The United Mexican States v. Cargill, Incorporated

[Indexed as: United Mexican States v. Cargill, Inc.]

107 O.R. (3d) 528

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Court of Appeal for Ontario,
Rosenberg, Moldaver and Feldman JJ.A.
October 4, 2011

Arbitration -- Award -- Respondent producing high fructose corn syrup in U.S. and selling it in Mexico through its subsidiary -- Respondent seeking arbitration for breaches of c. 11 of North American Free Trade Agreement after Mexico took steps to protect its sugar industry -- Arbitration panel awarding damages not only for subsidiary's lost sales in Mexico but also for respondent's lost sales of high fructose corn syrup to its subsidiary -- Mexico challenging latter award on basis that it fell outside panel's jurisdiction -- Mexico seeking to expand jurisdictional question into issues that went to merits of case -- Panel correctly identifying jurisdictional limits on its ability to award damages and seeking to determine respondent's loses as investor "by reason of or arising out of" Mexico's trade barrier breaches -- Question of whether lost capacity in respondent's U.S. plants constituted damages by reason of or arising out of Mexico's breaches was issue for expertise of panel rather than issue of jurisdiction.

Arbitration -- Jurisdiction -- Judicial review -- Standard of review -- Standard of review of decision of arbitration panel under North American Free Trade Agreement on issue of jurisdiction was correctness.

Cargill was a U.S. producer of high fructose corn syrup ("HFCS"). It sold HFCS in Mexico through CdM, its wholly owned subsidiary. In response to measures taken by Mexico to protect its sugar industry from competition from HFCS, Cargill and CdM sought arbitration for breaches of c. 11 of the North American Free Trade Agreement ("NAFTA") and an award of damages. Damages under c. 11 of NAFTA could only encompass Cargill's losses suffered "by reason of, or arising out of", Mexico's breaches of c. 11 affecting CdM. The arbitration panel's damages award included both CdM's lost sales ("down-stream losses") and Cargill's lost sales of HFCS to CdM ("up-stream losses"). Mexico applied to the Ontario Superior Court to set aside the award of up-stream losses to Cargill, relying on art. 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"). Article 34(2)(a)(iii) provides that an award may be set aside where it "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". Mexico argued that under c. 11 of NAFTA, the arbitration panel could only award damages to Cargill as an "investor" to compensate for losses suffered in connection with its "investment" in Mexico, which was CdM, and had no jurisdiction to award damages for losses suffered by the investor in another capacity, here as producer and exporter of its product into Mexico. The application judge found that the standard of review to be applied on the issue of jurisdiction was reasonableness. She concluded that Mexico's objection did not go to the jurisdiction of the panel but was an attack on the merits of the decision, which was beyond the scope of review. The application was dismissed. Mexico appealed.

Held, the appeal should be dismissed. [page529]

The applicable standard of review was that of correctness. The tribunal had to be correct in the sense that the decision it made had to be within the scope of the submission and the NAFTA provisions. However, courts are to be circumspect in their approach to determining whether an error alleged under art. 34(2)(a)(iii) of the Model Law properly falls within that

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provision and is a true question of jurisdiction. They are obliged to take a narrow view of the extent of any such question. And when they do identify such an issue, they are to carefully limit the issue they address to ensure that they do not stray into the merits of the question that was decided by the tribunal.

Mexico's submissions sought to expand the jurisdictional question into issues that went to the merits of the case. The tribunal correctly identified the jurisdictional limits on its ability to award damages and sought to determine Cargill's losses as an investor "by reason of or arising out of" Mexico's trade barrier breaches. The criteria for compensable damages provide a causation requirement, but no specified territorial limitation except in the definitional requirements of an investor. The tribunal accepted that Cargill's business model was an integrated enterprise for business in Mexico through CdM, and also the expert's characterization of Cargill's loss as the present value of the cash flows that both CdM and Cargill would have earned from sales of HFCS in Mexico from 2002 to 2007. In order to calculate that loss, the report factored in lost capacity in Cargill's U.S. plants that were built to supply CdM with product. The issue of whether lost capacity in Cargill's U.S. plants constituted damage by reason of, or arising out of, Mexico's breaches was a quintessential question for the expertise of the tribunal, rather than an issue of jurisdiction. The NAFTA parties had not consented to an interpretation of c. 11 that precluded the tribunal from ordering the up-stream damages.

Cases referred to

Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/05 (dispatched November 21, 2007); Supplementary Decision and Interpretation (dispatched July 10, 2008); Canada (Attorney General) v. S.D. Myers, Inc., [2004] F.C.J. No. 29, 2004 FC 38, [2004] 3 F.C.R. 368, 244 F.T.R. 161, 5 C.E.L.R. (3d) 166, 128 A.C.W.S. (3d) 635 (F.C.); Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious

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Affairs of the Government of Pakistan, [2011] 1 A.C. 763, [2011] 1 All E.R. 485, [2010] UKSC 46; Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9, 2008 SCC 9, 329 N.B.R. (2d) 1, 64 C.C.E.L. (3d) 1, 164 A.C.W.S. (3d) 727, EYB 2008-130674, J.E. 2008-547, [2008] CLLC 220-020, 170 L.A.C. (4th) 1, 372 N.R. 1, 69 Imm. L.R. (3d) 1, 291 D.L.R. (4th) 577, 69 Admin. L.R. (4th) 1, 95 L.C.R. 65, D.T.E. 2008T-223; Mexico v. Metalclad Corp., [2001] B.C.J. No. 950, 2001 BCSC 664, 89 B.C.L.R. (3d) 359, 14 B.L.R. (3d) 285, 38 C.E.L.R. (N.S.) 284, 104 A.C.W.S. (3d) 940, consd

Other cases referred to

Bayview Irrigation District #11 v. Mexico, [2008] O.J. No. 1858 (S.C.J.); Consolidated Arbitration in the NAFTA Chapter 11/UNICTRAL Cattle Cases v. United States of America, Award on Jurisdiction (January 28, 2008); Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International, S.p.A. (2000), 49 O.R. (3d) 414, [2000] O.J. No. 3408, 136 O.A.C. 113, 99 A.C.W.S. (3d) 537 (C.A.), affg (1999), 45 O.R. (3d) 183, [1999] O.J. No. 3573, 104 O.T.C. 1, 91 A.C.W.S. (3d) 520 (S.C.J.) [Leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 581]; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985); Quintette Coal Ltd. v. Nippon Steel Corp., [1990] B.C.J. No. 2241, [1991] 1 W.W.R. 219, 50 B.C.L.R. (2d) 207, 23 A.C.W.S. (3d) 541 (C.A.) [Leave to appeal to S.C.C. refused [1990] S.C.C.A. No. 431, 50 B.C.L.R. (2d) xxviii]; [page530] United Mexican States v. Karpa (2005), 74 O.R. (3d) 180, [2005] O.J. No. 16, 248 D.L.R. (4th) 443, 193 O.A.C. 216, 30 Admin. L.R. (4th) 272, 136 A.C.W.S. (3d) 200 (C.A.)

Statutes referred to

Arbitration Act 1996 (UK), 1996, c. 23 [as am.]

International Commercial Arbitration Act, R.S.O. 1990, c. I.9 [as am.], Sch.

Treaties and conventions referred to

North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, December 17, 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289, c. 11, Preamble, arts. 102, (a), 1101, 1102, 1103, 1105, 1106, 1110, 1116, 1117, 1131(1), 1139

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am.], art. 34, (1)(a)(i), (2), (a)(iii)
United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958), art. V1(a), (c)
Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, art. 31, (1), (3), (a), (b)
Authorities referred to
Heneghan, Patrick, and Jonathon Egerton-Peters, "Dallah v. Pakistan: Vive la diffrence?", Global Arbitration Review (April 20, 2011) online: Globalarbitration.com <www.globalarbitrationreview.com>
"Judicial Review of NAFTA Chapter 11 Arbitral Awards", McGill L.J. (forthcoming)

APPEAL from the order of Low J., [2010] O.J. No. 3698, 2010 ONSC 4656 (S.C.J.) dismissing an application to review an arbitration award.

Patrick G. Foy, Q.C., and Robert J.C. Deane, for appellant.

John Terry, for respondent, with the assistance of Jeffrey W. Sarles of the Illinois bar.

Barry A. Leon and Daniel A. Taylor, for intervenor ADR Chambers.

Malcolm N. Ruby, for intervenor United States of America.

Roger Flaim, for intervenor Attorney General of Canada.

The judgment of the court was delivered by

[1] FELDMAN J.A.: -- In response to measures taken by Mexico to protect its sugar industry from competition from imported high fructose corn syrup ("HFCS"), Cargill, Incorporated, a U.S. producer of HFCS, and its Mexican subsidiary distributor, Cargill de Mexico S.A. de C.V. ("CdM"), sought arbitration for breaches of c. 11 of the North American Free Trade Agreement

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Between the Government of Canada, the Government of Mexico and the Government of the United States, December 17, 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 ("NAFTA"), and an award of damages for those breaches. [page531]

[2] While recognizing that under c. 11 of the NAFTA, the award of damages could only encompass Cargill's losses suffered "by reason of, or arising out of" Mexico's breaches of c. 11 affecting Cargill's Mexican investment, namely, CdM, the arbitration panel's damages award included both CdM's lost sales as well as Cargill's lost sales of HFCS to CdM. The application judge dismissed the application challenging the award.

[3] The issue on appeal is whether, and on what standard of review, the latter award to Cargill is subject to being set aside by the court on review on the basis that it "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". For the reasons that follow, I would dismiss the appeal.

Background

Facts

[4] The history of the dispute between Mexico and the United States over Mexico's protection of its refined sugar industry against the U.S.'s importation of HFCS products before and after the NAFTA is set out in detail, at paras. 22-39 of the application judge's decision. As the application judge stated, the dispute between Cargill and Mexico is "but one battle in a larger conflict". For the purposes of the appeal, the relevant facts can be stated briefly.

[5] Cargill is a producer of HFCS, which is a low-cost substitute for cane sugar used extensively to sweeten soft drinks and other products. In 1993, before the NAFTA came into force on January 1, 1994, Cargill established a division of CdM, its existing wholly owned subsidiary, to begin to sell HFCS in Mexico through a distribution centre it built in Tula, in the State of Hidalgo, Mexico. Cargill also built a new

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production plant in Nebraska, expanded its HFCS plants in Iowa and Tennessee and built a new distribution centre in McAllen, Texas at the Mexican border. Cargill's business model was to import HFCS that it manufactured in the U.S. into Mexico through its border facility in Texas, for distribution in Mexico through CdM's distribution centre in Tula.

[6] The initial effect of the NAFTA was that the soft drink industry in Mexico, the second largest per capita consumer of soft drinks in the world, began to use HFCS rather than sugar in its products. In order to protect its sugar industry, Mexico enacted a number of trade barriers, all of which were ultimately found in the Cargill arbitration to constitute breaches of the NAFTA. Their effect on Cargill was that it was obliged to shut [page532] down a number of its HFCS production plants in the U.S. and its distribution centre in McAllen, Texas while CdM was forced to close its Tula distribution centre.

[7] In 2004, Cargill, on behalf of itself and CdM, served on Mexico a notice of intent to submit a claim to arbitration under c. 11 of the NAFTA for violation of arts. 1102, 1103, 1105, 1106 and 1110 of that chapter and for the damages properly compensable to Cargill and CdM as a result of Mexico's breaches of those provisions. For ease of reference, these and other relevant NAFTA provisions are included at Appendix "A".

[8] The parties then executed a consent to arbitration under c. 11, following which the claim was registered by the secretary-general of the International Centre for the Settlement of Investment Disputes (Additional Facility) ("ICSID"), and was heard by an expert panel in Washington, D.C. in October 2007. The decision was released in September 2009.

[9] Because the parties designated Toronto, Ontario as the "place of arbitration", the Ontario Superior Court of Justice had jurisdiction to review the award under the International Commercial Arbitration Act, R.S.O. 1990, c. I.9, which enacted the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") as a schedule to the Act.

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The Model Law was adopted by the United Nations Commission on International Trade Law on June 21, 1985.

The decision of the arbitration panel

[10] Having found that Mexico breached a number of provisions of c. 11 of the NAFTA, the panel awarded damages to Cargill and to CdM for the resultant losses in the amount of US$77,329,240. Those losses included what were referred to as both "up-stream" and "down-stream" losses. The down-stream losses of US$36,166,885 were the direct lost sales and associated costs suffered by CdM. The up-stream losses of US$41,162,355 represented the cost of lost sales to CdM of products manufactured by Cargill in the United States.

[11] At the arbitration, Mexico challenged the jurisdiction of the panel to award the up-stream damages, which it characterized as losses Cargill suffered in the United States as a producer and exporter of HFCS, rather than losses suffered as an investor in its Mexican investment, CdM.

[12] The panel addressed the matter directly. It concluded that a c. 11 arbitration panel had the jurisdiction to determine what damages arose "by reason of, or arising out of" Mexico's breaches (language in art. 1116) and to award damages to Cargill for losses to its business operations in the United States if it [page533] concluded, as a matter of interpretation, that those damages met the described jurisdictional criterion.

[13] The panel explained its conclusion on damages, at paras. 519-26 of its decision:

> To evaluate the damages claimed, the Tribunal has found it helpful to look at the lost profits claimed as divided at the United States-Mexican border, with those lost profits attributed to Cargill's inability to sell HFCS to CdM as "up-stream losses" and the direct losses of CdM as "down-stream losses."

According to Article 1139 and the Tribunal's previous

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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.

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 [Archer Daniels Midland v. The United Mexican States] 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."

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. . . .

With respect to the particular facts of this case, the Tribunal finds that the profits generated by Cargill's sales of HFCS to its subsidiary, Cargill de Mexico, for CdM's marketing, distribution and re-sale of that HFCS, were so associated with the claimed investment, CdM, as to be compensable under the NAFTA. Cargill's investment in Mexico involved importing HFCS and then selling it to domestic users, principally the soft drink industry. Thus, supplying HFCS to Cargill de Mexico was an inextricable part of Cargill's investment. As a result, in the view of the Tribunal, losses resulting from the inability of Cargill to supply its investment Cargill de Mexico with HFCS are just as much losses to Cargill in respect of its investment in Mexico as losses resulting from the inability of Cargill de Mexico to sell HFCS in Mexico.

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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 hand, was not a producer of HFCS and its HFCS business therefore depended on the HFCS sold to it by its parent.

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 [page534] 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.

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.

(Footnotes omitted)

Decision of the Superior Court

Jurisdictional issue

[14] Mexico asked the Superior Court to set aside the portion of the arbitral decision that awarded the up-stream damages to Cargill. Article 34(2) of the Model Law provides the authority for a Superior Court judge to set aside a decision of an international arbitral tribunal on limited grounds:

> Article 34. Application for setting aside as exclusive recourse against arbitral award
>
> . . . . .
>
> (2) An arbitral award may be set aside by the court

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specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State, or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case, or

(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, or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State, or

(ii) the award is in conflict with the public policy of this State. [page535]

[15] In seeking to have part of the award set aside, Mexico relied on art. 34(2)(a)(iii).

[16] Mexico argued that under c. 11 of the NAFTA, the

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arbitration panel could only award damages to Cargill as an "investor" (art. 1139) to compensate for losses suffered in connection with its "investment" (art. 1139) in Mexico, which was CdM, and had no jurisdiction to award damages for losses suffered by the investor in another capacity, here as producer and exporter of its product into Mexico.

[17] The application judge reasoned that the tribunal would have jurisdiction based on four threshold questions: (1) Is Cargill an "investor" in Mexico within the meaning of c. 11; (2) does Cargill have an investment in another Party to the NAFTA, [See Note 1 below] Mexico; (3) has Mexico adopted or maintained one or more measures, as defined by NAFTA; and (4) do those measures relate (a) to the investor, Cargill, or (b) to the investment, CdM? If the answer to all four threshold questions was "yes", then the next issue was "are there express or necessarily implied limitations on the scope and nature of damages open to the tribunal to award"?

Standard of review

[18] In order to properly assess the panel's response to these questions, the application judge first addressed the issue of the standard of review to be applied by the court when reviewing decisions of expert NAFTA international arbitration tribunals.

[19] Mexico argued that the standard of review on issues of jurisdiction is correctness. Cargill argued that the standard was one of deference. The application judge referred to judicial authorities for the "powerful presumption" that international arbitral tribunals act within their jurisdiction and that as a matter of respecting international comity and the global marketplace, courts should use their powers to interfere only sparingly: Quintette Coal Ltd. v. Nippon Steel Corp., [1990] B.C.J. No. 2241, 50 B.C.L.R. (2d) 207 (C.A.), leave to appeal to S.C.C. refused [1990] S.C.C.A. No. 431, 50 B.C.L.R. (2d) xxviii; United Mexican States v. Karpa (2005), 74 O.R. (3d) 180, [2005] O.J. No. 16 (C.A.); Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International, S.p.A. (2000), 49 O.R. (3d) 414, [2000] O.J. No.

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3408 (C.A.), leave to appeal refused to S.C.C. [2000] S.C.C.A. No. 581; Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614, 105 S. Ct. 3346 (1985). Based on [page536] those authorities, she concluded that the standard of review to be applied on issues of jurisdiction is reasonableness.

Application of the standard of review by the Superior Court

[20] In order to decide whether the decision of the panel that it had the jurisdiction to award Cargill its up-stream damages was a reasonable one, the application judge reviewed and considered the merits of the arguments on both sides. The thrust of Mexico's argument was that Cargill was being compensated not as an investor in another NAFTA Party, but as a producer in the home Party, the United States. That argument gained significant support from a recent decision of another NAFTA panel that also dealt with the consequences of Mexico's treatment of HFCS, the decision in Archer Daniels Midland Co. and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/05, dispatched November 21, 2007; Supplementary Decision and Interpretation, dispatched July 10, 2008 ("ADM").

[21] In that case, the two claimants were each producers of HFCS in the U.S., who also established a joint venture company in Mexico called Almidones Mexicanos S.A. de C.V. ("ALMEX") to produce and sell HFCS in Mexico and to import the product from the claimants to sell in Mexico. As in the Cargill case, the claimants claimed both for ALMEX's losses as well as for their own lost profits from forgone sales of their U.S.-produced HFCS to ALMEX. The panel in that case refused to award the latter losses, holding that it lacked jurisdiction to do so. It explained its reasoning, at paras. 273 and 274 of its award:

> 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

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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.

The Tribunal has jurisdiction only to award compensation for the injury caused to Claimants in their investment made in Mexico (through ALMEX). Therefore, the Claimants are not entitled to recover the lost profits on 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.

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[22] The application judge observed that the arbitral panel in Cargill distinguished the ADM case on the facts. The panel [page537] viewed Cargill's investment in Mexico as including both the importation and sale of HFCS into Mexico through the Mexican subsidiary CdM and its facility in Tula, while in ADM, the investment was only the ALMEX production facility. The panel found that Mexico's treatment of CdM destroyed it and thereby destroyed Cargill's business of distributing HFCS into the Mexican market through its subsidiary. As art. 1116 of c. 11 defines the required causation as loss to the investor "by reason of, or arising out of" the Party's breach, the panel was not unreasonable in concluding that the causation requirement had been met in this case. The application judge also noted that none of the relevant articles in c. 11 sets limits on damages other than the causation requirement. In particular, no article requires that the damages be suffered only in the territory of the investment.

[23] The application judge concluded that Mexico's objection did not go to the jurisdiction of the panel, but was an attack on the merits of the decision, which was beyond the scope of review for the court.

[24] The application judge also addressed the jurisdiction issue on the basis of Mexico's alternative argument that the result reached by the panel was unreasonable, and not within a range of reasonable outcomes, in accordance with the test

established by the Supreme Court of Canada in Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, [2008] S.C.J. No. 9. Mexico argued that having established only a distribution facility in Mexico and not a production operation, it was unreasonable for Cargill to be in a better position than the ALMEX investors whose investment was more extensive and included a joint venture production facility in Mexico.

[25] The application judge dismissed this argument as well. She noted that the ADM decision was not binding on the Cargill panel and that the panel had distinguished ADM on the facts. She also found that the result reached was consistent with the objects of the NAFTA as a whole, as set out in the Preamble, and with the objectives of the NAFTA agreement as set out in art. 102, including, in particular, the elimination of trade barriers and the facilitation of cross-border movement of goods and services, and that the result reached was therefore not irrational.

Issues on the appeal

[26] There are two main issues raised on the appeal: (1) what is the standard of review to be applied by the Superior Court in reviewing a decision of a c. 11 NAFTA arbitral panel under art. 34(2)(a)(iii) of the Model Law; and (2) did the application judge [page538] err in the application of the standard of review? Within the second question, the appellant attacks several of the application judge's findings in upholding the merits of the panel's decision.

Analysis

Issue 1: The standard of review

[27] The appellant submits that the application judge erred by applying the reasonableness standard to a decision on jurisdiction and that the appropriate standard of review is the correctness standard. Canada, an intervenor on the appeal, supported this position. The United States, which was also granted leave to intervene on appeal, took no position regarding the standard of review. The respondent agreed with the application judge that the standard is reasonableness.

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[28] ADR Chambers, which was given leave to intervene to assist the court on the issue of standard of review of a decision of a NAFTA arbitral tribunal, suggested a more nuanced approach to the issue. It submitted that the domestic administrative law tests do not apply when a court reviews the decision of an international arbitration panel under art. 34 of the Model Law. Rather, that article provides a limited and exhaustive list of grounds for judicial review relating to procedure, jurisdiction and public policy; no other ground may come under consideration. The court must not use the jurisdiction inquiry to effectively review the merits of the arbitral decision. Because the traditional arbitral nomenclature is not applicable, the proper description of the standard to be applied is the highest degree of deference.

[29] In a recent article titled "Judicial Review of NAFTA Chapter 11 Arbitral Awards", McGill L.J. (forthcoming), Henri Alvarez argues that reviewing courts in Canada and the U.S. have to date applied "various ill-defined standards of review". He suggests that the introduction of domestic administrative law standards, including reasonableness and correctness in Canada, and "manifest disregard of the law" in the United States, creates inconsistency in the review process and should be avoided.

[30] I agree that it is important to clearly define the standard of review to be applied by a court in reviewing an arbitral decision on the grounds set out in art. 34 of the Model Law. I also agree that importing and directly applying domestic concepts of standard of review, both from administrative law and from domestic review by appeal courts of trial decisions, may not [page539] be helpful to courts when conducting their review process of international arbitration awards under art. 34 of the Model Law.

[31] The starting point for determining the appropriate standard of review to be applied to NAFTA c. 11 arbitral decisions is the words of art. 34(2) of the Model Law set out above. The article provides that an award may only be set aside if the objecting party proves one of the enumerated

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deficiencies. None of the grounds allows a reviewing court to review the merits of a tribunal's decision. Article 34(2)(a)(iii) allows a court to review the award based on excess of jurisdiction by the tribunal and reads:

> (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[.]

[32] In the case of a c. 11 arbitration, the terms of the submission have three components: (1) the agreement of the parties; (2) the words of the relevant articles from c. 11, and where relevant, from other chapters of the NAFTA; (3) any interpretation of those words subsequently agreed to by the NAFTA signatory parties (Canada, the United States and Mexico). The third component comes from art. 31 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, which I will discuss later in these reasons. The submission to arbitration is always subject to, and governed by, the terms of the NAFTA.

[33] Canadian reviewing courts have consistently stated that courts should accord international arbitration tribunals a high degree of deference and that they should interfere only sparingly or in extraordinary cases: Quintette; Karpa; Canada (Attorney General) v. S.D. Myers, Inc., [2004] F.C.J. No. 29, [2004], 3 F.C.R. 368 (F.C.). In some cases, even on questions of jurisdiction, it has been said that the courts should apply "a powerful presumption" that an expert international arbitral tribunal acted within its authority: Bayview Irrigation District #11 v. Mexico, [2008] O.J. No. 1858 (S.C.J.), at para. 63; Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A. (1999), 45 O.R. (3d) 183, [1999] O.J. No. 3573 (S.C.J.), at p. 192 O.R., quoting concurring reasons in Quintette. Other courts have said that on questions of the tribunal's jurisdiction, the standard of review is correctness, but then have broken down the issues to be decided into questions of law, where the panel had to be correct, and questions of fact or mixed fact and law, where the panel had only to be reasonable: Myers, at paras. 58, 60 and 61.

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[34] Because the court has been given the oversight power provided in art. 34(2) of the Model Law, the question how a reviewing court is intended to perform the review and what test [page540] it is to apply is a critical one. In this case, the specific question is what test does the court apply under art. 34(2)(a)(iii) of the Model Law to determine whether the tribunal exceeded its jurisdiction by deciding an issue that was not within the submission of the parties under the provisions of c. 11?

[35] Accepting that courts should interfere only sparingly or in extraordinary cases, the court must have some basis to test whether the panel acted beyond its jurisdiction. If we were to use judicial review principles that apply in a domestic context, we would conduct a Dunsmuir analysis and determine whether the applicable standard is reasonableness or correctness. Normally, where the issue is one of pure jurisdiction, the correctness standard would apply, implying possible consideration of, but no deference to, the decision of the tribunal under review. In Mexico v. Metalclad Corp., [2001] B.C.J. No. 950, 89 B.C.L.R. (3d) 359 (S.C.) and Myers, both NAFTA review decisions under art. 34 of the Model Law, the courts held that the standard of review on questions of jurisdiction was correctness.

[36] It is also instructive to look at the approach to court review of an international arbitral award recently adopted by the English Supreme Court (replacing the House of Lords as the highest appeal court in the U.K.) in Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Government of Pakistan, [2011] 1 A.C. 763, [2011] 1 All E.R. 485 (U.K. S.C.). In that case, Dallah sought to enforce in England an international arbitration award made in its favour against the Pakistani ministry. Leave to enforce the award having been granted, the ministry sought to set aside the order granting leave on the basis that it had not been a party to the arbitration agreement and that the arbitration tribunal's decision that it had jurisdiction over the ministry was reviewable by the court. The English Arbitration Act 1996 (UK), 1996, c. 23, incorporates the 1958 United Nations Convention on

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the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10 1958), usually known as the New York Convention, rather than the 1985 Model Law. In that case, the court was applying art. V(1)(a) of the New York Convention, which contains similar wording to art. 34(1)(a)(i) of the Model Law. It reads:

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: [page541]

(a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made[.]

[37] The court found that the order granting leave should be set aside, holding that the tribunal's own view of its jurisdiction had no legal or evidential value, and that the court's role was to reassess the issue itself. Lord Mance explained his conclusion, at paras. 30-31, as follows:

The nature of the present exercise is, in my opinion, also unaffected where an arbitral tribunal has either assumed or, after full deliberation, concluded that it had jurisdiction. There is in law no distinction between these situations. The tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority in relation to the Government at all. This is so however full was the evidence before it and however carefully deliberated was its conclusion. It is also so whatever the composition of the tribunal -- a comment made in view of Dallah's repeated (but no more attractive for that) submission that weight should be given to the tribunal's "eminence", "high standing and great experience". The scheme of the New York Convention, reflected in sections 101-103 of the 1996 Act may give limited prima facie credit to apparently valid arbitration awards based on apparently

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valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in Article V(1) and section 103. But that is as far as it goes in law. Dallah starts with the advantage of service, it does not also start 15 or 30 love up.

This is not to say that a court seised of an issue under Article V(1)(a) and section 103(2)(b) will not examine, both carefully and with interest, the reasoning and conclusion of an arbitral tribunal which has undertaken a similar examination. Courts welcome useful assistance. The correct position is well summarised by the following which I quote from the Government's written case, at para. 233:

> Under section 103(2)(b) of the 1996 Act/Article V1(a) of the New York Convention, when the issue is initial consent to arbitration, the court must determine for itself whether or not the objecting party actually consented. The objecting party has the burden of proof, which it may seek to discharge as it sees fit. In making its determination, the court may have regard to the reasoning and findings of the alleged arbitral tribunal, if they are helpful, but it is neither bound nor restricted by them.

[38] In Dallah, the jurisdiction issue did not challenge the content of the award itself, but rather the ability of the tribunal to adjudicate: in particular, whether one party had committed to the arbitration process. In that context, the English Supreme Court's approach was to address the issue de novo, rather than as a review of the decision of the tribunal. One could view this approach as a variant of applying the correctness standard. As the court pointed out, the decision of the tribunal is given prima [page542] facie credit, because the onus is on the challenging party to set it aside. But because the court was deciding the validity of the agreement issue de novo, it heard evidence, including expert evidence on the French law governing the issue of the validity of the agreement, the court concluded that the agreement was not valid, and therefore, the arbitration panel had no jurisdiction. [See Note 2 below]

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[39] In this case, the jurisdiction issue is quite different under art. 34(2)(a)(iii). [See Note 3 below] The issue is whether the award itself complies with the submission to arbitration and, in particular, whether it "contains decisions on matters beyond the scope of the submission to arbitration". Under this subsection, the court is charged with reviewing the award and the submission to determine whether the tribunal stayed within its jurisdiction, based on the content of the submission, and the application of c. 11 of the NAFTA.

[40] Therefore, does the wording of art. 34(2)(a)(iii) assist the court in determining the standard of review the court is to apply? Although the subsection does not state a standard of review, because the question is whether the tribunal acted within its jurisdiction, and there are no words that limit the court's task, there is nothing that detracts from the normal rule that on questions of jurisdiction, the tribunal could not act beyond its jurisdiction. In the administrative law context, Lebel J. stated the principle in Dunsmuir, at para. 59, as follows:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or vires . . . "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be ultra vires or to constitute a wrongful decline of jurisdiction: D.J.M. Brown and J.M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at pp. 14-3 to 14-6. An example may be found in United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City), [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, per Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or vires.

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[page543]

[41] The tribunal therefore had to be correct in the sense that the decision it made had to be within the scope of the submission and the NAFTA provisions. Its authority to make any decision is circumscribed by the submission and the provisions of the NAFTA as interpreted in accordance with the principles of international law. It has no authority to expand its jurisdiction by incorrectly interpreting the submission or the NAFTA, even if its interpretation could be viewed as a reasonable one.

[42] I conclude that the standard of review of the award the court is to apply is correctness, in the sense that the tribunal had to be correct in its determination that it had the ability to make the decision it made.

[43] This conclusion is consistent with the reasoning in Dallah and with the decisions of the Supreme Court of British Columbia in Metalclad and of the Federal Court in Myers.

[44] It is important, however, to remember that the fact that the standard of review on jurisdictional questions is correctness does not give the courts a broad scope for intervention in the decisions of international arbitral tribunals. To the contrary, courts are expected to intervene only in rare circumstances where there is a true question of jurisdiction.

[45] In the domestic law context, courts are warned to ensure that they take a narrow view of what constitutes a question of jurisdiction and to resist broadening the scope of the issue to effectively decide the merits of the case. This point was emphasized by Lebel J. in Dunsmuir, the leading case on standard of review in the administrative law context, in his discussion at para. 59:

> These questions [of jurisdiction] will be narrow. We reiterate the caution of Dickson J. in [Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45] that reviewing

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judges must not brand as jurisdictional issues that are doubtfully so.
(Emphasis added)

[46] This latter approach is magnified in the international arbitration context. Courts are warned to limit themselves in the strictest terms to intervene only rarely in decisions made by consensual, expert, international arbitration tribunals, including on issues of jurisdiction. In my view, the principle underlying the concept of a "powerful presumption" is that courts will intervene rarely because their intervention is limited to true jurisdictional errors. To the extent that the phrase "powerful presumption" may suggest that a reviewing court should presume that the tribunal was correct in determining the scope of its jurisdiction, the phrase is misleading. If courts were to defer to the decision of the tribunal on issues of true jurisdiction, that would effectively [page544] nullify the purpose and intent of the review authority of the court under art. 34(2)(a)(iii).

[47] Therefore, courts are to be circumspect in their approach to determining whether an error alleged under art. 34(2)(a)(iii) properly falls within that provision and is a true question of jurisdiction. They are obliged to take a narrow view of the extent of any such question. And when they do identify such an issue, they are to carefully limit the issue they address to ensure that they do not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal.

[48] One challenge for a reviewing court is to navigate the tension between the discouragement to courts to intervene on the one hand, and on the other, the court's statutory mandate to review for jurisdictional excess, ensuring that the tribunal correctly identified the limits of its decision-making authority. Ultimately, when deciding its own jurisdiction, the tribunal has to be correct.

[49] For example, if the submission to arbitration, agreed to by both parties, makes a claim for damages suffered in the years 2007 and 2008, and the tribunal awards damages for 2009

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and 2010, that would be an "award . . . not falling within the terms of the submission to arbitration". Another example might be where the "investment" made by an investor from one Party is located in Brazil -- i.e., not in the territory of another Party -- and the tribunal awards c. 11 damages for losses suffered by the investor in Brazil even though c. 11 defines an investment as being located in the territory of another Party to the NAFTA, i.e., Canada, the United States or Mexico.

[50] The second challenge for the court is to limit its review to determining whether the award "contains decisions on matters beyond the scope of the submission" and not to review the merits of the decision itself.

[51] While the respondent advocates for review under art. 34(2)(a)(iii) on a reasonableness standard, as found by the application judge, in my view a reasonableness standard inevitably leads to a review of the merits of the decision. Any time the court reviews on the reasonableness standard, it undertakes an in-depth analysis of the reasoning and decision of the tribunal in order to decide whether the result was a reasonable one. That may include a review in the form of an exercise determining whether findings of fact made by the tribunal were reasonable. Once a court enters into a reasonableness review, it is effectively considering the merits of the tribunal's decision and deciding whether that decision is acceptable because it is reasonable, not because it was made within the jurisdiction of the tribunal. [page545]

[52] To summarize my approach, the role of the reviewing court is to identify and narrowly define any true question of jurisdiction. Specifically, under art. 34(2)(a)(iiii), did the tribunal decide an issue that was not part of the submission to arbitration or misinterpret its authority under the NAFTA? Another way to define the proper approach is to ask the following three questions:

-- What was the issue that the tribunal decided?
-- Was that issue within the submission to arbitration made under c. 11 of the NAFTA?
-- Is there anything in the NAFTA, properly interpreted, that precluded the tribunal from making the award it made?

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[53] The role of the reviewing court is to identify and narrowly define any true question of jurisdiction. The onus is on the party that challenges the award. Where the court is satisfied that there is an identified true question of jurisdiction, the tribunal had to be correct in its assumption of jurisdiction to decide the particular question it accepted and it is up to the court to determine whether it was. In assessing whether the tribunal exceeded the scope of the terms of jurisdiction, the court is to avoid a review of the merits.

Issue 2: Application of the standard of review

Positions of the parties

[54] To restate, Mexico says that the tribunal did not have the jurisdiction under c. 11 of the NAFTA to award damages to Cargill for losses it suffered as a producer and seller of HFCS in the United States and not as an investor in Mexico.

[55] As noted above, both Canada and the United States appeared as intervenors on the appeal. They supported Mexico's position on the basis that all three Parties to the NAFTA have agreed on a common view of the interpretation of art. 1116: that it limits an investor's damages "to those incurred in its capacity as an investor in seeking to make, making or having made an investment in the territory of another NAFTA Party". Canada also supported Mexico on the issue of standard of review, taking the position that the interpretation of the definition of "investment" in c. 11 is an issue of law that goes to the jurisdiction of the tribunal and on which it must be correct.

[56] Mexico divides its challenge into three specific issues. They are all versions of a similar objection -- that the tribunal [page546] erred in its interpretation of the relevant NAFTA provisions and that those errors amounted to errors of jurisdiction. In particular, Mexico argues that the tribunal first erred in concluding that the scope of the damages "arising by reason of, or arising out of" breaches of arts. 1116 and 1117 were matters of interpretation or application of

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the facts.

[57] The tribunal's second alleged error was failing to distinguish between Cargill in its capacity as producer and as investor for the purpose of calculating its damages.

[58] Its third alleged error was the failure to recognize that c. 11 has a territorial limitation to its application and to the scope of damages that can be awarded to an investor. Mexico relies on the same argument asserted by the two intervenors, Canada and the United States, that the NAFTA Parties have all taken the common position, in accordance with art. 31(3) of the Vienna Convention on the Law of Treaties, which recognizes the territorial limitation on the scope of damages.

[59] Taking these errors together, the tribunal is said to have exceeded its jurisdiction by treating Cargill's investment in a holistic manner, which effectively included a portion of its production and export business in the United States, thereby offending the territorial limitations of c. 11 and the jurisdictional limits imposed by the investment requirement. In making this submission, Mexico explicitly acknowledged that the damage suffered by an investor is not limited to damage suffered in the country where the investment is located, as long as the damage is suffered by the claimant in its capacity as an investor. For example, an investor could recover the cost of lobbying efforts in its home country in respect of the investment, as damages suffered as an investor.

[60] The territorial limitation was clearly and explicitly recognized by the ADM tribunal when it refused to award the claimant investors any damages for loss of sales to their Mexican investment subsidiary. In its Supplementary Decision, at para. 52, the ADM tribunal stated:

> When the Claimants manufactured HFCS in the United States for sale in Mexico, the investment of the Claimants responsible for generating the profits is the investment in plant and other facilities in the United States. These losses did not relate to an investment in Mexican territory, and therefore

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the Tribunal did not have jurisdiction over these alleged losses.

[61] In this case, Mexico argues that neither the tribunal nor the application judge provided a logical basis for distinguishing the ADM analysis. It also suggests that the ADM claimants had a stronger claim to damages because, in accordance with the goals of the NAFTA, they had made a substantial investment in [page547] a production operation in Mexico, not just a distribution centre for HFCS produced in the United States.

Analysis

[62] The focus of the jurisdictional challenge is two-fold: (1) the interpretation of the provisions of c. 11 of the NAFTA that accord the power to make complaints and to receive compensation for Party breaches affecting a local investment by an investor of another Party, through the arbitration process; and (2) the exact definition and extent of the interpretation of the c. 11 provisions that has been consented and agreed to by the Parties to the NAFTA, that may impose a territorial limitation on c. 11 damages.

[63] Article 1116 of c. 11 allows an investor to submit a claim to arbitration for defined breaches by a NAFTA Party where the "investor has incurred loss or damage by reason of, or arising out of, that breach". Article 1101 describes and confines the application of c. 11 to "measures adopted or maintained by a Party 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". Finally, the definition of investment in art. 1139 includes

> (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

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

[64] The definition goes on to provide that an 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[.]

[65] Mexico alleges that these provisions jurisdictionally limit the scope of an arbitration award of damages to damages suffered by an investor by reason of Mexico's trade barriers as they affected Cargill's investment in Mexico, but not as they affected its investments in the United States, and therefore precluded [page548] awarding damages for lost sales from Cargill's U.S. production facilities to its Mexican investment, CdM.

[66] I do not agree. I agree with the application judge that Mexico's submission seeks to expand the jurisdictional question into issues that go to the merits of the case. Again, the inquiry under art. 34(2)(a)(iii) is restricted to whether the tribunal dealt with a matter beyond the submission to arbitration, not how the tribunal decided issues within its jurisdiction.

[67] The relevant provisions allow the investor, which is necessarily an individual or an enterprise from another Party state, to claim damages. Those damages must arise from a breach by the host Party as described in c. 11. All of these breaches, as set out in the articles of c. 11, are in respect of the investor's investment in the host Party's territory. For example, art. 1103, "Most-Favoured-Nation Treatment", provides:

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation,

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and sale or other disposition of investments.

2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

[68] The investment must meet the definition and not be excluded as merely selling product to buyers in the affected Party territory. Finally, the investor's loss must have been incurred "by reason of, or arising out of" the breach. Those are the jurisdictional limits on the award of damages.

[69] It is up to the tribunal to make findings of fact, apply the facts to the definitions and determine whether, in any particular case, the claimed damages fall within the defined criteria. As the application judge described, the criteria for compensable damages provide a causation requirement but no specified territorial limitation except in the definitional requirements of an investment. That definition also provides that an investment does not include mere contracts for the sale of goods or services into a country; therefore, where there is no actual investment, there can be no damages that merely compensate for the loss of such sales.

[70] The tribunal correctly identified the jurisdictional limits on its ability to award damages and sought to determine Cargill's losses as an investor "by reason of or arising out of" [page549] Mexico's trade barrier breaches. In doing so, it relied on the expert damages report by Navigant Consulting Inc. submitted by Cargill. A copy of that report was provided to this court at the hearing. That report described Cargill's business model in Mexico. Its strategy called for production of HFCS by Cargill in the U.S. and sale to CdM at the U.S. border for distribution by CdM to end customers in Mexico. Cargill targeted high-volume, large corporate customers in Mexico. It therefore built two distribution centres to serve two areas of the country, one in Mexico and one in Texas near the border. It then expanded its production facilities in the U.S. to supply

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the Mexican market.

[71] The tribunal accepted that Cargill's business model was an integrated enterprise for business in Mexico through CdM, and also the expert's characterization of Cargill's loss as the present value of the cash flows that both CdM and Cargill "would have earned from sales of HFCS in Mexico from 2002 to 2007". In order to calculate this loss, the report factors in lost capacity in Cargill's U.S. plants that were built to supply CdM with product.

[72] Clearly there is an argument as to whether lost capacity in Cargill's U.S. plants constitutes damages by reason of, or arising out of, Mexico's breaches to the extent that those breaches affected CdM. However, this is a quintessential question for the expertise of the tribunal, rather than an issue of jurisdiction. Had there been language in the c. 11 provisions that prohibited awarding any damages that were suffered by the investor in its home business operation, even if those damages related to and were integrated with the Mexican investment, that would have been a jurisdictional limitation that would have precluded the arbitration panel from awarding such damages, even if in its view, they otherwise flowed from the breaches. But there is not such limiting language.

[73] The panel distinguished the ADM case on its view of the facts. There, because the joint venture Mexican subsidiary of the claimants was a producer of HFCS, it did not need to import product produced by the claimants in the U.S. as a necessary part of the business plan for its Mexican investment. Therefore, unlike in the Cargill case, because any losses suffered by ADM's U.S. production facilities could not be said to be by reason of, or arising out of, Mexico's breaches, there was no jurisdiction to award such losses.

[74] Whether or not the tribunal's distinction of the ADM case is a reasonable one is not an issue for the court. The only issue is whether the tribunal was correct in its determination that it had jurisdiction to decide the scope of damages suffered by Cargill by [page550] applying the criteria

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set out in the relevant articles of c. 11, and that there is no language in c. 11, or as agreed by the NAFTA Parties, that imposes a territorial limitation on those damages. Once the court concludes that the tribunal made no error in its assumption of jurisdiction, the court does not go on to review the entire analysis to decide if the result was reasonable. As I have determined that the tribunal acted within its jurisdiction, there is no review of the merits of the decision.

Issue 3: Have the NAFTA Parties consented to an interpretation of c. 11 that precluded the tribunal from ordering the up-stream damages?

[75] NAFTA tribunals are directed by art. 1131(1) to decide the issues in a dispute in accordance with the NAFTA and the applicable rules of international law. The Vienna Convention on the Law of Treaties is one of the governing documents that provides such rules. Articles 31(1) and (3)(a) and (b) of that convention are relevant and provide:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

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(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

[76] The three NAFTA Parties submit that the intent of c. 11 is not to protect the cross-border trade in goods, which is covered by other chapters, but specifically to address cross-border investments and to provide a remedy where those investments are not treated by the host Party in accordance with its obligations as set out in c. 11. This principle, as formulated, was [page551] recognized by the Cargill tribunal, which noted, at para. 515, that Cargill was making no claim for any loss of trade sales it made directly to Mexican customers.

[77] Neither does c. 11 protect investments in the investor's home country. For example, in The Consolidated Arbitration in the NAFTA Chapter 11/UNICTRAL Cattle Cases v. United States of America, Award on Jurisdiction (January 28, 2008), at para. 233, the tribunal decided it had no jurisdiction over the claim against the United States for any measures it took, because the Canadian claimants were claiming for damages in respect of their Canadian operations and (unlike in the Cargill case) had no present or intended investment in the other Party's territory, in that case, the United States.

[78] The Parties submit that in accordance with art. 31(3)(b) of the Vienna Convention, their subsequent practice has been to consistently submit to NAFTA tribunals their agreement that, quoting from the factum of the United States of America, at para. 19: "[T]he recovery available for claims submitted under Article 1116 is limited to loss or damage suffered by the claimant in its capacity as investor." This statement, however, merely reflects the words of the NAFTA, about which there is no dispute.

[79] In the context of this case, the Parties are effectively

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arguing that they have agreed, in accordance with art. 31 of the Vienna Convention, that the only compensable damages are those suffered in the territory of the Party where the investment is located and not losses suffered by the investor in its home business operation, even where those losses resulted from the breach. Reference is made in the factum filed by the United States, as evidence of the agreement, to submissions made to the Myers tribunal by the United States and Mexico.

[80] I have examined those submissions. They bear out the general agreement by the Parties reflected in the quote above: any compensable losses must be suffered by the investor in its capacity as an investor of an investment. However, those submissions do not go so far as to put a strict territorial limitation on the losses.

[81] Of course, because the fact situation and arguments in Myers posed a different problem than the one faced in Cargill, and the Parties focused their argument to meet the Myers facts, the argument does not address the specific damages issue that has arisen in Cargill. In Myers, it was argued that the purpose of the Canadian investment was intended to facilitate orders for PCBs to be sent to Myers' plant in the U.S. When Canada prohibited the cross-border transport of PCBs, the loss of business [page552] was suffered at the U.S. plant. Hence, the argument was that the measures that Canada took caused a loss to Myers in the U.S. mainly, with only incidental losses to the small Canadian investment. Mexico included the following statement as part of its submission, para. 40:

> In the case of lost profits, it will be important for the Tribunal to determine the amount of foregone profit (if any) that properly would have accrued to the Canadian investment rather than the U.S. investor. It would be wrong to lump together the investment's loss of profit that would have been earned by rendering sales and administrative services in Canada with the investor's loss of profit that would have been earned by providing PCB waste disposal services in the United States. This would compensate the investor for loss or damage that does not arise out of a breach of Section A of

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Chapter Eleven, but by reason (if at all) of a breach of Chapter Twelve, a chapter which falls outside the Tribunal's jurisdiction.

[82] This submission reflects the premise asserted by the Parties that damages awarded under c. 11 of the NAFTA must compensate the investor for breaches that affect it as an investor in the investment. However, it does not provide a specific agreement by the Parties that in all cases, damages awarded are to be limited only to those suffered by the investor in the territory of the investment.

[83] In my view, it is clear that NAFTA tribunals understand that the damages that may be awarded for c. 11 claims must be in relation to breaches that affect a claimant's investment in the host country and therefore affect the investor as an investor. That is the common position of the NAFTA Parties as well. They say, however, that what they mean by that position is that such damages are further limited to exclude losses suffered by the investor in its home business operation as opposed, for example, to losses that reflect administrative expenses such as lobbying expenses in the home country spent for the purposes of the investment.

[84] I agree that if that position of the three Parties was a clear, well-understood, agreed common position, in accordance with art. 31(3)(b) of the Vienna Convention, that prohibited the award of any losses suffered by the investor in its home business operation, even caused by the breach, it would be an error of jurisdiction for the tribunal to fail to give effect to that interpretation of the relevant provisions of c. 11. However, that does not appear to be the case. The common position, as far as it went, that damages must relate to the investment and to the investor as an investor, was understood and implemented by the Cargill tribunal, based on its findings of the nature of the losses in this case. In my view, no jurisdictional error was made. [page553]

Issue 4: Reference to the NAFTA objective

[85] The appellant raises one further issue in its factum. It

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objects to the reference by the application judge to the NAFTA objective in art. 102(a) -- the facilitation of the cross-border movement of goods -- as supporting her conclusion that the result reached by the tribunal was not irrational. In light of my conclusion on the standard of review, it is not necessary to address this issue.

Conclusion

[86] I would dismiss the appeal with costs. Counsel advised the court at the conclusion of oral argument that they would resolve the issue of costs. I would not make any award of costs in favour of or against the intervenors, and thank them for their helpful submissions.

Appeal dismissed.

Appendix "A"

Article 102: Objectives

1. 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.

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2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

. . . . . [page554]

Article 1101: Scope and Coverage

1. 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.

2. A Party has the right to perform exclusively the economic activities set out in Annex III and to refuse to permit the establishment of investment in such activities.

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Fourteen (Financial Services).

4. Nothing in this Chapter shall be construed to prevent a Party from providing a service or performing a function such as law enforcement, correctional services, income security or insurance, social security or insurance, social welfare, public education, public training, health, and child care, in a manner that is not inconsistent with this Chapter.

Article 1102: National Treatment

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

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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.

3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

4. For greater certainty, no Party may:

(a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or

(b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

Article 1103: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, [page555] 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 investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

. . . . .

Article 1105: Minimum Standard of Treatment

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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, nondiscriminatory 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).

Article 1106: Performance Requirements

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

(a) to export a given level or percentage of goods or services;
(b) to achieve a given level or percentage of domestic content;
(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
(e) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
(f) to transfer technology, a production process or

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other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or

(g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be [page556] construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure.

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:

(a) to achieve a given level or percentage of domestic content;

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

(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

4. Nothing in paragraph 3 shall be construed to prevent a Party from conditioning 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 a requirement to locate production, provide a

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service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

5. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.

6. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1(b) or (c) or 3(a) or (b) shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:

(a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
(b) necessary to protect human, animal or plant life or health; or
(c) necessary for the conservation of living or non-living exhaustible natural resources.

. . . . .

Article 1110: Expropriation and Compensation

1. No Party may directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except:

(a) for a public purpose;
(b) on a non-discriminatory basis;
(c) in accordance with due process of law and Article 1105(1); and
(d) on payment of compensation in accordance with paragraphs 2 through 6. [page557]

2. Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation"), and shall not reflect any change in value occurring because the intended expropriation had become known earlier. Valuation

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criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

3. Compensation shall be paid without delay and be fully realizable.

4. If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.

5. If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.

6. On payment, compensation shall be freely transferable as provided in Article 1109.

7. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter Seventeen (Intellectual Property).

8. For purposes of this Article and for greater certainty, a non-discriminatory measure of general application shall not be considered a measure tantamount to an expropriation of a debt security or loan covered by this Chapter solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

. . . . .

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

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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 loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage. [page558]

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 loss or damage by reason of, or arising out of, that breach.

2. An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first

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acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

3. Where an investor makes a claim under this Article and the investor or a non-controlling investor in the enterprise makes a claim under Article 1116 arising out of the same events that gave rise to the claim under this Article, and two or more of the claims are submitted to arbitration under Article 1120, the claims should be heard together by a Tribunal established under Article 1126, unless the Tribunal finds that the interests of a disputing party would be prejudiced thereby.

4. An investment may not make a claim under this Section.

. . . . .

Article 1131: Governing Law

1. A Tribunal established under this Section shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. An interpretation by the Commission of a provision of this Agreement shall be binding on a Tribunal established under this Section.

. . . . .

Section C -- Definitions

Article 1139: Definitions

For purposes of this Chapter:

disputing investor means an investor that makes a claim under Section B;

disputing parties means the disputing investor and the disputing Party;

disputing party means the disputing investor or the disputing

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Party;

disputing Party means a Party against which a claim is made under Section B;

enterprise means an "enterprise" as defined in Article 201 (Definitions of General Application), and a branch of an enterprise; [page559]

enterprise of a Party means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there;

equity or debt securities includes voting and non-voting shares, bonds, convertible debentures, stock options and warrants;

G7 Currency means the currency of Canada, France, Germany, Italy, Japan, the United Kingdom of Great Britain and Northern Ireland or the United States;

ICSID means the International Centre for Settlement of Investment Disputes;

ICSID Convention means the Convention on the Settlement of Investment Disputes between States and Nationals of other States, done at Washington, March 18, 1965;

Inter-American Convention means the Inter-American Convention on International Commercial Arbitration, done at Panama, January 30, 1975;

investment means:

(a) an enterprise;

(b) an equity security of an enterprise;

(c) a debt security of an enterprise

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

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

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but does not include a debt security, regardless of original maturity, of a state enterprise;

(d) a loan to an enterprise

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

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

but does not include a loan, regardless of original maturity, to a state enterprise;

(e) an interest in an enterprise that entitles the owner to share in income or profits of the 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 excluded from subparagraph (c) or (d);

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

(h) interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under [page560]

(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 in connection with a

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commercial transaction, such as trade financing, other than a loan covered by subparagraph (d); or

(j) any other claims to money,

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

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

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;

investor of a non-Party means an investor other than an investor of a Party, that seeks to make, is making or has made an investment;

New York Convention means the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958;

Secretary-General means the Secretary-General of ICSID;

transfers means transfers and international payments;

Tribunal means an arbitration tribunal established under Article 1120 or 1126; and

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law, approved by the United Nations General Assembly on December 15, 1976.

Notes

Note 1: The "Parties" to the NAFTA are Canada, Mexico and the

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United States.

Note 2: As an interesting aside, at a subsequent hearing before a French court, the court determined that the agreement was valid: "Dallah v. Pakistan: Vive la diffrence?", Global Arbitration Review, 6:3 (April 20, 2011) at <http://www.globalarbitrationreview.com>.

Note 3: Article 34(2)(a)(iii) is equivalent to art. V(1)(c) of the New York Convention.

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