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By Fax

February 26, 2003

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

Dear Members of the Tribunal,

Please find attached the Claimant's Observations on Mexico's request of January 30, 2003 and its attachments, which we have received today by fax from Counsel for the Claimant. Counsel for the Claimant has indicated to us that the original and a courtesy translation of the Claimant's Observations have been sent to us today by courier. Upon reception of the courtesy translation, we will send a copy to the members of the Tribunal and the Respondent.

Sincerely yours,

Gabriela Alvarez Avila
Secretary of the Tribunal

SUBSECRETARIA DE NEGOCIACIONES COMERCIALES INTERNACIONALES
FEB. 26 2003
RECIBIDO
DIRECCION GENERAL DE CONSULTORIA JURIDICA DE NEGOCIACIONES

Attachments

cc (without attachments):

Mr. Marvin R. Feldman Karpa
c/o Mr. Mark B. Feldman
c/o Mr. Fernando Pérez Correa
and Mr. Gustavo Carvajal Isunza

(with attachments):

United Mexican States
c/o Mr. Hugo Perezcano Díaz

SOLORZANO, CARVAJAL, GONZALEZ Y PEREZ-CORREA, S.C.
ABOGADOS

GUSTAVO CARVAJAL ISUNZA
LUIS FERNANDO GONZALEZ NIEVES
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February 26, 2003

By Facsimile (202) 522-2615

The Honorable Konstantinos D. Kerameus
The Honorable Jorge Covarrubias Bravo
The Honorable David A. Gantz

c/o Ms. Gabriela Alvarez-Avila
Secretary of the Tribunal
International Centre for Settlement of Investment Disputes
1818 H. Street, N.W.
Washington, D.C. 20433

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

Dear Sirs:

1. In Reply to the Government of the United Mexican States' ("Mexico" or "Respondent") January 30, 2003 request for interpretation of the final award (Mexico's Request), we respectfully submit the following arguments and alternative questions.

2. With the exception of one point, addressed below, Mexico's Request is no more than a blatant attempt to reopen that part of the award favorable to Claimant and reargue a case that has been fully litigated and decided.

3. Apart from the expense, which Claimant is in no position to bear, Respondent's maneuvers seek to protract further a proceeding that has gone on for too long. For the reasons stated below, Claimant believes that, with the possible exception of a clarification directing that compensation

should be immediately paid to Corporación de Exportaciones Mexicanas, S.A. de C.V. (CEMSA), the Tribunal should deny Respondent's frivolous request to re-litigate this case.

4. Should the Tribunal conclude otherwise and decide that reargument is appropriate, Claimant submits that such a proceeding should not be one-sided. In that event, Claimant requests the Tribunal to address and answer the questions listed in the final part of this submission, and to rectify certain monetary aspects of the award.

I. STANDARD APPLICABLE TO INTERPRETATIONS, CORRECTIONS AND SUPPLEMENTARY DECISIONS UNDER THE ARBITRATION RULES

5. Articles 56, 57 and 58 of the ICSID Additional Facility Arbitration Rules (the "Arbitration Rules") provide:

> *Article 56. Interpretation of the Award*
>
> *(1) Within 45 days after the date of the award either party, with notice to the other party, may request that the Secretary-General obtain from the Tribunal an interpretation of the award.* (Emphasis added).
> *(2) The Tribunal shall determine the procedure to be followed.*
> *(3) The interpretation shall form part of the award, and the provisions of Articles 53 and 54 of these Rules shall apply.*
>
> *Article 57. Correction of the Award*
>
> *(1) Within 45 days after the date of the award either party, with notice to the other party, may request the Secretary-General to obtain from the Tribunal a correction in the award of any clerical, arithmetical or similar errors. The Tribunal may within the same period make such corrections on its own initiative.* (Emphasis added).
> *(2) The provisions of Articles 53 and 54 of these Rules shall apply to such corrections.*
>
> *Article 58. Supplementary Decisions*
>
> *(1) Within 45 days after the date of the award either party, with notice to the other party may request the Tribunal, through the Secretary-General, to decide any question which it had omitted to decide in the award.* (Emphasis added).
> *(2) The Tribunal shall determine the procedure to be followed.*
> *(3) The decision of the Tribunal shall become part of the award and the provisions of Articles 53 and 54 of these Rules shall apply thereto.*

I.A. Corrections may Only be Made to Rectify Clerical, Arithmetical or Similar Errors.

6. Article 57 of the Arbitration Rules does empower a tribunal to make corrections to its award. This provision, however, expressly limits the scope of such corrections to clerical,

arithmetical or similar errors. Therefore, in deciding on the applicability of Article 57 of the Arbitration Rules, the first question a tribunal must address is whether the alleged error upon which correction is requested may be categorized as clerical, arithmetical or of a similar nature.

I.B. An Interpretation may Only be Granted to Clarify Specific Obscure or Ambiguous Language of an Award.

7. When deciding on the applicability of Article 56 of the Arbitration Rules a tribunal must draw a clear distinction between interpreting and amending an award.

8. While the Arbitration Rules allow a tribunal to *interpret* its own decisions, this power is not unlimited. The arbitrators may not indefinitely embark in endless explanations of the arguments and reasoning that led to their conclusions. An interpretation calls for the clarification of specific passages of an award that are obscure or ambiguous. Therefore, an interpretation may only be granted when the following two requirements are met (i) specific obscure or ambiguous parts of the award in question must be pointed out to the Tribunal; and (ii) the requesting party must demonstrate *prima facie* that the language in question does not adequately explain the conclusions and findings of the Tribunal.

9. In *Methanex Corporation v. United States of America*, the claimant asked for an interpretation under Article 35 of the UNCITRAL Arbitration Rules, which is framed in almost identical terms to Article 56 of the Arbitration Rules. The *Methanex* tribunal observed that:

> *It is well settled that such a request is limited to an interpretation of the award in the form of clarification; and that it cannot extend to a request to modify or annul the award or take the form of an appeal or review of the award.*[1]

10. In this respect, Mexico's Request does not call for a true *interpretation* of the final award. It is a cynical request for a *change* to the final award in the part that favors Claimant, based on alleged or implied errors of judgment of the Tribunal's majority.

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[1] Tribunal's Response to the Investor's Request for an Interpretation of the Preliminary Award on Jurisdiction and Admissibility, dated September 25, 2002, § 2.

I.C. Supplementary Decisions may Only be Issued When a Claim or Question Submitted by the Parties was not Decided by the Tribunal.

11. Under Article 58 of the Arbitration Rules, a supplementary decision is only permitted when a tribunal failed to rule on a particular claim or question submitted to it by the parties. Thus, supplementary decisions may only deal with issues not resolved in the final award, not with matters already decided by the Tribunal. Therefore, for this provision to be applicable, the requesting party needs to prove that (i) the parties approached the Tribunal with a specific question of law or fact; and (ii) the Tribunal indeed omitted to rule upon that very question. When the Tribunal rendered an opinion on all the issues submitted by parties, there is no room for a supplementary decision.

12. It is clear then, that Respondent's invocation of Article 58 of the Arbitration Rules totally misses the point. Mexico is not trying to have the Tribunal rule on a question submitted to it but left unanswered (in fact, it does not even allege that); rather, Mexico attempts to reargue the case to obtain a new award changing the result of the arbitration.

II. RESPONSE TO MEXICO'S ARGUMENTS IN RESPECT OF ARTICLE 1135.

13. Respondent asserts that since this claim was submitted under Article 1117(1) of the North American Free Trade Agreement (NAFTA) the compensation awarded by the Tribunal must be paid to CEMSA rather than to Claimant.

14. Article 1135(2) establishes:

> *Article 1135: Final Award*
> ...
> *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.*

15. Claimant agrees that the fact that the final award orders Respondent to pay compensation to Claimant personally, instead of CEMSA, as suggested by NAFTA article 1135, could be characterized as a clerical error.

16. Claimant does not believe, however, that issuing a correction is necessary. Claimant initiated this proceeding to obtain compensation for CEMSA and agrees to receive payment by

means of a deposit of the award's proceeds into CEMSA's account No. 09007884937, Banca Serfin, Branch No. 132, in Mexico City. If Respondent agrees to make such direct payment to CEMSA's account, this issue would be resolved without further action by the Tribunal. If, on the other hand, Respondent seeks to avoid or to defer payment of the award by asserting offsets or otherwise, it should advise the Tribunal so that issue can be addressed now.

III. RESPONSE TO MEXICO'S ARGUMENTS IN RESPECT OF ARTICLE 2105

III.A. Mexico's Request for an "Interpretation" is Rather a Request for a new Award, Which is Prohibited Under Articles 56, 57 and 58 of the Arbitration Rules.

17. Leaving apart the lack of merit of Respondent's allegations, the Tribunal should flatly reject Mexico's Request, since it does not represent a good faith request of an interpretation.

18. In calling for an "interpretation," Respondent points to paragraphs 178, 186 and 187 of the final award, which, according to Respondent, contain "inferences" adverse to it.

19. Respondent then, expressly invoking Article 56 of the Arbitration Rules, asks the Tribunal to "interpret" such paragraphs "and any others to similar effect".

20. Respondent in no way states what part of paragraphs 178, 186 and 187 are obscure or ambiguous, so as to warrant an interpretation of the language used in them (in fact, from the very text of Mexico's Request it is obvious that Respondent fully understands the meaning of such paragraphs).

21. In addition, Respondent does not in any way explain the Tribunal which "other paragraphs" have a "similar effect" to paragraphs 178, 186 and 187. This leaves Claimant wondering how can Mexico expect an interpretation of something which is not even identified.

22. Respondent does mention (in a parenthesis) "examples" of paragraphs containing "inferences" supposedly adverse to it (according to Respondent, paragraphs 6, 23, 167, 173, 174, 176, 177, 178, 186 and 187), but again, Respondent fails to point any passage or language therein which could be ambiguous or obscure.

23. After mentioning the paragraphs that supposedly need an "interpretation" from the Tribunal, Respondent follows with a standard of review of its making: according to it, the Tribunal must answer the following questions in respect of the "inferences" adverse to Mexico:

a) Did the majority consider Lic. Eduardo Diaz Guzman's testimony?

b) Did it do it in connection with the other Mexican resellers?

c) If so, did it consider his testimony regarding the other Mexican resellers and Article 69 of Mexico's Federal Fiscal Code (FFC)?

d) If so, did it consider Article 69 of the FFC to be a "law protecting privacy" within the meaning of NAFTA Article 2105?

e) If so, did it consider whether NAFTA Article 2105 should prevail over "international law" in deciding who should bear the burden of proof?

f) In any event, did the majority consider whether shifting the burden of proof would be contrary to public policy?

24. Claimant respectfully requests the Tribunal to respond to Mexico's questions with a brief statement that the award speaks for itself in that the Tribunal (i) did consider Lic. Eduardo Diaz Guzman's testimony (*see* paragraphs 159, 167, 168, 175 and 176 of the final award), and thus Respondent's questions are utterly frivolous and there is no need to "interpret" the Majority's findings in this respect, and (ii) determined, on the basis of all the evidence of record before it, that Mexico violated its obligations under NAFTA article 1102(2) by according CEMSA less favorable treatment than it accorded to investments of its own investors in like circumstances beginning in October 1997 and continuing, at a minimum, through 1998, 1999 and 2000. That evidence includes documents submitted by Claimant (App. 0473-0505 cited at Mem. 129 and Feldman 91) as well as data provided by Respondent. (Declaration/affidavit of Roland Garcia Ramos showing that Poblano companies exported about $5.5 million in cigarettes in 1998-2000 (CM 270-272); Guzman Decl. (Mem. App. 0516) admitted IEPS rebates of about $9.1 million to three trading companies (other than CEMSA) from September 1996-2000. Thus, Claimant met its burden of proof and Respondent failed to make any meaningful response.

25. At any rate, the reasoning of the *Pope & Talbot* tribunal, in connection with Canada's refusal to furnish documents allegedly protected by the attorney-client privilege, sheds some light on why Mexico's Request should be denied:

> *"...In the result, [Canada's] refusal [to provide the requested documents] did not appear prejudicial to the Investor, and the Tribunal proceeded upon the basis of the materials actually before it. However, the Tribunal deplores the decision of Canada in this matter. As the Tribunal noted in its decision on this matter dated September 6, 2000, Canada's position*

could well be a derogation from the "overriding principle" found in Article 15 of the UNCITRAL Arbitration Rules, under which these proceedings have been conducted, that all parties should be treated with equality."[2]

26. In short, Respondent is advancing new and old arguments to reopen a discussion already decided by this Tribunal. Mexico attempts to unduly broaden the scope of Articles 56, 57 and 58 of the Arbitration Rules. Consequently, the Tribunal must dismiss Mexico's Request.

27. As in *Methanex*, this Tribunal could issue an explanatory statement along the lines of paragraph 24, just to make it plain that Mexico's request is frivolous and unwarranted. We respectfully request this Tribunal, however, to state expressly, as the *Methanex* tribunal did[3], that such clarification statement is not rendered under Article 56 of the Arbitration Rules and consequently does not form part of the final award.

III.B. Mexico's Questions Introduce new Arguments After the Award has Been Issued, and such Arguments are at any Rate Wrong.

28. Implied in Respondent's "questions" are the two following assertions (i) that Article 69 of the FFC imposes an *absolute* duty of confidentiality on the Mexican government, and (ii) such absolute duty is a provision for the protection of *personal privacy* under NAFTA Article 2105.

29. The first assertion is patently false. There is no such absolute duty not to disclose tax information of Mexican taxpayers.

30. Article 69 of FFC itself establishes six exceptions, under which the duty of confidentiality does not apply to (i) cases specifically provided for in the tax laws, (ii) information requested by officials in charge of the "administration" and "defense" of federal tax interests, (iii) information requested in connection with criminal cases, (iv) information requested in connection with alimony proceedings, (v) the case provided for in Article 63 of the FFC, and (vi) information provided to private entities authorized to maintain and issue credit reports of individuals or legal persons.

31. Under Article 63 of the FFC, facts found in tax audits or any information in the file or files of taxpayers, may be used by the finance ministry or any other fiscal authority to support their determinations.

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[2] Case Pope & Talbot Inc v. Canada, at Second Phase's Final Award on Merits, April 10th 2001, §193.
[3] Case Methanex Corporation v. United States of America, at Tribunal's Response to the Investor's Request, September 25th 2002, §3.

32. In addition, Mexican courts have held on numerous occasions that Article 69 of the FFC does not prevent the disclosure of third-party tax information in tax court proceedings, because article 230 of the FFC does not limit the type of evidence that may be submitted by the parties (similarly to Article 230 of the FFC, Article 41(2) of the Arbitration Rules establishes that at any stage of the arbitration, a tribunal may call upon the parties to produce documents, witnesses and experts, without limiting the type of evidence that may be requested). As exhibits 1 and 2, we attach hereto the text of one of such precedents, and the text of Articles 63, 69 and 230 of the FFC.

33. More generally, Article 79 of the Federal Code of Civil Procedure (FCCP), applicable in all federal civil cases, as well as in all amparo suits, provides:

> *Article 79. To find the truth, the tribunal may rely on any person, be it a party or third party, and on any thing or document, whether it belongs to the parties or to a third party, without any limitations other than the type evidence in question is recognized by law and it has immediate connection to the disputed facts.*
>
> *The courts have no time limits to order the exhibition of evidence they judge indispensable to form their belief in respect of the litis, nor are applicable to them the prohibitions and limitations to the parties established in the rules of evidence.*

34. The fact-finding powers given to Mexican courts under Article 79 of the FCCP could hardly be broader. These powers are used routinely by Mexican courts, as Respondent perfectly knows. For example, the broadness of Article 79 has been found to trump the confidentiality obligations imposed by the banking laws on financial institutions, which make it a crime for bank officials to reveal their client's information. As exhibit 3, we provide the Tribunal an example of such interpretation.

35. It should be noted that the Mexican Supreme Court has held that International Treaties are part of Mexico's internal law, and supersede federal and local law. As exhibits 4 and 5, we attach copies of such interpretations.

36. Thus, insofar as this Tribunal is a tribunal existing under NAFTA Chapter XI, and insofar as NAFTA is part of Mexican internal law, there is no legal or logical reason why this Tribunal should not have the same fact-finding authority as ordinary Mexican courts do, specially given the fact that article 41 of the Arbitration Rules expressly grants such authority to this Tribunal.

37. Indeed, the fact that Article 69 of the FFC does not impose an absolute duty of confidentiality was proven at the hearing by Mexico itself, by providing files #328 and #333 to be reviewed by the Tribunal and Claimant's attorney.

38. Respondent's second assertion is equally dubious. Respondent fails to recognize that the third-party information requested by the Tribunal was information regarding the *treatment* received by other Mexican exporters of cigarettes; the Tribunal did not ask for information that typically receives privacy protection, such as client lists, amount of revenues, profits made, etc. Thus, to the extent that some (not all) of the information contained in the files of a taxpayer is ordinarily (not always or absolutely) protected by Mexican law, the information requested by the Tribunal in this case did not involve information that would have impeded the enforcement of Mexican privacy law within the meaning of NAFTA Article 2105, specially when one considers that such third-party information —as well as *all* other third-party tax information— is routinely presented as evidence in cases before the Mexican courts.

39. Mexico's argument that the very same third-party information that it would have to provide to the Mexican courts cannot be provided to this Tribunal on account of Mexican "privacy" law is, to say the least, bizarre.

IV. CLAIMANT'S QUESTIONS TO THE TRIBUNAL SHOULD IT DECIDE TO ANSWER MEXICO'S QUESTIONS.

40. As stated, Claimant believes that the "interpretation" requested by Respondent is completely unnecessary and inappropriate. However, Claimant also believes that should the Tribunal address and respond the questions presented by Mexico, then Claimant has the right to be treated equally and thus to have questions of himself addressed and answered by the Tribunal.

41. If such were the case, Claimant respectfully requests the Tribunal:

(a) To explain why it awarded to Claimant (or CEMSA) "simple" interest instead of compounded interest, which would represent a more appropriate reflection of the economical loss sustained by Claimant, particularly in light of the fact that (i) the Tribunal awarded Claimant compensation in Mexican Pesos, a currency that has depreciated 7.87% against the US Dollar since December 16, 2002, the date of the final award, and (ii) the *Pope & Talbot* tribunal did award compounded interest to the

investor. Accordingly, under Articles 56 and 57 of the Arbitration Rules, Claimant respectfully requests the Tribunal to issue a correction of paragraphs 205, 206, 207 and 211 of the final award, awarding CEMSA the sum of $ 9,464,627.50 Mexican Pesos as principal, plus compounded interest from the dates indicated in paragraph 205 of the final award, in accordance with the rate of interest indicated therein, which interest shall accrue until the date the payment is effectively made, as provided for in paragraph 211 of the final award

(b) To explain why it concluded, in paragraphs 87-88 of the final award, that there is a "conflict" between the 1998 Consulta issued by the Federal Tax Court and the 2002 Amparo Decision (which invalidated the 1999 tax assessment) issued by the Federal Circuit Court, since (i) the 1998 Consulta was based on the 1998 version of the IEPS law, which was different from the 1996 and 1997 versions of the IEPS law, and thus a version of the IEPS law not involved in this arbitration; (ii) the Federal Circuit Court is in any case superior in hierarchy and controlling over the Federal Tax Court, and (iii) the Federal Tax Court's decision was a *legality* decision (*i.e.* Hacienda acted according to the letter of the IEPS law), whereas the Federal Circuit Court's decision was a *constitutionality* decision (*i.e.* the provisions relied upon by Hacienda in the 1999 assessment —articles 2 and 4 of the IEPS law— are unconstitutional), in particular taking into account that such determination and the misunderstanding of the effects of the 1993 and the 2002 Amparos, were the basis for the Tribunal's determination that *"it appears to the Tribunal that the Claimant never really possessed a 'right' to obtain rebates upon exportation of cigarettes, but only a right to the 0% tax rate"* (paragraph 118 of the final award). Accordingly, under Article 56 of the Arbitration Rules, Claimant respectfully requests the Tribunal to issue an interpretation of paragraphs 118 through 134 of the final award, explaining whether, in determining that no expropriation had taken place, the Tribunal considered if the two constitutional rulings favoring CEMSA gave it the substantive right under the Mexican Constitution to be placed in the same *de iure* and *de facto* position as Mexican producers, *i.e.* to be able to export under the same economical and practical circumstances as the producers, and thus the right to obtain IEPS rebates.

(c) To explain why, having found Mexico guilty of discrimination (paragraphs 173-188) it did not award CEMSA damages for lost income from 1998-2002, particularly on the face of arguments made at the hearing that an appropriate measure of such damages would be $4,000,000.00 US Dollars; if discrimination during 1996-1997 gave rise to compensation, Claimant cannot understand why discrimination during 1998-2002 does not. Accordingly, under Article 58 of the Arbitration Rules, Claimant respectfully requests the Tribunal to issue a supplementary decision awarding CEMSA 4,000,000.00 US Dollars as compensation for discrimination during 1998 through 2002.

(d) To explain why it determined in paragraph 208 of the final award that each party should bear half of the cost of the arbitration, particularly in light of the fact that this arbitration took place only on account of Mexico's refusal to respect CEMSA's constitutional rights as declared by the Mexican Supreme Court. In this respect, the Tribunal should explain whether it considered the fact that Mexico's actions in failing to abide by the Supreme Court's decision made CEMSA's access to the national courts a meaningless right, thus forcing Claimant to begin this arbitration, with the considerable costs and expenses it necessarily entails; and whether the Tribunal considered if such circumstance gives Mexico a significant incentive to ignore the rights of investors, since the only alternative recourse —NAFTA Chapter XI arbitrations— represents a nearly insurmountable economical barrier of entry for the victims. To the extent that Respondent knows that few investors will have the resources and time to begin a NAFTA arbitration against it, and to the extent that the cost of the arbitration renders the pursuit of justice economically unviable in most cases, Respondent has the obvious and perverse incentive to ignore and/or defy the judicial decisions issued by the Mexican courts favoring foreign investors otherwise protected by NAFTA's provisions. The only way to counter those incentives is to find Respondent liable to investors for fees and costs in cases such as this one, where arbitration was pursued only after it became obvious that the host state would not abide by the decisions of its own constitutional courts. Accordingly, under Article 56 of the Arbitration Rules, Claimant respectfully requests the Tribunal to issue an

interpretation of paragraph 208 of the final award, responding the considerations set forth above.

(e) Lastly, as the Tribunal correctly points out in paragraphs 80-87 of the final award, Claimant requested from the Tribunal relief declaring that Mexico is not entitled to recover rebates paid to CEMSA in respect of exports made in 1996-1997. However, the Tribunal, having found that Respondent did violate Claimant's rights under NAFTA Article 1102, failed to decide on this issue, as it pertains to such violation. Accordingly, under Article 58 of the Arbitration Rules, Claimant respectfully requests the Tribunal to issue a supplementary decision stating that Respondent does not have the right to recover rebates paid to CEMSA for exports made in 1996-1997.

V. IF THE TRIBUNAL REJECTS MEXICO'S REQUEST FOR AN "INTERPRATION" OF THE FINAL AWARD, THE TRIBUNAL SHOULD RULE THAT RESPONDENT MUST BEAR THE COST OF THESE ADDITIONAL PROCEEDINGS.

42. Respondent's manifest attempt to re-litigate this arbitration through a request for an "interpretation" of the final award is both incongruous and unfair. Respondent knows perfectly well the permissible scope of award interpretations. Respondent is obviously aware of the terrible economical burden these additional proceedings place on Claimant; having an almost limitless purse to harass Claimant through endless litigation, Respondent should not be permitted to gratuitously impose such burden on Claimant. In this sense, it is only fair and reasonable that if the Tribunal finds, as it should, that Mexico's request for an interpretation of the final award is unwarranted under the present circumstances, then the Tribunal should also rule that Respondent bear the entirety of the costs of these proceedings, including attorney's fees.

Respectfully submitted,

Fernando Pérez Correa
Counsel for Claimant

Cc: Hugo Perezcano Diaz, Counsel for Respondent.

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

EXHIBIT 1

FEDERAL FISCAL TRIBUNAL'S RULING REGARDING ABOLUTE CONFIDENTIALITY PRINCIPLE

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

EXHIBIT 1

Second Epoch
Instance: First Northern Regional Chamber
Source: Federal Fiscal Tribunal's Magazine: Year VII. No. 69. September 1985.
Thesis: II-TASR-IX-682

ABSOLUTE CONFIDENTIALITY PRINCIPLE.- IT DOES NOT OPERATE REGARDING THE OFFERING OF DOCUMENTAL EVIDENCE RELATED TO CONTRIBUTORS DIFFERENT FROM THE CLAIMANT Article 69 of the Federal Fiscal Code in force, recognizes the principle of absolute confidentiality in relation to the data provided by the taxpayers or obtained as a result of the exercise of the authority's verification power, establishing an obligation not-to-do for the official personnel that intervene in the different procedures concerning the application of tax provisions. However, the same provision points out that such confidentility shall not be kept in the cases established by tax laws and that is the reason if in a nullity trial documents are tendered in relation to the tax situation of people different to the claimant in such trial, the above referred principle is not applicable, in accordance with what is established by Article 230 of the same tax law which sets forth that in nullity trials all kinds of evidence will be admitted.

Trial. No. 534/84.- Sentence made on February 12th, 1985, adopted by unanimous consent.- Propounder Magistrate: Ma. Guadalupe González de Uresti.- Clerk: Lic. Juan Francisco Tapia Tovar.

Segunda Época.
Instancia: Primera Sala Regional Noreste. (Monterrey)
R.T.F.F.: Año VII. No. 69. Septiembre 1985.
Tesis: II-TASR-IX-682
Página: 271

PRINCIPIO DE RESERVA ABSOLUTA.- NO OPERA RESPECTO DEL OFRECIMIENTO DE DOCUMENTALES QUE SE RELACIONAN CON CONTRIBUYENTES DIVERSOS AL ACCIONANTE.- El artículo 69 del Código Fiscal de la Federación vigente, consagra el principio de reserva absoluta respecto tanto de los datos suministrados por los contribuyentes como de los obtenidos con motivo del ejercicio de las facultades de comprobación de la autoridad, estableciendo una obligación de no hacer a cargo del personal oficial que interviene en los diversos trámites relativos a la aplicación de las disposiciones tributarios. Sin embargo, el mismo precepto señala que dicha reserva no comprenderá los casos que señalen las leyes fiscales, en razón de lo cual si en un juicio de nulidad se ofrecen como prueba documentos relacionados con la situación fiscal de personas distintas al actor de dicho juicio, no opera el principio de referencia, esto de acuerdo a lo dispuesto por el artículo 230 del propio ordenamiento tributario que prevé que en el juicio de nulidad serán admisibles toda clase de pruebas.(VI)

Juicio No. 534/84.- Sentencia de 12 de febrero de 1985, por unanimidad de votos.- Magistrada Instructora: Ma. Guadalupe González de Uresti.- Secretario: Lic. Juan Francisco Tapia Tovar.

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

EXHIBIT 2

ARTICLES 63, 69 AND 230 OF THE FEDERAL FISCAL CODE

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

EXHIBIT 2

Article 63, FCC.- The facts that become known as a consequence of the exercise of the verification powers foreseen in this Code, the fiscal laws, or figuring in files or documents under the control of fiscal authorities, or those provided by other fiscal authorities, may serve to motivate the resolutions of the Ministry of Finance and Public Income or of any other competent authority or decentralized office, regarding federal contributions.

Fiscal authorities shall follow what is provided in the former paragraph, without prejudice of their obligation to maintain the confidentiality of the information provided by independent third parties affecting their competitive position, as stated in Article 69 of this Code. [...]

Article 69, FCC.- The official personnel intervening in the different procedures related to the application of tax legislation shall keep absolute discretion concerning the statements and data provided by the taxpayers or by third parties related to them as well as those obtained during the exercise of the verification powers. This discretion shall not include the cases provided for in the tax laws and those in which data must be provided to the officials in charge of the administration and defense of the federal tax interests, neither to the judicial authorities knowing of criminal proceedings nor to Tribunals concerned with alimony proceedings, nor to what is set forth in Article 63 of this Code. Said discretion will not imply either the information related to the contributors' claimable fiscal credits provided by the fiscal authorities to those credit information societies approved by the Ministry of Finance and Public Income according to the Finance Groups Law. [...]

Article 230, FCC.- In the trials conducted at the Federal Tribunal of Fiscal and Administrative Justice, all types of evidence will be allowed, excepting the authorities' confession and the requirement of briefs, unless said briefs are limited to facts figuring in documents under the control of authorities.

The instructing magistrate may allow the exhibition of any document related with the facts in question or order the practice of any diligence.

Artículo 63, CFF.- Los hechos que se conozcan con motivo del ejercicio de las facultades de comprobación previstas en este Código, o en las leyes fiscales, o bien que constan en los expedientes o documentos que lleven o tengan en su poder las autoridades fiscales, así como aquellos proporcionados por otras autoridades fiscales, podrán servir para motivar las resoluciones de la Secretaría de Hacienda y Crédito Público y cualquier otra autoridad u organismo descentralizado competente en materia de contribuciones federales.

Las autoridades fiscales estarán a lo dispuesto en el párrafo anterior, sin perjuicio de su obligación de mantener la confidencialidad de la información proporcionada por terceros independientes que afecte su posición competitiva, a que se refiere el artículo 69 de este Código. [...]

Artículo 69, CFF.- El personal oficial que intervenga en los diversos trámites relativos a la aplicación de las disposiciones tributarias estará obligado a guardar absoluta reserva en lo concerniente a las declaraciones y datos suministrados por los contribuyentes o por terceros con ellos relacionados, así como los obtenidos en el ejercicio de las facultades de comprobación. Dicha reserva no comprenderá los casos que señalen las leyes fiscales y aquéllos en que deban suministrarse datos a los funcionarios encargados de la administración y de la defensa de los intereses fiscales federales, a las autoridades judiciales en procesos del orden penal o a los Tribunales competentes que conozcan de pensiones alimenticias, o en le supuesto previsto en el artículo 63 de este Código. Dicha reserva tampoco comprenderá la información relativa a los créditos fiscales exigibles de los contribuyentes, que las autoridades fiscales proporcionen a las sociedades de información crediticia que obtengan autorización de la Secretaría de Hacienda y Crédito Público de conformidad con la Ley de Agrupaciones Financieras. [...]

Artículo 230, CFF.- En los juicios que se tramiten ante el Tribunal Federal de Justicia Fiscal y Administrativa, serán admisibles toda clase de pruebas, excepto la de confesión de las autoridades mediante absolución de posiciones y la petición de informes, salvo que los informes se limiten a hechos que consten en documentos que obren en poder de las autoridades. [...]

El magistrado instructor podrá acordar la exhibición de cualquier documento que tenga relación con los hechos controvertidos o para ordenar la práctica de cualquier diligencia.

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

EXHIBIT 3

NINTH CIVIL COURT OF APPEALS FOR THE FIRST CIRCUIT'S RULING ON BANKING SECRECY

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

EXHIBIT 3

Ninth Epoch
Instance: NINTH CIVIL COURT OF APPEALS FOR THE FIRST CIRCUIT
Source: Federal Judicial Weekly and its Gazette
Volume: IV, September 1996
Thesis: I. 9o.C.40 C
Page: 721

BANKING SECRECY. IF THE INFORMATION IS REQUESTED BY THE AUTHORITY CONCERNED WITH THE PAYMENT SUSPENSION PROCEDURE, THERE IS NO VIOLATION TO THE. The judicial authority concerned with the payment suspension procedure, may request credit institutions to submit information related to the banking contracts entered by the parties, in accordance with the attributions that Article 26 (XI), in connection with Article 429 of the Bankruptcy and Payment Suspension Law provide, because the term "judgment" referred to at Article 117 of the Credit Institutions Law must be understood in a broad way, not only referred to as the controversy held between two parties, but also as any other type of judicial procedure, such as the payment suspension procedure.

Amparo review 819/96. Banco Internacional, S.A., Institución de Banca Multiple, Grupo Financiero Bital. May 29th, 1996. Unanimity of votes. Propounder: Guadalupe Olga Mejía Sánchez. Clerk: María Elena Rosas López.

Novena Epoca
Instancia: NOVENO TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO.
Fuente: Semanario Judicial de la Federación y su Gaceta
Tomo: IV, Septiembre de 1996
Tesis: I.9o.C.40 C
Página: 721

SECRETO BANCARIO. *SI* LA *INFORMACION* LA SOLICITA LA AUTORIDAD QUE CONOCE DEL PROCEDIMIENTO DE SUSPENSION DE PAGOS, NO EXISTE VIOLACION AL. La autoridad judicial que conoce del procedimiento de suspensión de pagos, puede solicitar a las instituciones de crédito, información relacionada con los contratos bancarios celebrados por las partes, conforme a las atribuciones que le confiere el artículo 26, fracción XI, en relación con el 429, de la Ley de Quiebras y Suspensión de Pagos, toda vez que el término "juicio" que refiere el artículo 117 de la Ley de Instituciones de Crédito, debe entenderse en forma genérica, no sólo a la controversia que sostengan dos partes, sino también a cualquier tipo de procedimiento judicial, como lo es el de suspensión de pagos.

NOVENO TRIBUNAL COLEGIADO EN MATERIA CIVIL DEL PRIMER CIRCUITO.

Amparo en revisión 819/96. Banco Internacional, S.A., Institución de Banca Múltiple, Grupo Financiero Bital. 29 de mayo de 1996. Unanimidad de votos. Ponente: Guadalupe Olga Mejía Sánchez. Secretaria: María Elena Rosas López.

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

EXHIBIT 4

SUPREME COURT OF JUSTICE'S RULING ON THE STATUS OF INTERNATIONAL TREATIES UNDER NATIONAL LAW

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

EXHIBIT 4

Ninth Epoch
Instance: Full Court
Source: Federal Judicial Weekly and its Gazette
Volume: X, November 1999
Thesis: P. LXXVII/99
Page: 46

INTERNATIONAL TREATIES. THEY ARE HIERARCHICALLY ABOVE OF THE FEDERAL LAWS AND BELOW THE FEDERAL CONSTITUTION. In doctrine persistently the question has arisen as to the hierarchy of laws in our legal system. There is unanimity in relation to the Federal Constitution as the fundamental norm, and even though in the beginning, the expression "...they will be the Supreme Law of the entire Union..." seems to indicate that the Constitution is not the only supreme norm, the objection is overcome by the fact that the laws must derive form the Constitution and be approved by a competent organ such as the Congress of the Union and that the treaties must be in accordance with the Fundamental Law, which clearly indicates that only the Constitution is the Supreme Law. The problem in relation to the hierarchy of the rest of the norms of the system, has found in jurisprudence and doctrine different solutions, among which are: supremacy of federal laws over local laws and the same hierarchy between them, in its plane version and with the existence of "constitutional laws"; and that which states that the supreme law shall be that characterized as constitutional law. Nevertheless, this Supreme Court of Justice considers that the international treaties are in a second level immediately below the Fundamental Law and above the federal and local legislation. This interpretation of Article 133 of the Constitution derives from the fact that the international commitments are adopted by the Mexican State as a whole and compromise all the authorities before the international community; that explains why the drafters of the Constitution empowered the President of the Republic to enter into international treaties in his character of head of State and, in the same way, the Senate intervenes representing the will of the federal states and, by means of its ratification, obliges their authorities. Another important aspect supporting this hierarchy of treaties, is that related to the absence of competence limitation between the Federation and the federal states, that is to say, federal and local competences are not taken into account in relation to the content of a treaty; rather based on an express order by Article 133, the President of the Republic and the Senate may oblige the Mexican State in any area, independently that for other purposes the federal states are competent in such areas. Consequently, the interpretation of Article 133 lead us to consider in a third place and the same hierarchy, federal and local laws, by virtue of what is established by Article 124 of the Constitution, which sets forth that "the power not expressly bestowed by this Constitution upon the federal authorities, will be reserved for the states." It is not neglected that this Maximum Tribunal had previously adopted a different position in the precedent

P.C/92, issued in the Judicial Official Gazette, No. 60, corresponding to December 1992, page 27, and titled "FEDERAL LAWS AND INTERNATIONAL TREATIES. THEY HAVE THE SAME HIERARCHY"; however, this Tribunal unanimously considers it appropriate to abandon such criterion and to adopt that which considers treaties as hierarchically superior even before federal law.

Amparo review 1475/98. Sindicato Nacional de Controladores de Tránsito Aéreo. May 11th, 1999. Adopted unanimously by ten votes. Absent: José Vicente Aguinaco Alemán. Propounder: Humberto Román Palacios. Clerk: Antonio Espinoza Rancel.

The Full Court, in its private session of October 28th, 1999, approved under the number LXXVII/1999, the previous isolated thesis; it was thus determined that the voting is ideal to constitute a jurisprudential thesis. México, Distrito Federal, October 28th 1999.

Note: This thesis abandons the criterion set forth by the thesis P.C/92, issued in the Judicial Official Gazette, No. 60, Eight Epoch, December 1992, page 27 and titled "FEDERAL LAWS AND INTERNATIONAL TREATIES. THEY HAVE THE SAME HIERARCHY".

Novena Epoca
Instancia: Pleno
Fuente: Semanario Judicial de la Federación y su Gaceta
Tomo: X, Noviembre de 1999
Tesis: P. LXXVII/99
Página: 46

TRATADOS INTERNACIONALES. SE UBICAN JERÁRQUICAMENTE POR ENCIMA DE LAS LEYES FEDERALES Y EN UN SEGUNDO PLANO RESPECTO DE LA CONSTITUCIÓN FEDERAL. Persistentemente en la doctrina se ha formulado la interrogante respecto a la jerarquía de normas en nuestro derecho. Existe unanimidad respecto de que la Constitución Federal es la norma fundamental y que aunque en principio la expresión "... serán la Ley Suprema de toda la Unión ..." parece indicar que no sólo la Carta Magna es la suprema, la objeción es superada por el hecho de que las leyes deben emanar de la Constitución y ser aprobadas por un órgano constituido, como lo es el Congreso de la Unión y de que los tratados deben estar de acuerdo con la Ley Fundamental, lo que claramente indica que sólo la Constitución es la Ley Suprema. El problema respecto a la jerarquía de las demás normas del sistema, ha encontrado en la jurisprudencia y en la doctrina distintas soluciones, entre las que destacan: supremacía del derecho federal frente al local y misma jerarquía de los dos, en sus variantes lisa y llana, y con la existencia de "leyes constitucionales", y la de que será ley suprema la que sea calificada de constitucional. No obstante, esta Suprema Corte de Justicia considera que los tratados internacionales se encuentran en un segundo plano inmediatamente debajo de la Ley Fundamental y por encima del derecho federal y el local. Esta interpretación del artículo 133 constitucional, deriva de que estos compromisos internacionales son asumidos por el Estado mexicano en su conjunto y comprometen a todas sus autoridades frente a la comunidad internacional; por ello se explica que el Constituyente haya facultado al presidente de la República a suscribir los tratados internacionales en su calidad de jefe de Estado y, de la misma manera, el Senado interviene como representante de la voluntad de las entidades federativas y, por medio de su ratificación, obliga a sus autoridades. Otro aspecto importante para considerar esta jerarquía de los tratados, es la relativa a que en esta materia no existe limitación competencial entre la Federación y las entidades federativas, esto es, no se toma en cuenta la competencia federal o local del contenido del tratado, sino que por mandato expreso del propio artículo 133 el presidente de la República y el Senado pueden obligar al Estado mexicano en cualquier materia, independientemente de que para otros efectos ésta sea competencia de las entidades federativas. Como consecuencia de lo anterior, la interpretación del artículo 133 lleva a considerar en un tercer lugar al derecho federal y al local en una misma jerarquía en virtud de lo dispuesto en el artículo 124 de la Ley Fundamental, el cual ordena que "Las facultades que no están expresamente concedidas por esta Constitución a los funcionarios federales, se entienden reservadas a los Estados.". No se pierde de vista que en su anterior conformación, este Máximo Tribunal había adoptado una posición diversa en la tesis P. C/92, publicada en la Gaceta del Semanario Judicial de la Federación, Número 60, correspondiente a diciembre de 1992, página 27, de rubro: "LEYES FEDERALES Y TRATADOS INTERNACIONALES.

TIENEN LA MISMA JERARQUÍA NORMATIVA."; sin embargo, este Tribunal Pleno considera oportuno abandonar tal criterio y asumir el que considera la jerarquía superior de los tratados incluso frente al derecho federal.

Amparo en revisión 1475/98. Sindicato Nacional de Controladores de Tránsito Aéreo. 11 de mayo de 1999. Unanimidad de diez votos. Ausente: José Vicente Aguinaco Alemán. Ponente: Humberto Román Palacios. Secretario: Antonio Espinoza Rangel.

El Tribunal Pleno, en su sesión privada celebrada el veintiocho de octubre en curso, aprobó, con el número LXXVII/1999, la tesis aislada que antecede; y determinó que la votación es idónea para integrar tesis jurisprudencial. México, Distrito Federal, a veintiocho de octubre de mil novecientos noventa y nueve.

Nota: Esta tesis abandona el criterio sustentado en la tesis P. C/92, publicada en la Gaceta del Semanario Judicial de la Federación Número 60, Octava Época, diciembre de 1992, página 27, de rubro: "LEYES FEDERALES Y TRATADOS INTERNACIONALES. TIENEN LA MISMA JERARQUÍA NORMATIVA.".

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