

**Marvin Roy Feldman Karpa
v.
United Mexican States
(ICSID Case No. ARB(AF)/99/1)**

CONFIDENTIAL

**Procedural Order No. 2
Concerning a
Request for Provisional Measures
and the
Schedule of the Proceeding**

Background

1. On February 15, 2000, following the distribution by the Secretariat to the parties of a provisional agenda for the first session of the Tribunal, the Claimant submitted a request for provisional measures. At the invitation of the Tribunal, the Respondent replied to such request on March 6, 2000. On March 9, 2000, the Claimant submitted a proposal on the schedule of the proceeding, including time limits for the filing of preliminary motions, exchange of documentation, and the filing of pleadings. At the invitation of the Tribunal, the Respondent replied to such proposal on March 17, 2000. The Claimant and the Respondent submitted further observations on the proposed schedule of the proceeding in their letters of March 22 and 23, 2000, respectively.

Request for Provisional Measures

2. Article 47(1) of the Additional Facility Arbitration Rules provides that the Tribunal shall give priority to the consideration of a request for provisional measures. Accordingly, at its first session held at the seat of the Centre on March 10, 2000, the Tribunal heard the parties concerning the Claimant's request for provisional measures.
3. In its submission of February 15, 2000, the Claimant requests the Tribunal to order the preservation of the status quo during the proceeding, and in particular to order the Respondent "immediately to cease and desist for the duration of this arbitration from any interference with Claimant or his property or with CEMSA's assets or revenues, whether by embargo or by any other means." In its communication of March 6, 2000, the Respondent states that there is, in its view, no basis for the Tribunal to grant provisional or interim measures of protection.
4. Article 47(1) of the Additional Facility Arbitration Rules provides that, "[u]nless the arbitration agreement otherwise provides, either party may at any time during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal." As indicated in the Tribunal's Procedural Order No. 1, this proceeding is conducted in accordance with the Additional Facility Arbitration Rules, as modified by the provisions of NAFTA Chapter 11, Section B. NAFTA Article 1134 qualifies the Tribunal's power to order provisional measures as follows: "A Tribunal may

not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 or 1117."

5. The Tribunal has deliberated on the Claimant's request for provisional measures and finds unanimously that an order for such measures in the terms requested by the Claimant (i.e., for the Respondent to refrain from any interference by any means with Claimant or his property) would not be consistent with the limitations imposed by NAFTA Article 1134, since such an order would entail an injunction of the application of the measures which in this case are alleged to constitute a breach referred to in NAFTA Article 1117. The Tribunal accordingly declines to grant the Claimant's request for provisional measures.

6. The Tribunal notes that, under Article 47(2) of the Additional Facility Arbitration Rules, it may recommend provisional measures other than those specified in a request. The Tribunal does not, however, deem that a recommendation of other provisional measures is necessary at this moment, since it is confident that the parties will keep in mind the desirability of not taking steps that might unduly aggravate or extend the dispute upon which the Tribunal is ultimately called upon to decide.

The Schedule of the Proceeding

7. As regards the schedule of the proceeding, in addition to the above-mentioned correspondence from the parties, the Tribunal heard the views of the parties on this matter at its first session of March 10, 2000.

8. The Tribunal has considered the above-mentioned communications and views of the parties on matters concerning the schedule of the proceeding, including the number, sequence and time limits for the filing of the parties' pleadings, and decides as follows:

a. In accordance with Article 41(2) of the Additional Facility Arbitration Rules, the Tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts. In addition, either party may seek from the other party the disclosure of reasonably specified documents and the production of statements on specific points by identified witnesses or experts. Disputes related thereto will be decided upon by the Tribunal, which may request a party to produce documents and written or oral statements by witnesses or experts. If a party does not comply with such a request by the Tribunal, the Tribunal may draw the appropriate inferences.

b. The parties are invited to exchange, by May 31, 2000, any specific requests for the production of documents and of written statements on specific points by witnesses or experts, with an indication of their relevance.

c. Each party is called upon to provide to the Tribunal, and to the other party by July 15, 2000, the documents and written statements requested by the requesting party in accordance with paragraph 8(b) above. In the event the requested party believes that the documents or statements so requested cannot or should not be

produced, such party shall as soon as possible inform the requesting party of the reasons therefor. In accordance with paragraph 8(a) above, the Tribunal shall decide any dispute related to such requests for documents or statements.

d. The Tribunal reserves its decision on whether to request either party to produce written or oral statements from any particular witness or expert. The Tribunal also reserves its decision on any questions concerning the time, place and manner in which any oral statements of witnesses and experts, and the eventual examination of witnesses and experts, are to be heard.

e. The Claimant shall submit its Memorial on or by September 1, 2000. The Respondent shall submit its Counter-Memorial on or by November 1, 2000. The parties' pleadings are to be accompanied by the documents and by statements of the witnesses or experts on which they rely, to the extent such documents or statements have not already been produced in the proceeding.

f. The Tribunal reserves its decision on whether to request the parties to file a reply and a rejoinder.

g. In accordance with Article 46 of the Additional Facility Arbitration Rules, any objection to the competence of the Tribunal is to be filed as soon as possible and in any event no later than the time limit for the filing of the Counter-Memorial.

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9. With its letter of March 22, 2000, the Claimant submitted a First Request for the Production of Documents. In its letter of March 23, 2000, the Respondent requested the Tribunal to review such First Request and to determine whether it is consistent with the rules governing this proceeding. In view of the foregoing decision of the Tribunal on the schedule of the proceeding, the Tribunal deems that the Claimant's First Request for the Production of Documents has been directed to the Respondent. Accordingly, the parties are referred to paragraphs 8(a) and 8(c) above. This order is signed on behalf of the members of the Tribunal by its President. LR



Konstantinos D. Kerameus
President of the Tribunal

Athens, May 3, 2000