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April 11, 2005

VIA HAND DELIVERY

Gonzalo Flores, Esq.
Senior Counsel
International Centre for the Settlement of Investment Disputes
1818 H Street, N.W.
Washington, D.C. 20433

Re: Request of the United Mexican States for Consolidation of *Corn Products International, Inc. v. United Mexican States* (Case No. ARB (AF)/04/01), and *Archer Daniels Midlands Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States* (Case No. ARB(AF)/04/5)

Dear Gonzalo:

Enclosed please find an original and seven copies of CPI's Brief in Opposition to Mexico's Request for Consolidation, and accompanying exhibits (in two volumes). For the convenience of the Secretariat and the Consolidation Tribunal, we are also providing you with one copy of a volume of authorities relied upon in the brief.

We understand you will distribute these documents to the tribunal and the other parties.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Lucinda A. Low
Miller & Chevalier Chartered
Counsel for Corn Products International, Inc.

Enclosures:

1. Brief in Opposition
2. Exhibits (2 volumes)
3. Volume of Authorities

cc: Hugo Perezcano Diaz
Warren Connelly and Lisa Pelluconi
Daniel Price, Stanimir Alexandrov, and Amy Porges

BEFORE THE

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

ADDITIONAL FACILITY

In the Matter of

REQUEST OF RESPONDENT UNITED MEXICAN STATES FOR CONSOLIDATION OF

CORN PRODUCTS INTERNATIONAL, INC.
V.
UNITED MEXICAN STATES
ICSID CASE NO. ARB(AF)/04/1

AND

ARCHER DANIELS MIDLAND COMPANY
AND
TATE & LYLE INGREDIENTS AMERICAS, INC.
V.
UNITED MEXICAN STATES
ICSID CASE NO. ARB(AF)/04/5

OPPOSITION OF CORN PRODUCTS TO MEXICO'S REQUEST FOR CONSOLIDATION UNDER NAFTA ARTICLE 1126

April 11, 2005

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Table of Contents

Table of Legal and Factual Authorities

I. MATERIALS FROM CONSOLIDATION PROCEEDING

II. SUBMISSIONS AND ORDERS IN *CORN PRODUCTS INTERNATIONAL, INC. V. UNITED MEXICAN STATES*

B. Selected Materials from WTO Proceedings related to HFCS Tax

VI. INTERNATIONAL AND DOMESTIC PROCEEDINGS RELATED TO MEXICAN ANTIDUMPING MEASURES AFFECTING HFCS FROM THE UNITED STATES

A. Selected Mexican Judicial and Administrative Determinations Related to Antidumping Measures Affecting HFCS from the United States

[1] Materials that are publicly available on the internet have generally not been included in the Exhibit volumes. However, web addresses have been provided for any such materials.

B. Selected Binational Proceedings Related to Mexican Antidumping Measures Affecting HFCS from the United States

VII. OTHER ARBITRAL AND JUDICIAL MATERIALS

A. Selected Iran-U.S. Award Claims Tribunal Materials

B. Other NAFTA Chapter 11 Proceedings

IX. LEGAL COMMENTARY

X. OTHER MATERIALS

A. ADM/ Tate & Lyle Annual Reports and Investor Conferences

B. Media Articles and Press Releases

OPPOSITION OF CORN PRODUCTS TO MEXICO'S REQUEST FOR CONSOLIDATION UNDER NAFTA ARTICLE 1126

I. INTRODUCTION AND SUMMARY

1. On September 8, 2004, Respondent United Mexican States ("Respondent" or "Mexico") filed a request for consolidation (the "Request" or "Consolidation Request") under Article 1126 of the North American Free Trade Agreement ("the NAFTA") of an active arbitration proceeding involving Corn Products International ("CPI") (ICSID Case No. ARB(AF)/04/1) and an arbitral claim jointly filed just prior to the making of the Request by two of CPI's principal competitors, Archer Daniels Midland Company ("ADM") and Tate & Lyle Ingredients Americas, Inc. "Tate & Lyle") ("collectively "ADM/Tate & Lyle" or the "Almex Shareholders") (ICSID Case No. ARB(AF)/04/5).[1] Respondent re-submitted its request for consolidation to the present Tribunal on February 24, 2005. By letter of March 18, 2005 from ICSID counsel, the parties were invited to file their observations on the question of consolidation. This filing in opposition responds to that invitation.

A. Summary of Reasons Why the Request Should Be Denied

2. CPI is fundamentally opposed to any consolidation of its claim with the Almex Shareholders' claim. It therefore urges this Tribunal to use the discretion Article 1126 gives it in this matter to deny Mexico's request. As this submission will demonstrate, Mexico has utterly failed to discharge its burden of demonstrating that fairness and efficiency – the ultimate touchstones of Article 1126 -- require consolidation.

3. While the claims are superficially similar, that similarity arises from an obvious effort by the Almex Shareholders to mirror CPI's claim and to downplay the differences in their market strategies, nature, and location of investments, and the additional measures that are a cause of their injury, as well as from the limited scope of Chapter 11 itself. Whatever common questions of fact may be found in the two claims, their resolution does not require consolidated proceedings, since these common questions are largely non-contentious, or readily established through existing public information. The differences, on the other hand, have implications that cut across the entire range of legal issues raised by the claims, from jurisdiction, to liability, to damages. These differences moot Respondent's concerns about possible inconsistent decisions.

4. Moreover, for this Tribunal to take on the task of sorting out these differences between the two claims in the context of consolidated proceedings would inevitably lead to great inefficiency. It would mean even greater delay than has already been experienced by CPI, and

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1 Both Claims were submitted under Article 1120 of the NAFTA. Both Claims allege violations by Mexico of its obligations to foreign investors and their investments under Chapter 11, Section A, of the NAFTA. NAFTA Chapter 11 is available at http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/NAFTA_Chapter_11_Trilateral_Negtiating_Draft_Texts/asset_upload_file258_5882.pdf.

significant additional expense. It would even risk CPI's claim being confused or compromised to its obvious prejudice because of the apparent goal of Mexico, and possibly the Almex Shareholders as well, to blur those differences.

5. And the fairness and efficiency considerations do not stop there. Having filed its Memorial before its Tribunal,[2] CPI is acutely aware of the extent to which proof of key aspects of its claim rests on confidential and proprietary business information. This confidential information permeates CPI's claim, going even to the character of a threshold issue under all of the NAFTA Chapter 11 provisions at issue -- the nature of its investment. It also implicates key elements of state responsibility, such as its reasonable and investment-backed expectations. CPI is therefore deeply concerned not only about the extensive and costly measures it will be forced to take to protect its confidential business information from its direct competitors in the context of consolidated proceedings, but also about the impact the confidentiality issue will have on its ability to present its claim effectively. It is profoundly disturbed by the costs and delays that--as experience to date has amply proven--are an inevitable consequence of consolidation.

6. More than three years have already gone by since Mexico imposed the illegal measure that is at the heart of CPI's case. In that period, CPI's every effort to obtain redress against the measure in domestic courts has failed. Its only remaining recourse has been to the Chapter 11 remedy, a remedy that is proving as burdensome and elusive as domestic remedies have been. CPI has already lost time in submitting its Memorial because of Mexico's request, and each day that passes without resolution of that request results in further prejudice to it.

7. This Tribunal should therefore exercise its discretion under Article 1126 against consolidation, leaving CPI free to proceed before its 1120 Tribunal, which stands ready, willing and able to hear the case. This is by far the fairest and most efficient alternative, especially if the schedule in the CPI case is set to allow the Almex Shareholders as well as Respondent to benefit from factual development and determinations in that case. This is not the type of case for which Article 1126 was drafted. The class is too small, the claims are too complex, and the issues are too individualized. Nor does any more limited degree of consolidation make sense. Indeed, Mexico already has the benefit of a joint claim from the Almex Shareholders--a claim that, had it been submitted as two separate claims by ADM and Tate & Lyle, would have presented a compelling case for consolidation of these claims. Mexico should not be allowed to attempt to drag out these cases further through the guise of consolidation of the CPI and Almex Shareholders' claims.

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2 *See* Memorial on Issues of State Responsibility (Confidential), *Corn Prod. Int'l Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01 (submitted by CPI on April 11, 2005). The cover page of the memorial and transmittal letter have been submitted as Volume I, Exhibit E.

B. Procedural History of CPI's Claim and Mexico's Consolidation Request

8. CPI filed its Notice of Intent to Submit a Claim to Arbitration under Chapter 11 of the NAFTA on January 28, 2003,[3] notified the competent tax authorities of the United States and the United Mexican States of its intent to claim expropriation based on a tax measure as required by NAFTA Article 2103(6) on the same date,[4] and submitted its Statement of Claim to ICSID on October 21, 2003.[5] ADM/Tate & Lyle submitted their joint Statement of Claim on August 4, 2004 -- roughly nine and a half months after CPI submitted its claim.

9. In the eighteen months since CPI submitted its claim to arbitration, there has been considerable progress in CPI's proceeding, despite Mexico's consistent efforts to slow the process at every turn. By mid-May, the Tribunal in CPI's proceeding (hereinafter, the "CPI Tribunal" or CPI's "1120 Tribunal") had issued its first procedural order, which was related to its constitution. By the end of May, CPI and Mexico had agreed on the legal situs of arbitration. In July, the Tribunal was reconstituted. In mid-September 2004, CPI and Respondent participated in a preliminary hearing at which the CPI Tribunal established a procedural framework for the proceedings, and set a briefing schedule for the written phase of state responsibility, no questions of jurisdiction having been raised at that point. The CPI Tribunal also considered and rejected Respondent's request for a suspension of the CPI proceedings based on Mexico's Consolidation Request, after hearing oral arguments from both CPI and Respondent.[6]

10. After considering a variety of alternatives, CPI, ADM/Tate & Lyle and Respondent (hereinafter, the "Disputing Parties") agreed in January 2005 upon a framework under which a Tribunal (the "Consolidation Tribunal") would hear the parties' arguments

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3 *See* Notice of Intent to Submit a Claim to Arbitration, *Corn Prod. Int'l Inc. v. United Mexican States*, (submitted by CPI on Jan. 28, 2003). The Notice of Intent was included as an attachment to the claim submission, and can therefore be found at Volume I, Exhibit G-3.

4 Submission under NAFTA Article 2103(6) to the Mexican Competent Authority Regarding Corn Products' Notice of Intent to Submit a claim to Arbitration Against the Government of Mexico Under Chapter 11 of the NAFTA (submitted by CPI on Jan. 28, 2003). The 2013(6) Submission was included as an attachment to the claim submission, and can therefore be found at Volume I, Exhibit G-4.

5 *See* Request for Institution of Arbitration Proceedings under NAFTA Chapter 11, *Corn Prods. Int'l, Inc. v. United Mexican States* (submitted by CPI on Oct. 21, 2003), ¶ 9 (*hereinafter* CPI Claim Submission) (Volume I, Exhibit G).

6 *See* Procedural Order No. 2, *Corn Products Int'l, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/04/1 (Jan. 14, 2005) (memorialization of decision of Sept. 16, 2004 of the CPI Tribunal not to suspend proceedings in light of the consolidation request of United Mexican States). Procedural orders 1-3 of the CPI Tribunal are submitted as Volume I, Exhibits A - C, and the minutes of the first procedural meeting of September 16, 2004 are submitted as Volume I, Exhibit D. *See also* Letter to Tribunal Requesting Suspension of Arbitral Proceedings, *Corn Prod. Int'l, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01 (submitted by Respondent United Mexican States, on Sept. 8, 2004) (Volume I, Exhibit F).

regarding consolidation and decide whether any part of the CPI and ADM/Tate & Lyle claims should be consolidated. That agreement was memorialized in a Confirmation of Agreement which has been previously provided to this Tribunal (the "Consolidation Agreement").[7]

11. Simultaneous with negotiations over the terms of the consolidation process, and in response to the schedule set by the CPI Tribunal, CPI prepared its Memorial on the issues of state responsibility presented by its claim. CPI was prepared to submit its Memorial earlier this year, but delays in the consolidation process prevented it from doing so. The deadline for submission of Claimant's Memorial, originally set for February 15, 2005, was extended by order of the CPI Tribunal, upon request of CPI, to March 17, 2005, and finally set by order of the CPI Tribunal to no later than April 15, 2005[8] pursuant to Procedural Order No. 3 of the CPI Tribunal of March 29, 2005. That Memorial –170 pages in length, with 17 witness statements, two expert opinions, and over 170 factual exhibits – has now been submitted.

C. Mexico's Consolidation Request and CPI's Response

12. Mexico's Consolidation Request is premised on the degree of alleged similarity between the CPI and Almex Shareholders' claim. To support its characterization of the claims as virtually identical, Respondent repeatedly relies heavily on facial parallels between the texts of the claims submitted by the respective Claimants. For example, on page four of its Consolidation Request, Respondent explains that:

> The Mexican government presents comparative tables of the factual and legal arguments from CPI and ADM/Tate & Lyle, taken textually from the claims that were presented to the ICSID. For purposes of comparison, in certain cases some paragraphs were rearranged or only extracts were cited.
>
> As can be appreciated, the vast majority of the factual and legal issues that are presented by CPI and ADM/Tate & Lyle in their claims are common. Both of them follow one same structure and frequently use the same terms. The parallelism is evident.[9]

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7 *See* Confirmation of Agreement of the Disputing Parties Regarding Consolidation among Respondent United Mexican States, Corn Products International, Inc., Archer Daniels Midland Company, and Tate & Lyle Ingredients Americas, Inc. (dated as of Feb. 11, 2005; signed April 7 and 8, 2005) (Volume II, Exhibit A).

8 The CPI Tribunal has also set a briefing schedule for the remainder of the written phase of state responsibility. Under this Schedule, all submissions on state responsibility will be made in 2005, setting the stage for a hearing on State responsibility to be heard in early 2006. *See* Procedural Order No. 3, *Corn Prods. Int'l, Inc. v. United Mexican States,* ICSID Case No. ARB(AF)/04/1 (Mar. 29, 2005) (Attachment 2, Exhibit 4).

9 Solicitud de acumulación de procedimientos al amparo del artículo 1126 del TLCAN, *Corn Prod. Int'l, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/1 and *Archer Daniels Midland Co. & A.E. Staley Mfg. Co. v. United Mexican States* (submitted by United Mexican States on Sept. 8, 2004) (Volume II, Exhibit B) (*hereinafter* the "Consolidation Request").

13. Based on its own textual presentation of the claims submissions -- a presentation that occupies more than half of the text of its Request, and facilitated by ADM/Tate & Lyle's parroting of CPI's claim filed ten months earlier -- Respondent asserts that the "vast majority" of legal and factual issues in the two claims are common. This questionable assertion forms the foundation of Respondent's conclusion that anything less than total consolidation would result in an unfair increase in the costs of litigation for Respondent or in inconsistent awards.[10]

14. As will be shown below, Respondent's Consolidation Request rests on a superficial analysis of the claimants' respective claims and an equally superficial examination of the applicable legal standard under NAFTA Article 1126. When the claims are examined more carefully, it will be more than evident that Respondent has not shown a commonality in the "vast majority" of significant legal and factual issues underlying the CPI and ADM/Tate & Lyle claims. Nor has it shown -- as it must -- that considerations of efficiency and fairness weigh in favor of consolidation of those claims. Respondent's editorialized and selective presentation of the claim submissions based on the Almex Shareholders' use of very similar language and echoing of CPI's theories of state responsibility does little to establish the extent of any common questions of law or fact. Certainly, it does not prove consolidation to be in the interests of fair and efficient resolution of the claims.

II. THE LEGAL STANDARD OF NAFTA ARTICLE 1126

15. As set forth in the Consolidation Agreement, this Tribunal is called on to decide Mexico's Consolidation Request by applying the standard of decision set forth in NAFTA Article 1126(2). That Article provides in relevant part that:

> Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:
> (a) assume jurisdiction over, and hear and determine together, all or part of the claims; or
> (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.
> [Emphasis added.]

16. Plainly, this language makes the question of consolidation a discretionary, not a mandatory, one for this Tribunal. Had mandatory consolidation been intended any time claims submitted to arbitration under Article 1120 presented common factual or legal questions, Article 1126 would have used the word "shall" instead of "may." But it does not.

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10 *Id.*; *see also* Consolidation Request, *supra* note 9, at pp. 19-21.

17. Moreover, the Tribunal's exercise of discretion contemplated by Article 1126 is to be guided not simply by the existence of common questions of law and fact, but, as the text clearly reveals, by a consideration of the interests of fairness and efficiency.

18. Article 1126 thus contemplates a two-step process: The threshold inquiry is whether two or more claims contain a common question of law or fact. Under this threshold inquiry, a Tribunal that is not satisfied that there is a common question of law or fact must deny the consolidation request. If -- as is more likely -- the Tribunal concludes that there is a common question of law or fact, it must then turn to the second, and critical, question: whether consolidation would be "in the interests of fair and efficient resolution of the claims."[11] Implicit in this formulation is that the fairness and efficiency interests favoring consolidation should outweigh those disfavoring consolidation before that discretion is exercised to require consolidation.

19. Article 1126, although clearly contemplating a factual inquiry, does not provide any detail on the components of fairness and efficiency that should guide that inquiry. Nor have any prior tribunals convened under NAFTA Chapter 11 considered this issue.[12] As a result, the present Tribunal must determine as a question of first impression what factors bear on this determination. Although this Tribunal's analysis in this regard will of necessity be heavily fact-based, its analysis may be informed by the factors that other international tribunals have identified as relevant in prior cases outside the NAFTA context.[13]

20. This Tribunal should also approach these questions with the object and the purpose of the NAFTA in mind.[14] In general, Chapter 11 of the NAFTA stands as testament to

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11 NAFTA Art. 1126(2). This is the more likely scenario, given that numerous cases could present a common question of law or fact. Because claims may only be asserted under Chapter 11 for violations of the obligations specified in the NAFTA, and the available remedies are likewise constrained by the Treaty's provisions, common questions may be presented in many cases.

12 To our knowledge, Mexico's request for consolidation in these cases was the first consolidation request filed under the NAFTA. Earlier this year, the United States requested consolidation of three Chapter 11 claims submitted against it, all of them arising out of the softwood lumber trade dispute between the United States and Canada. *See U.S. Request for Consolidation of Claims filed under NAFTA Chapter 11 by Canfor Corp., Terminal Forest Products Ltd., and Tembec Inc.* (Mar. 7, 2005) (Volume III, at A).

13 As discussed in Part IV.G, *infra*, there are few direct parallels to Article 1126 in the investor-state dispute context that have been tested. Chapter 11, the investment chapter of the NAFTA, functions as a bilateral investment treaty ("BIT") within the NAFTA. Prior to Chapter 11, very few BITs or other instruments designed to function in the context of investor-state disputes had consolidation provisions. Some analogies can be drawn from the Iran-U.S. Claims Tribunal, and there are authorities in the contractual context. Domestic authorities are not particularly relevant, given the requirements of the NAFTA. *See* NAFTA Art. 1131 ("A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.").

14 *See* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, Art. 31 (May 23, 1969) (Volume III, at B).

its drafters' intention to give foreign investors aggrieved by measures of a host country a direct right to claim individually against that host country for damages where breaches of its state responsibility standards have occurred. As we will show in Section IV.G, *infra*, the NAFTA consolidation provision was drafted as an exception to that general right, when the existence of multiple claims, and particular multiple claims of overwhelming similarity, made it impractical to proceed individually.

21. As the moving party, Respondent bears the burden of persuasion in this Consolidation Proceeding. With respect to "the proof of individual allegations advanced by the parties in the course of proceedings, the burden of proof rests upon the party alleging the fact."[15] Furthermore, "a Party having the burden of proof must not only bring evidence in support of his allegations, but must also convince the Tribunal of their truth, lest they be disregarded for want or insufficiency of proof."[16]

22. In determining whether this burden has been met, this Tribunal should give particular consideration to the fact that consolidation would deprive CPI of the Tribunal of its choice, and require it to start anew, setting it back procedurally and substantively many months if not more. Stated differently, unless all parties articulate support for consolidated proceedings, any doubts this Tribunal may have as to whether consolidation is in the interests of "fair and efficient resolution of the claims" should be resolved against full consolidation as requested by Respondent -- especially if there are alternatives that will promote fairness and efficiency.

III. RESPONDENT VASTLY OVERSTATES THE PRESENCE OF COMMON QUESTIONS OF LAW AND FACT IN THESE CASES

23. There are superficial similarities between the respective claims brought by CPI and ADM/Tate & Lyle: Both claimants have affiliates that produce at least one type of high fructose corn syrup (HFCS) product in Mexico; both complain of the same measure – the HFCS Tax as discussed below; and both claimants argue that the measure has resulted in the same breaches by Mexico of its obligations to foreign investors under NAFTA Chapter 11 (the provisions of Articles 1110 (expropriation), 1102 (national treatment), and 1106(3) (performance requirements)). However, these facial similarities are neither difficult nor particularly contentious. There is consequently little or no risk of inconsistency or inefficiency in having them be decided by separate tribunals.

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15 *Asian Agric. Prods., Ltd. v. Republic of Sri Lanka*, Case No. ARB/97/3, Award of June 27, 1990, ¶ 56. (Volume III, at C).

16 *Id.*; *See also* Alan Redfern, *et al.*, *The Standards and Burden of Proof in International Arbitration,* 10/3 Arb. Int'l 321-22 (1996) (Volume III, at D) ("The practice of nearly all international arbitral tribunals is to require the moving party to prove the facts upon which it relies in support of its case. This practice is given recognition in the UNCITRAL Arbitration Rules. . . . The only exceptions relate to propositions that are so obvious, or notorious, that proof is not required. The degree, or level, of proof that must be achieved is not capable of precise definition, but it may be . . . assumed that it is close to the 'balance of probability' (to be distinguished from the concept of 'beyond all reasonable doubt') . . .").

24. Conversely, notwithstanding the Almex Shareholders' efforts to frame their joint claim in a way that closely resembles CPI's claim, the two claims have very significant factual and legal differences. Some of these differences are apparent on the face of the claims, when these are subjected to a closer examination than Mexico's superficial side-by-side comparison; others have become apparent to CPI through its work on its Memorial on State Responsibility.[17] While the full impact of these differences on a consolidated proceeding is difficult to know, what is clear at this stage is that they potentially affect every phase of the arbitration proceedings--from jurisdiction, to liability, to damages.

A. The Common Factual Questions in this Case Can Be Readily Resolved Without the Need for Consolidated Proceedings.

25. The most obvious, and most significant, factual commonality between the two claims is that they both complain of the same "measure" -- the tax imposed by Mexico on January 1, 2002, on soft drinks and certain other beverages containing HFCS but not cane sugar as their sweetening ingredient (the "HFCS Tax" or "Tax").[18] The question whether this Tax qualifies as a "measure" under NAFTA requirements is simple and straightforward,[19] and not likely to be disputed by Mexico.

1. Elements of the Claimed Violations

26. To prove that this measure violates Articles 1102 (National Treatment), 1106 (Performance Requirements) and 1110 of the NAFTA (Expropriation) as each Claimant/Claimant group has asserted will require Claimants to demonstrate those facts that are

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17 To prove its claim, CPI has amassed extensive evidentiary materials. These materials are the bases for the factual statements it makes in this submission, unless otherwise indicated. Given the confidentiality concerns discussed *infra* at Section IV.B, CPI has not provided these specific evidentiary sources with this submission, but will gladly provide any such materials to the Tribunal for *in camera* review.

18 *See* CPI Claim Submission, ¶ 9 (Volume I, Exhibit G); *Request for Institution of Arbitration Proceedings under NAFTA Chapter 11, Archer Daniels Midland Co. & A.E. Staley Mfg. Company v. United Mexican States* (submitted Aug. 4, 2004), ¶ 2 (*hereinafter* "ADM/Tate & Lyle Joint Claim Submission") (Volume II, Exhibit C).

19 *See* NAFTA Article 1101(1) (establishing that Chapter 11, "applies to measures adopted or maintained by a Party."); NAFTA Article 201(1) (providing that, "measure includes any law, regulation, procedure, requirement or practice."). The HFCS Tax, which was adopted by the Mexican legislature on December 31, 2001 and entered into force on January 1, 2002, is undeniably a law. Other NAFTA Parties have readily admitted that a statute duly passed by the legislature is clearly a "measure." *See Ethyl Corp. v. Gov't of Canada,* Award on Jurisdiction, ¶¶ 65-69 (June 24, 1998), *at* http://www.dfait-maeci.gc.ca/tna-nac/documents/ethyl6.pdf. Prior NAFTA Chapter 11 tribunals have found the scope of the term "measure," to be broader still. *See id. See also, The Loewen Group, et al. v. United States,* Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, ICSID Case No. ARB(AF)/98/3, ¶¶ 39-60 (Jan. 5, 2001), *at* http://www.state.gov/documents/organization/8744.pdf.

legally significant for each of the claims, as well as the facts relevant to Chapter 11's jurisdictional standards:

Jurisdiction

Key additional elements for a NAFTA Chapter 11 Tribunal to have jurisdiction over a claim are that it involves a "measure" --

- "Relating to"
- "Investments" of
- An "investor of another party".

Article 1102 (National Treatment)

For a national treatment claim, the critical elements are whether the host country, Mexico, has --

- Accorded to investors of another party, or their investments
- Treatment no less favorable than that accorded to
- Local investors or their investments
- In "like circumstances" with them
- With respect to the establishments, acquisitions, expansion, management, operations, etc., of their investments.

Article 1106(3) (Performance Requirements)

For this claim, the key questions are whether the host country has --

- Conditioned the receipt or continued receipt
- Of an advantage
- In connection with
- Investments in its territory of an investor of another Party
- On compliance with
- Requirements with respect to domestic content or local purchasing.

Article 1110 (Expropriation)

Finally, this claim prohibits --

- Direct or indirect nationalization or expropriation of investments of an investor of another Party or the
- Taking of a measure tantamount to expropriation or nationalization
- Unless compensation is paid, there is a public purpose, and the action is non-discriminatory and does not violate due process or NAFTA Article 1105(1).

27. Although the ultimate operative facts will thus differ depending on the NAFTA provision at issue, proof of the claims will require, in general, a detailed explication of the Tax, a showing of how it relates to the Mexican investments of each Claimant or Claimant group, demonstration of any differential effect it may have had on domestic versus foreign investors or their investments, and close examination of the relative circumstances of domestic and foreign producers of sweeteners for soft drinks in the Mexican market. Many of these threshold issues either have been or will be developed as a general matter in other proceedings, or can be expected to be non-contentious. The rest, however, are so dependent on individual circumstances that they are not efficiently addressed in a consolidated proceeding.

2. Many Threshold Facts Have Already Been Established in Other Proceedings or in Public Records.

28. For instance, virtually all significant aspects of the Tax's operation, including its history, purpose, context, design and intended effects, have been exhaustively reviewed and briefed in the pending WTO case brought by the United States against Mexico.[20] That complaint involves a legal issue very close to the Article 1102 (National Treatment) issue in these claims -- whether the HFCS Tax violated the national treatment provisions of the GATT, specifically Articles III:2 and III:4. Significantly, it appears Mexico has chosen not to contest the facts asserted in the U.S. complaint in relation to the Tax, defending itself instead by resort to a broad-brush legal defense which argues that the WTO should abstain from addressing what Mexico considers to be a regional dispute arising under the NAFTA.[21] A WTO ruling on the complaint is expected next month.[22]

29. Additional issues, such as whether Mexican HFCS producers and Mexican sugar producers, and their respective products, are in competition with one another -- key issues to the "like circumstances" determination under NAFTA Article 1102 (National Treatment), have also

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20 *See, e.g., Mexico - Tax Measures on Soft Drinks and Other Beverages,* First Submission of the United States, WT/DS308 (Sept. 30, 2004) (Volume II, Exhibit D); *Mexico - Tax Measures on Soft Drinks and Other Beverages,* Second Submission of the United States, WT/DS308 (Jan. 21, 2005) (Volume II, Exhibit E).

21 *See, e.g., Mexico - Tax Measures on Soft Drinks and Other Beverages,* Second U.S. Submission, *infra* note 18, ¶5 (Volume II, Exhibit E) (reflecting Mexican failure to contest U.S. arguments that HFCS Tax is *prima facie* a violation of GATT Article III and U.S. statement of Mexican view that, "once the Panel has satisfied itself that the United States has met its burden to establish a *prima facie* case under Article III, Mexico does not object to the Panel proceeding on the presumption that its tax measures are incompatible with Article III.") Mexico's position is apparently that the Tax is justified because the United States has allegedly breached its NAFTA obligations regarding the U.S. market access of Mexican sugar.

22 *See Mexico - Tax Measures on Soft Drinks and Other Beverages,* Communication from the Chairman of the Panel, WT/DS308/6 (Feb. 2, 2005) (Volume II, Exhibit F) ("The Panel expects to complete its work by the end of May 2005, as envisaged in the timetable adopted after consultations with the Parties.").

been the subject of extensive factual development prior to this case, for example in bilateral trade proceedings and before Mexican domestic tribunals. Some of these proceedings have arisen from the Tax,[23] while others stem from prior illegal efforts by Mexico to close its market to HFCS.[24] In fact, the competition between Mexican HFCS and sugar producers, and fact that HFCS and sugar are "like" products has been settled fact and settled law for so long in these different contexts that it is practically subject to judicial notice.

30. Given this wealth of information, there is hardly a need for coordinated and consolidated briefing on these issues. Moreover, since CPI has already amassed, organized, and briefed, all available information on the Tax and these established issues, the most efficient approach would be for it to continue with its Tribunal. If the Almex Shareholders wish to take advantage of that work in preparing their own Memorial, they can then do so. Nothing could be more efficient.

31. When one goes beyond these threshold common issues, and turn to many of the ultimate facts affecting state responsibility, the factual differences between the claims become significant.

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23 *See, e.g., Oficio No. SE-10-096-2002-222 de la Sesión Ejecutiva de la Comisión Federal de Competencia*, Resolución Único (Apr. 22, 2002) (Volume II, Exhibit G) (determination by the Mexican Competition Commission finding that Mexican sugar producers and Mexican HFCS producers were competing producers and concluding that the HFCS Tax harmed the conditions of competition). A certified translation is also submitted at Volume II, Exhibit G. Similarly, a July 2002 opinion of the Mexican Supreme Court provided an authoritative articulation of the underlying purpose of the Tax when it acknowledged that the "extra-fiscal goal" (*fin extrafiscal*) of the HFCS Tax, as confirmed by the statements of Mexican legislators, was "protecting the national sugar industry." Suprema Corta de Justicia de la Nacion, *Sentencia relativa a la controversia constitucional 32/2002, promovida por la Cámara de Diputados Congreso de la Unión, en contra del Titular del Poder Ejecutivo Federal*, at 69 (July 17, 2002) (Volume II, Exhibit H). A certified translation is also submitted at Volume II, Exhibit H).

24 The record underlying Mexico's antidumping measures affecting HFCS is extensive, and includes multiple determinations of SECOFI, and multiple WTO and NAFTA panel reviews of those determinations. *See, e.g., Resolución final de la investigación antidumping sobre las importaciones de jarabe de maíz de alta fructosa, mercancía clasificada en las fracciones arancelarias 1702.40.99 y 1702.60.01 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia*, (Jan. 23, 1998), *at* http://www.contactopyme.gob.mx/upci/; *Mexico - Antidumping Investigation of High Fructose Corn Syrup from the United States,* WT/DS132/R (Jan. 28, 2000), *at* http://www.worldtradelaw.net/reports/wtopanelsfull/mexico-hfcs(panel)(full).pdf; *Mexico - Antidumping Investigation of High Fructose Corn Syrup from the United States,* WT/DS132/RW (June 22, 2001), *at* http://www.worldtradelaw.net/reports/wtopanelsfull/mexico-hfcs(panel)(21.5)(full).pdf, *Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup from the United States,* MEX-USA-98-1904-01 (Aug. 3, 2001), available at: http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/Mexico/ma98010e.pdf: *Review of the Final Determination of the Antidumping Investigation on Imports of High Fructose Corn Syrup from the United States,* MEX-USA-98-1904-01 (Apr. 15, 2002), *at* http://www.nafta-sec-alena.org/app/DocRepository/1/Dispute/english/NAFTA_Chapter_19/Mexico/ma98011e.pdf.

B. There Are Significant Factual Differences between the CPI and ADM/Tate & Lyle Claims.

32. Careful scrutiny of the two claims reveals many potentially legally significant distinctions between the Claimant-investors, their investments, investment and business strategies, and the effects they have suffered. Although the Claimants' Mexican affiliates (CPIngredientes, in the case of CPI, and Almex, in the case of ADM and Tate & Lyle) have sometimes been loosely referred to as the only HFCS producers in Mexico, that label suggests greater commonality -- especially in relation to the implications of the measure at issue in these cases, the HFCS Tax -- than is really the case. While all Claimants are members of the corn wet milling industry, produce corn-refined products, and produce through Mexican affiliates some types of HFCS in Mexico, the business strategies driving those investments, the location and market focus of those investments, and the effects of the Tax on those investments, differ sharply.

1. The Nature and Extent of the Claimants' Respective HFCS Investments In Mexico

a. The Investments Were Driven by Divergent Business Strategies.

33. CPI, ADM, and Tate & Lyle are all large, independent companies that compete world-wide in the corn wet milling and refining industries. But when it came to Mexico, and specifically to investing to supply HFCS to Mexico's large and growing soft drink industry,[25] they adopted very different strategies.

34. CPI, in keeping with an established business strategy of aiming to be the lowest-cost local supplier, decided to make the massive capital investments for the Mexican soft drink sweetener market in Mexico instead of in the United States. To do so, it expanded the most modern of its Mexican affiliate's four plants producing corn refined products, the plant at San Juan del Rio (SJR), in the State of Querétaro. Its investments in this expansion totaled over $165 million USD from 1994-2001. From the beginning, these massive, sunk investments were geared towards being able to fully produce those quantities of HFCS-55 (the concentration of HFCS used almost exclusively in soft drinks and requiring the greatest capital investments) required by the Mexican soft drink industry in Mexico.[26]

35. In contrast, the Almex Shareholders' business strategy appears to have focused largely on supplying HFCS-55 from their production facilities in the United States, at which they

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25 Mexico has the second largest per-capita consumption of soft drinks in the world. *See Mexico - Tax Measures on Soft Drinks and Other Beverages,* First U.S. Submission, *supra* note 18, ¶ 28 (Volume II, Exhibit D) (internal citations omitted).

26 To the limited extent that CPI exported finished HFCS to Mexico during this period, it was to seed the market, to supply customers when its Mexican plant was closed for maintenance, or to deal with situations of temporary excesses of demand over local supply.

made significant investments in hopes of meeting anticipated Mexican demand for HFCS. This strategy meant that for them, the Mexican soft drink sweetener market was an export -- rather than an investment -- market.

- For example, the 1995 Tate & Lyle annual report reflects major expansion of U.S. HFCS production capacity for purposes of exports to Mexico. "Several plant expansions, designed to meet the growing demand for starches and corn sweeteners, particularly in the US and Mexico, were undertaken this year. The Lafayette South operation in Indiana now has the capacity to produce more than one billion pounds additional high fructose corn syrup per year..."[27]

- A Forbes article from 1995 notes that: "Archer Daniels Midland ... spent $70 million to add 2.2 billion pounds of annual high-fructose corn syrup capacity. About half of this was meant to supply Mexico."[28]

36. ADM/Tate & Lyle's strategic vision of Mexico as an outlet for its U.S. HFCS production capacity also affected the level of economic and technological investments that the companies undertook in Mexico. Unlike CPI, ADM/Tate & Lyle did not make the investments in Mexico necessary to produce HFCS-55 or more refined types of HFCS locally. Instead, Almex imported these types of HFCS directly from the United States.

b. The Market Focus of the Claimants' Mexican Investments Was Likewise Different.

37. At every step of the way, CPI's investments were geared towards the needs of Mexico's soft drink bottlers. The construction at SJR sought to maximize production of HFCS-55 to supply the needs of soft drink bottlers such as Coca-Cola's Mexican affiliates, and to limit the production of HFCS-42 (a lower concentration of HFCS used by the food and beverage industries, but which is also necessary for the production of HFCS-55), to that amount technically required for its HFCS-55 production goals. CPI did not seek to develop other markets even for its HFCS-42, but focused its market development on the soft drink industry.

38. In contrast, CPI understands and believes that the Almex Shareholders' only production investments in Mexico were for HFCS-42. CPI also understands that a significant proportion of Almex's HFCS-42 output was produced for customers in the juice industry. Significantly, juices are not among the beverages subjected to the Tax.

39. As regards its sales to the soft drink sweetener industry, Almex could be characterized to a large degree as an import, blending and/or distribution operation. Almex not only imported U.S.-origin HFCS-55 stocks, which it then distributed directly to the Mexican soft drink industry, but it also imported highly concentrated types of HFCS inputs, primarily HFCS-

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27 Tate & Lyle, Annual Report, at 19 (1995) (Volume II, Exhibit I). *See also* ADM/Tate & Lyle Joint Claim Submission, ¶¶ 31 and 49 (Volume II, Exhibit C).

28 Howard Rudnitsky, *A Healthy Crop*, Forbes (June 5, 1995) (Volume II, Exhibit J).

90, which it blended with locally produced HFCS-42 inputs, resulting in HFCS-55 that could be marketed to the Mexican soft drink industry. Accordingly, all of the Almex Shareholders' sales of HFCS-55 in Mexico were dependent on U.S. HFCS imports, because they comprised either imported HFCS-55 stocks that were distributed directly to Mexican purchasers, or HFCS-55 output created by blending locally produced HFCS-42 with more refined HFCS inputs imported from the United States. Among corn refiners selling HFCS in Mexico, only CPI made the Mexican investments necessary to free itself of dependence on imported U.S. HFCS.[29]

c. These Differences Likely Mean a Vastly Dissimilar Impact of the Tax.

40. As a result of the nature and extent of its Mexican investments and market focus, the Tax on soft drinks containing HFCS has affected CPI's HFCS-55 investments in an overwhelming manner. Within days of the Tax, CPI suffered cancellation of virtually all of its HFCS orders, had to take back previously delivered products from customers, and was forced to shut down HFCS operations at its plant that produces HFCS-55. CPI was forced to cancel a major expansion of its HFCS-55 production in Mexico that was underway at the time of the Tax's enactment, and had to drastically reconfigure its entire Mexican operations, including by closing one of its four production facilities in Mexico.

41. In contrast, ADM/Tate & Lyle did not make the full investments required for HFCS-55 production in Mexico through their joint venture, Almex, but rather made them at their respective operations in the United States.[30] *A fortiori*, the impact of the Tax on ADM/Tate & Lyle's Mexican investments would have been exceedingly different, since they would not have been faced with large sunk investments in HFCS-55 in Mexico, which were no longer viable for their intended purpose and had no ready alternatives. Furthermore, by virtue of their location, ADM and Tate & Lyle's U.S.-based HFCS-55 investments were shielded from the full force of the Tax that fell on CPI's Mexican HFCS-55 production facilities.

d. Mexico Is Well Aware of These Differences.

42. Mexico is well aware of these differences in investments and market strategy, having investigated them in 1998 in connection with its antidumping investigation of HFCS

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29 H. Lee Murphy, *Global Reach Sweetens Syrup Maker's Outlook,* Crains Chicago Business (Feb. 1, 1999) (Volume II, Exhibit K) (noting that, "ADM and Cargill are suddenly itching for bigger positions in Mexico. But neither has the native capacity that Corn Products has."). Indeed, the Mexican Government has made findings of record with respect to this difference between CPI and the Almex shareholders. *See* discussion at footnotes 31 - 36, *infra*, and accompanying text.

30 *See* ADM/Tate & Lyle Joint Claim Submission, ¶ 49. (Volume II, Exhibit C) ("By December 1995, Almex had begun producing HFCS-42. Almex used a portion of its HFCS-42 production to produce HFCS-55 by blending it with HFCS-90 supplied by ADM. It sold its remaining HFCS-42 production to Mexican purchasers. It also distributed to Mexican purchasers HFCS-55 that it obtained from the U.S. production facilities of Claimants. ADM expanded U.S. production capacity in anticipation of being able to use Almex's distribution facilities to supply increasing volumes of HFCS to the Mexican market.").

imports for the United States.[31] The Mexican authorities (in fact, the same Ministry that has filed the pending consolidation request) concluded, among other things, that:

- The blending process by which Almex generates HFCS-55 in Mexico "does not require important investments, nor expenses in investigation and development."[32]
- "Arancia [the previous name of CPI's Mexican affiliate] is the only company in the United Mexican States that counts with all the production installations necessary for the fabrication process of HFCS-55...."[33]
- ADM and Tate & Lyle's "production installations in the United Mexican States are complementary to those established in the exporting country [the United States]..."[34]
- "[T]he blending process done by Almex in the United Mexican States in order to obtain HFCS-55 from imported enriched HFCS, constitutes an insignificant part of the total productive process of ... [HFCS-55]."[35]
- "As Almex has itself affirmed, it is more profitable to mix HFCS-42 with enriched HFCS without the need of investment or important facilities, also, since for each ton of the latter up to 4 tons of HFCS-55 can be obtained. [Under this business scheme], it is more profitable than directly importing the HFCS-55 and paying the tariff or, investing in the necessary facilities to produce the enriched HFCS."[36]

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31 *See Resolución final de la investigación sobre elusión del pago de cuotas compensatorias impuestas a las importaciones de jarabe de maíz de alta fructosa grado 55* (Sept. 8, 1998) (Volume II, Exhibit L). A certified translation is also submitted at Volume II, Exhibit L. This investigation resulted in a determination that the Almex Shareholders were circumventing an antidumping order by shipping highly enriched HFCS from the United States to Mexico in order to avoid duties on HFCS products with lower concentrations.

32 *Id.*, ¶ 77 ("Based on the available information, the Secretary's office determined that the production of HFCS-90 requires an important amount of investment in specialized machinery, equipment, and investigation and development. Such investments have been done by Tate & Lyle and ADM in the United States of America. In contrast, the mixture of HFCS-42 and enriched HFCS imported by Almex does not require important investments, nor expenses in investigation and development . . .")

33 *Id.*, ¶ 78.

34 *Id.*, ¶ 79.

35 *Id.*, ¶ 80.

36 *Id.*, ¶ 93.

2. The Almex Shareholders Are Affected by Border Measures Not Relevant to the CPI Claim.

43. Moreover, unlike CPI's claim, ADM/Tate & Lyle's claim is affected at least as much, and perhaps more, by border measures only cursorily mentioned in their claim, rather than the Tax. As demonstrated in the previous section, although ADM/Tate & Lyle assert that their Mexican joint venture, Almex, has HFCS-55 production capacity, this production capacity is premised on Almex's importation of U.S.-origin highly enriched HFCS inputs, which are then blended with HFCS-42 to create HFCS-55. Although the significance of this fact may not be immediately obvious to this Tribunal, it is potentially profound.

a. The Almex Shareholders' Reliance on HFCS Exports from the United States to Mexico to Supply HFCS-55 for the Soft Drink Industry Makes them At Least as Vulnerable to Trade Measures such as the Tax, and such Measures Are Present.

44. Because Almex's ability to sell HFCS-55 in Mexico depends upon its ability to import HFCS inputs of finished HFCS-55 from the United States from its shareholders, there may be a question whether the HFCS Tax is the exclusive, or even the principal, cause of any injuries it has suffered, as its claim seems to suggest. Instead, Almex's fundamental dependence on HFCS imports for blending and distribution of soft drink sweeteners makes it particularly vulnerable to international trade restrictions.

45. This vulnerability manifested itself in the late 1990s, when Mexico instituted antidumping measures on HFCS imported from the United States. While CPI was substantially insulated from the antidumping measure's effects because of its ability fully to produce HFCS-55 in Mexico without importing any HFCS inputs, ADM and Tate & Lyle were affected much more significantly because of their export-based approach to the Mexican HFCS-55 market.[37]

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37 Almex's continued ability to import HFCS for distribution and blending in Mexico during the pendency of the antidumping orders may have been partially attributable to the fact that the Mexican authorities imposed substantially lower antidumping margins on ADM (and Cargill) than on any other company in the initial investigation that concluded in January 1998. *See Resolución final de la investigación antidumping, supra* note 24, at 15. In September 2000, SECOFI revised these margins, fixing antidumping duty rates of $64/Mt for HFCS-42 and $55/Mt for HFCS-55 -- the lowest margins of all companies reviewed. Cargill, Staley (Tate & Lyle's predecessor company), CPC (CPI's predecessor company) and other U.S. companies received rates ranging from $90 - $100/Mt for HFCS-42, and from $75 - $175/Mt for HFCS-55. *See Resolución final que revisa, con base en la conclusión y recomendación Mundial del Comercio, la resolución final de la investigatión final de la investigatión antidumping sobre las importationes de jarabe de maíz de alta fructosa,* (Sept. 20, 2000), available at: http://www.contactopyme.gob.mx/upci/. Because ADM's rates were much lower than the rates applied to other companies, its U.S.-origin HFCS exports likely had a competitive advantage in the Mexican market vis-à-vis other U.S. HFCS producers, and it was also able to compete more effectively against CPI's Mexican-origin HFCS-55 output.

46. For example, public statements made by ADM representatives -- both prior to and after imposition of the Tax -- reflect that company's fundamental vulnerability to cross-border Mexican trade restrictions -- as opposed to internal restrictions on investments in the Mexican market:

- *ADM Chief Financial Officer* (April 2001): "[By] clearing our difficulties with NAFTA over access to the Mexican sweetener market for high-fructose corn syrup ... [,] [w]e could probably send another 3 billion pounds of high-fructose corn syrup to Mexico..."[38]

- *ADM Chief Executive Officer* (Jan. 2002): "We think that and hope that the excise tax is short-lived and that we will soon have the borders reopened to high fructose corn syrups.[. . .]After . . . major expansions in anticipation of the Mexican market, as you know, it's been very, very competitive and I think that's the real reason why we fell."[39]

- *ADM Vice President for Investor Relations* (July 2002): "As a background, exports from the US to Mexico had been roughly 600 million pounds per year up until the tax first went into effect on January 1, 2002. Even though the tax was temporarily lifted, volumes, exports to Mexico never recovered very much and in fact were running more like ten percent of annualized level."[40]

- *ADM Chief Executive Officer* (Oct. 2003): "[Senator] Grassley has been very outspoken about the Mexican high-fructose corn syrup issue, and sweeteners going into Mexico is an issue that would be very favorable for us if it were resolved, and there are substantial discussions going."[41]

- *ADM Chief Executive Officer* (January 2004): "[W]e are continuing to use all of our efforts to bring pressure on Mexico to open up their markets consistent with what their legal obligation are under the NAFTA agreement. And as you know we have had considerable discussions in Washington about Mexico's position and violation of all of their trade agreements in the agricultural sector.[42]

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38 Archer Daniels Midland Company Earnings Conference Call, FD Wire, at 11 (Apr. 23, 2001) (emphasis added) (Volume II, Exhibit M).

39 Archer Daniels Midland Company Earnings Conference Call, FD Wire, at 6, 16 (Jan. 23, 2002) (emphasis added) (Volume II, Exhibit N).

40 Archer Daniels Midland Company Earnings Conference Call, FD Wire, at 3-4 (July 24, 2002) (emphasis added) (Volume II, Exhibit O).

41 Archer Daniels Midland Company Earnings Conference Call, FD Wire, at 9 (Oct. 31, 2003) (emphasis added) (Volume II, Exhibit P).

42 Archer Daniels Midland Company Earnings Conference Call, FD Wire, at 14 (Jan. 30, 2004) *(emphasis added) (Volume II, Exhibit Q).*

- *ADM Chief Executive Officer* (April 2004): "Our HFCS trade issues with Mexico are still not settled, and we continue to explore ways to resolve this matter. A resolution would benefit both the U.S. farm economy and corn sweeter products."[43]

- *ADM Chief Executive Officer* (Feb. 2005): "[T]here still remains a great problem with Mexico, as you know, on opening their border and we have got excess capacity in the United States, and as a result, not all of the mills are operating this past year during the full year."[44]

47. As reflected in the aforementioned statements, the Almex Shareholders remain particularly susceptible to Mexican import restrictions on HFCS even to this date, because they have not invested in native HFCS-55 production capacity in Mexico. Accordingly, there is a second group of measures, mentioned only in passing in the Almex Shareholders' claim, that are critical to ADM and Tate & Lyle because they affect cross-border trade in HFCS between the United States and Mexico. That group of measures consists of HFCS import permit requirements that the Mexican Government has reportedly refused to issue to U.S. HFCS exporters since at least the latter half of 2002. [45]

48. Publicly-available evidence suggests that Almex received import permits during a period of temporary suspension of the Tax from March - July 2002, but that Mexico thereafter denied it such import permits.[46] Just last month, in connection with the WTO dispute involving

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43 Archer Daniels Midland Company Earnings Conference Call, FD Wire, at 4 (Apr. 30, 2004) (emphasis added) (Volume II, Exhibit R).

44 Archer Daniels Midland Company at Consumer Analyst Group of New York 2005 Conference - Final, FD Wire, at 6 (Feb. 22, 2005) (emphasis added) (Volume II, Exhibit S). While Tate & Lyle has also been affected by the same border measures as ADM, its large holdings in the Mexican sugar industry have reaped record profits from increased sugar prices. *See, e.g.*, Tate & Lyle Final Results, Company News Feed, 5 (June 3, 2004) ("No resolution has been achieved . . . on access for . . . HFCS into Mexico . . .As a consequence, our starch business, Almex, made a lower profit than in the comparative period, whilst our sugar operation, Occidente, achieved increased profits as a result of better selling prices."); Tate & Lyle Interim Results, Business Wire (Nov. 6, 2003) ("Almex in Mexico remains profitable despite the impact of the tax on soft drinks containing high fructose corn syrup. Occidente, our Mexican cane sugar producer, improved due to higher selling prices as a result of the same tax.") (Volume II, Exhibit Z.)

45 Since January 15, 2002, the Mexican Government has imposed import permit requirements on U.S.-origin HFCS imports. These requirements -- which Mexico has reportedly used to block U.S.-origin HFCS imports -- are summarized and reproduced at Volume II, Exhibit T. For additional detail regarding the import licensing restrictions, see *Mexico -- Tax Measures on Soft Drinks and other Beverages, U.S. Comments on Mexico's Answers to Questions after the 2nd Meeting*, WT/DS308, at 16-17 (Mar. 22, 2005) (Volume II, Exhibit U).

46 *See* Sacarias Ramirez, *El Azucar si Puede ser Rentable,* Revista Expansion (June 2002) (reflecting that Almex reportedly received 90% of the import quota allocations for HFCS in 2002, which it sold directly to PepsiCo de Mexico) (Volume II, Exhibit V).

the HFCS Tax, two unidentified U.S. HFCS exporters provided evidence to the United States Trade Representative of the difficulties caused by Mexico's refusal to grant import permit requirements for HFCS.[47]

49. The USTR summarized the impact of the import permit requirements as follows in one of its submissions to the WTO:

> • In early January, a large U.S. exporter sent a truckload of HFCS as a test shipment to the Mexican border. The truckload was denied entry ... because the shipment lacked an import license. The company then applied to SE [Secretaria de Economia] for an import license. At the end of January, SE informed the company that the license was denied because of alleged U.S. denial of market access for Mexican sugar, and that the license would not be granted until the bilateral sugar issue has been resolved. Representatives of the company then met in Mexico City with a senior level official from SE, who informed them that the official had been instructed to deny the import licenses for HFCS indefinitely, until the sugar market access issue is resolved.[48]

50. Although neither this "large U.S. exporter" nor the other HFCS exporter described in the USTR submission is identified by name, it is likely -- given their size and influence in the U.S. market and the limited number of U.S. exporters of HFCS to Mexico -- that at least one of these exporters is either ADM or Tate & Lyle. Neither of these exporters is CPI.

b. The Import Measures Raise Questions of Proximate Causation with Respect to the Tax.

51. Because Almex's ability to sell HFCS-55 in Mexico depends upon Mexico's administration of these import permit requirements,[49] it is unclear to what extent the Tax is a proximate cause of the losses complained of by the Almex Shareholders and to what extent those losses are attributable to these or other measures. Even if the Tax were repealed tomorrow, given Almex's dependence on imported HFCS inputs for which it is unable to obtain import permits, ADM/Tate & Lyle would likely be prevented from importing, blending and distributing HFCS-55 in Mexico. In contrast, CPI's position would essentially revert to the *status quo ante*.

52. Thus, CPI and ADM/Tate & Lyle's HFCS production activities in Mexico are likely not even affected by the same universe of measures. Stated differently, while elimination

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47 *See U.S. Comments on Mexico's Answers to Questions after the 2nd Meeting, supra* note 44, ¶47 (Volume II, Exhibit U) (describing the inability of two U.S. HFCS exporters -- neither of whom are CPI -- to obtain import licenses).

48 *Id.* The USTR submission proceeds to describe the effects on another U.S. HFCS exporter that sought in vain to export HFCS to Mexico.

49 *See* Section III.B.1.b, *supra*, and ADM/Tate & Lyle Joint Claim Submission, ¶ 63 (Volume II, Exhibit C).

of the Tax would eliminate the harm that CPI's Mexican investments have suffered and allow its business to revert to its pre-Tax operation, the same cannot be true for Almex Shareholders.

c. The Almex Shareholders' Dependence on Open Borders Also Raises Damages Questions.

53. The trade-dependent elements of ADM/Tate & Lyle's business are also reflected in their claims for damages related to investments in U.S. production facilities that export finished HFCS and other HFCS inputs to Almex.[50] The ADM/Tate & Lyle claim document asserts that, among other damages caused by the Tax,

> [T]he tax has adversely affected the investors' U.S. investments and operations undertaken to supply inputs to Almex's production. The lost profits, lost sales, and other damages to Almex and its investors from this discrimination are massive and continuing.[51] [emphasis added.]

54. CPI, in contrast, has not made any claims relating to the Tax's effects on investments in U.S. production facilities.[52] Indeed, the magnitude of the difference between the companies' claims is underscored by the fact that CPI's damage claim ($325 million at the date of claim submission) is significantly larger than ADM/Tate & Lyle's damages claim ("exceeding $100 million"). And even as to that figure, it remains unclear what portion of ADM/Tate & Lyle's asserted damages in fact represents funds actually invested in Mexico, as distinguished from funds invested in U.S. production facilities.

55. These are just two examples of significant factual differences not fully apparent from the face of the claims that could well have legal implications for the claims asserted by the respective claimants. As discussed below, there are likely others. As this Tribunal may be aware, even without the causation and damages questions posed above, the question of the extent to which Chapter 11 should encompass claims that, while perhaps satisfying the NAFTA's broad definition of "investment", are more akin to trade claims than true investment claims has become an acute one for the NAFTA countries in recent years. This is especially true given the number

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50 *See* ADM/Tate & Lyle Joint Claim Submission, ¶ 63 (Volume II, Exhibit C) ("ADM and Tate & Lyle, which had expanded HFCS production to supply inputs for Almex's growing HFCS-55 production and distribution business, also experienced immediate and continued losses as a result of the tax. In 2002, ADM was only able to ship minimal HFCS volumes to Almex. Tate & Lyle was unable to ship any HFCS to Almex in 2002. In 2003 and 2004, neither ADM nor Tate & Lyle has been able to ship any HFCS to Almex. In summary, the HFCS tax destroyed Claimants and Almex's hopes for growth and increased production and distribution of HFCS-55 and HFCS-42 in Mexico."); *See also, id.*, at ¶ 31 ("The tax has had its intended effect because it caused Almex to substantially cease the manufacture and sale of HFCS and to stop importing and distributing HFCS that ADM and Tate & Lyle produced in the United States for use by Mexican soft drink bottlers.").

51 ADM/Tate & Lyle Joint Claim Submission, ¶ 73. (Volume II, Exhibit C).

52 CPI has made some relatively traditional damage claims for damages proximately caused by the Tax. *See* CPI Claim Submission, ¶ 34. (Volume I, Exhibit G).

of cases involving the United States and Canada arising out of trade disputes that involve only limited or peripheral investment activities.[53] The presence of significant trade-based elements in the Almex Shareholders' case that are not present in the CPI case, and the role of the border measures not mentioned in the Almex Shareholders' claim, make the Almex Shareholders' case potentially subject to a variety of defenses that may not be raised in CPI's case.

C. There Are Other Potentially Important Legal Differences Between the CPI and ADM/Tate & Lyle Claims.

56. Mexico asserts that the legal similarities between the CPI and Almex Shareholders' claims are even greater than the factual similarities.[54] The superficiality of this logic becomes evident when the implications of the types of factual differences discussed in the previous section are considered in relation to the claims at issue.

57. Any NAFTA Tribunal considering ADM/Tate & Lyle's claim may have to address a range of jurisdictional, substantive and damages-based issues that have little -- if any -- bearing on CPI's claim. The following questions illustrate the point:

- NAFTA Articles 1116(2), 1117(2), 1119 and 1120:
  - Whether ADM/Tate & Lyle's claim is defective by not including the import measures; if so, whether it is still timely to amend their claim in order to include reference to the import measures that appear to be at the heart of -- but are not referenced in -- their Chapter 11 claim.

  NAFTA Article 1101(1):
  - Whether ADM/Tate & Lyle's investments in U.S. production and export facilities constitute "investments of investors of another Party [i.e., the United States] in the territory of the Party [i.e., Mexico]" under Article 1101(1)(b);
  - Whether the HFCS Tax "relates to" ADM/Tate & Lyle's investments in U.S.-based equipment and production facilities that exported HFCS to Mexico under Article 1101(1);
  - Whether the import permit requirements that have interfered with exports of U.S.-based HFCS inputs to Almex are "measures ... relating to" an investment in Mexico under Article 1101(1).

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53 *See, e.g.,* Press Release describing claim filed in the *Canadian Cattlemen for Fair Trade v. United States* case (Volume III, at E).

54 Consolidation Request, *supra* note 9, at page 19 ("*Puede apreciarse facilmente que ambas reclamaciones presentan numerosas cuestiones comunes sobre los hechos. En efecto, los principales hechos asociados con la supuesta responsabilidad del Estado mexicano son comunes. Por lo que a las cuestiones de derecho se refiere, la coincidencia es todavia mayor: ambas reclamaciones presentan practicamente las mismas.*") (Emphasis added.)

- NAFTA Article 1139:
  - Whether ADM/Tate & Lyle have properly framed the scope of their "investment" on the basis of which they are claiming damages under Chapter 11 claim -- especially in light of the detailed nature of the definition of "investment" in Article 1139.

- NAFTA Article 1102:

  Although there may be an inquiry as to whether CPI and CPIngredientes are in "like circumstances" with Mexican investors and investments, this inquiry will differ fundamentally from the inquiries in ADM/Tate & Lyle's case. There are several inquiries unique to the ADM/Tate & Lyle claim, including:

  - Whether ADM/Tate & Lyle, whose overall business approach to the Mexican market and whose Chapter 11 claim depends significantly on the export of U.S.-origin HFCS to Mexico, can be considered to be an "investor" that is "in like circumstances" to Mexican investors, especially given the lack of access of Mexican sweeteners to the U.S.;
  - Whether ADM/Tate & Lyle's investments in U.S. HFCS production and export facilities can be considered "investments" that are "in like circumstances" with the investments of Mexican sugar producers.
  - Whether the Tax can be shown to have had the requisite effect on the establishment, operation, expansion, management, etc., of the Almex Shareholders' investments in Mexico, as it so clearly has had on CPI's investments in Mexico.

- NAFTA Article 1106:
  - Whether the Tax can constitute a performance requirement on ADM/Tate & Lyle's investments in U.S. production in the face of the Article 1106(3) requirement that only performance requirements imposed "in connection with" an investment in the territory of the host country are actionable;
  - Whether the Tax can constitute a performance requirement on ADM/Tate & Lyle's Mexican HFCS-42 production sold to juice manufacturers and whether they are therefore not affected by the advantage the HFCS Tax accords to soft drinks using sweeteners other than HFCS.
  - Whether the Tax operates as a performance requirement over ADM/Tate & Lyle in the same way it does on CPI, given that the former have sugar refineries.

- NAFTA Article 1110:

  The Article 1110 issues are the most extensive, given that expropriation claims generally, and tax measures in particular, are recognized to be very fact-dependent.

  - Reasonable and Investment-Backed Expectations. For example, a critical issue for each Claimant's expropriation claim will likely be how the Tax related to the reasonable and investment-backed expectations of that Claimant.

As regards investment-backed expectations, CPI benefited from numerous specific assurances related to its investment from Mexican Presidents, cabinet-level officials, and federal, state and municipal government agencies. The Mexican President himself, Ernesto Zedillo, presided over the inauguration of CPI's Mexican plant built to produce HFCS for the soft drink industry. Only one of these specific assurances is common to the Almex Shareholders, because it was a benefit granted to an entire industry with respect to duty-free imported corn; all the other specific elements are unique to CPI.

- Effect. Another key issue for the Claimants' respective expropriation claims, especially since they involve a tax measure, will likely be the effect of the measure on the Claimant's investments. This question of impact is a central one when tax measures are claimed to be expropriatory, since it is the normal function of a tax to take property. A tax that has an impact akin to confiscation, however, is more likely to be expropriatory. Obviously the Tax's impact could be quite different given the materially different amounts and characters of their respective Mexican investments and businesses with respect to the market at issue – the Mexican soft drink sweetener market.
- Other Potential Issues:
  - Whether the relationship between the Tax and ADM/Tate & Lyle's investments in U.S. equipment and production facilities is actionable under Article 1110;
  - Whether the dependence of ADM/Tate & Lyle's Mexican investments on imported U.S. HFCS inputs affects the scope of the actionable impact under Article 1110;
  - Whether Almex's inability to produce HFCS-55 in Mexico post-Tax is in fact attributable to Mexico's refusal to issue import permits that Almex needs for highly enriched U.S.-origin HFCS inputs;
  - Whether other aspects of ADM and Tate & Lyle's overall business profile that are unique to those companies reduced the impact of the Tax on its Mexican investments;
  - Whether any frustration of the Almex Shareholders' investment-backed expectations is attributable to the Tax or rather to various trade restrictions, such as the antidumping measures imposed from 1998 - 2002 and the import permit requirements imposed thereafter.

- Damages calculation:
  - Whether ADM/Tate & Lyle's claim for damages to its investments in U.S. production facilities is actionable; and
  - Whether ADM/Tate & Lyle took adequate advantage of the various opportunities it had to mitigate its damages given its U.S. sourcing of HFCS-55-- for example, by shifting resources to the sugar refineries that are Tate & Lyle corporate affiliates, or to other markets.

D. Because of These Differences, There Is Little, if Any, Real Risk of Inconsistent Decisions in the Two Cases.

58. Given the important differences in factual circumstances of the Claimants, and the potential significance those differences have for the Claims in all of the aforementioned areas -- cutting across every single NAFTA violation alleged by the Claimants, as well as jurisdiction -- the only reasonable conclusion is that the factual and legal differences are far more significant than the superficial and easily addressed commonalities. The importance of this conclusion cannot be understated: It means that even if separate hearings of the two claims produced different results, those results could be entirely consistent.

59. Moreover, the nature and extent of the differences underscores how individualized the proof will be with respect to key issues of jurisdiction and state responsibility. The more fact-dependent the specific claim, the greater these differences will be. It also underscores the complexity of the cases, and in particular, the greater complexities of the Almex Shareholders' claim. As discussed in the following section, these differences have enormous fairness and efficiency implications, given their potential for bogging down any consolidated proceedings.

60. Finally, Mexico has not identified any common defenses it intends to raise to the claims.[55] And even if it did, its mere assertion of intention to raise a common defense would not suffice. To meet its burden, it would have to demonstrate that any such defense would decisively tip the initial interests of fairness and efficiency in the direction of consolidation, something it demonstrably has not done to date, and, we believe, it will be unable to do in light of the factors considered both previously and in the Section that follows.

IV. ESPECIALLY IN LIGHT OF THESE FACTUAL AND LEGAL DIFFERENCES, FAIRNESS AND EFFICIENCY REQUIRE THAT THE CASES PROCEED SEPARATELY

61. Not only has Respondent failed to prove that there is sufficient commonality in the "vast majority" of legal and factual issues presented in the CPI and ADM/Tate & Lyle claims, but more importantly, it has failed to prove -- as it must -- that consolidation would be the best way to promote the fair and efficient resolution of the claims.

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55 This lack of identification of common defenses stands in contrast to the recent Request of the United States to consolidate three Chapter 11 cases brought against it by Canadian investors. In that request, the United States has highlighted its intention to assert a common jurisdictional objection to all three cases. *See* U.S. Request for Consolidation of Claims filed under NAFTA Chapter 11, *supra* at note 10. Moreover, this assertion is consistent with jurisdictional objections that the United States had raised previously in the unconsolidated proceedings. Mexico, in contrast, has relied solely on the argument regarding the similar appearance of the two claims, and on unsubstantiated assertions of cost savings and a reduced risk of inconsistent decisions.

62. The evaluation of whether consolidation will result in fair and efficient resolution of the claims is a fact-intensive one. A review of existing authorities, as well as common sense, indicate that this evaluation requires consideration of a wide-range of factors, including:

- Whether consolidation could result in confusion of important factual and legal distinctions between the cases;
- The relationship among the claimants – or lack thereof;
- Whether sensitive business information could be protected in the context of consolidated proceedings;
- Whether consolidation would result in increased costs and delays for the parties;
- Whether the parties favor consolidation of the claims;
- The degree of commonality of the claims, and their susceptibility to streamlined resolution; and
- Whether there are reasonable alternatives to the type of consolidation order requested.

63. An evaluation of these factors leads inescapably to the conclusion that consolidation of these claims is inappropriate. The important differences between the Claimants, their investments and their claims mean that consolidation will result in prejudicial delays, increased costs, procedural complexities, and risks confusion of the crucial legal and factual distinctions between the claims. The Claimants are not only unrelated, but are in fact fierce competitors in Mexico and elsewhere, which creates serious challenges related to the protection of confidential business information in the context of the consolidated proceedings. At least CPI, the largest claimant, opposes consolidation. The commonalities do not justify it, and the complexities and differences of the Claims cut against it. All of these risks are reduced by separate proceedings.

A. The Absence of any Corporate or Contractual Relationship Between the Parties Militates Against Consolidation.

64. Consolidation of claims filed by parties that are not connected by any corporate or contractual relationship is extremely uncommon in arbitration. The absence of any corporate or contractual relationship underlying the separate and different claims filed by ADM/Tate & Lyle and CPI militates strongly against these factually and legally distinct claims.

65. As reflected in the extensive literature on consolidation of arbitral proceedings, consolidation in such cases is generally limited to circumstances in which the disputing parties have either expressly consented to consolidation, or have already chosen to associate themselves with one another through a complex commercial arrangement.[56] Even outside of the contractual context, there are situations that justify, and even compel, consolidation.

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56 The circumstances under which arbitral proceedings that implicate complex contractual arrangements may be consolidated has been a topic of extensive debate among international legal publicists for years. *See, e.g.,* Andreas Austmann, *Commercial Multi-party Arbitration: A Case-by-case Approach,* 1 Am. Rev. Int'l Arb. 341 (1990) (*hereinafter* "Austmann") (Volume III, at F) (explaining that *consolidation of arbitral proceedings may generally be at issue in three scenarios: separate claims based*

66. For example, if two joint venture partners in a single enterprise -- such as ADM and Tate & Lyle -- brought separate and identical claims for expropriation of their interests in Almex, it would be appropriate to consolidate those claims. Similarly, if a corporation and one if its major shareholders brought separate and identical claims for expropriation of a foreign company owned by the corporation, it would be appropriate to consolidate those claims. Thus, the relationship between the parties and the identical nature of the claims supported consolidation in the *CME Czech* and *Lauder* cases, because the claimant in the latter case (Ronald S. Lauder) brought a claim based on his large stake in the claimant company that filed the former case.[57]

67. The Iran-U.S. Claims Tribunal ("IUSCT") also offers examples of cases in the investor-state context that were consolidated where the parties asserting or defending against the claims were related by contract or corporate affiliation, as well as some that were not, despite such relationships.[58] It bears emphasis that the IUSCT's consolidation authority was broader than the authority supplied by NAFTA Article 1126. An IUSCT tribunal could consolidate claims "if the preliminary or main issues in two or more cases before different Chambers are similar." In contrast, consolidation is permitted under Article 1126 only if the tribunal is satisfied

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on a chain of inter-related contracts, separate claims in connection with contraction projects, and separate claims in connection with insured transactions); Klaus Peter Berger, *International Economic Arbitration*, 294 (1993) (*hereinafter* "Berger") (Volume III, at G) ("Apart from the typical multi-party type transactions such as international large-scale construction businesses and international joint-venture and consortia contracts, there are other transactions such as marine transports, international financing and other complex transnational projects which frequently involve the participation of a multitude of parties that are connected with each other in an horizontal vertical or mixed network of contracts. Even if this network consists of various independent contracts, they usually constitute a more or else homogeneous and uniform economic unit with interrelated contractual rights and obligations.").

57 Because both claimants stood in the exact same posture and had asserted identical claims vis-à-vis the Czech Republic, CME Czech Republic B.V. and its major shareholder, Mr. Lauder, repeatedly asked the Czech Republic to agree to a consolidation. Notwithstanding the inextricable corporate links among the claimants and their claims, the Czech Republic refused these requests. *See CME Czech Republic B. V. (The Netherlands) v. The Czech Republic* (Partial Award) (Sept. 13, 2001), *at* http://www.mfcr.cz/static/Arbitraz/en/PartialAward.pdf ("*CME Czech*"). *See also, Ronald S. Lauder v. The Czech Republic* (Award of September 3, 2001) ¶201, *at* http://www.investmentclaims.com/decisions/Lauder-Czech-FinalAward-3Sept2001.pdf.

58 *See, e.g., Eastman Kodak Co. v. Gov't of Iran and Eastman Kodak Int'l Capital Co. v. The Islamic Republic of Iran*, Consolidated Award No. 329-227/12384-3, 17 Iran-U.S. C.T.R. 153, ¶ 3 (Nov. 11, 1987) (Volume III, at H). After Eastman Kodak Company and two of its affiliates collectively filed a case against the Government of Iran, the United States filed a claim on behalf of Kodak Capital (another Kodak affiliate) against the Government of Iran. The Kodak claimants -- joined by the United States -- requested consolidation on the grounds that the claims in the claims in the latter case were "identical in all material respects to the trade-debt component" of the former case. The former case was then transferred to Chamber Three, and a simultaneous hearing was conducted for both cases.

as to the existence of a common question of law or fact, and conclude that consolidation would aid the fair and efficient resolution of the claims.[59]

68. In light of its broad authority, it is particularly noteworthy that the IUSCT adopted a very conservative approach to claim consolidation, denying it where, notwithstanding apparent commonalities, the moving party failed to discharge its burden of persuasion. For example, in the *Ammann & Whitney* case, the Tribunal denied a request by the Iranian Respondent to consolidate two separate claims, even though the claims were pending before different chambers, were filed by contractually related parties (a general contractor and its sub-contractor), and arose out of the same contract. The sub-contractor had claimed damages arising out of the general contractor's refusal to authorize payment to the sub-contractor, after the Iranian authorities had reneged on their payment obligations vis-à-vis the general contractor. In rejecting the consolidation request, the Tribunal concluded that Iran had not shown "sufficient reasons" to justify consolidation, and that, "Case 940 should proceed independently before Chamber Two, and that the present Case can be disposed of by a separate Award."[60]

69. In the present case, Mexico has likewise failed to discharge its burden of persuasion. Given this, and the lack of corporate or contractual relationship between the Claimants, it would be inappropriate to consolidate the separate and distinct claims filed by CPI and ADM/Tate & Lyle. This is especially true given the factual and legal differences between the Claimants, their status as investors, their investments and the relationship between the HFCS Tax and their respective claims.

B. The Challenge of Protecting Sensitive Business Information in a Case Involving Three Fierce Competitors Weighs Against Consolidation.

70. Not only are Claimants completely unrelated, but they are major competitors in Mexico and elsewhere. For CPI, a particularly critical fairness concern that flows from this fact is the need to safeguard its confidential information from not just one, but two direct competitors -- ADM and Tate & Lyle. Although NAFTA Chapter 11 procedures generally allow for the disclosure of information found in pleadings and awards, these procedures have never forced three parties who are the primary competitors of each other in a single market, much less in multiple markets, to join each other in a single arbitral proceeding.

71. Publicists in the international economic legal field have repeatedly emphasized the impropriety of forcing direct competitors into consolidated proceedings, where such consolidation will likely lead to the disclosure of confidential information. Professor Berger explains that even in situations involving different parties connected through some contractual relationship, confidentiality concerns may weigh against consolidation if the parties are competitors:

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59 *See* Presidential Order No. 1, 1 CTR 95, No. 5(a) (Oct. 19, 1981) (Volume III, at I).

60 *See Ammann & Whitney v. Ministry of Housing and Urban Development*, Case No. 198, Chamber One Award No. 248-198-1 (Aug. 22, 1986) (Volume III, at J).

> [P]arties may not have foreseen and are not willing to agree to the fact that a third party, perhaps a competitor of one of the parties of the other arbitration, will be participating in the taking of evidence which was intended to be confidential since it will deal with trade secrets, sale or production capacities and other confidential data of one of the parties to the first arbitration.[61]

72. Mexico cites to the confidentiality orders developed in the *Fireman's Fund* and *United Parcel Service* NAFTA Chapter 11 arbitrations to support the contention that a similar confidentiality order would suffice in this case.[62] But these measures are obviously inadequate. Whereas the aforementioned arbitrations involved only the Respondent Party and a single claimant, Respondent's consolidation request would join three horizontal competitors in and outside of Mexico[63] in a combined proceeding. The confidentiality orders designed in prior NAFTA cases may have been adequate to protect confidential information from public dissemination in the context of the increasing transparency of Chapter 11 proceedings, but they would be woefully inadequate to protect CPI's confidential information from its direct competitors, if they were joined in the same proceeding through common briefing schedules and hearings. Respondent's arguments fail to address these concerns. Indeed, the complexities of fashioning procedures that effectively addressed these concerns would raise tremendous cost and efficiency issues.

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61 Berger, *supra* note 56, at 303; *See also,* Martin Platte, *When Should an Arbitrator Join Cases?* 18/1 Arb. Int'l 67 (2002) (*hereinafter* "Platte") (Volume III, at K) ("Privacy and confidentiality of arbitral proceedings are two of the main advantages of arbitration as opposed to litigation. The parties are not required to reveal documents, evidence or other relevant facts to the outside world, which is especially important if the party to (be) join(ed) is a competitor. An arbitrator must not disregard this point!") (emphasis added); V.V. Veeder, *Multi-party Disputes: Consolidation under English Law,* 4(2) Arb. Int'l 310, 320-21 (1996) (*hereinafter* "Veeder") (Volume III, at L) (noting that, "a coerced party's commercial secrets or intellectual property may be exposed to parties with whom he would never have chosen to do business, let alone conclude a contract or arbitration agreement.").

62 *See Consolidation Request, supra* note 12 and accompanying text (*citing Procedural Order No. 3,* Fireman's Fund Ins. Co. v. United States, *Case ICSID No. ARB/AF/02/1; Procedural Directions and Order of the Tribunal,* United Parcel Service of Am., Inc. v. Govt of Canada (April 4, 2003) (Volume III, at M).

63 That competitive status requires the parties to be extraordinarily careful about sharing information that could run afoul of competitions and antitrust laws. This is not a hypothetical concern, as the claimants or their predecessors have been accused of violations of such laws in the past. This history suggests that all parties should take steps to avoid being placed in situations where sensitive information could inadvertently be shared. *See In re High Fructose Corn Syrup Antitrust Lit.*, 295 F.3d 651 (7th Cir. 2002) (Volume II, Exhibit X). In this decision, Judge Richard Posner concluded that there was sufficient admissible evidence to suport a hypothesis of a price-fixing conspiracy. Defendants ADM, Cargill and A.E. Staley Mfg Co. appealed this decision to the United States Supreme Court, which refused their writ of *certiorari. See Archer Daniels Midland Co. v. Dellwood Farms, Inc.,* 537 U.S. 1188 (2003); *A.E. Staley Mfrg. Co. v. Dellwood Farms, Inc.* 537 U.S. 1188 (2003); *Cargill, Inc. v. A&W Bottling, Inc.*, 537 U.S. 1188 (2003) (Volume II, Exhibit Y).

73. In its Memorial, CPI has adduced evidence of its sales, investment costs, production costs, customer lists, pricing, technology, plant design, business strategies and other sensitive confidential information. Even the very details of its HFCS investments are confidential. So are its expectations in making those investments. The Almex Shareholders, when they reach a similar stage, will presumably need to do likewise. In the context of consolidated proceedings, justifiable fears of competitive harm would discourage both Claimant groups from releasing sensitive information in briefing documents that would be reviewed by the other and in hearings in which all Claimants would participate. Thus, consolidation could impede each Claimant's ability to make its case. These concerns are particularly pronounced for CPI, which has made a much more significant investment in Mexico, and has information regarding investment costs and marketing strategies with respect to Mexican HFCS-55 production that is not yet known to ADM/Tate & Lyle, since they have not made those investments.

C. Consolidation Will Likely Result in Increased Costs and Delays for All Parties.

74. Mexico's assertion that consolidated proceedings will result in cost savings and efficiencies for the parties is not supported. Indeed, in this connection, it is instructive to consider Professor Gaillard's discussion of the risks of procedural inefficiencies, procedural complexities, delays and dilatory tactics. Professor Gaillard states:

> [T]he consolidation of related proceedings is by no means always the ideal answer to the difficulties arising in complex international disputes. Consolidated arbitral proceedings involving more than two parties can lead to a multitude of difficulties on a procedural level ... Further, the administration of arbitrations involving a number of parties may be prone to problems, particularly in light of the fact that most national rules of civil procedure, as well as international arbitration rules, are tailored to two-party proceedings. Giving three or more parties the opportunity to comment on each other's submissions can be very time-consuming and increases the risk of delaying tactics. It therefore takes clear rules as well as substantial experience on the part of the arbitral tribunal to ensure the respect of the principle of due process, while at the same time avoiding significant delays in multi-party arbitration.[64]

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64 Emmanuel Gaillard, *Consolidation of Arbitral Proceedings and Court Proceedings,* in Complex Arbitrations, ICC International Court of Arbitration Bulletin -- Special Supplement, at 36-37 (2003) (*hereinafter* "Gaillard") (Volume III, at N). *See also, Werner Melis, Praktische und prozedurale Probleme mit Mehrparteienschiedgerichten bei komplexen Langzeitvertraegen,* in Fritz Nicklisch, ed., *The Complex Long-term Contract: Structures and International Arbitration*, at 574 (1987) (*hereinafter* "Melis") (Volume III, at O) (commenting on the difficulty of temporally coordinating proceedings among multiple participants and noting that, when even one of the parties acts in a non-cooperative manner, the delays caused by those actions automatically affect all of the parties in the consolidated proceedings.).

75. Other publicists echo the view that consolidated proceedings are likely to be less, rather than more, efficient than separate proceedings.[65] Consolidation will make proceedings "more complex," such that the "proceedings may well last a lot longer and, possibly [a party's]... legal costs will increase," even in instances in which the parties are different but the issues are the same.[66]

76. The risk of increased costs and delays rises in cases where there are significant differences in both the parties and in the arguments underlying their claims. Given the demonstrable differences between the factual and legal underpinnings of the claims advanced by CPI and the Almex Shareholders, respectively, even with experienced and determined leadership of the consolidation Tribunal, it is inevitable that consolidation will result in significant delays and cost increases for all parties involved.

D. Consolidation Would Prejudice CPI Specifically.

1. Consolidation Would Force CPI to Delay its Proceedings by a Period of Many Months While ADM/Tate & Lyle Seek to Reach the Numerous Procedural Steps Already Completed by CPI.

77. Consolidation would also be particularly prejudicial to CPI because it would result in a reversal of the hard-earned progress that CPI has already made in its case, forcing it to re-argue issues in the context of consolidated proceedings that have already been resolved in its own case and forcing it to wait for ADM/Tate & Lyle to prepare its case in chief, a process that CPI has already completed. Publicists have recognized the inequity of consolidating a claim that

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65 *See, e.g.,* Berger, *supra* note 56, at 303 ("[C]onsolidated arbitrations will usually be more lengthy and costly than the simple two-party scheme as originally envisaged by the parties to the arbitrations."); Austmann, *supra* note 56, at 348 ("Furthermore, it is questionable whether joint hearings and joint presentation of evidence can cut time and costs. An increased number of parties and the resulting growth in procedures tend to complicate these matters substantially. ... Hence, the time- and cost-saving argument put forward in promotion of multi-party arbitration remains largely unsupported. But even if a single arbitration proceeding with multiple parties could be conducted more efficiently than a set of separate proceedings, only the party subject to more than one of the separate proceedings would benefit. The other parties would have to invest additional time and money because a multi-party arbitration would most likely consume more resources than a two-party arbitration. Thus, the time and cost factor may also work as an argument against multi-party arbitration. Again, in order to determine the direction and force of the argument, one must weigh the different interests at stake."); Melis, *supra* note 64, at 583-84, ("[T]he argument that multi-party arbitration leads to a reduction of the costs of arbitration for all parties concerned is as a general rule, not convincing. ... It is doubtful whether the additional costs which will probably arise in view of the much more complicated proceedings with several parties can be balanced by other savings.").

66 *See, e.g.,* Platte, *supra* note 61, at 78 ("If the parties are different but the issues are the same a balance has to be struck between the 'overall' increase in efficiency and the individual parties' interests. From the viewpoint of any one of the parties the proceedings may well last a lot longer, and possibly its legal costs will increase since the proceedings are likely to be more complex.")

is already procedurally advanced with a much less advanced claim. For example, V.V. Veeder warns that consolidation of such claims could mean that,

> the ultimate respondent can even without fault delay or lengthen the head arbitration particularly if the sub-arbitration is the second in time, as often it will be... Consolidation could then seriously prejudice the original claimant for the benefit of a third party with whom he has no arbitration agreement, nor any commercial or contractual relationship of any kind.[67]

78. CPI's case has now been underway for over two years, since CPI's submission of a Notice of Intent to Submit a Claim to Arbitration in January 2003. ADM/Tate & Lyle chose to file their claim almost ten months after CPI, and their claim has only been registered. There has been no determination in ADM/Tate & Lyle's case as to the Tribunal that will hear its case on the merits, nor have the disputing parties briefed or resolved questions relating to the legal situs of arbitration, the briefing schedule and many other procedural matters. Many of these issues were resolved in CPI's case by the end of May 2004, and all of these issues were resolved by mid-September 2004.

79. As regards each of these procedural stages that still lie ahead of ADM/Tate & Lyle, CPI passed each of these only after extensive effort and expense -- including frequent negotiations with the Government of Mexico. Furthermore, even after completing these procedural steps, CPI worked intensively for over six months on the preparation of its Memorial on State Responsibility. Preparations for the Memorial involved the review of thousands of pages of documents, multiple trips to CPI's headquarters and Mexican operations, dozens of witness interviews and the compilation of hundreds of exhibits. Following the delays already occasioned by the protracted nature of preparations for the consolidation proceeding, CPI has finally submitted its Memorial. Because ADM/Tate & Lyle have not even reached many of the procedural milestones that CPI passed many months ago, it is doubtful whether ADM/Tate & Lyle have even begun the process of preparing their Memorial on State Responsibility. Consideration of the merits of their claims could be delayed by jurisdictional objections, deferring that process even further.

80. Given the very different procedural stages of the CPI and ADM/Tate & Lyle proceedings, consolidation would require a reversal of much of the progress achieved over the past twenty-eight months in CPI's case. As noted above, ADM/Tate & Lyle's case is at least ten months -- and perhaps over a year -- behind CPI's case as a procedural matter. This gap is growing day by day.

81. It would be patently unfair and inefficient for this Tribunal to halt CPI's proceedings and force it to start its case anew, thereby turning back the clock on many hard-fought gains that came only at great effort and expense. Such action would be particularly inequitable given CPI's status as the largest investor with the largest damages and given that ADM/Tate & Lyle made an affirmative choice to file their claim some ten months after CPI. If

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67 Veeder, *supra* note 61, at 314-15.

this Tribunal acted to interrupt or end CPI's case in the name of consolidation, it would be unilaterally imposing on CPI massive costs without any countervailing benefit.

2. Consolidation Will Delay Resolution of CPI's Claim Pending Resolution of the Factual and Legal Complexities Raised by ADM/Tate & Lyle's Claim.

82. Consolidation is also inappropriate if it requires the combination of a significantly more complex claim with a less complex one. International authorities have emphasized the inequity of forcing one party to bear costs associated with a more complicated case brought by another claimant. For example, Professor Gaillard states:

> [I]t may well be that one of the parties involved is only concerned about obtaining an award on a specific point with respect to which the facts are established. In separate consolidation proceedings, involving the discussion of other, possibly more complicated, issues may take substantially longer. As a result, the consolidation of proceedings may well lead to additional costs, rather than to savings, for at least one of the parties.[68]

83. Consolidated proceedings in this case would be particularly protracted because of the more complex and issue-laden theories of jurisdiction, liability and damages apparently advanced by ADM/Tate & Lyle. It is not just Mexico that may have views on these theories. NAFTA Article 1128 gives the other States Parties the right to make submissions to a Tribunal on "questions of interpretation" of the NAFTA. This right has been frequently exercised in Chapter 11 cases to date. Such submissions add further complexity and time to the Chapter 11 process. In this case, for example, ADM/Tate & Lyle's claim for compensation for investments in U.S. production facilities that exported HFCS and other inputs to its Mexican subsidiary is likely to be particularly controversial for the other NAFTA parties, because of the concerns over the use of Chapter 11 to litigate trade disputes mentioned earlier. The United States and Canada may well choose to exercise their right to make Article 1128 submissions on this issue to the Tribunal hearing the Almex Shareholders' claim.

84. While ADM/Tate & Lyle are certainly free to advance such claims, and the States Parties certainly free to exercise their NAFTA rights under Article 1128, it would be inequitable and inefficient to force CPI to bear the costs, by delaying the ultimate resolution of CPI's claim while the Tribunal entertains written and oral submissions on ADM/Tate & Lyle's unique arguments. This cumbersome process could delay the resolution of CPI's claim by years -- not months.

E. At Least One, and Perhaps Two, of the Three Disputing Parties Oppose Complete Consolidation.

85. International legal authorities have repeatedly emphasized the consensual nature of arbitral proceedings, which places strict limits on the ability of a court or arbitral tribunal to

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68 Gaillard, *supra* note 64, at 37.

order mandatory consolidation of multiple proceedings against the wishes of one or more party. For example, Professor Emmanuel Gaillard has stated that:

> The principle of party autonomy dictates that any consolidation necessarily depends on the agreement of all parties involved. The possible disadvantages of consolidated proceedings, and especially the possible disrespect of the principle of party autonomy, mean that any exaggerated intervention by the courts in this respect cannot be accepted. ... The principle of the sanctity of contracts must remain untouched to the largest possible degree. To tamper with it would be to undermine the very basis of international arbitration.[69]

86. The respect for party autonomy in the context of arbitral proceedings has played a major role in prior rejections of consolidation requests outside of the NAFTA Chapter 11 context.[70] Although Article 1126 does not make consolidation turn on party consent, the principle still has vitality here, through the criteria of fairness and efficiency. The discretion Article 1126 gives to the consolidation Tribunal with respect to its ultimate decision underscores this conclusion.

87. In the present proceedings, at least CPI, the largest Claimant by far, vigorously opposes the request for consolidation made by Mexico, out of concerns that consolidation would frustrate its ability to obtain fair and efficient resolution of its claims filed under NAFTA Chapter 11. CPI respectfully submits that its opposition should weigh strongly against consolidation of the claims in this case.

F. The Lack of Commonality of the Non-Public Evidence Also Cuts Strongly Against Consolidation.

88. International legal authorities have emphasized the need to look at the presence or absence of overlapping evidence as a factor relevant to consolidation. For example, Professor Melis notes that potential efficiencies gained by calling a common expert or taking common evidence in consolidated proceedings must be weighed against the inefficiencies created by joining multiple parties, each of whom has the right to be heard, submit evidence and make requests.[71]

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69 *Id.* at 42.

70 *See, e.g., United Kingdom v. Boeing Co.*, 998 F.2d 68 (2d Cir. 1993) (Volume III, at P) (Second Circuit concluded that the district court lacked the authority to consolidate two proceedings in the absence of the parties' agreement to consolidate the proceedings); *See also, Consorzio Groupement L.E.S.I. v. DIPENTA c/République algérienne démocratique et populaire*, ICSID Case No. ARB/03/08 (Jan. 10, 2005), *at* http://www.worldbank.org/icsid/cases/lesi-sentence-fr.pdf (The tribunal upheld the Respondent's jurisdictional objection to the effect that because respoindent had separately contracted with the individual companies making up the consortium -- and not with the consortium -- the consortium lacked the legal standing to bring a claim against Respondent)

71 *See Melis, supra* note 64, at 574 (commenting on the large demands that the introduction of multiple parties' evidence places on the arbitral tribunal: "The joining of multiple proceedings in which *all parties have the right to be heard, to offer evidence and to make requests can make the common*

89. Here, as set forth in Section III.A, the common evidence is largely publicly available and uncontested. As to the non-public evidence, it is highly claimant-specific.

90. For example, CPI has submitted in connection with its Memorial the statements of 17 witnesses. Of these, all but one are internal witnesses whose statements are proprietary to CPI. Likewise, of the dozens of non-public Exhibits it plans to submit in connection with its Memorial, only one -- a corn supply assurance provided by Mexico to all members of the Mexican corn wet milling industry in 1994 -- is potentially relevant to Almex. All of the rest are unique to CPI, and, as indicated below, are not only unique but in most cases highly proprietary.

G. In Contrast to a Multiple Claims Scenario, the Small Class of Claimants and the Distinct Factual and Legal Bases for the CPI and ADM/Tate & Lyle Claims Militate Against Consolidation.

91. Apart from the types of related party claims discussed earlier, consolidation of claims through Article 1126 might well be justified in circumstances involving multiple, particularly mass, claims arising out of a single measure brought against a NAFTA Party – for example, a regulatory measure imposed on many companies operating in a particular sector in a NAFTA country. As we have shown, however, this case involves materially different factual and legal claims brought by a small group of direct competitors each of which has been affected by a different combination of governmental measures.

92. This is not the type of scenario for which consolidation provisions such as Article 1126 have been drafted. Although the available information about the NAFTA Parties' intentions in drafting Article 1126 is limited,[72] the information that can be found suggests that the intent of the NAFTA State Parties was to develop a consolidation provision that would prevent States Parties from being subjected to a large number of highly similar claims arising out of a single governmental act. For example, the draft consolidation provision agreed upon by the negotiators on June 4, 1992 reflects a concern for unidentified as well as identified claimants, suggesting a class action or mass claims scenario. Article XX07.9.3 of the June 4, 1992 negotiating text required a disputing Party requesting consolidation to,

> give notice of its request to establish an arbitral panel to *all known claimants* and to the Party or Parties of the claimants.[73]

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proceeding so burdensome and difficult that potential advantages -- such as calling the same expert or common presentation of part of the evidence -- are offset.") (translation by Counsel for CPI).

72 For example, no insights can be gained from the Statements of Administrative Action of the U.S. or Canada, which are merely descriptive of certain aspects of Article 1126 as finally negotiated. *See* North American Free Trade Agreement Act, Statement of Administrative Action, H.R. Doc. 103-159, Vol. 1, at 450 (103rd Cong. 1st Sess. 1993); Statement on Implementation of North American Free Trade Agreement, Can. Gaz. Part IC(1), at 155 (Jan. 1, 1994).

73 June 4, 1992 Draft Negotiating Text for the North American Free Trade Agreement, at Art. XX07.9.3 (emphasis added) (Volume III, at Q). As reflected in the marginal notes to this draft

93. This language ultimately evolved into Article 1126(4), which requires the disputing Party to notify the disputing parties of a consolidation request. Although there was no lower limit placed on the number of claims, nothing in the final version of Article 1126 suggests a change away from a focus on a large number of claims against a disputing Party.

94. Publicists writing on international arbitration confirm that Article 1126 and similar consolidation provisions are ideally suited to the mass claims context. For example, Professor Coe notes that NAFTA Article 1126, which is available to "accommodate multiple claims[,] ... should be of particular interest when the amounts in controversy are relatively low and the need for more streamlined procedures great."[74] Professor Kantor has noted that the consolidation provision of the Draft U.S. Model BIT (which is functionally analogous to Article 1126), "seeks to anticipate" situations like the "economic crisis in Argentina [that] has triggered around forty separate investor-state arbitrations under BITs."[75]

95. As suggested above, consolidation may be appropriate in instances in which numerous claims arising out of a single event are filed against a Party. Examples of such cases in the NAFTA context would include cases arising out of a single governmental act that affected numerous similarly situated claimants identically, such as an environmental regulation, or the hundreds of potential cases that could be filed by Canadian cattle producers against the United States in connection with its import ban on Canadian beef.[76]

96. In contrast to the mass claims situation, nothing about the "class" here supports consolidation. At most, the "class" in question here includes only one other party besides the Claimants in these cases. That party, Cargill, has recently filed a Chapter 11 claim against Mexico based on the Tax, which Mexico has not sought to include in its Request.[77] Although

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negotiating text, Canada was the country to propose inclusion of a consolidation provision in the NAFTA. None of the U.S. BITs or FTAs at the time had a consolidation provision.

74 Jack Coe, Jr. *Taking Stock of NAFTA Chapter 11 in its Tenth Year: An Interim Sketch of Selected Themes, Issues, and Methods,* 36 Vand. J. Transnat'l L. 1381, 1454-55 (2003) (Volume III, at R).

75 Mark Kantor, *The New Draft Model U.S. BIT: Noteworthy Developments,* 21(4) J. Int'l Arb. 383, 393 (2004) (Volume III, at S); *See also* Rajesh Singh, *The Impact of the Central America Free Trade Agreement on Investment Treaty Arbitrations: A Mouse that Roars?,* 21(4) J. Int'l Arb. 329, 337-38 (2004) (Volume III, at T) (noting that "[i]n light of recent events in Argentina, the [CAFTA] provision for consolidation seems eminently sensible . . . Argentina presently has some twenty ICSID claims registered against it . . .").

76 To date, it is our understanding that the Canadian companies organized by the Canadian Cattlemen's Association have voluntarily decided to consolidate all of these claims into a single claim. *See* Press Release describing claim filed in the *Canadian Cattlemen for Fair Trade v. United States* case, *supra* note 53.

77 See, e.g., *Roberto Morales,* Debido al Impuesto a la fructosa: Demanda empresas de EU a México, *El Economista (Nov. 18, 2004) (Volume II, Exhibit W).*

we would not favor consolidation with Cargill, the omission is telling. To use Mexico's words (*see* Consolidation Request, at 19), Cargill participated in the same market, with the same product, even though its operations were different and its damages distinct. Does that not give rise to common questions of fact and law? And if Mexico so ardently believes fairness and efficiency require consolidation of similarly situated market participants, why leave out a company that would surely be included in any "class" defined by participation in the Mexican soft drink sweetener market?

97. The answer lies in the reality that there is no true class for purposes of these claims, because each member of the supposed "class" is in a distinct factual and legal situation. We have already shown that there are significant differences between the CPI and Almex Shareholders' claim. Although Cargill's claim is not yet public, it is well-known that Cargill relied solely on imported HFCS to supply its Mexican soft drink industry customers, and its only relevant investments in Mexico all related to distribution of imported product. As such, its claim is more akin to the Almex Shareholders' claim than to the CPI claim, since it is affected by the border measures discussed earlier as much as -- if not more than -- the Tax.

98. This is hardly the makings of a class of the type consolidation provisions such as Article 1126 were designed to embrace. Moreover, taking Cargill into account makes it even clearer that each member of the "class" here is in actuality in a highly distinctive situation, factually and legally.

H. The Other Alternatives Provided Under Article 1126 Would Lead to Even Greater Unfairness and Inefficiency than Complete Consolidation.

99. Although Article 1126 gives this Tribunal the authority to order less-than-complete consolidation of the two cases, even a superficial examination of those options suggests they would lead to even greater unfairness and inefficiency than complete consolidation.

100. Article 1126 gives this Tribunal discretion either to order consolidation as to certain issues, as its reference to "part of the claims" makes clear, or to choose a claim to serve as the lead claim and decide it, to assist in the resolution of the others. (Article 1126(a), (b) (*see* Section II, *supra*)).

101. Partial consolidation would, however, fragment the cases and multiply the number of Tribunals required. Consolidation as to jurisdiction makes no sense, because there has been no suggestion of jurisdictional issues as to CPI's claim in the many months it has been pending. Moreover, as this submission has shown, any jurisdictional issues that might be asserted against the Almex Shareholders would likely be specific to the facts of their claim.

102. As to state responsibility, there would be no sense in consolidating the claims because of the many distinct issues as to each asserted breach of Chapter 11 that this submission has shown may be posed by the Almex Shareholders' claim. Moreover, for CPI's 1120 Tribunal to be left only hearing the damages phase of the CPI claim without having heard liability would be grossly inefficient and inappropriate. Without having heard the liability phase, the CPI Tribunal would not have been educated about the nature of the investments, the market focus,

and the effect of the measure, to name just some of the most critical issues. Because an understanding of each of these would be critical to an understanding of the damages, CPI would effectively be forced to repeat much of its state responsibility evidence merely as background.

103. Consolidating only some of the liability issues would also be grossly inefficient, given the overlap between some of the NAFTA provisions at issue, for example, between the Article 1102 (National Treatment) claim and the discrimination element of the Article 1110 (Expropriation) claim, and the need, in connection with all three obligations at issue, to adduce common facts relative to the industry, relevant market segments, operations, and the like.

104. Moreover, although the CPI case is the natural lead case because of its more straightforward character, first-in-time status, and larger damages, it makes no sense for this Tribunal to preempt an existing Tribunal that has already invested in the case and is ready, willing, and able to proceed.

105. The other options under Article 1126 are thus wholly unsatisfactory. Nor, as we have shown, is complete consolidation a fair and efficient way to proceed. Under these circumstances, the only fair solution is to allow CPI's claim to proceed before its 1120 Tribunal.

V. SEPARATE PROCEEDINGS, WHICH CAN BE STRUCTURED IN THE INTERESTS OF FAIR AND EFFICIENT RESOLUTION OF THE CLAIMS, ARE THE FAIREST ALTERNATIVE IN THIS CASE.

106. Allowing CPI's case to proceed before its 1120 Tribunal is the only way to ensure that its claim and the separate claim filed by the Almex Shareholders are resolved in a fair and efficient manner. As reflected in Sections II through IV above, the factual and legal differences in the claims filed by CPI and ADM/Tate & Lyle respectively would force any tribunal to undertake numerous factual and legal inquiries that are unique to one Claimant group or the other. These differences go to the very heart of the claims filed by the Claimants respectively -- including the nature and scope of the investments covered by the claims under Chapter 11, the comparability of the respective investors to similarly situated Mexican investors, the types of governmental assurances obtained by the respective investors, and the impact of the HFCS Tax on their respective investments. To the extent that the two claims do implicate similar factual questions, as we have shown, these issues are not the subject of contention and, to the extent that any resolution is required, can be resolved without a consolidated proceeding.

107. Moreover, as outlined at Section I.B above, the claims filed by CPI and ADM/Staley are at very different procedural stages. Having already suffered delay and financial prejudice relating to this process, CPI should not be forced to delay its case further, while waiting for ADM/Tate & Lyle and Mexico to cover ground that it has already covered in its own proceeding. Allowing CPI's case to proceed effectively addresses this important fairness and efficiency concern.

108. Allowing CPI's case to proceed separately will likely reduce (and will certainly not increase) the costs and delays that Mexico and the Claimants collectively and individually will face if the claims were consolidated. Mexico will be able to re-use any material that is

relevant to both claims, and -- with respect to factual and legal inquiries that are unique to only one of the claims -- it would be in no worse position in separate than in consolidated proceedings. Allowing CPI's claim to proceed separately also helps resolve the otherwise intractable challenges posed by the need for an effective protective order that addresses the serious confidentiality issues posed by a combined proceeding.

109. Allowing CPI's case to proceed separately does not increase the risk of inconsistent judgments. First, by filing their claims jointly, ADM and Tate & Lyle have substantially reduced the risk of inconsistent judgments with respect to two claims in which the operative facts are necessarily virtually identical.[78] Second, to the extent a second Tribunal would benefit from factual development in the CPI case, there should be no difficulty, given the relative stages of the two claims, for the Tribunal hearing the Almex Shareholders' claim to set a schedule that will allow it to consider any relevant findings in the CPI case without causing undue delays for the Almex Shareholders. Finally, as noted above, given the many factual and legal differences between the claims, it is only reasonable to expect some differences in the manner in which a tribunal -- or for that matter, two tribunals -- would resolve discrete legal issues presented by the CPI and ADM/Tate & Lyle claims, respectively.

VI. CONCLUSION AND REQUESTED RELIEF

110. CPI respectfully submits that, in light of the foregoing, this Tribunal can only reach one conclusion: that Mexico has failed to discharge its burden of persuasion in support of consolidation. To the contrary, it is clear that consolidation would not serve the interests of fair and efficient resolution of the factually and legally distinctive claims filed by CPI and ADM/Tate & Lyle respectively. Nor has Respondent offered any compelling reason that would justify subjecting CPI to continued prejudicial delays and depriving it of the possibility of an efficient resolution of its claim by the CPI Tribunal. Indeed, given all relevant factors, the interests of fair and efficient resolution of the claims would be best served by separate and sequential proceedings, as discussed above. CPI therefore respectfully requests that the Tribunal deny Respondent's Request for Consolidation, with prejudice to any resubmission of such request in connection with the Cargill claim.

111. CPI also respectfully requests that this Tribunal not suspend the proceedings of the CPI Tribunal pending its decision on consolidation. There are several compelling reasons for this. First, the extensive delays that have already been incurred in CPI's case make it imperative that further delays be minimized and that this Tribunal rule as expeditiously as possible on the question before it. Second, Mexico will not be prejudiced by non-suspension, since even under a consolidated scenario it will ultimately have to answer for its actions. If the two claims are as similar as Mexico argues, then its response to the consolidated claims will not be different from its response to CPI's claim alone. If they are not, then consolidation is unjustified, and requiring

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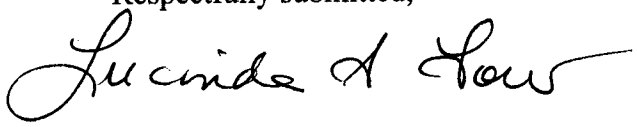
78 By filing their claims jointly, ADM and Tate & Lyle have ensured that a scenario, such as the one that arose when two closely affiliated parties filed separate claims in the *Lauder* and *CME Czech* cases, does not occur in this instance. Mexico implies in its consolidation request that such joinder was necessarily under the NAFTA (Request, at p. 19), but it was not.

it to proceed to prepare its Counter-Memorial (the next step in the CPI proceedings) puts it in no different a position than it would have been otherwise. There are no imminent deadlines in the CPI case, the next one being the deadline of September 15, 2005, for the filing of Respondent's Counter-Memorial. There is no reason that Mexico cannot work on its Counter-Memorial while waiting for this Tribunal's decision.[79] Moreover, in the event this Tribunal agrees with CPI that separate proceedings are the fairest and most efficient way to proceed, it will be helpful to have the CPI case be further advanced, so as to permit the Almex Shareholders' tribunal to consider any submissions in the CPI case.

112. Finally, CPI also respectfully requests that this Tribunal award it costs and attorneys' fees associated with responding to Mexico's Consolidation Request. Mexico's documented prior awareness of the differences between the CPI and Almex Shareholders' claims, coupled with its many efforts to delay CPI's case, makes it clear that Mexico's request is not only without merit, but was merely a delaying tactic.

Respectfully submitted,



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Dated: April 11, 2005

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79 Granting Mexico's request for a suspension of CPI's Article 1120 proceedings after the numerous delays CPI has already experienced in its case would also provide Mexico with an undeserved advantage, since both CPI and its Article 1120 Tribunal have already indulged Mexico with what was effectively a two-month suspension of its proceedings, when they allowed the entire briefing schedule to be extended twice. In its most recent order, the CPI Tribunal made clear that although it had twice set a briefing schedule based on the pendency of Mexico's consolidation request, it would not tolerate any such further delays. It stated that:

> The Tribunal does not propose to permit any further extensions based upon the existence of the consolidation proceedings. If the Article 1126 tribunal decides to assume jurisdiction over the present case, then Article 1126(8) will come into play. Unless and until that happens, it is the intention of the Tribunal that the present case will proceed according to the timetable set out above. The Tribunal will, of course, be prepared to consider applications from either Party based upon demonstrated prejudice but will be unlikely to vary the timetable further unless the Party requesting such variation can show very good cause." Procedural Order Number 3, *supra* note 8 (Volume I, Exhibit C), at 2-3.