NOTICE OF INTENT TO SUBMIT A CLAIM TO ARBITRATION UNDER SECTION B OF CHAPTER 11 OF THE NORTH AMERICAN FREE TRADE AGREEMENT

CARGILL, INCORPORATED AND CARGILL DE MÉXICO, S.A. DE C.V.,

Investor/Enterprise,

v.

UNITED MEXICAN STATES,

Party

Served on : Secretaria de Economia
Dirección General de
Inversión Extranjera

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September 30, 2004

NOTICE OF INTENT TO SUBMIT A CLAIM TO ARBITRATION

UNDER NAFTA CHAPTER 11[1]

I. TYPE OF CLAIM

The claim is intended to be submitted by:

☒ An investor of a Party on its own behalf.

☒ An investor of a Party on behalf of an enterprise that is a juridical person that the investor owns or controls directly or indirectly.

II. DISPUTING INVESTOR

a) **Full name of the disputing investor:** Cargill, Incorporated ("Cargill")[2]

b) **Indicate whether the disputing investor is:**

☐ A Party
☐ A state enterprise of a Party
☐ A national of a Party
☒ An enterprise of a Party

c) **For purpose of subparagraph (b), please identify the nationality of the disputing investor:**

☐ México
☐ Canada
☒ United States

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[1] Cargill, Incorporated and Cargill de México, S.A. de C.V. have voluntarily provided a Spanish translation of this Notice of Intent to Submit a Claim to Arbitration Under the North American Free Trade Agreement Chapter 11, as well as Spanish translations of all English-language documents attached as supporting documentation to this Notice of Intent. In the event there is any inconsistency between the Spanish translation of this Notice of Intent, or any supporting documentation, and the original English version of such document, the original English language version shall govern.

[2] A copy of the certificate of incorporation of Cargill, Incorporated demonstrating that Cargill, Incorporated is incorporated under the laws of Delaware, United States, as well as a Spanish translation of the certificate of incorporation, are attached at Exhibit 1.

d) **Address of the disputing investor:**

Cargill, Incorporated

15407 McGinty Road West	
Wayzata	Minnesota
United States of America	55391
(952) 742-7575	(952) 742-6349
Randall_Romsdahl@cargill.com (responsible party in legal department)	

III. CLAIM BY AN INVESTOR OF A PARTY ON BEHALF OF AN ENTERPRISE (SEE NAFTA ARTICLES 1117 AND 1119)

a) **Name of the enterprise:** Cargill de México, S.A. de C.V. ("Cargill Mexico")[3]

b) **Address of the enterprise:**

Bosque De Ciruelos #168	
Piso 3, Col. Bosques de las Lomas	
C.P. 11700, Mexico	
52-55-1105-7400	52-55-1105-7419
Pedro_Parra@cargill.com (responsible party in legal department)	

[3] A copy of the *Acta Constitutiva* for Cargill Mexico, demonstrating that the enterprise is organized under the laws of Mexico, is attached at Exhibit 2. *See* Exhibit 3 for copies of Cargill Mexico's share certificates demonstrating Cargill's control and direct and indirect ownership of Cargill Mexico. Also included in Exhibit 3 is a certification by the Corporate Secretary for Cargill Mexico declaring that Cargill holds an 85 percent ownership interest in Cargill Mexico. The remaining 15 percent is held by Cargill indirectly, through two other companies.

IV. INVESTMENT

Indicate the type(s) of investment(s) involved:

☒ (a) an enterprise;

☒ (b) an equity security of an enterprise;

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the debt security is at least three years.

not including a debt security, regardless of original maturity, or a state enterprises;

☐ (c) a debt security of an enterprise assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

☒ (d) a loan to an enterprise

(i) where the enterprise is an affiliate of the investor, or

(ii) where the original maturity of the loan is at least three years,

not including a loan, regardless of original maturity, to a state enterprise;

☒ (e) an interest in an enterprise that entitles the owner to share in income or profits of the enterprises;

☒ (f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraph (c) or (d);

☒ (g) real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes; and

☐ (h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(i) contracts involving the presence of an investor's property in the territory of the party, including turnkey or construction contracts, or concessions, or

(ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.

V. LEGAL REPRESENTATIVE AND SERVICE OF DOCUMENTS

a) **Name:**

Bryan, Greyson[4]
Almstedt, Kermit W.
Kimmelman, Louis B.
Smith, Steven
Lanthier, Veronique

b) **Address:**

O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Phone: (202) 383-5300
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E-mail for Greyson Bryan: gbryan@omm.com
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E-mail for Steven Smith: ssmith@omm.com
E-mail for Veronique Lanthier: vlanthier@omm.com

c) **Indicate the name and address of the person to whom correspondence should be directed:**

Name:

Bryan, Greyson
Lanthier, Veronique

Address:

O'Melveny & Myers LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
Phone: (202) 383-5300
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E-mail for Greyson Bryan: gbryan@omm.com
E-mail for Veronique Lanthier: vlanthier@omm.com

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[4] *See* Exhibit 4 for a copy of the Power of Attorney authorizing Greyson Bryan, Kermit Almstedt, Steven Smith, Louis B. Kimmelman and Veronique Lanthier of O'Melveny & Myers LLP to represent Cargill in these proceedings. Cargill's certificate of incorporation has been attached at Exhibit 1. Cargill's by-laws, which are submitted as an attachment to the Power of Attorney are included at Exhibit 5. *See* Exhibit 6 for a copy of the Power of Attorney authorizing Greyson Bryan, Kermit Almstedt, Steven Smith, Louis B. Kimmelman and Veronique Lanthier of O'Melveny & Myers LLP to represent Cargill Mexico in these proceedings.

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

A. Cargill, Incorporated and Cargill de Mexico S.A. de C.V. Have Standing to Bring a Claim Under Chapter 11 of NAFTA

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

2. On December 31, 2001 the Mexican legislature enacted a 20 percent tax on soft drinks and other beverages that use any sweetener other than cane sugar. The incidence of this 'HFCS tax' fell directly on high fructose corn sweetener ("GFCS"), a widely used substitute for cane sugar. The HFCS tax constitutes a measure that has been adopted or maintained by a Party and relates to investors of another party and investments of an investor of another party in the territory of another Party. As indicated above, Cargill, Incorporated ("Cargill") is a U.S. company headquartered in Minneapolis, Minnesota and is organized under the laws of the State of Delaware. Cargill de Mexico, S.A. de C.V. ("Cargill Mexico") is a wholly-owned subsidiary of Cargill, and therefore is an "investment owned or controlled directly or indirectly by an investor" in the United States. Article 201 of NAFTA defines a "measure" as "any law, regulation, procedure, requirement or practice." The tax on beverages sweetened with HFCS constitutes a measure, as it was adopted by the Government of Mexico as an amendment to the Mexican tax law, the *Impuesto Especial sobre Producción y Servicios* (Special Tax on Production and Services). Because the measure impairs the ability of Cargill and Cargill Mexico to sell and distribute HFCS to Mexican beverage producers, and because the stated purpose of the law is to protect Mexican cane sugar producers by imposing penalties for the use of HFCS as a substitute for cane sugar, the HFCS tax "relates" to Cargill and Cargill Mexico under Article 1101.

B. The Government of Mexico's HFCS Tax Violates Numerous Provisions of Chapter 11 NAFTA

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

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

4. Article 1102 requires that a Party provide national treatment with respect to the "establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments," *i.e.*, treatment that is no less favorable than that accorded, in like circumstances, to its own investors.[5]

5. Investments related to the production and distribution of HFCS are in "like circumstances" as those related to the Mexican sugar industry. HFCS and sugar are virtually interchangeable with respect to their use in beverages and sweeteners, and sugar and HFCS compete for the ability to supply the same customers. In addition, the Government of Mexico has made official determinations supporting both the conclusion that HFCS and sugar are substitutes and that the two sweeteners are in direct competition in the marketplace.[6]

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

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

7. Article 1105(1) requires each Party to "accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security." As set forth in more detail below, from early 1997 through the present, the Government of Mexico has maintained an ongoing campaign to eliminate HFCS from the Mexican market. This campaign was carried out under pretext of legitimate state action but was, in reality, a series of arbitrary

[5] The North American Free Trade Agreement ("NAFTA"), Dec. 17, 1992 *Id.*, art. 1102.

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

and discriminatory actions against U.S. investments in HFCS, culminating in the imposition of the HFCS tax. The HFCS tax, moreover, is itself an arbitrary and discriminatory measure that targets U.S. investors and investments in HFCS and has no rational basis as a tax measure. The stated purpose of the HFCS tax is not to raise revenue, or even to provide some reasonable measure of protection to the Mexican sugar industry; but rather, the purpose is to completely eliminate any use of HFCS by Mexican beverage producers. For these reasons, Cargill and Cargill Mexico maintain that the Government of Mexico has violated Article 1105(1) and failed to provide fair and equitable treatment in accordance with customary international law.

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

8. Article 1106(1) of NAFTA prohibits Parties from imposing performance requirements on investments from another Party, including a requirement to purchase, use or accord a preference to goods produced in that Party's territory. Article 1106(3) prohibits a Party from conditioning the receipt or continued receipt of an advantage on compliance with a performance requirement. NAFTA Article 2103 permits a claim involving taxation measures to be made under Article 1106(3).

9. The HFCS tax imposes a 20 percent *ad valorem* tax on beverages sweetened with any amount of HFCS or sweetener other than cane sugar. Beverages sweetened exclusively with cane sugar are exempt from such taxation. The blatant, discriminatory imposition of this tax essentially imposes a performance requirement on Mexican beverage, syrups and concentrate producers, as well as soft drink bottlers, to utilize sweeteners made exclusively from Mexican cane sugar, rather than HFCS produced by U.S.-owned facilities, whether in Mexico or the United States, in violation of Article 1106(1) of NAFTA.

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

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

11. NAFTA Parties are prohibited from expropriating, directly or indirectly, an investment of an investor of another Party.[7] Under Article 1110 of NAFTA, no Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment, except: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 1105(1); and (d) on payment of compensation in accordance with the provisions of NAFTA.

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

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

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

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

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[7] NAFTA., art. 1110.

VII. ISSUES AND FACTUAL BASIS FOR THE CLAIM

A. Factual Basis for The Claim

1. Description of HFCS

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

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

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

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

19. Mexico has the second highest per capita consumption of soft drinks globally, with annual sales of over 15 billion liters, or 150 liters per person. Through the early to mid 1990s, Mexican soft drinks had been sweetened exclusively with cane sugar. In the mid 1990s, however, a number of factors converged to make Mexico an attractive destination for Cargill's exports of HFCS. First, the superiority of HFCS as a beverage sweetener, relative to sugar, became increasingly well-accepted. Second, a number of U.S. beverage producers, including Pepsi and Coca-Cola, held interests in Mexican bottlers. Coca-Cola and Pepsi's U.S. operations had previously accepted HFCS as an equivalent replacement for sugar and supported the adoption of HFCS as a sweetener in their Mexican plants. Third, the Government of Mexico, which had until the mid-1990s provided the Mexican sugar industry with massive subsidization and other forms of market protection, began to reduce its level of involvement in that industry, thus opening

the sugar industry to competition from other sweeteners.[8] By signing NAFTA, the Mexican Government also demonstrated its commitment to liberalizing trade and safeguarding foreign investment.

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

20. Cargill and Cargill Mexico recognized the opportunities created by NAFTA for suppliers of HFCS. Based on the belief that the Mexican sweetener market would remain free and competitive and on the numerous advantages of HFCS to cane sugar as a beverage sweetener, Cargill and Cargill Mexico took the decision to become active participants in the development of Mexico's HFCS market.

21. The decision by Cargill and Cargill Mexico to enter the Mexican HFCS market required significant investment by the two companies. This substantial investment could have been structured a number of different ways. For example, Cargill and Cargill Mexico could have built a HFCS facility in Mexico. Because yellow corn, the primary input for HFCS, is not available in significant quantities in Mexico, this option would have required the companies to transport yellow corn from the U.S. to Mexico for wet-milling and processing into HFCS.

22. For business reasons, Cargill ultimately determined that HFCS for the Mexican market would be produced by Cargill in the United States and then exported to Mexico. At the time the decision was made, the U.S. industry did not have sufficient HFCS production capacity to serve both the U.S. and the Mexican market. Cargill, therefore, made the decision to expand existing HFCS production facilities in Memphis, Tennessee; Eddyville, Iowa; and Blair, Nebraska to serve Mexican demand for HFCS.

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

24. Cargill and Cargill Mexico's investment in the Mexican HFCS market initially was very successful. Mexican consumption of HFCS as a soft drink sweetener increased rapidly at the expense of Mexican sugar consumption, and Cargill enjoyed a 45 percent share of the burgeoning HFCS market in Mexico.

[8] In September 2001, however, the Government of Mexico resumed its direct involvement in the Mexican sugar industry when it expropriated 27 Mexican sugar mills.

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

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

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

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

28. At approximately this same time, the Mexican Government began reducing the corn wet milling industry's allocation of yellow corn imports, which had been guaranteed under the 1994 written agreement between the Mexican Government and the corn wet milling industry. U.S. producers of HFCS in Mexico were dependent upon yellow corn imports to produce HFCS. Thus, the reduction in the allocation of yellow corn imports resulted in the reduction of HFCS production.[9]

29. The Mexican Government has taken other, more recent actions to restrict HFCS in the Mexican market. For example, on December 31, 2001, the Mexican Government imposed the requirement that all HFCS imports from the U.S. be accompanied by an "import permit." Failure to supply the import permit would result in the imposition of tariffs ranging from 156 to 210 percent. In April 2002, the Mexican Government established a tariff-rate quota on HFCS, whereby 148,000 tons of HFCS would be subject to a 1.5 percent duty and a 210 percent out-of-quota duty rate would apply on imports above the 148,000 ton level. This action was reportedly in response to the U.S. Government's decision to limit the U.S. quota on Mexican sugar to 148,000 tons. In October 2001, the Mexican Government announced an increase in *ad valorem*

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

duties on HFCS imported from MFN countries. The original duty level was set at 15 percent *ad valorem*. The new duties ranged from 156 to 210 percent.

30. These actions by the Mexican Government to protect its sugar industry essentially decimated Mexico's expanding HFCS market and substantially depleted the value of U.S. investment in that sector.

5. Imposition of the HFCS Tax

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

32. Unlike the excise tax applied to all soft drinks between 1980 and 1990, the tax alleged by Cargill and Cargill Mexico to contravene NAFTA Chapter 11 principles applies only to beverages sweetened with HFCS, or other non-cane sugar sweeteners. Specifically, the tax applies to carbonated or mineral waters, soft drinks, hydrating or rehydrating beverages, concentrates, powders, syrups, flavor essences or extracts that can be diluted to produce soft drinks, hydrating or rehydrating beverages, which use sweeteners other than cane sugar. The tax also applies to syrups or concentrates for preparing soft drinks sold in open containers, prepared using automatic, electrical or mechanical equipment, which use sweeteners other than cane sugar.[10] Soft drink bottlers and beverage and syrup producers using cane sugar exclusively are exempted from the tax.

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

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

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

35. Mexican President Vincente Fox Quesada attempted to suspend the tax in March 2002 and reestablish parity between the Mexican sugar producers and foreign-owned suppliers of HFCS. These efforts were thwarted, however, by members of the Mexican legislature who brought action at the Supreme Court of Mexico to annul the President's temporary suspension of the tax. The members of the Mexican congress were successful. Based on its finding that the President lacked the constitutional authority to suspend the tax, the Supreme Court annulled President Fox's temporary suspension of the HFCS tax and reinstated it effective July 16, 2002. The tax continues to be applied to beverages sweetened with HFCS and continues to exempt from taxation beverages sweetened exclusively with cane sugar.

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

36. Imposition of the HFCS tax proved ruinous to Cargill's investment and its plans for supplying the Mexican HFCS market. Demand among beverage producers in Mexico, including Coca Cola and Pepsi, evaporated almost immediately and continues to be virtually nonexistent. As a result, Cargill and Cargill Mexico have been deprived of the economic benefit that would have flowed from sales of HFCS to the Mexican soft drink industry. The value of Cargill's investment in the Tula and McAllen facilities, which were constructed in order to distribute HFCS to Mexico, has also been significantly impaired. With little or no demand for HFCS as a beverage sweetener in Mexico, these facilities are largely idle.

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

B. Statement of Issues

1. **Has the Government of Mexico taken measures that are inconsistent with its obligations under Articles 1102, 1105, 1106(1), 1106(3) or 1110 of NAFTA?**

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

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

VIII. RELIEF AND AMOUNT OF DAMAGES

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

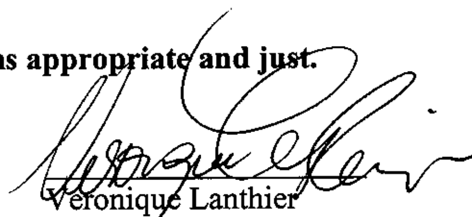
A. **Damages of not less than 100 million U.S. Dollars arising from the Government of Mexico's breaches of its NAFTA obligations, including loss of investment value, lost sales opportunities and lost profit;**

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

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

D. **an increase in the amount of the award to offset any tax consequences and maintain the value of the award;**

E. **such further relief as the tribunal deems appropriate and just.**



Véronique Lanthier

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Counsel to Cargill, Incorporated and
Cargill de México, S.A. de C.V.

September 30, 2004