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NAFTA Update and Trade News Highlights from February 2011 through April 2011

Chad Bond

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Chad Bond*

I. UPDATE TO NAFTA CHAPTER 11 MEXICAN SUGAR CASE

CORN Products International announced at the end of January that the Government of Mexico paid out $58.4 million as part of an award by a North American Free Trade Agreement (NAFTA) Chapter 11 Tribunal in 2008 arising from a claim of discriminatory tax treatment of beverages, such as soft drinks, containing high fructose corn syrup (HFCS) in violation of NAFTA’s national treatment provisions.¹

This most recent payout was the result of a series of arbitration cases dating back to 2003 involving HFCS plaintiffs against Mexico in which damages were awarded.² “The first award, to a coalition of Archer Daniels Midland and Tate & Lyle, was for $33.5 million.”³ The second award, in 2009, was that made to Corn Products International for $58.4 million and was the largest NAFTA award at the time.⁴ Finally, in 2009 the last award was issued to Cargill Inc.—which recovered damages totaling $77.3 million.⁵

“Corn Products International is a leading global provider of ingredients to the food, beverage, brewing and pharmaceutical industries as well as numerous industrial sectors.”⁶ The claim made by Corn Products International and the other agri-businesses concerned the imposition of a twenty percent tax on HFCS beverages by the Mexican government as part of the ongoing “battle with the United States over U.S. commitments under NAFTA.”⁷ “HFCS is widely used in the beverage industry as a sugar substitute. One particular type of HFCS, called HFCS-55, was de-

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3. Id.
4. Id.
5. Id.
7. Id.
veloped to replace sugar as closely as possible in soft drink production.”

The importance of HFCS is that the U.S. soft drink industry has relied on the sweetener since the 1980s due to its consistent cost advantage over sugar. Furthermore, “HFCS also has advantages over sugar in that it is provided to bottlers in liquid form, and the bottlers using HFCS can avoid the warehouse storage costs for sugar liquefaction, as well as the extra equipment maintenance required to avoid microbiological contamination when bottling with sugar.”

Corn Products International, along with Cargill Inc. and Archer Daniels Midland and Tate & Lyle, sought arbitration under the NAFTA Chapter 11 investor provisions after Mexico enacted a law in 2001 that imposed “a 20 percent tax on soft-drink companies using high-fructose corn syrup, and established stringent requirements for the importation of corn syrup,” apparently with the purpose of “forc[ing] Mexican soft-drink makers to use homegrown sugar rather than imported high-fructose corn syrup.” Part of the reason the United States has a comparative advantage in the production of HFCS is because it “is obtained principally from yellow corn. In Mexico, white corn predominates, which is used primarily for human consumption and is less apt for the production of HFCS. Accordingly, HFCS in Mexico is produced from yellow corn imported from the United States.”

As an aside, “Mexico has the world’s highest per capita consumption of carbonated soft drinks, and the world’s highest per capita consumption of Coca-Cola. The Mexican market for carbonated soft drinks was valued at almost $US 15 billion in 2001...”

In addition to the NAFTA Tribunal finding in 2008, the World Trade Organization (WTO) Appellate Body in 2006 “issued a ruling maintaining an earlier panel finding that Mexico’s 20 percent tax on soft drinks and other beverages that use sweeteners other than cane sugar violated Articles III:2 and III:4 of the General Agreement on Tariffs and Trade” (GATT). In light of the NAFTA and GATT violations, Mexico eventually took steps in 2008 to repeal the tax and lift the restrictions on HFCS.

II. CANADA TO ALLOW USED VEHICLE IMPORTS FROM MEXICO

On March 23, 2011, proposed amendments to the Motor Vehicle Safety Act (MVSA) and the Canadian Environmental Protection Act, 1999

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9. Id. ¶40.
10. Id.
11. Frankel, supra note 2.
12. Archer Daniels Midland Co., ICSID Case No. ARB(AF)/04/05 ¶ 43.
13. Id. ¶50.
15. Id.
(CEPA 1999)—which would permit used vehicles to be imported from Mexico if they can be modified to meet “Canadian safety and environmental standards”—received Royal Assent. In a press release by Canada’s Transport Department, it was stated that “[t]he amendments to the MVSA and CEPA 1999 will provide a balance between maintaining safety for Canadians, protecting the environment, and meeting the needs of individual Canadian consumers and commercial importers. The amendments ensure the Government of Canada complies with the [NAFTA] and continues its cooperative relationship with Mexico.”

On April 14, 2010 Bill S-5, The Ensuring Safe Vehicles Imported from Mexico for Canadians Act, was introduced in the Senate by the Honorable Marjory LeBreton, Leader of the Government in the Senate. Specifically, clause 3 of the bill amends section 7 of the MVSA—a section that allows an exception to the requirement that all vehicles sold in Canada conform to certain safety standards. At present, the section allows used vehicles that fail safety standards to be imported subject to the importer declaring that the vehicle will be modified to conform to such requirements prior to the vehicle being registered. “This exception is to allow importers of used vehicles from the United States the time to bring the vehicles up to the levels required by the more stringent Canadian safety standards.” The bill expands the exception to used cars from Mexico, albeit more restrictive—an importer must still make a declaration that the vehicle will be made to conform to the regulations, but, “before the vehicle can be presented for licensing and used in Canada, it must be appropriately certified as complying with the safety requirements.” The amendments to CEPA 1999 mirror those discussed above, but apply with respect to emission standards.

Additionally, the Bill is intended to bring regulations in line with NAFTA provisions that came into effect in 2009 requiring member states to allow the importation of used vehicles in a phased manner. To comply, “[t]he allowable importations will start with vehicles that are 10 years old and older. The age threshold for the vehicles will decrease by two years, every two years, until 2019 when countries may not adopt or main-

17. Id.
19. Id. at 2.
20. Id.
21. Id.
22. Id.
23. Id. at 3.
tain a prohibition or restriction on imports of used vehicles from each other.” It was recognized in the House of Commons that the President of Mexico issued a decree in 2008 to allow the importation of used vehicles ten years old and older and that the United States already has a comprehensive program for considering the importation of used vehicles from other countries—it was in this context that members raised the need to ensure reciprocal obligations are being met.26

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25. Id.
26. Id.
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