School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

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(1) GEMPLUS S.A., (2) SLP S.A., (3) GEMPLUS INDUSTRIAL S.A. DE C.V. V. THE UNITED MEXICAN STATES AND TALSUD S.A. V. THE UNITED MEXICAN STATES (ICSID CASES NOS. ARB (AF)/04/3) & ARB (AF)/04/4), AWARD

Case Report by Orlando F. Cabrera C.[**]
Not Edited Yet [***]

An Award rendered on June 16, 2010, on the matter of two conjoined arbitrations under the Treaty between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion and Protection of Investments (France BIT) and the Treaty between the Government of the United Mexican States and the Government of the Republic of Argentine for the Reciprocal Promotion and Protection of Investments (Argentina BIT) and in accordance with the Rules of Additional Facility of the International Centre for the Settlement of Investment Disputes (ICSID).

Tribunal:	V.V. Veeder, QC (President), Eduardo Magallón Gómez and L. Yves Fortier, CC, QC
Claimant's Counsel:	Philippe Sands QC; David Fraser and Edward Poulton Esqs. of Baker & Mackenzie
Defendant's Counsel:	Carlos Véjar Borrego, Director General de Consultoría Jurídica de Negociaciones, Secretaría de Economía

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1. Facts of the Case

(a) General (¶¶ 4-1 – 4-87)

The Tribunal considered that this case was factually and legally difficult,[1] and complicated and lengthy to relate[2] as well turned in substantial part on factual issues.[3]

The four Claimants in these two conjoined arbitration proceedings were (a) Gemplus, S.A. (Gemplus) from France; (b) SLP S.A. (SLP) from France; (c) Gemplus Industrial S.A. de C.V. (Gemplus Industrial) from Mexico and (d) Talsud S.A. (Talsud) from Argentina. The Claimants alleged against the Respondent (a) unlawful expropriation, (b) unfair, inequitable and arbitrary treatment and (c) failure to provide full protection and security in regard to their investments in the Concessionaire, Renave, S.A. de C.V. (Concessionaire), part owned by the Claimants as to 49% of its shareholding.[4]

In 1999 the Federal Secretariat of Commerce and Industrial Development (the Secretariat) awarded a Concession for the National Vehicle Registry to the Consortium. Afterwards the Consortium incorporated a Mexican legal person which became the Concessionaire.[5]

There were several vicissitudes, not only concerning the Mexican Government, but also the Mexican citizens and the Concessionaire itself in the development and performance of the National Vehicle Registry.[6]

Under the National Vehicle Registry Act of 1998 (Act), the Secretariat had the power to "enter into co-ordination agreements with the states and Federal District governments in order to facilitate the Registry's coverage…". The Secretariat's Under-Secretary (Dr. Ramos) and the Concessionaire's General Director (Mr. Cavallo) travelled through Mexico to negotiate and conclude such co-ordination agreements. However, the exercise remained incomplete.[7]

On August 21, 2000, the Secretariat announced the postponement of the deadline for the registration of used vehicles from December 15, 2000 to July 1, 2001. This postponement was intended by the Secretariat to allow the Secretariat additional time to conclude co-ordination agreements with the States and the Federal

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[1] Award ¶¶ 6-1, 12-42, 12-57, 13-92 and 13-99.

[2] The Tribunal rendered a 382-page Award in English and a 424-page Award in Spanish.

[3] Award ¶ 4-206.

[4] Award ¶ 1-10.

[5] Award ¶¶ 4-33 – 4-38. The Consortium and Concessionaire comprised Talsud with 29%, Gemplus 20%, and Henry Davis Group 51%

[6] Award ¶¶ 4-59 – 4-87.

[7] Award ¶¶ 4-75 – 4-78.

District to simplify the registration procedures. The Tribunal considered that this was a reasonable intention, reached in good faith by the Secretariat.[8]

(b) Cavallo Incident (4-93 – 4-113)

Ricardo Cavallo was not a named party to the proceedings nor was represented. On August 24, 2000, *Reforma*, a national Mexican newspaper, published an article on its front page entitled "Director of Renave accused of being a criminal". The article alleged Mr. Cavallo's involvement in the international crimes of genocide, terrorism, torture and murder as a military officer, as well as an involvement in document forgeries, auto thefts and property thefts, committed by the Argentinean military dictatorship during the "Dirty War" (1976-1983). On the same date, Mr. Cavallo was detained by the Attorney General's Office at Cancun airport while attempting to leave Mexico.[9]

On August 25, 2000, the Spanish judicial authorities, who had been investigating crimes committed against Spanish nationals in Argentina, ordered a Court to request the provisional arrest for extraction purposes of Mr. Cavallo for alleged crimes of genocide, terrorism and tortures committed during the Argentinean dictatorship.[10] The same day, the Attorneys General's Office in Mexico City received the request for provisional arrest and extradition of Mr. Cavallo from the Spanish Government. The request was submitted to a District Court in the Federal District, which issued a provisional arrest warrant for Mr. Cavallo. He was then placed in the formal custody of Interpol and held in prison in Mexico City, awaiting extradition proceedings to Spain.[11]

The Tribunal considered that an investigation by Interpol had begun in Mexico before the article on Mr. Cavallo's past was published. The Tribunal stated that "no conclusive evidence of Mr. Cavallo's identity as 'Miguel Angel Cavallo' had been secured by the relevant Mexican authorities before the publication of Reforma article… There was evidently a difference in name."[12]

The criminal allegations against Mr. Cavallo were very grave and related to "the most serious international crimes in Argentina from the 1970s onwards." Such allegations included widespread torture, cold-blooded murder, forced dispossession of prisoners' property and systematic forgeries made to facilitate thefts of property, including vehicles. The latter crimes struck directly at the secure workings of the Registry, particularly its confidential database of vehicle registration numbers and vehicle owners' names, and other personal details. In Mexico, it was considered that such confidential details in the possession of

[8] Award ¶ 4-92.
[9] Award ¶¶ 4-94 – 4-97.
[10] Award ¶ 4-98.
[11] Award ¶ 4-99.
[12] Award ¶ 4-100.

organized criminals could greatly facilitate not only car-theft but also kidnapping, extortion and murder.[13]

Mr. Cavallo was extradited from Mexico to Spain and afterwards to Argentina. As of the date of the Award it was unknown whether Mr. Cavallo's trial had taken place. Mr. Cavallo was and remains a shareholder in Talsud.[14]

Immediately following the publication of Mr. Cavallo' past, the Secretariat ordered an audit of the Concessionaire's. The Tribunal considered that this had been a responsible and measured response by the Secretariat to the public concerns resulting from the allegation made against Mr. Cavallo. On August 29, 2000, facing continued pressure from public and politic opposition concerning the security of information collected by the Concessionaire, the Secretariat issued a decree authorizing a "Technical Intervention" in the management of the Registry directed at the Concessionaire.[15]

(c) Opposition within the Government of the Federal District (¶¶ 4-88 – 4-90)

On August 24, 2000, Mayor Robles of the Government of the Federal District manifested to the Secretariat her concern and preoccupation regarding the legal uncertainty that could be generated for the citizens by leaving the operation of the Registry in the hands of a private party, particularly, in respect to the criminal past of Ricardo Miguel Cavallo, Director of the RENAVE. In her letter she also mentioned that the Permanent Commission of the Congress had approved an agreement by which it proposed to eliminate the fee for registration at the RENAVE and the possibility of tendering it to private parties. Thus, she requested to suspend the application of the Registry in the Federal District and to reimburse the citizens, the amount paid.[16] The Tribunal stated that the conduct of the Federal Disctrict's Government was not a breach by Mexico of international law or the two BITs at issue.[17]

(d) The Death of Dr. Ramos (4-125 – 4-130)

On September 7, 2000, Dr. Ramos, who had been responsible for running the project as Under-Secretary at the Secretariat was found dead in a wooded area. His death was either a murder or suicide, and was very unexpected, sudden and brutal death. The Tribunal considered impossible to record in full the devastating and immediate effect of Dr. Ramos' death on the Secretariat, the Concessionaire and the Mexican public at large. It was widely believed that Dr. Ramos had been murdered by powerful criminal interests in Mexico, and that such criminals were thereby protecting their illegal activities connected to the workings of the Registry. The violent death of Under-Secretary Ramos, so soon after the arrest of

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[13] Award ¶ 4-101.
[14] Award ¶¶ 4-108 – 4-113. Mr. Cavallo holds one third of the shares in the company.
[15] Award ¶¶ 4-118 – 4-123.
[16] Award ¶ 4-88.
[17] Award ¶ 4-90.

Mr. Cavallo, greatly exacerbated public speculation and concerns over the whole project of National Vehicle Registry.[18]

(e) First Administrative Intervention (4-149 – 4-169)

In September 15, 2000, the Secretariat ordered the first Administrative Intervention directed at the Concessionaire. This intervention was justified by reference to the situation which had been generated uncertainty among the users of the service and for the information contained in the database of the National Vehicle Registry.[19]

(f) Second Administrative Intervention (4-170 – 4-176)

Afterwards, there was a second intervention. The Tribunal considered that the new administrative intervenor acted at all times in strict accordance with the Secretariat's instructions and objectives. In addition, the Tribunal found clear on the evidence that Secretary Derbez instructed the intervenor to determine whether any reasons existed to revoke the Concession or otherwise adversely affected the Concessionaire. The Tribunal considered this, as the first step in a concerted pattern of malign conduct within the Federal Government which was to lead the Concession's Requisition and Revocation. Such conduct was known to have no justifiable legal basis by the Respondent. By April 2001, a decision was reached by the Secretariat to "pull the plug" on the Concession regardless whether or not it was legally justified.[20]

(g) Requisition and Revocation (4-177 – 4-189)

On June 25, 2001, by decree, the Secretariat ordered the "requisition" of the Concessionaire's operations on grounds of national security under Art. 25 of the Act. The Tribunal considered that the Secretariat's invocation of "imminent peril to national security" had been pretence and known to be factually false.[21]

Claimants received back from the Concessionaire in April and December 2002, authorised by the Respondent, certain amounts to compensate them for their lost capital in the Concessionaire, together with dividends and other expenses.[22]

On December 13, 2002, the Secretariat revoked the Concession Agreement. The Tribunal stated that the Respondent had been responsible for further conduct that like the earlier Requisition can be characterized as irrational, perverse and tainted with bad faith towards the Concessionaire.[23]

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[18] Award ¶¶ 4-125 -4-129.
[19] Award ¶ 4-149.
[20] Award ¶¶ 4-170 – 4-176.
[21] Award ¶¶ 4-177 – 4-183.
[22] Award ¶ 12-47.
[23] Award ¶¶ 4-184 – 4-189.

(h) Legal proceedings and the New Registry (4-190 – 4-206)

There were several proceedings before the Mexican Courts. However, the Tribunal considered that such court proceedings were irrelevant for the Award. Furthermore, none of the Claimants had been parties to the proceedings.[24]

In 2004, the Public Register of Vehicles Act was published in the Official Gazette, repealing the 1998 Act under which the Concessionaire had operated. The new legislative framework prohibited the operation of the registry by private entities. This essential difference gave rise to the present dispute.[25]

2. *Legal Issues Discussed in the Decision*

(a) Jurisdiction (¶¶ 2-5 – 2-7, 5-1 – 5-35 and 15.2)

The Tribunal concluded that the transfer of shares in Gemplus Industrial to SLP and not to Gemplus International (Gemplus Luxembourg) did not break the national chain of ownership under the France BIT. SLP never acquired the right to bring claims against the Respondent; Gemplus (France) retained all rights to maintain its existing claims. Furthermore, the Tribunal considered that Gemplus Industrial (Mexico) was not an investor "from the other Contracting State".[26]

The Tribunal assumed jurisdiction over all claims advanced against Respondent by Gemplus, having competence to do so, as with Talsud's claims and decided not to have jurisdiction with regard to any claims of Gemplus Industrial and whilst the Tribunal had jurisdiction over the claims pleaded by SLP, the latter's failed *in limine*. Additionally, it decided that from henceforth in the Award, when considering the merits, the term "Claimants" referred to Gemplus and Talsud.[27]

(b) Liability – General Approach (¶¶ 2-8 – 2-10, 6-1 – 6-27 and 15.4)

The Tribunal addressed the Claimant's claims only as treaty claims under the Argentina and France BITs (together with international law) and not as contractual claims under the Concession Agreement or infringements of Mexican law.[28] In addition, the Tribunal treated the Claimants as different and distinct legal persons from both the Concessionaire and its majority shareholder.[29]

Thus, the Tribunal decided not to exercise "an open-ended mandate to second-guess government decision-making."[30] It also decided that the standard of proof

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[24] Award ¶¶ 4-190 – 4-202.
[25] Award ¶¶ 4-203 – 4-206.
[26] Award ¶¶ 5-26 – 5-33, citing Art. 9 of the France BIT.
[27] Award ¶¶ 5-34 – 5-35 and 15.2.
[28] Award ¶¶ 6-21 – 6-24.
[29] Award ¶ 15.4.
[30] Citing Second Partial Award in *S.D. Myers v. Canada.*

for the Claimant's claims is prescribed by the wording of the respective BITs and international law, paying due regard to the "jurisprudence constante."[31]

(c) Fair and Equitable Treatment (¶¶ 2-11 – 2-21, 7-1 – 7-78 and 15.5 – 15.6)

The Tribunal did not consider that the Secretariat's postponement of the obligation to register used vehicles from December 15, 2000 to July 1, 2001 constituted any breach of either BIT. Furthermore, the Technical Intervention appeared to have been a rational response by the Secretariat, taken in good faith, to address public outcry and concern over the security of personal information maintained in the Concession's database.[32]

The Tribunal concluded that the combination of the Cavallo incident and the death of Dr. Ramos under tragic and mysterious circumstances would have destroyed all public confidence in the Concession permanently, but for the Secretariat's conduct between August 24, and September 15, 2000 in deciding to front the Concessionaire and thereby to shield it from adverse public opinion.[33]

The Tribunal decided that the Secretariat's First Administrative Intervention had been a measured and reasonable response to the very real and serious public concerns raised Mr. Cavallo's arrest and Dr. Ramo's death; that the Secretariat had intended to save the Concession and to be temporary until such time as the 'storm' had abated. The Tribunal found that the Respondent's conduct up to April 18, 2001 did not amount to any breach of either BIT.[34]

The Tribunal determined that the Secretariat's Second Administrative Intervention was markedly different in purpose and content from the First Administrative Intervention. Whilst the latter was motivated by the desire to keep the Concession alive the former's motivation was quite the opposite. The groundwork under the new administration was being prepared to revoke the Concession. The Requisition and Revocation inaccurately invoked imminent peril to national security in stark contrast to the earlier decisions. Therefore, the Tribunal concluded that there was no cogent factual evidence adduced in the arbitration proceedings which supported the Respondent's allegation to the effect that the Concessionaire's conduct resulted in an imminent peril to Mexico's national security. The difference between the decisions evidenced a clear intention to terminate the Concession and Concession Agreement without due regard to the Claimant's legal rights under the two BITs.[35]

The Tribunal decided that Fair and Equitable Treatment (FET) in both BITs included the exercise of good faith or the absence of manifest irrationality, arbitrariness or perversity by the Respondent. The Tribunal could only

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[31] Award ¶¶ 6-26 – 6-27.
[32] Award ¶¶ 7-30 and 7-37.
[33] Award ¶¶ 7-46 and 7-53.
[34] Award ¶ 7-60.
[35] Award ¶ 7-25 and 7-70.

characterise the Respondent's Requisition and Revocation as manifestly irrational, arbitrary and perverse, conducted in bad faith towards the Claimants and their rights as investors under the BITs.[36]

Thus, the Tribunal decided that the Claimants had established their FET claims in regard to both the Requisition of June 25, 2001, and the Revocation of December 13, 2002, with the interim period comprising composite acts consequential upon the Secretariat's decisions in regard to the Requisition and Revocation. For the purpose of establishing the first date of the FET breaches of both BITs by the Respondent whether as a completed act or as the first of series of composite acts, the Tribunal decided that date as June 25, 2001.[37]

(d) Expropriation (¶¶ 2-22 – 2-28, 8-1 – 8-28 and 15.7 – 15.8)

The Tribunal considered that an indirect expropriation occurs if the state deliberately deprived the investor of the ability to use its investment in any meaningful way and a direct expropriation occurred if the state deliberately took that investment away from the investor.

The Tribunal decided on the facts found that the Claimants' investments were unlawfully expropriated by the Respondent, indirectly with the Requisition on June 25, 2001, and directly with the Revocation December 13, 2002, in violation of Art. 5 (1) of the Argentina BIT and Art. 5 (1) of the France BIT respectively.

The Tribunal determined that the date of the first breach of both BITs as regards unlawful expropriation by the Respondent, as a completed act, occurred on June 25, 2001 with the Secretariats decree ordering the Requisition.[38]

(e) Protection and Security (¶¶ 2-29 – 2-33, 9-1 – 9-14 and 15.9 – 15-10)

The Tribunal considered that the two BIT provisions relating to the Respondent's obligation to provide 'protection' were materially similar, despite the different wording and different scope. Such protection does not generally impose strict liability on a host state under international law; and the mere fact of other unlawful conduct in the form of expropriation or inequitable and unfair treatment by the host state is not, to be treated as a breach of these provisions.

The 'protection' provisions involve the host state protecting the investment from a third party. The Tribunal determined, this had never been the case about a failure by the Respondent to afford physical or other like protection to the Claimants. Moreover, the harm alleged by the Claimants was attributed to the Respondent itself not to any third party. It had never been a case about a failure by the Respondent to afford, indirectly, legal protection to the Claimants or their investments under Mexican law within the Mexican legal system. Furthermore,

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[36] Award ¶¶ 7-67, 7-72, 7-76 and 7-78.

[37] Award ¶ 15.5.

[38] Award ¶¶ 8-21 – 8-28 and 15.7 – 15.8.

the Claimants had advanced no pleaded case in the arbitration proceedings for denial of justice.[39] Consequently, The Tribunal decided that the Claimants had not established any breach of the 'protection' provisions and these claims were dismissed by the Tribunal.[40]

(f) NLF/MFN Treatment (¶¶ 2-34 – 2-36, 10-1 – 10-10 and 15.11 – 15.2)

As the 'national security' provision of Art. 2(5) of the Argentina BIT had never been invoked by the Respondent as a defence to Talsud's claim, no decision in respect of the Claimant's submissions was required of the Tribunal, save to dismiss them as otiose in the arbitration proceedings.[41]

(g) Causation and Fault (¶¶ 2-37 – 2-41, 11.1 – 11.16 and 15.3)

The Tribunal considered that it was clear under international law that compensation for violation of a BIT would only be due from a respondent state if there was a sufficient causal link between the treaty breach and the loss sustained by the claimant. The two BITs expressly referred to 'causation'.[42]

The Tribunal determined that none of the Claimants had known or could reasonably have known of Mr. Cavallo's past. It had certainly not been known at the material time by the Respondent itself, which (as a state) had privileged access to the Government of Argentina and, having made an appropriate inquiry to Argentina before granting the Concession to the Concessionaire, received an anodyne response as to Mr. Cavallo antecedents. In the Tribunal's view, the facts sufficed to demonstrate the absence of any fault by any of the Claimants, and without such a fault, the defence advanced by the Respondent failed in its entirety on the facts of the case.[43]

Accordingly, the Tribunal determined that the Respondent caused the losses suffered by the Claimants without any reduction for "contributory negligence" or other fault, as alleged by the Respondent because neither of the Claimants materially contributed for the purpose of extinguishing or reducing the Respondent's liability to pay compensation to the Claimants.[44]

(h) Compensation: General Approach (¶¶ 2-42 – 2-44, 12-1 – 12-61 and 15.14)

The Tribunal observed that the relevant date for assessing compensation was June 24, 2001, being the day preceding the unlawful Requisition of June 25, 2001

[39] Award ¶¶ 9-9 – 9-12.
[40] Award ¶¶ 9-14 and 15-9.
[41] Award ¶¶ 10-9 and 15.11.
[42] Award ¶ 11.8.
[43] Award ¶¶ 11.14 – 11.15.
[44] Award ¶¶ 11.16 and 15.13.

which was the first completed breach by the Respondent under both BITs as regards both the FET standards and unlawful expropriation.[45]

The Tribunal determined that the Concession Agreement would not have continued beyond September 14, 2009, i.e. 8.25 years after the Requisition of June 25, 2001.[46] In addition, the Tribunal considered that this was an appropriate case in which the Tribunal should be guided by the same measure for breach of the FET standards in the two BITs, as for unlawful expropriation under the BITs. Thus, the Tribunal did not distinguished between compensation for unlawful expropriation and compensation for breach of the FET standards.[47]

Under international law and the BITs, the Claimants bear the overall burden of proving the loss founding their claims for compensation. The Tribunal stated that if the loss is found to be too uncertain or speculative or otherwise unproven, the Tribunal must reject these claims, even if liability is established against the Respondent.[48]

The Tribunal experienced considerable difficulties in deciding certain quantum issues in the arbitration proceedings. It stated that its function, as an arbitration tribunal, was not to make a simplistic binary choice between the very different cases advanced by the two sides. Given these issues' dependence on multiple findings on fact, the Tribunal considered that it would not even be possible to do so in the case, even if the Tribunal had been willing to do so (which it was not). Finally, it considered it had to exercise its own arbitral discretion in assessing compensation by reference to the applicable legal principles and the particular facts as determined by the Tribunal.[49]

In addition, the Tribunal stated that the Claimants' claims for compensation derived only from their status as investors with investments in the form of their respective minority shareholdings in the Concessionaire, as distinct from any claim by the Concessionaire itself (or its majority shareholder); that the Claimants' shares in the Concessionaire were worthless and had been so, effectively, from 31 December 2002.[50]

(i) Compensation: Lost Future Profits (¶¶ 2-42 – 2-44, 13-1 – 13-101 and 15-15)

The national project for registering vehicles in Mexico, as envisaged by the Respondent and the Concessionaire, comprised the registration of both used and new cars. It was not envisaged that such registration could be limited

[45] Award ¶ 12-43.
[46] Award ¶ 12-49.
[47] Award ¶ 12-52, citing *Enron* award and *Chorzów Factory.*
[48] Award ¶ 12-56.
[49] Award ¶ 12-57, citing *Chorzów Factory* and the award in *Starrett v. Iran.*
[50] Award ¶ 15.14.

permanently to new vehicles. The suspension of the obligation to register used vehicles was intended to be temporary, not permanent.[51]

Although the project never achieved the level of profitability contemplated in the Concessionaire's Business Plan, it still retained a reasonable opportunity to make significant future profits until the Requisition. Any profitability based only upon income from registering new vehicles was not a true measure of the Concessionaire's profitability, as its business was originally envisaged under the Concession Agreement.[52]

The Concession for the Concessionaire was a high risk project, subject to commercial factors, the co-operation of Mexican states and continuing support from Mexican public opinion. These risks were compensated by the prospect of significant profits from the Concession.[53]

The Tribunal accepted that there was no open, public, active or other available market for the Claimants' shares in the Concessionaire, as at the relevant date for their valuation (June 24, 2001). In addition, the Tribunal accepted that there had been no comparable business to the Concessionaire's Concession which could provide any reliable guide to the market value of the Claimants' shares.

The value of the Claimants' shares in the Concessionaire derived indirectly from its income stream reasonably anticipated from the Concession Agreement as an intangible asset.[54]

The Concession had been operative, as regards the registration of new and used vehicles under the Concession Agreement, for no more than five weeks in July-August 2000. After a period of uncertainty, the Concessionaire was limited to the registration of new vehicles, albeit with the possibility of being restored to full-life with the renewed registration of used vehicles. Effectively, the Concessionaire's business survived thereafter in a form of suspended half-live from September 15, 2000 to June 24, 2001, limited to the registration of new vehicles.[55]

The Tribunal did not consider the DCF method to be an appropriate methodology to apply on the facts of the case. The Tribunal accepted that the status of the Concessionaire as a business (from August/September 2000 up to the valuation date of June 24, 2001), was far too uncertain and incomplete to provide any sufficient factual basis for the DCF method. Thus, the Tribunal

[51] Award ¶ 13-63.
[52] Award ¶ 13-64.
[53] Award ¶ 13-65.
[54] Award ¶ 13-68.
[55] Award ¶ 13-69.

rejected the Parties' respective primary cases as to their respective DCF and Non-DCF methods and it considered appropriate to steer a middle course.[56]

The Tribunal rejected any argument that because the quantification of lost future profits was uncertain or difficult, that the Claimants should be treated in the case as having failed to prove an essential element of the claims in respect of lost future profits, with the result that their claims for compensation should be dismissed in the case. The Tribunal emphasised that it was there addressing contingent future events, i.e., what could have happened in the future. In addition, The Tribunal decided that it was not always possible for a claimant to prove that a future event could or could not happen with certainty; and a tribunal could only evaluate the chances of such a future event happening. That was not therefore an exercise in certainty, as such; but it was, in the circumstances, an exercise in "sufficient certainty."[57]

The Tribunal considered that, as a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant, the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent's wrongs and unfairly defeat the claimant's claim for compensation.[58] At this point, confronted by evidential difficulties created by the respondent's own wrongs, the Tribunal considered that the claimant's burden of proof may be satisfied to the tribunal's satisfaction, subject to the respondent itself proving otherwise.[59]

In the Tribunal's view, there had been as at June 4, 2001 no certainty or realistic expectation of this project's profitability as originally envisaged, but there had been nonetheless a reasonable opportunity that had a monetary value for the purpose of Art. 36 of the ILA Articles and the indemnities for compensation provided by the two BITs.[60]

It remained extremely difficult for the Tribunal to assess the value of this lost opportunity in money terms. First, the commercial, legal, political and other risks confronting the Concessionaire were considerable and were not susceptible to be expressed in percentages. Moreover, the Claimants' claims for compensation were based only indirectly on the Concessionaire's future performance. Second, the fact that such exercise was difficult due to the Respondent's breaches of the two BITs which have made it almost impossible for the Claimants to show how the Concessionaire could or would have made use of that lost opportunity. The Tribunal emphasised that it would be wrong to deprive or diminish the Claimants of the monetary value of that lost opportunity

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[56] Award ¶¶ 13-72 – 13-75.

[57] Award ¶ 13-91 citing Crawford, *The International Law Commission's Articles on State Responsibility* (CUP, 2002), at ¶. 27, p. 228.

[58] Citing *Saphire v. Iran.*

[59] Award ¶ 13-92.

[60] Award ¶ 13-98.

on lack of evidential ground when that lack of evidence was directly attributable to the Respondent's own wrongs. In the case, the burden of proof did not lay exclusively on the Claimants; and in the Tribunal's view, it was also for the Respondent to prove the contrary, and it had not done so.[61]

The Tribunal determined in the exercise of its arbitral discretion that the price agreed by the hypothetical buyer and seller for the shares in the Concessionaire as of June 24, 2001, would have been the sum of US$14,340,872.[62]

(j) Compensation: Past Payments (¶¶ 2-54 – 2-56, 14-1 – 14-26 and 15.16)

The Tribunal distinguished between the three different payments made to the Claimants: (i) the reimbursement of past expenses; (ii) dividends and (iii) the return of capital.[63] The Tribunal decided that the Claimants' distributions as to return of capital and as to dividends had to be deducted from these two of compensation assessed as at June 24, 2001, subject to adjustment for currency exchange rates and interest.[64]

Regarding the reimbursement of expenses the Tribunal considered that none of these distributions should be deducted from the two amounts of compensation, because these payments had not been received by the Claimants as shareholders but had arisen from a separate transaction; and that transaction pre-dated the valuation date of June 24, 2001.[65]

For the above, the Tribunal decided that as at December 30, 2002, Gemplus had received US$1,370,253 and Talsud US$2,028,764 as dividends and return of capital, to be deducted from the compensation assessed, as at June 24, 2001 in the amounts of US$5,178,022 for Gemplus and US$7,508,133 for Talsud – subject to adjustments for interest as later considered in Part XVI of the Award in regard to issue k "Currency and Interest."[66]

(k) Currency and Interest (¶¶ 2-57 – 2-59 and 16-1 – 16-29)

Neither BIT provides expressly for the specific currency or interest applicable in the case of a breach of the FET standards or unlawful expropriation, in contrast to compensation for lawful expropriation under Article 5 of the two BITs.[67]

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[61] Award ¶ 13-99.

[62] Award ¶¶ 13-100 and 15.15. US$ 14,340,872, *i.e.* US$ 5,853,417 for Gemplus and US$ 8,487,455 for Talsud as to their 20% and 29% shareholding in the Concessionaire, respectively.

[63] Award ¶ 14-14.

[64] Award ¶¶ 14-20 – 14-23.

[65] Award ¶ 14-24.

[66] Award ¶¶ 14-26 and 15.16 – 15.17.

[67] Award ¶ 16-2.

As to appropriate currency for lawful expropriation, the Tribunal noted that the Argentina BIT expressly referred to an amount "in a freely-convertible currency on the international financial market, that currency having been converted to the standard market quotation on the date of valuation ...". In contrast, the France BIT had no express provision regarding the currency in which such compensation is payable, save for the reference to "any other criteria."[68]

The Tribunal preferred the approach suggested by the two BITs, namely to convert the amount of compensation from Mexican currency to US$ at the date of the Tribunal's valuation (June 24, 2001). Given that the Claimants were foreign investors and that Mexican currency is historically subject to fluctuation, it deemed reasonable to assume that the Claimants, if fully compensated by the Respondent on June 24, 2001, would have required payment in US$ or, if not paid in US$ but in Mexican currency, that the Claimants would have immediately converted such compensation from Mexican currency into a reserve currency; and, in all the circumstances of this case, that currency would have been the currency of the United States of America for both Talsud and (at least initially) Gemplus. Accordingly, the Tribunal decided to express its order for compensation in US currency, converted from Mexican currency as at 24 June 2001.[69]

The principal sums of compensation ordered by the Tribunal for payment by the Respondent to the Claimants under this Award were thus: (i) Gemplus: US$ 4,483,164 and (ii) Talsud: US$ 6,458,721.[70]

As to appropriate interest for lawful expropriation, the Tribunal noted that both BITs provide expressly for interest. The Argentina BIT provides for pre-award and post-award interest from the date of valuation "corresponding to a reasonable commercial rate for that currency." The France BIT likewise provides for pre-award and post-award interest from the date of valuation "calculated at the applicable market rate"[71]

The Tribunal decided that the starting-date for interest on the principal sums had to be June 24, 2001 and the end-date the date of full payment.[72] Additionally, the Tribunal considered necessary to adjust for the Claimants' receipts of capital and 50% dividend in December 2002. Accordingly, the Tribunal decided that interest had to run on the greater sums of US$ 5,853,417 for Gemplus and of US$ 8,487,455 for Talsud from 24 June 2001 to 30 December 2002 (i.e. without deducting these receipts), a period of almost 18 months.[73]

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[68] Award ¶ 16-5.

[69] Award ¶¶ 16-18 and 16-19.

[70] Award ¶16-20, (i) Gemplus: US$ 4,483,164 (i.e. US$ 5,853,417 less deductions of US$ 1,370,253) and (ii) Talsud: US$ 6,458,721 (i.e. US$ 8,487,455 less deductions of US$ 2,028,734).

[71] Award ¶ 16-6.

[72] Award ¶ 16-21.

[73] Award ¶ 16-22.

The Tribunal decided that for the US currency amounts owed by a friendly sovereign to investor subject to the protection of two other friendly sovereign states, the appropriate base rate is the one month US Treasury Bill annualised rate published by the USD Federal Reserve Bank. As the rate changes from month to month, the Tribunal adjusted the base rate upwards to reflect an appropriate rate of interest for a US$ debt owing by the Respondent, which the Tribunal fixed as an average uplift of 2% for the period from June 2001 to full payment under the award. The Tribunal acknowledged that the above calculation was inexact and could not fully replicate in fact an essentially hypothetical situation; thus it fixed (i) a rate of interest of 4% from June 24, 2001 to December 30, 2002; (ii) a rate of interest of 4.25% from December 31, 2002 to December 31, 2009 and (iii) a rate of interest of 2% from January 1, 2010 to full payment by the Respondent under the Award.[74]

The Tribunal considered that the reference to "commercial" and "market" in Art. 5 of the BITs both point to the application of reasonable compound rates, given that it is the universal practice of banks and other loan providers in the world market to provide monies at a cost amounting to or equivalent to compound rates of interest. Furthermore, the current practice of international tribunals is to award compound interest. As well there is now a form of 'jurisprudence *constante'* that supports the position to order compound interest.[75]

Accordingly, the Tribunal decided that compound interest accrued from 24 June 2001 to December 2009 as follow: US$1,867,589 (Gemplus) and US$2,698,907 (Talsud). Interest on the principal sums of (i) US$4,483,164 (Gemplus) and (ii) US$6,458,721 (Talsud) shall carry compound interest at 2% from January 1, 2010 until full payment by the Respondent to the Claimants under the Award.[76]

(l) Legal and Arbitration Costs (¶¶ 2-60 – 2-63 and 17-1 – 17-27)

The Tribunal observed that the Claimants had prevailed overall on jurisdiction, liability, causation and to a lesser extent quantum,[77] and that Art. 58 of the ICSID Arbitration (Additional Facility) Rules, conferred power to the Tribunal in order to award costs in the arbitration proceeding and a broad discretion as to the legal and arbitration costs.[78]

Following the general principle that "reparation must, as far as possible, wipe out all the consequences of the illegal act"[79], it was the Tribunal's view that compensation included a claimant's reasonable costs in successfully and necessarily asserting its disputed legal right in arbitration proceeding against an unsuccessful respondent. The approach is consistent with the recent practice of

[74] Award ¶¶ 16-24 and 16-25.
[75] Award ¶ 16-26.
[76] Award ¶ 16-29.
[77] Award ¶ 17-20.
[78] Award ¶ 17-1, 17-21.
[79] Citing *Chorzów Factory*

other arbitral tribunals in investment treaty arbitration: successful party should have its reasonable costs paid by the unsuccessful party in accordance with the general position in other forms of transnational commercial arbitration[80] and the "loser pays principle."[81]

Accordingly, the Tribunal decided to apply the general principle that the Claimants, as the successful party, recovered their costs from the Respondent as the unsuccessful party. For the reasons set out above, the Tribunal awarded the Claimants their costs in the total amount of US$ 5,450,000.[82]

3. Decision

The Tribunal dismissed Respondent's jurisdictional challenge against Gemplus and declared to have jurisdiction on the merits of all claims advanced by Gemplus and Talsud. Furthermore, it decided that the Respondent had breached the FET standards applicable towards Gemplus and Talsud and their investments. Moreover, it determined that the Respondent unlawfully expropriated the investment of Gemplus and Talsud in breach of the France and Argentina BIT respectively. In addition, the Tribunal determined that the Respondent was liable to pay:

a. Compensation for the losses caused by its said breaches of the BITs in the principal sums of US$4,483,164 to Gemplus and US$6,458,721 to Talsud;

b. Compound interest on such compensation from June 24, 2001 to December 31, 2009, in the total sums of US$1,867,589 to Gemplus and US$2,698,907 to Talsud;

c. Compound interest on the said principal sums of US$4,483,164 and US$6,458,721 from January 1, 2010 at 2% per annum until full payment of such sums under the award to Gemplus and Talsud;

d. To Gemplus and Talsud their costs of the arbitration proceedings in the sums of US$ 2,375,000 and $ 3,075,000 respectively;

e. All other costs of these arbitration proceedings in full, without recourse to any of the Claimants.

Finally, the Respondent shall pay forthwith to Gemplus and Talsud all amounts which it was declared liable to pay; and save as aforesaid, all other claims by all Claimants and the Respondent had made in the arbitration proceedings were dismissed.

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[80] Citing Award in *ADC & ADMC v. Hungary.*

[81] Citing Award in *Thunderbird v. Mexico.*

[82] Award ¶ 17-27, US$ 5,450,000, i.e. US$ 2.375 million for Gemplus and US$ 3.075 million for Talsud.