Department of Foreign Affairs
and International Trade
Department of Justice

CANADA

Ministère des Affaires étrangères
et du Commerce international
Ministère de la Justice

125 Sussex Drive
Ottawa, Ontario K1A 0G2

October 6, 2000

BY FACSIMILE

Professor Konstantinos D. Kerameus
Mr. Jorge Covarrubias Bravo
Professor David R. Gantz

c/o Mr. Alejandro A. Escobar
Secretary of the Tribunal
International Centre for Settlement
of Investment Disputes
1818 H Street, N.W.
Washington, D.C.
USA 20433

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

Dear Sirs:

Pursuant to Procedural Orders No. 3 and 4 and the Tribunal's letter of August 24, 2000, please find enclosed Canada's NAFTA Article 1128 submission on jurisdictional issues.

Yours sincerely,

Fulvio Fracassi
Senior Counsel
Trade Law Division (JLT)

Encl.

c.c. Mr. Hugo Perezcano Diaz
Mr. Bart Legum
Mr. Mark Feldman

Marvin Roy Feldman Karpa v. United Mexican States

(ICSID Case No. ARB(AF)/99/1)

Submission of the Government of Canada

1. Canada makes this submission pursuant to NAFTA Article 1128 and Procedural Order No. 3 of the Tribunal in *Marvin Roy Feldman Karpa* v. *United Mexican States* dated July 17, 2000. Procedural Order No. 4 dated August 3, 2000 sets out five issues related to jurisdiction which the Tribunal has decided to hear as a preliminary matter before a hearing on the merits. This submission presents Canada's interpretation of the NAFTA in relation to four of the five issues. No inference should be drawn from the absence of comment on any issue not addressed below.

Has the Claimant submitted a claim in this arbitration proceeding concerning an alleged violation of NAFTA Article 1102?

2. Compliance by the investor with each of the NAFTA's prerequisites for submitting a claim to arbitration, including those set out in Articles 1116, 1117, 1118, 1119, 1120, 1121 and 1122, must be satisfied for a Chapter Eleven Tribunal to have jurisdiction over a claim.

3. This is made clear by NAFTA Articles 1121 and 1122 which provide that a State Party's consent to arbitrate is conditional on the submission of a claim to arbitration in accordance with the procedures set out in the NAFTA and the investor's corresponding consent to arbitrate in accordance with those procedures.

4. Canada agrees with the United Mexican States that for a claim to be properly before this Tribunal the disputing investor must fully comply with the requirements set out in NAFTA Article 1119. More specifically, to comply with Article 1119 the disputing investor must specify in the Notice of Intent (NOI) both "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". Otherwise put, this provision mandates that the disputing investor clearly and completely delineate, in the NOI, the scope of the claim.

5. The mandatory nature of giving the NOI and the obligation of the disputing investor to fulfill all the procedural requirements of Section B of Chapter Eleven in order to obtain the consent to arbitrate of the disputing Party has been recognized by the NAFTA Chapter Eleven Tribunal in *Waste Management Inc. v. The United Mexican States*, ICSID Case No. (AF)/98/2, Arbitral Award, 2 June 2000, para. 11, p. 9 and para. 16-17, p. 11 and 12.

6. Failure to properly describe a claim as required under this Article 1119, would deny, for the reasons stated above, a NAFTA Chapter Eleven Tribunal the jurisdiction to consider those claims not specified in the NOI.

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

7. Article 1120(2) of Section B of NAFTA Chapter Eleven states that "the applicable arbitration rules shall govern the arbitration except to the extent modified by this Section."

8. Canada submits that Article 1119 has modified Article 48 of the ICSID Additional Facility Rules in so far as it requires a disputing investor to clearly delineate the scope of its claim. To interpret Article 48 to allow the investor to add a new claim would defeat the purpose and requirements of Article 1119.

9. Alternatively, if the Tribunal holds that the requirements of NAFTA Article 1119 does not prevail over Article 48 of the Arbitration Rules, and that "additional" claims may be added, it is Canada's view that such new claims must comply with the requirements for submitting a claim set out in Articles 1119, 1120 and 1121, before proceeding with the additional claim.

Is the Respondent entitled to raise any defence 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 facts relevant to the claim or claims?

10. Canada agrees with the interpretation of Article 1117(2) presented by the United Mexican States.

11. Article 1117(2) provides that the investor has three years to make a claim from the date an investor first acquired or should have first acquired knowledge of the alleged breach and knowledge of damage or loss to the enterprise.

12. The time limitation is an express condition that must be adhered to in order for an investor to bring forward a claim under NAFTA Chapter Eleven. Failure by a disputing investor to adhere to the limitation period would deny a Tribunal jurisdiction to hear the claim.

13. A claim is made for purposes of Article 1117(2), not when a NOI is submitted, but when a claim is made via a Notice of Arbitration. The fact that Article 1119 provides that a NOI must be submitted ninety days "before the claim is submitted" indicates that a NOI is not by itself sufficient to constitute a claim. The NOI is exactly what it says it is: a preliminary expression of intent; it is not itself a claim. The NOI is a prerequisite step that must be taken before making a claim.

14. Furthermore, Article 1137(1)(b) provides that "a claim is submitted to arbitration when: ...(b) the notice of arbitration under Article 2 of Schedule C of the ICSID Additional Facility Rules has been received by the Secretary-General".

15. Thus, the limitation period expires if three years after the date the investor first acquired or should have first acquired the requisite knowledge, the investor has not yet submitted both a NOI and a Notice of Arbitration.

Can the Tribunal award damages to the Claimant for violations occurring prior to January 1, 1994 and continuing thereafter?

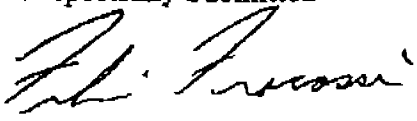
16. NAFTA Chapter Eleven obligations did not exist or were not in force prior to January 1, 1994. Therefore, there can be no breach or remedy for the pre-NAFTA period for events or measures occurring prior to the coming into force of NAFTA.

17. The NAFTA does not provide remedies for any and all breaches of international law but only provides remedies for breaches of the NAFTA. To this effect, Article 1116(1) provides that, "An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under: (a) Section A...and that the investor has incurred loss or damage *by reason of, or arising out of,* that breach.(Emphasis added). With respect to claims made by an investor on behalf of an enterprise of another Party, Article 1117 provides the same i.e. that an investor may submit to arbitration a claim that the other Party has breached an obligation under: "(a) Section A... and that the enterprise has incurred loss or damage by reason of, or arising out of, that breach."

18. As a result, investors are limited as to the claims they may bring. They may bring only claims arising from a breach of NAFTA. Where the loss or damage is not a result of a NAFTA violation, investors are not entitled to receive damages. A measure may only potentially violate NAFTA if the measure is effective or continues to be effective on or after the NAFTA entered into force, January 1, 1994.

19. Where a measure comes into force prior to the implementation of NAFTA and continues in force subsequent to the said implementation, a Party cannot be liable under the NAFTA for any damage or loss that the measure may have caused during the period prior to the NAFTA coming into force.

Respectfully Submitted



Fulvio Fracassi
Counsel for the Government of Canada
October 6, 2000