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INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ADDITIONAL FACILITY

REQUEST FOR INSTITUTION OF ARBITRATION PROCEEDINGS

SUBMITTED PURSUANT TO CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT

CARGILL, INCORPORATED

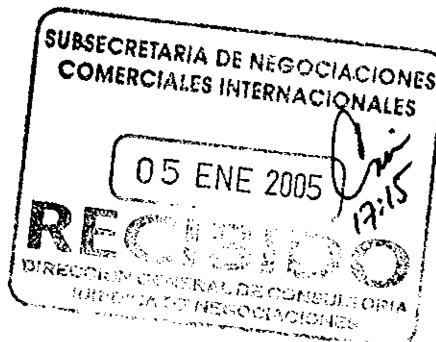
Claimant,

v.

UNITED MEXICAN STATES,

Respondent.

Submitted in accordance with Chapter 11 of the ICSID Arbitration (Additional Facility) Rules and delivered by hand on December 29, 2004, to the International Centre for Settlement of Investment Disputes, Secretariat, 1818 H Street, N.W., Washington, D.C. 20433.



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REQUEST FOR INSTITUTION OF ARBITRATION PROCEEDINGS PURSUANT TO CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT

I. PROCEDURAL REQUIREMENTS

A. Request for the Institution of Arbitration Proceedings

1. Pursuant to Article 2 of the Arbitration (Additional Facility) Rules of the International Center for the Settlement of Investment Disputes ("ICSID AF Arbitration Rules") and Articles 1116, 1117, 1120(1)(b) and 1137(1)(b) of the North American Free Trade Agreement ("NAFTA"), Cargill, Incorporated ("Cargill" or "Claimant"), a U.S. company, hereby requests the institution of arbitration proceedings on its own behalf and on behalf of its enterprise, Cargill de Mexico S.A. de C.V. ("Cargill Mexico"), a subsidiary company owned and controlled by Cargill and incorporated under the laws of Mexico.

2. Cargill submits to arbitration its claim that the Government of Mexico has breached obligations owed to Claimant under Section A of Chapter 11 of NAFTA. These breaches have arisen from the Government of Mexico's imposition since January 1, 2002 of a discriminatory tax on soft drinks and other non-alcoholic beverages, syrups, and concentrates sweetened with high fructose corn syrup ("HFCS"). This tax is not imposed on beverages sweetened only with cane sugar and was imposed by the Government of Mexico in order to protect the Mexican sugar industry from competition by producers of HFCS. Imposition of this tax (the "HFCS tax"), whether taken in isolation or when viewed as the culmination of a series of discriminatory acts dating back to 1997, has eliminated the most significant market for HFCS produced by Cargill and distributed by Cargill Mexico and substantially destroyed the value of Cargill's investments in the HFCS production and distribution facilities built to serve that market, including investments made through Cargill Mexico. In the arbitration, Cargill seeks to recover damages resulting from the Government of Mexico's discriminatory acts against the largely U.S.-owned HFCS industry.

II. PARTIES TO THE DISPUTE

3. Pursuant to Article 3(1)(a) of the ICSID AF Arbitration Rules, each party to the dispute is identified below.

A. Claimant

4. Cargill is a privately held company incorporated under the laws of the

state of Delaware, United States, and is headquartered in Wayzata, Minnesota.[1] Cargill's address is as follows:

Cargill, Incorporated
15407 McGinty Road West
Wayzata, Minnesota
United States of America 55391

As required by Article 3(1)(e) of the ICSID AF Arbitration Rules, Cargill has duly authorized the filing of this claim in accordance with its relevant internal procedures.[2]

B. Enterprise of Claimant

5. Cargill submits this claim to arbitration on its own behalf and on behalf of its enterprise, Cargill Mexico. Cargill exercises control over Cargill Mexico and directly holds an 85 percent ownership interest in Cargill Mexico. The remaining 15 percent is held by Cargill indirectly, through two other companies owned by Cargill.[3] Cargill Mexico is organized under the laws of Mexico and is located at the following address:

Bosque De Ciruelos #168
Piso 3, Col. Bosques de las Lomas
C.P. 11700, Mexico

C. Respondent

6. Respondent is the Government of Mexico, a sovereign state and party to NAFTA. For purposes of disputes arising under NAFTA, the Government of Mexico's address is as follows:

Secretaría de Economía
Dirección General de Inversión Extranjera
Av. Insurgentes sur No. 1940, piso 8,
Col. Florida, Del. Álvaro Obregón,
C.P. 01030, México, D.F.

III. PROCEDURAL HISTORY OF DISPUTE AND JURISDICTION

A. Notice and Time Requirements

7. NAFTA Article 1119 requires that an investor "deliver to the disputing

[1] Pursuant to Article 1119 of NAFTA, Cargill and Cargill Mexico submitted a Notice of Intent to Submit a Claim to Arbitration Under NAFTA Chapter Eleven ("Notice of Intent"), which is attached as Exhibit A. Attached as Exhibit 1 to the Notice of Intent is a Certificate of Incorporation of Cargill from the State of Delaware.

[2] *See* Exhibit B for a letter from Cargill authorizing the filing of this claim and stating that pursuant to Article 3(1)(e) of the ICSID Additional Facility Arbitration Rules, Cargill "has taken all necessary internal actions to authorize the request."

[3] Attached as Exhibit 2 to the Notice of Intent of Cargill and Cargill Mexico (attached hereto as Exhibit A) is the *Acta Costitutiva* of Cargill Mexico, demonstrating that the enterprise is organized under the laws of Mexico.

party written notice of its intention to submit a claim to arbitration at least 90 days before the claim is submitted."[4] Cargill fulfilled this requirement by delivering its Notice of Intent to Submit a Claim to Arbitration to the Government of Mexico on September 30, 2004, at least 90 days before the submission of this Request for Institution of Arbitration Proceedings.

8. Article 1120 of NAFTA indicates that an investor of a Party may submit a claim to arbitration "provided that six months have elapsed since the events giving rise to a claim . . . ." Cargill's claim arises from the Government of Mexico's imposition of a tax on beverages sweetened with HFCS. As described above, the HFCS tax is not imposed on beverages sweetened only with cane sugar and was imposed by the Government of Mexico on January 1, 2002 in order to protect the Mexican sugar industry from competition by producers of HFCS. Accordingly, Claimant has satisfied the requirements of Article 1120.

9. Articles 1116 and 1117 of NAFTA state that a claimant may not make a claim or make a claim on behalf of an enterprise "if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage." Mexico instituted the HFCS tax on January 1, 2002, and Claimant and its enterprise first acquired knowledge of the NAFTA breaches alleged herein and the potential loss or damage to the Claimant and its enterprise no earlier than January 1, 2002. Therefore, less than three years have elapsed since Cargill and its enterprise, Cargill Mexico, acquired knowledge of the alleged breaches.

B. Referral of Expropriation Claim to Competent Authorities

10. Article 2103, paragraph 6 of NAFTA requires an investor seeking to submit a claim of expropriation under NAFTA Article 1110 arising from a taxation measure to refer the issue of whether the measure is not an expropriation to the appropriate competent authority. Article 2103 states that "if the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 1120."

11. On October 6, 2004, Cargill provided a copy of its Notice of Intent to the Secretario de Hacienda y Crédito Público. On October 13, 2004, a copy of Cargill's Notice of Intent was formally served on the Subsecretario de Ingressos de la Secretario de Hacienda y Crédito Público, the competent authority in Mexico. The copies of the Notice of Intent submitted to the Secretario de Hacienda y Crédito Público and the Subsecretario de Ingressos de la Secretario de Hacienda y Crédito Público were certified copies of the Notice of Intent, date-stamped by the Secretario de Economia.[5]

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[4] As stated above, the Notice of Intent to Submit a Claim to Arbitration Under NAFTA Chapter Eleven of Cargill and Cargill Mexico is attached hereto as Exhibit A.

[5] *See* Exhibit C for a copy of the cover letter accompanying the Notice of Intent provided to the Subsecretario de Ingressos de la Secretario de Hacienda y Crédito Público.

12. A date-stamped copy of Cargill's Notice of Intent was submitted to the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury, which is the competent authority in the United States.[6]

13. In two separate arbitrations arising from the imposition of the HFCS tax, the U.S. competent authority and the Mexican competent authority have failed to agree that the measure was not an expropriation.[7] The Parties failed to agree that the HFCS tax was not an expropriation because the United States had declined to agree that the HFCS tax was not an expropriation.[8] On December 21, 2004 the United States competent authority informed Cargill that the position of the United States, taken in the two previous NAFTA arbitrations, remains unchanged.[9] Thus, the United States does not agree that the HFCS tax is not an expropriation and the competent authorities of the United States and Mexico have continued to fail to agree that the HFCS tax is not an expropriation. By the terms of Article 2103 set forth above, Cargill and Cargill Mexico's expropriation claims may be submitted to arbitration.

C. Consultations and Negotiations Pursuant to Article 1118 of NAFTA

14. Article 1118 of NAFTA states that, before initiating arbitration proceedings, the disputing parties should first attempt to settle a claim through consultation or negotiation. Since the imposition of the HFCS tax by the Government of Mexico, Cargill has sought repeal of the tax through various mechanisms. Cargill is an active member of the Corn Refiners Association, which has engaged in lobbying efforts to repeal the tax. Cargill has also participated in the Joint Mexican Sweetener Task Force, which met for over a year and still meets occasionally to discuss avenues for resolution of the sweetener dispute.

15. In addition to the activities carried out through the Corn Refiners Association and the Joint Mexican Sweetener Task Force, Cargill representatives met with Mexican officials, including then Secretary of the Economy Ernesto Derbez, to seek resolution of the sweetener dispute. Meetings between Cargill and Derbez occurred on December 10, 2001; January 19, 2002; and April 27, 2002. Cargill's efforts did not result in repeal of the tax.

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[6] *See* Exhibit D for a receipt confirming delivery of Cargill and Cargill Mexico's Notice of Intent to the Assistant Secretary of the Treasury (Tax Policy).

[7] *See* Request for Institution of Arbitration Proceedings Submitted Pursuant to Chapter 11 of the North American Free Trade of Corn Products International, Inc., ¶ 13 (ICSID October 21, 2003); Request for Institution of Arbitration Proceedings Submitted Pursuant to Chapter 11 of the North American Free Trade Agreement of Archer Daniels Midland Company and A.E. Staley Manufacturing Company at ¶ 13 (ICSID August 2, 2004).

[8] *See* Request for Institution of Arbitration Proceedings Submitted Pursuant to Chapter 11 of the North American Free Trade Agreement of Archer Daniels Midland Company and A.E. Staley Manufacturing Company at ¶ 14 (ICSID August 2, 2004).

[9] Oral communication from John Harrington, Associate International Tax Counsel, U.S. Department of the Treasury, to counsel for Claimant.

D. Consent and Waiver of the Parties Providing for Arbitration Under the ICSID AF Arbitration Rules

16. Article 3(1)(b) of the ICSID AF Arbitration Rules requires that a request for arbitration "set forth the relevant provisions embodying the agreement of the parties to refer the dispute to arbitration."

17. Cargill's claim is submitted pursuant to Section B of Chapter 11 of NAFTA, specifically Articles 1116, 1117, 1120, 1122 of NAFTA, which provide for the settlement of disputes between a Party and an investor of another Party.

18. Article 1122 of NAFTA provides that each Party consent to the submission of a claim to arbitration in accordance with the procedures set out in NAFTA. Article 1122(2) provides that a Party's consent under Article 1122(1) and the submission by a disputing investor of a claim to arbitration shall constitute written consent of the parties to arbitration for the purposes of the ICSID Additional Facility Rules.

19. Article 1121 of NAFTA requires that a claimant consent to the arbitration and waive (with limited exceptions) its right to "initiate or continue proceedings before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach referred to in Article 1116 . . . ." On behalf of itself and Cargill Mexico, Cargill hereby consents to arbitration in accordance with the procedures set out in NAFTA and, pursuant to Article 1121 of NAFTA, hereby waives its right to initiate or continue proceedings that seek damages based on alleged breaches of Article 1116 or 1117 of NAFTA.

20. Article 1121(3) specifies that a claimant and its enterprise must provide a written statement consenting to arbitration and waiving its right to initiate or continue proceedings, as described above. Pursuant to Article 1121(3), Cargill and Cargill Mexico have each executed a consent and waiver as required by this Article and have included the consent and waiver of Cargill and Cargill Mexico as Exhibit E to this submission, a copy of which will be delivered to the Government of Mexico.

E. Cargill and Cargill Mexico Have Standing to Bring a Claim Under Chapter 11 of NAFTA

21. NAFTA Article 1101 applies to breaches resulting from measures adopted or maintained by a Party relating to investors of another Party and investments of investors of another Party in the territory of the Party.

22. Article 201 of NAFTA defines a "measure" as "any law, regulation, procedure, requirement or practice." On December 31, 2001, the Mexican legislature enacted a 20 percent tax on soft drinks and other beverages that use any sweetener other than cane sugar. The tax on beverages sweetened with HFCS constitutes a measure, as it was adopted by the Government of Mexico as an amendment to the Mexican tax law, the *Impuesto Especial sobre Producción y Servicios* (Special Tax on Production and Services). The effect of the HFCS tax fell directly on high fructose corn sweetener, a

widely used substitute for cane sugar. Because the measure impairs the ability of Cargill and Cargill Mexico to sell and distribute HFCS to Mexican beverage producers, and because the stated purpose of the law is to protect Mexican cane sugar producers by imposing penalties for the use of HFCS as a substitute for cane sugar, the HFCS tax "relates" to Cargill and Cargill Mexico under Article 1101. The HFCS tax therefore constitutes a measure that has been adopted or maintained by a Party and relates to investors of another party and investments of an investor of another party in the territory of another Party.

23. Article 1116 of NAFTA permits an investor to submit a claim to arbitration if that investor "has incurred loss or damage by reason of, or arising out of," a breach by a Party. As indicated above, Cargill is a U.S. company headquartered in Wayzata, Minnesota and is organized under the laws of the State of Delaware. As described in more detail below, Cargill has made significant investments in the United States and Mexico, including those made through its Mexican enterprise, Cargill Mexico, to more effectively supply Mexican beverage producers with HFCS. Cargill incurred losses to these investments when the Government of Mexico imposed the discriminatory HFCS tax on beverages sweetened with sweeteners other than cane sugar. Cargill is, therefore, entitled to submit a claim to arbitration under Article 1116 of NAFTA.

24. Article 1117 of NAFTA permits an "investor of a party," such as Cargill, to file a claim "on behalf of an enterprise of another party that is a juridical person that the investor owns or controls directly or indirectly if the enterprise has incurred loss or damage by reason of, or arising out of, that breach. As noted above, Cargill Mexico is a company owned and controlled by Cargill, and therefore is an "investment owned or controlled directly or indirectly by an investor" in the United States. Cargill Mexico has made substantial investments in its HFCS sweetener operations, including the construction of facilities specifically designated for the distribution of HFCS to beverage producers in Mexico's major metropolitan areas. Cargill Mexico incurred losses to these investments when the Government of Mexico imposed the discriminatory HFCS tax on beverages sweetened with sweeteners other than cane sugar. Cargill, therefore, is entitled to bring a claim under Chapter 11 of NAFTA on behalf of Cargill Mexico.

F. Approval by the Secretary-General Pursuant to Article 4 of the ICSID AF Arbitration Rules

25. As stated above, the Government of Mexico has consented in writing to submit investment disputes with U.S. companies to the Additional Facility for binding arbitration, and Cargill and Cargill Mexico have consented to arbitration.

26. Article 2(a) of the ICSID AF Arbitration Rules authorizes the ICSID Secretariat to administer proceedings between a State and a national of another State if the proceedings are "conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Center because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State."

27. The instant dispute arises directly out of an investment and is between the Government of Mexico, a State, and a national of another State, Cargill. The dispute is not within the jurisdiction of the ICSID Convention because the State party to the dispute, Mexico, is not a Contracting State to the ICSID Convention.

28. Article 4 of the ICSID AF Arbitration Rules states that the Secretary-General of ICSID, once satisfied that the Request for Institution of Arbitration Proceedings conforms in form and substance to the provisions of Article 3 of the ICSID AF Arbitration Rules, shall register the request in the Arbitration (Additional Facility) Register and issue a notice of registration. As noted above, the subject matter of the instant dispute falls within the scope of the ICSID AF Arbitration Rules and consent to binding arbitration has been granted by both parties to the dispute. Therefore, Claimant respectfully requests that the Secretary-General approve access to the Additional Facility and issue a notice of registration.

G. Agreement Concerning the Number of Arbitrators

29. Article 3(2) of the ICSID AF Arbitration Rules states that the Request for Institution of Arbitration Proceedings may include any provision agreed to regarding the number of arbitrators and their method of appointment.

30. Article 1123 of NAFTA states that "unless the disputing parties otherwise agree, the Tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties." Claimant and the Government of Mexico have not otherwise agreed to the number and appointment of arbitrators. Therefore, Article 1123 of NAFTA shall govern.

IV. FACTUAL BACKGROUND FOR THE CLAIM

31. This dispute arises from the Government of Mexico's imposition of the HFCS tax. This tax applies to beverages sweetened with *any* HFCS, which is produced, distributed and sold primarily by U.S. owned entities, and exempts from taxation beverages sweetened *exclusively* with cane sugar. In contrast to HFCS, cane sugar is produced by domestically-owned companies, with the Government of Mexico having direct ownership of numerous Mexican sugar mills.[10]

A. Description of HFCS

32. HFCS is a liquid sweetener having very similar physical and chemical properties and sweetening power as sugar. HFCS is produced from corn and is used in the production of soft drinks, as well as in a broad range of industrial applications. In the late 1970s, U.S. corn refiners, including Cargill, developed the technology to produce HFCS for use as a sugar substitute in soft drinks. By the late 1980s, the U.S. soft drink

[10] In September 2001, the Government of Mexico resumed direct involvement in the Mexican sugar industry when it expropriated 27 Mexican sugar mills. The Government of Mexico now owns approximately 50 percent of the Mexican sugar industry.

industry relied almost exclusively on HFCS as a sweetener, rather than sugar.

33. HFCS is produced by subjecting corn to a sophisticated, capital-intensive production process, whereby corn is milled to produce slurry starch and then refined to produce dextrose. Dextrose is then further processed to produce two grades of HFCS: HFCS-42 and HFCS-90, according to the concentration of fructose. HFCS-42 and HFCS-90 are blended to produce HFCS-55, which is used as a sweetener in soft drinks.

34. The rapid and dramatic growth in the use of HFCS as a soft drink sweetener is a result of the many competitive advantages HFCS has over sugar. First, HFCS is less costly to produce than sugar; therefore, it is sold at a lower price than the equivalent amount of sugar needed to sweeten any particular product. Second, HFCS is produced in highly refined, liquid form and can be used in soft drink production without any further processing or modification. Sugar, on the other hand, requires additional investment, expense, time and effort to be converted into liquid form and, in many cases, must be further refined before use by the beverage industry. Third, HFCS has a greater consistency of quality than sugar. Fourth, HFCS is easier to store and distribute than sugar. Finally, carbonated beverages sweetened with HFCS are more shelf-stable than carbonated beverages sweetened with sugar.

B. Mexico's High Rate of Soft Drink Consumption, in Combination with the Mexican Government's Efforts to Encourage Foreign Investment, Made Mexico a Natural Market for HFCS

35. Mexico has the second highest per capita consumption of soft drinks globally, with annual sales of over 15 billion liters, or 150 liters per person.[11] Through the early-to-mid-1990s, Mexican soft drinks had been sweetened exclusively with cane sugar. In the mid-1990s, however, a number of factors converged to make Mexico an attractive destination for Cargill's exports of HFCS. First, the superiority of HFCS as a beverage sweetener, relative to sugar, became increasingly well-accepted. Second, a number of U.S. beverage producers, including Pepsi and Coca-Cola, held interests in Mexican bottlers. Coca-Cola and Pepsi's U.S. operations had previously accepted HFCS as a replacement for sugar and supported the adoption of HFCS as a sweetener in their Mexican plants.

36. Liberalization of the Government of Mexico's policies on trade and competition within the sweetener industry acted as a catalyst to Cargill's sweetener-related investment in Mexico. Until the mid-1990s, the Government of Mexico provided the Mexican sugar industry with massive subsidization and other forms of market protection. In the early 1990s, however, the Government of Mexico began to reduce its level of involvement in that industry, thus opening the sugar industry to competition from other sweeteners. By 1994, the Mexican Government had privatized the Mexican sugar industry, also signaling that the sweetener sector was open to competition.

[11] *See* Request for Institution of Arbitration Proceedings Submitted Pursuant to Chapter 11 of the North American Free Trade of Archer Daniels Midland Company and A.E. Staley Manufacturing Company at 8 (ICSID August 2, 2004).

37. In conjunction with these policy changes, the Government of Mexico became a signatory to NAFTA. By signing NAFTA and entering into a binding treaty with the United States and Canada, the Government of Mexico made the commitment to reduce or eliminate tariffs and quotas, open markets, and create a favorable environment for investment by its NAFTA partners.

C. The Decision of Cargill to Expand its Operations in Order to Compete in the Mexican HFCS Market

38. While Cargill had sold HFCS to distributors and food and beverage producers supplying the Mexican market beginning in 1990, its direct involvement in the Mexican sweetener sector occurred only in 1993, following the Government of Mexico's initiatives to facilitate trade and foreign investment. In making the decision to invest, Cargill relied heavily upon the Mexican Government policies underlying these initiatives, together with its assurances that the Mexican sweetener market would remain free and competitive.

39. In 1993, Cargill and Cargill Mexico decided to become active participants in the development of Mexico's HFCS market and to invest significant resources in the United States and Mexico to build their Mexican HFCS business. This substantial investment could have been structured a number of different ways. For example, Cargill and Cargill Mexico could have built an HFCS facility in Mexico. However, because yellow corn, the primary input for HFCS, is not available in significant quantities in Mexico, this option would have required the companies to transport yellow corn from the U.S. to Mexico for wet-milling and processing into HFCS.

40. For business reasons, Cargill ultimately determined that HFCS for the Mexican market would be produced by Cargill in the United States and then exported to Mexico. In 1993, a sweetener business unit was established within Cargill Mexico, which would be responsible for selling and distributing HFCS within Mexico. Because the U.S. industry did not have sufficient HFCS production capacity to serve both the U.S. and the Mexican market, Cargill elected to expand existing HFCS production facilities in Memphis, Tennessee and Eddyville, Iowa, and to build a new HFCS production facility in Blair, Nebraska to serve Mexican demand for HFCS. These facilities were built to serve the Mexican market in 1995 and 1996.

41. Cargill Mexico also purchased real property on which to build two distribution facilities that would be used to supply HFCS to Mexican beverage producers. These distribution facilities were built in Tula, Hidalgo, Mexico and McAllen, Texas, so that they could conveniently access the major cities of Mexico City and Monterrey.

D. Cargill's HFCS Sales in Mexico Skyrocketed as Mexican Beverage Producers Adopt HFCS as a Beverage Sweetener

42. While Cargill's history of participation in the Mexican sweetener market allowed the company to develop key market knowledge, the greatest financial success was achieved when Cargill Mexico began to make direct sales of HFCS to the Mexican

beverage industry. After several years of providing HFCS to the Mexican market through customers and partner companies located on the U.S.-Mexico border, Cargill established itself as a direct participant in the Mexican sweetener market when, as stated above, Cargill made significant HFCS-related investments in Mexico and the United States. These investments, including the establishment of Cargill Mexico's sweetener division in 1993, expansion of U.S. plants producing HFCS, and construction of the Tula and McAllen distribution facilities, were specifically undertaken to serve the Mexican beverage market's demand for HFCS.

43. Initially, Cargill and Cargill Mexico were optimistic regarding their future business opportunities in the Mexican sweetener market. Cargill Mexico's sales of HFCS grew significantly following the sweetener division's inception in 1993. Once competition within the Mexican sweetener market was permitted, Mexican consumption of HFCS as a soft drink sweetener increased rapidly at the expense of Mexican sugar consumption. By 1996, the use of HFCS, instead of sugar, as a beverage sweetener became common and well-accepted. Cargill and Cargill Mexico, because of the high quality of their product, reliability, and proven track record as a provider of HFCS for use in soft drink production in the United States, experienced tremendous success, with Cargill's market share of the burgeoning HFCS market in Mexico growing to 33 percent by 1997.

44. Cargill and Cargill Mexico reasonably expected sales to Mexican beverage producers to remain steady or increase, due in part to the signing of a multi-year supply contract with a major Mexican soft drink bottler. Cargill and Cargill Mexico's opportunities for growth were, however, destroyed when the discriminatory actions of the Government of Mexico eliminated the Mexican soft drink industry's demand for HFCS.

E. Actions by the Government of Mexico to Frustrate the Use of HFCS by Mexican Beverage Producers

45. In response to the phenomenal success of HFCS as a sweetener for beverages produced in Mexico, the Mexican sugar industry put pressure on the Mexican Government to take action to reverse that market trend. As a result, the Mexican Government engaged in a series of unlawful actions intended to assist Mexican sugar producers and to deter the production and sale of HFCS in Mexico.

46. In February 1997, pursuant to a complaint filed by the National Chamber of Sugar and Alcohol Industries, the Mexican Government initiated an antidumping duty investigation on imports of HFCS from the United States. In January 1998, the Mexican Government imposed antidumping duties ranging from $55 to $175 per ton of HFCS. The Mexican Government's decision to impose antidumping duties stemmed from its finding that HFCS and sugar are commercially interchangeable products and constitute the same "like product," as defined in Article 2.6 of the WTO Antidumping Agreement and Article 37 of Mexico's Foreign Trade Law. Panels convened under the WTO and NAFTA Chapter 19 both found that the imposition of the dumping duties was illegal. Nevertheless, the duties remained in place until May 2002.

47. Also in 1997, the Mexican Government reportedly supported an anti-competitive agreement between the sugar industry and soft drink bottling industry. Under the agreement, the bottlers reportedly agreed not to increase their consumption of HFCS beyond 1997 levels, and the sugar industry reportedly agreed to supply sugar at prices not exceeding 1997 levels.

48. At approximately this same time, the Mexican Government began reducing the corn wet-milling industry's allocation of yellow corn imports, which had been guaranteed under the 1994 written agreement between the Mexican Government and the corn wet-milling industry. U.S. producers of HFCS in Mexico were dependent upon yellow corn imports to produce HFCS. Thus, the reduction in the allocation of yellow corn imports resulted in the reduction of HFCS production in Mexico.[12]

49. The Mexican Government has taken other, more recent actions to restrict the availability of HFCS in the Mexican market. For example, on December 31, 2001, the Mexican Government imposed the requirement that all HFCS imports from the U.S. be accompanied by an "import permit." Failure to supply the import permit would result in the imposition of tariffs ranging from 156 to 210 percent. In April 2002, the Mexican Government established a tariff-rate quota on HFCS, whereby 148,000 tons of HFCS would be subject to a 1.5 percent duty and a 210 percent out-of-quota duty rate would apply on imports above the 148,000 ton level. This action was reportedly in response to the U.S. Government's decision to limit the U.S. quota on Mexican sugar to 148,000 tons. In October 2001, the Mexican Government announced an increase in *ad valorem* duties on HFCS imported from MFN countries (but not HFCS imported from NAFTA countries or other countries with trade agreements with Mexico). The original duty level was set at 15 percent *ad valorem*. The new duties ranged from 156 to 210 percent.

50. These actions by the Mexican Government to protect its sugar industry had the effect of constricting Mexico's expanding HFCS market and undermining the value of U.S. investment in that sector.

F. Imposition of the HFCS Tax

51. On December 30, 2001, the Mexican legislature enacted a 20 percent tax on the sale and importation of a broad range of soft drinks sweetened with HFCS and other non-cane sugar sweeteners. The tax became effective January 1, 2002, as an amendment to the *Ley del Impuesto Especial sobre Producción y Servicios,* (Special Tax on Production and Services), which is an excise tax applied on the sales of specific products and services, including gasoline, alcoholic beverages, tobacco, jet fuel, and telecommunications services.

52. Unlike the excise tax applied to all soft drinks between 1980 and 1990, the tax alleged by Cargill and Cargill Mexico as contravening NAFTA Chapter 11 principles

[12] While Cargill is not a producer of HFCS in Mexico, and the restriction on imports of yellow corn to Mexico therefore does not directly impact Cargill's sweetener business, such action on the part of the Mexican Government further demonstrates the pattern of discriminatory behavior carried out against HFCS-related investments.

applies only to beverages sweetened with HFCS, or other non-cane sugar sweeteners. Specifically, the tax applies to carbonated or mineral waters, soft drinks, hydrating or rehydrating beverages, concentrates, powders, syrups and flavor essences or extracts that can be diluted to produce soft drinks, in the event any use sweeteners other than cane sugar. The tax also applies to syrups or concentrates for preparing soft drinks sold in open containers, prepared using automatic, electrical or mechanical equipment that use sweeteners other than cane sugar.[13] Soft drink bottlers and beverage and syrup producers using cane sugar *exclusively* are exempted from the tax.

53. The discriminatory intent behind the imposition of the HFCS tax is a matter of public record. The Report of the Finance Committee of the Mexican Chamber of Deputies indicates that the tax was geared to avoid injuring the Mexican sugar industry by applying only to beverages made with HFCS, rather than sugar. In addition, comments by both the Mexican Federal Competition Commission and then Secretary of the Economy, Ernesto Derbez, have acknowledged that the tax protected the Mexican sugar industry at the expense of the foreign-owned producers of HFCS.[14]

54. The impact of the tax on sales of HFCS in Mexico was devastating and immediate. As soon as the tax became effective on January 1, 2002, Mexican producers of beverages and concentrates were forced to cancel orders of HFCS and resume their exclusive use of cane sugar as a soft drink sweetener, because the tax precluded them from being able to use HFCS cost-effectively as a sweetener.

55. Mexican President Vincente Fox Quesada attempted to suspend the tax in March 2002 and reestablish parity between the Mexican sugar producers and foreign-owned suppliers of HFCS. These efforts were thwarted, however, by members of the Mexican legislature who requested the Supreme Court of Mexico to annul the President's temporary suspension of the tax. The Mexican Supreme Court ruled that the President lacked the constitutional authority to suspend the tax, which it found was intended "to protect the sugar industry . . . ."[15] The Supreme Court accordingly annulled President Fox's temporary suspension of the HFCS tax and reinstated it effective July 16, 2002. The tax continues to be applied to beverages sweetened with *any* HFCS and continues to exempt from taxation beverages sweetened *exclusively* with cane sugar.

G. Impact of the HFCS Tax on Cargill's Investment

56. Imposition of the HFCS tax proved ruinous to Cargill's investment and its plans for supplying the Mexican HFCS market. Demand among beverage producers in Mexico, including Coca-Cola and Pepsi, evaporated almost immediately and continues to be virtually nonexistent. As a result, Cargill and Cargill Mexico have been deprived of the economic benefit that would have flowed from sales of HFCS to the Mexican soft

[13] *See Ley del Impuesto Especial sobre Producción y Servicios,* Diario Oficial, January 1, 2002, at Articles 2(I)(G) and 2(I)(H), attached as Exhibit F.

[14] *See* Request for Institution of Arbitration Proceedings Submitted Pursuant to Chapter 11 of the North American Free Trade of Archer Daniels Midland Company and A.E. Staley Manufacturing Company at 13 (ICSID August 2, 2004).

[15] *See* Decision by the Suprema Corte de Justicia de la Nación, Diario Oficial, July 17, 2002.

drink industry. The value of Cargill's investment in the Tula and McAllen facilities, which were constructed in order to distribute HFCS to Mexico, has also been significantly impaired. With little or no demand for HFCS as a beverage sweetener in Mexico, these facilities are largely idle.

57. Finally, because of the virtual ban on the use of HFCS as a beverage sweetener in Mexico, Cargill and other U.S.-owned HFCS producers both in the U.S. and Mexico were forced to divert HFCS capacity originally intended for the Mexican market to the U.S. market. As a result, the U.S. price of HFCS suffered a significant decline, and Cargill lost substantial revenue and profits from its U.S. sales of HFCS.

H. Cargill's Efforts to Mitigate the Negative Impact of the HFCS Tax Have Only Partially Offset its Economic Losses

58. As stated in Section III.C above, Cargill and Cargill Mexico engaged in numerous efforts to achieve repeal of the beverage tax. Cargill is an active member of the Corn Refiners Association and has joined the association in lobbying efforts geared to repeal the tax. Cargill has also participated in the Joint Mexican Sweetener Task Force, which met for over a year and is still meeting occasionally.

59. In an effort to mitigate the damages resulting from the closure of the Mexican market, Cargill made significant adjustments to its sweetener division's business plan. Cargill attempted to increase its sales to existing export markets, such as Canada, Jamaica, and Puerto Rico, while seeking to develop new export markets in Trinidad and Tobago, Malaysia, Colombia, Honduras, the Philippines, Taiwan, India, Saudi Arabia and Costa Rica.

60. Cargill also endeavored to broaden its HFCS customer base in an effort to minimize the supply buildup that resulted from the closure of the Mexican market. Cargill sought customers outside the soft drink industry and increased HFCS sales to manufacturers of juices, alcoholic beverage mixers, general food (peanut butter, fruit cocktail) and baked goods.

61. Despite these efforts, the losses incurred by Cargill and Cargill Mexico, as a result of the Government of Mexico's discriminatory conduct and violations of NAFTA, have been only partially offset.

V. PROVISIONS ALLEGED TO HAVE BEEN BREACHED AND OTHER APPLICABLE PROVISIONS

62. Cargill and Cargill Mexico allege that the HFCS tax adopted and maintained by the Government of Mexico violates numerous provisions of NAFTA Chapter 11, including: the obligation to provide national treatment (Article 1102), the obligation to provide fair and equitable treatment (Article 1105), the prohibition against performance requirements (Article 1106), and the proscription against expropriation (Article 1110).

A. The Government of Mexico's Tax on Beverages Sweetened with HFCS Denies National Treatment to Cargill and Cargill Mexico in Violation of Article 1102 of NAFTA

63. Article 1102 requires that a Party provide national treatment with respect to the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments," *i.e.*, treatment that is no less favorable than that accorded, in like circumstances, to its own investors.

64. Investments related to the production and distribution of HFCS are in "like circumstances" as those related to the Mexican sugar industry. HFCS and sugar producers participate in the same economic and business sector. The two products are virtually interchangeable with respect to their use in beverages and sweeteners, and sugar and HFCS compete for the ability to supply the same customers. In addition, the Government of Mexico has made official determinations supporting both the conclusion that HFCS and sugar are substitutes and that the two sweeteners are in direct competition in the marketplace.[16]

65. As already described, the Government of Mexico has discriminated against HFCS investments made by U.S. investors in order to protect the Mexican sugar industry. The sugar industry is largely or entirely owned by Mexican nationals, while the only HFCS available in Mexico was either produced in Mexico by the investments of U.S. investors and distributed by those investments, or produced in the U.S. and distributed by the Mexican investments of U.S. investors. The Government of Mexico has applied a tax on beverages produced with HFCS but not on beverages produced with sugar. Moreover, there is abundant evidence demonstrating that the purpose of the HFCS tax is to protect Mexican sugar producers from competition by foreign-owned HFCS producers and eliminate the use of HFCS as a competitive alternative to sugar in the Mexican sweetened beverage market.

B. The Government of Mexico's Misuse of State Authority to End the Utilization of HFCS in the Mexican Beverage Industry Violates the Obligation to Provide Fair and Equitable Treatment as Required by Article 1105 of NAFTA

66. Article 1105(1) requires each Party to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." Claimant's investments should be treated in accordance with international law, which includes not only the standard of "fair and equitable treatment," but also compliance with the international law principle of good faith, the customary international law prohibition against arbitrary and discriminatory treatment, and any relevant treaty standards to which the Government of Mexico has agreed to be bound. Under Article 1105 of NAFTA, the Government of Mexico must refrain from acting in a manner that deprives Claimant and its enterprise of substantive

[16] In an antidumping order issued on January 23, 1998, the Mexican authorities imposed antidumping duties on HFCS from the United States. This antidumping order was predicated, in part, on the Mexican authorities' determination that HFCS and sugar were like products with closely resembling characteristics.

and procedural due process, or subjects Claimant and its enterprise to unfair and unjust treatment.

67. As set forth above, from early 1997 through the present, the Government of Mexico has maintained an ongoing campaign to eliminate HFCS from the Mexican market. This campaign was carried out under color of legitimate state action but was, in reality, a series of arbitrary and discriminatory actions against U.S. investments in HFCS, a fact that became clear to Claimant with the imposition of the HFCS tax. The HFCS tax, moreover, is itself an arbitrary and discriminatory measure that targets U.S. investors and investments in HFCS and has no rational basis as a tax measure. The stated purpose of the HFCS tax is not to raise revenue, or even to provide some reasonable measure of protection to the Mexican sugar industry, but rather to eliminate any use of HFCS by Mexican beverage producers. For these reasons, Cargill and Cargill Mexico maintain that the Government of Mexico has violated Article 1105(1) and failed to provide fair and equitable treatment in accordance with international law.

C. The HFCS Tax Imposes Performance Requirements in Violation of Article 1106 of NAFTA

68. Article 1106(3) prohibits a Party from conditioning the receipt or continued receipt of an advantage on compliance with a performance requirement. NAFTA Article 2103 permits a claim involving taxation measures to be made under Article 1106(3).

69. The HFCS tax imposes a 20 percent *ad valorem* tax on beverages sweetened with any amount of HFCS or sweetener other than cane sugar. Mexican beverage producers and bottlers who use Mexican cane sugar exclusively are exempt from the 20 percent *ad valorem* tax. In order to continue to receive such an exemption, the Mexican beverage producers and bottlers must continue to use Mexican cane sugar in lieu of the HFCS produced in U.S. investor-owned plants. The continued receipt of this benefit is, therefore, conditioned on a performance requirement. The benefit also occurs "in connection with an investment in its territory of an investor of a Party," because imposition of the performance requirement has seriously impaired the development and growth of HFCS as a sweetener by Mexican beverage producers and bottlers. For these reasons, the HFCS tax imposes an impermissible performance requirement that violates Article 1106(3).

D. The Tax on Beverages Sweetened with HFCS Constitutes an Expropriation Under Article 1110 of NAFTA

70. NAFTA Parties are prohibited from expropriating, directly or indirectly, an investment of an investor of another Party.[17] Under Article 1110 of NAFTA, no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except: (a) for a public purpose; (b) on a non-

[17] NAFTA., art. 1110.

discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with the provisions of NAFTA.

71. The HFCS tax is an indirect expropriation and a measure tantamount to expropriation because it has effectively frustrated Cargill and Cargill Mexico's ability to sell and distribute its HFCS to Mexican producers of beverages, syrups and concentrates and Mexican soft drink bottlers. As a result, the HFCS tax has deprived Cargill and Cargill Mexico of a significant portion of the value of their investment in HFCS distribution facilities in Tula, Hidalgo, Mexico and McAllen, Texas, which were built to supply HFCS to the Mexican market.

72. Cargill has also suffered losses to the value of expansions and improvements to existing HFCS facilities in the U.S. These expenditures were specifically made so that Cargill could increase output of HFCS for use in the Mexican market. The value of the investment made to expand HFCS plants was severely impaired when demand for HFCS in Mexico was effectively eliminated by the Government of Mexico's actions to protect its domestic sugar industry at the expense of U.S. investor-owned HFCS interests.

73. Moreover, as a result of the HFCS tax, Cargill and Cargill Mexico have been deprived of the economic benefit that would have flowed from their U.S. and Mexican investments, including revenue from sales of HFCS in Mexico. Finally, because of the virtual ban on the use of HFCS as a beverage sweetener in Mexico, Cargill and other U.S.-owned HFCS producers were forced to divert HFCS capacity originally intended for the Mexican market to the U.S. market. As a result, the U.S. price of HFCS suffered a significant decline, and Cargill lost substantial revenue and profits from its U.S. sales of HFCS.

74. Pursuant to Article 1110(2), the Government of Mexico is required to compensate Cargill and Cargill Mexico equivalent to the fair market value of the expropriated investment immediately before the expropriation took place.

VI. STATEMENT OF ISSUES

A. Has the Government of Mexico taken measures that are inconsistent with its obligations under Articles 1102, 1105, 1106(3) or 1110 of NAFTA?

B. If so, which measures are inconsistent and at what time?

C. If so, what are the damages that are properly compensable to Cargill and Cargill Mexico as a result of the Government of Mexico's breaches of its obligations under NAFTA?

VII. RELIEF AND AMOUNT OF DAMAGES

75. Cargill and Cargill Mexico intend to seek the following relief for the actions and breaches by the Government of Mexico described herein:

A. Damages of not less than 100 million U.S. Dollars arising from the Government of Mexico's breaches of its NAFTA obligations, including loss of investment value, lost sales opportunities and lost profit;

B. Costs associated with these proceedings, including all professional fees and disbursements;

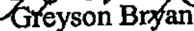
C. Pre-award and post-award compound interest at a rate to be fixed by the tribunal;

D. An increase in the amount of the award to offset any tax consequences or exchange rate fluctuations and maintain the value of the award;

E. Such further relief as the tribunal deems appropriate and just.

VIII. REQUIRED COPIES, PAYMENT, AND POWER OF ATTORNEY

76. In accordance with Article 3 of the ICSID AF Arbitration Rules and the March 8, 2004 Schedule of Fees, this Request for the Institution of Arbitration Proceedings is accompanied by five additional signed copies and by a non-refundable fee of U.S. $15,000. The undersigned counsel certify that all copies of documents attached as exhibits to this Request for the Institution of Arbitration Proceedings are copies of original documents.



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