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IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT (ICSID Case No. ARB(AF)/99/1)

MARVIN ROY FELDMAN KARPA

Claimant

v.

THE UNITED MEXICAN STATES

Respondent

CLAIMANT'S ADDITIONAL OBSERVATIONS SUBMITTED IN REPLY TO THE COUNTER-MEMORIAL ON PRELIMINARY ISSUES

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CLAIMANT'S ADDITIONAL OBSERVATIONS ON SUBMITTED IN REPLY TO RESPONDENT'S COUNTER-MEMORIAL ON PRELIMINARY ISSUES

Introduction

1. Claimant submits these additional observations in reply to Respondent's Counter-Memorial on Preliminary Questions pursuant to Procedural Order No. 4. For the convenience of the Tribunal, Claimant addresses the issues in the same order as they are addressed in the Counter-Memorial. Claimant does not repeat submissions, facts or arguments made in Claimant's Memorial on Preliminary Issues but incorporates all of these here.

2. As a preliminary point, Claimant notes that Respondent has neither admitted nor denied the specific statements of fact included in his Memorial (*see* Mem. ¶¶ 1-5 at 4-6, ¶¶ 8-11 at 7-8, ¶¶ 26-43 at 15-21, ¶¶ 67-70 at 34-35, ¶¶ 78-86 at 39-42 and accompanying exhibits) as required by ICSID's Arbitration (Additional Facility) Rules (the "Rules"), Article 38 (3). Although Claimant has gone first at the direction of the Tribunal on the preliminary issues, each issue represents a motion by Respondent to dismiss the claim, in whole or in part, as a matter of law. Therefore the Tribunal should assume all the facts stated by Claimant as true for purposes of its resolution of the preliminary issues.

I. Preliminary Issue e: Marvin Feldman Has Standing under NAFTA to Assert this Claim Against the United Mexican States.

A. Introduction

3. Respondent United Mexican States disputes Claimant Marvin Feldman's standing to bring this proceeding on the basis of four premises, each of which is untenable:

(1) that Marvin Feldman, although a U.S. citizen, is not a national of "another party" (other than Mexico) under NAFTA;

(2) that NAFTA imports a doctrine of international law – the non-responsibility rule – which has been superseded by decisions of the International Court of Justice and other international tribunals;

(3) that the dual nationality provisions of the ICSID Convention are rules of customary international law applicable in this case; and

(4) assuming an "effective nationality" test drawn from international law is applicable under NAFTA, that residence is more important than citizenship in determining an individual's "effective nationality."

4. To summarize Claimant's response to these points:

(1) Claimant is a national of the United States, and NAFTA does not provide, explicitly or implicitly, that standing is available solely to an investor of one Party who is NOT an investor of the Party against which the claim is being brought. No such restriction can be read into the text;

(2) No principle of international law bars Claimant from bringing this claim.

a. The non-responsibility rule is not customary international law;

b. The ICSID Convention is not applicable in this case. Even if it were, Marvin Feldman is not a dual national under Article 25 of the ICSID Convention, and would not be barred, under that Convention, from bringing an action against Mexico by virtue of his residency there.

c. Under customary international law, the key considerations for nationality are a genuine link to the state and allegiance. Even if an "effective nationality" analysis were appropriate to apply under NAFTA, Marvin Feldman's citizenship must outweigh his permanent residence.

5. Respondent also asserts that Claimant's statement in his Notice of Arbitration that he is a "United States citizen who is not a national of Mexico" is incorrect. Claimant disagrees. This representation was included in the Notice of Arbitration at the Secretariat's request to meet the requirements for jurisdiction under the Additional Facility, and it is correct for that purpose. It is a correct statement of Claimant's nationality under Mexican law and under general principles of international law. And, as explained below, it is correct for purposes of any "effective nationality" analysis that may be made in this case.

6. Moreover, at the time the Notice of Arbitration was reviewed for registration by the Secretariat and, then, by Respondent, all parties concerned knew that Claimant was a permanent resident of Mexico. Respondent's Secretaria de Gobernación ("Gobernación") had granted Claimant that status, and the Notice of Intent to Submit a Claim to Arbitration, which was delivered directly to Respondent's Ministry of Finance and Public Credit ("Hacienda") as well as its Secretaría de Comercio y Fomento Industrial ("SECOFI"), on February 16, 1998, expressly describes Claimant's domicile and his *inmigrado* certificate. Further, the Notice of Arbitration

states that Claimant has resided in Mexico since 1973. *See* Declaration of Marvin Feldman, Dec. 2, 1998 ("Feldman Decl. I"). Hacienda raised every possible objection to Claimant's pursuit of this case to the U.S. Treasury Department over a six month period, August 1998 - February 1999. At that time, no one involved in this case believed that Claimant's status as a permanent resident raised an issue of standing under NAFTA.

B. Discussion

1. Under NAFTA, Claimant is An Investor of the United States as regards his Investment in Mexico.

7. Respondent's main textual argument is that Claimant is not an investor of "another Party" under Article 1101, but it offers no support for this conclusion. Even if Claimant is a Mexican national for some purposes under NAFTA, he is still a U.S. citizen, and, thus, an Investor of a Party other than Mexico. To argue otherwise merely begs the question whether NAFTA bars a U.S. citizen who is also a Mexican resident from bringing a NAFTA claim against Mexico with respect to his Investment in that country.

8. Respondent acknowledges that "Article 1139 does not define the term "investor of another Party." (Counter-Memorial on Preliminary Questions ("Cntr.-Mem.") ¶ 23, emphasis in original.) This absence is significant and cannot be explained away. It demonstrates that the States Party to NAFTA did not intend to exclude claims by dual "nationals" as national is defined in this agreement. If the States Party had intended to bar access to NAFTA's dispute resolution mechanisms to any Claimant who might be a citizen of one party and a permanent resident of the respondent party, they would have done so expressly. The drafters, had they chosen to include

such a bar, would have adopted a familiar formulation such as the one found in Article 25 of the ICSID Convention.[1]

9. In the absence of any NAFTA definition of "investor of another Party," Respondent would have the Tribunal import a restriction into the Article 1139 definition of "investor of a Party" to read that phrase to mean "a national *solely* of such Party *and not of another Party*." However, such a restriction would be contrary to the language of the agreement and to its objectives. If the NAFTA parties had intended to restrict access to Chapter 11 dispute settlement, it is more likely they would have phrased Article 201 as follows: "National means a natural person who is a citizen of a Party or who, *not being a citizen of any Party,* is a permanent resident of a Party." This may be the better interpretation of the text. (*See* Claimant's Memorial on Preliminary Issues ("Mem.") ¶ 91.)

10. Respondent also argues that if Claimant, as a permanent resident of Mexico, is permitted to sue Mexico under NAFTA, then any dual national "whether dual citizens or citizens of a Party and permanent residents of another Party – would be entitled to sue either State of their nationality, a result that was clearly not intended by the NAFTA parties." (Cntr.-Mem. ¶¶ 41-43.) This argument is a non-sequitur. It assumes not only that the non-responsibility rule applies under NAFTA, but that the rule would be broadened to equate permanent residents with citizens. A citizen is not the same as a permanent resident in international law. Even if a dual national analysis were to be imported from international law into NAFTA as Respondent contends, it

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[1] Article 1 of the Rules Governing the Additional Facility for the Administration of Proceedings by the ICSID Secretariat defines "national of another State" as "a person who is not . . . a national of the State party to that proceeding." NAFTA has no such limitation. Moreover, Claimant is not a Mexican national under this provision.

would only apply to dual nationals *stricto sensu*. Citizenship, with its obligations of loyalty and allegiance, necessarily outweighs permanent residency, which carries no such duties.

11. Moreover, the rights of a dual national *stricto sensu* are not before the Tribunal. Marvin Feldman is not a Mexican national under Mexican law and Mexico does not claim him as such. The question is not whether Marvin Feldman could sue the United States, the state to whom he owes allegiance. It is whether he can bring a claim against Mexico, a state to which he owes no allegiance. As Mexico frames the issue: "[i]f 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." (Cntr.-Mem. ¶ 48.) There can be no dispute that Claimant, a United States citizen, is an investor of the United States under NAFTA Article 1139, and thus, is an "investor of another Party" even if he is also an investor of Mexico. He clearly meets the standard as stated in NAFTA Article 1117 under which he brought this case. He is "an investor of a Party [the United States]" bringing the action "on behalf of an enterprise [*i.e.*, CEMSA] of another Party [Mexico]." The fact that he may also be an investor of Mexico under Article 1139 is not relevant.

12. Moreover, Respondent's position undercuts the objectives of NAFTA, which "as elaborated more specifically through its principles and rules, including national treatment . . . and transparency, are to . . . increase substantially investment opportunities in the territories of the Parties." *See* NAFTA, art. 102; and see a recent decision in a NAFTA case, *Metalclad Corp. v. United Mexican States*, ARB(AF)/97/1, Award (August 30, 2000), ¶ 70, copy attached as Exhibit 1. Mexico's interpretation would make it difficult for investors who intend to establish long-term investments in the territory of another Party to reside in that territory in order to supervise their investments without resorting to expensive schemes to avoid losing their NAFTA protections,

e.g., through the establishment of non-resident holding companies. *See* Mem. ¶¶ 93 at 44-45, and Affidavit of Professor Alan Swan,[2] attached to Mem. at Tab L ("Swan Aff.") ¶ 5 (B) and (C) at 7, demonstrating that the purpose of NAFTA's inclusion of "permanent residents" in the protected group was meant to *extend* the protections of the Agreement to non-Party investors who were also permanent residents of a Party, not to *limit* the NAFTA protections. One purpose of this provision was to encourage capital owned by European and Asian investors to flow among the NAFTA parties. To read Article 201 to cut-off the rights of permanent residents in the host country would be to reduce the flow of capital among the Parties.

2. No Principal of International Law Restricts Claimant's Standing to Bring this Proceeding Under NAFTA.

a. Access to dispute settlement under NAFTA is determined by the agreement, not principles of customary international law.

13. The question of standing should be resolved in Claimant's favor by applying the plain meaning of the NAFTA text in light of its object and purpose as discussed above. General principles and rules of international law could be used to fill gaps in the NAFTA text, but no rule contrary to the text may be used to negate the Parties' agreement. Thus, the non-responsibility rule or an "effective nationality" principle cannot be imported into NAFTA to restrict Claimant's Chapter 11 rights. In any event, as discussed above, Marvin Feldman is not a dual national under international law. NAFTA Article 201 does not make him a Mexican "national" for purposes of

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[2] Claimant presents Professor Swan's affidavit as expert testimony and asks the Tribunal to consider it as such. Professor Swan has not been retained as Claimant's counsel. International tribunals, including ICSID tribunals, commonly accept expert testimony on questions of international law including interpretations of the ICSID Convention. Examples include: the complex Amco Asia litigation including *Amco Asia Corp. v. Indonesia*, (ICSID No. ARB/81/1) (Annulment Proceedings) May 16, 1986, 25 I.L.M. 1441, 12 Y.B. Com. Arb. 129 (1987); and, more recently, *Manufactures Hanover Trust Co. v. Arab Rep. of Egypt*, (ICSID No. ARB/89/1) (settled June 24, 1993) and *Csekoslovenska obchodni banka, a.s. v. Slovak Republic*, (ICSID No. ARB/97/4) (decision pending).

international law, and he is not a Mexican national under Mexican municipal law.[3] Thus, Respondent's discussion of the "non-responsibility" rule, of ICSID Article 25, of customary international law, and of the "effective and dominant nationality" principle are all quite beside the point since this case in not one involving dual nationality. *Cf. Mergé Claim*, 1955 I.L.R. 22, 455 (holding "the question of dual nationality obviously arises *only* in cases where the claimant was in possession of both nationalities . . [emphasis added]"; and *see George Pinson Case*, Franco Mexican Claims Commission (1924-1932) Annual Digest 1927-28, Cases No. 194 and 195 (holding that claimant's French nationality was proved, but not his Mexican nationality, so that, in reality, contrary to Mexico's claim, there did not exist a case of dual nationality and, therefore, the principle of non-responsibility was not applicable, (quoted in translation and discussed in *Mergé* at 451-52).)

b. The Non-Responsibility rule is not customary international law, and neither the 1930 Hague Convention nor the ICSID Convention applies under NAFTA.

14. Even if the Tribunal were to decide it necessary to consider applicable rules of international law together with the terms of NAFTA, the resolution of this issue would be the same. First, as demonstrated in Professor Swan's expert opinion, the "non-responsibility" rule adopted in Article 4 of the Hague Convention has been displaced in international law by a more discerning analysis, *i.e.*, the "effective nationality" rule, which has become the norm. (Swan Aff., Mem. Tab L ¶ 7 at 8-10.)

[3] *See* Mexican Constitution Articles 30 and 34.

15. Similarly, Respondent's reliance on the ICSID Convention as customary international law on the issue of claims by dual nationals is incorrect.[4] The Model Bilateral Investment Agreements adopted by most, if not all, capital-exporting countries do not include any provision disqualifying dual nationals from bringing claims under those agreements.[5] As Moshe Hirsch, an authority relied on by Respondent, points out in regard to Article 25 (2) of the Convention:

> this rule constitutes a *deviation from the emerging norm* in international law according to which a state is permitted to file an international claim due to injury that was inflicted upon its national, who is a national of the respondent state as well, when the respondent state is not the state of the victim's effective nationality.[6]

Again, because this is not a case of dual nationality, the current norm is not applicable either.

16. Respondent's depreciation of the Iran-Claims Tribunal jurisprudence on this issue is not convincing. The Tribunal included three distinguished arbitrators of neutral third countries and its decisions are widely accepted by other tribunals.[7] Moreover, Iran, the party objecting to the standing of "dual nationals" to bring a claim before the Tribunal, did not invoke the ICSID

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[4] Mexico is in no position to rely on the ICSID Convention as customary international law as it has never signed the Convention. Moreover, prior to NAFTA, it consistently opposed international responsibility for uncompensated expropriation of foreign investment under the *Calvo* doctrine and, we believe, has never repudiated that doctrine apart from specific agreements with selected foreign states.

[5] *See, e.g.*, United States model Bilateral Investment Treaty: Treaty Between the Government of the United States of America and the Government of the Republic of [Country] Concerning the Encouragement of Reciprocal Protection of Investment (1994 Prototype, *rev'd* April, 1998).

[6] Moshe Hirsch, The Arbitration Mechanism of the International Centre for the Settlement of Investment Disputes 78 (1993), footnote omitted, emphasis added.

[7] Hirsch recognizes that the decisions of the Iran-U.S. Claims Tribunal also reflect the "emerging norm" on this issue. *Id.*, n. 150; and *see generally* Ian Brownlie, Principles of International Law 23 (5th ed. 1998) (citing decisions of the Iran-United States Claims Tribunal as a source of a number of significant findings on issues of international law.)

Convention as a source of customary international law supporting its position because the point lacks credibility.[8] Iran was represented by highly competent counsel and had every incentive to raise all possible bases on which to object to standing. Thus, the Tribunal did not "overlook" the ICSID Convention; it simply was not relevant in that case or in this one.

17. In addition, even if the ICSID Convention did represent customary international law, it would not help Respondent in this case. The non-responsibility rule adopted in ICSID applies solely to dual nationals *stricto sensu.* This rule never applied to bar suits by foreign nationals who were merely residents and not nationals of the respondent state. Marvin Feldman is not a Mexican national and could bring a claim against Mexico under the ICSID Convention if it were applicable in this case.

c. Claimant's Effective Nationality Is That of the United States.

18. The Counter-Memorial does not address Claimant's argument that citizenship is the prime criterion in any analysis of "effective nationality" under international law and would be under NAFTA. There is no answer to this point. The basic premise of the non-responsibility rule and of the more flexible "effective nationality" doctrine which arose out of the *Nottebohm* case is that generally a state is not held accountable internationally for claims by persons who owe it allegiance.[9]

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[8] Even the dissenting Iranian Arbitrators did not cite the ICSID Convention to support their view that the non-responsibility rule of Article 4 of the Hague Convention defeated the claimant's standing. *Iran-United States*, Case A/18 Concerning the Question of Jurisdiction over Persons with Dual Nationality, 5 Iran-U.S. Cl. Trib. Rep. 251, 275 (1984)(dissenting opinion).

[9] *See generally,* Oppenheim's International Law, §150 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

19. Claimant's situation is far different from Nottebohm's. He is a natural born United States citizen, and there is no question concerning his "genuine link" to the United States. His allegiance is to the United States alone and he calls upon the United States for diplomatic protection. He also maintains other significant connections to his country of nationality. (Mem. ¶¶ 103, 106-109.) As stated in claimant's Declaration, he had contracted to purchase a home in Aventura, Florida in 1997, but lost the contract and a large deposit due to the huge negative financial impact of Respondent's denial of the 1997 IEPS rebates at issue. *See* Mem. Tab B, Second Declaration of Marvin Feldman, Aug. 18, 2000 ("Feldman Decl. II") ¶ 8, and see the copy of Claimant's contract for the attempted purchase of a Florida residence attached as Exhibit 2.

20. Marvin Feldman has never broken his bond of allegiance with the United States or foresworn the reciprocal protection the United States gives him. None of the evidence submitted by Respondent of Mr. Feldman's status as *inmigrado* in Mexico changes his genuine relationship with the United States. In this case, Claimant owes allegiance only to the United States, the state of his citizenship. He owes no allegiance to Mexico as a permanent resident, and Mexico expects none from him.

21. The opinion of Dr. Sergio López Ayllón, submitted by Respondent with its Counter-Memorial, clearly demonstrates the last point. Dr. López testifies that, under Mexican law, permanent residence is a lesser status than nationality, that many restrictions apply to *inmigrados*, and Mexico does not require allegiance from them. In fact, such permanent residents, under Mexican law, are presumed *not* to have an allegiance to Mexico. For this reason, Dr. López points out, an *inmigrado* may not serve in the Mexican Armed Force, form part of a crew on Mexican aircraft or ships, or act as a port authority or customs officer "for obvious

reasons of national security," and may not "interfere in national political matters." (Cntr.-Mem. App. I, ¶ 26.) In addition, it is clear that Mexico owes no obligation of diplomatic protection to its permanent residents who are not nationals *stricto sensu*. Mexico would not have standing under international law to represent Claimant or to exercise diplomatic protection on his behalf in another country.

22. NAFTA is exceptional in extending the benefits of the agreement to third-country nationals who reside permanently in one of the Parties. Very few international agreements adopt this approach. There is no suggestion in the Agreement, however, or in the practice of the Parties, that the broad definition of "national" was conceived as affecting basic questions of allegiance. Thus, there is no reason to apply an effective nationality analysis under NAFTA absent a true case of dual nationality *stricto sensu*. Citizens retain their rights against other NAFTA parties even if they are permanent residents there. If such an analysis *is* applied under NAFTA, however, the same result would obtain. The principle of allegiance inherent in citizenship prevails over mere residence in another state whatever the social and economic implications of such residence.

23. This is particularly true in this case where Claimant has repeatedly sought and received diplomatic assistance from the United States to persuade Mexico to comply with its NAFTA obligations towards him. The good offices of the United States Embassy in Mexico City in 1995 were instrumental in persuading Respondent to allow Claimant to resume exporting cigarettes with IEPS rebates as required by Mexican law, and Claimant is seeking to obtain the fruits of United States diplomatic protection in this proceeding. (*See* Mem. Tab B (Feldman Decl. II) ¶ 22, and Mem. Tabs G - I (U.S. Embassy letters).) Respondent has never regarded Claimant

as a Mexican national, and it is hard to imagine that it would consider extending him diplomatic protection under NAFTA or otherwise.

24. Finally, prior to June 30, 2000, Respondent never questioned the Embassy's right to make representations on Claimant's behalf or Claimant's right to assert those rights himself under NAFTA. As discussed in the Memorial (Mem. ¶ 115), Claimant has waived his and CEMSA's rights to seek damages for NAFTA breaches in the Mexican courts, and would be prejudiced severely if he is barred from pursuing his claims under Chapter 11. *See* Waivers attached as Exhibits B and C to the Notice of Arbitration pursuant to NAFTA Article 1121 (2) (b).

For the reasons stated, Claimant has standing to bring his claim to arbitration under NAFTA.

II. Preliminary Issues a and b: Claim for Discrimination on the Basis of Nationality under Article 1102.

25. Respondent's submissions regarding Claimant's Article 1102 claim are addressed to three points: 1) NAFTA overrides the Arbitration Rules and precludes presentation of new claim based on facts that post-date the submission of this claim to arbitration; 2) the claim is not supported by any claim for damages; and 3) the claim is not based on facts but only speculation. These submissions do not bear scrutiny for the reasons stated in Claimant's Memorial and below.

A. Claimant's Article 1102 Discrimination Claim is Admissible.

26. The issue of admissibility of a new claim based on facts occurring after submission of the Notice of Arbitration has been specifically addressed by an ICSID tribunal in a recently-concluded NAFTA case brought by a United States investor against Mexico and decided in favor

of the claimant. *See Metalclad Corp. v. United Mexican States*[10], Ex.1. The *Metalclad* case was heard and decided under ICSID's Additional Facility Rules by a distinguished panel headed by Sir Elihu Lauterpacht.

27. In *Metalclad*, the State of Mexico issued an ecological decree that barred the operation of the investment in the State. The decree was issued after the claimant-investor had instituted a NAFTA arbitration against Mexico claiming expropriation of its investment on other grounds. The claimant raised the issuance of the decree as an additional claim in the arbitration. Mexico made arguments, similar to those it makes here, against Metalclad's submission of an additional claim based on events occurring after submission of Metalclad's Notice of Arbitration.[11] As it has in the instant case, Mexico asserted that the formal "procedural prerequisites" of Articles 1119, 1120, and 1121 must be met before a claim can be amended. (*See, e.g.*, Cntr.-Mem. ¶¶ 175-176, 179.)

28. Metalclad responded, as Claimant has in the instant case, that the text of NAFTA did not preclude additional claims but was designed to encourage pre-arbitral attempts at settlement by negotiation, and that Article 48 of the Rules expressly permits amendment including additional claims. Metalclad also argued, as has Claimant here, that admission of the amendment was also dictated by policy considerations relating to the administration of justice, consistency with NAFTA's stated object of creating effective procedures relating to dispute resolution, and consistency with the broad jurisdiction of the tribunal under NAFTA Article 1120 and Article 48 of the Rules. *Metalclad* at ¶ 65. The tribunal resolved these issues in the claimant's favor.

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[10] *Metalclad Corp. v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award (August 30, 2000).

[11] *See Id.*, ¶ 64.

29. The *Metalclad* tribunal flatly rejected Mexico's argument that Section B of Chapter 11 modified the Rules with regard to the amendment of claims and the filing of ancillary claims so that Article 48 of the Rules was inapplicable, an argument identical to one Mexico makes in the instant case (Cntr.-Mem. ¶ 181). The tribunal stated:

> Metalclad properly submitted its claim under the Additional Facility Rules as provided under NAFTA, Article 1120. Article 1120(2) provides that the arbitration rules under which the claim is submitted shall govern the arbitration except to the extent modified by Section B of Chapter Eleven. Article 48(1) of the Rules clearly states that a party may present an incidental or additional claim provided that the ancillary claim is within the scope of the arbitration agreement of the parties.
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> The Tribunal does not agree with Mexico's post-hearing position that Section B of Chapter Eleven modifies Article 48 of the Rules. The Tribunal believes it was not the intent of the drafters of NAFTA, Articles 1119 and 1120, to limit the jurisdiction of a Tribunal under Chapter Eleven in this way. Rather, the Tribunal prefers Mexico's position, as stated in its Rejoinder, that construes NAFTA Chapter Eleven, Section B, and Article 48 of the rules as permitting amendments to previously submitted claims and consideration of facts and events occurring subsequent to the submission of a Notice of Claim, particularly where the facts and events arise out of and/or are directly related to the original claim. A contrary holding would require a claimant to file multiple subsequent and related actions and would lead to inefficiency and inequity.[12]

30. Finally the *Metalclad* tribunal found that the Rules regarding new claims and amendments must provide fairness and clarity, stating:

> The Tribunal agrees with Mexico that the process regarding amendments to claims must be one that ensures fairness and clarity. Article 48(2) of the Rules ensures such fairness by requiring that any ancillary claim be presented not later than the Claimant's Reply. In this matter, Metalclad presented information relating to the Ecological Decree and its intent to rely on the Ecological Decree as early as its Memorial. Mexico subsequently filed its Counter-Memorial and Rejoinder.

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[12] *Metalclad* at ¶ 66-67.

> The Ecological Decree directly relates to the property and investment at issue, and Mexico has had ample notice and opportunity to address issues relating to that Decree.[13]

31. Claimant has presented the issue of Article 1102 discrimination to Respondent and to the Tribunal well in advance of his Memorial on the merits. There is no prejudice to Respondent.[14] In addition, the claim under Article 1102, concerning Mexico's payment of IEPS rebates to Mexican-owned companies who are otherwise similarly situated to CEMSA, relates directly to Mexico's denial to CEMSA of IEPS rebates which are at issue here. There is no support for Mexico's submission that this issue is not one it has "consented" to arbitrate. Mexico's consent was given by its adoption of NAFTA. NAFTA, art. 1122.

32. It is unfortunate that Respondent has not called the Tribunal's attention to the *Metalclad* decision, directly on point, which it had in hand at the time it filed its September 8, 2000 Counter-Memorial. Instead, Mexico cited the opinion of an ICSID tribunal in *Waste Management, Inc. v. United Mexican States*,[15] for its proposition that strict compliance with the procedural requirements of Articles 1119, 1120 and 1121 is a mandatory prerequisite to obtaining the disputing party's consent to arbitrate. The *Waste Management* opinion is inapposite. The tribunal did not deal with the issue of new or amended claims, but was concerned only with the adequacy of the claimant's waiver, submitted pursuant to Article 1121 (b), where the claimant had

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[13] *Id.* at ¶ 68.

[14] In fact, Mexico has consistently pointed out that it does not expect to have a full picture of a claimant's case at least until the Memorial on the merits is filed (*see, e.g.*, remarks of Mr. Perezcano to Tribunal, Trans. (Eng.), Hearing Mar. 10, 2000 at 60-64, 72-73); its argument that it has not had an opportunity to investigate is hollow.

[15] *Waste Management, Inc. v. United Mexican States*, ICSID Case No. (AF)/98/2, (Award) June 2, 2000.

attempted to limit the scope of the waiver.[16] That tribunal did not have before it, and did not address, the sufficiency of an Article 1119 Notice of Intent with respect to its statement of issues and factual basis for the claim. Nor did that tribunal consider or discuss what, if any, procedural prerequisites exist for the assertion of new or amended claims after submission to arbitration.

33. Respondent also calls attention to the position of the United States which Mexico asserts was filed under Article 1128 in another NAFTA arbitration, *Pope & Talbot v. Canada,*[17] and with which Mexico states it concurred and filed supplementary submissions. (Cntr. Mem. ¶ 177.) This statement is cited in support of Respondent's argument that there can be no supplementation of NAFTA arbitrations without strict compliance with the "procedural prerequisites of Chapter 11." The Tribunal should disregard Respondent's assertion of the United States position in the *Pope and Talbot* case for two reasons. First, Claimant does not have access to the State Parties' submissions to the *Pope and Talbot* tribunal. The submissions have not been published and Respondent has ignored Claimant's request for a copy. (The United States Government has also declined Claimant's request for a copy.)

34. Second, and more important, *Pope and Talbot* rejected Respondent's position. With regard to the States Parties' submissions, quoted in the instant case by Mexico, the tribunal stated bluntly:

> The Tribunal's conclusion [that there was no new or amended claim on the facts presented] makes issues raised by the United States and Mexico irrelevant to this case. Even if the Tribunal were to concur with the United States that Article 1122 (1) conditions consent to arbitration on the satisfaction of each of the

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[16] *Waste Management*, ¶ 16.

[17] *Pope & Tabot v. Canada*, NAFTA/UNCITRAL Case, (Award Concerning Motion by Canada Respecting the Claim Based upon Imposition of the "Super Fee.") August 7, 2000.

> procedures set out in Articles 1116-1122, the Tribunal has concluded in its previous rulings that those requirements have been satisfied. In any case, as rulings by this Tribunal and the *Ethyl* Tribunal have found, strict adherence to the letter of those NAFTA articles is not necessarily a precondition to arbitrability, but must be analyzed within the context of the objective of NAFTA in establishing investment dispute arbitration in the first place. That objective, found in Article 1115, is to provide a mechanism for the settlement of investment disputes that assures "due process" before an impartial tribunal. Lading that process with a long list of mandatory preconditions, applicable without consideration of their context, would defeat the objective, particularly if employed with draconian zeal. [18]

A copy of the *Pope & Talbot* opinion is attached as Exhibit 3. Respondent reassertion of the arguments that have been soundly rejected by at least three previous tribunals[19] seems ill conceived.

B. CEMSA Has Suffered Damages As A Result of the Article 1102 Breach.

35. CEMSA has been damaged as a direct result of this discrimination by Mexico. CEMSA's lucrative cigarette export business was shut down by Respondent in November 1997. By that time, CEMSA was exporting a large volume of cigarettes each month and was earning approximately U.S. $ 1,000,000 each month on these exports. Respondent continues to prevent CEMSA from resuming this business. CEMSA has lost, and continues to lose, profits on the order of one million dollars per month for every month it has been, and is, shut out of the cigarette export business. Claimant made a claim for these damages in his Notice of Intent in the section headed "Relief Sought and Approximate Amount of Damages Claimed" ¶¶ 2-4, and in his Notice of Arbitration in Section D, "Damages."

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[18] *Id.*, ¶ 26 at 12-13 (footnotes omitted).

[19] *Metalclad, supra; Pope & Talbot, supra*; and *Ethyl Corp. v. Canada*, NAFTA/UNCITRAL Case, (Award on Jurisdiction) June 24. 1998, 38 I.L.M. 708. 730 (1999), ¶¶ 93-95, cited in *Pope & Talbot, supra,* and in Mem. ¶¶ 15-16, 19-22.

36. If the Tribunal concludes that Respondent's termination of CEMSA's cigarette export business by denying IEPS rebates was "tantamount to expropriation" in breach of Article 1110, Respondent will be liable to Claimant for the losses suffered in consequence of said breach. In addition, if Claimant can show that Respondent's continuing refusal to allow CEMSA to export cigarettes with IEPS rebates is in breach of Article 1102 because Respondent allows Mexican-owned companies to obtain IEPS rebates on cigarette exports, then the Tribunal can award the same damages under Article 1102 without even reaching the issue of expropriation under Article 1110. CEMSA's losses are the same. Only the basis of liability is different.

C. The Article 1102 Claim Is Not Speculative

37. Claimant did not state the factual basis for his Article 1102 claim until he had actual knowledge of the facts to support it. The Article 1102 claim is based on the following:

a. During 1999, Respondent made payments of IEPS rebates on cigarette exports to at least one Mexican-owned enterprise in like circumstances to CEMSA. That enterprise is Mercados Regionales, S.A.de C.V. ("Mercados I"), a Mexican export company owned by Mexican citizens. Like CEMSA, Mercados I is a reseller, not a producer, of cigarettes. The IEPS rebates paid to Mercados I are the same kind of rebates at issue in this case. (Mem. Tab B (Feldman Decl. II), ¶¶ 24-31.)

b. Another Mexican-owned company similarly situated to CEMSA, Mercados Extranjeros, S.A.de C.V. ("Mercados II"), has been seeking the same benefit. In early 2000, Hacienda denied an application by this company, but there is no reason to believe that the denial was final because Hacienda did not question the company's right to export cigarettes with IEPS benefits. This denial was based only on Hacienda's perception that the principals of Mercados II

had some relationship with Marvin Feldman, the claimant in this case. Thus, the denial was for a discriminatory purpose, and would not have been made if Respondent had not believed Claimant was connected to Mercados II. (Mem., Tab B (Feldman Decl. II).

38. Claimant must note the absurdity of Mexico's assertion that "if the Claimant lacks any knowledge of the facts surrounding the alleged breach of Article 1102, there can be no loss or damages incurred by CEMSA." If this were the case, a NAFTA Party could discriminate against alien investors with impunity, as long as it insured that the facts of such discrimination were kept secret. This result is not the one envisioned by NAFTA's goal of fostering investment, and is antithetical to the policy of transparency under NAFTA. *See* NAFTA, art. 102, specifically listing "transparency" as a principle and rule of NAFTA; and *See Metalclad*, ¶70, stressing NAFTA's specific objectives of transparency and substantial increase in investment opportunities.

39. In fact, Claimant has discovered specific facts clearly demonstrating this discrimination, as discussed above. Given the facts that are known, Claimant is entitled to request production of documents and information known to Respondent, and not otherwise available to Claimant, that will show whether Respondent made IEPS rebates to other resellers of cigarettes. This information is relevant to discrimination under both Article 1102 and Article 1110 (b). Claimant has made such requests in this case.

For the reasons stated, Claimant's Article 1102 claim must be allowed.

III. Preliminary Issue c: Article 1117(2) Does Not Bar Any Claims Asserted in this Case.

40. Respondent's argument that the Tribunal lacks competence to consider claims based on measures taken prior to April 30, 1996 rests on the incorrect theory that the doctrine of equitable estoppel is not established in international law and can not be used in the interpretation and application of NAFTA Article 1117 (2). The Counter-Memorial also misstates Claimant's allegations in material respects and seeks to draw the Tribunal into premature consideration of merits issues that have not been fully developed by the parties and are not before the Tribunal under Procedural Order No. 4.

A. The Three-year Limitation Period under Article 1117, if Applicable in this Case, is Computed from Delivery of Claimant's Notice of Intent.

41. Respondent argues that Article 1117 (2) is jurisdictional and that nothing in the text "authorizes flexibility in applying the time limitations, even if there were genuine equitable reasons for doing so. . ." which it disputes. (Cntr.-Mem. ¶199.) However, the text of that subparagraph does not use the phrase "submit to arbitration" that Respondent would read into it. Moreover, as shown below, equity is an integral part of international law, and the NAFTA Parties undoubtedly intended the agreement to be applied consistent with basic precepts of fundamental fairness and natural justice.

42. It has not been established that the time limitation of Article 1117 (2) is jurisdictional. Many of the preconditions for arbitration under NAFTA Chapter 11 are not jurisdictional. *See Ethyl Corp.*, supra, at 724, 729 (holding that certain NAFTA preconditions for arbitration constituted "procedural rules," such that Claimant's technical non-compliance constituted correctable problems rather than "an absence of jurisdiction *ab initio*"); *Pope &*

Talbot, supra, ¶ 28 at 12-13 (holding that "strict adherence to the letter of [NAFTA Articles 1116-1122] is not necessarily a precondition to arbitrability" and "lading that process with a long list of preconditions. . . would defeat the objective [of due process]").

43. As discussed in Claimant's Memorial, NAFTA creates an elaborate, particular regime for the presentation of claims and their submission to arbitration which is significantly more burdensome than most domestic legal regimes. The Notice of Intent required by Article 1119 is much more than a mere statement that Claimant is considering a lawsuit. It is one of several, time-consuming procedures with which a Claimant must comply before submitting a claim to arbitration, including efforts to settle a claim through consultation or negotiation (Art. 1118) and, in this case, reference to U.S. and Mexican tax authorities (Art. 2103(6)). Surely, the NAFTA parties did not intend to make a Claimant suffer unrecoverable losses while these procedures are underway.

44. The equities in this case are particularly strong. Claimant delivered the Notice of Intent on February 16, 1998 and was not authorized by the tax authorities to proceed to arbitration until February 18, 1999. Claimant (then not represented by counsel) delivered the Notice of Intent directly to Hacienda as well as to the U.S. and Mexican agencies responsible for NAFTA matters, *i.e.*, SECOFI and the United States Trade Representative ("USTR"). For reasons that have not been explained, USTR did not communicate the Notice to the U.S. Treasury Department as it should have done, and Hacienda waited six months to respond to the Notice of Intent. When it did write Claimant in August 1998, it took the position that he was required by Article 2103(6) to start over by submitting the Notice directly to Treasury. The U.S. Government concurred in this view. All other arguments aside, in these circumstances Article

1117(2) cannot be applied, consistent with equitable principles, to cut-off Claimant's damages for the period after February 16, 1995.

B. Equitable Principles and Estoppel Are Well Established Doctrines of International Law

45. General principles of international law have long included the concept of equity or equitable principles. M.W. Janis, *Equity in International Law*, *in* 7 Encyclopedia of Public International Law 74-75 (1984) (noting the acceptance of equity as part of international law by Grotius in 1625 and continuing through the 19th and 20th centuries); Prosper Weil, *L'équité dans la Jurisprudence de la Cour International de Justice, in* Fifty Years of the International Court of Justice 121, 122-126 (Vaughan Lowe & Malgosia Fitzmaurice eds. 1996); D.P. O'Connell, International Law 14 (1970).

46. The International Court of Justice (I.C.J.), for example, has frequently noted that equity constitutes an integral part of international law. "What are widely known as principles of equity have long been considered to constitute a part of international law, and as such they have often been applied by international tribunals." *Diversion of Water from the Meuse (Netherlands-Belgium)*, 1937 P.C.I.J. (ser. A/B) No. 70, at 76 (June 28) (concurring opinion of Hudson) (where the Netherlands complained that a lock built by Belgium contravened a treaty, previous Dutch conduct estopped claim). "[E]quitable criteria . . . may be used to ensure *in concreto* that a particular situation is dealt with in accordance with the principles and rules" of international law. *Gulf of Maine (Canada-United States)*, 1984 I.C.J. 246, 288-90 (Oct. 12). Equity lies not outside the rule of law, but within it, guiding the reasoning of judges to be just and fair, and therefore equitable. *North Sea Continental Shelf (Germany-Denmark; Germany-Netherlands)*,

1969 I.C.J. Reports 3, 48 (Feb. 20). *See also* Weil, *supra*, at 122 (citing numerous other I.C.J. cases that relied upon a concept of equity).

47. Similarly, the Iran-U.S. Claims tribunal has relied upon equity under law to decide various issues. "Our search is for justice and equity, even in cases where arguably relevant national laws might be designed to further other and doubtless quite legitimate goals." *CMI International, Inc. v. Iran*, Case No. 40, Dec. 27, 1983, 4 Iran-U.S. Cl.Trib.Rep. 263, 268.

48. Moreover, the doctrine of equitable estoppel is itself accepted as a general principle of international law. Respondent's argument that estoppel is unknown in Mexico or other civil law countries, and therefore out of place in an international arbitration, is without merit. "There is no doubt that estoppel is an operating doctrine in international law." Jorg Paul Muller & Thomas Cottier, *Estoppel, in* 7 Encycl. of Pub. Int'l L. 78, 80 (1984). Ian Sinclair, *Estoppel and Acquiescence, in* Fifty Years of the International Court of Justice 104, 120 (Vaughan Lowe & Malgosia Fitzmaurice eds. 1996) (concluding that estoppel is part of the wider pattern of state conduct relevant to disputes before international tribunals).

> The basis of the rule [of estoppel] is the general principle of good faith and as such finds a place in many systems of law; the description of this rule as an Anglo-American rule is misleading in so far as it suggests that its essentials are peculiar to the English and American legal systems. It may be true that in those systems the rule has developed refinements which find no place in the 'rough jurisprudence' of international courts, but the essentials of the rule are far more general, and their acceptance into the jurisprudence of international tribunals [are] apparent . . . .

D.W. Bowett, *Estoppel Before International Tribunals and its Relation to Acquiescence*, 33 Brit. Y.B. Int'l L. 176 (1957).

49. Indeed, although Respondent quoted Ian Brownlie as criticizing estoppel, Respondent failed to note that Professor Brownlie, just before Respondent's quote, accepts estoppel as a general principle of international law.

> A considerable weight of authority supports the view that estoppel is a general principle of international law, resting on principles of good faith and consistency. It is now reasonably clear that the essence of estoppel is the element of conduct which causes the other party, in reliance on such conduct, detrimentally to change its position or to suffer some prejudice.

Ian Brownlie, Principles of Public International Law 646 (5th ed. 1998).

50. The Iran-U.S. Claims Tribunal reached this same conclusion. "[T]he Tribunal is in no doubt that the doctrine of preclusion, whether based upon concepts of acquiescence, estoppel, or waiver, is available as a general principle of law which the Tribunal is authorized to consider . . ." *Phillips Petroleum Co. Iran v. Iran*, Case No. 39, June 29, 1989, 21 Iran-U.S. Cl.Trib.Rep. 79, 154-55.

51. Respondent asserts that the equitable principles of estoppel and tolling are common-law doctrines not found in Mexican law, but it fails to discuss relevant doctrines found in Mexican law, such as *preclusión*,[20] a form of estoppel, or *suspención de la prescripción*, a tolling of a limitations period. Under Article 1168 of Mexico's Federal Civil Code, the running of a statute of limitations is "interrupted" when a debtor recognizes his obligation, whether in writing, orally, or tacitly through unambiguous facts.[21] That is just the case we have here. At various times in

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[20] José Ovalle Favela, Teoría General del Proceso 199 (Harla, México 1996).

[21] "The running of the statute of limitations shall be interrupted . . . if the person who asserts adverse title or bar expressly acknowledges, verbally or in writing, or impliedly through unambiguous facts, the right of the person against whom the statute is running." Código Civil Federal (Mex.), art. 1168.

"The legal effect of the tolling of the statute of limitations is to void the time accumulated up to that moment." *Id.*, art. 1175.

1992-1997 Hacienda recognized in writing, orally and by administrative practice that CEMSA is entitled to IEPS rebates on cigarette exports.

52. In any event, whether or not these equitable principles are recognized under Mexican law, NAFTA and international law govern this proceeding (NAFTA, article 1131 (1).), and "A state cannot adduce its constitution or its laws as a defense for failure to carry out its international obligation." Restatement (Third) of Foreign Relations Law of the United States, § 115, Comment b, at 64, *citing Treatment of Polish Nationals in Danzig*, 1932 P.C.I.J. (ser. A/B) No. 44, at 22 (Feb. 4) (advisory opinion). This principle was expressly applied to NAFTA by the Tribunal in *Metalclad Corp. v. United Mexican States*, ICSID No. ARB(AF)/97/1, August 30, 2000, at ¶ 100. Thus, equitable principles, including estoppel, must be applied in addressing Respondent's contentions.

C. Claimant's Allegations Support His Theory of Estoppel or Tolling.

53. Respondent mischaracterizes the nature of the agreement between Hacienda and Claimant. Respondent argues that there was no agreement to "avoid taxes" and asserts that Claimant "asks the Tribunal to accept that he entered into a binding agreement with the Government of Mexico that he would refrain from bringing suit . . . ." (Cntr.-Mem. ¶ 213.) This is incorrect. Claimant has provided evidence -- Marvin Feldman's Declarations -- that the Government of Mexico agreed to pay CEMSA rebates of IEPS taxes on cigarette exports and that he relied on that promise in not pursuing legal remedies. Claimant does not seek to prove, and he is not required to prove, a specific agreement that he would forebear from bringing a NAFTA claim.

54. Moreover, Respondent is wrong to assert that Claimant "has only alleged that Hacienda *implied* that CEMSA could avoid paying IEPS taxes on future exports." (Cntr.-Mem. ¶ 218.) Claimant's testimony is that he received specific assurances from Hacienda that it would pay IEPS rebates to CEMSA. Relying on these express promises, CEMSA paid the IEPS tax which was included in the price of the cigarettes it bought for export. Marvin Feldman's testimony that he would never have risked investing large sums in such purchases without assurances that the tax would be rebated is wholly credible and stands uncontradicted.

55. Respondent also argues that Claimant has not 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." (Cntr.-Mem. ¶ 214.) The question whether the agreement to provide rebates is legally binding is for the Tribunal to decide at the merits stage of the proceeding. There is no doubt, however, that a foreign investor is entitled under NAFTA to rely on oral representations made by responsible Hacienda officials. As noted in the recent *Metalclad* case decided under NAFTA, "Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill." *Metalclad, supra,* at ¶ 89.

56. Under the cases cited in Claimant's Memorial, estoppel applies when defendant lulls plaintiff into a false sense of security. As under the Mexican Civil Code cited above, prescription is interrupted when the debtor recognizes its obligation, and a writing is not required. Oral statements or clear conduct suffice. *See Diversion of Water from the Meuse, supra,* at 75, 77 (conduct of Netherlands estopped it from bringing claim against Belgium). In this case, Claimant's allegations are supported by all three: (1) letters from Hacienda officials in 1992, 1994

and 1997 confirming CEMSA's legal rights[22], (2) an oral agreement in 1995 recognizing those rights, and (3) performance of that agreement in 1996-1997. Thus, it is clear that Claimant has met the standard for equitable estoppel or tolling.

57. In the Counter-Memorial, Respondent criticizes one of several cases cited by Claimant, *Atkins v. Union Pacific Railroad Co.* (*Atkins I*), 685 F.2d 1146 (9th Cir. 1982), and points out that the *Atkins* plaintiff's claim to estoppel was not sustained after the case went to trial. *Atkins v. Union Pacific Railroad Co.* (*Atkins II*), 753 F.2d 776 (9th Cir.1985). *Atkins II*, however, did not overturn *Atkins I*. Plaintiff did not prove his claim of estoppel, because his testimony at trial contradicted the allegations upon which he relied. Courts have continued to cite *Atkins I*'s general standard for estoppel as the correct statement of the law. *See, e.g., Foutty v. Equifax Services, Inc.*, 762 F. Supp. 295 (D. Kan. 1991) (citing *Atkins I* to show tolling applied where defendant told plaintiff he intended to settle a dispute over termination); *Heideman v. PFL, Inc.*, 710 F. Supp. 711 (W.D. Mo.1989) (citing *Atkins I* as an example of what conduct is sufficient to allow equitable estoppel).

58. In his Memorial on Preliminary Issues, Claimant cited several other cases that Respondent does not attack. The essence of all these cases is that conduct by a defendant which tends to lull a plaintiff into a false sense of security, such as by promising to settle a claim, can estoppe the defendant from later raising a limitations defense. This occurs, for example, where "the defendant assures the plaintiff that he intends to settle and the plaintiff, in reasonable reliance

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[22] *See* Attachments to Claimant's Notice of Arbitration Exs. 7, 8, and 15 and to Claimant's Memorial on Preliminary Issues, Tabs C and F.

on that assurance, delays in bringing his suit until after the statute has run . . . ." *Cerbone, v. Int'l Ladies Garment Workers' Union*, 768 F.2d 45 (2d Cir. 1985).

59. *United States v. Dalm*, 494 U.S. 596 (1990), the one case cited by Respondent, (Cntr.-Mem. ¶ 220,) does not support Respondent's argument. First, the case does not deal with equitable estoppel; it involves a technical tax procedure under United States law called equitable recoupment. Second, in *Dalm* there was no other basis for jurisdiction than the stale recoupment claim. *Dalm* would allow a stale recoupment claim to be presented in a U.S. tax action along with other claims establishing the court's jurisdiction over the case. Thus, the *Dalm* rule would not apply in this case. Third, the plaintiff in *Dalm* had had the opportunity to present its recoupment claim as a counter-claim in a prior tax suit and failed to do so. In that case, unlike this one, plaintiff slept on his rights and did not have grounds for equitable estoppel. Claimant Marvin Feldman, however, has vigorously pursued his claims against the Government of Mexico, as already shown in Claimant's Memorial on Preliminary Issues.

60. Finally, the language of NAFTA itself makes clear that the limitations provision of Article 1117 must be interpreted with concepts such as equitable estoppel and tolling in mind. Article 102 (2) states "The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives . . . and in accordance with *applicable rules of international law*." (Emphasis added.) In addition, NAFTA Article 1131 (1) requires that a tribunal established under Chapter 11 "shall decide the issues in dispute in accordance with this Agreement and *applicable rules of international law*." (Emphasis added.) This language is consistent with the Vienna Convention, article 31(3)(c), which provides that, when interpreting a treaty, "There shall be taken into account . . . any relevant rules of international law . . . ." As shown above, the

equitable principles of estoppel and tolling are general principles of international law. Thus, to reach a decision in a NAFTA Chapter 11 investment dispute without consideration of these two equitable principles would undermine the objectives, purpose, and the specific language, of NAFTA.

D. The History of the Dispute Is Relevant to Claims based on Respondent's 1997 Measures.

61. As shown in Claimant's Memorial on Preliminary Issues, ¶¶ 63-65, the history of the dispute between the parties is relevant even if the only claims deemed admissible are those based on measures taken by Respondent in 1997. The evidence presented by Claimant[23] relating to events prior to April 30, 1996 shows that (1) CEMSA relied on Mexican law and Hacienda's representations in purchasing cigarettes for export in October-November 1997, (2) that Respondent's denial of IEPS rebates to CEMSA for October-November 1997, was intended to shut down CEMSA's cigarette-export business permanently, and (3) that Respondent had taken similar measures twice in past years for the same purpose contrary to Mexican and international law. The circumstances surrounding these prior measures, including the intervention of Carlos Slim, help explain the purpose and effect of Respondent's measures in 1997.

62. Moreover, contrary to Respondent's argument (Cntr.-Mem. ¶¶ 260-261), its failure to comply with the 1993 decision of the Supreme Court of Justice, except for a brief period, is a key issue in this case. Claimant has argued at every stage of this dispute that the Supreme Court recognized CEMSA's right to receive IEPS rebates on future exports of cigarettes, and that

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[23] First Declaration of Marvin Feldman, Dec. 2, 1998 filed with the Notice of Arbitration; Second Declaration of Marvin Feldman, Aug. 18, 2000; and exhibits attached thereto, filed as Tab B to Mem.

Respondent's refusal to implement that decision is a measure tantamount to expropriation in breach of NAFTA Article 1110. Respondent's assertion to the contrary notwithstanding, the "question of how or why the 1993 amparo judgment was interpreted and implemented- or not implemented" is highly relevant to all of CEMSA's claims, including those based on the denial of IEPS rebates in 1997. (*See* Cntr.-Mem. ¶ 261.)

IV. Measures Prior to NAFTA's Entry Into force Are Relevant For Support of the Claims.

63. Respondent seeks to preclude the Tribunal from considering "measures" and other facts and circumstances that occurred before NAFTA entered into force on January 1, 1994 that are relevant to claims based on measures taken after that date. This argument makes no sense. If the facts are relevant to claims that are admissible, the date they occurred is immaterial. Moreover, Respondent acknowledges that a party may be liable under NAFTA for conduct occurring prior to January 1, 1994 if it continues thereafter:

> 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 <u>became</u> breaches of Section A when NAFTA entered into force. However, Chapter Eleven does <u>not</u> 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.[24]

It follows that the Tribunal is entitled to consider both "measures" and other facts and circumstances prior to January 1, 1994 if they are relevant to Respondent's liability for measures taken after that date.

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[24] Cntr.-Mem. ¶ 232.

64. The measures for which Claimant claims compensation for breach of Article 1110 are summarized at ¶ 76 of the Memorial. Other relevant measures, facts and circumstances are described in Claimant's two Declarations. Under the Rules, however, Claimant is not required to describe all the measures it complains of in detail until it submits its Memorial, and we do not understand Procedural Order No. 4 as directing Claimant to do so now.[25]

65. The Counter-Memorial concedes, as it must, that the answer to the narrow question put by the Tribunal in Issue d is: Measures adopted prior to NAFTA's entry into force are relevant to liability for claims based on measures taken thereafter. (See Cntr.-Mem. ¶ 232 quoted above.) But Respondent seeks to avoid the consequences of this concession by two arguments that both lack merit and are not admissible at this time under the terms of Procedural Order No. 4.

66. First, Respondent seeks to argue the merits of the substantive legal questions at issue in this proceeding:

> ... it is necessary ... 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.

(Cntr.-Mem. ¶ 236.) Much of the Counter-Memorial is devoted to legal argument as to whether various measures constitute breaches of NAFTA, but this is not the question before the Tribunal. Under the Rules, Claimant is entitled to a full hearing on the merits of its claims in written and oral proceedings, and nothing in Procedural Order No. 4 invites premature examination of the merits.

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[25] *See supra*, note 14.

67. Unless the Tribunal directs otherwise, Claimant will address the merits arguments presented by Respondent, as necessary, when it prepares its Memorial after the Parties implement Procedural Order No. 2.[26] It is worth noting , however, the absurdity of the argument that "there was no cigarette export business capable of being expropriated between 1993 and 1995," C-M ¶ 242, when it was Respondent that barred CEMSA from exporting cigarettes in that period by illegal and discriminatory manipulations of the IEPS law. The Notice of Arbitration asserts claims that these measures are in breach of Article 1110.

68. Second, referring to Claimant's comments on "creeping expropriation," Respondent asserts that "Claimant's case as now presented" is not permitted by NAFTA, Article 2103(6). (Cntr.-Mem. ¶ 253.) This argument lacks merit for several reasons:

(1) The interpretation and application of Article 2103(6) is not before the Tribunal. After considering the parties' differing views of which questions should be addressed as preliminary issues or reserved to the merits, the Tribunal set out five specific issues for preliminary disposition in Procedural Order No. 4. None of the five includes any question based on Article 2103(6). Any objection Respondent may have to the Tribunal's jurisdiction relating to Article 2103(6) has been joined to the merits under Rule 46 (4).[27]

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[26] Among other "merits" points argued prematurely in the Counter-Memorial are these: (1) Contrary to the plain language of Article 1110 (c), Article 1105 (1) is not incorporated in that provision; (2) Article 1110 only applies to expropriation of an entire enterprise, not to repression of a line of business or refusal to pay moneys owed to an enterprise, even where such measures are arbitrary and discriminatory; (3) CEMSA's acceptance of partial payment of the moneys owed for exports made in 1990-1991 constitutes an accord and satisfaction whatever the facts may show.

[27] It is an open question whether this provision is jurisdictional or procedural, and its intepretation will present difficult questions of first impression. The Tribunal will be better able to address those questions when it has all the facts and legal arguments before it.

(2) "Creeping expropriation" is not a "measure" to be referred to Competent Authorities under Article 2103(6) but a legal theory recognizing state responsibility for regulatory and indirect expropriations. Creeping expropriation is merely another way of saying measures tantamount to expropriation, or measures whose effect is equivalent to expropriation.[28] This theory is adopted in Article 1110 in the phrase "tantamount to expropriation," and the claims based on this concept were presented to both Competent Authorities.

(3) Respondent's characterization of Claimant's submission to the Competent Authorities in this case is incomplete. There is nothing new about Claimant's arguments. Claimant has consistently based his Article 1110 claims on the measures taken by Respondent to shut down cigarette exports by CEMSA by denying it rebates of IEPS taxes in 1997 and in prior years. Mexican officials sought to justify these actions to the U.S. Treasury Department with no success. The exchange of letters between the Competent Authorities precludes this Tribunal from reviewing the legality of an amendment to the IEPS law effective January 1, 1998. It does not affect the Tribunal's competence with respect to any claim included in the Notice of Arbitration.

69. To sum up, the measures, facts and circumstances prior to January 1, 1994 that Claimant considers relevant include (1) the first-shut down of CEMSA's cigarette exports in early 1991, (2) the second shut-down in late 1992, (3) Hacienda's delayed and partial payment

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[28] Ralph H. Folsom & W. Davis Falsom, Understanding NAFTA and Its International Business Implications 193 (1996); Ingrid Detter de Lupis, Finance and Protection of Investments in Developing Countries 104 (1993); Burns H. Weston, *"Constructive Takings" under International Law*, 16 Va. J. Int''l L. 103, 106-07 (equating indirect, de facto, disguised, constructive and creeping expropriations).

following the August 1993 Supreme Court decision, and (4) Hacienda's continuing refusal to authorize IEPS rebates to CEMSA prior to and after January 1, 1994.

CONCLUSION

For the reasons stated herein and in the Memorial, Claimant respectfully requests the Tribunal to enter an order upholding Claimant's submissions on each of the issues propounded in Procedural Order No. 4; to order the parties to complete the discovery process under Procedural Order No. 2 by a date certain; and to issue a new schedule for the written and oral procedures.

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