OCTOBER 27, 1997

DECISION ON A REQUEST BY THE RESPONDENT FOR AN ORDER PROHIBITING THE CLAIMANT FROM REVEALING INFORMATION REGARDING ICSID CASE ARB/(AF)/97/1

1. On September 10 1997, the Respondent, the Government of Mexico, requested the Tribunal to issue a formal order declaring that the proceedings are confidential and that breach of such order would permit the Respondent to request the Tribunal to enforce sanctions. The request was expressed as being made pursuant to Article 1134 of the NAFTA and Article 28 of the ICSID Additional Facility Rules. The Respondent's request was communicated to the Claimant for comment and comments were sent to the Tribunal on October 9, 1997.

2. The Respondent complains, first, of a telephone conference call conducted on August 19 1997, by the Chief Executive Officer (C.E.O) of the Claimant which (to use the Respondent's description) "apparently was intended to provide information to shareholders, investment analysts, and other members of the public, who are interested in the Claimants' activities" The C.E.O. first described the formal procedural steps involved in the case and then went on to discuss the content and possible effect of certain newspaper articles, as well as the possibility of a settlement and its terms. The Respondent also complains of what it describes as "a publicity campaign by the Claimant"; of a suggestion, as the Respondent sees it, by the Claimant that steps may be taken under the law of one of the NAFTA Parties to obtain the record of the proceedings; and, finally, of what the Respondent sees as a

serious question as to the Claimants' motives in invoking the NAFTA Chapter Eleven dispute settlement procedure.

3. The Respondent invokes in support of its application certain remarks made by the President of the Tribunal in the course of the first procedural session held on 15 July 1997 which the Respondent interprets as declaring the existence of a general principle of confidentiality of the proceedings. The remarks in question, as transcribed from the tape recording of the session, were as follows:

> "So we come to item 7, Records of Hearings, which is governed by the Arbitration Rules, Article Forty-four. And that Article provides that the Secretariat shall keep minutes of hearings and specifies what is expected. It requires the minutes to be signed by myself and the Secretary General, and I note the point that they shall not be published without the consent of the parties. On this point of, if I can put it this way, confidentiality of the proceedings, it is one which is to be borne in mind by all concerned. And then, in the third paragraph of Article Forty-four, it provides that the Tribunal may, and at the request of a party shall, order that the hearings be more fully recorded, in which event certain items may be omitted from the minutes. Now, the current proceedings of today are being fully recorded and, therefore, to that extent the minutes can be abbreviated. But again, I think that there's nothing for us to do except to note that point".

4. The Tribunal considers that the reference in the Minutes to the "confidentiality of the proceedings" cannot by itself be taken as expressing a general requirement that the Parties refrain entirely from every public utterance mentioning the existence, or speculating upon the possible outcome, of the proceedings. Read in their context, the words used by the President, " the confidentiality of the proceedings", are no more than a paraphrase of the words immediately preceding them, namely, that the minutes of the hearing "shall not be published without the consent of the parties". The prohibition must be read as one upon the publication of the contents of any particular minute, except in so far as the minute is merely a restatement of a point

already covered by the content of a public document e.g. the NAFTA itself or the Arbitration (Additional Facility) Rules.

5. Accordingly, the Claimant's mention of the specific time-limits established by the Tribunal for the exchange of written pleadings and for certain subsequent action was not made in accordance with the Rules. However, this departure from the Rules does not appear to the Tribunal to be of major significance. Though as a matter of principle regrettable, it appears, in the circumstances to be de minimis. The Tribunal will disregard it, but expresses the hope that no other departures from the Rules will occur.

6. As to the other matters to which the Respondent refers, the Tribunal finds that none of them involve a publication of any aspect of the minutes.

7. The Tribunal notes, however, that the Respondent states that its request is made pursuant to Article 1134 of the NAFTA as well as Article 28 of the ICSID Additional Facility Rules. The former provision empowers the Tribunal to order interim measures of protection to preserve the rights of a disputing party or to ensure that the Tribunal's jurisdiction is made fully effective. The latter provision only prescribes that the Tribunal shall make the orders required for the conduct of the hearing. The complaint does not invoke Article 47 of the Additional Facility Rules which deals with provisional measures of protection. Even so, the reference to Article 1134 of NAFTA is sufficient to oblige the Tribunal to consider whether the situation is one requiring an order for provisional measures of protection.

8. In order to succeed in a request for provisional measures an applicant party must demonstrate that the measures are urgently required in order to protect its rights from an injury that cannot be made good by the subsequent

payment of damages. The applicant party here (the Respondent) has in fact alleged that for certain reasons the Claimants' activities "affect the integrity of the process, undermine the Tribunal's jurisdiction and prejudice the Respondents' rights". The Tribunal recalls in this connection the statement made by the Tribunal in the Amco v Indonesia case to the effect that Article 47 of the ICSID Convention "requires that the party that solicits a provisional measure to specify the rights that such measure would be purported to preserve. Obviously, the rights to which this provision is relating are the rights in the dispute, and no such rights could be threatened by the publication of articles like those which are produced by both parties". (See 1 ICISID Reports 410, 411). Though the present case is being conducted under the NAFTA dispute settlement procedures and within ICSID Additional Facility and not under the ICSID Convention, the reasoning applicable to Article 47 of the latter is no less applicable to the wording of Article 1134 of the NAFTA. The Tribunal can find nothing in the Respondent's statement of reasons to support the claim that its rights have suffered prejudice, let alone serious or irreversible damage.

9. There remains nonetheless a question as to whether there exists any general principle of confidentiality that would operate to prohibit public discussion of the arbitration proceedings by either party. Neither the NAFTA nor the ICSID (Additional Facility) Rules contain any express restriction on the freedom of the parties in this respect. Though it is frequently said that one of the reasons for recourse to arbitration is to avoid publicity, unless the agreement between the parties incorporates such a limitation, each of them is still free to speak publicly of the arbitration. It may be observed that no such limitation is written into such major arbitral texts as the UNCITRAL Rules or the draft Articles on Arbitration adopted by the International Law Commission. Indeed, as has been pointed out by the Claimant in its

comments, under United States security laws, the Claimant, as a public company traded on a public stock exchange in the United States, is under a positive duty to provide certain information about its activities to its shareholders, especially regarding its involvement in a process the outcome of which could perhaps significantly affect its share value.

10. The above having been said, it still appears to the Tribunal that it would be of advantage to the orderly unfolding of the arbitral process and conducive to the maintenance of working relations between the Parties if during the proceedings they were both to limit public discussion of the case to a minimum, subject only to any externally imposed obligation of disclosure by which either of them may be legally bound.