

Consolidation Proceedings under NAFTA Article 1126

Corn Products International, Inc. v. United Mexican States
(ICSID Case No. ARB(AF)/04/1)

Archer Daniels Midland Company and Tate & Lyle Ingredients
Americas, Inc. v. United Mexican States
(ICSID Case No. ARB(AF)/04/5)

Introductory Note

NAFTA Chapter 11 (Investment) begins with a definition of its scope of application. Pursuant to Article 1101 (Scope and Coverage), this chapter applies to measures adopted or maintained by a State Party relating to investors or investments of investors of another State Party.

Needless to say, the same measure may relate to two or more investors or investments, thus giving rise to two or more disputes and, potentially, to two or more arbitration proceedings.

The drafters of the NAFTA foresaw this possibility and included, under Article 1126, a specific procedure for the consolidation of two or more arbitration proceedings initiated under Chapter 11. This procedure can be set in motion by any disputing party (defined in NAFTA Article 1139 as the disputing investor or the State Party against which a claim has been made).

Under Article 1126, the question of whether or not to consolidate two or more Chapter 11 claims is to be decided by a special three-member tribunal (Consolidation Tribunal), appointed by the Secretary-General of the International Centre for the Settlement of Investment Disputes (ICSID). The appointees to this tribunal should be a national of the disputing State Party, a national of a State Party of the disputing investors and, a third, presiding arbitrator, who cannot be a national of any of the NAFTA Parties. All three arbitrators should, in principle, be chosen from the ICSID Panel of Arbitrators.¹

¹ In the absence of available candidates in ICSID's Panel of Arbitrators, the Secretary-General may, at her discretion, appoint the co arbitrators from outside the Panel. The President of the Consolidation Tribunal, however, shall be appointed from the Panel.

NAFTA Article 1126 also outlines the powers of the Consolidation Tribunal. Its mandate is limited to finding whether or not two or more Chapter 11 claims should be, fully or partially, consolidated. The Consolidation Tribunal's conclusions must be guided by the double threshold set out in Article 1126, i.e. the Tribunal shall be satisfied that: (a) the claims submitted to arbitration "have a question of law or fact in common," and if so, that (b) consolidation is "in the interest of a fair and efficient resolution of the claims."³

This provision remained untested for more than ten years. On September 8, 2004, Mexico filed with ICSID the first request for consolidation of NAFTA Chapter 11 claims. The request related to two ICSID arbitration proceedings instituted against Mexico under NAFTA Article 1120.

The first case had been brought to the Centre in October 2003 by Corn Products International, Inc. (CPI), a U.S. producer of high fructose corn syrup (HFCS) in Mexico. CPI's claim concerned an excise tax levied on soft drinks that use HFCS as sweetener instead of cane sugar. CPI challenged the tax, describing it as a discriminatory measure, tantamount to expropriation and as a concealed performance requirement, in breach of the substantive protections granted to foreign investors under Section A of NAFTA Chapter 11. In August 2004, Archer Daniels Midland Company (ADM) and Tate & Lyle Ingredients Americas, Inc. (Tate & Lyle), two U.S. producers of HFCS in Mexico, jointly filed with ICSID a Request for the Institution of Arbitration proceedings under NAFTA Chapter 11, also challenging the HFCS tax.

Upon receipt of Mexico's request for consolidation of the two proceedings, ICSID's Secretary-General started consultations with the parties, seeking their agreement on the names of the three arbitrators that would comprise the Consolidation Tribunal. With the parties' agreement, the Secretary-General appointed Licenciado Eduardo Siqueiros (Mexico) and Mr. Arthur W. Rovine (U.S.), as co arbitrators, and Dr. Bernardo M. Cremades (Spain) as the President of the Consolidation Tribunal.

Once established, the Consolidation Tribunal invited the parties' written observations on the question of consolidation and listened to the parties' oral arguments on the matter during a hearing held at the seat of the Centre in Washington, D.C. in April 2005. In their written and oral pleadings CPI, ADM and Tate & Lyle opposed Mexico's consolidation request.

² In should be noted, however, that under NAFTA Article 1126(2) and (8) the Consolidation Tribunal, if satisfied that the requirements set forth in NAFTA Article 1126 have been met, may also take over the original NAFTA proceedings, replacing the tribunals originally established under NAFTA Article 1120.

After careful consideration of the parties' arguments on the matter, the Consolidation Tribunal decided to reject Mexico's request for consolidation. In doing so, the Tribunal acknowledged that the two claims submitted to arbitration under Chapter 11 shared some common questions of law or fact, as required under Article 1126. The Tribunal, however, did not find that the consolidation of these proceedings would be in the interest of a fair and efficient resolution of the claims.

Claimants had argued during the proceedings that, being "fierce competitors" in the Mexican market for HFCS, they could not work together and share information, and that, accordingly, their ability to fully present their cases in a consolidated setting would be severely impaired.

The Tribunal, noting that there was no dispute over the fact that the claimants are direct and major competitors, accepted the claimants' arguments, concluding that, because of the strong competition between them, consolidating these claims would be extremely difficult, requiring the application of complex confidentiality measures, which could only result in a slow and complex proceeding.

The Consolidation Tribunal also addressed Mexico's contention that separate proceedings in this case would risk inconsistent awards, which would be prejudicial to Mexico and could not be considered as a "fair" resolution of the claims. The Consolidation Tribunal acknowledged the problem, but found: (a) that the risk of inconsistent awards was limited, given that the claims differed in an important number of aspects; and (b) that, in any event, the risk of unfairness to the Respondent due to inconsistent awards resulting from separate proceedings could not outweigh the unfairness to the claimants due to procedural inefficiencies that could arise in consolidated proceedings.

Finally, in reaching its conclusions, the Consolidation Tribunal also gave weight to possible delays that would be associated to the consolidation of two proceedings that were at different procedural stages and to the "parties' autonomy," noting that three of the four parties involved in these proceedings have expressed their opposition to the consolidation.

As a result of the Order of the Consolidation Tribunal of May 20, 2005, rejecting Mexico's Request for Consolidation, both arbitration proceedings continued separately. Both claims are currently pending before their respective NAFTA Article 1120 tribunals.

The English and Spanish versions of the Order of the Consolidation Tribunal are reproduced below with the parties' consent. Both versions of the Order are also posted, in PDF format, on ICSID's website at *www.worldbank.org/icsid*.

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