

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

Procedural Order No. 5
concerning questions raised in connection
with Procedural Order No. 4

Background

1. In its Procedural Order No. 4 of August 3, 2000, The Tribunal specified five jurisdictional issues which it wished to consider preliminarily in this proceeding and directed the parties to submit written pleadings on those issues. The communications submitted by the parties in connection with Procedural Order No. 4 include the following: from the Claimant, communications of August 21 and 31, September 22, and October 6 and 24, 2000; from the Respondent, communications of August 29, September 8 and 22, and October 20, 2000.

2. In its communication of September 22, 2000, the Respondent included two submissions, one on a motion concerning the production of documents and information, and another on a motion concerning confidentiality, including the making of public statements by the parties in regard to the proceeding. In its communication of October 6, 2000, the Claimant opposed both motions. In its communication of October 20, 2000, the Respondent made observations on the Claimant's communication of October 6, 2000.

3. The Tribunal has carefully considered the above-mentioned communications from the parties and has decided on the above-mentioned

motions as set forth below. In addition, the Tribunal has carefully considered its consultations with the parties at its first session of March 10, 2000. Having dealt with, in a separate Decision, the preliminary jurisdictional issues specified in its Procedural Order No. 4, the Tribunal has determined the schedule of further proceedings as set forth below.

Production of Documents

4. In its Procedural Order No. 2, the Tribunal issued directions on the production by the parties of documents and written statements, with due regard to the relevant provisions of the Additional Facility Arbitration Rules. Under such directions "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." The parties were further directed to indicate the relevance of documents or statements being requested from the other party.

5. The Tribunal's directions on the production of documents and statements were supplemented by its directions transmitted to the parties through the Secretary's letter of September 1, 2000. In that 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."

6. The Tribunal's Decision on the preliminary issues specified in its Procedural Order No. 4 will provide guidance to the parties on the relevance of their respective requests for the production of documents and statements. In addition, the Respondent has sought further directions to the effect that such requests should also be necessary for the conduct of the proceeding, while expressing the hope that the parties may resolve between themselves matters concerning the production of documents and statements.

7. The Tribunal sees no need to provide further qualifications as to the admissibility or relevance of the parties' requests for production of documents and statements. The Tribunal will provide the parties, as set forth below, with a further opportunity to resolve between themselves matters concerning such requests, following which the parties should be prepared to produce such documents or statements by witnesses or experts as the Tribunal may require of them. The Tribunal points out that, having joined aspects of the preliminary issue specified at paragraph 5 (c) of Procedural Order No. 4 for consideration of the merits of the dispute, this will affect the period of time within which facts alleged by the parties may potentially be relevant to the dispute.

8. The Tribunal expects the parties to cooperate as fully as possible in determining the existence of the documents in the possession or under the control of each party which are being sought by the other party. If, despite such cooperation, the parties are unable to agree on whether an existing document being requested is relevant to the dispute, the parties should keep in mind that

the Tribunal might not yet be in a position to make a conclusive determination on the relevance of the document being requested. The same may apply to statements of witnesses and experts. The Tribunal would, in such an event, take into account the costs incurred by a party in producing a document or statement that was ultimately found by the Tribunal not to be relevant, when deciding on the distribution of costs and expenses in its Award. In order to encourage the fullest cooperation between the parties in the production of documents and statements, the Tribunal will consider, at the time of deciding on the distribution of costs and expenses in its Award, such submissions as may have been made by each party to the effect that specific documents produced by it at the request of the other party are ultimately not relevant to the dispute.

Confidentiality of the Proceeding

9. In its communication of September 22, 2000, the Respondent has requested an order enjoining the parties from making public any matter before the Tribunal without the consent of the other party or the authorization of the Tribunal; requiring the parties to treat as confidential all documents, testimony and other evidence produced in the proceeding; and providing for the imposition of appropriate penalties for the event that the Tribunal's order on confidentiality is not observed by a party. This request was opposed by the Claimant in his communication of October 6, 2000.

10. The Tribunal has carefully considered the above-mentioned submissions by the parties on the question of confidentiality of the proceeding. As regards the publication by a party of matters concerning the proceeding, the Tribunal does not find that there are any provisions in NAFTA Chapter Eleven or in the Additional Facility Arbitration Rules that prohibit such publication (with the very limited exception of Article 44(2) of the Additional Facility Arbitration Rules). Accordingly, the Tribunal does not consider it appropriate to enjoin the parties from such publication in regard to this proceeding. The Tribunal expresses the hope, however, that the parties will avoid any such publication that might aggravate the dispute.

11. As regards documents, testimony and other evidence produced in the proceeding, the Tribunal considers that each party is entitled to the treatment of such evidence by the other party as confidential. This is consistent with the provisions of NAFTA Article 1129, concerning the treatment of such evidence by the other State Parties to NAFTA. The Tribunal does not deem it necessary or appropriate, however, to provide in advance for penalties for the event that such duty of confidentiality in regard to evidence is not observed by a party. Nevertheless, the Tribunal points out that it may take into account any such non-observance for the purpose of determining how the costs and expenses of the proceeding are to be borne, in accordance with Article 59 of the Additional Facility Arbitration Rules.

Schedule of the Proceeding

12. The Tribunal hereby determines the following schedule for the proceeding:
 - a. The parties shall endeavor to agree, by December 20, 2000, on which documents and statements of witnesses or experts each party is to produce by providing copies to the other party and to the Tribunal. If the parties do not reach an agreement on the documents and statements of witnesses or experts to be produced, each party shall submit to the Tribunal, by December 29, 2000, (1) a list of the specific documents and statements being sought from the other party, with an indication of their relevance; and (2) the reasons for which it believes it should not produce documents or statements being sought by the other party.
 - b. Within fifteen days from the Tribunal's request, each party shall produce any documents or statements of witnesses or experts. The Tribunal expects to issue such a request, if it becomes necessary, by January 30, 2001.
 - c. Within six weeks from the production of documents and statements by each party, and in any event by March 30, 2001, the Claimant shall file its memorial.
 - d. Within six weeks from the filing of the Claimant's memorial, and in any event by May 15, 2001, the Respondent shall file its counter-memorial.

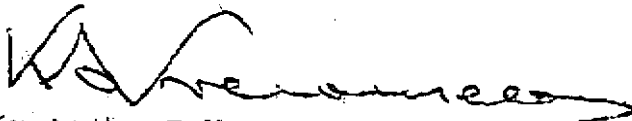
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e. For the purpose of allowing each party the opportunity to respond to the immediately preceding filing of the other party, the Tribunal has decided to allow the filing of a reply and a rejoinder. The Claimant shall file its reply within ten days of the filing of the Respondent's counter-memorial. The Respondent shall file its rejoinder within ten days of the filing of the Claimant's reply. Neither the reply nor the rejoinder are to raise any new issues.

f. As mentioned in the Tribunal's Procedural Order No. 2, 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. Each party is requested to number sequentially all documents and statements produced by it in this proceeding.

g. The Tribunal wishes to hold a hearing on the merits in Washington, D.C., from Monday, July 9, 2001 through Friday, July 13, 2001. The parties are requested to confirm to the Tribunal their availability for holding a hearing on those dates.

This order is signed on behalf of the Tribunal by its President.



Konstantinos D. Karameus
President of the Tribunal

December 6, 2000