File No. 34559

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE UNITED STATES OF AMERICA

Applicant
(Appellant)

- and -

CARGILL, INCORPORATED

Respondent
(Respondent)

- and -

THE ATTORNEY GENERAL OF CANADA

Intervener
(Intervener)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL, OF THE RESPONDENT, CARGILL, INCORPORATED

(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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Overview

1. The applicant Mexico proposes that this Court grant leave to hear an appeal from a judgment of the Court of Appeal for Ontario upholding a damages finding made by an expert arbitral tribunal appointed pursuant to Chapter 11 of the *North American Free Trade Agreement* (the "*NAFTA*").

2. The tribunal's damages finding, which reduced the claimed damages of Cargill, Incorporated (the "respondent" or "Cargill") from $124 million to $77.3 million, was a unanimous finding made following an arbitration that lasted over five years, involving comprehensive written and oral submissions on all issues, thousands of exhibits, numerous witness statements and expert reports, and *viva voce* witness and expert testimony. That damages finding was upheld by both Madam Justice Low of the Ontario Superior Court of Justice and by a unanimous panel of the Court of Appeal, each of which held that it was a finding of fact made within the tribunal's jurisdiction.

3. Mexico's application does not take issue with the standard of review – correctness – applied by the Court of Appeal to determine whether this was a finding of fact made within the tribunal's jurisdiction. Nor does it question the settled *NAFTA* jurisdictional requirement – applied by the tribunal and the courts below, and agreed to by the parties – that an investor such as Cargill is entitled to be compensated only for "loss or damage by reason of, or arising out of" a breach of a *NAFTA* Chapter 11 obligation, i.e. that damages must be suffered by Cargill in its capacity as an investor with an investment in Mexico.

4. Instead, Mexico's complaint is about the *application* of the standard of review and the *NAFTA* jurisdictional requirement to the *facts* found by the tribunal. A question relating to the application of unchallenged legal standards to factual findings is not a question of national importance that merits this Court's review.

5. Mexico attempts to characterize this case as raising two issues of national importance, but these issues do not in fact arise in this case.

6. The first alleged question of national importance is whether the *NAFTA* Parties "owe any obligations under *NAFTA* Chapter Eleven to a producer or investor in its home State, as opposed to an investor in the territory of the host State". But neither the tribunal nor the courts below made any finding that Mexico owed obligations to Cargill as a producer or investor in the United States. What the tribunal found, and the courts held it had jurisdiction to determine, was that Cargill was entitled to be compensated for all the net revenues that its Mexican investment would have earned *in Mexico* if not for the measures that Mexico adopted in violation of *NAFTA* Chapter 11 – and that the high fructose corn syrup ("HFCS") that Cargill would have supplied to its Mexican investment but for the *NAFTA* violations was properly included in the calculation of those lost profits. The tribunal held that Cargill's "up-stream" losses were an "inextricable part of Cargill's investment" – a finding of causation related specifically to the facts of this case that does not give rise to an issue of national importance.

7. The second question identified by Mexico relates to the provisions of Article 31(3)(a) and (b) of the *Vienna Convention on the Law of Treaties*, which provide that in the interpretation of a treaty, there should be "taken into account, together with the context" any "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" and "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Mexico asserts that all three *NAFTA* Parties took a common position before the Court of Appeal which should have been determinative of the appeal.

8. However, as the Court of Appeal found, the only common position adopted by the three *NAFTA* Parties is that, as the United States stated at paragraph 19 of its factum, damages under *NAFTA* Article 1116 are "limited to loss or damage suffered by the claimant in its capacity as investor" – a position with which the respondent wholly agrees. Mexico's real complaint in this case is not that the tribunal and courts failed to adopt that position, but that the tribunal failed to properly apply it to the facts of this case – an issue that does not implicate the *Vienna Convention* and is not an issue of national importance.

9. Mexico's application should be dismissed with costs.

Cargill's HFCS Business in Mexico

10. Cargill is a privately-held agricultural products company headquartered in Wayzata, Minnesota that produces, among other products, HFCS, a corn-based substitute for cane sugar used to sweeten soft drinks and other food products.[1] Cargill wholly owns a Mexican subsidiary, Cargill de Mexico, which markets and distributes HFCS to Mexican customers. Cargill de Mexico is headquartered in Mexico City, operates in ten Mexican states and has over 1,000 employees.[2] Mexico is the second largest *per capita* consumer of soft drinks in the world.[3]

11. On January 1, 1994, the *NAFTA* came into effect, providing, among other things, for the phased elimination of barriers on the trade of sweeteners such as HFCS between Mexico and the United States.[4] In 1996, Coca-Cola-Mexico began using a mix of HFCS and sugar in its soft drinks, triggering a widespread conversion to HFCS on the part of Mexican soft drink bottlers.[5]

12. Cargill responded to these developments by expanding both its HFCS production capacity and Cargill de Mexico's HFCS distribution network. It significantly expanded its supply of HFCS capacity and built new distribution facilities in Tula in the state of Hidalgo, Mexico and in McAllen, Texas, near the Mexican border.[6] It determined that optimal efficiency would be achieved by manufacturing the HFCS in its US plants and shipping the HFCS to Cargill de Mexico for sale and distribution to Mexican beverage producers. That approach was consistent with Cargill's general business strategy of building high-scale capacity at the source of the raw material (in this case yellow corn) and building distribution terminals near its customers.[7]

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[1] Award, para. 53, Application Record, Vol. I, Tab D1, p. 26

[2] Award, para. 7, Application Record, Vol. I, Tab D1, p. 16

[3] Award, para. 62, Application Record, Vol. I, Tab D1, p. 28

[4] Award, paras. 48, 71, Application Record, Vol. I, Tab D1, pp. 25, 30

[5] Award, para. 80, Application Record, Vol. I, Tab D1, p. 32

[6] Award, paras. 75, 77-79, Application Record, Vol. I, Tab D1, pp. 31-32

[7] Award, para. 76, Application Record, Vol. I, Tab D1, p. 31

13. Cargill de Mexico's HFCS sales increased 806% in 1996 over 1995 and another 203% in 1997. Cargill de Mexico's share of HFCS sales in Mexico grew from 3.56% in 1995 to 24.84% in 1997.[8]

Mexico's Anti-HFCS Measures

14. Starting in 1997, in order to protect its sugar industry in the face of this conversion to HFCS, Mexico enacted three kinds of trade barriers:

(a) punitive anti-dumping duties on HFCS imported from the United States, imposed in late 1997, subsequently declared unlawful by WTO and *NAFTA* trade panels. and revoked by Mexico in Spring 2002;

(b) a 20% tax on soft drinks and certain other products containing any sweetener other than cane sugar -- imposed by Mexico in January 2002 just before revoking its anti-dumping duties --which was also declared unlawful by a WTO trade panel; and

(c) a new permit requirement for HFCS imports from the United States, adopted by Mexico in January 2002.[9]

15. Upon the enactment of these measures, Mexican beverage producers immediately canceled their HFCS orders and switched back to cane sugar, destroying the Mexican HFCS market. Cargill de Mexico could no longer sell HFCS, forcing it to close its distribution centres in Tula, Mexico and McAllen, Texas.[10]

Cargill's *NAFTA* Arbitral Claim

16. In September 2004, Cargill initiated an arbitral claim under Chapter 11 of the *NAFTA*. Cargill claimed that Mexico's tax and import permit requirements breached *NAFTA* Articles 1102, 1103, 1105, 1106, and 1110.[11]

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[8] Award, para. 80, Application Record, Vol. I, Tab D1, p. 32

[9] Award, para. 101-103, 105-115 and 117-120, Application Record, Vol. I, Tab D1, pp. 38-43

[10] Award, paras. 107-108, 122, Application Record, Vol. I, Tab D1, pp. 39-40, 43; Reasons for Judgment of the Ontario Superior Court of Justice by Madam Justice Low, para. 39, Application Record, Vol. I, Tab D2, pp. 182-183 ("Reasons of the Superior Court of Justice")

[11] *NAFTA*, Articles 1102, 1103, 1105, 1106, 1110, Applicant's Book of Authorities, Tab 9

17. The arbitration was conducted pursuant to the Additional Facility Rules of the International Centre for the Settlement of Investment Disputes ("ICSID"). Although the arbitration hearing ultimately took place at the ICSID facilities in Washington, D.C., the parties agreed that the formal place of arbitration would be Toronto.

18. The parties selected a distinguished tribunal of three experts to conduct the arbitration. Mexico's appointed arbitrator was Donald McRae, the Hyman Soloway Professor of Business and Trade Law at the University of Ottawa and Editor-in-Chief of the Canadian Yearbook of International Law. Cargill's appointed arbitrator was David Caron, the C. William Maxeiner Distinguished Professor of Law at the University of California Berkeley School of Law and Vice-President of the American Society of International Law. The tribunal was chaired by Michael Pryles, then President of the Australian Centre for International Commercial Arbitration and now Chairman of the Singapore International Arbitration Centre.[12]

19. In accordance with the applicable ICSID procedure, the parties filed extensive briefs, documentary evidence and witness statements. Cargill filed its Memorial on December 22, 2006 together with three fact witness statements, two expert reports, exhibits and legal authorities. Mexico filed its Counter Memorial on May 2, 2007, together with four fact witness statements, one expert report, exhibits and legal authorities. Cargill submitted its Reply Memorial on July 2, 2007, together with four rebuttal fact witness statements, an expert rebuttal report, exhibits and legal authorities. Mexico submitted its Rejoinder Memorial on August 20, 2007, together with three rebuttal fact witness statements, a rebuttal expert report, exhibits and legal authorities.[13]

20. The tribunal held its hearing on jurisdiction and merits over five days from October 1 to 5, 2007. The tribunal heard evidence from 10 witnesses. Following the hearing, the tribunal received additional written submissions from both parties. The tribunal issued its 161 page Award in September 2009, after almost two years of deliberations following the hearing. As described below, the tribunal unanimously ruled that Mexico had breached three provisions of the *NAFTA* treaty and awarded Cargill US $77,329,240 in damages plus interest and costs.[14]

[12] Biographies of the Tribunal Members, **Tab 2A**

[13] Award, paras. 27-32, Application Record, Vol. I, Tab D1, pp. 22-23

[14] Award, paras. 39-51, Application Record, Vol. I, Tab D1, pp. 24-26

Tribunal's Conclusions on Jurisdiction

21. At the arbitration, Mexico raised a number of objections relating to the jurisdiction of the tribunal to deal with the claims made by Cargill. One of these objections, which Mexico reiterated in the court proceedings below, was that Cargill sought "damages sustained by its operations in the United States and not for operations relating to an investment in Mexico."[15]

22. The tribunal concluded that this objection was not jurisdictional, but was instead a merits issue related to the interpretation and application of the *NAFTA*'s damages provisions. The tribunal stated at paragraph 154 of the Award:

> It is not in dispute that there is an investment in Mexico in the form of Cargill de Mexico. As the Tribunal holds there to be a violation of NAFTA Chapter 11 provisions by a measure relating to that investment and Claimant as an investor, Claimant is entitled to claim for the loss or damage incurred 'by reason of, or arising out of, that breach.' Whether such damages encompass losses to Cargill within its business operations in the United States is a question of interpretation of these damages provisions and is not essentially a jurisdictional question.[16]

23. The tribunal then explained in detail why Cargill's claims satisfied each jurisdictional requirement of Chapter 11.

24. The tribunal first addressed the requirements of *NAFTA* Article 1101, which defines the scope of Chapter 11. The tribunal found that Article 1101(1) was satisfied because Cargill's claims challenged measures adopted or maintained by Mexico that related to Cargill (an investor of another *NAFTA* Party) and Cargill's investment in the territory of Mexico, namely Cargill de Mexico.[17]

25. The tribunal next found that Cargill satisfied the jurisdictional requirements of *NAFTA* Articles 1116 and 1117. Article 1116 authorizes claims brought by "an investor of a Party on its own behalf", and Article 1117 authorizes claims brought by "an investor of a Party on behalf of an enterprise." In each case the claim must allege "loss or damage by reason of, or arising out

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[15] Award, para. 142, Application Record, Vol. I, Tab D1, p. 50

[16] Award, para. 154, Application Record, Vol. I, Tab D1, p. 55

[17] Award, paras. 162-180, Application Record, Vol. I, Tab D1, pp. 56-62

of," a breach of a *NAFTA* obligation by the host country. The tribunal recognized that Cargill brought its claims under both Articles 1116 and 1117, the requirements of which were satisfied because Cargill was an investor of a Party and Cargill de Mexico was its enterprise, and that Cargill claimed losses due to Mexico's alleged breaches of the *NAFTA*.[18]

26. Having determined that all *NAFTA* jurisdictional requirements were satisfied, the tribunal concluded it had jurisdiction to hear the dispute.[19]

Tribunal's Findings on Merits

27. On the merits, the tribunal found that Mexico's tax and permit measures violated *NAFTA* Articles 1102, 1105, and 1106 and caused substantial harm to Cargill's investment in the Mexican market.[20]

28. First, the tribunal determined that Mexico's measures violated *NAFTA* Article 1102, which requires that every *NAFTA* Party accord to investors of another Party "treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to … investments."[21] The tribunal found that, by adopting the tax and the import permit requirements, Mexico had accorded less favorable treatment to Cargill and Cargill de Mexico than to Mexico's domestic suppliers of cane sugar, with which they were in like circumstances.[22]

29. Second, the tribunal held that Mexico's import permit requirement violated *NAFTA* Article 1105, which requires "fair and equitable treatment" of investments of investors of other *NAFTA* Parties.[23] The tribunal found that "the import permit was put into effect by Mexico with the express intention of damaging Claimant's HFCS investment to the greatest extent possible," its "sole effect was to virtually remove Claimant from the Mexican HFCS market," and it "all but annihilated a series of investments for the time that the permit requirement was in place."

[18] Award, paras. 181-182, Application Record, Vol. I, Tab D1, p. 62

[19] Award, para. 184, Application Record, Vol. I, Tab D1, p. 63

[20] *NAFTA*, Articles 1102, 1105, and 1106, Applicant's Book of Authorities, Tab 9

[21] *NAFTA*, Article 1102, Applicant's Book of Authorities, Tab 9

[22] Award, paras. 185-223, Application Record, Vol. I, Tab D1, pp. 63-73

[23] *NAFTA*, Article 1105, Applicant's Book of Authorities, Tab 9

The tribunal concluded that Mexico's anti-HFCS campaign had "surpasse[d] the standard of gross misconduct and [was] more akin to an action in bad faith."[24]

30. Third, the tribunal ruled that the tax violated *NAFTA* Article 1106(3)(b), which bars a *NAFTA* Party from conditioning receipt of an advantage in connection with an investment on the use of domestically-produced goods. The tribunal found that the tax violated that provision by conditioning "a tax advantage on the use of domestically produced cane sugar for the very purpose of affecting the sale of HFCS."[25]

31. The tribunal rejected two of Cargill's claims, finding no violation of *NAFTA* Articles 1103 and 1110.[26] It also rejected Mexico's contention that its tax and permit requirements could not be deemed wrongful because they were legitimate countermeasures in response to sugar import restrictions by the United States.[27]

Tribunal's Findings on Damages

32. Having addressed jurisdiction and liability, the tribunal proceeded to a detailed and extensive calculation of damages. The tribunal adopted a model proposed by Brent Kaczmarek, Cargill's damages expert from Navigant Consulting, which calculated damages as the lost cash flows from Cargill de Mexico's lost HFCS sales, rather than basing damages on the amount invested by Cargill, which had been proposed by Mexico's expert. Cargill did not seek damages based on the substantial harm caused by Mexico's *NAFTA* violations to Cargill's US plants or other impacts in the US. As Kaczmarek explained: "We have limited our calculation to the losses suffered by Cargill and CdM in the Mexican HFCS market, thus not incorporating losses Cargill sustained in the US due to a glut of HFCS supply. As a result, our damages analysis is limited to the Mexican market."[28]

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[24] Award, paras. 298-305, 550, Application Record, Vol. I, Tab D1, pp. 97-99, 172

[25] Award, para. 319, Application Record, Vol. I, Tab D1, p. 103

[26] Award, paras. 234, 378, Application Record, Vol. I, Tab D1, pp. 76, 121; *NAFTA*, Articles 1103, 1110, Applicant's Book of Authorities, Tab 9

[27] Award, paras. 420-430, Application Record, Vol. I, Tab D1, pp. 135-138

[28] Award, paras. 444-448, Application Record, Vol. I, Tab D1, pp. 143-144; Expert Rebuttal Report of Brant Kaczmarek dated 30 July 2007, para. 69, **Tab 2B**

33. The parties disputed whether the calculation of Cargill de Mexico's lost cash flows should be based on a "but for" scenario that removed the impact of the anti-dumping duties from 1998 to 2002 (as advocated by Cargill) or instead one that began in 2002 with an HFCS market that had been significantly reduced by Mexico's anti-dumping duties over the prior four years (as advocated by Mexico). The tribunal agreed with Mexico. Because Navigant had prepared lost cash flow models for both scenarios, the tribunal adopted Navigant's alternative lost cash flows model, which measured lost cash flows beginning in June 2002, did not correct for the effect of the anti-dumping duties, and calculated damages to be $100 million.[29]

34. The tribunal then analyzed the proper measure of damages and the compensable period of loss, as well as the projected size of the Mexican HFCS market, Cargill's projected market share, and the price of HFCS in Mexico over that period. The tribunal modified three key variables in Navigant's alternative model—the HFCS adoption rate, Cargill's market share, and the Mexican HFCS price—reducing the calculated damages by 23% to $77,329,240.[30]

35. For the purposes of presenting the lost cash flow according to the actual economic model established by Cargill to sell HFCS in Mexico, Cargill's damages expert allocated the lost cash flow 53.23% to Cargill and 46.77% to Cargill de Mexico based on the estimated HFCS transfer price. This allocation between what the tribunal called "up-stream losses" and "down-stream losses" played no role in the tribunal's determination of the total damages suffered by Cargill due to lost cash flows in Mexico from CdM's lost HFCS sales.[31]

36. The tribunal rejected Mexico's contention that Cargill was not entitled to any damages associated with its lost HFCS transfers to Cargill de Mexico because its production facilities were located in the United States. Based on "the particular facts of this case," the tribunal found that the profits generated by Cargill's HFCS sales to Cargill de Mexico for the latter's marketing, distribution and re-sale in Mexico "were so associated with the claimed investment, CdM, as to be compensable under the *NAFTA*." The tribunal explained:

> Cargill's investment in Mexico involved importing HFCS and then selling it to domestic users, principally the soft drink industry.

[29] Award, paras. 462-465, Application Record, Vol. I, Tab D1, p. 148

[30] Award, paras. 466-540, Application Record, Vol. I, Tab D1, pp. 149-170

[31] Award, paras. 515-516, Application Record, Vol. I, Tab D1, p. 163

> Thus, supplying HFCS to Cargill de Mexico was an inextricable part of Cargill's investment.[32]

37. It followed that:

> losses resulting from the inability of Cargill to supply its investment Cargill de Mexico with HFCS are just as much losses to Cargill in respect of its investment in Mexico as losses resulting from the inability of Cargill de Mexico to sell HFCS in Mexico.[33]

38. The tribunal therefore concluded that Cargill should be compensated for its net lost profits as determined for both Cargill de Mexico's lost sales to the Mexican market (down-stream losses), and Cargill's lost sales to Cargill de Mexico (up-stream losses).[34]

39. Finally, the tribunal awarded Cargill interest and costs.[35]

40. The tribunal distinguished the facts in this case from the facts in another arbitral case brought by Archer Daniels Midland ("ADM") and Tate & Lyle in respect of the same Mexican anti-HFCS measures.[36] In that other case, a tribunal had awarded damages that excluded losses resulting from lost cross-border HFCS sales. When the ADM decision was issued, the tribunal asked Cargill and Mexico for submissions on its implications. After considering those submissions, the tribunal held that the ADM case was distinguishable on its facts. The tribunal explained that, whereas ADM and Tate & Lyle created a Mexican joint venture (ALMEX) to produce HFCS in Mexico, Cargill de Mexico "was not a producer of HFCS and its HFCS business therefore depended on the HFCS sold to it by its parent". Thus, Cargill's investment in Mexico was an HFCS distribution business for which imported HFCS was an essential input, unlike ALMEX, an HFCS manufacturing business that produced its own HFCS in Mexico.[37]

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[32] Award, para. 523, Application Record, Vol. I, Tab D1, p. 165

[33] Award, para. 523, Application Record, Vol. I, Tab D1, p. 165

[34] Award, para. 526, Application Record, Vol. I, Tab D1, p. 166

[35] Award, paras. 541-547, Application Record, Vol. I, Tab D1, pp. 170-172

[36] *Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States*, Award (21 Nov. 2007), ICSID Case No. ARB(AF)/04/05, Applicant's Book of Authorities, Tab 1

[37] Award, para. 524, Application Record, Vol. I, Tab D1, p. 165. The tribunal did not receive a copy of the public version of the *CPI* award in time to address it. Award, para. 380 n. 102, Application Record, Vol. I, Tab D1, p. 122.

Madam Justice Low's decision

41. On November 25, 2009, Mexico filed an application with the Superior Court seeking to set aside the Award on two main grounds: (1) that the tribunal had exceeded its jurisdiction when it calculated the damages suffered by Cargill in relation to its investment in Mexico to include losses suffered by Cargill in the United States as supplier and exporter to its Mexican investment; and (2) that the tribunal had exceeded its jurisdiction by failing to properly distinguish between Cargill as an "investor" and Cargill's "investment" in its finding that Mexico's import permit requirement breached *NAFTA* Article 1105.[38]

42. Madam Justice Low dismissed Mexico's application. With respect to the first ground raised by Mexico, she held that the tribunal had correctly found that it had jurisdiction to determine what the investment comprises and what damages are sufficiently proximate for recovery, and had gone on to properly make that determination as part of its factual findings. With respect to the second ground, she held that the tribunal did not exceed its jurisdiction in its findings respecting *NAFTA* Article 1105.[39]

Court of Appeal Decision

43. Mexico appealed to the Court of Appeal for Ontario on two main grounds: (1) that Madam Justice Low had wrongly applied a standard of reasonableness rather than correctness in reviewing the tribunal's decision; and (2) that she had erred in applying the standard of review to the facts of the case, in particular in failing to find that the tribunal had wrongfully awarded damages to Cargill in its capacity as a producer rather than an investor.

44. The Court of Appeal dismissed Mexico's appeal.

45. Madam Justice Feldman, writing for a unanimous panel, held that the appropriate standard of review for the court to apply is correctness, in the sense that the tribunal had to be correct in its determination that it had the jurisdiction to make the decision it made. She emphasized, however, that the fact that the standard of review on jurisdictional questions is

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[38] Notice of Application dated November 25, 2009, **Tab 2C**

[39] Reasons of the Superior Court of Justice, paras. 67, 68, 74-79, Application Record, Vol. I, Tab D2, pp. 192, 193-194

correctness does not give the courts a broad scope for intervention and that courts are expected to intervene "only in rare circumstances where there is a true question of jurisdiction".[40]

46. With respect to the application of the standard of review, Madam Justice Feldman found that the tribunal correctly identified the jurisdictional limits on its ability to award damages and sought to determine Cargill's losses as an investor "by reason of or arising out of" Mexico's breaches of the *NAFTA*. She explained that the tribunal went on to make findings of fact to determine which of the claimed damages fell within the defined criteria, ruling that this was a decision for the tribunal to make, which a court may not set aside if it was reasonable.[41]

47. Madam Justice Feldman also dealt with an argument put forward by Mexico and Canada that the *NAFTA* Parties, in various submissions to arbitral tribunals, had adopted an agreement or subsequent practice under the terms of the Article 31(1)(3) (a) and (b) of the *Vienna Convention*[42] that essentially precluded the tribunal from awarding "upstream" damages in this case. She explained that if the three *NAFTA* Parties had adopted a clear, well-understood, agreed common position that prohibited the award of any losses suffered by an investor in its home business operation, even if caused by the breach, it would be an error of jurisdiction for the tribunal to fail to give effect to that interpretation. However, she held that in this case the common position was simply that damages must relate to the investment and to the investor as an investor, an interpretation that "was understood and implemented by the *Cargill* tribunal, based on its findings of the nature of the losses in this case".[43]

PART II – QUESTIONS IN ISSUE

48. The sole issue is whether this case raises issues of national importance such that this Court should grant Mexico's application for leave to appeal.

49. In attempting to characterize the case as one of national importance, Mexico states that the case raises the following two questions:

[40] Reasons for Judgment of the Court of Appeal for Ontario by the Honourable Madam Justice Feldman, para. 44, Application Record, Vol. II, Tab D4, p. 219 ("Reasons of the Court of Appeal")

[41] Reasons of the Court of Appeal, paras. 70-74, Application Record, Vol. II, Tab D4, pp. 228-230

[42] *Vienna Convention*, art. 31(3)(a), (b), Applicant's Book of Authorities, Tab 10

[43] Reasons of the Court of Appeal, paras. 83 and 84, Application Record, Vol. II, Tab D4, p. 234

(a) Do the *NAFTA* Parties owe any obligations under *NAFTA* Chapter 11 to a producer or investor in its home state, as opposed to an investor in the territory of the host state, the breach of which may give rise to compensable damages?

(b) With respect to the *Vienna Convention*:

(i) Do Articles 31(3)(a) or 31(3)(b) of the *Vienna Convention* require a court sitting in review of an international arbitral award to abide by the common agreement or practice of the treaty parties as expressed in submissions made to the court at the time of the review?

(ii) What is the standard against which an alleged agreement or practice of the treaty parties must be assessed, for the purposes of Articles 31(3)(a) and 31(3)(b) of the *Vienna Convention*?

50. However, this is a mischaracterization of the true nature of this case. As described below, none of these questions is really at issue or disputed in this case.

PART III – ARGUMENT

Issues Identified by Mexico Do Not Arise in this Case

51. The two issues identified by Mexico as being of national importance do not in fact arise in this case.

52. ***With respect to the first issue***, neither the tribunal nor the courts below made any finding that Mexico owed obligations to Cargill as a producer or investor in the United States. What the tribunal found, and the courts held it had jurisdiction to determine, was that Cargill was entitled to be compensated for all the net revenues that its Mexican investment would have earned *in Mexico* if not for the measures that Mexico adopted in violation of Chapter 11 of *NAFTA* – and that the calculation of those lost profits properly included the HFCS that Cargill would have supplied to its Mexican investment but for the *NAFTA* violations. The tribunal held that these "upstream" losses were an "inextricable part of Cargill's investment" – a finding of causation related specifically to the facts of this case.

53. Before the tribunal, Mexico argued that Cargill's lost profits on the product it would have sold to Cargill de Mexico did not relate to Cargill's investment, and instead were losses incurred by Cargill in its capacity as a producer. The tribunal considered and rejected that argument, finding as a fact that the production of HFCS in Cargill's U.S. facilities, its transfer to Cargill de Mexico, and its distribution by Cargill de Mexico were integrated activities and that losses arising from these activities, even if they were notionally "allocated" to Cargill, resulted from the impact of Mexico's *NAFTA* breaches on Cargill's investment in Mexico and thus were compensable under the *NAFTA*.

54. Mexico asked Madam Justice Low and then the Court of Appeal to set aside this finding, but both courts properly held that this was a factual finding within the tribunal's jurisdiction to make.

55. As Madam Justice Low stated:

> The tribunal viewed the investment in the instant case as comprising importation of HFCS into Mexico and selling it to domestic users. One segment of the business, the making of product, was accomplished in the U.S. in Cargill's plants and the other segment of the business, distribution of the product, was accomplished in Mexico by the subsidiary out of the facility at Tula. The tribunal found, as a fact, that the investment included everything that it took to achieve the result of obtaining a significant share of the Mexican market in HFCS. That there was integration, with the investment CdM being a wholly owned subsidiary and a part of Cargill's international operation was likely a significant factor in that finding. It is not within the jurisdiction of this court to review the tribunal's factual findings.[44]

56. Madam Justice Feldman stated for the Court of Appeal:

> Clearly there is an argument as to whether lost capacity in Cargill's U.S. plants constitutes damages by reason of, or arising out of, Mexico's breaches to the extent that those breaches affected CdM. However, this is a quintessential question for the expertise of the tribunal, rather than an issue of jurisdiction. Had there been language in the Chapter 11 provisions that prohibited awarding any damages that were suffered by the investor in its home business operation, even if those damages related to and were integrated

[44] Reasons of the Superior Court of Justice, para. 63, Application Record, Vol. I, Tab D2, pp. 191

> with the Mexican investment, that would have been a jurisdictional limitation that would have precluded the arbitration panel from awarding such damages, even if in its view, they otherwise flowed from the breaches. But there is not such limiting language.[45]

57. In rejecting Mexico's argument, the tribunal was well aware that Cargill was entitled to damages incurred only in its capacity as an investor, and not a producer or exporter. For example, at paragraph 515 of the Award, the tribunal noted that Cargill was not claiming for any lost direct sales from Cargill to Mexican customers, only for damages suffered by Cargill that arose from Mexico's treatment of its investment Cargill de Mexico. Nor did Cargill claim for damages arising from its investment in its U.S. plants that was affected by the Mexican measures or from price declines due to the over-supply of HFCS after the Mexican market collapsed. The tribunal noted at paragraph 196 of the Award that, although the impugned tax had an impact on Cargill as a producer of HFCS in the United States and an exporter of HFCS to Mexico, "that effect is not something that can be the subject of a *NAFTA* Chapter 11 claim." Instead, the tribunal was careful to award damages to Cargill only for the harm it suffered as investor in Mexico.[46]

58. This is not a case in which the tribunal and courts have extended the scope of the Chapter 11 damages provision to include damages suffered by Cargill in its capacity as a producer. The tribunal understood and implemented the requirement that Cargill be awarded only those damages suffered in its capacity as an investor. Mexico's complaint is with the tribunal's factual finding that Cargill's allocated "upstream losses" were inextricably tied to its investment in Cargill de Mexico and therefore compensable. That is a finding of fact made by an expert tribunal acting within its jurisdiction, which does not give rise to issues of national importance.

59. ***With respect to the second issue*** – the *Vienna Convention* argument – there is no basis for applying the "subsequent agreement" and "subsequent practice" provisions of the *Vienna Convention* to the facts of this case. The Court of Appeal agreed with Mexico that if the three *NAFTA* Parties had adopted a clear, well-understood, agreed common position that prohibited the award of any losses suffered by an investor in its home business operation, even caused by the

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[45] Reasons of the Court of Appeal, para. 72, Application Record, Vol. II, Tab D4, pp. 229

[46] Award, paras. 196, 515, Application Record, Vol. I, Tab D1, pp. 66, 163

breach, it would be an error of jurisdiction for the tribunal to fail to give effect to that interpretation. However, the Court of Appeal found, after reviewing the various submissions of the parties, that there was no evidence that the *NAFTA* Parties had adopted a common position that had this effect.

60. Instead, the only common position that the *NAFTA* parties have adopted in their submissions to *NAFTA* tribunals and courts is – as the United States describes it at paragraph 19 of its Court of Appeal factum – that recovery "is limited to loss or damage suffered by the claimant in its capacity as investor".[47] As the Court of Appeal held, the tribunal was well aware that Cargill was entitled to damages incurred only in its capacity as an investor, not as a producer or exporter, and proceeded on that basis in making its factual findings as to the amount of damages to be awarded to Cargill.

61. This is simply not a case in which the tribunal or the courts have failed to comply with a common position adopted by the *NAFTA* Parties and in which the questions raised by Mexico respecting the *Vienna Convention* arise.

62. Finally, *NAFTA* Article 2001 establishes a Free Trade Commission, composed of the *NAFTA* Parties, that is specifically authorized to resolve disputes that may arise regarding the *NAFTA*'s interpretation and application.[48] Article 2001 has been previously relied on by the *NAFTA* Parties to issue an interpretation respecting a provision in *NAFTA* Chapter 11.[49] If Mexico or any of the other *NAFTA* Parties is concerned about an interpretation of the *NAFTA* adopted by a *NAFTA* tribunal, it should use this mechanism to ensure that future tribunals do not interpret the *NAFTA* in this way, rather than seeking to enlist this Court for that purpose.

Alleged "Consequences" of Tribunal and Court Decisions are Unrealistic and Unsubstantiated

63. Mexico at paragraphs 30 to 34 of its memorandum of fact and law raises a number of *in terrorem* arguments about consequences that will allegedly result if leave is not granted and the Court of Appeal decision is allowed to stand. These arguments are wholly unsubstantiated.

[47] Factum of the United States of America (31 January 2011), para. 19, Application Record, Vol. II, Tab F-B, p. 317

[48] *NAFTA* Article 2001

[49] NAFTA Free Trade Commission, Notes of Interpretation on Access to Documents and Minimum Standard of Treatment in Accordance with International Law (July 31, 2001)

64. At paragraph 31, Mexico submits that "the logical consequence of the approaches taken by the tribunal and the Court of Appeal is that there will be *less* investment from abroad, with foreign investors relying upon the new obligations found to be owed to them in their home States, as long as they establish a toehold in one of the other *NAFTA* Parties sufficient to engage Chapter Eleven." The suggestion that the tribunal and court decisions in this case will result in less foreign investment in *NAFTA* countries is fanciful. It appears to be based on the wholly unrealistic assumption that businesses will make investment decisions based on the results in cases such as this, and is unsupported by any affidavit or other evidence.

65. At paragraph 32, Mexico argues that the precedent in this case will be invoked by bilateral investment treaty claimants throughout the world, and increase the exposure of Canada and other states to claims they did not contemplate they entered into these treaties. Once again, this is an unsubstantiated assertion. This is not a case in which the tribunal and courts have extended the scope of the treaty obligations to include claims not contemplated by the drafters. It is simply a case where Mexico disagrees with the tribunal's findings as to the amount of damages suffered by Cargill in its capacity as an investor.

66. At paragraph 33, Mexico argues that the Court of Appeal's approach to the *Vienna Convention* "creates ambiguities regarding the manner in which Canadian courts will interpret and apply treaties … and implicates Canada's national interests, as well as its international obligations to its treaty partners". But the Court of Appeal said nothing about the *Vienna Convention* that was in anyway ambiguous or deleterious to Canada's interests or international obligations. The only determination the Court made, as described at paragraphs 8 and 47 above, was that there was no evidence that the *NAFTA* Parties had adopted a common position that was inconsistent with the tribunal's decision.

67. Finally, at paragraph 34, Mexico argues that the issue of the standard of review for jurisdictional error in international arbitrations is an issue of national importance meriting this Court's review. But the Court of Appeal *agreed* with Mexico that the appropriate standard of review for jurisdictional error was correctness. Neither Mexico nor any of the other parties seek to have this determination reviewed or argue that it is inconsistent with Canadian or international case law. As a result, this case would be a poor vehicle for this Court to hear argument on and

consider the question of standard of review as it applies to jurisdictional decisions by arbitral tribunals.

A.G. Canada's Submissions

68. The Intervener A.G. Canada has filed a brief response supporting Mexico's application for leave to appeal The A.G. Canada argues that this appeal is of public importance because the tribunal and the courts below have expanded the scope of damages claims that can be asserted by investors under NAFTA Chapter 11 by granting "damages for Cargill's investments in its home state".

69. Canada's assertion is not correct. As explained at paragraphs 22, 32 to 40, 46, 57 and 60 above, the tribunal did not award Cargill damages "for Cargill's investments in its home state". The awarded damages were all incurred "by reason of" the harm suffered by Cargill's investments in Mexico as a result of Mexico's breaches of the NAFTA. It is important to remember that because only foreign investors can bring claims under NAFTA Chapter 11, it is common and expected for damages incurred to be reflected in a claimant's books at its home state headquarters, even though the harm to its investment occurred in the host state. It is also important to remember, as the Court of Appeal held and as Mexico concedes in its application for leave, that there is no territorial or other geographical limitation with respect to the damages that may be claimed under NAFTA Chapter 11, so long as they are claimed by an investor in respect of its investment in the host state.

PART IV – SUBMISSIONS ON COSTS

70. The respondent respectfully requests that it be granted costs.

PART V – ORDER REQUESTED

71. The respondent respectfully requests that this application for leave to appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

as agent for

John Terry
Torys LLP
Counsel for the Respondent, Cargill, Incorporated

PART VI – TABLE OF AUTHORITIES

Case	Para. No.
Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. The United Mexican States, Award (21 Nov. 2007), ICSID Case No. ARB(AF)/04/05 **[see Applicant's Book of Authorities, Tab 1]**	40

PART VII – STATUTES

Document	Para. No.
North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can TS 1994 No. 2, 32 ILM 289 (entered into force 1 January 1994), Articles 1102, 1103, 1105, 1106, 1110, **2001 [see Applicant's Book of Authorities, Tab 9 for Articles 1102, 1103, 1105, 1106, 1110; Article 2001 appended]**	16, 24, 25, 27-29, 62
NAFTA Free Trade Commission, Notes of Interpretation on Access to Documents and Minimum Standard of Treatment in Accordance with International Law (July 31, 2001) **[appended]**	62
Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 at 338, 8 ILM 679, Article 31(3)(a), (b) **[see Applicant's Book of Authorities, Tab 10]**	7, 47

Section A - Institutions

Article 2001: The Free Trade Commission

1. The Parties hereby establish the Free Trade Commission, comprising cabinet-level representatives of the Parties or their designees.

2. The Commission shall:

(a) supervise the implementation of this Agreement;

(b) oversee its further elaboration;

(c) resolve disputes that may arise regarding its interpretation or application;

(d) supervise the work of all committees and working groups established under this Agreement, referred to in Annex 2001.2; and

(e) consider any other matter that may affect the operation of this Agreement.

3. The Commission may:

(a) establish, and delegate responsibilities to, ad hoc or standing committees, working groups or expert groups;

(b) seek the advice of non-governmental persons or groups; and

(c) take such other action in the exercise of its functions as the Parties may agree.

4. The Commission shall establish its rules and procedures. All decisions of the Commission shall be taken by consensus, except as the Commission may otherwise agree.

5. The Commission shall convene at least once a year in regular session. Regular sessions of the Commission shall be chaired successively by each Party.

Article 2001 : La Commission du libre-échange

1. Les Parties créent la Commission du libre-échange, qui sera composée de représentants des Parties ayant rang ministériel ou de leurs délégataires.

2. La Commission :

a) dirigera la mise en oeuvre du présent accord;

b) supervisera son développement;

c) réglera les différends qui pourront survenir relativement à son interprétation ou à son application;

d) dirigera les travaux de tous les comités et groupes de travail institués en vertu du présent accord et visés à l'annexe 2001.2; et

e) étudiera toute autre question pouvant affecter le fonctionnement du présent accord.

3. La Commission pourra :

a) instituer des comités, groupes de travail ou groupes d'experts, spéciaux ou permanents, et leur déléguer des responsabilités;

b) recourir aux avis de personnes ou de groupes privés; et

c) prendre, dans l'exercice de ses fonctions, toutes autres dispositions dont les Parties pourront convenir.

4. La Commission établira ses règles et procédures. Toutes ses décisions seront prises par consensus, sauf lorsqu'elle en disposera autrement.

5. La Commission se réunira au moins une fois l'an en session ordinaire. Ces sessions seront présidées successivement par chacune des Parties.

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Dispute Settlement

NAFTA - Chapter 11 - Investment

Notes of Interpretation of Certain Chapter 11 Provisions (NAFTA Free Trade Commission, July 31, 2001)

See the News Release of August 1, 2001

Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:

1. **Access to documents**
    a. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.
    b. In the application of the foregoing:
        i. In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.
        ii. Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
            a. confidential business information;
            b. information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
            c. information which the Party must withhold pursuant to the relevant arbitral rules, as applied.
        iii. The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.
        iv. The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information.
    c. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold in accordance with Articles 2102 or 2105.
2. **Minimum Standard of Treatment in Accordance with International Law**

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1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

Closing Provision

The adoption by the Free Trade Commission of this or any future interpretation shall not be construed as indicating an absence of agreement among the NAFTA Parties about other matters of interpretation of the Agreement.

Done in triplicate at Washington, D.C., on the 31st day of July, 2001, in the English, French and Spanish languages, each text being equally authentic.

For the Government of the United States of America

____

Robert B. Zoellick
United States Trade Representative

For the Government of the United Mexican States

____

Luis Ernesto Derbez Bautista
Secretary of Economy

For the Government of Canada

____

Pierre S. Pettigrew
Minister for International Trade

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UNIVERSITY OF OTTAWA

Faculty Liasons: University of Ottawa

Donald M. McRae

FRSC, LL.B. (Otago). LL.M. (ibid.), Dipl.Int.Law (Cant.), of the Bars of New Zealand and Ontario. Full Professor

Professor McRae holds the Hyman Soloway Chair in Business and Trade Law and is a former Dean of the Common Law Section. He was formerly Professor and Associate Dean at the Faculty of Law at the University of British Columbia. He specializes in the field of International Law and has been an Advisor to the Department of External Affairs of the Government of Canada and Counsel for Canada in several international fisheries and boundary arbitrations. He was Chair of the first dispute settlement panel set up under Chapter 18 of the Canada-U.S. Free Trade Agreement, and has sat on subsequent panels under Chapters 18 and 19 of the Free Trade Agreement. He was also Chair of the first dispute settlement panel set up under the U.S. -Israel Free Trade Agreement. He is currently on the roster of panellists under Chapter 19 of NAFTA and on the Indicative List of Panelists of the World Trade Organization. In 1998 he was appointed the Chief Negotiator for Canada for the Pacific Salmon Treaty. His publications are principally in the field of International law and he is Editor-in-Chief of the Canadian Yearbook of International Law. Professor McRae teaches contracts, international law and international trade law.

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David Caron '83 is an expert in international law. He currently teaches public international law, resolution of private international disputes, ocean law and policy, and the advanced international law writing workshop.

Before joining the Boalt faculty in 1987, Caron practiced with the San Francisco firm of Pillsbury Madison & Sutro. From 1995 to 1996, he was a senior research fellow at the Max Planck Institute for Comparative Public and International Law. A Fulbright scholar and former navigator and salvage diver in the U.S. Coast Guard, Caron graduated from Boalt in 1983. He then served as a legal assistant to Judges Richard Mosk and Charles Brower at the Iran-United States Claims Tribunal in The Hague.

Among his professional affiliations, Caron is a vice president of the American Society of International Law, chair of the Advisory Board for the Institute of Transnational Arbitration of the Center for American and International Law and a member of the U.S. Department of State Advisory Committee on Public International Law. He is the co-director of Boalt's Law of the Sea Institute, an international consortium of scholars that has played a major part in studies of ocean law since the 1970s. He is a member of the NAFTA Chapter 11 Arbitration Panels in the matters of *Glamis Gold v. The United States and Cargill Industries v. The United States of Mexico*.

Caron has served as director of studies (1987), director of research (1995) and as a lecturer (2006) at the Hague Academy of International Law. He was a member of the board of editors of the *American Journal of International Law* from 1990 to 2005 and received the 1991 Deak

Prize of the American Society of International Law for outstanding scholarship by a younger academic. He has served as chair of the International Law Section of the Association of American Law Schools, a member of the precedent panel of the U.N. Compensation Commission for claims arising out of the Gulf War, counsel for Ethiopia before the Eritrea-Ethiopia Claims Commission, and president of the International Centre for Settlement of Investment Disputes Tribunal in the matter of *Aguas del Tunari v. The Republic of Bolivia*. In 2000, he received the Stefan A. Riesenfeld Award of the University of California for outstanding achievement and contribution to the field of international law.

Caron's recent publications include *The UNCITRAL Arbitration Rules: A Commentary* (co-authored with Lee Caplan and Matti Pellonpää, 2006); *Bringing New Law to Ocean Waters* (coedited with Harry N. Scheiber, 2004); "Framing Political Theory of International Courts and Tribunals: Reflections at the Centennial," in *Proceedings*, 100th Annual Meeting, American Society of International Law (2006); "If Afghanistan has Failed, Then Afghanistan is Dead: 'Failed States' and the Inappropriate Substitution of Legal Conclusion for Political Description," in *The Torture Debate in America* (2005); "The United Nations Compensation Commission for Claims Arising Out of the 1991 Gulf War: The 'Arising Prior To' Decision," in the *Florida State University Journal of Transnational Law & Policy* (2005); "The Reconstruction of Iraq: Dealing with Debt," in the *UC Davis Journal International Law & Policy* (2004); and "Does International Law Matter" in *Proceedings*, 98th Annual Meeting, American Society of International Law (2004).

EDUCATION:

B.S., U.S. Coast Guard Academy (1974)
M.Sc., University of Wales (1980)
J.D., UC Berkeley (Boalt Hall) (1983)
Diploma, Hague Academy of International Law (1984)
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MichaelCharlesPryles
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Michael Pryles is one of the leading arbitrators in the Asia/Pacific Region. A recent survey by Cross-border Quarterly (July-September 2006) ranked him in the top 20 arbitration specialists in the world.

He has sat as an arbitrator in over 200 cases in Asia, Europe, North America and Australia.

Michael has experience of both ad hoc and institutional commercial arbitrations under the UNCITRAL, ICC, LCIA, SIAC, HKIAC, CIETAC, SCC, JCAA, KLRCA and Swiss rules, and investor-state arbitrations under the ICSID rules, the ICSID Additional Facility Rules and the UNCITRAL Rules (BITs, NAFTA and state investor protection laws).

These have involved investment, construction, energy, commercial, technology-transfer and joint venture disputes with sums claimed up to US $5 billion.

Michael has published extensively. Previously he was a partner in a major Australian law firm and before that he held a named chair in Australia's largest law school. He has also held numerous international appointments.

Michael has offices in Melbourne and Singapore and chambers in London

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THE INTERNATIONAL CENTRE FOR SETTLEMENT
OF INVESTMENT DISPUTES

CARGILL INC., CLAIMANT

v.

THE UNITED MEXICAN STATES, RESPONDENT

EXPERT REBUTTAL REPORT OF BRENT C. KACZMAREK, CFA

NAVIGANT CONSULTING, INC.
1801 K STREET NW, SUITE 500
WASHINGTON, DC 20006
30 JUNE 2007

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I. Scope of Work

1. Navigant Consulting, Inc. ("NCI") has been asked by Mayer, Brown, Rowe & Maw LLP ("Counsel" to Cargill, Inc.) to prepare this expert rebuttal report in connection with the arbitration proceedings commenced by Cargill, Inc. ("Cargill" or "Claimant") against the United Mexican States ("Mexico" or "Respondent"). We have been asked to respond to comments and criticisms raised in the expert report prepared by Pablo Rion y Asociados ("PRA") regarding our calculation of Cargill's losses presuming Mexico is liable as Claimant alleges.

2. As stated in our first expert report, we understand that legal claims have been made by Claimant regarding alleged breaches of the NAFTA. Nothing in our conclusions or opinions stated herein is intended to address those legal arguments. This report does not contain any opinions on matters of law that would require legal expertise.

3. Some of the documents we have reviewed in this matter were originally prepared in Spanish. Where necessary, we have relied upon translations of these documents or translation services provided by Counsel. The list of documents we relied upon in preparing this expert rebuttal report is provided as Appendix 23.

II. Executive Summary

4. Mexico is of the view that any damages calculation in this case (including our own calculation) would inherently be speculative:

> "...it would be difficult for [the Tribunal] to assess damages without engaging in speculation. Put another way, the Tribunal will have to assess damages by relying solely on factually solid, wholly predictable figures for market size, market share and price, an exercise that may prove elusive in the circumstances of this case."[1]
>
> "No one can safely predict what would have happened had the Soft Drink Tax never been imposed, other than to say that there would have been a continuing crisis in the Mexican sugar industry..."[2]

5. With respect to our damages calculation, we disagree with Mexico's view for three reasons.

6. First, we believe that we have provided a sound basis upon which to project the three key elements of the damages calculation mentioned by Mexico:

[1] CM ¶512
[2] Id. ¶517

- With respect to projecting the size of the Mexican HFCS market, we relied upon US HFCS market experience with consideration given to the specific circumstances in Mexico such as soft drink bottlers owning sugar mills;
- With respect to projecting Cargill's share of the Mexican HFCS market, we relied upon the market share Cargill had actually achieved in 1997;
- With respect to projecting HFCS prices in Mexico, we established the 2002 Mexican HFCS price at 70 percent of the price of refined sugar in Mexico despite historical agreements between Cargill and its customers which indicated that Cargill was selling HFCS at 78 percent of the price of refined sugar in Mexico.

7. Moreover, if Mexico believes that forecasting these market developments is a speculative exercise, it is Mexico's own actions that have made it so. Mexico should not be able to rely on the very actions challenged by Claimant as a legitimate defense to a calculation of damages.

8. Second, our US$ 123.8 million lost cash flow calculation has been prepared on a very conservative basis. Some of the conservative assumptions in our lost cash flow calculation are listed below:

- We held Cargill's ultimate share of the Mexican HFCS market at the 1997 level of 26.5 percent despite the fact that Cargill increased its share of the Mexican HFCS market in every year from 1994 to 1997, had a stated goal of obtaining 33 percent market share in Mexico, and had grown its share of the United States HFCS market from 24.6 percent in 1998 to 31.3 percent by 2002.[3]
- We restricted the quantity of Cargill's HFCS sales to the excess production capacity at the Dayton and Dimmit HFCS plants, despite the fact that Cargill could have served the Mexican market from other plants or expanded production capacity to meet Mexican HFCS demand.[4] The effect of this conservative assumption was to limit Cargill's effective market share to an average of 25.31 percent over the period 2002 to 2007, which is lower than the 26.53 percent market share that even PRA accepts as reasonable.[5]
- We assumed that Cargill's sales mix of HFCS-42 and HFCS-55 would mimic the sales mix of the overall Mexican HFCS market, even though it is likely that Cargill would have sold relatively more higher-margin HFCS-55 due to its strong relationships with soft drink bottlers.[6]

[3] Navigant Expert Report ¶ 81; Mexican Corn Wet Milling Study, pg. 1. Cargill, Inc. 13 March 1995. (NAV-21), (C-Ex.-59)
[4] Navigant Expert Report ¶ 84-86
[5] PRA Expert Report ¶ 79:
See Appendix 24 for a calculation of effective market share when Cargill is subject to the capacity restriction.
[6] Navigant Expert Report at Appendix 8, Note 2

- We limited HFCS adoption in the beverage industry to 80 percent by 2007 which is significantly lower than the nearly 100 percent HFCS adoption that occurred in the United States beverage industry due to HFCS's cost and quality advantages.[7]

- We relied upon the United States HFCS adoption curve to project the adoption of HFCS in Mexico despite the fact that HFCS most likely would have been adopted at a faster rate in Mexico due to the experiences learned in the United States.[8]

- We forecasted zero growth in the overall Mexican sweetener market from 2005 to 2007, even though it is likely that the market would have experienced growth over that period.[9]

- We estimated the 2002 HFCS sales price at 70 percent of the price of Mexican refined sugar despite the fact that Cargill historically had sold HFCS in Mexico at 78 percent of the price of refined sugar.[10]

- Although the Soft Drink Tax contributed to excess refining capacity in US HFCS production, causing US HFCS prices to fall, we have not calculated the damages Cargill suffered due to a drop in US HFCS prices.[11]

- We assumed that the per unit costs of Cargill de Mexico, S.A. de C.V. ("Cargill de Mexico") would remain constant throughout the period 2002 to 2007, despite the fact that the projected increase in HFCS volume would most likely create economies of scale and significantly reduce costs on a per unit basis.[12]

9. Third, the non-speculative nature of our calculations is further demonstrated by the fact that there are very few assumptions in our forecast that are debated by PRA. Indeed, nearly all of the disparity between our US$ 123.8 million conclusion and PRA's US$ 14.4 million conclusion can be explained by differences in two key assumptions: the "but for" price of HFCS in 2002 and the size of the "but for" Mexican HFCS market during the forecast period.

10. We determined that Cargill could have sold HFCS in Mexico for US$ 14.73 per cwt in 2002 in the "but for" scenario. PRA, on the other hand, claims a more supportable price would be

[7] Navigant Expert Report ¶ 77
[8] Id. at Appendix 9, Note 7
[9] Id. at Appendix 9
[10] Navigant Expert Report ¶ 92; Agreement for Purchase and Supply of Fructose between Cargill de Mexico and Refrescos del Bajio Azteca. Cargill de Mexico. 10 June 1996. (NAV-28), (C-Ex.-73)
[11] Navigant Expert Report ¶ 10
[12] Id. ¶ 100

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US$ 14.01 per cwt – a price just 5 percent lower than our forecasted price.[13] It is difficult to consider our price forecast to be speculative when PRA's forecasted HFCS price is equal to 95 percent of our forecasted HFCS price.

11. With regard to the size of the HFCS market, there are just three issues separating the respective opinions of each expert:

- Should the "but for" Mexican HFCS market treat the anti-dumping duties as being lawfully or unlawfully imposed? In other words, should projections of the "but for" Mexican HFCS market eliminate the effects of the illegal anti-dumping duties?
- Absent Mexico's interference in the sweetener market, would Mexican soft drink bottlers have chosen to limit their use of HFCS in brand colas? In other words, would Mexican soft drink bottlers agree to subsidize the sugar industry by buying a more expensive, lower quality product?
- Should the "but for" Mexican HFCS market be restricted to the HFCS quota allotments set forth in the United States – Mexico Sweetener Agreements or would these quota allotments only serve as mitigating factors to damages?

12. Given the limited number of differences between the experts, we believe that PRA's expert report actually proves that our analysis was quite reasonable, rather than being speculative as Mexico claims.

13. Additionally, Mexico is wrong in suggesting that the only remedy for the sugar crisis in Mexico was to boost demand for sugar by imposing a tax on goods produced with a competitive product (HFCS). Mexico could have resolved the crisis in a number of different ways by cutting sugar supplies. For example, Mexico could have curtailed production by allowing inefficient mills (especially the bankrupt mills) to close during the 1997 to 2001 period (i.e., prior to Mexico's sugar mill expropriation decree).

14. Indeed, the crisis may have been averted altogether had certain aspects of Mexico's sugar program been implemented more effectively. In 1997 and 1998, Mexico issued the *acuerdos* which, *inter alia*, established an export quota system which required each mill to export its fair share of excess sugar production.[14] Failure to abide by the export quota would subject mills to

[13] PRA Expert Report ¶ 93

[14] Acuerdo que Establece las Reglas para la Determinación del Precio de Referencia del Azúcar para el Pago de la Caña de Azúcar. Secretaría de Comercio y Fomento Industrial. 26 March 1997. **(NAV-140)**, **(C-LA-64)**; Acuerdo

penalties that far outweighed the cost of selling at a loss in the export market.[15] A base production level system was announced in the 1998 *acuerdo*.[16] This system established base production levels for each mill and forced mills to export any excess production over the base level.[17] Collectively, these measures were designed to ensure that there would not be excess production and a drop in the domestic price for sugar. However, the program did not operate as intended, in part because some sugar mills sold excess sugar on the domestic market rather than exporting it.[18] A separate NAFTA tribunal found that Mexico was partly to blame for the sugar program's failure:

> "What GAMI has succeeded in demonstrating is that Mexico failed to make the 1997 Acuerdo a reality."[19]

> "The record shows that Mexico failed to implement key struts of its Sugar Program…"[20]

15. There is no disagreement that an oversupply of sugar in the domestic market created a crisis for the sugar industry in Mexico in 2001. However, we disagree with the suggestion that Mexico was limited in its ability to resolve the crisis by issuing "demand-side" policies that would boost domestic sugar prices. Mexico could have resolved the crisis by issuing "supply-side" policies that would reduce the amount of available sugar in the domestic market and boost domestic sugar prices.

16. In our view, nothing stated in Mexico's Counter Memorial or PRA's expert report warrants a revision to the US$ 123.8 million damages calculation we set forth in our first expert report. As just described in this Executive Summary, our calculation has been prepared using reasonable and conservative assumptions. In the following sections of this rebuttal report, we will address

que Reforma al Diverso que Establece las Reglas para la Determinación del Precio de Referencia del Azúcar para el Pago de la Caña de Azúcar. Secretaría de Comercio y Fomento Industrial. 30 March 1998. (NAV-142), (C-LA-69)

[15] Acuerdo que Establece las Reglas para la Determinación del Precio de Referencia del Azúcar para el Pago de la Caña de Azúcar Article 5, ¶ 2. Secretaría de Comercio y Fomento Industrial. 26 March 1997. (NAV-140), (C-LA-67)

[16] Acuerdo que Reforma al Diverso que Establece las Reglas para la Determinación del Precio de Referencia del Azúcar para el Pago de la Caña de Azúcar Article 3, ¶ 2. Secretaría de Comercio y Fomento Industrial. 30 March 1998. (NAV-142), (C-LA-69)

[17] Id. at Article 5. ¶ 1-2

[18] GAMI Investments, Inc. v. the Government of the United Mexican States. Final Award of Nov. 15, 2004 ¶ 70-72. NAFTA/UNCITRAL. (C-LA-33)

[19] Id. ¶ 78

[20] Id. ¶ 108

each of PRA's specific comments and criticisms and demonstrate how these comments and criticisms do not warrant an adjustment to our damages calculation.

III. Summary of PRA's Comments and Criticisms

A. *General Criticisms in PRA's Expert Report*

17. From an overall perspective, PRA rejects the methodology we implemented to calculate the damages Cargill suffered due to Mexico's imposition of the Soft Drink Tax.[21] Our approach to quantifying the damage suffered by Cargill is a straightforward and classic approach. We calculated damages as the difference between the net cash flows Cargill would have generated from sales of HFCS in Mexico through its Mexican subsidiary, Cargill de Mexico, (the "but for" scenario) and the net cash flows Cargill actually earned through such sales (the "actual" scenario). We expressed the difference between the annual net cash flows as of 22 December 2006 by present valuing these differences at the US prime rate of interest.[22]

18. Although PRA rejects the methodology we implemented to calculate damages, it does not offer an alternative. Instead, PRA simply performs a sensitivity analysis on our model by changing certain assumptions.

> "[W]e have replicated Navigant's model in order to understand what would be the impact of using assumptions that are closer to reality. Although we do not, at any time, validate or purport to validate the methodology used in the Navigant Report, simply by replacing Navigant's assumptions with more reasonable assumptions..."[23]

19. By incorporating different assumptions in our model, PRA demonstrates that it can achieve a damages calculation of US$ 14.4 million rather than the US$ 123.8 million we calculated.

> "It can be seen that by using erroneous and/or exaggerated assumptions, the Navigant model overstates the amount of damages by more than USD $109 million."[24]

20. However, as we will demonstrate, our assumptions are neither wrong nor exaggerated. Rather, our assumptions are well supported and are actually quite conservative.

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[21] PRA Expert Report ¶ 12, 15 & 27
[22] Navigant Expert Report ¶ 111
[23] PRA Expert Report ¶ 15
[24] Id. ¶ 18

B. *Specific Criticisms in PRA's Expert Report*

21. In addition to questioning our overall methodology and result, PRA takes issue with eight specific elements of our calculation of Cargill's lost cash flows. We summarize PRA's eight criticisms in this section and then address each individual criticism in turn in the remainder of this expert rebuttal report.

22. First, PRA asserts that our overall approach does not determine the fair market value ("FMV") of Cargill's investment in accordance with Article 1110 of the NAFTA.[25]

23. Second, PRA argues that our damage estimation period is incorrect. According to PRA, the damage suffered by Cargill only occurred from 1 June 2002 (the date the anti-dumping duties were eliminated) to 31 December 2006 (the date the Soft Drink Tax was revoked), not 1 January 2002 to 31 December 2007.[26]

24. Third, PRA criticizes us for incorporating the effects of Mexico's anti-dumping duties into the lost cash flow calculation. Specifically, PRA claims that it was inappropriate to project the total size of the Mexican HFCS market and Cargill's initial 2002 market share in the absence of both the Soft Drink Tax and the anti-dumping duties.[27]

25. Fourth, PRA contends that our estimate of the consumption of HFCS in the Mexican beverage industry is too high in the "but for" scenario.[28] In PRA's view, the Mexican beverage industry's use of HFCS would grow only 13.6 percent per annum between 2001 and 2007.[29] Furthermore, PRA estimates that the maximum rate of HFCS adoption in the Mexican beverage industry would be 65.81 percent, in accordance with soft drink bottlers' policies.[30] Finally, PRA asserts that the total size of the Mexican HFCS market in 2005 and 2006 is limited by the sugar – HFCS quota agreements between Mexico and the United States.[31]

26. Fifth, PRA takes issue with our estimate of Cargill's share of the Mexican HFCS market in 2002 and 2003. PRA does not dispute our assumption that Cargill would obtain a 26.53 percent

[25] Id. ¶ 28
[26] Id. ¶ 40-44
[27] Id. ¶ 45-49
[28] Id. ¶ 50-71
[29] Id. ¶ 70
[30] Id. ¶ 61
[31] Id. ¶ 105

share of the Mexican HFCS market. However, PRA believes that Cargill would only reach a 26.53 percent market share in December 2003, and thus contends that our estimate of Cargill's 2002 and 2003 market share is overstated.[32]

27. Sixth, PRA claims that the HFCS price used in our analysis is too high. PRA states that it would be more appropriate to use 2001 sugar prices (instead of 2002 sugar prices) to determine the price of HFCS in 2002.[33] Furthermore, PRA claims that the premium associated with our projected Mexican HFCS prices relative to actual United States HFCS prices is not justified by Cargill de Mexico's transportation costs and distribution margin.[34] In addition, PRA claims that Cargill's 2001 HFCS sales demonstrate that the HFCS price used in our analysis is overstated.[35]

28. Seventh, PRA argues that Cargill's investments in HFCS production and distribution facilities over the period 1993 to 1997 were not at all related to the Mexican HFCS market.[36] According to PRA, Cargill did not consider the anticipated growth in the Mexican HFCS market when it decided to invest in additional HFCS production in the United States.[37] PRA also calculates that Cargill invested just US$ 4 million in distribution facilities to supply HFCS to the Mexican market.[38]

29. Eighth, PRA alleges that our analysis fails to consider all of the mitigating factors that effectively reduce the harm caused by Mexico's Soft Drink Tax. In particular, PRA claims that we failed to consider the additional benefits Cargill obtained from its 2002 investment in Zucarmex, a Mexican sugar producer.[39]

IV. The Fair Market Value Standard for Article 1110 (Section C.1)

30. In Section C.1 of its expert report, PRA states that our damages methodology is inappropriate for purposes of making a claim under Article 1110 of the NAFTA. Specifically, PRA says:

> "...the methodology employed in the Navigant Report is not appropriate to assess damages for an alleged violation of NAFTA's Article 1110 (an expropriation) because it does not determine "the fair market value of the

[32] Id. ¶ 72-80
[33] Id. ¶ 81-98
[34] Id. ¶ 86-89
[35] Id. ¶ 95
[36] Id. ¶ 108-131
[37] Id. ¶ 109
[38] Id. ¶ 146
[39] Id. ¶ 147-156

> expropriated investment immediately before the expropriation took place" as prescribed in said Article. Its methodology simply estimates the cash flows that Cargill allegedly lost in a specific scenario (the "but-for" scenario), which contemplates, among other things, the absence of the tax and the fructose import permit requirement."[40]

31. We have two responses to PRA's comments in this regard. First, PRA's comments suggest that the only acceptable approach to determine damages for an expropriation is to value the investment or asset under the fair market value standard. This is not correct. For example, in *ADC v Republic of Hungary*, the tribunal awarded the Claimant the present value of its historically lost cash flows plus the present value of its expected future cash flows at the time of the award.[41] The tribunal characterized this analysis as a "restitution" analysis that was in conformity with customary international law.[42] Our damages analysis mirrors the "restitution" analysis accepted in the *ADC v Republic of Hungary* award except that our "valuation date" is the date of our first report rather than the date of an expected award.

32. Second, it is worth noting that our analysis is not significantly different from a traditional fair market value analysis of Cargill's market share losses. In protected agriculture markets, it is not uncommon for regulators to assign "production quotas" to market participants. Indeed, this is the case for many countries in the European Union.[43] These quotas define a participant's share in the market. If we consider that Cargill's "quota" in the Mexican HFCS market was 26.53 percent of the market, the fair market value of Cargill's "quota" could be established as of 1 January 2002 (the date the Soft Drink Tax came into force) by projecting and discounting the cash flows Cargill's "quota" would have yielded as of that date. Had we established 1 January 2002 as the date of our valuation rather than 22 December 2006 (which was the date of our first expert report), our analysis would serve as a good approximation of the fair market value of the Mexican HFCS "quotas" lost by Cargill.[44]

[40] Id. ¶ 27

[41] ADC Affiliate Ltd. and ADC & ADMC Management Ltd. v. the Republic of Hungary, Award of Oct. 2, 2006 ¶ 518, ICSID Case No. ARB/03/16. (C-LA-23)

[42] Id. ¶ 514, 517-518

[43] European Union Sugar Regime, Section II.C. Food and Agriculture Organization of the United Nations – Cuba Conference. December 7-9, 1999. **(NAV-145), (C-Ex.-291)**

[44] We have relied upon the prime rate of interest in the United States as our discount rate to determine damages as of 22 December 2006. A fair market value analysis of Cargill's Mexican HFCS "quota" as of 1 January 2002 would need to consider the risks related to the purchase of that "quota." We have not assessed these risks which may be higher or lower than the prime lending rate in the United States.

V. Appropriate Time Period to Measure Damages (Section C.3)

33. PRA argues in Section C.3 that the appropriate period in which damages should be considered is June 2002 to December 2006. Regarding the beginning date for the damages calculation, PRA explains that even though the Soft Drink Tax came into effect on 1 January 2002, the anti-dumping duties were not lifted until May 2002.[45] As such, damages corresponding to the Soft Drink Tax cannot begin until June 2002. Regarding the ending date for the damages calculation, PRA explains that the Soft Drink Tax was repealed as of 31 December 2006. Thus, PRA argues:

> "In the case of the IEPS, the relevant date is 31 December 2006, the date in which the tax was eliminated. Therefore, the appropriate time frame for the estimation of damages is from June 2002 to 31 December 2006 at the latest."[46]

34. With respect to the beginning date of the damages calculation, and as we will explain more fully in Section VI, our "but for" analysis of Cargill's sales of HFCS in Mexico eliminates all illegal acts committed by Mexico, including the imposition of the anti-dumping duties. Under this "but for" scenario, it is appropriate to calculate Cargill's damages attributable to the Soft Drink Tax beginning on 1 January 2002, when the Soft Drink Tax was imposed, rather than June 2002, when the anti-dumping duties were actually lifted.

35. With respect to the ending date of the damages calculation, PRA correctly notes that we did not end the damages calculation as of 31 December 2006, the date the Soft Drink Tax was repealed. The Soft Drink Tax was only repealed following the issuance of our first expert report on 22 December 2006. However, despite this new information, we do not agree that the damages period should end as of 31 December 2006 for two reasons.

36. First, Cargill's damages should cease as of 31 December 2006 only if Cargill can fully mitigate its damages beginning 31 December 2006. In our view, it is unreasonable to assume Cargill could fully mitigate its damages instantaneously on 31 December 2006. PRA reinforces this view by claiming that it would take Cargill 18 months to regain the market share it lost in 1998 when the anti-dumping duties were imposed.[47]

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[45] PRA Expert Report ¶ 41
[46] Id. ¶ 43
[47] Id. ¶ 79

37. Second, Cargill's ability to mitigate its damages is limited to the quota that has been assigned to Cargill under the US-Mexico Sweetener Agreements.[48] As discussed more fully in Section VII, in the "but for" world there is no Soft Drink Tax or quota restriction on the amount of HFCS that can be imported to Mexico. As such, Cargill's "but for" losses are equal to the difference between the amount of HFCS Cargill could have sold in an unrestricted Mexican HFCS market and the amount of HFCS Cargill is actually allowed to sell in Mexico under the US-Mexico Sweetener Agreements.

38. Therefore, we disagree with PRA that Cargill's damages should cease on the date the Soft Drink Tax was repealed given the restrictions Mexico maintains on the sale of HFCS in Mexico by US producers. The damages Cargill has suffered and will suffer in 2007 (US$ 21.1 million as of 22 December 2006) are calculated appropriately considering the HFCS market in Mexico continues to be restricted.

VI. Inclusion of the Effects of the Anti-Dumping Duties in the Damages Calculation (Section C.4)

39. In Section C.4 of its expert report, PRA notes that we were instructed by Counsel that Cargill cannot claim direct damages associated with the anti-dumping duties:

> "The Navigant Report states that it has been instructed by Cargill's counsel that damages incurred as a result of Mexico's antidumping duties cannot be claimed in this case:
>
> > *'We have been advised by Counsel that Cargill cannot claim direct losses incurred as a result of the unlawful anti-dumping duties imposed by Mexico.'*"[49]

40. PRA also claims that our calculation of Cargill's lost cash flows assumes that neither the Soft Drink Tax nor the anti-dumping duties had ever existed:

[48] The Mexican government allowed limited HFCS imports from the US under a quota system in 2005, 2006, and 2007. In 2005, as a result of the damage done to the US sugar production by Hurricane Katrina, the US and Mexican governments agreed to allow a certain amount of Mexican sugar into the US market. As a result, Mexico reciprocated and agreed to allow 250,000 MT c.b. of US HFCS into Mexico. As the result of a further temporary sweetener agreement, Mexico will allow the US HFCS imports of 250,000 MT (dry) from October 2006 to September 2007 and between 175,000 and 250,000 MT (dry) of US HFCS between October 2007 and December 2007. January 2006 Sugar and Sweeteners Outlook. USDA. 31 January 2006. (NAV- 101), (C-Ex.-242); "Corn Refiners Welcome Sweetener Deal with Mexico". Corn Refiners Association. 28 July 2006. (NAV-108), (C-Ex.-254)

[49] PRA Expert Report ¶ 46

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> "[F]rom a careful perusal of Navigant's projections it is apparent that the effects of the antidumping duties were taken into account. These are incorporated in the estimates for the size of the Mexican market and Cargill's market share but-for the IEPS. In other words, the projections in the Navigant Report are based on estimates for the size of the HFCS market and Cargill's market share but-for the tax and but-for the antidumping duties."[50]

41. PRA is indeed correct on both points. Counsel for Cargill informed us that Cargill could not make a claim for direct losses that occurred prior to the Soft Drink Tax, i.e., Cargill could not claim the actual duties themselves or any other damage that occurred prior to the implementation of the Soft Drink Tax. However, we were also instructed by Counsel to establish a "but for" situation which would eliminate all of Mexico's illegal acts pertaining to the HFCS market in Mexico, such that Mexico would not benefit from such acts.[51] Mexico's HFCS anti-dumping duties were ruled to be illegal by both the World Trade Organization and a NAFTA Chapter 19 panel.[52] Accordingly, we established a "but for" forecast of the HFCS market in Mexico (as well as Cargill's share of that market) which eliminated the effects of both the Soft Drink Tax and the anti-dumping duties.

42. In order to eliminate the effects of Mexico's illegal acts, we established a "but for" Mexican HFCS market beginning in 1998 (when the anti-dumping duties were imposed). At the end of 1997, Cargill's share of the Mexican HFCS market was 26.53 percent.[53] We projected that Cargill would maintain this market share to the extent that its investments in HFCS production could meet the corresponding demand.

43. PRA correctly notes that if we had not eliminated the effects of the unlawful anti-dumping duties beginning in 1998, our "but for" forecast of the size of the 2002 Mexican HFCS market would indeed be smaller than 1.2 million metric tons and Cargill's share of that market would indeed be lower than 26.53 percent in 2002 and 2003. However, it seems to us that the question

[50] Id. ¶ 47

[51] If the effect of the anti-dumping duties is not eliminated, Mexico clearly will benefit from its illegal acts. In PRA's analysis, the damage suffered by Cargill over the period 2002 to 2007 decreases by US$ 55 million if we include the effect of the anti-dumping duties. In our analysis, the damage suffered by Cargill decreases by US$ 23.8 million if the effect of the anti-dumping duties is not eliminated.

[52] Action by the Dispute Settlement Body: Mexico Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States. WTO. 26 November 2001. (NAV-57), (C-LA-17); Final Decision: Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup Originating from the United States of America. NAFTA Chapter 19 Panel. 15 April 2002. (NAV-65), (C-LA-56)

[53] See Appendix 16 to the Navigant Expert Report

being raised by PRA is of a legal nature. Either Cargill can recover the losses it suffered following the implementation of the Soft Drink Tax assuming Mexico had not committed any illegal acts or Cargill can only recover losses it suffered following the implementation of the Soft Drink Tax assuming the anti-dumping duties were lawfully imposed.

44. If Cargill can recover damages assuming that Mexico had not committed any illegal acts, then the damages are US$ 123.8 million – the figure calculated in our first expert report. However, if the tribunal decides that Cargill can only recover damages under the assumption that the anti-dumping duties were lawfully imposed, Cargill's damages would need to be calculated differently.

45. Using our model, PRA alleges that our damages calculation would be reduced by US$ 55 million to US$ 68.8 million under the assumption that the anti-dumping duties were legally imposed.[54] In preparing this alternative calculation, PRA made three assumptions. First, PRA assumed the damages period would begin in June 2002.[55] Second, PRA assumed that Mexican consumption of HFCS would grow by 13.6 percent per annum – the average annual rate of HFCS consumption growth between 1998 and 2001 – from the actual 2001 HFCS consumption of 450,000 metric tons.

> "In 2001, the soft drink industry in Mexico consumed a total of 450,000 metric tons of HFCS, which implies an annual growth of 13.6% since 1998. Thus, we consider that a more realistic and logical scenario would be to assume that in the years following 2001 the market would grow at a similar rate than the one observed during the period 1998-2001 absent the IEPS tax."[56]

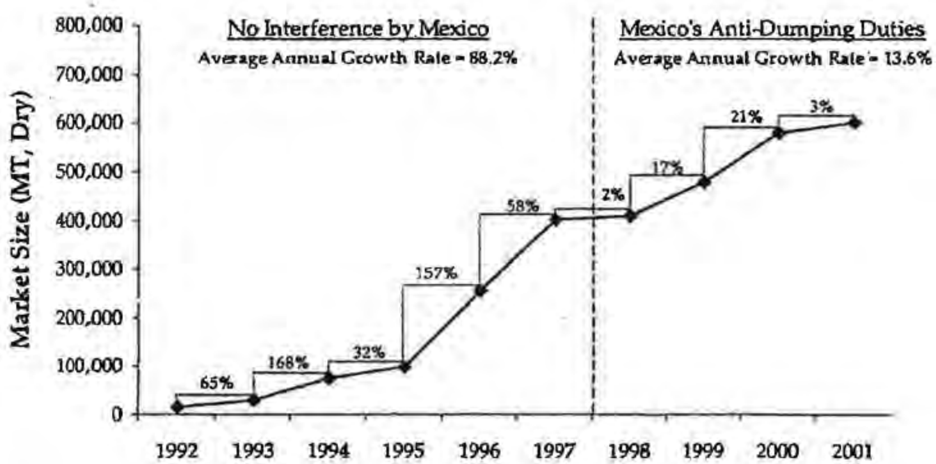
Third, PRA assumed Cargill would start with its actual market share of zero, but would regain its former market share of 26.53 percent in 18 months.[57] If it is the case that the anti-dumping duties cannot be considered, then we would agree with PRA's first assumption, but would disagree with the second and third assumptions.

46. With respect to PRA's HFCS growth rate assumption, we believe it is inappropriate to rely upon the average annual growth rate between 1998 and 2001 because Mexico interfered with the

[54] PRA Expert Report ¶ 49
[55] Id. ¶ 41
[56] Id. ¶ 70
[57] Id. ¶ 79

sweetener market during this period by imposing anti-dumping duties. The anti-dumping duties were clearly aimed at suppressing the penetration of HFCS into the Mexican market, which they did. The effect of the anti-dumping duties on HFCS consumption growth can be seen through an examination of the annual growth rates of HFCS consumption before and during the period in which the anti-dumping duties were imposed. See Figure 1 below.

Figure 1: Mexican HFCS Market Size and Growth Rate, 1992 – 2001[58]



47. As stated in our first expert report, we believe the US experience curve is a useful guide to predict how HFCS would have been adopted in Mexico. In 2001, the adoption rate of HFCS in the Mexican beverage industry was 28 percent.[59] Likewise, the adoption rate of HFCS in the United States beverage industry was 28 percent in 1980.[60] It took four years (1980 to 1984) for the adoption rate of HFCS in United States reach 75 percent.[61] We believe it is reasonable to assume that pent-up demand existed for HFCS in Mexico during the 1998 – 2001 time period, such that consumption would have accelerated after the elimination of the duties. As such, we believe it is reasonable to assume that the Mexican beverage industry's HFCS adoption rate

[58] Mexican Sweetener Consumption by Use, 1992-2007. USDA. 2006. (NAV-117), (C-Ex.-237); See Appendix 25 for an analysis of the growth in Mexican HFCS consumption
[59] See Appendix 26
[60] Id.
[61] Id.

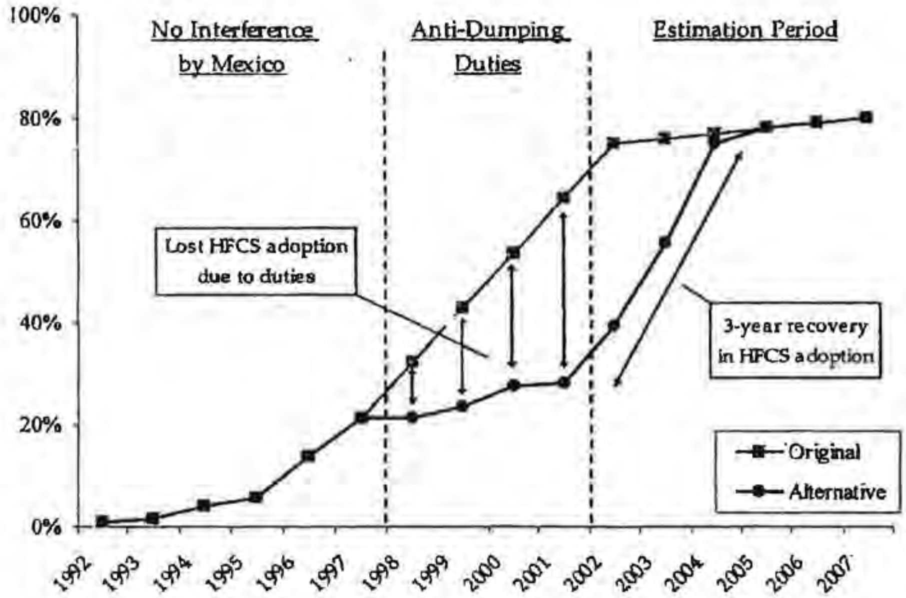
would have reached 75 percent in three years.[62] This equates to an average annual growth rate over the three year period of 43.5 percent – less than half the average annual growth rate HFCS experienced between 1992 and 1997 (88.2 percent).[63]

48. A second point of reference is also instructive in understanding the reasonableness of our estimates. In our first expert report, we projected that the adoption rate of HFCS in the Mexican beverage industry would reach 77 percent by year end 2004. In this alternative calculation, we project that the Mexican beverage industry's HFCS adoption rate would reach 75 percent by year-end 2004. In essence, we are projecting that it would take roughly three years for the HFCS market to recover to the level it would have reached but for the imposition of the anti-dumping duties. Figure 2 below shows how a "gap" would develop between our projected "but for" Mexican HFCS adoption rate (i.e., assuming the absence of the anti-dumping duties) and our "alternative but for" Mexican HFCS adoption rate (i.e., assuming the anti-dumping duties were in place during 1998 to 2002). In our alternative damage analysis, this gap is then closed over a period of three years.

[62] Considering that Coke and Pepsi had already gone through a successful conversion to HFCS in the United States, three years is more than reasonable in our view.

[63] Mexican Sweetener Consumption by Use, 1992-2007. USDA. 2006. (NAV-117), (C-Ex.-237); See Appendix 25 for an analysis of the growth in Mexican HFCS consumption.

Figure 2: Beverage Industry HFCS Adoption Rate Projections: Original Damages Calculation and Alternative Damages Calculation[64]



49. With respect to Cargill's market share in 2002 and 2003, we believe that Cargill could have regained its 26.53 percent market share in one year or less.[65] However, there is a range of reasonable estimates of the time it would take Cargill to regain its market share, and PRA's assumption of 18 months may fit within the upper end of that range. For purposes of being conservative, we would incorporate PRA's assumptions regarding Cargill's market share: 6.63 percent market share in 2002, 19.90 percent market share in 2003, and 26.53 percent market share from 2004 to 2007 (reduced during this period to account for capacity limitations).[66]

50. Under our alternative calculation of the damage suffered by Cargill where the anti-dumping duties are not considered, the present value of Cargill's lost cash flows over the period 2002 to 2007 would be **US$ 100.0 million.** This alternative calculation is US$ 23.8 million less than the damages we calculated under the assumption that the "but for" forecast should treat the anti-dumping duties as illegal (US$ 123.8 million). Our alternative calculation is significantly greater

[64] See Appendix 9 and Appendix 26

[65] Ortega Rebuttal Witness Statement ¶ 33

[66] PRA Expert Report ¶ 80

than PRA's calculation of US$ 68.8 million which was inappropriately based on HFCS consumption growth rates from the period when Mexico was interfering with the sweetener market. Our alternative calculation of Cargill's lost cash flow is contained in Appendices 26 through 32.

VII. Projection of the Size of the "But For" HFCS Market in Mexico (Section C.5.1)

51. In Section C.5.1 of its expert report, PRA claims that we overstated the size of the "but for" Mexican HFCS market throughout the period 2002 to 2007 in three ways. First, PRA says that we inappropriately begin our "but for" market projections in 1998 when the anti-dumping duties were imposed, rather than in 2002 when the anti-dumping duties were lifted.[67] Second, PRA says the Mexican beverage industry would have had a maximum HFCS adoption rate of 65.81 percent due to soft drink bottlers' policies regarding HFCS and sugar use.[68] Third, PRA says that the Mexican HFCS market was limited in 2005 and 2006 by the sweetener agreements between the United States and Mexico.[69] We address each of these three arguments in the following three subsections, respectively.

A. *When Should the "But For" Analysis of the HFCS Market Begin?*

52. As discussed previously in Section VI, we were instructed to develop a forecast of the "but for" Mexican HFCS market that assumes Mexico had not illegally interfered with the market through either the Soft Drink Tax or the anti-dumping duties. PRA indicates that the "but for" analysis should not begin until after the anti-dumping duties were lifted in May 2002. This issue is largely a legal issue. However it is decided, we have prepared calculations under both scenarios.

B. *Would Mexican Soft Drink Bottlers Have Capped HFCS Adoption in the "But For" Scenario?*

53. PRA claims that Mexican beverage industry HFCS adoption is capped at 65.81 percent due to soft drink bottlers' policies regarding HFCS and sugar use. According to PRA:

[67] Id. ¶ 45-49
[68] Id. ¶ 57-67
[69] Id. ¶ 55-56

> "Considering that during the year 2001 non-diet cola soft drinks accounted for 68.37% of the total market for carbonated soft drinks in Mexico, it is reasonable to assume that approximately the same proportion of the total amount of caloric sweeteners consumed by the bottling industry was used in their production [i.e., non-diet cola soft drinks]. If we also consider that both Coca-Cola and Pepsi Cola (which dominated 100% of the cola soft drink market at that time) had the policy of not using more than 50% fructose in its cola soft drinks, the maximum limit for HFCS use in the soft drink industry would have been 65.81% (1 - (0.5 x 68.37))."[70]

54. We believe that PRA's position regarding HFCS adoption is incorrect. While it is true that some Mexican bottlers adopted a policy of 50 percent sugar / 50 percent HFCS in brand colas, the time period in which the policies were developed is important to consider. For example, PRA quotes a Cargill document from 1995 as saying:

> "Coca Cola in Mexico has made the decision to switch to HFCS, 50% in Brand Coke and 100% in flavors. We believe Pepsi will soon follow Coke's lead."[71]

55. This quote from 1995 does not signal a finalized policy, but a brand new policy in which Coke was replacing 50 percent of its sugar needs with HFCS. It would have been unrealistic for Coke to switch to 100 percent given the available supply of HFCS. Moreover, as noted in our HFCS adoption rate curve for the United States (Figure 7 of our first expert report), it took nearly 10 years for HFCS to fully displace sugar in the beverage industry. Thus, we view this quote as the beginning of a policy to switch from sugar to HFCS rather than a finalized policy.

56. PRA then cites two additional quotes from 1996 and 1997 that indicate the policy remained at 50 percent in brand colas for both Pepsi and Coke.[72] Again, given the time it took HFCS to fully displace sugar in the US (nearly 10 years), it isn't surprising to note that the policy remained at 50/50 just two years later.

57. Finally, PRA cites an April 2007 quote from FEMSA indicating that the 50/50 policy in brand Coke would remain after the Soft Drink Tax was eliminated. PRA emphasizes several sections of the quote, but fails to emphasize a critical section. Below we emphasize the critical section of the quote PRA overlooks.

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[70] Id. ¶ 61
[71] Id. ¶ 59
[72] Id. ¶ 59

> "Precisely due to the importance of the sugar industry **and for reasons of supply**, the company maintains a policy of using both sweeteners approximately in equal volumes, that is, 50% sugar and 50% fructose in cola beverages. This policy has been in continuous use, even before the imposition of the IEPS on soft drinks. The company has considered maintaining this policy in the near future, even though the tax has been eliminated."[73] [Emphasis added]

58. Similarly, PRA does not emphasize a section of a quote from the 2004 Annual Report of GEUPEC, the second largest Pepsi bottler in Mexico. Below we emphasize the critical section of the quote PRA overlooks.

> "In the past, the Company has never used, and, **given current market conditions under which it operates**, does not plan to use in the near future other sweeteners as substitutes for sugar, such as high fructose corn syrup,..."[74] [Emphasis added]

59. Thus, FEMSA noted that supply of HFCS was a critical factor in announcing that their 50/50 policy would remain. GEUPEC noted "current market conditions" as a factor influencing their decision. It is also not surprising to us either that FEMSA would note the importance of the sugar industry as a factor influencing its policy given Mexico's decade-long effort to keep HFCS out of the market in favor of sugar. Had Mexico refrained from interfering in the manner that it did, thus allowing for an adequate supply of HFCS in the Mexican market, we strongly believe the bottlers would have switched to HFCS in "brand" colas given the significant cost advantages (just as they did in the United States). PRA does not consider how the bottlers would have behaved in the absence of Mexico's actions. PRA only considers how the bottlers have actually behaved given Mexico's actions.

60. Furthermore, to argue that Mexican bottlers would maintain such a policy in an unrestricted HFCS market (which PRA and Mexico both do) flies in the face of fundamental market economics. Mexico and PRA would have the tribunal believe that private companies (Mexican soft drink bottlers) would choose to *de facto* subsidize the sugar industry by purchasing a more expensive, lower quality product. Providing support for agricultural products is a role fulfilled by governments, not private operators who have a responsibility to their shareholders. Faced with similarly irrational economic arguments, tribunals have rejected such behavior as

[73] Ex. PRA-1, Pg. 1

[74] Ex. PRA-3, Pg. 16

implausible. For instance, when describing the possibility of creditors renouncing payments that had come due, the CMS tribunal stated:

> "The Tribunal cannot envisage such gross inefficiency or irrationality in the market."[75]

61. Finally, even if it were true that Mexican soft drink bottlers would have capped HFCS adoption at 50 percent in "brand" and 100 percent in "flavors" (which we do not believe would have been the case in the "but for" scenario), there is a serious error in PRA's calculation of the "maximum" beverage industry HFCS adoption rate. Essentially, PRA assumes in its calculation that carbonated beverage producers (i.e., soft drink bottlers) are the only potential HFCS users in the beverage industry.[76] PRA's assumption is incorrect. The Mexican beverage industry is comprised not only of carbonated soft drinks, but also fruit drinks, sports drinks, liquid and powdered drink concentrates, and ready-to-drink coffees and teas.[77] Mexico itself pointed out in the WTO anti-dumping proceedings that the beverage industry's consumption of HFCS would not be limited to soft drink bottlers, but would also include producers of the other types of beverages listed above. As summarized by the WTO panel:

> "Mexico argues that the United States incorrectly interprets Mexico's analysis by confusing the soft drink bottlers sector with the beverages industry as a whole, and fails to take into consideration that the latter consists both of producers of bottled soft drinks and of producers of other beverages such as juices, tonics for athletes and prepared infusions...In the view of Mexico, it is clear from SECOFI's determination that not only could soft drink bottlers continue to purchase HFCS at dumped prices as a substitute for sugar, but also other sectors in the beverage industry...would continue to purchase the imported product, gradually displacing their consumption of sugar."[78]

62. Furthermore, Mexico projected that HFCS adoption for non-soft drink beverages could reach 100 percent. According to the panel in the WTO anti-dumping case:

> "Mexico stated that, according to the Almex market survey, the degree of technical substitutability between HFCS and sugar varied per application as follows:

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[75] CMS Gas Transmission Co. v. The Argentine Republic, Final Award of May 12, 2005 ¶ 429, ICSID. (NAV-146), (C-LA-117)
[76] PRA Expert Report at Table 2
[77] Ex. PRA-2
[78] Mexico—Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) From The United States, Report of the Panel ¶ 5.550, WT/DS132/R, Jan. 28, 2000. (C-LA-10)

Industrial users	Degrees of substitutability of sugar with HFCS (percentage)
Non-soft drink beverage producers	**100**
Other products:	
Bread	100
Ketchup	50
Yoghurt	50
Marmalades	33
Biscuits, pastries and desserts	10

> Mexico also stated that the market survey referred to above reflected conditions in 1996, when the development of the HFCS market in Mexico was at a stage of product introduction; therefore, the degrees of substitutability quoted in this market study should not be considered as a technical limitation, but rather as the level of substitutability that had been reached up to that point."[79]

63. According to the Mexican beverage industry study utilized by PRA to calculate its maximum HFCS adoption rate, carbonated soft drinks represented only 68 percent of the total non-water, non-diet Mexican beverage industry volume.[80] If PRA had included the non-carbonated beverage types that account for the remaining 32 percent of the beverage market, which according to Mexico could have substituted HFCS for sugar at a rate of 100 percent, its maximum HFCS adoption rate increases to 75.5 percent. Table 1 below contains a corrected version of PRA's HFCS adoption rate calculation.

[79] Id. ¶ 5.568

[80] See Appendix 33

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Table 1: Corrected Version of PRA's "Maximum" HFCS Adoption Calculation[81]

Beverage Type	Quantity (M Litres)	Percent of Total Beverage Market	HFCS Adoption Rate	Weighted HFCS Adoption Rate
Carbonated Beverages				
Cola Carbonated ("Brand")	6,929	49.0%	50%	24.5%
Non-Cola Carbonated ("Flavors")	2,722	19.3%	100%	19.3%
Total Carbonated Beverages	9,650	68.3%		
Non-Carbonated Beverages				
Fruit/Vegetable Drinks	917	6.5%	100%	6.5%
Functional & Sports Drinks	160	1.1%	100%	1.1%
Concentrates	3,394	24.0%	100%	24.0%
RTD Tea & Coffee	4	0.0%	100%	0.0%
Total Non-Carbonated Beverages	4,476	31.7%		
Total Beverages Market	14,126	100.0%		75.5%

64. Although we do not believe PRA's maximum HFCS adoption calculation would apply to the "but for" scenario, it is worth noting that the 75.5 percent HFCS adoption rate produced by the corrected calculation is in line with our own projection. We limited the adoption rate of HFCS in Mexico to 80 percent. Considering PRA's approach to the adoption rate projection, our 80 percent limit is achieved if the "brand" cola HFCS adoption rate would increase from 50 percent HFCS to 60 percent HFCS.[82] Considering that it would take only a slight change in the soft drink bottlers' policies to reach our highest projected HFCS adoption rate, it is clear that our projected HFCS adoption rates are entirely reasonable and conservative given the positive economic aspects of substituting HFCS for sugar.

C. *Should the Mexican HFCS Market Be Limited by the United States – Mexico Sweetener Quota Agreements in the "But For" Scenario?*

65. PRA argues that the Mexican HFCS market would have been limited by the HFCS quota levels established in the United States – Mexico sweetener agreements from 2005 and 2006:

> "What Navigant does not consider is that the existence of an agreed-upon import quota for fructose with the United States establishes a maximum limit

[81] See Appendix 34 for more detail regarding the corrected "maximum" HFCS adoption rate

[82] See Appendix 35 for a version of the HFCS adoption table (Table 1) that assumes 60 percent HFCS adoption in "brand" colas

> to the amount of fructose that Cargill and its competitors would be able to import into Mexico. In other words, Cargill would not have been able to import HFCS in volumes greater than the quota that was assigned to it, and therefore, any volume estimate above that quota would be simply unfeasible."[83]

66. In making this argument, PRA has confused the "but for" scenario with the actual scenario. We agree that in the actual scenario the quota agreements do exist. However, in the "but for" scenario it would have been unnecessary to establish the HFCS quota agreements because the Mexican HFCS market would have been unrestricted. Thus, the HFCS quotas should be treated as mitigating factors that allowed Cargill and other United States HFCS producers to partially fulfill Mexican demand for HFCS. We correctly treat the quotas allocated to Cargill under the quota agreements as a mitigating factor to an unrestricted Mexican market for HFCS in the "but for" world.

VIII. Projection of Cargill's Market Share (Section C.5.2)

67. In Section C.5.2 of its expert report, PRA argues that it would take Cargill 18 months to recover the 26.53 percent share of the Mexican HFCS market Cargill held in 1997. According to PRA:

> "Without intending to validate this projection, we considered a plausible (although optimistic) scenario under which Cargill would have effectively recovered its market share of 26.53% in 1.5 years (that is, towards the end of 2003). Under this scenario, Cargill would have recovered half its market share towards the end of 2002; that is, it would have achieved a 13.27% market share towards the end of 2002 and a 26.53% market share towards the end of 2003."[84]

68. As stated earlier in Section VI, we believe Cargill could have recovered its market share in less than one year, but do not find PRA's assumption of 1.5 years to be an unreasonable assumption either.[85] In order to be conservative, we accept PRA's 1.5 year assumption for purposes of calculating Cargill's damages where the "but for" Mexican HFCS market considers Mexico's anti-dumping duties to be legally imposed. This market share assumption does not impact the original damages calculation prepared in our first report, where the "but for" Mexican HFCS market considers Mexico's anti-dumping duties to be illegal.

[83] PRA Expert Report ¶ 56
[84] Id. ¶ 79
[85] Ortega Rebuttal Witness Statement ¶ 33

IX. Projection of the Market Price for HFCS in Mexico (Section C.5.3)

69. In Section C.5.3 of its expert report, PRA determines that the HFCS market price used in our damages calculation is too high due to erroneous assumptions:

> "Another fundamental assumption in the damages assessment in the Navigant Report is the estimated price level for HFCS during the estimation period. This price is used to estimate the dollar amount of Cargill's alleged lost sales as a consequence of the measures adopted by Mexico. The analysis in the Navigant Report, however, presents a series of assumptions that we consider erroneous."[86]

70. PRA identifies three allegedly erroneous aspects of our projected HFCS price. In our view, PRA's criticisms of our HFCS price forecasts are unfounded and they ignore the factors we addressed in our first expert report which indicated our price development was conservative. For example, we estimated the 2002 Mexican HFCS price to be 70 percent of the Mexican refined sugar price in 2002.[87] Historically, Cargill had contracts to sell HFCS at 78 percent of the price of sugar.[88] If we had relied upon historically earned price of 78 percent of refined sugar, our damage calculation would have been significantly higher.

71. We will address each of three allegedly erroneous assumptions in turn.

72. First, PRA argues that we should not have used the 2002 sugar price because it was inflated due to Mexico's Soft Drink Tax:

> "First, the price estimate for HFCS for 2002 is based on the observed price of refined sugar in Mexico in the same year. The problem with this approach is that the price of sugar increased substantially as a consequence of the enactment of the IEPS tax."[89]

73. According to PRA, it would have been more appropriate to use the 2001 sugar price to determine the 2002 HFCS market price. In PRA's view:

> "If we recalculate the price of fructose in Mexico following Navigant's methodology (without implying with this that we validate it) but taking into account the average price of sugar in 2001 (USD $26 per cwt) the price for HFCS-55 would have been USD $14.01 per cwt, wet basis, instead of USD

[86] PRA Expert Report ¶ 81

[87] Navigant Expert Report ¶ 92

[88] Agreement for Purchase and Supply of Fructose between Cargill de Mexico and Refrescos del Bajio Azteca. Cargill de Mexico. 10 June 1996. (NAV-28), (C-Ex.-73)

[89] PRA Expert Report ¶ 82

> $14.73. This projection would be conservative given that the prices for sugar in 2002 would have been lower than those observed in 2001 if the IEPS tax had not been enacted."[90]

74. In advocating the use of 2001 sugar prices to project 2002 HFCS prices, PRA fails to realize that sugar prices in 2001 were at unsustainably low levels. Indeed, the weak sugar prices created an industry crisis, prompting Mexico to expropriate 27 of the 61 sugar mills in the country to "prevent the imminent financial collapse of the industry," an action which created direct incentive for Mexico to improve the sugar industry's financial situation.[91] Certainly, we agree sugar prices improved in 2002 due to the imposition of the Soft Drink Tax. However, in the absence of the Soft Drink Tax, we believe Mexico would have needed to take other measures that would have boosted sugar prices. Doing nothing was simply not an option in our view.

75. There are a number of legal measures Mexico could have taken in order to increase sugar prices to restore solvency to the sugar industry. For instance, Mexico could have implemented a program to decrease the level of sugar production, which would have raised prices throughout the industry. For example, Mexico could have:

- Closed some of the expropriated sugar mills and offered direct economic assistance to the affected mill workers and cañeros;
- Paid the cañeros to stop growing sugar cane and instead plant other crops;
- Purchased additional amounts of excess sugar, thus taking excess supply out of the Mexican market.

76. Regardless of the method, Mexico would have needed to adopt measures to increase the price of sugar even in the "but for" scenario. Thus, our "but for" scenario presumes Mexico would have taken appropriate actions to reduce supply and increase prices to 2002 prices in any event. As such, our method of using actual 2002 sugar prices to project HFCS prices for 2002 is appropriate.

77. Moreover, we would consider it equally appropriate to presume that actual Mexican sugar prices from 2002 to present are a reasonable proxy for "but for" Mexican sugar prices given Mexico's need to adopt measures necessary to stabilize the sugar industry in the "but for" world. Thus, it would have been equally appropriate to forecast Mexican HFCS prices at a discount to

[90] Id. ¶ 93
[91] CM ¶ 129

actual Mexican sugar prices from 2003 to present (in our first expert report we forecasted Mexican HFCS prices to trend with US HFCS prices from 2003 onward). Had we forecasted Mexican HFCS prices from 2003 to 2007 to be 70 percent of actual Mexican sugar prices, we would have achieved a nearly identical forecast of Mexican HFCS prices in every year of our forecast.[92]

78. Second, PRA also claims that the 2002 Mexican HFCS market price used in our analysis contains an unjustifiably high premium over the actual 2002 United States HFCS market price and cannot be rationalized relative to reasonable distributor margins. According to PRA:

> "It should also be noted that Navigant estimates HFCS-55 prices at $14.73 cwt wet basis (a cwt is equivalent to 100 pounds). This price is 143.09% higher than the price for HFCS-55 in the United States (estimated at USD $10.30 per cwt) or trades at a premium of 43.09% over the price in the United States.
>
> The Navigant Report points out that HFCS in Mexico would trade at a premium with respect to the US market to compensate for additional transportation and distribution costs and duties.
>
> > *"We believe prices of HFCS in Mexico would trade at a premium to U.S. HFCS prices in order to cover the additional transportation, distribution, and tariff costs".*
>
> Navigant estimates these additional costs that $2.27 per cwt. If we add these incremental costs to the US price for HFCS-55 we would obtain a price of USD $12.57 per cwt for HFCS-55 in Mexico. However, by projecting a price of USD $14.73 per cwt in Mexico, Navigant is assuming an <u>additional</u> premium of 17.18% for which it offers no explanation.
>
> Neither is it reasonable to consider this 17.18% premium as a sales commission that a local reseller or distributor would charge in Mexico (as would be the case of CdM for Cargill) since the typical margin for a distributor or a reseller oscillates between 3% and 10%."[93]

79. PRA is incorrect in its claim that the Mexican HFCS prices used in our analysis contain an "unjustifiable" 17.18 percent premium over United States HFCS prices and cannot be rationalized as providing a reasonable distributor margin. PRA fails to consider or incorrectly

[92] See Appendix 37

[93] PRA Expert Report ¶ 86-90

assesses four different factors which indicate the Mexican HFCS prices used in our analysis are reasonable.

80. For one, PRA fails to account for the fact that United States HFCS prices were depressed in part due to Mexico's Soft Drink Tax. There was excess HFCS production capacity in the United States throughout the period 1998 to 2002, due in part to Mexico's anti-dumping duties and the Soft Drink Tax. If Mexico had not depressed demand for HFCS in Mexico, the excess capacity would have been curtailed and US HFCS prices would have been stronger than they otherwise were. Consequently, we believe US HFCS prices would have been higher in 2002 if the Soft Drink Tax had been eliminated. Thus, the 17.18 percent premium can be explained by the effects Mexico's actions had on US HFCS prices.

81. In addition, PRA ignores the fact that Mexican HFCS prices historically have sold at a significant premium to US HFCS prices. While our forecasted 2002 premium of 43 percent may appear high, the average price of Cargill de Mexico's HFCS-55 sales in 1997 (the last year in which Mexico was not interfering with the HFCS market) contained a 38 to 58 percent premium over United States HFCS-55 prices. Thus, our premium is consistent with historically observed premiums in the market. Table 2 below contains a comparison of Cargill de Mexico's HFCS sales price with various United States HFCS market prices.

Table 2: Comparison of Mexican and United States HFCS-55 Prices[94]

HFCS Price Source	1997 HFCS-55 Price	MX HFCS Price / US HFCS Price
Cargill de Mexico HFCS-55 Sales Price	$14.85	
<u>United States HFCS-55 Prices:</u>		
US HFCS-55 Market Price	$10.76	138%
NACM Net Sales Price	$10.23	145%
Cargill to CdM Transfer Price	$9.42	158%

82. Furthermore, PRA fails to consider additional "in Mexico" HFCS costs that explain the 17.18 percent premium over the United States HFCS price. In addition to transportation, customs and broker fees, and import tariffs, Cargill de Mexico also incurred costs related to distribution, sales,

[94] See Appendix 36

and general administrative activity. In calculating Cargill's damages, we have accounted for these additional costs. When these costs are accounted for, the "additional premium" over United States HFCS price is only 8.3 percent.[95] Considering all of Cargill de Mexico's costs, an 8.3 percent margin is quite reasonable in our view and within PRA's own acceptable range of 3 to 10 percent.[96]

83. Finally, PRA underestimates the margin that Cargill de Mexico earns on HFCS sales. PRA misinterprets the Sales Brokerage Agreement between Cargill and Cargill de Mexico and incorrectly claims that Cargill de Mexico was restricted to a margin of only US$ 0.50 per cwt on HFCS sales.[97] The Sales Brokerage Agreement establishes a fee for Cargill de Mexico when it brokers sales of HFCS to Mexican customers on Cargill's behalf.[98] These are direct sales between Cargill and end Mexican consumers of HFCS. We do not account for these sales in our lost cash flow calculation. The Sales Brokerage Agreement does not cover Cargill's sales of HFCS to Cargill de Mexico as a wholesale buyer of HFCS.[99] As such, it is not accurate to compare the 4.85 percent margin implied by the Sales Brokerage Agreement with Cargill de Mexico's 8.3 percent margin over United States HFCS prices.

84. Third, PRA argues that our 2002 HFCS price is not in accordance with Cargill's actual 2001 HFCS sales:

> "To put this into perspective, during the year 2001, Cargill reported selling HFCS-55 and HFCS-42 to several clients in Mexico, among them, Jugos del Valle, Orvall, Kent Food and Industrias Citrícolas. After analyzing the prices at which Cargill sold HFCS during that year we obtained an average price of USD $12.90 for HFCS-55 and a price of USD $10.80 for HFCS-42. We observe again how the price of USD $14.73 that Navigant projects has no basis."[100]

[95] The additional Cargill de Mexico costs are equal to US$ 1.03 per cwt (US$ 0.76 per cwt for SG&A and financial expenses, US$ 0.27 per cwt for distribution and pumping). If these costs are considered, the relative HFCS cost calculation becomes: US$ 10.30 (US HFCS Price) + US$ 2.27 (transportation within Mexico, customs/broker, and NAFTA tariff charges) + US$ 1.03 (SG&A, financial expenses, distribution and pumping) = US$ 13.60 per cwt. Using this relative HFCS cost, the Cargill de Mexico distribution margin is calculated as: US$ 14.73 (projected Mexican HFCS price) / US$ 13.60 (relative Mexican HFCS cost) = 108.3%.

[96] PRA Expert Report ¶ 90

[97] Id. ¶ 91

[98] Ortega Rebuttal Witness Statement ¶ 32

[99] We understand that sales of HFCS between Cargill de Mexico and Cargill, Inc. were conducted under terms set forth in a service agreement established in the early 1990s. Cargill has been unable to locate this agreement, however.

[100] PRA Expert Report ¶ 95

85. Again, PRA does not consider that 2001 Mexican sugar prices were at unsustainable levels. Thus, it is not surprising to us that actual HFCS sales would be depressed in 2001 as well. Moreover, PRA fails to recall that the anti-dumping duties were in place in 2001. Given the extent of the duties imposed on Cargill in 2001, it was unprofitable for Cargill to sell HFCS in Mexico.[101] We understand that these sales, which were insignificant in size, were made solely to maintain relationships with customers Cargill planned to serve once the duties were removed.[102] Given these factors, Cargill's actual 2001 sales price of HFCS to Mexican customers is not a reasonable benchmark from which to judge a forecast of HFCS prices in the "but for" world.

X. Cargill's Investments in HFCS Capacity and Distribution in Mexico (Section C.7)

86. In Section C.7 of its expert report, PRA presents a series of quotes from internal Cargill documents and reaches the conclusion that none of Cargill's additional capacity investments between 1993 and 1998 were made to serve the Mexican HFCS market.

> "We believe that this fundamental premise [that Cargill invested in capacity to serve the Mexican HFCS market] is incorrect and that Cargill's investments in additional HFCS capacity were intended to serve the growing US HFCS market only."[103]

87. PRA's conclusion is both wrong and illogical. First, PRA bases its conclusion on selective quotes that were taken out of context. As discussed at length in the rebuttal witness statements of Mr. Michael Urbanic and Mr. Jeffrey Cotter, every one of the Commitment Requests contained lengthy discussions and analyses regarding the future potential of the Mexican HFCS market.[104] PRA simply ignores these sections of the documents from which it quotes.

88. Second, PRA's conclusion is illogical. PRA accepts that Cargill invested at least US$ 4 million in distribution facilities to supply HFCS to the Mexican market.[105] Yet despite agreeing that Cargill invested in facilities to distribute HFCS in Mexico, PRA illogically concludes that

[101] Cotter Witness Statement ¶ 88; Ortega Witness Statement ¶ 80
[102] Cotter Rebuttal Witness Statement ¶ 34
[103] PRA Expert Report ¶ 109
[104] Cotter Rebuttal Witness Statement ¶ 39-42; Urbanic Witness Statement ¶ 21-60
[105] PRA Expert Report ¶ 132
However, Cargill strongly rejects PRA's calculations and posits that the entirety of Cargill's investment in the Tula and McAllen transfer stations (US$ 5 million) was intended for HFCS. See Ortega Rebuttal Witness Statement ¶ 8-14 and Urbanic Witness Statement ¶ 82-91.

Cargill did not invest in the production capacity that would be needed to fulfill the distribution. Obviously, the product cannot be distributed unless it is first produced. Thus, investments must be made in both production and distribution. PRA's illogical conclusion in this regard is further proof that PRA has wrongly analyzed Cargill's internal documents.

XI. Consideration of Mitigating Factors to Cargill's Damages (Section C.8)

89. In Section C.8 of its expert report, PRA alleges that we did not consider all of the mitigating factors to the damage Cargill suffered due to Mexico's Soft Drink Tax. According to PRA, we failed to consider that Mexico's soft drink tax increased the value of Cargill's investment interests in Zucarmex, a Mexican sugar producer:

> "[T]he benefits Cargill obtained [from the Zucarmex investment], whichever they are, must be subtracted from the damages assessment in order to place Cargill in the position it would have been immediately before the measures that allegedly affected it were taken (i.e., the IEPS tax).
>
> Since the Navigant Report did not conduct this analysis nor calculation, we conclude that its analysis is incomplete and therefore its calculations overstate the amount of damages."[106]

90. PRA is wrong in stating that we did not consider how Cargill's investment in Zucarmex might mitigate its HFCS damages. When Cargill's investment in Zucarmex is appropriately analyzed, it cannot be logically concluded that the investment, or any benefits deriving from it, mitigate any of the damages Cargill has suffered from Soft Drink Tax.

91. On 26 June 2003, eighteen months after Mexico enacted the Soft Drink Tax, Cargill paid US$ 20 million in exchange for a 15 percent share in Impulsora Azucarera del Noroeste, the parent company of Zucarmex and a seven-year marketing contract with Zucarmex whereby Cargill was to be paid 5 pesos for every 50 kilogram bag of sugar that it sold ("Marketing Agreement").[107]

92. PRA argues that the benefits Cargill obtained from the Zucarmex investment should be counted against Cargill's lost cash flows because the Zucarmex investment would not have been as valuable if Mexico had not enacted the Soft Drink Tax. In our view, PRA's position in this regard is incorrect for two reasons.

106 PRA Expert Report ¶ 155-156

107 Jurgens Witness Statement ¶ 20

93. First, Cargill made its Zucarmex investment in June 2003 – eighteen months **after** Mexico enacted the Soft Drink Tax in January 2002. Because the Soft Drink Tax was already in place when Cargill made its investment, any beneficial aspects of the tax would have been factored into the $20 million price Cargill paid for the investment.[108] Only if Cargill had made the investment **before** the Soft Drink Tax was imposed or became known would there be a need to consider potential mitigating benefits earned as a result of the Soft Drink Tax.

94. Second, PRA wrongly assesses the Marketing Agreement between Cargill and Zucarmex. According to PRA, the Marketing Agreement was only viable because the Soft Drink Tax was supporting the price of sugar in Mexico:

> "If the price of sugar in the market was perceived to be unstable or significant reductions in the price of sugar were expected in the future it would be very hard to imagine that Zucarmex or Cargill would have considered a fixed commission in the future; they were sure that the market would support this.
>
> In fact, during 2002, and with full knowledge of the enactment of the IEPS tax, both Cargill and Zucarmex must have considered the prices for sugar would not be negatively affected (by HFCS imports, for example) at least for the following five years in which the "special" commission was in place."[109]

95. However, the Marketing Agreement did not benefit from high or stable sugar prices as PRA suggests. The terms of the Marketing Agreement were negotiated as an integral part of Cargill's US$ 20 million investment in Zucarmex. When Cargill considered investing in Zucarmex, it valued a 15 percent stake in Zucarmex at US$ 13.5 million.[110] However, Zucarmex was in need of US$ 20 million.[111] To justify a US$ 20 million investment in Zucarmex, the Marketing Agreement was signed to provide Cargill with additional value in the transaction. Thus, the Marketing Agreement ensured that Cargill received fair value for its US$ 20 million investment.[112] Without the Marketing Agreement Cargill certainly would not have paid US$ 20 million for the Zucarmex shares.[113]

[108] In fact, Cargill did consider the Soft Drink Tax when determining the value of the Zucarmex investment. See Jurgens Witness Statement ¶ 14
[109] PRA Expert Report ¶ 149-150
[110] Jurgens Witness Statement ¶ 15
[111] Id. ¶ 15
[112] Id. ¶ 17
[113] Id. ¶ 17

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96. If the benefits Cargill has received from its investment in Zucarmex must be offset from Cargill's losses related to HFCS sales in Mexico (as Mexico and PRA argue), Cargill would be put in the effective position where it has overpaid for its investment in Zucarmex. Consequently, Cargill's Zucarmex investment and any benefits Cargill has earned from its investment in Zucarmex are not factors which should mitigate Cargill's losses related to HFCS sales in Mexico that were impacted by the Soft Drink Tax.

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30 June 2007

Date

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Appendix 23

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LIST OF EXHIBITS TO EXPERT REBUTTAL REPORT

NCI ID	Claimant ID	Document Title	Date	Author
NAV-145	C-EE-291	European Union Sugar Regime	December 1999	Food and Agriculture Organization to the United Nations
NAV-146	C-LA-117	CMS Gas Transmission Co. v. The Argentine Republic - Final Award of May 12, 2005	5/12/2005	Lalonde, Rezek, Vicuña

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Appendix 24

CARGILL, INC. v UNITED MEXICAN STATES

EFFECTIVE CARGILL MARKET SHARE WITH CAPACITY RESTRICTIONS

Notes	Calc	Year	2002	2003	2004	2005	2006	2007	Total
Appendix 7	[A]	Cargill HFCS-55 Sales to Mexico (cwt, Wet)	7,064,075	7,124,696	7,589,603	7,476,222	6,621,986	5,334,041	41,209,923
Appendix 7	[B]	Cargill HFCS-42 Sales to Mexico (cwt, Wet)	3,892,921	4,934,910	4,690,158	4,811,184	2,301,238	3,688,148	25,318,559
Calc.	[C] = A + B	Total Cargill HFCS Sales to Mexico (cwt, Wet)	11,956,998	12,059,606	12,278,761	12,287,406	8,923,124	9,022,189	66,528,062
Appendix 8	[D]	Unserved Mexican HFCS-55 Market - Cargill Share (cwt, Wet)	7,064,075	7,124,696	7,588,603	7,476,222	6,621,986	5,334,041	41,209,623
Appendix 8	[E]	Unserved Mexican HFCS-42 Market - Cargill Share (cwt, Wet)	4,892,921	4,934,910	5,256,238	5,178,394	4,586,639	3,694,615	28,543,713
Calc.	[F] = D + E	Unserved Mexican HFCS Market - Cargill Share (cwt, Wet)	11,956,995	12,059,606	12,844,838	12,654,616	11,208,525	9,028,656	69,753,236
Appendix 16	[G]	Cargill Market Share - Assumed	26.53%	26.53%	26.53%	26.53%	26.53%	26.53%	26.53%
Calc.	[H] = F / G	Total Mexican HFCS Market (cwt, Wet)	45,068,434	45,450,656	48,410,066	47,693,149	42,243,073	34,027,509	262,898,386
Calc.	[I] = C / H	Cargill Market Share - Capacity Restricted	26.53%	26.53%	25.36%	25.76%	21.12%	26.51%	25.31%

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MEXICAN HFCS MARKET GROWTH COMPARISON BETWEEN 1992-1997 & 1998-2001

Mexican Industrial Sweetener Market - Historical Consumption

Note	Calc.	Year	Historical Sweetener Consumption (Actual) 1992	1993	1994	1995	1996	1997	Period of Interference (Actual) 1998	1999	2000	2001
		Beverage (MT, Dry)										
1	[A]	Sugar	1,197,559	1,269,156	1,330,668	1,266,805	1,175,128	1,117,238	1,139,915	1,161,841	1,142,250	1,190,400
1	[B]	HFCS	12,750	21,000	66,290	74,250	190,300	301,275	306,991	339,025	433,000	490,000
1	[C] = A + B	Total Beverage	1,210,309	1,290,156	1,396,958	1,341,055	1,365,428	1,404,013	1,446,906	1,500,866	1,575,250	1,680,400
Calc.	[D] = B / C	HFCS % of Beverage	1.05%	1.63%	4.75%	5.53%	13.75%	21.38%	21.22%	22.33%	27.49%	29.41%
		Non-Beverage (MT, Dry)										
1	[E]	Sugar	985,099	946,686	972,266	907,254	895,700	874,563	899,220	947,218	950,318	957,846
1	[F]	HFCS	4,250	7,000	18,750	24,750	63,500	100,425	102,331	119,875	145,000	150,000
1	[G] = E + F	Total Non-Beverage	989,349	953,686	991,016	932,004	959,200	975,000	1,001,551	1,067,093	1,095,318	1,107,846
Calc.	[H] = F / G	HFCS % of Non-Beverage	0.43%	0.73%	1.89%	2.66%	6.62%	10.30%	10.22%	11.23%	13.24%	13.54%
		Total Industrial (MT, Dry)										
Calc.	[I] = A + E	Sugar	2,181,552	2,215,842	2,303,434	2,174,059	2,070,828	1,982,701	2,039,035	2,120,099	2,092,572	2,148,246
Calc.	[J] = B + F	HFCS	17,000	28,000	75,000	99,000	254,000	401,700	409,322	459,500	580,000	640,000
Calc.	[K] = I + J	Total Industrial	2,198,552	2,243,842	2,378,434	2,273,057	2,324,828	2,384,401	2,448,357	2,603,559	2,672,577	2,788,246
Calc.	[L] = J / K	HFCS % of Industrial	0.77%	1.25%	3.15%	4.35%	10.83%	16.85%	16.72%	18.36%	21.66%	22.95%

Mexican Industrial Sweetener Market - Annual Growth Rates

Note	Calc.	Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Calc.	[M] = (J_n/J_(n-1))-1	Total HFCS Growth Rate		64.71%	167.86%	32.00%	156.57%	58.15%	1.90%	17.14%	20.90%	3.43%

Mexican Industrial Sweetener Market - Average Annual Growth Rate by Period

Note	Calc.		1992-1998	1998-2001
Calc.	[N] = (J_end/J_start)^(1/N)-1	Total HFCS CAGR	88.25%	15.60%

Notes

1. HFCS consumption data from "Mexican Sweetener Consumption by Use, 1992-2007." USDA. 2006. (NAV-117), (C-Ex.-237)

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ALTERNATIVE DAMAGE SCENARIO
CALCULATION OF THE "BUT FOR" MEXICAN HFCS MARKET

Mexican Industrial Sweetener Market (Actual & Projected)

(All consumption and production are in metric [illegible])

Note	Calc.	Year	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
		Beverage (MT, Dry)																
1	[A]	Sugar	1,195,553	1,249,156	1,330,648	1,268,800	1,195,126	1,107,738	1,129,815	1,194,841	1,117,299	1,150,601	[illegible]	730,611	431,308	363,500	369,941	[illegible]
2	[B]	HFCS	12,750	21,000	56,250	74,250	190,000	301,275	[illegible]	[illegible]	435,000	450,000	[illegible]	911,500	[illegible]	[illegible]	[illegible]	[illegible]
3	[C] = A + B	Total Beverage	1,219,303	1,290,156	1,386,898	1,343,050	1,348,088	1,409,013	1,446,806	1,543,466	1,582,299	1,600,600	1,640,700	1,642,299	1,735,502	1,743,574	1,743,574	[illegible]
Calc.	[D] = B / C	HFCS - % of Beverage	[illegible]	1.63%	[illegible]	5.53%	13.75%	21.39%	21.22%	23.33%	27.49%	28.11%	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
		Non-Beverage (MT, Dry)																
4	[E]	Sugar	[illegible]	[illegible]	[illegible]	967,251	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
5	[F]	HFCS	4,250	7,000	18,750	24,750	[illegible]	[illegible]	[illegible]	[illegible]	145,000	150,000	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
6	[G] = E + F	Total Non-Beverage	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	978,388	1,007,881	1,107,090	1,093,118	1,107,946	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Calc.	[H] = F / G	HFCS - % of Non-Beverage	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	10.30%	[illegible]	11.33%	13.26%	13.54%	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
		Total Industrial (MT, Dry)																
Calc.	[I] = A + E	Sugar	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	1,251,567	[illegible]
Calc.	[J] = B + F	HFCS	17,000	28,000	75,000	99,000	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Calc.	[K] = I + J	Total Industrial	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Calc.	[L] = J / K	HFCS - % of Industrial	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

United States Industrial Sweetener Market (Actual)

Beverage Sweetener Market (MT, Dry)

Note	Calc.	Year	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
7	[M]	Sugar	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
8	[N]	HFCS	[illegible]	[illegible]	291,540	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Calc.	[O] = M + N	Total Beverage	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Calc.	[P] = N / O	HFCS - % of Beverage	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Non-Beverage Sweetener Market (MT, Dry)

Note	Calc.	Year	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
7	[Q]	Sugar	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
8	[R]	HFCS	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Calc.	[S] = Q + R	Total Non-Beverage	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Calc.	[T] = R / S	HFCS - % of Non-Beverage	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

Total Industrial Sweetener Market (MT, Dry)

Note	Calc.	Year	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
7	[U]	Sugar	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
8	[V]	HFCS	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	1,123,739	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Calc.	[W] = U + V	Total Industrial	6,725,[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Calc.	[X] = V / W	HFCS - % of Industrial	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]

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ALTERNATIVE DAMAGE SCENARIO

CALCULATION OF THE "BUT FOR" MEXICAN HFCS MARKET

Notes:

1. Actual sugar use in Mexican beverage industry for 1992-2001 Source: Mexican Sweetener Consumption by Use, 1992-2007, USDA, 2006. (NAV-117), (C-Ex.-237)
   Forecasted Mexican beverage industry sugar use for 2002-2007 is based on total Mexican beverage industry sweetener use less forecasted Mexican beverage industry HFCS use.
2. Actual HFCS use in the Mexican beverage industry for 1992-2001 Source: Mexican Sweetener Consumption by Use, 1992-2007, USDA, 2006. (NAV-117), (C-Ex.-237)
   Forecasted Mexican beverage industry HFCS use for 2002-2007 is based on the HFCS adoption rate consistently increasing from 28.11% to 75% over a period of three years and then increasing in line with our original HFCS adoption rate projection (See Appendix 9).
3. Actual Mexican beverage industry sweetener use for 1992-2005 Source: Mexican Sweetener Consumption by Use, 1992-2007, USDA, 2006. (NAV-117), (C-Ex.-237)
   To be conservative, we have assumed that the Mexican beverage sweetener market does not grow in 2006-2007.
4. Actual sugar use in Mexican non-beverage industry for 1992-2001 Source: Mexican Sweetener Consumption by Use, 1992-2007, USDA, 2006. (NAV-117), (C-Ex.-237)
   Forecasted Mexican non-beverage industry sugar use for 2002-2007 is based on total Mexican non-beverage industry sweetener use less forecasted Mexican non-beverage industry HFCS use.
5. Actual HFCS use in the Mexican non-beverage industry for 1992-2001 Source: Mexican Sweetener Consumption by Use, 1992-2007, USDA, 2006. (NAV-117), (C-Ex.-237)
   Forecasted Mexican non-beverage industry HFCS use for 2002-2007 is based on consistent growth from 25% to 27% HFCS adoption.
6. Actual Mexican non-beverage industry sweetener use for 1992-2003 Source: Mexican Sweetener Consumption by Use, 1992-2007, USDA, 2006. (NAV-117), (C-Ex.-237)
   For 2004-2005, we assumed that non-beverage industry sweetener use is equal to 69.2% of beverage industry sweetener use, which is relationship of previous years in the ERS data/model.
   To be conservative, we have assumed that the Mexican non-beverage sweetener market does not grow in 2006-2007.
7. Source: U.S. Sugar Statistical Compendium, Table 50 - "U.S. Sugar deliveries to end users", USDA, 1991. (NAV-1), (C-Ex.-20)
   Short tons converted to metric tons at a rate of 1 metric ton equal to (2,204.6 / 2,000) = 1.102 short tons.
8. Source: U.S. Corn Sweetener Statistical Compendium, Table 17 - "U.S. HFCS deliveries to domestic users, by type of use, 1970-92", USDA, 1992. (NAV-7), (C-Ex.-27)
   Short tons converted to metric tons at a rate of 1 metric ton equal to (2,204.6 / 2,000) = 1.102 short tons.

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ALTERNATIVE DAMAGE SCENARIO

CARGILL'S POTENTIAL SALES IN THE "BUT FOR" MEXICAN HFCS MARKET

Note	Calc	Year	2002	2003	2004	2005	2006	2007
Appendix 26	[A]	Total Mexican HFCS Market (MT; Dry)	937,818	1,200,339	1,602,724	1,675,258	1,697,308	1,719,759
1	[B]	Cargill HFCS Market Share	6.63%	19.50%	26.53%	26.53%	26.53%	26.53%
Calc.	[C] = A x B	Unserved Mexican HFCS Market - Cargill Share (MT; Dry)	62,208	238,066	428,168	444,548	450,400	456,311
2	[D]	Cargill's HFCS Quota Allocation (MT; Dry)	-	-	-	16,613	71,413	131,029
Calc.	[E] = C - D	Unserved Mexican HFCS Market - Cargill Share less Quota (MT; Dry)	62,208	238,066	428,168	427,890	378,993	325,286
Unserved Mexican HFCS-42 Market - Cargill Share less Quota								
3	[F]	HFCS-42 as % of Mexican HFCS Market	39%	39%	39%	39%	39%	39%
Calc.	[G] = E x F	Unserved Mexican HFCS-42 Market - Cargill Share (MT; Dry)	24,246	93,098	165,705	166,271	147,513	128,908
4	[H]	Dry pounds of HFCS-42 equal to one wet	0.71	0.71	0.71	0.71	0.71	0.71
Calc.	[I] = G / H	Unserved Mexican HFCS-42 Market - Cargill Share (MT; Wet)	34,149	131,128	233,392	234,180	208,047	167,585
5	[J]	cwt per metric ton	22.046	22.046	22.046	22.046	22.046	22.046
Calc. 6	[K] = I x J	Unserved Mexican HFCS-42 Market - Cargill Share (cwt; Wet)	752,854	2,890,818	5,145,414	5,178,394	4,586,639	3,694,615
Unserved Mexican HFCS-55 Market - Cargill Share less Quota								
3	[J]	HFCS-55 as % of Mexican HFCS Market	61%	61%	61%	61%	61%	61%
Calc.	[K] = C x J	Unserved Mexican HFCS-55 Market - Cargill Share (MT; Dry)	37,983	145,269	259,456	261,119	231,280	186,300
4	[L]	Dry pounds of HFCS-55 equal to one wet	0.77	0.77	0.77	0.77	0.77	0.77
Calc.	[M] = K / L	Unserved Mexican HFCS-55 Market - Cargill Share (MT; Wet)	49,329	189,310	336,956	339,116	300,364	241,948
5	[N]	cwt per metric ton	22.046	22.046	22.046	22.046	22.046	22.046
Calc. 6	[O] = M x N	Unserved Mexican HFCS-55 Market - Cargill Share (cwt; Wet)	1,086,925	4,173,372	7,425,480	7,476,222	6,621,886	5,334,043

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ALTERNATIVE DAMAGE SCENARIO

CARGILL'S POTENTIAL SALES IN THE "BUT FOR" MEXICAN HFCS MARKET

Notes:

1. PRA Expert Report at Table 4
2. The Mexican government allowed HFCS imports under a quota system in 2005, 2006, and 2007. As a result of the damage done to U.S. sugar production by Hurricane Katrina, the U.S. and Mexican governments agreed to allow a certain amount of Mexican sugar into the U.S. market. As a result, Mexico reciprocated and agreed to allow 250,000 MT c.b. into Mexico from the U.S. In Oct 2006 - Sept 2007, Mexico will allow the import of 250,000 MT (dry) of HFCS. In Oct 2007 - Dec 2007, Mexico will allow the import of 175,000 to 250,000 MT (dry) of HFCS. To be conservative, we assumed that Mexico would allow the maximum amount of HFCS (250,000 MT) during October 2007 - December 2007. In order to convert the Mexican HFCS quota from Fiscal Year to Calendar Year, we assumed that the yearly quota imports were spread evenly over the relevant period. Although the quotas could be used for either HFCS-42 or HFCS-55, to be conservative we used the HFCS-55 wet to dry conversion factor of 0.77 to convert the October 2005 - September 2006 quota.
   Per Cargill's allocation percentage in 2005 & 2006, we assumed that the company received a 34.52 percent allocation for all HFCS quotas from 2005 to 2007. For example, Cargill's share of the 2007 calendar year quota is as follows: (34.52%) * (250,000*(3/4) + 250,000) = 151,025
   Source: January 2006 Sugar and Sweeteners Outlook. USDA. 31 January 2006. (NAV-101), (C-Ex.-242);
   "Corn Refiners Welcome Sweetener Deal with Mexico". Corn Refiners Association. 28 July 2006. (NAV-108), (C-Ex.-254)
   Memorandum: Mexican TRQ on HFCS. Weil, Gotshal & Manges LLP. 3 August 2006 (NAV-88), (C-Ex.-256)
3. Cargill has historically had a strong presence in the soft drink industry, where the primary sweetener is HFCS-55, and Cargill de Mexico's sales were almost entirely made up of HFCS-55 prior to the imposition of duties and the soft drink tax. However, to be conservative, we assumed that the mix of Cargill de Mexico's sales would mimic the long term product mix of the Mexican HFCS market, which we assumed to be 39% HFCS-42 and 61% HFCS-55. Our assumption about the allocation of HFCS sales to HFCS-42 and HFCS-55 represents the average composition of the mature US HFCS market from 1984-2005. See Appendix 15 for further detail.
4. *Source:* January 2006 Sugar and Sweeteners Outlook. USDA. 31 January 2006. (NAV-101), (C-Ex.-242)
5. *Source:* FTD Guide, Section 9 - Conversion Tables. US Census Bureau. 17 November 2006. (NAV-118), (C-Ex.-270)
6. Cargill's share of the Mexican HFCS market represents both Cargill de Mexico sales and Cargill, Inc. direct sales to Mexico. Cargill, Inc. direct sales are removed in Appendices 29 and 30; thus, the damages are quantified based only on CdM's projected sales in Mexico.

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ALTERNATIVE DAMAGE SCENARIO

CARGILL'S HFCS PRODUCTION AND SALES IN THE "BUT FOR" MEXICAN MARKET

Note	Calc	Year	2002	2003	2004	2005	2006	2007
1, 2	[A]	HFCS Grind & Finishing Capacity (bu./day)	75,000	75,000	75,000	75,000	55,000	55,000
3	[B]	Production days per year	230	350	350	350	350	350
Calc.	[C] = A x B	HFCS Grind & Finishing Capacity (bu./year)	17,250,000	26,250,000	26,250,000	26,250,000	19,250,000	19,250,000
Grind & Finishing Capacity for HFCS-55 Production:								
4	[D] = C	HFCS Capacity Available for HFCS-55 (bu.)	17,250,000	26,250,000	26,250,000	26,250,000	19,250,000	19,250,000
5	[E]	HFCS-55 Yield (cwt per bushel)	0.455	0.455	0.455	0.455	0.455	0.455
Calc.	[F] = D x E	HFCS-55 Production Capacity (cwt)	7,848,750	11,943,750	11,943,750	11,943,750	8,758,750	8,758,750
Appendix 27	[G]	Cargill Share of HFCS-55 Market (cwt)	1,086,921	4,173,572	7,428,608	7,476,222	6,621,586	5,334,040
Calc.	[H] = MIN (F,G)	Cargill HFCS-55 Sales to Mexico (cwt)	1,086,921	4,173,572	7,428,608	7,476,222	6,621,586	5,334,041
Calc.	[I] = H / E	Capacity Used for HFCS-55 Sales (bu.)	2,388,837	9,172,686	16,326,610	16,431,257	14,553,595	11,723,167
Grind & Finishing Capacity for HFCS-42 Production:								
Calc.	[J] = C - I	Capacity Available for HFCS-42 (bu.)	14,861,163	17,077,314	9,923,390	9,818,743	4,696,405	7,526,833
8	[K]	HFCS-42 Yield (cwt per bushel)	0.49	0.49	0.49	0.49	0.49	0.49
Calc.	[L] = J x K	HFCS-42 Production Capacity (cwt)	7,281,970	8,367,884	4,862,461	4,811,184	2,301,238	3,688,148
Appendix 27	[M]	Cargill Share of HFCS-42 Market (cwt)	772,994	2,690,018	5,145,414	5,179,394	4,560,039	7,094,815
Calc.	[N] = MIN (L,M)	Cargill HFCS-42 Sales to Mexico	772,994	2,690,018	4,862,461	4,811,184	2,301,238	3,688,148

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Appendix 28

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ALTERNATIVE DAMAGE SCENARIO

CARGILL'S HFCS PRODUCTION AND SALES IN THE "BUT FOR" MEXICAN MARKET

<u>Notes:</u>

1. The Dayton & Dimmitt capacities represent the minimum unmitigated excess capacity associated with Cargill's investment in the Mexican HFCS market. Because the Dayton and Dimmitt plants were shut down in 1998 & 2005, respectively, their production capacity, by definition, was not shifted to markets other than Mexico. If there had been additional avenues for sales that justified maintaining production, then the plants would not have been shut down. The Dayton plant capacity represents the unused excess capacity intended for the Mexican HFCS market in 2002-2005, as Dayton was shut down from 1998-2005. We understand that Dayton was reopened in 2006 to help meet ethanol demand as well as serve the HFCS demand from the trade agreements with Mexico. This new demand was not sufficient to keep Dayton fully utilized. In 2005, Cargill also shut down a plant in Dimmitt, TX, which had a lower capacity than Dayton. Therefore, the total incremental HFCS capacity gained by opening Dayton and closing Dimmitt approximates the additional mitigation of damages offered by the market developments in 2006 and 2007. As such, the Dimmitt capacity is used for the periods of 2006 and 2007.
2. *Source:* February 2003 Average Daily Corn Wet Milling Capacity. Cargill, Inc. 3 February 2003. (NAV-71), (C-Ex.-186)
   March 2005 Average Daily Corn Wet Milling Capacity. Cargill, Inc. 15 March 2005. (NAV-87), (C-Ex.-218)
   Although the 75,000 bu/day grind is nominally separated into HFCS-42 and HFCS-55 capacity, it is our understanding that HFCS-42 and HFCS-55 production capacity are substitutable at a pre-yield ratio of 1:1.
3. Witness Statement of Jeff Cotter, para. 30. For 2002, we assumed that production of HFCS for Mexico would only occur once the anti-dumping duties were lifted on 15 May 2002.
4. We have assumed that HFCS-55 demand would be satisfied before HFCS-42 demand since HFCS-55 is the higher margin product. As such, all production capacity is initially allocated to filling HFCS-55 demand. Only the portion of production capacity that is not used to fulfill HFCS-55 demand is available for the production of HFCS-42.
5. *Source:* February 2003 Average Daily Corn Wet Milling Capacity. Cargill, Inc. 3 February 2003. (NAV-71), (C-Ex.-186)

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ALTERNATIVE DAMAGE SCENARIO
CALCULATION OF PRE-TAX PROFITS FROM SALES OF HFCS-55
(All figures in USD)

Source	Calc	Item	2002 Total	2002 Percent	2003 Total	2003 Percent	2004 Total	2004 Percent	2005 Total	2005 Percent	2006 Total	2006 Percent	2007 Total	2007 Percent
Appendix 26	[A]	Total Cargill HFCS Sales in Mexico (cwt)	[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]	
1	[B]	Direct (Non-CdM) Sales as % of Total Sales	[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]	
Calc.	[C] = A x B	Direct Sales in Mexico (cwt)	[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]	
Calc.	[D] = A - C	Cargill de Mexico HFCS Sales (cwt)	[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]	
Appendix 19	[E]	Price per cwt	$ [illegible]		$ [illegible]		$ [illegible]		$ [illegible]		$ [illegible]		$ [illegible]	
Calc.	[F] = D x E	Cargill de Mexico HFCS Sales Revenue	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]
Cargill, Inc. Costs														
Appendix 11	[G]	Net Corn	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Appendix 13	[H]	Energy/Fixed	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Appendix 13	[I]	Plant	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
2	[J]	SG&A	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Appendix 19	[K]	US Transportation	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Cargill de Mexico Costs														
3	[L]	Import Tariff per NAFTA	[illegible]	[illegible]	[illegible]	[illegible]	-	[illegible]	-	[illegible]	-	[illegible]	-	[illegible]
Appendix 19	[M]	Cargill de Mexico SG&A	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Appendix 19	[N]	Distribution (Pumping)	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Appendix 19	[O]	Customs & Border	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Appendix 19	[P]	Mexico Transportation	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Calc.	[Q] = F - SUM (G:P)	Pre-Tax Income	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]

Notes:

1. Direct (non-CdM) sales to Mexico of [illegible] is based on 1997 direct sales to Mexico as a percentage of 1997 total sales to Mexico. Direct sales were defined as those HFCS shipments made by Cargill to companies other than CdM. Non-CdM shipments were identified as shipments made to companies that did not have customer ID [illegible], which was CdM's customer ID. In 1997, direct sales amounted [illegible] lbs c.b. Therefore, direct sales as a percentage of total Mexican HFCS sales was calculated as [illegible] lbs c.b. / [illegible] lbs c.b. = [illegible].
   Source: Profitability on Mexico Sales, 1996-2004, Cargill, Inc. 2004, (NAV-[illegible], (C-Ex-[illegible])
2. These are SG&A costs associated with production of HFCS. The majority of these costs are incurred at corporate headquarters and then allocated to each plant. As such, we have not adjusted these costs upwards to account for Dayton and Dimmitt being higher cost producing plants. They are derived from the "Non-Mfg Division" and "Non-Mfg Plant" line items. Given the similarity of other costs between the accounting years, we assumed 2002 SG&A costs would have approximated the calculated 2003 SG&A costs. The SG&A cost information for 2002 was unavailable.
   Source: 2003 FX Cost Allocation Workbook, Fructose Cost Summary - CWT. Cargill, Inc. 2003. (NAV-[illegible], (C-Ex-[illegible])
   2004 FX Cost Allocation Workbook, Fructose Cost Summary - CWT. Cargill, Inc. 2004. (NAV-[illegible], (C-Ex-[illegible])
   2005 FX Cost Allocation Workbook, Fructose Cost Summary - CWT. Cargill, Inc. 2005. (NAV-[illegible], (C-Ex-[illegible])
   2006 FX Cost Allocation Workbook, Fructose Cost Summary - CWT. Cargill, Inc. 2006. (NAV-[illegible], (C-Ex-[illegible])
3. Import tariff based on tariff rates of [illegible] in 2002, [illegible] in 2003, and 0% from 2004-2007 as stipulated in NAFTA. We have conservatively assumed that for purposes of calculating the import tariff, value is equal to Sales Price less Mexico Costs ([illegible]) - SUM ([illegible]). As a result, the tariff is being applied to a transfer price that includes the margin earned by CdM.
   Source: "U.S. - Mexico Sweetener Trade Mired in Dispute", Agricultural Outlook, USDA, September 1999. (NAV-[illegible], (C-Ex-[illegible])

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ALTERNATIVE DAMAGE SCENARIO

CALCULATION OF PRE-TAX PROFITS FROM SALES OF HFCS-42

(All figures in USD)

Note	Calc	Item	[illegible] Total	Per cwt	[illegible] Total	Per cwt	[illegible] Total	Per cwt	[illegible] Total	Per cwt	[illegible] Total	Per cwt	[illegible] Total	Per cwt
Appendix 28	[A]	Total Cargill HFCS Sales to Mexico (cwt)	[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]	
1	[B]	Direct (Non-CdM) Sales as % of Total Sales	[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]	
Calc.	[C] = A x B	Direct Sales to Mexico (cwt)	[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]	
Calc.	[D] = A - C	Cargill de Mexico HFCS Sales (cwt)	[illegible]		[illegible]		[illegible]		[illegible]		[illegible]		[illegible]	
Appendix 18	[E]	Price per cwt	$ [illegible]		$ [illegible]		$ [illegible]		$ [illegible]		$ [illegible]		$ [illegible]	
Calc.	[F] = D x E	Cargill de Mexico HFCS Sales Revenue	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]
Cargill, Inc. Costs														
Appendix 11	[G]	Net Corn	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Appendix 13	[H]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Appendix 15	[I]	Plant	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
2	[J]	SG&A	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Appendix 19	[K]	US Transportation	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Cargill de Mexico Costs														
3	[L]	Import Tariff per NAFTA	[illegible]	[illegible]	[illegible]	[illegible]	-	[illegible]	-	[illegible]	-	[illegible]	-	[illegible]
Appendix 19	[M]	Cargill de Mexico SG&A	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Appendix 19	[N]	Distribution (Pumping)	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Appendix 19	[O]	Customs & Broker	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Appendix 19	[P]	Mexico Transportation	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
Calc.	[Q] = F + SUM (G:P)	Pre-Tax Income	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]	$ [illegible]	[illegible]

Notes:

1. Direct (non-CdM) sales to Mexico of 6.35% is based on 1997 direct sales to Mexico as a percentage of 1997 total sales to Mexico. Direct sales were defined as those HFCS shipments made by Cargill to companies other than CdM. Non-CdM shipments were identified as shipments made to companies that did not have customer ID #741, which was CdM's customer ID. In 1997, direct sales amounted 19,367,456 lbs c.b. Therefore, direct sales as a percentage of total Mexican HFCS sales was calculated as 19,367,456 lbs c.b. / 305,144,436 lbs c.b. = 6.35%.
   Source: Profitability on Mexico Sales, 1996-2004, Cargill, Inc. 2004. (NAV-70), (C-Ex-201)
2. These are SG&A costs associated with production of HFCS. The majority of these costs are incurred at corporate headquarters and then allocated to each plant. As such, we have not adjusted these costs upwards to account for Dayton and Dimmitt being higher cost producing plants. They are derived from the "Non-Mfg Division" and "Non-Mfg Plant" line items. Given the similarity of other costs between the accounting years, we assumed 2002 SG&A costs would have approximated the calculated 2003 SG&A costs. The SG&A cost information for 2002 was unavailable.
   Source: 2003 FX Cost Allocation Workbook, Fructose Cost Summary - CWT. Cargill, Inc. 2003. (NAV-65), (C-Ex-199)
   2004 FX Cost Allocation Workbook, Fructose Cost Summary - CWT. Cargill, Inc. 2004. (NAV-75), (C-Ex-204)
   2005 FX Cost Allocation Workbook, Fructose Cost Summary - CWT. Cargill, Inc. 2005. (NAV-83), (C-Ex-223)
   2006 FX Cost Allocation Workbook, Fructose Cost Summary - CWT. Cargill, Inc. 2006. (NAV-93), (C-Ex-240)
3. Import tariff based on tariff rates of 3% in 2002, 1.5% in 2003, and 0% from 2004-2007 as stipulated in NAFTA. We have conservatively assumed that for purposes of calculating the import tariff, value is equal to Sales Price less Mexico Costs ([F] + SUM ([M]:[P])). As a result, the tariff is being applied to a transfer price that includes the margin earned by CdM.
   Source: "U.S. - Mexico Sweetener Trade Mired in Dispute", Agricultural Outlook. USDA. September 1999. (NAV-48), (C-Ex-119)

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ALTERNATIVE DAMAGE SCENARIO

ALLOCATION OF CARGILL, INC & CARGILL DE MEXICO'S LOST CASH FLOWS

(All figures in USD)

Note	Calc	Year	2002	2003	2004	2005	2006	2007
Appendix 30	[A]	Cargill HFCS-42 Pre-Tax Income	755,457	3,318,495	4,247,293	9,290,989	5,332,416	8,546,155
Appendix 29	[B]	Cargill HFCS-55 Pre-Tax Income	1,535,198	6,839,021	9,928,545	15,464,685	16,606,812	13,327,068
Calc.	[C] = A + B	Total Cargill HFCS Pre-Tax Income	2,290,654	10,157,516	14,175,838	23,755,673	21,939,227	21,873,223
Cargill de Mexico Nominal Lost Cash Flows:								
Appendix 18	[D]	Cargill de Mexico % of Pre-Tax Income	46.77%	46.77%	46.77%	46.77%	46.77%	46.77%
Calc.	[E] = C x D	Cargill de Mexico Pre-Tax Income	1,071,323	4,750,402	6,629,861	11,110,389	10,260,630	10,253,348
Cargill, Inc. Nominal Lost Cash Flows:								
Appendix 18	[F]	Cargill, Inc. % of Pre-Tax Income	53.23%	53.23%	53.23%	53.23%	53.23%	53.23%
Calc.	[G] = C x F	Cargill, Inc. Pre-Tax Income	1,219,330	5,406,914	7,545,989	12,645,308	11,678,597	11,669,878

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ALTERNATIVE DAMAGE SCENARIO

CALCULATION OF TOTAL COMPENSATION DUE CARGILL

(All figures in USD)

Note	Calc.	Year	2002	2003	2004	2005	2006	2007	TOTAL
Cargill de Mexico Damages:									
Appendix 31	[A]	Total CdM Nominal Lost Cash Flows	$ 3,077,323	$ 4,350,660	$ 6,459,943	$ 11,116,369	$ 10,360,510	$ 10,253,364	$ 44,076,419
1	[B]	Interest Rate/Discount Rate	4.68%	4.12%	4.34%	6.19%	7.96%	7.93%	
2	[C]	Present Value Adjustment to CdM Lost Cash Flows	$ 343,313	$ 716,966	$ 725,932	$ 1,089,848	$ 377,063	$ (161,290)	$ 2,701,694
Calc.	[D] = A + C	Present Value of CdM Lost Cash Flows							$ 46,778,104
Cargill, Inc. Damages:									
Appendix 31	[E]	Total Cargill, Inc. Nominal Lost Cash Flows	$ 3,219,200	$ 5,406,918	$ 7,545,889	$ 12,448,303	$ 11,678,397	$ 11,669,776	$ 50,968,233
1	[F]	Interest Rate/Discount Rate	4.68%	4.12%	4.34%	6.19%	7.93%	7.93%	
2	[G]	Present Value Adjustment to Cargill, Inc. Lost Cash Flows	$ 376,979	$ 816,012	$ 837,403	$ 1,172,122	$ 429,196	$ (186,580)	$ 3,074,942
Calc.	[H] = [G] + [E]	Present Value of Cargill, Inc. Lost Cash Flows							$ 53,280,464
Cargill Total Damages:									
Calc.	[I] = [D] + [H]	Present Value of Cargill's Lost Cash Flows							$ 100,019,776

Notes

1. Calendar year average of monthly bank prime loan rate. *Source:* Monthly Bank Prime Loan Rate, 2002-2006. United States Federal Reserve, 10 December 2006. (NAV-134), (C-Ex-277)
2. The profits that Cargill lost in the United States and Mexico would have occurred throughout 2002-2007. Cargill would have invested these profits and received interest (alternatively, debt instruments would have been unnecessary and interest payments avoided). In order to account for the value of the lost interest, actual United States interest rates were applied to the lost profits using the formulas: [C] = [A] x (1 + [B]) ^ ((22 December 2006 - 1 July 200X)/365) & [K] = [I] x (1 + [J]) ^ ((22 December 2006 - 1 July 200X)/365). For purposes of calculating interest we have assumed that these cash flows would have been earned evenly throughout the year and have used a start date of 1 July to calculate interest in every year other than 2006. Due to the fact that 2006 cash flows would occur both before and after the award date, we used a start date of 27 June to calculate interest for the pre-award cash flows (those occuring from 1 January 2006 to 22 December 2006) and a start date of 27 December to calculate interest for the post-award cash flows (those occuring from 23 December 2006 to 1 January 2007). For those cash flows expected to be earned after 22 December 2006, we have discounted them back to present value at 22 December 2006 using the same rate used to apply interest to cash flows earned prior to 22 December 2006.

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Appendix 33

CARGILL, INC. v UNITED MEXICAN STATES

OFF-TRADE SALES OF SOFT DRINKS BY SUBSECTOR: VOLUME, 1999-2004

Note	Beverage Classification	Annual Sales by Volume (Million Liters)					
		1999	2000	2001	2002	2003	2004
	Carbonates						
	Cola Carbonates						
1	Standard Cola	6,481.0	6,712.2	6,910.3	6,706.6	6,825.7	6,851.5
1	Other Cola	-	-	18.4	17.6	17.2	17.3
Calc.	*Total Cola Carbonates*	*6,481.0*	*6,712.2*	*6,928.7*	*6,724.2*	*6,842.9*	*6,868.8*
	Non-Cola Carbonates						
1	Lemonade/Lime Carbonates	525.5	542.2	558.1	579.5	624.9	632.4
1	Orange Carbonates	1,298.2	1,390.5	1,431.9	1,496.5	1,571.3	1,585.9
1	Mixers	54.5	57.1	58.8	61.3	64.3	65.1
1	Other Non-Cola Carbonates	617.8	630.2	672.8	739.7	776.0	799.2
Calc.	*Total Non-Cola Carbonates*	*2,496.0*	*2,620.0*	*2,721.6*	*2,877.0*	*3,036.5*	*3,082.6*
Calc.	**Total Non-Diet Carbonated Beverages**	**8,977.0**	**9,332.2**	**9,650.3**	**9,601.2**	**9,879.4**	**9,951.4**
	Non-Carbonates						
	Fruit/Vegetable Juice						
2	Juice Drinks (Up to 24%)	267.8	294.9	324.1	360.7	395.6	428.8
2	Fruit-Flavored Drinks (No Juice Content)	513.3	549.4	593.1	644.8	720.1	765.2
Calc.	*Total Fruit/Vegetable Juice*	*781.1*	*844.3*	*917.2*	*1,005.5*	*1,115.7*	*1,194.0*
	Functional Drinks						
3	Sports Drinks	118.5	135.2	160.0	175.0	190.6	203.4
3	Energy Drinks	-	-	-	2.8	5.1	9.2
3	Elixirs	-	-	-	-	-	-
Calc.	*Total Functional Drinks*	*118.5*	*135.2*	*160.0*	*177.8*	*195.7*	*212.6*
	Concentrates (RTD)						
4	Liquid Concentrates	1,977	2,000	2,015	2,178	2,200	2,223
4	Powder Concentrates	1,205	1,312	1,379	1,435	1,521	1,582
Calc.	*Total Concentrates*	*3,182*	*3,312*	*3,394*	*3,614*	*3,721*	*3,805*
	RTD Tea						
5	Still RTD Tea	3.7	3.9	4.1	10.8	11.5	12.0
5	Carbonated RTD Tea	-	-	-	-	-	-
Calc.	*Total RTD Tea*	*3.7*	*3.9*	*4.1*	*10.8*	*11.5*	*12.0*
6	*Total RTD Coffee*	-	-	-	5.3	7.8	10.0
Calc.	**Total Non-Carbonated Beverages**	**4,085**	**4,295**	**4,476**	**4,813**	**5,052**	**5,234**

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OFF-TRADE SALES OF SOFT DRINKS BY SUBSECTOR: VOLUME, 1999-2004

Notes:

1. Annex PRA-2, Table 41 at Pg. 26
2. Annex PRA-2, Table 59 at Pg. 34. Excludes 100% Fruit Juice and 25-99% Nectars.
3. Annex PRA-2, Table 90 at Pg. 48
4. Annex PRA-2, Table 103 at Pg. 52
5. Annex PRA-2, Table 123 at Pg. 58
6. Annex PRA-2, Table 136 at Pg. 61

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ALTERNATIVE VERSION OF PRA'S "MAXIMUM" HFCS ADOPTION CALCULATION

Note	Beverage Type	Quantity (M Litres)	Percent of Total Beverages Market	HFCS Adoption Rate	Weighted HFCS Adoption Rate
	Carbonated Beverages				
1	Cola Carbonated ("Brand")	6,929	49.1%	50%	24.5%
2	Non-Cola Carbonated ("Flavors")	2,722	19.3%	100%	19.3%
Calc.	Total Carbonated Beverages	9,650	68.3%		
	Non-Carbonated Beverages				
3	Fruit/Vegetable Drinks	917	6.5%	100%	6.5%
4	Functional & Sports Drinks	160	1.1%	100%	1.1%
5	Concentrates	3,394	24.0%	100%	24.0%
6	RTD Tea & Coffee	4	0.0%	100%	0.0%
Calc.	Total Non-Carbonated Beverages	4,476	31.7%		
Calc.	Total Beverages Market	14,126	100.0%		75.5%

Notes:

1. Appendix 33, "Cola Carbonates" data from 2001
2. Appendix 33, "Non-Cola Carbonates" data from 2001
3. Appendix 33, "Fruit/Vegetable Juice" data from 2001.
4. Appendix 33, "Functional Drinks" data from 2001
5. Appendix 33, "Concentrates (RTD)" data from 2001
6. Appendix 33, "RTD Tea" and "RTD Coffee" data from 2001

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Appendix 35

CARGILL, INC. v UNITED MEXICAN STATES

ALTERNATIVE VERSION OF PRA'S "MAXIMUM" HFCS ADOPTION CALCULATION

60 Percent "Brand" Cola HFCS Adoption

Note	Beverage Type	Quantity (M Litres)	Percent of Total Beverage Market	HFCS Adoption Rate	Weighted HFCS Adoption Rate
	Carbonated Beverages				
1	Cola Carbonated ("Brand")	6,929	49.0%	60%	29.4%
2	Non-Cola Carbonated ("Flavors")	2,722	19.3%	100%	19.3%
Calc.	Total Carbonated Beverages	9,650	68.3%		
	Non-Carbonated Beverages				
3	Fruit/Vegetable Drinks	917	6.5%	100%	6.5%
4	Functional & Sports Drinks	160	1.1%	100%	1.1%
5	Concentrates	3,394	24.0%	100%	24.0%
6	RTD Tea & Coffee	4	0.0%	100%	0.0%
Calc.	Total Non-Carbonated Beverages	4,476	31.7%		
Calc.	**Total Beverages Market**	14,126	100.0%		80.4%

Notes:

1. Appendix 33, "Cola Carbonates" data from 2001
2. Appendix 33, "Non-Cola Carbonates" data from 2001
3. Appendix 33, "Fruit/Vegetable Juice" data from 2001. Excludes 100% Fruit Juice and 24-99% Nectars.
4. Appendix 33, "Functional Drinks" data from 2001
5. Appendix 33, "Concentrates (RTD)" data from 2001.
6. Appendix 33, "RTD Tea" and "RTD Coffee" data from 2001

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Appendix 36

CARGILL, INC. v UNITED MEXICAN STATES

MEXICO - US HFCS PRICE COMPARISON

Note	HFCS Price Source	1997 HFCS-55 Price	MX HFCS Price / US HFCS Price
1.	Cargill de Mexico HFCS-55 Sales Price	$14.85	
	United States HFCS-55 Prices:		
2	US HFCS-55 Market Price	$10.76	138%
3	NACM Net Sales Price	$10.23	145%
4	Cargill to CdM Transfer Price	$9.42	158%

Notes:

1. Appendix 20
2. Sugar Program: Supporting Sugar Prices Has Increased Users' Costs While Benefiting Producers. GAO. June 2000. (NAV-51), (C-Ex.-124) HFCS-55 price converted from dry to wet using the 0.77 conversion factor.
3. FY1997 NACM 48Z Net Margin by Product, HFCS-55. Cargill, Inc. 1997. (NAV-33), (C-Ex.-86)
4. Average invoice price charged from Cargill, Inc. to Cargill de Mexico for shipments of HFCS-55 to Cargill de Mexico (cust no. 741, 2741) in 1997-1998.

Source: Profitability on Mexico Sales, 1996-2004. Cargill, Inc. 2004. (NAV-74), (C-Ex.-201)

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Appendix 37

CARGILL, INC. v UNITED MEXICAN STATES

DISCOUNT OF PROJECTED MEXICAN HFCS PRICES TO ACTUAL MEXICAN SUGAR PRICES

Note	Calc	Year	2002	2003	2004	2005	2006
Appendix 10	[A]	Projected Mexican HFCS-55 Price (USD/cwt, Wet)	$ 14.73	$ 14.95	$ 14.90	$ 15.33	$ 16.31
1	[B]	Dry pounds of HFCS-55 equal to one wet	0.77	0.77	0.77	0.77	0.77
Calc.	[C] = A / B	Projected Mexican HFCS-55 Price (USD/cwt, Dry)	$ 19.13	$ 19.41	$ 19.35	$ 19.91	$ 23.08
2	[D]	Actual Mexican Sugar Price (USD/cwt, Dry)	$ 27.33	$ 28.30	$ 27.39	$ 27.99	$ 36.04
Calc.	[E] = C / D	**Projected HFCS-55 Price as % of Actual Sugar Price**	70%	69%	71%	71%	70%

Notes:

1. *Source:* January 2006 Sugar and Sweeteners Outlook. USDA. 31 January 2006. (NAV-101), (C-Ex.-242)
2. *Source:* Sugar and Sweeteners Outlook, Table 19 - "Bulk sugar prices in Mexico, refinado sugar". USDA. 31 May 2006. (NAV-104), (C-Ex.-250) For full year 2006 sugar prices, see Table 55 at http://www.ers.usda.gov/Briefing/Sugar/Data.htm.

C

CV-09-391935

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE

IN THE MATTER OF AN APPLICATION TO SET ASIDE AN ARBITRAL AWARD UNDER RULE 14.05(2) OF THE *RULES OF CIVIL PROCEDURE* AND ARTICLE 34 OF THE *UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION*, BEING THE SCHEDULE TO THE *INTERNATIONAL COMMERCIAL ARBITRATION ACT*, R.S.O. 1990, C. I.9, AS AMENDED

BETWEEN:

THE UNITED MEXICAN STATES,

Applicant

- and –

CARGILL, INCORPORATED,

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION will come on for a hearing on June 3, 2010 at 10:00 a.m. or as soon thereafter as it may be heard, at the Courthouse at 393 University Avenue, Toronto, Ontario, or at such other location as the Court may advise.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the Application or to be served with any documents in the Application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the applicant, and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the court office where the application is to be heard as soon as possible, but at least two days before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Dated: November 25, 2009

Issued by: ______________________
Local registrar
(M. Brenton)

Address 393 University Avenue
10th Floor
Toronto, ON M5G 1E6

TO **CARGILL, INCORPORATED**
15407 McGinty Road West
Wayzata, Minnesota
United States of America
55391

APPLICATION

THE APPLICANT MAKES APPLICATION FOR:

1. An Order setting aside the award (the "**Award**") made on 18 September 2009 at Toronto, Ontario, by an arbitral tribunal (the "**Tribunal**") constituted under Chapter 11 of the *North American Free Trade Agreement* ("*NAFTA*"), concerning an arbitration arising between Cargill, Incorporated ("**Cargill**") and The United Mexican States ("**Mexico**") in ICSID (Additional Facility) Case No: ARB (AF)/05/2.2.

2. Further and in the alternative, an Order substituting for the Award:

   (a) an Order that Mexico pay to Cargill de Mexico the present value of Cargill de Mexico's lost cash flows in connection with its sales of high fructose corn syrup ("**HFCS**") in Mexico (the "**Proper Amount**"), plus interest from 1 January 2008 until payment in full at a rate equal to the United States Monthly Bank Loans Prime Rate, compounded annually; or

   (b) alternatively, an Order that Mexico pay to Cargill de Mexico an amount in Canadian currency sufficient to purchase in United States currency at a bank in Ontario listed in Schedule I to the *Bank Act (Canada)* at the close of business on the first day on which the bank quotes a Canadian dollar rate for purchase of United States currency before the day payment is received by Cargill de Mexico, the Proper Amount, plus interest from 1 January 2008 until payment in full at a rate equal to the United States Monthly Bank Loans Prime Rate, compounded annually.

   (the "**Substituted Award**")

3. Further and in the alternative, an Order suspending this Application in order to give the Tribunal an opportunity to resume the arbitral proceedings to eliminate the grounds for setting aside the Award by making the Substituted Award.

4. Further and in the alternative, an Order confirming that, pursuant to Article 1136 of the *NAFTA*, the recognition or enforcement of the Award be suspended pending the hearing of this Application.

5. An Order that Cargill pay to Mexico its costs of this Application on a full indemnity, or alternatively a substantial indemnity, basis.

6. Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE APPLICATION ARE:

Factual Background

1. Cargill is a corporation incorporated in the United States of America. Among other activities, Cargill produces at its production facilities in the United States and distributes HFCS, a sweetener used in soft drinks and other products.

2. Since 1973, and at all material times, Cargill de Mexico has been a subsidiary of Cargill, located in Mexico. Cargill sold HFCS to Cargill de Mexico, which then distributed it within Mexico.

3. The *NAFTA* entered into force on 1 January 1994. In or about 2005, Cargill brought a claim against Mexico under Chapter 11 of the *NAFTA*, alleging that Mexico's imposition of a tax on soft drinks containing HFCS, and its failure to issue import permits to Cargill de Mexico in respect of HFCS sought to be exported by Cargill to Mexico, violated Articles 1102 (National Treatment), 1103 (Most Favoured Nation Treatment), 1105 (Minimum Standard of Treatment), 1106 (Performance Requirements) and 1110 (Expropriation and Compensation) of the *NAFTA*. Cargill sought monetary damages on its own behalf, and on behalf of Cargill de Mexico.

4. On or about 21 June 2006, the Tribunal was constituted to determine Cargill's claims.

5. The place of the arbitration was Toronto, Ontario, Canada.

6. The applicable rules were the Additional Facility Rules of the International Centre for Settlement of Investment Disputes (the "***ICSID Additional Facility Rules***").

The Award

7. On 18 September 2009, the Tribunal delivered its Award, concluding that:

(a) Mexico had breached its obligations owed to Cargill de Mexico under Article 1102 (National Treatment) of the *NAFTA*. (Mexico does not challenge this aspect of the Award.)

(b) Mexico had breached its obligations owed to Cargill under Article 1105 (Minimum Standard of Treatment) of the *NAFTA*. (Mexico challenges this aspect of the Award on jurisdictional grounds.)

(c) Mexico had breached its obligations owed to Cargill de Mexico under Article 1106 (Performance Requirements) of the *NAFTA*. (Mexico does not challenge this aspect of the Award.)

(d) Mexico must pay to Cargill the present value of the lost cash flows that, but for Mexico's violation for the *NAFTA*, Cargill would have received on account of its sales of HFCS to Cargill de Mexico, plus the lost cash flows which Cargill de Mexico would have received by distributing such HFCS within Mexico. (Mexico challenges this aspect of the Award on jurisdictional grounds.)

(e) Mexico must pay interest on the Award from 1 January 2008 until payment in full at a rate equal to the United States Monthly Bank Loans Prime Rate, compounded annually. (Mexico does not challenge this aspect of the Award.)

(f) Cargill shall recover from Mexico a portion of its costs of the arbitration. (Mexico does not challenge this aspect of the Award.)

Matters Beyond the Scope of the Submission to Arbitration

8. The Award contains decisions on matters beyond the scope of the submission to the arbitration, contrary to Article 34(2)(a)(iii) of the *Model Law on International Commercial Arbitration* adopted by the United Nations Commission on International Trade Law on June 21, 1985 (the "***Model Law***"), as enacted in force and set out in the Schedule to the *International Commercial Arbitration Act*, R.S.O. 1990, c.I.9 (the "***ICAA***").

9. In particular, in and by the Award and contrary to the *Model Law* and the *NAFTA*:

   (a) the Tribunal held that the obligations in Article 1105 (Minimum Standard of Treatment) of the *NAFTA* are owed to investors of another *NAFTA* Party, and not, as the *NAFTA* text provides, solely to investments of investors of another *NAFTA* Party;

   (b) the Tribunal ordered Mexico to pay to Cargill compensation measured by reference to Cargill's lost sales of HFCS to Cargill de Mexico, where those losses were incurred by Cargill in its capacity as an exporter of HFCS from its production facilities in the United States, not in its capacity as an investor in Mexico – which is the only capacity in respect of which Cargill was owed obligations by Mexico under Chapter 11 of the *NAFTA*; and

   (c) the Tribunal framed its order to pay compensation in a manner contrary to the mandatory provisions of Article 1135 (2) and (3) of the *NAFTA*, to the extent the entire sum was ordered to be paid to Cargill, rather than to Cargill de Mexico.

Treaties, Enactments and Rules Relied Upon

10. The Applicant relies upon:

   (a) the *NAFTA*, including without limitation Chapter 11 of the *NAFTA*;

   (b) the *ICSID Additional Facility Rules*;

   (c) the *Model Law*, being a schedule to the *ICAA*;

(d) Rules 14.05(2) and 17.02(n) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194;

(e) the *Courts of Justice Act*, R.S.O. 1990, chap. C. 43, s. 121; and

(f) such further and other provisions as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE APPLICATION:

1. The Award, pleadings, exhibits and proceedings in the arbitration record.

2. Such further and other materials as counsel may advise and this Honourable Court may permit.

SERVICE OUTSIDE OF ONTARIO

1. This Application may be served outside of Ontario pursuant to Rule 17.02(n) of the *Rules of Civil Procedure* and pursuant to Article 2(1) of the *Model Law*.

November 25, 2009

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VAN01: 2715573: v5

CV-09-391935

Court File No:

The United Mexican States Applicant	and	Cargrill, Incorporated Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto, Ontario

NOTICE OF APPLICATION

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File No. 34559

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

THE UNITED STATES OF AMERICA

Applicant
(Appellant)

- and -

CARGILL, INCORPORATED

Respondent
(Respondent)

- and -

THE ATTORNEY GENERAL OF CANADA

Intervener
(Intervener)

CERTIFICATE OF COUNSEL
(CARGILL, INCORPORATED, RESPONDENT)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

I, John Terry, of the law firm Torys LLP, Counsel for the Respondent hereby certify that:

(a) there is no sealing order or confidentiality order in effect in the file of the lower court and no document filed includes information that is subject to a sealing or confidentiality order or that is classified as confidential by legislation;

(b) there is no ban on the publication of evidence or the names or identity of a party or witness;

(c) there is, pursuant to legislation, no information that is subject to limitations on public access.

Dated at the City of Toronto in the Province of Ontario, this 20th day of January, 2012.

as agent for

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