



**BEFORE THE HONORABLE TRIBUNAL ESTABLISHED
PURSUANT CHAPTER ELEVEN OF THE NORTH AMERICAN
FREE TRADE AGREEMENT (NAFTA)**

**MARVIN ROY FELDMAN KARPA,
CLAIMANT**

VS.

**THE UNITED MEXICAN STATES,
RESPONDENT**

COUNTER-MEMORIAL ON PRELIMINARY QUESTIONS

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(Courtesy Translation)

COUNTER-MEMORIAL ON PRELIMINARY QUESTIONS

PART I: INTRODUCTION

A. The Parties' Requests for Resolution of Certain Jurisdiction Issues

1. The Claimant requested four rulings, three of which went to questions of jurisdiction, in order to "define the scope of the proceedings". The Respondent agreed that they should be determined as preliminary questions, together with two additional questions.
2. The Respondent raised two additional issues which it submitted should also be determined as preliminary questions —whether the Claimant's status as a national of Mexico precludes him from advancing a claim against Mexico and whether the Claimant is entitled to advance a claim pursuant to Article 1105 in respect of "taxation measures".
3. Procedural Order No. 3 directed the Claimant to submit a memorial "on all the jurisdiction issues raised in the above-mentioned communications" and the Respondent to then submit a counter-memorial "on such jurisdiction issues".
4. The Claimant then sought to withdraw his request for rulings on the issues it raised, urging the Tribunal to join the jurisdiction questions raised by the Respondent to the merits.
5. Following an informal telephone conference, the Tribunal issued Procedural Order No. 4 directing that the following questions be addressed:
 - 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;
 - c) whether the Respondent is entitled to raise any defense on the basis of the 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 on relying on such time limitation;

- d) whether measures alleged to have been taken by the Respondent in the period between late 1992 and January 1, 1994, when the 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; and
- 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.

6. Part II of this Counter-memorial addresses the standing question. The remaining questions are addressed in the order presented above in Part III.

7. The Respondent will provide the Tribunal with its additional observations on the questions posed by 22 September, as directed in Procedural Order No. 4.

B. Principles of Interpretation

8. Article 1131 requires this Tribunal to "decide the issues in dispute in accordance with this Agreement and applicable rules of international law".

9. In interpreting the NAFTA, the Tribunal should apply the rules of interpretation of public international law as set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), which are generally accepted as reflecting customary international law. This approach has been applied by other NAFTA Chapter Twenty and Chapter Eleven panels and tribunals.

10. Articles 31 and 32 of the Vienna Convention provide:

Article 31. General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.¹

11. The starting point of an interpretation of the NAFTA is the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the Agreement. Accordingly:

...the first duty of a tribunal which is called upon to interpret and apply the provisions of a treaty, is to endeavor to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter².

12. Recourse to supplementary means of interpretation should be made only under the conditions specified in Article 32 of the Vienna Convention.

1. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969).

2. Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 8 (Advisory Opinion of March 3).

PART II: THE TRIBUNAL'S JURISDICTION *RATIONE PERSONAE*

A. Introduction

13. The Tribunal has been presented with a claim filed by a natural person who holds United States citizenship but who is legally a permanent resident of Mexico, having entered Mexico in 1973, applied for and obtained his status as "*inmigrante*" in 1985 and deepening his connection to Mexico by obtaining and continuing his migratory status as an "*inmigrado*" since 1991. Given the fact that in law, Mr. Feldman is a Mexican national for the purposes of the NAFTA, in light of the rules of international law which the Tribunal is bound to apply, he lacks the necessary standing to bring a claim against Mexico under Chapter Eleven of the Agreement. On one approach taken by the international law applicable to investment disputes between a State and a national of another State claims by an investor having the nationality of the host State are inadmissible, regardless of whether such person is also a national of another State.

14. On an alternative approach in international law, the Claimant's "dominant or effective nationality" for purposes of the NAFTA is that of Mexico. The record shows that Mr. Feldman has resided in Mexico and carried on business there for twenty-seven years —twenty years before the NAFTA even arose as a possibility. He did not invest as a result of NAFTA, nor could he have taken the possibility of NAFTA into consideration when he did so. Under the NAFTA, he is in the legal position of being a national of both the United States and Mexico. In the Respondent's submission, given the strength of the Claimant's connections to Mexico, his strong factual ties with Mexico, his real and effective nationality for the purposes of NAFTA is Mexico and, accordingly, he cannot, as a Mexican national, sue Mexico under Chapter Eleven of NAFTA.

15. In either case, he does not have the standing necessary to commence a claim against Mexico under Chapter Eleven of the NAFTA. Accordingly, the Tribunal lacks the requisite jurisdiction *ratione personae* and the claim must be dismissed.

B. The Text of the NAFTA

16. Just as the ICSID Convention was designed to protect the interests of investors of a Contracting State in other Contracting States, Chapter Eleven was designed to afford certain treaty-based protections to persons (legal and natural) who chose to engage in cross-border investment.

17. Article 201 of the NAFTA sets out certain definitions of general application for the purposes of the Agreement. One such definition is the definition of the term "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;"

18. Annex 201.1 adds:

For purposes of this Agreement, unless otherwise specified:

national also includes:

- (a) with respect to Mexico, a national or a citizen according to Articles 30 and 34, respectively, of the Mexican Constitution; and
- (b) with respect to the United States, “national of the United States” as defined in the existing provisions of the Immigration and Nationality Act;

19. For purposes of the Agreement, the text thus groups together nationals *stricto sensu* —i.e., Mexican nationals according to Article 30 of the Mexican Constitution and nationals of the United States as defined in the Immigration and Nationality Act—, citizens and permanent residents. These classes of persons are given certain rights. Thus, a United States national, broadly defined, has certain obligations owed to him when he is an “investor of a Party” (viz. an investor of the United States) in another Party. Also, a German national, for example, who is a permanent resident of a NAFTA Party is to be considered a national of that Party for the purposes of the NAFTA, and will have the same obligations owed to him as other investors of that Party in the host Party.

20. However, the NAFTA Parties did not intend to permit nationals *stricto sensu*, citizens and permanent residents of a Party to have the standing to sue that Party under Chapter Eleven.

21. This is made clear by the interplay of Chapter Eleven’s definitions and the text of the various obligations contained in its Section A.

22. Article 1139, which sets out certain definitions applicable to Chapter Eleven alone, defines an “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;”

23. Article 1139 does not define the term “investor of another Party”. This is due to the fact that the substantive obligations set out in Section A repeatedly underscore the notion of connection to another Party. Article 1101, which sets out the Chapter’s scope and coverage, states

This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) investors of another Party;

- (b) investments of investors of another Party in the territory of the Party; and
- (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

24. As subparagraph (c) indicates, except for two articles (Performance Requirements and Environmental Measures), the Chapter has no application to investors of a Party —or investments of investors of a non-Party— within that Party's own territory.

25. Yet, recourse to dispute settlement under Section B is limited to investors of a Party in respect of their investments in another Party. Indeed, Articles 1116 and 1117 provide that “[a]n investor of a Party” on its own behalf or “[a]n 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 Section B “a claim that another Party has breached an obligation” under Section A, and certain other obligations of Chapter Fifteen (emphasis added).

26. Thus, even though the Parties have undertaken certain obligations in the NAFTA in respect of all investments, recourse to dispute settlement under Section B is not available to investors of a Party against that same Party, and investors of a non-Party may not submit a claim to arbitration under Section B against any Party.

27. Insofar as Mexico is concerned, when dealing with natural persons, Article 1101 establishes that the chapter applies to measures “adopted or maintained” by Mexico relating to:

- (a) investors of either Canada or the United States (i.e., citizens and permanent residents of Canada and the United States);
- (b) investments of citizens and permanent residents of Canada and the United States; and
- (c) with respect to Articles 1106 and 1114, all investments in the territory of Mexico (that is, all investments made by Canadian, United States and Mexican nationals, citizens or permanent residents and those made by any other investors in Mexico).

28. The scope and coverage provision establishes definitively that Chapter Eleven does not apply to measures adopted or maintained by Mexico relating to its own nationals, be they nationals, citizens or permanent residents of Mexico.

29. This is underscored by the ensuing obligations:

Article 1102 requires treatment to be accorded to “investors of another Party” and “investments of investors of another Party” to be no less favorable than that accorded by Mexico to its own investors or their investments.

Article 1103 requires Mexico to accord “investors of another Party” treatment no less favorable than that it accords... to investors of “any other Party” or of “a non-Party”...

Article 1104 requires Mexico to accord to “investors of another Party” (and their investments) the better of the treatment required under the preceding two articles.

Article 1105 requires Mexico to accord to “investments of investors of another Party” treatment in accordance with international law.

30. The same focus upon investors of another Party is found in Articles 1107, 1109, 1110, and 1111. (As noted above, only two articles apply to a broader class of investors.) Article 1106 applies to an “investment of an investor of a Party or of a non-Party” and Article 1114 applies generally to “any investment activity” in a Party’s territory.

31. The Claimant suggests that:

[T]he stated objectives of the NAFTA are to expand investor rights and to protect their interests, not to restrict them. It is clear that by adopting a broad definition of “national,” including permanent residents as well as citizens, the NAFTA parties (sic) intended to broaden, not to narrow the scope of the agreement. Logically, the intended beneficiaries of this provision... must have been third country nationals.³

32. The NAFTA Preamble provides that the governments of the three NAFTA Parties resolved to “ENSURE a predictable commercial framework for business planning and investment”. Similarly, among the objectives of the NAFTA as stated in Article 102 is to “increase substantially investment opportunities in the territories of the Parties”. Yet, these provisions cannot be read in isolation. Indeed, Article 31 of the Vienna Convention requires that they be interpreted “in accordance with the ordinary meaning to be given to the terms... in their context” (emphasis added).

33. The substantive rights and obligations of Chapter Eleven are the primary focus of the interpretative analysis. The Preamble and the objectives are merely context for the interpretation of the actual rights and obligations. As explained above, Chapter Eleven applies to measures adopted or maintained by a Party relating to investors of another Party and investments of investors of another Party in the territory of the Party⁴. In other words, Chapter Eleven applies to foreign investors and their investments in the territory of a Party. Protection under the NAFTA does not extend to a Party’s own investors, be they its nationals, citizens or permanent residents.

3. Memorial, paragraph 93, at pp. 44 – 45.

4. See paragraphs 23 and 24.

34. This is underscored by the national treatment obligation: the NAFTA does not set out how a Party is to treat its own investors or their investments; rather, however it decides to treat them, it is under an obligation to treat investors of another Party and their investments no less favorably. It logically follows that a Party cannot breach any NAFTA obligation in respect of its own investors or investments and, accordingly, a Party's own investors cannot bring a claim against that Party under Section B of Chapter Eleven⁵.

C. The Claimant's Legal Status Under NAFTA

35. Prior to the registration of the claim, counsel for the Claimant represented to the ICSID Secretariat that Mr. Feldman was a "United States citizen who is not a national of Mexico". This representation was incorrect.

36. According to the clear language of the NAFTA, the Claimant in the instant case is both a national of the United States and a national of Mexico, a point now conceded by the Claimant⁶.

37. The question arises, therefore, as to whether Mr. Feldman, as a national of both countries, has the right to sue both. If Article 201 were read strictly in isolation, the answer might be in the affirmative.

38. The Vienna Convention, however, does not allow such an interpretation. The term "national" cannot be read in isolation, because it is incorporated into the definition of "investor of a Party". It must therefore be placed in its proper context according to the precise wording of the legal obligations owed by each NAFTA Party to investors of another Party.

39. Article 1101 makes it perfectly clear that Mexico owes obligations to Canadian and U.S. nationals, but not to its own nationals, the United States owes obligations to Canadian and Mexican nationals, but not to its own nationals, and Canada owes obligations to United States and Mexican nationals, but not to its own nationals.

40. The Claimant asserts:

Marvin Feldman, as a United States citizen, is an investor of the United States, a Party under the NAFTA. Mexico is another Party under the NAFTA, and CEMSA, a Mexican enterprise, is Marvin Feldman's investment in the territory

5. See above paragraph 26.

6. Memorial, paragraph 90 and 91, at p. 43: "Article 201, the general definitions article of the NAFTA, defines "national" to include "a natural person who is a citizen or a permanent resident of a Party..." Claimant fits each of these definitions."

of Mexico. Thus, under NAFTA's plain language, Marvin Feldman is entitled to maintain claims against Mexico on CEMSA's behalf.

[Footnote excluded]

41. However, on that interpretation, Mr. Feldman would be a national who could sue both his country of permanent residency and his country of citizenship, a result that, it is submitted, would be absurd, because it is equally true that:

Marvin Feldman, as a [permanent resident of Mexico]... is an investor of [Mexico]... Mexico is [a] Party under the NAFTA, and CEMSA, a Mexican enterprise, is Marvin Feldman's investment in the territory of Mexico.

42. Thus, "under NAFTA's plain language, Marvin Feldman is [not] entitled to maintain claims against Mexico...".

43. Legally, Mr. Feldman's situation is no different than that of a twenty five year resident of the United States holding dual United States and Canadian citizenship in the suing the United States in respect of an investment made while a permanent resident of the United States in the guise of being an investor of Canada. If Mr. Feldman, as a permanent resident of Mexico were entitled to sue Mexico under Chapter Eleven, it would follow that all dual nationals —whether dual citizens or citizens of a Party and permanent residents of another Party— would be similarly entitled to sue either State of their nationality, a result that was clearly not intended by the NAFTA Parties.

44. Since the drafters of NAFTA did not include definitional language as precise as Article 25 of the ICSID Convention⁷ (relying instead upon the interplay of the substantive obligations), it might be instructive to the Tribunal to consider not only the scope and coverage of Chapter Eleven and its obligations, but also the applicable principles of international law. Article 1131 mandates the Tribunal to "decide the issues in accordance with this Agreement and applicable rules of international law".

D. Applicable Rules of International Law

45. Traditionally, individuals have not been regarded as subjects of international law, although States can, and do, confer upon them certain rights, such as the right of direct access to international tribunals that would otherwise be enjoyed by States alone⁸. Individuals, therefore, do not have international rights *per se*. These exist by virtue of international agreements and can only be exercised by the individual to the extent provided for in such agreements.

7. Convention on the Settlement of Investment Disputes between States and Nationals of other States.

8. *Oppenheim's International Law*, 9th ed., (1996), pp. 16-17 and 847.

46. It is in this context that the NAFTA Parties established in Section B of Chapter Eleven a dispute settlement mechanism, whereby an investor of a Party on its own behalf, or 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 bring a claim before an international tribunal that another Party has breached an obligation under Section A (among certain other provisions), and that the investor or, as the case may be, the enterprise that it owns or controls, has incurred loss or damage by reason of, or arising out of, that breach.

47. Thus, recourse to Section B of the NAFTA is limited to investors of a Party as against another Party. It is not open for investors of a Party to bring a claim against that Party under Chapter Eleven⁹.

48. As stated above, the right of access under Section B exists only by virtue of the NAFTA. Because Article 1139 defines investor of a Party to include a "national" of a Party, the nationality of the Claimant for purposes of the Agreement is fundamental to ascertaining whether the Claimant has a right to bring a claim under Section B against Mexico. If he is not an investor of another Party, then the Tribunal must conclude that he lacks the necessary standing to bring the claim and must dismiss it.

E. Nationality in the International Plane

49. "Nationality is the principal link between individuals and international law"¹⁰. In the international plane, nationality finds its principal importance in a State's relationship with other States¹¹ in two main respects:

- a) being based on the notion of allegiance, it is the basis for diplomatic protection —with few exceptions, a State may exercise diplomatic protection only in respect of its nationals; and
- b) it may be subjected to international law whether as a matter specifically regulated by international agreements or because the operation of international agreements is made dependent on nationality¹².

9. See paragraphs 25 and 26.

10. *cf. Oppenheim*, § 379, p. 857. "To the extent to which individuals are not directly subjects of international law, nationality is the link between them and international law. It is through the medium of their nationality that individuals can normally enjoy benefits from international law..." *Id.* § 376, p. 849.

11. Sir Robert Y. Jennings, *Collected Writing of Sir Robert Jannings*, (1998), at p. 122.

12. *Cf. Sir Arthur Watts in V. Lowe and M. Fitz Maurice, Fifty years of the International Court of Justice*, (1996), p. 425: Nationality nevertheless has international consequences; for example, the operation of treaties is frequently dependent on the possession of nationality, and its relevant to the treatment of aliens (whose very definition is that they are non-nationals), to jurisdiction, and —as in the present context— to the presentation of international claims.

50. The NAFTA is such an agreement. The vast majority of Chapter Eleven's provisions apply in respect of certain persons only —investors of another Party— and the link between such persons and international law for purposes of the Agreement is established by the NAFTA itself, and is thus governed by its provisions.

51. Although nationality is primarily a matter within the reserved domain of each State¹³, the NAFTA Parties have given the term "national" a particular meaning for the purposes of the Agreement. In other words, nationality has been contractually defined by the NAFTA Parties for the purposes of the application of the Agreement's provisions, including the right of access to the dispute settlement mechanism established in Chapter Eleven.

52. Oppenheim states:

In principle, and subject to any particular international obligations which might apply [the footnote included in the original text clarifies, in pertinent part: 'States may agree that for the purposes of a particular treaty the term 'national' is to be given a special meaning...], it is not for international law but for the internal law of each state to determine who is, and who is not, to be considered its national.¹⁴

[Emphasis added]

53. Whether the Claimant has an international right to submit a claim to arbitration under the NAFTA —that is, the admissibility of the present claim under Chapter Eleven— is not a consequence of the application of the rules of international law in general, but rather, is a matter of treaty law. (This is not to say, however, that other rules of international law are not relevant to the instant case, but to the extent of a conflict, these must yield to the specific provisions of the NAFTA.)

13. See the Advisory Opinion of the Permanent Court of International Arbitration concerning the *Tunis and Morocco Nationality Decrees* (Collection of Advisory Opinions, Series B, No. 4, 1923, p.24):

The question whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends upon the development of international relations. Thus, in the present state of international law, questions of nationality are, in the opinion of the Court, in principle within this reserved domain.

For the purpose of the present opinion, it is enough to observe that it may well happen that, in a matter which, like that of nationality, is not, in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States...

See also Article 1 of the Hague Convention on Certain Conflicts of Nationality Laws —to which neither Mexico nor the United States are parties, but which nevertheless constitutes an important precedent on the subject.

14. *Oppenheim* § 378, p. 852.

54. The question of the Claimant's nationality in this proceeding arises exclusively within the context of the NAFTA as a matter of the direct application of its provisions. It has no implications beyond the Agreement.

55. Article 201 equates nationals *stricto sensu*, citizens and permanent residents. There is no question that, being a U.S. citizen and a permanent resident of Mexico —neither of which is in dispute— the Claimant is a national of both Parties: in other words, a dual national for the purposes of the NAFTA.

1. Principles of International Law in the Matter of Dual Nationality

56. The general principle concerning the nationality of claims is stated as follows:

[F]rom the time of the occurrence of the injury until the making of the award, the claim must continuously and without interruption have belonged to a person or to a series of persons (a) having the nationality of the State by whom it is put forward, and (b) not having the nationality of the State against whom it is put forward.¹⁵

57. The application of this rule, however, has not always been clear in cases involving persons who possess the nationality of the claimant State as well as that of the respondent State. In such cases, international law essentially provides two solutions:

- a) the principle according to which a claim may not be brought against any State whose nationality the person in question possesses; and
- b) the principle of effective or dominant nationality¹⁶.

58. As the Italian-United States Conciliation Commission stated in the *Mergé Claim*:

Uniformity of precedents in this field [of dual nationality] does not exist, but it can be stated that the *ratio* of nearly all the arbitral and judicial decisions on the international level is either one or the other of the two afore-mentioned principles.¹⁷

15. Ibid., § 150, pp. 512 – 513; Ian Brownlie, *Principals of Intentional Law*, at p 483 (5th ed., 1998).

16. See *Mergé Claim*, International Law Review, 22 (1955), at p. 449.

17. *Merge Claim*, ILR, 22, at p. 450.

a. **The principle that bars a claim concerning an individual who is a national of the State against which the claim is made**

(1) **The 1930 Hague Convention**

59. The straightforward application of the general rule concerning the nationality of claims¹⁸ precludes the submission of a claim concerning a person who is a national of the State against whom the claim is made. This rule has clearly been set forth in the Hague Convention Concerning Certain Conflicts of Nationality Laws of 1930 (the 1930 Hague Convention). Although neither Mexico nor the United States is a signatory of the 1930 Hague Convention, it is nevertheless a useful authority in international law¹⁹.

60. Article 4 of the 1930 Hague Convention provides:

A State may not afford diplomatic protection to one of its nationals against a State whose nationality such persons also possesses.²⁰

61. The 1930 Hague Convention, which recognizes that natural persons may have multiple nationalities, is premised on the sovereign equality of States and the principle that there cannot be responsibility under international law arising from acts of a State towards its own nationals. Thus, it provides that a State may not afford diplomatic protection against another State to a person who possesses the nationality of both.

(2) **The ICSID Convention**

62. Mr. Swan, tendered by the Claimant as an expert witness on international law²¹, suggests:

[W]hen placed in a large historical context, Respondent's interpretation is wholly at odds with all that has occurred in the growth and development of international law.²²

63. Mr. Swan also asserts that "broad dissatisfaction and practical non-conformity" with the principle stated in the 1930 Hague Convention, "led the International Court of Justice in the

18. See above, paragraph 56.

19. "The Hague Convention, although not ratified by all Nations, expresses a *communis opinio juris*, by reason of the near-unanimity with which the principles referring to dual nationality were accepted." *Mergé Claim*, *International Law Review*, 22 (1955), at p. 450.

20. Article 4 of the 1930 Hague Convention has been considered as a rule of customary international law. See *Oppenheim*, p. 516.

21. The Respondent objects to the admission of opinion evidence on international law which, in the Respondent's submission, is a matter for the Tribunal alone to decide. It is not a matter upon which evidence can or should be adduced. However, the Respondent does not object to Mr. Swan's affidavit being treated as a submission of counsel for the Claimant on the points of law it addresses.

22. Affidavit of Alan C. Swan, paragraph (6), at p. 8.

famous *Nottebohm Case* to abandon the formalism of that rule in favor of a more discerning analysis"²³.

64. However, Mr. Swan's affirmations are incorrect. The principle set forth in the 1930 Hague Convention continues to be widely applicable particularly in the context of modern investment agreements.

65. Modern investment agreements evolved from the older generation Friendship, Commerce and Navigation treaties, which provided for the protection of a State's nationals abroad, but where disputes could only be brought by a State against another State. They were, thus, premised on the principle of diplomatic protection.

66. Modern investment agreements also seek to protect a State's investors in the territory of other signatories, and they do not apply in respect of a State's own investors. Modern investment agreements, however, introduced a fundamental change: by providing for investor-State dispute settlement proceedings, they have replaced State intervention through diplomatic protection and espousal of claims of nationals. Article 27 of the ICSID Convention, for instance, expressly provides:

1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its nationals and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

67. This holds true for subsequent investment agreements derived from the ICSID Convention, such as the NAFTA. Indeed, although the NAFTA does not contain an express provision similar to Article 27 of the ICSID Convention, Article 1128 limits intervention of the other NAFTA Parties in a dispute between a Party and an investor of another Party to making submissions on "questions of interpretation" of the Agreement. This is a logical consequence of granting investors of a Party a direct right of access to international tribunals.

68. Although the right of diplomatic protection yielded to a direct right of access to international tribunals, the principle established in Article 4 of the 1930 Hague Convention continues to apply. In fact, Article 25 of the ICSID Convention builds upon, and indeed consolidates, such principle:

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent

23. Ibid. paragraph (7) at p. 8.

subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

(a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute...

[Emphasis added]

69. Paragraph 29 of the Report of the Executive Directors of the Bank for Reconstruction and Development appended to the Convention states in relation to Article 25(2)(a):

It should be noted that under clause (a) of Article 25(2) a natural person who was a national of the State party to the dispute would not be eligible to be a party in the proceedings under the auspices of the Centre, even if at the same time he had the nationality of another State. This ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent.

[Emphasis added]

70. The preliminary draft of the Convention contained the opposite rule: that jurisdiction of the Centre would extend to claims of an investor of a Contracting State who also was a national of the host State if the latter gave its consent. This was rejected. A proposal was made that claims of an investor would be allowed provided that his or her effective nationality was not that of the host State. This proposal was rejected too. It was finally agreed that claims of an investor of a Contracting State who is also a national of the host State would not be admissible²⁴.

71. Mexico is not a signatory of the ICSID Convention²⁵. Nevertheless, because it has been widely accepted by the international community, as shown by the fact that nearly 150 States have signed it, it is evidence of international custom in respect of this legal issue²⁶. As explained by Brownlie:

24. See Moshe Hirsch, *The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes*, 1993, p. 78.

25. Of the three NAFTA Parties, only the United States has signed the ICSID Convention.

26. *Cf. Oppenheim*, § 10, pp. 25-28:

Footnote continued on next page

...treaties are in principle binding only on parties, but the number of parties, the explicit acceptance of rules of law, and, in some cases, the declaratory nature of the provisions produce a strong law-creating effect at least as great as the general practice considered sufficient to support a customary rule. By their conduct, non-parties may accept the provisions of a multilateral convention as representing general international law...²⁷

[Footnotes excluded]

72. The Restatement (Third) of the Foreign Relations Law of the United States asserts:

International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.²⁸

[Emphasis added]

73. The *Restatement* further explains:

International agreements constitute practice of states and as such can contribute to the growth of customary law... Some multilateral agreements may come to be law for non-parties that do not actively dissent. That may be the effect where a multilateral agreement is designed for adherence by a significant number of important states. A wide network of similar bilateral arrangements on a subject may constitute practice and also result in customary law...²⁹

74. In the *North Sea Continental Shelf Cases*, the International Court of Justice confirmed that one of the recognized methods by which new rules of customary international law may formed is through acceptance by the *opinio juris* that a norm, while only conventional or

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“[A]lthough an international court is bound to consider any applicable provisions binding upon the parties, the treaty will in case of doubt be interpreted against the background of customary international law...

[T]here are two essential elements of custom, namely practice and *opinio juris*... This subjective element may be deduced from various sources, including the conclusion of bilateral or multilateral treaties...

[Footnotes excluded]

See also the opinion of the Italian-United States Conciliation Commission in the *Mergé Claim* cited above (footnote 19, in reference to the 1930 Hague Convention, which “although not ratified by all Nations, expresses a *communis opinio juris*, by reason of the near-unanimity with which the principles referring to dual nationality were accepted”.

27. Ian Brownlie, *Principles of International Law*, 5th ed., (1998), p. 12.

28. *Restatement (Third) of the Foreign Relations Law of the United States*, section 102(3), p. 24.

29. *Ibid.*, p. 27

contractual in its origin, may pass into the general corpus of international law, i.e., become a general rule of international law, so as to be binding even for countries which have never, and do not, become parties to a Convention. The Court considered that a very widespread and representative participation in the convention might suffice of itself, even without the passage of any considerable period of time. The Court's arguments for rejecting that the principle of equidistance established in Article 6 of the 1958 Geneva Convention on the Continental Shelf³⁰ had become a rule of customary international law³¹ should be contrasted with Article 25 of the ICSID Convention:

- It provides for no exceptions. Indeed, Report of the Executive Directors of the World Bank noted that the rule of ineligibility is absolute and cannot be cured even if the State party to the dispute had given its consent.
- Although the Convention does not contain an express provision on reservations, it should be noted that no Contracting State has adopted reservations to Article 25.
- Nearly 150 States have signed the ICSID Convention.
- The ICSID Convention was concluded in 1965. It came into force on 14 October 1966 and it has been signed by 49 States, just in the last decade.

75. Mexico has accepted the basic principles contained in the ICSID Convention, even though it is not a Contracting Party³². This is evidenced by the structure of Chapter Eleven and specifically the fact that Article 1120 provides that a disputing investor may submit a claim to arbitration under the ICSID Convention, the Additional Facility Rules of the ICSID or the UNCITRAL Arbitration Rules³³.

30. Article 6 prescribes that, in the absence of agreement, and unless another boundary is justified by special circumstances, the boundary shall be determined by application of the principle of equidistance.

31. The Court argued that the obligation to make use of the equidistance method applied second to a primary obligation to effect delimitation by agreement. It also observed the part played by the notion of special circumstances. It noted that express ability to adopt reservations to Article 6, but not to certain other articles, added to the difficulty of regarding such result as having been brought about, while admitting that this might not of itself prevent that result. The Court concluded the number of ratifications and accessions so far secured—46 signatures and 39 ratifications at the time—was, though respectable, hardly sufficient. Finally, as regards the time element, the Court noted that, at the time, it was over ten years since the Convention was signed, but less than five since it came into force in June 1964, and it was less than three years when the proceedings began.

32. Mexico does not oppose the principles of the ICSID Convention. Chapter Eleven of the NAFTA was the first investment agreement that Mexico has ever entered into. It only came into force in 1994. Since then, Mexico has entered into seven other free trade agreements that contain similar investment chapters, and 13 Agreements for the Reciprocal Protection of Investments which likewise contain similar provisions.

33. Mexico's other free trade agreements and Agreements for the Reciprocal Protection of Investments all contain similar provisions allowing for claims to be submitted under the ICSID Convention.

76. Thus, because the ICSID Convention is limited in its application to investment disputes between States and nationals of other States, and in light of the widespread —indeed almost universal— application and acceptance of its rules, the Respondent respectfully submits that the applicable rules of international law, which the Tribunal is bound to follow, preclude the submission of a claim under Section B of the NAFTA, by an investor who is a national of a Party, if the investor also has the nationality of the disputing Party.

77. Since Mr. Feldman is a national of Mexico under the NAFTA, he lacks the necessary *locus standi* to submit the present claim to arbitration against Mexico, and it must be dismissed.

(3) The Conclusions of the Iran-United States Claims Tribunal

78. The principle set forth in the 1930 Hague Convention was criticized by the Iran-United States Claims Tribunal, which concluded that “the relevant rule of international law... is the rule... of real and effective nationality”³⁴. Mr. Swan urges this Tribunal to consider the reasons given by the Iran-United States Claims Tribunal in evaluating the Respondent’s position³⁵.

79. The Iran-United States Claims Tribunal stated:

Article 4 of the Convention... must be interpreted very cautiously. Not only is it more than 50 years old and found in a treaty to which only 20 States are parties, but great changes have occurred since then in the concept of diplomatic protection, which concept has been expanded... This concept continues to be in the process of transformation, and it is necessary to distinguish between different types of protection, whether consular or claims related.

Moreover, the negotiating history of Article 4 suggests that its application is doubtful in a case such as the present one, where a dual national, by himself, brings before an international tribunal his own claim against one of the States whose nationality he possesses...

Another reason why the applicability of Article 4 to the claims of dual nationals before this Tribunal is debatable is that it applies by its own terms solely to “diplomatic protection” by a State. While this Tribunal is clearly an international tribunal established by treaty and while some of its cases involve disputes between two Governments and involve the interpretation and application of public international law, most disputes (including all of those brought by dual nationals) involve a party on one side and a Government or Government controlled entity on the other, and many involve primarily issues

34. Iran-United States Claims Tribunal: Decision in Case A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality, 23 I.L.M. p. 501. See below, section PART II:E.1.b.

35. Affidavit of Alan C. Swan, paragraph (8)(A), at p. 10.

of municipal law and general principles of law. In such cases it is the rights of the claimant, not his nation, that are to be determined by the Tribunal. This should be contrasted with the situation of espousal of claims in international law which the Permanent Court of International Justice described as follows: "... in taking up a case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law." Moreover, the object and purpose of the Algiers Declaration was to resolve a crisis in the relations between Iran and the United States, not to extend diplomatic protection in the normal sense...³⁶

[Footnotes excluded]

80. The Tribunal added:

This trend toward modification of the Hague Convention rule of non—responsibility by search of the dominant and effective nationality is scarcely surprising as it is consistent with the contemporaneous development of international law to accord legal protections to individuals, even against the State of which they are nationals...³⁷

81. The Iran-United States Claims Tribunal, however, completely overlooked the ICSID Convention, which establishes a modern investor-State dispute settlement mechanism and which, to date, has been signed by nearly 150 countries³⁸. As explained above, the ICSID Convention incorporates and restates the principle contained in Article 4 of the 1930 Hague Convention. Its complete absence from in the analysis of the Iran-United States Claims Tribunal's analysis is, thus, striking, and the Claims Tribunal's conclusions in this respect should therefore be considered with caution.

82. It warrants making the following remarks in response to the comments of Claims Tribunal:

- While the 1930 Hague Convention may today be over 70 years old and was entered into by only 20 States, the ICSID Convention was concluded in 1965 (it came into force on 14 October 1966, after the deposit of the twentieth instrument of ratification) and it has been signed by 49 States, in the last decade alone.
- The Tribunal's conclusion that Article 4 of the 1930 Hague Convention, by its terms, applies solely to diplomatic protection, must be contrasted with Article 27 of the

36. Iran-United States Claims Tribunal: Decision in Case A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality, 23 I.L.M., pp. 497-498.

37. Iran-United States Claims Tribunal, p. 501.

38. By 1984, when the Iran-United States Claims Tribunal rendered its decision concerning dual nationality, the Convention had entered into force for 84 countries.

ICSID Convention which expressly precludes recourse to diplomatic protection, except under very limited —and extreme— circumstances. Yet, the jurisdiction of the Centre does not extend to claims by dual nationals against either State whose nationality they hold.

- Similarly, regarding the Claims Tribunal's doubts as to the applicability of Article 4 of the 1930 Hague Convention to claims brought by dual nationals themselves, which do not involve espousal of claims in international law by the State of the person's nationality, it should be noted that the ICSID Convention specifically applies to disputes between States and nationals (i.e., persons) of other States, that is, to claims brought by such persons.
- In the Respondent's respectful submission, the rules established in Articles 25 and 27 ICSID Convention contradict the assertion made by the Iran-United States Claims Tribunal that the effective nationality principle is consistent with a purported contemporaneous development of international law to accord legal protections to individuals, even against the State of which they are nationals, at least in the context of investor-State disputes.
- Finally, this Tribunal should also bear in mind that the object and purpose of the Algiers Declaration was to resolve a crisis in the relations between Iran and the United States, while the ICSID Convention and the whole network of modern investment agreements are meant to address disputes arising out of the regular flows of cross-border investment.

83. Mr. Swans assertion that each of the reasons stated above, given by the Iran-United States Claims Tribunal "applies with equal if not greater force to cases under Chapter 11 of the NAFTA" is contradicted by the ICSID Convention. His proposition, therefore, cannot be sustained.

b. The principle of the dominant or effective Link

84. The principle of dominant or effective nationality developed in the context of private international law, in cases where municipal courts had to resolve conflicts of nationality laws³⁹, and thereafter was transported into the sphere of public international law and developed through decisions of several international tribunals. Perhaps the leading decision concerning this principle, which has found its principal application in cases of dual-nationality, is that of the International Court of Justice in the *Nottebohm Case*⁴⁰, which has served as a point of reference to many other international tribunals.

39. See *Mergé Claim*, p. 454.

40. *Nottebohm Case*, I.C.J. Reports (1955), p. 4.

85. This case involved a claim by Liechtenstein against Guatemala on behalf of Mr. Frederic Nottebohm, a native German who had naturalized as a national of Liechtenstein, but who had been a permanent resident of Guatemala for 34 years when the events that gave rise to the claim occurred. It is especially noteworthy because, although it is not a case of dual-nationality, dual nationality nevertheless served as the point of departure for the Court's analysis. As explained by the Italian-United States Conciliation Commission in its decision on the *Mergé Claim*, "it is interesting to note... what it set forth in the reasoning of the decision in regard to the problem of dual nationality when such problem arises because of the simultaneous possession of the nationality of two States involved in the dispute"⁴¹.

86. The Court stated:

International arbitrators have decided in the same way numerous cases of dual nationality, where the question arose with regard to the exercise of protection. They have given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the persons concerned and one of the States whose nationality is involved.⁴²

[Emphasis added]

87. Similarly, the Iran-United States Claims Tribunal stated that: "While Nottebohm itself did not involve a claim against a State of which Nottebohm was a national, it demonstrated the acceptance and approval by the International Court of Justice of the search for real and effective nationality based on the facts of a case..."⁴³.

88. Thus, the principle of real and effective nationality applied by the Court rests upon a search for the connecting factors between the person and the States concerned during the period preceding, contemporaneous with, and following the events in question:

... [T]he Court must ascertain... whether the factual connection between Nottebohm and Liechtenstein in the period preceding, contemporaneous with and following his naturalization appears to be sufficiently close, so preponderant in relation to any connection which may have existed between him and any other State, that it is possible to regard the nationality conferred

41. *Mergé Claim*, p. 452.

42. *Nottebohm Case*, p. 23. See Brownlie: "A... question arising from the decision is whether an effective nationality can exist in the absence of a formal status in the internal law of the state concerned. The statements of the principle in the Judgment and the finding that Nottebohm's close connection was with Guatemala lead to the conclusion that in can so exist".

43. Iran-United States Claims Tribunal: Decision in Case A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality, 23 I.L.M., p. 500.

upon him as real and effective, as the exact juridical expression of a social fact of a connection which existed previously or came into existence thereafter.⁴⁴

[Emphasis added]

89. The Court referred to the different factors to be taken into consideration in determining such stronger connecting factors:

Different factors are taken into consideration, and their importance will vary from one case to the next: the habitual residence of the individual concerned is an important factor, but there are other factors such as the centre of his interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children, etc.⁴⁵

90. Having analyzed the facts, the Court found that there was:

...an absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, that his naturalization in no way weakened.⁴⁶

91. The Court thus held that the Claim was inadmissible. The Court did not dismiss the claim based on the existence of a real and effective link between Nottebohm and Guatemala, but rather on the absence of such a link between him and Liechtenstein. Yet, on the basis of the "factors" to be taken into consideration in determining the nationality that "accorded to the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved", it still established that there was "a long-standing and close connection between him and Guatemala" (emphasis added).

92. Thus, Mr. Swan is incorrect in stating that:

There is no precedent in the diplomatic protection cases, no hint in the commentaries, suggesting that, under the doctrine of the "effective nationality," an international tribunal must inquire into the genuineness of the claimant State's relationship to its citizen when the latter claims only one citizenship and when the only tie to the respondent State is residence.⁴⁷

93. Indeed, the Court's conclusions in the *Nottebohm Case* suggest quite the contrary.

44. *Nottebohm Case*, p. 25.

45. *Nottebohm Case*, p. 23 - 24.

46. *Nottebohm Case*, p. 27.

47. Affidavit of Alan C. Swan, (8)(B), at p. 13.

94. The Italian-United States Conciliation Commission, in resolving the *Mergé Claim* —a case of dual-nationality— followed an approach similar to that taken by the International Court of Justice in the *Nottebohm Case*. The Commission concluded:

The principle, based on the sovereign equality of States, which excludes diplomatic protection in the case of dual nationality, must yield before the principle of effective nationality whenever such nationality is that of the claiming State. But it must not yield when such predominance is not proved, because the first of these two principles is generally recognized and may constitute a criterion of practical application for the elimination of any possible uncertainty.⁴⁸

95. The Commission added:

In order to establish the prevalence of the United States nationality in individual cases, habitual residence can be one of the criteria of evaluation, but not the only one. The conduct of the individual in his economic, social, political, civic and family life, as well as the closer and more effective bond with one of the two States must also be considered.⁴⁹

96. Similarly, in its Decision in Case A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality, the Iran-United States Claims Tribunal held:

[T]he rule of international law which the Tribunal may take into account for purposes of interpretation, as directed by Article 31, paragraph 3(c), of the Vienna Convention, is the rule that flows from the dictum of *Nottebohm*, the rule of real and effective nationality, and the search for “stronger factual ties between the person concerned and one of the States whose nationality is involved”...

In determining the dominant and effective nationality, the Tribunal will consider all relevant factors, including habitual residence, center of interests, family ties, participation in public life and other evidence of attachment.⁵⁰

97. The essential facts in the *Nottebohm Case* and some facts in the instant one bear a striking resemblance; in other respects, the facts show an even closer connection of Mr. Marvin Feldman to Mexico.

98. Frederic Nottebohm was a permanent resident of Guatemala for 34 years. As stated in the Court’s decision:

48. *Mergé Claim*, p. 455.

49. *Mergé Claim*, p. 455.

50. Iran-United States Claims Tribunal: Decision in Case A/18 Concerning the Question of Jurisdiction over Claims of Persons with Dual Nationality, 23 I.L.M., pp. 501-502.

In 1905 he went to Guatemala. He took up residence there and made that country the headquarters of his business activities, which increased and prospered; these activities developed in the field of commerce, banking and plantations. Having been an employee in the firm of Nottebohm Hermanos, which had been founded by his brothers Juan and Arturo, he became their partner in 1912 and later, in 1937, he was made head of the firm. After 1905 he sometimes went to Germany on business and to other countries for holidays. He continued to have business connections in Germany... Some of his other brothers, relatives and friends were in Germany, others in Guatemala. He himself continued to have his fixed abode in Guatemala until 1943.⁵¹

99. The Claimant makes the following allegations (in some cases undocumented) as proof of his ties to the United States:

- a) He is an American citizen by birth⁵².
- b) He lived in the United State for thirty-three years, "over half of his life"⁵³.
- c) He holds a United States Passport and a Social Security number⁵⁴.
- d) He has a twin brother in Miami, Florida and other relatives in the United States⁵⁵.
- e) He worked in various cities of the United States, including Miami, Florida and San Antonio, Texas⁵⁶.
- f) He maintains his voter registration in San Antonio, Texas; he claims to have voted in every Presidential election in the United States since moving to Mexico in 1973 and plans to vote again this year⁵⁷.
- g) He paid taxes in the United States when he used to live there and, to the best of his memory, has filed a U.S. federal tax return every year since he moved to Mexico⁵⁸.

51. *Nottebohm Case*, p. 13.

52. Second Declaration of Marvin Feldman, paragraph 1, at p. 1.

53. *Ibid.*, paragraph 2, at p. 1.

54. *Ibid.*

55. *Ibid.*

56. *Ibid.*

57. *Ibid.*, paragraph 7 at p. 3.

58. *Ibid.*

- h) He has bank accounts and an account with a securities brokerage in the United States⁵⁹.
- i) He has an American Express card issued in Fort Lauderdale, Florida⁶⁰.
- j) He signed a contract to purchase a house in Aventura, Florida, but was unable to complete the purchase⁶¹.

100. A description of applicable immigration laws and regulations prepared by Dr. Sergio López, an expert on Mexican law, is contained in Annex 1. A summary of the pertinent details is set out in the following paragraphs.

101. Mr. Feldman has very extensive connecting factors to Mexico:

- a) He has resided continuously in Mexico for twenty-seven years, more than two thirds of his adult life. He voluntarily applied for *inmigrante* status in 1985. As an *inmigrante*, in order to become the General Director of his former wife's family business, Recuperadora de Materiales Blix, S.A. de C.V.⁶² (Blix), and thereby expressing his desire reside permanently in Mexico, making it the center of his social, family, cultural, business and other activities⁶³. On 18 October 1991 he was granted the *inmigrado* status, thereby concluding the process that he began as an *inmigrante*, having reaffirmed his intention to become a permanent resident each year for five consecutive years⁶⁴.

59. Ibid.

60. Ibid.

61. Ibid.

62. Exhibit 1.

63. Statement of Sergio López:

Inmigrante is a foreigner who legally enters the country with the purpose of residing there permanently, while he or she is granted the *inmigrado* status. It is a transitory situation, the sole purpose of which is to demonstrate, in the facts, a true and continuous desire to establish permanently in Mexico and to make it the center of his or her social, family, cultural, business and other activities. Acquisition of the *inmigrante* status is entirely a voluntary act, in order to demonstrate to the Mexican State a genuine intent to make Mexico the place of his or her permanent residence. For such reason, the *inmigrante* shall reaffirm such intent before the immigration authority each year for five consecutive years and, during such period, he or she may not leave the country for more than 18 consecutive months.

64. Ibid.

Inmigrado is a person who acquires rights of permanent residence in Mexico. This status is not obtained automatically: after the five year period has elapsed and the person has fully satisfied the legal requirements and conditions imposed upon granting the *inmigrante* status, he or she may then apply within six months to change his or her migratory status to that of *inmigrado*.

Again, this is a voluntary act, through which the person concludes the process that began upon application for the *inmigrante* status, and whereby the State, being fully satisfied of his conviction

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- b) He has married Mexican nationals on two occasions, first in 1974 and again in 1999. He is the natural father of four Mexican children, born in 1974, 1976, 1981 and 1988, all of whom habitually reside in Mexico City⁶⁵. He had his youngest child with another Mexican national, whom he never married. He also has a grandson who is a Mexican national.
- c) Mexico City is the center of his business. In 1985 he was appointed General Director Blix—a Mexican company dedicated to the purchase, sale, import, export and general trade of photographic and radiology products. He later became its principal shareholder⁶⁶. In 1988, he incorporated CEMSA, along with four other Mexican nationals, and sometime thereafter he claims to have acquired all of the shares in that company. In his U.S. Individual Income Tax Returns filed for fiscal years 1994 through 1998, Mr. Feldman declared that he is an employee of CEMSA. As an employee of CEMSA, Mr. Feldman is also registered with to the Mexican Social Security Institute⁶⁷
- d) Mr. Feldman pays income tax in Mexico: he is under a legal obligation to do so⁶⁸, and has so declared to the United States Department of the Treasury. The *Secretaría de Hacienda y Crédito Público* has confirmed that Mr. Feldman pays income tax in Mexico, and that, since commencing activities there, he has continuously filed individual tax returns with the Mexican fiscal authorities⁶⁹.

Also, Mr Feldman has declared to the United States Department of the Treasury that he is required to pay income tax in Mexico, the place of his bona fide

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of making Mexico the center of his social and family life, his business, etc., grants him or her the rights of permanent residence.

65. Letter of Gabriel Oliver to Hugo Perezcano Díaz dated 1 September 2000, paragraph 2 at p. 2. Exhibit 2. See also Marvin Feldman's tax returns filed with the Claimant's response to Respondent's request for documents and Information Relating to the Preliminary Issues dated 6 September 2000 where he declared on 1994, 1995 and 1996 that his "total family" lived with him abroad for the "total year".

66. Letter of Marvin Feldman to Arturo Mejía Cruz, dated 10 February 1990. Exhibit 3.

67. Article 12 of the Social Security Act requires mandatory registration of all persons who are under the permanent or temporary employment of another person, whether the employer is a natural or juridical person, regardless of the employers economic character, and regardless of the origins of the labor relation.

68. This is an obligation under both, the Income Tax Act of Mexico (Article 1 provides that Residents—whether natural or juridical persons—in Mexico are required to pay income tax, in respect of all their income, regardless of where the source of wealth is located) and the Under the Convention between the Government of the United States of America and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (Article 15 provides: "salaries, wages, and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State").

69. Letter of Gabriel Oliver to Hugo Perezcano Díaz dated 1 September 2000, paragraph 4 at p. 1. Exhibit 2

residence for tax purposes⁷⁰. He has also declared that he has not submitted a statement to the Mexican authorities that he is not a resident of Mexico. . The Claimant asserts that he has filed tax returns in the United States every year since moving to Mexico in 1973. However, he has done so as a resident of Mexico. The Tribunal should also note that the Claimant's United States tax returns have been redacted to eliminate "personal financial information"⁷¹.

- e) Mr. Feldman's undocumented allegations that he has bank accounts, an account with a securities brokerage in the United States and a single credit card issued in the United States, should be contrasted with his admission that he has two personal bank accounts and three business accounts for CEMSA (Mr. Feldman refused to provide the records for such accounts. He also denies ever having been issued a credit card in Mexico)⁷².

- f) Mr. Feldman offers a self-serving statement that he plans to return to the United States as soon as he is able financially to do so and offers as proof of it a contract to purchase a house in Aventura, Florida, that he signed in 1997. The Tribunal should note, however, that Mr. Feldman currently lives with his wife, a Mexican national, in an apartment just outside of Mexico City, of which he claims to own 50% (he claims that his wife owns another 50%)⁷³. His sons, daughter and grandson, are all Mexican nationals and all live in Mexico. According to Mr.

70. Under the Convention between the Government of the United States of America and the Government of the United Mexican States for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, resident of a Contracting State means:

any person who, under the laws of that State, is liable to tax therein by reason of his domicile, residence, place of management, place of incorporation, or any other criterion of a similar nature. However, this term does not include any person who is liable to tax in that State in respect only of income from sources in that State.

2. Where by reason of the provisions of paragraph 1, an individual is a resident of both Contracting States, then his residence shall be determined as follows:

- a) he shall be deemed to be a resident of the State in which he has a permanent home available to him; if he has a permanent home available to him in both Contracting States, he shall be deemed to be a resident of the State with which his personal and economic relations are closer (center of vital interests);
- b) if the State in which he has his center of vital interests cannot be determined, or if he does not have a permanent home available to him in either State, he shall be deemed to be a resident of the State in which he has an habitual abode;
- c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident of the State of which he is a national;
- d) in any other case, the competent authorities of the Contracting States shall settle the question by mutual agreement.

71. Letter of Mr. Mark Feldman to Hugo Perezcano Díaz dated 6 September 2000, at p. 2.

72. Response of Marvin Feldman to Respondent's Request for Information Identified in Paragraph 14 of Respondent's Letter to the Tribunal dated August 29, 2000 as Relating to Preliminary Issues, subparagraph (b).

73. Response of Marvin Feldman to Respondent's Request for Information Identified in Paragraph 14 of Respondent's Letter to the Tribunal dated August 29, 2000 as Relating to Preliminary Issues, subparagraph (c).

Feldman's records, he has additionally purchased directly the following real property in Mexico:

- i) a share of four apartments located in the Cuauhtémoc neighborhood of Mexico City;
- ii) a house and a lot in the Algarín neighborhood , Mexico City;
- iii) a house in the Polanco neighborhood in Mexico City;
- iv) a warehouse in the Tánsito neighborhood in México City (which he donated to one of his sons and his daughter who continue to own it); and
- v) a house and a lot in Cuernavaca, Morelos⁷⁴

This is a total of 11 properties. In every case, he has declared that he bought them for residential purposes.

Even if Mr. Feldman has sold all but his 50% ownership in his Huixquilucan apartment, as he now claims but without adducing any proof, the fact that he has continuously bought and sold real property in Mexico for residential purposes, in addition to the fact that his whole family lives in Mexico (except perhaps a twin brother), and that his principal place of business continues to be Mexico, shows quite a different intention: one which comports to his uninterrupted residence in Mexico for over 27 years.

102. Mr. Feldman alleges that he:

applied for this [*inmigrado*] status because I was advised by government employees, that, without this document, my prior residence status would expire requiring me to go through annual formalities renewing the FM-2 certificate I had then.

103. The Respondent rejects this unsupported allegation that he applied for the *inmigrado* status on advice of unidentified government employees, in order to avoid administrative hassles. The purpose of becoming an *inmigrado*, as stated by Dr. Sergio López, is to obtain the rights of permanent residence in Mexico, having demonstrated to the Mexican State a conviction to make Mexico the center of the person's social, family and cultural life, of his business activities, etc.⁷⁵

104. The *inmigrado* status is not one that can be applied for directly. It is the conclusion of a voluntary, albeit lengthy, process. A person must first apply to become an *inmigrante*:

74. Exhibit 4.

75. See declaration of Sergio López.

Inmigrante is a foreigner who legally enters the country for the purpose of residing there permanently, while he or she is granted the *inmigrado* status. It is a transitory situation, the sole purpose of which is to demonstrate, in the facts, a true and continuous desire to establish permanently in Mexico and to make it the center of his or her social, family, cultural, business and other activities. Acquisition of the *inmigrante* status is entirely a voluntary act, in order to demonstrate to the Mexican State a genuine intent to make Mexico the place of his or her permanent residence. For such reason, the *inmigrante* shall reaffirm such intent before the immigration authority each year for five consecutive years and, during such period, he or she may not leave the country for more than 18 consecutive months.⁷⁶

105. Before applying to become an *inmigrante*, Mr. Feldman had entered the country as a tourist, and requested a change in his status in order to appointed General Director of his former wife's business, Recuperadora de Materiales Blix, S.A. de C.V. Mr. Feldman then went through the normal five-year process in order to become an *inmigrado*.

106. Mr. Feldman, having thus confirmed to the Mexican State his firm intention of establishing permanently in Mexico, and having so demonstrated by his daily conduct and his close personal, family and other ties to Mexico—as evidenced by his marriage to a Mexican national, his four Mexican offspring, the numerous properties in Mexico that he had by then acquired, his expanding business activities in Mexico—in 1990 he applied for a change in migratory status.

107. Prior to granting the *inmigrado* status, the immigration authorities conducted an investigation surrounding Mr. Feldman's compliance of civil obligations toward his offspring on account of his divorce. During the course of the investigation Mr. Feldman vehemently defended his right to obtain his *inmigrado* status. Mr. Feldman made the following submission:

"I understand that being the father of Mexican offspring, I have the right [to a change in migratory status to *inmigrado*], period... Given the current changes... Mexico needs people like me. People that create jobs, that export for the well-being of many Mexicans beyond oneself... I have four Mexican offspring and, thus the right to legally be in the country, so I therefore kindly request the issuance of the proper documentation [as an *inmigrado*]...

[Emphasis added]

108. Certainly, administrative facilities are inherent benefits that *inmigrados* have *vis à vis* non-*inmigrados*. But the argument that Mr. Feldman went through this process for such purpose only cannot be sustained, and is contrary to the facts.

76. Declaration of Sergio López.

109. Mr. Feldman's investments in Mexico, Recuperadora de Materiales Blix, S.A. de C.V. (incorporated on 13 October 1981 of which he became its principal shareholder at least by 10 February 1990), *Corporación de Exportaciones Mexicanas, S.A. de C.V.* (CEMSA) (incorporated in 1988) are all Mexican enterprises dedicated to imports and exports of any kind of goods including photographic and radiology products. These investments were thus made long before the NAFTA negotiations even began.

110. The capital used to establish CEMSA and to finance its operations has come from Mexican sources, not the United States or any other foreign source. Mr. Feldman's associates in CEMSA are Mexican nationals⁷⁷. The Claimant has refused to provide the information and documents that concerning the source of capital that the Respondent requested on numerous occasions. Mr. Feldman has admitted tersely, however, that "[a] number of individuals lent CEMSA different sums of money from time to time" and that "CEMSA has outstanding debts" with Messrs. César Poblanno and Mr. Gustavo Gamez, two Mexican nationals, and Dr. Ariel Zagorin, presumably also a Mexican national. Indeed, neither Mr. Feldman nor CEMSA has a significant commercial connection with the United States other than as an export market for Mexican goods.

111. Considering the facts relating to Mr. Feldman's *inmigrado* status and his investment in CEMSA, in light of the factors identified by the International Court of Justice and other international tribunals (i.e. the habitual residence of the individual, the center of his interests, his family ties, conduct in economic, social, political and civic life, his closer attachment to one of the States involved and inculcated in his children, etc.), it is unquestionable that Mr. Feldman has "stronger factual ties" with Mexico than the United States.

F. Alleged "Waiver" of the Respondent's Right to Contest the Claimant's Standing

112. The Claimant contends that by failing to raise its objection to the Claimant's standing before this claim was submitted to arbitration the Respondent has "waived any possible objection based on Claimant's nationality and is equitably estopped from challenging Claimant's standing at this late (sic) in the proceedings"⁷⁸.

113. The Respondent notes that:

- a) the Notice of Arbitration states, in the first sentence, that the Claimant is "a national of the United States who is not a Mexican national";

77. Mr. Israel Litmanwicz Litmanwicz, Ana Fridman, Virginia Andrade Salinas and María de la Luz Rodríguez Rodríguez. See deed of incorporation of CEMSA, pp. 20 and 21. Exhibit 5.

78. Memorial, paragraph 115.

- b) the first time the Respondent is entitled to assert a defense under the Arbitration Rules is upon filing the Counter-memorial on the merits;
- c) Article 46 (2) of the Arbitration Rules (reiterated in Procedural Order No. 2) requires any objection that the dispute is not within the competence of the Tribunal shall be filed ... as soon as possible after the constitution of the Tribunal, and in any event no later than filing of the Counter-memorial.

114. The Claimant seemingly contends that the Respondent should have asserted its objection to his standing to bring a claim before this claim was submitted to arbitration on the grounds that officials in SChP and/or counsel assigned to defend this proceeding should be imputed with the knowledge of *Secretaría de Gobernación* that the Claimant obtained *inmigrado* status (and thus became a permanent resident) in 1991⁷⁹.

115. In fact, immigration files kept by *Secretaría de Gobernación* are confidential and can only be released to the individual involved or upon his consent, or else by court order⁸⁰.

116. Accordingly, it is not possible or appropriate to impute the knowledge of *Secretaría de Gobernación* to SChP officials or to counsel.

117. Counsel for the Respondent first became aware of the Claimant's *inmigrado* status upon preparing the Respondent's request for production of documents. Closer scrutiny of documents appended to the Notice of Arbitration revealed a notarial certificate which recited the terms of an official letter dated 18 October 1991 from *Secretaría de Gobernación* conferring *inmigrado* status on the Claimant⁸¹. The Respondent thus requested production of documents and witness information concerning the Claimant's status as an "investor of a Party". Soon thereafter it requested the Tribunal to include the standing issue in the preliminary questions⁸².

118. The Respondent accordingly submits that it has complied with Article 46(2) of the Arbitration Rules.

119. The Claimant contends that he "placed himself at a disadvantage, relying on Respondent's lack of objection to Claimant's standing"⁸³. Although he does not testify to this allegation, his assertion through counsel in paragraph 115 of the Memorial seems to imply that he knew there was a question as to his standing before he submitted his claim to arbitration.

79. Memorial, paragraph 111.

80. See the Respondent's letters to the Claimant dated 9 August and 22 August 2000.

81. See the Respondent's Request for Production of Documents dated 31 May 2000, paragraph 3(g).

82. See the Respondent's letter to the Tribunal dated 30 June 2000, paragraphs 14—17.

83. Memorial, paragraph 115.

120. In any case, through counsel he now contends that he acted to his prejudice by giving a waiver of his right to initiate or continue domestic claims for damages as required by NAFTA Article 1121. This argument is unsupportable. In fact:

- a) the Claimant has initiated and continued claims for declaratory relief in the domestic courts, challenging both SCHP's denial of the IEPS rebates he alleges are owing for cigarettes exported in October and November 1997 and the validity of the 1998 amendment to the IEPS law⁸⁴; and
- b) the Claimant does not say what claims for damages he could and would have pursued in the domestic courts instead of submitting this claim to arbitration; and
- c) the Claimant vigorously contests the Respondent's position on the standing issue which he characterizes, through counsel, as "a weak after-thought (sic)".

121. The Respondent accordingly submits that there is no basis, in fact or in law, to deny the Respondent's right to challenge the Claimant's standing in this proceeding.

G. Conclusion

122. Whether the Tribunal accepts the Respondent's argument that dual nationals are automatically precluded from suing either Party in which they are nationals, or whether the Tribunal applies the dominant and effective nationality test, the result is the same: the claim must be dismissed. For the purposes of Chapter Eleven of the NAFTA, the Claimant is an investor of Mexico, not an "investor of another Party." The Tribunal thus lacks jurisdictional *ratione personae* and to receive and consider the claim would fall outside the Tribunal's jurisdiction under Chapter Eleven. Such an act would then render any award highly susceptible to being set aside under the law of the place of arbitration.

84. Notice of Arbitration, p. 7; First Feldman Declaration, paragraph 21.

PART III: THE REMAINING PRELIMINARY QUESTIONS

123. The remainder of this Counter-memorial addresses the other four other questions described in paragraphs 5 (a) to 5 (d) of Procedural Order No. 4:

- 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;
- c) whether the Respondent is entitled to raise any defense on the basis of the 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 on relying on such time limitation; and
- d) whether measures alleged to be taken by the Respondent in the period between late 1992 and January 1, 1994, when the 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.

124. In this Part:

- a) "Memorial" refers to the Claimant's Memorial on Preliminary Issues;
- b) "Counter-memorial" refers to the Respondent's Counter-memorial on Preliminary Questions;
- c) "SHCP" refers to *Secretaría de Hacienda y Crédito Público*, the Secretariat of Finance and Public Credit, (also referred to in the Memorial as "Hacienda"); and
- d) "Arbitration Rules" refers to the ICSID Arbitration (Additional Facility) Rules.

A. The Purpose of Determining the Jurisdiction Issues as Preliminary Questions

125. The entire claim is moot if the Tribunal finds that it lacks jurisdiction *ratione personae*. If the Tribunal finds that it has such jurisdiction, it must then consider the second set of questions.

126. The Respondent's submissions on the Tribunal's competence to decide the various matters in dispute are based on the well-established principle of arbitration law that an arbitral tribunal's jurisdiction is limited to deciding questions that are properly within the scope of the agreement between the parties to submit their dispute to arbitration.

127. In the case of arbitration under Section B of Chapter Eleven, a disputing Party's consent to arbitrate is invoked by the disputing investor's compliance with all procedural requirements of Section B. The provisions of the Chapter Eleven (and other applicable provisions of the NAFTA) define the agreement to arbitrate thus formed. The Tribunal has no jurisdiction to decide questions that do not properly fall within the scope of that agreement.

128. The Respondent's request for rulings on the Tribunal's jurisdiction is aimed at bringing some semblance of order to this proceeding by establishing which, if any, claims can be advanced and which cannot. The Tribunal's answers to the remaining questions will provide substantial guidance to the parties in determining:

- a) the legally relevant time frame applicable to this case —i.e. the first date that the Claimant may allege amounts to a breach of Section A of Chapter Eleven for which compensation could conceivably be claimed and the last date that such alleged breaches may be included in the submission of this claim to arbitration; and
- b) the extent to which the Claimant's demands for "discovery" of documents are relevant to admissible claims.

B. Chapter Eleven of the NAFTA

129. An investor of another Party can initiate arbitration under Chapter Eleven only if it (or an enterprise of the Party that it owns or controls) has incurred loss or damage arising out of a breach of a substantive obligation under Section A⁸⁵. It cannot complain that the host Party violated its domestic law or customary international law, or that the investor was otherwise

85. See Articles 1116 and 1117.

“mistreated”. There must be a measure⁸⁶ and the measure complained of must amount to a breach of an express obligation under Section A⁸⁷.

130. Of significance to this particular case are the provisions of Article 2103 which state that nothing in the NAFTA applies to taxation measures, except as provided by that article. The only substantive obligations that apply to taxation measures without qualification are Articles 1102 (National Treatment) and Article 1103 (Most Favored Nation Treatment). Article 1105 (Minimum Standard of Treatment), by its omission from Article 2103, does not apply to taxation measures.

131. Article 1110 (Expropriation and Compensation) applies to taxation measures only to the extent and in the manner prescribed by Article 2102(6):

Article 1110 (Expropriation and Compensation) shall apply to taxation measures except that no investor may invoke that Article as the basis for a claim under Article 1116 (Claim by an Investor of a Party on its Own Behalf) or 1117 (Claim by an Investor of a Party on Behalf of an Enterprise), where it has been determined pursuant to this paragraph that the measure is not an expropriation. The investor shall refer the issue of whether the measure is not an expropriation for a determination to the appropriate competent authorities set out in Annex 2103.6 at the time that it gives notice under Article 1119 (Notice of Intent to Submit a Claim to Arbitration). If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 1120 (Submission of a Claim to Arbitration).

132. This case deals exclusively with taxation measures—the implementation, interpretation and application of the IEPS law at various points in time. Accordingly, the claims that are admissible in this proceeding are set out in Section A alone, to the extent they are permitted by Article 2103, and by the substantive and procedural requirements of Section B.

C. The Legal Basis of the Claim Before the Tribunal

133. On February 28, 1998, the Claimant delivered a notice of his intention to submit a claim to arbitration pursuant to NAFTA Article 1119. The notice asserted that Mexico had breached Articles 1102 (National Treatment), 1104 (Standard of Treatment), 1105 (Minimum Standard of Treatment), 1106 (Performance Requirements) and “especially 1110 (Expropriation and

86. Article 201 (Definitions of General Application) provides that, for the purposes of the NAFTA, “measure includes any law, regulation, procedure, requirement or practice”.

87. See, for example, *Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2 Award, 1 November, 1999, at paragraph. 84, p. 27. Mr. Jan Paulsson, President.

Indemnification)" (sic). From the very beginning the Claimant has improperly included Article 1105 as an independent ground of alleged breach.

134. The factual description of the claim recites, in part, CEMSA's alleged right to obtain IEPS rebates on cigarette exports and an allegation that this right had been confirmed by the Mexican courts. It concludes by alleging that:

"...the responsible officials have violated our legitimate rights; they have applied us (sic) illegal, unconstitutional, unequal and unjust treatment, unlike what they give to producers, and they have resorted to measures tantamount to expropriation of an investment that has a value exceeding U.S.\$13,000,000..."⁸⁸

135. Even if the factual description could be claimed to support an alleged denial of treatment in accordance with international law contrary to Article 1105 (which, as noted above, is inadmissible in the case of taxation measures) or an expropriation contrary to Article 1110, it does not state any facts or circumstances that could support an alleged breach of Articles 1102, 1104 or 1106.

136. The Claimant eventually referred the following issues to the "appropriate competent authorities" pursuant to Article 2103(6):

- a) Mexico's alleged refusal to implement a decision of the Mexican Supreme Court rendered prior to NAFTA's entry into force concerning the rebate of certain excise taxes on the export of cigarettes;
- b) Mexico's refusal to provide rebates of excise taxes to CEMSA for cigarettes allegedly exported in October and November 1997; and
- c) Mexico's amendment to the IEPS law, effective January 1, 1998, which limits the availability of rebates of certain excise taxes to those who purchase cigarettes in the "first sale" of the cigarettes in Mexico⁸⁹.

137. The Claimant received a determination that Mexico's amendment to the IEPS law effective January 1, 1998 was "not an expropriation". The competent authorities were unable to agree on the limited information available to them that the other measures that the Claimant submitted for consideration were not an expropriation.

88. Notice of Intent to Submit a Claim, paragraph. 7, p. 4.

89. Letter of Donald C. Lubick, Assistant Deputy Secretary of the United States Department of Treasury, to Tomás Ruiz, Undersecretary of Revenue of Mexico's Secretariat of the Treasury and Public Credit, dated 17 February 1999. See Notice of Arbitration, Exhibit 6.

138. The Assistant Deputy Secretary of the United States Department of Treasury stated that no inference should be drawn concerning his views or the views of the United States government regarding whether these measures amounted to an expropriation under Article 1110. Simply put, the Claimant could contend that they violated Article 1110, it remained open for the Respondent to contend that neither amounted to an expropriation, in fact or in law.

139. About 10 weeks later, the Claimant submitted this claim to arbitration. In his Notice of Arbitration, he acknowledged the requirements of Article 2103(6) and stated:

In this case the competent authorities have acted. The Investor referred the issue to the competent Mexican authority and to the United States Government on February 18, 1998. Subsequently, the Investor referred the issue directly to the competent U.S. authority on August 18, 1998. After detailed discussions, the competent authorities reached an agreement that is set forth in a letter from Donald Lubick, Assistant Secretary of the United States Department of the Treasury, dated February 17, 1999, and a letter from Tomas Ruiz, Under Secretary of Revenue of the Mexican Ministry of Finance and Public Credit, dated February 18, 1999... This agreement bars NAFTA arbitration of claims based on certain Mexican legislation effective January 1, 1998, but allows the other expropriation claims asserted by CEMSA under NAFTA to proceed to arbitration.⁹⁰

140. Through legal artifice the Claimant has attempted to avoid two obvious limitations on his claim—the fact that Article 1105 cannot apply to taxation measures and the ruling of the competent authorities as to which of the three identified expropriation claims could proceed to arbitration—as follows:

- a) by contending that the reference to Article 1105(1) in Article 1110(1)(c) entitles him to assert claims based on Article 1105—such as denial of justice— notwithstanding its express exclusion in Article 2103(1) from the provisions of Chapter Eleven that can apply to taxation measures;
- b) by contending that he can assert an expropriation claim based on a bare (and new) allegation that Mexico's taxation authorities "made a decision in November 1997 to put CEMSA of business", notwithstanding that the only "measures" he has been able to identify in connection with this are the refusal to pay rebates for cigarettes allegedly exported during October and November 1997 and the amendment to the IEPS law that took effect on January 1, 1998; and
- c) by alleging general breaches of international law—such as "confiscation", "discrimination", and "denial of justice"— while avoiding identifying any "measures" taken by the Respondent or any specified breach of Section A of Chapter Eleven.

90. Notice of Arbitration, p. 4.

141. The Notice of Arbitration describes the “claims and issues in dispute” as follows:

This dispute involves claims for compensation and damages of U.S.\$50 million ... for measures tantamount to nationalization or expropriation and constituting a denial of justice in violation of the rules and principles of international law and NAFTA Articles 1110 and 1105(1). The claims relate to Respondent’s arbitrary, discriminatory and confiscatory actions during the period January 1, 1992-December 31, 1997, with the purpose and effect of suppressing CEMSA’s cigarette export business including, inter alia,

- (a) Respondent’s refusal to allow CEMSA to export cigarettes with rebate of excise taxes as provided by law during the period January 1, 1992 – December 31, 1997, except for the period June 1996 – November 1997, when such rebates were allowed;
- (b) Respondent’s refusal to implement a decision of Mexico’s Supreme Court of Justice issued on August 18, 1993 holding that the Mexican Constitution requires the tax authorities to allow CEMSA rebates of excise taxes for cigarette exports on the same basis that such rebates are made to cigarette manufacturers;
- (c) Respondent’s refusal to rebate 18,975,730 pesos in excise taxes owed to CEMSA in respect of cigarette exports that CEMSA made in October and November 1997 in reliance on the prior approval of the competent Mexican tax authorities;
- (d) Respondent’s refusal to allow CEMSA to export cigarettes with tax rebates in December 1997; and
- (e) Respondent’s decision in November 1997 to shut down CEMSA’s cigarette export business so as to reinstate an illegal export monopoly for cigarette producers.⁹¹

142. The Notice of Arbitration goes on to allege that the Respondent committed various violations of international law, citing the *Restatement (Third) of the Foreign Relations Law of the United States*, and is liable for “confiscatory taxation measures”, “discrimination against particular aliens” and “denial of justice”. However, there is no reference to the provisions of Chapter Eleven the Claimant says were violated in connection with these general allegations, save the allegation of denial of justice where he contends that “Article 1110 (c) (sic) refers specifically to ‘due process’ and expressly incorporates Article 1105 (1)”.

143. Finally, in describing the claim for damages, the Notice of Arbitration states that the Claimant seeks an award based on:

91. Ibid, p. 5.

- (a) Compensation for excise-tax (sic) rebates denied, and for lost profits otherwise caused, by Respondent between January 1, 1992 (the effective date of the Mexican legislation authorizing the excise-tax (sic) rebates for cigarette exporters) and December 1, 1997 (after which date Respondent changed course and refused to rebate the excise taxes paid by CEMSA on cigarette exports during October and November 1997), not including the period between June 1996 and November 1997 (during which time the Mexican authorities complied with their legal obligations and allowed rebates of the excise taxes paid by CEMSA); and
- (b) Compensation for lost profits, and lost good will caused by the intentional destruction of CEMSA's export business, after December 1, 1997.⁹²

144. In a footnote, the Claimant denies seeking compensation based on the amendment to the IEPS law that took effect on January 1998 (which the competent authorities determined was "not an expropriation") but says that he nonetheless seeks:

...compensation for profits lost after December 1997 and for good will (sic) (i.e., the value of CEMSA as a going concern in December 1997) lost by virtue of the intentional destruction of CEMSA's export business caused by Respondent's conduct prior to January 1, 1998.

145. Three unsustainable propositions of law underlie the claim:

- a) that the Respondent could be liable for alleged breaches of Chapter Eleven occurring prior to NAFTA's entry into force on January 1, 1994;
- b) that the Respondent could be held liable for breaches of Chapter Eleven occurring more than three years before this claim was submitted to arbitration; and
- c) that the Respondent could be found to have expropriated CEMSA in or about December 1997 and be liable to pay compensation comprising future profits and loss of goodwill, even though the competent authorities determined that the measure originally complained of—the amendment to the IEPS law that took effect on January 1, 1998— was "not an expropriation".

146. In an attempt to avoid these limits on the Tribunal's jurisdiction, a new theory is propounded in the Memorial on Preliminary Issues. Now the Claimant alleges that, since 1990, senior Mexican officials have engaged in "a sustained campaign to drive CEMSA out of the cigarette export business by illegal and discriminatory manipulation of the IEPS tax law that.

92. Ibid, p. 11.

culminated in the measures taken by Respondent in 1997 to shut down CEMSA's export business for the third time"⁹³.

147. This is now presented as a "creeping expropriation" comprised of a "pattern of conduct" dating back to 1991 which culminated in "the final extinction of CEMSA's cigarette export business in late 1997"⁹⁴. The Claimant also attempts to recast events occurring prior to January 1, 1994 as part of a "continuing breach" to support the novel proposition that any impediment to CEMSA's ability to claim IEPS rebates on cigarette exports prior to NAFTA's entry into force was a "breach of international law" for which the Claimant may now demand compensation under Chapter Eleven of the NAFTA.

148. The Memorial on Preliminary Questions is a model of obfuscation. It carefully avoids stating with any precision the "measures" the Claimant complains of in connection with alleged "illegal and discriminatory manipulation of the IEPS tax law by Mexico's taxation authorities". The Claimant also avoids identifying what Section A obligations could have been breached by the taking of such measures.

149. The Claimant's intentions are thinly veiled. Although he complains in vague terms of denial of justice and breach of international law, he does not stipulate that these offenses violate Article 1105 because the Respondent's obligation to accord treatment in accordance with international law does not apply to taxation measures. He also avoids stipulating that the pattern of conduct alleged to comprise a "creeping expropriation" violates Article 1110 because he has not complied with Article 2103(6) in respect of that claim of expropriation.

150. In any event the new "creeping expropriation" claim is inadmissible because the Claimant did not put that claim before the two taxation authorities as required by Article 2103(6). It therefore cannot be received by the Tribunal.

D. Question (a): Failure to Submit a Claim for Denial of National Treatment

Question

Whether the Claimant has submitted a point of claim in this arbitration proceeding concerning an alleged violation of NAFTA Article 1102.

93. Memorial, paragraph 46.

94. Memorial, paragraph 63.

Summary

151. The Claimant seeks to assert a new, separate claim based on an alleged breach of Article 1102 that was not notified to the Respondent pursuant to Article 1119 and was not submitted to arbitration pursuant to the Claimant's Notice of Arbitration. By its failure to comply with the requirements of Section B of Chapter Eleven, the Claimant has failed to invoke the Respondent's consent to arbitrate this claim. Accordingly, it is not a dispute that the Tribunal is competent to decide.

Submission

152. The Respondent objects to the Tribunal's competence to decide a claim based on denial of national treatment on the grounds that the Claimant has failed to meet the mandatory requirements of Articles 1119, 1120 and 1121 of the NAFTA and Article 3 of the Arbitration Rules in respect of the claim the Claimant now seeks to assert. Neither has the Claimant demonstrated that he can meet the elements of Article 1117 that are necessary to establish a claim for compensation arising out of an alleged breach of Article 1102.

153. Article 1119 requires the disputing investor to "specify" in its notice of intent to submit a claim to arbitration, *inter alia*: "the provisions of this Agreement alleged to have been breached and any other relevant provisions; [and] the issues and the factual basis for the claim". Article 3 of the Arbitration Rules requires that the notice of arbitration "contain information concerning the issues in dispute and an indication of the amount involved, if any".

154. Article 1120 requires the lapse of six months between the events giving rise to a claim and the submission of the claim to arbitration.

155. Article 1121 requires the disputing investor to provide a written waiver of its right to initiate or continue claims for compensation in domestic fora in respect of the measure that is alleged to be a breach of Section A of Chapter Eleven.

156. The Claimant's notice pursuant to Article 1119 alleged that Mexico had breached Articles 1102 (National Treatment), 1104 (Standard of Treatment), 1105 (Minimum Standard of Treatment), 1106 (Performance Requirements) and "especially 1110 (Expropriation and Indemnification) (sic)".

157. The factual description of the claim recites, in part, CEMSA's alleged right to obtain IEPS rebates on cigarette exports and an allegation that this right had been confirmed by the Mexican courts. In respect of an alleged breach of Article 1102, in his notice of intent, the Claimant alleges that:

[T]obacco producing companies oppose the exportation activities of the foreign trade companies, such as my principal and... they have achieved that various officials of the Ministry (sic) of Finance and Public Credit, using the fiscal

provisions (specifically the contents the contents of the IEPS Law) as pretexts and means to definitively hinder, block and prevent the exportation activities of my principal.⁹⁵

158. He concludes by alleging that:

“...the responsible officials have violated our legitimate rights; they have applied us (sic) illegal, unconstitutional, unequal and unjust treatment, unlike what they give to producers, and they have resorted to measures tantamount to expropriation of an investment that has a value exceeding U.S.\$13,000,000...”⁹⁶

159. Even if the factual description could be argued to support an alleged denial of treatment in accordance with international law contrary to Article 1105 (which is inadmissible) or an expropriation contrary to Article 1110, it does not state any facts or circumstances that could support an alleged breach of Articles 1102, 1104 or 1106.

160. The Claimant now contends:

The Notice of Intent to Submit a Claim to Arbitration delivered by Claimant to Respondent on February 16, 1998 pursuant to NAFTA Article 1119 (the “Notice of Intent”) clearly identifies “the provisions of Article 1102 (National Treatment)” as the first of the listed provisions of NAFTA alleged to have been breached...

In any event, Claimant cited Article 1102 as one basis for his claim in the Article 1119 Notice delivered to Respondent on February 16, 1998, and provided there all the relevant information that he knew at the time.⁹⁷

161. However, merely “citing” the provisions alleged to have been breached does not satisfy the requirements of Article 1119, which additionally requires the disputing investor to specify the issues and the factual basis for the claim. Moreover, the alleged inconsistent treatment with Article 1102 recited in the Notice of Intent refers to completely different facts —i.e. “unequal...

95. Notice of Intent to Submit a Claim, dated 13 February 1998, paragraphs 5 and 7, at pp 3 and 4.

96. Ibid.

97. Memorial, paragraph 1 and 20, at pp. 4 and 12, respectively. The Claimant argues: “Respondent did not complain then or later that the Notice of Intent was deficient in any respect” (Ibid.). Obviously, the Respondent did not complain of any deficiency concerning an Article 1102 claim “then”, because none was made in the Notice of Arbitration. However, the Respondent has raised its objections in a timely manner.

treatment, unlike what they give to producers”— a claim that, if intended, was abandoned in the Notice of Arbitration⁹⁸.

162. As for the Notice of Arbitration, the Claimant argues:

Subsequently, in his Notice of Arbitration submitted to the ICSID Secretariat on April 30, 1999, Claimant clearly stated discrimination as an issue. The Notice stressed Respondent's discriminatory treatment of Claimant's investment, *Corporacion de Exportaciones Mexicanas, S.A. de C.V.* ("CEMSA")...⁹⁹

163. Yet, as the Claimant himself acknowledges in the same paragraph, these claims were made in the context of alleged breaches of Articles 1105 and 1110 only; they do not relate to alleged violations to Article 1102:

Claimant asserted in this Notice [of Arbitration] that Respondent's decisions were part of a "continuing pattern of discrimination against CEMSA . . . dating back to 1991"; that the "claims relate to Respondent's arbitrary, discriminatory, and confiscatory actions . . ."; that Respondent's actions were in violation of due process and a denial of justice under NAFTA Articles 1110 (c) and 1105 (1); that Respondent's actions were discriminatory under Article 1110 (b); and that Respondent's actions violated international law against discrimination, which "principle applies not only to discrimination on the basis of nationality, but also to discrimination against particular aliens." (Notice of Arbitration at 4, 5, 8-9.)¹⁰⁰

164. Indeed, the Claimant's Notice of Arbitration describes the "Claims and Issues in Dispute" as follows:

This Dispute involves claims for compensation and damages of U.S. \$ 50 million, plus post-judgment interest, for measures tantamount to nationalization or expropriation and constituting a denial of justice in violation of the rules and principles of international law and NAFTA Articles 1110 and 1105 (1). The claims relate to Respondent's arbitrary, discriminatory and confiscatory actions during the period January 1, 1992-December 31, 1997, with the purpose and effect of suppressing CEMSA's cigarette export business...¹⁰¹

98. This claim could not have succeeded in any event because the cigarette producers and "resellers" such as Cigatam are not "in like circumstances" for the purposes of Article 1102 and any distinction between them in the IEPS law is based on their place in the distribution chain, not nationality.

99. Memorial, paragraph 2 at pp. 4 and 5.

100. Ibid.

101. Notice of Arbitration, at p. 5. The Notice also describes the "Provisions for Arbitration of the Dispute" (at p. 2) as follows:

Footnote continued on next page

[Emphasis added]

165. The Claimant has acknowledged that he did not (because he could not) specify the facts and issues in dispute in regard to his new Article 1102 claim:

...Claimant could not describe these actions with particularity in that Notice [of Arbitration] because they were unavailable to him... he did not know and could not have known, about Respondent's 1999 payments to Mexican-owned companies when he filed the Notice of Arbitration.¹⁰²

166. In fact, the Claimant did not describe such actions at all because "he did not know and could not have known" about them¹⁰³. It is thus confirmed, by the Claimant's own admission, that the claim of denial of national treatment he now asserts is not a claim that he knew of or that even existed when he delivered his notice of intent pursuant to Article 1119, or when he filed his Notice of Arbitration under the Article 3 of the Arbitration Rules.

167. Accordingly, the new claim he now asserts cannot be considered a "point of claim" that the Claimant has submitted to arbitration, regardless of whether the Tribunal considers his notice pursuant to Article 1119 or his Notice of Arbitration to be the operative instrument. It is a new, separate claim that post-dates the submission of this claim to arbitration.

168. Moreover, the Claimant has not met the requirements set forth in Article 1117, which provides that an investor of a Party that owns or controls an enterprise may submit to arbitration a claim that the other Party "has breached an obligation under Section A..." and that the enterprise "has incurred loss or damage by reason of, or arising out of, that breach" (emphasis added).

169. Article 1117 requires a necessary link between the alleged breach of an obligation under Section A and the loss or damage incurred by the enterprise by reason of, or arising out of, that breach. It is not just a matter of simply claiming damages and indicating an amount thereof. Compliance with Article 1117 is fundamental to the entitlement to submit a claim to arbitration.

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This dispute is subject to arbitration under the provisions of the North American Free Trade Agreement Between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America, entered into force January 1, 1994 ("NAFTA"), including Chapter 11- Articles 1110, 1117, 1120(1)(b) and (2), 1122, 1124; and Chapter 21 – Article 2103 and Annex 2103.6...

102. Memorial, paragraph 6 and 20, at pp. 6 and 13, respectively.

103. "Although Claimant knew that Respondent was hostile to CEMSA and that its treatment of CEMSA was discriminatory, he did not know, and could not have known, about the Respondent's 1999 payments to Mexican-owned companies when he filed the Notice of Arbitration." Memorial, paragraph 20 at p. 13.

170. Because the claims submitted to arbitration with the Notice of Arbitration related to Articles 1105 and 1110—leaving aside for the moment that Article 2103 does not allow claims based on alleged breaches of Article 1105—the damages estimated by the Claimant relate to a breach to such Articles only. Indeed, according to the Notice of Arbitration:

[The Claimant's] requested arbitration award [of 50 million dollars in damages] is based on the following:

- (a) Compensation for excise-tax rebates denied, and for lost profits otherwise caused, by Respondent between January 1, 1992 (the effective date of the Mexican legislation authorizing excise-tax rebates for cigarette exporters) and December 1, 1997 (after which Respondent changed course and refused to rebate the excise taxes paid by CEMSA on cigarette exports during October and November, 1997) not including the period between June 1996 and November 1997...
- (b) Compensation for lost profits, and lost good will (sic) caused by the intentional destruction of CEMSA'S export business, after December 1, 1997 [the ensuing footnote explains: "CEMSA does request compensation for profits lost after December 1, 1997 and for good will (sic) (i.e. the value of CEMSA as a going concern in December 1997) lost by virtue of the intentional destruction of CEMSA's export business caused by Respondent's conduct prior to January 1, 1998."].
- (c) An appropriate adjustment for inflation...
- (d) Pre-judgment interest at the applicable rate on CEMSA's damages caused by Respondent since January 1, 1992.¹⁰⁴

104. Notice of Arbitration, section D, at p. 11. Similarly, in the Notice of Arbitration (at pp. 5 and 6), the Claimant specified the following relief sought and the amount of damages claimed:

1. Of course, the first and fundamental relief sought must consist in the complete respect of our right to work, so that we may continue exporting the goods in question and recover the corresponding IEPS in the shortest time possible.
2. Otherwise, if they are not going to allow us to work, we should be compensated in an amount equivalent to the value of the company, which exceeds U.S. \$13,000,000 (thirteen million dollars, lawful currency of the United States of America).
3. Likewise, we hereby request the immediate refund of the more than U.S.\$2,000,000 (two million dollars, lawful currency of the United States of America) of the IEPS that various officials of the SHCP refuse to deliver to us, in a highly arbitrary, unconstitutional and illegal manner, along with the updating and the interest that would have been accrued and those that continue to be accrued until the material and total payments of said credit balances is made, derived from the exportations that we made in October and November 1997.
4. Finally, we hereby claim payment for the amount of the damages that have been caused to us and that will continue to be caused to us while they do not allow us to work, which are equal to at least U.S. \$3,000,000 (three million dollars, lawful currency of the United States of America)

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171. Even if the Claimant had belatedly complied with the requirements of subparagraph (c) of NAFTA Article 1119 and the first part of subparagraph (d) of Article 3 of the Arbitration Rules to state the factual basis of the claim and the issues in dispute (which is not conceded), the Claimant has still failed to identify any loss or damage arising from the new alleged breach of Article 1102. The Claimant's notice pursuant to Article 1119 and the Notice of Arbitration nowhere allege that the CEMSA suffered loss or damage by reason of any breach of Article 1102, let alone a breach that is now alleged to have occurred after both instruments were filed. Simply put, the alleged breach of Article 1102 the Claimant now seeks to assert is based on a new, separate claim based on a new allegation of denial of national treatment that would rely on a new (as yet unstated) theory of damages that could only have been incurred more than a year after the alleged "final extinction" of CEMSA in late 1997.

172. The purpose of Article 1119 is, among other things, to allow a disputing Party to investigate a measure that is alleged to be breach of one or more of its obligations under Section A of Chapter Eleven and to be able to assess whether such measure could result in damages to the investor for which the State could be liable, before a claim is submitted to arbitration. Article 1119 thus requires the disputing investor to "specify ... the provisions of [the] Agreement alleged to have been breached and any other relevant provisions; the issues and the factual basis for the claim; and the relief sought and the approximate amount of damages claimed". This is fundamental, because even assuming that the NAFTA had been actually breached, no claim may proceed unless such a violation has resulted in loss or damage to the enterprise in question.

173. In the circumstances of this case, the Respondent was not given notice that "Mercados" was being accorded more favorable treatment than CEMSA (such notice could not have been given because the alleged facts did not then exist), nor did the Claimant contend, as he now seeks to do, that persons or entities unknown may have received treatment more favorable than CEMSA at some point in time since 1991, a fact that he would like to determine through "discovery". Therefore, no damages to CEMSA could have ensued. If the Claimant lacks any knowledge of the facts surrounding the alleged breach to Article 1102, there can be no loss or damages incurred by CEMSA.

174. The Respondent has not been afforded an opportunity to investigate any measure alleged to be a breach of Article 1102 and whether that measure resulted or could result in damages to the investor for which the Mexican State could be liable, and therefore, whether any action to rectify would be necessary. It has investigated and chosen to defend the claim on the basis of its presentation in the Claimant's notice of under Article 1119, the determination of the competent authorities under Article 2103(6), and the Notice of Arbitration.

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for December 1997 and January and February 1998, plus U.S. \$1,000,000 (one million dollars, lawful currency of the United States of America) for each month that elapses without our receiving the refund and respect for our right to export cigarettes through prompt recovery of the corresponding IEPS.

175. The NAFTA Parties have becoming increasingly concerned with attempts by disputing investors to broaden the scope of their claims after they have been submitted to arbitration. All three take the view that compliance with Articles 1119, 1120 and Article 1121 is required for a disputing investor to invoke the consent of a disputing Party to arbitrate, as provided by Article 1122 (Consent to Arbitrate). It provides:

1. Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

[Emphasis added.]

176. The “mandatory nature of giving notice of intent” and the disputing investor’s obligation to fulfill all of the procedural requirements of Section B as “prerequisites” to obtaining the disputing Party’s consent to arbitrate was accepted by the arbitral tribunal in *Waste Management, Inc. v. The United Mexican States*¹⁰⁵.

177. This position was also supported by all of the NAFTA Parties in submissions to the arbitral tribunal in *Pope & Talbot v. The Government of Canada*.¹⁰⁶ The submission of the Government of the United States¹⁰⁷ pursuant to NAFTA Article 1128, in which Mexico concurred and made supplementary submissions, stated in summary:

No Chapter 11 claim may be submitted to arbitration unless the prerequisites for submitting a claim have been satisfied. [Citing, with approval, *Waste Management*-- tribunals must ensure prerequisites of Chapter 11 are fulfilled because the Parties consented to arbitrate only in accordance with the procedures set forth in Section B of Chapter 11.] The Parties did not consent in advance, through the NAFTA, to the automatic supplementation of the scope of arbitrations unless the procedural prerequisites of Chapter 11 are satisfied for any new claims. [Emphasis added.]

178. The Respondent accordingly submits that, by reason alone of the Claimant’s failure to comply with Articles 1117 and 1119 in respect of the new claim of denial of national treatment the Claimant now seeks to advance, this Tribunal is not competent to decide the claim. Put another way, this is not a question that the Tribunal has been asked to answer under notional agreement between the parties to arbitrate the dispute that has been submitted to arbitration.

105. ICSID Case No. (AF)/98/2, Arbitral Award, 2 June 2000, paragraph 11, p.9 and paragraphs 16-17, p. 11-12.

106. “Award of the Tribunal Concerning The Motion By Government of Canada Respecting the Claim Based upon Imposition of the Super Fee”, 7 August 2000, The Hon Lord Dervaird, presiding arbitrator. In that case the tribunal held that the measure at issue, an amendment to the Canada-US Softwood Lumber Agreement (SLA) was properly before it because the implementation of the SLA was the subject matter of the claim and the Claimant’s contentions concerning the amendment to the SLA was not in respect of a “new” claim but to an element that was part of the implementation of the SLA.

107. *Supra*, Third Submission of the United States of America, paragraph 7.

E. Question (b): The Claimant's Request to Amend to Assert A New Claim of Denial of National Treatment

Question

Whether the Claimant may submit additional claims, if any, or amend his claim on the basis of an allegation of NAFTA Article 1102

Summary

179. If the Claimant has not complied in all material respects with the requirements of Section B in respect of the claim he now seeks to assert, then the proposed claim would not be admissible as an "additional" claim pursuant to Article 48 of the Arbitration Rules. Alternatively, if the Tribunal determines that the new claim is admissible in this proceeding, the Claimant should be required to comply in substance with the applicable provisions of Section B, namely, Article 1119, 1120 and 1121, before the claim is admitted.

Submission

180. If the Tribunal determines, as the Respondent submits it must, that the Claimant has not complied in all material respects with the requirements of Section B of Chapter Eleven (including Article 1119) in respect of the claim that the Claimant now seeks make, then it cannot accept an amended claim pursuant to Article 48 of the Arbitration Rules.

181. The provisions of Section B of Chapter Eleven (including Article 1119) prevail over Article 48 of the Arbitration Rules. As stated in Article 1120(2), "the applicable arbitration rules shall govern the arbitration, except to the extent modified by this section."

182. The claim is outside of the scope of the arbitration as prescribed by Section B of Chapter Eleven and is not admissible as an "additional or incidental claim". The tribunal would not be competent to decide the dispute.

183. If the Tribunal holds that the requirements of NAFTA Article 1119 do not prevail over Article 48 of the Arbitration Rules, or that by merely citing Article 1102 in his notice of intent the Claimant is entitled now to assert any "additional" claims pertaining to Article 1102, the Claimant should be required to comply in substance with Articles 1119, 1120 and 1121 before proceeding with his additional claim. Such compliance should include the following:

- a) written notice—90 days before such claim is submitted to arbitration in this proceeding—of the factual basis of the claim, including¹⁰⁸:
 - i) the identity of the Mexican investment(s) that he alleges have been accorded more favorable treatment than has been accorded to or CEMSA;
 - ii) a description of the measure(s) the Claimant alleges amounted to more favorable treatment, in like circumstances, than the Respondent has accorded to CEMSA;
 - iii) the dates that such measures are alleged to have been taken by the Respondent;
- b) a waiting period of six months between the date of any measure that the Claimant now alleges is a breach of Article 1102 and the date that such claim is submitted to arbitration in this proceeding¹⁰⁹;
- c) a waiver of CEMSA's right to initiate or continue before any administrative or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the Respondent that is now alleged to be a breach of Article 1102, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party¹¹⁰.

184. In any case, it is not open for the Claimant to assert a claim now (or at any time) based only on suspicion or belief that persons or entities unknown have been accorded more favorable treatment than the Respondent has accorded CEMSA.

185. Having acknowledged that he lacks information concerning purported rebates made to Mercados Regionales, Mercados II or others, the Claimant affirms that "has no other means to discover this information", except if the Respondent provides him all the records "relating to the rebates of the IEPS for cigarette exports to any person or entity other than CEMSA, including Mercados Regionales"¹¹¹.

186. The Claimant is, thus, attempting to use a broad-based discovery demand in order to obtain information from other taxpayers to "find out" whether, in the last nine years, Mercados Regionales, S.A. de C.V. or any other exporter of cigarettes has successfully applied for IEPS rebates. In fact, in his letter to the Tribunal dated 11 July 2000, the Claimant purported to reserve the right expand the claim to include evidence of more favorable treatment accorded to

108. To comply in substance with Article 1119.

109. To comply in substance with Article 1120.

110. To comply in substance with Article 1121.

111. See the Claimant's Second Request for Documents at p. 1.

other domestically-owned entities "if discovery reveals additional facts to support Claimant's Article 1102 claim".

Chapter Eleven does not allow claims to be made on suspicion or speculation, and neither do the ICSID Additional Facility Rules. This is precisely why Article 1119 of the NAFTA and Article 3 of the Arbitration Rules require disputing investors to specify the issues and factual basis of the claim, and to set forth information concerning the issues in dispute, respectively.

187. Rather, the Claimant now attempts to abuse the NAFTA Chapter Eleven process in order to obtain information in order to "discover" whether Mexico has breached Article 1102 by granting IEPS rebates to other cigarette exporters, and whether that could have resulted in loss or damage to CEMSA. His suspicion that the Respondent may have made IEPS rebates to other cigarette exporters (in like circumstances) is refuted by statements that he continues to make publicly on CEMSA's "What is CEMSA's tantamount to expropriation?" website:

Why do I say it is only my business on the line? Because CEMSA, by virtue of favorable Mexican Court decisions, is the only exporter of branded cigarettes¹¹² aside from the producers.

188. In the Respondent's respectful submission, the Tribunal must determine that the Claimant has not complied with the requirements of the NAFTA and, consequently, cannot submit additional claims or amend his claim.

F. Question (c): The Three Year Limitation Period and Alleged Estoppel

Question

Whether the Respondent is entitled to raise any limitation 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 the facts relevant to the claim or claims, and whether the Respondent is estopped from relying on such time limitation.

Summary

189. The Claimant is barred by Article 1117(2) from asserting a claim for damages based on alleged breaches of the NAFTA that occurred more than three years before the submission of the Notice of Arbitration. The natural and ordinary meaning of Article 1117, and the context in

112. <http://members.tripod.com/~tantamount/whatis.html>

which it appears, leads to the conclusion that a claim is made when it is submitted to arbitration. The Claimant's arguments concerning estoppel by agreement and equitable estoppel fail because, on the facts alleged by the Claimant himself, he cannot meet the necessary requirements in law in either case. Submission

190. This question has three major components:

- a) Is the Respondent entitled to raise any defense on the basis of the limitation set forth in NAFTA Article 1117(2)?
- b) Is the Respondent estopped on relying on such time limitation?
- c) Does such time limitation affect the Tribunal's consideration of facts relevant to the claim or claims?

191. With respect to the Tribunal's jurisdiction over aspects of the claim that are affected by the time limit, the Claimant has presented several alternative arguments:

- a) The Claimant argues that the time limit of Article 1117(2) is satisfied when a notice of intent to submit a claim is delivered to the disputing Party pursuant to Article 1119, rather than when the claim is submitted to arbitration.
- b) The Claimant asserts that the Respondent entered into an agreement to waive application of the time limit.
- c) The Claimant argues that the Respondent is "equitably estopped" from invoking the time limit as a defense.

192. The Claimant separately argues that some of the documents and witness statements he has requested from the Respondent relating to matters that arose outside of the time limit are relevant to its claims that arise from actions allegedly occurring within the time limitation.

193. In this section, the Respondent will address the arguments relating to the Tribunal's jurisdiction. Matters relating to the scope of document and witness requests are addressed in the final section of this Counter-Memorial.

194. The three-year time limitation arises because in the Notice of Arbitration, the Claimant included the following actions of the Respondent in its list of the alleged breaches of the NAFTA on which its claim is based:

- a) Respondent's refusal to allow CEMSA to export cigarettes with rebate of excise taxes as provided by law during the period January 1, 1992 – December 31, 1997,

except for the period June 1996 – November 1997, when such rebates were allowed;

- b) Respondent's refusal to implement a decision of Mexico's Supreme Court of Justice issued on August 18, 1993 holding that the Mexican Constitution requires the tax authorities to allow CEMSA rebates of excise taxes for cigarette exports on the same basis that such rebates are made to cigarette manufacturers...¹¹³

195. The Claimant's Notice of Arbitration also included the following demand for damages:

Compensation for excise-tax rebates denied, and for lost profits otherwise caused, by Respondent between January 1, 1992 (the effective date of the Mexican legislation authorizing excise-tax rebates for cigarette exporters) and December 1, 1997 (after which date Respondent changed course and refused to rebate the excise taxes paid by CEMSA on cigarette exports during October and November 1997), not including the period between June 1996 and November 1997 (during which time the Mexican authorities complied with their legal obligation and allowed rebates of the excise taxes paid by CEMSA.)¹¹⁴

196. The Respondent's position is that the Claimant is barred by Article 1117(2) from asserting a claim for damages based on alleged breaches of the NAFTA that took place prior to three years before the submission of the Notice of Arbitration. Accordingly, the Tribunal lacks jurisdiction to render a decision on whether acts of Mexico that occurred prior to April 30, 1996 were a breach of the NAFTA.

197. The Respondent notes that the Claimant's arguments for flexibility in the application of the time limitation derive from a misapprehension of the nature of Article 1117(2). The Claimant pretends that this arbitration is a dispute between private parties, and that the governing consideration is whether the Respondent had notice that a claim might be brought.¹¹⁵

198. In this regard, the Respondent emphasizes that in the NAFTA, the governments of Mexico, the United States, and Canada agreed to arbitrate only to the extent provided for in Chapter Eleven, and the terms of their consent define the Tribunal's jurisdiction. The time limitation established by Article 1117(2) is an express condition of the consent of the three Parties authorizing arbitrations to be brought against them.

113. Notice of Arbitration dated April 30, 1999 at p. 5.

114. Notice of Arbitration at p. 11.

115. The Claimant's emphasis on his assertion that he had put the Respondent on notice of the possibility that he might initiate a NAFTA arbitration is misplaced. The Respondent is not asking the Tribunal to make a determination that the Claimant is barred from pursuing his claim by the equitable theory of laches; rather, the Respondent relies on an express condition of jurisdiction contained in the very NAFTA provisions that authorize arbitrations.

199. There is nothing in the language of Article 1117(2), or elsewhere in Chapter Eleven, that authorizes flexibility in applying the time limitation, even if there were genuine equitable reasons for doing so (which there are not in this case).

1. A Claim is Made when the Notice of Arbitration is Filed

200. The Claimant initially tries to stretch the time limitation by approximately one year by urging the Tribunal to find that the claim was "made" on February 16, 1998, when the Claimant delivered its notice of intent to submit a claim to the Respondent. This would result in the exclusion of acts and damages occurring prior to February 16, 1995, rather than April 30, 1996.

201. The Claimant selectively picks words from various locations in the NAFTA to construct an argument that a claimant has "made a claim" within the meaning of Article 1117(2) when it delivers a notice of intent to submit a claim to the disputing Party, and not when the claim itself is actually submitted. The Respondent disagrees with the Claimant's interpretation for several reasons.

202. Articles 1116 and 1117 are not simply "limitations articles," as the Claimant labels them. Article 1116 is titled "Claim by an Investor of a Party on Its Own Behalf"; Article 1117 is titled "Claim by an Investor of a Party on Behalf of an Enterprise" [emphasis added]. These articles contain the initial, basic descriptions of the permitted subject matter of a claim and when they may be initiated. The first paragraph of each article states that an investor "may submit to arbitration under this Section a claim that the other Party has breached an obligation" of certain provisions of the NAFTA [emphasis added]. Thus, a "claim" is made under Articles 1116 and/or 1117 when it is submitted to arbitration.

203. The second paragraph of each of Articles 1116 and 1117 establishes a time limitation on when an investor may "make" a claim: three years from the date on which the investor or enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor or enterprise has incurred loss or damage arising from the breach. The fact that this language immediately follows a paragraph authorizing claims to be submitted, and is part of an Article defining a "claim," makes plain that the negotiators intended that the time limit apply to the submission of the claim.¹¹⁶

204. It is important to note that Articles 1116 and 1117 do not say that an investor "may not deliver a notice of intent to file a claim" after three years; indeed, the concept of a "notice of intent" is not introduced until later in the Chapter, in Article 1119.

116. The Claimant's argument concerning Article 1117(3) is clever, but unconvincing. The point of that paragraph is to make completely clear that if separate claims are initiated under Article 1116 and Article 1117 arising out of the same events, the arbitration of those claims should be consolidated pursuant to Article 1126.

205. Moreover, Article 1120 (“Submission of a Claim to Arbitration”) establishes that a disputing investor may submit a claim to arbitration under the ICSID Convention, the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules. The Claimant in this case submitted his claim under the Additional Facility Rules. Additional Facility Articles 2 (“The Notice”), 3 (“Contents of the Notice”), 4 (“Registration of the Notice”), and 5 (“Certificate of Registration”) set out the procedures for making and registering a claim under the Additional Facility Rules. They contain no provision for a notice of intent to file a claim, and indeed the NAFTA does not require that the notice be filed with the ICSID. Consequently, under the Additional Facility Rules, no claim even exists until the requirements of Articles 2 through 5 are met.

206. The Respondent’s view is further supported by the jurisdictional and procedural requirements for the proper submission of a claim that are imposed by Article 1121 (“Conditions Precedent”). Article 1121 provides that a claim is considered submitted to arbitration only if the investor both (i) consents to arbitration in accordance with the procedures set out in the NAFTA, and (ii) waives his right to initiate or continue court or administrative tribunal proceedings for damages under domestic law. At the time the Claimant delivered its notice to the Respondent as required by Article 1119, he neither consented to arbitration nor waived his right to initiate or continue domestic proceedings for damages. He made no commitment to arbitration, and therefore no agreement to arbitrate could be deemed adopted as between the Claimant and the Respondent. Indeed, delivering a notice of intent creates no obligation on a claimant even to proceed with initiating an arbitration.

207. Under these circumstances, delivery of a notice of intent represents no more of a commitment to arbitration by a claimant than does sending a letter threatening litigation. The Respondent is not aware of a legal system of any country that deems a limitations period tolled when a person simply states that he is considering initiating a lawsuit or arbitration. The time limit applies until the case is commenced, and in the case of a NAFTA Chapter Eleven arbitration, commencement occurs only when the notice of arbitration has been submitted.

208. Consequently, the NAFTA restricts the Claimant from seeking damages for an alleged breach of the NAFTA that occurred prior to April 30, 1996 —the date that is three years before the date he submitted his notice of arbitration.

2. There is No Evidence of an “Agreement” Between CEMSA and the Respondent

209. The Claimant’s Memorial asserts that “the parties reached an understanding concerning CEMSA’s right to export cigarettes and to receive IEPS rebates on such exports on or about June 1, 1995 (See also Feldman Declaration II ¶¶ 18-23)”.¹¹⁷ Leaving aside the fact that NAFTA does not provide that an “agreement” could suspend the running of the limitation period, the

117. Memorial at p. 24, paragraph. 52.

Memorial itself contains no information or evidence of an agreement of any kind between CEMSA and Hacienda, and Mr. Feldman's declaration simply asserts that he received oral assurances that he could avoid paying the IEPS tax on future exports. There is not even an allegation that any official of the Mexican Government asked or advised Mr. Feldman not to initiate a NAFTA claim. Ultimately, therefore, the Claimant has failed to plead facts that support his claim of an agreement.

210. Specifically, Mr. Feldman's declaration indicates that he was engaged in a long-running dispute with Hacienda over his ability to avoid paying the IEPS tax. In paragraph 22 of his declaration, he asserts that he was "assured" by several officials "around or before June 1, 1995" that:

CEMSA would be permitted to export cigarettes and apply for rebates of IEPS taxes without the documentation that Cigatem refused to provide. Most importantly, I was assured by these officials that IEPS rebates would be paid to CEMSA on cigarette exports.¹¹⁸

211. Mr. Feldman goes on to say that "[u]nder the protection of these assurances and in reliance on them, CEMSA began to export cigarettes in the Spring of 1996 and to apply for the IEPS rebates."¹¹⁹

212. Mr. Feldman concludes:

Because of Hacienda's assurances, and its subsequent performance of its commitment by payment of the IEPS rebates for which CEMSA applied, I considered the matter resolved by agreement. In reliance on this agreement, I did not pursue legal remedies in the Mexican courts or under NAFTA, but I never waived my right to do so in the event the government reneged on its promises.¹²⁰

213. In other words, based on a combination of oral assurances allegedly given by tax officials on some uncertain date in June 1995 that he could claim rebates on future exports, and his success in avoiding payment of the IEPS tax a year later, the Claimant asks the Tribunal to accept that he had entered into a binding agreement with the Government of Mexico that he would refrain from bringing suit under domestic law or initiating an arbitration under the NAFTA for purported damages suffered in the period January 1992 through April 1996.

118. Second Feldman Declaration at p. 8, paragraph. 22.

119. The fact that CEMSA waited almost one year after June 1995 to begin exporting cigarettes calls into serious question whether there was a genuine relationship between the alleged "agreement" and Mr. Feldman's decision to claim refunds.

120. Second Feldman Declaration at p. 8, paragraph. 23.

214. The Respondent submits that wishful thinking is not a substitute for evidence. The Claimant has not even alleged facts that would demonstrate the existence of a legally binding commitment by the tax authorities to permit CEMSA to avoid payment of the IEPS tax,¹²¹ let alone a commitment by duly authorized representatives of the Respondent to enter into a settlement of a domestic lawsuit or a NAFTA arbitration (neither of which existed at the pertinent time).

215. Consequently, there is no need for the Tribunal to determine the credibility of Mr. Feldman's testimony on this issue. Even if the Tribunal were to assume that the description in paragraph 22 of his declaration of his interaction with the Hacienda officials was accurate, it would have to conclude that Mr. Feldman had not described an agreement with the Respondent that corresponds in any way with the broad commitment alleged in the Memorial. Even if he did, NAFTA does not provide that such an agreement could suspend the running of time.

3. There is No Legal or Factual Basis for "Equitable Estoppel"

216. The Claimant's argument that the Respondent is "equitably estopped from invoking any limitations period" inappropriately mingles international and domestic law concepts, and confuses "waiver" with "estoppel".

217. It is not at all clear that there is a generally accepted international law principle of estoppel. Professor Brownlie has written that "estoppel in municipal law is regarded with great caution, and ... the 'principle' has no particular coherence in international law, its incidence and effects not being uniform."¹²² There is certainly no precedent in international law, or the writings of international law publicists, that supports the idea that a government can be deemed to have implicitly and indirectly modified jurisdictional requirements for the waiving of its sovereign immunity.

218. In any event, moreover, the Claimant has only alleged that Hacienda implied that CEMSA could avoid paying the IEPS tax on future exports; he has not alleged that anyone from the Mexican Government ever advised him that the Respondent would "waive" the application of the time limitation in Article 1117(2) if he initiated a NAFTA arbitration, or that he was entitled to damages under the NAFTA for actions of Hacienda during the period January 1992 through April 1996.¹²³ Consequently, the Claimant's assertion of an international law of estoppel is simply irrelevant.

121. There is no provision of the NAFTA, or an established principle of international law, that deems oral advice from a tax official to create a property right in the ability to receive a tax rebate, nor does such a principle exist under domestic law. For example, the U.S. tax code expressly states that oral opinions and advice are not binding on the tax authorities. See 26 C.F.R. § 601.201(k).

122. Brownlie, p. 646.

123. As discussed below no reasonable person would assume that the NAFTA created liabilities on the part of the NAFTA governments that occurred before the NAFTA entered into force in January 1994.

219. The Claimant actually seems to be relying on the concept of “equitable estoppel” of a limitations period, which is a “common law” principle found in the domestic law of some countries, including the United States and Canada but not Mexico, which is not a common law country. The Claimant has no right or expectation to have a principle of domestic common law applied in an international proceeding against a civil law country such as Mexico.

220. Even under the domestic law of common law countries that apply the principle, however, equitable estoppel is not available if the time limitation is jurisdictional – such as where the limitation is part of a statute authorizing civil lawsuits against the government.¹²⁴ As discussed above, the time limitation in Article 1117(2) is jurisdictional, and there is no authority in the NAFTA or under generally accepted principles of international law that authorizes the Tribunal to modify the jurisdictional requirements of Article 1117(2).

221. The Respondent further notes that, even if this dispute arose under domestic law (which it does not), the Claimant’s argument would fail on the facts as pleaded. For example, the Claimant cites Atkins v. Union Pacific Railroad Co., a U.S. court decision, as “finding estoppel in light of negotiation promises that lulled the plaintiff into a false sense of security.”¹²⁵ In fact, that decision was a ruling dismissing a motion for summary judgment; it did not decide the merits, but rather allowed the case to proceed to trial. Later, after the trial on the merits, the case was appealed to the very same court, which held that the facts were insufficient to prevent the defendant from raising a limitations period defense. The court set forth the following standard:

In order to assert successfully the doctrine of equitable estoppel, a plaintiff must show that the defendant’s conduct was so misleading as to have caused the plaintiff’s failure to file suit.... More to the point, equitable estoppel will not apply to a claim such as this one unless the plaintiff shows either (1) an affirmative statement that the statutory period to bring the action was longer than it actually was; (2) promises to make a better settlement of the claim if plaintiff did not bring the threatened suit; or (3) similar representations or conduct on the part of defendants.¹²⁶

222. The Claimant has not alleged, nor could it, that the facts of this case come close to meeting this standard.

124. U.S. v. Dalm, 494 U.S. 596, 608 (1990).

125. Memorial at p. 29, paragraph. 58.

126. Atkins v. Union Pacific Railroad, 753 F.2d ___, 776 (9th Cir. 1985).

G. Question (d): Relevance of Claims Pre-dating NAFTA's Entry into Force

Question

Whether measures alleged to be taken by the Respondent in the period between late 1992 and January 1, 1994, when the NAFTA came into force, and which are alleged to be in violation of the NAFTA, general international law, or domestic Mexican law are relevant to the support of the claim or claims.

Summary

223. The Claimant is only entitled to assert a claim for loss or damage suffered by reason of a breach of a NAFTA obligation, not breaches of domestic law or breaches of international law that might have been breaches of the NAFTA if they had occurred prior to 1 January 1994. A new theory of the Claimant's case—that pre-NAFTA breaches of international law and domestic law that allegedly continued after NAFTA's entry into force comprise a "creeping expropriation" that "culminated" in measures taken late 1997—is offered to justify the alleged relevance of otherwise inadmissible claims. However, the theory is not plausible on any objective assessment of the Claimant's own testimony. Moreover, the claim of "creeping expropriation" now asserted is inadmissible under Article 2103(6).

Submission

1. The Alleged Breaches of the NAFTA, International Law, and Domestic Law

224. The manner in which the question has been posed, focusing on the relevance of alleged pre-NAFTA violations in support of the claim and not the admissibility of such breaches as claims in themselves, seems to accept that the NAFTA cannot have retroactive effect and thus the Respondent cannot be held liable for alleged breaches of international obligations that did not exist at the time.

225. The Claimant nonetheless insists that he is entitled to seek compensation for alleged breaches of Section A, and claims that might somehow exist at international law, for measures occurring prior to NAFTA's entry into force, if they can be construed as a "continuing breach".

226. Although the Claimant concedes that treaties do not have retroactive effect unless by their express language they so provide, he advances the novel and unsustainable theory that the Respondent's pre-NAFTA conduct amounted to a breach of international law (on what basis he does not say) and that the NAFTA merely created a "new forum" in which he could claim compensation for that breach.

227. Both arguments are specious.

228. If the Respondent had committed a breach of customary international law adversely affecting the Claimant's investment, the United States Government may have been entitled to espouse a claim on the Claimant's behalf. No such claim has ever been espoused, before or after NAFTA's entry into force.

229. Section B of Chapter Eleven created a new remedy for new conventional international law obligations undertaken by each of the NAFTA Parties.

230. Section A entered into force on 1 January 1994, together with Section B and the rest of the NAFTA. Nothing in the text of Section A states or implies that any Party owed conventional international law obligations to investors of the other Parties prior to its date of entry into force.

231. The Claimant nonetheless attempts to use the notion of a "continuing breach" to claim compensation for CEMSA's alleged inability to obtain IEPS rebates prior to 1 January 1994.

232. It is open to an investor of another Party to claim compensation (subject to compliance with Section B, including the applicable limitation period) for breaches of Section A occurring after NAFTA's entry into force, whether they are entirely "new" measures or continuing measures that became breaches of Section A when NAFTA entered into force. However, Chapter Eleven does not entitle an investor of another Party to claim compensation "for loss or damage by reason of, or arising out of" an obligation under Section A before such obligations came into existence.

233. This applies equally to measures that the NAFTA Parties committed to phase out pursuant to Article 1108 (Reservations and Exceptions).

234. The question then remains: what, if any, pre-NAFTA measures could the Claimant complain of that could be said to have "continued" after the NAFTA entered into force which could, if construed as a breach of a Section A obligation, form the basis of a claim for loss or damage arising from the continuance of such measures^{127?}

235. The Memorial on Preliminary Questions dodges this question. Instead it purports to characterize the Respondent's pre-NAFTA conduct as "illegal actions", that continued after 1 January 1994, which "constitute a continuing course of conduct in violation both public international law and NAFTA" in respect of which "Claimant is entitled to seek damages"¹²⁸.

127. Subject, of course, to compliance with Section B, including the three-year limitation period for making a claim.

128. Memorial, paragraph 76.

236. Accordingly, it is necessary to review the relevant parts of the Claimant's two declarations—paragraphs 4 to 14 of his first declaration (filed with the Notice of Arbitration) and paragraphs 14 to 23 of his second declaration (filed in support of the Memorial)—to determine what these pre-NAFTA measures were, and whether any of them became a breach of a Section A obligation after NAFTA's entry into force.

237. In his second declaration, the Claimant contends that SCHP "shut down" CEMSA's cigarette exporting business on two occasions prior to NAFTA's entry into force:

- a) first, in 1991, when SCHP "took administrative steps ... to deny rebates for exports for cigarette exports in November 1990 and to cut-off further exports by CEMSA"; and
- b) second, between 1993 and 1995, when SCHP "stopped making IEPS rebates to CEMSA".

a. The first alleged "shut down"

238. Objectively characterized, the first "shut down" of CEMSA's cigarette export business resulted from a disputed interpretation of the IEPS law that was in effect in 1991. The Claimant alleges that CEMSA was owed as much as 100,000 dollars for IEPS rebate claims filed in that year¹²⁹. The Claimant sought legal redress in the domestic courts which resulted in the 1993 *amparo* judgment in CEMSA's favor. On his own testimony, there was accord and satisfaction¹³⁰.

239. Even if it could be argued that SCHP's alleged delay in paying CEMSA what it was owed under the 1993 *amparo* judgment became a breach of the NAFTA on 1 January 1994, it could only have "continued" for about three months (until March or April 1994) when SCHP paid CEMSA a sum that the Claimant accepted in satisfaction of rebates owing for cigarettes exported in 1991.

240. An alleged delay in paying the rebates ordered under the 1993 *amparo* judgment cannot be construed as a breach of international law or a breach of Section A of Chapter Eleven. Leaving that aside, however, the key point is that an amount acceptable to the Claimant was paid in early 1994 and he did not pursue a claim for what he considered to be the balance owing.

129. First Feldman Declaration, paragraph 4.

130. The Claimant says CEMSA accepted the amount paid by SCHP in March or April 1994, even though it was only 70% of the IEPS rebates actually owing, rather than pursue that matter further in the domestic courts. See First Feldman Declaration, paragraph 10.

b. The second alleged “shut down”

241. Objectively characterized, on the Claimant’s own testimony, the events of 1993—1995 describe a period during which CEMSA won a judgment that resulted in payment of a sum that it accepted in satisfaction of its outstanding claims for IEPS rebates (described above), and a further period during which the Claimant lobbied SCHP officials to resolve CEMSA’s inability to convince Cigatam to issue invoices separately stating the IEPS—efforts the Claimant says resulted in SCHP’s assurance that CEMSA would be paid IEPS rebates on future cigarette exports. The Claimant alleges that in reliance on this assurance CEMSA resumed exporting cigarettes in May 1996, almost a year later.

242. No “measure” taken by the Respondent in connection with these events could properly be construed as a breach of Chapter Eleven. There are no facts that would support a claim of denial of national treatment, nor could they be construed as an expropriation—there was no cigarette export business capable of being expropriated between 1993 and 1995. With the exception of the Claimant’s alleged “test exports” in 1994 that resulted in an IEPS rebate of less than 150 dollars¹³¹, there were no cigarettes exported and no rebates claimed by CEMSA in that period.

243. The only substantive obligation that could possibly apply in the circumstances, as described by the Claimant himself, is Article 1105. However, even if the Claimant could establish that (i) SCHP had a positive duty and the legal authority under the IEPS law to compel Cigatam to issue invoices that separately state the IEPS, and (ii) that its failure to enforce the IEPS the law in CEMSA’s favor amounted to “denial of justice” at international law, the Claimant cannot allege a breach of Article 1105 because it does not apply to taxation measures.

2. Relevance of the Alleged Pre-NAFTA Breaches to Claims that are Admissible in this Proceeding

a. The new claim of “creeping expropriation” culminating in measures taken in late 1997

244. The Claimant states in his second declaration that SCHP “shut down CEMSA’s cigarette export business—for the third time—when it refused to pay the rebates requested for October and early November 1997”.

245. The Memorial on Preliminary Questions describes the third “shut down” as follows:

...facts and circumstances dating back to 1990 demonstrate a sustained campaign by senior Mexican officials to drive CEMSA out of the cigarette export business by illegal and discriminatory manipulation of the IEPS tax law

131. First Feldman Declaration, paragraph 11. (1,332 pesos).

that culminated in the measures taken by Respondent in 1997 to shut down CEMSA's cigarette export business for the third time¹³²

....

...it is indisputable that Respondent's measures after that date (April 30, 1996) are part of a dispute between the parties over CEMSA's export of cigarettes that dates back to 1991. Each episode of that long-running dispute is related to the others, and Respondent's conduct forms part of a 'creeping expropriation' culminating in the final extinction of CEMSA's cigarette exporting business in late 1997¹³³. [Emphasis added]

246. Having reviewed the two prior "episodes" that the Claimant alleges were part of a long running dispute—the first "shut down" which resulted in payment of sums owing for IEPS rebates sought in 1991, and the second "shut down" which the claimant says resulted in an agreement entitling CEMSA to obtain IEPS rebates upon exporting cigarettes—it is difficult to conceive how they "demonstrate a sustained campaign by senior Mexican officials to drive CEMSA out of the cigarette export business by illegal and discriminatory manipulation of the IEPS tax law".

247. To the Respondent's knowledge, the subject of "creeping expropriation" remains a matter of academic discussion and debate. However, it is hard to imagine that the facts presented here could be construed as a progressive series of hostile measures that "culminated in the measures taken by Respondent in 1997 to shut down CEMSA's cigarette export business for the third time"

248. More important, however, is the Memorial's continued failure to state what "measures" it alleges were taken or how such measures amounted to a breach of Section A of Chapter Eleven.

249. The Claimant's submission to the competent authorities pursuant to Article 2103 (6) contended that three measures amounted to an expropriation of CEMSA:

- a) Mexico's alleged refusal to implement a 1993 decision of the Mexican Supreme Court of Justice in favor of CEMSA concerning the rebate of certain excise taxes imposed on the sale of cigarettes;
- b) Mexico's refusal to provide rebates of excise taxes to CEMSA for cigarettes allegedly exported in October and November 1997; and

132. Memorial, paragraph 46.

133. Memorial, paragraph 63.

- c) Mexico's amendment to the relevant law, effective January 1, 1998, which limits the availability of certain excise taxes to those who purchase cigarettes in the "first sale" of the cigarettes in Mexico.

250. The Assistant Secretary of the United States Treasury agreed that the third measure, the 1998 amendment to the IEPS law, was not an expropriation under Article 1110 and advised that "no inference should be drawn" concerning his views or the views of the U.S. government concerning the first two measures.

251. Having regard to (i) the position by the Claimant when he submitted this claim for consideration by the competent authorities, (ii) his contemporaneous public statements as evidenced by advertisements he published in *Reforma* in December 1997 and (iii) his continuing public statements as evidenced by the contents of CEMSA's "What is the tantamount to expropriation case?" website¹³⁴, it is not open for the Claimant to contend that his claim of "creeping expropriation" culminated in something other than the 1998 amendment to the IEPS law.

252. Moreover, by alleging there was a series of measures that "culminated in the measures taken by Respondent in 1997 to shut down CEMSA's cigarette export business for the third time", logically the Claimant must be taken to concede that none of the previous measures he complains of—whatever they may be—amounted to an expropriation under Article 1110.

253. The Respondent therefore submits that, on the Claimant's case as now presented, either:

- a) he seeks to pursue a claim of expropriation based on the measure which the competent authorities have determined pursuant to Article 2103(6) is "not an expropriation"; or
- b) he seeks to pursue a new claim of expropriation based on the application of a taxation measure (or measures) that he has not referred to the competent authorities for a determination as required by Article 2103 (6).

254. The Respondent respectfully submits that, in either case, the claim as now presented is not admissible in this proceeding and the Tribunal has no jurisdiction to decide it.

255. The provisions of Article 2103 (6) are mandatory. They stipulate that "(t)he investor shall refer the issue of whether the measure complained of is not an expropriation for a determination to the appropriate competent authorities ... at the time that it gives notice under Article 1119" and that "no investor may invoke (Article 1110) as the basis for a claim under Article 1116 ... or Article 1117 ... where it has been determined ... that the measure is not an expropriation."

134. Exhibit 7, <http://members.tripod.com/~tantamount/whatis.html>, at p.1.

b. The Admissible Claims

256. Two claims of "expropriation" are conceivably admissible in this proceeding:

- a) SCHP's alleged refusal, after NAFTA's entry into force, to implement a 1993 decision of the Mexican Supreme Court of Justice in favor of CEMSA concerning the rebate of certain excise taxes imposed on the sale of cigarettes;
- b) SCHP's refusal to provide rebates of excise taxes to CEMSA for cigarettes allegedly exported in October and November 1997.

257. Claims pursuant to Article 1105 are not admissible for the simple reason that Article 1105 does not apply to taxation measures¹³⁵.

258. No claim pursuant to Article 1102 has been properly submitted to arbitration. However, even if such a claim were now to be admitted it need not be considered for the purpose of ascertaining the relevance of pre-NAFTA events. The Claimant's new allegations concerning "Mercados" pertain to events that are alleged to have occurred in 1999 and 2000 and have no plausible connection to the breaches alleged between 1991 and 1994.

c. Alleged failure to implement the 1993 *amparo* as an expropriation

259. As discussed above, the Claimant's own testimony refutes the suggestion that there was an expropriation of CEMSA's cigarette exporting business prior to NAFTA's entry into force or in the period 1993—1995, as he describes it, or at any time before CEMSA began exporting cigarettes in May 1996. In any event, on his testimony, the 1993 *amparo* judgment was implemented in June 1995 when SCHP officials are alleged to have agreed that CEMSA could resume exporting cigarettes and receiving rebates of the IEPS.

260. The Respondent submits that since there is no facially plausible claim of expropriation in connection with the alleged failure of SCHP to implement the 1993 *amparo* judgment, and no admissible claim pursuant to Article 1105, the question of how or why the 1993 *amparo*

135. In the Notice of Arbitration, the Claimant attempts to bring a claim of denial of fair and equitable treatment "in the back door" by contending that Article 1105 applies to taxation measures because Article 1105 (1) is referred to in Article 1110 (1)(c). The argument is specious. Article 1110 (1) lists four requirements that must be met by a Party if it wishes to expropriate an investment of an investor of another Party in a manner consistent with Article 1110, the most important being payment of compensation in the amount and manner prescribed. The requirement that it be "in accordance with due process and Article 1105(1)" does not create an independent obligation that can be reintroduced when the application of Article 1105 is excluded in respect of particular measures. It is a requirement that can serve only to justify an expropriation and has no application in this case. The Respondent has not invoked its right to expropriate under Article 1110. The Claimant alludes to this argument but does not attempt to justify it in paragraph 25 of the Memorial.

judgment was interpreted and implemented—or not implemented, as the Claimant alleges—is not relevant to support any claims that remain at issue and are properly admissible.

d. Denial of IEPS rebates for October and November 1997 as an expropriation

261. The claim that denial of specific IEPS rebates could amount to an expropriation of the sum owed is unsustainable because Chapter Eleven's definition of "investment" expressly excludes "claims to money" that do not involve the kinds of interest set out in subparagraphs (a) through (h) of the definition, none of which apply to tax remittances. Article 1110 applies only to the expropriation of an "investment" of an investor of another Party, in this case the enterprise CEMSA. If the expropriated property does not fall within the meaning of "investment", then Article 1110 does not apply.

262. The Claimant now alleges, in his second declaration, that the denial of IEPS's rebates for October and early November 1997 "shut down" CEMSA's cigarette exporting business for the third and final time, as if the denial of rebates was the operative expropriatory measure.

263. He now omits to refer to the 1998 amendment to the IEPS law that the competent authorities have determined was not an expropriation, notwithstanding his public protestations that the amendment to the law had put an end to CEMSA's ability to profitably export cigarettes.

264. Even if the Claimant could make out a plausible case that SCHP's denial of CEMSA's October and November 1997 rebate claims was a measure "tantamount to expropriation" of CEMSA (not just the rebates themselves), the alleged pre-NAFTA breaches of the NAFTA, international law or domestic law could not have any bearing on the matter.

265. The question for the Tribunal to answer is simply whether the measure complained of—denial of CEMSA's rebate claims for October and November 1997—was a measure tantamount to expropriation of the investment of an investor of another Party within the meaning of Article 1110.

266. The Respondent submits that the Claimant's remedy is in the fiscal.

PART IV: RELIEF SOUGHT

A. Answers to the Preliminary Questions.

267. The Respondent submits that the Tribunal should answer the Preliminary Questions in the following manner:

- a) the Claimant, as a permanent resident of Mexico, is not an investor of another Party for the purposes of the NAFTA and thus has no standing to submit this claim to arbitration;
- b) the Claimant has not submitted a point of claim in this arbitration proceeding concerning the alleged violation of NAFTA Article 1102 that he now seeks to assert;
- c) the Claimant may not submit any additional claim, or amend his claim on the basis of the alleged violation of NAFTA Article 1102 that he now seeks to assert;
- d) alternatively, the Claimant may submit an additional claim based on an alleged violation of NAFTA Article 1102 provided that he first complies in substance with Articles 1119, 1120, 1121 and in the manner described in paragraph 183 of this Counter-memorial;
- e) the Respondent properly may raise a limitation defense in respect of any claim based on measures taken or events occurring prior to 30 April 1996 and is not estopped from raising such defense;
- f) the Claimant is not entitled to assert a claim for loss or damage allegedly occurring before NAFTA's entry into force;
- g) the alleged breaches of NAFTA, general international law and domestic occurring prior to NAFTA's entry into force, or between 1 January 1994 and 30 April 1994 have not been shown to be relevant for the support of the claim or claims that are admissible in this proceeding.

B. Future Directions Concerning Requests for Production of Evidence

269. The Respondent will make additional observations concerning the appropriate form and scope of future requests for production of documents and witnesses, and directions of the Tribunal that may assist the parties in the orderly and efficient conduct of this proceeding.

All of which is respectfully submitted:

(signed in the original)

Hugo Perezcano Díaz
Agent and Counsel for
The United Mexican States