

**INTERNATIONAL CENTRE FOR THE SETTLEMENT OF**

**INVESTMENT DISPUTES**

**(ADDITIONAL FACILITY)**

Washington, D.C.

**(ICSID Case No. ARB(AF)/05/2)**

**Cargill, Incorporated**

**(Claimant)**

**- AND -**

**United Mexican States**

**(Respondent)**

**AWARD**

Before the Arbitral Tribunal  
constituted under Chapter 11  
of the North American Free Trade  
Agreement, and comprised of:

Dr. Michael C. Pryles  
Professor David D. Caron  
Professor Donald M. McRae

*Secretary of the Tribunal*  
Mr. Gonzalo Flores

*Legal Assistant to the Tribunal*  
Ms. Leah D. Harhay

Date of dispatch to the parties: 18 September 2009

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## FREQUENTLY USED ABBREVIATIONS AND ACRONYMS

ADM	Archer Daniels Midland Company
ADM Tate & Lyle	Archer Daniels Midland Company with Tate & Lyle Ingredients Americas, Inc.
BIT	Bilateral Investment Treaty
CdM	Cargill de Mexico, S.A. de C.V.
CPI	Corn Products International
CVD	Countervailing Duty
DCF	Discounted Cash Flow Method
DSB	World Trade Organization Dispute Settlement Body
FTC	Free Trade Commission
GATT	General Agreement on Tariffs and Trade
GEUPEC	Grupo de Embotelladoras Unidas, S.A. de C.V.
HFCS	High Fructose Corn Syrup
HFCS-42	42% High Fructose Corn Syrup
HFCS-55	55% High Fructose Corn Syrup
HFCS-90	90% High Fructose Corn Syrup
IBA	International Bar Association
ICSID	International Centre for the Settlement of Investment Disputes
IEPS Tax	Ley del Impuesto Especial Sobre Producción y Servicios (Law on the Special Tax on Production and Services)
ILC	International Law Commission
MFN	Most Favoured Nation
NAFTA	North American Free Trade Agreement
OECD	Organization for Economic Co-operation and Development
PRA	Pablo Ri3n and Associates

SECOFI	Mexico's Ministry of Trade and Industrial Development (now known as the Secretaría de Economía)
UNCITRAL	United Nations Commission on International Trade Law
UPCI	Mexico's Unidad de Prácticas Comerciales Internacionales
USTR	United States Trade Representative
WTO	World Trade Organization

## I. INTRODUCTION AND SUMMARY

1. Cargill, Inc. (“Claimant” or “Cargill”), a food company incorporated in the United States of America, argues in this arbitration that the government of United Mexican States interfered with its investment in the Mexican market, in breach of Mexico’s legal obligations under Chapter 11 of the NAFTA. Through its Mexican subsidiary, Cargill de Mexico S.A. de C.V., Cargill, Inc. had undertaken to sell high fructose corn syrup (“HFCS”) in Mexico. Cargill argues that Mexico’s imposition of a tax on soft drinks containing HFCS and its failure to issue import permits violated NAFTA Articles 1102, 1103, 1105, 1106 and 1110, and resulted in damages to Cargill’s investment. Mexico argues that its actions have not violated the NAFTA.<sup>1</sup>
2. The Tribunal holds that Mexico’s actions breached Articles 1102, 1105 and 1106. Specifically, the Tribunal holds that Respondent violated Article 1102 in that Cargill de Mexico was in “like circumstances” with domestic suppliers of cane sugar to the soft drink industry and that the treatment accorded to it was less favourable than the treatment accorded to domestic investors or their investments. With respect to Article 1105, the Tribunal finds that Respondent, in an attempt to further its goals regarding United States trade policy, targeted a few suppliers of HFCS, all but annihilating a series of investments for the time that the permit requirement was in place. The Tribunal finds this willful targeting to breach the obligation to afford Claimant fair and equitable treatment. Finally, the Tribunal holds that Respondent has breached its obligations under Article 1106 because the Ley del Impuesto Especial Sobre Producción y Servicios (“IEPS Tax”), by its very objective and design, involved a performance requirement within the meaning of Article 1106(3). It conditioned a tax advantage on the use of domestically produced cane sugar for the very purpose of affecting the sale of HFCS, and thus, it conditioned an advantage “in connection with” the operation of the Claimant’s investment which supplied HFCS to the soft drink bottling industry.
3. The Tribunal denies Claimant’s claims with respect to a breach of Article 1103 because the investor with which Claimant claims to be in “like circumstances” is not an investor of an “other Party or of a non-Party.” The Tribunal also denies Claimant’s

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<sup>1</sup> See Section IV, “Summary of Facts and Arguments,” ¶¶ 52-127.

claims for expropriation under Article 1110. Although the Tribunal concludes that business income, particularly when it is associated with a physical asset in the host country, is an investment within the meaning of Article 1139, both as an element of a larger investment involving the physical asset and as an investment in and of itself, it additionally concludes that Claimant has failed to prove that the damage done by the Mexican measures to its HFCS business resulted in a radical deprivation of Claimant's overall investment, or that the customary international law of expropriation includes claims for an interference with property that is temporary.

4. Mexico argues, however, that the dispute in this arbitration is but one part of a larger dispute with the United States regarding Mexico-U.S. obligations under the NAFTA regarding sugar and HFCS. It is often the case that an arbitration possesses jurisdiction over only one portion of a larger dispute or only one of a set of disputes. In this proceeding, Mexico argues that the facts to which Cargill points as breaches of NAFTA were lawful countermeasures in the context of the larger dispute it has with the United States and that, under the law of State responsibility, the fact that these acts were lawful countermeasures precludes their wrongfulness in this proceeding. The Tribunal does not address the question of whether the acts are or are not lawful countermeasures in Mexico's dispute with the United States. Rather, the Tribunal concludes that, even if the acts are lawful countermeasures in Mexico's dispute with the United States, such a status does not preclude the wrongfulness of these acts in this proceeding where the Claimant is not the United States.
5. Having found a breach by Mexico of various articles of the NAFTA, the Tribunal calculated the damages Cargill caused by such breaches. The Tribunal does so by calculating Cargill's net cash flow loss over the compensable period, namely from the start of June 2002 to the end of December 2007. This calculation involves projections of: (1) the price of two grades of HFCS in Mexico, (2) the size of the HFCS market in Mexico, and (3) Cargill's share of HFCS in the Mexican market. The Tribunal holds the damages owed by Mexico to Cargill, as of the end of 2007, to be USD \$77,329,240, with interest to be paid on this Award from 1 January 2008, until payment in full, at a rate equal to the U.S. Monthly Bank Loan Prime Rate, compounded annually.

## II. THE PARTIES

6. Claimant in this arbitration, Cargill, Inc., is a United States corporation incorporated under the laws of the State of Delaware and headquartered in Wayzata, Minnesota. Claimant produces and distributes high fructose corn syrup. It brings its claims in this arbitration on its own behalf and on behalf of its wholly owned enterprise in Mexico, Cargill de Mexico, S.A. de C.V. ("Cargill de Mexico" or "CdM").
7. Cargill de Mexico is organized under the laws of Mexico and is headquartered in Mexico City. It began operations in 1972, and now operates in 10 Mexican cities with over 1,000 employees. It was initially incorporated in 1967 under the name Carmex, S.A. de C.V. but, in 1989, the entity changed its name to that of Cargill de Mexico, S.A. de C.V.
8. Claimant is represented in these proceedings by:

Mr. Jeffrey W. Sarles  
Mayer Brown LLP  
71 South Wacker Drive  
Chicago, IL 60606-4637  
USA

Mr. William H. Knull III  
Mayer Brown LLP  
1909 K Street, N.W.  
Washington, D.C. 20006-1101  
USA

9. Respondent in this arbitration is the United Mexican States which is a sovereign State and a Party to the NAFTA. Respondent is represented by:

Licenciado Mariano Gomezperalta Casali  
Director General de Consultoría  
Jurídica de Negociaciones  
Secretaría de Economía  
Alfonso Reyes No. 30, Piso 17  
Colonia Condesa  
C.P. 06140  
Mexico, D.F.

Mr. J. Christopher Thomas, Q.C.  
Mr. J. Cameron Mowatt  
Mr. Greg Tereposky  
Thomas & Partners  
2211 West 4th Avenue, Suite 226

Vancouver, BC V6K 4 S2  
Canada  
Mr. Stephan E. Becker  
Mr. Sanjay J. Mullick  
Pillsbury Winthrop Shaw Pittman LLP  
2300 N Street NW  
Washington, D.C., 20037-1122  
USA

Professor James Crawford SC

10. Claimant commenced this arbitration under Chapter 11 of the NAFTA and the arbitration has proceeded in accordance with the International Centre for the Settlement of Investment Disputes (“ICSID”) Additional Facility Rules (Jan. 2003 ed.) (“Additional Facility Rules”). Claimant alleges that measures promulgated by Respondent breached Articles 1102, 1103, 1105, 1106 and 1110 of the NAFTA through measures imposed by Respondent between 1 January 2002 and 31 December 2007.
11. Respondent contends that the Tribunal lacks jurisdiction to hear this dispute. However, in the alternative, should the Tribunal decide that it has jurisdiction, Respondent denies Claimant’s allegations and contends that, even if a breach of obligations under the NAFTA did occur, Respondent undertook legitimate countermeasures in accordance with international law.

### III. PROCEDURAL HISTORY

#### Initial Party Submissions

12. On 30 September 2004, Claimant served on Respondent a Notice of Intent to Submit a Claim to Arbitration (“Notice of Intent”) pursuant to Article 1119 of the NAFTA, which requires such a Notice of Intent to be filed at least 90 days before a claim is submitted.
13. In its Notice of Intent, Claimant claimed, *inter alia*, a breach of Article 1110 of the NAFTA. Article 2103(6) requires investors claiming a breach of Article 1110 to refer the issue to the competent authorities for a determination of whether the measure is not an expropriation. Article 2103(6) provides as follows:

Article 1110 (Expropriation and Compensation) shall apply to taxation measures except that no investor may invoke that Article as the basis for a claim under Article 1116 (Claim by an Investor of a Party on its Own Behalf) or 1117 (Claim by an Investor of a Party on Behalf of an Enterprise), where it has been determined pursuant to this paragraph that the measure is not an expropriation. The investor shall refer the issue of whether the measure is not an expropriation for a determination to the appropriate competent authorities set out in Annex 2103.6 at the time that it gives notice under Article 1119 (Notice of Intent to Submit a Claim to Arbitration). If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 1120 (Submission of a Claim to Arbitration).

14. Annex 2103.6 sets out the competent authorities for both Claimant and Respondent. The authorities designated are, in the case of Mexico, the Deputy Minister of Revenue of the Ministry of Finance and Public Credit (Secretaría de Hacienda y Crédito Público); and, in the case of the United States, the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury.
15. On 6 October 2004, Claimant provided a copy of its Notice of Intent to the Secretaría de Hacienda y Crédito Público. On 13 October 2004, in accordance with Article 2103(6), it formally served a copy of its Notice of Intent on the Subsecretaría de Ingresos de la Secretaría de Hacienda y Crédito Público, the competent authority in Mexico. In addition, Claimant submitted a copy of its Notice of Intent, which had been date-stamped by the Secretaría de Economía, to the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury (the competent authority in the United States), on 5 October 2004.
16. Prior to this submission, Corn Products International (“CPI”) and the Archer Daniels Midland Company (with Tate & Lyle Ingredients Americas, Inc.) (“ADM Tate & Lyle”) had submitted claims to arbitration under Chapter 11 concerning the disputed IEPS Tax (a 20% tax applicable to soft drinks, hydrating and rehydrating drinks and syrups or concentrates for preparing soft drinks; discussed in detail below) (“IEPS Tax”) for consideration as to whether it did not in fact constitute an expropriation. Both parties submitted these claims as questions to the competent authorities pursuant to Article 2103(6). In both cases, the competent authorities of the United States and Mexico failed to agree that the measure was not an expropriation.

17. On 21 December 2004, the U.S. Department of the Treasury informed Claimant that the position of the United States remained unchanged and that the United States did not, and would not, agree that the IEPS Tax was not an expropriation. As a result of this determination, Claimant alleges that it considered that the competent authorities of the United States and Mexico had not agreed to reconsider their respective prior positions, and thus it was at liberty to submit its Article 1110 claim to arbitration.
18. Pursuant to Article 1120 of the NAFTA, on 29 December 2004, Claimant filed a Request for Institution of Arbitration Proceedings (“Request”) with ICSID, and requested approval of access to ICSID’s Additional Facility.
19. By letter dated 8 March 2005, the ICSID Secretariat requested Claimant to elaborate on the submission it made in its Request to specify that it had complied with the requirements of Article 2103(6). Claimant submitted its response by letter, dated 11 April 2005.
20. Subsequently, on 30 August 2005, the ICSID Secretary-General registered the Request in the Arbitration (Additional Facility) Register pursuant to Article 4 of the Additional Facility Rules.

#### **Constitution of the Arbitral Tribunal**

21. The Parties then undertook empanelment of the Tribunal. On 22 November 2005, Claimant nominated Professor David D. Caron, a U.S. national, as an arbitrator and the ICSID Secretariat confirmed Professor Caron’s acceptance of his appointment on 24 January 2006. Respondent nominated Professor Donald M. McRae, a national of Canada and New Zealand, as an arbitrator on 6 February 2006, and his acceptance of appointment was confirmed by the ICSID Secretariat on 9 March 2006. On 11 May 2006, the Parties jointly nominated Dr. Michael C. Pryles, a national of Australia, to serve as the third and presiding arbitrator. The arbitral panel was therefore constituted on 21 June 2006 when the ICSID Secretariat notified Dr. Pryles’ acceptance of his appointment. Mr. Gonzalo Flores, Senior Counsel, ICSID, was appointed to serve as Secretary of the Tribunal.



### **First Session of the Tribunal**

22. The first session of the Tribunal took place on 14 September 2006 at ICSID's offices at the seat of the Centre in Washington, D.C. Prior to the first session, the Parties agreed upon a number of procedural matters, including that the place of arbitration was Toronto, Canada, and that the hearings would take place at ICSID's seat in Washington, D.C.
23. At the session, Messrs. Javier Rubinstein, Jeffrey W. Sarles and Mark Ryan of Mayer Brown, LLP (formerly Mayer, Brown, Rowe & Maw LLP) appeared for Claimant. Mr. Glen Goldman and Mr. Jeffrey Cotter also attended. Lic. Hugo Perezcano Diaz and Lic. Luis Alberto González García of the Secretaría de Economía, and Messrs. Stephan E. Becker and Sanjay J. Mullick of Pillsbury Winthrop Shaw Pittman, LLP appeared for Respondent. Mr. Gonzalo Flores attended as Secretary of the Tribunal.
24. At the first session the following matters, among others, were agreed to by the Parties or decided by the Tribunal:
- The Parties confirmed their agreement that the Tribunal had been properly constituted on 21 June 2006, in accordance with the Additional Facility Rules and Chapter 11 of the NAFTA.
  - It was confirmed that, pursuant to NAFTA Article 1120, the proceedings would be conducted in accordance with the Additional Facility Rules as modified by the provisions of Chapter 11, Section B of the NAFTA.
  - It was confirmed that, in accordance with Articles 28(1)(f) and 58 of the Additional Facility Rules and ICSID's Administrative and Financial Regulation 14, the Parties would defray the expenses of the proceedings in equal parts, without prejudice to the final decision of the Tribunal as to costs.
  - It was agreed that a quorum for sittings of the Tribunal would be constituted by all three of its members and that, in the case of hearings, each member of the Tribunal should be physically present. Further, it was agreed that the Tribunal could make decisions by correspondence among its members, or by any other appropriate means of communication, provided that all members were consulted. The decisions of the Tribunal would be taken by a majority of its members.
  - It was additionally agreed that the languages of the proceedings would be English and Spanish. Simultaneous translation of English into Spanish and Spanish into English would be arranged for all hearings.

- The agreed upon place of arbitration was Toronto, Canada. However, it was also agreed that the hearings would take place at ICSID's seat in Washington, D.C., unless the Tribunal determined otherwise after consultation with the Parties, and that wherever the award was signed it would be deemed to have been made in Toronto, Canada.
  - It was agreed that the president of the Tribunal would have the power to fix and extend time limits for the completion of various steps in the proceeding. It was also agreed that, in extraordinary circumstances, the president of the Tribunal would have the power to rule by himself on other procedural matters, but the decision would be valid only after ratification by the other members of the Tribunal.
  - The Parties agreed that the pleadings would be comprised of: (a) a memorial by Claimant; (b) a counter-memorial by Respondent; (c) a reply memorial by Claimant; and (d) a rejoinder memorial by Respondent.
  - The Tribunal decided that the proceeding would not be bifurcated into liability and quantum phases.
  - It was agreed that the procedural calendar would provide for the other NAFTA Parties' right to file Article 1128 submissions, and the Tribunal requested the United States and Canada to exercise their rights under Article 1128, if they wished to do so, within 30 days of Respondent filing its counter-memorial.
  - The Tribunal established a schedule for the exchange of written pleadings and discovery of documents.
  - Finally, it was agreed that the International Bar Association ("IBA") Rules on the Taking of Evidence in International Commercial Arbitration would provide guidance to the Tribunal with respect to the conduct of proceedings.
25. On 3 October 2006, upon the suggestion of the Tribunal, the Parties agreed that Mr. Jonathon DeBoos, an Australian national, would serve as Assistant to the President of the Tribunal. He was later replaced, with the agreement of the parties, by Ms. Leah D. Harhay, a U.S. national, in February 2008, following Mr. DeBoos' taking up of other employment.
26. On 2 November 2006, the Tribunal issued *Procedural Order No. 1* concerning confidential information. Pursuant to this Order, a Party submitting a document containing any confidential business or governmental information was to designate the document as confidential. All documents designated as confidential and any information derived from them was to be used solely for the purpose of this arbitration. The Order contained a pro-forma confidentiality agreement for third parties, such as witnesses, to sign.

### Party Submissions

27. Pursuant to the procedural schedule agreed to at the first session of the Tribunal, Claimant submitted its Memorial on 22 December 2006. Claimant's Memorial was accompanied by witness statements from Michael A. Urbanic, Jeffrey Alan Cotter, and Eduardo Ortega, Jr.; expert reports from Peter A. Meyer, and Brent C. Kaczmarek, CFA; and exhibits and legal authorities. A Confidentiality Declaration signed by the witness or expert accompanied each witness statement and report.
28. On 10 January 2007, the Parties requested the Tribunal to clarify the procedural schedule agreed upon at the first session of the Tribunal. Prior to issuing a full procedural order, the Tribunal notified the Parties on 17 January 2007, that Respondent had until 7 February 2007 to file its request for production of documents. The Tribunal then followed this with *Procedural Order No. 2* of 25 January 2007, which it issued on 29 January 2007. This Order clarified and modified the dates for the steps of the procedural schedule agreed to in the first session of the Tribunal.
29. On 3 April 2007, the Parties agreed to an extension of the time limit for the filing of Respondent's Counter-Memorial.
30. Pursuant to the amended procedural schedule, Respondent submitted its Counter-Memorial on 2 May 2007, together with witness statements from Luis de la Calle Pardo, Gabriel Ramírez Nambo, Ildefonso Guajardo Villarreal, Ángel Villalobos; an expert report from Pablo Rión & Associates; and appendices, exhibits and legal authorities.
31. Article 1128 of the NAFTA provides that a NAFTA Party may, on written notice to the parties of a Chapter 11 dispute, make submissions to a tribunal on a question of interpretation of the NAFTA. On 29 May 2007, the government of Canada indicated that it did not intend to file an Article 1128 Submission prior to the October hearing, however it reserved the right to make submissions at the hearing. While no Article 1128 Submission was received from the United States either, on 28 September 2007, the United States government indicated that it would send representatives to attend the hearing.

32. Pursuant to the amended procedural schedule, Claimant submitted its Reply Memorial on 2 July 2007, together with rebuttal witness statements from Michael A. Urbanic, Jeffrey Alan Cotter, Eduardo Ortega, Jr., and Chad Jurgens; an expert rebuttal report from Brent C. Kaczmarek CFA; and exhibits and legal authorities.

### **Challenge to Jurisdiction**

33. Respondent asserted in its Counter-Memorial that the Tribunal lacked jurisdiction “to recognize two of the three measures of the Cargill claim” and requested that the Tribunal suspend the proceeding and resolve the objections to its jurisdiction as a preliminary matter. As such, on 6 July 2007, the proceedings were suspended in accordance with Article 45(4) of the Arbitration (Additional Facility) Rules. As Claimant’s Reply Memorial contained its observations on Respondent’s jurisdictional objections, Respondent was given seven days in which to provide additional comments.
34. On 9 July 2007, Claimant informed the Tribunal that it did not intend to comment further on Respondent’s jurisdictional objections.
35. On 12 July 2007, Respondent provided comments on the issue of bifurcation of the proceedings into jurisdiction and merits phases. On the same day, Claimant objected to this further submission by Respondent and contended that it should be struck from the record. Alternatively, Claimant also replied to Respondent’s submission.
36. On 18 July 2007, the Tribunal issued *Procedural Order No. 3* of 16 July 2007. In this Order, the Tribunal declined to order bifurcation of the proceedings and decided that the jurisdictional objections raised by Respondent would be decided together with the merits of the case. Consequently, the proceeding on the merits resumed.
37. Pursuant to the amended procedural schedule, Respondent submitted its Rejoinder Memorial on 20 August 2007, together with rebuttal witness statements from Hugo Perezcano Díaz, Ricardo Ramírez Hernández, and Luis de la Calle Pardo; a rebuttal expert report from Pablo Rión & Associates; as well as exhibits and legal authorities.
38. A pre-hearing teleconference was held on 17 September 2007. Claimant was represented by Mr. Jeffrey W. Sarles and Mr. William H. Knull of Mayer Brown LLP.

Respondent was represented by Lic. Luis Alberto González García of the Secretaría de Economía, Mr. Stephan E. Becker of Pillsbury Winthrop Shaw Pittman LLP, and Mr. J. Christopher Thomas of Thomas & Partners.

### **Arbitral Hearing**

39. The arbitral hearing was held from 1 to 5 October 2007, at ICSID's seat at the Centre in Washington D.C. Claimant was represented by Messrs. Jeffrey W. Sarles, William H. Knull and Richard D. Deutsch, and Ms. Violeta I. Balan of Mayer Brown LLP. Mr. Glen Goldman was also in attendance as a representative of Claimant. Respondent was represented by Lic. Luis Alberto González García of the Secretaría de Economía, Messrs. Stephan E. Becker, Sanjay J. Mullick and Jonathan Mann of Pillsbury Winthrop Shaw Pittman LLP, Messrs. J. Christopher Thomas, J. Cameron Mowatt and Greg Tereposky of Thomas & Partners, and Professor James Crawford. Mr. Salvador Behar of the Mexican Embassy in Washington DC. also attended on behalf of Respondent.
40. Messrs. Keith Benes, Mark Feldman and Jeremy Sharpe, and Ms. Jennifer Thornton of the Office of the Legal Advisor, U.S. Department of State, attended as observers of the United States.
41. At the hearing, Claimant cross-examined the following witnesses: Dr. Luis de la Calle; Sr. Ángel Villalobos Ramirez; Sr. Gabriel Ramírez Nambo; Lic. Hugo Perezcano Díaz; Sr. Pablo Rión Santisteban; and Sr. Ildefonso Guajardo Villarreal.
42. Respondent cross-examined the following witnesses: Mr. Michael A. Urbanic; Mr. Jeffrey Alan Cotter; Mr. Eduardo Ortega, Jr.; and Mr. Brent C. Kaczmarek, CFA.
43. At the hearing, the Parties agreed that there was no need for post-hearing memorials and the Tribunal accordingly made no orders in this regard. However, it was also agreed that the Tribunal could ask the Parties to submit on certain issues, if it required clarification on specific matters.
44. Throughout the course of this arbitration the Parties have paid the advances on costs, as directed by ICSID.

### Post-Hearing Submissions

45. At the arbitral hearing, the Tribunal expressed interest in receiving the awards of the related arbitrations, *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (“ADM”) and *Corn Products International v. United Mexican States* (“CPI”), should they become available to the Parties during the Tribunal’s deliberations. The Tribunal reiterated this request in a letter to the Parties on 9 February 2008.
46. On 9 April 2008, Respondent wrote to the Tribunal that it had received the ADM award, but had been thus far unable to secure claimant ADM’s consent to a redacted version of the award for distribution.<sup>2</sup> In light of its inability to provide the award, Respondent explained, in general terms, the damages that had been awarded and attached the claimant’s Notice of Application to set aside the damages portion of the award that explained these damages figures. Finally, Respondent requested the Tribunal to await the publication of the ADM award so that it could be considered in the Tribunal’s reasoning.
47. Claimant responded on 11 April 2008, arguing the Tribunal should not await publication of the ADM award and instead requested an expeditious award. Claimant also asserted that it was improper for Respondent to raise arguments about an award that neither Claimant nor the Tribunal had seen.<sup>3</sup>
48. On 17 July 2008, Respondent produced the ADM award to the Tribunal.
49. On 21 July 2008, Claimant provided its comments to the Tribunal regarding the ADM award. On 31 July 2008, Respondent likewise submitted its comments with respect to the ADM award and in response to Claimant’s submission of 21 July 2008.

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<sup>2</sup> Respondent also noted that, since the arbitral hearing, it had continued to seek redress from a Chapter 20 Panel. Respondent explained that the United States had “refused to countenance the dispute’s referral to a Panel.” Because of its unsuccessful attempt for eight years to bring the United States before a Chapter 20 Panel, Respondent wanted to inform the Tribunal that it had “reluctantly concluded that it [would] not be able to obtain justice in that forum.”

<sup>3</sup> Claimant also asserted that Mexico’s description of the recent developments in the “Sugar Dispute” had no bearing on this arbitration.

50. On 4 August 2008, Claimant submitted an unsolicited response to Respondent's comments of 31 July 2008. Respondent promptly objected to this response submitted without prior permission from the Tribunal on 8 August 2008.
51. On 13 August 2008, the Tribunal sent a letter to the Parties acknowledging Claimant's unauthorized submission of 4 August 2008 and, in order to ensure fairness, granting Respondent leave for further response to Claimant's submission. Respondent so responded on 19 August 2008.

#### IV. SUMMARY OF THE FACTS AND ARGUMENTS

52. In setting out the facts, the Tribunal will first note the products themselves and then continue on to the arrangements between the United States and Mexico concerning sugar and high fructose corn syrup ("HFCS") under the NAFTA, and the side letter agreement that forms the foundation of this dispute. The Tribunal will then proceed to set out details of Claimant's business in Mexico before examining the measures introduced by Mexico of which Claimant complains and for which it seeks redress in these proceedings. Many of the facts are not in dispute.

##### **Background on High Fructose Corn Syrup**

53. HFCS is a sweetener produced from corn starch slurry using a complex, capital-intensive production process. It is used as a low-cost substitute for sugar to sweeten soft drinks and other food products.
54. There are three commercial grades of HFCS: HFCS-42 (42% fructose), HFCS-55 (55% fructose), and HFCS-90 (90% fructose). HFCS-90 is customarily used in specialty syrups and has previously been used in formulas for lower calorie, diet beverages. Today HFCS-90 is commonly blended with HFCS-42 to produce HFCS-55.
55. HFCS-55 was created for the carbonated soft drink industry as a sweetener that would match the taste of sucrose. HFCS-55 is sweeter and has more solids than HFCS-42. Thus, more HFCS-42 is required to get the sweetness of HFCS-55. While there are some products that can use either type of HFCS, others require HFCS-55 because of the sweetness level, the solids, or the applications.

56. U.S. corn refiners (including Claimant) developed the technology for mass producing HFCS in the mid-1970's. Subsequently, HFCS rapidly replaced sugar as the primary soft drink sweetener in the United States. By the late 1980's, U.S. soft drink producers relied almost exclusively on HFCS as a sweetener.
57. Claimant asserts that HFCS has a number of advantages over sugar, including its lower production cost, consistency of quality, and ease of storage and distribution. The Tribunal notes, however, that the price advantage of HFCS is dependent on the cost of sugar in the markets in which it competes.

### **Background on Sugar**

58. There are three basic types of sugar that are traded on the world market: (1) raw sugar, which is minimally processed; (2) refined cane sugar, which is processed so as to remove all impurities; and (3) standard sugar, a semi-refined sugar (known as *estándar* in Mexico).
59. According to Respondent, sugar is widely produced and is one of the most highly protected agricultural markets in the world. Many States, including the United States and Mexico, restrict access of imported sugar to their markets to support higher domestic prices, which then encourages domestic production. As a result, surpluses emerge that must then be disposed of on the residual world market at distress prices.
60. World refined sugar prices can fluctuate dramatically. Respondent alleges that during the second half of the 1990's, a period in which Mexico entered a large surplus of *estándar* sugar, there was a substantial downturn in the world market. To compound the difficulties confronting sugar producers during this downturn, Respondent notes that, due to the long cycles of sugarcane production, growers could not quickly respond to market signals.
61. Respondent emphasizes the importance of the sugar industry to its economy. According to Respondent, the Mexican sugar industry generates a significant percentage of Mexico's gross domestic product and generates many direct and indirect jobs, affecting between four and five million people in Mexico.



### **The Mexican Sweetener Market**

62. Claimant asserts that Mexico is the second largest per capita consumer of soft drinks in the world, with annual consumption of over 150 billion liters and rising. Prior to the early to mid-1990's, Mexican soft drinks were sweetened exclusively with cane sugar. As sugar was central to the Mexican economy, Claimant alleges that the government provided Mexican sugar producers with various forms of market protection. However, in the late 1980's and early 1990's, the Mexican government began reducing its protection of the sugar industry.
63. Additionally, in the early 1990's, Mexico began to import HFCS from the United States. Claimant contends that, from 1990 to 1993, imports of HFCS from the United States rose 507%, but still only accounted for 1.25% of Mexico's total industrial sweetener market.

### **Claimant's HFCS Business Prior to the NAFTA**

64. Claimant characterizes itself as "a global producer of food and other products that prides itself on being a market leader in any business sector it enters." Claimant entered the HFCS business by building a refinery in Dayton, Ohio, in a joint venture with Miles Laboratories, which began commercial operation in 1977. By 1993, Claimant says that it held a [REDACTED] % share in the "entire North American [HFCS] market." It produced its HFCS at plants in Dayton, Ohio; Memphis, Tennessee; and Eddyville, Iowa.
65. In the late 1980's, Claimant states that it had begun to consider investing in the HFCS business in Mexico with a view to obtaining a leadership position in the potentially large HFCS market. In 1991, it entered into a relationship with Arancia S.A. de C.V. ("Arancia"), a Mexican corn milling producer. Claimant shipped HFCS from its Memphis plant by rail to Arancia, which then sold it to Mexican soft drink bottlers.
66. Claimant anticipated that the NAFTA's impending entry into force would dramatically increase the use of HFCS in Mexico. Claimant also claims that it believed the NAFTA would protect it from governmental interference. Consequently, in 1993, Claimant established a corn milling division of its Mexican subsidiary, Cargill de Mexico, to sell and distribute HFCS within Mexico. Once Claimant's Mexican HFCS business was

operational, Cargill de Mexico became primarily responsible for locating customers, negotiating sales contracts, delivering the product and servicing customers.

67. Claimant explains that, in order to meet the expected growing demand for HFCS in Mexico, while continuing to satisfy domestic demand in the United States, it decided to follow its established business model and expand HFCS production in the United States while building distribution terminals in Mexico and throughout North America.

#### **The NAFTA and Its Treatment of Sugar and HFCS**

68. The NAFTA was signed by representatives of the State Parties on 17 December 1992, and took effect on 1 January 1994. The NAFTA provided for immediate elimination of trade barriers in some sectors and for gradual elimination in more sensitive sectors, such as sweeteners. Claimant explains that this gradual elimination included a 15-year transition period for the elimination of barriers on the trade of sugar and HFCS between Mexico and the United States.
69. The original provisions of the NAFTA imposed several conditions on Mexico's sugar exports to the United States during the 15-year transition period. As explained by Claimant, there was a minimum fixed tariff-free quota of 7,258 metric tons per marketing year. In addition, under paragraph 15 of Annex 703.2(A) to the NAFTA, Mexico could export to the United States its net production surplus of sugar (domestic sugar production less domestic sugar consumption) within the following limits: 25,000 metric tons during the first six marketing years; 150,000 metric tons in the seventh marketing year (2000-2001); and 110% of the maximum limit of the previous marketing year, starting on the eighth marketing year and until the fourteenth marketing year (1 October 2001 through 31 September 2008), at which point exportation would become unlimited.
70. However, under paragraph 16 of Annex 703.2(A), Mexico could exceed these maximums beginning in the seventh marketing year if any one of three conditions was satisfied: (1) Mexico achieved a net production surplus in any two consecutive marketing years; (2) Mexico achieved a net production surplus for the previous and current marketing years; or (3) Mexico achieved a net production surplus in the current marketing year and projected that it would do the same in the next marketing year

(unless it was subsequently proven that these projections were incorrect). Under these conditions, Claimant alleges, Mexican sugar would have unlimited access to the United States.

71. The NAFTA provided for far simpler treatment of U.S. HFCS exports to Mexico, Claimant contends. It provided for tariff-only treatment of U.S. exports, beginning at 15% and declining to zero by 2004.

#### **The NAFTA's Passage Through the United States Congress and the Side Letter Agreement**

72. Respondent asserts that the U.S. sugar industry opposed opening the U.S. sugar market to Mexico as it was concerned that this would reduce the U.S. market price for sugar, thus depressing the returns to growers. According to the merged chronology of the dispute compiled by the Parties at the request of the Tribunal during the hearing ("Merged Chronology"), the United States Trade Representative ("USTR"), Ambassador Michael Kantor, in response to these concerns, proposed an exchange of letters to clarify the way HFCS would be contemplated in the "net production surplus" calculation under the NAFTA. Following months of negotiations, the United States and Mexico agreed to a side letter that modified a number of sugar provisions of the NAFTA. Respondent asserts that this side letter adjusted the quota arrangements to allow for more Mexican exportation to the U.S. during the first years of transition, but a lower volume in later years, and additionally stipulated that Mexico's sugar production would have to exceed its consumption of both sugar and HFCS for Mexico to be considered a net surplus producer. The side letter was initialed by the chief negotiators in two languages (English and Spanish) on 3 November 1993, and the English version was submitted by the U.S. president to Congress as part of the "NAFTA package" on 4 November 1993.
73. Subsequently, a dispute arose when Mexico alleged that the United States had included in its version of the letter a phrase that had not been part of the agreement. Respondent asserts that, according to the U.S. version of the side letter, paragraph 16 of Annex 703.2(A) (described above) would cease to apply. In addition, Respondent asserts that the U.S. letter only included HFCS consumption in the "net production surplus" calculation, whereas Mexico's letter includes both HFCS consumption and production.

Due to the differences between the two letters, Mexico's position was that the original terms of the NAFTA prevailed and the Parties never reached an agreement to the contrary.

#### **Claimant's HFCS Business Post-NAFTA**

74. This section describing the alleged effects of the NAFTA's passage on Claimant's HFCS business is based on factual assertions in Claimant's memorials and testimony.
75. Following passage of the NAFTA, Claimant decided to take advantage of the opportunities in Mexico that the NAFTA presented by expanding its production capacity and building distribution terminals in Mexico and the United States. By 1995-1996, Cargill de Mexico had developed a team of technical and sales personnel that met with Mexican soft drink bottlers to explain the various advantages of HFCS over sugar and the change in equipment necessary to effect a conversion to HFCS. In some cases, Claimant agreed to finance the required equipment change so as to solidify these business relationships.
76. Claimant considered building an HFCS plant in Mexico, but instead determined that it would be more efficient to manufacture HFCS in plants in the United States and ship it to Cargill de Mexico for distribution to customers that had entered into sales agreements with Cargill de Mexico.
77. Claimant's aim was to achieve a [REDACTED] % market share in Mexico, which it considered realistic as it had good working relationships with both Coca-Cola and Pepsi-Cola. To achieve this goal and to continue serving its other North American clients, Claimant believed that it needed to expand its North American HFCS production capacity.
78. To implement this strategy, Claimant constructed a new HFCS plant in Blair, Nebraska, which became operational in 1995. However, with the growth of HFCS demand in North America, further expansion was required. By late 1996, Claimant doubled the capacity of its Blair plant, and in 1997, it completed the expansion of its Eddyville, Iowa plant. At this time, it also expanded its Memphis, Tennessee plant. In total, Claimant added [REDACTED] pounds of HFCS capacity between 1993 and 1998. Mr. Michael A. Urbanic, President of Cargill's North American Corn Milling division

during this period, testified that this expansion was fuelled largely by the opportunities to distribute HFCS in Mexico through Cargill de Mexico.

79. Claimant also constructed distribution centres to service its Mexican customers. In 1994, it completed the construction of its distribution centre in Tula, Hidalgo. It also constructed an HFCS distribution centre in McAllen, Texas, to service its customers in northeastern Mexico. According to Claimant, it invested almost \$5 million in these two distribution centres alone.
80. Claimant asserts that the devaluation of the peso in 1995 temporarily set back growth in the use of HFCS but, in 1996, Coca-Cola-Mexico began using a mix of HFCS and sugar in its soft drinks, which in turn triggered widespread conversion to HFCS by Mexican soft drink bottlers. Mexican HFCS consumption increased over 156% from 1995, and the percentage of HFCS in industrial sweeteners more than doubled to almost 11%. According to Claimant, Cargill de Mexico's share of HFCS sales in Mexico grew from [REDACTED] % in 1995 to [REDACTED] % in 1996, and to [REDACTED] % in 1997.

#### **Problems in the Mexican Sugar Industry and Mexico's Market Access Grievance**

81. Respondent alleges the following facts with respect to the financial problems that developed in its sugar industry and its grievances with the United States due to the alleged lack of access for its sugar into the U.S. market.
82. In 1995, Respondent moved from being a net sugar importer to a net surplus producer. From 1995 to 2000, Mexico's sugar surpluses grew rapidly due to an increase in the productivity and planted areas following privatization, as well as decreased domestic consumption during the Mexican financial crisis of the mid-1990's. In addition, increased imports of HFCS from the United States and growing domestic production of HFCS displaced increasing quantities of sugar. The sugar surpluses either had to be sold on the domestic market, which would further depress prices, or on the world market at a substantial loss. This situation put the Mexican sugar industry under significant pressure.
83. Further, as discussed above, there were disagreements between the United States and Mexico regarding the treatment of sugar under the NAFTA. The first disagreement related to the way in which "net production surplus" was to be calculated under the

NAFTA, as the United States counted only consumption of HFCS in Mexico, while Mexico included both Mexican production and consumption of HFCS. The second disagreement related to whether paragraph 16 of Annex 703.2(A) continued to operate. Under this provision, Mexico could be entitled to export its entire sugar surplus in the marketing year 2000.

84. In response to the mounting sugar surplus in Mexico, which began to destabilize the sugar sector, Respondent sought increased access to the U.S. market and to avoid what Respondent viewed as an “already anticipated trade dispute.”

#### **Mexico’s Efforts to Resolve the Sugar Market Access Dispute**

85. Mexico, in its pleadings, details its efforts to resolve the sugar market access dispute; they are as follows. On 14 July 1997, President Zedillo wrote to President Clinton in an attempt to resolve the sugar market access dispute, specifically requesting greater access to the U.S. market. Although high level negotiations continued throughout 1997, no progress was made. Thus, on 13 March 1998, Mexico initiated dispute settlement under the NAFTA Chapter 20 by requesting consultations pursuant to that Chapter.
86. Chapter 20 provides a regime for the settlement of certain disputes between the NAFTA Parties. The first step in Chapter 20 dispute settlement is consultations between the Parties. (Article 2006) If these are unsuccessful, a Party may request a meeting of the Free Trade Commission (“FTC”). The FTC is comprised of cabinet-level representatives of the State Parties and is responsible for, *inter alia*, supervising the implementation of the NAFTA and resolving disputes that may arise regarding its interpretation or application. (Article 2001) Once a Party has requested a meeting of the FTC, the FTC shall convene within 10 days of delivery of the request and shall endeavor to resolve the dispute promptly, unless it decides otherwise. (Article 2007) If the FTC has convened and not resolved the dispute within 30 days, or such other period as the consulting Parties may agree, then either Party may request the establishment of an arbitral panel. (Article 2008(1)) Article 2008(2) provides that, upon delivery of the request, the FTC shall establish an arbitral panel.

87. To this end, Article 2009 provides that, by 1 January 1994, the State Parties would establish and maintain a roster of up to 30 individuals who would be willing and able to serve as panelists. In 1998, there were 15 panelists although, at the hearing, Respondent indicated that this initial roster of 15 had lapsed at some point. The NAFTA Parties discussed the enhancement of the roster on various occasions (19-21 March 1997, 3 April 1998, 18 September 1999, 16 October 2002, 19 March 2003, and 16 June 2004). The three trade ministers of the NAFTA Parties agreed to the full 30-person roster on 24 November 2006, but it only took effect from 1 December 2006. The Tribunal notes, however, that Article 2009 does not require that the roster comprise 30 persons but merely comprise “up to 30 individuals.”

88. The Tribunal additionally notes that Article 2011(1) sets out the procedure for appointing a Chapter 20 panel in disputes with two disputing State Parties. It provides as follows:

(a) The panel shall comprise five members.

(b) The disputing Parties shall endeavor to agree on the chair of the panel within 15 days of the delivery of the request for the establishment of the panel. If the disputing Parties are unable to agree on the chair within this period, the disputing Party chosen by lot shall select within five days as chair an individual who is not a citizen of that Party.

(c) Within 15 days of selection of the chair, each disputing Party shall select two panelists who are citizens of the other disputing Party.

(d) If a disputing Party fails to select its panelists within such period, such panelists shall be selected by lot from among the roster members who are citizens of the other disputing Party.

89. Further, the Tribunal notes that Article 2011(3) provides:

Panelists shall normally be selected from the roster. Any disputing Party may exercise a peremptory challenge against any individual not on the roster who is proposed as a panelist by a disputing Party within 15 days after the individual has been proposed.

90. According to the Merged Chronology, on 15 April 1998, Mexico and the United States held consultations pursuant to Chapter 20 in an effort to resolve the sugar market access dispute, but no resolution was reached. On 28 April 1998, the Merged

Chronology notes that Mexico informed the FTC that the consultations failed to resolve the dispute.<sup>4</sup>

91. The Merged Chronology further details that, on 13 September 1998, Mexico requested a meeting of the FTC pursuant to Article 2007 of the NAFTA; the United States, however, objected to Mexico's request. On 13 November 1998, Mexico again requested a meeting of the FTC, and the meeting took place on 17 November 1998. While no agreement was reached between the Parties, discussions continued.
92. On 5 January 1999, Mexico again requested an FTC meeting, according to the Merged Chronology. Secretary Blanco reiterated Mexico's request in a letter to USTR Charlene Barshefsky on 3 September 1999. The FTC met on 17 September 1999, but again failed to resolve the dispute.
93. Negotiations continued between the Parties with a view to resolving the dispute before the beginning of the seventh marketing year on 1 October 2000. As noted previously, from the seventh marketing year, Mexico could export its total net production surplus to the United States if it achieved a net production surplus in two consecutive years. At this time, Mexico had been a net surplus producer since 1995 and was experiencing a large sugar surplus. Thus, the practical effect of the disagreement between the United States and Mexico on the applicability of paragraph 16 would "kick in" on 1 October 2000, making it an important date in the context of the dispute. However, by August 2000 the dispute was not resolved. Thus, on 17 August 2000, Mexico requested the establishment of a Chapter 20 panel to resolve the sugar dispute.
94. Chapter 20 disputes are administered by the NAFTA Secretariat. The NAFTA Secretariat is not a single entity housed in one office; it is comprised of three sections, each of which is operated by one of the NAFTA Parties and situated in its capital city. Under the Model Rules of Procedure for Chapter Twenty ("Model Rules"), which were established pursuant to Article 2012, the section of the NAFTA Secretariat which is responsible for the administration of a Chapter 20 dispute is the section of the Party complained against. (Model Rules, Rule 2) Respondent contends that, as the United States is the respondent Party in this case, the United States section of the NAFTA

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<sup>4</sup> Respondent's Counter-Memorial places this event one day later, on 29 April 1998.



Secretariat is responsible for administering the sugar dispute case, including appointing panelists. Therefore, on 17 September 2000, the Mexican section requested the United States section to proceed with such appointment.

95. The Merged Chronology explains that the United States section did not act. Over the next few months, Mr. Ricardo Ramírez Hernández of Mexico's Ministry of Trade and Industrial Development ("SECOFI") (now known as the *Secretaría de Economía*) corresponded with Mr. William Busis and Mr. James M. Lyons of the USTR regarding the appointment of a chairman of the panel. On 17 October 2000, Mr. Ramírez wrote to Mr. Busis and proposed a chairman for the panel. In response, Mr. Lyons wrote on 17 November 2000, to advise that the United States would not agree to the initial proposal, but the United States would propose a candidate by the week of 26 November 2000. However, when the United States failed to propose a candidate by that week, Mr. Ramírez sent an email to follow up with Mr. Lyons on 30 November 2000, and a second email on 12 December 2000, to inform him that Mexico had not yet received a proposal for chairman from the United States. Later, in December 2000, Mr. Lyons informed Mr. Ramírez that the matter had been raised to a political level and he was without authority to propose panelists.
  
96. Respondent asserts that the Parties resumed negotiations in January 2001, with the Mexican officials continuing to insist on the panel's establishment. The Merged Chronology describes that, for instance, on 30 May 2001, Ambassador Zoellick and Secretary Derbéz participated in a conference call during which Secretary Derbéz indicated that it was necessary to resolve the sugar dispute or otherwise Mexico would be forced to impose restrictions on HFCS. Another meeting took place between a Mexican delegation led by Undersecretary Luis de la Calle Pardo and Ambassador Johnson and other USTR representatives on 24 August 2001, to discuss Secretary Derbéz's requests to Ambassador Zoellick for the establishment of a panel for the sugar dispute. Ambassador Johnson responded that "he did not have a positive answer to give [Mexico] in that regard." He further stated that "the U.S. government was under a lot of pressure from the sugar sector, that Mexico should not expect anything and that it would be best to find a negotiated solution to the problem." Undersecretary de la Calle informed Ambassador Johnson that "unless [the Parties] could find a

solution to the problem of Mexican sugar access to the U.S. market, Mexico would be forced to restrict HFCS.”

97. On 18 September 2001, according to the Merged Chronology, Secretary Derbéz appeared before the Mexican Congress to inform it of his meeting with Ambassador Zoellick. Congress responded that the panel should be appointed within 30 to 60 days or else Mexico would have to take other measures. At this time, Deputy Andrade submitted a proposal to prohibit HFCS imports because Mexico’s sugar industry was being affected by U.S. non-compliance with the NAFTA.
98. The Merged Chronology notes that, in October 2001, Secretary Derbéz and Ambassador Zoellick met to discuss, among other things, a potential tax on soft drinks and the appointment of panelists to the Chapter 20 panel. In addition, in the same time period, Undersecretary de la Calle met with Ambassador Johnson to propose “alternative ways” of reaching a solution to the dispute.
99. Respondent contends that the United States’ refusal to cooperate in the appointment of panelists precluded Respondent from having its grievances heard. It additionally argues that, in the 16 months following its request for the panel’s establishment and prior to the enactment of the IEPS Tax, it did everything within its power to convince the United States to submit to Chapter 20 dispute resolution, and it gave clear notice to the United States that, if Respondent could not have the sugar dispute settled by a Chapter 20 panel, it would take other measures.
100. On 31 December 2001, Mexico did take action, as explained in the Merged Chronology. On this day, Mexico’s Chamber of Deputies passed the IEPS Tax, which imposed a 20% tax on soft drinks and other beverages that contained sweeteners other than cane sugar.<sup>5</sup> Also, on the same day, Mexico’s executive announced that HFCS imports from the United States would require a permit issued by the secretary of economy.<sup>6</sup> Respondent contends that these measures were taken in response to two breaches by the United States of its obligations under the NAFTA: the failure to provide the required market access for sugar, and the failure to cooperate in constituting a Chapter 20 panel.

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<sup>5</sup> Discussed further from paragraph 105.

<sup>6</sup> Discussed further from paragraph 117.

### **Mexico's Antidumping Duties**

101. While the deepening crisis in the Mexican sugar industry and the sugar market access dispute were taking place, Claimant alleges that a number of measures were taken by Respondent to protect its industry, as detailed in the Merged Chronology. The measures commenced on 25 June 1997, with antidumping duties on imported HFCS initiated when Mexico's Sugar and Alcohol Chamber requested that Mexico's *Unidad de Prácticas Comerciales Internacionales* ("UPCI") undertake an antidumping investigation with respect to imported HFCS. The subsequent investigation commenced on 27 February 1997, and culminated on 23 January 1998, with a final UPCI order imposing antidumping duties.
102. Following failed consultations between the United States and Mexico to resolve the dispute regarding these antidumping duties pursuant to the General Agreement on Tariffs and Trade ("GATT"), the United States requested, in October 1998, the establishment of a World Trade Organization ("WTO") panel to address its claim that the antidumping duties violated the WTO Anti-Dumping Agreement, according to the Merged Chronology. In January 2000, the WTO issued a final report finding Mexico's antidumping measures to be inconsistent with the WTO Anti-Dumping Agreement; and, on 24 January 2000, the WTO Dispute Settlement Body ("DSB") adopted the panel's finding of noncompliance and recommended Respondent to bring its measures into compliance. Claimant asserts that, following Respondent's failure to repeal the duties, the United States went back to the WTO which, in June 2001, issued a new report, again finding that Mexico's antidumping duties did not comply with GATT requirements; this was confirmed by the DSB in November 2001.
103. The Merged Chronology describes that simultaneously, in February 1998, Claimant and other HFCS suppliers requested the initiation of a NAFTA Chapter 19 proceeding to investigate the antidumping duties. This panel issued two decisions, on 3 August 2001 and 15 April 2002, rejecting Mexico's justification for the duties and giving it 90 and 30 days, respectively, to revoke them. On 20 May 2002, Mexico revoked its antidumping duties and, on 17 September 2002, reimbursed Claimant for antidumping duties paid in 1997 and 1998.

104. Claimant alleges that the antidumping duties drove it and Cargill de Mexico out of the Mexican HFCS market from 1998 through the end of 2001, though Claimant planned to rebuild its business once the duties were lifted. Claimant asserts, however, that the critical situation of the Mexican sugar industry (discussed above) led the Mexican government to expropriate 27 sugar mills in September 2001 and, in October 2001, to raise its most favoured nation (“MFN”) tariffs (*i.e.*, its non-NAFTA tariffs) on HFCS. In addition, Claimant contends that, at the end of 2001, Respondent also adopted an import permit requirement for HFCS from the United States, forcing importers without a permit, like Claimant, to pay the higher MFN tariffs.<sup>7</sup>

### **The IEPS Tax**

105. Claimant, in its Memorial, presented the following facts with respect to the enactment and effects of the IEPS Tax. On 31 December 2001, Mexico enacted an amendment to the *Law on the Special Tax on Production and Services*, a statute imposing excise taxes on certain goods and services. The amendment, which took effect the following day, imposed a 20% tax on the internal transfer or importation of carbonated soft drinks and certain other beverages, syrups, powders and concentrates; this is known as the IEPS Tax. The Tax applied to all products that contained sweeteners other than cane sugar, which meant that the presence of any HFCS in a beverage was sufficient to trigger the Tax.
106. Claimant contends that the Tax was discriminatory in its effect because, while HFCS was produced and distributed entirely by U.S.-owned companies, cane sugar was produced by Mexican-owned companies and by the Mexican government-owned sugar mills. The Committee Report accompanying the IEPS Tax confirmed that the Tax exempted beverages containing cane sugar because Mexico did not want to negatively impact the Mexican sugar industry.
107. As a result of the IEPS Tax, Claimant asserts that the use of HFCS became prohibitively expensive for Mexican beverage producers, including Coca-Cola and Pepsi-Cola, who immediately cancelled their HFCS orders and switched back to sugar. The Tax applied to the soft drink price, not the HFCS price, so it was effectively a

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<sup>7</sup> Discussed below from paragraph 117.

400% tax on the HFCS included in the beverage, resulting in the eventual cancellation of HFCS orders by all Mexican bottling plants.

108. Claimant contends that the IEPS Tax had a very substantial impact on HFCS suppliers as 75% of all HFCS sales in Mexico were to soft drink bottlers. HFCS revenues fell 80% over the first three days of the Tax. In 2002, imports from the United States fell 90% from the previous year and then virtually ceased.
109. Claimant argues that there was substantial demand for HFCS in Mexico that the IEPS Tax artificially suppressed, as proved by the temporary suspension of the Tax on 5 March 2002 by President Vicente Fox Quesada. The suspension was intended to remain in effect until 30 September 2002. Immediately following the announcement of the suspension, Coca-Cola announced that it would resume sweetening its soft drinks with 30% HFCS. The suspension was lifted, however, on 12 July 2002, by order of the Mexican Supreme Court, which held that President Fox's suspension was unlawful, and noted that the Tax had the "non tax-related purpose" of "protecting the Mexican sugar industry."<sup>8</sup> Claimant additionally cites further statements of the Mexican Supreme Court and Mexico's Secretary of the Economy to support its contention that the Tax had a discriminatory and protectionist purpose.
110. Through September 2002, the IEPS Tax raised US \$17 million, a sum significantly less than the publicly projected US \$137.2 million. Claimant argues that this fact confirms that the purpose of the Tax was to harm the HFCS industry, rather than raise revenue. In addition, Claimant notes that Mexico experienced a sugar deficit during this period, and argues that Mexico sought to encourage sugar imports by reducing the import duty on sugar, rather than repealing the Tax and promoting HFCS imports.
111. At the end of 2002, the Mexican Congress renewed the IEPS Tax for 2003. The only modification was to exempt beverages containing more than 20% fruit juice, which had no effect on soft drinks.
112. In November 2003, and again in February 2004, Coca-Cola FEMSA won *amparos* against the IEPS Tax and resumed using HFCS, according to Claimant. An *amparo* is

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<sup>8</sup> Decision on Constitutional Objection [*Controversia Constitucional*] No. 32/2002, raised by the Chamber of Deputies of the Mexican Congress against the President of the United Mexican States, LS No. 05-2004-0050 JF/ALK Spanish, at 9 [C-LA-89B at 9].

a petition challenging the constitutionality of laws and seeking injunctive relief that applies only to the individual petitioner. Subsequently, Claimant contends that other bottlers began obtaining *amparos* against the Tax, thus re-opening the HFCS market in Mexico. Nonetheless, Claimant asserts that it was unable to participate in the market due to the import permit requirement discussed below.

113. On 10 June 2004, the United States requested the establishment of a WTO panel to investigate whether the IEPS Tax was in compliance with Mexico's obligations under the GATT. On 7 October 2005, the WTO panel ruled that the imposition of the Tax violated Article III of the GATT. Claimant notes a number of statements and findings made by the WTO panel, including:

- “HFCS and cane sugar are ‘directly competitive or substitutable products’ for producing soft drinks and syrups,” as well as “like products”;
- the physical characteristics of sugar and HFCS are “virtually identical”;
- producers decide which sweetener to use “largely on the basis of their relative prices”;
- Mexican label regulations do not distinguish between HFCS and sugar, so bottlers can switch between different mixtures of the two without changing their labeling;
- Mexico itself has recognized that sugar and HFCS operate in the same sweeteners market;
- HFCS and sugar were “not similarly taxed”;
- the IEPS Tax was designed and implemented to “afford protection to Mexican production of cane sugar” and “mostly affect[ed] imported sweeteners as opposed to domestic like products”;
- the “magnitude of the tax differential between imported and domestic products” was further evidence of the “protective effect of the measure on Mexican domestic production of sugar”;
- the protective effect of the Tax was “in line with the general character of the measures taken by Mexico in recent years in the sugar sector” and an “intentional objective”;
- the Tax afforded “less favourable treatment” to imported HFCS than the treatment “accorded to like products of national origin.”

114. The panel rejected Mexico's contention that the IEPS Tax only applied to beverages and not to HFCS, and found that, although the Tax on its face did not distinguish

between imported and domestic sweeteners, its distinction between cane sugar and HFCS was, “in fact, one that distinguishes between imported and domestic sweeteners.”<sup>9</sup>

115. The WTO panel’s ruling was subsequently upheld by the WTO appellate body.
116. Although the above characterizations of the WTO panel’s statements and findings are provided by Claimant, none were disputed by Respondent.

### **The Import Permit Requirement**

117. The Parties agree that, on 31 December 2001 (the same date on which Mexico introduced the IEPS Tax), the executive of Mexico published a decree that established new tariff rates for 2002 for the importation of goods under the NAFTA and other trade agreements. Under this decree, HFCS imports from the United States would require a permit issued by the secretary of economy (“import permit requirement”). If an importer did not have a permit, the import would be subject to the MFN tariff established by the Decree of 11 October 2001. Claimant explains that these MFN tariffs ranged from 156% to 210%; in comparison, the NAFTA tariff was 3% for 2002 and 1.5% for 2003.
118. Claimant asserts that Mexico indicated that the import permits would be issued automatically, though it retained the right to limit or suspend the issuance of the permits. It did not, however, publish the process or criteria for obtaining the permits. In fact, Claimant contends that when the Secretary of Economy published an announcement establishing the process for obtaining a permit on 20 March 2003, it stated that it would publish criteria for issuing the permits to import HFCS-42, HFCS-55 and HFCS-90 only when “the necessary conditions exist,” though temporary import permits for those products would continue to be issued automatically.
119. In May 2003, one of Claimant’s competitors won an *amparo* against the permit requirement. However, the *amparo* did not provide the company with an opportunity to sell HFCS in Mexico or to import HFCS from the United States as the IEPS Tax was still in force at that time.

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<sup>9</sup> Claimant’s Memorial, ¶ 149, citing *Mexico – Tax Measures on Soft Drinks And Other Beverages*, Report of the Panel, ¶ 8.119 [C-LA-8].

120. Claimant argues that its application was denied each time it applied for a permit. On 2 March 2005, it met with representatives of the secretary of economy to find out why its requests had been denied and what it needed to do to qualify for a permit. At the time, bottlers were winning *amparos* against the IEPS Tax causing the demand for HFCS to grow again, but Claimant asserts that it could not participate in the market. Claimant's witness, Mr. Jeffrey Alan Cotter, testified that Mexican officials informed Claimant that it had been denied a permit because "there were no parameters established by the Mexican Congress when they established the need to have a permit," so no permits could be granted.
121. In September 2005, Cargill de Mexico filed a *recurso de revocación* seeking reversal of the permit denials. The administrative authority failed to respond, so Cargill de Mexico filed a judicial "nullity" proceeding in April 2006, which according to the information available to the Tribunal at the time of the hearing, remains pending.

#### **The Effect of the IEPS Tax and the Import Permit Requirement**

122. Claimant argues that the IEPS Tax and the import permit requirement had a very significant impact on the Mexican sweetener industry. Before these measures were implemented, Claimant asserts, HFCS was used to sweeten most Mexican soft drinks; by 2003, however, it was virtually shut out of the industry. Imports of HFCS from the United States fell from around 219,000 metric tons in 2001, to around 84,000 metric tons in 2002, to around 11,000 metric tons in 2003 and to around 10,000 metric tons in 2004. Claimant states, however, that it was shut out of even these declining amounts.
123. The Parties agree that imports of HFCS from the United States were partially resumed in 2005 due to the "Katrina Swap", an agreement between the United States and Mexico whereby each party allowed 250,000 metric tons of the other's products to be imported duty-free. Claimant was allocated 34.52% of this allotment, but decided that it would be more profitable to sell its allotment to competitors rather than distribute the HFCS itself. Claimant contends that it was shut out of the market for so long that it was unable to take full advantage of the limited opportunity of re-entry.



### **Recent Developments in the U.S.-Mexico Sweetener Dispute**

124. On 17 July 2006, Mexico and the United States announced an agreement to resolve their sweetener disputes and to re-open the HFCS market in Mexico. The agreement provided for termination of the IEPS Tax as of 1 January 2007, and for reciprocal duty-free quotas of sweetener imports from 1 October 2006 to 31 December 2007, with free trade thereafter. During the tariff period, the United States would provide duty-free access to 500,000 metric tons of sugar from Mexico, and Mexico would do the same for 500,000 metric tons of HFCS from the United States. Claimant's allocation was expected to be ██████%.
125. In January 2007, Mexico indicated to the United States that it intended to revive its Chapter 20 sugar market access complaint and to include with it a complaint about the United States' obstruction of its original Chapter 20 complaint. Mexico sent its Request for Consultations on 15 March 2007, and consultations were duly held on 25 May 2007. The consultations failed to resolve the dispute, however.
126. On 3 July 2007, Mexico requested a meeting of the FTC, and one was held via teleconference on 13 July 2007; this too failed to resolve the dispute. Subsequently, Mexico and the United States exchanged settlement proposals, but no agreement was reached. The United States and Mexico did reach a further swap agreement on 10 September 2007, according to which Mexico would import 175,000 tons of HFCS from 1 October 2007 to 1 December 2007.
127. However, on 25 September 2007, Mexico again requested the establishment of a Chapter 20 panel to address the disputes about sugar market access and the United States' obstruction of dispute settlement.

## V. APPLICABLE LAW AND RULES

### Procedural Rules

128. Article 1120 of the NAFTA provides as follows:

#### ARTICLE 1120: Submission of a Claim to Arbitration

1. Except as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration under:
  - (a) the ICSID Convention, provided that both the disputing Party and the Party of the investor are parties to the Convention;
  - (b) the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention; or
  - (c) the UNCITRAL Arbitration Rules.
2. The applicable arbitration rules shall govern the arbitration except to the extent modified by this Section.

129. At the First Session of the Tribunal held on 14 September 2006, it was agreed and confirmed that proceedings would be conducted in accordance with the ICSID Additional Facility Arbitration Rules (2003) as modified by the provisions of Chapter 11, Section B, of the NAFTA.

### Applicable Law

130. Articles 1116 and 1117 of the NAFTA establish the rights of an investor of a State Party to bring a claim on its own behalf and on behalf of an enterprise, respectively:

#### ARTICLE 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:
  - (a) Section A or Article 1503(2) (State Enterprises), or
  - (b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,and that the investor has incurred a loss or damage by reason of, or arising out of, that breach.
2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

#### ARTICLE 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A, and that the enterprise has incurred a loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.
3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.
4. An investment may not make a claim under this Section.

131. With respect to the law governing the evaluation of these claims, Article 1131 of the NAFTA provides as follows:

ARTICLE 1131: Governing Law

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.
2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

132. The reference, in Article 1131(1), to the Agreement (*i.e.*, the NAFTA) is not confined to Chapter 11 and embraces the whole Agreement. Article 102(2) of the NAFTA provides that the Agreement must be interpreted and applied in the light of its stated objectives and in accordance with applicable rules of international law.

133. Article 1131(1) also refers to "applicable rules of international law." Other tribunals that have been called upon to decide disputes under Chapter 11 of the NAFTA have taken this to include the *Vienna Convention on the Law of Treaties* done at Vienna, 23 May 1969 ("Vienna Convention"). Mexico ratified the Vienna Convention on 25 September 1974.

134. The Vienna Convention rules on the interpretation of a treaty are widely recognized as reflective of customary international law. The Articles provide as follows:

Article 31. General Rule of Interpretation.

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
  - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
  - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
  - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
  - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
  - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32. Supplementary Means of Interpretation.

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

135. Finally, the NAFTA Free Trade Commission, in a binding note of interpretation issued on 31 July 2001 ("FTC Note"), clarified the Parties' understanding with respect to access to documents and the minimum standard of treatment in accordance with international law. With respect to the latter provision, the FTC Note explains that:

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another party.
2. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.

3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

## VI. JURISDICTION

### Objections Raised

136. Respondent requests that the Tribunal rule that it lacks jurisdiction to hear this dispute pursuant to Article 45 of the Arbitration (Additional Facility) Rules of ICSID, which provides that the Tribunal shall have the power to rule on its competence. In its Counter-Memorial, Respondent identifies its jurisdictional objections as follows:

- NAFTA has a territorial basis. Chapter 11 is designed to afford protection to investments of persons of a Party in the territory of another Party. A private party can invoke Chapter 11 only in respect of another Party's treatment of the claimant and/or its investments within that other Party's territory. Claimant's HFCS manufacturing facilities are in the United States and not Mexico. Respondent argues that Claimant's claims all relate in fact to these facilities and, therefore, no action or omission of Respondent can give rise to a Chapter 11 claim.
- The Tribunal lacks jurisdiction over Claimant's claim for damages based on the imposition of antidumping duties on imported HFCS for two principal reasons. First, the claim is time-barred because Claimant did not bring this claim within three years from the date it became aware of the antidumping measure. Second, antidumping measures are governed exclusively by NAFTA Chapter 19 and are not investment measures. In any event, Claimant was made whole by the refunding of the antidumping duties.
- Claimant's claim of a violation of the most-favoured-nation treatment obligation of Article 1103—on the basis that imports of HFCS from Canada were accorded better treatment than imports from the United States—is beyond the Tribunal's jurisdiction for two related reasons. First, Claimant has not identified any investment of a Canadian investor in Mexico that allegedly received better treatment than the investment of an U.S. investor. Claimant has only asserted differential treatment between nationals of the same country, namely the U.S., rather than discrimination based on the nationality of an investor. Where Claimant does allege favourable treatment towards imports from other countries, Respondent asserts that this is a claim in relation to trade in goods, and thus not a claim under Chapter 11.
- Respondent has raised two challenges as to the claims arising from the import permit. First, it asserts that Claimant had not referred to this claim in its Notice of Intent to Submit Request for Institution of Arbitration Procedures. By adding this later as a basis for its claim in its Memorial, Claimant acted inconsistently with the notice requirements of Article 1119. Second, the claim based on the imposition of the import permit requirement

is beyond the Tribunal's jurisdiction because the measure involves trade in goods and is thus governed by Chapter 3 of the NAFTA, not Chapter 11.

- The alleged violation of Article 1105 is based on a combination of three Mexican measures including the antidumping order which is outside the Tribunal's jurisdiction. Moreover, Article 1105 cannot be applied to tax measures such as the IEPS Tax.

137. It is not clear to the Tribunal that all of these objections are challenges to jurisdictional competence, or whether they are instead challenges to admissibility, or are simply allegations that all or part of the damages claimed by Claimant cannot be justified under the terms of the relevant NAFTA provisions. Rather than consider these challenges discretely, the Tribunal has chosen to address them in the context of analyzing the elements that Claimant must establish to succeed in its claims, while addressing at the outset the broad question of whether the claims are within the competence of this Tribunal.
138. With respect to the antidumping duties, Claimant states that it brings no claims based on these duties, which both the WTO and NAFTA Chapter 19 panel have determined are illegal. The Tribunal notes, however, that the antidumping duty period is indirectly implicated in Claimant's assessment of damages and will consider that question later in the Award when the Tribunal addresses damages.
139. The objections concerning Articles 1103 and 1105 will be addressed subsequently when the merits of the claim put forward by Claimant are considered, save that this section considers the broad question of whether measures relating to goods can ever fall within Chapter 11.
140. In this part of the Award, therefore, the Tribunal focuses on the jurisdictional requirements of Articles 1101 and 1115 to 1122, inclusive, of the NAFTA. However, before doing so, it will examine Respondent's principal jurisdictional objection, predicated on the scope and coverage of Chapter 11 as to the location of Claimant's investment and as to Chapter 11's relevance to measures affecting goods.

#### **Scope and Coverage of Chapter 11**

141. Paragraphs 226 to 246 of Respondent's Counter-Memorial are presented under the heading "Chapter Eleven does not afford protection to an investor's investments in its

home country.” Respondent appears to make two points in this section. The first point is that the scope of Chapter 11, as set out in Article 1101, is confined to investments of an investor in the territory of another Party. Respondent’s second point is that, as a general rule, trade disputes can only be settled via the dispute resolution mechanism in Chapter 20 and cannot be the subject of a claim under Chapter 11.

142. With respect to the first point, Respondent contends that Claimant is essentially claiming for damages sustained by its operations in the United States and not for operations relating to an investment in Mexico. Respondent argues that this is impermissible as Chapter 11 only applies to afford redress for claims by United States companies with respect to their investments in Mexico. Respondent does not deny that Claimant has an investment in Mexico. In its Counter-Memorial it states:

The fact that Cargill happens to have an investment in Mexico does not change the previous analysis. A claim for damages resulting from Mexico’s treatment of Cargill’s investment in Mexico can at least potentially be within the Tribunal’s jurisdiction; a claim based on the alleged effect of Mexico’s measures on Cargill’s investments in the United States cannot.

It is Respondent’s case, however, that Claimant is primarily claiming for damages sustained to its operations in the United States and that such claims are beyond the scope of Chapter 11.

143. The second, and related aspect of Respondent’s submission, is that any harm resulting from a measure related to trade in goods can only be the subject of a claim between the States concerned (the United States and Mexico) pursuant to the Chapter 20 dispute resolution process and would not fall within Chapter 11. In its Counter-Memorial, Respondent asserts that:

227. With respect to trade in goods, the NAFTA contemplates that goods produced in the territory of one Party may be exported to the territory of one or the other NAFTA Parties. Chapter Three, ‘National Treatment and Market Access for Goods’, establishes the rules governing the treatment that the importing Party must accord to such goods. Should one NAFTA Party consider that another Party is not complying with its Chapter Three obligations, it may request consultations under Article 2006, and if those fail to resolve the matter, it may proceed to State-to-State dispute settlement under Chapter Twenty. A private party has no right of standing to invoke Chapter Twenty dispute settlement.

228. As a general rule, the NAFTA’s mechanism for the settlement of disputes is established in Chapter Twenty. There are two exceptions to that rule: (i) investor-State arbitration for an alleged breach of a specified, and

exhaustive, list of obligations contained in Section A of Chapter Eleven and two sub-paragraphs of certain obligations in Chapter Fifteen; and (ii) Chapter Nineteen binational panel proceedings for review of national trade remedy measures. Each provides private parties with direct access to international jurisdiction, but only in respect of a circumscribed subject-matter.

229. In other words, Chapter Eleven tribunals do not have authority to address violations of other chapters of the NAFTA, in the same way a Chapter Nineteen panel cannot address anything other than a review of a Party's final anti-dumping or countervailing duty determination. (citations omitted)

144. Claimant does not deny that its HFCS was produced in the United States but says that it possessed a substantial investment in Mexico and is seeking damages with respect to lost cash flows from HFCS sales in Mexico. Its case, as stated in its Reply Memorial, is as follows:

21. In any event, Mexico's entire discussion about the 'territorial limitations of Chapter Eleven' rests on a faulty premise – that Cargill's claims are based on the 'effect of Mexico's measures on Cargill's investments in the United States.' In fact, as explained in the Memorial, Cargill's claims are based on the harm to Cargill and to its investments *in Mexico*. That investment included Cargill de Mexico because the definition of 'investment' in Article 1139 includes an 'enterprise' and Cargill de Mexico fits the definition of 'enterprise' in Article 201. Cargill does not seek damages for investments in its U.S. plants but rather for its investment losses in Mexico in the form of lost cash flows resulting from lost HFCS sales in Mexico. (citations omitted)

22. It is of course undisputed that Cargill made its HFCS in the United States. But it is also undisputed that Cargill made an enormous investment in a Mexican subsidiary, in a distribution center located in Mexico, in a marketing and sales force located in Mexico – in short, in an HFCS distribution network located in Mexico. The fact that an input into that business was made in the United States does not extinguish that investment. And the fact remains that Cargill is seeking damages for the lost cash flows from HFCS sales *in Mexico* due to Mexico's 'anti-HFCS' measures. (citations omitted)

145. The interrelationship between the chapters of the NAFTA dealing with investment disputes and those dealing with trade is a complex matter which has not been fully explored by other tribunals.
146. The NAFTA deals with trade and investment in separate chapters. Chapters 3 and 12 concern trade in goods and services and the dispute resolution provisions in Chapter 20 are applicable in the event of disputes between the State Parties regarding such trade. In contrast, Chapter 11 provides protection for investments and confers a right on an investor to institute dispute resolution proceedings directly against a host Party.



147. The demarcation drawn in the NAFTA between trade in goods/services and investment is further illustrated in the definition of “investment” found in Article 1139:

investment means:

- (a) an enterprise;
- (b) an equity security of an enterprise;
- (c) a debt security of an enterprise
  - (i) where the enterprise is an affiliate of the investor, or
  - (ii) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a state enterprise;
- (d) a loan to an enterprise
  - (i) where the enterprise is an affiliate of the investor, or
  - (ii) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a state enterprise;
- (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprise;
- (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);
- (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and
- (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
  - (i) contracts involving the presence of an investor’s property in the territory of the Party, including turnkey or construction contracts, or concessions, or
  - (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise;

but investment does not mean,

- (i) claims to money that arise solely from
  - (i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit in connection with a commercial transaction, such as trade financing, other than a loan covered by subparagraph (d);  
or

(j) any other claims to money, that do not involve the kinds of interests set out in subparagraphs (a) through (h)[.]

The Tribunal notes that while the Article 1139 definition of “investment” is broad and inclusive, paragraph (i) excludes from the definition, *inter alia*, claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party.

148. The fact that trade in goods/services and investment are dealt with in separate Chapters of the NAFTA does not *ipso facto* mean that there can be no overlap between the two. It is true that Article 1112(1) of the NAFTA provides that “in the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.” However, the primacy of the non-investment Chapters only applies in the event of an inconsistency and an overlap is not necessarily an inconsistency.

149. At least three previous tribunals appear to have also adopted this view. In *Ethyl Corp. v. Canada*,<sup>10</sup> the tribunal observed:

62. Canada asserts that since the MMT Act excludes MMT from importation into Canada, and prohibits inter-provincial trade in MMT, it should be viewed as affecting trade in goods and therefore falling within NAFTA Chapter 3, which covers ‘National Treatment and Market Access for Goods’ within a broader Part 2 on ‘Trade In Goods’ (which embraces Chapters 3 - 8). The argument made is that issues of trade in goods under Chapter 3 give rise to government-to-government dispute settlement procedures under Section B of Chapter 20, and, it is contended, thereby necessarily exclude the possibility of investor-State arbitration under Chapter 11.

63. Canada cites no authority, and does not elaborate any argument, however, as to why the two necessarily are incompatible. Canada confines itself in this regard to a reference to Article 1112, which simply requires that ‘In the event of any inconsistency between this Chapter [11] and another Chapter [e.g. 3], the other Chapter shall prevail to the extent of the inconsistency.’

64. As Ethyl has pointed out, Canada indicated at the hearing on jurisdiction that this was not ‘an issue that was absolutely critical to be disposed of at [that] hearing.’ In the circumstances, further treatment of this issue, if any,

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<sup>10</sup> NAFTA/UNCITRAL, Award on Jurisdiction (24 June 1998).

must abide another day. The Tribunal cannot presently exclude Ethyl's claim on this basis.

150. In *Pope & Talbot Inc. v. Canada*,<sup>11</sup> Canada sought to argue that the measures related to trade in goods and that the NAFTA drew a “sharp” distinction between trade in goods issues and investment issues. It asserted that the relevant dispute was not an investment dispute. The tribunal stated (at paragraph 26):

There is no provision to the express effect that investment and trade in goods are to be treated as wholly divorced from each other. The reference in Section A of Chapter 11 to treatment of investments with respect to the management, conduct and operation of investments is wide enough to relate to measures specifically directed at goods produced by a particular investment. The provisions for minimum standard of treatment in Article 1105 might well relate to similar measures. And Article 1106 in relation to performance requirements makes specific reference to limitations on dealing with goods in certain ways. It appears to the Tribunal accordingly that the language of Section A of Chapter 11 does not support the narrow interpretation of investment dispute which Canada and Mexico seek to advance.

151. The *Pope & Talbot* tribunal further observed (at paragraph 33):

[T]he fact that a measure may primarily be concerned with trade in goods does not necessarily mean that it does not also relate to investment or investors. By way of example, an attempt by a Party to require all producers of a particular good located in its territory to purchase all of a specified necessary raw material from persons in its territory may well be said to be a measure relating to trade in goods. But it is clear from the terms of Article 1106 that it is also a measure relating to investment in so far as it might affect an enterprise owned by an investor of a Party.

152. Likewise, in *S.D. Myers, Inc. v. Canada*,<sup>12</sup> the tribunal observed (at paragraph 139):

Chapter 11 is engaged because SDMI was an investor. It has a right to recover the economic losses to its investment initiative caused proximately by an interference with its investment contrary to the provisions of Chapter 11. The fact that some of the totality of SDMI's losses due to interference with its investment involved cross-border services does not prevent SDMI from recovering them.

153. The Tribunal concludes that there is no express or implied presumption that measures dealing with goods cannot *ipso facto* be alleged to be measures “relating to” investors or investments per Article 1101.

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<sup>11</sup> NAFTA/UNCITRAL, Award in Relation to Preliminary Motion by Government of Canada (26 Jan. 2000).

<sup>12</sup> NAFTA/UNCITRAL, Second Partial Award (21 Oct. 2002).

154. This interrelationship between trade and investment assumes relevance in relation to the assessment of damages and, in particular, as to whether damages to Claimant's actual or potential export sales are compensable, as there is a breach in respect of its Mexican investment. It is not in dispute that there is an investment in Mexico in the form of Cargill de Mexico. As the Tribunal holds there to be a violation of NAFTA Chapter 11 provisions by a measure relating to that investment and Claimant as an investor, Claimant is entitled to claim for the loss or damage incurred "by reason of, or arising out of, that breach."<sup>13</sup> Whether such damages encompass losses to Cargill within its business operations in the United States is a question of interpretation of these damages provisions and is not essentially a jurisdictional question. Consequently, it will be discussed below when the Tribunal addresses Claimant's Article 1110 claim and, again, in the calculation of damages.

#### **Competence**

155. Claimant's claims are brought under both Articles 1116 and 1117 of the NAFTA. Article 1116 allows an investor of a Party to submit to arbitration a claim that another Party has breached an obligation under Section A of Chapter 11 and to claim "that the investor has incurred loss or damage by reason of, or arising out of, that breach."
156. Article 1117 allows for a claim by an investor of a Party on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly. Under this provision, the investor may submit a claim to arbitration that the other Party has breached an obligation under Section A of Chapter 11 and "that the enterprise has incurred loss or damage by reason of, or arising out of, that breach."
157. In each case, there is a three-year time period to bring the claim from the date on which the investor—where Article 1116 claims are concerned—or the enterprise—where Article 1117 claims are concerned—"first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that ... [it] has incurred loss or damage."

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<sup>13</sup> NAFTA Articles 1116 and 1117.

158. Where Article 1116 is concerned, there are thus three jurisdictional questions: whether the claim was brought by an “investor of a Party”; whether the claim concerns a potential breach of a Section A obligation; and whether the claim is time barred.
159. Where Article 1117 is concerned, there is a further jurisdictional question as to whether the claim is brought on behalf of “an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly.”
160. A claimant must also provide preliminary notice pursuant to Article 1119 and satisfy the conditions precedent via consent and, where appropriate, waiver, under Article 1121. Consent of the respondent must be established pursuant to Article 1122.
161. Where the question in Articles 1116 and 1117 is whether the claim relates to an alleged breach of an “obligation under ... Section A,” this raises jurisdictional questions as articulated in Article 1101, which identifies the scope and coverage of Chapter 11. Indeed, Respondent’s jurisdictional challenges are essentially that the claims do not fit within the scope and coverage of Chapter 11. The Tribunal turns first to Article 1101 and then returns to Articles 1116 and 1117, as well as other articles that impact upon competence.

**NAFTA Article 1101**

162. Article 1101(1) explains the scope and coverage of Chapter 11 as follows:

ARTICLE 1101: Scope and Coverage

1. This Chapter applies to measures adopted or maintained by a Party relating to:

- (a) investors of another Party;
- (b) investments of investors of another Party in the territory of the Party;  
and
- (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

163. Jurisdictional elements of this Article involve questions as to: whether there are “measures”; whether they are “relating to” the stipulated persons or things; whether they involve “investors of another Party”; and whether they involve “investments” of those investors “in the territory of the Party” that would be subject to the claim.

164. By virtue of paragraph (a) of Article 1101, Chapter 11 applies to investors of another Party. Article 1139, Section C of Chapter 11 (Definitions) defines “investor of a Party” to mean “a Party or state enterprise thereof, or a national or an enterprise of such Party, that seeks to make, is making or has made an investment.” Although paragraph (a) does not contain an express requirement—like those included in paragraphs (b) and (c)—that the investment be in the territory of the Party which adopted the complained of measures, the tribunal in *Bayview Irrigation District v. United Mexican States*<sup>14</sup> held that the investment must be located in the territory of the State whose measures are complained of. The tribunal explained:

94) It is possible that the States Parties to the NAFTA might have given investors who are nationals of one NAFTA State and who had made an investment in that same State of which they are nationals, the right to bring a claim against another NAFTA Party in respect of a measure of that other Party which had adversely affected their investments in their national State. Such a right would, for example, entitle all Mexican business owners who had invested in Mexico by building up their own businesses there (and similarly all Canadian business owners who had invested in Canada) to bring actions against the United States in respect of any United States measure that affected their Mexican (or Canadian) businesses in violation of NAFTA provisions such as the ‘fair and equitable treatment’ provision in Article 1105. Such a right would be likely to give those Mexican and Canadian business owners much wider remedies in respect of injurious United States legislation than any United States investor would have against its own government; but such may sometimes be the effect of treaties that protect foreign investors and their investments. (citations omitted)

95) If, however, the NAFTA were intended to have such a significant effect one would expect to find very clear indications of it in the *travaux préparatoires*. There are no such clear indications, in the *travaux préparatoires* or elsewhere; and the Tribunal does not interpret Chapter Eleven of the NAFTA, and in particular Articles 1101 and 1139, in that way.

165. This Tribunal agrees with the decision in *Bayview Irrigation District* that Article 1101(1)(a) applies only to investors of another Party who have, or are proposing to make, an investment in the state of the Party whose measure is complained of.

166. Paragraph (b) applies to investments of investors of another Party in the territory of the Party. “Investment” is exhaustively defined in Article 1139 and includes “an enterprise”, which is defined in Article 201 as:

**enterprise** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-

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<sup>14</sup> NAFTA/ICSID Case No. ARB(AF)/05/1, Award (19 June 2007).

owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association;

**enterprise of a Party** means an enterprise constituted or organized under the law of a Party ....

167. In the case before us, it is clear that Claimant owns a subsidiary in Mexico, namely Cargill de Mexico, and that this subsidiary is an enterprise. Cargill de Mexico was incorporated in Mexico in 1967, and began operations in 1972. Its headquarters are in Mexico City and it operates in 10 Mexican states, employing over 1,000 people. In its Counter-Memorial, Respondent does not deny this and indeed concedes that Cargill de Mexico is an investment in Mexico held by Claimant. Thus, the Tribunal concludes that paragraphs (a) and (b) of Article 1101 are sufficiently satisfied.
168. The Tribunal must next determine whether there exist “measures adopted or maintained by a Party” which are “relating to” the investors or investment as required by Article 1101(1). Article 201 defines a “measure” as including any “law, regulation, procedure, requirement or practice.” Based on this definition, the Tribunal finds the Mexican actions to be “measures”.
169. In its Memorial, Claimant refers to Respondent’s anti-HFCS measures and lists three: (1) Mexico’s antidumping duties; (2) the IEPS Tax; and (3) the permit requirement for HFCS imports from the United States. In its Reply Memorial, Claimant refers to these three measures as constituting “a systemic anti-HFCS campaign” engaged in by Respondent. Claimant, however, clearly states that the antidumping duties are not a basis for its claims; thus the measures of which Claimant complains are only the IEPS Tax and the new permit requirement.
170. In its Counter-Memorial, Respondent contends that the import permit measure cannot be considered by this Tribunal as it is beyond its jurisdiction, as described above. It asserts two grounds for this contention. The first is that Claimant’s Notice of Intent to Submit Request for Institution of Arbitration Procedures exclusively described the soft drink Tax as the only basis for its allegations of violations of NAFTA Chapter 11. The second contention is that the import permit requirement is a trade measure, not an investment measure. In its Reply Memorial, Claimant responded that its Request for Institution of Arbitration stated that Mexico had engaged “in a series of unlawful actions intended to assist Mexican sugar producers” and described one of those

measures as the import permit. Claimant also argues that, under Article 47 of the ICSID Additional Facility Arbitration Rules, an additional claim can be filed so long as it is filed no later than in the Reply.

171. There does not seem to be a factual basis for this procedural challenge as the Notice of Intent to Submit a Claim to Arbitration served by Claimant specifically complains, at paragraph 49, of the import permit measure. In the alternative, the Tribunal is of the opinion that Claimant's Reply Memorial is persuasive and that, for the alternate reasons advanced by Claimant, the claim relating to the measure constituted by the import permit is admissible.
172. The second point raised by Respondent—that the import permit requirement is a trade measure, not an investment measure—relates to the discussion above, as to whether there is a rigid distinction drawn in the NAFTA between trade and investment matters. Claimant, in its Reply Memorial, observes that:
- Mexico offers no support for its supposed distinction between a trade measure and an investment measure. As the tribunal in *S.D. Myers* explained, '[t]here is no reason why a measure which concerns goods (Chapter 3) cannot be a measure relating to an investor or an investment (Chapter 11).'
173. Although the import permit requirement is a measure that notionally prevented Claimant's goods from crossing the border from the United States into Mexico, it directly affected the business of Cargill de Mexico. Cargill de Mexico, among its other businesses, resold HFCS sourced from the United States. By preventing the importation of its sourced goods, the measure affected Claimant's investment in Mexico.
174. Article 1101 has a causal connection requirement as well: the measures adopted or maintained by Respondent must be those "relating to" investors of another Party or investments of investors of another Party. The tribunal in *Methanex Corp. v. United States*<sup>15</sup> explored in some detail the requirement of "relating to". In paragraph 147 of its Partial Award, the *Methanex* tribunal determined that the phrase "relating to"

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<sup>15</sup> *Methanex Corp. v. United States* ("*Methanex*"), NAFTA/UNCITRAL, Partial Award (7 Aug. 2002) and Final Award on Jurisdiction and Merits (3 Aug. 2005).



signifies “something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them.”

175. Regardless of whether or not the test espoused in *Methanex* is too restrictive, it is satisfied in this case. The import permit requirement not only had an immediate and direct effect on the business of Cargill de Mexico but also constituted a legal impediment to carrying on the business of Cargill de Mexico in sourcing HFCS in the United States and re-selling it in Mexico.
176. The final question is thus whether the breaches as alleged relate to an “investment”. This is an express requirement in Articles 1101, 1116 and 1117 and also an element of the notion of “investor”. Article 1139 indicates that “investor of a Party” means “a national ... that seeks to make, is making or has made an investment.” It is not in dispute that Cargill de Mexico is an investment. However, Claimant has claimed damages for loss of cash flows in Mexico (which appear to comprise both sales transactions to its subsidiary, Cargill de Mexico, as well as re-sales by Cargill de Mexico). Whether actual or potential market share is itself an “investment” as defined in Article 1139 has been addressed but not resolved in previous cases.
177. The *Methanex* tribunal stated:

The USA is correct that Article 1139 does not mention the items claimed by Methanex. But in *Pope & Talbot Inc. v. Canada*, the tribunal held that ‘the Investor’s access to the U.S. market is a property interest subject to protection under Article 1110’. Certainly, the restrictive notion of property as a material ‘thing’ is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing. In the view of the Tribunal, items such as goodwill and market share may, as Professor White wrote, ‘constitute an element of the value of an enterprise and as such may have been covered by some of the compensation payments’. Hence in a comprehensive taking, these items may figure in valuation. But it is difficult to see how they might stand alone, in a case like the one before the Tribunal.<sup>16</sup>

178. While the tribunal in *Pope & Talbot Inc. v. Canada*<sup>17</sup> did make the above quoted comment, it is best understood in the context of later comments and the particular relevance of the proposition to the facts of that case. In *Pope & Talbot*, the investor had a wholly owned subsidiary in Canada that was subject to a voluntary export

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<sup>16</sup> NAFTA/UNCITRAL, Final Award on Jurisdiction and Merits, Part IV, Ch. D, ¶ 17 (3 Aug. 2005) (internal citation omitted).

<sup>17</sup> NAFTA/UNCITRAL, Interim Award (26 June 2000).

restraint. It was not in dispute that the subsidiary constituted an investment in Canada, the respondent in that case. After making the comment about market access, however, the tribunal subsequently made the following comments:

97. As noted, Article 1110 sets requirements that must be met by Parties expropriating ‘an investment of an investor of another Party.’ The Investor is acknowledged to be an ‘investor of another Party,’ but Canada claims that the ability to sell lumber to the U.S. market is not an investment within the meaning of NAFTA. Article 1139(g) defines investment to include, among other things, ‘property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.’

98. While Canada suggests that the ability to sell softwood lumber from British Columbia to the U.S. is an abstraction, it is, in fact, a very important part of the ‘business’ of the Investment. Interference with that business would necessarily have an adverse effect on the property that the Investor has acquired in Canada, which, of course, constitutes the Investment. While Canada’s focus on the ‘access to the U.S. market’ may reflect only the Investor’s own terminology, that terminology should not mask the fact that the two interests at stake are the Investment’s asset base, the value of which is largely dependent on its export business. The Tribunal concludes that the Investor properly asserts that Canada has taken measures affecting its ‘investment,’ as that term is defined in Article 1139 and used in Article 1110.

These comments make apparent that the discussion of the U.S. market was simply a reference to part of the value of the enterprise that constituted the investment in Canada.

179. At this stage, this Tribunal does not seek to determine whether market share in and of itself comes within any part of the definition of investment in Article 1139. This is because, in the event that Claimant succeeds in proving violation of a Chapter 11 provision, it can frame its claim for damages in respect of market share in one of two ways. Claimant could potentially argue either for this interpretation—that the market share is itself an investment in Mexico—or alternatively, show that if the relevant investment is limited to Cargill de Mexico, that nevertheless, the phrase “loss or damage by reason of, or arising out of, that breach” as found in both Articles 1116 and 1117 is broad enough to cover loss of actual and/or potential market share of Cargill in Mexico. It would therefore be necessary for the Tribunal to determine whether market share by itself constitutes an “investment”, a determination that the Tribunal will not address at this time in the Award.
180. In conclusion, the Tribunal holds that the scope and coverage requirements of Chapter 11 as set out in Article 1101 are satisfied in this case. The challenged regulations are

“measures”; they were “adopted or maintained” by Respondent; Claimant is an “investor of another Party”; and Cargill de Mexico is an “investment” of the investor “in the territory of the Party” that is the subject of the claim. As to the remaining matters relevant to competence which are in contention in respect of Article 1101, the Tribunal determines that the measures are all “relating to” the stipulated investors and investments; and the interrelationship between Chapter 11 and other elements of the NAFTA is not resolved in favor of Respondent simply by the allegation that any measure having any effect on trade in goods cannot come within Chapter 11; whether it does or does not will depend on the interpretation of the specific commitment provisions and the scope of the damages entitlement as articulated below.

#### **Articles 1116 and 1117**

181. The only claims within the competence of this Tribunal are those that can be asserted under either Articles 1116 or 1117. Claimant relies on both of these provisions in asserting its claims.
182. As explained above, Article 1116 allows an investor of a Party to submit to arbitration a claim that another Party has breached an obligation causing loss or damage; while Article 1117 allows for a claim by an investor of a Party *on behalf of an enterprise* of another Party that the investor owns or controls directly or indirectly. As previously noted, at paragraphs 167 and 180, Claimant is an investor and Cargill de Mexico qualifies as an enterprise. The requirements of these Articles are thus met.

#### **Consent**

183. The Tribunal must finally consider any challenges to the presence of consent by either of the Parties. Consent by the investor pursuant to Article 1121 is not disputed. Respondent, however, has challenged one element of the claim procedurally with respect to the import permit measure. As noted above, Respondent asserts that it was not validly notified pursuant to Article 1119. Because Claimant’s capacity to initiate arbitration under Article 1122 is limited to claims “to arbitration in accordance with the procedures set out in this Agreement,” the question is then whether Claimant has failed to comply with a procedural requirement with respect to the import permit measure and if so, whether this negates consent by Respondent in respect of such a

claim. The Tribunal does not consider this to be so. The Notice of Intent to Submit a Claim to Arbitration served by Claimant specifically complains of the import permit measure (*see* paragraph 171 above).

### **Conclusion of the Tribunal with respect to Jurisdiction**

184. For all the foregoing reasons the Tribunal decides that it possesses jurisdiction to hear the dispute.

## **VII. ARTICLE 1102 – NATIONAL TREATMENT**

### **Issue Presented**

185. Claimant argues that Mexico's measures violate NAFTA Article 1102. Specifically, the IEPS Tax was imposed on "all soft drinks containing HFCS, all of which was supplied by U.S.-owned companies" and not imposed on soft drinks sweetened with cane sugar, all of which was supplied by domestic sugar producers. In addition, Claimant argues that Mexico's import permit requirement and the failure to issue a permit to Cargill "disadvantaged Cargill to the benefit of Mexican domestic sugar producers." Claimant also points out that the fact that the IEPS Tax neither names HFCS nor singles out foreign investors is irrelevant, as the obligation under Article 1102 relates to *de facto* as well as *de jure* discrimination.
186. Respondent counters that there has been no violation of Article 1102. Claimant, it says, is confusing obligations under Article 1102 with obligations under NAFTA Article 301, incorporating GATT Article III, which deals with national treatment in relation to goods and which, Respondent argues, requires an analysis that is different from that required under NAFTA Article 1102. Further, Respondent claims, the IEPS Tax did not discriminate on the basis of nationality, a requirement for discrimination under Article 1102; nor, Respondent asserts, was Cargill de Mexico in "like circumstances" with Mexican sugar producers.
187. The relevant paragraphs of NAFTA Article 1102 provide:
1. Each Party shall accord to investors of another Party treatment no less favorable 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 favorable 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.

188. Article 1102 mandates non-discrimination in respect of both “investors” (paragraph 1) and their “investments” (paragraph 2). Claimant takes the view that Respondent has failed to comply with both paragraphs of Article 1102. That is to say, the IEPS Tax and the import permit requirement constituted less favourable treatment both for the investor Cargill and its investment Cargill de Mexico.
189. In the case of both the investor and the investment, there are two basic requirements for a successful claim to be brought under Article 1102: that the investor or the investment be in “like circumstances” with domestic investors or their investments, and that the treatment accorded to the investor or the investment be less favourable than the treatment accorded to domestic investors or their investments. A further requirement of Article 1102 is that the treatment must be “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.” The Tribunal will deal first with the “like circumstances” requirement. It will then address each of the two further requirements, in turn.

#### **“Like Circumstances”**

##### **Contentions of the Parties with respect to “Like Circumstances”**

190. Claimant argues that Cargill and its investment Cargill de Mexico are in “like circumstances” with Mexican domestic sugar producers because they operate “in the same business or economic sector.” They were, in Claimant’s view, supplying a “functionally interchangeable product to the same customers in the same sector of the economy for the same business purpose.” Claimant points to the decision of the WTO panel in *Mexico-Tax Measures on Soft Drinks and Other Beverages*, which found HFCS and sugar to be “directly competitive or substitutable” products within the meaning of GATT Article III.
191. Respondent’s response is that Claimant has confused the notion of “like products” in respect of goods under GATT Article III with the notion of “like circumstances” in

NAFTA Article 1102. Relying on the award in the *Methanex* case, in which the tribunal stated that Article 1102 must be read on its own terms and not as if the notion of “like, directly competitive or substitutable goods” was incorporated into it, Respondent argues that, just because the products sugar and HFCS compete in the same market, does not mean that the distributors of sugar and the distributors of HFCS are in “like circumstances”. Respondent cites in particular to the decisions in *GAMI* and *Pope & Talbot* to show that, even though investors and domestic producers are producing the same product, they may still not be in “like circumstances”.

192. In its Reply, Claimant rejects Respondent’s view that there is no relationship between “like circumstances” in Article 1102 and “like goods” or “like services” found elsewhere in the NAFTA and GATT, citing cases under the NAFTA (*SD Myers* and *Cross Border Trucking Services*) where the concepts of “like goods” and “like services” were referred to in the interpretation of Article 1102. “Like goods”, Claimant argues, is an important component of “like circumstances”.

#### **Conclusion of the Tribunal with respect to “Like Circumstances”**

193. The Tribunal accepts that “like circumstances” in Article 1102 has to be interpreted on its own terms. Article 1102 requires that no less favourable treatment be provided when foreign investors and domestic investors are in “like circumstances”. It does not refer to “like products” and there cannot be an automatic transfer of GATT law relating to “like products” to the Article 1102 term “like circumstances”. If the drafters of NAFTA Chapter 11 had intended to equate “like circumstances” with “like products” they could have done so. In this respect, this Tribunal agrees with the tribunal in *Methanex*.<sup>18</sup> The Tribunal thus concludes that the State Parties did not intend that “like circumstances” have a special meaning in the sense of Article 31(4) of the Vienna Convention on the Law of Treaties, but rather that it should be interpreted in accordance with Article 31(1) of the Vienna Convention, that is, the “ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

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<sup>18</sup> *Methanex*, Final Award on Jurisdiction and Merits, Final Award on Jurisdiction and Merits, Part IV, Ch. B, ¶¶ 33-34 (3 Aug. 2005).

194. It thus follows that, although as Claimant suggests “like goods” or “like products” can be an important component of “like circumstances”, the fact that an investor is producing a good that is “like” a domestically produced good does not necessarily mean that the investor is in “like circumstances” with the domestic producer of that good. Thus, the fact that a WTO panel in *Mexico-Tax on Soft Drinks* concluded that cane sugar and HFCS are “directly competitive or substitutable” products is relevant but not determinative of whether the producers of these products are in “like circumstances” for the purposes of Article 1102.
195. In this regard, the approach of the Tribunal is in accord with that in *GAMI* and *Pope & Talbot*. In each of these cases, the investor and domestic producers were not in “like circumstances” even though they produced the same product and competed in the same market. Thus, something more than the likeness of goods being produced has to be shown in order to establish that the investor and domestic producers are in “like circumstances”, particularly where there are other factors that potentially differentiate the situation of the investor or its investment from that of domestic producers of the “like goods” in question.
196. The Tribunal also notes that the IEPS Tax was applied to soft drinks containing HFCS, not to HFCS directly. Although the Tax had an impact on Claimant as a producer of HFCS in the United States and an exporter of HFCS to Mexico, as pointed out above, that effect is not something that can be the subject of a NAFTA Chapter 11 claim. The relevant impact of the Tax on Cargill as an investor was through its investment, Cargill de Mexico, which supplied HFCS to soft drink bottlers in Mexico. Hence, the question under the Article 1102 claim is whether Claimant’s investment, Cargill de Mexico, was in “like circumstances” with domestic investments. More particularly, was Cargill de Mexico, as a supplier of HFCS to the soft drink industry, in “like circumstances” with domestic suppliers of cane sugar to the soft drink industry?
197. Respondent cites three reasons for its contention that Cargill de Mexico and domestic sugar suppliers were not in “like circumstances”. First, Cargill de Mexico is a distributor of diverse products whereas Mexican sugar producers are limited to one product. Second, the market for sugar is highly regulated, but the market for HFCS is not. Third, the sugar industry was devastated economically, but the HFCS industry was not.

198. Claimant rejects each of these arguments. First, the fact that Cargill de Mexico distributes a variety of products is irrelevant because this case is about one product owned by Mexican nationals and one product owned by U.S. nationals. Second, the claim that the market for sugar is more highly regulated is neither pertinent nor proved. Third, the claim that sugar was more vulnerable “misses the point” because both products competed for the business of soft drink bottlers.
199. With respect to the first reason advanced by Respondent, the Tribunal fails to see the relevance of the diversity of Cargill de Mexico’s business. The question is whether, *in respect of its HFCS business*, Cargill de Mexico was in “like circumstances” with domestic sugar producers. The fact that Cargill de Mexico engaged in business other than the distribution of HFCS to the soft drink industry, or the fact that domestic suppliers of cane sugar engaged in businesses other than the supply of sugar to the soft drinks industry, does not appear to the Tribunal to prevent Cargill de Mexico, as a supplier of HFCS to the soft drinks industry, from being in “like circumstances” with domestic suppliers of cane sugar to the soft drinks industry.
200. Equally, the Tribunal does not find the fact that sugar operates in a highly regulated market in comparison to the HFCS market to be a relevant consideration. In fact, Respondent does not elaborate on how this factor is relevant. Rather, Respondent’s arguments on this point were largely a reiteration of its claim that the United States had failed to live up to its NAFTA obligations.
201. Respondent’s third argument to support its position that Cargill de Mexico and domestic sugar producers were not in “like circumstances” deserves closer attention. Respondent claims that the sugar industry and the HFCS industry were in different economic circumstances. The former was “economically devastated” while the latter was not. This argument about the difference in economic circumstances bears some resemblance to the approach taken in *GAMI*. There, the tribunal concluded that the Mexican government had expropriated certain mills on the basis of its perception that it was in the interest of the national economy to have public participation in mills operating at near insolvency. On that basis, the tribunal was not convinced that the mills that had not been expropriated were so like the expropriated mills as to constitute



a violation of Article 1102.<sup>19</sup> Thus, under *GAMI*, difference in economic circumstances appeared to be the basis for the tribunal concluding that the expropriated and non-expropriated mills were not in “like circumstances”.

202. In order to avoid the consequences of *GAMI*, Claimant argues that the decision in that case was based on a finding that the foreign investors could not show that they were less favourably treated than similarly situated domestic investors. However, an examination of the *GAMI* award shows that the tribunal concluded that the less favourable treatment that the Claimant received (being expropriated) was not a violation of Article 1102 because the expropriated investments were not in “like circumstances” with the investments that were not expropriated. And, they were not in “like circumstances” because of the perception of the difference in their economic situations.
203. In the present case, the essence of the Respondent’s argument is that an industry that is in dire economic straits (Mexican suppliers of cane sugar) is not in “like circumstances” with an industry that is economically healthy (U.S. suppliers of HFCS), even though they supply products that are “directly competitive or substitutable.” While it is true that this difference in economic circumstances existed, the question is whether the difference is relevant in the present case. In the Tribunal’s view, the fact that a difference in circumstances exists in the abstract is not enough; the difference has to be relevant in the context of the particular measure being imposed.
204. In *GAMI*, the difference in economic circumstances was directly related to the rationale for the measure. The measure—expropriation—was taken *because of* economic circumstances. Mills that were in dire economic circumstances were expropriated and those that were in different economic circumstances were not. Thus, it was not an abstract difference that prevented the mills from being in “like circumstances”; it was a difference that was relevant to the very rationale for the measure. In relation to the measure, mills that were in different economic circumstances were not in “like circumstances”.

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<sup>19</sup> *GAMI Investments, Inc. v. Mexico (“GAMI”)*, NAFTA/UNCITRAL, Final Award, ¶ 114 (15 Nov. 2004).

205. A similar approach appears to underlie the decision in *Pope & Talbot v. Canada*. There, the tribunal took the view that a determination of “like circumstances” had to take account of the surrounding facts and that “[a]n important element of the surrounding facts will be the character of the measure under challenge.”<sup>20</sup> The tribunal then looked at the rationale for the measure and its policy objective, which was to replace the countervailing (anti-subsidy) duty (“CVD”) imposed on Canadian lumber producers, and came to the conclusion that, in relation to that measure, lumber producers in “covered provinces” (provinces whose producers had been subject to the CVD) and lumber producers in non-covered provinces (provinces whose producers were not subject to the CVD) were not in “like circumstances”.
206. Thus, in both *GAMI* and *Pope & Talbot*, “like circumstances” was determined by reference to the rationale for the measure that was being challenged. It was not a determination of “like circumstances” in the abstract. The distinction between those affected by the measure and those who were not affected by the measure could be understood in light of the rationale for the measure and its policy objective. Indeed, it is possible that in respect of other, different measures, the mills in *GAMI* and the lumber producers in *Pope & Talbot* could have been found to be in “like circumstances”.
207. Thus, the question in this case is whether the difference in economic circumstances of the sugar industry and the HFCS industry in Mexico is relevant to the measure taken, the IEPS Tax imposed on soft drinks sweetened with HFCS. If the measure was one taken to benefit the sugar industry because of its economic condition in comparison with that of the HFCS industry then, on the basis of *GAMI*, the two industries would not have been in “like circumstances”.
208. This case, however, is different. It is not a case of a measure providing an advantage to an industry in dire economic circumstances that is not available to a more economically healthy industry. It is a measure taken to disadvantage an industry that was in healthy economic circumstances, and which had the effect of driving the industry out of the market. Undoubtedly, the measure did benefit sugar producers, but

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<sup>20</sup> *Pope & Talbot Inc. v. Canada* (“*Pope & Talbot*”), NAFTA/UNCITRAL, Award on the Merits of Phase 2, ¶ 76 (10 Apr. 2001).

Mexico did not claim that it took the measure simply to allow sugar producers to capture the sweetener market for soft drinks. Its rationale for the measure was to bring pressure on the United States government to live up to its NAFTA obligations.

209. Are, then, sugar producers and producers of HFCS in “like circumstances” in relation to the IEPS Tax, a measure designed to bring pressure on the United States? In the Tribunal’s view, a measure affecting a particular industry designed to put pressure on the United States government will focus on those who are likely to be able to influence the United States government and, in this, there is no necessary relationship with economic circumstances. In other words, unlike the *GAMI* and *Pope & Talbot* cases, there is no link here between the alleged difference—a difference in economic circumstances—and the rationale and objective of the measure in question. In the Tribunal’s view, a difference in economic circumstances is simply not relevant to determining whether the suppliers of HFCS and the suppliers of cane sugar are in “like circumstances” in relation to a measure designed to put pressure on the United States government.
210. Further, in the Tribunal’s view, even the fact that the IEPS Tax indirectly benefited the sugar cane industry does not make the difference in economic circumstances relevant for determining whether the industries in question are in “like circumstances”. In *GAMI*, reliance on a difference in economic circumstances to show that the Claimant’s mills were not in like circumstances with other mills was related to the fact that the measure was taken to benefit the economically disadvantaged industry. The Claimant’s mills were certainly treated differently, but they were not the target of a measure to drive them out of business. But, here, the measure and the effect are different from *GAMI*. If the *GAMI* principle could be used to justify a measure that destroys an economically viable foreign investment in order to benefit a domestic competitor, the national treatment protection in Article 1102 would be meaningless.

**Final Disposition of the Tribunal with respect to “Like Circumstances”**

211. In light of the above, the Tribunal concludes that, with respect to the IEPS Tax, suppliers of HFCS to the soft drink industry were in like circumstances with suppliers of cane sugar to the soft drink industry.

212. Although this conclusion relates to the IEPS Tax, in the Tribunal's view, the same reasoning must apply to the claim of "like circumstances" in relation to the import permit requirement. Since the import permit was a requirement that affected Cargill de Mexico as an investment of Cargill in Mexico, and not just Cargill as an exporter into Mexico, Claimant would have to show that Cargill de Mexico was in "like circumstances" with domestic suppliers of cane sugar for whom no such requirement existed.
213. Once again, the rationale for the measure—the import permit requirement—is relevant. Like the IEPS Tax, the rationale for the import permit requirement was to put pressure on the United States government to live up to its NAFTA obligations; indeed, it was perceived as a substitute for the IEPS Tax. The question, then, is whether a difference in economic circumstances is relevant to the determination of "like circumstances" in relation to a measure whose primary objective was to put pressure on the United States government. In the Tribunal's view, the answer to the import permit requirement is precisely the same as the answer for the IEPS Tax: difference in economic circumstances does not mean that the suppliers of HFCS and suppliers of cane sugar are not in "like circumstances" in relation to the import permit requirement.
214. In the light of the above, the Tribunal concludes that, in relation to both the IEPS Tax and the import permit requirement, Cargill de Mexico was in "like circumstances" with domestic suppliers of cane sugar to the soft drink industry.

#### **"Treatment No Less Favorable"**

##### **Issue Presented**

215. In view of the Tribunal's conclusion that suppliers of cane sugar and suppliers of HFCS were in "like circumstances", it is necessary to consider whether Cargill de Mexico, as a supplier of HFCS, received "less favorable treatment" than the suppliers of cane sugar.

##### **Contentions of the Parties with respect to "Treatment No Less Favorable"**

216. Claimant argues that the treatment accorded it by Respondent was less favourable in that the "difference in tax treatment made HFCS a far more expensive input into soft drinks than sugar." In respect of the IEPS Tax, Claimant draws support from the

decision of the WTO panel in *Mexico-Tax on Soft Drinks*, which concluded that HFCS, as a product, received less favourable treatment than sugar in relation to the soft drinks industry. Equally, Claimant argues that “Mexico’s new import requirement and its refusal to issue such a permit to Cargill” disadvantaged Claimant to the benefit of domestic sugar producers in the competition for sweetener orders from the soft drinks industry.

217. Respondent does not challenge the claim that, under the IEPS Tax, HFCS was treated less favourably than cane sugar, but instead argues that, in order to comply with Article 1102, differential treatment has to be received on the basis of nationality. Respondent claims that this requirement is the consistent position taken by the three NAFTA State Parties and that the Tribunal should give this due weight in interpreting Article 1102. Thus, Respondent argues, since there was some Mexican investment in the HFCS industry and there was foreign investment (including that of Cargill) in the cane sugar industry, the discrimination as between suppliers of HFCS and cane sugar to the soft drinks industry could not have been on the basis of nationality.
218. Claimant counters that Article 1102 applies to *de facto* as well as *de jure* discrimination. It contends as well that Article 1102 applies when the treatment received by foreign investors is “materially less favorable” as compared with the treatment received by domestic investors.

**Conclusion of the Tribunal with respect to “Treatment No Less Favorable”**

219. In the Tribunal’s view, there is no question but that, as a result of the IEPS Tax, the treatment received by suppliers of HFCS to the Mexican soft drinks industry was less favourable than the treatment received by suppliers of cane sugar. HFCS suppliers could no longer compete as a result of the IEPS Tax, whereas cane sugar suppliers were not affected.
220. Moreover, the Tribunal also concludes that the discrimination was based on nationality both in intent and effect. The IEPS Tax was taken avowedly to bring pressure on the United States government. By its very design, then, it was directed at United States producers of HFCS because only in that way would pressure be brought to bear on the United States government. The import permit requirement, which was intended by the

Mexican government to be a substitute for the IEPS Tax, was even more directly targeted at United States producers, even though it may have affected other nationals as well. The whole history of this case, as set out by both Claimant and Respondent, indicates that it is about measures directed at United States producers and suppliers of HFCS.

**Final Disposition of the Tribunal with respect to “Treatment No Less Favorable”**

221. In light of the above, the Tribunal concludes that the IEPS Tax and the import permit requirement resulted in Claimant receiving less favourable treatment within the meaning of Article 1102.

**Treatment “with respect to the Establishment, Acquisition, Expansion, Management, Conduct, Operation, and Sale or Other Disposition of Investments”**

222. The final requirement of Article 1102—that the treatment must be “with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments”—is clearly met in this case. Indeed, Respondent does not challenge this.

**Final Disposition of the Tribunal with respect to Claim Arising under Article 1102**

223. The Tribunal, accordingly, concludes that the IEPS Tax and the export permit requirement violate Mexico’s obligations under Article 1102.

**VIII. ARTICLE 1103 – MOST FAVOURED NATION (“MFN”) TREATMENT**

**Issue Presented**

224. Claimant argues that, as the import permit requirement applied only to HFCS imported from the United States and not to HFCS imported from Canada, Mexico violated its obligations under NAFTA Article 1103 to provide to Claimant, and its investment, Cargill de Mexico, treatment no less favourable than it provides in like circumstances to investors or investments of another Party or a non-Party.
225. Respondent’s response is that Claimant has not identified any measure that constituted a violation of Article 1103. For Respondent, this is a jurisdictional issue. In order to establish a violation of Article 1103, Claimant has to show that an investor, or the

investment of an investor, of another Party or of a non-Party has received more favourable treatment. This, Respondent claims, Claimant has not done. According to Respondent, Claimant has simply alleged that another U.S. investor had imported HFCS from Canada without the need for an import permit and had thus received more favourable treatment than had the Claimant.

226. As set out above,<sup>21</sup> the Tribunal determined that this issue went to the merits of the case, rather than to jurisdiction, and accordingly it is dealt with here.

227. Article 1103 provides:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party 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 favorable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

228. As Claimant points out, the requirement for MFN treatment tracks that of the national treatment requirement. Accordingly, it must be demonstrated first that the Claimant, as an investor, is in “like circumstances” with the investor of another Party or of a non-Party, or that the Claimant’s investment is in “like circumstances” with the investment of an investor of another Party or of a non-Party. And second, it must be shown that the treatment received by Claimant was less favourable than the treatment received by the comparable investor or investment.

229. The essence of Respondent’s argument is that there is no comparable investor or investment identified by the Claimant that fits within Article 1103 that is in “like circumstances” with Claimant as an investor or in “like circumstances” with Claimant’s investment. Accordingly, no question of less favourable treatment can arise. It is this threshold question that the Tribunal must address.

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<sup>21</sup> See *supra* ¶ 137.

### **Contentions of the Parties with respect to Claim Under Article 1103**

230. In its Memorial, Claimant compares itself for its Article 1103 claim with Corn Products International (“CPI”) that, it is alleged, imported HFCS from Canada without being required to have an import permit. The “like circumstances”, Claimant argues, result from the fact that Claimant has a Mexican subsidiary that imports HFCS from the United States while CPI has a Mexican subsidiary that imports HFCS from Canada.
231. For Respondent, such facts do not constitute an allegation of a violation of Article 1103. That Article, Respondent asserts, requires there be a comparable investor of another NAFTA Party or of a non-Party, or the investments of those investors. Article 1103 does not compare the treatment of an investor of a NAFTA Party with the treatment of another investor of the same NAFTA Party.
232. In its Reply, Claimant focuses on Casco, as the relevant Canadian investor. Casco, a Canadian subsidiary of CPI (a U.S. investor), produces HFCS in Canada and exports it to another CPI subsidiary in Mexico. In its Rejoinder, Respondent rejects the view that Casco provides an appropriate comparison on the grounds that it is neither a Canadian investor in Mexico nor the investment of a Canadian investor in Mexico, within the meaning of Article 1103. That article, Respondent claims, covers only investments within the territory of a responding Party, not investments made elsewhere.

### **Conclusion of the Tribunal with respect to Claim Arising under Article 1103**

233. Earlier in this Award, the Tribunal accepted the view expressed in *Bayview Irrigation District* that, for the purposes of a NAFTA Chapter 11 claim, the investment had to be located in the territory of the State complained of.<sup>22</sup> Casco is an investment of CPI in Canada, not an investment of CPI in Mexico, and so, even if it was an investment of “any other NAFTA Party or of a non-Party” and not an investment of a United States investor in Canada, it could not be used as a basis for comparison for the purposes of Claimant’s Article 1103 claim. It is not sufficient for Casco, as a Canadian subsidiary, to trade with a “sister subsidiary” in Mexico; it must have its own investment in

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<sup>22</sup> See *supra* ¶¶ 164-65.



Mexico. However, no claim was made that Casco itself is an investor in Mexico. Nor is there any evidence of other Canadian investors in Mexico, or investors of non-NAFTA Parties in Mexico, with whom Claimant could be in “like circumstances” or investments of those investors with which Cargill de Mexico could be in “like circumstances”.

#### **Final Disposition with respect to Claim Arising under Article 1103**

234. In light of this, the Tribunal concludes that Claimant has failed to show that it is in “like circumstances” with investors of another NAFTA Party or the investors of a non-Party, or that its investments are in “like circumstances” with the investments of an investor of another NAFTA Party or the investments of an investor of a non-Party. Accordingly, Claimant’s Article 1103 claim is dismissed.

#### **IX. ARTICLE 1105 – FAIR AND EQUITABLE TREATMENT**

##### **Issue Presented**

235. Claimant asserts that Respondent, through a series of measures, violated its obligations to Claimant under Article 1105. Claimant argues that, in evaluating its claim, the Tribunal should not focus on any one measure, but should instead view each and all measures in the context of “Mexico’s lengthy and unrelenting campaign to drive U.S.-owned HFCS producers and their HFCS investments in Mexico from the marketplace.” While conceding that one of the measures, the IEPS Tax, as a consequence of NAFTA Article 2103’s tax exclusion cannot itself serve as a basis for an Article 1105 claim, Claimant argues that its 1105 claim rests on “Mexico’s broad-based anti-HFCS campaign, of which the IEPS Tax was only one component.” It is the “aggregate of the situations” that determines whether a government fails to provide the “stable and predictable business environment” to which investors are entitled.<sup>23</sup> Claimant asserts, however, that the import permit requirement alone would be sufficient to constitute a violation of Article 1105.
236. Respondent counters that several of the measures pointed to by Claimant are outside of the Tribunal’s jurisdiction. It argues that the antidumping duties are outside of the

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<sup>23</sup> PSEG Global Inc. v. Republic of Turkey (“PSEG v. Turkey”), ICSID Case No. ARB/02/05, Award, ¶ 253 (19 Jan. 2007).

Tribunal's jurisdiction, both because of the Article 1121 limitations period and the fact that antidumping duties are governed exclusively by Chapter 19. The tax measures, Respondent adds, should also be excluded from the Tribunal's review as Article 2103 of the NAFTA provides that, except as set out in that article, nothing in the NAFTA applies to tax measures. Finally, Respondent contests Claimant's "bundling" of measures and asserts that the Tribunal must instead parse and carefully examine each measure.

237. More fundamentally, the Parties disagree as to the obligations required of a State Party under NAFTA Article 1105. Claimant, at least initially in its pleadings and argument, advocated a set of obligations based on what Respondent terms a "conventional", or "autonomous" treaty-based view of the obligations of fair and equitable treatment, rather than the view that Article 1105 incorporates by reference the obligations of fair and equitable treatment under customary international law. This basic difference leads the Parties to examine different authorities.
238. The following sections review the contentions of the Parties both as to the standard to be applied and its application in this case. This is followed by the Tribunal's conclusions as to both the standard required by the fair and equitable treatment obligation in Article 1105 and the application of that standard to this dispute.

#### **Contentions of the Parties with respect to Claim Arising Under Article 1105**

##### **Contentions of the Parties as to the Standard of Fair and Equitable Treatment Generally**

239. The Tribunal observes that the differences between the Parties as to the standard of fair and equitable treatment changed in some respects during the course of the proceedings. In particular, Claimant, at least initially, argued that the language of Article 1105 requiring "fair and equitable treatment" should be approached not as a reference to customary law, but rather as treaty language to be interpreted in accordance with the law of treaties. In this way, Claimant argued, for example, that the ordinary meaning

of “fair and equitable” required treatment that was “just”, “even-handed”, “unbiased” and “legitimate”.<sup>24</sup>

240. Respondent, citing to the July 2001 NAFTA Free Trade Commission *Notes on Interpretation of Certain Chapter 11 Provisions* (“FTC Note”), which was followed in then pending proceedings, *S.D. Myers v. Canada*,<sup>25</sup> and in all NAFTA Chapter 11 proceedings since, emphasized that Claimant’s approach was misplaced and that the Tribunal must rely solely on customary international law in applying Article 1105.
241. Claimant acknowledged the relevance of the FTC Note on Article 1105, but contends that a shift in approach to examining customary international law is of little practical significance because the customary international law standard is equivalent to the standard that is obtained by interpreting the phrase “fair and equitable treatment” as a matter of autonomous treaty obligation. More specifically, Claimant argues that Article 1105 of the NAFTA incorporates the customary international law minimum standard of treatment of aliens, providing a floor below which treatment of foreign investors must not fall. Claimant further argues that the relevant customary international law standard, like all of customary international law, may evolve, and that the present customary standard of fair and equitable treatment is no longer as narrow as it was found to be in the 1926 *Neer* decision.<sup>26</sup> Claimant asserts that all three State Parties to the NAFTA have agreed to this evolving nature of the standard.<sup>27</sup> Claimant finally asserts that the customary international law standard is in fact now equivalent to the autonomous meaning given to the phrase “fair and equitable treatment” by other tribunals.
242. Claimant points to the award in *Técnicas Medioambientales Tecmed S.A. v. United Mexican States* (“*Tecmed*”) not only as a statement of the autonomous meaning, but also of the current content of customary international law as to the duty to provide fair

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<sup>24</sup> *Azurix Corp. v. Argentine Republic* (“*Azurix v. Argentina*”), ICSID Case No. ARB/01/12, Award, ¶ 360 (14 July 2006), citing Oxford English Dictionary (22nd ed).

<sup>25</sup> *S.D. Myers, Inc. v. Canada* (“*S.D. Myers*”), NAFTA/UNCITRAL, Partial Award in Respect of Damages, ¶¶ 259, 263 (13 Nov. 2000).

<sup>26</sup> Citing *Pope & Talbot*, Award in Respect of Damages, ¶¶ 58-65 (31 May 2002); OECD, FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW, WORKING PAPER NO. 2004/3 (“*OECD Working Paper*”), at 40 (Sept. 2004); *L.F. Neer v. Mexico*, US-Mexico Mixed Claims Commission (“*Neer*”), 4 I.R.A.A. 60 (15 Oct. 1926).

<sup>27</sup> *OECD Working Paper*, at 11-12.

and equitable treatment. Relying on *Tecmed*, Claimant argues that there are four primary components to the duty to provide fair and equitable treatment. In *Tecmed*, the tribunal held that the obligation to provide fair and equitable treatment requires contracting parties to provide treatment that “does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor.”<sup>28</sup>

243. Fair and equitable treatment, according to Claimant, thus requires: (1) a stable and predictable environment that does not offend reasonable expectations; (2) a general lack of arbitrariness, ambiguity and inconsistency; (3) transparency; and (4) a lack of discrimination. These factors, Claimant contends, are considered a part of the minimum standard of treatment under customary international law.
244. Respondent, as noted above, argues that the FTC Note requires that the Tribunal apply the customary international law standard of “fair and equitable treatment”. Respondent appears to accept that the *Neer* decision of 1926 was a valid statement of the standard, and accepts that the standard may evolve. Respondent does not accept Claimant’s assertion that the customary international law standard has evolved over time in such a fashion that it is, at this point, identical to the meaning some tribunals have given to the obligation as a matter of autonomous treaty interpretation.
245. Respondent thus objects to Claimant’s reliance on *Tecmed* and the standard promulgated by its tribunal. First, Respondent argues *Tecmed* involved a dispute not arising under the NAFTA but rather under the *Mexico-Spain Bilateral Investment Treaty*, and that the tribunal in that instance approached the issue as one of treaty interpretation and not as one of ascertaining the content of custom.
246. Second, Respondent asserts that the standard promulgated by the *Tecmed* tribunal has not been embraced by all subsequent tribunals even when the issue is viewed as one of treaty interpretation and, in fact, has recently been criticized by the ICSID Annulment

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<sup>28</sup> Técnicas Medioambientales Tecmed S.A. v. United Mexican States (“*Tecmed*”), ICSID Case No. ARB (AF)/00/2, Award, ¶ 154 (29 May 2003).

Committee in its review of *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*.<sup>29</sup>

247. Third, Respondent argues that the standard provided by *Tecmed* is clearly incorrect in the context of the NAFTA and the FTC Note for four reasons: (1) it postulates a degree of clarity, simplicity and unity of regulatory goals that no State, even the most developed, can attain; (2) it exhibits a lack of understanding of the complexity of governmental decisions that must sometimes be made urgently based on the information at hand, resulting in the fact that they could be imperfect, incomplete or even wrong; (3) it relieves investors of the duty to inform themselves of the law; and (4) it appears to be based upon the belief that the investor's subjective expectations are the source of the State's treaty obligations.
248. In its Reply Memorial, Claimant supports its reliance on the *Tecmed* award by arguing that other NAFTA panels have relied on rulings in non-NAFTA investor-State cases. In addition, Claimant asserts that the *Tecmed* standard has been reaffirmed by other international tribunals.

**Contentions of the Parties as to the Application in this Instance of the Asserted Requirement of a "Stable and Predictable Environment to Uphold Reasonable Expectations"**

249. Claimant argues that the preamble to the NAFTA calls for "a predictable commercial framework for business planning and investment" and therefore tribunals consider a predictable commercial framework to be an essential element of fair and equitable treatment. For support of this assertion, Claimant, as noted above, cites to *Tecmed* for the holding that a treaty's inclusion of fair and equitable treatment requires the parties "to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment."<sup>30</sup>
250. Claimant contends that Respondent changed the rules upon which Claimant had based its legitimate expectations and investment decisions. Claimant asserts that it never could have expected Respondent would take special measures to harm its investment

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<sup>29</sup> ICSID Case No. ARB/01/7, Decision of Annulment Committee, ¶ 67 (21 Mar. 2007).

<sup>30</sup> *Tecmed*, Award, ¶ 154 (29 May 2003).

and “overthr[ow] the prior tax and import regimes on which [Claimant] reasonably relied when making its investments.”

251. According to Claimant, predictability and stability were of “paramount importance” to it when it decided to invest in the Mexican sweetener industry and, for the first several years under the NAFTA, Respondent provided a stable business framework. Claimant argues, however, that then the HFCS measures “pulled the rug out from under that framework,” defeating stability, predictability and Claimant’s reasonable expectations. Claimant asserts that the antidumping duties, the IEPS Tax, the unobtainable permit requirement and the “governmental determination to remove the competitive threat of HFCS at all costs” “breached its obligation of fair and equitable treatment by evisceration of the arrangements in reliance upon which the foreign investor was induced to invest.”<sup>31</sup>
252. Claimant concludes that “[t]his transformation of the investment landscape” cannot be considered a legitimate business risk as it arose not from natural economic factors, but from “hostile measures taken by the host government.” Claimant argues that the unpredictability of the measures is proven by their timing: when the antidumping duties were about to be revoked, Respondent instituted the IEPS Tax; and when bottlers began to win *amparos* against the Tax, Respondent withheld criteria for issuance of the import permits.
253. Respondent, on the other hand, points to Claimant’s internal feasibility studies and memoranda as proof that Claimant was not only not taken by surprise by the import licensing requirement, but was previously aware of the possibility of such an action. Respondent quotes, for instance, from Claimant’s “Mexico HFCS Plant Feasibility Study: Tula, Hidalgo,” (4 Nov. 1999), Executive Summary, p. 2, in which Claimant wrote under Section V, titled, “Mexico Government/Political Section” at p. 21:

The key factors are:

(A) Potential risk of government-imposed quota limiting quantities of HFCS imports, or the potential risk of elimination of HFCS imports because of domestically produced HFCS (longer term).

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<sup>31</sup>CME Czech Rep. B.V. (Netherlands) v. The Czech Republic (“CME v. Czech Republic”), UNCITRAL, Partial Award, ¶ 611 (13 Sept. 2001).

By Cargill not building in Mexico, we take the risk of our competitors and the sugar mills petitioning the Mexican government for protection of a now, local industry (HFCS). ... Cargill would be the only major wet miller without HFCS capacity in Mexico. As the HFCS duty declines to 0 over the next 9 years, our competitors would have a strong argument for local support of their investment employing Mexican workers, paying Mexican taxes. I believe it is safe to say that if there is a quota imposed on HFCS, the wet miller without local HFCS production would be at the most risk.

In further support, Respondent also quotes from an internal Cargill memorandum of 6 August 1996, a 17 July 2000 draft letter from Claimant to USTR Charlene Barshefsky, and a memorandum from the Corn Refiners Association regarding the status of NAFTA Chapter 19 litigation addressing the antidumping order sent to the board of directors (including Claimant's representative) on 28 August 2000. As final support for its contention that Claimant was aware of the possibility of such import restrictions, Respondent raises a 23 August 2001 meeting, at which Undersecretary de la Calle allegedly informed Claimant's representatives that such restrictions would occur unless the sugar market dispute was resolved expeditiously.

254. In response to Respondent's raising of these various documents in an effort to prove Claimant's anticipation of the permit requirement, Claimant counters that, "[o]f course, no company would consider an investment in a foreign country without assessing risks." Claimant asserts, however, that this does not mean that it should have reasonably expected Respondent to announce a permit requirement only for HFCS where such permits would be issued automatically, but where in fact Respondent would refuse to issue to Claimant such a permit on the basis that no criteria had been established for their issuance.

**Contentions of the Parties as to the Application in this Instance of the  
Asserted Prohibition of "Arbitrariness, Ambiguity and Inconsistency"**

255. Claimant next argues that Respondent's HFCS measures were arbitrary, ambiguous and inconsistent as illustrated by three alleged facts: (1) the IEPS Tax was imposed solely in response to domestic political and protectionist pressure, rather than an attempt to raise revenue; (2) the permit requirement was not reasonably related to any purpose other than excluding HFCS imported from the United States, as illustrated by Respondent's failure to announce criteria for obtaining the permits; and (3) the IEPS

Tax was in reality a tax on HFCS, not soft drinks, as soft drinks sweetened solely by sugar cane were exempted.

256. Claimant asserts that these actions were inconsistent as they constituted a dramatic shift from Respondent's initial equivalent tax treatment of sugar and HFCS. Claimant quotes the tribunal's holding in *GAMI* for support of its position: "The imposition of a new license requirement may for example be viewed quite differently if it appears on a blank slate or if it is an arbitrary repudiation of a preexisting licensing regime upon which a foreign investor has demonstrably relied."<sup>32</sup>

257. Respondent counters that international law strictly defines the concept of arbitrariness. In *Elettronica Sicula S.P.A. ("ELSP")*, for instance, the International Court of Justice held:

124. ...[i]t must be borne in mind that the fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. ... [B]y itself, and without more, unlawfulness cannot be said to amount to arbitrariness. ... To identify arbitrariness with mere unlawfulness would be to deprive it of any useful meaning in its own right. ...

128. Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. ...<sup>33</sup>

258. NAFTA tribunals, according to Respondent, have consistently held that even poor administration of government programs (which Respondent claims is not at issue) does not amount to a violation of the minimum standard of treatment under customary international law. Respondent quotes *S.D. Myers, Inc. v. Canada* to support this contention:

261. When interpreting and applying the 'minimum standard', a Chapter 11 tribunal does not have an open-ended mandate to second-guess government decision-making. Governments have to make many potentially controversial choices. In doing so, they may appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive. The ordinary remedy, if there were one, for errors in modern governments is through internal political and legal processes, including elections.

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<sup>32</sup> *GAMI*, Final Award, ¶ 91 (15 Nov. 2004).

<sup>33</sup> *Elettronica Sicula S.P.A. (United States v. Italy)*, (Judgment) 28 I.L.M. 1109, I.C.J. Reports 15 (1989).



263. The Tribunal considers that a breach of Article 1105 occurs only when it is shown that an investor has been treated in such an unjust or arbitrary manner that the treatment rises to the level that is unacceptable from the international perspective. That determination must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their own borders....<sup>34</sup>

259. Respondent argues that its actions at issue in this case, “viewed fairly in light of the difficult circumstances in which the sugarcane growers and the mills found themselves, and given the state of the sugar industry worldwide, within the United States, and particularly within Mexico, cannot be viewed as rising to the level of arbitrary acts at international law.” According to Respondent, it committed no “willful disregard of due process,” nor an “act which shocks, or at least surprises, a sense of juridical propriety.”<sup>35</sup>
260. Claimant agrees that it does not allege poor administration or errors, as would be forgiven under the above standards, but rather unfair and inequitable conduct, as exhibited in the IEPS Tax that deprived Claimant of its ability to compete for business in Mexico, and a permit requirement without any criteria for issuance.
261. Respondent counters that the permit requirement was not without criteria. The decree that establishes the permit requirement, issued 10 March 2003, makes special mention of the non-compliance of the United States with its obligation to grant access for Mexican sugar and that “such circumstances permit the Mexican authorities to adopt the necessary measures to face the situation.” The directive additionally states, according to Respondent, that the publication of criteria would occur “when necessary conditions” exist, “in accordance with international law and the obligations of Mexico.” Thus, when the necessary conditions exist, i.e., greater access is granted by the United States to Mexican sugar, the Secretariat will grant applicable permits.

**Contentions of the Parties as to the Application in this Instance of the Asserted Requirement of “Transparency”**

262. With respect to third alleged component of the obligation to provide fair and equitable treatment, Claimant asserts that transparency is not only a vital protection to investors, but is also included in the NAFTA as one of its primary objectives, as exhibited in

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<sup>34</sup> *S.D. Myers*, Partial Award (13 Nov. 2000).

<sup>35</sup> *ELSI*, Judgment, ¶ 128 (1989).

NAFTA Articles 102, 1306, 1411, 1802(1), and 1802(2). Claimant also quotes *Tecmed* for the proposition that a contracting party must act “totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives ....”<sup>36</sup>

263. Respondent violated its obligation of transparency, argues Claimant, by adopting the IEPS Tax and import permit requirement shortly after Mexican officials met with Claimant to discuss sweetener issues and failed to mention the forthcoming measures. Claimant contends that the lack of transparency is also particularly evident in Respondent’s failure to announce criteria for acquiring a permit or respond to Claimant’s alleged repeated queries for further information.
264. Respondent counters that Article 1802 and its duty of transparency is not part of Chapter 11, and thus outside of the Tribunal’s jurisdiction. Respondent contends that “conventional international trade law” establishes a State’s duty to make public information relating to its laws and regulations, as found, for example, in Article X of the GATT 1947. Respondent argues, however, that “conventional law” is not equivalent to “customary international law”. Respondent explains that it was because the tribunal relied upon the transparency obligation under *conventional*—as opposed to *customary*—international law to find a violation of Article 1105, among other reasons, that the award in *Metalclad*<sup>37</sup> was partially set aside on judicial review.

**Contentions of the Parties as to the Application in this Instance of the Asserted Prohibition on “Discrimination”**

265. Finally, Claimant incorporates its discussion of Respondent’s alleged acts of discrimination from its discussion of Articles 1102 and 1103 set forth above.<sup>38</sup> Respondent argues that this claim is inapposite, noting that Article 1105 “plainly means something different than Articles 1102 and 1103.”

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<sup>36</sup> *Tecmed*, Award, ¶ 154 (29 May 2003).

<sup>37</sup> *Metalclad Corp. v. United Mexican States (“Metalclad”)*, NAFTA/ICSID Case No. ARB(AF)/97/1, Award (30 Aug. 2000).

<sup>38</sup> *See supra* ¶¶ 216-18, 224, 228, 230, 232.

## Conclusion of the Tribunal with respect to Claim Arising under Article 1105

### The Fair and Equitable Treatment Standard

266. Article 1105(1) of the NAFTA provides: “Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” The content of this obligation has been difficult to define with precision and the statements of various NAFTA tribunals are difficult to apply to particular facts.
267. The Tribunal first observes that it is beyond cavil that the reference to “fair and equitable treatment” in Article 1105(1) is to be understood by reference to customary international law. On 31 July 2001, in response to the concern of State Parties that tribunals were reading this provision over-broadly, the NAFTA Free Trade Commission issued an FTC Note providing, *inter alia*, that:
1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
  2. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
  3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).
268. In light of the FTC’s interpretation and the binding force of that interpretation on this Tribunal by virtue of Article 1132(2),<sup>39</sup> the Tribunal joins all previous NAFTA tribunals in the view that Article 1105 requires no more, nor less, than the minimum standard of treatment demanded by customary international law. As stated by the *Mondev* tribunal, the FTC Note made “clear that Article 1105(1) refers to a standard existing under customary international law, and not to standards established by other treaties of the three NAFTA Parties.”<sup>40</sup> Likewise, as explained by Mexico in its 1128

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<sup>39</sup> Article 1131, titled “Governing Law,” in its second paragraph provides: “An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.”

<sup>40</sup> *Mondev Int’l Ltd. v. United States (“Mondev”)*, NAFTA/ICSID Case No. ARB(AF)/99/2, Award, ¶ 121 (11 Oct. 2002). See also *ADF Group Inc. v. United States (“ADF Group”)*, NAFTA/ICSID Case No. ARB(AF)/00/1, Award, ¶ 178 (9 Jan. 2003) (holding that the FTC Note “clarifies that so far as the three NAFTA Parties are concerned, the

Submission to the *ADF* tribunal, “‘fair and equitable treatment’ and ‘full protection and security’ are provided as examples of the customary international law standards incorporated in Article 1105(1). ... The international law minimum standard [of treatment] is an umbrella concept incorporating a set of rules that has crystallized over the centuries into customary international law in specific contexts.”<sup>41</sup>

269. Although Claimant initially argued that the meaning of “fair and equitable treatment” should be approached as a question of treaty interpretation, both Claimant and Respondent agreed by the time of the hearing that Article 1105 is a codification of the customary international law minimum standard of treatment. The Parties, however, continue to disagree as to the content of that customary international law standard.
270. In approaching the task of ascertaining the customary international law standard of “fair and equitable treatment,” the Tribunal emphasizes a foundational point to its mode of reasoning, which it simultaneously views as a point of weakness in some of the awards it has reviewed.
271. The shift in approach from seeking the meaning of “fair and equitable treatment” as a matter of treaty interpretation to seeking to ascertain the content of custom has fundamental implications for the legal reasoning of a tribunal. A tribunal confronted with a question of treaty interpretation can, with little input from the parties, provide a legal answer. It has the two necessary elements to do so; namely, the language at issue and rules of interpretation. A tribunal confronted with the task of ascertaining custom, on the other hand, has a quite different task because ascertainment of the content of custom involves not only questions of law but involves primarily a question of fact, where custom is found in the practice of States regarded as legally required by them. The content of a particular custom may be clear; but where a custom is not clear, or is disputed, then it is for the party asserting the custom to establish the content of that custom.
272. In the case of the customary international law standard of “fair and equitable treatment,” the Parties in this case and the other two NAFTA State Parties agree that

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long-standing debate as to whether there exists such a thing as a minimum standard of treatment of non-nationals and their property prescribed in customary international law, is closed.”).

<sup>41</sup> *ADF Group*, Second Article 1128 Submission of the United Mexican States, p. 8 (22 July 2002).

the customary international law standard is at least that set forth in the 1926 *Neer* arbitration. In that award it was held that “the treatment of an alien ... should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”<sup>42</sup> The Parties and the other two NAFTA State Parties also agree that the standard may evolve and, indeed, may have evolved since 1926.

273. The Parties disagree, however, as to how that customary standard has in fact, if at all, evolved since that time. The burden of establishing any new elements of this custom is on Claimant. The Tribunal acknowledges that the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant. If Claimant does not provide the Tribunal with the proof of such evolution, it is not the place of the Tribunal to assume this task. Rather the Tribunal, in such an instance, should hold that Claimant fails to establish the particular standard asserted.
274. The initial issue before the Tribunal therefore is to evaluate Claimant’s assertions as to the content of the customary international law standard of “fair and equitable treatment” in light of the sources placed before the Tribunal. Consistent and widespread State practice conducted out of a sense of legal obligation would establish the content of customary international law. The Tribunal acknowledges, however, that surveys of State practice are difficult to undertake and particularly difficult in the case of norms such as “fair and equitable treatment” where developed examples of State practice may not be many or readily accessible. Claimant has not provided the Tribunal with such a survey of recent State practice, nor is the Tribunal aware of such a survey.
275. In such instances, recourse may be made to other evidence of custom. The statements of States can—with care—serve as evidence of the content of custom. In the case of the NAFTA State Parties, they have made statements in the context of their position as respondents or as non-disputing State Parties in Chapter 11 arbitrations. Thus, Mexico has not only presented its view on the content of customary international law standard in this proceeding, but also as a non-disputing State Party in an Article 1128

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<sup>42</sup> *Neer*, 4 I.R.A.A. 60 (15 Oct. 1926).

Submission in the *ADF* proceeding. In *ADF*, Mexico's Article 1128 Submission approvingly quotes Canada's submission as respondent in *Pope & Talbot*, which states: "The conduct of the government toward the investment must amount to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, an outrage, bad faith or the willful neglect of duty."<sup>43</sup> The Tribunal acknowledges that the weight of these statements needs to be assessed in light of their position as respondents at the time of the statement. However, the Tribunal also observes that, for example, the United States maintains a similar position as to the customary international law standard of fair and equitable treatment in its model bilateral investment treaty, a situation in which it is at least equally possible that the United States would be in the position of either respondent or the state of nationality of the claiming investor.

276. It also is widely accepted that extensive adoption of identical treaty language by many States may in and of itself serve—again with care—as evidence of customary international law. The Tribunal notes that Claimant has not attempted to establish such a circumstance to this Tribunal except in the most general terms. Even accepting that such clauses are widespread, the Tribunal views the evidentiary weight of this possibility cautiously. The Tribunal observes that the requirement to provide "fair and equitable treatment" is included in many bilateral investment treaties ("BITs"). The Tribunal notes first that some of these clauses involve a reference to customary international law, while others apparently involve autonomous treaty language. It is the Tribunal's view that significant evidentiary weight should not be afforded to autonomous clauses inasmuch as it could be assumed that such clauses were adopted precisely because they set a standard other than that required by custom. It may be that widespread adoption of a strict autonomous meaning to "fair and equitable treatment" may in time raise international expectations as to what constitutes good governance, but such a consequence is different than such clauses evidencing directly an evolution of custom. The Tribunal notes second that the explosion in the number of BITs is a recent phenomenon and that responses of States to the questions presented in terms, for example, of calls for renegotiation or statements of approval is only now

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<sup>43</sup> *ADF Group*, Second Article 1128 Submission of the United Mexican States, p. 15 (22 July 2002), quoting *Pope & Talbot*, Post-Hearing Submission of the United Mexican States (Damages Phase), ¶ 8 (3 Dec. 2001), quoting *Pope & Talbot*, Respondent Canada's Counter-Memorial (Phase 2), ¶ 309 (10 Oct. 2000).

emerging. In such a fluid situation, the Tribunal does not believe it prudent to accord significant weight to even widespread adoption of such clauses.

277. Finally, the writings of scholars and the decisions of tribunals may serve as evidence of custom.<sup>44</sup> It is important to emphasize, however, as Mexico does in this instance, that the awards of international tribunals do not create customary international law but rather, at most, reflect customary international law. Moreover, in both the case of scholarly writings and arbitral decisions, the evidentiary weight to be afforded such sources is greater if the conclusions therein are supported by evidence and analysis of custom.
278. A substantial number of arbitral decisions have been rendered over the last decade in proceedings based on such BITs. In the Tribunal's view, these decisions are relevant to the issue presented in Article 1105(1) only if the fair and equitable treatment clause of the BIT in question was viewed by the Tribunal as involving, like Article 1105, an incorporation of the customary international law standard rather than autonomous treaty language.
279. The Tribunal observes that Claimant in the instant case has not offered a survey of all arbitral decisions bearing on the customary international law of fair and equitable treatment. Claimant's effort to establish the current customary content of "fair and equitable treatment" relies rather heavily on the award rendered in *Tecmed*, a reliance that Respondent contends is misplaced. The Tribunal agrees.
280. The Tribunal notes that the claim in *Tecmed* alleges violations of a BIT between Spain and Mexico.<sup>45</sup> Article 4(1) of the BIT involved in the *Tecmed* proceeding provides that each party guarantees in its territory just and equitable treatment, conforming with "International Law", to the investments of investors of the other contracting party. Article 4(2) explains further that this treatment will not be less favourable than that granted in similar circumstances by each contracting party to the investments in its territory by an investor of a third State. Although the language of Article 4(2) permits several interpretations, the *Tecmed* tribunal specifically states that it "understands that

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<sup>44</sup> See, e.g., The Statute of the International Court of Justice, Article 38 (1)(d).

<sup>45</sup> See Agreement on the Reciprocal Promotion and Protection of Investments signed by the Kingdom of Spain and the United Mexican States (1996).

the scope of the undertaking of fair and equitable treatment under Article 4(1) of the Agreement described ... is that resulting from *an autonomous interpretation* ....”<sup>46</sup> The award and statements of the *Tecmed* tribunal thus do not bear on the customary international law minimum standard of treatment, but rather reflect an autonomous standard based on an interpretation of the text. Thus, the Tribunal determines that the holding in *Tecmed* is not instructive in this arbitration as to the scope and bounds of the fair and equitable treatment required by Article 1105 of the NAFTA.

281. The Tribunal observes that several NAFTA arbitrations, the significance of which was argued before this Tribunal, in contrast do analyze and elaborate upon the customary international law minimum standard of treatment as required by NAFTA Article 1105. These tribunals agree, for instance, that the customary international law minimum standard of treatment is dynamic and therefore evolves with the rights of individuals under international law. As the *ADF* tribunal wrote: the customary international law minimum standard of treatment is “constantly in a process of development.”<sup>47</sup> The *Mondev* tribunal held similarly:

[B]oth the substantive and procedural rights of the individual in international law have undergone considerable development. In the light of these developments it is unconvincing to confine the meaning of ‘fair and equitable treatment’ and ‘full protection and security’ of foreign investments to what those terms – had they been current at the time – might have meant in the 1920s when applied to the physical security of an alien.<sup>48</sup>

282. As stated above, the Parties in this proceeding and this Tribunal agree with the view that the customary international law minimum standard of treatment may evolve in accordance with changing State practice manifesting to some degree expectations within the international community. As the world and, in particular, the international business community become ever more intertwined and interdependent with global trade, foreign investment, BITs and free trade agreements, the idea of what is the minimum treatment a country must afford to aliens is arising in new situations simply not present at the time of the *Neer* award which dealt with the alleged failure to properly investigate the murder of a foreigner.

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<sup>46</sup> *Tecmed*, Award, ¶ 155 (29 May 2003) (emphasis added).

<sup>47</sup> *ADF Group*, Award, ¶ 179 (9 Jan. 2003).

<sup>48</sup> *Mondev*, Award, ¶ 116 (11 Oct. 2002).



283. The central inquiry therefore is: what does customary international law *currently* require in terms of the minimum standard of treatment to be accorded to foreigners? The *Waste Management II* tribunal concluded that a general interpretation was emerging from NAFTA awards:

Taken together, the *S.D. Myers*, *Mondev*, *ADF* and *Loewen* cases suggest that the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.<sup>49</sup>

284. In reviewing the awards cited and, as importantly, the evidence of custom analyzed in those proceedings, this Tribunal agrees in part with the assessment cited above. The Tribunal observes a trend in previous NAFTA awards, not so much to make the holding of the *Neer* arbitration more exacting, but rather to adapt the principle underlying the holding of the *Neer* arbitration to the more complicated and varied economic positions held by foreign nationals today. Key to this adaptation is that, even as more situations are addressed, the required severity of the conduct as held in *Neer* is maintained. In this regard, the Tribunal finds particularly significant the statement of the standard found in the Article 1128 Submissions of Mexico and Canada in *ADF*. That standard is:

[T]he conduct of the government toward the investment must amount to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, bad faith or the willful neglect of duty.<sup>50</sup>

285. As outlined in the *Waste Management II* award quote above, the violation may arise in many forms. It may relate to a lack of due process, discrimination, a lack of transparency, a denial of justice, or an unfair outcome. But in all of these various forms, the “lack” or “denial” of a quality or right is sufficiently at the margin of acceptable conduct and thus we find—in the words of the 1128 submissions and

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<sup>49</sup> *Waste Management, Inc. v. United Mexican States (“Waste Management II”)*, NAFTA/ICSID Case No. ARB(AF)/00/3, Award, ¶ 98 (30 Apr. 2004).

<sup>50</sup> *ADF Group*, Second Article 1128 Submission of the United Mexican States, p. 15 (22 July 2002), quoting *Pope & Talbot*, Post-Hearing Submission of the United Mexican States (Damages Phase), ¶ 8 (3 Dec. 2001), quoting *Pope & Talbot*, Respondent Canada’s Counter-Memorial (Phase 2), ¶ 309 (10 Oct. 2000).

previous NAFTA awards—that the lack or denial must be “gross,” “manifest,” “complete,” or such as to “offend judicial propriety.” The Tribunal grants that these words are imprecise and thus leave a measure of discretion to tribunals. But this is not unusual. The Tribunal simultaneously emphasizes, however, that this standard is significantly narrower than that present in the *Tecmed* award where the same requirement of severity is not present.

286. The Tribunal thus holds that Claimant has failed to establish that the standard present for example in the *Tecmed* award reflects the content of customary international law. The Tribunal holds that the current customary international law standard of “fair and equitable treatment” at least reflects the adaptation of the agreed *Neer* standard to current conditions, as outlined in the Article 1128 submissions of Mexico and Canada. If the conduct of the government toward the investment amounts to gross misconduct, manifest injustice or, in the classic words of the *Neer* claim, bad faith or the willful neglect of duty, whatever the particular context the actions take in regard to the investment, then such conduct will be a violation of the customary obligation of fair and equitable treatment.
287. In articulating the above standard, the Tribunal finds the four “implications” identified by the *GAMI* tribunal to be both helpful and consistent. The Tribunal therefore joins the *GAMI* tribunal in the adoption of these four implications: (1) “The failure to fulfill the objectives of administrative regulations without more does not necessarily rise to a breach of international law”; (2) “A failure to satisfy requirements of national law does not necessarily violate international law”; (3) “Proof of a good faith effort by the Government to achieve the objectives of its laws and regulations may counter-balance instances of disregard of legal or regulatory requirements”; and (4) “The record as a whole—not isolated events—determines whether there has been a breach of international law.”<sup>51</sup>
288. As noted above, Claimant argues that fair and equitable treatment creates several specific obligations for each State Party: the provision of a stable and predictable environment that does not offend reasonable expectations; a general lack of arbitrariness, ambiguity and inconsistency; transparency; and a lack of discrimination.

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<sup>51</sup> *GAMI Investments*, Final Award, at ¶ 97 (15 Nov. 2004).

As far as these particular requirements, the Tribunal examines each briefly as to how it is to be approached in light of the Tribunal's holding in the previous paragraph.

### **Stable and Predictable Environment that Does Not Frustrate Reasonable Expectations**

289. Claimant provides the Preamble to the NAFTA as its sole legal or textual support for its contention that NAFTA State Parties are bound to provide a stable and predictable environment in which reasonable expectations are upheld.<sup>52</sup>
290. The Tribunal notes that there are at least two BIT awards, both involving a clause viewed as possessing autonomous meaning, that have found an obligation to provide a predictable investment environment that does not affect the reasonable expectations of the investor at the time of the investment.<sup>53</sup> No evidence, however, has been placed before the Tribunal that there is such a requirement in the NAFTA or in customary international law, at least where such expectations do not arise from a contract or quasi-contractual basis.

### **Arbitrariness, Ambiguity and Inconsistency**

291. With respect to arbitrariness, the Tribunal agrees with the view expressed by a Chamber of the International Court of Justice in the *ELSI* case, where it is stated:

Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. This idea was expressed by the court in the *Asylum* case, when it spoke of 'arbitrary action' being 'substituted for the rule of law' ... It is a wilful [*sic*] disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety.<sup>54</sup>

This holding, though not based on the NAFTA, has been accepted by at least two of the State Parties to the NAFTA as the "best expression" of arbitrariness.<sup>55</sup>

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<sup>52</sup> Claimant also cites to *Tecmed* to support its arguments with respect to the alleged requirement to provide a stable and predictable environment. However, as the Tribunal has determined that *Tecmed* arose from an autonomous interpretation of "fair and equitable treatment," as opposed to that drawn from the customary international law minimum standard of treatment, the Tribunal does not consider the *Tecmed* award a persuasive authority in evaluating these allegations.

<sup>53</sup> See *Tecmed*, Award, ¶ 154 (29 May 2003); *Saluka Investments BV (Netherlands) v. Czech Republic* ("*Saluka v. Czech Republic*"), UNCITRAL, Partial Award, ¶¶ 301-02 (17 Mar. 2006).

<sup>54</sup> *ELSI*, Judgment, ¶ 128 (1989) (internal citation omitted).

<sup>55</sup> See *ADF Group*, Award, ¶ 121 (9 Jan. 2003) (describing Canada's approval of the standard); *ADF Group*, Second Article 1128 Submission of the United Mexican States, pp. 16-18 (22 July 2002) (detailing Mexico's view of the standard as instructive).

292. The Tribunal also agrees with the view expressed in *S.D. Myers* that a tribunal, in assessing whether an action of a State is arbitrary, need recognize that governments “make many potentially controversial choices” and, in doing so, may “appear to have made mistakes, to have misjudged the facts, proceeded on the basis of a misguided economic or sociological theory, placed too much emphasis on some social values over others and adopted solutions that are ultimately ineffective or counterproductive.”<sup>56</sup> Therefore, an actionable finding of arbitrariness must not be based simply on a tribunal’s determination that a domestic agency or legislature incorrectly weighed the various factors, made legitimate compromises between disputing constituencies, or applied social or economic reasoning in a manner that the tribunal criticizes.
293. The Tribunal thus finds that arbitrariness may lead to a violation of a State’s duties under Article 1105, but only when the State’s actions move beyond a merely inconsistent or questionable application of administrative or legal policy or procedure to the point where the action constitutes an unexpected and shocking repudiation of a policy’s very purpose and goals, or otherwise grossly subverts a domestic law or policy for an ulterior motive.

### **Transparency**

294. The Tribunal holds that Claimant has not established that a general duty of transparency is included in the customary international law minimum standard of treatment owed to foreign investors per Article 1105’s requirement to afford fair and equitable treatment. The principal authority relied on by the Claimant—*Tecmed*—involved the interpretation of a treaty-based autonomous standard for fair and equitable treatment and treated transparency as an element of the “basic expectations” of an investor rather than as an independent duty under customary international law.

### **Discrimination**

295. The Tribunal finds that a discussion of whether a finding of discrimination will independently violate Article 1105 of the NAFTA is not called for at this time. In support of its contention that the customary international law minimum standard of

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<sup>56</sup> *S.D. Myers*, Partial Award, ¶ 261 (13 Nov. 2000).

treatment precludes discrimination, Claimant merely incorporates its discussion from its arguments for finding a violation of Articles 1102 and 1103. The FTC Note clearly states that “[a] determination that there has been a breach of another provision of the NAFTA ... does not establish that there has been a breach of Article 1105(1).” Therefore, looking to the facts presented as proof of a violation of Articles 1102 and 1103 will not assist the Tribunal in assessing a violation of Article 1105.

**Final Disposition of the Tribunal with respect to the Standard of Conduct Required by the Obligation of Fair and Equitable Treatment**

296. In summation, the Tribunal finds that the obligations in Article 1105(1) of the NAFTA are to be understood by reference to the customary international law minimum standard of treatment of aliens. The requirement of fair and equitable treatment is one aspect of this minimum standard. To determine whether an action fails to meet the requirement of fair and equitable treatment, a tribunal must carefully examine whether the complained of measures were grossly unfair, unjust or idiosyncratic; arbitrary beyond a merely inconsistent or questionable application of administrative or legal policy or procedure so as to constitute an unexpected and shocking repudiation of a policy’s very purpose and goals, or to otherwise grossly subvert a domestic law or policy for an ulterior motive; or involve an utter lack of due process so as to offend judicial propriety. The Tribunal observes that other NAFTA tribunals have expressed the view that the standard of fair and equitable treatment is not so strict as to require “bad faith” or “willful neglect of duty”. The Tribunal agrees. However, the Tribunal emphasizes that although bad faith or willful neglect of duty is not required, the presence of such circumstances will certainly suffice.

**Conclusion of the Tribunal with respect to whether the Mexican Measures at Issue in this Proceeding Breach the Fair and Equitable Treatment Requirement of Article 1105**

297. In analyzing the facts as presented by the Parties, the Tribunal observes that the effects of the IEPS Tax, as well as the consequences of the antidumping duties, may not serve as the basis of a claim asserting a breach of Article 1105(1). In the case of the former, this is because the tax measures are excluded from consideration in the context of Article 1105; in the case of the latter, because the antidumping duties are outside of the temporal jurisdiction of this Tribunal. A measure excluded as a basis for a claim,

however, may nevertheless aid the Tribunal's understanding of the context of the acts legitimately within the Tribunal's purview.<sup>57</sup> The Tribunal, therefore, considers solely whether the import permit requirement instituted by Mexico breached the requirement of fair and equitable treatment in Article 1105(1). But, in doing so, the Tribunal is cognizant that the permit requirement was only one in a series of measures taken by Respondent.

298. The import permit requirement instituted by Mexico may be analyzed in several respects under the standard the Tribunal has determined to be applicable. By far, the Tribunal finds most determinative the fact that the import permit was put into effect by Mexico with the express intention of damaging Claimant's HFCS investment to the greatest extent possible. For this reason, the Tribunal finds this action to surpass the standard of gross misconduct and be more akin to an action in bad faith.
299. Reviewing closely the record of this case, the Tribunal finds ample support for the conclusion that the import permit was one of a series of measures expressly intended to injure United States HFCS producers and suppliers in Mexico in an effort to persuade the United States government to change its policy on sugar imports from Mexico. The Tribunal finds that the sole purpose of the import permit requirement was to change the trade policy of the United States; while the sole effect was to virtually remove Claimant from the Mexican HFCS market. There is no other relationship between the means and the end of this requirement. The Tribunal finds the institution of a permit requirement for a few foreign producers in an attempt to persuade another nation to alter its trade practices to be manifestly unjust.
300. The Tribunal finds that Respondent, in an attempt to further its goals regarding United States trade policy, targeted the few suppliers of HFCS that originated in the United States. These few suppliers thus were then forced to bear the entire burden of Respondent's effort to act on what it views as the United States' failure to comply with international obligations. Indeed, the import permit requirement all but annihilated a series of investments for the time that the permit requirement was in place. The Tribunal finds this willful targeting, by its nature, to be a manifest injustice. The fact that the targeted investors are corporations with U.S. nationality is of no significance

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<sup>57</sup> See *GAMI*, Final Award, at ¶ 97 (15 Nov. 2004).

in the Tribunal's view. If the import permit requirement had been instituted to influence the trade policy of a country other than the country of the nationality of the investors, the manifest injustice is, in the Tribunal's view, patent. Given the Tribunal's holding within, rejecting Respondent's claim that its actions were justifiable as countermeasures,<sup>58</sup> it is equally clear that a targeted import permit requirement of this type is also manifestly unjust when the country sought to be influenced is also the country of nationality of the investor.

301. The Tribunal's finding that the import permit requirement surpasses the standard of gross misconduct and is more akin to an action in bad faith is supported by the fact that there was a complete lack of objective criteria put forth by the Mexican government by which a company could obtain a permit. The Tribunal finds Respondent's explanation that "the publication of the criteria for applying import permits will be established when 'the necessary conditions' exist" to be insufficient, given that the existence of such conditions depended entirely on the actions of an unrelated third party with respect to its trade policies.
302. The Tribunal recalls Respondent's argument that, as there has been no conclusion under domestic law that the import requirement was illegal, the "Tribunal cannot proceed to analyze if the conduct of the Mexican authorities rises to arbitrariness under international law." As proof of the lack of domestic resolution, Respondent points to a legal challenge filed by Claimant in 2006, that was "still pending" at the time of the Parties' submissions. The Tribunal likewise recalls Respondent's argument that tribunals have consistently held that poor administration of government programs (which Respondent claims is not at issue) does not amount to a violation of the minimum standard of treatment under customary international law. Finally, the Tribunal recalls Respondent's argument that Claimant was previously aware of the possibility of such an import permit requirement.
303. The Tribunal finds these arguments to be inapposite given the Tribunal's finding that the import permit intentionally targeted Claimant and therefore was manifestly unjust. Whether Claimant was previously aware or not of the possibility of an import permit requirement is not on point because such a line of argumentation suggests a public

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<sup>58</sup> See *infra* ¶¶ 420-29.

purpose to the requirement, rather than, as the Tribunal's finds, the fact that the requirement was an intentional targeting of Claimant's investment that was designed specifically so that Claimant would not receive a permit. Likewise, the issue is not whether there was poor administration of government leading to arbitrary acts. In this instance, the administration by the government of the import permit requirement was quite effective. Finally, the Tribunal does not, and need not, rest its holding on the import permit requirement being domestically unlawful given its conclusion that the requirement is manifestly unjust and akin to an act in bad faith. The Tribunal agrees with Respondent that even the unlawfulness of a municipal law does not necessarily mean that the act is unlawful under international law. The converse must be true, however, in that the *lawfulness* of a domestic law does not presuppose its lawfulness under international law. Indeed, this is the very rationale for the customary international law minimum standard of treatment of aliens: regardless of the views of each State, there is a minimum, a floor below which a State will be held internationally responsible for its conduct.

304. Lastly, the Tribunal acknowledges the dire and difficult circumstances that faced Mexico at the time of the measures in terms of the crisis gripping its sugar industry and the many citizens employed in that industry. The Tribunal does not assert that Mexico could not enact any laws and regulations to aid this industry and its populace. Rather, the Tribunal finds that the import permit requirement simultaneously breached the requirement to provide fair and equitable treatment under Article 1105(1). Mexico may seek to attain its objective by the regulation chosen, but it may not under Article 1105(1) leave the Claimant to bear the costs of this choice.

**Final Disposition of the Tribunal with respect to Claim Arising Under Article 1105**

305. For the forgoing reasons, the Tribunal finds the import permit requirement instituted by Mexico, for the period it was in effect, to be a breach of the Article 1105(1) obligation to provide fair and equitable treatment to Claimant.



## X. ARTICLE 1106 – PERFORMANCE REQUIREMENTS

### Issue Presented

306. Claimant argues that the IEPS Tax violated NAFTA Article 1106(3) because it conditioned the receipt of a tax advantage—avoidance of the IEPS Tax—on the use by soft drink bottlers of domestically produced cane sugar. This, Claimant asserts, accords a preference to goods produced in Mexico and is therefore a performance requirement within the meaning of Article 1106(3)(b).
307. Respondent argues that, for Article 1106(3) to apply, the advantage on which the use of domestic goods is conditioned must be “in connection with” an investment of the investor. Thus, according to Respondent, Claimant has to demonstrate that the conditioned tax advantage was imposed “in connection with” Cargill’s investment in Cargill de Mexico. However, Respondent claims, the tax measure was not in connection with Cargill’s investment in Cargill de Mexico, hence there is no violation of Article 1106(3).
308. Therefore, the Tribunal must determine whether a tax on soft drinks containing HFCS, with an exemption in respect of domestically produced cane sugar, can be said to be conditioning an advantage “in connection” with an investment when the investment of the investor relates to the business of supplying HFCS to the soft drink industry and not to the soft drinks industry itself.

### Contentions of the Parties with respect to Claim Arising under Article 1106

309. In support of its contention that there has been a violation of Article 1106(3)(b), Claimant relies on the decision of the tribunal in *ADF v. United States* where, Claimant says, the tribunal “agreed that the ‘Buy America’ requirement would have violated Article 1106 but for an exemption for governmental procurements.”
310. To support its position that in order to constitute a violation of Article 1106(3) the requirement has to be in connection with Cargill’s investment, Cargill de Mexico, Respondent refers to the fact that, in all of the cases in which Article 1106 has been raised, including *ADF*, the claimants have in fact argued that the measure in question was specifically related to their investments. Moreover, in this case, the IEPS Tax is

applied to soft drinks, and not to HFCS. Thus, according to Mexico, this is a measure applicable to a third party and not a measure applied “in connection with” Cargill’s investment, Cargill de Mexico.

311. In essence, Respondent argues, Claimant is complaining that the tax measure was “tantamount to a performance requirement” in respect of the way it affected Cargill de Mexico’s business. However, Respondent asserts, Article 1106 does not apply to measures that are tantamount to performance requirements or to indirect performance requirements.

#### **Conclusion of the Tribunal with respect to Claim Arising under Article 1106**

312. Article 1106(3)(b) which is headed “Performance Requirements” provides:

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:

...

(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory[.]

313. The Tribunal notes that, as both Parties point out, claims under Article 1106 have been infrequent. Thus, there is little guidance on the interpretation of its provisions. In the Tribunal’s view, the central question in this case is whether a tax on soft drinks containing HFCS can be said to be a measure “in connection with” an investment relating to the business of supplying HFCS to the soft drink industry. In other words, can the IEPS Tax be considered to be conditioning an advantage “in connection with” Cargill’s investment in Mexico, Cargill de Mexico?
314. The Tribunal accepts, as argued by Respondent, that in other cases in which Article 1106 has been raised, the claimant has alleged that its investment was directly affected by the measure in question. However, the Tribunal does not consider that the way that parties have argued cases in the past to be dispositive of the matter before it. The Respondent appears to equate “in connection with” with “directly affected by.” Thus, the question for the Tribunal is the interpretation of the words “in connection with” in Article 1106(3).
315. As the Tribunal indicated (*supra* ¶¶ 133-34), interpretation is governed by the fundamental rule of interpretation in Article 31 of the *Vienna Convention on the Law*

*of Treaties*. That rule requires that words be given their ordinary meaning, in their context and in the light of the object and purpose of the treaty as a whole. There is no accepted or uniform meaning to be given to the words “in connection with.” The dictionary meaning of “connection” is “an association or relationship” and the phrase “in connection with” is defined as “together with” or “in conjunction with.”<sup>59</sup>

316. To some extent, these dictionary meanings simply restate the problem. The question is what degree of relationship or conjunction is necessary between the requirements on which the advantage is conditioned and the investment in order to fall within Article 1106(3)? In this regard, the Tribunal notes that the *ADM* tribunal concludes that the advantage in relation to exemption from the IEPS Tax is “in connection with” the claimant’s investment because it “had a detrimental effect on the profitability of the investment.”<sup>60</sup>
317. In the present case, the Tribunal sees no necessity to define in the abstract the degree of association or relationship that must be present in order to establish whether a measure is “in connection with” an investment. Here, the performance requirement in question was integrally related to the investment of the investor. The objective of the IEPS Tax was to put pressure on the United States by restricting, if not eliminating, the opportunities for the sale of HFCS in Mexico. By its very design, the performance requirement—conditioning the receipt of a tax advantage on the use by soft drink bottlers of domestically produced cane sugar—was “in connection with” the operation of an investment that supplied HFCS to the soft drink bottling industry. Absent the objective of targeting the supply of HFCS in Mexico in order to bring pressure on the United States, there would have been no IEPS Tax.
318. Accordingly, the Tribunal considers that conditioning a tax advantage on the use of domestically produced cane sugar was, in the circumstances of the present case, a requirement that was “in connection with” the operation of an investment that supplied HFCS to the soft drink bottling industry.

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<sup>59</sup> Websters II New College Dictionary (1999).

<sup>60</sup> Archer Daniels Midland Co. and Tate & Lyle Ingredients America, Inc. v. United Mexican States (“*ADM*”), NAFTA/ICSID Case No. ARB(AF)/04/04, Award, ¶ 227 (21 Nov. 2007).

### **Final Disposition of the Tribunal with respect to Claim Arising under Article 1106**

319. Although the IEPS Tax was imposed on soft drink bottlers, not on Cargill de Mexico, by its very objective and design the Tax involved a performance requirement within the meaning of Article 1106(3). It conditioned a tax advantage on the use of domestically produced cane sugar for the very purpose of affecting the sale of HFCS. Thus, it was conditioning an advantage “in connection with” the operation of the Claimant’s investment Cargill de Mexico which supplied HFCS to the soft drink bottling industry. Accordingly, Respondent has breached Article 1106(3).

### **XI. ARTICLE 1110 – EXPROPRIATION**

#### **Issue Presented**

320. Cargill claims that Respondent, through its IEPS Tax and import permit requirement, expropriated Claimant’s “Mexican HFCS business” in breach of Respondent’s obligations under Article 1110 of the NAFTA. It is not disputed by the Parties that the adoption by Mexico of these measures in late 2001 had the result of making HFCS from United States producers uncompetitive as a sweetener in the Mexican soft drink manufacturers and bottlers market. The Parties also do not dispute that because of these measures, Claimant and its Mexican subsidiary, Cargill de Mexico, experienced a decline in their sales for the time these measures were in effect.
321. The Parties disagree on the degree of deprivation that Claimant suffered, as well as the time period for which Claimant suffered such harm. Central to these differences, in Respondent’s view, is the question of what constitutes Claimant’s “investment” under Article 1139 that is potentially subject to expropriation.
322. The Parties agree that Respondent did not formally expropriate Claimant’s investment and that the claim presented seeks to establish that the measures either constituted an indirect expropriation or an action “tantamount” to expropriation in breach of Article 1110. Claimant argues in cases such as these that three factors are assessed in order to determine whether a governmental measure is non-compensable regulation or compensable expropriation: (1) the degree of the interference with the property right (which includes both the severity of the economic impact of the interference and its

duration); (2) the extent to which the measures interfered with reasonable and investment-backed expectations; and (3) the character of the governmental action.

323. Respondent does not challenge this statement of the factors to be assessed, but instead primarily focuses its argument on the first factor and disputes the degree of interference with Claimant's property in this instance.

324. The issue presented therefore is whether the IEPS Tax and the import permit requirement, individually or in combination, effected an indirect expropriation of Claimant's investment or can be viewed as tantamount to expropriation of the investment in breach of Article 1110.

### **Contentions of the Parties with respect to Claim Arising under Article 1110**

325. As mentioned above, Claimant asserts that there are three factors to be assessed when considering whether a governmental measure is a non-compensable regulation or a compensable expropriation: (1) the degree of the interference with the property right; (2) the extent to which the measures interfered with reasonable and investment-backed expectations; and (3) the character of the governmental action. The contentions of the Parties are reviewed with reference to these three factors, and in the case of the first factor further subdivided into "the extent of the interference" and "the duration of the interference."

### **The 1<sup>st</sup> Factor: The Degree of Interference with the Property Right**

#### **The Extent of the Interference**

326. Claimant asserts that an indirect expropriation occurs when governmental measures result in "a significant depreciation of the value [of] the assets of the foreign investor."<sup>61</sup>

327. Claimant further argues that a measure is "tantamount to expropriation," under Article 1110(1), when it does "not explicitly express the purpose of depriving one of rights or assets, but actually [has] that effect."<sup>62</sup> Quoting *Tecmed*, Claimant asserts that when

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<sup>61</sup> Quoting UNCTAD, *INTERNATIONAL INVESTMENT AGREEMENTS: KEY ISSUES* 259 (2004).

<sup>62</sup> Quoting *Tecmed*, Award, ¶ 114 (29 May 2003).

an investor is “radically deprived of the economical use and enjoyment of its investments, as if the rights related thereto—such as the income or benefits related to the [investment] or to its exploitation—had ceased to exist,” the measure is tantamount to expropriation.<sup>63</sup>

328. Claimant contends that the effect of Respondent’s measures on its operations is tantamount to expropriation. The Mexican measures, Claimant argues, had the effect of depriving it of the income and other benefits of its investment so, like the claimant in *CME v. Czech Republic*, it was left “as a company with assets, but without business.”<sup>64</sup> Mexico’s IEPS Tax and import permit requirement, according to Claimant, deprived its investment of “any real substance” by preventing it from deriving an economic benefit from its investment.
329. Claimant distinguishes its situation from that present in *Pope & Talbot*, in which the tribunal held that there was no expropriation given that it found that the measures in that case resulted in a mere “interference” and only a *reduced* value of the claimant’s investment.<sup>65</sup> In contrast to the finding of mere “interference” in *Pope & Talbot*, Claimant contends, the Mexican measures “effectively banished Cargill from the Mexican HFCS market and kept it out until the present.”
330. Claimant acknowledges that it retained title to Cargill de Mexico and the Tula distribution facility at all times, but asserts that this fact does not undermine its claim of expropriation. Title, it argues, “means nothing if you can’t use it.” Claimant argues that “the point of [its] Article 1110 claim is that Mexico’s anti-HFCS measures prevented [Claimant] from making *any productive use* of Cargill de Mexico or the Tula facility to distribute and sell HFCS in Mexico for half a decade.” Claimant additionally contends that Respondent’s suggestion that expropriation cannot occur without the outright loss of Cargill de Mexico or the Tula facility “would effectively remove the words ‘indirectly’ and ‘tantamount to’ out of Article 1110.”

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<sup>63</sup> *Tecmed*, Award, ¶ 115 (29 May 2003).

<sup>64</sup> *CME v. Czech Republic*, Partial Award, ¶ 591 (13 Sept. 2001).

<sup>65</sup> Citing *Pope & Talbot*, Interim Merits Award, ¶¶ 96-98 (26 June 2000).

331. Respondent challenges Cargill's claim that Mexico's measures significantly devalued Claimant's investment by presenting related arguments as to what constituted Cargill's "investment" under Article 1139.
332. Respondent argues that the "Mexican HFCS business" that Claimant asserts as the basis of its claim does not fall within the definition of an "investment" under Article 1139 of the NAFTA. According to Respondent, Claimant has failed to prove that this "business opportunity" is an interest "arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory," as it has provided no evidence that the interest in question is the type of contract envisioned by Article 1139.
333. For Respondent, it is Cargill de Mexico and the Tula distribution facility that constitute the investment. Therefore, according to Respondent, Cargill's claim is, at most, one for temporary loss of business opportunity, but those business opportunities (the expected market share of the HFCS business of Cargill de Mexico and the Tula distribution facility) are not investments within the scope of Article 1139.
334. Respondent quotes *Methanex* for support of its position:

The USA is correct that Article 1139 does not mention the items claimed by Methanex [goodwill, market share and customer base]. But in *Pope & Talbot Inc. v. Canada*, the tribunal held that 'the Investor's access to the U.S. market is a property interest subject to protection under Article 1110.' Certainly, the restrictive notion of property as a material 'thing' is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing. In the view of the Tribunal, items such as goodwill and market share may, as Professor White wrote, 'constitute an element of the value of an enterprise and as such may have been covered by some of the compensation payments.' Hence in a comprehensive taking, these items may figure in valuation. But it is difficult to see how they might stand alone, in a case like the one before the Tribunal.<sup>66</sup>

Respondent likewise points to *Waste Management II* which, in its view, also distinguishes between the contractual rights Claimant's enterprise held and the actual enterprise.<sup>67</sup>

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<sup>66</sup> See *supra* ¶ 177; *Methanex*, Final Award of the Tribunal on Jurisdiction and the Merits, Part IV, Ch. D, p. 7, ¶ 17 (3 Aug. 2005), quoting GILLIAN WHITE, NATIONALIZATION OF FOREIGN PROPERTY 49 (1961), cited at Am. Defense, ¶ 169, fn. 622 (citations omitted).

<sup>67</sup> *Waste Management II*, Award, ¶¶ 159-60 (30 Apr. 2004).

335. In addition, Respondent argues that NAFTA cases have held that, in order for a measure to be “tantamount to expropriation”, its effects must be equivalent to an expropriation. Therefore, measures such as taxation which are not direct expropriation “must at least result in the substantially complete deprivation of the Claimant’s use and benefit of the investment at issue to be found to be a measure tantamount to expropriation.” Thus, in *Pope & Talbot*, although the tribunal agreed with the claimant that the right to participate in an export market was a legal right that could be expropriated, it found that the diminution of profits effected by Canada’s export control regime was not sufficient to be tantamount to expropriation:

While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner.<sup>68</sup>

Similarly, Respondent points to *S.D. Myers* in which the tribunal held that the 18-month closure of Canada’s border to PCB waste was not equivalent to an expropriation of the claimant’s enterprise.<sup>69</sup> Finally, Respondent cites to *Fireman’s Fund* and its holding that “[t]he 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) ....”<sup>70</sup>

336. Although acknowledging that the IEPS Tax and import permit requirement may have reduced Claimant’s profits, Respondent argues that this reduction is not sufficient to constitute a finding of expropriation, temporary or otherwise, under the above-cited statements of the standard involved. Mexico’s counsel stressed at the hearing that, “[a]t all times in this trade dispute, Cargill de Mexico was within the full ownership and control of Cargill, Inc., and it carried out its very diversified business. Its business as an importer and seller of HFCS was the only part of the company that was affected by the measure at issue here.” Respondent, in its submissions, asserts that Cargill de Mexico has been in operation since 1972 as a distributor of “many agricultural goods and food products, including HFCS between 1993 and 1997, and refined sugar from October 2002 to date.” In addition, according to Respondent, Claimant owns the Tula

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<sup>68</sup> *Pope & Talbot*, Interim Award, ¶ 102 (26 June 2000).

<sup>69</sup> *S.D. Myers*, Partial Award, ¶ 288 (13 Nov. 2000).

<sup>70</sup> *Fireman’s Fund Insurance Company v. United Mexican States (“Fireman’s Fund”)*, NAFTA/ICSID Case No. ARB(AF)/02/01, Award, ¶ 176(c) (17 July 2006) (Redacted) (citations omitted).



distribution facility that Cargill de Mexico operates and that continued to distribute throughout the period in question: “glucose, soybean oil, and flour, and later became the site of an oilseeds plant.”<sup>71</sup>

337. Finally, Respondent argues that Claimant’s business was not affected by the exclusion of HFCS from its distributed products to such an extent by the IEPS Tax or permit requirement, either individually or in combination, as to amount to a sufficiently substantial deprivation of its investment so as to constitute expropriation. To support its position, Respondent points to the financial statements of Cargill de Mexico which show that the sales revenue of this subsidiary increased in every year from 2001 to 2005, growing from ██████ pesos to ██████ pesos. Respondent attributes this growth to the fact that Claimant’s subsidiary offered diversified distribution and financial services in Mexico.<sup>72</sup>

338. Claimant takes issue with Respondent’s argument that no expropriation occurred as Cargill de Mexico continued to operate and Cargill de Mexico used the Tula site for other, non-HFCS purposes. Claimant reiterates that it is its investment in HFCS that is the subject of its claim, “including its investment in Cargill de Mexico’s HFCS business unit, which [Respondent’s] anti-HFCS measures made worthless. Moreover ... the HFCS terminal at Tula was idled by [the] measures.”

#### **The Duration of the Interference**

339. With respect to the assessment of whether the interference was of a sufficient duration, Claimant argues that expropriatory measures need not be permanent. Instead, citing to an award of the Iran-United States Claims Tribunal, Claimant asserts that the proper test finds such measures to be expropriatory so long as they are more than “merely ephemeral.”<sup>73</sup> Claimant cites specifically to *S.D. Myers*, in which the tribunal stated that, “in some contexts and circumstances, it would be appropriate to view a deprivation as amounting to an expropriation, even if it were partial or *temporary*.”<sup>74</sup>

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<sup>71</sup> Citing Comments and Analysis of the *Expert Report of Brent C. Kaczmarek, CFA* dated 21 December 2006, prepared by Navigant Consulting, Inc., Pablo Ri6n and Associates, ¶¶ 142-43 (Apr. 2007).

<sup>72</sup> Citing Navigant Report, ¶ 27 and Exh. R-120 (Cargill de Mexico Financial Statements).

<sup>73</sup> *Tippetts, Abbott, McCarthy, Stratton v. TAMS-AFFA Consulting Eng’rs of Iran (“Tippetts”)*, 6 Iran-US CTR 219, 255 (Award No. 141-7-2) (1984).

<sup>74</sup> *S.D. Myers*, Partial Award, ¶ 283 (13 Nov. 2000) (emphasis in original).

340. Claimant argues that its investment was rendered useless from 1 January 2002—the day on which the IEPS Tax and special permit program began—through the end of 2007. Citing *Wena Hotels* and *Middle East Cement*, as well as “any reasonable standard,” Claimant argues that, even should the measures have ceased soon after the filing of its Memorial, the expropriation would have lasted five years and “a five-year deprivation of one’s investment cannot be deemed ‘ephemeral.’”<sup>75</sup>
341. Respondent counters that no such category of “temporary expropriations” exists. Respondent cites to numerous NAFTA arbitral awards that it reads to require a *permanent* deprivation of the economic value of Claimant’s investment. Specifically, Respondent quotes the NAFTA arbitral award, that of *Firemen’s Fund*, in which the tribunal held: “The taking must be ... permanent, and not ephemeral or temporary.”<sup>76</sup>
342. Respondent attacks the jurisprudence cited by Claimant as showing that other tribunals have found “temporary expropriations,” arguing that these tribunals either found that no expropriation had occurred or that the government acts had created a total loss or permanent damage. To begin, Respondent argues that the language from *S.D. Myers* upon which Claimant relies for its argument that a claim for temporary expropriation exists under Article 1110 was not necessary to the tribunal’s decision, and that the tribunal found no expropriation had occurred even though the export bank had substantially interfered with the claimant’s business opportunity.<sup>77</sup> In addition, Respondent asserts that the BIT jurisprudence cited by Claimant, namely *Azurix*, *Wena Hotels*, *Middle East Cement* and *ADC*, do not support Claimant’s contention that the IEPS Tax and import permit requirement amounted to compensable expropriation. According to Respondent, the *Azurix* tribunal, after its review of *Wena Hotels* and *Middle East Cement* and their findings of expropriation after a year and four months, respectively, dismissed the claim of creeping expropriation before it, finding that the cumulative effect of the measures did not amount to an expropriation and that the claimant retained ownership and control of its investment without interruption.<sup>78</sup> The

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<sup>75</sup> See *Wena Hotels Ltd. v. Arab Republic of Egypt* (“*Wena Hotels*”), ICSID Case No. ARB/98/4, Award, ¶ 99 (8 Dec. 2000); *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt* (“*Middle East Cement*”), ICSID Case No. ARB/99/6, Award, ¶ 107, fn. 388 (12 Apr. 2002).

<sup>76</sup> *Fireman’s Fund*, Award, ¶¶ 176(c)-(d) (17 July 2006).

<sup>77</sup> See *S.D. Myers*, Partial Award, ¶ 288 (13 Nov. 2000).

<sup>78</sup> *Azurix v. Argentina*, Award, ¶¶ 313, 322 (14 July 2006).

*Wena Hotels* tribunal, Respondent points out, explained in a subsequent interpretation of the Arbitral Award:

It is true that the Original Tribunal did not explicitly state that such expropriation totally and permanently deprived Wena of its fundamental rights of ownership. However, in assessing the weight of the actions described above, there was no doubt in the Tribunal's mind that the deprivation of Wena's rights of ownership was so profound that the expropriation was indeed a total and permanent one.<sup>79</sup>

343. Respondent also disputes Cargill's arguments as to the length of interference in this case. In Respondent's view, Cargill can claim, at most, that the effect of the IEPS Tax prevented it from competing for sales to the Mexican bottling industry between May 2002, when the antidumping duties were lifted, and early 2005, when various bottlers obtained *amparos* against the Tax. The effect of the permit requirement could last, Respondent contends, only from January 2005, when Claimant first applied unsuccessfully for a permit, until September 2005, when it was granted a quota pursuant to the Katrina Swap. Therefore, Respondent asserts, the total combined effect of the IEPS Tax and the import permit requirement could not extend beyond a period of three years and four months.

**The 2<sup>nd</sup> Factor: The Extent to which the Measures Interfered with Reasonable and Investment-Backed Expectations**

344. Claimant's argument that Respondent's measures defeated its legitimate expectations was presented previously in the discussion of Article 1105, at paragraphs 249-252, and 254. In summation, Claimant argues that it "reasonably expected that Mexico would adhere to its NAFTA obligations and allow the growing competition between HFCS and sugar to sweeten Mexican soft drinks to be decided on the merits." Claimant contends that Respondent defeated these expectations by "instead implementing special measures with the purpose and effect of giving domestic sugar an insuperable advantage in that competitive struggle ...." Claimant submits that, although it was fully prepared for the risks of the marketplace, it could not "reasonably expect—nor does the law require it to expect—that Mexico would target its investment and effectively extinguish it for years without just compensation."

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<sup>79</sup> *Wena Hotels*, Decision on the Application by Wena Hotels for an Interpretation of the Arbitral Award, ¶ 120 (31 Oct. 2005).

345. Although Respondent did not counter this argument in its discussion of Article 1110, it can be assumed that its arguments in opposition to Claimant's 1105 claim are equally applicable here (*see* paragraph 253 above).

**The 3<sup>rd</sup> Factor: The Character of the Governmental Action**

346. Claimant challenges the character of the Mexican measures, arguing that the fact that Respondent implemented measures specifically directed to halting the sale and import of HFCS to give domestic sugar an "insuperable advantage" in the competition for the Mexican soft drink market proves that these measures were not "regulation as usual but rather a targeted campaign to destroy a particular foreign investment." Claimant asserts that this circumstance also supports its argument on the 2<sup>nd</sup> factor in that no investor would reasonably expect such State conduct, especially in light of the NAFTA. Finally, Claimant argues that the fact that the Mexican government "had a direct financial self-interest in the IEPS Tax separate and apart from the U.S. sugar dispute ... [and] benefited so directly from its anti-HFCS measures should heighten its liability for the harm caused ...."

**Conclusion of the Tribunal with respect to Claim Arising under Article 1110**

347. NAFTA Article 1110(1), titled "Expropriation and Compensation," provides:

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.

348. The Tribunal notes that Respondent's three objections to the claim are interrelated in that they all involve a challenge to the manner in which Claimant structures and presents its Article 1110 claim. In considering the claim of Claimant, the Tribunal first considers whether it bases its Article 1110 claim on an "investment" under Article 1139 and second evaluates the degree of interference Respondent's measures had on Claimant's investment. The Tribunal finds that Claimant has not established that it is

possible under Article 1110 to bring a claim for a “temporary” taking and denies the claim on that basis.

### **The Scope of Cargill’s Investment under Article 1139**

349. Respondent argues that Claimant’s Article 1110 claim is not based on an “investment” as that term is defined by Article 1139. The Tribunal disagrees.
350. Under Article 1139, it is clear that Cargill de Mexico (“CdM”) qualifies as an “investment” both because it satisfies the definition of an “enterprise,” and because it qualifies as “real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes” (including the Tula distribution facility).<sup>80</sup> This is argued by Claimant and not disputed by Respondent. Claimant’s claim, however, is based on its “Mexican HFCS business” and not on a taking of CdM or the Tula Facility: “it is *Cargill’s investment in HFCS* that is at issue here, including its investment in Cargill de Mexico’s *HFCS business unit* and in the *HFCS terminal* at the Tula distribution center” (emphasis added). Claimant thus does not claim for the diminished value of the physical assets held by Cargill de Mexico, but rather for the damages that resulted from the alleged loss of their intended use.
351. Respondent argues that the issue before the Tribunal is whether this “HFCS business” is an investment in and of itself under Article 1139 that is subject to expropriation within the meaning of Article 1110. The Tribunal agrees broadly with Respondent’s identification of the issue presented, but views the issue as involving two distinct questions: first, whether the “HFCS business” is an investment in and of itself under Article 1139; and second, whether the “HFCS business,” as an investment under Article 1139, can be the subject of a claim for expropriation within the meaning of Article 1110.
352. As to the first question, the Tribunal recalls its conclusion in paragraph 153, *supra*, that there is no express or implied presumption that measures dealing with goods cannot *ipso facto* be alleged to be measures “relating to” investors or investments per

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<sup>80</sup> See *supra* ¶ 167.

Article 1101. It likewise concluded in paragraph 147, *supra*, that although there are exclusions, the Article 1139 definition of “investment” is broad and inclusive.

353. The Tribunal thus has little difficulty in concluding that business income, particularly one associated with a physical asset in the host country and not merely trade in goods, is potentially an investment both as an element of a larger investment involving the physical asset and as an investment in and of itself.
354. This conclusion leads to the second question of whether the “HFCS business,” as an investment under Article 1139, can be the subject of a claim for expropriation within the meaning of Article 1110. In other words, the scope of what may be the subject of a claim is delimited in part by the definition of investment in Article 1139, but also by the confines of the legal basis of the particular claim. It is the unusual character of Claimant’s Article 1110 claim (namely that it is a claim based on a temporary taking and therefore a claim not for the physical asset but rather for the loss of business during the time of the interference) that is truly at the basis of Respondent’s objection.
355. The issue of whether a loss of business may be the subject of an Article 1110 claim has been considered by other NAFTA tribunals.
356. In *Pope & Talbot*, the tribunal was presented with a similar situation in that the claimant’s ability in that case to sell lumber in the U.S. market was impeded by a set of Canadian measures. Canada in that instance claimed, as in this case, that the claimant retained title to the investment and that loss of business was not the proper subject of an Article 1110 claim. The tribunal found that interference with the business had an impact on the property in the host country:

While Canada suggests that the ability to sell softwood lumber from British Columbia to the U.S. is an abstraction, it is, in fact, a very important part of the ‘business’ of the Investment. Interference with that business would necessarily have an adverse effect on the property that the Investor has acquired in Canada, which, of course, constitutes the Investment. While Canada’s focus on the ‘access to the U.S. Market’ may reflect only the Investor’s own terminology, that terminology should not mask the fact that the true interests at stake are the Investment’s asset base, the value of which is largely dependent on its export business.<sup>81</sup>

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<sup>81</sup> *Pope & Talbot*, Interim Award, ¶ 98 (26 June 2000).

The Tribunal agrees with the *Pope & Talbot* tribunal that the business income of an investment is an integral part of the value of the underlying property. But in both *Pope & Talbot* and the present case, the Claimant has not claimed for the value of the entire investment but rather only for the loss of business income. Usually, in the case of a permanent expropriation of the entire investment, the loss of business income would be reflected in the value given to the entire investment.<sup>82</sup> In this sense, the *Pope & Talbot* tribunal did not address what this Tribunal considers to be the key question: whether an Article 1110 expropriation claim may be based on a temporary taking and thus only seek the loss of business income.

357. This situation was also considered by the tribunal in the *Methanex* arbitration. The claimant in *Methanex* claimed for reduced return on investments, increased cost of capital, reduced value of investments, and reduced market value (as evidenced by drop in stock price).<sup>83</sup> The *Methanex* tribunal agreed with the reasoning of *Pope & Talbot* but then expanded on its holding:

Certainly, the restrictive notion of property as a material ‘thing’ is obsolete and has ceded its place to a contemporary conception which includes managerial control over components of a process that is wealth producing. In the view of the Tribunal, items such as good will and market share may, as Professor White wrote, ‘constitute an element of the value of an enterprise and as such may have been covered by some of the compensation payments.’ Hence, in a comprehensive taking, these items may figure in valuation. But it is difficult to see how they might stand alone, in a case like the one before the Tribunal.<sup>84</sup>

358. The Tribunal concludes that business income, particularly when it is associated with a physical asset in the host country, is an investment within the meaning of Article 1139 both as an element of a larger investment involving the physical asset and as an investment in and of itself. The separate question of whether an Article 1110 claim may be based on a temporary taking is considered *infra* at paragraphs 370-77.

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<sup>82</sup> In *Pope & Talbot*, given that “the true interests at stake are the Investment’s asset base, the value of which is largely dependent on its export business,” the tribunal found that the claimant had properly pled that measures affected its “investment”, but that the “interference [was not] sufficiently restrictive to support a conclusion that the property [had] been ‘taken’ from the owner.” *Pope & Talbot*, Interim Award, ¶¶ 98, 102, 104-05 (26 June 2000).

<sup>83</sup> *Methanex*, Final Award, Part II, Ch. D, p. 11, ¶ 31 (3 Aug. 2005), citing Second Amended Statement of Claim, ¶¶ 321-27.

<sup>84</sup> *Id.*, Part IV, Ch. D, p. 7, ¶ 17 (citations omitted). The *Methanex* tribunal therefore found no violation of Article 1110 in the claimant’s claims that “a substantial portion of [its] investments, including its share of the California and larger U.S. oxygenate market were taken by facially discriminatory measures and handed over to the domestic ethanol industry.” *Id.* ¶¶ 3, 15-18.

### The Degree of Interference with the Investment

359. There are two prongs to an assessment of the degree of interference with Claimant's investment: the severity of the economic impact and the duration of that impact. The Tribunal considers each in turn.

### The Severity of the Economic Impact

360. It is widely accepted that a finding of expropriation of property under customary international law requires a radical deprivation of a claimant's economic use and enjoyment of its investment. This is the consistent view of previous NAFTA tribunals. "[T]he affected property must be impaired to such an extent that it must be seen as 'taken'."<sup>85</sup> "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)."<sup>86</sup> It is a view also stated in numerous BIT arbitrations.<sup>87</sup> Therefore, putting to the side the question of sufficiency of the duration of the interference, the Tribunal must find a radical deprivation of the Claimant's economic use and enjoyment of its investment for the period of the interference.
361. The difference between the Parties' perspectives as to the severity of the economic impact in this case again is related to the question of whether it is permissible to raise an Article 1110 claim on the basis of a temporary taking and Claimant's formulation of its claim. To prove the severity of the economic impact of the Mexican measures, Claimant relies on data regarding lost profits as opposed to diminished value of the assets. Claimant explains the rationale behind this distinction: the temporary nature of the alleged expropriation. "The established valuation standard for temporary expropriations is the net loss from lost use of the expropriated property or investment during the expropriation period, which generally equates to the present value of the lost income stream during that period." Respondent, in contrast, both challenges the permissibility of a temporary taking claim and, if such a claim is accepted, focuses its analysis on all of the business streams conducted through the physical assets owned by Claimant in Mexico.

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<sup>85</sup> *GAMI*, Final Award, ¶ 126 (15 Nov. 2004).

<sup>86</sup> *Fireman's Fund*, Final Award, ¶ 176(c) (17 July 2006) (citations omitted).

<sup>87</sup> See, e.g., *Tecmed*, Award, ¶ 115 (29 May 2003).



362. At the outset, the Tribunal notes that the principal and growing aspect of the business of Cargill de Mexico and the Tula distribution centre was, at that time, the sale of HFCS.<sup>88</sup> The HFCS trade was clearly central to the business of CdM as Claimant reports, for instance, that it was forced to close the Tula distribution facility in 1998, when CdM was no longer able to sell HFCS, although it appears that at least some part of the facility was utilized by a Cargill oilseeds operation at different times within this period.<sup>89</sup> Likewise, it is not apparent that management could simply have replaced or sufficiently offset its loss of the sales in the HFCS market with different products. More importantly, it is not at all clear to the Tribunal that the good faith effort of a company to develop new outlets when it has lost business as a result of targeted governmental measures should lead to the loss of that company's claim based on those same measures.
363. The Tribunal also notes, however, that unlike the total cessation of business that one would expect to accompany a physical occupation of a business, Cargill de Mexico was not closed down, the Mexican government did not take control of its management, and CdM was not precluded from all business activity during the period in which the IEPS Tax and the special import permit program were in place. In addition, as the facilities and the overall business structure were still available and always under Claimant's control, there remained the opportunity for Claimant to utilize these assets for other products throughout the period in which trade in HFCS was not a viable option.
364. In fact, it appears to the Tribunal that HFCS, though an important component of the investment, was not the sole business of Cargill de Mexico. Claimant's own expert explains that Cargill de Mexico's Corn Milling division was established in 1993 in Mexico City, "along with the majority of CdM's other operations. Establishing a corn milling division rather than a separate company allowed CdM to take advantage of the synergies with existing CdM operations and to better leverage CdM's existing

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<sup>88</sup> See Navigant Expert Report (21 Dec. 2006), p. 51, Tbl. 10, titled "Nominal Lost Cash Flows Earned by CdM and Cargill on CdM's HFCS Sales."

<sup>89</sup> See E-mail correspondence from Mike Coots to Larry Popp re: Tula Terminal Pics (18 Sept. 2000); E-mail correspondence from Jeff Cotter to Pat Bowe, et al. re: FW: Mexico Status update (26 Oct. 2004).

customer relationships to help drive HFCS sales in the market.”<sup>90</sup> Respondent’s expert points to an internal Cargill memorandum circulated on 6 September 1994, offering space at the soon-to-be-constructed Tula facility:

North American Corn Milling (NACM) has recently inaugurated a corn sweetener terminal in McAllen, Texas, and has begun construction on a second terminal at Tula, Hidalgo, in the Mexico City area. Both sites were chosen for their strategic location to serve Cargill businesses, product lines, taking advantage of joint opportunities and synergies. The sites have land available for expansion by other Cargill product lines. In case of interest, please contact: Gordon Adkins ....<sup>91</sup>

In addition, Respondent raises a subsequent memorandum on 9 March 1996, entitled, “Mexico Corn Wet Milling Plant, Tula Hidalgo, Executive Summary,” which suggests that other Cargill divisions had indeed moved into the facilities: “Our terminals in McAllen and Tula are today distributing HFCS, Glucose, Soybean oil, and Flour throughout Northern and Central Mexico.”

365. Also strongly suggesting the presence of and contribution by other “businesses” administered by Cargill de Mexico and present at CdM’s facilities, the Tribunal notes that indeed the gross receipts of Cargill de Mexico increased during the period of interference. Claimant’s expert Navigant Consulting quantifies this increase as an annual revenue growth of █% between fiscal years 1990 and 2006; Cargill de Mexico’s gross profits grew an average of █% during the same period.

366. It is thus clear that Cargill de Mexico retained some businesses and some value during the period in which the Mexican measures were in effect. Therefore, to determine whether or not Claimant’s investment has suffered a radical deprivation, it is necessary to assess how greatly the alleged lost sales affected Claimant’s investment in CdM, as a whole. In order to evaluate this, the Tribunal determined a “but for net income” that CdM would have earned with its actual income during the period of 2002-2006, combined with the alleged lost income. From here, the Tribunal was able to determine

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<sup>90</sup> Navigant Expert Report (21 Dec. 2006), ¶ 34, citing Witness Statement of Eduardo Ortega, ¶ 30. Claimant’s witness, Eduardo Ortega, the individual responsible for development and growth in Latin America since 1999, and who began Claimant’s business in Mexico “from the ground up,” acknowledges that other Cargill business units operated out of the Tula industrial park. He alleges, however, that each business unit had to purchase and develop its own land at Tula to build its plants and that each division operated independently from both a financial and practical perspective. Rebuttal Witness Statement of Eduardo Ortega, Jr., ¶¶ 1, 10-12.

<sup>91</sup> Comments and Analysis of the *Expert Report of Brent C. Kaczmarek, CFA* dated 21 December 2006, prepared by Navigant Consulting, Inc., Pablo Ri6n and Associates, ¶ 137 (Apr. 2007), quoting Memorandum from Gordon Adkins to Cargill personnel (16 Sept. 1994).

what percentage the lost sales contributed to this “but for income” and thus what effect their loss would have had on the overall investment. Based solely on Claimant’s data, the Tribunal determined that, between 2002 and 2006, the Mexican measures allegedly decreased CdM and Cargill’s annual pre-tax earnings by between 33% and 79%.<sup>92</sup>

367. Respondent has raised strong evidence that Cargill de Mexico operated numerous other businesses, besides that of HFCS, some of which have been sufficiently profitable to fuel an increase in revenues during the period in which Claimant was excluded from Mexico’s HFCS market. These businesses suggest not only that Claimant never lost control of or access to its investment, but also that although the overall investment of Cargill de Mexico appears to have been harmed by the temporary loss of one of its businesses—high fructose corn syrup—the economic impact of that loss was not so complete as to create an appearance that the investment, in its entirety, was expropriated.
368. On the one hand, under Claimant’s analysis, Respondent’s measures resulted in a near total loss of the business income stream from Claimant’s Mexican HFCS business. On the other hand, adopting Respondent’s focus on all business income streams of CdM and the Tula facility, the Tribunal concludes that, in light of the circumstances of this case and the evidence before it with respect to these exhibits and the entire record, Claimant has failed to prove that the damage done by the Mexican measures to its HFCS business resulted in such a substantial diminution of Cargill de Mexico so as to equate to a radical deprivation of Claimant’s overall investment.
369. The Tribunal notes that the question of whether the severity of measures alleged to be a temporary taking should be valued in terms of the particular revenue stream affected, or in terms of all of the business streams of the underlying investment, need only be reached if the Tribunal finds that an Article 1110 claim may be based on a temporary taking. It is to this question the Tribunal now turns.

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<sup>92</sup> This percentage diminution was calculated by adding the actual “earnings before tax” derived from CdM’s various businesses and Navigant’s projected “nominal lost cash flows earned” (lost pre-tax income) and then dividing the lost income by this sum. (For these calculations, the Tribunal relied on Claimant Exhibit 248: “Cargill de Mexico 1991-2006 Financial Statements” for the actual earnings before tax; and Navigant Expert Report (21 Dec. 2006), p. 51, Tbl. 10: “Nominal Lost Cash Flows Earned by CdM and Cargill on CdM’s HFCS Sales” for the pre-tax income losses attributed to the lost sales.). These figures are for both CdM and Cargill, Inc.

### Duration of the Interference

370. It is accepted that there was not a permanent expropriation of Claimant's investment in Mexico. Given the respective contentions of the Parties, it is also accepted that Claimant was precluded from participating in its HFCS-related activities for at least three years and four months, and perhaps, as asserted by Claimant, for five years or more.
371. The Parties disagree as to whether a claim for damages arising from a temporary expropriation is permitted under NAFTA Article 1110 or under customary international law to the extent that it is assumed that Article 1110 incorporates custom in this regard.
372. "Expropriation" under customary international law involves the taking of property by a State. In the classic form of nationalization, title is transferred to the government. This *de jure* form of expropriation was extended over the decades to include *de facto* takings where, even though there was not a decree transferring title, the property was nonetheless deemed to have been taken. As the *S.D. Myers* tribunal wrote: "In general, the term 'expropriation' carries with it the connotation of a 'taking' by a governmental-type authority of a person's 'property' with a view to transferring ownership of that property to another person, usually the authority that exercised its *de jure* or *de facto* power to do the 'taking'".<sup>93</sup> In both the case of *de jure* and *de facto* takings, the investor was deprived permanently of the property. Article 1110, in using the terms "expropriation" and "tantamount to expropriation", incorporates this customary law of expropriation.
373. Claimant asserts that an expropriation claim may be based on a temporary rather than a permanent taking. In particular, Claimant argues that, if a government temporarily occupied an investor's facility preventing its intended use and later returned the facility to the control of the investor, then the government would be liable to the investor for a temporary taking where the measure of damages would not be the value of the property inasmuch as that which was returned, but rather damages that flow from that interference with the use of the property. Claimant argues that its situation in this case

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<sup>93</sup> *S.D. Myers*, Partial Award, ¶ 280 (13 Nov. 2000).

is analogous. Although Respondent did not physically occupy Claimant's facility and deny its intended use, Claimant argues that the effect of Mexico's measures was the same. While Claimant asserts that several authorities support this proposition, the Tribunal does not find them on point.

374. The practice of the Iran-United States Claims Tribunal is not of assistance. The statement in *Tippets, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Eng'rs of Iran* cited by Claimant for the proposition that measures may be expropriatory so long as they are more than "merely ephemeral" does not support Claimant's proposition regarding temporary takings.<sup>94</sup> In *Tippets*, the tribunal held that "the Claimant has been subjected to 'measures affecting property rights' by being deprived of its property interests in TAMS-AFFA since at least 1 March 1980." In making this holding, however, the tribunal concluded that the property interest in the partnership had been *de facto* permanently taken as of that date. That permanency is reflected in the fact that the tribunal proceeded to calculate damages by ascertaining claimant's interest in the dissolution value of the partnership as of 1 March 1980. The tribunal's reference to not "merely ephemeral" is a statement that the set of actions or measures alleged to give rise *de facto* to a permanent taking may not be merely ephemeral. Judge Brower writes of the *Tippets* award, that the "merely ephemeral" standard "appears to reflect a realization by the Tribunal that a genuinely temporary assumption of management control would not, without more, constitute a compensable taking."<sup>95</sup>
375. One NAFTA tribunal, without explanation, reserves the possibility of a temporary taking. Contrary to Claimant's position, the tribunal in *S.D. Myers* stated that an expropriation "usually amounts to a lasting removal of the ability of an owner to make use of its economic rights ...." But Claimant relies on the *S.D. Myers* tribunal's immediate statement thereafter that "in some contexts and circumstances, it [is] appropriate to view a deprivation as amounting to an expropriation, even if it [is] partial or temporary."<sup>96</sup> This possibility is neither explained nor supported, however. The *S.D. Myers* tribunal observes that the 18-month period of the measure in that case "may have significance in assessing the compensation to be awarded in relation to

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<sup>94</sup> *Tippets*, 6 Iran-US CTR 219 (Award No. 141-7-2) (1984).

<sup>95</sup> CHARLES N. BROWER AND JASON D. BRUESCHKE, *THE IRAN-UNITED STATES CLAIMS TRIBUNAL* 399, fn. 1866 (1998). See also *Tippets*, at 414-17.

<sup>96</sup> *S.D. Myers*, Partial Award, ¶ 283 (13 Nov. 2000).

[Canada's] violations of Articles 1102 and 1105, but it does not support the proposition on the facts of this case that the measure should be characterized as an expropriation within the terms of Article 1110,"<sup>97</sup> and in this sense the possibility on which it reserved judgment was not present in the case before it.

376. Finally, the BIT arbitration awards cited to by Claimant appear to not be on point either. The *Wena Hotels* tribunal found a year-long seizure and occupation of, and stripping of property from, a hotel to constitute a *de facto* permanent taking.<sup>98</sup> This permanency is evident in the fact that the loss was not valued in terms of the damages arising as a result of the period of deprivation, but as "the market value of the investment immediately before the expropriation."<sup>99</sup> In *Middle East Cement*, the tribunal found that a conceded deprivation of a license for at least four months amounted to a *de facto* permanent taking of the property right in the license.<sup>100</sup> This permanency is evident in the fact that the loss was not valued in terms of the four month loss but rather the remaining life of the license.<sup>101</sup>

377. It is always possible that there is evidence of practice suggesting that customary international law is changing to address not only claims of expropriation, but also claims for interference with property rights or claims based on other measures affecting property. For this case, such evidence would need to clearly indicate that it establishes an expansion of the scope of expropriation rather than the creation of categories of claims not encompassed within Article 1110. Such evidence, however, has not been presented to this Tribunal.

#### **Final Disposition of the Tribunal with respect to Claim Arising under Article 1110**

378. For these reasons, the Tribunal finds that Claimant's Article 1110 claim fails inasmuch as it does not present an instance of expropriation within the scope of Article 1110.

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<sup>97</sup> *Id.* at ¶ 284.

<sup>98</sup> *Wena Hotels*, Award, ¶ 99 (8 Dec. 2000).

<sup>99</sup> *Id.* at ¶ 125.

<sup>100</sup> *Middle East Cement*, Award, ¶ 107 (12 Apr. 2002).

<sup>101</sup> *Id.* at ¶¶ 121-28.

**XII. RESPONDENT'S DEFENSE THAT ITS ACTIONS WERE LEGITIMATE  
COUNTERMEASURES PRECLUDING THE WRONGFULNESS OF ITS ACTS**

**Issue Presented**

379. Respondent argues that, in the event the Tribunal should find that Respondent's actions have breached Chapter 11, the wrongfulness of such actions is precluded inasmuch as the actions were legitimate countermeasures under international law.
380. The Tribunal notes at the outset that this argument raises issues of first impression in the NAFTA specifically and in free trade agreements generally. This is a primary reason that the Tribunal sought the holdings of the two parallel high fructose corn syrup proceedings as described in paragraph 45 above. The holdings in these other proceedings are not binding *per se* upon this Tribunal. However, both the significance of the question presented and the close relationship of the parallel proceedings indicate that this Tribunal should, if at all possible, consider the reasoning of the panels in these proceedings as it may bear upon the issue as it is presented in this case. Both of the awards in the other proceedings were subject to business confidentiality restrictions that required redactions of the awards. Although the redactions were not extensive, the changes required a substantial amount of time. The 21 November 2007 award in *Archer Daniels Midland and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* was provided in redacted form to this Tribunal on 17 July 2008. The Tribunal requested and received the views of the Parties upon that award as it might bear on this proceeding, although it should be noted that the comments of the Parties focused on aspects of the *Archer Daniels* award other than countermeasures. The Tribunal has not received a redacted version of the decision on liability rendered in *Corn Products International v. United Mexican States*. The Tribunal concludes that, although it is desirable to review the reasoning of the tribunal in the *Corn Products* proceeding, that desirability is outweighed by the duty of the Tribunal to the Parties in this proceeding to render its Award in a timely manner.<sup>102</sup>

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<sup>102</sup> Just prior to the finalization of this award, the Tribunal received notice that the redacted version of the Decision on Responsibility in *Corn Products International Inc. v. United Mexican States* (January 15, 2008) was publically available. The Tribunal has reviewed the Decision and the Separate Opinion to that Decision and observes that the Tribunal in that proceeding rejects the countermeasures defense as well.

381. The possibility that countermeasures may be invoked as a circumstance precluding the wrongfulness of an act is an aspect of customary international law. An important recent statement of the customary law regarding circumstances precluding wrongfulness can be found in Chapter V, titled “Circumstances Precluding Wrongfulness,” of the International Law Commission’s (“ILC”) *Articles on State Responsibility*. The ILC *Articles on State Responsibility* in part are a codification of custom and in part manifest a progressive development of international law. It is not always apparent whether a particular article should be viewed as the codification of custom or the progressive development of it. Moreover, the ILC articles dealing with countermeasures were among the most controversial for, and commented upon by, the States reviewing the various drafts of the articles.<sup>103</sup> For these reasons, the Tribunal approaches the issue of countermeasures recognizing both the central position of the work of the International Law Commission, and the importance of ascertaining the applicable custom in the light of the ILC articles and the particular facts of this case.<sup>104</sup>

382. The practice of countermeasures as accepted in custom is a measured recognition of the legality of non-forcible self-help in response to a wrongful act. Thus, Article 22 of the ILC *Articles on State Responsibility*, entitled “Countermeasures in respect of an internationally wrongful act,” provides:

The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State in accordance with Chapter II of Part Three [where the procedural requirements of a valid countermeasure are specified].<sup>105</sup>

It is in this sense that Respondent submits that the actions at issue were lawful countermeasures precluding such actions from being wrongful acts constituting a breach of the NAFTA.

383. Claimant argues that countermeasures as a circumstance precluding wrongfulness may not be asserted by Respondent in this proceeding for three reasons. First, Claimant

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<sup>103</sup> See JAMES CRAWFORD, *THE INTERNATIONAL LAW COMMISSION’S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES* 48 (2002) (stating that this “was the most controversial aspect of the provisional text adopted in 2000” and summarizing the dimensions of the debate). Accord David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. OF INT’L L. 817, 818 (2002).

<sup>104</sup> James Crawford, *The ILC’s Articles on State Responsibility: A Retrospect*, 96 AM. J. OF INT’L L. 874, 890 (2002) (noting that “the ILC’s work is a part of a process of customary law articulation which ... requires care in its recipients but does not contravene any general principle”).

<sup>105</sup> Respondent’s Counter-Memorial, ¶ 409.



argues that it is a private entity possessing rights under Chapter 11 of the NAFTA that may not be affected by Mexico's purported countermeasures directed at the United States. Second, Claimant argues that the text and structure of the NAFTA as a matter of treaty law excludes the customary possibility of countermeasures as a circumstance precluding wrongfulness. Finally, Claimant asserts that this Tribunal does not have competence to consider Respondent's reliance on countermeasures as a defense because doing so would require it to determine that the United States—an absent third party—breached its international obligations to Mexico.

384. Assuming that the Tribunal was to find that it is possible for Respondent to invoke countermeasures as a circumstance precluding the wrongfulness of an act otherwise in breach of Chapter 11 obligations, Claimant goes on to argue that Respondent's assertion of countermeasures in any event should be denied effect, *inter alia*, because of a lack of proportionality.

385. In the following sections, the Tribunal reviews the contentions of the Parties regarding Claimant's three fundamental objections to the availability of countermeasures in this proceeding. The Tribunal then reviews the reasoning on the question of countermeasures in the 21 November 2007 award in *Archer Daniels Midland*. Finally, the Tribunal sets forth its reasons denying Respondent's invocation of countermeasures in this proceeding, concluding that such an assertion is not available in the context of a Chapter 11 proceeding.

#### **Contentions of the Parties with respect to Countermeasures**

##### **Whether Countermeasures between NAFTA State Parties are Available to Preclude the Wrongfulness of Acts Otherwise in Breach of the Rights of Investors under Chapter 11**

386. Claimant contends that the rights granted under Chapter 11 vest not in NAFTA State Parties but in the investors of those States, and that it is an "archaic fiction to pretend that investors' rights under Chapter 11 are in law the rights of the investor's national State." Claimant submits that the English Court of Appeal recently endorsed this view in the context of a BIT in *Occidental Exploration and Production Co. v. Republic of Ecuador*, where the court stated that it was "both artificial and wrong in principle to suggest that the investor is in reality pursuing a claim vested in his or its home

State.”<sup>106</sup> Claimant argues that this view “clearly comports with contemporary international law, which abandons arcane fictions for the sake of practical sense and realism.”

387. It follows, asserts Claimant, that “investors and their national States cannot necessarily be assimilated for legal purposes.” As such, if the United States breaches its obligations under the NAFTA, Mexico may not lawfully take countermeasures that “target” United States investors. Because investors have independent rights under Chapter 11, contends Claimant, taking countermeasures that “target private HFCS suppliers like Cargill ... [has] an effect equivalent to the targeting of a third State.”
388. In the Tribunal’s view, Claimant’s argument may be stated as: (1) investors enjoy rights under Chapter 11 apart from the States Parties; and therefore, (2) although Respondent’s reliance on countermeasures may preclude international responsibility as to obligations owed to the United States, it does not preclude wrongfulness as to obligations owed to Claimant under Chapter 11.
389. In reply, Respondent argues that, “[b]y virtue of NAFTA’s character as an international treaty, the Chapter Eleven obligations (and the balance of the NAFTA) are owed by Mexico to the United States and *vice versa*.” Section B of Chapter 11 accords investors only “a procedural right of access” that allows investors to enforce certain obligations under the NAFTA that are owed by and to the State Parties themselves.
390. Respondent submits that the structure of the NAFTA contradicts Claimant’s proffered concept of independent investor rights under Chapter 11. Chapter 11 is a “subordinate part of a trade agreement.” In support of this contention, Respondent cites Article 1115, which provides:

Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes....

In Respondent’s view, Article 1115’s “without prejudice” clause “indicate[s] that Chapter Eleven has a lower standing in the Treaty’s structure than Chapter Twenty ....”

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<sup>106</sup> *Occidental Exploration and Production Co. v. Republic of Ecuador* (“*Occidental v. Ecuador*”), Approved Judgment of Sept. 9, 2005, [2005] EWCA Civ. 1116, ¶ 17.

391. Respondent asserts that Claimant’s conception of investor rights under Chapter 11 conflicts with the rights of States Parties under Chapter 20 of the NAFTA. Respondent offers, as an example, the right to suspend benefits under Article 2019 in the event that a Party refuses to comply with its obligations following an adverse determination by an arbitral panel.<sup>107</sup> “In such a case, an investor of the recalcitrant Party affected by the legitimate suspension of benefits would not be able to successfully challenge such measures through a Chapter Eleven proceeding.” Otherwise, asserts Respondent, a “fundamental right” of Parties under Chapter 20 would be undermined.
392. Respondent further contends that Claimant’s concept of investor rights would “seriously constrain the States’ basic rights under international law,” and endow investors with greater rights than States. As lawful countermeasures preclude wrongfulness and thus challenge by the targeted State, it would be “absurd for a person of the Party against which the countermeasure is taken to successfully challenge it.” Otherwise, an investor would enjoy greater rights to challenge lawful countermeasures than its home State, and a State’s “right to adopt countermeasures in accordance with international law would be nullified.”
393. As such, submits Respondent, “[a] legitimate countermeasure against the United States is necessarily legitimate against United States’ nationals.”

**Whether the Language and Structure of the NAFTA as a Matter of Treaty Law Excludes the Customary Availability of Countermeasures**

394. Claimant contends that the NAFTA excludes the availability of countermeasures based on custom. Specifically, Claimant argues that the text and structure of Chapter 20 of the NAFTA excludes countermeasures until the Chapter 20 dispute resolution process has been exhausted. Because Respondent did not exhaust that process before resorting

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<sup>107</sup> Article 2019(1), entitled “Non-Implementation - Suspension of Benefits,” provides:

If in its final report a panel has determined that a measure is inconsistent with the obligations of this Agreement or causes nullification or impairment in the sense of Annex 2004 and the Party complained against has not reached agreement with any complaining Party on a mutually satisfactory resolution pursuant to Article 2018(1) within 30 days of receiving the final report, such complaining Party may suspend the application to the Party complained against of benefits of equivalent effect until such time as they have reached agreement on a resolution of the dispute.

to countermeasures, Claimant asserts that the possible availability of countermeasures in custom is not applicable in this case.

395. In support, Claimant directs the Tribunal's attention to Article 55 ("*Lex Specialis*") of the ILC *Articles on State Responsibility*. Article 55 provides that the articles do not apply "where, and to the extent, that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law."<sup>108</sup>
396. Claimant submits that the Chapter 20 dispute resolution mechanism is just such a special rule of international law, and governs to the extent that it conflicts with general customary rules of international law. More precisely, Claimant reads NAFTA Article 2019 to prohibit Parties from suspending performance under the NAFTA, unless a Chapter 20 panel has first issued a final report and the parties have not reached a mutually satisfactory agreement within 30 days of this report. That is, by providing for itself a type of countermeasure in specific circumstances, NAFTA precludes the availability of countermeasures based on custom.
397. In response to Claimant's argument that NAFTA Article 2019 is a *lex specialis* that precludes countermeasures until a Chapter 20 panel has rendered its final report and the respondent party has failed to bring itself into compliance, Respondent contends that a "*lex specialis* can apply only if it is permitted to operate as the Parties to the *lex specialis* intended." Because the United States obstructed the operation of the *lex specialis*, Respondent argues that it cannot restrict Mexico's rights under customary international law.
398. In Respondent's view, it "cannot be bound by Article 2019 when, through no fault of its own, it was prevented from obtaining a Panel finding that the United States violated its market access commitments. Otherwise, a recalcitrant respondent Party could, by obstructing dispute settlement, prevent the complaining Party from obtaining redress under the Treaty and from asserting its customary law rights in the event of the Treaty's breakdown."

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<sup>108</sup> Claimant's Reply., ¶ 135; see also Hearing Transcript, pp. 1274-75.

399. Claimant, in turn, disputes Respondent's contention that the United States obstructed Respondent from exhausting the Chapter 20 dispute resolution process. The disagreement between Claimant and Respondent focuses on the interpretation of NAFTA Article 2011(1)(d), which prescribes the process for selecting an arbitral panel under Chapter 20. Article 2011(1)(d) provides:

If a disputing Party fails to select its panelists within such period, such panelists shall be selected by lot from among the roster members who are citizens of the other disputing Party.

Claimant takes the position that the plain meaning of Article 2011(1)(d) and "common sense" dictate that "Mexico did not have to rely on the United States Section of the NAFTA Secretariat to implement the lot selection procedure ...." Nothing in the NAFTA itself or the Model Rules of Procedure for Chapter 20 supports Respondent's assertion to the contrary. Claimant reasons that giving "the Party accused of defaulting on its panel-appointment obligations veto power over the Article 2011 lot selection process is plainly bizarre ...."

400. Respondent, by contrast, submits that it "took all reasonable measures" to resolve its dispute with the United States. It is Respondent's position that Mexico could not have unilaterally implemented the lot selection process of Article 2011(1)(d) because doing so is "inherently unfair" to the respondent State and the United States would not have accepted the result.

401. Moreover, Respondent asserts that it could not have caused panelists to be "selected by lot from among the roster members"—the process provided by Article 2011(1)(d)—because no such roster existed at the relevant time. Compiling an Article 2009 roster would have required the agreement of the three NAFTA States Parties.

402. Claimant argues that the apparent fact that there were no roster members from whom to choose at the relevant time did not affect Mexico's obligation to press on with the Chapter 20 process. In Claimant's view, Mexico should have taken steps to establish a roster of panelists pursuant to NAFTA Article 2009.

**Whether this Tribunal May Consider Respondent's Contention that Countermeasures Preclude Wrongfulness**

403. Claimant contends that the “essential parties” principle bars this Tribunal from considering Respondent’s countermeasures defense. As formulated by Claimant, this principle prevents a tribunal from ruling upon the “conduct of a State that is not a party to the proceedings.”
404. Claimant notes that Respondent invokes two disagreements between the United States and Mexico—in which Mexico alleges the United States breached its obligations under the NAFTA—to “justify its purported countermeasures.” Claimant thus reasons that “[t]o sustain Mexico’s countermeasures defense, this Tribunal would have to side with Mexico and against the United States on those disagreements, contrary to the essential parties principle.”
405. In sum, Claimant contends that the merits of Respondent’s countermeasures defense cannot be evaluated “without first determining that the purported conduct of the United States amounted to violations of international obligations owed by the United States to Mexico.” Because this Tribunal lacks jurisdiction to make this determination, Claimant contends, it likewise lacks jurisdiction to evaluate the countermeasures defense.
406. Respondent advances two positions as to why the essential parties principle does not bar consideration of its countermeasures defense. First, Respondent contends that this Tribunal has sufficient jurisdiction and evidence before it to determine that the IEPS Tax was “potentially” a lawful countermeasure. More precisely, Respondent submits that “incidental jurisdiction” to evaluate the countermeasures defense derives from NAFTA Article 1131, which “requires the Tribunal to decide ‘the issues in dispute’ in this proceeding in accordance with the NAFTA (i.e., the whole of the NAFTA, not just Chapter Eleven) and applicable rules of international law.” In “deciding the ‘issues,’ which include Mexico’s defenses, the Tribunal has jurisdiction to apply the whole of the NAFTA” and rules of customary international law.
407. Second, Respondent further contends that, pursuant to its incidental jurisdiction, this Tribunal can, on the basis of the evidence before it, determine that Mexico’s Tax was “potentially” a lawful countermeasure *without* deciding whether the United States

breached its obligations to Mexico. That is, evaluating the countermeasures for notice, proportionality, and compatibility with the NAFTA does not require a determination on the question of breach. If, upon evaluating the evidence before it, this Tribunal determines that Mexico's Tax was "potentially" a lawful countermeasure—that if, assuming *arguendo* that the United States was in breach of its NAFTA obligations, the Tax would have been a legitimate countermeasure—Respondent submits that this Tribunal cannot hold it liable for damages because its conduct was potentially lawful.

408. Respondent acknowledges that this Tribunal has incidental jurisdiction to find the opposite, that the Tax "couldn't possibly be a countermeasure" because it clearly falls short of the customary international law requirements for countermeasures.
409. In the alternative, if this Tribunal determines that it does not have jurisdiction to evaluate Respondent's countermeasure defense, Respondent takes the position that the Tribunal should stay the proceedings until Respondent is able to obtain a definitive determination of its NAFTA rights vis-à-vis the United States.

#### **The *ADM v. Mexico* Award**

410. In a strikingly similar fact pattern—with the same respondent, the same IEPS Tax and the same argument by respondent that its actions were legitimate countermeasures precluding the wrongfulness of its acts—the *ADM* tribunal began its analysis of the countermeasures defense with *lex specialis* and the claimant's argument that the NAFTA Parties have waived their rights to countermeasures under customary international law for alleged violations of NAFTA provisions.<sup>109</sup> The *ADM* tribunal dispatched this argument, citing Article 66 of the ILC articles which allows, in the tribunal's words, that derogation from the articles' provisions by treaty and thus, "[t]he customary international law that the ILC Articles codify do not apply to matters which are specifically governed by *lex specialis* – i.e., Chapter Eleven ...."<sup>110</sup> As Chapter 11 does not provide for or specifically prohibit the use of countermeasures, the question of the availability of the defense falls to customary international law, as opposed to *lex*

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<sup>109</sup> Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States ("*ADM*"), ICSID Case No. ARB(AF)/04/05, ¶ 113 (Award) (November 21, 2007).

<sup>110</sup> *Id.* ¶¶ 116, 118.

*specialis*.<sup>111</sup> “The Tribunal therefore agrees with Respondent that countermeasures may serve as a defence under a Chapter Eleven case, as this is a matter not specifically addressed in Chapter Eleven, but valid under customary international law if certain conditions are met.”<sup>112</sup>

411. The *ADM* tribunal thus turned to the merits of the claimed countermeasure and held that there were four conditions that the respondent was required to demonstrate to support its assertion that its Tax was a valid countermeasure: (1) that the United States breached Chapters 3 and/or 7 and 20; (2) that the Tax was enacted in response to these U.S. breaches and was intended to induce U.S. compliance with its NAFTA obligations; (3) that the Tax was a proportionate measure; and (4) that the Tax did not impair the individual substantive rights of the claimant.<sup>113</sup> With respect to the first requirement, the *ADM* tribunal determined that it had no jurisdiction to decide whether the United States breached any of its international obligations, and therefore it turned to the other three requirements.<sup>114</sup>

412. With respect to the second requirement—whether the Tax was enacted in response to U.S. breaches and in an effort to induce U.S. compliance—the *ADM* tribunal found that it was not:

The evidence on record before the Tribunal indicates that the most immediate relevant context in which the dispute over the Tax arose were the Mexican anti-dumping measures, the WTO and NAFTA rulings against those measures, and the order for their final repeal. The evidence before us indicates that this was the setting for the enactment of the Tax, rather than the dispute between Mexico and the United States over access to the U.S. market of Mexican-produced excess sugar, a dispute that ripened in the year 2000, well after the imposition of the anti-dumping measures.<sup>115</sup>

The tribunal noted that nothing in the text of the IEPS amendment indicated that it was enacted as a countermeasure; rather, it was a device to protect domestic sugar producers from competition by the HFCS industry.<sup>116</sup>

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<sup>111</sup> *Id.* ¶ 120.

<sup>112</sup> *Id.* ¶ 123.

<sup>113</sup> *Id.* ¶ 127.

<sup>114</sup> *Id.* ¶¶ 128, 133. The tribunal also noted that, with respect to the remaining three requirements, “[i]f one fails, the defense fails ...,” and thus if all three of the remaining requirements under the tribunal’s jurisdiction were met, the tribunal might have had to grant the respondent’s request for a stay of the proceedings to allow for consideration of the first requirement.

<sup>115</sup> *Id.* ¶ 137.

<sup>116</sup> *Id.* ¶ 142.



413. The *ADM* tribunal similarly found the third requirement unmet, holding that the IEPS Tax could not be proportionate as it was not necessary. Relying upon the definition of proportionality as provided in the commentary to ILC Article 51 that “a clearly disproportionate measure may well be judged not to have been necessary to induce the responsible State to comply with its obligations but to have had a punitive aim and to fall outside the purpose of countermeasures enunciated in article 49,”<sup>117</sup> the *ADM* tribunal held that the IEPS Tax was intended not to induce U.S. compliance, but to protect the domestic sugar industry.<sup>118</sup> “Therefore the Tax was not necessary and reasonably connected with the aim purportedly pursued.”<sup>119</sup>
414. Finally, with respect to the fourth requirement—that the Tax not impair the substantive rights of the claimant—the *ADM* tribunal held that private investors do not have independent substantive rights under the NAFTA though, under Chapter 11, investors from State Parties to the NAFTA “are the direct objects and beneficiaries of the standards endorsed under Section A ...”<sup>120</sup> Therefore, according to the *ADM* tribunal, any of the obligations allegedly breached by the United States are only “inter-state obligations concerning international trade and the settlement of state-to-state disputes.”<sup>121</sup>
415. The *ADM* tribunal came to this conclusion after analysis of three theories of investor rights: (1) the “traditional derivative theory” that investors, when triggering arbitration proceedings against a State, are “in reality stepping into the shoes and asserting the rights of their home State;” (2) an “intermediate theory” whereby investors are “vested only with an exceptional procedural right to claim state responsibility under Section B” which will be decided in accordance “with the rights and obligations defined under Section A, which remain inter-state;”<sup>122</sup> and (3) a “direct theory” that “there are two distinct legal relationships under an investment treaty: the investor and the host State on one hand, and the State Parties on the other hand.”<sup>123</sup>
416. The *ADM* tribunal adopted the intermediate theory in its holding:

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<sup>117</sup> *Id.* ¶ 152.

<sup>118</sup> *Id.* ¶ 153.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* ¶ 157.

<sup>121</sup> *Id.* ¶ 158.

<sup>122</sup> *Id.* ¶ 163.

<sup>123</sup> *Id.* ¶ 166.

In the Tribunal's view, the obligations under Section A remain inter-state, providing the standards by which the conduct of the NAFTA Party towards the investor will be assessed in the arbitration. All investors have under Section B a procedural right to trigger arbitration against the host State. What Section B does is to set up the investor's exceptional right of action through arbitration that would not otherwise exist under international law, when another NAFTA Party has breached the obligations of Section A.<sup>124</sup>

The tribunal explained that, "[t]he investor accepts the host State offer to arbitration upon filing of the request for arbitration; and at that moment the investor may waive its procedural rights."<sup>125</sup> The tribunal differentiated these rights from the "substantive investment obligations" of Section A that cannot be waived.<sup>126</sup> The investor and the host State, upon the investor's acceptance of the host State's offer of arbitration, "enter into a direct legal relationship in the form of an arbitration agreement."<sup>127</sup> The tribunal concluded that, "[i]t therefore follows that the only individual rights investors enjoy under Chapter Eleven is the procedural right under Section B to invoke the responsibility of the host State."<sup>128</sup>

417. The *ADM* tribunal thus held that, "the countermeasures did not impair the Claimants' procedural right to bring a claim against the Mexican State, as the countermeasure had no relation whatsoever with the Respondent's offer to submit the present dispute to arbitration."<sup>129</sup> The tribunal concluded that, notwithstanding its finding that investors "do not enjoy individual or independent rights under Section A of Chapter Eleven," the Tax was not a valid countermeasure as "it was not adopted to induce [U.S.] compliance with the NAFTA; nor [did it] meet the proportionality requirements under customary international law."<sup>130</sup>

418. Arthur W. Rovine in his concurrence, agrees with the tribunal's decision but asserts a different line of reasoning. He argues that "NAFTA investor rights to legal redress for wrongs committed are substantive," and "countermeasures cannot ... eliminate,

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<sup>124</sup> *Id.* ¶ 173. For support of this holding, the *ADM* tribunal cited to 1128 State submissions that it read to reveal the State Parties' "view that investors do not enjoy individual substantive rights under Chapter Eleven; and that the rights under Section A are therefore inter-State rather than direct individual rights of investors." *Id.* ¶ 176, citing the submission of the United States in its response to the Counter-Memorial of the *Loewen Group* on Jurisdiction, and those of Canada in *Metalclad v. Mexico* and *Methanex v. United States*.

<sup>125</sup> *Id.* ¶ 174.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* ¶ 179.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* ¶ 180.

supersede, or suspend [these rights] should the countermeasures constitute a breach of Chapter Eleven ....”<sup>131</sup> Rovine begins his argument with a discussion of the *ILC Articles on State Responsibility*, and specifically the commentary to ILC Article 49 for the proposition that “Claimants possess individual third party investor rights under NAFTA that cannot validly be overridden or suspended by countermeasures ....”<sup>132</sup> The ILC articles, Rovine notes, “do not distinguish between procedural rights that may be superseded by countermeasures, and substantive rights that may not.”<sup>133</sup>

419. Rovine argues that, “[u]nless the provisions of Chapter Eleven create obligations owed to investors, to be enforced by investors, they have no meaning, even if the enforcement rights are ‘procedural’ and ‘derivative.’”<sup>134</sup> Rovine quotes the *ADM* claimant in pointing that: “Nowhere in the case law of Chapter Eleven or of BITs will you find the suggestion that claimants are enforcing the rights of the State. Nowhere do you find the suggestion that somehow investors are just deputized to enforce the rights of the state.”<sup>135</sup> Rovine reiterates that, in his opinion:

It is clear that Chapter Eleven, as stated by Brower and Steven, ‘creates substantive investment protections that are enforceable in arbitration by the individuals directly impacted by any breach of such protections.’ In my view, the substantive investment protections conferred by treaty upon NAFTA investors include the substantive right of legal redress for breaches of Section A of Chapter Eleven.

Why is the right to legal redress a substantive rather than a procedural right? In my view, the logic of the law, both internal and international, necessarily entails that a claimant with a right to file a claim and be awarded damages for breach of an obligation by defendant, should claimant prevail, has an individual right, owed to him directly, and underlying the right to file and collect damages, not to have that obligation breached by defendant. ...

... To have the right to bring the claim, in addition to having the possibility or reality of satisfying that claim, demonstrates an enforceable right and remedy. Again, legal redress for the wrong committed is a substantive right.<sup>136</sup>

These “rights of enforcement of the States Parties’ obligations,” Rovine argues, were directly granted to claimants, “as beneficiaries of the NAFTA governments ....”<sup>137</sup>

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<sup>131</sup> *ADM*, Concurring Opinion of Arthur W. Rovine, *Issues of Independent Investor Rights, Diplomatic Protection and Countermeasures*, p. 1 (21 Nov. 2007).

<sup>132</sup> *Id.* ¶ 5.

<sup>133</sup> *Id.* ¶ 4.

<sup>134</sup> *Id.* ¶ 45.

<sup>135</sup> *Id.*, quoting *ADM* Transcript, pp. 1013-14.

<sup>136</sup> *Id.* ¶¶ 46-48 (internal citation omitted).

<sup>137</sup> *Id.* ¶ 67.

Thus, he concludes, “even if it is accepted that the States Parties are parties only with each other, part of what the States Parties have agreed to with each other is the obligation to accept direct investor rights of legal redress for breaches of Chapter Eleven. There could not be a more significant individual right for NAFTA investors.”<sup>138</sup>

**Conclusion of this Tribunal with respect to Respondent’s Defense that Its Actions were Legitimate Countermeasures Precluding the Wrongfulness of Its Acts**

420. Under customary international law, a countermeasure may constitute a circumstance precluding the wrongfulness of an act. The ILC articles regarding countermeasures provide an important point of departure in ascertaining more precisely the content of that custom. The Tribunal notes that the Parties do not disagree with either of these statements.
421. The Tribunal further observes that countermeasures directed at an offending State will in many, if not most, circumstances have its intended effect on the offending State through its impact on nationals of that offending State.
422. In addition, the Tribunal observes that countermeasures may operate only to preclude the wrongfulness of an act that is not in conformity with an obligation owed to the offending State. Countermeasures may not preclude the wrongfulness of an act in breach of obligations owed to third States. The Tribunal similarly is of the opinion that countermeasures would not necessarily have any such effect in regard to specific obligations owed to *nationals* of the offending State, rather than to the offending State itself. Thus, the Tribunal finds Respondent’s assertion that “[a] legitimate countermeasure against the United States is necessarily legitimate against United States’ nationals” to be overbroad. The fact that a legitimate countermeasure against the United States will likely affect United States’ nationals does not mean that this same countermeasure necessarily has legal effects on the obligations owed directly to United States’ nationals in a forum intended to address disputes concerning such rights.

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<sup>138</sup> *Id.* ¶ 77.

423. It is in this context that the Parties have characterized the issue before the Tribunal as whether NAFTA Chapter 11 investors possess not only procedural rights of access, but also substantive rights.
424. With due respect to the majority in *ADM* and Respondent in this case, the Tribunal does not agree that investors under Chapter 11 are granted mere procedural rights of access. The Tribunal agrees with Respondent that if a State, through diplomatic protection, were to espouse the claims of its nationals damaged by a legitimate countermeasure, then that countermeasure would preclude the wrongfulness of the act that otherwise would have entailed State responsibility and the claims would be denied. In the case of diplomatic espousal, however, the claim is owned by the espousing State and the espousing State is the named party. Moreover, the operative paragraph of the resulting award reciting the decision of the tribunal names the espousing State, and not the national.
425. This is not the situation under Chapter 11 of the NAFTA. Article 1116(1) provides that it is the investor that “may submit to arbitration under this Section a claim;” not the State of that investor. Likewise, it is the investor, and not the State of that investor, that is the named party to the proceedings. Similarly, it is the investor that is named in the operating paragraph or “dispositive” of the award.
426. Respondent emphasizes, however, that “by virtue of NAFTA’s character as an international treaty, the Chapter Eleven obligations (and the balance of the NAFTA) are owed by Mexico to the United States and *vice versa*.” But here Respondent, in the Tribunal’s view, confuses the origin of the rights with holders of those rights. The Tribunal acknowledges that the rights of investors under Chapter 11 derive from the agreement of the State Parties and that they may to some extent, at least as far as the reach of Chapter 11, be dependent on the continuation of that agreement. But this situation is no different from rights of individuals within many municipal legal systems. That the origin of individual rights may be found in the act of a sovereign, or in the joint act of sovereigns, does not negate the existence of the rights conferred. It is the view of this Tribunal that Chapter 11 creates a framework within which it is the investor that acts upon and benefits from the obligations which are set forth in Chapter 11. It is not fruitful, in the Tribunal’s view, to characterize the issue as whether the rights conferred upon the investor are substantive or merely procedural. The fact is

that it is the investor that institutes the claim, that calls a tribunal into existence, and that is the named party in all respects to the resulting proceedings and award.

427. Respondent further argues that Article 1115's "without prejudice" clause "indicate[s] that Chapter Eleven has a lower standing in the Treaty's structure than Chapter Twenty ...." The Tribunal finds this argument to not be on point. Article 1115 provides: "Without prejudice to the rights and obligations of the Parties under Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures), this Section establishes a mechanism for the settlement of investment disputes ...." Therefore, in this article, the "without prejudice" clause indicates that the provisions of Chapter 11 do not 'affect' the rights or obligations of the State Parties under Chapter 20. Whether that clause's recognition that the rights and obligations of the State Parties under Chapter 20 are not subordinate in some sense to Chapter 11 also implies that Chapter 11 is subordinate in some sense to Chapter 20 is not an issue before this Tribunal.<sup>139</sup> But even if that were the case, the Tribunal does not see why such a relationship between two different mechanisms indicates that it is not the investors who hold rights when asserting a claim under Chapter 11.

428. Respondent contends that, if the rights of investors are not viewed as rights substantially held by the State of the investor, then absurd results follow under the NAFTA. Assuming that countermeasures are permitted within the framework of the NAFTA and Chapter 20, Respondent argues that it is absurd that countermeasures possibly could preclude the wrongfulness of its act vis-à-vis the offending State generally, while those very same countermeasures would be "nullified" by the fact that they would have no similar effect on the claims of investors of the offending State under Chapter 11. The Tribunal disagrees with Respondent's view that such a situation is absurd. To the degree that the existence of claims under Chapter 11 would limit the effectiveness of the countermeasures, then it need be recalled that there is always a range of possible countermeasures to be adopted. Moreover, customary international law itself prohibits certain countermeasures. There is no reason that the range of countermeasures might be further limited—either by direct exclusion in a

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<sup>139</sup> The complexity of this issue is manifest in the wording of the exclusions from dispute settlement asserted by both Mexico and Canada in Article 1138.2 and the precise relationship between the two chapters would in all likelihood depend significantly on the particular facts of the case.

treaty of certain measures or by the creation of a claims process placed directly in the hands of individuals—that limits the effectiveness of certain measures in whole or in part.

**Final Disposition of the Tribunal with respect to Respondent's Claim that Its Actions were Legitimate Countermeasures Precluding the Wrongfulness of Its Acts**

429. For the foregoing reasons, the Tribunal holds that Respondent's argument that its actions were countermeasures cannot have the effect of precluding the wrongfulness of those actions in respect of a claim asserted under Chapter 11 by a national of the allegedly offending State. Given this conclusion, the Tribunal finds that it is unnecessary to decide upon Claimant's other objections to Respondent's countermeasures defense.

430. Finally, as discussed above at paragraph 409, the Tribunal notes Respondent's request that, should this Tribunal find that it does not have the necessary jurisdiction to determine the validity or invalidity of Respondent's assertion that its actions are in fact countermeasures precluding the wrongfulness of those actions, the Tribunal stay the proceedings until Respondent is able to obtain a definitive determination of its NAFTA rights vis-à-vis the United States.<sup>140</sup> As the Tribunal determines that it possesses the requisite jurisdiction to make this determination, the Tribunal denies this request for a stay.

**XIII. DETERMINATION OF DAMAGES**

431. As the Tribunal has found breaches of Respondent's obligations under Articles 1102, 1105 and 1106 of the NAFTA, the Tribunal turns to the calculation of damages owed to Claimant. The Tribunal begins this analysis by noting that the Parties have dramatically different views as to the way in which the Tribunal should proceed to determine damages, as well as the various assumptions the Tribunal should utilize in its analysis. To assess these arguments and arrive at a sound and reasoned determination of damages, the Tribunal will analyze each of the following:

- (1) the measure of damages;

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<sup>140</sup> Respondent's Rejoinder, ¶ 196. Respondent lists four grounds for staying the proceeding at paragraph 199 of its Rejoinder.

- (2) Claimant's Alternative Damage Model and, in particular, the influence to be given the antidumping duties;
- (3) the compensable period of loss;
- (4) the projection of the Mexican HFCS market over the compensable period;
- (5) the projection of Claimant's share of the Mexican HFCS market over the compensable period;
- (6) the projection of the Mexican market price of HFCS over the compensable period;
- (7) the scope of loss to Claimant to be included in the determination of damages: whether Cargill, Inc. and Cargill de Mexico are to be viewed as one investment;
- (8) accounting for the Katrina Swaps; and
- (9) accounting for the effect of the Zucarmex investment.

#### **The Measure of Damages**

432. Claimant asserts that an award should appropriately reflect the “overall damage to the economic success of the investor arising from the measure adopted by the host state ....”<sup>141</sup> Claimant therefore seeks damages for the net lost cash flows that Cargill and Cargill de Mexico “would have garnered from Cargill de Mexico’s HFCS sales in Mexico from January 2002 through 2007 but for Mexico’s illegal conduct.”
433. Claimant calculates the gross “but for” cash flows as the product of the quantity of HFCS that CdM would have sold in Mexico and the per-unit profits that Cargill and CdM would have earned from these sales. This calculation requires projections of the total HFCS sales in Mexico, CdM’s projected individual market share, and a projection of the price of HFCS in Mexico. Claimant argues that, in making these projections, it relies upon the success that it had achieved prior to the imposition of the duties and “realistic assessments” of what it would have achieved but for the Mexican measures. While admitting that there is always some level of uncertainty in determining future lost profits, Claimant asserts that an “appropriate methodology” like the discounted cash flow method (“DCF”) can produce a “rationally justified” result.<sup>142</sup> Claimant argues that many factors *are* known: the levels of HFCS consumption in the United

<sup>141</sup> *S.D. Myers*, Second Partial Award, ¶ 117 (21 Oct. 2002).

<sup>142</sup> *CMS v. Argentina*, Award, ¶ 420 (12 May 2005).



States, the HFCS consumption in Mexico from 1992 to 1997, actual sugar and HFCS prices, the relationship between the United States and Mexico, and “Cargill’s lengthy historical record.”

434. To calculate the net lost cash flow from this gross “but for” lost cash flow, Claimant’s financial expert, Navigant Consulting, subtracts costs, such as plant costs, depreciation, SG&A (selling, general and administrative), slurry/feed costs and the net cost of corn which it derived from CdM invoice data in 1997 and 1998. Navigant also subtracts shipping and transportation costs as taken from listings of Cargill’s HFCS shipments to CdM in 1997 and 1998. Navigant further subtracts mitigation and saved costs from the use of excess milling capacity for sales to other markets and for other products such as ethanol, as well as through temporary trade deals between the United States and Mexico.
435. The final result is then brought to present value, considering the time value and opportunity cost of money, for a total claim of USD \$123.81 million. The total net lost cash flow claimed based upon these projections is thus USD \$123,813,029, with 46.77%, or USD \$57,906,525, attributed to CdM and 53.23%, or USD \$65,906,503, attributed to Cargill.<sup>143</sup>
436. Citing to *Feldman*, Respondent in turn argues that the NAFTA provides no guidance for determining the proper measure of damages beyond the scope of an expropriation under Article 1110. Thus, damages for breaches of other Chapter 11 articles should be determined based on the amount of loss or damage “that is adequately connected to the breach.”<sup>144</sup>
437. Respondent submits that damages must be limited to those losses that can be linked causally to a breach of an article of Chapter 11. It quotes *S.D. Myers* for support of this position:

[D]amages may only be awarded to the extent that there is a sufficient causal link between the breach of a specific NAFTA provision and the loss sustained by the investor. Other ways of expressing the same concept might

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<sup>143</sup> The total damages requested are calculated pre-tax as Claimant expects that any award would be taxed.

<sup>144</sup> *Feldman*, Award, ¶ 194 (16 Dec. 2002).

be that the harm must not be too remote, or that the breach of the specific NAFTA provision must be the *proximate* cause of the harm.<sup>145</sup>

438. Respondent contends that basing damages on lost net cash flows *could be* an appropriate valuation technique but, in this case, it violates the above-stated tenets because it requires the Tribunal to engage in speculation in order to assess future cash flows. Respondent cites to *Metalclad*, which states that where an “enterprise has not operated for a sufficiently long time to establish a performance record or where it has failed to make a profit, future profits cannot be used to determine going concern or fair market value.”<sup>146</sup> Damages that are alleged to have been caused by injurious competition, Respondent argues, “would come under the heading of possible but contingent and indeterminate damage which, in accordance with the jurisprudence of international tribunals, cannot be taken into account.”<sup>147</sup> In this arbitration, Respondent argues that Claimant’s claim for damages inappropriately urges the Tribunal to rely on several fundamental assumptions, including: (1) the projected size of Mexican HFCS market; (2) CdM’s projected market share; and (3) the projected HFCS prices during the relevant period.
439. Respondent agrees that Cargill and CdM are “very experienced, profitable companies,” but argues that they had been out of the Mexican market for four years and thus there is no reliable track record on which to base Navigant’s assumptions. In addition to its absence from the market, CdM was about to re-enter a market dominated during its absence by strong competitors at a time when sugar was in significant oversupply and the “plight of Mexico’s sugar industry was highly politicized.” These factors, Respondent asserts, make any projections as to market share, demand, price and assumptions as to the future regulatory environment “entirely speculative.” Respondent’s financial expert, Pablo Ri3n and Associates (“PRA”), contends that, “simply by replacing Navigant’s assumptions with more reasonable assumptions” with respect to market size, market share and price, its calculations reduce Navigant’s

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<sup>145</sup> *S. D. Myers*, Second Partial Award, ¶ 140 (21 Oct. 2002), citing Case concerning the Factory at Chorz3w (Claim for Indemnity) (The Merits) (“*Factory at Chorz3w*”), Judgment No. 13 (13 Sept. 1928), Publication of the Permanent Court of International Justice, Collection of Judgments, Series A.-No. 17 (emphasis in the original). Respondent notes that this award is currently under judicial review on the grounds that, *inter alia*, the tribunal exceeded its jurisdiction by combining losses the claimant suffered in its capacity as a cross-border service provider with damages suffered in its capacity as investor.

<sup>146</sup> *Metalclad*, Award, ¶ 120 (30 Aug. 2000).

<sup>147</sup> *Factory at Chorz3w*, Judgment No. 13, p. 57 (13 Sept. 1928).

estimated damages by USD \$81.8 million for an adjusted total of approximately USD \$42.0 million. This illustrates not only that the damages could be significantly lower, PRA argues, but also that the methodology is easily manipulated.

440. Instead of Navigant's DCF calculations, PRA advocates the alternate method of calculating Claimant's loss by applying a reasonable rate of return on its investment in Mexico during the period in which its Mexican HFCS business was impaired by the IEPS Tax and/or permit requirement. PRA explains that it would use the DCF methodology if it had "enough solid information," but absent that, it prefers to look at "sales and real profits obtained, and if it's just a future potential, then we look more at the assets and the future possibilities that have higher probability of risk because of there not being recent sales or profits." Respondent excludes any investment in the production capacity in the United States based on legal advice that damages should be limited to Claimant's investments in Mexico; thus Respondent focused on CdM and in particular on the Tula facility.<sup>148</sup>
441. Respondent asserts that the only investment in Mexico is the Tula distribution facility itself. Recognizing that part of the land has other commercial uses, PRA valued the Tula facility at USD \$2.732 million.<sup>149</sup> This valuation assumes that, in as much as other Cargill divisions operated out of the facility, only 50% of the total Tula plot would be devoted to the HFCS business.<sup>150</sup> Although Claimant argues that it had invested more in a sales force and customer relationships, Respondent refutes this by arguing that, prior to the implementation of the IEPS Tax, Claimant had no active HFCS sales force or customer relations because it had been out of the market for four years.
442. Using this valuation, PRA applies Claimant's stated target rate of return on investment in Mexico, 22.8% annually, to yield a projected return of \$6.654 to \$9.682 million, depending on whether the start date is determined to be January or June 2002, and whether the end date is determined to be September or December 2006. Respondent

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<sup>148</sup> PRA contends that the investments in the U.S. plants should not be included as they were justified by the growth of the American market, not the Mexican one.

<sup>149</sup> Navigant calculated the total capital investment in Tula to amount to USD \$3.47 million.

<sup>150</sup> In addition, PRA valued the McAllen, Texas facility at USD \$1.214 million, for a total value of investments in assets intended to serve the Mexican HFCS market of USD \$3.946 million. It excluded this amount, however, upon advice of Mexico's counsel that PRA calculate only damages related to investments made in the territory of Mexico.

asserts that this method produces a result similar to that which Claimant was aiming to achieve when its representatives met with Mexican officials in Washington, D.C. in 2001, to discuss ways to resolve the sweetener dispute. At that time, Respondent contends that Claimant was in favor of a 350,000 ton total annual HFCS quota of which Claimant would receive an 150,000 ton allocation. According to PRA, using Navigant's DCF model with PRA's slightly lower projection on price and this 150,000 ton limit, the DCF model yields damages totaling only USD \$11.1 million.

443. Based upon its calculations, Respondent estimates the total net lost cash flow for CdM between 1 January 2002 and 31 December 2006 at \$6.654 million, less any proper deduction for mitigation that "was made possible because of the IEPS [T]ax and for [Claimant's] contributory fault ...." At the October 2007 hearing, PRA claimed that, after this deduction was made, the appropriate level of damages was \$4.276 million. Respondent asserts that this estimate is closer to the \$3.47 million in plant and equipment investment for which Claimant provides evidence than Claimant's \$123.8 million total damages claim, a return on investment of 3,467.7%. Respondent reiterates, however, that should the Tribunal agree with its arguments that claims arising out of the import permit requirement are outside its jurisdiction, damages would be zero.

#### **Conclusion of the Tribunal with respect to the Measure of Damages**

444. The Tribunal agrees with Claimant that the appropriate approach to assessing damages in this proceeding is to determine the present value of net lost cash flows.
445. The Tribunal acknowledges Respondent's concerns about the difficulties in projecting the overall market for HFCS, Claimant's market share, and the appropriate price of and demand for HFCS in light of Claimant's four-year absence from a competitive market. The Tribunal does not find these projections, however, to be so unusual or difficult that employment of the method is inappropriate in this proceeding.
446. The Tribunal notes that Claimant did participate in the Mexican HFCS market from the early 1990's and began selling HFCS through CdM in 1993. In addition, neither Party denies that CdM, with Cargill, is doing so again. As Mr. Ortega of Cargill de Mexico explained under cross-examination, already as of the date of the hearing, CdM

was back in the Mexican HFCS market under the quotas prescribed by the Katrina Swaps. He explained that there was a current HFCS Division at CdM with 12 employees.

447. The Tribunal therefore accepts the methodology used by Claimant to calculate damages by determining the present value of the net lost cash flows. This calculation, as accepted and utilized by the Tribunal in its own analysis, calculates net lost cash flows as equal to the “but for” quantity of HFCS that Claimant would have sold—where quantity is determined as the product of the entire market for HFCS multiplied by the percentage of Claimant’s projected share of that market—multiplied by the price of HFCS, determined over the period of loss and brought to the present value using the appropriate interest rate.
448. However, as noted in the Tribunal’s consideration of factors within, several of the figures utilized by Claimant in its calculations must be discounted as it finds some of them to not be sufficiently established by the record; these discounts are detailed below. In such instances, the Tribunal’s discount reflects its considered assessment of the evidence submitted by the Parties.

**Claimant’s Alternative Damage Model: The Influence to be given the Antidumping Duties**

449. Claimant asserts that, although it does not claim damages for the losses it incurred because of the antidumping duties, “[i]t would be incongruous to reduce Cargill’s tax and permit damages based on the fact that they were preceded by unlawful duties.” Therefore, based on this belief, Navigant calculates damages based on the goal of putting Claimant back in the position that it would have been but for all illegal acts, including the antidumping duties.
450. Claimant acknowledges, however, that whether or not the effect of the antidumping duties can be included in the damages analysis is a legal question for the Tribunal. It therefore provides an alternative calculation in the event that the Tribunal determines to exclude the effects of the antidumping duties period. This alternative calculation, although reduced, is higher than the calculations provided by PRA because: (1) Navigant projects pent-up demand following the lifting of the duties and therefore an accelerated market growth following the elimination of the duties; and (2) Navigant

estimates that it would take three years for the HFCS market to recover to the level it would have achieved but for the imposition of the antidumping duties. Navigant agrees, however, that, removing the effect of the antidumping duties upon its calculations shifts the beginning of the damages period from January to June 2002. Based on these revised calculations, Navigant asserts that Claimant's damages would total USD \$100 million if the effects of the antidumping duties period are completely eliminated.

451. Claimant additionally asserts that, despite Respondent's arguments that Claimant is trying to include the effects of the antidumping duties in its calculations, Respondent is actually the one attempting to benefit from the antidumping duties. First, Respondent assumes, according to Claimant, a market share in January 2002 that is equivalent to what Claimant would have achieved prior to the imposition of the duties, but does not account for the larger share that Claimant would have enjoyed absent the duties. Claimant argues that Respondent takes Claimant's roughly █% market share and drops it to zero based on the illegal duties. Second, Respondent assumes that the overall HFCS market in 2002 would be only a "modest amount above the size of the market in 2001." Third, Respondent calculates market growth based on the assumption that the 13% growth rate of the HFCS market during the antidumping duties period would persist after the duties were lifted. Finally, Claimant argues that Respondent's start date for damages is incorrectly delayed until the lifting of the antidumping duties at the end of May 2002.
452. Respondent argues that Navigant projects HFCS and sugar consumption starting in 1998, resulting in a projected HFCS consumption in 2002 that was 275% of the actual HFCS consumed in 2001. In so doing, Respondent asserts that Navigant has effectively eliminated what it describes as the market restricting effects of the antidumping duties.
453. According to Respondent, Navigant calculates sales of 1.028 million metric tons of beverage HFCS in 2001, when there were only 450,000 metric tons actually sold in 2001. This projection gives Claimant an estimated █% market share at the beginning of 2002, just prior to the IEPS Tax when, Respondent argues, it was closer to 0.0%. Respondent argues that an immediate market share of █% ignores the fact that, upon re-entering the market in 2002, following the rescission of the

antidumping duties, Claimant would have had either to offer a competitive advantage to win over its competitor's customers or to focus on supplying new customers with whom it had a competitive advantage. This, Respondent argues, would cause price degradation for Claimant. This assumption that Claimant lacked a sufficient customer base in Mexico is confirmed, Respondent argues, by the fact that Claimant elected to sell its 2005-06 quotas to a competitor, reasoning that it would get a higher rate of return than supplying it directly to the Mexican market.

454. In addition to the difference in market share, Respondent alleges that, without the delaying effect of the antidumping duties included, the actual market for HFCS just prior to the IEPS Tax, in 2001, of 450,000 tons is more accurate than Navigant's projection of 1,028,808 tons. PRA bases this estimation of 450,000 tons on the assumption that the market would continue to grow in the but-for world at the same rate that it had grown during the antidumping duties. Respondent therefore argues that Claimant's claim for damages for its inability to export between 1 January and 20 May 2002, when the duties were rescinded, disappears when the effects of the antidumping duties are properly eliminated. The difference in these projections, according to Respondent, is USD \$55 million, a 44.4% decrease in the total claim for damages.

**Conclusion of the Tribunal with respect to Claimant's Alternative Damage Model: The Influence to be Given the Antidumping Duties**

455. With respect to the antidumping duties which, the Tribunal recognizes, were determined to be illegal and were rescinded following the decision of the WTO Dispute Settlement Body, the Tribunal acknowledges the appeal of Claimant's argument that Respondent should not be permitted to profit from its own illegal conduct. While there is a certain logic to this argument, the WTO and NAFTA have their own specific consequences for the illegal imposition of antidumping duties and it is not for a NAFTA Chapter 11 tribunal to amend those regimes by the addition of further consequences. If Mexico had enacted only the antidumping duties without following them with either the IEPS Tax or the permit requirement, Claimant would not be able to recover any damages or calculate any but-for growth during the period in which the antidumping duties were in place. The fact that the duties were instead followed by other measures cannot change this fundamental treatment of antidumping duties. It would be incongruous for Claimant to lose its market share and profits

during the period of the antidumping duties if they were implemented without subsequent measures, but for Claimant to receive certain benefits based upon the fact that these duties were instead followed by other actions of the host government.

456. The Tribunal therefore determines that, immediately following the lifting of the antidumping duties, its analysis of net cash flow loss should begin with the Claimant's market share at that time.
457. In proceeding with its analysis, therefore, the Tribunal will examine the remaining assumptions and calculations as provided in Claimant's Alternative Damage Model and in light of Respondent's objections to this alternate calculation.

#### **The Compensable Period of Loss**

458. When Claimant's Alternative Damage Model is employed, both Parties agree that the appropriate start date of the compensable period of loss is June 2002.
459. With respect to the end date of this period, Claimant argues that, although Mexico revoked the IEPS Tax on 31 December 2006, the impact on Claimant did not cease instantaneously. Claimant refers to the expert report of PRA in which Respondent's expert estimates that it would require approximately 18 months for Claimant to regain its market share and thus fully mitigate the effects of the measures.
460. In addition, Claimant argues that the permit requirement was still in place through the end of 2007: the MFN Tax was reinstated at 210% in June of 2007 and it was impossible to export any amount in excess of Claimant's allocated quota provided for in the most recent Swap Agreement. As Mr. Ortega explained: "Cargill's shipments to Mexico [were] limited to the allocation (*cupos*) set forth in the 2005 and 2006 Swap Agreements and even under the Swap Agreements, the special permit requirements remain[ed] in place for HFCS imports that exceed the *cupo* allocations." Thus, Claimant argues that damages should be calculated through 31 December 2007.
461. As described in the discussion of the claims arising under Article 1110, Respondent argues that Cargill can claim only that the effect of the IEPS Tax prevented it from competing for sales to the Mexican bottling industry between June 2002, immediately following the lifting of the antidumping duties in May 2002, and early 2005, when



various bottlers obtained *amparos* against the Tax. The effect of the permit requirement could last from January 2005, when Claimant first applied unsuccessfully for a permit, until September 2005, when it was granted a quota pursuant to the Katrina Swap. Therefore, Respondent asserts, the total combined effect of the IEPS Tax and the permit requirement could not extend beyond a period of three years and four months. In sum, Respondent argues that any damages should be awarded only between June 2002—the date upon which the IEPS Tax solely affected Claimant without the antidumping duties—and 31 December 2006, the date on which the Tax was removed.

#### **Conclusion of the Tribunal with respect to the Compensable Period of Loss**

462. Based upon the above determination that there can be no compensation for the effects of the antidumping duties period, the Tribunal holds that the correct date on which the compensable period begins must be June 2002. Regardless of the overlap of measures, Claimant was not affected by the other Mexican measures, without already being affected by the antidumping duties, until June 2002.
463. With respect to the appropriate date upon which the compensable period of loss should end, the Tribunal notes its decision below that the sweeteners dispute was not conclusively terminated by the Katrina Swaps and thus this is not the appropriate conclusion date for the damages period.
464. With these prior conclusions in mind, the Tribunal determines that damages will be awarded for losses occurring from June 2002 through December 2007.

#### **The Model's Projection of the Mexican HFCS Market over the Compensable Period**

465. As the Tribunal has determined that Respondent is not responsible for any damages during the period in which the antidumping duties were in place, the Tribunal continues to employ Claimant's Alternative Damage Model in its analysis. In evaluating the Model's appropriate projection of growth of the Mexican HFCS market, the Tribunal will first address the beverage segment of this market, followed by the non-beverage segment.

### The Model's Projection of the Mexican HFCS Market for the Beverage Sector

466. Navigant constructs the adoption rate of HFCS in the Mexican beverage market by using the experience of the United States as a guide. Navigant defends this assumption explaining that, despite some “fundamental differences” between the United States and Mexican markets, both HFCS markets are dominated by the beverage industry: the United States is the largest soft drink consuming nation and Mexico is the second largest. Additionally, both countries have heavily regulated domestic sugar industries, enjoying high domestic sugar prices relative to those of the world, and thus both present opportunities for competing with a lower cost sweetener.
467. Claimant asserts that, in 2001, the adoption rate of HFCS in the Mexican beverage industry was 28.11%.<sup>151</sup> Similarly, the adoption rate of HFCS in the U.S. beverage industry in 1980 was also close to 28% in 1980.<sup>152</sup> It took four years, from 1980 to 1984, for the adoption rate of HFCS to reach 75% in the United States.<sup>153</sup> Navigant asserts, however, that it is reasonable to assume that consumption would be accelerated in Mexico after the elimination of the duties based on pent-up demand developing during the 1998-2001 time period. Thus, Navigant argues that the HFCS adoption rate in Mexico would have reached 75% in only three years.<sup>154</sup> Over the three-year period, this equates to an average annual growth rate of 43.5%.
468. Claimant argues that, in recognition of the differences between the United States and Mexico—the U.S. was a deficit sugar producer while Mexico was an excess producer; the replacement product in the U.S. was nationally produced while it was an import to Mexico; there was a significant difference in socio-economic considerations including the traditional role of sugar in Mexico; and the fact that Pepsi was a large investor in the Mexican sugar industry—it limited the ultimate projected penetration in the Mexican beverage market to 80%, as compared to 95.41% in the same segment in the United States.<sup>155</sup>

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<sup>151</sup> Expert Rebuttal Report of Brent C. Kaczmarek, CFA (June 2007), App. 26: “Alternative Damage Scenario, Calculation of the ‘But For’ Mexican HFCS Market.”

<sup>152</sup> *Id.* The exact percentage listed for the United States HFCS beverages sweetener market in 1980 is 29.76%.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

469. Respondent, on the other hand, asserts that a Mexican market growth curve for HFCS based on that in the United States is untenable. Respondent contends that it is unreasonable to assume that major soft drink bottlers, who “undoubtedly place a high value on their brands’ public image,” would choose to ignore the social considerations and act solely on the basis of price to substitute sugar with HFCS. For support of this assertion, Respondent points to the fact that Mexico’s Coca-Cola and Pepsi bottlers, who accounted for 100% of the cola soft drink market in 2001, exercised voluntary restraint and never moved beyond a maximum adoption level of 50% HFCS, despite having obtained *amparos* against the Tax.
470. According to PRA, the Mexican beverage HFCS market grew approximately 14.38% from 1997 to 2001. From 1998 forward, the soft drink market’s growth rate, according to Respondent, would be 13.6%. PRA calculates this percentage based on the actual 450,000 metric tons of HFCS consumed in Mexico in 2001 which, according to PRA, implies an annual growth rate of 13.6% since 1998.
471. In addition, Respondent claims that the maximum Mexican soft drink market for HFCS was only 65.81% of the total market.<sup>156</sup> This is based on a determination that in 2001, non-diet cola carbonated soft drinks accounted for 68.37% of the Mexican market; if this sector adopted 50% HFCS, the maximum limit for HFCS use in the soft drink industry would be 65.81%.<sup>157</sup> Respondent argues that this maximum market share would hold following 2001 as well, as there is no evidence that Coca-Cola or Pepsi-Cola changed their adoption policies between 2002 and 2004. Respondent contends that the actual market would be even smaller though as some buyers, including Grupo de Embotelladoras Unidas, S.A. de C.V. (“GEUPEC”), the second largest Pepsi bottler in Mexico accounting for approximately 28.5% of the Pepsi volume sold in Mexico in 2004, had opted not to use HFCS at all.
472. This maximum was additionally confined by the quotas in place in 2005 and 2006, Respondent argues. Respondent asserts that, although Claimant subtracts the volume amounts of the quotas as a mitigating factor, it fails to acknowledge that Claimant would not be able to import more than its share under the quotas. Therefore,

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<sup>156</sup> Comments and Analysis of the *Expert Report of Brent C. Kaczmarek, CFA* dated 21 December 2006, prepared by Navigant Consulting, Pablo Ri6n and Associates (Apr. 2007), ¶ 61.

<sup>157</sup> *Id.* 65.81% = 1 – (0.5 x 68.37%).

regardless of the effects of the IEPS Tax or the permit requirement, the market for HFCS could not grow beyond that established by the quotas, according to Respondent.

473. In response to Respondent's arguments, Claimant contends that Respondent's calculation of the Mexican HFCS market improperly relies upon the average annual growth between 1998 and 2001, the period during which the antidumping duties were in effect, keeping HFCS out of the marketplace. Claimant argues that this policy of soft drink bottlers to limit their use of HFCS to 50% was based, at least in part, on a lack of supply of HFCS that would remedy over time and thus, these limits would be raised. According to Claimant, it would have been "economically irrational" for Mexican bottlers to maintain allegiance to a higher-priced sweetener in the subsequent unrestricted market. The fact that the bottlers would be compelled to switch to HFCS is supported by the fact that they *did* accept HFCS in the first place, which is what led to the international dispute and caused the need for the antidumping duties and the IEPS Tax, according to Claimant.

474. Claimant further asserts that, even if Respondent's assumption that Mexican soft drink bottlers would have capped HFCS adoption at 50%, there is a serious error in the calculation. Respondent's calculation assumes that carbonated beverage producers are the only potential HFCS users in the beverage industry when this industry is actually comprised of fruit drinks, sports drinks, liquid and powdered drink concentrates, etc. If PRA had included the non-carbonated beverage types that account for the remaining 32% of the beverage market which, according to Mexico, could have substituted HFCS for sugar at a rate of 100%, the maximum HFCS adoption rate would be 74.3%, not far from Navigant's own projection.<sup>158</sup>

475. Claimant finally counters Respondent's limiting of the HFCS market potential to the quotas (the Katrina Swaps), arguing such an interpretation is incorrect as, Claimant

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<sup>158</sup> Expert Rebuttal Report of Brent C. Kaczmarek, CFA (June 2007), ¶ 63, p. 25, Tbl. 1 and App. 34. Navigant originally calculated an adjusted adoption rate based on PRA's calculations of 75.5%, but Claimant adjusted this down to 74.3% in response to errors raised by PRA concerning the fact that a portion of the non-cola market, in which Navigant assumed 100% adoption, includes diet drinks which do not use caloric sweeteners such as HFCS. This reduction is a modification to Respondent's argument that Navigant's maximum market share should be reduced to 73.5% with the removal of the volumes of the powder products Clight and BeLight (which do not contain caloric sweeteners). Comments and Analysis to the Reply Report "Expert Rebuttal Report of Brent C. Kaczmarek, CFA" dated 30 June 2007, prepared by Navigant Consulting, Inc., Pablo Ri6n and Associates (Aug. 2007), ¶¶ 108-11 and p. 20, Tbl. 5.

contends, the quotas would not have existed but for the Mexican “anti-HFCS measures.” Claimant explains that it is for this reason that it treats the quotas as mitigating factors.

**The Model’s Projection of the Mexican HFCS Market for the Non-Beverage Sector**

476. To determine the market size of HFCS in Mexico for non-beverages, Navigant again bases its projection on the adoption curve of HFCS in the United States. It points out, however, that the adoption rate of HFCS in the non-beverage segment is different from that of the beverage segment as HFCS is not a viable replacement for sugar in some products. In light of these differences, Navigant constructs an adoption rate curve for the non-beverage sector in the United States, separate from that of the beverage sector, and applies it to the Mexican market for the non-beverage sector.
477. To project the adoption of HFCS in the non-beverage sector of the Mexican market, Navigant adopts a 21-year lag between the U.S. and Mexican adoption rates. Navigant supports this assumption based upon its finding that the actual HFCS adoption rate for the Mexican non-beverage segment was 10.30% in 1997, while it was 10.36% in the United States in 1976. In its Alternative Damage Model, Navigant projects an abrupt increase from the actual 2001 adoption rate of 13.54% to 25% in 2002. Then, it projects a modest but consistent growth from 25% in 2002, to a 27% HFCS adoption rate in 2007.<sup>159</sup>
478. While Respondent argues that a Mexican market growth curve for HFCS based on that in the United States is untenable (as described above), Respondent does not offer an alternative calculation for the growth rate of HFCS in the non-beverage segment of the market.

**Conclusion of the Tribunal with respect to the Model’s Projection of the Mexican HFCS Market over the Compensable Period**

479. In making its determination with respect to the appropriate projection for the size of the Mexican market, the Tribunal is influenced by both the price and social arguments.

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<sup>159</sup> Expert Rebuttal Report of Brent C. Kaczmarek, CFA (June 2007), App. 26: “Alternative Damage Scenario, Calculation of the ‘But For’ Mexican HFCS Market.”

First, the Tribunal notes the persuasive argument that, whenever there is a significant difference in price between substitutable products, there is usually a steep curve of substitution in favour of the cheaper of the two goods. Second, the Tribunal is very aware of the much publicized social considerations influencing Mexican soft drink bottlers who must try to sell their products to some of the same workers they might displace by switching from sugar to HFCS, and are certainly aware of the implications of potential protests and boycotts.

480. With these considerations in mind, the Tribunal first addresses the rate of growth of the Mexican HFCS market. Specifically, with respect to Respondent's contention that the Mexican HFCS market would continue at a *consistent* annual growth rate, the Tribunal finds that such a projection is unlikely in light of the varying economic circumstances over the time periods in question. In addition, the Tribunal determines that it is inappropriate to base the continued growth of the Mexican HFCS market on that observed during the periods of restriction on HFCS importation. The Tribunal is of the view that, instead, there would indeed be an initial period, as argued by Claimant when, because of the differential in price between HFCS and sugar and the suppressed availability of the product, there would be a rather rapid rise in adoption of HFCS. After some time, however, this increase would level off to a more consistent annual growth.
481. With respect to Claimant's contention that the HFCS market in Mexico would grow 75% in three years, the Tribunal holds that, with the economic and social constraints in place, this rapid a substitution of HFCS for sugar is unlikely. The Tribunal believes that there would be a certain amount of self-limitation among local bottlers due to the social consequences, despite the economic benefit of using a cheaper sweetener. Indeed, it does not matter how much bottlers save on ingredients if consumers will not buy their products out of social concern.
482. Also, with respect to Claimant's contentions as to the projected growth of the Mexican HFCS market, the Tribunal notes that, despite agreement that the damages period should begin on June 2002, it appears to the Tribunal that Navigant calculates the growth of the Mexican HFCS market based upon a full calendar year in 2002. The Tribunal makes this determination based upon a comparison of Appendix 26 of Navigant's supplemental expert report and Appendix 9 of Navigant's primary expert

report.<sup>160</sup> This interpretation is additionally supported by Navigant's statements that the Mexican HFCS market would grow 75% in the three years 2002-2004, for an average growth rate of 43.5%.

483. It therefore appears to the Tribunal that Navigant, in its Alternative Damage Model, did not project the three-year acceleration in HFCS adoption between June 2002 to June 2005, but instead based it upon full calendar years. The Tribunal is of the view, however, that the acceleration of the HFCS adoption rate in the Mexican beverage market should have accurately begun in June 2002, instead of at the beginning of 2002.
484. Based upon this finding, the Tribunal's determination that, instead of a linear growth over the years, there was more likely a two-part growth curve, and the Tribunal's belief that there would have been a certain level of reticence among Mexican bottlers to substitute completely sugar with HFCS in light of the numerous social considerations, the Tribunal determines that the appropriate growth rate of the Mexican HFCS market would follow a two-part growth curve, reaching 60% of the total beverage market in June of 2005, and continuing at a linear annual rate to achieve 74.3% of the total beverage market by 31 December 2007.
485. With respect to the maximum HFCS adoption rate that would have been achieved in Mexico at the end of the compensable period of loss on 31 December 2007, the Tribunal holds that a maximum market of 74.3% of the total beverage market is likely. This is based upon Navigant's amended revisions of PRA's own estimates, described above at note 158. The Tribunal finds this estimate to be reasonable in that, although Claimant has endeavored to recognize the differences between the United States and Mexican economies in its maximum adoption rate of 80% versus the United States' 95%, the Tribunal believes that this numeric recognition of the differences between the two countries is insufficient to fully capture the dramatic differences between the economic and social conditions in Mexico and the United States during the relevant time periods.

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<sup>160</sup> Expert Report of Brent C. Kaczmarek, CFA (Dec. 2006), App. 9: "Calculation of the But For Mexican HFCS Market"; Expert Rebuttal Report of Brent C. Kaczmarek, CFA (June 2007), App. 26: "Alternative Damage Scenario, Calculation of the 'But For' Mexican HFCS Market." Specifically, the Tribunal notes that Calculations [C], [G] and [K]—the total beverage, the total non-beverage and total industrial sweetener calculations—do not change between the two charts; instead the HFCS adoption rate, or the ratio of HFCS to sugar merely varies, with more sugar taking the place of the displaced HFCS in the Alternative Damage Model.

486. In regards to projecting the market size and trajectory of growth for the non-beverage sector of the Mexican HFCS market, for the years from 2002 to 2007, the Tribunal accepts the market size as calculated in Navigant's Alternative Damage Model, at Appendix 26. Again, however, the Tribunal begins its analysis of the Model based upon a start date of June 2002, and adjusts the projected market size and trajectory of growth for the non-beverage sector accordingly.

487. The Tribunal makes one further note with respect to the HFCS market size that will affect the final calculation of damages. In addition to calculating 2002's market growth on an annual basis, Navigant appears to have also used these calculations in the determination of damages, thus taking 6.63% as Claimant's share of the Mexican HFCS market for the full calendar year in 2002.<sup>161</sup> As the Tribunal has determined that damages may not be claimed for January-May 2002, the Tribunal makes an additional adjustment to Navigant's Alternative Damage Model for 2002 in its final damages calculations. Specifically, the Tribunal applies an adjustment to the damages claimed for 2002, by using 7/12 of the projected HFCS market in 2002 in its damages calculations.

#### **The Model's Projection of Claimant's Share of the Mexican HFCS Market over the Compensable Period**

##### **Contentions of the Parties**

488. Navigant projects that Claimant would capture approximately █% of the Mexican HFCS market, including all CdM's HFCS sales, as well as a small amount of Cargill Inc.'s direct sales. This is close to the █% market share that CdM enjoyed in 1997, prior to the disputed measures.<sup>162</sup> Indeed, Cargill's total share of the Mexican HFCS market—including both CdM's sales and Cargill's direct sales—constituted █% in 1997.<sup>163</sup> In forecasting Claimant's future market shares, Navigant holds this percentage constant, which it claims is a conservative assumption as CdM's market

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<sup>161</sup> Expert Rebuttal Report of Brent C. Kaczmarek, CFA (June 2007), App. 27: "Alternative Damage Scenario, Calculation of the 'But For' Mexican HFCS Market." Note Calculation [A] in Appendix 27 which is brought forward from Appendix 26. These figures are then carried forward into Appendices 29-32 in Navigant's damages calculations.

<sup>162</sup> Profitability on Mexico Sales, 1996-2004. Cargill, Inc. 2004; Mexican Sweetener Consumption by Use, 1992-2007, USDA, 2006.

<sup>163</sup> Expert Report of Brent C. Kaczmarek, CFA (Dec. 2006), App. 16: "Calculation of Cargill's Total Share of Mexican HFCS Market in 1997."



share had grown from [REDACTED] % in 1994 to [REDACTED] % in 1997, and Cargill's market share in the U.S. market had grown from [REDACTED] % in 1998 to [REDACTED] % in 2002.<sup>164</sup>

489. Respondent's expert PRA does not dispute Claimant's historic market share of 26.53% as a likely eventual market share for Claimant; it argues however that recovery of this market share would be gradual. Without validating the projection, PRA argues that it is "a plausible (although optimistic) scenario" that Claimant would instead regain this market share in 18 months, though this could be delayed by competition.
490. Claimant believes that it could have regained its [REDACTED] % market share in one year or less, but accepts this 18-month growth to its target market share as reasonable and thus, the Parties appear to agree that it would have taken approximately 18 months, beginning in June 2002, for CdM to win back a market share of [REDACTED] %, had the IEPS Tax not been imposed.

**Conclusion of the Tribunal with respect to the Model's Projection of Claimant's Share of the Mexican HFCS Market over the Compensable Period**

491. The Tribunal begins its analysis of the projection of Claimant's share of the Mexican HFCS market over the compensable period from its decision above that, because the effects of the antidumping duties must be removed from the consideration of damages, Claimant's market share at the lifting of those duties must be zero. Therefore, all calculations of the growth of Claimant's share of the Mexico HFCS market must begin from the basis that this share was zero on 1 June 2002.
492. As regarding the growth of this share from its starting point of zero on 1 June 2002, it appears to the Tribunal that the Parties are in apparent, though perhaps tacit, agreement that it would have taken approximately 18 months for Cargill de Mexico to win back a maximum market share of [REDACTED] %.<sup>165</sup> The Parties even agree that Claimant's market share would be [REDACTED] % in 2002, [REDACTED] % in 2003, and [REDACTED] % in the subsequent

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<sup>164</sup> Chapter 11 NAFTA Information, HFCS Shipments for Cargill & Industry. Veris Consulting. 20 Jan. 2006.

<sup>165</sup> Expert Rebuttal Report of Brent C. Kaczmarek, CFA (June 2007), App. 27: "Cargill's Potential Sales in the 'But For' Mexican HFCS Market"; Comments and Analysis of the *Expert Report of Brent C. Kaczmarek, CFA* dated 21 December 2006, prepared by Navigant Consulting, Inc., Pablo Ri6n and Associates (Aug. 2007), p. 21, Tbl. 4.

years.<sup>166</sup> Based upon its conclusion that the proper beginning date of the compensable period of damages is June 2002, the Tribunal, in its calculations, assumes that each of the annual percentages will begin in June of each year and continue for 12 calendar months.

**The Model's Projection of the Mexican Market Price of HFCS over the Compensable Period**

493. The two experts calculate their projections of the Mexican HFCS price starting from a percentage of the price of sugar in Mexico in one representative year. Specifically, Navigant asserts that, as it contends that the Mexican HFCS market would evolve in a manner similar to that in the United States, and thus the price of HFCS would evolve the same way: as a percentage of the price of sugar. Thus, Navigant obtains the 2002 price of HFCS from the 2002 price of refined sugar in Mexico and adjusts this base price to track the evolution of the United States market.
494. The main contention between the two Parties is whether the representative year upon which the original HFCS price is calculated should be 2001 or 2002. Respondent also criticizes Navigant's assumption that the Mexican market would track the market of the United States and Navigant's incorporation of an unexplained premium in its Mexican HFCS price.
495. In order to more easily present and assess the Parties' various arguments pertaining to the correct representative year and thus the price of HFCS, the contentions of the Parties are divided into four sub-categories: (1) Navigant's use of the 2002 Mexican sugar price as the base price for its projection of Mexican HFCS prices; (2) PRA's use of the 2001 Mexican sugar price as the base price for its projection of HFCS prices; (3) Navigant's test of its projection through the comparison of its HFCS projections to that of HFCS in the United States and PRA's critique of this test; and (4) Navigant's projection of the increase of the price of HFCS from 2003 to 2007 and PRA's critique.

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<sup>166</sup> *Id.* While Respondent's table ends at 2006—the date that Respondent argues is the end of the compensable period of loss—Claimant's Appendix 27 continues through 2007 (still at 26.53%) to the date it asserts completes the compensable period of loss.

## Contentions of the Parties

### Navigant's Use of the 2002 Mexican Sugar Price as the Base Price for Its Projection of HFCS Prices

496. To project the annual price of HFCS, Navigant begins with the price in 2002 and projects forward based on the evolution of the United States market. For the year 2002, Navigant projects the price of HFCS-55 as a percentage of the Mexican sugar price in 2002. To find the proper percentage, Navigant uses the discount between the HFCS and sugar prices in the United States for guidance. Specifically, Navigant assumes that the price of HFCS-55 would be 73% of the price of sugar because, for several years around the point of market maturity in the United States (the late 1980's), HFCS-55 prices averaged approximately 73% of the U.S. sugar prices.<sup>167</sup> Navigant argues that this percentage is analogous to the market in Mexico by observing that, historically, Claimant had contracts to sell HFCS at 78% of the price of Mexican sugar.<sup>168</sup> In what it describes as an effort to project conservatively, Navigant adopts a percentage of 70% of the price of sugar (rather than 73% or 78%), yielding a 2002 Mexican price of \$14.73 for HFCS-55 (USD/cwt, wet),<sup>169</sup> the basis for its damages model.<sup>170</sup>
497. Respondent criticizes Navigant's use of the actual price of refined sugar in Mexico in 2002 as the foundation of its projection of HFCS prices, arguing that Navigant incorporates a sugar price which was increased as a consequence of the IEPS Tax which resulted in fructose displacement and thus higher demand for sugar which, in turn, caused significant inventory reductions and price increases. This assumption results in an overstatement of sugar prices not only for 2002, but for every year following, Respondent argues. In a truly "but for" scenario, Respondent asserts that

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<sup>167</sup> Navigant asserts that if not for the actions of the Mexican government, 2002 would have marked the first year of maturity of the HFCS market in Mexico, similar to the U.S. market in the late 1980's. Navigant justifies this assertion by claiming that both the projected penetration rate and the projected growth rate of HFCS in Mexico are similar to the respective rates in the U.S. in the 1980's. Subsequently, however, Navigant states that the question of whether the market is mature or not is of little significance.

<sup>168</sup> See Agreement for Purchase and Supply of Fructose between Cargill de Mexico and Refrescos del Bajío Azteca. Cargill de Mexico. 10 June 1996. [NAV-28], [C-Ex.-73].

<sup>169</sup> A "cwt" is equivalent to 100 pounds.

<sup>170</sup> The price of HFCS-42 is adapted from that of HFCS-55 based on the estimate that the price of HFCS-42 would be 90% that of HFCS-55. Navigant supports this ratio by pointing to the fact that it is the same average discount that existed between the two products in the United States in the late 1980's, and between the two products from CdM during the mid-1990s. Navigant's projected price of HFCS-42 in 2002 is therefore \$13.26 USD/cwt, wet.

the value of sugar would certainly have decreased, not increased, due to excess supply, making sugar more competitive with HFCS.

498. Navigant acknowledges that the IEPS Tax likely improved sugar prices in 2002, but defends its use of 2002 sugar prices by claiming that Mexico would have had to take some measure to improve sugar prices. Therefore, Navigant asserts that its “but for” scenario presumes Mexico would have taken some appropriate action to boost sugar prices and thus, Navigant’s use of the actual price of sugar in 2002 is appropriate.

**PRA’s Use of the 2001 Mexican Sugar Price as the Base Price for Its Projection of HFCS Prices**

499. Respondent, using Navigant’s methodology without implying validation of it, projects an average HFCS price of USD \$14.01. To derive this estimate, PRA uses the average price of sugar in Mexico in 2001 (USD \$26 per cwt) rather than the Mexican 2002 average price of sugar of \$27.33 per cwt used by Claimant. Respondent contends that this difference accounts for an over USD \$50 million difference between the two valuations.
500. Respondent supports its use of the base year of 2001 by pointing out that Claimant was actually able to sell small amounts of both HFCS-55 and HFCS-42 in 2001 in Mexico notwithstanding the antidumping duties. Respondent argues that, therefore, actual prices of HFCS—prior to the enactment of the Tax—are available and should be utilized as the basis for the analysis. Actual average prices derived from 2001 sales in Mexico are \$12.90 for HFCS-55 and \$10.80 for HFCS-42. Thus, Respondent argues, Navigant’s \$14.73 “has no basis.”
501. Claimant disagrees with Respondent’s use of the 2001 sugar prices that, Claimant argues, were unsustainably low, a major factor that led to the Mexican government’s expropriation of almost half the country’s sugar mills. Claimant asserts that, although it was able to sell small amounts of HFCS in Mexico in 2001, such insignificant quantities made solely to maintain customer relations cannot be properly used to project but-for prices for 2001.
502. Respondent, however, argues that it is illogical to assume Claimant would sell below the market price, incurring even greater losses.

**Navigant's Test of Its Projected HFCS Prices Through the Comparison of Its Projections to the HFCS Prices in the United States and PRA's Critique of this Test**

503. Navigant tests its projection of the price of HFCS-55 as \$14.73, by comparing the projected price of Mexican HFCS-55 to the price of HFCS-55 in the United States in 2002. Navigant adds a premium to the 2002 HFCS-55 U.S. price in order to cover transportation, distribution, and tariff costs in Mexico. When the premium for additional costs in Mexico is added and the depressed nature of the 2002 U.S. HFCS prices is considered (based on the excess capacity created allegedly in part by the Mexican measures), Navigant contends that the \$14.73 price calculated above to be "quite reasonable."<sup>171</sup>
504. Respondent criticizes Navigant's conclusion from this test of its projections. Respondent claims that the price of HFCS-55 in 2002 is 143.09% higher than the price for HFCS-55 in the United States (estimated at \$10.30 per cwt), or trades at a premium of 43.09% over the price in the United States. While Navigant adds \$2.27/cwt to the U.S. HFCS-55 price as additional costs, such as transportation, distribution and duties, it leaves an additional premium of 17.18% with no explanation. Respondent contends that this premium is additionally unjustified if the competition of other U.S. HFCS producers is taken into account.
505. According to Respondent, an average distributor charges a 3-10% premium, and Cargill and CdM had agreed on a \$ [REDACTED] premium which equates to only [REDACTED]% based on the U.S. price of \$ [REDACTED].
506. Navigant responds that Respondent fails to consider that U.S. HFCS prices were depressed in part due to Mexico's IEPS Tax. Thus, the [REDACTED]% premium accounts for the lower prices in the United States. Respondent rejects this argument, asserting that the low prices of HFCS in the United States were due to an expected increase in the demand in the United States, which resulted in an increase, and eventual excess, in HFCS production capacity.
507. Claimant, however, provides further explanations for the premium, asserting that Mexican HFCS has historically sold at a significant premium to U.S. HFCS prices, ranging from [REDACTED]% to [REDACTED]% over HFCS-55 prices in the United States. Furthermore,

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<sup>171</sup> Expert Report of Brent C. Kaczmarek, CFA (Dec. 2006), ¶ 94 and p. 47, Tbl. 7.

accounting for additional “in Mexico” HFCS costs<sup>172</sup> cuts the premium to █%, which falls in the █% range suggested by PRA as a reasonable premium. Finally, Navigant claims that Respondent incorrectly calculated the premium from the Sales Brokerage Agreement between Cargill and Cargill de Mexico as it is merely an internal figure.

**Navigant’s Projection of the Increase of the Price of HFCS from 2003 to 2007 and PRA’s Critique**

508. To project the change in the projected price over the remainder of the compensable period—2003 to 2007—Navigant notes that, because of the NAFTA, the Mexican and U.S. markets were likely to converge with facilitated cooperation and integration, and thus Mexican HFCS prices would likely track those of the United States, while continuing to include a premium for the added costs of getting the finished product to market.<sup>173</sup> Navigant therefore asserts that Mexican HFCS prices after 2002 would behave in the same manner as the U.S. HFCS prices, increasing and decreasing by the same percentage as the HFCS-42 prices increased or decreased in the United States. Navigant thus projects growth from its \$█ HFCS-55 2002 base price so as to track the evolution of the price of HFCS-42 in the U.S. market.<sup>174</sup> For further support of this assumption, Navigant also calculates Mexican HFCS prices as being 70% of the actual Mexican sugar prices, as opposed to tracking the U.S. HFCS prices, and shows that this alternate calculation reaches nearly identical results.<sup>175</sup>
509. Respondent rejects Navigant’s assumption that the growth of HFCS prices would track those in the U.S. market, asserting that it is untenable as there are fundamental differences between the two markets. Respondent points out that, as explained above,<sup>176</sup> Mexico is a net surplus sugar producer while the United States is a net importer and, unlike in the United States, in Mexico a number of soft drink bottlers are integrated with sugar mills. Despite these arguments and for the sake of simplicity,

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<sup>172</sup> Claimant lists these “in Mexico” costs as transportation, customs, broker fees, import tariffs, distribution, sales and general administrative activity.

<sup>173</sup> As HFCS-55 was no longer traded on the commodities market in the U.S. between 2002 and 2007, Claimant based its projections for Mexican HFCS-55 on the U.S. HFCS-42 curve (with HFCS-42 estimated at 90% of the value of HFCS-55).

<sup>174</sup> Expert Report of Brent C. Kaczmarek, CFA (Dec. 2006), App. 10: “Calculation of HFCS-42 and HFCS-55 Prices in the Mexican Market.”

<sup>175</sup> Expert Rebuttal Report of Brent C. Kaczmarek, CFA (June 2007), App. 37: “Discount of Projected Mexican HFCS Prices to Actual Mexican Sugar Prices.”

<sup>176</sup> See *supra* ¶ 82.

Respondent instead recalculates Navigant's projection of HFCS prices using Navigant's mechanism and only changing the base price to that of \$14.01.<sup>177</sup>

**Conclusion of the Tribunal as to the 2002 to 2007 Price of HFCS to be Used in the Damages Calculation**

510. The first price to be ascertained is the 2002 price of Mexican HFCS-55. The Tribunal notes that PRA does not contest Navigant's contention that the price of HFCS-42 is 90% of the price of HFCS-55.
511. The difference between the estimates of Navigant and PRA of the 2002 price of HFCS depends on whether the estimate is made with reference to the price of Mexican sugar in 2002 or in 2001. There are problems with the use of either year. Although 2002 is the logical year to employ, the Tribunal finds persuasive Respondent's argument that the price of sugar in 2002 was artificially high because of the IEPS Tax. The Tribunal also finds Claimant's argument persuasive that the price of sugar in 2001 was unsustainably low and at a time of turmoil in the market. The Parties do not assert that any other year is relevant as the basis for this calculation.
512. Given the distortions present to some degree in both years, the Tribunal concludes that it should employ, as the basis for projecting the 2002 HFCS price, the price of Mexican sugar over the entire 2001-2002 period, thereby possibly smoothing out the distortions present. On this basis, the Tribunal finds the projected price of HFCS-55 in 2002 to be USD \$14.37.
513. The Tribunal acknowledges that the Mexican and the United States sugar markets are different from one another. Simultaneously, the Tribunal observes that the HFCS markets in both countries would have strong linkages. In addition, the Tribunal agrees with the Claimant and its expert that the markets—not distorted by the measures in question—would have roughly followed one another as a consequence of the NAFTA. The Tribunal thus adopts Claimant's expert's method of calculating the price for the subsequent years 2003 to 2007 by adjusting the 2002 price of \$14.37 to track the changes in the U.S. market.

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<sup>177</sup> Comments and Analysis of the *Expert Report of Brent C. Kaczmarek, CFA* dated 21 December 2006, prepared by Navigant Consulting, Inc., Pablo Ri3n and Associates, ¶ 102 (Apr. 2007) (referencing Revised App. 10).

514. In regards to the price of HFCS-42, the Parties appear to be in agreement that it is 90% of the price of HFCS-55. Thus, the Tribunal utilizes this calculation to find the price of HFCS-42 from 2002 to 2007.

**The Scope of Loss to Claimant to be Included in the Model: Whether Cargill, Inc.'s Loss of Sales to Cargill de Mexico is a Separate Export Loss or a Part of the Investment**

515. Navigant calculates the total damages that it projects for both Cargill and Cargill de Mexico to estimate what would be required to place the entities where they would have been but for the Mexican measures. Claimant asserts that it is not seeking any recovery for losses outside of Mexico, though it does claim for harm done to both Cargill de Mexico and Cargill, Inc. It contends that:

[A]ny allocation that Cargill, Inc., may have made between itself and its subsidiary, whether for tax or other accounting purposes, is simply not relevant because NAFTA expressly authorizes a foreign investor to bring claims and obtain damages both for itself and on behalf of its subsidiary in the host country. Thus, Cargill is entitled to make a claim for the entire loss that it and its subsidiary lost due to Mexico's measures.

Claimant therefore frames its claim for damages as the benefits of its investment in Cargill de Mexico, the Tula facility and the development of the Mexican HFCS market of which it claims it was denied. Claimant asserts that it "made the investment as an integral part of the distribution and sale of the fructose that it manufactures, and, therefore, the sales that are directly related to its investment that is in its distribution facility, its distribution entity in Mexico, are all part of the damages that it can recover under the NAFTA." Claimant does not claim, however, for any lost direct sales from Cargill, Inc. to Mexican customers.

516. "For purposes of presenting the lost cash flow according to the actual economic model established by Cargill to sell HFCS in Mexico," Navigant divides the lost profits between Cargill de Mexico and Cargill on a 46.77% and 53.23% split, respectively. Navigant acknowledges that this split depends on a transfer price for HFCS, which it was unable to define with absolute certainty, but calculates as \$9.42 based on a profitability analysis to determine a reasonable profit split between the entities.
517. Respondent argues that Cargill de Mexico's value, and any effects on such value by the Mexican measures, cannot include the lost value of profits that Cargill would have



received from sales to CdM. According to Respondent, USD \$65.9 million of the total damages claimed by Claimant are attributed to the alleged loss of export and sales of HFCS that Claimant asserts would have been produced in the United States and sold to CdM and thus should be excluded.

518. Respondent additionally attacks the transfer price used by Claimant's expert Navigant Consulting implying that, as the \$ [REDACTED] transfer price used by Navigant was lower than both the HFCS-55 market price in the U.S. and the net sales price of the North American Corn Milling Division, Navigant artificially increases CdM's projected profits. The effect of the chosen transfer price, according to Respondent, is that there is a [REDACTED]% return on investment for Cargill de Mexico, and only a [REDACTED]% annual return for Cargill, Inc. PRA does not, however, perform a detailed analysis of the transfer pricing as it claims that it lacked necessary information.

**Conclusion of the Tribunal with respect to the Scope of Loss to Claimant to be Included in the Model: Whether Cargill, Inc.'s Loss of Sales to Cargill de Mexico is a Separate Export Loss or a Part of the Investment**

519. To evaluate the damages claimed, the Tribunal has found it helpful to look at the lost profits claimed as divided at the United States-Mexican border, with those lost profits attributed to Cargill's inability to sell HFCS to CdM as "up-stream losses" and the direct losses of CdM as "down-stream losses."
520. According to Article 1139 and the Tribunal's previous conclusions, the down-stream losses are clearly compensable due to the violations of Articles 1102, 1105, and 1106 of the NAFTA. The issue, therefore, is whether those up-stream damages claimed by Claimant, and objected to by Respondent, are also compensable.
521. With respect to this disagreement, the Tribunal is aware that Chapter 11 applies only to measures relating to investments that are in the territory of the State Party enacting the measures.<sup>178</sup> It was for this reason that the *ADM* tribunal determined that it lacked jurisdiction to award compensation for "lost profits on HFCS [the claimants] would

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<sup>178</sup> *ADM*, Award, ¶ 273 (21 Nov. 2007).

have produced in the United States and exported to Mexico ‘but for’ the Tax, as these losses were not suffered in their capacity as investors in Mexico.”<sup>179</sup>

522. This Tribunal notes, however, that as it stated at paragraphs 147 and 352 above, Article 1139’s definition of investment is “broad and inclusive.” This Tribunal therefore has little difficulty in determining that business income, particularly business income so closely associated with a physical asset in the host country and not mere trade in goods, is both an element of a larger investment and an investment in and of itself. (*See supra* ¶ 353).
523. With respect to the particular facts of this case, the Tribunal finds that the profits generated by Cargill’s sales of HFCS to its subsidiary, Cargill de Mexico, for Cdm’s marketing, distribution and re-sale of that HFCS, were so associated with the claimed investment, Cdm, as to be compensable under the NAFTA. Cargill’s investment in Mexico involved importing HFCS and then selling it to domestic users, principally the soft drink industry. Thus, supplying HFCS to Cargill de Mexico was an inextricable part of Cargill’s investment. As a result, in the view of the Tribunal, losses resulting from the inability of Cargill to supply its investment Cargill de Mexico with HFCS are just as much losses to Cargill in respect of its investment in Mexico as losses resulting from the inability of Cargill de Mexico to sell HFCS in Mexico.
524. In this way, the situation of this dispute diverges from that which the *ADM* tribunal faced. ADM and Tate & Lyle created a joint venture, ALMEX, which began selling HFCS in Mexico in 1994 and commenced its own production of HFCS in December 1995, which grew to be ALMEX’s “most important product.”<sup>180</sup> Cargill de Mexico, on the other hand, was not a producer of HFCS and its HFCS business therefore depended on the HFCS sold to it by its parent.
525. Claimant’s intent was to enter the Mexican HFCS market and attain a significant share of that market; thus its investment included everything that it took to achieve such a result. Viewed holistically, Claimant was prevented from operating an investment that involved the sale into and distribution of HFCS within the Mexican market. The inability of the parent to export product to its investment is just the other side of the

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<sup>179</sup> *Id.* ¶ 274.

<sup>180</sup> *Id.* ¶¶ 8, 53.

coin of the inability of the investment, Cargill de Mexico, to operate as it was intended to import HFCS into Mexico.

526. The Tribunal therefore determines that Claimant is to be compensated for its net lost profits as determined for both Cargill de Mexico's lost sales to the Mexican market and Cargill, Inc.'s lost sales to Cargill de Mexico.

### **Accounting for the Effect of the Katrina Swaps**

#### **Contentions of the Parties**

527. As a result of the significant damage done to U.S. sugar production by Hurricane Katrina, the United States and Mexico negotiated limited trade in sugar and HFCS between the two countries. Of the HFCS that was allowed into Mexico, Claimant received 34.52% of the total quota, for fiscal years 2005-6, 2006-7, and 2007-8.<sup>181</sup> Respondent argues that these quotas represent the maximum allowable import quantities during these periods and therefore projecting that any larger quantity of HFCS could be imported is infeasible.
528. In addition, Respondent contends that, when the United States and Mexico agreed to the July 2006 Settlement Swap, this agreement "vacated and replaced" the permit requirement with a new regime. Respondent asserts that "[t]he Settlement Swap is an agreement between two NAFTA Parties which supersedes the commitments each Party made to the other with respect to those products for the period September 2006 to December 2007, pending the elimination of all border measures on both products on 1 January 2008." Respondent asserts that, accordingly, Claimant cannot claim damages for lack of access to the Mexican HFCS market after September 2006 because, once the Settlement Swap was negotiated, Claimant had no right to export any greater amount of HFCS to Mexico than its share of the negotiated Swap.
529. Claimant counters that Respondent is confusing the "but for" scenario with the actual scenario and that, in the "but for" scenario, it would have been unnecessary to negotiate the Swaps, as the NAFTA itself provides for unrestricted HFCS trade with Mexico. It is therefore incorrect for Respondent to claim that the upper limit of

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<sup>181</sup> This equated to 16,613 dry metric tons (MT) in 2005, 71,413 MT in 2006, and 151,025 MT in 2007.

imports would be the Swaps, as in “the but-for world, without Mexico’s tax and permit issue measures, it must be assumed that fructose imports would have been tied to Mexican demand, not to unnecessary Swap Agreements.” Claimant, instead, accounts for the amount allowed to be imported under the Swap Agreement as mitigation against its total claim of damages.<sup>182</sup>

**Conclusion of the Tribunal with respect to Accounting for the Effect of the Katrina Swaps**

530. To begin its analysis of the proper treatment of the quotas established under the Katrina Swaps—either mitigation or vacation and replacement of the permit requirement with a new regime—the Tribunal turns to the *Text of the U.S.-Mexico Sweetener Deal* as issued on 27 July 2006 (provided by Claimant as Exhibit 253). This deal established the quota system known as the Katrina, or Settlement, Swaps. In particular, the Tribunal notes paragraph 8:

Consultations and dispute settlement. Mexico and the United States recognize that there are ongoing disputes concerning trade in sweeteners, which have not been resolved, and that this agreement contributes to finding a resolution to those disputes. Mexico and the United States further recognize that this agreement will facilitate an orderly transition to full tariff elimination on sugar and syrup goods and HFCS goods on January 1, 2008. Mexico and the United States shall continue to consult on trade in sweeteners with a view toward facilitating that transition, further liberalizing trade in such goods, and making further progress on the issues underlying those disputes.

531. The Tribunal notes the language of this excerpt that far from indicates the reaching of a final conclusion to the dispute. Instead, “the agreement *contributes* to finding a resolution” and “will *facilitate* an orderly transition.” In addition, Mexico and the United States express their intent to continue consultation with a view to “making further progress on the issues underlying those disputes.”

532. The Tribunal additionally notes that, in examining the quotas themselves, they do not appear to end the NAFTA dispute. It strikes the Tribunal that, should the Katrina Swaps have provided a definitive end to the underlying NAFTA dispute, the other measures would have been unnecessary and thus would have been lifted.

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<sup>182</sup> Expert Rebuttal Report of Brent C. Kaczmarek, CFA (June 2007), App. 27: “Cargill’s Potential Sales in the ‘But For’ Mexican HFCS Market.”

533. Therefore, the Tribunal finds that Respondent has failed to prove that the Katrina Swaps “vacated and replaced” with a new regime that definitively ended the sweeteners dispute. Accordingly, the Tribunal determines that, instead, the quota amounts provided to Claimant under this agreement should be treated as mitigation to Claimant’s damages claim, as Claimant has in fact treated them.

**Accounting for the Effect of the Zucarmex Investment**

534. In October of 2002, Claimant invested USD \$ [REDACTED] in the holding company of Zucarmex, Impulsora Azucarera del Noroeste, S.A. de C.V. (“Zucarmex”), Mexico’s third largest sugar producer. This investment secured [REDACTED]% of the company for Claimant and secured a [REDACTED]-year marketing agreement with Zucarmex.

535. Respondent argues that this investment and the profits resulting from it must be subtracted from the assessment of Claimant’s total damages in order to ascertain Claimant’s pre-IEPS Tax position. According to Respondent, Claimant’s Zucarmex investment would not have been valuable but for the IEPS Tax. Although Respondent asserts that it could not assess the economic advantage that Claimant derived from the Zucarmex investment from the documents provided by Claimant, it notes that Claimant itself estimated the distribution agreement to represent a benefit of US \$ [REDACTED] to \$ [REDACTED] per year and to have a total value of US \$ [REDACTED].

536. Claimant counters Respondent’s contentions by arguing that its Zucarmex investment was made in June 2003, almost 18 months after the passage of the IEPS Tax. Any benefit of the Tax would therefore have been factored into the US \$20 million price tag for the investment, according to Claimant, as everyone negotiating the investment was well aware of the IEPS Tax and the benefits that it provided to sugar producers in Mexico. Any additional offsetting for this investment, Claimant asserts, would mean that Claimant overpaid for the investment. In addition, Claimant contends that [REDACTED]

[REDACTED]

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<sup>183</sup> Jurgens Rebuttal Witness Statement, ¶¶ 19-27.

**Conclusion of the Tribunal with respect to Accounting for the Effect of the  
Zucarmex Investment**

537. The Tribunal determines that the Zucarmex is a distinct investment, separate from that which Claimant made in Cargill de Mexico and, as such, it is not relevant to this consideration of appropriate damages. In addition, the Tribunal notes that Respondent's calculation of a US \$ [REDACTED] benefit to Claimant from the Zucarmex investment appears to stem from the Zucarmex Commitment Request (10 October 2002), which actually states that Claimant's expectation was of an "overall stake [of] around US \$ [REDACTED]." <sup>184</sup> Based on this and other evidence presented by Claimant, the Tribunal determines that there is no proof that this investment was at all profitable and therefore no means by which to determine how it could be accounted for as mitigation.

**Tribunal's Final Disposition with respect to Damages**

538. The Tribunal therefore takes as the basis for its calculation of damages owed Claimant Navigant's Alternative Damage Scenario as provided in Appendices 26 to 32 of its June 2007 Rebuttal Report. The Tribunal, however, adjusts certain inputs as detailed above.

539. Specifically, the Tribunal determines that all effects of the antidumping duties are properly eliminated and thus the compensable period of loss is from June 2002 through December 2007. In addition, the Tribunal substitutes Navigant's projections for the growth rate of the Mexican HFCS market with a two-part growth curve, reaching 60% of the total beverage market by June of 2005, and continuing at a linear annual rate to achieve a maximum adoption rate of 74.3% of the total beverage market by 2007. The Tribunal does not change the projected annual market shares that Claimant would secure to which both Parties agree, except to start those percentages in June, instead of January, 2002. The Tribunal also adopts Claimant's expert's method of calculating the price for the years 2003 to 2007 by adjusting the base price to track the changes in the U.S. market, but determines that the appropriate base price of HFCS-55 is \$ [REDACTED].

540. Recalculating Claimant's Alternative Damage Model as derived in Appendices 26 to 32 of its Expert Rebuttal Report and substituting in these inputs, the Tribunal

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<sup>184</sup> Zucarmex Commitment Request (10 Oct. 2002) [C-EX-299] (emphasis added).

determines that Claimant is owed USD \$77,329,240 in damages for Respondent's violations of its obligations under Articles 1102, 1105 and 1106 of the NAFTA.

#### XIV. COSTS AND INTEREST

##### Contentions of the Parties

541. With respect to the appropriate interest to apply to this Award, the Tribunal notes Claimant's argument that it is entitled to "applicable interest" per Article 1135(1)(a), and that, according to Claimant, most Chapter 11 tribunals award compound, as opposed to simple, interest.<sup>185</sup> Claimant additionally provides the awards of *Metalclad*, *S.D. Myers* and *Pope & Talbot* as evidence of this practice.<sup>186</sup> As regarding the appropriate rate of interest, Claimant asserts that it is the U.S. prime rate.
542. Respondent requests that only simple interest be awarded based upon the U.S. Treasury Bills which, it asserts, is "a reasonable interest rate for an award denominated in U.S. dollars." Respondent argues that this rate is more reasonable than the prime lending rate advocated by Claimant which, Respondent argues, is the rate a commercial lender would earn on making a loan.
543. Both Parties also claim for all fees and expenses incurred with respect to these proceedings. Citing to *S.D. Myers*, Claimant argues that the apportionment of legal costs can be based upon the Tribunal's assessment of the Parties' relative success on the merits.<sup>187</sup> In this case, Claimant asserts, fees are "especially warranted" as "Cargill provided Mexico with multiple opportunities to avoid this arbitration and because Mexico continued with its anti-HFCS campaign after repeated rulings by international tribunals that its measures were unlawful."

##### Conclusion of the Tribunal with respect to Costs and Interest

544. With respect to interest, the Tribunal believes that Claimant is entitled to interest on this Award at a rate based upon the U.S. Monthly Bank Prime Loan Rate as Claimant has effectively loaned this sum to Respondent for the duration of this dispute. This

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<sup>185</sup> See MEG N. KINNEAR, ET AL., INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11, § 1135, at 40.

<sup>186</sup> *Metalclad*, Award, ¶ 128 (30 Aug. 2000); *S.D. Myers*, Second Partial Award, ¶¶ 302-07 (21 Oct. 2002); *Pope & Talbot*, Interim Award on Damages, ¶ 90, fn. 66 (31 May 2002).

<sup>187</sup> *S.D. Myers*, Final Award, ¶¶ 53-54 (30 Dec. 2002).

interest shall be compounded annually and paid from 1 January 2008, until the date of this Award and thereafter until full payment is received.

545. With respect to costs, Article 58 of the ICSID Additional Facility Arbitration Rules provides that “unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne”. In doing so, the Tribunal finds guidance in the principles set forth in Article 40(1) and (2) of the UNCITRAL Arbitration Rules, which provides:

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

Article 40(1), on the one hand, adopts the general principle that the costs related to the arbitration shall be borne by the unsuccessful party, though the tribunal may instead apportion such costs, in light of the circumstances of the case. Article 40(2), on the other hand, grants the tribunal absolute discretion in the apportionment of the costs of legal representation, also taking into consideration the circumstances of the case.

546. In this case, the Tribunal notes that both Parties have well argued a difficult and complicated case. Claimant was successful in establishing its claim on the basis of several articles of Chapter 11, although not on other bases, namely Articles 1103 and 1110. Moreover, although Claimant was successful in proving a breach of Article 1105, it was not persuasive with respect to its arguments to incorporate the effects of the antidumping duties in the assessment of damages. Simultaneously, although Respondent was not successful in its efforts to claim that the wrongfulness of these breaches was precluded as the complained of acts were legitimate countermeasures, Respondent’s arguments presented issues of first impression and were based upon serious and considered legal questions.

547. With these considerations in mind, the Tribunal determines that Respondent shall be responsible for all of the costs of this arbitration and half of Claimant’s costs of legal



representation and assistance. Claimant, in turn, will maintain responsibility for the remaining half of its costs.

#### **XV. FINAL DISPOSITION OF THE TRIBUNAL**

548. The Tribunal holds that Respondent violated Article 1102 in that, in relation to both the IEPS Tax and the import permit requirement, Cargill de Mexico was in “like circumstances” with domestic suppliers of cane sugar to the soft drink industry and that the treatment accorded to it was less favourable than the treatment accorded to domestic investors or their investments.
549. The Tribunal denies Claimant’s claims with respect to a breach of Article 1103 of the NAFTA. For the purposes of a NAFTA Chapter 11 claim, the investment must be located in the territory of the State complained of. Casco, the CPI subsidiary Claimant alleges is in “like circumstances” to Cargill de Mexico, is an investment of CPI in Canada, not an investment of CPI in Mexico, and so it cannot be used as a basis for comparison for the purposes of Claimant’s Article 1103 claim.
550. With respect to Article 1105, the Tribunal finds that Respondent, in an attempt to further its goals regarding United States trade policy, targeted a few suppliers of HFCS, all but annihilating a series of investments for the time that the permit requirement was in place. The Tribunal finds this willful targeting to breach the obligation to afford Claimant fair and equitable treatment.
551. The Tribunal rejects Claimant’s claims for expropriation under Article 1110 of the NAFTA. The Tribunal concludes that business income, particularly when it is associated with a physical asset in the host country, is an investment within the meaning of Article 1139 both as an element of a larger investment involving the physical asset and as an investment in and of itself. The Tribunal additionally concludes, however, that Claimant has failed to prove that the damage done by the Mexican measures to its HFCS business resulted in such a substantial diminution of Cargill de Mexico so as to equate to a radical deprivation of Claimant’s overall investment, and that Claimant has failed to prove that customary international law has evolved to include a claim for temporary expropriation.
552. Finally, the Tribunal holds that Respondent has breached its obligations under Article 1106 because, although the IEPS Tax was imposed on soft drink bottlers and not

directly on Cargill de Mexico, the Tax, by its very objective and design, involved a performance requirement within the meaning of Article 1106(3). It conditioned a tax advantage on the use of domestically produced cane sugar for the very purpose of affecting the sale of HFCS, and thus, it conditioned an advantage “in connection with” the operation of the Claimant’s investment which supplied HFCS to the soft drink bottling industry.

553. The Tribunal finally holds that the wrongfulness of these breaches of Respondent’s obligations under NAFTA Chapter 11 is not precluded by Respondent’s assertion that its actions were lawful countermeasures. The Tribunal determines that countermeasures operate only to preclude the wrongfulness of an act that is not in conformity with an obligation owed to the offending state, not in regard to obligations owed to a third state nor those, as here, owed to the nationals of the offending state. The Tribunal further determines that, under the NAFTA, investors have both substantive and procedural rights, and investors are therefore protected under Chapter 11 from measures taken by a host state directly against them. This is true even if these same actions might constitute valid countermeasures if taken instead against the offending state, and even despite the fact that such valid countermeasures may in fact result in secondary effects on the nationals of the offending state.

#### **XVI. AWARD AND ORDER**

For the foregoing reasons, THE TRIBUNAL AWARDS AND ORDERS AS FOLLOWS:

554. Finds Respondent has acted inconsistently with respect to its obligations under Article 1102 of the NAFTA;
555. Denies Claimant’s claim for damages for a breach of NAFTA Article 1103;
556. Finds Respondent has acted inconsistently with respect to its obligations under Article 1105 of the NAFTA;
557. Finds Respondent has acted inconsistently with respect to its obligations under Article 1106 of the NAFTA;
558. Denies Claimant’s claim for damages under NAFTA Article 1110;
559. Orders Respondent to pay immediately to Claimant the sum of US \$77,329,240;
560. Orders interest to be paid on this Award from 1 January 2008, until payment in full at a rate equal to the U.S. Monthly Bank Loan Prime Rate, compounded annually;


561. Orders Respondent to pay all of the costs of this arbitration and half of Claimant's costs of legal representation and assistance, in addition to its own costs of representation, a total of US \$3,296,140; and Claimant to maintain responsibility for the remaining half of its legal representation and assistance costs, or US \$1,675,473. Considering the sums already expended, this equates to a payment from Respondent to Claimant of US \$2,085,473 for reimbursement of costs;
562. Denies all other claims for compensation.



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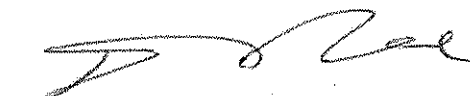
Doctor Michael C. Pyles  
President

Date: AUGUST 13, 2009



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Professor David D. Caron  
Arbitrator  
Date: July 29, 2009



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Professor Donald M. McRae  
Arbitrator  
Date: July 29, 2009