ICSID Case No. ARB(AF)/04/01

International Centre for Settlement of Investment Disputes
(Additional Facility)

CORN PRODUCTS INTERNATIONAL, INC.
Claimant

and

THE UNITED MEXICAN STATES
Respondent

DECISION ON RESPONSIBILITY

Before the Arbitral Tribunal constituted under Chapter Eleven of the North American Free Trade Agreement (NAFTA), and comprised of:

Professor Andreas F. Lowenfeld
Licenciado Jesús Alfonso Serrano de la Vega
Professor Christopher J. Greenwood (President)

Secretary of the Tribunal
Mr. Gonzalo Flores

Date: 15 January 2008

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DECISION

I. Summary of the Case

1. This case concerns a claim brought by Corn Products International, Inc. ("CPI"), a corporation incorporated in Delaware and thus a United States company for the purposes of the North American Free Trade Agreement ("the NAFTA"), against the United Mexican States ("Mexico"). The claim is for alleged violations of Chapter XI of the NAFTA and is brought pursuant to Article 2 of the Arbitration (Additional Facility) Rules of the International Centre for the Settlement of Investment Disputes ("ICSID"). The principal steps in the proceedings are recounted in **Part II** of the Decision.

2. CPI is a major manufacturer of High Fructose Corn Syrup ("HFCS"), a sweetener made from yellow corn and used, *inter alia*, as a sweetener in soft drinks. Following the entry into force of the NAFTA, CPI, through its wholly owned subsidiary, a Mexican company now known as Corn Products Ingredientes ("CPIng"), engaged in the large scale production of HFCS in Mexico, most of which was supplied to the Mexican soft drinks industry, where it competed with sweeteners made from cane sugar.

3. In December 2001 the Mexican Federal Congress adopted legislation amending the provisions for the Impuesto Especial Sobre Producción y Servicios ("IEPS"), an excise tax. The effect was to impose a tax of 20% on any drink which used a sweetener not made from cane sugar. The factual

background to the case is summarised in greater detail in **Part III** of the Decision.

4. CPI claimed that the effect of the tax was immediately to cause those soft drink bottlers which were its customers to switch from HFCS to sugar cane sweeteners, thereby destroying its market. It was obliged to close one of its plants and significantly to reduce its overall production in Mexico, although sales recovered in 2004 [redacted] The tax (to which the Tribunal will refer for convenience as the "HFCS tax") was repealed in December 2006 with effect from 1 January 2007.

5. CPI commenced proceedings under Chapter XI of the NAFTA, claiming that Mexico's action in imposing the tax violated the following provisions of the NAFTA:-

   Article 1102, which requires each State Party to the NAFTA to accord to investors of another State Party and their investments treatment no less favourable than that which it accords to its own investors and their investments. CPI maintained that cane sugar producers and HFCS producers were in like circumstances and that the tax was designed to favour the predominantly Mexican-owned sugar producers at the expense of the HFCS producers who were foreign-owned;

   Article 1106, which deals with performance requirements. CPI maintained that the effect of the tax was to condition the receipt of an advantage – exemption from paying the tax – on the use of Mexican produced cane sugar;

Article 1110, on the ground that the tax was a measure tantamount to expropriation of CPI's investment.

6. Mexico maintained that the HFCS tax was a countermeasure taken in response to prior violation of the NAFTA by the United States of America. Mexico submitted that the United States restricted exports of Mexican sugar to the United States in violation of the transitional provisions in the NAFTA for sugar exports and blocked the operation of the inter-State dispute settlement mechanism under Chapter XX of the NAFTA, with the result that Mexico was unable to obtain a ruling under Chapter XX regarding the incompatibility of the United States measures with its NAFTA obligations. Mexico contended that, in accordance with the principles of international law regarding State responsibility, the status of the HFCS tax as a countermeasure precluded its wrongfulness vis-à-vis the United States and that CPI, as an investor of United States nationality, could not enjoy rights under the NAFTA greater than those of the United States.

7. While Mexico thus argued that the status of the HFCS tax as a countermeasure was a complete defence to CPI's claims, it also contended that, quite apart from the issue of countermeasures, CPI had failed to establish a breach of any of the Chapter XI provisions on which it relied. The Parties' submissions are reviewed in greater detail in **Part IV** of the Decision.

8. The Tribunal considers that the questions whether the HFCS tax was a countermeasure and whether, if so, that provides an answer to CPI's claims arise only if the Tribunal first finds that, in the absence of a countermeasures defence, CPI would succeed under one or more of the three provisions on which it relies (see **Part V** of the Decision). Accordingly, the Decision first considers whether – setting aside the issue of countermeasures – CPI would succeed under Articles 1106, 1110 or 1102.

9. In **Part VI**, the Tribunal examines the claim under Article 1106 and concludes that CPI has failed to establish that the HFCS tax falls within either Article 1106(1) or (3). In the Tribunal's view, the HFCS tax is not a performance requirement and cannot give rise to liability under Article 1106.

10. In **Part VII** of the Decision, the Tribunal examines the expropriation claim under Article 1110. The Tribunal considers that CPI has failed to make out its claim under this provision. While it accepts that the imposition of the HFCS tax caused CPI losses during the period 2002-2004, it does not consider that the imposition of the tax rose to the level of an expropriation or a measure tantamount to an expropriation within the meaning of Article 1110.

11. The Tribunal then turns, in **Part VIII** of the Decision, to the claim under Article 1102. It concludes that Mexico failed to accord CPI, and its investment, treatment no less favourable than that it accorded to its own investors in like circumstances, namely the Mexican sugar producers who were competing for the market in sweeteners for soft drinks. Accordingly,

unless Mexico can succeed in its countermeasures argument, there has been a violation of Article 1102.

12. Whether Mexico can succeed in its countermeasures defence is considered in **Part IX** of the Decision. For the reasons there given the Tribunal has concluded that this defence fails. The Tribunal considers that, even if the doctrine of countermeasures can operate so as to exclude the wrongfulness of an act as between the States party to the NAFTA (on which the Tribunal expresses no opinion), it does not have this effect in Chapter XI proceedings where the claimant is an investor.

13. Accordingly, the Tribunal concludes (at **Part X** of the Decision) that Mexico has violated Article 1102 of the NAFTA. The amount of compensation due in respect of this violation will be considered in the next phase of the proceedings. CPI's other claims, under NAFTA Articles 1106 and 1110, are dismissed. The decision of the Tribunal is unanimous but Professor Lowenfeld appends a Separate Opinion regarding the reasoning of the Tribunal with respect to the issue of countermeasures.

14. The Tribunal wishes to express its gratitude to the Parties and their counsel for the very thorough submissions made on all aspects of the claim. The Tribunal has found them very helpful.

II. The Proceedings

15. The Claimant in the present case, Corn Products International, Inc. ("CPI"), is a corporation organized under the laws of the State of Delaware. The Respondent is the United Mexican States ("Mexico"). On 28 January 2003, CPI served on Mexico a Notice of Intent in which it stated its intention of commencing proceedings under Chapter XI of the North American Free Trade Agreement ("NAFTA"). On 21 October 2003, CPI delivered to the International Centre for the Settlement of Investment Disputes a Request for Arbitration under the ICSID Additional Facility Rules. The case was registered on 26 January 2004.

16. In accordance with Article 1123 of NAFTA and Article 6 of the Rules, the parties proceeded to constitute the Tribunal. CPI appointed Professor Andreas Lowenfeld, a United States national. Mexico appointed Licenciado Manuel Tron, a Mexican national. The Secretary-General, following consultations with the parties, appointed Professor Christopher Greenwood, CMG, QC, a British national, as President of the Tribunal. The Tribunal was constituted on 28 April 2004. On 3 May 2004 Licenciado Manuel Tron resigned from the Tribunal. In accordance with Article 14(3) of the ICSID Additional Facility Arbitration Rules ("the Rules"), the remaining members of the Tribunal considered his resignation and consented thereto. That consent was recorded in Procedural Order No. 1. On 17 June 2004, Mexico appointed Licenciado Jesús Alfonso Serrano de la Vega to fill the resulting vacancy in accordance with Article 17 of the Rules. The Tribunal was

reconstituted on 13 July 2004. Mr Gonzalo Flores, Senior Counsel, ICSID, was appointed Secretary of the Tribunal.

17. The parties agreed that the seat of the arbitration would be the City of Toronto, in Ontario, Canada, but that the hearings might be arranged for other locations if that were considered convenient.

18. By a letter of 8 September 2004, addressed to the Secretary-General of ICSID, Mexico requested the establishment of a consolidation tribunal under Article 1126 of NAFTA to consider the consolidation of the CPI claim with one filed by Archer Daniels Midland Co. and Tate and Lyle Ingredients Americas, Inc. (then A.E. Staley Manufacturing Co.) ("the ADM/Staley case"). In a letter of the same date to the Tribunal, Mexico requested the suspension of the present proceedings pending the decision of the consolidation tribunal.

19. The first session of the Tribunal was held in London, United Kingdom, on 16 September 2004. At that session, the Tribunal heard counsel for both parties on the application for a suspension. The Tribunal dealt with that application in its Procedural Order No. 2, the relevant parts of which are as follows:-

> "4. If a tribunal is established under Article 1126, and if that tribunal decides that the present case and the ADM/Staley case have a question of law or fact in common, then, under Article 1126(2) of NAFTA, that tribunal may decide that it would be "in the interests of fair and efficient resolution" of the two claims for them to be heard together. In that event, Article 1126(2) empowers that tribunal to assume jurisdiction over the two cases in whole or in part. By contrast, the present Tribunal has no power to decide whether or not the two cases

should be consolidated and, indeed, has no jurisdiction over the ADM/Staley case.

5. NAFTA Article 1126(8) provides that -

> "A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction."

Accordingly, if an Article 1126 tribunal assumes jurisdiction over the present case, then the jurisdiction of the present Tribunal will come to an end in respect of such part or parts of the claim over which the Article 1126 tribunal assumes jurisdiction.

6. The Tribunal notes that the ADM/Staley case has not yet been registered by the Center and that no tribunal has, as yet, been established under Article 1126. Accordingly, the Tribunal remains seised of the present case and, subject to any jurisdictional objection which may subsequently be raised by Mexico, has jurisdiction over it. Nothing in Article 1126, or in any other provision of NAFTA or the ICSID Additional Facility Arbitration Rules, requires the Tribunal to suspend proceedings in such a situation.

7. The Tribunal considers, however, that, while it has no duty to suspend the present proceedings, it has a discretion to do so. The existence of such a discretion appears to be implicit in Article 1126(9) of NAFTA, which provides that -

> "On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 2, may order that the proceedings of a Tribunal established under Article 1120 be stayed, *unless the latter Tribunal has already adjourned its proceedings.*" (Emphasis added)

The Tribunal has therefore treated the request by Mexico as an application that the Tribunal use its discretion to suspend the proceedings pending a decision of an Article 1126 tribunal.

8. The Tribunal considers that the two principles by which it should be guided in the exercise of its discretion are (a) the efficient conduct of the proceedings and (b) fairness to both disputing parties.

9. With regard to the first principle, if an Article 1126 tribunal should assume jurisdiction over the present case, even only in part, it may well wish to fix an entirely fresh schedule for submissions and there is a

danger that work done by the parties in preparing submissions for the present Tribunal may have to be duplicated. On the other hand, the Tribunal is concerned that the present claim was filed as long ago as October 2003. The Tribunal, while not at this stage seeking to inquire into the causes, is concerned by the fact that such a long period has elapsed since the claim was filed. If a tribunal is not established under Article 1126, or if such a tribunal is established but then decides not to assume jurisdiction over the present case, then if this Tribunal has suspended its proceedings, there will be a further delay – perhaps of several months – before a pleading schedule is even determined. The uncertainty regarding Mexico's application to the Center is enhanced by the fact that no Article 1126 tribunal exists as yet and, indeed, that the ADM/Staley case has not even been registered.

10. With regard to the duty of fairness to the parties, the Tribunal was impressed by the submissions of counsel for Mexico, which is, of course, party to both this case and ADM/Staley, that it should not be put in the position of having to conduct proceedings both before this Tribunal and before an Article 1126 tribunal and that it should not be required to expend time and money in preparing written submissions for this Tribunal when the Article 1126 tribunal may in due course assume jurisdiction and therefore put an end (at least for the time being) to these proceedings. On the other hand, the Claimant has already had to endure a considerable delay in the proceedings and its counsel has urged that further delay will prejudice it.

11. The Tribunal notes that it is the Claimant who will have to prepare the first written submissions, the Memorial. In view of the likely time scale for the establishment of an Article 1126 tribunal and the consideration by such a tribunal of whether or not to assume jurisdiction over the present case, if the deadline for the filing of the Memorial is set at a date early in 2005, it is probable that an Article 1126 tribunal, if one is convened, will have reached a decision on the question of consolidation before the Memorial has to be filed. While it remains the case that, if such a tribunal decides to consolidate the two cases and to assume jurisdiction over the present claim shortly before the Claimant is due to deposit its Memorial, the Claimant will have to halt in its tracks and prepare written submissions in accordance with whatever new timetable is determined by the Article 1126 tribunal, it is unlikely that that would cause any real prejudice to the Claimant. As the Claimant's counsel has explained, the Claimant would be obliged to do the work involved in preparing a Memorial in any event. Moreover, if there is any prejudice it would be to the Claimant and the Claimant has stated that it is prepared to take that risk.

> 12. Fixing a pleading schedule which involved the filing of the Memorial early in 2005 would involve no unfairness to Mexico, since it is probable that an Article 1126 tribunal would have taken a decision on consolidation before Mexico had to begin work on its Counter-Memorial. Nevertheless, in the event that the position regarding consolidation remained unclear by the time the deadline for the Claimant to file its Memorial approached, the Tribunal would be perfectly willing to hear an application from either party to vary the timetable. The Tribunal also notes that Article 1126(9) authorizes an Article 1126 tribunal to order suspension of our proceedings."

20. The Tribunal also decided, with the agreement of the parties, that the proceedings would consist of two rounds of written pleadings and an oral phase, addressed to the question of responsibility, with the issue of damages deferred until after the Tribunal had rendered a decision on responsibility.

21. The consolidation tribunal decided on 20 May 2005 not to order consolidation of the present case with the ADM/Staley case.

22. CPI deposited its Memorial on 11 April 2005. Mexico filed its Counter-memorial on 15 September 2005. CPI deposited its Reply on 26 October 2005 and Mexico its Rejoinder on 12 December 2005.

23. On 17 March 2006, CPI asked the Tribunal to reconsider the decision to bifurcate the proceedings. That application was refused by Procedural Order No. 5.

24. Oral hearings were held on 10-13 July 2006 at the seat of the Centre in Washington, DC. The parties were represented as follows:

Claimant

Ms Lucinda Low

Mr Jeffrey Pryce

Mr José Ramón González Magaz,

Mr Owen Bonheimer

Mr Sergio Puig

Ms Megan Ihrie, all of Steptoe and Johnson LLP;

Ms Mary Ann Hynes, of CPI

Ms Christine Castellano, of CPI, and

Ms María del Carmen Portilla Pons, of CPIngredientes.

Respondent

Mr Hugo Perezcano Díaz, of the Secretaría de Economía

Mr Salvador Behar

Ms Laura Martínez, both of the Embassy of Mexico to the United States

Mr Stephan E. Becker

Mr Sanjay Mullick, both of Pillsbury, Winthrop, Shaw and Pittman LLP

Mr J. Christopher Thomas, QC

Mr J. Cameron Mowatt

Mr Alejandro Barragán

Ms Celeste Mowatt, all of Thomas and Partners, and

Professor James Crawford, SC, of Matrix Chambers.

25. The Members of the Tribunal were assisted, with the agreement of the parties, by Mrs Jessica Wells, Barrister-at-Law, of Essex Court Chambers, who attended the hearing. Mrs Wells gave the same undertaking as to confidentiality as the Members of the Tribunal.

III. The Facts

26. High Fructose Corn Syrup ("HFCS") is one of the products of refined corn. It is produced by the wet milling of corn so as to produce a slurry starch which is then refined to produce a number of end products of which HFCS is one. While the refining process has existed for a long time, HFCS is a comparatively recent product. HFCS is used primarily as a sweetener in the food and beverages industry, where it competes directly with sweeteners made from sugar. There are two principal concentrations of HFCS produced for use as a sweetener in food and beverages: HFCS grade 55 ("HFCS 55"), which contains 55% fructose and has a sweetness level equivalent to that of sugar, and HFCS grade 42 ("HFCS 42"), which contains 42% fructose. HFCS 55 is used principally in the soft drinks industry. By the mid-1980's HFCS had become the sweetener most commonly used in soft drinks in the United States and Canada, gaining a competitive advantage over sugar both because it was generally cheaper and because it was supplied in liquid form and was therefore more convenient to use.

27. By the start of the 1990's, Corn Products International, Inc. ("CPI") had long been a major producer of HFCS and supplier to the soft drinks industry in the

United States. It also owned facilities in Mexico through its subsidiary, currently known as CP Ingredientes ("CPIng"). In 1993-94 CPI formed a joint venture with a Mexican company, Arancia, to produce HFCS in Mexico with the intention of competing with sugar for the soft drink sweeteners market in Mexico. The Mexican Government made a commitment in writing guaranteeing access to duty-free imported yellow corn for the purpose of producing HFCS in April 1994. The joint venture was to produce HFCS in Mexico. A key part of the intended market was to be sales of sweeteners to the Mexican soft drinks industry which had previously used sweeteners made from sugar.

28. The joint venture embarked upon what it described as the "Colibrí Project" to establish a substantial HFCS production facility in Mexico. In the first phase of that project, in 1995-97, CPI made a substantial investment in establishing HFCS production facilities at the San Juan del Rio plant ("SJR") already owned by CPIng. The new facilities were designed to operate on a continuous basis and to produce some [redacted] tons of HFCS a day. Production began in late 1996 and the plant was formally inaugurated by the then President of Mexico, Ernesto Zedillo, in May 1997. In 1997 [redacted] a major prospective customer, certified that the plant met its quality standards. Production capacity was increased at the end of 1997. HFCS produced at the plant became a major source of sweeteners for the Mexican soft drinks industry.

29. In 1998 CPI agreed to buy out the Aranguren family, the owners of Arancia. [redacted]

30. By 2001 CPI claimed to have acquired approximately [redacted] of the sweeteners market for soft drinks in Mexico, with sugar sweeteners accounting for [redacted] and the remainder being held by other HFCS suppliers. CPI's evidence gives the total production of HFCS by CPIng in Mexico in 2001 as [redacted] tons.

31. At the same time as HFCS was displacing sugar from a significant part of the market for soft drinks sweeteners, the Mexican sugar industry was engaged in a dispute with the United States over access to the United States sugar market.

32. In the early 1990's Mexico consumed more sugar than it produced but, following extensive restructuring of the industry as part of economic reforms introduced by the Mexican Government, sugar production was rising and, by the time that NAFTA was being negotiated, the Mexican Government considered that the deficit would soon disappear and Mexico would have a sugar surplus for which export markets would be needed. It therefore negotiated for access to the United States market. At all relevant times the price for sugar in both the United States and Mexico was substantially higher than the world market price.

33. The United States Government was not prepared to open its market to Mexican sugar imports with immediate effect but was prepared to concede access for surplus production under transitional arrangements, incorporated into the NAFTA, which would operate until 31 December 2007. There was, however, a difference between the two governments as to how the existence and size of any surplus was to be determined. In particular, the two governments differed over how the effect of HFCS displacement of sugar from part of its traditional market in Mexico was to be taken into account.

34. That issue was the subject of an exchange of letters attached to the NAFTA ("the side-letters"). There has, however, been a difference between the two governments over which text of these side-letters was finally agreed. This Tribunal has no jurisdiction to resolve that question, nor has it any need to do so. For present purposes it is sufficient to note, by way of background to the dispute between CPI and Mexico which is before this Tribunal, that between 1997 and 2006 the United States Government admitted to its market a smaller quantity of Mexican sugar than the Mexican Government and Mexican sugar producers maintained should have been admitted in accordance with the terms of NAFTA and the side-letters.

35. The result was that during the 1990's Mexico moved to a position in which it had a surplus of sugar which, in most years, it was unable to export to the United States (the only other potentially available market in which prices were so far in excess of the world market price). Moreover, sugar's share of

the market for soft drinks sweeteners in Mexico had fallen because of competition from HFCS.

36. There was considerable economic hardship in the Mexican sugar industry at that time. Approximately two million people were working in the sugar industry in Mexico and the economic situation led to a number of bankruptcies, unemployment and falling prices paid to sugarcane growers. One consequence was a restructuring within the industry which included the expropriation of a number of sugar mills which the Government considered to be in financial difficulties.[1]

37. The Government of Mexico complained to the United States Government that the latter was restricting access for surplus Mexican sugar to the United States market in breach of its obligations under NAFTA and the side-letters. The United States denied that its actions constituted a violation of those obligations.

38. The Mexican Government therefore invoked the machinery for settlement of disputes in Chapter XX of NAFTA. In March 1998 Mexico requested consultations under Article 2006. The consultations were held but did not resolve the issue. Mexico then requested a meeting of the Free Trade Commission established by NAFTA. That also did not achieve a resolution of the differences between Mexico and the United States regarding sugar

[1] This restructuring gave rise to claims under NAFTA Chapter XI; see *GAMI v. Mexico*, award of 15 November 2004, discussed at paras. 131-132 and 140, below.

access. In August 2000 Mexico requested the establishment of an arbitral tribunal under Article 2008 of NAFTA.

39. No tribunal was established. Why that was so is the subject of a controversy between the United States and Mexico over which this Tribunal has no jurisdiction. Suffice it to say that Mexico maintained that the United States effectively frustrated the operation of the Chapter XX mechanism, thereby contravening that part of NAFTA. The United States has denied that it acted contrary to its obligations under Chapter XX.

40. In December 2001 the Federal Congress in Mexico enacted legislation amending the Impuesto Especial Sobre Producción y Servicios ("IEPS"), an excise tax. These amendments required bottlers of soft drinks to pay a tax of 20% on the full price of each drink. The tax was also payable on each increase in price when the soft drink was transferred in the chain of distribution to the retailer. There was, however, an exemption from the tax if the soft drink was manufactured using sweeteners made exclusively from cane sugar. The result was that the new tax (referred to throughout the present proceedings and in this Decision as "the HFCS tax") was effectively payable only on soft drinks made using HFCS.[2] It was irrelevant whether the HFCS was produced in Mexico or imported as the HFCS tax applied whenever HFCS was used as a sweetener in soft drinks.

[2] It would also have been payable on soft drinks made using sweeteners made from sugar beet or other sources apart from cane sugar but there was no evidence before the Tribunal of any significant use of such sweeteners by Mexican soft drink bottlers.

41. The imposition of the HFCS tax was the result of initiatives within the Federal Congress and not a proposal from the Executive Branch. The record demonstrates that the Executive was opposed to the imposition of the tax. Nevertheless, the Mexican Government maintained that the HFCS tax was imposed by Mexico as a countermeasure in response to the alleged failures of the United States to honour its NAFTA obligations concerning the sugar access dispute and that it was notified to the United States as such.

42. That explanation was not accepted by CPI which maintained that the motive for the imposition of the HFCS tax was protectionist, that the tax raised no revenue because it could be avoided by switching from HFCS to sugar cane sweeteners and that the purpose was to protect the Mexican sugar industry by encouraging increased consumption of sugar. CPI quoted a number of statements by Members of the Federal Congress who supported the imposition of the tax which, CPI contended, showed the protectionist intent behind the tax.

43. The HFCS tax was imposed with effect from 1 January 2002. However, it was suspended by the Executive on 5 March 2002. The decision of the Executive was challenged by the Congress before the Supreme Court which ruled, in July 2002, that the Executive had no authority to suspend the tax and ordered its reimposition.

44. Although the HFCS tax was payable not by CPIng but by the soft drinks bottlers, there was an immediate effect upon CPIng, because the bottlers

could – and did – avoid paying the tax by switching from HFCS to cane sugar sweeteners. According to CPI, as soon as the HFCS tax was imposed, orders for HFCS from its soft drinks customers dried up. On [redacted] CPIng was forced to shut down HFCS 55 production at one plant. During 2002 production declined significantly. In 2003 and 2004 HFCS 55 production was impaired and at times stopped completely. [redacted]

45. CPIng endeavoured to challenge the HFCS tax before the Mexican courts but its challenges were rejected on the ground that it lacked standing, since the tax was paid not by CPIng but by the soft drinks bottlers.[3] Some of those bottlers did bring proceedings of their own and in 2004 there was an increase in orders for HFCS [redacted] leading to a significant recovery in sales.

46. The parties disagree as to the extent of the losses caused to CPI and CPIng by the HFCS tax. It was not denied that the initial effect was a significant reduction in orders leading to production cuts. Mexico alleged, however, that CPIng was able to make up for part of that loss by switching production to meet demand from other HFCS markets, [redacted]

[3] Decision of the Supreme Court of 25 August 2004 in *Amparo en Revisión* 756/2004, *Arancia-Corn Products SA de CV*, Exhibit C143.

[redacted] CPI denied that its attempts to mitigate its loss by finding alternative markets had had such substantial effects and contended that the recovery in production occurred later than Mexico had alleged. In view of the Tribunal's decision (set out below) on the need for a second phase of proceedings to determine quantum issues, the Tribunal makes no findings on these issues at this stage.

47. On 7 October 2005 a Panel of the World Trade Organization ("WTO") held that the HFCS tax contravened Article III of the General Agreement on Tariffs and Trade, 1994 ("GATT") and was not justified under Article XX(d) of the GATT. The Panel considered that HFCS and sugar sweeteners were "like products" for the purposes of Article III of GATT and that the tax was clearly designed to favour sugar sweeteners at the expense of HFCS. On 6 March 2006, the Appellate Body of the WTO issued a Report (*Mexico – Tax Measures on "Soft Drinks" and Other Beverages*, WT/DS308/AB/R) upholding the Panel's conclusions that the HFCS tax was contrary to Article III and that Mexico had not established that it was justified under Article XX. The Parties to the present proceedings differed regarding the significance of the WTO decisions.

48. The HFCS tax was finally repealed in 2006 following an agreement between the United States and Mexico concerning access for Mexican sugar to United States markets during the remainder of the transitional period.

IV. The Positions of the Parties

49. This Part of the Decision summarises the principal arguments of the Parties. Some aspects of these arguments are addressed in greater detail in **Parts VI to IX**, below.

A. The Claimant

50. The Claimant, CPI, claimed on its own behalf as an investor of the United States within Article 1116 of the NAFTA. It also claimed, under Article 1117, on behalf of its wholly owned subsidiary, CPIng, which is incorporated in Mexico, and which is "an enterprise of another Party that is a juridical person that the investor controls directly or indirectly" (Article 1117(1)). The investment to which the claim under Articles 1102 and 1106 relates was said to be CPIng itself. With regard to the Article 1110 claim, however, CPI's Memorial maintained that the relevant investment was the property CPI held, indirectly through CPIng, relating to its HFCS production and supply business. CPI's identification of the relevant investment for the purposes of the Article 1110 claim underwent some refinement during the course of the oral and written pleadings, as explained in **Part VII**, below.

51. CPI maintained that the HFCS tax was not, in reality, a tax at all. It claimed that it was openly acknowledged by Mexico that the HFCS tax would not raise significant, or any, revenue, because a bottler could avoid payment of the tax by switching from HFCS to sugar cane sweeteners and that the purpose of the tax was to put pressure on the bottlers to do precisely that. It

was therefore irrelevant that the tax was not levied on CPI or the other producers/suppliers of sweeteners but on the bottlers of soft drinks. The effect of the tax – both in intention and in the event – was to close off access for HFCS to the soft drinks market as the soft drinks bottlers switched *en masse* to the use of the untaxed cane sugar for use as a sweetener.

52. CPI's first claim was under Article 1102 of the NAFTA. CPI relied on paragraphs 1 and 2 of that Article, which provide as follows:-

> **"Article 1102: National Treatment**
>
> 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

53. CPI maintained that a producer of HFCS for the Mexican soft drinks market was in like circumstances (for the purposes of Article 1102(1)) to a sugar producer which was also seeking to supply to the same market. Likewise, it argued that its investment was in like circumstances (for the purposes of Article 1102(2)) to those of the sugar producers. While the Mexican sugar industry was predominantly owned by Mexican nationals (including the Mexican State), CPIng and the only other manufacturer of HFCS in Mexico were both foreign owned.

54. CPI relied heavily on what might be called a "competitive market analysis". It noted that HFCS and sugar were in direct competition – indeed, were treated as interchangeable – in the market for soft drink sweeteners. It derived support from the decisions of the WTO Panel and Appellate Body that HFCS and sugar were "like products" for the purposes of Article III of the GATT. While it accepted that the test of like circumstances under Article 1102 was not identical to that of "like products" under the GATT, CPI argued that the fact that the two products were interchangeable in the relevant market and in direct competition were facts of the utmost significance and led in this case to the conclusion that the "like circumstances" test was satisfied.

55. In addition, CPI relied upon the purpose of the HFCS tax. CPI did not accept that the tax was a countermeasure, the purpose of which was to address alleged US violations of the NAFTA, and asserted that it was, in reality, a piece of protectionist legislation designed to aid the Mexican sugar industry by effectively removing its principal competitor in the important soft drinks sweetener market. As such, CPI claimed, the tax was based on a recognition of the similarities between HFCS and sugar, which, according to CPI, further demonstrated that those who produced the two products were in like circumstances.

56. In CPI's view it then became plain that the HFCS suppliers were accorded less favourable treatment. Although the tax was not levied upon them but upon the bottlers, they were its intended target and they suffered the effects of it. Since sugar production in Mexico was predominantly Mexican-owned at

the relevant time, whereas HFCS was either imported from the United States or produced in Mexico by foreign-owned producers (including CPIng), the tax discriminated, both *de jure* and *de facto*, between Mexican and foreign companies. Moreover, Mexico's claim that the tax was intended as a countermeasure was further proof, according to CPI, that the tax discriminated on grounds of nationality, since a countermeasure designed to target the United States would have to impose a disproportionate burden upon United States interests and United States investors.

57. CPI also maintained that the HFCS tax amounted to a performance requirement of the kind prohibited by Article 1106 of the NAFTA.

58. Lastly, CPI argued that the tax amounted to indirect expropriation, or to a measure tantamount to expropriation, within Article 1110 of the NAFTA, because CPI had been denied the use and enjoyment of its HFCS manufacturing assets for a period of time while the HFCS tax was being imposed upon its customers. CPI's arguments on this point are summarised in greater detail at paragraphs 81 to 85.

B. The Respondent

59. In its Counter-Memorial, Mexico's principal response to CPI's claims was that the HFCS tax was a countermeasure taken by Mexico in response to prior violations of the NAFTA by the United States. As such it was, in the language of the International Law Commission Articles on State Responsibility ("the ILC Articles"), a "circumstance precluding

wrongfulness", which, because CPI was claiming as an investor of the United States, operated (according to Mexico) as a complete defence to the claims irrespective of whether those claims were otherwise well-founded.

60. Mexico's case was that the dispute between CPI and Mexico could not be separated from the broader dispute between Mexico and the United States regarding access for Mexican sugar to the United States market (see paragraphs 31 to 39, above). Mexico maintained that the United States had acted in breach of the NAFTA by restricting the amount of Mexico's surplus sugar production which could be exported to the United States at a time when Mexico was admitting HFCS produced in the United States and the imported HFCS, together with the HFCS produced by the Claimant and the other producer in Mexico, were directly contributing to the surplus of sugar in Mexico by displacing sugar from part of the soft drink sweetener market.

61. In addition, Mexico contended that the United States had frustrated the operation of the Chapter XX dispute settlement mechanism so that Mexico was unable to secure a hearing before an arbitration tribunal of its complaint that the United States was in breach of its NAFTA obligations regarding access to its sugar market. According to Mexico, this constituted a second, and separate, violation of the NAFTA by the United States.

62. In these circumstances, Mexico maintained that it was entitled to take countermeasures against the United States for the purpose of ensuring that the sugar dispute was heard by a Chapter XX tribunal. Mexico asserted that

countermeasures were a recognized part of general international law. It referred to the ILC Articles (in particular, Articles 22 and 49-54) and the decision of the International Court of Justice in the *Case concerning the Gabčíkovo-Nagymaros Project,*[4] in which the Court expressly recognized the right of a State to take countermeasures against another State which had committed a prior violation of international law. Provided that such countermeasures complied with the requirements of international law (which are discussed in **Part IX** of the Decision), Mexico claimed that they did not amount to a violation of the international obligations of the State having recourse to them.

63. Mexico argued that the HFCS tax met all of the requirements of international law for a lawful countermeasure. It claimed that the tax was a proportionate response to the actions of the United States, was directed against the United States and was intended to secure United States compliance with its NAFTA obligations. Mexico accepted that the initiative for adopting the tax had come from the Mexican Federal Congress rather than the Executive Government but denied that that was a material consideration and contended that it had notified the United States of the measure and called upon the United States to comply with its NAFTA obligations.

64. Once the HFCS tax were recognized to be a lawful countermeasure, Mexico contended, the effect would be to preclude the wrongfulness of Mexico's acts

[4] ICJ Reports, 1997, p. 7.

in adopting and enforcing the tax not only vis-à-vis the United States but also vis-à-vis CPI.

65. In Mexico's view, Chapter XI of the NAFTA could not be construed as conferring substantive rights upon investors. The substantive rights which it created existed solely at the inter-State level and were, according to Mexico, therefore subject to a defence of countermeasures. The investor was given only a procedural right of access to arbitration. If it exercised that right, then what it was enforcing in the arbitration that resulted was the rights of its State. Accordingly, Mexico maintained, CPI in the present arbitration was seeking to enforce the rights of the United States and the defence of countermeasures was equally available in respect of those rights when enforced by CPI as it would have been if the United States had sought to enforce them itself. As Mexico put it, CPI, as a United States investor, could not be entitled to rights which were greater than those of the United States.

66. In this context, Mexico denied that the WTO proceedings were of any relevance. They were concerned with a different treaty. The fact that the HFCS tax had been held to violate Mexico's obligations under the GATT did not preclude Mexico from relying on countermeasures as a defence to an action for violation of its obligations under the NAFTA. Mexico denied that it had relied upon countermeasures as a defence in the WTO proceedings and rejected the suggestion that the WTO Panel and Appellate Body had found that the HFCS tax was not a lawful countermeasure.

67. Mexico accepted that the Tribunal could not determine whether Mexico or the United States was right about the sugar market access dispute. Its argument was that since Mexico had a genuine and reasonable belief that the United States was in breach of its NAFTA obligations, it had been entitled to impose the HFCS tax as a countermeasure and that its action in doing so had the effect of extinguishing CPI's rights. Alternatively, Mexico advanced (at the oral hearings) an argument that this Tribunal should defer making a decision until a Chapter XX tribunal had ruled upon the question whether the United States had violated its NAFTA obligations to Mexico such as to justify Mexico in taking countermeasures against it.

68. While Mexico consistently maintained that the status of the HFCS tax as a countermeasure was a complete defence to CPI's claims, it also contended that those claims were unfounded in any event.

69. With regard to the Article 1102 claim, Mexico maintained that CPI was not in like circumstances to the Mexican sugar producers. It denied that the test of "like products" under the GATT/WTO was determinative with regard to whether or not the producers of such products were in "like circumstances" for the purposes of NAFTA Article 1102. In the present case, a highly material consideration, according to Mexico, was that the production of HFCS by CPI for sale in the Mexican market directly contributed to the sugar surplus and thus exacerbated the effect of the United States restrictions on market access for sugar, while CPI benefited directly from the opening up of Mexican markets by the NAFTA and had access to the United States for

HFCS produced in Mexico. Moreover, Mexico maintained, the price of sugar in Mexico was the subject of official regulation, whereas the price of HFCS was freely determined.

70. Mexico denied that the HFCS tax could plausibly be regarded as a performance requirement within the meaning of Article 1106 and argued that CPI's claim under this provision was "fanciful".

71. So far as the Article 1110 claim was concerned, Mexico emphasised that CPI had been deprived of neither legal title to, nor physical control of, any part of its investment. It maintained that the imposition of the tax had not had the claimed effect of sterilising the market for CPIng's product and pointed to a recovery in CPIng's sales of HFCS in 2003 and 2004 [redacted] as its customers succeeded, through *amparo* proceedings, in freeing themselves of the obligation to pay the tax if they used HFCS as a sweetener. While Mexico accepted that the concept of "measures tantamount to expropriation" was different from both direct and indirect expropriation, it denied that the concept was as broad as CPI claimed and submitted that the infliction on a business of losses occasioned by temporary restriction of a market was not capable of amounting to a measure tantamount to expropriation.

C. *Claimant's Response to the Countermeasures' Argument*

72. CPI maintained that countermeasures were not available as a circumstance excluding wrongfulness in the present case. It maintained that the Tribunal

lacked jurisdiction to decide whether the United States had violated NAFTA, so that a precondition for any successful countermeasures defence was absent. In addition, Chapter XI of the NAFTA conferred rights upon CPI as an investor which were separate and distinct from the rights and obligations of the United States. Moreover, the investor-State dispute resolution system created by Chapter XI was designed to avoid disputes between an investor of one NAFTA Party and another NAFTA Party becoming entangled with inter-State disputes. It therefore denied that Mexico could rely upon countermeasures as a defence to a claim by CPI, as opposed to one by the United States.

73. Furthermore, CPI contended that, even if a defence of countermeasures could, in principle, be maintained in a Chapter XI context, it had to fail in the present case, because the HFCS tax did not meet the criteria for a lawful countermeasure as codified in the ILC Articles.

V. The Tribunal's Approach to the Issues

74. The Tribunal begins by noting that there is no challenge to its jurisdiction over the CPI claims. In particular, Mexico has not denied that CPI is an investor of a Party within the meaning of Chapter XI or that CPIng constitutes CPI's investment.[5] Similarly, there is no doubt that the claim made by CPI falls within the jurisdictional provisions of Chapter XI.

[5] For the Parties' submissions regarding CPI's argument that its investment for purposes of the Article 1110 claim was different from the investment for the purposes of its two other claims, see para. 81.

75. The Tribunal therefore proceeds on the basis that it has jurisdiction and that, in principle, it must exercise that jurisdiction. Nevertheless, its jurisdiction is limited to Chapter XI of the NAFTA and to the parties before it. It has no jurisdiction – as both parties accept – to determine whether the United States, which is not a party to these proceedings, has violated provisions of the NAFTA which fall outside Chapter XI of that Agreement. That limitation is significant, as is explained in **Part IX** of the Decision, for the approach which the Tribunal must take to the issue of countermeasures.

76. A second matter on which there is broad agreement between the parties – at least as to the principles involved – concerns the law to be applied by the Tribunal. In accordance with Article 1131(1) of the NAFTA, the Tribunal "shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law". The Tribunal considers the applicable rules of international law to include the rules relating to the interpretation of treaties (which it is generally accepted have been authoritatively codified in the Vienna Convention on the Law of Treaties, 1969). The rules on State responsibility (of which, it is accepted, the most authoritative statement is to be found in the ILC Articles) are in principle applicable under the NAFTA save to the extent that they are excluded by provisions of the NAFTA as *lex specialis*.

77. The parties have cited a significant number of arbitration awards in other Chapter XI cases and in proceedings brought by investors under other international agreements. There is, of course, no doctrine of binding

precedent in international law, nor any reason of principle why the tribunal which has the first word on a subject should necessarily be treated as having spoken definitively thereon. Nevertheless, the views of other tribunals on issues similar to those arising in the present case and on questions of principle which impact upon the issues in these proceedings are necessarily of value to the Tribunal and have accordingly been taken into account.

78. Although Mexico's principal argument, at least in its Counter-Memorial, was that the HFCS tax was a countermeasure whose status as such precluded it from being a violation of Chapter XI of NAFTA, it also denied that its conduct would amount to a violation of any of the provisions relied upon by CPI in any event. The Tribunal considers that the question whether Mexico can succeed by reference to a countermeasures argument arises only if the Tribunal first concludes that – in the absence of a countermeasures defence – Mexico's conduct violated one or more of the three provisions invoked by CPI. The Tribunal has accordingly first considered whether the HFCS tax would breach any of these provisions. At the oral hearings counsel for Mexico accepted that this was the correct course to follow.

VI. The Performance Requirements Claim under Article 1106

79. The Tribunal will first deal with CPI's claim under Article 1106. In relevant part, Article 1106 provides as follows –

> "**Article 1106: Performance Requirements**
>
> 1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
>
> (a) to export a given level or percentage of goods or services;
> (b) to achieve a given level or percentage of domestic content;
> (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
> (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
> (e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
> (f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or
> (g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.
>
> 2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure.
>
> 3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

> (a) to achieve a given level or percentage of domestic content;
> (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory;
> (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
> (d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings."

80. CPI freely admits that its claim is without precedent. Counsel for Mexico described it as "fanciful". The Tribunal would not go that far but it is clear that CPI has not made out its case under this provision. No requirement was imposed on CPI by the tax enacted by the Mexican Congress on soft drinks using HFCS as a sweetener. Mexico made no demand on CPI for increased investment, increased local procurement or a greater level of local employees. Nor did the tax or any other regulation cited by CPI purport to prescribe the level of its domestic sales, imports, exports, or foreign exchange earnings. While the tax here challenged was adopted with the intent and effect of reducing the use by CPI's customers of CPI's product, the performance requirement, if any, was placed on the soft drink manufacturers, and even that was not mandatory. The claim under Article 1106 fails.

VII. The Expropriation Claim under Article 1110

81. CPI's second claim is that the HFCS tax amounted to an indirect expropriation, or a measure tantamount to an expropriation, of its investment. CPI maintained that, for the purposes of its Article 1110 claim, the "investment" in respect of which the claim was made was different from that with respect to which it claimed under Articles 1102 and 1106.[6] Whereas, for the purposes of its Article 1102 and 1106 claims, CPI argued that the "investment" was CPIng, for the purposes of its Article 1110 claim, CPI contended that the relevant investment was "the property it holds, indirectly through CP Ingredientes, relating to its HFCS production and supply business".[7] This raises the question whether a claimant under Chapter XI is entitled to rely upon different notions of what constitutes the "investment" for the purpose of different claims arising out of the same set of facts. Mexico questioned this aspect of CPI's submissions but the Tribunal has not considered the matter further, because it has concluded that, even if CPI's submission regarding what constitutes the "investment" for the purposes of Article 1110 is accepted, the claim for expropriation still fails for the reasons set out below.

82. A threshold problem for this part of CPI's case is that it retained both title and physical possession of all of the assets in question at all times. CPI acknowledged that but maintained that neither a physical taking nor a transfer

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[6] See paragraphs 50 and 74, above.

[7] Memorial, para. 252.

of title is required for indirect expropriation or for measures tantamount to expropriation. It relied heavily upon the award in *Metalclad v. Mexico* [8] and on two expert opinions prepared for it by Professor Dolzer. In particular, CPI relied on the statement by the *Metalclad* tribunal that "depriving the owner ... in significant part ... of the reasonably-to-be-expected economic benefit of property" [9] was capable of constituting expropriation.

83. In that context, CPI argued that the HFCS tax deprived it of "the expected economic use and benefits from its HFCS-related investments" [10] by destroying overnight its market for HFCS. It emphasised that the purpose of the HFCS tax (as opposed to that of the IEPS as a whole) was not to raise revenue but to destroy the soft drinks market for HFCS to the benefit of the Mexican sugar industry. It also placed great weight on what it argued was the discriminatory nature of the tax.

84. Mexico differed from CPI both as regards the content of the law under Article 1110 of the NAFTA and its application to the facts of the case. It argued (relying upon *Pope and Talbot*,[11] *SD Myers* [12] and *Feldman* [13]) that a measure is not "tantamount to expropriation" unless it is equivalent to an expropriation, that *Metalclad* was a widely criticised award which was annulled in part by the British Columbia Supreme Court [14] and that, even if it

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[8] ICSID Case No. ARB(AF)/97/1; 5 ICSID Reps 209.
[9] Ibid., para. 103.
[10] Memorial, para. 379.
[11] Award of 10 April 2001, 7 ICSID Reps. 102.
[12] First Partial Award on Liability, 13 November 2000; 8 ICSID Reps. 18.
[13] ICSID Case No. ARB(AF)/99/1; 7 ICSID Reps. 341.
[14] 5 ICSID Reps. 236 and 6 ICSID Reps. 52.

had been rightly decided, what was involved in *Metalclad* was the permanent destruction of the claimant's business, whereas CPI's production of HFCS recovered within two years and [redacted] In this connection, Mexico pointed to the reports filed by CPI for 2002, 2003 and 2004 which showed no write-down of the value of its assets as a result of the imposition of the HFCS tax and contained a series of optimistic statements about the likelihood of its repeal.

85. On this last point, CPI countered that the reports reflected accounting conventions and the position of CPI's Mexican business as a whole, rather than the relevant investment, which, it claimed, was far more heavily affected.

86. Article 1110(1) of the NAFTA provides that –

> "No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ('expropriation'), except:
> (a) for a public purpose;
> (b) on a non-discriminatory basis;
> (c) in accordance with due process of law and Article 1105(1); and
> (d) on payment of compensation in accordance with paragraphs 2 through 6."

87. The recent award in *Fireman's Fund Insurance Company v. Mexico* [15] ("*FFIC*") summarises the effects of the existing NAFTA jurisprudence on expropriation in the following terms (footnotes omitted)–

[15] ICSID Case No. ARB(AF)/02/01. The award was only made public in a redacted form in July 2007, although it had been notified to the parties to that case in July 2006.

"(a) Expropriation requires a taking (which may include destruction) by a government-type authority of an investment by an investor covered by the NAFTA.

(b) The covered investment may include intangible as well as tangible property.

(c) The taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof (i.e., it approaches total impairment).

(d) The taking must be permanent, and not ephemeral or temporary.

(e) The taking usually involves a transfer of ownership to another person (frequently the government authority concerned), but that need not necessarily be so in certain cases (e.g., total destruction of an investment due to measures by a government authority without transfer of rights).

(f) The effects of the host State's measures are dispositive, not the underlying intent, for determining whether there is expropriation.

(g) The taking may be *de jure* or *de facto.*

(h) The taking may be 'direct' or 'indirect'.

(i) The taking may have the form of a single measure or a series of related or unrelated measures over a period of time (the so-called 'creeping' expropriation).

(j) To distinguish between a compensable expropriation and a non-compensable regulation by a host State the following factors (usually in combination) may be taken into account: whether the measure is within the recognized police powers of the host State; the (public) purpose and effect of the measure; whether the measure is discriminatory; the proportionality between the means employed and the aim sought to be realized; and the bona fide nature of the measure.

(k) The investor's reasonable 'investment-backed expectations' may be a relevant factor whether (indirect) expropriation has occurred."[16]

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[16] Ibid., para. 176.

88. The present Tribunal agrees generally with this analysis. It considers that three points are of particular importance for the present case.

89. First, it is important not to confuse the question whether there has been an expropriation with that of whether the four criteria in paragraphs (a) to (d) of Article 1110 have been satisfied. Those paragraphs come into play only if it has been decided that there has been an expropriation, or a measure tantamount to an expropriation, but the absence of one or more of them is not in itself indicative of expropriation.[17]

90. Secondly, as the tribunal in *FFIC* recalls, it is necessary to bear in mind that there is a distinction between discriminatory treatment of the property of an investor (and, for that matter, unfair and inequitable treatment) and expropriation. It is not the case that, because a measure which affects property rights is discriminatory, it is therefore an expropriation (or something tantamount to an expropriation). Rather, if a measure is established to be an expropriation (or something tantamount thereto), it cannot then be justified if it is discriminatory. In *FFIC*, the tribunal held that there was a clear case of discriminatory treatment but that this did not rise to the level of a claim under Article 1110.[18]

[17] See *FFIC*, para. 174.
[18] See *FFIC*, paras. 203-209.

91. Thirdly, where there is no physical taking of property or forcible transfer of title, in the words of the *FFIC* award, "the taking must be a substantially complete deprivation of the economic use and enjoyment of rights to the property, or of identifiable distinct parts thereof (i.e. it approaches total impairment)".[19] In the words of the tribunal in *Waste Management (No. 2)*, "it is not the function of Article 1110 to compensate for failed business ventures, absent arbitrary intervention by the State *amounting to a virtual taking or sterilising of the enterprise*".[20]

92. Applying that test to the claim advanced by CPI, the Tribunal has concluded that CPI has failed to make good its claim under Article 1110. In the absence of a physical taking or transfer of ownership, CPI needed to show that there had been such a degree of interference as to sterilise its business; in the words of the tribunal in *FFIC* "the taking must be a substantially complete deprivation of the economic use and enjoyment of the rights to the property, or of identifiable distinct parts thereof".[21] It has failed to do so. That CPI's HFCS production facilities suffered a substantial blow to their market for a period of some two years is not in doubt. But CPI retained full control of its investment at all times, was able to report to its shareholders that the HFCS tax would not make a long term difference to its business [redacted] In these circumstances, the Tribunal concludes that the effects of the HFCS Tax cannot be considered to have amounted to a

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[19] Para. 176 (c).
[20] Para. 160. Emphasis added.
[21] See *FFIC* para. 176 (c) quoted in para. 87, above.

substantially complete deprivation of the economic use and enjoyment of the investment, even if (see paragraph 81, above) one takes the more restrictive view of what constitutes the investment for which CPI contended in its Article 1110 claim.

93. Government measures which have a detrimental effect on an investor's markets, even if they are discriminatory (an issue considered in the next section of this award), are not expropriatory unless they have the effect of destroying the business in question. That was simply not the case here. Whether or not one considers the standard laid down in *Metalclad* to be too broad, the fact is that what happened in the present case would not meet that standard.

94. The Tribunal thus dismisses the claim for violation of Article 1110.

VIII. The National Treatment Claim under Article 1102

95. Article 1102 reads, in relevant part, as follows –

> **"Article 1102: National Treatment**
>
> 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."

A. The Claimant's Submissions

96. CPI relied on both Article 1102(1) and 1102(2). It contended that the HFCS tax, although formally levied on the soft drink bottlers, was, in its effects, treatment of CPI with respect to the operation of its investment (within the meaning of Article 1102(1)) and treatment of that investment (within the meaning of Article 1102(2)) which was less favourable than Mexico accorded, in like circumstances, to its own investors and their investments.

97. To CPI, the test to be applied under Article 1102 was straightforward and had been identified in a series of earlier awards given by NAFTA tribunals applying that provision. CPI relied, in particular, upon the awards in *Pope and Talbot v. Canada*,[22] *SD Myers v. Canada*,[23] *ADF v. USA* [24] and *Feldman*

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[22] 7 ICSID Reps. 43.
[23] 8 ICSID Reps. 3.
[24] ICSID Case No. ARB(AF)/00/1; 6 ICSID Reps. 449.

v. Mexico. [25] It claimed that these awards laid down a consistent standard which this Tribunal should apply.

98. The Mexican investors with whom CPI maintained it was in "like circumstances" at the relevant time were the sugar producers. In this context, CPI relied heavily on the fact that HFCS and sugar were at all times direct competitors and directly substitutable products in the market for soft drink sweeteners in Mexico. It pointed out that, even before the matter was considered by the WTO, the Mexican Government had itself treated the two products as interchangeable in the course of its anti-dumping investigation [26] - and that it did not contest that HFCS and sugar were "like products" within the meaning of GATT Article III.

99. CPI also placed considerable reliance on the reports of the WTO Panel and Appellate Body regarding *Tax Measures on Soft Drinks and Other Beverages* which was directly concerned with the HFCS tax. The Panel there decided, *inter alia*, that HFCS and sugar were like products within the meaning of GATT Article III.[27] The Panel's conclusions were upheld by the Appellate Body.[28] While CPI accepted that the fact that HFCS and sugar were "like products" for the purposes of GATT was not by itself determinative of whether the producers of HFCS and of sugar were in "like circumstances" for

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[25] ICSID Case No. ARB(AF)/99/1; 7 ICSID Reps 318.

[26] Final Decision of the Antidumping Investigation, paras. 423-428, Official Gazette 23 January 1998, Exhibit C17B; Letter of 22 April 2002 from the Executive Secretary, Federal Commission on Competition, Exhibit C 144.

[27] Panel Report of 7 October 2005, WT/DS308/R, para. 8.136.

[28] Appellate Body Report of 6 March 2006, WT/DS308/AB/R.

the purposes of Article 1102, CPI argued that the WTO finding was highly relevant to the application of the "like circumstances" test in Article 1102.

100. CPI maintained that Article 1102 encompassed both *de facto* and *de jure* discrimination but that the HFCS tax was an instance of *de jure* discrimination. It pointed to the fact that, at the relevant time, the only producers of HFCS in Mexico were foreign-owned, whereas the majority of the sugar producers in Mexico were Mexican-owned, many of them being owned by the Mexican State. CPI contended that under Article 1102 it was required to show only that the treatment which it had received was less favourable than the best treatment accorded by Mexico to Mexican-owned sugar producers.

101. CPI also contended that Mexico had itself accepted that the HFCS tax discriminated against CPI because of its United States nationality. In that regard, it pointed both to statements made in the Mexican Congress, at the time of adoption of the tax, that the purpose of the tax was protectionist and to the Mexican defence that the tax was a countermeasure, arguing that this showed that the tax was directed against HFCS producers and importers as a means of retaliation against the United States, thus indicating that the tax was intended to have a discriminatory effect.

B. The Respondent's Submissions

102. Mexico contended that, quite apart from its argument that the tax was a lawful countermeasure, the HFCS tax was not inconsistent with Article 1102. Mexico did not contest that HFCS and sugar were like *products* in the market for soft drink sweeteners but challenged the relevance of the WTO finding to that effect for the question whether the producers of HFCS and the producers of sugar for that market were in like *circumstances*. According to Mexico, which relied on the award in *Methanex v. USA,* [29] the two tests were quite different.

103. Mexico emphasised a passage in the *Methanex* award, in which the Tribunal held that –

> "... if the drafters of NAFTA had wanted to incorporate trade criteria in its investment chapter by engrafting a GATT-type formula, they could have produced a version of Article 1102 stating 'Each Party shall accord to investors [or investments] of another Party treatment no less favourable than it accords its own investors, in like circumstances *with respect to any like, directly competitive or substitutable goods*'. It is clear from this constructive exercise how incongruous, indeed odd, would be the juxtaposition in a single provision dealing with investment of 'like circumstances' and 'any like, directly competitive or substitutable goods'."[30]

104. Mexico maintained that, in order to contravene Article 1102, a measure had to discriminate against an investor of another NAFTA Party (or the investment of an investor of another Party) *qua* investor. In Mexico's submission, the HFCS tax did not target CPI *qua* investor but was rather a response to the financial crisis in the sugar industry. According to Mexico,

[29] 44 ILM (2005) 1343, Part II, Chapter B, paras. 4-6.
[30] Ibid. at paras. 33-34.

the production and consumption of HFCS in Mexico was a central feature of that crisis, since the United States refused to take account of HFCS production in Mexico in calculating whether or not Mexico had a sugar surplus which carried an entitlement to access to the United States market.

105. That led, in Mexico's view, to the conclusion that HFCS and sugar producers were not in like circumstances, because, within a highly regulated market, HFCS producers like CPI had unfettered access to the market in both Mexico and the United States, whereas Mexican sugar producers had to contend with increased competition from HFCS in the home market while being severely limited in their access to the market in the United States.

106. So far as the case law was concerned, Mexico argued that the Tribunal should not rely upon *Pope and Talbot* or *Myers*, which it described as "'first generation' awards reflecting an incipient and tentative analysis" [31] that had not been accepted by the NAFTA Parties in their submissions in later cases. The other two cases primarily relied upon by CPI – *ADF* and *Feldman* – were of no assistance in Mexico's submission, *ADF* because it had turned on the application of the provisions in NAFTA on government procurement, and *Feldman* because Mexico had conceded in that case that the various cigarette exporters were in like circumstances.

[31] Rejoinder, para. 144.

107. Instead, Mexico urged the Tribunal to rely upon the award in *GAMI v. Mexico*,[32] where the tribunal had held that financially secure sugar producers in Mexico were not in like circumstances as those sugar producers which were in financial difficulty, so that the Mexican Government had not violated Article 1102 when it expropriated a number of financially insecure concerns, some of which were owned by United States investors, while leaving in private ownership other financially secure mills, some of which were Mexican-owned.

108. Mexico also relied on the award in *Loewen v. USA*,[33] which it read as authority for the proposition that parties in adverse interest could not also be in like circumstances for the purposes of Article 1102. CPI and the Mexican sugar producers were, it said, in adverse interest not only because they competed in the market for soft drink sweeteners but also because CPI, through the trade association of which it was a member, had opposed the relaxation of United States barriers on access for Mexican sugar to the United States market.

C. The Tribunal's Analysis

109. The Tribunal notes at the outset that Article 1102 embodies a principle of fundamental importance, both in international trade law and the international law of investment, that of non-discrimination. A study prepared for UNCTAD went so far as to say that –

[32] Award of 15 November 2004; to be published in 13 ICSID Reps.
[33] ICSID Case No. ARB(AF)/98/3; 7 ICSID Reps. 421.

> "the national treatment standard is perhaps the single most important standard of treatment embodied in international investment agreements."[34]

110. Its significance in the legal regime of GATT/WTO is also beyond doubt. GATT Article III, which embodies the principle of like treatment for like products irrespective of national origin is one of the cornerstones of that regime. Article III.4 provides that –

> "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product."[35]

111. The absolute character of this provision, as well as its central role within the regime, was highlighted by the GATT Panel in the *Section 337* case, involving a challenge by the European Community to procedures for determining patent disputes between domestic and imported products. The Panel there stated that –

> "The Panel noted that, as far as the issues before it are concerned, the 'no less favourable' treatment requirement set out in Article III.4 is unqualified ... The words 'treatment no less favourable' ... call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, purchase, transportation, distribution or use of products. This clearly sets a minimum standard as a basis. ... Given that the underlying objective is to guarantee equality of treatment, it is incumbent on the contracting party applying differential treatment to

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[34] UNCTAD, *National Treatment* (1999), United Nations Doc UNCTAD/ITE/IIT/11 (vol. IV), p. 1

[35] See also Article XVII of the GATS.

show that, in spite of such differences, the no less favourable treatment standard of Article III is met."[36]

112. The relationship between the principle of non-discrimination in matters of trade and non-discrimination in matters of investment was evident in the Canada-US Free Trade Agreement, Chapter 16 of which was largely carried over into Chapter XI of NAFTA (although Chapter XI of NAFTA contained the important additional feature of investor-State arbitration which had been absent from the earlier agreement).

113. The principle of national treatment is given prominence in the statement of the objectives of the NAFTA in Article 102(1), which provides that –

> "The objectives of this Agreement, as elaborated more specifically through its principles and rules, including *national treatment*, most-favoured-nation treatment and transparency, are to:
>
> (a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
>
> (b) promote conditions of fair competition in the free trade area;
>
> (c) increase substantially investment opportunities in the territories of the Parties;
>
> (d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
>
> (e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and

[36] *United States – Section 337 of the Tariff Act of 1930*, GATT Panel Report adopted 7 November 1989, BISD 36th Supp. 345 (1990), para. 5.11.

(f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.".[37]

114. Specific instances of the principle of non-discrimination appear in Articles 301 (national treatment with regard to goods), 1202 (national treatment with regard to services) and 1405 (national treatment with regard to financial services), as well as Article 1102, the provisions of which were described by the Tribunal in *Feldman* as "a fundamental obligation of Chapter XI".[38] The *Feldman* Tribunal also stressed that language analogous to that of Article 1102 was to be found in GATT Article III and in the Canada-US Free Trade Agreement.[39]

115. The parties in the present case agreed that Article 1102 embraces *de facto* as well as *de jure* discrimination.[40] The Tribunal agrees. The parties differed, however, on almost every other issue of relevance to the application of Article 1102 to the HFCS Tax.

116. The Tribunal considers, therefore, that it is necessary to start from first principles. The text of Article 1102 suggests that there are three elements which have to be established for a claim under that provision to succeed.

[37] Emphasis added. Article 102(2) provides that "the Parties shall interpret and apply the provisions of this Agreement in the light of its objectives as set out in paragraph 1 and in accordance with applicable rules of international law".
[38] 7 ICSID Reps. 318, para. 165.
[39] Ibid.
[40] CPI asserted that Article 1102 encompassed *de facto* discrimination in its Memorial, para. 298. Mexico accepted that proposition in response to a question from the Tribunal at the oral hearings, Transcript, Day 4, p. 1019, lines 15-16 (Mr Becker).

117. First, it must be shown that the Respondent State has accorded to the foreign investor or its investment "treatment ...with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition" of the relevant investments. Secondly, the foreign investor or investments must be "in like circumstances" to an investor or investment of the Respondent State ("the comparator"). Lastly, the treatment must have been less favourable than that accorded to the comparator.[41]

118. The application of this three-fold test must, however, be sensitive to the particular circumstances of each case with the analysis focussing on the specific nature of the measure under challenge. In this respect, there is a close relationship between whether the State intentionally discriminated on grounds of nationality and the test of like circumstances. As other Chapter XI tribunals have emphasised, it is necessary to consider the entire factual and legal context.[42]

119. Applying these principles to the facts of the present case, the first question is whether the imposition of the HFCS tax on the soft drink bottlers can be regarded as "treatment" accorded by Mexico to CPI. The Tribunal considers that it should be so regarded. Mexico concedes that the tax was not intended to raise revenue but to assist the Mexican sugar industry at a time of crisis and to respond to what Mexico considered was a US violation of other NAFTA provisions. It is obvious that if either of these objectives was to be

[41] See, e.g., the Award on the Merits of 24 May 2007 in *UPS* v. *Canada*, para. 83.
[42] *Pope and Talbot* Award, paras 75-78; *SD Myers*, para. 245.

achieved, the tax would have to produce an effect upon the HFCS producers and suppliers, of which CPI was the largest (with approximately [redacted] of the HFCS share of the market before the HFCS tax took effect). By contrast, there was no intention to produce any effect upon the bottlers other than of pressuring them to switch from HFCS to sugar as a sweetener. In these circumstances, it would be the triumph of form over substance to hold that the fact that the tax was structured as a tax on the bottlers, rather than the suppliers of sweeteners, precluded it from amounting to treatment of the latter for the purposes of Article 1102.

120. Turning to the question of whether CPI and the other producer of HFCS in Mexico were in like circumstances to the Mexican sugar producers – the only suggested comparator – the Tribunal concludes that this requirement is satisfied on the facts of the present case. It considers that it is necessary to begin with a comparison between domestic and foreign investors operating in the same business or economic sector as the claimant.[43] There can be no doubt that Mexican sugar producers operated in the same business or economic sector as CPI. When it came to supplying sweeteners to the soft drinks industry, their products were in direct competition with one another, treated both by customers and by Mexican law as being interchangeable. The purpose of the HFCS tax was avowedly to alter the terms of competition between them.

[43] See, e.g., *Pope and Talbot*, paras. 75-78.

121. In this context the Tribunal takes note of the fact that the WTO Panel and Appellate Body have held that HFCS and sugar were "like products" for the purposes of Article III of GATT. The Tribunal is mindful of the warning, afforded by *Methanex*,[44] that the terms of GATT Article III were taken into Chapter III of the NAFTA and not Chapter XI, where different language was used. It is also conscious that its jurisdiction is limited to the provisions of Chapter XI and does not extend to Chapter III. It accepts that CPI cannot succeed in its claim under Article 1102 simply by showing that HFCS and sugar are "like products" for the purposes of Article III of GATT, nor does it understand CPI to have advanced such an argument. The test under Article 1102 is a separate and distinct test from that under Article III.4 of GATT (or Article 301 of the NAFTA for that matter).

122. Nevertheless, the Tribunal does not accept that the fact that HFCS and sugar are like products for the purposes of GATT is irrelevant to the application of the Article 1102 test. On the contrary, it considers that this fact is highly relevant to the application of that test. While the Tribunal would not suggest that the fact that a foreign investor and a domestic investor are producing like products will necessarily mean that they are to be considered as being in like circumstances for the purposes of Article 1102, or that differential treatment will necessarily entail a violation of that provision, where the measure said to constitute the violation of Article 1102 is directly concerned with the products and designed to discriminate in favour of one and against the other,

[44] 44 ILM (2005) 1343 at Part IV, Chapter B, para. 30.

then that is a very strong indication that there has been a breach of Article 1102.

123. Although the passage from *Methanex* quoted in paragraph 103, above might be thought to take a different view, the Tribunal considers that the Final Award in *Methanex*, taken as a whole, is not inconsistent with the approach suggested in the preceding paragraph. The *Methanex* tribunal expressly recognized the relevance of GATT/WTO jurisprudence. [45] In addition, it is pertinent to note that that tribunal was at pains to emphasise that methanol was not a direct competitor with ethanol, since the latter was used as an additive to petrol whereas the former was merely one ingredient of the additive MTBE, [46] that the measure said to violate Article 1102 was not discriminatory on its face since it applied equally to US producers of methanol who were the obvious comparators for Methanex [47] and that the measure was adopted for legitimate regulatory reasons.

124. By contrast, HFCS is directly substitutable for sugar as a soft drink sweetener and, as stated above, had always been treated as such by Mexico. That fact also sets the present case apart from the facts of the *UPS* case, where the tribunal pointed out that packages delivered by mail and those sent by courier were treated differently (and had historically been treated differently) both by Canada and by other States.

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45 44 ILM (2005) 1343 at Part II, Chapter B, para. 6.

46 "The incontrovertible fact is that Methanex produced methanol as a feedstock for MTBE and not as a gasoline additive in its own right." (Ibid., at Part IV, Chapter B, para. 28).

47 Para. 21.

125. In response, Mexico raised three factors which, it claimed, militated against CPI and the sugar producers being in like circumstances: (1) the fact that the price for sugar was regulated, whereas that for HFCS was not, (2) the fact that Mexican sugar was to a significant extent denied access to the United States market during the relevant period, whereas there was no barrier to trade in HFCS across the US-Mexican border, and (3) the fact that the trade association of which CPI was a member had lobbied in the United States against increasing the amount of Mexican sugar which could be imported into the United States. The Tribunal has carefully considered each of these factors but is not persuaded that they lead to the conclusion that CPI and the sugar producers were not in like circumstances.

126. To take, first, the issue of price regulation. Mexico argued that, since sugar in Mexico (as in certain other countries, including the United States) is subject to a regulatory regime designed to affect the price, whereas the price of HFCS is unregulated, the two products, or the investments in the respective industries, cannot be regarded as "in like circumstances." The Tribunal has carefully considered this contention, in the light of the object and purpose of the non-discrimination provisions that run through the entire North American Free Trade Agreement. We conclude that where the products at issue are interchangeable and indistinguishable from the point of view of the end-users (i.e. the purchaser of soft drinks), the products, and therefore the respective investments, are in like circumstances. Any other interpretation would negate the effect of the non-discrimination clauses, because it would always be

possible to find differences between the way competing products are owned, managed, regulated, or priced. Just as a regulation on margarine is discriminatory when intended to protect the producers of butter, though only one of the products is made with milk, so a regulation on HFCS is discriminatory when intended to protect the producers of sugar. When the clear impact of that discrimination falls on the foreign investor, the result is a violation of Article 1102 of the NAFTA

127. In this regard, the Tribunal notes that there was no evidence that, if the market for sugar had been deregulated and Mexican sugar producers had been able to sell their products at economic cost (plus a reasonable rate of return), they would have been able to compete with HFCS on price. Sugar cane sweeteners were more expensive than HFCS, because the production costs of sugar were higher.[48] Moreover, if the problem had been the regulated price of sugar, Mexico could have relaxed that regulation – at least as regards sugar used to sweeten soft drinks. Instead, the avowed purpose of the HFCS tax was to raise the cost of HFCS as a sweetener, while retaining the existing high prices for sugar cane sweeteners.

128. Mexico's second contention was that HFCS producers and Mexican sugar producers could not be regarded as being in like circumstances within the context of the NAFTA because the latter were denied access to the United

[48] Mexico did not dispute CPI's assertion (Memorial, para., 25) that the production costs of HFCS were lower than those of sugar (Counter-Memorial, Appendix 1, p. 12).

States sugar market, whereas the former had access to markets in both the United States and Mexico.

129. It is impossible not to feel sympathy for the plight of the Mexican sugar producers who were substantially denied access to the market in the United States – whether in breach of NAFTA or not – during the relevant period. However, the Tribunal cannot accept that this fact alters the finding that the sugar producers and CPI were in like circumstances. Article 1102 requires that the investors (or investments) which are being compared are in *like* not *identical* circumstances. Whether CPI had access to markets in the United States was entirely irrelevant to the decision to impose the HFCS tax. It was because of HFCS's share of the market in Mexico that the tax was imposed.

130. Moreover, there is no evidence that CPI did – or could have – switched to customers in the United States for its Mexican-produced HFCS when it was confronted with the loss of its Mexican market as a result of the HFCS tax. On the contrary, the fact that it was obliged to close one plant and significantly reduce production elsewhere in Mexico, together with the lengths it went to in order to develop alternative products for different markets within Mexico (e.g. by trying to develop cleaning products based on HFCS) suggest that no alternative market in the United States was, in reality, to be found.

131. Nor is there a material difference between CPI and the sugar producers of the kind that existed in *GAMI* between the expropriated mills and those that were

not expropriated. In *GAMI*, considerations of nationality and the competition between the different producers were irrelevant to the choice of which producers were expropriated. It was financial stability which led to some being included while others were excluded

132. The present case might be analogous to *GAMI* if HFCS had been produced in equal (or nearly equal) volume by Mexican-owned and US-owned firms. In that circumstance, a measure designed adversely to affect the market for HFCS in order to protect the position of the sugar industry could not have been held to violate the requirement of national treatment. But the uncontradicted evidence in this case was that production of HFCS in Mexico was wholly concentrated in foreign-owned enterprises (predominantly CPI, which had [redacted] of the HFCS share of the market for soft drink sweeteners), whereas production of sugar was largely carried out by Mexican nationals (with the Mexican State itself owning a substantial part of sugar production). Thus, the effect of what was, in substance, a special tax on HFCS was the distortion of the market in favour of domestic suppliers and to the disadvantage of the foreign investors protected by Chapter XI of the NAFTA.

133. Lastly, Mexico argued that the fact that Mexican sugar producers sought access to the United States sugar market, whereas, so Mexico claimed, the trade association of which CPI was a member, lobbied against extending such access, showed that CPI and the sugar producers were not in like circumstances. This argument was supported, in Mexico's view, by reference

to the *Loewen* case, [49] which Mexico interpreted as authority for the proposition that two parties whose interests were directly opposed to one another could not be regarded as being in like circumstances.

134. The Tribunal is not convinced by this argument. In the first place, the Tribunal consider that the *Loewen* tribunal was laying down a principle of anything like the breadth suggested by Mexico. The tribunal was there concerned – in a passage notable for its brevity [50] – to show that the circumstances of a plaintiff in civil litigation differ from those of a defendant to such an extent that the treatment accorded to the plaintiff in a particular case cannot by itself be sufficient to establish that the treatment accorded to the defendant was a breach of the principle of national treatment. Even that statement has attracted a degree of criticism but it is unnecessary for this Tribunal to enter into that controversy. Even if the *Loewen* tribunal was correct in holding that there are material differences between the plaintiff and the defendant in a civil case, the circumstances of the present case are completely different. CPI and the sugar producers were not opposing parties in litigation.

135. The fact that economic competitors have – and lobby for – different interests is not at all surprising. On the contrary, it is a fact of economic and political life which may be observed in any open society. Far from suggesting that they are not in like circumstances, it tends to suggest the opposite; it is

[49] ICSID Case No. ARB(AF)/98/3; 7 ICSID Reps. 421 at 442.
[50] Ibid., para. 140.

precisely because they are in close competition that they lobby against each other – if they were not competing in the market for what are effectively interchangeable products, they would not trouble to maintain such lobbying activities. To accept Mexico's argument in all its breadth would be to neuter Article 1102, because it is precisely where the interests of foreign investors and domestic investors are in conflict that the principle of non-discrimination becomes most important.

136. Moreover, in marked contrast to *Methanex* and *GAMI*, the present case concerns a measure the purpose of which was to affect the competition between the products produced by the foreign and domestic investors and to afford a considerable competitive advantage to the latter. The competition between the two products – HFCS and sugar – was at the heart of the measure adopted. By contrast, in *Methanex*, it was not the competition which concerned those taking the measure but the environmental effect of one of the products. In *GAMI* the competition between the products was largely irrelevant. In these circumstances, the Tribunal cannot escape the conclusion that the producers of like products which were directly competitive were in like circumstances as regards a measure designed expressly for the purpose of affecting that competition.

137. It is also relevant that, again in contrast to *GAMI* and *Methanex*, nationality was a highly pertinent factor in the imposition of the tax. In saying that, the Tribunal does not endorse the submissions made by CPI based upon the remarks of individual members of the Mexican Congress about the purpose of

the legislation. We have doubts about the extent to which such comments can legitimately be treated as evidence of the intent of the Legislature as a whole, let alone of the State itself, in imposing a measure of this kind, although we do not need finally to decide that point. Rather, it is the countermeasures justification advanced by Mexico which we consider important. If the HFCS tax was intended as a countermeasure targeted against the United States, it had to have been crafted in such a way that it bore especially heavily upon US interests, otherwise it would have had no chance of being effective or of being a lawful countermeasure. As counsel for Mexico said in the course of the oral hearing, "the model countermeasure is one that causes pain". [51] But that pain has to be caused to the State against whom the countermeasure is targeted, in this case the United States. While the Tribunal will consider whether the HFCS tax amounted to a lawful countermeasure in the next Part of the Decision, we must at this stage say that the very fact that such a justification has been advanced amounts to a recognition by Mexico that HFCS producers and suppliers were targeted, in part at least, because of the extent of their links to the United States.

138. That factor is also decisive for the third part of the test set out in paragraph 117, above. It demonstrates an intention on the part of Mexico to treat CPI differently because of its nationality. While the existence of an intention to discriminate is not a requirement for a breach of Article 1102 (and both parties seemed to accept that it was not a requirement), where such an

[51] Professor Crawford, Transcript Day 4, p. 1071 (in answer to a question put by Licenciado Serrano).

intention is shown, that is sufficient to satisfy the third requirement. But the Tribunal would add that, even if an intention to discriminate had not been shown, the fact that the adverse effects of the tax were felt exclusively by the HFCS producers and suppliers, all of them foreign-owned, to the benefit of the sugar producers, the majority of which were Mexican-owned, would be sufficient to establish that the third requirement of "less favourable treatment" was satisfied.

139. Before the Tribunal leaves the subject of Article 1102, there are two matters which require brief consideration. The first relates to the treatment of the earlier awards on Article 1102. There was a marked difference between the parties concerning the weight to be given to the awards of other tribunals which have dealt with Article 1102. As explained above, CPI focussed primarily upon the awards in *SD Myers*, *Pope and Talbot*, *ADF* and *Feldman.* By contrast, Mexico either distinguished those cases on their facts or sought to explain them away as "first generation awards" the reasoning in which had now been superseded by that in *GAMI*, *Methanex* and *Loewen.*

140. The Tribunal does not accept that these are in fact competing lines of authority. It considers that the differences between them are more ones of emphasis – due, in large part, to differences between the facts of the cases concerned and therefore entirely understandable – than of principle. Of the cases relied upon by Mexico, *Loewen* and *Methanex* have already been discussed. The facts of *GAMI* place that award in a rather special category. The case concerned Mexico's plans for restructuring the sugar industry in the

face of a severe financial crisis. Those plans entailed the expropriation of a number of sugar mills which were in financial difficulties. The claimants argued that their mills had been expropriated, whereas others, some of which were Mexican-owned, had not. The Tribunal rejected the argument that the fact that the expropriation affected only some sugar mills necessarily entailed a breach of Article 1102. The nationality of the mill owners (including the shareholders in the mill owning companies) was irrelevant to the choice of which mills were expropriated, a decision based upon governmental perceptions of their economic condition. The Tribunal does not question the correctness of the decision in *GAMI* but it does question how much light it sheds on the issues in the present proceedings. The discussion of Article 1102 in that case occupied barely two pages of the award and was largely confined to the facts of the case. As explained above (paras. 131-132), the facts of the present case are very different.

141. The second matter concerns Mexico's argument that Article 1102 requires that a foreign investor be treated in a less favourable way *qua* investor, whereas, so Mexico argued, the HFCS tax did not amount to treatment of CPI *qua* investor but rather was a measure taken to address a crisis in the Mexican sugar industry.

142. The problem with this argument is that it confuses the nature of the measure taken with the motive for which it was taken. The Tribunal does not doubt either that there was a crisis in the Mexican sugar industry, or that the motive for imposing the HFCS tax was to address that crisis. That does not alter the

fact that the nature of the measure which Mexico took was one which treated producers of HFCS in a markedly less favourable way than Mexican producers of sugar. Discrimination does not cease to be discrimination, nor to attract the international liability stemming therefrom, because it is undertaken to achieve a laudable goal or because the achievement of that goal can be described as necessary.

143. Accordingly, the Tribunal finds that, unless Mexico is successful in its countermeasures argument (to which we now turn), the HFCS tax was a violation of CPI's rights under Article 1102 (1) and (2) of the NAFTA.

IX. The Respondent's Countermeasures Defence

144. The Tribunal's conclusions regarding Article 1102 make it necessary to consider Mexico's countermeasures defence. Before reviewing the submissions of the parties on this issue, the Tribunal will first set out the principles of general international law relevant to non-forcible countermeasures. The parties were generally in agreement on the content of these principles; it was whether those principles were applicable to a claim under Chapter XI and, if so, whether the Tribunal could find that the conditions for a lawful countermeasure were satisfied, which divided them.

A. International Law regarding Countermeasures

145. The concept of countermeasures is well-established in customary international law. That a countermeasure which complied with certain conditions could preclude the wrongfulness of an act which would otherwise be contrary to the international law obligations of the State which carried it out was expressly recognized by the International Court of Justice in the *Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*[52], as well as by the arbitral tribunal in the *US-France Air Services Case.*[53] It is generally agreed (and was certainly not in dispute between the parties in the present proceedings) that the conditions which a countermeasure is required to meet are as set out in the ILC Articles on State Responsibility (notably Articles 22 and 49-53).

146. Those conditions may be summarised as follows. In order to have the effect of precluding wrongfulness, a countermeasure must –

(1) be taken in response to a prior breach of international law by another State;[54]

(2) be directed against that wrongdoing State;[55]

(3) be taken for the purpose of inducing that State to comply with its international obligations;[56]

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[52] ICJ Reps, 1997, p. 3, at para. 83.
[53] (1978) 54 ILR 303, at para. 81.
[54] ILC Article 49(1).
[55] ILC Article 49(1).

(4) be limited in time and, so far as possible, be taken in such a way as to permit resumption of the performance of the obligations in question;[57]

(5) be proportionate to the injury caused by the original wrongful act, taking account of the gravity of the wrongful act and the rights in question;[58]

(6) be accompanied by a call on the State responsible for the original wrongful act to fulfil its obligations and a good faith attempt to negotiate or resolve the dispute in question through other forms of dispute settlement.[59]

147. Countermeasures are an exceptional remedy and must not be taken if the matter can be brought before a competent international court or tribunal unless the State responsible for the original wrong fails to implement the dispute settlement process in good faith.[60] A countermeasure must be terminated as soon as the State responsible for the original wrong has complied with its obligations.[61]

148. A countermeasure which meets these conditions has the effect of precluding the wrongfulness of the act which constitutes the countermeasure. It does so, however only vis-à-vis the State responsible for the original wrong and not

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[56] ILC Article 49(1).
[57] ILC Article 49(2) and (3).
[58] ILC Article 51.
[59] ILC Article 52.
[60] ILC Article 52(3) and (4).

vis-à-vis any other party.[62] It will be necessary to say more about this aspect of the law of countermeasures later.

149. Lastly, it should be said for the sake of completeness – though it has no direct relevance to the present case - that the doctrine of countermeasures does not affect certain obligations such as those concerning the use of force, the law of human rights or norms possessing the status of *jus cogens*.[63]

B. The Submissions of the Parties

150. Mexico contended that the HFCS tax was a countermeasure adopted by Mexico in response to a prior violation of the NAFTA by the United States. As the arguments in the case unfolded, Mexico developed its submissions regarding the prior violation as follows. It identified what it alleged were two separate violations by the United States. First, it maintained that the denial by the United States of access for most of Mexico's surplus sugar produce to the United States market was a violation of the NAFTA and of the side-letters on sugar. Secondly, Mexico contended that the United States had violated its obligations to Mexico under Chapter XX of the NAFTA by frustrating the dispute settlement mechanism under that Chapter and thus preventing Mexico from getting a hearing before a tribunal in respect of the dispute over sugar access.

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[61] ILC Article 53.
[62] Commentary to ILC Articles 22 and 49, Crawford, *The ILC Articles on State Responsibility* (2002), pp. 168-9 and 285 (hereinafter, "*The ILC Articles* (2002)").
[63] ILC Article 50.

151. Mexico further maintained that the tax complied with all of the other requirements of a countermeasure. In particular, it submitted that the tax was a measure directed against the United States. It also argued that wrongfulness was precluded against CPI because CPI had no substantive rights of its own under Chapter XI but was merely empowered by the Chapter to assert, in arbitration, rights which belonged to the United States. According to Mexico, an investor could not be in a stronger position under Chapter XI than the State upon whose rights it was dependent.

152. CPI raised six objections to the countermeasures argument:-

(1) The sugar access dispute was a trade dispute arising outside Chapter XI and was thus outside the jurisdiction of the Tribunal;

(2) The doctrine of countermeasures found no room in the NAFTA;

(3) Mexico had already lost the countermeasures argument in the WTO proceedings and could not therefore rely upon it in the present case;

(4) The countermeasures defence depended upon a finding that the United States had violated its obligations under the NAFTA. This Tribunal could not make such a finding and no such finding had been made by any tribunal competent to do so;

(5) Countermeasures did not exclude wrongfulness against a third party such as CPI; and

(6) The HFCS tax was not a countermeasure in any event. It had been intended by the members of the Mexican Congress who had promoted it as a protectionist measure and it did not satisfy the other requirements for a lawful countermeasure, including notification to the United States and proportionality.

C. The Tribunal's Analysis

153. The Tribunal considers that, for Mexico to succeed in its countermeasures defence it would have to satisfy the Tribunal regarding each of the following three propositions:-

(1) that the decisions of the WTO Panel and Appellate Body do not preclude Mexico from relying upon the defence of countermeasures in this case;

(2) that the doctrine of countermeasures, although devised in the context of the legal relations between States, is applicable to a claim brought not by one State against another, but by a private investor claiming under Chapter XI of the NAFTA; and

(3) that, if the doctrine of countermeasures is applicable, in principle, to claims under Chapter XI of the NAFTA, the conditions laid down by general international law for a successful countermeasures defence are satisfied in the present case.

The Tribunal will consider these questions in turn.

1. Is Mexico precluded from advancing a countermeasures defence because of the WTO Decisions ?

154. The Tribunal does not accept that Mexico is precluded from raising the defence of countermeasures because of the rulings against it by the WTO Panel and Appellate Body. Those decisions turn on the language of the GATT and, in particular, of GATT Article XX(d), which reads as follows –

> "*Article XX General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> ...
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;"

155. The Appellate Body decided that this provision was restricted to measures taken by a State which were designed to secure compliance with that State's own laws and regulations and did not encompass countermeasures in the sense of international law. The scope of the decisions is made clear in the following passages from the decision of the Appellate Body –

> "68. In our view, the central issue raised in this appeal is whether the terms 'to secure compliance with laws or regulations' in Article XX(d) of the GATT 1994 encompass WTO-inconsistent measures applied by a WTO Member to secure compliance with another WTO Member's obligations under an international agreement.
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> ...

> 75. … Even if 'international countermeasures' could be described as intended 'to secure compliance', what they seek 'to secure compliance with'—that is, the international obligations of another WTO Member—would be outside the scope of Article XX(d). This is because 'laws or regulations' within the meaning of Article XX(d) refer to the rules that form part of the domestic legal order of the WTO Member invoking the provision and do not include the international obligations of *another* WTO Member."[64]

156. The Appellate Body's decision is conclusive that the HFCS tax could not be justified under Article XX(d) of GATT and, taken together with the other findings, establishes that the HFCS tax violated Article III.4 of GATT. It does not, however, decide that the Tax could not amount to a countermeasure, or that, if it did, it could not preclude wrongfulness under the NAFTA. Indeed, the Appellate Body was at pains to stress that it could not determine questions of legality under the NAFTA.

157. The WTO decision is not, therefore, a rejection of the countermeasures defence under general international law and in the context of the NAFTA and does not preclude Mexico from advancing that defence in the present case.

158. Nor does the fact that the tax violated Mexico's obligations under the GATT mean that it could not constitute a countermeasure which operated to preclude wrongfulness under the NAFTA. It is a feature of countermeasures that they may operate to preclude wrongfulness in respect of one obligation of the State which takes them, while not affecting another obligation of that State. This is apparent from the text of Article 50 of the ILC Articles on State Responsibility. Paragraph 1 of that Article provides that –

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64 *Mexico-Tax Measures on Soft Drinks and Other Beverages* WT/DS308/AB/R 6 March 2006.

"Countermeasures shall not affect:

(a) The obligation to refrain from the threat or use of force as embodied in the Charter of the United Nations;

(b) Obligations for the protection of fundamental human rights;

(c) Obligations of a humanitarian character prohibiting reprisals;

(d) Other obligations under peremptory norms of general international law."

The language of this provision is instructive. It does not say that a measure which contravenes one of the obligations cited in paragraphs (a) to (d) cannot constitute a countermeasure but simply that countermeasures cannot affect those obligations. It appears to contemplate that a measure which is contrary to one of these obligations will entail a breach of *that* obligation by the State which undertakes it but may nevertheless preclude the wrongfulness in relation to *another* obligation of the State which does not fall within paragraphs (a) to (d).

159. Moreover, the Commentary to this Article [65] makes clear that "States may agree between themselves on other rules of international law which may not be the subject of countermeasures" in accordance with the *lex specialis* principle in Article 55. In such a case, the same conclusions would apply, namely that an act which was contrary to such *lex specialis* would involve the responsibility of the State under the *lex specialis* in question but it would not prevent the countermeasures principle operating to preclude wrongfulness in respect of obligations arising under other international agreements or rules of customary international law.

160. Accordingly, the Tribunal considers that the proceedings before the WTO and the decisions of the Panel and Appellate Body do not prevent Mexico from relying on the countermeasures principle in the present proceedings.

2. Is the international law on countermeasures applicable to claims under Chapter XI of the NAFTA ?

161. The Tribunal has concluded, however, that the doctrine of countermeasures, devised in the context of relations between States, is not applicable to claims under Chapter XI of the NAFTA. Those claims are brought by investors, not by States. A central purpose of Chapter XI of the NAFTA was to remove such claims from the inter-State plane and to ensure that investors could assert rights directly against a host State. The Tribunal considers that, in the context of such a claim, there is no room for a defence based upon the alleged wrongdoing not of the claimant but of its State of nationality, which is not a party to the proceedings.

162. The Tribunal wishes to emphasise that what is in issue here is not whether countermeasures can preclude wrongfulness under the NAFTA as a whole but only whether they can preclude wrongfulness against an investor claiming under Chapter XI.[66] That depends in large part on the nature of the rights and obligations which arise under Chapter XI.

163. It is a well established feature of the law relating to countermeasures that a countermeasure must be directed against the State which has committed the

[65] *The ILC Articles* (2002), p. 290, para. 10.

prior wrongful act. Moreover, even if a countermeasure is directed against that State, if it also entails action inconsistent with an obligation which the State taking countermeasures owes to another party, the doctrine of countermeasures does not preclude the wrongfulness of the measure as against that other party. Thus, the Commentary to ILC Article 49 explains that –

> "A second essential element of countermeasures is that they 'must be directed against' a State which has committed an internationally wrongful act and which has not complied with its obligations of cessation and reparation under Part Two of the present articles. The word 'only' in paragraph 1 applies equally to the target of the countermeasures as to their purpose and is intended to convey that countermeasures may only be adopted against a State which is the author of the internationally wrongful act. Countermeasures may not be directed against States other than the responsible State. In a situation where a third State is owed an international obligation by the State taking countermeasures and that obligation is breached by the countermeasure, the wrongfulness of the measure is not precluded as against the third State. In that sense the effect of countermeasures in precluding wrongfulness is relative. It concerns the legal relations between the injured State and the responsible State."[67]

164. A countermeasure cannot, therefore, extinguish or otherwise affect the *rights* of a party other than the State responsible for the prior wrongdoing. On the other hand, it can affect the *interests* of such a party. To quote from the Commentary to Article 49 once more –

> "This does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties. For example, if the injured State suspends transit rights with the responsible State in accordance with this Chapter, other parties, including third States, may be affected thereby. If they have no individual rights in the matter they cannot complain. Similarly if, as a consequence of suspension of a trade

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[66] The Tribunal expresses no view on the question whether a defence of countermeasures might operate in proceedings between two NAFTA States under Chapter XX of the NAFTA.

[67] *The ILC Articles* (2002), p. 285, para. 4. See also the Commentary to Article 22 at pp. 168-9.

agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided." [68]

165. The question, therefore, is whether an investor within the meaning of Article 1101 of the NAFTA has rights of its own, distinct from those of the State of its nationality, or merely interests. If it is the former, then a countermeasure taken by Mexico in response to an unlawful act on the part of the United States will not preclude wrongfulness as against CPI, even though it may operate to preclude wrongfulness against the United States.

166. During the oral hearings counsel for Mexico argued that Chapter XI of the NAFTA grants an investor only a procedural, and not a substantive, right. The investor of one NAFTA Party is granted the right to bring proceedings against another Party rather than depending upon its State of nationality to bring proceedings on its behalf (as would have happened under the traditional international law of diplomatic protection). However, Mexico argued, the substantive right which the investor was empowered to enforce was still the right of the State as a Party to NAFTA. Mexico maintained that this approach was supported by the fact that the substantive provisions of Chapter XI were not cast in terms of individual rights. It also relied upon the award of the *Loewen* Tribunal [69] and what it claimed was the concordant subsequent practice of the three NAFTA Parties.

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[68] *The ILC Articles* (2002), p. 285, para. 5.
[69] 7 ICSID Reps. 442.

167. The Tribunal has concluded that these arguments are not persuasive. In the Tribunal's view, the NAFTA confers upon investors substantive rights separate and distinct from those of the State of which they are nationals.

168. It is now clear that States are not the only entities which can hold rights under international law; individuals and corporations may also possess rights under international law. In the case of rights said to be derived from a treaty, the question will be whether the text of the treaty reveals an intention to confer rights not only upon the Parties thereto but also upon individuals and/or corporations.

169. In the case of Chapter XI of the NAFTA, the Tribunal considers that the intention of the Parties was to confer substantive rights directly upon investors. That follows from the language used and is confirmed by the fact that Chapter XI confers procedural rights upon them. The notion that Chapter XI conferred upon investors a right, in their own name and for their own benefit, to institute proceedings to enforce rights which were not theirs but were solely the property of the State of their nationality is counterintuitive.

170. It has long been the case that international lawyers have treated as a fiction the notion that in diplomatic protection cases the State was asserting a right of its own – violated because an injury done to its national was in fact an injury to the State itself. It was a necessary fiction, because procedurally only a State could bring an international claim, but the fact that it did not reflect substantive reality showed through not only in the juristic writing but also in

various rules of law surrounding diplomatic protection claims. Two examples will suffice.

171. First, the local remedies rule is applicable in general international law to claims brought by a State by way of diplomatic protection but not to claims in which it enforces obligations owed directly to it. Yet if the notion that the rights being enforced in diplomatic protection claims were the rights of the State itself, it is difficult to see why the two categories of cases should be treated differently.

172. Secondly, the doctrine of continuing nationality under general international law requires that in a diplomatic protection case the individual national in respect of whom the claim is brought must have been a national of the claimant State not only at the date of the alleged wrong but continuously from that date until the date of the award (or, on some views, the date of the claim being filed). Again, if an injury to the national is a violation of the rights of the State, it is difficult to see why the victim's nationality after the date of the injury is of any relevance at all; the rights of the State would have been violated anyway and there is no logical reason why the State should not claim in respect of that violation whatever subsequently becomes of the individual victim.

173. What these two rules actually demonstrate is that when a State claimed for a wrong done to its national it was in reality acting on behalf of that national, rather than asserting a right of its own. The pretence that it was asserting a

claim of its own was necessary, because the State alone enjoyed access to international dispute settlement and claims machinery. However, there is no need to continue that fiction in a case in which the individual is vested with the right to bring claims of its own. In such a case there is no question of the investor claiming on behalf of the State. The State of nationality of the Claimant does not control the conduct of the case.[70] No compensation which is recovered will be paid to the State. The individual may even advance a claim of which the State disapproves or base its case upon a proposition of law with which the State disagrees. That occurred in *GAMI*, in which the United States filed a submission that the Tribunal lacked jurisdiction with regard to certain shareholder claims advanced by the Claimants. The Tribunal disagreed and held that it had jurisdiction with regard to all the claims.[71] Yet if GAMI, as an investor of the United States, was doing no more than asserting the substantive rights of the United States, it is difficult to see how such a conclusion could have been reached.[72]

174. The Tribunal considers that the reality under Chapter XI is that an investor which brings a claim is seeking to enforce what it asserts are its own rights

[70] Article 2103(6) of the NAFTA gives the State of nationality of the investor a limited power regarding a claim for expropriation based upon a taxation measure but this is exceptional and, in any event, does not give the investor's State of nationality control over the proceedings.; rather its effect is that the State of nationality and the respondent State, if agreed, can together effectively preclude such a claim by determining that the measure in question was not an expropriation. It does not affect the analysis in the text above.

[71] See paras. 29-30 and 43 of the Award.

[72] See also the position of the Canadian Government in *Mondev v. USA*, ICSID Case No. ARB(AF)/99/2, 6 ICSID Reps. 18, and the article by Douglas, "The Hybrid Foundations of Investment Treaty Arbitration" 74 BYIL (2003) 151 at 170. The Court of Appeal for England and Wales espoused the view that investors under both the NAFTA and bilateral investment treaties were asserting rights of their own rather than exercising a mere procedural power to enforce the rights of their State, see *Republic of Ecuador v. Occidental Exploration and Production Co* [2005] EWCA Civ 1116, [2006] QB 432 at paras. 14-22.

under the treaty and not exercising a power to enforce rights which are actually those of the State.

175. The Tribunal does not read the *Loewen* award [73] as taking a different position. The passage in *Loewen* which is quoted as supporting the notion that the investor is enforcing the rights of the State [74] is actually dealing with a far more restricted point and says only that the rights are "in origin" those of States.

176. The Tribunal therefore concludes that the investor, such as CPI, has rights of its own under Chapter XI of the NAFTA. As such, it is a third party in any dispute between its own State and another NAFTA Party and a countermeasure taken by that other State against the State of nationality of the investor cannot deprive that investor of its rights. To revert to the two different examples given by the ILC in its Commentary on Article 49(1), this is a case involving the *rights* of a third party and not merely its *interests*. Mexico owed obligations to CPI under Chapter XI of NAFTA which were separate from the obligations it owed to the United States under the NAFTA as a whole. Even if the doctrine of countermeasures could operate to preclude the wrongfulness of the HFCS tax vis-à-vis the United States (and, for the reasons given below, the Tribunal makes no comment on that question), they cannot do so vis-à-vis CPI.

[73] 7 ICSID Reps. 421.
[74] Paras. 232-233.

177. The US-*France Air Services* case,[75] on which Mexico relied heavily, was quite different from the present case. The *US-France Air Services* case involved a claim by the United States that France had violated the Air Services Agreement between the two States by refusing to allow Pan-American, an airline designated by the United States in accordance with the Agreement, to continue operating a service from the west coast of the United States to Paris which involved a change of aircraft in London. One of the issues which arose in the proceedings was whether retaliatory action taken by the United States against an airline designated by France, Air France, was a lawful countermeasure. The tribunal held that the United States action against Air France (a threat to block Air France flights from Paris to the west coast of the United States) was a lawful countermeasure and that its wrongfulness was therefore precluded.[76]

178. However, the proceedings in that case were proceedings between the two States. Moreover, the tribunal plainly considered that the proceedings concerned the rights of the two States and not any rights of the airlines as it held, in another part of its award, that the local remedies rule was inapplicable, because the case was one concerning direct injury to a State and did not involve rights granted to a private party.[77] By contrast, the present case is between CPI and Mexico and, for the reasons given above, the

[75] 54 ILR 303.
[76] 54 ILR 303 at 335-341, paras. 72-98.
[77] 54 ILR 303 at 323-5; paras. 29-31.

Tribunal considers that it involves the rights, and not merely the interests, of CPI.

179. Nor is the Tribunal persuaded that the practice of the three NAFTA Parties demonstrates that the doctrine of countermeasures is applicable under Chapter XI of the NAFTA. Article 31(3) (c) of the Vienna Convention on the Law of Treaties, 1969, provides that "any subsequent practice in the application of the treaty *which establishes the agreement of the parties regarding its* interpretation" (emphasis added) shall be taken into account in the interpretation of that treaty. The Tribunal therefore agrees with Mexico that subsequent practice of the three NAFTA Parties must be taken into account in the interpretation of the NAFTA if that practice establishes the agreement of the three Parties regarding the proper interpretation of the relevant NAFTA provisions. It is essential, however, to consider precisely what agreement is said to be deduced from the practice of the Parties. The practice relied upon by Mexico (e.g., the United States imposition of tariffs upon Canadian sugar, [78] the Memorandum of Understanding between Canada and the United States regarding trade in wheat [79] and the Mexico-United States trucking dispute [80]) does not point to any agreement between the NAFTA Parties regarding the question which arises in this arbitration, namely whether countermeasures may afford a defence in Chapter XI proceedings. Whatever may be the relevance of that practice as regards the

[78] Counter-Memorial, paras. 264-6.
[79] Counter-Memorial, paras. 267-9
[80] Rejoinder, para. 76.

effect of countermeasures on State-to-State relations under NAFTA, that is a quite separate question (as the Tribunal has pointed out above, paragraph 162).

3. Are the requirements of a lawful countermeasure satisfied?

180. That conclusion makes it unnecessary to address the third question, identified in paragraph 155, above, namely whether the HFCS tax met the requirements for a lawful countermeasure under general international law, for example, whether it complied with the principle of proportionality and the requirement of proper notice. To address these questions would not only be unnecessary, it would also be inappropriate, as the question of whether the Tax was a countermeasure, thus precluding wrongfulness vis-à-vis the United States, may fall to be determined by another tribunal. This Tribunal accordingly says nothing further about these questions. There is, however, one matter which was the subject of much debate before the Tribunal (and to which the foregoing consideration does not apply) on which it is necessary to say something. That concerns the effect of the limits on the Tribunal's jurisdiction upon the defence of countermeasures.

181. It is common ground that the jurisdiction of this Tribunal is limited to alleged violations of Chapter XI of the NAFTA and to the parties before it. It has no jurisdiction to determine whether there has been a breach of any of the other provisions of the NAFTA or to rule on the conduct of the United States which is not a party to these proceedings.

182. It is immediately apparent that these jurisdictional limits give rise to serious difficulties in relation to the handling of Mexico's countermeasures defence. Mexico maintained that it was entitled to take countermeasures because the United States had violated its obligations under the NAFTA (a) by denying access for Mexican sugar producers to the United States market and (b) by frustrating the operation of the Chapter XX disputes settlement mechanism. But the Tribunal does not have jurisdiction to determine whether these allegations against the United States are well-founded or not. The United States is not a party to these proceedings and the Tribunal does not have jurisdiction to determine whether any provision of the NAFTA falling outside Chapter XI has been violated. How, then, can the Tribunal determine whether the HFCS tax was a response to a prior violation of international law? And if it cannot determine that this requirement of a lawful countermeasure is satisfied, how can it uphold Mexico's countermeasures defence ?

183. Mexico conceded that the Tribunal lacks jurisdiction to determine whether or not the United States was in breach of the NAFTA but argued that it could still succeed in its countermeasures defence. It contended that countermeasures were necessarily taken by a State before the question of whether there had been a prior wrong has been established by an international tribunal. It relied upon a passage in the *US-France Air Services* case, in which the Tribunal commented that –

> "Under the rules of present-day international law, and unless the contrary results from special obligations arising under particular treaties, notably from mechanisms created within the framework of international organizations, each State establishes for itself its legal situation vis-à-vis other States. If a situation arises which, in one State's view, results in the violation of an international obligation by another State, the first State is entitled, within the limits set by the general rules of international law pertaining to the use of armed force, to affirm its rights through 'countermeasures'."[81]

184. On that basis, Mexico argued that, for it to succeed in its countermeasures defence, it was not necessary for it to establish that the United States *had* violated the provisions of the NAFTA (whether in respect of denial of access to the sugar market or frustration of the dispute resolution provisions). It needed only to satisfy the Tribunal that Mexico had, when it imposed the HFCS tax, and continued to have while the Tax was in place, a genuine belief that it had a reasonable prospect of succeeding in establishing that the United States was in breach, should that question come before a competent tribunal.

185. Notwithstanding the skill with which this argument was advanced, the Tribunal does not believe that it is possible to "square the circle" in the way suggested by Mexico. The requirement of a prior violation of international law is an absolute precondition of the right to take countermeasures. That was made clear by the International Court of Justice in the *Gabčíkovo-Nagymaros* case, when the Court said –

> "In order to be justifiable, a countermeasure must meet certain conditions. ... In the first place it must be taken in response to a

[81] 54 ILR 303 at 337, para. 81.

> previous international wrongful act of another State and must be directed against that State."[82]

186. That requirement is reiterated in Article 49(1) of the ILC Articles, which states –

> "An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two."

The Commentary to that provision observes that –

> "A fundamental prerequisite for any lawful countermeasure is the existence of an internationally wrongful act which injured the State taking the countermeasure."[83]

187. It is plainly not open to this Tribunal to dispense with a fundamental prerequisite of this kind. Nor is the fact that countermeasures are taken before a tribunal rules on whether there has been a prior wrong alter the importance or the objective nature of this fundamental prerequisite. To quote the ILC Commentary again –

> "Paragraph 1 of Article 49 presupposes an objective standard for the taking of countermeasures, and in particular requires that the countermeasures be taken against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations of cessation and reparation. *A State taking countermeasures acts at its peril, if its view of the question of wrongfulness turns out not to be well founded. A State which resorts to countermeasures based on its own unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment.*"[84]

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[82] ICJ Reps., 1997, p. 7 at p. 55, para. 83.
[83] Commentary, para. 2; *The ILC Articles* (2002), p. 284.
[84] Commentary, para. 3; ibid., pp. 284-5 (emphasis added).

188. Moreover, the ILC Commentary expressly addresses (in a footnote to the passage just quoted) the statement by the Tribunal in the *US-France Air Services* case on which Mexico relies –

> "The Tribunal's remark in the Air Services case, to the effect that 'each State establishes for itself its legal situation vis-a-vis other States', (R.I.A.A., vol. XVIII, p. 416 (1979), at p. 443. para. 81) should not be interpreted in the sense that the United States would have been justified in taking countermeasures whether or not France was in breach of the Agreement. In that case the Tribunal went on to hold that the United States was actually responding to a breach of the Agreement by France, and that its response met the requirements for countermeasures under international law, in particular in terms of purpose and proportionality. The Tribunal did not decide that an unjustified belief by the United States as to the existence of a breach would have been sufficient."[85]

189. Since the burden of establishing all of the elements of the countermeasures defence is on Mexico, as the party asserting that defence, it would follow that, even if (contrary to the view of this Tribunal) the doctrine of countermeasures were applicable to Chapter XI proceedings, Mexico's defence would necessarily fail if Mexico could not establish one of the requirements of a countermeasure (especially the first and most fundamental requirement, namely that any countermeasure must be taken in response to a prior breach of international law by another State).

190. During the oral hearings, Mexico proposed that the Tribunal should stay the proceedings until the question whether or not the United States had acted unlawfully in the sugar access dispute had been resolved at the inter-State

[85] Ibid., n. 788, p. 285.

level and then resume consideration of the countermeasures issue when that question had been resolved. The Tribunal did not accept that proposal. [86]

191. For the reasons given above, the Tribunal considers that the doctrine of countermeasures does not apply under Chapter XI in any event. That renders it unnecessary for the Tribunal to decide upon the request for a stay. Moreover, the Tribunal considers that it would be impracticable for Chapter XI tribunals to stay proceedings and await resolution of issues of this kind at the inter-state level. The Tribunal notes that, in the present case, the question whether or not the United States was in breach of NAFTA in the sugar access dispute had still not been resolved more than a year after the conclusion of the oral hearings.

192. The Tribunal therefore rejects the countermeasures defence.

[86] Transcript, Day 4, pages 778-779.

X. Conclusions and Decision

193. The Tribunal therefore decides that:-

(1) Mexico has incurred responsibility for a violation of Article 1102 in respect of CPI and CPIng;

(2) The quantum of compensation will be determined in a later phase of the proceedings;

(3) CPI and CPIng's other claims are dismissed;

(4) The question of costs will be determined as part of the next phase of the proceedings.

[signature]
Andreas F. Lowenfeld

[signature]
Jesús Alfonso Serrano de la Vega

[signature]
Christopher J. Greenwood