

**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 MEMORIAL ON PRELIMINARY ISSUES

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iv
INTRODUCTION	1
CLAIMANT'S SUBMISSIONS ON ISSUES LISTED IN ORDER NO. 4	2
A. Issue a: Existing Claims.	2
B. Issue b: Additional or Amended Claims.	2
C. Issue c: NAFTA, Article 1117 (2) – Limitations.	2
D. Issue d: Measures Prior to January 1, 1994.	3
E. Issue e: Standing.	4
ARGUMENT	4
I. Issue a. Whether the Claimant has submitted a point of claim in this arbitration proceeding concerning an alleged violation of NAFTA Article 1102?	4
A. Statement of Facts	4
B. Statement of Law	6
Claimant Has Submitted an Article 1102 Claim In this Arbitration;	6
II. Issue 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?	7
A. Statement of Facts	7
B. Statement of Law:	8
1. A Claimant May Submit Additional or Amended (Ancillary) Claims Under Article 48 of the Rules, including a Claim under NAFTA Article 1102.	8
2. An Article 1102 Claim is not referable to the Competent Authorities under NAFTA Article 2103 (6).	14
3. Regardless of the Tribunal's determination on Issue a or b, Claimant is entitled to discovery on the issue of discrimination to support his Article 1110 claim.	15
III. Issue c. Whether the Respondent is entitled to raise any 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 facts relevant to the claim or claims, and whether the Respondent is estopped from relying on such time limitation?	15
A. Statement of Facts	15
B. Statement of Law	21
1. The facts in this case do not support any defense based upon the time limitation set forth in NAFTA Article 1117 (2).	21

	(a)	The three-year limitations period under NAFTA Article 1117, if it applies in this case, is computed from delivery of Claimant's Notice of Intent.	22
	(b)	The three year time limitation of Article 1117 was suspended, or tolled, by the parties' agreement in 1995.	24
	(c)	Respondent is equitably estopped from invoking any limitations period in this case.	27
2.		Any determination based on Article 1117 (2) limiting Claimant's ability to bring claims cannot limit the Tribunal's consideration of facts relevant to the remaining claims.	29
IV.	Issue d.	Whether measures alleged to be taken by the Respondent in the period between late 1992 and January 1, 1994, when 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?	34
	A.	Statement of Facts	34
	B.	Statement of Law The measures taken by the Respondent in the period before January 1, 1994, including those measures evidencing Respondent's Campaign Against CEMSA before 1994, Are Relevant to The Claims at Issue in This Proceeding and The Tribunal May Award Claimant Damages For All Losses Due to Respondent's Measures That Continued After January 1, 1994.	36
V.	Issue e.	Whether the Claimant, being a citizen of the United States of America, and a registered permanent resident of Mexico, has standing to sue under Chapter Eleven of NAFTA?	39
	A.	Statement of Facts	39
	B.	Statement of Law	42
	1.	Claimant, a United States Citizen, has Standing under Chapter 11 to Submit Claims on Behalf of his Mexican Enterprise.	42
	(a)	Under the Plain and Unambiguous Language of NAFTA, Claimant has Standing to Submit his Claims to Arbitration.	43
	(b)	The Object and Purpose of NAFTA Requires the Protection of Claimant's Investment in Mexico.	46
	(c)	If "Effective Nationality" Is An Issue, Marvin Feldman Is A United States National	49
	2.	Respondent's Objection To Claimant's Standing Is Not Timely	52
		CONCLUSION	55

TABLE OF AUTHORITIES

Treaties, Constitutions, Statutes, and Rules

Foreign Investment Act of 1993, art. 3, D.O. December 23, 1993, 33 I.L.M. 207, 212 (1994)	51
Mexican Constitution, art.34.	50
U.S.-Canada Free Trade Agreement, Jan. 2, 1988, U.S.-Can., art. 201 (1), 27 I.L.M. 281.	45
Convention on the Settlement of Investment Disputes between States and Nationals of Other States, <i>opened for signature</i> Mar. 18, 1965, <i>entered into force</i> Oct. 14, 1966:	
Article 25	45

ICSID (Additional Facility) Arbitration Rules:

Article 2	10
Article 3	8, 10
Article 41	30
Article 48	2, 8, 9, 11

North American Free Trade Agreement, *signed* Dec. 17, 1992, *entered into force* Jan. 1, 1994, Can. - Mex. - U.S., 32 I.L.M. 289 (pts. 1-3) & 32 I.L.M. 605 (pts. 4-8 & annexes):

Article 102	42, 44, 46
Article 1101	43
Article 1102	2, 4, 12-14, 22, 51
Article 1110	2, 5, 15, 22, 24
Article 1115	42
Article 1115	46

Article 1117	3, 15, 21, 22, 26, 29, 43, 47
Article 1118	23
Article 1119	4, 8, 11, 12, 23, 24
Article 1120	11, 23, 24
Article 1121	23
Article 1122	23
Article 1126	23
Article 1127	23
Article 1128	12
Article 1137	23
Article 1139	43
Article 201	43
Article 2103	14, 24, 41
Article 2103	23

Vienna Convention, *done at Vienna, May 23, 1969, entered into force, January 27, 1980*, 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969):

Article 28	36
Article 31	12
Article 32	12

Cases

Atkins v. Union Pacific Railroad Co., 685 F.2d 1146 (9th Cir. 1982) 28

Shufeldt Claim (U.S. v Guatemala), 2 R.I.A.A. 1083
(July 24, 1930) 27

American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No.
ARB/93/1, 36 I.L.M. 1534 (1997) 10

Barcelona Traction, Light and Power Co. (Belgium v. Spain), 1970 I.C.J. 3 47

Bowen v. New York, 476 U.S. 467 (1986) 25

Central London Property Trust Ltd. v. High Trees House Ltd., (1947) K.B. 130, 62
T.L.R. 557, (1947) L.J.R. 77, 175 L.T. 333 (U.K.) 27

Ethyl Corp. v. Canada (Award on Jurisdiction), NAFTA/UNCITRAL Case, June 24,
1998, 38 I.L.M. 708 (1999) 10, 12-14

Glus v. Brooklyn Eastern Dist. Terminal, 359 U.S. 231 (1959) 28

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 28

Honda v. Clark, 386 U.S. 484 (1967) 25

Iran-United States, Case No. A/18, April 6, 1984,
5 Iran-U.S. C.T.R. 251 49

Kruger v. The Queen, 31 A.C.W.S. 2d 188 (1985) (Can.) 28

Landgraf v. USI Film Prods, 511 U.S. 244 (1994) (quoted in *Creighton, Ltd. v.*
Government of the State of Qatar, 181 F.3d 118 (D.C. Cir. 1999) 37

Legality of Use of Force (Yugo. v. U.K.),
1999 I.C.J. 1 (June 2) 37

Loizidou v. Turkey (Merits), 1996-VI Eur. Ct. H.R. 2216
(Dec. 18) 37

Lynx Exportada, S.A. de C.V. v. Federal Fiscal Admin., et al., Attraction Lawsuit No.
400/92, Lawsuit for Annulment 517/92 (Feb. 20, 1996). 16

Nottebohm (Liechtenstein v. Guatemala), 1955 I.C.J. 4 49

<i>Temple of Preah Vihear</i> (Cambodia v. Thailand), 1962 I.C.J. 6 (June 15)	27
<i>United States v. Reliance Insurance Co.</i> , 436 F.2d 1366 (10 th Cir. 1971)	29

Other Authorities

U.S. Dep't of State, Prototype of a U.S. Bilateral Investment Treaty (BIT), art. VII, April 1998.	44
51 Am Jur. 2d Limitation of Actions, § 16 (1999)	26
Alan C. Swan, <i>International Decisions: Ethyl Corporation v. Canada</i> , 94 Am. J. Int'l Law 159 (2000)	12
Alan Redfern & Martin Hunter, <i>Law and Practice of International Arbitration</i> (3d ed. 1999)	10
Antonio Parra, <i>Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments On Investment</i> , 12 ICSID Review F.J.I.L. 287 (1997)	47, 48
Charles N. Brower, <i>Anatomy of Fact-Finding Before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence</i> , <i>in</i> <i>Fact-Finding Before International Tribunals: Eleventh Sokol Colloquium</i> , 150 (Richard B. Lillich ed., 1990)	31
D.W. Bowett, <i>Estoppel Before International Tribunals and Its Relation to Acquiescence</i> , 33 Brit. Y.B. Int'l L. 176 (1957)	27
Daniel M. Price & P. Bryan Christy, <i>An Overview of the NAFTA Investment Chapter</i> , <i>in</i> <i>The North American Free Trade Agreement</i> 166 (Bello, Holmer, & Norton, eds., American Bar Association 1994)	45, 47
Howard M. Holtzmann, <i>Balancing the Need for Certainty and Flexibility in International Arbitration Procedures</i> , <i>in</i> <i>International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?: Twelfth Sokol Colloquium 3</i> (Richard B. Lillich and Charles N. Brower eds., 1994)	11

I.C. MacGibbon, <i>Estoppel in International Law</i> , 7 Int'l & Contemporary L.Q. 468 (1958)	27
Isaak I. Dore, <i>The UNCITRAL Framework for Arbitration in Contemporary Perspective</i> (Julian Lew ed., 1993)	11, 14
Jo M. Pasqualucci, <i>Preliminary Objections Before the Inter-American Court of Human Rights: Legitimate Issues and Illegitimate Tactics</i> , 40 Va.J.Int'l.L.1, 43-46 (1999)	37
Subdireccion de Inmigrados, Secretaria de Gobernacion, <i>Cartilla de Derechos y Obligaciones del Inmigrado [Booklet of Rights and Obligations of the Immigrado]</i> (1998) (Mex.)	39

**In the Matter of Marvin Roy Feldman Karpa v. United Mexican States
(ICSID Case No. ARB(AF)/99/1)**

CLAIMANT'S MEMORIAL ON PRELIMINARY ISSUES

INTRODUCTION

In this Memorial, Claimant addresses five issues formulated in the Tribunal's Procedural Order No. 4 ("Order No. 4") of August 3, 2000. Four of these relate to the scope of the proceeding and were first raised by Respondent's objections to Claimant's requests for documents. The fifth relates to Respondent's new-found objection to Claimant's standing.

In a letter to Claimant dated May 25, 2000 (Tab A), Respondent argued that it could not be liable for breaches under the North American Free Trade Agreement¹ occurring outside a 22-month time-frame between April 30, 1996 (three years prior to submission of the Notice of Arbitration) and February 16, 1998 (the date of the Notice of Intent to Submit a Claim to Arbitration) and, therefore, would disregard requests for documents outside this arbitrary time-frame. Claimant does not agree that the proceedings can be restricted in this fashion. Moreover, even if there were some such "legally relevant timeframe," Respondent's objections to Claimant's requests for documents and written statements have no merit. The documents and information requested all bear directly on Respondent's liability for measures occurring within the asserted time-frame. Accordingly, with respect to the issues bearing on the scope of the proceedings, Claimant asks the Tribunal for both a decision on the substantive points and for an order directing discovery consistent with its ruling. Alternatively, in the event the Tribunal should disagree with

¹ North American Free Trade Agreement, signed Dec. 17, 1992, entered into force Jan. 1, 1994, Can.-Mex.-U.S., 32 I.L.M. 289 (pts. 1-3) & 32 I.L.M. 605 (pts. 4-8 & annexes) [hereinafter NAFTA].

Claimant on any of the substantive points, Claimant asks the Tribunal to confirm – for the reasons stated herein – that the requested documents and written statements are, or may be, relevant notwithstanding the Tribunal’s ruling on the particular point.

CLAIMANT’S SUBMISSIONS ON ISSUES LISTED IN ORDER NO. 4

A. Issue a: Existing Claims.

Claimant has submitted a point of claim concerning an alleged violation of NAFTA Article 1102.

B. Issue b: Additional or Amended Claims.

1. Under NAFTA and Article 48 of the ICSID (Additional Facility Arbitration) Rules (“the Rules”), Claimant is entitled to submit additional or incidental claims, or to amend its claim, within the scope of the parties’ arbitration agreement, NAFTA, including a claim of discrimination under NAFTA Article 1102.

2. Claimant’s requests for documents and statements concerning the additional, incidental or amended claims, including documents and information from 1999 and 2000, are relevant to the proceeding, and Respondent must respond to them in accordance with Procedural Order No. 2 (“Order No. 2”).

3. Alternatively, discovery concerning discrimination, including Respondent’s rebates of IEPS taxes on cigarette exports by Mercados Regionales S.A. de C.V. and any other resellers owned by Mexican citizens – in 1999-2000 and before – is relevant under NAFTA, Article 1110 (b). Respondent must respond to such requests relating to discrimination in accordance with Order No. 2.

C. Issue c: NAFTA, Article 1117 (2) – Limitations.

1. The facts in this case do not support any defense based upon the time limitation set forth in NAFTA Article 1117 (2).

2. The three-year limitations period under NAFTA Article 1117, if it applies in this case, is computed from delivery of Claimant's Notice of Intent.

3. The three year time limitation of Article 1117 was suspended, or tolled, by the parties' agreement in 1995.

4. Respondent is equitably estopped from invoking any limitations period in this case.

5. Any determination based on Article 1117 (2) limiting Claimant's ability to bring claims cannot limit the Tribunal's consideration of facts relevant to the remaining claims.

D. Issue d: Measures Prior to January 1, 1994.

1. The Tribunal may award Claimant damages for losses occurring prior to January 1, 1994 in respect of measures which began before that date and continued thereafter in breach of NAFTA. Specifically, the Tribunal may award damages for losses prior to and after January 1, 1994 due to:

(a) Respondent's failure to comply with the decision of the Mexican Supreme Court of Justice issued on August 18, 1993, and

(b) Respondent's refusal in 1993 - 1995 to allow Claimant the benefits allowed other cigarette exporters under the Special Tax on Production and Services ("IEPS") Law in force from January 1, 1992 - December 31, 1997.

2. Whatever the Tribunal may decide concerning Submission D.1. above, Respondent's conduct in the period 1992-1993 is relevant to its responsibility for measures taken or continuing after January 1, 1994, and Claimant is entitled, under Order No. 2, to request reasonably specified

documents and information from 1992 and 1993 that are relevant to such measures.

E. Issue e: Standing.

1. Under the plain and unambiguous language of NAFTA, Claimant, a United States citizen, has standing under Chapter 11 to submit claims on behalf of his Mexican enterprise.

2. The object and purpose of NAFTA require the protection of Claimant's investment in Mexico.

3. If "effective" nationality is an issue, Marvin Feldman is a United States national due to his close ties to the United States, especially his citizenship.

4. Respondent is estopped from challenging Claimant's standing based on nationality at this late date, when Respondent has known since the dispute began about Claimant's visa status and residence in Mexico.

ARGUMENT

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

A. *Statement of Facts*²

1. 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. (Notice of Intent at 2.)

2. Subsequently, in his Notice of Arbitration submitted to the ICSID Secretariat on April

² The statements of facts in this Memorial, while presented issue-by-issue for ease of comprehension, are intended to be cumulative and are put forward collectively in support of all the legal arguments made herein.

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"). Claimant asserted in this Notice 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.)

3. After filing the Notice of Arbitration, Claimant discovered additional facts which confirmed his suspicion that Respondent discriminated against CEMSA under Article 1102. In particular, Claimant discovered that Respondent had permitted at least one other reseller of cigarettes, similarly situated to CEMSA except for the citizenship of its Mexican owners, to export cigarettes and receive IEPS rebates for such exports in 1999 and 2000. (See Second Declaration of Marvin Feldman ("Feldman Decl. II"), August 18, 2000, Tab B, ¶ 29.)

4. Claimant advised Respondent that his claim included a claim for discrimination under Article 1102 during discussions held prior to the Preliminary Hearing in this matter on March 10,

2000. Claimant again advised the Respondent and the Tribunal of his Article 1102 claim at that March 10 hearing. (See Trans. First Hrg. at 55-56.)

5. Finally, Claimant spelled out his claim based on Article 1102 in his Requests for Production of Documents and Written Statements pursuant to Order No. 2 and in related correspondence with Respondent describing in greater detail the relevance of these requests.

B. *Statement of Law*

Claimant Has Submitted an Article 1102 Claim In this Arbitration;

6. The facts stated above support a determination by the Tribunal that Claimant has submitted to arbitration in this proceeding a claim of discrimination, including a claim based on NAFTA Article 1102. First, Respondent has been on notice since the Notice of Intent that Claimant relies, in part, on Article 1102, in making his NAFTA claims. Claimant set forth all facts known or knowable to him at the time he submitted his claims with the filing of the Notice of Arbitration. Respondent may be charged with knowledge of its own actions on which a claim of discrimination on the basis of nationality may be founded, even when Claimant could not describe these actions with particularity in that Notice because they were unavailable to him. Claimant also referenced his Notice of Intent in the Notice of Arbitration. Thus, Claimant has submitted his Article 1102 claim. He may amplify and elaborate this claim in his Memorial on the basis of facts discovered after the submission to arbitration.

7. Even if the Tribunal is not of the view that the point of claim was submitted with the Notice of Arbitration, it has been submitted at the preliminary hearing when Claimant's counsel stated the claim on the record, or with Claimant's discovery requests, or, at the latest, in this Preliminary Memorial. As set forth more fully at Issue b, below, Claimant is entitled under Article

48 of the Rules to submit additional or amended claims at any time up to and including the reply as a matter of right; after that time the Tribunal may accept amendments and additional claims in its discretion. There is no particular format required for such additional or amended claims. If a notice requirement for additional or amended claims may be implied by Article 1119 of NAFTA, or Articles 3 and 48 of the Rules, such notice requirement has been more than satisfied by Claimant's notices, his oral representations to Respondent and this Tribunal, the statements of relevance in his discovery requests, and by this Memorial.

II. Issue 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?

A. *Statement of Facts*

8. In early 1998, Respondent's Ministry of Finance and Public Credit ("Hacienda") established a new procedure requiring exporters of cigarettes or alcoholic beverages to be approved and registered by Hacienda. CEMSA attempted to obtain such approval and registration, but Hacienda would not respond. CEMSA also made efforts to export cigarettes without such registration, but Mexican customs blocked the shipments. Moreover, Hacienda ignored repeated requests for an explanation. (Feldman Decl. II ¶ 28)

9. In 1999, Claimant learned that Hacienda was permitting cigarette exports and making rebates of IEPS taxes on such exports to companies owned by Mexican citizens that, like CEMSA, are not cigarette producers. One such company was Mercados Regionales S.A. de C.V. ("Mercados I"). CEMSA's complaints before this Tribunal about this discrimination complicated Mercados I's arrangements with Hacienda, and its owners made efforts to substitute a new corporation as the exporter of record, Mercados Extranjeros S.A. de C.V. ("Mercados II").

Ironically, these efforts failed, at least temporarily, because Hacienda mistakenly believed that Marvin Feldman was involved in Mercados II's business. (Feldman Decl. II ¶ 29.)

10. Hacienda officials were angry that CEMSA had requested rebates of IEPS taxes and that Marvin Feldman was pursuing those claims under NAFTA. These officials knew that one of Mercados II's principals had a prior business relationship with Marvin Feldman. Consequently, Hacienda decided to retaliate against Mercados II by refusing to approve and register it as an exporter of cigarettes. (Feldman Decl. II ¶ 30, Ex. A)

11. Claimant does not know if Respondent continues to make rebates of IEPS cigarette taxes to Mercados I, or if it has made such rebates to Mercados II or other resellers who are non-producers similarly situated to CEMSA. Claimant has requested information on these points from Respondent under Order No. 2 and has no other means to discover this information. (Feldman Decl. II ¶ 31.)

B. *Statement of Law:*

1. A Claimant May Submit Additional or Amended (Ancillary) Claims Under Article 48 of the Rules, including a Claim under NAFTA Article 1102.

12. By letter dated June 30, 2000, Respondent asks:

Is the Tribunal competent to decide a claim based on denial of national treatment (in violation of Article 1102 of the NAFTA) notwithstanding that the Claimant did not include any information concerning such claim in the notice required by Article 3 of the ICSID Arbitration (Additional Facility) Rules and notwithstanding that the Claimant did not state any facts upon which such claim is or could be based in the notice required by Article 1119 of the NAFTA?

Respondent seems to be arguing that Article 3 of the Rules and Article 1119 of NAFTA override Article 48 (Ancillary Claims) of the Rules and preclude submission of any ancillary claim in a

NAFTA arbitration under the Rules.

13. The short answers are:

a. Article 3 of the Rules cannot apply to incidental or additional claims submitted pursuant to Article 48 (Ancillary Claims) of the Rules because such an interpretation would make Article 48 meaningless;

b. in the case of a claim submitted pursuant to Article 48, the information contemplated by Article 3 of the Rules and Article 1119 of the NAFTA may be presented by a claimant at any time "not later than the reply" and, therefore, may certainly be included in Claimant's Memorial;

c. NAFTA Article 1119 applies prior to the arbitration and does not modify the Rules;

d. in any case, neither Article 3 nor Article 1119 requires an exhaustive statement of issues and facts;

e. as noted above, any specific notice requirement under NAFTA Article 1119, or Articles 3 and 48 of the Rules, has been more than satisfied at this point by Claimant. Where an alleged procedural defect has been remedied, there can be no dismissal.

These points are expanded below.

The Rules at Issue - Articles 48 and 3.

14. Article 48 provides that:

(1) Except as the parties may otherwise agree, a party may present an incidental or additional claim or counter-claim, provided that such ancillary claim is within the scope of the arbitration agreement of the parties.

(2) An incidental or additional claim shall be presented not later than in the reply . . . unless the Tribunal . . . authorizes the presentation of the claim at a later stage of the proceeding.

Thus, it is clear beyond argument that the Rules do not require that information pertaining to ancillary claims be included in the Notice of Arbitration that institutes the proceeding under Articles 2 and 3. Otherwise, Article 48 would be without purpose or effect.

15. Article 3 states, in pertinent part: "(1) The notice shall: . . . (d) contain information concerning the issues in dispute and the amount involved, if any." This language on its face clearly does not require an exhaustive statement of all issues at the time the arbitration is initiated under the Rules. *Cf. Ethyl Corp. v. Canada (Award on Jurisdiction)*, NAFTA/UNCITRAL Case, June 24, 1998, 38 I.L.M. 708, 730 (1999), ¶¶ 93-95 (holding that the similar UNCITRAL Arbitration Rule Article 3 requiring a simple statement of the "general nature of the claim and an indication of the amount involved, if any," did not exclude a greater elaboration of the claim and points in issue in claimant's "Statement of Claim"); *see generally* Alan Redfern & Martin Hunter, *Law and Practice of International Arbitration* §6-52, at 306 (3d ed. 1999).

16. Article 48 clearly allows a claim arising from conduct occurring *after* a claim is submitted to arbitration. *See, e.g., American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, 36 I.L.M. 1534 (1997) (claimant submitted, and the tribunal considered, "Additional Claims" relating to alleged violations of a bilateral treaty which occurred after submission of Claimant's initial Request for Arbitration); and *cf. Ethyl* at 730, ¶95 (holding that claimant's inclusion in its Statement of Claim of a measure enacted after the Notice of Arbitration was not an assertion of a new claim, but, if anything, a permissible amendment of the claim previously described in the Notice.)

17. Rules permitting amendment or additions to a claim or defense in international arbitrations are designed to promote fairness, equality, and the opportunity for a full presentation of the case. *See generally* Isaak I. Dore, *The UNCITRAL Framework for Arbitration in Contemporary Perspective* 24 (Julian Lew ed., 1993) (discussing similar rules applicable in UNCITRAL, ICC or LCIA arbitrations). As Judge Holtzmann so aptly observed:

[T]ribunals should be flexible in permitting amendments after the case has begun. This is desirable because experience shows that as parties and their lawyers study their cases in greater depth while preparing their presentations, they may discern factors that require modification of their early pleadings. In recognition of this practical reality, international rules typically include provisions that liberally allow amendments to the statements of claim and defense.

Howard M. Holtzmann, *Balancing the Need for Certainty and Flexibility in International Arbitration Procedures*, in *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?*: Twelfth Sokol Colloquium, 3, 14 (Richard B. Lillich and Charles N. Brower eds., 1994).

The Arbitration Agreement – NAFTA

18. As noted in Article 48 of the Rules, any additional or incidental claim submitted to arbitration must fall within the arbitration agreement of the parties. In this case, NAFTA, Chapter 11, is the parties' arbitration agreement. NAFTA provides in Article 1120 (2) that "the applicable arbitration rules shall govern the arbitration except to the extent modified by this Section [*i.e.*, Section B of Chapter 11]." Nothing in Article 1119, or any other article of Section B, limits the application of the Rules' Article 48 in a case submitted to arbitration under the Rules in accordance with NAFTA Article 1120.

19. Article 1119 describes the information that a disputing investor shall provide to the disputing Party before submitting its claim to arbitration. Thus, by its terms, Article 1119 applies prior to the commencement of arbitration, not to the conduct of the arbitration proceedings. To conclude otherwise would circumscribe Article 3 of the Rules and negate Article 48 altogether. If the States Party to NAFTA had intended that surprising result, they would have so specified in the text of Chapter 11. *See generally Ethyl Corp. v. Canada (Jurisdiction)*, UNCITRAL Case, Award of June 24, 1998, reprinted in 38 I.L.M. 708, 723 ¶55 (1999) (rejecting the argument of Canada (and Mexico filed under Article 1128) “that Section B of Chapter 11 is to be construed ‘strictly.’ The erstwhile notion that ‘in case of doubt a limitation of sovereignty must be construed restrictively’ has long since been displaced by Articles 31 and 32 of the Vienna Convention.”[footnotes omitted]).³

20. 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. The Article 1102 claim was made at that time. Respondent did not complain then or later that the Notice of Intent was deficient in any respect. Nor is Respondent prejudiced by the absence of such specific reference in the Notice of Arbitration, filed on April 30, 1999. The Notice of Arbitration references the Notice of Intent. Moreover,

³ One commentator has noted the *Ethyl* decision is:

highly principled, rooted in an interpretive methodology that . . . is a model for the application of Articles 31 and 32 of the Vienna Convention on the Law of Treaties . . . and a powerful riposte to the ‘formalism’ that is increasingly creeping into the interpretation of treaties It reflects an interpretive methodology that recommends itself for future NAFTA arbitrations, whether under Chapter 11 [or other chapters.]

Alan C. Swan, *International Decisions: Ethyl Corporation v. Canada*, 94 Am. J. Int’l Law 159, 163 (2000).

Respondent may be charged with knowledge of the facts peculiarly within its own purview that support the discrimination claim, even though Claimant was ignorant of these specific facts. 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 Respondent's 1999 payments to Mexican-owned companies when he filed the Notice of Arbitration. When Claimant learned of facts establishing of Article 1102 discrimination, he promptly advised Respondent and the Tribunal.

21. Respondent concedes that Claimant is entitled to advance claims based on "Hacienda's alleged refusal to implement the 1993 Supreme Court decision concerning IEPS rebates and Hacienda's alleged refusal to grant rebates of IEPS paid in October - November 1997" (Tab A at 3, Eng.) Thus, the requirements of Mexican law concerning IEPS rebates and the consequences of Respondent's discrimination against CEMSA under NAFTA Article 1110 are before the Tribunal. The issues presented by Claimant's Article 1102 claim and any additional measures that Claimant may cite in its Memorial in support of its Article 1110 claim are closely connected to the issues before the Tribunal and will not complicate the proceeding.

22. In *Ethyl*, the Tribunal recognized that there is an important distinction, pertinent here, between jurisdictional provisions and procedural rules, noting:

It is important to distinguish between jurisdictional provisions, *i.e.*, the limits set to the authority of this Tribunal to act at all on the merits of the dispute, and procedural rules that must be satisfied by Claimant, but the failure to satisfy which results not in an absence of jurisdiction *ab initio*, but rather in a possible delay of proceedings, followed ultimately, should such non-compliance persist, by dismissal of the claim.

Ethyl at 274 ¶58. Here, as in *Ethyl*, none of Respondent's objections, with the exception of

Respondent's eleventh-hour objection to Claimant's standing, go to the competence of the Tribunal to act on the merits. As discussed below, there is no doubt that Claimant could present its Article 1102 claim in a new arbitration. But there is no legal or equitable justification for compelling him to do so. Thus, Respondent's question of "whether Article 1119 requires prior notice of all legal and factual premises of all claims that are submitted to arbitration" (Resp. Ltr. to Trib., July 14, 2000, ¶ 12 (a)) must be answered with a firm "no."

2. *An Article 1102 Claim is not referable to the Competent Authorities under NAFTA Article 2103 (6).*

23. Assuming, *arguendo*, that Claimant's Article 1102 claim relates to a "taxation measure," the claim is arbitrable under Article 2103 without reference to the Competent Authorities under NAFTA Article 2103 (6). NAFTA Article 2103 (4) (b) states that Article 1102 "shall apply to all taxation measures other than . . ." certain listed measures and certain exceptions under subsections (c) - (h), none of which are at issue here.

24. Thus, if Claimant is not allowed to submit the issue as an additional claim under Article 48 of the Rules, he would be free to submit a new claim under NAFTA, Chapter 11 without referring the issue to the United States Department of the Treasury. Again, there is no practical reason or legal basis to require a second proceeding. Many of the legal and factual issues would be the same in both proceedings. To refuse the additional claim, and require a second proceeding, is contrary to the goal of international arbitration to provide a fair and full hearing. *See Ethyl*, 31 I.L.M. at 728-29, ¶ 85 (holding that dismissal of a claim for failure to comply strictly to time requirements of Articles 1119 and 1120, where Claimant could simply resubmit its claim, would "disserve, rather than serve, the object and purpose of NAFTA"); and *see generally Dore, supra*,

¶ 17. Moreover, refusal in this case would be contrary to Article 48 of the Rules as discussed above.

3. **Regardless of the Tribunal's determination on Issue a or b, Claimant is entitled to discovery on the issue of discrimination to support his Article 1110 claim.**

25. Even if the Tribunal should determine Claimant is not permitted to pursue its Article 1102 claim in this proceeding, Respondent's payment of IEPS rebates on cigarette exports by Mercados I and II are highly relevant to Claimant's 1110 claims, including his claim of discrimination under Article 1110 (1) (b) and (c). (See Feldman Decl. II Part B). Respondent is in possession and control of the documents and information which demonstrate this fact, and must provide them to Claimant under Order No. 2.

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

A. *Statement of Facts*

26. Since 1990-1991, Respondent has undertaken a concerted effort to eliminate CEMSA from the business of cigarette exports. Claimant has vigorously and timely defended CEMSA's rights to export cigarettes and to receive IEPS tax rebates on such exports. The efforts of both sides regarding this dispute are summarized here.

27. CEMSA began exporting Marlboro cigarettes in 1990 and received rebates of IEPS taxes on such exports for a brief period. Cigarette producers complained and Respondent took steps to cut-off CEMSA's exports by illegally refusing to provide the IEPS rebates required by law. The first steps were administrative measures taken by Hacienda officials with no color of

legal justification denying rebates for exports made in 1990. These measures shut down CEMSA's cigarette export business for the first time. (Feldman Decl. II ¶ 9.)

28. Then, the IEPS law was amended as of January 1, 1991, to restrict rebates for cigarette exports to producers, manufacturers or their agents. On January 23, 1991, Ruben Aguirre Pangburn, Hacienda's General Technical Director of Income, sent a circular telex directing the responsible fiscal authorities to rebate IEPS taxes on cigarette exports only to producers and manufacturers. (Feldman Decl. II ¶ 10.)

29. Claimant brought suit in the Mexican courts in 1991 challenging these administrative and legislative acts. The district court found, in 1991, that the Hacienda officials had exceeded their authority and acted illegally in issuing the administrative actions. This decision was appealed to the Supreme Court of Justice. (Feldman Decl. II ¶ 11.)

30. While this appeal was pending, the IEPS law was amended, effective January 1, 1992, authorizing IEPS tax rebates for cigarette exports by resellers as well as producers. (See Regional Tax Administrator Jose Antonio Riquer Ramos' letter to CEMSA, March 12, 1992, Tab C).⁴ CEMSA resumed exporting cigarettes in 1992, paying the IEPS tax included in the purchase price, and Hacienda rebated the IEPS tax on its exports. (Feldman Decl. II ¶ 12.)

31. Despite the 1992 amendment to the IEPS law and Hacienda's recognition that CEMSA was entitled to IEPS rebates for its cigarette exports, Hacienda stopped making IEPS rebates to CEMSA. This action shut down CEMSA's cigarette export business for a second time, from

⁴ In February 1996, the Mexican Federal Tax Court issued a ruling that confirmed that the 1992 tax law entitled non-producer exporters to receive rebates of IEPS taxes for cigarette exports. *Lynx Exportada, S.A. de C.V. v. Federal Fiscal Admin., et al.*, Attraction Lawsuit No. 400/92, Lawsuit for Annulment 517/92 (Feb. 20, 1996). In this case, the court determined that the reseller was a taxpayer and exporter subject to the IEPS tax and, therefore, was entitled to the rebates of the IEPS tax on its cigarette exports.

1993-1995. The IEPS law remained constant in this regard through 1997. The policy of denial continued until mid -1995. (Feldman Decl. II ¶ 13.)

32. On August 18, 1993, the Supreme Court of Justice, in a unanimous decision, sustained CEMSA's right to export cigarettes and obtain IEPS rebates for such rebates (the "1993 Amparo decision"). The Court ruled that the 1991 IEPS amendment establishing an export monopoly for producers violated Mexican constitutional principles of tax equality and that CEMSA was entitled to receive IEPS rebates on cigarette exports. The Court had issued a similar ruling, also unanimous, the year before in another *amparo* review, brought by another exporter who was a reseller of cigarettes, and the Court cited that opinion in the 1993 Amparo decision. (Feldman Decl. II ¶ 14.)

33. Notwithstanding the unqualified language of the 1993 Amparo decision, Mexican tax authorities refused to comply with it. Claimant took out a series of advertisements in Mexican and United States newspapers to complain about the injustice of Hacienda's actions and obtained a district court order, dated November 8 and noticed to Hacienda on November 12, 1993, that required Hacienda to comply with the 1993 amparo decision within 24 hours. (Mexican District Court Order, Nov. 8, 1993, Tab D.) Hacienda ignored the court order. (Feldman Decl. II ¶ 15.)

34. Respondent's efforts to repress CEMSA's cigarette export business continued in 1994. Specifically, Hacienda refused to make the rebates ordered by the courts or to permit future exports by CEMSA unless CEMSA could produce invoices stating the IEPS tax component of the purchase prices, separately and expressly. Such documentation was impossible to obtain because the cigarette producers refused to comply with their obligation under the IEPS law to provide such documents to their customers. (Feldman Decl. II ¶ 16.)

35. Finally, in February 1994, Hacienda authorized a partial payment of the past-due IEPS rebates without requiring such documentation. CEMSA received the money sometime in March or April, 1994. But Hacienda continued to refuse to permit CEMSA to resume cigarette exports with the assurance of obtaining IEPS rebates, unless CEMSA could produce invoices from its vendors separately stating the IEPS tax. At the same time, Hacienda refused to require cigarette manufacturers to comply with the law requiring them to make such a statement on their invoices. Thus, Hacienda imposed impossible requirements on CEMSA. (Feldman Decl. II ¶ 17.)

36. On April 8, 1994, General Administrator Pangburn wrote CEMSA that the manufacturers were not required to state the tax separately. (See Pangburn letter, Apr. 8, 1994, Tab E.) CEMSA asked for revocation of this resolution arguing that the Amparo decision and the IEPS law did not permit such an interpretation. The Undersecretary for Income, Ismael Gomez Gordillo, acknowledged the merit of Claimant's position by reversing the April 8 resolution and confirming that CEMSA was entitled to have the IEPS tax "transferred expressly and separately." (See Ismael Gomez Gordillo letter to CEMSA, May 10, 1994, Tab F). Despite this resolution, Hacienda officials, including Undersecretary Gomez Gordillo himself, refused to require compliance by the manufacturers. (Feldman Decl. II ¶ 18.)

37. Claimant attempted to resolve the matter directly with the major cigarette manufacturer, a company named Cigatam, then owned by Carlos Slim, and now a subsidiary of Philip Morris. Claimant also attempted to resolve the problem with Hacienda by requesting numerous times that CEMSA be permitted to make the separation of the tax itself. Hacienda would not act. Thus, Hacienda set up requirements that were impossible for CEMSA to fulfill through no fault of its own. This situation continued until mid-1995. (Feldman Decl. II ¶¶ 17 19-20.)

38. NAFTA entered into force on January 1, 1994, and Claimant repeatedly invoked NAFTA in discussions with Mexican officials and the United States Embassy. On March 29, 1995, Dan Dolan, Counselor for Economic Affairs for the United States Embassy in Mexico, wrote to Dr. Pedro Noyola, Undersecretary of Income for Hacienda, requesting his intervention to resolve the issues arising from Hacienda's refusal to comply with the Supreme Court's 1993 Amparo decision. (See Dolan letter, Mar. 29, 1995, Tab G.) Mr. Dolan requested Dr. Noyola's intervention consistent with the commitments of NAFTA and to avoid a possible NAFTA proceeding which Mr. Feldman had requested the Embassy to pursue. (Feldman Decl. II ¶¶ 21-22.)

39. Eventually, Hacienda responded to the Embassy's concerns and worked out an arrangement with Claimant to avoid further controversy. On or about June 1, 1995,⁵ senior Hacienda officials, led by Dr. Noyola, assured Claimant that CEMSA could export cigarettes and apply for rebates of IEPS taxes without certain tax documentation that the cigarette producers refused to provide. Most importantly, Claimant was assured that the IEPS rebates would be paid to CEMSA. Regarding this settlement of the dispute between Claimant and Respondent, Claimant states:

Without these assurances, I never would have purchased cigarettes at high prices, which included the IEPS tax in the purchase price, for export and resale abroad at much lower prices. 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.

⁵ Claimant has asked Respondent to produce documents and written statements that will help pinpoint the date of these meetings and related administrative determinations within Hacienda.

(Feldman Decl. II ¶¶ 22-23; *see also* Feldman Decl. I ¶ 14.)

40. After receiving Hacienda's assurance that CEMSA could resume cigarette exports and would receive rebates of IEPS taxes for these exports, CEMSA geared up to do business. It made a few, small, test shipments in 1995 and resumed exporting cigarettes on a commercial scale in 1996. As time progressed, the business expanded and CEMSA invested large sums in the purchase of cigarettes for export. CEMSA continued to purchase and export cigarettes and to apply for IEPS rebates through November 1997. Respondent carried out the agreement and made rebates to CEMSA through September 1997. (Feldman Decl. II ¶¶ 23-24.)

41. Beginning in November 1997, however, Hacienda refused to pay the rebates that CEMSA had requested for shipments made in October and early November. Around December 1, 1997, Claimant was told informally that CEMSA would no longer be permitted to export cigarettes and that IEPS rebates owed CEMSA for October - November shipments would not be made. CEMSA immediately ceased purchasing cigarettes for export except for a few, small test shipments. But it was only on February 24, 1998 that CEMSA received formal notice of these adverse actions from Hacienda. (Feldman Decl. II ¶ 25.)

42. As discussed above, after the 1993 Amparo decision, Claimant left no stone unturned to obtain the rights granted CEMSA by the Supreme Court. He pressed his claims with Respondent; importuned the major cigarette producer; published statements about his case in the Mexican and United States press; and finally sought the assistance of the United States Embassy. His efforts took two years to produce results, but Claimant eventually succeeded. When Respondent finally agreed in mid-1995 to take measures to implement the Supreme Court decision, Claimant paused in his efforts to vindicate his rights. Claimant resumed the vigorous presentation of his claims as

soon as Respondent revoked its agreement and shut down CEMSA's cigarette-export business for the third time late 1997. (Feldman Decl. II ¶¶ 9-25.)

43. Claimant delivered his Notice of Intent to Submit Claim on February 16, 1998.

B. *Statement of Law*

1. The facts in this case do not support any defense based upon the time limitation set forth in NAFTA Article 1117 (2).

44. Claimant's Notice of Arbitration specifies five separate, but closely related, breaches of NAFTA Article 1110 which caused concrete damages to CEMSA. Three claims relate to measures taken by Respondent in November - December 1997 which shut down CEMSA's cigarette export business for the third and final time. Two other claims relate to measures of "creeping expropriation" taken by Respondent in the period 1993 - 1995 to deny CEMSA the benefits of Mexican legislation and decisions of the Supreme Court of Justice affirming CEMSA's right to export cigarettes in competition with producers and to receive IEPS tax rebates on such exports. The measures interfering with CEMSA's cigarette exports were suspended for about 32 months by the agreement of the parties at a time when the Government of Mexico gave more weight to its NAFTA obligations than to the influence of Carlos Slim.

45. Claimant hopes and expects that Respondent will acknowledge that no defense based on limitations can be raised concerning measures taken by Respondent in November - December 1997, *i.e.*, well after April 30, 1996, the date that Respondent argues is applicable. Presumably, however, Respondent will argue that claims relating to other measures taken in the period 1993 - 1995 are barred by Article 1117 (2) because these measures were known to Claimant more than three years before Claimant submitted his Notice of Arbitration on April 30, 1999. This argument

fails, however. Respondent incorrectly pegs the date from which to calculate the Article 1117 limitations period and does not take into account the arrangements between the parties that suspended the running of any limitations period for more than 32 months. As discussed below, Respondent is estopped by its own conduct from invoking any limitations defense in this case.

46. Furthermore, Respondent confuses the purpose of a limitations provision, incorrectly applying it to the relevance of evidence rather than as a defense to stale or abandoned claims. Even if a limitations period applied to some of the claims in this case, 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 that culminated in the measures taken by Respondent in 1997 to shut down CEMSA's cigarette export business for the third time. These facts and circumstances are highly relevant to Claimant's allegations that Respondent's 1997 measures were tantamount to expropriation in violation of NAFTA Articles 1102 and 1110.

(a) The three-year limitations period under NAFTA Article 1117, if it applies in this case, is computed from delivery of Claimant's Notice of Intent.

47. Contrary to Respondent's assertion, Claimant's Notice of Arbitration is *not* the event from which the three-year period of Article 1117 is to be calculated. Rather, NAFTA states:

An investor may not make a claim on behalf of an enterprise . . . if more than three years have elapsed from the date on which the enterprise first acquired, or should have acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

NAFTA Article 1117 (2) (emphasis added.). Thus, the three-year period is computed from the date an investor "makes a claim." In this case, the claim was made *no later than* February 16, 1998, when Claimant delivered his Notice of Intent.

48. Respondent argues that a claim is not “made” under Article 1117 until it is submitted to arbitration, but the two concepts are not the same. Whenever in Chapter 11 the NAFTA Parties intend to apply the date when a claim is submitted to arbitration, they do so explicitly. Thus, the words “submit” or “submitted to arbitration” appear in Articles 1119, 1120, 1121, 1122, 1126, 1127, and 1137. In contrast, these words do not appear in Article 1118 or 2103 (6) discussed below. These words and the phrase “make a claim” both appear in the limitations articles, Articles 1116 and 1117. In fact, Article 1117 (3) uses the phrases together in a way that shows a clear distinction between the formal “submission,” and the earlier “making” of the claim:

Where an investor *makes a claim* under this Article and the investor or a non-controlling investor in the enterprise *makes a claim* under Article 1116 arising out of the same events . . . *and two or more of the claims are submitted to arbitration* under Article 1120, the claims should be heard together. . . .[emphasis added].

If “making the claim” and “submission to arbitration” were synonymous, then the conjunction “and” in the foregoing would be meaningless; the drafters would have used a phrase such as “*by submitting two or more of the claims to arbitration*” not the phrase used: “*and ... the claims are submitted to arbitration.*” This language makes clear that the claim is made *first and then* submitted to arbitration. Thus, in NAFTA, the phrases “make a claim” and “submit to arbitration” are not synonymous.

49. This is the ordinary meaning of the words as used in Section B of NAFTA Chapter 1, and this meaning is consistent with the object and purpose of NAFTA. There are strong policy reasons for this distinction under NAFTA. The Parties deliberately imposed significant procedural requirements before claims made could be submitted to arbitration. These steps include:

(a) a six month "rest" period between the events giving rise to a claim and submission to arbitration (Article 1120);

(b) attempts first to settle the claim through consultation or negotiation (Article 1118);

(c) delivering a notice of intention to arbitrate at least ninety days before submission to arbitration (Article 1119); and, as in this case,

(d) referring Article 1110 claims regarding taxation measures to the competent authorities for further review of up to six months (Article 2103 (6)).

50. The Parties thus ensured that a minimum of six months, and possibly longer, would elapse between the date a claim is first "made" and the date it is allowed to be submitted to arbitration. Surely, the Parties did not intend a claimant to be prejudiced by compliance with these procedures, which include the obligation to make efforts to settle the matter by consultations or negotiations. Such prejudice is the exact result that Respondent's view would impose.

51. This claim was "submitted to arbitration" on April 30, 1999, under Article 1120 (1) (b), but the claim was "made" much earlier. At the latest, the claim was "made" on February 16, 1998, the date of the Notice of Intent.

(b) The three year time limitation of Article 1117 was suspended, or tolled, by the parties' agreement in 1995.

52. As described above, 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 Decl. II ¶¶ 18-23.) Without such an undertaking by Respondent, Claimant would never have taken the financial risk of investing large sums in the purchase of cigarettes for export sales at

prices well below the cost of the goods. Claimant relied on Respondent's representations in purchasing cigarettes for export and in forbearing from submitting CEMSA's claims to arbitration. Feldman Decl. II ¶ 23. These arrangements, made with and by authorized representatives of Respondent in mid-1995, led Claimant to believe that his disagreements with Hacienda had been settled satisfactorily. This agreement, and Claimant's reasonable reliance upon this settlement, suspended, or tolled, the running of any limitation period under Article 1117 (2), as well as under recognized principles of international law discussed below. Until November 1997, Claimant was permitted to export and had no reason to sue Respondent – while CEMSA was able to export cigarettes with IEPS rebates, it had no legal basis to seek damages for Hacienda's denial of rebates and good reasons not to imperil its export business by challenging Respondent's past errors. *See Bowen v. New York*, 476 U.S. 467 (1986); *Honda v. Clark*, 386 U.S. 484 (1967). In *Bowen*, the plaintiff knew for some time that his claims for federal disability benefits had been denied, but the court held that the statute of limitations had been suspended (tolled) until the government was forced to disclose a secret policy underlying those denials. Similarly, in *Honda*, the plaintiffs did not bring an action against the government until after a related case demonstrated that the financial damages recoverable were much greater than originally represented by the defendant government. The limitation period was held to have been tolled for the duration of the related case. In both cases, as here, the determinative consideration was a change in circumstances that greatly enhanced the practicality of litigation.

53. Moreover, suspension of the limitations period in this case would comport with the purpose of NAFTA's limitations provision. A limitations period is designed to prevent a dilatory claimant from asserting stale claims. The policy underlying a statute of repose "may be

outweighed if the interests of justice require vindication of the plaintiff's rights, as where a plaintiff has not slept on his rights, but rather has been prevented from asserting them." *See generally* 51 Am Jur. 2d Limitation of Actions, § 16 (1999). Here, the purposes of the limitation period incorporated in NAFTA Article 1117 (2) were undoubtedly met by Claimant's efforts to obtain relief from Respondent and his timely February 16, 1998 Notice of Arbitration. Claimant's actions in pursuit of his claims in this case can scarcely be described as dilatory. Claimant has vigorously pursued his rights whenever Respondent acted to deny these rights. It was Respondent who, by the 1995 agreement, induced Claimant to withhold his claims regarding the earlier actions.

54. Respondent performed as agreed and made rebates of cigarette taxes on CEMSA's exports for many months in 1996 and 1997 until it suddenly reversed course without notice to CEMSA in November-December 1997. (Feldman Decl. II ¶ 24) This reversal was first confirmed formally in February, 1998. Thus, if the three year limitation period of Article 1117 (2) applies, it was suspended for some 32.5 months, from the time of the parties' understanding resolving the issues reached on or about June 1, 1995, until Respondent's formal rejection of that agreement in February, 1998. This means that any limitations period applicable in this case, even to claims arising from January 1, 1993, was met when Claimant delivered his Notice of Intent on February 16, 1998. The three years of the limitation period, plus the 32.5 months during which the limitation period was tolled, or suspended, from June 1, 1995 - February 16, 1998, encompasses all measures causing harm to Claimant back to May 31, 1992. The claims now before this Tribunal, for measures taking place from January 1, 1993 to date are well within this period.

55. Even under Respondent's erroneous interpretation that Article 1117 (2) refers to the date the Notice of Arbitration is filed, the cut-off date, if applicable in this case, would not commence prior to August 16, 1993 – 3 years prior to April 30, 1999 excluding 32.5 months when the limitations period was suspended from June 1, 1995 - February 16, 1998.

(c) *Respondent is equitably estopped from invoking any limitations period in this case.*

56. In any event, even if Article 1117 (2) could apply to cut off Claimant's 1993 claims, Respondent would still be equitably estopped by its own actions from invoking Article 1117 (2) against the claims asserted in this case. It is well established that equitable principles, including principles of estoppel and tolling, form a part of the established rules and principles of international law. *See Temple of Preah Vihear* (Cambodia v. Thailand), 1962 I.C.J. 6, *39 (June 15) (separate opinion of Vice President Alfaro) ("A State party to an international litigation is bound by its previous acts or attitude when they are in contradiction with its claims in the litigation."); *Shufeldt Claim* (U.S. v Guatemala), 2 R.I.A.A. 1083 (July 24, 1930). *See generally* I.C. MacGibbon, *Estoppel in International Law*, 7 Int'l & Contemporary L.Q. 468, 468 (1958) ("[A] State ought to be consistent in its attitude to a given factual or legal situation."); D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 Brit. Y.B. Int'l L. 176 (1957). Equitable estoppel, the doctrine by which a person may be precluded by his act or conduct from asserting a right which he otherwise would have had, is recognized under many legal systems. *See, e.g., Central London Property Trust Ltd. v. High Trees House Ltd.*, (1947) K.B. 130, 62 T.L.R. 557, (1947) L.J.R. 77, 175 L.T. 333 (U.K.).

57. Here, Respondent lulled Claimant into believing that he could enjoy the fruits of a profitable export business consistent with the 1993 Amparo decision. No time limitation was suggested when the agreement was made in 1995 and no notice was given when the agreement was abrogated in late 1997. Claimant was justified in relying on Respondent's on-going commitments in foregoing any earlier efforts to collect comparatively modest compensation for Respondent's past breaches. Now that Respondent has reneged on its agreement and shut-down CEMSA's cigarette export business, it should be estopped on equitable principles from invoking Article 1117 (2) against the claims presented in this proceeding.

58. A finding of equitable estoppel is appropriate in a case such as this one where a lawsuit was discouraged by the actions of a defendant. Although the clearest example is where a defendant has expressly agreed not to raise a defense based upon a statute of limitations, other representations, promises, or actions will suffice to estop a party from invoking a statute of limitations. *Holmberg v. Armbrecht*, 327 U.S. 392 (1946). Many U.S. and Canadian judges have found that promises or offers made during negotiations can provide grounds to invoke equitable estoppel. Thus, when a potential defendant assures a plaintiff that he intends to settle and the plaintiff, in reasonable reliance on that assurance, delays bringing his suit until after the statute has run, the defendant may be estopped from relying on a limitations defense. *Kruger v. The Queen*, 31 A.C.W.S. 2d 188 (1985) (Can.) (stating that government cannot promise one thing, thereby inducing alteration of legal position to citizen's detriment, then simply ignore the promise to citizen); *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 232-33 (1959) (holding that conduct by a defendant which tends to lull a plaintiff into a false sense of security can, under general equitable principles, estop the defendant from raising a limitations defense); *Atkins v.*

Union Pacific Railroad Co., 685 F.2d 1146, 1148-49 (9th Cir. 1982) (finding estoppel in light of negotiation promises that lulled the plaintiff into a false sense of security); *United States v. Reliance Insurance Co.*, 436 F.2d 1366, 1370-71 (10th Cir. 1971). "Estoppel . . . arises where one party by his words, acts, and conduct led the other to believe that it would acknowledge and pay the claim, . . . but when, after the time for suit had passed, breaks off negotiations and denies liability and refuses to pay." *Reliance Insurance Co.* at 1370.

59. The Respondent and Claimant in this arbitration did more than simply discuss their differences. Claimant zealously approached Mexican officials again and again until, in mid-1995, Respondent gave Claimant assurances that exports would be permitted and rebates paid to CEMSA in the manner that Claimant sought. Claimant relied upon these assurances both in investing substantial sums to purchase cigarettes, at prices including the high IEPS tax, and in refraining from any legal action. In fact, Respondent respected the agreement and made IEPS rebates to CEMSA as requested for more than two years. Respondent's performance proves that Claimant had reason to believe, and reasonably did believe, that the long-standing dispute had been resolved and that he could rely on Respondent's assurances. When a respondent, as here, induces a claimant to forgo bringing a lawsuit or arbitration and then later undoes the settlement, the respondent must be estopped from asserting that the claim has become time-barred.

2. Any determination based on Article 1117 (2) limiting Claimant's ability to bring claims cannot limit the Tribunal's consideration of facts relevant to the remaining claims.

60. Respondent has no grounds to withhold documents and written statements that are directly relevant to either the limitations issue or to the merits of Claimant's case. The question of which claims Claimant can or cannot bring under NAFTA's Article 1117 (2) limitations period is

completely separate from the question of what evidence is relevant to support the claims that Claimant, in the end, is allowed to bring. The Tribunal, not Respondent, has the prerogative to determine what evidence is relevant and what documents should be produced. *See* Rules Article 41 (1). Respondent's contention that any witness statements or documents requested by Claimant concerning facts that pre-date April 30, 1996 cannot be relevant to this proceeding is absurd. Article 1117 (2) has the potential to limit claims, not discovery. The relevance of a particular fact depends on the issue in dispute, not on the date of the fact. A certain fact may pre-date a breach of NAFTA by months or years, but still be highly relevant evidence of such breach.

61. This proposition is so fundamental that there is little discussion of it in sources of customary international law. Judge Brower of the Iran-United States Claims Tribunal, an experienced international arbitrator, has summarized, however, certain principles for the evaluation of evidence applied by that Tribunal that demonstrate the truth of the proposition:

1. Contemporaneous written exchanges of the parties *antedating the dispute* are the most reliable source of evidence;
2. The actual course of conduct between the parties *prior to the dispute arising* constitutes the best evidence of the proper interpretation of their contract;
3. The failure of a party to object in writing to a writing (e.g., an invoice) it has received *at or shortly after the time of receipt* is strong evidence of its acceptance;
4. *Statements of a party* contradicting the position it has taken in the proceedings are strong evidence against that position; and
5. When it reasonably should be expected that *certain evidence exists* and that it is in the control of a party, the failure of that party to produce such evidence gives rise to a justifiable inference that such evidence, if produced, would be adverse to that party.

Charles N. Brower, *Anatomy of Fact-Finding Before International Tribunals: An Analysis and a Proposal Concerning the Evaluation of Evidence*, in *Fact-Finding Before International Tribunals: Eleventh Sokol Colloquium*, 150-51 (Richard B. Lillich ed., 1990) (emphasis added.)

62. Judge Brower's points clearly demonstrate that (1) facts and evidence prior to the date the dispute arose are relevant and probative, and (2) the content of the evidence is determinative of its relevance, not the time of its creation. In the real world, relevant evidence will often pre-date the actual dispute. Any arbitrary cut-off of discoverable evidence prior to a particular date alleged to be a limitations date has no support in logic or practice.

63. Assuming *arguendo* the worst case for Claimant – that all claims prior to April 30, 1996 are barred by Article 1117 – it is indisputable that Respondent's measures after that date 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 a pattern of "creeping expropriation" culminating in the final extinction of CEMSA's cigarette - exporting business in late 1997. Moreover, one of the key issues in this case is whether CEMSA was authorized by Hacienda officials in 1995 to apply for IEPS rebates without presenting documents that were impossible for CEMSA to obtain from the producers. CEMSA's complaints about this CATCH-22 and the relevant discussions with Hacienda and Cigatam, and the agreement with Hacienda, took place prior to April 30, 1996. The Tribunal cannot decide this case without considering all the facts and circumstances, and Claimant is entitled to discovery of relevant facts under Order No. 2.

64. By way of example, some of the key historical facts Claimant expects to prove include the following:

1. That Respondent took steps to shut down cigarette exports by CEMSA first in 1991, again in 1993, and, finally, in 1997;
2. That these measures responded to pressures from the cigarette producers, particularly Carlos Slim and Cigatam, and were for the avowed purpose of establishing and protecting a monopoly on cigarette exports for the producers;
3. That senior Mexican officials went to extraordinary lengths to perpetuate a policy they knew was illegal under Mexican law, including efforts to interfere in CEMSA's case before the Supreme Court of Justice; refusal to implement the Supreme Court's 1993 Amparo decision for CEMSA's benefit; and outright refusal to require cigarette producers to meet documentary requirements imposed on them by the IEPS law.
4. That Claimant lobbied Hacienda and Cigatam in 1993 - 1995 to obtain relief from the obstacles thrown up by Hacienda to protect Cigatam's monopoly and, finally, succeeded with the assistance of the U.S. Embassy;
5. That several officials who came to Hacienda from Respondent's Ministry of Commerce and Industry ("SECOFI") after the 1994 election of President Zedillo supported the rule of law and took steps to permit CEMSA to resume cigarette exports and obtain IEPS rebates without the documentation that the producers refused to provide;
6. That this determination was resisted by other officials in Hacienda who retaliated by seeking unsuccessfully to impose a tax audit on CEMSA around June 30, 1995;
7. That responsible Hacienda officials assured, and reassured, Claimant that CEMSA would receive IEPS rebates if it purchased cigarettes for export at prices including the IEPS tax and exported the cigarettes;

8. That key officials who authorized rebates to CEMSA in the 1996 - 1997 period had participated in or were officially informed of the 1995 negotiations and agreement with CEMSA; and

9. That, while CEMSA was exporting in 1996 - 97, Claimant made sure that the most senior officials in the Mexican Government knew that CEMSA was exporting cigarettes and relying on the government to honor its commitment to make IEPS rebates.

65. Claimant has testified to these facts, and he has requested corroborating evidence from Respondent under Order No. 2. A few examples of highly specific discovery requests rejected unilaterally by Respondent as not being in the "legally relevant timeframe" include the following requests for documents and information:

(1) Memoranda from Fiscal Attorney General Roberto Hoyo to the Undersecretary of Income dated October 27, 1993 and January 13, 1994 (which evidence Carlos Slim's intense involvement in Hacienda's reactions to the Supreme Court's 1993 Amparo decision and Hacienda's rejection of the Court's ruling);

(2) A memorandum prepared by or for Undersecretary Pedro Noyola in 1995 documenting Hacienda's approval of IEPS rebates for future cigarette exports by CEMSA;

(3) Documents relating to Hacienda's initiation and abrupt termination of a tax audit of CEMSA around June 30 - July 5, 1995;

(4) Documents relating to meetings between various Hacienda officials, including Fernando Heyfte (formerly Judicial Administrator, General Revenue Administration) and Angel Ramirez (former Administrator General) with Marvin Feldman in 1995 relating to CEMSA's requests for authorization of IEPS rebates for cigarette exports;

(5) Questions to Undersecretary Tomas Ruiz, who succeeded Dr. Pedro Noyola in early 1996 and served in that position until this year, concerning his knowledge of Hacienda's payment of IEPS rebates to CEMSA in 1996 - 1997 and the termination of such rebates in late 1997;

(6) Questions to Ismael Gomez Gordillo, former Undersecretary and Attorney General of Hacienda, concerning the positions he took at various times on the key issues that he discussed with Marvin Feldman, including implementation of the 1993 Amparo decision; and

(7) Questions to Santiago Oñate, former secretary to President Carlos Salinas, and now Ambassador to the United Kingdom, concerning his knowledge of any communication between former Secretary Pedro Aspe and any Justice, officer or employee of the Mexican Supreme Court regarding Amparo No. 1241/91, CEMSA's amparo, while that case was pending before the Court.

66. All these facts and circumstances are relevant to Claimant's allegations that Respondent acted in 1997, as it had done twice before, to repress cigarette exports by CEMSA through various measures including illegal and discriminatory manipulation of the IEPS tax law in violation of NAFTA Articles 1102 and 1110.

IV. Issue d. Whether measures alleged to be taken by the Respondent in the period between late 1992 and January 1, 1994, when 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?

A. *Statement of Facts*

67. First, under the Amparo order issued by the Mexican Supreme Court on August 18, 1993, Respondent was to pay all rebates due to CEMSA for cigarette exports in 1990 and 1991

with adjustments for interest and inflation. Despite prompt and repeated demands by CEMSA, and a November 8, 1993 order from a Mexican federal district court that Respondent comply with the Supreme Court's decision within 24 hours (Tab D), Respondent did not make any payment under the Amparo until after NAFTA entered into force on January 1, 1994.

68. On February 10, 1994, Respondent finally agreed to pay the rebates due as ordered by the court. No payment was made until sometime in March or April, 1994 when Respondent issued a payment that was substantially less than the amount due under the Amparo order. Hacienda gave no explanation for the underpayment. (Feldman Decl. II ¶ 17.)

69. Second, Respondent refused to allow CEMSA to export cigarettes and recover IEPS tax rebates for such exports from 1993 - 1995, notwithstanding CEMSA's clear entitlement under the *Amparo* order, the IEPS law in force from 1992 through 1997 and written acknowledgments by Hacienda officials that CEMSA was entitled to IEPS rebates for its cigarette exports. (Feldman Decl. II ¶¶ 13-18, 20.)

70. Each of these measures began before the effective date of NAFTA and continued, with a negative impact on CEMSA, for months and years after the effective date. Each of these measures, when combined with subsequent measures taken by Respondent against CEMSA, culminated in the expropriation of Claimant's cigarette-exporting business in late 1997.

B. *Statement of Law*

The measures taken by the Respondent in the period before January 1, 1994, including those measures evidencing Respondent's Campaign Against CEMSA before 1994, Are Relevant to The Claims at Issue in This Proceeding and The Tribunal May Award Claimant Damages For All Losses Due to Respondent's Measures That Continued After January 1, 1994.

71. Treaties are not generally read to bind parties retroactively,⁶ and Claimant is not seeking the retroactive application of NAFTA to measures that were completed prior to its entry into force. Rather, Claimant asks the Tribunal to hold Respondent accountable under NAFTA for measures which continued after January 1, 1994 and for a continuing course of conduct in violation of both general principles of international law and NAFTA.

72. First, treaty remedies may be applied to vindicate substantive rights which predated the treaty. NAFTA, Chapter Eleven, established a mechanism to resolve disputes based on principles of international law which, in large part, were well established when NAFTA entered in to force. In this case, the measures taken by Respondent prior to January 1, 1994 – its refusal to comply with legislation enacted as of January 1, 1992 and with the decision of its highest court entered on August 18, 1993 – constituted a denial of justice under international law principles long recognized by the United Mexican States. Thus, Claimant had claims against Respondent under general principles of international law before NAFTA entered into force, and application of NAFTA remedies is permissible under international law.

⁶ The Vienna Convention on the Law of Treaties states:

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or *any situation that ceased to exist before the date of entry into force of the treaty with respect to that party.*

Vienna Convention, art. 28, done at Vienna, May 23, 1969, entered into force, January 27, 1980, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969) (emphasis added.).

73. As the United States Supreme Court has held:

Application of a new jurisdictional rule usually takes away no substantive right but simply changes the tribunal that is to hear the case. Present law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties.

Landgraf v. USI Film Prods, 511 U.S. 244, 274 (1994) (quoted in *Creighton, Ltd. v. Government of the State of Qatar*, 181 F.3d 118, 124 (D.C. Cir. 1999), holding that application of the Foreign Sovereign Immunities Act to conduct that occurred before enactment is not an impermissible retroactive application).

74. Second, the continuing violation doctrine applies to overcome objections to jurisdiction *ratione temporis*. Violations that are accomplished “after the crucial date” that a treaty enters into force can be “taken in conjunction with earlier acts to which they are closely linked, [and thus] constitute . . . a single, continuing and progressive illegal act which was not fully accomplished until after the crucial date.” *Legality of Use of Force (Yugo. v. U.K.)*, 1999 I.C.J. 1 (June 2) (separate opinion of Judge Higgins) (citing International Law Commission’s Draft Article 25 on State Responsibility, Vol. II, pt. II, at 80).

75. Expropriation of property is considered to be a “continuing violation.” See, e.g., *Loizidou v. Turkey (Merits)*, 1996-VI Eur. Ct. H.R. 2216 at ¶ 41 (Dec. 18). Moreover, acts which predate a State’s adherence to a treaty may have continuing legal effects which constitute a “continuing violation” for which the State may be held responsible. See generally Jo M. Pasqualucci, *Preliminary Objections Before the Inter-American Court of Human Rights: Legitimate Issues and Illegitimate Tactics*, 40 Va.J.Int’l.L.1, 43-46 (1999).

76. In this case, Respondent's illegal actions continued after January 1, 1994 and were accomplished by various measures, including:

(1) its refusal to pay Claimant in a timely or complete manner the rebates owed under the Supreme Court decision;

(2) its refusal for several years to allow Claimant to export cigarettes under the IEPS law;

(3) its decision to shut down CEMSA's cigarette export business in 1997 and to deny CEMSA IEPS rebates for exports made in October - December 1997;

(4) its subsequent demand for repayment, with penalties, of all IEPS rebates paid to CEMSA between June 1996 and September 1997 despite prior commitments to pay such rebates; and

(5) its refusal to register CEMSA as an exporter in 1998. These measures constitute a continuing course of conduct in violation of both public international law and NAFTA. Claimant is entitled to seek damages for these violations.

77. The Tribunal's ultimate determination regarding the award of damages for violations that occurred before the effective date of NAFTA, is not material to the relevance of the measures taken by Respondent against CEMSA before January 1, 1994, and of the facts relating to these measures, to CEMSA's claims for post-January 1, 1994 measures.⁷ The actions and facts that pre-date NAFTA, including Respondent's failure to comply with the Supreme Court's *amparo* order prior to January 1, 1994, and its acquiescence to the demands of Carlos Slim on behalf of his company, the Mexican cigarette producer CIGATAM, with regard to CEMSA, are relevant to the

⁷ See discussion at *supra*, ¶¶ 60-62.

losses suffered by CEMSA thereafter. These actions and facts also evidence the purpose and motive behind the post - January 1, 1994 measures that ultimately caused Respondent to shut down CEMSA's cigarette exporting business in November-December, 1997.

V. Issue e. Whether the Claimant, being a citizen of the United States of America, and a registered permanent resident of Mexico, has standing to sue under Chapter Eleven of NAFTA?

A. *Statement of Facts*

78. Claimant is an American citizen by birth, born in Washington, D.C. on November 21, 1940. He holds a United States passport and Social Security number. His allegiance is to the United States of America, and he has never applied for a Mexican passport. (Feldman Decl. II ¶ 1.)

79. Claimant lived in the United States for thirty three years, over half his life, in various cities including Miami, Florida and San Antonio, Texas where he worked, voted and paid taxes. His twin brother continues to live in Miami, Florida and he has other relatives in the United States. (Feldman Decl. II ¶ 2.)

80. Claimant moved to Mexico in 1973, but he visits the United States frequently, often on business. On October 18, 1991 he was granted "inmigrado" status by the National Immigration Institute of Mexico, certificate FM-2 No. 341257. He applied for this status on advice of government employees and to avoid a variety of burdensome formalities including annual visits to the Immigration office regarding his status. This FM-2 certificate remains in force. (Feldman Decl. II ¶ 3.)

81. An "inmigrado" is not a citizen or national of Mexico under Mexican law and does not have equal rights with Mexican nationals. (See Subdireccion de Inmigrados, Secretaria de

Gobernacion, *Cartilla de Derechos y Obligaciones del Inmigrado* [Booklet of Rights and Obligations of the Immigrado] (1998) ((Mex.), Tab K.) Claimant is not allowed to vote, to hold political office, donate money to a political candidate personally or through CEMSA, or otherwise participate in politics in Mexico. He is not allowed to own real property, directly or permanently, within 100 kilometers from the border or within 50 kilometers from the shore, and is barred from a variety of investment activities which are restricted to Mexican nationals only. Unlike Mexican citizens or nationals, he must notify a government authority and receive permission for a variety of other business activities. (Feldman Decl II ¶ 4.)

82. Claimant has been married twice, to Mexican nationals. He has four children and one grandson. His children were born in Mexico and are citizens of both the United States and Mexico. Each child was registered with the American Embassy at birth, and each has American and Mexican passports. They all have U.S. Social Security numbers. The two-year old grandson is a Mexican citizen by birth. However, he will be naturalized as an American citizen. (Feldman Decl. II ¶¶ 5-6.)

83. Claimant maintains voter registration in San Antonio, Texas and has voted in every Presidential election since moving to Mexico in 1973. He plans to vote again this year. In addition, he pays taxes in the United States and maintains bank accounts there. Claimant has filed a U.S. federal tax return every year while living in Mexico. He also has an account with a securities brokerage in the United States and carries an American Express card issued in Fort Lauderdale, Florida. (Feldman Decl. II ¶ 7.)

84. For many years, Claimant has planned to return to the United States to live as soon as he is able financially to do so. In 1997, when CEMSA's cigarette export business was doing well,

he signed a contract to purchase a house in Aventura, Florida and made a down payment of US \$55,000.00. Unfortunately, he lost the house and the down payment as a direct result of Respondent's shutting down cigarette exports by CEMSA in November 1997. (Feldman Decl. II ¶ 8.)

85. The U.S. Embassy has invoked NAFTA on Claimant's behalf since March, 1995 without any objection from Respondent. (See Dolan letter, Tab G) On December 17, 1997, after Respondent shut down Claimant's cigarette export business for the third time, William Brew, Mr. Dolan's successor as Counselor for Economic Affairs for the United States Embassy, wrote to Tomas Ruiz, who had succeeded to Dr. Noyola as Undersecretary for Income at Hacienda, requesting his intervention to resolve NAFTA issues arising out of Hacienda's sudden denial of IEPS rebates for cigarette exports for October - November 1997 and its refusal to allow CEMSA to continue this business. (See Brew letter, Tab H.) Mr. Brew cited Mexico's commitments under NAFTA and stated his hope that the matter could be resolved without recourse to a proceeding under Chapter 11 of NAFTA. Last year, the U.S. Embassy reiterated its view to Mexico that NAFTA is an option available to Claimant. (See Letter from Deputy Chief of Mission Charles H. Brayshaw to the Secretary of Hacienda, Jose Angel Gurria, April 6, 1999, Tab I.)

86. In August 1998, Respondent wrote to Claimant, asking that Claimant formally refer the expropriation claim to the authority listed under NAFTA Article 2103 (6). (See Letter of Tomas Ruiz, August 14, 1998, Tab J.) Claimant complied. On February 17 and 18, 1999, after months of discussion between the two governments, the competent U.S. and Mexican tax authorities issued their determinations regarding which of Claimant's Article 1110 claims could proceed to arbitration and which could not. Claimant duly filed his Notice of Arbitration with ICSID on April

30, 1999. Respondent never raised any question of Claimant's standing during these detailed discussions.

B. Statement of Law

1. Claimant, a United States Citizen, has Standing under Chapter 11 to Submit Claims on Behalf of his Mexican Enterprise.

87. By letter dated June 30, 2000, Respondent told the Tribunal "it believes that there may be another jurisdictional issue concerning the Tribunal's jurisdiction *rationae personnae*." (Eng. at 5.) Respondent's theory appears to be that a citizen-investor of one Party who resides in the territory of another Party is a national of both under NAFTA and, therefore, may not bring a claim on behalf of his investment against the Party where the investor resides. This conclusion is a *non sequitur*. There is no language in NAFTA that supports this novel, new-found interpretation. Moreover, any construction eliminating the rights of foreign nationals resident in the host country would radically restrict the NAFTA regime and frustrate the purpose of Chapter 11. NAFTA, arts. 102, 1115. As discussed below, NAFTA specifically protects investments having the nationality of the host country.

88. Further, under any analysis of "effective nationality," citizenship is the supreme connection with a state. This is particularly true under NAFTA which permits the States Party to discriminate against nationals of other States Party in a wide variety of economic areas irrespective of their residence in the host country.

(a) Under the Plain and Unambiguous Language of NAFTA, Claimant has Standing to Submit his Claims to Arbitration.

89. Article 1101 (1) provides:

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.

90. Article 1117 provides that an "investor of a Party" may bring a claim on "behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly" An "investor of a Party" means "a Party . . . or a national or an enterprise of such Party, that . . . has made an investment." Article 1139. "Investment" is defined to include "an enterprise." *Id.* Although "national" is not defined in Chapter 11, Article 201, the general definitions article of NAFTA, defines "national" to include "a natural person who is a citizen or permanent resident of a Party"

91. Claimant fits each of these definitions. Marvin Feldman, as a United States citizen, is an investor of the United States, a Party under NAFTA. Mexico is another Party under NAFTA, and CEMSA, a Mexican enterprise, is Marvin Feldman's investment in the territory of Mexico. Thus, under NAFTA's plain language, Marvin Feldman is entitled to maintain claims against Mexico on CEMSA's behalf.⁸ Claimant's residence in Mexico is simply irrelevant to this issue. Marvin

⁸ As a general rule of interpretation, the Vienna Convention on the Law of Treaties provides that "[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." Vienna Convention, art. 31, done at Vienna, May 23, 1969, entered into force, January 27, 1980, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969).

Feldman indisputably is an investor of another Party, the United States of America, and that should be the end of the inquiry. Whether he is or is not also an "investor" of Mexico for any other purpose under NAFTA is beside the point. There are no words in NAFTA suggesting that a citizen-investor of one Party is barred from bringing a claim against another Party where his investment is located and where he resides. (*See* Affidavit of Alan Swan ("Swan Aff.") ¶ 4 (Tab L.))

92. Nor is there any precedent in international law or practice for such a limitation. Historically, many foreign investors have lived in the countries where their investments were located, and there is a long tradition of bilateral agreements between states securing the rights of alien traders and investors to reside where their investments are located.⁹ Employees of major multi-national enterprises generally may not become permanent residents of their host countries, but no one would argue that NAFTA was drafted to benefit only such multinationals and to exclude individual or family investments from its protections. Marvin Feldman is exactly the kind of foreign investor that NAFTA was intended to protect. (*See* Swan Aff. ¶ 5 (A) at 6.)

93. Moreover, the stated objectives of NAFTA are to expand investor rights and to protect their interests, not to restrict them.¹⁰ It is clear that by adopting a broad definition of "national," including permanent residents as well as citizens, the NAFTA parties intended to broaden, not to

⁹ For example, BITs between the United States and its investment partners provide that "each Party shall permit to enter and to remain in its territory nationals of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they . . . have committed or are in the process of committing a substantial amount of capital or other resources." U.S. Dep't of State, Prototype of a U.S. Bilateral Investment Treaty (BIT), art. VII, April 1998.

¹⁰ " . . . [t]he objectives of this Agreement, as elaborated more specifically through its principles and rules . . . are to "increase substantially investment opportunities in the territory of the Parties" and to "create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes." NAFTA, Art. 102 (1) (c), (e).

narrow the scope of the agreement. Logically, the intended beneficiaries of this provision, which derives from the U.S.-Canada Free Trade Agreement,¹¹ must have been third-country nationals. Thus, e.g., a German citizen with permanent resident status in the United States is, for purposes of NAFTA, a U.S. national entitled to the same protections for his investments in Mexico and Canada as an American citizen. (See *Swan Aff.* ¶ 5 (B) at 7).

94. It is generally recognized that NAFTA Chapter 11 is the most far reaching international investment agreement concluded to date.¹² There is no indication whatever that NAFTA's general definition of "national" was intended to restrict the rights of resident foreign investors in any way. If the NAFTA parties had intended such a restriction of the agreement, they would have done so expressly, but they did not. A model for such a restriction appears in one treaty that expressly prohibits true dual nationals from instituting arbitration proceedings against either of their own States, but this is done in specific and clear language. Article 25 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention")¹³, which is not applicable to this proceeding, provides:

- (1) The jurisdiction of the Center shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another Contracting State

¹¹ "[N]ational means an individual who is a citizen or permanent resident of a Party and also includes, for the United States of America, 'national of the United States' as defined in the existing provisions of the United States *Immigration and Naturalization Act.*" U.S.-Canada Free Trade Agreement, Jan. 2, 1988, U.S.-Can., art. 201 (1), 27 I.L.M. 281.

¹² See Daniel M. Price & P. Bryan Christy, *An Overview of the NAFTA Investment Chapter*, in *The North American Free Trade Agreement* 166, 181 (Bello, Holmer, & Norton, eds., American Bar Association 1994).

¹³ Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature Mar. 18, 1965, entered into force Oct. 14, 1966 [hereinafter ICSID Convention].

- (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 . . . *but does not include any person who . . . also had the nationality of the Contracting State party to the dispute . . .* (emphasis added).

No such language appears in the NAFTA text and none can be implied. In any event, Claimant is not a dual national under the ICSID Convention, because he is not a citizen of both states concerned, as defined by their respective nationality laws.¹⁴

(b) The Object and Purpose of NAFTA Requires the Protection of Claimant's Investment in Mexico.

95. As shown above, there is no textual basis in NAFTA for any argument Respondent might make that some concept of "effective nationality" limits Claimant's right to bring this case. Any such argument is inconsistent with the basic object and purpose of NAFTA under Articles 102, and with the object and purpose of NAFTA's investment dispute resolution mechanism as stated in Article 1115. (Below, at Subsection (c), we demonstrate further that Claimant is a United States national under any international law theory of "dominant" or "effective" nationality.)

96. It is well understood that NAFTA Chapter 11 is constructed on the foundation laid by more than one thousand bilateral investment agreements ("BITS") primarily between capital

¹⁴ Thus, the statement in Claimant's Notice of Arbitration that, because he is not a Mexican citizen, he is not a national of Mexico. The statement was elicited by the ICSID Secretariat in case Mexico should become a party to the Convention. We discussed the issue of permanent residence with the Secretariat at that time, and Claimant's residence was deemed irrelevant. Claimant is not a Mexican national under the laws of Mexico, under general principles of international law, or under the ICSID Convention. Moreover, Claimant's residence did not present a standing question under NAFTA until Respondent first conceived the point and raised it on June 30, 2000.

exporting and capital importing countries.¹⁵ These agreements were intended to support economic development in capital-importing countries by providing protections for foreign investors and their investments so as to encourage direct foreign investment in the host country. *See* Antonio Parra, *Provisions on the Settlement of Investment Disputes in Modern Investment Laws, Bilateral Investment Treaties and Multilateral Instruments On Investment*, 12 ICSID Review F.J.I.L. 287 (1997). To accomplish that objective,

... most of the investment laws, BITS and multilateral instruments discussed in this paper are extremely broad in their coverage of investments and investors.

Id. at 294.

97. NAFTA "is based on a conviction that investment inflows from other NAFTA countries will increase more rapidly if investors are not only guaranteed against discrimination and given rights under international law, but if they are also assured that those rights can be enforced at their behest through impartial adjudication before an independent tribunal." (Swan Aff. ¶ 5 at 5-6.)

Protection of Domestic Enterprises owned by Foreign Investors

98. NAFTA, like the BITs which preceded it, overrides the doctrine of the *Barcelona Traction, Light and Power Co.* (Belgium v. Spain), 1970 I.C.J. 3, which had rejected the standing of capital-exporting states to present claims relating to the expropriation of foreign companies owned by their nationals. By contrast, NAFTA Article 1117 recognizes a U.S. investor's right to bring a claim against Mexico on behalf of a Mexican enterprise, and Marvin Feldman's claims on behalf of CEMSA are based on Article 1117. In view of this NAFTA policy disregarding domestic corporate nationality as a bar to the submission of claims by foreign investors who own

¹⁵ Price & Christy, *supra* note 10, at 167-68.

those domestic enterprises, it would be nonsensical to bar such claims by foreign investors who happen to be resident in the host country but who are not citizens of the host country.

99. Moreover, such a conclusion would be inconsistent with the views of informed commentators including the General Counsel of ICSID:

... the undertakings of each State regarding investors generally apply to natural and juridical persons that qualify as nationals of the other treaty partner or partners. ... almost all of the treaties regard a natural person as being a national of a State if the person is so defined by the law of that State.

* * *

These criteria generally permit the protection of the treaty to extend to natural persons with the nationality of the host State, so long as they also have the nationality of the other state or States involved.

* * *

Some BITS and the majority of multilateral treaties further provide that permanent residents of a State party to the treaty will qualify for protection under the treaty by the other State or States, even if such residents have the nationality of the host State or of a State not party to the treaty.

Parra, *supra*, at 294-95. The author was surely mindful of the more restrictive scope of the ICSID Convention.

100. It would be inconsistent with the basic structure and purpose of NAFTA Chapter 11 to bar a foreign investor-resident from the protections of dispute settlement. There are other issues -- not before the Tribunal in this case -- which are more problematic. For example, does NAFTA's broad definition of "national" mean that Marvin Feldman could bring a NAFTA claim against the United States Government? As noted above the most logical answer may be that by including permanent residents in the definition of national, the NAFTA Parties meant only to include third-country nationals who would otherwise go unprotected. Under this construction,

which would conform with Mexican law and international practice, Marvin Feldman would not be a Mexican national for any purpose under NAFTA. The Tribunal, however, need not answer such questions which are not presented in this case.

(c) **If "Effective Nationality" Is An Issue, Marvin Feldman Is A United States National**

101. Because the express language of NAFTA supports Claimant's position, resort to other principles of international law is not necessary. Even so, it is a well established principle of international law that a state can be responsible for claims by a national of the state, if the claimant has the "effective" or "dominant" nationality of another state. *See Iran-United States*, Case No. A/18, April 6, 1984, 5 Iran-U.S. C.T.R. 251, 259-265; *Nottebohm* (Liechtenstein v. Guatemala), 1955 I.C.J. 4, 22.¹⁶ In the event the Tribunal believes it necessary to examine Claimant's connections with the United States and Mexico, there is no question that Marvin Feldman's "dominant" or "effective" nationality is with the United States. (See Swan Aff. ¶¶ 6-8 at 8-14.) *Citizenship Is the Supreme Connection*

102. Marvin Feldman is a citizen of the United States. He is not a citizen or national of Mexico under Mexican law. (Feldman Decl. II ¶ 4.) The doctrine of dual nationality presupposes that the person is actually a national of both states, not a national of one and a resident of

¹⁶ In *Nottebohm*, decided by the International Court of Justice on April 6, 1955, the Tribunal described the kinds of factual criteria that are relevant under international law if a claimant is a true dual national.

International arbitrators have . . . given their preference to the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved. 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 center 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.

another.¹⁷ We are not aware of any case in which a citizen of one state has been treated as having the effective nationality of a another state of which he is not a citizen, which is what Respondent apparently will argue here. Permanent residence may be significant where a person is a citizen of two states; in this case, however, residence cannot trump citizenship. (See Swan Aff. ¶ 4 at 5.)

103. As a citizen of the United States, Claimant can and does vote in the United States, he may and does carry a U.S. passport, and he may and does seek the protection or assistance of the United States Government when traveling abroad. Moreover, United States citizens, wherever they reside, are subject to a variety of U.S. laws governing such matters as federal income tax, foreign corrupt practices, and proliferation of nuclear or missile technology, among others.

104. Marvin Feldman moved to Mexico in 1973 and acquired *inmigrado* status in 1991. (Feldman Decl. II ¶ 3.) But *inmigrado* status is distinctly inferior to citizenship under Mexican law. The rights and responsibilities of citizens far outweigh those of permanent residents.¹⁸ *Inmigrados*, for instance, are not allowed to vote or participate in Mexican politics. *Inmigrados* cannot be absent from Mexico for three consecutive years or, five years in, a ten year period. As non-citizens, *inmigrados* are barred from owning real estate within 100 kilometers from the border or within 50 miles from the coast, directly or permanently. (Feldman Decl. II ¶ 4; and see Tab K.)

¹⁷ This conclusion is implied in such cases as *Dalia v. France*, Eur. Ct. H.R. (154/1996/773/974), Feb. 19, 1998, where a woman was found to be deportable from France despite having spent half of her life there with her nuclear family, because she was a citizen of Algeria.

¹⁸ Article 34 of the Mexican constitution awards citizenship to Mexican nationals who are 18 years old and have an honest way of life.

105. Even more important in this case, NAFTA permits the States Party to discriminate between their own nationals and nationals of the other States Party in a variety of significant economic areas whether the foreign nationals are resident in the host country or not. *See, e.g.,* NAFTA Art. 1102 (2) and Annex. Under Mexican legislation, Claimant is excluded from investment in such areas as petroleum, electricity, transportation, broadcasting, credit unions and from providing a variety of professional and technical services, because he is not a "national" under Mexican law. *See* Foreign Investment Act of 1993, art. 3, D.O. December 23, 1993, 33 I.L.M. 207, 212 (1994). Moreover, he is required under Mexican law to notify the authorities and obtain permission to make business investments in Mexico. *Id.*, arts. 15-17. These requirements do not apply to Mexican citizens. *Id.*

Other Connections

106. Apart from citizenship, Claimant has maintained close connections to the United States. He lived in the United States for many years and continues to visit the United States frequently. He regards himself as an American, carries an American passport, affirms his allegiance to the United States, and intends to return to the United States to live as soon as he is financially able. (Feldman Decl. II ¶¶ 1, 2, 8.)

107. In addition, Claimant maintains voter registration in the United States. He has voted in every U.S. Presidential election while living in Mexico and intends to vote in the Presidential election again this year. Claimant pays taxes in the United States and has filed a U.S. federal tax return every year while living in Mexico. (Feldman Decl. II ¶ 7.) He has never voted in Mexican elections nor has he participated in Mexican politics. Claimant's public life is thus centered in the United States.

108. While in Mexico, Claimant has been married twice to Mexican nationals and has four children and one grandson. All four of his children are U.S. and Mexican citizens, and each has both U.S. and Mexican passports. His grandson will be naturalized as an American citizen. (Feldman Decl. II ¶ 6.)

109. Claimant has a bank account and a securities account in the United States and carries a credit card issued in the United States. With this goal in mind, he took steps in 1997, to purchase a house in Aventura, Florida. Claimant made a down payment of US \$55,000 on the house, but he was unable financially to complete the purchase because Respondent shut down CEMSA's cigarette-export business without prior notice in November 1997 and so lost both the house and the down payment. (Feldman Decl. II ¶¶ 7-8.)

110. As noted above, there is no basis in the language, purpose or structure of NAFTA to question Claimant's standing to maintain this arbitration. Moreover, in the hierarchy of national connections, citizenship is the supreme connection. Even if the concept of "dominant" or "effective" nationality should be relevant under NAFTA, the facts recited above, taken together with Claimant's U.S. citizenship, support only one conclusion: Marvin Feldman is a U.S. national under any theory of dominant nationality.

2. Respondent's Objection To Claimant's Standing Is Not Timely

111. Respondent's objection to standing is a weak after-thought and Respondent is estopped from questioning Claimant's nationality at this late date. Respondent has been fully informed of Claimant's "inmigrado" status since he acquired it in 1991 and has had numerous opportunities to raise this argument -- and every incentive to do so -- if it believed the argument to be meritorious.

112. Respondent was silent on this issue and made no objection to Claimant's standing under NAFTA when the U.S. Embassy raised its concerns about Respondent's treatment of Claimant under NAFTA in March 1995 and, again in 1997 and 1999. (See Feldman Decl. II ¶¶ 21, 22; Dolan letter Tab G; Brew letter Tab H; Brayshaw letter Tab I.) Likewise, Respondent did not challenge Claimant's standing when he delivered his Notice of Intent to Submit this Claim to Arbitration to Respondent on February 16, 1998. In that Notice, Claimant described his domicile and cited his immigration document by name and number. In August 1998, Respondent wrote Claimant and the U.S. Department of Treasury stating that the Notice of Intent should have been delivered directly to the Treasury because the claims involved tax matters. The Office of the United States Trade Representative supported the Mexicans on this point, so Claimant complied. After six months of intense inter-governmental and inter-agency discussions, the U.S. Treasury blocked arbitration of one expropriation claim and allowed others to proceed to arbitration. During this process, Respondent never suggested that Marvin Feldman's *inmigrado* status in Mexico or his residence should bar his claims.

113. Respondent had another opportunity to question Claimant's standing when he filed his Notice of Arbitration with ICSID on April 30, 1999. Claimant's Declaration attached to said Notice specifically refers to his residence in Mexico. But Respondent did not object, and ICSID registered the case for arbitration under the Rules on May 27, 1999. In connection with such registration, the ICSID Secretariat requested, for reasons unrelated to NAFTA,¹⁹ a statement that Claimant was not a national of Mexico under Mexican law. At that time, neither the ICSID Secretariat nor the Parties considered that Claimant's residence in Mexico was an issue.

¹⁹ See *supra*, note 13.

114. The first meeting of the Tribunal was not scheduled until March 10, 2000. The parties outlined their positions for the Tribunal at that time. Again, Respondent did not contend that Claimant's residence was an issue. Only by letter dated June 30, 2000, two months after Procedural Order No. 2 did Respondent first suggest that Claimant's residence in Mexico might be an issue.

115. Allowing Respondent to raise this argument in such an untimely manner would be highly prejudicial to Claimant. As a precondition to submission of this dispute to arbitration, Claimant and CEMSA were required by NAFTA, Article 1121 to waive their rights to maintain a damage action in the Mexican courts. Both Claimant and CEMSA complied. Thus, Claimant placed himself at a disadvantage, relying upon Respondent's lack of objection to Claimant's standing to bring this arbitration. To permit Respondent to raise this objection so late in the process would unfairly prevent Claimant from seeking redress from his injuries. Respondent has, therefore, waived any possible objection based on Claimant's nationality and is equitably estopped from challenging Claimant's standing at this late in the proceedings. (*See*, cases cited at pp. 25, 27-28, *supra*).

Conclusion

For the reasons stated herein, 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.

Respectfully submitted,



Mark B. Feldman
Mona M. Murphy
Douglas R. M. King
FEITH & ZELL, P.C.
1300 19th Street, N.W.
Suite 400
Washington, D.C. 20036
Tel. 202-293-1600
Fax. 202-293-8965
Counsel for Claimant

Signed this 21 day of August, 2000

Of Counsel:
Nathan Lewin, Esquire
Stephanie Martz, Esquire
Miller, Cassidy, Larroca & Lewin, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
Tel: 202-833-5146
Fax: 202-293-1827