COURT FILE NO.: 03-CV-23500

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF AN ARBITRATION PURSUANT TO CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT ("NAFTA") BETWEEN MARVIN ROY FELDMAN KARPA AND THE UNITED MEXICAN STATES,
ICSID ADDITIONAL FACILITY CASE NO. ARB (AF)/99/1

B E T W E E N:	
THE UNITED MEXICAN STATES Applicant	J. Christopher Thomas, Q.C., J. Cameron Mowatt, Patrick G. Foy, Q.C., Lawrence A. Elliot, Robert J.C. Deane, for the Applicant
- and -	
MARVIN ROY FELDMAN KARPA Respondent	Barbara A. McIsaac, Q.C., Colin Baxter, Robert Benjamin Mills for the Respondent
- and -	
THE ATTORNEY GENERAL OF CANADA Intervener	Brian R. Evernden, for the Intervener
	HEARD: November 3 & 4, 2003.

CHILCOTT J.

DECISION

[1] This Application is for:

1. An order setting aside, in part, the award made by the Arbitration Tribunal ("the Tribunal") on December 16, 2002, in Ottawa, Ontario at the International Centre for Settlement of

Investment Disputes (Additional Facilities). This was case No. ARB (AF)/99/1 between Marvin Roy Feldman Karpa ("Feldman" or "the Claimant") and the United Mexican States ("Mexico" or "the Applicant"). The arbitration arose under Chapter Eleven of the North American Free Trade Agreement ("NAFTA") pursuant to s. 34 of the *International Commercial Arbitration Act* R.S.O., 1990, c. I-9 ("ICAA").

[2] The Tribunal found that Mexico discriminated against Feldman contrary to Article 1102 of the NAFTA. The Tribunal ordered Mexico to pay to Feldman, as damages, tax rebates that had been withheld from Mexico because of discrimination.

[3] The grounds for the application are:

(a) Mexico was unable to present its case, contrary to Article 34(2)(a)(ii) of the Model Law, because – having informed the parties that it would only draw adverse inferences in the event of a party's failure to comply with its orders – the majority of the Tribunal drew impermissible inferences (in the absence of an order) from Mexico's compliance with its own domestic law governing taxation law enforcement and taxpayer personal privacy protection;

(b) the arbitral procedure adopted by the majority of the Tribunal was not in accordance with the agreement of the parties, contrary to Article 34(2)(a)(iv) of the Model Law, because it conflicted with the mandatory rules for the conduct of investor-State arbitrartions under the NAFTA, in particular Article 2105 which prohibited the Tribunal from requiring Mexico "to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy";

(c) by requiring Mexico to pay to the Claimant, as damages, tax rebates to which the Tribunal previously held the Claimant had no legal right, the Award is, as the dissenting Arbitrator found, "repugnant", and is in conflict with public policy, contrary to Article 34(2)(b) of the Model Law.

FACTS FROM THE AWARD

[4] This case concerns a dispute regarding the application of certain tax laws by Mexico to the export of tobacco products by Corporación de Exportaciones Mexicanas S.A. de C.V. ("CEMSA"), a company organized under the laws of Mexico and owned and controlled by Feldman, a citizen of the United States of America ("United States"). The Claimant, who is suing as the sole investor on behalf of CEMSA, alleges that Mexico's refusal to rebate excise taxes applied to cigarettes exported by CEMSA and Mexico's continuing refusal to recognize CEMSA's right to a rebate of such taxes regarding prospective cigarette exports constitutes a breach of Mexico's obligations under Chapter Eleven, Section A of the NAFTA. In particular, Mr. Feldman alleges violations of the NAFTA Articles 1102 (National Treatment), 1105 (Minimum Level of Treatment), and 1110 (Expropriation and Indemnification).

[5] The dispute is subject to arbitration under the NAFTA. The NAFTA was concluded between the Governments of the United States of America, Canada and the United Mexican States, and came into force on January 1, 1994.

[6] NAFTA Article 1117 entitles an investor to bring a claim against a NAFTA State Party on behalf of an enterprise of another NAFTA Party which the investor owns or controls. NAFTA Article 1139 provides that an "enterprise of a Party means an enterprise constituted or organized under the law of a NAFTA party".

[7] NAFTA Article 1120 states that arbitral proceedings may be instituted under the Additional Facility Rules of the International Centre for Settlement of Investment Disputes ("ICSID"), as modified by the provisions of Chapter Eleven, Section B of the NAFTA, provided that either the disputing Party whose measure is alleged to be a breach referred to in Article 1117 (in this case, Mexico,) or the Party of the investor (in this case, the United States), but not both, is a party to the ICSID Convention. The ICSID Additional Facility Rules are applicable in this case since only the United States, as the Party of the investor, but not the United Mexican States, is a Contracting State to the ICSID Convention. Under NAFTA Article 1122(1), in conjunction with NAFTA Articles 1116, 1117 and 1120, Mexico expresses its consent to the submission to arbitration of claims of investors who are nationals of another State Party to the NAFTA either under the ICSID Convention, under the Additional Facility Rules or under UNCITRAL arbitration rules.

[8] The Applicant argues that because the award relates to a violation of the NAFTA Article 1102, Section 2(1) of the ICAA provides that subject to this Act, the Model Law is in force in Ontario. Model Law is a schedule to ICAA.

[9] Article 5 of the Model Law states:

> In matters governed by this Law, no court shall intervene except where so provided in this Law.

[10] Article 34 of the Model Law sets out grounds upon which an award may be set aside.

> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not

valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law, or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State, or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other actions as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

[11] By Article 34(2)(a) of the Model Law, the Applicant bears the burden of establishing that one or more grounds specified in Article 34(2)(a) are present. By Article 34(2)(b), the court may, on its own, conclude that the award is in conflict with public policy in Ontario.

[12] Section 13 of ICAA provides that, in interpreting and implying the Model Law, the Court may have regard to two commentaries.

(a) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (June 3-21, 1985); and

(b) the Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of the United Nations Commission on International Trade Law.

[13] The Applicant Mexico argues that it was unable to present its case contrary to Section 34(2)(a)(ii) of the Model Law. The Tribunal had informed the parties it would only draw adverse inferences in the event of a Party's failure to comply with its orders. Contrary to this, the majority of the Tribunal drew impermissible inferences because Mexico, in complying with its own domestic law governing taxation law enforcement and taxpayer privacy protection, refused or failed to disclose confidential information.

[14] Mexico further states that the arbitral procedure adopted by the majority of the Tribunal was not in accordance with the agreement of the parties because it conflicted with the mandatory rules for the conduct of Investor-States arbitrations. Under the NAFTA, in particular Article 2105, the Tribunal is prohibited from requiring Mexico "to furnish or allow access to information, the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy".

[15] Article 2105 states:

> Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party's law protecting personal privacy or the financial affairs and accounts of individual customers of financial institutions.

[16] The Applicant further argues that if the Party is for lawful reasons unable to disclose confidential information that an adverse inference cannot be drawn when that incapacity is invoked as an explanation for the absence of the information.

[17] Mexico further argues that it did not have full opportunity to present its case because the arbitral procedure was not in accordance with the Party's agreement. Mexico cites authorities stating that the award will be set aside on this ground providing that the breach of the Party's agreement is substantial. This is set out in the *Compagnie des Bauxites de Guinée v. Hammermills Inc.*, 1992 WL 122712 (D.D.C. 1992) at p. 4:

> Rather, the court believes a more appropriate standard of review would be to set aside an award based on a procedural violation only if such violation works substantial prejudice to the complaining party.

[18] The Applicant also argues that in the case of Investor-State Arbitration under NAFTA, the arbitration agreement is established by the Claimant's acceptance of the State Party's offer to arbitrate an investment dispute made in Article 1122. The NAFTA Party's consent is expressly conditioned.

[19] Article 1122 states:

> Each party consents to the submission of a claim to arbitration in accordance with procedures set out in this agreement.

[20] The procedure set out in the NAFTA includes substantive and procedural limitations imposed by Article 2105. Mexico therefore states that the arbitration was not conducted in accord with the procedures set out in the agreement. This vitiates the Party's consent and the award must be set aside.

[21] Another ground upon which Mexico urges this court to set aside the award is that by requiring Mexico to pay the Claimant, as damages, tax rebates to which the Tribunal previously held the Claimant had no legal right, the award is "repugnant" and is in conflict with public policy contrary to Article 34(2)(b) of the Model Law.

[22] The Tribunal as a whole had found that CEMSA had no legal right to claim rebates under *Impuesto Especial Sobre Produccion y Servicios* (the "Special Tax on Production and Services" or "IEPS") law and that CEMSA's business depended on them.

[23] Arbitrator Covarrubias states in his dissent:

> If in actual fact, the Claimant is not entitled to IEPS rebates, it is repugnant to grant him a somewhat equivalent amount of compensation for damages only because he alleges that there is another investor – a Mexican investor in like circumstances-who has been granted IEPS rebates without being entitled to them either.

[24] In *Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A.* (1999), 45 O.R. (3d) 183 aff'd 49 O.R. (3d) 414 (C.A.), the Superior Court of Justice held that Article 34(2)(b)(ii),

> ...is to be interpreted to include procedural as well as substantive justice and is not to exclude the manner in which an award is arrived at...

[25] Further, Mexico argues that the award is in conflict with the public policy of Ontario.

INTERVENER

[26] The Intervener, The Attorney General of Canada, contends that the majority of the Tribunal failed to consider the NAFTA Article 2105, its purpose or effect before rendering their decision.

[27] Further, the majority of the Tribunal supported their findings of discrimination and breach of the NAFTA Article 1102 by drawing a negative inference from Mexico's alleged refusal or failure to produce information about taxpayers without their consent.

[28] And on a proper construction of Article 2105 such an adverse inference is not permitted.

[29] The Attorney General of Canada does not take a position on the other issues raised by the Applicant, Mexico.

[30] The Attorney General of Canada accepts the facts set out in the Memorandum of Agreement filed by counsel for Mexico on September 29, 2003.

[31] The Intervener notes that the arbitrators neither requested nor received submissions on the application of Article 2105 and that the majority award contains no reference to Article 2105.

[32] The Intervener argues that the Tribunal failed to respect the governing law and therefore exceeded its jurisdiction in two ways. First, it failed to take Article 2105 into account as part of the agreement to arbitrate, and secondly it failed to take account of Article 2105 as part of the applicable rules of international law. Mexico informed the Tribunal that it could not provide certain information requested because it was protected by domestic law governing taxpayer confidentiality under Section 69 of the Fiscal Code of the Federation ("FCC").

[33] Therefore, pursuant to Article 2105 of the NAFTA, Mexico could not be required to furnish or allow access to this information, and the Tribunal cannot draw an adverse inference from Mexico's failure to do so.

[34] The Intervener states that Canada's domestic law concerning treatment of taxpayer information is similar to that of Mexico. The *Income Tax Act*, Sections 239 and 241 and the *Excise Tax Act*, Section 295 are examples.

[35] The Intervener argues that the majority of the Tribunal relied heavily upon Mexico's refusal or failure to disclose information about excise tax rebates given to other taxpayers and any investigations of such taxpayers. The Claimant Feldman agreed to accept a statement from a senior official that would disclose how Mexico was treating other taxpayers but without disclosing specific details relating to the individual taxpayer that would place the official in violation of the fiscal law.

[36] The Tribunal welcomed this agreement. The Tribunal had earlier ruled that it reserved the right to draw adverse inferences if a party did not comply with one of its directions to produce evidence.

[37] In summary, the Intervener argues that the approach adopted by the majority was inconsistent with the agreement of the parties and the rules governing arbitration as it forces a party to disclose information notwithstanding Article 2105 or risk losing the arbitration.

[38] And further, by drawing an adverse inference from Mexico's refusal to produce the taxpayer's documents at issue, the Tribunal failed to take into account Article 2105 and thereby exceeded the scope of the submission to arbitration in breach of Article 34(2)(a)(ii) of the Model Law.

POSITION OF THE RESPONDENT FELDMAN

[39] The Respondent here submits to the court that there is no basis upon which this court can set aside the award and the application should be dismissed.

[40] Feldman supports that position on a number of grounds.

1. That members of International Trade Tribunals are drawn from a roster of international trade experts and their decisions should be accorded a high level of deference by reviewing courts.

2. That that deference to the arbitral award is particularly appropriate where as here, the applicant challenges a finding of fact. Moreover, given the limited ground for review under Article 34 of the Model Law, this court should decline any invitation to re-weigh the evidence or visit findings of fact made by the Tribunal.

3. That a review in this case by the court is further limited by the terms of Article 34 of the Model Law.

4. That the highest degree of deference should be shown to the Tribunal's findings because of the full privative clause that applies in the present case.

5. That the Tribunal never imposed an obligation on Mexico to release information covered by the NAFTA Article 2105 and it was raised only after the decision of the Tribunal had been issued.

[41] I recognize these as the main grounds upon which the Respondent Feldman submits the application should be dismissed.

CONCLUSIONS

[42] Let me deal first with the Intervener's position. Mexico did not raise Article 2105 of the NAFTA before the Tribunal. There is no ruling by the Tribunal in respect of Article 2105 of the NAFTA nor is there any evidence or argument with respect to the article that took place before

the Tribunal. There is nothing upon which this court could make a reasoned ruling as to how Article 2105 should be interpreted in relation to Article 69 of the FCC.

[43] In my opinion, this court only has jurisdiction to set aside an award upon proof of certain circumstances set out in Article 34 of the Model Law, and this court considers it improper to raise the Article 2105 argument on this review.

[44] No requests were made by the Tribunal for confidential information under Section 69 of the FCC. No requests or submissions were made in respect of the application of Article 2105 of the NAFTA during the hearing, and neither the majority award nor the dissent mention Article 2105. What was sought before the Tribunal was an accommodation to provide information as to whom rebates were given and who was undergoing an audit.

[45] In the view of this court, Mexico could have provided the information as to how many corporations were getting rebates – whether they were domestic or foreign corporations and how much the rebates were - whether there were ongoing audits and if so how many - without breaching Section 69 or without divulging the names of the taxpayer. Mexico could also have indicated to the Tribunal if consent had been sought from the taxpayers in order to allow Mexico to divulge the information.

[46] The majority award found as an inescapable fact that the Respondent Feldman was denied certain rebates while domestic trading companies in like circumstances were given rebates.

[47] This court is of the opinion that the Tribunal did not exceed the scope of the submission to arbitration.

[48] The request of the Attorney General to have this court interpret and apply Article 2105 in accord with the principles set out in its submissions, is therefore denied.

[49] Now turning to the submissions of the Respondent Feldman.

[50] The Tribunal was appointed pursuant to the provisions of Chapter Eleven of the NAFTA. The Tribunal found that the Applicant Mexico discriminated against Feldman, an investor of the United States, contrary to Article 1102 of the NAFTA, and Mexico is challenging the award of the majority of the Tribunal.

[51] As the Party had designated Ottawa, Ontario, Canada as the place of arbitration, this court has jurisdiction to hear this review.

[52] The ICAA applies and the ICAA incorporates the Model Law on international commercial arbitration. Article 5 of the Model Law states that:

> In matters governed by this law no court shall intervene except where so provided in the law.

[53] Accordingly, the jurisdiction of this court to review the award is strictly limited to those instances provided for in Article 34 of the Model Law which allows for a very limited opportunity for the courts to provide any recourse against an award.

[54] The Tribunal found that Mexico violated Feldman's rights to non-discrimination under Article 1102 of the NAFTA.

[55] Article 1102 of the NAFTA provides:

> "Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.
>
> For greater certainty, no Party may:
>
> (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporation; or
>
> (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party."

[56] At the arbitration Feldman argued that Mexico had violated other articles of the NAFTA, namely Article 1105 (a Minimum Level of Treatment) and Article 1110 (Expropriation and Indemnification). The Tribunal determined that these provisions had not been violated.

[57] The Tribunal found that Feldman (CEMSA) were subject to *de facto* discrimination.

[58] The Tribunal articulated the issue as follows. The Award paragraph 169 -

> "Also, given that this is a case of likely *de facto* discrimination, it does not matter for purposes of Article 1102 whether in fact Mexican law authorizes SHCP to provide IEPS rebates to persons who are not formally IEPS taxpayers and do not have invoices setting out the tax amounts separately, as has been required by the

> IEPS law consistently since at least 1987 and perhaps earlier. The question, rather, is whether rebates have *in fact* been provided for domestically owned cigarette exporters while denied to a foreign re-seller, CEMSA. Mexico is of course entitled to strictly enforce its laws, but it must do so in a non-discriminatory manner, as between foreign investors and domestic investors. Thus, if the IEPS Article 4 invoice requirement is ignored or waived for domestic cigarette reseller/exporters, but not for foreign owned cigarette reseller/exporters, that *de facto* difference in treatment is sufficient to establish a denial of national treatment under Article 1102."

[59] The Tribunal found that there was agreement between the parties that there is at least one Mexican owned reseller/exporter, the so-called "Poblano Group", consisting of Mercados Regionales and Mercados Extranjeros ("Mercados I" and "Mercados II") and possibly other entities.

[60] The Tribunal also found that a Mexican official, Enrique Diaz Guzman, had confirmed that at least three trading companies (i.e. not producers) received IEPS rebates for cigarette exports at various times between September 1996 and May 2000, in the total amount of approximately NPS91,000,000.

[61] Many of those rebates were authorized and paid after January 1, 1998, when amendments to the IEPS law effectively made the 0% tax rate and IEPS rebates on cigarette exports legally unavailable to anyone other than producers (by limiting the payment of the tax rebates to the first sale).

[62] One of Mexico's witnesses, Mr. Diaz Guzman, did, however, state that only one of the three trading companies he identified was in the process of audit (as of March 2001), so presumably there are two others which have not been audited, despite being in like circumstances with CEMSA.

[63] The companies which are in like circumstances, domestic and foreign, are the trading companies, those in the business of purchasing Mexican cigarettes for export, which for purposes of this case are CEMSA and the corporate members of the Poblano Group.

[64] The only confirmed cigarette exporters on the limited record before the Tribunal are CEMSA, owned by U.S. citizen Feldman, and the Mexican corporate members of the Poblano Group, Mercados I and Mercados II. According to the available evidence, CEMSA was denied the rebates for October-November 1997 and subsequently; Mexico also demanded that CEMSA repay rebate amounts initially allowed from June 1996 through September 1997. Thus, CEMSA was denied IEPS rebates during periods when members of the Poblano Group were receiving them.

[65] On balance, the majority of the Tribunal found that CEMSA has been treated in a less favourable manner than domestically owned reseller/exporters of cigarettes (i.e. the Poblano

Group resellers/exporters), a *de facto* discrimination by Mexico, which is inconsistent with Mexico's obligations under Article 1102.

[66] Also the majority of the Tribunal found what appears to have been differential treatment between CEMSA and Mr. Poblano with regard to registration issues as well. According to Feldman's witness, Mr. Carvajal, taxpayer CEMSA filed its application for export registration status on June 30, 1998; information was still being requested in writing seven months later. For taxpayer Mr. Poblano, information was requested by SHCP (the Mexican Tax Authority) orally within 14 days of the date of Poblano's application, and any questions were apparently resolved.

[67] The majority of the Tribunal found that the Respondent had established a presumption and a *prima facie* case that CEMSA had been treated in a different and less favourable manner than several Mexican owned cigarette resellers, and Mexico had failed to introduce any credible evidence into the record to rebut that presumption.

[68] In my opinion, Mexico is not precluded by Mexican law from tendering evidence before the Tribunal as to whether the corporate domestic resellers in question were in the same circumstances as CEMSA or as to whether those resellers were receiving rebates in circumstances in which rebates were being denied to CEMSA.

[69] In reading the award and the documentation filed there is no evidence before this court by which I can conclude that Article 69 would have prevented Mexico from leading evidence it wanted to lead and which would have perhaps satisfied Feldman.

[70] Paragraph 187 of the Award states:

> On the basis of this analysis, a majority of the Tribunal concludes that Mexico has violated the Claimant's right to non-discrimination under Article 1102 of NAFTA. The Claimant has made a *prima facie* case for differential and less favorable treatment of the Claimant, compared with treatment by SHCP of the Poblano Group. For the Poblano Group and for other likely cigarette reseller/exporters, the Respondent has asserted that audits are or will be conducted in the same manner as for the Claimant, and implied that they will ultimately be treated in the same way as the Claimant. However, the evidence that this has occurred is weak and unpersuasive. The inescapable fact is that the Claimant has been effectively denied IEPS rebates for the April 1996 through November 1997 period, while domestic export trading companies have been given rebates not only for much of that period but through at least May 2000, suggesting that Article 4(III) of the law has been *de facto* waived for some if not all domestic firms. While the Claimant has also been effectively precluded from exporting cigarettes from 1998 to 2000, there is evidence that the Poblano Group companies have apparently been allowed to do so, notwithstanding Article II of the IEPS law. Finally, the Claimant has not been permitted to register as an exporting trading company, while the Poblano Group firms have been granted this registration. All of these results are inconsistent with the Respondent's obligations under Article

1102, and the Respondent has failed to meet its burden of adducing evidence to show otherwise.

[71] This court can find no reason to disagree with that conclusion.

[72] The affidavit of Carlos Loperena Ruiz (Loperena), sworn October 24, 2003 filed by the Respondent Feldman and referred to in the Respondent's Factum at paragraph 102, in essence states that at the time of the Tribunal hearing Mexico did not have a general law regarding the protection of personal privacy; but that such legislation has been enacted since the hearing, however, only in respect of personal information. The affidavit states at paragraph 42 that the duty of confidentiality under Article 69 of the FCC is not absolute.

[73] Mexico responds by arguing that if Feldman considered it appropriate to present rebuttal evidence regarding the effect of Article 69 it should have done so before the Tribunal in 2001 or 2002 and that the affidavit should not now be admitted before this court.

[74] In the alternative, Mexico argues that if the Loperena Ruiz affidavit is allowed to be filed in this review then the affidavit of Oscar Molena Chie (Chie), sworn the 30th of October 2003 should be allowed in evidence on behalf of Mexico.

[75] The Chie affidavit essentially disagrees with the Loperena affidavit.

[76] I do not propose to consider either affidavit in my Reasons. With respect to the issue of confidentiality as it relates to Section 69 of the FCC, I think it is improper that the affidavits be admitted at this stage. Also there has been no testing of the credibility or reliability of the deponents of the affidavit by cross-examination. Further, there must be finality to the Tribunal hearing.

[77] In my view, a high level of deference should be accorded to the Tribunal, especially in cases where the Applicant Mexico is in reality challenging a finding of fact. The panel who has heard the evidence is best able to determine issues of credibility, reliability and onus of proof.

[78] As stated in *Quintette Coal Ltd. v. Nippon Steel Corp.* (B.C.C.A.), [1990] B.C.J. No. 2241, per Gibbs J.A. at p. 7:

> "It is important to parties to future such arbitrations and to the integrity of the process itself that the court express its views on the degree of deference to be accorded the decision of the arbitrators. The reasons advanced in the cases discussed above for restraint in the exercise of judicial review are highly persuasive. The "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolutation of disputes" spoken of by Blackmun, J. are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to

> minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. That is the standard to be followed in this case."

[79] It is also important to respect the decision of parties to submit their disputes to international commercial arbitration.

[80] In *Automatic Systems Inc. v. Bracknell Corp.*, [1994] O.J. No. 828 (Ont. C.A.), Austin J.A. at p. 8 states:

> Having regard to international comity, the strong commitment made by the legislature of this province to the policy of international commercial arbitration through the adoption of ICAA and the Model Law, should, in my respectful view, require very clear language to preclude it.

[81] In reviewing the whole of the award I find no reason to question the majority's findings of fact. Also, a review in this case, as pointed out above, is further limited by Article 34 of the Model Law. It is of importance to note that the grounds of review in Article 34(2)(a) and 34(2)(b) do not provide for a review of a finding of fact.

[82] In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paragraphs 29 to 38, is a definitive list of factors to be considered in deciding where a given Tribunal decision lies on the spectrum of judicial deference. They are (i) the presence or absence of a privative clause; (ii) the relative expertise of the tribunal; (iii) the purpose of the Act or jurisdiction-conferring enactment as a whole; and (iv) the nature of the problem on judicial review and whether it involves a question of law or fact.

[83] While the United Nations Commission on International Trade Law (UNCITRAL) is the general body giving rise to Model Law, this arbitration is also governed by the International Centre for Settlement of Investment Disputes (ICSID).

[84] Additional Facility Rules Article 53 of the ICSID states:

> 53(1) The award shall be made in writing, shall deal with every question submitted to the tribunal and shall state the reasons upon which it is based.
>
> 53(4) The award shall be final and binding on the parties. The parties waive any time limits for the rendering of the award which may be provided for by the law of the country where the award is made.

[85] Articles 53(4) together with Article 34 of the Model Law are examples of the privative clauses that the Supreme Court of Canada has found to be "compelling evidence - that the court ought to show deference to the Tribunal's decision, unless other factors strongly indicate the contrary as regards the particular determination in question", as set out in paragraph 30 of *Pushpanathan, supra*.

[86] I think it is worthy of note in the present arbitration that the panel was made up of highly respected individuals with expertise in the field of international commercial arbitration. The expertise of the members of the panel was not brought into question.

[87] In my view, there has been no breach of public policy. The courts of this province have consistently held that for an arbitral award to be interfered with as being against public policy, it "must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the arbitral Tribunal". (See *Corporacion Transnacional de Inversiones*). The Applicant must establish that the awards are contrary to the essential morality of Ontario.

[88] The Tribunal did not agree with or condone or otherwise tell Mexico how to lead its evidence.

[89] In procedural order number 2 the Tribunal invited the parties to exchange by May 31, 2000 any specific requests for documents – provided that, in the event a Party believed documents requested cannot or should not be produced, it should as soon as possible, provide the requesting Party with its reasons for refusal – the Tribunal indicated it would decide any dispute related to such requests for documents.

[90] The Tribunal did point out that if a Party did not comply with a request from the Tribunal to produce documents, the Tribunal could draw appropriate inferences.

[91] In view of Mexico's admission that other resellers were receiving rebates, it then became necessary for Mexico to explain how this did not amount to discrimination and a breach of Article 1102 of the NAFTA.

[92] In the opinion of this court, Mexico was not unable to present its case as provided by the Model Law, but Mexico failed to present evidence to rebut the *prima facie* case of discrimination established by the Respondent Feldman. It is clear that Mexico did raise Article 69 of the FCC in the course of objecting to the production of documents, however, it never stated that it could not present evidence it wanted to present by reason of Article 69 of the FCC or Article 2105 of the NAFTA. No high level summary was ever given to the Tribunal of what evidence Mexico was unable to lead or how that evidence would show non-discrimination against CEMSA. Nor was the Tribunal ever asked to rule on the effect of Article 2105 of the NAFTA in relation to production under Article 69 of the FCC.

[93] In arriving at damages, the Tribunal came to the conclusion that CEMSA had been discriminated against and to the "inescapable fact" that CEMSA was denied certain tax rebates. The Tribunal awarded damages equal to rebates that were claimed for a three month period.

[94] Mexico claimed the award is contrary to public policy because CEMSA was unable to provide invoices showing the tax separately. However, the Tribunal found that domestic resellers who had also been unable to produce invoices, were receiving the rebates.

[95] In my view, the payment of damages was not against public policy and the measures that the majority of the Tribunal used to assess those damages was fair and proper.

[96] In no way did the quantum or the method of assessing damages offend in a fundamental way the principles of justice as they exist in the Province of Ontario.

[97] I accept the proposition that judicial deference should be accorded to arbitral awards generally and to international commercial arbitrations in particular.

[98] In my opinion there is no basis for this court to set aside the award.

[99] The application is therefore dismissed.

[100] The parties may make written submissions as to costs within ten days of the date hereof if agreement cannot be reached. The Intervener asked for no costs at the hearing.

CHILCOTT J.

Released: December 3, 2003