

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES (ICSID) (ADDITIONAL FACILITY): FELDMAN V. MEXICO (INTERIM DECISION ON PRELIMINARY JURISDICTIONAL ISSUES)*

[December 6, 2000]

+Cite as 40 ILM 615 (2001)+

Marvin Roy Feldman Karpa

v.

United Mexican States

(ICSID Case No. ARB(AF)/99/1)

**Interim Decision on
Preliminary Jurisdictional Issues**

I. Procedural Background

1. On April 30, 1999, Mr. Marvin Roy Feldman Karpa (the Claimant) filed, with the Secretary-General of the International Centre for Settlement of Investment Disputes (ICSID or the Centre), a Notice of Arbitration against the United Mexican States (the Respondent or Mexico) under Chapter Eleven of the North American Free Trade Agreement (NAFTA), and, simultaneously, sought approval of access to the Additional Facility of ICSID as foreseen under NAFTA Article 1120.

2. By such Notice of Arbitration, the Claimant, as a national of the United States of America, submitted a claim to arbitration under NAFTA Article 1117 on behalf of Corporación de Exportaciones Mexicanas S.A. de C.V. (CEMSA), a company constituted and organized under the law of the United Mexican States which the Claimant owns and controls.

3. On May 27, 1999, the Secretary-General of ICSID notified the parties that he had on that same day approved access to the Additional Facility and registered the Notice of Arbitration.

4. Under NAFTA Article 1123, the Tribunal was to be constituted by three arbitrators, one arbitrator appointed by each party and the third, who was to be the presiding arbitrator, appointed by agreement of the parties. In due course, the Claimant appointed Professor David A. Gantz, a national of the United States, and the Respondent appointed Mr. Jorge Covarrubias Bravo, a national of the United Mexican States. The parties not having agreed on the appointment of the third, presiding, arbitrator, the Claimant requested the Secretary-General of ICSID, under NAFTA Article 1124, to make that appointment. Following full consultation with the parties, the Secretary-General appointed Professor Konstantinos D. Kerameus, a national of Greece and a member of the ICSID Panel of Arbitrators, as the arbitrator to be President of the Tribunal.

5. On January 18, 2000, the ICSID Secretary-General announced that, each arbitrator having accepted his appointment, the Tribunal was deemed to be constituted, and the proceeding to have begun, on that date. Mr. Alejandro A. Escobar, Senior Counsel, ICSID, was designated to serve as Secretary of the Tribunal. In accordance with Article 22 of the Additional Facility Arbitration Rules, the Tribunal held its first session, with the parties, in Washington, D.C. on March 10, 2000. At that first session, the parties confirmed that the Tribunal had been properly constituted in accordance with the Additional Facility Arbitration Rules and NAFTA Chapter Eleven.

6. Following such first session, at which the Tribunal consulted the parties fully on questions of procedure, the Tribunal issued its Procedural Order No. 1, of April 3, 2000, on the place of arbitration, and its Procedural Order No. 2, of May 3, 2000, on a request for provisional measures and the schedule of the proceeding.

7. In its Procedural Order No. 2, the Tribunal invited the parties to exchange requests for the production of documents, and envisaged that documents would be produced by each party by July 15, 2000. The Claimant's memorial would then be filed by September 1, 2000, and the Respondent's counter-memorial would be filed by November 1, 2000.

8. By communications of May 23 and June 20, 2000, the Claimant informed the Tribunal of certain issues which had arisen in connection with the Claimant's request for the production of documents from the Respondent. Those communications were followed by a communication of June 11, 2000 from the Claimant. In addition, each party submitted a letter, each dated July 14, 2000, concerning the foregoing communications.

9. In its Procedural Order No. 3, of July 17, 2000, the Tribunal found that the foregoing communications raised "jurisdictional issues that both parties wish[ed] the Tribunal to consider and rule upon before the exchange of written pleadings on the merits." In that Order, the Tribunal announced that "both parties should be allowed an opportunity to brief such issues fully in writing" in addition to the observations already made by each party, but that the Tribunal did not, however, envisage holding a hearing on such jurisdictional issues. The Tribunal, in the Order, invited the parties to exchange written pleadings on those issues and suspended the time periods set forth in Procedural Order No. 2, which concerned the production of documents and the pleadings on the merits.

10. By the Secretariat's letter of July 17, 2000, the Tribunal informed the relevant officials of Canada and the United States of America of the directions given in Procedural Order No. 3, and invited Canada and the United States of America to file any submissions they wished to make under NAFTA Article 1128, on the interpretation of the relevant provisions of NAFTA, within the time period for the filing of the Respondent's counter-memorial on jurisdictional issues.

11. By letters of July 18, 19 and 21, 2000, the Claimant requested the revision of Procedural Order No. 3. That request was opposed by the Respondent in a letter of July 20, 2000. After careful consideration of this correspondence from the parties, the Tribunal in its Procedural Order No. 4, of August 3, 2000, confirmed the directions given in Procedural Order No. 3, including the preliminary briefing of jurisdictional issues, the suspension of time periods regarding the production of documents and pleadings on the merits, and the sequence in which the parties were called upon to brief the jurisdictional issues. In its Procedural Order No. 4, the Tribunal fixed a revised schedule for the briefing of the jurisdictional issues that it would consider preliminary, and specified that such issues were to be the following:

- a. Whether the Claimant has submitted a point of claim in this arbitration proceeding concerning an alleged violation of NAFTA Article 1102?
- b. Whether the Claimant may submit additional claims, if any, or amend its claims, on the basis of an alleged violation of NAFTA Article 1102?
- c. Whether the Respondent is entitled to raise any defense on the basis of the time limitation set forth in NAFTA Article 1117(2), and in particular whether such time limitation affects the Tribunal's consideration of facts relevant to the claim or claims, and whether the Respondent is estopped from relying on such time limitation?
- d. Whether measures alleged to be taken by the Respondent in the period between late 1992 and January 1, 1994, when NAFTA came into force, and which are alleged to be in violation of NAFTA, general international law, or domestic Mexican law, are relevant for the support of the claim or claims?

- e. Whether the Claimant, being a citizen of the United States of America, and a registered permanent resident in Mexico, has standing to sue under Chapter Eleven of NAFTA?
12. By simultaneous letters of August 15, 2000, Canada and the United States of America each requested a time period of 14 days, from the parties' last pleading on jurisdiction, to file their respective submissions under NAFTA Article 1128 on jurisdictional issues.
13. By letter of August 18, 2000, the Respondent referred to the letters of August 15, 2000 from Canada and the United States of America, and requested the modification of the briefing schedule set forth in Procedural Order No. 4. In its letter, the Respondent requested an additional time period for commenting on the submissions made under NAFTA Article 1128 as well as on the Claimant's additional observations on jurisdiction. By letter of August 21, 2000, the Claimant opposed such modification of the briefing schedule.
14. By letter of the Secretary of August 24, 2000, the Tribunal informed the parties that, having considered the foregoing correspondence, it did not consider it necessary to modify the briefing schedule set forth in Procedural Order No. 4, under which "the parties have been afforded an opportunity of a simultaneous second round of written pleadings on preliminary issues in order to address, by way of further explanation, arguments already made. A response to such further explanations has therefore not been considered necessary." The Secretary's August 24, 2000 letter, in addition, informed the parties that the Tribunal wished to receive the submissions of Canada and the United States of America under NAFTA Article 1128 no later than October 6, 2000 (a separate letter of August 24, 2000 was addressed by the Secretary to Canada and the United States of America to this effect), and that, while the parties remained free to make observations on them if they so wished, the Tribunal planned to begin considering the filings on jurisdictional issues soon after such submissions.
15. On August 21, 2000, the Claimant, as directed by the Tribunal, filed its memorial on jurisdictional issues.
16. By a communication of August 29, 2000, with accompanying documentation, the Respondent requested the Tribunal to order the production by the Claimant of documents concerning the preliminary issues being briefed by the parties. By a communication of August 31, 2000, with accompanying documentation, the Claimant opposed such request. By letter of the Secretary of September 1, 2000, the Tribunal informed the parties that, having taken due notice of the foregoing correspondence, it was not taking a position on the admissibility or relevance of such request for the production of documents, and that, if the Tribunal found that it required additional explanations or documentation on any preliminary issues once the parties had completed their filings, it would direct the parties accordingly. By that same letter, the Tribunal directed both parties "to promptly comply with any requests for the production of documents, which they regard, in good faith and after the exhaustion of all best efforts, to be admissible, relevant, and otherwise inaccessible to the party requesting them." By its letter of September 6, 2000, with accompanying documentation, the Claimant indicated that it was responding to the Respondent's above-mentioned request for the production of documents "pursuant to the invitation and direction of the Tribunal" of September 1, 2000.
17. On September 8, 2000, the Respondent filed the English text of its counter-memorial on jurisdictional issues. On September 11, 2000, the Respondent filed the Spanish text of its counter-memorial. By a letter of September 12, 2000, the Claimant sought English translations of Appendix 1 and Annex 2 of the Respondent's counter-memorial. By letter of September 13, 2000, the Respondent filed such English translations.
18. On September 22, 2000, both parties simultaneously filed the English texts of their respective additional observations on jurisdictional issues. The Claimant and the Respondent filed the Spanish texts of such additional observations on September 27 and 28, 2000, respectively.
19. On October 6, 2000, Canada and the United States of America filed their respective submissions under NAFTA Article 1128.

20. Also on October 6, 2000, the Claimant filed a communication with accompanying documentation, indicating that the Respondent's submission of September 22, 2000 had included two new motions, namely, (1) a motion concerning the production of documents and information, and (2) a motion concerning confidentiality, including the making of public statements by the parties in regard to the proceeding. In its October 6, 2000 communication, the Claimant opposed both motions.

21. By a communication of October 20, 2000, the Respondent made observations on the submissions of Canada and the United States of America, observations on the Claimant's communication of October 6, 2000, and observations on the Claimant's additional observations of September 22, 2000. The Respondent concluded its October 20, 2000 communication by requesting a hearing on the preliminary issues briefed by the parties. By a letter of October 24, 2000, the Claimant indicated its opposition to holding such a hearing on preliminary issues.

II. Incidental Questions of Procedure

22. The Tribunal has issued this decision on the specific preliminary issues set forth in its Procedural Order No. 4 and at paragraph 11 above, without holding a hearing on such issues. In its Procedural Order No. 3, the Tribunal announced that it did not envisage holding a hearing on the preliminary issues raised. The parties have fully addressed in writing the issues specified in Procedural Order No. 4, both in the pleadings scheduled in that same Order and in their respective subsequent communications. The Tribunal has found that it has been more than sufficiently enlightened by the parties' written submissions and has seen no need to hold a hearing on the preliminary issues.

23. As mentioned at paragraph 20 above, two additional procedural questions have been raised, one concerning the production of documents, and another concerning an order on the confidentiality of the proceeding. The Tribunal has considered those questions carefully and has decided to deal with them in a separate procedural order. That order will, in addition, deal with the reinstatement of the schedule of the proceeding and related directions to the parties.

III. Standing

24. The issue of Claimant's standing in this case (Procedural Order No. 4, para. 5 (e)) was extensively addressed by the Claimant in its Memorial on Preliminary Issues of August 21, 2000 (paras. 78-115) as well as in its Additional Observations of September 22, 2000 (paras. 3-17), and by the Respondent in its Counter-Memorial on Preliminary Questions of September 8, 2000. (paras. 13-122) as well as in its Additional Observations on the Preliminary Questions of September 22, 2000 (paras. 5-14). Under NAFTA Article 1128, the other NAFTA State Parties were also invited to make submissions to the Tribunal on the preliminary issues as far as they constitute questions of interpretation of NAFTA. Both Governments of Canada and the United States made such submissions on October 6, 2000, but only the latter included observations on the issue of standing (paras. 2-12). The Respondent answered to these observations as well as to Claimant's Additional Observations in a communication of October 20, 2000 (paras. 5-39, 57-66). Most of Parties' memorials and observations were accompanied by attachments of both legal and factual nature.

25. NAFTA Article 1117 (1) (a) is the main applicable provision with respect to the standing issue under consideration. This provision is included in Section B ("Settlement of Disputes between a Party and an Investor of Another Party") of Chapter Eleven ("Investment") of NAFTA. In its relevant part, Article 1117 (1) (a) states:

"1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

"(a) Section A . . .

" . . .

"and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach".

26. In addition, NAFTA Article 1139 includes the following definition of "investor of a Party":

"investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment".

NAFTA Article 201 includes the following definition of "national":

"national means a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1".

Finally, Annex 201.1 NAFTA provides in part that "national " also includes: "(a) with respect to Mexico, a national or citizen according to Articles 30 and 34, respectively, of the Mexican Constitution".

27. Against this legal background the Parties in this case seem to agree on the following basic facts, which are also supported by written evidence submitted to the Tribunal: The Claimant is a U.S. citizen by birth. He is not a citizen of any other State. He lived in the United States for the first 33 years of his life, while he has continuously resided in Mexico for the following 27 years. He holds a U.S. passport and a Social Security number in the United States. He maintains his voter registration in San Antonio, Texas. He has married Mexican nationals on two occasions, first in 1974 and again in 1999. He is the natural father of four children, born in 1974, 1976, 1981 and 1988, all of whom are citizens of both Mexico and the United States and habitually reside in Mexico City.

28. After the Claimant moved to Mexico in 1973 he made Mexico the center of his business activity. He first obtained *inmigrante* status which was in 1991 transformed into *inmigrado* status. Under the Mexican Ley General de Población (LGP), *inmigrado* is a permanent resident who has acquired the right of definitive residence in the country (see the information provided by Dr. Sergio Lopez Ayllón, Attachment 1 to Respondent's Counter-Memorial, p. 2 under II (2) 5). The Claimant never acquired the citizenship of Mexico nor is there any indication that he ever applied for it.

29. It should be added that, after disputes have arisen between the Claimant and Mexican authorities on whether export tax rebates should also be granted to CEMSA as exporter, although not manufacturer, of processed tobacco, the United States Embassy in Mexico intervened several times on Claimant's behalf by writing to the Mexican Ministry of Finance and Public Credit (see the letters of March 29, 1995; December 17, 1997; April 6, 1999, Attachments G, H, I to Claimant's Memorial). Such diplomatic representation was always based on Claimant's U.S. citizenship. There is no indication that such representations were denied because of lack of standing. The same applies with regard to the determination by the appropriate competent authorities whether or not some measures allegedly taken by the Mexican Government and complained of by Claimant were an expropriation under NAFTA Articles 1110 and 2103 (6). See the letter of February 17, 1999 from the U.S. Department of the Treasury to the Mexican Ministry of Finance and Public Credit, Attachment 6 to Respondent's Counter-Memorial.

30. Given the legal and the factual background of this case, the Tribunal deems it appropriate to recall that, under general international law, citizenship rather than residence or any other geographic affiliation is the main connecting factor between a state and an individual. Residence, even permanent or otherwise authorised or officially certified residence, only fulfills a subsidiary function which, as a matter of principle, does not amount to, or compete with, citizenship. In particular, in matters of standing in international adjudication or arbitration or other form of diplomatic protection, citizenship rather than residence is considered to deliver, subject to specific rules, the relevant connection.

31. Accordingly, dual nationality problems, including the search of the "dominant or effective nationality", require the existence of a double citizenship, connecting the same individual to two states with the legal bond of citizenship in the generally accepted meaning of the term. For the sake of avoiding misunderstandings, the Tribunal notes that, with respect to the issues discussed here, no distinction between citizenship and nationality is either relevant or

followed in this interim decision. While citizenship may pertain more to domestic aspects, and nationality rather to international aspects of the legal bond between a state and an individual, such distinction, even if useful for other purposes, is not relevant here. Therefore, the two terms will be used interchangeably in the following paragraphs.

32. For similar reasons, the *Nottebohm* opinion of the International Court of Justice (*Liechtenstein v. Guatemala*, [1955] I.C.J. Reports 4), which has been repeatedly referred to, is not precisely to the point. The issue in *Nottebohm* was whether the nationality of Liechtenstein conferred upon Nottebohm "in exceptional circumstances of speed and accommodation" and without any substantial bond could be relied upon as against Guatemala, with which Nottebohm had a long-standing and close connection, in justification of the proceedings instituted by Liechtenstein before the International Court of Justice. By contrast, here there is no doubt about the genuine and regular conferral by birth of the U.S. citizenship to Claimant. We are, therefore, not confronted, in terms of the state-individual relationship, with a conflict between, on the one hand, permanent residence and, on the other hand, superficial or artificial conferral of citizenship, but rather between the former and a citizenship which was conferred under normal circumstances in the first place and was not subsequently tainted by a total break of relationship. In these circumstances, citizenship must, as a matter of principle, prevail over permanent residence, as far as the issue of standing is concerned.

33. This result, obtained under general principles of international law, has now to be checked against the NAFTA legal framework. As already indicated (*supra*, para. 24), NAFTA Article 201 in its relevant part defines "national" as "a natural person who is a citizen or permanent resident of a Party". It has accordingly been argued that this Article makes permanent residence tantamount to nationality for all purposes, and therefore, in the present case, an instance of dual nationality arises which would call for a determination of the dominant or effective one.

34. The Tribunal cannot adopt such interpretation for two reasons. The first one relates to the very structure of NAFTA Article 1117 (1) (a), which is here the applicable provision concerning an investor of a State Party having standing (*cf. supra*, para. 23). This provision is supplemented by the definition in NAFTA Article 1139, according to which "investor of a Party" means, among other persons, "a national or an enterprise of such Party, that seeks to make, is making or has made an investment" (*cf. supra*, para. 24). In the framework of the above mentioned and reproduced provisions, it appears that the concept of "national", as defined in NAFTA Article 201, becomes relevant here only with respect to a State Party other than the one on which the investment is made. In fact, Article 1117 (1) literally addresses "[a]n investor of a Party, on behalf of an enterprise of another Party". Thus, the definition of "national" as "a natural person who is a citizen or permanent resident of a Party" is needed in this context to complement the definition in Article 1139 of the "investor of a Party" which, in the scope of application of Article 1117 (1), refers to an investor of a Party other than the one in which the investment is made. Such contextual interpretation of an equal treatment of nationals and permanent residents leads to the result that permanent residents are treated like nationals in a given State Party only if that State is different from the State where the investment is made.

35. This result is further corroborated by the very purpose of NAFTA itself. Article 102 (1) (c) and (e) have been pointed to, according to which "[t]he objectives of this Agreement, as elaborated more specifically through its principles and rules," are to "increase substantially investment opportunities in the territories of the Parties" and to "create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes". Such increase of both investment opportunities and their effective protection is also supported by enlarging the circle of investors to be protected, beyond nationals of another State Party, to permanent residents therein as well. Thus, e.g., an investor of a Party, entitled to seek arbitration under Chapter Eleven can be not only a U.S. citizen but a French citizen as well, provided he is a permanent resident of the United States. This is, in the opinion of the Tribunal, the proper meaning and function of the definition of "national[s]" in NAFTA Article 201.

36. Under the interpretation elaborated above (paras. 33-35), which concurs with general principles of international law (*see supra*, paras. 30-32), the Claimant in this case, being a citizen of the United States and of the United States

only, and despite his permanent residence (*inmigrado* status) in Mexico, has standing to sue in the present arbitration under Chapter Eleven of NAFTA. Indeed, the Claimant as a citizen of the United States should not be barred from the protection provided by Chapter Eleven just because he is also a permanent resident of Mexico.

37. Accordingly, the Tribunal dismisses Respondent's preliminary defense pertaining to Claimant's lack of standing because of his permanent residence in Mexico.

38. Having reached the immediately foregoing conclusion (para. 37) the Tribunal does not find it necessary to address Claimant's allegation that Respondent's defense about Claimant's standing is not timely (Claimant's Memorial, paras. 111-115).

IV. Time Limitation

39. The issues of time limitation under NAFTA Article 1117 (2) (Procedural Order No. 4, para. 5 (c)) was extensively addressed by the Claimant in its Memorial (paras. 26-66) as well as in its Additional Observations (paras. 40-60), and by the Respondent in its Counter-Memorial (paras. 189-222) as well as in its Additional Observations (paras. 38-43). The issue was also addressed by the Government of Canada and the United States in their submission (paras. 10-15, and 13-18, respectively).

40. NAFTA Article 1117 (2) provides:

"An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage".

41. While it is obvious that this provision adopts, as it is usual in both litigation and arbitration, a time limitation period, and sets it at three years, the provision needs interpretation in view of two additional sets of provisions included in the same Section B of Chapter Eleven. On the one hand, the meaning of "making a claim" is unclear since NAFTA also refers to delivering notice of intent to submit a claim to arbitration (Art. 1119), submitting the claim to arbitration (Art. 1120 (1)), and the time when a claim is submitted to arbitration (Art. 1137 (1)).

42. On the other hand, NAFTA itself provides several other time-related constrains in order to allow arbitration to proceed. Thus, under Article 1118, "[t]he disputing parties should first attempt to settle a claim through consultation or negotiation"; no time indication is provided here. In addition, under Article 1119, the notice of intent to submit a claim to arbitration shall be delivered to the disputing Party "at least 90 days before the claim is submitted". Moreover, under Article 1120 (1) a disputing investor may submit a claim to arbitration only after "six months have elapsed since the events giving rise to [the] claim". Finally, while NAFTA in principle does not apply to taxation measures (Art. 2103 (1)), there are several exceptions. Among them, Article 1110 on expropriation and compensation shall apply to taxation measures and arbitration may proceed unless it has been determined that the measure is not an expropriation. If the competent authorities fail to agree that the measure is not an expropriation within a period of six months after this issue was referred to them, the claim pertaining to taxation measures alleged to be an expropriation may be submitted to arbitration (Art. 2103 (6)).

43. Against this legal background, the file shows that the notice of intent to submit the claim to arbitration was delivered on February 16, 1998, while the notice of arbitration was received by the Secretary-General on April 30, 1999, i.e. more than fourteen months later. On the other hand, measures complained of by Claimant practically extend over the whole period starting in the years 1990 or 1991. Therefore, the issue of the point in time at which the limitation period is interrupted becomes relevant: depending on whether the notice of intent to submit a claim to arbitration or the notice of arbitration has this effect, the three-year limitation period is apt to affect alleged measures

taken before, respectively, February 16, 1995, or April 30, 1996, that is, three years counted backwards from each notice.

44. The NAFTA terminology with regard to commencement of arbitration is not always consistent. Particularly it is not clear whether Article 1117 (3) does distinguish between "making a claim" and "submitting a claim to arbitration", as the United States Government alleges (para. 16) with regard to the particular Mexican situation under Annex 1120.1. However, regardless of this discrepancy, the Tribunal is of the opinion that Article 1117 uses the expression "making a claim" in a general rather than time-related or time-oriented meaning. "Making a claim" is used to denote the definitive activation of an arbitration procedure rather than to localize the commencement of arbitration in terms of time (see also Art. 1117 (4): "An investment may not make a claim under this Section"). The relevant provision is to be found in Article 1137 (1) (b) where, under the heading "General" for the Article, and "Time when a Claim is Submitted to Arbitration" for the first paragraph, the following is stated:

"1. A claim is submitted to arbitration under this Section when:

"(a) ...

"(b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General; or

"(c) ..."

Therefore, the time at which the notice of arbitration has been received by the Secretary-General rather than the time of delivery of the notice of intent to submit a claim to arbitration is apt to interrupt the running of limitation period under NAFTA Article 1117 (2).

45. Of course, there are systems under which already taking preparatory steps towards commencing litigation or arbitration may have the effect of interrupting the running of limitation (see, e.g., German Civil Code §§ 210, 220 (1); Greek Civil Code Art. 262, 269). But in such instances there is usually an additional period after the preparatory steps have been taken within which the (prospective) claimant must definitely bring the claim. In the NAFTA such additional periods of time are missing. Both the 90-day period under Article 1119 and the cooling-off period of six months under Article 1120 (1), as well as the further period of six months under Article 2103 (6) (see supra, para. 44), are only minimum periods, not maximum ones. It is, therefore, consistent that NAFTA has adopted the reception of the notice of arbitration rather than any previous step as the critical point in time which stops the running of limitation.

46. On the other hand, even taking into account all the preparatory periods, there still seem to remain for Claimant's benefit about 30 months of "pure" limitation period in order for him to definitely proceed to arbitration. In fact, Article 1120 (1) provides for a cooling-off period of six months between the events giving rise to a claim and the submission of the claim to arbitration. This period may well run together with the six-month period for determining that a taxation measure is not an expropriation since thereafter the investor may submit its claim to arbitration (Art. 2103 (6)). Neither is concurrence excluded with regard to the 90-day period after delivery of the notice of intent to submit a claim to arbitration since thereafter the investor may submit its claim to arbitration as well (Art. 1119). In sum, then, these three preparatory periods are concurrent rather than consecutive and may well be reduced to a single period of six months. Thus the limitation period of three years under Article 1117 (2) could be shortened to about thirty months of unencumbered time.

47. Based at the above considerations (paras. 39-46), the Tribunal concludes that the cut-off date of the three-year limitation period under NAFTA Article 1117 (2) is April 30, 1996 rather than February 16, 1995.

48. However, this is not the end of the story. In fact, Claimant alleges that (a) the Parties on or about June 1, 1995 reached an agreement concerning the right of CEMSA (being the Claimant's Mexican enterprise) to export cigarettes and to receive tax rebates on such exports; Respondent deviated from this agreement in November-December 1997

and formally confirmed this deviation in February 1998; therefore, the limitation period under Article 1117 (2) was suspended for some 32.5 months, i.e. from June 1, 1995 to mid-February 1998 (Claimant's Memorial, paras. 52-55; Claimant's Additional Observations, paras. 53-60); and (b) the Respondent is equitably estopped from invoking any limitation period in this case because Respondent gave Claimant assurances that exports would be permitted and rebates paid to CEMSA (Claimant's Memorial, paras. 56-59; Claimant's Additional Observations, paras. 45-60). Both allegations are denied in law and particularly in fact by Respondent (Respondent's Counter-Memorial, paras. 209-222).

49. Since both allegations require a substantial analysis of facts the Tribunal decides to join these two aspects of the limitation issue (supra, para. 48) to the examination of the merits.

V. Admissibility of an Additional Claim under NAFTA Article 1102

50. The issue is here whether the Claimant has submitted or is allowed to submit additional claims, or amend its claims, on the basis of an alleged violation of NAFTA Article 1102 concerning denial of national treatment. The issue (Procedural Order No. 4, para. 5 (b)) was extensively addressed by the Claimant in its Memorial (paras. 8-25) as well as in its Additional Observations (paras. 25-39), and by the Respondent in its Counter-Memorial (paras. 179-188) as well as in its Additional Observations (paras. 27-37). The issue was also addressed by the Government of Canada in its submission (paras. 7-9).

51. It appears from the file that the Claimant in its notice of intent to submit a claim to arbitration under NAFTA Article 1119 announced a claim based on an alleged violation of Articles 1102, 1104, 1105, 1106 and 1110. However, in its subsequent notice of arbitration the Claimant omitted to rely again on an alleged violation of Article 1102. Therefore, the Tribunal proposed to consider, among others, the following preliminary issues:

- a. Whether the Claimant has submitted a point of claim in this arbitration proceeding concerning an alleged violation of NAFTA Article 1102?
- b. Whether the Claimant may submit additional claims, if any, or amend its claim, on the basis of an alleged violation of NAFTA Article 1102?

The Tribunal will now consider the two issues together.

52. Article 48 of the Additional Facility Arbitration Rules (the Arbitration Rules) provides as follows under the heading "Ancillary Claims":

"(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim, provided that such ancillary claim is within the scope of the arbitration agreement of the parties.

"(2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding".

53. In this regard, Respondent relies on NAFTA Article 1120 (2), under which "[t]he applicable arbitration rules shall govern the arbitration except to the extent modified by this Section". The Respondent argues that Section B of Chapter Eleven, and precisely NAFTA Articles 1119, 1120 and 1121 have modified Article 48 of the Arbitration Rules (see Respondent's Counter-Memorial, para. 181; Additional Observations, paras. 27-37). The Canadian Government in its submission (paras. 8-9) adopts the same view.

54. The Tribunal cannot accept this approach. It considers that, for the exception in NAFTA Article 1120 (2) to become operative, there must be a rule in Section B of Chapter Eleven which specifically addresses the issue of

ancillary claims. Such rules does not appear to exist. Therefore, the issue of ancillary claims remains untouched by Section B of Chapter Eleven and is governed by Article 48 of the Arbitration Rules. For the rest, the reference of Article 1120 (2) to "[t]he applicable arbitration rules" is fully justified because of the fact that the same Article in its preceding paragraph 1 lists three alternative bodies of eventually applicable arbitration regimes.

55. The Tribunal notes that the same opinion has also been adopted by other Arbitral Tribunals under Chapter Eleven of NAFTA, either under the ICSID Additional Facility Rules (*Metalclad Corporation v. The United Mexican States*, Award of August 30, 2000, Attachment 1 to Claimant's Additional Observations, paras. 67-69) or under the UNCITRAL Arbitration Rules (*Ethyl Corporation v. The Government of Canada*, Award of June 24, 1998, 38 I.L.M. 708, at 729-730, paras. 93-95 [1999]; see also *Pope and Talbot v. The Government of Canada*, Award of August 7, 2000, Attachment 3 to Claimant's Additional Observations, paras. 22-29).

56. To the extent that Respondent's point of view relies on the necessity to comply with the requirement provided by NAFTA Article 1119 (see Respondent's Counter-Memorial, paras. 180, 181, 183), to wit that the NAFTA provisions alleged to have been breached and any other relevant provisions must have been specified, such specification has already happened *in casu* since Article 1102 on national treatment has been mentioned in Claimant's notice of intent to submit his claim to arbitration. It seems, therefore, to the Tribunal that, even regardless of the proper understanding of NAFTA Article 1120 (2) (*supra*, paras. 51-56), Respondent's major concern has been already taken here into account.

57. Of course the other requirements set out in Article 48 of the Arbitration Rules must also be complied with. In particular, (a) the ancillary claim should be within the scope of the arbitration agreement of the parties (Art. 48 (1)), and (b) such ancillary claim should be presented in principle not later than in the reply (Art. 48 (2)).

58. The Tribunal finds that both requirements have been met. In the first place, the consent given by both parties to arbitration depends under NAFTA Article 1122 (2) (a) on "the Additional Facility Rules for written consent of the parties". Further, under Article 3 (1) (d) of the Arbitration Rules, the notice of arbitration shall "contain information concerning the issues in dispute and an indication of the amount involved, if any". This Article does not require as well the enumeration of the provision allegedly violated by the Respondent State Party; it satisfies itself with the identification of the issues in dispute. Such issues have been identified in the notice of arbitration under consideration, including an explicit and repeated allegation of discrimination, even without particular reference to NAFTA Article 1102 (see pp. 4, 5, 6, 8, 9). Therefore, it appears that the Claimant has submitted a point of claim concerning an alleged denial of national treatment, which is another expression for discrimination, that is an alleged violation of Article 1102. In addition, however, such ancillary claim is within the scope of the arbitration agreement of the parties and, therefore, admissible in the present arbitration proceeding. On the other hand, this ancillary claim has been presented timely, since the time limit provided by Article 48 (2) of the Arbitration Rules is the submission of the reply, while in the present case not even the main memorials have yet been filed. For the rest, Article 1102 (as well as 1103) claims are arbitrable under Article 2103 (4) (b) without reference to the competent authorities under Article 2103 (6), which reference is only limited to expropriation.

59. Based on the above considerations (paras. 27-35) the Tribunal concludes that the point of claim concerning an alleged denial of national treatment or violation of NAFTA Article 1102 is properly before the Tribunal because it has been in substance included in the notice of arbitration. In addition, to the extent that it was subsequently presented as ancillary claim, the Tribunal accepts such incidental or additional claim.

VI. Relevance of Claims Pre-Dating NAFTA's Entry into Force

60. This issue (Procedural Order No. 4, para. 5 (d)) pertains to whether measures alleged to be taken by the Respondent in the period between late 1992 and January 1, 1994, when NAFTA came into force, and which are alleged to be in violation of NAFTA, general international law, or domestic Mexican law, are relevant for the support of the claim or claims. The issue was addressed by the Claimant in its Memorial (paras. 67-77) as well as in its

Additional Observations (paras. 61, 62) and by the Respondent in its Counter-Memorial (paras. 223-266) as well as in its Additional Observations (paras. 44-51). The issue was also addressed by the Government of Canada in its submission (paras. 16-19).

61. The Tribunal has taken due knowledge of the parties' respective allegations and observes that its jurisdiction under NAFTA Article 1117 (1) (a), which is relied upon in this arbitration, is only limited to claims arising out of an alleged breach of an obligation under Section A of Chapter Eleven of the NAFTA. Thus, the Tribunal does not have, in principle, jurisdiction to decide upon claims arising because of an alleged violation of general international law or domestic Mexican law. Both the aforementioned legal systems (general international law and domestic Mexican law) might become relevant insofar as a pertinent provision to be found in Section A of Chapter Eleven explicitly refers to them, or in complying with the requirement of Article 1131(1) that "A Tribunal established under this Section shall decide the issue in dispute in accordance with this Agreement and applicable rules of international law." Other than that, the Tribunal is not authorized to investigate alleged violations of either general international law or domestic Mexican law.

62. The reliance of the Tribunal on alleged violations of NAFTA Chapter Eleven Section A also implies that the Tribunal's jurisdiction *ratione materiae* becomes jurisdiction *ratione temporis* as well. Since NAFTA, and a particular part of NAFTA at that, delivers the only normative framework within which the Tribunal may exercise its jurisdictional authority, the scope of application of NAFTA in terms of time defines also the jurisdiction of the Tribunal *ratione temporis*. Given that NAFTA came into force on January 1, 1994, no obligations adopted under NAFTA existed, and the Tribunal's jurisdiction does not extend, before that date. NAFTA itself did not purport to have any retroactive effect. Accordingly, this Tribunal may not deal with acts or omissions that occurred before January 1, 1994. However, this also means that if there has been a permanent course of action by Respondent which started before January 1, 1994 and went on after that date and which, therefore, "became breaches" of NAFTA Chapter Eleven Section A on that date (January 1, 1994), that post-January 1, 1994 part of Respondent's alleged activity is subject to the Tribunal's jurisdiction, as the Government of Canada points out (paras. 18, 19) and also the Respondent concedes (Counter-Memorial, para. 232). Any activity prior to that date, even if otherwise identical to its post-NAFTA continuation, is not subject to the Tribunal's jurisdiction in terms of time.

63. Based on the above considerations (paras. 60-61) the Tribunal concludes that only measures alleged to be taken by the Respondent after January 1, 1994, when NAFTA came into force, and which are alleged to be in violation of NAFTA, are relevant for the support of the claim or claims under consideration.

December 6, 2000

Jorge Covarrubias Bravo
Arbitrator

David A. Gantz
Arbitrator

Konstantinos D. Kerameus
President