportions to infusions of new capital from, *inter alia* (i) [REDACTED] and (ii) the issuance of the US \$100 million in GFB dollar- and peso-denominated debentures, [REDACTED].²⁰ For the latter, the Government expressly agreed to take over BanCrecer loans in a two-to-one ratio to the capital raised by the GFB debentures.²¹ Ultimately, some MXP [REDACTED] in non-performing loans were removed from BanCrecer's books and transferred to FOBAPROA pursuant to this agreement.²²

18. Just as FOBAPROA's removal and replacement of the non-performing loans was contingent on GFB raising additional capital for the Bank through Fireman's Fund's (and the Mexican investors') subscription of the GFB debentures, Fireman's Fund's subscription itself

²⁰ See Acosta Affidavit at para. 6 (C0723 and C0730 PUBLIC); García Affidavit at para. 16 (C0695-96); Affidavit of Eduardo Cepeda Fernandez, June 3, 2004, at para. 5 ("Cepeda Affidavit") (C0740); see also [REDACTED]

[REDACTED] (C0753 RESERVED);

[REDACTED] (C0761-64 RESERVED).

²¹ See Acosta Affidavit at paras. 5-6 (C0722-23 and C0729-30 PUBLIC); Cepeda Affidavit at para. 5 (C0740); [REDACTED] (C0753 RESERVED); [REDACTED] (C0761 RESERVED).

²² See Acosta Affidavit at para. 6 (C0723 and C0730 PUBLIC); García Affidavit at para. 16 (C0695-96); Mancera S.C./Ernst & Young Report to BanCrecer, BanOro, National Banking and Securities Commission and FOBAPROA, September 20, 1996 (reporting on portfolio of loans transferred) (C0765-77); see also [REDACTED]

[REDACTED] (C0073 RESERVED);

[REDACTED] (C0754 RESERVED);

[REDACTED] (C0761 RESERVED);

[REDACTED] (C0785 RESERVED).

was made in reliance upon the FOBAPROA loan take off agreement.²³ Fireman's Fund was aware of the agreement and of the beneficial effects that it would have on BanCreceer's financial condition, and Fireman's Fund relied upon that transaction in making its investment.²⁴ Without the FOBAPROA portfolio take off, BanCreceer's financial position would have been far less secure, and an investment in the debentures issued by BanCreceer's holding company would have been substantially more risky. Fireman's Fund's investment in the GFB debentures was thus made in reliance on the Government's pledge to take off loans corresponding to the capital raised by that Fireman's Fund investment.²⁵

19. The September 1995 loan take off agreement was the first such transaction arranged for BanCreceer. FOBAPROA subsequently took over additional portions of BanCreceer's non-performing loan portfolio [REDACTED],²⁶ ultimately totaling approximately MXP \$20 billion.²⁷ All of the loans transferred to FOBAPROA were fully documented, transferred to, and accepted without reservation by FOBAPROA.²⁸ In addition, the September 1995 portfolio was audited by Mancera, S.C./Ernst & Young, [REDACTED]

[REDACTED].²⁹

²³ See Reuss Supplemental Affidavit at para. 12 (C0689).

²⁴ See Reuss Supplemental Affidavit at paras. 10-12 (C0688-89).

²⁵ See Reuss Supplemental Affidavit at para. 12 (C0689).

²⁶ See [REDACTED] (C0788-94 RESERVED); [REDACTED] (C0795-98 RESERVED).

²⁷ See García Affidavit at para. 16 (C0695-96).

²⁸ See Acosta Affidavit at para. 8 (C0723 and C0730 PUBLIC).

²⁹ See Acosta Affidavit at para. 9 (C0723 and C0730-31 PUBLIC); Mancera, S.C./Ernst & Young Report to BanCreceer, BanOro, National Banking and Securities Commission and FOBAPROA, September 20, 1996 (C0765-77); [REDACTED] (C0799 RESERVED).

C. The Government Working Group

20. FOBAPROA's ongoing takeovers of tranches of non-performing loans served to improve the financial conditions of the banks involved, but in most cases, more comprehensive restructuring and recapitalization efforts were required. To this end, a Working Group of Mexican Government officials representing all of the relevant financial authorities worked to develop "rescue" plans tailored to the circumstances of each bank.³⁰

21. The agencies involved in the Working Group included:

- the National Banking and Securities Commission, represented by the Commission's President, Eduardo Fernández García, Commission Vice President for General Supervision Patricia Armendariz, and Commission Vice President for Special Supervision Alejandro Vargas Durán;³¹
- the Secretaría de Hacienda y Crédito Público ("Finance Ministry"), represented by Minister of Finance José Angel Gurría Treviño, the Undersecretary of Finance Dr. Martín Werner Wainfeld, Director General for Banking and Savings Vicente Corta, and General Director of Commercial Banks Fernando Borja Mujica;³²
- FOBAPROA, represented by its Director General Javier Arrigunaga Gómez del Campo, Director of Commercial Bank Recovery Mauricio Naranjo, and Gabriel Reyes Oroña, Secretary to the Technical Committee;³³ and

³⁰ See García Affidavit at paras. 4-7 (C0693-94); Cepeda Affidavit at para. 3 (C0739); Reuss Affidavit at para. 9 (C0032).

³¹ See García Affidavit at para. 9 (C0694); Cepeda Affidavit at paras. 3, 4, 8 (C0739-41); Reuss Affidavit at para. 9 (C0032).

³² See García Affidavit at para. 9 (C0694); Cepeda Affidavit at paras. 3, 4, 8 (C0739-41); Reuss Affidavit at para. 9 (C0032).

³³ See García Affidavit at para. 9 (C0694); Cepeda Affidavit at paras 3, 4, 8 (C0739-41); Reuss Affidavit at para. 9 (C0032).

- the Banco de México (“Central Bank”), represented by Governor Guillermo Ortíz Martínez, and Director General for Financial Intermediaries Angel Palomino.³⁴

The National Banking and Securities Commission, as the principal regulatory agency overseeing the condition of Mexican banks, functioned as the lead agency for the Working Group.³⁵ Most meetings of the Working Group took place in the Commission’s offices.³⁶

22. The Working Group met on a near-weekly basis, supplemented by numerous *ad hoc* meetings, to consider and develop rescue plans for the Mexican banks.³⁷ Typically a rescue plan for a bank would include three components: (i) transferring or confirming the prior transfer of non-performing loans to FOBAPROA, as discussed above, (ii) writing off capital deficits against existing equity capital, and (iii) securing infusions of fresh capital from new investors and/or existing shareholders.³⁸ The scale and scope of each component, and the process by which each was to be effected, varied from bank to bank.

23. Representatives of each bank were frequently invited to attend the Working Group meetings in which plans for their banks were discussed.³⁹ Once developed and agreed to by the Working Group, each plan was presented to the Technical Committee of FOBAPROA for official approval. Formally, the rescue plan would be put forward to FOBAPROA in the form of a proposal from the bank in question; as a practical matter, however, the terms of each plan were

³⁴ See García Affidavit at para. 9 (C0694); Cepeda Affidavit at paras. 3, 4, 8 (C0739-41); Reuss Affidavit at para. 9 (C0032).

³⁵ See García Affidavit at para. 7 (C0694).

³⁶ See García Affidavit at para. 8 (C0694).

³⁷ See García Affidavit at para. 8 (C0694).

³⁸ See García Affidavit at para. 5 (C0694).

³⁹ See, e.g., García Affidavit at paras. 7, 11 (C0694-95).

painstakingly negotiated with, and in many cases (including BanCreceer's) dictated by, the Government Working Group.⁴⁰

24. The series of rescue plans developed by the Working Group were largely successful in restoring most Mexican banks to sound financial footing. In late 1996, the Working Group turned its attention to the last bank in the queue: BanCreceer.⁴¹

D. The BanCreceer Recapitalization Program

25. BanCreceer's financial position had been strengthened by the takeovers of tranches of non-performing loans by FOBAPROA—the September 1995 transfer expressly linked to the GFB debentures, and subsequent transfers in 1996.⁴² But in the face of the still-struggling Mexican economy, BanCreceer, like most of the Mexican banks already aided by the Government's Working Group, was in need of a recapitalization plan to complement the FOBAPROA transactions.

26. As the Working Group wrestled with the terms for a recapitalization throughout 1997, the Bank's financial position was weakening. By the end of 1997, BanCreceer was turning to the interbank market to cover daily shortfalls.⁴³ BanCreceer was able to obtain this interim financing from the interbank market only because the President of the National Banking and Securities Commission issued verbal guarantees to the lending banks to reassure them and persuade them to cover BanCreceer's shortfalls.⁴⁴

⁴⁰ See García Affidavit at para. 5 (C0694).

⁴¹ See García Affidavit at para. 7 (C0694); Cepeda Affidavit at para. 12 (C0742).

⁴² See García Affidavit at para. 16 (C0695-96).

⁴³ See Acosta Affidavit at para. 20 (C0725 and C0733 *PUBLIC*); García Affidavit at para. 25 (C0697-98).

⁴⁴ See Affidavit of Eduardo Fernández García, December 6, 2002 at para. 11(c) ("Fernández García Affidavit") (C0018); see also Acosta Affidavit at para. 20 (C0725 and C0733 *PUBLIC*); García Affidavit at para. 25 (C0697-98).

27. The Government, through the Working Group, insisted upon terms for the BanCreceer Recapitalization Program that were initially resisted by BanCreceer's existing shareholders. The Working Group was adamant that any plan would include the write-down of all existing share capital to zero against existing liabilities, and that the existing Mexican shareholders could not retain control of the Bank.⁴⁵ Throughout 1997, BanCreceer continued to forward various proposals to the Working Group that were incompatible with the Government's parameters, because the proposals suggested recognizing existing equity, at least in part, and permitting significant future equity participation by those shareholders.⁴⁶

28. Ultimately, the Working Group framed a recapitalization plan of its own, which was the basis of the plan formally presented to and approved by FOBAPROA's Technical Committee in February 1998.⁴⁷ As the Government had insisted all along, the "Program of Rescue and Capitalization for Grupo Financiero BanCreceer" (hereinafter "Recapitalization Program") envisioned writing down all existing equity positions to zero, a loss of control by the existing Mexican shareholders, and fresh capital infusions.⁴⁸ Existing shareholders were permitted to put in fresh capital after their existing positions were written off, but only for a minority stake (40%).⁴⁹ A key component of the Working Group's Recapitalization Program was the anticipated ownership stake to be held by a new strategic foreign (*i.e.*, non-Mexican) banking

⁴⁵ See Cepeda Affidavit at para. 9 (C0741).

⁴⁶ See García Affidavit at para. 15 (C0695); *see also, e.g.*, [REDACTED]

[REDACTED] (C0057 RESERVED).

⁴⁷ See García Affidavit at paras. 15, 18 (C0695-96).

⁴⁸ See Reuss Affidavit at paras. 11-12 (C0033); García Affidavit at paras. 15-17, 35 (C0695-96, C0700); *see also* Cepeda Affidavit at paras. 9-10 (C0741); *see generally* Programa de Saneamiento y Capitalización Resumen de Términos y Condiciones ("Draft Memorandum of Intent"), May 1998 (C0046-55).

⁴⁹ See Reuss Supplemental Affidavit at para. 16 (C0689); *see also* Draft Memorandum of Intent at 2, 4-5 (noting write-down of existing shares, new investment by existing shareholders, and resulting 40% equity stake) (C0048,

partner with extensive experience in banking operations. That new investor would be expected to participate in the capital of the cleaned-up BanCreceer in the amount of approximately US \$200 million, for a 40% equity stake in the Bank.⁵⁰

29. To make possible this critical element of the BanCreceer Recapitalization Program, the Working Group deemed it essential to ensure that Fireman's Fund and the Allianz group would be involved in the Program. The Government planned to rely on Fireman's Fund to use the Allianz group's resources and contacts in the financial services industry to identify potential foreign bank investors and to interest them in the BanCreceer opportunity.⁵¹ The Government counted on Fireman's Fund's participation to lend credibility to the Recapitalization Program. As the former President of the National Banking and Securities Commission, Eduardo Fernández García, has explained, "[i]n the government's view, participation by a large foreign investor such as Fireman's Fund and Allianz was essential to the success of the Recapitalization Program."⁵²

30. Accordingly, the Working Group framed Fireman's Fund's role in the Recapitalization Program as follows: In exchange for Fireman's Fund agreeing to locate and interest a new foreign bank investor for BanCreceer and to invest a fresh US \$50 million of its own in the Bank, the US \$50 million value of Fireman's Fund's GFB debentures would be converted into equity in the cleaned-up BanCreceer.⁵³ If Fireman's Fund was ultimately unable to

C0050-51).

⁵⁰ See Reuss Affidavit at para. 12 (C0033); Reuss Supplemental Affidavit at para. 16 (C0689); García Affidavit at para. 17 (C0696); *see also* Draft Memorandum of Intent at 4-5 (noting desired US \$200 million investment by "strategic" partner, resulting 40% equity stake) (C0050-51).

⁵¹ See Fernández García Affidavit at para. 11(d) (C0018); Reuss Affidavit at paras. 12, 18 (C0033-34); Reuss Supplemental Affidavit at para. 17 (C0689-90); García Affidavit at paras. 17-18 (C0696-97).

⁵² Fernández García Affidavit at para. 11(d) (C0018).

⁵³ See Fernández García Affidavit at para. 11(d) (C0018); Reuss Affidavit at para. 12 (C0033); García Affidavit at paras. 17-18 (C0696-97); *see also* Draft Memorandum of Intent at 4-5 (referencing US \$100 million Allianz Group investment and said investor's obligation, jointly with GFB shareholders and JP Morgan, to promote

BanCreceer confirms that “[a]t the time the Recapitalization Program was presented to Fireman’s Fund, it was clear to me that the Recapitalization Program was being offered to them as their *only* option to preserve the value of their US \$50 million debenture investment, by transforming their debenture investment into an equity participation in the new, recapitalized Bank.”⁶⁰

32. Bowing to this pressure, Fireman’s Fund participated in the Recapitalization Program on the terms specified. Those terms were set by the Government Working Group, agreed with GFB, presented to Fireman’s Fund, and approved by FOBAPROA’s Technical Committee. Upon that commitment, JP Morgan then worked to operationalize the parties’ undertaking in a draft Memorandum of Intent whose “terms and conditions reflect the agreements reached between the [GFB] shareholder group led by Mr. Roberto Alcántara Rojas (the “Investor Group”), [Hacienda], the Bank of Mexico, the [Commission, and FOBAPROA], which have been ratified by FOBAPROA’s Technical Committee to carry out the Restructuring and Capitalization Program for BanCreceer.”⁶¹

E. An Undisclosed Alternative: The Peso Debenture Repurchase

33. At the time the Working Group’s plans were being refined into the Recapitalization Program, and then formally presented to Fireman’s Fund, all involved were making it clear to Fireman’s Fund that it had no choice but to participate in that Recapitalization Program.⁶² What Fireman’s Fund did not then know was that a financially advantageous alternative—namely,

⁶⁰ García Affidavit at para. 33 (C0699) (emphasis added).

⁶¹ Draft Memorandum of Intent at 1 (“Los siguientes términos y condiciones reflejan los acuerdos alcanzados entre el grupo de accionistas de [GFB] encabezado por el señor Roberto Alcántara Rojas (el “Grupo de Inversionistas”), [la SHCP], el Banco de México, la [Comisión, y FOBAPROA], mismos que han sido ratificados por el Comité Técnico del FOBAPROA, para llevar a cabo el Programa de Saneamiento y Capitalización de BanCreceer...” (C0047).

⁶² See Reuss Affidavit at para. 13 (C0033); Reuss Supplemental Affidavit at para. 19 (C0690); García Affidavit at para. 33 (C0699).

immediate repurchase of the debentures at their full par value—had been developed in late 1997 for the Mexican holders of the peso-denominated GFB debentures, and that that repurchase was already in full swing at the time the Recapitalization Program was being presented to Fireman's Fund as its only option.

34. In the course of its discussions of recapitalization plans for BanCreceer, the Working Group in 1997 gave attention to the question of holders of peso-denominated debentures.⁶³ Concerned about the impediments that politically influential or even ordinary Mexican investors could pose to restructuring efforts,⁶⁴ the Working Group determined that arrangements should be made to pay off potentially troublesome Mexican debenture-holders by repurchasing their debentures at the full original purchase price (par value).⁶⁵

35. GFB's liaison to the Working Group explains that "[i]n a series of meetings, the Working Group determined that the best vehicle for such a repurchase" transaction would be a trust (*fideicomiso*) that, while formally separate from the Bank or GFB, would be created, funded and administered by BanCreceer.⁶⁶ The Working Group's plan was that the trust would repurchase peso-denominated debentures at full par value, and then hold title to them until the completion of the Recapitalization Program, at which time the debentures could potentially be re-sold to new investors. Such a trust was established by BanCreceer pursuant to a trust

⁶³ See García Affidavit at paras. 20-22 (C0697); Acosta Affidavit at para. 17 (C0725 and C0732 *PUBLIC*); Reuss Affidavit at para. 18 (C0034).

⁶⁴ See García Affidavit at para. 21 (C0697) (discussing Working Group's concerns in light of experiences in other Mexican Government bank rescue efforts).

⁶⁵ See García Affidavit at para. 23 (C0697); see also Letter from BanCreceer to National Banking and Securities Commission, November 17, 1997 (stating that procedures for the acquisition of the Grupo Financiero debentures, including the establishment of a trust, were underway in accordance with the decisions of the governmental working group) (R0166).

⁶⁶ García Affidavit at para. 24 (C0697); Acosta Affidavit at para. 19 (C0725 and C0732-33 *PUBLIC*).

agreement on November 28, 1997,⁶⁷ and, in the words of the Director General of GFB, “[t]he repurchase was carried out at the direction of, and on specific instructions from, the financial authorities.”⁶⁸

36. The scheme of repurchasing the peso-denominated debentures, and doing so through a BanCreceer-controlled trust, was thought to be, at a minimum, “highly irregular.”⁶⁹

Accordingly, it was critical to all involved that the scheme was “designed, known, and approved by the Government’s own agencies”⁷⁰—namely, the Government Working Group and its financial agency representatives.

37. To begin with, the repurchase plan appeared to conflict with the Government’s own restrictions imposed at the time of the debentures’ issuance, as well as with at least two explicit restrictions in the debenture issuing documents. The Central Bank’s September 15, 1995 letter authorizing the debentures’ issuance explicitly conditions that authorization on compliance with a number of restrictions, including that

Grupo Financiero BanCreceer, S.A. de C.V., the legal persons that are part of that financial group, as well as the companies in which any of them hold shares, [shall] not grant, directly or indirectly, credits of any kind with the object of financing the acquisition of the subordinated debentures at issue.⁷¹

⁶⁷ See Fideicomiso que Constituye BanCreceer, S.A., Institución de Banca Múltiple, Grupo Financiero BanCreceer, 28 November 1997 (“Trust Indenture”) (R0169-71).

⁶⁸ Acosta Affidavit at para. 17 (C0725 and C0732 PUBLIC).

⁶⁹ Acosta Affidavit at para. 21 (C0725-26 and C0733 PUBLIC); see also García Affidavit at para. 26 (C0698).

⁷⁰ Acosta Affidavit at para. 22 (C0726 and C0733 PUBLIC).

⁷¹ Letter from Central Bank to Grupo Financiero BanCreceer, September 15, 1995 (“Grupo Financiero BanCreceer, S.A. de C.V., las personas morales integrantes de esa Agrupación Financiera, así como las sociedades en las que estas participen, no otorguen, directa o indirectamente, créditos de ninguna especie con el fin de financiar la adquisición de las obligaciones subordinadas que nos ocupan.”) (R0054).

The peso debenture repurchase, however, was directly funded by loans made to the trust by BanCrecer, a member of the GFB group, with the express purpose of acquiring the GFB debentures governed by the Central Bank's September 15, 1995 conditional authorization.

38. In turn, Clause Eight of the debenture issuing documents provides that "in no case may the debentures be acquired by" a series of prohibited purchasers, including:

- "(I) Financial entities of whatever type, when acting for their own account" (subject to certain exceptions not applicable here); and
- "(IV) Trusts, agencies or commissions, when the investment is made at the discretion of the fiduciary, in the case of trusts, agencies or commissions in which the fiduciary is the same issuing institution or any entity of the financial group to which the issuing institution belongs."⁷²

39. The repurchase of the peso-denominated debentures was to be carried out by a trust in which BanCrecer was the settlor (the entity establishing the trust), as well as the fiduciary (the entity administering the trust), and which would act pursuant to BanCrecer's instructions in setting up the trust, and which was funded by two loans of MXP \$250 million each from BanCrecer.⁷³ The GFB, BanCrecer, and Government officials involved evidently appreciated that this trust device appeared to be prohibited by the letter of the issuing documents, and most certainly by the spirit of those terms.⁷⁴

⁷² Debenture Issuing Document for Peso Debentures, at clausula octava ("Las obligaciones en ningún caso podrán adquirirse por: (I) entidades financieras de cualquier tipo, cuando actuen por cuenta propia... (IV) fideicomisos, mandatos o comisiones, cuando la inversión se efectue a discreción de la fiduciaria, tratándose de fideicomisos, mandatos o comisiones en los que la fiduciaria sea la propia institución emisora o alguna entidad del grupo financiero al que pertenezca la institución emisora") (R0090-91).

⁷³ See Trust Indenture (R0169-71); see also García Affidavit at paras. 24-25 (C0697-98); Acosta Affidavit at paras. 17, 19 (C0725 and C0732-33 *PUBLIC*); Authorization of BanCrecer Executive Committee, January 21, 1998 (memorialized March 2, 1998) (authorizing MXP \$250 million loan for acquisition of debentures) (C0800); Authorization of BanCrecer Executive Committee, May 19, 1998 (authorizing increase of loan for acquisition of peso debentures to MXP \$500 million) (C0801); Minutes of BanCrecer Board of Directors Meeting, March 11, 1999 at Item XIII (ratifying MXP \$500 million loan approved by Executive Committee for debenture acquisition, "making clear that this operation had been authorized by the authority") (C0157).

⁷⁴ See García Affidavit at para. 26 (C0698); Acosta Affidavit at paras. 21-22 (C0725-26 and C0733 *PUBLIC*).

40. Another questionable point was the relationship between the peso debenture repurchase and Article 106 of the Credit Institutions Law, which the Government later invoked to block identical arrangements for repurchasing the dollar-denominated debentures.⁷⁵ Article 106 provides that “credit institutions shall be prohibited to...XV. [p]ay prematurely, in whole or in part, their payment obligations derived from money deposits, loans or credits, bonds, subordinated debentures or securities repurchase agreements” unless the Central Bank grants an exception with the goal of (i) securing resources for credit institutions or (ii) regulating their operation, on the most appropriate terms for the situation of the market or the banking system.⁷⁶ While it appears that this provision is actually inapplicable to a secondary market repurchase of debentures by an entity other than the issuer (as contrasted with an early redemption or conversion of debentures by the issuer) in the first instance, the Government in 1999 characterized it as an obstacle to the repurchase of Fireman’s Fund’s debentures. And yet there is no evidence whatsoever that the financial authorities ever considered whether the peso debenture repurchase scheme was compatible with Article 106.⁷⁷

41. In addition, there were concerns that the Bank’s actions in paying off peso-denominated debenture holders at their full purchase price could constitute an improper

⁷⁵ See Letter from Central Bank of Mexico to Grupo Financiero BanCreceer, August 16, 1999 (C0238).

⁷⁶ Ley de Instituciones de Crédito, art. 106 (“A las instituciones de crédito les estará prohibido:...XV. Pagar anticipadamente, en todo o en parte, obligaciones a su cargo derivadas de depósitos bancarios de dinero, préstamos o créditos, bonos, obligaciones subordinadas o reportos;...El Banco de México podrá autorizar, mediante reglas generales, excepciones...a lo previsto en las fracciones XV a XVIII a fin de procurar la captación de recursos por las instituciones o regular la celebración de operaciones, en los términos más adecuados a la situación del mercado o del sistema bancario.”) (R0410-12).

⁷⁷ See Reuss Affidavit at para. 29 (C0036-37). Although Claimant repeatedly and specifically requested the production of Government documents that would indicate any such analysis, Mexico produced none. See Claimant’s Renewed Request for the Production of Documents, November 4, 2002, at 4 (requesting documents evidencing analysis of peso debenture repurchase under Article 106); Claimant’s Request for the Production of Documents, October 31, 2003, at 3 (same); Letter from Respondent to Claimant, January 12, 2004 (noting documents produced [which do not include Article 106 analyses] and stating that Respondent does not possess any additional responsive documents). It is appropriate to infer, therefore, that no such assessment took place.

preferential payment relative to BanCreceer's and GFB's other creditors.⁷⁸ The debentures were by their terms subordinated to senior debt instruments, and were on a par with the dollar-denominated debentures. Particularly given the Bank's manifest financial and liquidity problems in late 1997 and early 1998, to pay the peso-denominated debentures not only the interest owed by the terms of the debentures, but indeed to offer their full purchase price when the debentures were two-fifths of the way to maturity (and had already paid out two years' interest), and to do so in preference to senior and equally ranked debt, could have exposed the BanCreceer and GFB officials to accusations of improper transfers in the event that GFB or BanCreceer were to fall into insolvency proceedings.⁷⁹

42. In light of these apparent irregularities, GFB's then-Senior Vice President explains that "[t]he Government's participation in and assumption of responsibility for the peso debenture repurchase was also essential to all of us involved (both Government officials and GFB and BanCreceer executives)" because the process "could only be sanctioned by the fact that the Mexican Government had actively participated in the design, approval, execution and control of this peso bond repurchase."⁸⁰ That reassurance was critical: "It was, therefore, *only* because of the Government's support and approval of the peso debenture repurchase plan that the Bank's officials and the Government officials involved in this decision were prepared to proceed with the repurchase in the manner decided by the Working Group."⁸¹

43. It is also the case that the peso debenture repurchase could not have proceeded without the Government's assistance with the funding for the transaction. As noted previously,

⁷⁸ See García Affidavit at para. 26 (C0698).

⁷⁹ See García Affidavit at para. 26 (C0698).

⁸⁰ García Affidavit at para. 26 (C0698).

⁸¹ García Affidavit at para. 26 (C0698) (emphasis added).

the trust's repurchase of the peso-denominated debentures was, "[a]t the financial authorities' instruction, ... funded by two loans from BanCreceer of 250 million Mexican pesos each" to the trust.⁸² At that time, however, BanCreceer had liquidity issues and lacked sufficient funds to make the loans to the trust. As discussed above, BanCreceer's growing cash flow shortfalls were forcing it to resort to increasing volumes of borrowing in the interbank market.⁸³ But banks were only willing to cover BanCreceer's shortfalls in that market because of the backing of and oral guarantees by the National Banking and Securities Commission on BanCreceer's behalf. As explained by the former President of the Commission, "[t]he Mexican government and FOBAPROA were standing behind BanCreceer (effectively, guaranteeing its loans) in the loan market."⁸⁴ While those Government reassurances were not specific to the funds used by BanCreceer for the peso debenture repurchase, it is undoubtedly the case that "the trust could not have been funded, and the debentures could not have been repurchased, without access to [the interbank] funds covered by Government guarantees."⁸⁵

44. The Government through the Working Group not only designed and facilitated the peso debenture repurchase plan, but also carefully monitored its execution.⁸⁶ Originally, the

⁸² Acosta Affidavit at para. 19 (C0725 and C0732-33 *PUBLIC*). The loans were approved by the Executive Committee of the BanCreceer Board of Directors in January and May of 1998, *see* Authorization of BanCreceer Executive Committee, January 21, 1998 (memorialized March 2, 1998) (C0800); Authorization of BanCreceer Executive Committee, May 19, 1998 (C0801), but were not disclosed to the full Board of Directors until March of 1999, *see* Minutes of BanCreceer Board of Directors Meeting, No. S.A. 71-149, March 11, 1999 at Item XIII (ratifying MXP \$500 million loan approved by Executive Committee for debenture acquisition, "making clear that this operation had been authorized by the authority") (C0157).

⁸³ *See* García Affidavit at para. 25 (C0697-98); Acosta Affidavit at para. 20 (C0725 and C0733 *PUBLIC*).

⁸⁴ Fernández García Affidavit at para. 11(c) (C0018).

⁸⁵ García Affidavit at para. 25 (C0697); *see also* Acosta Affidavit at para. 20 (C0725 and C0733 *PUBLIC*).

⁸⁶ *See, e.g.*, Letter from BanCreceer to National Banking and Securities Commission, November 17, 1997 (stating that procedures for the acquisition of the Grupo Financiero debentures, including the establishment of a trust, were underway in accordance with the decisions of the governmental working group) (R0166); Letter from National Banking and Securities Commission to BanCreceer, December 8, 1997 (specifying parameters of peso debenture repurchase program and requesting copy of trust instrument and monthly reports on progress of debenture

repurchase was to be limited to peso-denominated debentures whose original purchase may have been inadequately documented, presumably on the theory that unless they were paid off, such debenture holders would be readily positioned to impede a restructuring plan by challenging any losses they might suffer under a restructuring plan.⁸⁷ Accordingly, the National Banking and Securities Commission in a letter dated December 8, 1997 approved the peso debenture repurchase plan, subject to the limitation that the repurchase would extend to improperly documented debentures.⁸⁸

45. In practice, however, it soon proved infeasible to distinguish between debenture holders whose peso-denominated debentures should and should not be repurchased. The Working Group, therefore, decided to offer to repurchase all of the peso-denominated debentures.⁸⁹ The full repurchase proceeded apace in 1997 and the first half of 1998, with the National Banking and Securities Commission receiving regular reports on its progress from GFB and BanCreceer.⁹⁰ By June 1998, fully 86% of the peso-denominated debentures had been successfully repurchased, and ultimately over 99% of them were paid off at full par value.⁹¹

acquisition) (R0172-73); Letter from BanCreceer to National Banking and Securities Commission, April 16, 1998 (remitting copy of November 28, 1997 Trust Indenture to Commission) (C0104-07); Letter from BanCreceer to National Banking and Securities Commission, July 13, 1998 (documenting peso debenture acquisitions from December 8, 1997 to date) (C0108-10); Letter from National Banking and Securities Commission to Grupo Financiero BanCreceer, August 12, 1998 (removing December 8, 1997 limitations on peso debenture repurchase) (C0802); Letter from National Banking and Securities Commission to Grupo Financiero BanCreceer, August 12, 1998 (formally taking note of acquisition of peso debentures as part of Recapitalization Program for BanCreceer) (C0111).

⁸⁷ See García Affidavit at paras. 21-22, 27 (C0697-98).

⁸⁸ See Letter from National Banking and Securities Commission to BanCreceer, December 8, 1997 (specifying parameters of peso debenture repurchase program) (R0172-73).

⁸⁹ See García Affidavit at para. 28 (C0698-99); see also Letter from National Banking and Securities Commission to BanCreceer, August 12, 1998 (removing December 8, 1997 limitations on peso debenture repurchase) (C0802).

⁹⁰ See García Affidavit at para. 29 (C0699); Acosta Affidavit at para. 21 (C0725-26 and C0733 PUBLIC); see, e.g., Letter from BanCreceer to National Banking and Securities Commission, July 13, 1998 (documenting peso debenture acquisitions from December 8, 1997 to date) (C0108-10).

⁹¹ See García Affidavit at para. 29 (C0699); see also Status of Debentures Purchased by BanCreceer Trust as of

46. In August 1998, the National Banking and Securities Commission issued two letters on the same date recognizing the completion of the repurchase scheme. In one letter dated August 12, 1998, the Commission retroactively removed the restriction it had originally imposed on the scope of the repurchase (the limitation to improperly documented debentures), by canceling the effect of its December 8, 1997 letter.⁹²

47. In another letter, the Commission formally took notice of the peso debenture repurchase program carried out by GFB and BanCrececr pursuant to the decisions of the Government Working Group:

With respect to your kind letter which refers to the agreements adopted regarding the Program of Rescue and Recapitalization of Grupo Financiero BanCrececr, S.A. de C.V., in the sessions held by the working group consisting of the Finance Ministry, the Central Bank, FOBAPROA and this National Banking and Securities Commission, and which has informed this Supervisory Authority of the procedure through which has been initiated the process of acquisition of subordinated debentures issued in 1995 (GFCRECE95), which form part of the referenced program, you are hereby informed that we have taken note of said procedure.⁹³

This letter was officially copied to the Minister of Finance, the Governor of the Central Bank, the Director General of FOBAPROA, and the President of the Commission, and stamped by each to acknowledge their receipt. This document was treated by all involved as a form of insurance, or in the words of the former Director General of GFB, as a “written acquittal” confirming the

September 30, 2002 (indicating trust holdings of 499,200,000 GFCRECE 95L debentures) (C0112).

⁹² See Letter from National Banking and Securities Commission to BanCrececr, August 12, 1998 (removing December 8, 1997 limitations on peso debenture repurchase) (C0802).

⁹³ Letter from National Banking and Securities Commission to Grupo Financiero BanCrececr, August 12, 1998 (“En respuesta al atento escrito mediante el cual se refieren a los acuerdos adoptados respecto del Programa de Saneamiento y Capitalización del Grupo Financiero BanCrececr, S.A. de C.V., en las sesiones celebradas por el grupo de trabajo conformado por la Secretaría de Hacienda y Crédito Público, Banco de México, el Fondo Bancario de Protección al Ahorro (FOBAPROA) y esta Comisión Nacional Bancaria y de Valores, informando a esta Autoridad Supervisora el procedimiento conforme al cual han iniciado el proceso de adquisición de obligaciones subordinadas emitidas en el año 1995 (GFCRECE95), mismo que forma parte del programa aludido, se les

Government's involvement and approval of the repurchase procedure and ensuring that the company officials could not later be accused of improprieties in carrying out the "acts and schemes designed, known, and approved by the Government's own agencies."⁹⁴

48. Fireman's Fund, however, was kept in the dark about this scheme until it was well underway. At the Government's insistence, the entire peso debenture repurchase scheme was developed and put in motion under conditions of "absolute secrecy."⁹⁵ As a general matter, the Government Working Group always strove to keep confidential the details of the rescue plans for each individual bank, so that the variations in treatment from one bank to another would not become known and used as leverage in restructuring negotiations. This dynamic was especially true for an unusual debenture repurchase scheme like that developed for BanCreceer, which would be likely to generate claims for comparable arrangements from other banks and bondholders who may have received less favorable treatment.⁹⁶ And, of particular importance in the BanCreceer situation, there was the additional risk that disclosure of the peso debenture repurchase scheme would prompt claims by Fireman's Fund for comparable treatment⁹⁷—thereby jeopardizing the Government's plans to use Fireman's Fund to secure a new foreign investor for the Recapitalization Program.

49. Accordingly, as GFB participants confirm, the peso debenture repurchase scheme was kept strictly confidential and revealed only to very few parties outside the Working Group.⁹⁸

comunica que se han tomado nota de dicho procedimiento.") (C0111).

⁹⁴ Acosta Affidavit at para. 22 (C0726 and C0733 PUBLIC); see also García Affidavit at para. 28 (C0698-99).

⁹⁵ See Acosta Affidavit at para. 18 (Government instructions "to keep [peso debenture repurchase] in absolute secrecy") (C0725 and C0732 PUBLIC); García Affidavit at para. 30 (C0699).

⁹⁶ See García Affidavit at para. 30 (C0699); Acosta Affidavit at para. 18 (C0725 and C0732 PUBLIC).

⁹⁷ See Acosta Affidavit at para. 18 (C0725 and C0732 PUBLIC).

⁹⁸ See García Affidavit at para. 30 (C0699); see also Acosta Affidavit at para. 18 (C0725 and C0732 PUBLIC).

Indeed, it was not even disclosed to the full Board of Directors of BanCreceer until months after the repurchase was well underway. At the Bank, only the officers and the Board's Executive Committee were aware of its existence until March of 1998, when a potential debenture repurchase was mentioned in passing in a Board meeting.⁹⁹ Even then, the Board of Directors' minutes contain only a forward-looking reference to seeking Government approval for redemption of GFB debentures. They most certainly did not indicate that a trust had already been created in November 1997, nor that it was actively purchasing peso-denominated debentures from Mexican investors at full par value.

50. Likewise, the terms of the Recapitalization Program described to Fireman's Fund on February 26, 1998 made no mention of differential treatment of the peso- and dollar-denominated debentures. This omission vis-à-vis Fireman's Fund contrasts directly with the

[REDACTED]

[REDACTED]

[REDACTED]

.¹⁰⁰ Even JP Morgan, which was hired by GFB to refine the details of the Recapitalization Program in consultation with the Working Group, was unaware of the peso debenture repurchase until well into 1998.¹⁰¹ As the Senior Country Officer who supervised that engagement states, "[h]ad [JP Morgan] known about the repurchasing of the Peso Debentures, we would have advised GFB to disclose this information to Fireman's Fund...because of the basic concern of differential treatment of a major foreign

⁹⁹ See Minutes of BanCreceer Board of Directors Meeting, No. SA 68-146, March 11, 1998 at Item IV (C0991-93). Dr. Reuss, Fireman's Fund and Allianz México's representative, served on the Board of Directors of GFB, but not on its Executive Committee, and was only an alternate member (*miembro suplente*) of the BanCreceer Board. See Reuss Supplemental Affidavit at para. 8 (C0688).

¹⁰⁰ See Reuss Affidavit at paras. 12, 14-15 (C0033-34); [REDACTED] (C0056-64 *RESERVED*); see also García Affidavit at paras. 19, 31-32 (C0697, C00699).

¹⁰¹ See Cepeda Affidavit at para. 11 (C0741).

investor.”¹⁰² As Commission President Eduardo Fernández García would later explain to an IPAB Consultative Committee meeting in September 1999, “Mexican authorities would suffer an important setback in international fora when it becomes known that unequal treatment of a foreign institution was intended.”¹⁰³

51. It was not until April 1998, when Dr. Gerhart Reuss was shown a copy of a letter from GFB to the National Banking and Securities Commission enclosing for the latter’s review a copy of the trust agreement governing the trust for the peso debenture repurchase, that Fireman’s Fund learned of the existence of an operative scheme to repurchase debentures.¹⁰⁴ When Dr. Reuss saw the trust agreement, which mentioned repurchasing GFB debentures in general terms, and the cover letter specifying that the trust was intended to repurchase the peso-denominated debentures, he immediately sought an explanation from the Mexican Government.¹⁰⁵ Obviously, an option to have the GFB debentures immediately repurchased at par value (US \$50 million) would be far more attractive to Fireman’s Fund than the necessarily less certain prospect of obtaining an equity stake in a restructured BanCrecer at the price of an additional US \$50 million investment—a prospect that was far from appealing for a company with no interest in running a bank.¹⁰⁶

52. Upon questioning from Dr. Reuss, the President of the National Banking and Securities Commission acknowledged that the Working Group had decided to treat Fireman’s

¹⁰² Cepeda Affidavit at para. 11 (C0741).

¹⁰³ Discussion Note for IPAB Consultative Committee, September 9, 1999, Fernández García Affidavit Exhibit A, (C0024 and C0027).

¹⁰⁴ See Reuss Affidavit at para. 17 (C0034).

¹⁰⁵ See Reuss Affidavit at paras. 17-18 (C0034-35).

¹⁰⁶ See Reuss Affidavit at para. 17 (C0033-34); Reuss Supplemental Affidavit at paras. 19-21 (C0690).

Fund differently from the Mexican holders of the peso-denominated debentures.¹⁰⁷ The Commission President Eduardo Fernández García candidly acknowledged that “the interest of the Mexican authorities was the participation of Fireman’s Fund in the Recapitalization Plan,” and that the Mexican Government “could not afford to forego the leverage provided by their bonds to keep [Fireman’s Fund] involved” in the Recapitalization Program.¹⁰⁸ It is important to bear in mind that Dr. Reuss at that meeting requested that the Fireman’s Fund debentures be repurchased on the same terms, and his request was refused.¹⁰⁹ Furthermore, the Commission President made it clear to Dr. Reuss that any attempt to make a formal or written request for such treatment would jeopardize the Recapitalization Program, Fireman’s Fund’s only avenue for salvaging the value of its debenture investment.¹¹⁰

53. That April 1998 meeting was only the first of many times in the next eighteen months that Fireman’s Fund requested that the Government treat its investment equally with that of the Mexican investors, and authorize a repurchase of the dollar-denominated debentures. Each time, the Government refused. In the words of the former Commission President, “Fireman’s Fund, despite repeated requests in meetings with the financial authorities, including meetings with me, was not granted the possibility of debenture repurchase by Grupo Financiero BanCrecer because the interest of the Mexican authorities was the participation of Fireman’s Fund in the Recapitalization Program.”¹¹¹ The Government thus barred Fireman’s Fund from preserving the value of its investment through the repurchase mechanism offered to Mexican investors, and

¹⁰⁷ See Reuss Affidavit at para. 18 (C0034).

¹⁰⁸ Fernández García Affidavit at para. 11(d), (e) (C0018-19); *see also* Reuss Affidavit at para. 18 (C0034-35).

¹⁰⁹ See Reuss Supplemental Affidavit at para. 21 (C0690); Reuss Affidavit at paras. 18-19 (C0034-35).

¹¹⁰ See Reuss Affidavit at paras. 18-19 (C0034-35)

¹¹¹ Fernández García Affidavit at para. 11(e) (C0019).

forced it to participate in the Recapitalization Program instead. Soon, however, the Government would act to cut off that means of preserving the value of Fireman's Fund's investment as well.

F. Developments Concerning the Recapitalization Program

54. Denied any alternative to participating in the Recapitalization Program, Fireman's Fund continued its efforts, begun months earlier, to fulfill in good faith its responsibilities under that Program to recruit a foreign banking concern to invest in BanCreceer. Fireman's Fund had already met with representatives of Argentaria, a major Spanish bank, by early 1998,¹¹² as a result of which Argentaria confirmed in a February 25, 1998 letter that it would be interested in considering an investment in a reconstituted BanCreceer.¹¹³ With the assistance of JP Morgan, which had been engaged by GFB in November 1997 to help implement the Working Group's Recapitalization Program, contacts were also made in 1998 and early 1999 to explore prospects for investment in BanCreceer by Banorte, Nbank, NationsBank, Banco Bilbao Vizcaya, and Bank of America.¹¹⁴

55. But, in order for discussions with these potential strategic investors in BanCreceer to proceed past preliminary stages and tentative expressions of interest like that of Argentaria, the Government's commitment to the Recapitalization Program needed to be spelled out in detail

¹¹² Fireman's Fund had learned of the general outlines of the Government Working Group's Recapitalization Program in GFB and BanCreceer Board of Directors meetings prior to the formal presentation on February 26, 1998, and at GFB's request had begun outreach efforts with potential banking investors. *See* Reuss Affidavit at paras. 10-11 (C0032-33); García Affidavit at para. 17 (C0696).

¹¹³ *See* Letter from Argentaria to Allianz México, February 25, 1998 (C0209-14); García Affidavit at para. 17 (C0696). Argentaria is now known as Banco Bilbao Vizcaya Argentaria, following its merger with Banco Bilbao Vizcaya. *See* Reuss Affidavit at para. 10 (C0032-33).

¹¹⁴ *See* Cepeda Affidavit at paras. 8, 13 (C0741-42); García Affidavit at para. 17 (C0696); *see also* Memorandum from José Juan de Olloqui to Dr. Reuss, January 27, 1999 (enclosing materials from presentation in Madrid to Banco Bilbao Vizcaya regarding investment opportunities in BanCreceer) (C0113-31); Restructuring Proposal to Banco Bilbao Vizcaya from J.P. Morgan, February 1999 (C0132-208).

