

## CASES

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

#### Introductory Note

On May 27, 1999, ICSID approved access to the Additional Facility and registered a Notice for institution of arbitration proceeding submitted by Mr. Marvin Feldman, a United States national, against the United Mexican States (Mexico). The arbitration proceedings were initiated by Mr. Feldman on behalf of Corporación de Exportaciones Mexicanas, S.A. de C.V. (CEMSA), a Mexican company which Mr. Feldman owned and controlled, pursuant to Article 1117 of the North American Free Trade Agreement (NAFTA). It concerned the refusal of Mexican tax authorities to rebate excise taxes applied to tobacco products exported from Mexico by CEMSA and the refusal of such tax authorities to recognize CEMSA's right to a rebate of such taxes regarding prospective exports.

Pursuant to NAFTA Article 1123, the Claimant appointed as an arbitrator Professor David A. Gantz, a United States national, and the Respondent appointed Mr. Jorge Covarrubias, a Mexican National. Failing an agreement of the parties on the President of the Tribunal, the Secretary-General of ICSID appointed Professor Konstantinos D. Kerameus, a Greek national, in accordance with NAFTA Article 1124. On January 18, 2000, the Centre notified the parties that all the arbitrators had accepted their appointment and the Tribunal was therefore deemed to be constituted on that date.

Mexico raised five objections to the Tribunal's jurisdiction. Four were decided by the Tribunal in its Decision on Preliminary Jurisdictional issues of December 6, 2001, and the remaining issue was joined to the merits of the

case. Among the objections raised by the Respondent were objections regarding the standing of the Claimant, the time limitation of three years to bring a claim under NAFTA Article 1117(2), and the relevance of the claims predating NAFTA's entry into force. The Tribunal first considered that the Claimant, being a citizen of the United States only, and despite his permanent residence in Mexico, had standing to sue in the present arbitration. Regarding the time limitation, the Tribunal found that the cut off date of the three-year limitation period was April 30, 1996 and the Respondent was not estopped from raising this objection. The Tribunal finally found that only measures alleged to be taken by the Respondent after the entry into force, and which are alleged to be in violation of the NAFTA were relevant for the support of the claims under consideration.

With respect to the merits of the case, the Tribunal first examined the question of an alleged expropriation under NAFTA Article 1110 and dismissed the claim. The Claimant's key contention was that the various actions of Mexican authorities in denying to CEMSA the tax rebates on cigarette exports resulted in an indirect or "creeping" expropriation of the Claimant's investment and were tantamount to expropriation under Article 1110. The Tribunal's rationale for declining to find a violation of Article 1110 was supported by four grounds. It considered that: (i) not every business problem experienced by a foreign investor is an expropriation; (ii) NAFTA and principles of customary international law do not require a state to permit gray market exports of cigarettes; (iii) the Mexican Tax Law has at no time afforded Mexican cigarette resellers, such as CEMSA, a "right" to export cigarettes; and (iv) the Claimant's investment, the exporting business known as CEMSA, remained under the complete control of the Claimant.

The Tribunal then examined the question of an alleged violation of national treatment under NAFTA Article 1102. The Claimant contended that Mexico discriminated against CEMSA in the 1998-2000 period, by permitting at least three resellers of cigarettes to export cigarettes and to receive rebates, notwithstanding the fact that like the Claimant, they did not fulfill the requirements of the Mexican tax law to obtain rebates. The Tribunal first considered that a *de facto* difference in treatment between foreign and domestic investors in like circumstances is sufficient to establish a denial of national treatment under Article 1102. The Tribunal found that limited facts were made available to the Tribunal as to other resellers receiving rebates for exports. However, the majority indicated that the Claimant had established a presumption and a *prima facie* case that the Claimant had been treated in a different and less favorable manner than at least two other Mexican owned cigarette resellers, and the Respondent had failed to introduce any credible evi-

dence into the record to rebut that presumption. The Tribunal then concluded that Mexico violated its obligations under Article 1102 and granted to the Claimant 16,961,056 Mexican Pesos (approximately US\$1.7 million) as compensation, including the interest accrued until the signature of the award.

The main point of disagreement resulted in the dissenting opinion by Mr. Covarrubias and concerns the interpretation of the facts of the case. According to Mr. Covarrubias, the Claimant had failed to prove that he had been treated less favorably than other resellers. In particular, he pointed out that the Claimant was treated in the same way as other resellers, since rebates had been granted to him on some occasion and denied in others, and this same policy was followed regarding other resellers. The dissenting opinion also stated that there was no basis for shifting the burden of proof from the Claimant to the Respondent and that Mexico was bound, as in most legal systems, by the confidentiality linked to any information related to taxpayers.

On the questions of costs, the Tribunal decided that the costs of the arbitration should be shared equally and that each party should bear its own expenses, since neither Party completely succeeded in its contentions.

The December 16, 2002 award was issued in English and Spanish. The text of the decision is reproduced below in English with the parties' consent and is posted in both language in PDF format on ICSID's website at [www.worldbank.org/icsid](http://www.worldbank.org/icsid), together with a correction and interpretation of the award of June 13, 2003.

Subsequently, Mexico filed a request before the Ontario Superior Court of Justice to set aside the award. This was the second time Mexico tried to challenge an award rendered pursuant the Chapter 11 NAFTA provisions before Canadian courts. The Ontario Superior Court of Justice rejected Mexico's request. The decision of the Ontario Superior Court of Justice is posted in [www.naftaclaims.com/disputes\\_mexico/disputes\\_mexico\\_karpa.htm](http://www.naftaclaims.com/disputes_mexico/disputes_mexico_karpa.htm).

*Gabriela Alvarez Avila*  
*Senior Counsel, ICSID*