MEMORANDUM OF ARGUMENT

PART I – OVERVIEW

A. INTRODUCTION

1. Canada, the United Mexican States ("**Mexico**"), and the United States of America form one of the world's largest economic trading blocs, with investors of each country investing heavily in the territories of the others. The proposed appeal raises questions, none of which has been addressed by this Court before, regarding the scope of the protections which Canada, the United States and Mexico agreed to confer upon those investors through Chapter Eleven of the *North American Free Trade Agreement* (the "***NAFTA***"), as well as issues concerning the scope and operation of the *Vienna Convention on the Law of Treaties*. The proposed appeal is of national and supra-national significance, because it has implications for the proper application of similar investment-protection treaties throughout the world, including many to which Canada is a signatory.

2. Indeed, even if the Court of Appeal is found to have reached the correct result in this particular case, Canada's broad international economic interests (and those of the Mexico and the United States of America) – as well as the interests of investors in the *NAFTA* Parties, and elsewhere – will be served by this Court's consideration of the important issues engaged by the proposed appeal. The particular importance of the issues raised by this case is reflected in the fact that both of the other *NAFTA* Parties – Canada and the United States – which were not parties to the underlying arbitration, intervened at the Court of Appeal, with Canada being granted leave to participate as a full party.

3. The proposed appeal arises from Mexico's application pursuant to the Ontario *International Commercial Arbitration Act*, R.S.O. 1990, C. I-9 (the "***ICCA***") for an order setting aside in part an investor-State arbitral award made on 18 September 2009 (the "**Award**") in favour of the respondent, Cargill, Incorporated ("**Cargill**"). The *ICCA* is based on the

UNCITRAL *Model Law on International Commercial Arbitration*, which has been implemented in Canada federally and by each province and territory.[1]

4. The Award was rendered by a Tribunal constituted under Chapter Eleven of the *NAFTA*, and requires Mexico to pay to Cargill damages in the amount of USD$77,329,240, plus interest and costs. The Award is one of three separate *NAFTA* Chapter Eleven claims made against Mexico, each of which arose in the context of a larger dispute between Mexico and the United States regarding cross-border trade in sugar and high fructose corn syrup ("**HFCS**").

5. Mexico submitted below that the Tribunal went beyond the scope of the submission to arbitration, as that submission is defined by *NAFTA* Chapter Eleven, by awarding damages on account of a breach of investment obligations said to be owed to Cargill in connection with its HFCS-producing facilities situated in the United States, ***in addition*** to damages on account of the losses suffered by the investment of Cargill in Mexico – Cargill de Mexico. Only the latter damages flowed from any obligations owed to investors by Mexico under the *NAFTA*, it was submitted below.

6. Although it clarified Canadian jurisprudence regarding the standard against which international arbitral awards should be reviewed by courts (which is itself an important issue), the Court of Appeal declined to give effect to the agreement or practice of the three *NAFTA* Parties, and held that the Tribunal did not commit a jurisdictional error when it ordered Mexico to compensate Cargill for the losses it suffered as a producer of HFCS at its production facilities (*i.e.*, its investments) in the United States, in addition to the losses it suffered as an investor in the territory of Mexico.

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[1] See: *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.) (Canada); *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 (British Columbia); *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5 (Alberta); *International Commercial Arbitration Act*, S.S. 1988-89, c. I-10.2 (Saskatchewan); *International Commercial Arbitration Act, C.C.S.M.*, c. C-151 (Manitoba); *International Commercial Arbitration Act*, R.S.O. 1990, c. I-9 (Ontario); *Civil Code of Procedure*, R.S.Q., c. C-25 (as am.), Articles 940-952; *Quebec Civil Code*, S.Q. 1991, c. 64, Articles 2638-2643, 3121, 3133, 3148 and 3168 (Quebec); *International Commercial Arbitration Act*, S.N.B. 1986, C. I-12.2 (New Brunswick); *International Commercial Arbitration Act*, R.S.N.S. 1989, c. 234 (Nova Scotia); *International Commercial Arbitration Act*, 1988, c. I-5 (Prince Edward Island); *International Commercial Arbitration Act, R.S.N.* 1990, c. I-15 (Newfoundland and Labrador); *International Commercial Arbitration Act*, R.S.N.W.T. 1988, c. I-6 (Northwest Territories, and Nunavut under the *Nunavut Act*, S.C. 1993 c. 28, s. 29); and *International Commercial Arbitration* Act, R.S.Y. 2002, c. 123 (Yukon Territory).

7. The proposed appeal raises issues regarding the scope of the obligations owed by each of the three *NAFTA* Parties to foreign investors in their territories, as well as the nature of a court's role when presented with the common agreement of the State parties to an international treaty, as prescribed by the *Vienna Convention on the Law of Treaties*. If leave to appeal is granted, this Court's judgment will affect Canada's international interests, as well as potentially the interests of the United States and Mexico (and their respective investors and others with a stake in the viability of such investments). It is in the public interest that the issues raised by this case be resolved by Canada's highest court.

B. STRUCTURE OF THE *NAFTA*

8. The *NAFTA* has two major components. First, it is a free trade agreement which liberalizes trade among the three Parties in different sectors. Second, in addition, *NAFTA* contains a separate chapter providing investment protection (Chapter Eleven). As a *trade agreement*, the *NAFTA* regulates trade among the Parties. As an *investment protection agreement*, the *NAFTA* separately regulates the treatment accorded by each Party to investments and investors of another *NAFTA* Party in its territory.

Award, para. 68

9. Under Chapter Eleven of the *NAFTA*, investors are given direct but limited access to initiate an arbitration claim for damages against one of the three Parties to the *NAFTA*. No other chapter of the *NAFTA* permits a claim for (or an award of) damages for breach. This special right of access to international arbitration does not extend to all obligations contained in the twenty-two Chapters of the *NAFTA*, but rather is expressly limited strictly to the 14 substantive obligations contained in Section A of Chapter Eleven (and two obligations contained in Chapter Fifteen). Correctly identifying the boundaries between Chapters of the *NAFTA* is therefore an essential task for any *NAFTA* Chapter Eleven tribunal, as well as the Court called upon to review an award. Otherwise, as in this case, there is a risk that the *NAFTA* Parties will be ordered to compensate individual investors for breaches of obligations that are not owed to them under Chapter Eleven at all, but rather are addressed elsewhere in the *NAFTA*, and which do not give rise to individual compensatory remedies.

C. THE HFCS AND SUGAR INDUSTRIES

10. The proposed appeal arises in the context of the HFCS industry. HFCS is a sweetener produced from corn starch, and is used as a low-cost substitute for refined sugar to sweeten soft drinks and other food products. Producers of HFCS therefore compete with producers of refined sugar: the price advantage of HFCS, if any, depends on the relative cost of sugar in the particular market. Many countries, including the United States and Mexico, restrict access of imported sugar to their markets in order to support higher domestic prices. This in turn encourages domestic production and increases returns to sugar growers and producers.

Award, paras. 53-57, 59-61, Application Book, Tab 1

Reasons for Judgment of the Honourable Madam Justice Low (26 August 2010), paras. 24, 26, 31, Application Book, Tab D2

11. Mexico is also a very large *per capita* consumer of soft drinks. Prior to the early to mid-1990s, soft drinks produced in Mexico were sweetened exclusively with cane sugar. At around the time of the *NAFTA's* entry into force (1 January 1994), Mexico began to import HFCS from the United States, but these imports represented a very small portion of Mexico's total sweetener market. HFCS producers in the United States, of course, wanted to expand their share of the Mexican market.

Award, para. 62, Application Book, Tab 1

Reasons for Judgment of the Honourable Madam Justice Low (26 August 2010), paras. 26-27, Application Book, Tab D2

D. CARGILL'S PARTICIPATION IN THE HFCS INDUSTRY

12. Cargill is a company incorporated in the United States. Cargill entered the HFCS production industry by building a refinery in Dayton, Ohio in about 1977. By 1993, Cargill produced HFCS at plants in the United States at Dayton, Ohio; Memphis, Tennessee; and Eddyville, Iowa.

Award, para. 64, Application Book, Tab 1

Reasons for Judgment of the Honourable Madam Justice Low (26 August 2010), para. 25, Application Book, Tab D2

13. Before the *NAFTA* came into force, Cargill owned Cargill de Mexico, a Mexican company incorporated in 1967. In 1993, Cargill established a division within Cargill de Mexico to begin selling HFCS in Mexico for the first time. Cargill de Mexico never produced HFCS in Mexico, but rather purchased and imported HFCS from its United States parent and re-sold it to industrial customers (mainly soft drink bottlers) in Mexico. Cargill was therefore a producer of HFCS from its investments in the United States (selling both to Cargill de Mexico and to other purchasers of its HFCS in Mexico), and was also an *investor* in Mexico by reason of its ownership of its "investment" – Cargill de Mexico.

> Award, paras. 6, 9, 66-67, 76-77, 167, 364-366, Application Book, Tab 1
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> Reasons for Judgment of the Honourable Madam Justice Low (26 August 2010), para. 30, Application Book, Tab D2

14. In contrast to the other major United States HFCS producers, three of which also brought claims against Mexico arising from the same measures encountered by Cargill, Cargill never invested in any HFCS refineries in Mexico. Rather, Cargill chose to invest in its production facilities in the United States and sell that United States HFCS to Cargill de Mexico in the United States, as well as to other customers directly in Mexico. For its part, Cargill de Mexico imported the United States-produced HFCS from Cargill, and sold it to its customers in Mexico.

> Award, paras. 66-67, 76-77, Application Book, Tab 1
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> Reasons for Judgment of the Honourable Madam Justice Low (26 August 2010), para. 30, Application Book, Tab D2

E. TRADE DISPUTES BETWEEN THE UNITED STATES AND MEXICO REGARDING HFCS AND SUGAR

15. The price of sugar rose in Mexico after *NAFTA*'s entry into force, because Mexico agreed in the *NAFTA* to replicate the United States' import barriers for refined sugar from third countries as part of the *NAFTA* bargain. This gave HFCS the price advantage in Mexico as it had enjoyed in the United States, and consumption of HFCS began to grow in Mexico after 1995. Mexico's sugar surpluses also grew, though, and the industry began to experience significant

disruptions, with broad social and economic consequences in Mexico.

Award, paras. 80-83, Application Book, Tab 1

16. On 25 June 1997, Mexico imposed anti-dumping duties with respect to HFCS imported from the United States. These anti-dumping duties were the subject of proceedings before the World Trade Organization (the "**WTO**") (pursuant to the *General Agreement on Tariffs and Trade*, the "**GATT**"), and a State-to-State dispute resolution panel under Chapter Nineteen of the *NAFTA*. Ultimately, the anti-dumping duties were revoked on 20 May 2002, and the duties were reimbursed.

Award, paras. 101-103, Application Book, Tab 1

F. THE IEPS TAX AND THE IMPORT PERMIT REQUIREMENT

17. On 31 December 2001, in light of the failure to resolve its dispute with the United States, Mexico took two additional steps to address the disruption in its domestic sugar industry: (a) Mexico's Chamber of Deputies passed an amendment to the *Ley del Impuesto Especial Sobre Producción y Servicios* (*Law on the Special Tax on Production and Services*) (the "**IEPS Tax**"); and (b) Mexico's executive announced that all HFCS imports from the United States would require a permit issued by the Secretary of Economy (the "**Import Permit Requirement**") (together, the "**Measures**").

Award, paras. 96-100. Application Book, Tab 1

Reasons for Judgment of the Honourable Madam Justice Low (26 August 2010), para. 35, Application Book, Tab D2

18. The IEPS Tax imposed a 20% tax on the sale or importation of soft drinks and other beverages that contained sweeteners other than cane sugar. As a result of the IEPS Tax, it became more expensive for Mexican soft drink producers to use HFCS, so most switched back to using domestic sugar as a sweetener. The United States initiated WTO dispute settlement proceedings against Mexico, challenging the IEPS Tax and, on 7 October 2005, a WTO panel found that the imposition of the IEPS Tax violated the *GATT (1994)*. This ruling was subsequently upheld by the WTO Appellate Body, and Mexico then brought itself into compliance with the *GATT (1994)*.

Award, paras. 100, 105-109, 112-113, Application Book, Tab 1

Reasons for Judgment of the Honourable Madam Justice Low (26 August 2010), para. 35, Application Book, Tab D2

19. The Import Permit Requirement was part of a decree establishing tariff rates for the importation of goods into Mexico. In order to obtain the benefit of Mexico's *NAFTA* preferential tariff rate for HFCS, an importer of HFCS into Mexico was required to obtain a permit issued by the Secretary of Economy. Absent a permit, the imported HFCS would be subject to the higher rate applicable to HFCS imported from non-*NAFTA* countries. No import permits were issued to Cargill de Mexico.

Award, paras. 117-120, Application Book, Tab 1

G. THE TRIBUNAL AWARDS DAMAGES FOR LOSSES BY CARGILL IN THE UNITED STATES IN ADDITION TO THE LOSSES BY CARGILL DE MEXICO IN MEXICO

20. On 30 September 2004, in response to the Measures, Cargill served on Mexico a Notice of Intent to Submit a Claim to Arbitration pursuant to *NAFTA* Article 1119. Cargill alleged that Mexico's imposition of the IEPS Tax and its failure to issue import permits to Cargill de Mexico violated *NAFTA* Articles 1102 (*National Treatment*), 1103 (*Most-Favoured-Nation Treatment*), 1105 (*Minimum Standard of Treatment*), 1106 (*Performance Requirements*) and 1110 (*Expropriation*). Cargill sought monetary damages on its own behalf, and on behalf of Cargill de Mexico (Cargill's investment in Mexico). On 21 June 2006, the Tribunal was constituted. The parties agreed that the place of arbitration would be Toronto, Canada.

Award, paras. 10, 12-13, 21-22, 39, Application Book, Tab 1

21. On 18 September 2009, the Tribunal delivered its Award. The Tribunal dismissed Cargill's claims that Mexico had breached its obligations under *NAFTA* Articles 1103 (*Most-Favoured-Nation Treatment*) and 1110 (*Expropriation*), but found Mexico liable for breaches of *NAFTA* Articles 1102 (*National Treatment*), 1105(1) (*Minimum Standard of Treatment*), 1106 (*Performance Requirements*). Having found breaches of *NAFTA* Articles 1102, 1105(1) and 1106, the Tribunal concluded that Cargill was to be compensated for the value of the lost sales of HFCS by Cargill de Mexico in Mexico, *plus* the value of the lost sales of that same HFCS by

Cargill to Cargill de Mexico in the United States. The Tribunal calculated these damages to be USD$77,329,240.

22. In the Award, the Tribunal explained why it considered it had jurisdiction to award compensation to Cargill for the value of the foregone sales of HFCS manufactured using Cargill's investments in the United States which was then sold (in the United States) to Cargill de Mexico.

> 519. To evaluate the damages claimed, the Tribunal has found it helpful to look at the lost profits claimed as divided at the United States-Mexican border, with those lost profits attributed to Cargill's inability to sell HFCS to CdM as "up-stream losses" and the direct losses of CdM as "down-stream losses".
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> 520. . . . The issue, therefore, is whether those up-stream damages claimed by Claimant, and objected to by Respondent, are also compensable.
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> 523. With respect to the particular facts of this case, the Tribunal finds that the profits generated by Cargill's sales of HFCS to its subsidiary, Cargill de Mexico, for CdM's marketing, distribution and re-sale of that HFCS, were so associated with the claimed investment, CdM, as to be compensable under the *NAFTA*. Cargill's investment in Mexico involved importing HFCS and then selling it to domestic users, principally the soft drink industry. Thus, supplying HFCS to Cargill de Mexico was an inextricable part of Cargill's investment. As a result, in the view of the Tribunal, losses resulting from the inability of Cargill to supply its investment Cargill de Mexico with HFCS are just as much losses to Cargill in respect of its investment in Mexico as losses resulting from the inability of Cargill de Mexico to sell HFCS in Mexico.
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> 525. . . . Viewed holistically, Claimant was prevented from operating an investment that involved the sale into and distribution of HFCS within the Mexican market. The inability of the parent to export product to its investment is just the other side of the coin of the inability of the investment, Cargill de Mexico, to operate as it was intended to import HFCS into Mexico.
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> 526. The Tribunal therefore determines that Claimant is to be compensated for its net los profits as determined for both Cargill de Mexico's lost sales to the Mexican market and Cargill, Inc.'s lost sales to Cargill de Mexico.
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> Award, paras. 519-526, Application Book, Tab 1

23. Mexico challenged this aspect of the Award on the basis that it amounted to a decision on a matter falling outside the scope of the submission to arbitration. The Tribunal had no jurisdiction to award to Cargill damages in respect of its sales in the United States because a *NAFTA* Party (whether Mexico, the United States, or Canada) owes no obligations to investors operating in their home states, rather than the host State against which the *NAFTA* Chapter Eleven claim is made. The function and purpose of Chapter Eleven is to protect investments made by investors of another *NAFTA* Party in the territory of the host *NAFTA* Party, not investments made in the investor's home State.

H. JUDGMENTS BELOW

1. Judgment of the Ontario Superior Court of Justice (Low J.)

24. Because Toronto had been designated as the seat of arbitration, Mexico applied to the Ontario Superior Court of Justice for an order setting aside the Award, in part, under the *ICAA*. Once Cargill's lost profits on sales to Cargill de Mexico – the so-called "upstream losses" – are excluded from the total amount awarded, Mexico took the position that the properly-compensable damages are the direct losses suffered by Cargill de Mexico (Cargill's actual investment in Mexico) on its re-sales in Mexico – the so-called "downstream losses".

25. The Honourable Madam Justice Low dismissed Mexico's application, holding that: (a) the standard of review in considering whether the Tribunal had exceeded its jurisdiction was "reasonableness" (paras. 55, 67); (b) Cargill had only one legal capacity, and could not be both a producer and an investor (para. 65); (c) Chapter Eleven imposed no limits on compensation when Chapter Eleven obligations were breached (para. 65); and (d) the Award was reasonable, having regard to the *NAFTA* as a whole, including trade-promotion provisions found outside the investment-protection framework of Chapter Eleven (paras. 70, 73).

> Reasons for Judgment of the Honourable Madam Justice Low (26 August 2010), paras. 55, 65, 67, 70, 73, Application Book, Tab D2

2. Judgment of the Court of Appeal for Ontario (per Feldman, J.A.; Rosenberg and Moldaver JJ.A., concurring)

26. Mexico appealed to the Court of Appeal for Ontario. The United States and Canada were granted leave to intervene, with Canada being permitted to intervene as a full party, supporting Mexico's position and crystallizing an issue respecting the *Vienna Convention on the Law of Treaties*. In addition, ADR Chambers intervened for the purposes of making submissions regarding the standard of review of international arbitral awards.

27. On appeal, Mexico submitted that: (a) the standard of review for jurisdictional excess is "correctness"; (b) Cargill's only relevant capacity under Chapter Eleven was as an investor through its ownership of Cargill de Mexico (which, while a subsidiary of Cargill, is a separate legal entity); (c) compensation under Chapter Eleven is limited to the obligations owed to investors in respect of investments in Mexico; and (d) it was an error to refer to the objectives of the *NAFTA* as a whole in assessing the reasonableness of the Award made under Chapter Eleven.

28. The Court of Appeal dismissed Mexico's appeal. Erroneously calling the breaches by Mexico "trade barrier breaches" (para. 70) – *trade barriers* are not the subject of *NAFTA* Chapter Eleven, which deals with the Parties' *investment-protection* obligations – the Court of Appeal held that: (a) the standard of review is "correctness" for the question of jurisdiction; (b) the question of what damages flowed from the breaches is not a jurisdictional question; and (c) the *NAFTA* imposes no territorial limitation on damages suffered by an investor in its capacity as an investor of an investment.

PART II – QUESTIONS IN ISSUE

29. The proposed appeal raises the following issues of public interest and national importance:

(a) Do the *NAFTA* Parties (Canada, the United States and Mexico) owe any obligations under *NAFTA* Chapter Eleven to a producer or investor in its home State, as opposed to an investor in the territory of the host State, the breach of which may give rise to compensable damages?

(b) With respect to the *Vienna Convention on the Law of Treaties*:

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

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

PART III – ARGUMENT

A. IMPORTANCE OF THE ISSUES RAISED

30. The proposed appeal raises issues of national and supra-national importance. A clear understanding of the obligations owed by the *NAFTA* Parties is important to North American investors (and the individuals whose livelihoods upon the investments made by those investors), and to each of Canada, the United States and Mexico as host States whose financial exposure is magnified when a tribunal acts outside the scope of the submission to arbitration.

The importance of the issues raised is illustrated by fact that all of the *NAFTA* Parties participated in the proceedings before the Court of Appeal.

31. Mexico submits that the logical consequence of the approaches taken by the Tribunal and the Court of Appeal is that there will be *less* investment from abroad, with foreign investors relying upon the new obligations found to be owed to them in their home States, as long as they establish a toehold in one of the other *NAFTA* Parties sufficient to engage Chapter Eleven. This is contrary to the objectives of the *NAFTA* (which include the objective to "increase substantially investment opportunities in the territories of the Parties" (Article 102(1)(c)), the purpose of Chapter Eleven, and the national social and economic interests of the three *NAFTA* Parties, for which foreign investment is so important.

32. Because the Award creates the possibility that an investor will be able to claim compensation extending far beyond the small investment actually made in the host State, this is a precedent that will likely be invoked by claimants under other bilateral investment treaties throughout the world, including the 28 investment protection treaties to which Canada is a party.[2] As such, it will increase the exposure of Canada (and other States which have entered into such treaties) to claims beyond that which they contemplated when they entered into the treaties.

33. The Court's approach to the *Vienna Convention on the Law of Treaties*, which Canada ratified in 1970 and which came into force in 1980, creates ambiguities regarding the manner in which Canadian courts will interpret and apply treaties to which Canada is a party, not only the *NAFTA*. To the extent Canada (or a foreign treaty party) relied on its subsequent agreements and practices being taken into account by a Canadian court called upon to interpret and apply the treaty, the approach taken by the Court of Appeal is a matter of concern, and implicates Canada's national interests, as well as its international obligations to its treaty partners.

> *Vienna Convention on the Law of Treaties*, [1980] Can. T.S. 1980 No. 37, Applicant's Book of Authorities, Tab 10

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2 As of 2 December 2011, Canada was a party to 24 foreign investment protection agreements: see http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa_list.aspx?lang=en&menu_id=14&view=d. In addition to the *NAFTA*, Canada is a signatory to three Free Trade Agreements which provide for investor-state arbitration – those with Colombia, Peru and Chile: see http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=en&view=d.

34. Wholly apart from the issues concerning the *NAFTA* and the *Vienna Convention on the Law of Treaties*, the intervention of ADR Chambers in the Court of Appeal illustrates the importance of the arbitral review issues raised: indeed, the Court of Appeal recognized that "[t]he question of how a reviewing Court is intended to perform the review and what test it will apply is a critical one" (para. 34) and that "revising courts in Canada and the U.S. have to date applied 'various ill-defined standards of review'" (para 29). The standard of review for jurisdictional error under the *Model Law* engages Canada's international reputation as a seat of international arbitration. This Court, having recently examined standard of review issues in the administrative law context, is ably positioned to examine the application of these standards for the benefit of the international community, this time with the benefit of the recent views of the Supreme Court of the United Kingdom in *Dallah Estate and Tourism Holding Company v. Ministry of Religious Affairs et al.*

> *Dallah Estate and Tourism Holding Company v. Ministry of Religious Affairs et al.*, [2010] UKSC 46, Applicant's Book of Authorities, Tab 2

B. SCOPE OF THE OBLIGATIONS OWED BY CANADA, THE UNITED STATES AND MEXICO IN *NAFTA* CHAPTER ELEVEN

35. The importance of the proposed appeal is founded in the broad implications of the Court of Appeal's understanding of the obligations each of Canada, the United States and Mexico agreed to assume in the *NAFTA*.

36. Although the Court of Appeal correctly held that the question of whether the Tribunal strayed outside its jurisdiction under Chapter Eleven must be reviewed on the standard of correctness, the Court applied that standard to the wrong questions. A *NAFTA* Chapter Eleven tribunal's jurisdiction is not defined by simply asking, as the Court of Appeal did, whether the claimed investment fits within the definition provided in Article 1139, and whether the damages claimed were incurred "by reason of, or arising out of" the breach (with the issue of whether such damages were in fact causally related to the alleged breach, in a broad sense, being simply a question of fact in the particular case). Nor, contrary to what the Court of Appeal thought, was the issue before the reviewing courts whether there are any "territorial limitations" on the

location in which damages must be incurred in order to be compensable under *NAFTA* Chapter Eleven (para. 69).

37. Rather, the proper question was whether Canada, the United States and Mexico owe any *NAFTA* Chapter Eleven obligations to an investor in relation to its investments in its home State at all. The *NAFTA* Parties have unanimously taken the position that no such obligations are owed, such that there are no obligations for which compensation can be ordered – as distinguished from compensation for damages incurred by investments owned by persons that have invested in the host State. In order to understand the importance of this distinction, an understanding of the structure and purpose of the *NAFTA* is necessary.

38. The *NAFTA* contains a number of separate parts. First, it is a trade treaty among three sovereign States, imposing disciplines on cross-border trade of goods (for example, Chapter Three). Unlawful barriers to trade in goods obligations ("trade barrier breaches") are remediable only by the Parties in State-to-State arbitration under Chapter Twenty (and in respect of which no claim for money damages lies). Second, in Chapter Eleven, it is an investment protection treaty, providing direct but limited access to investors to international arbitration in respect to the obligations set out in Chapter Eleven. Investment protection breaches are limited by the specific obligations contained in Chapter Eleven. Third, the *NAFTA* provides for the replacement of domestic reviews of anti-dumping duties with bi-national panel reviews (Chapter Nineteen) in which panels can exercise a remand power.

39. Most of the obligations in *NAFTA* are only enforceable in State-to-State dispute settlement proceedings initiated by Canada, the United States or Mexico directly, as would be the case in a conventional trade treaty. As noted, the Chapter Three trade-in-goods obligations are only subject to State-to-State arbitration under Chapter Twenty. Each *NAFTA* Party retains the right to restrict imports, subject to review by Chapter Twenty panels at the State to State level. Damages are not available under Chapter Twenty: the only available relief is prospective.

40. The role of Chapter Eleven, on the other hand, is to promote and protect foreign investment by investors of one *NAFTA* Party in the territory of another *NAFTA* Party. It is not directed at protecting an investor's investments in its own State, nor is it directed at trade and

goods measures, but rather only "measures" relating to investors in respect of their investments in the host State. Under Chapter Eleven, investors of other States are only permitted to submit to arbitration claims that a State has breached one of its substantive obligations set out in Chapter Eleven.

41. On the proposed appeal, Mexico will submit that: (a) the only claims that can be submitted to arbitration under Chapter Eleven of the *NAFTA* are claims based upon the alleged breach of Chapter Eleven obligations; (b) there are no Chapter Eleven obligations owed by Mexico in respect of investments situated outside the territory of Mexico; and (c) the Tribunal went beyond the scope of the submission to arbitration by assuming jurisdiction over claims based on losses suffered by investments in the United States: Chapter Eleven Tribunals do not have jurisdiction over claims that are based on injury to investments located in one *NAFTA* Party on account of actions taken by authorities in another *NAFTA* Party. Chapter Eleven applies only to investors of the *NAFTA* Party who seek to make, are making, or have made an investment in the other *NAFTA* Party.

42. The effect of the Tribunal's award (and the approach taken by the Court of Appeal) is to ignore the distinction between Cargill as "investor" and Cargill as "producer" or investor in its home State, and ascribe to Mexico, for the benefit of Cargill's production investments in the United States, obligations that Mexico never agreed to assume under *NAFTA* Chapter Eleven (and neither did Canada or the United States).

43. It is not Mexico's position that there is a *territorial* limitation on an investor's damages; it is Mexico's position that there is a *substantive* limitation on an investor's claims; they must be the claims incurred *qua* investor in the host State. Cargill's only claims *qua* investor in this case were satisfied by an Award to Cargill de Mexico of its losses. Cargill's remedies for its claims as a producer and investor in its home State are restricted to trade barrier remedies, excisable only by the United States under *NAFTA* Chapter Twenty or the WTO, as indeed the United States did, when it challenged the same measures at issue in the arbitration at the WTO.

44. The distinction is illustrated by the approach recently taken by the *NAFTA* Chapter Eleven tribunal in *Grand River Enterprises Six Nations Ltd. v. United States of America.* In *Grand River Enterprises*, the claimants – Canadian nationals who were involved in the distribution in the United States of tobacco through First Nations reserves – sought compensation for damages alleged to be incurred as a result of several states' administration of an agreement to settle litigation against major United States cigarette manufacturers. Consistent with the understandings of Canada, the United States and Mexico concerning the obligations they agreed to assume under Chapter Eleven, the *Grand River* tribunal found that it did not have jurisdiction to determine the claims brought by Grand River and two personal claimants, all of whom had invested in manufacturing plants in Canada for the purpose of exporting cigarettes to the United States for distribution there. Summarizing its conclusions, the Tribunal said:

> . . . the record shows that, as relevant here, their activities centred on the manufacture of cigarettes at Grand River's manufacturing plant in Canada for export to the United States. The Tribunal concludes that such activities and investments by investors in the territory of one *NAFTA* party do not satisfy the jurisdictional requirements for a claim against another *NAFTA* party. [Emphasis added.]
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> *Grand River Enterprises Six Nations Ltd. v. United States of America*, Award (12 January 2011) at paras. 5, 81-89, 122, Applicant's Book of Authorities, Tab 3
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> See also: *Archer Daniels Midland Company v. The United Mexican* States, ICSID Case No: ARB (AF) /04/05 (21 November 2007) at paras. 270-275, Applicant's Book of Authorities, Tab 1

45. Whether investors in Canada, the United States and Mexico are entitled to the broad protections identified by the Tribunal and the Court of Appeal in this case, or the particular protections identified by the Parties to the *NAFTA* and the *Archer Daniels Midland* and *Grand River* tribunals, is a question of significant importance to each of the three *NAFTA* Parties, and investors in their territories. Its resolution will have economic implications for each of Canada, the United States and Mexico, and potentially elsewhere.

C. THE PROPER APPROACH TO A SUBSEQUENT PRACTICE OR AGREEMENT UNDER THE *VIENNA CONVENTION ON THE LAW OF TREATIES*

46. The proposed appeal also raises important issues, of interest to the international community generally, concerning the proper application of the *Vienna Convention on the Law of Treaties*; in particular, the effect of Articles 31(3)(b) and 31(3)(c), which require that the subsequent practice or an agreement among the treaty parties be taken into account when determining the nature of the obligations the parties agreed to assume.

47. The *Vienna Convention* is used by states and courts world-wide to interpret and apply international treaties. As Mr. Justice Rothstein observed in *Yugraneft Corp. v. Rexx Management Corp*:

> The *Convention's* text was designed to be applied in a large number of States and thus across a multitude of legal systems (N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration* (5th ed. 2009), at pp. 70 and 72-73; J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (2nd ed. 2007), at p. 868). One leading author has described the *Convention* as a "constitutional instrument" that "leaves a substantial role for national law and national courts to play in the international arbitral process" (G. B. Born, *International Commercial Arbitration* (3rd ed. 2009), at p. 101). The text of the *Convention* must therefore be construed in a manner that takes into account the fact that it was intended to interface with a variety of legal traditions.
>
> *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19 at para. 19, [2010] 1 S.C.R. 649, Applicant's Book of Authorities, Tab 6

48. The Court of Appeal's analysis will accordingly be considered and analyzed in any case throughout the world in which a treaty party claims that the court must have regard to an agreement or practice occurring subsequent to the treaty's signing.

49. The *Vienna Convention* is engaged in this case because *NAFTA* Article 1131(1) provides that the obligations owed under Chapter Eleven are to be interpreted in accordance with the *NAFTA* and the "applicable rules of international law" – which includes the provisions of the *Vienna Convention* recognizing the legal right of the States as parties to make authoritative and binding interpretations of the treaties they have negotiated and ratified – and to have those

binding interpretations enforced by domestic courts. As the International Law Commission, which was responsible for drafting the *Vienna Convention*, commented regarding Article 31(3)(a) of the draft *Vienna Convention*, "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation."

> *United Nations, Yearbook of the International Law Commission 1966* (New York: 1967) (U.N. General Assembly Doc. A/CN.4/SEA.A/1966/Add.1), Vol. II, p. 221 at para. 14, Applicant's Book of Authorities, Tab 7

50. The Court of Appeal's understanding of the scope of Articles 31(3)(b) and (c) of the *Vienna Convention* is not entirely clear from the Reasons for Judgment. On the one hand, the Court of Appeal mischaracterized the nature of the subsequent agreement and practices relied upon by the *NAFTA* Parties, which the Court described as an effective agreement "that the only compensable damages are those suffered in the territory of the Party where the investment is located and not losses suffered by the investor in its home business operation, even where those losses resulted from the breach" (paras. 79, 83). As noted above, the distinction drawn by the *NAFTA* Parties is between the obligations owed to *investors* in their respective territories (which obligations are found in Chapter Eleven), and the obligations owed investors in the territories of the other *NAFTA* Parties (which obligations are not found in Chapter Eleven). It is not a position that depends on the *situs* of the damages suffered – it turns on the *capacity* in which the obligations are owed.

51. Taken as a whole, though, the Court of Appeal's approach reflects a misunderstanding of the role of the *Vienna Convention.* This misapprehension creates uncertainty regarding the approach a Canadian court will take to the obligations assumed by Canada and its treaty parties, when interpreting the treaties to which Canada is a party. In particular, the Court of Appeal appears to have understood that its mandate under the *Vienna Convention* was to examine the record for the purpose of identifying the type of "agreement" or "practice" that would have been available for review by the Tribunal prior to the making of the Award. The Court focussed, for instance, almost exclusively on the submissions made by the Parties to the Tribunal in the *S.D. Myers v. Canada* case, which predated the Award in this case

(at paras. 79-82), and searched for a "clear, well-understood, agreed common position" (albeit a common position that did not, in fact, reflect what the Parties said they understood were their obligations owed under Chapter Eleven).

52. This restricted approach to the *Vienna Convention* deprives the reviewing court of the benefit of the treaty signatories' contemporaneous understanding of the obligations they agreed to assume in the treaty, and denies the signatories' their lawful right to make binding agreements and practices concerning those obligations, and to have those interpretations enforced by domestic courts. In this way, the Court of Appeal's approach is inconsistent with the text and purpose of the *Vienna Convention*. At a more base level, as Mr. Justice LaForest held for the majority of this Court in *Thomson v. Thomson*: [i]t would be odd if in construing an international treaty to which the legislature has attempted to give effect, the treaty were not interpreted in the manner in which the state parties to the treaty must have intended."

> *Thomson v. Thomson*, [1994] 3 S.C.R. 551 at para. 40, Applicant's Book of Authorities, Tab 5
>
> See also: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at paras. 51-73 (reviewing past statements and practices of the treaty parties, within the interpretative framework of the *Vienna Convention*), Applicant's Book of Authorities, Tab 4

53. Canada, the United States and Mexico took a common position before the Court of Appeal. This common position (which was consistent with prior statements of the *NAFTA* Parties dating back over a decade and which another Chapter Eleven Tribunal – the *Archer Daniels Midland* Tribunal – applied) itself constituted an "agreement" or a "practice" regarding the interpretation of the *NAFTA*, and the *Vienna Convention* requires that "agreement" or "practice" to be taken into account when, among other things, considering the jurisdiction conferred upon a *NAFTA* Chapter Eleven tribunal.

> Factum of the United States of America (31 January 2011), para. 21; Affidavit of Valerie Hollingdale (30 November 2011) (the "**Hollingdale Affidavit**"), Exhibit "B", Application Book, Tab FB
>
> Factum of the Attorney General of Canada (31 January 2011), paras. 15-16, 27, 32; Hollingdale Affidavit, Exhibit "A", Application Book, Tab FA

Factum of the United Mexican States (29 October 2010), paras. 83-85; Hollingdale Affidavit, Exhibit "C", Application Book, Tab FC

54. The Court of Appeal did not have regard to this common position expressed by the Parties to the *NAFTA*, due to its misconception of the nature and scope of the *Vienna Convention*. The approach to be taken by Canadian courts to the subsequent agreements and practices of states which are parties to treaties with Canada – including the *NAFTA*, but also including myriad other treaties – is of national and supra-national importance.

PART IV – COSTS

55. Mexico submits that the costs of this application for leave to appeal should be costs in the cause of the appeal.

PART V – ORDER SOUGHT

57. Mexico seeks an Order that this application for leave to appeal be allowed, and that the costs of this application be in the cause of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, 2 December, 2011.

Patrick G. Foy, Q.C.
Robert J.C. Deane
J. Christopher Thomas, Q.C.

(BORDEN LADNER GERVAIS LLP)
Counsel for the Applicant

PART VI – TABLE OF AUTHORITIES

CASE LAW	PARA
Archer Daniels Midland Company v. The United Mexican States, ICSID Case No: ARB(AF) /04/05 (21 November 2007) at paras. 270-275.	44, 45, 53
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Thomson v. Thomson, [1994] 3 S.C.R. 551 (QL) at para. 40, [1994] S.C.J. No. 6 [*Thomson* cited to QL].	52
Yugraneft Corp. v. Rexx Management Corp., 2010 SCC 19, [2010] 1 S.C.R. 649 at para. 19.	47

SECONDARY SOURCES	PARA
United Nations, Yearbook of the International Law Commission 1966 (New York: 1967) (U.N. General Assembly Doc. A/CN.4/SEA.A/1966/Add.1), Vol. II, p. 221.	49

PART VII – STATUTES RELIED ON

FILED IN BOOK OF AUTHORITIES

DOCUMENT
International Commercial Arbitration Act, R.S.O. 1990, c. I-9, ss. 1-5 and Schedule (Article 34).
North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can TS 1994 No. 2, 32 ILM 289 (entered into force 1 January 1994) [*NAFTA*], Articles 102, 1102-1103, 1105-1106, 1110, 1116-1117, 1119, 1131, 1139, 1901-1911 and 2003-2019.
Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331 at 333, 8 ILM 679 [*Vienna Convention*], Articles 31(3)(a), 31(3)(b) and 31(3)(c).