Court File No. 03-CV-23500
Ottawa Registry

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

- and -

MARVIN ROY FELDMAN KARPA

Respondent

- and –

THE ATTORNEY GENERAL OF CANADA

Intervenor

RESPONDENT'S FACTUM

McCARTHY TÉTRAULT LLP
Barristers & Solicitors
The Chambers
1400-40 Elgin Street
Ottawa ON K1P 5K6

Barbara A. McIsaac, Q.C.
Colin S. Baxter
R. Benjamin Mills

(613) 238-2000
(613) 563-9386

Solicitors for the Respondent

TO: BORDEN LADNER GERVAIS LLP
World Exchange Plaza
100 Queen Street, Suite 1100
Ottawa, ON K1P 1J9

Patrick G. Foy, Q.C.
Lawrence A. Elliot
Robert J.C. Deane

Tel: (613) 237-5160
Fax: (613) 230-8842

AND TO: DEPARTMENT OF JUSTICE CANADA
East Tower, Room 1213
234 Wellington Street
Ottawa, ON K1A 0H8

PART I - FACTS

INTRODUCTION

1. An Arbitration Tribunal (Tribunal) appointed pursuant to the provisions of Chapter 11 of the *North American Free Trade Agreement* (NAFTA) has found that the Applicant (Mexico) discriminated against the Respondent, an investor of the United States, contrary to Article 1102 of the NAFTA.

2. Mexico is challenging the Tribunal's award in ICSID Case No. ARB (AF)/99/2 ("Award"). Because the parties designated Ottawa, Ontario as the place of arbitration, this Court has jurisdiction to hear this review.

3. The *International Commercial Arbitration Act*, R.S.O. 1990, c. 1-9 (ICAA) applies. The ICAA incorporates the *Model Law on International Commercial Arbitration* (*Model Law*).

4. Article 5 of the *Model Law* states that:

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

Accordingly, the jurisdiction of this Honourable Court to review the Award is strictly limited to those instances provided for in the *Model Law*, and more particularly in Article 34 thereof.

5. Article 34 of the *Model Law* allows for a very limited opportunity for the courts to provide any recourse against an award.

6. In this case, Mexico is simply unhappy with the Award and the findings of fact made by the Tribunal on which the Award was based. Those findings of fact were made in light of admissions by Mexico made in its own evidence.

7. Mexico has tried to cast its objections to the Award in terms of questions of international law or jurisdiction in order to fit itself within the limited grounds for recourse specified in Article 34 of the *Model Law*, but its objections are really ones of a factual nature.

8. There is no basis for this Court to provide Mexico with any recourse against the Award.

BACKGROUND AND CLAIMANT'S CASE BEFORE THE TRIBUNAL

Summary

9. The Tribunal found that Mexico violated the Respondent's rights to non-discrimination under Article 1102 of the NAFTA.

Reference: Award dated December 2, 2002, Marvin Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/2 ("Award"), para. 210 Applicant's Record, Vol. III, Tab 81 p. 1038.

10. It found as an "inescapable fact" that the Respondent's export trading company was denied certain tax rebates on the exportation of cigarettes while domestic export trading companies, in like circumstances, were given the rebates.

Reference: Award, para. 187 Applicant's Record, Vol. III, Tab 81 p. 1028.

11. At the arbitration, the Respondent argued that Mexico violated other articles of the NAFTA, in particular, Article 1105 (Minimum Level of Treatment) and Article 1110 (Expropriation and Indemnification). The Tribunal determined that these provisions had not

been violated. As such, Articles 1105 and 1110 of the NAFTA and findings pertaining thereto, are not in issue before this Court.

Reference: Award, para. 1 Applicant's Record, Vol. III, Tab 81 p. 951.

Text of Article 1102 – NAFTA

12. 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."

Reference: Article 1102 NAFTA, Applicant's Case Book, Tab 26.

The Evidence

13. From at least 1990 to the present, Mexico has imposed a tax on cigarettes sold in the domestic Mexican market under the *Impuesto Especial Sobre Produccion y Servicios* ("IEPS") law. The tax has varied but has never been less than 85% of the sale price.

Reference: Award, para. 8 Applicant's Record, Vol. III, Tab 81 p. 953.

14. However, when the cigarettes are exported by "producers" the IEPS tax is 0%. That is producer/exporters do not pay the IEPS tax. In addition, through December of 1997, except for a brief period in 1991, "resellers," (i.e. those who purchase cigarettes on the Mexican domestic market for subsequent export), such as the Respondent, were entitled under the IEPS law to a rebate of the tax paid on cigarettes purchased in, and then exported from, Mexico.

Reference: Opinion of Carlos Loperena Ruiz Concerning Mexican Law, dated March 16, 2001 ("Loperena Opinion Concerning Mexican Law"), p. 14, Responding Application Record ("Respondent's Record"), Tab 1 p. 14.

15. In 1990, the Respondent, a citizen of the United States of America, took advantage of this rebate to establish himself in the business of exporting cigarettes produced in Mexico. His company is Corporación de Exportaciones Mexicans, S.A. de C.V. (CEMSA). It received the IEPS rebates.

Reference: Award, para. 9 Applicant's Record, Vol. III, Tab 81 p. 953.

16. In January 1991, the IEPS law was amended to deny the export rebate to "resellers" such as CEMSA. This amendment was challenged in two Amparo (constitutional challenge) proceedings before the Supreme Court of Justice of Mexico. One was brought by CEMSA. The other was brought by another reseller, LYNX Exportadora, S.A. de C.V. (LYNX).

Reference: Award, para. 10 Applicant's Record, Vol. III, Tab 81 p. 954.

Loperena Opinion Concerning Mexican Law p. 2 and 3, Respondent's Record, Tab 1 p.2 and 3.

17. In both cases, the Court unanimously declared, in 1993, that the denial of tax rebates to resellers in the position of CEMSA or LYNX combined with a 0% tax on exports by producers violated the principles of non-discrimination and equitable treatment contained in Article 31 (IV) of the Mexican Constitution.

Reference: Loperena Opinion Concerning Mexican Law p. 2 and 3, Respondent's Record, Tab 1, p. 2 and 3.

18. In anticipation of this decision, in 1992 the Mexican legislature amended the IEPS law to restore the right of rebate to resellers engaged in exporting cigarettes. Accordingly, from 1992 through 1997, resellers such as CEMSA were by law entitled to a rebate of all IEPS taxes paid on cigarettes purchased in Mexico and subsequently exported. This right was embodied in Mexican law. Also, decisions of the highest judicial authority in Mexico have declared that the rebate was Constitutionally required to be made available to resellers so long as producers were entitled to export cigarettes free of any IEPS tax.

Reference: Award, para. 12, Applicant's Record, Vol. III, Tab 81 p. 955.

Loperena Opinion Concerning Mexican Law, p. 14, Respondent's Record, Tab 1 p. 14.

19. Upon the passage of the 1992 amendments to the IEPS law, CEMSA returned to its business of exporting cigarettes. This business was entirely legal under Mexican law.

Reference: Declaration of Claimant Marvin Feldman in Support of Claimant's Memorial, dated March 28, 2001 ("Declaration of Marvin Feldman"), para. 20, Respondent's Record, Tab 3 p. 43.

Loperena Opinion Concerning Mexican Law, p. 14, Respondent's Record, Tab 1 p. 14.

20. However, in 1993 the Mexican government refused to grant CEMSA any further rebates. It is believed that this initiative stemmed in large measure from the desire of Mexican producers to extend and maintain a monopoly on exports beyond the bounds granted them by Mexican law.

Reference: Declaration of Marvin Feldman, para. 14 and 15, Respondent's Record, Tab 3 p. 41.

Declaration of Oscar Roberto Enriquez Enriquez in Support of Claimant's Memorial, para. 6, Respondent's Record, Tab 2 p. 30.

Loperena Opinion Concerning Mexican Law, p. 23 and 24, Respondent's Record, Tab 1 p. 23 and 24.

21. From 1993 until early 1996, although recognizing that CEMSA was a taxpayer which was legally entitled to rebates upon the export of cigarettes, Mexico denied CEMSA's repeated requests for rebates. Mexico cited CEMSA's failure to provide producers' invoices separating out the tax from the aggregate price of the cigarettes. This was a requirement which was beyond CEMSA's control and for which the producers were legally responsible. However, the producers refused to accept this responsibility and Mexico refused to enforce it.

Reference: Award, para. 14 and 15, Applicant's Record, Vol. III, Tab 81 p. 955.

22. Without the rebate, CEMSA could not export any cigarettes to its customary export markets without incurring significant losses. Mexico's denial of rebates drove CEMSA out of the business of exporting cigarettes from Mexico during the period 1993 to mid-1996. In so doing, Mexico completely destroyed the Respondent's business.

Reference: Declaration of Marvin Feldman, para. 23, Respondent's Record, Tab 3 p. 43.

23. On January 1, 1994, the NAFTA came into force, and the United States Embassy, invoking the NAFTA, intervened on CEMSA's behalf prompting Mexico to start discussions with CEMSA. The discussions continued throughout 1995.

24. Eventually, Mexico gave CEMSA assurances that even without producing vendor invoices with the actual tax breakout but supplying instead its own statement of the taxes paid, CEMSA would receive the IEPS tax rebate upon the exportation of cigarettes from Mexico.

Reference: Declaration of Marvin Feldman, para. 47 and 53, Respondent's Record, Tab 3 p. 51 and 53.

25. CEMSA then re-entered the export business. From mid-1996 to September 1997, CEMSA received the rebates and, as a consequence, embarked again on an extensive exporting business which eventually accounted for nearly 15% of all Mexican cigarette exports.

Reference: Declaration of Marvin Feldman, para. 56, Respondent's Record, Tab 3 p. 54.

26. Suddenly, Mexico reversed its position and peremptorily withheld $2.3 million (USD) of rebates for exports made by CEMSA in October and November, 1997. In December, 1997 CEMSA was informally told that there would be no further rebates, a position only confirmed in writing in March 1998.

Reference: Award, para. 20, Applicant's Record, Vol. III, Tab 81 p. 956.

Declaration of Marvin Feldman, para. 76 and 83, Respondent's Record, Tab 3 p. 62 and 65.

27. In December of 1997, the IEPS law was again amended, effective January 1, 1998, to bar rebates to "resellers". The terms of those amendments were substantially identical to the terms of the 1991 amendments that had been declared unconstitutional by the Mexican Supreme Court of Justice in the earlier Amparo cases brought by LYNX and CEMSA. The amendment imposed an obligation on exporters of cigarettes to register in the Sectorial Exporters Registry maintained by the Mexican government. CEMSA was refused registration. As a result, from January 1998, and continuing to the present time, Mexico has again driven CEMSA completely out of the business of exporting cigarettes from Mexico, by refusing to pay the rebates.

Reference: Award, para. 21, Applicant's Record, Vol. III, Tab 81 p. 57.

Reference: Declaration of Marvin Feldman, para. 88 to 90, Respondent's Record, Tab 3 p. 66 and 67.

28. However, during the period that Mexico was refusing to pay the rebates to CEMSA, it has admitted that rebates were paid to at least three other resellers.

Reference: Counter-Memorial, para. 506, Applicant's Record Vol. II, Tab 62 p. 720 (reverse).

29. Mexico claimed that audits were underway with respect to these payments.

Reference: Counter-Memorial, para. 506, Applicant's Record Vol. II, Tab 62 p. 720 (reverse).

30. At the hearing, Mexico agreed to produce files pertaining to certain corporate taxpayers. The files were identified to the Tribunal as File 328 and File 333. File 328 was the file for a company called Mercados Extranjeros, one of the Mexican owned companies receiving rebates while they were being denied to CEMSA. According to Mexico, the taxpayers in question provided their consent to the disclosure of the contents of the files.

Reference: Transcript, Day 1, p. 10 at 11, Applicant's Record Vol. III, Tab 84A, p. 1070.

Transcript, Day 2, p. 3 at 1, Applicant's Record Vol. III, Tab 84B, p. 1112.

31. Because the files apparently contained records of corporate taxpayers who exported cigarettes as resellers, they should have been of assistance to the Tribunal in determining Mexico's treatment of CEMSA's Mexican competitors.

Reference: Award, para. 174, Applicant's Record, Vol. III, Tab 81, p. 1021.

32. Counsel for Mexico advised the Tribunal that the two files were voluminous.

Reference: Transcript, Day 2, p. 4 at 4, Applicant's Record Vol. III, Tab 84B, p. 1112.

33. When the files were produced, counsel for the Respondent was allowed by Mexico to review them. He reported to the Tribunal as follows:

- File 328 only covered the period January 19, 2000 to March 20, 2000.
- File 333 only covered the period January 24, 2000 to March 17, 2000.
- The 328 file contained no audit or assessment of taxpayer 328.

Reference: Transcript, Day 3, p. 2 and 3, Applicant's Record Vol. III, Tab 84C, p. 1148.

34. Mexico did not lead any evidence in respect of the files. However, Mexico did file the evidence of Mr. Diaz Guzman who advised that there were at least three resellers of cigarettes who were receiving IEPS rebates on the export of cigarettes at the time such rebates were being denied to CEMSA.

Reference: First Witness Statement of Eduardo Diaz Guzman, dated March 25, 2001 ("First Witness Statement of Guzman"), p. 5, Applicant's Record Vol. II, Tab. 61, p. 644.

35. Contradicting Mexico's assertions in its Counter-memorial, as noted above at paragraph 29, Mr. Guzman stated that only one of the three resellers that he had identified was in the process of an audit as of March 2001.

Reference: First Witness Statement of Guzman, p. 5, Applicant's Record Vol. II, Tab 61, p. 644.

Proceedings Before the Tribunal

36. Prior to the actual hearing, the Tribunal made a number of procedural orders in which documentary production issues were discussed. However, contrary to the statements at paragraphs 3(a), 138(a) and 150 of the Applicant's Factum, at no time did the Tribunal relieve Mexico of the obligation to present its case in full and meet its evidentiary obligations. In particular, the statement at paragraph 150 is incorrect. Nowhere in Procedural Order No. 2 of May 3, 2000 does the Tribunal accept, "that the way to deal with the problem was to allow

summary evidence to be given and that no adverse inferences were to be drawn absent a failure to comply with a ruling of the Tribunal."

Reference: Procedural Order No. 2, Applicant's Record, Vol. 1, Tab 11.

37. No procedural order made by the Tribunal relieved Mexico of its obligation to present its case. The Tribunal neither sanctioned any particular approach to the presentation of evidence by Mexico nor gave any undertakings as to what inferences it might or might not draw from any particular evidence or from the lack of evidence on any particular issue.

38. The approach now taken by Mexico on this application is that the Tribunal somehow had an obligation to tell Mexico that its evidence was insufficient.

The Alleged "Agreement"

39. The Tribunal did not, as asserted by Mexico, agree as to the nature or quality of the evidence that Mexico should lead in responding to the allegation that it had discriminated against CEMSA. The parties themselves reached an accommodation with respect to how evidence could be led to avoid problems with the confidentiality of third party taxpayer information, but Mexico still failed to lead evidence to rebut the *prima facie* case that CEMSA had been treated differently than Mexican owned resellers.

40. The agreement was expressed by Mexico as follows:

> The Respondent (ie. Mexico) agreed to provide a statement from a suitably qualified Hacienda official, attesting to the circumstances of any IEPS rebates paid to cigarette re-sellers other than CEMSA and any action taken subsequently by Hacienda. As indicated in the Respondent's 22 December letter to the Claimant, the Respondent believes that the Claimant agreed with this proposal. Counsel for the Claimant has subsequently advised that he has concerns as to the comprehensiveness of the statement that the Respondent proposes to produce. The Respondent thus suggests that the Claimant be at liberty to seek further information from the Respondent or, if necessary, further directions from the Tribunal, if the statement produced by the Respondent is considered inadequate.

Reference: Letter from Mexico to the Tribunal dated January 11, 2001, Applicant's Record Vol. II, Tab 54 p. 478

41. The Respondent replied as follows:

> Claimant has told Respondent that he will accept information in the form of a written statement in lieu of documents if a thorough search is made of Hacienda's files and Respondent acknowledges the IEPS rebates made to resellers other than CEMSA. Claimant reserves the right, however, to insist on written statements from the officials directly involved including, on information and belief, Tomas Ruiz, Rafael Obregón, Fernando Heyfte, Angel Suarez and Jose Riquer Ramos

Reference: Letter from Claimant to the Tribunal dated January 16, 2001, Applicant's Record Vol. II Tab 55 p. 487

42. The Tribunal did no more than welcome this apparent agreement and note that Mexcio should be aware that a party is entitled to confidentiality in the proceeding in respect of evidence produced by it. The Tribunal stated that:

> In the event however, that a party wishes to avoid irreparable prejudice to third parties that may result from the production of such a document, the Tribunal sees no reason in principle why information pertinent to the dispute, and arising from such documents, could not be produced in the proceeding by means of **statements of officials who could examine such documents and identify them in their statements.** (emphasis added)

Reference: Letter from Tribunal dated February 5, 2001, Applicant's Record, Vol. II, Tab 58, p. 500.

43. At the same time, the Tribunal expressly reserved its right to call upon the parties to produce documents or other evidence at any stage of the proceedings and to draw adverse inference, from any failure of a party to produce documents or other information.

Reference: Letter from Tribunal dated February 5, 2001, Applicant's Record, Vol. II, Tab 58, p. 501

44. Mexico continued to delay and by letter dated July 2, 2001, the Tribunal ordered Mexico to produce a memorandum allegedly written by Mr. Rafael Obregón and the 328 and 333 tax files referred to above.

Reference: Letter from Secretary of the Tribunal dated July 2, 2001, Applicant's Record, Tab 77 p. 940. Ref Tab 77

45. Mexico never did produce a statement of an official, or of officials attesting to the fact that they had examined the documents over which Mexico claimed confidentiality, identifying such documents or explaining why CEMSA was denied IEPS rebates in circumstances in which domestic resellers were receiving them.

THE FINDINGS OF THE TRIBUNAL AS TO DISCRIMINATION

46. The Tribunal found that the Respondent and CEMSA were subject to *de facto* discrimination. The Tribunal articulated the issue as follows:

> "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."

Reference: Award, para. 169, Applicant's Record Vol. III, Tab 81, p. 1019.

47. The Tribunal then proceeded, on the basis of agreement between the parties, that CEMSA was "in like circumstances with Mexican owned resellers of cigarettes for export".

Reference: Award, para. 171, Applicant's Record Vol. III, Tab 81, p. 1020.

48. Based on the Evidence, the Tribunal made the following findings:

- There is 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.

Reference: Award, para. 167, Applicant's Record Vol. III, Tab 81, p. 1018.

- A Mexican official, Enrique Diaz Guzman, has 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 NP$91,000,000.

  Reference: Award, para. 167, Applicant's Record Vol. III, Tab 81, p. 1018.

- 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).

  Reference: Award, para. 167, Applicant's Record Vol. III, Tab 81, p. 1018.

- 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 the Claimant**. (emphasis added)

  Reference: Award, para. 168, Applicant's Record Vol. III, Tab 81, p. 1019.

- 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.

  Reference: Award, para. 171, Applicant's Record Vol. III, Tab 81, p. 1020.

- On balance, CEMSA has been treated in a less favorable 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.

  Reference: Award, para. 173, Applicant's Record Vol. III, Tab 81, p. 1021.

- The only confirmed cigarette exporters on the limited record before the tribunal are CEMSA, owned by U.S. citizen Marvin Roy Feldman Karpa, 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.

  Reference: Award, para. 173, Applicant's Record Vol. III, Tab 81, p. 1021.

- There appears to have been differential treatment between CEMSA and Mr. Poblano with regard to registration issues as well. According to the Claimant'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.

Reference: Award, para. 175, Applicant's Record Vol. III, Tab 81, p. 1022.

49. The Tribunal based its conclusion that discrimination had occurred on the following analysis:

- It adopted the following statement of international law as stated by the Appellate Body of the WTO:

> "…various international tribunals, including the International Court of Justice have generally and consistently accepted and applied the rule that the party who asserts a fact, whether the claimant or respondent, is responsible for providing proof thereof. Also, it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a claim or defence. *If that party adduces evidence sufficient to raise a resumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.* (Emphasis supplied.) [Footnote - *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, Adopted 23 May 1997, WT/DS33/AB/R, p. 14. Accordingly, *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Reports, pp. 246, 272, 1990. ("In case a party adduces some evidence which *prima facie* supports his allegation, the burden of proof shifts to his opponent.")]

- It found that the Respondent had established a presumption and a *prima facie* case that CEMSA has been treated in a different and less favorable manner than several Mexican owned cigarette resellers, and Mexico had failed to introduce any credible evidence into the record to rebut that presumption.

Reference: Award, para. 177, Applicant's Record Vol. III, Tab 81, p. 1023.

50. At paragraph 187 of its decision, the majority of the Tribunal found as follows:

> "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."
>
> **Reference:** Award, para. 187, Applicant's Record Vol. III, Tab 81, p. 1023.

51. The findings of the Tribunal were findings of fact made on the basis of the evidence available to it.

The Alleged "Adverse Inference"

52. It is important to appreciate that the Tribunal made its final determination on a number of factors: the positive evidence before it of differential treatment; the lack of any explanation by Mexico for that differential treatment; and Mexico's unsuccessful attempts to link the Respondent to the Poblano Group rather than directly address the issue of discrimination.

> **Reference:** Award para 178, Applicant's Record Vol. III, Tab 81, p. 1024.

MEXICAN LAW

Entitlement to Rebates

53. Subsequent to the hearing of this matter by the Tribunal, the Federal Circuit Court of Mexico issued an Amparo Ruling in which it found that Article 4 of the FCC, which is the

article requiring that a taxpayer seeking the IEPS rebate must submit invoices with the IEPS tax stated separately, contravened Mexican constitutional principles (2002 CEMSA Amparo Ruling). The SHCP has subsequently appealed that ruling and the matter is before the Mexican Supreme court.

Reference: Affidavit of Carlos Loperena Ruiz dated October 24, 2003 ("Loperena Affidavit") para. 15, Respondent's Record, Tab. 5, p. 88.

Confidentiality

54. The Applicant alleges that Mexican law, particularly Article 69 of the FCC, precluded it from leading evidence before the Tribunal. Mexico led no evidence before the Tribunal on the effect of Article 69. There is no evidence before this Court on which it can conclude that Article 69 would have had the effect of preventing Mexico from leading evidence it wanted to lead.

55. In fact, the evidence before this Court, by way of the expert affidavit of Carlos Loperna Ruiz, an attorney licensed to practice law in Mexico who has been recognized as an expert on Mexican law and procedure, is that Article 69 of the Fiscal Code does not provide an absolute bar to the disclosure of tax related information and that the general duty of confidentiality is subject to several exceptions.

Reference: Loperena Affidavit, para. 41, Respondent's Record, Tab 5 p. 93.

56. Mexico has not tendered any evidence before this Court with respect to Mexican laws relating to the protection of personal privacy. The Respondent has. The affidavit of Carlos Loperena Ruiz states that prior to the enactment of the Mexican Freedom of Information Law (FOIL) there was no generally accepted definition of "personal information". The FOIL now

provides for the protection of personal information, but that term is defined as being limited to the information concerning a physical person.

Reference: Loperena Affidavit para. 53 to 58, Respondent's Record, Tab 5 p. 96 to 98.

57. The evidence of Mexican law regarding confidentiality and laws relating to personal privacy that is before this Court is that Mexico was not precluded by Mexican law from tendering evidence before the Tribunal as to whether the corporate domestic resellers in question were in like circumstances to CEMSA or as to whether those resellers were receiving rebates in circumstances where the rebates were being denied to CEMSA. Article 2105 of the NAFTA is not engaged.

PART II - ISSUES AND THE LAW

58. The Applicant raises three grounds in its argument that this Court should set aside the Tribunal's award:

(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)(iv) of the Model Law, because it conflicted with the mandatory rules for the conduct of investor-State arbitrations 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.

STANDARD OF REVIEW

International Commercial Arbitrations

59. International arbitral tribunals are chosen by parties because they are seen to be neutral and independent from national preferences and influences. The members are drawn from a roster of international trade experts, and their decisions are accorded a high level of deference by reviewing courts.

60. Leading Canadian authority on this matter well expresses the appropriate judicial stance to a review of international arbitral awards:

> "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 resolution 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."

Reference: *Quintette Coal Ltd. v. Nippon Steel Corp.* (B.C.C.A.), [1990] B.C.J. No. 2241 per Gibbs J. at pg. 7, Respondent's Book of Authorities, Tab 1.

61. It is submitted that deference to the arbitral award is particularly appropriate in cases such as this where the applicant challenges a finding of fact. Factual findings are best left to the arbitral panel which has heard the evidence and weighed issues such as credibility and onus of proof.

62. Given the limited grounds for review under Article 34 of the *Model Law*, this Court should decline any invitation to reweigh the evidence or to revisit findings of fact made by the Tribunal.

63. The Ontario Court of Appeal has recognized the importance of respecting the decision of parties to submit their disputes to international commercial arbitration, and that this in turn, calls for an attitude of appropriate judicial restraint. In a case where the ability to refer a matter to arbitration was at issue, Justice Austin recognized the importance of international comity and "the strong commitment made by the legislature of this province to the policy of international commercial arbitration through the adoption of the ICAA and the *Model Law*". In light of that commitment, it is submitted that this Court should be extremely reticent to review findings of fact, whether they are stated as such or "dressed up" as alleged jurisdictional errors.

Reference: *Automatic Systems Inc. v. Bracknell Corp.*, [1994] O.J. No. 828 (Ont.C.A.) at pp. 8-9, Respondent's Book of Authorities, Tab 2.

64. However, should this Court consider it appropriate to enter into these factual inquiries, it is important to understand what courts in Ontario have said about reviewing international arbitral awards. For example, Justice Stinson in the recent case of *NetSys Technology Group AB v. Open Text Corp.*, after reviewing the statutory scheme and the relevant authorities, concluded as follows:

> "As is apparent from the foregoing summary, the underlining theme that can be found in both the *ICA Act* and the *Model Law* is that court intervention or involvement with matters that are already the subject of an arbitration agreement is strictly limited. The legislature has chosen to grant extensive authority to the arbitrator selected by the parties and to restrict court intervention to specific instances. These provisions signal a marked departure from historical judicial approaches to the scope of private dispute resolution mechanisms and a "clear shift in policy towards encouraging parties to submit their differences to consensual dispute resolution mechanisms outside of the regular court stream": *Onex Corp. v. Ball Corp.* (1994), 12 B.L.R. (2d) 151 (Ont.Gen.Div.) at 158, per R.A. Blair J. (See also the cases cited there). These legislative changes and these cases reflect what has been described by the Ontario Court of Appeal as "the strong public policy favouring international commercial arbitration": *Automatic Systems Inc. v. Bracknell Corp.* (1994), 12 B.L.R. (2d) 132 (Ont.C.A.), at p. 144."
>
> **Reference:** *NetSys Technology Group AB v. Open Text Corp.* [1999] O.J. No. 3134 para. 33 and 39, Respondent's Book of Authorities, Tab 3.

65. In that case, the Court deferred to the arbitrator's interpretation of the arbitration agreement which decided matters of the arbitrator's own jurisdiction. A court should be even more deferential to an arbitrator's finding of fact.

Review Under Article 34 of the *Model Law*

66. The review in this case is further limited by the terms of Article 34 of the *Model Law* which provides as follows:

> "**Article 34.** Application for setting aside as exclusive recourse against arbitral award
>
> (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 action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside."
>
> **Reference:** *Model Law,* Schedule to the *International Commercial Arbitration Act*, R.S.O. 1990, C.I-9, Article 34, Applicant's Case Book, Tab 28.

67. It is notable that the limited grounds of review of in Articles 34(2)(a) and 34(2)(b) do not provide for a review of findings of fact, and it is submitted that this is the appropriate judicial stance having regard to the deference that is and should be accorded to arbitral awards generally, and to international commercial arbitrations in particular.

68. Any judicial review of this award under Article 34 requires appropriate judicial deference even within the grounds set forth in the *Model Law*. For example, this Court should recognize that the arbitral tribunal is in the best position to determine the scope of the matters

submitted to it (Article 34(2)(a)(iii)) as well as the effect or importance of the provision of certain information (or the lack thereof) to its arbitral decision (Article 2105 – NAFTA).

69. The deferential approach to judicial review of international awards is echoed in the Canadian courts' approach to domestic judicial review of administrative decisions. It is submitted that this jurisprudence is instructive but should only be applied by this Court within the context and strictures of Article 34 of the *Model Law*. In other words, the appropriate level of deference should be accorded to the tribunal even when examining alleged errors from amongst the limited class of reviewable errors set out in Article 34.

Deference in Domestic Judicial Review

70. Since the seminal decision in *U.E.S., Local 298 v. Bibeault* in 1988, Canadian courts have adopted the "pragmatic and functional approach" to determining the level of deference owed to administrative decisions that are subject to judicial review. A plethora of cases have enumerated the factors which the courts have considered significant in determining the appropriate level of deference. Reviewing courts often look at the wording of the tribunal's statute, and the presence or absence of privative clauses as well as the particular question about which error is alleged (i.e. issue of fact or law) and the relative expertise of the tribunal in this regard.

Reference: *U.E.S., Local 298 v. Bibeault* [1988] 2 S.C.R. 1048, Respondent's Book of Authorities Tab 4.

71. The Supreme Court of Canada clarified the jurisprudence on judicial deference in the case of *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* and adopted what has become the definitive list of factors to be taken into account in determining where a given tribunal decision lies on the spectrum of judicial deference. These factors are the following:

(i) the presence or absence of privative clauses;

(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.

Reference: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paras. 29-38, Respondent's Book of Authorities, Tab 5.

Privative Clause

72. Article 32(2) of the UNCITRAL Arbitration Rules provides that an arbitral tribunal's award "shall be final and binding on the parties". This, it is submitted, is the classic formulation of a full privative clause (see discussion below). While UNCITRAL is the general body giving rise to the *Model Law* (which is in turn adopted in Ontario by the ICAA), the parties to this arbitration were also governed by the ICSID Additional Facility Rules (see paragraph 5 of the arbitral tribunal's ruling). Article 53 of the ICSID Additional Facility Rules states as follows:

> "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. **[Emphasis added.]**

Reference: ICSID Additional Facility Rules, Article 53, Applicant's Case Book, Tab 23.

73. Article 53(4) together with Article 34 of the *Model Law* are classic examples of the type of full and robust 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 that decision falls within one of the narrow enumerated grounds for setting it aside. It is submitted that the only possible grounds available to Mexico in this case are that the Tribunal exceeded its terms of reference or jurisdiction (Article 34(2)(a)(iii)) or that the arbitral award is in conflict with the public policy of Canada (Article 34(2)(b)(ii)).

74. Accordingly, it is submitted that Article 34 is precisely the type of full privative clause "that declares that decisions of the Tribunal are final and conclusive from which no appeal lies and all forms of juridical review are excluded", save for the limited areas of excess of jurisdiction or public policy. Accordingly, it is submitted that this Honourable Court should afford the highest degree of deference to the Tribunal's finding in this case.

Reference: *Pushpanathan*, *supra*, at para. 30, Respondent's Book of Authorities, Tab 5.

Expertise

75. Chapter 11 of the NAFTA provides for a consensual arbitration process according to which the parties themselves (ie., Canada, USA and Mexico),

> "...shall establish, and thereafter maintain, a roster of 45 presiding arbitrators meeting the qualifications of the Convention and rules referred to in Article 1120 and experienced in international law and investment matters. The roster members shall be appointed by consensus and without regard to nationality." (emphasis added)

Reference: NAFTA c. 11, Article 1124(4), Applicant's Case Book, Tab 25.

76. It is submitted that the investor provisions in Chapter 11, and the arbitration process envisaged therein, have attracted some of the best qualified lawyers and international arbitrators in the world today. Indeed, it is significant that Canada and the other parties are responsible for establishing and updating the roster of arbitrators, and therefore must be taken to have endorsed explicitly the expertise of these individuals, who are typically well-known

international lawyers, judges or legal scholars. The following examples of the arbitral tribunals in Chapter 11 arbitrations are instructive in this regard:

> *ADF Group Inc. v. The government of the United States of America*: Judge Florentino P. Feliciano – President, Professor Armand de Mestral and Ms. Carolyn B. Lamm
>
> *Ethyl Corporation v. Government of Canada*: Professor Dr. Jur. Karl-Heinz Bockstiegal – Chairman, Judge Charles N. Brower and the Hon. Marc Lalonde
>
> *Methanex Corporation v. United States of America*: Mr. V.V. Veeder, QC – Chairman, Mr. Warren Christopher and Mr. J. William Rowley, QC
>
> *UPS of America, Inc. v. Canada*: President – Sir Kenneth Keith, Yves Fortier, QC and Dean Ronald Cass

77. This stellar line-up of renowned judicial talent is another reason to accord deference to the Tribunal's findings. As Mexico was actively involved both in the appointment of arbitrators to this dispute and the establishment and maintenance of the roster from which presiding members are named, it cannot seriously take issue with the expertise of this Tribunal. Indeed it is noted that there are no arguments to this effect in the Applicant's Factum

***Purpose of the NAFTA and the* International Commercial Arbitration Act**

78. The purpose of international trade treaties and legislation providing for international commercial arbitration is to confer jurisdiction, in advance, on respected third parties to arbitrate and finally decide business disputes involving international investors. As noted in *Pushpanathan*, the questions of purpose and expertise often overlap. In cases such as the present one, the specialized nature of the legislative structure and dispute settlement mechanism, and the need for expertise which is manifested by the requirements as to the specific qualifications of the arbitrators, all combine to indicate that the statutory purpose at play here was to take the resolution of these disputes out of the hands of domestic courts and

to place this task squarely within the hands of qualified international arbitrators. The appropriateness of court supervision is accordingly diminished significantly, and strictly confined to matters of jurisdiction and public policy.

Question of Fact or Law

79. It is submitted that the issues raised by Mexico all involve findings of fact by the Tribunal, even if they are "dressed up" in Mexico's Factum as alleged jurisdictional errors. Here, Mexico's argument hinges upon the rejection by the Tribunal of Mexico's evidence as to the existence and number of other corporate taxpayers who were receiving rebates in the relevant time period, as well as its rejection of Mexico's evidence as to whether these other taxpayers were in fact under audit and subject to potential repayment of the rebates. These are questions of fact for which the Tribunal enjoyed a "signal advantage" as the body that heard the evidence and for which it was necessarily the primary and sole finder of fact.

Public Policy

80. Even if this Honourable Court agrees to enter into the inquiry that the Applicant urges as to an alleged breach of public policy, it is submitted that the Tribunal's appreciation of these factors should be given the utmost deference. Ontario courts have consistently held that an arbitral award worthy of judicial interference on this ground "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."

Reference: *Corporacion Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.p.A. et al.*, aff'd (2000), 49 O.R. (3d) 414 (C.A.); application for leave to appeal dismissed, [2000] S.C.C.A. No. 581, Applicant's Case Book, Tab 6.

POSITION OF THE RESPONDENT

(a) Mexico was Not Unable to Present its Case

81. Mexico appears to argue that it was somehow "misled" by the Tribunal. This argument has no merit. The Tribunal did not agree with, or condone or otherwise tell Mexico how to lead its evidence. Nor, it is submitted, could it, or should it, have done so in carrying out its mandate to arbitrate the dispute.

82. Procedural Order No. 2, on which Mexico relies does not provide what is alleged in paragraph 150 of Mexico's Factum.

83. In its First Request For Production of Documents, the Respondent did request all documents relating to the payment of IEPS rebates to Mercados Regionales, S.A.V.C.

> **Reference:** Letter from Claimant to Tribunal, dated March 22, 2000, enclosing Claimant's First Request for Production of Documents, Applicant's Record, Vol. I, Tab 8, p. 57.

84. Mexico did not specifically respond to that request. Rather, by letter dated March 23, 2000, it asked "…the Tribunal to review the claimant's First Request for Production of Documents…" and asked the Tribunal to "…express its view as to whether in principle this kind of discovery request is consistent with the rules".

> **Reference:** Letter from Respondent to Tribunal, dated March 23, 2002, Applicant's Record, Vol. I, Tab 9, p. 60.

85. In Procedural Order No. 2, the Tribunal:

- invited the parties to exchange, by May 31, 2000, any specific requests for the production of 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;

- indicated it would decide any dispute related to such requests for documents; and
- expressly did not rule on either the appropriateness of the Respondent's First Request for Documents or on Mexico's objection to the scope of the request – see paragraph 9 of the Order.

Reference: Procedural Order No. 2, para. 8, Applicant's Record, Vol. I, Tab 11, p. 63 and 64.

86. Article 41 of the Additional Facility Arbitration Rules which applied to this arbitration, provides:

1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value;

2) The Tribunal may, if it deems necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts.

Reference: Article 41, Additional Facility Arbitration Rules, Applicant's Case Book, Tab 23.

87. 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 the appropriate inferences. However, the Tribunal did not make any order against, or request to, Mexico pursuant to Rule 41(2).

Reference: Procedural Order No. 2, para. 8, Applicant's Record, Vol. I, Tab 11, p. 63 and 64.

88. The Tribunal did not say that it would not draw an adverse inference from Mexico's failure to lead evidence to support its position that other resellers were not receiving IEPS rebates during the period they were being denied to the Respondent's company, CEMSA.

89. After all, the essence of the Respondent's position on the issue of discrimination was quite clearly set out in its Memorial at pages 54 – 56 and is based on the admission by Mexico

that it had paid close to 91,000,000 pesos (approx. US$9.1 million) in IEPS rebates to three reseller trading companies, other than CEMSA, since September, 1996, including after December, 1997.

Reference: Claimant's Memorial, p. 54 to 56, Applicant's Record, Vol. II, Tab 60, p. 562 to 564.

First Witness Statement of Eduardo Diaz Guzman, dated March 5, 2001 p. 5, Applicant's Record, Vol. II, Tab 61, p. 644.

90. It was incumbent on Mexico, in light of its admission that other resellers were receiving rebates to explain, in some manner, why this did not amount to discrimination and a breach of Article 1102 of the NAFTA.

91. This Mexico did not do. Mexico failed to provide any explanation for the differential treatment between companies owned by Mexicans and that owned by the Respondent. Mexico also failed to provide any explanation as to why the differential treatment did not constitute a violation of Article 1102 of NAFTA. The latter failure was compounded by the former and the Tribunal was entitled to infer that Mexico had no satisfactory explanation for the differential treatment.

92. Indeed, when Mexico finally attempted to address the substantive issue of discrimination, it produced files that were incomplete and irrelevant and had no probative value. It now seeks to blame either the Respondent or the Tribunal for its failure to adequately present its case.

93. Mexico cites *Iran Aircraft Industries* as a precedent to be followed by this court. However, that case is easily distinguished. The arbitral tribunal in *Iran Aircraft Industries* expressly indicated to an arbitrating party that it would not be required to produce the invoices and could rely on summaries. The arbitral tribunal then did not accept the evidence as

presented. In the case at bar, the Tribunal did not give Mexico any direction, either express or implied, as to what evidence to lead or how to lead it. Indeed, it did not find that the evidence was non-satisfactory, but found that it supported the Respondent's claim to discrimination.

Reference: *Iran Aircraft Industries v. Avco Corp.*, 890 F. 2d 141 (2nd Cir. 1992) at 146, Applicant's Case Book, Vol. 1, Tab 9.

94. At most, the Tribunal stated that it saw no reason "in principle" why Mexico could not deal with the issue of confidentiality by having an official review the documents for which it claimed confidentiality and then file a statement from that official with respect to his review, outlining what the documents were and why they could not be produced. However, Mexico chose not to do this – presumably because, as the Tribunal found, the documents relating to the Mercados companies would have confirmed that they were receiving rebates in circumstances where CEMSA was being denied them.

Reference: Letter from Tribunal dated February 5, 2001, Applicant's Record, Vol. II, Tab 58, p. 500.

95. Indeed, there is a procedure which has been adopted by both tribunals appointed under the NAFTA and by tribunals appointed under the World Trade Agreement. The accepted procedure provides for the objecting party to furnish the tribunal with the dates of each of the documents that it objects to production, identify each document, provide an indication of the aspect of the dispute, if any, to which the document relates and to "explain clearly the basis for the need to protect that information".

Reference: Canadian Measures Affecting the Export of Civilian Aircraft, WTO Panel, April 14, 1999 at para. 9.347 and footnote, Respondent's Book of Authorities, Tab 6.

Decision of the NAFTA Chapter 11 Tribunal in NAFTA Uncitral Investor State Claim, Pope & Talbot Inc. and the Government of Canada, September 6, 2000, Procedural Order, No. 6, at paras. 1.6 & 1.7, Respondent's Book of Authorities, Tab 7.

96. However, Mexico did not identify documents and make specific objections to production. It simply claimed a blanket objection, purporting to rely upon Article 69 of the FFC.

97. Mexico was not, as provided by the *Model Law*, "unable to present his case". It simply failed to present a convincing case to rebut the *prima facie* case of discrimination established by the Respondent that was corroborated and bolstered by Mexico's own evidence. There is no basis for the court to set aside the award under Article 34(2)(a)(ii) of the *Model Law.*

(b) Arbitral Procedure Was in Accordance with Agreement

98. It is only after receiving an the decision from the Tribunal that Mexico raised Article 2105 of the NAFTA. It did so for the first time in its request for interpretation and correction of the Award.

99. In its Decision on Mexico's Request for Interpretation, the Tribunal made two crucial points:

- It never at any time imposed an obligation on Mexico to release information covered by the NAFTA Article 2105;
- Mexico never invoked Article 2105 during the proceedings.

Reference: Decision on Correction and Interpretation of the Award, dated June 13, 2003, at para. 11, Applicant's Record, Vol. III, Tab 83, p. 1065.

100. In any event, Article 2105 does not address the issue of whether or not a Party ought to be required to disclose information about tax rebates to a corporate entity. It only addresses laws protecting:

- information, the disclosure of which would impede law enforcement;

- Personal Privacy; and
- laws protecting the financial affairs and accounts of individual customers of financial institutions.

Reference: Article 2105 NAFTA, Applicant's Case Book, Tab 27.

101. Article 2105 of the NAFTA is very specific and does not sweep up all laws of a Party dealing with confidentiality as the Applicant suggests. How would the disclosure of the evidence which Mexico now claims it could not present impede law enforcement? Mexico has offered no explanation.

102. Since the taxpayers involved were all corporations, how would disclosure of the evidence which Mexico now claims it would not present be contrary to its law protecting personal privacy? The evidence is that Mexico did not, at time of the Tribunal hearing, have a general law regarding the protecting personal privacy. Such legislation has since been enacted in the context of Freedom of Information legislation, but only in respect of the personal information of individuals. Corporations are not covered.

Reference: Loperena Affidavit, para. 53 to 58, Respondent's Record, Tab. 4, p. 96 to 98.

103. While Mexico did raise Article 69 of its FFC in the course of objecting to the production of document requested by the Respondent, it never stated to the Tribunal that it could not present evidence that it otherwise wanted to present because of Article 69 of the FCC or Article 2105 of the NAFTA. Article 69 of the FCC was raised in the context of Mexico's refusal to produce documents which had been requested by the Respondent. The Tribunal was never asked to rule, nor did it ever rule, on the applicability of Article 69 or the effect of Article 2105.

104. Mexico has completely failed to give the Tribunal, or this Court, even a high level summary or description of what evidence it was unable to lead or how this evidence would have shown that the Respondent was not being discriminated against. Indeed, in the end, with the production of File 328 and 333, Mexico was apparently able to produce certain evidence at the eleventh hour. However, such evidence was inadequate and incomplete.

105. Foreign law is a question of fact and a party which relies on the effect or impact of a foreign law has the burden of pleading it and proving it.

Reference: *Bank of Nova Scotia v. Wassef* [2000] O.J. No. 4883 at 17 (Ont. S.C.), Respondent' Book of Authorities, Tab 8.

Key v. Key, [1930] 65 O.L.R. 232 at para. 18 (C.A.), Respondent's Book of Authorities, Tab 9.

106. The evidence before this Court is that Article 69 of the FCC admits of a number of exceptions that would have allowed Mexico to lead evidence to rebut the *prima facie* case of discrimination. In addition, the evidence shows that the general duty of confidentiality provided in Article 69 of the FCC did not act to bar Mexico from presenting any or adequate evidence to the Tribunal.

Reference: Loperena Affidavit paras. 41 to 50 and paras. 59 to 63, Respondent's Record, Tab 5, p. 93 to 96 and 98 to 99.

107. There is no basis for the argument that the arbitration procedure was not in accordance with the agreement to submit claims to arbitration as encapsulated by the NAFTA.

(c) Public Policy

108. Article 1135 of the NAFTA provides for a final award against a Party if the Tribunal finds a breach of the NAFTA.

Article 1135: Final Award

"1. Where a Tribunal makes a final award against a Party, the Tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest;

(b) restitution of property, in which case the award shall provide that the disputing Party may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs in accordance with the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is made under Article 1117(1):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A tribunal may not order a Party to pay punitive damages.

Reference: Article 1135 NAFTA, Applicant's Case Book, Tab 26.

109. In bringing his claim to arbitration, the Respondent sought 303,819,319 Mexican pesos (or $30,381,938 (USD)) as damages on the following terms:

(a) 64,582,645 Mexican pesos (or $6,458,264 (USD)) for IEPS dues in the period of October to December 1997;

(b) 90,350,605 Mexican pesos (or $9,035,060 (USD)) for lost profits in the period of January 1, 1994 to May 1996, calculated on the expected exports applying a profit margin of 62.4%; and

(c) 148,886,141 Mexican pesos (or $14,888,614 (USD)) as CEMSA's "going concern value" on the basis of the present discounted value of the future cash flow.

Reference: Award, para. 190, Applicant's Record, Vol. III, Tab 81, p. 1030.

110. In coming to its determination on damages, the Tribunal gave thoughtful consideration to the evidence before it, the NAFTA, previous arbitration decisions and the fact that Mexico had, in fact, treated CEMSA in a discriminatory manner. In particular, the Tribunal held that, in a case of discrimination that constitutes a breach of Article 1102 of NAFTA, "what is owed by the responding Party is the amount of loss or damages that is adequately connected to the breach."

Reference: Award, para. 194, Applicant's Record, Vol. III, Tab 81, p. 1031.

111. In light of these considerations and the Tribunal's finding as an "inescapable fact" that the Respondent's export trading company was denied certain tax rebates on the exportation of cigarettes while domestic export trading companies were given the rebates, the Tribunal determined that CEMSA ought to be awarded monetary damages equivalent to those rebates that it had applied for but had not received. The Tribunal only awarded damages equal to rebates that were claimed for a (3) three month period with a principal value of 9,464,627.50 Mexican pesos (or approximately $946,462 (USD)).

Reference: Award, para. 187 and 205, Applicant's Record, Vol. III, Tab 81, p. 1028 and 1035.

112. Mexico claims that the Award is contrary to public policy because CEMSA was unable to provide invoices issued by the producer stating the tax separately.

113. However, what the Tribunal found was that the domestic resellers – which were also required to submit invoices stating the tax separately – and which were also unable to do so – were receiving rebates. In other words, the requirement was waived in the case of the domestic resellers, but Mexico refused to waive the requirement for CEMSA.

114. It is not contrary to public policy to compensate Mr. Feldman for this egregious form of discrimination by the Mexican government and taxing authorities by awarding CEMSA what it should legitimately expect in way of rebates, given Mexico's practice of paying out rebates to domestic resellers in similar circumstances. Indeed, it is a fair and legitimate measure of the damages that CEMSA suffered as a result of Mexico's violation of the NAFTA.

115. Public policy is defined in The *Report of the Secretary General to the Eighteenth Session of the United Nations Commission on International Trade* (Report), which is noted as an interpretative aid to the *Model Law at Article 13 of the ICAA*. The Report states that the United Nations Commission understood that public policy "was not equivalent to the political stance or international policies of the States but compromised the fundamental notions and principles of justice" and included such acts as corruption, bribery or fraud.

Reference: *Report of the Secretary General to the Eighteenth Session of the United Nations Commission on International Trade* paras. 296-97, Applicant's Book of Authorities Vol II, Tab 30.

116. This elementary definition of public policy has been adopted in Canadian jurisprudence. Indeed, in *Coporacion Transnocional de Inersiones, S.A. de C.V. v. STET International, S.p.A.*, the Ontario Court of Appeal saw the issue of public policy as being a question as to whether the tribunal offended principles of justice, as they exist in Ontario, in a "fundamental way".

Reference: *Coporacion Transnocional de Inersiones, S.A. de C.V. v. STET International, S.p.A.* 49 O.R. (3d) 414 at 415, Applicant's Case Book Vol I, Tab 6.

117. Further, as noted by Justic Feldman in *Schreter v. Gasmac Inc.*, the integrity of the arbitration process can be maligned by the ubiquitous resort to public policy as a justification for review.

Reference: *Schreter v. Gasmac Inc.* 89 D.L.R. (4th) 365 at 379, Respondent's Book of Authorities, Tab 10.

118. The applicant has not described an act or determination of the Tribunal that could possibly amount to a fundamental offense to principles of justice as they exist in Ontario. Certainly, Mexico is not happy with the finding as, in its essence, it suggests that Mexico deliberately provided rebates to companies owned by Mexican nationals whereas it denied those same rebates to a similarly situated American owned company. Such discrimination, as found by the Tribunal is not only in violation of the NAFTA but also, at least according to Mexico, its own domestic laws.

119. Furthermore, in light of the 2002 CEMSA Amparo Ruling, there is at the very least a serious question as to whether the law on which the Tribunal made its determination as to CEMSA's entitlement to the IESP rebates is valid. Quite simply, in these circumstances, the principles of justice have not even been offended, let alone in a "fundamental way."

120. Indeed, considering that the Tribunal found that Mexico acted in a discriminatory manner, it would be contrary to any fair interpretation of Canadian and Ontario public policy to countenance government action of waiving compliance with a tax requirement for one group of taxpayers simply on the basis of their nationality while insisting on compliance for others.

CONCLUSION

121. It is submitted that there is no basis for this Court to set aside the award.

PART III - ORDER REQUESTED

122. It is submitted that this Application should be dismissed with costs, to be awarded to the Respondent on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 27, 2003

McCarthy Tétrault LLP
The Chambers
Suite 1400, 40 Elgin Street
Ottawa ON K1P 5K6

Barbara A. McIsaac, Q.C. LSUC#: 15297G
Colin S. Baxter LSUC# 33574P
R. Benjamin Mills LSUC#: 46376V
Tel: (613) 238-2000
Fax: (613) 563-9386

Solicitors for the Respondent

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Quintette Coal Ltd. Nippon Steel Corp.* (B.C.C.A), [1990] B.C.J. No. 2241.
2. *Automatic Systems Inc. v. Bracknell Corp.*, [1994] O.J. No. 828 (Ont. C.A.).
3. *Netsys Technology Group AB v. Open Text Corp.*, [1999] O.J. No. 3134.
4. *U.E.S. Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048.
5. *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982.
6. *Canadian Measures Affecting the Export of Civilian Aircrafts*, W.T.O. Panel, April 14, 1999.
7. Decision by Tribunal in NAFTA UNCITRAL Investor-State Claim: Pope & Talbot Inc. and The Government of Canada.
8. *Bank of Nova Scotia v. Wassef* (2000), 11 C.P.C. (5^{th}) 338 (Ont. S.C.).
9. *Key v. Key*, [1930] 65 O.L.R. 232 (C.A.).
10. *Schreter v. Gasmac Inc.*, 89 D.L.R. (4^{th}) 365.

THE UNITED MEXICAN STATES Applicant	and	MARVIN ROY FELDMAN KARPA Respondent	Court File No: 03-CV-23500

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Ottawa

RESPONDENT'S FACTUM

McCarthy Tétrault LLP
The Chambers
Suite 1400, 40 Elgin Street
Ottawa ON K1P 5K6

Barbara A. McIsaac, Q.C. LSUC# 15297G
Colin S. Baxter LSUC# 33574P
R. Benjamin Mills LSUC# 46376V
Tel: (613) 238-2000
Fax: (613) 563-9386

Solicitors for the Respondent

Served on Fax No.: (613) 232-7525; and
Served on Fax No.: (613) 230-8842