

INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES
(ADDITIONAL FACILITY)

CASE No. ARB(AF)/04/05

B E T W E E N:

ARCHER DANIELS MIDLAND COMPANY

and

TATE & LYLE INGREDIENTS AMERICAS, INC.
Claimants

v.

THE UNITED MEXICAN STATES
Respondent

**Decision on the Requests for Correction,
Supplementary Decision and Interpretation**

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

Mr. Bernardo M. Cremades, President
Mr. Arthur W. Rovine
Mr. Eduardo Siqueiros T.

Secretary of the Tribunal:
Mr. Gonzalo Flores

Date of dispatch to the parties: July 10, 2008

THE TRIBUNAL

Composed as above,

After deliberation,

Makes the following Decision:

I. PROCEDURAL HISTORY

- 1.- On 21 November 2007, the Arbitral Tribunal rendered an Award ordering the Respondent to pay to the Claimants the amount of US\$33,510,091, in damages for lost profits, as well as interest at the simple interest rate paid on U.S. Treasury Bills. On 8 January 2008 the Arbitral Tribunal issued a Rectification of Award, correcting a typographical error in the expression of the amount awarded to the Claimants in item 4 of paragraph 304 of the Award.
- 2.- On 7 January 2008, the Respondent requested correction of the Award, "under Article 57" of the ICSID Arbitration (Additional Facility) Rules (the "*AF Rules*"), to state that the damages awarded are payable to ALMEX rather than the Claimants. On the same date, the Claimants submitted a request for a supplementary decision pursuant to Article 57 of the AF Rules, and for interpretation of the Award pursuant to Article 55 of the AF Rules.
- 3.- By letter dated 10 January 2008, the Arbitral Tribunal advised the Parties: (i) that the Tribunal granted the Claimants a period of 30 days to file a detailed written submission regarding their requests; (ii) that the Respondent would subsequently have a period of 30 days to reply to the Claimants' written submissions; and (iii) that after receiving the submissions of both parties, the Arbitral Tribunal would issue a decision on the Parties' requests.
- 4.- In accordance with the procedural timetable, on 11 February 2008 the Claimants filed a Detailed Submission Supporting their Request for a Supplementary Decision (the "*Claimants' Submission*").
- 5.- On 11 March 2008, the Respondent requested an extension for the filing of its Reply to the Claimants' Submission. Further, and in light of proceedings relative to

the Award in Canada, the Respondent requested that the Tribunal reject any request by Claimants to redact the Award and to order immediately its disclosure.

- 6.- On 14 March 2008, the Claimants consented to the Respondent's requested extension of time to submit a reply, and asked the Tribunal to reject the Respondent's request for immediate publication of the Award.
- 7.- On 25 March 2008, the Respondent filed a 'Response to the Request of the Claimant for a Supplementary Decision' (the "*Respondent's Response*").
- 8.- On 7 April 2008, the Claimants presented their 'Reply to Mexico's Response to Claimants' Request for a Supplementary Decision.' On 8 April 2008 the Respondent objected to the admission of this document. On 8 April 2008, the Tribunal advised the Parties that it would accept the Claimants' Reply while allowing the Respondent a right of response. On 21 April 2008, the Respondent submitted its comments to the Claimants' Reply.

II. APPLICABLE RULES

- 9.- Chapter IX of the AF Rules is entitled 'The Award' and consists of six Articles (Articles 52 to 57). Article 52 sets forth the mandatory requirements of the Award. Article 53 provides for authentication of the Award and related matters, and Article 54 addresses Applicable Law. There then follow three provisions relating to the powers of the Tribunal in relation to its award after the award is rendered. There are three distinct powers: the power to interpret, the power to correct, and the power to supplement:

Article 55

Interpretation of the Award

(1) *Within 45 days after the date of the award either party, with notice to the other party, may request that the Secretary-General obtain from the Tribunal an interpretation of the award.*

(2) *The Tribunal shall determine the procedure to be followed.*

(3) *The interpretation shall form part of the award, and the provisions of Articles 52 and 53 of these Rules shall apply.*

Article 56

Correction of the Award

(1) *Within 45 days after the date of the award either party, with notice to the other party, may request the Secretary-General to obtain from the Tribunal a correction in the award of any clerical, arithmetical or similar errors. The*

Tribunal may within the same period make such corrections on its own initiative.

(2) The provisions of Articles 52 and 53 of these Rules shall apply to such corrections.

Article 57
Supplementary Decisions

(1) Within 45 days after the date of the award either party, with notice to the other party may request the Tribunal, through the Secretary-General, to decide any question which it had omitted to decide in the award.

(2) The Tribunal shall determine the procedure to be followed.

(3) The decision of the Tribunal shall become part of the award and the provisions of Articles 52 and 53 of these Rules shall apply thereto.

- 10.- These three powers address distinct potential defects in the award. The power to interpret anticipates an interpretative difference arising from the award requiring clarification. The power to correct addresses 'clerical, arithmetical or similar errors'. The power to supplement addresses the omission to decide 'any question' in the Award.
- 11.- The distinction between these three powers is clear at a conceptual level although, as the present applications demonstrate, the Parties might differ in their perception of the nature of the power required to remedy an alleged defect. Accordingly, the Claimants seek to confirm through an interpretation pursuant to Article 55 that the order in the Award that damages be paid to "*the Claimants*" means the Claimants as defined in the Award. The Respondent considers the reference to "*the Claimants*" in the order is an error, and accordingly seeks its correction pursuant to Article 56.
- 12.- In relation to Article 57, the power to supplement is limited to the situation in which the Tribunal omitted 'to decide any question'. Article 57 does not empower a Tribunal to issue a supplementary decision as a means to consider new evidence, to hear new arguments, to rehear an issue, or to modify or supplement its original reasoning. In short, Article 57 does not empower the Arbitral Tribunal to make a new decision, or to modify its existing decision, or even to supplement the reasoning of its existing decision. The applicant under Article 57 must clearly identify a 'question' that the award had failed to decide.
- 13.- The Claimants' submissions in the present case link the reference to a 'question' in Article 57 to the requirement in Article 52(1)(i) that the Award contains "*the decision of the Tribunal on every question submitted to it.*" 'Question' can be

presumed to have the same meaning in both contexts. The meaning of 'question', and particularly the level of abstraction at which a 'question' should be conceived, are matters that the Tribunal is required to address in the present Decision.

- 14.- Article 52(1)(i) also requires a Tribunal in its Award to provide 'the reasons upon which the decision is based'. The Claimants relate the requirement of reasons in Article 52(1)(i) to the power to make a supplementary decision in Article 57, suggesting that a decision on any question and the requirement of reasons are inextricably linked. This is true in Article 52, but not in Article 57. The Claimants argue, in effect, that the requirement for reasons for a decision on a question in Article 52(1)(i) means that a failure to give reasons, or to give sufficient reasons, *ipso facto* means the Tribunal has omitted to decide a question. This is not necessarily so. The Claimants in their original request for a supplementary decision of 7 January 2008 state:

AF Article 52(1)(i) provides that each award shall contain "the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based." Thus, an Article 57 request is appropriate if a tribunal "omitted to decide in the award" any question that a party submitted to it or failed to provide an adequate statement of the reasons for its decision on a particular question. (emphasis added)

- 15.- The final part of this statement is a *non sequitur*. The failure to provide an adequate statement of reasons does not necessarily mean that the Tribunal has omitted to decide a question (the only basis of an Article 57 application). Article 57 empowers the Tribunal to "*decide a question which it had omitted to decide in the award,*" but not to modify or supplement its reasoning on a question it did in fact decide.
- 16.- Additionally, the Arbitral Tribunal notes that the present numbering of Chapter IX dates from the amendment to the ICSID Arbitration (Additional Facility) Rules that entered into force on January 1, 2003. Prior to this date the provisions corresponding to the present Articles 52 to 57 were numbered 53 to 58 respectively. The Tribunal mentions this point because the Respondent in its application of January 7, 2008 applied pursuant to 'Article 57(1)' to 'correct an error' ("*rectifique un error*") relating to the payment of damages. The Respondent in its Response makes clear its reliance on the Decision on the Correction and Interpretation of the Award dated 13 June 2003, rendered in *Marvin Roy Feldman Karpa v. United Mexican States* (Case No. ARB(AF)/99/1) which involved an application for correction of an error under Article 57(1) AF Rules in force at that time, but corresponding to the present Article 56(1). Accordingly, the Arbitral Tribunal has considered the substance of the Respondent's submission, which is clearly an application for correction pursuant to Article 56(1), and has treated its reference in its original letter to Article 57(1) as a typographical error.

III. THE CLAIMANTS' REQUEST FOR INTERPRETATION AND THE RESPONDENT'S REQUEST FOR CORRECTION OF THE AWARD

- 17.- ADM and TLIA, defined in the Request for Arbitration as "*the Claimants*" requested the institution of arbitration proceedings "...under NAFTA Article 1117 on behalf of ALMEX, as well as on their own behalf under Article 1116...." They thus argued that ADM and TLIA were eligible to contest the Respondent's tax measures, "...on their own behalf and on behalf of their investment, ALMEX, pursuant to NAFTA Article 1116 and 1117, respectively" (Claimants' Request for Arbitration dated 4 August 2004, paragraphs 7 and 20).
- 18.- The Respondent alleges that payment under the Award should be made to ALMEX and not to ADM and TLIA, as the Claimants submitted the dispute to arbitration not only on their own behalf (under Article 1116 of the NAFTA) but on behalf of ALMEX (pursuant to Article 1117 of the NAFTA). The Respondent contends that the amounts awarded were calculated on the basis of the damages ALMEX suffered during the imposition of the Tax, and not damages suffered by ADM and TLIA in relation to the sale of HFCS in Mexico. The Respondent states that the damages awarded were necessarily based on Article 1117 NAFTA, and that Article 1135(2)(b) NAFTA requires payment to be made to ALMEX. The Respondent requests correction of the Award pursuant to Article 56 AF Rules (wrongly described, as explained above, as Article 57).
- 19.- The Claimants consider that as "the Claimants" in the arbitration were defined in Section I of the Award, paragraph 6, as ADM and TLIA, payment should be made to ADM and TLIA –under Article 1116 of the NAFTA– and not to ALMEX under Article 1117. They request an interpretation of the Award under Article 55 of the AF Rules, confirming the Tribunal's order in items 4 and 5 of paragraph 304 to make payment to "the Claimants" under Article 1116, and not to ALMEX under Article 1117 of the NAFTA.
- 20.- Articles 1116 and 1117 of the NAFTA were designed to broaden the standing of private individuals against the Member States, in relation to breaches of by the host State of its obligations of Chapter XI. In particular, Article 1116 allows an investor to bring a claim on its own behalf, and the focus of Article 1116 is on the loss or damage suffered by the investor as a result of a breach of Chapter XI by the host State. Article 1117, on the other hand, allows the same investor to bring its claim on behalf of an enterprise that the investor owns or controls, where the enterprise has suffered loss or damage as a result of a breach of Chapter XI by the host State. In claims brought under Article 1117, the focus is on the damage suffered directly by the enterprise.

- 21.- Accordingly, the structure of NAFTA Chapter XI anticipates that an investor might seek damages both for losses it suffered as well as for losses suffered by an enterprise owned by the investor. The two separate bases for claims in Articles 1116 and 1117 do not justify two arbitrations or double recovery for the same loss. If the investor claims damages for its own losses and the losses of the enterprise in separate arbitrations, then Article 1117(3) creates a presumption that the arbitrations should be consolidated in accordance with NAFTA Article 1126. If the loss claimed under Article 1116 is the same as the loss claimed under Article 1117 then there is a single measure of compensation. This is not contested in the present case; what is in question is to whom the damages should be paid, the investor under Article 1116 or the enterprise under Article 1117.
- 22.- Article 1135(2)(b) provides that if the damages are awarded pursuant to Article 1117 then the damages must be paid to the enterprise. The Claimants in their pleadings did not distinguish between Article 1116 and Article 1117 in claiming damages for ALMEX's lost profits. However, the methodology proposed by the Claimants concentrated on the loss of profits suffered by ALMEX, and not the loss or damage to the Claimants. The inquiry was as to the direct loss suffered by the enterprise in the terms of Article 1117, and not the loss indirectly suffered by the investors pursuant to Article 1116 by measuring the decline in value of their investment.
- 23.- Accordingly, the damages awarded by the Arbitral Tribunal in the Award, following the approach first proposed by the Claimants and accepted by the Respondent, measured damages in accordance with Article 1117. As mentioned, Article 1135(2)(b) requires these damages to be paid to the enterprise, that is ALMEX. The dispositive section of the Award therefore contains a clerical or similar error in failing to distinguish the successful party making the claim (that is, the Claimants) from the proper recipient of the damages in accordance with the mandatory provisions of NAFTA. On this basis, the Tribunal accepts the application by the Respondent for a correction to the Award pursuant to Article 56 AF Rules, and rejects the Claimants' application for interpretation pursuant to Article 55 AF Rules.
- 24.- Accordingly, in subparagraphs 4 and 5 of the dispositive part of the Award (paragraph 304) the expression "the Claimants" shall be deleted and substituted by the word "ALMEX". These subparagraphs shall therefore read as follows:
4. *Orders the Respondent to pay to ALMEX the sum of US\$33,510,091 dollars (Thirty Three Million Five Hundred and Ten Thousand and Ninety One dollars of the United States of America) as principal;*
 5. *Orders the Respondent to pay to ALMEX interest on the sum referred to in paragraph 4 above, for each month of the period from the date the damage*

was calculated (December 31, 2005, and for the damages claimed for 2006 as from the end of such year), until the payment is effectively made, at a rate equivalent to the yield for the month, at the simple interest rate paid on U.S Treasury Bills;

IV. THE CLAIMANTS' REQUESTS FOR SUPPLEMENTARY DECISIONS

- 25.- The Claimants submit that the Award requires supplementation in respect to:
- (a) its determination of ALMEX's lost profits. In particular, the Claimants state that the Tribunal failed to reach a reasoned decision regarding their damages calculation, as the Award fails to: (i) accurately and adequately summarize and weigh the evidence offered by each party; (ii) decide every question after the weighing process; and (iii) provide a statement of the reasons upon which it is based;
 - (b) its determination that the Claimants are not entitled to recover lost profits on U.S.-origin high fructose corn syrup (HFCS) that the Claimants distributed using their investment in distribution facilities in Mexico; and
 - (c) its determination that the Claimants are not entitled to recover compound interest on the lost profits award.
- 26.- The Respondent argues that through their request for supplementary decisions the Claimants intend to reargue their claim for damages, requesting the Tribunal to reconsider the factual and legal questions of the case fully dealt with in the Award, and requesting the Tribunal to reach in a supplementary decision different conclusions as to the amounts of damages granted to the Claimants. The Respondent contends that the scope of the Claimants' requests is beyond the authority of Article 57 and that the Tribunal would be acting in excess of its powers if it acted as the Claimants requested.
- 27.- The Respondent considers that the Tribunal rendered a reasonable award, based on all evidence provided by the Parties and preferring the conclusions of the Respondent's expert reports as reasonable and more realistic. The Respondent alleges that it was Claimants' burden to prove their alleged quantum of damages, which they did not. Therefore, the Award is sufficiently reasoned by determining that the Respondent's evaluation on the loss of profits was more realistic.
- 28.- The Respondent also states that by rejecting the decision of the Tribunal that it does not have jurisdiction to award damages to the Claimants (rather than ALMEX) in connection with HFCS manufactured in the United States, the Claimants are asking the Tribunal to revise legal determinations of the Award. The

suggestion that there are factual issues that were not resolved in the Award, which would have otherwise resulted in a different conclusion by the Arbitral Tribunal, has no grounds whatsoever.

29.- As regards the Tribunal's decision on interest, the Respondent contends that there is no legal basis to justify the Claimants' request for additional reasoning.

30.- Having considered the Parties' submissions, and after deliberation among the members of the Tribunal, the Tribunal unanimously decides that the Claimants' requests for supplementary decisions must be denied, for the reasons explained below.

(a) **The Determination of ALMEX's lost profits:**

31.- The Claimants' submissions relate to three inputs or variables relevant to the calculation of ALMEX's damages. The Claimants state (paragraphs 13-16 of the Claimants' Submission dated February 11, 2008, footnotes omitted):

13. *Mr. Maniatis determined that Almex suffered [REDACTED] in lost profits during the agreed upon 2002-2006 damages period. Mr. Ri3n estimated Almex's lost profit damages at a maximum of [REDACTED] during this five year period. The Tribunal accepted Mr. Ri3n's calculation [REDACTED]*

14. *At issue between the parties, and critical to the outcome of the damages analysis, were three of the key inputs into that model, namely: [REDACTED]*

15. *In adopting Mr. Ri3n's damages calculation, the Tribunal necessarily adopted each of Mr. Ri3n's three input values. However, as to each of Mr. Ri3n's inputs, the Award omits: an accurate and complete statement of the Claimants' evidence and arguments; reasoned findings of fact in light of that evidence; and an adequate and complete statement of reasons for the conclusions that necessarily depended on those findings of fact...*

16. *Claimants believe that, upon conducting the required supplementary analysis, the Tribunal will conclude that it cannot maintain its prior adoption of the three Ri3n input values identified above. In that event, the Tribunal will need to issue reasoned factual findings and a new statement of its reasons as to the damages properly awardable to Claimants.*

- 32.- The Tribunal notes that the Claimants' submission does not precisely identify the questions that the Tribunal has omitted to decide within the meaning of Article 57. The Claimants conflate Article 52 and 57 in the manner referred to earlier, and in fact seek further reasons under the guise of an application for a supplementary decision.
- 33.- The indeterminacy of the term 'question' in Article 57 (and Article 52) encourages argumentation based upon the adequacy of the degree of abstraction that a tribunal chooses to express its reasoning. In the present case, if the 'question' was the calculation of damages to which ALMEX was entitled then, as the Claimants acknowledge, this question was decided in the Award. If, at the other extreme, the 'questions' to be decided in this case were the precise mathematical weight to be accorded to every factor affecting the calculation of damages, then few awards would be immune from allegations of *infra petita*.
- 34.- The Respondent referred to the judgment of the Supreme Court of British Columbia in *United Mexican States v. Metalclad Corporation* (2001 B.C.S.C. 664) that distinguishes (in the context of what is now Article 52(1)(i)) a 'question' or a 'basic issue' from an 'argument' submitted to the arbitral tribunal. The Court stated that 'every question' submitted to the tribunal was not synonymous with 'every argument which could have changed the outcome of the award', and continued:

[122] The Tribunal must answer the questions that have been submitted to it and give its reasons for its answers. In other words, the tribunal must deal fully with the dispute between the parties and give reasons for its decision. It is not reasonable to require the tribunal to answer each and every argument which is made in connection with the questions which the tribunal must decide.

The questions cumulatively describe the dispute, and the subject matter of the decision, and might require consideration of a range of lesser issues. The obligation of the Tribunal under Article 52 is to decide the questions, and to provide the reasons for its decisions, and although this task may require the Tribunal to evaluate many lesser issues, there is no obligation for the tribunal to exhaustively enumerate them in the Award and decide and reason each individually. The distinction between a 'question' or 'basic issue' and a 'lesser issue' (argument, point, proof, or submission) might be of degree rather than kind, and might itself be contested, but the distinction does exist, is presumed by the drafting of Articles 52 and 57, and is fundamental to the efficiency and finality of arbitral proceedings. Indeed, the coherence of the expression of a tribunal's reasons for its decision could be fatally injured by a formalistic atomisation of reasoning so that any argument or piece of testimony that might have some effect on the outcome of the arbitration has to be dealt with individually.

- 35.- The identification of the questions for decision cannot be divorced from the instrument on which the arbitration is based, and the nature of the Tribunal's inquiry arising from the pleadings and evidence. The present application concerns an inquiry into damages pursuant to NAFTA and therefore the applicable rules of international law (Article 1131(1) NAFTA). The legal principles applicable to the calculation of damages are considered in paragraphs 275 to 286 of the Award. The Tribunal noted its discretion in establishing the methodology to determine damages (Award, paragraph 279). In light of the Claimants' submissions, it is useful to elaborate on the nature of the discretion of an arbitral tribunal in the determination of damages, and its exercise in the present case.
- 36.- The discretion of an arbitral tribunal in the calculation of damages arises from the uncertainty of the inquiry into lost profits. Many tribunals have emphasised that the assessment of damages for lost profits is not a precise science. In the present arbitration the determination of lost profits involved an inquiry with a counterfactual premise, namely the consideration of the profits that would have been made if an illegal act –which did in fact occur- had not occurred. This uncertainty may be reduced or exacerbated, depending on the convergence or divergence of the expert evidence of the Parties.
- 37.- There are recognised principles to guide the arbitral tribunal in the exercise of its discretion. These principles do not eliminate the uncertainty inherent in the inquiry, or produce a mathematical exactness where this is not possible. However, they guide the arbitral tribunal in the exercise of its discretion so as to ensure that the process for the determination of damages is fair and reasonable for both parties.
- 38.- Firstly, the claimant has the burden of proving the quantum of damages. Nevertheless, the failure of a claimant to prove its damages with certainty, or to establish its right to the full damages claimed, does not relieve the tribunal of its duty to assess damages as best it can on the evidence available, as "*...it is well settled that the fact that damages cannot be assessed with certainty is no reason not to award damages when a loss has been incurred.*" (*Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/84/3), Award, 20 May 1992, (1993) 32 I.L.M. 933-1038 at paragraph 215).
- 39.- Secondly, the tribunal must avoid speculative benefits in its damages calculation. This principle is sometimes expressed as a limitation imposed by causation or remoteness of damages (Award, paragraph 282 and 285). The avoidance of speculative benefits has been a particular concern in relation to the Discounted Cash Flow ("DCF") methodology. For example, in *Amoco International Finance Corp. v. Government of the Islamic Republic of Iran* (Iran-US Claims Tribunal, Award N° 310-56-3, 14 July 1987) the Tribunal commented:

244. In the words of the Claimant's expert, 'there necessarily will be room for some variations in detail and the exercise of expert judgment in applying the [DCF] analysis in a specific instance.' It appears that 'the exercise of expert judgment' is at a peak for the determination of the adjustment of the reference discount rate. With all respect for the undoubted experience of such a distinguished expert, it remains true that expert judgement means subjective judgment...

245. In addition, some comment is appropriate concerning the Claimant's general approach to evaluation of specific risks. Not all of these risks relate only to economics and, in the words of one of the Claimant's experts, the assessment of some of them was given by him 'just as a common-sense layman'

- 40.- Similarly in *Himpurna Cal. Energy Ltd. v. PT. (Persero) Perusahaan Listrik Negara*, Final Award of 4 May 1999, 25 Yearbook Commercial Arbitration 13 (2000), the Tribunal states (at paragraphs 375-376):

The present Arbitral Tribunal wishes to be transparent in both its reasoning and its computations, fully recognising the limitations of an exercise where risks, costs, and revenues are conjectural, controversial, and imperfectly synchronised. The Arbitral Tribunal has followed three lodestars: (i) the DCF method is adopted in accordance with the understanding articulated above... (ii) the claimant must bear the burden of demonstrating the validity of its hypotheses; (iii) the infirmities perceived by the Arbitral Tribunal with respect to those hypotheses have resulted in a recomputation which the arbitrators fully realise is imprecise, but which seeks to avoid arbitrariness by compelling a thorough consideration of all relevant factors, all the while being conscious of erring, whenever imprecision is inevitable, in favour of PLN. Thus doubts have been resolved equitably in favour of the debtor.

*There is no reason to apologise for the fact that this approach involves approximations; they are inherent and inevitable. Nor can it be criticised as unrealistic or unbusiness like; it is precisely how business executives must, and do, proceed when they evaluate a going concern. **The fact that they use ranges and estimates does not imply abandonment of the discipline of economic analysis; nor, when adopted by the arbitrators, does this method imply abandonment of the discipline of assessing the evidence before them.** (emphasis added)*

- 41.- Third, and as recognised in the foregoing quotation, an arbitral tribunal should not seek a mathematical exactness where this is not possible. The experts may propose more than one methodology. The variables within the methodology may require subjective judgement. The subjective judgment, even if an expert, may be of a range rather than an exact figure for a particular variable. Experts might differ widely in the ranges proposed. The tribunal must be guided by the expert evidence, but the decision remains with the tribunal. The tribunal may, within its discretion, form an overall impression rather than assign a precise value to specific variables.

42.- Tribunals have adopted different approaches when faced with the problem of applying a particular methodology, perhaps requiring complex calculations, to their own variables. In *Phillips Petroleum Co. Iran v. Government of the Islamic Republic of Iran*, Award No. 425-39-2 (29 June 1989) the Iran-US Claims Tribunal (at paragraph 114) stated that “*the Tribunal does not intend to make its own DCF analysis with revised components, but rather to determine and identify the extent to which it agrees or disagrees with the estimates of both Parties and their experts concerning all these elements of valuation*” and that in particular it would not ‘substitute the claimant’s discount rate with its own’. If the arbitral tribunal cannot accept the variables proposed by the parties then the question is whether there is sufficient evidence on which to base an estimate of damages, evaluating the evidence in its totality and notwithstanding the doubts relating to specific variables.

43.- The Claimants’ analysis of the Award in its application for a supplementary decision often assumes a mathematical exactness at odds with the reality of the inquiry, and the above principles. In particular the Claimants assume that because the Tribunal adopted a damages figure proposed by Mr. Pablo Ri6n, the Tribunal therefore accepted all variables proposed by Mr. Ri6n in reaching this figure. The statement (paragraph 31 above) that “*In adopting Mr. Ri6n’s damages calculation the Tribunal necessarily adopted each of Mr. Ri6n’s three input values*” is fallacious as it assumes a mathematical calculation without any discretion. The Tribunal accepted Mr. Ri6n’s variables only to the extent expressly so stated in the Award.

44.- The Claimants submit that the Award did not adequately consider

However, the precise quantification of these variables was not a question for decision within the meaning of Article 57 because of the discretionary nature of the damages inquiry, as already described. The quantification of these variables was not a question that the Tribunal was obliged to decide. Rather these variables were considered by the Tribunal in deciding questions relating to the calculation of the Claimants’ damages, the burden of proof, the reliability of the proposed methodology, the avoidance of speculative damages, and the proper exercise of its discretion.

45.- For these reasons, the Arbitral Tribunal finds that the Claimants have not identified any questions that the Arbitral Tribunal omitted to decide within the meaning of Article 57. Accordingly, the application for a supplementary decision is dismissed.

46.- Nevertheless, and in light of the Claimants' extensive submissions on this matter, the Arbitral Tribunal makes the following observations. The Claimants maintained throughout the arbitration the correctness of its evidence on three variables. The Arbitral Tribunal considered the probative value of the Claimants' evidence (cf. Article 41 AF Rules) and found, as stated in the Award, that it did not substantiate the variables proposed. Once it rejected the Claimants' calculation, the Tribunal did not attempt to assign a precise figure for each of these variables. The Tribunal formed an impression of these variables based on the range of possibilities presented and the totality of the evidence. Indeed, a feature of the expert evidence of Mr. Pablo Ri3n was his resistance to assigning a precise value to counterfactual variables that involved judgment, not measurement ("*some of these things are not entirely precise*" (Transcript, 944)), and might be best conceived in terms of a range rather than a single figure (Award, paragraph 267; Transcript 913, 948).

47.- The Tribunal was impressed by the uncertainties attached to much of the evidence affecting these three variables, and particularly by the Respondent's important and realistic assessment of the



48 The Tribunal preferred Mr. Ri3n's assessment of the variables affecting the assessment of lost profits, notwithstanding his admitted imprecision and ranges of figures, to the Claimants' speculative claims. The Tribunal was not obliged to perform its own calculation using exact variables where the testimony so clearly demonstrated that precision was illusory, and still less to look for some 'middle way' between the positions of the Parties' experts. In the exercise of its discretion, and recognising Mr. Ri3n's own reservations regarding certain elements of his calculation, the Tribunal was nevertheless satisfied that he had made a careful and expert assessment of these variables. The Tribunal must, in the final analysis, award an exact figure even if it considers that the damages would be better

conceived as a range of probabilities, and the Tribunal decided that the most justified single figure on the evidence for the profits that might reasonably have been anticipated in the absence of the Tax, and therefore the amount reasonably required to compensate for Mexico's breach of NAFTA, was US\$ 33,510,091.

49.- For all the above reasons, the Arbitral Tribunal denies the Claimants' request for a supplementary decision with respect to the determination of ALMEX's lost profits.

(b) Lost Profits on U.S.-origin HFCS:

50.- The Claimants contend that the Award contains material omissions and factual errors in its determination that the Claimants (rather than ALMEX) are not entitled to recover lost profits on U.S.-origin HFCS that ALMEX distributed using the Claimants' investment in distribution facilities in Mexico. In particular, the Claimants allege that the quotations from other awards referred to in the Award do not support the Tribunal's jurisdictional decision regarding U.S.-origin HFCS. Furthermore, the Claimants consider that the Award omitted reasons for disregarding the fact that the value of the investment included its value in allowing the Claimants to distribute U.S.-origin HFCS in Mexico.

51.- The Respondent contends that the Claimants seek to reargue the merits of the case regarding the Tribunal's determination as to its lack of jurisdiction to award damages in connection with HFCS originating from the Claimants' plants in the United States. The Claimants seek in reality to reverse the Tribunal's decision on a question of law.

52.- The Claimants suggest various 'questions' that the Tribunal failed to decide which in fact are points relating to the evidence or the interpretation of other NAFTA awards. The question considered in paragraphs 270-274 of the Award was whether the Claimants ADM ad TLIA could recover the lost profits on the HFCS that they would have produced in the United States and sold in Mexico 'but for' the Tax. The Award addressed and decided this question in the negative, and clearly explained its reasons. When the Claimants manufactured HFCS in the United States for sale in Mexico, the investment of the Claimants responsible for generating the profits is the investment in plant and other facilities in the United States. These losses did not relate to an investment in Mexican territory, and therefore the Tribunal did not have jurisdiction over these alleged losses.

53.- The Claimants' Submission (paragraphs 79-82) raises various points relating to the position of the Member States in *S.D. Myers, Inc. v. Government of Canada* and *Bayview Irrigation District, et al. vs. the United Mexican States* (ICSID Case No. ARB (AF)/05/01). The Claimants complain of the lack of explanation of the

factual differences of these cases with the facts in issue in this arbitration. The Claimants' Submission misunderstands the scope of a supplementary decision under Article 57, and demonstrates the dangers of attempting to justify a supplementary decision on the basis of allegedly inadequate reasoning. An application under Article 57 requires the Tribunal to be satisfied that there is in fact a question that the Tribunal has omitted to decide, and to proceed to modify an award on the basis proposed by the Claimants would call into question the finality of awards and undermine the juridical security of investment arbitration.

- 54.- The Claimants also refer to their investment in ALMEX's Mexican distribution facilities as a justification for their right to recover lost profits on US manufactured fructose that would have been distributed through these facilities. The Claimants here confuse the losses of their investment in Mexico (ALMEX) with their losses from their U.S. operations. The Tribunal has jurisdiction to award compensation for losses of the Claimants in respect of their investment in Mexico in their capacity as investors (paragraph 274). Therefore the award of damages includes the lost profits suffered by *ALMEX* arising from: (i) the sale and distribution of HFCS manufactured by ALMEX in Mexico; and (ii) the resale and distribution by *ALMEX* of HFCS produced in the United States. However, the damages do not include the profits ADM and TLIA would have earned from HFCS manufactured in the United States and subsequently exported to Mexico for resale by ALMEX.
- 55.- For all the above reasons, the Arbitral Tribunal denies the Claimants' request for a supplementary decision with respect to the Award's jurisdictional decision concerning lost profits on U.S. origin HFCS.
- (c) **Interest:**
- 56.- The Claimants further contend that the Award fails to address key questions in its determination that Claimants were not entitled to recover compound interest on the damages for their lost profits. In particular, the Claimants complain that "*the Award omits to state reasons...for the implicit determination that a simple interest rate is commercially reasonable....*". Later in the same paragraph the Claimants refer to their opinion that "*to Claimants knowledge, no commercial investment vehicles offer simple interest*" (paragraph 88, emphasis original).
- 57.- In this section of the Award (paragraphs 294-300) the Tribunal considered the questions of whether interest should be awarded, the applicable rate of interest, whether the interest should be simple or compound, and the period of interest. These questions were all decided in the Award, and the reasons for the decisions explained.

- 58.- The Claimants are not satisfied with the Tribunal's decision, or at least the explanation of its decision, to award simple rather than compound interest. However, as explained, it is not a proper use of Article 57 to seek additional reasons for a question that was decided in the Award. Indeed, considered in its totality the Claimants' submission on this question lacks all merit. Its premise is to ignore the express wording of Article 57 and to read Article 57 to require reasons, then to analyse the Tribunal's reasons to identify a doubt, then to present this doubt either as a question not decided or a decision not reasoned. At best, the methodology demonstrates the scale of the Claimants' misapprehension of the Article 57 power. Its possible consequence in costs is considered later.
- 59.- The Tribunal awarded simple interest and rejected the claim for compound interest, and gave its reasons for this decision. There is no outstanding question and accordingly the Claimants' request for a supplementary decision on this ground is also rejected.

V. DISCLOSURE OF AWARD

- 60.- The Respondent requests the Tribunal to reject any request by Claimants to redact the Award and to order immediately its publication, as the Claimants have initiated annulment proceedings before the Superior Court of Ontario, which are open to the public. The Claimants allege that through the application to set aside a part of the Award, they have not indirectly publicized certain confidential information; and if the Claimants decide to continue with the proceedings in Canada they will seek a procedural order of the court to protect any confidential information contained in the record, or seek an agreement with Mexico, prior to filing any evidence which may compromise any confidential information addressed in the Award.
- 61.- On 24 January 2006, the Parties advised the Tribunal that they had agreed on the terms of an order to protect confidential information in this arbitration and requested the Tribunal to issue an order recording the Parties' agreement. On 21 July 2006, the Tribunal issued Procedural Order No. 1 'Concerning Confidential Information' formalising the Parties agreement in an order of the Tribunal.
- 62.- The Claimants' application to the Superior Court of Ontario, and the material provided to date in support of its application, has not been shown to require the disclosure of the Award or otherwise to breach the terms of the Parties' agreement as recorded in Procedural Order N° 1. Nor has the Respondent demonstrated any inevitable disclosure of confidential information. Further, the Superior Court of Ontario has the power to decide in the annulment proceedings the degree of protection or disclosure of confidential information required according to the law of Ontario, and will no doubt take into consideration the Parties' agreement and any further submissions on this issue. Finally, the possibility of some disclosure in

the Ontario proceedings, even if established, does not necessarily justify the complete and immediate publication of the Award as sought by the Respondent.

- 63.- For these reasons, the Respondent's application to reject any request by Claimants to redact the Award and to order immediately its publication is rejected.

V. COSTS

- 64.- The Respondent's Response requests that the Claimants "be ordered to pay the expenses and costs incurred by Mexico for the preparation of this brief, in addition to paying the fees of the tribunal." In its letter of 3 April 2008 the Respondent quantified its costs for February and March 2008 at US\$54,753.00. This figure includes only the costs of external advisers, and not the costs incurred by the Secretaría de Economía internally.
- 65.- The Arbitral Tribunal has jurisdiction to make a decision as to the costs of these post-Award applications. Decisions pursuant to Articles 55, 56 and 57 AF Rules are subject to the provisions of Articles 52 and 53 and form part of the original award. Article 52(1)(j) states that the Award shall contain any decision of the Tribunal regarding the cost of the proceeding, and the content of this decision and related powers is further elaborated in Article 58.
- 66.- The Claimants requests for supplementary decisions have proved to be without foundation and have been rejected in their entirety. The Claimants' application for an interpretation has also been rejected, and the Respondent's application for a correction to the Award has been accepted. The Respondent's application relating to the disclosure of the Award was rejected, but this application has formed a small part of the overall submissions. In light of the above, it is evident that the Respondent is the successful party in relation to these post-Award applications.
- 67.- The Claimants have sought to use Article 57 AF Rules to open and re-argue questions that were decided in the Award. Without any foundation in the text of Article 57, the Claimants have argued that Article 57 justifies an application for further reasons. The Claimants' many allegations of the Tribunal's failure adequately to reason its decisions have formed the most significant and time consuming element of these post-Award applications. In many instances the Claimants' real complaint has appeared to be that the Tribunal did not accept its evidence at the hearing. The Respondent has been required to respond in detail to unjustified and on occasion reckless argumentation of the Claimants. The Respondent has incurred substantial costs and in the circumstances a costs order in its favour is justified.

68.- Accordingly, the Claimants shall pay the fees and expenses of the members of the Arbitral Tribunal and the expenses and charges of the Secretariat in relation to these post-Award proceedings. The Respondent is also entitled to recover certain legal costs associated with responding to the Claimants' applications for supplementary decisions. The Tribunal considers that the external legal costs associated with the preparation of the Respondent's Response amounting to US\$54,753.00 is a reasonable figure for this item.

VI. DECISION

69.- For the foregoing reasons, this Arbitral Tribunal hereby:

1. Dismisses the Claimants' requests to supplement the Award;
2. Allows the Respondent's request for the correction of the Award, and orders by way of correction pursuant to Article 56 AF Rules that in subparagraphs 4 and 5 of the dispositive part of the Award (paragraph 304) the word "Claimants" shall be deleted and replaced by the name "ALMEX".
3. Dismisses the Claimants' request for the interpretation of the Award;
4. Dismisses the Respondent's request in respect of redaction and disclosure of the Award.
5. Orders that the Claimants shall pay the fees and expenses of the members of the Arbitral Tribunal and the expenses and charges of the Secretariat in relation to these post-Award proceedings, and shall pay to the Respondent the sum of US\$54,753.00 (FIFTY-FOUR THOUSAND SEVEN HUNDRED AND FIFTY THREE UNITED STATES DOLLARS) in respect of its legal costs.

Made as at Toronto, Canada, in English and Spanish, both versions being equally authentic.

THE ARBITRAL TRIBUNAL

[signature]

Mr. Arthur W. Rovine
Arbitrator

Date: 17 June 2008:

[signature]

Mr. Bernardo M. Cremades
Presiding Arbitrator

Date: 9 June 2008

[signature]

Mr. Eduardo Siqueiros
Arbitrator

Date: 12 June 2008