

**IN THE MATTER OF:** The North American Free Trade Agreement;

**AND IN THE MATTER OF:** A Request for Consolidation by the United Mexican States of the claims in:

**CORN PRODUCTS INTERNATIONAL, INC.**

**v.**

**UNITED MEXICAN STATES**

ICSID CASE N°. ARB(AF)/04/1

**AND**

**ARCHER DANIELS MIDLAND COMPANY**

**AND**

**TATE & LYLE INGREDIENTS AMERICAS, INC.**

**v.**

**UNITED MEXICAN STATES**

ICSID CASE N°. ARB(AF)/04/5

## **ORDER OF THE CONSOLIDATION TRIBUNAL**

Before the Arbitral Tribunal constituted under Chapter 11 of the North American Free Trade Agreement and comprised of:

Mr. Arthur W. Rovine, Arbitrator

Mr. Eduardo Siqueiros, Arbitrator

Mr. Bernardo M. Cremades, Presiding Arbitrator

**Representing Corn Products  
International, Inc:**

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Mr. Joseph P. Whitlock  
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Of Counsel: Mr. Robert E. Herzstein

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**Appearing on behalf of Canada:**

Mr. Douglas Heath  
Embassy of Canada in Washington, D.C.

**Appearing on behalf of the United  
States of America:**

Ms. CarrieLyn Guymon  
U.S. Department of State

1. On 21 October 2003, Corn Products International, Inc. (“CPI”), a company incorporated in the State of Delaware, submitted a Request for Institution of Arbitration Proceedings to the International Centre for Settlement of Investment Disputes (“ICSID”) against the United Mexican States (“Mexico”) under Chapter 11 of the North American Free Trade Agreement (“NAFTA”), for alleged breaches of Articles 1102, 1106 and 1110 of NAFTA arising from the imposition of an excise tax with effect from January 1, 2002 on soft drinks containing high fructose corn syrup. On 4 August 2004, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. (hereinafter “ADM/Tate & Lyle” or “the ALMEX shareholders”), two Illinois based companies incorporated in the State of Delaware, submitted a similar Request for Institution of Arbitration Proceedings against Mexico, based on the same tax measure.

2. On 8 September 2004, Mexico submitted a detailed request, pursuant to NAFTA Article 1126, seeking the establishment of an arbitral tribunal to decide whether to consolidate the CPI and ADM/Tate & Lyle claims. CPI and ADM/Tate & Lyle (hereinafter collectively “the claimants”) and Mexico subsequently reached agreement on the membership and mandate of a “Consolidation Tribunal” to rule on Mexico’s request. On 8 April 2005, Mexico and the claimants submitted a “Confirmation of Agreement of the Disputing Parties Regarding Consolidation” which confirmed the membership and mandate of the Consolidation Tribunal pursuant to Article 1126, but stipulated that should consolidation be ordered, the disputing parties would by agreement amongst themselves determine the composition of the panel to hear the consolidated claims. The Confirmation Agreement also stipulated that all proceedings of the Consolidation Tribunal were to be “governed by the ICSID Additional Facility Arbitration Rules, as modified by the procedural requirements of NAFTA Chapter Eleven.”

3. Mexico's submission supporting consolidation and the claimants' submissions in opposition thereto were received by ICSID on 11 April 2005 and by the Consolidation Tribunal on 12 April 2005. The disputing parties, through their counsel, presented oral arguments and responded to the Tribunal's inquiries at a hearing held at the seat of the centre in Washington, D.C. on 18 April 2005. Representatives from the Governments of Canada and the United States also attended the hearing.

4. At the outset, the Tribunal expresses its appreciation to the parties for their outstanding written submissions and oral presentations. The Tribunal was greatly assisted in its analysis of the questions and issues before it by the parties' arguments and by the high quality of their advocacy.

5. The question before this Tribunal is whether the NAFTA Article 1120 claims submitted by CPI on the one hand, and ADM/ Tate & Lyle on the other, should be consolidated in whole or in part. In order to issue an order of consolidation, the Consolidation Tribunal must first be "satisfied" that the claims have "a question of law or fact in common." If that requirement is met, the Tribunal may, "in the interests of fair and efficient resolution of the claims," issue a consolidation order (Article 1126(2)).

6. The Consolidation Tribunal accepts that the claims submitted to arbitration do have certain questions of law or fact in common for purposes of Article 1126(2). The Tribunal must therefore consider whether in the interests of the fair and efficient resolution of the claims it should grant or refuse the consolidation order.

7. In this regard, the Tribunal notes first and foremost that the parties do not dispute that CPI and the ALMEX shareholders are direct and "fierce competitors." Mexico has maintained that these parties could coordinate their respective Charter 11 claims against Mexico, but has not disputed that CPI and the ALMEX shareholders are global competitors. As such, each company emphasized that it cannot make known to the other, before an arbitration tribunal or anywhere, details as to the nature of its investments, business strategies, production costs, plant design, the effect of the tax on

their investors and investments, and other data that must be put to a tribunal engaged in examining whether or not there has been discrimination, illegal performance requirements, or an expropriation within the meaning of Chapter 11.

8. The direct and major competition between the claimants, and the consequent need for complex confidentiality measures throughout the arbitration process, would render consolidation in this case, in whole or in part, extremely difficult. The parties would not be in a position to work together and share information. The process, including essential confidentiality agreements, discovery, written submissions and oral arguments would have to be carried out, in substantial measure, on separate tracks. The consolidation of the claims of direct and major competitors would necessarily result in complex and slow proceedings in order to protect the confidentiality of sensitive information.

9. The Tribunal considers that the competition between the claimants will adversely affect their ability in a consolidated proceeding to be fully able to present their cases. Due process is fundamental to any dispute resolution procedure, and the parties should not have to calculate which items of information, evidence, documents and arguments they can share with their competitors and which ones they cannot share. The tribunal hearing the claims should not have to require separate procedures to accommodate the competitive sensitivity of the evidence and submissions of the different claimants. Under such circumstances, a consolidation order cannot be in the interests of fair and efficient resolution of the claims. Two tribunals can handle two separate cases more fairly and efficiently than one tribunal where the two claimants are direct and major competitors, and the claims raise issues of competitive and commercial sensitivity.

10. Mexico maintains that all confidential information will and can be protected in consolidated proceedings, and that the issue of competition and confidentiality are present even with separate proceedings. However, confidential information among competitors is much more easily protected in separate proceedings, which in turn also permit a far more efficient arbitration process under such circumstances. Competitors

who file Article 1120 claims should not be compelled to risk (a) not being able fully to present their cases; or (b) having to share confidential and sensitive business information with their competitor; or (c) a parallel proceeding within one arbitral process that will necessarily be far slower and less efficient than proceedings before separate tribunals.

11. Largely because of their strong competition, the claimants do not wish to have their claims consolidated. Are their preferences of any significance? Article 1126 does not address preferences against consolidation. Yet party autonomy has appeared to play a role of some importance in the agreed establishment of the Consolidation Tribunal and its agreed rules of procedure. The parties “contracted around” the appointment and rules provisions of Article 1126, with the affirmative participation and agreement of the Government of Mexico, and without objection from the Governments of Canada and the United States of America. Representatives of Canada and the United States of America attended the hearing, and subsequently both Governments stated in letters to the Tribunal that they were not going to file submissions, pursuant to NAFTA Article 1128, on the consolidation proceedings.

12. It would appear to follow that since party autonomy, at least for certain limited purposes, has been read into Article 1126 and accepted by all three NAFTA treaty states as well as by the private parties in this consolidation proceeding, party autonomy should be a relevant consideration to be taken into account in the interpretation and application of Article 1126 in this case. The Tribunal notes that three of the four parties before it do not wish to have the claims consolidated, either in whole or in part, in large measure because of the direct competition problem. The Tribunal views those wishes as a relevant consideration in evaluating the fairness of the proposed consolidation.

13. Mexico argued, with persuasive force, that the claims submitted by CPI and ADM/Tate & Lyle are very much the same, that the merits issues of state responsibility would be the same, and that while there might be important differences between the claimants with respect to damages, those differences did not justify separate proceedings. Mexico urged the Tribunal to focus on the wording of the claims submitted by CPI and

ADM/Tate & Lyle, and indeed, the wording of those claims is very similar. Mexico also maintained that the competition/confidentiality problem was insufficient as a basis for denying Mexico's request.

14. CPI and the ALMEX shareholders, on the other hand, point to different strategic business plans for the claimants, different investments, markets, technology, costs, and different impacts of the tax. Differing expectations in making the investments were also cited, all of which could represent different questions of fact within the meaning of Article 1126(2). The ALMEX shareholders stated that their "strategic plan will need to be disclosed to the Tribunal during subsequent proceedings under a protective order." They cited their inability to disclose it in the proceedings before this Tribunal, and how it differs from the CPI plan, as an illustration of the competition/confidentiality problem. CPI maintained that the ALMEX shareholders' claims were primarily trade related and raised jurisdictional problems. The ALMEX shareholders did not accept these representations by CPI. But the claimants were clear that their investments were based on different business strategies, that their market focus and investments were different, and that the tax would have a substantially dissimilar impact on the claimants. Mexico did not dispute the different impact of the tax, but maintained that the Tribunal's focus should be on the close similarity of the claims as initially submitted to ICSID by the claimants. Yet, as CPI pointed out in its written submission, Mexico did not indicate, apart from jurisdiction, common defenses it intends to raise to the claims. Mexico is not required under Article 1126 to so indicate, although it might have been helpful to Mexico's position in terms of evaluating the significance of any common questions of law or fact.

15. The Tribunal is persuaded that notwithstanding certain common questions of fact and law, the numerous distinct issues of state responsibility and quantum further confirm the need for separate proceedings.

16. Mexico maintains, also with persuasive force, that separate proceedings risk inconsistent awards, to the prejudice of Mexico, and that inconsistent awards cannot

constitute a “fair” resolution of the claims. The claimants, on the other hand, are willing to accept the risk of inconsistent awards. The Tribunal believes that inconsistent awards are not a major risk in these cases since the claims do appear to be sufficiently different, with respect to both state responsibility and quantum. This Tribunal does not have before it a large number of identically or very similarly situated claimants. The impact of the tax may well differ in terms of the potential liability of Mexico. The tax could, for example, constitute an expropriation as to one claimant, but not another. Assuming expropriation, which will certainly be contested by Mexico, the quantum calculations will differ among the three claimants. Different awards as to liability and damages do not necessarily indicate inconsistent awards.

17. In any event, the Consolidation Tribunal is satisfied that the risk of unfairness to Mexico from inconsistent awards resulting from separate proceedings cannot outweigh the unfairness to the claimants of the procedural inefficiencies that would arise in consolidated proceedings, for the reasons explained above

18. The Tribunal also considers that the problem of delay is relevant to the question of the fairness and efficiency of consolidation. As noted, CPI submitted its Request for Institution of Arbitration Proceedings to ICSID on October 21, 2003, while ADM/Tate & Lyle submitted their joint Request for Institution of Arbitration Proceedings on August 4, 2004. On September 8, 2004, Mexico filed a request for consolidation. CPI is before an established tribunal and has submitted its Memorial on Issues of State Responsibility. ADM/Tate & Lyle as yet have no tribunal. The CPI Tribunal, in its Procedural Order No. 2 dated 14 January 2005, decided not to suspend its proceedings despite a request from Mexico that it do so, stating that “the [CPI] 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.”

19. The Consolidation Tribunal shares the concern of the CPI Tribunal. Consolidation of the CPI and ADM/Tate & Lyle claims, in whole or in part, would require a briefing and hearing schedule to accommodate four parties. Complex



procedures would have to be established to protect confidential and proprietary information at every point in the process. Not only would the claimants have to take extraordinary care to avoid revealing such information to the other, but Mexico would have its own difficulties in submitting responses to claims while taking care not to provide in its evidence, written responses and oral arguments confidential and proprietary information from one party to the other. If, alternatively, the cases were on separate tracks, to guard against any risk of inconsistent awards the tribunal would have to await the completion of each of the cases before issuing its final award. But since the cases are not close to procedural alignment, the necessary result would be a very substantial delay in decision making, particularly for CPI, and for Mexico in the case brought by CPI. In the Tribunal's judgment, adding further complexity and delay confirms that the tests of "fair and efficient resolution of the claims," within the meaning of Article 1126, cannot be met.

20. For the foregoing reasons, Mexico's request for consolidation is rejected.

21. CPI has sought its costs and attorneys' fees associated with responding to Mexico's request. The request by Mexico and the hearing before this Consolidation Tribunal have meant that the parties have all had the opportunity and the benefits of an inquiry into the most appropriate means to conduct the arbitration of their claims. In these circumstances the Consolidation Tribunal decides that each party should bear its own costs and attorneys fees, and that 50% of the fees and expenses of the members of the tribunal and the expenses and charges of ICSID should be borne by Mexico, 25% by CPI, and 25% by the ALMEX shareholders.

**Made at Washington D.C. this 20<sup>th</sup> day of May, 2005.**

Mr. Arthur W. Rovine  
Arbitrator

Mr. Eduardo Siqueiros  
Arbitrator

Mr. Bernardo M. Cremades  
Presiding Arbitrator