

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

**PROCEDURAL ORDER NO. 2**

1. The present Tribunal was constituted under Article 1120 of the North American Free Trade Agreement ("NAFTA") on April 28, 2004, and reconstituted under the same provision on July 13, 2004.
2. By a letter dated September 8, 2004, the United Mexican States ("Mexico") notified the Tribunal that it had applied to the Secretary-General of the Center for the establishment of a consolidation tribunal, pursuant to NAFTA Article 1126, to consider the consolidation of the present case with one brought against Mexico by Archer Daniels Midland Co. and A.E. Staley Manufacturing Co. ("the ADM/Staley case"). By the same letter Mexico requested that the Tribunal suspend proceedings in the present case pending the decision of the consolidation tribunal.
3. At a hearing held in London on September 16, 2004, the Tribunal heard submissions by counsel for Mexico and counsel for the Claimant, Corn Products International, Inc., on this request. Counsel for the Claimant opposed the request for a suspension. So far as the Tribunal and the parties are aware, Article 1126 has not previously been invoked before a NAFTA tribunal. The Tribunal has, accordingly, considered it desirable to set out in brief its reasoning in dealing with the request for a suspension of proceedings.
4. If a tribunal is established under Article 1126, and if that tribunal decides that the present case and the ADM/Staley case have a question of law or fact in common, then, under Article 1126(2) of NAFTA, that tribunal may decide that it would be "in the interests of fair and efficient resolution" of the two claims for them to be heard together. In that event, Article 1126(2) empowers that tribunal to assume jurisdiction over the two cases in whole or in part. By contrast, the present Tribunal has no power to decide whether or not the two cases should be consolidated and, indeed, has no jurisdiction over the ADM/Staley case.

5. NAFTA Article 1126(8) provides that -

"A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction."

Accordingly, if an Article 1126 tribunal assumes jurisdiction over the present case, then the jurisdiction of the present Tribunal will come to an end in respect of such part or parts of the claim over which the Article 1126 tribunal assumes jurisdiction.

6. The Tribunal notes that, subsequent to the hearing of September 16, 2004, the ADM/Staley case has been registered by the Center. Nevertheless, until a tribunal established under Article 1126 exercises jurisdiction, the Tribunal remains seised of the present case and, subject to any jurisdictional objection which may subsequently be raised by Mexico, has jurisdiction over it. Nothing in Article 1126, or in any other provision of NAFTA or the ICSID Additional Facility Arbitration Rules, requires the Tribunal to suspend proceedings in such a situation.

7. The Tribunal considers, however, that, while it has no duty to suspend the present proceedings, it has a discretion to do so. The existence of such a discretion appears to be implicit in Article 1126(9) of NAFTA, which provides that -

"On application of a disputing party, a Tribunal established under this Article, pending its decision under paragraph 2, may order that the proceedings of a Tribunal established under Article 1120 be stayed, *unless the latter Tribunal has already adjourned its proceedings.*" (Emphasis added)

The Tribunal has therefore treated the request by Mexico as an application that the Tribunal use its discretion to suspend the proceedings pending a decision of an Article 1126 tribunal.

8. The Tribunal considers that the two principles by which it should be guided in the exercise of its discretion are (a) the efficient conduct of the proceedings and (b) fairness to both disputing parties.

9. With regard to the first principle, if an Article 1126 tribunal should assume jurisdiction over the present case, even only in part, it may well wish to fix an entirely fresh schedule for submissions and there is a danger that work done by the parties in preparing submissions for the present Tribunal may have to be duplicated. On the other hand, the Tribunal is concerned that the present claim was filed as long ago as October 2003. The Tribunal, while not at this stage seeking to inquire into the causes, is concerned by the fact that such a long period has elapsed since the claim was filed. If a tribunal is not established under Article 1126, or if such a tribunal is established but then decides not to assume jurisdiction over the present case, then if this Tribunal has suspended its proceedings, there will be a further delay – perhaps of several months – before a pleading schedule is even determined. The uncertainty regarding Mexico's application to the Center is enhanced by the fact that no Article 1126 tribunal exists as yet and, indeed, that the ADM/Staley case has not even been registered.

10. With regard to the duty of fairness to the parties, the Tribunal was impressed by the submissions of counsel for Mexico, which is, of course, party to both this case and ADM/Staley, that it should not be put in the position of having to conduct proceedings both before this Tribunal and before an Article 1126 tribunal and that it should not be required to expend time and money in preparing written submissions for this Tribunal when the Article 1126 tribunal may in due course assume jurisdiction and therefore put an end (at least for the time being) to these proceedings. On the other hand, the Claimant has already had to endure a considerable time in the proceedings and its counsel has urged that further delay will prejudice it.

11. The Tribunal notes that it is the Claimant who will have to prepare the first written submissions, the Memorial. In view of the likely time scale for the establishment of an Article 1126 tribunal and the consideration by such a tribunal of whether or not to assume jurisdiction over the present case, if the deadline for the filing of the Memorial is set at a date early in 2005, it is probable that an Article 1126 tribunal, if one is convened, will have reached a decision on the question of consolidation before the Memorial has to be filed. While it remains the case that, if such a tribunal decides to consolidate the two cases and to assume jurisdiction over

the present claim shortly before the Claimant is due to deposit its Memorial, the Claimant will have to halt in its tracks and prepare written submissions in accordance with whatever new timetable is determined by the Article 1126 tribunal, it is unlikely that that would cause any real prejudice to the Claimant. As the Claimant's counsel has explained, the Claimant would be obliged to do the work involved in preparing a Memorial in any event. Moreover, if there is any prejudice it would be to the Claimant and the Claimant has stated that it is prepared to take that risk.

12. Fixing a pleading schedule which involved the filing of the Memorial early in 2005 would involve *no unfairness to Mexico*, since it is probable that an Article 1126 tribunal would have taken a decision on consolidation before Mexico had to begin work on its Counter-Memorial. Nevertheless, in the event that the position regarding consolidation remained unclear by the time the deadline for the Claimant to file its Memorial approached, the Tribunal would be perfectly willing to hear an application from either party to vary the timetable. The Tribunal also notes that Article 1126(9) authorizes an Article 1126 tribunal to order suspension of our proceedings.

13. Accordingly, the Tribunal has decided not to suspend the present proceedings but, after hearing further submissions from the parties regarding timetabling, to order that -

- (a) the Claimant should file its Memorial no later than 15 February 2005;
- (b) the Respondent should file its Counter-Memorial no later than 15 July 2005;
- (c) the Claimant should file its Reply no later than 26 August 2005;
- (d) the Respondent should file its Rejoinder no later than 7 October 2005.

14. With the agreement of the parties, the Tribunal further orders that these submissions be directed to the question of responsibility and reserves any consideration of issues of damages to a later stage of the proceedings to the extent necessary.

15. At the hearing on September 16, 2004, the Tribunal also considered a number of other procedural questions. Its conclusions are recorded in the minutes attached to

this Order and the Tribunal hereby directs compliance with the decisions recorded in those minutes.

Christopher Greenwood, CMG, QC  
President of the Tribunal



14 JANUARY 2005