

IN THE ARBITRATION PURSUANT TO
CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE ARBITRATION (ADDITIONAL FACILITY) RULES OF THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
BETWEEN

MARVIN ROY FELDMAN KARPA,

Claimant/Investor,

-and-

THE UNITED MEXICAN STATES,

Respondent Party.

ICSID CASE No. ARB(AF)/99/1

**SUBMISSION OF THE UNITED STATES OF AMERICA
ON PRELIMINARY ISSUES**

1. Pursuant to Article 1128 of the North American Free Trade Agreement ("NAFTA"), the United States of America respectfully makes this submission regarding several questions of interpretation of the NAFTA raised during the preliminary phase of this case. No inference should be drawn from the absence of comment on any issue not addressed below.

STANDING UNDER ARTICLE 1117(C)

2. A threshold question raised in this case concerns the standing of a claimant to submit a claim under Chapter Eleven of the NAFTA. Specifically, the Tribunal must decide whether a natural person who is both a citizen of the United States and a permanent resident – but not a citizen – of Mexico has standing to submit a claim against Mexico under Chapter Eleven. *See* Procedural Order No. 4 (Aug. 3, 2000) at 3.

3. It is the United States' position that such a claim is not barred by the NAFTA, either by its express terms or by its reference to applicable rules of international law, including the rule limiting certain claims by dual nationals. Given the difference in meaning between "national" in the NAFTA and in international law, the United States uses the terms "citizen" and "citizenship" rather than "national" and "nationality" in its discussion of the applicable rules of international law.

4. The NAFTA provision that governs the question of a claimant's standing to bring a claim on behalf of an enterprise under Chapter Eleven states in relevant part that "[a]n investor of a Party, on behalf of an enterprise of another Party . . . may submit to arbitration under [Section B] a claim that the other Party has breached an obligation under . . . Section A. . . ." NAFTA art. 1117(1); *see also id.* art. 1116(1). Accordingly, Article 1117(1) *affirmatively grants* the right to submit a claim to arbitration to (1) an "investor of a Party," (2) on behalf of an "enterprise of another Party," (3) as to which such other Party breached an obligation under Section A.

5. Article 1139 of the NAFTA defines the term "investor of a Party" to include a natural person who is "a national . . . of such Party that seeks to make, is making or has made an investment." NAFTA art. 1139. Article 201 of the NAFTA defines the term "national" as "a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1." *Id.* art. 201. Read together, and by the ordinary meaning, these express terms of the NAFTA provide that a citizen or permanent resident of a Party (*e.g.*, the United States) "may submit" a claim to arbitration on behalf of an eligible enterprise of another Party (*e.g.*, Mexico) alleging such other Party breach a NAFTA obligation.

6. No provision in Chapter Eleven, or anywhere else in the NAFTA, restricts the right set forth under Article 1117 to a limited subset of "investors of a Party." In particular, no provision of Chapter Eleven *expressly prohibits* a natural person who is both a citizen of the United States and a permanent resident of Mexico from submitting claim against Mexico under Article 1117, where all the other conditions of that provision are also met¹. Thus, the NAFTA does not by its terms bar a claim against Mexico under Chapter Eleven by a natural person who is a citizen of the United States just because the natural person is also a permanent resident of Mexico.

7. The argument has been made that the claimant nevertheless lacks standing under rules of customary international law applicable to this case. The United States notes that the NAFTA does indeed direct the Tribunal to decide disputed issues not only in accordance with the treaty itself, but also in accordance with "applicable rules of

¹ Nor does the use of the phrase "investors of another Party" in Article 1101 or elsewhere in Section A indicate that a claim against Mexico by a permanent resident of Mexico who is also a citizen of the United States should be barred. Just as the term "investor of a Party" includes a person who is both a citizen of the United States and a permanent resident of Mexico, so does the term "investor of another Party." If a measure adopted or maintained by Mexico relates to a citizen of the United States, it relates no less to the citizen if he or she is also a permanent resident of Mexico.

international law.” NAFTA art. 1131(1). The United States, however, disagrees that any such rules bar this claim.

8. To begin, the United States accepts that the rule set forth in *United States ex rel. Mergé v. Italian Republic*, and adopted by *Iran v. United States, Case No. A/18*, provides a rule of decision that governs Chapter Eleven tribunals by virtue of Article 1131(1). *See Mergé Case* (Italian-U.S. Claims Commission) 14 R.I.A.A. 236 (1955); *Case No. A/18, : IRAN-U.S. CL. TRIBUNAL REP.* 251 (1984). This rule in effect states that the principle of “non-responsibility” must yield to the principle of “dominant and effective” citizenship when the claim is brought by or on behalf of a dual citizen whose “dominant and effective” citizenship is not that of the defending State. In other words, a State is not responsible for a claim asserted against it by one of its own citizens, unless the claimant is a dual citizen whose dominant and effective citizenship is that of the other State.

9. The rule only applies, however, to cases of “dual nationality” as understood under customary international law, *i.e.*, where a natural person has acquired the citizenship of two States. *See* 8 M. WHITEHEAD, *DIGEST OF INTERNATIONAL LAW* § 8, at 65 (1967) (“A person who is claimed as a subject or citizen by two states is said to possess dual nationality”). Thus, notwithstanding the use in NAFTA of the word “national” to include permanent residents, under customary international law, nationality is, in all respects relevant here, synonymous with citizenship and thus excludes mere permanent residents. *See* 11 OPPENHEIM *INTERNATIONAL LAW* § 293, 642-43 (8th ed. 1995) (“Nationality of an individual is his quality of being a subject of a certain State, and therefore its citizen.”). Furthermore, customary international law looks to a State’s municipal law to define who may be considered a citizen in any given situation. *See* WHITEHEAD § 7, at 48; OPPENHEIM § 293, at 643.² In this case, of course, there is no suggestion that the claimant has acquired Mexican citizenship under the municipal law of Mexico. Thus, the NAFTA’s choice of terminology does not mean that permanent residents of one Party are now to be considered “nationals” of that Party for purposes of customary international law generally.

10. Nothing in the NAFTA suggests that the Parties intended to alter the customary international law principle of non-responsibility. Therefore, pursuant to Article 1131(1), that principle must be applied with reference to the customary international law meaning of citizenship according to which the principle was developed, not with reference to the term “national” in the NAFTA. Accordingly, the non-responsibility principle does not apply to, let alone bar, a claim brought against Mexico under Chapter Eleven by a natural person who is both a citizen of the United States and a permanent resident (but not a

² See also Article I, CONVENTION ON CERTAIN QUESTIONS RELATING TO THE CONFLICT OF NATIONALITY LAWS, *done* at The Hague, April 12, 1930, 179 U.N.T.S. 89 (“It is for each State to determine under its own law who are its nationals. This law shall be recognised by States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.”).

citizen of Mexico, because such a person does not have the “dual nationality” required for the principle to operate.

11. It follows that the principle of dominant and effective citizenship is also inapplicable in this case. The application of this rule is limited to cases of “dual nationality” as understood under customary international law, because it applies to defeat the principle of non-responsibility of States for claims of certain dual citizens. *See Merg Case*, 14 R.I.A.A. at part V, para. 5; *Case A/18*, 5 IRAN-U.S. CL. TRIBUNAL REP. at 264-66. Likewise, even though the *Nottebohm Case* did not involve a dual citizen, its analysis of whether an espousing State’s ties to a purported citizen were sufficiently close to be cognizable in international law is inapposite where, as here, there is no dispute regarding the genuineness or international effect of the claimant’s claimed citizenship. *See generally Nottebohm Case (Liechtenstein v. Guatemala)*, 1955 I.C.J. 4, 21-26 (April 6) (Judgment).

12. In sum, the United States submits that, under applicable rules of international law a State Party to the NAFTA is not responsible for a claim asserted against it under Chapter Eleven by an investor of another Party possessing the nationality of both State Parties – as determined by each Party’s municipal law, not by Article 201 of the NAFTA unless such individual’s dominant and effective citizenship is that of the other Party. But where the claimant is not a citizen of the disputing Party, neither the NAFTA nor the principle of non-responsibility bars the claim, nor does the principle of dominant and effective citizenship apply.

MEANING OF “MAKE A CLAIM” UNDER ARTICLE 1117(2)

13. Included among the preliminary questions currently before the Tribunal is the question of the meaning of the words “make a claim” in Article 1117(2). *See* Procedura Order No. 4 at 2. That provision states that “[a]n investor may not make a claim . . . if more than three years have elapsed” since the enterprise first acquired knowledge of the alleged breach and consequent damages. NAFTA art. 1117(2).

14. It is the United States’ position that only the submission of a claim to arbitration and not the delivery of the notice of the intent to submit a claim to arbitration, effectuate the “making of a claim” for purposes of Article 1117(2). Thus, it is the act of submitting a claim to arbitration under Article 1120 that must fall within the three-year limitations period contained in Article 1117(2).

15. First, under the arguments raised here, the date by which investors must “make a claim” under Article 1117(2) can only be either the date an investor “submits” a claim to arbitration (as provided in Articles 1117(1) and 1120) or the date an investor “delivers” notice of intent (as provided in Article 1119). In the view of the United States, the text Chapter 11 leads to the conclusion that the date of submission was intended. The three-year limitation period is specified in Article 1117(2) – that is, the subparagraph

immediately following the subparagraph that establishes an investor's right to submit a claim to arbitration." By contrast, the obligation to deliver notice is mentioned in an entirely separate article, Article 1119. If the State Parties to the NAFTA had meant for the limitations period to apply to the notice required in Article 1119, and not the claim allowed in Article 1117(1), they would surely have put the provision fixing that limitations period in Article 1119, not two articles ahead. For the United States, these considerations of the textual context of the words "make a claim" in Article 1117(2) clearly show the limitations period runs to the date the claim is submitted to arbitration.

16. Moreover, Article 1117(3) in no way implies the opposite result. Although Article 1117(3) does distinguish between "make" and "submit," it does so in order to account for the particular status of the NAFTA under Mexican law. In Mexico, an investor of another Party may allege a breach of a Chapter 11 obligation "in proceedings before a Mexican court or administrative tribunal," and thereby be precluded from also submitting a claim under NAFTA Articles 1116 or 1117. *See* Annex 1120.1; *see also* NAFTA Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. 1 (1993) at 146 (attached hereto).⁴ Thus, where Mexico is the defending Party it is possible that an Article 1116 claim might be submitted to arbitration under the NAFTA, while an Article 1117 claim arising out of the same events might be submitted to a Mexican tribunal. Pursuant to Article 1117(3), those two claims could not be consolidated because they were not both "submitted to arbitration," even though each was "made" pursuant to the terms of either Article 1116 or 1117. This is the meaning behind Article 1117(3); it does nothing to undercut the conclusion that the limitations period in Article 1117(2) applies to the submission of a claim to arbitration under Article 1117(1).

17. Second, the United States' interpretation is consistent with the general purpose of a limitations period. The limitations period is designed to ensure that litigation be finite. If this Tribunal were to find that Article 1117(2) merely required a claimant to deliver the Article 1119 notice of intent within the three-year period, the very purpose of the limitations period would be defeated. Claimants would be free to wait indefinitely before commencing arbitration, as Article 1119 only requires a minimum, rather than a maximum, waiting period between the filing of a notice of intent and submitting a claim. *See* NAFTA art. 1119 (notice of intent must be submitted *at least* 90 days before the

⁴ Article 1116, the article permitting an investor to bring a claim on his own behalf, has the identical structure.

⁵ "Annex 1120.1 avoids subjecting the Mexican Government to possible 'double exposure' by providing that a claim cannot be *submitted* to Chapter Eleven arbitration where the same claim has been *made* before a Mexican court or administrative tribunal." SAA at 146 (emphasis supplied).

⁶ *In re: Republic of Argentina*, *at sit finis litium*. Redfern & Hunter, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 149 (1986); *see also id.* at 147 ("The generally accepted purpose of time limits is to ensure that claims are made whilst events are reasonably fresh in the minds of those concerned; and to provide 'some limit to the uncertainties and expense of arbitration and litigation.'") (citations omitted).

claim is submitted). Such an erroneous interpretation would deprive the State Parties of the requisite certainty with respect to the resolution of disputes under Chapter Eleven.

18 Finally, it is customary in international practice that arbitration be commenced within a given limitations period. See REDFERN & HUNTER, *supra* note 5, at 151 ("It must be remembered that in order to stop time running, arbitration proceedings must be commenced in accordance with the relevant law . . ."). In the NAFTA, it is clear that the delivery of the notice of intent does *not* commence arbitration and, indeed, must precede the commencement of arbitration by at least 90 days. See NAFTA art. 1119. Rather, arbitration commences when the claim has been submitted to arbitration. See, e.g., *id.* at 11-7(1)(b) (the claim is submitted to arbitration when the notice of arbitration "has been received by the Secretary General" of ICSID). Thus, it is the act of submission that must be accomplished within the limitations period.

Respectfully submitted,



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Attachment

THE NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT

STATEMENT OF ADMINISTRATIVE ACTION

This Statement of Administrative Action is submitted to the Congress in compliance with section 1103 of the Omnibus Trade and Competitiveness Act of 1988 ("1988 Act") and accompanies the implementing bill for the North American Free Trade Agreement ("NAFTA" or "Agreement"). The bill approves and makes statutory changes required or appropriate to implement the Agreement, which the President signed on December 17, 1992, on behalf of the United States under the authority of section 1102 of the 1988 Act.

This Statement describes significant administrative actions proposed to implement the NAFTA. In addition, incorporated into this Statement are two other statements required under section 1103: (1) an explanation of how the implementing bill and proposed administrative action will change or affect existing law; and (2) a statement setting forth the reasons why the implementing bill and proposed administrative action are necessary or appropriate to carry out the Agreement.

For ease of reference, this Statement generally follows the organization of the NAFTA, with the exception of grouping the general provisions of the Agreement (*i.e.*, Chapters One, Two and Twenty-Two of the Agreement) at the beginning of the discussion.

For each chapter of the NAFTA, the Statement first briefly summarizes the most important provisions of the Agreement. Next, the Statement describes the pertinent provisions of the implementing bill, explaining how the bill changes or affects existing law and stating why those provisions are required or appropriate to implement the NAFTA. Finally, the Statement describes the administrative action proposed to implement the particular chapter of the NAFTA, explaining how the proposed action changes existing administrative practice and stating why the changes are required or appropriate to implement the Agreement.

The Statement addresses certain provisions of Title V as well as Title VI of the implementing bill -- which make various changes in U.S. law that are appropriate (rather than required) to implement the NAFTA -- following the discussion of NAFTA Chapter Twenty-One.

It should be noted that this Statement does not, for the most part, discuss those many instances in which U.S. law or administrative practice will remain unchanged under the NAFTA. In many cases, U.S. laws and regulations are already in conformity with the obligations imposed by the Agreement. In other cases, U.S. laws and regulations are "grandfathered" (*i.e.*, exempted) from the obligations of the NAFTA. In addition, some provisions of the NAFTA impose obligations only on Canada or Mexico.

In a few instances where there have been frequent questions from the public or the Congress, the Statement notes examples of specific statutes, regulations or practices that do *not* have to be changed as a result of the Agreement. Because this Statement is designed to describe *changes* in U.S. laws and regulations proposed to implement the NAFTA, however, the Statement concentrates on those changes and generally does not attempt to enumerate instances in which no change in existing law or practice will be required.

Although the implementing bill is voluminous, a careful reading of this Statement makes clear that the NAFTA requires comparatively few significant changes in U.S. law or regulation. Much of the bulk of the legislation is taken up with amendments or additions to U.S. law -- such as Title VI, the "Customs Modernization Act," -- that the Administration, working with the Congress, considered to be desirable, rather than necessary, to implement the NAFTA. Other parts of the bill -- such those establishing NAFTA's "rules of origin" for goods -- set out certain parts of the NAFTA itself. Still other bill provisions, simply extend to Mexico treatment currently enjoyed by Canada under the United States - Canada Free-Trade Agreement Implementation Act of 1988.

Finally, references in this Statement to particular sections of U.S. statutes are based on those statutes in effect as of the date this Statement was submitted to the Congress.

investments, that otherwise qualify for coverage under the chapter, where the firms are owned or controlled by investors from a non-NAFTA country.

The article preserves the foreign policy prerogative of each government to deny benefits to firms owned or controlled by nationals of a non-NAFTA country with which it does not have diplomatic relations or to which it is applying economic sanctions.

It also permits each government to deny benefits to such firms if they have no substantial business activities in the NAFTA country where they are established. Thus shell companies could be denied benefits but not, for example, firms that maintain their central administration or principal place of business in the territory of, or have a real and continuous link with, the country where they are established. This provision requires the denying government to give prior notification, and to consult, in accordance with Articles 1803 and 2006.

(8) Environmental Measures

Article 1114 affirms that Chapter Eleven does not preclude a NAFTA government from adopting, maintaining or enforcing measures otherwise consistent with the chapter to ensure investment is consistent with its environmental protection goals. The article also provides that no government should waive or relax its environmental measures in order to attract or retain an investment. Derogations from this provision are subject to compulsory consultations if requested by a NAFTA government but are not subject to formal dispute settlement under Chapter 20. The Commission on Environmental Cooperation, created by the supplemental agreement on environmental cooperation, may assist in such consultations.

2. Section B - Investor - State Dispute Settlement

Section B of Chapter Eleven provides a mechanism for an investor to pursue a claim against a host government that it has breached its obligations under Section A. This mechanism is patterned after the investor-State dispute settlement mechanism of the standard U.S. bilateral investment treaty and permits an investor to submit its claim to binding arbitration under internationally-accepted rules.

a. Nature of Claims

Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by the investor. In both cases, investors may bring claims where the injury results from an alleged breach of Section A or of certain provisions governing the behavior of government monopolies in Chapter Fifteen.

All claims must be brought within three years. Article 1117(3) provides that if claims arising out of the same events are brought under both Articles 1116 and 1117, the claims should be heard together by a tribunal under Article 1126.

Article 1138(1) excludes from investor-State dispute settlement decisions to prohibit or limit investment on national security grounds. Read together with Annex 1138(2), Article 1138(2) also excludes from investor-State dispute settlement, and from government-to-government dispute settlement under Chapter Twenty, decisions taken by Canada or Mexico to prohibit or restrict an acquisition under their laws providing for screening of foreign investment.

b. Initiation of Dispute Settlement Proceedings

Article 1118 encourages the settlement of claims through consultation or negotiation. Articles 1119 and 1120 set forth the process leading up to the submission of a dispute to an arbitral panel.

Article 1119 provides that an investor must provide notice of its intention to submit a claim to arbitration at least 90 days before doing so, and specifies the content of such notice. Article 1120 provides that once six months have elapsed from the events giving rise to a claim, the investor may submit the claim for arbitration to:

- the International Centre for the Settlement of Investment Disputes (ICSID), provided both the country of the investor and the host country are parties to the ICSID Convention (neither Canada nor Mexico currently is);
- ICSID's "Additional Facility," in the event one such country is not a party to the Convention; or
- an *ad hoc* arbitral tribunal established under the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL).

Because the NAFTA will give rise to private rights of action under Mexican law, Annex 120.1 avoids subjecting the Mexican Government to possible "double exposure" by providing that a claim cannot be submitted to Chapter Eleven arbitration where the same claim has been made before a Mexican court or administrative tribunal.

Article 1137(1) describes the actions by which claims are considered to have been submitted to arbitration.