

**In the Matter of the Arbitration Proceedings Pursuant to NAFTA Chapter 11 and the
UNCITRAL Arbitration Rules between:**

GAMI INVESTMENTS, INC.

Claimant/Investor,

AND

THE GOVERNMENT OF THE UNITED MEXICAN STATES

Respondent/Party.

CLAIMANT'S POST-HEARING BRIEF

Charles E. Roh, Jr.
Guillermo Aguilar Alvarez
Adam P. Stochak
Lucía Ojeda
J. Sloane Strickler
Elsa Ortega
Alicia Cate
Itziar Esparza

May 24, 2004

Attorneys for GAMI Investments, Inc.

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. THE MEXICAN GOVERNMENT HARMED GAMI AND BREACHED NAFTA BY FAILING TO IMPLEMENT AND ENFORCE ITS SUGAR LAWS	3
A. The Mexican Sugar Program Should Have Worked, But Mexico Did Not Implement It Properly	3
1. The Reference Price And Its Adjustment	5
2. Export Requirements	8
3. Production Controls	13
B. Seeking Public Support And Consensus Did Not Relieve Mexico Of Its Legal Duty To Enforce And Respect The 1991 Sugarcane Decree And Its Implementing Acuerdos	15
C. The Problems Experienced By GAM And Most Of The Mexican Sugar Industry Were The Fault Of The Government, And Not Other Factors	17
1. Mexico’s Failure To Enforce And Implement The Sugar Program Caused The Financial Crisis Prior To The Expropriation	18
2. To The Extent That These Other Factors Had Any Effect On GAM’s Operations, They Were The Result Of Mexico’s Non- Compliance	22
a. HFCS Imports	22
b. The Lack Of Credit	23
c. GAM’s “Below Market” Sales	24
d. Low International Prices	25
e. The 600,000 Tons Of Sugar	26
3. The Improved Market Conditions Since September 2001 Demonstrate That A Properly Functioning Sugar Program Renders External Pressures Essentially Irrelevant	27
D. Mexico’s Failure To Implement And Enforce The Sugar Program Constitutes A Violation Of International Law And Article 1105	28
III. THE MEXICAN GOVERNMENT EXPROPRIATED GAMI’S SHARES IN GAM WITHOUT A VALID PUBLIC PURPOSE, ARBITRARILY AND DISCRIMINATORILY, AND WITHOUT COMPENSATION IN VIOLATION OF ARTICLE 1110, 1105 and 1102	28
A. The Expropriation Of GAM’s Mills And GAMI’s Shares Had No Valid Public Purpose	30

TABLE OF CONTENTS
(continued)

	Page
B. The Expropriation Of GAM And GAMI’s Share In GAM Was Arbitrary And Discriminatory	31
C. The Expropriation Was Not Justified By The Criteria Of The Expropriation Decree	32
D. The Expropriation Of GAMI’s Investment Was Arbitrary And Discriminatory And Not Justified By Comparison With Investments In Unexpropriated Mills	35
E. The Expropriation of GAM and GAMI’s Shares in GAM Was Discriminatory in Violation of Article 1110(b) and Article 1102	40
F. Mexico’s Arbitrariness Is Contrary To Article 1105	41
IV. MEXICO OWES GAMI COMPENSATION UNDER NAFTA	41
A. Article 1110 Requires Compensation “Without Delay” That Is “Fully Realizable” And At “Fair Market Value”	41
B. Compensation under NAFTA and International Law Requires Adjustment To Account For The Effects Of Mexico’s Malfeasance	43
C. Valuation Of GAMI’s Investment	48
V. JURISDICTION	54
VI. ANSWERS TO THE TRIBUNAL’S QUESTIONS	56
Tribunal Question B	56
Tribunal Question A	59
Tribunal Question C	65
Tribunal Question D	67
The Chairman’s Question	72
VII. CONCLUSION	75

I. INTRODUCTION

1. The evidence adduced at the merits hearing during the week of 29 March 2004 only underscores Mexico's breaches of its Treaty obligations and reinforces GAMI's claims for compensation under Chapter 11 of NAFTA. The testimony of the witnesses heard by the Tribunal confirms that Mexico failed to implement and enforce the requirements of its own sugar program, reducing the value of GAMI's investment to nearly nothing. Ignoring repeated requests of both millers and *cañeros*, Mexico failed to enforce properly the sugar laws or even to provide the information that would facilitate private enforcement. Instead, confronting a deepening crisis of its own making, the Government arbitrarily expropriated 27 of the nation's 60 mills, including, for reasons Mexico has never been able to explain credibly, the five mills in which claimant GAMI Investments, Inc. ("GAMI") invested.

2. The Mexican courts already have determined that the expropriation lacked any valid public purpose and violated the Mexican Constitution. What is left is the unavoidable conclusion that the expropriation, and the Governmental malfeasance and nonfeasance in the administration of the sugar program that preceded it, also violated Articles 1110, 1102, and 1105 of the NAFTA. The record establishes that Mexico's wrongful conduct violated the fundamental rights and protections the NAFTA confers on foreign investors – protections that GAMI relied upon when it invested US\$30 million in the Mexican sugar industry.

3. The record, confirmed and expanded by testimony at the hearing, shows that Mexico had the authority and the duty to manage its sugar program in a way that balanced support for the *cañeros* with the necessary measures to support the domestic price of sugar at a level that maintained the economic viability of the mills. The record unequivocally demonstrates that

Mexico abdicated its duties by failing to implement and enforce export requirements, production controls, and sugarcane price adjustment mechanisms, driving down the domestic price of sugar. The testimony of all three mill operators, including Mexico's own witness, Mr. Pinto, confirmed that Mexico's abdication of its responsibilities was a primary cause of the market disorder that eroded the value of GAMI's investment prior to the expropriation. Mr. Pinto conceded that the absence of price equilibrium prior to September 2001 was caused by "a glut in the market of sugar," which had to be exported "according to certain regulations," but was not.¹

4. The remarkable recovery of the domestic Mexican market after the expropriation – caused largely if not exclusively by long overdue compliance with the sugar program – is strong evidence that Mexico had the ability and the duty to run its sugar program properly under the law. At the hearing, neither Mexico nor its witnesses could explain away the central correlation between compliance with the sugar program and the condition of the industry. In contrast, the record shows no such correlation to the sundry factors Mexico sought to blame for its own failings. The hearing testimony establishes exactly what GAMI complained of when it initiated these proceedings: Mexico ran down the value of GAMI's investment through abdication of its responsibilities under the Sugarcane Decree and its implementing *Acuerdos*, confiscated the investment when it was at the low point of its market value, and then quickly restored equilibrium in the marketplace to the great benefit of non-U.S. investors in the unexpropriated mills. It is hard to imagine conduct more violative of both the letter and the spirit of Chapter 11 of NAFTA.

¹ Pinto, Tr. at 505:14-506:2 (emphasis added).

5. Bearing in mind the extensive record and argumentation that has already been submitted, this brief deals in summary fashion with the arguments, with particular emphasis on the hearing. In section II of this brief, we review the evidence showing that Mexico's failure to implement and enforce its own sugar laws damaged GAMI's investment in GAM even before the expropriation. Section III summarizes the record demonstrating the wrongful nature of Mexico's expropriation, and its violation of Articles 1110, 1105, and 1102 of the NAFTA. In section IV, we summarize the evidence showing why GAMI's request for compensation is entirely reasonable, and why the criticism of Mexico and its witnesses was unfounded. Section V briefly reviews jurisdictional issues. Finally, in Section VI we answer the Tribunal's questions set out in Procedural Order No. 5 as well as the Chairman's question, posed orally at the hearing, concerning what avenues are available to GAM under Mexican law to seek compensation.

II. THE MEXICAN GOVERNMENT HARMED GAMI AND BREACHED NAFTA BY FAILING TO IMPLEMENT AND ENFORCE ITS SUGAR LAWS

A. The Mexican Sugar Program Should Have Worked, But Mexico Did Not Implement It Properly

6. Mexico enacted a sugar support program intended to insulate the domestic price of sugar from external pressures by keeping supply and demand in equilibrium.² The system was simple and it should have worked:

- millers would be required to export surplus sugar and curb production under Government enacted rules;
- *cañeros* would share in the risks and rewards of sugar price fluctuations through use of a reference price formula; and

² See Andrés Antonius González, *The Mexican Sugar Industry 1991-2001* at 4 (January 2003) (Exh. C-19) ("Antonius First Expert Report"); Rebuttal - Expert Report by Andrés Antonius González at 8 (Exh. C-112) ("Antonius Rebuttal Expert Report").

- the Government would enforce the system in a manner consistent with its own declaration that the sugar sector was of “public interest.”³

7. In simplest terms, the Government created a support program that was supposed to be balanced – with a high price for sugarcane, keeping the *cañeros* employed, but also with measures that would enable millers to obtain a return commensurate with the price of sugarcane. Those measures were the export requirement and the base production levels, both of which would operate to reduce the supply of sugar in Mexico, and hence support the price, with an adjustment mechanism for the price to be paid to *cañeros*, in the event actual returns to the millers were less than those estimated in the creation of the reference price.⁴

8. The very nature of the Mexican sugar program, assuming proper Governmental implementation and enforcement, enables it to adjust automatically and in a balanced way to changing conditions, such as increases or decreases in domestic sugar consumption. Both the price to *cañeros* and the price of sugar in Mexico were supported at levels well above world prices, which could not be sustained without Government intervention.⁵ This is so because the millers could afford to pay a high price for cane only if the domestic price of sugar was

³ See Antonius First Expert Report at 25-27 (Exh. C-19); GAMI’s Statement of Claim at paras. 43-47; GAMI’s Reply at paras. 18-57; see also Santos, Tr. at 135:13-137:1, 173:5-6 (“The scheme was very well designed.”).

⁴ See Antonius First Expert Report at 25-26 (Exh. C-19) (“The purpose of this system was twofold: to strengthen the domestic price of sugar to a level where mills could once again be profitable, and to ensure that the cost of doing so (exporting the surplus) would be borne in part by the cane growers. If the world price of sugar fell, or if the amount required to be exported increased, the price of sugarcane would fall accordingly. Likewise, if the domestic price of sugar fell, the price of sugarcane would again be adjusted downward.”).

⁵ See *id.* at 23-24 (noting that the price for cane in Mexico exceeds the prevailing world price for sugar).

maintained at levels high enough to cover those costs, through Government intervention to restrict domestic supply. That is the system that Mexico established.

9. GAMI invested in the Mexican sugar industry at a time when the program was running reasonably successfully and GAM was making a profit. Had GAMI known that that compliance with the rules of the program would become optional in practice, and that the Government itself would not respect them, it would have invested its capital elsewhere.⁶

10. The evidence in these proceedings establishes that Mexico failed to implement and enforce each of the key elements of the program in accordance with the law.

1. The Reference Price And Its Adjustment

11. Mexico has not disputed that the reference price and the adjustment mechanism establish the formula that determines the price to be paid *cañeros* for their cane, as well as the mechanism for adjustment to that price if the return to millers is greater or less than that projected in the initial calculation for each harvest year. The reference price formula set out in Article 3 of the 1997 *Acuerdo* is applied at the beginning of the harvest year, in advance of sugar actually being produced and sold.⁷ Mills would make an initial, pre-liquidation payment for cane equal to 80

⁶ See Mark Radzik Witness Statement at paras. 7-8 (Exh. C-17).

⁷ The reference price formula is expressed as follows in Article 3 of the 1997 *Acuerdo* (Exh. C-23):

$$P_r = aP_n + (1 - a)P_x^e$$

where:

P_r = Wholesale price of a kilogram of base standard sugar to be applied as a reference for the payment of sugarcane during the harvest.

a = *Expected* share of the national consumption of sugar with respect to total production of the harvest.

P_n = Reference price of standard sugar in the domestic market.

percent of what was expected to be owed to the *cañeros* based on the initial calculation of the reference price. The final payment to the *cañeros* was to be adjusted at the end of the harvest year pursuant to Articles 4 and 5 of the 1997 *Acuerdo*.

12. Article 4 of the 1997 *Acuerdo* (Exh. C-23) requires that the reference price formula be run with *actual* numbers at the end of the harvest year. It also requires each mill to demonstrate its actual returns, and it requires the Government to collect and cumulate data on each mill's domestic and export returns. The actual distribution of data was to be performed by the *Secretaría de Hacienda y Crédito Público* (SHCP). More specifically, Article 4 of the 1997 *Acuerdo* creates the legal obligation for the SHCP to provide, at the end of each harvest season:

- information on export prices and quantities captured in the *Sistema Automatizado Aduanero Integral*⁸ (section II); and
- a determination of the level of compliance by each individual mill with its export obligations as allocated by the Ministry of Economy (section III).

13. Based on the calculations required under Article 4, Article 5 entitles a mill to reduce the final (20%) payment to *cañeros* to the extent that the reference price, recalculated to account for the degree to which actual returns are less than the estimates used to calculate the initial reference price and the initial 80% payment to the *cañeros*. However, for mills that did not meet their export obligation, Article 5 accorded *cañeros* the right to a penalty price from the offending mills, in the amount of 2.5 times, the difference between Mexican and world prices for the deficit from the export requirement.

$1 - \mathbf{a}$ = *Expected* share of surplus sugar with respect to total production of the harvest.

P_x^e = *Expected* price for sugar to be exported.

⁸ Integral Customs Computer System.

14. It is undisputed that Mexico never, at the end of the harvest season, provided the data required under Article 4 to run the reference price formula with *actual* figures. This, in turn, prevented any price adjustment. Furthermore, Mexico did not provide information on compliance with the export obligations to the *cañeros* as required by section III of Article 4 to permit collection of the penalty price, thereby thwarting the primary device for enforcing the export requirement.⁹ As a result, mills which did not comply with their export obligations (including the Government's mills) were effectively rewarded (since they sold at higher domestic prices instead of low world market prices) while complying mills (including GAM's) suffered the double penalty of low world prices for the sugar that GAM exported, and a domestic price that was below what it should have been if all had complied with their export requirements.

15. Mexico asserted, but offered no proof or testimony that required information was made available,¹⁰ while both Mr. Cortina and Mr. Romero specifically testified to the contrary.¹¹ SHCP was legally *required* to provide comprehensive data for all mills on a nationwide basis pursuant to section III of Article 4 of the 1997 *Acuerdo*, and Mexico has yet to explain why never did so.

⁹ See Witness Statement of José Cruz Romero Romero at 6-7 (Exh. C-113) ("Romero Statement"); Second Witness Statement of Juan Cortina at paras. 8-9 (Exh. C-115) ("Cortina Second Statement"); see also Actas del Comité de la Agroindustria Azucarera: Minutes of CAA Session No. 42/2/ORD/2000 dated 29 November 2000 at para. 8 (Exh. R-76); Form 20-F Annual Report for 1999 at 39 (Exh. R-33).

In GAMI's Reply, GAMI incorrectly referred to José Cruz Romero Romero as "Mr. Cruz" instead of "Mr. Romero." GAMI apologizes for any confusion that this error may have caused.

¹⁰ Perezcano, Tr. at 594:8-11.

¹¹ See Cortina Second Statement at paras. 8-9 (Exh. C-115); Cortina, Tr. at 297:5-9; Romero Statement at 6 (Exh. C-113).

16. Mexico did purport to demonstrate compliance with its obligations by presenting a series of letters identified as Exhibits R-78, A through J. However, Mexico's letters are, in fact, evidence to the contrary. They establish that information which should have been released to adjust the reference price for the 1997-1998 harvest had still not been provided as of June 2001.¹² By mid-2001 the GAM mills had been forced to overpay for sugar cane in 4 consecutive harvests.

17. Mexico's failure to provide information led to a breakdown of the entire domestic support program: a low price for sugar would not translate into a low price for sugar cane.¹³ Mexico does not dispute that the reference price for sugar, and therefore the price of sugarcane, steadily increased between 1997 and 2001, while the real price of sugar decreased. It is a matter of record that the reference price formula and its adjustment mechanism tied the price of cane to the price of sugar. Properly run, the system never should have yielded prices that moved in opposite directions.

2. Export Requirements

18. The 1997 *Acuerdo* requires mills to export surplus sugar, in an amount proportional to its share in total production. Bizarrely, Mexico denied that this was an obligation.¹⁴ However, that argument is belied by the rest of the record, for example: (i) the substantial penalty provided in the *Acuerdos* for failure to export (*i.e.*, 2.5 times the difference between Mexican and world

¹² The letters also prove that Mexico refused to voluntarily provide export compliance information at the end of each harvest year. Aguilar, Tr. at 536:16-537:8.

¹³ See Antonius First Expert Report at 29-31; Antonius Rebuttal Expert Report at 9 (Exh. C-112).

¹⁴ See Mexico's Statement of Defense at para. 103.

prices for the deficit from the export requirement);¹⁵ (ii) the eventual prosecution of CAZE for falsely claiming to have met its export commitments, and (iii) Mexico's efforts to try to excuse or justify non-compliance throughout this proceeding.

19. At the hearing, Mexico argued for the first time that there was reasonable compliance with export obligations for the 1999-2000 and 2000-2001 harvests.¹⁶ Beyond the inconsistency of claiming both that there was no obligation and that there was reasonable compliance with it, the claim of compliance is based on data that cannot be reconciled either with undisputed documents on the record, or with the testimony of Mexico's own witnesses that non-compliance with the export requirements was in fact a substantial cause of the industry's financial distress.¹⁷

20. Either directly or through the *Comité de la Agroindustria Azucarera* ("CAA") that it controlled, Mexico had both the authority and the duty to act in a manner that would result in strict compliance with the Sugarcane Decree and its implementing *Acuerdos*, including by issuing such rules as may be required to effectively implement the sugar program.¹⁸ By far the most important mechanism for compliance – the "teeth" in the law – was or should have been the imposition of a penalty price for sugarcane.¹⁹

¹⁵ 1997 *Acuerdo*, article 5 (Exh. C-23).

¹⁶ See Mowatt, at Tr. at 655:4-657:20; *infra* section II.C.1.

¹⁷ See Pinto, Tr. at 505:14-506:2; see also *infra* section II.C.1.

¹⁸ Sugarcane Decree, article 4(a), (c) (31 May 1991) (Exh. C-20).

¹⁹ 1997 *Acuerdo*, article 5(II) (Exh. C-23); Actas de Las Sesiones Nos. 40/1/ORD./99. (16 December 1999) y 41/1/ORD./2000 (7 February 2000) at 2 (Exh. R-44). Santos, Tr. at 173:12-13. The other penalty was to be deprived of participation in the U.S. sugar quota, an insignificant penalty because the U.S. quota was so small.

21. Article 7 of the 1991 Sugarcane Decree designated the *Junta de Conciliación y Arbitraje de Controversias Azucareras* (“JCACA” or “Junta”) as the competent authority to resolve economic disputes between the mills and the *cañeros*. It is a matter of record that:

- SAGARPA controls the budget of the JCACA;²⁰
- the Government held two of the six seats in the JCACA and casts the deciding vote;²¹ and
- JCACA decisions are binding by virtue of law and contract.²²

22. The record shows that the *cañeros* sued the mills in connection with the failure to comply with export quotas,²³ and that the Government-controlled JCACA failed to adjudicate the lawsuits filed by the *cañeros* to enforce the penalty price against delinquent firms.²⁴

23. It is also not disputed that the Mexican Government’s two mills, Santa Rosalía and La Joya, notoriously and drastically failed to meet their export obligations.²⁵ Thus, Mexico not only

²⁰ *Juez Séptimo de Distrito en Materia Civil en el Distrito Federal* (“Seventh Civil District Judge”), Proceeding No. EXP 133/99 (2 December 1999) (Exh. C-124).

²¹ Mexico’s Statement of Defense at para. 74. The President of the JCACA in fact has recently referred to this authority to cast the deciding vote in a submission to a federal judge. *Juez Séptimo de Distrito en Materia Civil en el Distrito Federal* (“Seventh Civil District Judge”), Proceeding No. EXP 133/99 at 7-8 (2 December 1999) (Exh. C-124).

²² See Sugarcane Decree, Articles 5 and 7 (31 May 1991) (Exh. C-20); *Contrato Uniforme de Siembra, Cultivo, Cosecha, Entrega y Recepción de Caña de Azúcar* (Exh. C-22).

²³ See GAMI’s Reply at para. 35 (citing Exhibits C-28 and C-29).

²⁴ *Cañeros’ Suit* filed before the JCACA on 4 December 2000 re: Non-Compliance on the Part of the Mills with Export Quota Requirements in the 1998/1999 Harvest (Exh. C-28); *Cañeros’ Suit* filed before the JCACA on 4 December 2000 re: Non-Compliance on the Part of the Mills with Export Quota Requirements in the 1999/2000 Harvest (Exh. C-29); see also GAMI’s Reply at para. 35; Romero Statement at 6 (Exh. C-113); Cortina Witness Statement at para. 18 (Exh. C-18) (“Cortina First Statement”); Antonius First Expert Report at 32 (Exh. C-19); Santos, Tr. at 133:10-12.

²⁵ See GAMI’s Reply at paras. 37-38.

failed to apply the 1997 *Acuerdo* in its capacity as a regulator of the sugar market, it also directly violated the requirements of the *Acuerdo* in its capacity as a participant in the sugar market.

Messrs. Santos and Cortina both testified without challenge that the failure of the two Government mills to comply set a poor example for the rest of the industry, contributing to the sense that noncompliance would not be punished.²⁶

24. The evidence confirms that increasing numbers of private mills (but not those of GAM), doubtless observing the absence of punishment for non-compliance and the Government's own non-compliance, failed to comply. During the 1997-1998 harvest, 10 mills (including the two Government-owned mills) failed to export their respective quotas; by the next harvest (1998-1999) the number had increased to 19 and by the 2000-2001 season it had reached 30, always including La Joya and Santa Rosalía.²⁷

25. Testimony also confirmed the negative effect of the Government's failure to take effectual action against CAZE's failures to meet its export commitments. Mexico does not deny that it was aware of CAZE's fraud as early as October of 1999.²⁸ Mr. Santos testified that the CAZE situation was further discussed at a meeting held in November of 1999 with the participation of the Ministers of SECOFI, SAGARPA, Finance and Labor.²⁹ At the meeting, the Government officials indicated that no action could be taken against CAZE before the end of the

²⁶ Santos, Tr. at 133:10-15, 137:19-138:4; Witness Statement of Alberto Santos at para. 11 (Exh. C-114) ("Santos Statement"); Cortina, Tr. at 229:2-7.

²⁷ See GAMI's Reply at para. 38 (citing Exhibits C-31 and C-32); GAMI's Statement of Claim at paras. 53-54; *see also* Santos, Tr. at 189:14-190:2 (nothing that there was non-compliance); Pinto, Tr. at 505:19-506:2; Romero Statement at 6-7 (Exh. C-113).

²⁸ Letter from CNIAA to the Minister of Commerce (27 October 1999) (Exh. C-126).

²⁹ Santos Statement at paras. 10-11 (Exh. C-114).

fiscal year.³⁰ On 14 December 1999, the *Cámara Nacional de las Industrias Azucarera y Alcohólica* (“CNIAA” or “Chamber”) addressed another letter to the Minister of Trade confirming its request for Government action.³¹ By the end of 1999, the Government had still taken no action, despite the fact that it was by that time clear that CAZE had falsified documents to make a phony claim to have met its export requirements.³² Mr. Santos confirmed that Mexico turned a blind eye toward the export problem, testifying that even after the Chamber gave the Government specific information about the CAZE fraud, Mexican officials told him and other members of the Chamber that “the case was closed, there’s nothing to be done, and we should forget about it . . .”³³

26. Although Mexico asserts that it took criminal action after the expropriation, the reality of the market for a commodity such as sugar is that action must be timely, and belated prosecutions will not solve the problem in the market. As testified by Chief Justice Schmill, Mexico had ample authority to intervene, but Mexico did not do so in a timely manner to protect the public interest that had been harmed by CAZE.³⁴

³⁰ *See id.*

³¹ Letter from CNIAA to the Minister of Commerce (14 December 1999) (Exh. C-127).

³² Santos Statement at paras. 10-11 (Exh. C-114).

³³ Santos, Tr. at 134:19-135:8, *see also id.* at 134:13-137:1, 140:10-141:11, 172:4-9, 175:6-20.

³⁴ Expert Opinion of Former Chief Justice Ulises Schmill Ordoñez at paras. 82 and 103 (Exh. C-110) (“Schmill Opinion”).

3. Production Controls

27. Mexico was also required to establish production controls, and failed to do so. There is no question that the 1998 *Acuerdo* required the Government to determine per mill base production levels starting with the 1997-1998 harvest.

SECOFI and SAGAR, hearing the opinion of the [CAA] *shall define a base production level per sugar mill as of the 1997-1998 harvest . . .*³⁵

28. While the 1998 *Acuerdo* provided for consultation with the CAA, Chief Justice Schmill's testimony that the Government was under a legal obligation to act stands unchallenged.³⁶ The obligation to consult the CAA does not give the CAA a veto over the Government's obligation to issue base production levels nor even obligate the Government to follow the CAA's advice. However, once more, the record is clear that Mexico waited 21 months after issuance of the 1998 *Acuerdo* to even convene the CAA,³⁷ and for two consecutive harvests the Government failed to set base production levels.³⁸

³⁵ Article 3 of the 1997 *Acuerdo* as amended by the 1998 *Acuerdo*, (Exh. C-25) (emphasis added); *see also id.* at sixth transitory ("For purposes of article 3 . . . SECOFI and SAGARPA, hearing the opinion of the CAA shall define *no later* than October 1 the base production level per sugar mill for each harvest year.") (emphasis added).

³⁶ *See* Schmill Opinion at para. 85 (Exh. C-110).

³⁷ *See* Actas del Comité de la Agroindustria Azucarera: Acta No. 39/2/ORD/96, de fecha 14 de mayo de 1996; Acta No. 40/1/ORD/99, de fecha 16 de diciembre de 1999; Acta No. 41/1/ORD/2000, de fecha 7 de febrero de 2000; Acta No. 42/2/ORD/2000, de fecha 29 de noviembre de 2000; Acta No. 43/1/Ext/01, de fecha 24 de mayo de 2001; Acta No. 44/2/ORD/01, de fecha 7 de junio de 2001 (Exh. R-76). Mexico's letter of 2 February 2004 confirms that it provided GAMI all the minutes of meetings of the CAA for the 1996-2001 period.

³⁸ Cortina, Tr. at 240:13-242:14; Cortina First Statement at para. 19 (Exh. C-18); Cortina Second Statement at paras. 6-7 (Exh. C-115); Santos, Tr. at 195:7-13; Santos Statement at para. 13 (Exh. C-114).

29. Mexico has tried to defend its failure by asserting that it “implemented” base production levels through the 2000 *Acuerdo*, by providing at least GAM its level in a private meeting in which a GAM employee was allegedly shown GAM’s number.³⁹

30. As the record shows, this defense fails at several levels. The 1998 *Acuerdo* calls for determination of the base production levels by SECOFI and SAGARPA by 1 October 1998, not March of 2000. Mexico tries to imply the delay resulted from the CAA failing to reach consensus, but this fails because the *Acuerdo* manifestly requires the Government, not the CAA to set the levels. The CAA’s role is to advise. Further, the base production levels table attached to Mr. Adalberto Gonzalez’s written statement⁴⁰ was signed only by the Government and the cane growers, was never published, and was never before this arbitration made available to GAM.⁴¹ Mr. Pinto claims that the list was available at the Chamber, but that is contradicted by Mr. Cortina.⁴² There is no corroborating evidence for Mr. Pinto’s recollections, and further, there has been no explanation as to why this list, if it was available, was signed only by the Government and the cane growers. Mexico provided no documentary evidence that it actually delivered the table included in Exhibit R-28 to any mill, including Beta San Miguel.

³⁹ Mexico’s Statement of Defense at paras. 111-112.

⁴⁰ Testimonio de Adalberto Gonzalez Hernández (Exh. R-28).

⁴¹ Cortina Second Statement at paras. 6-7 (Exh. C-115); Cortina, Tr. at 244:4-14, 301:2-9.

⁴² *See, e.g.*, Cortina, Tr. at 244:4-14 (“ARBITRATOR REISMAN: Let me just make sure I understand completely your second statement. You say Mr. [Adalberto González] asserts that the final base production levels, quoting, the final base production levels were made available to a representative of GAM in early 2000. And your testimony is that is not correct? THE WITNESS: That is not correct. We never got any sort of official paper nor official proposal nor official anything regarding base production levels.”); Cortina Second Statement at paras. 6-7 (Exh. C-115).

31. In addition, paragraph 3 of Article 2 of the 2000 *Acuerdo* also required the Government to issue rules for the operation of the mechanism set out in paragraphs 1 and 2 to limit per mill production levels:

. . . [SECOFI and SAGAR], upon hearing the opinion of the [CAA] *shall draw up corresponding rules of operation for setting and applying said figures of paragraphs 1 and 2 of Article 2*. . .⁴³

These rules were never issued and, without them, it was impossible to apply and enforce the 2000 *Acuerdo*.⁴⁴

32. Absent official, reliable and publicly available data and enforcement transparency, there could be no shared sense that all must comply and that violators would be punished. Mexico in particular has not explained how it expected to enforce production limits when it could not even prove that it had disseminated official, comprehensive, industry-wide numbers.

B. Seeking Public Support And Consensus Did Not Relieve Mexico Of Its Legal Duty To Enforce And Respect The 1991 Sugarcane Decree And Its Implementing Acuerdos

33. At the hearing, Mexico continued to argue that the failings of the sugar program were a result of the lack of consensus among the industry, the *cañeros* and the Government.⁴⁵ GAMI has not disputed the desirability of a Government seeking public support for its policies,

⁴³ 2000 *Acuerdo*, article 2 (Exh. C-33) (emphasis added).

⁴⁴ Schmill Opinion at para. 99 (Exh. C-110); Romero Statement at 10 (Exh. C-113); Cortina First Statement at para. 19 (Exh. C-18).

⁴⁵ *See, e.g.*, Perezcano, Tr. at 607:8-14, 615:9-616:11.

including industry and *cañero* consensus, but the search for consensus does not justify the failure to carry out the Government's responsibilities under the Decreto and the *Acuerdos*.⁴⁶

34. As GAMI has previously pointed out, the Government's own statement defending the expropriation before a federal judge recognizes the Government's duty to prevent the sale of surplus production in the domestic market:

Esta actividad, la agroindustrial, debe estar adecuadamente supervisada por el Estado, para que se produzca lo que se requiera para el consumo interno, y además, para que cada uno de los ingenios cumplan con la cuota de exportación a la que se encuentran obligados
...⁴⁷

35. Mexico's professed desire for consensus is also difficult to reconcile with the failure of Mexico even to convene the CAA between May of 1996 and December of 1999.⁴⁸ It bears emphasis also that this was precisely the time period in which the Government, not the CAA, issued the 1997 and the 1998 *Acuerdos*.

⁴⁶ Decreto por el que se Aprueba el Plan Nacional de Desarrollo 1989-1994, Diario Oficial de la Federación ("Diario Oficial") (31 May 1989), section 4.4.1 at para. 4 (Exh. R-73). Again, Mr. Sempé's position that compliance with the provisions of the 1991 Sugarcane Decree and its implementing *Acuerdos* was optional for the mills and the *cañeros*, section II, *see* Opinión Jurídica de Carlos Sempé Minvielle at para. 3 (Exh. R-82), is untenable and it would lead to absurd conclusions. Mills would be absolutely free to underpay *cañeros* in their purchases of sugarcane and there would be no restriction on the ability of mills to produce and sell as much sugar as they desired in the domestic market. The failure of both mills and *cañeros* that would result from low prices and domestic oversupply would therefore be an acceptable outcome under the 1991 Decree and its implementing *Acuerdos*.

⁴⁷ Letter to the Tribunal (27 Feb. 2004) ("This activity, the agro industry, should be adequately supervised by the State, so that it produces that which is required by internal consumption, and moreover, so that each of the mills complies with the export quota to which it is obligated.").

⁴⁸ Exhibit R-76 contains the minutes for these two consecutive meetings. Further, we have already stated that the *Plan Nacional de Desarrollo* on which Mexico relies in fact supports GAMI's case. This 1989 - 1994 national plan clearly provides that the Government *must* exercise its authority to protect the public interest where it is not possible to achieve consensus.

36. Finally, Mexico's own actions after the expropriation are inconsistent with Mexico's claim to need consensus to act. In the post-expropriation period, the Government assumed direct responsibility for adjustment of the reference price.⁴⁹

C. The Problems Experienced By GAM And Most Of The Mexican Sugar Industry Were The Fault Of The Government, And Not Other Factors

37. Mexico argued at the hearing that the harm to GAMI's investment was caused by factors other than Government malfeasance and nonfeasance, putting forth various factors that it claimed contributed to the damage in GAMI's investment prior to September 2001. These included: the importation of high fructose corn syrup ("HFCS"); the alleged lack of working capital financing; GAM allegedly selling at "below market" prices; low international prices; and the alleged effects of the 600,000 tons of sugar warehoused in 1998 in expectation of export to the higher priced U.S. market.⁵⁰ Of course, these arguments miss the main point – that the Mexican sugar regime, like sugar programs of many nations, is designed to isolate the domestic

⁴⁹ *Determinación del Precio de Referencia del Azúcar para el Pago de la Caña de Azúcar Durante La Zafra 2002/2003*, Diario Oficial (14 April 2003) (Exh. C-152). This *Acuerdo* was issued by the Ministry of Economy and SAGARPA, *inter alia*, in application of their authority under the *Ley Orgánica de la Administración Pública Federal*. This is precisely the legal grounds that Chief Justice Schmill testified were available for Government action. Schmill Opinion at para. 33 (Exh. C-110). Chief Justice Schmill did not advocate recourse to "implicit powers" as wrongly suggested by Mexico and Mr. Sempé. Mexico's Rejoinder at para. 23; Opinión Jurídica de Carlos Sempé Minvielle at 4 (Exh. R-82).

⁵⁰ See Mowatt, Tr. at 679:5-10 (HFCS imports), 680:5-17 (lack of financing), 681:2-5 (GAM's below market sales), 677:16-18 (low international prices), 678:5-9 (the 600,000 tons of warehoused sugar). GAMI also notes that Mexico's list of other factors has changed over the course of this proceeding. For instance, Mexico argued in its Statement of Defense that the national financial crisis and alleged (but never specified) inefficiencies in GAM's operations contributed to GAM's problems – arguments that Mexico has apparently now abandoned. Compare Mexico's Statement of Defense at paras. 32 and 142, with Mowatt, Tr. at 680:10-20. See also GAMI's Reply at paras. 52-53 (responding to these unfounded allegations).

sugar market from external factors, adjusting domestic supply to maintain supported prices.⁵¹ Thus, if the program had been implemented and enforced in accordance with Mexican law, these other factors allegedly by Mexico, to the extent they existed, would have been offset by the sugar laws, properly implemented and enforced. Accordingly, to the extent that any of these other factors had any price-depressing effect in the domestic market – which is doubtful for reasons noted previously and below – the sugar program should have adjusted for them, and to the extent it did not, that was the Government’s fault for failing to implement and enforce the sugar program. In effect, Mexico contends that this Tribunal consider that other factors share the blame for the sugar industry crisis because Mexico’s failure to implement and enforce the sugar program enabled these other factors to influence the domestic market. Such an argument must fail.

1. Mexico’s Failure To Enforce And Implement The Sugar Program Caused The Financial Crisis Prior To The Expropriation

38. Mexico’s refusal to enforce the export requirements, implement the base production levels, or allow the reference price to be adjusted resulted in the elimination of GAM’s refining margin. At the hearing, Mexico itself conceded that such non-compliance was a factor causing damage to GAM’s profitability.⁵² Notwithstanding this concession, Mexico still urges that non-compliance with export requirements was not significant enough to account for the industry’s

⁵¹ *See, e.g.*, Antonius First Expert Report at 4 (Exh. C-19) (“[T]he high levels of protection mentioned above have isolated important sugar producing sectors from the full impact of world prices, both by setting or guaranteeing prices determined irrespective of market forces and implementing preferential international trading agreements, such as the US quota system, that sidestep the world market.”).

⁵² *See* Mowatt, Tr. at 651:2-5.

financial crisis.⁵³ Mexico bases this entire line of reasoning on a single chart in Mr. García's expert report.⁵⁴ Mr. García's conclusions, however, are unsupported by any documentation and contradict both the documentary evidence in the record and the testimony of numerous witnesses, including Mexico's.

39. For example, without any supporting documentation, Mr. García claims that during the 1999/2000 harvest non-compliance with export requirements industry-wide amounted to only 13,092 tons, or 0.3% of domestic sweetener consumption.⁵⁵ This data cannot be reconciled with official export compliance documentation contained in the record,⁵⁶ the veracity of which Mexico has never disputed. Specifically, Exhibit C-31 shows that total production for just the CAZE Group alone for the 1999/2000 harvest was 1,050,056 tons. Assuming an export quota of 10 percent, CAZE was required to export at least 100,000 tons during this harvest.⁵⁷ However, Exhibit C-31 also shows a CAZE weighted-average compliance rate of only 56.72%, meaning that collectively CAZE's nine mills alone failed to export over 40,000 tons in 1999/2000. Thus, the deficiency of just one group far exceeded the 13,000 tons that Mr. García claims that the

⁵³ *See id.*

⁵⁴ *See id.* at 655:20-656:4; FGA Reply Report at 6 (Exh. R-85).

⁵⁵ *See id.*

⁵⁶ *See* Export Quota Compliance Chart 1996/1997 – 1999/2000 (Exh. C-31); Export Quota Compliance Chart 2000/2001 (Exh. C-32).

⁵⁷ This figure is in line with CAZE's export quota in the previous harvest which accounted for at least 129,260 tons. *See* Letter from CNIAA to the Minister of Commerce (27 October 1999) (Exh. C-126) (listing CAZE's fraudulent export totals as 109,529 tons for 1996/1997, 72,017 tons for 1997/1998 and 129,260 tons for 1998/1999).

entire industry failed to export.⁵⁸ Moreover, as GAMI has previously demonstrated, in addition to CAZE's nine mills, 10 other mills failed to fulfill their exports requirements that year as well.⁵⁹ Of course, the fact that there is now disagreement over the export numbers further highlights GAMI's position that Mexico was not producing timely and consistently accurate data to allow compliance and enforcement of the program.

40. But export compliance was far from the only area in which the Government's administration of the sugar program fell short. As set out in detail section III.A above, Mexico did not determine or implement base production levels and it also frustrated the mechanism for the adjustment of the reference price by withholding data that it was compelled by law to provide. With regard to the base production levels, Mexico puts forward no evidence either that production dropped in 2000 or 2001 following the alleged release of the figures or that exports increased because production exceeded those Government set ceilings.⁶⁰ Further, there is no dispute that the reference price was never adjusted even though the mills' refining margin was being squeezed between the relatively high cane prices and low domestic and international prices.

41. GAMI's expert and all three of the millers who appeared before the Tribunal agreed that non-compliance with the sugar program was the central factor causing the crisis in the sugar

⁵⁸ Although GAM's Form 20-F Annual Report of 2000 contained similar data, as Mr. Cortina explained at the hearing, that represented nothing more than the best "information we had available at that time." Cortina, Tr. at 275:6-7. As subsequent events and data illustrate, the actual export compliance was far worse than GAM knew at the time.

⁵⁹ See GAMI's Reply at para. 38.

⁶⁰ In fact, as GAMI has already demonstrated, the surface area under cultivation for a number of mills actually increased, not the decreased between the 1997/1998 and 2001/2002 harvests. See GAMI's Reply at n.101 (citing exhibits C-128 and C-129).

industry. Thus, Mr. Antonius stated in his First Expert Report that Mexico's general failure to enforce and implement the sugar program in accordance with the 1997 and 1998 *Acuerdos* was the "primary reason" for the financial crisis in the industry prior to September 2001.⁶¹ Similarly, in response to Mexico's argument that other factors contributed to the damage to GAMI's investment, Mr. Antonius stated in his Rebuttal Expert Report that:

The conclusion, therefore, made in my report "The Mexican Sugar Industry 1991-2001" is correct. Namely, if the *Acuerdos* had been applied, the domestic price in Mexico would have been greater than it was (as sugar would have been exported), and the price of cane would have been lower (through the application of the weighted average formula). The *key factor* behind the deterioration in the viability of the Mexican sugar sector during the period of the GAMI investment continues to be the lack of application of the *Acuerdos*.⁶²

42. Mr. Santos testified that rampant non-compliance with export requirements and the failure to establish base production levels were the critical reasons why the industry was in a state of crisis prior to September 2001.⁶³ Similarly, both Mr. Cortina and Mr. Pinto testified that

⁶¹ Antonius First Expert Report at 29 (Exh. C-19) ("The pricing system put in place in the 1997 and 1998 *Acuerdos* did not resolve the crisis in the Mexican sugar sector, because the Government failed to implement it. The primary reason behind this result was that the *Acuerdos* were not respected.").

⁶² Antonius Rebuttal Expert Report at 5 (Exh. C-112) (emphasis added); *id.* at 9 (stating that "[t]he problem mills faced was the lack of application of the *Acuerdos*. This then led to increased financial constraint, which then led to lower prices. To ignore the first part of this process is to ignore the actual cause.").

⁶³ Santos, Tr. at 136:16-137:1 ("So, it's quite clear from me, very clear, that the Mexican Government agencies of the executive in charge of applying legal rules that they themselves approved did not comply with the main responsibility of punishing those not exporting and by not establishing basic [sic] production levels to all 62 mills."); Santos Statement at paras. 10-13; *see also* Romero Statement at 6-10 (Exh. C-113) (discussing the Government's failure to enforce the export requirements or implement the base production level program in a in a timely fashion); Cortina Second Statement at paras. 6-9.

the critical difference between the crisis that preceded September 2001 and the “orderly” market that followed is the fact that export compliance has been much better since September 2001.⁶⁴

43. Taken as a whole, the documentary evidence on the record, Mr. Antonius’ two expert reports, the witness statements, and the testimony at the hearing, the conclusion is beyond dispute: Mexico’s failure to enforce and implement the sugar program as required by Mexican law was the major contributing factor to the financial crisis in the sugar industry that preceded the expropriation in September 2001.

2. To The Extent That These Other Factors Had Any Effect On GAM’s Operations, They Were The Result Of Mexico’s Non-Compliance

a. HFCS Imports

44. In both his report and oral testimony, Mexico’s valuation expert, Mr. García, stated that “one of the main reasons” for the price depression in the years leading up to the expropriation was the market penetration of HFCS.⁶⁵ However, shortly after making this statement, Mr. García admitted: (1) that between 1995 and 1998, when the market share of HFCS more than doubled

⁶⁴ Lacarte & Cortina, Tr. at 236:11-19 (“ARBITRATOR LACARTE: And so they are complying with the commitment they had vis-a-vis the world market? THE WITNESS: Yes, even though we were probably not there, and we haven’t been in the last meetings where these subjects are dealt with. I understand that both the Government and the private sector really observed the commitments for export in 2002.”); Reisman & Pinto, Tr. at 505:19-506:18 (“THE WITNESS: . . . I would say there were a number of circumstances. On the one hand, there was a glut in the market of sugar that had to be exported according to certain regulations. *Not all sugar factories were complying with this.* . . . ARBITRATOR REISMAN: Let me make sure that I understand the answer. The first reason was that the glut in the market was reduced by exporting and that prior to September 2001, a significant number of firms had not exported. THE WITNESS: *That is correct.*) (emphasis added); *see also* Perezcano & Pinto, Tr. at 504:4-13 (“Q. Mr. Pinto, what was the reason why prices recovered after the expropriation of the mills, in your opinion? A. The organization of the market. Q. And What does the organization of the market entail? A. That supply and demand reached equilibrium, and the excess supply stopped, ceased to exist, and exports were made at that time, and the market adjusted.”).

⁶⁵ García, Tr. at 396:11-397:1; *see also* Mowatt, Tr. at 679:5-10.

in Mexico, GAM remained profitable (once its extraordinary expenses were accounted for),⁶⁶ and (2) later, when HFCS consumption was level or declining as a portion of domestic consumption of sweeteners, GAM suffered significant losses. Questioned subsequently about these relationships by Arbitrator Reisman, Mr. García was forced to concede that in fact imports of HFCS were “not a very good correlator of the operating results of GAM.”⁶⁷

b. The Lack Of Credit

45. At the hearing, Mr. Mowatt also claimed that the lack of credit significantly impacted GAM’s operations.⁶⁸ There was a credit crunch for the sugar industry, but it did not coincide with the national availability of credit, and it was the result, not the cause of the depressed sugar prices prevailing as a result of the Government’s malfeasance. As Mr. Santos explained, and as the record supports, 1996 was a very good year for the industry and a year which neither GAM nor its competitors faced a credit crunch, notwithstanding the fact that during this same year the country as a whole was in the midst of a financial crisis.⁶⁹ In fact, it was not until the latter part of 1998, when conditions in the sugar industry worsened, that the banks stopped lending money to the sugar industry.⁷⁰ Further, Mr. García testified that the banks pulled out entirely and did not resume lending to the sugar industry until 2003, at least a full year after the return of profitability post-expropriation.⁷¹ According to Mr. García, the banks’ decision on whether to

⁶⁶ Compare Cortina, Tr. at 292:11-294:1, with García, Tr. at 398:11-399:4.

⁶⁷ Reisman & García, Tr. at 439:3-17.

⁶⁸ See Mowatt, Tr. at 680:16-20.

⁶⁹ Santos, Tr. at 185:2-3.

⁷⁰ Santos, Tr. at 186:2-3 (stating that the banks did not pull out of the market until 1998-1999).

⁷¹ García, Tr. at 435:4-8.

loan money to the mills is based on their “perception” of the health of the sugar market.⁷² In other words, the financing follows the prices, not the other way around.

c. GAM’s “Below Market” Sales

46. Although Mexico has repeatedly tried to establish that GAM, due to its indebtedness, contributed to its own financial problems by selling “below market,” it has still not put forward any evidence whatsoever that this in fact happened. Mr. Cortina, GAM’s CEO, put these unfounded allegations to rest:

Q. And there is other evidence in the case, sir, I think consistent with this, that after the company began to feel a liquidity crisis coming on or once it was experiencing one, it was selling at below market prices; is that correct? Or at depressed prices, as you've said here.

A. At depressed prices because, you know, we were--we are a rational company, and sugar is a commodity, and you sell at whatever price the market gives you at that given moment in time.

Q. But when you say "depressed times," you mean below the market; isn't that right?

A. *No, I mean the market price was depressed.* Sugar prices for--starting in '97, started to decrease every year, and in 1999 and 2000 it got even worse, the price declines than we were experiencing, especially in the first part of the year when, as you stated earlier, in our 20-F, I think it was, you have to pay the cane that you process in six months while you sell your sugar over a 12-month period, and obviously if there is no working capital financing, there is even more supply out there in the first six months of the year, which further depressed prices.⁷³

⁷² García, Tr. at 432:16-433:3 (“Now, I should say, and this is just a perception that with the problems with the sugar industry, the commercial banks began to move out of the market, perceiving that the quality of the creditworthiness of the sugar mills was declining. Indeed, when GAM bought its discount debt and then went into suspensión de pagos, I think that the bank, then private banks pulled out, then there was a new suspensión de pagos.”).

⁷³ Mowatt & Cortina, Tr. at 277:13-278:15 (emphasis added).

d. Low International Prices

47. As Navigant's Valuation Report explained, international prices for sugar remained very low during the 1990's and actually were falling between November 1997 and September 2001.⁷⁴ The world price for this commodity has historically been very low and for this reason, sugar producing countries such as Mexico and the United States have created sugar programs to isolate their domestic sugar prices from the effect of world prices.⁷⁵ Prior to the seizure of GAM's mills, however, Mexico's poor enforcement and implementation of the program exposed the mills that were complying with their export requirements to the low international prices because these mills could neither reduce their cane cost nor recoup their losses suffered on international sales in the domestic market. Mr. Cortina made this point very clear.

Q. And it was true, then, that the company's problems, its liquidity crisis were from both domestic price suppression and international price suppression?

A. Correct. Domestic prices, for obvious reasons, was having an effect on the company, and international prices, since we weren't able to transfer the cost to the cane growers by having to export more sugar and transferring the lower cost or adjusting the price formula within the cane formula for payment of the sugarcane growers that would reflect a higher export number, obviously international prices were affecting us.⁷⁶

⁷⁴ See Navigant Valuation Report, exhibit 4.1 (Exh. C-26); Antonius Rebuttal Expert Report at 5 (Exh. C-112); see also Antonius First Expert Report at 23-24 (Exh. C-19) (noting that the price for cane in Mexico exceeds the prevailing world price for sugar); Pinto, Tr. at 513:16-18 ("Prices in the world market are always lower than the prices from the U.S. market.").

⁷⁵ See Antonius First Expert Report at 7-8 (Exh. C-19).

⁷⁶ Mowatt & Cortina, Tr. at 271:21-272:12.

Mr. Cortina's testimony confirms exactly both GAMI's position and the position of Mr. Antonius, an unquestioned expert in the field.⁷⁷

e. The 600,000 Tons Of Sugar

48. Finally, Mexico contends that 600,000 tons of sugar which had been stored pending the anticipated opening of the U.S. market (which never came) is an "unknown" causation factor.⁷⁸ According to GAM's SEC filing, in 1998 the Mexican Government proposed to warehouse 600,000 tons anticipating that access to the U.S. market would increase substantially in 2000.⁷⁹ Prior to the record closing, Mexico put in no evidence on whether this amount was actually put aside and if so, what happened to it given that the United States has reduced, not increased, imports of Mexican sugar.⁸⁰ In fact, Mexico freely concedes that not only does it not know what happened to this sugar, nor what effect it had on the crisis affecting the GAM mills in the years prior to the expropriation (if any), it speculates that maybe no one would know this information.⁸¹ This is, therefore, just another unfounded allegation that the Tribunal should ignore.

⁷⁷ See Antonius First Expert Report at 30 (Exh. C-19); Antonius Rebuttal Expert Report at 6 (Exh. C-112); GAMI's Statement of Claim at paras. 61-62; GAMI's Reply at paras. 54-57.

⁷⁸ Mowatt, Tr. at 678:6-7; *see also id.* at 651:12-652:4.

⁷⁹ Form 20-F Annual Report presentado por GAM en La SEC para el ejercicio de 2000 ("SEC Report") at 13 (Exh. R-57).

⁸⁰ See Pinto, Tr. at 516:20-517:3 (stating that currently the United States only allows a quota of 7,000 tons of Mexican sugar to be imported and that this is "practically zero.").

⁸¹ See Mowatt, Tr. at 678:17-19.

3. The Improved Market Conditions Since September 2001 Demonstrate That A Properly Functioning Sugar Program Renders External Pressures Essentially Irrelevant

49. As discussed more fully in response to Question A and C, after seizing almost half of the mills in the industry, compliance with the sugar program increased dramatically, which led directly to a significant and lasting increase in the domestic price.⁸² This occurred even though numerous factors that Mexico claims helped cause the crisis prior to the expropriation remained unchanged or have even worsened since September 2001, including low international prices and the lack of available credit (at least through 2002).⁸³ The testimony of witnesses for both parties confirms that the improvement in the market was the result of increased compliance, a return to “order” and a will to conform, precisely what was lacking prior to the expropriation.⁸⁴

50. The only other significant driver of higher domestic sugar prices cited by Mexico is the imposition in 2002 of a tax on beverages using HFCS – a measure aimed at deterring conversion from sugar to HFCS as a sweetener of soft drinks. The effects of that tax on sugar consumption, however, were largely offset by the almost total elimination of Mexico’s access to the U.S. sugar market.⁸⁵ Accordingly, the evidence shows that resumption of export compliance after the expropriation was the most significant driver of the financial recovery of the industry.

⁸² See *infra*, section VI.B.

⁸³ See *supra* section II.C.2.

⁸⁴ See *infra* para 114.

⁸⁵ See Pinto, Tr. at 513:18-20, 516:16-517:3 (stating that the NAFTA quota is “practically zero” after the United States reduced the quota from 148,000 to 7,000 tons in response to Mexico’s imposition of the HFCS tax).

D. Mexico's Failure To Implement And Enforce The Sugar Program Constitutes A Violation Of International Law And Article 1105

51. As GAMI explained in its written memorials and at the hearing, Mexico's failures of implementation and enforcement rise to the level of a breach of the requirements of Article 1105. Mexico's actions and inactions largely destroyed the value of GAMI's investment, even before the arbitrary expropriation. Mexico was not required under international law to have a sugar support program, nor would every regulatory deficiency in the implementation of that program rises to the level of a breach of the international law. However, the pattern of behavior here exhibited by Mexico, in the implementation of a law on which the milling industry manifestly depended to survive if it was going to pay the elevated prices for cane required by the Government, was flagrant, devastating, and below the standards required by Article 1105.⁸⁶

III. THE MEXICAN GOVERNMENT EXPROPRIATED GAMI'S SHARES IN GAM WITHOUT A VALID PUBLIC PURPOSE, ARBITRARILY AND DISCRIMINATORILY, AND WITHOUT COMPENSATION IN VIOLATION OF ARTICLE 1110, 1105 AND 1102.

52. There is no question that Mexico indirectly expropriated GAMI's shares in GAM when Mexico expropriated GAM's five sugar mills in September 2001. The testimony and discussion at the hearing established what GAMI has already demonstrated – that Mexico's expropriation of

⁸⁶ GAMI's Statement of Claim at paras. 75-81 (citing *Mondev International, Ltd. v. United States*, Award, ICSID Case No. ARB (AF)/99/2 (11 October 2002) (Exh. C-44), *ADF Group Inc. and the United States of America*, Final Merits Award, ICSID Case No. ARB (AF)/00/1 (9 January 2003) (Exh. C-46); Restatement (Third) of The Foreign Relations Law of the United States 712 (1987) (Exh. C-48); and S. Vasciannie, *The Fair and Equitable Treatment Standard in International Investment Law and Practice*, 70 BYIL 99 (1999) (Exh. C-149)); GAMI's Reply at paras. 101-103 (citing same as well as: *Técnicas Medioambientales Tecmed S.A. v. The United Mexican States*, Case No. ARB (AF)/00/2, Award (May 29, 2003) (Exh. C-150); *Metalclad v. United Mexican States, Metalclad Corporation and the United Mexican States* Award ICSID Case No. ARB (AF)/97/1 (30 August 2000) (Exh. C-79); *Maffezini v. Spain*, ICSID Case No. ARB/97/7, Award on the Merits (November 13, 2000) (Exh. C-151)).

GAMI's investment violated each of the conditions of Article 1110.⁸⁷ The absence of a valid public purpose was confirmed directly by Messrs. Santos and Cortina, and indirectly by Mr. Tapia, Mexico's own witness, who could provide no credible explanation for the expropriation of GAM's mills, a point that was also corroborated as a matter of Mexican law by the Mexican courts. Testimony at the hearing also confirmed that the expropriation was both arbitrary and discriminatory, as neither Mexico nor its witnesses could explain the expropriation of GAM's mills (and GAMI's shares) while other mills (and the shares of their shareholders) were not. The expropriation breached Article 1102 and 1105 for this reason. Finally, GAMI has not received compensation in accordance with the requirements of Article 1110. As GAMI noted in previous submissions, the court-ordered return of three of the five expropriated mills to GAM and the possibility that GAM may obtain financial compensation from the Mexican Government in the future cannot be considered adequate compensation in accordance with NAFTA standards.⁸⁸

53. Mexico's basic defense of its actions has been that the expropriation claim is expunged because GAM has received three of its mills back, and GAM may receive additional compensation in Mexican proceedings under Mexican law.⁸⁹ This action and the possibility of further action on the part of Mexico to compensate GAM does not remedy the breach of Article

⁸⁷ See GAMI's Statement of Claim at paras. 139-146; see also GAMI's Reply at paras. 131-138 (noting in detail the reasons why Mexico did not comply with the following requirements of Article 1110: (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and [NAFTA] Article 1105(1); and (d) on payment of compensation in accordance with paragraphs 2 through 6 of Article 1110).

⁸⁸ See GAMI's Reply at paras. 142-147; Roh, Tr. at 549:16-550:15.

⁸⁹ See Mexico's Rejoinder at para. 81; Perezcano, Tr. at 62:3-4 (stating that "[t]he expropriation has been resolved."); see also *id.* at 68:4-9 ("The collegial court in its judgment of 20 February granted the amparo, and as Mr. González García explained, under the amparo law things are put back--well, the expropriation and all of its effects are rolled back to the situation prior to the expropriation.").

1110 alleged by GAMI in any respect. To the degree the return of three mills (after over two and a half years) and any other compensatory actions Mexico may take under its laws may increase the value of GAM's shares, then conditioning the award on GAMI conveying title to its shares to Mexico safeguards the interests of GAM and its shareholders and assures equity to Mexico and creditors.

A. The Expropriation Of GAM's Mills And GAMI's Shares Had No Valid Public Purpose

54. Testimony at the hearing confirmed what GAMI has argued all along – that Mexico's expropriation had no valid public purpose. For example, in his witness statement, Mr. Tapia claimed various reasons for the expropriation of GAM's mills, however, when questioned at the hearing, he had no knowledge or understanding of the state of GAM's mills at the time of the expropriation nor any basis for his written assertions.⁹⁰ In response to President Paulsson's question as to Mexico's explanation for expropriating the mills, Mr. Santos stated: "To what I understand, to the extent I understand it, there was no rational or logical explanation . . . The reason, I think it was a very serious, very serious, mistake, and now the courts decision is (sic) demonstrated this."⁹¹

55. Indeed, the Mexican courts have found that Mexico's expropriation of GAM's sugar mills failed the public purpose standard of Mexican law.⁹² On 9 February 2004, an appellate

⁹⁰ See Tapia, Tr. at 308:10-330:18.

⁹¹ Santos, Tr. at 143:6-144:5; *see also* GAMI's Statement of Claim at paras. 140-143; GAMI's Reply at paras. 133-135.

⁹² See *Juicio de Amparo Indirecto* 863/2001-III-A, 15 August 2003 at p. 48 (Exh. C-142) (noting "It is evident that the concepts upon which the contested Decree was founded do not rest upon clear and evident concepts that could be considered causes of public purpose, thus it is evident that the Decree breaches, to the disadvantage of the complaining party, the content of Article 27,

court (“Eighth Collegiate Court in Administrative Matters of the First Circuit”) upheld a lower court’s 15 August 2003 ruling and found that “the public purpose rationale invoked to support the administrative procedure was not proven.”⁹³

56. While the Tribunal must apply the Treaty standard of Article 1110, the reasoning of the domestic courts, together with the lack of evidence to back any of the claimed bases for the expropriation in the Administrative Record of the expropriation (discussed below), as well as the testimony at this hearing all demonstrate that Mexico has not shown and could not show a valid public purpose for the expropriation.

B. The Expropriation Of GAM And GAMI’s Share In GAM Was Arbitrary And Discriminatory

57. As GAMI has noted in its memorials and as became evident at the hearing, Mexico could not and cannot justify the expropriation of GAM and GAMI’s shares in GAM on the basis of the criteria listed in the Expropriation Decree.⁹⁴ Moreover, many of the unexpropriated mills were in the same position as GAM or worse off with respect to these criteria, thereby demonstrating

section VI, second paragraph of the Mexican Constitution, thereby requiring this court to grant the *amparo* and solicited protection of the federal judicial system.”) (original Spanish text: “*es evidente que los conceptos en los que se fundó el decreto reclamado, no descansan en conceptos claros y evidentes para considerarlos como causas de utilidad pública, por lo cual resulta evidente que viola en perjuicio de la parte quejosa el contenido del segundo párrafo de la fracción VI, del artículo 27 de la Constitución Política de los Estados Unidos Mexicanos, lo que obliga a conceder el amparo y protección de la justicia federal solicitado*”).

⁹³ Decision of the Eighth Collegiate Court in Administrative Matters of the First Circuit at page 500, attached to Mexico’s Letter to the Tribunal on 1 March 2004 (original Spanish text: “*no se encuentran probadas las causas de utilidad pública invocadas con el procedimiento administrativo formado*”); see also Mexico’s Letter to the Tribunal on 27 February 2004 (stating of the decision: “It is a final decision. There is no other remedy.”) (original Spanish text: “*Es una sentencia definitiva. No existe ya otro recurso.*”).

⁹⁴ See GAMI’s Statement of Claim at para. 97; GAMI’s Reply at paras. 73-85, 104-112.

that Mexico arbitrarily and discriminatorily expropriated GAMI's shares in violation of Articles 1102, 1110(b) and 1105.

C. The Expropriation Was Not Justified By The Criteria Of The Expropriation Decree

58. GAMI has duly noted and refuted each of the criteria set out by Mexico in the Expropriation Decree and Administrative Record for its decision to expropriate the sugar mills.⁹⁵ Mexico, in its letter of 19 May 2003, stated that the Administrative Record contains all documents considered by the Government in connection with its decision to expropriate.⁹⁶

However, GAMI pointed out that in fact very little contained therein pertains to GAM, and even

⁹⁵ See GAMI's Statement of Claim at paras. 96-107; GAMI's Reply at paras. 104-112 (noting and refuting the criteria listed in the Expropriation Decree for the expropriation including: (1) whether the mills were being properly and honestly managed; (2) whether the financial state of the mill placed those whose livelihood depended on it, namely the *cañeros*, at risk; (3) whether the mill would be able to make the necessary repairs for the 2001/2002 harvest; and (4) whether the mill was one with whom the *cañeros* did not want to work); see also GAMI's Reply at para. 73-85 (noting and refuting 8 criteria listed in the Administrative Record – Technical File for the expropriation of GAM's mills: (1) GAM produces approximately 9% of the country's sugar; (2) As of 30 June 2001, GAM's 6 mills owed the Federal Government approximately 450 million pesos; (3) GAM could not receive credit due to its entry into *suspensión de pagos* on 2 May 2000; (4) GAM could not pay its debts to the cane producers, which totaled approximately 463 million pesos; (5) GAM was involved in serious difficulties related to the issuance of bonds to foreign investors in Europe and had to repurchase those bonds with serious losses for the investors that acquired those instruments; (6) The foregoing events affected and continue to affect confidence in the national sugar industry; (7) GAM's financial problems jeopardize the milling of nearly 4 million tons of sugarcane in the next harvest; and (8) The Mexican Central Bank classified GAM's mills with "Letter E" signifying that they cannot be granted credit nor guarantees.)

⁹⁶ See Letter from Mexico to GAMI (19 May 2003) (stating "I confirm that the documents that the competent government entities considered in connection with the expropriation of the sugar mills are integrated in the administrative file for each mill.") (original Spanish text: "*confirmando que los documentos que las dependencias gubernamentales competentes consideraron en conexión con la expropiación de los ingenios azucareros están integrados en el expediente administrativo de cada ingenio*"); see also Mexico's Statement of Defense at para. 151 ("The administrative file comprised by SAGARPA contains technical information that shows the suitability of the expropriated assets to satisfy the public interest upon which the Decree is based. The administrative file is available to interested parties.").

those few pages that do relate to GAM contain out-of-date or incorrect information.⁹⁷ It was an arbitrary act, a violation of due process as well as a violation of the minimum standard of treatment in Article 1105 for Mexico to have made a decision as important as the expropriation of an entire investment on the basis of the incomplete and fundamentally flawed information contained in the Administrative Record.

59. Mexico has failed to refute GAMI's contentions or to provide supporting evidence. Testimony at the hearing only further demonstrated Mexico's errors and its failure to prove that GAM met the announced criteria for expropriation.⁹⁸

60. With regard to whether GAM's mills were being properly and honestly managed, there is not a shred of evidence suggesting that they were not.⁹⁹ The Administrative Record contains no evidence to the contrary, nor did Mexico refute this either in its submissions or at the hearing. Mexico thus had no basis to expropriate GAM and GAMI's shares in GAM under this rationale.

61. Mexico also did not refute either in its submissions or at the hearing that the Administrative Record is simply wrong about a number of crucial pieces of information, without which Mexico has no rational basis for expropriating GAM's mills. First, the record shows that, contrary to the unsupported allegations in the Administrative Record and the witness statement submitted by Mr. Tapia, GAM went to considerable effort prior to the expropriation to ensure

⁹⁷ See GAMI's Statement of Claim at paras. 96-107; GAMI's Reply at paras. 73-85. The blue pages within each of the Administrative Record files (Exh. C-116-120) are those that pertain specifically to GAM.

⁹⁸ See *supra* notes 90-91.

⁹⁹ See GAMI's Statement of Claim at para. 99; GAMI's Reply at para. 106.

that its *cañeros* would receive payment.¹⁰⁰ At the hearing, even Mr. Tapia acknowledged that “sugar had been pledged to cover – to guarantee the payment to the cane growers.”¹⁰¹ Mr. Pinto conceded that Beta San Miguel, which was not expropriated, utilized the same type of sugar pledge.¹⁰² Thus, there was no basis for Mexico to expropriate GAM due to risks to the livelihood of the *cañeros*.

62. The Administrative Record contains no evidence that GAM’s financial condition would have prevented it from repairing its mills prior to the 2001/2002 harvest. Mr. Tapia’s written testimony tried to create the impression that, when Mexico took over GAM’s mills in September 2001, there was a problem with the state of repair in relation to the next harvest.¹⁰³ Any such insinuation was baseless, as became evident in Mr. Tapia’s examination at the hearing. Mr. Tapia was unaware that repairs were well advanced in relation to the actual normal harvest date (as opposed to Mr. Tapia’s erroneous view of that date in his testimony).¹⁰⁴ Mr. Tapia acknowledged that repairs normally are undertaken over a 4-6 month period and that he had no basis to believe that the state of repair as of the expropriation was abnormal or in any way threatened the normal harvest season.¹⁰⁵ Contrary to what Mr. Tapia stated in his witness statement, by the time of the expropriation, GAM’s repairs were indeed financed, scheduled for

¹⁰⁰ See GAMI’s Statement of Claim at paras. 102-103; GAMI’s Reply at paras. 59-68.

¹⁰¹ Tapia, Tr. at 326:4-9.

¹⁰² See Pinto, Tr. at 502:14-503:6.

¹⁰³ Tapia Witness Statement at para. 13.

¹⁰⁴ Compare Tapia Witness Statement at para. 13, with Tapia, Tr. at 313:4-7 and 314:3-6.

¹⁰⁵ See Tapia, Tr. at 322:12-323:8.

completion prior to the commencement of the 2001/2002 harvest, and already well underway.¹⁰⁶
This was confirmed by Mr. Cortina in a letter to Secretary Usabiaga dated 11 October 2001.¹⁰⁷

63. Another criterion of Mexico asserted to justify expropriation in the Expropriation Decree was that the *cañeros* associated with a mill did not wish to work with the owners of the mill. Again, in the case of GAM's mills, nothing in the record suggests such a problem.¹⁰⁸

D. The Expropriation Of GAMI's Investment Was Arbitrary And Discriminatory And Not Justified By Comparison With Investments In Unexpropriated Mills

64. The record also shows the arbitrary and discriminatory nature of Mexico's expropriation when the situation of GAM's mills is compared to that of mills that were not expropriated, in the light of Mexico's claimed criteria for the expropriation. The scantiness of the Administrative record – which Mexico said represented all that was considered in deciding which mills to expropriate – is itself strong proof of arbitrariness. GAMI showed specifically that, in relevant respects, the mills of GAM and of Grupo Beta San Miguel (BSM) were in like circumstances, but those of BSM were not expropriated. GAMI has also shown how in various ways Mexico's own evidence does not correlate with which mills were expropriated and which not.¹⁰⁹ Finally Mexico argued that GAM's entry into *suspensión de pagos* made GAM's circumstances different from all other mills, but GAMI showed, including through the undisputed expert testimony of Mr. Oscós, that *suspension de pagos* if anything made GAM better positioned to weather the

¹⁰⁶ See GAMI's Statement of Claim at para. 102; see also GAMI's Reply at para. 106.

¹⁰⁷ See Letter from Juan Cortina re: Maintenance of GAM Mills (11 October 2001) (Exh. C-57).

¹⁰⁸ See GAMI's Statement of Claim at para. 105.

¹⁰⁹ See GAMI's Statement of Claim at paras. 108-131, 144; GAMI's Reply at paras. 113-130, 136.

sugar industry crisis than unexpropriated mills. Testimony at the hearing confirmed all of these points.

65. While Mr. Pinto argued in his written statement that BSM's circumstances prior to the expropriation were different from those of GAM, testimony at the hearing confirmed that the similarities were far more important and the differences were not salient in regard to the claimed criteria of Mexico for deciding which mills to expropriate. BSM, like GAM, owned five sugar mills, controlled approximately 9% of the market share and had comparable net sales.¹¹⁰ Moreover, as Mr. Pinto conceded at the hearing, BSM, like GAM, was losing money in 2000¹¹¹ and was highly indebted by 2001 as a result of Mexico's failure to administer the sugar regime.¹¹² Mr. Pinto testified that, just a few months prior to the expropriation in September 2001, BSM's funded debt was roughly 1.4 billion pesos compared to GAM's funded debt of roughly 1.3 billion pesos.¹¹³ In addition, BSM, like GAM, pledged sugar to pay certain debts in 2001.¹¹⁴ A review of Table 9, attached to Mr. García's analysis shows that even with regard to basis operating indicators between 1999 and 2001, BSM and GAM were in "like

¹¹⁰ See GAMI's Statement of Claim at para. 117 (citing BSM Financial Statements for 2000 and 2001 at 8 (12 September 2002) (Exh. C-59), Export Quota Compliance Chart 2000/2001 (Exh. C-32); GAM Quarterly Report for Period Ending 30 September 2001 at 22 (Exh. C-16); BSM and GAM Comparative Worksheet for the Third Quarter 2001 (Exh. C-60)).

¹¹¹ See Pinto, Tr. at 487:19-488:1 (agreeing that both GAM and BSM were losing money on operations in 2000).

¹¹² See Pinto, Tr. at 459:20-460:10.

¹¹³ See Pinto, Tr. at 499:15-19; *see also id.* at 500:15-501:2.

¹¹⁴ See Pinto, Tr. at 502:14-503:6.

circumstances.”¹¹⁵ Most importantly, with respect to the debt per ton of production benchmark, which is widely used in the sugar industry, BSM had a debt to production ratio of \$278/ton, compared with GAM’s ratio of \$325/ton.¹¹⁶ Even Mr. Pinto was compelled to concede that by many measures GAM’s finances were no worse than BSM’s, just “different.”¹¹⁷

66. In sum, at the time of the expropriation, BSM was “in like circumstances” with GAM; however, not one of the BSM mills was expropriated. Thus, BSM, and the Mexican investors in BSM were treated more favorably than GAM, and its U.S. investors, GAMI.

67. Other evidence confirms the lack of a rational basis for expropriating GAMI’s investment, but not the investment of Mexican investors in other mills in like circumstances. For example, with regard to the ability to pay *cañeros*, another criterion for the expropriation, the evidence showed that GAM, BSM and Grupo Saenz all made similar arrangements to pay

¹¹⁵ The following are basic average operating indicators for the 1996-2001 harvests taken from Mr. García’s Report (FGA Report at table 9 (exh. R-12)):

	% Saccharose In cane	% Fiber in cane	% Purity of Mixed Juice	TLS %	THTL	TFL	USC	Petroleum expense per ton of sugar (Its)	KSBS/TCN
GAM average	12.936	13.378	81.774	2.362	28.138	9.294	81.674	73.022	109.768
National Average	13.34	13.51	82.65	2.43	26.10	11.47	81.72	149.35	114.37
BSM average	13.218	14.056	79.736	2.704	28.11	13.84	79.488	79.36	111.17

TLS=Total loss of saccharose in cane

THTL = Total harvest time lost

TFL = Total factory loss

USC = Use of saccharose in cane

Source: COAAZUCAR. Results of various harvests. Final Report

¹¹⁶ See GAMI’s Statement of Claim at para. 118 (*comparing* BSM Debt Calculation Worksheet (Exh. C-61), *with* GAM Debt Calculation Worksheet (Exh. C-51)).

¹¹⁷ See Pinto, Tr. at 491:17-20; *see also id.* at 488:9-12 (conceding that both GAM and BSM were losing money); *id.* at 500:15-503:6 (noting that BSM and GAM had similar funded debt, that the effects of the liquidity crisis affected BSM’s finances and that BSM, like GAM, pledged sugar to guarantee payment to the *cañeros*).

cañero debts, yet only GAM and Santos were expropriated.¹¹⁸ Second, the record shows that Mexico expropriated some of the most financially stable mills. For instance, the Administrative Record itself demonstrates that Mexico did not follow its criteria with respect to the rating a mill received; Mexico only expropriated some mills with a “Letter E” rating, while others which had the same rating or even no rating at all due to their poor finances were not expropriated.¹¹⁹ Also, in the case of the mills of Grupo Machado, as Mr. García’s chart shows, Mexico expropriated the four most efficient mills of that group but left the one mill that was struggling financially in the hands of its owner.¹²⁰

68. At the hearing, Mr. Pinto acknowledged that Mexico apparently did not differentiate among the mills on the basis of “improper practices,”¹²¹ stating: “Among the 27 factories that were – that were taken over by the government, some had complied [with the export requirements]. Some had not.”¹²² There is no dispute that GAM complied with its export obligations.

69. With no other coherent rationale, Mexico has tried (*post hoc*) to justify the expropriation of GAM on grounds that GAM was the only mill owner to have entered into *suspensión de pagos*. As GAMI demonstrated in GAMI’s second memorial, however, and as was confirmed in testimony at the hearing, entry into *suspensión de pagos* did not mean as a practical matter or as

¹¹⁸ See Santos, Tr. at 143:6-8.

¹¹⁹ See GAMI’s Reply at paras. 82-84.

¹²⁰ See GAMI’s Reply at para. 83 (citing Exh. R-12 at 33).

¹²¹ Expropriation Decree, preamble at para. 2 (Exh. C-15).

¹²² Pinto, Tr. at 508:7-9.

a legal matter that GAMI was in worse circumstances than other sugar mills that were not expropriated with regard to the criteria of the Expropriation Decree. For instance, Mexico's own expert, Mr. García, conceded that, while GAM was the only holding company that formally entered into *suspensión de pagos*, other mills including BSM and Grupo Saenz were simply ceased paying their debts:

ARBITRATOR LACARTE: Going back to the question of credit, what is your opinion about this issue that when the sugar market suffered deterioration that the least indebted companies and those with the best access to credit were better situated to get past the crisis; is that right?

THE WITNESS: Yes, that is right, Don Julio, but like San Miguel, Grupo Science [sic -- Saenz], and the vast majority, interestingly, have survived because they ceased paying their obligations. In other words, given the lack of liquidity, they opted to default vis-à-vis the banks and continue working. So, I mean to say, well, that *many of the companies were in the same situation or worse than GAM, but in those particular cases, they opted not to go into a formal suspensión de pagos, even though de facto they stopped paying.* And now that good prices have come back with a tax on high fructose corn syrup and it diminishing as prices of the market, the prices have gone back up, and the private sugar mills are doing very well.¹²³

70. As a legal matter, Dario Oscós, in his undisputed expert testimony, aptly noted that, by entering into *suspensión de pagos*, GAM freed up cash flow to pay the *cañeros* and the mill workers and to maintain its equipment.¹²⁴ Mexico's own witness acknowledged that entry into *suspensión de pagos* actually gave GAMI an advantage.¹²⁵ The supervision of the court also is

¹²³ García, Tr. at 439:18-440:17 (emphasis added).

¹²⁴ See Oscós Opinion at paras. 9-10, 39 (Exh. C-111); see also GAMI's Statement of Claim at paras. 102-103; see GAMI's Reply at paras. 61, 69-72, 107-108.

¹²⁵ See Segundo Testimonial de José Pinto Mazal at 1 (Exh. R-84); see also Pinto, Tr. at 470:16-20.

more protective of creditors than simply ceasing to pay debts. Far from justifying worse treatment of GAM and GAMI's investment in GAM, *suspensión de pagos* left GAM better able to cope with payment of *cañeros* and mill repairs, as compared to those who failed to manage their debt. That was demonstrated most graphically when the Independencia mill, which was not expropriated, later went bankrupt despite the improved conditions post-expropriation.¹²⁶

E. The Expropriation of GAM and GAMI's Shares in GAM Was Discriminatory in Violation of Article 1110(b) and Article 1102.

71. The record thus shows that GAMI and its investment in GAM were treated worse than Mexican investors and their investments in other mills in like circumstances that were not expropriated. As GAMI has explained in written memorials and at the hearing, the expropriation of GAMI's investment in GAM, while the investments of Mexican investors in other sugar mills in like circumstances were not expropriated, is inconsistent with Article 1102 and for the same reasons does not meet the test of Article 1110(b).¹²⁷ Mexico argues that GAMI must show an intent to discriminate by nationality, but, as GAMI has explained, Article 1102 creates no such intent test.¹²⁸ Mexico can point to no salient difference of circumstance to explain the less favorable treatment of GAMI and its investment than other Mexican investors and their investments that were not expropriated.

72. Mexico has argued that this does not matter, because GAMI has not shown that Mexico's unfavorable treatment of GAMI was motivated by nationality. With respect, there is no such

¹²⁶ See GAMI's Reply at para. 25 (citing García Statement at 10-14 (Exh. C-113); Exh. R-12, at 33; and 2001 Financial Statement of Independencia Mill (Exh. C-140)).

¹²⁷ See GAMI's Statement of Claim at paras. 108-131, 144; GAMI's Reply at paras. 113-130, 136.

¹²⁸ See GAMI's Reply at paras. 124-130.

intent test, which would undo much of the protection of Article 1102. Accordingly, the Tribunal must find that Mexico has breached Articles 1102 and 1110(b).

F. Mexico’s Arbitrariness Is Contrary To Article 1105

73. Even if Mexico’s actions had not resulted in *de facto* discrimination contrary to Article 1102, the expropriation of GAM’s mills and GAMI’s investment without rational basis either by the standards of Mexico’s Expropriation Decree or by comparison with investments in sugar mills that were not expropriated is grossly arbitrary behavior well below the requirements of Article 1105. A NAFTA Party violates Article 1105 if it engages in arbitrary or discriminatory acts or omissions that impair property or other interests of foreign investors.¹²⁹ As Mr. Santos aptly summed it up: “To what I understand, to the extent I understand it, there was no rational or logical explanation [for what the Government did].”¹³⁰ Such arbitrariness in Mexico’s expropriation process is a violation of the minimum standard of treatment required under international law and Article 1105.¹³¹

IV. MEXICO OWES GAMI COMPENSATION UNDER NAFTA

A. Article 1110 Requires Compensation “Without Delay” That Is “Fully Realizable” And At “Fair Market Value”

74. Mexico has not compensated GAMI for the indirect expropriation of its shares as required by paragraphs 2 through 6 of Article 1110. For this reason alone, the Tribunal should find that Mexico has breached Article 1110.¹³²

¹²⁹ See GAMI’s Statement of Claim at paras. 75-80; GAMI’s Reply at paras. 101-102.

¹³⁰ Santos, Tr. at 143:5-8.

¹³¹ See GAMI’s Statement of Claim at paras. 98-107; GAMI’s Reply at paras. 104-112.

¹³² See GAMI’s Statement of Claim at para. 146; GAMI’s Reply at paras. 138-139.

75. Contrary to Mexico's arguments at the hearing, neither the return of three of its mills to GAM nor the possibility of undefined future compensation under Mexican law expunges the expropriation. The seizure of the five mills in September of 2001 indirectly expropriated GAMI's shares in GAM. By any theory, it is impossible to see how the return of three mills two and one half years later can expunge the expropriation or meet the compensation requirement of Article 1110. The possibility that Mexico may accord future compensation to GAM under Mexican law likewise does not expunge the expropriation or cure the breach for purposes of the NAFTA.

76. There is no requirement for a NAFTA claimant to wait to see what, if any, future compensation may come under local law proceedings, and Mexico cites no authority for that proposition. To take an example, U.S. law provides for compensation under U.S. law standards when the United States expropriates as a matter of U.S. law, but that does not mean that a Mexican investor who believes its investment has been expropriated by the standards of NAFTA must wait to see whether and how much the United States will compensate under U.S. law before bringing a NAFTA complaint.

77. In this proceeding, GAMI has requested nothing more than that which international law and Article 1110 require, namely compensation which fully accounts for the fair market value of GAMI's investment. Mexico seized mills that demonstrably were efficient, well-run and fully capable of being profitable (as they had been before and were again) – if the Government would simply fulfill its duties and utilize its ample authority to run the sugar program properly. International law requires compensation on that basis, not the “fire sale” value of GAMI's shares caused by Mexico's own malfeasance prior to the outright seizure of the mills.

B. Compensation under NAFTA and International Law Requires Adjustment To Account For The Effects Of Mexico's Malfeasance

78. Under NAFTA's Article 1131, the Tribunal must decide the issues in dispute "in accordance with this Agreement and applicable rules of international law." Article 1110 of the NAFTA calls for compensation "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place. . . . Valuation criteria shall include going concern value, asset value, . . . and other criteria, as appropriate, to determine fair market value."

79. Though Mexico never directly provides a "Mexican" valuation of GAMI's investment, Mexico implies that the value should be at or near zero, based on GAM's very difficult circumstances and apparently low stock value (albeit based on few, small stock transactions) just prior to the expropriation.¹³³ That value, however, would not meet NAFTA and international law standards of "fair market value" in circumstances where it was the Government's own conduct that resulted in the deteriorated value of the investment in the period prior to the expropriation. Mexico urged at the hearing that Article 1110 affirmatively precludes consideration other than an unadjusted market valuation.¹³⁴ However, that is wrong as a matter of international law and the NAFTA. Article 1110(2) does not make compensation simply a mechanical calculation of the stock market value of GAMI's shares. That would read the word "fair" out of "fair market value," and ignore basic tenets of international law.

¹³³ See Mexico's Statement of Defense at para. 287, 322; García, Tr. at 340:3-19; FGA Reply Report at 25 (Exh. R-85).

¹³⁴ Mowatt, Tr. at 661:4-662:11.

80. It is a basic principle of international law that a State cannot through its actions or inactions reduce the value of an investment, then expropriate the investment and claim that it owes no more than the depressed value of the investment that the government itself caused. This point is noted in commentary to the Restatement (Second) of the Foreign Relations Law of the United States:

[s]o far as practicable, full value must be determined as of the time of taking, unaffected by the taking, by other related takings, or by conduct attributable to the taking state and having the effect of depressing the value of the property in anticipation of the taking.¹³⁵

81. The reason is apparent, as another authority observed: “[t]o permit a state through its own machinations to deflate the value of an enterprise and then expropriate it and offer compensation at a deflated value, does not amount to adequate compensation.”¹³⁶

82. Precedent for adjusting compensation to remove the effects of the Government’s own actions can be found in international arbitral awards. In *ITT Industries, Inc. v. Iran*, the Tribunal stated that “[i]n computing compensation for expropriated property, the Tribunal must find as best it can the real value at the moment of taking, excluding only any decline in value resulting from the threat of taking or other acts attributable to the Government itself.”¹³⁷ In *Starrett Housing Corp. v. Iran*, the Tribunal noted that “when valuing the property, international law

¹³⁵ Restatement (Second) of the Foreign Relations Law of the United States § 188, comment b at 565 (1965) (emphasis added) (Exh. C-162).

¹³⁶ See Cecil J. Olmstead, *Nationalization of Foreign Property Interests, Particularly Those Subject to Agreements with the State*, 32 N.Y.U. L. Rev. 1122, 1133 (1957) (Exh. C-163). See also Richard B. Lillich, *The Valuation of Nationalized Property in International Law*, Volume IV at 70 (1987) (“As a matter of law, a State may not reduce its obligation to pay compensation simply by creating a situation in which expropriation is feared before it occurs or by breaching contractual or other duties to the foreign investor.”) (Exh. C-164).

¹³⁷ 77 Am. J. Int’l L. 891 at 893 (May 26, 1983) (Exh. C-165).

requires that the expert exclude any diminution in value attributable to wrongful acts of the Government . . . before the date of taking.”¹³⁸ In addition, in *Metalclad v. Mexico*, the Tribunal acknowledged the principle that “where the state has acted contrary to its obligations, any award to the claimant should, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would in all probability have existed if that act had not been committed (the *status quo ante*).”¹³⁹ In that case, the Tribunal considered that it did not have a sufficient basis for determining a discounted cash flow value, because the investment had never operated, but the Tribunal equally did not simply apply a wooden “market value” of an enterprise that, for reasons attributable to government conduct, would have had little or no market value.

83. GAMI’s claim in this proceeding is a particularly compelling case for the application of the principle that valuation should be adjusted to remove the effects of the government’s own conduct. Mexico needed a viable sugar mill industry to meet its stated goal to provide for the livelihood of the *cañeros*, who in turn required mills to have an outlet for their production. The record shows that Mexico expropriated what were, in the opinion of Mexico’s own expert, some of the most “efficient” mills in the industry,¹⁴⁰ but only after having reduced their going concern value to next to nothing by failing to implement and/or abide by the laws of the sugar regime. Mr. Tapia acknowledged at the hearing that, after the expropriation, the GAM mills were an

¹³⁸ 4 Iran -U.S.C.T.R. 122, Interlocutory Award No. ITL 32-24-1 at 28 (December 19, 1983) (Exh. C-156).

¹³⁹ ICSID Case No. ARB(AF)/97/1, Award at para. 122 (August 30, 2000) (Exh. C-79).

¹⁴⁰ In his first report, Mr. García acknowledged that GAM’s mills were “efficient” in their operations. *See* FGA Report at 32-35 (Exh. R-12); *see also* Antonius Rebuttal Expert Report at 5-8 (Exh. C-112); Cortina, Tr. at 233:10-14 (“As we always said, GAM mills are very efficient, and even in 1995, ’96 to 2000, more than \$50 million were invested so they would become more efficient. They are winners, and they’re going to continue being this way.”).

ongoing, profitable enterprise that was financially capable of making cane payments to *cañeros*, completing mill repair work, and satisfying its other obligations, and he further acknowledged that he had no basis for the statements in his written testimony that suggested that GAM could not have met these commitments prior to the expropriation.¹⁴¹

84. GAM had substantial positive cash flow and operating profits in the mid- mid- to late- 1990s, but those operating profits were turned into losses by the Government's failure to implement and enforce measures necessary to maintain the domestic price of sugar at a level that would permit mills to be viable.¹⁴² Ultimately, the Government's abdication of its duties deprived GAMI's investment of substantially all its value by the time it was indirectly taken on 3 September 2001.

85. The record also demonstrates that, while all mills were suffering before the expropriation from the crisis engendered by Mexico's failure to implement and enforce the sugar laws, mills that were not expropriated have benefited from the vastly improved compliance with the sugar program since the Government expropriated the mills.¹⁴³

¹⁴¹ See generally Tapia, Tr. at 308:10-330:21.

¹⁴² GAM had positive EBITDA (cash flow) of M\$361 million in 1997, M\$309 million in 1998, and M\$329 million in 1999. Tr. at 351:9-351:15. Similarly, GAM had operating profits of M\$366 million in 1996, M\$238 million in 1997, a small operating loss of M\$61 million in 1998 due to certain extraordinary expenses, and, finally, an operating profit of M\$8 million in 1999. FGA Reply Report at 6 (Exh. R-85); Cortina, Tr. at 292:1-294:1. By 2000, however, GAM showed an operating loss of M\$302 million, followed by another operating loss of M\$160 million in the first six months of 2001 prior to the expropriation. FGA Reply Report at 6 (Exh. R-85).

¹⁴³ See *infra* paras. 113-114; see also Tr. 439:18-441:3 (noting that subsequent to the expropriation, the Government decided to allow the substantial majority (if not all) of the non-expropriated mill owners that carried public FINA debt to repay this debt at significantly discounted rates).

86. As compensation for the breach of Article 1110, GAMI is accordingly entitled to the value GAMI's interest in GAM would have had on the day before the expropriation, but for Mexico's own conduct that had depressed the value of GAMI's shares.¹⁴⁴ That would be so under international law even if the Mexican conduct that caused the deterioration in value did not rise to the level of an independent breach of NAFTA obligations. In this dispute, for reasons GAMI has explained, Mexico's arbitrary and flagrant failures to implement and enforce its sugar laws did rise to the level of a violation of Articles 1105, but, even if they did not, the record clearly shows that it was Mexico's gross mismanagement and arbitrary failures of enforcement that caused the deterioration of GAM's value, and this must be taken into account in determining the fair market value of the investment under the NAFTA and international law.

87. GAMI has repeatedly noted that it is not seeking duplicative damages, and that it would be appropriate for the Tribunal to condition its award of compensation for the expropriation of GAMI's investment on GAMI turning over to Mexico legal title to GAMI's shares in GAM. In that way, to the extent the value of those shares has been increased by the return of the three mills and may be increased (or decreased) in the future depending on whether Mexico provides compensation to GAM under Mexican law, Mexico will be the beneficiary, as owner of GAMI's shares in GAM.

88. In the unlikely event that the Tribunal were to find that there has been no violation of Article 1110, the proper measure compensation for the breach of Article 1105, the amount that would restore the value lost by Mexico's breach as of 3 September 2001 is the same 27.8 million dollars, plus interest and costs, since the breaches in the failure to implement and enforce the

¹⁴⁴ See Statement of Claim at paras. 147-151; GAMI's Reply at paras. 160-161.

sugar program destroyed the value of the shares in GAM relative to the value that the could be expected to have had Mexico simply followed and enforced its own law.

C. Valuation Of GAMI's Investment

89. GAMI's valuation of its investment at \$27.8 million is based upon, and fully supported by, the principles of international law set forth above. Navigant Consulting calculated the value of GAMI's investment by using historic data, corrected for the effects of Mexico's wrongful conduct leading up to the confiscation of the mills on 3 September 2001.¹⁴⁵ As Mexico chose neither to cross-examine GAMI's valuation experts, nor to present its own valuation, Navigant's expert reports stand as the only affirmative evidence of the proper value of GAMI's investment in the record of these proceedings.

90. The sole evidence relating to valuation put forth by Mexico is Mr. García's "commentary and analysis" of the Navigant valuation. Mr. García's own testimony at the hearing, however, established that his criticisms are methodologically unsound and logically flawed. Indeed, in one critical respect Mr. García completely recanted the very opinion set forth in his report, conceding that the data actually supported exactly the opposite conclusion. A review of the hearing testimony shows why the Tribunal should accept Navigant's valuation and reject Mr. García's criticisms.

¹⁴⁵ In calculating GAM's forecast EBITDA for purposes of its valuation, Navigant made two reasonable assumptions. First, it assumed that, but for Mexico's wrongful conduct regarding its own sugar program, the domestic price of sugar would be comparable to the average national market prices actually observed after the expropriation. Navigant then assumed that GAM would be able to obtain prices above the average national market measure by roughly the same percentage margin that it had achieved in 1998, when the market was functioning properly. Both these assumptions are reasonable – the first because the actual post-expropriation data confirm that these prices are realistic and the second because the data indisputably show that GAM did in fact obtain prices that significantly exceeded the average national market measures in 1997 and 1998.

91. The cornerstone of Mexico’s position on valuation is its contention that adjustment of the value of GAMI’s investment to account for the financial effects of the domestic sugar surplus is inappropriate because, as Mexico argued in its closing argument, the failure of the mandatory sugar export program was only a partial cause of the problems of the sugar industry.¹⁴⁶ Thus, Mexico urges that other factors – in particular the increased market penetration of HFCS – were responsible for the low sugar prices in Mexico leading up to the expropriation.¹⁴⁷

92. For support, Mexico relies primarily on the opinion of Mr. García that HFCS consumption constitutes a more significant factor than noncompliance with the *acuerdos* in explaining the GAM’s financial performance.¹⁴⁸ In his testimony, Mr. García conceded that his written report was trying to make this particular point:

the point we were trying to prove with that table was that the fault of exports or the amount of exports not done, which at some point in time reached almost 4 percent of total consumption, was not a relevant factor in the overall results of GAM, but rather the entry of high fructose. That was the point we were trying to prove.¹⁴⁹

93. When the data on HFCS and the results of GAM were placed before him at the hearing, however, Mr. García had to concede that the very data he included in his own report not only did

¹⁴⁶ See Mexico’s Statement of Defense at paras. 174-177, 301-306; see also Mexico’s Rejoinder at paras. 157-165.

¹⁴⁷ Although Mr. García’s report cites the existence of “other factors,” it offers no empirical or even anecdotal evidence pertaining to any factor other than HFCS consumption. FGA Reply Report at 6-7 (Exh. R-85). In its argument at the hearings, Mexico’s counsel did seek to blame other factors, see Mowatt, Tr. at 679:5-681:5, but these other factors, like the HFCS argument, do not withstand scrutiny, as discussed above at. See *infra* section II.C.2.

¹⁴⁸ FGA Reply Report at 6 (Exh. R-85).

¹⁴⁹ García, Tr. at 438:16-439:2. Mr. Pinto similarly testified that HFCS’s increased market share prior to the expropriation, and its decline after the expropriation in response to the government’s imposition of a tax on beverages not containing cane sugar, was a critical factor in explaining the financial decline, and subsequent turn-around, of the sugar industry in Mexico. Pinto, Tr. at 513:16-516:18.

not support the point he was “trying to prove,” they in fact established exactly the opposite – that GAM’s financial performance did *not* correlate to the market penetration of HFCS:

ARBITRATOR REISMAN: No, I understand that that was the point you were making in your report, but in response to the questions that were posed to you, where there’s no apparent correlation in a number of critical years between the increased penetration of high fructose corn syrup on the one hand and GAM’s profits on the other would have led one to conclude that that was not a critical factor. You acknowledged the correlations, but didn’t address the impact that it had on your initial report.

THE WITNESS: Yes. Apparently they have--the high fructose apparently was not a very good correlator of the operating results of GAM, yes.¹⁵⁰

94. As explained more fully above in section II.C.2 and in response to Tribunal questions A and C below, it is not surprising that HFCS was a poor correlator with GAM’s performance. Indeed none of the other factors Mexico has sought to blame for the poor condition of the Mexican sugar industry in the period prior to the expropriation stand up to scrutiny.¹⁵¹ Experience confirms the result that logically would be expected: the sugar program, properly implemented and enforced, adjusts to other factors and provides a reasonable rate of return. Other factors do not correlate to the condition of the industry or – like the availability of credit to the industry – are logically the result, not the cause of the financial condition of the sugar industry. The failure to implement and enforce that program is thus largely, if not exclusively responsible for the problems of the Mexican industry, which explains why Mr. García had to concede that HFCS was a poor correlator to the condition of GAM.

¹⁵⁰ García, Tr. at 439:3-17.

¹⁵¹ See *supra* section II.C.2.

95. Thus the facts, and even the testimony of Mexico's own witness rebuts any contention that Navigant's adjustments to revenues in computing its model financial statements for GAM were in any way inappropriate in this case.

96. Other aspects of Mr. García's testimony show that his opinions on valuation are not supported by the rigorous, objectively analysis or data. Starting with the projection of GAM's EBITDA, Mr. García testified at the hearing that his model attributed zero value to interest income earned by GAM on loans made to *cañeros*. As he conceded, however, charging interest on credit extended to *cañeros* is a commonplace practice in the Mexican sugar industry and one that historically produced a consistent stream of cash flow for GAM comparable to the amount included by Navigant in its projections.¹⁵² Mr. García's attribution of zero value to this income stream simply ignores reality and is supported by no accepted valuation methodology.

97. Mr. García explained the omission of interest income from his model with the argument that he also had excluded interest expense on account of the *suspensión de pagos* proceedings. This is a false analogy. What Mr. García does is pick and choose from various elements in modeling EBITDA, accepting those that he likes and rejecting those that he does not, but providing no rational basis for doing so in either case. There is no correlation between interest income and interest expense such that if one is excluded so too must be the other. Indeed, it was perfectly appropriate for Navigant to include interest income in its EBITDA calculation because it was actual cash flow of which GAM would have the benefit, while excluding certain interest expenses from its projections because its assumption was that higher sugar prices would have

¹⁵² See García, Tr. at 401:20-405:10.

generated sufficient cash flow to pay down debt, thus reducing and eventually eliminating interest expense.

98. Mr. García finds fault in Navigant's use of standard market measures to calculate the domestic price of sugar. This criticism too, however, fell apart upon cross-examination. The evidence introduced at the hearing, including Mr. García's own testimony, confirmed that the pricing data Navigant used in its valuation corresponded exactly to the actual domestic component of reference price.¹⁵³ Thus, Navigant committed no error in calculating the reference price.

99. Mr. García's application of various valuation methodologies also did not withstand the scrutiny examination at the hearing. While Navigant's work utilized widely-accepted valuation techniques and relied upon the reasoned judgments of the experts GAMI proffered as witnesses in these proceedings, Mr. García's views on valuation lack rigorous, qualitative judgment and were based instead on unsupported and illogical hypotheses, untested speculation, and the faintly xenophobic and highly incredible claim that the Mexican sugar industry is so unique that any comparison to transactions or companies in other countries or industries is untenable. A brief comparison of the valuation methodologies illustrates the point:

¹⁵³ See García, Tr. at 379:7-386:3.

<u>VALUATION METHODOLOGY</u>	<u>NAVIGANT ANALYSIS</u>	<u>GARCÍA ANALYSIS</u>
Comparable Transactions	Concludes based on review of 13 comparable transactions that a multiple of 5.87 times EBITDA is appropriate.	Concludes based on the unsupported “policy opinion” of the ED&F Mann Company that a multiple of 3 to 4 times EBITDA is appropriate. Tr. at 412:11-414:14. Provides no data for even a single comparable transaction.
Comparable Publicly-Traded Companies	Concludes based on a review of nine comparable publicly-traded companies with substantial sugar milling operations that a multiple of 5.49 times EBITDA is appropriate.	Concludes that no publicly-traded company is comparable to GAM, but food sector is closest analogy. Based on review of eight companies in the food sector, none of which have sugar operations, concludes that a multiple of 4.13 times EBITDA is appropriate. Concedes that two of these companies have multiples in excess of Navigant’s 5.49 and that weighting of the companies’ EBITDA multiples for purposes of deriving an average was done by revenue rather than any qualitative judgment as to which companies were most comparable to GAM. Tr. at 421:18-426:14.
Initial Public Offering	Used initial public offering value as a benchmark to test other valuation methodologies. Concludes that the initial public offering value of GAM based on the October 1, 1997 offering equates to an EBITDA multiple of 6.8.	Concedes that 1997 IPO valuation is one data point that you might look at because it is a market price that does not require you to make any assumptions. Tr. at 372:17-373:6.

100. In sum, Navigant's conclusion of \$27.8 million as the value of GAMI's investment on the day prior to the expropriation stands unrebutted. The Tribunal should award this amount, plus interest and the costs of these proceedings.

V. JURISDICTION

101. As GAMI explained in detail in its Reply on Jurisdiction at paragraphs 38 to 45, its Rejoinder on Jurisdiction at paragraphs 64 to 102 and again at the hearing on jurisdiction,¹⁵⁴ Mexico's argument regarding Article 1101 – that “relating to” means that the foreign investor/investment must be specifically referred to in the offending measure – is simply wrong. Such an interpretation renders many provisions and reservations of NAFTA meaningless¹⁵⁵ and negates substantive protections under NAFTA, including Article 1110, which specifically provides protection against indirect expropriation., which almost by definition will not “refer to” the expropriated investor or the investment.

102. Mexico's contention that GAMI, as a minority investor cannot make a claim for the damage done to its investment if the harm arises out of harm to GAM was rebutted at length in GAMI's Reply on Jurisdiction at paragraphs 16 to 37, in its Rejoinder on Jurisdiction at paragraphs 36 to 63 and again at the hearing on jurisdiction.¹⁵⁶ The plain language of the Treaty as well as NAFTA tribunals have recognized a minority shareholder's right to bring a claim for

¹⁵⁴ See English Manuscript of Jurisdictional Hearing on September 17, 2003 at 70:11-87:8.

¹⁵⁵ See GAMI's Rejoinder on Jurisdiction at paras. 95-99 (delineating numerous contextual examples where Mexico's proposed interpretation for 1101 would make no sense).

¹⁵⁶ See English Manuscript of Jurisdictional Hearing on September 17, 2003 at 47:12-70:10.

“loss or damage” “arising out of” a breach of NAFTA.¹⁵⁷ In *CMS Gas Transmission Company v. Republic of Argentina*, the Tribunal held that there is “no bar in current international law to the concept of allowing claims by shareholders independently from those of the corporation concerned, not even if those shareholders are minority or non-controlling shareholders.”¹⁵⁸ In *Mondev International, Ltd. v. United States*, the Tribunal noted that Chapter 11 has a “detailed scheme” to address issues of standing and noted:

there does not seem to be any room for the application of any rules of international law dealing with the piercing of the corporate veil or with derivative actions by foreign shareholders. The only question for NAFTA purposes is whether the claimant can bring its interest within the scope of the relevant provisions and definitions.¹⁵⁹

As established in prior submissions, GAMI’s 14.8% interest in GAM falls squarely within the scope of NAFTA Articles 1139 and 1116.¹⁶⁰

103. Mexico’s theory is not only unsupported by case law and the text of the Treaty but would strip minority investments and investors of their rights. Throughout this proceeding, including

¹⁵⁷ NAFTA, art. 1116; *see also* GAMI’s Statement of Claim at para. 137 (citing *Am. Int’l Group, Inc. v. Islamic Republic of Iran*, 4 Iran-U.S. Cl. Trib. Rep. 96, Part VI (1983) (Exh. C-80) (awarding claimant, damages for its 35 percent interest in an Iranian insurance corporation, that was nationalized pursuant to the Law of Nationalization of Insurance Companies); *In the Dispute between Libyan American Oil Co. and the Government of the Libyan Arab Republic Relating to Petroleum Concessions 16, 17 and 18*, 20 I.L.M. 1, 84-86 (1977) (Exh. C-81) (awarding compensation to the Libyan American Oil Company (LIAMCO) following Libya’s nationalization by decree of LIAMCO’s 25.5% minority interest in certain oil concessions)).

¹⁵⁸ ICSID Case No. ARB/01/8, Decision of the Tribunal on Objections to Jurisdiction at para. 48 (July 17, 2003) (Exh. C-155).

¹⁵⁹ ICSID Case No. ARB(AF)/99/2, Award at para. 79 (October 11, 2002) (Exh. C-44).

¹⁶⁰ *See* Statement of Claim at paras. 10-12, 135; *see also* GAMI’s Reply on Jurisdiction at paras. 16-37; GAMI’s Rejoinder on Jurisdiction at paras. 36-63.

the damages GAMI has requested, GAMI has sought damages only for the harm GAMI and GAMI's investment in GAM have suffered, and the Tribunal clearly has jurisdiction under NAFTA to make such an award.

VI. ANSWERS TO THE TRIBUNAL'S QUESTIONS¹⁶¹

Tribunal Question B

To What Extent Is It Correct That The Sugarcane Decree Of 1991 Created An Obligation On The Part Of The Mexican Government To Ensure Direct And Permanent Regulation Of The Industry? How (If At All) Is An Acuerdo To Be Distinguished From A Unilateral Governmental Regulation In Its Legal Effect?

GAMI's Response

The Sugarcane Decree Of 1991 Created An Obligation On The Part Of The Mexican Government To Ensure Direct And Permanent Regulation Of The Industry

104. The 1991 Sugarcane Decree does create an obligation on the part of the Mexican Government to intervene directly and permanently in the industry. The Parties do not dispute that the 1991 Sugarcane Decree declared the sowing, cultivation, harvest and industrialization of sugarcane to be of public interest. In fact, the title of the 1991 Sugarcane Decree itself includes this very declaration:

*Decreto por el que se declaran de interés público la siembra, el cultivo, la cosecha y la industrialización de la caña de azúcar.*¹⁶²

105. Chief Justice Schmill provided expert testimony, backed by Mexican Federal Court authority, that, given the 1991 Sugarcane Decree's declaration, "... the State must

¹⁶¹ This section responds to the Tribunal's questions in the following order: B, A, C, D, and the Chairman's question posed orally at the hearing.

¹⁶² Sugarcane Decree at 1 (31 May 1991) (Exh. C-20) (emphasis added).

intervene in a direct and permanent manner to protect the public interest.”¹⁶³

Specifically, Chief Justice Schmill testified that the State was required to prevent contravention of the public interest by private parties,¹⁶⁴ and to secure “strict compliance” with the Sugarcane Decree and its implementing *Acuerdos*.¹⁶⁵ Finally, Chief Justice Schmill confirmed that Mexico had the necessary authority to permanently and directly intervene to protect domestic sugar prices.¹⁶⁶ Mexico chose not to cross-examine Chief Justice Schmill, whose testimony on these critical issues stands unchallenged.

106. Mexico’s argument that the Sugarcane Decree does not include mandatory obligations for Mexico to undertake is thus wrong. In making such an argument, Mexico has relied heavily on the *Plan Nacional de Desarrollo* for the proposition that the entire

¹⁶³ Schmill Opinion at para. 39 (Exh. C-110) (“... *el Poder Judicial Federal ha reconocido que el Estado debe intervenir de manera directa y permanente para proteger el interés público*”); see also *id.* at para. 103. Mexico’s expert does not address this issue. Strangely, Mr. Sempé takes the position that compliance with the provisions of the 1991 Sugarcane Decree and its implementing *Acuerdos* was optional for the mills and the *cañeros*, see Sempé Opinion at section III at para. 3 (Exh. R-82), a proposition which is hard to reconcile with the 1991 Sugarcane Decree’s declaration of public interest.

¹⁶⁴ Chief Justice Schmill also explained that State declarations of public interest are possible only in respect of activities which constitute a priority. Private interests, therefore, will always surrender to the protection of the public interest by the State. See Schmill Opinion at para. 38.

¹⁶⁵ *Id.* at para. 103 (“... *tratándose de una actividad de interés público, el Gobierno necesitaba intervenir de manera directa y permanente para hacer cumplir los objetivos del Decreto de 1991, sus modificaciones de 1993 y los Acuerdos de 1997, 1998 y 2000*”) (“... being an activity of public interest, the Government needed to intervene in a direct and permanent way, to accomplish the objectives of the 1991 Decree, its 1993 amendments and the 1997, 1998 and 2000 *Acuerdos*.”)).

¹⁶⁶ See *id.* at para. 102 (“... *el Gobierno, o sea, la rama administrativa del Estado Mexicano tenía todas las facultades y reglamentaciones necesarias para asegurar el funcionamiento del esquema de protección del precio interno del azúcar*”) (“... the government, in other words, the administrative branch of the Mexican State had all powers and regulations necessary to assure the operability of the scheme to protect domestic sugar prices”)).

system under the 1991 Sugarcane Decree and its implementing *Acuerdos* was to operate strictly by consensus, with the Government as some sort of benign, hands-off facilitator. As GAMI pointed out previously, however, not only did the 1989-1994 *Plan Nacional de Desarrollo* expire in 1994, but also the *Plan* itself recognizes that the State is *required* to act where lack of consensus jeopardizes the public interest.¹⁶⁷

The Legal Effect Of The *Acuerdos* Applicable Here Is Indistinguishable From That Of Unilateral Government Regulations.

107. The term “*acuerdo*,” though occasionally used to describe other types of administrative acts, means, as used in the 1997, 1998 and 2000 *Acuerdos*, a form of unilateral Governmental regulation which is binding in Mexico like any other regulation. An *acuerdo* is issued by the Government alone, and may only be amended or repealed by the Government. It is inaccurate to translate “*acuerdo*” in this context as “agreement” when referring to the 1997, 1998 and 2000 legal instruments because they are regulations, not agreements or contracts, even in a figurative sense.¹⁶⁸ Mexico does not dispute this point.

108. In his written report Chief Justice Schmill explained that:

- the 1991 Sugarcane Decree and its implementing *Acuerdos* set out rights and obligations;¹⁶⁹
- the provisions of the 1997 and 1998 *Acuerdos* are not mere invitations or the certification of private arrangements between private industrial or

¹⁶⁷ *Decreto por el que se Aprueba el Plan Nacional de Desarrollo 1989-1994*, section 4.4.1, para. 4 (Exh. R-73).

¹⁶⁸ See Aguilar, Tr. at 534:11-20.

¹⁶⁹ Schmill Opinion at para. 21 (Exh. C-110).

campesino individuals – they have been issued by State entities in the exercise of their authority;¹⁷⁰

- any participation that private parties may have had in the development of the *Acuerdos* does not remove their public and binding nature;¹⁷¹ and
- the CAA could only be established by regulatory action of the Government.¹⁷²

109. Chief Justice Schmill further stressed that the 1991 Sugarcane Decree and the 1997, 1998 and 2000 *Acuerdos* are acts of State issued pursuant to, *inter alia*, the *Ley Orgánica de la Administración Pública Federal*, not contractual arrangements governed by private law.¹⁷³ It is thus not surprising that amendment of the 1997 *Acuerdo* could only be achieved by a subsequent Government issued *Acuerdo* in 1998.¹⁷⁴

110. In sum, the legal effect of the *Acuerdos* applicable here is indistinguishable from that of other unilateral Government regulations.

Tribunal Question A

What Were The Ultimate Causes Of The Improved Financial Performance Of GAM's Mills (And Others) After September 2001?

GAMI's Response

111. The improved performance of the mills is largely if not exclusively the result of improved domestic prices for sugar and correspondingly improved refining margins for the mills, which in turn is the result of the remedying of non-compliance with the sugar

¹⁷⁰ *See id.* at para. 105.

¹⁷¹ *See id.* at para. 21.

¹⁷² *See id.* at para. 41.

¹⁷³ *See id.* at para. 105.

¹⁷⁴ *See* 1998 *Acuerdo* (Exh. C-25).

laws and regulations. The record of this proceeding shows that, since the expropriation, virtually every other factor affecting mill returns has essentially stayed the same or worsened. On the other hand, not only GAMI's witnesses, but also Mexico's own witness, Mr. Pinto, points to the importance of compliance with the sugar program in the recovery of domestic prices.

112. Mexican sugar mills have three basic markets for their sugar output: the domestic market, whose price is supposed to be protected by the sugar program, the world market, which is a low-price market to which sugar mills are required to export under the sugar program, and the U.S. market, which is a protected, high-price market, to which Mexican access is limited by U.S. measures. Since the expropriation, the world price has not improved, leading to further losses on sales to the world market and reflecting continued excess supply in the global free market.¹⁷⁵ In this same period, the U.S. protected market price has remained strong, but the United States has reduced Mexico's access to the U.S. sugar market, such that Mexican mills have substantially reduced returns from the U.S. market relative to period before expropriation.¹⁷⁶

113. Since external returns have worsened, it follows that the improved financial performance of GAM's mills and others is the result of domestic conditions improving to such a degree that they more than offset the adverse trend of external markets. The

¹⁷⁵ See Navigant Valuation Report, exhibit 4.1 (Exh. C-26) (showing world price from November 1995 to May 2002); see also Pinto, Tr. at 513:16-18 ("Prices in the world market are always lower than the prices from the U.S. market.").

¹⁷⁶ See Pinto, Tr. at 516:18-517:3 ("If we want to quote the last part of your solution, so to speak, currently the U.S. quota for Mexico is practically zero. It is 7,000 tons, and, in effect, it was a higher quota for two years, but it was cut down as a result of applying the tax, and it's basically 7,000 tons.").

record confirms this. While the cost of sugarcane for the mills – the price the mills must pay to *cañeros* – has continued to increase,¹⁷⁷ the testimony establishes that the improvement in domestic prices for sugar more than offsets the increased costs. As discussed at the hearing, there has been a significant improvement in the domestic price for sugar September 2001 and that this has made the mills profitable once again.¹⁷⁸ For example, Mr. Pinto testified that BSM recovered from suffering operating losses in 2000 and 2001 to posting profits in 2002 and 2003 of 274 and 269 million pesos respectively and that these results were directly tied to the “substantial” increase in the domestic price of sugar.¹⁷⁹

114. The fundamental reason for the improved prices was the effective functioning of and compliance with the sugar program, as even Mexico’s own witnesses appeared to agree. In the period prior to the expropriation, many mills (but not those of GAM) failed to meet their respective sugar export requirements, leading to an oversupply of sugar

¹⁷⁷ See Reference Price for 2002/2003 Harvest (Exh. C-152).

¹⁷⁸ See Lacarte & Cortina, Tr. at 235:14-17; 236:1-10 (“THE WITNESS: . . . And for the last two and a half years, in fact, the sugar industry has had a bonanza quite different from the last three years that the mills were in our hands . . . ARBITRATOR LACARTE: And what is the reason for that bonanza? THE WITNESS: Well, first, the price went up. The day after the expropriation-I don't remember percentage, but I think the prices went up in more than 15 percent. And why did they go up? Well, because there was an order in the market. So it should have happened a long time ago and, really, what allowed prices to come to what they needed to.”); Pinto, Tr. at 463:20-464:9 (“Q. In fact, the industry is very profitable right now; correct? A. It is profitable. Q. And in your view, that is--well, let me put it this way: Would you agree with me, sir, that the reason the industry is profitable in Mexico is due to domestic sugar prices? A. Yes. Q. There has been a substantial increase, correct? A. That is right.”).

¹⁷⁹ See Pinto, Tr. at 458:13-460:10; 464:1-14; see also Stochak & García, Tr. at 341:7-12 (“Q. Now, with respect to the liquidity crisis, certainly one factor that contributed to the liquidity crisis was the price of sugar in the domestic market; right? A. That was, in my opinion, the *main reason* for the liquidity crisis.”).

relative to the level that could sustain adequate domestic returns for the mills.¹⁸⁰ Since the expropriation, compliance has been good. Both Mr. Cortina and Mexico's own witness, Mr. Pinto, attributed the improved prices largely or wholly to the rectification of previous failures of compliance, a return to "order" and a will to conform.¹⁸¹ Faced with a situation in which the Government, as purported owner of almost half of Mexico's mills, had an obvious interest in the success of the sugar program, it is apparent that the mills, including those left unexpropriated who previously had failed to honor their export requirements, "are now complying, resulting in strong prices to the benefit of all."¹⁸² Mr. Romero put it in clear terms:

After the expropriation, there were events and measures adopted by the Mexican Government which had an

¹⁸⁰ See *supra* section II.A.

¹⁸¹ Cortina, Tr. at 236:6-10 ("And why did [the prices] go up? Well, because there was an order in the market. So it should have happened a long time ago and, really, what allowed prices to come to what they needed to."); Perezcano & Pinto, Tr. at 504:4-13 ("Q. Mr. Pinto, what was the reason why prices recovered after the expropriation of the mills, in your opinion? A. The organization of the market. Q. And What does the organization of the market entail? A. That supply and demand reached equilibrium, and the excess supply stopped, ceased to exist, and exports were made at that time, and the market adjusted."); see also Larcarte & Santos, Tr. at 175:1-8 ("ARBITRATOR LACARTE: So, this takes us to the board, the junta. The conciliation board has a very clear-cut statute that commits both cane growers and sugar mills. Why is it that it didn't work on this occasion? THE WITNESS: Well, my personal opinion is that there wasn't a political will on the part of the executive); Santos, Tr. at 186:5-14 ("The structural solution to those problems was not expropriation. It was to apply the Decree to force us to export and protect us, obviously, from the noncompliance of NAFTA by the United States because there it is established that all the surplus from Mexico that was projected and that was going to result from importing fructose was going to be exported free of tariffs to the U.S. All of that did not happen.").

¹⁸² Cortina, Tr. at 236:16-19; see also Larcarte & Cortina, Tr. at 236:11-19 ("ARBITRATOR LACARTE: And so they are complying with the commitment they had vis-a-vis the world market? THE WITNESS: Yes, even though we were probably not there, and we haven't been in the last meetings where these subjects are dealt with. I understand that both the Government and the private sector really observed the commitments for export in 2002.").

important effect on the price of sugar. This has placed non expropriated mills in favorable conditions and it will allow the Government to again privatize the expropriated mills at a better value.¹⁸³

115. Mexico argues that a variety of other factors, aside from proper implementation of the law, created the beneficial commercial environment after September 2001. However, as discussed above, on examination, none of the factors cited by Mexico, individually or cumulatively, explains the increase in domestic prices, and some even were negative factors that, if anything, would reduce returns to millers:

- World prices have not improved, as there continues to be a glut of sweeteners on the world market;¹⁸⁴
- Mexican access to the United States market has declined as the United States has cut Mexico's import quota to 7,000 tons, significantly reducing the returns for Mexican exporters to the high priced U.S. market;¹⁸⁵ and
- Millers have continued to pay mandatory high prices for sugarcane in Mexico.¹⁸⁶

116. GAMI also notes that Mr. García stated that there has been an improvement in the availability of credit since September 2001.¹⁸⁷ However, the improved ability of the sugar industry to obtain credit could not be a reason for the mills' improved financial

¹⁸³ Romero Statement at 14-15 (Exh. C-113) (“*Después de la expropiación, hay eventos y medidas adoptadas por el gobierno mexicano que han impactado de manera importante el precio del azúcar, colocando a los industriales no expropiados en condiciones favorables y que permitirá Navigant’s Valuation Report al gobierno volver a privatizar los ingenios expropiados a un mejor valor.*”).

¹⁸⁴ See *supra* n. 174.

¹⁸⁵ See *supra* n. 175.

¹⁸⁶ See *supra* n. 176.

¹⁸⁷ García, Tr. at 435:4-8 (“Now, it's just now eight years later that the banking system is going back to the market to actively place money . . .”).

condition because, as explained above, the improvement in available credit is logically the result, not the cause, of higher sugar prices.¹⁸⁸ Of course, it is axiomatic that profitable industries in a stable environment will find it much easier to obtain credit than those that are losing money in unstable conditions, such as those that prevailed in the years just prior to the expropriation.¹⁸⁹

117. Two of Mexico's witnesses also suggested that the tax on soft drinks that do not contain sugar, which took effect on January 1, 2002, was another cause of the improved financial condition of Mexican mills.¹⁹⁰ GAMI agrees that this tax helps the Mexican sugar industry in that it deters the Mexican soft drink industry from converting from sugar to HFCS in soft drinks. However, for the most part the Mexican industry had not converted to HFCS before the expropriation (and the tax), so the effect of the tax on consumption of sugar pre-versus post-expropriation was more modest, and, it might be added, apparently offset by the dramatic cut in Mexico's access to the U.S. market, which one witness suggested was a U.S. retaliation for the tax on HFCS-containing soft

¹⁸⁸ See *supra* section II.C.2.b.

¹⁸⁹ There was another cause of the improved credit situation for some unexpropriated sugar mills – but not those of GAM or other expropriated mills. According to Mr. García, after the expropriation the Government decided to allow the substantial majority (if not all) of the mill owners that carried public FINA debt to repay this debt at significantly discounted rates. García, Tr. at 441:1-3 (“So, the sugar mills that still have debts to FINA have been negotiating cash payments with a big discount.”). This is true even for the mill owners that had previously simply defaulted on their FINA debt prior to the expropriation, rather than finding a legally recognized solution as GAM did. See *id.* at Tr. 439:18-441:3. Accordingly, the improved credit position of privately-held mills currently did not cause the post-expropriation rise in prices, but rather is both a function of the price rise and the Government's own decision to forgive significant debts of the companies that it chose not to expropriate in September of 2001.

¹⁹⁰ See Perezcano, Tr. at 615:17-618:7; *Ley del Impuesto Especial sobre Producción y Servicios*, *Diario Oficial* (1 January 2002) (Exh. C-130).

drinks.¹⁹¹ Finally, the evidence in the record suggests no correlation between HFCS supply and the financial performance of GAM, as even Mexico's own expert witness conceded.¹⁹²

118. Accordingly, the essential difference between the pre-and post-expropriation conditions for sugar mills in Mexico is that the problems of non-compliance with Mexico's sugar program have been rectified. These issues are also further discussed below in response to Question C.

Tribunal Question C

Was There A Material Change In The Efficacy Of Regulatory Implementation Post-September 2001?

GAMI's Response

119. There was a material improvement in the efficacy of governmental regulation post-expropriation, and the testimony at the hearing confirmed this. The best evidence of the efficacy of regulatory implementation is compliance with the regulatory regime. As discussed above, prior to the expropriation, compliance was poor and deteriorating.¹⁹³ The Government failed to implement and enforce the export requirement, base production levels, and the reference price adjustment mechanism. It also set a

¹⁹¹ Pinto, Tr. at 516:16-517:3 (stating that the quota "was cut down as a result of [Mexico] applying the tax . . ."); *see generally supra* section II.C.2.a.

¹⁹² *See supra* section II.C.2.a (quoting Mr. García's testimony).

¹⁹³ *See supra* section II.A.

notoriously bad example by its own flagrant non-compliance of the export requirements at the two government-owned mills, Rosalía and La Joya.¹⁹⁴

120. In contrast, since September 2001 compliance has been good according to all witnesses that testified on this point, including Mexico's own witnesses.¹⁹⁵ There has been no change in the law since the expropriation.¹⁹⁶ If anything, the rising Mexican prices and falling world prices created an even greater economic incentive for any mill to cheat on compliance, if it thought it could get away with it. Mr. Pinto attributed the improvements to the collective "will" of the industry (which now consisted of the Government managing almost half the mills in addition to fulfilling its original duties under Mexican law).¹⁹⁷ Thus, the only conceivable explanation for the industry's renewed inclination to perform in accordance with its legal obligations is the perception that the Government would no longer turn a blind eye to rampant non-compliance.

121. We do not know whether there were particular enforcement actions or meetings as GAM was not in control of its mills and therefore not a member of the Chamber after the expropriation. We note, however, that Mexico provided no evidence on this question. In any event, the number of enforcement actions is not necessarily significant, since it is

¹⁹⁴ See *supra* section II.A.2; see also Santos, Tr. at 133:13-15.

¹⁹⁵ See *supra* para. 114.

¹⁹⁶ See, e.g., Reisman & Pinto, Tr. at 510:7-9 ("ARBITRATOR REISMAN: Were there teeth introduced or applied after September 2001? THE WITNESS: No.").

¹⁹⁷ Pinto, Tr. at 509:5-9; see also Pinto, Tr. at 509:5-9 ("I would say that the only actual teeth after September 2001 was the will to have an orderly market; in other words, there was more consensus as to the obligations that all the parties had regarding a balanced sugar market.").

even more efficient if the belief that compliance will be required induces voluntary compliance.

122. Moreover, the Government also began to ensure that the other provisions of the sugar regime were being complied with as well. For instance, as Mr. Cortina testified, prior to the expropriation, it was impossible for a mill to achieve a downward adjustment in a reference price that had been set too high because the Government would never support such an adjustment.¹⁹⁸ However, subsequent to the expropriation, on April 14, 2002, the Government announced that the *Secretaría de Economía* and SAGARPA would be directly assuming responsibility for decisions on adjustments (in place of the tripartite committee controlled by the Government), a move widely understood to mean that the Government for the first time was going to begin assessing whether an adjustment was needed in a fair and balanced manner.¹⁹⁹ It may be surmised, however, given the prevailing strong prices, that there would have been little need for adjustments in the post-expropriation period.

Tribunal Question D

What Evidence Is There Of Written Complaints Or Other Initiatives By GAMI In Reaction To Perceived Regulatory Malfeasance Or Nonfeasance? Would Such Evidence Be Legally Significant?

GAMI's Response

¹⁹⁸ Cortina & Strochak, Tr. at 297:5-14 (“A. . . . Moreover, the company has not been able to obtain from the Mexican Government an adjustment of the reference price paid to the sugarcane growers despite current market conditions. Q. The last sentence with the discussion of the adjustment of the reference price, is that the same problem that you previously have explained with respect to the adjustment? A. Yes, correct.”).

¹⁹⁹ See Reference Price for 2002/2003 Harvest (Exh. C-152).

Evidence Of Complaints By GAMI

123. There is no evidence that GAMI itself made any written complaints to Mexico regarding the Government's arbitrary mis-management of the sugar industry. The fact that GAMI did not file any formal complaints, however, is not legally significant under NAFTA because Chapter 11 does not require exhaustion of local remedies as a condition to bring a complaint under Chapter 11. Furthermore, it is clear that under Mexican law, GAMI, as a minority investor, does not have standing to make a formal legal complaint to the Government.

124. As was noted at the hearing and in the written testimony of Mr. Santos and Mr. Cortina, GAM, other members of the sugar industry, and the *cañeros* did complain, both in writing and orally, about the Government's poor implementation and enforcement of the law. The record shows that most of these complaints were "informal," reflecting the view that litigation or other formal avenues of complaint were unlikely to produce timely results, if such avenues were available at all. Further, while the existence of complaints may help to corroborate that there was concern about the Government's behavior at the time, as noted above, the absence of such complaints by GAM or the sugar industry in any event would not have barred GAMI's NAFTA claim nor meant that the Government's actions were valid, either under domestic law or under the NAFTA.

Complaints

125. The record and testimony shows that GAM, the millers, and the *cañeros* did make written complaints to the Government, to no avail.

- GAM and *cañero* representatives expressly requested SAGARPA to apply and enforce the penalty price on mills which failed to comply with their export

obligations. In signing the document which sets out this plea, SAGARPA did not take exception with such characterization of its role in connection with the enforcement of export quotas.²⁰⁰

- In 1999, the Chamber wrote several letters to the Government informing it of CAZE's fraudulent submission of export documents in the harvests 1996/1997, 1997/1998 and 1998/1999.²⁰¹ In response, as Mr. Santos recounted, the Government did not take any action other than to summon the members of the Chamber to inform them that "the case is closed, there's nothing to be done, and [the members of the Chamber] should forget about it."²⁰²
- The *cañeros* independently requested the Government to: (i) apply the *Acuerdos*; (ii) enforce the obligation to export surplus sugar to the world market; and (iii) instruct the Secretary General of the JCACA to expedite resolution of matters pending before such *Junta*.²⁰³
- Finally, Mr. Santos indicated at the hearing that the Chamber had filed written complaints on behalf of the industry and that, to the best of his knowledge, these complaints were in the files of the Chamber.²⁰⁴ While GAMI, as a minority investor, has never had access to such files, both GAM and the Santos Group lost access when their mills were expropriated.²⁰⁵

²⁰⁰ Minutas de la reunión entre funcionarios de SAGARPA, *cañeros* y el representante de GAM sobre adeudos de GAM a *cañeros* del 14 junio de 2001 at para. 6 (Exh. R-60).

²⁰¹ See Letter from CNIAA to the Minister of Commerce (27 October 1999) (Exh. C-126), and Letter from CNIAA to the Minister of Commerce (14 December 1999) (Exh. C-127). See also Santos Statement at para. 10 (Exh. C-114).

²⁰² Santos, Tr. at 134:18-21, 135:1-8.

²⁰³ See Decreto Cañero de 1980 at 2-3, sections a and c (Exh. R-27); Testimonio de Adalberto Gonzalez Hernández at 2, para. 1 (Exh. R-28); Actas del Comité de la Agroindustria Azucarera: Acta No. 42/2/ORD/2000 (29 November 2000) at para 9 (Exh. R-76); Romero Statement at 6, para. 4 (Exh. C-113).

²⁰⁴ Santos, Tr. at 180:1-12 ("Mostly, we would do these actions or that we would take these actions in a personal way. There are some documents written where we would request or we would complain about matters, but those are in the chamber's files. In our case, in GAM, we have no access to the chamber, unfortunately, so in some way those mills that were not expropriated sort of are acting against us. They don't let us in. We have no access there, but they are in the files. There is a significant number of documents where these complaints were recorded.").

²⁰⁵ See *id.*

126. Even more significant, however, is the fact that both Mr. Cortina and Mr. Santos provided uncontroverted testimony that GAM and other mill owners more often did not file written complaints but instead repeatedly met with Government officials to voice their concerns with the decline of domestic sugar prices.²⁰⁶ In doing so, GAM did what it believed would be most effective in the circumstances. Mr. Santos also agreed with that this was the correct conclusion, at one point stating:

. . . in Mexico it was not easy to fight the Government. Now you have the chance to win at courts, but in those times I was senator of the PRI, and I could tell you. It was much better to try it before in a friendly way.²⁰⁷

According to Mr. Santos, therefore, the millers did everything they could to change Mexico's conduct prior to September 2001.²⁰⁸

²⁰⁶ Cortina, Tr. at 286:16-17; Santos, Tr. at 138:10-18, 162:10-15; *see also* Santos Statement at para. 12 (Exh. C-114).

²⁰⁷ Santos, Tr. at 195:14-18; *see also id.* at 138:10-18 (“Mr. Chairman, you have no idea how many times in my two years as President of the Chamber, and I also had the advantage of being Senator of the Republic, I went . . . at all the levels from the President . . . to Ministers, they would promise they would take measures and nothing happened. I have nothing in writing because these are personal endeavors, but numerous times we submitted it and it was never responded.”).

²⁰⁸ Reisman & Santos, Tr. at 193:15-194:8 (“ARBITRATOR REISMAN: I'm interested in what you could have done, and your answer is that, as far as you could see, there was nothing else you could have done? THE WITNESS: Well, I might have been wrong, but at that moment--well, we had hundreds of meetings among themselves, trying to convince ourselves that voluntarily, because it was on our own benefit, we should comply with the export quota. And, of course, Molina would say, Yes, everybody has to comply with them, and I am the one that put in the example, and we are bringing in the document, because he was the first to export, and--I mean, it was completely out of control if you have to deal with people like that.”).

127. These complaints, while not required under the NAFTA, corroborate the contemporaneous concerns of the industry, of which Mexico was aware as recipient of the complaints about its failure to enforce key elements of sugar program.

The Futility Of Formal Legal Procedures

128. Mexico has wrongly argued that the absence of court actions and a court finding of violation demonstrates that Mexico cannot be considered to have failed to follow its own law. NAFTA does not include an exhaustion of local remedies requirement and GAMI did not bring a claim for denial of justice in the instant matter. Therefore, GAMI is under no NAFTA obligation to produce a finding of breach of Mexican law by Mexican courts, and GAMI's rights in this proceeding do not depend on GAM's legal strategies under Mexican law.

129. One of Mexico's expert witnesses, Mr. Sempé, argued that there were a number of avenues for domestic legal challenge to Mexico's actions. However, even assuming that each or any of those avenues would have been available to GAM, none would result in appropriate and timely redress given the nature of the sugar industry and the need for immediate intervention to support domestic sugar prices. GAM's objective was to prevent the rapid decline of sugar prices. It would have been useless, for instance, to litigate for years to remove a Government officer under the *Ley Federal de Responsabilidades de los Servidores Públicos* or under the *Ley Federal de Responsabilidades Administrativas de los Servidores Públicos* (enacted after the expropriation on 14 March 2002). In addition, it was apparent to the industry that the

JCACA was subject to political pressure from the Government, prohibiting it from acting against any delinquent mill since enactment of the 1997 *Acuerdo*.²⁰⁹

130. Accordingly, the calculation of GAM and its attorneys that formal legal proceedings would not have been able to bring timely relief was again reasonable.

Such Evidence Of Complaints Is Not Legally Significant In This Proceeding

131. Under Mexican law, GAMI, as a minority shareholder, did not have standing under Mexican law to bring a complaint or other legal action against Mexico. In any event, NAFTA does not include an exhaustion of local remedies requirement, nor has GAMI alleged a denial of justice, so the presence or absence of a complaint under local law is not legally significant under NAFTA. However, the fact is that GAM and others in the sugar industry did complain, which constitutes evidence of contemporaneous concern about the behavior of the Mexican Government.

The Chairman's Question

What Kind Of Relief Is Available Under Mexican Domestic Law For GAM In Regard To: (I) Losses Resulting Mexico's Occupation Of The Tala, Lázaro Cárdenas And Benito Juárez Mills; And (II) Compensation For The San Pedro And San Francisco Mills?

GAMI's Response

132. At the hearing, Chairman Paulsson inquired about relief available to GAM under Mexican law in regard to losses resulting from Mexico's occupation of the three returned

²⁰⁹ Cortina, Tr. at 290:17-20. Although Mexico has repeatedly argued that it was significant that GAM at one point objected to the jurisdiction of the JCACA, such an argument is irrelevant with regard to GAMI's rights under NAFTA. Moreover, it is typical for lawyers to make jurisdictional and procedural objections at the outset of legal proceedings in Mexico and no special significance should be attributed to GAM's objection to the JCACA.

mills and compensation for San Pedro and San Francisco.²¹⁰ In response to Mr. Paulsson's questions, Mr. Perezcano indicated that the Mexican Expropriation Law expressly provides for compensation while other non-specified legal provisions apply to civil liability and payment of damages.

133. On the last day of the hearing Chairman Paulsson invited GAMI to indicate whether it accepted Mr. Perezcano's statement as to what remedies are available to GAM under Mexican law.²¹¹ In this regard, we note the following points.

134. GAMI agrees that Mexican Expropriation Law requires the payment of compensation. However, this law is essentially untested, and it is not known in particular how long the process will take and whether the Mexican legal standards will be interpreted in the same way as NAFTA and international law standards. One question in domestic law is the effect to be given to Article 27 of the Mexican Constitution, which provides that the amount of compensation shall be based on the "fiscal value" of the real estate taken.²¹²

135. In addition, it is questionable whether the Expropriation Law provides grounds for redress in the case of the returned Tala, Lázaro Cárdenas and Benito Juárez mills and

²¹⁰ Paulsson, Tr. at 28:7-19, 98:16-21, 99:1-20.

²¹¹ *Id.* at 569:19-21.

²¹² "Compensation for the expropriated thing shall be based on its fiscal value as registered in the real estate tax or collection offices, whether the amount has been declared or tacitly accepted by the owner in paying taxes on that basis." ("*El precio que se fijará como indemnización a la cosa expropiada, se basará en la cantidad que como valor fiscal de ella figure en las oficinas catastrales o recaudadoras, ya sea que este valor haya sido manifestado por el propietario o simplemente aceptado por él de modo tácito por haber pagado sus contribuciones con esta base.*").

we disagree that GAM would necessarily be able to recover damages from Mexico under the theory of civil (*tort*) liability.²¹³ The Chairman noted that this question was without prejudice to the separate question whether there was any requirement to pursue compensation locally as a condition precedent to a NAFTA claim for expropriation. As GAMI stated at the hearing,²¹⁴ it is GAMI's position that there clearly is no such requirement in the NAFTA.


²¹³ Under article 1927 of the Federal Civil Code *tort* liability may only be personally assessed on the public officer responsible for the tortuous act. The State would only be jointly liable where the public officer acted with *dolo*. "The State shall be liable for damages caused by its public officers in the exercise of their functions. Such liability shall be joint in case of malicious acts and several in all other cases, and it may only be assessed against the State where the directly liable public officer does not have property or has insufficient property to cover the damages." (*"El Estado tiene la obligación de responder del pago de los daños y perjuicios causados por sus servidores públicos con motivo del ejercicio de las atribuciones que les estén encomendadas. Esta responsabilidad será solidaria tratándose de actos ilícitos dolosos, y subsidiaria en los demás casos, en los que sólo podrá hacerse efectiva en contra del Estado cuando el servidor público directamente responsable no tenga bienes o los que tenga no sean suficientes para responder de los daños y perjuicios causados por sus servidores públicos."*)

²¹⁴ Roh, Tr. at 551:9-559:4.

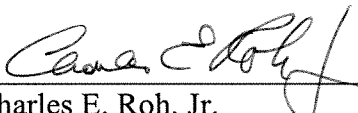
VII. CONCLUSION

136. For the foregoing reasons, the Tribunal should find that Mexico breached Articles 1105, 1102, and 1110 of NAFTA and award compensation to GAMI in an amount not less than US\$27.8 million, plus interest compounded from 3 September 2001, plus attorneys' fees, expenses and the cost of these arbitration proceedings.

Respectfully submitted,


Guillermo Aguilar Alvarez
Lucía Ojeda
Elsa Ortega
Itziar Esparza

SAI ABOGADOS
Edificio Plaza Reforma
Prol. Paseo de la Reforma #600-103
Mexico, D.F. 01210
Tel: (52-55) 5259-6618
Fax: (52-55) 5259-3928


Charles E. Roh, Jr.
Adam P. Stochak
J. Sloane Strickler
Alicia Cate

WEIL, GOTSHAL & MANGES, LLP
1501 K Street, N.W., Suite 100
Washington, D.C. 20005
U.S.A.
Tel: (202) 682-7100
Fax: (202) 857-0940

Dated: May 24, 2004