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CERTIFICATE

Cargill, Incorporated

v.

Republic of Poland

UNCITRAL Arbitration Rules Proceeding

I hereby certify that the attached document is a true copy of the Final Award of the Arbitral Tribunal dated February 29, 2008.

Eloïse Obadia
Secretary of the Tribunal

Washington, D.C., March 5, 2008

Arbitration Proceedings conducted under the UNCITRAL Rules

CARGILL, INCORPORATED (United States of America)

Claimant

v.

REPUBLIC OF POLAND

Respondent

FINAL AWARD

Rendered by an Arbitral Tribunal composed of:
Prof. Gabrielle Kaufmann-Kohler, President
Prof. Emmanuel Gaillard, Arbitrator
Prof. Bernard Hanotiau, Arbitrator
Secretary of the Tribunal:
Ms. Eloïse Obadia

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ABBREVIATIONS

BIT or Treaty	:	Agreement between the Republic of Poland and the United States concerning Business and Economic Relations dated 21 March 1990
Cargill's Memorial	:	Cargill's Memorial of 16 September 2005
Cargill's FPHB	:	Cargill's First Post-Hearing Brief of 29 September 2006
Cargill's Reply	:	Cargill's Reply of 24 March 2006
Cargill's SPHB	:	Cargill's Second Post-Hearing Brief of 27 October 2006
ER	:	Expert Report
Exh. C...	:	Cargill's Exhibit n°...
Exh. R...	:	Poland's Exhibit n°...
MT	:	Metric ton(s)
PO	:	Procedural Order
Poland's Counter-Memorial	:	Poland's Statement of Defense and Counter-Memorial of 20 January 2006
Poland's FPHB	:	Poland's First Post-Hearing Brief of 29 September 2006
Poland's Rejoinder	:	Poland's Rejoinder of 15 May 2006
Poland's SPHB	:	Poland's Second Post-Hearing Brief of 30 October 2006
RA	:	Request for Arbitration
TR/...	:	Transcript of the evidentiary hearing of 19-23 June 2006, testimony of ...
WS/...	:	Witness Statement of ...

* * * * *

I. THE PARTIES

1. THE CLAIMANT

1. The Claimant is Cargill, Incorporated ("Cargill" or "the Claimant"), a company incorporated and existing under the laws of the United States of America. The address of its principal place of business is P.O. Box 5724, Minneapolis, MN 55440, U.S.A.

2. Cargill was represented in this arbitration by Mr. Daniel M. Price (until 6 July 2007) and Mr. Stanimir A. Alexandrov, Sidley Austin LLP, 1501 K Street, NW, Washington, D.C., 20005, USA, as well as by Prof. Grzegorz Domański and Mr. Marek Świątkowski, Domański Zakrzewski Palinka Limited Partnership Law Office, Rondo ONZ 1, 00-124 Warszawa, Poland.

3. Cargill is a marketer, processor, and distributor of agricultural, food, financial, and industrial products and services.

2. THE RESPONDENT

4. The Respondent is the Republic of Poland ("Poland" or "the Respondent").

5. Poland was represented in this arbitration by Prof. Stanisław Sołtysiński, Dr. Ewa Skrzydło-Tefelska, Dr. Rudolf Ostrihansky, and Dr. Katarzyna Michałowska, Sołtysiński Kawecki & Szlęzak Kancelaria Radców Prawnych i Adwokatów Spółka Komandytowa w Warszawie, 02-034 Warszawa, ul. Wawelska 15 B, Poland, as well as by Mr. David Pawlak, as Of counsel, David A. Pawlak LLC, 1661 Crescent Place, NW, Washington, D.C., 20009, USA & Grójecka 40 m/11, 02-320 Warszawa, Poland.

II. THE ARBITRAL TRIBUNAL

6. The co-arbitrator nominated by the Claimant by letter dated 13 September 2004 is Prof. Emmanuel Gaillard, Shearman & Sterling LLP, 114, avenue des Champs-Elysées, 75008 Paris, France.

7. The co-arbitrator nominated by the Respondent by letter dated 1 October 2004 is Prof. Bernard Hanotiau, Hanotiau & Van Den Berg, Avenue Louise 480 B.9, IT Tower 9th Floor, 1050 Bruxelles, Belgium.

8. The president was proposed jointly by the co-arbitrators on 20 October 2004 for consideration by the parties, and was thereafter appointed upon agreement of the latter, pursuant to Article 9 of the ICSID Arbitration (Additional Facility) Rules (the "ICSID Additional Facility Arbitration Rules"). The president is Prof. Gabrielle Kaufmann-Kohler, Lévy Kaufmann-Kohler, 3-5, rue du Conseil-Général, P.O. Box 552, 1211 Geneva 4, Switzerland.

III. SUMMARY OF THE ARBITRAL PROCEEDINGS

1. INITIATION OF THE ARBITRATION AND CONSTITUTION OF THE ARBITRAL TRIBUNAL

9. On 29 April 2004, Cargill filed a Request for Arbitration with the Secretary-General of the International Centre for Settlement of Investment Disputes ("ICSID").

10. On 30 April 2004, the Deputy Secretary-General of ICSID acknowledged receipt of Cargill's Request for Arbitration. On 7 July 2004, the Request for Arbitration was registered in the Additional Facility Arbitration Register pursuant to Article 5 of the ICSID Additional Facility Arbitration Rules. The registration was based on the ICSID arbitration clause in the Agreement between the Republic of Poland and the United States Concerning Business and Economic Relations (the "BIT" or "Treaty", Exh. C21), signed on 21 March 1990 and which entered into force on 6 August 1994.

11. On 7 July 2004, the parties were invited to constitute an arbitral tribunal in accordance with Chapter III of the ICSID Additional Facility Arbitration Rules. After some disagreement between the parties about the constitution of the Tribunal, the Deputy Secretary-General of ICSID informed the parties on 9 September 2004 that the Tribunal was to be constituted in accordance with Article 9 of the ICSID Additional Facility Arbitration Rules, i.e. that the Tribunal was to consist of three arbitrators, one arbitrator appointed by each party and the president of the Tribunal appointed by agreement between the parties.

12. On 13 September 2004, Cargill appointed Prof. Emmanuel Gaillard as arbitrator. On 22 September 2004, ICSID confirmed that Prof. Gaillard had accepted his appointment.

13. On 1 October 2004, the Respondent appointed Prof. Bernard Hanotiau as arbitrator. On 7 October 2004, ICSID confirmed that Prof. Hanotiau had accepted his appointment.

14. On 20 October 2004, the co-arbitrators jointly proposed the appointment of Prof. Gabrielle Kaufmann-Kohler as president of the Tribunal. On 1 November 2004, Prof. Kaufmann-Kohler accepted her appointment as president of the Tribunal.

15. On 2 November 2004, the Secretary-General of ICSID informed the parties that Prof. Kaufmann-Kohler had accepted her appointment, and that on that date, the Tribunal was deemed to have been constituted and the proceedings to have begun. The Secretary-General of ICSID also informed the parties that Ms. Martina Polasek, ICSID counsel, would serve as Secretary of the Tribunal. Ms. Polasek was later replaced by Ms. Eloïse Obadia, ICSID senior counsel.

2. THE ARBITRAL TRIBUNAL'S FIRST SESSION

16. The Arbitral Tribunal held a first session on 10 January 2005 at the offices of the World Bank in Paris. In addition to the Members of the Tribunal and the Secretary, the following persons attended the hearing:

- Representing Cargill:
  - Mr. Todd T. Erickson, senior attorney, Cargill International SA,
  - Mr. Cédric Grandjean, attorney, Cargill International SA,
  - Mr. Daniel M. Price, Sidley Austin LLP,
  - Mr. Stanimir A. Alexandrov, Sidley Austin LLP,
  - Prof. Grzegorz Domański, Domański Zakrzewski Palinka LP, and
  - Mr. Marek Świątkowski, Domański Zakrzewski Palinka LP.
- Representing Poland:
  - Prof. Stanisław Sołtysiński, Sołtysiński Kawecki & Szlęzak,
  - Dr. Ewa Skrzydło-Tefelska, Sołtysiński, Kawecki & Szlęzak, and
  - Dr. Rudolf Ostrihansky, Sołtysiński, Kawecki & Szlęzak.

17. A sound recording was made of the session, copies of which were sent to the parties. The Secretary also prepared summary minutes of the session.

18. At the outset of the session, a number of procedural issues were dealt with. In particular, it was noted that, subject to any objections to jurisdiction, the proceedings would be conducted in accordance with the ICSID Additional Facility Arbitration Rules in force since 1 January 2003.

19. In the course of the session, Poland stated that it was formally raising an objection to the jurisdiction of the Arbitral Tribunal.

3. AGREEMENT ON THE JURISDICTION OF THE ARBITRAL TRIBUNAL AND THE UNCITRAL RULES

20. In a document entitled "Agreement on Jurisdiction" dated 10 March 2005, the parties agreed that the arbitration would proceed under the UNCITRAL Arbitration Rules (the "UNCITRAL Rules") and would be administered by ICSID. The parties agreed that the Arbitral Tribunal would be re-established, in the same composition as a tribunal acting under the UNCITRAL Rules. Poland agreed not to raise objections to the jurisdiction of the Tribunal.

21. The "Agreement on Jurisdiction" further provided the following:

> *The seat of the Tribunal shall be Paris, the remuneration of the arbitrators shall be $500 per hour. All other matters agreed during the session of the arbitral tribunal held in Paris on 10 January 2005 shall be deemed to be agreed between the parties with respect to the arbitration governed by the UNCITRAL Rules.*

22. In a procedural order of 4 April 2005, the Tribunal took due notice of the "Agreement on Jurisdiction." In order to implement such Agreement, the Tribunal provided that pursuant to Rule 49(1) of the ICSID Additional Facility Arbitration Rules, the arbitration was discontinued as an ICSID proceeding and would continue on the merits under the UNCITRAL Rules and administered by ICSID. The Tribunal further provided that the Request for Arbitration dated 29 April 2004 would be deemed to be the notice of arbitration under Article 3 of the UNCITRAL Rules, and that the Tribunal would be re-established and deemed regularly constituted under the UNCITRAL Rules.

4. PRE-HEARING WRITTEN PHASE

23. By letter dated 29 April 2005, Cargill requested that the Tribunal order the bifurcation of the proceedings into a liability phase and a damage phase. Poland objected to the bifurcation of the proceedings on 10 May 2005.

24. In an order of 31 May 2005, the Tribunal dismissed the request for bifurcation as not appropriate. It noted however the possibility of organizing two separate hearings for liability and damages, while such matters would be dealt with together in the written submissions. The Tribunal also invited the parties to submit an agreed schedule for the merits.

25. On 9 June 2005, Cargill informed the Tribunal that the parties had agreed on the following schedule:

- Cargill's Memorial: 16 September 2005
- Poland's Counter-Memorial: 16 December 2005
- Cargill's Reply: 17 February 2006
- Poland's Rejoinder: 31 March 2006
- Hearing: May/June 2006

26. On 16 June 2005, the Tribunal informed the parties that its members had booked five days during the week of 19 June 2006 for the hearing.

27. On 10 August 2005, Cargill requested that the Arbitral Tribunal direct Poland to desist from engaging, through its domestic authorities, in "improper discovery" from Cargill. Cargill's request was accompanied by one binder of exhibits (Exh. 1 to 11). Poland commented on Cargill's request on 26 August 2005. Four days later, on 30 August 2005, Cargill filed an unsolicited reply, which the Tribunal accepted, inviting Poland to file a rejoinder by 5 September 2005, which Poland did. The Tribunal then invited Cargill and Poland to file their observations regarding three specific issues by 26 September 2005 and 6 October 2005 respectively, which the parties did.

28. In an order dated 24 October 2005, the Tribunal dismissed Cargill's request for provisional measures and reserved the costs of the proceedings related to this request to be determined at a later stage.

29. In the meantime, Cargill had filed its Memorial on the merits on 16 September 2005 together with seven affidavits (Exh. C1 to C7), one expert report (Exh. C8) and 93 exhibits (Exh. C9 to C101).

30. On 4 November 2005, Poland requested the production of twenty-eight documents and categories of documents ("Poland's First Document Production Request"). Cargill

commented on 11 November 2005 and produced one document responsive to Poland's request No. (2). It also stated that it would review its files and produce any responsive non-privileged documents that it might locate, in particular, documents responsive to Poland's requests No. (1), (22), (23), and (24). Cargill objected to the remainder of Poland's requests. On 16 November 2005, Cargill then produced the Polish original of the letter already submitted as Exhibit C9 in response to Poland's request No. (1). Two days later, it informed ICSID that it was ready to produce the documents responsive to Poland's requests Nos. (22), (23), and (24) on which its damage expert had relied, subject to the issuance of a protective order ensuring confidentiality.

31. After some additional correspondence, including a request from Poland for an extension of the time-limit for the filing of the Counter-Memorial, the Tribunal, on 29 November 2005, ordered the production by Cargill of a number of documents responsive to some of Poland's requests[1]. It issued a protective order to safeguard confidential business information contained or derived from such documents. It also extended time for the filing of the Counter-Memorial to 20 January 2006, the Reply being filed by 3 March 2006, and the Rejoinder by 14 April 2006.

32. On 2 December 2005, Poland requested a clarification of the Tribunal's PO of 29 November 2005, and a supplemental order for document production ("Poland's Second Document Production Request"). Cargill filed its comments on 5 December 2005 (on clarification) and on 14 December 2005 (on supplemental documents).

33. On 9 December 2005, the Secretary of the Tribunal ruled on the request for clarification and the Tribunal issued a procedural order on 22 December 2005 on the document

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[1] The Tribunal ordered the production of, *inter alia*, the following documents:

- All communications between Hoop S.A. and Cargill directly pertaining to the decrease in Hoop S.A.'s purchases of isoglucose subsequent to the imposition of quotas by Poland.
- All communications between Cargill and Coca-Cola Beverages Polska sp. z o.o. directly pertaining to the impact of the imposition of isoglucose quotas on the purchases of isoglucose by Coca-Cola Beverages Polska sp. z o.o. and on the contractual relationship between the latter and Cargill.
- All communications between Cargill and Maspex directly relating to the impact of the imposition of quotas by Poland on the amount of isoglucose sold to Maspex.
- All communications between Cargill and Maspex directly related to the sale of syrup G29 after the imposition of isoglucose quotas by Poland.
- All the letters of interest and of intent received by Cargill, that have not yet been produced by Cargill with its Statement of Claim, and all other communications from purchasers in which the latter expressed an interest in purchasing isoglucose from Cargill.
- The formal five-year agreement concluded by Cargill and Hoop S.A. in the fall of 1999.
- The documents evidencing an agreement between Coca-Cola Beverages Polska sp. z o.o. and Cargill, be it the answer of Coca-Cola Beverages Polska sp. z o.o. to Cargill's offer of 10 August 2001, an exchange of further written communications, or a formal agreement signed by the two entities.

production allowing the production of one category of documents[2] and refusing the others[3].

34. On 21 December 2005, Poland filed yet another submission request for production of documents and for explanations regarding the redaction of certain documents relied upon by Cargill's damage expert, produced by Cargill and marked as "Business Confidential" ("Poland's Third Document Production Request"). Cargill filed its comments on 5 January 2006, produced documents responsive to one of Poland's requests, and provided explanations regarding the redacted documents.

35. Following subsequent comments by the parties on 12 and 17 January 2006, the Tribunal ordered, on 23 January 2006, that the documents which Cargill had produced in a redacted form be produced again without redactions. The Tribunal also took due notice of the documents that Cargill had produced with its comments of 5 January 2006, and dismissed Poland's other requests for document production.

36. Poland filed its Counter-Memorial on the merits on 20 January 2006 together with four affidavits (Exh. R1-R4), one expert report (R199), and 207 exhibits (Exh. R5-R198 and R200-R212).

37. On 2 February 2006, Cargill requested the production of documents, and a three-week extension for the filing of the Reply ("Cargill's First Document Production Request"). Poland commented on 10 February 2006.

38. After further communications on 13 and 16 February 2006 from the parties, the Tribunal ordered on 24 February 2006 the production of certain documents[4], and

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2 Namely documents directly evidencing the moment of delivery of the isoglucose production equipment at the Bielany Wroclawskie facility, if any.

3 The Tribunal also took due notice of the fact that Cargill had agreed to review its files and produce, inter alia, the documents that had formed the basis for Mr. Haberman's statement in his report that "*the production assets are being depreciated over an average period of 10 years, 2 months*" which "*Cargill estimates* [...] *to be the useful life of the isoglucose plant.*"

4 It ordered the production of:

- Those portions of the records (including, but not limited to, stenographic records) of the meetings of the Council of Ministers of 7 January 1999, 28 January 1999, 16 February 1999, 20 May 1999, 9 July 1999, 27 July 1999, 7 September 1999, 13 July 2000, 30 November 2000, and 12 December 2000, which pertain specifically to the issue of the introduction of isoglucose quotas in relation to a new or revised sugar law, following the 1994 Sugar Law.
- Documents pertaining to the production, sales, capacity, and/or demand for isoglucose in Poland, on which Poland relied in deciding to request, on 22 December 1999, the amount of 20,000 MT dry matter, on 14 May 2002, the amount of 42,200 MT dry matter, on 11 October 2002, the amount of 62,200 MT dry matter, on 20 November 2002, the amount of 62,200 MT dry matter, and in deciding to increase, on 13 December 2002, the isoglucose quota proposed by the EU by 6,210 MT dry matter, to the exclusion of those documents that had already been submitted by Cargill with its Memorial and by Poland with its Counter-Memorial.
- Documents regarding isoglucose production, sales, trade, demand, and/or capacity in Poland; which the Respondent submitted to the EU prior to the issuance of the EU's proposals on 30

extended the deadline for the filing of the Reply to 24 March 2006 and of the Rejoinder to 5 May 2006.

39. On 12 March 2006, Cargill requested that the Tribunal order Poland to comply with the PO of 24 February 2006 with respect to document production and with the PO of 29 November 2005 with respect to confidentiality.

40. Poland commented on 16 March 2006 and produced additional documents. Two further exchanges of communications took place on 21 and 23 March 2006, and 23 and 24 March 2006.

41. On 4 April 2006, the Tribunal ordered Poland to comply with the PO of 24 February 2006, and to deliver certain specified records to Cargill[5]. The Tribunal deferred its decision on Cargill's request that the Tribunal draw adverse inferences from Poland's alleged failure to produce documents responsive to the order of 24 February 2006[6], and gave additional directions on confidentiality[7].

42. Cargill filed its Reply on 24 March 2006 together with eight affidavits (Exh. C102-C109), two expert reports (Exh. C110 and C111), and 54 exhibits (Exh. C112-C165).

43. On 31 March 2006, Poland requested an extension of the time limit for the Rejoinder to 2 June 2006, a postponement of the hearing, and the production of the information on which Cargill's damage expert, Mr. Haberman, had relied for the preparation of his second report. On 5 April 2006, Cargill objected against Poland's time extension and document production request and attached an eight-page document allegedly provided to Mr. Haberman for the preparation of the latter's second report.

January 2002 for an isoglucose quota in the amount of 2,493 MT dry matter, on 15 April 2002 for an isoglucose quota in the amount of 2,493 MT dry matter, on 20 June 2002 for an isoglucose quota in the amount of 2,493 MT dry matter, on 31 October 2002 for an isoglucose quota in the amount of 6,232 MT dry matter, and in December 2002 for an isoglucose quota in the amount of 20,571 MT dry matter, to the exclusion of those documents that had already been submitted by Cargill with its Memorial or by Poland with its Counter-Memorial.

- Communications between the EU and Poland pertaining directly to the Parliament's request that applicant countries supply data for the period 1995-1999, on the one hand, and to the Commission's decision to extent the relevant period to include the year 2000, on the other hand.

5 Specifically, those portions of the records (including, but not limited to, stenographic records) of the meetings of the Council of Ministers' Economic Committee held on 7 January 1999, 28 January 1999, 20 May 1999, 9 July 1999, and 13 July 2000, which pertained specifically to the issue of the introduction of isoglucose quotas in relation to a new or revised sugar law following the 1994 Sugar Law.

6 Considering the Tribunal's analysis below, this request has become moot.

7 With respect to Cargill's request that the Tribunal order Poland to comply with the Tribunal's Order of 29 November 2005 regarding confidentiality, the Tribunal made the following order: "*With respect to the portions of the records of the Council of Ministers' meetings already produced by the Respondent, on the one hand, and the portions of the records of the meetings of the Council of Ministers' Economic Committee to be produced by the Respondent in compliance with ¶ (i) of the present Order, on the other hand, Cargill shall sign and execute a declaration in compliance with the Confidentiality Agreement and Undertaking proposed by the Respondent on 6 March 2006, to the exclusion of ¶¶ 6 and 7 of this Agreement.*"

44. In an order of 10 April 2006, the Tribunal granted Poland an extension for the Rejoinder to 15 May 2006, stated that the hearing would take place as scheduled between 19 and 23 June 2006, and scheduled a pre-hearing telephone conference. Two days later, it took due notice of Cargill's production of an eight-page document by Cargill's damage expert for his second Report.

45. Poland filed its Rejoinder on 15 May 2006, together with four affidavits (Exh. R213-R216), one expert report (Exh. R217), and 126 exhibits (Exh. R218-R343).

5. THE EVIDENTIARY HEARING

46. On 22 May 2006, the parties addressed to the Tribunal a joint letter regarding the organization of the 19 to 23 June 2006 evidentiary hearing. On the same day, Cargill filed an additional communication in this respect. On the following day, the president of the Tribunal (by delegation of the other members of the Tribunal), the secretary, and counsel for the parties held a telephone conference to discuss all outstanding procedural and organizational matters regarding the evidentiary hearing. One day later, each of the parties addressed yet another communication to the Tribunal in this respect and on 29 May 2006, the Tribunal followed up on the conference call and issued an order on the organization of the hearing. On 6 June 2006, it issued an additional order regarding some further organizational matters.

47. The evidentiary hearing was held in Paris from 19 to 23 June 2006. The following witnesses and experts were heard:

- On behalf of Cargill:
  - Mr. Gerrit Hueting (fact witness),
  - Mr. Arkadiusz Wawryszewicz (fact witness),
  - Mr. Marcin Wielgus (fact witness),
  - Mr. Sławomir Witek (fact witness),
  - Ms. Ruth Rawling (fact witness), and
  - Mr. Philip Haberman (Cargill's expert on damages).
- On behalf of Poland:
  - H.E. Ambassador Jan Truszczyński (fact witness),

- H.E. Mr. Artur Balazs (fact witness),
- Mr. Marek Zaczek (fact witness),
- Ms. Bogumiła Kasperowicz (fact witness),
- H.E. Mr. Jarosław Kalinowski (fact witness), and
- Mr. Roger Stanley (Poland's expert on damages).

48. At the end of the hearing, the Arbitral Tribunal and the parties agreed on the following calendar:

- simultaneous post-hearing briefs on 29 September 2006;
- simultaneous rebuttal post-hearing briefs on 27 October 2006; and
- statements on costs on 10 November 2006.

6. THE TRIBUNAL'S DECISION REGARDING THE ADMISSIBILITY OF THE KACZMAREK AFFIDAVIT

49. With its Reply of 24 March 2006, Cargill filed a written witness statement signed by former Minister of State Treasury and member of the Council of Ministers Wiesław Kaczmarek (the "Kaczmarek Affidavit" – Exh. C106).

50. Mr. Kaczmarek was called by Poland at the evidentiary hearing for cross-examination.

51. By letter dated 7 June 2006, Cargill informed the Tribunal that Mr. Kaczmarek would not be in a position to attend the hearing for allegedly valid reasons. It requested that the Tribunal "*consider Mr. Kaczmarek's affidavit, taking into account the testimony of other witnesses at that hearing and evidence already on the record*" (Cargill's letter of 7 June 2006, p. 2). On 9 June 2006, Poland replied arguing that Cargill had offered no valid reason for Mr. Kaczmarek's non-appearance. Cargill responded on the same day. At the close of the hearing, the Tribunal directed that if Poland should move to strike the Kaczmarek Affidavit, it should do so no later than 6 July 2006, with the Claimant replying by 17 July 2006 at the latest (Minutes of the Hearing on the Merits, 19-23 June 2006, ¶ 4). Poland indeed requested that the Tribunal find the Kaczmarek Affidavit inadmissible on 6 July 2006 and Cargill opposed the request on 17 July 2006. In an order of 28 July 2006, the Tribunal decided that it would not consider

Mr. Kaczmarek's Affidavit as there were no exceptional circumstances or valid reasons for Mr. Kaczmarek's non-appearance before the Tribunal[8].

7. THE POST-HEARING BRIEFS

52. The parties simultaneously filed their first post-hearing briefs on 29 September 2006. Together with its first post-hearing brief, Cargill filed one annex, a "Revised Exhibit C135," as well as five exhibits (Exh. C166 – Exh. C170) introduced at the evidentiary hearing as new exhibits, and Poland's appendices numbered A0, A1, A2, A3, B, and C.

53. By letter dated 9 October 2006, Poland requested that the Tribunal grant a two-day extension for the filing of Poland's second post-hearing brief, which the Tribunal did until 30 October 2006, being specified that Cargill's time limit would remain 27 October 2006, but that the latter's brief would be circulated simultaneously with Poland's brief. Cargill filed its second (rebuttal) post-hearing brief, together with three annexes numbered A, B and C on 27 October 2006 and Poland on 30 October 2006.

54. On 10 November 2006, the parties simultaneously filed their statements on costs with accompanying exhibits. Together with its statement on costs, Poland also filed an additional affidavit (Affidavit of Dr. Rudolf Ostrihansky).

8. THE FILING OF NEW DOCUMENTS AFTER THE HEARING ON THE MERITS

55. By letter dated 21 February 2007, Poland filed nine new documents with ICSID which it had received from the U.S. Department of State pursuant to a request based on the Freedom of Information Act (FOIA) made in December 2005 (Exhibits A through I; the "New Documents"). It requested that the Tribunal consider these materials as evidence of record in its deliberations. Cargill objected to the filing by letter dated 28 February 2007. The parties filed further submissions on 2 March 2007.

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[8] The Order reads more particularly:

> *78. The Tribunal is of the opinion that there are no "exceptional circumstances" or "valid reasons" under ¶ 14 of the Tribunal's Procedural Order of 29 May 2006. As a consequence, the general rule set in the Procedural Order of 29 May 2006, i.e. that the Arbitral Tribunal will not consider a written statement of a person who is called but does not appear in person, applies and no exception can be made.*
>
> *79. This conclusion appears especially appropriate in the present case. Mr. Kaczmarek is a former Polish Minister and member of the Council of Ministers. He filed a statement in support of Cargill against his own Government. To properly assess his evidence, the Tribunal would have needed to understand the circumstances surrounding this unusual situation. This understanding would most likely have been gained at the hearing through direct and cross-examination, as well as through questions posed by the Tribunal. Due to Mr. Kaczmarek's failure to appear, it becomes impossible for the Tribunal to properly weigh the evidentiary value of Mr. Kaczmarek's statement.*
>
> *80. Therefore, the Tribunal will not consider the Kaczmarek Affidavit.*

56. By PO dated 12 March 2007, the Tribunal declared Exhibits B and H attached to Poland's letter of 21 February 2007 admissible, ordered that Cargill produce an unredacted copy of Exhibit H, and granted Cargill an opportunity to file written comments strictly limited to Exhibits B and H, including on the quota amount referred to in Exhibit H that would appear from the unredacted version of such exhibit. It declared the other exhibits inadmissible.

57. By letter dated 16 March 2007, Cargill requested the production of all the documents that Poland had received from the U.S. Department of State in response to its 2005 FOIA request which Poland had not already filed. Cargill also produced an unredacted version of Exhibit H. On 23 March 2007, Poland requested leave to file four additional documents (the "Four Additional Documents") received from the US Department of State on 21 March 2007 and asked the Tribunal to reconsider the finding of inadmissibility made on 12 March 2007. On the same day, Cargill made an additional submission with a second supplemental affidavit of Gerrit Hueting (Exh. C171) and a second supplemental affidavit of Arek Wawryszewicz (Exh. C172), to which Poland objected on 26 March 2007.

58. On the same day, Cargill opposed the filing of the Four Additional Documents by Poland and filed a fax of 20 August 2002 from Mr. Hueting to the US Embassy in Warsaw.

59. On 30 March 2007, Poland expanded on its objections to the production of the supplemental affidavits. By letter of the same date, Cargill reiterated its request that the supplemental affidavits be admitted and its opposition to Poland's request for reconsideration and filing of the Four Additional Documents. A diplomatic cable of May 2000 was attached to Cargill's letter. On 2 April 2007, Poland suggested to Cargill an agreed resolution to certain issues, which the latter referred to as "self-serving".

60. In an order of 18 April 2007, the Tribunal dismissed Poland's requests for reconsideration of the Tribunal's PO of 12 March 2007 and for admission of the Four Additional Documents; admitted the supplemental affidavits of Messrs. Hueting and Wawryszewicz and the fax of 20 August 2002, but not the diplomatic cable of May 2000; and granted Poland an opportunity to comment on the contents of the supplemental affidavits (Exh. C171 and C172) by 26 April 2007.

61. On 26 April 2007, Poland commented on such affidavits and requested that the Tribunal reconsider part of the Order of 18 April 2007 declaring the Four Additional Documents inadmissible, appended the Four Additional Documents (Tab. A), another

new document (Tab. B), and letters and submissions previously filed by the parties and Orders (Tab. 1 through 18). Cargill replied on 27 April 2007 and requested that Poland's submission of 26 April 2007 – or at a minimum all portions of it not directly responsive to Exh. C171 and C172 – be stricken from the record; Poland's request for admission of the Four Additional Documents be dismissed; and the Tribunal award Cargill's legal fees and other costs incurred in connection with the proceedings initiated by Poland on 21 February 2007.

62. By an Order dated 25 May 2007, the Tribunal dismissed Cargill's request that Poland's submission of 26 April 2007 be stricken from the record; declared admissible a letter of 3 December 2002 from the US Secretary of Commerce to President Kwaśniewski[9] and its Polish version, appended to Poland's submission of 26 April 2007 under Tab A; dismissed Poland's request for admission of the other "Four" Additional Documents under Tab A[10]; declared inadmissible the document submitted under Tab B; and reserved its decision on costs and legal fees.

63. On 31 May 2007, Poland wrote to the Tribunal regarding what it believed to be two apparently inadvertent oversights in the Order of 25 May 2007, and impliedly seeking a request for reconsideration of such Order asked for admission of the document appended to Poland's submission of 26 April 2007 under Tab B. It also requested the Tribunal to rectify the name of President Kwaśniewski in the same Order and inquired about the timing of the final award, a matter which the ICSID Secretariat addressed on 18 June 2007. Cargill commented on 7 June 2007 opposing Poland's request for admission of the document filed under Tab B.

64. On 19 June 2007, the Tribunal accepted the document under Tab B and confirmed that the letter of 3 December 2002 under Tab A was addressed to President Kwaśniewski.

65. In finalizing its award after these incidents, the Tribunal has reviewed all the documents newly admitted into the record[11]. Because the contents of some of the new documents are disputed by the parties and cannot be determined with sufficient certainty, the Tribunal considers that these documents ought not to be relied upon in the Final Award. In any event, the Tribunal is of the opinion that none of the new documents – whether interpreted in accordance with the Claimant's allegations or in accordance

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9 Mistakenly referred to as President Kalinowski in the operative part of the Tribunal's PO.

10 Namely a letter dated 12 July 2002 from the US Secretary of Commerce to Deputy Prime Minister Kalinowski and a letter of 1 October 2001 from the US Department of Commerce to Minister Balazs.

11 Namely Exh. B and H attached to Poland's letter of 21 February 2007, the supplemental affidavits of Messrs. Hueting and Wawryszewicz (Exh. C171 and C172), the fax of 20 August 2002 from Mr. Hueting to Mr. Huff, the letter dated 3 December 2002 from the US Secretary of Commerce to President Kwaśniewski, and the document appended to Poland's submission of 26 April 2007 under Tab B.

with the Respondent's allegations – is such as to alter the Tribunal's findings as they resulted from the prior record. Indeed, even if the Tribunal had relied on the new documents, these documents would either not have had any impact on the Tribunal's findings (if interpreted as suggested by the Claimant), or they would have confirmed the Tribunal's findings as they resulted from the record before the filing of the new documents (if interpreted as suggested by the Respondent) (for more specific explanations regarding Exh. B and H, see fn. 69 below and ¶ 190 below).

IV. MAIN FACTS RELATING TO THE MERITS OF THE CASE

66. This chapter sets forth the factual background of this arbitration. Other facts will be referred to under the heading "Analysis" as and when appropriate.

1. ISOGLUCOSE AND SUGAR

1.1 Nature and properties of isoglucose

67. Under Community Regulations, isoglucose is defined as "*the product obtained from glucose or its polymers with a content by weight in the dry state of at least 10% fructose*" (Council Regulation (EEC) No 1785/81 of 30 June 1981 on the Common Organisation of the Markets in the Sugar Sector – Exh. R49).

68. Isoglucose is indistinguishable in taste from sugar and is used in the food industry as a sweetener in both alcoholic and non-alcoholic, carbonated and non-carbonated beverages, in nectars, syrups, and jams, in ketchups and other fruit- and vegetable-based preparations, in bakery and confectionary products, as well as in ice creams and frozen desserts. The primary customers for isoglucose are large beverage producers (see Poland's Counter-Memorial, p. 20). Unlike sugar, isoglucose is not used as a household sweetener.

69. According to the Institute of Chemical University of Łódź, isoglucose may contain fructose of various concentrations ranging from 10% to 90% (Expert Opinion Concerning Demand for 120 Thousand Tons of Isoglucose by the Polish Food Industry and Positive Influence of the Above Production for the Polish Agriculture – Exh. C14). Whereas F42 isoglucose contains approximately 40% fructose, F55 isoglucose contains approximately 55% fructose. F42 isoglucose is equivalent in sweetness to sugar.

70. Finally, as stated by Kyd Brenner, Cargill's expert witness on isoglucose, "*isoglucose can be produced and sold at a lower price than sugar in nearly every region of the world*" (Exh. C110, p. 5, ¶ 12).

71. Isoglucose has captured a large share of the markets in which it has been allowed to compete with sugar. The US and Canadian soft drink industries, for example, switched from sugar to isoglucose as their sweetener of choice during the late 1970s and early 1980s[12]. This switch was led by Coca-Cola and Pepsi-Cola which, in 1984, announced they would use F55 isoglucose for 100% of their sweetener needs[13]. Subsequently, other US bottlers switched to isoglucose (Exh. C114), and today, the Canadian soft drink industry uses as a sweetening agent approximately 20 times as much isoglucose as sugar[14]. In Japan, isoglucose holds a 60% share of the soft drink sweetener market[15]. In Africa and South America, isoglucose consumption tripled between 1985 and 1996, while in Asia it grew by 60%[16].

72. Given that isoglucose is sold as a liquid, in order to compare it to sugar, which is sold in a dry state, the commercial quantity of isoglucose must be multiplied, for F42 isoglucose by 0.71 and for F55 isoglucose by 0.77.

1.2 Production of sugar in Poland

73. Poland has long been an important producer of sugar beet and sugar in Europe. Its sugar production has grown substantially in the last fifty years, from 387,000 MT in 1946 to 1,971,000 MT in 1990. In 1997, Polish sugar production reached 2,145,000 MT[17].

74. In 1989, the State began to liquidate its monopoly on sugar production and opened the sugar sector to foreign competition (Exh. R19 and R21). The sugar sector privatization was governed by the Act on Sugar Market Regulation and Ownership Transformations in Sugar Industry (the "1994 Sugar Law" discussed at chapter 2.1 below; Exh. R75). A significant part of the privatization of the sugar sector was carried out through the free

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12 R. Barry, et al., Sugar: Background for 1990 Farm Legislation, USDA, Economic Research Service – Exh. C153; Peter Buzzanell & Ron Lord, Sugar and Corn Sweetener: Changing Demand and Trade in Mexico, Canada, and the United States, United States Department of Agriculture, Economic Research Service, Agriculture Information Bulletin, No. 655 – Exh C113.

13 Corn Refiners Association, The History of High Fructose Corn Syrup, 1996 Corn Annual, Inc. – Exh. C114.

14 Agriculture and Agri-food Canada, The Canadian Soft Drink Industry – Exh. C142.

15 Sweetener Markets to 2015: The Outlook for the Structure of Demand for Caloric and Low Calorie Sweeteners, The Chart Book, Volume I, LMC International Ltd. – Exh. C140.

16 Agricultural Economics and Rural Development Division, Evaluation of the Common Organisation of the Markets in the Sugar Sector – Exh. C126.

17 Poland's Reply to the Common Position of the European Union in the Negotiation Area of "Agriculture," CONF-PL 6/01 – Exh. R162.

distribution of shares to eligible employees and sugar beet growers and, alternatively, by the sale of shares of sugar companies owned by the State Treasury[18].

75. By the end of the negotiations regarding Poland's accession to the EU, i.e. by December 2002, 68 sugar plants operated in the sugar sector, out of which 36 were companies constituting Krajowa Spółka Cukrowa S.A. or "KSC," the majority shareholder of which remains the State Treasury[19].

76. In 2005, the largest sugar producer in Poland in terms of the number of plants remained the Polish State-owned KSC (Website Market share – Exh. R18). All other sugar producers in Poland were foreign-owned, as acknowledged by Poland (Poland's Counter-Memorial, p. 18).

2. CARGILL'S INVESTMENT IN THE PRODUCTION OF ISOGLUCOSE IN POLAND UNDER THE 1994 SUGAR LAW

2.1 The 1994 Sugar Law

77. On 26 August 1994, Poland adopted the 1994 Sugar Law, which established the legal framework for the organization of the sugar market. Articles 2 and 3 of the 1994 Sugar Law provided for the imposition of quotas limiting the volume of sugar that could be produced and introduced in the domestic market or produced and exported with subsidies during an ascribed period of time. Indeed, these provisions read as follows:

> ***Article 2***
>
> *1. Limits are imposed on the domestic sugar production.*
>
> *2. The limiting referred to in Sec. 1 consists in the establishment annually by the Council of Ministers, by regulation, at the request of the Minister of Agriculture and Food Economy, of sugar production quotas (A quota and B quota).*
>
> *3. The terms used in Sec. 2 mean:*
>
> *1) A quota – the maximum quantity of sugar that can be produced during the sugar campaign of the relevant year with the purpose of supplying the domestic market, within the period from 1 October to 30 September of the following year;*

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18 Information Regarding Ownership Transformations in the Sugar Sector, appended to the Draft Revised Negotiating Position of Poland, 11 May 2002, Annex 2 – Exh. C79; E-mail from Jaroslaw Wojtowicz, Deputy Director of the Department of Budget and Finance at the States Treasury to Eric Rheims, Lawyer in SK&S – Exh. R188.

19 Ministry of State Treasury, Income from Privatisation, 1991-2004, 2004 – Exh. R161; in 2005 the State owned 88.74 % of the shares of KSC, see Ministry of the State Treasury, List of companies with majority interest of the State Treasury, 10 October 2005 – Exh. R183; Ministry of the State Treasury, Privatization Poland 1990-2004, 2004 – Exh. R198.

2) *B quota – the maximum quantity of sugar that can be produced during the sugar campaign of the relevant year with the purpose of exporting, within the period from 1 October to 30 September of the following year, using the subsidies referred to in Article 5 Sec. 4;*

4. *The A and B quotas are established by 1 August of the year preceding the sugar campaign in the following year.*

Article 3

The surplus sugar production over and above the established A and B quotas must be exported – without the subsidies referred to in Article 5 Sec. 4.

78. Within the above quotas, Article 4:1 of the 1994 Sugar Law made the following provisions as to the limits to be allocated to companies:

> 1. *The Minister of Agriculture and Food Economy establishes annually for the companies referred to in Article 6 and sugar producers operating outside such companies limits determining:*
>
> 1) *maximum quantity of sugar that can be produced as part of the A quota;*
>
> 2) *maximum quantity of sugar produced as part of the A quota that can be put on the domestic market during a quarter;*
>
> 3) *maximum quantity of sugar that can be produced as part of the B quota.*

79. Each year, the Council was required to establish a minimum selling price for sugar within the national market (Article 10:1 of the 1994 Sugar Law).

80. In 1994, no isoglucose was produced in Poland and the 1994 Sugar Law did not include isoglucose in its regulatory ambit.

81. On 20 November 1996, Poland amended the 1994 Sugar Law (the "Amended Law"), extending the scope of products covered by the B quota to include processed products containing more than 20% sugar. The Amended Law further provided that the surplus sugar production over and above the established A and B quotas represented the C quota which was to be exported without certain subsidies (referred to in Article 5:4, Article 1:1:2). Shares (or "limits") of the aggregate quota level were granted to producers based on the efficiency of production during the three preceding years (Article 1:4:b Amended Law). The Amended Law came into effect in January 1997. At that time, there was still no production of isoglucose in Poland and therefore no regulation of such production.

2.2 Cargill's initial investments in isoglucose in Poland

2.2.1 Cargill's decision to invest in isoglucose in Poland

82. Cargill is a privately-held company and one of the largest international marketers, processors and distributors of agricultural, food, financial and industrial products and services with over 100,000 employees in 60 countries.

83. In 1990, Cargill opened an office in Warsaw and began to invest in Poland. Cargill established its wholly-owned subsidiary, Cargill (Polska) Sp. z o.o. ("Cargill Polska") in 1991.

84. In 1995, Cargill allegedly began to invest in the starch and sweetener industry in Poland, opening a wet mill and a glucose refinery in Bielany Wrocławskie ("Bielany"), capable of producing different types of glucose syrups used in the confectionary, non-dairy coffee creamer and jam industries.

85. In the second half of 1996, Cargill began the production of glucose syrups and starch in Bielany, allegedly at the cost of approximately USD 28 million[20].

86. In its Memorial of 16 September 2005, Cargill alleged that in August 1998, it began to look into options for diversifying its sweetener production in Poland, with a focus on the domestic market, which led it to investigate the possibility of producing and marketing other sweetener syrups at its Polish facilities. Cargill recounts that in order to determine the production possibilities and the sales potential of isoglucose in Poland, it imported inulin syrup blended with F42 isoglucose in batch production to be tested in the Polish market. Cargill started to produce its own batches at the end of 1998.

87. In February 1999, Cargill began producing F42 and F55 isoglucose on a continuous flow basis at the Bielany facility.

88. At the time when Cargill decided to invest in isoglucose production in Poland, there were no quota restrictions on isoglucose production or sale. Cargill was the first – and is to this date the only – producer of isoglucose in Poland.

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[20] See Cargill Milling Sp. z o.o. Management Board Report FY 1996/1997, 31 May 1997, p. 3, showing fixed assets for PLN 90,622,538.66, roughly equal to USD 28,340,000 as of that date – Exh. R81.

2.2.2 *Cargill's contacts with Polish officials with respect to its initial decision to invest in isoglucose in Poland*

89. By letter dated 26 March 1998, Dariusz Piórkowski, Sales Manager of Cargill Milling Sp. z o.o., wrote to the Department of Agricultural Development, Ministry of Agriculture and Food Economy, to inform the latter of Cargill's presence in Poland since 1990, of its investments in the food industry, and of its plan to start producing isoglucose syrups (Exh. C28). Dariusz Piórkowski pointed out that isoglucose syrups having numerous applications, had not been produced in Poland so far, and added:

> *According to our expectations, the scale of isoglucose syrups production will amount to 85,000 tons on annual basis. Our investment, the commencement of which we plan for the second half of this year, should be completed in. 1999/2000. After reaching the planned production capacity, our total demand for wheat will be 350,000 tons annually.*

90. In the Activity Report appended to this letter, Dariusz Piórkowski wrote as follows:

> *Presently, the fructose production in the European Union is limited to the level of 625,000 tons a year (quota A and B) including: isoglucose – 303,000 tons, and inulin – 323,000 tons annually, expressed in the so called sugar equivalents (syrups in form of 100% dry mass). This status is true for 15 current Union member states* [...].
>
> [...]
>
> *We think it necessary in negotiations with EU regarding Poland's access, to emphasize our plans of fructose syrups production commencement to avoid any possible disputes when our country becomes the EU member.*

91. On 1 June 1998, Frank van Lierde from Cargill Polska informed Jacek Janiszewski, Minister of Agriculture and Food Economy, that Cargill's "*glucose syrups plant in Bielany Wrocławskie manufacture*[d] *a wide range of starch syrups for the needs of domestic market, and for export*" (Exh. C29). He specifically asked for feedback on Cargill's production plan in view of Poland's forthcoming EU membership:

> *In relation to the investment plans adopted, we would like to inform you about the development of the Bielany Wrocławskie plant, by way of adding the production line of capacity equal to 85 thousand tons of fructose syrup.*
>
> *Cargill would like to apply for inclusion of our production, i.e. the fructose syrup, to negotiations with the European Union, due to the fact that at present, in the European Union, the fructose production is limited by quantities.*
>
> *Until 2002, the Bielany Wrocławskie plant will reach the target production of about 350 thousand tons of wheat. We think that this amount will have significant impact on the domestic cereal market* [...].
>
> *Dear Sir, in consideration of the aforementioned facts, we would appreciate if you could express your opinion about our production plans in view of our future EU membership, in writing* [...].

92. In response, the Ministry of Agriculture advised Cargill that an imposition of production quotas was to be expected, both in the context of the EU quota system and as a result of the upcoming amendment to the 1994 Sugar Law. Indeed, on 31 July 1998, Zbigniew Kossowski, Director at the Ministry of Agriculture, wrote to Cargill in the following terms (Exh. R85):

> *In the European Union Member States the production of isoglucose, as a direct substitute of sugar, is also subject to a regulation regime.* [...]
>
> *In 1979, the EU Commission enacted a regulation as a result of which isoglucose was covered by the regulation result. The point was for a product that has began [sic] to compete strongly with sugar to be regulated as part of a similar quota system. The "A" quota was set at a relatively low level of 138.9 thousand tones. The "B" quota accounted for 27.5% of the "A" quota.* [...]
>
> *The work on amending the Act on Regulation of the Sugar Market and Ownership Transformations in the Sugar Industry of 26 August 1994 is currently under way at the Ministry of Agriculture and Food Economy. The scope of the proposed amendment includes also issues relating to isoglucose.* [...]

93. On 7 December 1998, Jan Zukowski, member of the Council of Chambers of Agriculture of Lower Silesia, addressed a letter to Leszek Kawski, Vice-Minister of Agriculture and Rural Development, in which the former requested the "*approval of target production of isoglucose by Cargill company in Bielany Wrocławskie*" (Exh. C32). Mr. Zukowski explained that "*the target production of isoglucose in the amount of 80,000 tons per year constitutes an alternative to utilization of about 300,000 tons of wheat*," that Cargill's production "*will be based upon the raw material produced in Poland* [and that] *a significant part of production is and will be designated for export.*"

94. On 8 June 1999 (Exh. C40), 17 November 1999 (Exh. C43), 20 January 2000 (Exh. C46), 25 July 2000 (Exh. C48), 12 April 2001 (Exh. C60), 5 June 2001 (Exh. C64), and 16 November 2001 (Exh. C71), Poland issued and delivered to Cargill a number of construction design approvals and permits for the development of existing structures and the construction of additional structures, as well as decisions amending some of these approvals and permits.

2.2.3 Cargill's initial contacts with customers

95. On 15 July 1999, Roman T. Kląskała, CEO of Hoop S.A., addressed to Cargill Polska a letter of intent (Exh. C41), in which he expressed the interest of Hoop S.A. "*in cooperation with the Bielany Wrocławskie Branch of Cargill Polska Sp. z o.o., with respect to the purchase of glucose syrup containing fructose for use in sweetening beverages produced by Hoop.*" Mr. Kląskała stated that he saw "*the possibility of*

buying the syrup in quantities of 10,000 MT [commercial quantity] *per year within a period not shorter than five years.*"

96. On 6 December 1999, Michał Rosa, External Relations Director of Coca-Cola Beverages Polska, wrote to Cargill Polska to "*confirm the interest of* [his] *company in the production of isoglucose, as an alternative sweetener, to be launched in Poland*" (Exh. C44). The letter further read as follows:

> *If we decide to switch to isoglucose technology, we also would have to make significant financial outlays. Thus, the decision to use this type of sweetener should mean the need to make large purchases from the very beginning, i.e. not less than 40,000 tonnes [commercial quantity] per year. Therefore, we strongly support your initiative to increase your existing production capacity to enable production of 55% isoglucose in Poland on a mass scale.*
>
> [...]
>
> *We also hope that the planned amendments to Polish law relating to the "sugar regime" will not become a legal barrier for Polish isoglucose production. As the chairman of the Sugar Users Forum* [...]*, I will be trying to prevent this.*

2.3 Contacts between Cargill and Polish officials regarding Cargill's production of isoglucose between 1999 and 2001 and production forecasts for subsequent years

97. On 17 March 1999, the Regional Inspectorate of Agricultural Produce Purchasing and Processing (WISIPAR) inspected Cargill's isoglucose plant in Bielany for the first time. During this inspection, Arek Wawryszewicz, an employee of Cargill, declared that in 1999, the output of isoglucose syrups was 40,000 MT, but refused to provide information "*on production in Q4 1998 / Q1 1999 (this applies also to the entire 1998)*" and added that "*following receipt of a written enquiry from an appropriate government administration body, we will consider the possibility of providing answers to the above enquiry*" (Exh. R90; see also Exh. R89 and Exh. C119).

98. On 31 August 2000, Gerrit Hueting addressed to Jolanta Tarska of the Ministry of Agriculture a letter reflecting the value of Cargill Polska's production and actual sales of F42 isoglucose for the years 1998 to 2001 and Cargill Polska's forecast of such production and sales for the years 2001 to 2004 (Exh. C50). The letter predicted that production capacity would reach 120,000 MT of F42 isoglucose in 2001. In this letter, Gerrit Hueting explained the following:

> *The increase in sales that took place in 2001 is a result of orders received from a world soft drink producer. Before the end of 2001, we are planning to gain another two Polish and foreign clients (soft drink producers), whom we will supply with isoglucose in 2002. Further increase will come from*

additional utilisation of fructose by our existing clients, in their new recipes. Currently we are only making F-42 fructose. If we are allocated with a higher production quota, we will consider opening of a new fructose-55 production line, which will result in further increase in our sales from 40 000 up to 60 000 Mt beginning in 2001.

99. On 6 March 2001, Mr. Wawryszewicz addressed a fax to Ms. Tarska (Exh. R110) containing the following "*official data on isoglucose production:*"

Period: 1 January – 31 December 2000

Product:	*isoglucose 42*	*23,064.770 tons*
	isoglucose 60.20	*536.095 tons*
	isoglucose 60.10	*1,038.235 tons*
	isoglucose 60.30	*0.295 tons*
Total	***24,639.395 tons***	

Period: 1 January – 31 December 2001

Product:	*isoglucose 42*	*2,574.400 tons*
	isoglucose 60.20	*46.460 tons*
	isoglucose 60.10	*150.325 tons*
Total	***2,771.185 tons***	

100. In May 2001, the Chief of Staff at the Ministry of Agriculture, Mr. Zagurski, attended an opening ceremony at Cargill's Bielany plant and read a congratulatory letter dated 29 May 2001 from Minister Balazs (Exh. C63):

I hope that implementation of new technologies in sweeteners industry will seriously improve and modernize production.

It is very important to mention, that isoglucose will be produced from Polish raw materials and new production line start-up will allow to increase employment in company Cargill. [...]

I believe that further engagement and permanent initiative from your side will result [in] *permanent interest in your products not only in Poland but also abroad, which cause high position of company Cargill in agricultural and food sector of economy.*

In such ceremonial day I would like to wish a lot of success in your professional activity [...].

3. DOMESTIC QUOTAS ON ISOGLUCOSE

3.1 Propositions for amendments to the 1994 Sugar Law

101. In 1998 and 1999, propositions to amend the 1994 Sugar Law were put forth by the Polish Parliament and Government respectively.

102. In December 1998, parliamentary officials circulated a draft law, the "Sejm Draft Act on Production of Sugar Beets, Beet Sugar and Regulation of Domestic Sugar Market" dated 29 December 1998 (the "First Draft"), which was intended to "*regulate* [...] *the*

domestic sugar beet and sugar market including the production of and trading in [...] *1) sugar beets; 2) beet sugar and other sugars; 3) isoglucose*" (Article 1:1 – Exh. R88). This First Draft provided for A and B quotas and A and B "limits" for sugar, as well as a quota for isoglucose in the form of a "*maximum quantity of isoglucose that can be produced domestically during the market year*" (Article 1:2:16). With respect to this quota, Article 9 further provided as follows:

> 1. *In the period of three months of the effective date of the Act, the Council of Ministers, after consulting the opinion of the Sugar Market Committee, establishes by regulation* [...] *the isoglucose quota for the following marketing year.*
> 2. *The* [...] *isoglucose quota for the following marketing years* [...] *are established under the procedure set forth in paragraph 1 not later than one year prior to the commencement of a given marketing year.*
> 3. *While establishing the quantity of* [...] *the isoglucose quota, the Council of Ministers takes into account the balance of domestic production, domestic consumption, imports, exports and stock of* [...] *isoglucose in the preceding marketing year.*
> 4. [...]
> 5. *In the first marketing year after the effective date of the Act, the isoglucose quota is 3 thousand tons.*

103. The Justification of 29 December 1998 accompanying the First Draft set forth two series of reasons for the enactment of a new law:

- First, the need to protect the interests of sugar beet farmers and consumers:

> *The need for the new Act on sugar beet production, beet sugar and on regulating the Polish sugar market primarily stems from the fact that the national regulations in this respect proved ineffective, in particular by leading to a fall in profitability rate of sugar beet production, sugar overproduction and sugar prices at their all-time low, which in the long term may lead to a crash on the sugar market and all its ramifications for the producers and consumers alike.*
>
> *This situation hinders the privatization of the sugar sector and consequently the inflow of capital, necessary to modernise the industry* [...]. *Modernisation of the industry lies directly in the interest of the consumer, since the cost of sugar production needs to be reduced, and is also beneficial for sugar beet farmers, as stable contracts with a modern industry will ensure stability of farming conditions. The industry itself must be competitive also on the international market where, despite low prices, the sugar surplus needs to be exported, with the sugar surplus bound to appear owing to the very nature of agricultural production, dependent on climatic conditions.* (Exh. C33)

- Second, the need to achieve compatibility with EU law:

> *The overriding need to introduce an Act that could regulate the production of sugar beet and the sugar market in Poland is derived, however, from the requirement to implement the provisions of the Association Agreement between Poland and European Communities,*

> [...], *providing* [...] *that the "major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community.* [...].
>
> *The proposed draft act relies,* [...], *on the letter and spirit of the European Union legislation regulating sugar beet production and the sugar market, in particular on the key Regulation of the Council of European Communities No. 1785/81 of 30 June 1981.* (Exh. C33)

104. Regarding more specifically the quota on isoglucose, a "Reply of the Minister of Agriculture to the question No. 1244 on the proposed amendments to the so-called Sugar Act" was issued on 11 January 1999, and set forth that "*the limit on isoglucose production is introduced in the territory of the Republic of Poland, since the production of isoglucose* [...] *is a serious competition to the sugar produced from sugar beet. Isoglucose* [...] *is chiefly used as a sweetener. Therefore, a high production level of isoglucose would entail a dramatic fall in the sugar beet crop, and consequently in the sugar production*" (Exh. C35). The document further provided that "*the minister competent for agriculture will assign the quotas or isoglucose production at the request of the interested isoglucose producers.* [...] *The basis for fixing the limits will be production capacities of isoglucose producers*" (Exh. C35).

105. In March 1999, the Polish Government, in turn, put forth a draft revision of the 1994 Sugar Law (the "Second Draft"), namely the "Act on Amending the Act on Sugar Market Regulations and Ownership Transformations in the Sugar Industry" (Exh. C37). This Second Draft did not include a quota amount but provided that the Council of Ministers, upon recommendation of the Minister of Agriculture, would set isoglucose quotas (as well as sugar quotas) annually "*in an amount resulting from the demand on the domestic market, as well as from the Polish concession list to the Agreement Establishing the World Trade Organization (WTO)*" (Article 2.2).

106. As to "*isoglucose production limits for isoglucose producers for a given calendar year*," which "*the minister in charge of agriculture* [was to] *determine* [...] *each year, by 15 December of the preceding year*" (Article 4b.1), Article 4b.3 provided the following:

> *Isoglucose production limits are fixed by dividing the amount referred to in art. 2 clause 2, pro rata to the production capacity of individual isoglucose producers.*

107. The Justification of 12 March 1999 of the Second Draft provided that the revision of the 1994 Sugar Law was "*mainly a consequence of the need to adjust its current provisions to the regulations binding the sugar industries of EU Member States*" (Exh. C38). The Justification nevertheless also provided that "*the limits to the production of isoglucose within the territory of the Republic of Poland are also introduced, as the production of isoglucose, which is manufactured mainly from imported raw materials, is*

highly competitive with sugar manufactured from sugar beets. [...] *high isoglucose production would be related to drastic reduction in the cultivation area of sugar beets, and hence also to a reduction in sugar production.*" The Justification further provided that

> *Isoglucose production will be limited by setting forth isoglucose production quotas.* [...] *The Minister competent for agricultural affairs shall allocate isoglucose production limits upon motions submitted by isoglucose producers. At present, no isoglucose is manufactured in Poland and it is not being used in Polish products. The limits shall be determined based upon the production capacity of individual isoglucose producers* [...]. (Exh. C38)

108. Neither the First nor Second Draft was enacted.

3.2 The 2001 Sugar Law

3.2.1 Adoption of the 2001 Sugar Law

109. On 21 July 1999, the Commission of Agriculture and Rural Development proposed to pass a new act governing the sugar market in Poland, which would replace the provisions on market regulation of the 1994 Sugar Law (Exh. R94).

110. In February 2001, a "Draft Act of 2001 on Sugar Market Regulation" (Exh. C58) provided at its Article 4.5 that "*the isoglucose and inulin syrup production quotas cannot jointly constitute more than 1.08% of the A quota.*" Pursuant to Article 4.3, the "*A quota for sugar production* [was to be] *determined in an amount corresponding to the average annual sale to the domestic market, calculated for the three years preceding the quota determination period and in consideration of the superfluous surplus of A quota sugar.*" The proposed quota was however withdrawn before the enactment of the 2001 Sugar Law.

111. On 11 April 2001, at a session of the Lower House of Parliament, the First and Second Drafts (see sub-section 3.1 above) were again discussed. Jerzy Buzek, the Chairman of the Council of Ministers, restated that "*both the* [the First and Second Drafts] *were founded, firstly, on the need to realign our legislation in that area with the models employed by the European Union*" (Exh. R112).

112. The "Draft Act on Sugar Market Regulation" (the "2001 Draft") was adopted by the Sejm (the Parliament's Lower House) on 11 April 2001. It was thereafter passed on to the President and Chairman of the Upper House of the Polish Parliament (the "Senate"), who proposed, in a Resolution dated 10 May 2001, a number of amendments regarding, *inter alia*, quotas on sugar, isoglucose and inulin syrup, and the mode of granting production limits to producers (Exh. R114). With respect to the

Senate's propositions, Jacek Saryusz-Wolski, Secretary of the Committee for European Integration, stated, on 22 May 2001, that "*the amendments presented in the Resolution of the Senate of the Republic of Poland mostly* [fell] *within the scope of the EU law*" (Exh. R115), and that "*they put right certain provisions contained in the bill approved by the Sejm of the Republic of Poland that were contrary to the EU law, and introduce mechanisms which from the EU perspective were missing from the act approved by the Sejm*" (Exh. R115). He confirmed that "*the approval by the Sejm of the Republic of Poland of the amendments contained in the Resolution of the Senate of the Republic of Poland* [would] *realign the sugar market regulation framework with the relevant provisions of the EU law*" (Exh. R115).

113. According to the Report of the Committee for Agriculture and Rural Development of 23 May 2001 on the Senate's position (Exh. R116), most of the amendments proposed by the Senate were accepted.

114. After submission by the Polish Parliament to the President for signature, Poland enacted the new law on sugar, namely the Law of 21 June 2001 on Sugar Market Regulation (the "2001 Sugar Law" – Exh. R120). This Law provided an overall regulation of the sugar market in Poland. It applied, inter alia, to isoglucose (Art. 1.3) and imposed, for the first time in Poland, quotas on isoglucose limiting the amount which could be sold domestically.

3.2.2 Isoglucose quotas and limits under the 2001 Sugar Law

115. The 2001 Sugar Law limited the amounts of isoglucose (or sugar or inulin syrup) which in one accounting year could be introduced into the domestic market ("A isoglucose quota" – Article 2:8), on the one hand, or introduced into the market or exported with subsidies, on the other ("B isoglucose quota" – Article 2:9). The 2001 Sugar Law further defined the "A and B isoglucose limit" as a part of the A and B isoglucose quota allocated to the isoglucose producer (Article 2:10) – such limits being allocated at the request of producers, for a given accounting year, by division of the A and B isoglucose quotas, pro rata to the volume of sales in the domestic market in the calendar year preceding the effective date of the Act (Article 11:2 and 11:3). "C isoglucose" designated the amount manufactured by a producer in excess of the A and B limits allocated to him, or by a producer who had not been allocated any A and B limits (Article 2:12), and which was to be exported in an unprocessed form (Article 7:1).

116. The 2001 Sugar Law did not set a specific quota amount for A and B isoglucose. Art. 5 of the Law rather provided that A and B isoglucose quotas "*for a given accounting year*

shall be determined, by way of an ordinance, by the Council of Ministers upon request of the minister in charge of agricultural markets and upon consultation with the Chairman of the Agricultural Market Agency and Branch Commission of Agreement, till August 1st of the calendar year that precedes the year in which the given accounting year shall start." The Branch Commission established by the 2001 Sugar Law consisted of six representatives of sugar producers and six representatives of sugar beet growers (Article 3:3).

117. With respect to A and B isoglucose (and sugar and inulin syrup) quotas for a given year, the 2001 Sugar Law made no reference to the production capacity or planned production capacity. Neither did Articles 6:1, 6:2, and 11 of the Law, pertaining to the distribution of the aggregate sugar and isoglucose quotas among producers (i.e. allocation of sugar and isoglucose limits), make any reference to production capacity.

118. Notwithstanding the fact that the 2001 Sugar Law provided for the division of the A and B isoglucose quotas among various producers (Art. 11:3), since there was no other isoglucose producer in Poland than Cargill, the latter enjoyed the privilege of the entire quota in two consecutive years before the accession period as well as thereafter.

119. During the pre-accession period, the Council of Ministers issued regulations on three occasions establishing the level of the isoglucose quotas.

a) First national quota on isoglucose (1 October 2002 – 30 June 2003)

120. On 21 August 2001, Jacek Romaniuk, Chief of Production at Cargill, declared that he did "*not have documentation on the basis of which the isoglucose production in the individual months of 2000 could be determined*" (Exh. R122).

121. On 22 August 2001, Poland performed an audit of Cargill's facilities. According to the Record of Inspection, the inspection covered the "*production and sales of isoglucose on the domestic market in the years 1999 and 2000*" and indicated that "*the volume of sales of isoglucose in the examined periods* [...] *was as follows: 24,639.50 tons* [...] *in 2000 and 9,903.95 tons*" (Exh. C69) in 1999. "*For seven months of this year overall sales of isoglucose was 20,563.12 tons of a value of 28,697,658.57 PLN which constituted 151,77% of sales for the analogous period of the previous year, which was 13,548.55 tons of a value of 19,110,906.73 PLN and with respect to sales for the year 2000 it constituted 83.45%*" (Exh. C69). Attachment 8 to the Record of Inspection also provided details regarding "*signed contracts for deliveries of isoglucose containing 42% of fructose (GF42) and isoglucose containing 55% of fructose (GF55)*[:]

1. *Contract of August 10, 2001 between Cargill Polska Sp. z o.o. and Coca Cola Beverages Polska Sp. z o.o. for sale of GF42 isoglucose in the quantity of 20,166.65 metric tons per year (60,500.00 metric tons in the period 2001-2003).*

2. *Contract of July 16, 2001 between Cargill Polska Sp. z o.o. and Pepsi Cola General Bottlers Poland Sp. z o.o. for sale of GF55 isoglucose in the quantity of 33,766.23 metric tons per year.* (Exh. C69)

122. On 24 August 2001, following the inspection, the WISIPAR sent a letter to Arek Wawryszewicz in which it noted that:

> *In result of the performed control, it was found lack of the production and warehouse documentation related to individual assortments of isoglucose, what makes unable to verify the production volume and to control its warehouse status, in given reporting periods, what also will be essential when the production limits will be subject to allocation* [...]. (Exh. R123)

123. On 19 October 2001, Cargill filed an "Application for A and B Isoglucose Limits for 2002/2003 Settlement Year" (Exh. R124), in which it reported that its isoglucose production in 2000 stood at 18,559 MT dry matter.

124. The Ordinance of the Council of Ministers of 12 November 2001 on A and B Sugar Quotas and A and B Isoglucose Quotas (Exh. C72) determined the following isoglucose quotas for the nine-month period from 1 October 2002 to 30 June 2003:

- A quota for isoglucose: 40,000 tons translated into dry matter in a 42% fructose solution, and

- B quota for isoglucose (which entitled Polish isoglucose producers (i.e. Cargill) to receive export subsidies): 2,200 tons translated into dry matter in a 42% fructose solution,

- amounting to a total of 59,437 MT commercial quantity.

125. Quantities of isoglucose produced in excess of the A and B quotas and without subsidies could be exported without any limitations.

126. With respect to isoglucose, the Justification to the Resolution (Ordinance) (Exh. R283) provided the following:

> *In consideration that Poland has initiated isoglucose production at the end of 1998 (in 1999 the production volume was 9.9 thousand tons, in 2000 – 24.6) and that the said product has been covered by the market regulatory system, and in consideration of the production opportunities, utilization of the agricultural product (wheat), and demand of companies utilizing the isoglucose, it is hereby suggested that the isoglucose production should be established from the period starting from October 1st, 2002 until June 30, 2003, meant for supplying the domestic market (A quota) in volume of 40 thousand tons, as converted into dry substance contained in 42% fructose*

solution, and the B quota – in volume of 2.2 thousand tons, as converted into dry substance contained in 42% fructose solution, which will be implemented from January 1st, 2003 to June 30th, 2003.

127. On 22 November 2001, during a meeting of the Parliament's Committee on Agriculture and Rural Development, Undersecretary of State at the Ministry of Agriculture, Kazimierz Gutowski, provided the following explanation with respect to the isoglucose quota set in the Ordinance of the Council of Ministers of 12 November 2001:

> *Isoglucose production quota of 40 thousand tonnes is a compromise. Figures ranging from 0 to 120 thousand tonnes have been suggested when the ordinance of the Council of Ministers on sugar, isoglucose and inulin syrup production quotas was consulted with the representatives of the producers. The final arrangements were that the isoglucose production quota would be 40 thousand tonnes. A similar amount of this product was produced this year. Hence we are not increasing the limit.* (Exh. C73)

128. According to the Ordinance of the Council of Ministers of 12 November 2001, the A sugar quota for the relevant period amounted to 1,540,000 MT while the B sugar quota amounted to 50,000 MT (Exh. C72). The Justification to the Council of Ministers' Resolution (Ordinance) of 12 November 2001 provided that the following factors were taken into consideration when determining the aggregate national sugar quotas (Exh. R283):

> a) *the needs of the Polish internal market,*
>
> b) *Poland's obligations resulting from its membership in the World Trade Organization (WTO),*
>
> c) *very low white sugar prices which have been prevailing on the world market,*
>
> d) *introduction of the production limits for isoglucose and inulin syrup.*

129. According to Mr. Gutowski, the first national quota referred to the entire first accounting year through June 2003, not just to the preceding nine-month period (Letter from Kazimierz Gutowski to Gerrit Hueting dated 23 May 2002 – Exh. 6. RA).

130. On 31 December 2001, Mr. Hueting of Cargill addressed a letter to Minister Gutowski and Ms. Tarska regarding the "*isoglucose output data in the period 1998 – 31 November 2001*" (Exh. R125), conveying the following information:

- Commercial products in MT:

Year	*Imports*	*Output*	*Sales*	*Stock*
1998	*530*	*3 560*	*4 090*	*0*
1999	*1*	*9 903.94*	*9 903.94*	*0*
2000	*0*	*26 139.48*	*24 639.48*	*1 500*
31 November 2001	*0*	*36 071.73*	*35 771.73*	*1 800*

- Converted into dry mass:

Year	*Imports*	*Output*	*Sales*	*Stock*
1998	*376.3*	*2 537.60*	*2 903.90*	*0*
1999	*0.71*	*7 031.80*	*7 031.80*	*0*
2000	*0*	*18 559.03*	*17 494.03*	*1 065*
31 November 2001	*0*	*25 610.93*	*25 397.93*	*1 278*

b) Second national quota on isoglucose (1 July 2003 – 30 June 2004)

131. On 29 March 2002, Mr. Hueting wrote to Minister Kalinowski, insisting on "*the appropriate adjustment of the domestic quota:*"

> [W]e *wish to express our thanks for your understanding and the will to find solutions that will led [sic] to establishment of isoglucose production quotas set at a level that on the one hand meets the Polish production potential and on the other the domestic consumption (demand). As we understand, this applies to both the domestic quota and the Polish position on the quota within the EU.*
>
> [...]
>
> *In the next few days, after consultations with our suppliers and customers (grain producers and soft-drink and food processing industries), we will submit the latest data on the current and projected sales and demand for wheat and isoglucose in the next reference periods.* (Exh. R131)

132. On 5 April 2002, Mr. Hueting provided Kazimierz Gutowski with data on isoglucose syrup production and sales in 2001 and in the months of January and February 2002 (Exh. R133). The total sales for 2001 amounted to 38,851.65 MT commercial quantity or 27,584.67 MT dry matter. In this respect, Mr. Hueting indicated that "*as projected,* [Cargill's] *sales in the calendar year 2001 stood at 40,000 tons of the commercial product*" (Exh. R133). For January and February 2002, Cargill's total sales amounted to 5,020 MT. Mr. Hueting also provided Cargill's "projected" production and sales for the remaining months of 2002, amounting to 56,122 MT dry state. In this respect, Mr. Hueting specified that "*given the introduction of the production limit, the above output and sales in the period from October to December 2002 will have to be reduced as a result of the too low isoglucose production quota granted, thus, resulting in losses for soft drink producers and wheat farmers*" (Exh. R133).

133. On 15 April 2002, Mr. Hueting wrote to Minister Kalinowski requesting an increase of the quota:

> ***1. Arguments for correction of the quota***
>
> [...] *As far as isoglucose is concerned, the domestic quota i.e. the part of production that is to be used for domestic consumption has been determined at a lower level than the domestic consumption.* [...]

2. ***Negotiation process arguments***

Assuming that in negotiations with the EU Poland will apply for isoglucose production quota conforming to the domestic consumption demand, it is extremely important that domestic, current and subsequent quotas to be established this year, are established at a level reflecting as least the domestic industry's demand for the next few years. [...]

3. *All isoglucose customers have been asked to provide detailed estimates of isoglucose demand for the first accounting year (October 1st, 2002 – June 30th, 2003) as well as demand for the second accounting period (July 1st 2003 – June 30th 2004). The relevant results are appended hereto in the form of sums as well as details – individually for each customer.*

First accounting year: October 1st, 2002 – June 30th, 2003

Quota equivalent: 79,160 tons

Second accounting year: July 1st, 2003 – June 30th 2004

Quota equivalent: 110,355 tons

We respectfully ask that you increase the isoglucose quota for the first accounting year from the current level of 40 000 tons up to 80 000 tons for the period between October 1st, 2002 and June 30th, 2003. Bearing in mind the above data, the recommended A quota for the second accounting period should amount to 120 000 tons. This quota would allow us to take advantage of the investments already made, ensure that the Polish farmers are able to sell their wheat and the food industry to obtain the product that it needs, to be competitive in the domestic market after accession to the EU. (Exh. C77)

134. Although there is some contradiction between the documents on which the parties rely[21], they concur on the fact that the second national isoglucose quota amounted to 62,200 MT dry state.

135. The arguments behind the determination of the national quota levels for isoglucose were virtually the same as for the first quota period:

> *Poland has initiated isoglucose production at the end of 1998 (in 1999 the production volume was 6.5 thousand tons, in 2000 – 16.8 thousand tons, and in 2001 – 27.6 thousand tons as converted into the dry mass contained in 42% fructose solution), and* [...] *the said product has been covered by the market regulatory system, in consideration of the production opportunities, utilization of agricultural produce (wheat), and demand of companies utilizing*

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21 Whereas Cargill stated that the second national quota was set in the Ordinance of the Council of Ministers dated 30 July 2002 on A and B Sugar Quotas and A and B Isoglucose Quotas (Exh. C83) (which indeed sets forth an A isoglucose quota of 60,000 tons dry matter and a B quota of 2,200 tons dry matter), Poland stated that the second domestic quota was set in the Resolution of the Council of Ministers of 13 August 2002 amending the Resolution on the A and B Quota for Sugar and A and B Quota for Isoglucose of 30 July 2002 (Exh. R142) (which also provided for an A quota of 60,000 tons dry matter). The excerpt of the Regulation of the Council of Ministers of 30 July 2002 – allegedly amended by the Resolution of 13 August 2002 (Exh. R142) – which was produced by Poland as Exh. R141, does not correspond to the Resolution of the same date produced by Cargill as Exh. C83: whereas the former sets a total isoglucose quota of 42,200 tons dry matter and an A quota of 40,000 tons dry matter, the latter sets a total isoglucose quota of 62,200 tons dry matter and an A quota of 60,000 tons dry matter (as does the Resolution of 13 August 2002 produced by Poland as Exh. R142). This discrepancy is not the result of a translation mistake: it appears both in the English translations and in the Polish originals. Furthermore, one cannot come to the conclusion that Exh. C83 was merely wrongly dated and in fact corresponds to Exh. R142 (and should therefore have been dated 13 August 2002), since the text of Exh. C83 resembles that of Exh. R141 and not that of Exh. R142.

the isoglucose [...]. (Exh. R297 regarding the Justification to the Resolution of 30 July 2002; Exh. R300 regarding the Justification to the Resolution of 13 August 2002)

136. The A sugar quota for the period of 1 July 2003 to 30 June 2004, as compared to the previous year, was reduced to the level of 1,520,000 tons. The B sugar quota remained unchanged for the whole second quota period and amounted to 102,200 tons (Exh. C83/Exh. R141; Exh. R142).

137. The justifications to the Council of Ministers' Resolutions of 30 July 2002 and 13 August 2002 (Exh. R297; Exh. R300) listed the following factors taken into consideration for the determination of sugar quotas:

> [T]*he needs of the Polish internal market, Poland's obligations resulting from its membership in the World Trade Organization (WTO), and projection of prices in the world sugar market.*

138. The second national quota was intended to be in effect between 1 July 2003 and 30 June 2004. On 1 May 2004, however, Poland acceded to the EU. Pursuant to Article 2 of the Commission Regulation (EC) No. 60/2004 of 14 January 2004 Laying Down Transitional Measures in the Sugar Sector by Reason of the Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, for the period from 1 May 2004 to 30 June 2004, the A isoglucose quota in Poland amounted to 4,152 MT dry matter, whereas the B isoglucose quota in Poland amounted to 312 MT dry matter (Exh. C93).

139. In a letter dated 18 February 2003 from Steven Euller of Cargill to Prime Minister Leszek Miller regarding the 2001 Sugar Law and the first two domestic quotas, the former stressed that Cargill's production capacity and the demand exceeded the quotas by far:

> *A and B quotas of isoglucose established by the Council of Ministers in the Regulations for the period from 01 October 2002 till 30 June 2003 equal, accordingly, to 40,000 tonnes and 2,200 tonnes (sugar equivalent) and for the period from 01 July 2003 till 30 June 2004 equal, accordingly, to 60,000 tonnes and 2,200 tonnes (sugar equivalent). The production capacity of Cargill (Polska) sp. z o.o. amounts to 120,000 tonnes of commercial product, which corresponds to the current demand of isoglucose on the Polish food market. The size of the demand was determined on the basis of the forecast sale of isoglucose in 2002/2003 based on the agreements or written off-take estimates from customers, executed by Cargill (Polska) sp. z o.o with its business partners. Cargill (Polska) sp. z o.o has achieved the above level of capacity as a result of the investment in Bielany Wrocławskie, which has been implemented since 1995, of the total value of 90 million USD.* (Exh. C88)

c) *Third national quota on isoglucose (1 July 2004 – 30 June 2005)*

140. In July 2003, that is two months after Poland had accepted, in the context of its accession negotiations with the EU, an isoglucose quota of 26,781 MT dry state, Poland announced its third and final domestic quota on isoglucose. According to the Ordinance of the Council of Ministers of 22 July 2003 on A and B Sugar Quotas and A and B Isoglucose Quotas, "*for the settlement period 2004/2005, the following* [isoglucose] *quotas* [were] *determined*:

> *1) A quota:*
>
> [...]
>
> *b) for isoglucose – 24.911 thousand tons translated into dry matter in a 42% fructose solution.*
>
> *2) B quota*
>
> [...]
>
> *b) for isoglucose – 1.870 thousand tons translated into dry matter In a 42% fructose solution.* (Exh. C90)

141. The A sugar quota amounted to 1,580,000 tons and the B sugar quota to 91,926 tons (Exh. C90).

142. The Justification to the Ordinance of the Council of Ministers of 22 July 2003 provided that "*in the said proposal of the Regulation the quantities negotiated by Poland with the European Union have been taken into account in the determination of the A sugar and isoglucose quotas intended to supply the domestic market and the B sugar and isoglucose quotas which may be sold in the domestic market or exported with export subsidies in the marketing year 2004/2005*" (Exh. R311).

143. This third national quota was intended to be in effect between 1 July 2004 and 30 June 2005. Because of Poland's accession to the EU on 1 May 2004, the 2001 Sugar Law was repealed even before the relevant period had started, and subsequent quotas were imposed directly through the EU regulations (see Council Resolution (EC) No 1260/2001 of 19 June 2001 on the Common Organization of the Markets in the Sugar Sector – Exh. C65; Exh. R311).

4. CONTACTS BETWEEN CARGILL AND (POTENTIAL) CUSTOMERS FOLLOWING THE ENACTMENT OF THE 2001 SUGAR LAW

144. On 14 May 2001, Gerrit Hueting, General Director of Cargill Foods, and Marcin Wielgus, Sales Director of Cargill Polska Bielany Wrocławskie Branch, addressed to Zenon Sroczyński, owner of Hellena S.A., a fax dated 27 April 2001 (Exh. C100), in

which the former offered to sell to Hellena S.A. 800 MT of F42 isoglucose over a period of 6 months and an unspecified quantity of F55 isoglucose over 10 years. The message indicated that the offer regarding F42 isoglucose would remain valid only provided that the agreement be executed by 31 May 2001. With respect to F55 isoglucose, Messrs. Hueting and Wielgus asked for Hellena's anticipated purchase quantities over 10 years so as to formulate a proposal.

145. With respect to quotas, Messrs. Hueting and Wielgus wrote as follows:

> *[W]e assume that before Poland becomes a EU Member State, the isoglucose production will not be limited. We would like to note however that if the Polish Government introduces limits on isoglucose production, we will have to refer to a force majeure event, and, consequently, use the guarantees issued to us.*

146. In a letter of 16 July 2001 (Exh. C67), Jacek Petryka, Director of Manufacturing, Pepsi-Cola General Bottlers Poland Sp. z o.o. ("PCGB"), informed Mr. Hueting of PCGB's

> *intentions with respect to a possible transaction to use of High Fructose product FX 55, called later FX55, that Cargill will have in their offer starting Q1 2002.* [...] *Pepsi Cola General Bottlers will initially be interested in FX 55 equivalent to 6700 T of sugar, with the declaration that the usage will grow once is approved for wider product range. If implementation of the pilot quantities is successful the total quantities per annum will be equivalent to 26000 T of sugar.*

147. Mr. Petryka went on stressing that this letter was not meant to be binding:

> *[T]his letter is not otherwise intended to be binding on the parties or a legally enforceable agreement. Nothing in this letter binds either party to enter into a transaction at this time.* [...] *Neither party will be obligated to consummate the transaction contemplated in this letter unless and until the parties have reached a definitive agreement on all the essential terms. The parties agree to negotiate in good faith and to use their best efforts to execute a definitive agreement as expeditiously as possible.*

148. Attachment 8 to the Record of Inspection of 22 August 2001 of the Voivodship Inspectorate of Purchasing and Processing Agricultural Products to Cargill Polska (Exh. C69) states that on 16 July 2001, a contract was signed by Cargill Polska and PCGB "*for sale of GF55 isoglucose in the quantity of 33,766.23 metric tons per year*".

149. Indeed, the agreement concluded on 10 August 2001 by Coca-Cola Beverages and Cargill Polska (Exh. C68, which is also mentioned in Exh. C69) read as follows:

> *Customer desires, subject to consumer test approval, to purchase a minimum of 43.000 MT dry substance HFS-42 (60.500 MT of commercial product at 71% dry solids), an alternative sweetener, for its soft drinks (excluding Coca-Cola) over a 3 years period starting from the date of the first delivery.*

150. The agreement contained the following force majeure clause allowing suspension of performance

> *in the event of* [...] *acts of government which asserts [sic] prohibitions, prevention or limitation of HFS-42 production* [...].

151. In addition to the above agreements, the Record of Inspection of 22 August 2001 of the Voivodship Inspectorate of Purchasing and Processing Agricultural Products to Cargill Polska (Exh. C69) shows that Cargill was selling approximately 40,000 MT commercial quantity per year to other customers (the Record mentioned sales of 20,563 MT for the first seven months of 2001).

152. Finally, relying on twenty-one communications dated April 2002 from potential customers (Exh. R132), attached to Gerrit Hueting's letters of 10 July 2002 to Prime Minister Leszek Miller (Exh. C81) and of 15 April 2002 to Minister of Agriculture Jarosław Kalinowski (Exh. C77), Cargill argues that by April 2002, it had obtained statements of intent from customers showing their interest in purchasing over 155,000 MT commercial quantity per year in the aggregate.

5. EU QUOTAS ON ISOGLUCOSE

5.1 Poland's accession to the EU

153. On 16 October 1991, the "Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part" (Exh. R66) was signed. The formal accession process was launched in 1998, and was followed by screening sessions intended to determine the extent to which Poland had accorded its laws with Community Law.

154. In March 1998, Poland had to present its initial "National Programme for the Adoption of the Acquis" ("NPAA"), which was to set out a specific timetable for achieving the priorities and intermediate objectives contained in the Accession Partnership (98/260/EC: Council Decision of 30 March 1998 on the Principles, Priorities, Intermediate Objectives and Conditions Contained in the Accession Partnership with the Republic of Poland – Exh. R84).

155. In the field of agriculture, the NPAA included as medium-term priorities Poland's alignment with the agricultural *acquis* and the development of a capacity to implement and enforce the EU's common agricultural policy ("CAP") (Section 3.2 ¶ 6 of the Council Decision 98/260/EC – Exh. R84).

156. On 22 June 1999, Poland submitted to the EU a document entitled "Organization of Polish sugar market," which provided, *inter alia*, that "*for several years* [...], *Poland ha*[d] *carefully observed the solutions adopted in the EU legislation with regard to the organisation of sugar market*," and in which Poland concluded that "*it should be said that Polish regulations are similar to those applied in the EU, although they are not identical. Generally, the ultimate target set for Poland is to have the EU legislation on the sugar sector fully implemented from 1 January 2003. The adjustment of Polish legislation is going to be achieved as a result of the following steps:* [...] *3. By the end of 2002, a common system of sugar and isoglucose production quotas and production limits for sugar manufacturers will have been introduced, according to the rules being in force in the EU*" (Exh. R263).

157. On 22 December 1999, Poland provided a position paper to the EU in which it declared that it "*accepts and will implement in full the* acquis communautaire *in the area of 'Agriculture'*," and that "*by 31 December 2002 Poland will produce legal and institutional arrangements which will allow Poland to apply the CAP instruments*" (Polish Position Paper on Chapter 7 "Agriculture," CONF-PL 63/99 – Exh. R99).

158. On 1 May 2004, Poland acceded to the EU.

5.2 EU regulation of sweeteners

159. Chapter 2 of the Council Regulation (EC) No 1260/2001 on the Common Organisation of the Markets in the Sugar Sector of 19 June 2001 (Exh. R119) governed isoglucose quotas and applied to the 2001/2002 to 2005/2006 marketing years (Article 10:1). The Regulation set out the basic A and B quantities of sugar, isoglucose, and inulin syrup to which the common market arrangements applied (Article 11:2), while A and B production quotas were allocated by each Member State to each undertaking producing isoglucose, which was provided with an A and B quota during the 2000/2001 marketing year and which was established in this Member State's territory (preamble ¶ 16, Article 11:1).

160. Under the EU quota regulations applicable from Poland's accession to the present, production quotas are granted for periods running from July of a given year through June of the following year.

5.3 Negotiations between Poland and the EU regarding isoglucose quotas

161. In 1999, three candidate countries among the most recently admitted Member States — Hungary, Poland and Slovakia — requested the following quotas (see Commission

of the European Communities, Enlargement and Agriculture: Successfully Integrating the New Member States into the CAP, Issues Paper, SEC(2002) 95 final, 30 January 2002, p. 6 – Exh. C74):

- Poland:
  - A quota: 15,000 tons dry matter;
  - B quota: 5,000 tons dry matter;
  - Total: 20,000 tons dry matter.
- Hungary:
  - A quota: 130,000 tons dry matter;
  - B quota: 10,000 tons dry matter;
  - Total: 140,000 tons dry matter.
- Slovakia:
  - A quota: 50,000 tons dry matter;
  - B quota: 10,000 tons dry matter;
  - Total: 60,000 tons dry matter.

162. Indeed, on 9 December 1999, Poland applied for an isoglucose quota of 20,000 MT in total (an A quota of 15,000 MT and a B quota of 5,000 MT), stating that "*in 1999 isoglucose production was begun. It is planned that isoglucose output will reach 20000 tonnes in 1999, which would satisfy an annual demand for this product in Poland*" (Poland's Position Paper in the Area of "Agriculture" for the Accession Negotiation with the EU, CONF-PL 63/99 – Exh. C45).

163. The EU Common Position of 7 June 2000 (Exh. R307) invited Poland to reconsider its request:

> *The EU notes that Poland requests* [...] *an isoglucose quota of 20,000 tonnes (A quota: 15,000 tonnes and B quota: 5,000 tonnes). The EU emphasizes, that annual production quotas for sugar and isoglucose must be determined taking account of historical production figures during a reference period to be defined, and the need to avoid adding to EU market surpluses, having regard also to WTO constraints. The EU invites Poland to reconsider the request on this basis and present actualized and complete data for 1995-1999 related to the following items* [...].

164. The Commission thus required Poland and the other candidate countries to provide statistical data regarding historical production (Exh. C74, p. 10, ¶ 5.3). The Commission noted that data regarding isoglucose production in Poland was incomplete (only production data having been provided) and inadequate (it being unclear, according to the Commission, how Polish data had been expressed) (Exh. C74, pp. 5-6). In 2000, "*no reliable publicly available data with respect to the*

consumption of [isoglucose] *in the EC exist*[ed], *neither at EC level, nor at Member State level. Estimates* [...] *assume*[d] *that production roughly equal*[ed] *consumption*" (Evaluation of the Common Organization of the Markets in the Sugar Section, September 2000, p. 98 – Exh. R107). Furthermore, "*there* [was] *no public data on HFS market prices, neither at the Community nor at the individual Member State level. The same* [held] *for production cost data. This implie*[d] *that the assessment of the competitive position of HFS vis-à-vis other sweeteners and third countries* [had] *to be based on relative production, export and consumption figures and cost of production and price estimates*" (Exh. R107, p. 98).

165. The quotas first proposed by the EU were the following (see Exh. C74, p. 6):

- Poland:
  - A quota: 2,493 MT dry matter;
  - B quota: 0 MT dry matter;
  - Total: 2,493 MT dry matter.
- Hungary:
  - A quota: 111,244 MT dry matter;
  - B quota: 0 MT dry matter;
  - Total: 111,244 MT dry matter.
- Slovakia:
  - A quota: 3,220 MT dry matter;
  - B quota: 0 MT dry matter;
  - Total: 3,220 MT dry matter.

166. Thus, the preliminary EU proposition for Poland was an A quota of 2,493 tons based on the reference years 1995 through 1999 (Exh. C74, p. 6).

167. On 23 January 2001, in its Reply to the Common Position of the European Union in the Negotiation Area of "Agriculture" (Exh. C57), Poland informed the EU that it expected its domestic production of isoglucose to amount to approximately 170,000 MT by the year 2003. It did not, however, formulate a revised request.

168. As of 2002, "*the total EC isoglucose quota* [was] *only around 300,000 tonnes a year and* [was] *invariably fully exploited.* [...] *The owners of the EC isoglucose quota* [were]*: Amylum (about 165,000 tonnes), Cerastar (72,000 tonnes), Roquette (around 43,000 tonnes), Danisco (around 12,000 tonnes) and Copam (about 10,000 tonnes)*" (Exh. R136, p. 129). In 2002, Cargill acquired Cerastar and thus 72,000 MT dry matter of the total EU-15 isoglucose quota.

169. On 15 April 2002, the European Commission Directorate-General for Enlargement issued a "Revised Draft Common Position" (Exh. R134) reiterating that the isoglucose A quota for Poland should be set at 2,493 tons and restating the measurement parameters:

> *The EU reiterates that annual production quotas for sugar and isoglucose must be determined taking account of historical production figures during a reference period to be defined, and the need to avoid adding to EU market surpluses, having regard also to WTO constraints. The EU reiterates its invitation to Poland to reconsider the request on this basis.*
>
> [...]
>
> *With regard to isoglucose quotas, the same general principles should be applied as for sugar quotas, with the exception of the adjustments to WTO constraints.* [...] *The A quota will equal domestic consumption. In a similar way to the approach for sugar quotas, isoglucose quotas should be based on the average isoglucose performance over the years 1995-1999. [This is in line with the approach taken in previous enlargements, where 5 years have been considered an adequate period, thus leveling out fluctuations in production, consumption, trade and other elements.]*
>
> *Poland started its isoglucose production in 1998 only, at a low production level. In order to fully use the capacity of the existing plant, Poland's request is based on production potential. However, an increase in isoglucose production immediately before accession should not be taken into account* [...].
>
> *This approach would lead to setting the total isoglucose quota for Poland at 2,493 tonnes which would be at the same time the A quota. As Poland is considered to be a net exporter no B quota would be proposed. The total isoglucose proposed corresponds to 13% of the total request and to 100% of the average production over the years 1995-1999.*
>
> *The data provided by Poland were not complete as they were limited to production data. It is not clear whether they are expressed correctly as 42% fructose equivalent. For the quota proposal, it was, however, assumed that they were expressed in the right way. Production data appeared to be consistent with other sources. As Poland did not provide consumption data the production data were used for the A quota proposal.*

170. In its Draft Revised Negotiating Position of 11 May 2002, Poland declared that it had "*changed its standpoint regarding isoglucose quota and would like to apply for the quota in aggregate amount of 42.2 thousand tons (quota A – 40 thousand tons, quota B – 2.2 thousand tons)*", i.e. the same quota as the domestic quota at that time (Exh. C79) for the following reasons:

> *In respect of the fiscal year of 2002/2003 the Council of Ministers (Ordinance of the Council of Ministers dated November 12th, 2001* [...]*) has established the aggregate quota of isoglucose in amount of 42.2 tons, calculated in dry substance contained in 42% fructose solution, and B quota – 2.2 thousand tons of dry substance in 42% fructose solution).*
>
> *According to the information provided by the producer's information, in 2001, the isoglucose production amounted to 27.6 thousand tons (calculated as dry substance). According to information provided by the representatives of the processing industry, the demand and production capacity in respect of isoglucose will be 120 thousand tons in 2003.*

171. In its Position Paper of 17 June 2002 (Exh. C80) issued in response to the Commission's "Revised Draft Common Position" of 15 April 2002 (Exh. R134 discussed above), Poland formally requested from the EU a quota of 42,200 tons dry state reiterating the figures stated in May regarding actual production in 2001 and production capacity in 2003.

172. In its Common Position Paper of 20 June 2002, the EU confirmed its earlier positions of January and April 2002: the isoglucose A quota remained at 2,493 MT dry matter, based on the fact that isoglucose production quotas "*should be determined on the basis of the average sugar and isoglucose production of the years 1995-1999 and with a view to ensuring the self-financing system of the CMO, having regard also to WTO constraints*" (Exh. R139). In its Fact Sheet of June 2002 regarding EU agriculture and enlargement, the European Commission Directorate-General for Agriculture further stated that even though "*the Commission has proposed to determine agricultural production supply management instruments, such as quotas, on the basis of the most recent historical reference periods — from 1995 to 1999* [...] *where figures for 2000 exist, these will also be taken into consideration*" (Exh. R208).

173. On 11 October 2002, the Council of Ministers stated its intent to increase the request for isoglucose quotas to 62,200 tons dry matter:

> *Poland maintains its position presented in CONF-PL 43/02 and reiterates that Poland forwarded to the EU data on sugar production, consumption, imports, exports, prices of sugar beet as well as sugar balance during the campaign years from 1994/95 to 1998/99 and for calendar years 1995-2000. In addition, information concerning isoglucose production and WTO commitments relating to export subsidies was furnished.*
>
> [...]
>
> *Poland changes its position with regard to the isoglucose quota and requests the total quota of 62,200 tonnes (A quota – 60,000 tonnes and B quota – 2,200 tonnes).*
>
> *According to the manufacturer's information, isoglucose production in 2001 was 27,600 tonnes (as converted into dry matter). The information given by processing industry representatives indicates that the demand for and production capacity of isoglucose in 2003 will be equal to 120,000 tonnes.* (Exh. C84)

174. This request for an increase met with criticism in the sugar industry. On 23 October 2002, at a meeting of the Committee of Agriculture and Rural Development of the Senate, Stanisław Barnás, President of the National Union of Sugar Beet Growers, opposed the increase:

> *There are no arguments explaining why the Polish government has increased the amount of isoglucose. Such arguments simply do not exist. The amount of 6,600 tonnes offered by the Union is sufficient. Such production is not in the interest of Poland, as our sugar base is too big, and inverted sugar can replace isoglucose.*

The American firm may manufacture other products, not only isoglucose, it may make glucose or ten other products, at the same place. I would like to ask for not replacing the sugar quota with isoglucose during the final negotiations, as mentioned by the minister. The Polish side should not even suggest this. (Exh. C135)

175. At the same meeting, Jerzy Plewa, Undersecretary of State at the Ministry of Agriculture and Rural Development, explained that the increase was prompted by requests from the processing industry asking for 120,000 tons:

> *Of course, in its ordinance the government decided to increase the A and B quotas production limits of sugar and isoglucose. In the past year the government took this decision twice. In the case of the A quota this was 40,000 tonnes, and then 60,000 tonnes. Why was this decision taken?*
>
> *Why did the government take this decision? Well, in such a difficult situation in the grain market in 2002 Cargill undertook to purchase additional 500,000 tonnes of wheat during that year's harvest. This matter was also discussed at the latest meeting of the parliamentary commission, and there was a tie between the votes for and against the isoglucose solution. The processing industry in Poland assumes that 40,000 tonnes is too little and sends us letters asking for more isoglucose. They want to move away from using sugar, because the global trend is to sweeten products with isoglucose. This has to be considered very carefully. They are asking for 120,000 tonnes. I would also like to tell you that, although I am not prepared for discussing this issue, the government, voivodship authorities and local governments, agriculture chambers in that voivodship and several MPs and farmers' unions have also been appealing for increasing this limit to 120,000 tonnes.*
>
> [...] *It is obvious that any representatives of the sugar industry present in this room will criticise this decision of the government and claim that the amount is excessive. On the other hand, representatives of the makers of isoglucose would criticise the decision too, saying that the amount is too low. The government reconsidered the matter and took a different decision. It is good that the issue has been referred to the tribunal, and I think that it will be resolved. I simply wanted to explain in a few words the reasons behind this decision of the government. It stems from a logical approach to the entire issue, and also from a certain compromise. This is not 120,000 but 60,000 tonnes. Thank you very much.* (Exh. C135)

176. On 30 October 2002, in its Reply to the Common Position of 20 June 2002, Poland again increased its request to a total isoglucose quota of 62,200 MT dry state, i.e. an amount equal to the second domestic quota. It restated that according to the manufacturer's information, isoglucose production in 2001 was 27,600 tons dry matter and that the demand and production capacity of isoglucose in 2003 would amount to 120,000 tons processing industry (Exh. C84).

177. In its Common Position Paper of 31 October 2002, the EU reiterated that isoglucose production quotas should, as a general rule, be determined upon the same principles as those established for sugar quotas, which were based on effective production during the period 1995-1999 (Exh. R145). The EU nevertheless added that since isoglucose production had only begun in Poland in 1998, "*the average isoglucose performance over the effective production years 1998-1999 should be considered for*

isoglucose quota determination" (Exh. R145). Accordingly, the EU revised its proposal upwards to a 6,232 tons A quota, taking into account effective production in 1998-1999 (Exh. R145). It did not set a B quota, given the alleged "*absence of relevant data on trade and consumption of isoglucose over the period 1998-2001*" (Exh. R145).

178. On 25 November 2002, in reply to the EU's position of 31 October 2002, Poland maintained its position on the isoglucose quota volume of 62,200 tons on the basis that in 2001, production of isoglucose had amounted to 27,684.7 MT and "*annual production capacity resulting from irreversible investments, which took place in the years 1998-1999 amount to 120 thousand tones*" (Exh. C85).

179. In December 2002, the EU revised its position and proposed an isoglucose A quota of 20,571 MT based on the 1999-2001 reference period as a "*global solution to all outstanding issues in the accession negotiations* [...] *at the Copenhagen European Council, adjusted in the light of the discussion at the Council in December 2002*" (Report of the Council of the European Union on Enlargement, 11 December 2002 – Exh. R148).

180. On 5 December 2002, Jan Truszczyński, Secretary of the European Integration Committee, Secretary of State, Office of Foreign Affairs, and chief Polish negotiator, reported to the Council of Ministers on the "Status of Accession Negotiations as at 5 December 2002" and insisted that there was no flexibility on the part of the EU with respect to quotas:

> *At the level of the Presidency and the European Commission there is no negotiations flexibility with respect to quotas and paraqwotas* [sic]. *Changes would require a decision of EU 15 at the political level, which the Presidency would not want to propose out of concern for defending the Danish package as it stands now. The partners stress that there is no justification to increase quota given our statistical data for 1995-2001. We have received no counterproposals regarding quotas and paraquotas. It is the opinion of the EU that Polish expectations are excessive and go beyond the ceilings that are acceptable to member states (reference yield, milk quota, isoglucose, starch, sugar B quota, beef premium). There is no flexibility even as for as any "barter trade" does with respect to the lesser demands (e.g. sugar B quota in exchange for isoglucose, starch and B sugar in exchange for beef premium eligibility for suckler cows produced as a negative reaction.* (Exh. R310)

181. On the final day of the negotiations during the European Council meeting in Copenhagen on 13 December 2002, Poland agreed to trade a portion of its sugar quota for an increase in its isoglucose quota (from 1,678,137 MT to 1,671,927 MT). Poland eventually accepted an isoglucose quota which amounted to 26,781 MT dry state per year (24,911 MT dry state A quota and 1,870 MT dry state B quota), equal to 37,719 MT commercial quantity. As stated in the course of a European Parliament

public hearing held on 14 July 2005, the quota limiting the production of isoglucose "*represent*[ed] *approximately 3% of the sugar market, which mean[t] 500.000 tons in EU-25*" (Exh. R181).

182. In conclusion, the following quotas were allocated (see European Commission, A Description of the Common Organization of the Market in Sugar, September 2004 (AGRI/63362/2004), p. 26, Annex II – Exh. R172):

- Poland:
  - A quota: 24,911 MT dry matter;
  - B quota: 1,870 MT dry matter;
  - Total: 26,781 MT dry matter.
- Hungary:
  - A quota: 127,627 MT dry matter;
  - B quota: 10,000 MT dry matter;
  - Total: 137,627 MT dry matter.
- Slovakia:
  - A quota: 37,522 MT dry matter;
  - B quota: 5,025 MT dry matter;
  - Total: 42,547 MT dry matter.

5.4 Contacts between Cargill and Poland regarding EU accession negotiations

183. On 7 December 1999, Mr. Hueting addressed a letter to Mr. Plewa, Undersecretary of State, Ministry of Agriculture and Rural Development, with an "*expert opinion regarding level of production quota for isoglucose in connection with the Polish negotiating position in the field of agriculture*" (Exh. R98). This "expert opinion" pointed out that the production capacity had been 40,000 MT in 1999, would amount to 80,000 MT in 2001 and 120,000 MT in 2002 and would match demand. It concluded:

> ***7. Summary***
>
> *It is very important for Poland to aim at negotiating the isoglucose production quota in the amount no less than 120 thousand tons.*

184. On 3 March 2000, after Poland's application for an isoglucose quota of 20,000 tons in total (an A quota of 15,000 tons and a B quota of 5,000 tons) in December 1999 (see Exh. C45), Cargill's Vice-Chairman, Guillaume Bastiaens, wrote to Deputy Prime Minister and Finance Minister, Leszek Balcerowicz, and attached to his letter a copy of "*Cargill's position on the isoglucose quota in light of Poland's European Union accession negotiation*" (Exh. R271). Cargill urged the Government to increase its quota

request to 120,000 MT, explaining that this figure was necessary as "*the soft drinks industry alone could use up to 230,000 MT.*" It also restated the production capacity referred to in December 1999 and ended by urging "*you to show a strong commitment to correct the Polish quota negotiation by asking the EU to incorporate that the 20.000 MT is only the starting point for a serious development up to 120.000 MT*" (Exh. R271).

185. In a letter of 20 March 2000 addressed to Artur Balazs, Minister of Agriculture and Rural Development, Cargill restated this request for an increase to 120,000 MT (Exh. C47), arguing that demand for isoglucose and Cargill's production capacity were growing, and that such factors had been taken into account in the accession negotiations with Spain, Portugal and Hungary. Specifically, Cargill argued that:

- Negotiations between Portugal and Spain, on the one hand, and the EU, on the other hand, "*fully provided for the concurrently increasing production and demand over the years until full conclusion of the negotiation process*" (Exh. C47).

- "*In its negotiation stance Hungary provided for its food industry's demand as well as its isoglucose production capacity and therefore requested a quota of 140 thousand tons. Such quota allows them to meet their internal demand as well as to meet any future demand of the Polish food industry*" (Exh. C47).

186. In a letter on 30 August 2000 to Minister Balazs, Mr. Hueting reiterated his request for an A quota of 100,000 tons and a B quota of 20,000 tons, reflecting "*the target production capacity as well as domestic market's demand*" (Exh. C49). Shortly thereafter, in his "Record for Meeting on Polish Isoglucose Production Quota" of 19 September 2000, Mr. Hueting again emphasized the need to increase the quota request by reference to Cargill's investment and planned production:

> *Cargill has so far invested 85 million dollars in Poland and the expansion of its Wrocław plant is under way. The isoglucose output of 120,000 tons is an integral part of these activities and plays an essential role in the plant's operation. If the production quota is not increased to that level, serious doubts as to the future of the plant will arise.* (Exh. R109)

187. The following month, on 27 September 2000, Mr. Hueting once again restated Cargill's position in a letter addressed to the Chairman of the Sugar, Isoglucose, and Inulin Team, Ministry of Agriculture and Rural Development (Exh. C51):

> *5. Demand of the Polish food industry*
>
> *The Polish sugar industry stated itself that the food market's absorption of isoglucose is estimated to be 800 thousand tons per year. The Polish food industry stated that demand for isoglucose in Poland was extremely high, as their own demand was much higher that* [sic] *the requested 120 thousand tons. It was also stated that if*

there were no Polish production, the Polish food industry would import isoglucose as a competitive sweetening agent.

[...]

Summary

[...] *Being aware of the balance of wheat and sugar in Poland, the Cargill company respectfully requests that isoglucose production limit of 120 thousand tons be determined. Polish isoglucose production will partially meet the demand of the Polish food market, guarantee sales of wheat, and be anti-import production as well as provide farmers and processing companies with an alternative. 120 thousand tons of isoglucose will not have any significant influence on the sugar balance in Poland.*

188. On 14 May 2002, Mr. Hueting wrote to Czesław Siekierski, Secretary of State at the Ministry of Agriculture, stressing that Poland's negotiation position would have to be substantiated with detailed data on current and contracted domestic consumption rather than on historical production:

As indicated by the analysis of the recently published preliminary positions of the European Commission (January 2002, April 2002), the assessment of the Polish application by the EU side – similarly to the other products – will be primarily based on the domestic isoglucose consumption data. Given the recently launched production, very high domestic consumption growth rate and the investments made in production capacity [...], *Poland has good grounds not to apply the historical reference period criterion. We suggest that the justification of the application be based on very detailed and most up-to-date data on the current and contracted domestic consumption and the corresponding output.* [...]

The Polish side has such detailed information at its disposal. To support our isoglucose quota adjustment application, we have gathered and submitted very detailed data on consumption and production with a breakdown including each of our customers and confirmed with relevant demand statements issued by the various Polish companies.

The data indicates that the current domestic consumption and demand is at the level of over 110 thousand tons and fully justifies a quota of 120 thousand tons requested by the Polish industry since 1999.

In our opinion to effectively defend the adjusted Polish position and its credibility, it is extremely important for the requested quota to correspond with the detailed data on domestic consumption plus a small margin upwards providing some negotiating elbow room. [...] *If the negotiations are launched with a 120 thousand tons request there will still be some room for negotiation's concessions, and the final quota negotiated may be at a level similar to the currently demonstrated domestic consumption.* (Exh. R137)

189. Two months later, on 10 July 2002, Cargill strongly protested in a letter to Leszek Miller, Prime Minister, against Poland's negotiation position advocating a quota of 42,000 tons:

[...]

REQUEST (repeated)

Re: revised Polish negotiation stance in the Chapter on Agriculture – on isoglucose production quota.

*With great disappointment we found out that the Council of Ministers approved the revised Polish negotiation stance re. establishment of isoglucose production quota at the level of **42.2 thousand** tons. Our regret is all the greater that despite our request as the applicant and the main party interested, once again we were totally ignored in the process of consultations and we are absolutely unaware of any reasons or data behind the government's decision.*

*On our part we supplied reliable and detailed data on national demand forecast and proper justification, which should constitute the only basis for quota establishment, including domestic one for the next accounting period (2003/2004) as well as for the revised request to be presented in accession negotiations with the EU. The initially considered values – 82.2 thousand tons (which we found out from the internet) as well as those finally accepted 42.2 thousand tons are radically different from the requested ones – **120 thousand tons.***

We consider this decision to be discriminative and requiring correction [...]. (Exh. C81)

190. On 21 February 2007, Poland filed a fax transmission of 4 August 2002 from Mr. Hueting to Mr. Huff, Counselor for Economic Affairs, US Embassy, Warsaw, which reads in part as follows: "*I would much appreciate it if the ambassador could contact President Kwaśniewski today to intervene and ensure to raise the quota to at least 80,000 MT*" (Exh. H). The parties disagree whether said quota was expressed by Mr. Hueting in commercial quantity or in dry state. Therefore, the Tribunal has decided not to rely on this exhibit.

191. Thereafter, in its Reply of 30 October 2002 to the Common Position of 20 June 2002, Poland increased its total isoglucose quota request to 62,200 MT dry matter (Exh. C84). In reaction to this request, Cargill again wrote to Prime Minister Miller asking that the quota be increased to 120,000 or at least 102,000 tons, and that the justification of the then current request of 62,000 tons, which was "*an absolute minimum*," be supported with proper data:

Having gained cognisance of the change in the Polish stance re. the isoglucose quota as well as justification thereof, we would like to ask you to promptly verify and supplement the concerned justification, as it is very short, incoherent, and contains incorrect information.

[...]

We propose that the Polish stance is supplemented and corrected in such manner as to take into consideration all data and arguments, which are of essential meaning for the isoglucose quota allocated to Poland after accession to the EU, i/e. it is necessary to indicate:

- *data on investments made between 1998 and 1999,*
- *annual production capacity,*
- *increasing domestic level of consumption demand, including domestic industry forecast with respect to the target demand level,*

- *domestic quotas for 2002-2003 (nine months) and 2003-2004, indicating domestic consumption during the concerned period (those quotas reflect the currently contracted internal consumption),*
- *data on external trade, which confirm the domestic level of consumption (domestic consumption = production + import — export),*
- *the quoted acquis i.e. article 9 R.R. 1293/79 amending R.R. 1111/77, which R.R. 1785/81 refers to.*

[...]

As we indicated in our previous requests and speeches, the optimum level of Polish quota [...] *is at the level of 120 thousand tons.*

A quota of 102 thousand tons at an acceptable level, this quota results from acquis and the principle of equal treatment and no discrimination of Polish producers by comparison to the EU ones. It is calculated based on the same principles that was previously used to calculate in the EU the currently applicable isoglucose production quotas.

[...]

Therefore it is fully justified for Poland to apply for an optimum quota of 120 thousand tons, or at least one at the authorised and acceptable level. i.e. 102 thousand tons. (Exh.C9; see also Exh. R146)

192. In another undated letter to the Prime Minister, Cargill reiterated its view that the isoglucose quota should be set at 102,000-120,000 MT, and insisted that Cargill should benefit from the same treatment as that enjoyed by EU companies at the time isoglucose was introduced into the EU market regulation system:

We still strongly believe that there is a necessity to negotiate the Polish isoglucose production quota to be at the level of 102-120 thousand tons, as this quota reflects:

[...]

3) Investments made into isoglucose production capacity

We believe that similarly as it is the case with other chapters, the basic principle to be used by the Polish Government in accession negotiations re. common agricultural policy is the ***principle of equal treatment****, and Poland is entitled to expect that as far as its isoglucose production quota is concerned, that the EU will apply the same criteria as it did when establishing isoglucose production quotas for EU companies, when isoglucose was included into the market regulation system.*

In the EU, isoglucose production quotas have been established at the level of approximately 85% of annual production capacity of EU companies [...]. (Exh. C10)

193. Cargill addressed two other undated letters (Exh. C11; Exh. C12) as well as a letter dated 11 December 2002 (Exh. R 149) in similar terms to the Prime Minister. In the first of these letters, Mr. Hueting noted that "*this negotiation chapter will be very difficult, all the more that the European sugar cartel, which controls nearly entire sugar and isoglucose production in the EU as well as in the candidate states, is openly hostile towards the Polish producers, and is trying everything to undermine Poland's right to set the isoglucose quota at the proper level*" (Exh. C11). Cargill therefore asked

to be allowed "*to participate in preparatory works re. the Polish negotiation stance and detailed justification thereof*" (Exh. C11).

194. Poland argues that on 3 December 2002, Cargill sent yet another letter to Prime Minister Miller regarding Poland's reduction of the isoglucose quota in the negotiations with the EU from 62,200 MT to 42,200 MT dry matter. According to Poland, Cargill had explicitly conceded in this letter that the method of calculation of the quota was determined by the *acquis* and could not be negotiated. Poland further argues that Cargill also acknowledged, in the said letter, that up to that point, the isoglucose quota submitted in the EU negotiations had been calculated in a proper way (i.e. it took into account both current production and domestic consumption). Finally, according to Poland, Cargill also requested in its letter that Poland revise its negotiation position and revert to the level of 62,200 MT. No exhibit evidencing the existence of the 3 December 2002 letter was filed.

6. CARGILL'S EXPORTS OF ISOGLUCOSE

195. According to a letter of 4 February 2003 from Cargill Polska to Ms. Kasperowicz, "*in 2002, the output of isoglucose converted into 100% dry mass in 42% fructose solution was 43,495.62 tons*" and "*the exports of isoglucose converted into 100% dry mass in 42% fructose solution were as follows: Lithuania – 204.51 tons; Latvia – 49.87 tons*" (Exh. R151).

196. On 11 July 2003, Cargill advised the Ministry of Agriculture that its total exports of isoglucose in the period from 1 October 2002 to 30 June 2003 amounted to 3,588.68 MT:

> *In the reference period from 1 October 2002 to 30 June 2003, the isoglucose output converted into 100% dry mass in 42% solution was 43.612.90 tons, including 12,784.35 tons until 31 December 2002.*
>
> *The exports of isoglucose converted into 100% dry mass in 42% fructose solution were as follows:*
>
> | | |
> |---|---|
> | *Lithuania* | *378.94 tons, including 127.96 tons until 31 December 2002;* |
> | *Latvia* | *146.62 tons, including 146.62 tons until 31 December 2002;* |
> | *Croatia* | *2,988.50 tons, including 0.00 tons until December 2002;* |
> | *Czech Republic* | *74.62 tons including the entire volume until December 2002.* |
>
> *The total exports were 3,588.68 tons, including 228.47 tons until 31 December 2002. The stock at the end of the accounting period, that is as at 30 June 2003, was 586.26.*

Utilisation of "B" quota – 2,200.00 tons;
*Utilisation of "C" quota – 1,388.68 tons (*Exh. R153*).*

197. By letter dated 16 February 2004, Cargill informed the Ministry of Agriculture that production of isoglucose for the entire year 2003 had reached 63,650.65 MT dry state (89,648.80 MT commercial quantity) and that the volume of isoglucose exports (as a C volume) amounted to 6,013.18 MT dry mass (8,469.27 MT commercial quantity). In the same letter, Cargill stated that as of 31 December 2003 it had stored 1,249.33 MT dry state (1,759.62 MT commercial quantity) (Exh. R168).

* * * * *

V. SUMMARY OF THE PARTIES' POSITIONS AND LATEST RELIEF SOUGHT

198. The parties' general positions as set forth in written and oral submissions are summarized in this chapter. They will be further referred to in the course of the Tribunal's analysis.

1. CARGILL

1.1 Cargill's case in a nutshell

199. At all stages of Cargill's investments in the production of isoglucose in Poland, Poland was on notice of Cargill's investment plans, its production capacity and the demand for isoglucose. Poland encouraged Cargill's investment in isoglucose and led it to believe that its investment plans and the economic benefit thereof would not be impeded.

200. Poland did nothing to warn Cargill of the impending restrictive governmental intervention or to discourage Cargill from pursuing its plans. In particular, until July 2002, Poland did not warn Cargill that quotas would be imposed which would sharply restrict Cargill's production to a level far below its planned capacity level. To the contrary, Poland gave Cargill assurances that the latter would be able to enjoy the full benefits of its investment.

201. Poland nevertheless made a deliberate choice to favour its domestic sugar industry by imposing restrictive national quotas on isoglucose, on the one hand, and by negotiating with the EU restrictive quotas on isoglucose, on the other.

202. Poland had a general financial interest in restricting isoglucose production. Indeed, sugar and isoglucose are competing products and Poland had an interest in the

economic well-being of the Polish sugar industry given the considerable ownership it retained (and still retains) in this industry. Poland also had an interest in keeping the sugar quotas high in order to make greater profits in the context of the privatization of its sugar plants, each of which held sugar quota allocations.

203. With respect to the restrictive national isoglucose quotas imposed by Poland:

- The imposition of national quotas prior to Poland's accession to the EU was neither required by EU law, nor emulated by other EU candidate countries that had an isoglucose industry. Furthermore, the imposition of national quotas was in fact in direct conflict with assurances provided by Poland to Cargill. In any event, the EU did not require the imposition of quotas based on actual production.

- Poland imposed national quotas on isoglucose at a level significantly lower than both market demand and Cargill's production capacity, notwithstanding the fact that Poland was in possession of the data necessary for taking into account Cargill's production and expansion in setting domestic quotas. Indeed, Cargill provided extensive information to Poland regarding demand, production capacity, actual production and sales, on the one hand, and the status of its investments, on the other hand. Furthermore, it cooperated with numerous government inspections. Prior to the submission of its Counter-Memorial, Poland never suggested that the data provided by Cargill was inaccurate or contradictory.

- The precipitous introduction of national quotas disproportionately benefited Cargill's direct competitors, the Polish domestic sugar producers – in which Poland had a significant financial interest and with which it had close institutional ties – and their suppliers, Polish sugar beet growers. Quotas on sugar exceeded domestic demand, notwithstanding the existence of a considerable surplus of sugar and of sugar overproduction in Poland. The high domestic sugar quotas allowed Poland to secure equally high sugar quotas in its accession negotiations with the EU.

- The restrictive national isoglucose quotas crippled Cargill's production and deprived Cargill of the value of its investment in the production of isoglucose in Poland. Indeed, as a result of the quotas on isoglucose imposed by Poland, Cargill experienced substantial losses:

  - Cargill's ability to produce isoglucose was limited to levels well below its capacity and market demand;

- Cargill lost a significant amount of business (it had to cancel or refuse to renew contracts with both customers and suppliers); the customer base carefully built up by Cargill between 1998 and 2001 was destroyed and Cargill was thereby deprived of considerable revenues from the isoglucose market in Poland;

- Cargill has been and still is unable to use a substantial portion of its equipment;

- Cargill could not "freely" produce isoglucose and simply export the amount in excess of the quota;

- in some instances, the restrictive quotas had the effect of forcing Cargill to purchase sugar and then blend it with glucose in order not to default on its existing contracts;

- Cargill was deprived of its other sweetener businesses;

- many of Cargill's potential customers decided against investing in the equipment necessary to use isoglucose.

- Poland's imposition of a low national quota undermined the possibility of obtaining an EU quota that would accommodate Cargill's investment, notwithstanding the fact that the EU was amenable to a higher isoglucose quota.

204. With respect to the restrictive EU-mandated quotas:

- Despite the information provided by Cargill, Poland failed to supply accurate information on market demand to the EU and to request, during its accession negotiation, EU quotas that would accommodate Cargill's production capacity and actual market demand.

- The EU-mandated quotas on isoglucose further undermined Cargill's investment, in particular by dissuading potential customers from establishing or renewing relationships with Cargill.

- In its accession negotiations with the EU, Poland sought and obtained sugar quotas exceeding market demand while proposing quotas for isoglucose that were below existing capacity and demand.

205. Prior to the introduction of national quotas, demand for isoglucose was robust and growing, and Cargill's prospects for isoglucose production in Poland were strong. If isoglucose quotas had not been imposed, demand for isoglucose would have grown in the EU as in the rest of the world beverage market. Cargill's decision to invest in the production of isoglucose was therefore commercially sound. In fact, from the time it made its initial decision to invest in isoglucose production in 1998 until the final stage of its expansion in February 2002, Cargill invested in isoglucose production to supply the growing demand in the Polish market and had a thriving and profitable isoglucose operation.

206. Cargill made efforts to mitigate its damages where possible.

207. Through the imposition of restrictive national isoglucose quotas and the negotiation of restrictive EU-mandated isoglucose quotas:

- Poland failed to accord Cargill national treatment, in violation of Articles II:1 and II:8(1) of the BIT.
- Poland failed to fulfill its obligations under Article II:6 of the BIT; indeed, Poland denied Cargill fair and equitable treatment, and impaired Cargill's use and enjoyment of its investment through arbitrary or discriminatory measures.
- Poland imposed on Cargill impermissible performance requirements in violation of Article II:4 of the BIT.
- Poland deprived Cargill of the use and value of its investment in violation of Article VII:1 of the BIT.

208. As a result, Cargill is entitled to compensation for deprivation of its US-Poland Treaty rights.

1.2 Cargill's latest prayers for relief

209. In its Second Post-Hearing Brief, Cargill made the following request for relief:

> *Cargill requests that the Tribunal award it compensation in the amount of US $82,969,321 plus interest dating from October 1, 2002 compounded annually at a rate of 5.20 percent. Cargill also respectfully requests an award of its legal fees and other costs incurred in connection with this proceeding.* (p. 71)

2. POLAND

2.1 Poland's case in a nutshell

210. Cargill invested in Poland at a time when the regulatory regime was undergoing dramatic changes. Indeed, from 1993, Poland was reforming its regulations applicable to a range of sectors and products to bring them in line with the regulatory framework applicable in the EU. Poland's regulation of sweeteners followed this broad pattern. The law and practices of the EU guided Poland's reform of its sugar market regulation and the implementation of its new laws.

211. Having operated in Poland for years, Cargill was well familiar with the Polish political and economic landscape. In particular, Cargill knew what to expect as Poland prepared for its impending accession to the EU. Thus, to the extent that Cargill actually had the expectations it claims in the present proceedings, those expectations were wholly unreasonable. In other words, Cargill miscalculated the investments it could make in Poland.

212. The specific timeline of events after the initiation of the investment shows that Cargill's July 2001 decision to expand its production capacity to 120,000 MT (commercial quantity) was particularly unreasonable. Indeed:

- Poland had announced, on 12 November 2001, a quota less than half the amount of 120,000 MT (commercial quantity);
- Five days prior to 12 November 2001, Cargill had not even signed the contract to procure one of the major pieces of equipment required for the expansion to 120,000 MT; the fee related to the termination of such a contract would have required Cargill to pay only for the portion of the work completed as of the date of termination, and as of 12 November 2001, the supplier was only five days into a construction contract estimated to take months to be completed.
- Cargill's reliance on "various world markets" only served its theoretical speculations about demand in a hypothetical Polish market unaffected by EU regulation, and only showed that Poland's future isoglucose market was expected to be unlike other open markets in the world, in that demand was expected in Poland to be limited by EU regulation.

213. With respect to domestic isoglucose quotas:

- Before its accession to the EU, Poland was under the obligation to approximate its laws – including its regulations regarding the sweetener market – to those of the EU. The adoption of the *acquis communautaire* was not only an absolute pre-condition to Poland's accession to the EU but also a condition for Poland's timely accession. Poland imposed domestic isoglucose quotas because it legitimately believed that approximation was an absolute requirement to be satisfied prior to Poland's accession to the EU.

- In any event, without any desire or intent to discriminate against Cargill, Poland could have freely chosen to impose quotas prior to its accession to the EU, even if it was not required to do so, simply to ensure that its integration into the EU would proceed smoothly, or for any other reason.

- From 1994, historical production was playing a significant role in Poland's regulation of the sugar market. Even if this had not been the case and even if the applicable law or practice did actually direct Polish officials to focus on capacity or projected capacity (rather than on historical production), reliance on historical production was, in the present instance, necessary considering Cargill's misrepresentations regarding its isoglucose production operations. Indeed, in determining quota levels, Poland had to rely on actual production as a result of:

  - the incomplete and inconsistent data regarding isoglucose production provided by Cargill; in particular its failure to provide evidence supporting the allegation that its decision to expand to a capacity of 120,000 MT (commercial quantity) was reasonable and regarding the date on which it received and installed the equipment necessary to complete the 120,000 MT (commercial quantity) phase of its expansion;

  - the fact that Cargill's production line was not properly equipped to allow verification of production;

  - Cargill's failure to provide complete and consistent data regarding isoglucose production when Poland was negotiating isoglucose quotas with the EU.

- Cargill had no reasonable ground to assume that production capacity would form the basis for quota determinations in Poland. Indeed, Cargill knew from the beginning that quota levels would be imposed during its expansion timetable and, given the uncertainty surrounding the final quota levels, it had no reasonable

basis for believing that it would be able to use any particular capacity without any interruption in the future.

214. With respect to the EU-mandated quotas:

- Poland had no ability to determine, on its own, the final accession package.
- Poland negotiated quotas with the EU which Cargill in fact considered to be satisfactory.

215. Poland did not provide Cargill with any assurances that regulations concerning isoglucose imposed domestically or negotiated with the EU would accommodate both market demand and Cargill's planned production capacity. In fact:

- The evidence on record shows that despite Cargill's request for written assurances on two occasions in June and July 1998, long before it began construction of its isoglucose facility, Cargill never received any such assurances.
- In July 1998, Cargill received a warning from the Ministry of Agriculture that domestic quotas were pending, and that history demonstrated very low quotas in the EU regime.
- The purported absence of regulation was no basis for Cargill's conclusion that it had been assured by the Polish government that quotas would accommodate its capacity and market demand.
- The assurances allegedly provided to Cargill were obtained only after the latter's decision to invest in the production of isoglucose.

216. In conclusion, Cargill had no reasonable basis for its purported expectation that isoglucose production in Poland would not be subjected to the type of regulation at issue in the present proceedings. Cargill proceeded with the expansion of its investment at its own risk.

217. Cargill has misrepresented key facts not only to the Polish government but also to the Arbitral Tribunal. This defeats the claim that it provided the Polish government with reliable information regarding its actual isoglucose production or production capacity.

218. Cargill has ongoing business activities and several viable alternative uses for its investment with the result that it has not been deprived of the benefits of its investment. Indeed:

- Until the date of Poland's accession to the EU, Cargill could produce isoglucose without any limitation.

- Cargill held the entire share of the isoglucose quotas established pursuant to the 2001 Sugar Law and later mandated by the EU.

- Even after the imposition of the domestic quotas, Cargill exported significant portions of its production, including to non-EU member states.

- The imposition of isoglucose quotas did not deter Cargill's other business activities, such as the production of crude alcohol.

219. As to the violations of the BIT invoked by Cargill:

- The Tribunal lacks jurisdiction over Cargill's claims as to the EU-mandated quotas, on the one hand, and Cargill's performance requirements claim, on the other hand.

- Cargill's claim under Article II:6 of the BIT, i.e. the provision on fair and equitable treatment, fails in law and in fact. Indeed, Poland has not violated any of the requirements under the minimum standard of customary international law. In any event, Cargill's attack on the national and EU-mandated quotas is unfounded.

- Cargill has failed to prove that it has suffered less favourable treatment on account of its nationality, and its claim under Articles II:1 and II:8 of the BIT therefore fails. First, Cargill's attempt to establish a difference in treatment between its purported capacity and the aggregate consumption of sugar produced by both Polish and non-Polish entities is to no avail. Second, Cargill is "in like circumstances" with glucose producers which are accorded exactly the same treatment as Cargill, and not with Polish-owned sugar producers. Finally, reasons unrelated to nationality of ownership justify, in any event, the alleged differentiation among producers of sugar and producers of isoglucose.

- Cargill's claim of expropriation is likewise flawed, since Cargill has failed to identify any investment capable of being expropriated and since there has, in any event, been no taking under international law.

2.2 Poland's latest prayers for relief

220. In its Second Post-Hearing Brief, Poland made the following request:

[...] *the Republic of Poland respectfully requests that this Tribunal render an award: (i) in favor of Poland and against Cargill, dismissing Cargill's claims in their entirety and with prejudice; and (ii) pursuant to paragraphs 1 and 2 of Article 40 of the UNCITRAL Arbitration Rules, ordering that Cargill bear the costs of this arbitration, including Poland's costs for legal representation and assistance.* (p. 86)

* * * * *

VI. ANALYSIS

221. The Tribunal will first examine a few introductory matters (sub-section 1 below) and the question of jurisdiction and admissibility (sub-section 2 below), before addressing whether Poland failed to accord Cargill national treatment in violation of Articles II:1 and II:8(1) of the BIT (sub-section 3 below); whether Poland failed to fulfill its obligations under Article II:6 of the BIT to provide fair and equitable treatment, and not to impair Cargill's use and enjoyment of its investment through arbitrary or discriminatory measures (sub-section 4 below); whether Poland imposed on Cargill impermissible performance requirements in violation of Article II:4 of the BIT (sub-section 5 below); and whether Poland deprived Cargill of the use and value of its investment in violation of Article VII:1 of the BIT (sub-section 6 below).

1. INTRODUCTORY MATTERS

222. As preliminary matters, the Tribunal will address the relevance of previous decisions rendered in the context of state-investor disputes (1.1) and the law applicable to the dispute (1.2).

1.1 The relevance of previous decisions or awards

223. In support of their positions, both parties have relied on previous ICSID decisions or awards, either to conclude that the same solution should be adopted in the present case or in an effort to explain why this Tribunal should depart from that solution.

224. The Tribunal considers that it is not bound by previous decisions[22]. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to

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22 *See, e.g., AES Corporation v. Argentine Republic*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 13 July 2005, ¶¶ 30-32.

meet the legitimate expectations of the community of States and investors towards certainty of the rule of law[23].

1.2 Law applicable to the dispute

225. It is common ground between the parties that "*the terms of the Treaty and international law, not Polish law, govern this dispute*" (Cargill's FPHB, p. 44) "*even where, as is the case with the BIT at issue here, the treaty itself is silent as to applicable law*" (Poland's FPHB, p. 2).

226. The Respondent further contended that "*at least four categories of international law may be applicable to claims of breach of a treaty on investment such as the BIT at issue here*" (Poland's FPHB, p. 3), i.e. the law of treaties and the rules of treaty interpretation, certain customary international law relevant to foreign investment, international claims law and the international law of damages (Poland's FPHB, pp. 3-5).

227. In addition, the Respondent argued that "*the fact that international law supplies the rule of decision does not mean that EU and Polish law are irrelevant*" (Poland's FPHB, p. 2). Indeed, first, "*municipal law may serve, for example, as a control group for assessing whether a supposed rule constitutes part of customary international law*" (Poland's FPHB, p. 2). Second, in an investment dispute governed by international law, municipal law "*forms part of the facts of the case*" (Poland's FPHB, p. 7).

228. Absent a choice of law in the BIT, the parties' common position is in line with the law and practice of international investment treaties. In lieu of many others, one may quote the Vivendi Annulment Committee, which held that a claim based up on a substantive provision of a BIT is "*governed by* [...] *the BIT and by applicable international law*"[24]. This said, the Tribunal agrees with the Respondent's view that municipal law, here Polish and EU law, may have to be taken into account as facts.

229. Accordingly, the Tribunal will apply the BIT and other rules and principles of international law where appropriate. It may also refer to Polish and EU law as facts to be taken into consideration for the assessment of the host State's responsibility under

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23 On the precedential value of ICSID decisions, *see* Gabrielle Kaufmann-Kohler, Arbitral Precedent: Dream, Necessity or Excuse?, Freshfields lecture 2006, Vol. 23, no. 3, Arbitration International 2007, p. 337.

24 *Compañia de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID case No. ARB/97/3, Decision on Annulment, 3 July 2002, ¶¶ 96 and 102; *see* also *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 12 July 2006, ¶ 67; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 87; *Wena Hotels Ltd. V. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶ 78.

international law. The Tribunal will further examine the issue of the law applicable to damages, in the relevant chapter below.

2. JURISDICTION AND ADMISSIBILITY

230. Poland has raised objections to the jurisdiction of the Tribunal over claims based on performance requirements (2.1.1) and to the admissibility of claims related to EU quotas (2.1.2). Since the parties have dealt with these objections together, the Tribunal will adopt the same approach. Prior to addressing these objections, however, it may be useful to quote the relevant parts of the dispute resolution clause of the BIT:

> *ARTICLE IX*
>
> *Settlement of Disputes Between a Party and an Investor of the Other Party*
>
> [...]
>
> *In the event of an investment dispute between a Party and a national or company of the other Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation, which may include the use of non-binding, third party procedures.* [...] *Subject to paragraph 3 of this Article, if the dispute cannot be resolved through consultation and negotiation, the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures.* [...].
>
> *(a) At any time after six months from the date on which the dispute arose, the national or company concerned may choose to consent in writing to the submission of the dispute for settlement by conciliation or binding arbitration to the International Centre for the Settlement of Investment Disputes ("Centre") or to the Additional Facility of the Centre or pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") or pursuant to the arbitration rules of any arbitral institution mutually agreed between the parties to the dispute. Once the national or company concerned has so consented, either party to the dispute may institute such proceeding provided:*
>
> *the dispute has not been submitted by the national or company for resolution in accordance with any applicable previously agreed dispute-settlement procedures; and*
>
> *the national or company concerned has not brought the dispute before the courts of justice or administrative tribunals or agencies of competent jurisdiction of the Party that is a party to the dispute.*
>
> *If the parties disagree over whether conciliation or binding arbitration is the more appropriate procedure to be employed the opinion of the national or company concerned shall prevail.*
>
> *(b) Each Party hereby consents to the submission of an investment dispute for settlement by conciliation or binding arbitration:*
>
> *to the Centre, in the event that the Republic of Poland becomes a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States done at Washington, March 18, 1965 ("Convention") and the Regulations and Rules of the Centre, and to the Additional Facility of the Centre, and*
>
> *to an arbitral tribunal established under the UNCITRAL Rules, as those Rules may be modified by mutual agreement of the parties to*

the dispute, the appointing authority referenced therein to be the Secretary General of the Centre.

(c) Conciliation or arbitration of disputes under (b)(i) shall be done applying the provisions of the Convention and the Regulations and Rules of the Centre, or of the Additional Facility as the case may be.

(d) The place of any arbitration conducted under this Article shall be a country which is a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

2.1 Poland's objections

2.1.1 Regarding claims based on performance requirements

231. Poland argues that the Tribunal lacks jurisdiction over Cargill's claims based on performance requirements under Article II:4 of the BIT on the ground that claims based on EU performance requirements in the agricultural sector have been eliminated from the scope of the Treaty by operation of Article I of the 12 January 2004 Additional Protocol Between the United States of America and the Republic of Poland to the Treaty Between the United States of America and the Republic of Poland Concerning Business and Economic Relations (the "Additional Protocol", Exh. R164) (Poland's Counter-Memorial, p. 84, see also p. 140). By way of extension, Poland's objection covers Cargill's claims regarding performance requirements under domestic quotas since such requirements were implemented in order to meet Poland's forthcoming EU obligations.

232. Poland avers that since the performance requirements under domestic quotas fall within the exception provided by the Additional Protocol and Cargill did not respect the BIT requirements regarding the submission of that claim to arbitration (see ¶ 236 below), Cargill's claim regarding performance requirements should be dismissed. Indeed, according to Poland:

> *There can be no dispute that the [*Additional*] Protocol entered into force no later than August 20, 2004.* [...] *Cargill's claims as to the EU-mandated quotas requirements could not have properly been submitted until November 2004. As a result, the [*Additional*] Protocol precludes Cargill's claims under Treaty Article II:4 as to the EU-mandated quotas.* (Poland's Counter-Memorial, p. 85)

233. In fact, "*even if the Tribunal were to accept Cargill's premature submission* [...], *the parties' subsequent agreement precludes Cargill's claims under Treaty Article II:4 as to the EU-mandated requirements*" (Poland's Counter-Memorial, pp. 85-86):

> [I]*n signing the* [Additional] *Protocol on January 12, 2004, the parties established their shared understanding with respect to Treaty Article II:4 upon Poland's accession to the EU. The parties' subsequent agreement "shall be taken into account" under the applicable rules of treaty*

> *interpretation. The parties indisputably intended the Additional Protocol to the BIT to take effect no later than Poland's accession to the EU.* (Poland's Counter-Memorial, p. 85; emphasis added)

234. And further:

> *Arguably, the parties' subsequent agreement as to Article II:4 of the Treaty should be recognized not as of May 1, 2004, but as of January 12, 2004, thus precluding Cargill's performance requirements claims as to the EU-mandated and Polish national quotas. The parties' agreement as reflected in their (i) exchange of letters and (ii) signing of the Protocol on January 12, 2004 preceded Cargill's submission of its claims by nearly four months. Poland's imposition of quotas was necessary to approximate Polish laws to the EU sugar regime.* (Poland's Counter-Memorial, p. 85, footnote 423; emphasis added)

235. In addition, Poland denied having waived its right to object to the Tribunal's jurisdiction over specific claims by entering into the parties' Agreement on Jurisdiction of 10 March 2005. Besides the fact that jurisdictional objections cannot generally be waived, Poland could not waive its right when Cargill's case had not yet been fully set forth.

2.1.2 Regarding EU quota claims

236. Poland also raised a general objection to the admissibility of the claims related to the EU quotas. It alleges that, in submitting its claim to arbitration, the Claimant failed to comply with the plain language of Article IX of the BIT regarding the parties' consent to submit to arbitration disputes arising from the Treaty.

237. Specifically, the Claimant's notice of breach to the Respondent (by letter dated 18 February 2003 received by the Respondent on 5 March 2003, Exh. C88) preceded by two months the Respondent's "acceptance" of an isoglucose quota in its negotiations with the EU and came more than one year prior to the application of the EU-mandated quotas in Poland, which started on 1 May 2004 under a transitional EU regulation (Poland's Counter-Memorial, p. 81, and Exh. C93).

238. Similarly, at the time of Cargill's Request for Arbitration, the EU quotas did not apply in Poland and thus could not form the basis of an investment dispute. Even if one were to accept that a dispute could have arisen prior to the application of the EU quotas, "*the quotas had not accorded Cargill or any other entity 'treatment' under the substantive provisions of the Treaty*" (Poland's Counter-Memorial, p. 82). By the same token, Cargill could have incurred no loss "*attributable to measures that had not taken effect*".

239. Moreover, Poland contends that Cargill failed to comply with the six-month waiting period required under Article IX:3(a) before submitting its dispute to arbitration. According to this provision, the earliest date on which Cargill could have started an

arbitration regarding the EU quotas was 1 November 2004 (Poland's Counter-Memorial, p. 83).

2.2 Cargill's position

2.2.1 On the performance requirements

240. Cargill's position is that Poland is barred from raising a jurisdictional objection because it waived any such objection when entering into the Agreement on Jurisdiction of 10 March 2005. Therefore, according to Cargill, the Tribunal should dismiss Poland's objection on the basis of waiver or estoppel.

2.2.2 On the EU quota claims

241. Cargill replies that Poland's argument is based on a "*faulty assumption about the point at which a 'dispute' arises*" and "*that a dispute over the EU*" and "*the national quotas arose more than six months before Cargill submitted its Request for Arbitration on April 29, 2004*" (Cargill's Reply, pp. 169-170), not just when the quotas were implemented as a result of Poland's accession to the EU.

242. For the Claimant, "*the fate of its investment was sealed*" when Poland's final EU isoglucose quotas were set by 13 December 2002. At least from that date, the parties had a "*conflict of legal views or of interests' with respect to the EU quotas negotiated by Poland*" (Cargill's Reply, p. 170).

243. Alternatively, the Claimant argues that even if the end of the negotiations were not regarded as the relevant date, the dispute still arose before 1 May 2004. Indeed, even if one "*were to maintain that the end of the negotiations did not result in the formal adoption of the restrictive EU quotas, this dispute still arose well before 1 May 2004. Poland formally accepted the EU quotas as one of the terms of its EU accession*" when signing the Act of Accession on 23 September 2003. At that time, the dispute was "*sharply delineated*" (Cargill's Reply, p. 171).

244. Moreover, the Respondent had in any event formally opposed the Claimant's legal views with respect to the quotas well before the Claimant filed its Request for Arbitration.

245. Finally, Cargill contends that its claims were timely even if one adopts Poland's theory that a dispute begins when a loss occurs. The EU quota levels were officially announced in April 2003. From then on, Polish users of industrial sweeteners knew

that "*they could not rely on Cargill to supply the vast majority of them with isoglucose*" (Cargill's Reply, pp. 172-173).

2.3 Analysis

246. The Tribunal will first determine whether Poland waived its right to object to jurisdiction (2.3.1). It will then examine Poland's objections on jurisdiction regarding performance requirements (2.3.2) and on the admissibility of the EU quota claims (2.3.3), prior to reviewing its general jurisdiction (2.3.4) and reaching a conclusion (2.3.5).

2.3.1 Waiver

247. The parties entered into an Agreement on Jurisdiction which was received by the Centre on 10 March 2005. This Agreement reads in its relevant part as follows:

> *Cargill Incorporated and the Republic of Poland have reached the following understanding in order to avoid delay and costs of a dispute over jurisdiction.*
>
> [...]
>
> *The Republic of Poland agrees that it will not raise objections to the jurisdiction of the UNCITRAL tribunal and the arbitration will proceed to the merits phase.*

248. Thereafter, the parties established a timetable for the presentation of their written submissions on the merits and the Tribunal took due notice of the Agreement on Jurisdiction and of the agreed timetable in an Order of 4 April 2005.

249. Poland then raised the objection before the Tribunal in its Statement of Defense and Counter-Memorial of 20 January 2006 in accordance with Article 21(3) of the UNCITRAL Rules.

250. It is commonly accepted that defenses of lack of jurisdiction can be waived by the parties in UNCITRAL proceedings[25]. The wording of the waiver in the Agreement on Jurisdiction is unambiguous and is not limited by any exceptions. In March 2005, when the Respondent gave such waiver, it was in a position to assess the rights which were the subject of the waiver. Indeed, Cargill had raised its claims based on performance requirements in its Request for Arbitration filed almost a year before. The content of the Request for Arbitration was sufficient for Poland to assess its possible defenses before entering into the Agreement.

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[25] See e.g. *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 13 September 2001.

251. Therefore, the Tribunal is of the opinion that Poland has waived any objections against jurisdiction and is thus estopped from raising jurisdictional defenses in these proceedings. For the sake of completeness, it adds that Poland's objection to jurisdiction is in any event ill-founded.

2.3.2 Jurisdiction over the performance requirements

252. The Tribunal is unconvinced by Poland's contention that domestic quotas were imposed with a view to complying with the EU's requirements. It has been established in these proceedings that Poland had no such obligation prior to its accession to the EU (see ¶ 462 below). Thus, the Tribunal's review of Poland's objection based on the Additional Protocol must be limited in scope to the performance requirements under the EU quotas.

253. The Additional Protocol signed between the US and Poland on 12 January 2004 (Exh. R164) aimed at establishing before Poland's accession to the EU a framework acceptable "*for avoiding or remedying present and possible future incompatibilities*" between US BITs concluded with some future EU member countries including Poland and such countries' future obligations under EU law (Letter of submittal from President Bush to the Senate - Exh. R312) in the line of the September 2003 Understanding among the US, Poland and the EC. The Protocol entered into force on 20 August 2004 upon the exchange of the ratification instruments (US Government Statement dated 31 October 2004, see Exh. R164).

254. From the wording of Article I of the Protocol and from the letter exchanges at the time of its execution, it seems clear that the intent of Poland and of the United States of America was *inter alia* to allow Poland to derogate from Article II:4 of the Treaty and to apply performance requirements in the agricultural sector in connection with production, processing and processed agricultural products in order for Poland to meet its obligations pursuant to the measures adopted by the EU.

255. There is no doubt that the performance requirements regarding isoglucose would qualify as performance requirements in the agricultural sector as described in the Protocol.

256. As mentioned above while recalling Poland's position, Poland claims that the amendment regarding performance requirements resulting from the Protocol became effective as of 12 January 2004, the date of its execution, and otherwise no later than Poland's accession to the EU. Therefore, Poland argues that Cargill's claim based on the EU requirements is inadmissible.

257. In other words, Poland seeks to apply the Protocol prior to its entry into force. The Tribunal must thus determine whether the Protocol can apply retroactively. Article 28 of the Vienna Convention on the Laws of Treaties reads as follows:

> *Article 28: Non-retroactivity of treaties*
>
> *Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.*

258. Nothing in the Protocol indicates that it has retroactive effect. Article VI of the Protocol provides that it shall enter into force upon the exchange of instruments of ratification and shall remain in force as long as the Treaty remains in force. The official US version of the Protocol (Exh. R164) shows that the exchange of the ratification instruments took place on 20 August 2004.

259. It follows that the amendments to Article II:4 of the Treaty resulting from the Protocol only applied as of 20 August 2004[26]. Therefore, Poland's EU-related performance requirements imposed from the date of its accession until 20 August 2004 do not fall within the scope of the Additional Protocol. Therefore, they fall within the jurisdiction of this Tribunal.

2.3.3 Admissibility of the EU quota claims

260. It is open to debate whether Poland waived its right to object to the admissibility of the claims. It may well be that when using the word "jurisdiction" in the Agreement on Jurisdiction, the parties also had this type of objection in mind. Failing any clear indication in this respect, the Tribunal will nevertheless examine the Respondent's admissibility objections.

261. Poland was made aware of Cargill's position on the EU quotas before these quotas were finally adopted (see letters from Cargill's managing director to Polish officials – Exh. R146 dated 31 October 2002, R109 dated 19 September 2002, C81 dated 10 July 2002), and in any event well before the quotas entered into force on 1 May 2004. In addition, the EU quotas were announced in April 2003 and Cargill alleges that this announcement drew customers away.

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[26] The Tribunal notes here that the Protocol also contains amendments to the effect that Poland may reserve its rights to make or maintain exceptions to national treatment or to most-favored nation treatment in the sector of agriculture (Article II:1). However, these amendments do not apply to existing investments for a period of 10 years from the relevant regulation or EU measures directly applicable or 20 years from the date of entry into force of the Treaty, whichever date is later. This limitation does not apply, however, to performance requirements under Article II:4 of the Treaty.

262. Under these circumstances, the Tribunal has no hesitation accepting that there existed a dispute, i.e. a disagreement on rights, for purposes of Article IX of the Treaty more than 6 months prior to the filing of the Request for Arbitration. It notes in this respect that Article IX of the BIT does not require any formal notice to be served before initiating consultation or negotiations or submitting the dispute to arbitration.

263. Therefore, the requirement of a cooling-off period of six months under the BIT was met and Poland's argument that Cargill's claim regarding EU quotas is inadmissible on that ground fails.

2.3.4 General jurisdiction over Cargill's claims

264. The Tribunal has previously already taken due note of the parties' Agreement on Jurisdiction of 10 March 2005 (Order of 4 April 2005). Since jurisdiction depends not only on the parties' consent but equally on the other requirements of the applicable BIT, the Tribunal will briefly ascertain whether such other requirements have been met. It comes to the conclusion that they have been met for the following reasons: Cargill qualifies "*as a company of a* [Contracting] *Party*" pursuant to Article I:1(a) of the Treaty; it has made an investment for the purposes of the Treaty, as will be shown below; this is an investment dispute within the meaning of Article IX:1(c) of the BIT, which provides that an investment dispute is *inter alia* a dispute involving *"(c) an alleged breach of any right conferred or created by this Treaty with respect to an investment*"; the dispute has not been resolved by consultation and negotiation, and Cargill was entitled to consent in writing to submit the dispute to arbitration in accordance with Article IX:3(a).

2.3.5 Conclusion: Poland's objections to jurisdiction and admissibility must be dismissed

265. As a result of the considerations set forth above, the Tribunal holds that Poland's defense of lack of jurisdiction and admissibility are ill-founded and must be dismissed.

3. NATIONAL TREATMENT - ARTICLES II:1 AND II:8(1) OF THE TREATY

266. The Tribunal will summarize the parties' positions (3.1 and 3.2) prior to analyzing Cargill's claims regarding national treatment, the equality of competitive opportunities and the alleged violation of Article II: 8(1) (3.3).

3.1 Cargill's position: Poland has failed to accord Cargill national treatment

267. By imposing on the Claimant highly restrictive isoglucose quotas while providing domestic sugar companies with a generous sugar quota, the Respondent has failed to treat Cargill's investment "*at least as favorably as the most favorable treatment*" it accords its own companies in like circumstances. It has thus breached its national treatment obligation under Articles II:1 and II:8 of the BIT. Indeed, the Respondent imposed domestic quotas and arranged for EU quotas that prevented the Claimant – a foreign investor – from using its production capacity to fully supply the domestic market while enabling the domestic sugar industry to oversupply the very same market.

3.1.1 Cargill and domestic sugar producers are "in like circumstances"

268. The following elements should be taken into account when determining whether a foreign investor and a domestic company are in "like circumstances". In the present instance, these elements show that the Claimant, on the one hand, and sugar producers in Poland, on the other hand, are in "like circumstances".

269. First, tribunals should consider whether "*the products supplied by the foreign and domestic businesses are substitutable* [...]. *If they supply substitutable products, then the businesses compete for the same customers, are in the same sector, and thus are 'in like circumstances'*" (Cargill's Memorial, p. 63).

270. In the present case, the Claimant – the only producer of isoglucose in Poland – and Polish sugar producers operate in the same economic or business sector and supply the same or similar customer base with directly competitive, substitutable products. Isoglucose and sugar producers process agricultural commodities (wheat and sugar beets respectively) to produce sweeteners (isoglucose and sugar) that compete directly in supplying sweeteners to beverage, syrup and processed food producers in Poland. Sugar and isoglucose are thus substitutes, "*meaning that a manufacturer can use either isoglucose or sugar to produce a large number of food or beverage products*" (Cargill's Memorial, p. 65).

271. In this respect, "*efforts by a domestic industry to exclude its foreign-owned competitor from the market provide particularly persuasive evidence that the two industries are 'in like circumstances' because they demonstrate that the domestic industry itself perceives the foreign-owned firm as a market competitor*" (Cargill's Reply, p. 100). In the present instance, it is precisely because isoglucose was a competitor to sugar that the Respondent tried to exclude its foreign-owned competitor from the market.

272. Second, "*where* [...] *there are no domestic producers of the identical product, the 'like circumstances' test will have to be more flexible and involve 'comparators that* [are] *less like than those who produce identical products*" (Cargill's Reply, p. 95). Since the entire isoglucose industry in Poland is owned by one U.S. investor, the proper comparator for Claimant is the entire Polish sugar industry.

273. Third, tribunals take the nature of a government's policy objective into account when identifying like circumstances "*inasmuch as those objectives are not contrary to the principles of national treatment*" (Cargill's Memorial, p. 64). In the present instance, the Respondent's actions were taken "*for the express purpose of bestowing a commercial benefit on sugar producers*" and "*coincided with the financial self-interest of the government*" (Cargill's Memorial, p. 65). Hence, Poland's actions were "*not based on any legitimate, non-discriminatory policy objective*," which evidences that producers of isoglucose and producers of sugar are in like circumstances.

274. The Respondent's argument that isoglucose competes with glucose syrup (see ¶ 296 below) is untenable:

- Glucose syrup is significantly less sweet and significantly thicker than isoglucose. It is used primarily in the production of confectionary products, such as beer, ice cream, coffee whiteners, baked goods, dairy products, jams, jellies, and medicinal syrups. It is used only marginally in the beverage industry.

- Glucose has not been subjected to quotas under the domestic or the EU regime, which constitutes "*the clearest evidence that glucose does not compete with isoglucose*" (Cargill's Reply, p. 104).

- None of the sources and documents discussed in the course of the proceedings (i.e. the 2001 Sugar Law, drafts of the Law, official justifications of those drafts, parliamentary meeting records, and the correspondence between the parties) ever referred to glucose syrup as a competitor to either isoglucose or sugar, or to domestic glucose manufacturers as competitors or potential competitors to isoglucose or glucose producers.

3.1.2 Poland has failed to accord Cargill treatment "at least as favorable as the most favorable treatment" accorded to Polish sugar producers

275. The purpose of Article II:1 of the BIT is to "*prohibit protectionism and to ensure that foreign investors can compete with domestic companies on a level regulatory playing field*" (Cargill's FPHB, p. 52). In the present instance, this prohibition was breached

because the measures taken by the Respondent – the quotas imposed on isoglucose – were discriminatory.

276. The measures in question discriminated against Cargill as a foreign investor. Indeed, although they "*did not discriminate against non-nationals as such, they discriminated against isoglucose production, which is limited in Poland to a single, foreign-owned company*" (Cargill's Memorial, p. 67).

277. No discriminatory intent is necessary to establish a denial of national treatment and "de facto *discrimination is just as inconsistent with treaty-based national treatment obligations as is* de jure *discrimination*" (Cargill's Reply, p. 106).

278. In the present case, as the sole manufacturer of isoglucose in Poland is a foreign-owned company and sugar production is controlled by domestic Polish interests, "*the connection between nationality and regulatory classification is unmistakable*" (Cargill's Reply, p. 109). In any event, *in casu*, the Respondent's prejudiced approach to sweetener quotas was entirely deliberate. The Polish government did intend to discriminate against the Claimant both when it imposed national quotas and in the context of the accession negotiations.

279. The practical effect of such discrimination was to richly benefit the domestic sugar companies and to severely disadvantage the sole foreign-owned producer of isoglucose. It effectively idled two thirds of Cargill's production capacity. The national quota allowed Cargill to produce at only about two thirds of its capacity. When the sugar companies filled 100% of domestic demand. The EU quota "*reduced the national isoglucose quota by about one half, which limited Cargill production to less than one-third of its capacity,* [while] *the sugar quota, by contrast, remained at a high level that not only met but actually exceeded domestic demand for sugar*" (Cargill's Memorial, p. 67).

3.1.3 The quotas denied Cargill equality of competitive opportunities

280. National treatment implies "*equal opportunity for competition in the market.*" Hence, to compare the treatment afforded isoglucose producers and that of sugar producers, one must compare "*the right afforded each group to satisfy market demand. By this standard, Poland has unquestionably favored sugar producers*" (Cargill's Reply, p. 115).

281. The quotas set for sugar were designed in such a fashion as to enable the existing overproduction of sugar to continue and "*to limit any further contraction and reduction*

in capacity within the sugar industry" (Cargill's Reply, p. 114). By comparison, the isoglucose quota was a "'*compromise' between the interests of Claimant, who wanted to be able to fully supply market demand, and sugar producers, who wanted to prevent Claimant from supplying any isoglucose at all*" (Cargill's Reply, p. 116 and 118 on EU quotas).

3.1.4 Poland has discriminated against Cargill with respect to marketing activities

282. According to Cargill, the isoglucose quota severely restricted its ability to market its products, including "*through internal distribution and marketing systems and by direct contract with individuals and companies*" (Cargill's Memorial, p. 69), "*while allowing the domestic sugar industry to engage in such activity to the full extent the market would bear*" (Cargill's Reply, p. 119).

283. The marketing activities were limited by the quotas themselves. Because Cargill was unable to produce the quantities its customers required, "*existing customers cancelled their orders, and a number of prospective customers decided not to follow through with their plans to convert to isoglucose. The sugar industry, by contrast, was able to continue marketing to its customers without the significant handicap of being publicly prohibited from filling its orders*" (Cargill's Reply, p. 120).

3.2 Poland's position: Cargill has not been denied national treatment

3.2.1 Cargill has failed to prove discrimination on the basis of nationality as required by Article II:1 of the BIT

284. The investor must demonstrate that "*the measure treats the foreign-owned entity less favorably than domestic investments on the basis of its nationality*" (Poland's Counter-Memorial, p. 110). It must prove that any discrimination is perpetrated on account of its nationality. Cargill has failed in this demonstration. It has failed to "*establish that measures regulating isoglucose are targeted at the US company because it is an US company*" (Poland's Rejoinder, p. 135). In fact, the evidence in the record "*confirms that nationality was not a factor in quota determinations*" (Poland's Rejoinder, p. 137).

285. Specifically, the Respondent's method for determining quotas conformed to "*long-standing EU and Polish law concerning sweetener regulation*" (Poland's Rejoinder, p. 134) and was "*part of a long-standing process of approximation of its laws to the EU*" (Poland's FPHB, p. 54). The quotas were "*nationality neutral*" (Poland's Counter-Memorial, p. 111). Had the isoglucose production facility "*been owned by a Belgian,*

French, Swiss or Polish corporation, both the national and EU-mandated quotas would have imposed exactly the same limitations on that facility's production of isoglucose" (Poland's Counter-Memorial, p. 111).

286. In spite of Cargill's allegations, the record evidences neutrality towards nationality:

- statements regarding the draft laws of 1999 are of questionable relevance and, in any event, do not support a finding of nationality-based discrimination;
- neither does Mr. Kaczmarek's testimony;
- statements by non-governmental actors – representatives of the sugar industry – offer no support for Cargill's Article II:1 claim; and
- statements of isolated government actors may not be taken as a basis on which to establish discrimination on account of nationality.

287. In any event, even if one were to consider that the above statements show a discriminatory intent, the Respondent's actual and official conduct repudiates any such intent.

288. The Claimant's claim of discrimination is further undermined by the fact that the Respondent supports production by the Claimant of a range of products that compete with products produced by Polish-owned companies. It is also undermined by the fact that both parties knew that other companies, including Polish-owned entities, intended to produce isoglucose. Thus, it is wrong to argue, as Cargill does, that "*Respondent was thus fully aware that the isoglucose quotas would not harm Polish producers*" (Cargill's Reply, p. 110, fn 369).

3.2.2 Cargill has failed to demonstrate that it was accorded less favorable treatment than Polish-owned investments

289. Poland objects to the Claimant's relying on alleged production capacity and market demand to establish a difference in treatment. It argues that awarding a claim on the basis of production capacity would reward a gamble:

> *Ignoring long-standing common practices throughout the EU and multiple clear signals from Poland's legislative processes, Cargill proceeded with its investment and purported expansions based on a gamble that high-level interactions with officials and other lobbying efforts would yield Cargill's desired results, despite existing regulatory frameworks. To allow Cargill to pursue its claims based on* capacity *would reward Cargill's haste and may provide incentive to other potential claimants to embark on similar gambles. Investor-State arbitration — and respondent State fiscs — should not be*

resorted to by corporations as a safety net for unreasonably risky ventures plainly unsupported by the applicable regulatory context. See e.g., Olguin v. Republica del Paraguay [...]. (footnote 568, Poland's Counter-Memorial)

290. Poland further argues that Cargill has in any event not established its capacity production and "*has not offered any evidence of capacity for any entity to which it claims it should be compared*" (Poland's Counter-Memorial, p. 115).

291. Similarly, Cargill has not defined demand and "*failed to prove that Respondent's quotas gave the 'Polish sugar industry' the opportunity to satisfy demand in the beverage market*" (Poland's Rejoinder, p. 150). Cargill has not substantiated that it has been denied the "right" to satisfy market demand and that the Respondent accommodated the ability of Polish-owned sugar producers to supply that demand. It has not proven "*any instance in which a Polish-owned company supplies – or even could supply – Cargill's target market*" (Poland's Rejoinder, p. 147). In any event, during the post-accession period, the Respondent "*could not have 'protected' the Polish sugar industry's 'right' to demand vis-à-vis Cargill because of the EU's principle of free movement of goods*" (Poland's Rejoinder, p. 147).

292. More specifically, Poland's main arguments are:

- With respect to domestic quotas:
  - The Claimant did not present reliable evidence of the volume of its production or sales during any year, but merely undocumented declarations of its production capacity. Nor did the Claimant offer evidence of capacity for any entity to which it claims it should be compared, but merely figures regarding aggregate domestic demand for sugar.
  - Readily available figures on capacity and production confirm that the domestic "*quotas of which Cargill complains accorded it treatment no less favorable than that accorded to Polish-owned investments*" (Poland's Counter-Memorial, p. 109). Even in the absence of evidence of Cargill's actual sales, "*it is clear that the quota levels imposed during each of Poland's national quota periods necessarily would have accommodated the entirety of Cargill's actual sales of isoglucose*" and "*the entirety of Cargill's production capacity in the year prior*" (Poland's Counter-Memorial, p. 116). On the other hand, quotas imposed on sugar producers "*did not allow for them to produce up to the level of their long-standing, verified capacity*" (Poland's Counter-Memorial, p. 116).

- With respect to EU-mandated quotas:

  - The Claimant provided no reliable data on Cargill's production during the expanded reference period of 1999-2001 or any other years.

  - According to information furnished by Cargill to the Polish authorities, the final EU-mandated quota was "*substantially greater than the level to which it was entitled under the regulations*" (Poland's Counter-Memorial, p. 118), while the final quota level for sugar was lower than annual average sugar production during the 1995-1999 reference period, because "*in setting the quota level for sugar, the EU did not allow for any deviation from the established period of reference, as Poland has accomplished for the benefit of isoglucose*" (Poland's Counter-Memorial, p. 118).

293. In addition, Cargill's argument that the Respondent should have "swapped" sugar quantities for isoglucose in the accession negotiations must fail "*in light of the EU-methodology*" (Poland's FPHB, p. 60).

294. In conclusion, Cargill has failed to establish that it was not accorded national treatment. In any event, "*Respondent demonstrated ample public-interest justification for any purported differentiation in treatment*" (Poland's FPHB, p. 55).

3.2.3 Cargill is not in like circumstances with Polish-owned sugar producers

295. According to Poland, Cargill is in like circumstances with Polish-owned glucose manufacturers (a), not with Polish sugar producers (b). Even if a comparison between Cargill and sugar producers were admissible, the comparator would have to be limited to Polish-owned entities and could not cover the Polish sugar industry as a whole (c).

a) Cargill is in like circumstances with Polish-owned glucose manufacturers

296. Cargill must be compared and receive the same treatment as glucose producers because "*glucose producers and isoglucose producers are like in every aspect, including competition among their products*" (Poland's Rejoinder, p. 166):

- Isoglucose and glucose have the "*same or similar applications and functionality*" (Cargill's Rejoinder, p. 169), which is shown by the fact that the contracts between the Claimant and its Polish customers substituted isoglucose with other similar products, not with sugar.

- At least six Polish-owned companies manufacture sweetener syrups that are used, like isoglucose, in the food and beverage industries. As a result, "*according to Cargill's test, such producers should be deemed to be in 'like circumstances' because they operate in the same economic sector and supply the same or similar customer base with directly competitive, substitutable products*" (Poland's Counter-Memorial, pp. 121-122).

- Isoglucose and glucose do not only compete in certain markets, they are complementary. Indeed, "*Cargill's significant target customers required that Cargill combine its isoglucose products with other glucose products, and not sugar*" (Poland's Rejoinder, p. 169).

- Cargill itself produces glucose, specifically 25,000 MT of dextrose for sale on the market (Poland's Rejoinder, p. 168).

- But for the fact that Cargill holds the entire quota, Polish-owned glucose syrup manufacturers would have the possibility to produce isoglucose. The same is not true of sugar producers (Cargill's Rejoinder, pp. 169-170).

b) Cargill is not in "like circumstances" with Polish-owned sugar producers

297. There are many differences between the sugar and the isoglucose sectors, which demonstrate that these industries are not in like circumstances:

- The Polish sugar industry is long-established and an integral part of Poland's agricultural sector, while Cargill's isoglucose production line is uncertain and represents a minuscule component of the Polish sweeteners market, and an even smaller component of Poland's agricultural sector.

- Whereas sugar inputs are sugar beets and sugar outputs may be stored for long periods and are generally delivered in their dry state and consumed by a vast array of industrial, commercial and retail users, isoglucose input is wheat and isoglucose output is generally a liquid, with a limited longevity compared to that of sugar, and consumers within a narrow field of commercial producers of beverages. Moreover, unlike isoglucose and glucose syrups, sugar is consumed in households.

- Whereas the long-standing history of verified volumes of sugar production provided a basis for setting sugar quota levels under the applicable Polish and EU regulations, Cargill's historical isoglucose production in Poland, to the extent

that it could be verified at all, was so limited that officials determined the isoglucose quota level by expanding the reference period provided for in applicable regulations.

- The Claimant's own (non-litigation) position before the Polish government was that isoglucose and sugar do not compete.

- Finally, a different treatment in like circumstances can be justified in order to protect the public interest. In the present instance, the historic changes in Polands' agricultural sector and the government's "*desire to avoid the closure of sugar beet farms and the associated rural instability*" (Poland's Rejoinder, p. 174), fully justified any differentiation between Cargill and Polish sugar producers. The government's desire also "*reflected an EU-directed policy priority,* not *evidence of discrimination*" (Poland's Rejoinder, p. 174, emphasis in original).

c) Assuming that sugar producers could be compared to Cargill, the comparator would not be the Polish sugar industry in the aggregate, but only its Polish-owned entities

298. In the applicable regulatory framework, "*there is one provision for setting the aggregate quota and two for setting producers' individual limits, that is, one for individual sugar producers and another for individual isoglucose producers*" (Poland's Rejoinder, p. 162). Therefore, the Tribunal cannot compare the treatment given to Cargill with that accorded to the Polish industry as a whole. The comparison must be "*with other single investments,* not *industries*" (Poland's Rejoinder, p. 145, emphasis in original).

299. Notwithstanding the above, Cargill has not identified by name even one Polish-owned sugar producer for purposes of the required comparison.

3.2.4 Cargill's claim that it has been discriminated against with respect to marketing efforts is without merit

300. The Claimant's argument that the Respondent violated Article II:8(i) of the BIT Treaty by preventing it from producing all of the isoglucose its customers wished to buy, is an "*attack on production limits on isoglucose,* not *a claim of discrimination in marketing*" (Poland's Rejoinder, p. 174, emphasis in original). Production limits are not the type of restrictions aimed at in Article II:8.

301. Moreover, Cargill has not shown – not even alleged – the existence of an "internal distribution system" through which it markets its products and it points to "*no instance*

of Respondent having impeded 'direct contact with individuals or companies" (Poland's Rejoinder, p. 175).

302. Further, the national and EU-mandated quotas make no difference between Cargill and Polish-owned marketers: "*To the extent that a marketer of isoglucose syrups wished to market a volume of isoglucose that is available in the market, like Cargill, it could do so, regardless of its nationality*" (Poland's Counter-Memorial, p. 127).

303. In addition, Cargill was not hindered in its marketing efforts by the quotas. During the first and the second national periods, it sold less than its share of the A quota. The same is true of the EU quotas, Cargill having failed "*to establish that it ever had produced a quantity of product that exceeded the volume allowed under the EU regulation*" (Poland's Counter-Memorial, p. 127). Similarly, the quotas did not impose on Cargill the "*significant handicap of being publicly prohibited from filling its orders*" (Poland's Rejoinder, p. 176). Rather, as the record demonstrates, "*Cargill has imported into Poland volumes of product that it has marketed to its customers*" (Poland's Rejoinder, p. 176).

304. Finally, Cargill has not identified a single Polish-owned sugar producer or marketer that purportedly received better treatment than Cargill. In fact, Polish-owned Pepees Corp. would produce and market isoglucose if it were not for Cargill's having monopolized the quota.

3.3 Analysis

3.3.1 Relevant provisions of the US-Poland Treaty

305. Under Article II:1 and II:8 of the Treaty, the host State shall accord foreign investments non-discriminatory treatment:

> *1. Each Party shall permit, in accordance with its relevant laws and regulations, and treat investment and associated activities on a nondiscriminatory basis, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty.* [...]
>
> *8. Subject to the right to make or maintain exceptions falling within one of the sectors or matters listed in the Annex, each Party shall accord nondiscriminatory treatment to nationals and companies of the other Party in the conduct of their investment and associated activities with respect to:*
>
> [...]
>
> *(i) the marketing of goods and services, including through internal distribution and marketing systems and by direct contract with individuals and companies.*

306. Article I:1(f) of the Treaty defines "non-discriminatory treatment" as

> *treatment that is at least as favorable as the better of national treatment or most-favored nation treatment.*

307. In turn, Article I:1(g) defines "national treatment" as

> *treatment that is at least as favorable as the most favorable treatment accorded by a Party to companies or nationals of that Party in like circumstances.*

308. The national treatment clause is "*understood to require 'equal' treatment. In the context of international trade, from whence the obligation emerged, '... non-discrimination is often translated operationally in commercial treaties to mean effective equality of opportunity to compete on equivalent terms and conditions.' Essential to the determination of discriminatory State action is that there be a disparate treatment, that the treatment of the protected investor be inferior, and that the favored entity is 'comparable,' i.e. in circumstances similar to those of the protected investor*"[27].

3.3.2 Are Cargill and domestic sugar producers "in like circumstances"?

309. To decide whether Poland has breached Article II:1 of the Treaty, it is first necessary to determine whether Cargill, as the sole isoglucose producer in Poland, is "in like circumstances" with Polish sugar producers.

310. The meaning of the terms "in like circumstances" varies depending on the facts of each case. Indeed, "*by their very nature, 'circumstances' are context dependent and have no unalterable meaning across the spectrum of fact situations. And the concept of 'like' can have a range of meanings, from 'similar' all the way to 'identical.' In other words, the application of the like circumstances standard will require evaluation of the entire fact setting surrounding*"[28].

311. There is no precise and final definition of the term "like". As stated by the WTO Appellate Body, the interpretation and application of "like" "*is a discretionary decision that must be made in considering the various characteristics of products in individual*

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27 Noah Rubins & N. Stephan Kinsella, *International Investment, Political Risk and Dispute Resolution – A Practitioner's Guide* (2005), pp. 225-226.

28 *Pope and Talbot Inc. v. Government of Canada*, Award on the Merits of Phase 2, 10 April 2001 UNCITRAL (NAFTA), ¶ 75; *see* also *SD Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), First Partial Award, 12 November 2000, ¶ 244.

cases. [...] *there can be no one precise and absolute definition of what is 'like'. The concept of 'likeness' is a relative one that evokes the image of an accordion*"[29].

312. Bearing in mind the relative character of likeness, the Tribunal will review the circumstances which it deems appropriate, giving consideration to the wording and purpose of Article II:1. It will in particular examine (a) whether there is any other isoglucose producer than Cargill in Poland; (b) whether the foreign investor (isoglucose producer) and domestic investor (sugar producer) are in the same economic or business sector; (c) whether sugar and isoglucose are substitutable and, as a result, competing products; (d) whether there is a policy objective or public interest which justifies according different treatments to the domestic and foreign investors; and (e) whether the foreign investor may be compared to the domestic sugar industry as a whole.

a) Is there any other isoglucose producer in Poland than Cargill?

313. The record shows that no other entity in Poland other than Cargill has ever produced isoglucose (see Cargill's Reply, p. 93; Poland's Statement of Defense and Counter-Memorial, p. 47; Exh. R191 regarding the absence of production of isoglucose by WPPZ Lubón; Exh. R274 and Exh. R276 regarding the absence of production of isoglucose by Hellena; and TR/Zaczek, p. 871, ll. 20-21 regarding the absence of production of isoglucose by Pepees). In fact, the only piece of evidence referred to by the Respondent in support of its allegation that "*as late as 2000, the evidence of record demonstrates that Pepees was blending and selling isoglucose as well*" (Poland's SPHB, pp. 54-55) is Exhibit R252, which pertains to the results of production tests conducted by engineer Godlewski, but this does not demonstrate that Pepees was actually producing and selling isoglucose.

314. Thus, there is no domestic isoglucose producer that can be compared to Cargill. It must therefore be determined whether Cargill is in like circumstances with domestic sugar producers, as argued by the Claimant, or rather with domestic glucose producers, as argued by the Respondent.

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29 *Japan – Alcoholic Beverages*, WT/DS38/AB/R.

b) Are domestic sugar producers in the same economic or business sector as Cargill?

315. Some tribunals have held that "*as a first step, the treatment accorded a foreign owned investment* [...] *should be compared with that accorded domestic investments in the same business or economic sector*"[30].

316. Other tribunals have expressed the view that the "same economic/business sector" criterion is too narrow. For instance, one tribunal has stated that "*the purpose of national treatment is to protect investors as compared to local producers, and* [that] *this cannot be done by addressing exclusively the sector in which that particular activity is undertaken*"[31]. This tribunal upheld the view that "*the meaning of 'in like situations' does not refer to those industries or companies involved in the same sector of activity, such as oils producers, but to companies that are engaged in exports even encompassing different sectors*"[32].

317. If the "*narrow same economic/business sector*" criterion is satisfied, a less narrow requirement will necessarily also be met. Hence, the Tribunal will first review the economic or business sector involved here, which leads to the following observations:

- Sugar and isoglucose are both sweeteners.
- Sugar and isoglucose are both used for the confection of beverages, such as alcoholic beverages, carbonated and non-carbonated soft drinks, and processed foods.
- Whereas isoglucose can only be used by producers of food and beverages and is not appropriate for household consumption, sugar may be distributed to individual consumers. In the Tribunal's view, this difference does not change the fact that there is a common market for both products. Under Article II:1 of the Investment Treaty, it appears sufficient that the products involved belong to sectors which at least partly overlap. Hence, this difference does not affect the "like circumstances" test.

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30 *Pope and Talbot, op. cit.*, ¶ 78. Indeed, "*the concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favorable treatment is in the same 'sector' as the national investor* [,] [...] *the word 'sector'* [having] *a wide connotation that includes the concepts of 'economic sector' and 'business sector'*"; *SD Myers, op. cit.*, ¶¶ 248 and 250.

31 *Occidental Exploration and Production Co. v. Republic of Ecuador*, LCIA Case No. UN3467, Final Award of 1 July 2003, ¶ 173.

32 *Ibid.*, ¶ 168.

c) *Is sugar substitutable to and competing with isoglucose?*

318. The Claimant has argued that if the domestic and foreign investors supply substitutable products, they are in like circumstances (Cargill's Memorial, p. 63). In support, it has referred *inter alia* to the WTO Appellate Body, pursuant to which "*a determination of 'likeness'* [...] *is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products*"[33]. In other words, according to the Claimant, the question is whether the foreign investor "*was in a position to attract customers that might otherwise have gone to the* [domestic] *operators*"[34].

319. By contrast, the Respondent has argued that "*a competitive relationship may be one factor in the 'like circumstances' analysis, but it is not determinative*" (Statement of Defense and Counter-Memorial, p. 119). It has failed, however, to explain which other "factors" should be taken into consideration.

320. The tribunals in *Occidental v. Ecuador* and *Methanex* have distinguished between "like products", which is the test for GATT/WTO purposes, and "like circumstances or situations", which is the test under the present and other BITs as well as NAFTA[35]. In the opinion of the Tribunal, this distinction does not imply that competitiveness is irrelevant to the "like circumstances" test. It rather implies that, although relevant, a positive answer to the substitutability (i) or competitiveness test (ii) is neither a necessary nor a sufficient element of the "like circumstances" test.

(i) Substitutability of the products

321. The issue is whether domestic sugar producers or domestic glucose producers may be "in like circumstances" as the foreign investor, and which of these two categories of domestic producers is more "like" the foreign investor[36].

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33 *European Communities – Measures Affecting Asbestos and Asbestos-Containing products*, WTO Appellate Body Report, WT/DS135/AB/R, 5 April 2001, DSR 2001:VII, 3243, ¶ 99.

34 *SD Myers, Inc., op. cit.*, ¶ 251.

35 In *Occidental*, the tribunal held that "*the reference to 'in like situations' used in the Treaty seems to be different from that to 'like products' in the GATT/WTO*," and that whereas "*the 'situation' can relate to all exporters that share such condition,* [...] *the 'product' necessarily relates to competitive and substitutable products*" (¶ 176). In *Methanex v. USA* (Final Award on Jurisdiction and the Merits, 3 August 2005, Part IV, Ch. B), the tribunal, discussing the "like circumstances" test of Article 1102 of NAFTA, stated that "*if the drafters of NAFTA had wanted to incorporate trade criteria in its investment chapter by engrafting a GATT-type formula, they could have produced a version of Article 1102 stating 'Each Party shall accord to investors* [or investments] *of another Party treatment no less favorable than it accords its own investors, in like circumstances with respect to any like, directly competitive or substitutable goods'*" (¶ 34). The tribunal concluded that "*Article 1102 is to be read on its own terms and not as if the words 'any like, directly competitive or substitutable goods' appeared in it*" (¶ 37).

36 These comparators are chosen for lack of an identical comparator, Cargill being the only isoglucose producer in Poland. As held in *Methanex* under Article 1102 of NAFTA, "*it would be as perverse to ignore identical comparators if they were available and to use comparators that were less 'like', as it would be*

* *Isoglucose and sugar*

322. Isoglucose and sugar producers process agricultural commodities (wheat and sugar beets, respectively) to produce sweeteners for a large number of food and beverage products. They do appear substitutable:

- EC regulations have explicitly recognized that isoglucose is a "*direct substitute for liquid sugar derived from sugar beet or cane*"[37].

- Two international tribunals, one under the NAFTA and one under the WTO Agreement, have determined that high fructose corn syrup (HFCS - isoglucose produced from corn, chemically identical to isoglucose produced from wheat) is "*directly competitive and substitutable*" with sugar, and that the two are in fact "like" products:

  – A binational panel convened under Chapter 19 of the NAFTA to examine a challenge to Mexico's anti-dumping determination on HFCS agreed with Mexico that sugar and HFCS are "like products," explaining that "*sugar and HFCS as sweeteners are like products because they possess a high sweetening power, similar nutritional properties and caloric contribution, an equivalent capacity to sweeten, and give volume, texture and appropriate body for food and beverages. They also have a high and immediate water solubility and a taste that does not cover other flavors. At the same time HFCS and sugar have no toxic effects and are easy to digest*"[38].

  – On 7 October 2005, a WTO panel report stated that "*industrial consumers of sweetener regard cane sugar and HFCS as interchangeable products for producing soft drinks and syrups*"[39].

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perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed" (*Methanex Corporation v. United States*, Final Award of the Tribunal on Jurisdiction and Merits, Part IV, Ch. B, ¶ 17).

37 See Council Regulation (EEC) No. 1111/77 of 17 May 1977 – Exh. R39; Council Regulation (EEC) No. 1785181 of 30 June 1981 on the Common Organization of the Markets in the Sugar Sector (Official Journal L 177, July 1, 1981, at 0004), i.e. the first EC regulation that established a common market for sugar, which recognized that isoglucose is treated as "*a direct substitute for liquid sugar obtained from sugar beet or sugar cane*" – Exh. C19; Council Regulation (EC) No. 1260/2001 of 19 June 2001 on the Common Organisation of the Markets in the Sugar Sector (Official Journal L 178, June 30 2001, at 1), according to which isoglucose and inulin syrup are liquid substitutes for sugar – Exh. C65.

38 Review of the Final Determination of the Anti-Dumping Investigation on Imports of High Fructose Corn Syrup, Originating from the United States of America, MEX-USA-98-1904-01, 3 August 2001, ¶¶ 505-506.

39 WTO Panel Report, Mexico – HFCS Tax, ¶ 8.72.

"*Both HFCS and cane sugar* [...] *may be used, during an industrial process, for the purpose of sweetening products such as the soft drinks and syrups that are involved in the present dispute.*

– The same panel found that HFCS and cane sugar are "like products" for the purposes of GATT's national treatment provision, Article III:4[40].

- The U.K. Competition Commission observed in May 2002 that "*fructose blends of varying strengths can serve as a very close substitute for sugar, with the term isoglucose generally used to refer to a 42 per cent fructose blend*," and that "*at the current sugar price level within the EC, isoglucose would be a low-cost substitute for sugar if large quantities became available*"[41].

* *Isoglucose and glucose*

323. Although glucose and isoglucose may be produced from the same starch and at the same facilities, the end products have different characteristics. For instance, whereas isoglucose – in particular F55 isoglucose – has the same level of sweetness as sugar, glucose is not as sweet. Also, the viscosity of glucose is substantially higher. As a result, glucose and isoglucose are often not used for the same purpose in the manufacture of the same end products. For instance, glucose is used in the manufacture of baked goods, processed foods, and confectionary products. It is not used as a sweetener in soft drinks, but rather as a thickener. This was confirmed at the evidentiary hearing by Gerrit Hueting (TR/Hueting, p. 447, ll. 13-18) and Marcin Wielgus (TR/Wielgus, p. 536, l. 20-p. 537, l. 4; see also the affidavit dated 23 March 2006 of Larry Hobbs, ¶¶ 16-18). It is further confirmed in Kyd Brenner's expert report on isoglucose (ER/Kyd Brenner, p. 4, ¶ 9)[42]. Similarly, in its Report of May 2002 regarding the merger of Cargill Inc. and Cerastar SA (Exh. R136) referred to above,

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Physically, although not identical, HFCS and cane sugar have similar characteristics. [...]. *This similarity is deliberate, since HFCS is designed to mimic sugar as far as possible, so that it can be used as an alternative industrial sweetener.* [...]

Cane sugar and HFCS may serve the same end-use, i.e., to be sweeteners in the production of soft drinks and syrups. Indeed, the evidence suggests that HFCS was developed mainly as a cost-effective alternative to sugar for the production of soft drinks.

[...]

The immediate consumers of the sweeteners are the industrial producers of soft drinks and syrups. The evidence suggests that these producers consider HFCS and cane sugar to be completely interchangeable and will substitute HFCS for cane sugar, if that reduces costs. [...]". (WTO Panel Report, Mexico – HFCS Tax, ¶¶ 8.69-8.73; emphasis added)

40 "*The Panel is satisfied that the facts amply demonstrate that, as sweeteners for soft drinks and syrups, cane sugar and HFCS are in a close competitive relationship and that they undoubtedly can be considered as 'like products' under Article III:4.*" (WTO Panel Report, Mexico – HFCS Tax, ¶ 8.106)

41 U.K. Competition Commission, Cargill Inc. and Cerastar SA, A Report on the Merger, May 2002 – Exh. R136.

42 "[I]*soglucose was not developed to compete, and does not compete, in the same markets as the product commonly referred to as 'glucose.' Glucose is typically much more viscous and much less sweet than isoglucose. As a result, it is not generally used in the production of beverages, which is the primary market for isoglucose. Rather, glucose is used in the production of confectionary products, alcoholic beverages, baking, canning (tinning), dairy products, jams, jellies and medicinal syrups.*"

the U.K. Competition Commission in fact specified that "*both the conditions of supply and demand for fructose materially differ from those for glucose syrups.*"

324. As a result, for instance, "*the* [glucose] *syrups that Pepees produced in the years '99-2000 were* [...] *not delivered to manufacturers of soft drinks, but to other customers in the food processing sector*" (TR/Zaczek, p. 869, ll. 6-10). It is thus with respect to sales to "*producers of ice cream, to confectionary producers, and to other customers who used starch syrups*" (TR/Zaczek, p. 869, ll. 16-17) that Cargill competed with Pepees. Whereas seventy percent of the isoglucose produced by Cargill was used for sweetening beverages, the remaining thirty percent were used in baked goods, condiments, ice-cream, alcoholic beverages and processed foods.

325. The Respondent has argued that since isoglucose is a product obtained from glucose or its polymers, and "*the know-how, inputs, equipment and production processes relied upon by producers of glucose and isoglucose are the same*" (Poland's SPHB, p. 54), Cargill belongs to the glucose syrups producers (Poland's FPHB, p. 66). The Tribunal fails to see how this argument supports the proposition that isoglucose and glucose producers are "in like circumstances". Equally, the facts that Cargill's isoglucose production lines produce dextrose, that Cargill has captured seventy percent of the glucose market in Poland, and that in the process of producing isoglucose Cargill produces glucose syrup, does not lead to a conclusion of likeness between glucose and isoglucose[43].

326. In addition, the fact that "*the Polish sugar industry has been long-established and integral to Poland's agricultural sector*", while "*Cargill's production line in Poland is fledgling and uncertain, and represents a minuscule component of its agricultural sector*", that "*sugar has the overwhelming majority of the market for sweeteners*," while identified consumers of isoglucose in Poland "*are a narrow field of commercial producers of beverages*", and that "*some industrial consumers of sugar have determined that their customers prefer that they do not use isoglucose in place of sugar*" (Poland's Statement of Defense and Counter-Memorial, p. 123), do not constitute elements which may lead to the conclusion that domestic sugar producers and Cargill are not "in like circumstances".

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[43] Similarly, the fact that Cargill neither produces nor has the capacity to produce sugar, and that sugar producers, in turn, neither produce nor have the capacity to produce glucose or isoglucose, does not constitute an argument supporting the absence of competition between sugar and isoglucose or the existence of a competitive relationship between glucose and isoglucose. Finally, the mere fact that Polish-owned producers of glucose syrups would have the possibility to produce isoglucose and that Polish- and foreign-owned entities expressed their interest in obtaining a share of the isoglucose quota in Poland does not support a finding of "likeness of circumstances" between producers of isoglucose and producers of glucose.

327. Finally, the fact that after having converted to isoglucose – and having therefore invested in certain specific storage equipment – sweetener users tend not to revert back to using sugar but would rather acquire isoglucose from abroad, does not affect the above analysis. When users initially select their sweetener, sugar and isoglucose do compete.

328. The Tribunal does not ignore that glucose and isoglucose may be substituted in the production of processed foods, such as jams, baked goods and confectionary products. For the purposes of the likeness test, however, it must determine which investors – investors in sugar or investors in glucose – are closer to the investor in isoglucose. In this respect, as stated above, glucose and isoglucose are complementary rather than substitutable products in certain markets. By contrast, isoglucose and sugar are competitive products in all markets. As a result, producers of isoglucose and sugar must be deemed more "in like circumstances" than producers of isoglucose and glucose.

(ii) Competition between the products

329. The justification of the 12 March 1999 amendment to the 1994 Sugar Law provides that "*the limits to the production of isoglucose, which is manufactured mainly from imported raw materials, is highly competitive with sugar manufactured from sugar beets.* [...] *Therefore high isoglucose production would be related to drastic reduction in the cultivation area of sugar beets, and hence also to a reduction in sugar production*" (Exh. C38).

330. Various Polish government officials have acknowledged in public statements that isoglucose and sugar compete directly, and that any increase in quotas for isoglucose would have to be offset by a quota reduction for sugar. For instance, the "*Reply of the Minister of Agriculture to the question No. 1244 on the proposed amendments to the so-called Sugar Act*" issued on 11 January 1999 (Exh. C35), provided, in part, as follows:

> *The limit on isoglucose production is introduced in the territory of the Republic of Poland, since the production of isoglucose* [...] *is a serious competition to the sugar produced from sugar beet. Isoglucose* [...] *is chiefly used as a sweetener. Therefore, a high production level of isoglucose would entail a dramatic fall in the sugar beet crop, and consequently in the sugar production.*

331. Polish officials also acknowledged the direct impact of the production of isoglucose on sugar consumption in the food industry and the threat that isoglucose represented with

respect to the stability of the sugar market[44]. The competitive relationship between isoglucose and sugar producers has also been recognized in official documents (see the Justifications to the Resolutions of the Council of Ministers of 12 November 2001 (Exh. R283) and 30 July 2002 (Exh. R297)).

d) Is there a policy objective or public interest which could justify considering that Cargill and sugar producers are not in "like circumstances"?

332. Once it is established that the products at issue compete, a "*difference in treatment of their producers will presumptively violate national treatment, unless they are justified by a policy objective or public interest which is not in and of itself discriminatory*"[45].

333. Accordingly, it is only if Poland has failed to grant Cargill national treatment that the Tribunal will have to inquire whether economic and social reasons justify the differentiation and lead to a finding that Cargill and domestic sugar producers are in fact not in like circumstances. This inquiry may thus be deferred (see ¶¶ 379-385 below).

e) Is the Polish sugar industry in the aggregate the proper comparator?

334. Article II:1 of the Investment Treaty implies a comparison between the foreign investor and a domestic investor.

335. The Respondent, on the one hand, has argued that the like circumstances requirement precludes a comparison of Cargill with the entire sugar industry (Poland's Rejoinder, p. 161), as "*by definition, Cargill – a single company with an industry – is unlike an industry as a whole*" (Poland's Rejoinder, p. 162). The Claimant, on the other hand, has argued that "*the entire isoglucose industry in Poland is owned by a single U.S. investor. Thus, the proper comparator for Claimant is the Polish sugar industry*" (Cargill's Reply, p. 93).

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44 See, for instance, statements made by members of Parliament, such as Marian Dembiński (Exh. C27) and Marek Kaczyński (Exh. C53), by Minister of Agriculture Jacek Janiszewski (Exh. C35), by Deputy Minister of Agriculture and Food Economy Leszek Kawski (Exh. C39 and Exh. C118), by Deputy Minister of Agriculture Kazimierz Gutowski and Secretary of State in the Foreign Ministry Danuta Hübner (Exh. C82), and by representatives of Polish sugar producers (Exh. C54 and C56).

45 *Pope and Talbot Inc., op. cit.*, ¶ 78; see also *SD Myers, op. cit.* (quoting OECD, National Treatment for Foreign Controlled Enterprises), "*more general considerations, such as the policy objectives of Member countries could be taken into account to define the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible inasmuch as those objectives are not contrary to the principle of national treatment*" (¶ 248); and *Gami Investments, Inc. v. United Mexican States*, Award, 15 November 2003, finding no national treatment violation where "*a reason exists for the measure which was not itself discriminatory*," and reaching the conclusion that "*that measure was plausibly connected with a legitimate goal of policy* [...] *and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity*" (¶ 114).

336. To decide this issue, the Tribunal must first take account that there is only one isoglucose producer in Poland. As a result, this producer benefits from the entire isoglucose quota and is subject to no "limit" in the sense of Article 11 of the 2001 Sugar Law. It thus makes sense to compare the holder of the entire isoglucose quota with whomever holds the entire sugar quota, here the totality of the sugar producers.

337. The Tribunal further takes into consideration Cargill's argument that the national and EU isoglucose quotas limited its production (because they were below demand), while the aggregate sugar quota did not limit any sugar producer in its production and sales (because it was equal or above demand). In sum, the Claimant finds that due to the imposition of isoglucose quotas below market demand, Cargill was accorded less favorable treatment than each and all of the sugar producers in Poland (see ¶¶ 346 below). It derives from Cargill's argument that if any of the domestic sugar producers is unable to freely compete with other sugar producers to satisfy market demand, this can only be due to the limit allocated to each producer, and not to the global or aggregate quota on sugar production.

338. On this basis, the Tribunal comes to the conclusion that the Claimant was right in comparing itself to the sugar industry as a whole. It would have been wrong for the Claimant to refer to any specific domestic sugar producer, since any such reference would also have taken into consideration the individual limit allocated to that producer and would thus have distorted the comparison.

f) Conclusion

339. Considering that there is no domestic isoglucose producer to be compared to Cargill for purposes of determining whether the latter did not enjoy a treatment as favorable as that accorded to the former, that sugar and isoglucose producers are in the same economic or business sector since sugar and isoglucose are substitutable and competing products, and that there is no requirement that the foreign domestic isoglucose producer be compared to a specifically designated sugar producer rather than to the sugar industry as a whole, the Tribunal reaches the conclusion that Cargill and domestic sugar producers are in like circumstances, subject to its reviewing whether a policy objective or public interest justifies a contrary conclusion. As mentioned above, this last issue will be discussed below (see ¶¶ 379-385).

3.3.3 Is there a violation of the national treatment guarantee?

340. In application of the wording of the Treaty, the Tribunal will consider that there is a breach of Article II:1 of the BIT if the treatment accorded to foreign investments is less

than the most favorable treatment accorded to national investments[46]. As the Claimant rightly emphasizes, the absence of assurances or representations is irrelevant to this determination. Indeed the only relevant inquiry is *"whether the effect of the quotas denied Cargill treatment 'at least as favorable' as that accorded sugar producers"* (Cargill's FPHB, p. 53).

341. Prior to discussing the treatment accorded Cargill (b), the Tribunal will address the question whether a discriminatory intent based on nationality is required as Poland contends (a).

a) Is it necessary that the host State have a discriminatory intent based on nationality?

342. According to the Respondent, the Claimant should have demonstrated that the difference in the treatment was based on its foreign nationality. In other words, it should have shown that the Respondent intended to discriminate against Cargill on the basis nationality. The Respondent submits that there was no such intent, given that any investor in the production of isoglucose would have been subject to the same treatment as Cargill, regardless of its nationality.

343. Article II:1 of the Treaty is an objective provision: it requires that (i) there be a foreign investor, (ii) this foreign investor be in like circumstances with a national investor, and (iii) the host State fail to grant the foreign investor as favorable a treatment as that accorded to the domestic investor. If the three conditions are satisfied, there is a breach of the national treatment guarantee.

344. This conclusion is in no way in conflict with the reasoning in *Feldman v. Mexico*[47], referred to by the Respondent. Quite to the contrary:

> *It is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or "by reason of nationality."* [...] *However, it is not self-evident* [...] *that any departure from national treatment must be explicitly shown to be a result of the investor's nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that <u>it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances</u>.*

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46 If we assume for the sake of argument that even though the Claimant was the only isoglucose producer in Poland, it was allocated a limit, i.e. a portion of the aggregate quota on isoglucose, then the test, under Article II:1 of the Investment Treaty would have been the following: (1) was the isoglucose producer accorded less favorable treatment than sugar producers as a result of the imposition of different quotas (which are the basis for the subsequent determination of limits)? And (2) was the isoglucose producer accorded less favorable treatment than any of the domestic sugar producers as a result of the allocation of limits? Only the first issue is under examination in the present instance (see also *Pope & Talbot*).

47 *Feldman v. The United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002.

[...]

[R]*equiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government.* [...]. *If Article 1102 violations are limited to those where there is explicit (presumably* de jure*) discrimination against foreigners, e.g., through a law that treats foreign investors and domestic investors differently, it would greatly limit the effectiveness of the national treatment concept in protecting foreign investors.* (¶¶ 181 and 183)[48]. (Emphasis added)

345. In sum, for purposes of the application of the national treatment guarantee, it may be left open whether the Respondent imposed national and negotiated EU quotas with the intent to protect the interests of its nationals to the detriment of the foreigner. Only the impact or result of the quotas must be examined. Since isoglucose and sugar are "in like circumstances", according less favorable treatment to the isoglucose producer which is in fact a foreigner protected by an investment treaty, amounts to a breach of the national treatment guarantee under such treaty.

b) Was Cargill not accorded treatment as favorable as the most favorable treatment accorded to Polish-owned sugar producers?

346. Cargill argues that in order for its investment to have enjoyed the national treatment guaranteed by the Treaty, the national and EU quotas should have been based on its production capacity and on market demand. As the quotas were not based on these criteria, Cargill alleges that the national quotas adopted (i) and the EU quotas negotiated by Poland (ii) led to a treatment of Cargill's investment which was less favorable than that accorded to domestic sugar producers. Specifically, it contends that national quotas allowed it to *"produce at only about two-thirds of its capacity"* and that the EU quota limited its "*production to less than one-third of its capacity*" (Cargill's Memorial, pp. 66-67). At the same time, the sugar producers were able "*to meet 100 percent of domestic demand*" (Cargill's Memorial, p. 67).

(i) National quotas

347. The Tribunal has noted that the Justification to the Resolution of 12 November 2001 fixing the first national quota provided that this quota had been determined in consideration of, *inter alia*, the fact that Poland had initiated isoglucose production at the end of 1998, as well as in consideration of production opportunities, and of demand of companies utilizing isoglucose (Exh. R283). It has also noted that the Respondent

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48 See also *Pope and Talbot, op. cit.*, in which the tribunal presumed that discriminatory treatment of foreign investors in like circumstances would be in violation of Article 1102, "*unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or* de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA*" (¶ 78).

has argued that "*the process of setting the A and B quotas for sugar, isoglucose and inulin syrup for a given accounting year relied to a significant extent on determination of actual production*" (Poland's Statement of Defense and Counter-Memorial, p. 45; see also Poland's FPHB, p. 56, and Poland's SPHB, pp. 42-43). Indeed, the Respondent has recurrently stated that "*the Polish and EU regulatory frameworks for setting quotas are based on actual sales or actual production during a pre-referenced period of reference*" (Poland's Statement of Defense and Counter-Memorial, p. 113).

348. Having said that, three questions arise:

- Has Cargill proved that the national quotas prevented it from producing and selling isoglucose at its full capacity and from satisfying market demand?
- Has Cargill proved that sugar quotas did not prevent domestic sugar producers from satisfying market demand?
- Is the difference, if any, between the treatment accorded to Cargill and that accorded to domestic sugar producers justified?

* *Has Cargill proved that the national quotas prevented it from producing and selling isoglucose at its full capacity and from satisfying market demand?*

349. To answer this question, the Tribunal first needs to review Cargill's production capacity and its selling capacity during the national quota period.

350. The Claimant argues that its "*isoglucose production capacity reached 80,000-85,000 MT (commercial) in March 2001, over eight months before the first quota level of 42,200 MT (dry) (59,436 MT (commercial)) was determined, and over a year and a half before that quota became effective*" (Cargill's Reply, p. 59). According to Cargill's expert, if the first quota had not been introduced, Cargill's sales would have steadily increased in 2002 to reach a volume of sale of 85,000 MT commercial quantity (60,360 MT dry mass) at the time the first national quota became effective (2nd Haberman Expert Report, ¶ 2.5, Exh. C111) and 120,000 MT commercial quantity in July 2003 at the time the second national quota became effective, which would have represented an increase in production and sale of 35,000 MT commercial quantity in 8 months. Based on an extrapolation, Cargill claims that it would have sold 54,189 MT dry mass during the first quota period, i.e. approximately 83,336 MT commercial quantity, while it was capped at 42,200 MT dry mass (59,437 MT commercial quantity) through the imposition of the first quota.

351. Would Cargill have been able to produce and sell such a volume of isoglucose between 1 October 2002 and 30 June 2003? For the reasons set forth immediately below, the Tribunal is satisfied that Cargill had an actual capacity of 83,336 MT commercial quantity during the first quota period, and would have been able to sell its production.

352. Between 1998 (Cargill's first investments in the production of isoglucose in Poland) and October 2002 (the beginning of the first domestic quota period), no quotas were imposed on the production of isoglucose. At that time, Cargill's domestic sales volumes were the following:

- 2,903 tons dry mass in 1998 (4,090 MT commercial quantity – Exh. R125);
- 7,301 tons dry mass in 1999 (9,903 MT commercial quantity according to the Record of Inspection of the audit performed on 22 August 2001 – Exh. C69; Exh. R125);
- 14,946 tons dry mass between 1 October 1999 and 30 September 2000 (see Cargill's "Application for A and B Isoglucose Limits for 2003/2004 Settlement Year" – Exh. R210);
- 17,494 tons dry mass in 2000 (see Cargill's "Application for A and B Isoglucose Limits for 2003/2004 Settlement Year" – Exh. R210; Exh. R125; 24,639 MT commercial quantity according to the Record of Inspection of the audit performed on 22 August 2001 – Exh. C69; Exh. R125);
- 22,455 tons dry mass between 1 October 2000 and 30 September 2001 (see Cargill's "Application for A and B Isoglucose Limits for 2003/2004 Settlement Year" – Exh. R210);
- 27,584 tons dry mass in 2001 (see Cargill's "Application for A and B Isoglucose Limits for 2003/2004 Settlement Year" – Exh. R210; 38,851 MT commercial quantity – Exh. R133);
- 40,000 tons dry mass between 1 October 2001 and 30 September 2002 (see Cargill's "Application for A and B Isoglucose Limits for 2003/2004 Settlement Year" – Exh. R210).

353. It results from these figures that, before the imposition of the first national quota, Cargill was rapidly increasing its sales. Until the imposition of the first national quota, Cargill's domestic sales in fact increased as follows:

- by about 250% between 1998 and 1999;

- by about 240% between 1999 and 2000 (according to the Record of Inspection of the audit performed on 22 August 2001, "*for seven months of* [the] *year* [1999] *overall sales of isoglucose was 20,563.12 tons* [...] *which constituted 151,77% of sales for the analogous period of the previous year, which was 13,548.55 tons* [...] *and with respect to sales for the year 2000 it constituted 83.45%*" (Exh. C69); and

- by about 150% between 2000 and 2001.

354. Or, for yearly periods which start in October i.e. the month when the first domestic quota period was imposed, Cargill's domestic sales increased as follows:

- by about 150% between the 1999/2000 period and the 2000/2001 period; and

- by about 178% between the 2000/2001 period and the 2001/2002 period.

355. With respect to the level of domestic demand and production capacity, it goes without saying that they were necessarily equal or superior to actual sales.

356. In October 2002, the first national isoglucose quota was imposed at a level of 42,200 tons dry mass. During the first national quota period (1 October 2002 to 30 September 2003), Cargill's sales reached the quota (Exh. R154; they amounted to 43,900 tons dry state according to Exh. R211). Whereas, as indicated above, the progression of Cargill's domestic sales in the years prior to the first domestic quota period always increased in excess of 150%, when the first quota was imposed, the increase was only 109% between the 2001/2002 period and the first domestic quota period.

357. The Tribunal notes that Cargill has adduced a number of contracts with important industrial consumers that were negotiated before the first quota (¶¶ 144-152 below), but did not produce a full set of contracts covering its entire production capacity. The Tribunal nonetheless finds that the evidence on record is sufficient to establish that Cargill could have made sales up to its full production capacity at the time. In addition to the contracts on record, the Tribunal takes into account the facts that the isoglucose market was expanding and that the prospect of the imposition of domestic quotas must necessarily have deterred commercial users from committing to buy from Cargill. It is thus reasonably satisfied that a demand equal to or above Cargill's capacity production would have existed during the first national quota period.

358. Thus, there is conclusive evidence that during the first quota period, Cargill's production capacity and domestic demand were above Cargill's sales, and that the quota constituted a ceiling which prevented Cargill from selling at its then full capacity and satisfying market demand.

359. Now, the Tribunal must turn to the second national quota which was set at 62,200 MT dry mass (87,606 MT commercial quantity) per year from 1 July 2003 to 30 April 2004. Based on the evidence adduced and the increasing sales when no quotas existed, the Tribunal is satisfied that Cargill would have been able to reach a production of 120,000 MT commercial quantity at the time of the second quota in July 2003 and that there was a demand for such quantity.

360. In the second quota period, Cargill's actual sales did not remain at the 40,000 tons (or 43,900 tons) dry mass reached during the first quota period, but went up to 52,167 tons dry matter (73,475 MT commercial quantity) (Cargill's Reply, pp. 59-60; Exh. R212) or even to 58,136 MT dry mass according to 2nd Haberman Expert Report (Exh. C111, ¶ 2.33).

361. Although the Claimant did not sell 62,200 MT dry matter of isoglucose – corresponding to the second domestic quota – between 1 July 2003 and 30 June 2004, it cannot be assertively stated that the Claimant failed to reach the second domestic quota level. In fact, as explained immediately below, it is highly likely that the second domestic quota, just as the first domestic quota, limited the Claimant's domestic sales of isoglucose.

362. The second quota was set at a level of 62,200 MT dry matter, and was to be in effect from 1 July 2003 until 30 June 2004. On 1 May 2004, however, the EU quota on isoglucose became effective. As a result, the second domestic quota was in effect only during a period of ten months, until 30 April 2004. According to Mr. Haberman's Second Expert Report, between 1 July 2003 and 30 June 2004, the Claimant sold 58,136 MT dry mass of isoglucose (Exh. C111, p. 7, ¶ 2.33). Of that amount, the Claimant sold 51,250 MT dry mass between 1 July 2003 and 30 April 2004 (1st Haberman Expert Report, Appendix 3 – Exh. C8). In other words, the Claimant sold 82% of its annual quota during the first ten months of the second domestic quota period, that is nearly 5/6th of its quota in a period of time equal to 5/6th of the second domestic quota period. It results from this figure, as well as from the established domestic demand for isoglucose and the Claimant's production capacity, that if the Claimant had not been restricted by the EU quota during the last two months of the second domestic quota period – i.e. if it had been entitled to sell 62,200 MT dry mass

in total during that period – the Claimant would most likely have reached the second national quota amount.

363. The experts called by both parties agree that the EU isoglucose quota for May and June 2004 amounted to 4,464 MT dry mass (see 2nd Stanley Expert Report, ¶ 3.25 – Exh. R217, according to which "*the only additional requirement was that during the period from 1 May 2004 to 30 June 2004 the quota was not to exceed 4,464 MT (net). However, the actual annual* [domestic] *quota was not decreased*"; see also 2nd Haberman Expert Report, ¶ 2.32). Indeed, both experts converted the annual EU quota into a monthly quota to determine the quantity of isoglucose that the Claimant was allowed to sell in May and June 2004. If the Tribunal follows the experts' explanations (although it would seem to the Tribunal that within each yearly quota period, the Claimant was entitled to distribute its sales as it saw fit and that the annual quota should therefore logically not be converted into a monthly quota), given the imposition of the EU quota on isoglucose on 1 May 2004, it was not possible for the Claimant to sell 62,200 MT dry state of isoglucose during the second national quota period unless it had already sold 57,736 MT dry state by 30 April 2004.

364. In any event, it appears very likely that the imposition of the first national quota discouraged actual or potential isoglucose users from purchasing isoglucose from the Claimant. Accordingly, even if the Tribunal were not to rely on the above assumptions regarding the quantities of isoglucose that would have been sold during the second national quota period in the absence of the EU quota during the months of May and June 2004, and even if the Tribunal were consequently to conclude that the Claimant's sales did not reach the second domestic quota, it could reasonably be held that Cargill's failure to reach the second domestic quota amount was not the result of the absence of demand for isoglucose or of the Claimant's incapacity to produce the necessary quantities of isoglucose, but rather the consequence of the fact that the first domestic quota had the effect of discouraging customers from purchasing isoglucose. The Tribunal is thus of the opinion that Cargill was prevented from producing and selling at its full capacity during the second national quota period.

365. The fact that, as argued by the Respondent (see Poland's Statement of Defense and Counter-Memorial, pp. 115 and 116), the first and second national quotas accommodated the Claimant's declared production capacity in the year prior to the announcement of the quota in question, is of no help to the Respondent's case. Given that isoglucose was a new product and that the Claimant was investing in its facilities so as to expand its production capacity to satisfy the increasing market demand,

relying on sales volumes of the prior year was no guarantee that the quotas would allow the Claimant to sell at full capacity for the following year.

366. Furthermore, the Tribunal cannot follow the Respondent when it argues that it could not have been aware of domestic market demand for isoglucose. Indeed, the Respondent should have known that demand would reach at least 120,000 MT commercial quantity, since it could not have been unaware of the two reports of the Technology University of Łódź, namely the report commissioned by the Ministry of Agriculture itself in 1998 (Exh. C154) and the report commissioned by Cargill from the same university in 2000 (Exh. C14). The former report estimated isoglucose demand in Poland in the beverage market alone at 100,000 tons dry mass (140,000 MT commercial quantity) in 1997 (¶ 4.1) and growth in overall sweetener consumption at 1.5% annually (¶ 4.2). The report even projected that demand for isoglucose in 2002 would reach approximately 153,533 tons dry mass (216,244 MT commercial quantity) (¶ 4.2). At the hearing, Ms Kasperowicz explicitly declared that she was aware of the report commissioned by the Ministry of Agriculture (TR/Kasperowicz, p. 946, l. 3 – p. 947, l. 11) and that she did not question its accuracy (TR/Kasperowicz, p. 958, ll. 1-5).

367. In any event, Poland knew that isoglucose was a new product, that Cargill had invested in its isoglucose production facilities so as to satisfy market demand, and that Cargill's production capacity was rapidly increasing. In May 2001, one month before the enactment of the 2001 Sugar Law, the Chief of Staff of the Minister of Agriculture, Mr. Zagurski, attended an opening ceremony at Cargill's Bielany Wroclawskie plant, celebrating Cargill's planned expansion of its isoglucose capacity to 120,000 MT commercial quantity (see Exh. C63).

368. In addition, in August 2001, three months before setting the first national quota level, the Respondent performed an audit of Cargill's facilities, which showed both the production capacity that Cargill had already installed and the production capacity that was in the process of being installed (Exh. C69). This audit also showed that Cargill had in place specific contracts or letters of intent to sell approximately 54,000 MT commercial quantity of isoglucose (Exh. C69 and Exh. C67). Specifically, the audit showed that Cargill had a three-year contract with Coca-Cola for the sale of 20,167 MT commercial quantity of F42 isoglucose, and a letter of intent from Pepsi for 33,766 MT commercial quantity of F55 isoglucose (Exh. C69). The audit further showed that, in the course of a year, Cargill's sales of isoglucose had increased by 51%, indicating that Cargill's planned expansion was supported by the existing demand.

369. As a result, Poland could not have been unaware that by setting isoglucose national quotas on the basis of past production, it would prevent Cargill from satisfying market demand and producing and selling isoglucose at full capacity.

370. Finally, with respect to the Respondent's allegation that the Claimant's production capacity was unknown to it when the quotas were set, the Tribunal notes, *inter alia*, that on 7 December 1999, Mr. Hueting communicated to Mr. Plewa, Undersecretary of State in the Ministry of Agriculture and Rural Development, an "*expert opinion elaborated by [*Cargill's*] team of experts*", the contents of which had been discussed "*with the Association of Producers of Starch and its Derivatives in Poland*" (Exh. R98). This expert opinion provided the following information regarding Cargill's production capacity:

> *Production capacity may and will keep pace with the demand for high quality sweeteners. In 1999 this capacity reached 40 thousand tons, and in 2000 it reached the level of 80 thousand tons to obtain subsequently the level of 120 thousand tons in 2002. Production of 120 thousand tons will fully cover the demand for isoglucose.* (Exh. R98)

* *Has Cargill proved that sugar quotas did not prevent domestic sugar producers from satisfying market demand?*

371. The guarantee of national treatment is breached if the foreigner is not accorded treatment as favorable as the Polish sugar producers. The application of the test thus implies review of the treatment accorded to the sugar producers under the sugar quotas.

372. Between 1999 and 2002, sugar quotas were already in effect based on the 1994 Sugar Law. The method for fixing quotas under the 1994 Sugar Law provided that quotas on sugar production were based on actual production, not on present or future production capacity (Article 4:2).

373. To support its allegation that sugar quotas allowed sugar producers to oversupply the domestic market and to prove market demand for sugar, Cargill relied on domestic consumption figures. Domestic consumption of sugar – which is naturally below or equal to production[49] – was 1,590,000 MT in 1999, and has remained at about the same level ever since (Exh. C95; Exh. C123). As a result, Cargill argued that the domestic quotas on sugar, which amounted to 1,590,000 MT for the first quota period (Exh. C72), and, to 1,622,200 MT for the second quota period (Exh. C83), were first equal to and then above market demand.

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[49] Subject to imports, but imports were negligible (Exh. C95).

374. Minister Kalinowski, on the other hand, declared at the hearing that "*from the middle of 1995, with some ups and downs, the production was equal to demand*" (TR/Kalinowski, p. 1070, ll. 20-22; emphasis added). Production amounted to approximately 1,805,000 MT in 1999/2000, approximately 2,013,000 MT in 2000/2001, and approximately 1,602,000 MT in 2001/2002 (Exh. C95). As a consequence, according to Minister Kalinowski's statement, sugar quotas (1,590,000 MT during the first quota period (Exh. C72) and 1,622,200 MT during the second quota period (Exh. C83)) were below domestic demand.

375. The exact level of domestic demand for sugar[50] cannot be determined on the basis of the evidence, given the existence of a quota on sales of domestic sugar since the 1994 Sugar Law. In any event the following conclusions may be drawn from the evidence on record, specifically from Exhibit C95 ("Sugar Market – Current Situation and Perspectives – Table Illustrating the Production, Consumption, Import and Export of White Sugar in Poland"):

- The fact that "domestic use" has steadily remained at 1,590,000 MT between 1999/2000 and 2002/2003 and reached 1,600,000 MT in 2003/2004 (that is at the time of the second national quota under the 2001 Sugar Law) seems to indicate that "domestic use" corresponds to sales of domestic sugar.

- The existence of (fluctuating) imports combined with the fact that sales of domestic sugar seem to have reached the domestic sugar quota strongly indicate that domestic demand was above the level of domestic quotas.

- This said, imports were negligible as compared to quantities of domestic sugar sold in Poland, which tends to indicate that demand for sugar was only slightly above the level of quotas.

376. Considering the above, the Tribunal cannot exclude the possibility that domestic demand was higher than the level of sugar quotas, and that, as a result, contrary to what is argued by the Claimant (Cargill's Memorial, p. 67), sugar producers were in fact not able to meet 100 percent of domestic demand. This being so, the difference, if any, between the domestic demand and the level of sugar quotas, was not significant.

377. Nevertheless, there is no doubt for the Tribunal that the foreign isoglucose producer was affected by the existence of a domestic quota to a greater extent than domestic sugar producers. Indeed, the method of fixing quotas based on past production is

[50] It is indeed not possible, on the basis of Exh. C95, to determine the portion of imported sugar that was sold on the domestic market and the portion that was re-exported.

bound to prejudice any new investor which seeks to expand its production, as compared to any long-established investor with a stable production capacity.

378. As a result, the Tribunal concludes that not only does the record provide some indication that domestic quotas on isoglucose constituted a compromise between the interests of the Claimant and those of sugar producers (see Exh. C73), but it also provides strong evidence that the foreign isoglucose producer has been limited by domestic isoglucose quotas to a more significant extent than sugar producers by domestic sugar quotas. Accordingly, the foreign investor was not granted treatment as favorable as that accorded to domestic producers.

* *Is the difference between the treatment accorded to Cargill and that accorded to domestic sugar producers justified?*

379. Given the Tribunal's finding that the treatment accorded to the foreign producer is less favorable than that accorded to domestic sugar producers, the question arises, as explained above (see ¶ 333 above), whether there is a justification for such a difference in treatment.

380. The Respondent has argued that "*no fewer than seven compelling economic and social reasons – wholly unrelated to Cargill's nationality of ownership – explain any purported differentiation between sugar and isoglucose*" (Poland's Statement of Defense and Counter-Memorial, p. 125). To support this allegation, the Respondent quoted Poland's Position Paper in the Area of "Agriculture" for the Accession Negotiation with the EU of 9 December 1999, which reads as follows:

> *The tradition of sugar beet planting and sugar production in Poland has been followed for over one hundred years. Every year sugar beets are planted on average on the area of 400,000 [*hectares*]. This is one of the most important agricultural crops. Most plantations are located in south-eastern and north eastern Poland, i.e. in regions where industry is underdeveloped and which are threatened with the biggest unemployment. Revenues from sugar beet sales are an important item in the household budget of many agricultural families. Further reduction in the area planted to sugar beets, for which Poland has very good natural soil and climatic conditions, without any alternative sources of income may result in the lower living standard of farmers and a burden for the national budget due to social benefits to be paid to farmers and their families.*

381. The Respondent argued that "*to the extent that* [its] *decisions regarding setting of* sugar *quotas reflected Poland's desire to avoid the closure of sugar beet farms and the associated rural instability, they reflected an EU-directed policy priority,* not *evidence of discrimination against Cargill on account of its U.S. nationality of ownership*" (Poland's Rejoinder, p. 174).

382. The Tribunal has carefully reviewed these arguments and understands the economic and social importance of sugar beet revenues for the Polish national economy. On the basis of the Respondent's explanations, however, it is unable to reach the conclusion that less restrictive quotas would necessarily have led to a lower standard of living of farmers and a burden for the national budget, in particular if one considers that isoglucose is made of wheat, which is itself an agricultural product.

383. That "*Cargill's record of production and capacity in Poland were uncertain at best* [...][, that] *there is no evidence that Cargill or its wheat suppliers constitute critical agricultural sectors located in economically-depressed regions, where families are dependent on their production* [,] [and that] *neither Cargill nor wheat producers enjoy the natural comparative advantage that Poland highlighted to the EU Commission*" (Poland's Statement of Defense and Counter-Memorial, p. 125) does not explain in what way the production and sale of isoglucose in Poland constituted such a threat to the sugar agricultural sector that domestic quotas on isoglucose were to be imposed based on a past production reference period. In addition, the alleged "*evidence that decision-makers in Poland had concerns regarding isoglucose as a product tainted by genetic modification*" (Poland's Statement of Defense and Counter-Memorial, pp. 125-126) does not provide a reasonable justification to the difference in treatment resulting from quotas imposed on sugar and isoglucose.

384. The Respondent has also argued that "*the overriding need to introduce an Act* [on sugar isoglucose quotas] *in Poland 'derived' from the requirement to implement the provisions of the Association Agreement between Poland and European Communities* [...]" (Poland's Statement of Defense and Counter-Memorial, p. 125, fn. 620), that a "*major precondition for Poland's economic integration into the Community* [was] *the approximation of that country's existing and future legislation to that of the Community*" (Poland's Statement of Defense and Counter-Memorial, p. 125, fn. 620), and that "*Poland's approach to determining isoglucose quota levels accorded with long-standing methodologies adopted by the EU*" (Poland's Statement of Defense and Counter-Memorial, p. 126, ¶ 214). In response to these arguments, the Tribunal notes that, as explained in more detail below (see ¶¶ 462-467), there was no requirement under EU law that Poland impose national quotas prior to its accession to the EU. As a result, EU law cannot be invoked as a justification for the less favorable treatment accorded to isoglucose.

385. In conclusion, the Tribunal can find no compelling economic or social reason justifying a determination that domestic sugar producers and the foreign isoglucose producer are not in like circumstances. As a result, the difference between the treatment accorded to

the foreign investor and that accorded to domestic investors in relation to national quotas constitutes a violation of the national treatment guarantee.

(ii) EU quotas

386. The Tribunal must ask itself the same questions as those identified above (¶ 348) in connection with the EU quotas in force as of 1 May 2004, since Cargill argues that its production was limited to less than one third of its capacity by the EU quotas while the sugar producers were able to meet 100% of the demand.

* *Has Cargill proved that the EU quota prevented it from producing and selling isoglucose at its full capacity and from satisfying market demand?*

387. The EU quota for isoglucose was set at 26,781 tons dry mass (Exh. C65). It is clear that the EU quota was lower than the second national quota. Based on the Tribunal's previous findings (see above ¶ 362) and its finding that Cargill reached the full capacity of 120,000 MT commercial quantity (i.e. 82,500 MT dry mass) in July 2003, the Tribunal finds that the EU quotas did prevent Cargill from producing at its full capacity and satisfying market demand.

* *Has Cargill proved that sugar quotas did not prevent domestic sugar producers from satisfying market demand?*

388. Poland's first EU quota request for sugar was for 1,866,000 MT dry mass (Exh. C45, ¶ II.3; Exh. C80). The EU quota for sugar was finally set at 1,671,926 MT dry mass (Exh. C65). As explained above (see ¶ 376), it is possible that market demand for sugar was above domestic consumption, which amounted to 1,590,000 tons dry mass (Exh. C95, table p. 1; Exh. C123). On the basis of the evidence on record (Exh. C95), the Tribunal cannot, however, determine the extent of the difference between domestic sugar consumption and the EU sugar quotas.

389. This being so, such difference if it existed was necessarily much smaller than the related difference existing for isoglucose (¶ 387). There is thus again a strong indication that the sugar producers were better treated than the isoglucose producers as they benefited from more favorable production and sales capacity under the EU quotas than Cargill.

* *Is the difference between the treatment accorded to Cargill and that accorded to domestic sugar producers justified?*

390. Here again, the Tribunal must inquire whether the difference of treatment was justified by a policy objective or public interest which in itself is not discriminatory.

391. Cargill claims that the difference of treatment stems from Poland's failure to seek higher isoglucose quotas in its EU accession negotiations. Specifically, it argues that Poland *"was not required, as a consequence of its accession process, to seek in its negotiations with the EU isoglucose quotas below Cargill's production capacity or demand for isoglucose in Poland"* (Cargill's FPHB, p. 48).

392. In response to Poland's argument that the EU quotas resulted from EU policy, Cargill replies that Poland's accession to the EU cannot be an excuse for breaching Articles VII and II:6 of the Treaty. In connection with expropriation under Article VII of the Treaty, it specifically states:

> *Regardless of whether acceding to the EU constitutes a `public purpose´ within the meaning of Article VII of the Treaty, it does not relieve Respondent of the obligation to compensate for expropriatory losses resulting therefrom.* [...] *Regardless of Respondent's policy interests in acceding to the EU, to the extent that Respondent's interest had the effect of depriving Cargill of its rights under the BIT, that loss should not be borne by Cargill alone. Rather, that loss should be borne by Poland, the beneficiary of EU accession.* (Footnote 202, Cargill's FPHB)

393. Most importantly, as far as national treatment is concerned, the Claimant points out that, in accordance with Article IV of the Protocol (Exh. R164), Poland's right to make or maintain exceptions to national treatment (*inter alia* in the agricultural sector) does not apply to investments existing for a period of 10 years from the date of the relevant regulation or EU measure directly applicable, or for a period of 20 years from the date of entry into force of the Treaty, whichever is later.

394. In its Second PHB, the Respondent for its part stresses that the Claimant has "alterated" its claim. Not only does it consider it a stale claim (¶ 13, footnote 30) but most importantly it argues:

> *As Cargill knew, EU quotas were going down as a matter of EU policy. Thus, even if Poland had achieved the quota sought by Cargill, to the extend* [sic] *Cargill established harm as a result of quotas below its capacity, that harm was caused by EU policy (which Cargill knew of and expected), not acts of Poland.* (Poland's SPHB, ¶ 17, footnotes omitted)

395. The Respondent concluded that Cargill failed in its burden to show that the negotiating positions advanced by the Respondent proximately caused its alleged injuries.

396. First, the Tribunal does not consider that Cargill's argumentation should be disregarded for being "stale" or not within the scope of Article IX of the BIT. It is clearly the continuation of a claim presented in the Request for Arbitration and was simply elaborated upon in the course of the proceedings.

397. Second, the Tribunal notes that Poland ought to have extended protection under the Treaty, as amended by the Protocol, to existing investments for a certain period of time. It therefore needs not review whether Poland's violation could be excused by EU policy.

398. Because the EU negotiations were extensively discussed by the parties, the Tribunal will also examine whether the Respondent's failed to negotiate the isoglucose quota as well as the sugar quota and whether a higher isoglucose quota would have been granted, if Poland had better negotiated this quota as alleged by the Claimant.

399. EU quotas were based on historical production during a reference period. This was, for instance, provided in the EU Common Position Paper dated 7 June 2000, according to which "*the EU emphasizes, that annual production quotas for sugar and isoglucose must be determined taking into account of historical production figures during a reference period*" (Exh. R307). In this respect, the Tribunal notes that Council Regulation (EEC) No. 1293/79 of 25 June 1979 Amending Regulation (EEC) No. 1111/77 Laying Down Common Provisions for Isoglucose provided that "*it seems appropriate, when fixing such quotas, for reasons of economic fairness, to take into account the technical production capacities per annum of the undertakings in question*" (Exh. C17), and that Poland in fact obtained that a reference period that included the years 1999 to 2001, instead of the years 1995 to 1999 (see TR/Kalinowski, p. 1056, ll. 18-21; see also European Union Common Position CONF-PL 81/02, 31 October 2002 – Exh. R145). There is no evidence in the record that the EU "*would have been willing to alter the applicable reference period further, or even to deviate from the reference period approach altogether,*" as argued by the Claimant (Cargill's Reply, p. 79), in particular considering the Commission's declaration of 30 January 2002 that even though "*in order to fully see the capacity of existing plants,* [Poland's and Slovakia's] *requests are based on production potential* [...] *increase in isoglucose production immediately before accession should* [...] *not be taken into account*" (Exh. C74).

400. The oral evidence given at the hearing confirms the written record. Minister Balazs stated at the hearing that "*when* [Poland] *submitted a request for 20,000, the Union reacted quite sharply, and* [Poland was] *reminded in an official position paper that* [it] *should base* [its] *quota request on the reference period, that there were no other*

possibilities. That was the position taken by the Union after [Poland's] *initial request*" (TR/Balazs, p. 798, l. 21 – p. 799, l. 3).

401. Minister Kalinowski, in turn, declared at the hearing that in the course of the negotiations with the EU, he had "*tried to advance* [the] *argument as the Minister of Agriculture* [that production capacity was to be taken into account in setting the isoglucose quota], [...] *each time around that was rejected, and* [he] *was told that the general principle was the reference period*" (TR/Kalinowski, p. 1073, ll. 10-13).

402. Furthermore, even when in November 2002 – i.e. after the EU's statement of 31 October 2002 that the A quota on isoglucose should amount to 6,232 MT (Exh. R145) – Poland "*submitted 60,000 tonnes of isoglucose to the Council of Ministers*," specifying that "*according to the manufacturer's information, annual production capacity resulting from irreversible investments, which took place in the years 1995-1999 amount to 120 thousand tonnes*" (Exh. C85), "[Poland] *got the position of the European Commission which held to its earlier position, saying that this was its final position, 18,000 or around 20,000*" (TR/Kalinowski, p. 1081, ll. 1-7).

403. Asked at the hearing whether Poland had dropped its request from 62,200 MT back to 40,000 MT in November 2002, Minister Kalinowski replied:

> *We're talking now about the last weeks before Copenhagen, and we requested 60,000, we were told 18 or roughly 20,000. We were told that take it or leave it, and there is no way we can get any more. This is a final position.*
>
> *But given that there were few, two, three weeks I think left to the Copenhagen Summit, we thought that for technical reasons it might be better to push down our proposal a bit in the hope that the other side would meet us halfway.* (TR/Kalinowski, p. 1069, ll. 1-10)

404. Considering the above, the fact that Poland's 20,000 MT dry mass first EU quota request for isoglucose and its 62,200 MT dry mass highest EU request (Exh. C84, ch. 7) represented only 14.3% and 44.4% respectively of domestic market demand for isoglucose (140,000 MT dry mass, Exh. C154) does not mean that Poland failed to properly negotiate the isoglucose EU-mandated quota.

405. It should be noted that like Poland, Slovakia had a single isoglucose producer that began limited production in 1998 (at 9,798 MT dry mass) (Exh. R135), and faced an initially low quota proposal from the EU (3,220 MT dry mass; Exh. C74). Slovakia had recently entered the isoglucose market when it opened negotiations with the EU (Exh. R135), and pointed out that actual production over the reference period suggested by the EU was an inappropriate basis given that "*the proposed reference*

period [did] *not reflect the real production of Slovakia, since isoglucose* [was] *not a traditional but so called new production commodity*" (Exh. R135). Slovakia therefore requested that the reference period years 2000-2002 be taken into consideration. Ultimately, Slovakia obtained a quota of 42,547 MT dry mass representing 112.6% of it average production during the years 1999 to 2001 (37,782 MT dry mass) (Exh. R135). In comparison, the EU quota obtained by Poland (26,781 MT dry mass) represented 151% of its average production during the years 1999 to 2001 (17,724 MT dry mass).

406. With respect to negotiations between the EU and Hungary, the Claimant has put forward that the latter requested an isoglucose quota of 140,000 tons dry matter and was granted a quota of 137,627 tons dry matter. In this respect, the Tribunal notes that the average Hungarian production in the years 1995 through 1999 amounted to 120,080 tons dry matter. In other words, whereas the quota granted to Poland represented 151% of its average production during the years 1999 to 2001 (17,724 MT dry mass), the quota granted to Hungary represented only 114% of its production during the years 1999 to 2001.

407. In any event, with respect to earlier negotiations between the EU and other member States, Ambassador Truszczyński, Poland's chief negotiator, declared that "*as a rule, it was an ineffective and unproductive approach in our negotiations to invoke achievements or negotiating results obtained by other countries before* [...]. *As a rule the response of E.U. negotiators was that our situation and our accession process is something that is judged on its merits, and that we have to adapt to the E.U. legislation as it stands at the time when we negotiate the terms of our accession*" (TR/ Truszczyński, p. 622, l. 13-22).

408. Finally, Ambassador Truszczyński also stated that the Council of Ministers had the ability, albeit a limited one, to swap part of its sugar quota for a higher isoglucose quota (TR/Truszczyński, p. 683, ll. 9-11). And in fact, Poland did swap 6,210 tonnes of sugar for 6,210 tonnes of isoglucose (TR/Truszczyński, p. 682, ll. 6-10). There is no evidence that Poland could have sought to swap a more important share of its sugar quota for a greater isoglucose quota.

409. In conclusion, although it may be true that conveying information on demand and production capacity to the EU would have strengthened Poland's negotiating position (TR/Truszczyński, p. 643, ll. 22-23), there is no evidence that even if Poland had been more demanding in the negotiations, a higher quota would have been granted by the EU. This finding does not, however, affect Poland's obligation to grant protection to existing investments on the basis of the Treaty and the Protocol.

(iii) Conclusion on national treatment

410. The Tribunal concludes that through the imposition of the national and EU quotas, Cargill was treated less favorably than the sugar producers. The Tribunal is mindful that the extent of the difference has not been established. Having said that, the Tribunal considers that a determination of a breach of the national treatment guarantee relies exclusively upon the showing of a difference of treatment irrespective of the magnitude of such difference[51].

3.3.4 Did Poland deny Cargill equality of competitive opportunities?

411. The Tribunal's determination that there has been a violation of the national treatment guarantee in the context of national and EU quotas leads to the conclusion that there has also been a violation of equality of competitive opportunities. As a result of the imposition of low isoglucose quotas, the foreign investor suffered less favorable treatment than domestic investors in like circumstances in that, in relative terms, the foreign investor was entitled to sell less isoglucose than sugar producers were allowed to sell sugar. As a result, the Tribunal concludes that the former was denied equality of competitive opportunities and was thus put at a competitive disadvantage in comparison with national investors.

3.3.5 Is there a violation of Article II:8(i)?

412. As stated by the Claimant, "*Article II:8(i) simply guarantees that the general national treatment obligation of Article II:1 applies with respect to particular economic activities*" (Cargill's Memorial, p. 69).

413. The Claimant has argued that the imposition of national quotas and the negotiation of EU quotas below domestic demand and production capacity "*have severely limited Claimant's ability to market its product through either 'internal distribution and marketing systems' or 'direct contract with individuals and companies,' while allowing the domestic sugar industry to engage in such activity to the full extent the market will bear*" (Cargill's Reply, p. 119). According to the Claimant, "*it is the quotas themselves, by preventing the Claimant from producing all of the isoglucose its customers wish to buy, that impede Claimant's marketing activities*" (Cargill's Reply, p. 119).

414. As already stated above, it appears more than likely in the ordinary course of events that the imposition of domestic quotas on isoglucose discouraged actual and/or potential customers from purchasing isoglucose from the Claimant, if such customers'

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[51] See also Pope & Talbot, *op. cit.*, Award on the Merits, phase 2, ¶ 72.

needs could not be satisfied by the quantities that could be produced under the domestic quotas. In any event, it is undisputable that the existence of the quotas activities made marketing activities (partly) useless. As a result the Tribunal finds that Poland breached Article II:8(i).

4. FAIR AND EQUITABLE TREATMENT

415. The Tribunal will briefly restate the parties' positions (4.1 and 4.2) prior to reviewing the merits of this claim (4.3).

4.1 Cargill's position: Poland has failed to comply with its obligations under Article II:6 of the Investment Treaty

4.1.1 Poland has denied Cargill "fair and equitable treatment"

416. According to Cargill, the standard of treatment considered fair and equitable is to be determined by reference to contemporary international law and can "*be read to require proactive assistance*" (Cargill's Memorial, p. 70). It includes providing non-discriminatory treatment (a), providing security for legitimate expectations (b), refraining from arbitrary conduct (c), and complying with the requirements of transparency and due process (d).

417. Cargill disputes Poland's interpretation that the standard is limited to the minimum requirements under customary international law and challenges Poland's references to state practice arbitral decisions. It adds that the component principles that it has articulated are in any event "*part of an autonomy as well as of the minimum standard of treatment*" (Cargill's Reply, p. 122).

a) Poland has discriminated against Cargill

418. It is the Claimant's case that the Respondent discriminated against Cargill by securing high domestic sugar production to favor Poland's own proprietary interests, at the expense of the sole foreign isoglucose producer. In Cargill's view, Poland granted national sugar producers more favorable quotas than to Cargill and by exercising its regulatory powers "*in an uneven-handed way, not to advance the public interest, but to achieve its own commercial interest as shareholder in certain enterprises*" (Cargill's Memorial, p. 74). Indeed, certain officials of the Agricultural Ministry in charge of recommending quota levels to the Council of Ministers were directors of state-owned sugar companies and "*had a fiduciary duty to advance the interests of these Polish sugar companies*" (Cargill's Memorial, p. 73). In addition, given that at the time when

the quotas were negotiated and set, Poland was seeking to sell its shares in sugar companies to private investors, and that higher quotas would have increased the market value of the companies, Poland "*had an institutional, financial interest in maximizing the sugar quota, which, in turn, required minimizing the isoglucose quota*" (Cargill's Memorial, p. 74).

b) Poland has deprived Cargill of its legitimate expectations

419. The Respondent initially encouraged the Claimant's investment in isoglucose and led it to believe that its investment plans and resulting economic benefits would not be impeded. Subsequently, however, Poland deprived Cargill of three specific reasonable expectations on the basis of which Cargill had invested in the expansion of its isoglucose production facilities, i.e. first, the expectation that Poland would not impose quotas on isoglucose before its accession to the EU; second, the expectation that national quotas would match the level of domestic demand or Cargill's production capacity; third, the expectation that the EU isoglucose quota would reflect demand and production capacity.

420. Cargill contends that since Poland had never before imposed quotas on isoglucose, "*it was reasonable to expect that Respondent would refrain from doing so until it was required at the* [actual] *time of accession. Indeed every prior effort by the sugar producers to cause Respondent to impose such a quota had been firmly rebuffed. Although drafts of legislation that would have imposed isoglucose quotas were circulated as early as December 1998, they did not advance in the Parliament, and government officials and members of Parliament never gave notice to Cargill that national quotas on isoglucose would be imposed before EU accession*" (Cargill's Memorial, p. 76).

421. Cargill argues that it had a second "*well-founded expectation that the national quota would be set at a level that accommodated its production capacity*" (Cargill's Memorial, p. 76) based on the following circumstances.

422. First, Poland had granted Cargill all necessary building, operation and expansion permits, and never suggested that the Claimant should cease or alter its investment plans, nor did it give any notice of legal changes that would dramatically alter the fundamental premise of the Claimant's investment. In fact, government officials and members of Parliament consistently expressed support for Cargill's expansion and their understanding that the isoglucose quota had to be sufficiently high to enable the Claimant to utilize its production capacity.

423. As a second reason for its expectation, Cargill states that "*the government was fully aware of the rising domestic demand for isoglucose and of Cargill's efforts to expand production to meet those demands*" (Cargill's Memorial, pp. 76-77). Indeed, it had briefed numerous high-ranking government officials and members of Parliament both on its decision to expand production in 1998 and on the progress of that expansion. It had also shared with the government detailed information regarding domestic demand for isoglucose, particularly during the first half of 2000, between June and December 2001, and in March 2002.

424. Third, when, "*during the period of Cargill's expansion, the company did learn of developments that conflicted with its initial expectations regarding the quota* [...] *government officials and members of Parliament reaffirmed Cargill's original expectations and assured the company that it could proceed with its plans*" (Cargill's Memorial, p. 79).

425. Cargill's third expectation that the EU isoglucose quota would reflect demand and production capacity arose because "*Cargill was assured by numerous senior government officials and members of Parliament that they would request or support a request for an EU isoglucose quota that would not hinder Cargill's expansion*" (Cargill's Memorial, p. 78).

426. Cargill's expectation was also based on its knowledge that the European Union had historically set isoglucose quotas for its member States based on their levels of domestic production. Similarly, the Claimant was aware that the European Union had advised the Respondent that it was *"free to request an isoglucose quota that was higher than existing production in order to account for projected growth*" (Cargill's Memorial, pp. 78-79).

427. Finally, even after the Claimant learned that the Respondent had made quota requests in negotiations with the EU that were lower than production capacity, the Claimant was offered explicit assurances from the competent government officials and members of Parliament that future negotiating positions would be substantially higher and would take into account domestic demand and production capacity.

428. The Claimant submits that Poland deprived it of all three expectations. With the enactment of the 2001 Sugar Law, the Respondent deprived Cargill of its expectation that no quota would be imposed prior to Poland's accession to the European Union. By setting a restrictive first quota, the Respondent frustrated Cargill's expectation that the quota would be set at a level accommodating Cargill's full capacity. And in its

accession negotiations, the Respondent failed to request from the EU a quota level high enough to reflect Cargill's capacity.

c) Poland has subjected Cargill to arbitrary treatment

429. Cargill submits that Poland engaged in arbitrary treatment in several ways. First, Poland allowed its treatment of Cargill's investment "*to be dictated not by legitimate considerations of public policy but by pressure from politically influential sugar companies and sugar beet growers*" (Cargill's Memorial, p. 81).

430. Second, Poland set quotas for isoglucose and sugar which were not based on any coherent economic rationale. The isoglucose quota was in and of itself arbitrary, in particular in light of the level of the sugar quota, which exceeded domestic demand and, as a result, remained unfilled.

431. Third, the imposition of a national isoglucose quota below the level of domestic production in the middle of negotiations undercut Poland's negotiating position vis-à-vis the EU in an arbitrary manner.

d) Poland has denied Cargill transparency and due process

432. Poland denied Cargill a fair opportunity to be heard in the process of setting isoglucose quotas, as quotas were set by the Council of Ministers after consultation with an advisory body, the Branch Commission, which "*included representatives of sugar producers but, despite Cargill's request to participate, excluded producers of isoglucose*" (Cargill's Memorial, p. 85).

433. Finally, Poland failed "*to act in a transparent manner by not disclosing its reasons either for imposing an isoglucose quota prior to EU accession or for setting that quota at an exceedingly low level*" (Cargill's Memorial, p. 85).

4.1.2 Poland has impaired Cargill's use and enjoyment of its investment through arbitrary or discriminatory measures

434. The imposition of "*an exceedingly low quota on isoglucose*" caused Cargill to lose substantial business and at the same time allowed Poland to maintain a higher quota on sugar for the benefit of sugar producers and sugar beet growers, and also to "*garner for itself significant economic gains through its ownership of the very entities on which it bestowed a sugar quota in excess of domestic demand*" (Cargill's Memorial, p. 86).

4.2 Poland's position: Cargill has failed to establish a violation of Article II:6 of the Treaty

4.2.1 The "fair and equitable treatment" obligation under Article II:6 of the BIT corresponds to minimum standards of customary international law and has not been breached

435. It is Poland's case that the fair and equitable treatment provision invoked by Cargill merely imposes a customary international law obligation. Poland finds this position supported by State practice, subsequent practice and arbitral decisions.

436. Poland further argues that "*none of the concepts invoked by Cargill – discrimination, lost expectations, arbitrariness and a lack of transparency and due process – is cognizable under the customary international law standard of Article II:6*" (Poland's Counter-Memorial, p. 94).

437. Finally, Poland contends that "*Cargill's fair and equitable treatment claim is meritless because it fails to identify – because there is none – any customary international law standard that is applicable to the challenged actions under the circumstances presented here*" (Poland's Counter-Memorial, p. 94).

4.2.2 Cargill's attack on Poland's imposition of isoglucose quotas is unfounded in any event

438. It is Poland's submission that even if one were to consider the principles upon which Cargill relies, one would reach the conclusion that no breach had occurred, be it in respect of discrimination (a), expectations (b), arbitrary treatment (c), or transparency and due process (d).

a) There has been no discriminatory treatment

439. In Poland's view, the quotas did not discriminate against Cargill, as "to *the contrary,* [...] *Cargill has been accorded no less favorable – if not preferential – treatment under the national and EU-mandated quota systems*" (Poland's Counter-Memorial, pp. 95-96). No discrimination can be founded on the particular claims of financial interests of Agricultural Ministry officials and of the Respondent itself in sugar companies. Under international law, government actions benefit from a presumption of regularity, which cannot be overcome by a mere suggestion that government officials could only satisfy their fiduciary duty as directors of sugar companies by recommending high sugar quotas, which is supported by the fact that Cargill does not identify *"even a single*

instance of any recommendation that was made by any director-official, nor one that was adopted by Respondent to Cargill's detriment" (Poland's Counter-Memorial, p. 96).

440. Further, no discrimination can be based on the privatization of certain state-owned sugar enterprises. Put in motion at the end of 1998, "*the bulk of the sugar industry privatization occurred prior to Respondent's November 2001 announcement of the first national quota. There was no gain to be had from manipulating quotas levels*" (Poland's Counter-Memorial, p. 97).

b) Cargill's claims of lost expectations are meritless

441. Poland submits that Cargill's claims of lost expectations must fail. With respect to quotas set upon Poland's accession to the EU, Cargill concedes that they were expected. It is Poland's argument that Cargill had to expect pre-accession quotas as well. Indeed, "*production quotas had been a regulatory reality across Europe since the 1970s for both sugar and isoglucose and Poland's accession to the EU dictated the approximation of its laws to the EU's* acquis" (Poland's Counter-Memorial, p. 98).

442. In line with this evolution, numerous government officials had specifically and repeatedly informed Cargill of the impending regulatory changes. In fact "*nearly eight months prior to Cargill's first installation in August 1999 of any isoglucose production capacity, Cargill was on notice that the specific regulatory context would not support plans that at the time were, at best, in their infancy*" (Poland's Counter-Memorial, p. 99).

443. Poland further contends that Cargill could not expect that quotas would reflect domestic demand or production capacity. In Poland's contention, Cargill was aware that the regulations were clear that historical production should figure significantly into the determination of quota levels and did not require that capacity be taken into account.

444. In this context, Poland stresses that "*Cargill's representations regarding capacity varied and were unreliable*" (Poland's Counter-Memorial, p. 102). It also insists that there is no evidence supporting the existence of confirmed contractual commitments, and it is "*despite a total absence of any confirmed contractual commitments* [that] *'by March 2000 Cargill had decided to expand its capacity to 120,000 MT commercial quantity'*" (Poland's Counter-Memorial, p. 101).

445. Moreover, the quota levels accommodated the entirety of Cargill's purported production capacity. Poland even increased the isoglucose quota for the second national quota period by 50 percent. Accordingly, "*to the extent that Cargill had any reasonable*

expectations relevant here, those expectations were fulfilled, if not exceeded. So too was the case with regard to the quota levels achieved by Poland for the exclusive benefit of Cargill at the close of the EU negotiations" (Poland's Counter-Memorial, p. 104).

446. Finally, the record contains no evidence of promises of an isoglucose quota that would have accommodated future production capacity. In fact, "*any expectation of such promises defies common sense: Cargill's wish was an isoglucose quota for itself that was more than one-third of the total amount shared among various producers in all* fifteen *EU Member States*" (Poland's Counter-Memorial, p. 105).

c) There has been no arbitrary treatment

447. Poland opposes Cargill's claim that it underwent arbitrary treatment with the argument that the "*imposition of isoglucose quotas was entirely rational and consistent with its past practices and those of the EU Member States as well as other EU hopefuls*" (Poland's Counter-Memorial, p. 105).

d) Cargill's complaints of lack of transparency and due process are unfounded

448. In Poland's view, there was no denial of transparency and due process: "*Poland determined its isoglucose quotas in accordance with an usual, open legal process which was characterized by regularity*" (Poland's Counter-Memorial, p. 106). Cargill had "*multiple, often high-level meetings with members of the Polish government and Parliament*" (Poland's Counter-Memorial, p. 106), which demonstrates its participation in the process. In addition, the proposed quota levels and the basis for their calculation were "*plainly accessible in the public record well in advance of their effective dates*" (Poland's Counter-Memorial, pp. 107-108).

4.2.3 Cargill's claim of impairment by arbitrary and discriminatory measures is without merit

449. According to Poland, Cargill has failed to establish that the measures of which it complains were either discriminatory or arbitrary, or any impairment of the "*management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments*", or that the quotas were imposed with the intention to harm the foreign investor.

450. To the contrary, "*Poland accommodated not only all of Cargill's sales volume during the year prior; it also accommodated Cargill's declared production capacity during those periods*" (Poland's Counter-Memorial, p. 108).

4.3 Analysis

4.3.1 Applicable Treaty provision and relevant standard

451. Article II:6 of the Treaty reads as follows:

> *Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments.*

452. The parties disagree on the meaning of these terms and on the applicable standard, which is an autonomous standard for Cargill and the minimum standard of treatment in customary international law for Poland. Accordingly, the Tribunal will first address whether the standard is autonomous or self-contained, or whether it merely reflects customary international law. Second, it will determine its contents.

453. The wording of Article II:6 quoted above shows that the Contracting States intended to adopt an autonomous standard. In the words of Christoph Schreuer, "*it is inherently implausible that a treaty would use an expression such as 'fair and equitable treatment' to denote a well-known concept such as the 'minimum standard of treatment in customary international law.' If the parties to a treaty want to refer to customary international law, it must be presumed that they will refer to it as such rather than using a different expression*"[52]. The reference to international law in Article II:6 clearly sets a floor and not a ceiling[53]. This said, several ICSID tribunals have considered that the treaty standard of fair and equitable treatment is not materially different from the international law minimum as it has evolved under customary law[54], and this Tribunal tends to concur.

454. In support of its argumentation in favor of the minimum standard, the Respondent has referred to State practice. In particular, it has cited nine US BITs with Armenia, Moldova, Mongolia, Jamaica, Ukraine, Ecuador, Uzbekistan, Trinidad & Tobago, and Georgia which include a provision identical or nearly identical to Article II:6 of the

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52 Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. W. & T. 357, p. 360 (2005).

53 *Azurix* ¶ 361, referred to above.

54 *Azurix* ¶ 361, *CMS* ¶ 284, referred to above.

Treaty. However, in all nine cases, the Letter of Transmittal to the Senate accompanying the BIT explicitly provides that the guarantee of fair and equitable treatment "*sets out a minimum standard of treatment based on standards found in customary international law.*" No such mention appears in the Letter of Transmittal of *this* BIT.

455. The Respondent has also pointed to the interpretation by the US of the NAFTA and to statements made by the US in the context of a NAFTA proceedings (NAFTA Free Trade Commission Interpretative Declaration of 31 July 2001, Article 1105(1) of the NAFTA and *ADF Group Inc. v. United States of America*[55]). It further relied upon certain international decisions, namely *Mondev International Ltd. v. United States of America*, *Loewen Group, Inc. v. United States of America*, and *Waste Management Inc. v. United Mexican States*. All of these cases dealt with disputes under the NAFTA which in Article 1105(1) contains wording distinct from Article II:6 of the BIT and subject to a binding interpretation. The same is true of the interpretations and statements to which the Respondent refers.

456. More important is the determination of the contents of the standard. The preamble of the BIT which informs the object and purpose of the Treaty specifies that "*fair and equitable treatment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources*". The need for stability of the investment environment has repeatedly been confirmed in *MTD*[56], *CME*[57], *Tecmed*[58], *Azurix*[59], *Occidental v. Ecuador*[60], and *LG&E*[61] since it was first envisaged in *Metaclad*[62]. It emerges as an important element of the assessment of fair and equitable treatment and is closely linked to the other key factors involved in the standard, which are the reasonable or legitimate expectations of the foreign investor. In the words of *Tecmed*, the purpose of the fair and equitable treatment guarantee is "*to provide to international investments treatment that does not affect the basic*

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55 Rejoinder of Respondent United States of America on Competence and Liability (29 March 2002) at 41-42.

56 *Op. cit.*, ¶ 113.

57 *Op. cit.*, ¶ 602

58 *Técnicas Medioambientales TECMED S.A. v. The United Mexican States*, ICSID case No. ARB(AF)/00/2, Award, 29 May 2003.

59 *Op. cit.*, Award, 14 July 2006, ¶ 360.

60 *Op. cit.*, ¶ 183.

61 *LG&E v. Argentine Republic*, ICSID case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 124.

62 *Metaclad Corp. v. The United Mexican States*, ICSID case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 76.

expectations that were taken into account by the foreign investor to make the investment"[63].

457. And in the terms of *Saluka*:

> *By virtue of the 'fair and equitable treatment' standard, the host State must* [...] *be regarded as having assumed an obligation to treat foreign investors so as to avoid the frustration of investors' legitimate and reasonable expectations.* [...][64].

458. The protection of the investors' expectations has its limits. The expectations are only protected if they are reasonable and legitimate. The assessment of the reasonableness or legitimacy must take into account all circumstances at the time of the investment, including not only the facts surrounding the investment, but also the political, socioeconomic, cultural and historical conditions prevailing in the host State. In particular, as the *Saluka* tribunal emphasized "*no investor may reasonably expect that the circumstances prevailing at the time the investment is made remain totally unchanged. In order to determine whether frustration of the foreign investor's expectations was justified and reasonable, the host State's legitimate right subsequently to regulate domestic matters in the public interest must be taken into consideration as well. As the S.D. Myers tribunal has stated, the determination of a breach of the obligation of 'fair and equitable treatment' by the host State 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*"[65].

459. In addition, in order to benefit from the treaty guarantee of fair and equitable treatment, the investor must have relied upon the legitimate expectations to make the investment[66].

4.3.2 Reasonable expectations

460. In the present instance, the Claimant argued that it had reasonable expectations that the Respondent would not impose quotas on isoglucose before its accession to the EU (a), that when the Respondent would impose isoglucose quotas, these quotas would not be less than the level of domestic demand and Cargill's production capacity, and,

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63 TECMED, ¶ 154.

64 *Saluka Investments B.V. (The Netherlands) v. The Czech Republic*, Partial Award, 17 March 2006, ¶ 302.

65 *Ibid.*, ¶ 305.

66 See *Waste Management v. The United Mexican States*, ICSID case No. ARB (AF)/98/2, Final Award, 30 April 2004, ¶ 98 and *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Award, 26 January 2006, ¶ 147; *LG&E, op. cit.*, ¶ 127; *TECMED, op. cit.*, ¶ 154.

thus, would not hinder the marketing of Cargill's actual or planned production (b), and that the EU isoglucose quota would reflect domestic demand and Cargill's production capacity (c).

a) Was Cargill's expectation that no national quotas would be imposed prior to Poland's accession to the EU reasonable?

461. To be reasonable, Cargill's expectation that there would be no quotas on isoglucose prior to Poland's accession to the EU was subject to two conditions. The first condition was that there was no requirement under EU law that Poland imposed pre-accession national quotas (i). The second cumulative condition was that there be no other circumstance which could reasonably have led Cargill to acknowledge the possibility that Poland might impose pre-accession domestic quotas (ii).

(i) Was there an obligation under EU law that Poland impose domestic quotas on isoglucose prior to its accession?

462. Testimony by the Respondent's witnesses and documents on record converge to support the Claimant's position that there was no requirement under EU law that Poland impose national quotas prior to its accession to the EU.

463. Asked whether "*there was a requirement to fix in Poland's national law a specific number, a specific numerical quota for isoglucose prior to E.U. accession*" (TR/Price, p. 656, ll. 18-21), Ambassador Truszczyński, chief negotiator for Poland, was clear: "*No, of course there was no such legal requirement from the European Union. Neither was there any legal requirement from the European Union concerning any other quota or any other limitation for any other product, be it industrial or agricultural*" (TR/Truszczyński, p. 657, ll. 1-6)[67].

464. In addition, none of the other statements made by Polish officials in the course of the hearing to which Poland refers in its First Post-Hearing Brief (at p. 33, ¶ 60), supports the allegation that under EU law isoglucose quotas were to be imposed prior to Poland's accession[68].

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67 By contrast, Minister Kalinowski's statement that deferring the establishment of an isoglucose quota until after the Copenhagen summit "*would have been a violation of the law*" (TR/Kalinowski, p. 1102, l. 6) was somewhat ambiguous. It cannot, however, be understood as meaning that, according to EU law, isoglucose quotas were to be imposed at the domestic level prior to Poland's accession negotiations.

68 These declarations merely indicate that Poland had to "*adopt the instruments governing the specific Common Market organizations, including that of sugar and isoglucose*" (TR/Truszczyński, p. 658, ll. 15-17); that Poland "*had to adapt* [its] *institutions and* [its] *officials for handling such instruments*" (TR/Truszczyński, p. 658, ll. 17-19); that in the accession process, "*all the statutes were* [...] *reviewed in detail to check their compliance with the E.U. law and our obligation to implement it*" (TR/Balazs, p. 752, ll.

465. Turning now to the relevant documents in the record, in Chapter 7 – pertaining to agriculture – in a document entitled "Enlargement" summarizing key agreements reached in the negotiations with Bulgaria, Romania, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia, the European Commission stated that the legislation regarding agriculture would "*be directly applicable at the date of accession and does not call for transposition on the part of the candidate countries. The emphasis in the preparations for accession will therefore be on the candidate country's ability to implement and enforce the Community* acquis" (Exh C143; see also Exh. C136, p. 15).

466. Further, at a meeting of the Council of Ministers held on 7 January 1999, Minister Pietras of the Committee for European Integration answered the question whether there was a need to introduce quotas on isoglucose prior to Poland's accession to the EU, stating that "*there is no direct requirement that it has to happen now, but we always have to tell the European Union precisely when we intend to introduce this, whether next year or in five years*" (Exh. C166).

467. Finally, it should be noted that although the Association Agreement which Poland and the EU signed in October 1991 noted the importance of Poland's "approximation" of its domestic laws to those of the EU, the areas identified as requiring "approximation" did not even include agriculture (Exh. R66, Articles 68 and 69). And although Accession Partnerships entered into by Poland and the EU in 1998 (and revised in 1999) (Exh. R84, Articles 3.1 and 3.2; Exh. R97, Articles 3.1 and 3.2) and in 2002 (Exh. R128, Annex, section 4) dealt with agriculture, they contained no reference to quotas of any kind.

(ii) Were other circumstances such that they should reasonably have led Cargill to believe that Poland might impose domestic quotas?

468. In the Tribunal's opinion, the circumstances of the present instance should reasonably have led Cargill to acknowledge the possibility that Poland might impose domestic quotas. In other words, one cannot say that it was reasonable to expect that Poland would not impose quotas on isoglucose prior to its accession to the EU.

14-16); that "*there were harmonization or approximation programs that each ministry and department had to set up and implement*" (TR/Kasperowicz, p. 927, l. 22 – p. 928, l. 2); that "*the European Integration Committee, also had an organizational cell, and* [...] *any draft law had to be accepted by that office as serving to approximate* [Poland's] *law to the E.U. law*" (TR/Kasperowicz, p. 928, ll. 8-11); and that "*production quotas were allocated on the basis of calculations, and things were being done to regulate the market in order to adapt the starch market in Poland to* [...] *European Union regulations*" (TR/Zaczek, p. 907, ll. 4-8).

469. At the time when Cargill decided to invest in the production of isoglucose in Poland, the 1994 Sugar Law already existed, setting the legal framework for the organization of the sugar market in Poland. This Law provided for the imposition of quotas on the volume of sugar that could be produced and introduced into the domestic market or produced and exported with subsidies. The Claimant has argued that "*as Respondent had never before imposed an isoglucose quota in national law, it was reasonable to expect that Respondent would refrain from doing so until it was required at the time of accession*" (Cargill's Memorial, p. 76). It should be noted, however, that if the 1994 Sugar Law did not include isoglucose in its regulatory ambit, it is most likely because in 1994 no isoglucose was produced in Poland.

470. The Claimant itself has consistently argued throughout these proceedings that sugar and isoglucose belong to the same market, are substitutable and competitive products. Cargill could therefore have expected that once isoglucose production would start in Poland, there was a risk that such production would be subject to quotas like sugar production.

471. It could expect it even more clearly as it had sought assurances to the contrary and had not received them. Indeed, on 1 June 1998, the Claimant informed the Minister of Agriculture of its plan "*of adding the production line of capacity equal to 85 thousand tons of fructose syrup*" (Exh. C29). It concluded its letter by asking the Minister "*if you could express your opinion about our production plans in view of our future EU membership, in writing*" (Exh. C29). On 31 July 1998, Mr. Kossowski from the Agriculture Development Department of the Ministry of Agriculture and Food Economy responded that "*the work on amending the Act on Regulation of the Sugar Market and Ownership Transformations in the Sugar Industry of 26 August 1994* [was] *under way at the Ministry of Agriculture and Food Economy*" and that "*the scope of the proposed amendment include*[d] *also issues relating to isoglucose*" (Exh. R85). In other words, the Ministry made it clear that the amended act would include quotas on isoglucose.

472. Further, before Cargill started producing isoglucose on a continuous flow basis (see the Annex to Cargill's FPHB), the Polish Parliament and Government put forward proposed amendments to the 1994 Sugar Law, in 1998 and 1999 (see ¶¶ 101-108 above). These proposals foresaw the imposition of quotas on isoglucose. The First Draft, circulated in December 1998, provided for a quota for isoglucose in the form of a "*maximum quantity of isoglucose that can be produced domestically during the market year*" (Article 1:2:16 - Exh. R88). The Second Draft put forth in March 1999, stipulated that the Council of Ministers would set isoglucose quotas annually upon recommendation of the Minister of Agriculture (Exh. C37).

473. Contrary to the Claimant's argument, the fact that neither the First nor the Second Draft was enacted cannot lead to the conclusion that it was reasonable to expect that no isoglucose quotas would be imposed prior to Poland's accession to the EU. The mere fact that two draft laws were issued at a very early stage of Cargill's investments illustrates the possibility of quotas being imposed.

474. To support its position that it was reasonable to expect no domestic pre-accession isoglucose quota, the Claimant argued that the draft laws "*did not represent a considered position of the Polish Government, but, rather the narrow interests of the Polish sugar producing industry and the Polish sugar beet growers*" (Cargill's Memorial, pp. 18-19). The Tribunal finds this argument unconvincing, especially when Cargill asserts at the same time, in the context of its national treatment claim, that the Polish Government had an interest in protecting the sugar industry.

475. The Claimant further referred to an internal communication from Mr. Wawryszewicz to Ms Rawling, in which the former recounts a meeting with the Vice-President of the Parliamentary Agricultural Committee, Mr. Pilarczyk, and reported that "*as far as he* [Mr. Pilarczyk] *understand* [sic] *from government bill, there is no max quota within the proposed legislation, and this 300mt is complete nonsense. He* [Mr. Pilarczyk] *will support no number within legislation, and then upon our motion the x number will be granted (after proving the ability)*" (Exh. C34)). This communication thus acknowledged the possibility that a quota on isoglucose would be imposed and it focused on the level of such a quota, a matter which will be reviewed later.

476. With respect to the enactment of the draft, Mr. Wawryszewicz reported that Ministry of Finance had withdrawn its support for the governmental bill, and that Mr. Pilarczyk did not believe the parliamentary bill "*will go through the Parliament*". But he immediately added "*although you never know*" (Exh. C34).

477. The Claimant also referred to another internal communication of 18 February 1999 from Mr. Witek, Chief Executive Officer (public affairs advisor) at the European Public Policy Advisors Polska ("EPPA"), to Mr. Glass, in which the former referred to an "*informal talk with Ms Bogumiła Kasperowicz, deputy director of the Agriculture Development Department*", and merely reported that "*in the opinion of Kasperowicz, the part of the draft that refers to the quota for 1999 is already dead and Cargill can quietly develop its production capacities, as no limitations exist,*" and "*there are little chances for adopting the new amended law before the end of March*" (Exh. C36).

478. In conclusion, the record shows that the Claimant knew or should have known of the risk that quotas would be imposed on isoglucose before the Respondent's accession to the EU. Under the circumstances just set forth, it was not reasonable to expect that there would be no pre-accession quotas.

b) Was Cargill's expectation that national/EU quotas would reflect the level of domestic demand and Cargill's production capacity reasonable?

479. To answer this question, the Tribunal will first review whether Poland provided assurances (i) and then whether the circumstances may otherwise have given rise to legitimate expectations (ii).

(i) Did Poland provide assurances that the level of national/EU quotas would match domestic demand and Cargill's production capacity?

* *Written assurances*

480. The evidence does not support the allegation that the Respondent provided written assurances that quotas on isoglucose would accommodate Cargill's production capacity and market demand for the following reasons.

481. First, the evidence referred to by the Claimant is limited to letters sent by Cargill to the Ministry of Agriculture (Exh. C28; Exh. C29; Exh C47; Exh. C50), Cargill's internal correspondence and communications containing references to informal talks with individual members of the Polish Parliament (Exh. C34; Exh. C30; Exh. C36; Exh. C116), excerpts from communications following meetings of the Council of Ministers (Exh. C123 and Exh. C125), and a draft parliamentary document (Exh. C37). The only document which a Polish official addressed to Cargill was a letter from Minister Balazs to Gerrit Hueting, written on the occasion of the opening of the isoglucose line in Bielany. It made no reference to the level of quotas to be imposed on isoglucose production (Exh. C63). No other document referred to by the Claimant in this context emanated from the Polish Government.

482. Second, although some of the documents on which Cargill relies clearly support the view that Poland encouraged Cargill's investments in isoglucose in Poland, none of them can reasonably qualify as containing assurances that quotas would accommodate production capacity or market demand:

- An internal correspondence of 11 January 1999 from Arek Wawryszewicz, then Commercial Manager at Cargill in Wroclaw, to Ruth Rawling, Vice-President of

Public Affairs for Cargill Europe/Africa, and Andrew Glass, Managing Director at Cargill Polska (Exh. C34), recounting a meeting between Mr. Wawryszewicz and Mr. Pilarczyk, then Vice President of the Parliamentary Agricultural Committee, merely provided that:

- Cargill would have Mr. Pilarczyk's support for its investment "*even for 80,000 mt of isoglucose*";
- "*as far as* [Mr. Pilarczyk] *understand* [sic] *from governmental bill, there is no max quota within the proposed legislation and* [the] *3000 mt* [proposed in the First Draft was] *complete nonsense*";
- Mr. Pilarczyk would "*support no number within legislation, and* [...] *upon* [Cargill's] *motion the x number* [would] *be granted (after proving the ability)*";
- "*the parliamentary bill* [was] *fully sponsored by SudCuker, and* [Mr. Pilarczyk did] *not believe it* [would] *go through the Parliament.*"

- Another document sent by Mr. Witek from EPPA to Cargill on 18 February 1999 and recounting an informal talk with Ms. Kasperowicz, then deputy director of the Agriculture Development Department, in which Mr. Witek stated, with respect to "*the fears of Cargill concerning the vast difference between the present and future capacity and the very low initial quota*," that "*Kasperowicz said that the* [First Draft] *places an obligation on the Ministry of Agriculture to take account of the production potentials*," but that Ms. Kasperowicz was "*not perfectly right, as this refers only to allocation of the quota among producers and not to the level of the quota itself – but in sum it is good that she thinks so*" (Exh. C36).

- A letter dated 28 March 2002 from Mr. Hueting to Christopher Hill, U.S. Ambassador to Poland, recounting a meeting with Minister Kalinowski, merely provided that Cargill's "*impression* [was] *that Minister Kalinowski* [was] *ready to provide the EU with a new Polish negotiating position significantly increasing isoglucose demand for Poland justifying it with the argument of irreversible investment*" and that "*Minister Kalinowski* [had] *declared his support to change and defend an internal quota size matching internal demand*" (Exh. C76). Mr. Hueting added that "*the exact quantity that Poland* [would] *defend* [was] *still unclear and* [would] *need to be clarified during the next few weeks*" (Exh. C76).

- An internal communication between Mr. van Lierde and Mr. Klaeisjsen dated 7 June 1998 recounting a meeting with "*2 key people of the 'Polish Committee for European Integration, sub-commission sugars' (Prof Smolenski and Dr. Chudoba)*" provided, in a list of "*interesting remarks from* [the latter's] *side*" and of conclusions, the following:

> ** In granting quota's, the EU should not focus too much on the present and past situation in Poland.*
>
> *Poland will emphasise the dynamics of it's* [sic] *economy, demanding quota's allowing "significant growth".*
>
> [...]
>
> *CONCLUSION:*
>
> [...]
>
> ** They will include our 85.000 Mt/yr (sugar bss) in their report presenting the Polish sugar industry to the EU screening commission.*
>
> ** By that time, fall 98, we'll get an official letter from the Polish government confirming their support and their commitment to include our HFCS capacity in the accession negotiations.* (Exh. C30)

- An e-mail of 6 November 1998 from Mr. Wawryszewicz summarizing a meeting between Cargill's representatives and Professor Smolenski from the Institute of AgroEconomy, a non-governmental body, did not provide evidence of Cargill's claims that it had received assurances with respect to the quota amount. In fact, the e-mail merely provided the following:

> *3) because, as we all realize, PL joining EU, will take place in around 2006, and there is no prod. of fx in Poland at this moment, they suggested to the govrnm't not to establish quota for fx prod and not to include it to Sugar Bill.*
>
> *to do so, they want us to start the prod. asap, and bss our market experience, they will negotiate the quota with pl governm't/sugar producers/then EU.* (Exh. C116)

In any event, Professor Smolenski could not have provided assurances on behalf of Poland and his statements may not be attributed to Poland.

- The excerpts from communications following the Council of Ministers' meeting of 27 July 1999 (Exh. C123) and the meeting of 12 July 2000 of the Economic Committee of the Council of Ministers (Exh. C125) contained no reference to isoglucose, not to mention assurances regarding the level of isoglucose quotas. They in fact referred exclusively to sugar production quotas and "*the minimum price for sugar producers selling sugar on the domestic market*" pursuant to the 1994 Sugar Law. The 1994 Sugar Law did not include isoglucose in its regulatory ambit.

483. Third, Mr. Wawryszewicz conceded at the hearing that he did not "*recall ever seeing a written assurances*" (TR/Wawryszewicz, p. 516, ll. 4-5). In turn, Mr. Witek confirmed that no specific assurances regarding quotas had been provided by Polish government officials (see TR/Witek, p. 562, l. 1 - p. 563, l. 10).

* *Oral statements made by Polish officials*

484. Although Cargill's internal correspondence and reports from informal lobbying activities mention "assurances" provided by Polish officials, the Tribunal has noted that officials present at the hearing all confirmed the absence of assurances provided to Cargill.

485. In particular, in the documentary evidence filed by the Claimant, reference was made to alleged assurances provided by Mr. Pilarczyk (Exh. C34) and Ms Kasperowicz (Exh. C36), then Deputy Director of the Agriculture Development Department of the Ministry of Agriculture. The Claimant also mentioned assurances by Agriculture Minister Balazs when the 2001 Sugar Law was enacted. According to Minister Balazs, the domestic quotas which would ultimately be set would not restrict production to levels below capacity. Finally, the Claimant referred to statements allegedly made by Minister Kalinowski in March 2002, after Cargill had in fact completed its investment and its installed production capacity had reached 120,000 MT commercial quantity.

486. Minister Balazs declared at the hearing that he had "*a lot of understanding and goodwill for that Company* [Cargill]" (TR/Balazs, p. 801, ll. 5-6), that he had "*exhibited a tremendous amount of goodwill and good faith in trying to find a solution*" (TR/Balazs, p. 750, ll. 9-10), that he "*spared no efforts that* [Poland] *had the highest possible quotas*" (TR/Balazs, p. 746, l. 22 - p. 747, l. 1), and that "*there was sort of a general sympathy extended to them to assist them in expanding their operations*" (TR/Balazs, p. 716, ll. 4-16). In the Tribunal's view, although they undoubtedly show a generally friendly and hospitable climate, these declarations do not evidence assurances regarding the level of isoglucose quotas. Nor does the fact that Minister Balazs stated that the various parameters taken into account in the context of Poland's second formal request to the EU included, *inter alia*, "*rising demand on the domestic market*" (see TR/Balazs, p. 800, ll. 4-13).

487. To the question whether, in the course of a meeting held in March 2002 with U.S. Ambassador Hill, Minister Kalinowski had expressed his "*willingness to support a national quota matching internal demand*" (TR/Price, p. 1046, ll. 5-6), the latter responded in the following terms: "*No, no, I was in no position to make such declarations.* [...] *this should have been interpreted by Cargill* [...] *as some sort of*

assistance, some sort of aid, but not a decision which would have been the underpinning for the decision to be taken by the Council of Ministers" (TR/Kalinowski, p. 1046, ll. 8-9 and 14-19). Minister Kalinowski emphasized on several other occasions that he had made "*no promises regarding concrete quantities*" both in respect of domestic and EU quotas (TR/Kalinowski, p. 1048, ll. 12-17, p. 1024, ll. 18-22).

488. In this latter respect, he indicated that he had merely stated that he would "*try and get higher quotas*".

489. Finally, Ms Kasperowicz's statements do not appear to amount to assurances regarding the level of isoglucose quotas. Nor does Ms Kasperowicz's declaration at the hearing referred to by the Claimant – "*what strikes me is that we are talking about a production capacity which was not actual as regards isoglucose, but that was merely potential*" (TR/Kasperowicz, p. 952, ll. 7-9) - indicates that any assurances were provided to Cargill. Like Minister Kalinowski, she appeared eager to stress that she had given no assurances (TR/Kasperowicz, p. 930, ll. 20-22) and had "*never heard of anyone saying something like that in* [her] *presence or otherwise.* [She] *never heard of such a declaration or statement being made*" (TR/Kasperowicz, p. 931, ll. 16-19).

490. It is obvious from the evidence that the Polish officials referred to above appeared favorable to Cargill's project and must have displayed a friendly and positive attitude. They certainly also encouraged Cargill's plans in informal conversations. Did they go so far as to give specific assurances? It is difficult to assess the true significance of certain oral statements, especially those denying any assurances. The Tribunal has pondered this together with all the other evidence and has come to the conclusion that the record does not confirm the existence of assurances on the level of the quotas.

(ii) Were there circumstances which could have led Cargill reasonably to expect that national/EU quotas would match the level of domestic demand and Cargill's production capacity?

491. For the reasons set forth below, the Tribunal has reached the conclusion that given the environment which Cargill was facing in 1998 and throughout the time when it was building its capacity, the Claimant could not reasonably have expected that it would be able to fully use its capacity.

* *National Quotas*

492. The mere absence of regulation regarding isoglucose at the time when Cargill first decided to invest in Poland and Poland's encouragements towards Cargill's

investments taken in isolation from the other circumstances surrounding the investment might have led Cargill to expect that its investments would not be impeded by quotas below market demand and production capacity. However, these aspects are neutralized if one considers the existence of sugar quotas and even more so the legislative proposals to introduce isoglucose quotas.

493. It is true that the Polish Parliament rejected the December 1998 Draft Law (Exh. R88) that proposed an isoglucose quota of 3,000 MT dry matter / 4,225 MT commercial quantity. Such rejection could have led Cargill to believe that quotas of such level would never be enacted. However, the very low level of the quotas, i.e. 3,000 MT dry matter should have alerted Cargill. Even if it could hope that the quantity would be increased in a later legislative process, the gap measured at its own planned capacity was truly huge. Questions must certainly have arisen as to whether the gap would ever be bridged.

494. In addition, the Justification accompanying the First Draft set forth two series of reasons for the proposed amendments, which should also have alerted the Claimant. The First Justification pertained to the need to protect the sugar industry, and the second one to the purported need for a reform to achieve compatibility between EU law and Polish law (Exh. C33). Similarly, the Justification of the Second Draft (12 March 1999) provided that the purpose of the amendment was "*the need to adjust* [Poland's] *current provisions to the regulations binding the sugar industries of EU Member States*", and again the protection of sugar producers.

495. As an additional circumstance, the Tribunal notes that in February 2001, a "Draft Act of 2001 on Sugar Market Regulation" (Exh. C58) provided at its Article 4.5, that "*the isoglucose and inulin syrup production quotas cannot jointly constitute more than 1.08% of the A quota.*" Pursuant to Article 4.3, the "*A quota for sugar production* [was to be] *determined in an amount corresponding to the average annual sale to the domestic market, calculated for the three years preceding the quota determination period and in consideration of the superfluous surplus of A quota sugar.*" Although the proposed quota was withdrawn before the enactment of the 2001 Sugar Law, Cargill itself noted that "*based on the quota for sugar for the period from October 1, 1999 to September 30, 2000, this quota would have amounted to a maximum of approximately 17,600 MT dry state (or approximately 24,789 MT commercial quantity) of isoglucose (in the event that the entire quota were assigned to isoglucose and none to inulin). This amount was considerably lower than Cargill's production capacity – which at that time*

was approximately 80,000 – 85,000 MT commercial quantity" (Cargill's Memorial, p. 26)[69].

496. The Tribunal also notes that the 2001 Sugar Law did not provide that isoglucose quotas would be based on domestic demand. In fact, the 2001 Sugar Law did not set a specific quota amount for A and B isoglucose, and made no reference to production capacity or planned production capacity. The Justification to the Resolution regarding the first domestic quota rather provided for a combination of factors to be taken into account, including the fact that "*Poland* [had] *initiated isoglucose production at the end of 1998 (in 1999 the production volume was 9.9 thousand tons, in 2000 - 24.6) and that the said product* [had] *been covered by the market regulatory system,* [...] *the production opportunities, utilization of the agricultural product (wheat), and demand of companies utilizing the isoglucose*" (Exh. R283).

497. Similarly, Cargill should have been troubled by the responses, or more specifically the lack of response, it received from Polish officials in reply to its requests for assurances (see Section IV.3 above).

498. Cargill itself has argued that it knew that Poland had an interest in isoglucose quotas being set at a level below domestic demand. Cargill has in particular contended that the fact that Poland owned the majority of sugar plants and that those plants produced a majority of Poland's sugar "*gave Respondent and its regulators - a number of whom had close relationships with the sugar industry - a direct interest in protecting the sugar industry against the competitive threat posed by Cargill.*" (Cargill's FPHB, p. 28, 51).

499. At the hearing, Mr. Witek conceded that "*at the beginning,* [he had] *heard, and* [he knew] *Cargill had heard, it was mentioned that historic data and reference period data will be – will be taken into account*". He also stated that he believed that "*in the course of those meetings Cargill was able to explain and make all relevant people understand why capacity is important in case of new products to the market, new entrance to the market*" (TR/Witek, p. 575, l. 14 – p. 576, l. 1).

500. Finally, Cargill suggested that the Justification which accompanied the announcement of the first national quota contained assurances that the second domestic quota would reflect domestic demand. In the Tribunal's opinion, this Justification could not possibly

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69 The new document filed by Poland on 21 February 2007 as Exh. B is a legal opinion dated 3 October 2001, prepared by Cargill's counsel, Domański Zakrzewski Palinka, which mentions a "*draft ordinance dated 13 September 2001, according to which isoglucose A and B quotas would be set at the level of 22,200.00 tons or similar, i.e. significantly lower than the isoglucose manufacture level assumed by Cargill (Polska) sp. Z o.o. in connection with the investments made.*" The Tribunal has decided not to rely on this exhibit, since very little information was provided regarding the said "draft ordinance" and the context in which it was prepared. In any event, the exhibit would merely have confirmed the present findings.

have created expectations other than that the second quota would again constitute a "compromise" based on various parameters.

* *EU quotas*

501. The Tribunal first notes that although Poland negotiated the EU quotas, it did not set them. Hence, it does not appear tenable to argue that the Claimant had a reasonable expectation that the isoglucose EU quota would be set at a given level, i.e. a level reflecting market demand and accommodating Cargill's production capacity.

502. This could have been different had Poland given assurances about the level of EU quotas. It was shown above, however, that this was not so. In addition, considering the EU methodology for the establishment of isoglucose quotas and the quotas obtained by other Member States, the Claimant should have known that the EU quota was unlikely to reflect domestic demand (see ¶¶ 161-182 and 399-409 above). Indeed, pursuant to EU Common Positions, quota levels were to be determined on the basis of past performance, i.e. "*historical production figures during a reference period to be defined*"[70]. In this respect, in the Report of 19 September 2000 on the Enlargement of the European Union of the European Parliament as adopted in Committee, the Committee on Foreign Affairs, Human Rights, Common Security and Defence "*support*[ed] *the idea of determining the level of production quotas for each product group concerned on the basis of historical production data for a reference period to be specified and of asking the applicant countries to supply data on the corresponding quantities for the period 1995-1999*" (Report of 19 September 2000 on the Enlargement of the European Union of the European Parliament as adopted in Committee[71]. Only "*exceptional conditions such as natural disasters or significant market disturbances*" could warrant departures from the established period of reference (Exh. C74).

503. As a result, the Claimant could not reasonably expect that "*any isoglucose quota Respondent agreed to as part of its accession to the EU would not impede Cargill's production capacity or its plans to increase production*" (Cargill's Memorial, p. 79).

504. The fact that in January 2001 the Respondent sent to the EU forecasts of market demand for isoglucose (170,000 MT commercial quantity per year by 2003 - see Exh. C57) could not reasonably have led the Claimant to conclude that the EU would

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70 Commission of the European Communities, Enlargement and Agriculture: Successfully Integrating the New Member States into the CAP, Issues Paper, SEC(2002) 95 final, 30 January 2002, p. 9, ¶ 5.1 – Exh. C74.

71 COM(1999) 500 – C5 – 0341/2000 – 2171/2000 (COS) – Exh. R108.

necessarily rely on this information to set the isoglucose quota. The same is true of the Polish government's request that the Claimant provide information regarding domestic demand for isoglucose.

505. At the hearing, Minister Balazs acknowledged that "*on the basis of* [his] *memory with regard to that initial position communicated to the European Union,* [he] *believe*[d] *towards the end of 1999, and when drafting the corresponding regulation or ordinance in 2001, because of the lack of data from the reference period,* [he] *did mention that the production capacity, for want of other arguments, should also be taken into consideration*" (TR/Balazs, p. 724, ll. 6-13). It was thus clear that EU isoglucose quotas would not necessarily be set according to domestic demand and production capacity.

506. As early as 31 July 1998, Mr. Kossowski from the Agriculture Development Department of the Ministry of Agriculture and Food Economy wrote to Mr. van Lierde explaining that isoglucose was covered by the sugar regime regulations and subject to quotas. Mr. Kossowski went on to state that "*the point was for a product that has began* [sic] *to compete strongly with sugar to be regulated as part of a similar quota system*" (Exh. R85). Mr. Kossowski further mentioned that in 1979, the isoglucose A and B quotas were low and that "*a reserve of 5 percent of the base quota was also established for businesses that started their production during the reference period*" (Exh. R85). Nothing in this letter may have created any expectation that isoglucose EU quotas would be based exclusively on domestic demand and production capacity.

507. On this basis, it is difficult to conclude that Cargill could have reasonably expected that the EU isoglucose quota would reflect domestic demand and its own production capacity.

(iii) Did Poland wrongfully fail to warn Cargill that its business plans were unwise considering the impending restrictive isoglucose quotas?

508. According to the Claimant, "*Respondent never once – prior to the completion of Cargill's investment and the imposition of the domestic quotas – advised Cargill that it would be unable to utilize a substantial portion of its investment for its designated purpose*" (Cargill's Reply, p. 45). For the Claimant, as it had "*kept Respondent fully informed of its investment plans from the very point that they were first developed*" (Cargill's FPHB, p. 59, 104), "*if Respondent's plans changed, and it adopted a policy of restricting isoglucose production to below demand and Cargill's capacity, Respondent had a duty to notify Cargill*" (Cargill's FPHB, p. 60).

509. The Tribunal has difficulty following Cargill's argument. The record does not show that Poland changed its plans. From the moment of its initial decision to invest in the production of isoglucose, the Claimant knew that the production of sugar was already subject to quotas and it was aware of the draft laws providing for the imposition of isoglucose quotas, without having any clear indication let alone to speak of assurances of their prospective levels.

c) Conclusion

510. On the basis of the foregoing analysis, the Tribunal finds that Cargill's expectations were not legitimate or reasonable under the circumstances. Cargill took certain business decisions and knew or should have known that they involved regulatory risks. Doing so, it may well have had hopes that the risks would not materialize. But mere hopes are not equivalent to reasonable expectations which benefit from treaty protection.

4.3.3 Transparency and due process

511. Cargill has claimed that Poland breached its duty of transparency. The Treaty does not expressly provide for such a duty. It is, however, generally accepted that it forms part of fair and equitable treatment. The principle of transparency was clarified in *Tecmed* in the following terms:

> [...] *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, 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, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved hereunder, but also to the goals underlying such regulations* [...].[72] (Emphasis added)

512. The Claimant put forward a first breach arising from the fact that "*Respondent denied Cargill a fair opportunity to be heard in the process of setting isoglucose quota and thus denied Cargill fair and equitable treatment*" (Cargill's Memorial, pp. 84-85). It explained that in spite of its requests, Poland did not allow it to participate in the "*advisory body, the Branch Commission, which the Council of Ministers was to consult when setting isoglucose and sugar quotas, while the Commission did include representatives of sugar producers*" (Cargill's Memorial, p. 84). Poland opposes this claim on the ground that Cargill extensively participated in the legislative, regulatory and negotiation processes.

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72 *TECMED, op. cit.*, Award, 29 May 2003, ¶ 154.

513. It is true that Article 5 of the 2001 Sugar Law provided that isoglucose quotas were to be determined "*by way of an ordinance, by the Council of Ministers upon request of the minister in charge of agricultural markets and upon consultation with the Chairman of the Agricultural Market Agency and Branch Commission of Agreement* [...]". It is also true that the Law provided that the Branch Commission would include six representatives of sugar beet growers and six representatives of sugar beet producers (Article 3(3) of the 2001 Sugar Law). Thus, the Law excluded the isoglucose industry from the consultation process prior to the determination of the quotas. This failure to integrate Cargill into the contracting process is undoubtedly another illustration of the less favorable treatment awarded Cargill compared to the Polish-owned sugar sector in violation of Article II:1 of the BIT. In the Tribunal's view, it does not at the same time imply a breach of the duty of transparency which cannot be deemed to imply a duty of conciliation.

514. The Claimant further claims that Respondent breached its obligation to act in a transparent manner by "*not disclosing its reasons* [...] *for imposing an isoglucose quota prior to EU accession* [...] *and for setting* [the national] *quota at an exceedingly low level*" (Cargill's Memorial, p. 85).

515. In its analysis of fair and equitable treatment above, the Tribunal reached the conclusion that the Claimant's expectations that quotas would reflect domestic demand were not legitimate given the circumstances and that the Respondent had no duty to warn the Claimant that the applicable quotas would not match domestic demand and production capacity. In other words, the Claimant could have known that national quotas would not necessarily match its production capacity and domestic demand. These conclusions do not entirely rule out the possibility of a breach of the duty of transparency. The question indeed remains – which is a different one - whether the Respondent should have informed the Claimant of the specific basis for the determination of national isoglucose quotas.

516. To answer this question, the Tribunal takes the following main elements into consideration:

- The 2001 Sugar Law did not provide any explanation as to how domestic quotas were to be set. It made no reference to domestic demand, production capacity, or actual production.

- The Justification to the Resolution of 12 November 2001 regarding the first national quota period (Exh. R283) referred to historical production and additional

parameters, including the fact that "*Poland* [had] *initiated isoglucose production at the end of 1998 (in 1999 the production volume was 9.9 thousand tons, in 2000 – 24.6) and that the said product* [had] *been covered by the market regulatory system,* [...] *the production opportunities, utilization of the agricultural product (wheat), and demand of companies utilizing the isoglucose*" (Exh. R283).

- Subsequently, on 22 November 2001, during a meeting of the Parliament's Committee on Agriculture and Rural Development, Mr. Gutowski provided the following explanation with respect to the isoglucose quota set in the Ordinance of the Council of Ministers of 12 November 2001:

> *Isoglucose production quota of 40 thousand tonnes is a compromise. Figures ranging from 0 to 120 thousand tonnes have been suggested when the ordinance of the Council of Ministers on sugar, isoglucose and inulin syrup production quotas was consulted with the representatives of the producers. The final arrangements were that the isoglucose production quota would be 40 thousand tonnes. A similar amount of this product was produced this year. Hence we are not increasing the limit.* (Exh. C73)

- Notwithstanding the above Justification and statements made by Mr. Gutowski, it appears that the first national quota relied on past production to the exclusion of other criteria such as production capacity or domestic demand. Indeed, the A quota for the first national period amounted to 40,000 MT dry mass, and the B quota to 2,200 MT dry mass; and in fact, the Claimant's domestic sales volume between 1 October 2001 and 30 September 2002 was 40,000 MT dry mass (Exh. R210).

- The Justification to the Resolution of 30 July 2002 referred to virtually the same considerations as for the first quota period ("*Poland has initiated isoglucose production at the end of 1998 (in 1999 the production volume was 6.5 thousand tons, in 2000 – 16.8 thousand tons, and in 2001 – 27.6 thousand tons as converted into the dry mass contained in 42% fructose solution), and* [...] *the said product has been covered by the market regulatory system,* [...] *the production opportunities, utilization of agricultural produce (wheat), and demand of companies utilizing the isoglucose*" (Exh. R297 and Exh. R300 regarding the Justification to the Resolution of 13 August 2002)).

- Yet, the second quota amounted to 62,200 MT dry state, i.e. it was set 20,000 MT dry mass above the first quota level. If, as argued by the Respondent, quotas were to be set strictly based on historical production, there should have been no increase in the quotas between the first and second national quota period.

517. In conclusion, the Tribunal finds that Cargill was not informed or was misinformed as to the parameters governing the level of quotas. This may well be due to the fact that this level was more a result of political compromise than of the application of specific parameters. It remains that the opacity surrounding the methodology for the determination of the quotas is contrary to the duty of transparency which is part of fair and equitable treatment.

4.3.4 Prohibition of discriminatory and arbitrary treatment

518. Article II:6 of the Treaty explicitly provides that "*neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion or disposal of investments.*"

519. Given the existence of such a *lex specialis* in the Treaty, the issue of the applicable standard (i.e. autonomous requirement under Article II:6 of the US-Poland Treaty or the minimum requirement under customary international law) is irrelevant as far as discriminatory and arbitrary treatments is concerned.

a) Has Poland subjected Cargill to discriminatory treatment?

520. As seen above, the Treaty defines "non-discriminatory treatment" in Article I:1(f) as

> *treatment that is at least as favorable as the better of national treatment or most-favored nation treatment.*

521. By contrast, the Treaty does not offer any definition of the term "discriminatory measures" used in Article II:6. The Tribunal sees no reason why the notion of discrimination should be given a different meaning in Article II:6 and in Article II:1. It will thus apply the definition contained in Article I:1(f) of the Treaty to its analysis under Article II:6.

522. On that basis, the Tribunal need not question Poland's intention nor does it need to inquire whether nationality dictated Poland's measures.

523. The Tribunal reached the conclusion above that through the imposition of domestic and EU isoglucose quotas, the Respondent accorded less favorable treatment to the foreign investor than to domestic producers. Therefore, pursuant to the Treaty, the Respondent discriminated against Cargill and breached its obligation not to impair the management and enjoyment of Cargill's investment by discriminatory measures.

b) Has Poland subjected Cargill to arbitrary treatment?

524. According to the Claimant, "*Respondent engaged in arbitrary treatment by allowing its decisions affecting Cargill's investment to be dictated not by legitimate considerations of public policy but by pressure from politically influential companies and sugar beet growers*" (Cargill's Memorial, p. 81). More particularly, the Claimant first argues that the Respondent's national quota policy for isoglucose was highly arbitrary since no national quotas were required prior to Poland's accession to the EU. The Tribunal does not believe that the Respondent's imposition of quotas on isoglucose prior to Poland's accession to the EU was arbitrary. Indeed, considering the forthcoming accession and related obligation to take over the *acquis*, it made sense to anticipate the changes.

525. Cargill further contends that the Respondent acted arbitrarily because the level of the quotas was "*not based on any coherent economic rationale*" (Cargill's Memorial, p. 82, ¶ 146). It is true that the process lacked transparency (see ¶ 519 above) and that the rationale for setting the national quota level was unclear. Whereas it appears that the first national quota was most likely based on historical production, the second could not have been based only on this parameter. This lack of transparency does not amount, however, to arbitrary treatment.

526. Finally, Cargill asserts that the Respondent's negotiations regarding EU quotas for isoglucose were arbitrary. It maintains not only that the Respondent's initial quota request in December 1999 was arbitrary, but that subsequent requests were too, as they were based on national quota figures and "*any arbitrariness with regard to the national quotas can thus be imputed to those EU quota requests as well*" (Cargill's FPHB, p. 57).

527. The Tribunal cannot follow the Claimant's argument:

- As mentioned above, EU quotas were based on historical production during a reference period (see, for instance, Exh. R307; Exh. C74, p. 10, ¶ 5.3; Exh. R134; Exh. R139; Exh. R145; Exh. R310; TR/Balazs, p. 798, l. 21 – p. 799, l. 3; TR/Kalinowski, p. 1073, ll. 10-13). Poland's initial isoglucose quota application, on 9 December 1999, was for an amount of 20,000 MT in total based on the consideration that it was "*planned that isoglucose output* [would] *reach 20 000 tonnes in 1999, which would satisfy an annual demand for this product in Poland*" (Poland's Position Paper in the Area of "Agriculture" for the Accession Negotiation with the EU, CONF-PL 63/99 – Exh. C45).

- As stated by the Claimant itself, "*subsequent requests for isoglucose were based on* [Poland's] *national quota figures*" (Cargill's FPHB, p. 57). Indeed:

  – in its Position Paper of 17 June 2002 (Exh. C80) issued in response to the Commission's "Revised Draft Common Position" of 15 April 2002 (Exh. 134), Poland formally requested from the EU a quota of 42,200 tons dry state. In its Draft Revised Negotiating Position of 11 May 2002, it explained that "*in respect of the fiscal year of 2002/2003 the Council of Ministers* [...] *established the aggregate quota of isoglucose in amount of 42.2 tons*," considering that "*in 2001, the isoglucose production amounted to 27.6 thousand tons (calculated as dry substance)*", and that "*according to information provided by the representatives of the processing industry, the demand and production capacity in respect of isoglucose* [would] *be 120 thousand tons in 2003*" (Exh. C79);

  – in its Reply to the Common Position of 20 June 2002 of 30 October 2002, Poland increased its request to a total isoglucose quota of 62,200 MT dry state, i.e. an amount equal to the second domestic quota, explaining that "*according to the manufacturer's information, isoglucose production in 2001 was 27,600 tonnes (as converted into dry matter)*" and that "*the information given by processing industry representatives indicate*[d] *that the demand for and production capacity of isoglucose in 2003* [would] *be equal to 120,000 tonnes*" (Exh. C84). Poland maintained its position on the volume of the isoglucose quota of 62,200 tons in its reply of 25 November 2002 to the EU's position of 31 October 2002 (Exh. C85).

  As explained above, the Tribunal does not consider either of the domestic quotas on isoglucose to have been set arbitrarily. Accordingly, and considering in particular that EU quotas were based on historical production during a reference period, the Tribunal disagrees with the Claimant's contention that "*any arbitrariness with regard to the national quotas* [...] [is to] *be imputed to those EU quota requests as well*" (Cargill's FPHB, p. 57).

- With respect to the fact that Poland dropped its request from 62,200 MT back to 40,000 MT in November 2002, Minister Kalinowski testified at the hearing that considering the fact that shortly before the Copenhagen Summit, Poland had requested 60,000 but had been offered "*18 or roughly 20,000*," Poland "*thought that for technical reasons it might be better to push down our proposal a bit in the hope that the other side would meet us halfway*" (TR/Kalinowski, p. 1069, ll. 1-

10). This appears like a plausible explanation for the decision to reduce the request. Even if one may question the negotiation tactic chosen and believe that it involved poor judgment, the decision cannot be deemed arbitrary.

528. In conclusion, Poland's isoglucose quota requests to the EU cannot be considered arbitrary.

c) Has Poland impaired Cargill's use and enjoyment of its investment through arbitrary or discriminatory measures?

529. The Claimant has argued that "*by imposing an isoglucose quota below domestic demand and production capacity for isoglucose, Respondent denied Cargill the ability to market its product and also denied consumers the ability to obtain efficiently a necessary and cost-effective input*" (Cargill's Memorial, p. 82).

530. The Tribunal has acknowledged above that the Claimant has suffered discriminatory treatment as it has indeed been prevented from selling isoglucose and from satisfying demand as well as the sugar producers were able to do. Hence, it has been denied the ability to market isoglucose and it appears reasonable to admit as a result – considering the level of potential market demand for isoglucose in Poland and the Claimant's investments in its isoglucose production facilities – that the Claimant was compelled "*to cancel sales to existing customers*" or at least to "*cease its efforts to develop new customer*" (Cargill's Reply, p. 155).

531. The Tribunal accordingly finds a violation of Article II:6 of the BIT on the ground of discriminatory impairment of Cargill's investment during the period of the domestic quotas.

5. PERFORMANCE REQUIREMENTS – ARTICLE II:4 OF THE TREATY

5.1 Cargill's position: Poland has imposed impermissible performance requirements

532. According to Cargill, the 2001 Sugar Law and the EU Commission Regulation No. 1464/95 require that it export outside Poland or outside the European Union any amount of production that exceeds the quotas, creating thereby "performance requirements" on Cargill.

533. These performance requirements are inadmissible under Article II:4 of the Treaty since they condition Cargill's investment expansion and maintenance. Cargill can use and benefit from its full isoglucose capacity only if it exports any output above the quota

level. This implies that any use of the capacity above the quota level is subject to the export requirement. Such requirement has the same effect as a maximum production quota, as Cargill cannot profitably export isoglucose in any significant quantity.

534. The fact that Cargill's entire production is not affected by the export requirement is irrelevant. It is sufficient that a volume of isoglucose in excess of the quotas is subject to the export requirement.

535. Lastly, the fact that Cargill may have planned when the regulatory environment was still free to export part of its production "*does not affect the impermissible nature of Respondent's measures*" (Cargill's Reply, p. 168).

5.2 Poland's position: Cargill's performance requirements claim is without merit

536. Poland alleges that Cargill's claim based on Article II:4 of the Treaty is without merit, because the national and EU export requirements did not condition the expansion or maintenance of Cargill's investment. In other words, the quotas were not inadmissible performance requirements as "[m]*easures of general application that do not impose conditions under which an investment may be undertaken are not prohibited by Article II:4*" (Poland's Counter-Memorial, p. 141), and a producer is not required to export the production exceeding quotas, although it may choose to do so. Cargill has not established having ever been affected by the regulations regarding C volume production.

537. In fact, the provision regulating C volume production of isoglucose was adopted with the 2001 Sugar Law and took effect at the beginning of the first national quota period in October 2002, i.e. at a time when Cargill had completed the expansion of its investments. In addition, Cargill has not proven that it produced quantities of isoglucose in excess of the A and B quotas levels, so "*the regulation regarding C volume production does not even apply to it*" (Poland's Counter-Memorial, p. 143). Cargill itself argued that isoglucose is inherently "*un-exportable*"; it cannot complain against a requirement that cannot be implemented. In any event, Cargill is not affected for the supplemental reason that as early as 1998, it stated that a "*significant part of production is and will be designated for export*" (Poland's Counter-Memorial, p. 143).

538. Alternatively, Poland contends that Cargill's claims can only run from 1 May 2004 to 20 August 2004 (Poland's Rejoinder, footnote 417, p. 110).

5.3 Analysis

539. The Tribunal will first review whether the measures at stake constitute performance requirements (5.3.1). If this is answered in the affirmative, it will then ascertain whether Poland violated Article II:4 of the BIT (5.3.2).

5.3.1 Do the quotas at stake constitute performance requirements?

540. Cargill claims that the C volume levels of both the domestic and the EU quotas constitute performance requirements as they obliged Cargill to export its production.

541. To assess this claim, one must start by defining performance requirements: "[p]*erformance requirements are stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country*"[73]. Export requirements and restrictions on sales of goods and services in the territories where they are produced or provided fall within this category[74].

542. As mentioned by the Claimant, provisions regarding performance requirements are mainly found in BITs concluded by the United States of America. Article 1106 of the NAFTA contains a similar provision. Few tribunals have addressed performance requirements.

- In *Pope & Talbot*[75], the tribunal dealt with the conditions attached to the export of softwood lumber to the US which was subject to an increasing fee determined in accordance with the company's quotas. Exports which exceeded the quotas were subject to the highest fee. The tribunal held that the general aim of performance requirements was to increase the export of goods and services. The measure at stake did not impose or enforce any requirement to export because an option was available once the quotas were exceeded, namely payment.

- In *SD Myers*[76], the claimant contented that Canada's export ban breached Article 1106 because it required the claimant to carry out a major part of its business in Canada. For the claimant, the export ban was a condition of operating in Canada. The tribunal disagreed. It underlined that one must look to the substance of the ban and not only to its form. It then found that the measures did not constitute a

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73 Foreign Direct Investment And Performance Requirements: New Evidence from Selected Countries, UNCTAD, 2003, p. 2, available online at http://www.unctad.org/en/docs/iteiia20037_en.pdf.

74 *Op. cit.*, p. 3.

75 *Op. cit.*

76 *Op. cit.*

performance requirement as they did not fall within any specific requirements prohibited by Article 1106 of the NAFTA.

- In *ADF*[77], the US measure at stake required that steel material for the construction of an interchange project be produced and fabricated entirely in the US. The claimant contended that this was a requirement of local content in breach of the NAFTA. The respondent replied that such a performance requirement was allowed in the specific context of procurement by the US under Article 1108 of the NAFTA. The tribunal agreed and held that the measures did not constitute a violation of Article 1106 of the NAFTA.

543. These decisions show that the approach of NAFTA tribunals regarding performance requirements has been cautious and has favored a strict interpretation of the terms of Article 1106 of the NAFTA.

544. Bearing these decisions in mind, the Tribunal is of the opinion that the C volume levels constitute performance requirements. They required that any production exceeding the A and B quotas "must be exported" outside Poland (Art. 7 of the 2001 Sugar Law - Exh. C66) or the EU. Under the Sugar Law, the charge to be paid for producers who "violated" the provisions was equivalent to the value of the non-exported C sugar using a coefficient of 1.9 for isoglucose in sugar equivalent. Under the EU system, C sugar is to be exported without refund or can be carried over to the following marketing year (see Exh. R172 – An EU Description of the Common Organisation of the Market in Sugar, 2004).

545. As stated by Poland in its Counter-Memorial "[i]*n turn the sugar, isoglucose and inulin syrup produced by the producer over the A and B limit allocation* [...] *constituted C volume of sugar, isoglucose and inulin syrup and had to be exported* [...]. *In the event a producer did not manage to fulfill the obligation to export all C volume products, the remaining product was subject to financial sanctions*" (Poland's Counter-Memorial, ¶ 72). Contrary to what Poland now asserts, exportation is a requirement. In requiring the export of volume C level, Poland set a condition on the activities of Cargill in Poland.

546. The fact that the measure applied equally to isoglucose and sugar, as argued by the Respondent, does not affect this conclusion since the comparison between the two is of no assistance in the context of performance requirements. Indeed, performance

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77 *ADF Group v. United States*, ICSID case No. ARB(AF)/00/1, Award, 9 January 2003.

requirements are not to be determined by comparing the positions of two companies, unlike national treatment.

5.3.2 Did Poland actually impose on Cargill impermissible performance requirements?

547. The Tribunal must now determine whether the performance requirements at issue[78] were in breach of Article II:4 of the BIT.

548. Article II:4 reads as follows:

> *Neither Party shall impose, as a condition of establishment, expansion or maintenance of investments, any performance requirements which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements or measures.*

549. Article II:4 aims specifically at the imposition of performance requirements which require exporting goods produced locally, provided it is made "*as a condition of establishment, expansion or maintenance of investments*".

550. No quotas and consequently no performance requirements were imposed when the Claimant established its investment and while Cargill still maintains its investment in Poland. Hence, the Tribunal must examine whether the quota imposition hindered the expansion of the investment.

551. Cargill's present claim does not relate to quotas A and B, but to volume C production. Whereas quotas A and B limited Cargill's possible expansion on the Polish market, the same does not apply to volume C level. Had Cargill intended to expand, it could have done so notwithstanding quotas A and B by producing for export. Therefore, the Tribunal cannot agree with Cargill that volume C level had the same effect as a maximum production quota.

552. The Tribunal does not ignore Marcin Wieglus' additional witness statement (Exh. C104 - ¶¶ 11-13) pursuant to which export was not an alternative due to high costs of storing, transportation, and import tariffs. Mr. Wieglus insisted on the difficulty of transporting isoglucose since it must be delivered soon after it is produced. He also stated that the situation worsened after the EU accession, when the export markets of countries close to Poland were no longer available.

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78 And as far as EU quotas are concerned, only until 20 August 2004.

553. Nonetheless, and notwithstanding these practical and financial impediments, it appears that Cargill took a commercial decision not to export more of its production. Cargill failed to convince the Tribunal that its decision not to expand on foreign markets was due to the imposition of the volume C level.

554. Therefore, it is not established that Poland has breached Article II:4 of the Treaty given that the Claimant failed to establish that the performance requirements resulting from the volume C level were imposed as a condition of the expansion of its investment.

6. USE AND VALUE OF CARGILL'S INVESTMENT – ARTICLE VII:1 OF THE TREATY

6.1 Cargill's position: Poland deprived Cargill of the use and value of its investment

6.1.1 Poland was required to refrain from measures that could deprive Cargill of the use and value of its investment

555. According to Cargill, Article VII:1 of the Treaty protects "*not only* [from] *outright takings of title to property but also* [from] *interference with an investor's property that deprives the investor of the use or value of that property*" (Cargill's Memorial, pp. 89-90). Interference by a government with an investor's reasonably expected future economic benefits from its investments can also amount to expropriation.

556. In addition, "*as long as Respondent's actions have deprived Cargill 'in significant part' of the 'use or reasonably-to-be-expected' value of that investment, Respondent's actions are expropriatory*" (Cargill's Memorial, p. 94), irrespective of whether only a part of the investment has been expropriated.

557. Finally, the government's intention is irrelevant. It is the effect of the government's acts which is relevant and decisive. In this case, the effect of the Respondent's acts was to deprive Cargill of the use and value of isoglucose facilities.

6.1.2 Cargill's isoglucose production capacity is an investment capable of being expropriated

558. Cargill's isoglucose facility, equipment, and other assets, but also associated rights related to such assets, fall within the broad definition of "investment" contained in the Treaty. Such rights include Cargill's rights to use and enjoy that equipment and production capacity to generate income for Cargill (Polska).

559. In fact, the true value of Cargill's investment is its ability to produce and sell at full production capacity. "*Cargill's rights to derive the full economic benefit of its investment*

and to produce isoglucose at capacity constitute valuable rights capable of being expropriated under the US-Poland Treaty" (Cargill's Reply, p. 159).

6.1.3 Poland's national quotas and the EU quotas unreasonably interfere with the use and value of Cargill's investment

560. Poland imposed discriminatory regulation through national and EU quotas on the production and sale of isoglucose in Poland. This constitutes expropriatory measures. Indeed, "*the national and EU quotas on isoglucose constitute an indirect expropriation of a significant portion of Cargill's isoglucose production capacity, thereby depriving Cargill of the reasonably expected use and enjoyment of that investment*" (Cargill's Memorial, p. 96). More specifically:

- The quotas on isoglucose which the Respondent imposed from October 2002 to May 2004 "*foreclosed to Cargill the use of some one-third of its production capacity*" (Cargill's Memorial, p. 96).

- The EU quota on isoglucose, which the Respondent accepted, and which became effective on May 2004, "*currently deprives Cargill of the use of two-thirds of its production capacity*" (Cargill's Memorial, p. 96).

- Cargill's "*property rights with respect to a significant portion of this facility have been 'rendered so useless that they must be deemed to have been expropriated'*", referring to *Starrett Housing* (Cargill's Memorial, p. 96). The total amount of damages that the Claimant has suffered as a result of Respondent's illegal acts is USD 87.8 million.

- Cargill had reasonable investment-backed expectations that were undermined by the Respondent. Cargill's expectations were based on, *inter alia*, the absence of quotas when Cargill initially decided to invest in isoglucose in Poland, the support and encouragement of government officials, assurances that any future quotas in Poland would be based on market demand and production capacity, and evidence of market demand for isoglucose in Poland. The Claimant reasonably expected that it would be allowed to produce to the fullest extent permitted by the market.

561. The imposition of quotas inflicted significant harm which has been continuous between 2002 and 2006, and is likely to continue in the future. Therefore, the imposition of the isoglucose quotas can hardly be considered "merely ephemeral".

562. The Claimant could not compensate for the deprivation it has suffered since it could not provide substantial quantities of isoglucose to customers outside of Poland, and could not pursue other lines of business activity.

563. Finally, Cargill emphasized that even if the Respondent were required by the EU to impose a low quota, "*that does not excuse Respondent's actions nor render it not responsible for the losses suffered by Cargill*", because Poland made a policy choice to join the EU and Cargill should not bear the loss caused by such choice (Cargill's Memorial, p. 97).

6.2 Poland's position: Cargill's claim of expropriation is baseless

6.2.1 Cargill's production capacity is not capable of being expropriated

564. According to Poland, Cargill has not identified any investment that was expropriated. It claims a taking of a portion of its production capacity which is not, by itself, capable of being expropriated since it is intangible. A loss of capacity or a loss of a committed customer base is too vague a concept to be capable of being an investment under Article I of the BIT and therefore be expropriated.

565. In any event, Cargill has not established that it ever used the capacity that it alleges was taken from it. Nor has it established that a portion of its capacity could be sold or traded.

566. As of November 2001, when Poland announced the first national quota of 59,437 MT commercial quantity, Cargill's capacity allegedly stood at 80,000-85,000 MT commercial quantity. Notwithstanding the quota, Cargill proceeded with a fifty-percent expansion of its capacity. "*Under Cargill's logic, had it expanded its capacity by an additional hundred or even two hundred percent, it now would be in a position to allege that portion of its capacity was expropriated as well*" (Poland's Counter-Memorial, pp. 130-131).

567. In addition, all of Cargill's capacity still exists and it has not been deprived of it. It continues to hold and use productively its isoglucose-producing installation. "*The capacity of that installation may constitute a component of its value, but it cannot, by itself, have been expropriated*" (Poland's Counter-Memorial, p. 130).

6.2.2 *Measures like those at issue in the present case, i.e. non-discriminatory regulatory actions for a public purpose, do not amount to expropriation*

568. Relying on *Methanex*, Poland contends that regulatory action does not amount to expropriation. The production quotas apply equally to all producers of isoglucose regardless of nationality and were adopted out of necessity in advance of Poland's accession to the European Union in an open and transparent law-making process in which Cargill participated substantially. No assurances of any kind were provided.

569. Cargill should have been, and was, aware of Respondent's commitments in that regard prior to making its investment.

6.2.3 *A mere negative impact on an investment resulting from regulation is insufficient to establish a taking under international law*

570. "*An allegation that an investment's profits have diminished as a result of regulatory action is insufficient to support a claim for an expropriation*" (Poland's Counter-Memorial, p. 134). In the present instance, Cargill has not demonstrated any impact, much less an interference so substantial with the investment that it could be viewed virtually as a deprivation of Cargill's investment.

571. First, Cargill has not proven that its investment has suffered any damage as a result of the national or EU quotas. It "*has not alleged that Respondent has interfered with Cargill's ability to produce isoglucose to such a degree as to render its isoglucose facility useless or valueless*" (Poland's Rejoinder, p. 180). In fact:

- "*Cargill has failed to establish that either the national or EU-mandated quotas resulted in any interference with actual demand or its actual production*" (Poland's Counter-Memorial, p. 134). Indeed, Cargill admits that its isoglucose production and sales continue to this date.

- Cargill has not alleged that it has been deprived of control of the company.

- Cargill's claims of interference with projected production, if relevant at all, are insufficient.

- "*Cargill's investment retains significant value*" (Poland's Counter-Memorial, p. 134). Indeed, first, it could have continued with the marketable production from two of its lines which purportedly have the capacity to produce 145,000 MT dextrose syrup and 120,000 MT commercial quantity of isoglucose (F42). Second, as Cargill acknowledged during the negotiation with the EU, 62,200 MT

dry state (87,606 MT commercial quantity) that was applicable under the national system "*conform*[ed] *to a level which makes it economically viable to continue isoglucose production in Poland*" (Poland's Counter-Memorial, p. 135). Third, the measures did not result in a total and permanent deprivation of Cargill's fundamental rights of ownership in its investment. Cargill's isoglucose operation continues to this day.

- Cargill's had the intention in developing its facility to serve markets outside of Poland.

572. Second, Cargill retains viable alternative uses for its investment. Indeed, Cargill may manufacture products that are not subject to the quotas, using its investment in the isoglucose production facility. "*Cargill began the production of alcohol at its facility since the imposition of production quotas on isoglucose* [and in fact,] *isoglucose production facilities, or at least substantial portions of such facilities, can be converted for the production of alcohol*" (Poland's Counter-Memorial, p. 137). Cargill's "*target markets include the pharmaceutical and other sectors [*which*] will soon be made available to Cargill as an outlet for unlimited isoglucose production and sales*" (Poland's Rejoinder, p. 180).

573. Third, temporary deprivations are not sufficient to establish a claim of expropriation. In the case at hand, quotas have, if at all, only had a temporary impact on Cargill's opportunity to make a maximum profit:

- The first quota period ran from 1 October 2002 to 30 June 2003. It accommodated essentially all of Cargill's isoglucose sales during 2001 and could have accommodated substantially greater production. Thus, whatever its capacity, Cargill cannot sustain a claim that it suffered any diminution in value of its investment during the period October 2002 through June 2003.

- The second national quota level enabled Cargill to produce more than twice the level of its 2001 production, during which period Cargill confronted no limitation on production whatsoever. In addition, it imposed no limitation whatsoever on export sales. Under the circumstances, Cargill's claims of lost sales are a lacking factual foundation.

- Further, "*Cargill's reduction in its damages claims in and of itself shows that its alleged 'deprivation' is not a 'deprivation' of property rights, but – accepting Cargill's facts – merely a diminishment in profits generated by the property at*

issue. There simply has been no lasting harm to Cargill's ability to use its property" (Poland's Rejoinder, pp. 183-184).

- Finally, even assuming that the imposition of quotas is permanent, this would not imply a permanent deprivation of the use of the alleged excess capacity, as *"the quota levels could well rise to equal or surpass Cargill's alleged capacity."* (Poland's Rejoinder, p. 185).

6.2.4 Cargill lacked a reasonable investment-backed expectation

574. A finding of an expropriation requires that the investor establish that it was deprived of a reasonably expected economic benefit of its investment. Indeed, "*a finding of liability is not appropriate where the investment undertaken by the claimant* [...] *was 'speculative or, in the best of circumstances, imprudent*" (Poland's Counter-Memorial, p. 139).

575. In the present case, given the regulatory context, Cargill did not have – and should not have had – reasonable investment-backed expectations that its rights to develop and later expand its production facility would not be affected by production quotas. Indeed, "*Poland's impending accession to the EU was a clear and definitive signal of the type and intensity of regulation that Cargill should have expected* [...] *Likewise, Cargill ignored many other signals both prior to its initial investment and at each phase of its alleged expansion process as well*" (Poland's Counter-Memorial, p. 139). Cargill installed and expanded its production capacity with the knowledge that its product was certain to be regulated.

576. Furthermore, "*under the national quota system, it was Cargill that urged Respondent – successfully – to make the quota allotment dependent on production during the year prior* [and] *Cargill's monopoly on the production of isoglucose in Poland was ensured by regulation*" (Poland's Counter-Memorial, p. 139).

6.3 Analysis

577. In pertinent part, Article VII of the Treaty reads as follows:

> *Article VII*
>
> *Compensation for Expropriation*
>
> *1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose, in a nondiscriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II (6). Compensation shall be equivalent to the fair*

market value of the expropriated investment immediately before the expropriatory action was taken or became publicly known, whichever is earlier; be paid without delay; include interest at a commercially reasonable rate, such as LIBOR plus an appropriate margin, from the date of expropriation; be fully realizable; be freely transferable; and calculated on the basis of the prevailing market rate of exchange for commercial transactions on the date of expropriation.

2. A national or company or either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefore, conforms to the provisions of this Treaty and to principles of international law.

6.3.1 The standard of determination

578. The Tribunal considers that whether there has been an expropriation in this case hinges upon one critical factor, i.e. the level of the Claimant's deprivation. It concurs with the *Tecmed* tribunal which held:

> *116.* [...] *Therefore, it is understood that the measures adopted by a State, whether regulatory or not, are an indirect* de facto *expropriation if they are irreversible and permanent and if the assets or rights subject to such measure have been affected in such a way that "...any form of exploitation thereof..." has disappeared; i.e. the economic value of the use, enjoyment or disposition of the assets or rights affected by the administrative action or decision have been neutralized or destroyed. Under international law, the owner is also deprived of property where the use or enjoyment of benefits related thereto is exacted or interfered with to a similar extent, even where legal ownership over the assets in question is not affected, and so long as the deprivation is not temporary. The government's intention is less important than the effects of the measures on the owner of the assets or on the benefits arising from such assets affected by the measures; and the form of the deprivation measure is less important than its actual effects. To determine whether such an expropriation has taken place, the Arbitral Tribunal should not:*
>
> [...] *restrict itself to evaluating whether a formal dispossession or expropriation took place, but should look beyond mere appearances and establish the real situation behind the situation that was denounced.*[79]
> (footnotes omitted)

579. It follows that an expropriation might occur even if the title to the property is not affected, depending on the level of deprivation of the owner[80]. This is a well established principle in investment arbitration, which is illustrated *inter alia* by *CMS*[81], *Azurix*[82], *Telenor*[83] and *LG&E*[84].

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79 *Op. cit.*

80 *Starrett Housing Corp. v. Iran*, Interlocutory Award, 19 December 1983, 4 Iran-US CTR 122; *Tippetts, Abbett, McCarthy, Stratton v. TAMS-AFFA Consulting Engineers of Iran*, Award, 22 June 1986, 6 Iran-US CTR 219.

81 *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 409.

82 *Op. cit.*

580. In the Tribunal's opinion and contrary to Cargill's submission, the investor's expectations are not a useful benchmark to decide whether measures taken by a State are tantamount to expropriation. This subjective test is better applied in the context of fair and equitable treatment. What matters here is the objective result of the measures retained by the Tribunal as being violations of the BIT.

581. The question here is thus whether by regulating the production of isoglucose and imposing domestic quotas Poland took a measure which is tantamount to an expropriation of Cargill's investment. To answer this question, the Tribunal must first identify Cargill's investment (6.3.2) and then examine the degree of the interference of the measures with the investment so identified (6.3.3).

6.3.2 Cargill's investment for the purpose of an expropriation

582. Cargill contends that its right to use and enjoy its isoglucose production capacity falls within the definition of an investment under the Treaty. In its Request for Arbitration, it also submitted that "*Cargill Poland is a wholly owned subsidiary of Cargill and thus qualifies as an investment*" under the Treaty (Cargill's Request, ¶ 30). It further described the "*facility, the equipment and other assets and associated rights*" which it owned through Cargill Poland as investments. In its submission, its right to produce and to sell to full capacity was expropriated notwithstanding the fact that Cargill Poland is still in the possession of all the physical assets and able to produce isoglucose, although not to the extent originally planned.

583. The Tribunal agrees that Cargill has a right to use and enjoy the production facilities owned by its subsidiary. This right is an intangible asset which is included in the definition of investment given by the Treaty. Indeed, Article I:1(b) of the Treaty specifies that an "investment" includes tangible and intangible property as well as claims to money or to performance having economic value, and associated with an investment. Bearing this in mind, the question then arises whether such right (to use and enjoy a production capacity) is a separate element which can be expropriated in isolation or whether it exists solely in relation to Cargill's global interest in Cargill Poland and cannot be expropriated in isolation. The Tribunal is aware that some decisions rendered in investor-state arbitrations have accepted that specific rights relating to an investment can be expropriated separately[85]. In this case, it considers,

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83 *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No. ARB/04/15, Award, 13 September 2006.

84 *Op. cit.*

85 For example *Waste Management Inc. v. The United Mexican States*, *op. cit.*, Award, 30 April 2004; *Eureko v. Poland*, Partial Award, 19 August 2005; *EnCana v. Ecuador*, Award, 3 February 2006.

however, that Cargill's right to use and enjoy the production facilities is directly contingent upon the facility; it cannot be dissociated from it. Thus, the Tribunal is of the opinion that the correct approach here is to assess the investment as a whole in order to determine whether there was an expropriation.

584. The same approach was in particular adopted in *Telenor v. Hungary*[86]. In that case, the Claimant asserted that its investment was composed of a mobile network, a concession agreement, the customers of its local subsidiary, and the income expectations of the subsidiary. The tribunal held that these elements taken together constituted the investment made by Telenor through its subsidiary. In this context, it made the following statement:

> *The Tribunal considers that, in the present case at least, the investment must be viewed as a whole and that the test the Tribunal has to apply is whether, viewed as a whole, the investment has suffered substantial erosion of value.* (¶ 67)

585. The Tribunal agrees with this view. Hence, it will examine the effect of the measures on Cargill's investment taken in its entirety and not limited to the right to use and enjoy the production capacity.

6.3.3 Effect of the measure

586. Turning to the impact of the measure imposing domestic quotas, Cargill alleges that its "*property rights with respect to a significant portion of this facility have been 'rendered so useless that they must be deemed to have been expropriated*" (Cargill's Memorial, p. 96).

587. The Tribunal further concurs with the tribunal in *Telenor* that to amount to an expropriation, the measures complained of must be *"such as to have a major adverse effect on the economic value of the investment"*[87]. It also agrees that the test to be applied is whether the investment, as a whole, has suffered a substantial erosion of value[88].

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86 *Telenor Mobile Communications AS v. Republic of Hungary*, ICSID Case No ARB/04/15, Award, 13 September 2006, ¶ 67. This approach was also followed in *Saipem SpA v. the Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007.

87 *Telenor*, ¶ 64, *op. cit.*

88 *Op. cit.*, ¶ 67. Or, in the words of another tribunal: "*Thus, the effect of the Argentine State's actions has not been permanent on the value of the Claimants' shares', and Claimants' investment has not ceased to exist. Without a permanent, severe deprivation of LG&E's rights with regard to its investment, or almost complete deprivation of the value of LG&E's investment, the Tribunal concludes that these circumstances do not constitute expropriation"; LG&E v. Argentine Republic, op. cit.*, Decision on liability, 3 October 2006, ¶ 200.

588. In assessing the impact of the measures on the investment, the Tribunal notes that Cargill still owns the shares of its Polish subsidiary; that it still has title, possession and use of the production facility, the equipment and other physical assets. More significantly, Cargill Poland still produces isoglucose and other products. It is true that the level of production authorized by the EU quota is substantially lower than the capacity of the facility. Nonetheless, on these facts the Tribunal cannot accept that Cargill is radically deprived of its investment as viewed in its entirety. In other words, the investment is not neutralized or rendered useless.

589. For these reasons, the Tribunal concludes that Cargill has failed to establish a violation of Article VII:1 of the Treaty.

* * * * *

VII. DAMAGES

590. In this section the Tribunal will first set forth the parties' positions (1 and 2), and then set forth the applicable principles of compensation (3.1), and the quantum for each breach (3.2 to 3.4). Thereafter, it will address the issue of taxation (3.5).

1. CARGILL'S POSITION: CARGILL IS ENTITLED TO COMPENSATION FOR DEPRIVATION OF ITS TREATY RIGHTS

1.1 Full compensation is due

591. The Claimant relies on the *Chorzów Factory* case and other international decisions, that hold that reparation must wipe out as far as possible all the consequences of the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed.

592. The Claimant contends that the principle of full compensation provided in Article VII:1 of the Treaty in the event of an expropriation must apply to all the breaches found in the present case. Although the Respondent's acts and omissions violated multiple provisions of the Treaty, the damages incurred are the same. Or in Cargill's words, "[t]*he same acts and omissions by Respondent, and the same measures of Respondent – namely, the nontransparent formulation and ultimate imposition of economically crippling quotas – are the basis for each one of Claimant's Treaty claims. And the same injuries – namely, the loss of the right to produce and sell isoglucose up*

to Cargill's full capacity – result from those measures, regardless of which Treaty provision the measures are found to violate" (Cargill's Reply, p. 178).

1.1.1 Cargill's damages are properly measured by the fair market value of its lost profits

a) The "fair market value" is the proper measure for the compensation of all of Poland's breaches under the Treaty

593. According to Cargill, Article VII:1 of the Treaty provides specific guidance on the measure of damages for expropriation, which must result in "*prompt, adequate and effective compensation*" in accordance with international law standards. The measurement of Article VII:1 also represents a valid compensation standard for breaches of other provisions of the Treaty, as held by the *CMS* tribunal.

594. To effect full compensation, one must take into account the fair market value at the time before it was known that the illegal act would occur. In the present case, the Respondent's breaches of Articles II:1, II:8, II:6, II:4, and VII of the Treaty caused by the imposition of national quotas, and its request for and acquiescence to EU quotas below Cargill's isoglucose production capacity, resulted in damages corresponding to the value of the expected profits on the isoglucose sales that Cargill lost as a result of its inability to utilize the full capacity of its investment. Contrary to what the Respondent suggests, "[t]*he value of which Cargill has been deprived is not just the value of the isoglucose production equipment itself, but the value of the income (and more specifically the profits) that that equipment would have generated but for Poland's too-low quotas*" (Cargill's Reply, p. 181).

b) The discounted cash flow method

595. Cargill argues that the discounted cash flow (DCF) method is the proper method to calculate its expected profits on the sales lost as a result of the imposition of the quotas. This method enables "*account to be taken of risk and uncertainty in an explicit and transparent manner*" (Exh. C111, 2nd Haberman Expert Report, ¶ 2.49).

1.1.2 Calculation

596. Cargill's lost earnings amount to "*the difference between Cargill's net revenues under the quota regime and the net revenues it could have earned absent the quota regime, beginning with the imposition of the first national quota on isoglucose on October 1, 2002, and continuing through May 31, 2011*" (Cargill's Memorial, pp. 103-104).

597. Indeed, Cargill's losses began to accumulate when the level of the first national quota was announced in November 2001, as customers began to grow concerned that Cargill would not be able to accommodate their sweetener requirements. By that date, Cargill had substantially made its investment in the final capacity expansion of 35,000-40,000 MT. Therefore its full investment up to 120,000 MT was actually completed. To be conservative, the Claimant's damage expert, Mr. Haberman, nevertheless used 1 October 2002, the operative date of the quotas, as a date of reference.

598. From that date, Cargill's damages continued to accrue with the replacement of the Polish national quotas by even lower EU quotas which became effective on 1 May 2004. For the Claimant, there is no question that it continues to be damaged by the EU quota regime just as it was by the national quotas.

599. The loss compensation must extend to 31 May 2011, which "*corresponds to the end of the average expected useful life of the isoglucose production equipment at the Bielany Wrocławskie facility*" (Cargill's Memorial, p. 104), i.e. a ten year and two-month span from the equipment's weighted average installation date of 1 April 2001.

600. The Claimant computes its lost revenues for three subperiods between October 2002 and May 2011: first, the period of the national quota (1 October 2002 to 30 April 2004); second, the period of the EU quota for which Cargill's actual sales data is available (1 May 2004 to 31 May 2005); third, the period under the EU quota for which future sales and costs are estimated (1 June 2005 to 31 May 2011).

601. After adjusting the gross lost profits to account for Cargill's partial mitigation of the damages through other uses of the isoglucose production facilities such as the production of F9 isoglucose for dilution and the profits generated by exports, Cargill's expert then discounted the net lost profits back to the date on which the breaches of the Treaty may conservatively be fixed (the date on which the quotas first came into effect, i.e. 1 October 2002), to reach a present day value. The discount rate used is equal to Cargill's average annual cost of borrowing of 5.20%, which reflects the time value of money to Cargill Inc. Since Cargill is not a listed company, no risk factor is added as the investment involves a "*well established production process which is inherently low risk*" and which is operated by a group with similar plants worldwide (2nd Haberman Expert Report, ¶ 2.59).

602. Cargill's alleged damages were of:

- USD 151,801,548 in the First Haberman Expert Report;

- USD 87,798,762 in the Second Haberman Expert Report to account for the impact of two EU regulations and mitigating sales;

- and finally of USD 82,969,321 on the day of Mr. Haberman's testimony to account for the production levy to be paid under the EU sugar regime by each manufacturer per ton of isoglucose produced[89] (Addendum 2 to Mr. Haberman's 2nd Expert Report submitted on 21 June 2006, Exh. C169).

1.2 Interest should be awarded at Cargill's cost of borrowing on a compound basis

603. Cargill claims that it is entitled to interest on the value of its investment to place it in the position it would have been in had Respondent promptly paid adequate compensation.

604. The applicable interest rate corresponds to Cargill's cost of borrowing which is a "commercially reasonable" rate for these proceedings. That rate was 5.20% in 2005.

605. Furthermore, to make it whole for the injuries inflicted by the Respondent's wrongful acts, Cargill requests that interest be compounded annually (Cargill's Memorial, pp. 106-107). It also requests that the interest run from the date of the internationally wrongful act, which is also the date as of which damages are calculated, and that it continue to accrue until the amounts awarded are settled.

1.3 Issues of taxation

606. At the hearing, the Tribunal asked the parties to expand in their Post Hearing Briefs on the issue of taxation that was addressed in Mr. Stanley's report to the effect that any damages awarded by the Tribunal should take into consideration certain Polish taxes.

607. The Claimant argues that the award should be net of taxes in Poland. Cargill's damages were calculated on a before-tax basis, as it was assumed by Cargill's expert that it would be taxed in the jurisdiction in which payment would be made. Any award paid to Cargill would be subject to corporate taxes in the US at a rate of 35%, even if Polish taxes were to be deducted, since the United States-Poland Double Taxation Treaty takes into consideration only the actual payment of taxes made in a foreign country. Therefore, Cargill would be taxed twice, unless the resulting total of the award was grossed up for the effect of US taxes.

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89 Under the original quota system, Cargill pays a sugar fee for the right to operate under an isoglucose quota. Under the national quota, this was recovered by Cargill through the subsidy system operating at the time. This was not recoverable under the EU quotas. "*But with effect from July 2006 [until September 2009] the sugar fee was replaced by a new form of fee which is a payment into the sugar restructuring fund*" (Haberman Tr. H, p. 1109, ll 8-12). After September 2009, there will be no more sugar fee because the restructuring fund is temporary only (idem, p. 1109, ll. 21-22 – p. 1110, ll.1-2).

2. POLAND'S POSITION: CARGILL IS NOT ENTITLED TO DAMAGES

2.1 Cargill has suffered no losses

608. According to the Respondent, no losses allegedly due to the introduction of the national isoglucose quotas are established for the following reasons:

- Cargill has not demonstrated that at any time prior to October 2002 it utilized the full capacity of its plant.
- During the first national quota period, Cargill did not use its entire A quota. Its sales reflected the actual demand on the Polish market for isoglucose. Consequently, Cargill did not sustain any loss during that time.
- During the second national quota period, Cargill failed to use almost one fifth of its domestic quota. It was not successful either in exporting isoglucose.
- Cargill also did not incur any losses as a result of the imposition of the EU quota. Since Council Regulation (EC) No 318/2006 of 20 February 2006 on the Common Organization of the Markets in the Sugar Sector became operative on 1 July 2006, "*Cargill will be able to use as much of its production capacity as it will be able to secure demand for*" (Poland's Rejoinder, p. 197). Indeed, "*the customer for industrial isoglucose will be Community-based groups of industrial users of isoglucose* [and] *Cargill will be competing on the Community market in the same way it would in case Cargill were allocated a quota it wished for*" (Poland's Rejoinder, pp. 196-197).

2.1.1 Cargill's calculation of its purported damages is flawed in law and in fact

609. The Treaty does not specify the measure of damages in the event of a breach other than expropriation. Poland accepts that rules of customary international law provide the legal principles governing any award of damages proximately caused by a breach of the Treaty, but notes that Cargill failed to establish the content of such rules.

610. For compensation to be awarded for a breach of national treatment, fair and equitable treatment, and performance requirements, the Claimant should have proven the damage which it incurred as a result of each and every violation it alleges. It has failed to do so: "*As for such violations alone, there is no property taken away, and there is no value of such property to form the basis for compensation. For losses of value, there is no market*" (Poland's Rejoinder, p. 200).

611. Therefore, the Tribunal is invited to consider the claims in light of the specific circumstances of the case taking into account other provisions of the Treaty and the principles of international law.

612. In any event, fair market value is not the measure of damages for breaches under the Treaty. It *"is reserved for findings of total and permanent deprivations of fundamental rights to property in violation of Article VII, 'Compensation for Expropriation"*. (Poland's Counter-Memorial, pp. 145-146). For other breaches, "[i]*n the absence of express regulation, the matter must be left to be decided on a case by case basis by the bodies adjudicating claims for violations of other Treaty guarantees what would be the standard for compensating these violations*" (Poland's Rejoinder, p. 198).

613. Poland also submits that the DCF method is not appropriate in this case. Cargill Polska's record of performance is untested and not established to serve as a basis for calculation of lost profits over a ten-year and two month period. In the same vein, Cargill failed to present convincing evidence that, at any time during its operations in Poland, it had a sufficient contractually-committed isoglucose client base to presume that it would be able to sell its entire isoglucose output during the future ten-year period. Cargill's projected profits are speculative, remote and unsuited for DCF evaluation.

614. Under the latest EU regulation, there are increased isoglucose quotas for the entire EU, from which Cargill is certain to benefit. Such regulation "*mandates the reduction of guaranteed prices for sugar in the EU. The prices of sugar and isoglucose are linked, and, therefore, Cargill's future profitability is uncertain. This reform initiative alone shows that the DCF method of valuation is inappropriate for this case*" (Poland's Counter-Memorial, p. 150).

615. The Respondent' expert, Mr. Stanley, further noted in his First Report that "*Mr. Haberman has not considered other alternative methods, which might be more appropriate. For example, these would include a calculation of the loss of investment, which I understand has been adopted in similar cases, in particular where they may be uncertainty as to future profits arising from an investment*" (¶ 4.104).

2.1.2 Calculation

616. If anything, "[c]*alculation of such compensation should be limited to the outlays for that part of Cargill's isoglucose producing facility made obsolete as a result of the measures implemented by Respondent and for which there are no other commercially and technically viable uses"* (Poland's Counter-Memorial, ¶ 276).

617. Indeed, in the Respondent's submission, Cargill is entitled to no more than the damages it actually suffered, if any: "*Cargill is not entitled to damages in any amount, to the extent associated with the approximate 40,000 MT commercial quantity installed after it was aware of the first national quota period*" (Poland's Counter-Memorial, p. 151). Even assuming that Cargill may justify ignoring the variety of warnings prior to November 2001, the Respondent can not possibly be responsible for Cargill's lost profits on the post-November 2001 installation.

618. Further, even assuming that the DCF analysis were appropriate in this case, the Respondent raises the following objections:

- The proper application of that method would require consideration of the *actual production volumes* of isoglucose achieved by Cargill as a basis for calculation of lost future profits, and not of its production capacity. The weighted average of Cargill's production for the period 1999-2001, which served as the basis for the EU-mandated quotas, should be used as a reference for the calculation of any lost future profits.

- Cargill's valuation has not been tested against and compared with other methods of loss valuation followed in international arbitration cases.

- Cargill did not meet the standard of proof attached to the DCF methodology and Cargill's projected profits are both speculative and remote.

- With respect to the period covered by the EU isoglucose quotas, Cargill's claims "*might merit consideration if Cargill continued to operate in an unregulated sweeteners market*" (Poland's Rejoinder, p. 207). To assess future lost profits, reference should be made to a market with the following characteristics: "*large historic production of sugar, newly established presence of an isoglucose producer, no checks on the production of sugar and isoglucose, no minimum guaranteed prices for sugar and isoglucose*" (Poland's Counter-Memorial, p. 152).

- Cargill failed to offer evidence as to the inelasticity of isoglucose prices, which it assumed to exist specifically in the context of the new EU regulations.

- Cargill failed to account for any differentiation between Poland and the United States or other countries in terms of risks that exist in developing markets generally and in Poland in particular. Instead of applying to the forecast cash flows the discount rate that reflects the risk of the cash flows of Cargill's Bielany

Wrocławskie investment on a stand-alone basis, Cargill and Mr. Haberman adopted Cargill's global borrowing rate as the discount factor. The application of a proper discount rate, i.e. a significantly higher rate, based on the weighted average costs of capital (WACC), would have resulted in a lower figure of total losses.

- Cargill's treatment of costs raises doubt as to whether all appropriate costs have been included. Mr. Haberman assumes in his calculation of damages that the labor costs are fixed costs notwithstanding the situation in the region where Cargill's factory is located, i.e. in the rapidly-developing region of Lower Silesia where a shortage of skilled labor is already felt.

619. Furthermore, the Respondent's expert has submitted an addendum to his report in which he evaluated Cargill's losses at USD 47,348,057, based on a 80,000 MT gross production and using the same method as the Claimant's expert.

2.2 Cargill's internal rate of borrowing is not the appropriate interest rate and simple interest should be awarded, if any, from the date of signature of the Award

620. The interest rate sought by Cargill has no justification under the Treaty. As directed by the Treaty, the Tribunal must apply a commercially reasonable rate such as LIBOR. During the period from October 2002 to May 2004, LIBOR on 6-month deposits in US dollars was between 1.124% (lowest in June 2003) and 1.618% (highest in October 2002) (Poland's Counter-Memorial, p. 153).

621. The interest on any amounts that the Tribunal may wish to grant Claimant should bear simple interest, because of "*the circumstances of this case and considerations of fairness*" as well as "*the fact that Cargill's conduct contributed to the losses*" and due to "*the nature of the European sugar regime*" (Poland's Rejoinder, p. 211).

622. Last, the interest should be computed from the date of signing the award.

2.3 Issues of taxation

623. According to Poland, the award in itself would not be subject to taxation in Poland upon payment to Cargill based on the United States-Poland Double Tax Treaty. Indeed, business profits are subject to taxation in the state of the registered office of the recipient.

624. However, in the calculation of the award, the Tribunal should, in any event, be mindful of:

- The Polish VAT on calculation of hypothetical revenues of Cargill Polska payable on goods and services hypothetically produced at a standard rate of 22%. The VAT will not apply directly to the award, but must be taken into account in the calculation of the lost profits.

- The Polish corporate income tax (CIT) on hypothetical revenues of Cargill Polska. The subsidiary would have been subject to a tax of 28% in 2002, 27% in 2003 and 19% thereafter.

- The Polish withholding tax of 5% on hypothetical dividends payable to a US shareholder.

625. Cargill's alleged loss of profits are not in fact lost profits if VAT and CIT are not deducted from Cargill's alleged gross earnings.

3. ANALYSIS

626. In its analysis of the different breaches claimed, the Tribunal has found the following Treaty breaches:

- Article II:1: Breach of national treatment in connection with the imposition of national and EU quotas and the denial of equal competitive opportunities;

- Article II:8: Discrimination in connection with the imposition of national and EU quotas;

- Article II:6: Breach of transparency in connection with the non-disclosure of the methodology for the national quotas and breach of the prohibition on discriminatory measures.

627. In essence, the breaches relate to the discrimination perpetrated in connection with the imposition of the national and EU quotas, be it under Article II:1, II:8 or II:6, and the lack of transparency surrounding the determination of the national quotas under Article II:6.

628. The Tribunal will now define the applicable standards for compensation[90] (3.1). It will then distinguish between compensation for breach of transparency (3.2), breaches of national treatment, equal opportunities and discrimination due to national quotas (3.3)

[90] Restitution not being an option in this case.

and breaches of national treatment, equal opportunities and discrimination due to EU quotas (3.4).

3.1 Applicable standard for compensation

629. According to the Claimant, the Tribunal ought to use the "fair market value" measurement of Article VII:1 on expropriation, namely "the fair market value of its lost profits" (Cargill Reply, p. 175), as the standard for compensation. On that basis, Cargill has presented a claim covering the period of time from 1 October 2002 to May 2011. The Respondent objects to the use of the standard applicable to expropriation to compensate other violations of the Treaty.

630. The Treaty only provides a standard for compensation in the event of an expropriation. It contains no guidance for evaluating damages arising from breaches of other provisions. The Tribunal must therefore identify the measure of compensation which is most appropriate in the circumstances of this case[91].

631. In the circumstances, the Tribunal considers that the principle of the *Factory at Chorzów*, according to which any award should *"as far as possible wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed"*[92], constitutes good guidance. In other words, the Tribunal must determine what the Claimant's situation would have been had no violations of the Treaty occurred and what losses it incurred as a result of the violation. These cover losses accrued in the past and future lost profits provided the latter are sufficiently certain.

632. Having said that, the Tribunal wishes to emphasize that compensation will only be awarded if there is a sufficient causal link between the breach of the BIT and the loss sustained by the Claimant. As stated by the tribunal in *SD Myers*:

> *Other ways of expressing the same concept might 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.* [93]

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91 See for instance *CMS, op. cit.*, ¶ 409, *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, 25 July 2007, ¶ 40.

92 *Case concerning the Factory at Chorzów (Germany v. Poland)*, 1928, PCIJ, Series A No. 17, p. 47.

93 *SD Myers, Inc. v. The Government of Canada*, Second Partial Award, 21 October 2002, ¶ 140.

3.2 Lack of transparency

3.2.1 Cargill's injury

633. Cargill contends that the alleged breaches of the Treaty resulted in a loss of its right to produce and sell isoglucose to its full production capacity, i.e. that it suffered lost profits (Cargill's Reply, ¶ 302). It does not distinguish between the injuries caused by the different breaches, while Poland insists that Cargill must prove its alleged damages in direct relation to every alleged violation of the BIT. To assess whether there is a sufficient causal link, the Tribunal must necessarily start from a given act or breach and examine its effects on Cargill's investment. In other words, it must determine for each claim which it held well-founded whether Cargill suffered injury as a result of the acts giving rise to the claim.

634. The Tribunal fails to see how Cargill has incurred lost revenues due to the lack of transparency in 2001 and how it could have earned more had Poland not committed this breach. It sees, however, that Cargill could arguably have saved investment costs by not pursuing the expansion of its isoglucose production capacity had it been aware in due time of the criteria to be adopted for the determination of the first national quota.

635. By contrast, the lack of transparency in the determination of the second national quota does not appear to have contributed to Cargill's alleged injury. Indeed, at that time, Cargill had incurred the vast majority of its investment costs. As a result, even if Poland had been fully transparent, it would have been too late for Cargill to stop the expansion of its production capacity and thereby reduce the amounts of its investment.

3.2.2 Quantification

636. In seeking to determine any damage caused by the lack of transparency in the course of 2001, the Tribunal first notes that Cargill has alleged that its total investment costs in the isoglucose production facilities in Poland amounted to USD 27.4 million[94] (WS, G. Hueting, ¶ 13, Exh. C1), but has not broken down or otherwise evidenced these costs. The reason appears to be that it dismissed the "*amounts invested approach*", which was advocated by the Respondent (see ¶ 615-617 above), on the ground that this approach was misguided. Consequently it chose to rely on the fair market value as the measure of damages for all violations suffered indistinctly (Cargill's Reply, pp. 179-180). Although Poland submitted that "*Cargill is not entitled to have its damages*

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94 Cargill's total investment in Poland is said to have been USD 95 million (Tr/counsel for the Claimant, p. 1315, line 4).

assessed on another basis" than the one on which it relied (Poland's Rejoinder, p. 201), Cargill did not offer an alternative method of calculation[95].

637. The Tribunal also notes that Cargill computed its claim as of 1 October 2002. It is true that it also mentioned other possible dates (Cargill's Memorial, p. 104), i.e. 21 June 2001 (enactment of the Sugar Law) and 12 November 2001 (announcement that the first quota would apply to Cargill). However, these dates were not retained by its expert, who used 1 October 2002 as a starting date for the damage computation. Cargill therefore does not appear to have considered the effects of the lack of transparency which occurred in 2001 when formulating its claim for damages as of 2002.

638. The Tribunal is thus faced with the fact that Cargill has not articulated its damages resulting from the breach of the transparency duty. This said, it is clear from the record that a substantial portion of the investment costs was in any event committed prior to such breach. Indeed, Cargill first invested in its subsidiary to produce glucose. Faced with poor financial results, it then decided to switch to isoglucose and, after first importing isoglucose for resale in Poland, started to produce its own batches of isoglucose in 1998 (WS/Hueting, ¶ 10-11, Exh. C1; WS/Jaruga, ¶ 13, Exh. C4). In early 1999, Cargill began to produce isoglucose on a continuous flow basis. In a first phase of expansion, it reached 20,000 MT commercial quantity in August 1999. From that time onward, Cargill's expansion grew gradually, i.e. from 20,000 MT commercial quantity to 40,000 MT commercial quantity in April 2000, to 60,000 MT commercial quantity in June 2000, and to 85,000 MT commercial quantity in March 2001 (WS/Hueting, ¶ 13, Exh. C1). It is therefore obvious that substantial costs were already engaged when discussions regarding the determination of the first national quota started and when the breach of transparency occurred.

639. According to Mr. Jaruga's unchallenged testimony, during the final phase of expansion from 85,000 MT commercial quantity in March 2001 to 120,000 MT commercial quantity in February 2002, the date of the alleged completion of the expansion of the production capacity, Cargill installed "*a special mixed-bed demineralizer used to filter out silica, an evaporator, tanks, a microfiltration unit and a chromatograph column for separation of glucose from fructose*" (WS/Jaruga, ¶ 9, Exh. C105). Out of these items, Mr. Jaruga pointed three items that were only used for the F55 syrup line and could not be used otherwise, unlike the evaporator and tanks that were re-deployed for other

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95 Cargill's expert stated: "[t]*hus seeking an approach different from DCF is a fruitless exercise* [...]." "*In my opinion, DCF is the only appropriate methodology to use for evaluating the future loss in this case*". (2nd Haberman's Expert Report, ¶¶ 3.7-3.8).

uses. These three items are the chromatograph the cost of which is estimated at USD 1,345,000, the mixed bed demineralizer the cost of which is estimated at USD 576,000, and the micro-filtration unit the cost of which is estimated at USD 589,000, i.e. a total of USD 2,510,000. Mr. Jaruga was not called for cross examination at the hearing.

640. On this basis, the Tribunal could use its discretion to assess the costs that Cargill would have saved by not pursuing the expansion of its isoglucose production capacity, had it been aware in due time of the criteria to be adopted for the determination of the first national quota. The Tribunal is mindful, however, of the following elements: (i) Cargill has not claimed investment costs and has not computed damages prior to October 2002, (ii) Poland opposes the use of any method of damage quantification other than that chosen by Cargill, (iii) the above figures were not substantiated in the record, and (iv) there would be a risk of double recovery if one were to award cumulatively compensation for investment costs as well as for losses, which necessarily imply that investments have been made (see below).

641. For all these reasons, the Tribunal will not award damages for the breach of transparency.

3.3 Violations related to the national quotas

642. Poland's violations of the Treaty are based on the imposition of the national quotas and more particularly on the difference of treatment between Cargill and the sugar producers taking place during the same period of time, namely during the period of the national quotas from 1 October 2002 to 30 April 2004.

3.3.1 Cargill's injury

643. By treating sugar producers more favorably than Cargill contrary to Article II:1, Poland caused Cargill to earn less than what it could have earned had it been treated no less favorably (the "but for approach"), the extent of that loss being addressed later. By impairing Cargill's "equality of competitive opportunities" under Article II:1 and discriminating against Cargill under Article II:8 and II:6, Poland also caused Cargill to earn less than what it could have earned. In other words, all of these breaches taken together caused one and the same injury.

3.3.2 Cargill's losses

a) Valuation method

644. The Tribunal will begin by establishing Cargill's total lost revenues during the national quota period by comparing Cargill's actual net revenues under the national quotas with its potential net revenues absent any breaches based on the figures provided by the parties between 1 October 2002 (as suggested by Mr. Haberman) and 30 April 2004. It will then discuss whether Cargill's entire lost revenues during the national quota period are the proper measures of the harm caused by Poland's violations in connection with the imposition of national quotas.

645. Most of the parties' arguments with respect to valuation hinge upon Cargill's hypothetical profitability assuming no quotas had been imposed. They in particular address whether Cargill Poland was a going concern, whether the DCF method is appropriate, and to what extent. For the purpose of its current calculation, the Tribunal need not enter into such arguments. The Tribunal is furthermore unconvinced by a retrospective application of the DCF method in this case as suggested by the Claimant's expert. It considers that the award of compensation for lost revenues together with the allocation of compound interest will suffice to reinstate Cargill into the situation it would have been in had no violations of the Treaty occurred in relation to national quotas.

b) Quantification

646. In approaching the quantification, the Tribunal will consider that the following elements were sufficiently established in the course of the proceedings:

- The market for isoglucose was expanding and was likely to be profitable based on the worldwide growth of isoglucose use in the soft drinks market (see Mr. Brenner's witness statement, Exh. C110).

- The soft drinks market in Poland was expanding (Doc FF attached to Mr. Brenner's witness statement, Exh. C110, Report of Datamonitor forecasting a 9.5% annual growth between 2005 and 2010).

- Given the context of the isoglucose market in Poland, Cargill's aimed production capacity of 120,000 MT (commercial quantity) appeared reasonable.

647. The parties have extensively debated over Cargill's full production capacity and have discussed whether Cargill would have been able to produce and sell such production.

The Respondent insisted that Cargill had not adduced documents establishing that it could have produced up to 120,000 MT commercial quantity. The Tribunal has made an opposite finding earlier in this Award (see ¶¶ 350-370 above). The following figures are useful in the present context:

- During the first national quota period: on the basis of the Tribunal's earlier findings (see ¶ 350) and on the fact that Cargill's sales increased by 178% between the 2000/2001 and 2001/2002 periods (see ¶ 354 above), the Tribunal is satisfied that Cargill has established that it had an actual capacity of 83,336 MT commercial quantity during the first quota period.

- During the second national quota period: on the basis of the evidence adduced and the Tribunal's previous findings (¶ 359), the Tribunal is satisfied that Cargill would have been able to reach a production of 120,000 MT commercial quantity in July 2003.

648. As a result, the Tribunal will not follow Mr. Stanley's counter-calculation, which uses Mr. Haberman's methodology capped at 80,000 MT commercial quantity throughout the national quota periods.

649. According to its expert, Cargill's actual sales during the national quota periods amounted to 94,711 MT dry mass. Based on a projection of hypothetical sales of 54,189 MT dry mass for the first period and of 71,000 MT dry mass for the second period, Mr. Haberman found that Cargill would have sold a total of 125,189 MT dry mass over these periods. Accordingly, Cargill lost sales in a quantity of 30,478 MT dry mass for a value of USD 12,404,546[96]. Mr. Haberman then deducted from that amount variable costs of USD 6,461,336[97], sugar fees of USD 13,576 and mitigating activities of USD 4,045,712 (exports and production of F9 [USD 3,826,859] plus profits from imported sales [USD 218,857]), and found a net total loss before discounting and interest of USD 1,911,070 (App. 1 to Second Report).

650. The mitigating activities amounted to USD 4,045,712 during the national quota period because Cargill employed the isoglucose production facilities for other uses, such as the production of F9 isoglucose for dilution, and because it made some profits from exported F55 and F42 sales. F9 is an isoglucose that contains less than 10% fructose in dry mass. The production and sale of F9 is not restricted, as the quotas apply only to

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96 At a price per dry ton of USD 407.

97 Amongst variable costs feature the net wheat cost, power, gas, water, sewer, fixed labor costs, sugars and sweeteners, flour processing costs (1st Haberman Expert Report, ¶ 3.8). The average variable costs for the national quota periods amount to 212 US per MT.

sweeteners with at least 10% fructose dry mass. According to Mr. Haberman, "[t]*his placed the production of volumes of isoglucose that were diluted into F9 outside the quota system"* (1st Report, ¶ 1.13).

651. Poland's expert considered that Cargill's saved costs were *"understated thus overstating* [the] *calculation of lost profits"* (1st Stanley Report, ¶ 4.89), because labor costs were not fixed and should also have been deducted. He further argued that Cargill could have further mitigated its damages by producing additional quantities of glucose on line 1 and by making further export sales (1st Stanley Report, ¶ 4.101).

652. The Tribunal is satisfied by the explanations provided by the Claimant's expert and Mr. Hueting (1st Haberman Expert Report, ¶ 3.5; WS/Hueting, ¶ 27, Exh. C102) that the labour costs associated with the isoglucose production were fixed. Indeed, they do not vary with the production volume and remained fixed regardless of the volume output. The Tribunal also understands that Cargill attempted to mitigate its damages by investing in the construction of a F9 line (WS/Hueting, ¶ 59, Exh. C1). This said, although F9 is an isoglucose product, it is not a substitute to F42 and cannot capture the same market.

653. Regarding exports, the Claimant argues that further sales were limited by high import tariffs in some countries (WS/Wieglus, ¶¶ 11-12, Exh. C104) and by the costs of storing and transportation (idem). As already stated above (¶¶ 552-553 above), Cargill appears to have made a business decision favouring the production of F9 isoglucose over exports. In any event, the Tribunal observes that the mitigation activities during the national quota periods based represented 68% of Cargill's alleged lost isoglucose profits[98] for that period. Considering this high percentage, the Tribunal is inclined to follow Cargill's explanations and thus concludes that Cargill made reasonable efforts to mitigate its damages.

654. Based on an actual production capacity of 83,336 MT commercial quantity (54,189 MT dry mass) and of 120,000 MT commercial quantity (82,500 MT dry mass) as established by Cargill's expert, the Tribunal is thus satisfied that Cargill's lost sales amounted to 30,478 MT dry mass, that is USD 12,404,546. Taking into account Cargill's variable costs, sugar fees and the revenues from its mitigation activities during the national quota period, the Tribunal finds that Cargill's actual net total loss amounts to USD 1,911,070.

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98 I.e. Cargill's lost sales revenues (USD 12,404,546) minus the variable costs (USD 6,461,336) and the sugar fee (USD 13,576).

655. This sum corresponds to Cargill's full production capacity and to 100% of market demand during the national quota period. The Tribunal pondered whether this amount provides a reasonable measure of the position in which Cargill would have been if Poland had not breached the Treaty, or whether Cargill's actual damages should rather be a proportion of its lost revenues mirroring the extent to which the sugar producers received a better treatment than Cargill[99].

656. The Tribunal considers that Cargill's loss of revenues of approximatively USD 1.9 million was directly and entirely caused by the imposition of national quotas. Thus, it finds that Cargill's lost revenues during the national quota period are the best available measure of the impact of Poland's Treaty breaches related to the imposition of national quotas. For the Tribunal, the measure covers the harm caused by all the Treaty breaches during the national quota period. Therefore, the Tribunal finds that Cargill's loss due to the imposition of the national quotas amounts to USD 1,911,070.

c) Interest

657. As mentioned above, the Tribunal finds that in order to ensure full reparation for Cargill's loss, Cargill must be awarded interest to compensate the economic loss arising from the non-availability of the funds due, such interests must be compounded quarterly. The recoverable losses were incurred over a period of 19 months (October 2002 to April 2004). The Tribunal has thus contemplated awarding interest from a near date rather than from the end of this period. However, it has no evidence of the manner in which the proceeds from the mitigating activities are spread over the period and is not in a position to determine a date which would effectively reflect the non-availability of the funds. Hence, it will award interest from the end of the relevant time span, i.e. from 1 May 2004.

658. Cargill claims that the compensation awarded should bear interest at a rate of 5.2 % per annum, which represents its average annual worldwide borrowing rate as it applied in 2005. Cargill also provides such a rate for 2004 (5.21%) and 2003 (6.49%) (1st Haberman Expert Report, ¶ 5.5). It does not, however, produce evidence of this rate nor explain how it is determined. By contrast, Poland requests that the Tribunal apply a commercially reasonable rate and notes that the six-month LIBOR on dollar deposits

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99 As seen above (¶ 377), it is not possible to precisely determine the extent to which the sugar producers have been better treated on the basis of market demand. Indeed, the level of domestic demand for sugar cannot be determined with precision due mainly to the existence of sugar quotas. Irrespective of whether Cargill has satisfied its burden of proof, such a determination would require an impossible proof. Indeed, no evidence can be satisfactorily adduced in the context of a "non-determinable" demand.

was between a lowest rate of 1.124 % in June 2003 and a highest rate of 1.618 % in October 2002 (Poland's Counter-Memorial, p. 153).

659. The Tribunal considers that it would not reflect the actual economic loss to adopt a flat rate over the entire period during which interest is owing and it does not have the necessary information available to adjust Cargill's suggested rate of borrowing to the fluctuations of the market. Moreover, it finds that LIBOR plus an adequate spread to take account of the borrower's solvency risk is generally a fair reflection of the cost of money. It finally considers it appropriate for a project located in Europe to grant a rate applicable in the London financial market as opposed to the US market. Therefore it will apply a rate equal to LIBOR for six month dollar deposits plus 2% from 1 May 2004 to full settlement, such rate to be compounded quarterly.

3.4 Violations related to the EU quotas

660. With respect to the imposition of the EU quotas, Cargill claims lost revenues as of 1 May 2004 over 85 months based on its full production capacity of 120,000 MT commercial quantity. This claim is divided into two periods: a first period from 1st May 2004 to 31 May 2005 (i.e. up to the 1st Expert Report) and a second one from 1 June 2005 to 31 May 2011. To rule on this claim, the Tribunal will first examine Cargill's injury (3.4.1) and whether a causal link has been established (3.4.2) prior to turning to the quantification of Cargill's loss (3.4.3).

3.4.1 Cargill's injury

661. By treating sugar producers more favorably than Cargill contrary to Article II:1, Poland caused Cargill to earn less than what it could have earned had it been treated no less favorably. By impairing Cargill's "*equality of competitive opportunities*" under Article II:1 and discriminating against Cargill under Articles II:8 and II:6, Poland also caused Cargill to earn less than what it could have earned. In other words, as for the national quotas, all these breaches taken together caused one and the same injury, namely a loss of revenues.

3.4.2 Causation

662. In its earlier findings on the national quotas, there was no doubt for the Tribunal that Cargill's entire lost revenues for the period 2001-2004 were directly related to the imposition of the national quotas. Although Cargill had no legitimate expectations with respect to the non-imposition of quotas, it was nonetheless unaware of them when it invested and suffered a direct injury as a result of their imposition.

663. The Tribunal must now examine whether the same considerations apply to the EU quotas. The question is whether the harm inflicted through the imposition of the EU quotas was caused by Poland's acts exclusively or whether Cargill contributed to it, and, if so, to what extent.

664. Article 39 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts provides that the victim's contribution to the injury must be taken into account when setting the reparation:

> *Contribution to the injury*
>
> *In the determination of reparation, account shall be taken of the contribution to the injury by willful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought.*

665. As specified by the *ad hoc* Committee in *MTD v. Chile*, "[t]*here is no reason not to apply the same principle of contribution to claims for breach of treaty brought by individuals*"[100]. In that case, the tribunal, whose decision was upheld by the *ad hoc* Committee, determined that the investor had to bear 50% of the losses because it "*had made decisions that increased their risk in the transaction and for which they bear responsibility, regardless of the treatment given by Chile to the Claimants*"[101].

666. It is clear from the record that Cargill knew that quotas would be imposed upon Poland's accession to the EU (see ¶ 478 above). It does acknowledge it in its Request for Arbitration, in its Memorial, and in letters sent as early as March 1998 (Exh. C28). It has also been clearly established that Cargill received no assurances from Poland regarding the level of the forthcoming quotas (see ¶¶ 480-490).

667. Furthermore, it is established that Cargill could not reasonably expect that the EU methodology for establishing the quotas would reflect domestic demand or production capacity (see ¶¶ 501-507). The Tribunal concurs with Poland when it asserts that "*Cargill should have anticipated that the basis for imposing quotas would be* [historical] *production*" (Poland's Rejoinder, ¶ 51)[102].

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100 Decision on Annulment, 21 March 2007, ¶ 99.

101 *MTD Equity Sdn Rhd and MTD Chile SA v. Republic of Chile*, ICSID Case No. ARB/01/17, Award, 25 May 2004, ¶ 242-243.

102 It also argued that Cargill made a "*gamble*" (footnote 568, Poland Counter-Memorial quoted above, ¶ 289). Put differently, counsel for Poland also argued that Cargill already "*held an isoglucose quota in the EU. It came to Poland to capture additional quotas.* [...] *Cargill simply did not appreciate the regulatory environment into which Cargill invested.*" (Tr. H, p. 1330, lines 7-13). "*Cargill does not dispute that they were fully aware of implications of the EU Common Agriculture Policy and the imminent Poland's accession to the EU. In fact, they have invested in Poland in the field of isoglucose to secure maximum quotas*" (Tr. H, p. 1331, lines 1-6).

668. In other words, Cargill invested an alleged total of USD 27 million in a plant with a production capacity of 120,000 MT commercial quantity knowing of the forthcoming imposition of EU quotas and of the risk that it may not be able to use its full capacity, such quotas being based on historical production. Put differently, Cargill knowingly took a business or regulatory risk.

669. This said, it is true that Poland undertook in the Protocol not to make exceptions to the principle of national treatment for existing investments in the agricultural sector. Hence, Cargill is entitled to treaty protection. Entitlement to treaty protection cannot, however, provide a blanket cover against specific risks knowingly assumed. Indeed, by assuming these risks, Cargill's conduct significantly contributed to its own losses.

670. The extent to which Cargill contributed to its own losses by taking a regulatory risk is a matter for the Tribunal to assess in view of all the circumstances. Although it is admittedly difficult to assess precisely, the Tribunal considers that a contribution of 40% appropriately reflects the measure of risk assumed by Cargill.

3.4.3 Quantification

671. For the quantification of Cargill's claims, the Tribunal will follow the division in time periods adopted by the Claimant's expert[103].

a) First period: 1 May 2004 – 31 May 2005

672. For the 13 months from May 2004 to May 2005, the Claimant alleges net lost profits of USD 28,871,888, namely USD 49,498,560 of lost sales revenue[104] minus USD 18,561,960 of variable costs[105], USD 2,060,202 of sugar fee and USD 4,510 of imported sales profit (2nd Haberman Expert Report, App. 1). The Respondent challenges the premises of the calculation for the same reasons as it did in respect of the national quotas. The Respondent's expert also considers that due to the increase in the price of isoglucose, the demand would have diminished by approximately 12% (1st Stanley Expert Report, ¶4.48; 2nd Stanley Expert Report, ¶ 3.16).

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103 The Tribunal notes that in its last submissions or at the time of the hearing the Claimant did not provide an updated calculation of its "actual" damages by opposition to its future damages. On the day of his testimony, Mr. Haberman only offered updated figures of Cargill's lost profits as of June 2006 to take into account the new sugar fee. As a result, the Tribunal will follow the methodology adopted by the Claimant and will thus treat the period of 2005-2006 as future losses pursuant to the Claimant's presentation.

104 The sales price per dry ton is USD 816. It is accepted by the experts that the price of isoglucose broadly doubled on Poland's joining the EU in 2004 (1st Stanley Expert Report, ¶ 4.46).

105 The average variable costs for this period amount to USD 306 per MT.

673. Like for the national quota period, the Tribunal considers that the award of compensation for lost revenues for that period and compound interest will re-establish the situation which would have existed in all probability, had the violations not been committed with respect to the volumes at stake. The Tribunal has previously found that the plant would have achieved a production of 120,000 MT commercial quantity. In connection with the level of the demand, it is aware of the price elasticity but is not convinced that the demand would have dropped during the short period of time examined at this juncture. For these reasons and on the same basis as for the national quotas period, the Tribunal accepts the amount of loss profits put forward by Cargill.

674. The parties debated whether Cargill could have mitigated its damages during this period. Indeed, the Claimant's calculation does not take mitigation activities into account besides the sale of small quantities of imported isoglucose (USD 4,510). Mr. Haberman explained that he did not consider further F9 sales as of June 2004 because "*the quota now appl*[ied] *to the first intermediate isoglucose product made rather than the final product output*" (1st Report, ¶ 1.14). Mr. Stanley seemed to accept this argument but stated that he was "*instructed that EU regulation 318/2006 permits out-of-quota production of* [industrial] *isoglucose*" (2nd Report, ¶ 2.8) and that "*no account has been taken of potential sales of industrial isoglucose in the claim*" (2nd Report, ¶ 4.6). The Respondent also argued that further export sales to non-EU countries, such as Croatia, could have been made (1st Stanley Expert Report, ¶ 4.101). The Claimant objected that industrial isoglucose is a different product for a different market and that less expensive alternatives already existed for this product (Cargill's SPHB, p. 64). It further put forward the same arguments against export sales than those mentioned for the national quotas period (see above ¶ 653).

675. In the Tribunal's opinion, it is highly unlikely that Cargill could have sustained as high a level of mitigation during the EU quota period as during the national quota period, because the mitigating activities in the former related primarily to F9 sales which were no more available. Nevertheless, the Tribunal is not convinced that Cargill could not have mitigated its losses to a lower extent, especially through exports. Therefore, it will admit that Cargill's mitigation activities could have amounted to 10% of its lost profits for the period from May 2004 to May 2005.

676. Accordingly, the Tribunal will award Cargill damages in an amount of USD 14,438,199. It reaches this result by deducting from the net lost profits of 28,876,398 (i.e. USD 28,871,888 plus USD 4,510 mitigation activities deducted by Claimant) (i) 40% on account of Cargill's contribution to its losses and (ii) 10% on account of mitigation of damages.

677. For the reasons set out in connection with the national quotas (see ¶¶ 657-659 above), this sum shall bear interest compounded quarterly at a rate equal to LIBOR for six-month USD deposits plus 2%. Since the recoverable losses were incurred over a period of 13 months (1 May 2004 to 31 May 2005), interest will start running from the mean date of 1 January 2005. This date takes into account that large losses were incurred towards the end of the relevant period. It also assumes that the deductions are evenly spread over the time period.

b) Second period: 1 June 2005 to 31 May 2011

678. The Tribunal now turns to the second period. As a matter of principle, it agrees that the DCF method is appropriate to compute future losses. In this case, it finds however that Cargill faces critical hurdles in its damage computation, specifically in its DCF projections. These hurdles are due to the lack of certainty of the applicable regulatory framework.

679. First, there is an uncertainty about the price of isoglucose. The price of isoglucose is driven by the price of sugar and the regulation of the sugar market. The regulation of the sugar market creates an artificially high price for sugar. The isoglucose price is set through negotiations with individual customers on the basis of a discount on the price of the sugar (1st Haberman Expert Report, ¶ 2.22). On average, it appears that isoglucose is 10% cheaper than sugar. It is true that, upon Poland's accession to the EU on 1 May 2004, the price of isoglucose increased, as a result of an increase in the price of sugar. However, the EC Regulation 318/2006 (Exh. C150) adopted on 20 February 1998[106] resulted in the price of white sugar being cut by 36% over 4 years until 2009 (1st Stanley Expert Report, p. 30). This had a direct effect on the price of isoglucose. Yet, Mr. Haberman assumed in his written evidence that there would be no further price changes (2nd Report, ¶ 4.10) and testified that possible fluctuations would only move upwards and not downwards (Tr/Haberman p. 1185). The Tribunal is not convinced by this evidence. The sugar market is undergoing profound worldwide restructuring and one cannot rule out that future EU policy may impact sugar prices.

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106 Establishing a temporary scheme for the restructuring of the sugar industry in the Community and amending Regulation (EC) No 1290/2005 on the financing of the Common Agricultural Policy. Applicable from 1 July 2006 to October 2010 (October being the end of the marketing year). "[T]o *bring the Community system of sugar production and trading in line with international requirements and ensure its competitiveness in the future it is necessary to launch a profound restructuring process leading to a significant reduction of unprofitable production capacity in the Community.* [...] *Under this scheme quotas should be reduced in a manner that takes account of the legitimate interests of the sugar industry, sugar beet, cane and chicory growers and consumers in the Community.* [...] *The restructuring measures provided by this Regulation should be financed by raising temporary amounts for those sugar, isoglucose and inulin syrup producers which will eventually benefit from the restructuring process*".

680. Second, there is an uncertainty about the potential effects of EU isoglucose regulation. On the one hand, Regulation 318/2006 just referred to (Exh. C170) provided for a 100,000 MT increase in the EU's total isoglucose quotas in 2006, 2007 and 2008, to be allocated proportionately to current quotas, i.e. an additional 5.275% for Poland and thus an extra quantity of 5,275 MT for Cargill (2nd Haberman Expert Report, ¶ 4.4). On the other hand, Regulation 1609/2005 adopted on 1 October 2005 (Exh. C147), reduced the quotas of EU Member States for 2006/2007 because of an exportable balance exceeding the maximum set in EU laws. Transitional quotas were finally put in place at 23,996 MT for 2006/2007 (IP/06/261). This led Cargill's expert to admit that it is difficult to be certain about future quota levels because most of the recent announcements appear to be contradictory (2nd Haberman Expert Report, ¶ 4.6).

681. This is well illustrated by the fact that, in the course of the proceedings, the adjustments resulting from these two EU Regulations alone lead to a decrease of Cargill's alleged lost gross profit in an amount of USD 88,357,450 (164,556,930[107] minus 76,199,480[108]).

682. Third, the Tribunal notes that the life span or useful economic life of the production equipment until 2011 is hardly established and was seriously disputed by Mr. Stanley.

683. Finally, as for the period of 2004-2005 (see ¶¶ 674-675 above), the Tribunal sees an uncertainty in respect of Cargill's mitigating activities.

684. This said, the Tribunal recognizes that any projection of future cash flows entails unavoidable uncertainties for the simple fact that it seeks to capture future events. At the same time, it notes that the uncertainties in this case far exceed the inevitable measure usually found in computations of future losses. This is mainly due to the uncertainties related to the sugar market.

685. As recalled by Article 36(2) of the ILC Articles on Responsibility of States for Internationally Wrongful Acts, "[t]*he compensation shall cover any financially assessable damages including lost of profits insofar as it is established*". It is indeed an accepted principle (irrespective of the appropriateness of the applicable method of valuation) that: "[o]*ne of the best settled rules of the law of international responsibility of States is that no reparation for speculative or uncertain damage can be awarded.*

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107 First figure adduced by Mr. Haberman for loss gross profits (1st Report).

108 Second figure adduced in the 2nd Report after taking into account the EC Regulations. It does not take into account the effect of the new sugar fee from July 2006 onwards.

[...] [This principle] *does not permit the use of a method that yields uncertain figures for the valuation of damages, even if the existence of damages is certain*"[109].

686. The Tribunal is aware that under certain circumstances a court or tribunal may make up for the insufficiency of evidence by assessing the damage in its discretion[110] and/or using an alternative method of valuation[111]. This implies, however, that there are a number of elements on record which allow one to reach a meaningful figure[112], which is not the case here. The Tribunal is of the opinion that Cargill's claim for lost future profits must be disregarded due to its speculative nature.

687. Having reached this conclusion, the Tribunal asked itself whether it ought to resort to an alternative method of evaluation. More particularly, it pondered whether Cargill was entitled to recover the value of its investment. In this regard, it has taken into account that (i) Cargill has not claimed investment costs[113], (ii) Poland opposes the use of any method of damage quantification other than that chosen by Cargill and most importantly, (iii) the amount of USD 27.4 million adduced by Mr. Hueting's in his first witness statement is unsubstantiated and was disputed by Poland. For these reasons, the Tribunal concluded that the alternative valuation lacked sufficient justification in the circumstances. In any event, an award for the value of Cargill's investment would have been in lieu of compensation for lost profits, as these two concepts are mutually exclusive from an economic point of view.

688. Having carefully considered the parties' arguments and their expert reports, the Tribunal concludes that Cargill is not entitled to compensation on the ground of the imposition of the EU quotas from June 2005 onwards because the quantification of the related losses is fraught with uncertainties to a point that it becomes speculative.

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109 *Amoco International Finance Corporation v. Islamic Republic of Iran*, Partial Award, 14 July 1987, ¶ 238. See e.g. *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, ¶¶ 292-293; *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶¶ 118-130.

110 See e.g., *Southern Pacific Properties v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, ¶ 215, Award, 20 May 1992; *Sapphire International Petroleum Ltd v. National Iranian Oil Co.*, Award, 15 March 1963, 35 ILR 136, pp.187-188.

111 See e.g. for a recent example *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, 20 August 2007.

112 See *ADC v. Hungary*, ICSID Case ARB/03/16, "*The Tribunal is of course grateful to the experts on both sides for their enormous help on the issue of damages. However the Tribunal feels bound to point out that the assessment of damages is not a science. True it is that the experts use a variety of methodologies and tools in order to attempt to arrive at the correct figure. But at the end of the day, the Tribunal can stand back and look at the work product and arrive at a figure with which it is comfortable in all the circumstances of the case*" (¶ 521), Award, 2 October 2006.

113 On the contrary, it rejected this approach as "*misguided, because it necessarily understates Claimant's damages, in violation of the international principle of full compensation. The value of Cargill's isoglucose production business is more than $27.4 million price tag for the equipment's purchase and installation, because that equipment over its lifetime would enable Cargill to earn profits in excess of its cost*". (Cargill's Reply, ¶ 298).

3.5 Taxation

689. The parties debated whether the Tribunal should take into account taxation issues. The Tribunal understands that Cargill's damages were calculated on a before-tax basis, as Cargill's expert assumed that it would be taxed in the jurisdiction in which payment would be made. Mr. Haberman further stated at the hearing that the valuation methodology could "*either work out tax or ignore it completely*" (Tr/Haberman, pp. 1188, ll.14-22, p.1189, ll.1-9). The Tribunal also understands that any sum paid to Cargill under the award will be subject to corporate taxes in the US.

690. On that basis, the Tribunal sees no reason to depart from the before-tax computation adopted by Cargill's expert.

VIII. COSTS OF THE ARBITRATION

691. In application of Articles 38-40 of the UNCITRAL Rules, the Tribunal must determine the amount of costs of the arbitration and which party shall bear them or how they shall be apportioned.

692. Each party has deposited with ICSID an amount of USD 550,000 to cover the costs of the arbitration.

693. A schedule of the amounts invoiced and paid to each member of the Tribunal, as well as the expenses incurred in relation with the services provided by ICSID will be provided by ICSID to the parties as soon as practicable. Having regard to the provision of Article 38(a) of the UNCITRAL Rules, this schedule shall be deemed to form part of this Final Award.

694. According to Article 40 of the UNCITRAL Rules, the unsuccessful party bears in principle the costs of arbitration. In the present case, the Tribunal deems it appropriate that the costs be borne equally by the parties. In reaching this conclusion, the Tribunal takes into account (i) the outcome of the arbitration (Cargill has prevailed on jurisdiction and admissibility; it has succeeded in establishing certain breaches of the Treaty and not others; it has not prevailed on the major portion of its damage claim), (ii) the conduct of the parties during the proceedings (in this respect, in addition to the very competent and professional presentations on both sides, the Tribunal notes that Poland filed new documents after the hearing which prolonged the process), and (iii) the nature of the case (which raised genuine issues that were complex and in part new, and that required extensive submissions by the parties).

695. Both parties have claimed an award in respect of the costs incurred in connection with this arbitration (Art. 38 (c) to (e)). Poland claims USD 2,405,139.35 and Cargill USD 3,092,508.85. For the same reasons as those stated above, the Tribunal finds it appropriate that each party shall bear the costs it has incurred in connection with these proceedings.

IX. DECISION

For the reasons set out above, the Tribunal decides as follows:

1. The Tribunal has jurisdiction over the claims raised in these proceedings. Poland's objections on jurisdiction and admissibility are dismissed;

2. Poland shall pay to Cargill an amount of USD 1,911,070 together with interest at the rate of LIBOR plus 2% for six month borrowings in US dollars, compounded quarterly, from 1 May 2004 until payment is full.

3. Poland shall pay to Cargill an amount of USD 14,438,199 together with interest at the rate of LIBOR plus 2% for six month borrowings in US dollars, compounded quarterly, from 1 January 2005 until payment is full.

4. Each party shall bear one half of the arbitration costs, the final amount of which will be provided by ICSID to the parties as soon as practicable in a schedule that shall be deemed to form part of this Final Award.

5. Each party shall bear its own legal fees and other costs incurred in connection with these proceedings.

6. All other claims are dismissed.

Place of arbitration: Paris

29 February 2008

The Arbitral Tribunal

Prof. Emmanuel Gaillard
Arbitrator

Prof. Bernard Hanotiau
Arbitrator

Prof. Gabrielle Kaufmann-Kohler
President