

BEFORE THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES UNDER THE
RULES GOVERNING THE ADDITIONAL FACILITY
FOR THE ADMINISTRATION OF PROCEEDINGS
AND UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT

REQUEST OF THE UNITED MEXICAN STATES FOR CONSOLIDATION OF

Corn Products International, Inc. v. United Mexican States
(ICSID Case No. ARB(AF)/04/01)

and

Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v.
United Mexican States
(ICSID Case No. ARB(AF)/04/05)

OBSERVATIONS ON THE QUESTION OF CONSOLIDATION

SUBMITTED ON BEHALF OF

ARCHER DANIELS MIDLAND COMPANY

AND

TATE & LYLE INGREDIENTS AMERICAS, INC.

April 11, 2005

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OBSERVATIONS ON THE QUESTION OF CONSOLIDATION

I. Background

1. On September 8, 2004, the United Mexican States (“Mexico”), which is the Respondent in *Corn Products International, Inc. v. United Mexican States* (ICSID Case No. ARB(AF)/04/01), submitted a request seeking establishment of an arbitral tribunal under Article 1126 of the North American Free Trade Agreement (“NAFTA”), to determine whether to consolidate the claims raised in that proceeding and in the request for arbitration submitted by Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. (the “ALMEX Shareholders”).¹ Mexico requested that the tribunal (“Consolidation Tribunal”) assume jurisdiction over, and hear and determine together, all of the claims, or in the alternative, one or more of the claims, the determination of which would assist in the resolution of the others.²

2. After Mexico submitted this request, Corn Products International, Inc. (“CPI”) and the ALMEX Shareholders agreed with Mexico on the composition of this Consolidation Tribunal. The parties to both disputes also agreed that the mandate of the Consolidation Tribunal would be limited to deciding whether the claims submitted to arbitration by CPI and the ALMEX Shareholders shared common questions of law or fact, and if so, whether to order that a single tribunal assume jurisdiction over, and hear and determine together, all or

¹ Letter from Mr. Hugo Perezcano Díaz to Mr. Roberto Dañino, Secretary-General of ICSID, dated Sept. 8, 2004.

² *Id.* at 21.

some of the claims, the determination of which would assist in the resolution of the others. On January 7, 2005, Mexico informed the Secretary-General of ICSID of this agreement.³

3. On April 8, 2005, the parties to both disputes submitted to ICSID a “Confirmation Agreement of the Disputing Parties Regarding Consolidation.” That agreement stipulates *inter alia* that the proceedings of the Consolidation Tribunal shall be governed by the ICSID Arbitration (Additional Facility) Rules, as modified by the procedural requirements of Chapter Eleven of NAFTA, and by the provisions of NAFTA Article 1126, except to the extent that the parties have agreed otherwise.

4. On March 18, 2005, ICSID transmitted a request from the President of the Consolidation Tribunal, Dr. Bernardo Cremades, that the disputing parties submit by April 11, 2005, their respective observations concerning the question of consolidation. The ALMEX Shareholders hereby submit their observations in response to the Tribunal’s request.

II. The ALMEX Shareholders Oppose Consolidation

5. The ALMEX Shareholders oppose the consolidation of claims for the reasons set forth below.

6. The task facing the Consolidation Tribunal is a novel one because Mexico’s request is the first request for consolidation to be decided under Article 1126 of NAFTA. It is, therefore, essential that the Consolidation Tribunal formulate the consolidation standards, and then apply them, with the utmost care and concern for not just the situation presented here, but also for future situations.

³ Letter from Mr. Hugo Perezcano Díaz to Mr. Roberto Dañino, Secretary-General of ICSID, dated Jan. 7, 2005.

7. In doing so, we urge the Tribunal to bear in mind that the consolidation of claims has been provided in Article 1126 of NAFTA as a limited exception to the general rule that each claim proceeds on its own. Arbitration of investment claims normally takes place on the basis of the mutual consent of an investor and the host State, and that consent does not contemplate or imply an additional consent to consolidation with other claims by other parties. Moreover, the remedies permitted under NAFTA's investment arbitration provisions in Section B of Chapter Eleven focus on, and are limited to, the relationship between an investor and its investment, on the one hand, and a Party, on the other. Article 1136 thus provides that an award made by an investor-state arbitral tribunal under Chapter Eleven "shall have no binding force except between the disputing parties and in respect of the particular case." Further, under Article 1135, the award is limited to monetary damages, restitution of property, and costs. Thus, in deciding whether to consolidate any claims, this Tribunal must ensure that it will not compromise the right of each individual party to a separate determination of liability and damages on its own separate claims. We submit that a Tribunal should err on the side of non-consolidation in order to ensure that the separate arbitration rights afforded by Chapter Eleven of NAFTA are not compromised.

8. To put it another way, as an exception, Article 1126 must be interpreted narrowly, and the party invoking that exception has the burden of proof to establish at the outset that there is absolutely no possibility of prejudice to the rights of any party if some or all of the claims in two separate arbitrations are consolidated for adjudication. Thus, Mexico must demonstrate that the respective claims of the ALMEX shareholders and CPI are based on common questions of law or fact and that consolidation would better achieve the goal of fair

and efficient resolution of the claims of all parties to both disputes. Mexico has not met that burden.

9. It is obvious that the facts in the two cases are very different. For example, ALMEX is owned by two shareholders, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. Those companies devised a different strategic plan for the ALMEX facility in Guadalajara than did CPI with respect to its own facility.⁴ The nature of each plan directly affected how the ALMEX shareholders, on the one hand, and CPI, on the other, responded to events both preceding and following Mexico's implementation of the soft drink tax. Moreover, as Mexico itself admits in its request for establishment of the Consolidation Tribunal, there are significant differences between the claimants in respect of the claims for damages.⁵ In addition, in cases of expropriation, liability must be established with respect to each individual investor.

10. Even if common questions of fact and law predominated in these disputes, which they do not, Mexico must still demonstrate that consolidation would be in the interest of the fair and efficient resolution of the claims. Mexico has not satisfied this test.

11. The effect of consolidation on the fairness and efficiency of the resolution of these claims must be evaluated by taking into account the interests of *all* of the disputing parties, and not just Mexico's interests. Consolidation would impose a significant burden on the ALMEX Shareholders. In the absence of consolidation, the ALMEX Shareholders would exercise their normal Chapter Eleven rights to conduct their case without the need for time

⁴ The nature of the strategic plan will need to be disclosed to the Tribunal during subsequent proceedings under a protective order. However, the very fact that we are unable to articulate in these Comments precisely what the strategic plan was, and how it appears to have differed from the CPI plan, in itself demonstrates one of the problems with consolidation.

⁵ Letter of September 8, 2004, *supra* n. 1, at p. 21.

consuming and inefficient coordination of procedural matters, such as briefing schedules, potential discovery requests, confidentiality restrictions, and other rules that will govern future proceedings, not to mention substantive submissions on both liability and damages issues. Thus, resolution of the ALMEX Shareholders' claims by a consolidated tribunal will be inevitably more costly and time-consuming for the ALMEX Shareholders, in a situation where they have already sustained very substantial and continuing damages to their investments. In short, consolidation will cause delay, and delay will greatly aggravate the continuing damage and effectively prevent redress for Mexico's imposition of a blatantly discriminatory tax. If not consolidated, each dispute will reach a quicker resolution, and Mexico should not be allowed to delay final resolution merely because the liability claims of the parties invoke the same NAFTA Chapter Eleven provisions.

12. The ALMEX shareholders are also greatly concerned about maintaining the confidentiality of information pertaining to numerous aspects of their factual and legal claims. Although a protective order is essential, we remain concerned that such an order will not be sufficient to ensure, in a consolidated case, that the ALMEX shareholders can present all of their views free of any concern about disclosure. ALMEX and CPI Mexico, the two foreign-owned firms that comprise the high fructose corn syrup industry in Mexico, are head-to-head competitors. Establishing the factual foundation for expropriation and other claims made in this dispute could require the claimants to share and discuss evidence of substantial competitive value, including production, sales, and business strategies. The ALMEX Shareholders believe that any sharing of competitive information that would be necessitated by consolidation will cause them competitive harm.

13. The ALMEX Shareholders, therefore, submit that Mexico has not met its burden of proof, and that consolidation would not be in the interest of the fair and efficient resolution of the claims. Therefore, the two separate proceedings should remain unconsolidated.

III. The ALMEX Shareholders Request Unified Disposition of the ALMEX Claims

14. There are three possible outcomes of the present proceedings. First, the Consolidation Tribunal could decline to consolidate any of the claims. Second, the Consolidation Tribunal could consolidate the claims in part by, for instance, consolidating issues relating to liability but not issues regarding damages, or by consolidating only certain issues relating to liability and not others. Third, the Consolidation Tribunal could consolidate all of the claims in one proceeding. Whichever option the Tribunal favors, it will be in the interest of the “fair and efficient resolution of the claims” under the Article 1126 standard if one and the same tribunal decides all aspects of the claims of the ALMEX Shareholders, from beginning to end, including all procedural, liability, and damages issues.

15. The ALMEX Shareholders, therefore, request that this Tribunal assume jurisdiction over and proceed to expeditiously resolve all aspects of their claims, regardless of whether the Tribunal consolidates them in whole, in part, or not all, with CPI’s claims.

Thus,

(a) if the Consolidation Tribunal decides not to consolidate any claims, then the ALMEX Shareholders request that the Consolidation Tribunal continue as the Tribunal to hear and determine all the claims in the (non-consolidated) case of *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*.

(b) if the Consolidation Tribunal decides to consolidate all claims in the two cases, then the ALMEX Shareholders similarly request that the Consolidation Tribunal continue as the Tribunal to hear and determine all of those claims.

(c) if the Consolidation Tribunal decides to partially consolidate the claims, then the ALMEX Shareholders request that this Tribunal handle all aspects of the ALMEX claims, including both the consolidated and non-consolidated aspects. This is because any division of responsibilities for adjudication of the ALMEX claims between two tribunals would require the ALMEX shareholders and Mexico to educate two tribunals on the facts and the law, leading to additional expense, additional delay, and the risk of inconsistent treatment of those facts or the related issues by the separate tribunals.

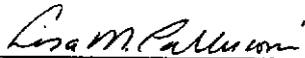
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IV. Conclusion

16. The ALMEX Shareholders submit that of the three possible outcomes of the Consolidation Tribunal's work, complete non-consolidation of all claims would serve best the fair and efficient resolution of the claims in the two separate disputes at issue. The burden is on Mexico to convince the Consolidation Tribunal both that there are factual and legal issues in common in the two cases and that consolidation would be more fair and more efficient than the alternative. The ALMEX Shareholders wish to continue with the Consolidation Tribunal as the tribunal to hear and determine all of the ALMEX claims, including all aspects of liability and damages, whether the Consolidation Tribunal decides to consolidate all, part or none of the claims in the two cases.

17. The ALMEX Shareholders request that the Consolidation Tribunal hold a conference with the disputing parties, after it has issued its order, to discuss procedural issues in the proceedings going forward.

Respectfully submitted,



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