Cargill v. Mexico ruling finds three NAFTA breaches; publication of 2009 arbitral award delayed 17 months as redactions debated

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A 2009 arbitral award has been published in a slightly-redacted form, some 18 months after it was rendered by a tribunal hearing claims against Mexico.*

Arbitrators in the Cargill v Mexico case found three breaches by Mexico of its obligations under Chapter 11 of the North American Free Trade Agreement (NAFTA). Cargill turned to arbitration after Mexico levied a tax on soft-drink bottlers who used the popular sweetener High Fructose Corn Syrup (HFCS). That tax was introduced by Mexico in 2002, at a time when HFCS was making rapid inroads into the Mexican sweetener market, to the chagrin of Mexico's struggling sugar industry.

As previously reported** by *IAReporter*, three groups of claimants initiated NAFTA claims against Mexico. Each case was arbitrated in separate proceedings, following an unsuccessful bid by Mexico to have the cases consolidated under one arbitral tribunal.

With final awards now rendered in all three matters, Mexico is on the hook for upwards of 170 Million USD in losses. The government has paid awards rendered in favour of Archer Daniels Midland and Tate and Lyle, and Corn Products International (CPI). However, as is noted in this separate analysis article, Mexico continues its efforts to set aside the 77 Million USD award in the Cargill case.

Now that awards are published in all three cases, certain notable divergences can be seen in the approaches of the respective tribunals on key legal issues.***

Cargill's production of HFCS in U.S.A. does not preclude jurisdiction

One notable difference between the Cargill case and the earlier-decided ADM and CPI cases is that Cargill complained not only about the HFCS tax, but also a separate import permit requirement which affected its business due to its greater reliance on imports of HFCS from the United States for onward distribution in Mexico.

For its part, Mexico urged the tribunal to decline jurisdiction over Cargill's claims, pointing to the fact that the company did not produce HFCS in Mexico, but instead shipped it from United States production facilities. Indeed, Mexico argued that NAFTA's investment chapter should not provide a vehicle for exporters to claim for damages sustained in the trade realm.

The tribunal acknowledged that trade and investment are addressed in separate chapters of the NAFTA, with traders not enjoying the same direct rights to initiate arbitration on the plane of international law. However, arbitrators also took the view that there is not a "rigid" distinction between trade and investment in the NAFTA, and that measures impacting trade might also impact upon an investment.

Arbitrators also pointed to the fact that Cargill owned a Mexican subsidiary, Cargill de Mexico (CdM), which was engaged in sale and distribution of HFCS. Cargill's ownership of CdM meant that its claims could be distinguished from an earlier NAFTA claim, Bayview v. Mexico, which had foundered as a result of the U.S. claimants in that case having no investment in Mexican territory.

While upholding jurisdiction over Cargill's claims, arbitrators conceded that it would fall to the damages phase of the arbitration to grapple with any consequences of Cargill's having produced inputs in the

United States, before exporting them to its subsidiary in Mexico for distribution.

Mexico in clear breach of National Treatment obligation

In keeping with the outcome in two separate claims by other HFCS producers against Mexico, the tribunal found that Mexico's tax had discriminated in violation of the National Treatment commitment in NAFTA Chapter 11.

Arbitrators in the Cargill case did emphasize that the obligation to provide national treatment to investments that are "in like circumstances" was not to be conflated with the "like goods" test seen in international *trade* law. Thus, the tribunal nodded to the earlier GAMI and Pope & Talbot cases for the proposition that "something more than the likeness of goods being produced has to be shown".

However, on the facts of the case, the arbitrators found that Cargill de Mexico and local sugar suppliers were in like circumstances. In a nod to Mexico, arbitrators did entertain the possibility that measures taken to assist an economically-devastated industry might place that industry in different circumstances than an economically-healthy competitor industry.

However, arbitrators ultimately concluded that such different economic circumstances needed to be "relevant in the context of the particular measure being imposed". In lay terms, the HFCS tax was not a measure used to rehabilitate a suffering industry. Rather, arbitrators viewed the tax as an assault on a healthy industry (HFCS) with the intention of pressuring the United States to resolve Mexico's sugar-related grievances.

Consequently, this was not a case where a state-benefit was conferred upon a struggling industry, but not extended to healthy competitors. If that had been the case, the struggling industry and the healthy industry might not have been "in like circumstances" for purposes of the National Treatment analysis. However, on the facts of the Cargill case, the tribunal held that the destructive measures taken against the HFCS industry were targeted not simply at assisting the sugar industry, but also at bringing pressure on the United States to live up to its NAFTA trade obligations *vis a vis* the sugar industry. It would render the National Treatment obligation "meaningless" if arbitrators were to focus upon the different economic circumstances of the HFCS and sugar industries in order "to justify a measure that destroys an economically viable foreign investment in order to benefit a domestic competitor".

Must discrimination be nationality-based?

Arbitrators acknowledged Mexico's argument that all three NAFTA states appear to take the doctrinal view that actual discrimination on the basis of nationality is needed in order to make out a breach of the National Treatment obligation. Indeed, Mexico argued that some Mexican suppliers of HFCS were also affected by the HFCS tax (and a separate import permit requirement), so there should be no suggestion that Cargill was discriminated against as a consequence of its U.S. nationality.

The tribunal's ruling appears ambiguous as to whether nationality-based discrimination must be present in order to make out a breach of the National Treatment obligation. On the one hand, the tribunal pointedly noted, albeit without elaboration, that there was no question that the treatment received by suppliers of HFCS to the Mexican soft drinks industry was less favourable than the treatment received by suppliers of cane sugar. Yet, it was also clear, according to the tribunal, that nationality-based discrimination occurred both as a matter of intent and effect, with the tax having been designed to bring pressure on the US government to address Mexico's sugar grievances.

In light of its strongly-held conviction that Mexico had deliberately targeted U.S. nationals, the tribunal did not express a clear-cut view on the doctrinal debate flagged by Mexico. By contrast, arbitrators in the parallel CPI arbitration were forthright in their view that nationality-based discrimination need not be demonstrated in order for the National Treatment obligation to be breached.****

MFN claim dispatched swiftly

The tribunal rejected a separate claim by Cargill that it suffered a breach of the Most-Favoured Nation (MFN) Treatment obligation. Arbitrators held that there was no Mexican company, owned by nationals of another country, which could be a comparator for purposes of the MFN analysis.

Tribunal finds that performance requirement was imposed

As earlier reported, arbitrators in the parallel ADM and CPI cases reached conflicting conclusions as to whether Mexico's tax on HFCS should be viewed as an illegal "performance requirement" under NAFTA Chapter 11.

Arbitrators in the CPI case dismissed the possibility of such a claim when they noted that any performance requirements fell on the shoulders of local soft-drink bottlers, who would pay the HFCS tax, not on CPI. By contrast, arbitrators in the ADM case took a broader view and held that the imposition of performance requirements on others (e.g. local soft drink bottlers) could be deemed to be in connection with ADM's investments.

Following in the vein of the ADM ruling, the tribunal in the Cargill case would find that the phrase "in connection with an investment" did not mean that a measure needed to be levied on that investment per se. However, the tribunal did not see any need to define in the abstract the precise degree of association or relationship with an investment. Rather, it was clear on the facts that the tax in question was "integrally related to" Cargill's investments by dint of the Mexican government's desire to pressure the HFCS industry (and the United States).

"Temporary" taking cannot breach NAFTA expropriation clause

Arbitrators had little difficulty finding that the 6 year duration of the HFCS tax and import permit requirement did not give rise to an indirect expropriation of Cargill's investment in Mexico. Arbitrators held that NAFTA Article 1110 did not permit claims for "temporary takings".

While dismissing this claim on the basis of the "duration" of the alleged taking, the arbitrators also questioned the severity of the interference suffered by the claimant. They found that Mexico's measures caused significant harm to Cargill de Mexico, but that Cargill's Mexican subsidiary was engaged in other business lines, and that there was no "radical deprivation" of the overall investment.

Arbitrators and Counsel

Australian lawyer Michael Pryles chaired the arbitration. Cargill nominated David C. Caron of the law school at the University of California at Berkeley. Mexico nominated Donald M. McRae of the University of Ottawa law school.

Cargill was represented by Mayer Brown LLP. Mexico was represented by Thomas and Partners, Pillsbury Winthrop, and Prof. James Crawford of the University of Camrbridge.

* The Cargill award is here: http://ita.law.uvic.ca/documents/CargillAwardRedacted.pdf
The Spanish version is here: http://ita.law.uvic.ca/documents/CargilllaudoRedactada.pdf** Our report on the factual underpinnings of these disputes is here: http://www.iareporter.com/articles/20091001_68

*** See this report on some of the divergences between the ADM and the CPI awards: http://www.iareporter.com/articles/20090922_13

**** The CPI tribunal's handling of the National Treatment issue is discussed here: http://www.iareporter.com/articles/20090922_12