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Sweetener arbitration news tends to come in small serving-sizes

Luke Eric Peterson (Investment Arbitration Reporter) · Wednesday, August 19th, 2009

One set of international arbitrations which don't get enough attention are the series of claims mounted under NAFTA Chapter 11 by US investors in the Mexican sweetener industry.

A group of agri-business heavyweights, including Cargill, Archer Daniels Midland, Tate & Lyle have all invoked NAFTA's investment protections in order to challenge a Mexican tax levied on those soft drink bottlers who use the sweetener High Fructose Corn Syrup (HFCS). The Mexican tax was introduced against a backdrop of a much broader trade dispute over access for Mexican sugar to the US market.

The NAFTA arbitrations are interesting for a variety of reasons – a couple of which I'll advert to below – but information about these cases has tended to come out in dribs and drabs.

Partly this is a function of the cases proceeding on three parallel tracks (more on that in a moment), but their relative obscurity also stems from the fact that the different cases have not always dealt with liability and damages issues together. This has meant that liability for breach of the NAFTA has sometimes been assessed, and then many months have passed before a ruling on damages is rendered. Witness, for example, yesterday's announcement by Corn Products International that arbitrators have ordered Mexico to pay a sum of $58.386 Million (US). This award, which is the largest NAFTA Chapter 11 damages award to date, comes some 20 months after an award on liability in that NAFTA arbitration.

Moreover, it could be some time before the text of the Aug 18, 2009 damages award is published, owing to lengthy back-and-forth discussions on the redaction of sensitive business information. Indeed, it took more than a year for a January 2008 liability ruling in the same case to be released in a sanitized version.

As the awards and rulings trickle out, I've tried to keep something of a spotlight on this slow-motion saga by highlighting and analyzing the key developments in my newsletter.

However, pulling back the frame, one of the more interesting things about these arbitrations is that they've tended to confirm the argument by Mexico that the cases should have been bundled together and heard by a single arbitral tribunal.

Readers may recall that the NAFTA is somewhat unusual in that it has express provisions for the consolidation of parallel investor-state claims. And, in two instances to date, a state-party facing

multiple NAFTA claims has asked that those claims be consolidated. In one instance, a so-called consolidation tribunal ordered that 3 claims brought against the United States by Canadian forestry companies should be heard in a single proceeding.

However, in the HFCS cases against Mexico, a consolidation tribunal decided not to bring the NAFTA claims under a single roof. The tribunal acknowledged Mexico's concerns that separate panels running in parallel could reach divergent interpretations of the same NAFTA obligations. However, the panelists ultimately deferred to the wishes of the various claimants, who had protested that their intense economic competition made it impractical for them to collaborate on a single legal claim. (Documents related to the consolidation proceeding are available here).

Each HFCS case went on to be heard separately, and somewhat to the chagrin of Mexico has led to divergent legal rulings on certain issues.

Perhaps most notable, different panels of arbitrators have split on the basic question as to whether a NAFTA member-state may take retaliatory measures against incoming investors of another NAFTA member party. Mexico had argued that the HFCS tax – if found to breach NAFTA protections owed to US investors – could be deemed a legitimate "counter-measure" in the context of alleged failures by the US to live up to its trade obligations vis a vis Mexico.

Thus far, however, the rulings in the CPI case and in a separate claim brought by Archer Daniels Midland and Tate & Lyle have not given much clarity as to whether foreign investors, in some circumstances, should have to bear the burden of their home country's (alleged) sins.

Indeed, this was not the only issue on which arbitrators in the two cases diverged. The two NAFTA Chapter 11 panels also disagreed as to whether Mexico had imposed so-called performance requirements contrary to its obligations to foreign (US) investors.

It remains to be seen how arbitrators in a third claim, Cargill v. Mexico, will deal with some of the issues over which the CPI and ADM/Tate & Lyle tribunals diverged. Proceedings in the Cargill case were formally closed in April of this year.

The Cargill award, when it does hit the streets, could be a doorstopper as arbitrators will deal with jurisdictional, liability and damages in a single decision.

However, if past practice is any guide, an announcement of the Cargill outcome could be followed by many months of waiting for a public version of the award to surface.

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