



**SUBSECRETARÍA DE NEGOCIACIONES
COMERCIALES INTERNACIONALES
Dirección General de Consultoría
Jurídica de Negociaciones**

Oficio No.: DGCJN.511.23.682.04
México, D.F.; a 8 de septiembre de 2004.

Asunto: Solicitud de acumulación de procedimientos al
amparo del artículo 1126 del TLCAN.

Roberto Dañino
Secretario General
Centro de Internacional de Arreglo
de Diferencias relativas a Inversiones
1818 H Street, NW
Washington, D.C.
Estados Unidos de América

Escribo con fundamento en el artículo 1126 del Tratado de Libre Comercio de América del Norte (TLCAN), para solicitar que instale un tribunal arbitral de conformidad con lo dispuesto en el mismo (tribunal de acumulación), para que resuelva sobre la acumulación de las reclamaciones en los casos *Corn Products International, Inc. c. Los Estados Unidos Mexicanos*, con el expediente CIADI No. ARB(AF)/04/1 (CPI), y *Archer Daniels Midland Company y A.E. Staley Manufacturing Company*, recibida por el CIADI el 4 de agosto de 2004 (ADM/Staley)¹.

Los inversionistas contendientes contra los cuales se solicita la acumulación de los procedimientos son:

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¹. Los documentos completos se recibieron en esta oficina el 16 de agosto de 2004.

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El artículo 1126 del TLCAN dispone:

2. Cuando un tribunal establecido conforme a este artículo determine que las reclamaciones sometidas a arbitraje de acuerdo con el Artículo 1120 plantean cuestiones en común de hecho o de derecho, el tribunal, en interés de una resolución justa y eficiente, y habiendo escuchado a las Partes contendientes, podrá ordenar que:

- (a) asuma jurisdicción, desahogue y resuelva todas o parte de las reclamaciones, de manera conjunta; o
- (b) asuma jurisdicción, desahogue y resuelva una o más de las reclamaciones sobre la base de que ello contribuirá a la resolución de las otras.

El gobierno de México sostiene que las reclamaciones presentadas por CPI y ADM/Staley plantean cuestiones en común de hecho y de derecho que no sólo permiten la consolidación de ambas reclamaciones, sino que la requieren en interés de una resolución justa y eficiente.

El presente escrito únicamente tiene como propósito solicitar el establecimiento de un tribunal de acumulación en los términos del artículo 1126 del TLCAN. El gobierno de México se reserva el derecho de presentar al tribunal de acumulación sus argumentos escritos y orales en forma íntegra.

Este escrito no prejuzga en modo alguno la posición de México sobre las cuestiones de competencia o las relativas al fondo de la disputa, que se reserva para presentar en el momento procesal oportuno conforme a las reglas aplicables.

A. Antecedentes

CPI presentó una notificación de su intención de someter la reclamación a arbitraje el 28 de enero de 2003. El 14 de octubre de 2003 ADM/Staley presentó su propia notificación². Por tratarse de medidas de carácter fiscal, el artículo 2103(6) requiere que las reclamaciones relativas a expropiación sean turnadas a las autoridades fiscales competentes de las Partes pertinentes, para que las consideren por un período de seis meses antes de que el inversionista pueda someter la reclamación a arbitraje. CPI presentó su reclamación ante el CIADI el 21 de octubre de 2003. El CIADI solicitó a CPI información adicional relativa a la reclamación mediante carta del 19 de diciembre de 2003. El 26 de enero de 2004, el CIADI informó a las partes que había aprobado el acceso al Mecanismo Complementario, y procedió a registrar la reclamación y a emitir el certificado correspondiente. El 24 de febrero el CIADI dirigió una comunicación al gobierno mexicano en relación con la designación de árbitros. El 8 de marzo México dio respuesta al CIADI.

En esa comunicación, el gobierno de México informó al CIADI que otras empresas (ADM/Staley) habían presentado una notificación de su intención de someter una reclamación a arbitraje en la que alegaban violaciones a las mismas disposiciones del TLCAN, derivadas de las mismas medidas, por lo que ambas reclamaciones planteaban cuestiones de hecho y de derecho comunes. México manifestó que estaba considerando solicitar la acumulación de ambos procedimientos, pero que en el caso de ADM/Staley el plazo establecido en el artículo 2103(6) aún no expiraba. Por consiguiente, solicitó que el CIADI tomara debida nota y se lo comunicara al árbitro nombrado por CPI, así como al árbitro que en su oportunidad México designara y al Presidente del Tribunal. México advirtió que, conforme al artículo 1126(8), en caso de que un tribunal establecido conforme al artículo 1126 acumulara las reclamaciones, el tribunal establecido conforme al artículo 1120 para oír la reclamación de CPI quedaría sin jurisdicción.

CPI contestó la comunicación de México el 17 de marzo de 2004. En esencia, señaló que en su comunicación del 8 de marzo México había expresado que sólo estaba considerando la acumulación de los procedimientos, pero no estaba solicitándola. Añadió que ADM/Staley no había sometido su reclamación a arbitraje porque el período de seis meses previsto en el artículo 2103(6) no había expirado, de modo que una solicitud de acumulación habría sido prematura.

México coincide. La solicitud de acumulación en ese momento habría sido prematura, por lo que se limitó a informar al CIADI y a CPI³ sobre el aviso de intención de ADM/Staley, explicó por qué todavía no había sido sometida una reclamación a arbitraje y solicitó que el CIADI tomara nota y lo informara a los árbitros en su oportunidad⁴.

². Se anexan ambas.

³. El gobierno mexicano marcó copia de su comunicación a CPI, aunque desde el 23 de enero de 2004, en una conversación telefónica, había planteado a la representante legal de la empresa la probable acumulación de los procedimientos.

⁴. CPI expresó que el propósito de México era demorar el procedimiento. México rechaza ese señalamiento. Los términos de su oficio del 8 de marzo son claros. Además, en ningún caso puede considerarse que el ejercicio de un derecho que el TLCAN le confiere —solicitar la acumulación de procedimientos— tiene el objetivo de demorar

El 18 de marzo de 2004 México notificó al CIADI la designación del árbitro que le correspondía. Reiteró que estaba considerando solicitar la acumulación de los procedimientos, así como su solicitud de que el CIADI lo informara a los dos árbitros designados y al Presidente del Tribunal. Volvió a advertir que el tribunal establecido conforme al artículo 1120 podría quedar sin jurisdicción sobre la reclamación presentada, en la medida en que un tribunal establecido conforme al artículo 1126 la asumiera.

El 4 de agosto de 2004 ADM/Staley presentó al CIADI su reclamación.

El suscrito se comunicó telefónicamente con la representante legal de CPI el 23 de agosto para expresarle su intención de solicitar la acumulación de los procedimientos. El 25 de agosto se comunicó por el mismo medio con uno de los representantes legales de ADM/Staley para los mismos efectos.

B. Las reclamaciones de CPI y ADM/Staley presentan cuestiones comunes de hecho y de derecho.

A continuación, el gobierno de México presenta cuadros comparativos de los argumentos de hecho y de derecho de CPI y ADM/Staley, respectivamente, tomados textualmente de las reclamaciones que presentaron al CIADI. Para efectos de la comparación, en ciertos casos se reacomodó párrafos o se citan sólo extractos.

Como podrá apreciarse, son comunes la gran mayoría de las cuestiones de hecho y de derecho que las reclamaciones de CPI y ADM/Staley presentan. Las dos siguen una misma estructura y con frecuencia utilizan los mismos términos. El paralelismo es evidente.

1. Cuestiones de hecho

El cuadro comparativo habla por sí mismo. El gobierno de México ha agrupado los argumentos de hecho de los reclamantes, siguiendo, en la mayor medida posible, la estructura de las propias reclamaciones.

Antecedentes relativos a la fructosa

CPI	ADM/Staley
27. HFCS is a relatively recent innovation that has revolutionized the sweetener business in the last thirty years. It is a liquid sweetener that has substantially the same chemical characteristics as sugar. The primary applications for HFCS are in the beverage and food industries. There are two principal grades of HFCS: grade 55 (HFCS), which contains 55 percent fructose, and grade 42 (HFCS-52), which contains 42 percent fructose.	33. HFCS is a liquid sweetener with virtually the same chemical characteristics as sugar. HFCS has transformed the sweetener markets of the United States and Canada since the late 1970's. The same transformation was under way in Mexico when the Mexican Government intervened to protect the Mexican sugar industry. 35. Approximately 90 percent of HFCS-55 is used in the beverage industry. HFCS-55 is a very close substitute for

los procedimientos. De hecho, México actuó en forma por demás diligente al informar al CIADI y a los miembros del Tribunal desde entonces de su intención de solicitar la acumulación.

CPI	ADM/Staley
<p>Approximately 90 percent of HFCS-55, which has a sweetness level equivalent to sugar, is used in the soft drink and carbonated beverages industry. Arancia CP is the only producer of HFCS-55 in Mexico.</p>	<p>sugar, having similar physical characteristics, functional properties, caloric and nutritional properties, sweetening power and flavor...</p>
<p>28. Corn refiners produce HFCS by subjecting corn to a technologically highly sophisticated, capital-intensive, multi-stage, production process. The process begins with corn, which is milled to produce slurry starch and refined to produce dextrose. Dextrose is further processed to produce HFCS-42. HFCS-42 is then mixed with a solution of 90 percent fructose and further refined to produce HFCS-55. The production process requires not only basic corn wet milling capacity, but also specialized machinery and equipment to produce both the intermediate products and HFCS-55. Expensive enzymes and chemicals, energy and other utilities, water, storage and transportation capacity, and, of course, corn, are all required as well. The capital investment required for HFCS-55 production typically runs into the hundreds of millions of dollars.</p>	<p>34. HFCS contains a relatively large proportion of fructose, which is the sweetest of all natural sugars. Corn refiners, including ADM, Staley, and ALMEX, produce HFCS by subjecting corn to a sophisticated, capital-intensive, multi-stage production process. The process begins with corn, which is first milled to produce slurry starch and then refined to produce dextrose. Dextrose is further processed to produce two types of HFCS – HFCS-42 and HFCS-90. HFCS-42 and HFCS-90 are blended to produce HFCS-55. The production process requires not only basic corn wet milling technology, but also specialized machinery and equipment, as well as expensive enzymes and chemicals. The capital investment required for HFCS-55 production typically runs into the hundreds of millions of dollars.</p>
<p>29. It was not until the 1970s that the technology to produce HFCS-55 on a commercial scale was fully developed. Since its market introduction, however, HFCS-55's success as a sweetener has been dramatic, especially in the soft drink industry. HFCS-55 was first offered in the U.S. as a soft drink sweetener in the mid-1970s. Prior to that time, all non-dietetic soft drinks were sweetened with sugar. By the late 1980s, just over a decade later, U.S. soft drink bottlers used HFCS exclusively for their caloric sweetener needs. In Canada, where HFCS was introduced several years later, there was similar success, with HFCS capturing 90-95 percent of the soft drink market in just a few years.</p>	<p>35. ...The technology to produce HFCS-55 on a commercial scale did not become available until the 1970s. Prior to its introduction, sugar had served as the only source of sweetener for non-dietetic soft drinks. Once introduced, HFCS-55 quickly became a cost competitive substitute for sugar in soft drinks, which it rapidly replaced in the United States. Between 1977 and 1982, HFCS-55 sales grew from 15,000 short tons to over 1.5 million short tons. By the late 1980s, U.S. soft drink manufacturers relied almost exclusively on HFCS-55. The same near-complete replacement of sugar took place shortly thereafter in the Canadian market.</p>
<p>30. This phenomenal growth reflects the several advantages that HFCS has as an input over sugar for soft drink sweetener in an open market environment. In addition to lower per unit prices resulting from HFCS' lower unit production costs, HFCS is produced as a liquid and distributed to soft drink bottlers in bulk form that can be directly used in the soft drink production process. By contrast, sugar is produced in solid form and typically requires further processing before it can be used as a sweetener in soft drinks. In Mexico, HFCS' advantages over sugar are even more pronounced. There, sugar is delivered in 50-kilo bags and must be unwrapped, cleaned, and further processed to produce dissolved</p>	<p>36. The phenomenal growth of HFCS consumption in soft drinks is due to several competitive advantages over sugar. First, HFCS, while almost completely interchangeable with sugar, sells for a lower price than the equivalent amount of sugar needed as a sweetener in any particular product. Second, although HFCS is sold in liquid form ready for beverage use, a bottler who uses sugar must undertake the additional effort and expense of converting it to liquid form. Third, HFCS is easier to store than sugar. Fourth, carbonated beverages made with HFCS are more shelf-stable.</p>

CPI	ADM/Staley
sugar for use in soft drinks. Other factors, including easy storage and availability, contribute to the preference for HFCS over sugar by many soft drink bottlers, in Mexico and elsewhere. In Mexico before the HFCS Tax, HFCS' price advantage over sugar was approximately 15 percent.	

Circunstancias en las que se realizaron las inversiones

CPI	ADM/Staley
<p>31. Mexico is a natural market for HFCS for a number of reasons. First, Mexico is the second largest per capita consumer of soft drinks in the world, with annual sales of more than 15 billion liters, or 150 liters per person. In 1994, approximately one-third of its total sugar consumption, or 3.2 billion pounds (1.45 million metric tons) was used to sweeten soft drinks. Given the rapid conversion of U.S. soft drink bottlers in Mexico, it was clear early in the history of HFCS that the huge Mexican soft drink industry could present significant opportunities for HFCS producers if the conditions were right.</p>	<p>32. Every year, Mexican consumers drink over 15 billion liters of soft drinks, or about 150 liters per capita, and the soft drink market has been growing every year. Consumption of soft drinks has created a market of great potential for the sweetener industry. Claimants invested in Mexico, relying on the guarantees of NAFTA and other Mexican Government representations that they could compete in the Mexican Market on a nondiscriminatory basis. However, the HFCS tax has deprived Claimants of their ability to participate in this market or benefit from its growth.</p> <p>37. As noted above, Mexico is the second largest per capita consumer of soft drinks. The Mexican soft drink industry includes the world's second largest Coca-Cola bottler, Fomento Empresarial Mexicano ("FEMSA"). Before 1993, the Mexican soft drink industry was an emerging market for HFCS-55. Since U.S. soft drink producers, such as Coca-Cola and Pepsi, held interests in Mexican Bottlers, it was clear that Mexico could be an excellent market for HFCS if conditions were right.</p>
<p>32. When the technology to produce HFCS was developed in the late 1970s, Mexico represented an obvious candidate for HFCS production. Since the 1930s, Mexico has had a significant corn-refining industry consisting of Mexican- and foreign-owned companies. These companies produced a variety of products other than HFCS for food and beverage and industrial applications. In addition, yellow corn, the principal input for HFCS, although not available in Mexico in significant quantities, was amply available from the United States. These preconditions were insufficient, however, to attract HFCS investment to Mexico in the 1980s. Domestic capital to fund the large investment required for HFCS production was scarce, and foreign capital was deterred by the lack of effective legal protection for foreign investment, the political clout of Mexico's sugar barons, uncertainties as to the willingness of Mexican bottlers to switch from sugar to HFCS, and heavy government intervention in the</p>	<p>38. Mexico was a natural destination for investment in HFCS production. Mexico already had a corn-refining industry, including firms like ALMEX that had been producing products other than HFCS for food, beverage, and industrial applications. In addition, yellow corn, the principal input for HFCS, was available from the United States, although it was not available in Mexico in significant quantities. However, until the 1990s, domestic capital for HFCS investment was unavailable, and foreign capital was deterred by, among other things: (a) the lack of effective legal protection for foreign investment; (b) the power of Mexico's sugar industry; and (c) heavy government intervention in the market.</p>

CPI	ADM/Staley
market.	
<p>33. During the 1970's and 1980's, the Mexican sugar industry was closely tied to the Government in a system of rigid laws and ownership relations that had been in place for decades, and made the industry a virtual ward of that state. Among other things, these laws required sugar mills to purchase the entire sugar harvest of neighboring farms and offered heavy subsidies to mills and growers. Government ownership of sugar mills was common. The industry's political influence was enormous. This influence derives from the industry's historical ties to the Partido Revolucionario Institucional (PRI). The PRI was the ruling party in Mexico for 71 years. The labor and industry unions, which represent hundreds of thousands of cane growers and workers in Mexico's 50-plus mills, have been major financial supporters of the PRI. These unions are instrumental in developing policies favourable to the sugar industry that ultimately are supported or adopted by the PRI and its legislators. Any knowledgeable observer of Mexico in the 1980s would have concluded that efforts to introduce a competing sweetener to the soft drink market could be frustrated in many ways – including through discriminatory government actions and unseen lines of influence.</p>	<p>40. During the 1970's and 1980's, the Mexican sugar industry was closely tied to the Government in a system of rigid laws and ownership relations that had been in place for decades, making the sugar harvest of neighboring farms and offered large subsidies to mills and growers. Government ownership of sugar mills was common. The political influence of the industry and its sugar workers was enormous. The Chamber of the Sugar Industry and the unions of cane growers and sugar mill workers have been major supporters of the Partido Revolucionario Institucional, which was the ruling party in Mexico for 71 years and which controls the majority in the Mexican Congress.</p>
<p>34. Between the late 1980s and early 1990s, Mexico's barriers to HFCS investment were progressively dismantled. The Mexican Government embarked on a series of market-liberalization measures that significantly opened Mexico to foreign investment and trade and created market conditions conducive to competition, high technology, and economic efficiency. By 1994, Mexico had privatised sugar producers and taken broad measures to redirect the role of the state in the economy. These measures, including reduced trade barriers and sale of state-owned companies, deregulation, and new laws on foreign investment and intellectual property, all sent a clear signal that Mexico was open to trade and investment. That signal was repeatedly broadcast in clearest terms in speeches by high-level government officials. These dramatic changes were codified that year when a binding treaty with the U.S. and Canada, the NAFTA, took effect. Both the treaty and other emphatic declarations of government policy created an opening for competition in the sweetener business.</p>	<p>41. By the mid-1990s, Mexico appeared to have committed itself to free and open trade and investment. It had embarked on a series of market liberalization measures that significantly increased the attractiveness of Mexico for foreign investment. Most importantly, the Mexican Government signed the NAFTA, a binding treaty that committed Mexico, Canada and the United States to tariff reduction and elimination, quota reduction and elimination, other market opening measures, investment liberalization, and strong protection for investment.</p> <p>42. As part of its effort to create an open and competitive marketplace, Mexico dismantled significant barriers to trade and investment in HFCS sales and production. The Mexican Government also took steps to reduce its involvement in the sugar industry by privatising Mexican sugar producers and permitting competitive pricing.</p>

CPI	ADM/Staley
<p>35. Corn Products responded to the Mexican government's clear and assuring signals. In the wake of NAFTA, the Company decided the time was right for investment in HFCS production in Mexico. Corn Products was a leading U.S. producer of HFCS and other products derived from corn wet milling. It had first invested in wet milling facilities in Mexico making traditional corn products in 1930. Over the years, its affiliate, Productos de Maíz, S.A. de C.V. ("Productos de Maíz") which through a merger is now Arancia CP, became one of the principal members of the corn wet milling industry in Mexico. In 1984, Productos de Maíz, with significant investment from Corn Products, built a technologically advanced plant in San Juan del Río (the "SJR Facility" or "SJR Plant"), in the Mexican State of Querétaro, near Mexico City. The SJR Plant was designed for corn wet milling and the production of corn starch, glucose, and other traditional corn products. The SJR Facility was Corn Products' second plant in Mexico.</p> <p>44. In October 1998, Corn Products committed to acquire the remainder of Arancia CP in a series of transactions. Pursuant to this agreement, at the end of 1998, Corn Products acquired a controlling interest in Arancia CP from the Aranguren family and consolidated Arancia CP's results in Corn Products' financial statements. In January 2000, Corn Products increased its ownership in Arancia CP to 90 percent. In March 2002, the 1998 agreement was fully consummated by Corn Products' acquisition of the remaining equity of Arancia CP. Each additional equity purchase increased Corn Products' investment in Arancia CP. Corn Products paid consideration of U.S. \$39 million in cash and common stock to Arancia CP's Mexican shareholders in 2002, and U.S. \$41 million in cash and common stock in 2000. The biggest payment, however, was in 1998 when, in order to acquire a controlling interest in Arancia CP, Corn Products had to pay a premium of U.S. \$120 million. This amount, carried on the financial statements of Corn Products as goodwill, was based principally on the projected value of Arancia CP's HFCS business.</p>	<p>45. Almidones Mexicanos, S.A., first began its corn milling activities in 1960. Staley first invested in the company in 1968, bringing to the venture both capital and its advanced milling technology. In 1990, Staley acquired 100 percent of the equity of ALMEX and initiated an expansion of production capacity. In 1993, Staley formed a joint venture with ADM to operate ALMEX, in which each company held a 50 percent equity interest.</p>
<p>37. (...) For example, in April 1994, in the wake of NAFTA, the Mexican Government entered into a written agreement with Arancia, Productos de Maíz, and other member of the Mexican corn wet milling industry promising the industry that a quota for the import of duty-free yellow corn, a critical input for</p>	<p>43. Most importantly, the Mexican Secretary of Commerce and Industry ("SECOFI") signed an agreement in April 1994 with IDAQUIM an association of wet millers, including ALMEX, that guaranteed unlimited duty free imports of U.S. yellow corn for the production of, among other things, "fructose". This agreement</p>

CPI	ADM/Staley
<p>HFCS production and, as noted earlier, a product not grown in Mexico in significant quantities and needing to be imported from the U.S., would be available. Arancia also received encouragement from the Mexican government to proceed with the investment.</p>	<p>assured prospective investors in HFCS production and distribution operations, such as ADM and Staley, that this essential raw material, which is not produced in sufficient quantities in Mexico, would be available.</p>
<p>42. Mexican soft drink bottlers embraced HFCS quickly. By 2001, less than five years after HFCS-55 production began at the SJR Facility, HFCS had captured 25% of the market in Mexico for sweeteners in soft drinks, with the sugar industry supplying the other 75%.</p>	<p>51. By 2001, HFCS had captured about 25 percent of the Mexican market for soft drink sweeteners and was continuing to gain market share at a rapid pace. ALMEX was justifiably optimistic about the future of its HFCS-55 production and distribution opportunities in the Mexican market. However, for reasons explained in detail below, ALMEX's further opportunities for growth have collapsed due to multiple discriminatory actions by the Mexican Government, culminating in the discriminatory HFCS tax.</p>

Medidas objeto de la reclamación

CPI	ADM/Staley
<p>47. The success of HFCS in supplying the Mexican soft drink industry beginning in the mid-1990s did not go unnoticed by Mexico's sugar producers. As early as 1997, the industry began attempting to check the growing success of their foreign competitors, and sought the government's assistance in reversing the success. Responding to this pressure, the Mexican Government began to take measures targeting the foreign-owned HFCS industry.</p>	<p>52. Mexico's two HFCS producers are now owned entirely by U.S. investors. Their early success did not go unnoticed. As HFCS gained market share at expense of sugar, the Mexican sugar industry sought government assistance to reverse this trend. In response to the industry's pressure, the Mexican Government repeatedly engaged in unlawful actions designed to help Mexican-owned sugar producers and interfere with the production and sale of HFCS in Mexico.</p>
<p>48. In 1997, at the request of the domestic sugar industry, the Mexican Government initiated an antidumping case against imported HFCS and ultimately imposed antidumping duties on HFCS imported from the United States. Despite rulings by NAFTA and WTO panels that the duties were unjustified, Mexico continued to impose these duties until May 2002.</p>	<p>53. First, on February 21, 1997, at the request of the Sugar Chamber, the Government of Mexico initiated an antidumping investigation of HFCS imported into Mexico from the United States. Mexico then imposed antidumping duties until May 2002, based on a determination by SECOFI that HFCS and sugar are commercially interchangeable and constitute the same "like product" under Article 2.6 of the WTO Antidumping Agreement and Article 37 of Mexico's Foreign Trade Law. The WTO and a panel convened under NAFTA Chapter 19 both ruled that these duties were illegal.</p>

CPI	ADM/Staley
<p>49. In addition to attacking HFCS imports through the dumping case, Mexican sugar producers sought to impede domestic production of HFCS. The industry pressured the Mexican Government to reduce the corn wet milling industry's annual allocation of duty-free yellow corn imports, which had been guaranteed in its agreement with the industry association in 1994. The Government responded beginning in 1997, and continuing each year thereafter, with reductions in those quotas. In 2000, for example, the corn wet milling industry requested 326,000 tons of imported yellow corn to produce HFCS but was allocated only 140,000 tons, a clear breach of the Government's corn supply commitment. In 2001, the industry required 385,000 tons of imported yellow corn to produce HFCS but was granted quota for only 270,000 tons.</p> <p>51. Since 2001, the Mexican Government has taken, or attempted to take, a number of additional actions targeting HFCS. These measures, which show the Government's clear intention to impede the HFCS business, include the imposition of import permit requirements, burdensome tariff rate quotas, and increased duty rates. In addition, in September 2001, the Mexican Congress even went so far as to propose a ban on all imported HFCS and yellow corn for the production of HFCS. Although this ban was not enacted, the measures that were, particularly the reduction in the yellow corn quotas from 1997 forward, created significant difficulties for Arancia Corn Products. Although these measures did not prevent Arancia CP's HFCS sales to the soft drink industry in Mexico from occurring and even growing through 2001, sales growth was almost certainly slower than it would have been otherwise.</p>	<p>54. Other attacks on the U.S.-owned HFCS industry included: repeated breaches of the agreement with IDAQUIM that interfered with ALMEX's right to timely, unlimited corn imports; imposition of a tariff rate quota on HFCS; and a requirement for ALMEX to obtain special permits to import HFCS within the TRQ.</p>
<p>53. The HFCS Tax was passed in December 2001, and became effective January 1, 2002. It was structured as an amendment to a preexisting tax regime, the <i>Impuesto Especial Sobre Producción y Servicios</i> (Special tax on Production and Services) ("IEPS"). The IEPS, adopted in 1980, is not a generally applicable sales or value-added tax, but is an excise tax that is applied to sales of specific products or services, including gasoline, alcoholic beverages, and tobacco products.</p>	<p>55. Continuing its pattern of interfering with the production and sale of HFCS in Mexico, effective January 1, 2002, the Mexican Government imposed a tax of 20 percent on the sale and importation of a wide variety of beverages that contained HFCS. The Mexican Congress enacted the HFCS tax on December 30, 2001, effective January 1, 2002, as an amendment to a pre-existing tax law called the <i>Ley del Impuesto Especial sobre Productos y Servicios</i>. This law, first enacted in 1980, provides for excise taxes applied to sales of specific products or services, including gasoline, alcoholic beverages, and tobacco products. The IEPS is the third largest source of tax revenue for Mexico, after income and value-added taxes.</p>
<p>54. The HFCS Tax imposed a permanent, facially</p>	<p>56. The fact that the law targeted HFCS was clear from its</p>

CPI	ADM/Staley
<p>discriminatory, 20 percent <i>ad valorem</i> tax on soft drinks containing HFCS, for the purpose of protecting the domestic sugar industry by making HFCS uneconomic as a soft drink sweetener. The HFCS Tax, enacted as Article 2, paragraph I.G. of the IEPS, applies to:</p> <p>Gasified or mineral waters; soft drinks; hydrating or rehydrating beverages; concentrates, powders, syrups, flavor essences and extracts, that when diluted allow one to produce soft drinks, hydrating or rehydrating beverages that use sweeteners different from sugar from cane.</p>	<p>text, which imposed a tax on “carbonated or mineral waters, soft drinks; hydrating or rehydrating beverages, concentrates, powders, syrups, flavor essences or extracts that can be diluted to produce soft drinks, hydrating or rehydrating beverages, which use sweeteners other than cane sugar”.</p>
<p>55. In adopting the HFCS tax, the Mexican Congress readily admitted that its purpose was to protect the domestic sugar industry. For example, on December 30, 2001, Representative Francisco Raúl Ramírez Avila, on behalf of the <i>Comisión de Hacienda y Crédito Público</i> (Tax Committee) of the Mexican House of Representatives, urged the Congress to pass the IEPS amendments on the following basis:</p> <p>We legislators, however, have the commitment to protect the domestic sugar industry because a great number of Mexicans’ subsistence depends on it. For that effect, a tax on soft drinks that applies only to those that for their production use fructose in substitution of sugar from cane is proposed.</p>	<p>58. Public information confirms the discriminatory purpose of the HFCS tax. The Report of the Finance Committee of the Mexican Chamber of Deputies on this legislation stated that the soft drink tax was intended to “avoid damaging the sugar industry” by applying the tax “exclusively to beverages which are manufactured with fructose in substitution for cane sugar.”</p>
<p>56. At the time of the Tax’s adoption, Mexico had a divided government. The PRI had lost the presidency to Vicente Fox Quesada of the <i>Partido Acción Nacional</i> (PAN) in 2000. However, the PAN was not able to secure control of the Congress. There, the dominant party remained the PRI, which as noted above (see paragraph 33) has long been closely tied to the sugar industry. The Tax was approved by the Congress in late 2001 in a process that, as described below, was neither open nor transparent.</p>	<p>40. During the 1970’s and 1980’s, the Mexican sugar industry was closely tied to the Government in a system of rigid laws and ownership relations that had been in place for decades, making the sugar harvest of neighboring farms and offered large subsidies to mills and growers. Government ownership of sugar mills was common. The political influence of the industry and its sugar workers was enormous. The Chamber of the Sugar Industry and the unions of cane growers and sugar mill workers have been major supporters of the Partido Revolucionario Institucional, which was the ruling party in Mexico for 71 years and which controls the majority in the Mexican Congress.</p>
<p>57. President Fox, recognizing the Tax’s illegal, discriminatory character, opposed it. He acted to suspend the Tax in March 2002. However, the Congress filed a constitutional challenge to his authority to do so in April 2002. In July 2002, the Mexican Supreme Court ruled in favor of the Congress, and the suspension was lifted.</p>	<p>60. Responding to arguments that the tax illegally discriminated against HFCS, President Vicente Fox Quesada temporarily suspended the tax on March 5, 2002, until September 30, 2002, by a decree issued under a provision of the Fiscal Code authorizing the President to provide temporary tax relief to particular sectors of the economy. The same members of the Mexican Congress that had promoted the tax immediately reacted. On April 5, the Chamber of Deputies voted to challenge the constitutionality of the Fox decree. On July 12, 2002, the</p>

CPI	ADM/Staley
	<p>Mexican Supreme Court ruled that the President's suspension decree was unconstitutional and void because the Fiscal Code provision did not authorize temporary suspension of a statute in a manner that would contradict the statute's fundamental purpose. Citing the Finance Committee's report, the Supreme Court ruled that the intention of the HFCS tax was "to protect the sugar industry" and that President Fox's action nullified the "non-fiscal purpose" of the law. On that basis, the court annulled the temporary suspension of the tax and reinstated the tax effective July 16, 2002.</p>
<p>59. The illegitimate nature of the Tax is further revealed by its absence of revenue character. Had the Tax been applied to all soft drinks, as it was in the 1980's, it would have raised billions of dollars of much-needed revenue for the Government's coffers. But it was not. Applied only to soft drinks made with HFCS as the most cost-effective sweetener to domestic sugar to avoid the tax. The Mexican legislators were well aware of the ability of sugar to substitute for HFCS-55 in soft drinks and, in passing the tax, intended such substitution to occur. Thus, it is evident the tax could not have been intended to raise revenue since its very existence eliminates the market for the sweetener it targets – HFCS. The Government's own revenue projections for the Tax confirm this reality.</p>	<p>71. (...) The tax on beverages and syrups has raised little or no revenue because of soft drink producers, as a result of the tax, were economically compelled to switch back to sugar. Since any soft drink with HFCS carries a 20 percent tax, Mexico's soft drink producers have stopped buying HFCS and are relying solely on cane sugar.</p>

Supuesto impacto del impuesto

CPI	ADM/Staley
<p>62. Literally within days of the HFCS Tax's effectiveness on January 1, 2002, bottlers began cancelling outstanding orders for HFCS they had previously placed with Arancia CP. New orders ceased. By January 7, 2002, Arancia CP was forced to shut down HFCS-55 production at the SJR Plant. By the end of January 2002, the first month of the Tax, Arancia CP's losses were already in the millions of dollars.</p>	<p>62. The HFCS tax had the practical effect of prohibiting the use of HFCS-55 in the beverage business in Mexico, beginning on January 1, 2002. The impact of the tax on ALMEX's HFCS-55 and HFCS-42 production and sales was immediate and devastating. As noted above, upon institution of the tax, ALMEX's customers returned HFCS products, which had to be destroyed or disposed of at distress prices. ALMEX's sales of HFCS-55 declined by 90 percent between 2001 and 2002 and ceased completely by 2003. Its production of HFCS-42 also declined significantly.</p>

Acciones en torno de la eliminación del impuesto

CPI	ADM/Staley
<p>69. Given the devastating impact of the HFCS Tax on Arancia CP's business, Corn Products and Arancia CP have made many efforts to overturn the HFCS Tax, to no avail.</p>	<p>64. Since January 2002, Claimants and ALMEX have repeatedly attempted to obtain removal of the HFCS tax, by direct representations and negotiation with the Mexican Government. In the first months of 2002, immediately</p>

CPI	ADM/Staley
<p>70. Arancia CP has undertaken an extensive lobbying campaign seeking the Tax's repeal over the last 21 months. This campaign has involved meeting with over 100 legislators, including leaders of the PRI and PAN parties in both the Mexican Senate and Mexican House of Representatives, leaders of the relevant congressional committees, including the budget Commission and Commerce Commission, and members of the congressional sugar commission. In addition, Arancia CP and Corn Products have met on numerous occasions with executive branch officials to seek their support in persuading the Congress to repeal the Tax.</p> <p>71. Arancia CP's efforts to convince the Mexican Congress to repeal the Tax thus far not been successful. In December 2002, the Mexican Congress voted against repeal, leaving the Tax in place for 2003. As a result, as noted earlier, HFCS sales have been further adversely affected, and financial losses on Arancia CP and Corn Products continue to mount daily.</p>	<p>after the HFCS tax was enacted, senior officers of ADM and Staley and the Corn Refiners Association met with the Mexican Secretary of Economy in Washington, D:C., to argue that the tax is illegal, unfair, and discriminatory, and to urge its removal. From January 2002 through July 2004, officers of ALMEX repeatedly wrote to and met with Mexican Government officials, including the Secretary of Economy, Undersecretary of Economy, Secretary of Foreign Relations, Secretary of Agriculture, and Senators and Deputies, to urge removal of the tax. Senior officers if ADM and Staley and the President of the Corn Refiners Association also met in Mexico City with the Secretaries of Foreign Relations, Agriculture, and Economy in October 2003 to communicate the same message. All of these efforts were unsuccessful in resolving the present dispute.</p>

2. Cuestiones de derecho

a) **Ambas reclamaciones alegan las mismas violaciones al TLCAN, derivadas de las mismas medidas**

El mecanismo de solución de controversias previsto en la sección B del capítulo XI del TLCAN establece un derecho de acción a favor de un inversionista de una Parte, para reclamar (por cuenta propia o en representación de una empresa de otra Parte, que sea una persona moral propiedad del inversionista o que esté bajo su control directo o indirecto) que la Parte en cuyo territorio efectuó su inversión ha violado una obligación establecida en la sección A del mismo capítulo⁵, y que el inversionista o la empresa, según el caso, ha sufrido pérdidas o daños en virtud de esa violación o a consecuencia de ella⁶. De tal manera, los casos instaurados conforme al capítulo XI del tratado involucran la responsabilidad internacional del Estado por violaciones a ciertas disposiciones de un tratado internacional, el TLCAN, que producen pérdidas o daños pecuniarios al inversionista respectivo o su inversión.

En el caso concreto, tanto CPI como ADM/Staley reclaman las mismas violaciones a los artículos 1102, 1106 y 1110, derivadas de las mismas medidas.

⁵. El derecho de acción también abarca ciertas disposiciones del capítulo XV del TLCAN, que no son pertinentes en este caso.

⁶. Artículos 1116 y 1117 del TLCAN.

CPI	ADM/Staley
26. The HFCS Tax represents a violation of Mexico's obligations under the NAFTA, specifically, its obligation of national treatment under Article 1102 as well as its obligation not to impose certain types of performance requirements under Article 1106, and constitutes an unlawful expropriation of property under Article 1110.	65. The HFCS tax is a measure of Mexico, which breaches obligations under provisions of NAFTA Chapter 11, as set forth below: National Treatment (Article 1102), Performance Requirements (Article 1106), and Expropriation and Compensation (Article 1110).

1102 (Trato Nacional)

CPI	ADM/Staley
82. Article 1102 of the NAFTA requires each NAFTA Party to accord to investors of another Party, and investments of investors of another Party, treatment no less favourable than it accords, in like circumstances, to its own investors and their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.	66. Article 1102 requires Mexico to accord investors of another NAFTA Party, and investments of investors of another Party, treatment no less favorable than it accords, in like circumstances, to its own investors and their investments with respect to "establishment, acquisition, expansion, management, operation, and sale of other disposition of investments.
83. It is indisputable that producers HFCS and producers of sugar are in "like circumstances." Both produce sweeteners for use by soft drink manufacturers. The sweeteners are substantially similar in chemical characteristics and are interchangeable in application by the soft drink producers. Various branches of the Mexican government, including the Executive, through the Secretariat of Commerce (SECOFI), legislative officials, the Mexican Supreme Court, and Mexico's Federal Competition Commission, have confirmed in many different contexts that HFCS and sugar producers compete with each other in the same economic and business sector. The Tax itself demonstrate that they are competitive and interchangeable.	68. It is indisputable that HFCS investments in Mexico are in "like circumstances" with Mexico's sugar producers. HFCS and sugar producers participate in the same economic and business sector. They compete to supply interchangeable types of sweeteners to the same market of beverage and syrup manufacturers. Moreover, the Mexican Government has made official determinations supporting this conclusion on a number of occasions. 69. First, in an antidumping order issued in January 1998, SECOFI determined that ALMEX belonged to the same domestic industry as Mexican sugar refiners. Second, Mexican legislators then agreed with this determination when they enacted the HFCS and sugar was implicit in the HFCS tax, which the legislators discussed during passage of the tax in 2001 and renewal of the tax in 2002 and 2003. Third, the Mexican Supreme Court ruled in July 2002 that protecting sugar by taxing HFCS was the HFCS tax's central animating concern. This ruling necessarily assumed that HFCS and sugar are in the same industry and compete directly.
84. By discriminatorily taxing soft drinks produced with HFCS while not taxing soft drinks produced with sugar, the Government of Mexico has accorded less favorable treatment to HFCS producers generally, and Corn Products and Arancia CP specifically, than that accorded to domestic sugar producers with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale of investments. Arancia CP's	71. Mexico's HFCS tax fails to accord national treatment to ALMEX and to Claimants. Under Article 1102, the standard of national treatment for a foreign investor is the best treatment accorded to any domestic investor or investment under like circumstances. The best treatment accorded to Mexican sugar producers consists of exemption from taxation, from beverages and syrups that are sweetened <i>exclusively</i> with cane sugar are exempt from the HFCS tax. The Mexican Government has no

CPI	ADM/Staley
<p>operation of the SJR Plant, and particularly HFCS-55 production at the Plant, has been significantly impaired, and its conduct of its HFCS-55 business has been destroyed by the Tax. The Mexican Government has not claimed any legitimate basis for the invidious distinction the Tax makes between soft drinks produced with HFCS and soft drinks produced with sugar. Moreover, even if assisting the domestic sugar industry were a legitimate goal, the means chosen – discriminatory taxation to insulate a national industry against foreign competition – is illegitimate.</p>	<p>legitimate public policy basis for the tax because the sole basis for this protectionism.</p>
<p>85. The HFCS Tax was plainly adopted to undo the results of fair and open competition between foreign owned HFCS producers and the Mexican sugar industry. Before the tax, those foreign producers had succeeded in capturing 25 percent of the soft drink sweetener market on the basis of price and product quality. As the Mexican Congress was well aware, of the HFCS-55 sold in Mexico prior to the Tax was either imported from the U.S. or produced by Arancia CP, a wholly owned company. By deliberately giving the soft drink sweetener market to the domestic sugar industry, the Tax discriminates against Corn Products and Arancia CP as a matter of law and fact.</p>	<p>72. The Mexican Government was well aware when it enacted the tax that the only HFCS available in Mexico was: (a) produced in Mexico by the investments of U.S. investors and distributed by those investments, or (b) produced in the U.S. and distributed by ten Mexican investment of U.S. investors. The sole purpose of the tax was to protect Mexico’s sugar industry from free and fair competition with HFCS. As discussed, Mexican Government officials stated publicly that they intended the tax to stop the production, distribution, and sale of HFCS made by U.S. investments and investors, and they have accomplished their objective.</p>
<p>86. The HFCS Tax’s invidious discrimination has thus eliminated the most significant customer base for Arancia CP and the reason for its HFCS investment. It has caused enormous damages to it and to Corn Products. These include lost profits and other damages incurred as a result of Arancia CP’s having to cease production of HFCS for the soft drink industry, and damages at the parent company (Claimant) level as well. These damages are continuing.</p>	<p>73. The HFCS tax has, as intended, eliminated the most significant customer base for ALMEX and the primary impetus behind the original investment of ADM and Staley and planned expansion. The HFCS tax has caused ALMEX to stop producing and selling HFCS-55 and has caused a substantial decline in ALMEX’s HFCS-42 production. In addition, the tax has adversely affected the investors’s 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.</p>

1106 (Requisitos de desempeño)

CPI	ADM/Staley
<p>88. NAFTA Article 1106(3) prohibits a Party from conditioning the receipt of continued receipt of an advantage on compliance with such performance requirements. Article 2103 of the NAFTA permits a claim involving taxation measures to be stated under this paragraph.</p>	<p>74. NAFTA Article 1106(3) prohibits the Mexican Government from, among other things, conditioning “the receipt of continued receipt of an advantage, in connection with an investment in its territory or an investor of a Party” on compliance with a requirement “to achieve a given level or percentage of domestic content” or “to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory”. Article 2103 of the NAFTA permits a claim</p>

CPI	ADM/Staley
	involving taxation measures to be made under Article 1106(3).
89. The HFCS Tax imposes prohibited performance requirements on both sweetener producers such as Arancia CP, and on soft drink producers, requiring them to use Mexican inputs rather than inputs from the United States or produced by U.S.-owned business.	75. The HFCS tax offers benefits (i.e. exemption from taxation) to Mexican manufacturers of soft drinks and beverage syrups and concentrates, and conditions those benefits sweetening those drinks exclusively with (Mexican) cane sugar. The tax applies to drinks sweetened with any amount of HFCS or other non-cane sugar sweetener. It imposes a domestic content requirement by requiring the use of sugar from Mexican producers as opposed to HFCS produced and sold by investments of U.S. investors.

1110 Expropiación

CPI	ADM/Staley
94. Under NAFTA Article 1110, “[n]o Party may directly or indirectly ... expropriate an investment of an investor of another Party in its territory or take a measure tantamount to ... or expropriation..., except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation, in accordance with [its provisions].	77. Under NAFTA Article 1110, “[n]o Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment,” except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation equivalent to the fair market value of the expropriated investment.
95. As the language quoted above demonstrates, Article 1110 provides both for claims of direct expropriation involving a physical taking of property and for claims of indirect expropriation, generally involving regulatory measures that effect an expropriation or that have an effect tantamount to an expropriation.	78. Article 1110 is not limited to direct expropriation involving the physical taking of property. It also includes indirect expropriation or measures tantamount to an expropriation. Mexico’s HFCS tax is an indirect expropriation and a measure tantamount to an expropriation.
98. By virtue of the HFCS Tax, Mexico has indirectly expropriated, or has taken measures tantamount to an expropriation, of an investment of an investor of another party, i.e., Corn Products. In particular, Mexico has indirectly expropriated the assets used in Arancia CP’s HFCS production and other assets critical to the HFCS-55 business in Mexico. Even though the taking was “indirect”, it was nonetheless immediate and decisive. The HFCS Tax has deprived Arancia CP of the value of its HFCS investments as a consequence of the Tax’s elimination of HFCS? Ability to participate in the Mexican soft drink sweetener market for which those investments were made. The economic effect of this measure on Corn Products and Arancia CP is equivalent to abandonment or a sale of the HFCS production channel and related assets at a distress	78. (...)It effectively deprived ADM and Staley of the use of a significant part of ALMEX business, as well as reasonably expected economic benefits flowing from it. Specifically the tax terminated the ability of ADM, Staley and ALMEX to sell HFCS-55 to soft drink customers in expertise. In addition, the HFCS tax has indirectly expropriated a portion of ALMEX’s production and sale of HFCS-42 in Mexico. The HFCS tax resulted in a substantial deprivation of the value of ADM’s and Staley’s investment and interference with their use and enjoyment of that investment.

CPI	ADM/Staley
price.	
100. The imposition of the HFCS Tax, by depriving Arancia CP of access to the Mexican soft drink sweetener market and rendering Corn Products' HFCS investments, through Arancia CP, in the SJR Plant uneconomic and unusable, has frustrated the reasonable and justified investment expectations Corn Products had when it made its HFCS investments in Mexico beginning in the mid-1990's.	79. ADM and Staley invested in ALMEX for the purpose of producing and supplying sweetener to Mexico's soft drink industry. ALMEX's growth and potential expansion depended on expanded sales to this market. The HFCS tax, which deprives ALMEX of this customer base, has forced ALMEX to almost completely abandon the production and sale of its principal product. As a result, the tax has had the effect of idling a significant portion of ALMEX's production, distribution, and storage facilities. Likewise, the HFCS tax has blocked ALMEX's planned expansion of production capacity and deprived it of expected growth in sales of HFCS-55 in Mexico.
101. As a result of Mexico's expropriation of Corn Products' investments in HFCS-55 production, Corn Products is entitled under NAFTA Article 1110 to compensation in an amount that is at least equivalent to the fair market value of the investment necessary for that production. As Corn Products will show during the course of arbitration, Arancia CP's years of successful operation in the HFCS business prior to the Tax's imposition make going concern value the only fair basis for compensation.	81. Having effectively expropriated ADM's and Staley's investment, the Mexican Government must pay compensation under Article 1110(2) that is equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. As of the date of the filing of this request, the Mexican Government has not offered to pay, nor has it paid, any compensation to ADM, Staley, or ALMEX to offset the damages that ADM, Staley, and ALMEX have suffered by reason of the expropriation.

b) Las medidas son de carácter fiscal

Puesto que las reclamaciones giran en torno de la adopción por el Congreso mexicano de un impuesto, ambas están sujetas al artículo 2103 del tratado. Los inversionistas reclamantes turnaron a las autoridades fiscales competentes de México y Estados Unidos el asunto relativo a la supuesta expropiación de su inversión, según lo requiere el párrafo 6 del artículo referido:

6. El Artículo 1110, "Expropiación y compensación", se aplicará a las medidas tributarias, salvo que ningún inversionista podrá invocar ese artículo como fundamento de una reclamación, hecha en virtud del Artículo 1116 ó 1117, cuando se haya determinado de conformidad con este párrafo que la medida no constituye una expropiación. El inversionista turnará el asunto, al momento de hacer la notificación a que se refiere el Artículo 1119 "Notificación de la intención de someter la reclamación a arbitraje", a las autoridades competentes señaladas en el Anexo 2103.6, para que dicha autoridad determine si la medida no constituye una expropiación. Si las autoridades competentes no acuerdan examinar el asunto o si, habiendo acordado examinarlo no convienen en estimar que la medida no constituye una expropiación, dentro de un plazo de seis meses después de que se les haya turnado el asunto, el inversionista podrá someter una reclamación a arbitraje, de conformidad con el Artículo 1120 "Sometimimiento de la reclamación al arbitraje".

Ninguno de los inversionistas contendientes pudieron presentar su reclamación, sino hasta que transcurrió el plazo previsto en ese artículo.

A continuación se comparan los argumentos de los reclamantes al respecto.

CPI	ADM/Staley
<p>11. NAFTA Article 2103 requires an investor seeking to submit a claim involving a breach of NAFTA Article 1110 (Expropriation and Compensation) that involves taxation measures to “refer the issue of whether the measure is not an expropriation for a determination to the appropriate competent authorities set out in Annex 2103.6 at the time that it gives notice under Article 1119 (Notice of Intent to Submit a Claim to Arbitration).” NAFTA Article 2103 also states: “If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 1120 (Submission of Claim to Arbitration).”</p>	<p>12. NAFTA Article 2103(6) requires that an investor seeking to submit a claim of expropriation under NAFTA Article 1110 arising from a taxation measure must refer the issue of whether the measure is not an expropriation to the appropriate “competent authority” at the time the investor submits its Notice of Intent to Submit a Claim to Arbitration under Article 1119. The “competent authority,” as identified in Annex 2103.6, must then consider whether or not the taxation measures constitutes an expropriation and, “[I]f the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 1120.</p>
<p>12. On January 28, 2003, the same date on which Corn Products delivered its Notice of Intent to the Government of Mexico, Corn Products delivered submissions to the competent authorities of the United States and Mexico designated pursuant to NAFTA Article 2103, requesting that those authorities permit Corn Products to submit to arbitration a claim for expropriation under NAFTA Article 1110. The submission to the Mexican competent authority is attached to this Request for Institution of Arbitration Proceedings.</p>	<p>13. Under NAFTA Annex 2103.6, the competent authority in the case of a United States investor is the assistant Secretary of the Treasury (Tax Policy), Department of the Treasury. Claimants provided a copy of their Notice of Intent to the competent authority in the United States on October 14, 2003. Claimants also provided a copy on November 25, 2003, to the competent authority in Mexico, who is the Deputy Minister of Revenue of the Ministry of Finance and Public Credit. Claimants did not receive a written response from either competent authority. Six months have elapsed since October 14, 2003, and the competent authorities have not achieved the agreement referred to in Article 2103(6). Claimants are, therefore, free to submit their claim to arbitration under Article 1120.</p>
<p>13. On July 28, 2003, the United States competent authorities had failed to agree that the measure was not an expropriation. By this terms of Article 2103, as set forth above, the effect of this determination is that Corn Products’ expropriation claim may be submitted to arbitration.</p>	<p>14. Moreover, on November 21, 2003, the United States competent authority informed Claimants that it did not agree that the HFCS tax was not an expropriation, and thus, the competent authorities had failed to agree that the measure was not an expropriation. By operation of Article 2103, the effect of this determination is that Claimants’ claim may be submitted to arbitration.</p>

c) El remedio conforme al TLCAN

El remedio previsto en el TLCAN en el caso de que se determine la responsabilidad internacional de una Parte del TLCAN es el mismo en todos los casos:

Artículo 1135. Laudo definitivo

1. Cuando un tribunal dicte un laudo definitivo desfavorable a una Parte, el tribunal sólo podrá otorgar, por separado o en combinación:

- (a) daños pecuniarios y los intereses correspondientes;
- (b) la restitución de la propiedad, en cuyo caso el laudo dispondrá que la Parte contendiente podrá pagar daños pecuniarios, más los intereses que proceda, en lugar de la restitución.

En ambos casos, los inversionistas contendientes alegan que cada uno, al igual que las empresas en cuya representación han sometido la reclamación a arbitraje, han sufrido pérdidas o daños en virtud de las violaciones que alegan o a consecuencia de ellas, y en esencia solicitan la misma reparación, si bien el monto de los daños que demandan es distinto. Los inversionistas contendientes son personas distintas y ambos manifiestan que compiten entre sí⁷, al igual que sus respectivas inversiones, por lo que, si bien participan en el mismo mercado con el mismo producto, sus operaciones no son idénticas y el monto de los daños que reclaman es obviamente distinto. Ello, sin embargo, es insuficiente para resolver en contra de la acumulación de los procedimientos.

3. La acumulación es en interés de una resolución justa y eficiente

1. Justa

Puede apreciarse fácilmente 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 todavía mayor: ambas reclamaciones presentan prácticamente las mismas. Obviamente, la parte demandada es la misma. Estas circunstancias explican por sí mismas por qué la acumulación es en interés de una resolución justa y eficiente.

Debe añadirse que, de no acumularse los procedimientos, se corre el riesgo de que tribunales distintos rindan decisiones diferentes, y hasta contradictorias, respecto de las mismas cuestiones, al grado que los fallos podrían contraponerse entre sí⁸. Si bien el TLCAN dispone que "el laudo dictado por un tribunal será obligatorio sólo para las partes contendientes y

⁷. Reclamación de Arbitraje de CPI. ¶ 92. Reclamación de Arbitraje de ADM/Staley, ¶ 52.

⁸. Cf. las decisiones en los casos *CME Czech Republic B.V. (The Netherlands) vs. The Czech Republic* y *Ronald S. Lauder vs. The Czech Republic*. Debe advertirse que estos casos involucraron tratados distintos (el Tratado para Promoción y Protección Recíproca de las Inversiones entre el Reino de Los Países Bajos y la República Federal Checa y Eslovaca, y el Tratado para Promoción y Protección Recíproca de las Inversiones entre los Estados Unidos de América y la República Federal Checa y Eslovaca) y no había reglas relativas a la acumulación de reclamaciones. Tampoco hubo un acuerdo al respecto entre las partes. El TLCAN, por el contrario, expresamente prevé la acumulación.

únicamente respecto del caso concreto” (artículo 1136) y, por lo tanto, no sientan precedentes jurídicos que deban ser observados por otros tribunales, es bien sabido que otros tribunales las estudian y analizan cuidadosamente y que influyen en sus propias decisiones. Por tal motivo, es en interés del buen funcionamiento del mecanismo de solución de controversias establecido en la sección B del capítulo XI tener una jurisprudencia uniforme. El gobierno de México tiene un interés elemental en el buen funcionamiento del mecanismo de solución de controversias.

Por último, apreciará que el gobierno mexicano ha sido plenamente transparente y diligente respecto de la acumulación de las reclamaciones. Con toda oportunidad dio aviso a los involucrados —CPI, ADM/Staley, el CIADI y los miembros del tribunal en el caso instaurado por CPI— del derecho que tiene conforme al artículo 1126 de solicitar la acumulación de los procedimientos y su intención de ejercerlo. Si no solicitó el establecimiento de un tribunal de acumulación previamente, fue simplemente porque ADM/Staley no había sometido la reclamación a arbitraje y, como lo apuntó CPI en su comunicación del 17 de marzo del presente, no había todavía procedimientos que pudiesen acumularse.

2. Eficiente

La similitud entre ambas reclamaciones por sí misma explica por qué la acumulación es en interés de una resolución eficiente. En términos simples, dadas las numerosas cuestiones comunes de hecho y de derecho en torno de la supuesta responsabilidad del Estado mexicano, es más eficiente que un solo tribunal conduzca un procedimiento. La acumulación evitará duplicidad innecesaria, particularmente en el caso de México como demandada única.

En el caso de las demandantes, se trata de una cuestión de coordinación entre ellas que, aparentemente, ya se está dando, según lo demuestra la gran similitud de ambas reclamaciones y que se aprecia incluso en el empleo de párrafos casi idénticos.

La acumulación favorecerá una resolución eficiente aun en aspectos que trascienden el arbitraje. Por ejemplo, en el caso de que cualquiera de las partes procediera a la revisión judicial del laudo, será más eficiente para todos los involucrados tener un solo laudo y una sola decisión sobre las cuestiones comunes de hecho y de derecho.

Finalmente, la solicitud de México es oportuna. ADM/Staley apenas sometió su reclamación a arbitraje. El gobierno de México fue diligente al contactar a los representantes legales de ambos reclamantes para informarles de su intención, especialmente porque el Tribunal establecido conforme al artículo 1120 en el caso instaurado por CPI ha fijado la fecha de su primera sesión con las partes contendientes, y está consciente de que la solicitud que hace por este medio tendrá un impacto en ese procedimiento.

3. Naturaleza de la solicitud

La similitud de las reclamaciones de CPI y ADM/Staley, particularmente en lo que concierne a las cuestiones de hecho y de derecho en las que los inversionistas reclamantes pretenden fundar la responsabilidad internacional del Estado mexicano, demuestra por sí misma las razones que sustentan esta solicitud de acumulación. Desde luego, habrá ciertos hechos —y

quizás algunas cuestiones jurídicas, aunque por el momento no se vislumbra ninguna— que serán específicos sólo a alguno de los reclamantes. La acumulación de procedimientos necesariamente supone que existen tales diferencias —de otra forma, la acumulación no tendría razón de ser, no estaríamos ante casos de acumulación, sino frente a una misma reclamación⁹. Sin embargo, ninguna de tales cuestiones es atinente al fondo de las reclamaciones que se presentan en contra de México. Incluso en sus respectivas reclamaciones, ambos reclamantes aluden a particularidades de las operaciones y negocios del otro, en el contexto de su propia reclamación¹⁰.

Un tribunal de acumulación será, desde luego, capaz de discernir esas diferencias específicas y abordarlas de manera apropiada. El tribunal de acumulación puede dar una consideración adecuada a aquellas cuestiones de hecho que son claramente distintas, sin que ello afecte la conducción ordenada del procedimiento en el que se acumulen las reclamaciones. Por ejemplo, respecto de los daños que se demandan —es probable que tampoco haya cuestiones jurídicas diferentes en materia de daños—, procedería bifurcar el procedimiento acumulado.

Un tribunal de acumulación igualmente dispone de los medios para atender preocupaciones legítimas, por ejemplo las relativas a la confidencialidad de la información. En efecto, la Nota de la Comisión de Libre Comercio del 31 de julio de 2001¹¹ establece reglas que permiten preservar la confidencialidad de la información por razones legítimas. Las Reglas de la *International Bar Association* en materia de Prueba, que comúnmente se utilizan como guía en este tipo de procedimientos, también lo regula. En el marco del TLCAN, otros tribunales han emitido órdenes en este sentido¹².

En consecuencia, la parte demandada solicita que el tribunal de acumulación asuma jurisdicción, desahogue y resuelva todas las reclamaciones de manera conjunta. En la alternativa, solicita que el tribunal de acumulación asuma jurisdicción, desahogue y resuelva una o más de las reclamaciones sobre la base de que ello contribuirá a la resolución de las otras.

México también solicita que, de conformidad con lo dispuesto en el artículo 1126(9), el tribunal de acumulación aplase los procedimientos instaurados conforme al artículo 1120 por CPI y ADM/Staley, respectivamente, en espera de su decisión sobre la solicitud de México. El gobierno de México desea informarle que, por separado, solicitará que el Tribunal en el caso CIADI No. ARB/(AF)/04/01 suspenda por sí mismo el procedimiento de acuerdo con lo establecido en el propio artículo 1126(9), y hará lo propio si se instala un tribunal en el caso interpuesto por ADM/Staley. En ambos casos acompañará copia de esta solicitud.

⁹. Tal es el caso de la propia reclamación de ADM y Staley.

¹⁰. Reclamación de Arbitraje de CPI, ¶ 92. Reclamación de Arbitraje de ADM/Staley, ¶ 52.

¹¹. Anexo 2.

¹². Cf. *Fireman's Fund Insurance Company c. Los Estados Unidos Mexicanos*. Caso CIADI No. ARB/AF/02/1. Orden de Procedimiento No. 3.; *United Parcel Service of America, Inc. c. El gobierno de Canadá, Procedural Directions and Order of the Tribunal*. Anexo 3.

Petición

Por las razones expuestas, el gobierno de México solicita que proceda a la instalación de un tribunal de acumulación de conformidad con lo previsto en el artículo 1126 del TLCAN.

Atentamente,
El Consultor Jurídico

Hugo Perezcano Díaz

C.c.p.: Miembros del Tribunal Arbitral Corn Products International Inc. c./ los Estados Unidos Mexicanos, Caso CIADI No. ARB/AF/04/1.
Rafael Serrano Figueroa. Secretario General de la Sección Mexicana del Secretariado de los Tratados de Libre Comercio.
Sra. Lucinda A. Low. Representante legal de Corn Products International.
Sr. Daniel Price. Representante legal de Staley y Co-Representante de Almex.
Sr. Warren Connelly. Representante de ADM y Co-Representante de Almex.