**CITATION**: United Mexican States v. Cargill, Incorporated, 2010 ONSC 4656
**COURT FILE NO.:** CV09-391935
**DATE:** 20100826



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**IN THE MATTER OF AN APPLICATION TO SET ASIDE AN ARBITRAL AWARD UNDER RULE 14.05(2) OF THE *RULES OF CIVIL PROCEDURE* AND ARTICLE 34 OF THE *UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION*, BEING THE SCHEDULE TO THE *INTERNATIONAL COMMERCIAL ARBITRATION ACT*, R.S.O. 1990, C. I.9 AS AMENDED**

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| **BETWEEN:** | |
| UNITED MEXICAN STATES<br>Applicant | *Patrick G. Foy* and *Robert J. C. Deane*, for the Applicant |
| **– and –** | |
| CARGILL, INCORPORATED<br>Respondent | *John A. Terry* and *Jeffrey Sarles*, for the Respondent |
| | **HEARD:** June 3 and 4, 2010 |

**LOW J.**

**THE APPLICATION**

[1] The applicant United Mexican States (Mexico) seeks to set aside an arbitration award (the Award) made on September 18, 2009 under Chapter Eleven of the North American Free Trade Agreement (NAFTA). The award granted damages to the respondent Cargill, Incorporated in the amount of USD$77,329,240.

[2] The arbitration tribunal consisted of Professor David D. Caron, Cargill’s nominee, Professor Donald M. McRae, Mexico’s nominee, and Dr. Michael C. Pryles, chairman of the panel, all distinguished experts. The Award issued out of the International Centre for the Settlement of Investment Disputes (Additional Facility) at Washington D.C.

[3] The parties designated Toronto, Ontario as the "place of arbitration". Accordingly, this court has jurisdiction to review the Award under the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 enacting the *Model Law on International Commercial Arbitration* adopted by the United Nations Commission on International Trade Law on June 21, 1985 (the Model Law).

[4] The limits of this court's jurisdiction to review is set out in Article 34 of the Model Law. It provides, in relevant part:

> (2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> (a) the party making the application furnishes proof that:
>
> ….
>
> (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside ….

[5] It is Mexico's position that the arbitration tribunal exceeded its jurisdiction, that the award should therefore be set aside and that an award of USD$36,166,885 be substituted for it.

## THE PARTIES

[6] Mexico is one of the three signatories to the NAFTA.

[7] The respondent Cargill, Incorporated ("Cargill") was originally established in 1865 in Iowa and is headquartered in Minnesota but has operations across the world. It is, among other things, a global supplier of agricultural products. Cargill de Mexico S.A. de C.V. ("CdM"), organized in 1967 under the laws of Mexico is a wholly owned subsidiary of Cargill and is headquartered in Mexico City. Cargill, through its subsidiary CdM, was engaged in the business of importation and distribution of high fructose corn syrup (HFCS) into Mexico following the advent of the NAFTA which came into force on January 1, 1994.

## ARTICLES IN THE NAFTA GIVING RISE TO ARBITRATION PROCEEDINGS

[8] Chapter Eleven of NAFTA deals with investments. The scope and coverage of Chapter Eleven is set out in Article 1101 which provides:

> This Chapter applies to measures adopted or maintained by a Party relating to:
>
> (a) investors of another Party;

(b) investments of investors of another Party in the territory of the Party; and

(c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

….

[9] A “measure” is defined in Article 201 of NAFTA AS “any law, regulation, procedure, requirement or practice”.

[10] The jurisdiction of the arbitration tribunal arises under Articles 1116 and 1117 of Chapter Eleven pursuant to which non-party entities who are investors as defined in NAFTA, have a right to initiate a claim against any of the three sovereign states which are parties to NAFTA in respect of a limited number of obligations owed by the party states as set out in Chapter Eleven and Chapter Fifteen.

[11] Articles 1116 and 1117 provide:

Article 1116: Claim by an Investor of a Party on Its Own Behalf

1. An investor of a Party may submit to arbitration under this Section a claim that another Party has breached an obligation under:

(a) Section A or Article 1503(2) (State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party’s obligations under Section A,

and that the investor has incurred a loss or damage by reason of, or arising out of, that breach.

….

Article 1117: Claim by an Investor of a Party on Behalf of an Enterprise

1. An investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly, may submit to arbitration under this Section a claim that the other Party has breached an obligation under :

(a) Section A or Article 1503(2) State Enterprises), or

(b) Article 1502(3)(a) (Monopolies and State Enterprises) where the monopoly has acted in a manner inconsistent with the Party's obligations under Section A,

and that the enterprise has incurred a loss or damage by reason of, or arising out of, that breach.

….

[12] There appears no provision whereby an investment may initiate a claim on its own behalf.

[13] Under Article 1139,

investment means:

(a) an enterprise;

(b) an equity security of an enterprise;

….

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

(f) an interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan ….

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

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

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

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

but investment does not mean,

(i) claims to money that arise solely from

(i) commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or

(ii) the extension of credit …; or

(j) any other claims to money,

that do not involve the kinds of interests set out in subparagraphs (a) through (h);

….

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of such Party that seeks to make, is making or has made an investment;

investment of an investor of a Party means an investment owned or controlled directly or indirectly by an investor of such Party;

[14] An “enterprise” is defined in Article 201 of NAFTA as

any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship, joint venture or other association.

**THE ARBITRATION**

[15] In 2004, Cargill, on behalf of itself and CdM, served on Mexico a notice of intent to submit a claim to arbitration. It alleged that Mexico had violated articles 1102, 1103, 1105 1106 and 1110 of Chapter Eleven. In its Statement of Issues, Cargill posed the following questions:

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

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

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

[16] Cargill and Mexico executed a document consenting to arbitration under Chapter Eleven of NAFTA and waiving their rights to court or administrative tribunal proceedings with respect to Mexico’s measures alleged to be a breach of NAFTA except for injunctive and declaratory relief not involving the payment of damages.

[17] In August 2005, the Secretary–General of the ICSID registered the claim in the Arbitration Register under the *ICSID Additional Facility Rules.* The tribunal was constituted in June 2006 and the hearing took place in Washington, D.C. from October 1 to October 5, 2007. The tribunal received oral and voluminous documentary evidence, expert reports, and oral and written arguments. On September 18, 2009, the tribunal delivered its Award.



**NAFTA PROVISIONS FOUND TO HAVE BEEN VIOLATED**

[18] Of the five Chapter Eleven articles alleged by Cargill to have been breached, the arbitration tribunal found three to have been violated: Articles 1102, 1105 and 1106.

[19] Article 1102 deals with "National Treatment". The relevant paragraphs provide:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

[20] Article 1105, dealing with "Minimum Standard of Treatment", provides:

> 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.
>
> 2. Without prejudice to paragraph 1 and notwithstanding Article 1108(7)(b), each Party shall accord to investors of another Party, and to investments of investors of another Party, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
>
> 3. Paragraph 2 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 1102 but for Article 1108(7)(b).

[21] Article 1106, deals with "Performance Requirements". The relevant paragraphs provide:

> 3. No Party may condition the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with any of the following requirements:

….

(b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from producers in its territory[.]

**HISTORY OF THE DISPUTE**

[22] The factual background of the trade dispute between Mexico and the U.S. leading to Cargill's claim is complex, but as it is no longer in dispute that Mexico violated certain articles of NAFTA, the history may be summarized briefly.

[23] The dispute between Cargill and Mexico is but one battle in a larger conflict between the United States and Mexico concerning their sugar industries.

[24] Cargill is a producer of high fructose corn syrup (HFCS). It is a low-cost substitute for refined sugar for sweetening soft drinks and other food products and is therefore in direct competition with sugar. The technology for mass-producing HFCS was developed in the U.S. in the 1970s and, by the 1980s, U.S. soft drink producers used it almost exclusively as a sweetener rather than sugar.

[25] Cargill had started to produce HFCS in the U.S. in 1977. By 1993, Cargill was producing HFCS in its plants in Ohio, Tennessee and Iowa, near the sources of raw material, yellow corn.

[26] Sugar is one of the most highly protected agricultural commodities. In Mexico, the sugar industry is very important as it generates a significant portion of its GDP. Mexico is also the second highest per capita consumer of soft drinks in the world. Prior to the mid-1990s, soft drinks produced in Mexico were sweetened exclusively with cane sugar.

[27] When NAFTA came into force on January 1, 1994, the U.S. was a producer of both HFCS and refined sugar and Mexico was a producer of refined sugar. Mexico began to import small amounts of HFCS from the U.S..

[28] The tariff elimination provisions of NAFTA allowed a transition period for the elimination of barriers to the sweetener trade between Mexico and the U.S. The tariffs were set at 15% in 1994, declining to zero by 2004. Removal of tariffs was very controversial for the U.S. sugar market. The U.S. sought a bilateral agreement with Mexico to replicate certain trade barriers to protect the U.S. sugar market. The bilateral agreement found its way into an annex to NAFTA. Before ratification of NAFTA, however, issues arose in the U.S. as to how HFCS would be treated in the calculation of Mexico's reciprocal access to the United States' sugar market during the transition period. The U.S. and Mexico tried to resolve the issue with an exchange of side letters but disputes arose concerning the interpretation of the side letters and no agreement was reached.

[29] Cargill was one of the companies prejudiced by the lack of a clear agreement between the U.S. and Mexico.

[30] Prior to the coming into force of NAFTA, Cargill had established, in 1993, a division within its subsidiary CdM to start selling HFCS in Mexico. Before this, CdM had been distributing other food products in Mexico. With the advent of NAFTA, Cargill built an HFCS distribution centre in Tula, in the state of Hidalgo, Mexico. It built a new plant in Nebraska and expanded its HFCS plants in Iowa and Tennessee. It also built an HFCS distribution centre in McAllen, Texas. Cargill's U.S. plants manufactured the HFCS which it shipped to CdM at its centre in Tula for distribution in Mexico. CdM did not manufacture HFCS in Mexico but imported the product from its parent company at the U.S./Mexico border.

[31] As part of the NAFTA bargain, Mexico had replicated the U.S. import barriers for refined sugar from third countries. Thus the price of sugar rose in Mexico after NAFTA came into force and the price of HFCS came to have the same price advantage in Mexico that it had hitherto enjoyed in the U.S. and, after 1995, consumption in Mexico of HFCS grew significantly. CdM's market share of sales of HFCS grew from 3.56% in 1995 to 24.84% in 1997.

[32] Cargill also sold HFCS directly to customers in Mexico without CdM's involvement. Such direct sales lost as a result of Mexico's measures and not having any connection with CdM do not form part of Cargill's claim in the arbitration proceeding.

[33] Between 1995 and 2000 the Mexican sugar industry experienced significant disruption and financial pressure. Sugar surpluses arose due to a combination of displacement of sugar by HFCS imported from the U.S. or produced in Mexico by U.S. companies who had established production facilities there, increased sugar production in Mexico and decreased domestic demand.

[34] In June 1997, in response to pressure from its sugar industry, Mexico imposed anti-dumping duties with respect to HFCS imported from the U.S. These anti-dumping duties were the subject of proceedings before the World Trade Organization pursuant to the GATT and a dispute resolution panel under chapter Nineteen of NAFTA. Ultimately the anti-dumping duties were revoked in May 2002 and Cargill was reimbursed for the duties it had paid.

[35] Mexico took two additional steps, however, to address the disruption in its sugar industry. It imposed a 20% tax on the sale or importation of soft drinks and other beverages that contained sweeteners other than cane sugar (the IEPS Tax). It also required that all HFCS imports from the U.S. have a permit issued by Mexico's Secretary of Economy (the Import Permit Requirement).

[36] As a result of the IEPS Tax, it became prohibitively expensive for Mexican soft drink producers to use HFCS and most reverted to using sugar. In 2002, HFCS exports from the U.S. to Mexico fell 90% from the previous year and then virtually ceased. The U.S. initiated WTO dispute settlement proceedings against Mexico and in 2005, a WTO panel held that the imposition of the IEPS Tax violated the GATT, a ruling upheld on appeal. Thereafter, Mexico brought itself into compliance with the GATT.

[37] The Import Permit Requirement was part of a decree establishing 2002 tariff rates for the importation of goods into Mexico. To obtain the benefit of the NAFTA preferential tariff rate for HFCS, an importer into Mexico was required to obtain an Import Permit from the Secretary of Economy. Without a permit, the imported HFCS would be subject to the high non-NAFTA "Most Favoured Nation" (MFN) rate applicable to HFCS imported from non-NAFTA countries. The MFN tariffs ranged from 156% to 210% while the NAFTA tariff was 3% for 2002 and 1.5% for 2003.

[38] Cargill presented evidence at the arbitration that every application for an Import Permit made by CdM was denied. Mexico denied CdM's permit applications on the grounds that it had not satisfied the criteria to obtain a permit but Mexico refused to announce what the criteria were.

[39] Mexico's measures had a swift negative impact on Cargill. The IEPS tax made the use of HFCS uneconomic and caused Mexican bottlers to cancel their HFCS orders and revert to the use of sugar, decimating the Mexican HFCS market and forcing U.S. suppliers, including Cargill, to cut production. The anti-dumping duties prevented Cargill from shipping HFCS to its subsidiary CdM while the duties were in force and the Import Permit Requirement prevented taking advantage of opportunities to sell HFCS to those Mexican bottlers who were able to obtain relief from the IEPS tax. As a result, Cargill was forced to shut down several HFCS production plants as well as its distribution centres in Tula and McAllen.



## **<u>THE TRIBUNAL'S RULING ON MEXICO'S OBJECTION</u>**

[40] In the arbitration proceeding, Mexico raised an objection to the effect that the tribunal had no jurisdiction to award damages in relation to loss incurred by Cargill arising out of its activities in the U.S. as a producer and exporter of HFCS to CdM, referred to as the "upstream losses". Mexico's argument there, which is reiterated on this application for review, was that Cargill sought damages sustained by its operations in the United States and not for operations relating to its investment, CdM, in Mexico. It is said that the arbitration tribunal had jurisdiction only to assess and award to Cargill its damages in its capacity as an investor, and no jurisdiction to assess and award damages that it may have suffered in its capacity as a producer and exporter of HFCS.

[41] The tribunal held that Mexico's objection did not go to jurisdiction but was instead an issue related to the interpretation and application of NAFTA's damages provisions. At paragraph 154 of the Award, the tribunal stated:

> It is not in dispute that there is an investment in Mexico in the form of Cargill de Mexico. As the Tribunal holds there to be a violation of NAFTA Chapter 11 provisions by a measure relating to that investment and Claimant as an investor, Claimant is entitled to claim for the loss or damage incurred 'by reason of, or arising out of, that breach.' Whether such damages encompass losses to Cargill

within its business operations in the United States is a question of interpretation of these damages provisions and is not essentially a jurisdictional question.

[42] In the result, the tribunal held, at paragraph 519 et seq.:

> 519. To evaluate the damages claimed, the Tribunal has found it helpful to look at the lost profits claimed as divided at the United State-Mexican border, with those lost profits attributed to Cargill's inability to sell HFCS to CdM as "up-stream losses" and the direct losses of CdM as "down-stream losses."
>
> 520. According to Article 1139 and the Tribunal's previous conclusions, the down-stream losses are clearly compensable due to the violations of Articles 1102, 1105 and 1106 of the NAFTA. The issue, therefore, is whether those up-stream damages claimed by Claimant, and objected to by Respondent, are also compensable.
>
> 521. With respect to this disagreement, the Tribunal is aware that Chapter 11 applies only to measures relating to investments that are in the territory of the State Party enacting the measures. It was for this reason that the *ADM* tribunal determined that it lacked jurisdiction to award compensation for "lost profits on HFCS [the claimants] would have produced in the United States and exported to Mexico 'but for' the Tax, as these losses were not suffered in their capacity as investors in Mexico."
>
> 522. This Tribunal notes, however, that as it stated at paragraphs 147 and 352 above, Article 1139's definition of investment is "broad and inclusive." This Tribunal therefore has little difficulty in determining that business income, particularly business income so closely associated with a physical asset in the host country and not mere trade in goods, is both an element of a larger investment and an investment in and of itself….
>
> 523. With respect to the particular facts of this case, the Tribunal finds that the profits generated by Cargill's sales of HFCS to its subsidiary, Cargill de Mexico, for CdM's marketing, distribution and re-sale of that HFCS, were so associated with the claimed investment, CdM, as to be compensable under the NAFTA. Cargill's investment in Mexico involved importing HFCS and then selling it to domestic users, principally the soft drink industry. Thus, supplying HFCS to Cargill de Mexico was an inextricable part of Cargill's investment. As a result, in the view of the Tribunal, losses resulting from the inability of Cargill to supply its investment Cargill de Mexico with HFCS are just as much losses to Cargill in respect of its investment in Mexico as losses resulting from the inability of Cargill de Mexico to sell HFCS in Mexico.

524. In this way, the situation of this dispute diverges from that which the *ADM* tribunal faced. ADM and Tate & Lyle created a joint venture, ALMEX, which began selling HFCS in Mexico in 1994 and commenced its own production of HFCS in December 1995, which grew to be ALMEX's "most important product." Cargill de Mexico, on the other hands, was not a producer of HFCS and its HFCS business therefore depended on the HFCS sold to it by its parent.

525. Claimant's intent was to enter the Mexican HFCS market and attain a significant share of that market; thus its investment included everything that it took to achieve such a result. Viewed holistically, Claimant was prevented from operating an investment that involved the sale into and distribution of HFCS within the Mexican Market. The inability of the parent to export product to its investment is just the other side of the coin of the inability of the investment, Cargill de Mexico, to operate as it was intended to import HFCS into Mexico.

526. The Tribunal therefore determines that Claimant is to be compensated for its net lost profits as determined for both Cargill de Mexico's lost sales to the Mexican market and Cargill, Inc.'s lost sales to Cargill de Mexico.

[43] Earlier, at paragraphs 349 to 358 of the Award the tribunal had dealt with the scope of Cargill's investment under Article 1139. It wrote:

349. Respondent argues that Claimant's Article 110 claim is not based on an "investment" as that term is defined by Article 1139. The Tribunal disagrees.

350. Under Article 1139, it is clear that Cargill de Mexico ("CdM") qualified as an "investment" both because it satisfies the definition of an "enterprise," and because it qualified as "real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes" (including the Tula distribution facility). This is argued by Claimant and not disputed by Respondent. Claimant's claim, however, is based on its "Mexican *HFCS business unit* and in the *HFCS terminal* at the Tula distribution centre" (emphasis added). Claimant thus does not claim for the diminished value of the physical assets held by Cargill de Mexico, but rather for the damages that resulted from the alleged loss of their intended use.

351. Respondent argues that the issue before the Tribunal is whether this "HFCS business" is an investment in and of itself under Article 1139 that is subject to expropriation within the meaning of Article 1110. The Tribunal agrees broadly with the Respondent's identification of the issue presented, but

views the issue as involving two distinct questions: first, whether the "HFCS business" is an investment in and of itself under Article 1139; and second, whether the 'HFCS business," as an investment under Article 1139, can be the subject of a claim for expropriation within the meaning of Article 1110.

352 As to the first question, the Tribunal recalls its conclusion in paragraph 153, *supra*, that there is no express or implied presumption that measures dealing with goods cannot *ipso facto* be alleged to be measures "relating to" investors or investments per Article 1101. It likewise concluded in paragraph 147, *supra*, that although there are exclusions, the Article 1139 definition of "investment is broad and inclusive.

353. The Tribunal thus has little difficulty in concluding that business income, particularly one associated with a physical asset in the host country and not merely trade in goods, is potentially an investment both as an element of a larger investment involving the physical asset and as an investment in and of itself.

....

356. In *Pope & Talbot*, the tribunal was presented with a similar situation in that the claimant's ability in that case to sell lumber in the U.S. market was impeded by a set of Canadian measures. Canada in that instance claimed, as in this case, that the claimant retained title to the investment and that loss of business was not the proper subject of an Article 1110 claim. The tribunal found that interference with the business had an impact on the property in the host country:

> While Canada suggests that the ability to sell softwood lumber from British Columbia to the U.S. is an abstraction, it is, in fact, a very important part of the 'business' of the Investment. Interference with that business would necessarily have an adverse effect on the property that the Investor has acquired in Canada, which, of course, constitutes the Investment. While Canada's focus on the 'access to the U.S. Market' may reflect only the Investor's own terminology, that terminology should not mask the fact that the true interests at stake are the Investment's asset base, the value of which is largely dependent on its export business.

The Tribunal agrees with the *Pope & Talbot* tribunal that the business income of an investment is an integral part of the value of the underlying property. But in both *Pope & Talbot* and the present case, the Claimant has not claimed for the value of the entire investment but rather only for the loss

> of business income. Usually, in the case of a permanent expropriation of the entire investment, the loss of business income would be reflected in the value given to the entire investment. In this sense, the *Pope & Talbot* tribunal did not address what this Tribunal considers to be the key question: whether an Article 1110 expropriation claim may be based on a temporary taking and thus only seek the loss of business income.
>
> ….
>
> 358. The Tribunal concludes that business income, particularly when it is associated with a physical asset in the host country, is an investment within the meaning of Article 1139 both as an element of a larger investment involving the physical asset and as an investment in and of itself….

**<u>THE ISSUE TO BE DECIDED</u>**

[44] The central issue on this application is not whether the tribunal erred in law in finding that both the upstream and downstream losses to Cargill were "by reason of or arose out of" Mexico's measures in breach of Chapter Eleven and thus compensable. Rather, the issue is whether the tribunal was empowered to inquire whether the upstream losses were a compensable area of loss.

[45] Mexico does not challenge the damages awarded insofar as they constitute CdM's loss of revenue that would have been achievable on sale of product in Mexico although it takes the position that those losses are the losses of the investment only. It is Mexico's position that the tribunal had no jurisdiction to award damages to Cargill arising out of its activities as the producer in the U.S. of the product that it supplied to CdM and which CdM imported into and sold in Mexico. It therefore seeks an order substituting the tribunal's award of damages of USD$77,329.240 with an award of USD$36,166,885, payable to Cargill's Mexican subsidiary, CdM.

[46] In *Desputeaux v. Éditions Chouette* (1987) Inc., [2003] 1 S.C.R. 178 at 22, the Supreme Court stated,

> The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding. As we shall later see, that agreement comprises the arbitrator's terms of reference and delineates the task he or she is to perform, subject to the applicable statutory provisions. The primary source of an arbitrator's competence is the content of the arbitration agreement (art. 2643 *C.C.Q.*). If the arbitrator steps outside that agreement, a court may refuse to homologate, or may annul, the arbitration award (arts. 946.4, para. 4 and 947.2 *C.C.P.*). In this case, the arbitrator's terms of reference were not defined by a single document. His task was delineated, and its content determined, by a judgment of the Superior Court, and by a lengthy

> exchange of correspondence and pleadings between the parties and Mr. Rémillard.

[47] Here, as in *Desputeaux*, the submission to arbitration consists not of a single arbitration agreement but rather of a set of documents starting with Cargill's Notice of Intention to Submit a Claim to Arbitration. Following the empanelling of the tribunal, pleadings were exchanged consisting of a memorial of the Claim, counter-memorial of the Respondent, reply memorial by Claim and rejoinder memorial by Respondent.



[48] The claim was launched under Chapter Eleven. It alleged that measures taken by Mexico violated various provisions of chapter Eleven causing damages to Cargill and CdM. There are four threshold questions that must be answered in the positive for the tribunal to have jurisdiction over the claim launched under Articles 1116 and 1117 and they arise out of the scope and coverage Article, 1101:

(1) Is Cargill an investor?

(2) Does it have an investment in another Party, Mexico?

(3) Has Mexico adopted or maintained a measure, as defined by NAFTA?

(4) Do(es) the measure(s) relate

(a) to the investor, Cargill, OR

(b) to the investment, CdM?

If the answer to all of the threshold questions is positive, are there express or necessarily implied limitations on the scope and nature of damages open to the tribunal to award?

**<u>STANDARD OF REVIEW</u>**

[49] Mexico argues that the standard of review where jurisdiction is concerned is correctness. Cargill argues that the standard is one of deference.

[50] In *Quintette Coal Ld. v. Nippon Steel Corp.* (1991), 50 B.C.L.R. (2d) 207; [1991] 1 W.W.R. 219, leave to appeal refused (1990) 50 B.C.L.R. (2d) xxviii, the British Columbia Court of Appeal approved the world wide trend toward restricting judicial control over international commercial arbitration awards, citing the majority decision of the U.S. Supreme Court in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614, 87 L. Ed. 2d 444, 105 S.Ct. 3346 (1985) wherein Blackmun J. wrote, at 638-9,

> As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have

> increased in diversity as well as in complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration." Kulukundis Shipping Co. v. Amtorg Trading Corp. 126 F2d 178, 985 (CA2 1942), and also their customary and understandable unwillingness to cede jurisdiction of a claim arising under domestic law to a foreign or transnational tribunal. To this extent at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favoring commercial arbitration….



[51] Recognizing the importance of guidance to parties to future arbitrations concerning the standard of review, Gibbs J.A. wrote, at p. 229,

> The "concerns of international comity, respect for the capacities of foreign and transnational tribunals and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" spoken of by Blackmun J. are as compelling in this jurisdiction as they are in the United States or elsewhere. It is meet therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia. That is the standard to be followed in this case.

[52] Hutcheon J.A., concurring in the result, put it more forcefully: (at p. 223) "I … would paraphrase a passage in *Parsons & Whittemore Overseas Co*., 508 F.2d 969 (1974) at 976 that Quintette must overcome a powerful presumption that the arbitral board acted within its powers."

[53] The standard of "powerful presumption" that the tribunal acted within its powers was adopted in *Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A.* (1999), 45 O.R. (3d) 183 (Sup. Ct.) at 190, appeal dismissed (2000) 49 O.R. (3d) 414.

[54] More recently, in this province, Armstrong J.A. stated in *United Mexican States v. Karpa* (2005), 74 O.R. (3d) 180 at 34 et seq.:

> [34] Notions of international comity and the reality of the global marketplace suggest that courts should use their authority to interfere with international commercial arbitration awards sparingly.
>
> [35] In another context, Austin J.A. made reference to "the strong commitment made by the legislature of this province to the policy of international commercial arbitration through the adoption of the ICAA and the Model Law…": see *Automatic Systems Inc. v. Bracknell Corp*. (1994), 18 O.R. (3d) 257, [1994] O.J. No. 828 (C.A.), at p. 216 O.R.

> ….
>
> [37] Quite apart from principles of international comity, our domestic law in Canada dictates a high degree of deference for decisions of specialized tribunal generally and for awards of consensual arbitration tribunals in particular.
>
> ….
>
> [41] NAFTA tribunals settle international commercial disputes by an adversarial procedure under which they determine legal rights in a manner not dissimilar to the courts. This may suggest that such tribunal ought not to attract a high degree of deference upon judicial review. However, I accept that there is merit in the submission of counsel for Mr. Feldman that "the dispute settlement mechanism and the need for expertise, all combine to indicate that the statutory purpose is to take the resolution of these disputes out of the hands of domestic courts". If this is so, it would again suggest a high degree of deference on review by the courts.
>
> [42] The matters to be decided by the tribunal in this case were heavily fact laden. I will have more to say about the nature of the particular issues to be determined by the tribunal later in these reasons. However, it is trite to say that a tribunal, which is engaged primarily in a fact-finding task, is entitled to a high degree of judicial deference.
>
> [43] Taking the above factors into account, I conclude that the applicable standard of review in this case is at the high end of the spectrum of judicial deference.

[55] The weight of authority supports the respondent's submission that the court's approach should be one of restraint and deference and that standard of review in considering whether the tribunal has exceeded its jurisdiction is one of reasonableness.

**DID THE TRIBUNAL EXCEED ITS JURISDICTION?**

[56] The language defining the jurisdiction of the tribunal is Article 1101 combined with Articles 1116 and 1117.

[57] With reference to the threshold issues in Article 1101, Mexico acknowledges that Cargill was an investor, and that CdM was an investment. Clearly the measures adopted by Mexico related to the investor and the investment. The term "related" requires only some connection and does not require that the measure be adopted with the express purpose of causing loss.

[58] As set out above, the tribunal's factual finding was that the investment comprised more than the bricks and mortar assets in Mexico together with the subsidiary corporate entity and its income: it included Cargill's business income derivable therefrom notwithstanding that a segment of activity necessary to earn the income took place in the United States.

[59] Mexico's argument rests upon the distinction between production and investment or producers and investors which it characterizes as two different "capacities". It argues that since Chapter Eleven of NAFTA sets out obligations only to investors and not to producers, damages for breach of Chapter Eleven obligations may only be awarded to the investor *qua* investor, and not *qua* producer. It argues that damages suffered by Cargill that emanate from its loss by reason of its production activities must therefore be outside the jurisdiction of the tribunal as those activities did not take place in territorial Mexico.

[60] Mexico relies on a decision of an arbitral tribunal in *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc v. the United Mexican States*, ICSID CASE No. ARB (AF)/04/05, dispatched November 21, 2007, Supplementary Decision and Interpretation dispatched July 10, 2008 (the ALMEX case). The ALMEX case also involved HFCS. The claimants were separate U.S. producers of HFCS. They established a joint venture company in Mexico, ALMEX, and established a production plant in Mexico where ALMEX produced HFCS. The claimants also sold HFCS that they produced in the U.S. to the joint venture company for resale in Mexico.

[61] The tribunal in ALMEX held, at 270 et seq.:

> 270. The Tribunal has jurisdiction to award damages which include loss of profit suffered by ALMEX [the investment], but it does not accept the claims of ADM and TLIA [the investors] for the profits they claim to have lost on the sale of HFCS produced outside the territory of the Respondent State,
>
> ….
>
> 273. Chapter Eleven of the NAFTA applies to measures adopted or maintained by a Party relating to, *inter alia* "investments of investors of another Party in the territory of the Party", and pursuant to Article 1101(1)(b) only measures relating to investments that are within the scope of Chapter Eleven should be covered. This means that the protection applies only to measures relating to investments of investors of one Party that are in the territory of the party that has adopted or maintained such measures. In a case such as the one at bar, this would exclude investments of ADM and TLIA located outside of Mexico, even if such investments are destined to promote fructose sales in Mexico.
>
> 274. The Tribunal has jurisdiction only to award compensation for the injury cause to Claimants in their investment made in Mexico (through ALMEX). Therefore, the Claimants are not entitled to recover the lost profits on sales of HFCS they would have produced in the United States and exported to Mexico "but for" the Tax, as these losses were not suffered in their capacity as investors in Mexico.

[62] It appears that in ALMEX, the investment was found to consist of the joint venture company and its business of production and sale of HFCS in Mexico.

[63] Here, the tribunal distinguished the ALMEX case on the facts, (see para. 524-5 of the Award reproduced *supra* at para. 42). The tribunal viewed the investment in the instant case as comprising importation of HFCS into Mexico and selling it to domestic users. One segment of the business, the making of product, was accomplished in the U.S. in Cargill's plants and the other another segment of the business, distribution of the product, was accomplished in Mexico by the subsidiary out of the facility at Tula. The tribunal found, as a fact, that the investment included everything that it took to achieve the result of obtaining a significant share of the Mexican market in HFCS. That there was integration, with the investment CdM being a wholly owned subsidiary and a part of Cargill's international operation was likely a significant factor in that finding. It is not within the jurisdiction of this court to review the tribunal's factual findings.

[64] Mexico's treatment of CdM had the effect of annihilating it. The annihilation of CdM destroyed Cargill's business of distributing HFCS into the Mexican market through its subsidiary. To find liability under Article 1116 it appears that causation must be shown to the extent that the loss or damage to the investor must be "by reason of, or arising out of" the breach of the chapter Eleven obligation by the Party. The language of those articles does not require that loss and damage be suffered in the territory of the violating party. The tribunal did not consider the fact that loss was suffered in the U.S. to be a circumstance that either rendered the loss either too remote or beyond scope of the tribunal's jurisdiction. I am of the view that the tribunal was not unreasonable in arriving at that conclusion.

[65] I am not able to accept that the argument that the activities of producing and investing delineate different "capacities" of a person, whether natural or artificial. The claimant has only one legal capacity – that of a corporate person in its own right carrying on commercial activity for economic benefit. Cargill has numerous businesses organized into five segments: agricultural services, industrial, origination & processing, risk management & financial, and food ingredients & applications. All are part of the constellation of activities done with the ultimate objective of generating economic benefit.

[66] Neither Article 1101 defining scope and coverage, nor Articles 1102, 1105 or 1106 setting out Parties' obligations, nor Articles 1116 and 1117 conferring claim rights set out limits, other than causation, as to the nature and scope of damages recoverable. No provision stipulates areas of activity or lines of business in respect of which compensation is recoverable if Chapter Eleven obligations are breached by a Party.

[67] The tribunal's assessment of damages hinges on its factual findings, set out above, as to the nature of the investment and what is comprised in the investment. Factual findings are clearly accorded deference and this court has no jurisdiction under Article 34 of the Model Law to interfere.

[68] In my view, there has been no excess of jurisdiction, and the tribunal held correctly that Mexico's objection to jurisdiction is, in substance, an argument going to the merits – questions of what the investment comprises in this case and what damages are sufficiently proximate for recovery.

[69] An alternative argument was advanced by Mexico that the result is an unreasonable one and reliance is placed on *Dunsmuir v. New Brunswick*, [2008] 1 S. C. R. 190, 2008 SCC 9. It is said that the result does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. It is argued that the tribunal's reasoning was not consistent with the aims of Chapter Eleven which is to protect investments only. It is argued that Cargill, having chosen to establish a distribution facility in Mexico but not a production facility, should not be put in better position in damages than investors such as those in the ALMEX case which established a joint venture production facility in Mexico.

[70] The ALMEX decision is not binding on the tribunal in this case and was distinguished by the tribunal in its reasons. As well, a consideration of the rationality of the result must take into account the purposes, not only of Chapter Eleven, but of the NAFTA as a whole. Both the preamble and Article 102, which sets out the objects of the NAFTA are helpful in that respect.

[71] The preamble states:

> The Government of Canada, the Government of the United Mexican States and the Government of the United States of America, resolved to:
>
> > STRENGTHEN the special bonds of friendship and cooperation among their nations;
> >
> > CONTRIBUTE to the harmonious development and expansion of world trade and provide a catalyst to broader international cooperation;
> >
> > CREATE an expanded and secure market for the goods and services produced in their territories;
> >
> > REDUCE distortions to trade;
> >
> > ESTABLISH clear and mutually advantageous rules governing their trade;
> >
> > ENSURE a predictable commercial framework for business planning and investment;
> >
> > ….
> >
> > ENHANCE the competitiveness of their firms in global markets;

> ….
>
> CREATE new employment opportunities and improve working conditions and living standards in their respective territories;
>
> ….

[72] Article 102 provides:

> The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
>
> a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
>
> b) promote conditions of fair competition in the free trade area;
>
> c) increase substantially investment opportunities in the territories of the Parties;
>
> d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
>
> e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
>
> f) establish a framework for further trilateral, regional and multilateral cooperation to expand and enhance the benefits of this Agreement.

[73] Viewed in the context of the NAFTA as a whole and bearing in mind that one of the six enumerated objectives of the agreement is to eliminate trade barriers and to facilitate the cross-border movement of goods and services, the result is not, in my view, irrational.

**DID THE TRIBUNAL EXCEED ITS JURISDICTION UNDER ARTICLE 1105?**

[74] I turn now to Mexico’s argument that the tribunal exceeded its jurisdiction in awarding damages to Cargill for a violation of Article 1105.

[75] Article 1105 requires that each Party to NAFTA accord to investments of investors of another Party fair and equitable treatment and full protection and security. Mexico argues that the benefit of Article 1105 accrues only to investments of investors of another Party and that investors have no right to claim damages for breach of Article 1105 – only investments have that right. Accordingly, it is argued, under Article 1105, the tribunal has jurisdiction only to inquire

into the loss suffered by the investment. In this case, CdM's loss is the lost revenue from sales that it would have had in Mexico but for the measures.

[76] I am not persuaded that the tribunal erred in awarding damages to Cargill in respect of a breach of Article 1105 by Mexico. The remedial provisions in Articles 1116 and 1117 are cumulative and not mutually exclusive. In particular, Article 1116 is engaged if there is a breach of a Section A provision (which Article 1105 is), and the investor, Cargill, is able to show that it has incurred loss or damage by reason of or arising out of that breach.

[77] There is no requirement that the damages awarded arising from the finding that Article 1105 has been violated be restricted to damages suffered by the investment, notwithstanding that Article 1105 obligates fair and equitable treatment to investments rather than to investors. In my view, Article 1116 contemplates a claim by an investor for loss that it has suffered by reason of a measure that offends the obligation to give fair and equitable treatment to an investment of the investor. In short, the language of 1116 is sufficiently broad to confer on the investor a viable claim for damages that it has suffered arising out of a breach of the obligation owed to its investment.

[78] In any event, Cargill and CdM are integrated and the tribunal found, as a factual matter, that the subsidiary was part of Cargill's business operation of selling HFCS into Mexico. It is therefore not unreasonable in that context to find that the damages to the subsidiary are damages to the parent even though they are two corporate entities.

[79] In the totality of the circumstances, however, it matters not whether some or all of the damages was awarded under Article 1105 since the totality of the damages was, on the tribunal's finding as to the nature and scope of the investment, compensable to the investor under both Articles 1102 and 1106. Accordingly, if there was an error in awarding damages to Cargill under Article 1105, it does not affect the result as there is no suggestion that Cargill is entitled to recover more than once.

[80] For the foregoing reasons, the application is dismissed. If the parties are unable to agree concerning costs, I may be spoken to upon arrangement with my assistant.

Low J.

**Released:** August 26, 2010

**CITATION**: United Mexican States v. Cargill, Incorporated, 2010 ONSC 4656
**COURT FILE NO.:** CV09-391935
**DATE:** 20100825



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

UNITED MEXICAN STATES

Applicant

**– and –**

CARGILL, INCORPORATED

Respondent

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**REASONS FOR JUDGMENT**

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Low J.

**Released:** August 26, 2010