

THE INTERNATIONAL CENTRE FOR THE SETTLEMENT OF
INVESTMENT DISPUTES

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In the Matter of Arbitration :
Between: :
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CORN PRODUCTS INTERNATIONAL :
INC., :
:
Claimant, :
:
and : Case No.
: ARB/(AF)/04/1
:
UNITED MEXICAN STATES, :
:
Respondent. :
- - - - - X
ARCHER DANIELS MIDLAND COMPANY :
and TATE & LYLE INGREDIENTS :
AMERICAS, INC., : Case No.
: ARB/(AF)/04/5
:
Claimants, :
:
and :
:
UNITED MEXICAN STATES. :
- - - - - X

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Monday, April 18, 2005

The World Bank
1818 H Street, N.W.
MC Building
Conference Room 13-121
Washington, D.C.

The hearing in the above-entitled matter
came on, pursuant to notice, at 9:07 a.m. before:

DR. BERNARDO M. CREMADES, President

MR. ARTHUR W. ROVINE, Arbitrator

LIC. EDUARDO SIQUEIROS, Arbitrator

Also Present:

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1 P R O C E E D I N G S

2 PRESIDENT CREMADES: Good morning to
3 everybody. A very welcome to this very special
4 meeting. I understand that that's going to be
5 taking place for the first time in this house in
6 these consolidation proceedings, so I will start
7 moving knowing that there might be plenty of open
8 questions, and we try to solve them during those
9 days.

10 As the Tribunal told you, we are going to
11 start this morning first with the intervention of
12 the representative of the Republic of Mexico, half
13 an hour. That has been agreed by the Tribunal.
14 Even if some questions were posed in the very last
15 hours, we insist that everyone should have half an
16 hour, including the three representatives of the
17 claimants in this case, and we change a little bit
18 our mind in the sense that after coffee break in
19 the rebuttal, the Republic of Mexico will start
20 again, and then we are going to do the reverse so
21 that you will be CPI, the last to present your
22 rebuttal phase.

1 And I know that that could raise some
2 problems from the other co-claimants, but that's
3 the decision we have taken in the very last minute.
4 So that there is no--there is a compensation
5 between you having half an hour and 15 minutes like
6 the other claimants, but at the rebuttal phase we
7 have changed the order, and we are going to be
8 flexible. Don't worry about being the last or not,
9 because that's going to be the same.

10 First of all, I wanted to welcome
11 everybody, especially the representative from the
12 State Department and from the Canada government.
13 We have been asked, as you know, that Cargill
14 lawyers should follow our session and not taking
15 part in this session. They will be following us in
16 a separate room through the technology allowing
17 them to follow what we are doing after you gave
18 your consent for that.

19 And let's go to the main presentations. I
20 know that you might have lots of procedural and
21 points of order to put on the desk, but my
22 suggestion on behalf of the Tribunal is that we

1 start listening to you for half an hour in the
2 order we have foreseen, and then after coffee break
3 we will continue.

4 Do you have any questions? I guess so.
5 The other one.

6 MS. LOW: Could I just have 30 minutes for
7 Republic of Mexico, 30 minutes for ourselves,
8 followed by 30 minutes for the other joint--

9 PRESIDENT CREMADES: 30 minutes for each
10 one of the others?

11 MS. LOW: Each one of the others. Could I
12 ask the Tribunal to clarify why there is a
13 disequality of treatment? It is a joint claim.

14 PRESIDENT CREMADES: Well, the position of
15 the Tribunal is exactly not to discriminate them,
16 and equal treatment for everybody, half an hour.
17 That's the reason why we took into consideration
18 your concerns about that, and we compensate you,
19 giving you the last word on the rebuttal phase.
20 Okay?

21 MS. LOW: Thank you.

22 PRESIDENT CREMADES: Yes, please.

1 MR. PRICE: Thank you, Mr. President, and
2 I'm sorry to prolong this preliminary phase. Was
3 there a request by a party to change the order?

4 PRESIDENT CREMADES: Well, there was not a
5 request, but, I mean, there has been verbal
6 contacts, and the Tribunal felt that probably the
7 best way to solve everybody's concern was that way.
8 But anyhow, don't be concerned about being the last
9 because we are going to be flexible.

10 MR. PRICE: I understand. I would just
11 like the record to reflect that we were unaware
12 that any such request was made to this Tribunal,
13 whether in writing or verbally. Thank you,
14 Mr. President.

15 PRESIDENT CREMADES: Thank you. All
16 right. I will give the floor now to the
17 representative of Mexico, who will have 30 minutes
18 to present his request for consolidation.

19 OPENING STATEMENT BY COUNSEL FOR RESPONDENT

20 UNITED MEXICAN STATES

21 MR. PEREZCANO: Thank you very much,
22 Mr. Chairman.

1 Mr. Chairman, members of the panel, good
2 morning. The request from Mexico about the
3 consolidation is not a complicated issue, despite
4 the efforts on the part of CPI to describe it as
5 such. Mexico, first of all, repeats its arguments
6 as they appear in its request of September 8, 2004,
7 and its communication of April 11, 2005.

8 Today, I would like to just take up the
9 following matters. First, the arguments of
10 claimants that Article 1126 is an exception;
11 secondly, the basis on which the Tribunal must
12 decide the request from Mexico; and thirdly, the
13 differences to which CPI, ADM have referred to
14 which do not apply to the issue of consolidation;
15 and finally, a number of other issues that CPI
16 refers to in its most recent written statement of
17 April 11, 2005.

18 So, let me begin, sir, with the argument
19 about the fact that Article 1126 is an exception.
20 Both CPI, ADM/Tate & Lyle argue that Article 1126
21 is an exception to Article 1120 of the Treaty. In
22 other words, the NAFTA Treaty. Their

1 interpretation is incorrect. NAFTA establishes
2 waivers very clear or exemptions very clearly. For
3 instance, Chapter 21 entitled Exceptions sets forth
4 a number of exemptions. Article 2101 establishes
5 general exceptions. 2102, exceptions in the field
6 of national security; 2103, exceptions in the field
7 of taxation, et cetera. And specifically in
8 Chapter 11, Article 1108 sets forth waivers and
9 exceptions to specific articles of the Treaty.
10 Article 1138, for instance, establishes exclusions
11 to the mechanisms for the settlement of disputes.

12 Article 1126 is not a provision of that
13 kind. It contains specific rules that are
14 applicable in the event of multiple claims that
15 come up with common question of laws or fact that
16 deserve to be consolidated for the sake of a fair
17 and efficient settlement of all of those claims;
18 and, therefore, one should not confuse what might
19 be an exception with what happens to be a specific
20 rule.

21 Having just made these very brief comments
22 on this matter, I would now like to deal with the

1 basis on which the Tribunal's decision should rest.
2 Both claimants--and when I say claimants, CPI on
3 the one hand and ADM/Tate & Lyle on the other--have
4 submitted claims under Articles 1116 and 1117
5 pertaining to Article--in connection with 1120.
6 Pursuant to the applicable provisions that include
7 Article 1119, both must specify what NAFTA
8 provisions presumably have not been complied with,
9 and what questions of law or fact do they base
10 their claim on. And both have done so.

11 In addition to the notification of
12 intention of submitting the issue to arbitration,
13 both have also presented their notification of
14 claim, which respectively contain allegations that
15 by having adopted certain measures, specifically a
16 tax, Mexico violated three articles of NAFTA, and
17 they are 1102, 1106, and 1110. Both sustain that
18 they caused losses to their investors and to the
19 investments; so the notifications of claim are the
20 basis on which the Tribunal must decide the request
21 from Mexico for consolidation.

22 While CPI now comes up with a number of

1 arguments having to do with facts pertaining to
2 ADM's situation and that situation of Tate & Lyle,
3 those are not events or facts that are pertinent to
4 consolidation, as I will explain a little later.

5 And in any event, they are speculation on
6 CPI's part on the claim that ADM and Tate & Lyle
7 might submit. But the Tribunal cannot decide on
8 the basis of pure speculation as to what the claim
9 of each claimant might be and what additional
10 issues might appear in their respective claims.
11 ADM and Tate & Lyle have not submitted a claim in
12 the case started under 1120 of the agreement. In
13 fact, the parties in that case have not even
14 established a tribunal, and the written document by
15 CPI in its own case under Article 1120 is
16 irrelevant to Mexico's request for consolidation.

17 The only documents that this Tribunal has
18 in front of it and on the basis of which it needs
19 to solve Mexico's request are the requests or
20 notifications of claims submitted by each.

21 In its request for consolidation, Mexico
22 submitted a table or a number of tables, in fact,

1 where we compare the arguments submitted by one and
2 the other complainant practically paragraph by
3 paragraph as they appear in their respective
4 requests for the Tribunal, and the Tribunal will
5 see that the contracts or differences between both
6 cases is minimal. As Mexico indicated, the case of
7 both claimants is based on the fact that Mexico's
8 allegedly violated the same provisions of the NAFTA
9 agreement by adopting the same measures. The
10 pertinent facts having to do with those measures
11 and those alleged violations of the Treaty are
12 practically identical.

13 And this is true not only in the case of
14 the measures adopted by Mexico, which are the
15 subject of the claims, but also of issues with
16 regard to which CPI in its most recent submission
17 attempts to establish distinctions about that you
18 may see by looking at the headings that we use in
19 our 8 September document. According to the
20 notifications of claims, the background information
21 about the protests are identical in both cases.
22 The circumstances under which both claimants

1 claimed that they made their respective investments
2 in Mexico are practically the same.

3 The assumed impact or presumed impact that
4 each claimant has identified is also the same, and
5 the actions that each has taken to get rid of the
6 tax are also the same. And consequently the core,
7 the heart of the claim because of violations of
8 Chapter 11 presented by each claimant is basically
9 like the other.

10 Needless to say, there may be differences
11 between one claim and the other, and, in fact,
12 there are differences. In fact, Article 1126
13 necessarily, and I underline necessarily, assumes
14 that there will be such differences. However, the
15 key issues having to do with law or fact that have
16 to do with the alleged violations of Chapter 11 are
17 identical in both cases. In point of fact there is
18 no disagreement among the parties on this.

19 First of all, there are the notifications
20 of claims that I have referred to and that we have
21 already compared paragraph by paragraph. CPI
22 criticizes ADM and Tate & Lyle for simply having

1 used, and I quote, CPI's text language that is very
2 similar, and they reflect the theories of CPI on
3 liability, end of quote, paragraph 14 of CPI's
4 submission of April 11. But whether this is true,
5 whether it's true that ADM/Tate & Lyle simply
6 copied the claim or parts of CPI's claim, and
7 whatever the reasons might have been on the part of
8 ADM and Tate & Lyle to do that, the fact is that
9 the language used by claimants and the theories
10 about liability they propose are practically the
11 same. And the common questions of law or fact that
12 they identify consequently are also practically the
13 same.

14 In addition, the Tribunal will understand
15 that each claimant and not Mexico prepared their
16 own claim documents, and both claims have the same
17 structure. They use the same language. Both claim
18 for the same measures. They claim that those
19 measures are a violation of the same provisions of
20 the NAFTA agreement for the very same reasons.

21 Neither CPI nor ADM/Tate & Lyle have
22 attempted to prove that the questions of law or

1 fact that each one identifies in the respective
2 notifications of claim are different. ADM/Tate &
3 Lyle, on the one hand, simply indicate that there
4 are some differences, but they don't go beyond
5 that, and they don't indicate how those differences
6 would run counter to consolidation. CPI, on its
7 part, speculates on the arguments that ADM/Tate &
8 Lyle might be submitting, and it attempts to
9 establish differences with its case based on those
10 speculations.

11 But, in addition, if Tate & Lyle and ADM
12 were to submit those arguments, they would not have
13 a bearing on the claim that they have already
14 presented and which is in identical terms as those
15 of CPI.

16 Claimants seem to suggest that all issues
17 or questions of law or fact need to be common for
18 consolidation to take place, but this argument is
19 clearly incorrect and would make Article 1126
20 nugatory. If all questions of law or fact were the
21 same, we would not be talking about multiple
22 claims, but rather about a single claim.

1 And, in fact, the fact that ADM and Tate &
2 Lyle have submitted a single claim refutes that
3 suggestion. It's obvious that not even in the case
4 of ADM and Tate & Lyle, all facts are identical and
5 the same. To start with, there are different
6 investors. Just to mention some of the differences
7 mentioned by claimants in other contexts, there are
8 certainly companies that compete against each
9 other, and the damages as investors will be
10 different, depending on each shareholding--the
11 shareholdings, and also may be depending on some
12 other questions, but even so they've submitted a
13 single claim.

14 Obviously, Article 1126 assumes that there
15 can be even deeper or far-reaching differences.
16 The arguments on which CPI pretends to make a
17 distinction in the claim that ADM and Tate & Lyle
18 represented are based on legal issues that do not
19 apply to violations of Chapter 11 that have already
20 been submitted and that Mexico has asked to be
21 consolidated.

22 First of all, CPI argues that the

1 similarity between its claim and that of ADM/Tate &
2 Lyle refer to facts that do not involve
3 difficulties and are not especially controversial,
4 paragraph 23 of their document of 11 April. CPI
5 pretends to respond to a defense that Mexico has
6 not yet submitted, and suggests that many of the
7 facts it submits in its claim started under Article
8 1120 had been established in other procedures, and
9 therefore will not be taken up.

10 With all due respect and in the best of
11 cases, this is simply a wish on the part of CPI.
12 Mexico has not yet seen the claim of CPI under
13 Article 1120. We just got it Friday, last Friday
14 afternoon, but we don't need to see it to
15 anticipate that Mexico, in fact, will challenge the
16 facts contained in that document. Its defense both
17 when it comes to competition, jurisdiction, and on
18 the merits will basically be the same in the case
19 of one and the other claimant, even when some of
20 the arguments that may be submitted that Mexico
21 will submit may be individual, unique responses to
22 one or the other claimant.

1 In any event, and as I have already said,
2 the specific claims that CPI and that ADM and Tate
3 & Lyle may submit to a consolidation tribunal are
4 irrelevant to the decision of this Tribunal on
5 consolidation. First of all, they're not before
6 this Tribunal. This Tribunal needs to settle
7 Mexico's request on the basis of the request for
8 claims that have been submitted and which the
9 Tribunal has in front of it. This Tribunal cannot
10 speculate on what arguments each claimant may be
11 submitting, what Mexico's defense might be, what
12 facts will be accepted and which will not. To what
13 extent, well, the facts applicable to other cases
14 be relevant, for instance, the controversy within
15 the framework of the World Trade Organization and
16 how will Mexico approach them within the context of
17 this controversy or this dispute.

18 Secondly, the Tribunal can certainly wait
19 for each party to develop its arguments as best it
20 may wish. For the time being, however, CPI simply
21 speculates on arguments that ADM and Tate & Lyle
22 may or may not submit and defenses that Mexico may

1 or may not use. For instance, CPI refers to the
2 various uses of fructose grades 42 and 55. The
3 grade 55 fructose is the one that is used in
4 preparing soft drinks and which both claimants
5 claim has been affected by the tax that's in
6 question in this dispute.

7 CPI also describes ADM and Tate & Lyle's
8 claim as one that affects trans-border commerce in
9 goods, specifically in fructose, and consequently
10 it's not the tax that has had an impact on its
11 investment. It also refers to other defects in the
12 arguments that ADM and Tate & Lyle may or may not
13 submit. In due course, Mexico will submit its
14 specific defense arguments.

15 For the time being, it has presented a
16 consolidation request that is put forth before this
17 Tribunal. As I have mentioned before, the
18 applicable rules require that investors present
19 their claims and include in their claims all the
20 questions of law and fact that are the grounds of
21 those submissions, and also, the provisions of
22 NAFTA that allegedly have been not complied with.

1 This is based on the arguments that have been put
2 forth by the claimants, and this is the Tribunal
3 that needs to listen to that.

4 The Tribunal has to see whether those
5 claims should prevail or not. This Tribunal cannot
6 speculate on the specific arguments of fact or of
7 law are presented by each claimant. What grounds
8 are they going to present, what defenses is Mexico
9 going to bring about in terms of jurisdiction or
10 the merits of the case, and how the Tribunal that's
11 going to hear the merits of the case is going to
12 determine in connection with this case.

13 I would like to refer to the argument,
14 CPI's argument, related to the impact that--the
15 diverse impact that the tax has had on the
16 investment of each one the claimants. CPI says
17 that due to the size and the manner in which the
18 investors operated, the impact that the tax has had
19 on each of the investors has been quite
20 diverse--this on paragraph 40 and 41 of the
21 submission. And this is different from the request
22 for consolidation.

1 I would like to give you an example in
2 this regard. Let's assume that the government
3 issued--issues a decree and expropriates three
4 pieces of land, and these three pieces of land
5 belong to different investors. CPI's argument in
6 connection with impact of this measure would impede
7 the consolidation of the three claims because the
8 plot of land on the left is larger than the one on
9 the right; because the one on the left, there is a
10 certain crop growing; and on the one on the right
11 there is an industry or plant; and in the plot of
12 land in the middle belongs to a company that has
13 national investors for the most part, and also
14 there are doubts related to the legitimacy of the
15 investor to put forth the claim.

16 I would like to--I would not like to
17 oversimplify this, but the Tribunal can understand
18 that there are certain issues related to
19 jurisdiction and to the merits of the case that are
20 going to stem from one claim and not out of the
21 other, and that the damages claimed in each one of
22 those cases are going to be different. That,

1 however, does not change the nature of the claims,
2 and it does not change the facts and legal issues
3 that are relevant and that are common.

4 ADM and Tate & Lyle's claim illustrates
5 this point, that both have presented a claim under
6 1116, and the Tribunal can anticipate that the
7 damages that each one of them claims as investors
8 are going to be different because of their
9 shareholding in Almex and because of other
10 circumstances.

11 Moreover, the three parties agree that if
12 the Tribunal decides to consolidate these cases, it
13 should also accumulate claims related to damages.
14 The third part is also--state that if consolidation
15 takes place, the same Tribunal that has to do--the
16 same Tribunal that's analyzing liability issues
17 should analyze damage issues.

18 I would also like to refer to CPI's
19 arguments related to confidential information. CPI
20 has stated that claimants are not only unrelated,
21 but that they're also fierce competitors in Mexico
22 and elsewhere. They state that this presents

1 serious challenges related to confidential
2 information. This is on paragraph 63 of the
3 submission.

4 The Tribunal will understand that the
5 treatment of information is not relevant to the
6 consolidation case because CPI and ADM and Tate &
7 Lyle already have this problem, regardless of the
8 fact that claims are going to be consolidated or
9 not.

10 On the basis of the decision of the NAFTA
11 Commission issued on July 31st, 2001, submissions
12 presented under Chapter 11 claims are public
13 documents. The decision of the Commission, of
14 course, provides for the protection of confidential
15 information. Now, that is not enough to say that
16 all of these submissions and the Annexes are
17 reserved commercial information, such as CPI has
18 done. According to the Free Trade Commission, the
19 information that may be excluded is the information
20 that may be classified as commercial classified
21 information. ADM and Tate & Lyle have, well, found
22 themselves in this situation, regardless of the

1 decision of the Consolidation Tribunal, or, in its
2 case, any of the tribunals under 1120. Those
3 tribunals are going to have to issue an order
4 that's going to protect information that was duly
5 classed as confidential business information.

6 In the April 11th submission, CPI refers
7 to the antidumping investigation by the Secretary
8 of Industrial Advancement in 1998, and CPI, ADM,
9 and Tate & Lyle, which at the time was Staley
10 Manufacturing Company, and also one governmental
11 agency. One governmental agency analyzed the
12 information, the information that was deemed at the
13 time sensitive information, information related to
14 the prices. Mexico has no notice that problems
15 arose in connection with the rules that have to do
16 with the protection of confidential business
17 information.

18 I would like to refer to the argument
19 related to the lack of corporate links. This
20 argument was put forth by CPI. CPI stated that in
21 international arbitration cases, it is not common
22 to have consolidation of cases when there is no

1 relationship between the claimants of a contractual
2 nature, and it quotes Emmanuel Gaillard's works.

3 Now, what is not common in agreements that
4 protect investments is Article 1126 and things
5 related to consolidation of cases. Now, if we had
6 not an article such as 1126, it would be, of
7 course, much harder to bring about a consolidation
8 of cases when there is no corporate or contractual
9 relationship between the claimants.

10 Now, when you have an Article such as
11 1126, even Professor Gaillard has recognized the
12 use of consolidation proceedings, and it has urged
13 the parties to consider a case such as this. An
14 article from Mr. Gaillard is quoted there and
15 specifically when no specific rules are stated.

16 CPI has informed the Tribunal that under
17 Chapter 11 of NAFTA, there is an express provision.
18 Now, Mr. Gaillard himself has favored
19 consolidation. In the case of Canfor against the
20 U.S., where Professor Gaillard was the presiding
21 Arbitrator, Professor Gaillard states the following
22 in English: "Very mindful of the existence of

1 Article 1126 of NAFTA, which provides for the
2 possibility of consolidation, at the request of any
3 party in any of these proceedings, the parties
4 could have another Tribunal decide on issues which
5 would be similar, and they could dispose of these
6 issues for the sake of consistency and for the sake
7 of fair and efficient resolution of the claims to
8 track the language of Article 1126 of the NAFTA."
9 That is the end of the quote.

10 Professor Gaillard confirms the
11 disposition of the Tribunal to hear the claim put
12 forward by Canfor, and then the quote continues.
13 "We are equally comfortable if you were to use the
14 tools which the NAFTA provides for you, which for
15 the sake of consistency is consolidation." I
16 wanted to underline that.

17 Professor Gaillard continues, "To be
18 Arbitrators and you should be assured that we are
19 perfectly comfortable with that, and indeed from
20 our standpoint we wondered if it would not be a
21 good idea to ensure consistency by using these
22 tools." That is the end of the quote, and that is

1 the transcription, of course, of the quote. We
2 have copies of the transcriptions that the
3 Secretary of the Tribunal is going to be given, and
4 if you go to the Internet also to the government
5 pages of Mexico and of the U.S., you will find in
6 its Web pages these quotes.

7 The U.S. requested ICSID to establish a
8 tribunal under Article 1126 recently, and it states
9 both questions of law and fact are identical. They
10 said that the claims in question involve the same
11 measures on the part of the Government of the U.S.
12 They said that the three companies also alleged the
13 same kinds of violations to the NAFTA, and the U.S.
14 also underscored the fact that it would be
15 advisable not to have contradictory decisions.

16 Mr. Chairman, I am about to conclude. If
17 I could have two more minutes, please, in order for
18 me to be able to finish, if you allow me to do so.

19 CPI also stated that the memorial was
20 submitted under the procedure of Article 1120, and
21 it says that that is one of the reasons why this
22 Tribunal has to decide against consolidation

1 because of efficiency matters. Mexico requested
2 that the Tribunal suspend the proceeding. CPI
3 opposed this, and the Tribunal did not agree to
4 Mexico's request. But in that case the Tribunal
5 looked at this matter, and I would like to look at
6 the Procedural Order Number 2. This is Procedural
7 Order Number 2, and I would like to quote paragraph
8 11, and I'm going to read in English as the
9 original.

10 Paragraph 11 says, and I quote: Claimant
11 who will have to prepare the first written
12 submission the memorial. While it remains the case
13 that if such a tribunal decides to consolidate the
14 two cases and assume jurisdiction over the present
15 claim shortly before the claimant is due to deposit
16 its memorial, the claimant will have to halt in its
17 tracks and prepare written submissions in
18 accordance with whatever timetable is determined by
19 the Article 1126 Tribunal. It is unlikely that
20 that would cause any real prejudice to the
21 claimant. As the claimants' counsel has explained,
22 the claimant would be obliged to do the work

1 involved in preparing a memorial in any event.
2 Moreover, and I would like underscore this, it
3 would be to the claimant and the claimant has
4 stated that it is prepared to take that risk.

5 CPI expressly accepted this risk of
6 finding itself in a situation such as this, a
7 situation that now it claims it would not be
8 amenable to it, and it--it accepted the risks
9 related to this situation. In connection with
10 these risks put forth by ADM Title Nine, Mexico has
11 shown that the Tribunal has enough grounds to order
12 consolidation of cases. CPI, ADM/Tate & Lyle have
13 not presented enough reasons for the Tribunal to
14 determine otherwise.

15 Thank you so much for your attention, and
16 that is the end of my closing arguments or opening
17 arguments.

18 PRESIDENT CREMADES: Thank you very much,
19 Mexico. And the representative of CPI has the
20 floor.

21 OPENING STATEMENT BY COUNSEL FOR CLAIMANT

22 CORN PRODUCTS INTERNATIONAL, INC.

1 MS. LOW: Thank you very much,
2 Dr. Cremades, Members of the Tribunal,
3 representatives of the governments of the United
4 States and Canada, my colleagues at the table.

5 I would like to address in the 30 minutes
6 that you have allotted us some issues that go to
7 the merits of Mexico's consolidation requests. I'm
8 delivering these comments on behalf of our client,
9 Corn Products International, not on behalf of any
10 other claimant. I would like expressly to reserve
11 time later to address the issue of suspension which
12 Mexico has requested and not addressed in its
13 remarks just included. It's an issue that's
14 peculiar to CPI, and it should not, in our view,
15 count against the limited time that has been
16 allotted to us here, as well as any other issues
17 that are peculiar to the situation of Corn
18 Products.

19 We are concerned, and let me say this for
20 the record, that the Tribunal has chosen to allow
21 the other claimant, which is a single claimant,
22 double the amount of time to present their

1 arguments on the merits of our request, and I would
2 like to have that be in the record. But let me
3 turn to the issue of the merits of consolidation.

4 We will show, as we have shown in our
5 brief, that Mexico has not discharged its burden of
6 persuasion as the moving party. It has not shown
7 that the balance of fairness and efficiency
8 considerations which are the basis on which this
9 Tribunal must exercise the discretionary authority
10 that Article 1126 of the NAFTA gives to it.

11 Our brief has shown the flawed logic and
12 the superficial and one-sided analysis that
13 underlies Mexico's original request on September
14 8th for consolidation of these cases. What you
15 have heard today and what you heard in Mexico's
16 submission of April 11th a week ago really adds
17 very little to those previous arguments. They are
18 essentially a restatement of the flawed mantra that
19 because these two claims happen to look alike in
20 the claim submissions, they must, in fact, be
21 alike, and therefore must be combined.

22 But we have an old saying in English. It

1 is you can't judge a book by the cover, especially
2 when you have access to some of the chapters that
3 are inside. Now, we don't have to prove what's
4 inside the book. Mexico has the burden of proving
5 that the balance of factors of fairness and
6 efficiency favor consolidation. But the fact is
7 that if there is information that shows even what
8 some chapters inside the book look like and the
9 effect of those is to cast doubt on the conclusory
10 arguments that Mexico has put forwarded today, then
11 it is the duty of this Tribunal not to consolidate
12 these cases. And we are dealing, we submit, with
13 two very different books with very different
14 stories in respects that are legally significant
15 and that go to fundamental questions of how
16 consolidation of these claims would work in terms
17 of the key issues of fairness and efficiency.

18 Now, I would like to say a few words about
19 the legal standard that is your duty to apply
20 today, and then I would like to talk about several
21 of the issues that Mexico has highlighted.

22 By virtue of the parties' agreement--and

1 this is common cause among the parties--the
2 applicable standard is the standard of Article 1126
3 of the NAFTA; there is no question about that.
4 Mexico's submissions give lip service to the
5 elements of Article 1126, but they try very hard to
6 avoid the truism implications of the Article 1126
7 standard. They imply that this Tribunal is obliged
8 to consolidate based on their assertions, their
9 bare assertions, which if our assertions are
10 speculation, theirs are certainly as well of common
11 facts and legal issues for the good of the system.
12 We articulate the standard differently. Certainly,
13 consolidation is an exception to the general
14 approach of Chapter 11, just by virtue of the fact
15 that it doesn't have exception in its header is
16 irrelevant. That is a formality, and it is obvious
17 when you consider the scheme, the dispute
18 resolution scheme that Chapter 11 establishes that
19 consolidation functions as an exception to the
20 general rule that an investor has direct recourse
21 individually to a state whose actions have
22 implicated its international responsibilities under

1 the provisions of the NAFTA. So, that's the first
2 point.

3 If you go on to look at the standard of
4 Article 1126, there is a threshold question, and
5 it's not a very high threshold. It's whether there
6 is a common question of fact or law in the cases.
7 That is the question that's going to be met in a
8 great many cases, especially the way Mexico
9 interprets it. Apparently all one has to do to
10 imply indicate this standard is point to two claims
11 that cite the same provisions of Chapter 11, and
12 you're there.

13 So, we should move past that very quickly.
14 That isn't going to be central to this decision
15 that this Tribunal has to make. But the question
16 is how significant are those common questions to
17 the claim, and what implications will those common
18 questions have for the process of deciding the
19 claim in fairness and efficiency issues.

20 The ultimate touchstone in Article 1126 is
21 the interest of fairness and efficiency. There can
22 be no question about that. Plainly, at the end of

1 the day, this Tribunal, after considering all the
2 arguments of fairness and efficiency, then has a
3 decision. It's not a mandatory decision. It's a
4 discretionary decision. Look carefully at the
5 language of Article 1126(2). It says the Tribunal
6 may in the interests of fairness and efficiency.
7 It does not say "must." It does not say "shall."
8 It very clearly says "may." So, this is an
9 exercise of discretion, and only if you are
10 convinced of the strong balance of fairness and
11 efficiency factors we submit should you
12 consolidate.

13 There is no other--you should also be
14 convinced that there is no other approach to these
15 cases that would better serve those interests. And
16 whose interests are we talking about? It's not
17 just the interests of Mexico that are at stake. It
18 is the interests of all of the parties in having a
19 fair and efficient resolution of their claims.

20 These questions of fairness and efficiency
21 focus this Tribunal necessarily on the facts of
22 these cases and the circumstances of these cases.

1 It suggests several things that we respectfully
2 submit that this Tribunal should not do in making
3 its decision. It should not consolidate simply
4 because a party, even the government, has asked for
5 it. It should not do it based on systemic
6 considerations that are not relevant to this case.
7 It should not do it based on mere assertions backed
8 up--not backed up by substance of fairness and
9 efficiency, especially when these assertions have
10 been countered by the claimants, who oppose
11 consolidation.

12 It is the duty of this Tribunal to weigh
13 the requesting party's assertions against what the
14 other parties have put forward remembering all the
15 while that it is Mexico as the moving party that
16 ultimately has the burden of persuasion here, and
17 any doubts should be resolved against Mexico for at
18 least three reasons: First, because of that
19 burden; second, because 1126 makes the decision of
20 consolidation ultimately a discretionary one for
21 this Tribunal; and third, given its exceptional
22 character within the scheme of Chapter 11.

1 Now, let me say some words about the
2 application of the Article 1126 standard to our
3 case. I would like to say something about Mexico's
4 arguments, and I would like to say something about
5 our arguments in response.

6 Mexico's argument from the very beginning
7 has been these cases are essentially the same.
8 They look the same. Look at the pleadings. They
9 look the same. Except for damages or some
10 immaterial questions of fact, these are the same
11 cases; and, in fact, they devote two thirds of
12 their original request for consolidation to a
13 side-by-side comparison of the two cases, taking
14 language from the claims, taking some not others,
15 and trying to frame them in a way that enhances the
16 facial similarity of the two claims.

17 Now, of course, there is no question that
18 the cases are framed in terms of the same NAFTA
19 violations. There aren't that many violations of
20 NAFTA one can assert, especially if a tax measure
21 is concerned. They asked for the same remedy.
22 That's also clear. Again, the remedies under NAFTA

1 are quite limited, we submit. And, yes, claimants
2 are dealing in the same market with the same
3 product.

4 From that, Mexico has asserted that the
5 similarity must flow from the fact that the
6 claimants are working together, that it must be
7 fair and efficient to consolidate; otherwise, there
8 would be increased costs and inconsistent
9 decisions. Their entire argument flows from the
10 alleged facial similarity.

11 Now, as I said, we do concede that the
12 cases look alike, but it's not because the
13 claimants are coordinating, but because of the
14 limitations of NAFTA, as I pointed out earlier, and
15 because a subsequent claimant chose to pattern
16 their claim on ours, and because Mexico chose to
17 ignore differences of which it is well aware.

18 This explains why the books have similar
19 covers, but this is a superficial and self-serving
20 analysis.

21 We have tried to demonstrate in detail in
22 our brief that the reality is quite different. We

1 have tried to give you a peak inside the book, and
2 we have brought our memorial today. As we said in
3 our submission to you, we are prepared to make this
4 memorial available to the Tribunal for its review
5 in camera. It contains a great deal of
6 confidential information, and it cannot be made
7 publicly available without a great deal of editing
8 or available to the other side, but we are prepared
9 to back up our assertion of differences by making
10 this available, should the Tribunal so choose. Not
11 to prove the facts, but this goes back to the
12 question of burden of proof, to show that Mexico
13 has not met its burden as to its own speculations.

14 So, yes, there are some common questions
15 especially in terms of the background and context,
16 and even as to the measure that is at issue here,
17 but we do not need consolidated proceedings with
18 all the delay and costs and difficulty that those
19 will imply to deal with these issues. Much of the
20 common information that Mexico alludes to, as we
21 have pointed out, is publicly available. It's not
22 contentious, and it is not going to be critical, in

1 our view, to liability issues.

2 And as to these issue, if consolidation
3 would benefit anyone on these commonalities, it
4 would be the claimants, not Mexico, and the
5 claimants don't want consolidation. We have
6 already addressed many of these issues, perhaps all
7 of them, in our memorial. So, those are the
8 commonalities.

9 Now, what about the differences? The
10 differences, although they are somewhat masked by
11 the selective side-by-side comparison you have from
12 Mexico and by the patterning of the two claims are,
13 we believe, legally significant, not just at the
14 damages phase of these proceedings, but also with
15 respect to issues of state responsibility, and
16 possibly even jurisdiction. Now, we have had no
17 jurisdictional issues raised in our case to date,
18 so these would not be issues as to us, but they may
19 be as to the other claimant.

20 Our brief gives several examples of key
21 factual differences that have legal significance in
22 this case. They go to the nature and extent of the

1 claimants' respective investments in Mexico versus
2 the United States--and this is not speculation,
3 this is public information. They go to differences
4 in market strategy, highly proprietary information.
5 And they go to information's in dependence of the
6 claimants on the degree of open trade between the
7 U.S. and Mexico in order to carry out that market
8 strategy. Those are the ones we know either from
9 public information or from our work on this case.
10 There are probably others that we don't fully know
11 about. The basis for our investments, for example,
12 contrary to Mexico's assertion that it was all the
13 same, are very specific. They go to very specific
14 permits, very specific assurances, very specific
15 studies and actions the government took. There is
16 only one that we are aware of that is common in
17 terms of specific assurances.

18 The effect of the tax on investments is
19 also very specific, and I want to come back to
20 Mexico's example about expropriation in a moment
21 when I talk about confidentiality.

22 These differences that we have highlighted

1 are legally potentially quite significant. As I
2 said before, for example, the trade dimensions of
3 the Almex claim means that there may be
4 jurisdictional questions that aren't relevant to
5 our claim, and the state responsibility questions
6 also differ. The more factual the claim--and we
7 have claims here that are very fact-specific, such
8 as expropriation claims--the greater the
9 significance of these factual differences is going
10 to be.

11 Both claims are complex, but we believe
12 the Almex claim is even more complex than the Corn
13 Products claim because of the trade dimension of
14 that case. Mexico has made a general statement
15 without any support, without any detail, that it
16 intends to raise common defenses to the two claims,
17 but it's not enough to merely assert an intention
18 to raise common defenses. In the face of
19 everything we have put forward, the burden is on
20 Mexico to explain, in fact, what common defense it
21 intends to assert so that the Tribunal can judge
22 whether those are defenses that are significant to

1 this claim. And the contrast to what has happened
2 here and what is going on in the Canfor case that
3 Mexico alluded to is striking, and I want to pause
4 on that for a minute because my colleague from
5 Mexico has made much of Professor Gaillard's
6 comments in the Canfor case.

7 That is a case as to which the United
8 States has now requested consolidation along with
9 two other cases. The basis of the United States's
10 request is its intention to raise a jurisdictional
11 objection to those cases that go to the
12 interrelationship of different chapters of the
13 NAFTA: Chapter 19, dealing with trade remedies, and
14 Chapter 11.

15 The United States has not merely asserted
16 its intention--asserted defense to those claims
17 that is common. It has said we intend to assert a
18 jurisdictional defense, and that assertion is
19 wholly consistent with how the United States has
20 acted in the individual cases. It has raised
21 jurisdictional defenses in the individual cases
22 that it now seeks to consolidate.

1 We have no such situation here. All we
2 have are vague assertions of commonalities in
3 facts, commonalities in defenses, and that, we
4 submit, is not sufficient for Mexico to establish
5 its--to meet its burden of proof in these cases.

6 So, what is the implication of these
7 differences? These difference, we believe, are
8 material differences in legally significant facts
9 in the two cases. They mean that different
10 tribunals reviewing these cases could come to
11 different results without there being inconsistency
12 in the two cases.

13 Now, we question, as an aside, whether
14 this issue of inconsistency, which is at the heart
15 of Mexico's request, is really part of the fairness
16 and efficiency criteria that this Tribunal should
17 consider. Inconsistency is much more a systemic
18 issue, and we don't concede its relevance to the
19 Article 1126 analysis. But we address it
20 nonetheless because Mexico has emphasized it so
21 strongly. Mexico has raised in its written
22 pleadings the specter of the CME Lauder decisions

1 which have generated great discussion in the
2 arbitration world in recent times. But that is
3 obviously not the apposite situation here. You
4 will recall that that was a case of a shareholder
5 bringing a claim under a different treaty in a
6 different forum than the investment entity and the
7 two cases reaching a different result. It would be
8 as if the Loewen case, which we all know from
9 Chapter 11, had been brought separately by Raymond
10 Loewen and the company.

11 In fact, you do have a consolidated case
12 here today that, if not consolidated, would raise
13 the CME Lauder issue, and that is the Almex
14 shareholders' claim. ADM and Tate & Lyle, as
15 Mexico just said, have somewhat different
16 circumstances, and yet the identity of their issues
17 is so close that they have rightly submitted a
18 joint claim. That is not our situation, and we
19 will not have inconsistency if we have separate
20 tribunals.

21 Let me turn to two remaining issues that
22 are clearly issues of fairness and efficiency. We

1 have shown that the Mexican premise of similarity
2 is misguided in key respects or at least is a
3 premise that this Tribunal should view with serious
4 doubt. It follows from that that the risk of
5 inconsistency is, likewise, not what it is
6 presented to be. But that similarity is the
7 foundation, the very foundation of Mexico's
8 arguments about fairness and efficiency. If you go
9 back to their original submission of September
10 18th--September 8th, excuse me--on pages 19 through
11 20, it all flows from the alleged similarity of the
12 two cases. Again, a highly superficial and flawed
13 analysis, especially in view of the other factors
14 that our brief has highlighted, and in which as to
15 many of them, the Almex shareholders appear to
16 coincide. I'm going to focus on two here:
17 Confidentiality and prejudice from a consolidated
18 proceeding.

19 Confidentiality is a key issue, a key
20 issue for the claimants. These are not related
21 claimants. They are fierce competitors. They are
22 horizon competitors in Mexico and elsewhere, and

1 for these purposes we are three, not just two.
2 They are subject to legal constraints, certainly in
3 the United States under U.S. antitrust laws, and in
4 Mexico and elsewhere by competition laws and the
5 types of information they can share without legal,
6 severe legal consequences. So, that is one
7 constraint.

8 There is also in this case a great deal of
9 business proprietary information, the sharing of
10 which with direct competitors in a market, Mexico,
11 possibly elsewhere, could be extremely harmful to
12 the claimants, particularly to us. How does that
13 play out in the context of this claim? Let me
14 return to the common versus noncommon facts. It
15 happens that the common facts in this case are
16 largely public and nonproprietary. There have been
17 these other proceedings that have established many
18 facts.

19 So, they are not an issue. But the
20 noncommon facts in contrast are largely nonpublic,
21 at least for corn products, and highly sensitive,
22 not just as to damages, but as to the nature of

1 investments, the plant layout, market strategies,
2 customer relationships, expansion plans that corn
3 products had that were affected by the tax, and
4 many others relevant to state responsibility. Our
5 expropriation claim, for instance, is quite a
6 nuanced claim, quite a nuanced claim. We are not
7 alleging the taking of the whole of corn products'
8 Mexican business. It is a business with different
9 component parts dealing in a variety of markets
10 with a variety of products. Our claim relates to a
11 particular part that was concerned with this
12 product.

13 Now, merely defining what that product is
14 is a confidential exercise. Merely explaining what
15 equipment went into the claimants' Corn Products
16 HFCS-55 refinery in Mexico, how it was laid out,
17 how the business was organized is confidential
18 information, very sensitive to us. Why? Because
19 we know--and this is fact--that the other claimants
20 are not in the market in the same way. So, by
21 presenting our theory of expropriation, we
22 necessarily reveal, have to reveal, confidential

1 information.

2 Now, this is very different--very
3 different--than what Mexico talked about with
4 respect to the public character of NAFTA Chapter 11
5 proceedings. If we are in a consolidated
6 proceeding, it is not simply a question of what
7 information is made available to the world, to the
8 outside. We can deal with that issue. We will
9 have to deal with that issue. We acknowledge that.
10 It is a question of what goes on in the hearing
11 room, how we present our case, what measures we
12 have to take to shield this confidential
13 information from our competitor. That is going to
14 be, at a minimum, a very burdensome, very costly
15 exercise, and it may impair our rights to present
16 our claim. That is very serious prejudice, we
17 submit to you. And it would not be a problem in
18 separate proceedings because in separate
19 proceedings we are not inside the tent together.
20 We are in one tent, they are in another tent. We
21 can control what goes outside. But controlling
22 that within the context of a consolidated

1 proceeding, a single hearing room is going to be
2 exceptionally burdensome, difficult, and
3 potentially impairing our core rights.

4 Even without this very serious
5 confidentiality issue, the coordination that is
6 going to be required in the context of
7 consolidating proceedings will be very costly. We
8 know this from our experience to date. Our
9 memorial is 170 pages. I assume the Almex memorial
10 will be very substantial as well. We shudder to
11 think of the coordination that is going to be
12 required as we try to sort out what is common and
13 what is separate.

14 Let me last address in the couple of
15 minutes that remain the question of prejudice to
16 CPI specifically. This does stem from several
17 features. First, the more advanced state of CPI's
18 case. As you know, we have a tribunal, we have had
19 our first session, we now submitted our memorial.
20 Our Tribunal stands ready to proceed. We have
21 already been delayed months by the slowness of this
22 process, not just since Mexico filed its

1 consolidation request six months ago, but from the
2 beginning. It took us almost a year from the time
3 we first filed our claim before ICSID to when we
4 had the first session before the Tribunal.

5 Mexico says we assumed that risk. We did
6 not. We were diligent. We were the first to file
7 as soon as it became clear that the tax was not
8 going to be repealed. Almex waited an extra 10
9 months to file their claim. Why should we, in our
10 exercise of diligence, be prejudiced by someone
11 else's decision to proceed later and by Mexico's
12 musings and eventually resulting in the filing of
13 this consolidation request, about trying to seek
14 consolidation? We should not be forced under these
15 circumstances to suffer further delays that are
16 inevitable, given the very different postures of
17 the two cases. Our witnesses are put at risk by
18 delays. We have increased costs and damages, and
19 without a commensurate benefit because
20 consolidation will surely mean even more delay with
21 no benefit to us.

22 We have never consented to slow this

1 process down. The only time we sought an extension
2 was when we were forced to do so by uncertainties
3 of the status of this process in order to avoid
4 prejudice, but our Tribunal has now concluded that
5 there should be no further delays because the
6 consolidation process has taken so long, and we
7 filed in response to their order number three,
8 which Mexico did not cite to, which directed us to
9 do that last week.

10 So, in conclusion, these are just some of
11 the significant fairness and efficiency
12 considerations that Mexico's superficial and
13 conclusory arguments based on shaky assumptions has
14 utterly failed to adequately address. While there
15 may be cases, other cases where consolidation is
16 appropriate, if ADM and Tate & Lyle had filed
17 separately, in the cattlemen's claim which we
18 discuss in our memorial, which is a mass claim,
19 this is not the case. The differences are too
20 great, the risk of prejudice to parties is too
21 great, consolidation would be grossly unfair and
22 grossly inefficient. And if that is true for

1 complete consolidation, we submit that a fortiori,
2 it is true for anything less than complete
3 consolidation.

4 The only fair and efficient solution in
5 this case is separate proceedings. Let us proceed
6 with our Tribunal, which is ready, willing, and
7 able to go, and try to sequence the proceedings in
8 such a way to allow Mexico and Almex in different
9 tents to take advantage of whatever is relevant to
10 their claim.

11 So, we request, in closing, that this
12 Tribunal deny Mexico's request. We emphasize the
13 need for an expedited determination of this issue
14 because of the delays that have already occurred,
15 and we appreciate this Tribunal's prompt scheduling
16 of this hearing. Thank you very much.

17 PRESIDENT CREMADES: Thank you. I see
18 you're not blaming this Tribunal for being slow.

19 MS. LOW: No.

20 PRESIDENT CREMADES: Thank you. So let's
21 move to the other tent, and the ADM representative
22 has the word.

1 OPENING STATEMENT BY COUNSEL FOR CLAIMANT

2 TATE & LYLE INGREDIENTS AMERICAS, INC.

3 MR. PRICE: Mr. President, members of the
4 Tribunal, good morning, and thank you for your
5 prompt attention to this matter. We do not expect
6 to spend very long on our opening remarks, so if
7 the CPI claimants have more that they wish to say,
8 we are prepared to cede 15 minutes of our time to
9 them now.

10 MS. LOW: That's very kind of you. At
11 this point, we will decline the kind offer.

12 MR. PRICE: Then we will proceed, thank
13 you.

14 As my colleague, Warren Connelly said, my
15 remarks today will be on behalf of the Almex
16 shareholders and Almex.

17 We do oppose consolidation for reasons
18 that we will explain. Unfortunately, I have to
19 make a series of preliminary observations because
20 we were actually quite surprised that in the filing
21 of CPI, it chose to speculate about issues of
22 jurisdiction and merits concerning the claims of

1 the Almex shareholders. We do not believe that
2 that was necessary or appropriate for this
3 Tribunal's consideration at this time, and we would
4 like the Tribunal to be on notice that we do not
5 accept CPI's characterization of our claims. We
6 would note that we learned of CPI's arguments and
7 characterization of our claims at the same time as
8 the Tribunal did. The filing that was made on
9 April 11th was not shared in advance with the Almex
10 shareholders.

11 For reasons set forth in our request for
12 arbitration, we believe that the claims that have
13 been asserted are fully within Chapter 11 and that
14 all jurisdictional requirements are fully
15 satisfied.

16 This is not the time or the proceeding to
17 lay that out, but we simply wish the record to
18 reflect that we reject any characterization of our
19 claims as outside the jurisdiction of the NAFTA
20 Chapter 11 Tribunal or as raising claims or having
21 claimants that are not properly before such a
22 tribunal.

1 We would also like to correct a particular
2 misimpression that may have been created, and that
3 is that the tax affected sales to soft drink
4 bottlers which used only the concentration known as
5 HFCS-55. We will address this issue in some detail
6 in our memorials, but we didn't wish the Tribunal
7 to have a misunderstanding in this regard.

8 It is our view that 42 and 55 compete
9 freely for sales for noncola soft drinks. Indeed,
10 there are many brands of soft drinks that permit
11 the use of both, and indeed, some that before the
12 imposition of this tax were sweetened exclusively
13 with 42.

14 There's actually more that I would like to
15 say about this. The problem is, and here we agree
16 completely with CPI, the nature of the sales of
17 Almex, their customers, their strategies, the
18 competition between these claimants is quite real,
19 and I can't. I will come back to this point
20 because I think this is one of, if not the
21 principal argument that counsels against
22 consolidation.

1 We also dispute that it is import measures
2 that are at the heart of our claims. That is not
3 the case. Ours is an investment dispute. The
4 dispute concerns an investment and its related
5 activities in Mexico, and it is not a dispute about
6 exports to that market.

7 Again, there is more that I would like to
8 say to highlight the differences between these two
9 parties on their strategies, on their production
10 mix, on their expansion plans, but we are
11 competitors, so we can't go there.

12 Let me conclude on this point by saying
13 that the parties' perceptions of their respective
14 claims are really quite far apart; but there is
15 common grounds between and among the claimants in
16 their opposition to consolidation and on three
17 principal reasons. First, as I've indicated and as
18 counsel for CPI has indicated, we are dealing with
19 very, very fierce competitors, not only in the
20 Mexican market, but globally. The idea, the
21 prospect, the possibility that these parties could
22 coordinate and so create efficiencies in the

1 presentation of their claims, that possibility, we
2 suggest to you, does not exist. Indeed, there was
3 not even coordination or a sharing of the filing
4 that was made to this Tribunal by CPI.

5 The claimants on behalf--on whose behalf I
6 speak are intensely concerned about possible
7 disclosure of confidential business information and
8 business strategies that could result from a
9 consolidated proceedings, and the concern is not
10 about protecting this information from disclosure
11 to the public as to which protective orders are
12 routinely entered. The concern is about sharing
13 the information with the people with whom we are
14 sitting at the table as to whom there is to be
15 coordination and a sharing of strategy. That's not
16 going to happen. Were this Tribunal to order
17 consolidation, we still could not share that
18 information. The only effect of consolidation
19 would be to impair the ability of these two
20 claimants to fully and effectively argue their
21 claims before this Tribunal. We simply couldn't do
22 it.

1 We also share the view of the other
2 claimant, that Chapter 11 carries a presumption of
3 separate proceedings. If you look at the remedy
4 envisioned by Chapter 11, it is a remedy that is
5 focused on a particular party. If you look at the
6 impact of an award, you will see in Article 1126
7 that an award, quote, shall have no binding force
8 except between the disputing parties and in respect
9 of the particular case.

10 The whole thrust and thesis of Chapter 11,
11 leaving 1126 to the side, and I will return to
12 that, is each party gets own day and own proceeding
13 before a tribunal. Moreover, it's interesting that
14 Article 1125 is limited--limits the nature of an
15 award to monetary damages or restitution of
16 property. In other words, Chapter 11 does not
17 authorize a tribunal to require a party to take
18 action generally to change its law or eliminate the
19 violations of the rules set forth in Section A of
20 Chapter 11. The remedy concerns only the disputing
21 parties, again showing that the focus of Chapter 11
22 is on particular parties.

1 We say and we agree is that 1126 is both
2 exceptional and discretionary. It doesn't need to
3 say annex exceptions 1126 in order for this
4 Tribunal to conclude by the structure and wording
5 of 1126 that it is, indeed, exceptional. And I
6 focus, as did my colleague, on the word "may." We
7 look at paragraph 2, and it says, were a tribunal
8 established under this Article is satisfied--once
9 you're satisfied that there are questions of law or
10 fact in common, once you are first satisfied that
11 you have those questions in common--then you may,
12 but only if the interest of fair and efficient
13 resolution of the claims is served thereby. It
14 says, "may, in the interest of fair and efficient
15 resolution."

16 I contrast this to Article 1117, paragraph
17 three, where the word "should" is used in respect
18 of a claim by an investor on behalf of the
19 enterprise and the investor. Article 1117
20 paragraph three says, the claims should be heard
21 together. This suggests that the negotiators of
22 NAFTA chose their language carefully. They did not

1 put the thumb on the scale and say "should" or
2 "shall." They said "may."

3 And what is to guide the exercise of that
4 discretion? Whether consolidation would serve the
5 fair and efficient resolution of claims, and we
6 submit in this case that standard is not met.

7 I would like to make one observation on
8 why in our view, although there are surface
9 similarities of fact and law, to reach any legal
10 decision on these claims, whether it's
11 expropriation or national treatment, to reach this
12 legal decision there will need to be particularized
13 fact finding. I'm not talking about damages. I'm
14 talking about the question of whether a NAFTA rule
15 has been breached.

16 The impact of this tax on a particular
17 investor and on a particular investment will
18 determine whether or not there is an expropriation.
19 That is a specific factual inquiry.

20 The impact of the tax is bound up in the
21 question of whether there is an expropriation, and
22 the factual situations of these claimants are very

1 different, and they are different in ways that, as
2 you heard from counsel for CPI, it is very
3 difficult for us to elaborate in any detail in the
4 presence of the other party. These investors made
5 different decisions. Yes, they all entered the
6 sweetener market, but they made very different
7 decisions as to how to approach that market, and
8 thus the impact of this discriminatory tax differs,
9 not just the quantum of harm, but the way in which
10 the tax intersects with production processes,
11 marketing, customer orientation, and plans differs.

12 And so, it is not a case where you can
13 say, well, we can make a decision about whether
14 there is an expropriation and then whether the tax
15 is expropriatory, and then we can do evaluation of
16 damages on each entity. No. To answer that first
17 question is a particularized fact-finding exercise,
18 and they no more want us to know about how it
19 impacts them in the particular than we want them to
20 know how it impacts us.

21 Mr. President and members of the Tribunal,
22 while the mandate of this Tribunal is only to

1 decide the issue of what should be consolidated,
2 the Almex shareholders, for their part, wish to
3 state, as they did in their filing, that this
4 Tribunal is fully acceptable to the Almex
5 shareholders, and we would hope to respondent, the
6 Government of Mexico, to hear and decide the claims
7 of the Almex shareholders. I look forward to the
8 questions of the Tribunal and to hearing the
9 further remarks of my colleagues. Thank you very
10 much.

11 PRESIDENT CREMADES: Mr. Connelly, do you
12 have do add something?

13 MR. CONNELLY: No, Mr. President.

14 PRESIDENT CREMADES: Thank you. So, I
15 think it's time for coffee break. Let's make 15
16 minutes--we start back at 11, and then we will
17 after coffee break go into that rebuttal starting
18 with the Mexican intervention. Then one tent, and
19 the other tent at the end.

20 And the Tribunal would like you to explore
21 in the after-coffee-break intervention of each one
22 about the possibility of making a different

1 approach to liability issues and quantum, in the
2 sense that probably the request for consolidation
3 of the Mexican Republic is much more inclined into
4 liability issues, and your response as being
5 concerned about confidentiality issues could be
6 much more inclined into this quantification. And I
7 mean, that's something you could explore and
8 clarify the Tribunal about this possibility because
9 it could be very well the situation in which the
10 Tribunal might consolidate liability issues and
11 leave quantum for different tribunals or the very
12 same consolidated Tribunal acting in parallel
13 arbitration proceedings without mixing the
14 interventions and not requesting the cooperation of
15 the parties from different tents. That's something
16 you could explore and clarify the Tribunal position
17 after the coffee break. Thank you.

18 MR. PEREZCANO: Mr. Chairman, I have one
19 request. In order to be able to get to the rooms
20 where we will be working, I would like to suggest
21 we come back at 11:15 to give us enough time to go,
22 come back and still have 15 minutes.

1 PRESIDENT CREMADES: We will come back at
2 11:15.

3 (Brief recess.)

4 PRESIDENT CREMADES: If you see fit, we
5 are going to resume for 15 minutes. The
6 representative of Mexico has the floor.

7 REBUTTAL ARGUMENT BY COUNSEL FOR RESPONDENT

8 UNITED MEXICAN STATES

9 MR. PEREZCANO: Thank you, Mr. Chairman.
10 Thank you for this opportunity you have given us to
11 make these additional comments.

12 We are going to focus on certain issues
13 only, and as I have stated before and I will say
14 this again, I will reiterate the arguments that we
15 put forth the Tribunal before, and so I don't think
16 I will have to repeat them once more.

17 In the April 11th submission CPI states
18 that it opposes the accumulation proceedings in
19 Mexico. As Mr. Price said, it puts forth only a
20 series of speculations related to the arguments
21 that ADM/Tate & Lyle may make further in the purity
22 and also the effects that those arguments may have.

1 Mr. Price agrees that these are just
2 speculations. He also rejects those arguments.
3 This puts us back to square one. The only thing we
4 have are the notices of claim that establish those
5 claims precisely, and I would like to underscore
6 the word "claims" because that is what Article 1126
7 provides that may be consolidated, and those
8 notices are the documents where each one of the
9 parties has established the facts and also the
10 questions of law that are common to both.

11 CPI has accused Mexico and has said that
12 Mexico has analyzed this from a unilateral and
13 superficial viewpoint specifically in relation to
14 the arguments put forth in favor of the
15 consolidation. It said that the Tribunal should
16 not consolidate these cases only based on
17 statements that are not grounded. However, the
18 Tribunal has to bear in mind that to--Mexico
19 grounds its statements on the arguments put forth
20 by the claimants on their own notices of claim.
21 Mexico did not write those notices of claim.

22 Now, CPI comes back and suggests that

1 these things were done superficially. I don't
2 think that's enough for the Tribunal to dismiss
3 this claim, and that is not enough for them to say
4 that arguments will be made in the future that are
5 going to be more serious, more detailed, et cetera.
6 These are the arguments put forth, and these are
7 the things on which the respective claims were
8 based.

9 CPI also states that Mexico said, in
10 reality, we're talking about the same case, or
11 rather the same cases, rather. Mexico has said
12 these are not the same cases. Mexico has requested
13 that the claims be consolidated. The cases are
14 different things. The cases will be heard by the
15 appropriate Tribunal. They will be heard in
16 Tribunal. What Mexico has shown is these are two
17 claims that have common matters, both issues of law
18 and of fact, and that in light of the
19 circumstances, these claims need to be
20 consolidated.

21 Of course, as I have said before and I
22 will repeat that once more, the cases are going to

1 be different. The claims, as presented, are
2 different, or have differences. Article 1126
3 presupposes that these differences exist.

4 Now, Article 1126 does not provide that
5 these cases be heard by two different tribunals.
6 Before an 1126 Tribunal may decide whether those
7 claims are to be consolidated or not. Mexico
8 understood that and expressed this from the very
9 beginning. As I said before, Mexico cannot control
10 when each of the claimants is to make its claim.
11 Mexico does not control those time lines, but there
12 have been no surprises in this regard.

13 Article 1126 does not require that the
14 cases be fully preceded with or accumulate
15 consolidations to take place. So, we need to have
16 this opportunity to do this from the very beginning
17 of the procedure, and that's where we are now.
18 Both claimants have spent some time talking about
19 this argument of being fierce competitors, and I
20 would like to correct a perhaps mistaken impression
21 that they have put forth, if that is what they
22 intended to say. They had said that under U.S.

1 law, there is a lot of information that is of a
2 confidential nature, and that, because of legal
3 issues, that information cannot be divulged or
4 shared because these are two fierce competitors, as
5 they have described themselves.

6 I would like to state that ADM and Tate &
7 Lyle itself are fierce competitors in other
8 contexts and in other markets, but nothing has
9 prevented them from coordinating issues in order to
10 have a joint investment and to compete together in
11 the Mexican market to compete against CPI and
12 others.

13 The legal provisions related to
14 competition in the U.S. and in Mexico have not
15 prevented them from making that kind of
16 coordination efforts to compete together, even
17 though they say that they are joint competitors in
18 other contexts.

19 Today, Mr. Price, the counsel of one of
20 these two fierce competitors, presented the
21 arguments for both of them, so these arguments have
22 to be looked at very carefully. Mexico does not

1 dispute that there is information that may not be
2 shared and that needs to be duly protected. Mexico
3 insists that the decision from the Free Trade
4 Commission and the authorities that the Tribunal
5 has are enough to give the appropriate treatment to
6 information that may be looked at as reserved or
7 confidential information.

8 Then the argument that two competitors do
9 not really get along, that's not an argument that
10 may go against the consolidation of claims

11 The alleged damage suffered by CPI, well,
12 in that regard I would like to go back to the text
13 of Procedural Order Number 2 of the Tribunal. It
14 accepted this risk. It knew what this procedure
15 entailed. It knew where this procedure would take
16 us to, and the situation is a situation that needs
17 to be accepted.

18 Lastly, in connection with the suggestion
19 made by the Tribunal, I think this is an
20 appropriate suggestion. Matters of jurisdiction
21 and responsibility should be dealt with separately
22 from matters related to damages. Perhaps this

1 issue of damages is not an issue that needs to be
2 resolved necessarily right at this minute. Mexico
3 would be satisfied if the Tribunal decides to
4 consolidate the matters of jurisdiction and
5 liability, and then later on it may hear issues
6 related to damages, and then, perhaps in the
7 future, it may or may not decide to consolidate
8 damages issues. And perhaps then they will proceed
9 accordingly when these sensitive legitimate issues
10 are to be heard.

11 But we feel that your suggestion, the
12 Tribunal's suggestion, is a very good suggestion,
13 and Mexico accedes to it, and it's satisfied with
14 it. Mr. Chairman, thank you so much, and that is
15 the end of my presentation for now. Thank you.

16 PRESIDENT CREMADES: Thank you very much.

17 Who is going to speak? Mr. Price.

18 REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANT

19 TATE & LYLE INGREDIENTS AMERICAS, INC.

20 MR. PRICE: Thank you, Mr. President and
21 members of the Tribunal. A few points of
22 clarification in response to what my colleague,

1 Mr. Perezcano, just said, and then I'd like to
2 address the question posed by the Tribunal just
3 before the break.

4 First, to be clear, what we rejected in
5 our opening remarks was the characterization of our
6 claims, not their appropriateness for
7 consolidation, because it is our position that the
8 claims are not appropriate for consolidation even
9 as we have correctly characterized them. So, I
10 just wanted to make clear as counsel, for Mexico
11 was suggesting, that somehow our rejection of the
12 characterization of those claims by CPI somehow
13 lent support for his position that those claims
14 should be consolidated. We reach the opposite
15 conclusion.

16 We also note that counsel for Mexico did
17 not respond to the implicit invitation of claimant
18 CPI to state whether or not it had jurisdictional
19 objections to either the claims of CPI or the
20 claims of ADM and Tate & Lyle. We would have
21 assumed that, given a request for consolidation, it
22 would have made clear that it had no objections to

1 jurisdiction. Now, after the coffee break, we hear
2 in response to the President's question, which went
3 to liability and quantum, not jurisdiction
4 liability and quantum, now we hear counsel for
5 Mexico saying, oh, yes, in fact, it would be
6 appropriate to consolidate issues of jurisdiction
7 when none have yet been raised.

8 And this contrasts as sharply as it could
9 with the request of the United States Government in
10 the Canfor case, where it has said it intends to
11 raise a common comprehensive objection to
12 jurisdiction. I would invite the Tribunal, should
13 it deem appropriate, to inquire whether Mexico does
14 intend, in fact, or not to raise jurisdictional
15 objections since I think both claimant groups are
16 now somewhat in the dark on that particular point.

17 One other preliminary point. Yes, ADM and
18 Tate & Lyle are competitors outside of Mexico. To
19 suggest that the fact that ADM and Tate & Lyle were
20 able to get together and coordinate and bring this
21 claim and that somehow that means that the same
22 could applied to CPI ignores a fundamental and

1 obvious fact. ADM and Tate & Lyle are the equal
2 joint owners of Almex. The claims relate solely to
3 the impact of this tax on Almex and the
4 shareholders. It is not the case that ADM and Tate
5 & Lyle, as shareholders of Almex, are somehow
6 competing with each other inside a single company.

7 So, I was at some loss to understand the
8 significance of the observation that ADM and Tate &
9 Lyle are in other markets competitors.

10 Let me return to the question that the
11 Tribunal posed, and if I understood it correctly,
12 the question was: Are the differences between
13 these parties and are the concerns about
14 confidential information, do those really relate
15 only to damages, only to quantum? Or do they also
16 bear on liability? Because, if they don't bear on
17 liability, then maybe some kind of consolidation
18 can be achieved on liability.

19 Let me answer that directly. The
20 differences between the parties' situations, the
21 differences in facts on the ground, the concern
22 about confidential business information relates

1 equally to liability and to damages.

2 Let us take the example of expropriation.

3 This is not a situation where beachfront property
4 has been nationalized or expropriated and ownership
5 vested in the state, and the question is what is
6 the property worth? This is a very, very different
7 case. To decide in this case whether there has
8 been an expropriation, the Tribunal must examine
9 the impact of this tax on each individual
10 investment and investor.

11 So, the very question of liability, is
12 there an expropriation, not is there a tax? That's
13 not disputed. There is a tax, but the question of
14 whether that tax constitutes an expropriation of
15 this investment or that investment will turn on
16 scrutiny, review, and understanding and production
17 of evidence of impact by each individual investor.
18 That fact-specific inquiry that the Tribunal must
19 undertake at the liability stage to answer the
20 question, is there an expropriation, raises those
21 concerns about confidentiality and the sharing of
22 information and the leakage of information between

1 competitors that an examination of the damages that
2 each party has suffered would raise.

3 Therefore, while we would agree with the
4 Tribunal that in some circumstances it may be
5 appropriate to examine questions of liability in
6 common as in the case perhaps of the beachfront
7 property owners where really the question is, does
8 it constitute an expropriation, is it subject to
9 some exception or not, but really the question is,
10 okay, how much is your parcel worth, that is not
11 our case, and therefore the suggestion, appropriate
12 as it may be in other cases to handle a matter in
13 that way, does not work in our case.

14 Now, if I have misunderstood the proposal
15 of the Tribunal, I'm prepared to respond further.

16 PRESIDENT CREMADES: There is no proposal.
17 It's just some thoughts for consideration.

18 MR. PRICE: Okay. Well, then,
19 Mr. President, if I have misunderstood the nature
20 of the thoughts for consideration, that is, you
21 know, a common proceeding on liability and separate
22 proceeding for damages, then I welcome further

1 explanation.

2 But as I heard it, particularly given by
3 the question posed by the President, it seems to me
4 that the Tribunal must answer for itself the same
5 particularized factual questions at the liability
6 phase that it must then turn to at a damages phase.
7 Thank you.

8 PRESIDENT CREMADES: Thank you, Mr. Price.

9 Ms. Low?

10 REBUTTAL ARGUMENT BY COUNSEL FOR CLAIMANT

11 CORN PRODUCTS INTERNATIONAL, INC.

12 MS. LOW: Thank you, Mr. President,
13 members of the Tribunal.

14 We coincide with the remarks that our
15 fellow claimant has made with respect to a number
16 of issues, most particularly his last comments with
17 respect to the factual differences that bear on the
18 question of liability, and I want to come back to
19 that with another example for the Tribunal in a
20 moment. But first let me make a few more general
21 observations, harking back to Mexico's remarks.

22 Mexico has suggested that we are back to

1 where we were at the beginning because of the
2 discussions today. Both for the reasons expressed
3 by my colleague, and for other reasons, I submit,
4 that the clear answer is, no, we are not back to
5 where we were at the beginning. Mexico has put
6 forth a series of surface and formalistic arguments
7 drawn from the claims that have been submitted by
8 the parties, without at the same time being willing
9 to come forward with particulars of its own
10 arguments. And it is important to highlight the
11 question of jurisdiction, among others in this
12 regard.

13 But 1126 forces this Tribunal to look at
14 very practical issues at the end of the day, to
15 look at the questions of fairness and efficiency.
16 And in that regard, it's not just confidentiality,
17 but a host of other things that the Tribunal needs
18 to think about in considering those very practical
19 questions. And we would submit that Mexico simply
20 has not grappled with the depth of the challenges
21 that are posed by those questions in this case, and
22 therefore has not met its burden of persuasion that

1 consolidation, as it seeks it, is in the interest,
2 the best interest, of a fair and efficient
3 resolution.

4 The differences in the facts raise
5 challenges for the Tribunal as to how the Tribunal,
6 the effort that will need to be made to
7 differentiate appropriately between the claimants
8 when differentiation is necessary. It raises the
9 specter of dealing with the complexities of both
10 cases and the time element that dealing with those
11 complexities will require.

12 And finally, it raises the issue of
13 confidentiality that we have spoken of a great deal
14 today. And as I said at the beginning, we fully
15 coincide in the statement that the factual
16 differences here and the implications of
17 confidential information are not limited to the
18 damages phase of the proceeding, but go to the very
19 heart of questions of state responsibility. My
20 colleague's example with respect to the impact of
21 the tax is a particularly important one, because as
22 this Tribunal I'm sure knows, when the question is

1 whether an expropriation has occurred via a tax
2 measure, it is not a question of direct action by
3 the government. It's a question of indirect
4 action, and so the question of impact of the tax
5 becomes terribly important, and that will be quite
6 different for these claimants because of the
7 different character and extent of their
8 investments, because of the differential effect on
9 their operations. That information that goes to
10 that question of impact, we can assure you from the
11 standpoint of our client's situation, is
12 proprietary and confidential beyond a doubt. It
13 goes to the very configuration of their investments
14 for this particular market and how those
15 investments relate to the rest of their business.
16 You can't understand the part within the whole in a
17 vacuum. You have to understand how it relates to
18 the part and how it relates to the rest of the
19 business.

20 So, that becomes an extremely sensitive
21 area of inquiry for us in particular because we
22 have investments not only in amount, but in scope

1 that go beyond the investments that the Almex
2 shareholders have made in Mexico. Sharing that
3 information is extremely sensitive for us. The
4 question of investment-backed expectations and on
5 what basis the investors proceeded to make their
6 different investments in Mexico, a generalized
7 criterion for an expropriation claim. We have
8 submitted with our memorial studies, affidavits,
9 documents. Pages and pages of our memorial are
10 devoted to the discussion that sets the stage for
11 our position that there were reasonable
12 investment-backed expectations of our claim. That
13 is not information that we're prepared to share
14 with the Almex shareholders. It reveals market
15 strategies. It reveals competitive information.
16 It is the most sensitive information imaginable.
17 So, those are some examples from the expropriation
18 context.

19 From the national treatment context as
20 well. It is required by the provisions of Article
21 1102 of the NAFTA that each claimant demonstrate
22 how the measure at issue has affected their

1 investments in the operation, establishment,
2 expansion, or other kinds of activities. In our
3 case, without going into the details, I will simply
4 tell this Tribunal that the tax came when a major
5 expansion effort had been initiated by our client.
6 Now, the details of that expansion, the details of
7 our expansion plans are not something we are
8 prepared to share with the Almex shareholders, and
9 yet that is something we have to show in order to
10 establish liability under Article 1102 of the
11 NAFTA.

12 So, those are examples, and we could give
13 others, but those are examples of how we believe
14 the confidential issue permeates the liability
15 phase of this claim, and it underscores the
16 challenges and, indeed, the prejudice that we
17 believe our clients would suffer if forced against
18 its will to be joined in the tent in a consolidated
19 proceeding.

20 So, we would urge this Tribunal to
21 deliberate very carefully on the issue of
22 consolidation, to keep in mind the question of the

1 burden of proof and whether that burden has
2 met--been met by Mexico in this case.

3 We have been very forthcoming about
4 details as far as we can go within the bounds of
5 the constraints of confidentiality. Mexico, in
6 contrast, has relied on much more general
7 statements, and we submit to you that they have not
8 discharged their burden and urge to you deny this
9 motion. Thank you very much.

10 PRESIDENT CREMADES: Thank you. There is
11 a question that's in the air which is, does Mexico
12 intend to take any--file any motion or make any
13 reservation with respect to jurisdiction in these
14 procedures?

15 MR. PEREZCANO: Yes, Mr. President. I
16 would like, first of all, to note that under the
17 rules that govern, that we have agreed would govern
18 in this proceeding that, also the rules that govern
19 both of the Article 1120 proceedings, Article 1105
20 gives us the possibility to identify any
21 jurisdictional objections we may have up until the
22 time we submit our countermemorial. In this case,

1 I reiterate Mexico's request is based on the claims
2 that have been made. In the case of CPI, it was
3 just last Friday afternoon that we received the
4 memorial. We have not yet had a chance to look at
5 it. In the case of ADM/Tate & Lyle, there is not
6 even a tribunal, and there is no memorial for us to
7 look at.

8 As I was saying, Article 1126 does not
9 require that we hear issues on the merits or on
10 jurisdiction to be able to decide on a
11 consolidation. I could anticipate that we would
12 have objections to jurisdiction and that they would
13 be common. I couldn't say at this time that I
14 could identify all of the issues that might come up
15 once we look at the memorials and are able to
16 answer them.

17 A difference with the case involving the
18 United States has to do with the applicable rules.
19 In the case of the United States, it is the
20 Arbitration Rules, the UNCITRAL Arbitration Rules
21 that govern that require that the parties from the
22 outset submit--I forget the term in Spanish--but

1 they must submit a statement of claim and a
2 statement of defense from the outset. The Canfor
3 procedure is much further along procedurally
4 speaking than any of the cases presented against
5 Mexico. And the other two cases in which the
6 United States is seeking consolidation, the case of
7 Tembec and Timber Forest or Terminal Forest is just
8 in the initial stages.

9 So, the United States has been able,
10 because the procedure and the rules so operate,
11 it's been able to identify more precisely just what
12 its defense stand is, and the rules on the status
13 of the cases involving Mexico are not in the same
14 position. So, I think it's more difficult to state
15 right now and even to try to expound on what
16 Mexico's defenses would be, whether going to the
17 merits or going to issues of jurisdiction.

18 PRESIDENT CREMADES: Are you satisfied
19 with the answer of the Republic of Mexico, or do
20 you want to add something into your request about
21 jurisdictional issues?

22 MR. PRICE: Thank you, Mr. President. I

1 am satisfied that the response of the Government of
2 Mexico with respect to the jurisdictional issues
3 merely underscores the reason not to consolidate
4 these proceedings.

5 PRESIDENT CREMADES: Thank you. Any
6 Members of the Tribunal have any questions?

7 QUESTIONS FROM THE TRIBUNAL

8 ARBITRATOR ROVINE: I just have one or two
9 questions, Mr. Chairman. I would like to hear
10 something from the parties with respect to the
11 notion of party autonomy. We haven't heard
12 anything on that question today, and I would like
13 to hear the parties spend just a couple of minutes
14 on it. That is the extent to which party autonomy
15 is or should be a relevant consideration for the
16 Tribunal.

17 PRESIDENT CREMADES: We will ask if this
18 question could be answered when we go into the
19 procedural matters, number two when we speak about
20 parties' agreement concerning consolidation. If
21 you don't mind, we will postpone this question to
22 that stage.

1 ARBITRATOR ROVINE: Okay. Then, if I can
2 make another inquiry, with respect to the question
3 of prejudice, which has to be a very relevant
4 consideration for the Tribunal, looking at
5 prejudice to the Government of Mexico, looking at
6 prejudice to the private parties concerned and
7 balancing them is something that we will have to
8 do. My question is this, addressed primarily, I
9 think, to the government: Assuming the facts and
10 the law are primarily the same with respect to
11 these claims, I would--it would seem to follow from
12 that that the arguments in response would be
13 approximately the same. They would have to be made
14 twice, if we were not to consolidate, once in one
15 Tribunal and once in another, but the arguments
16 would be the same if, in fact, what the government
17 is saying is correct.

18 With respect to prejudice to the private
19 parties, I do think we have to take into account
20 the delay. I know that Procedural Order Number 2,
21 paragraph 11, was cited, and it was said that if
22 there is any prejudice, the claimant would be

1 prepared to take that risk. I read that as having
2 to do with the work in preparing a memorial. That
3 was the context in which that sentence was written.

4 But may I call your attention, again
5 directed to the Government of Mexico, expressions
6 of concern by the 1120 Tribunal with respect to
7 delay, the Tribunal, while not at this stage
8 seeking to inquire into the causes is concerned by
9 the fact that such a long period has elapsed since
10 the claim was filed. Danger that work done by the
11 parties in preparing submissions for the present
12 Tribunal may have to be duplicated, the Tribunal is
13 concerned that the present claim was filed as long
14 ago as October 2003. Now, that's a long time.

15 So, the question is, measuring the
16 prejudice to Mexico against the prejudice to the
17 private parties, how would you balance that out?

18 (Pause.)

19 MR. PEREZCANO: I'd be pleased to field
20 that question, Mr. Rovine. First, with respect to
21 the question of prejudice to the private parties,
22 all of us who are sitting around this table have

1 experience in litigation of this sort involving
2 investments, and it shouldn't be surprising to
3 anyone that these are, by the nature procedures
4 that take or proceedings that take time. They're
5 not equivalent to private commercial arbitration
6 which has other *raison d'etre*, another logic.
7 These are a different sort of proceeding, and they
8 take their time.

9 Now, I would like to maintain the
10 comparison with the cases that we have raised to
11 point out that in the Canfor case, for example, the
12 notice of claim was submitted in 2002. The request
13 for consolidation is coming about three years
14 later. Article 1126 does not establish a deadline
15 for requesting consolidation of proceedings; that
16 depends on the circumstances of the cases in
17 question. Moreover, Mexico has been extremely
18 diligent. From the outset of the proceeding, CPI
19 announced that this--of the proceeding with CPI had
20 announced that this was a possibility. It
21 announced when it presented its notice of claim.
22 It announced it subsequently when the Tribunal in

1 that case set the date for the first session with
2 the parties. It so stated once again in that first
3 session with the parties. It stated it when ADM
4 and Tate & Lyle submitted their claim. There has
5 not been any surprise. Mexico has been diligent in
6 the extreme.

7 And it seems to me that one should not
8 allow the parties to control or manipulate the
9 proceedings to control when it is proper and ceases
10 to be proper to seek consolidation. Mexico does
11 not have, and could not have had control over when
12 CPI would submit its claim and when ADM/Tate & Lyle
13 would present theirs, but it's been perfectly
14 transparent with everyone involved that the members
15 of all of the tribunals that have been established
16 as to this situation. It's been clear and
17 transparent, and it's been very diligent.

18 (Lost interpretation.)

19 MR. PEREZCANO: I don't know quite at what
20 point you stopped hearing me. I did want to refer
21 to some letters we presented to the Tribunal
22 recently in response to suggestions that somehow

1 Mexico caused delays in bad faith, and we reject
2 those suggestions. Mexico tried to respond to
3 complaints raised by claimants. We have modified
4 our request. We have requested extensions for
5 procedures to move ahead more smoothly, but I
6 reject the thought that Mexico is responsible for
7 any delay in these proceedings, and you have
8 already heard the arguments that we have made,
9 which I will not repeat.

10 When it comes to prejudice to Mexico,
11 Mr. Rovine, you referred to one important aspect.
12 There are no--there should be no doubt that there
13 are common questions of law and fact, and that will
14 lead to a common defense on the part of the
15 Government of Mexico that would have to be
16 presented in two different proceedings with all of
17 the complexities that that entails.

18 To go back to the question of Mr. Cremades
19 a little while back, on exceptions that may be
20 raised in the case of documents already submitted
21 in this proceeding and in Annex U to the CPI
22 pleading of February 11, I would remit you to

1 question 58 that anticipates a possible common
2 defense that might be used, but let's not lose
3 sight of the fact that the possibility of decisions
4 that are incompatible as in the case of Lauder
5 against CME that you're all very familiarized with,
6 would cause serious damage to the Mexican
7 Government, and especially to the government that
8 is institutionally interested in the proper
9 operation of the Treaty.

10 Claimants, once they are done with the
11 Treaty, whether they win or lose, that's the end of
12 their concerns. They don't have to worry about the
13 institutional development or a good and proper
14 operation of treaties, but we governments do have
15 that concern.

16 We all know that the northern CME case
17 when it comes to questions of law and fact that
18 were common, tribunals followed totally different
19 paths and reached conclusions that are not only
20 different, but contradictory and that has caused
21 enormous concerns that have been mentioned in many
22 fora, and they continue to be discussed. The

1 possibility that that might happen in these
2 proceedings would cause institutional prejudice
3 that goes beyond Mexico's mere participation in
4 this case.

5 PRESIDENT CREMADES: Thank you very much.

6 Mr. Siqueiros, do you have any questions?

7 ARBITRATOR SIQUEIROS: Yes, Mr. Chairman,
8 I do have a question directed primarily towards the
9 representative for the Government of Mexico. I
10 will pose the question in Spanish.

11 One of the assumptions for the
12 consolidation is that there be common questions of
13 fact. I would like to know the position of the
14 Government of Mexico with regard to what would be
15 common facts. We know that the measure that has
16 been mentioned would violate the Treaty, as a
17 violation of the Treaty, is a common measure, but
18 when reference is made to common facts, what is the
19 scope of that standard?

20 MR. PEREZCANO: Yes, Mr. Siqueiros, I
21 would be delighted. Mexico in its pleading of
22 September 2004, in its table where it compares

1 various facts, it has mentioned a number of those
2 common facts. These had been taken from the claims
3 of each one of claimants, the back-down on
4 fructose, the circumstances under which each
5 claimant entered the Mexican market. It gives
6 another example. The measures covered by the claim
7 on that specific matter, you stopped for a
8 minute--let's not lose sight of the fact that the
9 measure that is the subject of the claim, in other
10 words, the tax that was adopted by law, while it is
11 a legal standard for Mexico, in these international
12 proceedings it's a question of fact.

13 Under 1120 or the consolidated Tribunal
14 will not be able to determine the legality or the
15 illegality of the tax from the point of view of
16 Mexican law, because those are questions of fact
17 for an international tribunal.

18 So, the measure itself, the reasons why it
19 was adopted, the motivations leading the Mexican
20 Congress to pass that bill are common questions of
21 fact. The measure itself is a common question of
22 fact, as are the market circumstances in the

1 sweetener area in Mexico before and after the entry
2 into force of the NAFTA agreement as well as
3 questions that have to do with market access
4 commitments for sweeteners set forth in the NAFTA
5 agreement. The denial on the part of the U.S.
6 Government to allow access of Mexican sugar to the
7 U.S. market. The competition in the sweeteners
8 market on the part of fructose produced and
9 manufactured nationally with sugar produced in
10 Mexico, the denial of the United States to submit
11 to the settlement of disputes procedures set forth
12 in Chapter 20 of the NAFTA agreement, there is a
13 whole series of events, of facts that affect not
14 only Mexican legal standards that are the subject
15 of the dispute, but very different situations that
16 are common and that will certainly require a common
17 response on the part of the Mexican Government,
18 just to mention a few.

19 PRESIDENT CREMADES: I thank you very
20 much.

21 Anything else?

22 ARBITRATOR SIQUEIROS: Thank you,

1 Mr. Chairman. The other question I have is for the
2 representatives of claimants, and that is what do
3 you view as the intrinsic principles of efficiency
4 which a tribunal shall take into account in order
5 to decide this petition?

6 PRESIDENT CREMADES: Ms. Low?

7 MS. LOW: Thank you for your question,
8 Dr. Siqueiros.

9 We have tried in our written submission of
10 April 11 to gather the authorities that we believe
11 are relevant to this issue, recognizing that this
12 Tribunal is dealing with this question of first
13 impression, and that does not have decisions of
14 other tribunals, certainly under NAFTA Chapter 11
15 Tribunals to look at.

16 The NAFTA Article 1126 itself does not
17 provide detail, as you have doubtless perceived, in
18 what the components of these all-important concepts
19 of fairness and efficiency should be. But the
20 concepts, I think, point in a set of fairly obvious
21 directions that, as to which there are relevant
22 authorities that one can point to. And what they

1 are really looking at intrinsically, in our view,
2 is the smooth functioning of a consolidated
3 proceeding, the practical operation of a
4 consolidated proceeding. What will it mean in
5 terms of cost implications for each party, not just
6 one party, but for all parties? What is the
7 balance there? What will it mean in terms of
8 delays? NAFTA cases may go on for some period of
9 years, but they're not intended to go on forever.
10 When a claimant goes to a NAFTA Tribunal for
11 redress and seeking damages, they forego the right
12 to seek damages from domestic tribunals. They are
13 relying on this dispute resolution mechanism for
14 satisfaction of their claims.

15 So, the question of delay, we submit, is
16 an extremely important question. Now, obviously,
17 the more complex and the more different the cases
18 are, the more one can expect. Even if there are no
19 confidentiality considerations at all, one can
20 expect that there would be issues of delay and cost
21 implications for the parties. But it's not just a
22 cost issue. It's really ability to gain redress.

1 And if I may step back two steps, I just
2 want to underscore that our Mexican colleague's
3 comment about in response to this Tribunal's
4 jurisdictional question underscores our fundamental
5 concern about timing in this proceeding. How long
6 would we have to wait in a consolidated proceeding?
7 Would we have to wait until everyone who is
8 consolidated has filed their Statement of Claim and
9 it's come time for Mexico to file its defense
10 before we know whether there are even
11 jurisdictional objections?

12 We are entering into that phase now in our
13 1120 tribunals, so there is obvious delay that
14 comes into play in the context of these
15 proceedings.

16 So, costs, delay, any other type of
17 prejudice that can be established, the disclosure
18 of confidential information, there is no question,
19 if you look at the writings of publicists in this
20 area, there is no question that that is of grave
21 concern that they pose.

22 The fairness and efficiency considerations

1 do not as we read them the issues of systemic
2 concerns that Mexico has just related--reiterated
3 that it believes are at issue here. Fairness and
4 efficiency really focus on the cases at hand. They
5 focus on the proceedings. How will they work? If
6 you put these proceedings together, how are they
7 going to operate in a very practical day-to-day
8 way? Not what's the effect on the system. That is
9 a completely different kind of question.

10 So, it seems to us that's what this
11 Tribunal has to grapple with. Fortunately, all of
12 you are very experienced in this field, and I think
13 can envision what life would be like if we are both
14 inside the tent together, and that's what I think
15 you need to think about. Thank you very much.

16 PRESIDENT CREMADES: Thank you, Lucinda.

17 Mr. Price?

18 MR. PRICE: Thank you, Mr. President.

19 Dr. Siqueiros, you asked about efficiency,
20 so I will focus on efficiency and not fairness I
21 think we have expressed our views on fairness. I
22 hope.

1 The fundamental question on efficiency is
2 to ask yourself whether the injection of a third
3 Tribunal in the face of two tribunals working along
4 really promotes effective, coherent, more speedy
5 resolution of the claims. And we submit that this
6 is not a case where efficiency so dictates. We
7 don't have dozens of identically situated claimants
8 facing identical measures which impact them
9 identically. Nor are we facing a situation--and
10 this goes to your question about facts--where we
11 have a series of disputed background facts. The
12 existence of this tax is not in dispute. The
13 essential facts, background facts, background facts
14 that may be common, are not in dispute. What's in
15 dispute are the facts and legal questions about
16 each of these particular investments, and the
17 impact of this tax on each individual investment.
18 Those are not common questions. Those are
19 individual questions that go to liability. So, we
20 don't think that efficiency, as we understand it to
21 be used in 1126, is served by consolidating these
22 claims.

1 Now, let me say something about the risk
2 of inconsistent decisions and the Lauder cases and
3 how that might bear on efficiency. CPI and Almex
4 are not the Lauder case. The Lauder case is ADM
5 and Tate & Lyle, and we are already together.
6 There is no risk of inconsistent decisions. That
7 is to say, a tribunal could find that in the case
8 of the Almex shareholders, there was an
9 expropriation, and in the case of CPI there was not
10 or vice versa, I hasten to add, and those may not
11 be inconsistent decisions because the legal
12 question, does this measure as applied to this
13 investment constitute an expropriation, those could
14 be answered potentially in different ways without
15 there being inconsistent decisions.

16 My only point in running through this
17 illustration is that the risk of inconsistent
18 decisions is acute, where you have an enterprise
19 and a controlling shareholder, or its controlling
20 shareholders. There is no risk of inconsistent
21 decisions in that case because we are jointly
22 before you.

1 Thank you very much.

2 PRESIDENT CREMADES: Thank you. Any other
3 question?

4 ARBITRATOR SIQUEIROS: None, Mr. Chairman.

5 PRESIDENT CREMADES: Is there any remark,
6 comment from the parties concerning--

7 MS. LOW: If I might venture--

8 PRESIDENT CREMADES: Would you wait for a
9 moment to leave our friends to.

10 Are you ready?

11 MR. PEREZCANO: Yes, sir, accepting your
12 envision, I have a comment that I would like to
13 make.

14 It's really a question to ADM/Tate & Lyle,
15 and I would like to know, assuming now that the
16 Tribunal decides not to consolidate the
17 proceedings, that Mr. Price would be ready to
18 accept the determinations of fact by the CPI
19 Tribunal on the Mexican measure as being binding in
20 the procedure that they have initiated, for
21 example?

22 PRESIDENT CREMADES: Did you catch the

1 question?

2 MR. PRICE: I'm sorry, Mr. President, not
3 very clearly.

4 PRESIDENT CREMADES: Would you repeat,
5 please.

6 MR. PEREZCANO: Yes. My question is
7 whether ADM/Tate & Lyle would be ready to accept as
8 binding in its 1120 case the determinations of fact
9 that the Tribunal in the CPI case would make with
10 regard to the measure, in other words, the tax
11 under dispute.

12 MR. PRICE: As counsel for Mexico knows,
13 we are not a party to that proceeding. We are not,
14 for obvious reasons, participating in the
15 development of that factual record. That said,
16 there may be aspects of those findings on which
17 these claimants will seek to rely. There may be
18 aspects of those findings which will be completely
19 irrelevant to our claims, and there may be aspects
20 of those findings made in the context of a
21 CPI-specific investment that we will reject as
22 inapplicable to our case.

1 So, we can't sit here and state we are
2 prepared to accept as binding everything that a
3 tribunal in which we do not participate and which
4 is not looking at our claim dictates.

5 PRESIDENT CREMADES: Are you satisfied
6 with that answer?

7 MR. PEREZCANO: Yes, Mr. President.
8 President. Yes thank you. That's precisely why we
9 asked the question.

10 PRESIDENT CREMADES: Any other questions
11 on the topics discussed this morning?

12 MR. PEREZCANO: No, Mr. President. Thank
13 you very much.

14 PRESIDENT CREMADES: Any more at this
15 stage?

16 MS. LOW: No, not at this stage. I will
17 save it for later.

18 PRESIDENT CREMADES: Mr. Connelly, even
19 though you didn't speak this morning, do you have
20 anything to add?

21 MR. CONNELLY: Not at this time, Mr.
22 President.

1 PRESIDENT CREMADES: Mr. Price?

2 MR. PRICE: Are there any further
3 questions from the Tribunal, Mr. President?

4 PRESIDENT CREMADES: No, there aren't.

5 MR. PRICE: At this point?

6 PRESIDENT CREMADES: At this point.

7 MR. PRICE: Then I will take 10 seconds
8 and say one word about fairness since I responded
9 to a question on efficiency, and that is that there
10 are three or four parties before you, not that this
11 is necessarily a majority rules, but only one of
12 those parties, the Government of Mexico, is saying
13 that fairness would be served by consolidation.
14 Three are saying fairness would not be so served,
15 and those parties who say fairness would not be so
16 served are also saying something somewhat more
17 fundamental, and that is that they will be impeded
18 and fully and fairly presenting their claims for
19 decision by a tribunal if their claims are
20 consolidated by virtue of their concerns about
21 confidential and competitive information. Thank
22 you very much.

1 PRESIDENT CREMADES: Thank you, Mr. Price.
2 So, for the purpose of the free court, we can
3 assume that you have this morning the opportunity
4 to express all your views, that you agree that for
5 the purpose of the record that the proceedings were
6 in the proper way, and you accept the way it has
7 been done. If that's the case, let's go into the
8 procedural matters we have to be dealing, and
9 that's going to be a quick question. The first is
10 the Constitution of the Tribunal. As you know, in
11 the Constitution of the Tribunal you made a big
12 departure from 1126. I want you to confirm for the
13 purpose of the record that you agree that the
14 Constitution of this Tribunal is on the proper way
15 done and accepted by you.

16 Mexico?

17 MR. PEREZCANO: Yes, Mr. President. We
18 agree and we're happy with it.

19 PRESIDENT CREMADES: Ms. Low?

20 MS. LOW: Mr. President, we confirm our
21 complete satisfaction with the constitution of the
22 Tribunal.

1 PRESIDENT CREMADES: Thank you.

2 ADM?

3 MR. CONNELLY: We agree.

4 PRESIDENT CREMADES: And, Mr. Price?

5 MR. PRICE: We too agree, Mr. President.

6 PRESIDENT CREMADES: Thank you. Then we
7 move to the point number two. It's confirmation of
8 the party's agreement concerning consolidation, and
9 then I leave the word to Mr. Rovine, who wanted to
10 say something about party autonomy.

11 ARBITRATOR ROVINE: Well, I didn't want to
12 say something about it--I'm sorry. I didn't want
13 to say anything about it. I wanted simply to raise
14 the question of party autonomy, and the extent to
15 which it should be a relevant consideration for
16 this Tribunal. That's the question, and I would
17 like to hear from each of the parties on that.

18 PRESIDENT CREMADES: As you are aware,
19 this agreement makes a big departure from 1126.
20 Anyone who reads the agreement and at the same time
21 taking into consideration 1126 has some legal
22 problems. What is your position, and even if we

1 know those problems, do you confirm to the Tribunal
2 that you agree the way you have agreed in front of
3 this Tribunal, do you confirm that? Mr. Perezcano.

4 MR. PEREZCANO: Thank you, Mr. President.
5 The position of the Government of Mexico is that
6 the parties have the power to reach the kind of
7 agreement that we have reached and that we have
8 submitted to the Tribunal. I confirm once again
9 that we are satisfied with the agreement and with
10 the legal consequences that may stem from an
11 agreement such as the one we have reached and under
12 the terms that we have established.

13 MS. LOW: Yes, thank you very much. We
14 coincide with Mexico's statement that we believe
15 the parties have the power to reach an agreement
16 that is outside the provisions of Article 1126. We
17 have within that agreement agreed to apply the
18 standard of Article 1126, and we confirm the
19 agreement that was submitted to this Tribunal that
20 has been signed by all of the parties.

21 If I may make one further comment, because
22 I understood Mr. Rovine's question perhaps not to

1 go just to the issues of the parties' agreement,
2 this procedural point, but also more broadly to the
3 relevance of consent to the 1126 standard; am I
4 correct in that assumption?

5 ARBITRATOR ROVINE: It goes to both.

6 You've already answered one.

7 MS. LOW: The first part. Okay.

8 ARBITRATOR ROVINE: I'm interested in what
9 you said about the second.

10 MS. LOW: As to the second, it is obvious
11 when reading the Article 1126 standard that consent
12 is not an explicit element of that standard.
13 However, we have been having discussion in this
14 session this morning about the components of
15 fairness and efficiency, and it is our view that
16 the opposition or willingness, conversely, of a
17 party to engage in consolidation is an element that
18 the Tribunal should take into account in
19 determining whether--where the balance of fairness
20 and efficiency criteria lie, and particularly, I
21 would say, on the issue of fairness, because it
22 is--if a party is opposed, consolidation is a

1 decision that divests them of the Tribunal of their
2 choice and divests them of the normal remedy that
3 is provided for in NAFTA Chapter 11, which is an
4 individualized determination of claim.

5 So, we would say it is in the mix of
6 considerations through the criterion of fairness
7 that a party should take into account. Obviously,
8 the Tribunal needs to look at the soundness of the
9 basis for that opposition and whether there are
10 good reasons that a party can put forward in
11 opposition to consolidation.

12 So, the content is important, but we would
13 say it does have some relevance through the
14 criterion of fairness. Thank you.

15 PRESIDENT CREMADES: Thank you, Ms. Low.

16 Mr. Connelly?

17 MR. CONNELLY: The agreement certainly
18 reflects ADM's position. We are very satisfied
19 with it.

20 PRESIDENT CREMADES: Mr. Price?

21 MR. PRICE: I thank you. Two words. Just
22 to confirm the consolidation agreement. But also

1 to note in that regard it's not a agreement. It's
2 a unilateral statement by the Almex shareholders
3 that they would be prepared to have this Tribunal
4 here and decide their claims, as we stated in our
5 filing.

6 Now, if I could say a word about party
7 autonomy, not as reflected in the consolidation
8 agreement, but as a concept or principle which
9 ought to inform the Tribunal's interpretation of
10 1126, the Tribunal will have noted that 1116 and
11 1117 are stated in the singular. An investor of a
12 party may submit to arbitration a claim. Article
13 1117, an investor of a party on behalf of an
14 enterprise may submit a claim.

15 That is what gets the entire process
16 going. The consent of the respondent states is
17 preexisting. It is the act of an individual
18 investor having decided that its claim properly
19 belongs before a Chapter 11 Tribunal. It's that
20 decision which commences the process. It is not
21 initiating at that time a consolidated claim.
22 Obviously, if there are--if there is an enterprise

1 and two equal shareholders, they may choose, as you
2 see before you, to submit those claims jointly.

3 But that is a choice by the parties.

4 That concern for party autonomy is, I
5 think, reflected in the text of NAFTA. I already
6 indicated the contrasting language of "should"
7 found in Article 1117(3) where the NAFTA talks
8 about which claims should be heard together, and
9 1126, which describes claims which, when fairness
10 and efficiency so require, may be heard together.
11 I suggest to you that the architecture and the text
12 reflect well an understanding of party autonomy.

13 Thank you very much, Mr. President.

14 PRESIDENT CREMADES: Thank you, Mr. Price.
15 Then let's move to the point number (c) applicable
16 Arbitration Rules.

17 Yes?

18 MR. PEREZCANO: Mr. President, if you
19 would allow me, I would like to make a comment in
20 connection with the second part of the question
21 posed by Mr. Rovine. I don't know if I did not
22 field the question properly initially, and this had

1 to do with the comment made by CPI on consent.

2 The consent of all the parties that are
3 present here today, investors under Article 1121
4 and of the companies under 1121, the consent, I
5 would say, is in accordance with the terms set
6 forth in this Treaty.

7 So, just like Article 1122nd, the consent
8 of governments such as Mexico is based on the
9 provisions of the Treaty; and, of course, 1126 is
10 under the Treaty, so everybody here agreed to the
11 procedures that are included in Article 1126.

12 PRESIDENT CREMADES: Thank you very much.
13 Mr. Perezcano. Agreement regarding consolidation
14 to apply Additional Facility Rules. I want you to
15 confirm for purposes of the record that is correct
16 and that is the fair understanding. Mr. Perezcano?

17 MR. PEREZCANO: Yes, Mr. President, I
18 confirm this just as I have confirmed the previous
19 agreement.

20 MS. LOW: I would like to confirm our
21 agreement on this previous point.

22 PRESIDENT CREMADES: Mr. Connelly?

1 MR. CONNELLY: We agree.

2 PRESIDENT CREMADES: Mr. Price?

3 MR. PRICE: We agree, Mr. President.

4 PRESIDENT CREMADES: Thank you.

5 Place of arbitration. We have to fix a
6 place of arbitration. Probably the reason why
7 we're in Washington, D.C. is a good sign that you
8 want Washington D.C. as a place of arbitration.
9 You want to confirm that? Mr. Perezcano?

10 MR. PEREZCANO: Mr. President, this is an
11 issue that we have not discussed. I mean the
12 parties we, have not discussed this previously, so
13 I would like to offer the position of the
14 Government of Mexico. We are dealing with U.S.
15 investors that have made investments in Mexico, and
16 these investments involved measures--well, first of
17 all, investments made in Mexico and then measures
18 taken in Mexico, and these measures are allegedly a
19 violation of the standards.

20 Initially the position of Mexico is that
21 the place of arbitration should be Mexico because
22 all the facts revolve around Mexico. However, with

1 the view of not introducing a debate in this regard
2 at this time, perhaps we should choose the place of
3 arbitration and perhaps Toronto, Canada would be a
4 neutral place, in Toronto, Canada, because the
5 Treaty requires that the place of arbitration be in
6 one of the member countries to the Treaty. So, one
7 of the parties is also Canada, so I think it's
8 fitting.

9 MS. LOW: Thank you, Mr. President. We
10 are in agreement that there has been no prior
11 agreement of the parties on this issue and, indeed,
12 no discussion of this issue. We think that the
13 suggestion of the Tribunal that this be the place
14 of arbitration is the best--

15 PRESIDENT CREMADES: It's not a suggestion
16 of the Tribunal. It was just a confirmation of the
17 fact that we are meeting in Washington, D.C., no
18 more than that, without any legal effect.

19 MS. LOW: Well, I modify my statement in
20 that case. Perhaps I had hoped to hear a
21 suggestion, but in any event, it appears to us that
22 given that the mandate of this Tribunal is focused

1 on the consolidation issue and the consolidation
2 issue alone, we should seek a place of arbitration
3 that provides the greatest efficiency, should there
4 be any need for judicial review. And given that we
5 have two claimants, three companies that are based
6 in the United States, it would seem to us that
7 having the place of arbitration be the United
8 States, it would be clearly the most efficient for
9 the purposes of this consolidation proceeding.

10 So, we would submit that it certainly
11 should not be Mexico. There has never been, to my
12 knowledge, a NAFTA case where Mexico as a
13 respondent where the place of arbitration has been
14 Mexico.

15 And so, the options that are presented
16 before this Tribunal are that it would be either
17 the United States or Canada, and we think
18 efficiency considerations should reign here. In
19 other cases it might be appropriate to choose a
20 place like Canada, and indeed, that's the place of
21 arbitration we've agreed upon for our 1120
22 proceeding, but this case should be dictated we

1 think by somewhat different considerations. Thank
2 you.

3 PRESIDENT CREMADES: How about Toronto?

4 MS. LOW: I think that's in Canada, the
5 last time I looked. Is it not? Canada is a very
6 fine place, and so is Toronto, but as I said, that
7 would be our second choice. If we were to array
8 the possibilities after the United States, we would
9 suggest Toronto, but it would be our first
10 preference for the interest of efficiency to have
11 it be here.

12 PRESIDENT CREMADES: Mr. Connelly?

13 MR. CONNELLY: We certainly endorse
14 Washington as opposed to Toronto. As I think about
15 it, I see no advantage to Toronto. When people
16 have to travel to a hearing, there is going to be
17 some matter of inconvenience for those who have to
18 get on an airplane and travel to that site. It
19 strikes me that there is no greater convenience for
20 those who have to come from out of town to going to
21 Toronto as opposed to Washington, D.C. What we
22 wind up doing, however, is putting a lot more

1 people on airplanes and inconveniencing them and
2 incurring the expense of hotel, et cetera. So, I
3 think Washington, not to mention the phenomenal
4 facilities here is by far the best choice between
5 the two.

6 MR. PRICE: We would prefer Washington,
7 Mr. President, and we know the obvious, that right
8 now the only mandate of this Tribunal is to decide
9 the question of whether there should be
10 consolidation.

11 PRESIDENT CREMADES: Are you suggesting
12 that we shouldn't fix a place for arbitration from
13 the legal point of view?

14 MR. PRICE: I guess I'm suggesting that if
15 a legal place of arbitration is fixed, it should be
16 Washington.

17 All I'm saying is that, as we consider
18 which of the places to pick for arbitration, it's a
19 different question than would arise if we were
20 entering into a hearing on jurisdiction, merits,
21 and liability.

22 PRESIDENT CREMADES: May I suggest that

1 there is no agreement, that both--well, the parties
2 make a different attitude, even they considered
3 that probably is not appropriate at this stage to
4 fix a place of arbitration, as we are in a
5 consolidating arbitration phase, should we put that
6 into the record, and just leave for the Tribunal
7 eventually to consider the possibility of fixing a
8 place, if necessary; is that the consent we have?

9 ARBITRATOR ROVINE: Mr. Chairman, do I
10 understand that to mean you're saying the parties
11 should consult further among themselves to try to
12 reach agreement?

13 PRESIDENT CREMADES: I didn't say that.
14 What I'm saying is that there is no agreement, and
15 I don't think there is a possibility today to get
16 an agreement from the parties, and we put that into
17 the record so that there is no agreement on fixing
18 a place for arbitration.

19 ARBITRATOR ROVINE: But that leaves it to
20 the Tribunal to decide the place?

21 PRESIDENT CREMADES: Not necessarily. We
22 could leave that open.

1 ARBITRATOR ROVINE: We will have to
2 discuss that.

3 PRESIDENT CREMADES: What is the opinion
4 of the parties? To leave it open or request from
5 the Tribunal to fix a place? Party autonomy.

6 MR. PEREZCANO: Mexico has no problem in
7 leaving this issue pending, and for the Tribunal to
8 make a decision in this regard later on.

9 MS. LOW: We also are in agreement with
10 leaving the question open for the moment, and with
11 the concept suggested by the President that if it
12 becomes necessary to decide, the Tribunal can do
13 so.

14 MR. CONNELLY: I think we can leave it
15 open, too, for now.

16 PRESIDENT CREMADES: Mr. Price?

17 MR. PRICE: We'll defer to the Tribunal's
18 decision on whether it should specify a place of
19 arbitration, and if so, what that place should be,
20 having heard the parties on their views on this
21 topic.

22 PRESIDENT CREMADES: Thank you. Then we

1 move to the other question, fees and expenses of
2 the Arbitrators. You have referred to the
3 Additional Facility Rules, and the Additional
4 Facility Rules, unless there is an agreement
5 between the parties, refers to the calculation of
6 fees of the Arbitrators. Is that the consent of
7 the parties?

8 MR. PEREZCANO: That is the understanding
9 of the Government of Mexico, Mr. President, yes.

10 MS. LOW: Yes, it is. Mr. President.

11 PRESIDENT CREMADES: Mr. Connelly?

12 MR. CONNELLY: Yes, that's our
13 understanding.

14 PRESIDENT CREMADES: Mr. Price?

15 MR. PRICE: Yes, Mr. President.

16 PRESIDENT CREMADES: Thanks. We come to
17 other matters, and one of the matters is to have
18 present here representatives from Canada and from
19 the United States. Mr. Perezcano has said
20 that--Mr. Perezcano has said that in forcing party
21 autonomy, you have agreed departing from 1126,
22 probably Canada and the United States not being

1 involved in this dispute, they are parties to the
2 NAFTA. I want them to say if they have to say
3 anything, about they have heard this morning and if
4 they want to make any statement or just to confirm
5 they prefer to be silent. United States?

6 MS. GUYMON: United States would like to
7 make a written submission to the Tribunal just
8 stating its intention whether it needs to state
9 anything further or not, and we will do that in the
10 next couple of days.

11 PRESIDENT CREMADES: What delay do you
12 need? Because we are finishing now.

13 MS. GUYMON: We just need to confer. I
14 will need to confer with the rest of the NAFTA
15 arbitration division on the proceedings that went
16 on today and determine whether any submission is
17 necessary from the United States. But I do not
18 anticipate that a submission will be made other
19 than the written submission to state that we don't
20 have anything to say. But I wanted to reserve that
21 opportunity in case, upon learning of the
22 proceedings today, others of my colleagues feel

1 there is a need for the United States to make a
2 substantive submission.

3 PRESIDENT CREMADES: So we say in order to
4 fix that reservation, that within the 48 hours you
5 might react. If not, your silence is confirmed?

6 MS. GUYMON: That's fine. We will make a
7 written confirmation, though, just to be certain
8 within that 48-hour period.

9 PRESIDENT CREMADES: Okay. How about
10 Canada?

11 MR. HEATH: Thank you, Mr. President.
12 Similarly, with the Tribunal's permission, Canada
13 would like to review today's proceedings and will
14 undertake to notify the Tribunal within the 48
15 hours whether or not she intends to make comments.

16 PRESIDENT CREMADES: Thank you. Any other
17 matters Mr. Perezcano?

18 MR. PEREZCANO: No, Mr. President, thank
19 you.

20 PRESIDENT CREMADES: Ms. Low?

21 MS. LOW: No, thank you.

22 PRESIDENT CREMADES: Mr. Connelly?

1 MR. CONNELLY: No matters.

2 PRESIDENT CREMADES: Mr. Price?

3 MR. PRICE: No, Mr. President. It just
4 remains for us to thank you and the other members
5 of the Tribunal and the ICSID Secretariat and our
6 transcription service for their kind attention
7 today.

8 PRESIDENT CREMADES: Thank you. I think
9 we have to thank everybody in the room, especially
10 the representatives of the parties for the
11 patience, and even if we were not so slow, we tried
12 to do our best and quick, and I'm coming to the
13 expectation of the parties about our decision. We
14 intend, but it is too much to say, not to make a
15 long decision like normally in the investment
16 arbitration we are used to. We think that even if
17 I'm a scholar by profession and origin, we think
18 that our purpose is not to make a big treaty on
19 consolidation, but to give you just a consolidation
20 order the way you have requested, and I think you
21 can expect that very soon. Of course, not before
22 the 48 hours the United States and Canada have

1 reserved to get it done.

2 Thank you to everybody, especially the
3 court reporter and interpreters, and we are looking
4 forward very much to meeting you in the very near
5 future, probably for other reasons or for this very
6 one. Thank you.

7 (Whereupon, at 12:53 p.m., the hearing was
8 adjourned.)

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1 CERTIFICATE OF REPORTER

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3 I, David A. Kasdan, RDR-CRR, Court
4 Reporter, do hereby testify that the foregoing
5 proceedings were stenographically recorded by me
6 and thereafter reduced to typewritten form by
7 computer-assisted transcription under my direction
8 and supervision; and that the foregoing transcript
9 is a true record and accurate record of the
10 proceedings.

11 I further certify that I am neither
12 counsel for, related to, nor employed by any of the
13 parties to this action in this proceeding, nor
14 financially or otherwise interested in the outcome
15 of this litigation.

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DAVID A. KASDAN, RDR-CRR

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