

CHILCOTT J.

DECISION

[1] This Application is for:

1. An order setting aside, in part, the award made by the Arbitration Tribunal ("the Tribunal") on December 16, 2002, in Ottawa, Ontario at the International Centre for Settlement of Investment Disputes (Additional Facilities). This was case No. ARB (AF)/99/1 between Marvin Roy Feldman Karpa ("Feldman" or "the Claimant") and the United Mexican States ("Mexico" or "the Applicant"). The arbitration arose under Chapter Eleven of the North American Free Trade Agreement ("NAFTA") pursuant to s. 34 of the *International Commercial Arbitration Act* R.S.O., 1990, c. I-9 ("ICAA").

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

[3] The grounds for the application are:

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

(b) the arbitral procedure adopted by the majority of the Tribunal was not in accordance with the agreement of the parties, contrary to Article 34(2)(a)(iv) of the Model Law, because it conflicted with the mandatory rules for the conduct of investor-State 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.

FACTS FROM THE AWARD

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

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

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

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

Intervener

DECISION

CHILCOTT J.

Released: December 3, 2003