

**Marvin Feldman  
v.  
Mexico**

**Case No. ARB(AF)88/1  
Dissenting Opinion**

**1. SUBJECT-MATTER OF THE DISPUTE**

I agree with the Award on the description of the facts and allegations, on procedural and jurisdictional issues, and on the Claimant's actions with regard to expropriation and due process. In all such matters, my vote is for the Award. But I do not agree with the conclusions of the Award concerning national treatment and discrimination.

It should be noted that the majority of the Tribunal has found a violation of NAFTA Article 1102 based on a *de facto* discrimination, consisting in a differential treatment accorded by the Respondent to CEMSA —*as a non-manufacturing reseller of cigarettes with an investment made by a United States citizen, who was denied rebates of the special tax on production and services*—, when compared with the treatment given by the Respondent to another non-manufacturing reseller.

The Award has not considered the potential discrimination between producers and related resellers —*to whom tax rebates were effectively granted*— and other resellers to be a violation of international law.

**2.- CEMSA HAD NO RIGHT TO THE TAX REBATE**

For the reasons stated in the Award<sup>1</sup>, CEMSA has never been entitled to claim tax rebates from the Government of Mexico, due to its admitted inability to show invoices issued by the supplier stating separately and expressly the amount of the tax. This requirement has never been met. CEMSA's right to tax rebates is not

---

<sup>1</sup> See Section H3.3 of the Award, paragraphs 117 y 188.

provided for in the law, in the decisions of any domestic tribunal or in any determination of the tax authorities. Furthermore, all regulations on this issue included in Mexico's domestic law are against CEMSA.

On the other hand, it is true, as stated in the Award<sup>2</sup>, that Mexican tax policy has a rational, valid reason for requiring from a taxpayer invoices that separately state the IEPS tax amounts as a condition for receiving rebates, since such rebates are therefore only granted in practice to cigarette producers (or their related resellers) and not to independent resellers in general.

### **3. THE ECONOMIC VIABILITY OF CEMSA'S BUSINESS: IT WAS BASED ON ILLEGAL REBATES OF IEPS.**

The core business of CEMSA is the exportation of cigarette<sup>3</sup>. Such business was not profitable, unless CEMSA received IEPS rebates from the Government of Mexico. This is shown by the financial, accounting and tax information submitted by CEMSA<sup>4</sup>, and by the decisions adopted by the company when the rebates were denied to it<sup>5</sup>.

Thus, CEMSA's cigarette export business, being a legal activity, was based on premises that clearly violated Mexican laws: to obtain tax rebates from the Government without being entitled to them.

### **4. GRANTING TAX REBATES DOES NOT NECESSARILY MEAN THERE HAS BEEN A RESOLUTION BY TAX AUTHORITIES**

---

<sup>2</sup> See Section H3.4, paragraph 136.

<sup>3</sup> See Jaime Zaga Hadid's Affidavit, where he states the following "I know that the cigarette business was by far CEMSA's most profitable business line. By 1997, cigarette exports represented more than 90% of CEMSA's gross profits".

<sup>4</sup> 1991-1998 Tax Resolutions, Volume 1 Audits, 1996 and 1997 bank statements of account, 1996 and 1997 checks' supporting documents, 1996 and 1997 purchase invoices, 1996 and 1997 journal and earnings supporting documents, 1996 and 1997 Journal Reports, Financial Information, 1996 and 1997 Export Documentation.

<sup>5</sup> Claimant's Statement.

In México, as in other countries, the tax administration constantly receives a great number of requests for tax rebates. In view of the practical impossibility for tax authorities to examine and decide on each request, the law<sup>6</sup> establishes that, when *'taxpayers are refunded any credit balance shown in their tax returns without any further requirement... such rebate order shall not mean a resolution in favor of the taxpayer'*.

The quotation above means that rebate orders do not confer rights to applicants; in other words, authorities refunding excise taxes are not, by such act, determining the applicant's legal position. It is the applicant who estimates any credit balance and the amount thereof, securing its rebate in a manner that might be considered automatic, since it is not preceded by an authority's resolution certifying or confirming the applicant's right to the rebate, or verifying whether the amounts are accurate and in conformity with the law.

It can thus be understood why the tax authority may grant tax rebates to a taxpayer not entitled to receive them, as it repeatedly happened with CEMSA<sup>7</sup> and as it may have happened with other non-manufacturing exporters as well, for example the Poblano Group, without thereby acknowledging or conferring any right to the recipient.

It is in this context of the domestic law that the potential violation of the Free Trade Agreement and of international law on the point of discrimination, as alleged by the Claimant, must be examined.

---

<sup>6</sup> Article 22 of the Federation's Fiscal Code.

<sup>7</sup> The record shows that CEMSA obtained the following rebates: on May 15, 1996, \$21,761; on June 4, 1996, \$240,752; on October 12, 1996, \$1,061,033; on July 10, 1996, \$335,183; on September 9, 1996, \$612,908, on October 18, 1996, \$1,588,138; on December 2, 1996, \$5,010,722; on January 20, 1997, \$12,908,447, on February 4, 1997, \$783,360; on March 4, 1997, \$9,173,115; on April 4, 1997, \$5,368,500; on May 6, 1997, \$6,220,528; on June 4, 1997, \$7,899,720; on July 3, 1997, \$8,052,575; on September 10, 1997, \$8,849,367; on August 5, 1997, \$5,259,676 and on November 3, 1997, \$9,032,364.

**5. THE CLAIMANT'S CASE IS THE BEST EVIDENCE THAT IMPROPER OR EXCESSIVE REBATES MAY BE GRANTED**

CEMSA received tax rebates on several occasions, notwithstanding the fact that it was not entitled to them since it did not meet the requirement of submitting supplier's invoices with the IEPS expressly and separately stated. In addition, CEMSA prepared its own tax returns with excessive credit balances calculated using an arbitrary method, which resulted in the Mexican tax authorities refunding greater amounts than those originally collected from the manufacturing and sale of the product<sup>8</sup>. However, CEMSA 'automatically' obtained the rebates sought.

**6.- NATIONAL TREATMENT. CLAIMANT FAILED TO PROVE VIOLATION OF THIS PRINCIPLE. NEITHER DID IT DEMONSTRATE THE EXISTENCE OF DIFFERENTIAL, LESS FAVORABLE TREATMENT**

The Award points out very clearly that the discrimination claimed in this case is not on a *de jure* but on a *de facto* basis. A *de facto* discrimination involves a NAFTA violation, if the investors of another State are accorded less favorable treatment than domestic investors. Finding of such violation will depend on a comparison between treatments.

The Claimant's version of the facts, as stated in his memorial and annexes does not support his view that (an)other Mexican investor(s) has (have) been treated more favorably; furthermore, the Claimant describes the treatment that the Mexican Government has allegedly given to the other investor, and that description shows that such treatment has essentially been the same as that accorded to CEMSA.

Indeed, CEMSA received rebates for several periods, and was denied rebates for other periods as a result of a formally issued resolution of the tax authorities. The Claimant asserts that the Poblano Group companies—*which are presumably in like*

---

<sup>8</sup> See note 25 of the Award and its references.

*circumstances and owned by Mexican investors*— were also given rebates for several periods and denied them for others<sup>9</sup>.

It would have been quite different should the Claimant have asserted that the Poblano Group companies had always been given the rebates sought, or that the Mexican tax authorities had in some way acknowledged their right to rebates notwithstanding the lack of invoices stating the tax amounts separately.

Thus, the Claimant alleges a discriminatory treatment but from his own arguments it follows that the treatment received by CEMSA from the Mexican Government has essentially been the same as that received by the Poblano Group. Such inconsistency probably stems from the fact that the issue of discrimination was added as an ancillary claim after the main proceedings had been commenced. The fact is that this issue does exist, and the Tribunal cannot deviate from the facts presented by the Claimant himself which, for the reasons stated above, do not at all contribute to support his allegations of a less favorable treatment and discrimination.

Besides, the evidence furnished by the Claimant also fail to prove that, in practice, the Poblano Group has received a more favorable treatment than CEMSA, a fact which could have been proved if the Poblano Group had always received the tax rebates applied for. Moreover, the Claimant cannot even prove one single element

---

<sup>9</sup> CEMSA establishes at pages 54, paragraphs 128, 129 y 130 of English version and pages 59 and 60, paragraphs 128, 129 and 130 Spanish version as follows: “**128.** Around July, 1999, Claimant learned that Hacienda was permitting cigarette exports and making rebates of IEPS taxes on such exports to at least one company owned by Mexican citizens that, like CEMSA, is not a cigarette producer. That company was Mercados Regionales, S.A. de C.V. (“Mercados I”). This information CAME from Cesar Poblano, a principal in the LYNX business, who had also been a lender to CEMSA in 1997 when CEMSA borrowed to finance cigarette purchases as discussed above. Feldman Decl.) 91. **129.** Later, Claimant obtained documents showing Hacienda’s payment of IEPS rebates to Mercados I for cigarette exports made in 1999. He received these documents from CEMSA’s former counsel, Javier Moreno Padilla. Feldman Decl.) 91; and see documents at App. 0473-0505. **130.** CEMSA’s complaints to the Tribunal about this discrimination apparently disrupted Mercados I’s arrangements with Hacienda, and its owners made efforts to substitute a new corporation as the exporter of record, Mercados Extranjeros, S.A. de C.V. (“Mercados II”). These efforts failed, at least temporarily, because Hacienda mistakenly believed that Marvin Feldman was involved in Mercados II’s business. Feldman Decl.) 92; App. 0470-72.”

showing the treatment given by the Mexican Government to the Poblano Group with regard to its acceptance or denial of tax rebates.

The majority of the Tribunal has reached the conclusion that CEMSA has been treated less favorably on the basis of a chain of inferences —*with which I disagree and will describe in the following paragraph*—, without providing a detailed description of the kind of treatment allegedly given by the tax authorities to the Poblano Group in order to make a proper comparison with the treatment given to CEMSA.

In fact, paragraph 12.2 of the Award is based on the fact that, during a 16-month period in 1996 and 1997, the Poblano Group was not denied the rebates —*or, in other words, that it was indeed granted tax rebates*—, while CEMSA was.

However, the majority forgets that, according to the Claimant himself, the Poblano Group was also denied the rebates during certain periods, for which reason the Award does not reflect what can be inferred from the evidence on the record, namely, that the treatment received by both investors has essentially been the same.

Neither do the documentary and other evidence submitted by the Claimant prove a differential, more favorable treatment of the Poblano Group; moreover, on the basis of that evidence it cannot be established what kind of treatment has been accorded to the Poblano Group, not even if the Poblano Group has obtained any tax rebate at all.

The Claimant produced three documents intended to prove his point of claim concerning discrimination, which were reviewed in the Award:

- a. The statement of the General Administrator of Major Taxpayers under the purview of the Ministry of Finance, Eduardo Díaz Guzmán, in which it is said
-

that three cigarette exporters were registered as such, while other two were denied export registration.

- b. An unsigned memorandum bearing no date, that the Claimant attributes to the Respondent, indicating that Mercados Regionales, a member of the Poblano Group should be denied registration as an authorized exporter.
- c. An informal printout of part of a database, apparently belonging to the Federal Register of Taxpayers, including data allegedly supplied by a Poblano Group company.

It is only on the basis of such documents that the majority presumes that CEMSA has been discriminated against, as compared to the treatment —*found proven*— accorded to the Poblano Group, for which finding the Tribunal has stated the rationale detailed below:

**176.** The extent of the evidence of discrimination on the record is admittedly limited. There are only a few documents in the record bearing directly on the existence of differing treatment, particularly (the statement of Mr. Diaz Guzman, the “mystery” memorandum from Hacienda’s files, and the tax registration statement for Mercados Regionales, owned by the Poblano Group). One member believes it is insufficient to prove discrimination (see dissent). The majority’s view is based first on the conclusion that the burden of proof was shifted from the Claimant to the Respondent, with the Respondent then failing to meet its new burden, and on an assessment of the record as a whole. But it is also based on a very simple two-pronged conclusion, as neither point was ever effectively challenged by the Respondent:

- a) No cigarette reseller-exporter (the Claimant, Poblano Group member or otherwise) could legally have qualified for the IEPS rebates, since none under the facts established in this case would have been able to obtain the necessary invoices stating the tax amounts separately.
- b) The Claimant was denied the rebates at a time when at least three other companies in like circumstances, apparently including at least two members of the Poblano Group, were granted them.

I do not share those conclusions for the following reasons:

The majority admits that the extent of the above mentioned evidence of discrimination is limited. I would suggest that it is not only limited but null and void, since it proves absolutely nothing with regard to the issue of discrimination.

The statement of Eduardo Díaz Guzmán only mentions that three companies were registered as exporters, but it sheds no light on the circumstances of the three companies; it does not provide their names, it does not make any reference as to whether or not they submitted invoices stating the IEPS tax separately and, in general, it provides no information accounting for the fact that their circumstances should be considered similar as those of CEMSA, in order to determine whether the national treatment obligation under NAFTA is applicable in this instance. It would not be unlikely for those companies to be producer-related resellers who, under the IEPS scheme, can have invoices stating the tax separately and expressly, thus being entitled to IEPS rebates. Given the tax policy reasons described above, the law provides that such companies have the right to tax rebates.

From the Díaz Guzmán statement it does not follow that the Poblano Group companies have been registered as exporters, let alone that they have been granted tax rebates.

The unsigned memorandum states —*assuming that it should be taken into account, despite its lack of authenticity*— that the Poblano Group firms should be denied registration as export trading companies. This is in conflict with the claim made by the Claimant.

The informal printout of the Federal Register of Taxpayers, if its authenticity is taken for granted, only proves that one Poblano Group company has applied for registration with that register —*which differs from the exporters register*— as a company engaged in the selling of processed tobacco. What does that prove with



regard to the treatment given to the Poblano Group in terms of IEPS taxes and rebates? In my opinion, nothing at all.

In addition, the statement of Mr. Carvajal, a CEMSA's employee, provides no specific data on the rebates either granted and/or denied to the Poblano Group.

## **7. THE BURDEN OF PROOF**

It is a general principle of law and a normal rule that the burden of proof lies with the party who alleges the affirmative of any proposition: Necesitas probandi incumbit illi qui agit<sup>10</sup>. Thus, in order to assert that the Respondent has violated the provisions of Article 1102 of the Free Trade Agreement to the Claimant's detriment and that the Respondent should, for that reason, compensate him for such act, the Claimant should have proved the alleged *de facto* discrimination, by explaining what kind of treatment was accorded by the Mexican Government to Mexican investors as regards tax rebates for cigarette exports, showing the different treatment received by CEMSA and explaining why the treatment given to CEMSA was less favorable.

In addition, the Claimant should have proved that the circumstances of the Poblano Group and of CEMSA were similar.

The evidence produced by the Claimant is insufficient. What is more noticeable is how little emphasis he has placed on proving the allegedly more favorable treatment of the Poblano Group. If Mr. César Poblano was practically a partner of Mr. Marvin Feldman<sup>11</sup>, why did he not offer Mr. Poblano as a witness?, or why did he not secure from Mr. Poblano documents proving the more favorable treatment allegedly received by the latter?

---

<sup>10</sup> To the same effect, Giuseppe Chiovenda. *Istituzioni de Diritto Processuale Civile* Vol. III, p 99.

<sup>11</sup> See M. Feldman Statement, paragraphs 72 and 73, where he acknowledges having borrowed money from Mr. Poblano to purchase cigarettes, with a 14% interest on the loan that was to be returned after obtaining the IEPS rebate; it is clear that they had an agreement to share in the profits and not only an arrangement for the payment of interest.

In my opinion, neither the NAFTA nor international law provide any grounds to account for the fact that, as in this case, the burden of proof should shift to the Respondent, as the majority of the Tribunal suggests in paragraph 177 of the Award, where the Claimant is said to have established a presumption and a “*prima facie* case”.

I disagree. The Claimant asserts there has been discrimination, but he himself describes the treatment received by the Poblano Group and that description is essentially coincident with the description of the treatment accorded to CEMSA, as explained above; the Claimant basically submits documentary evidence, from which nothing can be inferred about the treatment given to the Poblano Group in relation to the IEPS rebate issue. On those grounds, the treatment of CEMSA cannot be presumed to have been less favorable than that accorded to the Poblano Group.

With reference to the issue of shifting the burden of proof, the fact that the information requested was of a tax nature cannot be disregarded. Nevertheless, the inferences that the majority of the Tribunal have drawn from the facts have led it to conclude that CEMSA was less favorably treated, on the basis that the Mexican Government did not provide any evidence of the rebates that were granted, or denied to the Poblano Group. The majority considers that the Claimant has sufficiently made its point for the burden of proof to be shifted to the Mexican Government, who should then prove that there has been no discrimination.

It is true that the Mexican tax authorities, as is the case with tax authorities in most countries<sup>12</sup>, are under the obligation not to disclose tax returns or any other

---

<sup>12</sup> For instance, the United States of America and Canada, who are Mexico's trade partners in the NAFTA, are also bound to keep the information on their taxpayers confidential. So much so that both countries have entered into a broad Tax Information Exchange Agreement with Mexico to exchange data pertaining to their taxpayers, but undertaking to ensure that the information received from one another will be handled with the same degree of confidentiality as that obtained on the basis of their domestic law. On the matter of the banking secret, attorney-client privilege and the confidentiality of returns and information obtained by the tax authorities, in Spain, Germany and Argentina, see Guiliani Fonrouge, *Derecho Financiero*, Vol. 1, p. 549, Ediciones Depalma, Buenos Aires, 2001.

information provided by taxpayers. This confidentiality principle is essential to make taxpayers rely on tax administration, thus making tax collection easier. Even though this relates to domestic law, it is clearly a public policy.

It is also true that, should Hacienda officials have supplied information to this Tribunal regarding the tax returns filed by the Poblano Group companies, the credit balances shown on them and the tax rebates granted and/or denied, such officials would have incurred personal liability.

Therefore, a procedural matter such as the one being discussed, though in the context of international law, should not disturb that rule. In short, it is not reproachable that the Mexican Government should have refrained from submitting to the Tribunal the tax information and tax documents related to the Poblano Group kept in its records.

On the other hand, it is not reasonable to conclude that the Claimant's statements are true just because Hacienda has failed to file in these arbitration proceedings the information it had on a particular taxpayer, information which it is legally prevented from disclosing.

In any case, the Tribunal should have based its conclusions on the facts convincingly and overwhelmingly proven by the Claimant —*which is not the case here*—, including presumptions and unproven facts only when considering non-essential issues.

On this point, paragraph 178 of the Award states : “... *The majority is also affected by the respondent's approach to the issue of discrimination. If the respondent had had available to it evidence showing that the Poblano Group companies had not been treated in a more favorable fashion than CEMSA with regard to receiving IEPS rebates, it has never been explained why was it not introduced?*”.

The Respondent's position should not have affected the judgment of the other arbitrators, as it did not affect mine, for the following reasons:

- a. Because, contrary to what is said in the above transcribed statement, the Respondent did explain its legal impediment at length and on several occasions<sup>13</sup>.
- b. Because the Respondent itself has suggested that, in order to be able to provide such information without incurring personal liability, proceedings should be brought before a court of the first instance which should order tax authorities to furnish it<sup>14</sup>. Neither the Claimant made a reply to this suggestion nor the Tribunal adopted any decision on that point.
- c. Because the Respondent, despite its impediment, has showed willingness to cooperate with the Tribunal. In its counter-memorial and rejoinder, the Respondent provided information concerning the Poblano Group's cigarette exports, on the basis of records prepared by the Ministry of Economy (*Secretaría de Economía*) (who is not a tax authority).

In the same paragraph 178, the majority asserts that the Respondent, instead of focusing on the information that it should have provided on the Poblano Group,

---

<sup>13</sup> From official letter no. DGCJN.J11.01.373.01 dated July 2, 2001 can be read: "...With respect to files 328 and 333, as has been manifested by the Respondent, these are files that contain confidential information from third party taxpayers, the disclosure of which is forbidden by Law. The Respondent advised the Tribunal on the restriction in the matter of providing confidential taxpayer information through its official letter of January 11, 2001. Neither the person signing this official letter, nor any official from the Ministry of the Economy or their consultants have access to these files, nor have they had any and we are not authorized to know their content.

Respectfully, the Respondent does not have knowledge according to which rules the Tribunal could authorize the officials from the Ministry of the Economy or other persons to have access to such communications.

Moreover, any official from the Ministry of the Treasury and Public Credit that divulges information contained in the referred to files can incur in administrative and criminal liability ... The order of the Tribunal would obligate the officials from the Ministry of the Treasury and Public Credit to act in direct contravention of precise legal dispositions and would personally make them incur in the risk of responsibility".

<sup>14</sup> Same official letter as that cited in the last part.

spent a substantial amount of its time seeking to demonstrate that CEMSA and Poblano were related companies and that, even if the Poblano Group firms had not received the IEPS rebates, that evidence of relationship was totally irrelevant.

I do not agree with that conclusion either, since, as I have already pointed out, it is significant that the two companies should be clearly interrelated (*Mr. Feldman was apprised of the opportunity to obtain the IEPS rebates through Mr. César Poblano; they have the same attorney; Mr. Poblano shares in the profits of CEMSA's export business since he funds it*); therefore, it is not only the Mexican Government which may have information available on the treatment received by the Poblano Group, but also the Claimant, despite which he has failed to present clear evidence on that point, which would have made his claim of discrimination convincing.

I may assume that, should the information on the Poblano Group IEPS rebates have been available, it would have shown that the treatment of the Poblano Group was similar to that received by CEMSA, that is to say, rebates were sometimes granted to it and sometimes not, as it was so stated by the Claimant himself.

#### **8.- DISSENT WITH THE INFERENCES DRAWN BY THE MAJORITY**

Based on the above reviewed documents and on the fact that the Respondent did not submit any evidence on the treatment accorded by the Mexican Government to a domestic investor, the majority concludes that CEMSA has been subject to a discriminatory treatment, for which it has had to make the following inferences:

1. That the Poblano Group companies applied for IEPS rebates. This has not been proved in the proceedings.
-

2. That Hacienda refunded the IEPS taxes paid by the Poblano Group on cigarette exports. There is no evidence on the record supporting that statement, only a presumption by the majority of the Arbitral Tribunal.
3. That the rebates to the Poblano Group were granted for a 16-month period during 1997 and 1998. I truly cannot understand why this should be accepted as a true fact.
4. That the Poblano Group had no invoices stating the IEPS tax separately and that, therefore, its circumstances were similar to those of CEMSA. This has been neither proved nor asserted by the Claimant<sup>15</sup>.
5. That the treatment accorded to the Poblano Group was more favorable, which necessarily implies that rebates were not denied but were always granted to it.

I respectfully submit that the Claimant has not proved his claim and that it is neither rational nor legally valid to make assumptions of unknown facts (the treatment of the Poblano Group) on the basis of a chain of inferences.

I also consider that to be able to affirm that a State systematically violates its own laws, in order to give a less favorable treatment to the investors of the other State, or with any other purpose, evidence that clearly proves those facts must be had; I am of the opinion that for such affirmation simple inferences are not enough; that if there exists a pattern of conduct, there would be diverse manifestations that would permit any of the parties to prove it in a convincing and reliable way.

## **9. DISSENT WITH THE POINTS OF LAW SUPPORTED BY THE MAJORITY**

---

<sup>15</sup> Equal circumstances, according to the comments on article 24. Nondiscrimination of the Organisation for Economic Cooperation and Development's Model Tax Convention on Income and Capital, arise when *de jure* and *de facto* conditions are similar. The United Nations Model Double Taxation Convention between Developed and Developing Countries has provisions to the same effect. The evidence furnished by the Claimant does not meet those requirements.

The NAFTA makes it mandatory to accord investors of another State treatment no less favorable than that it accords to its own investors, in order not to incur discrimination.

In this instance, a *de facto* discrimination is alleged on the basis of facts involving a single domestic investor.

I do not deem this sufficient to conclude that there has been discrimination. Indeed, even if CEMSA had been treated less favorably than the Poblano Group, that single fact would not be sufficient grounds to state that México has violated its obligation to accord national treatment under NAFTA.

In accordance with the content of the Draft Agreement on the Responsibility of States for Internationally Wrongful Acts, approved by the International Law Commission of the United Nations in its 53<sup>rd</sup> session, that single fact is unlikely to sustain the claim that Mexico is guilty of discrimination under Article 1102. The kind of discrimination that violates the provisions of the NAFTA cannot be proven on the basis of single, isolated events but of composite acts involving a set of conducts of a State evincing a systematic practice<sup>16</sup>.

Discrimination, according to international law, is determined on the basis of composite acts which involve the adoption of a systematic policy or practice by the responsible State.

Therefore, if only a “universe of two” has been “proved to exist” in the record before this Tribunal, as the Award so acknowledges, it would be in order to conclude that no sufficient evidence is available to uphold the claim of discrimination and of

---

<sup>16</sup> Comment 2 to Article 15 of that Agreement states the following: “Composite acts covered by Article 15 are limited to breaches of obligations which concern some aggregate of conduct and not individual acts as such. In other words, their focus is a series of acts or omissions defined in aggregate as wrongful. Examples include the obligations concerning genocide, apartheid or crimes against humanity, systematic acts of racial discrimination, systematic acts of discrimination prohibited by a trade agreement, etc.”

differential treatment given to the investor of another State, vis-à-vis the treatment generally accorded to domestic investors.

I can find no basis to conclude that, for want of evidence to support the claim submitted, it is enough to analyze a universe restricted to two cases; even more so if, given the legal nature of the obligation to accord national treatment to investors of another State, that obligation should be assessed in terms of its institutionality and consistency.

#### **10. SPECIAL SIGNIFICANCE OF ALL OF THE ABOVE IN MATTERS OF TAXATION**

If, in actual fact, the Claimant is not entitled to IEPS rebates, it is repugnant to grant him a somewhat equivalent amount as compensation for damages, only because he alleges that there is another investor —*a Mexican investor, in like circumstances*— who has been granted IEPS tax rebates without being entitled to them either. This issue becomes even more sensitive if we consider, as described above, that the economic viability of CEMSA's business was based on obtaining illegal tax rebates; otherwise, such business was pointless.

If the approach taken in this Award were to prevail, it would suffice for any investor from a NAFTA State to show that another State party to the same Treaty has made only one mistake or miscalculation in the administration of a tax, favoring a single national investor —*whose circumstances are apparently similar*— to claim and obtain a benefit from that State, to the detriment of its public finance.



Juridical-procedural considerations adopted by the majority in this case have also left Mexican tax authorities defenseless, and the same may happen to the public finance of the two other countries subject to NAFTA Article 1102. Indeed, tax authorities in Mexico —*as those in the United States of America and Canada*— are to keep all information on their taxpayers confidential. I do not think it wise that an investor's claims against tax authorities, which they cannot prove otherwise given the confidentiality principle involved, should be deemed true, thus determining, on that basis, that the State in question has committed an illicit act which shall entail a loss to that State's public finance.

Finally, in my opinion, assuming that a State systematically violates its tax laws against its own economic interests and reprimanding that State in international arbitration proceedings for failing to violate such laws to the benefit of a foreign investor, is a highly delicate argument. As such, it should have been supported by extremely clear and convincing evidence, which was not the case in *Marvin Feldman v. México*.

## **CONCLUSION**

I do not find discrimination or violation of NAFTA Article 1102; I do not agree with the award of damages.

Jorge Covarrubias Bravo

December 3, 2002