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**MAKING THE MOST OF INTERNATIONAL INVESTMENT AGREEMENTS:
A COMMON AGENDA**

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**Is Consolidation of Claims a Step to Improvement?
The HFCS case**

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1. INTRODUCTION

Anyone involved in international investment disputes knows that there is no such thing as a typical claim under investment treaties. In recent years, we have seen not only how complex the disputes have become but also how numerous. Complexity of claims is often seen in the nature of the measure and the degree of interference by a government. Increasingly, investors challenge regulatory actions that affect or interfere with their investment, ranging from the non-performance of a contract to denial of justice by a judicial body to claims in the context of a financial crisis. Should such disputes arise between the investor and the host State, they may be resolved in arbitration under an investment treaty. But what happens if not one but multiple investors are affected by a single measure or policy? And what happens if such investors are competitors of different nationalities and hence protected by different international treaties? All this can lead to unexpected difficulties.

Under such circumstances, investment treaties and most arbitration rules allow an arbitrator to hear multiple disputes, thus saving time and costs to the disputing parties. This mechanism is called “consolidation”. Consolidating multiple disputes into a single arbitration proceeding is crucial for the efficiency of the arbitration process. On its face it is clear that consolidation can serve the efficiency of justice by preventing inconsistency or contradictory judgments over the same set of issues. The authority to decide on the question of consolidation lies within the arbitrator’s discretion which is limited by the requirements set forth in the treaty’s applicable consolidation provision. For an arbitral tribunal to consolidate proceedings, it will be necessary to demonstrate that there are common questions of law or fact and that resolution of those questions is in the interest of the fair and efficient resolution of the claims.

Have arbitral tribunals been supportive of consolidation? Does the trend of cases favour consolidation? Some cases have not been very supportive. I want to tell you about one in which Mexico

has been involved and where the tribunal constituted to rule on the issue decided not to consolidate the claims, even though the investors raised identical questions of law and facts and it would have been crucial for the fairness and efficiency of the resolution.

I will briefly summarise the factual and procedural background of the case and then consider the issues at hand. I will also address the findings of the arbitral tribunal and talk about the lessons we can learn from this specific case.

2. THE CASE

Corn Products International (CPI), a U.S. investor, filed its notice of intent in January 2003 alleging that Mexico had breached its obligations under NAFTA by virtue of certain measures imposed on the investor and Arancia CP, its subsidiary in Mexico. The dispute arises out of the Mexican Congress's imposition of a tax on soft drinks containing high fructose corn syrup (better known as HFCS) while not doing so on soft drinks containing sugar. CPI alleges that the tax was adopted to shield the Mexican sugar industry from competition from the HFCS industry in the Mexican soft drink sweetener market.

Due to the fact that this claim was brought under the ICISD Additional Facility Rules, ICSID registered CPI's request for arbitration in January, 2004. During the period CPI requested ICSID to register its claim, Archer Daniels Midland Company and A.E. Staley Manufacturing Company (ADM/Staley), also U.S. investors, filed their combined notice of intent alleging the same violations of the NAFTA derived from the same measure as alleged by CPI. Both CPI and ADM/Staley claimed to be HFCS producers in Mexico.

Mexico informed the ICSID that another claim based on the same tax measure had been filed and that it was considering requesting the consolidation of both disputes. In the following months, the CPI tribunal was constituted. In August 2004, ADM/Staley submitted to ICSID its request for arbitration.

On 8 September 2004, Mexico submitted a request seeking establishment of an arbitral tribunal under NAFTA's consolidation provision, Article 1126, to determine whether to consolidate the claims raised in the CPI case and in the request for arbitration submitted by ADM/Staley. Mexico's intention was that the consolidation tribunal should assume jurisdiction over, hear and determine all or some of the claims. Right after Mexico's request, CPI, ADM/Staley and Mexico agreed on the composition of the consolidation tribunal and the parties agreed that the mandate of that tribunal would be limited to deciding whether the claims submitted by the investors raised common questions of law or fact and, if so, whether another tribunal ought to assume jurisdiction over, hear and determine together all or some of the claims. One can imagine the tribunal's surprise upon receiving its mandate as a consolidation tribunal from the disputing parties.

CPI and ADM/Staley opposed the consolidation of claims on several grounds. First, they argued that NAFTA Article 1126 is a limited exception to the general rule that each claim proceeds on its own. Second, they argued that some issues such as claims of damages and business plans differ from one case to the other. Third -and most important for the investors- they argued that they could suffer competitive harm due to their status as competitors in the Mexican HFCS market. Other practical considerations such as the delay and difficulties in coordinating procedural matters were raised by investors so as to prevent the consolidation of claims.

Mexico, on the other hand, sought to demonstrate that the questions of law or fact were common. It referred to the content of the notices of intent of both CPI and ADM/Staley (now Tate&Lyle) and to the requests for arbitration so the tribunal could see that both investors challenged the same tax measure; they claimed the violation of the same substantive obligations under NAFTA; and, finally, both argued that such

a measure caused losses to their investments and the investors. In its request for consolidation, and in order to satisfy the test, Mexico submitted a table comparing side-by-side the arguments submitted by the CPI and ADM complaints paragraph by paragraph as they appeared in their respective requests for arbitration. This enabled the tribunal to see that the differences in the arguments were minimal and that the alleged violations were practically identical.

Mexico demonstrated that both investors showed identical factual background, that the alleged impact of the measure was the same and that each one took the same actions to tackle the tax. The important issue now was what to do with the argument of confidentiality of the information? Mexico clearly indicated that the investors' concerns were protected by the NAFTA Free Trade Commission decision issued on 31 July 2001 that provides for protection of confidential information regardless of whether a specific claim is consolidated. A NAFTA tribunal would have to issue an order on confidentiality if such information exists, as has been done in other NAFTA proceedings.

Once common questions of law and fact have been established, the question is whether those common questions have fairness and efficiency issues. Mexico indicated that by not consolidating these claims there was the risk of having different tribunals reach different conclusions, which might even be contradictory in respect of the same issues. Mexico also indicated that consolidation would save the parties both time and costs and that it was evident that both investors were collaborating with one another.

3. THE DECISION

The consolidation tribunal dismissed Mexico's request. It decided as follows.

The tribunal first had to determine if it was "satisfied" that the claims had a common question of law or fact to issue an order of consolidation. It accepted that the claims submitted "[did] have certain questions of law or fact in common". Surprisingly, the tribunal only accepted some degree of common questions in both disputes. Then it considered whether "it should grant or refuse the consolidation order" in the interest of the fair and efficient resolution of the claims— the big question.

The tribunal did not address the issues at stake in depth and instead concluded, in a simplistic way, that because the investors were "global competitors," the "direct and major competition between the claimants and the consequent need for complex confidentiality measures...would render consolidation in this case...extremely difficult". It concluded that investors would not be in a position to be "fully able to present their cases". Therefore, the tribunal held that a consolidation order could not be in the interests of a fair and efficient resolution of the claims. In my view, the tribunal chose the easiest way out. A crucial element can be identified here: the difficulty of shielding confidential information from "fierce competitors". This is the main ground on which the tribunal based its decision not to consolidate. Can a tribunal be right in refusing consolidation of claims on the basis of confidentiality?

The reasoning that led to the consolidation tribunal's refusal to consolidate cannot be ignored. As stated by the *Canfor* tribunal, the general trend in investor-State arbitration is transparency of process; therefore the issue of confidentiality, as the *Canfor* tribunal concluded, "must be approached with caution". In a NAFTA tribunal this concern is also irrelevant. The treatment of information is safeguarded by the decision made by the NAFTA Free Trade Commission. NAFTA proceedings are public and if an investor has reserved confidential information such information should be classified and not disclosed to the public. ADM/Staley, who are competitors, have managed this situation well. Companies get together every day for a specific project and work well together, protected by a confidentiality agreement. Investors would have been saved from the inconvenience of sharing information with other claimants by the issuance of an order on confidentiality by the tribunal.

The tribunal also pointed out differences in issues of state responsibility and quantum of damages “confirming the need for separate proceedings”. This conclusion is open to criticism for a simple reason: because consolidation could be dealt with exclusively, it does not necessarily need to be dealt within a single phase. Rather, a tribunal can consolidate claims in matters of jurisdiction and liability and then it may or may not decide to consolidate damages.

In the tribunal’s view, 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 again is open to strong criticism.

The problem with this approach is the fact that the tribunal seems to ignore that consistency is a crucial element of fairness and efficiency, together with costs and time saved, as required by NAFTA Article 1126. Experience has shown that inconsistent results do occur as was the case in *CME/Lauder v. Czech Republic*, where two separate arbitral proceedings, one by the company itself and the other by the minority shareholder of the company, took place. In one case the tribunal found the Czech Republic liable and, in the other one –dealing with the same issues- the claim was dismissed. Avoiding contradictory results inevitably results in efficient resolution of claims.

4. FINAL REMARKS

What the consolidation tribunal in the HFCS case is probably suggesting is that in practice consolidation of claims will be extremely difficult, if not impossible; in situations where the investors are not integrated on a contractual basis even though there are questions of law or fact in common and even though high costs, time and inconsistent resolutions all may be avoided as a result. NAFTA Article 1126 does not set a high bar for consolidation, as held by the *Canfor* tribunal. Another suggestion from the tribunals’ approach is the prevailing interests of investors over the respondent State. NAFTA Article 1126 is intended to balance the procedural rights of investors and the respondent State where the principle of procedural economy should be read in light of the particular situation of the respondent State.

Is it fair to place the respondent State in a position where it has to respond to two different tribunals, two claims that are essentially the same, that different procedural schedules are followed and that involve a high risk of having two different and contradictory decisions rendered?

Another problem with the tribunal’s approach is that the allegation that claimants do not get along seems to suffice as a basis for why not to consolidate claims. However, this causes serious prejudice to the respondent State. As explained above, confidentiality should not be considered an insurmountable obstacle to arbitrators in this new era of investor-State arbitration. Confidentiality is not a wall that cannot be overcome safeguarding the interest of all parties.

The complexity of the system does not stop there. There is also a question of timing. Multiple tribunals may be constituted in different periods of time before the consolidation issue is actually raised. The requests for arbitration or notices of intent do not necessarily deal with all the questions of law or fact and arbitrators may have to rule on what has been submitted. They ought not to speculate on what can happen if this or that situation should arise. On the other hand there is the question of delay which has to be considered carefully by arbitrators. The party requesting the consolidation may be seen by the opposing party as intentionally trying to delay the process. Good faith plays an important role in the assessment by arbitrators.

In my view, procedural difficulties will always exist when more than one claimant is involved. This is even true for minority shareholders of the same company but with different claims although this should not be a crucial issue for arbitrators.

The role of arbitrators is of great importance when dealing with a request for consolidation. It is under the authority of arbitrators to rule and balance the issues at stake. This discretionary power is subject to the requirements set forth in the consolidation provision. The issues of fairness and efficiency are especially crucial. Therefore arbitrators need to be aware of the implications: The potential practical consequence of not consolidating multiple claims that raise common questions of law or fact, such as shown in this case, will undoubtedly undermine the effectiveness of the consolidation provision. This is not a hypothetical approach, but rather happened in the *CME/Lauder v. Czech Republic* discussed above. This fiasco should be prevented from happening again. Therefore it is important that States include clear and binding consolidation provisions in their investment treaties in order to prevent, as far as possible, similar situations.