

Courtesy Translation

Letter No.: DGCJN.511.06.079.03

Mexico, D.F. 30 January 2003

Ref: *Marvin Roy Feldman Karpa vs. United Mexican States*
ICSID Case No. ARB(AF)/99/01

Member of the Tribunal
At'n: Secretary of the Tribunal
International Centre Investment Disputes

The Government of the United Mexican States seeks, pursuant to Articles 56, 57 and 58 of the ICSID (Additional Facility) Arbitration Rules (the "Arbitration Rules") to have the Tribunal address the following matters in relation to the Award issued in the above referenced case, notified to the disputing parties on 16 December 2002.

Compliance with NAFTA Article 1135

Article 1135 (Final Award) of the North American Free Trade Agreement (NAFTA) provides as follows:

1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:
 - (a) monetary damages and any applicable interest;
 - (b) restitution of property, in which case the Award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is made under Article 1117(1):
 - (a) an award of restitution of property shall provide that restitution be made to the enterprise;
 - (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
 - (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.
3. A Tribunal may not order a Party to pay punitive damages.

[Emphasis added.]

Although the Award acknowledges in paragraphs 1 and 4 that the claim was made under NAFTA Article 1117(1) —consistent with the Claimant's Notice of Intent to Submit a Claim to Arbitration, his Notice of Arbitration and his Memorial— the Award directs the Respondent “to pay immediately to the Claimant” the sum awarded and makes no mention of the requirement stated in Article 1135(2)(b) and (c).

Articles 57 and 58 of the Arbitration Rules provide:

Article 57 – Correction of the Award

(1) Within 45 days after the date of the award either party, with notice to the other party, may request that the Secretary-General to obtain from the Tribunal a correction of the award of any clerical, arithmetical or similar errors. The Tribunal may within the same period make such corrections on its own initiative.

(2) The provisions of Articles 53 and 54 of these Rules shall apply thereto.

Article 58 – Supplementary Decisions

(1) Within 45 days after the date of the award either party, with notice to the other party, may request the Tribunal, through the Secretary-General, to decide any question which it had omitted to decide in the award.

(2) The Tribunal shall determine the procedure to be followed.

(3) The decision of the Tribunal shall become part of the award and the provisions of Articles 53 and 54 of these rules shall apply thereto.

The Respondent is not in a position to know whether this omission was in the nature of a error which requires a clarification, or whether it was a question which the Tribunal omitted to decide. If the former, the Tribunal can rectify the award in accordance with Article 57 of the Arbitration Rules in order to clarify that the sum awarded be payable to *Corporación de Exportaciones Mexicanas, S.A. de C.V.* (CEMSA), without prejudice to any right that any person may have in the relief under Mexican law. If it was a matter that the Tribunal omitted to decide, pursuant to Article 58 of the Arbitration Rules the Tribunal could so provide in accordance with NAFTA Article 1135.

The Respondent respectfully requests Secretary-General to forward its request to the Tribunal, in order obtain a correction of the Award under Article 57 of the Arbitration Rules, or in order to allow the Tribunal to decide the question pursuant to Article 58 of the such rules, as applicable.

Application of NAFTA Article 2105

The second matter concerns the application of NAFTA Article 2105 in relation to certain findings made by the majority of the Tribunal in deciding the claim under Article 1102 (National Treatment) in the Claimant's favor. NAFTA Article 2105 (Disclosure of Information) provides as follows:

Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions.

The majority of the Tribunal made inferences and findings adverse to the Respondent stating that the Respondent failed to submit evidence to rebut the claim of denial of 1102 of NAFTA (see for, example paragraphs 6, 23, 167, 173, 174, 176, 177, 178, 186, and 187 of the Award) including the following:

- a) "If the Respondent had had available to it evidence showing that the Poblano Group companies had not been treated any more favorable fashion than CEMSA with regard to receiving IEPS rebates, it has never been explained why it was not introduced."¹
- b) "However, in the absence of evidence to this effect presented by Mexico – the only party in a position to provide such information – the Tribunal need not decide whether Article 1102 requires treatment equivalent to best treatment provided to *any* domestic investor. Presumably, if there was evidence that another domestic investor had been treated in a manner equivalent to the Claimant, in terms of export registration, audit and granting or withholding of rebates, the Respondent would have provided that evidence to the Tribunal."²
- c) "For the Poblano Group and for other likely cigarette reseller/exporters, the Respondent has asserted that audits are or will be conducted in the same manner as for the Claimant, and implied that they will ultimately be treated in the same way as the Claimant. However, the evidence that this has occurred is weak and unpersuasive."³

The Respondent invokes Article 56 (Interpretation of the Award) of the Arbitration Rules which provides as follows:

- (1) Within 45 days after the date of the award either party, with notice to the other party, may request that the Secretary-General obtain from the Tribunal an interpretation of the award.
- (2) The Tribunal shall determine the procedure to be followed.
- (3) The interpretation shall form part of the award, and the provisions of articles 53 and 54 of these Rules shall apply.

¹ Award at paragraph 178.
² Award at paragraph 186.
³ Award at paragraph 187.

The Respondent requests the Secretary-General to obtain from the Tribunal an interpretation of the Award as it applies to the remarks and findings described above (and any others to similar effect) by explaining if, in arriving at those conclusions:

- a) the majority of the Tribunal considered the unchallenged testimony of Lic. Eduardo Díaz Guzmán, who explained that of the three other cigarette resellers that had obtained IEPS rebates during the period in question, one had been reassessed and required payment after a finding that rebates had been improperly obtained, because the IEPS could not be credited; and the documents of the other two enterprises were under review and the respective reassessment pending, whereby refund of amounts unduly obtained would be sought⁴;
- b) if so, did the majority consider Lic. Díaz Guzmán's testimony regarding Article 69 of the Fiscal Code that compels officials from the *Secretaría de Hacienda y Crédito Público* (SHCP) to maintain absolute confidentiality as regards statements and data submitted by taxpayers?⁵
- c) if so, did the majority consider whether Article 69 of the Fiscal Code is a "law protecting personal privacy" in Mexico within the meaning of NAFTA Article 2105?
- d) if so, did the majority consider whether NAFTA Article 2105 should prevail over "international law" in deciding that the burden of proof should shift in the circumstances of this case, or in finding that the Claimant had established a presumption that he was treated in a different or less favorable manner, and that the Respondent "failed to introduce any credible evidence into the record to rebut" such presumption?⁶
- e) in any event, did the majority consider whether it would be contrary to public policy to shift the burden of proof on the Respondent, so that the Respondent would have to require taxation officials to violate their legal obligation to preserve the confidentiality of taxpayers' information in order to fully answer the Claimant's allegations, or to avoid an adverse inference being made by the Tribunal?

The Respondent further requests that the Secretary-General forward the Tribunal its request pursuant to Article 58 of the Arbitration Rules, so that the Tribunal may decide any of the above questions that it omitted to decide in the Award, as applicable.

Attentively,
 El Consultor Jurídico
 [Signed in the Original]
 Hugo Perezcano Díaz

⁴ Reply, paragraphs 77, 184, 189-194 and Second Testimony of Eduardo Díaz Guzmán, paragraph 7.

⁵ Rejoinder, paragraphs 189, Testimony of Eduardo Díaz Guzmán dated 5 March 2001, pg. 2 and Second Testimony of Eduardo Díaz Guzmán, paragraph 10.

⁶ Award at paragraph 177.