

Todd Weiler

From: Todd Weiler [tweiler@naftalaw.org]
Sent: Saturday, August 09, 2003 4:50 AM
To: 'tweiler@umich.edu'
Subject: NAFTA News - New Cases, Old Materials and Conspiracies Abound

Dear NAFTA News Subscribers:

This has been an interesting week for NAFTA Chapter 11 watchers. First, there is a new dispute involving the USA. Second, a treasure trove of old legal documents involving disputes against Mexico have recently been made public. Finally, we may have seen the outline of what might be termed a "bureaucratic plot" to narrow the meaning of the national treatment obligation hidden in an singularly innocuous "Stakeholders' Report."

First, I am pleased to report that interested parties can download the latest notice of intent filed against the USA – this time by a Canadian mining company called Glamis Gold Ltd. I have attached an article from the Inside US Trade subscription service which summarizes the facts of the potential case. In a nutshell, the Glamis Gold claim takes over where Methanex ended (some say prematurely, through a jurisdictional award which adopted a novel interpretation of Article 1101).

Glamis holds the mining rights to land located somewhere in the vast desert stretching between Southern California and New Mexico. It struggled for years with the Clinton Administration to receive permission to mine on this land. The problem was that the proposed mining venture was opposed by local native peoples who valued the nearby land as sacred. With a new Administration in the White House that is notoriously friendlier to resource extraction firms, these environmental concerns eventually gave way to permission to start cyanide-based-open-pit-mining. However, for the same reasons that federal approval was withheld for years, the California State government stepped in and issued regulations requiring reclamation of the site which would be so costly as to render the proposed mining project uneconomic. Glamis apparently never thought federal officials could refuse to sanction mining activities for reasons not listed in the relevant laws and regulations (such as the protection of nearby sacred native land). It probably also believes that the State of California has no business regulating activities which would take place on federal land. However, just because government action is ultra vires of local law does not mean that it is a breach of international law.

If this claim goes forward, it will likely focus on the question of legitimate expectation in regulatory takings. This is because it appears rather straight-forward that the effect of the State measure is to deprive Glamis Gold's investment of any value in its mining rights. In other words, we appear to have a prima facie constructive taking. However, this is likely not the end of the story. There is virtually no international law jurisprudence concerning legitimate, non-discriminatory environmental takings (the Metalclad v. Mexico NAFTA case and the new TecMed v. Mexico case arising under the Mexico-Spain FTA both deal with fundamentally-flawed and arbitrary regulatory processes, rather than legitimate regulatory activity). As Thomas Walde wrote a few years ago in an article on environmental expropriation which can be found at www.cepmip.org, principles of law drawn from EU and domestic takings jurisprudence suggest that a taking may go uncompensated where the property-holder did not possess a legitimate expectation of enjoying the property in the manner now claimed to be deprived. This looks like the kind of case in which such a theory could be tested.

The second big piece of news is that Mexico has finally released most documents related to past and ongoing NAFTA cases. This includes an amusing order from the Metalclad Tribunal on confidentiality, in which Mexico resorted to Article 1134 to try to ensure that Metalclad could not make any public disclosures about the arbitration. Times have apparently changed... although not completely. Both Mexico and the USA still follow a practice of NOT publishing notices of intent received, until after they have moved to the arbitration stage. This explains why the Glamis notice of intent is not on the State Department web site.

Nonetheless, Mexico's publication of many old NAFTA documents is a laudatory one. The one unfortunate aspect of Mexico's publication of these documents is that some of them are HUGE. In fact, there are many scans which are between 5 and 10 MEGS in size. Accordingly, you must be very patient in trying to download them. I found that it sometimes took minutes for some memorials to download using my high speed connection. I would not even attempt a download through a phone line. Moreover, I would strongly advise against trying to read these

documents in your web browser. It would be better to download them to your hard drive and then open them yourself in Acrobat. If you find that you just cannot open a document, but you do have a high speed connection, let me know and I will e-mail it to you instead.

Finally, the outlines of a possible NAFTA conspiracy may have appeared this week in a document written by Canadian investment policy bureaucrats. You may recall that last November a NGO activist reported through his email newsletter that he had obtained a copy of a secret Canadian Memorandum to Cabinet which outlined, among other things, a plan to narrow the ambit of NAFTA Articles 1102 (national treatment) and 1103 (MFN treatment). The plan allegedly involved receiving approval to issue an interpretative note with the other NAFTA governments that would forbid tribunals from adopting an interpretation of these provisions that focused on the discriminatory impact of a measure, rather than on proving the existence of discriminatory intent by its drafters. In other words, plans were apparently afoot at the Canadian Department of Foreign Affairs and International Trade to reject over 50 years of WTO jurisprudence by stipulating that a government only breaches Articles 1102 or 1103 where it can be proved to have specifically intended to discriminate against an investor with its measure. This would mean that all cases where the measure was non-discriminatory on its face, but unfair in its affect upon and investor or investment (i.e. de facto measures) would no longer constitute a breach of the NAFTA (as they would under the GATS or any other investment treaty). Only de jure breaches would be prohibited. If this kind of interpretative rule had been imposed upon tribunals earlier, it is possible that there would not have been any awards against investors under Article 1102 thus far. In fact, if this interpretative approach was the norm in the WTO, there would have been very few panel findings against governments over the past ten years.

News of these plans drew a sharp response from the Canadian Counsel on International Business, which demanded the Minister of Foreign Affairs and International Trade to be informed of any plans to further alter any NAFTA obligation. This demand was met with vague assurances that no changes were imminent, and that an opportunity for comment would be provided. That "opportunity" appears to have been provided in May, when Canadian bureaucrats held an invitation-only "stakeholders" meeting on NAFTA Chapter 11. Initially, no lawyers or consultants who had worked for NAFTA investors on claims were invited. Eventually, at the last minute, two were permitted to attend. Rumour has it that – when asked why other investors' counsel were not invited to this consultation meeting – one Canadian official candidly noted that they already knew what such people would say anyway!

The meeting apparently focused on procedural issues, particularly the interest of NGO's in receiving full rights of participation in hearings. In terms of substantive obligations, NGO concerns focused upon regulatory expropriation whereas business concerns focused upon maintaining the status quo. However, even though the issue of non-discrimination apparently did not receive any real discussion, the notes prepared by Canadian officials reported that stakeholders sought a new interpretation of Articles 1102 and 1103. These stakeholders were allegedly so specific in their statements as to suggest that the terms "like circumstances" (which can be found in each article) should be construed as requiring evidence of government intent to discriminate in order to conclude that a breach had been made out. Neither of the two people working for investors had any recollection of such a discussion taking place.

Accordingly, perhaps we should not be surprised if the three NAFTA governments issue another "interpretation" this fall which would purport to dramatically reduce investment protection in the NAFTA. We should be disappointed and concerned, but not surprised.

Kindest regards,

TJW

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